COURT OF APPEALS
CASE NO. 14-13399-C

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, DAN BARKER, ANNIE LAURIE GAYLOR, and DAVID WILLIAMSON,

Plaintiffs/Appellants,

v.

ORANGE COUNTY SCHOOL BOARD,

Defendant/Appellee.

INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Case No. 6:13-cv-00922-GKS-KRS

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CERTIFICATE OF INTERSTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellants hereby certify that the following entities and persons have an interest in the outcome of this appeal:

Barker, Dan (Appellant)

Brady, Steven M. (Counsel for Appellant)

Elliott, Patrick (Co-Counsel for Appellant)

Freedom From Religion Foundation, Inc. (Appellant)

Gaylor, Annie Laurie (Appellant)

Geiger, Lisa (Counsel for Appellee)

Jeffrey, Jerry H. (Former Counsel for Appellants)

Marks, Howard S. (Counsel for Appellee)

Seidel, Andrew L. (Co-Counsel for Appellant)

Sharp, G. Kendall (U.S. District Court Judge)

Spaulding, Karla R. (U.S. Magistrate Judge)

Wasula, Christine A. (Counsel for Appellant)

Williamson, David (Appellant)

Appellant, Freedom From Religion Foundation, further asserts that it is not a publicly-traded corporation. Appellants reserve the right to amend this Certificate of Interested Persons and Corporate Disclosure Statement.

JURISDICTIONAL STATEMENT

This appeal is a direct appeal of a final judgment dismissing Appellants' case for lack of subject matter jurisdiction.

The basis for this Court's jurisdiction is founded upon this Court's appellate jurisdiction from appeals of final decisions of the district courts pursuant to 28 U.S.C. § 1291, arising out of the district court's federal question jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rule 34, it is Appellants' position that oral argument is necessary for resolution of the issues raised in this appeal. The issues are highly factual in nature and involve legal determinations based upon substantive law that is not well-defined. As a result, the decisional process will likely be aided through oral argument.

STATEMENT OF THE ISSUES

1. **Whether the district court erred in dismissing Plaintiffs' request for injunctive and declaratory relief as moot when there was no formal change in Defendant's public school literature distribution policy.**

2. **Whether the district court erred in dismissing the case for lack of subject matter jurisdiction without ruling on Plaintiffs' claims for nominal damages.**

3. **Whether the district court erred in denying Plaintiffs' discovery motions.**

STATEMENT OF THE CASE AND FACTS

This action arises out of a complaint for declaratory relief, injunctive relief, and damages, alleging that Defendant/Appellee, the Orange County School Board, violated Plaintiffs/Appellants' rights under the First and Fourteenth Amendments to the United States Constitution, including free speech and equal protection, by prohibiting, on the basis of viewpoint, the distribution of Plaintiffs' literature in Orange County Public Schools.

1. Plaintiffs' Request to Distribute Literature in Public Schools.

Orange County Public Schools allows persons to distribute materials to its students as part of a "passive distribution" forum. (Doc 1-1 – Pg 45-46). On January 16, 2013, Orange County Public Schools allowed World Changers of Florida to distribute *New International Version* Bibles to students in eleven of Defendant's public schools. (Doc 1 – Pg 5, ¶ 21). Defendant did not vet or read the NIV Bible but approved it fully and without comment for distribution in schools. (Doc 1 – Pg

5, ¶¶ 23-24).

The Freedom From Religion Foundation ("FFRF") and one of its members, David Williamson, opposed the Bible distribution that took place on January 16, 2013. (Doc 1 – Pg 5, ¶ 26; Doc 1-1 – Pg 20-22). FFRF is an educational charity that defends the constitutional separation between state and church, and educates the public about the views of non-theists. (Doc 1 – Pg 2-3, ¶ 6). FFRF and Williamson encouraged Defendant to adopt a policy that "prohibits outside groups from turning schools into religious battlegrounds while preserving the distribution system for the benefit of the school." (Doc 1 - Pg 5-6, ¶ 26). In the alternative, FFRF's January 15, 2013 letter asked to "arrange for the distribution of FFRF materials in OCPS schools sometime in the next two weeks." (Doc 1 – Pg 6, ¶ 27).

John Palmerini, Associate General Counsel for Defendant, granted verbal permission for Plaintiffs' distribution and confirmed permission in a letter dated January 22, 2013. (Doc 1 – Pg 6, ¶ 27). In part, the letter said, "[We] require the materials to be submitted to us in order to ensure they are not the types of materials we may prohibit from distribution under the Collier County Consent Decree." (Doc 1 – Pg 6, ¶ 28). The Collier County Consent Decree is an agreement between a different school board, the District School Board of Collier County, and World Changers of Florida. (Doc 1-1 – Pg 23-28). The Consent Decree allows for schools within Collier County to prohibit seven types of materials, including material that

the school finds "is not appropriate for the age and maturity of high school students" or if it "is likely to cause substantial disruption at the school." (Doc 1-1 – Pg 27).

On January 29, 2013, Williamson submitted Plaintiffs' and other secular groups' desired literature to Palmerini for approval. (Doc 1 – Pg 6, ¶ 32). The materials included nine "nontracts," five brochures, eight books, one essay, and one sticker. (Doc 1 – Pg 6, ¶ 33). Plaintiffs voluntary rescinded three books because of pressure by Defendant, who was delaying approval. (Doc 1 – Pg 7, ¶¶ 35-36). Defendant prohibited four of Plaintiffs' five remaining books leaving one partial book and several small pamphlets, or "nontracts." (Doc 1 – Pg 7, ¶ 37). Even though 11 of 20 submitted materials were approved, the substantial majority of Plaintiffs' message was forbidden. (Doc 1 – Pg 7, ¶ 37).

