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.

REPLY 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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INTRODUCTION

There is a justiciable controversy in this case for four reasons. First, the Orange County School Board ("OCSB") has not unambiguously halted its illegal conduct because plaintiff FFRF[1] has not been allowed or not been able to distribute in the forum since OCSB's original censorship of FFRF's message. Second, even if it had ceased its conduct, it is likely that OCSB will repeat the conduct because its only policy is to "follow existing jurisprudence" and it believes it was following existing jurisprudence when it discriminated against FFRF's viewpoint in the first place. Third, OCSB and the District Court misapprehend the chilling of FFRF's speech. Past injury—not future injuries—chill FFRF's speech, creating a justiciable case. Finally, nominal damages for past violations of rights cannot be dismissed because they do not affect the parties' future rights. Damages redress past injury, which FFRF has suffered, not future conduct. Therefore, the damages claim presents a live controversy.

ARGUMENT

If a government were to unambiguously stop challenged conduct and show that it is unlikely to repeat it, claims for prospective relief are moot. OCSB illegally silenced most of FFRF's speech and then, after FFRF filed suit, OCSB promised to

[1] Appellants Freedom From Religion Foundation, Inc., Dan Barker, Annie Laurie Gaylor, and David Williamson will collectively be referred to as "FFRF."

follow the law—although it maintains that its previous discrimination was legal. OCSB's promise to follow the law was not accompanied by any new or formal policy change and, despite the promise, OCSB has successfully silenced most or all of FFRF's message three out of three times. Has OCSB unambiguously ended its conduct and shown that it is unlikely to silence FFRF's speech in the future?

I. OCSB has not unambiguously ceased the illegal conduct because it has successfully silenced FFRF's message since claiming to cease its conduct.

An initial mootness question is whether the government unambiguously terminated the offending conduct. *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 forum in this case is a single-day forum each year. (Answer Brief at 8; App. 333, ¶¶ 3, 6).[2] OCSB's actions have silenced most or all of FFRF's message at every one of the three possible distributions days. This cannot be construed as ceasing the conduct that precipitated the underlying case.

In 2013, OCSB prohibited the distribution of numerous books and pamphlets sought to be distributed by FFRF, prohibiting the bulk of FFRF's message. (App. 021-23, ¶¶ 37-38, 40; App. 037-40; App. 095-96, ¶¶ 37, 40, 41; App. 159-60, ¶ 4). OCSB prohibited the materials based on the viewpoint being expressed.

[2] References to Appellants' Appendix will be cited as "App. [page number within the appendix].

In 2014, OCSB manipulated three factors to silence FFRF's message. First, FFRF's speech was chilled because of the previous censorship, OCSB's lack of intelligible policy, and lack of change in any of the decision-making apparatus that led to the viewpoint discrimination in the first place. Plaintiff David Williamson was reluctant to participate in the January 16, 2014 distribution because he understood that OCSB "kept the same vetting process in place that rejected FFRF and CFFC materials in 2013." (App. 161, ¶¶ 14-15). He "was discouraged and inhibited as a result of [OCSB]'s vetting process." (App. 161, ¶ 16). Second, when OCSB ostensibly decided to allow FFRF's previously-banned literature, it told FFRF on Jan. 3, three days *after* the deadline for submitting additional literature. (App. 134; App. 161, ¶ 17; App. 163). This precluded FFRF from adding to its distribution (and allowing OCSB to try and argue that any such injury is hypothetical, but only because it timed things just so). Third, this late notice gave FFRF less than two weeks to organize 40 volunteers, shepherd them through the OCSB volunteer-approval process, and gather hundreds of pieces of literature sent from all over the country. Such short notice almost seems designed to discourage participation. Williamson was unable to participate because OCSB did not provide enough time to prepare materials and volunteers. (App. 160, ¶¶ 9-13).

In 2015, FFRF was not able to distribute any literature. OCSB informed FFRF that it put distribution on hold while OCSB "considers changing its policy regarding

distribution of materials." *See* Exhibit A to Appellant's Motion to Supplement the Record, which is incorporated by reference herein.

OCSB has ensured that FFRF's message has been completely or mostly silenced in every distribution, hardly the unambiguous cessation of conduct mootness requires.

