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ATTORNEYS FOR PLAINTIFFS

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER, Plaintiffs, v. MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE, Defendants.	No. _____ Judge _____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The Montana Legislature has decided that all parents should have the opportunity to choose their children's schools, regardless of the size of their bank account. So it followed the lead of 27 other states and the District of Columbia and passed a school choice program in May 2015. Montana's program provides a modest tax credit, of up to $150 annually, to individuals and businesses who donate to private scholarship organizations. Those scholarship organizations will then use the donations to give scholarships to families who want to send their children to private schools. The program, as passed by the Legislature, allows all private schools to participate, regardless of whether they are secular or religious.

2. The program could be a boon both for families who cannot afford to send their children to the school of their choice and for families who make tremendous financial sacrifices in order to do so.

3. The problem is that the State Department of Revenue has just adopted a rule that denies choice to the overwhelming majority of eligible families under the program, including Plaintiffs. The new rule limits program scholarships to only those who wish to attend nonreligious private schools and excludes those who wish to attend religious private schools. As most of the private schools in the state are religious, the rule virtually guarantees the program's failure.

4. The rule is invalid. First, it exceeds the Department of Revenue's authority by contradicting the clear intent of the Legislature to make scholarships available for students to attend all private schools, not just secular ones. The Department of Revenue ("the Department") argues the rule is required by the Montana Constitution's prohibition on the State granting funds to religious entities in Article V, Section 11(5) and Article X, Section 6(1). These provisions, however, do not apply to the program as the case law is unanimous that tax credits do not

constitute appropriations or payments of public funds. Moreover, the scholarships are awarded to families, not schools.

5. In fact, both the Montana and federal Constitutions' Religion and Equal Protection Clauses forbid the Department's rule because it discriminates against religion. Even the State's own Attorney General's Office submitted comments to the Department urging it not to adopt the rule because it "would not be defensible" in court and because there is a "substantial likelihood that [the rule] would be declared unconstitutional."

6. Accordingly, Plaintiffs respectfully request that this Court strike the rule down.

JURISDICTION AND VENUE

7. Plaintiffs are all parents who seek relief against the new rule adopted by the Department that states that only children attending nonreligious private schools—not religious private schools—are eligible for scholarships under Montana's new Tax Credits for Contributions to Student Scholarship Organizations program ("scholarship tax-credit program," or "program"), passed as part of Senate Bill 410. (Attached as Exhibit 1).

8. Plaintiffs bring several challenges to this rule. Plaintiffs challenge the rule as ultra vires under section 2-4-305(6)(a), MCA, of the Montana Administrative Procedure Act. Plaintiffs also challenge the rule as unconstitutional in violation of the Montana Constitution's Freedom of Religion provision, at Article II, section 5; the Montana Constitution's Equal Protection Clause, at Article II, section 4; and the U.S. Constitution's First and Fourteenth Amendments, through the Civil Rights Act of 1871, 42 U.S.C. § 1983.

9. Plaintiffs request declaratory and injunctive relief under sections 27-8-201, 27-19-201, & 27-19-101 *et seq.*, MCA.

10. Plaintiffs also seek one dollar in nominal damages.

11. This Court has jurisdiction under section 3-5-302, MCA.

12. Venue is proper in this Court pursuant to section 25-2-126, MCA, because all of the Plaintiffs live in Flathead County.

THE PARTIES

13. Plaintiffs are Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer.

14. Plaintiff Kendra Espinoza is a resident of Flathead County. Kendra's husband unexpectedly left her and her two daughters, Naomi and Sarah, and Kendra now struggles to pay their tuition at Stillwater Christian School.

15. Plaintiff Jeri Ellen Anderson is a resident of Flathead County. She is a single mom who struggles to pay the tuition to send her academically gifted daughter, Emma, to Stillwater Christian School.

16. Plaintiff Jaime Schaefer is a resident of Flathead County. Jaime and her husband struggle to send their son and daughter, Jake and Ellie, to Stillwater Christian School.

17. Defendant Montana Department of Revenue is a governmental department of the State of Montana. Section 17 of SB 410 charges the Department with "adopt[ing] rules, prepar[ing] forms, and maintain[ing] records that are necessary to implement and administer" the scholarship tax-credit program.

18. Defendant Mike Kadas is the Director of the Montana Department of Revenue. Pursuant to sections 2-15-1301–1302, MCA, the Director has the responsibility and practical ability to ensure that the rules and policies adopted by the Department are enforced and implemented in accordance with the laws and Constitutions of Montana and the United States. Mr. Kadas is sued in his official capacity.

STATEMENT OF FACTS

MONTANA'S SCHOLARSHIP TAX-CREDIT PROGRAM

19. On May 8, 2015, the Montana Legislature passed the scholarship tax-credit program as part of SB 410.

20. The purpose of the program is to "provide parental and student choice in education." SB 410, § 7.

Private Scholarship Organizations

21. The program encourages private scholarship organizations ("SOs") to form and register with the Department. SOs must also be tax-exempt organizations under section 501(c)(3) of the federal Internal Revenue Code. SB 410, § 8(9)(a).

22. SOs fundraise for donations, which they must distribute as scholarships to families who wish to start sending their children to private schools or who have children currently attending private schools. *Id.* at § 9.

23. SOs must allow the scholarship recipients to use their scholarship at any private school. *Id.* at §§ 8 (9)(b)-(c), 9(1)(b).

24. Students eligible for program scholarships must be Montana residents who are at least 5 years old and not older than 18 years old by September 10 of the school year that they wish to use the scholarship. *Id.* at § 8(2).

25. SOs are free to consider a family's financial need in selecting scholarship recipients.

26. SOs cannot give any scholarship that exceeds 50 percent of the average amount that the State spends to send children to public schools (the "per-pupil average of total public school expenditures"), nor can any scholarship recipient accept two or more scholarships that

total more than 50 percent of this figure. *Id.* at §§ 9(1)(d), 10(2); *see also id.* at § 22. In addition, the average scholarship amount that an SO grants cannot exceed 30 percent of this figure. *Id.* at § 9(1)(e).

27. According to the Montana Office of Public Instruction, the per-pupil average of total public school expenditures in Montana for fiscal year 2013 was $10,418.

28. SOs must give at least 90 percent of their funds as scholarships, keeping at most 10 percent for administrative expenses. *Id.* at § 8(9)(b).

29. Each SO must undergo an annual fiscal review of its accounts by an independent certified public accountant and submit the fiscal review report to the Department. *Id.* at § 11(1)(b)-(c).

30. The Department has the power to inspect the documents of any SO and terminate the SO if it fails to operate in compliance with the program. *Id.* at § 16.

Program Tax Credits

31. Individuals and corporations who donate at least $150 to an SO can receive a maximum $150 tax credit against their annual state income tax. *Id.* at § 14(1). Donors are, of course, free to donate more than $150 to an SO, but they cannot receive a tax credit for more than $150 a year.

32. A donor also cannot receive a tax credit that exceeds the donor's income tax liability for that year, and the credit must be applied in the year the donation is made. *Id.* at § 14(3)-(4).

33. Donors may not direct or designate their donations to a parent, legal guardian, child, or school. *Id.* at § 14(1).

34. The maximum aggregate amount of annual tax credits allowed for the program is $3 million, beginning in tax year 2016. *Id.* at § 14(5)(a)(i). Every year the maximum is met, the maximum amount will increase by 10 percent for the next year. *Id.* at § 14(5)(a)(ii).

35. The Department must approve the tax credits for taxpayers on a first-come, first-served basis. *Id.* at § 14(5)(b).

36. Donors cannot receive a tax credit for any amount that they deducted on their state taxes as a charitable-contribution to a 501(c)(3) organization. *Id.* at § 14(6).

37. The program goes into effect on January 1, 2016. *Id.* at § 31.

Qualified Education Providers

38. Scholarship recipients can use their scholarships at "any qualified education provider." *Id.* at §§ 8(9)(b)-(c), 9(1)(b).

39. Section 8(7) of SB 410 defines a "qualified education provider" very broadly to allow virtually all private schools to participate in the program, whether religious or nonreligious.

40. Specifically, section 8(7) defines a "qualified education provider" as an education provider that:

a. is not a public school;

b. (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or

(ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;

c. is not a home school as referred to in 20-5-102(2)(e);

d. administers a nationally recognized standardized assessment test or criterion-referenced test and:

(i) makes the results available to the child's parents or legal guardian; and

(ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;

e. satisfies the health and safety requirements prescribed by law for private schools in this state; and

f. qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

41. The legislative history of SB 410 and a recent poll of the Legislature confirm that the Legislature intended that qualified education providers under the program include both religious and nonreligious private schools.

THE DEPARTMENT OF REVENUE'S RULE 1

42. In October 2015, the Department issued a notice of public hearing on the proposed adoption of three rules related to the program. (Attached as Exhibit 2). One of these rules was proposed "Rule 1," which provided a new definition of "qualified education provider," different from the definition provided by SB 410.

43. Rule 1 states:

(1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, 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.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

44. The Department's notice states that the proposed Rule 1 is implementing "Montana Constitution, Art. V, Section 11[;] Montana Constitution, Art. X [,] Section 6;" and "15-30-3101, MCA."

45. Article V, Section 11(5) of the Montana Constitution states, "[n]o appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state."

46. Article X, Section 6(1) of the Montana Constitution states, "[t]he legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."

47. The Department's notice opined that these two constitutional provisions prohibit "the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose."

48. Section 15-30-3101, MCA is a provision in SB 410 that says the program "must be administered in compliance" with these two provisions of the Montana Constitution.

The Hearing on Proposed Rule 1 and the Rule's Adoption

49. On November 5, 2015, the Department held a hearing of the proposed Rule 1. Several people testified against Rule 1.

50. One of the Rule 1 opponents at the hearing was SB 410's sponsor, Senator Llew Jones. Senator Jones testified that it was always his intent, and the intent of the Legislature, to include both religious and nonreligious schools in the program.

51. An attorney for the Institute for Justice also testified against Rule 1. The Institute for Justice testified that the rule exceeded the Department's authority because it conflicted with the purpose and text of the program.

52. The Institute for Justice also testified that Rule 1 was not required by the Montana Constitution because the program does not grant public funds to religious entities, but instead grants tax credits to donors for student scholarships.

53. The Institute for Justice also testified that the rule violates the U.S. Constitution by discriminating against religion.

54. As the Institute for Justice additionally testified, if the Department is correctly interpreting Article X, Section 6(1) of the Montana Constitution to bar the program, this provision would violate the U.S. Constitution. That is because the historical evidence shows that this provision (also known as Montana's Blaine Amendment) was included in the Montana Constitution in 1889 to discriminate against Catholics, and it would now be used to discriminate against all religions. Discriminatory state constitutional provisions are invalid under the federal Constitution.

55. Additionally, the State Attorney General's Office, through Solicitor General Dale Schowengerdt, submitted lengthy written comments to the Department urging it not to adopt the rule. These comments stated "that Rule 1 is neither authorized nor required by the Montana Constitution." The comments additionally said that the rule "would not be defensible" in court, and that there is a "substantial likelihood that Rule 1 would be held unconstitutional" under the

federal Constitution "because it categorically excludes religious entities from an otherwise neutral benefits program without sufficient reason." (Attached as Exhibit 3).

56. Eric Feaver, President of the Montana Education Association-Montana Federation of Teachers (MEA-MFT) testified in support of the rule.

57. After the hearing, and pursuant to Section 2-4-403, MCA, a poll was taken of the Legislature regarding Rule 1, and majorities in both houses voted that Rule 1 was inconsistent with SB 410. (Attached as Exhibit 4).

58. Despite the testimony opposing Rule 1 and the legislative poll showing that the rule defied the will of the Legislature, the Department adopted the rule and sent the adoption notice to the Montana Secretary of State on December 14, 2015.

59. The rule is expected to be published by the end of December 2015.

THE PLAINTIFF PARENTS

60. Rule 1 harms many families by preventing them from using program scholarships to send their children to the school of their choice—simply because the school of their choice is a religious private school. Families harmed by Rule 1 include those who currently cannot afford to send their children to such schools, as well as families who are seriously struggling to keep their children in such schools. Three parents who are harmed by Rule 1 are the Plaintiffs.

PLAINTIFF KENDRA ESPINOZA

61. Kendra is a single mother raising her two daughters, Naomi and Sarah. Naomi is 10 years old and in the 4th grade, and Sarah is 7 years old and in the 2nd grade.

62. Before her husband unexpectedly left, Kendra homeschooled her daughters. But after he left, their house went into foreclosure, and Kendra had to get a job as a bookkeeper and put Naomi and Sarah in public school.

63. Kendra was not happy with her daughters' public school. When Naomi started a daily Bible study for her friends that took place during recess, she was repeatedly bullied by other students and called a "goody two shoes." In addition, Sarah was easily distracted and was struggling academically.

64. Kendra was also concerned about her daughters' peers in public school. Many of the students seemed to have parents with drug addiction. In addition, other students often used inappropriate language around her young girls.

65. When Kendra first toured Stillwater Christian School, she had to hold back tears; she desperately wanted to send her children there, but knew she could not afford the tuition on her salary.

66. Kendra started working to raise tuition funds. For example, she raffled off handmade quilts and held two yard sales. She also got part-time work cleaning houses.

67. Naomi insisted on helping raise tuition funds by getting a job mowing lawns.

68. This fundraising and the extra jobs, combined with generous financial aid from Stillwater, allowed Kendra enough funds to start sending her children to Stillwater Christian School. Kendra volunteers at the school in return for the financial aid.

69. Now both children are thriving at Stillwater. Kendra loves that the teachers are so warm to her daughters and to the other students. Every morning, for instance, all the teachers stand in their classroom doorways and welcome in the children. Kendra also never worries about her daughters being bullied at Stillwater.

