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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* **BRIEF IN SUPPORT OF MONTANA QUALITY EDUCATION COALITION'S MOTION TO INTERVENE**

INTRODUCTION & BACKGROUND

The Montana Quality Education Coalition, the state's largest public education advocacy group, moves to intervene in this action in accordance with M.R.Civ.P. 24. Montana's intervention rules are designed to promote judicial efficiency by avoiding "delay, circuity and multiplicity of suits." *Estate of Schwenke v. Becktold*, 252 Mont. 127, 132-33, 827 P.2d 808

(1992). This action appears to be the one that will judicially determine the validity of SB410 and the administrative rules promulgated thereunder. Intervention by an organization that has long advocated for public education funding and advocated specifically for the rule at issue in this case is sought both as a matter of right and permissively. *M.R.Civ.P. 24(a) and (b).*

SB 410 AND DEPARTMENT RULE 1 -- BACKGROUND

The 2015 Montana Legislature enacted SB410, now codified as Section 15-30-3101, *et seq. MCA.* The law creates a "tax replacement program," *§ 15-30-3101,* MCA, that allows for state income tax credits for donations to student scholarship organizations that, in turn, provide scholarships to students to attend private schools which are run by what the statute calls "qualified education provider(s)." *Section 15-30-3102(9), MCA.*

The Department of Revenue was tasked with the responsibility to adopt rules, prepare forms and maintain records to implement and administer the law, *Section 15-30-3114, MCA,* and cautioned specifically to do so "in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution." *Section 15-30-3101, MCA.*[1] The Department went through a rulemaking process after which it adopted Rule 1, which provides that a qualified education provider may not be a private religious school. The purpose of this rule and its specific language is to comply with Article X, Section 6 of the Montana Constitution which is entitled, "Aid prohibited to sectarian schools."

[1] Article V, Section 11(5) says, "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" Article X, Section 6 says, "(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. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education."

On December 16, 2015, before Rule 1 was finally promulgated, Plaintiffs initiated this action by filing a complaint for declaratory and injunctive relief seeking to invalidate Rule 1 as violative of the free exercise, establishment and equal protection clauses of the Montana and U.S. constitutions. The Department moved for dismissal of the action; Plaintiffs sought a preliminary injunction. On March 31, 2016, this Court declined to dismiss the case and issued a preliminary injunction enjoining the enforcement of Rule 1 pending final resolution of this case. The Court's Order gave the Department 42 days to file its Answer, during which time the State also had the right to appeal the preliminary injunction. *M.R.App.P. 6(3)(e).* The State appears to have elected not to appeal and filed its *Answer* to the Complaint on or about May 12, 2016. Accordingly, the case is now officially at issue.

MONTANA QUALITY EDUCATION COALITION:

The Montana Quality Education Coalition (MQEC) has moved to intervene in this action as a defendant. The Montana Department of Revenue does not object. The Plaintiffs have not responded to MQEC's request for their position on the motion to intervene.

Filed in support of this brief is an affidavit by MQEC's executive director, Dianne Burke. According to that affidavit, MQEC was formed in 2001 by K-12 public school superintendents and education organizations frustrated with what its members believed was the State's lack of compliance with constitutional guarantees afforded Montana students and citizens under Article X of the Montana Constitution. MQEC was established to serve as the "constitutional guardian" of Article X of the Montana Constitution by working for public school students and their communities. MQEC "advocates for, pursues, and defends the need for adequate funding to provide quality education for each of Montana's public school students." *See, http://www.mqec.org/. Affidavit of Dianne Burke in Support of MQEC at* ¶3.

Currently, nearly 90 AA, A, B, C and independent elementary school districts and six public education advocacy organizations are members of MQEC, including the Kalispell, Evergreen, Billings and West Valley Elementary School Districts. *Id.* at ¶4. These school districts and educational organizations have joined together to ensure the State's compliance with its constitutional duties under Article X of the Constitution. *Id.* at ¶5. MQEC's membership is both diverse and broad, encompassing public school districts ranging from large to small, rural to urban, and east to west, as well as public education advocacy organizations representing over 10,000 public school teachers (who work to develop the educational potential of children in Montana's public schools as envisioned in Article X, Section 1 of the Constitution), 1,400+ community-elected school trustees (who serve on a volunteer basis exercising supervision and control over Montana's public schools pursuant to Article X, Section 8 of the Constitution), 300+ business officials, and over 1,000 public school administrators (who provide instructional leadership for the students served in Montana's public schools). *Id.* at ¶¶4, 6.

