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7 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF  
8 THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

9 \* \* \* \* \*

10 KENDRA ESPINOZA, JERI ELLEN  
11 ANDERSON, and JAIME SCHAEFER,

12 Plaintiffs,

13 v.

14 MONTANA DEPARTMENT OF  
15 REVENUE, and MIKE KADAS, in his  
16 official capacity as DIRECTOR of the  
17 MONTANA DEPARTMENT OF  
18 REVENUE,

19 Defendants.

Cause No. DV-15-1152C

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANTS'  
CROSS-MOTION FOR SUMMARY  
JUDGMENT

20 THIS CAUSE is before the Court on Plaintiffs' motion for summary judgment and  
21 Defendants' cross-motion for summary judgment on the Complaint. Having fully considered  
22 the motions and briefs of the parties and Amicus Montana Quality Education Coalition, along  
23 with oral argument heard on March 7<sup>th</sup>, and being fully advised in the premises, the Court now  
24 enters the following:

25 **ORDER**

26 Plaintiffs' motion is GRANTED.

27 Defendants' cross motion is DENIED.

28 Defendants are permanently enjoined from applying or enforcing Rule 1.

**RATIONALE**

The Legislature passed Senate Bill 410 in 2015. SB 410 created a tax-credit program

1 that incentivizes contributions to private “Student Scholarship Organizations” (SSOs) which in  
2 turn provide scholarships to “Qualified Education Providers” (QEPs). §§ 15-30-3101 – 15-31-  
3 3114, MCA. The SSOs must provide scholarships to eligible students without limiting student  
4 access to only one education provider. § 15-30-3102(9)(c), MCA. The law provides a \$150  
5 dollar for dollar tax credit to individuals who donate to an SSO.

6 SB410 mandates that the State, through the Department of Revenue (“DOR”), expend  
7 resources to qualify, track, monitor, and maintain a website listing the SSOs (Sections 15-30-  
8 3105 – 15-30-3106, and 15-30-3111 – 15-30-3113, MCA) as well as determine who is a QEP  
9 as defined in Section 15-30-3102(7), MCA.<sup>1</sup> The DOR is further charged with monitoring the  
10 credits given for donations and implementing the program’s \$3 million cap. § 15-30-  
11 3111(5)(a), MCA. The Fiscal Note for the bill prepared by the 2015 Legislature states that “[i]t  
12 appropriates state general fund money for purposes other than paying for emergency services.”  
13 Fiscal Note, p. 7. (Exhibit C to Amicus brief.)

14 Section 15-30-3101, MCA, provides in part that:

15 The tax credit for taxpayer donations under this part must be administered in  
16 compliance with Article V, section 11(5), and Article X, section 6, of the  
17 Montana constitution.

18 Article V, Section 11(5) of the Montana Constitution states:

19 No appropriation shall be made for religious, charitable, industrial, educational, or  
20 benevolent purposes to any private individual, private association, or private  
21 corporation not under control of the state.

22 Article X, Section 6(1) of the Montana Constitution states:

23 Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns,  
24 school districts, and public corporations shall not make any direct or indirect  
25 appropriation or payment from any public fund or monies, or any grant of lands or  
26 other property for any sectarian purpose or to aid any church, school, academy,

26 <sup>1</sup> The DOR’s determination of who is a QEP is not a simple exercise of merely relying on Board of Public  
27 Education accreditation. Non-accredited providers or tutors can be QEPs. § 15-30-3102(b)(ii), MCA, and,  
28 according to the affidavit of Madalyn Quinlan, Chief of Staff of the Office of Public Instruction, the vast majority of  
private schools in Montana are not accredited by the State of Montana.

1 seminary, college, university, or other literary or scientific institution, controlled  
2 in whole or in part by any church, sect, or denomination.

3 SB 410 directs the DOR to adopt rules, prepare forms, and maintain records that are  
4 necessary for the law's implementation and administration. § 15-30-3114, MCA. Pursuant to  
5 this direction, the DOR proposed "Rule 1" which defines "Qualified Education Provider" as  
6 follows:

7 (1) A "qualified education provider" has the meaning given in 15-30-3102,  
8 MCA, and pursuant to 15-30-3101, MCA, may not be:

9 (a) a church, school, academy, seminary, college, university, literary  
10 or scientific institution, or any other sectarian institution owned or  
11 controlled in whole or in part by any church, religious sect, or  
12 denomination; or

13 (b) an individual who is employed by a church, school, academy,  
14 seminary, college, university, literary or scientific institution, or any  
15 other sectarian institution owned or controlled in whole or in part by  
16 any church, religious sect, or denomination when providing those  
17 services.

