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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

KATHY ARMSTRONG and JERRY
ARMSTRONG, individuals; ASSOCIATION
OF CHRISTIAN SCHOOLS
INTERNATIONAL, a non-governmental
organization,

Plaintiffs,

v.

MIKE KADAS, in his official capacity as
Director of the Montana Department of
Revenue,

Defendant.

Civ. No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. On May 12, 2015, the Montana Legislature enacted Senate Bill 410 (the Scholarship Tax Credit Program), the state's first school choice program. *See* Mont. Code Ann. § 15-30-3101, *et seq.* The Scholarship Tax Credit Program allows individuals and businesses to claim a tax credit for donations to authorized Student Scholarship Organizations, which use the money to create scholarships for students to use at accredited private schools in Montana. On December 14, 2015, the Montana Department of Revenue (Department) adopted Mont. Admin. R. 42.4.802 (“the Religious School Ban” or “the Rule”), which prevents students from using scholarship money at any religious school. Plaintiffs Kathy Armstrong, Jerry Armstrong, and the Association of Christian Schools International bring this challenge seeking declaratory and injunctive relief against Defendant Mike Kadas, in his official capacity as Director of Montana Department of Revenue, on the grounds that the Religious School Ban is unlawful and unenforceable because it violates the First and Fourteenth Amendments to the United States Constitution, and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305.

JURISDICTION AND VENUE

2. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The Court has jurisdiction of these federal law claims under 28 U.S.C. §§ 1331 (federal question) and 1343(a) (redress deprivation of civil rights). The Court has jurisdiction of the state law claim under 28 U.S.C. § 1367, because that claim is so closely related to Plaintiffs' federal claims that they form part of the same case or controversy for purposes of Article III of the U.S. Constitution. Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendant resides in this district, and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred or will occur in this district.

4. Venue is proper in the Helena Division of this District Court under Local Rule 3.2 because Defendant resides in a county within the division at the commencement of the lawsuit. Plaintiff Association of Christian Schools International also has member schools in a county within the division.

PARTIES

Plaintiffs

Kathy and Jerry Armstrong

5. Kathy Armstrong and Jerry Armstrong are the parents of an eighth grade student who attends Valley Christian School in Missoula, Montana. Kathy and Jerry Armstrong's son is eligible for a scholarship under the Scholarship Tax Credit Program, and the Armstrongs would apply for a scholarship if their son could use it to attend Valley Christian School.

6. Kathy and Jerry Armstrong are also taxpayers in the State of Montana. They would donate to Student Scholarship Organizations under the Montana Scholarship Tax Credit Program, if their donations could be used at religious schools. They do not intend to donate to a Student Scholarship Organization unless their donations could be used at religious schools.

Association of Christian Schools International

7. Plaintiff Association of Christian Schools International (ACSI) is a non-profit, non-denominational, religious association providing support services to nearly 24,000 Christian schools in over 100 countries. Founded in 1978, it is the world's largest association of Protestant schools educating 5.5 million children worldwide. ACSI

accredits Protestant pre-K–12 schools and provides professional development, best practices, teacher certification, school accreditation, student testing, student activities, curricula, and more. In the U.S., ACSI serves 3,000 Christian preschools, elementary, and secondary schools, including 10 in Montana. ACSI member schools in Montana are located in Billings, Butte, Great Falls, Hamilton, Helena, Bozeman, Libby, Frazer, Kalispell, and Missoula, and educate nearly 2,000 students. ACSI performs a host of services for these member schools, including school accreditation. But, because ACSI is a religious organization, none of the schools that it accredits is eligible to enroll students who receive scholarships under the Scholarship Tax Credit Program. Therefore, ACSI is directly harmed by the Religious School Ban. ACSI also has standing to bring suit on behalf of its member schools. *See Hunt v. Wash. Apple Advertising Comm’n*, 432 U.S. 333, 342 (1977). Specifically, ACSI’s member schools have standing to sue in their own right, maximizing scholarship fund opportunities for the member schools is part of ACSI’s mission, and the equitable nature of ACSI’s claims does not require its members’ participation.

Defendant

8. Defendant Mike Kadas is Director of the Montana Department of Revenue. Defendant is responsible for implementing and enforcing Montana tax laws, including

any applicable tax credits. Accordingly, Defendant is also responsible for implementing and enforcing the Montana Scholarship Tax Credit Program. Defendant is an officer of the State of Montana with the duty to abide by the United States Constitution, federal law, and Montana law. Defendant is sued herein in his official capacity as Director of the Montana Department of Revenue.

