FREE SPEECH, FAKE NEWS & SOCIAL MEDIA: THE FIRST AMENDMENT IN THE SPOTLIGHT

South Florida Legal Guide recently interviewed Thomas R. Julin, a shareholder in Gunster's Miami office whose practice focuses on free speech, libel law and freedom of information cases for the press. Here are his thoughts on current First Amendment issues.

Q. WHAT IS THE FIRST AMENDMENT AND WHY IS IT IMPORTANT?

The First Amendment to the U.S. Constitution says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In this amendment, the founding fathers recognized that citizens need to be able to speak their minds and that the press plays a vital role in society by exposing excessive, unlawful or corrupt governmental actions.

Q. WHY IS IT IN THE NEWS TODAY?

President Trump's repeated attacks on the media are testing the First Amendment right from the top. But that's not the only issue facing the press. In South Dakota a beef products company accused by a government official of using fillers called "pink slime" filed a $6 billion libel suit against ABC News, which reported the controversy accurately. After a three-week trial, the case was settled recently. Hulk Hogan's successful invasion of privacy suit against the Gawker website has inspired a lot of hostility against the media.

Q. HOW DO THE COURTS VIEW THE FIRST AMENDMENT?

It will be important for the courts to rein in excessive libel and privacy invasion claims so that facts and viewpoints can continue to be freely expressed in our country. The U.S. Supreme Court in recent years has been a strong protector of speech of large corporate interests, but has not shown as much concern for individuals' speech rights.

Q. WHEN IT COMES TO LIBEL, WHAT CAN THE PRESIDENT SAY OR NOT SAY?

Libel law provides immunity to government officials whenever they are speaking in their roles. It also protects them from other types of tort actions. Although former FBI director James Comey told Congress that he was defamed by Trump's comments, basic common law principles protect the President.

Q. WHAT ABOUT SATIRISTS AND COMEDIANS?

The First Amendment also protects satirists and comedians, unless their words create a true threat to the President. The portrayal of Trump as "Julius Caesar" in a Broadway play, and Kathy Gifford's repulsive showing of the bloody head of President Trump are close to the edge. But anyone threatening real violence needs to be aware that the First Amendment does not provide protection.

Q. DO WE HAVE POLARIZATION IN THE MEDIA?

To some extent, the answer is yes. Many people listen to their own echo chambers, whether it's MSNBC or Fox News. However, the media as a whole does an excellent job presenting both sides of a story. While commentators today might be critical of the other side or focus on certain aspects of a story, they don't ignore it.

Q. SO IS THE MEDIA THE REAL PROBLEM?

No. Americans today are divided. Some favor Trump's approach with tax cuts and support for business, while others believe issues like healthcare and education for all are far more important. The media is very good at reporting on these issues, and people choose the arguments that fit their beliefs and values on both sides. So, what we have is a very healthy debate in our society. What we need to do is learn how to use these debates to solve our problems.

THOMAS JULIN

Q. HOW DO YOU DEAL WITH THE TORRENT OF FAKE NEWS ON SOCIAL MEDIA?

Both Facebook and Twitter have recognized that their platforms are being used by people who want to propagate false statements. They are implementing more fact checking, technical and social solutions, because they realize that people will turn away if they can no longer rely on their social media platforms.

Q. WHAT ABOUT TRADITIONAL MEDIA?

Newspapers and TV stations have implemented fact checking and editorial review systems throughout their existence. That's very different from social media where no one is filtering the news, and anyone can disseminate anything to millions of people.

Q. ANY FURTHER THOUGHTS?

The quality and depth of information now available to Americans is unparalleled in our history. During the Presidential campaign, we regularly saw fact-checking articles run side-by-side with the candidates' statements. In some cases, reporters have made mistakes and columnists have gone too far with their opinions. That's an ongoing concern, but nothing to warrant the ongoing campaign to undermine the integrity of serious journalism.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

PRISON LEGAL NEWS,

Plaintiff,

v. **Case No. 4:12cv239-MW/CAS**

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant.

_____/

ORDER

This case involves an as-applied First Amendment challenge to Florida Administrative Code Rule 33-501.401(3)(l) and (m), as well as a procedural due process claim brought under 42 U.S.C. § 1983. Prison Legal News[1] and Julie L. Jones, on behalf of the Florida Department of Corrections, litigated this case to a four-day bench trial beginning on January 5th, 2015.[2] This order sets forth the findings of fact, analysis of law, and verdict.

[1] In 2009, PLN, the corporation, changed its name to the Human Rights Defense Center. Tr. of Trial 36:24-:25 (Jan. 5, 2015). This order continues to refer to the entity as PLN.

[2] The sole remaining defendant in this action, Julie L. Jones, is the current Secretary of the FDOC. Two other secretaries have cycled through the FDOC during this litigation, Kenneth S. Tucker and Michael D. Crews. Some early documents are directed at these individuals. The Secretary of the FDOC is responsible for the overall management of the Florida prison system

I

The parties dispute the constitutionality of the FDOC's impoundment and rejection of PLN's magazine, *Prison Legal News*, a monthly publication comprising writings from legal scholars, attorneys, inmates, and news wire services. FDOC regulates inmate mail with Rule 33-501.401 of the Florida Administrative Code, titled "Admissible Reading Material." Rule 33-501.401 authorizes the FDOC to screen all mail entering its facilities and sets forth a detailed process by which it may impound that mail.

Section (3) of Rule 33-501.401 contains thirteen subsections, labeled (a) through (m), providing distinct criteria by which incoming publications "shall be rejected" from the prison population. The First Amendment action specifically challenges subsections (l) and (m), ECF No. 14 ¶ 22, which state:

> [A] [p]ublication[] shall be rejected when . . .
>
> (l) It contains an advertisement promoting any of the following where the advertisement is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.
>
> 1. Three-way calling services;
> 2. Pen pal services;
> 3. The purchase of products or services with postage stamps; or
> 4. Conducting a business or profession while incarcerated.

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and has ultimate responsibility for the promulgation and enforcement of all FDOC rules, policies and procedures, and administrative code provisions. *See* ECF No. 14 ¶ 15; ECF No. 68 ¶ 15. For simplicity, this order refers to Defendant Jones as the FDOC.

> [or]
>
> (m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person.

Fla. Admin. Code R. 33-501.401(3)(l), (m) (2009) (amended 2010).[3]

As relief, PLN requests a declaratory judgment that Rule 33-501.401(3) is unconstitutional as applied to *Prison Legal News*. ECF No. 14, at 13. PLN also seeks an injunction that prohibits the impoundment and rejection of *Prison Legal News*, orders the delivery of all previously censored and withheld issues, and requires individualized notice and an opportunity to be heard whenever a copy of an issue is rejected.[4] Finally, PLN seeks the same due process remedies for the books and information packets it has mailed to FDOC inmates, which it maintains the FDOC impounded without notice. Tr. of Trial 4-5 (Jan. 8, 2015).

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[3] That is the 2009 version. The Rule was amended in 2010. That amendment did not change subsections (3)(l) and (m). In the version before 2009, the prohibition against advertisements for three-way calling services, pen pal services, the purchase of products or services with postage stamps, and conducting a business while incarcerated appeared in section (4), not subsection (3)(l). *See* Fla. Admin. Code R. 33-501.401(4) (2006) (amended 2009). For clarity, this Court refers to these prohibitions as (3)(l). The other subsection at issue in this case is (3)(m), the Rule's residual clause. Prior to 2009, the residual clause appeared under subsection (3)(l). *See* Fla. Admin. Code R. 33-501.401(3)(l) (2006) (amended 2009). This Court refers to the residual clause as (3)(m).

[4] PLN attempted to add a void-for-vagueness claim. It sought leave to file a second amended complaint on February 19, 2013. ECF No. 119. That motion was denied for failure to show good cause. ECF No. 127, at 3. At the time, the trial was set for May 13, 2013. ECF No. 106. The trial would eventually be delayed by more than a year. Had this Court known, perhaps it would have ruled differently on the motion to amend. Either way, PLN did not again move to amend the complaint until *trial*. By then it was far too late, and the motion was denied.

II

This part of the order sets forth background facts that help situate the lawsuit in the broader contest between the parties.

A

This is not the parties' first rodeo—that would have been in February 2003, when the FDOC began censoring *Prison Legal News* due to its advertisement of services accepting postage stamps as payment, three-way calling services, pen pal services, and offers to purchase inmate artwork. *See Prison Legal News v. Crosby*, No. 3:04-cv-14-JHM-TEM, slip op. at 5-8, ¶¶ 4, 7, 14-16 (M.D. Fla. July 28, 2005), Pl.'s Trial Ex. 23 (the "Moore Order"). PLN sued the FDOC in January 2004 challenging that censorship under the First Amendment.[5] *Id.* at 2.

While the suit was pending in March 2005, the FDOC amended Rule 33-501.401 to clarify that publications would not be rejected for the advertising content in that case, so long as those ads are "merely incidental to, rather than

[5] The First Amendment challenge to the censorship was not the sole claim. PLN also argued that Rule 33-602.207 of the Florida Administrative Code, which prohibits prisoners from engaging in outside businesses or professions and which the FDOC interpreted as proscribing compensation for writing for *Prison Legal News*, infringes on PLN's First Amendment rights as a publisher. Moore Order 17. The Eleventh Circuit would eventually disagree. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 875 (11th Cir. 2006). Lastly, PLN had originally asserted a due process claim under the Fifth and Fourteenth Amendments, but abandoned that claim at the start of the bench trial. Moore Order 2 n.1.

being the focus of, the publication."[6] Moore Order 15. Following this amendment, the FDOC promised to no longer impound *Prison Legal News* for its advertising content. *Id.* at 13-15. The FDOC ceased impounding and rejecting *Prison Legal News* for the duration of the litigation and argued that PLN's First Amendment challenge to the Rule was moot.

This convinced the district court. Four months after the amendment was implemented, it found that the FDOC had "shown that the [newly adopted] procedures . . . allow for distribution of [*Prison Legal News*] in its current format" and that the magazine would not be rejected solely on the basis of the advertising content at issue. *Id.* at 15-16. The Eleventh Circuit reiterated these sentiments on appeal. In rejecting PLN's argument that an injunction was necessary to prevent further censorship, the Eleventh Circuit stated:

> We agree with the district court's finding that, although the FDOC previously wavered on its decision to impound the magazine, it presented sufficient evidence to show that it has "no intent to ban PLN based solely on the advertising content at issue in this case" in the

[6] Rule 33-501.401 has been amended several times. The FDOC's interpretation of the Rule has also fluctuated. In the first lawsuit, "the FDOC changed its position several times as to whether PLN's magazine contained prohibited material. In early 2003, the FDOC began impounding issues of PLN's magazine because they contained ads for three-way calling services, which are prohibited for Florida inmates because they pose a threat to prison security. In November 2003, the FDOC reversed its decision and allowed for delivery of eight issues that it had previously impounded. However, a month later, in December 2003, the FDOC again decided to impound the magazine for including three-way calling service ads due to ongoing security concerns. By March 2004, the FDOC was satisfied that its telephone provider could properly monitor prisoners' calls and that the three-way calling service ads were no longer a security concern. Therefore, the FDOC again approved delivery of the magazine." *McDonough*, 200 F. App'x at 875.

> future. The FDOC demonstrated that its current impoundment rule does allow for distribution of PLN in its current format and that the magazine will not be rejected based on its advertising content. The FDOC officially revised its impoundment rule and has not refused to deliver issues of the magazine since this amendment. . . . We have no expectation that FDOC will resume the practice of impounding publications based on incidental advertisements.

McDonough, 200 F. App'x at 878. Since the Eleventh Circuit disposed of the claim as moot, it further declared that, "[a]s to the current rule, we offer no opinion on its constitutionality." *Id.*

B

Less than three years after the Eleventh Circuit's ruling in *McDonough*, the FDOC amended the Rule to provide an additional ground for rejection under (3)(l). Under the revised Rule, publications with "*prominent* or *prevalent*" advertisements for services prohibited by (3)(l) would also be rejected. Fla. Admin. Code R. 33-501.401(3)(l) (emphasis added).

The 2009 amendments became effective on June 16, 2009. Def. Crews' Obj. to Pl.'s First Set of Interrogs. to Def. Crews 2-3 (Jan. 18, 2013), Pl.'s Trial Ex. 30. The FDOC has impounded every issue of *Prison Legal News* since September 2009. Tr. of Trial 105:24-106:2 (Jan. 6, 2015).

PLN initiated this suit on November 17, 2011. ECF No. 1. On December 16, 2011, PLN filed its First Amended Complaint. ECF No. 14. Only two counts remain, both against the FDOC. *See* ECF No. 117 (confirming the dismissal of the

other two original defendants under a settlement agreement). Count III is a First Amendment as-applied challenge to subsections (3)(l) and (m) of the Rule. ECF No. 14, at 11, ¶¶ 40-43. PLN alleges that the FDOC's actions "in refusing to deliver or allow delivery of Plaintiff's publications to Florida inmates in its custody, solely because of the presence of certain advertisements within these publications, violate Plaintiff's rights to free speech, press and association as protected by the First and Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983." *Id.* ¶ 43. And, in Count VI, PLN contends that the FDOC's "failure and refusal to provide Plaintiff with constitutionally required notice and an opportunity to be heard and/or protest the decision each time Plaintiff's publications are censored . . . violates Plaintiff's rights to due process of law protected by the Fifth and Fourteenth Amendments . . . and by 42 U.S.C. § 1983." *Id.* at 14, ¶¶ 52-55.

On January 5, 2015, the parties began a four-day bench trial on these two counts. ECF No. 235. At its conclusion, the Court extended the parties an opportunity to brief certain key issues. *See* ECF Nos. 241-44, 246.

III

In this part are the facts of the case, as found by this Court after careful consideration of all the evidence presented at trial. Most facts are undisputed. For those in dispute, the order lays out the competing views before resolving them.

A

Established in 1990 by Paul Wright and Ed Meade, *Prison Legal News* is a monthly magazine that reports on news and legal developments related to the criminal justice system. Tr. of Trial 32:8-:22 (Jan. 5, 2015).[7] PLN, a nonprofit with its principal place of business in Lake Worth, Florida, publishes *Prison Legal News*. Tr. of Trial 36:18-37:2 (Jan. 5, 2015). Its mission is to inform the public about events in prisons and jails and the need for progressive criminal justice reform, to inform prisoners and their advocates about these events and how to advocate for their rights, and to enhance rehabilitation for prisoners, ensure transparency and increase accountability of prison officials. Tr. of Trial 32:23-33:9 (Jan. 5, 2015).

Over the past 25 years, *Prison Legal News* has published over 700 articles on the FDOC and Florida prisons and jails, with coverage ranging from misconduct by FDOC contractors to individual cases involving a host of legal issues. Tr. of Trial 51:15-:22 (Jan. 5, 2015). Prisoners are the magazine's primary audience. Tr. of Trial 123:6-:10 (Jan. 5, 2015).

[7] The magazine was initially titled *Prisoner's Legal News*. Tr. of Trial 122:22-123:5 (Jan. 5, 2015). In 1992, the editors changed the name to *Prison Legal News* because they "thought that [the] news and information was too important to . . . restrict it to prisoners." *Id.*

Prison Legal News started carrying advertisements in 1996.[8] Tr. of Trial 41:16-:22 (Jan. 5, 2015). But it was not until February 2003 that the FDOC censored *Prison Legal News* for its advertising content. Tr. of Trial 41:23-42:8, 184:9-:10 (Jan. 5, 2015). The FDOC specifically took issue with the publication's advertisement of services accepting postage stamps as payment, three-way calling services, pen pal services, and offers to purchase inmate artwork; proscribed mostly by subsection (3)(l). Moore Order 5-8. The justification was that those advertisements presented a security risk because they promoted prohibited services. *Id.* at 3.

PLN sued and the FDOC subsequently amended the Rule several times during the 2005 litigation, vacillating between admitting publications containing (3)(l) advertisements and rejecting them. Moore Order 7. Eventually the FDOC settled on a rule that would not reject publications such as *Prison Legal News* for advertising services prohibited by subsection (3)(l), so long as the advertisements were "merely incidental to, rather than being the focus of, the publication." *Id.* at 8.

This Court finds that there were several reasons for this change. First, the FDOC believed that it had in place security measures to alleviate some of the concerns associated with the prohibited services advertized in *Prison Legal News*.

[8] The FDOC says that advertisements are unnecessary. The evidence overwhelmingly refutes that argument. This Court finds that without advertisements PLN could not print *Prison Legal News*. This Court further finds that printing a Florida-only edition of *Prison Legal News* would be cost-prohibitive. Tr. of Trial 60:23-71:14 (Jan. 5, 2015).

Significantly, the FDOC trusted that its telephone vendor, at the time MCI, could detect and block three-way calls and call-forwarding. *See, e.g.*, *id.* at 7; Tr. of Trial 78:11-:22 (Jan. 6, 2015). Second, the FDOC recognized that "incidental" advertisement did not pose a significant security threat to the prisons. Moore Order 15. Following this recognition, the FDOC promised that it would no longer impound and reject *Prison Legal News* "in its current format." *Id.* at 16. The Rule was not, as PLN claims, amended to "moot" the 2005 case. Tr. of Trial 78:11-:22 (Jan. 6, 2015).

Finally, this Court finds that the 2005 litigation did not concern services prohibited by subsection (3)(m). *See* Tr. of Trial 69:9-70:8 (Jan. 6, 2015) (discussing the major concerns in the prior litigation); Tr. of Trial 214 (Jan. 7, 2015) (testifying that prior litigation was not about subsection (3)(m)). This litigation does.

B

From 2005 to 2009 the FDOC, proceeding under the revised Rule, did not reject *Prison Legal News*. Then, in June 2009, the FDOC once again amended subsection (3)(l) of the Rule. Along with this revision came the decision to resume rejection of publications such as *Prison Legal News* for advertising services

prohibited by subsection (3)(l).[9] [10] At trial, the parties vigorously disputed what prompted these changes. Everyone agrees it was not any major incident or tragedy related to (3)(l) services, since none occurred between 2005 and 2009.[11] Tr. of Trial 5:9-:12 (Jan. 6, 2015).

FDOC administrators gave three primary reasons for amending subsection (3)(l) in 2009, each of which this Court deems credible. *See* Tr. of Trial 58:20-:21 (Jan. 6, 2015). The first was a disagreement among the administrators "over

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[9] At times during this litigation the FDOC has taken the position that the 2009 revisions were not substantive—that is, that the sole purpose was to clarify "incidental" to assist mailroom staff. The witnesses at trial could not agree on whether the change was substantive, and the parties never directly addressed the issue.

If truly not substantive, adding "prominent or prevalent" should not have resulted in heightened censorship, generally. Yet that is precisely what happened. Within a few months the FDOC resumed rejection of *Prison Legal News*, even though there was no noticeable change in the magazine between June 2009, when the rule was implemented, and September 2009, the first issue impounded since 2005. *See* Def.'s Trial Ex. 1; Pl.'s Trial Ex. 79.

What explains this inconsistency? First, it may not be an inconsistency at all. It could be the case that *Prison Legal News*' advertising content had ballooned well beyond "incidental" back in October 2008, when it made the permanent jump from 48 pages per issue to 56. *See* Pl.'s Trial Ex. 79, at 38. This would mean that FDOC mailroom staff mistakenly admitted *Prison Legal News* for nearly a year. Under this view, the 2009 amendment worked. The staff has gotten it right ever since, impounding and rejecting *every* issue of the magazine from September 2009 to the present.

This Court finds, however, that the *true* and more obvious answer is that the 2009 amendment was *not* a simple "restyling"—to borrow from the judicial Committee on Rules of Practice and Procedure—of the Rule. The evidence at trial bears this out. For instance, Susan Hughes, chairwoman of the Literature Review Committee from 2012 to October 2013, testified that she understood the 2009 revision to be a change in the rule. Tr. of Trial 2:13-:17, 6:9-7:8 (Jan. 7, 2015). And, as this Court will discuss, the FDOC provided additional justifications for the *substantive* decision to again reject *Prison Legal News*, such as renewed security concerns.

[10] The FDOC also began censoring *Prison Legal News* for advertisements prohibited by subsection (3)(m).

[11] While no single, major incident prompted the amendment, this Court finds that there *is* evidence that companies and prisoners disregarded prison rules against exchanging stamps for money and services. *See, e.g.*, Tr. of Trial 36:18-40:13 (Jan. 6, 2015).

whether the prior policy met the needs of the department." Tr. of Trial 59:8-:10 (Jan. 6, 2015). According to James Upchurch, new technology, such as the advent of Voice over Internet Protocol ("VoIP") technology, forced the FDOC to reconsider previous security decisions. Tr. of Trial 19:12-:22 (Jan. 6, 2015). Securus is the FDOC's current telephone vendor. Like MCI, it works by detecting noises and clicks made on a phone line that signal the initiation of three-way calls and call-forwarding. Tr. of Trial 15-16 (Jan. 6, 2015). Circumventing the system generally requires obfuscating those specific noises or transferring calls without any noise at all. VoIP employs the latter. Tr. of Trial 19:12-:22 (Jan. 6, 2015). The changes in technology proved wrong the FDOC's belief that it had adequate security measures to curb three-way calling and call-forwarding.

The second reason given was dissatisfaction with the vagueness of subsection (3)(l). FDOC administrators sought to clarify the circumstances under which publications should be censored for their advertising content. *See* Tr. of Trial 59:11-:14 (Jan. 6, 2015); *see also* Pl.'s Trial Ex. 30 (identifying clarity as the goal of the 2009 revisions). They did so with the antonyms "prominent or prevalent," which the FDOC believed would assist mailroom staff in their decision-making. Lastly, the FDOC had noticed an increase in the volume of advertisements related to postage stamps. Tr. of Trial 59:16-:18 (Jan. 6, 2015).

A major theme in PLN's First Amendment challenge is that the FDOC had no legitimate reasons for amending subsection (3)(l). So, PLN endeavored to undermine these reasons all through trial.

PLN asserts that the first reason—the purported circumvention of Securus—is false. Securus, like MCI, is contractually obligated to block the call services at issue. This contract was recently renewed by the FDOC. That means the system works, says PLN. Otherwise, the FDOC would not have renewed the contract.

FDOC offers evidence to refute PLN's argument. First, Securus itself admits it is not 100% effective. Second, FDOC personnel monitoring phone calls have heard inmates successfully transfer calls. Third, hundreds of thousands of attempted calls have been detected by Securus. According to the FDOC, this means that some prisoners successfully transfer calls, or else there would not be so many attempts.

FDOC officials also said that increasing Securus' effectiveness would be too costly. They explained that Securus could be made more effective by increasing its sensitivity to noise. The heightened sensitivity would capture more attempts, but also result in more false positives. It would shutdown inmates placing rule-abiding phone calls. This would lower prisoner morale and increase tension to untenable levels. Tr. of Trial 15-16:25 (Jan. 6, 2015). So it goes.

With respect to the first reason, this Court makes the following determinations. At the time of the 2005 litigation, the FDOC believed that its telephone vendor could detect all attempts at three-way calling and call-forwarding. After all, Securus, its current vendor, is contractually obligated to block three-way calls and call-forwarding attempts. Yet it is unable to do so. Some calls, including those transferred using VoIP technology, elude the system. There is no evidence to suggest that any other provider could do a better job than Securus. And while it is theoretically possible to increase Securus' efficacy, any benefit from doing so would be offset by attendant prison instability.

As to the third reason, PLN points out that the FDOC never ran a study to determine whether advertisements accepting stamps as payment increased between 2005 and 2009. Tr. of Trial 59:19-60:7 (Jan. 6, 2015). The FDOC instead relied on plain observations and noticed that the number of such advertisements had grown "substantially." Tr. of Trial 59:19-60:18 (Jan. 6, 2015); *accord* Tr. of Trial 8:22-9:1 (Jan. 6, 2015).

That is beside the point. In fact the magazine did increase in size. Tr. of Trial 109:18-110:6 (Jan. 5, 2015). In four years the magazine went from 48 pages to 56 pages per issue, containing both more substantive, non-offending content and prohibited advertisements. *See* Pl.'s Trial Ex. 79 (providing total number of pages for every issue of *Prison Legal News* dating back to January 2002); Def.'s Trial

Ex. 7. Qualitatively, the advertisements have changed as well. The number of "half page or greater" (3)(l) ads have increased. Def.'s Trial Ex. 7. And since 2010, PLN has run an offending advertisement on the back cover of the magazine. *Id.* Today, *Prison Legal News* is 64-pages long. *See* Pl.'s Trial Ex. 79. No formal study is necessary to see that.

PLN additionally argues that the FDOC is wrong to look to the total number of advertisements. Tr. of Trial 49:9-:12 (Jan. 7, 2015). Instead, as PLN would have it, the proper measure is the percentage of the magazine that is prohibited advertisement. Tr. of Trial 49:14-50:2 (Jan. 7, 2015). The merits of this argument are explored later. For now, suffice to say that the percentage of advertisements for three-way calling services, stamps as payment, pen pal services, and conducting a business services—that is, those prohibited by subsection (3)(l) of the Rule—increased only slightly from 9.21% in 2005 to 9.8% in 2009. *See* Pl.'s Trial Ex. 79, at 85. In 2014, (3)(l)-prohibited advertisements averaged 15.07% of the publication. *Id.*[12]

Notably, neither this "study" nor anything else introduced by the parties examines the percentage for advertisement prohibited by (3)(m). *See* Tr. of Trial 242, 250:9-:15 (Jan. 5, 2015) (explaining methods, which excluded (3)(m) ads);

[12] Evidence before this Court shows that advertising content in *Prison Legal News* has been on the rise since 2005. Paul Wright testified that PLN does not intend to further increase the number and size of offending advertisements. Tr. of Trial 59:8-:10 (Jan. 5, 2015). This Court has no reason to disbelieve Mr. Wright.

see also Def.'s Trial Ex. 7 (providing number of advertisements forbidden by other rules, including (3)(m), and showing that, by 2009, *Prison Legal News*' advertising content had widened to include more types of prohibited advertisements; but still not revealing the percentage of (3)(m) advertisements).

Another contention made by PLN, which it hopes this Court will adopt as fact, is that FDOC officials amended the Rule in 2009 specifically to exclude *Prison Legal News*. PLN cites email exchanges among FDOC administrators where they discuss the 2009 amendment and how the new rule might "run afoul" of the promises made in the 2005 litigation. *See, e.g.*, Tr. of Trial 61-66 (Jan. 6, 2015); Pl.'s Trial Ex. 57a-57i. To PLN, these emails are a smoking gun of the ulterior motive animating the 2009 revisions. *See* Tr. of Trial 135-136 (Jan. 5, 2015) (accusing the FDOC of censoring *Prison Legal News* for its editorial content).

At minimum, the emails reveal that FDOC officials were aware that the 2009 changes would lead to rejection of *Prison Legal News*. This supports the finding that the FDOC intended the 2009 amendments to be substantive. And perhaps when placed, as PLN does, in the broader context of FDOC prevarication and inconsistent application of the Rule, they hint at chicanery (more on this later). But it is still a stretch to say that the emails demonstrate that FDOC officials amended the Rule in 2009 specifically to exclude *Prison Legal News*.

These emails are the closest thing PLN presented to direct evidence that the FDOC targets *Prison Legal News*. Other circumstantial evidence relies heavily on inference to support this theory. PLN reasons, for example, that security concerns could not possibly underlie the amendment because no major incident or tragedy related to the services advertised occurred between 2005 and 2009. The Rule must then be a façade, masking institutional bias against a publication that informs prisoners of their rights.

Such a finding would be nothing less than conjecture. There are many reasons, not the least of which is that there *is* some evidence of stamp-related problems. Animus is not the only inference that can be drawn from the fact that the FDOC amended subsection (3)(l) before a calamity transpired. Plus, the FDOC unequivocally denies any malice, its officials going as far as saying that they view *Prison Legal News* favorably. *See, e.g.*, Tr. of Trial 212:9-:13 (Jan. 7, 2015). More importantly, PLN failed to offer *any* evidence showing that the FDOC does *not* censor other publications containing similar advertising content, or that the only other publications that the FDOC censors contain editorial content similar to *Prison Legal News*. To the contrary, the FDOC produced evidence, though limited, that it has repeatedly rejected other publications on (3)(l) grounds, some of which on their face do not resemble *Prison Legal News*. *See, e.g.*, Def.'s Trial Ex. 12, at 37-39 (censoring *American Arab Message* for advertising services for

stamps), 63-65 (censoring *Cellmates* for pen pal advertisement), 69-71 (censoring *Butterwater* catalog for advertising services for stamps), 72-74 (censoring *Picture Entertainment* for advertising services for stamps); Def.'s Trial Ex. 15.

Here, the more limited conclusion is the soundest. And that conclusion is that FDOC officials did not amend subsection (3)(l) in 2009 because they disliked *Prison Legal News*' "editorial" content.[13] And there is no evidence, this Court finds, that the FDOC censors *Prison Legal News* but not other publications with similar advertising content. Lastly, with respect to subsection (3)(l), this Court finds, consistent with the expert testimony presented at trial, that advertisements for such services implicate legitimate security concerns. Tr. of Trial 69-147 (Jan. 7, 2015).

Turning to subsection (3)(m), this Court makes the following findings. Subsection (3)(m) contains a residual clause requiring the FDOC to reject publications that otherwise present a threat to security, order, rehabilitative objectives, and safety. From 2009 onward, the FDOC became increasingly concerned with services falling outside the ambit of (3)(l) and within the purview of (3)(m). *See, e.g.*, Tr. of Trial 15:14-:20 (Jan. 7, 2015). Chiefly troubling among

[13] It is not entirely clear how much "motive" matters, if at all, in the First Amendment analysis. The order later explores the divergent case law on this issue. Ultimately, this Court does not decide whether motive matters because, even if it does, PLN failed to present sufficient evidence that FDOC officials acted with ill will in 2009 when they amended the Rule and resumed impounding *Prison Legal News*.

these services—at least to the FDOC—are prisoner concierge services, which enable inmates to establish outside bank accounts, run background checks, and locate people, among other things. *See* Tr. of Trial 69:9-70:8 (Jan. 6, 2015); *see also* Tr. of Trial 73:13-:21 (Jan. 7, 2015) (listing services falling under umbrella term "prisoner concierge services"). This Court finds, consistent with the expert testimony produced by the FDOC, that advertisements for these services constitute legitimate security risks. *See* Tr. of Trial 69-147 (Jan. 7, 2015).

Prison Legal News contained these sorts of advertisements in 2009. *See* Def.'s Trial Ex. 7. It did not back in 2005. *See id.* Indeed, the largest increase in advertisements in *Prison Legal News* has been for prisoner concierge services. Tr. of Trial 73:13-:21 (Jan. 7, 2015). Unremarkably, then, the FDOC began invoking subsection (3)(m) to censor the publication.

Not all of PLN's evidentiary arguments are duds. The following is largely undisputed. Florida is the *only* state that censors *Prison Legal News* because of its advertising content. Tr. of Trial 71:15-:20, 198-200 (Jan. 5, 2015). The private prison corporations censor *Prison Legal News* only in Florida as well. Tr. of Trial 75:14-:20 (Jan. 5, 2015). Some states that previously censored the publication because of its advertising content have found less restrictive ways of furthering their legitimate penological goals without banning it. *See, e.g.*, Tr. of Trial 81:19-

82:14 (Jan. 5, 2015) (explaining that New York staples a notice to the magazine before delivering it to inmates warning them that certain services are prohibited).

Other prison rules seem in tension with the penological grounds upon which the FDOC censors *Prison Legal News*. Inmates may call up to 10 numbers preapproved by the FDOC. Tr. of Trial 13:1-:7 (Jan. 6, 2015). The FDOC claims that three-way calling and call-forwarding present a security risk because these services mask the identity and location of the true recipient of a call. Tr. of Trial 197-200 (Jan. 5, 2015). Yet the FDOC allows inmates to list cell phone numbers, for which it has no way of knowing the location and identity of the person on the other end. *Id.*; *see also* Tr. of Trial 22:5-:10 (Jan. 6, 2015). The assignment of a cell phone number likewise does not depend on geography. Tr. of Trial 49-50 (Jan. 6, 2015) (explaining how someone in Miami can obtain a cell phone number with a Tallahassee area code). Similarly, even though the FDOC has stamp-related security concerns, it allows inmates to possess up to 40 stamps at any given time. Tr. of Trial 188:3-:4 (Jan. 5, 2015). And, as PLN stresses, there are many ways for inmates to obtain the information advertized in *Prison Legal News* despite its censorship.

