ETHAN W. BLEVINS, Montana State Bar No. 37415893
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: ewb@pacificlegal.org

JOSHUA P. THOMPSON, Cal. State Bar No. 250955*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jthompson@pacificlegal.org

Attorneys for Plaintiffs
*pro hac vice

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 **RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

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INTRODUCTION

In 2015, Montana adopted a scholarship tax credit program (Tax Credit Program). *See* Mont. Code Ann. § 15-30-3101, *et seq.* The program allows taxpayers to claim a tax credit for donations to Student Scholarship Organizations (SSOs). *Id.* § 15-30-3101. SSOs award scholarships to any K-12 student who wants to attend an accredited private school. *Id.* § 15-30-3102(2). SSOs may not discriminate among private schools when offering scholarship assistance to students. *Id.* § 15-30-3103(1)(b).

Before the law could take effect, the Montana Department of Revenue (Department) adopted a rule forbidding students from using these private scholarships at religious schools (Religious School Ban). Mont. Admin. R. 42.4.802. Plaintiffs Kathy Armstrong, Jerry Armstrong, and Association of Christian Schools International (ACSI) filed this lawsuit claiming the Religious School Ban violates their rights under the Establishment and Free Exercise Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Montana Administrative Procedure Act. First Amended Complaint (FAC) ¶¶ 35-67.

The Armstrongs' son attends Valley Christian School, a private religious school in Missoula. *Id.* ¶ 5. Because of the Ban, they cannot receive scholarship assistance unless they forgo educating their son at a religious school. *Id.* ¶ 5, 27. ACSI has ten member schools in Montana. *Id.* ¶ 7. These schools—because of their religious

status—cannot accept students relying on scholarships from the Tax Credit Program. *Id.* ¶ 27.

The Department filed a motion to dismiss Plaintiffs' complaint. It argues that Plaintiffs lack standing to pursue their constitutional claims in federal court. The motion lacks merit. Students and schools are precisely those most directly and adversely affected by the Religious School Ban. The Religious School Ban inflicts unequal treatment on the Armstrongs and ACSI, harms their religious freedom, and stigmatizes them for their religious beliefs. This Court can redress these injuries by declaring the Ban unconstitutional and enjoining its enforcement. The motion to dismiss should be denied.

I

LEGAL FRAMEWORK FOR ARTICLE III STANDING

Article III standing requires that plaintiffs allege an injury traceable to the challenged action and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations and quotation marks omitted). This injury must stem from the conduct complained of and not from the "independent action of some third party not before the court." *Id.* Finally, a favorable decision must be likely to alleviate the harm. *Id.* "At bottom, the gist of standing is whether [plaintiffs] have

such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illustration." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (internal quotation marks omitted).

At the motion to dismiss stage, a complaint's factual allegations enjoy an "assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When a motion to dismiss challenges a plaintiff's standing at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561.

II

THE ARMSTRONGS AND ACSI HAVE ALLEGED CONCRETE INJURIES

The Armstrongs and ACSI have alleged three injuries that satisfy Article III. First, the Religious School Ban subjects the Armstrongs and ACSI to unequal treatment that denies them opportunity and inflicts a competitive disadvantage. *See* FAC ¶ 27. Second, the Ban conditions access to private scholarships on Plaintiffs abandoning their religious practice. *See id.* Third, the Ban stigmatizes Plaintiffs by communicating to the public that their religious beliefs are disfavored by the Montana government. *See id.*

The Department argues that Plaintiffs' injuries are too speculative. *See* Department's Br. in Support of Its Motion To Dismiss Plaintiffs' Complaint at 10-13; Department's Br. in Support of Its Motion To Dismiss Plaintiffs' First Amended Complaint at 2 (incorporating standing argument from original motion to dismiss).[1] The Department is wrong. Plaintiffs' First Amended Complaint alleges injuries that are widely and universally recognized by the federal courts as sufficient to satisfy Article III.

A. The Religious School Ban Treats Plaintiffs Unequally, Stripping Them of Opportunities and Inflicting a Competitive Handicap

The Armstrongs are injured by the Religious School Ban because it strips them of the chance to seek tuition assistance for their son's education at Valley Christian School. The Armstrongs need not apply for aid and face inevitable rejection to satisfy standing. ACSI's member schools suffer an economic disadvantage because students cannot accept a scholarship if they choose to attend one of its schools. These types of injury routinely satisfy standing inquiries in federal court.

