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**Pro Hac Vice application
concurrently filed*

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. 20-cv-1795

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

**DEMAND FOR TRIAL BY
JURY**

INTRODUCTION

1. After 41 years of faithful service, Hermiston Christian School (“HCS”) could be forced to shut its doors for good unless the Court stops an obvious case of discrimination: Defendants’ COVID-19 orders and guidance generally prohibit in-person instruction but grant a “small school” exception to *public* schools while denying the same exception to *private religious* schools (“Religious School Closure”) in Umatilla County.

2. Defendants have created two categories of “small schools” – public and private. All public small schools are in a preferred category of schools that are permitted to invoke an exception to pursue in-person instruction in collaboration with their local public health authority. All private small schools are in a non-preferred category of schools not permitted to invoke the same exception. Because all religious schools are necessarily private, all religious schools are categorically relegated to the non-preferred category.

3. Religious schools make up 100% of the private schools in Umatilla County where HCS operates, and religious schools comprise the majority of private schools state-wide.

4. The Religious School Closure targets religious schools for less favorable treatment compared to public schools, even when religious schools serve the same number of students, engage in the same type of activity, meet in a larger and safer physical environment, follow the same health and safety protocols, and operate *in*

the very same county where local public health authorities allow public schools to invoke the “small school” exception and provide in-person instruction.

5. The reason for Defendants’ discriminatory treatment is clear: on the very same day that Defendants continued their prohibition of in-person instruction for religious schools, a policy advisor and liaison for Governor Brown discussed the potential for a “mass exodus” of children from public schools and emphasized that public schools could suffer a reduction in funding if students disenrolled to obtain education elsewhere.

6. The Religious School Closure is unconstitutional and makes no sense. The virus does not discriminate between public and religious schools; neither should the government. There is no basis for Defendants to grant a special exception for public schools while denying the same treatment to religious schools.

7. The Religious School Closure also 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.

8. Indeed, the CDC, AAP, and other experts in public health and education encourage schools to reopen for in-person instruction. For example, the CDC recently issued a report entitled “The Importance of Reopening America’s Schools This Fall,” which found that “[d]eath rates among school-aged children are much lower than among adults. At the same time, the harms attributed to closed schools on the social, emotional, and behavioral health, economic well-being, and

academic achievement of children, in both the short- and long-term, are well-known and significant.”¹

9. Defendants engaged in an unlawful bait-and-switch that could permanently close HCS and other religious schools. Throughout the summer, Defendants issued orders and guidance assuring HCS that it could resume in-person classes so long as it complied with the health and safety protocols in Sections 1-3 of Defendants’ guidance.

10. Although the Oregon Department of Education (“ODE”) lacks authority to regulate religious schools, HCS relied on Defendants’ assurance and made significant investments to prepare for in-person classes consistent with Defendants’ guidance. Among other things, HCS retained teachers and staff, made expenditures to comply with the health and safety protocols set forth in Sections 1-3 of Defendants’ guidance, and told parents and children that they could plan on in-person classes in the fall.

11. But everything changed on July 29, 2020. After assuring HCS that it could reopen so long as it complied with the health and safety protocols in Sections 1-3 of the school guidance, Defendants suddenly changed course and introduced a new section to their guidance—“Section 0”—a name that itself reveals the section was an afterthought addition to Defendants’ prior advice.

¹ Ctrs. for Disease Control & Prevention, *The Importance of Reopening America’s Schools This Fall*, <https://perma.cc/6ZUL-6EQA> (last updated July 23, 2020).

12. Contrary to guidance issued throughout the summer, the new “Section 0” prohibits religious schools from providing in-person instruction unless and until the county where they operate meets certain “community health metrics.”

13. Section 0 of the guidance contains six exceptions allowing certain schools to provide in-person instruction under more lenient conditions than those required under the section’s standard county health metrics.

14. The sixth exception to Section 0 allows public school districts with 75 or fewer students to provide in-person instruction in consultation with their local public health authority, even if their county fails to meet the standard health metrics (“small school exception” or “Exception 6”). Exception 6 includes a non-exhaustive list of 22 public schools that Defendants identified as eligible to invoke the exception.

15. Defendants have allowed a public school in Umatilla County—Ukiah School District—to reopen with in-person instruction despite the county’s failure to meet the standard metrics required under Section 0. Indeed, Defendants’ guidance expressly lists Ukiah School District in its non-exhaustive list of 22 public schools eligible to invoke the “small school” exception to reopen for in-person instruction

16. Meanwhile, religious schools—which constitute 100% of the private schools in Umatilla County—are not eligible to invoke Exception 6. On August 4, 2020, 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 because HCS was not eligible for any exceptions under Defendants' guidance.

17. HCS is not eligible to invoke the "small school" exception due to its status as a religious school. HCS would be eligible to invoke the "small school" exception if it were a secular public school because it meets the definition of a "district" under the guidance, has fewer than 75 students, complies with the same health and safety protocols, and operates in the same county where public health officials have allowed similar public schools to reopen in-person.

18. HCS is located just eight miles south of the border with Washington State, where schools are open for in-person instruction. Thus, the Religious School Closure does not ensure any public health benefit for the community HCS serves, HCS could lose enrollment to schools providing in-person education just across the border. Indeed, some HCS families have already completed paperwork necessary to move their children to a Washington school if HCS cannot reopen soon.

19. The Religious School Closure puts HCS in an impossible position. If HCS follows its religious convictions to provide in-person religious formation and instruction, it faces criminal penalties including imprisonment and fines, regardless of the school's ability to meet or exceed relevant health and safety protocols. But if HCS complies with the unconstitutional Religious School Closure, it could be forced

to shut its doors for good. This Court must intervene to prevent irreparable harm to HCS and other religious schools.

