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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 **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

I. Plaintiff lacks standing.

A. The most this Court can do for Plaintiff is deny the cross motions.

The Court must deny Plaintiff's Motion for Summary Judgment as a matter of law. Even if the Court determines that the School Choice Tax Credit is unconstitutional, it cannot reach the merits of Plaintiff's Motion for Summary Judgment because the Motion, Reply, and Complaint contain no allegations or facts

supporting standing. The only evidence supporting standing is contained in Plaintiff's *Response* to Defendants' Motion for Summary Judgment.

"When there are cross-motions for summary judgment, a district court must evaluate each party's motion on its own merits." *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 52-53, 403 P.3d 664, 667. The moving party bears burden of showing the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *McDaniel v. State*, 2009 MT 159, ¶ 13, 350 Mont. 422, 208 P.3d 817.

Plaintiff bears the burden of establishing standing. Plaintiff only made standing arguments in its Response to Defendants' Motion for Summary Judgment. *See* Doc. 46 at 4 n. 1 (Plaintiffs Reply in Support of its Motion for Summary Judgment noting that it would address standing issues raised by the State in its Response to State's Motion for Summary Judgment). It offered no standing facts or arguments in its Complaint, Motion for Summary Judgment, or Reply. *See* Docs. 8, 27, 46. The Burke and Resig affidavits offered by Plaintiff in its Response, therefore, can only be used to *defeat* Defendants' Motion for Summary Judgment—Plaintiff cannot use them to *prevail* on its own Motion for Summary Judgment. *Kilby Butte Colony*, ¶ 7. The affidavits, moreover, were filed on July 15 as part of Plaintiff's Response—which occurred *after* the briefing for Plaintiff's Motion for Summary Judgment concluded.

As a result, there's no evidence in the applicable record or allegations in the Complaint supporting standing for purposes of Plaintiff's Motion. Because standing is a threshold jurisdictional question, the Court cannot rule on the merits of Plaintiff's Summary Judgment Motion until Plaintiff affirmatively establishes standing. Given that it hasn't, this Court cannot grant Plaintiff's Motion for Summary Judgment. *See Sands v. Town of W. Yellowstone*, 2007 MT 110, ¶ 17, 337 Mont. 209, 213, 158 P.3d 432, 436 ("[w]hen faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other…. 'Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under

consideration.'") (quoting *Hajenga v. Schwein*, 2007 MT 80, ¶ 18, 336 Mont. 507, 511, 155 P.3d 1241, 1244).

B. Plaintiff must satisfy standing.

Plaintiff argues that it's entitled to standing as a right. In reality, it recognizes that it can only satisfy the standing threshold if the Court applies an extremely relaxed standard. Plaintiff's only evidence of this lower threshold, however, is that Article V, Section 11(6) applies a *more restrictive* standing test by only allowing Section 11 challenges within two years of a law's effective date. Doc. 50 at 10 (citing MONT. CONST. art. V, § 11(6)).

MQEC and MFPE don't allege standing as a taxpayer, physician or patient, or voter. *See, e.g.,* A*rmstrong v. State,* 1999 MT 261, ¶ 9, 296 Mont. 361, 366, 989 P.2d 364, 369; *Brown v. Gianforte*, 2021 MT 149, ¶ 11, 404 Mont. 269, 277, 488 P.3d 548, 553. Its alleged injury is entirely related to the funding of public education and declining membership in public employee unions. Plaintiff, therefore, doesn't allege "direct economic injury." *See Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 372, 922 P.2d 1140, 1143 (1996) ("Here, plaintiffs alleged that the government will impose tax burdens on them as it seeks to recoup losses and that the investments will result in a lessening of governmental services. These allegations of an economic injury satisfy the injury requirement."). As discussed below, the causal chain is highly attenuated.

C. Plaintiff's alleged injuries aren't traceable to the School Choice Tax Credit.

Plaintiff also lacks standing because its alleged injury has not been caused by Defendants. Plaintiff essentially asserts two injuries: (1) underfunding of public schools and (2) declining membership in public employee unions. Neither of these injuries can be fairly traced to the School Choice Tax Credit.

