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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.

No. CV 15-114-H-SEH

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs Kathy Armstrong, Jerry Armstrong, and Association of Christian Schools International (ACSI) respectfully request that this Court temporarily enjoin Defendant Mike Kadas, Director of the Montana Department of Revenue (Department), from enforcing the Department's regulation banning religious schools from Montana's Scholarship Tax Credit Program.

I

INTRODUCTION AND STATEMENT OF THE CASE

On May 12, 2015, the Montana Legislature enacted Montana's Scholarship Tax Credit Program. *See* Mont. Code Ann. § 15-30-3101, *et seq.* The Program allows individuals and businesses to donate to student scholarship organizations in return for a tax credit up to $150. Mont. Code. Ann. § 15-30-3101. Student scholarship organizations in turn use those donations to assist students with private school tuition. The statute prevents student scholarship organizations from discriminating against "particular education provider[s]" and requires that student scholarship organizations "allow an eligible student to enroll with any qualified education provider of the parents' or legal guardian's choice." *Id.* § 15-30-3103(1)(b). Families can apply for aid, and successful applicants inform the student scholarship organization of the private school they wish to attend. *Id.* The organization then disburses funds directly to the school. *Id.* § 15-30-3104. All Montana students are eligible for the Scholarship Tax Credit Program and may select from any of Montana's accredited private schools.

The Department, however, crippled this fledgling school choice program before it began. On December 14, 2015, the Department adopted Rule 42.4.802 (Religious School Ban), which prohibits scholarships for students to attend religious schools. The Religious School Ban prohibits scholarships from being issued to schools that are "owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. 42.4.802. Any school accredited by a faith-based organization, like ACSI, is also excluded. *Id.* The Department argues that this discrimination against religion is required by the Montana Constitution. *See* 24 Mont. Admin. Reg. 2331, 2334-47 (Dec. 24, 2015).

The Religious School Ban injures Plaintiffs Kathy and Jerry Armstrong as parents of an eighth grade child attending a private religious school in Montana. Declaration of Kathy Armstrong (Armstrong Decl.) ¶ 1. The Armstrongs' son currently attends Valley Christian School in Missoula, and they will continue to enroll their son in Valley Christian School for the next four years. *Id.* The Armstrongs chose Valley Christian School for their son, in part, because of its religious message and mission. *Id.* However, private school is expensive, and the Armstrongs would seek a scholarship for their son to offset the costs of private tuition at Valley Christian School if the scholarship were available on a non-discriminatory basis. *Id.* ¶ 2. The Religious School Ban prevents the Armstrongs from obtaining a scholarship for their son to attend Valley Christian School. *See* Mont. Admin. R. 42.4.802 (prohibiting

religious schools from participating in the Scholarship Tax Credit Program).

The Armstrongs are also injured as Montana taxpayers. The Armstrongs would donate to a student scholarship organization[1]—and claim the corresponding tax credit—if student scholarship organizations were permitted to create scholarships to religious and secular schools equally. *Id.* The Armstrongs will not donate so long as the Department's Religious School Ban prevents scholarships from being afforded to students seeking to attend a religious school. Armstrong Decl. ¶ 3.

ACSI is also injured by the Religious School Ban. ACSI is a protestant educational organization with ten member schools in Montana. Declaration of Philip Scott ¶ 2. ACSI provides accreditation, among other services, to its members. *Id.* Because ACSI is a religious organization, none of the schools it accredits can enroll students who receive funding through the scholarship program so long as the Religious School Ban is in place. *Id.* ¶ 4. The rule harms ACSI and its members by inhibiting their mission to educate children according to a Christian world view. *Id.*

The Department's discriminatory regulation violates the First and Fourteenth Amendments to the United States Constitution and Montana law. This Court should not allow the Department to suffocate Montana's school choice experiment and jeopardize constitutional freedoms during litigation.

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[1] Since the Act came into effect on January 1, the Department of Revenue has approved the application of at least one student scholarship organization, which has already received donations.

II

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 65, the granting of a motion for preliminary relief depends on (1) likelihood of success on the merits of the underlying complaint, (2) the risk of suffering irreparable harm if preliminary relief is not granted, (3) whether the balance of equities tips in the movant's favor, and (4) whether granting preliminary relief would be in the public interest. *See Am. Trucking Ass'ns. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). "In this circuit, preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor." *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) (citing *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)).

