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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

MONTANA QUALITY EDUCATION COALITION, Plaintiff, -v- STATE OF MONTANA and MONTANA DEPARTMENT OF REVENUE, Defendants.	Cause No: ADV-2017-487 Hon. Mike Menahan **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Montana's tax credit subsidizing the cost of private schools is unconstitutional—the Montana Supreme Court already declared it violates Mont. Const. Art. X, § 6, which prohibits aid to religious schools. *Espinoza v. Mont. Dept. of Revenue*, 2018 MT 306, 393 Mont. 446, 435 P.3d 603. On appeal, a narrowly divided United States Supreme Court held the Montana Supreme Court "should have 'disregarded' the no-aid provision" of the Montana constitution because excluding religious schools from receiving public benefits

solely because of religious status violates of the federal constitution's Free Exercise Clause. *Espinoza v. Mont. Dept. of Revenue*, 591 U.S. ___, 140 S. Ct. 2246, 2262 (2020), referencing Mont. Const. Art. X, § 6 and U.S. Const. amend. I.

In the same decision, however, the United Supreme Court recognized an important controlling parameter: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id*. at 2261.

The Montana Constitution bars funding private education in at least three places. The verbatim transcript of the 1972 Constitutional Convention discusses the prohibition so frequently that one delegate remarked, "I think we ought to realize that we have [a prohibition on public funds for private or religious education] at least two other places in the proposed Constitution we've already adopted … I guess if you put it in there three times, you've really got the message across." 6 *Montana Constitutional Convention, Verbatim Transcript, p. 2015* (Harbaugh)(hereafter cited as "*Tr*.")

The constitutional prohibition on public funding for private education (whether secular or religious) at Mont. Const. Art. V, § 11(5) controls this dispute: "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."

This Court should hold Montana's "Tax Credit for Qualified Education Contributions" is a forbidden "appropriation" under Mont. Const. Art. V, § 11(5) for several reasons:

(1) The Montana Supreme Court has already held that indirect financial benefits for private entities such as the State's pledge of credit are impermissible under Mont. Const. Art. V, § 11(5);

(2) The Montana State Legislature itself includes tax credits in its definition of "appropriation" as: "directly or indirectly incurring a financial obligation with the expectation that a certain amount of money will be expended or directed for a specific use or purpose," at Mont. Code Ann. § 13-27-211(2);

(3) The tax credit program to fund private schools is an appropriation because the Legislature diverted a specific amount of money that would otherwise be tax revenues to the dollar-for-dollar tax credit—the Legislature is not incentivizing donations but repaying donors to do what the State clearly cannot; and

(4) The Nevada Supreme Court recently and unanimously ruled that a functionally identical 2015 tax credit program is an appropriation. *Morency v. State Dept. of Education*, 496 P.3d 584 (Nev. 2021).

MONTANA FORBIDS PUBLIC FUNDING OF PRIVATE EDUCATION

Fifty years ago, delegates to Montana's Constitutional Convention met to fashion what would become our current state constitution. The constitution adopted by Montanans sought "to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations." *Mont. Const., preamble.* Nowhere in the document is the guarantee of "equality of opportunity" more pronounced than in its fulsome commitment to public education. The Constitution sets the lofty goal for the state public education system to "develop the full educational potential of each person" while guaranteeing "[e]quality of educational opportunity … to each person of the state." *Mont. Const., Art. X, § 1(1).*

Delegates recognized it would take significant funding to achieve the constitutional mandates to "provide a basic system of free quality public elementary and secondary schools" and to "fund and distribute in an equitable manner … the state's share of the cost of the basic elementary and secondary school system." *Mont. Const. Art. X, § 1(3).* Delegates to the convention recognized the State's financial resources are limited and need to be

preserved to meet this mandate. Delegate Harbaugh explained, "[T]he committee realizes that the economic resources of the state limit this goal, and yet it's our belief that it's very important to set forth a goal for education and that the development of our human resources to the fullest possible extent ought to be a primary goal of the state's educational enterprise." *6 Tr. 1949-1950*. Delegate Champoux explained, "Because of this overriding importance of education, the committee recognizes the awesome task of providing the appropriate constitutional provisions necessary to protect and nurture the public education system." *Id*. at 1948.