70. An additional reason Kendra chose Stillwater is because she is a Christian and she loves that the school teaches the same Christian values that she teaches at home.

71. It gives Kendra great peace of mind to know that her children are happy at Stillwater.

72. But it is still a real financial struggle for Kendra to pay the remaining tuition every month. Kendra often worries that she will not have enough money to make the payments. She is especially concerned about the tuition increase at Stillwater when Naomi reaches high school.

73. Kendra works very hard, and she cannot remember the last time she took a vacation.

74. It would be a tremendous financial and psychological relief for Kendra if her children were to receive scholarships under the scholarship tax-credit program to help pay Stillwater's tuition.

75. Kendra's girls are eligible to receive scholarships under the program.

76. Stillwater Christian School is a qualified education provider under the program.

77. Because of the Department's Rule 1, Kendra and her girls could not use the scholarships at the school of their choice, Stillwater Christian School—simply because Stillwater is a religious school.

78. Kendra is only aware of one nonreligious private school near her, Kalispell Montessori School, which only serves grades 1st to 8th. Kendra does not wish to send her daughters to this school because it does not teach Christian values, and moreover, she could not send her daughters to high school there. Kendra instead wishes to use program scholarships to continue sending her daughters to Stillwater until they graduate high school.

79. But for Rule 1, Kendra would apply for program scholarships for both of her daughters as soon as an SO begins accepting scholarship applications.

PLAINTIFF JERI ELLEN ANDERSON

80. Jeri Ellen ("Jeri") is a single mother raising her 8-year-old daughter, Emma. Emma is in the second grade at Stillwater Christian School.

81. Jeri adopted Emma from China when she was 9 months old. The entire process took 27 months.

82. Emma is academically gifted and loves to learn.

83. Jeri went to public schools all her life, and there are public school teachers in her family. But Jeri is not satisfied with her local public schools because, in talking to her friends and their children using the public schools, she concluded that the public schools are not academically challenging enough for Emma.

84. When Jeri learned about Stillwater, she knew she had to send Emma there.

85. Jeri made the decision to send Emma to Stillwater when she had just been laid off from her job at an insurance company. Jeri got a new job at another insurance company, but she now makes $6 dollars less an hour. Nevertheless, Jeri was determined to pay Stillwater's tuition however she could.

86. Jeri is a Christian and appreciates that Stillwater teaches religious values. That was one of the reasons that Jeri chose Stillwater for Emma.

87. Jeri's primary reason for choosing Stillwater is the rigorous academic education that it provides.

88. Emma's teachers at Stillwater carefully guide her learning and frequently refer her to books in the school library so Emma can learn more about topics that interest her. Emma soaks it all up like a sponge.

89. When Emma was learning about how to build houses at school, she told her mom that Stillwater is "like my foundation. I'm going to just keep growing."

90. Jeri also really appreciates Stillwater's open door policy that allows her to pop into Emma's classrooms at any time. This was especially helpful when Emma was initially struggling with separation anxiety.

91. Stillwater has become like Emma's second home, and she loves it there.

92. Jeri is fortunate enough to receive some financial aid from Stillwater, and in return, she volunteers for Stillwater's high school drama production. Jeri's sister also helps complete Jeri's required volunteer hours by helping judge Stillwater's science fairs.

93. Jeri works very hard and budgets very carefully.

94. Yet, paying the remaining tuition every month is still a serious struggle for Jeri. She worries about it constantly. Jeri prays that she will be able to keep Emma at Stillwater.

95. It would be a tremendous financial and psychological relief for Jeri if Emma were to receive a program scholarship to help pay her tuition.

96. Emma is eligible to receive a scholarship under the program.

97. Because of the Department's new Rule 1, Jeri and Emma could not use the scholarship to attend the school of their choice, Stillwater Christian School—simply because Stillwater is a religious school.

98. Jeri is only aware of one nonreligious private school near her, Kalispell Montessori School. Jeri did not wish to send Emma to this school because it only goes to the 8th grade. Jeri instead wishes to use program scholarships to continue sending her daughter to Stillwater through 12th grade.

99. If not for Rule 1, Jeri would apply for a program scholarship for Emma to attend Stillwater as soon as an SO begins accepting applications.

PLAINTIFF JAIME SCHAEFER

100. Jaime and her husband have two children: Ellie is 12 and in 7th grade, and Jake is 9 and in 4th grade.

101. At first, Jaime had Ellie in public school. But she was disappointed in the academic expectations there. For instance, Ellie already knew how to read in kindergarten, but her class was still learning the alphabet.

102. So Jaime began homeschooling Ellie, and then did the same for her son. After a few years, Jaime felt her children were ready for a more competitive environment and she wanted to put them back into school. She began researching her options, and liked what she learned about Stillwater Christian School.

103. So Jaime got a job as an accountant to help pay tuition. Fortunately, the family also receives some financial aid from Stillwater for both children.

104. Jaime's children are thriving at Stillwater. Jaime is impressed that they are already learning speech and debate and that they can participate in Stillwater's well-developed music program. Jaime especially likes that her children's classmates are from likeminded families that teach similar values.

105. Jaime is a Christian and loves that the school teaches the same Christian values that she teaches at home. That was an important reason that Jaime chose Stillwater for her children.

106. Jaime is very involved at Stillwater. She coached the volleyball team and also volunteers 30 hours a year there, including by helping in the classrooms, chaperoning field trips, making bulletin boards, and helping fundraise.

107. But paying tuition every month is a huge struggle for her family. It is like a second mortgage payment. It is a year-by-year decision whether the Schaefers can keep their children at Stillwater.

108. It would be a significant financial and psychological relief to the family if they were to receive program scholarships for their children to continue sending them to Stillwater.

109. Jaime's two children are eligible for scholarships under the program.

110. Because of the Department's new Rule 1, Jaime could not use the scholarships at the school of her choice, Stillwater Christian School—simply because Stillwater is a religious school.

111. Jaime is only aware of one nonreligious private school near her, Kalispell Montessori School, which serves grades 1st to 8th. Jaime does not wish to send her children to this school because the family loves Stillwater. Moreover, she knows of no nonreligious private high school nearby and Ellie is soon to enter high school. Jaime instead wishes to use program scholarships to continue sending her children to Stillwater through high school.

112. But for Rule 1, Jaime would apply for program scholarships for both of her children to attend Stillwater as soon as an SO begins accepting applications.

LEGAL CLAIMS

CLAIM I: RULE 1 IS ULTRA VIRES

113. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

114. The Department does not have the authority to adopt Rule 1.

115. Section 2-4-305(6)(a), MCA, of the Montana Administrative Procedure Act prohibits an agency from enacting a rule that is not "consistent" with the statute it is implementing.

116. According to Montana courts, administrative regulations are not consistent with legislative guidelines if they: (1) engraft additional and contradictory requirements on the statute, or (2) if they engraft additional, noncontradictory requirements on the statute that were not envisioned by the Legislature.

117. Rule 1 engrafts additional and contradictory requirements on SB 410.

118. The definition of a qualified education provider in SB 410, section 8(7), encompasses virtually all private schools. It defines a "qualified education provider" as an education provider that:

a. Is not a public school;

b. (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or

(ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;

c. is not a home school as referred to in 20-5-102(2)(e);

d. administers a nationally recognized standardized assessment test or criterion-referenced test and:

(i) makes the results available to the child's parents or legal guardian; and

(ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;

e. satisfies the health and safety requirements prescribed by law for private schools in this state; and

f. qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

119. In contrast, Rule 1 states:

(1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, 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.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

120. The definition of a "qualified education provider" in SB 410 clearly encompasses both religious and nonreligious private schools. By requiring that qualified education providers be nonreligious private schools, Rule 1 engrafts additional and contradictory requirements on SB 410.

121. Alternatively, if Rule 1 does not engraft contrary requirements on SB 410 (which it does), it is an additional, noncontradictory requirement on SB 410 not envisioned by the Legislature.

122. The Legislature envisioned that both religious and nonreligious private schools would be qualified education providers under the scholarship tax-credit program. This is demonstrated, for instance, by the legislative history. It is also demonstrated by the recent

legislative poll where majorities of Montana legislators in both houses voted that Rule 1 was inconsistent with SB 410. Rule 1 thus engrafts an additional requirement on the program that was not envisioned by the Legislature by excluding religious private schools from participating in the program.

123. In addition, the Montana Constitution does not give the Department authority to adopt Rule 1.

124. Rule 1 is not required by either Article X, Section 6(1) or Article V, Section 11(5) of the Montana Constitution.

125. Neither Article X, Section 6(1), nor Article V, Section 11(5) applies to the scholarship tax-credit program because these two constitutional provisions only apply to appropriations of public funds to religious entities.

126. The State does not appropriate public funds when it grants tax credits. Tax credits merely reduce taxpayers' tax liability, allowing them to keep more of their own money.

127. The Department's incorrect constitutional interpretation cannot give it authority to adopt a rule inconsistent with SB 410.

128. Thus, Rule 1 exceeds the Department's authority and is invalid.

129. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

130. As a direct and proximate result of the Department enacting Rule 1 without legal authority, Plaintiffs' and other families' rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to these rights.

131. Unless Defendants are enjoined from committing the above-described ultra vires violation, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM II: RULE 1 VIOLATES THE MONTANA FREE EXERCISE CLAUSE

132. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

133. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Rule 1 violates Plaintiffs' and other families' rights under Montana's Free Exercise Clause in Article II, section 5 of the Montana Constitution.

134. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

135. Rule 1 and the Defendants thus discriminate against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children.

136. As a direct and proximate result of Rule 1, Plaintiffs' and other families' Montana Free Exercise rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Free Exercise rights.

137. Unless Defendants are enjoined from committing the above-described constitutional violation, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM III: RULE 1 VIOLATES THE FEDERAL FREE EXERCISE CLAUSE

138. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

139. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Rule 1 violates Plaintiffs' and other families' rights under the federal Free Exercise Clause in the First Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

140. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

141. Rule 1 and the Defendants thus discriminate against Plaintiffs and other families because of their religious views and/or the religious nature of the school that they have selected for their children.

142. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Free Exercise Clause.

143. As a direct and proximate result of Rule 1, Plaintiffs' and other families' federal Free Exercise rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Free Exercise rights.

144. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM IV: RULE 1 VIOLATES THE MONTANA ESTABLISHMENT CLAUSE

145. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

146. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny a generally available benefit to families simply because of their religious views and/or the religious nature of the school that they have selected. This disfavors and inhibits religion in violation of Plaintiffs' and other families' rights under Montana's Establishment Clause, in Article II, section 5 of the Montana Constitution.

147. But for Rule 1, Plaintiffs and other families are eligible for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

148. Rule 1 and the Defendants thus impose burdens on Plaintiffs and other families simply because the school of their choice is religious.

149. As a direct and proximate result of Rule 1, Plaintiffs' Montana Establishment Clause rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Establishment Clause rights.

150. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM V: RULE 1 VIOLATES THE FEDERAL ESTABLISHMENT CLAUSE

151. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

152. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny a generally available benefit to families simply because of their religious views and/or the religious nature of the school that they have selected. This disfavors and inhibits religion in violation of Plaintiffs' and other families' rights under the federal Establishment Clause, in the First Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

153. But for Rule 1, Plaintiffs and other families are eligible for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

154. Rule 1 and the Defendants thus impose burdens on Plaintiffs and other families simply because the school of their choice is religious.

155. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Establishment Clause.

156. As a direct and proximate result of Rule 1, Plaintiffs' federal Establishment Clause rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their Establishment Clause rights.

157. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM VI: RULE 1 VIOLATES EQUAL PROTECTION UNDER THE MONTANA CONSTITUTION

158. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

159. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny Plaintiffs and other families the equal protection of the laws by discriminating against them because of their religious beliefs and/or the religious nature of the school that they have selected for their children in violation of Montana's Equal Protection Clause in Article II, section 4 of the Montana Constitution.

160. Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools are similarly situated to families wishing to use program scholarships to send their children to nonreligious private schools.

161. Defendants have no compelling, important, or rational justification in treating these two similarly situated groups differently.

162. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

163. Rule 1 and the Defendants thus burden Plaintiffs and other families simply because the school of their choice is religious.

164. As a direct and proximate result of Rule 1, Plaintiffs' and other families' equal protection rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their equal protection rights.

165. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

CLAIM VII: RULE 1 VIOLATES EQUAL PROTECTION UNDER THE FEDERAL CONSTITUTION

166. Plaintiffs re-allege and incorporate by reference all of the allegations contained in the preceding paragraphs.

167. By preventing families who wish to send their children to religious private schools from obtaining scholarships solely because the school they prefer is religious, Defendants deny Plaintiffs and other families the equal protection of the laws by discriminating against them because of their religious beliefs and/or the religious nature of the school that they have selected for their children in violation of the federal Equal Protection Clause, in the Fourteenth Amendment of the U.S. Constitution, effective through 42 U.S.C. § 1983.

168. Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools are similarly situated to families wishing to use program scholarships to send their children to nonreligious private schools.

169. Defendants have no compelling, important, or rational justification in treating these two similarly situated groups differently.

170. But for Rule 1, Plaintiffs and other families are eligible to apply for scholarships under the program to send their children to Stillwater Christian School or another Montana religious private school.

171. Rule 1 and the Defendants thus burden Plaintiffs and other families simply because the school of their choice is religious.

172. In addition, the Department justifies the enactment of Rule 1 in part by Article X, Section 6(1) of the Montana Constitution. The history behind that constitutional provision shows it was actually passed to discriminate against Catholics. By relying on a state constitutional provision that was intended to discriminate against a religion in order to discriminate against all religion, the Defendants also violate the federal Equal Protection Clause.

