EXHIBIT 2
DATE 3/28/11
HB 397

Memorandum

To: Pat Wagman, Montana Family Foundation
From: Tim Keller, Institute for Justice
Date: February 16, 2011
RE: Tax Credit Funded Tuition Scholarship Programs Are Constitutional

Introduction

The Montana Legislature is currently considering several proposals to provide taxpayers with a tax credit for the taxpayer's voluntary decision to help provide children with private school tuition scholarships. In a prior memorandum dated February 10, 2009, the Institute for Justice concluded that tax-credit-funded scholarship programs are constitutional under Montana's Constitution. Sadly, the Montana Education Association and Montana Foundation for Teachers (MEA-MFT) continue to allege the proposals violate Article 10, section 6 of the Montana Constitution.

The relevant language of Article 10, section 6 prohibits the legislature from making "any direct or indirect appropriation or payment from any public fund or monies . . . 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."

This second memorandum explains in additional detail why Montana's Constitution does not restrict private citizens from claiming a tax credit for using their money to help fund scholarships for private school tuition.

Tax Credit Programs In Montana

There is already a clearly established precedent in Montana for allowing tax credits for contributions to organizations that funds private school scholarships at both the K-12 and post-secondary education levels. *See* Dick M. Carpenter II, Ph.D. and John K. Ross, *Expanding Choice: Tax Credits and Educational Access in Montana*, Institute for Justice (March, 2009), available at http://www.ij.org/images/pdf_folder/other_pubs/expanding_choice_montana.pdf. The Qualified Endowment tax credit provides credits to taxpayers who support one or more of over a thousand nonprofit organizations with a wide variety of missions--including religious foundations. *Id.* While the nature of the various endowments span a range of issues from the arts to health care, many of the endowments exist to fund college scholarships, including scholarships to private and religious colleges and elementary and secondary schools.[1] There is also a separate

[1] Qualified endowments receiving support through the tax credit include the Canton Church Project, Holy Rosary Health Center, Diocese of Great Falls, Episcopal Church of the Incarnation, First Presbyterian Church and Hope

College Contribution Credit, which allows for funds to be used at private, religious colleges. *Id.* Montana is thus already encouraging the funding of scholarships at private and religious schools through donations raised by individuals who receive a tax credit for their charitable contributions.

Tax Credit Programs In Other States

At least ten states already have school choice tax benefit programs, including seven that have provisions in their state constitutions that are similarly worded to Montana's Article X, section 6.[2] Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Minnesota, Pennsylvania, and Rhode Island all have tax credit or tax deduction programs similar to the Montana proposals.[3]

The Arizona and Illinois tax credit programs survived numerous constitutional challenges under their respective state constitutions. *See Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding Arizona's individual tax credit program); *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009) (upholding Arizona's corporate tax credit program); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. 4th Dist. 2001) (upholding Illinois' personal use tax credit); and *Griffith v. Bower*, 747 N.E.2d 423 (Ill. App. 5th Dist. 2001) (same).

The only judicial panel to suggest that tax deduction programs are unconstitutional under a state constitutional provision is the Massachusetts Supreme Court in a 1987 Advisory Opinion.[4] *See Opinion of Justices to Senate*, 514 N.E.2d 353 (Mass. 1987). The Court did not issue the Advisory Opinion in the context of an adversarial proceeding, which means that no party was present before the Court to advocate in favor of the program and to argue such a program would be constitutional, if enacted. This Advisory Opinion is not binding legal precedent, and thus deserves little weight.

Lutheran Church Trust Fund. The Qualified Endowment Credit also funds foundations like the Hawkins Scholarship Foundation and the Peggy L. Unrau Scholarship Foundation, which award educational scholarships for use at a post-secondary student's school of choice, including religious institutions. Other endowments benefit K-12 private schools, such as Great Falls Montessori School and Children's House Montessori School, and still others support religious schools, such as Blessed Trinity Catholic School and Heritage Christian School. And some of these endowments for religious schools pay for tuition scholarships for students.