The Delegates settled on a series of "appropriate constitutional provisions" by "thoroughly and deeply reflect[ing]" upon constitutional language used in the 1972 Montana State Constitution. Id. First, Delegates created a "public school fund" consisting of income from state public lands and other sources that must "forever remain inviolate, guaranteed by the state against loss or diversion*." Mont. Const. Art. X, §§ 2-3.* Second, consistent with an overarching concern that limited public funds be preserved for public education, the Delegates deemed it essential to prohibit public aid to private schools. "Any diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." *6 Tr. 2009* (Burkhardt). Delegates felt so strongly about this they included prohibitions in the 1972 Constitution three times—leading Delegate Harbaugh to make his observation, "I guess if you put it in there three times, you've really got the message across." *6 Tr. 2015.*

Constitutional prohibitions on public funding for private education include:

Mont. Const. Art. V, § 11(5):

> No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.
>
> Mont. Const. Art. VIII, § 1:
>
> Taxes shall be levied by general laws for public purposes.
>
> Mont. Const. Art. X, § 6:
>
> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grants of land or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

The language of Art. X, § 6 is specific to "sectarian" schools, an outdated term also used in the 1889 Montana State Constitution. *1889 Mont. Const., Art. XI, § 8.* Perhaps because private schools are overwhelmingly religious in nature, the terms "private" and "sectarian" were used interchangeably. The voter information pamphlet for the 1972 Constitution describes Art. X, § 6 as "prohibit[ing] state aid to **private** schools." *Mont. Const. Convention, Proposed 1972 Constitution for the State of Montana: Official Text with Explanations,* at 15 (1972) *(emphasis added)(McDonald Decl., Exhibit 1).* The voter information pamphlet does not mention religion at all in explaining Art. X, § 6.

The point of these interlocking provisions was to preserve as many public resources as possible for the public education system. As Delegate McNeil explained, "I am speaking to you today … as one who is dedicated to preserving our public school system. And that's what this issue is all about. I don't think we ought to dilute that in any way. We aught not to open the door to anyone. We have the finest public school system, open to all, that has ever been devised by any society." *6 Tr. 2016.*

Montana's decision to avoid diluting its public education system by disallowing any diversion of public resources to private education is entirely proper. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ*., 347 U.S. 483, 493 (1954). "A State need not subsidize private education." *Espinoza*, 140 S. Ct. at 2261 (2020).

STATEMENT OF UNDISPUTED FACTS

The 2015 Legislature created a tax-credit program intended to fund private education -- the "Tax Credit for Qualified Education Contributions." *2015 Mont. Laws 2165, Ch. 457*, codified at *Mont. Code Ann. § 15-30-3101, et. seq*. The purpose of the program is to "provide parental and student choice in education with private donations through tax replacement programs." *Id*. The State provides a taxpayer or corporation with a dollar-for-dollar tax credit for contributions made to a "student scholarship organization" ("SSO"). *Mont. Code Ann. §§ 15-30-159; 15-30-3111(1).* Taxpayers and corporations were originally allowed a maximum $150.00 tax credit per year. *Mont. Code Ann. § 15-30-3111(1)(2015).* The 2021 Legislature increased the tax credit from $150.00 per year to $200,000.00 per year. *Mont. Code Ann. § 15-30-3111(1)(2021).*

Taxpayer and corporate contributions into SSOs are paid out to "qualified education providers," which the statute defines in relevant part as "not a public school". *Mont. Code Ann. §§ 15-30-3103(1)(c), 15-30-3102(7)(a).* Home schools are also definitionally excluded. *Mont. Code Ann. § 15-30-3102(7)(c)*. SSOs must pay out at least 90% of the contributions as scholarships to qualified education providers. *Mont. Code Ann. § 15-30-3103.* A taxpayer or corporation making a donation to a SSO is not permitted to specify a family or qualified education provider whom their money should benefit. *Mont. Code Ann. § 15-30-3111(1).*

Instead, the parent or guardian of a student attending private school selects the qualified education provider to whom the contributions are to be paid and the SSO makes payment directly to the private school. *Mont. Code. Ann. § 15-30-3104(1).* SSOs are private entities not under control of the State. See, Montana Secretary of State Business Entity Search, Big Sky Scholarships (*McDonald Decl*., *Exhibit 2*).