III

ARGUMENT

This Court should grant Plaintiffs' motion for a preliminary injunction. Plaintiffs are likely to succeed on the merits because the Religious School Ban facially discriminates on the basis of religion and is neither justified by a compelling state interest, nor narrowly tailored to a compelling state interest. The Religious School Ban causes constitutional injury that is irreparable as a matter of law. Moreover, the

equities favor Plaintiffs because they face continuing injury to core constitutional liberties while the Department suffers no concrete harm. Lastly, the public has an interest in the education of their children, the protection of constitutional rights, and the lawful exercise of administrative authority.

A. Plaintiffs Are Likely To Succeed on the Merits

Plaintiffs Kathy Armstrong, Jerry Armstrong, and ACSI are likely to succeed on the merits of this case because the Religious School Ban plainly violates the United States Constitution and Montana law. The Religious School Ban violates the Establishment Clause of the First Amendment to the United States Constitution because it favors secular over religious institutions regarding access to neutral benefits. The Religious School Ban violates the Free Exercise Clause of the First Amendment to the United States Constitution because it conditions government benefits—eligibility for scholarships and tax credits—on the abandonment of religion. This Religious School Ban violates the Equal Protection Clause to the Fourteenth Amendment of the United States Constitution because it facially discriminates on the basis of religion, a suspect class. Each of these constitutional violations fails strict scrutiny, because the Religious School Ban does not serve a compelling governmental interest, and is not narrowly tailored to a compelling governmental interest. Separately, the Religious School Ban violates Montana law, because it is inconsistent and in conflict with the Scholarship Tax Credit Program.

1. The Religious School Ban Violates the Establishment Clause

The Religious School Ban violates the Establishment Clause because it inhibits religion and does not have a secular purpose. The Religious School Ban specifically targets and singles out schools solely on the basis of religion, favors religion over non-religion, and thereby imposes a unique burden on religion by denying religious schools a benefit otherwise open to secular private schools.

States are forbidden from enacting rules creating an establishment of religion. U.S. Const. amend. I; *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 14 (1947) (Establishment Clause applies to state action). "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). To that end, government can neither favor nor inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Establishment Clause not only forbids favoritism among religions, but also "mandates governmental neutrality between religion and religion, *and between religion and nonreligion*." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1992) (emphasis added). To satisfy the Establishment Clause, a law must have a secular purpose, and "its principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612.

A law lacks a secular purpose if the intent of the law is to support religion or exhibit hostility toward religion. *See Epperson*, 393 U.S. at 104. Secular purpose is determined by asking "whether an objective observer, acquainted with the text, . . . history, and implementation of the [rule] would perceive it as" state hostility toward religion. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). Where a possible religious or anti-religious purpose appears to exist on the face of a law, the government must prove that a valid secular purpose eclipses it. *See Epperson*, 393 U.S. at 107-08. Here, the Religious School Ban facially singles out religious institutions for disparate treatment, so the Defendant bears the burden of showing that a valid secular purpose eclipses the blatant hostility towards religion.

When determining whether an anti-religious rule fulfills a valid secular purpose, the government's stated purpose does not receive deference. For example, in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Supreme Court held that a statute requiring display of the Ten Commandments in public schools lacked a secular purpose despite the state's assertion that the displays were educational. *Id.* at 41. Courts must distinguish a "sham secular purpose from a sincere one." *Wallace*, 472 U.S. at 75. Even a genuine secular purpose will not save a law if the secular purpose is secondary to a predominantly religious or anti-religious one. *McCreary Cnty v. ACLU of Ky.*, 545 U.S. 844, 865 (2005).

The Religious School Ban serves no valid secular purpose. The Department's

sole purpose for the rule is to bring the Scholarship Tax Credit Program into compliance with the Montana Constitution's prohibition against public funding of religion. *See* 19 Mont. Admin. Reg. 1682, 1683-84 (Oct. 15, 2015); Mont. Const. art. 10, § 6. However, the Department misunderstands how the Scholarship Tax Credit Program works. At no time are scholarships being provided from state funds. The Program is explicit that the donations from individuals are "private contributions." Mont. Code Ann. § 15-30-3101.