ALLEGATIONS

The Montana Legislature adopts Senate Bill 410 – The Montana Scholarship Tax Credit Program

9. Montana's Scholarship Tax Credit Program, Senate Bill 410, was introduced in the Montana Legislature on March 20, 2015. The Bill passed the Montana Senate 27 to 23 and the Montana House of Representatives 59 to 41 on April 23, 2015. The two chambers voted again on the Bill after a failed concurrence vote, and approved it by a margin of 28 to 22 in the Senate, and 58 to 42 in the House on April 24, 2015.

Montana Governor Steve Bullock did not act on the Bill, allowing it to become law on May 12, 2015. The Program is codified at Mont. Code Ann. § 15-30-3101 *et seq.*

10. The Scholarship Tax Credit Program allows individuals and businesses to receive a tax credit for donations to approved Student Scholarship Organizations. Student Scholarship Organizations use the private donations to create scholarships for

children between the ages of 5 and 19. The Program allows parents to use the scholarships to send their children to any private school in Montana, as long as the school meets safety and quality standards. Mont. Code Ann. § 15-30-3101, *et seq.*

11. The Scholarship Tax Credit Program allows individuals and businesses in Montana to donate to Student Scholarship Organizations to help students with tuition at a private school of their choice. Mont. Code Ann. § 15-30-3101. Donors receive a tax credit of up to \$150 for donations made to approved Student Scholarship Organizations. Mont. Code Ann. § 15-30-3111.

12. The Scholarship Tax Credit Program requires Student Scholarship Organizations to: be certified as a 501(c)(3) under the Internal Revenue Code; allocate at least 90 percent of their donations to scholarships; pay out all donations in 3 years; not restrict scholarships to a particular school or type of school; keep separate accounts for scholarships and administrative money; complete an annual review; prevent donations from being earmarked to a particular family, child, or school; report donations and expenditures to the Department of Revenue; not limit gifts to specific pupils; and keep records pursuant to the educational environment of the student. Mont. Code Ann. § 15-30-3103. Student Scholarship Organizations then “deliver the scholarship funds directly to the qualified education provider selected by the parents

or legal guardian of the child to whom [a] scholarship [is] awarded.” Mont. Code Ann. § 15-30-3104.

13. All Montana students between the ages of 5 and 19 are eligible for a scholarship under the Scholarship Tax Credit Program. Mont. Code Ann. § 15-30-3102. The amount each student may receive can be no larger than 50 percent of the average state per-pupil funding in public schools. Mont. Code Ann. § 15-30-3103.

14. The Scholarship Tax Credit Program specifies that Student Scholarship Organizations may only provide scholarships to a “qualified educational provider,” which the Program defines as a school that administers a nationally norm-referenced test; provides test results to parents; provides the overall test scores of students in grades 8 through 11 to the Montana Department of Public Instruction or on the school’s website; is accredited; and complies with all health and safety laws required by the State of Montana. Mont. Code Ann. § 15-30-3102(7).

15. The Scholarship Tax Credit Program does not, however, place any religion-based restrictions on schools that can accept scholarship students. *See* Mont. Code Ann. § 15-30-3102(7). Indeed, the Program prohibits discrimination, by making it illegal to “restrict or reserve scholarships for use at a particular education provider or any particular type of education provider.” Mont. Code Ann. § 15-30-3103(1)(b).

16. The Scholarship Tax Credit Program charges the Montana Department of Revenue with the duty of promulgating regulations to administer and enforce the terms of the Program, including its prohibition on discriminating among different types of schools. Mont. Code Ann. § 15-30-3113.

The Montana Department of Revenue Adopts the Religious School Ban

17. On October 15, 2015, the Montana Department of Revenue proposed three rules to administer and enforce the Scholarship Tax Credit Program.

18. As relevant here, Mont. Admin. R. 42.4.802 adds new restrictions to the definition of a “qualified education provider.”

19. The Religious School Ban specifies that a “qualified education provider” may not be:

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

Mont. Admin. R. 42.4.802.

20. A school accredited by a faith-based organization is “controlled in whole or in part by a church, religious sect, or denomination” under the Religious School Ban. Mont. Admin. R. 42.4.802.

21. The Montana Department of Revenue held a public hearing on November 5, 2015, and received written testimony until November 17, 2015. The Association of Christian Schools International and its member schools, Helena Christian School and Foothills Community Christian School, submitted oral and written testimony regarding the constitutional problems with the Religious School Ban, and the disastrous effects that the Rule will have on education in Montana and on Montana families.

22. The Montana Scholarship Tax Credit Program’s sponsor, Senator Llew Jones, also testified at the Department’s public hearing. Senator Jones testified that the Rule was inconsistent with the intent of the Legislature to allow Montana students to use privately funded scholarships at any private school in Montana.

23. Both chambers of the Montana Legislature conducted a draft poll on whether the Religious School Ban complied with the Montana Scholarship Tax Credit Program. Both chambers voted that the Religious School Ban was inconsistent with legislative intent, by a vote of 29 to 15 in the Senate and 58 to 34 in the House.