These inconsistencies aside, this Court determines that the FDOC's stated penological objectives for censoring *Prison Legal New* have been steadfast: security, rehabilitation, and protecting the public, FDOC staff and inmates.

C

The FDOC's literature review process can be broken down into two groups. The first group consists of incoming publications that have not previously been rejected by the Literature Review Committee ("LRC"), the body that reviews impoundment decisions made by FDOC institutions. As to that group, the process works as follows.

An issue of *Prison Legal News* enters an FDOC facility or institution. Mailroom personnel initially flag potential advertising violations. If they think the advertising content violates the Rule, the publication is sent to the warden or the warden's designee ("[f]or the purposes of approving the impoundment of publications," the designee is limited to the assistant warden), who makes the impoundment decision for the FDOC institution. Fla. Admin. Code R. 33-501.401(8)(a). If that official believes the publication violates the Rule, he or she completes "Form DC5-101, Notice of Rejection or Impoundment of Publications." *Id.* The form is supposed to indicate the "specific reasons" for impoundment. *Id.*

Several copies of this form are made. Not everyone is entitled to a copy. Under the Rule, the inmate is always entitled to notice whenever a copy of any publication addressed to him or her is impounded. But the Rule only requires that the institution that "originated the impoundment . . . also provide a copy of the completed form to the publisher, mail order distributor, bookstore or sender, and to

the literature review committee." Fla. Admin. Code R. 33-501.401(8)(b). "[A] copy of the publication's front cover or title page and a copy of all pages *cited* on [the form]," are attached to the copy sent to the LRC.[14] *Id.* (emphasis added).

FDOC personnel do not mark down every offending advertisement. So the LRC *never* receives a photocopy of the entire impounded publication.[15] The LRC reviews the institution's decision—in (3)(l) cases, reviewing to see whether offending advertisement is "prominent or prevalent throughout the publication"—without ever knowing the number and size of all offending advertisements in any given issue of *Prison Legal News*, nor the issue's total page count. It may affirm or overturn the institution's decision on different or additional grounds. Tr. of Trial 113:20-:25, 120:20-:23 (Jan. 6, 2015). The LRC does not use Form DC5-101 to make its decision. Tr. of Trial 120 (Jan. 6, 2015). Instead, the LRC uses a different form that it keeps internally. *Id.* These internal forms have not been provided to this Court by either party.

Once an initial impoundment decision is made, the Rule requires all other institutions to impound the same publication pending review by the LRC. Fla. Admin. Code R. 33-501.401(8)(c). The initial impounding institution is supposed

[14] Briefly, the parties dispute the burden of making a copy for the publisher every time an FDOC facility impounds a copy of an issue. The dispute centered on whether doing so would impose a *de minimus* burden on the FDOC. This Court has considered the evidence and now finds that making a copy for the publisher every time would be minimally burdensome.

[15] The FDOC does not copy the entire publication for fear that doing so infringes copyright protections.

to notify other institutions of the impoundment through a centralized database that explains why a specific publication was impounded. This reduces duplicative efforts. Institutions that subsequently receive the same publication should automatically reject it on the same grounds as the initial institution.

Group two concerns publications that have previously been rejected by the LRC. Once the LRC affirms an initial impoundment, it rejects the specific issue of a publication and informs all institutions of its decision. Future recipient institutions are then required to reject other copies of that issue. The LRC does not notify publishers when it upholds an impoundment decision unless the publisher appealed the initial impoundment decision. Tr. of Trial 86:3-:8 (Jan. 6, 2015).

D

The FDOC has impounded every issue of *Prison Legal News* since September 2009. Pursuant to its policy, it admits not providing PLN a notice of impoundment for every *copy* of each issue it has impounded.[16]

The FDOC says that it has provided PLN at least one impoundment notice per *issue* since 2009. As evidence, the FDOC called two witnesses who worked in the mailroom at Florida State Prison. Tr. of Trial 154, 180 (Jan. 7, 2015). One of them, Ms. Patricia Goodman, has been working there since at least 2009. Tr. of Trial 154:22-155:7 (Jan. 7, 2015). The two witnesses are responsible for mailing

[16] Whether due process requires individualized notice per copy will be discussed later.

out the impoundment notices originating at Florida State Prison. Both testified about the impoundment protocol at their institution and how closely these procedures are followed by mailroom staff. *See, e.g.*, Tr. of Trial 158:5-:7 (Jan. 7, 2015). Neither could independently recall actually sending PLN an impoundment notice every single time. As further support, the FDOC provided documentation of notices of impoundment from 2009 to the present. *See* Def.'s Trial Ex. 5.

None of this, says PLN, demonstrates that the FDOC provided PLN with an impoundment notice for every issue since 2009. PLN is absolutely correct. First, the testimonial evidence submitted by the FDOC is limited to one of its institutions, Florida State Prison. No one argues that Florida State Prison was always the original impounding institution. There is no evidence that the other institutions regularly followed protocol like Ms. Goodman. Second, even for the Florida State Prison, the witnesses admitted that they could not recall whether they notified PLN every time. Third, the notices of impoundment submitted are reproductions of notices received by PLN from *prisoners*, not the FDOC. *See* ECF No. 241, at 9-10 (explaining that the notices reproduced in Defendant's Trial Exhibit 5 contained PLN Bates numbers; PLN originally disclosed these notices to the FDOC during discovery).

This Court finds in favor of PLN on these facts. PLN proved that it did not receive an impoundment notice for every issue impounded since November 2009.

ECF No. 241, at 9. Two of its witnesses explained PLN's mail protocol, credibly establishing PLN's meticulous recordkeeping. Tr. of Trial 252, 268 (Jan. 5, 2015). From November 2009 to June 2013, Mr. Zachary Phillips was responsible for filing mail concerning censorship or possible censorship of *Prison Legal News*. Tr. of Trial 253:8-254:6 (Jan. 5, 2015). He reviewed notices of rejection or impoundment from November 2009 to May 2013. Tr. of Trial 257-263 (Jan. 5, 2015). PLN did not receive a notice of impoundment from the FDOC for many of those months. *See, e.g.*, Tr. of Trial 257:13-:14 (Jan. 5, 2015) (stating that in 2010 PLN did not receive notices in May, June, July, August, September, and October).

In summary, for 26 issues between November 2009 and December 2014, PLN did not receive any notice from the FDOC that *Prison Legal News* had been impounded.[17] That is roughly 42% of all issues during that period where the FDOC withheld *Prison Legal News* without notifying PLN. ECF No. 241, at 9. Of the notices PLN did receive, many did not list the page numbers containing advertisements allegedly in violation of the Rule. *Id*. Some did not even state the subsection allegedly breached. *Id.* And at least three times PLN received a notice of *rejection* without having first received a notice of impoundment, meaning that the LRC had made its decision before PLN had an opportunity to appeal. *Id.*

[17] This is the summary provided by PLN in its post-trial brief. *See* ECF No. 241, at 9. This Court has independently reviewed the evidence submitted at trial and agrees with the summary.

Lastly, this Court finds that the FDOC failed to provide notice every time it impounded the *Prisoners' Guerilla Handbook* and the information packets sent to its inmates by PLN. *See* Tr. of Trial 261-262 (Jan. 5, 2015); Tr. of Trial 4-5 (Jan. 8, 2015); Pl.'s Trial Ex. 46; Pl.'s Trial Ex. 86.

IV

There are three principal issues to be resolved. The first is preliminary and does not address the merits of PLN's lawsuit. That issue is whether the FDOC should be judicially estopped from censoring *Prison Legal News* under Rule 33-501.401(3)(l). Resolving that issue does not completely dispose of the case because PLN also brought an as-applied First Amendment challenge to subsection (3)(m) of the Rule. The two remaining issues are: first, whether the FDOC's censorship of *Prison Legal News* under Rule 33-501.401(3)(l) and (m) unconstitutionally abridges PLN's First Amendment rights;[18] and second, whether the FDOC violated PLN's procedural due process rights.

A

The preliminary question is whether judicial estoppel bars the FDOC from censoring *Prison Legal News* on the basis that its advertising content violates Rule 33-501.401(3)(l).

[18] Applied to the State of Florida by the Fourteenth Amendment.

The doctrine of judicial estoppel generally "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting 18 *Moore's Federal Practice* § 134.30, p. 134-62 (3d ed. 2000)). It is designed "to protect the integrity of the judicial process." *Id.* To that end, the doctrine, in its "simplest manifestation[]," estops a party from asserting "a present position because [that] party had earlier persuaded a tribunal to find the opposite." 18B Charles Alan Wright et al., *Federal Practice & Procedure* § 4477 (2d ed. 2015).

The Supreme Court in *New Hampshire* explained that while "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," "several factors typically inform the decision whether to apply the doctrine in a particular case." 532 U.S. at 750 (alteration in original) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an

> inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted).

In this Circuit, courts consider two additional factors. "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1308 (11th Cir. 2001), *cert. granted, judgment vacated on other grounds*, 537 U.S. 1085 (2002)). "[T]hese . . . enumerated factors are not inflexible or exhaustive." *Id.* at 1286. And, courts have discretion in invoking the doctrine. *New Hampshir*e, 532 U.S. at 750. But they "must always give due consideration to *all of the circumstances* of a particular case when considering [its] applicability." *Burnes*, 291 F.3d at 1286 (emphasis added).

The FDOC currently maintains that the advertisements for (3)(l) services in *Prison Legal News* present a security threat, justifying the publication's censorship under that subsection. PLN insists that this position is clearly inconsistent with the 2005 representation that "such 'incidental' ads do not pose a significant security threat to the prisons." Moore Order 15. It would be different if the underlying facts changed, but according to PLN, the only thing that has changed is the FDOC's "interpretation of the evidence or its decisions on how to enforce the rules

at issue." ECF No. 241, at 20. It points out that the percentage of (3)(l) advertising content in *Prison Legal News* did not increase significantly from 2005 to 2009, and that no major incident or tragedy linked to (3)(l) services occurred during that time period. The FDOC's "flip-flopping" "over the same rule and same security concerns," PLN claims, is precisely the sort of inveiglement of the judiciary that judicial estoppel is supposed to ward against.

But because circumstances *have* changed, the two FDOC positions are not clearly inconsistent. First, technology changed. In 2005, the FDOC decided not to censor publications containing advertisements for three-way calling and call-forwarding services because it believed that its telephone vendor could detect and block all such attempts. *See* Moore Order 14. Yet inmates have continued to bypass the FDOC's security measures using technology such as VoIP that previously was not so widely available. The FDOC was clearly mistaken about the efficacy of its security measures. Judicial estoppel simply does not apply "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996).

Second, the extent to which *Prison Legal News* advertizes services prohibited by (3)(l) has also changed. PLN stresses that the proportion of the magazine that is (3)(l) advertisement barely increased from 9.21% in 2005 to 9.8%

in 2009. To PLN, these percentages demonstrate that in 2009 such advertisements were no less "incidental" than they had been in 2005. PLN thus equates "incidental" to proportional.

A strictly proportion-based metric, however, overlooks significant differences. For starters, *Prison Legal News* ran larger ads in 2009. A chart submitted by the FDOC tallies the number of "half page or greater" (3)(l) ads. Def.'s Trial Ex. 7. From April 2005, the last issue censored in the previous litigation, to September 2009, the number of such ads increased by 100%, from 2 to 4. *Id.* at 1. That number rose even more, now hovering around 6 per issue. *Id.* at 3. So while the overall proportion of (3)(l) advertisement had not increased significantly in 2009, the number of larger, more conspicuous ads did.

The magazine also shifted away from advertising three-way calling services to advertisements enabling inmates to purchase products or services with postage stamps. By PLN's own account, the number of these so-called "stamp" advertisements went from 2 in April 2005 to 7 in September 2009. *Compare* Pl.'s Trial Ex. 79, at 17-18, *with id.* at 43-44. That number has steadily ticked upward: 8 by November 2009; 9 in February 2010; 10 in March 2010; a slight decrease before rebounding to 11 in July 2010; 13 by August 2010; peaking at 17 in March 2013; and steadying at the lower end of the teens ever since. *Id.* at 44-84. Advertisements for three-way calls have not seen this growth, but they have not

decreased either. *Id.* Although PLN argues that the overall percentage of (3)(l) advertisements has not changed much,[19] the magazine clearly emphasizes a different *type* of (3)(l) ad today than it did in 2005.

The most obvious shortcoming with equating "incidental" to proportional is that it misses the absolute increase of advertisements for services prohibited by (3)(l). *See id.*; Def.'s Trial Ex. 7. Perhaps a 10-page publication with one page of advertisement is functionally equivalent to a 100-page publication with ten pages of advertisement. This Court, however, refuses to supplant FDOC officials' judgment on whether one of these equally proportionate, but qualitatively different publications presents any more of a security risk than the other. *See Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (admonishing the lower court for "not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement").

All of these changes to the content and format of *Prison Legal News* matter for judicial estoppel. PLN paints the FDOC's representations in 2005 as a blanket promise that *Prison Legal News* would never again be censored for advertising services prohibited by (3)(l). But that is not what the Moore Order articulates. The

[19] This is not actually true. The overall percentage in 2005 was 9.21%. Pl.'s Trial Ex. 79, at 85. By 2011 that number had gone up to 10.19%. *Id.* It hit 12.66% in 2012, and now hovers above 15%. *Id.*

FDOC represented that "*such* 'incidental' ads" did not pose a security threat. Moore Order 15 (emphasis added). This is a direct reference to the advertising content at issue in that case. *See* Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). By limiting its representation, the FDOC's promise cannot fairly be read as extending to all future iterations of such advertisements, particularly those different in kind.

Furthermore, the Moore Order itself reflects the limited finding that the FDOC had promised not to impound *Prison Legal News* "in its *current format*." Moore Order 21 (emphasis added). The Eleventh Circuit reiterated this understanding on appeal. *McDonough*, 200 F. App'x at 878 ("The FDOC demonstrated that its current impoundment rule does allow for distribution of PLN in its *current format*.") (emphasis added). The format changed in four years. It has changed even more since then. Consequently, the FDOC's current position is not clearly inconsistent with the position it took before Judge Moore, and this Court's acceptance of that position would not "create the perception that . . . the first . . . court was misled." *New Hampshire*, 532 U.S. at 750-51.

Accordingly, the FDOC is not judicially estopped from adopting the current position that *Prison Legal News* must be censored because its (3)(l) advertising content presents a security risk.[20]

B

This Court must also decide whether the FDOC's censorship of *Prison Legal News* pursuant to Rule 33-501.401(3)(l) and (m) violates PLN's rights under the First Amendment.

PLN has a legitimate First Amendment interest in accessing prisoners "who, through subscription, willingly seek [the] point of view" expressed in *Prison Legal News*. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). Prison regulations limiting that access must be analyzed under the reasonableness standard developed by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987). *Thornburgh*, 490 U.S. at 413-14 (holding that regulations affecting the sending of a "publication" to a prisoner must be analyzed under *Turner*; refusing to distinguish between incoming correspondence from prisoners and incoming correspondence from nonprisoners); *accord Washington v. Harper*, 494 U.S. 210, 224 (1990) ("[T]he

[20] The FDOC additionally contends that judicial estoppel does not apply against states when doing so would "compromise a governmental interest in enforcing the law" and "where broad interests of public policy [are] at issue." ECF No. 242, at 4-5 (quoting *New Hampshire*, 532 U.S. at 755-56). It argues this case implicates both concerns. First, estoppel would compromise the FDOC's interest in enforcing prison safety rules. Second, broad interests of public safety and prison security are at issue. PLN responds that neither interest is at play in this litigation. This Court need not decide this issue because it finds that the totality of the circumstances counsel against judicial estoppel.

standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."); *Perry v. Sec'y, Florida Dep't of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011). Under *Turner*, such regulations are "valid if [they are] reasonably related to legitimate penological interests." *Thornburgh*, 490 U.S. at 413 (alteration in original) (quoting *Turner*, 482 U.S. at 89).

Several factors are relevant to the reasonableness inquiry. The first factor is multifold, requiring courts to "determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Id.* at 414. This " 'factor' is more properly labeled an 'element' because it is not simply a consideration to be weighed but rather an essential requirement." *Salahuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006); *accord Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) ("[After stating the first *Turner* factor:] If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor.").

A second factor "is whether there are alternative means of exercising the right that remain open to [the plaintiff]." *Turner*, 482 U.S. at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources

generally." *Id.* Finally, *Turner* instructs lower courts to inquire whether there are "easy alternatives" indicating that the regulation is not reasonable, but rather an "exaggerated response" to prison concerns. *Id.*

After the impinged constitutional right has been identified, as is the case here, the state must "put forward" the legitimate governmental interests underlying its regulation. *Id.* at 89. Once this is done, the plaintiff bears the ultimate burden of showing that the regulation in question, as applied, is not reasonably related to legitimate penological objectives. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden, moreover, is not on the State to prove the validity of prison regulations but on the [plaintiff] to disprove it.").

The FDOC identified public safety and prison security as the underlying legitimate governmental interests.[21] No one questions whether those are legitimate governmental interests. Any suggestion to the contrary would be fruitless. *See Thornburgh*, 490 U.S. at 415 (holding that regulation promulgated with the purpose of "protecting prison security" is legitimate, since that "purpose . . . is central to all other corrections goals"); *Perry*, 664 F.3d at 1366 (acknowledging that "protecting the public and ensuring internal prison security" are legitimate penological interests).

[21] It identified other reasons too, but only the security objectives are necessary for this analysis.

PLN instead contends that the FDOC's application of Rule 33-501.401(3)(l) and (m) is not content-neutral, and that censoring *Prison Legal News* for its advertising content is not rationally related to public safety and prison security. And so, with respect to the first factor, the question becomes (1) whether the Rule "operate[s] in a neutral fashion, without regard to the content of the expression" at issue; and (2) whether censoring *Prison Legal News* due to its advertising content rationally relates to public safety and prison security. *Turner*, 482 U.S. at 90.

As to neutrality, the Supreme Court has explained that *Turner* requires nothing more than that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). "Where . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' . . . ." *Id.* at 415-16.

The limited evidence at trial reveals that the FDOC censors an assorted mix of publications under subsections (3)(l) and (m). Nothing in the record implies that such censorship turns on the content of the publication. PLN did not show, for instance, that the FDOC disparately censors publications critical of its institutions.

Lacking this evidence, PLN argues that FDOC administrators did not amend the Rule in 2009 on legitimate penological grounds. PLN alleges, citing a series of

emails, that the true motivation behind the amendment was a dislike of *Prison Legal News*. *See* Pl.'s Trial Ex. 57a-57i.

"It is unclear what role, if any, motive plays in the *Turner* inquiry." *Hatim v. Obama*, 760 F.3d 54, 61 (D.C. Cir. 2014). *Compare Hammer v. Ashcroft*, 570 F.3d 798, 803 (7th Cir. 2009) ("It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons. The Supreme Court did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal.") (citation omitted), *with Salahuddin*, 467 F.3d at 276-77, *and Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("Prison officials are not entitled to the deference described in *Turner* and *Procunier* if their actions are not actually motivated by legitimate penological interests at the time they act."). In this case, the contours of that role need not be delineated because "[e]ven if some quantum of evidence of an unlawful motive can invalidate a policy that would otherwise survive the *Turner* test," the evidence introduced by PLN is "too insubstantial to do so." *Hatim*, 760 F.3d at 61; *see also Prison Legal News v. Stolle*, No. 2:13CV424, 2014 WL 6982470, at *6 n.2 (E.D. Va. Dec. 8, 2014) (rejecting applicability of motive and holding, in the alternative, that PLN failed to present sufficient evidence of "unlawful motive" that could "invalidate a policy that would otherwise survive the *Turner* test"). As previously explained, the emails simply do not evidence unlawful animus on the part of FDOC administrators. Neither does

the other circumstantial evidence. PLN thus failed to show that the FDOC applies Rule 33-501.401(3)(l) and (m) in a biased fashion.

Setting neutrality aside, this Court now turns to the gravamen of PLN's First Amendment challenge. PLN advances three principal reasons for why there is no rational connection between the censorship at issue and the stated penological objectives.

The first argument boils down to a dispute about the evidentiary burden necessary to establish a "rational" connection. Everyone, even PLN's expert, agrees that the underlying services addressed in Rule 33-501.401(3)(l) and (m) unquestionably compromise public safety and prison security. *See, e.g.*, Tr. of Trial 68-69 (Jan. 8, 2015) (summarizing how even PLN's expert agrees that the underlying services compromise security); Tr. of Trial 203:9-:15 (Jan. 5, 2015) (admitting that "[those services raise] very legitimate concerns"). This is why the FDOC forbids prisoners from using them.

But PLN says that evidence that prohibiting the use of these services furthers security is not enough. This case, PLN insists, is not about those services. This case is about censoring a publication because it *advertizes* those services. That is correct. Even so, the FDOC *also* articulated a logical connection between censorship and the penological objectives at stake, *and* presented sufficient evidence in support.

The logic is straightforward. Without question, the proper, initial response to the dangerous services is forbidding prisoners from using them. Though not surprisingly, they do so anyway. Tr. of Trial 241-243 (Jan. 7, 2015). *See generally Washington*, 494 U.S. at 225 ("[A] prison environment, . . . 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.' " (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984))). So the FDOC has adopted prophylactic safeguards in addition to bare proscription.

Rule 33-501.401 is such a safeguard. Advertisements compromise security because they convert a publication into a "one-stop shop"—to borrow from the FDOC's expert—for dangerous services. Tr. of Trial 71-72:15 (Jan. 8, 2015). By limiting inmates' exposure, the Rule seeks to reduce the likelihood that inmates will use those services.

PLN responds that such "general or conclusory" articulation of rationality is insufficient to withstand constitutional muster. Tr. of Trial 64:17 (Jan. 8, 2015). This Court agrees, "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). The FDOC met that burden by providing the testimony of several administrators who, "relying on their professional judgment, reached an *experience-based* conclusion that [censorship] .

. . further[s] [the] legitimate prison objectives." *Id.* at 533 (emphasis added); *see also Prison Legal News v. Livingston*, 683 F.3d 201, 216 (5th Cir. 2012) ("[P]rison policies may be legitimately based on prison administrators' *reasonable assessment* . . . .") (emphasis added). And, as additional support, the FDOC provided "expert testimony to establish that [censorship] will help curb" prisoners' use of the services. *Perry*, 664 F.3d at 1366 (holding that expert testimony is sufficient to establish rational connection; deferring to the opinion of FDOC administrator James Upchurch, who is also a witness in this case).

None of this suffices for PLN. It wants specific past incidents. And not merely some past example of an inmate using a prohibited service to do something bad; PLN demands a concrete, unfortunate incident caused by an inmate using a banned service, which the inmate learned about in *Prison Legal News*. *See, e.g.*, Tr. of Trial 66:2-:8 (Jan. 8, 2015).

No controlling precedent in this Circuit requires the FDOC to provide evidence of an actual, past incident. *See, e.g.*, *Perry*, 664 F.3d at 1363 (affirming summary judgment in favor of the FDOC on First Amendment challenge to prison regulation despite fact that the FDOC failed to cite specific instances of the alleged problem in Florida). Several other circuits likewise do not require it. *See, e.g.*, *Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015) ("[P]rison officials need not wait until particular prohibited material causes harm before censoring it . . . .");

Livingston, 683 F.3d at 216 ("[P]rison policies may be legitimately based on prison administrators' reasonable assessment of *potential* dangers."). But even if such evidence were required, FDOC administrators provided examples, both in Florida and throughout the country, of problems associated with specific services that advertize, or have advertized, in *Prison Legal News*. *See, e.g.*, Tr. of Trial 5-6, 39-41 (Jan. 6, 2015) (explaining that FDOC officials learned of a company that had been sending prisoners money for stamps, and how such companies could distribute money for prisoners to people in the outside world in exchange for stamps; this company had previously advertized on *Prison Legal News*).

PLN's second reason is that the FDOC applies the Rule arbitrarily. PLN introduced evidence of identical issues of *Prison Legal News* censored at separate FDOC facilities on different grounds, as reflected on the impoundment notice accompanying the censorship. There is also some testimony about issues that were initially admitted at some facilities while denied at others. Lastly, PLN stresses that advertisements for other prohibited services and products are not censored by the FDOC. PLN maintains that these inconsistencies amount to an irrational application of the Rule.

Case law supports the proposition that the consistency with which a regulation is applied matters for determining whether it is rationally connected to a legitimate penological objective. "The existence of *similar* material within the

prison walls may serve to show inconsistencies in the manner in which material is censored such as to undermine the rationale for censorship or show it was actually censored for its content." *Murchison*, 779 F.3d at 890 (emphasis added). In addition to inconsistent censorship of "similar" material, general "inconsistencies could [also] become so significant that they amount to a practical randomness that destroys the relationship between a regulation and its legitimate penological objectives." *Id.* (quoting *Livingston*, 683 F.3d at 221); *see also Thornburgh*, 490 U.S. at 417 n.15.

Although PLN has presented evidence of inconsistent censorship decisions made by FDOC mailroom staff, this Court does not believe PLN demonstrated inconsistencies that rise to a level of randomness or that undermine the rationale for censoring *Prison Legal News*. The fact that mailroom personnel do not uniformly censor *Prison Legal News* on the same grounds is not dispositive. "With the volume of material that must be screened, we cannot expect prison officials to perfectly screen all material that violates prison regulations." *Murchison*, 779 F.3d at 890. Inconsistent application by mailroom staff goes more to the vagueness of the Rule.

In any event, mailroom staff decisions are not final and do not permanently compel censorship of the magazine throughout Florida. Initial impoundment decisions are subject to review by the LRC. The LRC rejects the publication on

the grounds it thinks adequate. That decision is then uniformly applied throughout Florida because once the LRC makes a decision, there is no further individualized review by mailroom staff.

This pares down the risk of randomness and distinguishes this case from *Thornburgh*,[22] where each prison warden independently decided censorship, such that "certain federal prisons had excluded the *very same book* that others had allowed." *Livingston*, 683 F.3d at 221. Here, the very same issue of *Prison Legal News* is eventually censored throughout the FDOC. Like in *Livingston*, the LRC's "system-wide" "exclusion decisions" make the inconsistencies "only arguable," because the only apparent inconsistencies left to sort out are the decisions to admit, for example, an advertisement about guns versus one about three-way calling. *Id.* This Court refuses to engage in such "one-to-one comparisons" of specific ads. *Id.* Not because these inconsistencies are irrelevant. But rather, due to the substantial deference owed prison administrators regarding which type of advertisement is more problematic.

Absent a showing that the FDOC is admitting other magazines containing advertisements closely resembling those found in *Prison Legal News*, which there is none, this Court holds that the "limited amount of inconsistency at the margins

[22] Yet, even the inconsistencies in that case did not defeat an otherwise rational connection. *Thornburgh*, 490 U.S. at 417 n.15 (addressing the "seeming inconsistencies" in that case and holding that the regulation at issue struck "an acceptable balance" between uniformity and individualized review).

of [the FDOC's] exclusion decisions is not enough to defeat the reasonableness of [the FDOC's] practices." *Id.*

The last argument PLN advances is that other FDOC regulations undermine the Rule to such a great extent that they render the Rule's connection to security irrational. To illustrate, among the many such rules explored at trial is a regulation permitting inmates to list cell phone numbers on their preapproved contact list and another allowing inmates up to 40 stamps at any given time. *See* Tr. of Trial 22:5-:10 (Jan. 6, 2015); Tr. of Trial 188:3-:4 (Jan. 5, 2015). PLN asserts that these rules undermine the logic behind censoring some of the services singled out in (3)(l). Cell phones have three-way calling and call-forwarding capabilities identical to, or better than, the services advertized on *Prison Legal News*. The FDOC has no way of knowing a cell phone user's location, just like it does not know the location of the person on the other end of a forwarded call. Tr. of Trial 197 (Jan. 5, 2015); Tr. of Trial 22:5-:10 (Jan. 6, 2015). Also, the FDOC allows inmates to have stamps and allows families to send inmates stamps despite their contention that they are a serious hazard in prisons. *See* Tr. of Trial 188:3-:4 (Jan. 5, 2015).

An FDOC administrator explained each conflicting rule. Cell phones are ubiquitous in modern society. Prohibiting inmates from calling cell phones would effectively preclude them from speaking with many of their loved ones who no longer carry land lines. The FDOC could theoretically impose such a draconian

rule, but it would surely lead to increased tension within prisons. *See* Tr. of Trial 102-103 (Jan. 7, 2015) (summarizing practical impossibility).

Likewise, the FDOC once proposed a rule that would have embargoed stamps sent by family members to an inmate by mail. Tr. of Trial 23 (Jan. 6, 2015). Under the proposed rule, families would have been limited to depositing money into inmates' prison accounts which the inmate could then use to purchase stamps. Families and friends of prisoners vehemently opposed the proposal, expressing concern that the rule would increase the likelihood that their imprisoned loved ones would either be victimized or simply not purchase any stamps at all. Tr. of Trial 23-24 (Jan. 6, 2015). Moreover, FDOC officials testified that implementing the accounting measures proposed by PLN to counteract the problems with stamps would be too costly and require amending state statutes. Tr. of Trial 25 (Jan. 6, 2015). Nearly every other seemingly paradoxical regulation in place also had some corresponding explanation.

Running a prison system is not easy. Prison administrators, charged with the unenviable task of "deal[ing] with the difficult and delicate problems of prison management," must make considered decisions that balance order, security and resources. *Thornburgh*, 490 U.S. at 407-08. The first *Turner* factor requires this Court to determine whether the censorship at issue is rationally related to legitimate penological objectives. Finding that it is both rational and supported by

evidence, this Court declines PLN's invitation to disrupt the balance struck by the FDOC.

The remaining factors tilt in the FDOC's favor as well. When considering whether alternative means of exercising the abridged right remain open to the plaintiff, the Supreme Court instructs courts to view " 'the right' in question . . . sensibly and expansively." *Id.* at 417. This means that the alternatives need not be perfect substitutes. *Livingston*, 683 F.3d at 218.

The Rule leaves open sufficient alternatives for PLN to express their point of view to inmates. First, as in *Perry*, the Rule does not completely prevent PLN from corresponding with inmates. 664 F.3d at 1366. There are countless other written materials that PLN may send prisoners. As the Fifth Circuit in *Livingston* explained, if alternative means existed in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), "where prisoners were cut off from [a] unique and irreplaceable [activity]"—"a unique religious ceremony"—surely there are alternatives to a magazine. 683 F.3d at 219.

Second, even *Prison Legal News* is not invariably censored. The Rule applies only when a particular issue's advertising content crosses a certain threshold.[23] And while this Court accepts that advertisements are necessary, the unfeasibility of printing *Prison Legal News* without advertising content is not

[23] This threshold, however, is almost impossible to identify. As this Court will explain shortly, vagueness is principally responsible for the Rule's disparate application.

dispositive. PLN has not proven that it is unable to adopt advertising rubrics that would help bring its magazine in line with prison regulations.

The third factor is the impact the accommodation of the asserted constitutional right will have on guards, inmates and prison resources. In this case, "the class of publications" excluded by the Rule "is limited to those found potentially detrimental to order and security." *Thornburgh*, 490 U.S. at 418. The evidence demonstrates that accommodating the specific way in which PLN seeks to exercise its right—through a publication containing dangerous amounts of advertising content—would "significantly less[en] liberty and safety for everyone else, guards and other prisoners alike." *Id.* The Supreme Court has held that this fact alone pushes the third factor in FDOC's favor. *Id.* (deferring to the "informed discretion of corrections officials" who had said that accommodating the right would lessen liberty and safety for "everyone else, guards and other prisoners").

