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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

**FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

This amendment is made pursuant to M.R.Civ.P. 15(b), with the written consent of defense counsel, in order to remove the issues addressed by the United States Supreme Court in *Espinoza v. Mont. Department of Revenue*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2246 (2020). This narrows the scope of requested judicial review to whether the challenged tax credit program violates Mont. Const. Art. V, § 11(5).

This lawsuit seeks declaratory and injunctive relief to prevent the State from appropriating public money to pay for the private educational pursuits of certain Montana students in violation of Mont. Const. Art. V, §11(5). Specifically, the 2015 Montana State Legislature created a tax credit system whereby millions of dollars per year of revenue destined for the public treasury may be diverted to tax credits for taxpayer payments to a non-profit student scholarship organization that, in turn, provides money to private schools. See, § 15-30-3101, et seq. In so doing, the 2015 Montana State Legislature has violated provisions of the Montana State Constitution that prohibit the appropriation of money for private educational purposes. The State's effort to circumvent the constitutional prohibition on such appropriations by employing tax credits and a "scholarship" intermediary to move money that would otherwise be in the state treasury into the hands of private educational providers does not save the system from unconstitutionality.

Therefore, Plaintiff is entitled to their sought relief. For their cause of action, Plaintiff alleges as follows:

### **PARTIES**

1. Plaintiff Montana Quality Education Coalition ("MQEC") is a public advocacy organization formed in 2001 due to the State of Montana's lack of compliance with constitutional guarantees afforded Montana students and citizens regarding the funding of an adequate public educational system. The organization's guiding mission is to ensure constitutional compliance regarding how education is funded in Montana. The MQEC membership includes the MFPE, the Montana School Boards Association, the School

Administrators of Montana, the Montana Association of School Business Officials, the Montana Rural Education Association and scores of public school districts.

2. The Defendant State of Montana is a state that has its capitol in Helena, Montana. The State established a tax credit for qualified education contributions under the provisions of Chapter 457, Laws of 2015. The purpose of the tax credit system is “to provide parental and student choice in education with private contributions through tax replacement programs,” as well as to comply with Article V, section 11(5) and Article X, section 6 of the Montana constitution.” Section 15-30-3101, MCA.

3. The Montana Department of Revenue is a governmental department of the State of Montana, contemplated by § 2-15-1301, MCA. It is charged with adopting rules, preparing forms and maintaining records necessary to implement and administer the tax credit system challenged here. Section 15-30-3114, MCA.

### **JURISDICTION AND VENUE**

4. The district court has original jurisdiction over the claims alleged herein pursuant to § 3-5-302, MCA.

5. Venue is proper in the Montana First Judicial District Court, Lewis & Clark County, Montana pursuant to § 25-2-126(1), MCA.

### **GENERAL ALLEGATIONS**

6. During the 64<sup>th</sup> Legislative Session, the 2015 Montana State Legislature passed SB410, a bill creating the Tax Credit for Qualified Education Contributions. Under this program, taxpayers may make donations to “Student Scholarship Organizations” and receive a tax credit

up to a maximum of \$150 against their annual state income tax obligation. These tax credits are non-refundable. Section 15-30-3111, MCA.

7. The donations for which tax credits are available must be made to Student Scholarship Organizations, non-profits registered with the Montana Department of Revenue that must spend at least 90% of the donations on scholarships for students to attend private schools. Section 15-30-3103, MCA. Student Scholarship Organizations pay scholarships directly to private schools; scholarships are not paid to students or their parents. Section 15-30-3104, MCA.

8. Under the challenged tax credit system, the Montana Department of Revenue is charged with ensuring the scholarship organizations submit to annual fiscal and programmatic review. Section 15-30-3105, MCA.

9. SB410, as passed, included a fiscal note prepared by the Office of Budget and Planning.

10. Section 17-1-508, MCA, requires the Office of Budget and Planning to prepare a fiscal note for each piece of legislation that proposes to create a statutory appropriation.

11. The fiscal note included with SB410 affirmatively states that the bill “appropriates state general fund money for purposes other than paying for emergency services.”

12. SB410 capped the amount the State of Montana will spend on tax credits for donations made to student scholarship organizations at \$3,000,000.00 in FY2016. That amount increased in subsequent fiscal years.

13. The fiscal note included with SB410 includes a Fiscal Summary estimating the net impact the tax credit programs the bill creates will have on the state general fund balance for FY2016-2019. The estimated net impact ranged from \$5,037,904 in FY2016 to \$7,354,287 in FY2019.

14. The purpose of the Tax Credit for Qualified Education Contributions is to reduce the net price of attending private school for students who receive scholarships from a Student Scholarship Organization.
15. The cost to the state of the tax credit programs created by SB410 was included in the state's main budget bill, HB2.
16. The Montana State Legislature statutorily defined a tax expenditure to include those losses to the state treasury attributable to provisions of tax laws that allow a special exclusion, exemption or deduction from a taxpayer's gross income, or that provide a special credit, or a preferential rate of tax or a deferral of tax liability. Section 5-4-104(2), MCA.
17. Among the examples of a "tax expenditure" specifically identified by the Montana State Legislature is "credits allowed against Montana personal income tax[.]" Section 5-4-104(2)(d).
18. The Tax Credit for Qualified Education Contributions created by SB410 is a tax expenditure.
19. Scholarships paid from Student Scholarship Organizations to private schools constitute a financial benefit to the private schools.

#### **ARTICLE V, SECTION 11 VIOLATION**

20. Plaintiff re-alleges the allegations contained in the previous paragraphs.
21. The Montana State Constitution recognizes the ability of the Legislature to make both direct and indirect appropriations of public money. See, e.g., Mont. Const. Art. X, § 6.
22. The Tax Credit for Qualified Education Contributions appropriates public money for a private educational purpose.

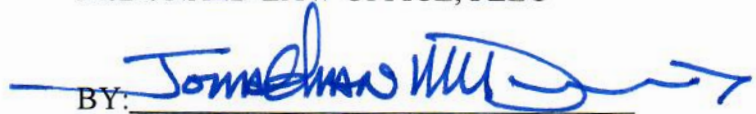
23. The Montana State Constitution at Art. V, § 11 forbids the Legislature from appropriating money for educational purposes to any private individual, association or corporation not under control of the state.

24. The Tax Credit for Qualified Education Contributions violates Mont. Const. Art. V, § 11. WHEREFORE Plaintiff prays for judgment against Defendants as follows:

- 1) For a Declaratory Judgment that the Tax Credit for Qualified Education Contributions is an unconstitutional violation of Mont. Const. Art. V, § 11(5).
- 2) For an order enjoining Defendants from further operation of the Tax Credit for Qualified Education Contributions.
- 3) For attorneys' fees and costs, as allowed by law.
- 4) For such other and further relief as this Court deems just and proper.

DATED this 2 day of September, 2020.

McDONALD LAW OFFICE, PLLC

BY:   
JONATHAN McDONALD  
*Attorneys for Plaintiff*

#### CERTIFICATE OF SERVICE

This is to certify that on this 2 day of September, 2020, a copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following by the undersigned:

Dan Whyte  
Montana Department of Revenue  
125 N. Roberts St.  
Helena, MT 59601

Matt Cochenour  
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