The explicit text of the statute accords with Supreme Court precedent. The Supreme Court of the United States has held that private contributions under a similar scholarship program are not public funds. *See Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011). "[W]hen taxpayers choose to contribute to [student scholarship organizations], they spend their own money, not the money the State has collected." *Id.* State courts in Arizona and Illinois agree. *Kotterman v. Killian*, 972 P.2d 606, 612-13 (Ariz. 1999); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001); *Toney v. Bower*, 744 N.E.2d 351, 357-58 (Ill. App. Ct. 2001). The Department cannot rely on compliance with the Montana Constitution as a valid secular purpose and has offered no other secular purpose for discrimination against religious schools.

Even if the Religious School Ban served a valid secular purpose, it would still violate the Establishment Clause because it has the primary effect of inhibiting religion. Both endorsement and disapproval of religion violate the Establishment Clause. *Lynch*, 465 U.S. at 688. "Endorsement sends a message to nonadherents that they are outsiders, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* Courts can assess effect by asking whether a reasonable observer would believe that the government is endorsing or disapproving of religion. *Id.* at 687.

Here, where the text of the Religious School Ban is facially hostile to religion, the rule's primary effect inhibits religion. Indeed, the rule is precisely designed to prevent private donations from becoming religious school scholarships. The government may not dictate who gets private donations based on their religion. When the government prohibits religious giving, it leaves an impression of disapproval in the mind of a reasonable observer. This broadcasts the message to the Armstrongs, ACSI, and ACSI's member schools "that they are outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688.

The Religious School Ban lacks a valid secular purpose because it does not actually further the asserted rationale of church-state separation. It also inhibits

religion by excluding religious schools from a neutral benefit. The Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.

2. The Religious School Ban Violates the Free Exercise Clause

The Religious School Ban violates the Free Exercise Clause because it conditions the availability of a governmental benefit upon the abandonment of religion. The exclusion of religious schools from private donations burdens the religious practices of families, schools, and donors. Because the Religious School Ban infringes on the Armstrongs' and ACSI's Free Exercise rights, they are likely to succeed on the merits of their challenge to the rule.

The First Amendment prevents states from adopting any law that prohibits the free exercise of religion. U.S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (Free Exercise Clause applies to state action). Any law "burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The neutrality principle prohibits laws that facially discriminate against religion. *Id.* at 533. A law is not generally applicable when government places "burdens only on conduct motivated by religious belief." *Id.* at 543.

A plaintiff need not unearth evidence of bigotry to demonstrate a violation of neutrality. *Id.* Rather, a law is not neutral "if it refers to a religious practice without

a secular meaning discernable from the language or context." *Id.* at 533. The scrutiny applied to a law lacking neutrality or general applicability demands that the law "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*

The neutrality principle is violated when a law withholds benefits because of religious practice or status. In *McDaniel v. Paty*, 435 U.S. 618 (1978), a Tennessee law forbade ministers from running for certain elected offices. *Id.* at 620. The Supreme Court held that the state cannot condition a government benefit on the surrender of a religious right. *Id.* at 626. The Court also recognized that the Free Exercise Clause protects not only religious decisions, but also religious status, such as a clergyman's position as a minister. *Id.* at 626-27. Other attempts to condition statutory benefits on the abdication of religious rights have faced the same fate. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (government cannot condition employment benefits on abdication of religious practice); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 719 (1981) (same); *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981) (a law requiring a father to violate religious convictions to obtain public assistance for his daughter had to satisfy strict scrutiny).

The Religious School Ban targets religious students and schools by excluding only those schools "owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. 42.4.802. This not a generally applicable

rule because of its textual emphasis on religious schools. It also violates neutrality by conditioning a benefit on the abandonment of a civil right. There is "no neutrality when the government's ostensible object is to take sides." *McCreary County*, 544 U.S. at 860. The Armstrongs are faced with either forgoing tuition assistance or abandoning their religious belief. They also are forced to choose between accepting a tax credit by donating to a secular education or not having access to the tax credit. ACSI's member schools cannot access a broader pool of students because of their religious status. Accordingly, the Religious School Ban violates the Free Exercise Clause and can only be saved if it is narrowly tailored to serve a compelling governmental interest.