The final *Turner* factor is whether there are "easy alternatives" indicating that the regulation is not reasonable, but rather an "exaggerated response" to prison concerns. 482 U.S. at 90. This is not an inquiry into whether prison officials adopted the "least restrictive alternative." *Id.* at 90-91. "But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

As this Court explained during its discussion of rationality, there are no "easy alternatives" available to the FDOC. The prohibition against using the services themselves is not enough. Similarly, the alternatives suggested by PLN to eliminate the security concerns either have equally unattractive side effects or are costly to implement.

Additionally, with respect to subsection (3)(l), "[a]lthough the FDOC did not need to narrowly tailor its Rule to only prohibit" publications containing "prominent or prevalent" offending advertisements, it adopted a less exaggerated response than censorship for *any* amount of offending advertising content. *Perry*, 664 F.3d at 1367. And as to subsection (3)(m), this Court is "comforted by the individualized nature of the determinations required by the regulation," under which a publication is censored only if the LRC determines that it "presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *Thornburgh*, 490 U.S. at 416.

Admittedly, the fact that Florida is the only state that currently censors *Prison Legal News* for its advertising content is troubling—at least for purposes of determining whether the Rule is indeed an exaggerated response. Some states *have* censored the publication for its advertising content. New York once censored it for carrying advertisements about services accepting stamps as payment. Tr. of Trial 81-82 (Jan. 5, 2015). New York eventually settled on a less restrictive way of

furthering its security interest without censoring the entire magazine: attaching a notice warning prisoners that the services advertized are prohibited. *Id.* Even if this is the sounder policy, the FDOC is not required to implement the least restrictive regulation. Moreover, the FDOC may be constrained in ways that New York's department of corrections is not. Significant variances would make comparison futile. Comparing different states' department of corrections is difficult, and in this case the parties did not submit sufficient evidence to do so.

This Court is also not blind to the *many* other worrisome facts uncovered at trial. The most disconcerting is the Rule's vagueness. None of the witnesses at trial were able to articulate any reasonably specific guidelines to determining when advertisements were "prominent or prevalent." Some considered whether font was large and bolded to determine prominence. Others looked to the size of the advertisements. For prevalence, no one could identify a cutoff. With no framework handy, this Court would probably be unable to apply the Rule to those publications at the margins. Yet FDOC officials felt very strongly about their ability to determine prominence and prevalence correctly. It seems that they, unlike this Court, "know it when [they] see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

To make matters worse, the LRC, the final decision-maker, *never* reviews an entire publication or book when it makes its decision. As this Court mentioned

earlier, this means that final determinations about *prevalence* are made without knowing whether, for instance, the four or five pages copied and attached to the impoundment notice are four or five out of one hundred, one thousand.

That being said, there is no void-for-vagueness claim pending. This lawsuit instead focuses on whether the FDOC has applied subsections (3)(l) and (m) to *Prison Legal News* in a manner reasonably related to legitimate penological interests. Courts have wrestled with the role played by *general* vagueness in the *Turner* analysis. *See Martinez v. Fischer*, No. CIV S-10-0366 GGH P, 2011 WL 4543191, at *8 n.4 (E.D. Cal. Sept. 28, 2011) ("[T]he undersigned has trouble fitting the *Turner* test, an analysis focused on the legitimacy of prison regulations, with an analysis focused on whether regulations are understandable."); *Miller v. Wilkinson*, No. 2:98-CV-275, 2010 WL 3909119, at *5 (S.D. Ohio Sept. 30, 2010) (noting that "[p]rison regulations are not often challenged on vagueness grounds" and that some courts have held that "the First Amendment overbreadth doctrine, do not 'apply with independent force in the prison-litigation context' " (quoting *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999))); *Bahrampour v. Lampert*, 356 F.3d 969, 975-76 (9th Cir. 2004) (applying *Turner* test despite inmate's assertion that vagueness and overbreadth claims must be considered separate and apart from application of *Turner* test.); *cf. Sweet v. McNeil*, No. 4:08CV17-

RH/WCS, 2009 WL 903291, at *7 (N.D. Fla. Mar. 31, 2009) (Hinkle, J.) (importing deferential principles to void-for-vagueness suit, in light of *Turner*).[24]

In this case, all *Turner* factors support the FDOC. This includes the last one, where, instead of banning any amount of offensive advertisement, the FDOC elected the less restrictive option of allowing publications with some advertising content. The difficulty of applying the more reasonable option should not, and does not, overcome the other *Turner* factors. The uniformity with which the publication has been rejected by the LRC, both at the time and after re-reviewing the censored issues in preparation for trial, further alleviates the concern that the Rule cannot be applied intelligibly. Finally, the Rule here seems equally as difficult to apply as the one in *Thornburgh*, but that did not preclude a finding in the government's favor. *See* 490 U.S. at 428 (Stevens, J., concurring in part and dissenting in part) (addressing the regulation's vagueness).

This Court therefore holds that PLN has failed to show that the FDOC's censorship of *Prison Legal News* is not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

[24] PLN does not argue that the *Turner* analysis entirely subsumes the void-for-vagueness inquiry. Moreover, PLN moved to amend their complaint to add a void-for-vagueness claim. This implies that PLN also thinks that the two claims are separate and distinct. In addition, there has not been *any* argument on the issue of whether void-for-vagueness and overbreadth claims apply with independent force in the prison context. This Court accordingly treats them as separate claims.

C

The final issue is whether the FDOC violated PLN's due process rights in its impoundment of *Prison Legal News*, the *Prisoners' Guerilla Handbook* and the information packets sent to FDOC inmates.

The "decision to censor or withhold delivery of a particular [publication]," such as *Prison Legal News*, "must be accompanied by minimum procedural safeguards."[25] *Procunier*, 416 U.S. at 417. Under *Procunier*, those safeguards are: (1) notifying the intended recipient-inmate; (2) giving the author of the publication a reasonable opportunity to protest the decision; and (3) referring complaints about the decision to a prison official other than the person who originally disapproved the correspondence.[26] *Id.* at 418-19.

[25] *Procunier* addressed the due process afforded prisoners and their correspondents when exchanging letters. Circuit courts have extended the due process safeguards to magazine publishers. *See Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996). They have held that a publisher's right to due process does not depend on notifying the inmate. *Jacklovich*, 392 F.3d at 433-34.

[26] The FDOC seems to have abandoned its argument that *Mathews v. Eldridge* applies. 424 U.S. 319 (1976). Even if *Eldridge* did apply, *see Perry*, 664 F.3d at 1368, it would similarly require of the FDOC the same procedural safeguards this Court sets forth in this order. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Eldridge*, 424 U.S. at 333. A "meaningful manner" presupposes that the deprived party be provided with the information necessary to mount a meaningful challenge to the deprivation. In this case, that means informing PLN of the distinct, independent bases upon which its magazine has been impounded. Sharing this information is critical to reducing the risk of erroneous deprivation. Testimony about the ease of making additional copies suggests that the costs of implementation are minimal. The upshot of doing so benefits the government's interest in due process of law and ensures that PLN has a meaningful opportunity to contest the deprivation.

PLN claims that the current review process violates *Procunier* because only the institution that initially impounds an issue of *Prison Legal News* is required to provide the publisher notice. Publishers, PLN argues, are entitled to notice every time a *copy* of an issue is impounded. This is so even if later impoundment decisions duplicate earlier determinations. The FDOC responds that since all issues of *Prison Legal News* are alike, PLN is only entitled to one notice per issue.

Neither party properly demarks the requirements of due process. *Procunier* demands that the publisher "be given a *reasonable* opportunity to protest" the censorship. *Id.* at 18 (emphasis added). For an opportunity to be reasonable, the publisher must know of the grounds upon which the publication has been censored. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (explaining that it is "fundamental" to due process that "notice be given . . . that . . . clearly inform[s] the individual of the proposed action and the grounds for it"). This knowledge component of due process does not turn on whether the publication is the first copy or a subsequent copy. What matters is the basis for censorship. If a subsequent impoundment decision is based on a *different* reason not previously shared with PLN, due process requires that PLN be told of this new reason.

The FDOC's current policy of providing notice once per issue should theoretically satisfy this formulation. Under the Rule, once one institution

impounds an issue of *Prison Legal News*, a later institution must *automatically* impound that same issue pending a final rejection determination by the LRC. Fla. Admin. Code R. 33-501.401(8)(c). The subsequent institution learns of the first institution's reasons for impoundment through a centralized database. It must then inform its inmate of "the specific reasons why the publication *was* impounded." *Id.* (emphasis added). That is, the later institution must inform the prisoner of the initial institution's reasons for impoundment.

The succeeding, perfunctory impoundment amounts to "routine enforcement of a rule with general applicability" because it does not raise new grounds for censorship. *Livingston*, 683 F.3d at 223. The initial reasons for impoundment having been communicated to PLN, this ordinarily would not require additional notice.

Despite this mechanism, PLN has at times received multiple notices impounding a specific issue of *Prison Legal News* on different grounds. PLN expresses uncertainty as to how this happens, since the Rule requires future institutions to replicate the first institution's reasoning. ECF No. 241, at 12 n.10.

One explanation is that sometimes multiple institutions receive the same issue of *Prison Legal News* simultaneously. When that happens, each institution thinks of itself as an initial impounding institution. In that scenario PLN should receive a notice *per* initial impounding institution. But the moment these

simultaneous, initial impoundment decisions are disseminated throughout the FDOC, later institutions should cease providing independent grounds for exclusion.

Another explanation is that the Rule is not always followed. And as a result a subsequent impoundment is not perfunctory, but rather the product of an independent determination. *See, e.g.*, ECF No. 241, at 11-12 (summarizing evidence). Worse, FDOC has at times completely failed to inform PLN of an impoundment decision, only notifying PLN of a *rejection*. This means that by the time PLN received notice, the LRC had already reviewed the initial impounding institution's decision.

The FDOC claims that even if its employees failed to send PLN impoundment notices, it cannot be held liable because the failure is merely negligent. It cites *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), in support of the argument that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels*, 474 U.S. at 328. PLN, in response, contends that *Daniels* only holds that the *substantive* deprivation must be caused by conduct beyond mere negligence. According to PLN, the failure to provide notice—that is, the process itself—gives rise to liability, even if the employee only negligently failed to do so.

There seems to be a circuit split on the issue of whether *Daniels* is limited to the substantive deprivation or whether it extends to the process itself. In *Dale E. Frankfurth, D.D.S., v. City of Detroit*, the plaintiff brought an action under § 1983 for damages resulting from the demolition of a building he owned. Nos. 86-1476, 86-1825, 1987 WL 44769, at *1(6th Cir. Sept. 17, 1987). The Sixth Circuit, citing *Daniels*, held that the plaintiff's "failure to receive notice was due to the negligent act of a clerk. Because the act was negligent, no fourteenth amendment deprivation is involved and there is no constitutional need to provide a remedy." *Id.* at *3; *accord Brunken v. Lance*, 807 F.2d 1325, 1331 (7th Cir. 1986) ("[*Daniels*] teaches that an official does not 'deprive' a person of life, liberty, or property, within the meaning of the Fourteenth Amendment, when an official's negligent act causes the unintended loss of or injury to life, liberty, or property. . . . Given this evidence, [the defendant's] failure to notify [the plaintiff] was at most negligent.").

In contrast, the Third Circuit in *Sourbeer v. Robinson* limited *Daniels* to the substantive deprivation. 791 F.2d 1094, 1104-05 (3d Cir. 1986). In so doing, it summarized the distinction well:

> Cases such as *Davidson*, dealing with a state of mind requirement for § 1983/due process actions, relate only to the highly unusual circumstance where the *deprivation* of life, liberty, or property the case is predicated upon was not intentional, as opposed to where the failure to provide adequate process was not intentional. For example, in *Davidson* prison guards negligently failed to take action to protect

> one prisoner who was threatened by another, allegedly "depriving" him of a liberty interest in being free of assaults. . . . In [*Daniels*] it was alleged that a correctional deputy had negligently left a pillow on a stairway, causing the plaintiff to slip and thereby "depriving" him of a liberty interest. These cases, it is readily apparent, are of a highly unusual nature—the defendants had probably not even been aware until after the fact of the "deprivations" that would trigger due process concerns. "To hold that injury caused by such conduct is a *deprivation* within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."
>
> Here, in contrast, the keeping of Sourbeer in administrative custody—depriving him of liberty—was itself an intentional act. That being the case, it was not necessary for the district court to make any other state of mind finding. We know of no authority for the proposition that an intentional deprivation of life, liberty or property does not give rise to a due process violation because the failure to provide due process was without fault.

Id. (citations omitted). As far as this Court or the parties can tell, the Eleventh Circuit has not spoken on the issue.

This Court believes that the Third Circuit has the better-reasoned opinion. This is particularly true here, where the relief sought is declaratory and injunctive. Even supposing that the "fault" associated with past failures matters for recovering damages against the government, an injunction pivots on the "independent legal right . . . being infringed." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir. 2005). The right in this case implicates "the most rudimentary demands of due process of law"—notice. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Just because past failures were the product of negligent

conduct does not absolve the FDOC of its constitutional obligation to provide notice going forward.

In any event, PLN has shown that the FDOC's failure to provide notice exceeded negligence. The systemic failure of FDOC personnel to provide notice 42% of the time reveals that the failures were not coincidental. The high failure rate indicates a substantial risk, one disregarded by FDOC administrators. At the very least this amounts to recklessness or gross negligence, which everyone agrees suffices for a due process violation. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1305 (3d Cir. 1994) (collecting cases); *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 802 (11th Cir. 1988), *affirmed sub. nom. Zinermon v. Burch*, 494 U.S. 113 (1990) (holding allegations of actions taken willfully, wantonly, and with reckless disregard sufficient to state a due process claim). *See generally Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (deliberate indifference is conscious disregard of a substantial risk).

This same reasoning applies to impoundment of the *Prisoners' Guerilla Handbook* and the information packets. The record unquestionably establishes that FDOC personnel failed to notify PLN on a couple of occasions that it had impounded the *Prisoners' Guerilla Handbook* and the information packets. The injunction is appropriate because those failures are part of the greater, widespread practice of not providing notice.

Before concluding, this Court addresses two remaining arguments. First, the FDOC contends that PLN waived due process. Mr. Wright admitted that at some point PLN stopped appealing impoundment decisions. Tr. of Trial 159:20-160:2 (Jan. 5, 2015). Apparently PLN thought appealing was futile. From this the FDOC concludes that it no longer had to apprise PLN of impoundment decisions since, in all likelihood, PLN would not have appealed.

The problem with that logic is that the reasons for impounding *Prison Legal News* vary. Indeed, the Rule proscribes "total[] rejection" of a periodical and mandates that "each issue of the subscription . . . be reviewed separately." Fla. Admin. Code R. 33-501.401(5). That PLN did not appeal past impoundments does not necessarily mean that it will not appeal future impoundments based on different reasons. The old adage that past behavior does not predict future performance rings truer here, where the underlying circumstances change over time.

More importantly, the FDOC failed to notify PLN of many impoundment decisions. Of course PLN did not appeal. It did not know that an issue had been censored, by which institution, and on what grounds. The fact that PLN may have *later* received a copy of an impoundment notice from an *inmate* is of no consequence. Notice must be timely and must set forth the basis for censorship, which many impoundment notices introduced at trial clearly did not. *Armstrong*,

380 U.S. at 552 ("[The opportunity to be heard] must be granted at a meaningful time and in a meaningful manner."). Given these deficiencies, PLN did not waive its right to due process by failing to appeal.

Finally, PLN asserts that the LRC's practice of affirming an impoundment decision on different or additional grounds than that found by the initial impounding institution violates *Procunier*. Recall that *Procunier* instructs that certain "minimum procedural safeguards" must accompany the decision to censor a periodical. 416 U.S. at 417. PLN says that the LRC's practice violates the third safeguard requiring that complaints about a censorship decision be referred to someone other than the prison official who "originally disapproved the [publication]." *Id.* at 418-19. PLN says that by censoring a publication on a different or additional basis, the LRC effectively becomes the "original" decision-maker. And because no other prison official reviews the LRC's decisions, PLN is left to ask the LRC to review its own decision, in violation of *Procunier*.

Under PLN's view, the *reason* for censorship determines who "originally disapprove[s]" the publication. There would be a different "original" decision-maker for each new reason. But *Procunier* is not so specific. It only requires that a different prison official review the original censorship. It says nothing about whether that review must be limited to the reasons originally given.

This is consistent with *Baker on Behalf of Baker v. Sullivan*, 880 F.2d 319, 320 (11th Cir. 1989), which PLN relies on to argue that expanding the scope of review without notice violates due process. In this case the issue never expands. The initial impounding institution is tasked with determining whether a particular publication violates the Rule. The same issue that the LRC must decide.

V

The Supreme Court has made it clear that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Yet these protections mean little if inmates do not understand them.[27] Cue PLN. Through its publications PLN teaches inmates their rights and informs them of unconstitutional prison practices. With this knowledge inmates become another check to government encroachment on constitutional rights. This in turn helps prison administrators correct insidious practices, ensuring long-term stability. Everyone ultimately benefits when knowledge grows from more to more.

But the Constitution does not guarantee PLN unfettered communication with inmates. That right must be balanced against the legitimate penological concerns inherent in running a prison system. In this case, the FDOC requires PLN to conform its written communications to Rule 33-501.401(3), which censors

[27] This is even more pernicious considering how prisoners are not afforded counsel and how prisons limit inmates' access to the prison library, books, and legal materials.

publications containing certain types of advertisements. After carefully considering the evidence presented at trial and the arguments made by the parties, this Court concludes that the FDOC's censorship of *Prison Legal News* under subsections (3)(l) and (m) of the Rule does not violate PLN's First Amendment rights because the censorship reasonably relates to public safety and prison security.

That the censorship in this case complies with the First Amendment, however, does not give the FDOC license to censor without regard to its due process obligations under the Fourteenth Amendment. But that is precisely what the FDOC has done, repeatedly. It has impounded multiple issues of *Prison Legal News* and other PLN mail without notifying PLN. Adhering to its regulations, it then fails to notify PLN when the mail is finally rejected. The FDOC will continue to do this going forward absent interjection by this Court.

For these reasons,

IT IS ORDERED:

1. Judicial estoppel does not preclude the Florida Department of Corrections from adopting its current litigation position.
2. The Florida Department of Corrections' censorship of *Prison Legal News* under Rule 33-501.401(3) of the Florida Administrative Code does not violate Prison Legal News' First Amendment rights.

3. The Florida Department of Corrections' censorship procedures violate Prison Legal News' right to due process under the Fourteenth Amendment.

4. The Clerk shall enter judgment stating:

> Prison Legal News' First Amendment claim against the Florida Department of Corrections is dismissed with prejudice.
>
> Prison Legal News successfully proved that the Florida Department of Corrections has violated its right to due process under the Fourteenth Amendment. Prison Legal News has also shown that the Florida Department of Corrections' current censorship practices will continue to deprive Prison Legal News of due process of law.
>
> Accordingly, the Florida Department of Corrections is permanently enjoined from censoring Prison Legal News' written communications without due process of law. To comply with due process of law, this permanent injunction modifies the Florida Department of Corrections' current notification procedures as follows: (1) The Florida Department of Corrections must notify Prison Legal News when it first impounds a particular written communication by Prison Legal News. (2) The notification must specify the prison rule, including the subsection, purportedly violated and must indicate the portion of the communication that allegedly violates the cited regulation. (3) The Florida Department of Corrections does not have to notify Prison Legal News when copies of that same written communication are subsequently impounded, unless the subsequent impoundment decision is based on a different or additional reason not already shared with Prison Legal News. (4) The Florida Department of Corrections' Literature Review Committee must notify Prison Legal News of any final determination regarding written

communication by Prison Legal News. (5) The Literature Review Committee's notification must provide the basis for its decision, including the specific prison rule violated and the portion of the communication that violates the cited regulation. (6) The Florida Department of Corrections does not have to notify Prison Legal News when copies of that same written communication are subsequently rejected, unless the subsequent rejection decision is based on a different or additional reason not already shared with Prison Legal News.

5. Although all claims have been adjudicated, the Clerk must **not** close the file. This Court retains jurisdiction over the open file to decide costs and attorney's fees, if any.

SO ORDERED on August 27, 2015.

s/Mark E. Walker
United States District Judge

Privileged and Confidential
ACLU Legal Observer Incident Report

Date of Incident: _____ Time of Incident: _____
Location:_____
Occasion/Event: _____
Names of Protestors or Demonstrators Involved:_____
_____
Date of Birth of Person(s) Arrested:_____
Contact Information of Person(s) Arrested: _____
_____
Law Enforcement Agencies Involved: _____
Officers Involved (including badge numbers):_____
_____
Description of Incident: _____

_____

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_____

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_____

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_____

_____

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_____

_____

Legal Observer Information:

Phone: Email:
Print Name: Signature:
Date:

Please Return to ACLU-FL Coordinator

ACLU Legal Observer Guidelines

ACLU Legal Observers are trained volunteers who are witnesses to political demonstrations and who document the events of public protests, including police misconduct or violations of the rights of protesters. Observers are committed to defending free speech in a way that is as objective as possible so that their documentation can be used as evidence if police misconduct or obstructions to constitutionally protected free speech are later challenged in court.

As a Legal Observer, your safety is of paramount importance. Please review these reminders:

1) **Stay Alert.**
    - In the event of an incident, document everything the police and protestors do and say. Be as thorough as possible. This includes taking notes, photos, etc.

2) **You are not a "peace-keeper", mediator, or advisor. You are a neutral observer.**
    - You are providing an important service for protestors. You are not a protestor.
    - You are not to represent or direct the protestors, nor intervene between participants and law enforcement.
    - Your role is defined in a very particular way for important reasons. The demonstrators rely on you to fulfill that role.

3) **Take detailed notes**
    - Pay very close attention to what the police are doing and saying.
    - Document your observations through camera use and detailed notes.
    - As you observe, you will not likely be able to determine what could potentially be important later, so our motto is "the more detail, the better".

    Examples of information we are interested in collecting:
    - Did police offer a warning or an alternative to being arrested? ("Stand over there, not here" or "you cannot be in the street", etc.)
    - Did police misquote statutes?
    - Did police force protestors into the street, then arrest them for obstructing traffic?

4) **Complete your Incident Report and return to ACLU Coordinator(s).**
    - Your ACLU Coordinator will provide incident forms to observers.
    - At the end of the event, submit all the incident forms to your coordinator.
    - Provide your contact information. It is imperative that we can get in contact with you in case you and your notes are needed for the defense of an arrestee.

VOLUNTEER OBSERVER PROGRAM

WAIVER FORM

I (print) _____ agree to participate as an Observer through the American Civil Liberties Union of Florida (ACLU-FL).

Email:

Phone:

Mailing Address:

I am available to observe in: (name of city/county) _____

I have attended or will attend the ACLU-FL training. I understand that ACLU-FL is neither responsible for my safety nor my actions.

I agree that ACLU-FL will not be bound to defend me in the event of arrest nor will ACLU-FL be bound to indemnify me in any way.

I understand that as an ACLU Observer I will maintain neutrality when observing and documenting events.

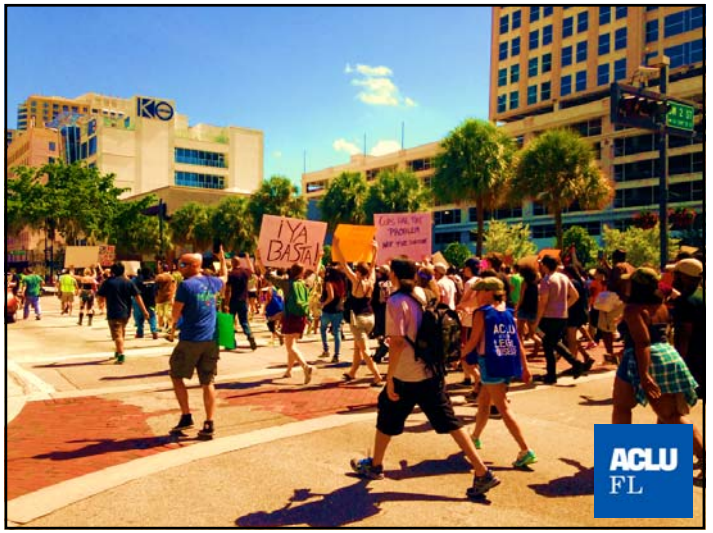
Date: ____/____/_____

Signature _____

Lawyers and Resistance: Free Speech, Protest, & How to Help

Legal Observer Training

Presenter:
Jacqueline Azis, ACLU of Florida Staff Attorney



Training Overview

- **What is a Legal Observer?**
- **Legal Observing at Rallies & Protests**
- **Know Your Rights: Demonstrations and Protests**

What are Legal Observers?

Legal observers act as legal witnesses to political demonstrations and document the events of public protests, including any incidents of police misconduct or violations of the rights of protestors.

Legal Observers:

- Are neutral, impartial volunteers
- Silently document
- Observe police
- Witness arrests

ACLU Legal Observer Guidelines

ACLU Legal Observers are trained volunteers who are witnesses to political demonstrations and who document the events of public protests, including police misconduct or violations of the rights of protesters. Observers are committed to defending free speech in a way that is as objective as possible so that their documentation can be used as evidence if police misconduct or obstructions to constitutionally protected free speech are later challenged in court.

As a Legal Observer, your safety is of paramount importance. Please review these reminders:

•Stay Alert.
•In the event of an incident, document everything the police and protestors do and say. Be as thorough as possible. This includes taking notes, photos, etc.

•You are not a "peace-keeper", mediator, or advisor. You are a neutral observer.
•You are providing an important service for protestors. You are not a protestor.
•You are not to represent or direct the protestors, nor intervene between participants and law enforcement.
•Your role is defined in a very particular way for important reasons. The demonstrators rely on you to fulfill that role.

•Take detailed notes
•Pay very close attention to what the police are doing and saying.
•Document your observations through camera use and detailed notes.
•As you observe, you will not likely be able to determine what could potentially be important later, so our motto is "the more detail, the better".
Examples of information we are interested in collecting:
•Did police offer a warning or an alternative to being arrested? ("Stand over there, not here" or "you cannot be in the street", etc.)
•Did police misquote statutes?
•Did police force protestors into the street, then arrest them for obstructing traffic?

•Complete your Incident Report and return to ACLU Coordinator(s).
•Your ACLU Coordinator will provide incident forms to observers.
•At the end of the event, submit all the incident forms to your coordinator.
•Provide your contact information.

To participate as a legal observer, all volunteers must review the legal observer guidelines and sign the legal observer waiver.

5

Things to Keep in Mind

- You are not a peacekeeper.
- Do not give legal advice.
- Do not promise to help or intervene with police on behalf of anyone.
- Do not promise legal representation for anyone.
- Be courteous and alert organizers or police to any immediate problems.
- **You are suspending your First Amendment rights to protect the First Amendment rights of others.**

6

General Rules

- **Stay alert** - In the event of an incident, document everything the police and protestors do and say as thoroughly as possible. This includes notes, photos, etc.
- **You are a neutral observer -** You are not to represent or direct the protestors, nor intervene between participants and law enforcement. Your role is defined in a very particular way for important reasons, and the demonstrators rely on you to fulfill that role.
- **Take pictures and make detailed notes** - Pay very close attention to what the police are doing and saying. Document anything that could be used later to aid in the defense of an arrestee. The more detail, the better.
- **Complete Incident Reports** – Fill out your incident reports in full, complete with your contact information. Return all reports to your coordinator.

7

What Should I Look For?

Particular issues you should look for:

- Did the police order people to leave an area?
- Did the police declare an area to be a "crime scene" during the protest?
- Did the police have name tags? If not, did individual officers give their name when asked?
- Did the police at any time tell you or others to stop taking photos or filming?

8

Privileged and Confidential
ACLU Legal Observer Incident Report

Date of Incident: _____ Time of Incident: _____

Location:_____

Occasion/Event: _____

Names of Protestors or Demonstrators Involved:_____
Date of Birth of Person(s) Arrested:_____
Contact Information of Person(s) Arrested: _____

Law Enforcement Agencies Involved: _____
Officers Involved (including badge numbers):_____

Description of Incident:_____
_____
_____
_____

Legal Observer Information:

Phone: Email:
Print Name: Signature:
Date:

Please Return to ACLU-FL Coordinator

ACLU of Florida Legal Observer Incident Report form

9

Legal Observing at Protests & Rallies

For organized protests and demonstrations, you will receive an email from an ACLU of Florida regional organizer asking for assistance in your area for a certain date/time.

10

Day of the Event

- Wear comfortable clothes and good shoes (you may be walking several miles)
- Bring water and snacks
- Charge your phone
- When you arrive on site, the Site Coordinator will give you a vest, clipboard (if necessary) a contact sheet, and incident report forms
- Pay attention to counter-protesters and anyone planning civil disobedience.

11

What do I do if something goes wrong?

- Stay calm
- Contact the nearest Legal Observer or Site Coordinator
- Contact support staff at the ACLU of Florida main office
- OBEY POLICE ON SITE

12

What if someone approaches me with questions?

- Engage people and police about what you are doing
- Media/Press – send all media to the Site Coordinator
- People seeking legal help?
  - Point them to our intake process at: aclufl.org/get-help

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Are there other instances where legal observation is needed?

- Record police interactions where you live
- See suspicious police practices?
  - Large police presence
  - Aggressive policing
  - Checkpoints
  - Militarized or heavily armed
- **Remember: Keep a safe distance, record, and report!**

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Recent Legal Observing at The Florida March for Black Women





15

Know Your Rights: Demonstrations & Protests

Frequently Asked Questions

- Can my free speech be restricted because of what I say—even if it is controversial?
- Where can I engage in free speech activity?
- What about free speech activity on private property?
- Do I need a permit before I engage in free speech activity?

16

Can my free speech be restricted because of what I say—even if it is controversial?

No. The First Amendment prohibits restrictions based on the content of speech.

However, this does not mean that the Constitution completely protects all types of free speech activity in every circumstance. Police and government officials are allowed to place certain nondiscriminatory and narrowly drawn "time, place and manner" restrictions on the exercise of First Amendment rights. Any such restrictions must apply to all speech regardless of its point of view.

17

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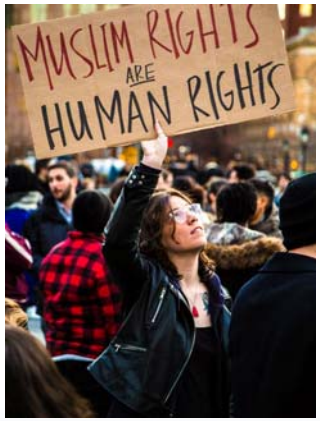

Where can I engage in free speech activity?

Generally, all types of expression are constitutionally protected in traditional "public forums" such as streets, sidewalks and parks. In addition, your speech activity may be permitted to take place at other public locations that the government has opened up to similar speech activities, such as the plazas in front of government buildings.

18

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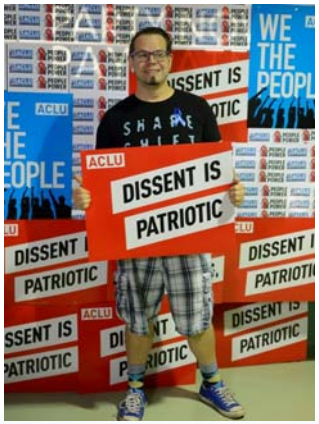

What about free speech activity on private property?

The general rule is that the owners of private property may set rules limiting your free speech. If you disobey the property owner's rules, they can order you off their property (and have you arrested for trespassing if you do not comply).

19

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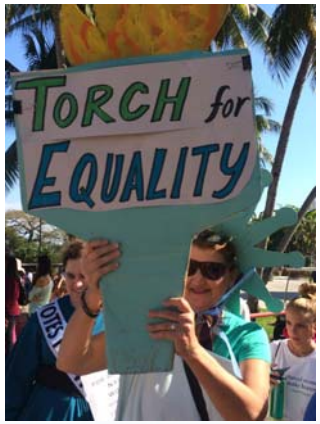

Do I need a permit before I engage in free speech activity?