24. Nonetheless, the Montana Department of Revenue adopted the Religious School Ban. The publication date for the Rule is December 24, 2015. The effective date is December 25, 2015. The Rule will go into effect when the Scholarship Tax Credit Program takes effect on January 1, 2016.

INJUNCTIVE RELIEF ALLEGATIONS

25. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 24 of this Complaint.

26. Defendant, in his official capacity as Director of the Montana Department of Revenue, adopted and will implement the Religious School Ban, which prohibits Student Scholarship Organizations from creating student scholarships for use at religious schools. If an injunction does not issue enjoining Defendant from enforcing the Religious School Ban, Plaintiffs will be irreparably harmed in that they will be prohibited from freely exercising their religious beliefs, and will be discriminated against on the basis of their religious beliefs, because they will not be able to enjoy government benefits without disavowing their religious beliefs. The Religious School Ban will also deprive religious schools of their constitutionally protected rights to compete on equal terms with non-religious schools, and will force them to choose

between maintaining their status as a religious school and participating in the Montana Scholarship Tax Credit Program.

27. If not enjoined by this Court, Defendant and his agents, representatives, and employees will continue to discriminate against religious schools, in contravention of the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause of the United States Constitution, and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305.

28. Pecuniary compensation to Plaintiffs or other victims of such continuing discrimination would not afford adequate relief, and it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief.

29. Restraint of Defendant is necessary to prevent a multiplicity of judicial proceedings on these same or similar issues.

30. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

31. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 30 of this Complaint.

32. An actual and substantial controversy exists between Plaintiffs and Defendant as to their respective legal rights and duties. Plaintiffs contend that the establishment,

administration, and implementation of the Religious School Ban, which discriminates on the basis of religion, violate the First and Fourteenth Amendments to the United States Constitution, and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305. Defendant disputes that the Department of Revenue's Religious School Ban is unconstitutional and illegal.

33. There is a present justiciable controversy between the parties regarding the constitutionality and legality of Defendant's Religious School Ban. Plaintiffs will be directly, adversely, and irreparably affected by Defendant's actions enforcing and administering the Religious School Ban, and Defendant's continuing administration, implementation, reliance, and enforcement of the discriminatory Religious School Ban now and in the future. A judicial determination of rights and responsibilities arising from this actual controversy is necessary and appropriate at this time.

**FIRST CLAIM FOR RELIEF
VIOLATION OF THE ESTABLISHMENT CLAUSE
OF THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION**

34. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 33 of this Complaint.

35. The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. This provision also applies to state governments. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947) (New Jersey law allowing the state to pay parents for transportation to private schools did not violate the Establishment Clause).

36. The Defendant’s actions in enforcing and administering the Department’s Religious School Ban, which prohibits students from using scholarships from the Scholarship Tax Credit Program at any school “owned or controlled in whole or in part by any church, religious sect, or denomination,” are hostile to religion, because they single out religious schools and religious individuals for discriminatory treatment.

37. The Defendant’s actions in enforcing and administering the Department’s Religious School Ban do not serve a valid secular purpose, because the Montana Scholarship Tax Credit Program is funded by private donations.

38. The Defendant’s actions in enforcing and administering the Department’s Religious School Ban have the primary effect of hostility to religion, because the government conveys disapproval of religion when it prevents private money from going to religious schools.

39. The Defendant's actions in enforcing and administering the Department's Religious School Ban excessively entangle the Department with religion as it has to determine a school's religious affiliation to administer the Rule.

40. The Defendant's actions in enforcing and administering the Department's Religious School Ban target religion for disparate treatment, because the Defendant's actions favor secular schools over religious schools, and non-religious parents over religious parents.

**SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREE EXERCISE
CLAUSE OF THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION**

41. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 40 of this Complaint.

42. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. The provision also applies to state governments. *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (invalidating, on free exercise grounds, a Connecticut statute requiring a permit for religious solicitation).

43. Plaintiff ACSI, and its member schools, have a sincere religious belief to educate children in a way consistent with a Christian worldview.

44. Plaintiff Kathy Armstrong has a sincere religious belief to educate her son in a way consistent with a Christian worldview.

45. Plaintiff Jerry Armstrong has a sincere religious belief to educate his son in a way consistent with a Christian worldview.

46. The Defendant's actions in enforcing and administering the Department's Religious School Ban require Plaintiffs to abandon their religious beliefs in order to participate in the Scholarship Tax Credit Program. This requirement violates the Free Exercise Clause of the United States Constitution, because the government is conditioning a benefit on the abandonment of religious status or religious beliefs.

47. The Defendant's actions in enforcing and administering the Department's Religious School Ban place a substantial burden on Plaintiffs' religious exercise by requiring Plaintiffs to choose between participating in a government program or forfeiting their religious beliefs and practices.

