STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

CATHY MOSES and PAUL WEINBAUM,

Plaintiffs,

v.

No. D-101-CV-2012-00272

HANNA SKANDERA, SECRETARY OF EDUCATION, NEW MEXICO PUBLIC EDUCATION DEPARTMENT,

Defendants,

and

ALBUQUERQUE ACADEMY, THE NEW MEXICO ASSOCIATION OF NONPUBLIC SCHOOLS, REHOBOTH CHRISTIAN SCHOOL, ST. FRANCIS SCHOOL, SUNSET MESA SCHOOL, ANICA BENIA and MAYA BENIA,

Intervenors.

INTERVENORS' COMBINED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs present a grab bag of claims under the New Mexico Constitution. None are meritorious. Plaintiffs lack standing and the challenged statute is wholly constitutional. Plaintiffs' motion should thus be denied and summary judgment granted in favor of Intervenors.

BACKGROUND

The Instructional Materials Law (IML) establishes a State-wide library of instructional materials for students from kindergarten through twelfth grade. NMSA §§ 22-15-1 to 14. The library is funded by an "instructional material fund" authorized by statute to accept "appropriations, gifts, grants, donations, and any other money credited to the fund. NMSA § 22-15-5(A). In practice, the fund is supported by federal money granted to New Mexico under the federal Mineral Lands Leasing Act. *See* Defs.' Opp., Exs. A-C. The library functions in all material respects like any other State-owned library, with collections owned and controlled by the State, but circulated among participating members.

Collections of materials. The instructional materials library comprises a collection of "school textbooks and other educational media that are used as the basis for instruction . . . ." NMSA § 22-15-2(C). Approved materials are catalogued on a "multiple list" maintained by the Public Education Department (PED). NMSA § 22-15-2(D). IML ensures that the collection will reflect the State's diversity: "[a]t least ten percent of materials "concerning language arts and social studies shall contain material that is relevant to the cultures, language, history and experience of multi-ethnic students." NMSA § 22-15-8.

All materials are purchased directly by the State or its agencies or subdivisions, but materials for public or private schools are purchased in different ways. For materials selected by public schools, PED has "procedures for the distribution of funds directly" to those schools, which then purchase the materials. NMSA § 22-15-9(D). Materials selected by private schools,

however, must be identified to PED, which purchases those materials directly from an "in-state depository." NMSA §22-15-9(E). Schools may not specify materials that are "religious, sectarian or nonsecular." NMSA § 22-15-9(C).

Circulation by lending. Any K-12 student attending a public or private school "is entitled to the free use of instructional material." NMSA § 22-15-7(A). To ensure classroom uniformity, materials are distributed through the public and private schools "as agents for the benefit of students." NMSA § 22-15-7(B). As agents, the schools become "responsible for distribution . . . and for the safekeeping of the instructional material." NMSA § 22-15-7(C).

Circulation is limited based only upon the amount of funds allocable and the number of students. Roughly speaking, each eligible public and private school is allocated a percentage of the money available in the instructional materials fund equivalent to the percentage of its students, as measured against all students across the entire State. NMSA § 22-15-9(A). Each school—acting on behalf of its students—can then select materials up to the amount of the allocation. However, all purchases are made by a State agency or subdivision; no funds are distributed to any non-governmental entity. *See* NMSA §§ 22-15-9(D) & (E), 22-15-13(A).

The schools' agency relationship with the students is prescribed by law. Schools must distribute instructional materials for use by students, and students are "responsible for the loss, damage or destruction of instructional material while the material is in the possession of the student." NMSA §§ 22-15-7(C), 22-15-10(B); *see also* NMSA § 22-15-9(D) (school boards must ensure that every student has a textbook and must "allow[] students to take those textbooks home."). Indeed, a school "may withhold the grades, diploma and transcripts of the student responsible for damage or loss of instructional material ...." *Id.*

Finally, students are entitled only to "use" of the instructional materials—materials are on loan only. NMSA § 22-15-7(A). Although schools may sell materials they no longer use, PED must pre-approve the sale, and only at a price lower than the State's original purchase price. NMSA § 22-15-10(A). PED can also demand that materials no longer in use be returned for use elsewhere instead of being sold. NMSA § 22-15-10(E). If a sale is authorized, public schools must use the funds only for purchasing further materials within the program. NMSA § 22-15-10(C). Private schools must return the funds to the Department. NMSA § 22-15-10(D).

