UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., DAN BARKER, ANNIE LAURIE GAYLOR, AND DAVID WILLIAMSON,

Plaintiffs

v.

ORANGE COUNTY SCHOOL BOARD,

Defendant

Case No. 6:13-cv-00922

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Orange County hurls adjectives — graphic, lewd, incendiary, inflammatory, offensive, polarizing, prurient, and deviant — at this Court, hoping it will ignore facts and focus on verbiage. Journalist Sydney J. Harris once wrote, "An excessive display of adjectives, like an excessive flexing of muscles, usually indicates some inner doubt of strength."[1] Orange County's adjectives cannot disguise its failure to address plaintiffs' strongest points.[2] These adjectives are opinions, not excuses to trample free speech rights — especially given that the First Amendment protects speech some might find disagreeable.[3] This reply addresses the legal points Orange County raised amid its adjectival flexing.

[1] SYDNEY HARRIS, LAST THINGS FIRST 269-270 (Houghton Mifflin, 1961).
[2] E.g., The plain language in defendant's April 2013 censorship letters explaining their censorship rationale; that every objection to plaintiffs' literature applies with equal force to the approved Bible; *the censorship itself* violates the Equal Protection Clause, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); chilling plaintiffs' speech requires court remedy; and the unbridled discretion.
[3] Speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction … or even stirs people to anger [or is] provocative and challenging." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The logic in Orange County's arguments is often self-defeating. Orange County claims authority to censor student speech in school, but this case involves citizen speech in a limited public forum. Orange County announces an intention (no more) to not prohibit the literature again, but also labels the censorship correct and admits that the same censor will review future literature using the same unwritten criteria, making discrimination likely to recur. Orange County blusters about the prohibited literature creating a "very real opportunity for violence" but also claims that it can be distributed. To refute an unequal treatment assertion, it argues that one religion's book deserves special treatment. Despite such contradictions, the facts offer an easy decision for plaintiffs and the Constitution.

1. Plaintiffs' claims are not moot, nor its pleadings procedurally deficient.

Orange County argues — again — that plaintiffs' claims are moot. Previously, it did not argue that *all* plaintiffs' claims were moot, only plaintiffs' declaratory and injunctive relief.[4] But these claims are live because defendant has not "unambiguously terminated" its policy. *See Nat'l Ass'n of Bds. of Pharmacy v. Univ. of Ga.*, 633 F.3d 1297, 1310-11 (11th Cir. 2011). Defendant has no written policy, has adopted no written policy, and disclaims the Collier County Consent Decree.[5] Maintaining this regulatory vacuum is not "unambiguously terminating" a policy. The voluntary cessation argument fails. *Id*.

Failing to take any corrective action beyond an affidavit, arguing that the censorship is valid, and allowing the same personnel to review future literature chills plaintiffs' speech.[6] Orange County has never disputed this chilling effect. Nor has Orange County challenged

[4] *See* Def. Motion to Dismiss.
[5] Williamson declaration opposing Def. Motion to Dismiss ¶¶14-16; Answer ¶¶ 28-29.
[6] Williamson declaration opposing Def. Motion to Dismiss ¶¶14-16; Def. Answer ¶¶ 32, 33, 35, 37, 39, 40, 49.

plaintiffs' nominal damages claim, which plaintiffs are entitled to for violations of their free speech rights. *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1262 (11th Cir. 2006).

Orange County plucks one phrase from plaintiffs' complaint to claim that plaintiffs plead an as-applied challenge but argue a facial challenge.[7] The pleadings and precedent undermine this baffling argument. Other language in the complaint shows a facial challenge: "prior restraint" and "defendants' practice and actions *chill*, *deter*, and *restrict* plaintiffs . . . [at] *future distributions*."[8] Although plaintiffs focused on the discriminatory effects of defendant's policy, they were also concerned that defendant's unwritten policy *chilled*, *deterred*, and *restricted* speech, giving "unbridled discretion" that "may result in [illegal] censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

Moreover, the as-applied/facial distinction is not dispositive. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2012) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition … it goes to the breadth of the remedy employed by the Court, *not* what must be pleaded ...").[9] Thus, plaintiffs argued a facial *and* an as-applied challenge.

