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**Admitted Pro Hac Vice*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION

HERMISTON CHRISTIAN CENTER
d/b/a HERMISTON CHRISTIAN
SCHOOL,

Plaintiff,

v.

KATHERINE BROWN, in her official
capacity as Governor of the State of
Oregon; COLT GILL, in his official
capacity as Director of the Oregon
Department of Education; PATRICK
ALLEN, in his official capacity as
Director of the Oregon Health Authority;
JOSEPH FIUMARA, JR., in his official
capacity as Director of the Umatilla
County Public Health Department;
TRAVIS HAMPTON, in his official
capacity as Superintendent of the Oregon
State Police; TERRY ROWAN, in his
official capacity as Umatilla County
Sheriff;

Defendants.

Civil Case No. 2:20-cv-01795-SU

**PLAINTIFF'S FIRST
AMENDED VERIFIED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**DEMAND FOR TRIAL BY
JURY**

INTRODUCTION

1. Two weeks after Plaintiff Hermiston Christian School (“HCS”) filed its original complaint, Governor Brown announced yet another change in Defendants’ guidance for Oregon schools. But the new guidance simply continues Defendants’ unconstitutional discrimination against religious schools.

2. The Constitution is clear: if the government imposes COVID-19 restrictions but grants an exception for a secular activity, it must also grant an exception for comparable religious activity that burdens the government’s interest to a similar degree. Otherwise, the restrictions trigger strict scrutiny.

3. Here, the relevant activities aren’t merely “similar” or “comparable;” they are *physically indistinguishable*. Defendants authorized HCS to provide indoor childcare for up to 70 children (ages 36 months to 12 years) in its school facilities from 7:00am to 5:30pm Monday through Friday. But Defendants threaten HCS with imprisonment and fines if it dares to provide religious instruction to *the very same children*, in the same facilities, during the same time period, observing the same standard health and safety protocols (“Religious Instruction Ban”).

4. The Religious Instruction Ban is unconstitutional and makes no sense. The virus does not discriminate between children receiving religious instruction and those receiving secular supervision; neither should the government. There is no basis for Defendants to allow childcare while prohibiting religious instruction involving the very same children in the same physical environment.

5. In addition to Defendants' favorable treatment for childcare facilities, Defendants' orders and guidance have repeatedly—even facially—targeted private religious schools for less favorable treatment compared to public schools.

6. Defendants initially advised the exclusively-religious private schools in Umatilla County that they could reopen for the fall semester regardless of public school operations, but Defendants changed course to prohibit in-person instruction for most private religious schools.

7. *On the very same day* that Defendants issued guidance prohibiting in-person instruction for most private religious schools, a policy advisor and liaison for Governor Brown explained: allowing different reopening standards for private schools could result in a “mass exodus” of children from public schools, with a corresponding reduction in public school funding.

8. Notwithstanding general health metrics required for reopening, Defendants initially granted a special “small school” exception for *any* school with 75 or fewer students. But one week later, Defendants issued new guidance quietly and inexplicably narrowing the exception to “small *public* schools.”

9. In Umatilla County, the discriminatory effect of the “small public schools” exception was obvious: small public schools like Ukiah School District could reopen while all of the county's small private (religious) schools were closed.

10. Now, after HCS was forced to file a lawsuit challenging the “small public schools” exception, Defendants issued new guidance to remove their *facial* preference for public schools while ensuring the same outcome: small public schools

like Ukiah School District remain open while all of the county's small private (religious) schools must remain closed.

11. To make matters worse, HCS is located just eight miles south of the border with Washington State, where schools are open for in-person instruction. Thus, the Religious Instruction Ban does not ensure any public health benefit for the community HCS serves, and HCS could lose enrollment to schools providing in-person education just across the border. Indeed, some HCS families have threatened to move their children to a Washington school if HCS cannot reopen soon.

12. The Religious Instruction Ban defies expert scientific guidance from the Center for Disease Control and Prevention ("CDC"), the American Academy of Pediatrics ("AAP"), and other experts in health and education who recommend that schools reopen in-person following health and safety protocols.

13. Because Defendants threaten severe penalties for violation of their orders and guidance—including imprisonment for 30 days and/or a fine up to \$1,250—injunctive relief is necessary to preserve HCS's rights.

JURISDICTION & VENUE

14. This is a civil rights action that raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

15. This Court has original jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

16. This Court has authority to award the requested declaratory relief pursuant to 28 U.S.C. §§ 2201–02; the requested injunctive relief pursuant to 28 U.S.C. § 1343 and FED. R. CIV. P. 65; the requested nominal damages pursuant to 42 U.S.C. § 1983; and costs and attorneys’ fees pursuant to 42 U.S.C. § 1988.

17. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because at least one Defendant resides in this district, and because a substantial part of the events or omissions giving rise to the claims occurred in this district.

18. Divisional venue is proper in the Pendleton Division pursuant to Local Rule of Civil Procedure 3-2(a)(2) because at least one Defendant resides in Umatilla County, and because a substantial part of the events or omissions giving rise to the claims occurred in Umatilla County.

