

# THE RUTHERFORD INSTITUTE

Post Office Box 7482  
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD  
Founder and President

TELEPHONE 434 / 978 - 3888  
www.rutherford.org

October 17, 2019

Via Email (Carson.Kerr@ky.gov) and Certified Mail

Mr. Carson F. Kerr  
Kentucky Board of Optometric Examiners  
Kentucky Board of Ophthalmic Dispensers  
656 Chamberlin Avenue, Suite B  
Frankfort, KY 40601

**Re: Kendall Optometry Ministry, Inc. / Religious Freedom**

Dear Mr. Kerr:

This letter will serve as the response of Kendall Optometry Ministry, Inc. (“the Ministry”) to your letter of September 27, 2019 on behalf of the Kentucky Board of Optometric Examiners and the Kentucky Board of Ophthalmic Dispensers (collectively, “the Boards”). We appreciate your views on the provisions of 201 KAR 5:120 § 6 restricting the distribution of used corrective lens glasses (the “used eyeglasses provision”), and the acknowledgement that these provisions do not bar the Ministry’s activities. As we wrote in our original letter of July 18, 2019, and as your letter acknowledges, that regulation does not apply to the Ministry because it is not a licensed optometrist. Based on your last letter, we understand that the Ministry is permitted to continue to host events in accordance with its religious exercise, during which the Ministry may continue to distribute gently used eyeglasses to impoverished people suffering from impaired vision.

However, your letter incorrectly insists that a challenge by the Ministry under KRS § 446.350, Kentucky’s Religious Freedom Restoration Act (“KRFRA”), to certain “licensure requirements” would be unsuccessful. For the reasons explained in further detail below and described in the July 18, 2019 letter, the Boards’ position is contrary to law.

## **The Ministry’s Activities Are Protected In Their Entirety By KRFRA**

As an initial matter, the “licensure requirements” referred to herein define the practice of optometry to include “[p]rescribing and adapting lenses [and] eyeglasses” and make it unlawful to “fit, or dispense visual aids except upon the written prescription of an optometrist . . .

regularly licensed to practice optometry” and “to practice optometry, directly or indirectly, or to hold oneself out as being able so to do without first having obtained a license from the board.” *See* KRS § 320.210(2); KRS § 320.300. These licensure requirements, if applied to restrict the Ministry’s mission of bringing sight to the poor, violate the right to Free Exercise of Religion guaranteed by the First Amendment to the U.S. Constitution, Sections 1, 3 and 5 of the Kentucky Constitution, and run afoul of KRFRA.

KRFRA precludes the government, including the Boards, from substantially burdening religious exercise, even if the burden results from a rule of general applicability, unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest. Under KRFRA, a claimant must demonstrate that application of the law would substantially burden the claimant’s ability to engage in conduct that is substantially motivated by a sincere religious belief. Upon such a showing, KRFRA shifts the burden of proof onto the government to prove, by clear and convincing evidence, that (1) it has a compelling governmental interest in infringing the specific activities of the claimant and (2) it is using the least restrictive means to further that interest. *Id.* Four key elements should be evaluated when interpreting the KRFRA: (1) free exercise of religion; (2) substantial burden; (3) compelling governmental interest; and (4) least restrictive means. *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

**A. The Ministry’s Exercise is Motivated by a Sincere Religious Belief.**

There can be no dispute that the Ministry is a religious organization and that its mission to provide free glasses to the poor and underprivileged to improve their sight constitutes an exercise of the sincere Christian beliefs of the Ministry. Indeed, the Boards have acknowledged the Ministry’s work is motivated by sincerely-held religious beliefs. *See, e.g.*, Boards’ Aug. 2, 2019 letter at 3 (“The Boards twice commended Mr. Kendall for his charitable work . . . [and] again praised Mr. Kendall for his desire to aid those in need[.]”); *see also id.* at 4 (expressing a desire to “achieve an amicable resolution” that satisfies, in part, the Ministry’s “call to minister by providing glasses to the underprivileged[.]”).