3. The Religious School Ban Violates the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prohibits states from enacting any law that denies "equal protection of the laws." U.S. Const. amend XIV, § 1. On its face, the Religious School Ban violates equal protection because it treats schools eligible to accept students on tuition scholarships differently solely on the basis of religion. *See* Mont. Admin. R. 42.4.802 (prohibiting scholarships awarded to schools "owned or controlled in whole or in part by any church, religious sect, or denomination"). ACSI's member schools are discriminated against because they were accredited by ACSI—a religious organization—and because they are

religiously affiliated. Similarly, the Religious School Ban discriminates against individuals like the Armstrongs on the basis of religion. Because of their religious beliefs and desire to educate their son according to a Christian world view, Armstrong Declaration ¶ 1, the Armstrongs are excluded from accepting a scholarship for their son's private education. Individuals and schools not sharing the Armstrongs' or ASCI's Christian beliefs are free from discrimination, and may enjoy the full benefits of the Scholarship Tax Credit Program.

Courts view religious discrimination with the same hostility as racial discrimination. *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.") (internal quote omitted); *see also Davis v. Abercrombie*, 903 F. Supp. 2d 975, 1005 (D. Haw. 2012) ("[A] classification based on religion is a suspect classification" and must satisfy strict scrutiny.). A law that discriminates based on religion must be "justified by a compelling interest that is narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. When a law discriminates on its face, a court will apply strict scrutiny without examining legislative or regulatory intent. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

Because the Religious School Ban facially classifies and treats differently on the basis of religion, it is unconstitutional unless it satisfies strict scrutiny. It cannot

satisfy this high bar. As explained in more detail below, restricting private money on the basis of religion serves no compelling governmental interest, and the rule is not narrowly tailored because of its overbroad exclusion of schools and private donations.

4. The Religious School Ban Fails Strict Scrutiny

Unless saved by strict scrutiny, the Religious School Ban violates the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In order to satisfy the Constitution, the government must prove that the discriminatory rule furthers a compelling governmental interest, and that it is the least restrictive means of furthering that interest. Both prongs doom the constitutionality of the Religious School Ban.

The Department's sole rationale for the rule is to comport with the Article 10, section 6, and Article 5, section 11, of the Montana Constitution, which together prohibit the public funding of religion. The Department interprets the Montana Constitution to demand stricter church-state separation than the Establishment Clause. Under the Department's understanding of the Montana Constitution, facially neutral programs that incidentally benefit religion are prohibited.

The Religious School Ban does not serve a compelling governmental interest. Even if the Department's understanding of the Montana Constitution were correct, furthering that goal is not sufficiently compelling to permit the state to violate the First and Fourteenth Amendments to the United States Constitution. "[A]chieving greater

separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution [] is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 277-78 (1981). Thus, an interest in church-state separation beyond federal constitutional mandates is not compelling, even where the state's interest is "derived from its own constitution." *Id.*; *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 172 (3d Cir. 2002). And, to be clear, the Establishment Clause does not forbid religious institutions from receiving generally applicable, neutral benefits. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Because the Department's asserted interest for violating Plaintiffs' First and Fourteenth Amendment rights is simply an attempt to create greater church-state separation than that which is required by the Establishment Clause, it is not compelling.

While compliance with the Montana Constitution is the Department's purported interest for the Religious School Ban, there is no evidence that it serves that goal. 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. Mont. Const. art. 10, § 6. But the private donations under the scholarship program are not a "public fund or monies," nor does the Legislature "appropriate" the scholarship money. *Id.* The rule prevents religious schools from receiving *private* dollars. The scholarship program itself refers to donations as "private contributions."

Mont. Code Ann. § 15-30-3101. And, as noted above, both the Supreme Court and state supreme courts agree that private donations permitted under similar tax credit schemes do not constitute state monies. *See, e.g.*, *Winn*, 536 U.S. at 141; *Kotterman*, 972 P.2d at 612-13; *Griffith*, 747 N.E.2d at 426; *Toney*, 744 N.E.2d at 357-58. "Like contributions that lead to charitable tax deductions, contributions yielding [tuition organization] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. [The] contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands . . . . Private bank accounts cannot be equated with the . . . State Treasury." *Winn*, 563 U.S. at 144.

The Department's position that tax credits constitute appropriations of public money jeopardizes pillars of Montana state law. In Montana, "buildings . . . owned by a church and used for actual religious worship" are tax-exempt. Mont. Code Ann. § 15-6-201(1)(b). Like a tax credit, this exemption requires government to forgo revenue, which benefits religious institutions. Montana also offers income tax deductions for charitable contributions to churches. *Id.* § 15-31-114(1)(g)(I) (incorporating 26 U.S.C. § 170(b)(1)(A)(I)). This deduction operates like a tax credit—the government carves out a revenue source in a manner that benefits religion. If the decision to forgo tax revenue constitutes an appropriation of public money, then deductions and exemptions benefitting religions would violate the Montana

Constitution. *See Kotterman*, 972 P.2d at 618. This Court should avoid such a radical interpretation of the Montana Constitution.