173. As a direct and proximate result of Rule 1, Plaintiffs' and other families' equal protection rights are violated. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their equal protection rights.

174. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs and other families who wish to use program scholarships to send their children to religious private schools will continue to suffer great and irreparable harm.

REQUESTS FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment that the exclusion of religious schools from the scholarship tax-credit program, contained in Rule 1, exceeds the Department of Revenue's authority under the Montana Administrative Procedure Act and was undertaken for frivolous

reasons and/or in bad faith, justifying an award of attorneys' fees pursuant to Mont. Code Ann. § 25-10-711;

B. A declaratory judgment that the exclusion of religious schools from the scholarship tax-credit program, contained in Rule 1, violates the Free Exercise, Establishment, and Equal Protection Clauses of the Montana and U.S. Constitutions, both facially and as applied;

C. A declaratory judgment that if Article V, Section 11(5) of the Montana Constitution bars the participation of religious schools in the program, then Article V, Section 11(5) violates the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution, as applied;

D. A declaratory judgment that if Article X, Section 6(1) of the Montana Constitution bars the participation of religious schools in the program, then Article X, Section 6(1) violates the Free Exercise, Establishment, and Equal Protection Clauses of the U.S. Constitution, both facially and as applied;

E. A temporary restraining order, preliminary injunction, and/or permanent injunction prohibiting Defendants from enforcing Rule 1;

F. One dollar in nominal damages;

G. Reasonable costs and attorneys' fees; and

H. Such other legal or equitable relief as this Court may deem appropriate and just.

DATED this 15th day of December, 2015.

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CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

EXHIBIT 1

AN ACT GENERALLY REVISING LAWS RELATED TO TAX CREDITS FOR ELEMENTARY AND SECONDARY EDUCATION; ALLOWING INCOME TAX CREDITS FOR DONATIONS TO PUBLIC SCHOOLS AND STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING SUPPLEMENTAL FUNDING TO PUBLIC SCHOOLS FOR INNOVATIVE EDUCATION; ESTABLISHING GEOGRAPHIC REGIONS AND DISTRICTS FOR SUPPLEMENTAL FUNDING DISTRIBUTIONS; CREATING A STATE SPECIAL REVENUE ACCOUNT; ESTABLISHING OPERATING REQUIREMENTS, REVIEW PROCESSES, AND TERMINATION PROCEDURES FOR STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING THAT THE AMOUNT OF A SCHOLARSHIP IS NOT TAXABLE INCOME; PROVIDING RULEMAKING AUTHORITY; PROVIDING A STATUTORY APPROPRIATION; AMENDING SECTIONS 15-30-2110, 15-30-2618, 15-31-511, 17-7-502, AND 20-9-543, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Purpose. Pursuant to 5-4-104, the legislature finds that the purpose of innovative educational programs is to enhance the curriculum of public schools with supplemental private contributions through tax replacement programs. The tax credit for taxpayer donations under [sections 1 through 6] must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution.

Section 2. Definitions. As used in [sections 1 through 6], the following definitions apply:

(1) "Department" means the department of revenue provided for in 2-15-1301.

(2) "Eligible public school" means a Montana public school.

(3) "Geographic region" has the meaning provided in [section 3].

(4) "Innovative educational program" means an advanced academic program that enhances the curriculum or academic program of an eligible public school and that is not part of the regular academic program of an eligible public school. The instruction, program, or other activities offered through an innovative educational program must include at least one of the following characteristics:

(a) provides different focus, methodology, skill training, or delivery, including internet-based and distance learning technologies, than is provided in a typical academic program of a public school;

(b) is accessible before or after public school hours, on weekends, as a year-round program, as an extension of the public school year, or in a combination of these characteristics;

(c) uses specialized instructional materials, instructors, or instruction not provided by a public school;

(d) uses internships and other work-based learning opportunities for a student that supplements the curriculum or academic program of a student and provides a student with the opportunity to apply the knowledge and skills learned in the academic program; or

(e) offers instruction or programming that provides credits or advanced placement, or both, at a 2-year or 4-year college or university.

(5) "Large district" has the meaning provided in [section 3].

(6) "Quality educator" has the meaning provided in 20-4-502.

(7) "Taxpayer" has the meaning provided in 15-30-2101.

Section 3. Establishment of geographic regions and large districts -- innovative educational program. (1) (a) Geographic regions are established on the basis of county boundaries and are designed to achieve approximate statewide equity among the eleven regions in terms of the number of trustees on school boards located within the applicable regions. The equity must be reviewed periodically by the superintendent of public instruction by dividing the number of trustees serving on school boards located within the applicable region, including trustees on school boards referenced in subsection (2), by the total number of geographic regions and large districts.

(b) The geographic regions are established as follows:

(i) 1st region: Flathead, Lake, and Lincoln Counties;

(ii) 2nd region: Blaine, Hill, and Phillips Counties;

(iii) 3rd region: Daniels, Roosevelt, Sheridan, and Valley Counties;

(iv) 4th region: Dawson, Garfield, McCone, Prairie, Richland, and Wibaux Counties;

(v) 5th region: Cascade, Fergus, Golden Valley, Judith Basin, Musselshell, Petroleum, and Wheatland Counties;

(vi) 6th region: Mineral, Missoula, Ravalli, and Sanders Counties;

(vii) 7th region: Beaverhead, Deer Lodge, Granite, Jefferson, Madison, Powell, and Silver Bow Counties;

(viii) 8th region: Broadwater, Gallatin, Meagher, Park, and Sweet Grass Counties;

(ix) 9th region: Big Horn, Carbon, Stillwater, Treasure, and Yellowstone Counties;

(x) 10th region: Carter, Custer, Fallon, Powder River, and Rosebud Counties; and

(xi) 11th region: Chouteau, Glacier, Lewis and Clark, Liberty, Pondera, Teton, and Toole Counties.

(2) (a) Large districts are established as each of the seven largest school districts in the state based on combined pupil enrollment from kindergarten through the 12th grade.

(b) The seven largest school districts are established as follows:

(i) Billings;

(ii) Butte;

(iii) Bozeman;

(iv) Great Falls;

(v) Helena;

(vi) Kalispell; and

(vii) Missoula.

(3) The superintendent of public instruction shall make recommendations to the education and local government interim committee regarding any adjustments to the regions and large districts necessary to preserve equity and fairness.

Section 4. Distribution of supplemental revenue to public schools -- innovative educational program. (1) The superintendent of public instruction shall:

(a) obligate at least 95% of its annual revenue from the educational improvement account provided for in [section 5] for supplemental funding to eligible public schools for innovative educational programs and technology deficiencies;

(b) provide innovative educational program or technology deficiency supplemental funding to eligible public schools; and

(c) distribute supplemental funding from the educational improvement account to each geographic region and each large district in a manner that provides proportionate funding based on the amount of donations under [section 13] in each of the respective geographic regions and large districts. In distributing the supplemental

funding, the superintendent of public instruction shall determine the allocation for each school district in a geographic region based on the ratio of the school district's number of quality educators compared to the total number of quality educators in the school district's geographic region.

(2) (a) Subject to subsection (2)(b), the superintendent of public instruction shall use the taxpayer's residential address and allocate the supplemental funding to the geographic region or large district schools that serve the taxpayer's residence. If a residential address is served by schools that are part of a large district and a smaller district, then the superintendent of public instruction must allocate the supplemental funding between the large district and the geographic region of the smaller district based on the average number belonging served by each district.

(b) A taxpayer may specify the geographic region or large district in which the supplemental funding must be used. If a taxpayer specifies that an allocation is to be used in a:

(i) geographic region, the allocation may not be used in a large district; and

(ii) large district, the allocation may not be used in a geographic region.

(3) The supplemental funding must be deposited in the district's school flexibility fund provided for in 20-9-543. Each district shall report the expenditure of supplemental funding for specific schools to the superintendent of public instruction.

Section 5. Educational improvement account -- revenue allocated -- appropriations from account. (1) There is an educational improvement account in the state special revenue fund established in 17-2-102. The funds in the account must be administered by the superintendent of public instruction.

(2) The superintendent of public instruction shall accept donations for the purpose of funding innovative educational programs and deposit the donations into the account. The department shall preapprove tax credits for donations as provided in [section 13]. In order to implement and administer the provisions of [sections 1 through 6], the department and the superintendent of public instruction shall exchange taxpayer information and develop policies to prevent the unauthorized disclosure of confidential records and information.

(3) Interest and earnings on the account must be deposited in the account.

(4) Money in the account is statutorily appropriated, as provided in 17-7-502, to the superintendent of public instruction for administrative expenses and for supplemental funding to public schools as provided in [section 4].

Section 6. Rulemaking. The superintendent of public instruction may adopt rules, prepare forms, and maintain records that are necessary to implement and administer [sections 1 through 6].

Section 7. Purpose. Pursuant to 5-4-104, the legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs. The tax credit for taxpayer donations under [sections 7 through 17] must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution.

Section 8. Definitions. As used in [sections 7 through 17], the following definitions apply:

(1) "Department" means the department of revenue provided for in 2-15-1301.

(2) "Eligible student" means a student who is a Montana resident and who is 5 years of age or older on or before September 10 of the year of attendance and has not yet reached 19 years of age.

(3) "Geographic region" has the meaning provided in [section 3].

(4) "Large district" has the meaning provided in [section 3].

(5) "Partnership" has the meaning provided in 15-30-2101.

(6) "Pass-through entity" has the meaning provided in 15-30-2101.

(7) "Qualified education provider" means an education provider that:

(a) is not a public school;

(b) (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or

(ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;

(c) is not a home school as referred to in 20-5-102(2)(e);

(d) administers a nationally recognized standardized assessment test or criterion-referenced test and:

(i) makes the results available to the child's parents or legal guardian; and

(ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;

(e) satisfies the health and safety requirements prescribed by law for private schools in this state; and

(f) qualifies for an exemption from compulsory enrollment under 20-5-102(2)(e) and 20-5-109.

(8) "Small business corporation" has the meaning provided in 15-30-3301.

(9) "Student scholarship organization" means a charitable organization in this state that:

(a) is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3);

(b) allocates not less than 90% of its annual revenue for scholarships to allow students to enroll with any qualified education provider; and

(c) provides educational scholarships to eligible students without limiting student access to only one education provider.

(10) "Taxpayer" has the meaning provided in 15-30-2101.

Section 9. Requirements for student scholarship organizations. (1) A student scholarship organization:

(a) shall obligate at least 90% of its annual revenue for scholarships. For the purpose of this calculation:

(i) the cost of the annual fiscal review provided for in [section 11(1)(b)] may be paid out of the total contributions before calculation of the 90% minimum obligation amount; and

(ii) all contributions subject to the 90% minimum obligation amount that are received in 1 calendar year must be paid out in scholarships within the 3 calendar years following the contribution.

(b) may not restrict or reserve scholarships for use at a particular education provider or any particular type of education provider and shall allow an eligible student to enroll with any qualified education provider of the parents' or legal guardian's choice;

(c) shall provide scholarships to eligible students to attend instruction offered by a qualified education provider;

(d) may not provide a scholarship to an eligible student for an academic year that exceeds 50% of the per-pupil average of total public school expenditures calculated in [section 22];

(e) shall ensure that the organization's average scholarship for an academic year does not exceed 30% of the per-pupil average of total public school expenditures calculated in [section 22];

(f) shall maintain separate accounts for scholarship funds and operating funds;

(g) may transfer funds to another student scholarship organization;

(h) shall maintain an application process under which scholarship applications are accepted, reviewed, approved, and denied; and

(i) shall comply with payment and reporting requirements in accordance with [sections 10 and 11].

(2) An organization that fails to satisfy the conditions of this section is subject to termination as provided in [section 16].

Section 10. Tuition payment limitation. (1) A student scholarship organization shall deliver the scholarship funds directly to the qualified education provider selected by the parents or legal guardian of the child to whom the scholarship was awarded. The qualified education provider shall immediately notify the parents or legal guardian that the payment was received.

(2) A parent or legal guardian of an eligible student may not accept one or more scholarship awards from a student scholarship organization for an eligible student if the total amount of the awards exceeds 50% of the per-pupil average of total public school expenditures calculated in [section 22]. This limitation applies to each eligible student of a parent or legal guardian.

Section 11. Reporting requirements for student scholarship organizations. (1) Each student scholarship organization shall:

(a) submit a notice to the department of its intent to operate as a student scholarship organization prior to accepting donations;

(b) complete an annual fiscal review of its accounts by an independent certified public accountant within 120 days after the close of the calendar year that discloses for each of the 3 most recently completed calendar years:

(i) the total number and dollar value of individual and corporate contributions;

(ii) the total number and dollar value of scholarships obligated to eligible students;

(iii) the total number and dollar value of scholarships awarded to eligible students; and

(iv) the cost of the annual fiscal review;

(c) submit the annual fiscal review report to the department within 150 days of the close of the calendar year.

(2) The department shall provide written notice to a student scholarship organization that fails to submit the annual fiscal review report, and the organization has 30 days from receipt of the notice to submit the report.

(3) An organization that fails to satisfy the conditions of this section is subject to termination as provided in [section 16].

Section 12. Student scholarship organizations -- listing on website. (1) The department shall maintain on its website a hyperlink to a current list of all:

(a) student scholarship organizations that have provided notice pursuant to [section 11(1)(a)]; and

(b) qualified education providers that accepted scholarship funds from a student scholarship organization.

(2) The list must include:

(a) a statistical compilation of the information received from the student scholarship organizations; and

(b) a hyperlink to the qualified education provider's overall testing scores contained on a publicly accessible private website or to the office of public instruction's website pursuant to [section 8(7)(d)(ii)].

