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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FOR INJUNCTIVE, DECLARATORY, AND OTHER RELIEF; AND INCORPORATED MEMORANDUM OF LAW

Under the U.S. Constitution, the government cannot prohibit speech because of its message or treat similarly situated groups differently. Orange County Public School Board allowed World Changers of Florida, an evangelical Christian group, to actively distribute its version of the Bible without vetting it; then, after an extensive vetting process, prohibited plaintiffs from distributing literature critiquing the Bible and Christianity. Did Orange County unconstitutionally discriminate against plaintiffs and their message?

This case is not about the truth of the literature at issue or public schools' ability to regulate *student* speech; this case is about the government treating two non-student speakers addressing the same topic — religion — differently because of their differing messages.

Pursuant to Rule 56, Federal Rule of Civil Procedure, Plaintiffs, FREEDOM FROM RELIGION FOUNDATION, INC., DAN BARKER, ANNIE LAURIE GAYLOR, and

DAVID WILLIAMSON, submit this Motion for Summary Judgment on all the claims in their complaint and request the following relief against Defendant, ORANGE COUNTY SCHOOL BOARD:

A. A declaratory judgment that the Orange County School Board violated plaintiffs' rights protected by the First and Fourteenth Amendments to the United States Constitution, including free speech and equal protection.

B. A declaratory judgment that distributing Bibles in public schools precludes the Orange County School Board from prohibiting plaintiffs' literature now or in the future as age inappropriate or potentially disruptive.

C. A permanent injunction ordering the Orange County School Board to refrain from prohibiting plaintiffs' literature on the basis of its viewpoint and to institute policies and procedures to protect against such violations in the future.

D. Nominal damages for past violations of plaintiffs' constitutional rights.

E. Costs of this action including attorneys' fees under 42 U.S.C. §1988.

F. Such other relief as this Court deems just and proper.

There are sufficient undisputed facts for this Court to rule in favor of plaintiffs, and plaintiffs are entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Orange County School Board ("Orange County" or "District") created a limited public forum in Orange County Public Schools for outside groups to distribute materials to

students.[1] World Changers of Florida distributed New International Version Bibles to students in 11 public schools.[2] World Changers was the first group to use Orange County's limited public forum.[3] World Changers had active, as opposed to passive, distributions.[4]

Orange County has admitted that it "did not read," let alone vet, World Changers' version of the Bible before approving it for distribution.[5] Yet, Orange County required plaintiffs to submit the literature they wished to distribute for review: "to ensure they are not the types of materials we may prohibit from distribution …."[6]

Plaintiffs submitted their literature (nine "nontract" pamphlets, five brochures, five books,[7] one essay, and one sticker) for review on January 29, 2013.[8] Not all the material was approved for distribution;[9] some was prohibited. Nearly three months later, on April 22, 2013, Orange County sent the plaintiffs the letter attached to the Complaint as Exhibit A.[10] This letter explains which literature was permitted, which was prohibited, and the reasons for those prohibitions. Orange County wrote another letter on April 25, 2013 that prohibited Robert Green Ingersoll's essay *The Truth.*[11] The reasons behind Orange County's prohibitions are laid out in **Appendix I.** Among its objections, Orange County noted that plaintiffs' literature:

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[1] Def. Answer ¶1, 18.
[2] Def. Answer ¶21, 22.
[3] Def. Answer ¶31.
[4] David Williamson Declaration in support of Plaintiffs' Motion for Summary Judgment authenticates the relevant documents in the complaint and verifies other facts contained in this motion.
[5] Def. Answer ¶23.
[6] Exhibit E to plaintiffs' complaint; page 21 of document 1-1. "Defendant admits that exhibit E was sent by its counsel to Plaintiffs' counsel" Def. Answer ¶27, 28.
[7] Plaintiffs initially submitted eight books but voluntarily rescinded three; only five were vetted.
[8] Def. Answer ¶32, 33, 35.
[9] Def. Answer ¶37, 39, 40, 49.
[10] Defendant admits to sending this letter. *See* Def. Answer ¶43, 45, 56, 58.
[11] Defendant admits to sending this letter. *See* Def. Answer ¶41.