Government ownership and control. All instructional materials always remain under the ownership and ultimate control of PED. No funds are distributed to private parties. Rather, PED or other state institutions buy all materials, and materials are only loaned to others for their "use." PED may "enforce rules for the handling, safekeeping and distribution of instructional material . . . to be followed by school districts, state institutions, and private schools." NMSA § 22-15-4(B). In case of any violation of, or noncompliance with, the IML or any rules adopted under the IML, PED may "withhold the privilege of participating in the free use of instructional material." NMSA § 22-16-4(C). Schools must "file [an annual] report with [PED] that includes an itemized list of instructional material" obtained by the school. NMSA § 22-15-12.

ARGUMENT

Plaintiffs' claims must be rejected for several reasons. First, Plaintiffs have failed to demonstrate that they are injured by the statute. Thus, they lack standing to challenge it. Second, even if Plaintiffs had shown some injury from the IML, they have failed to show that it violates New Mexico's constitution. To the contrary, the IML complies with the Constitution in every respect. Thus, the Court should deny Plaintiffs' motion for summary judgment and instead grant summary judgment in favor of the Defendants and Intervenors.

I. Plaintiffs lack standing as state taxpayers because their petition only challenges the use of federal royalty payments, not state tax dollars.

Plaintiffs claim standing because they are New Mexico taxpayers and have children in the New Mexico public schools. Yet the money at issue comes not from New Mexico taxpayers, but from the federal government. *See* Defs.' Opp., Exs. A-C. Indeed, Plaintiffs readily admit that the IML is funded with federal royalties from mineral and gas leases, not with state or federal tax dollars. *See* Pls.' Reply at 3.[1] Thus, Plaintiffs cannot be injured in their status as New Mexico taxpayers—their tax dollars are completely uninvolved, let alone being used improperly. Moreover, Plaintiffs concede that they are not asserting any federal claims and that the United States Supreme Court has in any case "repeatedly held that the use of public funds to provide or loan textbooks to elementary or secondary sectarian schools does not violate" the federal constitution. Pls.' Memo. at 7. Thus state taxpayer standing does not exist.

Nor do Plaintiffs explain how the fact that they have children in the public schools would give them standing to assert that expenditures of *federal* money for the benefit of all students creates a judicially cognizable injury under the *state* constitution. They suggest that, but for the IML, the federal funds might all go to the public schools, but that is purely speculative. Legislatures are authorized to use the federal funds, at their discretion, for "(i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service." 30 U.S.C. § 191. There is no evidence that, absent the IML, the federal funds would be used to increase spending for the public schools.

Under their extreme theory, Plaintiffs would have standing as state taxpayers to challenge all sorts of expenditures of federal funds within New Mexico—Medicare, Medicaid, FEMA, and

[1] Plaintiffs call it the "Federal Oil and Gas Royalty Simplification and Fairness Act of 1996," and Defendants call it the "Mineral Lands Leasing Act," but both cite the same statute, 30 U.S.C. §§ 181 *et seq*.

other programs authorizing States to spend federal dollars would all be fair game. The court should reject such an unlimited theory of standing.

II. As a matter of law, Plaintiffs cannot prevail on the merits of their claims.

Plaintiffs challenge the IML under four provisions of the State Constitution: Article IX, § 14; Article XII, § 3; Article IV, § 31; and Article II, § 11. All address the use of state, not federal, funds. For this reason alone, Plaintiffs' claims are without merit and should be dismissed with prejudice. Moreover, even if the IML were funded with state rather than federal dollars, none of the cited provisions would be violated because the IML fully complies with their terms.

A. The IML does not violate Article IX, § 14.

In relevant part, Article IX, § 14 provides: Neither the state nor any county, school district or municipality . . . shall . . . make any *donation* to or in aid of any person, association or public or private corporation." N.M. Const. Art. IX , § 14 (emphasis added). The IML does not violate this "antidonation provision" for two reasons. First, the provision—which appears under the heading of "State, County, or Municipal Indebtedness"—prohibits donations by "the state." *Id.* It says nothing about the expenditure of *federal* funds, *i.e.*, the only funds at issue here.

In *Hotels of Distinction West, Inc.* v. *City of Albuquerque*, the City of Albuquerque contracted with a private entity to build a first-class hotel "using funds received by the city from the federal [government]." 107 N.M. 257, 258, 755 P.2d at 596 (1988). The private entity could "use the federal grant money without interest and with no obligation to repay for six years." 107 N.M. at 259, 755 P.2d at 596. An already existing hotel sued on grounds that using "state" funds to aid a competing hotel would violate Article IX, § 14. The New Mexico Supreme Court disagreed, noting that the provision would only be violated if it involved "municipal investment in the project through the lending of *municipal* funds." 107 N.M. at 259, 755 P.2d at 597 (emphasis added). Since the hotel project was instead "funded with ten million dollars in *federal*

funds," the Court found no violation, emphasizing that the mere "channeling of federal funds through the City does not violate the antidonation clause." *Id.* Similarly, here, merely channeling federal dollars through the State Legislature to fund the IML does not implicate Article IX, §14.