Where government discriminates in the allocation of benefits, a member of the disfavored group "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Florida Chapter of the Associated Gen.*

[1] This Court disfavors incorporating substantive argument from prior briefing by reference. *See* Local Rule 7(d)(2)(D). The Department has also failed to contact counsel for Plaintiffs prior to filing the instant Motion to Dismiss as required under Local Rule 7(c)(1).

Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993); *see also Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995). Rather, the denial of equal treatment itself establishes injury, "not the ultimate inability to obtain the benefit." *Ne. Florida Chapter*, 656 U.S. at 666. A plaintiff need not go through the futile process of seeking a benefit for which she does not qualify. *See Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) ("To apply for the waiver would have been futile on Taniguchi's part and, therefore, does not result in a lack of standing."). "All that [is] necessary [is] that the plaintiff wished to be considered." *Id.* at 664.

This principle—that a lost opportunity can give rise to standing without further proof—extends beyond the context of racial discrimination and equal protection. For example, in *Serrato v. Clark*, an inmate challenged the cancellation of an early release program. 486 F.3d 560, 562-63 (9th Cir. 2007). Although the Bureau of Prisons would have had the discretion to deny early release, she still had standing to challenge the legality of the program's termination. *Id.* at 566. She suffered an injury when the Bureau "denied her the ability to be *considered* for a program that would have allowed her to serve only six months in prison." *Id.* (emphasis in original); *see also Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (holding that a lost opportunity was an injury-in-fact).

Organizations or businesses that are denied equal access to government benefits are put at a competitive disadvantage. They need not demonstrate that they will lose

business in the future. *Bras*, 59 F.3d at 873. "Rather, they need only show that they are forced to compete on an unequal basis." *Id.* In *Bras*, government utilities offered 5% bidding preferences to minority- and women-owned businesses. *Id.* A preferred business could win a contract so long as its offer was within 5% of the lowest bid. The inability to compete on the same terms caused concrete injury to firms that did not receive preferential treatment. *Id.* at 875. The plaintiff did not need to show that its bid would have been accepted. When government action "renders a person unable to fairly compete for some benefit, that person has suffered a sufficient 'injury in fact.'" *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (holding that a medical school applicant's inability to compete on an equal basis with minority applicants caused concrete injury).

Rules that aid a plaintiff's competitors cause imminent injury. "[A] plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors." *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010). It is a "basic law of economics" that increased competition causes concrete injury. *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002). A plaintiff facing tougher competition due to a governmental preference to its competitors need not wait until its ledgers demonstrate loss.

1. The Armstrongs Have Alleged Concrete Injury Because the Department's Discriminatory Treatment Has Cut Off the Opportunity to Qualify for a Scholarship

The Armstrongs suffer concrete injury because they wish to be considered for a benefit unavailable to them because of the unequal treatment required by the Religious School Ban. The Armstrongs' son attends Valley Christian School. FAC ¶ 5. The Religious School Ban excludes schools from the program if they are "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." Mont. Admin. R. 42.4.802. Because of Valley Christian's religious status, the Religious School Ban forbids SSOs from offering a scholarship to the Armstrongs' son during his tenure at that school. *See* FAC ¶ 5. Conversely, students attending or seeking to attend a private secular school can qualify for a scholarship.

This discriminatory treatment concretely injures the Armstrongs. The Armstrongs need not prove that their son would receive scholarship funds in the absence of the Ban. Nor do they need to make the empty gesture of applying for aid for which they are categorically ineligible. The Armstrongs must only allege that "they wish to be considered" for a scholarship. *Ne. Florida Chapter*, 656 U.S. at 644. They have done so. FAC ¶ 5. Like the plaintiff's lost opportunity in *Serrato*, the lost opportunity to apply for a scholarship causes harm without the need for further

allegations. The Tax Credit Program, as enacted by the Legislature, would have allowed the Armstrongs to qualify for scholarship assistance at Valley Christian School. The Religious School Ban stripped them of that opportunity. This unequal treatment causes injury sufficient to confer standing under Article III.

