November 17, 2015

VIA E-MAIL AND U.S. FIRST-CLASS MAIL

Director Mike Kadas
Montana Department of Revenue
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Re: Proposed rule to limit the definition of "qualified education provider" under Montana's scholarship tax credit program

INTRODUCTION

Pacific Legal Foundation and Association of Christian Schools International offer this written testimony to urge the Montana Department of Revenue to discard the proposed rule barring students who want to attend a religious school from scholarship assistance under the state's fledgling scholarship tax credit law. This proposed exclusion of schools that are owned, controlled, or accredited by religious institutions imperils numerous rights guaranteed by the United States Constitution and exceeds the Department's authority.

IDENTITY OF PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced non-profit legal foundation of its kind. PLF litigates across the country for limited government and constitutional freedoms.

PLF supports the right of parents to choose the best education for their child.[1] PLF has also been involved in key religious freedom and equal protection cases before the Supreme Court of the United States.[2]

IDENTITY OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

Association of Christian Schools International (ACSI) is the largest Protestant educational organization in the world. Founded in 1978, ACSI has enhanced the development of Christian educators and provided a support structure for Christian schools. ACSI member schools serve more than 5.5 million students worldwide. With eleven member schools in Montana, ACSI advocates for all Montana students to enjoy a broad range of educational choices, including religious schools.

TESTIMONY

I. The proposed regulation is not supported by the text and purpose of the scholarship tax credit statute because it restricts a law designed to provide choice to all Montana's families to only those families who choose a non-religious school.

Agencies are not lawmakers. They can pass rules and regulations necessary to administration of the law, but they cannot overstep the boundary

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[1] *See, e.g., Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015); *Duncan v. State*, 102 A.3d 913 (N.H. 2014).

[2] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Az. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

that separates agency from legislator. "Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government."[3] To that end, Montana courts have plainly demarcated the boundaries of administrative rulemaking.

Administrative rules stray beyond the agency's delegated authority in one of two ways. The rule cannot "engraft additional and contradictory requirements on the statute."[4] Nor can it add "noncontradictory requirements on the statute which were not envisioned by the legislature."[5]

Bell v. Department of Licensing is an instructive example. There, the Supreme Court of Montana dealt with a hurdle added by an agency to the statutory criteria for approval to operate a barber's college. The statute only required ten years of experience and a favorable character review.[6] The Board added a rule that the college's instructors must pass an exam administered by the Board.[7]

The Supreme Court of Montana invalidated the rule. While the exam did not contradict the statute, the Court held that it added a requirement not envisioned by the Legislature because the laws regarding barber colleges never mentioned an exam.[8] Thus, where a rule adds requirements that have no connection to the statute as written, the rule extends beyond the agency's authority.

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[3] *Bell v. Dept. of Licensing*, 182 Mont. 21, 22-23 (1976) (quotation marks and citation omitted).
[4] *Id.* at 23 (quotation marks and citation omitted).
[5] *Id.*
[6] *Id.*
[7] *Id.* at 22.
[8] *Id.* at 23.

Here, the Department's proposed rule seeks to add a new requirement to the eligibility criteria to become a qualified education provider entitled to receive dollars donated through the tax credit program. Like the Board of Barbers, the Department throws up another barrier to obtaining a statutory benefit that has no relationship to the Legislature's criteria.

A school must meet six statutory requirements to be a "qualified education provider." None relate to religion. Just as in *Bell*, the Legislature's total silence regarding the subject matter of the new requirement indicates that the Legislature could not have envisioned it.

In fact, statutory guidelines for student scholarship organizations show that the Legislature wanted as broad a range of choice as possible for students. The statute says student scholarship organizations "may not restrict or reserve scholarships for use at a particular education provider or any particular type of education provider."[9] Ironically, the Montana Department of Revenue must disqualify student scholarship organizations that violate this non-discrimination clause.[10] Surely the Legislature could not have envisioned that the agency assigned to enforce non-discrimination would now demand discrimination.