The 2015 Legislature made $3,000,000 of tax credits available to taxpayers and corporations contributing to SSOs. *Mont. Code Ann. § 15-30-3104(1)(2015)*. If the full amount allocated by the Legislature was claimed, the amount of available tax credits would increase by 10% in subsequent years. *Mont. Code Ann. § 15-30-3111(5)(ii)(2015).* According to the fiscal note that accompanied the bill in 2015, the tax-credit program was expected to reduce general fund revenues by up to $9.6 million per year by fiscal year 2022. *Fiscal Note for SB410, at p. 5, 64th Mont. Leg. (April 21, 2015)(McDonald Decl., Exhibit 3).*

Initially, the tax credit was not heavily utilized. The fiscal note accompanying the 2021 amendments to the program (increasing the tax credit limit from $150 to $200,000 per year) states the total amount contributed to both SSOs and a separate tax credit program for public schools from 2015-2020 was $94,188. *Fiscal Note for HB279 at p. 2, 67th Mont. Leg. (April 26, 2021)(McDonald Decl., Exhibit 4).*

Consequently, the 2021 Legislature vastly increased the size of the credits that individual taxpayers or corporations could claim and reduced the aggregate amount of tax credits allowed to $1 million for fiscal year 2022, then $2 million for fiscal year 2023 with ongoing escalation in subsequent years if 80% of the credits are claimed. *Mont. Code Ann. § 15-30-3111(4)(2021).* The 2021 fiscal note predicted the revamped tax credit program would reduce general fund revenue by $1,907,453 in fiscal year 2023, increasing to a

$5,561,280 reduction in general fund revenue by fiscal year 2025. (*McDonald Decl., Exhibit 4*). According to the State of Montana's website, taxpayers and corporations have claimed the entire $1 million of tax credits available for 2022.[1] This means the Legislature has moved $1 million that would otherwise be state tax revenue into private education.

When the tax credit program was created in 2015, the Legislature mandated "[t]he tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5) and Article X, section 6, of the Montana constitution." *Mont. Code Ann. § 15-30-3101(2015).* While this mandate was repealed by the 2021 Legislature, the provision served as the genesis of the *Espinoza* decisions from both the Montana Supreme Court and United States Supreme Court. *Mont. Laws 2021, Ch. 480*.

Relying on that mandate, the Montana Department of Revenue promulgated an administrative rule that expressly excluded from the statutory definition of "qualified education provider" any schools "owned or controlled in whole or in part by any church, religious sect or denomination". *A.R.M. § 42.4.802(1)(a)(2015); Mont. Admin. Reg. Notice No. 42-2-939* (Dec. 24, 2015). The Montana Department of Revenue's rule did not bar private schools—only private *religious* schools.

A group of Montana parents whose children attended a religiously affiliated private school filed suit, arguing A.R.M. § 42.4.802(1)(a)(2015) violated the free exercise clauses of the state and federal constitutions. *Espinoza*, 2018 MT at ¶ 11. Ultimately, the Montana Supreme Court ruled the tax credit violated Mont. Const. Art. X, § 6. *Id*. at ¶ 39 ("The Legislature's enactment of the Tax Credit Program is facially unconstitutional and violates

[1] https://svc.mt.gov/dor/educationdonation2/

Montana's constitutional guarantee to all Montanans that their government will not use state funds to aid religious schools."). The Montana Supreme Court further held the Department of Revenue should never have promulgated A.R.M. § 42.4.802 (2015) because "[a]n agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule. It is the Legislature's responsibility to craft statutes in compliance with Montana's Constitution, which it failed to do here." *Id*. at ¶ 44.

That decision was appealed to the United States Supreme Court, which held the Montana Supreme Court "should have 'disregarded' the no-aid provision" of the Montana constitution because excluding religious schools from receiving public benefits solely because of religious status violates of the federal constitution's Free Exercise Clause. *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. at 2262 (2020).

Neither decision addresses the Montana Constitution's general prohibition on public funding of private education, except to the extent the U.S. Supreme Court recognized states are free to ban aid to all private schools.

LEGAL STANDARDS GOVERNING MOTION

"The constitutionality of a statute is a question of law." *Walters v. Flathead Concrete Products*, 2011 MT 45, ¶ 9, 359 Mont. 346, 249 P.3d 913. Rule 56 of the Montana Rules of Civil Procedure requires that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200. "The party moving for summary judgment has the initial burden of

establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Id*.