"[T]here must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly … trace[able] to the challenged action of the defendant, and not … the result [of] the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotations

omitted). "The line of causation between the defendant's action and the plaintiff's harm must be more than attenuated." *Native Village. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (cleaned up).

Plaintiff claims MQEC and MPFE are harmed because funding of private education takes away from public education. Doc. 50 at 6-7. First, Plaintiff itself admitted in its "Statement of Undisputed Facts" that "[t]he fiscal note accompanying the 2021 amendments to the program (increasing the tax credit limit from $150 to $200,000 per year) states the total amount contributed to both SSOs and a separate tax credit program for public schools from 2015-2020 was $94,188." Doc. 27 at 7 (citing Fiscal Note for HB279 at p. 2, 67th Mont. Leg. (April 26, 2021)). So any alleged impact on education funding or Plaintiff's membership is negligible.

Second, Plaintiff laments that the 2021 Legislature "voted down bills that would have added money for public education in Montana." Doc. 50 at 7. But any discussion of education funding in the 2021 Legislature wholly neglects the COVID-19 pandemic and the massive amounts of federal funding given to states for education from by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA), and the American Rescue Plan Act (ARPA). *See, e.g.*, Alex Sakariassen, *Education's federal relief windfall*, MONTANA FREE PRESS (Apr. 4, 2021) ("Montana's public schools are set to receive nearly $500 million in COVID-19 relief funds, with tens of millions more available at the state's discretion."), https://montanafreepress.org/2021/04/01/educations-federal-relief-windfall/.

Additionally, the decline in public employee union membership has other—more direct—causes. In 2018, the U.S. Supreme Court decided that public-sector unions could no longer collect mandatory "fair share" fees to cover the costs of collective bargaining. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *see, e.g.*, *Unions Fend Off Membership Exodus in 2 Years Since Janus Ruling*, BLOOMBERG LAW (June 6, 2020) ("Unions with a large public-sector membership were hit the hardest by *Janus*"). Plaintiff's alleged injuries—to extent they have been established—simply aren't traceable to the School Choice Tax Credit.

D. Plaintiff's injuries aren't redressable.

Redressable injuries "must be one[s] that would be alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 221, 255 P.3d 80, 91. Plaintiffs must "show a substantial likelihood that the relief sought would redress the injury." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quotations omitted). For the reasons stated above regarding traceability, Plaintiff cannot show that eliminating the School Choice Tax Credit will lead to increased public-school funding or public employee union membership.

II. The School Choice Tax Credit is constitutional.

The plain meaning of Article V, Section 11(5), the consistent use of the term "appropriation" throughout the Montana Constitution, longstanding Supreme Court precedent, and the views of four current Montana Supreme Court Justices in *Espinoza* overwhelmingly support upholding the School Choice Tax Credit. Plaintiff asks the Court to disregard common sense, as well as every other principle of statutory interpretation, so that it can accomplish through the courts what it has failed to accomplish through the democratic process.

To be clear, the only evidence Plaintiff cites to support its theory of the original public meaning of Section 11(5) are statements from individual delegates debating *a different constitutional provision* related to public education and religious schools. In short, if Plaintiff is somehow correct that out-of-context statements of individual delegates trump textualism, structure, and precedent, the words of the Constitution are hollow and courts possesses the power to impose their preferred policy preferences based on vague notions of the Framers' objectives. *See* ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("As Justinian's Digest put it*: a verbis legis non est recedendum* ('Do not depart from the words of the law')") (quoting Digest 32.69 pr (Marcellus)).