Defendant rejected the book Jesus is Dead by Robert Price because "the claim that Jesus was not crucified or resurrected is age inappropriate." (Doc 1 – Pg 10, ¶ 48; Doc 1-1 – Pg 2-8). Defendant suppressed the nontract *Dear Believer*, alleging it "will cause a substantial disruption" because it "asserts that God is hateful, arrogant, sexist and cruel." (Doc 1 – Pg 10, ¶ 45; Doc 1-1 – Pg 2-8. Defendant prohibited another book, *What on Earth is an Atheist?* for its alleged disruptive capacity in part because "the District's administration will not permit the distribution of materials insulting religions." (Doc 1 – Pg 12, ¶ 56; Doc 1-1 – Pg 3).

2. Plaintiffs' Lawsuit.

Plaintiffs filed suit against Defendant on June 13, 2013 for violation of the free speech clause of the First Amendment and the equal protection clause under the Fourteenth Amendment. Plaintiffs sought a declaratory judgment, permanent injunction, nominal damages, attorney's fees and costs. (Doc 1 – Pg 19, ¶ 89). Plaintiffs' request for injunctive relief included a request for "a permanent injunction ordering Defendant to refrain from prohibiting Plaintiffs' literature." (Doc 1 – Pg 19, ¶ 89).

On January 3, 2014, after the lawsuit was filed, John Palmerini, Associate General Counsel for Defendant, sent a letter to Plaintiffs informing them that "passive distribution of materials by both World Changes (sic) of Florida and the Freedom From Religion Foundation/Central Florida Freethought Community will take place at our high schools on January 16, 2014." (Doc 21-1 – Pg 1-3). The letter stated:

> With respect to the current litigation…OCSB believes it has a defensible position that will survive Court scrutiny. However, in an effort to reduce litigation going forward, OCSB makes an unconditional offer separate and apart from the current litigation to allow the Freedom From Religion Foundation to passively distribute the following materials on January 16, 2014, along with any other material identified in the above-styled action that Freedom From Religion Foundation identified as being prohibited from being distributed…"

(Doc 21-1 – Pg 1). The letter identified five books, nine "miniature brochures," four "regular brochures," and one sticker that the Defendant would now allow to be distributed. (Doc. 21-1 – Pg 1-2). The letter said, "Any other materials to be distributed will need to be submitted to this office by December 31, 2013." (Doc 21-1 – Pg 2). Notably, the letter was sent by the Defendant after the Dec. 31, 2013 deadline had passed. The letter did not identify any change in protocol on how new submissions would be judged. Plaintiff Williamson understood that the process would be the same as that which denied his 2013 submissions. (Doc. 22-1 – Pg 4, ¶14).

Plaintiffs' counsel sent a response letter dated January 13, 2014, outlining the Plaintiffs' concerns. (Doc 22-1 – Pg 4, ¶ 17). The letter stated, in part, "OCPS is still requiring FFRF's materials to be vetted." (Doc 22-1 – Pg 6). The letter further stated, "Plaintiffs' speech continues to be censored and chilled." (Doc 22-1 – Pg 6). Plaintiffs' counsel asked, "What policy is being used to evaluate materials to be distributed?" (Doc 22-1 – Pg 7). Plaintiffs did not receive a substantive response. Plaintiffs served interrogatories and requests for production of documents on Defendant on March 13, 2014 relating, in part, to Defendant's distribution policies and procedures. (Doc 24 – Pg 2). Four days later, on March 17, 2014, the Defendant filed a Motion to Dismiss Plaintiffs' claims for injunctive and declaratory relief on the basis of mootness. (Doc 19).

Defendant's Motion contended that Defendant had notified Plaintiffs that they could passively distribute all of the previously prohibited materials on January 16, 2014. (Doc 19 – Pg 3). The Motion further contended that Defendant did not "plan," in the future, to change its position and that it would permit Plaintiffs to passively distribute the previously prohibited materials at the same time and in the same manner as other groups that were permitted to passively distribute materials. (Doc 19 – Pg 3). Therefore, in light of the fact that Plaintiffs were seeking declaratory and injunctive relief, and the fact that Plaintiffs were no longer prohibited from distributing the previously –prohibited materials, Defendant contended for the first time that the declaratory and injunctive relief sought in the Complaint should be dismissed for mootness. (Doc 19 – Pg 4).

In response to the Motion, Plaintiff Williamson submitted an affidavit in which he stated that he intended to coordinate future literature distributions at OCPS schools where bibles were distributed. (Doc 22-1 – Pg 3, ¶ 5). He further stated that he intended those distributions to include many materials that had not yet been vetted by Orange County Public Schools, (Doc 22-1 – Pg 3, ¶ 6), and that he expected each distribution to include new or different materials, (Doc 22-1 – Pg 3, ¶ 7). In part, he chose not to participate in the January 16, 2014 distribution because he understood that the Defendant kept the same vetting process in place that previously

rejected his materials in 2013.[1] (Doc 22-1 – Pg 4, ¶ 14). He felt discouraged and inhibited from submitting new materials as a result of how his materials had been treated. (Doc 22-1 – Pg 4, ¶ 16).

3. Discovery Issues.

Pursuant to the district court's Case Management and Scheduling Order ("Scheduling Order") the deadline for completing discovery was April 14, 2014. (Doc 18 – Pg 1). The Scheduling Order also stated as follows:

> Each party shall timely serve discovery requests so that the Rules allow for a response prior to the discovery deadline. The Court may deny as untimely all motions to compel filed after the discovery deadline.

(Doc. 18 – Pg 3).

In accordance with the Scheduling Order, Plaintiffs propounded written discovery requests on the Defendant on March 13, 2014, thereby giving Defendant sufficient time to respond before the close of discovery. (Doc 24 – Pg 2). In response, Defendant filed objections to the discovery requests on the ground that the issues in the lawsuit were moot. (Doc 29-2 and 29-3).