> mentions sex;[12] describes the religious rituals of ancient societies;[13] claims that Jesus was not crucified or resurrected;[14] mentions prostitution;[15] speaks of circumcision;[16] discusses "what the Bible does or does not say about abortion;"[17] discusses "the shortcomings of the Mormon Church and the Roman Catholic Church;"[18] criticizes the God of the Bible;[19] "argues that Jesus did not promote equality and social justice, was not compassionate, was not reliable and was not a good example;"[20] "criticizes the Roman Catholic Church… [and] criticizes Protestants and Roman Catholics… "[21]

As a result of the censorship, and the fact that the vetting process was applied to plaintiffs but not World Changers, plaintiffs are disinclined to participate in future distributions.[22] Plaintiffs would like to distribute other literature, but are reluctant to submit it through the same vetting process that previously censored them.[23] Orange County has no policy on literature distributions.[24] Orange County has never claimed to change or institute any new policy on distributions. It has made no substantive changes to the rules or vetting process.[25] While it reversed course regarding specific materials, its management of the forum is unchanged.[26] Plaintiffs filed suit to protect their right to free speech and equal protection.

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[12] Complaint Exhibit A, page 2 ¶2A; page 3 ¶5B through 5G, 5I; page 4 ¶9.
[13] Complaint Exhibit A, page 2 ¶2E.
[14] Complaint Exhibit A, page 2 ¶3.
[15] Complaint Exhibit A, page 2 ¶4.
[16] Complaint Exhibit A, page 3 ¶5H.
[17] Complaint Exhibit A, page 2 ¶2D; page 4, ¶8.
[18] Complaint Exhibit A, page 2 ¶3, 4; page 3 ¶5A.
[19] Complaint Exhibit A, page 3 ¶2.
[20] Complaint Exhibit A, page 4 ¶7.
[21] Complaint Exhibit B, page 3.
[22] *See* David Williamson declaration in opposition to Defendant's Motion to Dismiss, ¶¶14-16.
[23] *See* David Williamson declaration in opposition to Defendant's Motion to Dismiss, ¶¶5-7, 14-16.
[24] Answer ¶28, 29.
[25] *See* David Williamson declaration in opposition to Defendant's Motion to Dismiss, ¶¶14-16.
[26] *Id.*.

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

ARGUMENT

1. Orange County violated plaintiffs' free speech rights.

A. Orange County opened a limited public forum and was therefore required to manage the forum fairly and impartially.

It is undisputed that Orange County has opened a limited public forum in its public schools. Therefore it "is bound by the same standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Orange County is required to treat differing viewpoints equally. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (citing *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984)). *See also, Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972); *Perry*, 460 U.S. at 59; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

The viewpoint neutrality principle is worth repeating: the government cannot "*regulate speech* in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel*, 508 U.S. at 394 (emphasis added). Violating this principle does not require

malice or announcements opposing the unpopular speech — it only requires: (1) government regulation of speech in (2) a way that disfavors one viewpoint. In this case, the government has not only regulated speech so as to favor the religious viewpoint at the expense of plaintiffs' viewpoint, but also provided written reasons for its viewpoint discrimination that fail to meet any constitutional test.

Orange County's management of the forum violated plaintiffs' free speech rights for three reasons: (1) it allowed material promoting religion, but not material critical of religion (2) it had no valid reason for prohibiting plaintiffs' literature, and (3) it has unbridled discretion to prohibit speech.

B. Orange County allowed materials promoting religion, but prohibited literature critical of religion. Favoring one viewpoint and censoring another is quintessentially viewpoint discrimination.

"The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175-6 (1976). *See also Young v. Am. Mini Theatres, Inc*., 427 U.S. 50, 67 (1976) ("[R]egulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1258-59 (11th Cir. 2004) (Barkett, J. *concurring*) (government has no authority to enforce a "heckler's veto").

Viewpoint discrimination is easily recognized. For instance, denying Christian editorials by denying funds to print those editorials is viewpoint discrimination. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). As is denying a religious group access to a school's literature distribution forum. *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004).