A. The School Choice Tax Credit isn't an appropriation

1. Supreme Court precedent forecloses Plaintiff's challenge.

The Montana Supreme Court has already interpreted and defined the term "appropriation" narrowly. The Court has "long held" that "an appropriation is 'an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands.'" *Meyer v. Knudsen*, 2022 MT 109, ¶ 12, 409 Mont. 19, 25, 510 P.3d 1246 (quoting *State ex rel. Bonner v. Dixon, 59 Mont*. 58, 78, 195 P. 841, 845 (1921) (emphasis added), *overruled on other grounds*, *Board of Regents v. Judge*, 168 Mont. 433, 447, 543 P.2d 1323, 1331 (1975)); *see also Meyer*, ¶ 12 ("[A] long line of cases' mak[es] clear that 'appropriation' refers only to the authority given to the legislature to expend money from the state treasury.") (quoting *Nicholson*, 265 Mont. at 415, 877 P.2d at 491). Even if this Court indulged Plaintiff's fantasy that the definition of "appropriation" for Article V, Section 11(5) could be different than in Article III, Plaintiff still cannot overcome *Espinoza*'s characterization of the same tax-credit program at issue here.

Plaintiff concedes that if this Court follows precedent from *Dixon* and *Nicholson*, "it is unlikely to prevail." Doc. 46 at 11. There's no practical or jurisprudential reason why "appropriation" means something different in Article V, Section 11(5) than it does in Article III and Article X, Section 6. Plaintiff offers no real rationale for jettisoning the consistent and longstanding meaning beyond looking to cherry-picked legislative history.

i. "Appropriation" has a consistent meaning throughout the Constitution.

Plaintiff cannot overcome the fundamental rule that language is presumed to have the same meaning throughout the Constitution. *See Kottel v. State*, 2002 MT 278, ¶ 43, 312 Mont. 387, 60 P.3d 403. In addition to the reasons explained in Defendants' opening brief, Doc. 45 at 13–14, the presumption applies because Article V, Section 11(5) came to fruition as a part of a wholesale adoption of the new Montana Constitution. *See* SCALIA & GARNER, *supra*, at 172–73 (noting that although context can defeat the presumption of constituent usage, it's persuasive when

the cited statue was enacted at the same time as the statute under construction). A term can theoretically carry multiple meanings throughout the Constitution, but context must support those different meanings.

Plaintiff offers that the Court should disregard the *Dixon* and *Nicholson* Article III definition of appropriation primarily because "the Court should first consider the Framers' objective in prohibiting 'appropriations' to private education" and then cites back to Delegate Burkhart. Doc. 46 at 11. This exposes Plaintiff's entire theory as a house of cards: without ignoring all the other, primary interpretive devices—like precedent and canons of construction—and relying exclusively on legislative history, it has nothing.

Plaintiff points to the term "the people" in the Federal Constitution as alleged proof that the same term can have different meanings throughout a document. This is red herring that skips several levels of constitutional construction. As the U.S. Supreme Court recognized in both *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the term "the people" is a term of art. *Heller*, 554 U.S. at 580; *Verdugo-Urquidez*, 494 U.S. at 265. Plaintiff claims *Heller* and *Verdugo-Urquidez* came to different conclusions regarding the meaning of "the people." But they didn't. *Heller* and *Verdugo-Urquidez* applied a homogenized definition of "the people" across the Bill of Rights.

In deciding that the Fourth Amendment didn't apply to the search and seizure by federal agents of property owned by a nonresident alien and located in a foreign country, the *Verdugo-Urquidez* Court said the term "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. *Heller* then quoted that language from *Verdugo-Urquidez* right after making clear it was applying a uniform definition of "the people" across the Constitution. *Heller*, 554 U.S. at 580 ("What is more, in all six other provisions of the

Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset.").[1]

At best, Plaintiff has a case that the meaning of "the people" in Article I, Section 2 differs from its meaning in First, Second, Fourth, and Tenth Amendments because it refers to just voters. But that argument ignores two key points of construction. First, the text of Article I, Section 2 differs from the Bill of Rights provisions because it more specifically concerns "the people of the several states" and not "the people" generally, so it's necessarily more limited in scope. U.S. CONST. art. I, § 2. Second, the context of "the people" in Article I, Section 2 provides ample reason to depart from the presumption of consistent usage. It concerns the elected representatives in our republican form of government. It follows—logically—that "the people" choosing those representatives must be voters. As Justice Joseph Story famously discussed, context can defeat the presumption of consistent usage. Doc. 46 at 8; SCALIA & GARNER, *supra*, at 170–71. Plaintiff, however, offers nothing but conclusory assertions for why it should.

