



1. The Montana Legislature has decided that all parents should have the opportunity to choose their children's schools, regardless of the size of their bank account. So it followed the lead of 27 other states and the District of Columbia and passed a school choice program in May 2015. Montana's program provides a modest tax credit, of up to \$150 annually, to individuals and businesses who donate to private scholarship organizations. Those scholarship organizations will then use the donations to give scholarships to families who want to send their children to private schools. The program, as passed by the Legislature, allows all private schools to participate, regardless of whether they are secular or religious.

2. The program could be a boon both for families who cannot afford to send their children to the school of their choice and for families who make tremendous financial sacrifices in order to do so.

3. The problem is that the State Department of Revenue has just adopted a rule that denies choice to the overwhelming majority of eligible families under the program, including Plaintiffs. The new rule limits program scholarships to only those who wish to attend nonreligious private schools and excludes those who wish to attend religious private schools. As most of the private schools in the state are religious, the rule virtually guarantees the program's failure.

4. The rule is invalid. First, it exceeds the Department of Revenue's authority by contradicting the clear intent of the Legislature to make scholarships available for students to attend all private schools, not just secular ones. The Department of Revenue ("the Department") argues the rule is required by the Montana Constitution's prohibition on the State granting funds to religious entities in Article V, Section 11(5) and Article X, Section 6(1). These provisions, however, do not apply to the program as the case law is unanimous that tax credits do not

constitute appropriations or payments of public funds. Moreover, the scholarships are awarded to families, not schools.

5. In fact, both the Montana and federal Constitutions' Religion and Equal Protection Clauses forbid the Department's rule because it discriminates against religion. Even the State's own Attorney General's Office submitted comments to the Department urging it not to adopt the rule because it "would not be defensible" in court and because there is a "substantial likelihood that [the rule] would be declared unconstitutional."

6. Accordingly, Plaintiffs respectfully request that this Court strike the rule down.

### **JURISDICTION AND VENUE**

7. Plaintiffs are all parents who seek relief against the new rule adopted by the Department that states that only children attending nonreligious private schools—not religious private schools—are eligible for scholarships under Montana's new Tax Credits for Contributions to Student Scholarship Organizations program ("scholarship tax-credit program," or "program"), passed as part of Senate Bill 410. (Attached as Exhibit 1).

8. Plaintiffs bring several challenges to this rule. Plaintiffs challenge the rule as ultra vires under section 2-4-305(6)(a), MCA, of the Montana Administrative Procedure Act. Plaintiffs also challenge the rule as unconstitutional in violation of the Montana Constitution's Freedom of Religion provision, at Article II, section 5; the Montana Constitution's Equal Protection Clause, at Article II, section 4; and the U.S. Constitution's First and Fourteenth Amendments, through the Civil Rights Act of 1871, 42 U.S.C. § 1983.

9. Plaintiffs request declaratory and injunctive relief under sections 27-8-201, 27-19-201, & 27-19-101 *et seq.*, MCA.

10. Plaintiffs also seek one dollar in nominal damages.

11. This Court has jurisdiction under section 3-5-302, MCA.

12. Venue is proper in this Court pursuant to section 25-2-126, MCA, because all of the Plaintiffs live in Flathead County.

#### **THE PARTIES**

13. Plaintiffs are Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer.

14. Plaintiff Kendra Espinoza is a resident of Flathead County. Kendra's husband unexpectedly left her and her two daughters, Naomi and Sarah, and Kendra now struggles to pay their tuition at Stillwater Christian School.

15. Plaintiff Jeri Ellen Anderson is a resident of Flathead County. She is a single mom who struggles to pay the tuition to send her academically gifted daughter, Emma, to Stillwater Christian School.

16. Plaintiff Jaime Schaefer is a resident of Flathead County. Jaime and her husband struggle to send their son and daughter, Jake and Ellie, to Stillwater Christian School.

17. Defendant Montana Department of Revenue is a governmental department of the State of Montana. Section 17 of SB 410 charges the Department with "adopt[ing] rules, prepar[ing] forms, and maintain[ing] records that are necessary to implement and administer" the scholarship tax-credit program.