Not usually. However, certain types of events require permits.

Generally, these events are:

- A march or parade that does not stay on the sidewalk, and other events that require blocking traffic or street closure
- A large rally requiring the use of sound amplifying devices; or
- A rally at certain designated parks or plazas

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Always Remember:

- **Stay alert.**
- **You are not a "peace-keeper," mediator or advisor.**
- **Take detailed notes.**
- **Complete your Incident Report and return to ACLU Coordinator(s).**

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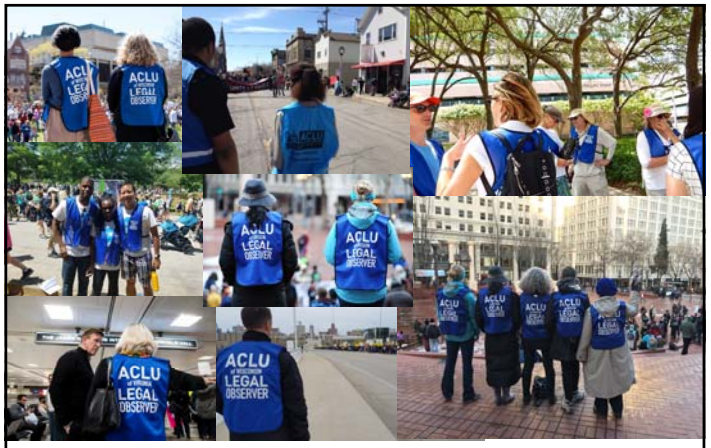
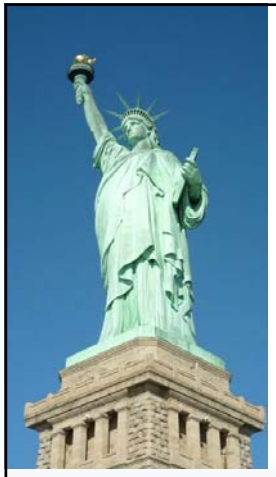
ACLU FL



You are joining a vast nationwide network of ACLU Legal Observers!
Thank you for helping us defend the First Amendment in Florida!

22

ACLU FL



For more information, contact:

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Monica Espitia: mespitia@aclufl.org

Natishia Y. June: njune@aclufl.org

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, FEMHEALTH USA, INC., d/b/a CARAFEM, MILO WORLDWIDE LLC, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., Plaintiffs, v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PAUL J. WIEDEFELD, Defendants.	No. 1:17-cv-_____

MEMORANDUM IN SUPPORT OF PLAINTIFF MILO WORLDWIDE LLC'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff MILO Worldwide LLC has filed a motion for a preliminary injunction ordering Defendant Washington Metropolitan Area Transit Authority to re-display, for the remaining 18 days of a 28-day advertising campaign, a set of advertisements for the book *Dangerous* by Milo Yiannopoulos that it approved, received full payment for, posted, and then precipitously removed after receiving complaints from members of the public. It files this memorandum in support of that application and that motion.

STATEMENT OF FACTS

> *"The display of this ad is consistent with Metro's policy of remaining content-neutral when accepting advertising. Although Metro understands that feelings and perceptions will vary among individuals within the community, we cannot reject advertising because some find it inappropriate or offensive."*
>
> -- Response by WMATA Customer Relations staff to complaints about Milo Worldwide's advertisements, before WMATA changed its mind and removed the advertisements.

* * *

Milo Yiannopoulos is a public figure who is known for his iconoclastic opinions about contemporary issues. Part of his distinct media personality and brand is to engage provocatively with various matters of public concern. Plaintiff MILO Worldwide LLC ("Milo Worldwide") is a corporation through which Mr. Yiannopoulos carries out his activities as an author, journalist, and public speaker. Milo Worldwide is the publisher of Mr. Yiannopoulos' new book, *Dangerous*. Declaration of Alexander Macris ("Macris Decl."), ¶ 2.

Defendant Washington Metropolitan Area Transit Authority ("WMATA") is a governmental entity created by an interstate compact between Maryland, Virginia, and the District of Columbia. *See* D.C. Code § 9-1107.01 (the WMATA Compact). WMATA operates the second largest heavy rail transit system, the sixth largest bus network, and the fifth largest paratransit service in the United States, with an annual budget of nearly three billion dollars. *See* WMATA, FY2017 Approved Budget, at 8, 14, *available at* https://www.wmata.com/upload/FY2017-Approved-Budget-2.pdf. Defendant Paul J. Wiedefeld is the General Manager and CEO of WMATA. The Defendants are referred to collectively in this memorandum as WMATA.

WMATA sells advertising opportunities in Metrorail stations, in Metrorail cars, and in and on Metrobuses, earning approximately $23 million in advertising revenue in the current fiscal year. *See id*. at 21, 25. Advertising on WMATA has deep market penetration in the Washington, D.C. metropolitan area. WMATA estimates that its exterior bus advertising alone reaches 90% of the population on a daily basis. *See* WMATA, Advertising Opportunities, https://www.wmata.com/about/business/advertising.cfm.

Prior to May 28, 2015, WMATA advertising space was available for a wide variety of commercial and non-commercial advertising. The D.C. Circuit had held that WMATA's advertising space was a public forum. *Lebron v. WMATA*, 749 F.2d 893, 896 (D.C. Cir. 1984).

On May 28, 2015, in response to the submission of an advertisement WMATA did not wish to accept, WMATA closed its advertising space to "all issue-oriented advertising . . . until the end of the calendar year." *American Freedom Defense Initiative v. WMATA*, No. 15-cv-1038, 2017 WL 1167197 at *2 (D.D.C. 2017), *appeal pending,* No. 17-7059 (D.C. Cir. filed April 7, 2017).

On November 19, 2015, WMATA formally amended its Guidelines Governing Commercial Advertising ("Guidelines"). The new Guidelines restrict the advertising that WMATA accepts for its advertising space. They contain fourteen numbered restrictions. The application of Guidelines Nos. 9 and 14 are at issue in this motion:

> No. 9: Advertisements intended to influence members of the public regarding an issue on which there are varying opinions are prohibited.
>
> No. 14: Advertisements that are intended to influence public policy are prohibited.[1]

In this lawsuit, the validity and application of those guidelines (and two others) are challenged by four Plaintiffs: the American Civil Liberties Union Foundation, whose advertisements displaying the text of the First Amendment in English, Spanish, and Arabic were rejected; Carafem, a nonprofit women's health provider whose advertisement about an FDA-approved method of medical abortion was rejected; People for the Ethical Treatment of Animals, whose advertisements encouraging a vegan diet and informing viewers about the victimization of animals in military training were rejected; and Milo Worldwide, whose advertisements for

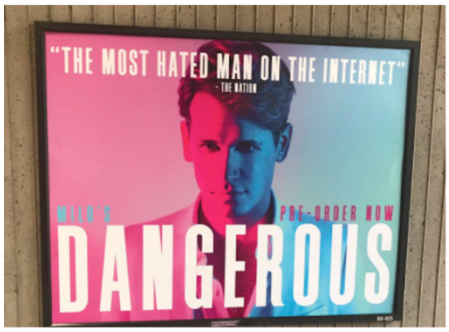
[1] The Guidelines are available at https://www.wmata.com/about/records/upload/Advertising_Guidelines.pdf.

Dangerous were accepted and posted but then removed after complaints from some riders. The instant motion is brought only by Milo Worldwide, and involves only the application of Guidelines 9 and 14 to its advertisements.

The publication date for *Dangerous* was July 4, 2017. In conjunction with its publication, Milo Worldwide wished to advertise the book in WMATA advertising spaces. Macris Decl. ¶¶ 2-3.

In June 2017, Milo Worldwide submitted its proposed advertisements to WMATA's agent, Outfront Media, Inc. ("Outfront"). The advertisements simply displayed Mr. Yiannopoulos's face, the book's title ("Milo's Dangerous"), an invitation to "Pre-Order Now," and, across the top, one of four short quotations from different book reviews. *Id*. ¶ 5.

The advertisements were accepted without hesitation, and on June 21, 2017, Milo Worldwide executed two contracts with Outfront (one for production, one for display) and paid $27,690 for the production and display of 45 large posters (46" H x 60" W) in Metro stations, and 200 "car cards" (22" H x 21" W) in Metrorail cars on a space-available basis, for four weeks beginning on June 26, 2017. The advertisements were posted on that date. *Id*. ¶¶ 5-6. As posted, one of them looked like this:



Shortly thereafter, some WMATA riders began complaining about the advertisements. Initially, WMATA's Customer Relations staff responded to complaints with the following message: "The display of this ad is consistent with Metro's policy of remaining content-neutral

when accepting advertising. Although Metro understands that feelings and perceptions will vary among individuals within the community, we cannot reject advertising because some find it inappropriate or offensive." *Id*. ¶¶ 7-8.

But on July 6—ten days into the 28-day advertising campaign—Outfront informed Milo Worldwide that the advertisements "are being removed at the direction of the Washington Metropolitan Area Transit Authority. They're claiming you cannot run this as it violates guidelines #9 and #14." Outfront noted that it had expressed "concern to the fairness of this ruling," but "must be cautious to our partnership [with WMATA]." *Id*. ¶ 9. When pressed by news media to explain "what, precisely, about the ads violate[d] the guidelines," "Metro declined to answer." *Id*. ¶¶ 9-10.

Outfront informed Milo Worldwide that WMATA had instructed it to draw up a contract cancellation and refund the money that had been paid. It requested written permission to do so. Milo Worldwide responded, "You do NOT have our written permission. . . . [W]e consider this to be a violation of our First Amendment rights. If WMATA is intent on pursuing this unconstitutional course of action they should expect to face the full consequences of that." *Id*. ¶ 11.

Dangerous has been selling briskly since its release on July 4, 2017. It has been #4 or #5 on the New York Times hardcover non-fiction best-seller list for the past three weeks (July 23, 30, and August 6). It has been on the Wall Street Journal non-fiction best-seller list for the past four weeks, reaching #2 for the week ended July 9 and #1 for the week ended July 23. It has also been on the Publisher's Weekly hardcover non-fiction best seller list for the past four weeks, reaching #1 on the July 24 list. On the Amazon.com non-fiction best-seller list it was #5 for the

week of July 9 and #9 for the week of July 23. Its entire first print run has already shipped, and a second printing has begun to be shipped. *Id*. ¶ 13.

Advertising contributes to the sales of new books. Milo Worldwide has lost and continues to lose sales of *Dangerous* by having its advertisements censored by WMATA. Re-posting of Plaintiff's advertisements for the remaining 18 days of the advertising run it already paid for will contribute to the book's continued sales. *Id*. ¶ 14.

APPLICABLE LEGAL STANDARD

Preliminary relief is warranted where the party seeking relief makes a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of equities in its favor, and accord with the public interest." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). "In First Amendment cases, the likelihood of success will often be the determinative factor in the preliminary injunction analysis." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (internal quotation marks omitted). For that reason, where there is likely success on the merits, the court will "view more favorably [Plaintiff]'s arguments regarding irreparable injury, the balance of the equities, and the public interest." *Id*.[2]

ARGUMENT

As a governmental entity, WMATA is of course subject to the First Amendment's command that it "make no law . . . abridging the freedom of speech." But as an entity created by

[2] In this Circuit, courts have traditionally applied these factors on a "sliding scale," where a stronger showing on some factors can compensate for a weaker showing others. *See, e.g*., *Davenport v. Int'l Brotherhood of Teamsters*, 166 F.3d 356, 360 (D.C. Cir. 1999). It has been suggested, but not decided, that a likelihood of success on the merits may be required. *See Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20-22 (2008)). Under either approach, however, Plaintiff makes the necessary showing here.

a compact between Maryland, Virginia, and the District of Columbia, the path to enforcement of that command is slightly complicated.

First, courts have held that WMATA is entitled to the Eleventh Amendment immunity of Maryland and Virginia. *See Barbour v. WMATA*, 374 F.3d 1161, 1163 (D.C. Cir. 2004); *Morris v. WMATA,* 781 F.2d 218, 219-20 (D.C. Cir. 1986). But the Compact affirmatively waives the application of Eleventh Amendment immunity to suits against WMATA regarding its proprietary functions. D.C. Code § 9-1107.01, ¶ 80. And "[t]he rental of commercial advertising space is clearly a proprietary function. Thus, WMATA, under the clear language of section 80, has waived its Eleventh Amendment immunity in this case." *Lebron v. WMATA*, 665 F. Supp. 923, 935 (D.D.C. 1987). Additionally, the Compact affirmatively provides that "[t]he United States District Courts shall have original jurisdiction . . . of all actions brought by or against the Authority." D.C. Code § 9-1107.01, ¶ 81. The Eleventh Amendment is therefore no bar to the maintenance of this lawsuit.

Second, to the extent WMATA is a state entity, rather than a District of Columbia entity, the First Amendment's protections apply to it through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'") That makes no substantive difference, for the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power." *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

Finally, courts in this District have held that WMATA is not a "person" for purposes of 42 U.S.C. § 1983. *See, e.g., Headen v. WMATA*, 741 F. Supp. 2d 289, 294 (D.D.C. 2010).[3] But under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Injunctive relief may therefore be entered against defendant Wiedefeld in his official capacity. *See Hedgepeth v. WMATA*, 386 F.3d 1148, 1152 n.3 (D.C. Cir. 2004).

We turn next to the merits.

I. Plaintiff Milo Worldwide Has a Clear Likelihood of Success on the Merits Because WMATA's Action Violated its First Amendment Rights

Analysis of a person's right to engage in public expression on government property generally begins by determining what category of "forum" is involved—a traditional, designated, limited, or non-public forum—because the government's ability to restrict speech varies according to the type of forum. In *Lebron v. WMATA*, 749 F2d. 893 (D.C. Cir. 1984), the D.C. Circuit (Bork, Scalia & Starr, JJ.) expressed "no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA has converted its subway stations into public fora by accepting other political advertising." *Id*. at 896. More recently, this Court has held WMATA's advertising spaces to be a nonpublic forum. *American Freedom Defense Initiative v. WMATA*, No. 15-cv-1038, 2017 WL 1167197 at *3 (D.D.C. 2017).

It is not necessary in considering this motion to determine what type of forum is involved, because even in a limited or nonpublic forum, "[o]nce it has opened [the forum], the

[3] That issue is currently before the Court of Appeals in *American Freedom Defense Initiative v. WMATA*, No. 17-7059 (D.C. Cir. filed April 7, 2017).

State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (internal quotation marks and citations omitted).[4] WMATA's treatment of Plaintiff's advertisements violates each of the three principles set out in *Rosenberger*.

A. WMATA has not respected the lawful boundaries it has itself set

The Interstate Compact creating WMATA authorizes it to "[a]dopt, amend and repeal rules and regulations respecting the exercise of the powers conferred by this [Compact.]" D.C. Code § 9-1107.01 ¶ 12(c). Pursuant to that power, WMATA's Board of Directors duly adopted the Guidelines Governing Commercial Advertising in November 2015. It must now "respect the lawful boundaries it has itself set." *Rosenberger,*515 U.S. at 829; *accord Christian Legal Society v. Martinez*, 561 U.S. 661, 663 (2010); *Women's Health Link, Inc. v. Fort Wayne Public*

[4] The D.C. Circuit's forum nomenclature differs somewhat from the Supreme Court's. The Supreme Court generally refers to three types of forums: (i) traditional public forums, (ii) designated public forums, and (iii) limited public forums, sometimes also called nonpublic forums. *See, e.g., Christian Legal Society v. Martinez*, 561 U.S. 661, 679 (2010); *American Freedom Defense Initiative v. King County*, 136 S. Ct. 1022 (2016) (Thomas, J., dissenting from denial of certiorari); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017). The D.C. Circuit, by contrast, sometimes refers to (i) traditional public forums, (ii) limited or designated public forums, and (iii) nonpublic forums, *Oberwetter v. Hilliard*, 639 F.3d 545, 551 (D.C. Cir. 2011); sometimes to (i) traditional public forums, (ii) designated public forums, and (iii) nonpublic forums, *Initiative & Referendum Institute. v. U.S. Postal Service*, 685 F.3d 1066, 1070 (D.C. Cir. 2012); and most recently to (i) traditional and designated public forums, and (ii) nonpublic forums, *Hodge v. Talkin*, 799 F.3d 1145, 1157–58 (D.C. Cir. 2015). *See generally* Marc Rohr, *First Amendment Fora Revisited: How Many Categories Are There?,* 41 Nova L. Rev. 221 (2017).

Oberwetter aside, however (and there it made no difference), there is no disagreement that in forums that are neither traditional nor designated, the rules set out in *Rosenberger* and its progeny apply.

Transportation Corp., 826 F.3d 947, 953 (7th Cir. 2016); *Davison v. Loudoun County Bd. of Supervisors*, No. 16-CV-932, 2016 WL 4801617, at *7 (E.D. Va. Sept. 14, 2016).

The Seventh Circuit's decision in *Women's Health Link* is directly on point. There, a city transit company prohibited advertisements that "express or advocate opinions or positions upon political, religious, or moral issues." 826 F.3d at 949. It rejected an advertisement that "did not express or advocate any such opinion or position," *id*., but that was sponsored by a pro-life organization. *Id*. at 950. The court (per Judge Posner) made short work of the transit system's rejection. Observing that "[n]othing in Health Link's proposed ad violates *any* of the restrictions," *id.* at 952, and that "[o]nce a government entity has created a facility (the ad spaces in and on its buses, in this case) for communicative activity, it 'must respect the lawful boundaries it has itself set,'" *id*. at 953 (quoting *Rosenberger*, 515 U.S. at 829), the court concluded that "Citilink's refusal to post the ad was groundless discrimination against constitutionally protected speech." *Id*.[5]

Judge Cacheris' recent decision in *Davison* follows the same path. There, a citizen's critical comment posted on the Loudoun County Board of Supervisors' Facebook page "was 'quickly hidden' by someone operating the Board's Facebook page." *Davison*, 2016 WL 4801617, at *1. The parties and the court agreed that the County's Facebook page was a limited public forum, *id*. at *6, which "encourage[d]" visitors "to submit questions, comments and concerns" regarding "matters of public interest in Loudoun County," *id*. at *7, with some restrictions, such as "vulgar language" or "spam." *Id*. at *6. Holding that the rule about

[5] The court also noted that there was no need "to decide which type of forum makes the best fit with the display surfaces in and on Citilink's buses; for its refusal to allow Health Link's ad to be displayed is an unjustifiable, because arbitrary and discriminatory, restriction of free speech." *Id*. at 951.

"'respect[ing] the lawful boundaries it has itself set' . . . applies as much to Defendants' Facebook page as to any other limited public forum," *id*. at 7 (quoting *Rosenberger*, 515 U.S. at 829), the court held that "unless Plaintiff's comments pertained to other than 'matters of public interest in Loudoun County' or violated an enumerated rule, [he] was entitled to post them on the County's Facebook page." *Id*.

Likewise, in *Vaguely Qualified Productions LLC v Metropolitan Transportation Authority*, No. 15 Civ. 04952, 2015 WL 5916699 (S.D.N.Y. Oct. 7, 2015), *appeal dismissed*, No. 15-3695 (2d Cir. Feb. 18, 2016), the New York MTA adopted a rule prohibiting advertisements that are "political in nature," defined to include "any message that expresses a viewpoint about a disputed economic, political, moral, religious or social issue, or some matter related to such issues." *Id*. at *3. When plaintiff Vaguely Qualified Productions sought to run a series of advertisements for a humorous documentary film called *The Muslims Are Coming!*, the MTA rejected the ads as political. Judge McMahon held that the advertiser's desire "to capitalize on controversy" did not make the advertisements political in nature, *id*. at *10, and enjoined their rejection.

This case is the same. Plaintiff's advertisements for Mr. Yiannopoulos' book are innocuous on their face, and violate none of the Guidelines. The objections that resulted in their removal were apparently based on third parties' reactions to Mr. Yiannopoulos' image and identity. WMATA was not constitutionally entitled to act based on the reactions of such third parties. It was required to "respect the lawful boundaries it has itself set." WMATA properly recognized when it first accepted the advertisements, and when it first received complaints, that its Guidelines provided no ground for rejecting Plaintiff's speech—a judgment confirmed by

WMATA's inability to explain what about the advertisements violated the Guidelines. Macris Decl. ¶ 10.[6]

B. WMATA's removal of Plaintiff's advertisements was viewpoint-discriminatory

Even in a limited or nonpublic forum, "'viewpoint discrimination' is forbidden." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (Alito, J.). "[I]t is well-settled law that . . . viewpoint discrimination is prohibited in any forum." *Morgan v. Swanson*, 659 F.3d 359, 413 (5th Cir. 2011). WMATA's rejection of Plaintiff Milo Worldwide's advertisements for *Dangerous* violated this bedrock standard.

The timeline of WMATA's actions makes clear what went on here. Innocuous advertisements for a book were accepted and displayed. Then some riders complained about the viewpoints of the book's author on current political and social issues, or perhaps about the presumed viewpoint expressed in his book. For example, one complainant quoted in the media said, "WMATA does not have to advertise hate speech." A complaint tweeted at WMATA and reproduced in the Washington Post, said, "Hey @wmata why are there milo yionwlopsooe posters all over the metro? He is a literal nazi." Macris Decl. ¶ 7.[7]

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[6] WMATA's actions also violated the fundamental principle that government agencies must follow their own rules, often called the *Accardi* doctrine after *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954). Whether applicable to WMATA as a matter of federal law, *see Elcon Enterprises v. WMATA,* 977 F.2d 1472, 1479–80 (D.C. Cir. 1992), or as a matter of District of Columbia law, *see Dankman v. D.C. Board of Elections and Ethics*, 443 A.2d 507, 513 (1981), the principle provides a complimentary ground for enjoining WMATA's action in this case.

[7] Of course even actual Nazis have First Amendment rights. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam); *Colin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

Initially, WMATA responded appropriately, explaining that "[t]he display of this ad is consistent with Metro's policy of remaining content-neutral when accepting advertising. Although Metro understands that feelings and perceptions will vary among individuals within the community, we cannot reject advertising because some find it inappropriate or offensive." *Id*. ¶ 8.

But after a few more days of complaints, WMATA caved. Shrugging off its constitutional responsibilities, it took down the advertisements on the pretense that they now violated the Guidelines with which they had previously complied. When asked to explain how the advertisements violated the Guidelines, WMATA declined to respond. *Id*. ¶¶ 9-10.

"If the Supreme Court's First Amendment jurisprudence makes anything clear, it is that speech may not be disfavored by the government simply because it offends." *Davison*, 2017 WL 3158389, at *11 (citing *Matal*, 137 S. Ct. at 1763). In Justice Alito's epigram, "Giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763. And "the fact that [Metro riders] may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

That the viewpoint deemed offensive by WMATA was that of Mr. Yiannopoulos, rather than anything on the face of the advertisements, does not change the analysis. If anything, prohibiting a person's present expression based on what he or she has said in the past is a greater violation. *See Near v. Minnesota*, 283 US 697, 712-13 (1931) (prohibiting a publisher from circulating future issues of his newspaper because prior issues were "malicious, scandalous and defamatory" is "the essence of censorship").

Prohibiting Mr. Yiannopoulos' expression based on perceptions about him as a person is equally impermissible. As the Supreme Court has recognized, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010). For that reason, "[t]he First Amendment protects speech and speaker, and the ideas that flow from each." *Id*. at 341. *Cf. Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (striking down statute burdening publication by accused or convicted criminals).

WMATA's viewpoint-discriminatory ground for removing Plaintiff Milo Worldwide's advertisements requires that its action be enjoined.

C. WMATA's exercise of unfettered discretion was unreasonable and viewpoint-based

Rosenberger's third prohibition on government regulation of speech in limited or nonpublic forums is that the state "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum." 515 U.S. at 829. One of the classic examples of an unreasonable exclusion of speech is an exclusion imposed in the exercise of an official's unbridled or unfettered discretion: "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–51 (1969). Otherwise, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975).

In the seminal public transit advertising case, the Supreme Court noted that "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). Subsequently, the Court confirmed that the "arbitrary, capricious, or invidious" standard

captured the meaning of "unreasonable" in a limited or nonpublic forum. *See United States v. Kokinda*, 497 U.S. 720, 725–26 (1990) ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or, as was said in *Lehman,* 'arbitrary, capricious, or invidious.'"). The Ninth Circuit has applied the same standard of unreasonableness in a public transit advertising case. *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (per Justice White, sitting by designation).

Equally important, one of the main reasons a regulation of speech that gives unfettered discretion to administrators runs afoul of the First Amendment is that "'[w]here the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he [or she] will favor or disfavor speech based on its content.'" *A.N.S.W.E.R. Coalition v. Jewell*, 153 F. Supp. 3d 395, 408 (D.D.C. 2016), *aff'd*, 845 F.3d 1199 (D.C. Cir. 2017) (quoting *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002)).

WMATA's application of the unfettered discretion afforded by its Guidelines here resulted in a speech restriction that was both unreasonable and viewpoint-based. The two Guidelines WMATA has cited to justify its removal of Plaintiff's advertisements are No. 9, prohibiting "Advertisements intended to influence members of the public regarding an issue on which there are varying opinions," and No.14, prohibiting "Advertisements that are intended to influence public policy." Neither provides an objective or definite standard, as demonstrated by WMATA's acceptance and subsequent rejection of Plaintiff's advertisements even though their content had not changed.

In *Vaguely Qualified Productions v. MTA*, the court relied on the fact that the New York MTA had accepted a variety of other advertisements that were at least as political as the rejected

advertisement to conclude that the MTA's rejection of plaintiff's advertisement was "not reasonable." *See* 2015 WL 5916699 at *11-12. For example, the MTA had accepted advertisements for CNN's coverage of a presidential debate featuring quotations from candidates, *id*. at *11, and advertisements for a television show with headlines such as "CORPORATIONS OWN YOUR MINDS." *Id*.

So too here. In recent months, WMATA has accepted and displayed advertisements for a gambling casino, for alcoholic beverages, for a "hookup" website marketed to gay men, and for a movie showing women ogling a male stripper. *See* Complaint Exhibits E, F, K, and O. WMATA's apparent decision that these advertisements do not involve "issue[s] on which there are varying opinions," while Plaintiff's advertisement for a book does, was arbitrary, capricious, or invidious, and shows the unreasonableness of Guideline No. 9 as applied to Plaintiff's advertisement. Likewise, WMATA has accepted and displayed advertisements by military contractors touting the virtues of their products, and an advertisement showing a crowd of demonstrators holding signs with "Black Lives Matter," "Stand for Justice," and similar slogans. *See* Complaint Exhibits D and C. WMATA's apparent decision that these advertisements are not "intended to influence public policy," while Plaintiff's advertisement for a book is, was arbitrary, capricious, or invidious, and shows the unreasonableness of Guideline No. 14 as applied to Plaintiff's advertisement. Like the rejection of the movie advertisements in the New York MTA case, WMATA's rejection of Plaintiff's book advertisements here was "not reasonable," and was therefore unconstitutional even in a limited or nonpublic forum.

For similar reasons, the application of the Guidelines to reject Plaintiff's advertisements was also viewpoint-discriminatory. The examples of accepted advertisements given just above demonstrate that in applying the unfettered discretion afforded under its vague Guidelines,

WMATA accepted some viewpoints while rejecting others. In particular, on the question of what consumable media riders should purchase or patronize, WMATA's rejection of Plaintiff's advertisements for a book, when it has accepted advertisements for other consumable media expressing various other points of view, *see* Complaint ¶ 62 and Exhibits N and O, indicates that WMATA's unfettered discretion resulted in viewpoint discrimination against Milo Worldwide. *See Vaguely Qualified Productions,* 2015 WL 5916699 at *11 (refusing to approve plaintiff's advertisement on the ground that it was political "cannot be deemed viewpoint neutral when the MTA has approved other advertisements addressing issues of cultural import that are similarly, or far more, 'political.'"). Other examples from the Complaint underscore how readily the Guidelines invite viewpoint discrimination. For example, Plaintiff PETA's advertisement showing a pig saying "I'm ME, not MEAT" was rejected, while a restaurant's advertisement showing a delicious (to carnivores) pork dish and captioned "PORKADISE FOUND" was accepted. *See* Complaint ¶¶ 69-71, 76 and exhibits P and T.[8]

* * *

For each of the reasons given above, Plaintiff Milo Worldwide has demonstrated a clear likelihood of success on the merits.

II. Plaintiff Milo Worldwide is Suffering and Will Continue to Suffer Irreparable Harm in the Absence of Relief

If the Court finds that Plaintiff Milo Worldwide has shown a likelihood that its constitutional rights are being violated, it follows that Plaintiff is suffering irreparable harm. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of

[8] In *American Freedom Defense Initiative v. WMATA,* No. 15-cv-1038, 2017 WL 1167197 (D.D.C. 2017), *appeal pending,* No. 17-7059 (D.C. Cir. filed April 7, 2017), this Court held that WMATA's advertising Guidelines are not unconstitutional on their face. As noted earlier, the instant motion presents only an as-applied challenge to Guidelines 9 and 14.

time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)); *accord American Freedom Defense Initiative v. WMATA,* 898 F. Supp. 2d 73, 84 (D.D.C. 2012) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.") (quoting *Bronx Household of Faith v. Board of Education of City of New York*, 331 F.3d 342, 349-50 (2d Cir. 2003)); *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) ("The Court presumes that irreparable harm will flow to plaintiffs from a continuing constitutional violation.").

Although lost profits from book sales may be recoverable in damages, lost profits are far from the only injury that Plaintiff is suffering. Its publication and sale of *Dangerous* is an effort to reach people with a message and to persuade them that the message has validity. Every lost sale therefore represents a lost opportunity to communicate, and perhaps to persuade. The book is a piece of advocacy on contemporary political and social issues, and thus lies near the core of the First Amendment, which "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). This remains true even if the speech is "not always with perfect good taste." *Id*. (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)).

Even aside from the non-monetary consequences of lost book sales, the advertisements themselves convey a First-Amendment-protected communication of what Mr. Yiannopoulos looks like and the fact that he has published a book. That some Metro riders were moved to complain about the mere fact that the advertisements were posted proves the point that they were communicating cogent content.

Dangerous, which was first released on July 4, 2017, is still very much on the market. As noted above, it has been and remains on the New York Times, Wall Street Journal, and Publisher's Weekly hardcover non-fiction best-seller lists. Milo Worldwide had 18 days remaining in the WMATA advertising campaign it paid for, and every day its advertisements remain censored it will continue to suffer the irreparable harms described above.

III. The Balance of Equities and the Public Interest Favor Entering Relief

If the Court finds that Plaintiff has shown a likelihood that its First or Fifth Amendment rights are being violated, it likewise follows that the balance of equities and the public interest weigh in Plaintiff's favor.

As this Court has noted, "[t]he Government cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (internal quotation marks omitted). Nor will WMATA suffer financial harm or opportunity costs, as Milo Worldwide has paid WMATA its usual commercial advertising rates.[9]

Requiring WMATA to re-post Plaintiff's advertisements may, of course, lead to renewed complaints from some Metro riders. But some people's unhappiness about the government's failure to censor other people's speech is not a harm about which the government can legitimately complain: "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell v. IMS Health Inc*., 564 U.S. 552, 575 (2011). In its most recent First Amendment decision, the Supreme Court reiterated that "[s]peech may not be banned on the ground that it expresses ideas that offend," *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017), and that "the proudest boast of our free speech jurisprudence is that we protect the

[9] Indeed, to the extent Plaintiff's advertisements may replace the many unpaid pubic service advertisements visible in Metro stations and trains, an injunction will help fill WMATA's depleted coffers.

freedom to express 'the thought that we hate.'" *Id*. at 1764 (plurality opinion) (quoting *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

For reasons like these, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting *Abdah v. Bush*, No. 04-cv-1254, 2005 WL 711814 at *6 (D.D.C. Mar. 29, 2005)); *accord Lamprecht v. F.C.C.*, 958 F.2d 382, 390 (D.C. Cir. 1992) ("a [government] policy that is unconstitutional would inherently conflict with the public interest"); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). At a minimum, "[t]he public interest in this case will be served by ensuring that plaintiffs' First Amendment rights are not infringed before the constitutionality of the [Guidelines] has been definitively determined." *Stewart v. District of Columbia Armory Board*, 789 F. Supp. 402, 406 (D.D.C. 1992).

