No. OP 16-0494

IN THE

Supreme Court of the State of Montana

MONTANA QUALITY EDUCATION COALITION,

Petitioner-Applicant Intervenor,

VS.

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY, HONORABLE DAVID M. ORTLEY, PRESIDING

Respondent.

RESPONSE OF RESPONDENTS KENDRA ESPINOZA, JERI ELLEN ANDERSON, AND JAIME SCHAEFER TO THE PETITION FOR WRIT OF SUPERVISORY CONTROL

From The Eleventh Judicial District Court, Flathead County, Montana
Espinoza, et al. v. Montana Department of Revenue and Kadas
Case No. DV-15-1152D
Hon. David M. Ortley, Presiding

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INTRODUCTION

The Montana Quality Education Coalition ("MQEC") has petitioned this Court to take supervisory control over the Eleventh Judicial District Court in this case. MQEC seeks an order from this Court directing the District Court to permit its intervention in a lawsuit involving Montana's tax credit scholarship program, which encourages donations to charities awarding scholarships to students attending private schools. MQEC also seeks to further delay the litigation by requesting an order instructing the District Court to permit it discovery, despite pending cross motions for summary judgment by the current parties and the District Court's rejection of a virtually identical motion for discovery filed by the Defendants. Because the District Court's order denying MQEC's intervention was entirely reasonable, did not involve pure questions of law, and contained no mistake of law, this petition does not meet the standard for granting an extraordinary writ, and in no circumstance is there any need for further discovery prior to summary judgment.

MQEC filed its motion to intervene very late, after Plaintiffs had already won a preliminary injunction and filed for summary judgment.

It now seeks to derail the briefing schedule and demand discovery that Judge Ortley has already denied. Under these unique circumstances, MQEC is not entitled to intervention.

If MQEC is granted discovery, the case will go to another judge when Judge Ortley retires at the end of the year, causing even further delay. Donors will not contribute to a program that is in constitutional doubt, and Plaintiffs' children may thus be unable to obtain scholarships for the next school year. This Court should not condone these tactics.

BACKGROUND

MQEC is a coalition of entities dedicated to public education and ensuring proper support for Montana's *public* schools. Petition at 4. Neither the program nor this lawsuit, however, have anything to do with the public schools.[1] No matter which side wins this lawsuit, the same amount of tax credits will be available for taxpayers to use at private schools. Even if Defendants prevail, the $3 million in tax credits will still be available for donations providing scholarships to

[1] The legislation that created a tax credit for donations to scholarship organizations awarding scholarships to private school students also created a tax credit for donations to *public schools*, but no one challenges that part of the legislation.

students in secular private schools; they will not go to funding the public schools.[2]

A. MQEC Moves to Intervene Six Months Late.

Plaintiffs filed this lawsuit on December 16, 2015. MQEC was well aware of the lawsuit but chose not to intervene,[3] despite Defendants' motion to dismiss and Plaintiffs' motion for a preliminary injunction, which Judge Ortley resolved after a lengthy hearing. Instead, MQEC moved to intervene only after Plaintiffs had already won a preliminary injunction and moved for summary judgment. Plaintiffs did not agree that MQEC met the standards for intervention of right under M. R. Civ. P. 24(a), but nevertheless, did not oppose permissive intervention under Rule 24(b)—with one important condition: that the District Court require MQEC to comply with the briefing schedule for summary judgment, modified to give MQEC 21

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[2] Neither Defendants nor MQEC has challenged the constitutionality of tax credits for donations funding scholarships at secular private schools.

[3] In November 2015, MQEC was actively monitoring the possibility of a lawsuit. *See* Exhibit 2 at 2. After Plaintiffs filed the lawsuit, not only was the lawsuit discussed in virtually every newspaper in the state, but MQEC called a "Special Board Meeting" for the sole purpose of discussing "SB 410" (the scholarship program) on January 7, 2016. *See* Exhibit 3.

extra days to respond to Plaintiffs' summary judgment brief. *See* Exhibit 1 at 5 (Plaintiffs' Response to Motion to Intervene).

Judge Ortley did not rule on MQEC's motion to intervene for nine weeks and the parties continued with summary judgment briefing. MQEC filed a "Notice of Issue" on June 20th (Exhibit 4), advising the District Court that its intervention motion was ready for ruling. MQEC could have filed an amicus brief, but chose not to.