[2] *See* Arizona Const. Art. II, § 12; Arizona Const. Art. IX, § 10; Florida Const. Art. I, § 3; Georgia Const. Art. I, § II, Para. VII; Illinois Const. Art. X, § 3; Indiana Const. Art. 1, § 6; Minnesota Const. Art. I, § 16; Minnesota Const., Art. XIII, § 2; Pennsylvania Const. Art. 3, § 15.

[3] *See* Ariz. Rev. Stat. Ann. § 43-1889; Fl. Stat. § 220.187; Georgia Code, 20-2A and 48-7-29.13; 35 Ill. Comp. Stat. 5/201m; Iowa Code § 422.11M; La. Rev. Stat. § 47:297.10; Minn. Stat. § 290.01, 290.0674; 24 Penn. Code §§ 20-2001-B to 20-2008-B; and RI Gen. Laws §§ 44-62-1 to 44-62-7.

[4] The U.S. Supreme Court is currently considering a case involving Arizona's individual tax credit program. *Garriott v. Winn.* However, that case involves only the First Amendment to the U.S. Constitution and it challenges an aspect of the Arizona program not present in any of the Montana proposals. The case is therefore not relevant to any of Montana's proposed tax credit programs.

Tax Credit Programs Do Not Appropriate Public Funds Or Monies

As an initial matter, tax credits do not violate Montana's Constitution because donations by private individuals to charitable organizations do not constitute either a direct or an indirect "appropriation or payment from any public fund or monies." In both the Arizona and Illinois cases, opponents of the scholarship tax credit programs argued that the monies donated to scholarship organizations were public funds. The courts soundly rejected that argument:

"The credit at issue here does not involve any appropriation or use of public funds. No money ever enters the state's control as a result of this tax credit. Rather, the Act allows Illinois parents to keep more of their own money to spend on the education of their children as they see fit and thereby seeks to assist those parents in meeting the rising costs of educating their children." *Griffith v. Bower*, 747 N.E.2d 423, 426 (internal citation omitted).

"[T]he Credit does not constitute an 'appropriation,' as that term is commonly understood. An appropriation involves "'the setting apart from public revenue a certain sum of money for a specific object.'" *American Federation of State, County & Municipal Employees v. Netsch,* 216 Ill. App. 3d 566, 567, 575 N.E.2d 945, 946, 159 Ill. Dec. 138 (1991), quoting *Illinois Municipal Retirement Fund v. City of Barry,* 52 Ill. App. 3d 644, 646, 367 N.E.2d 1048, 1049, 10 Ill. Dec. 439 (1977). Accordingly, we reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money . . . ." *Toney v. Bower*, 744 N.E.2d 351, 358-59.

"[N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with 'public money.'" *Kotterman v. Killian*, 972 P.2d at 618, ¶ 36. Moreover, the Arizona Supreme Court said, "[f]or us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before. The tax on that amount would then instantly become public money . . . . It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim." *Kotterman* at 618, ¶ 40.

Even If The Tax-Credit-Funds Are Appropriations, There Is Still No Constitutional Violation

The Arizona and Illinois courts did not end their analysis after determining that tax credit programs do not involve public funds. Both states went on to say that even if

public funds were implicated, that the programs would not run afoul of their state's constitutions.

The Illinois courts said, "However, were we to agree with plaintiffs' argument on this issue, we would find that the Credit does not contravene the constitutional provisions plaintiffs cite." *Toney v. Bower*, 744 N.E.2d at 359. This is because "[f]unds become available to schools only as the result of private choices made by individual parents." *Griffith v. Bower*, 747 N.E.2d at 426 (also citing *Mueller v. Allen,* 463 U.S. 388, 400 (1983)).

The Arizona Supreme Court said, "Even if we were to agree that an appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization violates this clause. The way in which a [scholarship organization] is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system--all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach." *Kotterman* at 620, ¶ 46.

Tax Credit Programs Aid Families, Not Schools Or Churches

The Montana Constitution, Article, section 6, is concerned with appropriations that aid institutions—such as schools and churches. But tuition tax credit programs do not aid institutions, they aid individuals. Individuals use their aid to purchase, in a bargained for exchange, services from private institutions. Thus, school choice programs do not aid schools, just like food stamps do not aid grocery stores. The Arizona Supreme Court recognized this important distinction by emphasizing that "the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves." *Kotterman* at 620, ¶ 47.

