LUCAS COUNTY COURT OF COMMON PLEAS

JEFFREY W. SWIECH, ET AL.,	)	Case No. G-4801-CI-0202203323-000
	)	Judge IAN B. ENGLISH
plaintiffs,	)	Judge
	)	
vs.	)	**Plaintiffs' motion for temporary restraining order**
	)	
BD. OF EDUC., SYL. CTY. SCHOOLS, ET AL.,	)	
	)	Andrew R. Mayle (0075622)
defendants.	)	Benjamin G. Padanilam (0101508)
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"We don't want the public parents to think all our buses will be going k-12."

—James Wolpert, Sylvania Schools director of transportation, June 15, 2022 internal email to Superintendent Dr. Veronica Motley, *See Complaint*, ¶¶20-21.

What was Mr. Wolpert anxious about? His employer, the Sylvania schools, was about to announce a major shift in district bussing policy that, absent a TRO here, will afford religious-school students lesser, and thus unequal, service compared to that enjoyed by public students. He didn't want the "public parents" to think they'd be getting the lesser service. Plaintiffs are parents whose children *are* being afforded lesser bussing service by defendants by virtue of their attending local religious schools.

* * *

"The Free Exercise Clause provides that 'Congress shall make no law…prohibiting the free exercise' of religion" and is "applicable to the States under the

terms of the Fourteenth Amendment." *Kennedy*, supra, 142 S.Ct. at 2421. Under R.C. 3327.01, Ohio law generally requires districts to transport students in grades kindergarten through eight who live more than two miles from their public or nonpublic school "to and from that school."[1] The Free Exercise Clause similarly "protects religious observers"—like plaintiffs and their children—"against unequal treatment." *Monclova Christian Academy v. Toledo-Lucas Cnty. Health Dept.*, 984 F.3d 477,

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[1] R.C. 3327.01 states in relevant part:

> Notwithstanding division (D) of section 3311.19 and division (D) of section 3311.52 of the Revised Code, this section and sections 3327.011, 3327.012, and 3327.02 of the Revised Code do not apply to any joint vocational or cooperative education school district.
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> In all city, local, and exempted village school districts where resident school pupils in ***grades kindergarten through eight*** live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community school which they attend, ***the board of education shall provide transportation for such pupils to and from that school*** except as provided in section 3327.02 of the Revised Code. ***
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> In all city, local, and exempted village school districts, **the board *may* provide transportation for resident school pupils in grades nine through twelve** to and from the high school to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community high school which they attend for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code.
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> * * *
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> The cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly out of state appropriations, in accordance with regulations adopted by the state board of education.
>
> No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members, or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin.

479, reh'g denied (Jan. 6, 2021), (health department order closing all schools in order to slow spread of COVID-19 unconstitutional as applied to religious schools), quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993). "The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It 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..." *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2421 (2022).

Under these principles, government must treat students who attend religious students equally to those who attend public schools. This includes protection against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson as next friend of O. C. v. Makin*, 142 S.Ct. 1987, 1996 (2022). Despite this, defendants are offering Sylvania families whose children attend religious schools lesser bussing service this academic year compared to their public-school peers.[2]

Absent a restraining order, the district will transport public-school students to and from their schools, just as R.C. 3327.01 requires, but intends on giving lesser—and thus inherently unequal—service to students who attend religious schools.

[2] Section 3327.01 says that, "The cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly out of state appropriations, in accordance with regulations adopted by the state board of education." Further, the school district is reimbursed at twice the rate to transport nonpublic school students.

The Sylvania plan is to force religious-school students in grades kindergarten through eight to ride with high school students, which requires the religious-school students to be picked up earlier than they otherwise would be, travel to the public high school, exit at that high school, wait there for some time, transfer to another bus, and only then be transported to their religious grammar school. The effect is to increase ride times, decrease safety, cause confusion, and otherwise provide lesser service to religious-school students in comparison to all others. This has the collective effect of discouraging nonpublic school students from riding the bus, or perhaps even attending religious schools. Worse, defendants would give religious-school students lesser bussing service relative to their public school counterparts while simultaneously giving preferential treatment to public high school students despite the fact that, under Ohio law, **high school students**, unlike plaintiffs' K-8 children, **are *not* entitled to any transportation service under R.C. 3327.01**. In sum, the preferential, discretionary treatment afforded to high school students who are *not* entitled to transportation, comes at the expense of religious students who *are* entitled to transportation.