CONCLUSION

For the reasons given above, Plaintiff Milo Worldwide's motion for a preliminary injunction, ordering WMATA to re-display Plaintiff's advertisements for the remaining 18 days of the contracted 28-day advertising campaign, should be granted.[10]

[10] Because the entry of an injunction will not harm WMATA financially (and may help, *see* n.7, above), the security required by Fed. R. Civ. P. 65(c) should be set at zero or at a nominal amount, such as $10. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) ("The district court retains discretion as to the amount of security required, *if any*.") (internal quotation marks omitted) (emphasis in original); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) ("the district court did not abuse its discretion in dispensing with the bond").

Proposed orders are filed herewith.

August 9, 2017

Respectfully submitted,

/s/ *Arthur B. Spitzer*

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID WILLIAMSON, CHASE HANSEL, KEITH BECHER, RONALD GORDON, JEFFERY KOEBERL, CENTRAL FLORIDA FREETHOUGHT COMMUNITY, SPACE COAST FREETHOUGHT ASSOCIATION and HUMANIST COMMUNITY OF THE SPACE COAST,

Plaintiffs,

v. **Case No: 6:15-cv-1098-Orl-28DCI**

BREVARD COUNTY,

Defendant.

ORDER

The Board of County Commissioners of Brevard County, Florida, holds regular meetings to conduct the business of the county, and it begins its meetings with invocations delivered by citizens. But the County has a policy and practice barring certain citizens from giving the invocation based on those citizens' religious beliefs.

The Plaintiffs in this case primarily assert that the County's invocation practice violates the Establishment Clause of the First Amendment of the United States Constitution. They also bring claims under the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Article I, Sections 2 and 3 of the Florida Constitution. Plaintiffs seek injunctive and declaratory relief as well as money damages. The case is before the Court on the parties' cross-motions for summary judgment, and as set forth below, both motions are granted in

part and denied in part.

I. Factual and Procedural Background[1]

A. The Parties

This case was brought by eight Plaintiffs—five individuals and three organizations. The individual Plaintiffs—David Williamson, Chase Hansel, Keith Becher, Ronald Gordon, and Jeffrey Koeberl—identify themselves as atheists, and all but Gordon also identify themselves as Secular Humanists. (ASOF ¶ 85). The American Humanism Association describes Humanism as "a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity." (Id. ¶ 86). Becher, Koeberl, and Williamson are ordained as Humanist clergy by the Humanist Society; all three are Humanist Celebrants, and Koeberl is also a Humanist Chaplain. (Id. ¶ 93).

Plaintiffs do not profess a belief in the existence of God. (Id. ¶ 209). Their beliefs are strongly held, having a place in their lives equal to the significance of theistic beliefs in the lives of monotheists. (Id. ¶ 91). They consider their beliefs to be a religion. (Id. ¶ 92). Four of the individual Plaintiffs are residents of Brevard County; Williamson lives in neighboring Seminole County. (Id. ¶ 83). Hansel and Gordon own homes in Brevard County and pay property taxes there. (Id. ¶ 84).

The three organizational Plaintiffs are the Humanist Community of the Space Coast

[1] The facts are not in dispute. After the Court heard oral argument on the parties' cross-motions for summary judgment (Docs. 54 & 55), the parties submitted a 67-page, 301-paragraph Amended Stipulation of Facts Regarding Cross-Motions for Summary Judgment (Doc. 83). The factual background is taken largely from that Amended Stipulation of Facts, though other record evidence is also cited herein. References to the Amended Stipulation of Facts are indicated by "ASOF" followed by the paragraph number(s).

(HCSC), the Space Coast Freethought Association (SCFA), and the Central Florida Freethought Community (CFFC), all of which "are organizations for nontheists" whose members are principally atheists, agnostics, Humanists, and other nontheists. (Id. ¶¶ 94–95). HCSC and SCFA are headquartered in Brevard County, where most of their members live. (Id. ¶ 96). CFFC is headquartered in Seminole County, but some of its members reside in Brevard County. (Id.). Plaintiff Gordon is a member of SCFA, (id. ¶ 101), and the other individual Plaintiffs are leaders of the organizational Plaintiffs,[2] (id. ¶¶ 98–99).

Defendant Brevard County is a political subdivision of the State of Florida that had a population of nearly 550,000 in 2010. (Id. ¶ 1; Doc. 53-8 at 50). The County is known as Florida's Space Coast because of the presence of NASA and the Kennedy Space Center. (Doc. 53-8 at 37). The Brevard County Board of County Commissioners (the Board) is the legislative and governing body of the County. (ASOF ¶ 2). The Board has five Commissioners, each of whom represents, and is elected by, voters residing in one of five numbered single-member districts that make up the County. (Id. ¶ 8). Pursuant to a state statute, "[t]he county commissioners shall sue and be sued in the name of the County." (Id. ¶ 9; § 125.15, Fla. Stat.).

B. Board Meetings

The Board meets regularly—typically more than once per month—to discuss issues, hear from citizens, and carry out its responsibilities. (ASOF ¶ 10). The meetings are conducted in a boardroom that is approximately sixty feet wide and seventy feet deep and

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[2] Specifically, Becher is President and Organizer of HCSC and a member of the boards of directors of all three organizational Plaintiffs. (ASOF ¶ 98). Hansel is President of SCFA and a member of its board of directors. (Id.). Koeberl is Vice-President and Co-Organizer of HCSC and a member of its board and SCFA's board. (Id.). Williamson is the founder and Chair of CFFC and a member of its board. (Id.).

has 196 seats for audience members and a total capacity of 270.[3] (Id. ¶¶ 10, 18, & 22). During Board meetings, the five Commissioners, the County Manager, and the County Attorney sit on a raised dais facing the audience; the number of attendees varies from fewer than ten to a full house. (Id. ¶¶ 20–21, 27). Board meetings proceed according to printed agendas, are open to the public, are carried live on cable television, are available for public viewing on the Board's website, and can be watched live on a television in a lobby just outside the boardroom entrance. (Id. ¶¶ 12–13). During its meetings, the Board sometimes considers and votes on matters that affect only one person or a small group of people. (Id. ¶ 30).

Board meetings typically begin with a call to order that is then followed by: an invocation; the pledge of allegiance; "resolutions, awards, and presentations"; consent agenda items; and other scheduled matters, including at least one "Public Comment" period.[4] (Id. ¶¶ 35, 64, & 141–43). During the "resolutions, awards, and presentations" segment of the meetings, individuals or groups are recognized for contributions they have made to the community, and children sometimes appear before the Board to be honored or to watch those who are being honored. (Id. ¶¶ 36–39). Generally, those who attend the "resolutions, awards, and presentations" segment are also present in the boardroom during the invocation. (Id. ¶¶ 38 & 42). Ordinarily, there are more people at the beginning of Board meetings than at the end; usually, some attendees leave before the "Public

[3] The parties note in their stipulated facts that the Board also holds "workshop" meetings and other special meetings outside the boardroom described in the text. (ASOF ¶ 15). Those meetings are not opened with an invocation and are not at issue in this lawsuit. (Id. ¶¶ 16–17).

[4] As explained later in this Order, the Board changed the timing and number of Public Comment periods during the timeframe of the events at issue in this case.

Comment" segment. (Id. ¶ 145).

C. Invocations and Selection of Invocation Speakers in the County

Board meetings "are typically opened with a religious invocation" that is "generally, but not always, given by a cleric from the faith-based community." (Id. ¶¶ 14, 56). Invocation speakers are unpaid volunteers invited by an individual Commissioner or his or her staff; the five Commissioners take turns inviting speakers according to an annual schedule assigning that task for each meeting. (Id. ¶¶ 43, 45, & 49; Anderson Dep., Doc. 42, at 12–13; see also 2013–2014 Invocation and Pledge Schedule, Pls.' Ex. 64[5]). On occasion, the assigned Commissioner has difficulty finding someone to give an opening invocation or a scheduled speaker does not show up, and on those occasions either a Commissioner gives the invocation, a member of the audience is permitted to give the invocation, or a moment of silence is held in lieu of the invocation. (ASOF ¶¶ 50–51 & 203; see also, e.g., Pls.' Exs. 30 & V2[6] (transcript and video of Dec. 15, 2015 and Mar. 15, 2016 invocations) (pastor did not show up and a commissioner gave the invocation); Pls.' Exs. 29, 30, & V2 (speaker list, transcript, and video of Mar. 9, 2010 invocation) (reverend did

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[5] References to Plaintiffs' Exhibits 1 through 163 are to the exhibits filed with Plaintiffs' summary judgment motion and their response to the County's motion. Exhibits 1–133 are attachments to their motion (Doc. 55), and Exhibits 134–163 are attachments to their response (Doc. 60).

[6] In addition to Exhibits 1 through 163, Plaintiffs have submitted two USB flash drives containing video and audio evidence, and those exhibits are numbered V1 through V18. (See Notices of Physical Filing, Docs. 57 & 61). Exhibits V1 through V13 are contained on the USB flash drive that was filed with the first Notice of Physical Filing (Doc. 57), and Exhibits V14 through V18 are contained on the USB flash drive that was filed with the second Notice of Physical Filing (Doc. 61). Exhibit V2 contains all available videos of invocations given at Board meetings between March 19, 2010, and March 15, 2016, and Exhibit V14 contains all available videos of invocations given at Board meetings between March 29, 2016, and May 26, 2016. (See Pls.' App. of Exs., Doc. 55-1, at 14 (listing and describing Pls.' Ex. V2); Pls.' App. of Suppl. Exs., Doc. 60-1, at 5 (listing and describing Pls.' Ex. V14)).

not show up and a Commissioner's assistant gave the invocation); Pls.' Exs. 30 & V2 (transcript and video of Sept. 13, 2011 invocation) (unidentified audience member gave invocation when no one was scheduled); Pls.' Exs. 30 & V2 (transcript and video of Aug. 19, 2014 invocation) (moment of silence observed when pastor did not arrive on time to meeting)).

Not all invited speakers are clergy; non-clergy who have delivered opening invocations include police officers, staff members of a Congressman's office, a state judge, aides to the Commissioners, and a lay leader of the Church of Jesus Christ of Latter-day Saints. (ASOF ¶ 57). Chaplains of hospitals, a baseball team, the Brevard County Sheriff's Office, and a city police department have also given invocations. (Id. ¶ 59).

The selected invocation speaker's name, along with the name of the organization he or she represents, often appears on the meeting agenda. (Id. ¶ 65; see also July 7, 2015 Agenda, Doc. 54-2 at 6). The Commissioner who invites the speaker typically introduces the speaker. (ASOF ¶ 66). Some Board Chairpersons ask the audience to stand up for the invocation "out of respect for the religion of the person giving the invocation." (Id. ¶¶ 67–68). Other Chairpersons merely stand up and the other Commissioners and the audience generally follow suit and stand as well, though on occasion some audience members do not stand. (Id. ¶¶ 69–72).

The invocation speaker stands at a lectern at the front of the boardroom and usually, but not always, faces the Commissioners rather than the audience.[7] (Id. ¶ 76; see Pls.'

[7] During one invocation, the invited clergyman, after remarking, "Not quite sure where I need to face; my congregation [gesturing to the audience] or my choir [gesturing to the Board members]," faced the audience while giving his invocation. (See Pls. Ex. V2 (Mar. 3, 2016)). Another speaker, a chaplain, asked which way he should face, and the Chairwoman instructed him to face the Board. (See Pls.' Exs. 30 & V2 (Sept. 16, 2014)).

Exs. V2 & V14 (videos of invocations at Board meetings)). The inviting Commissioner often encourages the invocation speaker to tell the audience about his or her house of worship or organization and its activities before giving the invocation itself. (ASOF ¶ 77). After the invocation is given, a Commissioner usually leads the audience in the Pledge of Allegiance, and after the Pledge the inviting Commissioner thanks the invocation speaker for giving the invocation. (Id. ¶¶ 78–79).

Neither the Commissioners nor their staffs review drafts of invocations before they are given. (Id. ¶ 52). From January 1, 2010, through March 15, 2016, 195 invocations were given at Board meetings, and all but seven of those were given by Christians or contained Christian content. (Id. ¶ 53). Six of the seven "non-Christian" invocations were given by Jews, and the other was "generally monotheistic." (Id. ¶ 54). All 195 invocations "had at least some theistic content," (id. ¶ 60), and "[t]o the parties' knowledge, all the opening invocations delivered at [Board] meetings have appealed to or invoked a divine authority," (id. ¶ 204).

D. Requests to Give an Invocation and the Board's Reactions

On May 5, 2014, the United States Supreme Court issued its opinion in Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), upholding against an Establishment Clause challenge the invocation practice employed at town board meetings in the town of Greece, New York; that town's practice also involved invocations given by invited speakers. At that time, the five Commissioners in Brevard County were Chairwoman Mary Bolin Lewis and Commissioners Andy Anderson, Robin Fisher, Trudie Infantini, and Chuck Nelson. Four days after the Town of Greece decision, on May 9, 2014, Plaintiff Williamson, as Founder and Chair of Plaintiff CFFC, sent a letter to Chairwoman Lewis noting the decision and requesting the opportunity to offer invocations at Brevard County Board meetings. (ASOF

¶ 112; May 9, 2014 Letter, Pls.' Ex. 43). Williamson wrote to Chairwoman Lewis again two months later, stating in a July 22, 2014 letter that he had not received a response to his May 9 letter and demanding that the County permit a member of CFFC to deliver an invocation and "ensure its selection procedures for invocations comport with the Constitutions of Florida and the United States." (ASOF ¶ 113; July 22, 2014 Letter, Pls.' Ex. 44).

Williamson's second letter did prompt a response from the Board, but it was not the response he had hoped for. Before responding, the Board considered a proposed letter to Williamson that was attached to the agenda for its August 19, 2014 meeting. During that meeting, after hearing comments from Williamson and others, the Board unanimously approved the sending of the pre-drafted response letter.[8] (ASOF ¶¶ 114–15; Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)). The letter thanked Williamson and CFFC for their request but then stated:

> The Invocation portion of the agenda is an opening prayer presented by members of our faith community. The prayer is delivered during the ceremonial portion of the County's meeting and typically invokes guidance for the County Commission from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist. The invocation is also meant to lend gravity to the occasion, to reflect values long part of the County's heritage and to acknowledge the place religion holds in the lives of many private citizens in Brevard County.
>
> Your website leads us to understand your organization and its members do not share those beliefs or values which, of course, is your choice under the laws of the United States. However, this Commission chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a large segment of its constituents. . . .

(ASOF ¶ 117; Aug. 19, 2014 Letter, Pls.' Ex. 46).

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[8] Incidentally, the pastor who was scheduled to give the invocation at the August 19, 2014 Board meeting was late, and in lieu of an invocation a moment of silence was observed. (See Pls.' Exs. 30 & V2 (Aug. 19, 2014 invocation)).

The Board's August 19 letter went on to explain that although Williamson and CFFC members would not be permitted to deliver an invocation at the beginning of Board meetings, they could address the Board for three minutes during the Public Comment portion of the meetings, which as of that date was held at the end of each meeting. (Aug. 19, 2014 Letter ("This Commission respectfully takes issue with the claim that members of your organization are being excluded from presenting their viewpoint at County Commission meetings. You or your Brevard members have the opportunity to speak for three minutes on any subject involving County business during the Public Comment portion of our meeting."); ASOF ¶ 141). The letter noted that in the past, during the Public Comment portion of the meeting the Board had "listened to Bible readings; political points of view of all varieties; and some of our citizens' sharpest critiques and criticisms of County staff and the County Commission, among other things." (Aug. 19, 2014 Letter).

During discussion of the issue at the August 19, 2014 meeting, several of the Commissioners commented. Commissioner Anderson stated: "For you to say that Christianity isn't under attack, I'd like you to look over at Iraq right now and let me know if Christianity is not under attack"; "I need all the prayer in my life I can get to get through these meetings"; and "I just never understood the concept on—and this is no personal slight to anybody—how you could possibly be offended by something that you do not believe exists. I just never understood that." (ASOF ¶¶ 177–79; Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)). In addressing how speakers are chosen, Commissioner Infantini stated: "My staff and I, we search—I mean I don't have any specific religion—we will go anywhere to find somebody. No, not anywhere. Okay, correct, not anywhere. Not anywhere. There are certain places." (ASOF ¶ 182; Pls.' Ex. V3 (video excerpt of Aug.

19, 2014 Board meeting)). And after seconding the motion to approve the response letter, Commissioner Fisher stated: "I think the Public Comment section . . . will give them an opportunity to speak, we are opening the Commission up to that, . . . when I looked at their website one of the things I noticed was it wasn't so much about prayer as it was about trying to separate . . . state and church, and if that's the issue, state and church, then I think the Public Comment section of the agenda is probably the best place anyway." (Pls.' Ex. V3 (video excerpt of Aug. 19, 2014 Board meeting)).

In August and September 2014, Plaintiff Gordon emailed Commissioner Infantini, asking that a member of CFFC be allowed to deliver an invocation and stating that he was a Brevard County atheist who was willing to give an invocation. (ASOF ¶ 118; Pls.' Ex. 47). Commissioner Infantini did not accept Gordon's offer. (ASOF ¶ 118).

On August 21, 2014, Brevard County resident Reverend Ann Fuller emailed all five Commissioners, stating that she was "ordained clergy" and a "known humanist in the community" and requesting "an opportunity to give an invocation at an upcoming board meeting." (Id. ¶ 119). Reverend Fuller explained that she had "served Brevard County humanists as a Community Minister since 2006 affiliated with the [Unitarian Universalist] Church of Brevard." (Id.). That same day, Commissioner Infantini responded in an email that stated in part: "I am willing to have most anyone offer an invocation. However, by definition, an invocation is seeking guidance from a higher power. Therefore, it would seem that anyone without a 'higher power' would lack the capacity to fill that spot. . . . Further, I welcome 'freethinkers[,]' being the only 'freethinker' on the board. It just doesn't seem like the invocation is the correct place for it is all." (Id. ¶ 120).

On August 28, 2014, the Board received a letter from the Anti-Defamation League

objecting to the Board's decision on the issue of nontheistic invocations and suggesting that the Board's "decision to prohibit an atheist from delivering an invocation would most likely violate the standards set forth in the U.S. Supreme Court's recent decision in" Town of Greece. (ASOF ¶ 121; Anti-Defamation League Letter, Pls.' Ex. 48). At its November 6, 2014 meeting, the Board unanimously approved a response letter to be sent to the Anti-Defamation League attempting to explain the Board's practice of excluding nontheists. (ASOF ¶ 122; November 6, 2014 Letter, Pls.' Ex. 49). That November 6 response letter stated in part:

> [Y]our suggestion to allow atheists to provide the invocation would, in fact, show hostility toward the faith-based community—as evidenced by the content on social media webpages maintained by [CFFC] and the Freedom from Religion Foundation . . . . Therefore, this Board has no desire to follow your suggested action since that action could be easily construed, either overtly or by implication, as evidencing vicarious disdain, scorn or disrespect for the beliefs of our faith-based community.
>
> . . . It follows that the Board's decision to avoid hostility toward the faith-based community precludes any claim of discrimination. Indeed, if your characterization of secular humanism as a religion is valid, modifying the county's time-honored pre-meeting tradition by affording a secular humanist the opportunity to recite a secular "prayer" during the faith-based invocation portion of the Board's agenda could be perceived as [] endorsing a specific religion—*secular humanism*—in violation of the Establishment Clause because all Board actions at the meeting held following such a *secular "prayer"* invariably involve an underlying *secular purpose*. Atheists or secular humanists are still afforded an opportunity to speak their thoughts or supplications during the secular business portion of the agenda under "public comment."

(ASOF ¶ 124; Nov. 6, 2014 Letter, Pls.' Ex. 49) (emphasis in original). Thus, the Board maintained its stance that atheists and Secular Humanists could speak only during the Public Comment period and could not give the opening invocation.

Prior to December 16, 2014, the Public Comment segment of a Board meeting occurred at the end of the meeting. (ASOF ¶¶ 141–42). But on that date, the Board

adopted a resolution—Resolution No. 14-219—moving up the first thirty minutes of the Public Comment section so that it occurs after the "consent agenda" section and before the "public hearings" section of each regular Board meeting. (Id. ¶ 142; Mins. of Dec. 16, 2014 Board Meeting, Pls.' Ex. 33; see also, e.g., Agenda for July 7, 2015 Board Meeting, Ex. A to Whitten Aff., Doc. 54-2). Under that December 16 resolution, if the Public Comment section is not concluded within thirty minutes, the remainder occurs "at the conclusion of business specified on the regular commission agenda." (ASOF ¶ 143).

The terms of Commissioners Lewis and Nelson ended in November 2014, and at that time new Commissioners Curt Smith and Jim Barfield began their terms. (Id. ¶ 150). On January 26, 2015, the then-legal Director for Americans United for Separation of Church and State sent a letter to all five Commissioners with the subject line "Nontheists' Delivery of Opening Invocations." (Id. ¶ 125; Jan. 26, 2015 Letter, Pls.' Ex. 50). The letter noted that "requests from nontheists have been denied on the ground that belief in a higher power is a precondition to offering the invocation" and stated that "[i]n light of the recent change in the Board's leadership, we write on behalf of several national legal organizations"—Americans United for Separation of Church and State, the Freedom From Religion Foundation,[9] the ACLU of Florida, and the ACLU Program on Freedom of Religion and Belief—"to ask that you reconsider this limitation." (ASOF ¶¶ 125–26; Jan. 26, 2015 Letter, Pls.' Ex. 50). The letter requested that Plaintiff Williamson, non-party Reverend Ann Fuller, and Plaintiff Hansel be added to the roster of invocation givers and granted the opportunity to give an opening invocation at a Board meeting. (ASOF ¶ 127; Jan. 26, 2015 Letter, Pls.' Ex. 50).

[9] Plaintiff CFFC is a Freedom From Religion Foundation chapter. (ASOF ¶ 207).

Neither the Board nor any individual Commissioner responded to the January 26 letter, (ASOF ¶ 128), and on May 26, 2015, the same four organizations sent another letter to all five Commissioners, (id. ¶ 129; May 26, 2015 Letter, Pls.' Ex. 51). In that letter, the organizations requested that one of the five individual Plaintiffs or another representative of one of the three organizational Plaintiffs be permitted to deliver nontheistic invocations at a Board meeting. (ASOF ¶ 129; May 26, 2015 Letter, Pls.' Ex. 51). The County Attorney responded to the letter on May 28, 2015, advising that the Board's next meeting was on July 7, 2015, and that the attorney would present the letter to the Board at that time and seek a response. (ASOF ¶ 130; May 28, 2015 Letter, Pls.' Ex. 52).

At its July 7, 2015 meeting, the Board "responded to the May 26, 2015 letter by adopting Resolution 2015-101." (ASOF ¶ 131; Resolution 2015-101, Doc. 53-8 at 34 through 93[10]). Resolution 2015-101, which is attached as an appendix to this Order, is eleven pages long and consists of five "whereas clauses" followed by thirty-nine numbered paragraphs of "findings" and "conclusions"; it concludes with an amendment to the Board's Operating Procedures. In the whereas clauses, the Resolution notes: the Board's "longstanding tradition of calling for an invocation before commencing a regular meeting at which the secular business of the County will be reviewed and acted upon"; the Board's prior responses to requests from atheists, which "identified an informal policy addressing the issue of pre-meeting prayer"; that the Board had "not yet enacted a formal policy

[10] Resolution 2015-101 appears in several places in the record, including as an exhibit (Docs. 24-3 through 24-11) to the County's original Answer (Doc. 24) and as Exhibit 77 to the deposition of Plaintiff Williamson (Doc. 53-8 at 34 through 93). The parties represent in their Amended Stipulation of Facts that the version that is Exhibit 77 to Williamson's deposition is a true and correct copy with all exhibits attached to it, and the Court accordingly refers to that version. (See ASOF ¶ 131).

relating to pre-meeting prayer"; that Board members had received letters requesting "the Board to allow . . . atheists, agnostics and secular humanists to give a pre-meeting prayer at a regular Board meeting"; and that "the Board wishes to formalize a policy on invocations that is not hostile to faith-based religions and that does not endorse secular humanism or non-belief over traditional faith-based religions comprised of constituents who believe in God." (Resolution 2015-101 at 1, Doc. 53-8 at 35).

The "findings" paragraphs in Resolution 2015-101 recount the County's tradition of pre-meeting invocations; provide demographic data regarding Brevard County, including that only 34.9% of the County's total population "claimed to be adherents to any religious faith" in 2010; describe a webpage of the Freedom From Religion Foundation, with whom CFFC is noted to be affiliated, that includes "Godless quotes," as well as a webpage of Americans United for Separation of Church and State that "makes clear the organization's calculated goal" to eliminate activity that it considers violative of its "views of what the principles of separation of church and state should be"; examine Secular Humanism; and discuss CFFC's Facebook page, on which CFFC "strategically seeks to offend faith-based religions in open forums in order to pressure the local government into closing the forum or censoring the content and exposing itself to liability." (Resolution 2015-101 at 1–9, Doc. 53-8 at 35–43).

The resolution then states "conclusions" based on the findings, including that: "yielding . . . by supplanting traditional ceremonial pre-meeting prayer . . . with an 'invocation' by atheists, agnostics or other persons represented or associated with [the Freedom From Religion Foundation] or [Americans United for Separation of Church and State] could be viewed as County hostility toward monotheistic religions whose theology

and principles currently represent the minority view in Brevard County"; that allowing the requesting organizations to give an invocation and "displac[e] representatives of the minority faith-based monotheistic community . . . could be viewed as . . . Board endorsement of Secular Humanist and Atheist principles" because of "the overwhelmingly secular nature of the Board's business meeting following the invocation" and "evidence suggesting that the requesting organizations are engaged in nothing more than a carefully orchestrated plan to promote or advance principles of Secular Humanism through the displacement or elimination of ceremonial deism [sic] [11] traditionally provided by monotheistic clerics giving pre-meeting prayers"; that "[a]ll of the organizations seeking the opportunity to provide an invocation have tenets or principles paying deference to science, reason and ethics, which, in most cases, are the disciplines the Board must consider, understand and utilize when acting upon secular items presented for consideration during the Board's secular business agenda" and that "deferring consideration or presentation of a secular humanist supplication during the Public Comment portion of the agenda immediately after the consent agenda . . . does not deny or unreasonably restrict the opportunity of the requesting parties to present their Secular Humanist or atheistic

[11] The word "deism" appears to be a clerical error in the resolution. "Deism" is "a movement or system of thought advocating natural religion, emphasizing morality, and in the 18th century denying the interference of the Creator with the laws of the universe." Merriam Webster's Collegiate Dictionary (10th ed. 1993). Scholars have noted that "[m]any of our founding fathers, including Thomas Paine, Thomas Jefferson, [and] Benjamin Franklin, . . . were flat-out deists, and many others, such as John Adams, James Madison, Alexander Hamilton, James Monroe, and George Washington, were at least partial deists." Geoffrey V. Stone, The World of the Framers: A Christian Nation?, 56 UCLA L. Rev. 1, 7 (Oct. 2008). In light of the deposition testimony of several Commissioners that they would not allow a deist to give an invocation, (see, e.g., Doc. 43 at 12; Doc. 44 at 9; Doc. 46 at 11; & Doc. 48 at 10), it is likely that "theism"—"belief in the existence of a god or gods," Merriam Webster's Collegiate Dictionary (10th ed. 1993)—was the word that was intended in this sentence of Resolution 2015-101.

invocations, supplications, instruction, petitions for redress of grievances or comments." (Resolution 2015-101 at 9–10, Doc. 53-8 at 43–44).

The amendment portion of Resolution 2015-101 adds a new section to the Board's Operating Procedures and provides:

> In view of the requests by secular, humanist, atheist and Secular Humanist organizations to provide a secular, Secular Humanist or an atheist invocation, the Board hereby clarifies the intent of the Board's existing policies allowing Public Comment to include individual or representative comments intended to instruct the Board; to petition for redress of grievances; to comment upon matters within the control, authority and jurisdiction of the Board; and to comment on matters that are relevant to business of the County Commission, as well as matters upon which the Board has traditionally expressed a position for the betterment of the community interest. Secular invocations and supplications from any organization whose precepts, tenets or principles espouse or promote reason, science, environmental factors, nature or ethics as guiding forces, ideologies, and philosophies that should be observed in the secular business or secular decision making process involving Brevard County employees, elected officials, or decision makers including the Board of County Commissioners, fall within the current policies pertaining to Public Comment and must be placed on the Public Comment section of the secular business agenda. Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years.

(Resolution 2015-101 at 10–11, Doc. 53-8 at 44–45). Thus, as stipulated by the parties, the resolution "adopted a formal policy that allows the traditional faith-based invocation prior to the beginning of the Board's secular business agenda and subsequent 'secular invocations' during the Public Comment section of that secular agenda." (ASOF ¶ 133 (further internal quotation omitted)). None of the Plaintiffs has ever delivered a "secular invocation" during the Public Comment segment of a Board meeting. (Id. ¶ 149).

E. This Lawsuit

After the Board passed Resolution 2015-101, Plaintiffs filed this lawsuit. (Compl., Doc. 1). In their six-count Amended Complaint (Doc. 28), Plaintiffs allege violations of: the Establishment Clause of the First Amendment to the U.S. Constitution (Count I); the Free

Exercise Clause of the First Amendment (Count II); the Free Speech Clause of the First Amendment (Count III); the Equal Protection Clause of the Fourteenth Amendment (Count IV); Article I, Section 2 of the Florida Constitution (Count V); and Article I, Section 3 of the Florida Constitution (Count VI). (Doc. 28 at 66–71). The Amended Complaint seeks an injunction, a declaratory judgment, and damages. (Id. at 72–74). However, at mediation the parties resolved the issue of damages. (See Mediation Report, Doc. 39). Plaintiffs' counsel explained during oral argument on the parties' cross-motions for summary judgment that at mediation the parties reached a settlement on what the amount of the damages should be if the Plaintiffs prevail on the merits and that the Court should allow the parties to file their settlement agreement with the Court if it finds in favor of Plaintiffs. (See Hr'g Tr., Doc. 93, at 32–33). The parties agree that no facts are in dispute and that this case may be appropriately resolved on their cross-motions.[12] (See Mins., Doc. 69).

II. Analysis[13]

A. Establishment Clause (Count I)

Plaintiffs' primary claim is under the Establishment Clause of the First Amendment,

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[12] In addition to the declarations, depositions, voluminous exhibits, several notices of supplemental authority, and the Amended Stipulation of Facts (Doc. 83), the pertinent filings are: the County's Motion for Summary Judgment (Doc. 54); Plaintiffs' Motion for Summary Judgment (Doc. 55); the County's Notice of Filing Supplemental Inadvertently Omitted Footnote References (Doc. 58); the County's Response to Plaintiffs' Motion for Summary Judgment (Doc. 59); Plaintiffs' Opposition to the County's Motion for Summary Judgment (Doc. 60); the County's Reply regarding its motion (Doc. 62); Plaintiffs' Reply regarding its motion (Doc. 63); the County's Supplemental Memorandum of Law (Doc. 84); Plaintiffs' Supplemental Brief (Doc. 85); Plaintiffs' Supplemental Summary-Judgment Brief on Their Free-Speech Claim (Doc. 95); the County's Corrected Supplemental Summary Judgment Brief on Plaintiffs' Free Speech Claim (Doc. 97-1); and Plaintiffs' Supplemental Summary-Judgment Reply Brief on Their Free-Speech Claim (Doc. 98).