On March 12, 2014, Plaintiffs asked Defendant to provide deposition dates for its corporate representative and Assistant General Counsel, John Palmerini, who

[1] Based on recent events, it appears that the School Board may be changing its mind now that other minority groups are seeking to distribute their materials.

had provided an affidavit in support of Defendant's motion to dismiss on the basis of mootness. (Doc 29-3 – Pg 2). In support of their deposition requests, Plaintiffs provided Defendant with draft deposition notices containing lists of topics and document requests. (Doc 29-3 – Pg 2). In response, Defendant's counsel stated that he was unavailable during the next 30 days due to a jury trial. (Doc. 29-3 – Pg 3).

Defendant's counsel never stated that he was unwilling to schedule the depositions, only that he was unavailable at times during the following month. Accordingly, Plaintiff did not seek judicial relief but rather attempted to resolve the issue informally, which they were directed to do by the Middle District Discovery Handbook.

Because the depositions of Defendant's representatives had not yet been scheduled by the close of discovery, Plaintiffs, out of an abundance of caution, filed a motion to compel on April 14, 2014. (Doc 25). On the same day, Defendant filed a motion for protective order with respect to Plaintiffs' written discovery requests, arguing that it should not be required to produce the requested information because the case was moot. (Doc. 24).

On April 16, 2014, the magistrate judge denied Defendant's motion for protective order on the ground that discovery had closed and, therefore, the motion was moot. (Doc 27 – Pg 1). The magistrate judge also denied Plaintiffs' motion to compel on the ground that it was untimely because it left no time for the requested

depositions to occur. (Doc 27 – Pg 2). In the order, the Magistrate Judge specifically noted that Plaintiffs had not filed a motion to extend the deadline for discovery so that their motion to compel could be determined. (Doc 27 – Pg 2).

In accordance with the Magistrate Judge's order, Plaintiffs filed a motion to reopen discovery for 45 days in order to complete the requested depositions and to obtain a ruling on Defendant's objections to Plaintiffs' written discovery requests. (Doc 29). However, the Magistrate Judge denied the motion to reopen discovery on the ground that it was not appropriate to reopen discovery to file an untimely motion to compel with respect to Defendant's objections or to complete the depositions. (Doc 30). Plaintiffs timely filed objections to the Magistrate Judge's orders on the ground that they were clearly erroneous (Doc 31 and Doc 34), but Plaintiffs' objections were overruled by the district court. (Doc 33).

4. Dismissal of Lawsuit.

On May 12, 2014, Plaintiffs filed a Motion for Summary Judgment on the ground that the undisputed record evidence in the case clearly demonstrated that the Defendant had violated Plaintiffs' constitutional rights by prohibiting their literature on the basis of viewpoint. (Doc 36). Plaintiffs' motion sought: (1) a declaration that distributing Bibles in public schools precluded Defendant from prohibiting Plaintiffs' literature as age inappropriate or potentially disruptive; (2) a permanent injunction ordering the School Board to refrain from prohibiting Plaintiffs' literature

on the basis of its viewpoint; (3) nominal damages for past violations of Plaintiffs' constitutional rights; and (4) attorney's fees and costs pursuant to 42 U.S.C. § 1988. (Doc 26 – Pg 2).

On July 3, 2014, the district court entered an order granting Defendant's Motion to Dismiss on the ground that the circumstances were sufficiently clear that the alleged wrongful behavior—Defendant's initial prohibition of a subset of materials that Plaintiffs sought to distribute—would not recur in the future. (Doc 45 – Pg 7). The district court found that Defendant had unambiguously expressed its position that each of the materials Plaintiffs sought to distribute would be unconditionally allowed. (Doc 45 – Pg 8). The district court further found that the Plaintiffs were provided with an opportunity to distribute all of the materials for which they had sought prior approval at the distribution event that occurred on January 16, 2014. (Doc 45 – Pg 8). Therefore, because the district court found that Plaintiffs had not "rebutted the presumption that Defendant, as a government entity, will not reengage in the purportedly unconstitutional conduct that, to date, it has voluntarily ceased," the district court held that the Plaintiffs' claims for prospective relief were moot and the district court lacked subject matter jurisdiction to adjudicate those claims. (Doc 45 – Pg 9).

Although the district court's order on Defendant's Motion to Dismiss only addressed Appellants' claims for prospective relief, (Doc 45 – Pg 10), and did not

address Appellants' claims for nominal damages, on July 14, 2014, the district court entered a second order dismissing the entire case for lack of subject matter jurisdiction, and denying Appellants' Motion for Summary Judgment as moot, on the ground that the case no longer presented a justiciable controversy because the claims in Plaintiffs' Complaint had been resolved. (Doc 47).

On July 28, 2014, Plaintiffs' timely filed their notice of appeal from the district court's orders. (Doc 48).

SUMMARY OF THE ARGUMENT

The district court erred in granting Defendant's Motion to Dismiss on the basis of mootness because Defendant did not unambiguously terminate its distribution policy. Rather, Defendant's change in behavior was aimed solely at mooting Plaintiffs' claims for injunctive and declaratory relief, and there was no evidence that Defendant had consistently applied a new policy or substantially changed its conduct. Accordingly, because Defendant failed to prove that it was "absolutely clear" that it had ceased violating the constitutional rights of the Plaintiffs, the district court erred in granting Defendant's Motion to Dismiss.

In addition, the district court's order on the Defendant's Motion to Dismiss only addressed Plaintiffs' claims for prospective relief, and did not address Plaintiffs' pending claims for nominal damages. Therefore, because Plaintiffs'

claims for nominal damages were still pending, the district court erred in dismissing the entire case for lack of subject matter jurisdiction.