Finally, appropriation is not a broad and/or generic term like "the people," "person" or "state." *Heller* recognized that "the people" was a generic term with a broad meaning. *See Heller*, 554 U.S. at 580 ("What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset."). Generic terms are

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[1] Plaintiff's argument seems to be that "the people" can refer to both citizens and noncitizens. *But see United States v. Perez,* 6 F.4th 448, 452 (2d Cir. 2021) ("Based on this reading of 'the people,' we have previously concluded that, '[a]lthough the [*Heller*] Court uses 'citizens', presumably at least some non-citizens are covered by the Second Amendment.' For example, permanent resident aliens who are law-abiding, pay taxes, and contribute to political campaigns have established connections with this country that may qualify them to be among 'the people' who have a Second Amendment right. Based on this reading of 'the people,' we have previously concluded that, '[a]lthough the [*Heller*] Court uses 'citizens', presumably at least some non-citizens are covered by the Second Amendment.' For example, permanent resident aliens who are law-abiding, pay taxes, and contribute to political campaigns have established connections with this country that may qualify them to be among 'the people' who have a Second Amendment right.").

the most compatible with broad interpretation. *See* SCALIA & GARNER, *supra*, at 101 ("Without some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope."). Although the term "the people" is broad, it's actually a subset of the even broader term "person." *Verdugo-Urquidez*, 494 U.S. at 269 ("If such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.'); SCALIA & GARNER, *supra,* at 101 ("Examples of general words with general meanings can be found in the post-Civil War amendments….The Fourteenth Amendment … guarantees equal protection of the laws to 'all persons.'"). "Appropriation" is much more limited.

ii. Article V, Section 11(5) doesn't prohibit indirect appropriations

Plaintiff wrongly claims that interpreting appropriation differently is "consistent with the actual text of the Constitution" because "it already recognizes the existence of both direct and indirect appropriations." Doc. 46 at 12; Doc. 46 at 9–10. The Constitution does distinguish between direct and indirect appropriations in Article X, Section 6. But, if anything, that dichotomy strongly favors the State's position. The generic term appropriation doesn't encompass both direct and indirect appropriations.

Article X, Section 6 specifies that it prohibits both direct and indirect appropriations, as well as direct and indirect payments. MONT. CONST. art. X, § 6(1) ("The 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."). Article V, Section 11(5), on the other hand, contains no such language. The plain text only prohibits "appropriations." MONT. CONST. art. V, § 11(5) ("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.).

Justice Gustafson recognized in her *Espinoza* concurrence that an "indirect appropriation" is an entirely separate legal creature from the traditional definition of appropriation, which constitutes only "direct" appropriations. *See Espinoza*, ¶ 47 (Gustafson, J., concurring) ("[T]he plain language of Article X, Section 6(1), prohibits more than appropriations … it prohibits four actions, including indirect payments."). As discussed below, the ordinary meaning of appropriation cannot include "indirect" appropriations. And this makes sense. For example, say one statute prohibited the state from allowing "gambling" while another prohibited the state from allowing direct or indirect gambling. The latter provision could outlaw things such as the stock market, commodities speculation, and fantasy football, even if they didn't meet the tradition definition of "gambling." *See Espinzoa,* ¶ 52 (Gustafson, J., concurring) ("Likewise, Article X, Section 6(1), of the Montana Constitution recognizes that a tax expenditure may not be an appropriation *per se* but nonetheless may function in the same manner. Thus, Article X, Section 6(1), prohibits not only appropriations, but also payments."). But, in that context, no one could reasonably construe the generic ban on "gambling" in the former to encompass activities classified as indirect gambling.