The statistics regarding Montana's private schools confirm that the Legislature did not plan to exclude religious schools. Of the 126 private schools in Montana, 85 are religiously affiliated.[11] The Montana Legislature intended to offer school choice options for all Montana families. A rule that excludes over

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[9] MCA 15-30-3103(b).
[10] MCA 15-30-3103(i)(2), 3113(2).
[11] Private School Review, *Montana Private Schools*, www.privateschoolreview.com/montana (last visited Nov. 16, 2015).

two-thirds of Montana's private schools flouts that noble goal and could not have been envisioned by a legislature determined to broaden educational opportunity.

The Department of Revenue should not rewrite this school choice statute by removing most of the choices. If the Department does not drop the rule, a court surely will.

II. The proposed regulation violates the Free Exercise Clause of the United States Constitution because it denies true school choice to any student who seeks to attend a religious school.

Laws "prohibiting the free exercise of religion" violate the First Amendment.[12] The Department's proposed rule shutting out religious schools from private charitable dollars burdens the free exercise of religion for families, religious schools, and donors.

The right to free exercise means that government cannot withhold benefits because of religious decisions. Any law "burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[13] Such scrutiny demands that the law "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[14] For example, in *Sherbert v. Verner*,[15] the Supreme Court of the United States held that an unemployment commission could not deny unemployment benefits because the applicant refused to work on Saturdays for religious reasons. The Court said the commission "forces her to choose between following the precepts

[12] U.S. Const. amend. I.
[13] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993).
[14] *Id.*
[15] 374 U.S. 398 (1963).

of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[16] The Supreme Court has repeatedly struck down similar attempts to condition benefits on the abandonment of religious rights.[17]

The Department's proposed rule targets religious students and schools for disfavor. It is neither neutral nor generally applicable. The rule shares too much in common with the unemployment commission's refusal to help an unemployed woman because of her Sabbath worship in *Sherbert v. Verner*. The Department's proposed rule tells students, "If you want help to go to the school of your choice, you have to give up your right to choose a religious school." It tells donors, "If you want to give to students who want to attend religious schools, you don't get a tax credit." It tells schools, "If you want low-income students receiving tuition assistance through the tax credit program, you need to sever religious affiliations." The Department cannot impose these conditions on the tax credit program.

A different free exercise case in the scholarship context provides a useful contrast. In *Locke v. Davey*, a student received state scholarship money to help with college tuition.[18] A student could use the scholarship to attend a religious school but not to pursue a devotional theology degree.[19] The student sued the state, arguing that this limitation inhibited the free exercise of religion. The

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[16] *Id.* at 404.
[17] *See, e.g.*, *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136 (1987) (holding that the state's refusal to grant unemployment benefits due to Saturday worship violated Free Exercise); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981) (holding that state could not deny unemployment benefits because of applicant's refusal to build parts for military tanks for religious reasons).
[18] 540 U.S. 712, 717 (2004)
[19] *Id.* at 715.

Supreme Court of the United States held that the exclusion did not violate the Free Exercise Clause. The Court permitted this burden on religion because it served the "historic and substantial state interest" in prohibiting "*any* tax dollars from supporting the clergy."[20]

This case has several key distinctions that place it in greater constitutional peril than the law upheld in *Locke v. Davey*. Foremost, the law here does not serve the "substantial state interest" of preventing tax dollars from supporting the clergy. The burden on religion therefore cannot be justified on the basis of preventing the establishment of religion or complying with Montana's Blaine Amendment.

In fact, the tax credit law does not control the flow of *tax* dollars at all. Instead, it prohibits students who want to attend religious schools from accessing private charitable donations. The law refers to the scholarship money donated through the program as "private contributions."[21] The Supreme Court of the United States also has held that dollars donated through tax credit programs are not public funds.[22] "[W]hen taxpayers choose to contribute to STOs, they spend their own money, not the money the State has collected from . . . taxpayers."[23] The state has no legitimate interest in preventing students from accessing private dollars just because they want to attend a religious school.

Moreover, unlike *Locke v. Davey*, the proposed rule bars students from accessing scholarships to attend religious schools generally, not just programs

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[20] *Id.* at 723, 725.
[21] MCA 15-30-3101.
[22] *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1447 (2011).
[23] *Id.*

with a strong religious emphasis. The proposed rule forbids use of tax credit dollars for any schools controlled or owned in whole or in part by religious institutions. Thus, even a school with a purely secular curriculum might not qualify under the proposed rule.