Even assuming compliance with the Montana Constitution is a compelling state interest, and also assuming that private donations are tax dollars despite never entering the state coffer, the Religious School Ban would still not further an interest in compliance with the Montana Constitution because the government's role is far too attenuated and insignificant. The private scholarship money reaches religious schools only through the independent choices of students, donors, student scholarship organizations, and schools. "[A] consistent distinction" exists "between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. Where private choices rather than government action direct public money toward religious schools, there is no violation of the Establishment Clause. *Id.*

Many steps of independent choice exist between the tax credit and scholarship dollars reaching religious schools, such that any residue of government action is eliminated. First, the choice of whether to take advantage of the tax credit sits in the hands of private actors—the donors. Next, donors decide which student scholarship organization to donate to, another private choice. Then student scholarship organizations, which are private entities, decide which students to offer scholarships.

Next, the students select the school they wish to attend. Finally, the schools decide whether to accept the student and the scholarship assistance. At least five stages of private choice remove any governmental "sectarian purpose" that could exist by offering the tax credit. The link between government action and funding of religious institutions becomes far too attenuated to constitute even an indirect appropriation to a religious school. *See id.*

Additionally, the Religious School Ban is not narrowly tailored. Government is "constrained in how it may pursue" a compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The government can select only those means "specifically and narrowly framed to accomplish" its asserted purpose. *Id.* The government must fit its goal "so closely that there is little or no possibility" of burdening a constitutional right beyond what is essential to fulfil the compelling interest. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

The Religious School Ban is overinclusive, because it applies to more schools than necessary to protect church-state separation. The rule is not limited to programs that teach or advocate religious doctrines or schools. Rather, the rule bars any school that is "owned or controlled in whole or in part by any church, religious sect, or denomination." Mont. Admin. R. 42.4.802. If a religious institution is a shareholder or on a board at a private school with a wholly secular curriculum, the Religious School Ban prohibits that school from participating in the program.

The Religious School Ban stands in stark contrast to the law upheld in *Locke v. Davey*, 540 U.S. 712 (2004). In *Locke*, students could not use a state-funded scholarship for a devotional theology program. *Id.* at 715. The Supreme Court upheld the law against a Free Exercise challenge. The Court held that the exclusion did not overly burden free exercise because the scholarship went "a long way toward including religion in its benefits" by permitting students to use the scholarship at "pervasively religious schools" with mandatory religion classes. *Id.* at 724. By only excluding a specific religious degree, the scholarship program was narrowly tailored to the interest of preventing taxpayer funding of religion while honoring free exercise interests.

In contrast, the Religious School Ban prohibits much more than a devotional theology degree; it prohibits any religious instruction, and even prohibits secular instruction at religious schools. Worse, the Religious School Ban shuts out those schools that do not require or offer religious instruction if they are even tacitly affiliated with religion. *See* Mont. Admin. R. 42.4.802. This broad exclusion does not satisfy narrow tailoring.

Moreover, assuming that the dollar-for-dollar donation up to the $150 tax credit limit is public money, the Religious School Ban is still not narrowly tailored because it forbids donations that exceed the $150 tax credit limit for use at religious schools. While prospective donors—like Kathy Armstrong and Jerry Armstrong— could

receive a maximum tax credit of $150, they may donate additional dollars to student scholarship organizations. *See id.* Yet the Religious School Ban forbids student scholarship organizations from giving *any* funds to religious schools, even if the donation was not matched by a corresponding tax credit. *See id.*

Donations in excess of $150, however, cannot be an appropriation of public money because there is no additional matching amount of revenue that the state forsook. For example, a donor who gives $200 to a student scholarship organization will earn a $150 tax credit. Under the state's theory, $150 of that donation is an appropriation because the state allowed the taxpayer to divert foregone state revenue. But the state did not forsake any revenue for the additional $50. Those dollars cannot be public even under the Department's theory, yet the rule forbids their use at religious schools. *See id.* The Religious School Ban is therefore not narrowly tailored to achieve its purpose and unnecessarily trammels the constitutional rights of students, schools, and donors.