Even if state funds were at issue, Article IX, § 14 would not be implicated by the IML because there is no "donation" of funds. In *Village of Deming* v. *Hosdreg Co.*, the plaintiff challenged Deming's power to issue revenue bonds for the purpose of acquiring or constructing industrial buildings for sale or lease to industries wishing to locate in the municipality. 62 N.M. 18, 24, 303 P.2d 920, 924 (1956); *see also State Park and Rec. Comm'n* v. *New Mexico State Auth.*, 76 N.M. 1, 20, 411 P.2d 984, 997 (1966) (describing statute at issue in *Deming*). The bonds unquestionably "result[ed] in the promotion of and gain to a private corporation." 62 N.M. at 30, 303 P.2d at 928. Nevertheless, the Court concluded that there was no "donation" at issue. 62 N.M. at 28, 303 P.2d at 927. The Court noted that Article IX, § 14 requires a "*donation* to or in aid of any . . . private corporation," not just "the giving of aid to private enterprise." 62 N.M. at 27; 303 P.2d at 926. A "donation" requires "a gratuitous transfer of property from one to another"; "incidental aid or resultant benefit to a private corporation" is not enough. 62 N.M. at 28; 303 P.2d at 926. The Court chose a "cautious interpretation" of the word "donation." *Id.*

Here, there is no "donation." The IML establishes a library of textbooks and other instructional materials. All materials are owned and controlled by the State. All are loaned to students based on course selections made by their schools—public or private. All students in the state are eligible to participate. All purchases are made by the State and all materials (or their proceeds if sold) must be returned by private schools to the state when they are no longer in use.

It is irrelevant that individual students or their families may incidentally benefit from not having to purchase the books themselves—nothing is "donated" to them. Holding otherwise

would call into question the constitutionality of any state, county, or municipal library, because borrowers of books from traditional libraries also incidentally benefit from not having to purchase the books themselves. Similarly, the IML does not involve a "donation" to private schools. At most, private schools are saved from having to purchase the textbooks themselves *and pass the cost along to their students*. Thus, there is no evidence that private schools are even aided by, let alone receiving "donations" from—the IML.

In sum, mere "aid or benefit" is not enough, unless it "take[s] on character as a donation *in substance and effect*." *State Park and Rec. Comm'n*, 76 N.M. at 22, 411 P.2d at 998 (emphasis added). Here, the plain terms of the IML confirm there is no donation in "substance" or in "effect." There is simply lending of books to students for a limited period of time (*i.e.* for a school year) before they are passed on to another student or returned to the State.

B. The IML does not violate Article XII, § 3.

Section 3 of Article XII provides that no "funds appropriated, levied, or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." N.M. Const. Art. XII, § 3. The funds at issue here are federal lease royalties, not tax dollars "appropriated, levied, or collected" by the State for educational purposes. And as set forth in the preceding section, federal funds are not converted into state funds simply by being channeled through the State Legislature. *Hotels of Distinction*, 107 N.M. at 259, 755 P.2d at 597. Similarly, Plaintiffs have submitted no evidence that the funds actually "support" *any* "private school, college or university," religious or secular. At most, the IML supports students and their families by saving them some of the costs of attending a private school. The IML is clear on its face that it involves instructional materials only and that those materials are loaned to students, who bear the ultimate responsibility for their return to the State.

Such "support" is not barred by Article XII, § 3.

Plaintiffs' reliance *Zellers* v. *Huff* is misplaced. *See* Pls.' Reply at 9-11. *Zellers* involved what the Court referred to as "a Roman Catholic school system supported by public funds within [the New Mexico] public school system." 55 N.M. 501, 510, 236 P.2d 949, 954 (1951). Nearly the entire educational experience—including the bussing, teachers, and textbooks—was funded with state taxes but controlled by the Catholic Church. 55 N.M. at 506, 236 P.2d at 952. All of the goods and services were essentially donated directly to the Church at the State's expense.[2]

Here, there are no state funds at issue. There are no donations to any one private entity, religious or secular. There is simply a central collection of secular instructional materials, on temporary loan to schoolchildren, with all public and nonpublic schools across the State acting as agents for the students to ensure uniformity of educational materials in each school or classroom.