Finally, the district court abused its discretion in denying Plaintiffs' motion to compel and Plaintiffs' motion to re-open discovery because the Magistrate Judge's rulings on these motions were clearly erroneous and contrary to law, particularly the district court's Scheduling Order.

Thus, for these reasons, the Court should reverse the district court's orders and remand the case for further proceedings.

STANDARDS OF REVIEW

This Court conducts a *de novo* review of a district court's dismissal of a complaint for lack of subject matter jurisdiction. *See Motta ex rel. A.M. v. U.S.*, 717 F.3d 840 (11th Cir. 2013); *Lobo v. Celebrity Cruises, Inc*., 704 F.3d 882 (11th Cir. 2013). It is extremely difficult to dismiss a claim for lack of subject matter jurisdiction. *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1260 (11th Cir. 1997), *citing Simanonok v. Simanonok*, 787 F.2d 1517, 1519 (11th Cir.1986). "Factual attacks" on subject matter jurisdiction "challenge 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.' " *Id.* at 1261, *quoting Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). A district court's determination on mootness is treated as if it were decided under Rule 12(b)(1) of the

Federal Rules of Civil Procedure even if it is presented as a grant of summary judgment. *Sheely v. MRI Radiology Network,* 505 F.3d 1173, 1182 (11th Cir. 2007).

As the Supreme Court has said, "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000), *quoting City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S., 283, 289 (1982). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id., quoting U.S. v. Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203 (1968).

This Court has said that the burden is met only if:

> "(1) it can be said with assurance that there is no reasonable expectation ... that the alleged violation will recur, and
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

Harrell v. The Florida Bar, 608 F.3d 1241, 1265 (11th Cir. 2010), *citing Los Angeles County v. Davis,* 440 U.S. 625 (1979). "In other words, when a party abandons a challenged practice freely, the case will be moot only if it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (emphasis in original) (citations omitted).

The district court's rulings on discovery motions are reviewed for abuse of discretion. *See U.S. v. Caro*, 2014 WL 5462358, at *4 (11th Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF AS MOOT WHEN THERE WAS NO FORMAL CHANGE IN DEFENDANT'S PUBLIC SCHOOL LITERATURE DISTRIBUTION POLICY.

A. Defendant failed to meet its burden of proving it is "absolutely clear" that it will cease unconstitutional conduct.

This Court has found that three factors are relevant to the mootness inquiry. *Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1310-11 (11th Cir. 2011). Each factor will be discussed in turn.

1. *Defendant did not unambiguously terminate its policy. Rather, Defendant has retained its distribution policy.*

Generally, government defendants are given more leeway than private parties when they claim they have terminated an illegal policy. *See Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004). The presumption in favor of the government in such cases occurs when the government policy has been "unambiguously terminated." *Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1310-11 (11th Cir. 2011).

The first mootness factor to be examined is "whether the termination of the

offending conduct was 'unambiguous.'" *Id.* (citations omitted). Here, Defendant's assurances must be characterized as ambiguous, at best, because Defendant has not even completely ceased the offending conduct.

Plaintiffs in this action challenge disparate treatment by Defendant. This includes the policies and practices surrounding Defendant's distribution system, which scrutinized Plaintiffs' materials and not materials that were distributed by persons giving away bibles. The Complaint states, "Plaintiffs seek relief from this illegal viewpoint discrimination and prior restraint including a declaration that the censorship violates the First and Fourteenth Amendments and an injunction against future viewpoint discrimination and prior restraint." (Doc 1 – Pg 2, ¶ 4).

Under the voluntary cessation doctrine, there is no presumption that government entities will refrain from engaging in illegal conduct when the government entity has not enacted a new policy. *See Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999) ("While the factual basis for the challenges to the regulation has changed since the institution of these proceedings, the cases are not moot. First, the challenged regulation remains effective." Defendant claimed in its Motion to Dismiss that the threat of injury to Plaintiffs "is too remote and speculative." (Doc 19 – Pg 7). However, Defendant did not enact a *new* policy. Instead, Defendant seemingly intended to abide by its *old* policy and merely stated its intent to allow specific pre-approved materials to be distributed. Both factually

and legally, this is very different from the cases relied upon by Defendant in its Motion to Dismiss. *See Seay Outdoor Advertising, Inc. v. City of Marty Esther,* 397 F.3d 943 (11th Cir. 2005) (billboard advertiser claim moot when City repealed sign ordnance); *Troiano v. Supervisor of Elections in Palm Beach Cnty.,* 382 F.3d 1276, 1282 (11th Cir. 2004) (claim of visually impaired voters mooted when there was a subsequent undisputed availability of audio equipment in every precinct and for every election); *Jews for Jesus v. Inc. v. Hillsborough Cnty. Aviation Auth.,* 162 F.3d 627, 629 (11th Cir. 1988) (claim moot where a new "open door" policy adopted by airport officials was consistently applied for three years).

The Defendant's review of materials is a central aspect to Plaintiffs' lawsuit. A number of books and pamphlets by Plaintiffs were prohibited because they were deemed to be inappropriate by Defendant. For example, Defendant prohibited the book *What on Earth is an Atheist?* in part for its alleged disruptive capacity because "the District's administration will not permit the distribution of materials insulting religions." (Doc 1 – Pg 12, ¶ 56; Doc 1-1 – Pg 3). Defendant prohibited the book *Jesus is Dead* by Robert Price because it said the "claim that Jesus was not crucified or resurrected is age inappropriate." (Doc 1 – Pg 10, ¶ 48; Doc 1-1 – Pg 3).