II. <u>**Even if this Court agrees that OCSB has unambiguously ceased the conduct, there is a reasonable expectation that the conduct will recur because OCSB has no written policy, has not adopted a new policy, and does not think its discriminatory decision was wrong in the first place.**</u>

Simply stating "I will follow the law" cannot rob a court of jurisdiction. Otherwise, no court would ever hear another case to completion. Standing alone, the "voluntary cessation of allegedly illegal conduct … does not make the case moot.'" *Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 946-47 (11th Cir. 2005). Something more is needed, "voluntary cessation of a challenged practice renders a case moot only if there is no 'reasonable expectation' that the challenged practice will resume after the lawsuit is dismissed." *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998).

Assuming for the moment that OCSB has voluntarily ceased its illegal conduct, four facts undercut any argument that this censorship will not recur:

First, OCSB admits that it never had a formal, written, or adopted policy for literature distributions; nor does it follow the Collier decree. FFRF's Complaint alleged that OCSB has "no written policy on distributing of materials by

outside groups in their limited public forum, but by practice follow the Collier County Consent Decree." (App. 020, ¶ 29). OCSB admitted the no-policy allegation and "denie[d] that by practice it follows the Collier County Consent Decree." (App. 094, ¶ 29). OCSB never presented evidence that it had a written policy.

Second, OCSB did not change its nonexistent policy, did not adopt a new policy regarding literature distributions, and has no new procedure for vetting literature; it merely changed its "position" on FFRF's prohibited literature. The only evidence OCSB has submitted regarding mootness are two affidavits by John Palmerini, OCSB Associate General Counsel. Those affirm that OCSB "reconsidered its position on the materials" and informed FFRF "of this change in position" (App. 334, ¶ 10). The affidavits never mention a policy (new or old) and only mention the Collier decree to help define "the standards set out in applicable law." (App. 334, ¶ 9). Even this change of position was unaccompanied by any change of procedure. Williamson understood that the process remained the same as that in 2013. (App. 161, ¶¶ 14-16).

Third, OCSB's only practice regarding literature distributions it to "follow existing jurisprudence." Though no evidence suggests any policy adoption or change, OCSB claims to follow the law. In its initial denial of literature, OCSB wanted to "determine whether the materials should be allowed to be distributed pursuant to the standards set out in applicable law.... [and] did consider

the law set out in both of these cases as well as other law when reviewing Plaintiffs' materials." (App. 334, ¶ 9). OCSB later "recommitted itself to its policy of following existing jurisprudence." (Answer Brief at 38). This "recommitment" is the only thing preventing recurrence, except that it is undercut by the fourth fact:

Fourth, OCSB believes it was "following existing jurisprudence" when it prohibited FFRF's literature. OCSB's position has been that it was right to break the law in the first place. OCSB maintains that it had a "legitimate reason to deny" FFRF's materials. (App. 120, ¶ 14); App. 133) ("OCSB believes it has a defensible position that will survive Court scrutiny."). Hence, OCSB believes prohibiting the "claim that Jesus was not crucified or resurrected" as "age inappropriate" for high school students is permissible. (App. 038). OCSB did not prohibit the content—the crucifixion and resurrection also appear in the bible OCSB permitted. OCSB objected only to materials that "claim" that neither occurred. In short, OCSB still maintains it had a "legitimate reason to deny" FFRF's viewpoint.

Changing a "position" is not changing a policy—it is getting caught with your hand in the cookie jar. "Following existing jurisprudence" is not a policy, it is the law—everyone has to follow it. And in this case, following the law is no safeguard since OCSB thinks it was right to violate the law in the first place. If anything, this shows that OCSB does not understand the law enough to comply with it—a recipe for recurrence.

In both *Seay* and *Jews for Jesus* the government formally abandoned policies that caused the alleged censorship and formally adopted new policies. *Seay*, 397 F.3d at 945-6; *Jews for Jesus*, 162 F.3d at 628-29. In addition, the government in *Seay* disavowed any intention of defending its old policy. *Id.* at 948. OCSB has done neither.

This case is substantially different than those relied upon by OCSB: *Seay, Troiano,* and *Jews for Jesus*. The total absence of a policy creates several problems,[3] most notably a substantial likelihood of recurrence. Here, OCSB's counsel merely said that OCSB would "follow existing jurisprudence," which it misunderstands so dramatically that it illegally discriminated against FFRF in the first place.