2. ACSI Member Schools Suffer Injury Because They Cannot Compete on an Equal Footing with Secular Schools

ACSI's member schools suffer injury-in-fact because it faces a competitive handicap against secular private schools. FAC ¶ 27. The availability of scholarship assistance at private secular schools makes those schools more attractive to prospective students. In effect, the Ban operates as a subsidy to ACSI's schools' competitors. It gives secular schools an edge over their religious counterparts as surely as the 5% bidding preference in *Bras*. *Bras*, 59 F.3d at 873. ACSI does not need to show that its member schools will lose business—" they need only show that they are forced to compete on an unequal basis." *Id.* They have made that showing. FAC ¶ 27.

The economic consequences of the Religious School Ban's preferential treatment of secular schools are imminent and not speculative. The "basic law of economics" that aiding one business hurts its competitors suffices to establish an imminent injury. *New World Radio, Inc.*, 294 F.3d at 172.

B. The Armstrongs and ACSI Have Standing to Raise a Free Exercise Claim Because the Department Has Burdened Their Religious Beliefs

The Religious School Ban infringes on religious freedom by conditioning a benefit on the abandonment of a religious practice. Parents have standing to challenge laws regarding religion that impair their children's education. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 (1963) ("The parties here are . . . parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain."). The Armstrongs have alleged that the Religious School Ban infringes upon their religious right to educate their son at Valley Christian School. FAC ¶ 5, 27. The Ban thus imposes imminent injury upon the Armstrongs' Free Exercise rights.

Plaintiffs have standing to assert a Free Exercise challenge when "they claim infringement of their personal religious freedom." *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1531 (9th Cir. 1985); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 292 n.25 (5th Cir. 2001); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 71 (2d Cir. 2001); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 684 (7th Cir. 1994). Parents enjoy the freedom "to control the religious upbringing and training of their minor children." *Grove*, 753 F.2d at 1531. Any burden imposed upon that freedom, however minor, constitutes an injury-in-fact. *See Schempp*, 374

U.S. at 225. "[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Id.*

A future injury to religious freedom satisfies standing if the injury is imminent. "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The imminence requirement looks to whether there is "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The purpose of this temporal aspect of standing is "to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564. Future injury becomes too speculative to support standing when it is attached to a "highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). If an injury depends on mere guesswork regarding the choices of decisionmakers who are free to do as they please, then the injury is not imminent. *Id.* at 1141, 1154.

1. The Religious School Ban Injures the Armstrongs by Burdening Their Religious Freedom to Educate Their Son at a Religious School

The Armstrongs are injured because the Religious School Ban infringes upon their "personal religious freedom" to "control the religious upbringing and training" of their son. *Grove*, 753 F.2d at 1531. The Armstrongs must either abandon their

religious choice to educate their son at Valley Christian School or abandon tuition assistance offered through the Tax Credit Program. The Department has dismissed the burden of this unconstitutional condition as minimal, but "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Schempp*, 374 U.S. at 225.

The Armstrongs face "certainly impending" harm because the distance between the Department's rule and the Armstrong's injury is not bridged by "a highly attenuated chain of possibilities." *Clapper*, 133 S. Ct. at 1148. The Religious School Ban removes discretion from SSOs, ensuring that they cannot send funds to help the Armstrongs if they persist in their religious convictions. There is no causal link that needs to be established here; all events have occurred. The government already approved an SSO, and taxpayers have donated to it. FAC ¶ 13. As discussed above, the Armstrongs need not file a futile scholarship application. *See supra* Part I.A. Thus, the injury here does not depend on speculation regarding future choices. There is no risk "of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564. The Armstrongs' injury to their personal religious freedom is certain.

2. The Religious School Ban Injures ACSI and Its Member Schools by Infringing Upon Their Status as Religious Institutions

The unconstitutional condition imposed on students—requiring that they abandon their religion in order to access a benefit—applies to ACSI's member schools

as well. If member schools want students to obtain financial help and admit prospective students who plan to use scholarship assistance, the member schools would have to abandon their religious mission. *See* Mont. Admin. R. 42.4.802; FAC ¶¶ 7, 27.

C. The Religious School Ban Inflicts Stigmatic Injury

The stigmatic harm caused by the Religious School Ban is sufficient for Plaintiffs' standing under Article III. The Religious School Ban denies financial help to students who choose a religious school. This exclusion and denigration of the religious practices of students and schools is a stigmatic injury that federal courts can redress.