Previously, the Sylvania schools treated plaintiffs' children equitably.

So, to preserve the *status quo* while this case is litigated on the merits, this court should temporarily restrain defendants from executing upon their new school-transportation plan for this upcoming academic year. As one former Attorney General

stated, "After the decision to provide transportation has been made, the Board must treat equally all students who are similarly situated." *Ohio Att'y Gen. Op.*, 1974-040.

This same sentiment is echoed throughout judicial precedent.

I. The federal and state constitutions forbid the defendants' plans.

This court should issue a TRO on Free Exercise, Free Speech, and Equal Protection grounds.

A. The Ohio constitution provides *greater* protection than the First Amendment, which itself provides robust protections.

Plaintiffs should prevail under both the federal and state constitution, which independently provides great protections than the federal constitution.

1. The double protections of the First Amendment: Free Exercise and Free Speech.

Courts give robust protection under the Free Exercise Clause. For instance, just this last term, the Supreme Court of the United States invalidated a Maine law that afforded vouchers for rural families with students in high school, but required that the vouches only be used to pay for tuition at "nonsectarian" high schools. *Carson as next friend of O. C. v. Makin*, supra. As mentioned above, the Supreme Court explained in *Carson* that the Free Exercise Clause protects against indirect coercion or penalties for religious exercise. It also prohibits conditions being placed upon benefits. *Carson*, 142 S.Ct. at 1996, quoting *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965

(1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

The Sylvania Schools' plan conditions direct bus service "to and from" the students' school upon the student *not* attending a religious school. That is, better service is given to non-religious school students. This violates the federal constitution. While in *Carson*, supra, the government withheld all tuition assistance for students who attended private, religious schools, this is only a difference in degree from this situation, where the government is withholding equal transportation services. In each instance, there is a condition placed upon a benefit or privilege.

Next, the First Amendment also protects religious expression via the Free Speech clause. The Free Exercise and Free Speech clauses work in tandem: "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities." *Kennedy v. Bremerton School Dist.*, supra, 142 S.Ct. at 2421. Attending a religious school is a concrete form of religious expression. "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.*

Here, the plaintiffs' families attend religious—not public—schools. This is a form of daily-life religious expression and thus is protected speech. The government offering plaintiffs lesser bus service in return is not neutral and is invalid. Therefore, this court

should temporarily restrain the district from executing upon its plan to treat students who attend religious schools differently in terms of transportation services.

2. The Ohio Constitution provides even greater protection.

"The Ohio Constitution contains a section devoted entirely to the freedom of religion, which it describes in detail:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Humphrey v. Lane, 89 Ohio St.3d 62, 66, 728 N.E.2d 1039, 1043 (2000), quoting Ohio Const. Art. I, Sec. 7.

The Supreme Court of Ohio in *Humphrey v. Lane* explicitly held that the Ohio constitution affords **greater protection** than the First Amendment:

> In employing our comparison we are not doing a mere word count, but instead are looking for a qualitative difference. The Ohio Constitution does have an eleven-word phrase that distinguishes itself from the United States Constitution: "nor shall any interference with the rights of conscience be permitted." The United States Constitution states that Congress shall make no law "prohibiting the free exercise [of religion]." We find the phrase that brooks no "interference with the rights of conscience" to be broader than that which proscribes any law prohibiting free exercise of religion. The Ohio Constitution allows no law that even interferes with the rights of

> conscience. The federal Constitution concerns itself with laws that prohibit the free exercise of religion. By its nature the federal Constitution seems to target laws that specifically address the exercise of religion, i.e., not those laws that tangentially affect religion. Ohio's ban on any interference makes even those tangential effects potentially unconstitutional.

