William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Facsimile: (406) 252-1669
Email: wwmercer@hollandhart.com

Richard D. Komer *(Admitted Pro Hac Vice)*
Erica Smith *(Admitted Pro Hac Vice)*
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: dkomer@ij.org
esmith@ij.org

ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	)	Cause No. DV 15-1152A Judge David M. Ortley **PLAINTIFFS' RESPONSE TO MONTANA QUALITY EDUCATION COALITION'S MOTION TO INTERVENE**

INTRODUCTION

Plaintiffs do not oppose the Montana Quality Education Coalition's Motion To Intervene in this action, but are concerned that the proposed intervenors not be permitted to delay the prompt resolution of this suit.

Plaintiffs have a Motion for Summary Judgment currently pending before this Court, based upon their view that the issues for this Court to decide are legal in nature and that no material facts are in dispute. The proposed intervenors, in an effort to buttress their argument that the named Defendant, the Montana Department of Revenue (DOR), will not adequately defend their purported interests,[1] seek to introduce a red herring into the defense of this action that would unnecessarily and substantially delay its resolution.

MQEC faults DOR for not arguing the invalidity of post-legislative polling permitted under § 2-4-404, MCA, which determines "legislative intent" rather than the actual records of the public meetings of the Montana State Legislature. MQEC Motion To Intervene at 11-12. But as explained more fully below, the language of the statute underlying DOR's rule is plain on its face, inasmuch as the definition of "qualified education provider" does not exclude religiously-affiliated schools, while DOR's rule does. The legal question currently before this Court in Plaintiffs' Motion for Summary Judgment is whether DOR's Rule 1 is justified by either Article V, § 11(5) or Article X, § 6 of the Montana Constitution, and the validity of the legislative poll is irrelevant to that question. This Court should be careful not to allow the proposed intervenor to delay the timely resolution of this action with improper discovery into legislative motivation, whether with regard to the legislative poll conducted by the legislature or its passage of the tax credit scholarship program DOR's Rule purportedly implements.

[1] A showing that the current defendant will not adequately protect the proposed intervenors' interests is a necessary factor for intervention of right under Mont. R. Civ. P. 24(a) but not permissive intervention under Mont. R. Civ. P. 24(b).

Plaintiffs propose that this Court give the proposed intervenor 21 days from an order granting intervention to respond to Plaintiffs' currently pending summary judgment motion and do not object to the court extending DOR's deadline for response to the motion to the same date.

I. THE LEGISLATIVE POLLING ISSUE INTERVENORS RAISE IS IRRELEVANT TO THE RESOLUTION OF THE LEGAL ISSUES IN THIS CASE.

MQEC claims that it is not "feasible that an administrative branch of government is going to challenge the Legislature over a statute that purports to give it the extra-legislative power to overrule administrative rules when it is not in session [by] making ex post facto decisions via poll about its 'legislative intent' without a duly formed quorum or any public participation or observation as required by our Constitution." MQEC Brief at 12. This argument that the Legislature has improperly exercised its powers through its legislative poll is—even if true, which it is not—beside the point. This becomes clear upon even cursory examination of this Court's Order granting Plaintiffs' Motion for Preliminary Injunction and denying Defendant's motion to dismiss.

In that Order, this Court concluded that the language in the statute establishing the scholarship tax credit program plainly includes all private schools within the definition of "qualified education providers" and that by excluding religious schools via Rule 1, DOR was adding qualifiers to the language of the definition—qualifiers that effectively precluded families like the Plaintiffs from eligibility for the end benefit of the program. This conclusion is incontestable and not a function of the legislative poll. This Court then concluded that Rule 1 draws a distinction based on religious affiliation, which it obviously does, and that religion is an inherently suspect class on which to draw a distinction for purposes of equal protection analysis. The Court next noted that both the First Judicial District Court and the U.S. Supreme Court have

held that a tax credit is not a government appropriation or expenditure. From these conclusions this Court stated that all these factors established that the Plaintiffs will likely succeed on the merits of their claims. Order at 14-15.

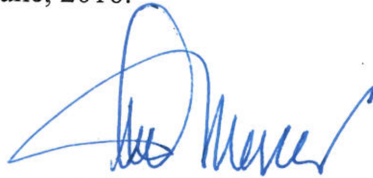
Nowhere in the Order did this Court suggest that the legislative poll was relevant to or in any way controlling on the underlying legal question that will determine the outcome of this action going forward. That underlying legal question remains what it has been since the beginning: do either Article V, § 11(5) or Article X, § 6 require the adoption of Rule 1 by DOR? This Court never suggested, and Plaintiffs are confident it never intended to suggest, that the legislative poll could justify overruling Rule 1 if these two provisions of the Montana Constitution required DOR to exclude religious schools. There is no need to rely on the poll for legislative intent at this stage, as the plain text of the definition of "qualified education provider" includes religious schools, and DOR's Rule excludes them from the definition. No further inquiry into the legislative poll or intent of the Legislature is needed, and no discovery relating to the poll is necessary.

II. CONCLUSION: BECAUSE THIS CASE CAN BE RESOLVED ON PURELY LEGAL ISSUES, MQEC SHOULD BE ORDERED TO RESPOND TO THE PENDING MOTION FOR SUMMARY JUDGMENT IN 21 DAYS.

Plaintiffs believe that this action is ripe for resolution by this Court, which is why they have moved for summary judgment. The question to be answered is a strictly legal one: whether the two constitutional provisions relied upon by DOR require its promulgation of Rule 1. As Plaintiffs have shown in their concurrently filed response to DOR's Rule 56(f) Motion asserting that Plaintiffs' Summary Judgment Motion is premature, the proper response to Plaintiffs' timely summary judgment motion is to oppose it with a clear statement of what *material* facts remain in dispute that would preclude summary judgment and why. Should this Court grant MQEC's

application to intervene, Plaintiffs suggest that as late arrivals to the party, they should take the case as they find it,[2] and be given 21 days to respond to the summary judgment motion from the date this Court grants the motion to intervene. Plaintiffs will not oppose moving DOR's date for filing its substantive response to the same day MQEC's response would be due.

DATED this 1st day of June, 2016.



William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639

Richard D. Komer *(Admitted Pro Hac Vice)*
Erica Smith *(Admitted Pro Hac Vice)*
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, Virginia 22203

ATTORNEYS FOR PLAINTIFFS

---

[2] This case is now six months old, and MQEC's "interest" in it arose when it was filed. Their late arrival should not be held against the Plaintiffs, who have done everything possible to move this case to a prompt resolution.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was duly served on the following as indicated below.

Daniel J. Whyte Brendan Beatty Nicholas J. Gochis Montana Department of Revenue Sam W. Mitchell Building 125 North Roberts Room 476 P.O. Box 7701 Helena, Montana 59604-7701 dwhyte@mt.gov bbeatty@mt.gov ngochis@mt.gov	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Jonathan McDonald McDonald Law Office, PLLC P.O. Box 1570 Helena, Montana 59624 jm@mcdonaldlawmt.com	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Karl J. Englund Kark J. Englund, P.C. P.O. Box 8358 Missoula, Montana 59807 KarlJEnglund@aol.com	[X] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail

DATED this 1st day of June, 2016.

____

8844012_2