48. The Defendant's actions in enforcing and administering the Department's Religious School Ban target religious exercise by prohibiting Plaintiff ACSI from

participating in the Scholarship Tax Credit Program because ACSI's member schools are religious institutions.

49. The Defendant's actions in enforcing and administering the Department's Religious School Ban target religious exercise by prohibiting Plaintiffs Kathy and Jerry Armstrong from using scholarships from the Scholarship Tax Credit Program at religious schools.

50. The Defendant's actions in enforcing and administering the Department's Religious School Ban are neither neutral toward religion nor generally applicable.

51. The Defendant's actions in enforcing and administering the Department's Religious School Ban target religion for disparate treatment by favoring non-religious individuals and secular schools over their religious counterparts.

52. The Defendant's actions in enforcing and administering the Department's Religious School Ban do not serve a compelling governmental interest, and are not narrowly tailored to achieve a compelling governmental interest.

**THIRD CLAIM FOR RELIEF
VIOLATION OF THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT
TO THE UNITED STATES CONSTITUTION**

53. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 52 of this Complaint.

54. The Defendant's actions in enforcing and administering the Department's Religious School Ban allow similarly situated schools to enroll students under the Scholarship Tax Credit Program as long as those schools are not "owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. 42.4.802.

55. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

56. The Equal Protection Clause requires that the government treat all similarly situated persons or institutions equally with respect to religion. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (government action that singles out a group for unequal treatment on the basis of religion violates the Equal Protection Clause).

57. The Defendant's actions in enforcing and administering the Department's Religious School Ban prohibit students from using scholarships from the Scholarship Tax Credit Program at any school accredited by ACSI. This prohibition is in place because of ACSI's religious affiliation.

58. The Department's actions to prevent Plaintiff ACSI from participating in the Scholarship Tax Credit Program target religious institutions for disparate treatment as compared to secular institutions.

59. The Department's actions to prevent Plaintiffs Kathy and Jerry Armstrong from participating in the Scholarship Tax Credit Program target religious parents for disparate treatment as compared to non-religious parents.

60. Because religion is a suspect class, the Defendant's actions in enforcing and administering the Department's Religious School Ban must be narrowly tailored to achieve a compelling governmental interest. *See 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.”).

61. There is no compelling governmental interest that justifies Defendant's disparate treatment of Plaintiffs on the basis of Plaintiffs' religion.

62. The Religious School Ban, which prohibits Plaintiffs from participating in the Scholarship Tax Credit Program, is not narrowly tailored to achieve a compelling governmental interest.

**FOURTH CLAIM FOR RELIEF
VIOLATION OF THE MONTANA
ADMINISTRATIVE PROCEDURE ACT,
MONT. CODE ANN. § 2-4-305**

63. Plaintiffs incorporate by reference and reallege each and every allegation set forth in paragraphs 1 through 62 of this Complaint.

64. According to the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305, a regulation is not valid unless it is “consistent and not in conflict with the statute.”

65. The Montana Scholarship Tax Credit Program is designed to give students and their parents the ability to choose from every accredited private school in Montana, irrespective of religious affiliation.

66. The Religious School Ban forbids parents from using scholarships created under the Scholarship Tax Credit Program at any religious school or at any school accredited by a religious institution. Most Montana private schools have a religious affiliation and/or were accredited by a religious organization. Many school choice

options available to parents before the Rule was adopted will be eliminated when the Rule takes effect. Therefore, the Religious School Ban is inconsistent and in conflict with the Montana Scholarship Tax Credit Program.

PRAYER FOR RELIEF

WHEREFORE, based on the allegations above, Plaintiffs respectfully request judgment as follows:

1. A declaration that the Religious School Ban or a subsequent and similar discriminatory regulation, enforced by Mike Kadas, Director of the Montana Department of Revenue, is unconstitutional, illegal, invalid, and unenforceable because it excessively entangles the government with religion, prevents the free exercise of religion, discriminates on the basis of religion, and exceeds the Department's authority in violation of the First and Fourteenth Amendments to the United States Constitution and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305.
2. For a preliminary and permanent prohibitory injunction enjoining Mike Kadas in his official capacity as Director of the Montana Department of Revenue and his agents, employees, officers, and representatives from

adopting, enforcing, attempting, or threatening to enforce the Religious School Ban or any other similar discriminatory regulation, insofar as the Religious School Ban excessively entangles the government with religion, prevents the free exercise of religion, discriminates on the basis of religion, or exceeds the Department's authority in violation of the First and Fourteenth Amendments to the United States Constitution and the Montana Administrative Procedure Act, Mont. Code Ann. § 2-4-305.

3. For legal costs, expenses, and attorneys' fees, and other just relief the Court deems proper.

DATED: December 28, 2015.

Respectfully submitted,

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