Humphrey v. Lane, 89 Ohio St.3d at 67.

The *Humphrey* court went on: "the Ohio Constitution's free exercise protection is broader, and we therefore vary from the federal test for religiously neutral, evenly applied government actions. We apply a different standard to a different constitutional protection. We adhere to the standard long held in Ohio regarding free exercise claims—that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. **That protection applies to direct and indirect encroachments upon religious freedom**." *Id.* at 68, (emphasis added).[3]

Here, no compelling interest in providing different level of bussing service—particularly when the statutory law requires transportation service—exists. Implicit in Ohio's codified transportation regime is a requirement of equality in service.

Unequal service is an interference with the attendance of religious schools and thus amounts to at least an indirect, if not direct, encroachment upon religious freedom because exercising that freedom by attending a religious school results in subpart transportation. Perhaps the best evidence of unequal treatment is the fact that the

[3] *Accord, State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶17, ("in *Humphrey v. Lane*, we made clear that the Ohio Constitution's Free Exercise Clause grants broader protections to Ohio's citizens than the federal Constitution affords.")

district is providing high school students with "Cadillac" service even though, under the plain terms of the applicable statutory scheme, students in grades nine through twelves are not entitled to any transportation. In sum, the law requires districts to prioritize students enrolled in kindergarten through eighth grade, but the Sylvania schools have de-prioritized such students if, and only if, they attend religious schools.

B. Plaintiffs and their children are entitled to equal protection of law.

Apart from the Free Exercise and Free Speech aspects of this case, plaintiffs' families are also being denied the equal protection of laws. Again, the Ohio constitution provides more robust protection than its federal counterpart. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, (sex-crime statute applied to police invalid under Ohio constitution, which provides at Article I, Section 2 that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit.") "An equal-protection analysis of any law centers upon the law's classification of persons and whether the classification relates to a legitimate government interest." *Mole*, ¶24. The concept of equal protection prohibits different treatment based on criteria that are unrelated to the purpose of the law." *Id.* Here, the religious students are treated differently based upon criteria that are unrelated to the purpose of R.C. 3327.01.

II. This court should issue a TRO.

Civil Rule 65(A) states in its entirety:

> *Temporary restraining order; notice; hearing; duration.* A temporary restraining order may be granted without written or oral notice to the

adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that he believes this information to be true. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for one like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be set forth in the order of extension. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

For purposes of Rule 65(A)(2), we have notified defendants about this action via email.

Because school starts next week, there will be irreparable injury absent a TRO as shown in this motion and the verified complaint. And in addition to the constitutional issues, remember that R.C. 3327.01 requires that, "In all city, local,

and exempted village school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the nonpublic or community school which they attend, *the board of education shall provide transportation for such pupils* <u>*to and from that school*</u> except as provided in section 3327.02 of the Revised Code."

This contemplates direct—i.e., "to and from"—transportation unless a declaration of impracticability is made under R.C. 3327.02.

But now, the board will only provide transportation to and from "*that* school," i.e., a pupil's school of attendance, if it's a public school. This court should order defendants to provide service to and from school for the religious school students too. Providing lesser services based upon the fact that a student attends a religious school is improper and not enabled by the statute.

CONCLUSION

If a district prioritized transportation for religious students over public-school students, then people would likely be outraged—and appropriately so. But the reverse is also troubling: offering substandard service to kindergarten through eighth-grade students who express or exercise their religious freedoms offends the core ideals of

equality and religious freedom and liberty enshrined in both the Ohio and United States constitutions.

Respectfully submitted,

/s/ Andy Mayle

CERTIFICATE OF SERVICE

On August 11, 2022, I served the defendants with a copy of this pleading by emailing a copy to school officials, along with a copy of the complaint, at *vmotley@sylvaniaschools.org* and *jwolpert@sylvaniaschools.org*.

/s/ Andy Mayle