Rosenberger is the most significant and applicable of these decisions. The Court found viewpoint discrimination because the government had eliminated messages reflecting religious perspectives. The same ought to hold true for regulations and practices that exclude nonreligious viewpoints or viewpoints critical of religion.

In fact, the same *does* hold for messages that are critical of religion. The Supreme Court summed it up, "from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). The government cannot prohibit, even in public schools, messages that are critical of religion. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) (upholding student-delivered message critical of religion, "Islam is a lie").

Appendix I shows that every reason Orange County claimed for censoring plaintiffs' speech could equally be applied to the District-approved Bible, but was not. The sole

difference between approved and censored speech is the viewpoint. The religious message portrayed in the Bible was permitted, while messages critical of religion were prohibited.

If Orange County legitimately prohibited plaintiffs' literature, the District must also prohibit the Bible. Conversely, once a school allows the Bible to be distributed, it cannot deny other literature as age inappropriate or likely to cause a disturbance when an objective review would disqualify the Bible on those same grounds.

C. Viewpoint discrimination is presumptively unconstitutional. Orange County's age-inappropriate and disruption objections are *in fact* viewpoint discrimination and cannot overcome that presumption.

This Court has held that "viewpoint discrimination is presumptively unconstitutional." *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough County,* Fla., 905 F. Supp. 2d 1262, 1273 (M.D. Fla. 2012) (citing *Rosenberger* 515 U.S. at 828 (1995)). That presumption is nearly impossible to overcome and Orange County offers no good reason for doing so.

The government may exclude speakers in a limited public forum based on the content of their speech, not its viewpoint, "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius,* 473 U.S. at 800; *Perry,* 460 U.S. at 45.

Orange County has proffered two reasons for excluding the bulk of plaintiffs' message: (1) it is age inappropriate and (2) it is likely to cause a disruption. Neither of these can overcome the presumption of invalidity because they are not genuinely based on content. In this case, each "explanation is merely a pretext for viewpoint discrimination." *Cornelius* 473 U.S. at 797.

(1) ***Orange County's claim that plaintiffs' literature was age inappropriate is a pretext for viewpoint discrimination because the District-approved Bible contains content equivalent to that which is supposedly age inappropriate and because the District* knew *about these similarities yet still prohibited plaintiffs' literature.***

The similar and often identical content of the allegedly age-appropriate Bible and plaintiffs' prohibited, allegedly age-inappropriate literature proves that the age-inappropriate rationale is an excuse to justify viewpoint discrimination.

Appendix I shows that every "age inappropriate" objection Orange County raised to plaintiffs' literature has a direct parallel, albeit from an opposite viewpoint, in the Bible. Orange County prohibited some of plaintiffs' literature because it:

- mentions sex and virginity,[27]
- mentions abortion,[28]
- describes the religious rituals of ancient societies,[29]
- discusses the crucifixion and resurrection of Jesus,[30]
- mentions prostitution,[31]
- speaks of circumcision[32]

All these themes appear in the District-approved Bible. Orange County objected to the viewpoint, not the propriety of content.

Orange County prohibited one of plaintiffs' books in part because, "[t]he claim that Jesus was not crucified or resurrected is age inappropriate for the maturity levels of many of the students in high school."[33] The District-approved Bible claims that Jesus *was* crucified and resurrected. It is not that torture, or execution, or rising from the dead are age-

[27] Complaint Exhibit A, page 2 ¶2A; page 3 ¶5B through 5G, 5I; page 4 ¶9.
[28] Complaint Exhibit A, page 2 ¶2C, 2D.
[29] Complaint Exhibit A, page 2 ¶2E.
[30] Complaint Exhibit A, page 2 ¶3.
[31] Complaint Exhibit A, page 2 ¶4.
[32] Complaint Exhibit A, page 3 ¶5H.
[33] Complaint Exhibit A, page 2, ¶3.

inappropriate topics; it is that one viewpoint — "that Jesus was not crucified or resurrected" — is allegedly age inappropriate.