With MQEC sitting on the sidelines, Defendants first responded to Plaintiffs' summary judgment motion by filing a request under M. R. Civ. P. 56(f) for discovery. Defendants claimed that it needed discovery to address a legislative poll that had been conducted to determine whether the Legislature agreed with Defendants' rule implementing the program, a rule which interprets the Montana Constitution (specifically article V, section 11(5) and article X, section 6) to preclude tax credits from generating scholarships for families enrolling their children in religious schools. *See* Exhibit 5 (Defendants' Rule 56(f) memorandum). Plaintiffs opposed this motion as requesting unnecessary discovery that would require contested efforts to depose legislators regarding

legislative acts. *See* Exhibit 6. Judge Ortley denied the discovery in the same order that denied MQEC's intervention on August 10th.

In the interim, Defendants concluded that there were no genuine issues of material fact precluding summary judgment and filed their own cross motion for summary judgment on July 7th. *See* Exhibit 7. In its supporting brief, Defendants argued extensively against the constitutionality of the legislative poll (*id.* at 11-12) and mounted a vigorous defense of its interpretation of article X, section 6 (*id.* at 13-27).

Judge Ortley later denied Defendants' Rule 56(f) motion because he specifically found that no discovery was necessary with respect to the legislative poll, as it simply confirmed the statute's definition of the "qualified education providers" at which scholarships could be used. *See* Exhibit 8 at 2-3. Thus, Defendants have already made precisely the argument that MQEC sets out in both its motion to intervene and its petition to this Court about the unconstitutionality of the legislative poll, for which it asserts a need for discovery.

In addition, despite MQEC's fears that Defendants would not do so,[4] Defendants have argued at great length why Montana's Constitution requires the exclusion of religious schools from among the private schools at which families, like Plaintiffs, can use their scholarships. *See* Exhibit 7 at 13-27. Thus, on August 4th, when Judge Ortley denied MQEC's motion to intervene, he had before him Defendants' cross motion for summary judgment, in which Defendants made all the arguments that MQEC suggested Defendants might not make, as well as Plaintiffs' request that any intervention by MQEC be conditioned on its adherence to the ongoing summary judgment schedule.

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[4] In discussing the potential that its interest will not be adequately represented by Defendants, MQEC argues in its petition that "[a] state agency is far less likely to vigorously challenge the constitutionality of legislative acts passed by the government body that creates and funds the state agency. Moreover, it may be inappropriate for state agencies to challenge legislative acts." Petition at 12. MQEC asserts that it has raised this claim in its First Affirmative Defense:

> Without Rule 1 in place [disqualifying participation of religious schools], the scholarship program created by SB 410 is invalid and violates Art. X, § 6 of the Constitution, which prohibits direct and indirect appropriations to religious schools.

As discussed throughout this brief, this defense is *precisely* the position that Defendants have taken *throughout* this litigation, namely that Rule 1 is necessary to comply with section 6. *E.g.*, *supra* at 4, 12.

ARGUMENT

I. MQEC HAS FAILED TO MEET THE STANDARD FOR EXTRAORDINARY RELIEF.

MQEC argues that:

> A writ is appropriate because (1) appeal from a final judgment would be wholly inadequate, creating circumstances of an emergency nature; (2) there are no factual issues in dispute regarding an unopposed motion to intervene and the Court's denial is purely a question of law; (3) the District Court's denial of MQEC's intervention is a mistake of law causing grave injustice; and (4) the underlying litigation involves statewide issues of constitutional significance.

Petition at 2. MQEC's first three points are mistaken.

First, this is an ordinary denial of intervention, not an emergency.

Second, this was not an "unopposed motion to intervene." Plaintiffs' non-opposition to the motion to intervene was conditioned on MQEC's intervention not substantially delaying the summary judgment process, which was already underway by the time MQEC moved to intervene more than six months after the litigation began. Moreover, the court's denial was not "purely a question of law." It was an exercise of discretion based on the fact that (1) Defendants had already written briefs saying everything MQEC claimed it wanted to say and (2)

Defendants had already moved for (and been denied) discovery on the same issue on which MQEC seeks discovery.

Third, the District Court's denial of MQEC's motion to intervene contains no mistake of law. MQEC does not meet the standards for intervention of right or permissive intervention. MQEC has not prosecuted its "interest" in a timely fashion, and, as Judge Ortley found in his order, Defendants' cross motion for summary judgment demonstrates that Defendants had adequately represented MQEC's interests. Defendants had in fact argued everything that MQEC claims Defendants might not assert when MQEC petitioned this Court. Similarly, MQEC has failed to demonstrate any way in which Judge Ortley abused his discretion in not allowing MQEC to join this litigation as a party at this late date.