Seay involved two written policies—ordinances, actually. 397 F.3d at 946. Public, well-deliberated, written laws. The first policy, under which the billboard company was denied permits, was abandoned by the city. The city passed a completely new sign ordinance. But the billboard company's lawsuit challenged the old, abandoned policy. FFRF has not challenged a school board policy that has been repealed. No written policy exists to be challenged. That makes it more likely that there is a "possibility that the defendant could simply return to his old ways." *Id.* at

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[3] For instance, OCSB repeatedly mentions that FFRF "did not seek an appeal" of OCSB's decision to censor FFRF's materials. (Answer Brief at 10). This is doubly wrong. FFRF appealed the April 22, 2013 decision in an April 23 letter to OCSB. (App. 049-51). Second, claiming that FFRF "did not appeal" the decision is nonsensical because there is no policy that lays out an appellate procedure.

946-47. That concern is heightened here, where OCSB has reaffirmed the righteousness of its initial discrimination.

In *Troiano v. Supervisor of Elections in Palm Beach County, Florida,* 382 F.3d 1276 (11th Cir. 2004), visually impaired voters challenged the lack of audio devices in county voting booths. 382 F.3d at 1281-82. *Before*—and the *Troiano* Court itself emphasized that word—the defendant was served with the suit, the defendant placed audio-equipped voting machines in every precinct and trained workers on their operation. *Id.* at 1279, 1281. It was clear that the government was not going to remove the machines and un-train workers (something that couldn't happen), especially after numerous elections had been conducted where the devices were made available. Moreover the Court could be sure of the unlikelihood of recurrence because the government fixed the problem *before* the suit was served.

Troiano teaches that when the government is made aware of a legal violation and fixes that problem before a suit is filed, the likelihood of recurrence is low. Conversely, when the government is made aware of a violation, defends that violation, and only changes course well after a lawsuit is filed, the likelihood of recurrence if much higher. Unlike *Troiano*, OCSB did not change its "position" until after the lawsuit was filed, and, also unlike *Troiano*, maintains that its initial discrimination was legal.

Factually, *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627 (11th Cir.1998), is also distinguishable. It involved three policies: (1) the initial policy that was under review when JFJ applied for permission to distribute literature, (2) the policy that banned all distributions, which JFJ challenged, and (3) the final policy that lifted the distribution ban. *Id.* at 628-9. This Court focused on the newly adopted policy, finding that "the new 'open door' policy appears to have been the result of substantial deliberation on the part of airport officials, and the evidence suggests that it has been consistently applied for the past three years." *Id.* at 629.

Unlike *Seay* and *Jews for Jesus*, OCSB has not even changed its practice, let alone adopted a written policy. The same personnel still vet literature through the same process using the same interpretation of the law that caused the viewpoint discrimination in the first place. The only thing OCSB has changed is its "position"—and even that change is suspect given that OCSB successfully silenced FFRF's message each time the single-day forum was open. Notably, the airport in *Jews for Jesus* applied its "open door" policy uniformly: all groups were allowed. OCSB has not adopted such a policy and, in practice, has allowed only a Christian group's literature in a subsequent distribution.

The lack of policy also destroys OCSB's reliance on a facial/as-applied challenge distinction. First, the Supreme Court recently found that the distinction is nowhere near as meaningful as OCSB argues:

> [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 in every case involving a constitutional challenge. The distinction is both instructive and necessary, ***for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint***."

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010); *see also U.S. v. Treasury Employees*, 513 U.S. 454, 477–478, 115 S.Ct. 1003 (1995).

Secondly, OCSB does not have a written policy to facially challenge. OCSB had a position on specific FFRF literature, not a policy governing its treatment. And OCSB maintains that its initial position was legal.

III. The government's chilling of speech is not a hypothetical injury, as such, FFRF has suffered a concrete injury that may be remedied.

A government action that chills speech is subject to challenge when an individual shows "that ***he has sustained, or*** is immediately in danger of sustaining, a direct injury as the result of that action…." *Laird v. Tatum*, 408 U.S. 1, 13, 92 S.Ct. 2318, 2325 (1972), *citing Ex parte Levitt*, 302 U.S. 633, 634 (1937) (emphasis added).

OCSB and the District Court mischaracterize this inquiry and focused solely on whether a plaintiff is in immediate danger of being injured. But FFRF does not need to prove an immediate danger *if it has already suffered an injury of the same kind*. That's why the Supreme Court concluded *Laird* by noting that "nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication ***that actual*** or threatened injury by reason of unlawful activities ... would go unnoticed or unremedied." *Laird*, 408 U.S. at 16 (emphasis added).