18. Defendant Mike Kadas is the Director of the Montana Department of Revenue. Pursuant to sections 2-15-1301–1302, MCA, the Director has the responsibility and practical ability to ensure that the rules and policies adopted by the Department are enforced and implemented in accordance with the laws and Constitutions of Montana and the United States. Mr. Kadas is sued in his official capacity.

## STATEMENT OF FACTS

### MONTANA'S SCHOLARSHIP TAX-CREDIT PROGRAM

19. On May 8, 2015, the Montana Legislature passed the scholarship tax-credit program as part of SB 410.

20. The purpose of the program is to “provide parental and student choice in education.” SB 410, § 7.

#### Private Scholarship Organizations

21. The program encourages private scholarship organizations (“SOs”) to form and register with the Department. SOs must also be tax-exempt organizations under section 501(c)(3) of the federal Internal Revenue Code. SB 410, § 8(9)(a).

22. SOs fundraise for donations, which they must distribute as scholarships to families who wish to start sending their children to private schools or who have children currently attending private schools. *Id.* at § 9.

23. SOs must allow the scholarship recipients to use their scholarship at any private school. *Id.* at §§ 8 (9)(b)-(c), 9(1)(b).

24. Students eligible for program scholarships must be Montana residents who are at least 5 years old and not older than 18 years old by September 10 of the school year that they wish to use the scholarship. *Id.* at § 8(2).

25. SOs are free to consider a family’s financial need in selecting scholarship recipients.

26. SOs cannot give any scholarship that exceeds 50 percent of the average amount that the State spends to send children to public schools (the “per-pupil average of total public school expenditures”), nor can any scholarship recipient accept two or more scholarships that

total more than 50 percent of this figure. *Id.* at §§ 9(1)(d), 10(2); *see also id.* at § 22. In addition, the average scholarship amount that an SO grants cannot exceed 30 percent of this figure. *Id.* at § 9(1)(e).

27. According to the Montana Office of Public Instruction, the per-pupil average of total public school expenditures in Montana for fiscal year 2013 was \$10,418.

28. SOs must give at least 90 percent of their funds as scholarships, keeping at most 10 percent for administrative expenses. *Id.* at § 8(9)(b).

29. Each SO must undergo an annual fiscal review of its accounts by an independent certified public accountant and submit the fiscal review report to the Department. *Id.* at § 11(1)(b)-(c).

30. The Department has the power to inspect the documents of any SO and terminate the SO if it fails to operate in compliance with the program. *Id.* at § 16.

#### Program Tax Credits

31. Individuals and corporations who donate at least \$150 to an SO can receive a maximum \$150 tax credit against their annual state income tax. *Id.* at § 14(1). Donors are, of course, free to donate more than \$150 to an SO, but they cannot receive a tax credit for more than \$150 a year.

32. A donor also cannot receive a tax credit that exceeds the donor's income tax liability for that year, and the credit must be applied in the year the donation is made. *Id.* at § 14(3)-(4).

33. Donors may not direct or designate their donations to a parent, legal guardian, child, or school. *Id.* at § 14(1).

34. The maximum aggregate amount of annual tax credits allowed for the program is \$3 million, beginning in tax year 2016. *Id.* at § 14(5)(a)(i). Every year the maximum is met, the maximum amount will increase by 10 percent for the next year. *Id.* at § 14(5)(a)(ii).

35. The Department must approve the tax credits for taxpayers on a first-come, first-served basis. *Id.* at § 14(5)(b).

36. Donors cannot receive a tax credit for any amount that they deducted on their state taxes as a charitable-contribution to a 501(c)(3) organization. *Id.* at § 14(6).

37. The program goes into effect on January 1, 2016. *Id.* at § 31.

#### Qualified Education Providers

38. Scholarship recipients can use their scholarships at “any qualified education provider.” *Id.* at §§ 8(9)(b)-(c), 9(1)(b).

39. Section 8(7) of SB 410 defines a “qualified education provider” very broadly to allow virtually all private schools to participate in the program, whether religious or nonreligious.