Defendant retained its distribution system and presented no evidence that the School Board or Orange County Public School policymakers had changed their review process. Defendant presented no evidence as to what criteria would be

applied to materials that persons seek to distribute. Defendant presented no directives as to how that review would take place. Defendant's associate general counsel merely stated (personally, and not as the authorized representative of the Orange County School Board) that specific items that Plaintiffs previously sought to distribute could now be distributed. Any other materials would need to be submitted to Defendant's general counsel for review. (Doc 21-1). That system is the exact same one that censored Plaintiffs' non-religious viewpoint. Plaintiffs responded to this letter saying that their speech was still being chilled. (Doc 22-1).

Defendant's challenged conduct remained unaddressed. Specifically, Plaintiffs' Complaint charged that "Defendant's practice and actions chill, deter, and restrict Plaintiffs from freely expressing their nonreligious convictions in the May 2 distribution and future distributions." (Doc 1 – Pg 17, ¶ 76). Plaintiff Williamson asserted in a sworn affidavit that he intends to conduct future distributions at OCPS schools. (Doc 22-1 – Pg 3, ¶ 5). He seeks to distribute books and materials that have not been vetted by Orange County Public Schools. (Doc 22-1 – Pg 3, ¶ 6). He did not submit new materials for a distribution on January 16, 2014, in part, because Defendant kept the same vetting process. (Doc 22-1 – Pg 4, ¶ 14). In sum, the Defendant was continuing to chill his speech.

2. *Defendant's change in behavior was not the result of substantial deliberation, but was merely an attempt to moot Plaintiffs' injunctive and declaratory relief.*

The second factor examined in a mootness inquiry, is "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction." *Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1310. The "timing and content" of a voluntary decision to cease challenged activity are relevant to determining the motive for cessation. *Harrell*, 608 F.3d at 1266.

In *Nat'l Ass'n of Boards of Pharmacy*, the court found that injunctive relief in a copyright infringement case was not moot despite the claims of a public university that its professor canceled his review course and had retired. In examining the mootness "substantial deliberation" factor, the court said that the decision to cancel the review course "appears to have been made solely in response to the current litigation—in order to avoid an injunction." 633 F.3d at 1312. Facts relevant to the court's determination were that the announcement was first made at the preliminary injunction hearing, that the professor wished to continue to teach and doubted that he infringed the copyrights, and that "neither counsel provided any reasoned basis for voluntarily ceasing the infringing conduct." *Id.* Under the circumstances, the court concluded that if the case were concluded, the infringement might continue. *Id.*

Likewise, this Court has ruled that other governmental termination of conduct did not moot a plaintiff's case. The government's claim of mootness in *Harrell* is

similar to that made by Defendant in this case. In *Harrell*, the Florida Bar claimed that its rejection of a lawyer's advertising slogan was moot because the Board of Governors later declared the slogan permissible, at least as used in the advertisements that the lawyer submitted for review. 608 F.3d at 1265. In regard to the "substantial deliberation" factor, the Court said, "With respect to content, we look for a well-reasoned justification for the cessation as evidence that the ceasing party intends to hold steady in its revised (and presumably unobjectionable) course." *Id.* at 1266. The Court found that the Board met behind closed doors and did not disclose the basis for its decision and said, "As a result, we have no idea whether the Board's decision was 'well-reasoned' and therefore likely to endure." *Id.* at 1267 (citations omitted). The *Harrell* court expounded:

> In fact, the Board's decision might reflect a range of possible judgments, and some of them would not warrant a finding of mootness. In *ACLU v. The Florida Bar*, 999 F.2d 1486 (11th Cir.1993), for example, we applied the voluntary cessation exception to a plaintiff's challenge to certain of the Bar's rules even though the Bar had "acquiesced in [the plaintiff's] position." *Id.* at 1490. We did so because, although the Bar had agreed that it would not enforce the rule against the plaintiff in that particular instance, it still maintained that the challenged rule was constitutional and that the plaintiff's conduct fell within it. *See ACLU*, 999 F.2d at 1494–95. In this case, the Bar's opaque decision fairly leaves open the possibility that, just as in *ACLU*, the Board agrees with the Standing Committee but has decided that it will not enforce the rule against Harrell in this case. *Id.; see also Graham*, 5 F.3d at 500 (interpreting *ACLU*, 999 F.2d at 1494). Such a

> course by the Bar would not suffice to moot the instant controversy.

Id. Defendant's Motion to Dismiss speaks to this factor directly. Defendant's change in behavior was not a result of a change by policymakers through a deliberative process. Changes by policymakers were not disclosed to the district court or the Plaintiffs at the relevant time.

More importantly, Defendant, in its Motion to Dismiss, continued to stand by its denial of Plaintiffs' materials. A denial of wrongdoing by a defendant is evidence that the violation may recur. "[U]nder controlling law, a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007). Defendant's Motion to Dismiss stated that materials were denied because they "were thought not to be appropriate for the level of maturity of the students, other materials were thought to be pornographic, obscene or libelous or were likely to cause substantial disruption." (Doc 19 - Pg 3). Defendant stated, "Therefore, there was a good faith and legitimate reason to deny some of the materials." (Doc 19 – Pg 3). Since Defendant stood by its censorship decisions, it could reasonably be expected to continue such censorship going forward. Indeed, the School Board would be in bad faith if it didn't, presumably.

Indeed, Defendant stated that its decision to allow Plaintiffs to distribute certain materials was precisely because of the lawsuit. The letter from Defendant's counsel on January 3, 2014 stated: "With respect to the current litigation…OCSB believes it has a defensible position and will survive Court scrutiny. However, in an effort to reduce litigation going forward, OCSB makes an unconditional offer separate and apart from the current litigation to allow the Freedom From Religion Foundation to passively distribute the following materials…" (Doc 21-1). This admission also weighs against Defendant. *See Sheely*, 505 F.3d at 1186 ("[W]e are more likely to find that cessation moots a case when cessation is motivated by a defendant's genuine change of heart rather than his desire to avoid liability.").