There is nothing hypothetical about FFRF's injury. FFRF was in fact prohibited from delivering its entire message. In 2013, FFRF was censored by OCSB. In 2014, Williamson understood that OCSB "kept the same vetting process in place that rejected FFRF and CFFC materials in 2013" (App. 161, ¶¶ 14-15). He "was discouraged and inhibited as a result of [OCSB]'s vetting process." (App. 161, ¶ 16). In 2015, FFRF has not been allowed to distribute materials.

Moreover, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [citizens] what is being proscribed." *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 604 (1967), *citing Stromberg v. People of State of Cali.*, 283 U.S. 359, 369 (1931); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). OCSB's practice or policy "following existing jurisprudence" and claim to have a

"legitimate reason to deny" FFRF's literature under that jurisprudence provides no informative policy for citizens. This is exacerbated by the absence of any written policy whatsoever. Just like these cases, the "extraordinary ambiguity" of OCSBs opaque literature distribution practice and approval process itself chills citizens' speech.

OCSB and the District Court ignored FFRF's actual injury, focusing solely on a future injury they label hypothetical. But this misses the point, when citizens' rights have been trampled by their government, and that government claims a "legitimate reason" to do the trampling, any citizen would be reluctant to open themselves to another injury. That disinclination to exercise one's free speech rights because the rights have been previously violated is itself an injury that creates a justiciable controversy for this Court.

IV. FFRF's nominal damages claim presents a live case or controversy.

A. Judicial relief in the form of damages does not constitute a mere "advisory opinion."

OCSB asserts that the District Court was correct in dismissing FFRF's claim for nominal damages because such an award "would have no practical effect on the parties' future rights." (Answer Brief at 22). OCSB misses the purpose of a damages award. Unlike injunctive relief, damages relate to the defendant's past conduct and provide relief to an injured plaintiff.

The Supreme Court has recognized that "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. " *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969) (citations omitted). Put another way, the question is whether the parties "have a personal stake in the outcome of the lawsuit." *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1519 (11th Cir. 1992), *citing Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477–78, 110 S.Ct. 1249, 1253–54 (1990).

Plaintiffs who have presented a damages claim in a First Amendment lawsuit have a personal stake in the outcome of the lawsuit. In *Naturist Society*, the plaintiffs' message was partially silenced because of government-imposed limitations. 958 F.2d 1515, 1519 (11th Cir. 1992). On that basis, this Court held that "the claim for damages saves from mootness the Society's contention that the "old" park regulations were unconstitutional as applied to it. *Id. (*citing *Memphis Light, Gas & Water Div. v. Kraft,* 436 U.S. 1, 8, 98 S.Ct. 1554, 1559 (1978)).

Claims for damages and nominal damages relate to the past conduct of the defendant and cannot easily be mooted by a future change in conduct. In *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), this Court held that a claim challenging the City of Atlanta's moratorium on issuing outdoor festival permits was not moot. 451 F.3d at 1277. Atlanta "moved to dismiss the challenge by CAMP to the moratorium as moot because 'the moratorium expired

four years ago and has never been reinstituted.'" *Id.* The case was not moot even though there was a change in policy because "CAMP requested damages in its complaint about the moratorium and has preserved an argument about that claim for relief on appeal." *Id.*

B. FFRF has a personal stake in receiving a nominal damages award.

Like the plaintiffs in *Naturist Society,* FFRF has a personal stake in a damages award for violations of its constitutional rights. OCSB claims, "No meaningful relief can be afforded by a determination of the merits in this Litigation because the only challenged conduct was the Distribution Decision." (Answer Brief at 39). FFRF's Complaint sought, "Nominal damages for past violations of Plaintiffs' constitutional rights." (App. 033, ¶ 89). OCSB would have it that a damages claim for any past violation of constitutional rights can instantaneously be mooted by changing course months or years after the initiation of a lawsuit.

Yet, FFRF has a right to seek nominal damages, which are appropriate in the context of a First Amendment violation. *See KH Outdoor, LLC v. City of Trussville II*, 465 F.3d 1256, 1261 (11th Cir. 2006). To recover nominal damages, a plaintiff is not required to prove actual injury but "must show only a violation of a fundamental constitutional right." *Id.* at 1262. In *KH Outdoor II,* the Court recognized that impermissible discrimination based on the content of speech was within the realm of fundamental constitutional rights. *Id.*

OCSB trivializes its unconstitutional viewpoint discrimination. OCSB asserts that FFRF's nominal damages claim "is merely an attempt to maintain jurisdiction for the issuance of an advisory opinion" because "OCSB agreed to allow the distribution of all FFRF's materials subject of this Litigation…" (Answer Brief at 39). But a change in practice cannot undo the unconstitutional viewpoint discrimination that took place during the 2012-2013 school year.