Because the Religious School Ban does not further a compelling interest and is not narrowly tailored to achieving its asserted goal, it is unconstitutional and Plaintiffs are likely to succeed on their constitutional claims.

5. The Religious School Ban Violates the Montana Administrative Procedure Act

The Religious School Ban contradicts the terms of the Scholarship Tax Credit Program. The Program was created by the Montana Legislature in order to "provide parental and student choice in education with private contributions through tax replacement programs." Mont. Code Ann. § 15-30-3101. The Program does not place any restrictions on the schools which may receive "private contributions," and specifically prohibits scholarship organizations from restricting "scholarships for use at a particular education provider." The Legislature tasked the Department with adopting regulations "necessary to implement and administer" the terms of the Scholarship Tax Credit Program. *Id.* § 15-30-3114. Under that delegated authority, the Department adopted the Religious School Ban. *See* Mont. Admin. R. 42.4.802.

Under the Montana Administrative Procedure Act, a regulation "is not valid or effective unless it is . . . consistent and not in conflict with the statute." Mont. Code Ann. § 2-4-305(6)(a). "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." *Bell v. Dep't of Licensing*, 182 Mont. 21, 22-23 (1979) (quotation marks and citation omitted). Administrative rules stray beyond the agency's delegated authority when they "engraft additional and contradictory requirements on the statute" or add "noncontradictory requirements on the statute

which were not envisioned by the legislature." *Id.* at 23 (quotation marks and citation omitted). Where a rule adds qualifications that have no connection to the statute as written, the rule is invalid. *Id.*

Here, statutory guidelines in the Scholarship Tax Credit Program contradict the Religious School Ban. The statute prevents student scholarship organizations from "restrict[ing] or reserv[ing] scholarships for use at a particular education provider or any particular type of education provider." Mont. Code Ann. § 15-30-3103(b). The Religious School Ban, however, *requires* student scholarship organizations to "restrict" and "reserve" scholarships for schools without religious affiliation. Moreover, the Religious School Ban's extra barrier to obtaining a statutory benefit has no relationship to the statute. A school must meet six statutory requirements to be a "qualified education provider." None relate to religion. The Legislature's total silence regarding the subject matter of the new requirement indicates that the rule deviates from legislative intent.

The Religious School Ban eliminates most private school options the Legislature sought to open up to scholarship. Of the 126 private schools in Montana, 85 are religiously affiliated. Private School Review, *Montana Private Schools*.[2] A rule that excludes over two-thirds of Montana's private schools flouts that objective. The Montana Legislature reaffirmed this in a poll in which a majority in both

[2] *Available at* www.privateschoolreview.com/montana (last visited Jan. 7, 2016).

chambers voted that the rule violated legislative intent. 24 Mont. Admin. Reg. 2348-49. The Department cannot rewrite this school choice statute by removing most of the choices.

B. Plaintiffs Suffer Irreparable Harm from Ongoing Constitutional Violations

A plaintiff seeking preliminary injunction must show likelihood of irreparable injury. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Armstrongs and ACSI have suffered and will continue to suffer irreparable harm because the Religious School Ban violates core constitutional rights. There is a presumption of irreparable harm for First Amendment violations. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003). In the Ninth Circuit irreparable harm is presumed for any constitutional violation. "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) (abrogated on other grounds by *NASA v. Nelson*, 562 U.S. 134 (2011)). Thus, colorable constitutional claims satisfy the irreparable injury requirement. Because Plaintiffs have alleged colorable First and Fourteenth Amendment violations, the Court should presume irreparable injury.

C. The Balance of Hardships Weighs in Plaintiffs' Favor

A plaintiff seeking a preliminary injunction must show that "the balance of equities tip in his favor." *Winter*, 555 U.S. at 20. Here, the Armstrongs and ACSI's member schools will suffer from the stigma of religious discrimination because they have been singled out for unequal treatment by the Montana government. This kind of "stigmatizing injury . . . is one of the most serious consequences of discriminatory government action." *Allen v. Wright*, 468 U.S. 737, 755 (1984).

The constitutional injury alleged here is particularly severe because the Religious School Ban focuses not only on religious choices, but religious status. ACSI's members and other religious schools are not excluded because of what they teach, but because of what they are. Their religious status acts as an impenetrable barrier to accessing a pool of students who cannot afford to attend their school without the scholarship program. The Religious School Ban's targeting of a status exacerbates stigmatic harm and the burden on religious rights.