PLAINTIFF

19. Hermiston Christian Center (“HCC”) is a Christian church affiliated with The Assemblies of God, operating in Hermiston, Oregon (Umatilla County). HCC is a nonprofit corporation organized exclusively for religious purposes within the meaning of § 501(c)(3) of the Internal Revenue Code.

20. HCS is a private Christian school operating in Hermiston, Oregon (Umatilla County). HCS operates as a ministry of HCC, providing religious formation and education to children from kindergarten through the 12th grade.

21. HCS currently has 52 students enrolled in its K-12 program.

22. Founded in 1979, HCS has provided its students with a private, academically-sound education based upon the principles of God’s Word. This was

HCS's primary motivation in establishing the school 41 years ago, and this remains its purpose today.

23. The stated mission of HCS is to glorify God through the discipleship of students and the pursuit of excellence in education with the Bible as the foundation and Jesus Christ as its focus.

24. The stated vision of HCS is to provide an outstanding spiritual and educational environment where, working with Christian families and churches, students will be thoroughly prepared to fulfill God's purpose for their lives.

25. As a Christian ministry of HCC, HCS exists to form and educate children in the Christian tradition. Religious worship, speech, education, practice, and prayer are essential to the identity and work of HCS.

26. HCS believes that the scriptures, both the Old and New Testaments, are God's revelation to mankind and constitute the infallible, authoritative rule of faith and conduct.

27. In-person education is essential for HCS's free exercise of religion. HCS's mission is to teach its students what it means to be a disciple of Jesus Christ, not only through classroom education, but also through prayer, worship, and religious formation that occurs in-person.

28. HCS firmly and sincerely believes that the Bible requires Christians to gather together in order to practice the Christian faith and to learn how to be a disciple of Jesus Christ.

29. HCS students have daily devotions and attend at least one chapel service each week, which involves corporate worship, prayer, scripture meditation, and religious education. HCS believes that it cannot effectively provide a Christian education to its students if the students are not able to meet in person.

30. HCS teachers, staff, and students engage in prayer multiple times throughout each day. These times of prayer allow students to share their worries and fears with teachers, and to receive encouragement and religious formation through the ministry of prayer. HCS believes that this daily prayer ministry is ineffective in a distance learning environment.

31. HCS engages in daily scripture memorization activities. In-person engagement is critical for these activities, and HCS teachers report that without in-person instruction, scripture memorization has suffered significantly.

32. Beyond daily devotions, scripture study, and chapel services, HCS teaches every subject from the perspective of a Christian worldview, infusing Biblical and religious truth into each course of study.

33. Some HCS families lack reliable access to internet access and other technology required to successfully engage in distance learning.

34. The school day at HCS begins at 8:00 a.m. and ends at 4:00 p.m. on Monday through Thursday each week school is in session.

35. HCS has a large facility capable of hosting all of its students while maintaining adequate social distancing protocols. The school facility is approximately

10,000 square feet, with eight separate rooms that could be used as classrooms for different cohorts of students.

36. In addition to the 10,000 square-foot school facility, HCS also has access to a 10,000 square-foot gym facility that it can use for socially distanced education.

37. HCS wants to reopen for in-person education from 8:00am to 4:00pm on Monday through Thursday, and would do so but for the Religious Instruction Ban. HCS has a reopening plan that is at least as protective, if not more, than guidance from the CDC and state and local public health agencies.

38. The Religious Instruction Ban deprives HCS of the right to the free exercise of religion.

39. HCS serves some low-income families in its community who cannot simultaneously supervise their children's remote education while working outside of the home to provide essential income.

DEFENDANTS

40. Defendant Katherine Brown is the Governor of Oregon and is sued in her official capacity only.

41. Defendant Brown serves as the chief executive of the state and is responsible for issuing and enforcing the Religious Instruction Ban. Defendant Brown has the authority to enforce, rescind, and/or modify her executive orders and guidance, including the Religious Instruction Ban.

42. Defendant Colt Gill is the Director of the Oregon Department of Education ("ODE") and is sued in his official capacity only.

43. Defendant Gill issued or authorized administrative rules and guidance challenged herein and has the authority to enforce, revise, and/or rescind the rules and guidance, including the Religious Instruction Ban.

44. Defendant Patrick Allen is the Director of the Oregon Health Authority (“OHA”) and is sued in his official capacity only.

45. Defendant Allen issued or authorized administrative rules and guidance challenged herein and has the authority to enforce, revise, and/or rescind the rules and guidance, including the Religious Instruction Ban.

46. Joseph Fiumara, Jr. is the Director of the Umatilla County Public Health Department and is sued in his official capacity only.

47. The Umatilla County Public Health Department has authority to enforce administrative rules and guidance challenged herein and has the authority to approve or deny schools’ requests to reopen for in-person instruction.