FFRF materials were submitted for the May 2, 2013 distribution and many were rejected by OCSB. (App. 095, ¶ 39; App. 159-60, ¶ 4). OCSB rejected some of the materials because "the claim that Jesus was not crucified or resurrected is age inappropriate" and "the District's administration will not permit the distribution of materials insulting religions." (App. 024, ¶ 48; App. 026, ¶ 56; App. 038). Thus, FFRF was unable to fully communicate its message on May 2, 2013 during its designated day of literature distribution.

OCSB claims that such censorship is moot because it later offered to allow FFRF to distribute materials the next year on January 16, 2014.[4] The proposition that this moots a damages claim is especially troubling in the context of viewpoint discrimination. A speaker who has been silenced by the government is unable to go back in time and speak as he or she desired. Also, the intended audience of the speech

[4] FFRF disputes that OCSB made a bona fide change in conduct given the timing of the OCSB offer.

has changed as students who attended OCBS high schools and received bibles may well have graduated or now attend a new school. A claim of nominal damages is an entirely appropriate remedy to address the injury to the plaintiffs given that the distributions are limited to one day per year and that FFRF could not speak as it desired during the May 2, 2013 distribution.

Finally, this case is factually and legally distinct from *Seay*, 397 F.3d 943, for which OCSB cites as "jurisprudence that shows a nominal damages claim does not always save the day." (Answer Brief at 39). In *Seay,* the complained of sign ordinance was repealed two months prior to the lawsuit and the lawsuit did not challenge the new version of the sign ordinance. *Id.* at 945. The Court also noted, "Seay does not claim that that particular provision is unconstitutional. Rather, *Seay* claims that the Repealed Sign Ordinance is unconstitutional in its entirety..." *Id.* at 946. The claims in *Seay* seemingly involved a facial challenge to a repealed law and did not include a challenge to the particular provision enforced against the plaintiff. In contrast, FFRF challenges a governmental enforcement practice as unconstitutional and its claim for nominal damages directly relates to particular censorship action taken against it. Seay claimed that an obsolete statute was at one time unconstitutional on its face.

Like the claims for damages in *Naturist Society,* 958 F.2d 1515, *CAMP Legal Def. Fund,* 451 F.3d 1257 and *KH Outdoor II,* 465 F.3d 1256, FFRF's nominal damages claim is live.

V. **The District Court's discovery ruling encourages parties to burden the court with motions to compel before there is a reason to compel, i.e., before the party has refused to produce discovery.**

The legalities of this issue have been well briefed. But this discovery issue also presents a straightforward policy question for this Court: if opposing counsel promises to fulfill discovery, should attorneys assume opposing counsel will renege and file a motion to compel; or should parties assume opposing counsel will honor the promise and file motions to compel only when it becomes clear the other party will not?

FFRF requested documents and depositions before discovery ended. OCSB's counsel promised to produce the documents and schedule the depositions. Relying on the promise, FFRF's counsel did not burden the District Court with a motion to compel before opposing counsel had unequivocally welshed. FFRF's motion was held untimely because it was filed on the last day of discovery; the motion was clearly filed within the discovery deadline. Moreover, if FFRF had submitted a motion to compel earlier, it would have been premature. Prudence and policy ought to decide this issue in favor of not burdening the already overwhelmed federal courts with thousands of premature motions to compel.

It would be counterproductive for courts to encourage lawyers to run to judges at every whiff of a discovery violation. But upholding the District Court's order does precisely that, by punishing parties that seek the court's help in addressing violations that have in fact occurred.

OCSB's argument that FFRF failed to properly seek jurisdictional discovery is also without merit. Contrary to OCSB's contention, FFRF did not merely mention the issue in passing but rather discussed the issue in detail (for three pages) in its response to OCSB's motion to dismiss, and it provided multiple citations to Eleventh Circuit case law in support of its request for jurisdictional discovery. App. A22, 153-155. Therefore, because FFRF properly requested jurisdictional discovery in response to the motion to dismiss, the District Court committed reversible error by granting the motion to dismiss without permitting the requested discovery. *See Eaton v. Dorchester Development, Inc.*, 727, 729 (11th Cir. 1982) (reversing dismissal for lack of subject matter jurisdiction and remanding for discovery on jurisdictional facts where deposition had not taken place because a "[p]laintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2015 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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