The Armstrongs face a similar injury. Their eighth grade child is attending Valley Christian School and has another four years of schooling. Armstrong Decl. ¶ 2. The Armstrongs are denied a chance at a meaningful tuition subsidy to help their son attend the school of their choice. They cannot embrace the tuition scholarship without uprooting him from school. The Religious School Ban thus discriminates against them on the basis of their choice to educate their child with a Christian world

view. The constitutional hardship imposed upon religious schools and students is "one of the most serious consequences of discriminatory government action." *Allen*, 468 U.S. at 755.

In contrast, the Department will suffer no hardship if this Court enjoins the Religious School Ban. The rule does not prevent unconstitutional funding of religion or serve any other beneficial purpose. Nor will the state suffer a financial setback. Any loss in public school funding due to transfers to private schools is matched by the diminished cost of per-pupil expenditures and is too speculative to establish hardship. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (speculative injuries are not weighed in determining whether to grant a preliminary injunction); *Duncan v. State*, 102 A.3d 913, 926-27 (N.H. 2014) (holding that fears of lost funding for local school districts due to New Hampshire's scholarship tax-credit program was too speculative to establish taxpayer standing). There is no evidence that substantially more taxpayers will take advantage of the tax credit if religious schools can participate during this litigation. Regardless, any such speculative injury cannot suffice to demonstrate hardship.

D. A Preliminary Injunction Would Serve the Public Interest

A motion for preliminary injunction must show "that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Here, the public has a robust interest in the preservation of First Amendment values, quality education, and the assurance that

public officials act within the bounds of their discretion.

"Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Ct., in and for Cnty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002), *abrogated on other grounds by Winter*, 555 U.S. 7. Moreover, the public has a strong interest in "meticulous compliance with the law by public officials." *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993). This includes an interest in ensuring that agencies act within the bounds of their delegated discretion. *See Bracco Diagnostics v. Shalala*, 963 F. Supp. 20, 30 (D.D.C. 1997).

The First and Fourteenth Amendment issues as well as the issue of agency overreach place a preliminary injunction well within the public's interest. The public has a profound interest in enforcement of the Establishment Clause, because "nothing does a better job of roiling society" than government's involvement in religious matters. *McCreary Cnty.*, 545 U.S. at 876. The targeting of religion for disfavor will only widen civic divides. Moreover, the rule has barred families hoping to send their children to private school from using the scholarship program for most private schools. This barrier to increased choice, particularly in light of the Legislature's clear intent to expand educational opportunities, thwarts the public interest. Mont. Code Ann. § 15-30-3101.

The power of bureaucratic agencies to adopt rules that transform the face of a

law also endangers the public at large. The Department has attempted to usurp legislative authority by striking most of the choices from a school choice law. Regardless of public sentiment about school choice, this trespass into the legislative domain affects the interests of all Montanans in representative government.

By contrast, the public has no real interest in how private individuals spend their charitable dollars. While the public does have an interest in preventing taxpayer support of religion, the Religious School Ban does not further that interest. The public's interest would be best served by issuing a preliminary injunction.

E. The Bond Requirement Should Be Waived or Set at a Nominal Amount

Federal Rule of Civil Procedure 65(c) normally requires a movant for a preliminary injunction to post a bond, but courts may exercise their equitable discretion to waive the bond or set a nominal amount. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). For instance, a district court may demand only a nominal bond where the public interest is strong and "any cost to the government, in the event it is found to have been wrongfully enjoined, would be minimal." *Id.*

As explained above, the public has an abiding interest in the protection of First Amendment liberties and the lawful exercise of bureaucratic discretion. To require a bond "would have the effect of discouraging suits to remedy more flagrant abuses" of these individual rights. *Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis.

1975). The state faces no meaningful costs from a preliminary injunction. No evidence exists that suspending the rule will significantly affect revenue, and since the tax credit would first apply in 2017—when individuals file their taxes for the 2016 fiscal year—any such harm would not accrue until after this litigation has concluded. Because "the amount of any order for bond or security would be based upon gross speculation or conjecture," this Court should waive the requirement or set the bond at a nominal amount. *Id.*

CONCLUSION

Plaintiffs respectfully request that this Court temporarily enjoin the Department of Revenue from enforcing the Religious School Ban.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing memorandum contains 6,397 words, as determined by the word count function of Corel WordPerfect X7.

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