20. Defendants' orders and guidance also provide more favorable treatment to secular public schools with respect to funding. Defendants provide secure funding and assistance to ensure that public schools can survive and comply with Defendants' ever-changing demands. But for religious schools, Defendants impose excessive burdens without providing financial support. In addition to regular funding for public schools, Governor Brown has authorized \$28 Million in additional funding to help public schools carry the burdens associated with Defendants' restrictions, but Defendants have refused to provide a single dollar to enable religious schools to carry the heavy burdens imposed by Defendants.

21. Defendants also grant more favorable treatment to childcare facilities and institutions of higher education, which can provide in-person instruction.

22. Defendants allow HCS to provide in-person, full-day childcare, but Defendants threaten jail time and fines if HCS provides in-person religious instruction to those same children.

23. "The religious education and formation of students is the very reason for the existence of most private religious schools" *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055, 2064 (2020). Yet Defendants have effectively shuttered religious schools in Oregon, contrary to the advice of the CDC, AAP, and other public health experts.

24. Responding to crises can be difficult, but this case is not. “While the law may take periodic naps during a pandemic, we will not let it sleep through one.” *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020) (per curiam). Crises do not suspend the Constitution and there is no legitimate, much less compelling, justification for suddenly prohibiting in-person religious instruction for religious schools—without financial support to carry the burden of such restrictions—while granting secular public schools exceptions and more lenient treatment.

25. The Constitution forbids the government from prohibiting the free exercise of religion—which is exactly what Defendants’ orders and guidance do while secular public schools, childcare facilities, and institutions of higher education to provide in-person instruction for the same children.

26. 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

27. 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.

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

29. 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.

30. 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.

31. 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

32. 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.

33. 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.

34. HCS currently has 51 students enrolled in its K-12 program.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

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

46. 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.

47. 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.

48. HCS wants to open for in-person education and would do so but for the Religious School Closure. 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.

49. The Religious School Closure deprives HCS of the right to the free exercise of religion.

50. 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

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

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

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

54. 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 School Closure.

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

56. 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 School Closure.

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

58. 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.

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

60. The Oregon State Police serves as the lead agency for the state's enforcement of the challenged executive orders and guidance, including the Religious School Closure. The Oregon State Police are authorized by state law to enforce the Religious School Closure.

61. Defendant Hampton has the power, both personally and through his subordinates, to enforce the Religious School Closure.

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

63. As Sheriff of Umatilla County, Defendant Rowan has the power, both personally and through his subordinates, to enforce the Religious School Closure.

FACTUAL ALLEGATIONS

A. Governor Brown issued shifting executive orders leading to the Religious School Closure.

64. On March 8, 2020, Governor Brown issued Executive Order 20-03, declaring a state of emergency related to the COVID-19 pandemic. *See* Executive Order 20-03, attached as **Exhibit 1**.

65. Governor Brown later issued a series of executive orders extending the state of emergency through November 3, 2020. *See* Executive Orders 20-24, 20-30, and 20-38, attached as **Exhibits 2, 3, and 4**.

66. 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. *See* Executive Order 20-08, attached as **Exhibit 5**.

67. Governor Brown expressly exempted *private* K-12 schools from closure under Executive Order 20-08, stating that “private schools are not subject to this Executive Order.” *Id.* at 2.

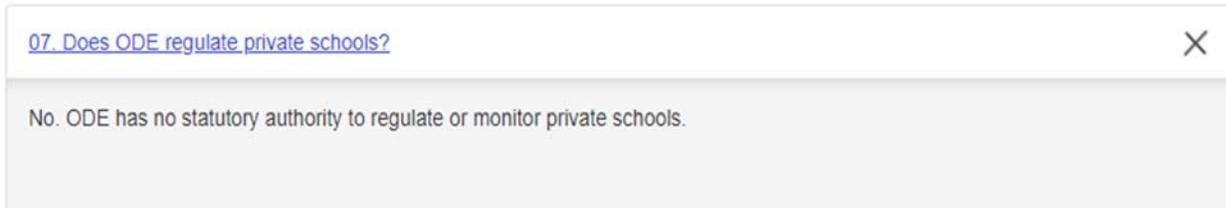
68. On April 23, 2020, Governor Brown issued Executive Order 20-20, prohibiting in-person instruction for both public and private K-12 schools through July 30, 2020. *See* Executive Order 20-20, attached as **Exhibit 6**, at 3.

69. For public schools, Executive Order 20-20 prohibited in-person instruction and imposed other requirements while making provision for public schools to receive funding as though they were in session. Ex. 6, at 3.

70. But for private schools, Executive Order 20-20 prohibited in-person instruction and imposed other requirements without making provision for private schools to carry the burdens imposed by Defendants' orders and guidance. *See id.*

71. Executive Order 20-20 directed ODE to promulgate rules and guidance for public and private K-12 schools. Ex. 6, at 5.

72. 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." ODE Private School General Information and FAQs, attached as **Exhibit 7**.



73. On May 14, 2020, Governor Brown issued Executive Order 20-25, which introduced a state-wide reopening plan. *See* Executive Order 20-25, attached as **Exhibit 8**.

74. Executive Order 20-25 reiterated that public and private K-12 schools remained subject to Executive Order 20-20 and guidance from ODE. *Id.* at 11-12.

75. On June 5, 2020, Governor Brown issued Executive Order 20-27 regarding Phase 2 of the state-wide reopening plan. *See* Executive Order 20-27, attached as **Exhibit 9**.