48. Defendant Travis Hampton is the Superintendent of the Oregon State Police and is sued in his official capacity only.

49. The Oregon State Police serves as the lead agency for the state’s enforcement of the challenged executive orders and guidance, including the Religious Instruction Ban. The Oregon State Police are authorized by state law to enforce the Religious Instruction Ban.

50. Defendant Hampton has the power, both personally and through his subordinates, to enforce the Religious Instruction Ban.

51. Defendant Terry Rowan is the Sheriff of Umatilla County and is sued in his official capacity only.

52. As Sheriff of Umatilla County, Defendant Rowan has the power, both personally and through his subordinates, to enforce the Religious Instruction Ban.

FACTUAL ALLEGATIONS

A. Governor Brown issued shifting executive orders leading to the Religious Instruction Ban.

53. On March 8, 2020, Governor Brown issued Executive Order 20-03, declaring a state of emergency related to the COVID-19 pandemic. Governor Brown has issued executive orders extending the state of emergency through January 2, 2021.

54. On March 17, 2020, Governor Brown issued Executive Order 20-08, closing all *public* K-12 schools in Oregon from March 16, 2020 through April 28, 2020, while exempting private K-12 schools from closure.

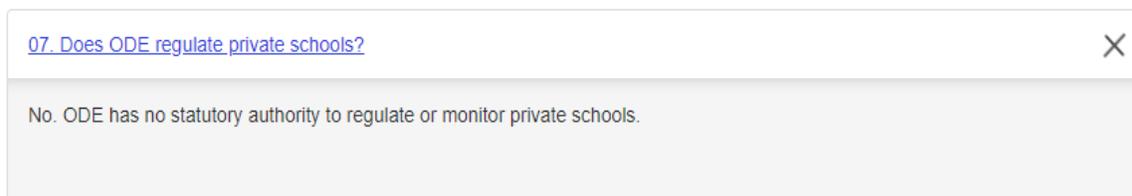
55. On April 23, 2020, Governor Brown issued Executive Order 20-20, prohibiting in-person instruction for both public and private K-12 schools through July 30, 2020.

56. Executive Order 20-20 prohibited in-person instruction and imposed other requirements for public and private schools, but made provision for public schools to receive funding as though they were in session.

57. On June 24, 2020, Governor Brown issued Executive Order 20-29, regarding reopening K-12 schools for the 2020-2021 school year.

58. Executive Order 20-29 provided that “in-person instruction at public schools and private schools shall be subject to restrictions,” namely, that “in-person instruction may only take place if it complies with the guidance” published by the Oregon Department of Education (ODE) and/or the Oregon Health Authority.

59. ODE does not have authority to regulate or monitor private schools like HCS. Indeed, Defendant ODE publicly admits as much on its website: “Does ODE regulate private schools? No. ODE has no statutory authority to regulate or monitor private schools.”



60. Executive Order 20-29 provides that “[i]n addition to any other penalty that may be imposed under applicable laws, any person, business, or entity found to be in violation of this Executive Order or any guidance issued by OHA, ODE, or other state agencies to implement this Executive Order is subject to the penalties described in ORS 401.990.” *Id.* ORS § 401.990 relates to Class C misdemeanors, which are punishable by imprisonment for 30 days and/or a fine up to \$1,250. *See* ORS §§ 161.615(3) & 161.635(1)(c).

B. Defendants’ guidance initially allowed in-person instruction.

61. Since June 10, 2020, Defendants Gill and Allen—by and through their respective organizations, ODE and OHA—have jointly issued eight separate guidance documents for public and private K-12 schools. ODE and OHA identified

the guidance as versions of a “Ready Schools, Safe Learners” plan. The most recent version is Guidance Version 4.0.0, attached as **Exhibit 1**.

62. Each version of the guidance provides that “each private school will develop its own Operational Blueprint for Reentry that is tailored to the community it serves.”

63. The school guidance requires that every Operational Blueprint for Reentry—including those for private religious schools—“must be submitted to the local school board (or private school operator), the local public health authority, and ODE; the blueprint must also be made available to the community online.” *See, e.g.*, Ex. 1, at 11 (Guidance Version 4.0.0).

64. The first three versions of the guidance included eight sections required for an Operational Blueprint for Reentry: (1) public health protocols; (2) facilities and school operations; (3) response to outbreak; (4) equity; (5) instruction; (6) family and community engagement; (7) mental, social, and emotional health; and (8) staffing and personnel.

65. However, under the first three guidance documents, private schools were only required to comply with sections 1-3. *See* ECF No. 1-11, at 5 (Guidance Version 1.0.0); ECF No. 1-12, at 9 (Guidance Version 1.5.8); ECF No. 1-13, at 11 (Guidance Version 2.7.2).

C. Defendants suddenly changed their guidance to prohibit in-person instruction for most schools.

66. On July 29, 2020, ODE and OHA issued their fourth guidance document, “Ready Schools, Safe Learners, Version 3.0.1.”

67. In addition to the eight sections described in each prior version, Version 3.0.1 introduced a new section entitled “Section 0 – Community Health Metrics.”

