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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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| S.B. (alias) a minor, by and through his next friend, Terri E. Baker; and Heritage House<br><br>Plaintiffs,<br><br>v.<br><br>Mark Burghart, in his official capacity as Kansas Secretary of Revenue which oversees the Kansas Department of Revenue<br><br>Defendant | Case No. 5:23-cv-04110-JAR |

Amended Complaint

JURISDICTION AND VENUE

1. Plaintiff Heritage House school has been denied a Kansas sales tax exemption for schools because its general education curriculum is connected to religious instruction while other non-sectarian private schools obtain that sales tax benefit.

2. This civil rights action 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.

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1346, as this action challenges the defendant's violation of the plaintiffs' civil rights pursuant to 42 U.S.C. § 1983.

4. Venue lies in this Court pursuant to 28 U.S.C. § 1391, as a substantial part of the event and omissions giving rise to the claims occurred in this judicial district.

THE PARTIES AND FACTS

1. The plaintiffs Heritage House and S.B., by his parent Terri Baker, bring this complaint against Mark Burghart, in his official capacity as Kansas Secretary of Revenue, which oversees the Kansas Department of Revenue (KDOR).

2. Terri Baker is a resident of Kansas and the parent of S.B.

3. Heritage House has been assigned a Kansas business ID entity number 6152300 as a not for profit corporation in good standing in the state of Kansas.

4. Heritage House is an organization exempt under section 501(c)(3) of the Internal Revenue Code assigned an identification number of 20-8303650.

5. Heritage House is currently registered with the state of Kansas as a non-accredited private school assigned #94951. *See* attached exhibit to original Complaint.

6. Heritage House meets the definition of a school under K.S.A. 79-3606(c).

7. In 2023, Heritage House submitted, with sufficient supporting documentation, to the Kansas Department of Revenue Form St-28 requesting

exemption from Kansas sales and compensating use tax under K.S.A. 79-3606(c).

8. On August 31, 2023, the exemption request was denied without explanation by KDOR.

**FIRST CAUSE OF ACTION**
**Violation of Plaintiffs' Fourteenth Amendment Right to Equal Protection of the Law**
**(42 U.S.C. § 1983)**

9. Plaintiffs repeat and reallege each of the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

10. Terri Baker, like many other religious parents, strive to raise her child S.B. according to her Christian faith. The state of Kansas provides for private school choice and duel enrollment under Kansas House Bill 2553.

11. Heritage House meets the definition of a "private elementary" school under K.S.A. 79-3606(c).

12. S.B. is the son of Terri E. Baker (Terri). Terri is on the Board of Directors for Heritage House.

13. S.B. is 9 years old and classified by the Blue Valley School District as a special needs student with an individualized education program pursuant to U.S.C. § 1401(9)(D).

14. Heritage House meets the definition of a "Private, nonprofit elementary school" under K.S.A. 72-3461.

15. S.B. is currently duel enrolled at Heritage House and receives educational instruction at Heritage House in connection with religious courses, devotional

exercises, religious training, and other religious activity which is prohibited under K.S.A. 72-3463. Plaintiffs have previously brought suit against the Kansas Department of Education and the Blue Valley School District regarding K.S.A. 72-3463 in Kansas District Court, case No. 5:23-cv-04022-TC-TJJ.

5. Plaintiffs are a "class of one" and allege that they each have been intentionally treated differently from others similarly situated students and private schools and "that there is no rational basis for the difference in treatment." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215-16 (10th Cir. 2011).

6. "A violation of equal protection occurs when the government treats someone differently than another who is similarly situated." *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, Kan., 927 F.2d 1111, 1118 (10th Cir. 1991).

16. K.S.A. 79-3606(c) conveys a sales tax exempt benefit upon certain private schools:

> (c) all sales of tangible personal property or services, including the renting and leasing of tangible personal property, purchased directly by a public or private elementary or secondary school or public or private nonprofit educational institution and used primarily by such school or institution for nonsectarian programs and activities provided or sponsored by such school or institution or in the erection, repair or enlargement of buildings to be used for such purposes.

17. K.S.A. 79-3606(c) is facially, and as applied to each plaintiff, unconstitutional because it targets private schools such as Heritage House for disparate and unequal treatment because of religion as it conveys tax exempt

benefits to private schools but only when sales are used "primarily" for "for nonsectarian programs and activities."