Stigma inflicts grave injury. "There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Allen v. Wright*, 468 U.S. 737, 755 (1984). One such circumstance arose in *Heckler v. Mathews*, 465 U.S. 728 (1984). There, a federal law offered better pension benefits to women than men. *See id.* at 733-34. Because of a peculiarity in the law, the plaintiff, a male retiree, could not receive any economic benefit from his equal protection claim even if successful. *Id.* at 734. Nonetheless, the Supreme Court upheld the plaintiff's standing. "[D]iscrimination itself," the Court declared, "by stigmatizing members of the disfavored group as . . . less worthy participants in the

political community can cause serious non-economic injuries to those persons who are personally denied equal treatment." *Id.* at 739-40.

Stigmatic injury also supports standing under the Establishment Clause. An Establishment Clause injury occurs when government makes "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); *see also Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (adopting Justice O'Connor's reasoning in *Lynch*); *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049, 1052-53 (9th Cir. 2010) (applying Justice O'Connor's *Lynch* concurrence to standing). As with gender discrimination in *Heckler*, disapproval of religion sends the message that believers "are outsiders, not full members of the political community." *Lynch*, 465 U.S. at 687.

Indeed, even a government statement that disfavors religion causes stigmatic injury that gives rise Article III standing. In *Catholic League*, the Ninth Circuit, sitting en banc, held that stigmatic injury supported standing for Catholic League, a religious advocacy group, challenging a non-binding resolution of the San Francisco City Council. 624 F.3d at 1051-53. The controversy arose when Catholic leadership told church adoption agencies to refrain from placing children with same-sex couples. *Id.* at 1047. The City Council published a resolution denouncing the Catholic Church

and the Cardinal who issued the policy. *Id.* Catholic League had standing because of the stigma caused by the resolution. *Id.* at 1053.

Standing can arise in the Establishment Clause context even if nothing "but the religious or irreligious sentiments of the plaintiffs" suffer harm. *Catholic League*, 624 F.3d at 1050. This harm to religious sentiment is not a mere "psychological consequence" caused by "observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Protestants in Pasadena, for instance, would not have standing due to the mere offense caused by reading San Francisco's anti-Catholic proclamation. *Catholic League*, 624 F.3d at 1051-52. Catholics in San Francisco, though, faced a different kind of psychological harm entirely—they were "directly stigmatized" by "exclusion or denigration on a religious basis within the political community." *Catholic League*, 624 F.3d at 1052; *see also O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005) ("In the context of alleged violations of the Establishment Clause . . . 'standing is clearly conferred by non-economic religious values.'") (quoting *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973).

Catholic League is not limited to government speech. It applies to the enactment of laws or regulations. For example, in *Awad v. Ziriax*, 670 F.3d 1111, 1116 (10th Cir. 2012), Oklahoma voters approved an amendment to the state

constitution that would bar state courts from applying Islamic law. However, the amendment would not become binding until after certification by an election board. *Awad*, 670 F.3d at 1117. A Muslim plaintiff sued to enjoin certification under the Establishment Clause. *Id.* at 1119. The Court concluded that Mr. Awad had standing to challenge this "directive of exclusion and disfavored treatment" because it stigmatized him and his religion. *Id.* at 1123.

Plaintiffs alleging First Amendment claims can challenge a law before it comes into effect. In *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), booksellers raised a First Amendment challenge before a law restricting the display of pornographic materials came into effect. *Id.* at 386, 392. The Supreme Court upheld their standing. "The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." *Id.* at 393. The Court noted that the risk of self-censorship alleged by the plaintiffs was "a harm that can be realized even without [enforcement]." *Id. Awad* presented a similar situation—Awad could sue before the amendment became effective because the injury it caused was not predicated on active prosecution. *See Awad*, 670 F.3d at 1117. Thus, a law's effective date does not bar standing where the harm does not depend on enforcement.