68. Contrary to Defendants’ prior guidance generally permitting in-person instruction, Section 0 of Version 3.0.1 of the school guidance prohibited religious schools from providing in-person instruction unless and until the counties where they operate meet standard metrics for three consecutive weeks.

69. On July 29, 2020—the very same day that Defendants changed their guidance to prohibit in-person instruction for religious schools—the Oregon Governor’s office held a conference call with school administrators.

70. During this conference call, Mary Starrett, Vice Chair of the Yamhill County Board of Commissioners, asked the Governor’s Office why private schools were now prohibited from reopening for in-person instruction.

71. In response to Ms. Starrett’s question, Leah Horner, a policy advisor and liaison to Governor Brown, explained that different standards for private schools could cause a “mass exodus” from public schools.

72. Between August 11 and October 30, 2020, ODE and OHA issued their fifth, sixth, seventh and eighth versions of guidance, which retained Section 0 and generally prohibited religious schools from providing in-person instruction unless they satisfied Sections 0-3.

73. The current version of the school guidance (Version 4.0.0) only allows three models of instruction: (1) comprehensive distance learning, (2) in-person

instruction through an on-site model; and (3) in-person instruction through a “hybrid” model. *See* Ex. 1, at 5 (Guidance Version 4.0.0).

74. Even if HCS satisfies all of the health and safety protocols under Sections 1-3 of the school guidance, the current version of Section 0 prohibits in-person instruction unless and until Umatilla County meets the following standard “metrics”: (1) the county’s case rate must be 200 or fewer cases per 100,000 population over 14 days; (2) the county’s test positivity rate must be 10% or less over 14 days. *See id.* at 15.

75. At present, Umatilla County does not satisfy the standard metrics required under “Section 0” for schools to reopen for in-person instruction without an exception.

76. On or around August 11, 2020, the ODE issued “Guidance for Limited In-Person Instruction During Comprehensive Distance Learning.” According to that guidance, public and private schools relegated to the distance learning model are permitted to bring a limited number of students on-site for a limited 2-hour period, so long as they comply with the health and safety protocols in Sections 1-3 of the school guidance.

D. Defendants granted special exceptions and more lenient treatment for secular public schools.

77. Each version of the school guidance includes “private schools” in its definition of the term “district.”

78. The versions of guidance containing Section 0 each contain exceptions, which permit schools qualifying for such exceptions to provide in-person instruction

by meeting health metrics that are more lenient than the standard metrics generally imposed in Section 0.

79. Version 3.7.4 of Defendants’ guidance first introduced Exception 6, an exception initially applicable “School-wide in small districts (Statewide).” This statewide “small school” exception broadly allowed “districts” (a term defined to include “private schools”) with 75 or fewer students to work with local public health officials to provide in-person instruction by meeting more lenient public health criteria.

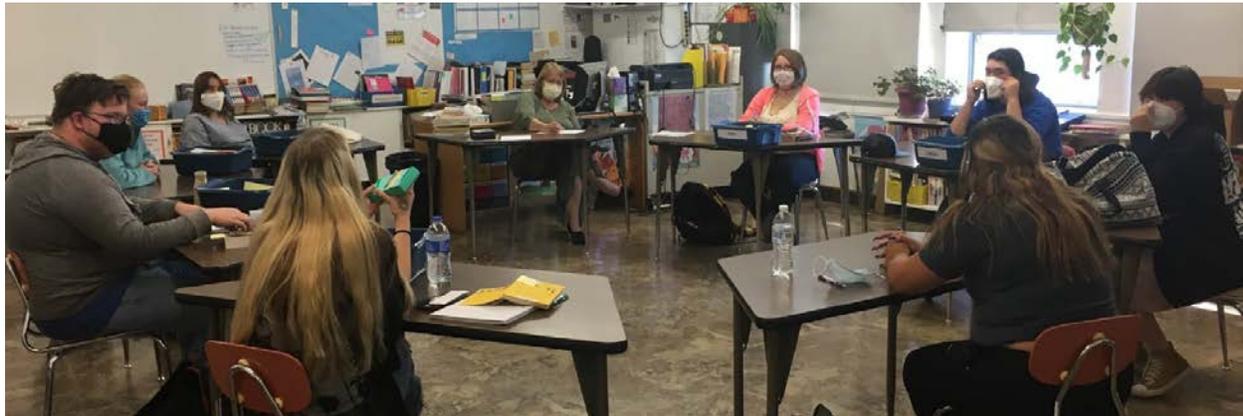
80. Just one week later, Defendants issued a new version of guidance (Version 3.7.5), which quietly narrowed the application of Exception 6 from “small districts” to “small *public* districts,” and included a non-exhaustive list of public school districts eligible to invoke the “small school” exception.

81. Version 3.7.8 of Defendants’ guidance expressly stated that Exception 6 applies for Ukiah School District, a public K-12 school district operating in Umatilla County, the same county where HCS operates.