2. This case involves citizen speech in a limited public forum, not student speech in a public school.

Orange County fails to cite a single case that permits censorship and discrimination in a limited public forum. Orange County cites only cases censoring *student* speech.[10] It may

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[7] Def. Response at Section IV.
[8] Compl. ¶ 74-76 (emphasis added). *See also* Plaintiffs' response to Def. Motion to Dismiss.
[9] *See also* Richard Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) (noting facial/as-applied changes, at most, the test courts use.); Roger Pilon, *Foreword: Facial v. As-Applied Challenges: Does It Matter?*, 2009 Cato Sup. Ct. Rev. viii.
[10] In alphabetical order, defendant relies on these cases, all involving student speech (save one prison case):

be true that "a careful analysis of *Denno*, *Tinker*, and *Bethel*, [reveals] that school officials can appropriately censure students' speech," but that does not mean that schools can censor citizen speech in a forum created specifically for citizens to exercise their free speech rights. *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1248 (11th Cir. 2003) (citations omitted).

Orange County admits to opening a "limited public forum," a term with specific, unalterable legal meaning. That legal designation removes this case from the line of cases involving student speech in the school context and places it squarely under the limited public forum line of cases. Other forum characteristics distinguish this case factually from Orange County's cited cases: (1) The forum is for citizens to enter the schools and engage in speech,

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- *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (punishing a student for innuendo in a school speech);
- *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake County, Fla.*, No. 5:13-cv-623, 2014 WL 897072 (M.D. Fla. March 6, 2014) (deciding free speech claim involving formation of middle school student club);
- *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661 (2010) (denying college students' free speech, expressive association, and free exercise of religion claims when law school denied recognition to student group that discriminated against LGBTQ students);
- *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010) (dismissing student's free speech claim against school dress code);
- *Ferrell v. Dallas lndep. Sch. Dist.*, 392 F.2d 697 (5th Cir. 1968) (school can ban Beatles haircuts for students). *Contra Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004) (*Ferrell* is "patently inconsistent" with *Tinker* "there must be a real or substantial threat of actual disorder" not "mere possibility");
- *Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee County*, 483 F. Supp. 2d 1224 (S.D. Fla. 2007) (granting school access to gay-straight alliance student club);
- *Guiles ex. rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006) (finding censorship of student speech "depicting President George W. Bush in an uncharitable light" violated student's free speech rights);
- *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (finding censorship of student speech in school newspaper permissible where newspaper was school-sponsored speech);
- *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972) (finding regulations on student hair length permissible);
- *Lansdale v. Tyler Junior Coll.*, 470 F.2d 659 (5th Cir. 1972) (rejecting student hair length rules in college);
- *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989) (finding, based on highly distinguishable facts, that denying satanic literature to a prisoner was justified by "legitimate penological interests"). This citation is a desperate attempt to characterize plaintiffs' literature as satanic and further chills their speech;
- *Morse v. Frederick*, 551 U.S. 393 (2007) (rejecting student's free speech challenge to school suspension for promoting illegal drug use at school-sponsored event during school hours);
- *Murray v. W. Baton Rouge Parish Sch. Bd.,* 472 F.2d 438 (5th Cir. 1973) (upholding student grooming codes);
- *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (holding that "school officials can appropriately censure *students*' speech" when students displayed confederate flag in school);
- *Smith ex. rel. Lanham v. Greene County Sch. Dist.*, 100 F. Supp. 2d 1354 (M.D. Ga. 2000) (student dress code did not violate student's free speech; facts were "significantly different from those in *Tinker*");
- *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (ruling that student political speech, a passively displayed black armband, was not disruptive and therefore could not be censored by the school);
- *Whitsell v. Pampa lndep. Sch. Dist.*, 439 F.2d 1198 (5th Cir. 1971) (student hair length rule is valid).

not for student speech; (2) Forum speech occurs as literature distributions; (3) To avoid disruptions to school operations, Orange County requires passive distributions (though it has disparately enforced this rule); (4) Disclaimers noting that the speech was not sponsored or endorsed by Orange County accompany the distributions; (5) Students may take or leave the literature only during noninstructional times and receive no special privileges, such as permission to read the literature during instructional time; and (6) The operation of the forum does not suspend Orange County's traditional disciplinary rules and procedures.

Defendant's cases even undermine its position. In *Shanley*, the students were speaking as citizens and therefore ***not*** subject to school regulations. 462 F.2d at 974-75. Ironically, immediately after the *Shanley* language defendant cited,[11] the Court notes that "… freedom of expression should not be restrained or punishable … merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance." *Shanley*, if it applies, prohibits Orange County's heckler's veto.

3. Even if this case is treated like student speech in a public school context, Orange County violated plaintiffs' free speech rights.

A. Orange County discriminated against plaintiffs' viewpoint.

Even if we accept that the government has the right to censor the message of a non-student citizen in a limited public forum because it discusses, for instance, sex, it does not follow that the government can allow a speaker to discuss sex from a religious view and censor a speaker addressing sex from a nonreligious view. Such discrimination is exacerbated when, as here, the censored speaker criticized the first speakers' message.