Defendant's decision to allow Plaintiffs to distribute certain materials "appears to have been made solely in response to the current litigation—in order to avoid an injunction." *Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1312.

3. Defendant has not "consistently applied" a new policy or substantially changed its conduct

The third factor to be examined by the Court is "whether the government has 'consistently applied' a new policy or adhered to a new course of conduct." *Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1310, *citing Jews for Jesus*, 162 F.3d at 629.

While Defendant granted permission to Plaintiffs to distribute certain

materials, it did not present evidence that it would adhere to a new overall course of conduct. On January 3, 2014, Plaintiffs were instructed that specific pre-approved literature would be permitted but, "[a]ny other materials to be distributed will need to be submitted" to John Palmerini, Associate General Counsel for Defendant who had prohibited Plaintiffs' literature in the first place. (Doc 21-1). Palmerini reviewed Plaintiffs' first submission of materials in 2013 and rejected numerous books because they were "thought not to be appropriate for the level of maturity of the students, other materials were thought to be pornographic, obscene or libelous or were likely to cause substantial disruption." (Doc 19 – Pg 3; Doc 1-1 – Pg 2-8). Defendant presented no evidence that it had abandoned this vetting process for new submissions. Thus, this case is unlike *Jews for Jesus, Inc.*, where a new "open door" policy that was the result of substantial deliberation by airport officials was consistently applied. 162 F.3d at 629.

Because new materials submitted by Plaintiffs could be treated differently than biblical materials, injunctive and declaratory relief remain a necessity. Notably, a municipality may not easily moot a case involving the potential for ongoing discrimination. *See Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than

the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its 'Sheltered Market Plan' is a 'set aside' by another name—it disadvantages them in the same fundamental way."). Defendant's submission process and review of new materials maintains a discriminatory vetting process by Defendant. As this Court noted in another speech case involving questions of mootness, "This process itself, aside from [the rules], is enough to chill speech." *ACLU v. The Florida Bar*, 999 F.2d at 1495 (11th Cir. 1993).

B. Granting Defendant's Motion to Dismiss without allowing discovery was prejudicial to Plaintiffs.

Finally, Defendant's jurisdictional challenge went to factual issues that the Plaintiffs did not have the opportunity to investigate in discovery. "[D]ismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly." *Chatham Condo. Associations v. Century Vill., Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979); *see also In re: CP Ships Ltd. Securities Litigation*, 578 F.3d 1306, 1312 (11th Cir. 2009) ("In a factual challenge [to subject matter jurisdiction], the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss."). Therefore, the district court erred in granting Defendant's Motion to Dismiss because Plaintiffs' timely filed discovery requests,

which included the subject of Defendant's policies and practices regarding literature distribution, had not yet been answered, nor did Plaintiffs have the opportunity to take depositions that had been requested.

In arguing that Plaintiffs' claims for injunctive and declaratory relief should be dismissed, Defendant relied solely on the affidavit of Associate General Counsel Palmerini,[2] which asserted that the Defendant did not intend to prohibit materials identified in the lawsuit from being passively distributed in the future. However, Plaintiffs' claims went not only to *what* is distributed, but also to *how* it is distributed and vetted, and Plaintiffs' discovery requests sought to develop those facts further. Therefore, to rely on Defendant's last-minute bare assertion that its current practices would not harm Plaintiffs in the future, which Plaintiffs disputed, as the sole evidence in resolving subject matter jurisdiction, was prejudicial to Plaintiffs. *See J.S. ex rel. N.S. v. Attica Cent. Schs*., 386 F.3d 107, 110 (2d Cir. 2004) (holding that court may not consider conclusory allegations in ruling on a defendant's motion to dismiss for lack of subject matter jurisdiction); *cf. Stanley v. Life Ins. Co. of North America*, 426 F. Supp. 2d 1275, 1282 (M.D. Fla 2006) (holding that conclusory allegations in affidavit in support of notice of removal were insufficient to establish subject matter jurisdiction).

[2] Which did not state that he was speaking on behalf of the School Board as its authorized representative.

Plaintiffs had a right to investigate Defendant's factual assertions related to mootness. *See Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980) ("Plaintiff is not required to rely exclusively upon a defendant's affidavit for resolution of the jurisdictional issue where that defendant has failed to answer plaintiff's interrogatories specifically directed to that issue. To hold otherwise would permit an advantage to a defendant who fails to comply with the rules of discovery."). In addition, "Plaintiff[s] must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction. As we said in *Blanco,* 'the rules entitle a plaintiff to elicit material through discovery before a claim may be dismissed for lack of jurisdiction.'" *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) (citing *Blanco*, 632 F.2d at 658). Moreover, "[w]ith the facts not fully developed, a fair and conclusive resolution of the jurisdictional issue cannot be made at this stage of the proceedings. We again emphasize that the preferred procedure in cases such as the present one, where the jurisdictional issue is inextricably bound up with the merits, is to defer resolution of the jurisdictional question to a consideration of the merits." *Chatham,* 597 F.2d at 1012.

Therefore, the district court erred in granting Defendant's Motion to Dismiss without allowing Plaintiff to conduct discovery and test Defendant's claim of mootness.

C. Conclusion.

As demonstrated above, (1) Defendant did not unambiguously terminate its policy, (2) Defendant's change in behavior was aimed at mooting Plaintiffs' claims for injunctive and declaratory relief, and (3) Defendant did not consistently apply a new policy or substantially change its conduct. Accordingly, because Defendant failed to prove that it was "absolutely clear" that it had ceased violating the constitutional rights of Plaintiffs, the district court erred in granting Defendant's Motion to Dismiss on the basis of mootness.