1. The Religious School Ban Stigmatizes the Armstrongs on the Basis of Their Religious Decisions Regarding Education

The Armstrongs have suffered the kind of stigmatic injury that granted standing to plaintiffs in *Heckler*, *Catholic League*, and *Awad*. The Religious School Ban shuts out students on the basis of religion. Like in *Heckler*, this disparate treatment of religious students and institutions "stigmatiz[es] members of the disfavored group as . . . less worthy participants in the political community." *Heckler*, 465 U.S. at 1390-91. The Religious School Ban's cramped definition of eligible schools causes "exclusion [and] denigration on a religious basis within the political community." *Catholic League*, 624 F.3d at 1052. The Armstrongs are not just concerned bystanders; they are "directly stigmatized" because the law targets and disfavors their religious practice. *Id.*

The Armstrongs do not have to wait for the Tax Credit Program to go into effect to establish standing. The stigmatic harm here "is realized without [enforcement]." *Am. Booksellers*, 484 U.S. at 393. In fact, as with *Awad*, the injury here was not just imminent prior to the law's effective date—it occurred as soon as the Department declared that religious school students would be barred from the Tax Credit Program.

2. The Religious School Ban Stigmatizes ACSI and Its Member Schools by Excluding Them from the Tax Credit Program Because of Their Religious Status

All of ACSI's member schools are subject to the Religious School Ban because they are religious schools. FAC ¶ 7. The schools face exclusion and denigration because the Ban expressly forbids their involvement in the Tax Credit Program on the basis of their religious status. FAC ¶ 27. If anything, the stigma is more severe than with students and their families. While the Ban disfavors a religious choice made regarding how parents educate their children, the Ban disfavors the religious *status* of the member schools and ACSI themselves. By striking at a core characteristic of the schools and ACSI as an accrediting institution, the Ban inflicts an even harsher stigmatic injury on ACSI and its members.

III

THE INJURIES SUFFERED BY THE PLAINTIFFS ARE DIRECTLY CAUSED BY THE RELIGIOUS SCHOOL BAN

To satisfy standing, plaintiffs' injuries must be traceable to the challenged rule rather than the "independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. Losses due to unequal treatment, infringement on personal religious freedoms, and stigma all stem from the Religious School Ban. The unequal footing occasioned by the Ban does not depend on a third party's choices, and the Armstrongs need not apply for a benefit that their son cannot receive. *See supra* Part I.A. The

infringement on key parental religious freedoms regarding the upbringing of children also flows directly from the Ban without intervening action. And the stigma caused by the Religious School Ban can have no other source than the Ban itself.

The unequal treatment is traceable to the Religious School Ban even though the Armstrongs could choose a secular school and qualify for scholarship assistance. The Ninth Circuit has repeatedly held that a plaintiff suffers a concrete injury even if she can change her conduct to avoid the harm. For example, in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), a plaintiff brought an Establishment Clause claim seeking removal of a cross on a public preserve. *Id.* at 544-46. Although he only visited the preserve occasionally and could avoid the cross by taking a different route, he had standing because the cross inhibited his ability to "unreservedly use public land." *Id.* at 546-47. The fact that he could modify his conduct to avoid injury did not spoil his standing. *Id.*; *see also Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 850 (7th Cir. 1999) (holding that the ability of plaintiffs to avoid harm from unequal retirement benefits by retiring early did not vitiate standing).

The Armstrongs are not required to forgo their religious conviction and parental choice by applying for a scholarship to a secular school before challenging whether they may use the scholarship at a religious school. As in *Buono*, the restriction on the freedom of choice, the power to choose their son's educational path, causes injury regardless of whether other avenues are available.

IV

A FAVORABLE DECISION WILL REDRESS PLAINTIFFS' INJURIES

The third pillar of standing is redressability. "It must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Plaintiffs seek a declaratory judgment invalidating the Religious School Ban and an injunction against its enforcement. *See* FAC ¶¶ 26-34. Both remedies would remove the stigmatic impact of the Religious School Ban, restore equal treatment of religious students and schools, and lift the burdens imposed on Plaintiffs' religious practices. The injuries here are redressable by this Court, and Plaintiffs have standing.

V

ACSI HAS ASSOCIATIONAL STANDING

ACSI has associational standing to sue on behalf of its member schools. An association has standing if: (1) the members would have standing to sue independently; (2) the association seeks to protect interests germane to its purpose; and (3) neither the claims nor the relief require members' individual participation. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). ACSI satisfies this test. The independent standing of ACSI's member schools has been addressed at

length above. *See supra* Part I. ACSI also satisfies the second and third elements of *Hunt*.