40. Specifically, section 8(7) defines a “qualified education provider” as an education provider that:

- a. is not a public school;
- b. (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or  
(ii) is a nonaccredited provider or tutor and has informed the child’s parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;
- c. is not a home school as referred to in 20-5-102(2)(e);
- d. administers a nationally recognized standardized assessment test or criterion-referenced test and:

- (i) makes the results available to the child's parents or legal guardian; and
  - (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;
- e. satisfies the health and safety requirements prescribed by law for private schools in this state; and
  - f. qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

41. The legislative history of SB 410 and a recent poll of the Legislature confirm that the Legislature intended that qualified education providers under the program include both religious and nonreligious private schools.

#### **THE DEPARTMENT OF REVENUE'S RULE 1**

42. In October 2015, the Department issued a notice of public hearing on the proposed adoption of three rules related to the program. (Attached as Exhibit 2). One of these rules was proposed "Rule 1," which provided a new definition of "qualified education provider," different from the definition provided by SB 410.

43. Rule 1 states:

- (1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:
  - (a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or
  - (b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.



- (2) For the purposes of (1), “controlled in whole or in part by a church, religious sect, or denomination” includes accreditation by a faith-based organization.

44. The Department’s notice states that the proposed Rule 1 is implementing “Montana Constitution, Art. V, Section 11[;] Montana Constitution, Art. X [,] Section 6;” and “15-30-3101, MCA.”

45. Article V, Section 11(5) of the Montana Constitution states, “[n]o 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.”

46. Article X, Section 6(1) of the Montana Constitution states, “[t]he 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 grant of lands 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.”

47. The Department’s notice opined that these two constitutional provisions prohibit “the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose.”

48. Section 15-30-3101, MCA is a provision in SB 410 that says the program “must be administered in compliance” with these two provisions of the Montana Constitution.

#### The Hearing on Proposed Rule 1 and the Rule’s Adoption

49. On November 5, 2015, the Department held a hearing of the proposed Rule 1. Several people testified against Rule 1.

50. One of the Rule 1 opponents at the hearing was SB 410's sponsor, Senator Llew Jones. Senator Jones testified that it was always his intent, and the intent of the Legislature, to include both religious and nonreligious schools in the program.

51. An attorney for the Institute for Justice also testified against Rule 1. The Institute for Justice testified that the rule exceeded the Department's authority because it conflicted with the purpose and text of the program.

52. The Institute for Justice also testified that Rule 1 was not required by the Montana Constitution because the program does not grant public funds to religious entities, but instead grants tax credits to donors for student scholarships.

53. The Institute for Justice also testified that the rule violates the U.S. Constitution by discriminating against religion.

54. As the Institute for Justice additionally testified, if the Department is correctly interpreting Article X, Section 6(1) of the Montana Constitution to bar the program, this provision would violate the U.S. Constitution. That is because the historical evidence shows that this provision (also known as Montana's Blaine Amendment) was included in the Montana Constitution in 1889 to discriminate against Catholics, and it would now be used to discriminate against all religions. Discriminatory state constitutional provisions are invalid under the federal Constitution.

55. Additionally, the State Attorney General's Office, through Solicitor General Dale Schowengerdt, submitted lengthy written comments to the Department urging it not to adopt the rule. These comments stated "that Rule 1 is neither authorized nor required by the Montana Constitution." The comments additionally said that the rule "would not be defensible" in court, and that there is a "substantial likelihood that Rule 1 would be held unconstitutional" under the

federal Constitution “because it categorically excludes religious entities from an otherwise neutral benefits program without sufficient reason.” (Attached as Exhibit 3).

56. Eric Feaver, President of the Montana Education Association-Montana Federation of Teachers (MEA-MFT) testified in support of the rule.

57. After the hearing, and pursuant to Section 2-4-403, MCA, a poll was taken of the Legislature regarding Rule 1, and majorities in both houses voted that Rule 1 was inconsistent with SB 410. (Attached as Exhibit 4).

58. Despite the testimony opposing Rule 1 and the legislative poll showing that the rule defied the will of the Legislature, the Department adopted the rule and sent the adoption notice to the Montana Secretary of State on December 14, 2015.

59. The rule is expected to be published by the end of December 2015.

#### **THE PLAINTIFF PARENTS**

60. Rule 1 harms many families by preventing them from using program scholarships to send their children to the school of their choice—simply because the school of their choice is a religious private school. Families harmed by Rule 1 include those who currently cannot afford to send their children to such schools, as well as families who are seriously struggling to keep their children in such schools. Three parents who are harmed by Rule 1 are the Plaintiffs.