76. Like Executive Order 20-25, Executive Order 20-27 reiterated that K-12 schools remained subject to Executive Order 20-20 and guidance from ODE. *Id.* at 10.

77. Under the Governor's reopening plan set forth in Executive Orders 20-25 and 20-27, all Oregon counties begin in an initial "baseline phase" but may seek approval from the Governor to advance to Phase 1, Phase 2, or Phase 3. Ex. 8, at 13 (Executive Order 20-25); Ex. 9, at 12 (Executive Order 20-27).

78. On June 24, 2020, Governor Brown issued Executive Order 20-29, regarding reopening K-12 schools for the 2020-2021 school year. *See* Executive Order 20-29, attached as **Exhibit 10**.

79. 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 described in paragraph 3 of this Executive Order, as well as such administrative rules as may be promulgated by the State Board of Education and the Teacher Standards and Practices Commission pursuant to paragraph 8 of this Executive Order, and the directives of this Executive Order." Ex. 10, at 3.

80. Paragraph 3 of Executive Order 20-29 provides that "[t]he Oregon Health Authority (OHA) and Oregon Department of Education (ODE) shall, individually or jointly, publish guidance relating to the conduct of in-person instructional activities at public schools and private schools. Such guidance may include, but is not limited to, requirements for face coverings, physical distancing,

sanitation, monitoring, and isolation procedures, as well as standards for the continuity of high-quality education.” *Id.* at 4.

81. Paragraph 8 of Executive Order 20-29 provides that “[t]he Oregon State Board of Education and the Teachers Standards and Practices Commission, in collaboration with the ODE, shall promulgate rules necessary to facilitate the directives in this Executive Order, and the ability of public schools to respond to the ongoing emergency.” *Id.* at 5.

82. Executive Order 20-29 requires that by August 15, 2020, public and private schools must consult with local health authorities to develop a written plan explaining how the school will comply with Executive Order 20-29 and related guidance. *Id.*

83. 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.

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

the guidance documents as successive versions of a “Ready Schools, Safe Learners” plan. See Guidance Version 1.0.0, attached as **Exhibit 11**; Guidance Version 1.5.8, attached as **Exhibit 12**; Guidance Version 2.7.2, attached as **Exhibit 13**; Guidance Version 3.0.1, attached as **Exhibit 14**; Guidance Version 3.7.4, attached as **Exhibit 15**; Guidance Version 3.7.5, attached as **Exhibit 16**; Guidance Version 3.7.8, attached as **Exhibit 17**.

85. Each version of the school guidance purports to govern religious schools, stating that “[t]his guidance . . . applies to . . . private schools which include private or parochial schools providing courses of study usually taught in kindergarten through grade 12 in the public schools and in attendance for a period equivalent to that required of children attending public schools, as defined in ORS 339.030(1)(a).” Ex. 11, at 5 (Guidance Version 1.0.0); Ex. 12, at 9 (Guidance Version 1.5.8); Ex. 13, at 11 (Guidance Version 2.7.2); Ex. 14, at 12 (Guidance Version 3.0.1); Ex. 15, at 11 (Guidance Version 3.7.4); Ex. 16, at 11 (Guidance Version 3.7.5); Ex. 17, at 7 (Guidance Version 3.7.8).

86. Each version of the school guidance provides that “each private school will develop its own Operational Blueprint for Reentry that is tailored to the community it serves.” Ex. 11, at 2 (Guidance Version 1.0.0); Ex. 12, at 6 (Guidance Version 1.5.8); Ex. 13, at 6-7 (Guidance Version 2.7.2); Ex. 14, at 7-8 (Guidance Version 3.0.1); Ex. 15, at 6-7 (Guidance Version 3.7.4); Ex. 16, at 6-7 (Guidance Version 3.7.5); Ex. 17, at 2-3 (Guidance Version 3.7.8).

87. 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.” Ex. 17, at 12 (Guidance Version 3.7.8); *see also* Ex. 11, at 8 (Version 1.0.0); Ex. 12, at 9 (Version 1.5.8); Ex. 13, at 11 (Version 2.7.2); Ex. 14, at 12 (Version 3.0.1); Ex. 15, at 11 (Version 3.7.4); Ex. 16, at 7 (Version 3.7.5).

88. On June 10, 2020, ODE and OHA issued the first guidance document, “Ready Schools, Safe Learners, Version 1.0.0.” *See* Ex. 11 (Guidance Version 1.0.0).

89. Version 1.0.0 of the school guidance identified eight sections described as essential elements 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. Ex. 11, at 2-4 (Guidance Version 1.0.0).

90. However, under version 1.0.0 of the school guidance, private schools were only required to comply with sections 1-3 of the guidance. *Id.* at 5 (“Note: Private schools are required to comply with only sections 1-3 of this guidance.”); *Id.* at 8 (“Private schools are required to complete sections 1-3.”); *Id.* at 28, 31, 39, 41, 42 (introducing the remaining sections 4-8 with language clarifying that “[p]rivate schools are not required to comply with this section.”).

91. On June 30, 2020, ODE and OHA issued their second guidance document (Version 1.5.8), and on July 22, 2020, issued their third guidance document (Version 2.7.2). Exs. 12 and 13.

92. The second and third versions of the school guidance (Versions 1.5.8 and 2.7.2) retained the same eight sections for an Operational Blueprint for Reentry and reiterated that private schools were only required to comply with Sections 1-3. Ex. 12, at 7-8, 9, 12, 34, 37, 47, 49, 50 (Version 1.5.8); Ex. 13, at 8-9, 11, 14, 40, 44, 59, 61, 63 (Version 2.7.2).