82. At the Ukiah School District, grades K-12 are housed together in one small building that it describes as “reminiscent of the old fashioned one room school house [where] [c]lasses from preschool to 5th grade are housed in the north wing, while the rest of the students share classrooms surrounding the open foyer of the school, contributing to [] open and interactive relationships” See Ukiah School District, *About Us*, <https://bit.ly/2G7pmuA> (last visited Nov. 16, 2020).

83. Ukiah School District submitted an Operational Blueprint for Reentry, indicating that it would provide in-person instruction through a hybrid model, and that it would comply with Sections 1-3 of the Blueprint and school guidance.

84. Indeed, Ukiah School District is currently open and providing in-person instruction in Umatilla County. In its September newsletter to parents and students, Ukiah School District shared photos of students in classrooms and said, “Welcome Back All! Students are back in class and we couldn’t be happier! [...] It’s not exactly what we are used to, but it is wonderful to have the students back in the building, feel the enthusiasm and energy of learning, and to hear the happy voices again!”



85. Meanwhile, in the very same county where Ukiah School District is open in-person, the county metrics under Section 0 of the guidance prohibit HCS from providing in-person instruction, and HCS was not eligible to invoke Exception 6 due to the school's religious status, even though HCS also has fewer than 75 students and Umatilla County's local public health officials allow a similar public school to provide in-person instruction.

86. The Umatilla County Public Health Department advised HCS that, despite the school's ability to comply with health and safety protocols in Sections 1-3 of the guidance, HCS could not provide in-person instruction because Umatilla County did not meet the standard metrics requirements under Section 0 and HCS was not eligible for any of the exceptions.

87. The current version of school guidance includes a "safe harbor clause," allowing any school that qualified for an exception under prior versions of guidance to continue providing in-person instruction through January 4, 2021.

88. The existence of numerous exceptions to Section 0, as well as delegation of reopening decisions to local health officials in each county, demonstrates that Defendants' guidance gives rise to a system of individualized assessments, and therefore, is not generally applicable.

E. Defendants grant special exceptions and more favorable treatment to similar secular activities, including childcare.

89. Defendants have not made in-person operation of similar activities—including childcare facilities—dependent upon the "Community Health Metrics"

that Defendants require for religious schools to provide in-person instruction under Section 0 of Defendants' guidance.

90. On August 14, 2020, ODE and OHA issued guidance for childcare facilities, which took effect on September 1, 2020 for the upcoming school year: "Health and Safety Guidelines for Child Care and Early Education Operating Under Covid-19" (hereafter "Childcare Guidance"). Childcare Guidance, ECF No. 1-37, at 5.

91. The Childcare Guidance broadly applies to "all childcare and preschool provided in public school settings," licensed childcare programs, relief nurseries, and other facilities providing childcare. *See id.* at 4.

92. Under the Childcare Guidance, childcare facilities are allowed to provide in-person services to children across the state. *See id.* at 8.

F. HCS's Plan to Reopen for In-Person Instruction.

93. On or around March 13, 2020, HCS initially ceased in-person instruction in compliance with Governor Brown's executive orders.

94. After its closure on March 13, 2020, HCS actively planned to reopen with in-person instruction for the fall semester on August 24, 2020.

95. In preparation for reopening in-person, HCS budgeted for teachers and staff, and told its students and parents that they could plan on in-person classes for the fall semester.

96. HCS invested significant time and resources to comply with the health and safety protocols in Sections 1-3 of Defendants' guidance. HCS spent at least

\$4,000.00 and dozens of paid work hours purchasing equipment and creating plans to implement health and safety protocols including, but are not limited to, the following:

- Educating staff and students to stay home if they, or anyone in their household, has COVID-19 or experiences any of virus symptoms;
- Purchasing thermometers to screen staff and students;
- Implementing protocols to screen all students and staff for COVID-19 symptoms upon entering the school building;
- Requiring hand hygiene upon entering the school building or classrooms, including handwashing and/or hand sanitizer;
- Requiring face coverings or face shields for all students and staff;
- Ensuring classroom capacity with a minimum of 35 square feet per person;
- Maintaining physical distancing of six feet between individuals at all times;
- Configuring classrooms, hallways, and other spaces to minimize time standing in lines and to ensure social distancing;
- Modifying lunch and break schedules to limit the number of students in rooms;
- Assigning students to stable cohorts to reduce the risk of spreading the virus;

- Establishing a system of daily logs to enable contact tracing among classes and cohorts;
- Purchasing additional tables to reconfigure classrooms for adequate social distancing;
- Purchasing and equipping each classroom with a sanitation station including hand sanitizer, wipes, Kleenex, thermometer, disinfectant spray, and a first aid kit;
- Providing a handwashing station in classrooms for grades 1-3;
- Thoroughly sanitizing each classroom each day, and sanitizing tables and heavily used areas throughout each day;
- Purchasing and installing water-bottle fillers to eliminate the use of drinking fountains;
- Purchasing and installing touchless faucets to reduce the spread of the virus;
- Purchasing air purifiers for each classroom.

