UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

DOUGLAS H. PETERSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**CASE NO. 1:20-cv-00898-WJ-CG**
	)	
KATHYLEEN M. KUNKEL, *et al.*,	)	
	)	
Defendants.	)	
	)	

THE UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this Statement of Interest supporting Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed on September 11, 2020. Doc. 2.

This case involves important questions of how to balance the deference owed to public officials in addressing a pandemic threatening the health and safety of the public with the fundamental right of parents to direct the education of their children. While a state or local government has significant discretion to decide what measures to adopt to meet a public health threat, the Constitution requires that, whatever level of restrictions it adopts, government treats similarly situated people equally, particularly when the government adopts a classification impacting a fundamental right. The Tenth Circuit has held that when government classifications abridge a fundamental right (even in part), the Equal Protection Clause of the Constitution mandates strict scrutiny, a level of scrutiny which defendants cannot meet here.

INTEREST OF THE UNITED STATES

The Attorney General has statutory authority "to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517.[1]

The United States has a substantial interest in the preservation of its citizens' fundamental rights guaranteed by the Constitution. To that end, the United States regularly files statements of interest and amicus briefs on important issues of fundamental rights in courts at every level, from trial courts to the Supreme Court of the United States. In the area of education, for example, the United States has filed briefs or statements of interest in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Carson* v. *Makin*, No. 19-1746 (1st Cir. argued Jan. 8, 2020); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004); and *Brown v. Jones Cty. Junior Coll.*, No. 2:19–cv–00127 (D. Miss. filed Dec. 9, 2019), among many others.

The United States also has a strong interest, especially in the midst of the COVID-19 pandemic, in ensuring the development and maintenance of the best possible public health strategies to combat the virus and protect the people of the United States from harm. But that interest must be balanced with constitutional liberties. This case raises issues of national public importance regarding the interplay between the government's compelling interest in protecting

[1] Section 517, in its entirety, provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. Section 517 provides clear statutory authority for the United States, in its discretion, to attend to its interests in any court or proceeding to which it is not a party. The United States has a long history of using this authority in private suits, filing over 600 statements of interest since 1925. Victor Zapana, Note, The Statement of Interest as a Tool in Federal Civil Rights Enforcement, 52 Harv. C.R.–C.L. L. Rev. 227, 228-29 (2017)."

public health and safety from COVID-19 and parents' fundamental right to direct the upbringing of their children through education.

BACKGROUND[2]

Douglas Peterson has chosen to send his daughter K.P. to Albuquerque Academy, an independent K-12 school, where she is in the seventh grade. Doc. 1, ¶ 7. In response to the COVID-19 pandemic, the State of New Mexico has, like other states, adopted a range of measures to control the spread of the disease, including completely barring some activities, imposing capacity restrictions on others, and imposing a range of specific preventive measures such as social distancing and mask requirements in a variety of settings. *See* Doc. 1-1.

As pertinent to this case, the State has determined that public schools may open at 50 percent of "classroom capacity level" and has published this standard in its New Mexico Public Education Department Reentry Guidance. Doc. 2-4, 5.[3] Daycare facilities may operate at 100 percent of capacity. Doc. 1-1, 3, 5-6. Private schools, however, including religious private schools, are all limited to 25 percent of capacity for live instruction. *Id.* at 7. This limitation has "prevented Albuquerque Academy from reopening for in-person instruction of students, which is superior to the online instruction of students." Doc. 1, ¶ 15.

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[2] For purposes of this statement, the United States assumes the truth of the facts alleged in the exhibits accompanying the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

[3] Defendants assert that only grades K-6 may currently open at 50 percent of capacity, and that the standards are not yet being applied in the grades 7 to 12 setting, citing to a September 16 newspaper article. Doc. 17, 9-10 n.21. There is no evidence in the record, however, that the standards are not operational, or will not be operational imminently. While the arguments set forth by the United States below that Defendants have engaged in discrimination in violation of the Equal Protection Clause apply equally to the K to 6 context and the 7 to 12 context, the United States recognizes that the Plaintiffs in this case, a seventh-grade student and her father, only have standing to challenge the injury to themselves. The court thus may need to engage in further factual inquiry before deciding this case.