93. Therefore, the first three versions of the school guidance permitted religious schools to reopen and provide in-person instruction so long as they complied with the health and safety requirements in Sections 1-3 of the guidance: (1) public health protocols; (2) facilities and school operations; (3) response to outbreak. *See id.*

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

94. After nearly two months advising that religious schools could provide in-person instruction so long as they complied with Sections 1-3 of the school guidance, Defendants reversed course and prohibited most in-person instruction.

95. On July 29, 2020, ODE and OHA issued their fourth guidance document, “Ready Schools, Safe Learners, Version 3.0.1.” Ex. 14.

96. 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.” *See id.* at 1, 9, 17-24.

97. 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. *Id.* at 17-21.

98. Version 3.0.1 of the school guidance generally prohibited religious schools from providing in-person instruction unless they satisfied Sections 0-3. *See id.* at 12.

99. 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. Declaration of Mary Starrett, attached as **Exhibit 18**, at 1.

100. 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. *Id.*

101. In response to Ms. Starrett’s question, Leah Horner, a policy advisor and liaison to Governor Brown, discussed the potential for a “mass exodus” of children from public schools if students disenrolled to obtain education elsewhere. *Id.*

102. On August 11, 2020, ODE and OHA issued their fifth guidance document, “Ready Schools, Safe Learners, Version 3.7.4.” Ex. 15.

103. Version 3.7.4 of the school guidance retained Section 0 and generally prohibited religious schools from providing in-person instruction unless they satisfied Sections 0-3. *See id.* at 12.

104. On August 18, 2020, ODE and OHA issued their sixth guidance document, “Ready Schools, Safe Learners, Version 3.7.5,” which retained Section 0 and generally prohibited religious schools from providing in-person instruction unless they have satisfied Sections 0-3. Ex. 16, at 12.

105. On September 8, 2020, ODE and OHA issued their seventh guidance document, “Ready Schools, Safe Learners, Version 3.7.8,” which retains Section 0 and generally prohibits religious schools from providing in-person instruction unless they have satisfied Sections 0-3. Ex. 17, at 8, 13-19.

106. The current version of the school guidance (Version 3.7.8) 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 id.* at 17-19 (Guidance Version 3.7.8).

107. Even if a private school satisfies all of the health and safety protocols under Sections 1-3 of the school guidance, the late addition of Section 0 generally prohibits in-person instruction models for religious schools unless and until their county meets the following standard “metrics” for 3 consecutive weeks: (1) the school must be in a county that is no longer in the baseline phase of the reopening plan; (2) the state-wide test positivity rate must be 5% or less in the preceding seven days; (3) the county’s test positivity rate must be 5% or less in the preceding

seven days; and (4) the county's case rate must be 10 or fewer cases per 100,000 population in the preceding seven days. *See id.* at 18-19.

108. 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. *See* OHA County Metrics Report, attached as **Exhibit 19**, at 3.

109. 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. *See* Guidance for Limited In-Person Instruction During Comprehensive Distance Learning, attached as **Exhibit 20**.

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

110. Each version of the school guidance includes "private schools" in its definition of the term "district." Ex. 11, at 5 (Guidance Version 1.0.0); Ex. 12, at 9 (Guidance Version 1.5.8); Ex. 13, at 11 (Guidance Version 2.7.2); Ex. 14, at 12 (Guidance Version 3.0.1); Ex. 15, at 11 (Guidance Version 3.7.4); Ex. 16, at 11 (Guidance Version 3.7.5); Ex. 17, at 7 (Guidance Version 3.7.8).

111. The recent versions of school guidance containing Section 0 each contain six 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: (1) in-person instruction for

kindergarten through third grade; (2) limited in-person instruction for specific groups of students; (3) more lenient county metrics for remote or rural schools in larger population counties; (4) more lenient county metrics for smaller population counties; (5) more lenient county metrics for counties with low population density; and (6) in-person instruction for small “districts.” Ex. 15, at 20-22 (Guidance Version 3.7.4); Ex. 16, at 20-22 (Guidance Version 3.7.5); Ex. 17, at 16-18 (Guidance Version 3.7.8).

112. Version 3.7.4 of Defendants’ guidance first introduced Exception 6, an exception initially applicable “School-wide in small districts (Statewide).” Ex. #, at 22. 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:

6) School-wide in small districts (Statewide)

If the school district has an enrollment of ≤ 75 in total and county does not meet the metrics in this section (≤ 30 cases, with less than half of cases or ≤ 5 cases reported in the last week of the three-week period), the Local Public Health Authority may work with the district to establish the criteria below and open the school(s) in the district to in-person instruction.

- There is not community spread in the school catchment area.
- There is not community spread in the communities that serve as the primary employment and community centers (for shopping and other in-person services) and the school is isolated by a significant distance from communities reporting COVID-19 community spread in the previous three weeks.
- In considering community spread, public health should take into consideration the cases in the community, COVID-19 test availability in the community, recent percent positivity of tests,

capacity in the community to respond to cases and outbreaks and the regional hospital capacity available for those with severe disease.

Ex. 15, at 22.

113. 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:

6) School-wide in small *public* districts (Statewide)

If the school district has an enrollment of ≤ 75 in total and county does not meet the metrics in this section (≤ 30 cases, with less than half of cases or ≤ 5 cases reported in the last week of the three-week period), the Local Public Health Authority may work with the district to establish the criteria below and open the school(s) in the district to in-person instruction. This section applies to: Juntura SD, Frenchglen SD, Troy SD, Diamond SD, Pine Creek SD, Suntex SD, Ashwood SD, Drewsey SD, Adel SD, Double O SD, Plush SD, Pinehurst SD, South Harney SD, Arock SD, Black Butte SD, **Ukiah SD**, Long Creek SD, Burnt River SD, Monument SD, Dayville SD, Jordan Valley SD, Spray SD, and others as verified and approved by ODE. The LPHA must establish:

- There is not community spread in the school catchment area.
- There is not community spread in the communities that serve as the primary employment and community centers (for shopping and other in-person services) and the school is isolated by a significant distance from communities reporting COVID-19 community spread in the previous three weeks.
- In considering community spread, public health should take into consideration the cases in the community, COVID-19 test availability in the community, recent percent positivity of tests, capacity in the community to respond to cases and outbreaks and the regional hospital capacity available for those with severe disease.