18. "Condition[ing] the availability of benefits" on a school's lack of religious character "'effectively penalizes the free exercise' of religion" and violates the First Amendment. *Carson*, at 1997-98.

19. This scheme violate Plaintiffs' First Amendment rights in nine different ways: (1) by targeting religion in violation of the Free Exercise Clause (*Lukumi*); (2) by denying access to an otherwise available public benefit program in violation of the Free Exercise Clause (Carson); (3) by categorically exempting certain secular schools from the burdens imposed on religious private schools (*Tandon*); (4) by infringing on the rights of parents to direct the religious education of their children in violation of the Free Exercise Clause (*Yoder*); (5) by coercing speech on religious matters in violation of the Free Speech Clause (*Hurley*); (6) by interfering with Plaintiffs' right of expressive association in violation of the Free Speech Clause (*Roberts*); (7) by causing entanglement of church and state in violation of the Establishment Clause (*Carson*); (8) by interfering with the operation of religious schools in violation of church autonomy principles (*Our Lady of Guadalupe*); and (9) by imposing unconstitutional conditions in violation of the First Amendment (AOSI). Any one of these violations would justify a preliminary injunction. Plaintiffs are likely to succeed on each.

**SECOND CAUSE OF ACTION**
**Violation of U.S. Const. Amend. I: Free Exercise Clause Categorical Exclusion from Otherwise Available Government Benefits**
**(42 U.S.C. § 1983)**

20. All preceding paragraphs are realleged and incorporated herein by reference.

21. S.B. is entitled under K.S.A. 72-3421 to have all of the special education and related services designated on his I.E.P. to be delivered to him – either by the Blue Valley School District or his parent Terri.

*22.* K.S.A. 79-3606(c) hinders or otherwise excludes S.B. from that tax exempt benefit. K.S.A. 79-3606(c) dictates how Terri and Heritage House may obtain the sales tax exempt benefit, and conversely how S.B. may receive that benefit which encroaches on religious autonomy in violation of the Establishment Clause. The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly." *Kennedy v. Bremerton Sch. Dist.,* 142 S.Ct. 2407, 2421 (2022). It also does "perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Id.*

23. Although there are "various ways" laws can burden religious exercise, *id.*, religious exercise is plainly burdened when people are "coerced by the Government's action into violating their religious beliefs," *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 449 (1988); *see Kennedy,* 142 S.Ct. at 2422; *Roman Catholic Diocese*, 141 S.Ct. at 65-66, or when "governmental

action penalize[s] religious activity by denying any [religious] person an equal share of the rights, benefits, and privileges enjoyed by other citizens," *Lyng*, 485 U.S. at 449; *see Carson v. Makin* at 96-97 (holding that discriminatory provisions are not justified by distinguishing religious use from religious status).

24. Under the Free Exercise Clause, K.S.A. 79-3606(c) imposes "special disabilities on the basis of religious views or religious status" which triggers strict scrutiny. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019-21 (2017). Under *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Kennedy* at 2422 (analyzing non-neutral school district directive without requiring a substantial burden), these plaintiffs need not demonstrate any burden on a sincerely held religious practice to prevail here. Strict scrutiny automatically applies.

25. Thus, a "categorical ban" excluding religious entities from generally available state benefits solely because of a religious use is unconstitutional unless the government can satisfy strict scrutiny. *Carson v. Makin*; *Espinoza,* 140 S. Ct. at 2261. This is because "religious schools and the families whose children attend them" "are members of the community too, and their exclusion from [government benefit] program[s] is odious to our Constitution and cannot stand." *Id.* at 2261-63. *See Carson v. Makin*.

26. K.S.A. 79-3606(c) violate the plaintiffs' right to free exercise of religion by categorically "exclud[ing] some members of the community from an otherwise

generally available public benefit because of their religious exercise." *Carson* at 1998.

27. K.S.A. 79-3606(c) burdens religious exercise with its "nonsectarian" use conditions and similarly requires Terri and Heritage House to choose between exercising their religious beliefs and the receipt of the sales tax exempt status to benefit S.B. as an exceptional student.

28. K.S.A. 79-3606(c) is "discrimination against religion" because the "State [provides funding] for certain students at private schools – so long as the schools are not religious." *Carson*, at 1998.

29. Categorically prohibiting sale tax exemption status in connection with any religious use or "primary" religious use while permitting it for all secular uses furthers no governmental interest.

30. K.S.A. 79-3606(c)'s non-sectarian / sectarian discrimination classification is not the least restrictive means of furthering a compelling governmental interest.