Further, if the term "appropriation" includes both direct and indirect appropriations, then the use of the term "indirect" in Article X, Section 6(1) would be mere surplusage. *See, e.g.,* S*ee Gannett Satellite Info. Network Inc. v. State, Dep't of Revenue,* 2009 MT 5, ¶ 19, 348 Mont. 333, 201 P.3d 132 ("we must avoid a statutory construction that renders any section of the statute superfluous and fails to give effect to all the words used."); SCALIA & GARNER, *supra*, at 174 ("[T]he courts must … lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.") (quoting Thomas M. Cooley, *A Treatise on Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868)). That's also why Article X, Section 6(1) specifies that

it prohibits indirect appropriations. Plaintiff's argument would require this Court to erase words from the constitutional text.

iii. Tax credits are indirect payments, not indirect appropriations

Even if Plaintiff is correct, moreover, that the word "appropriation" in Article V, Section 11(5) prohibits both direct and indirect appropriations, *Espinoza* held that the School Choice Tax Credit isn't an indirect appropriation, but rather an "indirect payment." *Espinoza*, ¶¶ 31–36 (majority opinion). *Espinoza* made clear that tax credits are different from appropriations:

> The Tax Credit Program permits the Legislature to subsidize tuition payments at religiously-affiliated private schools. A subsidy is a "grant, usu[ally] made by the government, to any enterprise whose promotion is considered to be in the public interest." *Subsidy*, Black's Law Dictionary (10th ed. 2014). "Although governments sometimes make direct payments (such as cash grants), subsidies are usu[ally] indirect. They may take the form of … tax breaks …." *Subsidy*, BLACK'S LAW DICTIONARY (10th ed. 2014). When the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school's educational program. That type of government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit.

Espinoza, ¶ 34.

Article X, Section 6 is considerably more expansive than Article V, Section 11(5). *See Espinoza*, ¶ 31 ("Article X, Section 6, broadly prohibits any type of direct or indirect aid"); *id.* ¶ 52 (Gustafson, J., concurring) ("Likewise, Article X, Section 6(1), of the Montana Constitution recognizes that a tax expenditure may not be an appropriation *per se* but nonetheless may function in the same manner. Thus, Article X, Section 6(1), prohibits not only appropriations, but also payments."). *Espinoza* is clear that the School Choice Tax Credit is an indirect payment. Indirect payments are not appropriations.

Other than the out-of-context statements of delegates, Plaintiff provides no rationale for why the Court should interpret the same term differently for Article V

and Article X as applied to the exact same law. The textual differences between the two provisions—particularly in light of *Espinoza*—are dispositive.

2. The plain meaning of appropriation doesn't include tax credits

Even if this Court were to ignore Supreme Court precedent and begin with a blank slate regarding the meaning of "appropriation" in Article V, Section 11(5), Plaintiff still cannot prevail. The ordinary meaning of "appropriation" does not include tax credits. SCALIA & GARNER, *supra*, at 69 ("The ordinary meaning rule is the most fundamental semantic rule of interpretation…. Interpreters should not be required to divine arcane nuances or to discovery hidden meanings."). The Delegates to the 1972 Convention, moreover, understood the longstanding definition of appropriation and were well aware of the Supreme Court's decisions in *Dixon*. There's no evidence they intended to depart from it.

Plaintiff contends that it meets the longstanding *Black's Law Dictionary* definition of "appropriation" because the tax credit "sets apart a specified portion of the public revenue to be applied to some expense." Doc. 46 at 8-9. But it doesn't. Tax credits are not "public revenue" because the tax credit never enters the public treasury and are never in the government's control. *See Revenue,* BLACK'S LAW DICTIONARY (10th ed. 2014) ("[i]ncome from any and all sources; gross income or gross receipts."); *Income*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("money or other form of payment that one receives, usu. periodically, from employment, business, investments, royalties, gifts, and the like."). Tax credits are not appropriations because they do not constitute government revenue or income.

Plaintiff then contends that relying on the 1921 definition from *Dixon* is problematic for interpreting a term from the 1972 Constitution. Doc. 46 at 12–13. First, as evidenced by Plaintiff's discussion of *Black's Law Dictionary*, the term appropriation has maintained a consistent meaning since at least 1891. Doc. 46 at 9 n.4. Plaintiff claims Dixon "should not bind the hands of the Framers in 1972." *Id.* at 15. The Delegates and the public, however, would have been well aware of *Dixon*. As such, the "Prior-Construction" canon provides that appropriation should have the

same meaning because *Dixon's* definition becomes part of its ordinary meaning. *See* SCALIA & GARNER, *supra*, at 322 ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort … they are to be understood according to that construction."). Thus, when a term has been interpreted by the Montana Supreme Court and then used in a later constitutional provision, "[t]he term has acquired, in other words, a technical legal sense … that should be given effect in the construction of later-enacted statutes." *Id.* at 324. If anything, the Delegates understood the 1921 definition of appropriation and made the conscious choice to make Article X, Section 6 broader than Article III and Article V, Section 11 by prohibiting indirect appropriations and payments.