Ex. 16, at 22 (emphasis added).

114. The current version of the school guidance (Version 3.7.8) retains the narrow application of Exception 6 to “small public schools,” and retains the same

non-exhaustive list of 22 public schools eligible to invoke the section. Ex. 17, at 18 (Guidance Version 3.7.8).

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

116. 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] classes 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 Sept. 25, 2020).

117. 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. See Ukiah School District Operational Blueprint for Reentry, attached as **Exhibit 21**.

118. 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!"



Ukiah School District Newsletter, attached as **Exhibit 22**.

119. In addition to Ukiah School District, most of the public schools listed in Defendants' guidance as eligible to invoke the "small school" exception have also submitted Operational Blueprints for Reentry declaring their plans to reopen with in-person instruction, either through an on-site or hybrid model. *See* Operational Blueprint for Harney County ESD including Diamond SD, Double O SD, Drewsey SD, Frenchglen SD, Pine Creek SD, South Harney SD, and Suntex SD, attached as **Exhibit 23**; Operational Blueprint for Dayville SD, attached as **Exhibit 24**; Operational Blueprint for Adel SD, attached as **Exhibit 25**; Operational Blueprint for Arock SD, attached as **Exhibit 26**; Operational Blueprint for Ashwood SD,

attached as **Exhibit 27**; Operational Blueprint for Black Butte SD, attached as **Exhibit 28**; Operational Blueprint for Burnt River, attached as **Exhibit 29**; Operational Blueprint for Jordan Valley SD, attached as **Exhibit 30**; Operational Blueprint for Juntura SD, attached as **Exhibit 31**; Operational Blueprint for Long Creek SD, attached as **Exhibit 32**; Operational Blueprint for Monument SD, attached as **Exhibit 33**; Operational Blueprint for Spray SD, attached as **Exhibit 34**; Operational Blueprint for Troy SD, attached as **Exhibit 35**.

120. 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 is 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.

121. 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. *See* Email Correspondence Between HCS and Umatilla County Public Health Department, attached as **Exhibit 36**, at 1-2, 7.

122. HCS would qualify for Exception 6 if it were not a private religious school. HCS constitutes a "district" under the guidance, has fewer than 75 enrolled students, has committed to comply with the health and safety protocols required in

Sections 1-3 of Defendants' guidance, and operates in the same county as a public school that qualifies for Exception 6.

123. There is no legitimate reason for allowing public schools with 75 or fewer students to provide in-person instruction in Umatilla County while denying the same opportunity to small religious schools who operate with the same number of students, performing the same type of activity, working in the same type of physical environment, complying with the same health and safety protocols, in the very same county.

124. The existence of an exception for small public schools demonstrates that the Religious School Closure is not narrowly tailored to serve a compelling public health interest.

125. 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.

126. Defendants have not made in-person operation of similar activities—including childcare facilities and institutions of higher education—dependent upon the “Community Health Metrics” that Defendants require for religious schools to provide in-person instruction under Section 0 of Defendants' guidance.

127. 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, attached as **Exhibit 37**, at 5.

128. 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.

129. Under the Childcare Guidance, childcare facilities are allowed to provide in-person services to children across the state. *See Ex. 37*, at 8. Even in counties that remain in the “baseline” phase of the Governor’s reopening plan, childcare facilities may provide in-person services so long as they operate with separate groups of 10 children or less. *See id.* In counties under Phase 1 or Phase 2 of the reopening plan, childcare facilities may provide in person services so long as they operate with separate groups of 20 children or less. *See id.*

130. In addition to childcare facilities, Governor Brown also allows colleges and universities to provide in-person instruction.

131. On March 19, 2020, Defendant Brown issued Executive Order 20-09, prohibiting in-person instruction at all public and private institutions of higher education in Oregon from March 21, 2020 through April 28, 2020. *See Executive Order 20-09*, attached as **Exhibit 38**.

132. On April 17, 2020, Defendant Brown issued Executive Order 20-17, extending Executive Order 20-09’s prohibition of in-person instruction for

institutions of higher education through June 13, 2020. *See* Executive Order 20-17, attached as **Exhibit 39**.

133. But on June 12, 2020, Defendant Brown issued Executive Order 20-28, which allowed institutions of higher learning to reopen for in-person instruction so long as they follow health and safety protocols, including face coverings, physical distancing, sanitation, monitoring, and isolation procedures. *See* Executive Order 20-28, attached at **Exhibit 40**, at 3-5.

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

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

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

136. 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.

137. 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.

138. 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).

139. 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.” Email Correspondence Between HCS and Umatilla County Public Health Department, Ex. 36, at 1.

140. 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. *Id.* at 1-2, 7.

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

141. 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. *See* HCS First Operational Blueprint for Reopening, attached as **Exhibit 41**, at 2.

142. 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.” *Id.*

143. 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. *See id.* at 3-18.

144. 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. *See* HCS Second Operational Blueprint for Reentry, attached as **Exhibit 42**.

145. 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. *See id.* at 3-18. HCS now plans to open for in-person instruction on November 2, 2020.

146. 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. Ex. 36 at 14-15.