Plaintiff Peterson would like his daughter to be able to attend school in person in the same way that public school students do throughout the state. However, her school has determined that it will not open unless the school can operate at 50 percent of capacity, a level at which they could accommodate all currently enrolled students. Doc. 2-2. Plaintiffs therefore filed this suit on September 1, 2020, for violations of the United States Constitution, alleging that the actions of the Defendants violated Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Rights to Association and Assembly under the First Amendment, and the Contract Clause. Doc. 1. On September 11, they moved for a Temporary Restraining Order and Preliminary Injunction, which this Court has set for a hearing on September 23. Doc. 2.

ARGUMENT[4]

I. There Is No Pandemic Exception to the Constitution

The United States Constitution and its Bill of Rights protect us at all times. These protections are especially important during times of crisis such as the current COVID-19 pandemic, when the federal government, the District of Columbia, and all fifty States have declared states of emergency and have taken unprecedented and essential steps to contain the spread of the novel coronavirus and the consequences of the life-threatening COVID-19 pandemic.[5]

The Constitution generally provides for substantial deference to necessary, temporary measures taken by the government to meet a genuine health emergency. According to the Supreme Court's seminal decision in the area of government restrictions during a public health

[4] This Statement of Interest addresses only the merits of Plaintiffs' Equal Protection claim.

[5] *See, e.g.*, Presidential Proclamation, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020).

emergency, "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

That deference is not absolute, however. Courts have a duty to intervene "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. In that analysis, the key inquiry is often whether the government is treating like behavior alike. The government cannot subject protected activity to restrictions that are "more severe" than the "restrictions [that] apply to comparable" non-protected activity, or draw artificial distinctions within such protected activity. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief).

And, as Justice Alito recently noted, the calculus likely changes even further when the government's actions during an emergency not only implicate fundamental constitutional rights but are *also* widespread and long-lasting. *See, e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, ___ U.S. ___, 2020 WL 4251360, at *5 (July 24, 2020) (Alito, J., dissenting from denial of injunctive relief) ("[I]t is important to keep in mind that *Jacobson* primarily involved a substantive due process challenge to a local ordinance requiring residents to be vaccinated for small pox. It is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case."). "At the dawn of an emergency—and the opening days of the COVID–19 outbreak plainly qualify—public officials may not be able to craft

precisely tailored rules," and so "at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules," but "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Id.* at *2. In such cases, the government's actions should generally satisfy the same legal tests used outside of public health emergencies—*e.g.*, restrictions on First Amendment activities must "withstand strict scrutiny" just as in any other case involving First Amendment restrictions, *id.* at *4—although the government's competing interests admittedly may be greater than during a non-emergency.

Although the precise legal tests may change based on the specific restriction at issue, the bottom line remains the same: there is no pandemic exception to the Constitution. Individual rights set forth in the Constitution are always operative and restrain government action.

II. The State's Disparate Treatment of Private and Public Schools Abridges a Fundamental Right, at Least in Part, and Thereby Triggers Strict Scrutiny

The right of parents to direct their children's education is well established, and, under Tenth Circuit precedent, any abridgment of that right, even in part, triggers strict scrutiny.[6]

The Supreme Court has held that "the interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Due Process Clause protects "the right of parents to 'establish a home and bring up children' and 'to control the education of their

[6] *See Kitchen v. Herbert*, 755 F.3d 1193, 1218 (holding that where a government classification impinges on a fundamental right, the State must demonstrate that "its classification has been precisely tailored to serve a compelling governmental interest'")(quoting *Plyler v. Doe*, 457 U.S. 202, 216-17); *Riddle v. Hickenlooper*, 742 F.3d 922, 927 (10th Cir. 2014) (holding, in the context of a law limiting political contributions to write-in candidates to half that of major party candidates, that heightened scrutiny is triggered when a fundamental right was burdened, even though not eliminated).

own.'" *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)). In *Meyer*, the Supreme Court invalidated a Nebraska law barring private schools from providing instruction in languages other than English.