Accordingly, Plaintiffs respectfully request that this Court deny the petition.

II. MQEC HAS NOT SHOWN THAT POST-JUDGMENT APPEAL WOULD BE AN INADEQUATE REMEDY.

Although MQEC recognizes that denials of intervention are not appealable orders until final judgment is entered, Petition at 8, MQEC's argument for an emergency exception to be made in its case would

swallow the rule against appeals prior to final judgment. The "circumstances" to which MQEC refers are not significantly different from any other case in which intervention has been denied. In effect, MQEC is arguing that this Court should always immediately review denials of intervention. That is simply not the law.

The case will not suffer from MQEC's failure to participate as an intervenor, as MQEC seeks only to make arguments already made by Defendants and to renew a motion already lost by the Defendants. Its petition has identified absolutely nothing new that it seeks to add to the case. MQEC is welcome to provide its views as a friend of the court, but should not be allowed to further delay the resolution of the summary judgment motions currently pending in the District Court.

III. THE PROPOSED INTERVENTION IS INAPPROPRIATE BECAUSE OF ITS UNIQUE PROCEDURAL POSTURE.

MQEC asserts that its motion was unopposed and that the District Court's conclusion was purely a question of law. Neither is correct.

A. Because MQEC's motion was untimely, Plaintiffs consented to permissive intervention with a condition that MQEC not cause significant delay.

Plaintiffs consented only to permissive intervention. And, recognizing the untimeliness of MQEC's proposed intervention, Plaintiffs consented only if the intervention did not significantly delay the litigation. *See* Exhibit 1 at 1-2, 5.

MQEC states that it filed its motion to intervene and its Answer eight days after Defendants filed its Answer, asserting that "it is difficult to draft an *Intervenor's Answer* (required by M. R. Civ. P. 24(c)) without an opportunity to reference the named party's *Answer*." Petition at 14. This is absurd. Parties serious about intervening in lawsuits routinely file answers with intervention motions before government defendants file their answers *in order to ensure that their motions are considered timely*, a prerequisite for both intervention of right and permissive intervention. Otherwise, like MQEC here, the proposed intervenors cannot participate in critical early stages of the litigation, such as motions to dismiss and motions for preliminary injunctions.

B. The District Judge's decision was based on the unique procedural posture of the motion to intervene and was not a pure decision of law.

This Court only grants supervisory writs when there is a pure issue of law at stake. *See* M. R. App. P. 14(3). Here, however, the District Court's decision rested on the unique procedural context of this particular motion to intervene:

- The motion to intervene was filed six months after the case had begun, after the resolution of two substantive motions and in the middle of briefing on summary judgment.
- Because the case involves children attending schools, the case requires quick resolution.
- Plaintiffs had consented to intervention as long as the proposed intervenor did not significantly delay the case.
- The proposed intervenor in fact sought to delay the case by seeking discovery on a non-dispositive issue.
- Defendants had already sought discovery on the same issue, and the Judge intended to reject that motion.
- The proposed intervenor listed two major arguments it wanted to make and claimed these arguments might not be

adequately briefed by Defendants. Both of those issues had in fact just been briefed at length in the Defendants' brief.

Specifically, MQEC states in its petition that it intends to argue (1) constitutional issues related to the legislative poll and (2) that if Defendants did not limit the tax credits to donations to scholarship organizations providing scholarships to secular schools, the program would violate the article X, section 6's prohibition on direct and indirect appropriations to religious schools. Petition at 12-13. Defendants had already briefed both of these issues at length in their brief submitted five weeks earlier. Exhibit 7 at 11-12, 13-27. Normally, an intervenor intervenes before the party it supports has had a chance to submit substantial briefing. Here, the District Court was in the unusual position of being able to *factually* evaluate whether the substantive briefs of the party covered the exact issues the intervenor proposed to raise. Indeed, the District Court denied intervention at the same time it denied Defendants' motion for discovery. It would make no sense for the District Court to grant intervention so that MQEC could make the same motion that the court had just denied.

The procedural context of the District Court's denial of MQEC's intervention is important, because it distinguishes this case from every case that MQEC cites in support of intervention.