Nor can Plaintiff smuggle tax credits into the meaning of "appropriation" through the term "tax expenditure." A "tax expenditure" is a budgeting term, not a constitutional one. When the Legislature sets tax policy, they estimate the amount of funds needed to run the state and balance that with tax rates and tax expenditures. The baseline for the Legislature is that they need to raise enough revenue to meet their constitutional and political obligations. To that end, policymakers engage in a delicate balance of raising enough projected revenue in any given year to cover spending. Part of that process involves deciding the rate of taxation for all persons and entities and any credits, deductions, or exemptions. Just because budgeting terminology calls it an "expenditure" doesn't mean it "expends" money from the state treasury like an appropriation. The baseline for determining what is and isn't an appropriation is that all money that doesn't become state revenue belongs to *the people*.

Plaintiff's theory crumbles under the overwhelming force of precedent, structure, and plain text.

B. The legislative history doesn't clearly manifest an intent not apparent from the express language of Article V, Section 11(5).

Plaintiff believes vague objectives about the Framers support for public education are enough to overcome the plain text of Article V, Section 11(5). They're not. "[A] fundamental rule of constitutional construction is that [courts] must

determine the meaning and intent of constitutional provisions from the plain meaning of the language used without resort to extrinsic aids except when the language is vague or ambiguous or *extrinsic aids clearly manifest an intent not apparent from the express language*." *Nelson v. City of Billings*, 2018 MT 36, ¶ 16, 390 Mont. 290, 296, 412 P.3d 1058, 1065 (emphasis added). The breadcrumbs offered by Plaintiff are insufficient to demonstrate such an intent. The Court should reject the inconclusive and inconsistent legislative history.

Plaintiff asks the Court to go outside the plain text of Article V, Section 11(5) based on statements from delegates and a Voter Information Pamphlet that both concern not only a separate provision of the Constitution, but an entirely separate article. Indeed, Plaintiff admits that "the plain language [of Article X, Section 6] only applies to religious schools." Doc. 46 at 5. But then it asks this Court to inject a ban on indirect funding of private schools not into an interpretation of Article X, Section 6 but into Article V, Section 11(5). The purported "objective" of the Framers apparently not only transcends the plain meaning of the text, but also permeates throughout other provisions of the Constitution.

Plaintiff can't actually refute Defendants' argument that the Delegates' statements cited in Plaintiff's briefing came in the context of debating Article X, Section 6—preventing aid to religious schools. Doc. 45 at 15. All Plaintiff musters in responses is that Delegate Burkart's statement mentioned both religious and private schools. Doc. 46 at 5. That might be relevant if this Court was considering a broader meaning of Article X, Section 6, but it isn't. If the Delegates wanted to prohibit indirect aid to both religious and public schools, they could have put that express language in Article X, Section 6 to that effect. They didn't.

Plaintiff then retreats to the Voter Information Pamphlet, claiming that language informing the voters about ratifying Article X, Section 6 somehow informs the interpretation of an entirely separate provision of the Constitution. Doc. 46 at 5. This invites constitutional mischief. It provides limitless opportunities for vague "objectives" to trump the written word.

Plaintiff also failed to respond to another of the State's arguments regarding the language of Voter Information Pamphlet ("VIP"). *See* Doc. 45 at 15. Assume for the moment that Plaintiff is correct regarding Article V, Section 11(5) and aid to private schools. If there was a separate provision in Article V, Section 11(5) forbidding any aid to private education, why would the VIP advertise Article X, Section 6 as "prohibit[ing] state aid to private schools"? *Id.* Thus, if Article V, Section 11(5) and Article X, Section 6 both prohibit all state aid to private schools, it renders one of them mere surplusage. *See Gannett*, ¶ 19; *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., concurring) (call it a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Plaintiff's constitutional history make no sense.