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

21 The DOR's notice stated that proposed Rule 1 was to implement Article V, Section 11 and  
22 Article X, Section 6, of the Montana Constitution.

23 The Revenue and Transportation Interim Committee reacted to the DOR's proposed  
24 Rule 1 by conducting a Section 2-4-403 poll of the Legislature. The Committee released the  
25 results of the poll on December 1, 2015, and it showed that a majority of both houses believed  
26 Rule 1 to be contrary to their legislative intent. Section 2-4-404, MCA, provides that, where a  
27 Section 2-4-403, MCA, poll determines that a majority of the members of both houses find that  
28 "the proposed rule or adopted rule is contrary to the intent of the legislature, the proposed rule  
or adopted rule must be conclusively presumed to be contrary to the legislative intent in any

1 court proceeding involving its validity.” Despite the poll, the DOR adopted Rule 1 as proposed  
2 on December 24, 2015. Admin. R. M. 42.4.802 (2015).

3 Plaintiffs are parents of children attending Stillwater Christian School who are  
4 challenging Rule 1. In Claim I, they assert that Rule 1 is ultra vires because Articles X and V  
5 apply to appropriations of public funds, not tax credits, with the result that the Montana  
6 Constitution does not give the DOR authority to adopt Rule 1, as well as because the Rule is  
7 inconsistent with the statute it seeks to implement. They argue further in Claims II – VII that  
8 Rule 1 violates the equal protection, free exercise, and establishment clauses of the State and  
9 Federal Constitutions. Plaintiffs seek a declaratory judgment that Rule 1’s exclusion of  
10 religious schools from the tax-credit program, exceeds the DOR’s authority under the Montana  
11 Administrative Procedure Act and was undertaken for frivolous reasons and/or in bad faith,  
12 justifying an award of attorneys’ fees pursuant to Mont. Code Ann. § 25-10-711. They also  
13 seek a declaratory judgment that the DOR’s exclusion of religious schools from the scholarship  
14 tax-credit program violates the Free Exercise, Establishment, and Equal Protection Clauses of  
15 the Montana and U.S. Constitutions, both facially and as applied. Finally, they raise pleas for  
16 relief contingent on the Court’s upholding Rule 1, ask that enforcement of the rule be enjoined,  
17 seek one dollar in nominal damages, costs, and attorneys’ fees.

18 Plaintiffs moved for a preliminary injunction to enjoin DOR from enforcing Rule 1 and  
19 Judge Ortley granted the motion on March 31, 2016. (Doc. no. 29.) They moved for summary  
20 judgment on May 16, 2016. (Doc. no. 36.) One week later, the Montana Quality Education  
21 Coalition (MQEC), which advocates for the interests of public school students and their  
22 communities, filed an unopposed motion to intervene. The DOR subsequently filed a cross  
23 motion for summary judgment. (Doc. no. 51.) Judge Ortley denied the MQEC’s motion to  
24 intervene on the grounds that MQEC had not established a statutory right to intervene pursuant  
25 to M.R.Civ.P. 24(a)(1). (Order on Pending Motions, doc. no. 57.)

26 The MQEC moved the Montana Supreme Court for supervisory control to direct Judge  
27 Ortley to provide the MQEC with a meaningful opportunity to participate through discovery  
28

1 and briefing. The Court ostensibly declined to exercise supervisory control because Judge  
2 Ortley's decision to deny the motion to intervene, not being a pure legal issue on intervention as  
3 a matter of right, was a discretionary ruling. (Montana Supreme Court Opinion OP 16-0494.)  
4 The Court also observed that the current posture of the case did not include development of a  
5 factual record so the MQEC's factual expertise (one of its main arguments for intervention)  
6 would not bear on the protection of its interests by existing parties to the case. The Court did  
7 say, however, that if the posture of the case changed to one in which a factual record may be  
8 necessary, "the interests for intervention purposes also may change." Despite declining to  
9 intervene, the Court stated that MQEC should be allowed to file an amicus brief on summary  
10 judgment.