#### **PLAINTIFF KENDRA ESPINOZA**

61. Kendra is a single mother raising her two daughters, Naomi and Sarah. Naomi is 10 years old and in the 4th grade, and Sarah is 7 years old and in the 2nd grade.

62. Before her husband unexpectedly left, Kendra homeschooled her daughters. But after he left, their house went into foreclosure, and Kendra had to get a job as a bookkeeper and put Naomi and Sarah in public school.

63. Kendra was not happy with her daughters' public school. When Naomi started a daily Bible study for her friends that took place during recess, she was repeatedly bullied by other students and called a "goody two shoes." In addition, Sarah was easily distracted and was struggling academically.

64. Kendra was also concerned about her daughters' peers in public school. Many of the students seemed to have parents with drug addiction. In addition, other students often used inappropriate language around her young girls.

65. When Kendra first toured Stillwater Christian School, she had to hold back tears; she desperately wanted to send her children there, but knew she could not afford the tuition on her salary.

66. Kendra started working to raise tuition funds. For example, she raffled off handmade quilts and held two yard sales. She also got part-time work cleaning houses.

67. Naomi insisted on helping raise tuition funds by getting a job mowing lawns.

68. This fundraising and the extra jobs, combined with generous financial aid from Stillwater, allowed Kendra enough funds to start sending her children to Stillwater Christian School. Kendra volunteers at the school in return for the financial aid.

69. Now both children are thriving at Stillwater. Kendra loves that the teachers are so warm to her daughters and to the other students. Every morning, for instance, all the teachers stand in their classroom doorways and welcome in the children. Kendra also never worries about her daughters being bullied at Stillwater.

70. An additional reason Kendra chose Stillwater is because she is a Christian and she loves that the school teaches the same Christian values that she teaches at home.

71. It gives Kendra great peace of mind to know that her children are happy at Stillwater.

72. But it is still a real financial struggle for Kendra to pay the remaining tuition every month. Kendra often worries that she will not have enough money to make the payments. She is especially concerned about the tuition increase at Stillwater when Naomi reaches high school.

73. Kendra works very hard, and she cannot remember the last time she took a vacation.

74. It would be a tremendous financial and psychological relief for Kendra if her children were to receive scholarships under the scholarship tax-credit program to help pay Stillwater's tuition.

75. Kendra's girls are eligible to receive scholarships under the program.

76. Stillwater Christian School is a qualified education provider under the program.

77. Because of the Department's Rule 1, Kendra and her girls could not use the scholarships at the school of their choice, Stillwater Christian School—simply because Stillwater is a religious school.

78. Kendra is only aware of one nonreligious private school near her, Kalispell Montessori School, which only serves grades 1st to 8th. Kendra does not wish to send her daughters to this school because it does not teach Christian values, and moreover, she could not send her daughters to high school there. Kendra instead wishes to use program scholarships to continue sending her daughters to Stillwater until they graduate high school.

79. But for Rule 1, Kendra would apply for program scholarships for both of her daughters as soon as an SO begins accepting scholarship applications.

**PLAINTIFF JERI ELLEN ANDERSON**

80. Jeri Ellen (“Jeri”) is a single mother raising her 8-year-old daughter, Emma.

Emma is in the second grade at Stillwater Christian School.

81. Jeri adopted Emma from China when she was 9 months old. The entire process took 27 months.

82. Emma is academically gifted and loves to learn.

83. Jeri went to public schools all her life, and there are public school teachers in her family. But Jeri is not satisfied with her local public schools because, in talking to her friends and their children using the public schools, she concluded that the public schools are not academically challenging enough for Emma.

84. When Jeri learned about Stillwater, she knew she had to send Emma there.

85. Jeri made the decision to send Emma to Stillwater when she had just been laid off from her job at an insurance company. Jeri got a new job at another insurance company, but she now makes \$6 dollars less an hour. Nevertheless, Jeri was determined to pay Stillwater’s tuition however she could.

86. Jeri is a Christian and appreciates that Stillwater teaches religious values. That was one of the reasons that Jeri chose Stillwater for Emma.