IV. THE DISTRICT COURT MADE NO LEGAL ERROR IN DENYING THE MOTION TO INTERVENE.

MQEC argues that this Court's decision granting a writ of supervisory control in *Sportsmen for I-143 v. Fifteenth Judicial District Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400, involved a case remarkably similar to this one. On the contrary, the differences between this case and *Sportsmen* demonstrate why a supervisory writ should not issue here. First, the intervenors in *Sportsmen* had more of an interest than MQEC, as they authored and sponsored the challenged ballot initiative at issue and had moved to intervene in three other identical cases. Second, the *Sportsmen* intervenors were timely, unlike MQEC. Third, the *Sportsmen* intervenors moved to intervene when the case had just begun, so there was still a question of whether the party they supported would adequately represent their interest.

The key basis for this Court's decision in *Sportsmen* was the nature of the intervenors' interest. The intervenors in *Sportsmen* were the "authors, sponsors, active supporters and defenders" of the ballot

initiative throughout the enactment process, *id.* at ¶12, which is not the case here. The Court thus found that they "may be in the best position to defend their interpretation of the resulting legislation." *Id.* at ¶17.

As this Court stated in *Sportsmen*, that case "present[ed] the purely legal question of whether the primary proponent of a ballot initiative has a legally protectable interest sufficient to allow it to intervene in a case challenging the resulting statute." *Id.* at ¶6. Ballot initiative sponsors play a key role in defining and promoting the proposal, akin to that of the legislative sponsors of standard legislation, who are primarily responsible for its enactment. This role is a far cry from the role MQEC played with respect to the tax credit legislation at issue here. MQEC did not sponsor or draft the legislation nor the administrative rule challenged here. Rather, it opposed the legislation and supported the adoption of the administrative rule, merely as one of many individuals and groups participating in the legislative and rulemaking process. It was Defendants that proposed and adopted the

rule, and who are vigorously defending the rule as being constitutionally required.[5]

In addition, it was uncontested that the intervenors in *Sportsmen* were timely. Here, timeliness *is* contested. MQEC waited six months before seeking to intervene after the resolution of a motion to dismiss and a motion for preliminary injunction and while a motion for summary judgment was already pending.[6]

Finally, as Judge Ortley concluded, there is no reasonable argument that Defendants' defense of their position *may be* inadequate,

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[5] MQEC recognizes that this Court follows federal precedent in determining whether a public interest group is entitled to intervene as a matter of right. Petition at 7 (citing *Sportsmen* at ¶12). The U.S. Supreme Court has cast doubt on intervention for parties with greater interest, and more timely motions, than MQEC here. *See Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (reversing Ninth Circuit decision that permitted intervenor sponsors of an initiative to appeal decision invalidating the initiative); *see also Diamond v. Charles*, 476 U.S. 54 (1986) (denying intervention when the intervenor was an individual who merely supported the initiative and who could not state any injury of his own (like MQEC here)); *cf. Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011) (reversing Ninth Circuit holding that opponents of tax credit legislation had standing to challenge the legislation under the Establishment Clause for allowing religious schools to participate in the program, the same constitutional issue involved here).

[6] *See, e.g., Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects*, 309 F.3d 1113, 1120 (9th Cir. 2002) ("[A] party seeking to intervene must act as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation") (internal marks omitted); *Smith v. Marsh*, 194 F.3d 1045, 1050 (9th Cir. 1999) ("[T]he fact that the district court has substantively—and substantially—engaged the issues in this case weighs heavily against allowing intervention as of right"); *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184 (1982) (finding motion to intervene untimely when filed 4 ½ months after receiving notice of complaint).

because Defendants' cross motion briefing demonstrates they have in fact raised and argued all the claims and issues MQEC feared would be unaddressed. Intervenors base their inadequacy of representation argument on *Northwest Forest Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996), which considers: "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *See* Petition at 12-13. Applying *Glickman* to the situation on August 10th (when Judge Ortley denied MQEC's motion to intervene, five weeks after Defendants filed its cross motion for summary judgment), Judge Ortley's conclusion that Defendants adequately represent MQEC's interests is unassailable. Defendants *have* made every argument that MQEC argues it might not make and MQEC also has failed to show that it would offer any necessary elements that Defendants neglected. It has no direct interest in the litigation. Although MQEC suggests that it would bring "considerable experience in the area of requiring state compliance with educational

funding mandates of our Constitution," Petition at 13, its experience is with ensuring educational funding for public schools, which is irrelevant to the tax credit program, let alone "necessary" to resolving the program's constitutionality.