Two facts clearly show that Orange County *knew* that "age inappropriate" concepts appear in both the Bible and plaintiffs' literature. First, the very literature prohibited often cites and directly quotes the Bible. For instance, of the 1,373 substantive words in the prohibited pamphlet *Why Jesus?*, 797 directly quote, cite, or discuss passages present in the Bible.[34] *Why Jesus?* was not prohibited because it discussed a religious figure and the tenets of his religion; it was prohibited because of its viewpoint, because "it argues that Jesus did not promote equality and social justice, was not compassionate, was not reliable and was not a good example."[35]

Second, plaintiffs made this point to Orange County several times prior to litigation, yet the District stood by and, importantly for the relief plaintiffs have requested, *continues to stand by its censorship as valid*.[36]

Orange County knew that it was prohibiting literature because of its viewpoint, but did so anyway.

(2) ***The only remotely plausible governmental interest Orange County claimed – the potential for classroom disruption – is not valid against plaintiffs' "silent, passive" distribution***.

Orange County's passive distribution rule is the appropriate, narrowly-tailored tool for preventing disruptions, not censorship. Orange County attempts to justify the censorship using the *Tinker* line of cases. Under *Tinker*, a public school may not restrict private student

[34] The text of *Why Jesus?* is attached to the complaint as Exhibit G.
[35] Complaint Exhibit A, page 4 ¶7.
[36] Motion to Dismiss ¶14 and Palmerini Affidavit Exhibit A.

expression unless the school reasonably forecasts it "would materially and substantially interfere with the requirements of appropriate discipline in operation of the school," or "impinge upon the rights of other students." *Tinker*, 393 U.S. at 505–06, 509. But Orange County had already protected against classroom disruptions by enforcing silent, passive distribution rules against plaintiffs.

There was no reasonable danger of disruption from plaintiffs' passive literature distribution. Even in cases involving student speech, unlike citizen speech at issue here, "Officials may not restrict speech based on 'undifferentiated fear or apprehension of disturbance' or a 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'" *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 37 (10th Cir. 2013) (citing *Tinker*, 393 U.S. at 508–09). A reasonable forecast of disruption must be based on a "concrete threat." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 262 (3d Cir. 2002). The fact that students could easily avoid plaintiffs' message is important to the constitutional calculus. *See Cohen v. California*, 403 U.S. 15, 21-23 (1971).

An example of a legitimate restriction on public school speech is the fetus doll distribution prohibited in *Roswell*:

> [S]tudents pulled the dolls apart, tearing the heads off and using them as rubber balls or sticking them on pencil tops. Others threw dolls and doll parts at the "popcorn" ceilings so they became stuck. Dolls were used to plug toilets. Several students covered the dolls in hand sanitizer and lit them on fire. One or more male students removed the dolls' heads, inverted the bodies to make them resemble penises, and hung them on the outside of their pants' zippers.713 F.3d at 31.

The dolls actually disrupted school operations and were legitimately prohibited. It may even have been foreseeable that distributing thousands of small, nude, rubber fetus dolls to high

school students might cause some disruption. But the same cannot be said of literature, sitting "silent, passive" on a table for students to voluntarily take or leave.

In this case, there was no danger of disruption. When, as occurred here, the literature is distributed in a polite, orderly, and non-disruptive fashion, students are not forced to take materials, and ingress or egress to a building is not blocked, there is no basis for restricting the activities. *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 971 (5th Cir. 1972). This is precisely the kind of "silent, passive" expression that courts will not allow schools to limit. *See Tinker*, 393 U.S. at 514; *Roswell*, 713 F.3d at 37. Indeed, there is no doubt that plaintiffs' distribution *was* passive—though the Bible distributions were not.

Like *Tinker*, here "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id*. at 514. Also like *Tinker*, plaintiffs "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id*. Therefore, like *Tinker*, "In the circumstances, our Constitution does not permit officials of the State to deny their form of expression." *Id.* Orange County had no valid reason to censor plaintiffs.

(3) ***Even if the disruption interest were valid against plaintiffs' passive distribution, Orange County's disruption claim is a pretext for viewpoint discrimination because it approved a Bible with content nearly identical to the alleged disruptive content of plaintiffs' literature. The content was not disruptive, only the viewpoint.***

Plaintiffs are not arguing that a disruption must "actually materialize. School officials may prevent problems as long as the situation 'might reasonably lead authorities to

forecast' substantial disruption … [but] [t]his forecast must be reasonable." *Roswell,*713 F.3d at 36-37 (citing *Tinker*, 393 U.S. at 514). But Orange County cannot use the disruption interest as a pretense to stifle a viewpoint: "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The Court continued, "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511.