Section 13. Credit for providing supplemental funding to public schools -- innovative educational program. (1) Subject to subsection (5), a taxpayer or corporation is allowed a credit against the tax imposed by chapter 30 or 31 for donations made to the educational improvement account provided for in [section 5] for the purpose of providing supplemental funding to public schools for innovative educational programs and technology deficiencies. The taxpayer may direct the donation to a geographic region or a large district as provided in [section 4(2)(b)]. The amount of the credit allowed is equal to the amount of the donation, not to exceed $150.

(2) (a) If the credit allowed under this section is claimed by a small business corporation, a pass-through entity, or a partnership, the credit must be attributed to shareholders, owners, or partners using the same proportion as used to report the entity's income or loss.

(b) A donation by an estate or trust qualifies for the credit. Any credit not used by the estate or trust may be attributed to each beneficiary of the estate or trust in the same proportion used to report the beneficiary's income from the estate or trust for Montana income tax purposes.

(3) The credit allowed under this section may not exceed the taxpayer's income tax liability.

(4) There is no carryback or carryforward of the credit permitted under this section, and the credit must

be applied in the year the donation is made, as determined by the taxpayer's accounting method.

(5) (a) (i) The aggregate amount of tax credits allowed under this section is $3 million beginning in tax year 2016.

(ii) Beginning in 2017, by August 1 of each year, the department shall determine if $3 million or the aggregate limit provided for in subsection (5)(a)(iii) in donations were preapproved by the department. If this condition is satisfied, the aggregate amount of tax credits allowed must be increased by 10% for the succeeding tax years.

(iii) If the aggregate limit is increased in any tax year, the department shall use the new limit as the base aggregate limit for succeeding tax years until a new aggregated limit is established under the provisions of subsection (5)(a)(ii).

(b) The department shall approve the amount of donations for taxpayers on a first-come, first-served basis and post a notice on its website advising taxpayers when the aggregate limit is in effect. If a taxpayer makes a donation after total donations claimed exceeds the aggregate limit, the taxpayer's return will be processed without regard to the credit.

(6) A credit is not allowed under this section with respect to any amount deducted by the taxpayer for state tax purposes as a charitable contribution to a charitable organization qualified under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3). This section does not prevent a taxpayer from:

(a) claiming a credit under this section instead of a deduction; or

(b) claiming an exclusion, deduction, or credit for a charitable contribution that exceeds the amount for which the credit is allowed under this section.

(7) After consultation with the superintendent of public instruction, the department may develop an internet-based registration system that provides taxpayers with the opportunity to obtain preapproval for a tax credit before making a donation.

Section 14. Qualified education tax credit for contributions to student scholarship organizations. (1) Subject to subsection (5), a taxpayer or corporation is allowed a credit against the tax imposed by chapter 30 or 31 for donations made to a student scholarship organization. The donor may not direct or designate contributions to a parent, legal guardian, or specific qualified education provider. The amount of the credit allowed is equal to the amount of the donation, not to exceed $150.

(2) (a) If the credit allowed under this section is claimed by a small business corporation, a pass-through entity, or a partnership, the credit must be attributed to shareholders, owners, or partners using the same proportion as used to report the entity's income or loss.

(b) A contribution by an estate or trust qualifies for the credit. Any credit not used by the estate or trust may be attributed to each beneficiary of the estate or trust in the same proportion used to report the beneficiary's income from the estate or trust for Montana income tax purposes.

(3) The credit allowed under this section may not exceed the taxpayer's income tax liability.

(4) There is no carryback or carryforward of the credit permitted under this section, and the credit must be applied in the year the donation is made, as determined by the taxpayer's accounting method.

(5) (a) (i) The aggregate amount of tax credits allowed under this section is $3 million beginning in tax year 2016.

(ii) Beginning in 2017, by August 1 of each year, the department shall determine if $3 million or the aggregate limit provided for in subsection (5)(a)(iii) in tax credits were preapproved by the department. If this condition is satisfied, the aggregate amount of tax credits allowed must be increased by 10% for the succeeding tax years.

(iii) If the aggregate limit is increased in any tax year, the department shall use the new limit as the base aggregate limit for succeeding tax years until a new aggregated limit is established under the provisions of subsection (5)(a)(ii).

(b) The department shall approve the amount of tax credits for taxpayers on a first-come, first-served basis and post a notice on its website advising taxpayers when the aggregate limit is in effect. If a taxpayer makes a donation after total donations claimed exceeds the aggregate limit, the taxpayer's return will be processed without regard to the credit.

(6) A credit is not allowed under this section with respect to any amount deducted by the taxpayer for state tax purposes as a charitable contribution to a charitable organization qualified under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3). This section does not prevent a taxpayer from:

(a) claiming a credit under this section instead of a deduction; or

(b) claiming an exclusion, deduction, or credit for a charitable contribution that exceeds the amount for which the credit is allowed under this section.

(7) The department may develop an internet-based registration system that provides donors with the

opportunity to obtain preapproval for a tax credit before making a contribution.

Section 15. Report to revenue and transportation interim committee -- student scholarship organizations. Each biennium, the department shall provide to the revenue and transportation interim committee a list of student scholarship organizations receiving contributions from businesses and individuals that are granted tax credits under [section 14]. The listing must detail the tax credits claimed under the individual income tax in chapter 30 and the corporate income tax in chapter 31.

Section 16. Review determination -- termination -- confidentiality. (1) Subject to subsection (7), the department is authorized to examine any books, papers, records, or memoranda relevant to determining whether a student scholarship organization is in compliance with [sections 8, 9, and 11].

(2) If a student scholarship organization is not in compliance, the department shall provide to the organization written notice of the specific failures and the organization has 30 days from the date of the notice to correct deficiencies. If the organization fails to correct all deficiencies, the department shall provide a final written notice of the failure to the organization. The organization may appeal the department's determination of failure to comply according to the uniform dispute review procedure in 15-1-211 within 30 days of the date of the notice.

(3) (a) If a student scholarship organization does not seek review under 15-1-211 or if the dispute is not resolved, the department shall issue a final department decision.

(b) The final department decision for a student scholarship organization must provide that the student scholarship organization:

(i) will be removed from the list of eligible student scholarship organizations provided in [section 12] and notified of the removal; and

(ii) shall within 15 calendar days of receipt of notice from the department of removal from the eligible list cease all operations as a student scholarship organization and transfer all scholarship account funds to a properly operating student scholarship organization.

(4) A student scholarship organization that receives a final department decision may seek review of the decision from the state tax appeal board pursuant to 15-2-302.

(5) Either party aggrieved as a result of the decision of the state tax appeal board may seek judicial

review pursuant to 15-2-303.

(6) If a student scholarship organization files an appeal pursuant to this section, the organization may continue to operate until the decision of the court is final.

(7) The identity of donors who make donations to the educational improvement account provided for in [section 5] or donations to a student scholarship organization is confidential tax information that is subject to the provisions of 15-30-2618.

Section 17. Rulemaking. The department may adopt rules, prepare forms, and maintain records that are necessary to implement and administer [sections 7 through 17].

Section 18. Credit for providing supplemental funding to public schools -- innovative educational program. There is a credit against tax liability under this chapter for a donation made to the educational improvement account as provided in [section 13].

Section 19. Qualified education individual income tax credit for contributions to student scholarship organization. There is a credit against tax liability under this chapter for a charitable donation made to a student scholarship organization as provided in [section 14].

Section 20. Credit for providing supplemental funding to public schools -- corporate tax credit -- innovative educational program. There is a credit against tax liability under this chapter for a donation made to the educational improvement account as provided in [section 13].

Section 21. Qualified education corporate credit for contributions to student scholarship organization. There is a credit against tax liability under this chapter for a charitable donation made to a student scholarship organization as provided in [section 14].

Section 22. Statewide average per-pupil spending. (1) The superintendent of public instruction shall calculate the per-pupil average of total public school expenditures in Montana for the second most recently completed school fiscal year by August 1 of the ensuing school fiscal year and make the calculation available to

the public. The calculation is made by dividing total expenditures calculated in subsection (2) by total pupils calculated in subsection (3).

(2) Funds to be included in total school expenditures for the second most recently completed school year include but are not limited to:

(a) district general fund expenditures;

(b) transportation;

(c) bus depreciation;

(d) food services;

(e) tuition;

(f) retirement;

(g) miscellaneous programs;

(h) traffic education;

(i) nonoperating fund;

(j) lease-rental agreement;

(k) compensated absence fund;

(l) metal mines tax reserve;

(m) state mining impact;

(n) impact aid;

(o) litigation reserve;

(p) technology acquisition;

(q) flexibility fund;

(r) debt service;

(s) building reserve; and

(t) interlocal agreement.

(3) Total pupils are computed using an amount equal to the per-pupil average, but not the per-ANB average provided in 20-9-311, for Montana school districts for the second most recently completed school year.

Section 23. Section 15-30-2110, MCA, is amended to read:

"15-30-2110. Adjusted gross income. (1) Subject to subsection (13), adjusted gross income is the

taxpayer's federal adjusted gross income as defined in section 62 of the Internal Revenue Code, 26 U.S.C. 62, and in addition includes the following:

(a) (i) interest received on obligations of another state or territory or county, municipality, district, or other political subdivision of another state, except to the extent that the interest is exempt from taxation by Montana under federal law;

(ii) exempt-interest dividends as defined in section 852(b)(5) of the Internal Revenue Code, 26 U.S.C. 852(b)(5), that are attributable to the interest referred to in subsection (1)(a)(i);

(b) refunds received of federal income tax, to the extent that the deduction of the tax resulted in a reduction of Montana income tax liability;

(c) that portion of a shareholder's income under subchapter S. of Chapter 1 of the Internal Revenue Code that has been reduced by any federal taxes paid by the subchapter S. corporation on the income;

(d) depreciation or amortization taken on a title plant as defined in 33-25-105;

(e) the recovery during the tax year of an amount deducted in any prior tax year to the extent that the amount recovered reduced the taxpayer's Montana income tax in the year deducted;

(f) if the state taxable distribution of an estate or trust is greater than the federal taxable distribution of the same estate or trust, the difference between the state taxable distribution and the federal taxable distribution of the same estate or trust for the same tax period; and

(g) except for exempt-interest dividends described in subsection (2)(a)(ii), for tax years commencing after December 31, 2002, the amount of any dividend to the extent that the dividend is not included in federal adjusted gross income.

(2) Notwithstanding the provisions of the Internal Revenue Code, adjusted gross income does not include the following, which are exempt from taxation under this chapter:

(a) (i) all interest income from obligations of the United States government, the state of Montana, or a county, municipality, district, or other political subdivision of the state and any other interest income that is exempt from taxation by Montana under federal law;

(ii) exempt-interest dividends as defined in section 852(b)(5) of the Internal Revenue Code, 26 U.S.C. 852(b)(5), that are attributable to the interest referred to in subsection (2)(a)(i);

(b) interest income earned by a taxpayer who is 65 years of age or older in a tax year up to and including $800 for a taxpayer filing a separate return and $1,600 for each joint return;

(c) (i) except as provided in subsection (2)(c)(ii), the first $3,600 of all pension and annuity income received as defined in 15-30-2101;

(ii) for pension and annuity income described under subsection (2)(c)(i), as follows:

(A) each taxpayer filing singly, head of household, or married filing separately shall reduce the total amount of the exclusion provided in subsection (2)(c)(i) by $2 for every $1 of federal adjusted gross income in excess of $30,000 as shown on the taxpayer's return;

(B) in the case of married taxpayers filing jointly, if both taxpayers are receiving pension or annuity income or if only one taxpayer is receiving pension or annuity income, the exclusion claimed as provided in subsection (2)(c)(i) must be reduced by $2 for every $1 of federal adjusted gross income in excess of $30,000 as shown on their joint return;

(d) all Montana income tax refunds or tax refund credits;

(e) gain required to be recognized by a liquidating corporation under 15-31-113(1)(a)(ii);

(f) all tips or gratuities that are covered by section 3402(k) or service charges that are covered by section 3401 of the Internal Revenue Code of 1954, 26 U.S.C. 3402(k) or 3401, as amended and applicable on January 1, 1983, received by a person for services rendered to patrons of premises licensed to provide food, beverage, or lodging;

(g) all benefits received under the workers' compensation laws;

(h) all health insurance premiums paid by an employer for an employee if attributed as income to the employee under federal law, including premiums paid by the employer for an employee pursuant to 33-22-166;

(i) all money received because of a settlement agreement or judgment in a lawsuit brought against a manufacturer or distributor of "agent orange" for damages resulting from exposure to "agent orange";

(j) principal and income in a medical care savings account established in accordance with 15-61-201 or withdrawn from an account for eligible medical expenses, as defined in 15-61-102, of the taxpayer or a dependent of the taxpayer or for the long-term care of the taxpayer or a dependent of the taxpayer;

(k) principal and income in a first-time home buyer savings account established in accordance with 15-63-201 or withdrawn from an account for eligible costs, as provided in 15-63-202(7), for the first-time purchase of a single-family residence;

(l) contributions or earnings withdrawn from a family education savings account or from a qualified tuition program established and maintained by another state as provided by section 529(b)(1)(A)(ii) of the Internal

Revenue Code, 26 U.S.C. 529(b)(1)(A)(ii), for qualified higher education expenses, as defined in 15-62-103, of a designated beneficiary;

(m) the recovery during the tax year of any amount deducted in any prior tax year to the extent that the recovered amount did not reduce the taxpayer's Montana income tax in the year deducted;

(n) if the federal taxable distribution of an estate or trust is greater than the state taxable distribution of the same estate or trust, the difference between the federal taxable distribution and the state taxable distribution of the same estate or trust for the same tax period;

(o) deposits, not exceeding the amount set forth in 15-30-3003, deposited in a Montana farm and ranch risk management account, as provided in 15-30-3001 through 15-30-3005, in any tax year for which a deduction is not provided for federal income tax purposes;

(p) income of a dependent child that is included in the taxpayer's federal adjusted gross income pursuant to the Internal Revenue Code. The child is required to file a Montana personal income tax return if the child and taxpayer meet the filing requirements in 15-30-2602.