At the outset of litigation, Plaintiffs would not have opposed intervention (and indeed they were willing to grant conditional intervention even when it was late). But even if MQEC would have had a plausible argument that Defendants might not adequately represent MQEC's position had MQEC attempted to intervene in a timely fashion, by the time MQEC actually did attempt to intervene, it had become apparent that Defendants were vigorously arguing everything MQEC said they might not. No speculation is necessary now. This confirms that MQEC is not entitled to intervention of right, and that Judge Ortley made no error of law in concluding that MQEC had no right to intervene.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION.

Judge Ortley concluded in his August 10th Order on Pending Motions that Defendants' "cross motion for summary judgment ensures

that the appropriate legal issues have been raised and will be argued to this Court." He further concluded that participation by MQEC "will not serve to further elucidate the issues before this Court." In light of these clearly correct conclusions and his recognition that the purpose of Rule 24 is to promote judicial efficiency, it is clear that Judge Ortley did not abuse his discretion in denying MQEC permissive intervention.[7]

M. R. Civ. P. 24(b)(3) requires a court to exercise its discretion after considering whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Granting permissive intervention on the terms requested by MQEC would have obviously delayed and prejudiced the adjudication of Plaintiffs' rights. Throughout this litigation, Plaintiffs have asserted the need for a prompt resolution of the constitutional question underlying this case. While the preliminary injunction issued by Judge Ortley has allowed the program to move forward, so long as this litigation continues to cast a constitutional cloud over this program, it will continue to interfere with the private decisions of potential donors who are deciding whether

[7] MQEC does not make any effort to challenge the Order as an abuse of discretion, focusing solely on intervention of right. In the interests of completeness, Plaintiffs briefly explain why Judge Ortley did not abuse his discretion in denying permissive intervention, as well.

to donate, which undercuts the Legislature's intent. The longer the constitutional uncertainty persists, the less likely donors are to contribute to scholarship funds and the less likely Plaintiffs' children will receive the scholarships they desire.

VI. THERE IS NO NEED FOR DISCOVERY.

This Court should not exercise supervisory control over discovery here because the discovery disputes at issue do not involve pure questions of law.

Supervisory control is rarely appropriate to resolve discovery issues because they involve factual determinations. Instead, supervisory control is only granted for discovery issues when the district court abused its discretion. *See, e.g., Hegwood v. Mont. Fourth Judicial Dist. Court*, 317 Mont. 30, 75 P.3d 308, ¶16 (2003) (denying writ of supervisory control because "[t]he district court is in a better position than this Court to supervise the day-to-day operations of discovery" and "[w]e will not overturn a district court's order affecting discovery unless it amounts to an abuse of discretion").

Here, the District Court has already denied discovery to Defendants on the same matters on which MQEC seeks discovery. In

rejecting Defendants' request for discovery regarding the legislative poll and financial ramifications of the tax credit, Judge Ortley properly concluded that these issues were "not central to or determinative of the constitutional question squarely before the Court"—being the scholarship program's constitutionality under article X, section 6. This conclusion is not an abuse of discretion, but instead plainly correct. Whether article X, section 6 requires Defendants' rule excluding participation of religious schools is a question of law, and the fact that majorities of the Legislature believe Defendants' wrongly enacted the rule is irrelevant.

Should this Court take supervisory control and instruct Judge Ortley to allow MQEC to intervene, it should deny MQEC's request for discovery, which will only serve to unnecessarily delay resolution of this case.

CONCLUSION

Plaintiffs respectfully request that this Court deny the writ for supervisory control. Furthermore, even if this Court permits MQEC to intervene—which it should not—it should not allow MQEC to cause further delay by taking unnecessary discovery.

Dated September 23, 2016.

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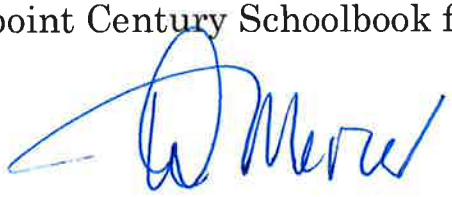
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Montana Rule of Appellate Procedure 14(9)(b) because this brief contains 3,941 words, excluding the parts of the brief exempted by Montana Rule of Appellate Procedure 11(4)(d).

I further certify that this brief complies with the typeface and text style requirements of Montana Rule of Appellate Procedure 11(2) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Century Schoolbook font.



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CERTIFICATE OF SERVICE

I certify that I served the following parties with a true and accurate copy of the foregoing by mailing a copy, first class, postage prepaid on September 23, 2016:

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