Unlike *Heinkel v. Sch. Bd. of Lee County, Fla.,* where the school's disruption finding was upheld, Orange County permitted literature with nearly identical content but a different viewpoint. 194 F. App'x 604 (11th Cir. 2006). A brief perusal of Orange County's letters explaining its rationale for prohibiting plaintiffs' literature shows that it was the literature's viewpoint, and not its capacity for disruption, that was so offensive. Orange County prohibited plaintiffs' literature as disruptive because it:

- mentions killing humans and discusses the relative value of human life,[37]
- discusses "what the Bible does or does not say about abortion"[38]
- discusses "the shortcomings of the Mormon Church and the Roman Catholic Church"[39]
- criticizes the God of the Bible,[40]
- criticizes a character in the Bible (i.e., "argues that Jesus did not promote equality and social justice, was not compassionate, was not reliable and was not a good example.")[41]

[37] Complaint Exhibit A, page 2 ¶2B.
[38] Complaint Exhibit A, page 2 ¶2D; page 4, ¶8.
[39] Complaint Exhibit A, page 2 ¶3, 4; page 3 ¶5A.
[40] Complaint Exhibit A, page 3 ¶2.
[41] Complaint Exhibit A, page 4 ¶7.

- "criticizes the Roman Catholic Church… [and] criticizes Protestants and Roman Catholics… "[42]

According to Orange County:

- What the Bible says about abortion **is not disruptive**; pointing out what the Bible says about abortion **is disruptive.**
- Saying that God is good **is not disruptive**; saying that God is not good **is disruptive.**
- Asserting that Jesus was reliable **is not disruptive**; asserting that Jesus was unreliable **is disruptive.**
- Endorsing Christianity while criticizing other religions **is not disruptive**; endorsing no religion and criticizing all religions equally **is disruptive.**

Viewpoint is the issue. As with the age appropriate objections, every disruption objection has a biblical parallel, illustrating the dissembling, as opposed to compelling, nature of this interest. *See* **Appendix I.**

D. Orange County has unbridled discretion bound by no policy or procedure when prohibiting speech in the forum. This unchecked authority chills speech, especially in light of Orange County's past actions.

Government policies requiring pre-approval of speech are unconstitutional: "vague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable." *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 822-23 (5th Cir. 1979). When allowing or licensing speech, "placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 757 (1988) (citations to six Supreme Court cases omitted).

[42] Complaint Exhibit B, page 3.

Unbridled censorial power is unconstitutional in the school context. A policy giving the school unfettered discretion to deny access to the forum for any reason at all violates the First Amendment. *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006). Even pre-approval is problematic in the school context. A literature distribution policy requiring school approval three days before the proposed distribution is an impermissible prior restraint under the First Amendment, because the policy gave school officials the unbridled discretion to suppress protected speech in advance. *Slotterback ex rel. Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 68 Ed. Law Rep. 599 (E.D. Pa. 1991).

Even written policies that fail to prescribe "time limits within which the School Board must act to grant or deny a request to distribute documents" present "significant risks of arbitrary censorship." *Heinkel*, 194 F. App'x at 608-09 (citing *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1270–71 (11th Cir.2005) and *Shanley*, 462 F.2d at 978)). Orange County not only has no time limits, forcing plaintiffs to wait several months for approval, it has no policy at all.

The First Amendment requires that courts strike down policies, procedures, and practices open to "arbitrary application . . . because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc*., 452 U.S. 640, 649 (1981).

Orange County has tried to obscure the issue in this case by claiming that anyone can distribute anything. But Orange County made this same claim to plaintiffs in January 2013 and this claim is the reason plaintiffs asked to distribute literature in the first place. Since

that time, through its initial denial of plaintiffs' literature, through litigation, and up to the submission of this motion, Orange County has not changed or instituted a policy that would prevent discrimination or censorship. It has not subjected any other literature to the vetting process that plaintiffs endured — it does not even have a policy explaining that process. As it stands, there are no criteria, no policies, no rules, and no processes for distributing new literature, something plaintiffs have desired from day one. All is left to the unbridled discretion of government personnel who previously censored plaintiffs' speech.