31. Plaintiffs have suffered and will suffer harm absent relief.

**THIRD CAUSE OF ACTION**
**Violation of U.S. Const. Amend. I: Free Exercise Clause Categorical Exemptions**
**(42 U.S.C. § 1983)**

32. All preceding paragraphs are realleged and incorporated herein by reference.

33. State action "burdening religious practice must be of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

34. A law is not generally applicable if it treats "any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, at 1296; see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *Lukumi*, at 542-12.

35. Under K.S.A. 79-3606(c), Kansas nonsectarian private schools are entitled to receive sales tax exempt status while their religious counterparts may not receive the tax exempt status – and only because of religion. K.S.A. 79-3606(c) "effectively penalizes the free exercise of religion." *Carson*, at 1997.

36. Thus, Kansas law treats "comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. 191. The Kansas framework is therefore subject to strict scrutiny, requiring the State to have a compelling interest in discriminating against religious parents and schools, and this policy must be the least-restrictive means of achieving that end. *Lukumi*, at 531-32.

37. Conditioning access to government tax exempt benefit based upon a school's "nonsectarian" use furthers no governmental interest.

38. The discrimination against the religious schools general education curriculum based solely upon religion is not the least restrictive means of furthering a compelling governmental interest.

39. Plaintiffs have suffered and will suffer harm absent relief.

**FOURTH CAUSE OF ACTION**
**Violation of U.S. Const. Amend. I: Unconstitutional Conditions**
**(42 U.S.C. § 1983)**

40. All preceding paragraphs are realleged and incorporated herein by reference.

41. The "unconstitutional conditions doctrine … vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

42. "The 'unconstitutional conditions' doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006); see also *Koontz*, at 608 ("We have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights").

43. In order to obtain the sales tax exempt benefit, private schools such as Heritage House must modify its general education curriculum to eliminate religious ideology and all connections to religious activities – essentially forfeiting their religious identity – in order avail special needs student S.B. and Heritage House of the tax exempt benefit.

44. Terri must forfeit private school choice, free speech, and free exercise, in order to receive sales tax exempt status for her student S.B. S.B. loses the

benefit of an educational curriculum incorporating religious values and instruction because of K.S.A. 79-3606(c)

45. Such a requirement violates the unconstitutional conditions doctrine.

46. Plaintiffs have suffered and will suffer harm absent relief.

**FIFTH CAUSE OF ACTION**
**Violation of U.S. Const. Amend. I: Free Exercise Clause Right to Religious Education**
**(42 U.S.C. § 1983)**

47. All preceding paragraphs are realleged and incorporated herein by reference.

48. Heritage House meets the definition of "school" under K.S.A. 72-3461 and K.S.A. 79-3606(c). Despite meeting both definitions of "school" KDOR arbitrarily declares a different school classification called "homeschool" which KDOR improperly pronounces does not meet the definition of a "school" under K.S.A. 79-3606(c).

49. There is no "home school" classification in the Kansas education code at all – rather schools as classified as accredited or non-accredited schools. There are only two types of schools: accredited and non-accredited. The Kansas Department of Education classifies home schools as non-accredited schools – but a "school" nevertheless. https://tinyurl.com/3m8xzkcm.

50. "Homeschool" is a nomenclature of common usage but it is not a legal classification under Kansas law.

51. KDOR publishes "Business Taxes for Schools and Educational Institutions" (Pub KS-1560) which states KDOR will exclude "home schools" from eligibility

for the sale tax exemption. This is contrary to the statutory language of K.S.A. 79-3606(c).

52. The Publication states that "there are two types of schools that do not meet the definition of a school or educational institution in sales tax law, and therefore do not qualify for the sales tax exemptions: for-profit schools and home schools."

53. KDOR considers homeschools and homeschooled children of a lesser god. KDOR declares, by arbitrary fiat, that a "home school is just that, a school in the home. The fact that educational activities are conducted in a residence does not make the residence a school for purposes of the sales tax exemption. Therefore, persons operating a home school may not claim exemption from sales tax as a school and must pay sales tax on their taxable purchases."

54. Even that statement above admits that a home school is a school. The rest of its analysis is wrong and irrelevant under K.S.A. 79-3606(c).

55. KDOR's interpretation rewrites the statute. "Schools" in Kansas are not classified by the building they operate in. Homeschools can and do operate in buildings not named "homes."