The proposed rule prevents students from accessing private scholarship money to attend over two-thirds of the state's private schools, regardless of whether those schools even engage in religious indoctrination. This burden on the free exercise of religion cannot be justified on the basis of preventing government endorsement of religion. It therefore violates the core constitutional promise of the free exercise of religion.

III. The proposed regulation violates the Establishment Clause of the United States Constitution by dictating that privately donated scholarship money cannot go to students who want to attend a religious school.

"The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[24] To that end, government can neither favor nor inhibit religion.[25] The Establishment Clause not only forbids favoritism among religions, but also "mandates neutrality between religion and religion, *and between religion and non-religion*."[26] Thus, governments may not treat religions on a lesser footing than other groups.

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[24] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).
[25] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).
[26] *Epperson v. Arkansas*, 393 U.S. 97, 104 (1992) (emphasis added); *See also Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 217 (1963) ("[T]his court has rejected unequivocally the

Courts look to a law's purpose and effect to test its compliance with the Establishment Clause. A law must have a dominant secular purpose, and "its principal or primary effect must be one that neither advances nor inhibits religion."[27] Courts can assess the effect of a law by asking whether the law gives the perception to a reasonable observer that the government is endorsing or disapproving of religion.[28]

The Department's proposed rule serves no legitimate secular purpose and has the effect of inhibiting religion. The Department justifies its rule as necessary to comply with Montana's prohibition against the use of public money for religious purposes. The Montana Constitution forbids "any direct or indirect appropriations or payment from any public fund or monies . . . for any sectarian purpose or to aid any" religious institution.[29]

Blocking the use of tax money to support a religion might be a secular purpose, but that cannot be the purpose of the rule here. As discussed above, the money that would go to religious schools under the tax credit program never touches the public coffer. The donations do not come from "any public fund or monies." Thus, the Department cannot rely on compliance with the Montana Constitution as a valid secular purpose.

The rule would also have the principal effect of inhibiting and disapproving of religion. When the government reaches out to slap away a giving hand because the recipient is religious, it leaves an impression of disapproval in the

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contention that the Establishment Clause forbids only governmental preferences of one religion over another.").

[27] *Lemon*, 403 U.S. at 612.

[28] *Lynch*, 465 U.S. at 687 (1984) (O'Connor, J., concurring).

[29] Mont. Const. Art. X, § 1.

mind of a reasonable observer. This makes students' and schools' religious affiliation relevant to their "standing in the political community."[30] The government may not dictate who gets privately donated dollars based on their religion.

IV. The proposed regulation violates the Equal Protection Clause of the United States Constitution because it discriminates against religious families by blocking access to private charitable help just because they choose a religious school.

Courts look upon religious discrimination with the same hostility as programs that discriminate based on race.[31] A law that discriminates based on religion is unconstitutional unless "it is justified by a compelling interest that is narrowly tailored to advance that interest."[32] When a law discriminates on its face, a court will apply this strict scrutiny without examining legislative intent. [33] The proposed rule cannot satisfy this strict standard.

The Department plans to discriminate against religion by singling out religious schools for unfavorable treatment. On the face of the text, the rule deprives families hoping to send their kids to a religious school of private donations that are otherwise available to students who choose a secular school. Meddling with the flow of private tuition dollars to schools on the basis of religious

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[30] *Lynch*, 465 U.S. at 687 (1984).
[31] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification."); *Davis v. Abercrombie*, 903 F.Supp.2d 975, 1005 (D. Haw. 2012) ("[A] classification based on religion is a suspect classification.").
[32] *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533.
[33] *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015).

affiliation serves no compelling government interest. The rule cannot withstand strict scrutiny and violates the Equal Protection Clause.

CONCLUSION

The proposed rule transforms Montana's first school-choice program into a dim specter of genuine choice. Under this rule, Montana families may only choose a school the government approves. It so happens that the government only approves of schools with no religious affiliation. This bald discrimination upends the Legislature's intent to expand educational choice and defies our constitutional values of religious liberty and equal protection. We urge the Department to refrain from adopting this discriminatory regulation.

Respectfully Submitted,

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