If no genuine issues of material fact exist, the district court "then determines whether the moving party is entitled to judgment as a matter of law." *Id*.

"The Constitutional Convention Delegates' (Delegates) intent controls our interpretation of a constitutional provision." *Espinoza* at ¶ 18, citing *Nelson v. City of Billings*, 2018 MT 36, ¶ 8, 390 Mont. 290, 412 P.3d 1058.

> We primarily discern the Delegates' intent 'from the plain meaning of the language used.' *Nelson*, ¶ 14 (explaining that we apply our rules of statutory construction to our analysis of constitutional provisions). However, we define the Delegates' intent 'not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.' *Nelson*, ¶ 14. Accordingly, we 'determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or extrinsic aids clearly manifest an intent not apparent from the express language.' *Nelson*, ¶ 16.

Espinoza at ¶ 18.

ARGUMENT

I. The Tax Credit for Qualified Education Contributions is an Unconstitutional Appropriation.

The question before this Court is whether a tax credit that supports private education is an "appropriation" forbidden by Mont. Const. Art. V, § 11(5). The challenged tax credit program permits the Legislature to divert a specified amount of tax dollars that would otherwise be paid to the public fisc into private education—the precise public policy the Montana Constitution sought to avoid. The Nevada Supreme Court recently ruled that a functionally identical tax credit program in that state is an appropriation. Further, the Montana State Legislature has defined "appropriation" at Mont. Code Ann. § 13-27-211(2)

to include "directly or indirectly incurring a financial obligation with the expectation that a certain amount of money will be expended or directed for a specific use or purpose," which is precisely what the tax credit does. Finally, the Montana Supreme Court requires courts interpreting words in the state constitution consider both the plain meaning and the intention of the framers, which was clearly to prevent the dilution of the public education system by allowing diversion of public money to private education. Accordingly, the Court should rule the Tax Credit for Qualified Education Contributions violates Mont. Const. Art. V, § 11(5).

A. Mont. Const. Art. V, § 11(5) Broadly Prohibits Even Indirect Appropriation of Public Money Such as a Pledge of Credit; A Direct Legislative Allocation of Public Money from a Public Fund is Not Required for a Law to be Unconstitutional.

On the infrequent occasions the Montana Supreme Court has ruled upon the scope of Mont. Const. Art. V, § 11(5), it has been to prevent even indirect appropriation such as pledging the state's credit to issue bonds that would ultimately benefit private entities. Mont. Const. Art. V, § 11(5) states:

> No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

For purposes Mont. Const. Art. V, § 11(5), an appropriation does not require a specific allocation of public money from a public fund for a private purpose. According to the Montana Supreme Court, the pledge of the State's credit can render legislative acts unconstitutional. *White v. State*, 233 Mont. 81, 759 P.2d 971 (1988); *Hollow v. State*, 222 Mont. 478, 723 P.2d 227 (1986).

In *White*, the 1987 Legislature passed a law to create "a public-private sector partnership to encourage scientific and technological development within the state in order to

keep pace with a changing economic structure and to create new jobs and expand small business opportunities[.]" *White* at 83, 759 P.2d at 972. The law provided the Montana Science and Technology Development Board with bonding authority to raise money to invest in "seed capital projects, start-up capital projects and expansion capital projects." *Id*. at 84, 759 P.2d at 972. While the law directed that the bonds were to be repaid from "proceeds received by the Board as the return on its technology investments," the bonds themselves were secured by the Coal Severance Tax Permanent Trust Fund. *Id*. Specifically, the law required that "such amounts, not to exceed $38 million, as are necessary from time to time" be transferred from the Coal Severance Tax Permanent Trust Fund to the technology investment program debt service fund "to pay principle of and premium, if any, and interest on obligations when due." *Id.* at 87, 759 P.2d at 974. The law also required the legislature to continue collecting coal taxes to ensure sufficient money to secure the bonds. *Id*.

The Montana Supreme Court struck down the law as violating Mont. Const. Art. V, § 11(5). "As we said in *Hollow*, "What we do not and cannot condone is the direct use of tax monies by legislative provision which in effect directly pledges the credit of the state to secure the bonds involved in this case." *Id*.