**B. The Ministry’s Religious Exercise is Substantially Burdened by the Licensure Requirements.**

Although the Boards’ letter of September 27, 2019 asserts the Ministry has not identified “how the licensure requirement ‘substantially burdens’ [the Ministry’s] freedom of religion,” the Ministry directs the Boards’ attention to our July 18, 2019 letter, which discussed at length the ways in which application of the various licensure requirements would clearly impose a substantial burden on the Ministry’s exercise of religion. *Id.* at 3 (“The state could seek an injunction to stop the Ministry’s exercise of religion . . . and could prosecute the Ministry and its volunteer and assess significant criminal penalties.”) (internal citations omitted). This all stemmed from the Boards’ April 26, 2019 letter in which the Boards warned the Ministry that its activities are in violation of state licensing regulations, a position reiterated during the Boards’

June 29, 2019 meeting with Holland Kendall.

Yet the Boards have denied threatening the Ministry with litigation or ordering it to cease and desist its work in the Commonwealth. *See, e.g.*, Boards' Aug. 2, 2019 letter at 3; *see also* Boards' Sept. 27, 2019 letter at 3 ("Recognizing the valuable role of your client's ministry, the Boards reiterate that they have not taken any action against Mr. Kendall or his ministry nor threatened such action."). If the Boards do not intend to enforce the various licensure requirements against the Ministry, then the Ministry will continue to engage in its religious exercise as it always has—by hosting free eyeglasses clinics, during which the Ministry measures attendees' eyes with an autorefractor or an Eyenetra portable phoropter in order to match the measurement to a pair of donated glasses. In other words, if the Boards are denying the existence of a substantial burden created by the law on the Ministry by denying any intention to apply the burdensome laws and regulations to the Ministry, then the Boards should memorialize this exemption in writing in response to this letter.

Absent such assurances, the Ministry's exercise of its religion would be substantially burdened by the Boards' application of the licensure requirements. The government substantially burdens an exercise of religion when it places substantial pressure on an adherent to modify his behavior and to violate his beliefs or effectively bars his sincere faith-based conduct. *Doe v. Cong. of the United States*, 891 F.3d 578, 589 (6th Cir. 2018). Application of the licensure requirements to the work performed by the Ministry operates, in effect, as a complete prohibition on the Ministry's work altogether. A complete prohibition on the Ministry's work constitutes a "real," "significant" and "substantial" burden on the Ministry's freedom of religion. *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004) (finding that the burden must be "real" and "significant" as opposed to "merely perceived" and "trivial.>").

**C. The Boards Cannot Satisfy Their Burden to Demonstrate that Application of the Licensure Requirements to the Ministry's Religious Exercise is the Least Restrictive Means by Which to Further a Compelling Government Interest.**

In the letter of September 27, 2019, the Boards make the blanket assertion that "[t]he regulation of optometry serves a valid public health interest" to justify application of the licensure requirements to the Ministry, and "invites further discussion" of an exemption "should [the Ministry] provide some justification for the implicit claim that neither Mr. Kendall nor his volunteers must be licensed to practice optometry." The Boards' letter simply applies KRFRA backwards.

Because the Ministry has established that the licensure requirements substantially burden the Ministry's religious exercise, *the burden of proof is on the Boards* to demonstrate that application of the licensure requirements to the Ministry is the least restrictive means by which to further a compelling government interest. *See EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560, 590 (6th Cir. 2018) (citing *Gonzales v. O Centro Espírita Beneficente União*

*do Vegetal*, 546 U.S. 418, 431 (2006)). This burden-shifting scheme applies under RFRA and its state counterparts (*i.e.*, KRFRA) and requires looking “beyond broadly formulated interests justifying the general applicability of government mandates,” scrutinizing “the asserted harms” and granting “specific exemptions to particular religious claimants.” *Gonzalez*, 546 U.S. at 422 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963)); *see also Holt v. Hobbs*, 190 L.Ed.2d 747 (2015) (finding that a prison’s ban on beards, although generally valid, could not be applied to prohibit religiously-motivated facial hair.). “[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 716, 718 (1981) (quoting *Yoder*, 406 U.S. at 215).