147. In a subsequent email, dated October 5, 2020, the same official explained to the HCS administrator that Exception 6 in Section 0 of the ODE guidance requires local public health authorities to establish that “there is not community spread in the school catchment area” before recommending a school reopen under the exception. Ex. 36 at 13; *see* Ex. 17 at 18. The official added, however, that the ODE guidance “does not give specific detail on an evaluation process.” Ex. 36 at 13.

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, many of whom are HCS students*

148. 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.

149. 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.

150. 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." ODE On-site Evaluation Report for HCS and ODE Authorization, attached as **Exhibit 43**, at 9.

151. 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. Ex. 43 at 10.

152. HCS is now providing childcare under the ODE's authorization.

153. 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 School Closure threatens HCS's existence.*

154. The Religious School Closure 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 School Closure prevented HCS from providing in-person instruction.

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

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

157. 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.

G. *The Religious School Closure defies health experts' guidance encouraging schools to reopen in-person.*

1. *Research shows that distance learning is less effective than in-person instruction.*

158. The CDC, AAP, and other experts encourage that schools resume in-person instruction.

159. Research demonstrates that distance learning is less effective than in-person instruction, that distance learning can be harmful to children's development, and that in-person learning poses minimal risks for children, who are less likely to contract or transmit COVID-19.

160. Studies show that students using a distance learning model underperform compared to students learning in-person. In 2019, the National

Education Policy Center found that only 48.5% of virtual schools received acceptable performance ratings, with an average graduation rate of 50.1%, “far short of the national average of 84%.”²

161. The Center for Research on Education Outcomes at Stanford University (“CREDO”) conducted a similar study comparing distance learning students with similar students attending in-person classes. Compared to the in-person students, virtual students showed significantly weaker academic performance.³

162. Distance learning impedes the development of younger children. “In grades K-3, children are still developing the skills to regulate their own behavior, emotions, and attention, and therefore struggle with distance learning.”⁴ Most distance-learning models rely on increased levels of parental involvement, which imposes unique burdens upon single parents or low-income families with two working parents. *See, e.g.*, 2015 Mathematica Policy Research Report (showing that 78 percent of online charter elementary schools “expect parents to actively participate in the student’s instruction”).⁵

² Alex Molnar, Nat’l Educ. Pol’y Ctr., *Virtual Schools in the U.S. 2019*, at 9 (May 2019), <https://bit.ly/33YNJ7I>, attached as **Exhibit 44**.

³ James L. Woodworth et al., Ctr. for Research on Educ. Outcomes, *Online Charter School Study 23* (2015), <https://stanford.io/34gu2sj>, attached as **Exhibit 44**.

⁴ News Release, Nat’l Acads. of Scis., Eng’g, & Med., *Schools Should Prioritize Reopening in Fall 2020, Especially for Grades K-5, While Weighing Risks and Benefits* (July 15, 2020), <https://perma.cc/6QHC-4FYV>.

⁵ Brian Gill et al., Mathematica Pol’y Research, *Inside Online Charter Schools 22-23*(Oct. 2015), <https://bit.ly/2Y52F0p>, attached as **Exhibit 46**.

163. Most distance learning also requires increased “screen time” that has proven harmful to children. According to the National Institutes of Health, “children who spent more than two hours a day on screen-time activities scored lower on language and thinking tests,” and children who spent more than seven hours a day on a screen “experienced thinning of the brain’s cortex, the area of the brain related to critical thinking and reasoning.”⁶

164. The problems with distance learning apply with equal or greater force to religious instruction. As described above, HCS operates as a religious school because religious instruction is infused throughout the school day, including during non-instructional time. Teachers and staff model religious behavior inside and outside the classroom, in the lunchroom, and on the playground and playing fields. Students congregate together in a religious manner for chapel services, daily prayer, scripture study, and religious education. These things cannot be adequately sustained online.

2. *Distance learning has negatively impacted children during the COVID-19 pandemic.*

165. News reports have described distance learning as an unmitigated disaster that has been terrible for children due to technological problems, limited student engagement, and screen time vastly exceeding what health experts recommend as safe for children.⁷

⁶ Jennifer F. Cross, *What Does Too Much Screen Time Do to Children’s Brains?*, HEALTH MATTERS (2020), <https://bit.ly/3mrTUYK>.

⁷ Bethany Mandel, THE NEW YORK POST, *‘Remote Learning’ is a disaster, and terrible for children* (Sept. 16, 2020), <https://bit.ly/3hZ2vOY> /.

166. Recent research reveals troubling trends resulting from schools' transition to distance learning in the spring of 2020.

167. The University of Washington's Center on Reinventing Public Education reported that, after surveying 477 school districts that provided distance learning as a result of the pandemic: "[J]ust one in three districts expect teachers to provide instruction, track student engagement, or monitor academic progress for all students.... Far too many districts are leaving learning to chance during the coronavirus closures."⁸

168. Another study found that due to school closures in the Spring of 2020, students' academic achievement would likely be restricted to only "63–68% of the learning gains in reading relative to a typical school year," and only "37–50% of the learning gains in math."⁹

169. Yet another study found that students who receive online learning during the upcoming fall semester will lose "three to four months of learning" by the start of 2021, compared to students receiving in-person education.¹⁰

170. The reduced effectiveness of distance learning restricts students' religious education to the same degree as students' secular education.

⁸ Betheny Gross & Alice Opalka, Ctr. on Reinventing Pub. Educ., *Too Many Schools Leave Learning to Chance During the Pandemic* 1 (June 2020), <https://bit.ly/3kesOSS>.