The Court in *Troxel* also noted that two years after *Meyer*, the Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), invalidated an Oregon law that required all parents to send their children to public school. As the *Troxel* Court describes, "we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'" 530 U.S. at 65 (quoting *Pierce*, 268 U.S. at 534-35). As Justice Thomas stated in his concurrence in *Troxel*, "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them." 530 U.S. at 80.

Although many private schools are religious-based, the fundamental right to educate one's children is not limited to private religious schools. The lead plaintiff in *Pierce* was a religious order that ran a school, but the other plaintiff in the case was a private military school, and the fundamental right identified in *Pierce* applies equally to parents' choices to send their children to nonreligious as well as religious private schools. For this reason, the Tenth Circuit explained that parents "have a right to send [their children] to a private school, whether that school is religious or secular." *Swanson v. Guthrie Ind. Sch. Dist*., 135 F.3d 694, 699 (10th Cir. 1998). Likewise, the Sixth Circuit has determined that the "fundamental right" of parents "to choose the manner in which their children will be educated . . . has been recognized in circumstances where First Amendment concerns were not predominant." *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 947 (6th Cir. 1985).

Accordingly, the right to send one's child to private school is unquestionably a fundamental right for constitutional purposes. And, as noted above, under Tenth Circuit precedent, any abridgment of that right, even in part, therefore triggers strict scrutiny.

In this case, although the State Reentry Guidance and Public Health Orders nominally allow private schools to open, the manner in which they differentiate between private and public schools abridges the well-established right for parents to choose a private education for their children—and therefore triggers strict scrutiny. The State treats public and private schools drastically differently in terms of live instruction, allowing public schools to operate at 50 percent of capacity while limiting private schools to 25-percent capacity, meaning private school students are uniquely deprived of opportunities for in-person instruction.[7] Moreover, this differential treatment has a direct effect because, as alleged, "in-person instruction of students . . . is superior to the online instruction of students," Doc. 1, ¶ 15, and the American Academy of Pediatrics has stated that "the importance of in-person learning is well-documented," with a lack of in-person instruction leading to increased "social isolation," "learning deficits," "abuse, substance use, depression, and suicidal ideation." *Id.* ¶ 21. The Centers for Disease Control have likewise announced that schools must safely re-open for live instruction or else students will continue to face "social and emotional" harm. *Id.* ¶¶ 22-23.

The State's differential treatment in its Reentry Guidance and Public Health Orders therefore puts private education at a direct and substantial disadvantage vis-à-vis public

[7] As noted in the Background section, see n. 2 above, while there is nothing in the record indicating that the Reentry Guidance has not been applied to any seventh grade public school classes, or will not be so applied imminently, Defendants have raised this as an issue in their brief. While this does not impact the substance of the United States' arguments, it may impact the standing of the Plaintiffs in this case. The United States notes that further fact finding may be necessary to decide the standing issue.

education in terms of the ability to offer meaningful instruction and a healthy social environment for students. The effect is that parents, while nominally having a choice between public and private education for their children, in reality have little choice at all: their children can attend public school and have a far greater chance of receiving the benefits of live instruction (along with any associated social and emotional benefits)—or they can attend private school and forego those educational and socio-emotional benefits. The State standards and orders turn private education into a second-class option, with the predictable effect that parents may feel compelled to forgo their right to private education and send their children to public schools instead, or (as has happened here) private schools may not reopen for live instruction at all.

By establishing such barriers and disfavored status towards private education but not public education, the State's classification therefore abridges, in part, the fundamental right of parents to choose a private school education for their children, thereby triggering strict scrutiny under Tenth Circuit precedent. *See Kitchen*, 755 F.3d at 1218; *Riddle*, 742 F.3d at 927.