[13] In some of its filings the County asserts, albeit cursorily, that Plaintiffs lack standing to bring one or more of their claims. (See, e.g., Doc. 54 at 19 (asserting that "none of the Plaintiffs has standing to sue for coercion because none has alleged a concrete and particular injury in fact"); id. at 21 (arguing lack of standing because "Plaintiffs

which provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause, like the other clauses of the First Amendment, applies to the states and their subdivisions via the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); accord Sch. Dist. of Abington Twp. v. Pennsylvania, 374 U.S. 203, 215–16 (1963).

Plaintiffs contend that the County's invocation practice violates the Establishment Clause in three ways: by purposefully discriminating based on religious beliefs; by entangling public officials in religious judgments; and by coercing audience members to take part in religious exercises. The County, on the other hand, maintains that its invocation practice "conforms to Establishment Clause principles promulgated by the U.S. Supreme Court." (Doc. 54 at 1). Each side asserts that Supreme Court jurisprudence—especially the Court's 2014 decision in Town of Greece v. Galloway—supports its position.

Marsh v. Chambers and *Town of Greece v. Galloway*

Although Establishment Clause claims are typically analyzed using one of several formal "tests" established by the Supreme Court for such claims—such as the coercion test,[14] the endorsement test,[15] or the Lemon test[16]—the Supreme Court has declined to

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cannot show an injury that can be redressed by a favorable decision from this Court"); Doc. 62 at 7 (averring that Plaintiffs lack standing because their injuries are "self-created" and because of "their inability to give a religious prayer"). These contentions are without merit. The Court is satisfied that Plaintiffs have standing to pursue their claims, and the County's arguments go to the merits of Plaintiffs' claims rather than to the issue of standing.

[14] See, e.g., Lee v. Weisman, 505 U.S. 577 (1992).

[15] See, e.g., Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[16] See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing three-part test providing that to pass muster under the Establishment Clause, (1) a statute "must have a secular legislative purpose," (2) the statute's "principal or primary effect must be one that neither advances nor inhibits religion," and (3) "the statute must not foster 'an excessive government entanglement with religion'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674

apply any of those tests in the context of legislative prayer. But relying on other principles, the Supreme Court has addressed legislative prayer in two landmark cases—Marsh v. Chambers, 463 U.S. 783 (1983), and Town of Greece—and those decisions inform this Court's analysis here.

At issue in Marsh was the prayer practice of the Nebraska Legislature. That body opened each of its sessions with a prayer given by a chaplain who was paid with public funds and chosen every two years by the Executive Board of the Legislative Council. By the time the case made its way to the Supreme Court, the same Presbyterian minister had served as chaplain for nearly twenty years. Although some of the minister's earlier prayers "were often explicitly Christian," the minister "removed all references to Christ after a 1980 complaint from a Jewish legislator." 463 U.S. at 793 n.14. The plaintiff—a member of the legislature and a Nebraska taxpayer—brought an Establishment Clause challenge, seeking to enjoin the prayer practice.[17] The district court found no violation of the Establishment Clause from the prayers themselves but concluded that the paying of the chaplain with public funds did violate the clause. Chambers v. Marsh, 504 F. Supp. 585 (D. Neb. 1980). On appeal, the Eighth Circuit applied the Lemon test, found that the Nebraska practice failed all three prongs of that test, and prohibited Nebraska from continuing to engage in the prayer practice. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

The Supreme Court reversed, finding—without applying Lemon or any other formal

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(1970))).

[17] It is not clear from the court opinions whether the plaintiff in Marsh was the legislator who complained about references to Christ in the prayers. The district court opinion describes him as "a non-Christian member of the legislature." Chambers v. Marsh, 504 F. Supp. 585, 591 n.14 (D. Neb. 1980).

test—that neither the prayers themselves nor the use of public funds to pay the chaplain violated the Establishment Clause. The Marsh Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and that throughout this country's history "the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." 463 U.S. at 786. After tracing the history of legislative prayer and noting that the First Congress selected a chaplain to open each session with prayer, the Court concluded that "[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause from a practice of prayer similar to that now challenged." Id. at 791.

The Marsh Court explained:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed [in Zorach v. Clauson, 343 U.S. 306, 313 (1952)], "[w]e are a religious people whose institutions presuppose a Supreme Being."

Id. at 792 (citation omitted). The Court rejected the plaintiff's contention that the Establishment Clause was violated due a minister of only one denomination having been selected for sixteen years. Perceiving no "suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," the Court concluded that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, . . . his long tenure does not in itself conflict with the Establishment Clause." Id. at 793–94.

Nor was the Marsh Court troubled by the fact that the prayers given in the Nebraska

Legislature were in the Judeo-Christian tradition. The Court explained that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to advance any one, or to disparage any other, faith or belief" and that under those circumstances "it is not for [the Court] to embark on a sensitive evaluation or to parse the content of a particular prayer." Id. at 794–95.

The Supreme Court took up the issue of legislative prayer again in 2014 in Town of Greece. In the town of Greece, New York, for some time prior to 1999 the town board began its monthly board meetings with a moment of silence. But in 1999, a newly elected town supervisor began inviting local clergymen to deliver invocations at the beginnings of meetings. "The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures." 134 S. Ct. at 1816. Prayer givers in Greece were unpaid volunteers, and the town "followed an informal method for selecting prayer givers"—a town employee called congregations listed in a local directory until she found an available minister for that month's meeting. Id. And "[t]he town eventually compiled a list of willing 'board chaplains' who had accepted invitations and agreed to return in the future." Id. The town "at no point excluded or denied an opportunity to a would-be prayer giver," and "[i]ts leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." Id. The town did not review the prayers in advance or provide guidance on tone or content; "[t]he town instead left the guest clergy free to compose their own devotions." Id. From 1999 to 2007, all of the participating minsters were Christian, and "[s]ome of the ministers spoke in a distinctly Christian idiom." Id.

The two plaintiffs in Town of Greece—one Jewish, the other an Atheist[18]—attended town board meetings to address issues of local concern, and they took offense to the prayers and the pervasive Christian themes in them. Id. at 1817. After the plaintiffs complained, the town invited a Jewish layman and the chairman of a Baha'i temple to give prayers; additionally, a Wiccan priestess requested and was given a chance to give an invocation. Id. The plaintiffs nevertheless filed suit, alleging that the town's prayer practice violated the Establishment Clause. They sought not to end the practice but to limit the prayers to "nonsectarian" prayers—"inclusive and ecumenical" prayers referring only to a "generic God" and "not identifiable with any one religion." Id. at 1817 & 1820.

After the district court upheld the practice and the Second Circuit reversed, the Supreme Court reversed the appellate court, finding that the town's invocation practice passed muster under the Establishment Clause. The Court began by discussing Marsh, noting that "Marsh is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to 'any of the formal "tests" that have traditionally structured' this inquiry." 134 S. Ct. at 1818 (quoting Marsh, 463 U.S. at 796 & 813 (dissenting opinion of Brennan, J.)). "The Court in Marsh found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause." Id. The Town of Greece Court noted that like Congressional prayer, the practice of local legislative bodies opening their meetings with prayer also "has historical precedent," id. at 1819, but the Court emphasized that "Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical

[18] See Galloway v. Town of Greece, 732 F. Supp. 2d 195, 196 (W.D.N.Y. 2010).

foundation" and explained that Marsh "teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings," id. (internal quotation and citation omitted).

The Supreme Court then turned to "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." Id. The plaintiffs made two arguments: first, that Marsh does not countenance sectarian prayers, and second, that the town's practice was coercive because the setting and nature of the town meetings "create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending [those who] sponsor the prayer and will vote on matters citizens bring before the board." Id. at 1820. The Supreme Court rejected both of these contentions.

First, the Court concluded that "insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." Id.[19] The Town of Greece Court explained that Marsh upheld the Nebraska legislative prayers "because our history and tradition have shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom'" rather than "because they espoused only a generic theism." Id. (alteration in original) (quoting Marsh, 463 U.S. at 786). The Marsh Court did not "imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified

[19] Prior to Town of Greece, some courts had held that only "nonsectarian" legislative prayers were permissible under the Establishment Clause. See, e.g., Wynne v. Town of Great Falls, S.C., 376 F.3d 292 (4th Cir. 2004); accord Joyner v. Forsyth Cty., N.C., 653 F.3d 341 (4th Cir. 2011). The Eleventh Circuit, however, did not, pre-Greece, read Marsh as authorizing only nonsectarian prayers. See generally Pelphrey v. Cobb Cty., 547 F.3d 1263 (11th Cir. 2008).

by only one faith or creed," id. at 1821, and "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact," id. at 1822.[20]

The Town of Greece Court emphasized that "[o]ur government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior" and that "[g]overnment may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." Id. And "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." Id. at 1822–23.

Although the Town of Greece Court rejected the notion that legislative prayer must be nonsectarian, it did "not imply that no constraints remain on its content." Id. at 1823. "The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." Id. "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect

[20] In holding that legislative prayer need not be nonsectarian in order to remain within the confines of the Establishment Clause, the Town of Greece Court receded from dictum in County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989). See Town of Greece, 134 S. Ct. at 1821 (finding some statements in County of Allegheny "irreconcilable with the facts of Marsh and with its holding and reasoning" and explaining that "Marsh nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content").

upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function." Id.

The Town of Greece Court also rejected the Second Circuit's conclusion that the town violated the Establishment Clause "by inviting a predominantly Christian set of ministers to lead the prayer." Id. at 1824. Noting that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one," the Court emphasized that "[s]o long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing." Id.; see also id. at 1831 (Alito, J., concurring) ("I would view this case very differently if the omission of . . . synagogues [from the list of congregations] were intentional.").

Second, the Town of Greece Court addressed plaintiffs' assertions that the prayer practice was unconstitutionally coercive. The plaintiffs asserted "that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling," id. at 1825, arguing that prayer in the setting of a town board meeting "differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation," id. at 1824–25. Though no rationale garnered a majority of votes, five justices rejected the plaintiffs' coercion argument.

Application

In view of this precedent, this Court must assess Plaintiffs' Establishment Clause

claim. Plaintiffs assert that the County's invocation practice is distinguishable from the practice approved in Town of Greece, while the County maintains that its practice is consistent with the facts of, and principles established in, that case. As set forth below, the facts of this case indeed distinguish it from Town of Greece, and the overwhelming evidence of purposeful discrimination and "impermissible purpose" here demonstrates the constitutional infirmity in the County's invocation practice.

1. Purposeful Discrimination

Although the County contends that its invocation practice passes constitutional muster under Town of Greece, the Supreme Court's opinion in that case cannot be read to condone the deliberate exclusion of citizens who do not believe in a traditional monotheistic religion from eligibility to give opening invocations at County Board meetings. Neither Town of Greece nor any other binding precedent supports the County's arguments, and none of the County's asserted justifications for its practice holds water.

The Town of Greece Court upheld an invited-speaker invocation practice that resulted in the prayers being given predominantly by Christians, but in doing so it repeatedly emphasized the inclusiveness of the town's practice. There was no evidence in that case that the town leaders intended to exclude anyone from participation in the giving of invocations; in fact, there was evidence to the contrary. "The town at no point excluded or denied an opportunity to a would-be prayer-giver." 134 S. Ct. at 1816. That invitees were solely Christian was not the product of intentional discrimination but instead due merely to the fact that the speakers were selected from a directory of the town's religious organizations. The Supreme Court expressly noted a lack of evidence of "an aversion or bias on the part of town leaders against minority faiths," and, on the contrary, there was evidence of "a policy of nondiscrimination" with regard to who was allowed to

give the invocation. Id. at 1824. Similarly, thirty years earlier, the Marsh Court noted lack of evidence of "impermissible motive" in the repeated reappointment of the same chaplain.

And after Marsh but six years prior to Town of Greece, the Eleventh Circuit—in a decision entirely consistent with Town of Greece—found that an invocation practice violated the Establishment Clause where there was evidence of intentional discrimination in the selection of invocation speakers. In that case, Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008), two county commissions allowed volunteer religious leaders to offer invocations at the commissions' meetings on a rotating basis. The Eleventh Circuit agreed with the district court's finding that the invocation practice of one of the two commissions was unconstitutional during two years of the time period at issue because of the way in which speakers were selected, finding that "the selection procedures [in those two years] violated the 'impermissible motive' standard of Marsh." 547 F.3d at 1281. The Pelphrey court noted that the "impermissible motive" standard "prohibits intentional discrimination," id., and during the two years at issue, the employee who selected speakers for one of the commissions "'categorically excluded' certain faiths from the list of potential invocation speakers," id. at 1282.[21] The Eleventh Circuit "agree[d] with the district court that the categorical exclusion of certain faiths based on their beliefs is unconstitutional." Id.

Marsh, Town of Greece, and Pelphrey thus make clear that while legislative prayer—even sectarian legislative prayer—is, as a general matter, constitutional, intentional discrimination and improper motive can take a prayer practice beyond what the Establishment Clause permits. Cf. Lund v. Rowan Cty., N.C., 863 F.3d 268, 278 (4th Cir.

[21] That practice was evidenced by a "long and continuous line through certain categories of faiths" in the phone book that the employee used to compile the list of potential speakers. Pelphrey, 547 F.3d at 1282.

2017) (en banc) ("Marsh and Town of Greece, while supportive of legislative prayer, were measured and balanced decisions. . . . Town of Greece told the inferior federal courts . . . to grant local governments leeway in designing a prayer practice that brings the values of religious solemnity and higher meaning to public meetings, but at the same time to recognize that there remain situations that in their totality exceed what Town of Greece identified as permissible bounds."). The undisputed facts of the case at bar establish that the bounds of the clause have been exceeded in Brevard County.

The facts here differ in significant ways from those in Town of Greece. In Greece, "a minister or layperson of any persuasion, including an atheist, could give the invocation." Id. at 1816. "[A]ny member of the public [wa]s welcome . . . to offer an invocation reflecting his or her own convictions." Id. at 1826. And when the plaintiffs complained about the pervasive Christian themes in the prayers, the town responded by inviting non-Christians to give prayers and granted a Wiccan priestess's request for an opportunity to give the invocation. Id. at 1817; accord id. at 1829 (Alito, J., concurring) ("[W]hen complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation.").

What happens in Brevard County is a far cry from what happens in the town of Greece. Brevard County does not allow everyone to give an invocation. Instead, it limits the prayer opportunity to those it "deems capable" of doing so—based on the beliefs of the would-be prayer giver. And after Plaintiffs requested to give an invocation at a Board meeting, the County responded not with an attitude of inclusion but with an express statement and policy of exclusion. Cf. Lund, 863 F.3d at 282 ("By opening its prayer

opportunity to all comers, the town [of Greece] cultivated an atmosphere of greater tolerance and inclusion. Rowan County regrettably sent the opposite message.").

With regard to the County's "policy," Resolution 2015-101—the resolution that the Board passed in July 2015 in response to Plaintiffs' repeated requests to give an invocation—is neither a novel statement of the County's position with regard to "nonbelievers" giving invocations nor a complete invocation policy. The resolution merely codifies the County's previously existing practice of denying nontheists an opportunity to give an invocation and relegating them to the Public Comment portion of Board meetings—a practice described in the August 19, 2014 letter (Pls.' Ex. 46) from the Board to Plaintiff Williamson. And although the resolution concludes with the statement that "Pre-meeting invocations shall continue to be delivered by persons from the faith-based community in perpetuation of the Board's tradition for over forty years," (Resolution 2015-11 at 11), the resolution does not define "faith-based community" or explain how invocation givers are invited or selected. Thus, at issue here is not just Resolution 2015-101 but the County's actual, overall invocation practice, which is evidenced by the events of this case, the text of the resolution itself, and statements made by the Commissioners in their depositions and elsewhere.[22]

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[22] The Court asked the parties whether it was appropriate to consider the deposition testimony and other statements of the Commissioners, and the parties briefed that issue. (See Docs. 84 & 85). The County (despite citing Commissioner deposition testimony in its own summary judgment filings, (see, e.g., Doc. 59 at 10)), took the position that the Court could properly consider only statements made prior to or contemporaneous with Resolution 2015-101, but the Court disagrees. The Supreme Court and the Eleventh Circuit have relied on statements of legislators in gauging motive and intent. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 57 (1985) (considering district court testimony of legislator); Church of Scientology Flag Serv. Org. v. City of Clearwater, 2 F.3d 1514, 1530 (11th Cir. 1993) (considering materials including newspaper articles, that "tend[ed] to show sectarian motivation"). This Court finds an even more compelling basis for doing so here than in

When Plaintiff Williamson wrote to the Board in 2014 requesting an opportunity to give an invocation, the Board eventually responded with a letter that the Commissioners approved at the August 19, 2014 meeting. As earlier noted, that letter stated in part: that the invocation was "an opening prayer presented by members of our faith community"; that the invocation "typically invokes guidance . . . from the highest spiritual authority, a higher authority which a substantial body of Brevard constituents believe to exist"; that CFFC's website "leads [the Board] to understand [that CFFC] and its members do not share those beliefs or values" and that the Board "chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a large segment of its constituents." (Aug. 19, 2014 Letter, Pls.' Ex. 46). Two days later, Commissioner Infantini responded to a Humanist who requested to give an invocation with an email stating that "by definition, an invocation is seeking guidance from a higher power" and that therefore "anyone without a 'higher power' would lack the capacity to fill that spot." (ASOF ¶¶ 119–20).

And when letters were sent to the Board in January and May 2015 asking that one of the five individual Plaintiffs or another representative of one of the three organizational Plaintiffs be permitted to give an invocation, the Board ultimately responded by passing Resolution 2015-101 at its July 7, 2015 meeting. That resolution states in one of its "whereas" clauses that "the Board wishes to formalize a policy on invocations that is not hostile to faith-based religions and that does not endorse secular humanism or non-belief over traditional faith-based religions comprised of constituents who believe in God."

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those cases; as noted in the text, this case concerns not only Resolution 2015-101 but also the County's overall invocation policy and practice, and the statements of the Commissioners both before and after passage of Resolution 2015-101 bear on that overall practice.

(Resolution 2015-101 at 1). The resolution then notes that "[o]n a rotating basis, individual Board members have predominately selected clerics from monotheistic religions and denominations—including Christian, Jewish, and Muslim—to present the invocation," (id. at 2), and that "[p]rior to the invocation, in recognition of the traditional positive role faith-based monotheistic religions have historically played in the community, the Board . . . typically . . . offer[s] the cleric the opportunity to tell the Board, meeting attendees and the viewing audience something about their religious organization," (id.).

The resolution then purports to describe the "relevant demographics" of the County, stating that "[i]n Brevard County, the faith-based community is a minority component of the larger majority community [sic] represented by the Board" and that data from the Association of Religious Data Archives indicate that in 2010, only 34.9% of the County's residents claimed to be adherents to any religious faith. (Id.). The "demographics" section of the resolution also notes that the County "is home to a large population of rocket scientists" and a technological university that offers programs in various scientific areas. (Id. at 3).

Three pages of Resolution 2015-101 describe Secular Humanism, noting that the website of the Council on Secular Humanism describes Secular Humanism as "nonreligious" and "espousing no belief in a realm or [sic] beings imagined to transcend ordinary experience" and that Secular Humanism "is philosophically naturalistic." (Id. at 6). Further, the resolution refers to the requesting organizations as wanting to "conduct a pre-meeting invocation by displacing representatives of the minority faith-based monotheistic community which has traditionally given the pre-meeting prayer" and expresses the concern that this "displac[ement]" "could be viewed as . . . Board endorsement of Secular

Humanist and Atheist principles." (Id. at 9–10).

In their depositions, the seven Commissioners who served on the Board during 2008 to 2016 were asked about whom they would allow to give an invocation and what the purpose of the invocation is. Several testified that they would "say no" to invocation givers of certain religions or belief systems or that they would "have to look into" or "do more research" about whether to allow those potential speakers to give an invocation. For example, several Commissioners would not allow a Wiccan to give an invocation, (see, e.g., Fisher Dep., Doc. 46, at 10; Smith Dep., Doc. 43, at 10), would "want to do more research to understand what that particular religion was about" before allowing it, (Nelson Dep., Doc. 47, at 8), "guess[e]d" she would allow it, (Infantini Dep., Doc. 45, at 9), or "would probably suggest that they do it during" the Public Comment period, (Lewis Dep., Doc. 44, at 8). Similar testimony was given regarding whether an adherent to a Native American religion would be permitted to give an invocation. (See, e.g., id. at 9 (would "have to think on" traditional Native American religion); (Barfield Dep., Doc. 48, at 10 (unsure about a Native American shaman); Doc. 43 at 11 (would "talk to them" and "see what they had to say")). Others were unsure if they would allow a Muslim to give an invocation, (Doc. 47 at 8; Doc. 44 at 8), and several would not allow a deist[23] to do so, (Doc. 46 at 11; Doc. 44 at 8–9; Doc. 48 at 10; Doc. 43 at 12).

Several Commissioners expressed doubt about allowing a member of a polytheistic religion—including Hinduism—to give an invocation. (See, e.g., Doc. 46 at 11–12; Doc. 44 at 9). One Commissioner would not consider inviting a member of a polytheistic religion or anybody who does not believe in a monotheistic religion. (Doc. 43 at 12). Another

[23] See n.11 supra.

testified that he would not invite an adherent of a polytheistic religion because he "just doesn't think that's representative of our community," yet he inexplicably maintained that he would be willing to invite a Hindu. (Doc. 48 at 10).

One Commissioner testified that she has never invited someone she knew not to be a Christian to give an invocation because "[t]he purpose of the prayer or the invocation was in respect to the Christian community." (Doc. 44 at 10–11). That Commissioner explained that she would be willing to invite a believer in any "God-fearing religion" to give an invocation, (id. at 9), and that the invocation is "a long-standing tradition of honoring the Christian community in Brevard County," (id. at 27).

Another Commissioner stated in his deposition that invocations "are reserved for faith-based organizations to introduce their church," and "[i]t gives them an opportunity to promote their church, established church, recognized church." (Doc. 42 at 38). Another said that an invocation is "more for a faith-based monotheological type of situation" where people can speak about whatever they believe. (Doc. 48 at 19). Another explained that he believes in Resolution 2015-101 because he believes "that the long history in this country gives people of the faith-based community the ability to speak and speak freely" and that "the Constitution says we have freedom of religion, not from religion." (Doc. 43 at 21). That same Commissioner explained, "[W]e don't set time aside for non faith-based people to speak during the invocation," (id. at 24), and the Board "endorses faith-based religions," (id. at 27). Additionally, that Commissioner acknowledged saying to a radio station that "[t]he invocation is for worshiping the God that created us," by which he means "[t]he one and only true God"—"[t]he God of the Bible." (Id. at 37; see also Pls.' Ex. V13 (audio recording of radio interview)). He also acknowledged being quoted as saying that

"[i]f they were a religion and they honored the word of God" set forth in "[t]he Holy Bible" "they would have every opportunity to speak to us during that period that we set aside to honor God." (Doc. 43 at 38).

This overwhelming, undisputed record evidence clearly demonstrates that the County's invocation practice runs afoul of the principles set forth in Marsh, Town of Greece, and Pelphrey. It reveals "impermissible motive" in the selection of invocation givers, Marsh, 463 U.S. at 793, and reflects a "policy of []discrimination," Town of Greece, 134 S. Ct. at 1824, as well as "purposeful discrimination" and "categorical[] exclusion" of certain potential invocation givers, Pelphrey, 547 F.3d at 1281 & 1282. It also demonstrates that through its practice, the County has strayed from invocations' traditional purpose.

The County cannot and does not deny that it has imposed a categorical ban on Plaintiffs and other nontheists as givers of opening invocations at its Board meetings. Nevertheless, the County describes its invocation practice as "purposefully inclusive" rather than exclusive, (see Doc. 59 at 7–8 & 20), and it attempts to justify its practice on several bases. None of these asserted justifications, however, withstands analysis.

"Invocations Must Invoke A Higher Power"

The County attempts to defend its exclusion of Plaintiffs as invocation-givers by imposing a "theism" requirement for invocations. As is apparent from evidence already discussed, the County maintains that an invocation must be "religious" and "invoke a higher power" and that because the Plaintiffs are not "religious" and do not believe in a higher power they are "not qualified" to give an opening invocation at Board meetings. The Court rejects this asserted justification or the County's policy and practice of exclusion.

As Plaintiffs note, the Supreme Court and other courts have recognized atheism

and Humanism as religions entitled to First Amendment protection. See, e.g., Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (noting that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God [is] . . . Secular Humanism"); Glassroth v. Moore, 335 F.3d 1282, 1294 (11th Cir. 2003) ("The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess a belief in the Judeo-Christian God; indeed, it includes the lack of any faith."). To this, the County responds that atheism and Humanism are not necessarily religions "for all purposes," (see Doc. 93 at 52), and insists that an invocation is "an appeal to divine authority" that Plaintiffs are "incapable" of offering.

The County's assertion that a pre-meeting, solemnizing invocation necessarily requires that a "higher power" be invoked is an overly narrow view of an invocation. The County relies largely on the Supreme Court's description in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), of "invocation" as "a term that primarily describes an appeal for divine assistance." 530 U.S. at 306–07. But, as Plaintiffs counter, "'primarily' does not mean 'exclusively,'" (Doc. 60 at 5), and the Santa Fe Court also noted that the purpose of the message there was "to solemnize the event" and, in striking down a prayer practice as improperly encouraging religious messages at high school football games, "[a] religious message is the most obvious method of solemnizing an event," id. at 306; "most obvious" does not mean "exclusive" either.

And Town of Greece, though addressing whether "sectarian" religious prayer is permissible in the legislative setting rather than whether a legislative invocation necessarily is religious, suggests that there is no such requirement. There, the Court noted that the invocation in that town was—apparently as described by the parties—"intended to place

town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures," 134 S. Ct. at 1816 (record citation omitted). The Supreme Court noted in Town of Greece that "[a]s practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." Id. at 1818. These purposes and effects may have bases in monotheistic religions, but they are not necessarily dependent on "religion." In discussing permissible constraint on the content of legislative prayer, the Town of Greece Court stated that an opening invocation "is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage," id. at 1823—again, functions that do not necessitate religious references—and the Court then explained that "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function," id.

Other aims of legislative prayer identified in Town of Greece include "to elevate the purpose of the occasion and to unite lawmakers in their common effort." Id. And while the Court did note that "[t]he tradition reflected in Marsh permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths," id., it then stated that "[t]hese religious themes provide particular means to universal ends," id., suggesting that religiously themed invocations are but one method of achieving the overarching goal of solemnizing governmental proceedings. The Court further noted that prayers offered to Congress "vary in their degree of religiosity" but "often seek peace for the Nation, wisdom for its lawmakers, and justice of its people, values that count as

universal and that are embodied not only in religious traditions, but in our founding documents and laws." Id. And, of course, the Town of Greece Court emphasized that the town would allow anyone, "including an atheist," to "give the invocation." Id. at 1816; accord id. at 1829 (Alito, J., concurring) (noting that the town "would permit any interested residents, including nonbelievers, to provide an invocation"). This suggests that an atheist or other "nonbeliever" is capable of giving an invocation and that an "invocation" need not "invoke a higher power." A recent decision of the en banc Sixth Circuit buttresses this conclusion. See Bormuth v. Cty of Jackson, -- F.3d --, No. 15-1869, 2017 WL 3881973, at *1 (6th Cir. Sept. 6, 2017) (en banc) (upholding commissioner-led legislative prayer practice where each commissioner, "regardless of his religion or lack thereof, is afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience"); id. at *14 (noting that the county's "prayer policy permits prayers of any—or no—faith") (emphasis removed).

Moreover, as earlier noted, on those occasions when a speaker is not scheduled in Brevard County or does not show up, either a moment of silence is observed or an audience member is solicited to give an invocation. Obviously, a moment of silence does not invoke "a higher power" or anything else. And when audience members fill in for an absent speaker, they apparently do not have their beliefs vetted before being permitted to speak. These facts only further emphasize the differential treatment to which Plaintiffs have been subjected in Brevard County. The record also reflects that Plaintiffs and other nontheists have given invocations before other governmental bodies and have even been invited back. Those invocations do not "invoke a higher power," yet they fit within the purposes described in Town of Greece—to solemnize the meeting, "lend gravity to the

occasion and reflect values long part of the Nation's heritage." 134 S. Ct. at 1823.[24]

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[24] Examples of these invocations include the following:

Martin County is a diverse community representing a wide spectrum of religious, secular, political, ethnic, and racial perspectives. Despite our diversity we are united by the democratic principles of equal treatment for all as contained in our Constitution and Bill of Rights. We are also united in our desire to develop policies and legislation for the benefit of Martin County and its residents.

We come to this meeting with divergent points of view that need to be discussed and carefully evaluated to ensure that wise decisions are made. While we may believe that our perspectives on issues like All Aboard Florida or the Indian River Lagoon are preferable, it is important that we express ourselves in ways that demonstrate respect for others as we plant the seeds of cooperation that are necessary for us to work together for the common good.

Let us be guided by reason and compassion in our quest to solutions for life's problems. Should we find ourselves becoming displeased over what someone has said it can be helpful to remember that harsh words don't educate others about our points of view. They only create tension and interfere with decision making.

Let us be guided by the advice that Aristotle offered the world twenty-four hundred years ago when he said, "We should conduct ourselves towards others as we would have them act towards us.

(Invocation given by Joe Beck at the June 17, 2014 Meeting of the Martin County, Florida Board of County Comm'rs, Pls.' Ex. 14 at 23). And:

Through the millennia we as a society have learned the best way to govern the people is for the people to govern themselves. Today, in this tradition, we travel from our homes and businesses across the county; citizens, staff, and those elected converge on this chamber to work as one community united and indivisible by nearly every measure. Each of us arrives as individuals with unique ideas and experiences but all with a need or, in a spirit of goodwill, to fulfill the needs of others.

Citizens request assistance and offer their concerns and we are ever grateful for their interest and for their trust in the process. Staff provides invaluable expertise in their particular field and we truly appreciate their continued service. Elected officials listen, debate, and choose the path forward for us all out of a sincere desire to serve and honor the people of Osceola County while shaping its future. We all offer our thanks in that often thankless task.

When we leave this chamber this evening let us carry with us this same spirit of service and goodwill tomorrow and every day that follows.

This is how we assemble to serve and to govern, ourselves.

(Invocation given by David Williamson at the June 16, 2014 Meeting of the Osceola County, Florida Board of County Comm'rs, Pls.' Ex. 14 at 24).

Furthermore, in holding that legislative prayer was not required to be "nonsectarian" in order to pass constitutional muster, the Supreme Court emphasized in Town of Greece that "government may not seek to define permissible categories of religious speech" and that "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates." Id. at 1822. The Court explained that "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech." Id. And, "[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior." Id.

For a governmental entity to require, or attempt to require, "religious" content in invocations is, in effect (or, at best, but a step removed from) that entity composing prayers for public consumption or censoring the content of prayers—in contravention of the principles set forth in the Town of Greece. Here, the County is attempting to require that God be mentioned in invocations by limiting the sphere of invocation givers to those who believe—or who the County thinks believe—in one God. This practice cannot be squared with controlling precedent, and the County's invocation practice cannot be defended based on a "religiosity" requirement.

The Minority and the Majority

The County also argues that it is not discriminating against a minority because atheists and secularists are a "clear majority" and "religious adherents . . . are the statistical minority in Brevard County." (Doc. 59 at 13). This contention touches on a confusing and sometimes conflicting theme in the record evidence and the County's filings—the notion of

a "majority" versus a "minority." At times, the County casts the facts as if the "faith-based community" is an endangered and oppressed minority in the County, while at others it relies on the "substantial" number of monotheists in the County as part of its justification for rejecting Plaintiffs' requests to give an invocation. (See, e.g., Aug. 19, 2014 Letter from Board to Plaintiffs Williamson and CFFC, Pls.' Ex. 46 (referring to "a higher authority which a **substantial body** of Brevard constituents believe to exist" and stating that "this Commission chooses to stand by the tradition of opening its meetings in a manner acknowledging the beliefs of a **large segment** of its constituents" (emphasis added)); Resolution 2015-101 at 2 ("In Brevard County the faith-based community is a minority component of the . . . community represented by the Board . . . ."); id. at 9 (stating that allowing atheist invocations "could be viewed as County hostility toward monotheistic religions whose theology and principles currently represent the minority view in Brevard County"); id. (referring to "displacing representatives of the minority faith-based monotheistic community"); Cty.'s Resp. Mem., Doc. 59, at 7 (referring to the County as one "where 94% of persons with a religious affiliation belong to Christian congregations"); id. at 13 ("[T]his case does not involve discrimination against a minority faith because atheists, as a subset of secularists[,] are members of a clear majority when compared to the number of people who regularly attend religious services. It is religious adherents . . . who are the statistical minority in Brevard County."); id. at 16 (referring to "faith-based" invocators as "representing a substantial body—though a minority—of constituents" and noting that "the County Commission currently governs an overwhelmingly secular community"); id. at 18 (referring to the Board as "placed in the tenuous position of governing a secular county"); id. at 19 (referring to the County's "minority faith-based community")).

