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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAMIE 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 *Hon. David M. Ortley* **REPLY BRIEF IN SUPPORT OF MONTANA QUALITY EDUCATION COALITION'S MOTION TO INTERVENE**

Plaintiffs begin their *Response Brief* by noting they do not object to MQEC's intervention in this matter. Thus, neither Plaintiffs nor Defendants object to intervention, it is unopposed by any existing party and should be granted by this Court. Attached for the Court's convenience is a proposed order granting intervention.

While Plaintiffs do not object to MQEC's intervention, they seek to impose conditions on it which are not properly before this Court at this time. Specifically, Plaintiffs suggest a schedule in which MQEC has 21 days[1] to respond to Plaintiffs' pending motion for summary judgment in what is a complex constitutional case in which there has been no discovery or development of the factual record. While the issue of the scheduling of the completion of this case is not before the Court by way of the present motion (and while MQEC fully intends to comply with any Court order), MQEC notes that the approach advocated by Plaintiffs will almost certainly lead to an extended delay if the Montana Supreme Court finds the record inadequate to support a final decision by this Court and thus remands for the case to actually undergo some litigation.

"In keeping with this philosophy, the granting of summary judgment will be held to be error when discovery is not yet completed, and summary judgment has been denied as premature when the trial court determines that discovery is not finished." 10B Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* § 2741. "As is true with other cases involving important public issues, courts may refuse to grant summary judgment in these actions [constitutional cases] because it is felt that a fuller record is necessary in order to be able to decide properly the issues involved." 10B Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* § 2732.2.

Here, at present, no record at all has been developed other than through the one-sided, advocacy-oriented affidavits of the Plaintiffs and those affiliated with Plaintiffs, none of whom have been deposed or cross-examined. Plaintiffs may complain about the way the State or Intervenors may choose to frame or defend against their claims, but litigation would look very

[1] Less time than is even permitted to get a single request for admission answered under M.R.Civ.P. 36(a)(3).

different in American courts if one side could unilaterally decide how the other side must litigate its case through use of premature motions for summary judgment in complex cases. MQEC notes that Defendant Department of Revenue has filed a M.R.Civ.P. 56(f) motion, requesting time to develop a record prior to engaging in motions practice aimed at the resolution of this case without a bench trial. If permitted to intervene, MQEC intends to join in the Department of Revenue's M.R.Civ.P. 56(f) motion. MQEC believes the question of the Department's Rule 1 validity cannot be divorced from the question of whether the tax credit program created by SB410 is an indirect legislative appropriation of the sort prohibited by Mont. Const. Art. X, §6. Notwithstanding Judge Sherlock's decision, cited by this Court in its Preliminary Injunction Order, the question of what constitutes an "indirect appropriation" is largely unanswered by the Montana Supreme Court. The one guidance from the Court is from Justice Jim Nelson's concurring opinion in *Kaptein v. Conrad School District*, 281 Mont. 152, 163-64, 931 P.2d 1311, 1318-19 (1997):

> Article X, Section 6, which was carried over from our 1889 Constitution, represents the Constitutional Convention's strong and continuing belief in the necessity to maintain Montana's public school systems apart from any entanglements with private sectarian schools and to guard against the diversion of public resources to sectarian school purposes. As Delegate Burkhardt stated:
>
> > The primary and significant advantage secured by the present provision is the unequivocal support it provides for a strong public school system. The traditional separation between church and state, an important part of the American social framework, has also become a fundamental principle of American education. The growth of a strong, universal, and free educational system in the United States has been due in part to its exclusively public character...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.

See also, Id. at165, 931 P.2d 1319(Gray, J. concurring in part and dissenting in part)(joining Justice Nelson's "reasoning" in regards to Article X, Section 6).

MQEC's position in this litigation will be that SB410 appropriates $3 million that would otherwise be in State coffers and available to pay the expenses of the our state including support for public education, and moves that money by way of a tax credit program from public into private coffers of religious schools. This sort of entanglement is precisely what at least two former Supreme Court justices believe Article X, Sec. 6 is meant to avoid. However, to establish its argument, Applicant-Intervenors will some time to establish a record concerning how tax credits are administered in Montana in other programs and in the one created by SB410; to confirm how and whether the $3 million would otherwise have been used; and to determine whether the tax credit program in SB410 was created by diverting "funds or effort from the public school system."