III. Defendants Cannot Meet Strict Scrutiny

Defendants cannot demonstrate that the 25-percent rule for private school is "precisely tailored to serve a compelling governmental interest," as required by Tenth Circuit precedent. *Kitchen*, 755 F.3d at 1218.

Although fighting COVID-19 as a general matter is of course a compelling interest, Defendants must prove that the State has a compelling government interest in the particular application here: limiting private schools to 25 percent of capacity to reduce COVID-19 transmission, while allowing public schools to meet at twice that capacity. As the Supreme Court has explained, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited," *Gonzales v. O*

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 433 (2006), and the Tenth Circuit has held that "[a] law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all." *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.); *see also Kitchen*, 755 F.3d at 1218 ("A provision subject to strict scrutiny 'cannot rest upon a generalized assertion as to the classification's relevance to its goals.'") (quoting *Richmond v. J.A. Crosson Co.*, 488 U.S. 469, 500 (1989)).

Here, the State has not explained why two activities so similar in nature—public and private education—are treated so drastically differently. There is no evidence that private schools are simply less interested in or capable of protecting their students during live instruction. Further, the State puts no capacity limitation on private daycares at all, *see* Doc. 1-1, 3, 5-6, undermining any argument that a 25-percent capacity for private *schools* is truly compelling due to their private nature. While courts should generally defer to reasonable policy choices by local officials seeking to control transmission during the initial stages of an outbreak, that deference has limits. Defendants bear a heavy burden to satisfy strict scrutiny, and this burden require them to explain why 50-percent capacity prevents transmission adequately at public schools and why 100-percent capacity prevents it adequately in daycares—but yet private schools must be limited to 25 percent, even with social distancing and hygiene measures. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 864-67 (2015) (recognizing the deference due prison officials but holding that exemptions to rules for some prisoners and not others showed that the prison did not satisfy strict scrutiny); *cf. Taylor v. Roswell Ind. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) ("Under strict scrutiny, the government must prove its policy or application of that policy is

narrowly tailored to accomplish a governmental interest that is compelling, not merely legitimate."). Their citation to a news article that a different, single private school has been able to open at 25 percent, Doc. 17, 18 n.25, falls far short of the mark.

In addition, the State has not established that its approach is the least restrictive means of furthering any asserted compelling interest. To do so, it must refute the "alternative schemes suggested by the plaintiff to achieve that same interest and show[ing] why they are inadequate." *Yellowbear v. Lampert*, 741 F.3d at 62. Here, Plaintiffs have posited that the school could be permitted to operate with "appropriate safety precautions" to address concerns about disease transmission, Doc. 2, 9, much like the "COVID-safe practices" standard the State applies to childcare centers. *Id.* at 6. Plaintiffs assert that "[t]he risks posed by the SARS-CoV-2 virus among children in a school setting is no greater for those who attend private schools than those who attend public schools or childcare facilities." Doc. 1, ¶ 38. The State notes that the Reentry Guidance puts hygiene and other risk-mitigation requirements like social distancing on public schools, Doc. 17, 9-10, but the State is obligated to explain persuasively why this regimen would be insufficient in private schools while acceptable in public schools (or daycares). It has not done so. *See, e.g.*, *Calvary Chapel*, 2020 WL 4251360, at *1 (Alito, J., dissenting) (noting that "the State has made no effort to show that conducting services in accordance with Calvary Chapel's [safety] plan would pose any greater risk to public health than many other activities that the directive allows").

CONCLUSION

The United States respectfully requests that the Court consider these arguments in deciding Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and

that, if the Court finds that Plaintiffs have standing to proceed, that the Court grant Plaintiffs' requested Temporary Restraining Order or a Preliminary Injunction.

DATED: September 21, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I filed the foregoing pleading electronically through the CM/ECF system which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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