Although the County attempts to ascribe relevance to the statistical breakdown of "religious adherents" versus "those who attend religious services" versus "nonbelievers," it is not germane to Establishment Clause analysis whether a particular segment of the County's population is the majority or minority. "The First Amendment is not a majority rule . . . ." Town of Greece, 134 S. Ct. at 1822; see also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 884 (2005) (O' Connor, J., concurring) ("[W]e do not count heads before enforcing the First Amendment."); Doe v. Pittsylvania Cty., Va., 842 F. Supp. 2d 906, 927 (W.D. Va. 2012) ("The Bill of Rights exists to protect the rights of individuals from popular tyranny."). In sum, the County's vacillating assertions regarding majorities and minorities do not advance its cause here.

The Public Comment Period

The County next insists that it has not denied Plaintiffs the opportunity to give an invocation because it allows nontheists to give a "secular invocation" during the Public Comment portion of Board meetings—which the County describes as "an alternative and comparable opportunity." (Doc. 62 at 3).[25] The County maintained at oral argument that anyone can give an invocation and "[i]t's just a matter of where [and when] they're gonna give it"—at the beginning of the meeting or during Public Comment. (Hr'g Tr., Doc. 93, at 49). This argument fails.

First of all, the County's argument that an "invocation"—"secular" or otherwise—given during the Public Comment period is comparable to an opening, pre-meeting invocation is unpersuasive. A pre-meeting invocation is given before the meeting starts

[25] The County also argues that it created separate "limited public forums" in its invocation period and Public Comment periods. That contention is addressed in the next subsection of this Order.

and serves to solemnize the entire meeting. That is its purpose. The Town of Greece Court noted the invocation's "place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage." 134 S. Ct. at 1823. Here, Plaintiffs are not seeking to discuss their beliefs in a Public Comment setting but to participate in the solemnizing function that is afforded to others at the outset of meetings; they "want to give invocations that call on the kinds of nontheistic higher authorities and values approved in [Town of Greece], such as the U.S. Constitution, democracy, equality, cooperation, fairness, and justice." (Doc. 60 at 4).

The County cites Town of Greece in support of its Public Comment justification, but in doing so it distorts the Supreme Court's opinion. The County relies on the statement that in the town of Greece, "any member of the public is welcome **in turn** to offer an invocation reflecting his or her own convictions." 134 S. Ct. at 1826 (emphasis added). In the County's view, this "in turn" language means that the Supreme Court did not "say it has to be at the beginning of the meeting, as long as they have an opportunity to do it." (Hr'g Tr., Doc. 93, at 50).

But the County's argument that "in turn" supports the validity of its practice of allowing "separate invocations" during different parts of a meeting fails. First of all, this "in turn" language is from the discussion of coercion in Justice Kennedy's plurality opinion in Town of Greece—not from the part of the opinion that addresses the requirement of a policy of nondiscrimination with regard to inviting invocation-givers. In context, the sentence reads: "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially

where, as here, any member of the public is welcome **in turn** to offer an invocation reflecting his or her own convictions." 134 S. Ct. at 1826 (emphasis added). Moreover, Town of Greece did not involve bifurcated invocation-presentation periods, and there is no basis to infer that Justice Kennedy was using "in turn" to refer to different parts of a meeting. In context, it is clear that Justice Kennedy was referring to an opportunity to give an invocation at the beginning of a future meeting rather than during a later "Public Comment" period or other section of the agenda after a meeting is already underway and has been solemnized.

In attempting to justify its "bifurcated invocation periods," the County also seizes on language from Town of Greece referring to the need for a court to make "inquiry into the prayer opportunity as a whole." Id. at 1824 (citing Marsh, 453 U.S. at 794–95). The County argues that "as a whole," it "affords an invocation opportunity to the Plaintiffs." (Doc. 54 at 24). Again, however, the County takes language from Town of Greece out of context. The "prayer opportunity as a whole" language appears in the Supreme Court's discussion of the plaintiffs' assertions regarding the allegedly disparaging content of some of the prayers given there. In that vein, the Court explained:

> Although these two remarks strayed from the rationale set out in Marsh, they do not despoil a practice that **on the whole** reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. Marsh, indeed, requires an inquiry into **the prayer opportunity as a whole**, rather than into the contents of a single prayer.

134 S. Ct. at 1824 (emphasis added). Here, although the County has conceded that some of the invocations at its meetings have crossed the line into proselytizing, (see Hr'g Tr., Doc. 93, at 57), Plaintiffs' claims are not based on the content of the prayers, and Plaintiffs are not arguing this aspect of Town of Greece. The "prayer opportunity as a whole"

language in Town of Greece does not lend viability to the County's requiring separation of "religious invocations" from "secular invocations," the latter being relegated to the Public Comments portions of the meeting.

Furthermore, as a factual matter the County's description of two "separate but comparable" invocation periods—one for "religious invocations" at the outset of the meeting and one for "secular invocations" during Public Comment is belied by the record in this case. It is undisputed that the Public Comment period is indeed not reserved for secular invocations but is open to discussion of any subject involving County business, and a "Christian prayer" would be permitted both at the beginning of the meeting and during Public Comment. (ASOF ¶ 148). Thus, "religious" invocators have multiple opportunities to speak, whereas "secular invocations" can only be given during Public Comment.

Limited Public Forums and "Avoiding an Establishment Clause Violation"

The County also attempts to justify its invocation practice by asserting that the invocation period is a "limited public forum" as to which the County has defined the permissible content.[26] And the County avers that in creating these separate forums, it was trying to *avoid* an Establishment Clause violation because allowance of atheist or Secular Humanist invocations would show hostility toward monotheism or "faith-based" religions and because it is trying to avoid "a pattern of proselytizing secular invocations." These arguments are also rejected.

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[26] The County argues that "[l]ike Greece, the Brevard policy allows atheists to present invocations in a separate limited public forum during the Public Comment section of the agenda." (Doc. 54 at 18–19). The County's likening of its policy to the invocation practice in Greece is puzzling. Greece's practice did not involve separate invocation "forums," and there, anyone—including an atheist—could give an invocation at the beginning of a meeting.

The County asserts that it has created two limited public forums—one for "religious invocations" and one for "secular invocations." As stated by the County, "under [its] policy, only members of the faith-based community are permitted to give the invocation during the limited public forum set aside by the Commission solely for the purpose of recognizing the faith-based community prior to the commencement of the secular business meeting." (Doc. 54 at 16). And, says the County, it has created not one but "two limited public forums for secular invocations" during the two Public Comment periods. (Id. at 17).

Plaintiffs urge that the invocation portion of a meeting is not a limited public forum and that even if it is, the County has engaged in impermissible viewpoint discrimination by excluding nontheists from it. The Court agrees with Plaintiffs on the latter point and thus need not resolve the first.

"[W]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech." Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). "The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" Id. (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)) (alteration in original). But "[t]he State's power to restrict speech . . . is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be 'reasonable in light of the purpose served by the forum.'" Id. (citations omitted) (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

The County insists that its restrictions are viewpoint neutral, but this Court disagrees. The County discriminates among invocation speakers on the basis of viewpoint, and its restriction on invocation givers is not reasonable in light of the purpose of the

invocation. Thus, even if the pre-meeting invocation period is a limited public forum, this viewpoint discrimination renders the County's practice unconstitutional.

The County tries to define its proposed forum as available "to members of the faith-based community capable and desirous of delivering faith-based religious invocations," (Doc. 54 at 23), and asserts that Plaintiffs' "secular invocations" "do not fit within the limitations of the limited public forum established for [these] religious invocations." (Id.). Again, however, the purpose of an invocation is to solemnize a meeting, "lend gravity to the occasion," and "reflect values long part of the Nation's heritage." Town of Greece, 134 S. Ct. at 1823. The County declares that *its* purpose for the invocations is to "recogni[ze] the contribution of the faith-based community to the county," (ASOF ¶ 199), (and the Commissioners themselves described the purpose in various ways, including to "worship[] . . . the one and only true God, the God of the Bible" and "to honor God", Doc. 43 at 37–38) and then tries to justify exclusion of nontheists using its "faith-based" requirement. But exclusion of nontheists—who, as discussed earlier, are indeed "capable" of providing an invocation within the meaning of Town of Greece—is impermissible viewpoint discrimination.

The County argues that its creation of different forums was attempt to avoid an Establishment Clause violation rather than to commit one. The County asserts that allowing nontheistic invocations would send a message of hostility toward "believers" and that because nontheistic invocations are secular and the Board's meeting agendas deal with secular business, allowing secular invocations would violate the Establishment Clause by "establishing" secularism. This argument is baseless. The Court simply cannot fathom how the County would be committing an Establishment Clause violation or showing hostility

toward anyone by allowing Plaintiffs to give an invocation at the beginning of a Board meeting. "While the Supreme Court has recognized that 'the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,' that Court also has made it clear that the neutrality commanded by the establishment clause does not itself equate with hostility towards religion." Smith v. Bd. of Sch. Comm'rs of Mobile Cty., 827 F.2d 684, 692 (11th Cir. 1987) (citations omitted) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963)). As noted earlier, moments of silence are sometimes observed in lieu of a "religious invocation," and the County does not claim that such silence represents hostility toward religion—nor could it. Indeed, obviously the County need not have any kind of invocation practice at all, and not having one could not reasonably be construed as hostility toward the "religious."

The County's argument regarding "avoiding a pattern of proselytization" is also misguided. This argument is based on the County's assertion that because Plaintiffs or affiliates of Plaintiffs have posted on websites invocations that are hostile to theistic religions, it must refuse to allow them to give an invocation in order to avoid running afoul of Town of Greece. Here, however, the County is mixing apples and oranges. The portion of Town of Greece that the County relies upon here pertained to the plaintiffs' reliance, in support of their "nonsectarian" argument—on "invocations that disparaged those who did not accept the town's prayer practice." 134 S. Ct. at 1824. The Court then acknowledged a few invocations that strayed in their content from what Marsh approved, but the Court held that "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer

will not likely establish a constitutional violation." Id.

The relevant pattern is the pattern that might appear over time in the governmental venue, not a pattern of statements by would-be invocation givers outside the invocation forum. That Town of Greece instructs that assessment of the pattern of invocations given at a government meeting may sometimes be called for to determine whether a prayer practice has crossed the line to disparaging or proselytizing does not mean that the County is justified in denying Plaintiffs the opportunity to give an invocation based on website contents or past invocations—most of which occurred prior to Town of Greece[27]—especially not where, as here, Plaintiffs have repeatedly attested in sworn declarations that they understand the purpose of an invocation and will not proselytize or disparage, (see, e.g., Williamson Decl., Pls'. Ex. 7, ¶ 25; Second Williamson Decl., Pls'. Ex. 138, ¶ 4). The County's alleged concern about "allowing such patterns to manifest" is not realistic; Plaintiffs are not seeking to give an invocation at every meeting, and surely if they crossed the line once they would not be invited back, so no "pattern" could emerge. Moreover, Plaintiffs have countered with evidence of disparaging and proselytizing comments made in sermons or on the Internet by those whom the County has allowed to give "religious invocations." (See Pls.' Exs. 147–163, V14–18). So long as an invocation giver—whether nontheistic or theistic—does not disparage or proselytize during the invocation itself, the County need not be concerned. Again, the relevant "pattern" is the pattern at the meetings,

[27] Plaintiff Williamson explains in his Second Declaration that before Town of Greece, he "sometimes advocated against the inclusion of invocations" at local government meetings but that he recognizes that the Supreme Court has ruled that invocations are permissible. (Second Williamson Decl., Pls.' Ex. 138, ¶ 2). Abiding by Town of Greece, he and CFFC no longer seek to end invocations but "to receive treatment equal to that of the theists and theistic organizations who are welcome to present opening invocations." (Id. ¶ 3).

not outside them.

Conclusion as to Intentional Discrimination

In sum, the County's attempted justifications for its policy and practice ring hollow. The County's reliance to support its position is misplaced. Both Marsh and Town of Greece establish that theistic invocations are permissible in legislative prayer, but they did not establish that a governmental entity may require theistic content in invocations. Indeed, Town of Greece made clear that an invocation giver must be permitted to give an invocation as his conscience dictates, limited only by a prohibition on proselytizing and disparaging. And although the cases speak of permissible effects of theistic invocations, permissible effects are not the same as permissible purposes for an invocation in the first instance. By straying from the historical purpose of an invocation and intentionally discriminating against potential invocation-givers based on their beliefs, the County runs afoul of the Establishment Clause. Plaintiffs are thus entitled to summary judgment on this claim.

2. *Entanglement*

Plaintiffs also argue that the County's invocation policy violates the Establishment Clause because it excessively entangles the County with religion. Plaintiffs note that Resolution 2015-101 includes "a five-page dissection of the beliefs of Secular Humanists and organizations affiliated with" Plaintiffs, (Doc. 55 at 19), and that the Commissioners testified in their depositions that they would "have to examine" the beliefs of various other groups before deciding whether to allow a representative of that group to give an invocation, (id.).

In support of their entanglement argument, Plaintiffs cite Lemon v. Kurtzman, 403 U.S. 602 (1971), which established a three-part test for Establishment Clause cases, one part of which examines whether a law fosters "an excessive government entanglement with

religion," id. at 612; Hernandez v. Comm'r, 490 U.S. 680, 696–97 (1989), which applied the Lemon test; and Town of Greece. As noted earlier, in Marsh and Town of Greece the Supreme Court declined to apply the Lemon test in the legislative prayer context, and to the extent Plaintiffs are urging application of all or part of that test here, this Court declines to formulaically apply it.

Nevertheless, entanglement remains relevant to Establishment Clause analysis even when legislative prayer is involved. In rejecting the argument that the town of Greece violated the Establishment Clause "by inviting a predominantly Christian set of ministers to lead the prayer," the Town of Greece Court noted that a "quest to promote a diversity of religious views would require the town to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each, a form of government entanglement with religion that is far more troublesome than the current approach." 134 S. Ct. at 1824 (alteration in original) (internal quotations and citation omitted). As made plain by the discussion of Plaintiffs' purposeful discrimination argument above, the County is clearly entangling itself in religion by vetting the beliefs of those groups with whom it is unfamiliar before deciding whether to grant permission to give invocations.

3. Coercion

Next, Plaintiffs assert that the County's invocation practice violates the Establishment Clause by coercing participation in religious exercises. Plaintiffs base this argument on the fact that "Commissioners regularly direct audience members to rise for invocations . . . in the coercive environment of meetings in a small boardroom that are sometimes attended by [fewer] than ten people" and "go on to vote on issues, such as zoning variances, that may greatly affect attendees, who may need to address the Board

about those items." (Doc. 55 at 21). The County denies that its practice is coercive. Again, both sides rely on Town of Greece in support of their positions.

In arguing coercion in Town of Greece, the plaintiffs contended "that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation." 134 S. Ct. at 1824–25. In the town board meeting setting, on the other hand, "[c]itizens attend . . . to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances." Id. at 1825. In light of these differences, the plaintiffs argued "that the public may feel subtle pressure to participate in the prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling." Id. In Greece, "board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, [but] they at no point solicited similar gestures by the public"; although audience members were sometimes "asked to rise for the prayer," the plurality noted that those requests to rise "came not from town leaders but from the guest ministers." Id. at 1826.

As earlier noted, the Town of Greece plaintiffs' coercion argument was rejected by a divided Court, with no majority rationale. The plurality—Justices Kennedy and Alito and Chief Justice Roberts—was "not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance," but it emphasized that "[t]he inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the

audience to whom it is directed." Id. at 1825 (plurality opinion). Although it found no coercion on the facts of Town of Greece, the plurality noted that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."[28] Id. at 1826. And while the Town of Greece plaintiffs stated in declarations that the prayers offended them and made them "feel excluded and disrespected," the plurality held that "[o]ffense . . . does not equate to coercion." Id.

Concurring with the plurality's conclusion that the town's invocation practice was not coercive, Justice Thomas, joined by Justice Scalia, noted that historically, coercion meant "'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*'" Id. at 1837 (Thomas, J., concurring) (emphasis in original) (quoting Lee v. Weisman, 505 U.S. 577, 640 (1992)). "Thus," said Justice Thomas, "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." Id. at 1838. Justices Thomas and Scalia agreed with the plurality's conclusion that "[o]ffense . . . does not equate to coercion" and noted that they "would simply add . . . that '[p]eer pressure, unpleasant as it may be, is not coercion' either." Id. (alterations in original) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004)).

Here, Plaintiffs focus their coercion argument on the fact that from 2010–2016,

[28] Plaintiffs do not allege that they were "singled out . . . for opprobrium" or that the Board members "indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." Their coercion argument is based only on the requests from Commissioners to stand for the invocation.

sometimes—indeed, more often than not—a Commissioner in Brevard County asked the audience to stand before the invocation was given, followed by the Pledge of Allegiance.[29] In addition to noting the "coercive environment" of the boardroom, Plaintiffs urge that the presence of children at some of the meetings supports their coercion argument, citing Doe v. Indian River Sch. Dist., 653 F.3d 256, 275–80 (3d Cir. 2011), a case involving prayer at school board meetings. In Doe, the Third Circuit reiterated "the Supreme Court's observation that students are particularly vulnerable to peer pressure in social context." Id. at 277 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000)).

Regardless of whether Justice Kennedy's plurality opinion or Justice Thomas's Town of Greece concurrence governs the coercion issue,[30] on the facts of this case the

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[29] The parties phrased their stipulated facts regarding the audience being asked to stand in terms of Chairpersons—suggesting that some Chairpersons ask the audience to stand and some do not, as a matter of individual practice or habit. (See ASOF ¶ 67 ("[S]ome Board chairpersons ask the audience to stand for a prayer and the Pledge of Allegiance.")). However, the Court's review of the transcripts and videos of the invocations given from 2010 through May 2016 reveals that: during a clear majority of those invocations, a Commissioner asked the audience to stand; individual Commissioners were inconsistent in whether they asked the audience to stand; and every Commissioner asked the audience to stand on at least two occasions, with several doing so much more frequently. (See Pls.' Exs. 30, 144, V2, & V14). There is, however, a noticeable change in the regular practice beginning in 2016: only once (on March 29, 2016) did a Commissioner ask the audience to stand from January 2016 through May 26, 2016—the date of the last transcript and video in the record. (See Pls.' Exs. 30, 144, V2, & V14). This lawsuit was filed in July 2015.

[30] Even though Justice Kennedy's opinion on coercion garnered three votes and Justice Thomas's only two, Justice Kennedy's plurality opinion is not necessarily controlling on the coercion issue. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Judges have disagreed as to whether Justice Kennedy's plurality opinion or Judge Thomas's concurrence constitutes the "narrowest grounds" on the coercion issue. See, e.g., Bormuth v. Cty. of Jackson, No. 15-1869, -- F.3d --, 2017 WL 3881973, at *15 & n.10 (6th Cir. Sept. 6, 2017) (en banc) (finding it unnecessary to resolve the issue but noting division among

Court cannot find that any of the Plaintiffs was subjected to unconstitutional coercion under either rationale. The evidence does not support a finding of "actual legal coercion," and many of the arguments made here—including the notion that a municipal board meeting setting is different from a state legislature setting—were noted by Justice Kennedy in the plurality opinion. Analyzing the specific facts here, this Court does not conclude that the occasional presence of children or the fact that requests to stand—for both the invocation and the Pledge of Allegiance that followed—were often made by Commissioners, without more, amounts to unconstitutional coercion, especially where the two Plaintiffs—adults—who have attended Board meetings did not feel so pressured that they actually stood if asked to do so. See, e.g., Williamson Dep., Doc. 53-1, at 44–45 (testimony that Williamson was filling out a comment card at the time of the invocation, had not yet taken a seat, and did not recall whether the audience was asked to stand for the invocation during meeting

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Sixth Circuit judges about which opinion is narrowest, with at least three judges viewing Judge Thomas's opinion as narrowest); id. at *15 (Rogers, J., concurring) (discussing the issue and concluding that Justice Thomas's opinion is not controlling); Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 602 n.9 (6th Cir. 2015) (Batchelder, J., concurring in part) (concluding that Justice's Kennedy's plurality opinion "is controlling on the lower courts, as it is narrower than the accompanying two-justice concurring opinion); Lund v. Rowan County, 837 F.3d 407, 426-28 (4th Cir. 2016) (panel opinion) (mentioning the different rationales of the Town of Greece coercion opinions and then applying Justice Kennedy's opinion without mentioning "narrowest grounds" analysis), rev'd on other grounds on reh'g en banc, 863 F.3d 268 (2017); Fields v. Speaker of the Pa. House of Representatives, Civ. Action No. 1:16-CV-1764, 2017 WL 1541665, at *13 (M.D. Pa. Apr. 28, 2017) (concluding that Justice Kennedy's "three-Justice plurality represents the narrowest grounds to" the coercion ruling); see also Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2285 (2014) (Scalia, J., dissenting from denial of certiorari petition) ("It bears emphasis that the original understanding of the kind of coercion that the Establishment Clause condemns was far narrower than the sort of peer-pressure coercion that this Court has recently held unconstitutional . . . ." (citing Justice Thomas's Town of Greece concurrence)). In the instant case, the parties did not brief the issue of which coercion opinion is controlling. Because this Court reaches the same conclusion under either opinion, it need not determine which opinion constitutes the "narrowest grounds."

he attended); Becher Dep., Doc. 52-1, at 12–13 (testimony that Becher attended several meetings, did not stand up when asked to stand for the invocations, and had no business on the agenda before the Board at those meetings). And to the extent Plaintiffs were offended, "[o]ffense . . . does not equate to coercion." 134 S. Ct. at 1826 (plurality opinion); id. at 1838 (Thomas, J., concurring) ("The majority properly concludes that 'offense . . . does not equate to coercion.'" (emphasis in original)). Thus, insofar as Plaintiffs' Establishment Clause claim is based on coercion, the claim fails.

B. Other Federal Constitution Claims

In addition to their Establishment Clause claim, Plaintiffs also bring claims under the Free Exercise and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Some courts have held that challenges to legislative prayer practices are appropriately analyzed only under the Establishment Clause and that claims under other clauses are not viable in this context. Although the County does not rely on that proposition in defending against these "other clause" claims,[31] the Court will nevertheless discuss it before proceeding to analyze Plaintiffs' Free Exercise, Free Speech, and Equal Protection claims.

Before Town of Greece, the Fourth Circuit twice found legislative prayer claims subject to analysis only under the Establishment Clause. In Simpson v. Chesterfield Cty. Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005), a Wiccan who requested but was denied an opportunity to give an invocation sued under all four of the clauses asserted in the instant case. In affirming the district court's grant of summary judgment on the plaintiff's

[31] The County does not defend these claims on any basis other than the "avoidance of an Establishment Clause violation" argument discussed and rejected elsewhere in this Order.

free exercise, free speech, and equal protection claims, the Fourth Circuit "agree[d] with the district court's determination that the speech in th[at] case was government speech 'subject only to the proscriptions of the Establishment Clause.'" 404 F.3d at 288 (quoting the district court decision). The district court had noted that "[t]he invocation is not intended for the exchange of views or other public discourse" or "for the exercise of one's religion" and that "the Board may regulate the content of what is or is not expressed when it 'enlists private entities to convey its own message.'" Simpson v. Chesterfield Cty. Bd of Supervisors, 292 F. Supp. 2d 805, 819 (E.D. Va. 2003), quoted in Simpson, 404 F.3d at 288.

Three years after Simpson, the Fourth Circuit again addressed the issue in Turner v. City Council of the City of Fredericksburg, Va., 534 F.3d 352 (2008), cert. denied, 555 U.S. 1099 (2009). There, the city council began each meeting with an opening prayer delivered by one of the Council's elected members, and the council required that prayers be nondenominational and not invoke Jesus Christ. One of the council members, wanting to pray in the name of Jesus Christ, was denied his turn to give a prayer and filed suit, claiming that the "nondenominational" requirement violated the Establishment, Free Exercise, and Free Speech Clauses. The Fourth Circuit concluded that the prayers were government speech, that the plaintiff "was not forced to offer a prayer that violated his deeply-held religious beliefs," and that instead "he was given the chance to pray on behalf of the government." Id. at 356. The Turner court thus found no violation of any of the clauses. Id.

In addition to the Fourth Circuit's Simpson and Turner opinions, several district court decisions have addressed the viability of legislative prayer claims grounded in clauses

other than the Establishment Clause. In Atheists of Fla., Inc. v City of Lakeland, 779 F. Supp. 2d 1330 (M.D. Fla. 2011) (Kovachevich, J.), atheists sued to enjoin a prayer practice involving invocations given by religious ministers, asserting claims under the Establishment, Free Speech, and Equal Protection Clauses. The district court found that the Establishment Clause claim survived the defendants' motion to dismiss. 779 F. Supp. 2d at 1340–41. However, with regard to the free speech and equal protection claims, the plaintiffs conceded that the prayers involved were "government speech" and the court, relying on Simpson, concluded that as such, the prayers at issue were "'subject only to the proscriptions of the Establishment Clause." Id. at 1342 (quoting Simpson, 404 F.3d at 288); see also id. ("The proper analytical device in this case is the Establishment Clause, and not the Equal Protection or Free Speech [C]lauses . . . . Plaintiffs' concession that the prayers at issue here are government speech is simultaneously a recognition that the Establishment Clause, and the Establishment Clause only, governs the conduct at issue in this case.").

And in Coleman v. Hamilton Cty., Tenn., 104 F. Supp. 3d 877 (E.D. Tenn. 2015), the plaintiffs challenged a legislative prayer practice under both the Establishment Clause and the Equal Protection Clause.[32] Citing Simpson and Atheists of Florida without discussion, the Coleman court concluded that "legislative prayer cases . . . are subject to analysis only under the Establishment Clause of the First Amendment, and not under the Equal Protection Clause of the Fourteenth Amendment." 104 F. Supp. 3d at 891.

[32] The Coleman court noted at the summary judgment stage of the case that the plaintiffs also attempted to argue a free speech claim, but the court did not allow that challenge because plaintiffs had not pleaded a free speech claim. See 104 F. Supp. 2d at 884 & n.9. The court also found the pleading of the equal protection claim to be "vague" but concluded that it failed even if deemed sufficiently asserted. Id. at 890–91.

The most recent discussion of this issue appears in Fields v. Speaker of the Pennsylvania House of Representatives, Civil Action No. 1:16-CV-1764, 2017 WL 1541665 (M.D. Pa. Apr. 28, 2017). The Pennsylvania House of Representatives opens its sessions with an invocation delivered by either a House member or a guest chaplain; guest chaplains, according to an internal rule, must be "member[s] of a regularly established church or religious organization," and the Speaker interprets that rule as excluding "non-adherents" and "nonbelievers" from "the guest chaplain program." 2017 WL 1541665, at *1. After nontheists requested and were denied an opportunity to give an invocation, they—represented by the same counsel as Plaintiffs here—brought claims under the same four constitutional clauses at issue in this case.

In its April 28, 2017 order, the Fields district court granted in part and denied in part the defendants' motion to dismiss, finding that the Establishment Clause claim was plausibly pleaded but dismissing the claims under the other clauses. The Fields court noted that because "courts generally regard legislative prayer as 'government speech,'" they "have thus declined to entertain legislative prayer challenges cast under the Free Speech, Free Exercise, and Equal Protection Clauses." 2017 WL 1541665, at *14 (citing Simpson, Turner, Coleman, Atheists of Florida, and Coleman). The court rejected the plaintiffs' assertion that cases construing legislative prayer as government speech either predated Town of Greece or "fail[e]d to account for" Town of Greece. The Fields court also rejected the plaintiffs' argument that legislative prayer is "hybrid speech," id., and it "join[ed] the unanimous consensus of courts . . . to conclude that legislative prayer is subject to review under the Establishment Clause alone," id.

Having considered these cases, Town of Greece, the facts of this case, and the

manner in which Plaintiffs couch their claims, this Court is not persuaded that legislative prayer claims are necessarily subject to analysis under only the Establishment Clause. Instead, the viability of the various potential causes of action depends on the circumstances of each case and the nature of the claim being asserted. In some cases, an Establishment Clause claim may indeed be the only available type of challenge—under facts like those in Town of Greece, for example. There, the plaintiffs did not seek to give an invocation themselves; they only attempted to have the court limit the content of the "sectarian" prayers to which they were subjected at town meetings. They only brought an Establishment Clause claim, and it is hard to imagine how they could have framed a free exercise, free speech, or equal protection claim on those facts. And if there had been an Establishment Clause violation, that violation would seemingly have run to all upon whom an unconstitutional prayer practice was imposed.

Where, however, a claimant both objects to the prayer practice as establishing and imposing religion on citizens and, as here, is denied the opportunity to give an invocation while others are invited or allowed to do so, other types of constitutional claims may indeed be independently viable. In other words, when a governmental entity opens up the invocation opportunity to volunteers and then discriminates among those volunteers on an impermissible basis, an additional type of violation is not necessarily foreclosed even where an Establishment Clause claim is presented.

Thus, although the County does not raise this argument, to the extent that these other cases are not distinguishable on their facts or as not surviving Town of Greece—which prohibits discrimination in selection of speakers, and does not bar sectarian references, and prohibits proselytizing and disparaging—this Court respectfully disagrees

with them and other cases categorically limiting legislative prayer cases to only Establishment Clause analysis under all circumstances. One caveat to this, of course, is that a claimant may not avoid the holdings of Town of Greece merely by casting claims in terms of a different Constitutional clause. For example, a claimant cannot, after Town of Greece, insist on a right to say whatever he or she wants—such as proselytizing or disparaging remarks—at an invocation under the guise of a right to free speech or free exercise of religion; Town of Greece forbids such comments because of the limited purpose of an invocation. Plaintiffs do not attempt any such avoidance here—instead focusing on the fact that they have been treated differently than other invocation-givers during the selection process—and the Court will examine Plaintiffs' other federal constitutional claims on their merits.

1. Free Exercise Clause (Count II)

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I, cl. 2. Plaintiffs claim in Count II that the County violates this provision by making adoption or profession of a religious belief a precondition for taking part in governmental affairs.[33] This argument has merit.

Plaintiffs primarily rely on Torcaso v. Watkins, 367 U.S. 488 (1961), in support of this claim. In that case, the plaintiff was appointed as a notary public in Maryland "but was refused a commission to serve because he would not declare his belief in God." 367 U.S. at 489. The Maryland Constitution prohibited "religious tests"—"other than a declaration of

[33] Plaintiffs do not argue in this claim that they have the right to say whatever they want if given an opportunity to give an invocation, and they do not seek to run afoul of the constraints imposed in Town of Greece on what can be said during an invocation. They instead limit this claim to the "religious test" theory described in Torcaso. It is on this basis—and this basis only—that this Court finds that they prevail.

belief in the existence of God"—as a requirement for a qualification for office. Id. The plaintiff filed suit, bringing claims under the First and Fourteenth Amendments. The Supreme Court held that the "test oath" required of plaintiff "unconstitutionally invade[d]" his "freedom of belief and religion and therefore [could not] be enforced against him." Id. at 495; see also McDaniel v. Paty, 435 U.S. 618, 626–27 (1978) (describing Torcaso as a free exercise case).