97. On August 4, 2020— after nearly five months preparing for in-person classes in compliance with Sections 1-3 of Defendants’ guidance, and just weeks before HCS was to begin its fall semester—HCS learned that Defendants had issued yet another version of school guidance with a new section imposing additional restrictions based on county metrics (Guidance Version 3.0.1).

98. On August 4, 2020, Stephanie Evans, the administrator of HCS, sent an email to the Umatilla County Public Health Department, inquiring whether

HCS could provide in-person instruction and sharing that “we have been working hard to ready our building and classrooms and change some of our procedures and activities. [...] I have some parents that are in panic mode that work essential jobs and have kids in the younger grades.”

99. From August 4 through August 11, the Umatilla County Public Health Department responded to HCS’s inquiry with a series of emails advising that HCS could not reopen in-person because Umatilla County did not meet the standard county metrics in Section 0 of the school guidance, and because HCS did not qualify for any exceptions.

1. *HCS cannot offer in-person instruction pursuant to its Operational Blueprint*

100. On August 15, 2020, HCS submitted its first Operational Blueprint for Reentry, stating that it planned to reopen with comprehensive distance learning because Umatilla County did not meet the metrics required for in-person instruction under Section 0.

101. Despite selecting the comprehensive distance learning model, HCS’s first Operational Blueprint for Reentry stated that “[w]e will follow the required guidelines in the Guidance for Limited In-Person Instruction during Comprehensive Distance Learning as well as our on-site plans written in Sections 1-3 of this Operational Blueprint for school reentry.”

102. In its first Operational Blueprint for Reopening, HCS affirmed that the school can—and will—comply with the health and safety protocols required in Sections 1-3 of the Blueprint and the school guidance.

103. On September 18, 2020, HCS submitted its second Operational Blueprint for Reentry, stating that it plans to invoke Exception 6 to resume in-person instruction through an on-site learning model.

104. Like its first submission, HCS's second Operational Blueprint for Reentry affirms that the school can—and will—comply with the health and safety protocols required in Sections 1-3 of the Blueprint and the school guidance. HCS now plans to open for in-person instruction for children aged 36 months to 12 years following the 2020-2021 holiday season.

105. On September 30, 2020, an official from the Umatilla County Public Health Department informed the HCS administrator that it could not recommend that HCS reopen for in-person education under Exception 6.

2. Although under the Defendants' rules HCS cannot provide in-person education for its students, the school can provide childcare for up to 70 children, all of whom are HCS students

106. On August 11, 2020, HCS submitted an application to the ODE for temporary status as an Emergency Child Care Facility, which would allow it to provide day care services for school-aged students during the state of emergency.

107. On September 16, 2020, the ODE granted HCS initial approval as an Emergency Child Care Facility for school aged children, subject to final approval following a virtual inspection.

108. On September 23, 2020, the ODE performed an evaluation of HCS's facilities for purposes of HCS opening as an Emergency Child Care Facility, noting

that its “[f]acility is very clean and organized. [HCS is] very well prepared and [is] following the Health & Safety Guidelines.”

109. On September 24, 2020, the ODE approved HCS as an Emergency Child Care Facility, authorizing HCS to provide childcare from 7:00 a.m. through 5:30 p.m. on weekdays for up to 70 children, ages 36 months through 12 years. *Id.* at 10.

110. HCS is now providing childcare under the ODE’s authorization.

111. All of the children receiving childcare from HCS are HCS students who would engage in in-person instruction, but for the Religious Instruction Ban.

112. The risk of COVID-19 transmission is the same for HCS’s childcare and in-person instruction operations because the physical activities and environments are substantially similar. Like its in-person instruction schedule, HCS’s childcare involves a morning greeting for the staff to speak to the children, breaks for lunch and outdoor play, and students sit at socially-distanced desks to read books, work on arts-and-crafts projects, and play computer games.

113. The health and safety protocols required under the Childcare Guidance are substantially similar to the health and safety protocols required for in-person instruction under the school guidance.

114. The Umatilla County Public Health Department advised HCS that the school guidance prohibits in-person instruction even if HCS students are in its facilities for childcare.

3. *The Religious Instruction Ban threatens HCS's existence.*

115. The Religious Instruction Ban has caused HCS to lose new enrollment opportunities. Approximately 10 new families began the process to enroll their children with HCS for the fall semester, but then decided not to enroll upon learning that the Religious Instruction Ban prevented HCS from providing in-person instruction.

116. Numerous families have threatened HCS that they will disenroll their children if HCS is not able to provide in-person instruction.

117. HCS has incurred expenses in order to comply with Defendants' orders and guidance.

118. There is a significant risk that HCS will be forced to permanently close if it is not allowed to reopen for in-person instruction this semester.

LEGAL ALLEGATIONS

119. At all times relevant to this Complaint, each and all of the acts and policies alleged herein were attributed to the Defendants who acted under color of a statute, regulation, custom, or usage of the State of Oregon (*i.e.*, under color of state law and authority).