The Montana Supreme Court also recognizes a distinction between programs that aid individuals and programs that aid institutions. In *Montana State Welfare Board v. Lutheran Social Services*, the Montana Supreme Court upheld a public assistance program allowing indigent expectant mothers to choose private and religious adoption agencies from which to obtain counseling and other services. 480 P.2d 181 (Mont. 1971). The Montana Supreme Court even said that the private and religious adoption agencies are in "no way . . . directly or indirectly benefited by payments to or on behalf of a qualified recipient." *Id.* at 186.

If Tax Credits Constitute Public Funds, As MEA-MFT Suggests, Then So Must Other Tax Policy Equivalents Such As Deductions And Exemptions.

The contention that tax credits are public funds "directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions. Indeed, it seems to us that unless a constitutionally significant difference between credits and deductions can be demonstrated, petitioners' argument must fail." *Kotterman* at 618, ¶ 38.

The Illinois courts could find "no evidence demonstrating that the framers of the Illinois Constitution intended the term 'public fund' to have the broad, expansive meaning that [opponents] would give it. Giving the term such a meaning may have broad implications for other tax credits, deductions, and exemptions from taxation, such as the property tax exemption for property used exclusively for religious purposes (*35 ILCS 200/15-40* (West 1998)) and the partial state income tax exemption for religious organizations (*35 ILCS 5/205(a)* (West 1998)). We are unwilling to interpret the term 'public fund' so broadly as to endanger the legislative scheme of taxation." *Toney v. Bower*, 744 N.E.2d at 358.

The Montana Constitutional Provision At Issue Is A Blaine Amendment And Sadly Has A Religiously Discriminatory History

Finally, Article X, section 6 is a Blaine Amendment. These notorious constitutional provisions, found in 37 state constitutions, possess an unsavory history. They receive their name from a Maine Senator named James G. Blaine, who introduced a proposed amendment to the U.S. Constitution in the latter half of the 19th Century that would have prevented funding for "sectarian" schools or institutions. However, in the parlance of the times, "sectarian" was code for "Catholic" and the amendment was introduced against the backdrop of a well-documented atmosphere of anti-immigrant and anti-Catholic bigotry. Arizona's then-Chief Justice, Thomas Zlaket, explained that history in *Kotterman*:

> The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing "Catholic menace." Viteritti, *15 Yale L. & Pol'y Rev. at 146;* see also Stephen K. Green, The Blaine Amendment Reconsidered, *36 Am. J. Legal Hist. 38, 54 (1992).* Its supporters were neither shy nor secretive about their motives. As one national publication which supported the measure wrote:

> Mr. Blaine did, indeed bring forward . . . a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.

Green, *supra*, at 54 (quoting The Nation, Mar. 16, 1876, at 173). Other contemporary sources labeled the amendment part of a plan to "institute a general war against the Catholic Church." Green, *36 Am. J. Legal Hist. at 44* (quoting The New York Tribune, July 8, 1875 at 4). While such efforts were unsuccessful at the federal level, the jingoist banner persisted in some states. By 1890, twenty-nine states had incorporated at least some language reminiscent of the Blaine amendment in their own constitutions. Viteritti, *15 Yale L. & Pol'y Rev. at 147.*

Although the Arizona Supreme Court found "no recorded history directly linking" the original Blaine Amendment to the Arizona Constitution, it nevertheless said it "would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Kotterman,* 972 P.2d at 624, ¶ 66.

The MEA-MFT's interpretation of Montana's Blaine Amendment is nothing more than an effort to extend the Blaine Amendment's reach from discrimination against the Catholic Church to discrimination against all religious entities. The unions' attempt to grasp at constitutional straws in an effort to halt a policy they do not like should be rejected.

Conclusion

There is nothing in the plain language of Article 10, section 6 of the Montana Constitution that prohibits the proposed tax credit plans. The established case law confirms that tax credits do not involve public funds, that tax credits aid families not schools, and that any other interpretation would jeopardize existing tax policies, such as deductions and exemptions. It is our opinion that the proposed tax credit tuition scholarship programs are constitutional.