(q) principal and income deposited in a health care expense trust account, as defined in 2-18-1303, or withdrawn from the account for payment of qualified health care expenses as defined in 2-18-1303;

(r) that part of the refundable credit provided in 33-22-2006 that reduces Montana tax below zero; ~~and~~

(s) the amount of the gain recognized from the sale or exchange of a mobile home park as provided in 15-31-163; and

(t) the amount of a scholarship to an eligible student by a student scholarship organization pursuant to [section 10].

(3) A shareholder of a DISC that is exempt from the corporate income tax under 15-31-102(1)(l) shall include in the shareholder's adjusted gross income the earnings and profits of the DISC in the same manner as provided by section 995 of the Internal Revenue Code, 26 U.S.C. 995, for all periods for which the DISC election is effective.

(4) A taxpayer who, in determining federal adjusted gross income, has reduced the taxpayer's business deductions by an amount for wages and salaries for which a federal tax credit was elected under sections 38 and 51(a) of the Internal Revenue Code, 26 U.S.C. 38 and 51(a), is allowed to deduct the amount of the wages and salaries paid regardless of the credit taken. The deduction must be made in the year that the wages and salaries were used to compute the credit. In the case of a partnership or small business corporation, the deduction must

be made to determine the amount of income or loss of the partnership or small business corporation.

(5) Married taxpayers filing a joint federal return who are required to include part of their social security benefits or part of their tier 1 railroad retirement benefits in federal adjusted gross income may split the federal base used in calculation of federal taxable social security benefits or federal taxable tier 1 railroad retirement benefits when they file separate Montana income tax returns. The federal base must be split equally on the Montana return.

(6) Married taxpayers filing a joint federal return who are allowed a capital loss deduction under section 1211 of the Internal Revenue Code, 26 U.S.C. 1211, and who file separate Montana income tax returns may claim the same amount of the capital loss deduction that is allowed on the federal return. If the allowable capital loss is clearly attributable to one spouse, the loss must be shown on that spouse's return; otherwise, the loss must be split equally on each return.

(7) In the case of passive and rental income losses, married taxpayers filing a joint federal return and who file separate Montana income tax returns are not required to recompute allowable passive losses according to the federal passive activity rules for married taxpayers filing separately under section 469 of the Internal Revenue Code, 26 U.S.C. 469. If the allowable passive loss is clearly attributable to one spouse, the loss must be shown on that spouse's return; otherwise, the loss must be split equally on each return.

(8) Married taxpayers filing a joint federal return in which one or both of the taxpayers are allowed a deduction for an individual retirement contribution under section 219 of the Internal Revenue Code, 26 U.S.C. 219, and who file separate Montana income tax returns may claim the same amount of the deduction that is allowed on the federal return. The deduction must be attributed to the spouse who made the contribution.

(9) (a) Married taxpayers filing a joint federal return who are allowed a deduction for interest paid for a qualified education loan under section 221 of the Internal Revenue Code, 26 U.S.C. 221, and who file separate Montana income tax returns may claim the same amount of the deduction that is allowed on the federal return. The deduction may be split equally on each return or in proportion to each taxpayer's share of federal adjusted gross income.

(b) Married taxpayers filing a joint federal return who are allowed a deduction for qualified tuition and related expenses under section 222 of the Internal Revenue Code, 26 U.S.C. 222, and who file separate Montana income tax returns may claim the same amount of the deduction that is allowed on the federal return. The deduction may be split equally on each return or in proportion to each taxpayer's share of federal adjusted gross

income.

(10) A taxpayer receiving retirement disability benefits who has not attained 65 years of age by the end of the tax year and who has retired as permanently and totally disabled may exclude from adjusted gross income up to $100 a week received as wages or payments in lieu of wages for a period during which the employee is absent from work due to the disability. If the adjusted gross income before this exclusion exceeds $15,000, the excess reduces the exclusion by an equal amount. This limitation affects the amount of exclusion, but not the taxpayer's eligibility for the exclusion. If eligible, married individuals shall apply the exclusion separately, but the limitation for income exceeding $15,000 is determined with respect to the spouses on their combined adjusted gross income. For the purpose of this subsection, "permanently and totally disabled" means unable to engage in any substantial gainful activity by reason of any medically determined physical or mental impairment lasting or expected to last at least 12 months.

(11) (a) An individual who contributes to one or more accounts established under the Montana family education savings program or to a qualified tuition program established and maintained by another state as provided by section 529(b)(1)(A)(ii) of the Internal Revenue Code, 26 U.S.C. 529(b)(1)(A)(ii), may reduce adjusted gross income by the lesser of $3,000 or the amount of the contribution. In the case of married taxpayers, each spouse is entitled to a reduction, not in excess of $3,000, for the spouses' contributions to the accounts. Spouses may jointly elect to treat half of the total contributions made by the spouses as being made by each spouse. The reduction in adjusted gross income under this subsection applies only with respect to contributions to an account of which the account owner is the taxpayer, the taxpayer's spouse, or the taxpayer's child or stepchild if the taxpayer's child or stepchild is a Montana resident. The provisions of subsection (1)(e) do not apply with respect to withdrawals of contributions that reduced adjusted gross income.

(b) Contributions made pursuant to this subsection (11) are subject to the recapture tax provided in 15-62-208.

(12) (a) A taxpayer may exclude the amount of the loan payment received pursuant to subsection (12)(a)(iv), not to exceed $5,000, from the taxpayer's adjusted gross income if the taxpayer:

(i) is a health care professional licensed in Montana as provided in Title 37;

(ii) is serving a significant portion of a designated geographic area, special population, or facility population in a federally designated health professional shortage area, a medically underserved area or population, or a federal nursing shortage county as determined by the secretary of health and human services

or by the governor;

(iii) has had a student loan incurred as a result of health-related education; and

(iv) has received a loan payment during the tax year made on the taxpayer's behalf by a loan repayment program described in subsection (12)(b) as an incentive to practice in Montana.

(b) For the purposes of subsection (12)(a), a loan repayment program includes a federal, state, or qualified private program. A qualified private loan repayment program includes a licensed health care facility, as defined in 50-5-101, that makes student loan payments on behalf of the person who is employed by the facility as a licensed health care professional.

(13) Notwithstanding the provisions of subsection (1), adjusted gross income does not include 40% of capital gains on the sale or exchange of capital assets before December 31, 1986, as capital gains are determined under subchapter P. of Chapter 1 of the Internal Revenue Code as it read on December 31, 1986.

(14) By November 1 of each year, the department shall multiply the amount of pension and annuity income contained in subsection (2)(c)(i) and the federal adjusted gross income amounts in subsection (2)(c)(ii) by the inflation factor for that tax year, but using the year 2009 consumer price index, and rounding the results to the nearest $10. The resulting amounts are effective for that tax year and must be used as the basis for the exemption determined under subsection (2)(c). (Subsection (2)(f) terminates on occurrence of contingency--sec. 3, Ch. 634, L. 1983; subsection (2)(o) terminates on occurrence of contingency--sec. 9, Ch. 262, L. 2001.)"

Section 24. Section 15-30-2618, MCA, is amended to read:

"15-30-2618. Confidentiality of tax records. (1) Except as provided in 5-12-303, 15-1-106, 17-7-111, and subsections (8) and (9) of this section, in accordance with a proper judicial order, or as otherwise provided by law, it is unlawful to divulge or make known in any manner:

(a) the amount of income or any particulars set forth or disclosed in any individual report or individual return required under this chapter or any other information secured in the administration of this chapter; or

(b) any federal return or federal return information disclosed on any return or report required by rule of the department or under this chapter.

(2) (a) The officers charged with the custody of the reports and returns may not be required to produce them or evidence of anything contained in them in an action or proceeding in a court, except in an action or proceeding:

(i) to which the department is a party under the provisions of this chapter or any other taxing act; or

(ii) on behalf of a party to any action or proceedings under the provisions of this chapter or other taxes when the reports or facts shown by the reports are directly involved in the action or proceedings.

(b) The court may require the production of and may admit in evidence only as much of the reports or of the facts shown by the reports as are pertinent to the action or proceedings.

(3) This section does not prohibit:

(a) the delivery to a taxpayer or the taxpayer's authorized representative of a certified copy of any return or report filed in connection with the taxpayer's tax;

(b) the publication of statistics classified to prevent the identification of particular reports or returns and the items of particular reports or returns; or

(c) the inspection by the attorney general or other legal representative of the state of the report or return of any taxpayer who brings an action to set aside or review the tax based on the report or return or against whom an action or proceeding has been instituted in accordance with the provisions of 15-30-2630.

(4) The department may deliver to a taxpayer's spouse the taxpayer's return or information related to the return for a tax year if the spouse and the taxpayer filed the return with the filing status of married filing separately on the same return. The information being provided to the spouse or reported on the return, including subsequent adjustments or amendments to the return, must be treated in the same manner as if the spouse and the taxpayer filed the return using a joint filing status for that tax year.

(5) Reports and returns must be preserved for at least 3 years and may be preserved until the department orders them to be destroyed.

(6) Any offense against subsections (1) through (5) is punishable by a fine not exceeding $500. If the offender is an officer or employee of the state, the offender must be dismissed from office or employment and may not hold any public office or public employment in this state for a period of 1 year after dismissal or, in the case of a former officer or employee, for 1 year after conviction.

(7) This section may not be construed to prohibit the department from providing taxpayer return information and information from employers' payroll withholding reports to:

(a) the department of labor and industry to be used for the purpose of investigation and prevention of noncompliance, tax evasion, fraud, and abuse under the unemployment insurance laws; or

(b) the state fund to be used for the purpose of investigation and prevention of noncompliance, fraud,

and abuse under the workers' compensation program.

(8) The department may permit the commissioner of internal revenue of the United States or the proper officer of any state imposing a tax upon the incomes of individuals or the authorized representative of either officer to inspect the return of income of any individual or may furnish to the officer or an authorized representative an abstract of the return of income of any individual or supply the officer with information concerning an item of income contained in a return or disclosed by the report of an investigation of the income or return of income of an individual, but the permission may be granted or information furnished only if the statutes of the United States or of the other state grant substantially similar privileges to the proper officer of this state charged with the administration of this chapter.

(9) On written request to the director or a designee of the director, the department shall furnish:

(a) to the department of justice all information necessary to identify those persons qualifying for the additional exemption for blindness pursuant to 15-30-2114(4), for the purpose of enabling the department of justice to administer the provisions of 61-5-105;

(b) to the department of public health and human services information acquired under 15-30-2616, pertaining to an applicant for public assistance, reasonably necessary for the prevention and detection of public assistance fraud and abuse, provided notice to the applicant has been given;

(c) to the department of labor and industry for the purpose of prevention and detection of fraud and abuse in and eligibility for benefits under the unemployment compensation and workers' compensation programs information on whether a taxpayer who is the subject of an ongoing investigation by the department of labor and industry is an employee, an independent contractor, or self-employed;

(d) to the department of fish, wildlife, and parks specific information that is available from income tax returns and required under 87-2-102 to establish the residency requirements of an applicant for hunting and fishing licenses;

(e) to the board of regents information required under 20-26-1111;

(f) to the legislative fiscal analyst and the office of budget and program planning individual income tax information as provided in 5-12-303, 15-1-106, and 17-7-111. The information provided to the office of budget and program planning must be the same as the information provided to the legislative fiscal analyst.

(g) to the department of transportation farm income information based on the most recent income tax return filed by an applicant applying for a refund under 15-70-223 or 15-70-362, provided that notice to the

applicant has been given as provided in 15-70-223 and 15-70-362. The information obtained by the department of transportation is subject to the same restrictions on disclosure as are individual income tax returns.

(h) to the commissioner of insurance's office all information necessary for the administration of the small business health insurance tax credit provided for in Title 33, chapter 22, part 20;

(i) to the superintendent of public instruction information required under [section 5]."

Section 25. Section 15-31-511, MCA, is amended to read:

"15-31-511. Confidentiality of tax records. (1) Except as provided in this section, in accordance with a proper judicial order, or as otherwise provided by law, it is unlawful to divulge or make known in any manner:

(a) the amount of income or any particulars set forth or disclosed in any return or report required under this chapter or any other information relating to taxation secured in the administration of this chapter; or

(b) any federal return or information in or disclosed on a federal return or report required by law or rule of the department under this chapter.

(2) (a) An officer or employee charged with custody of returns and reports required by this chapter may not be ordered to produce any of them or evidence of anything contained in them in any administrative proceeding or action or proceeding in any court, except:

(i) in an action or proceeding in which the department is a party under the provisions of this chapter; or

(ii) in any other tax proceeding or on behalf of a party to an action or proceeding under the provisions of this chapter when the returns or reports or facts shown in them are directly pertinent to the action or proceeding.

(b) If the production of a return, report, or information contained in them is ordered, the court shall limit production of and the admission of returns, reports, or facts shown in them to the matters directly pertinent to the action or proceeding.