120. HCS is suffering irreparable harm from the Religious Instruction Ban.

121. HCS has no adequate or speedy remedy at law to correct or redress the deprivation of their rights by Defendants.

122. Defendants' actions and policies, as set forth above, do not serve any legitimate or compelling state interest and are not narrowly tailored to serve any such interests.

123. Defendants have deprived, and continue to deprive, HCS of its clearly established rights under the United States Constitution, as set forth in the causes of action below.

124. Unless the policies and conduct of Defendants are enjoined, HCS will continue to suffer irreparable injury.

125. Pursuant to 42 U.S.C. §§ 1983 and 1988, HCS is entitled to appropriate relief invalidating Defendants' challenged policies and related conduct. Additionally, HCS is entitled to the reasonable costs of this lawsuit, including their reasonable attorneys' fees.

FIRST CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FIRST AMENDMENT
(FREE EXERCISE)

126. The allegations contained in paragraphs 1–125 are incorporated herein by reference.

127. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits any law abridging the free exercise of religion.

128. Defendant's orders and guidance discriminate against religion by prohibiting HCS from providing in-person religious instruction, while allowing comparable secular activity that burdens the State's interest to a similar degree, namely, allowing in-person, full-day childcare for the same children.

129. HCS's in-person religious instruction is comparable to in-person, full-day childcare, and burdens the State's interests to a similar degree.

130. Because Defendant's school guidance provides for individualized exceptions, it is not generally applicable and discriminates on the basis of religion.

131. In-person religious education is central to the free exercise of religion by HCS.

132. The Religious Instruction Ban infringes on the right of HCS to provide religious instruction to its students, the right of parents to pursue religious education for their children, and the right of students to receive religious instruction.

133. The ODE lacks authority to regulate and monitor religious schools like HCS.

134. While Defendants have a compelling interest in safeguarding public health generally, such interest must apply to HCS specifically but fails to do so.

135. The Religious Instruction Ban is not narrowly tailored to that interest. The CDC, the AAP, and other public health organizations have endorsed in-person instruction for the 2020–21 school year, and have outlined measures that would ensure public safety while also providing students with the educational developmental benefit of in-person education. The state itself has crafted social distancing guidelines and other preventative measures that allow public schools, childcare facilities, and institutions of higher education to safely conduct in-person

operations. Those measures, among others, are more narrowly tailored than the blanket closure order imposed here.

136. Compared to religious instruction, Defendants also grant more favorable treatment and less burdensome restrictions for secular businesses and activities, including businesses and activities that Defendants deem “essential.”

137. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the Free Exercise Clause of the First Amendment to the United States Constitution.

SECOND CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FOURTEENTH AMENDMENT
(SUBSTANTIVE DUE PROCESS—PARENTAL RIGHTS/RIGHT TO AN EDUCATION)

138. HCS repeats and incorporates paragraphs 1-125 as if fully stated herein.

139. The Due Process Clause of the Fourteenth Amendment protects citizens from state action that infringes on fundamental rights and liberties.

140. Fundamental constitutional rights include the right of parents to direct the upbringing and education of children under their control.

141. In-person instruction is an essential element of HCS’s mission to provide religious formation and education.

142. In exercising their fundamental rights to direct the upbringing and education of their children, parents have chosen to enroll their children at HCS to receive in-person religious formation and education.

143. HCS cannot provide the same type and degree of religious formation and education through distance learning models.

144. The Religious Instruction Ban infringes on the fundamental rights of parents by preventing them from directing the religious upbringing and education of their children.

145. The Religious Instruction Ban infringes on the fundamental rights of parents by preventing parents from choosing in-person religious formation and education for their children.

146. The Religious Instruction Ban is contrary to guidance from the CDC, the AAP, and other public health organizations that encourage schools to provide in-person instruction while complying with standard health and safety protocols.

147. The Religious Instruction Ban is not narrowly tailored to the state's interest in preventing the spread of COVID-19. Special exceptions and less restrictive regulations imposed on childcare facilities demonstrate that the Defendants could prevent the transmission of COVID-19 through less restrictive means that do not infringe on fundamental constitutional rights.

148. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FOURTEENTH AMENDMENT
(EQUAL PROTECTION)

149. HCS repeats and incorporates paragraphs 1-125 as if fully stated herein.

150. In developing and implementing the Religious Instruction Ban, Defendants treat religious schools less favorably than childcare providers, even when they involve the same educators, the same children, the same facilities and staff, and the same health and safety protocols.

151. Religious schools are similarly situated to childcare facilities in relation to COVID-19. For example, HCS's current provision of in-person, full-day childcare is physically indistinguishable from—and therefore presents the same or similar risk of COVID-19 transmission compared to—HCS's planned provision of in-person religious instruction.

152. Defendants grant exceptions and more lenient treatment for childcare providers while denying the same exceptions to HCS and other religious schools.

153. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FIRST AMENDMENT
(FREE SPEECH AND EXPRESSIVE ASSOCIATION)

154. HCS repeats and incorporates paragraphs 1-125 as if fully stated herein.

155. Defendants' Religious Instruction Ban violates HCS's freedom of speech by prohibiting it from providing religious instruction to the in-person audience already receiving childcare supervision in its facilities. Defendants disfavor the religious content or viewpoint of HCS's speech.