This unbridled discretion is a violation in itself, but it also violates plaintiffs' rights now *and in the future* because it chills speech: "The mere potential for the exercise of [governmental censorial power] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez,* 132 S. Ct. at 2548. *See also Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1267 (S.D. Fla. 2012).

There not only exists an unbridled censorial power that currently casts a chill, but **four of Orange County's past actions** exacerbate this chilling effect. **First**, Orange County has already censored plaintiffs' speech. The illegality of that censorship was repeatedly pointed out to it, yet went uncorrected. Litigation was required. **Second**, Orange County stands by that initial, illegal censorship. Orange County believes it was correct in prohibiting the materials in the first place[43] and that it had "a good faith and legitimate reason to deny some of the materials."[44] **Third**, on January 3, 2014, Orange County offered plaintiffs a disingenuous opportunity to distribute new literature, provided that any new literature was

[43] *See* Palmerini Affidavit Exhibit A.
[44] Motion to Dismiss ¶14.

submitted for approval by December 31, 2013 — *a deadline that passed three days **before** the offer was sent to plaintiffs*.[45] **Fourth**, Orange County has done nothing to check the unbridled power of its administrators even though that power was used so injudiciously in the past.

Both this unbridled discretion and past behavior show that all future literature distributions are just as likely to be censored as were past distributions. No citizen, at least no non-Christian citizen, can be expected to believe that his or her speech will be treated fairly in such a forum. Plaintiffs are "reluctant," "discouraged and inhibited as a result of the Defendants' vetting process."[46] Correcting this chilling effect requires both an injunction and declaration from this Court. Orange County would have this Court believe that no substantive change is required, that the word — and only the word — of the very person who discriminated against the plaintiffs in the first place is enough to ensure that discrimination will not repeat itself.

2. Orange County violated plaintiffs' right to equal protection.

Equal protection law can be a complicated quagmire. Thankfully, the parties agree on an important point of law, that "[t]he Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that the government treat similarly situated persons and groups equally."[47]

[45] *See* Palmerini Affidavit Exhibit A. Original affidavit included incorrectly dated letter. Amended Affidavit Exhibit A includes letter dated January 3, 2014—three days after the December 31, 2013 deadline.
[46] *See* David Williamson declaration in opposition to Defendant's Motion to Dismiss, ¶¶14-16.
[47] Complaint ¶81, Def. Answer ¶81.

The Supreme Court also agrees: "[t]he Equal Protection Clause of the Fourteenth Amendment … is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). In short, the government "must treat like cases alike." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Laws, rules, and policies must be equally applied.

Whatever the body of Equal Protection law requires with regard to protected classes, fundamental rights, and levels of scrutiny, this Court need not consider. The simple facts clearly show that two opposing, yet similarly situated groups were treated differently. Even under the lowest constitutional bar, the rational basis test, Orange County's unequal treatment cannot stand. This is not an argument that nonreligious plaintiffs asserting a free speech claim should receive the lowest level of scrutiny. Rather, plaintiffs are arguing that this Court need not determine which level of scrutiny is appropriate because Orange County's discrimination cannot be justified under even the most facile of constitutional tests.

"To state an equal protection violation, a plaintiff must show that they were treated differently from similarly situated people and that defendants unequally applied a facially neutral ordinance for the purpose of discriminating against plaintiffs." *Manseau v. City of Miramar*, 395 F. App'x 642, 645 (11th Cir. 2010) (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006)). In this case, the ordinance is the limited open forum Orange County created for passive literature distributions.

Only two groups have used Orange County's forum: the Christian group, World Changers, and plaintiffs, representing atheists, agnostics, freethinkers, and other nonreligious

citizens. Orange County treated plaintiffs and the similarly situated religious group differently in **four distinct ways**.