87. Jeri’s primary reason for choosing Stillwater is the rigorous academic education that it provides.

88. Emma’s teachers at Stillwater carefully guide her learning and frequently refer her to books in the school library so Emma can learn more about topics that interest her. Emma soaks it all up like a sponge.

89. When Emma was learning about how to build houses at school, she told her mom that Stillwater is “like my foundation. I’m going to just keep growing.”

90. Jeri also really appreciates Stillwater’s open door policy that allows her to pop into Emma’s classrooms at any time. This was especially helpful when Emma was initially struggling with separation anxiety.

91. Stillwater has become like Emma’s second home, and she loves it there.

92. Jeri is fortunate enough to receive some financial aid from Stillwater, and in return, she volunteers for Stillwater’s high school drama production. Jeri’s sister also helps complete Jeri’s required volunteer hours by helping judge Stillwater’s science fairs.

93. Jeri works very hard and budgets very carefully.

94. Yet, paying the remaining tuition every month is still a serious struggle for Jeri. She worries about it constantly. Jeri prays that she will be able to keep Emma at Stillwater.

95. It would be a tremendous financial and psychological relief for Jeri if Emma were to receive a program scholarship to help pay her tuition.

96. Emma is eligible to receive a scholarship under the program.

97. Because of the Department’s new Rule 1, Jeri and Emma could not use the scholarship to attend the school of their choice, Stillwater Christian School—simply because Stillwater is a religious school.

98. Jeri is only aware of one nonreligious private school near her, Kalispell Montessori School. Jeri did not wish to send Emma to this school because it only goes to the 8th grade. Jeri instead wishes to use program scholarships to continue sending her daughter to Stillwater through 12th grade.

99. If not for Rule 1, Jeri would apply for a program scholarship for Emma to attend Stillwater as soon as an SO begins accepting applications.

**PLAINTIFF JAIME SCHAEFER**

100. Jaime and her husband have two children: Ellie is 12 and in 7th grade, and Jake is 9 and in 4th grade.

101. At first, Jaime had Ellie in public school. But she was disappointed in the academic expectations there. For instance, Ellie already knew how to read in kindergarten, but her class was still learning the alphabet.

102. So Jaime began homeschooling Ellie, and then did the same for her son. After a few years, Jaime felt her children were ready for a more competitive environment and she wanted to put them back into school. She began researching her options, and liked what she learned about Stillwater Christian School.

103. So Jaime got a job as an accountant to help pay tuition. Fortunately, the family also receives some financial aid from Stillwater for both children.

104. Jaime's children are thriving at Stillwater. Jaime is impressed that they are already learning speech and debate and that they can participate in Stillwater's well-developed music program. Jaime especially likes that her children's classmates are from likeminded families that teach similar values.

105. Jaime is a Christian and loves that the school teaches the same Christian values that she teaches at home. That was an important reason that Jaime chose Stillwater for her children.



106. Jaime is very involved at Stillwater. She coached the volleyball team and also volunteers 30 hours a year there, including by helping in the classrooms, chaperoning field trips, making bulletin boards, and helping fundraise.

107. But paying tuition every month is a huge struggle for her family. It is like a second mortgage payment. It is a year-by-year decision whether the Schaeferes can keep their children at Stillwater.

108. It would be a significant financial and psychological relief to the family if they were to receive program scholarships for their children to continue sending them to Stillwater.

109. Jaime's two children are eligible for scholarships under the program.

110. Because of the Department's new Rule 1, Jaime could not use the scholarships at the school of her choice, Stillwater Christian School—simply because Stillwater is a religious school.

111. Jaime is only aware of one nonreligious private school near her, Kalispell Montessori School, which serves grades 1st to 8th. Jaime does not wish to send her children to this school because the family loves Stillwater. Moreover, she knows of no nonreligious private high school nearby and Ellie is soon to enter high school. Jaime instead wishes to use program scholarships to continue sending her children to Stillwater through high school.

112. But for Rule 1, Jaime would apply for program scholarships for both of her children to attend Stillwater as soon as an SO begins accepting applications.