[11] Def. Response at 10 citing *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972).

Orange County's censorship is a textbook free speech violation: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. … regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citations to 5 Sup. Ct. cases omitted).

If the court accepts as true Orange County's argument that "references to beastiality [*sic*], to raping a wife, and to deviant sexual and ritual practices are age-inappropriate, offensive, lewd and prurient"[12] discrimination still occurred because the Orange County approved Christian literature with identical references.[13] Accepting that argument requires accepting the logical corollary that the Bible is similarly "profane," "offensive," "deviant," etc., and not just the Bible, but also other literature that Orange County actually teaches. Defendant makes much of the phrase "fucked men" in Ibn Warraq's *Why I am not a Muslim*. But the word "fuck" appears five times in *Catcher in the Rye,*[14] a book typically assigned to public high school students in Orange County.[15] In a sad piece of irony, Warraq is quoting a poem that Islamists censored by murdering the poetess.

B. Orange County offers no legitimate reason for its censorship; passive distributions and disciplinary rules aptly halt disruptions.

Orange County's desperate groping for a valid censorship rationale is most evident in its claim that the prohibition was appropriate "[g]iven that very real opportunity for violence

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[12] Def. Response at 10-11.
[13] *See* Appendix I to Plaintiff's Motion for Summary Judgment. *Bestiality see, e.g.,* Exodus 22:19, Leviticus 18:23, 20:15-16, Deuteronomy 27:21; *Rape*, Deuteronomy 22:23-24, 25-27, 28-29 and Numbers 31:15-18.
[14] J.D. SALINGER, THE CATCHER IN THE RYE. *See* Roy Peter Clark *What J.D. Salinger Taught Me about Literary Use of the F-Word*, The Poynter Institute (Jan. 28, 2010) available at http://tinyurl.com/poynter-jd-sal.
[15] *See, e.g.,* University High School 2013-2014 Summer Reading, *available on the Orange County Schools website* http://tinyurl.com/OCteachesJD; Lake Nona Middle/High School's "lexile ladder books," *available on the Orange County Schools website* http://tinyurl.com/OCteachesJD2.

over the incendiary comments in the Plaintiffs' literature…."[16] Notably, this is the first time defendant has connected plaintiffs' literature to school violence, a claim for which it offers no factual support. If there is indeed a "very real opportunity for violence," the problem lies with Defendant's management of the schools. Literature provides an opportunity to learn. Any "opportunity for violence" can only result from defendant's failure to ensure a passive distribution or to curtail disruptions with normal discipline.

Orange County harps on the potential for disruption. But passive distribution rules minimize disruptions *and* the school's ability to censor speech under the disruption rationale. *Tinker*, 393 U.S. at 514. Should a disruption occur despite the passive distribution, Orange County can rely on normal disciplinary procedures.

There is no evidence that plaintiffs' literature is disruptive. It took Orange County more than three months to find the few "objectionable" phrases in plaintiffs' literature. Does Orange County expect this Court to believe that students are going to sit down at their desks, open plaintiffs' literature during class, stumble upon the "objectionable" words, then throw a temper tantrum or punch? If so, the proper response is to reprimand the student who bullies his peers because he learned that some people do not believe that Jesus rose from the dead.

C. Partial Censorship is still viewpoint discrimination.

Defendant argues that approving part of plaintiffs' literature, however small, disproves discrimination. This fails both legally and factually. The Supreme Court has specifically rejected defendant's contention, holding that the viewpoint neutrality principle applies where a viewpoint is partially stifled, rather than totally silenced. *See R.A.V. v. City*

[16] Def. Response at 10.

of St. Paul, Minn., 505 U.S. 377, 384 (1992) (Even when a class of speech could be prohibited but is not, the government may not prohibit viewpoints within the class: "the government may proscribe libel; but [not] *only* libel critical of the government.").[17]

Factually, Orange County's claim fails too. All 780,000 words, nearly 2,000 pages,[18] and 66 books of the Bible were permitted, along with the introductory and closing materials that included solicitations.[19] Defendant rejected 1,107 pages of plaintiffs' 1,247-page message. Only 140 of 1,247 pages were distributed. **Defendant excluded nearly 90% of plaintiffs' message.** The religious message was nearly 15 times more voluminous.