MQEC members – including by way of example, the Helena School District, the East Helena School District, the Billings School District, the White Sulphur Springs School District, MEA-MFT, the Montana School Boards Association, the School Administrators of Montana, and the Montana Rural Education Association – were named plaintiffs in *Columbia Falls Elem. Sch. Dist. No. 6 v. State,* 2005 MT 69, 326 Mont. 304, 109 P.3d 257, an action contending that the State was unconstitutionally administering and funding Montana's public school system which resulted in a landmark decision holding that Montana's then-current funding system for public education was not grounded in principles of quality, and was not constitutionally sufficient under the Public Schools Clause of Article X, Section 1(3), and the Indian Education Clause of Article X, Section 1(2). *Id.* at ¶7.

MQEC's members were the plaintiffs in a successor action seeking supplemental relief filed against the state of Montana in the First Judicial District, Lewis & Clark County, which contended that the State had failed to comply with the Court's order in *Columbia Falls*. *Id.* at ¶8.

MQEC itself was the named plaintiff in *Montana Quality Education Coalition v. State of Montana,* Montana First District Judicial District Court Cause No. ADV-2011-1076, which resulted in a consent decree in which the State agreed to increase the inflationary adjustment in Montana's school funding formula. *Id.* at ¶9.

Since its founding and continuing to date, MQEC and its members actively monitor the State's compliance with the constitutional guarantees of Article X of the Montana Constitution and also lobby the legislature in furtherance of MQEC's core purpose as a guardian of constitutional guarantees for students under Article X for adequate funding for public education and in opposition to proposed legislation which would have the effect of diverting funding from public to private schools or otherwise cause Montana to revert to its historical pattern of neglect of the constitutional guarantees of Article X. *Id.* at ¶10.

MQEC was active in the 2015 Montana legislature's consideration of SB 410 and sought to insure that public money was not diverted to sectarian schools in violation of Montana's constitutional prohibition against the direct or indirect appropriation of any public fund or monies for any sectarian purpose or to aid any sectarian school under the Aid Prohibited to Sectarian Schools Clause of Article X, Section 6(1). *Id.* at ¶11.

After the passage of SB 410, MQEC and its members encouraged Governor Bullock that in the administration's implementation of the new law, "the revenue replacement programs

created in Senate Bill 410 be administered in compliance with the Montana Constitution … under Article V, Section 11(5) and Article X, Section 6." *Id.* at ¶13.

In November 2015, MQEC, and its members including the MEA-MFT, the Montana School Boards Association, and the School Administrators of Montana, testified before the Department of Revenue in its rulemaking process in support of the Department's draft Rule 1 which is the subject of this action. *Id.* at ¶14. Accordingly, MQEC and its members have actively supported Rule 1 which is the subject of this action.

DISCUSSION

MQEC satisfies the intervention requirements of both M.R.Civ.P. 24(a) and (b); thus, this Court should permit it to appear as an Intevenor-Defendant.

I. MQEC May Intervene as a Matter of Right.

Montana Rule of Civil Procedure 24(a) provides for intervention as of right if: the application is timely; the applicant for intervention has an interest relating to the property or transaction which is the subject of the action; without intervention, the protection of that interest may as a practical matter be impaired or impeded by the disposition of the action; and, the interest is not adequately represented by existing parties. *JAS, Inc. v. Eisele,* 2014 MT 77, ¶ 26, 374 Mont. 312, 321 P.3d 113 [citing, *Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992)].

Montana's version of Rule 24 is patterned after its federal counterpart and thus it is appropriate to use federal case law to interpret Montana's rule. "Montana's rule is essentially identical to the federal rule which is interpreted liberally." *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶7, 308 Mont. 189, 40 P.3d 400 [citing *Sagebrush Rebellion, Inc., v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)("Rule 24 traditionally has received a

liberal construction in favor of applica[tions] for intervention.")]. *See, also, Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) *cert. denied,* 461 U.S. 913 (1983); *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998). Courts "are guided primarily by practical and equitable considerations." *Id.*

A. The Application Is Timely

In considering the timeliness of a motion to intervene, our Court looks to four factors: (1) the length of time the intervenor knew or should have known of its interest in the case before moving to intervene; (2) the prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay in making its application to intervene; (3) the prejudice to the intervenor if the motion is denied; and, (4) any unusual circumstances mitigating for or against a determination that the application is timely. *In re C.C.L.B.,* 2001 MT 66, ¶ 24, 305 Mont. 22, 22 P.3d 646. The federal courts evaluate three similar factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and, (3) the reasons for and length of delay. *County of Orange v. Air California,* 799 F.2d 535, 537 (9th Cir. 1986).