⁹ Megan Kuhfeld et al., *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement* 2 (Brown Univ. Annenberg Inst., Paper No. 20-226, May 2020), <https://bit.ly/2FHPvA4>.

¹⁰ Emma Dorn et al., McKinsey & Company, *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime* 3 (June 2020), <https://mck.co/3kKUnV0>, attached as **Exhibit 47**.

171. Experts throughout the scientific community overwhelmingly support re-opening schools this fall, including the CDC;¹¹ the AAP;¹² the World Health Organization (“WHO”);¹³ Royal College of Pediatrics and Child Health;¹⁴ The National Academies of Sciences, Engineering and Medicine;¹⁵ the former Commissioner of the Food and Drug Administration, Dr. Scott Gottlieb;¹⁶ and the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony S. Fauci.¹⁷

172. Dr. Anthony S. Fauci encouraged that the “default position should be to try, as best as you possibly can, to open up the schools for in-person learning ... because of the psychological benefit and in some places, even for the nutrition of children[.]”¹⁸

¹¹ Ctrs. for Disease Control & Prevention, *The Importance of Reopening America’s Schools This Fall*, <https://perma.cc/6ZUL-6EQA> (last updated July 23, 2020).

¹² *COVID-19 Planning Considerations: Guidance for School Re-entry*, Am. Acad. of Pediatrics, <https://perma.cc/V3HV-W9Y9>

¹³ World Health Org., *Considerations for School-Related Public Health Measures in the Context of COVID-19* (May 10, 2020), <https://bit.ly/3h1Ixn5>, attached as **Exhibit 48**.

¹⁴ Royal College of Pediatrics and Child Health, *Open Letter from UK Paediatricians About the Return of Children to Schools* (June 17, 2020), <https://bit.ly/3221jom>, attached as **Exhibit 49**.

¹⁵ News Release, Nat’l Acads. of Scis., Eng’g, & Med., *Schools Should Prioritize Reopening in Fall 2020, Especially for Grades K-5, While Weighing Risks and Benefits* (July 15, 2020), <https://bit.ly/32AWq71>.

¹⁶ Scott Gottlieb, Opinion, *Schools Can Open Safely This Fall*, WALL ST. J. (July 12, 2020), <https://on.wsj.com/2EcjAr6>.

¹⁷ Mark Pazniokas, *In Connecticut Briefing, Fauci Urges a Return to Classroom*, CT MIRROR (Aug. 3, 2020), <https://bit.ly/3hzrlon>.

¹⁸ *Id.*

173. According to the CDC, in-person instruction is critical for students' development because "[s]chools play a critical role in supporting the whole child, not just their academic achievement," but also "development of social and emotional skills," "creat[ing] a safe environment for learning; address[ing] nutritional needs; and facilitat[ing] physical activity."¹⁹

LEGAL ALLEGATIONS

174. 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).

175. HCS is suffering irreparable harm from the Religious School Closure.

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

177. 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.

178. 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.

¹⁹ Ctrs. for Disease Control & Prevention, *The Importance of Reopening America's Schools This Fall*, <https://perma.cc/6ZUL-6EQA> (last updated July 23, 2020).

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

180. 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)

181. The allegations contained in paragraphs 1–180 are incorporated herein by reference.

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

183. The Supreme Court has repeatedly recognized that “disqualifying otherwise eligible recipients from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2255 (2020) (internal quotations omitted).

184. A state action that discriminates on the basis of religion is subject to strict scrutiny and must be invalidated unless it is “justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

185. A law that provides for individualized exceptions is not generally applicable, and therefore, discriminates on the basis of religion.

186. By issuing and enforcing the Religious School Closure, Defendants unlawfully target religious schools. Defendants have created two categories of “small schools” – public and private. All public small schools are in a preferred category of schools that are permitted to invoke an exception to pursue in-person instruction in collaboration with their local public health authority. All private small schools are in a non-preferred category of schools not permitted to invoke the same exception. Because all religious schools are necessarily private, all religious schools are categorically relegated to the non-preferred category.

187. There are only six private schools in Umatilla County, and all of them are religious: (1) HCS – Assemblies of God; (2) Lighthouse Christian Academy – Pentecostal; (3) Hermiston Junior Academy – Adventist; (4) Harris Junior Academy – Adventist; (5) Blue Mt. Valley Adventist School – Adventist; (6) Milton Stateline Adventist School – Adventist.

188. Religious schools make up the majority of Oregon’s private schools.

189. In-person religious education is central to the free exercise of religion by Plaintiffs.

190. The Religious School Closure 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.

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

192. The Religious School Closure is not generally applicable because it does not apply to equivalent operations such as childcare facilities and camps. It also grants local health officials discretion to allow certain public schools to open for in-person instruction. The Religious School Closure contains vague language and does not offer any objective standard for local health officials to employ when evaluating the merits of exception and waiver requests.

193. While Defendants unquestionably have a compelling interest in safeguarding public health generally, such interest must apply to the Plaintiffs specifically but fails to do so.

194. The Religious School Closure 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.

195. Moreover, mandatory distance learning for all grade levels and all ability groups does not advance the state's interest in protecting public health.

Distance learning increases educational inequities, particularly for low-income, minority, and special-needs students; deprives families of childcare, meals, and other supports; decreases mental health; and increases the risk of child abuse. Children are at the lowest risk of contracting or spreading COVID-19 and are at the lowest risk of developing serious complications in the improbable event that they contract COVID-19.

196. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure 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)

197. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

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

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

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

201. 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.

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

203. The Religious School Closure infringes on the fundamental rights of parents by preventing them from directing the religious upbringing and education of their children.