This litigation is germane to ACSI's mission. "[C]ourts have generally found the germaneness test to be undemanding." *Presidio Golf Club v. NPS*, 155 F.3d 1153, 1159 (9th Cir. 1998). Germaneness asks only for "mere pertinence" between the litigation's subject matter and the organization's purpose. *Bldg. & Constr. Trades Council of Buffalo, NY & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006). ACSI is a religious association that exists to support Christian schools. FAC ¶ 7. It offers an array of services to the students, teachers, and administrators of these schools. *See id.* Combating religious discrimination against religious schools and students is germane to ACSI's mission of helping Protestant schools further their educational and spiritual pursuits.

Individual members need not participate to effectuate the claims and remedies in this case. Individual participation of members is not needed when "the relief sought will run equally to all of them." *Defenders of Wildlife v. USEPA*, 420 F.3d 946, 958 (9th Cir. 2005) (reversed on other grounds by *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)). The declaratory and injunctive relief pursued here will benefit all of ACSI's members equally. ACSI satisfies all requirements for associational standing.

VI

THE DEPARTMENT CANNOT RELY ON PLAINTIFFS' ABANDONED COMPLAINT TO MAKE UNWARRANTED INFERENCES REGARDING ACSI'S ASSOCIATIONAL STANDING

The Department points to a difference between the original and amended complaint to argue that ACSI has abandoned its claim to associational standing. *See* Department's Motion to Dismiss the First Amended Complaint at 3-4. This contention improperly relies on the original complaint and ignores basic rules of pleading.

The amended complaint removed two sentences from paragraph seven of the original complaint. Those sentences amounted to a legal conclusion that ACSI has associational standing to sue on its members' behalf under *Hunt*, 432 U.S. 333. The amended complaint, however, still contains *allegations* that ACSI represents the interests of religious schools in the state of Montana in improving educational quality and commitment to their religious missions. *See* FAC ¶ 7. It also alleges that member schools are injured by the Ban. *See* FAC ¶¶ 27, 34.[2]

The amended complaint supersedes the original complaint, which should be treated as non-existent. *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011).

[2] The primary purpose of the First Amended Complaint was to add an allegation that a Student Scholarship Organization has been approved and has received donations since the filing of the Original Complaint. *See* FAC ¶ 13.

Yet the Department hopes to revive the original complaint to draw the unfounded inference that ACSI has conceded that it lacks standing to sue on behalf of its members. This Court cannot divine ACSI's litigation strategy through speculative comparisons of the original and amended complaints.

Regardless, legal conclusions lack the pleading power of factual allegations. Courts reviewing a motion to dismiss need not accept a legal conclusion as true. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The legal conclusion in the original complaint that ACSI has associational standing to sue on its members' behalf has no bearing on whether the First Amended Complaint's allegations establish ACSI's standing. The First Amended Complaint's removal of this allegation only brings the complaint into greater compliance with pleading standards. ACSI need only offer up factual allegations to support associational standing. As discussed above, it has done so.

CONCLUSION

The Religious School Ban has inflicted many injuries on Plaintiffs. The Ban strips the Armstrongs of the opportunity to seek scholarship aid, stigmatizes the Armstrongs and ACSI, and burdens their religious exercise. It also forces ACSI's member schools to compete on an unequal footing with secular private schools. These

injuries are caused by the Ban and can be redressed by this Court. Plaintiffs have a personal stake in the outcome of this litigation and satisfy the requirements of Article III.

DATED: March 25, 2016.

Respectfully submitted,

ETHAN W. BLEVINS
JOSHUA P. THOMPSON*
Pacific Legal Foundation

By /s/ Ethan W. Blevins
ETHAN W. BLEVINS
Montana State Bar No. 37415893

By /s/ Joshua P. Thompson
JOSHUA P. THOMPSON*
Cal. State Bar No. 250955

Attorneys for Plaintiffs
*pro hac vice

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing RESPONSE IN OPPOSITION TO MOTION TO DISMISS contains 5,048 words, as determined by the word count function of Corel WordPerfect X7.

DATED: March 25, 2016.

/s/ Ethan W. Blevins
ETHAN W. BLEVINS

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 25th day of March, 2016, by filing with the CM/ECF system that sends notice electronically to:

DANIEL WHYTE
dwhyte@mt.gov;
tiacorwin@mt.gov

/s/ Ethan W. Blevins
ETHAN W. BLEVINS