II. THE DISTRICT COURT ERRED IN DISMISSING THE CASE FOR LACK OF SUBJECT MATTER JURISDICTION WITHOUT RULING ON PLAINTIFFS' PENDING CLAIMS FOR NOMINAL DAMAGES.

In addition, the district court erred in dismissing the case for lack of subject matter jurisdiction without ruling on Plaintiffs' pending claims for nominal damages.

The United States Supreme Court has held that nominal damages are the "appropriate means of vindicating rights whose deprivation has not caused actual, provable injury." *Memphis Cmty. Sch. Dist. V. Stachura*, 477 U.S. 299, 308, n.11, 106 S.Ct. 2537 (1986). In addition, it is clear that nominal damages are available for violations of the First Amendment. *Familias Unidas v. Briscoe*, 619 F.3d 391, 402 (5th Cir. 1980); *see also Gonzalez v. School Bd. of Okeechobee County*, 2008 WL 2116610, at *4 (S.D. Fla. 2008). In a recent similar case, the Southern District

of Florida held that students who prevailed on their viewpoint discrimination claim against a school board were entitled to prevailing party status, and attorney's fees, by virtue of having attained nominal damages in the amount of $1.00. *See Gonzalez v. School Board of Okeechobee County*, 571 F. Supp. 2d 1257 (S.D. Fla. 2008); *see also Virdi v. Dekalb County School District*, 216 Fed. Appx. 867, 873-74 (11th Cir. 2007) ("The fact that Virdi suffered a constitutional violation means that he is entitled to an award of nominal damages.").

A claim for damages for a violation of constitutional rights is not mooted by a change in policy. In *Naturist Soc., Inc. v. Fillyaw*, this Court discussed and dispensed with the mootness question, in part, based on the plaintiffs' claims for damages:

> The district court found that the Society sought to approach park visitors on and off the beach to distribute literature, sought to carry a sign and display nude sculpture, and sought to circulate petitions. 736 F.Supp. at 1106. It further found that the Naturists were limited in their distribution of literature and prevented from carrying a sign, displaying nude sculpture, and circulating a petition "because of the limitations imposed by Fillyaw." 736 F.Supp. at 1107. Thus, the claim for damages saves from mootness the Society's contention that the "old" park regulations were unconstitutional as applied to it. *See Memphis Light, Gas and Water Div. v. Kraft*, 436 U.S. 1, 8, 98 S.Ct. 1554, 1559, 56 L.Ed.2d 30 (1978).

958 F.2d 1515, 1519 (11th Cir. 1992); *see also Granite State Outdoor Adver., Inc. v. City of Clearwater*, 351 F.3d 1112, 1119 (11th Cir. 2003) ("In this case, the City

argues that Granite State's claims are now moot because Clearwater has revised the Code in accordance with the district court's decision. Because Granite State has requested damages, however, the changes made to the ordinance do not make this case moot."); *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254, 1259-60 (11th Cir. 2007) ("A change in statute will not always moot a constitutional claim, however. If a litigant asserts damages from the application of a constitutionally defective statute, he may be able to pursue his constitutional challenge notwithstanding later legislative changes that would appear to address his complaint.").

In this case, Plaintiffs sought nominal damages in their original complaint, (Doc 1 – Pg 19), and they subsequently reasserted their claim for nominal damages in their motion for summary judgment, (Doc 36 – Pg 2). However, the district court's order granting Defendant's Motion to Dismiss was directed only to Plaintiffs' claims for prospective and injunctive relief, and it did not address Plaintiffs' claims for nominal damages. (Doc 45 – Pg 10). In this regard, Defendant's brief in support of its Motion to Dismiss confirms that Defendant was not seeking dismissal of Plaintiffs' claims for nominal damages:

> Defendant is requesting dismissal as moot *only* the declaratory and injunctive relief, recognizing that the nominal damages claim as to past alleged unconstitutional conduct will stand. *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (holding that the amendments to the complained-of ordinance mooted the request for

> injunctive relief, but not the claim for nominal damages); *Smith v. Barrow*, 2012 WL 6522020 (S.D. Ga. December 13, 2012) (the court dismissed the first amendment injunctive claim as moot, but permitted the nominal damage claim to stand).

(Doc 19 – Pg 4, n.1)

Therefore, because Plaintiffs' claims for nominal damages clearly remained pending after the district court dismissed Plaintiffs' claims for declaratory and injunctive relief, the district court erred in dismissing the case for lack of subject matter jurisdiction and finding that Plaintiffs' motion for summary judgment was moot.

III. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' DISCOVERY MOTIONS.

Finally, the district court erred in denying Plaintiffs' motion to compel and motion for enlargement of time to complete discovery.

As noted above, the Magistrate Judge denied Plaintiffs' motion to compel depositions on the ground that the motion was untimely because it was not filed until the last day of discovery and, therefore, it left no time for the requested depositions to occur. (Doc 27). In her order, the Magistrate Judge specifically noted that Plaintiffs had not filed a motion to extend the deadline for discovery so that their motion to compel could be determined. (Doc 27 – Pg 2).

In response to the Magistrate Judge's order, Plaintiffs filed a motion to reopen discovery for 45 days in order to complete the requested depositions and to obtain a

ruling on Defendant's objections to Plaintiffs' written discovery requests. (Doc 29). However, the Magistrate Judge denied the motion to reopen discovery on the ground that it was not appropriate to reopen discovery to file an untimely motion to compel with respect to Defendant's objections or to complete the depositions. (Doc 30). Plaintiffs timely filed objections to the Magistrate Judge's orders, (Doc 31 and Doc 34), but the objections were overruled by the district court. (Doc 33).