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

205. The Religious School Closure 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.

206. The Religious School Closure is not narrowly tailored to the state's interest in preventing the spread of COVID-19. Special exceptions and less restrictive regulations imposed on small public schools, childcare facilities, and institutions of higher education demonstrate that the Defendants could prevent the transmission of COVID-19 through less restrictive means that do not infringe on fundamental constitutional rights.

207. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure 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)

208. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

209. In developing and implementing the Religious School Closure, Defendants treat private schools—the majority of which are religious schools—differently than public schools.

210. Religious schools are similarly situated to public schools in relation to COVID-19.

211. Religious schools make up 100% of the private schools in Umatilla County, and religious schools make up the majority of Oregon’s private schools state-wide.

212. Defendants grant exceptions and more lenient treatment for public schools while denying the same exceptions to HCS and other religious schools.

213. Defendants allow public schools with 75 or fewer students to open in consultation with their local health authorities, while refusing the same opportunity to religious schools with 75 or fewer students.

214. Defendants have also issued orders and guidance permitting childcare facilities and institutions of higher education to provide in-person instruction.

215. Defendants’ representatives have publicly admitted that the Religious School Closure was motivated by a desire to keep private (mostly religious) schools from opening, which they feared could cause a “mass exodus” from public schools.

216. Defendants have refused to grant similar exceptions and lenient treatment to HCS and other religious schools.

217. Without equal treatment, it is difficult or impossible for religious schools like HCS to carry the impossibly heavy burdens imposed by Defendants' orders and guidance.

218. HCS has incurred expenses in order to comply with Defendants' executive orders and guidance, but unlike public schools, HCS does not receive commensurate funding from Defendants to ensure its survival.

219. The Religious School Closure also places HCS and small other religious schools at a direct and substantial disadvantage in relation to public education in terms of the ability to offer meaningful instruction and a healthy social environment for students.

220. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure 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)

221. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

222. Defendants' Religious School Closure violates HCS's freedom of speech by prohibiting it from teaching subjects from a biblical worldview to an in-person audience. Defendants disfavor the religious content or viewpoint of HCS's speech.

223. 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.

224. The Religious School Closure specifically targets private schools—the overwhelming majority of which are religious schools whose central purpose involves religious speech—while granting exceptions and more favorable treatment to public schools engaging in secular speech.

225. Defendants’ executive orders and guidance, including Exception 6, are vague and grant local public health authorities and local law enforcement officials unbridled discretion with respect to enforcement of the Religious School Closure and imposition of penalties, making the orders and guidance susceptible to content- and viewpoint-based discrimination.

226. Prohibiting or punishing HCS’s religious speech does not serve any legitimate, rational, substantial, or compelling government interest.

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

228. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure violates the Free Speech Clause of the First Amendment.

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

229. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

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

231. The Religious School Closure 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.

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

233. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure 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)

234. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

235. 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. *Espinoza*

v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) (“[W]e have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.”).

236. Schools like HCS generally have standing to assert the constitutional rights of parents to direct their children’s education.

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

238. 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.

239. The Religious School Closure 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.

240. By forcing religious schools to close while permitting in-person instruction to continue at some public schools, childcare facilities, and institutions of higher education, Defendants unlawfully abridged the ability of HCS, its parents, and their children to freely exercise their religion.

241. The Religious School Closure 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 public schools, childcare facilities, and institutions of higher education 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.

242. Therefore, the Court should enter judgment in favor of HCS and declare that the Religious School Closure violates the Free Exercise Clause of the First Amendment.

SEVENTH CAUSE OF ACTION
42 U.S.C. § 1983
VIOLATION OF THE FOURTEENTH AMENDMENT
(PROCEDURAL DUE PROCESS)

243. HCS repeats and incorporates paragraphs 1-180 as if fully stated herein.

244. The Fourteenth Amendment prohibits state actors from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. A law is also unconstitutional if it is overbroad, vague, or gives enforcement officials unbridled discretion. And laws that grant unbridled discretion allow constitutional violations through arbitrary and discriminatory enforcement.

245. Procedural due process generally requires state actors to provide citizens notice and a hearing for the State to deprive them of liberty or property.

246. Here, the State violated HCS’s procedural due process rights by failing to define a host of terms in Exception 6, including “community spread” and “significant distance.” By using vague and undefined terms, and Exception 6 grants officials unbridled discretion.

247. Exception 6 also grants officials unbridled discretion by failing to specify what are the acceptable metrics for each of the five things local public health authorities “should”—but not must—consider: (a) “the cases in the community,” (b) “COVID-19 test availability in the community,” (c) “recent positivity of tests,” (d)

“capacity in the community to respond to cases and outbreaks,” and (e) “the regional hospital capacity available for those with severe disease.” Ex. 17 at 18.

248. The State also failed to provide a pre-deprivation or post-deprivation hearing before infringing on HCS’s religious liberty.

249. The Religious School Closure deprives HCS of its rights to freely exercise its religion.

250. The Religious School Closure deprives parents of HCS students of their fundamental rights to direct the education and upbringing of their children.

251. The Religious School Closure creates a substantial risk of erroneous deprivation that could be prevented by procedural safeguards, including a hearing. A hearing would allow HCS to provide information about the size and layout of its facilities, as well as its plans to meet or exceed the requirements of relevant health and safety protocols.

252. The State lacks any justification for dispensing with hearings because Defendants issued the Religious School Closure more than four months after Oregon proclaimed a State of Emergency, and nearly two months before the start of the school year.

253. The Religious School Closure violates Due Process because it fails to provide HCS a hearing.

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

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 16th day of October, 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 Plaintiffs

VERIFICATION

I declare under penalty of perjury that the foregoing 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: October 15, 2020

A handwritten signature in black 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