Further, Plaintiffs have argued in their briefing that SB410 helps families, not religious schools. See, e.g., *Plaintiff's Brief in Support of Preliminary Injunction*, p. 18; *Plaintiff's Brief in Support of Summary Judgment*, p. 14. That is a question of fact. But if, in fact, the program facilitates payment of money to families rather than religious schools, the legislature's commitment of $3 million in tax credits would also violate the plain language of Mont. Const. Art. V, §11: "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."

Next, notwithstanding its stated lack of opposition, Plaintiffs in footnote 2 of their Reply argue the case is six months old and MQEC's "late arrival" should not be held against them. This appears to be an effort to suggest they are suffering prejudice by an untimely intervention.

However, there is no cognizable prejudice because they have a preliminary injunction in place that protects them against the one thing they believe this case is about: the validity of Rule 1.

"The most important consideration in deciding whether a motion to intervene is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case … the absence of prejudice supports finding the motion timely. Thus, for example, an application made before the existing parties have joined issues in the pleadings has been regarded as clearly timely, whereas an application made after the trial has begun or just as it is about to begin may be denied as untimely." 7C Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* § 1916.

There is no cognizable prejudice because Plaintiffs secured a preliminary injunction that protects them against the one thing they believe this case is about: the validity of Rule 1.

Moreover, the motion to intervene was made approximately one week after the *Answer* was filed and the issues in this case joined. While earlier intervention may have been possible, it may also have been futile if either the motion to dismiss was granted, or if an appeal of the preliminary injunction made to the Supreme Court. Intervention was sought as soon as it was clear neither of those events was to occur.

CONCLUSION

MQEC's Motion to Intervene was timely and Plaintiffs will suffer no prejudice if intervention is permitted. Plaintiffs moved for summary judgment one day after the *Answer* was filed in this case. This is an invitation to error and remand.

If allowed to intervene, MQEC will ask this Court to enter a scheduling order pursuant to M.R.Civ.P. 16 that provides a reasonable timeline for both discovery and that sets a time for the

consideration of dispositive motions. This can be done in such a way as to ensure this Court can render an opinion before the end of 2016; however, to rule now would be to ensure an appeal on a procedural rather than a substantive ground and would be to the detriment of all parties.

As stated, a proposed Order granting MQEC's application to intervene accompanies this Brief.

DATED this 7th day of June, 2016.

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BY: ______________________
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CERTIFICATE OF SERVICE:

This is to certify that on this 7th day of June, 2016, a copy of the foregoing was served upon the following by U.S. Mail, postage prepaid and addressed as following:

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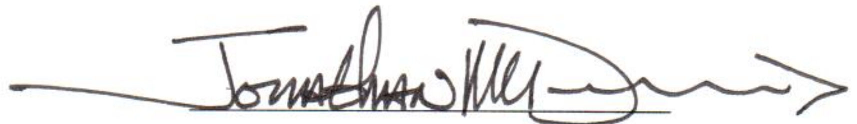

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAMIE SCHAEFER, Plaintiffs, -v- MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants, MONTANA QUALITY EDUCATION COALITION, Intervenor-Defendant.	Cause No: DV-15-1152A *Hon. David M. Ortley* **ORDER PERMITTING INTERVENTION BY MQEC**

Before the Court is the Montana Quality Education Coalition's M.R.Civ.P. 24 Motion to Intervene in this matter. It is unopposed by both Plaintiffs and Defendants and therefore, the motion is GRANTED.

The Clerk of the District Court is hereby directed to file the Intervenor's Answer attached to MQEC's May 20, 2016 Motion to Intervene.

The Court will address the issues raised by the other pending motions of the Parties separately.

DATED this _______ day of June, 2016.

____

HON. DAVID M. ORTLEY
District Court Judge

c: Daniel Whyte/Brendan Beatty
William Mercer/Richard Komer/Erica Smith
Jonathan McDonald/Karl J. Englund