Hollow involved a similar effort at economic development by which a state board could issue bonds and notes to finance and guarantee loans funding various projects in Montana. *Hollow,* 222 Mont at 480-81, 732 P.2d at 229. The law expressly stated that the board's debts were not the debts of the State, and included only a "moral obligation" that the governor submit proposed budgets funding the board's "capital reserve account to the sum of minimum capital reserve requirements." *Id.* The Montana Supreme Court acknowledged the Legislature's efforts at avoiding a formal guarantee of the board's debts. *Id* at 486, 732

P.2d at 232. However, the law still pledged the use of in-state investment fund monies derived from coal taxes to guarantee the board's debts and thus violated Mont. Const. Art. V, § 11(5) for the same reasons as in *White*. *Id.* at 485-486, 732 P.2d at 232.

Both *White* and *Hollow* establish that in construing "appropriation" under Mont. Const. Art. V, § 11(5), the Montana Supreme Court views the prohibition as expansive and including both direct and indirect uses of state funds. Both cases involved a pledge of credit to support public boards authorized to issue bonds. Neither involved a direct allocation of a specific sum of public dollars to be paid for a specific purpose. Both establish that a Legislative act offends Mont. Const. Art. V, § 11(5) when an indirect effect on the public treasury is implicated.

B. The Tax Credit for Qualified Education Contributions is an Appropriation.

The private school tax credit at issue here diverts money owed to the state, on a dollar-for-dollar basis, away from the public's tax collections and into private education. The program permits the Montana Legislature to specify a sum of money owed to the State by taxpayers or corporations and direct it to SSOs which fund private education[2]. It is an attempt by the Legislature to do that which Mont. Const. Art. V, § 11(5) expressly forbids: to appropriate money for educational purposes to private entities.

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[2] MQEC does not believe there is dispute that SSOs exist for educational purposes or that they are private entities not under state control. See, Mont. Code Ann. § 15-20-3101; Montana Secretary of State Business Entity Search for Big Sky Scholarships, which is a nonprofit corporation. *McDonald Decl., Exhibit 2*. Big Sky Scholarships was the SSO discussed by both the state and federal supreme courts in the Espinoza decisions. *Espinoza*, 140 S. Ct. at 2251; *Espinoza*, 2018 MT 306 at fns 1, 6. Big Sky Scholarships is on the State website as an eligible SSO.: https://svc.mt.gov/dor/educationdonation2/

"Appropriation" has a plain, unambiguous and obvious meaning: the setting aside from the public revenue a certain sum of money for a specified object. A tax credit system by which a legislature selects a specific amount of money destined for the public treasury and uses it for a specified purpose such as funding private school scholarships is an "appropriation."

That was precisely the unanimous holding of the Nevada Supreme Court in a lawsuit involving the Nevada Educational Choice Scholarship Program ("NECSP"), a 2015 tax credit funding private school scholarships that is functionally identical to Montana's Tax Credit for Qualified Education Contributions. *Morency v. State Dept. of Education*, 496 P.3d 584 (Nev. 2021).

Under NECSP, Nevada employers receive a dollar-for-dollar tax credit against their state tax obligation if they make donations to scholarship organizations. *Id.* at 587. The Nevada scholarship organizations assist low-income students attend private schools. *Id*. The 2015 Nevada Legislature authorized a maximum $5 million in tax credits for the first year, increasing by 10% each year thereafter. *Id.* The 2019 Nevada Legislature eliminated the 10% annual increase and indefinitely capped the available tax credits at $6.65 million per year. *Id.* Capping the available tax credits was projected to increase Nevada's general fund revenue by nearly $1.4 million by fiscal year 2020-21. *Id*.

A group including businesses which benefit from the Nevada tax credit challenged the 2019 decision to cap the annual increases, arguing it violated the Nevada State Constitution's supermajority voting provision, which requires two-thirds of each legislative chamber to approve any bill that "increases any public revenue in any form[.]" *Id.,* citing Nev. Const., Art. 4, § 18(2). Nevada argued that the 2019 law did not increase public revenue by

changing tax formulas but simply redirected funds from a specific appropriation back into the state general fund, requiring a simple majority vote.

The Nevada Supreme Court held, "The NECSP tax credit is clearly an appropriation. An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other. The State funds the NECSP tax credits by setting aside a specified portion of tax money owed pursuant to [Nevada laws]." *Id*. at 590 (internal cites to Nevada cases omitted).