56. KDOR's interpretation is not only discriminatory as applied but contrary to the definition of school under K.S.A. 79-3606(c).

57. K.S.A. 79-3606(c) interferes with the Plaintiffs' expressive association rights. S.B. and Terri must associate themselves at all times with a sectarian school to obtain the tax exempt benefit. As to messaging, the First Amendment

protects the rights of individuals, as well as institutions, to "associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, … and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). "Religious groups" like Heritage House and Terri, "are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 200 (2012). The First Amendment protects the right to direct the education of a child and by extension the right to associate with others of their choosing to accomplish that purpose. *See Yoder*, 406 U.S. at 232; *see also Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2053 (2021) ("In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children").

58. Heritage House partners with Terri and S.B. in educating S.B. according to Terri's Christian faith. To accomplish that purpose, Heritage House must be free to express its Christian message in its general educational curriculum without forfeiture of the tax exempt benefit.

59. The "traditional interest of parents with respect to the religious upbringing of their children" is a "fundamental right and interest" and is "specifically protected by the Free Exercise Clause of the First Amendment." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *see also Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990) ("the right of parents … to direct the education of their children" receives heightened scrutiny) (citing *Yoder and Pierce v. Society of Sisters*).

60. KDOR's interpretation of K.S.A. 79-3606(c) interferes with Heritage House and Terri's ability to direct the religious upbringing of S.B. which is subject to strict scrutiny. *Yoder*, 406 U.S. at 214 (when government action "interferes with the practice of a legitimate religious belief … the State [must] not deny the free exercise of religious belief by its requirement" or the State must demonstrate an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

61. By prohibiting the use of otherwise generally available public funding for special education and related services in connection with a private religious school's general education curriculum involving ideology, religious activities, or religious uses, Defendant has interfered with the plaintiffs' right to direct the religious upbringing of their children and the vital role that religious schools such as Heritage House "play in the continued survival of [Christian] communities." *Yoder*, 406 U.S. at 235.

62. Defendant does not have a compelling reason for its actions, and Defendant has not selected the means least restrictive of religious exercise in order to further a compelling governmental interest.

63. Plaintiffs have suffered and will suffer harm absent relief.

**SIXTH CAUSE OF ACTION**
**Violation of U.S. Const. Amend. I: Excessive Entanglement**
**(42 U.S.C. § 1983)**

64. All preceding paragraphs are realleged and incorporated herein by reference.

65. K.S.A. 79-3606(c)'s "primary" "nonsectarian use" requirement invites excessive government entanglement under *Carson*.

66. It would require someone "scrutinizing whether and how a religious school pursues its educational mission" and would "raise serious concerns about state entanglement with religion and denominational favoritism," both of which violate the Establishment Clause. *Carson* at 2001 (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049, 2064 (2020); *Larson v. Valente,* 456 U.S. 228, 244 (1982)).

67. Determining what is "primary" in whether the use is sectarian or nonsectarian is an entanglement that is not only arbitrary, it invites Kansas officials to condone the actions of religious schools who have beliefs the government agrees with and sanction those who do not. Further, "it is not only the conclusions that may be reached by the [KDOR] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). As *Carson* recognized, "this kind of government interference in the internal policies of religious organizations is anathema to our constitutional order." 142 S. Ct. at 2001.

68. Plaintiffs have suffered and will suffer harm absent relief.

**PRAYERS FOR RELIEF**

WHEREFORE, each plaintiff requests that judgment be entered in their respective favor and against the defendant Secretary as follows:

A. An order enjoining defendant, his officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing K.S.A. 79-3606(c)'s primary nonsectarian requirement;

B. An order enjoining defendant, his officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing KDOR's publication interpreting K.S.A. 79-3606(c) as excluding the class of non-accredited schools characterized as "home schools" from the sales tax exemption benefit;

C. Declaratory relief consistent with the injunction, to the effect that K.S.A. 79-3606(c)'s primary nonsectarian requirement is unconstitutionally void and unenforceable as it violates the First Amendment rights of freedom of religion, free speech, and the Fourteenth Amendment's guarantee of due process against vague and unconstitutional laws;

F. An award of actual damages to the plaintiffs;

G. An award of nominal damages to the plaintiffs;

H. Cost of suit, including attorney fees and costs pursuant to 42 U.S.C. § 1988 and any other relief as the Court deems just and appropriate.

DEMAND FOR TRIAL BY JURY

Plaintiffs each demand a trial by jury for all issues so triable herein.

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