Plaintiffs' targeting of "sectarian" schools in asking this Court to strike down the IML is particularly troubling because it invokes Article XII, § 3's ugly history. *See, e.g.*, Pls. Memo. at 1, 2, 7. Article XII, § 3 is a "Blaine Amendment," a set of state constitutional provisions inspired by anti-immigrant, anti-Catholic nativism that all used the word "sectarian."[3] Both the Supreme Court and the Tenth Circuit have put Blaine Amendments under suspicion, as it was "an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (upholding program distributing textbooks in kind to private schools). This "hostility to aid to pervasively sectarian schools has a shameful pedigree," which courts should

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[2] Plaintiffs' explication of other states' laws is overstated. But more importantly, "[i]n the end," courts "must look to [New Mexico's] own Constitution rather than to a decision of another State, based upon its Constitution." *Deming*, 62 N.M. at 30, 303 P.2d at 927-28. And in the process, courts must afford a strong presumption that the Legislature has acted within its authority. *Id.*

[3] New Mexico's enabling act expressly required that certain funds of the new state could not "be used for the support of any *sectarian or denominational* school, college or university." Enabling Act § 8 (emphasis added); Article XII, § 3 results from that Congressional mandate.

"not hesitate to disavow." *Id.*; *see also Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) ("the term 'sectarian' imparts a negative connotation"). Blaine Amendments thus "target religious conduct for distinctive treatment" in violation of the Free Exercise Clause. *See Church of the Lukumi* v. *City of Hialeah*, 508 U.S. 520, 534 (1993). And Plaintiffs have offered no "interest of the highest order" that would justify the unequal burdens they seek to impose on nonpublic schools. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (citation omitted).

C. The IML does not violate Article IV, § 31.

Section 31 of Article IV prohibits most appropriations to individuals or entities that are "not under the absolute control of the state." N.M. Const. Art. IV, §31. But nothing in that section purports to address the expenditure of *federal* money.

The IML is consistent with Article IV, § 31 for an additional reason. Under a plain reading of "appropriation," the constitutional provision covers direct appropriations of money, not the lending of books. The IML does not make any appropriation to any individual or entity other than PED. The IML simply makes materials purchased by PED available for borrowing by students. Article IV, §31 is simply not implicated when appropriations are made to a state agency, which in turn distributes the money. *See State ex rel. Interstate Stream Comm'n* v. *Reynolds*, 71 N.M. 389, 396 (1963) ("The fact that nonprofit organizations may incidentally benefit from the appropriations made to the State [officer], who has absolute control of their expenditure, does not put them within the classifications of this section.").

Plaintiffs have not identified any appropriations to students or schools, and there are none. The IML is no more an appropriation for students or schools than the funding of any other library that extends borrowing privileges to persons not "under the absolute control of the state."

C. The IML does not violate Article II, § 11.

Finally, Plaintiffs rely on the language from Article II, § 11 guaranteeing that "[e]very man shall be free to worship God according to the dictates of his own conscience." N.M. Const. Art. II, § 11. They claim that "the use of their tax dollars to fund the Act" violates this provision. But as repeatedly noted, no state taxpayer funds have gone to support the instructional materials fund. Accordingly, this claim is equally ill-founded as the others.

Even if it were not federal funds at issue, however, Article 2, § 11 has never been interpreted as providing greater constitutional protections than the First Amendment of the United States Constitution. *See Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 32, ___ N.M. ___, 284 P.3d 428, *cert. granted* 2012-NMCERT-008 (Aug. 16, 2012). Article 2, Section 11 is interpreted "lock-step" with the First Amendment. The purchase of textbooks to lend to private school students with federal funds passes muster under the First Amendment. *See Mitchell v. Helms*, 530 U.S. 793 (2000). As a result, the IML does not violate Article II, § 11.

CONCLUSION

Plaintiffs' arguments prove far too much. Under their interpretation of New Mexico's constitution, it would be unconstitutional for state government to provide any in-kind services. It would be illegal to provide fire protection or police service. Public roads could not be built because they would constitute a "donation" or "support" for private individuals and entities. Indeed, in Plaintiffs' absurd view, individuals could not even access the court system *in forma pauperis* or receive legal aid because that would be an illegal "donation." This reading is not supported by the Constitution's plain language or the relevant case law. For the foregoing reasons, the Court should deny the plaintiffs' motion for summary judgment and grant summary judgment in Defendants' and Intervenors' favor instead.

Respectfully submitted,

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was submitted through the Court's Electronic Filing System for filing and service and that a copy of the same was mailed to the following counsel of record on the 16th day of November, 2012:

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