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, the district court erred in overruling Plaintiffs' objections to the Magistrate Judge's orders because the orders were clearly erroneous and contrary to the law. In accordance with the district court's Scheduling Order, Plaintiffs propounded written discovery requests on Defendant on March 13, 2014, thereby giving Defendant sufficient time to respond before the close of discovery. (Doc 24 – Pg 2). Plaintiffs also submitted a request for deposition dates on March 12, 2014, attempting to coordinate the depositions of Defendant's corporate representative and Defendant's Assistant General Counsel, John Palmerini, who had provided an affidavit in support of Defendant's Motion to Dismiss. (Doc 29-3 – Pg 2). In support of their deposition requests, Plaintiffs provided Defendant with draft deposition notices containing a list of topics and document requests. (Doc 29-3 – Pg 2). In response, Defendant's counsel stated that he was unavailable for the depositions during the following 30 days--i.e., before the close of discovery--due to a jury trial. (Doc 29-3 – Pg 3).

Defendant's counsel never stated that he was unwilling to schedule the depositions, only that he was unavailable at times during the following 30 days. Accordingly, Plaintiffs did not seek judicial relief but rather attempted to resolve the issue informally, which they were directed to do by the Middle District Discovery Handbook. *See* Middle District Discovery (2001) at 3 ("If unable to informally resolve the matter, counsel should move for an extension of time to respond.").

Because the depositions of Defendant's representatives had not yet been scheduled by the close of discovery, Plaintiffs, out of an abundance of caution, filed a timely motion to compel on April 14, 2014. (Doc 25). On the same day, Defendant filed a motion for protective order with respect to Plaintiffs' written discovery requests, arguing that it should not be required to respond because it had a pending motion to dismiss. (Doc 24).

The district court's Scheduling Order did not state that discovery motions had to be filed in sufficient time to allow the requested discovery to occur. (This Court would not be reading this section of the brief it it had.) The Scheduling Order only stated that motions to compel "may" be denied as untimely if they are filed after the discovery deadline. (Doc 18 - Pg 1). Therefore, Plaintiffs' motion to compel was not untimely but rather was in strict compliance with the Scheduling Order, and the issues raised in the parties' discovery motions were not moot. In addition, the only reason Plaintiffs waited until the last day of discovery to file their motion to compel

is because they were trying to resolve the scheduling issue informally, which they were directed to do by the Discovery Handbook.

Rule 72 of the Federal Rules of Civil Procedure provides an avenue for a party to seek review of the Magistrate Judge's ruling by filing timely objections. *See* Fed. R. Civ. P. 72(a). To prevail in an objection to a magistrate judge's determination of a discovery motion, the objecting party must establish that the conclusions to which it objects are clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *see also Williams v. Wright*, 2009 WL 4891825, at *1 (S.D. Ga. Dec.16, 2009) ("A district court reviewing a magistrate judge's decision on a nondispositive issue 'must consider ... objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.'") (quoting Rule 72(a)).

"[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." "*Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005). A magistrate judge's order "is contrary to law 'when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Pigott v. Sanibel Dev*., LLC, 2008 WL 2937804, at *5 (S.D. Ala. July 23, 2008); *Schaaf v. SmithKline Beecham* Corp., 2008 WL 489010, at *3 (N.D. Ga. Feb. 20, 2008).

In the instant case, the Magistrate Judge's orders were clearly erroneous and contrary to the law, particularly the district court's Scheduling Order. As a general rule, Plaintiffs are entitled to obtain discovery relating to any matter that is relevant to their claims and defenses. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs made timely efforts to obtain the requested depositions, which were relevant to Defendant's Motion to Dismiss, before the close of discovery. Pursuant to the dictates of the Discovery Handbook, Plaintiffs made a good faith effort to resolve the deposition issues informally before resorting to a motion to compel. When Plaintiffs' informal efforts proved to be unsuccessful, Plaintiffs timely filed a motion to compel before the close of discovery, in strict and full compliance with the Court's Scheduling Order.

Similarly, Plaintiffs timely propounded their written discovery requests to Defendant more than 30 days before the close of discovery, which required Defendant to respond before the close of discovery. Plaintiffs also reasonably expected to respond to Defendant's discovery objections in their response to Defendant's motion for protective order. Because the Court's Scheduling Order did not specifically state (although it could have) that discovery disputes had to be resolved before the close of discovery, Plaintiffs had no reason to believe that Defendant's discovery objections would be deemed to be moot as a result of the close of discovery.

Permitting Defendant to avoid its discovery obligations simply because Plaintiffs tried to resolve the discovery issues informally would be contrary to the spirit and language of the Discovery Handbook. In addition, there is no indication that Defendant would be prejudiced if the district court had granted a brief extension of time to allow the requested discovery to occur.

In contrast, Plaintiffs were greatly prejudiced by the district court's denial of their motions because they were not permitted to conduct discovery that was critical to their case, particularly their response to Defendant's Motion to Dismiss. Accordingly, because the Magistrate Judge's discovery orders were clearly erroneous and contrary to law, the district court erred in approving the orders.

CONCLUSION

WHEREFORE, based upon the above facts and authorities, the Appellants, FREEDOM FROM RELIGION FOUNDATION, DAN BARKER, ANNIE LAURIE GAYLOR, and DAVID WILLIAMSON, respectfully request that this Court (1) reverse the district court's orders (Docs. 27, 30, 33, 45, and 47); (2) remand the case for further proceedings; and (3) grant any such other and further relief as this Court deems appropriate.

Dated this 7th day of November, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 7, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **Howard S. Marks, Esquire**, hmarks@burr.com, dmmorton@burr.com, mrannell@burr.com, and **Lisa Geiger, Esquire**, lgeiger@burr.com, echaves@burr.com, Burr & Foreman, LLP, 200 S. Orange Avenue, Suite 800, Orlando, Florida, 32801, Counsel for Appellee.

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I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 8,066 words.

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