(3) This section does not prohibit:

(a) the delivery of a certified copy of any return or report filed in connection with a return to the taxpayer who filed the return or report or to the taxpayer's authorized representative;

(b) the publication of statistics prepared in a manner that prevents the identification of particular returns, reports, or items from returns or reports;

(c) the inspection of returns and reports by the attorney general or other legal representative of the state in the course of an administrative proceeding or litigation under this chapter;

(d) access to information under subsection (4);

(e) the director of revenue from permitting a representative of the commissioner of internal revenue of the United States or a representative of a proper officer of any state imposing a tax on the income of a taxpayer to inspect the returns or reports of a corporation. The department may also furnish those persons abstracts of income, returns, and reports; information concerning any item in a return or report; and any item disclosed by an investigation of the income or return of a corporation. The director of revenue may not furnish that information to a person representing the United States or another state unless the United States or the other state grants substantially similar privileges to an officer of this state charged with the administration of this chapter.

(f) the disclosure of information to the commissioner of insurance's office that is necessary for the administration of the small business health insurance tax credit provided for in Title 33, chapter 22, part 20.

(4) On written request to the director or a designee of the director, the department shall:

(a) allow the inspection of returns and reports by the legislative auditor, but the information furnished to the legislative auditor is subject to the same restrictions on disclosure outside that office as provided in subsection (1); ~~and~~

(b) provide corporate income tax and alternative corporate income tax information, including any information that may be required under Title 15, chapter 30, part 33, to the legislative fiscal analyst, as provided in 5-12-303 or 15-1-106, and the office of budget and program planning, as provided in 15-1-106 or 17-7-111. The information furnished to the legislative fiscal analyst and the office of budget and program planning is subject to the same restrictions on disclosure outside those offices as provided in subsection (1).

(c) furnish to the superintendent of public instruction information required under [section 5].

(5) A person convicted of violating this section shall be fined not to exceed $500. If a public officer or public employee is convicted of violating this section, the person is dismissed from office or employment and may not hold any public office or public employment in the state for a period of 1 year after dismissal or, in the case of a former officer or employee, for 1 year after conviction."

Section 26. Section 17-7-502, MCA, is amended to read:

"17-7-502. Statutory appropriations -- definition -- requisites for validity. (1) A statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the need for a biennial legislative appropriation or budget amendment.

(2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both of the following provisions:

(a) The law containing the statutory authority must be listed in subsection (3).

(b) The law or portion of the law making a statutory appropriation must specifically state that a statutory appropriation is made as provided in this section.

(3) The following laws are the only laws containing statutory appropriations: 2-15-247; 2-17-105; 5-11-120; 5-11-407; 5-13-403; 7-4-2502; 10-1-108; 10-1-1202; 10-1-1303; 10-2-603; 10-3-203; 10-3-310; 10-3-312; 10-3-314; 10-4-301; 15-1-121; 15-1-218; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121; 15-70-101; 15-70-369; 15-70-601; 16-11-509; 17-3-106; 17-3-112; 17-3-212; 17-3-222; 17-3-241; 17-6-101; 18-11-112; 19-3-319; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506; 19-20-604; 19-20-607; 19-21-203; 20-8-107; [section 5]; 20-9-534; 20-9-622; 20-26-1503; 22-1-327; 22-3-1004; 23-4-105; 23-5-306; 23-5-409; 23-5-612; 23-7-301; 23-7-402; 30-10-1004; 37-43-204; 37-51-501; 39-1-105; 39-71-503; 41-5-2011; 42-2-105; 44-4-1101; 44-12-206; 44-13-102; 53-1-109; 53-1-215; 53-2-208; 53-9-113; 53-24-108; 53-24-206; 60-11-115; 61-3-415; 69-3-870; 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 76-13-150; 76-13-416; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-11-518; 81-1-112; 81-7-106; 81-10-103; 82-11-161; 85-20-1504; 85-20-1505; 87-1-603; 90-1-115; 90-1-205; 90-1-504; 90-3-1003; 90-6-331; and 90-9-306.

(4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing, paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory appropriation authority for the payments. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion of 19-20-604 terminates contingently when the amortization period for the teachers' retirement system's unfunded liability is 10 years or less; pursuant to sec. 10, Ch. 10, Sp. L. May 2000, secs. 3 and 6, Ch. 481, L. 2003, and sec. 2, Ch. 459, L. 2009, the inclusion of 15-35-108 terminates June 30, 2019; pursuant to sec. 73, Ch. 44, L. 2007, the inclusion of 19-6-410 terminates contingently upon the death of the last recipient eligible under 19-6-709(2) for the supplemental benefit provided by 19-6-709; pursuant to sec. 14, Ch. 374, L. 2009, the inclusion of 53-9-113 terminates June 30, 2015; pursuant to sec. 5, Ch. 442, L. 2009, the inclusion of 90-6-331 terminates June 30, 2019; pursuant to sec. 16, Ch. 58, L. 2011, the inclusion of 30-10-1004 terminates June 30,

2017; pursuant to sec. 6, Ch. 61, L. 2011, the inclusion of 76-13-416 terminates June 30, 2019; pursuant to sec. 13, Ch. 339, L. 2011, the inclusion of 81-1-112 and 81-7-106 terminates June 30, 2017; pursuant to sec. 11(2), Ch. 17, L. 2013, the inclusion of 17-3-112 terminates on occurrence of contingency; pursuant to secs. 3 and 5, Ch. 244, L. 2013, the inclusion of 22-1-327 is effective July 1, 2015, and terminates July 1, 2017; and pursuant to sec. 10, Ch. 413, L. 2013, the inclusion of 2-15-247, 39-1-105, 53-1-215, and 53-2-208 terminates June 30, 2015.)"

Section 27. Section 20-9-543, MCA, is amended to read:

"20-9-543. School flexibility fund -- uses. (1) (a) The trustees of a district shall establish a school flexibility fund and may use the fund, in their discretion, for school district expenditures incurred for:

(i) technological equipment enhancements and expansions considered by the trustees to support enhanced educational programs in the classroom;

(ii) facility expansion and remodeling considered by the trustees to support the delivery of educational programs or the removal and replacement of obsolete facilities;

(iii) supplies and materials considered by the trustees to support the delivery of enhanced educational programs;

(iv) student assessment and evaluation;

(v) the development of curriculum materials;

(vi) training for classroom staff considered by the trustees to support the delivery of enhanced educational programs;

(vii) purchase, lease, or rental of real property that must be used to provide free or reduced price housing for classroom teachers;

(viii) salaries, benefits, bonuses, and other incentives for the recruitment and retention of classroom teachers and other certified staff, subject to collective bargaining when applicable; ~~or~~

(ix) increases in energy costs caused by an increase in energy rates from the rates paid by the district in fiscal year 2001 or from increased use of energy as a result of the expansion of facilities, equipment, or other resources of the district; or

(x) innovative educational programs as defined in [section 2] and technology deficiencies.

(b) If the district's ANB calculated for the current fiscal year is less than the ANB for the current fiscal

year when averaged with the 4 previous fiscal years, the district may use money from the school flexibility fund to phase in over a 5-year period the spending reductions necessary because of the reduction in ANB.

(2) The trustees of a district shall fund the school flexibility fund with the money allocated under [section 4] and 20-9-542 and with the money raised by the levy under 20-9-544.

(3) The financial administration of the school flexibility fund must be in accordance with the financial administration provisions of this title for a budgeted fund."

Section 28. Codification instruction. (1) [Sections 1 through 6] are intended to be codified as an integral part of Title 20, chapter 9, and the provisions of Title 20, chapter 9, apply to [sections 1 through 6].

(2) [Sections 7 through 17] are intended to be codified as an integral part of Title 15, and the provisions of Title 15 apply to [sections 7 through 17].

(3) [Sections 18 and 19] are intended to be codified as an integral part of Title 15, chapter 30, part 23, and the provisions of Title 15, chapter 30, part 23, apply to [sections 18 and 19].

(4) [Sections 20 and 21] are intended to be codified as an integral part of Title 15, chapter 31, and the provisions of Title 15, chapter 31, apply to [sections 20 and 21].

(5) [Section 22] is intended to be codified as an integral part of Title 20, chapter 9, and the provisions of Title 20, chapter 9, apply to [section 22].

Section 29. Coordination instruction. If both Senate Bill No. 171 and [this act] are passed and approved and if [this act] contains a section that amends 15-30-2110 and Senate Bill No. 171 contains a section that repeals 15-30-2110, then [section 1] of Senate Bill No. 171 must be amended as follows:

"NEW SECTION. **Section 1. Adjustments to federal taxable income to determine Montana taxable income.** (1) The items in subsection (2) are added to and the items in subsection (3) are subtracted from federal taxable income to determine Montana taxable income.

(2) The following are added to federal taxable income:

(a) to the extent that it is not exempt from taxation by Montana under federal law, interest from obligations of a territory or another state or any political subdivision of a territory or another state and exempt-interest dividends attributable to that interest except to the extent already included in federal taxable income;

(b) a withdrawal from a medical care savings account provided for in Title 15, chapter 61, used for a purpose other than an eligible medical expense or long-term care of the employee or account holder or a dependent of the employee or account holder;

(c) a nonqualified withdrawal from a family education savings account provided for in Title 15, chapter 62, to the extent that it was deducted from income in calculating Montana individual income taxes;

(d) a withdrawal from a first-time home buyer savings account provided for in Title 15, chapter 63, used for a purpose other than for eligible costs for the purchase of a single-family residence;

(e) an item of income, deduction, or expense to the extent that it was used to calculate federal taxable income if the item was also used to calculate a credit against a Montana income tax liability;

(f) a deduction or expense upon which a state tax credit is computed under 33-22-2006 to the extent that it was included as a deduction or expense in determining federal taxable income;

(g) a deduction for an income distribution from an estate or trust to a beneficiary that was included in the federal taxable income of an estate or trust in accordance with sections 651 and 661 of the Internal Revenue Code, 26 U.S.C. 651 and 661; and

(h) for a taxpayer that deducts state income taxes pursuant to section 164(a)(3) of the Internal Revenue Code, 26 U.S.C. 164(a)(3), an additional amount equal to the state income tax deduction claimed, not to exceed the amount required to reduce the federal itemized amount computed under section 161 of the Internal Revenue Code, 26 U.S.C. 161, to the amount of the federal standard deduction allowable under section 63(c) of the Internal Revenue Code, 26 U.S.C. 63(c).

(3) To the extent they are included as income or gain or not already excluded as a deduction or expense in determining federal taxable income, the following are subtracted from federal taxable income:

(a) if exempt from taxation by Montana under federal law:

(i) interest from obligations of the United States government and exempt-interest dividends attributable to that interest; and

(ii) railroad retirement benefits;

(b) salary received from the armed forces by residents who entered into active duty from Montana and are serving on active duty in the regular armed forces;

(c) interest and other income related to contributions that were made prior to January 1, 2016, that are retained in a medical care savings account provided for in Title 15, chapter 61, and any withdrawal for payment

of eligible medical expenses or for the long-term care of the employee or account holder or a dependent of the employee or account holder;

(d) interest and other income related to contributions that were made prior to January 1, 2016, that are retained in a family education savings account provided for in Title 15, chapter 62, and any qualified withdrawal for payment of qualified higher education expenses;

(e) interest and other income related to contributions that were made prior to January 1, 2016, that are retained in a first-time home buyer savings account provided for in Title 15, chapter 63, and any withdrawal for payment of eligible costs for the first-time purchase of a single-family residence;

(f) a deduction for an income distribution from an estate or trust to a beneficiary in accordance with sections 651 and 661 of the Internal Revenue Code, 26 U.S.C. 651 and 661, recalculated according to the additions and subtractions in subsections (2), ~~and~~ (3)(a) through (3)(e), ~~and~~ (3)(g), and (3)(h); ~~and~~

(g) for each taxpayer that has attained the age of 65, an additional subtraction of $6,400; and

(h) the amount of a scholarship to an eligible student by a student scholarship organization pursuant to [section 10 of Senate Bill No. 410].

(4) By November 1 of each year, the department shall multiply the subtraction from federal taxable income for a taxpayer that has attained the age of 65 contained in subsection (3)(g) by the inflation factor for that tax year, rounding the result to the nearest $10. The resulting amount is effective for that tax year and must be used as the basis for the subtraction from federal taxable income determined under subsection (3)(g)."

Section 30. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 31. Effective date. [This act] is effective January 1, 2016.

Section 32. Applicability. [This act] applies to tax years beginning after December 31, 2015.

Section 33. Termination. [This act] terminates December 31, 2023.

- END -

I hereby certify that the within bill,

SB 0410, originated in the Senate.

_____

Secretary of the Senate

_____

President of the Senate

Signed this _____ day

of _____, 2015.

_____

Speaker of the House

Signed this _____ day

of _____, 2015.

SENATE BILL NO. 410

INTRODUCED BY L. JONES

AN ACT GENERALLY REVISING LAWS RELATED TO TAX CREDITS FOR ELEMENTARY AND SECONDARY EDUCATION; ALLOWING INCOME TAX CREDITS FOR DONATIONS TO PUBLIC SCHOOLS AND STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING SUPPLEMENTAL FUNDING TO PUBLIC SCHOOLS FOR INNOVATIVE EDUCATION; ESTABLISHING GEOGRAPHIC REGIONS AND DISTRICTS FOR SUPPLEMENTAL FUNDING DISTRIBUTIONS; CREATING A STATE SPECIAL REVENUE ACCOUNT; ESTABLISHING OPERATING REQUIREMENTS, REVIEW PROCESSES, AND TERMINATION PROCEDURES FOR STUDENT SCHOLARSHIP ORGANIZATIONS; PROVIDING THAT THE AMOUNT OF A SCHOLARSHIP IS NOT TAXABLE INCOME; PROVIDING RULEMAKING AUTHORITY; PROVIDING A STATUTORY APPROPRIATION; AMENDING SECTIONS 15-30-2110, 15-30-2618, 15-31-511, 17-7-502, AND 20-9-543, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE.

CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

EXHIBIT 2

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through III pertaining to tax credits for contributions to qualified education providers and student scholarship organizations	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On November 5, 2015, at 1:30 p.m., the Department of Revenue will hold a public hearing in the Fourth Floor East Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed adoption of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building facing Sanders Street.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, advise the department of the nature of the accommodation needed, no later than 5 p.m. on October 26, 2015. Contact Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov.

3. The rules proposed to be adopted provide as follows:

NEW RULE I QUALIFIED EDUCATION PROVIDER (1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, 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.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: Montana Constitution, Art. V, Section 11, Montana Constitution, Art. X Section 6, 15-30-3101, MCA

REASON: The department proposes adopting New Rule I based on the passage of Senate Bill (SB) 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education. SB 410, Section 7, was codified at

15-30-3101, MCA.

As proposed, New Rule I will conform to the requirements of 15-30-3101, MCA, which requires the department to administer the tax credit for taxpayer donations in accordance with Art. V, Section 11(5) and Art. X, Section 6(1) of the Montana Constitution, which prohibits the direct or indirect appropriations or payment from any public fund to any sectarian or religious purpose.

NEW RULE II STUDENT SCHOLARSHIP ORGANIZATION REQUIREMENTS (1) An organization seeking approval as a student scholarship organization shall complete and submit to the department an online application prior to accepting donations. This application will be located on the department's web site at revenue.mt.gov. the student scholarship organization shall include the following information on the application:

(a) the student scholarship organization's name, address, and federal employer identification number;

(b) the student scholarship organization's representative's name, title, phone number, and e-mail address;

(c) a list of all qualified education providers who may receive scholarships from the student scholarship organization on behalf of students; and

(d) any other necessary information.

(2) A student scholarship organization may provide scholarships only to an eligible student who attends a Montana school or is taught by a qualified education provider in Montana.

(3) Pursuant to 15-30-3103, MCA, a minimum of 90 percent of all contributions received by a student scholarship organization, after the cost of the fiscal review in 15-30-3105, MCA, must be awarded as scholarships within the three calendar years following the year of the contributions. For example, if a student scholarship organization received $105,000 in contributions in 2017 and the cost of the fiscal review is $5,000, the student scholarship organization must award at least $90,000 of those contributions as scholarships before the end of 2020.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: 15-30-3102, 15-30-3103, 15-30-3105, 15-30-3106, MCA

REASON: The department proposes adopting New Rule II based on the passage of Senate Bill (SB) 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education. SB 410, Section 9, was codified at 15-30-3103, MCA, Section 11 was codified at 15-30-3105, MCA, and Section 12 was codified at 15-30-3106, MCA.

As proposed, (1) will clarify the information a student scholarship organization must provide to register with the department, as set forth in 15-30-3105 and 15-30-3106, MCA. Section (2) clarifies the scholarships from which the credits originate can only be awarded to Montana students. Section (3) provides an example for the deadline for when a student scholarship organization must award scholarships relative to its receipt of contributions.

NEW RULE III CREDIT LIMITATIONS AND CLAIMS (1) A taxpayer may

claim a credit for contributions to an innovative educational program provided for in 20-9-901, MCA, and/or student scholarship organizations provided for in 15-30-3101, MCA.

(2) The maximum credit that may be claimed in a tax year by a taxpayer for allowable contributions to:

(a) innovative education programs is $150; and

(b) student scholarship organizations is $150.

(3) In the case of a married couple that makes a joint contribution, unless specifically allocated by the taxpayers, the contribution will be split equally between each spouse. If each spouse makes a separate contribution, each may be allowed a credit up to the maximum amount.

(4) An allowable contribution from:

(a) an S corporation passes to its shareholders based on their ownership percentage; and

(b) a partnership or limited liability company taxed as a partnership passes to their partners and owners based on their share of profits and losses as reported for Montana income tax purposes.

AUTH: 15-1-201, 15-30-3114, MCA
IMP: 15-30-3101, 15-30-3111, MCA

REASON: The department proposes adopting New Rule III based on the passage of Senate Bill (SB) 410, L. 2015, which generally revised laws related to tax credits for elementary and secondary education. SB 410, Section 1, was codified at 20-9-901, MCA, and SB 410, Section 7, was codified at 15-30-3101, MCA.

As proposed, New Rule III outlines that the maximum credit amount applies to each taxpayer rather than each contribution. The proposed rule further provides that the tax credit is available to each partner, shareholder, or other owner of a pass-through entity based on allowable contributions made by the entity.

4. Following adoption, the department plans to apply the provisions of New Rule I effective January 1, 2016, when the legislative changes to 16-4-311, MCA, become effective.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Laurie Logan, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail lalogan@mt.gov and must be received no later than November 17, 2015.

6. Laurie Logan, Department of Revenue, Director's Office, has been designated to preside over and conduct this hearing.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and e-mail or mailing address of the person to receive notices

and specifies that the person wishes to receive notice regarding a particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at revenue.mt.gov/rules. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary sponsor of Senate Bill 410, Senator Llew Jones, was contacted by letter on June 22, 2015, September 2, 2015, and September 21, 2015.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses. Documentation of the department's determination is available at revenue.mt.gov/rules or upon request from the person in 5.

/s/ Laurie Logan	/s/ Mike Kadas
Laurie Logan	Mike Kadas
Rule Reviewer	Director of Revenue

Certified to the Secretary of State October 5, 2015

CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

EXHIBIT 3

ATTORNEY GENERAL
STATE OF MONTANA

Tim Fox
Attorney General

Department of Justice
Joseph P. Mazurek Justice Bldg.
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

November 17, 2015

Mr. Mike Kadas, Director
Montana Department of Revenue
Sam W. Mitchell Building
125 North Roberts, 3rd Floor
Helena, Montana 59601

Re: Proposed New Rule 1 Qualified Education Provider (SB 410)

Dear Director Kadas,

I'm writing to you about the Department of Revenue's Proposed New Rule 1 Qualified Education Provider (Rule 1). The Department of Justice believes that Rule 1 is neither authorized nor required by the Montana Constitution, and in fact would unnecessarily put the Montana Constitution in potential conflict with the United States Constitution. Therefore, we advise you not to adopt it.

As an initial matter, our recommendation not to adopt Rule 1 is based on the Attorney General's authority to decide when and how to defend State law. *See Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 17, 367 Mont. 112, 118, 291 P.3d 545, 550 ("As an executive officer of the State of Montana, the Attorney General determines when to prosecute or to defend cases in which the State has an interest. Thus, if a challenge is brought to a state statute, the Attorney General has discretion to decide whether or not to defend its constitutionality."). We believe Rule 1, should it be adopted and then challenged in federal court, would not be defensible.

BACKGROUND

Rule 1 is one of several proposals designed to implement Senate Bill (SB) 410, which provides tax credits for elementary and secondary students who attend private schools that are "qualified education provider[s]". Senate Bill 410 is very similar to tax credit plans in other states. *See, e.g., Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 563 U.S. 125 (2011) (describing Arizona's school tuition organization tax credit,

similar to SB 410). Rule 1 proposes to exclude from the definition of "qualified education provider" any "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." Rule 1(a). The Rule also excludes "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." Rule 1(b). In essence, the Rule proposes a wholesale exclusion of religious, or "sectarian," entities from being included in SB 410's tax credit plan.

The Department of Revenue states that two provisions of the Montana Constitution—article V, section 11(5), and article X, section 6(1)—require the exclusion of religious entities from the scope of SB410. As detailed below, we believe that the Department of Revenue's interpretation of the Montana Constitution is incorrect.

ANALYSIS

I. THE DEPARTMENT OF REVENUE LACKS AUTHORITY TO ADOPT RULE 1 BECAUSE TAX CREDITS ARE NOT AN "APPROPRIATION" UNDER MONTANA LAW.

The Montana Constitution does not authorize, much less require, the wholesale exclusion of religious entities from being considered qualified education providers under SB 410. There have been very few cases analyzing the scope of article V, section 11(5) and article X, section 6(1) of the Montana Constitution. But these provisions generally prohibit the State from making any "direct or indirect appropriation or payment of public monies" to a religious entity or for a "sectarian" purpose. Both provisions speak of an "appropriation" of state funds.

It is significant that SB 410 involves tax credits for contributions to school scholarship organizations that may incidentally benefit religious entities, rather than direct grants from the public fisc to religious entities. Tax credits are not appropriations because they do not spend money from the State treasury. Judge Sherlock of the First Judicial District addressed this precise question in *MEA-MFT v. McCulloch*, 2012 Mont. Dist. LEXIS 20, *5 (Mont. Dist. Ct. 2012). As Judge Sherlock noted, the Montana Supreme Court has defined an "appropriation" as:

> [A]n authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state. It means the setting apart of a portion of the public funds for a public purpose, and there must be money in the fund applicable to the designated purpose to constitute an appropriation.

Id. at * 4-5 (quoting *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 78, 195 P. 841, 845 (1921)).

Judge Sherlock held that "the money, whether it is in the form of a tax credit or tax refund, is not set aside for a 'public purpose.'" Further, it is not set aside for 'specified objects or demands against the state.' Rather, the money is a tax refund or credit that a taxpayer may or may not claim. In the case of the credit, it is money that was never in the general fund, and in the case of a refund, it would be money that the state is not entitled to keep. *Id.* at *5 (Mont. Dist. Ct. 2012).[1] Thus, the court held that the tax credit at issue in that case was not an appropriation.

Although the Montana Supreme Court has not directly addressed the issue of tax credits, it has rejected the notion that funds given to an individual who uses them to pay for services at a private institution is an "appropriation." In *Montana State Welfare Bd. v. Lutheran Social Servs*, 156 Mont. 381, 480 P.2d 181 (1971), the plaintiffs asked the Court to declare that funds could not be given to indigent expectant mothers for medical and foster home expenses if the mother used a private adoption agency (many of which were religious). The State Welfare Board argued that the funds were an illegal "appropriation" that violated various provisions of the State constitution. But the Court rejected the idea that funds given to an individual were an appropriation at all: "We hold that payment of public assistance to indigent expectant mothers is not an unconstitutional 'appropriation', 'loan', 'donation', or 'grant' in violation of the Montana Constitution, simply because such persons may request the counseling and assistance of private adoption agencies." *Id.* at 390. Indeed, the Court found that to hold otherwise would violate the Equal Protection Clause. *Id.*[2]

The same rationale applies here. No funds are appropriated to private schools under SB 410. In fact, the relationship between the State and the private entity is even more attenuated here than it was in *Lutheran Social Services*. Under SB 410, individuals who donate money for tuition assistance to students are given a tax credit, not direct financial

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[1] For your convenience, a copy of *MEA-MFT v. McCulloch* is attached.

[2] The Court also found that the Department of Public Welfare's regulation was beyond the scope of the law that it was administering, and thus void for that reason too. Although we don't address that argument here, Rule I could potentially be invalid for going beyond the scope of what the Legislature intended in enacting SB 410.

aid. That the donation may eventually end up as tuition paid at a private religious school is a result of the individual's choice, not an appropriation by the government. As Judge Sherlock noted *MEA-MFT v. McCulloch*, a tax credit program cannot reasonably be considered an "appropriation" by the State.

The United States Supreme Court has also recognized the distinction between tax credits and government expenditures. In *Arizona Christian School Tuition Organization v. Winn*, the Court held that the plaintiffs lacked taxpayer standing to make an Establishment Clause challenge to an Arizona tax credit plan very similar to Montana's SB 410. The Court noted that when the government "collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth." 131 S. Ct. at 1447. But that is much different than a tax credit program like SB 410, where no money is being appropriated by the government. "While the State, at the outset, affords the opportunity to create and contribute to [a school tuition organization], the tax credit system is implemented by private action and with no state intervention." *Id.* at 1448. The Court rejected the plaintiffs' argument that tax credits "should be treated as if it were government property even if it has not come into the tax collector's hands." *Id.* The Court analogized tax credits to charitable tax deductions. "Like contributions that lead to charitable tax deductions, contributions yielding [student tuition organization] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations." *Id.*[3]

The United States Supreme Court has likewise rejected the notion that tax exemptions are a form of appropriation. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Walz v. Tax Com. of New York*, 397 U.S. 664, 675 (1970).

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[3] Incidentally, the Arizona Supreme Court also rejected the argument that Arizona's tax credit plan resulted in an "appropriation" to a religious entity:

> "An appropriation 'set[s] aside from the public revenue . . . a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money.'" *Rios v. Symington*, 172 Ariz. 3, 6-7, 833 P.2d 20, 23-24 (1992) (quoting *Hunt v. Callaghan*, 32 Ariz. 235, 239, 257 P. 648, 649 (1927)). It does not follow, however, that reducing a taxpayer's liability is the equivalent of spending a certain sum of money. An appropriation earmarks funds from 'the general revenue of the state' for an identified purpose or destination. *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 399, 218 P. 139, 145 (1923). Furthermore, we disagree with petitioners' characterization of this credit as public money or property within the meaning of the Arizona Constitution. Therefore, we are unwilling to hold that a proscribed appropriation or application occurs by operation of this statute."

Kotterman v. Killian, 193 Ariz. 273, 287, 972 P.2d 606, 620 (1999).

The same logic applies to tax credits, and indeed, with more force. Tax credits go to individuals who may or may not divert money to a religious entity. A tax exemption, on the other hand, is a direct benefit conferred on a religious entity. Yet nothing suggests that Montana's various exemptions to churches and other religious institutions violates the Montana Constitution. Indeed, the Montana Constitution specifically allows it. *See* Mont. Const., art. VIII, § 5(1). It would make no sense to suggest that a tax credit—which is granted to a private party for a donation that may or may not be directed to a religious entity—violates the State constitution, while a direct tax exemption by the State to a church does not.