11 Any person whose rights, status, or other legal relations are affected by a statute may  
12 have determined any question of construction or validity arising under the statute and obtain a  
13 declaration of rights, status, or other legal relations thereunder. *See* § 27-8-202, MCA.  
14 Summary judgment is appropriate when there is no genuine issue as to any material fact and the  
15 moving party is entitled to judgment as a matter of law. M.R.Civ.P. 56(c)(3). When faced with  
16 cross-motions for summary judgment, a district court is not required to grant judgment as a  
17 matter of law for one side or the other. . . . "Rather, the court must evaluate each party's motion  
18 on its own merits, taking care in each instance to draw all reasonable inferences against the  
19 party whose motion is under consideration." *Hajenga v. Schwein*, 2007 MT 80, ¶18, 336 Mont.  
20 507, 155 P.3d 1241 (citing *Ike v. Jefferson Nat. Life Ins. Co.* (1994), 267 Mont. 396, 399-400,  
884 P.2d 471, 474).

21 The issue presented is whether the DOR correctly interpreted Article V, Section 11, and  
22 Article X, Section 6, of the Montana Constitution as prohibiting tax credits for donations to  
23 SSOs that could ultimately go towards religious schools.<sup>2</sup> The Court concludes it did not. Both  
24 articles of the Montana Constitution prohibit appropriations that aid religious schools but they  
25 are silent concerning tax credits. The DOR argues that tax credits should be deemed  
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27 <sup>2</sup> "The issue for the Court to consider is whether the tax credit is a violation against any state aid to religious schools  
28 under Art. X, § 6." (Defs' Opp. Br. at 20 n.3.)

1 appropriations based on the legislature's inclusion of tax credits under the definition of "tax  
2 expenditures" in section 5-4-104, MCA. This section is part of an act requiring legislative  
3 review of tax expenditures and mandating that the DOR continue to report them in its Biennial  
4 Report. Considering tax credits to be functionally equivalent to expenditures may seem sensible  
5 from a budgetary point of view, but the statute does not purport to abolish the commonly  
6 understood definitions of credits, deductions, exemptions, and appropriations. The Montana  
7 Supreme Court, citing a long line of Montana cases, has opined that "appropriation" refers only  
8 to the authority given to the legislature to expend money from the state treasury:

9           Appropriation means an authority from the law-making body in legal form to  
10           apply sums of money out of that which may be in the treasury in a given year, to  
11           specified objects or demands against the state.

12 *Nicholson v. Cooney*, 265 Mont. 406, 415, 877 P.2d 486, 491 (1994) (citations and internal  
13 quotation marks omitted).


14           Non-refundable tax credits simply do not involve the expenditure of money that the state  
15 has in its treasury; they concern money that is not in the treasury and not subject to expenditure.  
16 Since the plain language of Article V, Section 11(5) and Article X, Section 6(1) of the Montana  
17 Constitution prohibit appropriations, not tax credits, the Department's Rule 1 is based on an  
18 incorrect interpretation of the law. The Court concludes that the term "appropriation" used in  
19 Article V, Section 11(5) and in Article X, Section 6(1) does not encompass tax credits.

20           "Courts should avoid constitutional questions whenever possible." *State v. Peters*, 2011  
21 MT 274, ¶ 33, 362 Mont. 389, 264 P.3d 1124 (quoting *Kulstad v. Maniaci*, 2010 MT 248, ¶ 49,  
22 358 Mont. 230, 244 P.3d 722). Having concluded that Rule 1 is based on a mistake of law, the  
23 Court declines to address the constitutionality of the Rule or whether Article V, Section 11(5)  
24 and Article X, Section 6(1) of the Montana Constitution violate the United States Constitution.

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26           The Court does not conclude that the Department's defense was frivolous or pursued in  
27 bad faith. Plaintiffs are not entitled to their costs and fees pursuant to Section 25-10-711, MCA.  
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Dated this 23<sup>rd</sup> day of May, 2017.



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Heidi J. Ulbricht  
District Judge

cc: William W. Mercer  
Richard D. Komer / Erica Smith  
Daniel J. Whyte / Brendan Beatty / Nicholas J. Gochis