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2 District Judge, Department No. 4
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7 MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
8 FLATHEAD COUNTY

9 Kendra Espinoza, Jeri Ellen Anderson,
10 and Jaime Schaefer,
11 Plaintiffs,

12 vs.

13 Montana Department of Revenue, and
14 Mike Kadas, in his official capacity as
15 Director of the Montana Department of
16 Revenue,
17 Defendants.

Cause No. DV-15-1152 (D)

ORDER ON PENDING MOTIONS

18 This matter is before the Court on several pending motions, including an
19 unopposed motion to intervene brought by the Montana Quality Education Coalition
20 (MQEC). (Doc. 38). Plaintiffs' Motion for Summary Judgment (Doc.35), while the first
21 filed, will not be ripe until August 18, 2016 because of extensions having been granted
22 which allow Plaintiffs to incorporate within their reply brief their response to
23 Defendant's Cross Motion for Summary Judgment (Doc. 51). Also ripe is Defendant's
24 Rule 56(f) Motion in which it seeks to delay consideration of Plaintiffs' motion in favor of
25 additional discovery. Oral argument has not been requested and the Court finds that
26 argument would not serve to elucidate the issues which have been fully briefed. Having
27 considered the ripe motions the Court enters the following order:

28 MQEC Motion to Intervene: The motion to intervene is denied. While the motion
is unopposed the Court finds there is no basis upon which it can conclude that MQEC is
either entitled to intervene or should be allowed to do so. It is well established that "M.
R. Civ. P. 24 is a discretionary rule whose purpose is to promote judicial efficiency.

1 It is used to avoid delay, circuitry, and multiplicity of actions.” *Loftis v. Loftis*, 2010 MT
2 49, ¶ 9, 355 Mont. 316, 227 P.3d 1030 (citations omitted).

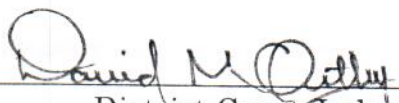
3 It is beyond debate that MQEC has been one of the champions of public education
4 and the struggle to ensure that Montana’s public schools are adequately funded by the
5 legislature. Its record as an advocate for its members, before the legislature and in the
6 courts of Montana, is extensive. In the context of Rule 1, MQEC advocated as a
7 proponent of the Rule to ensure that no public money was used to promote or fund
8 religious education at the expense of public schools consistent with Article X, Section 6,
9 of the Montana Constitution. Nonetheless, the Court concludes that no statute grants
10 MQEC the right to intervene. The expressed interest of MQEC, and its constituent
11 members, as an advocacy organization is adequately represented by the parties to the
12 case. Like the MDOR, MQEC believes that Rule 1 is appropriately drafted to prevent the
13 appropriation of public funds to, and for, the benefit of religious schools. As has been
14 well argued by the parties, and as argued in MQEC’s brief in support of its intervention
15 motion, the issue upon which this litigation rises, and may fall, is whether the tax credit
16 created is an appropriation of public funds. It came as no surprise to the Court that
17 MDOR demonstrated in its response to Petitioner’s motion for summary judgment that
18 its attorneys are well qualified to address the legal issues driving this case. Further, its
19 cross motion for summary judgment ensures that the appropriate legal issues have been
20 raised and will be argued to the Court. The Court concludes that the expertise of counsel
21 for MQEC will not serve to further elucidate the issues before the Court, nor enhance any
22 earlier preliminary determination of those issues as this case makes its procedural
23 journey to the Montana Supreme Court as it most certainly will.

24 **MDOR Rule 56 (f) Motion:** The motion is denied. MDOR seeks to stay
25 determination of Petitioner’s summary judgment motion so that discovery can be
26 conducted to determine the actual financial ramifications of the tax credit, and to the
27 legal impact and efficacy of the legislative poll referenced by the Court in its order on
28 granting the preliminary injunction in this matter. The Court concludes that discovery
is not needed to fully develop the narrow constitutional question identified above.

1 The filings to date reflect that money has been paid to at least one School
2 Scholarship Organization (SSO). The Court has been reminded that up to 3 million
3 dollars in tax credits may be given during the first year that such credits are allowed.
4 For the purpose of determining whether the tax credit is properly considered an
5 unconstitutional appropriation it matters not whether credits of three dollars or three
6 million dollars are given against otherwise taxable income that may well make its way to
7 the State treasury. With regard to the intent of the legislature and the poll which is
8 referenced in the Court's order granting the preliminary injunction, the legal impact of
9 the poll is not central to or determinative of the constitutional question squarely before
10 the Court. Further, the Court's reliance on the poll is oblique when the entirety of the
11 record is considered. In the final analysis, the constitutionality of Rule 1 does not depend
12 on legislative intent. The Rule is clear and unambiguous. Operation of the Rule has
13 given rise to an equally clear constitutional challenge. Further inquiry into the
14 mechanism of the poll, and ultimately its efficacy, is not necessary in the determination
15 of the penultimate question involved.

16 Upon the filing of Petitioner's response to MDOR's cross motion, and the
17 expiration of the time afforded for a reply and a request for oral argument, the court will
18 issue an appropriate order.

19 August 4, 2016.

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22 _____
23 District Court Judge

24 c: Daniel Whyte/Brendan Beatty
25 William Mercer/Richard Komer/Erica Smith
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