The Montana private-school tax credit at issue here is functionally identical to the NECSP that was found to be an appropriation. Montana taxpayers and corporations receive dollar-for-dollar reductions from their state tax obligation if they make donations to SSO. *Mont. Code Ann. § 15-30-3111(1).* The SSOs are required to send the donations to private schools. *Mont. Code Ann. § 15-30-3103(1)(c).* The 2015 Montana Legislature authorized a maximum $3 million in tax credits for the first year, increasing by 10% each year thereafter. *Mont. Code Ann. § 15-30-3111(5)(2015).* A subsequent 2021 Montana Legislature altered the allocation of available tax credits. *Mont. Code Ann. § 15-30-3111(4)(2021).* Such changes are predicted to result in specific changes to the state's general fund balance—"a reduction in general fund revenue by $1,907,453 in FY2023, which increases to $5,561,280 in FY 2025." Fiscal Note for HB279 at p. 2, 67th Mont. Leg. (April 26, 2021)(*Exhibit 4*). As the *Morency* Court held, a tax credit program of this type "is clearly an appropriation." The Legislature has set aside from the public revenue a certain sum of money for a specified object and the tax credits are funded "by setting aside a specified portion of tax money owed pursuant to [tax laws]." *Morency* at 590.

Next, even if the term "appropriation" as set forth above is uncertain, *Espinoza* and *Nelson* instruct Montana courts to "define the Delegates' intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced, *and the objective they sought to achieve*." *Espinoza* at ¶ 18; *Nelson* at ¶ 14 (emphasis added). As set forth above, there can be no doubt from the verbatim transcript of the Constitutional Convention that Delegates intended to fulfill the promise of equal educational opportunity by avoiding any diversion of public resources to private schools. "Any diversion of funds or effort from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." *6 Tr. 2009* (Burkhardt).

Finally, the Legislature itself acknowledges that an "appropriation" includes dollar-for-dollar tax credits such as the tax credit at issue here. While Legislative construction of the meaning of constitutional provisions "is not binding on this Court, it is entitled to consideration." *Keller v. Smith*, 170 Mont. 399, 407, 553 P.2d 1002 (1976). The Legislature broadly defines "appropriation" at Mont. Code Ann. § 13-27-211(2):

> For purposes of this section, "appropriation" includes but is not limited to the act of designating or setting aside budgetary authority or directly or indirectly incurring a financial obligation with the expectation that a certain amount of money will be expended or directed for a specific use or purpose. The term also includes increasing or expanding eligibility to a government program.

The 2021 Legislature wrote this definition as a way to curtail citizen lawmaking under Mont. Const. Art. III, § 4 (referendum and initiative). Nevertheless, the definition fairly encompasses the breadth of how the Legislature itself can set aside from the public revenues a certain sum of money for a specified object. The Legislature's definition includes

tax credits because they “directly or indirectly incur[] a financial obligation with the expectation that a certain amount of money will be expended or directed for a specific use or purpose.” The tax credits result in diminishment of state tax collections with the expectation that a sum certain will be directed for a specific use, e.g. $1 million in 2022 to scholarships for private education.

The Legislature also defines “tax expenditure” as “those revenue losses attributable to provisions of Montana tax laws … including … (d) credits allowed against Montana personal income tax or Montana corporate income tax.” Mont. Code Ann. § 5-4-104(2)(d). Based on this definition, the tax credits are “tax expenditures” that reduce the state budget. The Legislature’s determination to cap the number of credits at $3 million in 2015, $1 million in 2021 and $2 million in 2022 shows the credits are a loss of these sums to other state programs, including public education.

Under the plain meaning of appropriation, the *Morency* decision from Nevada, the clearly expressed intent of the Delegates to the 1972 Constitutional Convention and the Legislature’s own statutory definition at Mont. Code Ann. § 13-27-211(2), the Tax Credit for Qualified Education Contributions violates Mont. Const. Art. V, § 11(5).