First, Orange County required that all literature be submitted for vetting and approval. This rule was only enforced against plaintiffs. Plaintiffs submitted their literature and received no approval for nearly three months, despite submitting literature significantly less voluminous than the Bible and rescinding some of their submitted literature. While plaintiffs' literature was extensively picked apart for even the tiniest nit, Orange County admits that it did not vet World Changers's literature. The religious group's literature was not reviewed; plaintiffs' literature was subjected to an extensive review.

Second, Orange County required that all literature distributions be passive — that the literature sit on an unattended table with a disclaimer and without solicitations. This rule was only enforced against plaintiffs. As the exhibits attached to the complaint show, World Changers had active distributions. World Changers set up interactive whiteboards asking students "WHAT IS YOUR BIGGEST QUESTION ABOUT THE BIBLE? Don't be shy… Take a marker and write your thoughts below. Also, feel free to pick up a Free Bible!"[48] World Changers had volunteers, both students and adults, staffing the tables to talk with students and presumably to encourage them to "pick up a Free Bible!"[49] World Changers also passed out invitations to worship at the Orlando Wesleyan Church.[50]

Plaintiffs asked to pass out similar invitations, but were prohibited. Plaintiffs were not permitted to have interactive whiteboards. Plaintiffs were not permitted to staff the tables

[48] Complaint Exhibit M.
[49] Complaint Exhibit N.
[50] Complaint Exhibit O.

(except to briefly restock the literature). In short, the passive distribution rules applied to plaintiffs, but not the similarly situated religious group.

Third, Orange County has allowed World Changers to dictate the distribution date for plaintiffs. Obviously, Orange County can put legitimate time and place restrictions on its forum. But forcing all groups to distribute their literature on a date selected by the religious group is not a reasonable restriction. It is a delegation of school power to a religious organization. For the reasons explained to Orange County in plaintiffs' January 13, 2014 letter, plaintiffs particularly object to being forced to distribute their literature alongside Bibles on "Religious Freedom Day."[51]

There can be no rational basis for treating plaintiffs differently in any of the three aforementioned instances.

Fourth, the free speech argument laid out above shows that there is no legitimate, reasonable, or rational basis for censoring plaintiffs' literature while allowing the Bible. The bulk of plaintiffs' literature was prohibited, all of World Changers' was allowed. "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard." *Mosley*, 408 U.S. at 96 (internal citations omitted). By censoring plaintiffs' message Orange County has violated both the First Amendment and the Equal Protection Clause.

[51] *See* Response to MTD, Williamson Declaration Exhibit A.

CONCLUSION

This brief shows that Orange County has subjected plaintiffs "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" and therefore "shall be liable" under 42 U.S.C. §1983 for redress.

Orange County seems distracted by the idea that plaintiffs would prefer the forum to close.[52] Plaintiffs have been up front about this from the beginning both with the court and defendants[53] and this preference is a viable option for resolving the District's mismanagement of the forum. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783-84 (1995)(Souter J., concurring); *Perry,* 460 U.S. at 46; *Chabad-Lubavitch of Georgia v*. *Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993). Orange County has rebuffed these closure attempts so plaintiffs tried to rely on the old saying, "if you can't beat 'em, join 'em." But Orange County bullied them out of the forum. That plaintiffs wish defendant would stand by its educational mission in no way mitigates the violation Orange County committed. It has opened a forum; it now has a duty to ensure that the forum is managed in a fair and constitutional manner. Orange County breached this duty and ought to be held accountable.

Plaintiffs ask the Court to grant this motion and order the requested relief.

Dated May 12, 2014

STEVEN M. BRADY
TRIAL COUNSEL

/s/ Steven M. Brady
Steven M. Brady, Esquire

[52] *See* Answer, page 8, ¶9; Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss.
[53] Complaint ¶5; Exhibits pgs 16, 17-19.

FBN: 749516
The Brady Law Firm, P.A.
7380 W. Sand Lake Road
Suite 500
Orlando, FL 32819
Telephone: 321-300-5290
Email: steven@bradylaw.us

CO-COUNSEL FOR PLAINTIFFS
Andrew L. Seidel
WI Bar Number: 1089025
Freedom From Religion Foundation
PO Box 750
Madison, WI 53701
Email: aseidel@ffrf.org
Pro Hoc Vice