C. Plaintiff's theory jeopardizes the legality of other tax credits.

Plaintiff understandingly attempts to differentiate the School Choice Tax Credit from all other tax credits. Although the School Choice Tax Credit operates somewhat differently from other tax credits, nothing about those differences is significant for constitutional purposes. It's still just a tax credit.

First, Plaintiff claims that because the School Choice Tax Credit is capped at a specific dollar amount it somehow transubstantiates into something other than a tax credit. That makes no sense as a matter of constitutional law. *See Espinoza*, ¶ 35 ("The Legislature violates Article X, Section 6's prohibition on aid to sectarian schools when it provides any aid, no matter how small."). The Legislature capping the School Choice Tax Credit at $1 million is no different than the Legislature limiting charitable or other deductions to any particular amount. In both instances, the Legislature uses its authority of taxation, the budgets, and public policy to set the financial parameters of each policy. Plaintiff's briefing acknowledges the various other ways the Legislature has limited the amount available for tax credit. *See* Doc. 46 at 17.

Next, Plaintiff essentially argues that dollar-for-dollar "tax credits" are impermissible while deductions and exemptions are not. *See* Doc. 46 at 17–18. Tax credits are dollar-for-dollar deductions from tax liability. *See, e.g.*, *What is the*

difference between a tax deduction and a tax credit?, H&R BLOCK ("A tax credit is a dollar-for-dollar reduction of the income tax owed. A tax credit directly decreases the amount of tax you owe …. Tax deduction lowers a person's tax liability by reducing their taxable income Because a deduction lowers your taxable income, it lowers the amount of tax you owe, but by decreasing your taxable income—not by directly lowering your tax."), https://www.hrblock.com/tax-center/filing/credits/difference-between-tax-deduction-and-tax-credit.

Plaintiff classifies the School Choice Tax Credit as "repayment" on a dollar-for-dollar basis. Doc. 46 at 18. But any tax credit is a repayment on a dollar-for-dollar basis. The only difference is that the School Choice Tax Credit goes to SSOs—which Plaintiff disfavors. Article V, Section 11(5) prohibits appropriations for "religious, *charitable*, *industrial*, educational, or *benevolent* purposes to any *private individual*, private association, or private corporation." (emphasis added). Dollar-for-dollar or lump-sum tax credits that taxpayers keep would clearly violate Section 11(5) under Plaintiff's paradigm. Plaintiff insists that it doesn't endanger them. If that's true, the gravamen of their theory singles out private schools for discriminatory treatment in the tax code.

As discussed above, Plaintiff attempts to smuggle tax credits into the meaning of "appropriation" through budgeting terminology, *i.e.,* the State's definition of "tax expenditure." Doc. 46 at 15. But that theory, again, contradicts Plaintiff's claim that it doesn't threaten other tax credits. MCA 5-4-104 defines tax expenditures as "those revenue losses attributable to provisions of Montana tax laws that allow a special exclusion, exemption, or deduction from gross income or that provide a special credit, a preferential rate of tax, or a deferral of tax liability." So where's the limiting principle? There isn't one.

The Court should test the outer limit of Plaintiff's theory and inquire whether Plaintiff believes the School Choice Tax Credit would pass constitutional muster if it wasn't capped at $1 million and provided, for example, only a 50% credit. Defendants know what the answer is. Any form of tax relief that benefits private education offends Plaintiff. They shouldn't be allowed to hide from the implications.

CONCLUSION

For these reasons, the Court should grant Defendants' Motion for Summary Judgment and uphold the School Choice Tax Credit.

DATED this 3rd day of August, 2022.

AUSTIN KNUDSEN
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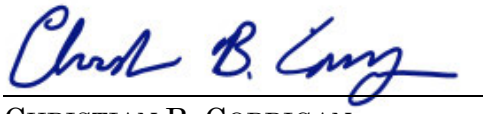

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CERTIFICATE OF SERVICE

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Dated: August 3, 2022

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