## **LEGAL CLAIMS**

### **CLAIM I: RULE 1 IS ULTRA VIRES**

113. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

114. The Department does not have the authority to adopt Rule 1.

115. Section 2-4-305(6)(a), MCA, of the Montana Administrative Procedure Act prohibits an agency from enacting a rule that is not “consistent” with the statute it is implementing.

116. According to Montana courts, administrative regulations are not consistent with legislative guidelines if they: (1) engraft additional and contradictory requirements on the statute, or (2) if they engraft additional, noncontradictory requirements on the statute that were not envisioned by the Legislature.

117. Rule 1 engrafts additional and contradictory requirements on SB 410.

118. The definition of a qualified education provider in SB 410, section 8(7), encompasses virtually all private schools. It defines a “qualified education provider” as an education provider that:

- a. Is not a public school;
- b.
  - (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or
  - (ii) is a nonaccredited provider or tutor and has informed the child’s parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;
- c. is not a home school as referred to in 20-5-102(2)(e);
- d. administers a nationally recognized standardized assessment test or criterion-referenced test and:
  - (i) makes the results available to the child’s parents or legal guardian; and
  - (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;

- e. satisfies the health and safety requirements prescribed by law for private schools in this state; and
- f. qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

119. In contrast, Rule 1 states:

- (1) A “qualified education provider” has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:
  - (a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or
  - (b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.
- (2) For the purposes of (1), “controlled in whole or in part by a church, religious sect, or denomination” includes accreditation by a faith-based organization.

120. The definition of a “qualified education provider” in SB 410 clearly encompasses both religious and nonreligious private schools. By requiring that qualified education providers be nonreligious private schools, Rule 1 engrafts additional and contradictory requirements on SB 410.

121. Alternatively, if Rule 1 does not engraft contrary requirements on SB 410 (which it does), it is an additional, noncontradictory requirement on SB 410 not envisioned by the Legislature.

122. The Legislature envisioned that both religious and nonreligious private schools would be qualified education providers under the scholarship tax-credit program. This is demonstrated, for instance, by the legislative history. It is also demonstrated by the recent

legislative poll where majorities of Montana legislators in both houses voted that Rule 1 was inconsistent with SB 410. Rule 1 thus engrafts an additional requirement on the program that was not envisioned by the Legislature by excluding religious private schools from participating in the program.

123. In addition, the Montana Constitution does not give the Department authority to adopt Rule 1.

124. Rule 1 is not required by either Article X, Section 6(1) or Article V, Section 11(5) of the Montana Constitution.

125. Neither Article X, Section 6(1), nor Article V, Section 11(5) applies to the scholarship tax-credit program because these two constitutional provisions only apply to appropriations of public funds to religious entities.

126. The State does not appropriate public funds when it grants tax credits. Tax credits merely reduce taxpayers' tax liability, allowing them to keep more of their own money.

127. The Department's incorrect constitutional interpretation cannot give it authority to adopt a rule inconsistent with SB 410.

128. Thus, Rule 1 exceeds the Department's authority and is invalid.

129. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

130. As a direct and proximate result of the Department enacting Rule 1 without legal authority, Plaintiffs' and other families' rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to these rights.

131. Unless Defendants are enjoined from committing the above-described ultra vires violation, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

**CLAIM II: RULE 1 VIOLATES THE MONTANA FREE EXERCISE CLAUSE**

132. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

133. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Rule 1 violates Plaintiffs' and other families' rights under Montana's Free Exercise Clause in Article II, section 5 of the Montana Constitution.

134. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

135. Rule 1 and the Defendants thus discriminate against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children.

136. As a direct and proximate result of Rule 1, Plaintiffs' and other families' Montana Free Exercise rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Free Exercise rights.

137. Unless Defendants are enjoined from committing the above-described constitutional violation, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

### **CLAIM III: RULE 1 VIOLATES THE FEDERAL FREE EXERCISE CLAUSE**

138. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

139. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Rule 1 violates Plaintiffs' and other families' rights under the federal Free Exercise Clause in the First Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

140. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

141. Rule 1 and the Defendants thus discriminate against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children.

142. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Free Exercise Clause.

143. As a direct and proximate result of Rule 1, Plaintiffs' and other families' federal Free Exercise rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Free Exercise rights.

144. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

**CLAIM IV: RULE 1 VIOLATES THE MONTANA ESTABLISHMENT CLAUSE**

145. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

146. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny a generally available benefit to families simply because of their religious views and/or the religious nature of the school that they have selected. This disfavors and inhibits religion in violation of Plaintiffs' and other families' rights under Montana's Establishment Clause, in Article II, section 5 of the Montana Constitution.

147. But for Rule 1, Plaintiffs and other families are eligible for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

148. Rule 1 and the Defendants thus impose burdens on Plaintiffs and other families simply because the school of their choice is religious.

149. As a direct and proximate result of Rule 1, Plaintiffs' Montana Establishment Clause rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Establishment Clause rights.

150. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

**CLAIM V: RULE 1 VIOLATES THE FEDERAL ESTABLISHMENT CLAUSE**

151. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

152. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny a generally available benefit to families simply because of their religious views and/or the religious nature of the school that they have selected. This disfavors and inhibits religion in violation of Plaintiffs' and other families' rights under the federal Establishment Clause, in the First Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

153. But for Rule 1, Plaintiffs and other families are eligible for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

154. Rule 1 and the Defendants thus impose burdens on Plaintiffs and other families simply because the school of their choice is religious.

155. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Establishment Clause.



156. As a direct and proximate result of Rule 1, Plaintiffs' federal Establishment Clause rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Establishment Clause rights.

157. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

**CLAIM VI: RULE 1 VIOLATES EQUAL PROTECTION UNDER THE MONTANA CONSTITUTION**

158. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

159. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny Plaintiffs and other families the equal protection of the laws by discriminating against them because of their religious beliefs and/or the religious nature of the school that they have selected for their children in violation of Montana's Equal Protection Clause in Article II, section 4 of the Montana Constitution.

160. Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools are similarly situated to families wishing to use program scholarships to send their children to nonreligious private schools.

161. Defendants have no compelling, important, or rational justification in treating these two similarly situated groups differently.

162. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

163. Rule 1 and the Defendants thus burden Plaintiffs and other families simply because the school of their choice is religious.

164. As a direct and proximate result of Rule 1, Plaintiffs' and other families' equal protection rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their equal protection rights.

165. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

**CLAIM VII: RULE 1 VIOLATES EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION**

166. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

167. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny Plaintiffs and other families the equal protection of the laws by discriminating against them because of their religious beliefs and/or the religious nature of the school that they have selected for their children in violation of the federal Equal Protection Clause, in the Fourteenth Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

168. Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools are similarly situated to families wishing to use program scholarships to send their children to nonreligious private schools.

169. Defendants have no compelling, important, or rational justification in treating these two similarly situated groups differently.

170. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

171. Rule 1 and the Defendants thus burden Plaintiffs and other families simply because the school of their choice is religious.

172. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Equal Protection Clause.

173. As a direct and proximate result of Rule 1, Plaintiffs' and other families' equal protection rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their equal protection rights.

174. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

#### **REQUESTS FOR RELIEF**

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment that the exclusion of religious schools from the scholarship tax-credit program, contained in Rule 1, exceeds the Department of Revenue's authority under the Montana Administrative Procedure Act and was undertaken for frivolous

reasons and/or in bad faith, justifying an award of attorneys' fees pursuant to Mont. Code Ann. § 25-10-711;

B. A declaratory judgment that the exclusion of religious schools from the scholarship tax-credit program, contained in Rule 1, violates the Free Exercise, Establishment, and Equal Protection Clauses of the Montana and U.S. Constitutions, both facially and as applied;

C. A declaratory judgment that if Article V, Section 11(5) of the Montana Constitution bars the participation of religious schools in the program, then Article V, Section 11(5) violates the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution, as applied;

D. A declaratory judgment that if Article X, Section 6(1) of the Montana Constitution bars the participation of religious schools in the program, then Article X, Section 6(1) violates the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution, both facially and as applied;

E. A temporary restraining order, preliminary injunction, and/or permanent injunction prohibiting Defendants from enforcing Rule 1;

F. One dollar in nominal damages;

G. Reasonable costs and attorneys' fees; and

H. Such other legal or equitable relief as this Court may deem appropriate and just.

DATED this 15th day of December, 2015.



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