The Ministry disputes whether the licensure requirements, particularly KRS § 320.300, which makes it unlawful to “fit, or dispense visual aids except upon the written prescription of an optometrist . . . regularly licensed to practice optometry” serve a compelling and valid “public health interest” in the first place. To the extent the Boards have suggested that it is somehow harmful for a person to wear corrective lenses that deviate from the person’s precise prescription, ocular telemedicine corporations and online eyeglass providers have begun challenging state optometry laws and regulations that arbitrarily require the written prescription of an optometrist for a person to receive eyeglasses, in the name of “valid health interests.” *See* Matt Powers, *Lawsuit Challenges Indiana’s Ban on Using Online Eye Tests to Obtain Prescriptions*, INSTITUTE FOR JUSTICE, available at <https://ij.org/press-release/lawsuit-challenges-indianas-ban-on-using-online-eye-tests-to-obtain-prescriptions/#> (last visited Oct. 5, 2019); *see also* Matt Powers, *Lawsuit Challenges South Carolina’s Ban on Using Online Eye Tests to Obtain Prescriptions*, INSTITUTE FOR JUSTICE, available at <https://ij.org/press-release/lawsuit-challenges-south-carolinas-shutdown-innovative-online-eye-exam-company/#> (last visited Oct. 5, 2019); *see also* Jacqueline Howard, *The doctor will see you now: Online vs. in-person vision tests*, CNN, available at <https://www.cnn.com/2017/03/15/health/online-eye-exam-telemedicine-explainer/index.html> (last visited Oct. 5, 2019). An overarching ban on the Ministry from using technology to provide glasses that the poor and underprivileged need is not necessary to further a compelling interest, but instead harms the welfare and health of consumers and provides no discernible countervailing benefits to the public.

The Boards have also suggested that the licensure requirements eliminate the risk that those served by the Ministry will avoid addressing serious eye diseases. As explained in the Ministry’s letter of August 15, 2019, while the Ministry does not dispute the need for a certain level of regulation, it instead questions the sincerity of the Boards’ “public health interest” as it relates to the Ministry’s work and, in particular, those benefited by its work. The Boards’ “eye disease” argument fails to account for the fact that many of the Ministry’s clients would never have a comprehensive eye health examination in the first place. The underprivileged citizens served by the Ministry face significant barriers to accessing the level of healthcare deemed critical to achieving good health. The Ministry provides the means by which these citizens—particularly those who need, but cannot afford, the services offered by a licensed optometrist—can receive the gift of clearer vision. If the Boards do not exempt the Ministry from the

Mr. Carson F. Kerr  
October 17, 2019  
Page 5

licensure requirements, the Boards will effectively deny these citizens perhaps the only means by which they could obtain at least *some* access to better vision and, eventually, the means by which they could eventually afford the luxury of a comprehensive eye health examination. If the Boards are indeed motivated by a “public health interest,” the Boards will certainly agree that *some* access to improved vision is better than none. The fact that certain poverty-stricken people are given the gift of vision correction, even where slightly imperfect, does not put those same people at any greater risk of an undiagnosed disease. In any event, adequate protection from the alleged “undiagnosed disease” risk is afforded by the Ministry’s use of appropriate disclaimers and warnings intended to put attendees on notice of their continuing need to obtain a comprehensive eye health examination.

There are more efficient and less burdensome ways to further these alleged “public health interests.” Importantly, the Board itself identifies a less restrictive alternative in its September 27, 2019 letter: revising the Ministry’s name “to omit reference to ‘optometry’ to avoid misleading the public and contravening applicable state law.” The availability of one “less restrictive alternative” by which to further the alleged “compelling interest” is sufficient to warrant an exemption.

For the reasons outlined above, we believe courts would agree that the Boards have placed a substantial burden on the Ministry’s observation of a central religious practice, and that the Boards cannot satisfy their burden of proving both that a compelling interest justifies such a burden and that there are no less restrictive alternatives. As such, the Ministry is entitled to an exemption to the licensure requirements in order to protect the Ministry’s right to the free exercise of religion. In conjunction with the Boards’ resolution to prioritize the revision of other administrative regulations, including to clarify that the Ministry is not within the scope and reach of the used eyeglasses provision in 201 KAR 5:120, we respectfully demand the Boards grant a formal permanent exemption to the Ministry, in writing, to the licensure requirements no later than Friday, November 1, 2019.

Sincerely,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal stroke at the end.

John W. Whitehead  
President

cc: Holland Kendall, President (via electronic mail)  
John O. Sheller, Esq. (via electronic mail)