A motion to intervene was untimely when filed: 16 months after the initiation of a personal injury action, *Schwenke,* 252 Mont. at 132, 827 P.2d at 811; six weeks after actual notice that a judgment had been entered, *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982); two and one half years after becoming aware of a promissory note at issue, *Archer v. LaMarch Creek Ranch*, 174 Mont. 429, 433, 571 P.2d 379, 382 (1977); and, three years after filing suit, *Continental Ins. Co. v. Bottomly*, 233 Mont. 277, 280, 760 P.2d 73, 75 (1988).

In this case, there has been no significant delay in the filing of the application for intervention. The Department of Revenue's *Answer* was filed on or about May 12, 2016, and the proceedings are at the earliest possible stage. "An issue of fact arises: (1) whenever a material

allegation in the complaint is controverted by the answer[.]" *Section 25-31-802, MCA*. Here, the *Answer* was filed less than two weeks ago.

Granting this motion will not prejudice any party since this motion has been filed before any substantive rulings on the merits, the preliminary injunction issued by this Court has enjoined the implementation of the rule at issue (and thus delay cannot cause any hardship on the individual plaintiffs) and discovery has not yet commenced. The reason this Court issued the preliminary injunction was to prevent potential "irreparable injury before their rights can be fully litigated." *Order on Plaintiffs' Motion for Preliminary Injunction,* at 15. Thus, as the parties now prepare to fully litigate this matter before an eventual appeal to the Montana Supreme Court, the MQEC timely seeks to intervene.

B. Applicant-Intervenors Have the Requisite Interest in the Subject of This Case

To intervene as a matter of right, "it is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. USEPA,* 995 F.2d 1478, 1484 (9th Cir. 1993); *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *see also Donnelly*, 159 F.3d at 410 ("relationship" requirement is satisfied if the resolution of plaintiffs' claims will affect the applicant). MQEC easily satisfies this standard.

By their Complaint, Plaintiffs seek to have Rule 1 invalidated so that their children, who attend private religious schools, would be eligible for scholarships granted by a student scholarship organization. The funds for such scholarships are supplied by an unrefundable state income tax credit for taxpayers who donate to a student scholarships organization. Contrary to Plaintiffs, MQEC and its members support the promulgation of Rule 1 to prevent what they perceive as an unconstitutional indirect appropriation of public money to sectarian schools.

The liberal application of Rule 24 applies to public interest groups, such as MQEC, who have a significant interest in the outcome of litigation. For example, in *Idaho v. Freeman,* 625 F.2d 886 (9th Cir. 1980), Idaho and Arizona sued the General Services Administration challenging the procedures for ratification of the Equal Rights Amendment. The National Organization for Women (NOW) sought to intervene pursuant to Rule 24(a). The Ninth Circuit held that "NOW has such an interest in the continued vitality of ERA, which would as a practical matter be significantly impaired by an adverse decision and which is incompletely represented here." *Freeman*, 625 F.2d at 887. Similarly, in *Sagebrush Rebellion*, the Ninth Circuit held that a public interest group had a substantial interest in defending the legality of a measure it had strongly supported. *Sagebrush Rebellion,* 713 F.2d at 526-29. In that case, the Audubon Society sought to intervene in an action challenging a federal statute creating a conservation area the group had supported. *Id.* The Ninth Circuit held that Audubon had a substantial interest in defending the creation of the conservation area. "[A] public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *Id.* at 527 [citing, *Spellman,* 684 F.2d at 630]. Here, directly to the point, MQEC and several of its members actively supported the Department's promulgation of Rule 1. Accordingly, MQEC has the requisite protectable interest in the subject matter and outcome of this case.

C. Disposition of This Case May, as a Practical Matter, Substantially Impair or Impede Proposed Defendant-Intervenors' Interests

The interests of MQEC and its members may, as a practical matter, be impaired or impeded by the disposition in this case, which, if the Plaintiffs are successful, will decide whether public funds can be diverted from public schools to private religious-based schools.

Similarly, in the cases outlined above, the Ninth Circuit recognized that the outcome of the litigation might have a tangible, detrimental impact on the public interest groups who supported a challenged action. As mentioned, in discussing the ERA case, the Ninth Circuit explained that "the court had no question that disposition of [the] suit might, as a practical matter, impair the ability of the organization to protect its interest." *Sagebrush Rebellion,* 713 F.2d at 527.

So too is the situation with MQEC. MQEC and its members have long worked to increase funding to public education and to oppose measures that could divert funding from public to private schools.

SB410 is a means by which money that would otherwise be in the public coffers – and available for public schools – have been moved into the hands of private religious schools. This not only reduces the funds available for public education, but also serves as a "test case" for further legislative efforts to direct public monies into private religious schools, the precise sort of action that MQEC has long opposed. Contrary to the notion that SB410 cannot be an appropriation at all because a tax credit involves money not yet in the possession of the State, the fiscal note for SB410 demonstrates a direct, measurable and significant reduction to the state's general fund. *Affidavit of Burke*, Exhibit A, p.5.