156. Defendants have prohibited HCS from engaging in religious speech through its chapel sermons and worship services, prayer and counseling ministries, and religious formation and education that occur exclusively on private property.

157. The First Amendment also protects the right of persons to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

158. HCS engages in expressive association because it conveys a system of values—namely Christian values and a desire to promote those values in its educational philosophy, mission, and goals.

159. Prohibiting or punishing HCS's religious speech or its efforts to associate does not serve any legitimate, rational, substantial, or compelling government interest.

160. Defendants have alternative, less restrictive means to achieve any government interests the State may have.

161. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the First Amendment's protections for free speech and free association.

FIFTH CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FIRST AMENDMENT
(RIGHT TO ASSEMBLE)

162. HCS repeats and incorporates paragraphs 1-125 as if fully stated herein.

163. The First Amendment prohibits the State from violating HCS's right to peaceably assemble.

164. The Religious Instruction Ban violates HCS's right to peaceably assemble because the ban on in-person religious instruction does not serve any legitimate, rational, substantial, or compelling governmental interest.

165. In addition, the State has alternative, less restrictive means to achieve any interest that it might have.

166. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the right to assemble under the First Amendment to the United States Constitution, both facially and as applied.

SIXTH CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS
(HYBRID RIGHTS: FREE EXERCISE – PARENTAL RIGHTS)

167. HCS repeats and incorporates paragraphs 1-125 as if fully stated herein.

168. The Free Exercise Clause of the First Amendment, in combination with the Due Process Clause of the Fourteenth Amendment, protects the rights of parents to direct the religious education and upbringing of their children.

169. In-person instruction is an essential element of HCS's mission to provide religious formation and education.

170. In exercising their fundamental rights to direct the upbringing and education of their children, parents have chosen to enroll their children at HCS to receive in-person religious formation and education.

171. The Religious Instruction Ban infringes on the ability of parents to direct the religious upbringing and education of their children by preventing them from selecting in-person religious formation and education that HCS provides.

172. By forcing religious schools to close while permitting in-person supervision to continue at childcare facilities, Defendants unlawfully abridged the ability of HCS, its parents, and their children to freely exercise their religion.

173. The Religious Instruction Ban is not narrowly tailored to the state's interest in reducing the spread of COVID-19. The special exceptions and less restrictive regulations allowed for childcare facilities demonstrate that Defendants could adequately pursue their interest in reducing the spread of COVID-19 through more narrow means that do not infringe on HCS's religious liberty.

174. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious Instruction Ban violates the Free Exercise Clause of the First Amendment.

PRAYER FOR RELIEF

WHEREFORE, HCS respectfully request that this Court enter judgment against Defendants, and provide HCS with the following relief:

- A. Enter a temporary restraining order, preliminary injunction, and permanent injunction prohibiting Defendants from enforcing the portion of Defendants' executive orders and guidance prohibiting private religious schools from providing in-person instruction, thus allowing HCS and its students to proceed with their current plans to resume in-person instruction while complying with standard health and safety protocols;
- B. Enter a judgment declaring that Defendants' executive orders and guidance prohibiting private religious schools from providing in-person instruction violates the U.S. Constitution's Free Exercise, Due Process, Equal Protection, Free Speech, and Freedom of Assembly Clauses;
- C. Award HCS nominal damages for Defendants' violation of HCS's constitutional rights;
- D. Award HCS damages as a result of its preparation for reopening for in-person instruction;
- E. Award HCS's court costs, and reasonable attorney fees; and
- F. Award such other and further relief as to which HCS may be entitled.

Respectfully submitted this 27th day of November 2020.

s/ Kristen K. Waggoner

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**Pro Hac Vice application
concurrently filed.*

Attorneys for Plaintiff

DEMAND FOR TRIAL BY JURY

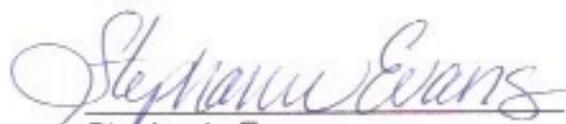
Plaintiff demands trial by jury for all matters so triable herein.

s/ Kristen Waggoner

Kristen Waggoner
Attorney for Plaintiff

I declare under penalty of perjury that the foregoing First Amended Verified Complaint has been examined by me and that the factual allegations therein are true to the best of my knowledge, information, and belief.

Dated: November 27, 2020

A handwritten signature in blue ink that reads "Stephanie Evans". The signature is written in a cursive style with a horizontal line underneath the name.

Stephanie Evans
Administrator
Hermiston Christian School

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2020, the foregoing was filed with the Clerk of Court using CM/ECF system, which in turn automatically generated a Notice of Electronic Filing to all parties in the case who are registered users of the CM/ECF system.

s/ Ryan J. Tucker
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