In fact, the State evidently already grants tax credits that benefit religious entities, such as the College Contribution Credit, Mont. Code Ann. § 15-30-2326, and the Qualified Endowment Credit, Mont. Code Ann. § 15-30-2328, both of which the Department of Revenue administers. But the Department has not prohibited tax credits for donations that may incidentally benefit religious entities in these examples. It should follow the same policy in administering SB 410. Indeed, if the Montana Constitution were interpreted to prohibit these tax credits, other neutral governmental benefits as basic as fire and police protection could conceivably be denied to religious entities as well. *See*, e.g., *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291-92 (6th Cir. 2009) (noting that a myopic reading of the Establishment Clause could invalidate a host of benefits to religious groups, including fire and police protection, as well as city sidewalks and sewer hookups; benefits which have long been approved by the Supreme Court). The Montana Constitution obviously does not require such an absurd application.

In sum, because SB 410's tax credit plan cannot reasonably be considered an "appropriation" under article V, section 11(5) and article X, section 6(1), the Montana Constitution does not authorize—much less require—the Department of Revenue to exclude religious entities from being included as qualified education providers under SB 410.

II. IF THE MONTANA CONSTITUTION WERE READ AS BROADLY AS THE DEPARTMENT OF REVENUE SUGGESTS, IT WOULD LIKELY VIOLATE THE UNITED STATES CONSTITUTION.

If the Montana Constitution were read so expansively as to *prohibit* tax credits for donations that benefit religious entities in a neutral program like SB 410, it would very likely be in irreconcilable tension with the United States Constitution.

Federal court have held that to categorically exclude religious entities from a neutral generally available benefit violates the religion clauses of the First Amendment, as well as Equal Protection under the Fourteenth Amendment. As the Tenth Circuit noted, "the State's latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008); *see also Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780 (7th Cir. 2010) (excluding groups that engaged in prayer or religious instruction from neutral government benefits "evinced hostility to religion" and was unconstitutional); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (holding that the Free Exercise Clause prohibits discriminating against "a particular religion or . . . religion in general"); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992) (recognizing that laws that discriminate on the basis of religion are inherently suspect); *Lutheran Social Services*, 156 Mont. at 39 (prohibiting grants to individuals because they chose to use private adoption agency may violate Equal Protection).

The Supreme Court has allowed exclusion of religion from a benefits program, but in a much different context than SB 410. In *Locke v. Davey*, 540 U.S. 712 (2004), the Supreme Court found that it did not violate the Constitution for Washington State to exclude theology degrees from a state scholarship program. But Washington's exclusion was limited to "not funding the religious training of clergy." *Id.* at 722 n.5. The Court noted that the "entirety" of the program went "a long way toward including religion in its benefits," by providing scholarship money for students to attend religiously affiliated schools, take religion courses, and even take devotional theology courses. *Id.* at 724-25. In other words, the Court did not sanction the wholesale exclusion of religion from the scholarship program, and indeed, the program's general inclusion of religion is likely what saved it. *Id.*

It is unclear how expansively the Montana Supreme Court would interpret article X, section 5, but it would be very unlikely to interpret it to categorically deny tax credits that may incidentally benefit religious entities. A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). As a result, many states have interpreted provisions like article X, section 5 of the Montana Constitution to apply coequally with the federal Establishment Clause of the United States Constitution, despite differences in the language of the state and federal provisions. *See, e.g., American Atheists*, 567 F.3d at 301 (6th Cir. 2009) (noting that despite differences in language, Michigan had applied its no-aid clause as no more restrictive than the federal Establishment Clause); *Alabama Educ. Ass'n v. James*, 373 So. 2d 1076, 1081 (Ala. 1979) (same). Doing so avoids unnecessary friction with the

federal Constitution.

While the Montana Supreme Court may or may not interpret article X, section 5 as narrowly, it is very unlikely to interpret it so broadly as to categorically exclude religious entities from SB 410's tax credit plan, especially when doing so would present grave difficulties in reconciling the Montana Constitution with the United States Constitution.

CONCLUSION

Rule 1's rationale—that the Montana Constitution requires categorical exclusion of religious entities from SB 410's tax credit program—is in error because the tax credit envisioned by SB 410 is not a direct or indirect appropriation by the State to a religious entity. Moreover, there is a substantial likelihood that Rule 1 would be held unconstitutional if challenged under the United States Constitution because it categorically excludes religious entities from an otherwise neutral benefits program without sufficient reason. If the Department adopts Rule 1, it is likely that its constitutionality would be challenged in federal court. The Attorney General believes that it would not be defensible.

If you have any questions or would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

Dale Schowengerdt
Solicitor General

CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

EXHIBIT 4

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Revenue and Transportation Interim Committee

64th Montana Legislature

December 1, 2015

RE: Results of the Poll of the Legislature: MAR Notice No. 42-2-939

To Whom it May Concern:

On October 15, 2015, the Department of Revenue published MAR Notice No. 42-2-939 pertaining to the public hearing on the proposed adoption of New Rule I, which is located on page 1682 of the 2015 Montana Administrative Register, Issue Number 19. The proposed new rule relates to Senate Bill No. 410 (2015), which created two new tax credits, one for contributing to a new educational improvement special revenue account for distribution to school districts for new programs and one for making donations to student scholarship organizations that give scholarships to students in private schools. The short title of SB 410 is "Provide for tax credits for contributions to public and private schools".

Objection Letters Received

Section 2-4-403, MCA, requires the interim committee that has subject matter jurisdiction over an agency to conduct a poll of the members of the Legislature when 20 or more legislators object to a proposed rule. As of October 31, 2015, the Legislative Services Division had received 20 written objections to the Department of Revenue's proposed New Rule I in MAR 42-2-939, which falls under the jurisdiction of the Revenue and Transportation Interim Committee under section 5-5-227, MCA. Further written objections were received after October 31, 2015.

Poll of the Legislature

The Revenue and Transportation Interim Committee conducted a poll of the members of the Legislature starting on November 10, 2015, and ending on November 24, 2015, at 5:00 p.m. The question raised in the poll was as follows:

Proposed Rule I in MAR 42-2-939 (Qualified Education Provider)

_____ The proposed rule IS CONSISTENT WITH legislative intent.

_____ The proposed rule IS CONTRARY TO legislative intent.

The following table accurately reflects the vote of the Senate:

Senate District	Senator	The proposed rule IS CONSISTENT WITH legislative intent	The proposed rule IS CONTRARY TO legislative intent
20	ANKNEY, DUANE		1
26	ARNTZEN, ELSIE		1
36	BARRETT, DEBBY		1
45	BARRETT, DICK	1	
4	BLASDEL, MARK		1
17	BRENDEN, JOHN		1
2	BROWN, DEE		1
28	BROWN, TAYLOR		1
11	BUTTREY, EDWARD		1
41	CAFERRO, MARY		
42	COHENOUR, JILL	1	
43	CONNELL, PAT		1
25	DRISCOLL, ROBYN	1	
50	FACEY, TOM	1	
7	FIELDER, JENNIFER		1
15	HAMLETT, BRADLEY MAXON		
14	HANSEN, KRISTIN		1
32	HINKLE, JEDEDIAH		1
13	HOVEN, BRIAN		1
29	HOWARD, DAVID		1
9	JONES, LLEW		1
22	KARY, DOUG		1
40	KAUFMANN, CHRISTINE	1	
38	KEANE, JIM		
5	KEENAN, BOB		1
47	LARSEN, CLIFF	1	
46	MALEK, SUE	1	
24	MCNALLY, MARY	1	
12	MOE, MARY SHEEHY	1	
19	MOORE, FREDERICK (ERIC)		1
31	PHILLIPS, MIKE	1	
33	POMNICHOWSKI, JP	1	
10	RIPLEY, RICK		1
18	ROSENDALE, MATTHEW		1

35	SALES, SCOTT		1
49	SANDS, DIANE	1	
37	SESSO, JON	1	
27	SMITH, CARY		1
21	STEWART-PEREGOY, SHARON		
30	SWANDAL, NELS		1
6	TAYLOR, JANNA		1
44	THOMAS, FRED		1
3	TUTVEDT, BRUCE		1
34	VANCE, GORDON		1
1	VINCENT, CHAS		1
39	VUCKOVICH, GENE	1	
23	WEBB, ROGER		1
8	WHITFORD, LEA	1	
16	WINDY BOY, JONATHAN		1
48	WOLKEN, CYNTHIA		
	Senate Total	**15**	**30**

The following table accurately reflects the vote of the House of Representatives:

House District	Representative	The proposed rule IS CONSISTENT WITH legislative intent	The proposed rule IS CONTRARY TO legislative intent
87	BALLANCE, NANCY		1
91	BENNETT, BRYCE	1	
1	BENNETT, JERRY		1
58	BERGLEE, SETH		1
40	BERRY, TOM		1
9	BRODEHL, RANDY		1
13	BROWN, BOB		1
63	BROWN, ZACH	1	
67	BURNETT, TOM		1
17	CLARK, CHRISTY		1
18	COOK, ROB		1
50	COURT, VIRGINIA	1	
2	CUFFE, MIKE		1
98	CURDY, WILLIS	1	
39	CUSTER, GERALDINE		1
36	DOANE, ALAN		1
94	DUDIK, KIMBERLY	1	

84	DUNWELL, MARY ANN	1	
79	ECK, JENNY	1	
86	EHLI, RON		1
81	ELLIS, JANET	1	
54	ESSMANN, JEFF		1
43	FISCUS, CLAYTON		1
20	FITZPATRICK, STEVE		1
70	FLYNN, KELLY		1
82	FUNK, MOFFIE	1	
7	GARNER, FRANK		1
6	GLIMM, CARL		1
88	GREEF, EDWARD		1
52	HAGSTROM, DAVE		1
29	HARRIS, BILL		1
66	HAYMAN, DENISE	1	
12	HERTZ, GREG		1
28	HESS, STEPHANIE		1
90	HILL, ELLIE BOLDMAN		
27	HOLLANDSWORTH, ROY		1
38	HOLMLUND, KENNETH		1
83	HUNTER, CHUCK	1	
21	JACOBSON, TOM	1	
46	JONES, DONALD		1
48	KARJALA, JESSICA	1	
47	KELKER, KATHY		1
15	KIPP III, GEORGE		
34	KNUDSEN, AUSTIN		1
60	LAMM, DEBRA		1
33	LANG, MIKE		1
53	LASZLOFFY, SARAH		1
8	LAVIN, STEVE		1
5	LIESER, ED	1	
76	LYNCH, RYAN		
51	MACDONALD, MARGARET (MARGIE)	1	
57	MANDEVILLE, FORREST		1
85	MANZELLA, THERESA		1
49	MCCARTHY, KELLY	1	
73	MCCLAFFERTY, EDIE	1	
89	MCCONNELL, NATE	1	
23	MCKAMEY, WENDY		1
22	MEHLHOFF, ROBERT		
32	MEYERS, G. BRUCE		1
80	MILLER, MIKE		1

69	MONFORTON, MATTHEW		1
92	MOORE, DAVID (DOC)		1
44	MORTENSEN, DALE		1
10	NOLAND, MARK		1
74	NOONAN, PAT	1	
100	OLSEN, ANDREA	1	
11	OLSZEWSKI, ALBERT		1
30	OSMUNDSON, RYAN		1
42	PEASE-LOPEZ, CAROLYN	1	
41	PEPPERS, RAE		1
3	PERRY, ZAC	1	
96	PERSON, ANDREW	1	
78	PIERSON, GORDON	1	
19	PINOCCI, RANDALL		1
65	POPE, CHRISTOPHER	1	
24	PRICE, JEAN	1	
37	RANDALL, LEE		1
59	REDFIELD, ALAN		1
4	REGIER, KEITH		1
55	RICCI, VINCE	1	
56	RICHMOND, TOM		1
93	SALOMON, DANIEL		1
25	SCHREINER, CASEY	1	
14	SCHWADERER, NICHOLAS		1
71	SHAW, RAY	1	
31	SMITH, BRIDGET	1	
35	STAFFANSON, SCOTT		1
99	STEENBERG, TOM	1	
77	SWANSON, KATHY	1	
26	TROPILA, MITCH		
97	TSCHIDA, BRAD		1
75	WAGONER, KIRK		1
16	WEBBER, SUSAN	1	
72	WELBORN, JEFFREY		1
64	WHITE, KERRY		1
61	WILLIAMS, KATHLEEN	1	
95	WILSON, NANCY	1	
68	WITTICH, ART		1
62	WOODS, TOM	1	
45	ZOLNIKOV, DANIEL		1
	House Total	**36**	**59**

Potential Impact of the Poll Results

Section 2-4-404, MCA, provides that the results of an interim committee poll must be admissible in any court proceeding involving the validity of the proposed rule. It provides further that if a majority of the members of both houses find that the proposed rule or adopted rule is contrary to the intent of the legislature, the proposed rule or adopted rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving its validity.

Additional Information

The poll materials are available by contacting the Legislative Services Division, P.O. Box 201706, Room 110, State Capitol, 1301 East Sixth Avenue, Helena, MT 59620-1706; telephone (406) 444-3064 or fax (406) 444-3036. Alternatively, the poll materials that were received by the members of the Legislature are available on the Revenue and Transportation Interim Committee website: www.leg.mt.gov/rtic or http://leg.mt.gov/css/Committees/Interim/2015-2016/Revenue-and-Transportation/

Senator Fred Thomas
Chairman

Representative Tom Jacobson
Vice Chairman

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