MQEC and its members actively supported the promulgation of Rule 1. If that Rule is invalidated, MQEC interest in the Rule's continued viability will be impaired and its long - standing efforts to defend public educational funding from diversion to private religious schools will be frustrated.

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D. MQEC'S Interests are Inadequately Represented by the Existing Parties

The burden of showing inadequacy of representation by other parties is minimal. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822-23 (9th Cir. 2001). An Applicant-Intervenor need only show that the existing parties "may" inadequately represent its interests. *Id.* at 823.

In making this determination, the Court must consider: whether the interests of the existing parties are so aligned with the intervenor's that the parties will undoubtedly make all of the intervenor's arguments; whether the existing parties are capable and willing to make those arguments; and, whether the would-be intervenor would offer any element to the litigation that the existing parties might neglect. *Id.; see also Northwest Forrest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Even where the would-be intervenor has the same "ultimate objective" as some of the parties, intervention is appropriate if its interests might diverge from those of the existing parties. *Southwest Ctr. for Biological Diversity*, 268 F.3d at 823-24. Any doubt concerning the propriety of intervention should be resolved in favor of the proposed intervenors because it allows the courts to resolve all related disputes in a single action. *Federal Savings and Loan Ins. Corp. v. Falls Chase Special Taxing District,* 983 F.2d 211 (11th Cir. 1993).

Without any disrespect to, or disregard for the work of, the Department of Revenue and its attorneys, the Department and its Director cannot adequately represent all of MQEC's interest in this litigation. MQEC is uniquely qualified, based on its long and successful history, to focus this Court's attention to provisions of Article X of the Montana's Constitution. Similarly, as this Court noted in its Order granting the preliminary injunction, Rule 1 was the subject of a legislative poll under the provisions of § 2-4-404, MCA, which impermissibly interferes with the

Court's exclusive authority to determine the meaning of an existing statute and which allows the Legislature to effectively amend a statute without going through the entire legislative process. The Department has not made this argument; nor is it 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, but making *ex post facto* decisions via poll about its "legislative intent" without a duly formed quorum or any public participation or public observation as required by our Constitution. In fact, it would lead to chaos if administrative agencies began challenging the constitutionality of legislative actions. Given that this Court relied upon the results of the legislative polling in its *Order on Plaintiffs' Motion for Preliminary Injunction*, the absence of argument on the validity of such polling shows MQEC's interests are not perfectly aligned with the Department.

Further, in permitting private parties to intervene alongside government, the Ninth Circuit has recognized the fact that "[t]he interest of government and the private sector may diverge." *Southwest Center for Biological Diversity*, 268 F.3d at 823-24. Here, the Department's ultimate interest is in the vindication of its administrative rules. The MQEC's ultimate interest is in ensuring the dictates of Article X of the Constitution are followed and that the Legislature's efforts to indirectly move public money to private religious schools are not successful. The MQEC and government are typically on opposite sides of cases, further demonstrating the potential for disparate interests.

Accordingly, MQEC's interests are not adequately represented in this matter.

II. MQEC Also Meets the Requirements for Permissive Intervention.

Rule 24(b) of the Montana Rules of Civil Procedure provides an alternative basis for MQEC's intervention in this action. "On timely motion, the court may permit anyone to

intervene who … has a claim or defense that shares with the main action a common question of law or fact." Thus, to intervene on a permissive basis, an application must: 1) be timely; and, 2) involve a claim or defense that shares with the main action a common question of law or fact.

As discussed above, this application for intervention is timely. The Answer was just filed, there is no M.R.Civ.P. 16 scheduling order in place and no discovery has occurred.

Second, the proposed *Answer* that MQEC will file upon intervention raises several issues that share common questions of law or fact with the main action. Specifically, whether SB410 constitutes an impermissible indirect appropriation to sectarian schools which is forbidden under our Constitution and whether post-session "polling" of legislators under § 2-4-404, MCA, is valid and, if so, what weight a district court should give it in evaluating an administrative rule.

CONCLUSION

For the foregoing reasons, the Court should grant MQEC's motion to intervene (i) as a matter of right pursuant to Rule 24(a)(2) of the Montana Rules of Civil Procedure or, in the alternative, (ii) permissively pursuant to Rule 24(b) of the Montana Rules of Civil Procedure. The Court should thus permit Applicant-Intervenors to file a responsive pleading to Plaintiff's Complaint, a copy of such responsive pleading setting out the claims and defenses for which intervention is sought is attached to the Motion, as required by Rule 24(c).

DATED this 20th day of May, 2016.

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BY: _____
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CERTIFICATE OF SERVICE:

This is to certify that on this 20th day May, 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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