4. Prohibiting solicitations from one group and allowing them from another group is discrimination.

Orange County falsely claims that "An X-Rated Book: Sex & Obscenity in the Bible" was only prohibited because it contained a solicitation and later distributed with a redaction.[20] Even so, Orange County allowed comparable solicitations in the approved, unvetted Bible.[21] Orange County might be able to bar solicitations, but it is discrimination to allow solicitations for some speakers and not others.

5. Taking plaintiffs' literature out of context is discrimination.

Defendant removes phrases from their context in plaintiffs' literature to declare them

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[17] *See also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (sleeping and tents are message, prohibiting either could be censorship); Randall P. Bezanson, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 Iowa L. Rev. 953, 959 (1998) (editing a message necessarily entails "the capacity to engage in viewpoint discrimination," arguing otherwise is "vacuous.").

[18] If printed as a normal book and not with tiny text on onionskin paper. Complaint at ¶66.

[19] *See* Daniel Koster Declaration submitted with this brief.

[20] Def. Response at 11-12. The pamphlet, not distributed, was labeled as "disruptive" and "age inappropriate." Exhibit 2 to Def. Response, page 4 ¶9. It is neither. It contains about 1,400 words: 1,160 from the approved Bible and another 100 from Thomas Paine's *Age of Reason*, which Orange County also approved—90% of the pamphlet was approved in other sources. Complaint Exhibit I. It allegedly contained a solicitation too.

[21] Koster Declaration; Complaint Exhibit I for plaintiff's alleged solicitation.

unfit. This is curious given the response brief's intense devotion to context.[22] In arguing that they have not discriminated against plaintiffs under the Equal Protection Clause, Orange County actually admits discrimination: "…the themes and wording of Plaintiffs' material, without the historical and social context, can be taken solely as lewd, obscene and offensive." Treating plaintiffs' literature out of context while giving special attention to the Bible's context is discrimination (equal treatment may have revealed the Bible's solicitations too).

Plucking words and phrases from plaintiffs' literature makes it seem worse than it is. For instance, prohibiting *Letter to a Christian Nation* because "the book described how those students who pledge to abstain from sex by taking 'virginity pledges' are 'more likely than their peers to engage in oral and anal sex'" takes that claim entirely out of context. Harris's biological language[23] cites a scientific study by Yale University Ph.D. Hannah Bruckner and Columbia University Ph.D Peter Bearman.[24] According to Orange County, Harris (who has a Ph.D. from UCLA in neuroscience) and the other scientists "graphically discuss[] oral and anal sex…."[25] Untrue, and if the age-appropriate Bible discusses virginity, oral sex, and anal sex, scientific language citing peer-reviewed data cannot be censored as age inappropriate.

Orange County facetiously asks, "Are Plaintiffs actually asserting that OCSB is required to strike through certain sections of the Bible …?" No. If Orange County was right

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[22] Def. Response at 13-14: "marginalizes and ignores those contextual differences…"; "context and presentation play a part in determining that appropriateness or eligibility …"; "The difference is context."

[23] Harris wrote: **"There is nothing wrong with encouraging teens to abstain from having sex. But we know, beyond any doubt, that teaching abstinence alone is not a good way to curb teen pregnancy or the spread of sexually transmitted disease. In fact, kids who are taught abstinence alone are less likely to use contraceptives when they do have sex, as many of them inevitably will. One study found that teen 'virginity pledges' postpone intercourse for eighteen months on average—while, in the meantime, these virgin teens were more likely than their peers to engage in oral or anal sex."** SAM HARRIS, LETTER TO A CHRISTIAN NATION, 26 (Knopf, 2006).

[24] Hannah Brückner, Ph.D., and Peter Bearman, Ph.D., "After the promise: the STD consequences of adolescent virginity pledges," *Journal of Adolescent Health* 36 (2005) 271–278.

[25] Def. Response at 2.

to prohibit plaintiffs' literature on any grounds it has asserted, it must also prohibit the Bible. If Orange County was correct to allow the Bible distribution, it must allow plaintiffs' literature. Orange County cannot have it both ways. And it cannot escape the language it used to prohibit plaintiffs' literature, which "criticizes the Protestant faith …,"[26] "asserts that God is hateful, arrogant, sexist, and cruel," "that Jesus did not promote equality and social justice, was not compassionate, [etc.]," "discuss[es] what the Bible does or does not say about abortion," and that "Jesus was not crucified or resurrected."[27] These statements prohibit the viewpoint expressed in the literature and make this an easy case for this Court.

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[26] Complaint Ex. B, ¶ on Ingersoll essay, *The Truth*.
[27] Complaint Ex. A, ¶ on *Dear Believer*; *Why Jesus?*; *What does the Bible Say About Abortion*?; *Jesus is Dead*.