C. The *Nicholson* Decision Does Not Control this Dispute.

While not called upon to answer the question, two concurring opinions in *Espinoza* state that the Tax Credit for Qualified Education Contributions is <u>not</u> an appropriation pursuant to *Nicholson v. Cooney*, 265 Mont. 406, 877 P.2d 486 (1994). See, *Espinoza*, ¶¶ 47, 75 (Gustafson, J.; Sandefur, J.). “Concurring opinions do not constitute controlling precedent.” *Doe v. Dept. of Revenue*, 256 Mont. 348, 846 P.2d 1018 (1993). This brief

presents arguments that could not have been made to the *Espinoza* Court, such as Nevada's *Morency* decision and the Legislature's adoption of Mont. Code Ann. § 13-27-211(2).

Nicholson did not involve an appropriation under Mont. Const. Art. V, § 11(5)—such as was the case in both *White* and *Hollow*, *supra*—but rather dealt with Montana's broad and constitutionally guaranteed referendum power. Mont. Const. Art. III, § 5 states that voters can "reject by referendum any act of the legislature except an appropriation of money." The Supreme Court requires "initiative and referendum provisions of the Montana Constitution should be broadly construed to maintain the maximum power in the people." *Nicholson* at 411, 877 P.2d. at 488.

Nicholson involved a citizen-led referendum to reject revisions the 1993 Legislature made to Montana tax laws, pending a legislative referendum on the adoption of a sales tax. *Id*. at 409, 877 P.2d at 477. Opponents of the citizen-led referendum argued the tax law changes could not be challenged because "an appropriation of money" is excluded under Mont. Const. Art. III, § 5. Emphasizing the need to maintain the maximum power in the people, the *Nicholson* Court took a very narrow view of what constituted an "appropriation" "**<u>under the above provision</u>** in Montana's Constitution" – the provision guaranteeing the power of initiative. *Nicholson*, at 415, 877 P.2d at 491.

> "Appropriation" means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state.

Id. at 415-416, 877 P.2d at 491, citing *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78, 195 P. 841, 845 (1921)(another initiative case in which the Montana Supreme Court declined to invalidate a citizen initiative to issue bonds for educational buildings, ruling the initiative did not appropriate money but simply placed in a fund for future appropriation).

Thus the definition of "appropriation" in *Nicholson* is specific to Mont. Const. Art. III, § 5 and was narrowly construed to permit "the maximum power in the people" to use referendum and initiative powers. It does not properly control the definition in Mont. Const. Art. V, § 11(5), which governs this dispute and the meaning of which must be ascertained "not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the [Delegates] drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Espinoza* at¶ 18; *Nelson* at ¶ 14.

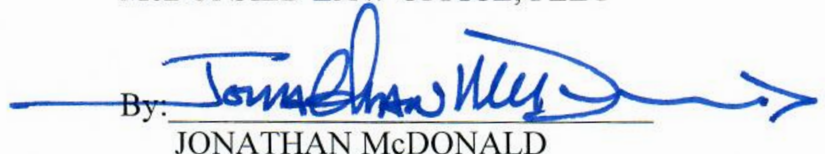
CONCLUSION

The challenged tax credit funds private education, contrary to the express intention of Delegates to the 1972 Constitutional Convention, contrary to Mont. Const. Art. V, § 11(5) and contrary to the legislative definition of the term 'appropriation' at Mont. Code Ann. § 13-27-211(2). It should be declared unconstitutional.

The Court should issue a declaratory judgment in favor of Plaintiffs, ruling the challenged tax credit program violates the Montana Constitution and enjoining the state from its further use.

DATED this 31st day of May, 2022.

McDONALD LAW OFFICE, PLLC



By:____________________
JONATHAN McDONALD

-and-

KARL J. ENGLUND, P.C./Karl Englund
Attorneys for Plaintiff MQEC

CERTIFICATE OF SERVICE

This is to certify that on this 31st day May, 2022, a copy of the foregoing was served upon the following by both U.S. Mail and e-mail (where indicated), pursuant to M.R.Civ.P. 5(b)(2)(E):

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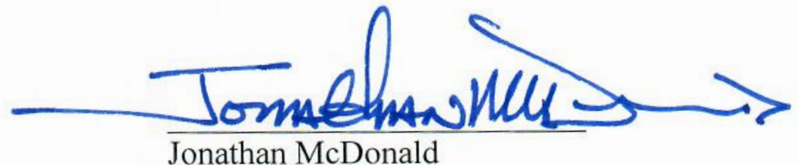

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