Although, as earlier discussed, legislative prayer occupies a unique place in Supreme Court jurisprudence, under Torcaso and the circumstances of this case the Court finds that the County's invocation practice violates not only the Establishment Clause but the Free Exercise Clause as well. By opening up its invocation practice to volunteer citizens but requiring that those citizens believe in "a higher power" before they will be permitted to solemnize a Board meeting, the County is violating the freedom of religious belief and conscience guaranteed by the Free Exercise Clause. Plaintiffs thus prevail on this claim.

2. Free Speech Clause (Count III)

Plaintiffs allege in Count III that the County's invocation practice violates the Free Speech Clause of the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I, cl. 3. Plaintiffs assert that the Free Speech Clause "prohibits government from denying citizens opportunities to take part in governmental activities based on their beliefs or affiliations," and that the County bars Plaintiffs from giving invocations based on their nontheistic beliefs and affiliations.[34] (Doc.

[34] As with their free exercise claim, Plaintiffs do not argue in their free speech claim that they have the right to say whatever they want during an invocation, instead couching this claim in terms of being denied an opportunity to participate based on their beliefs or affiliations. In this sense, their freedom of speech claim has merit.

55 at 22–23).

Cases cited by Plaintiffs support their "belief and affiliation" argument. See, e.g., Branti v. Finkel, 445 U.S. 507, 516–17 (1980) (noting that "the First Amendment prohibits dismissal of a public employee solely because of his private political beliefs"); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013); see also Cuffley v. Mickes, 208 F.3d 702, 707 (8th Cir. 2000) (concluding the state violated the Ku Klux Klan's free speech right by prohibiting it from participating in the state's adopt-a-highway program based on its beliefs and advocacy); Wishnatsky v. Rovner, 433 F.3d 608 (8th Cir. 2006) (upholding the plaintiff's claim that denial of representation by public defender based on the plaintiff's beliefs was a violation of his free speech right). Thus, Plaintiffs are entitled to summary judgment on their Free Speech Clause claim.

3. Equal Protection Clause (Count IV)

In their fourth and final federal claim, Plaintiffs assert that the County's invocation practice violates the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiffs contend that the County's practice violates this clause because the County is treating citizens differently based on their religious beliefs. The Court agrees.

It is clear from the undisputed evidence that in selecting invocation speakers, the County is categorizing its citizens along religious lines—both by dividing, in Resolution 2015-101, "religious" citizens from "secular" citizens, and by dividing, in practice, "monotheistic, faith-based" citizens from all other citizens. Plaintiffs correctly note that religion is a suspect classification under the Equal Protection Clause. See, e.g., Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992); City of New Orleans v. Dukes, 427 U.S.

297, 303 (1976). Thus, strict scrutiny applies to the County's practice, and it can withstand an equal protection challenge only if it is "narrowly tailored to achieve a compelling interest." See Miller v. Johnson, 515 U.S. 900, 920 (1995). As correctly argued by Plaintiffs, the County's practice does not satisfy strict scrutiny.

Plaintiffs note that in Resolution 2015-101, the County attempts to justify its policy of excluding them from the invocation practice by citing a desire to recognize "faith-based monotheistic religions," to avoid "displacing . . . the minority faith-based monotheistic community" or appearing "hostil[]e toward monotheistic religions," and to avoid an appearance of approving atheism or Secular Humanism. (See Resolution 2015-101 ¶¶ 5, 36, & 37). These interests are not by any means "compelling." And a neutral policy that allowed citizens of all belief systems to provide an opening invocation would not, as argued by the County, convey a message of endorsement or hostility. Accordingly, Plaintiffs prevail on their federal equal protection claim.

C. Florida Constitution (Counts V and VI)

1. Art. I, Section 2 (Count V)

In their fifth claim, Plaintiffs allege a violation of Article I, Section 2 of the Florida Constitution, which provides in part that "[a]ll natural persons . . . are equal before the law" and that "[n]o person shall be deprived of any right because of . . . religion." This clause is construed like the Equal Protection Clause of the U.S. Constitution. See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 251 (Fla. 1987). For the reasons discussed in the preceding section with regard to Count IV, Plaintiffs prevail on Count V as well.

2. Art. I, Section 3 (Count VI)

Finally, Plaintiffs allege violations of Article I, Section 3 of the Florida Constitution.

This section, titled "Religious freedom," provides, among other things,[35] that "[t]here shall be no law respecting the establishment of religion" and that "[n]o revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Fla. Const. art. I, § 3. Plaintiffs assert violations of both of these parts of section 3—the establishment clause and the "no-aid" clause. (See Doc. 55 at 25).

a. Florida Establishment Clause

The Florida Establishment Clause and the federal Establishment Clause have nearly identical wording and are interpreted in the same manner by courts. See, e.g., Todd v. State, 643 So. 2d 625, 628 & n.3 (Fla. 1st DCA 1994); see also Bush v. Holmes, 886 So. 2d 340, 344 (Fla. 1st DCA 2004) (en banc) ("[T]he first sentence of article I, section 3 is synonymous with the federal Establishment Clause in generally prohibiting laws respecting the establishment of religion."). Plaintiffs make the same arguments with regard to the Florida Establishment Clause as they do with respect to the federal clause. For the reasons stated earlier in this order in the discussion of Plaintiff's claim under the

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[35] This section provides in full:

> Religious freedom.—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Fla. Const. art. I, § 3. Although this section contains a free exercise clause ("There shall be no law . . . prohibiting or penalizing the free exercise [of religion]."), Plaintiffs do not include a free exercise claim among their Florida constitutional challenges. Instead, they rely only on the establishment, equal protection, and "no-aid" clauses. (See Doc. 55 at 25–26; Hr'g Tr., Doc. 93, at 4–5).

Establishment Clause of the U.S. Constitution in Count I, to the extent Count VI is based on the Establishment Clause of the Florida Constitution Plaintiffs likewise prevail in part.

b. Florida "No-Aid" Clause

The "no-aid" clause of section 3—which provides that "[n]o revenue of the state or any political subdivision thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution"—"imposes 'further restrictions on the state's involvement with religious institutions than [imposed by] the Establishment Clause.'" Council for Secular Humanism, Inc. v. McNeil, 44 So. 3d 112, 119 (Fla. 1st DCA 2010) (alteration in original) (quoting Holmes, 886 So. 2d at 344). The no-aid clause "contains a broad prohibition against the expenditure of state revenues." Holmes, 886 So. 2d at 359.

Plaintiffs contend that the County violates the no-aid clause by "using tax dollars to fund an invocation practice that prefers monotheism over atheism, Humanism, and other religions." (Doc. 55 at 25). Plaintiffs rely on the fact that "[t]he Commissioners use County resources funded with taxpayer dollars—such as email, mail, and phones—to invite and communicate with invocators." (Id. at 3). Additionally, Plaintiffs note that invocation-givers sometimes "orally give the audience promotional information about their houses of worship before delivering their invocations." (Id.)

In Atheists of Florida, Inc. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013), a case in which administrative employees contacted potential invocation speakers from a list of religious leaders, the plaintiffs argued that the time and expense of printing and mailing invitations to the speakers constituted an impermissible expenditure "in aid of" religion. The City estimated that the annual cost of updating the list and mailing out invitations was $1200 to $1500. The Eleventh Circuit concluded that based on the record before it, the

plaintiffs did not demonstrate that the city's expenditures on arranging invocational speakers resulted in a direct or indirect pecuniary benefit to any group or showed that any religious organization received financial assistance from the city to promote and advance its theological views. 713 F.3d at 596. Although Plaintiffs argue that Atheists of Florida is distinguishable and that here, the County used public funds to advance religion, Atheists of Florida weighs against Plaintiffs' no-aid clause claim. Clearly there is no payment of funds to any church or sect here, and Plaintiffs have not presented any evidence or estimate of how much it cost the County to use existing email and telephone systems to contact potential invocation speakers.

Plaintiffs have cited no case—and the Court has found none—where an incidental cost incurred by a public entity sufficed to give rise to a violation of the no-aid clause. This issue is, of course, a matter of Florida law, and if the Supreme Court of Florida has not spoken on the topic at issue, this Court "must predict how [that] court would decide" the question presented. Molinos Valle Del Ciabo, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011).

This Court's research uncovered a Supreme Court of Florida case that lends some guidance here. In Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1, in and for Duval County, 115 So. 2d 697 (Fla. 1959), the court rejected a no-aid clause claim involving incidental costs incurred by a municipal entity. There, the school district's Board of Trustees allowed several churches to use school buildings on Sundays. The plaintiffs argued that such use of the school buildings "constitute[d] an indirect contribution of financial assistance to a church" in violation of the predecessor provision to

the current no-aid clause,[36] 115 So. 2d at 698, and that "regardless of how small the amount of money might be, . . . if anything of value can be traced from the public agency to the religious group, the Constitution has been thereby violated," id. at 699. The Board countered that the record did not "reveal any direct expenditure of public funds" and that "any indirect expense to the public because of depreciation resulting from use by the churches is of such small consequence that the law should refuse to notice it." Id.

The Supreme Court of Florida took note "of [the plaintiffs'] insistence that the use of the building is something of value and that the wear and tear is an indirect contribution from the public treasury," id., but concluded that it "might here properly apply the maxim *De minimis non curat lex*," id., which translates to "The law does not concern itself with trifles," Black's Law Dictionary (10th ed. 2014). The Court continued: "Nothing of substantial consequence is shown and we see no reason to burden this opinion with a discussion of trivia." Id. at 699–700. See also Holmes, 866 So. 2d at 356 ("[N]o disbursement was made from the public treasury in [Southside], a fact which significantly distinguishes it from the instant case" (in which a scholarship program authorized state funds to be paid to sectarian schools)).

In light of the Southside court's refusal to find a use of public funds from incidental expense due to use of buildings, and in the absence of any case finding a no-aid clause

[36] The provision at issue in Southside was Section 6 of the Declaration of Rights of the 1885 Florida Constitution, which provided that "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution." The constitution was revised in 1966–68. See generally Bush v. Holmes, 886 So. 2d 340, 348–351 (Fla. 1st DCA 2004) (tracing the history of the no-aid clause and noting that the current clause is "much the same as under section 6 of the 1885 Constitution").

violation in similar circumstances, this Court concludes that the Supreme Court of Florida would not find a violation of the no-aid clause on the facts of this case. Thus, to the extent that Count VI of the First Amended Complaint is grounded in the no-aid clause of the Florida Constitution, Plaintiffs' motion for summary judgment is denied and the County's motion for summary judgment is granted.

III. Conclusion

As the Fourth Circuit recently noted in Lund, "[t]he great promise of the Establishment Clause is that religion will not operate as an instrument of division in our nation." 863 F.3d at 272. Regrettably, religion has become such an instrument in Brevard County. The County defines rights and opportunities of its citizens to participate in the ceremonial pre-meeting invocation during the County Board's regular meetings based on the citizens' religious beliefs. As explained above, the County's policy and practice violate the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 3 of the Florida Constitution.

It is **ORDERED** as follows:

1. Defendant's Motion for Summary Judgment (Doc. 54) is **GRANTED in part** and **DENIED in part** as set forth in this Order.

2. Plaintiffs' Motion for Summary Judgment (Doc. 55) is **GRANTED in part and DENIED in part** as set forth in this Order.

3. No judgment shall be entered at this time. Instead, in accordance with the parties' prior agreement,[37] **on or before October 13, 2017**, the parties shall file their

[37] During oral argument on parties' cross-motions for summary judgment, Plaintiffs' counsel reminded the Court that at mediation the parties reached a settlement agreement as to the amount of damages and that that agreement allows the parties to file it with the Court if Plaintiffs prevail on the merits. (See Hr'g Tr., Doc. 93, at 32–33; see also Mediation

settlement agreement as to damages along with proposed language for the final judgment, including but not limited to language regarding injunctive relief and incorporation of the parties' settlement agreement into the final judgment.

DONE and **ORDERED** in Orlando, Florida, on September 30th, 2017.

JOHN ANTOON II
United States District Judge

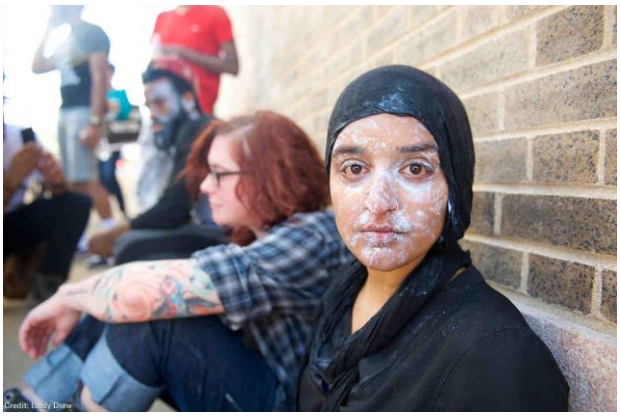
Copies furnished to:
Counsel of Record

Appendix: Brevard County Resolution 2015-101 (without attachments)

Report, Doc. 39, at 2).

I Was an ACLU Legal Observer During the St. Louis Protests. Here's What I Saw.

By Justice Gatson, Organizer, ACLU of Missouri
SEPTEMBER 29, 2017 | 11:00 AM



Maleeha Ahmad, a plaintiff in the ACLU of Missouri's suit against city of St. Louis, was pepper sprayed by police without warning.

ST. LOUIS — Over the last week, I have been on the streets of St. Louis monitoring the police crackdown on protests sparked by the acquittal of Officer Jason Stockley on charges he murdered Anthony Lamar Smith. And though there have been real moments of darkness, I also have seen things that give me hope.

Last weekend, I witnessed St. Louis police department endanger people by using pepper spray and releasing smoke bombs. It was legal observers like me who documented incidents, gathering smoke bomb canisters left in street to bring back to teams of attorneys as evidence. If it wasn't for citizens acting as legal observers, the ACLU of Missouri would not have the evidence it needed to file its suit last Friday over police using chemical agents, interfering with video recording of police activity, making arbitrary arrests, and surrounding and confining people to detain them in what is called "kettling."

As a legal observer, I report objectively about what I witness. As an organizer, a mom of three kids, and a Black woman, it's really hard to see all the things that are going on. I've watched police form lines around innocent protesters or tap their batons to intimidate people who have nothing in their hands except a Black Lives Matter sign.

Two nights ago, I went back out on the streets to observe the police. Standing on the corner, I saw one little boy who was about 7 years old followed by a group of kids. He was asking for a gas mask to wear and couldn't find any. I offered them some extra masks I had in my set of supplies. As they put them on and disappeared into the crowd, I thought about my earliest memories as a 5-year-old. For these kids, these will be their memories of growing up in St. Louis.

People are coming together with incredible solidarity because they feel beat down by the justice system and by what they perceive to be injustice. The outpouring of community protests here is not just about demanding justice for Anthony Lamar Smith, or for Mike Brown in Ferguson, but for the situation that so many Black and brown residents face being overpoliced and criminalized.

The level of support community members offering to each other is tremendous. When almost two dozen people were arrested at the St. Louis Galleria on Saturday, many came together to set up camp outside the jail where people were being sent. They brought coolers of water, pizza, and snacks and waited until people were released from jail.

There's a sense of urgency and determination. In these past two weeks, clergy members have been arrested and assaulted by police. When Reverend Karla Frye reacted to her grandson getting assaulted by the police, she was put in a chokehold and charged with a felony.

The protesters here know that what they are doing is important and the whole nation is watching. Last Sunday, actor Nick Cannon was in the crowd among protestors shouting, "Whose streets? Our streets." I felt the energy. I saw a man lie down in the middle of the gathering and tell the crowd, "I feel free." It was an indescribable moment. This solidarity is creating a sense of safety that is rare to feel.

People in St. Louis are asking themselves an important question: Do I feel Black lives matter? People are waking up to the situation Black people in America are in and waking up to the fight for justice. The strong sentiment here is, we survived Ferguson. We don't want to be here again, but if we must, we're going to stay together and support each other.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JASON KESSLER,	)	
	)	
Plaintiff,	)	Civil Action No. 3:17CV00056
	)	
v.	)	**MEMORANDUM OPINION**
	)	
CITY OF CHARLOTTESVILLE, VIRGINIA, et al.,	)	By: Hon. Glen E. Conrad United States District Judge
	)	
Defendants.	)	

On August 10, 2017, Jason Kessler filed this action under 42 U.S.C. § 1983 against the City of Charlottesville, Virginia ("the City") and Maurice Jones, the City Manager. The action stems from the eleventh-hour decision to revoke a permit previously issued by the City, which granted Kessler the right to hold a demonstration in Emancipation Park on August 12, 2017. Kessler claims that the City's decision to revoke the permit abridges his freedom of speech in violation of the First and Fourteenth Amendments. He has moved to preliminarily enjoin the defendants from interfering with the planned demonstration. The court held a hearing on the motion on August 11, 2017. For the following reasons, the motion will be granted.

Background

On May 30, 2017, Kessler applied for a permit to conduct a demonstration in Emancipation Park ("the Park") in the City of Charlottesville. Kessler intends to voice his opposition to the City's decision to rename the Park, which was previously known as Lee Park, and its plans to remove a statue of Robert E. Lee from the Park. On June 13, 2017, the defendants granted Kessler a permit to conduct a demonstration on August 12, 2017. In the

following weeks, the defendants granted organizations, which oppose Kessler's message, permits to counter-protest in other public parks a few blocks away from Emancipation Park.

On August 7, 2017, less than a week before the long-planned demonstration at the Park, the defendants notified Kessler by letter that they were "revok[ing]" the permit. The defendants further advised that they were "modif[ying]" the permit to require that the demonstration take place at McIntire Park, which is located more than a mile from Emancipation Park. At the same time, the defendants took no action to modify or revoke the permits issued to counter-protestors for demonstrations planned within blocks of Emancipation Park. In revoking the permit, the defendants cited "safety concerns" associated with the number of people expected to attend Kessler's rally. However, the defendants cited no source for those concerns and provided no explanation for why the concerns only resulted in adverse action being taken on Kessler's permit.

Kessler filed the instant action on the evening of August 10, 2017. The following morning, he filed the instant motion for preliminary injunctive relief. The motion was fully briefed and the court heard oral argument on August 11, 2017.

Discussion

A preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power" and is "to be granted only sparingly and in limited circumstances." MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991)). In order to obtain preliminary injunctive relief, "a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" WV Ass'n

of Club Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 298 (4th Cir. 2009) (quoting Winter v. Nat. Res. Defense Council, Inc., 555 U.S. 7, 20 (2008)).

I. Likelihood of Success on the Merits

Kessler claims that the defendants' decision to revoke his permit was a content-based restriction that cannot survive strict scrutiny. Based on the current record, the court concludes that Kessler has shown that he is likely to prevail on this claim.

Under the First Amendment, made applicable to the states through the Fourteenth Amendment, "a municipal government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Content-based restrictions—those that target speech based on its content—"are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

"Government regulation of speech is content based if a [restriction] applies to particular speech because of the topic discussed or the idea or message expressed." Id. at 2227. Content-based restrictions are not limited to those that "'on [their] face' draw[] distinctions based on the message a speaker conveys." Id. Instead, they include those that "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" Id. (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

Based on the current record, the court concludes that Kessler has shown that he will likely prove that the decision to revoke his permit was based on the content of his speech. Kessler's assertion in this regard is supported by the fact that the City solely revoked his permit,

but left in place the permits issued to counter-protestors. The disparity in treatment between the two groups with opposing views suggests that the defendants' decision to revoke Kessler's permit was based on the content of his speech rather than other neutral factors that would be equally applicable to Kessler and those protesting against him. This conclusion is bolstered by other evidence, including communications on social media indicating that members of City Council oppose Kessler's political viewpoint. At this stage of the proceedings, the evidence cited by Kessler supports the conclusion that the City's decision constitutes a content-based restriction of speech.

Content-based restrictions "can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Id. at 2231 (citation and internal quotation marks omitted). Based on the existing record, the court is unable to conclude that the defendants can meet this burden. Although the defendants maintain that the decision to revoke Kessler's permit was motivated by the number of people likely to attend the demonstration, the record indicates that their concerns in this regard are purely speculative. Simply stated, there is no evidence to support the notion that many thousands of individuals are likely to attend the demonstration.

Additionally, to the extent the defendants' decision was based on the number of counter-protestors expected to attend Kessler's demonstration, it is undisputed that merely moving Kessler's demonstration to another park will not avoid a clash of ideologies or prevent confrontation between the two groups. As both sides acknowledged during the hearing, critics of Kessler and his beliefs would likely follow him to McIntire Park if his rally is relocated there. Thus, changing the location of Kessler's demonstration will not separate the two opposing groups. Moreover, given the timing of the City's decision and the relationship between

Kessler's message and Emancipation Park, supporters of Kessler are likely to still appear at the Park, even if the location of Kessler's demonstration is moved elsewhere. Thus, a change in the location of the demonstration would not eliminate the need for members of the City's law enforcement, fire, and emergency medical services personnel to appear at Emancipation Park. Instead, it would necessitate having personnel present at two locations in the City.

In sum, the City's eleventh-hour decision forecloses the City from demonstrating that its decision to revoke Kessler's permit and move his demonstration to another park was narrowly tailored to serve compelling state interests. Stated differently, the court finds that the scant record and the undisputed circumstantial evidence weigh substantially against a finding that the relocation of the event furthers a compelling interest and is narrowly tailored to achieve that interest. Accordingly, the court concludes that Kessler has demonstrated a likelihood of success on the merits of his First Amendment claim.

II. Irreparable Harm

The United States Court of Appeals for the Fourth Circuit has observed that, "in the contest of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim." WV Ass'n of Club Owners, 553 F.3d at 298. Having concluded that Kessler has made the requisite showing of a likelihood of success on the merits of his claim against the defendants, the court likewise concludes that Kessler has established that he will suffer irreparable harm in the absence of preliminary injunctive relief. See Legend Night Club v. Miller, 637 F.3d 291, 302 (4th Cir. 2011) ("As to irreparable injury, it is well established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

III. Balance of the Equities and the Public Interest

Finally, given the timing of the City's decision, the court is of opinion that the balance of the equities favors the plaintiff in the instant case. The court further concludes that an injunction protecting the plaintiff's rights under the First Amendment is in the public interest. See, e.g., Christian Legal Society v. Walker, 453 F.3d 853, 859 (7th Cir. 2006) ("[I]njunctions protecting First Amendment freedoms are always in the public interest.").

Conclusion

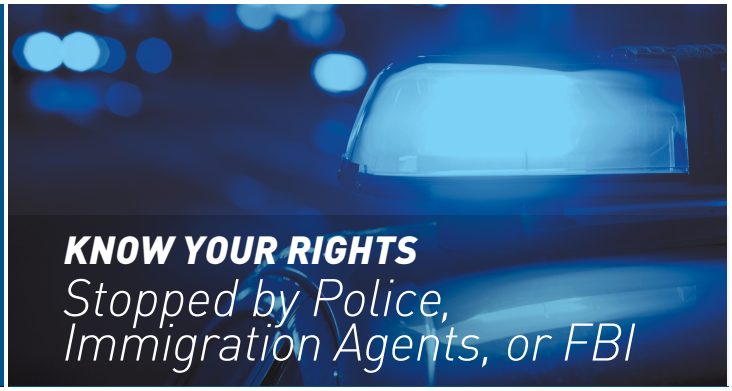
For the reasons stated, the court will grant the plaintiff's motion for preliminary injunctive relief. Specifically, the court will enjoin the defendants from revoking the permit to conduct a demonstration at Emancipation Park on August 12, 2017.

The Clerk is directed to send copies of this memorandum opinion and the accompanying order to all counsel of record.

DATED: This 11th day of August, 2017.

United States District Judge

★ KNOW ★ YOUR RIGHTS



If You're Stopped By Police

- You have a right to remain silent. If you wish to remain silent, tell the officer. (Some states may require you to identify yourself to the police if you're suspected of a crime.)
- Stay calm. Don't run. Don't argue, resist, or obstruct the police. Keep your hands where police can see them.
- Ask if you're free to leave. If yes, calmly and silently walk away.
- You do not have to consent to a search of yourself or your belongings.

If You're Stopped In Your Car

- Stop the car in a safe place as quickly as possible. Turn off the car, turn on the internal light, open the window partway, and place your hands on the wheel.
- Upon request, show police your driver's license, registration, and proof of insurance.
- If an officer or immigration agent asks to search your car, you can refuse. But if police believe your car contains evidence of a crime, they can search it without your consent.
- Both drivers and passengers have the right to remain silent. If you're a passenger, you can also ask if you're free to leave. If yes, silently leave.

If You're Asked About Your Immigration Status

- You have the right to remain silent. You do not have to answer questions about where you were born, whether you're a U.S. citizen, or how you entered the country. (Separate rules apply at international borders and airports, and for individuals on certain nonimmigrant visas, including tourists and business travelers.)
- If you're not a U.S. citizen and have valid immigration papers, you should show them if an immigration agent requests it.
- Do not lie about your citizenship status or provide fake documents.

If The Police Or Immigration Agents Come To Your Home

- You don't have to let them in unless they have a warrant signed by a judge.
- Ask them to show you the warrant. Officers can only search the areas and for the items listed on the warrant. An arrest warrant allows police to enter the home of the person listed on the warrant if they believe the person is inside. A warrant of removal/deportation (ICE warrant) does not allow officers to enter a home without consent.
- Even if officers have a warrant, you may remain silent. If you choose to speak, step outside and close the door.

If You're Arrested by Police

- Do not resist.
- Say you wish to remain silent and ask for a lawyer. If you can't afford a lawyer, the government must provide one.
- Don't say anything, sign anything, or make any decisions without a lawyer.
- You have the right to make a local phone call. The police cannot listen if you call a lawyer.
- Don't discuss your immigration status with anyone but your lawyer.
- An immigration officer may visit you in jail. Do not answer questions or sign anything before talking to a lawyer.
- Read all papers fully. If you don't understand or cannot read the papers, say you need an interpreter.

If You're Taken Into Immigration (Or "ICE") Custody

- You have the right to a lawyer, but the government will not provide one. If you don't have a lawyer, ask for a list of free or low-cost legal services.
- You have the right to contact your consulate or have an officer inform the consulate of your arrest.
- Tell the immigration officer you wish to remain silent. Do not discuss your immigration status with anyone but your lawyer.
- Do not sign anything, such as a voluntary departure or stipulated removal, without talking to a lawyer. If you sign, you may be giving up your opportunity to try to stay in the U.S.
- Know your immigration number ("A" number) and give it to your family. It will help them locate you.

If You Feel Your Rights Have Been Violated

- Write down everything you remember, including officers' badge and patrol car numbers, which agency the officers were from, and any other details. Get contact information for witnesses. If you're injured, seek medical attention immediately and take photographs of your injuries.
- File a written complaint with the agency's internal affairs division or civilian complaint board. In most cases, you can file a complaint anonymously if you wish.

This information is not intended as legal advice. Some state laws may vary. Separate rules apply at checkpoints and when entering the U.S. (including at airports). Updated Dec. 2016.

For more information, call your local ACLU
www.ACLU.org/affiliates.

ACLU

Know Your Rights:
Demonstrations and Protests

General guidelines

Can my free speech be restricted because of what I say—even if it is controversial?
No. The First Amendment prohibits restrictions based on the content of speech. However, this does not mean that the Constitution completely protects all types of free speech activity in every circumstance. Police and government officials are allowed to place certain nondiscriminatory and narrowly drawn "time, place and manner" restrictions on the exercise of First Amendment rights. Any such restrictions must apply to all speech regardless of its point of view.

Where can I engage in free speech activity?
Generally, all types of expression are constitutionally protected in traditional "public forums" such as streets, sidewalks and parks. In addition, your speech activity may be permitted to take place at other public locations that the government has opened up to similar speech activities, such as the plazas in front of government buildings.

What about free speech activity on private property?
The general rule is that the owners of private property may set rules limiting your free speech. If you disobey the property owner's rules, they can order you off their property (and have you arrested for trespassing if you do not comply).

Do I need a permit before I engage in free speech activity?
Not usually. However, certain types of events require permits. Generally, these events are:

- A march or parade that does not stay on the sidewalk, and other events that require blocking traffic or street closure
- A large rally requiring the use of sound amplifying devices; or
- A rally at certain designated parks or plazas

Many permit procedures require that the application be filed several weeks in advance of the event. However, the First Amendment prohibits such an advance notice requirement from being used to prevent rallies or demonstrations that are rapid responses to unforeseeable and recent events. Also, many permit

ordinances give a lot of discretion to the police or city officials to impose conditions on the event, such as the route of a march or the sound levels of amplification equipment. Such restrictions may violate the First Amendment if they are unnecessary for traffic control or public safety, or if they interfere significantly with effective communication with the intended audience. A permit cannot be denied because the event is controversial or will express unpopular views.

Specific problems

If organizers have not obtained a permit, where can a march take place?
If marchers stay on the sidewalks and obey traffic and pedestrian signals, their activity is constitutionally protected even without a permit. Marchers may be required to allow enough space on the sidewalk for normal pedestrian traffic and may not maliciously obstruct or detain passers-by.

May I distribute leaflets and other literature on public sidewalks?
Yes. You may approach pedestrians on public sidewalks with leaflets, newspapers, petitions and solicitations for donations without a permit. Tables may also be set up on sidewalks for these purposes if sufficient room is left for pedestrians to pass. These types of free speech activities are legal as long as entrances to buildings are not blocked and passers-by are not physically and maliciously detained. However, a permit may be required to set up a table.

Do I have a right to picket on public sidewalks?
Yes, and this is also an activity for which a permit is not required. However, picketing must be done in an orderly, non-disruptive fashion so that pedestrians can pass by and entrances to buildings are not blocked.

Can government impose a financial charge on exercising free speech rights?
Some local governments have required a fee as a condition of exercising free speech rights, such as application fees, security deposits for clean-up, or charges to cover overtime police costs. Charges that cover actual administrative costs have been permitted by some courts. However, if the costs are greater because an event is controversial (or a hostile crowd is expected)—such as requiring a large insurance policy—then the courts will not permit it. Also, regulations with financial requirements should include a waiver for groups that cannot afford the charge, so that even grassroots organizations can exercise their free speech rights. Therefore, a group without significant financial resources should not be prevented from engaging in a march simply because it cannot afford the charges the City would like to impose.

Do counter-demonstrators have free speech rights?
Yes. Although counter-demonstrators should not be allowed to physically disrupt the event they are protesting, they do have the right to be present and to voice

their displeasure. Police are permitted to keep two antagonistic groups separated but should allow them to be within the general vicinity of one another.

Does it matter if other speech activities have taken place at the same location?
Yes. The government cannot discriminate against activities because of the controversial content of the message. Thus, if you can show that similar events to yours have been permitted in the past (such as a Veterans or Memorial Day parade), then that is an indication that the government is involved in selective enforcement if they are not granting you a permit.

What other types of free speech activity are constitutionally protected?
The First Amendment covers all forms of communication including music, theater, film and dance. The Constitution also protects actions that symbolically express a viewpoint. Examples of these symbolic forms of speech include wearing masks and costumes or holding a candlelight vigil. However, symbolic acts and civil disobedience that involve illegal conduct may be outside the realm of constitutional protections and can sometimes lead to arrest and conviction. Therefore, while sitting in a road may be expressing a political opinion, the act of blocking traffic may lead to criminal punishment.

What should I do if my rights are being violated by a police officer?
It rarely does any good to argue with a street patrol officer. Ask to talk to a supervisor and explain your position to him or her. Point out that you are not disrupting anyone else's activity and that the First Amendment protects your actions. If you do not obey an officer, you might be arrested and taken from the scene. You should not be convicted if a court concludes that your First Amendment rights have been violated.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTIAN W. SANDVIG
2117 Washtenaw Avenue
Ann Arbor, MI 48104,

KYRATSO KARAHALIOS
1109 S. Douglas Avenue
Urbana, IL 61801,

ALAN MISLOVE
5 Grayfield Avenue
West Roxbury, MA 02132,

CHRISTOPHER WILSON
46 Symmes Street, No. 3
Roslindale, MA 02131,

FIRST LOOK MEDIA WORKS, INC.
114 Fifth Avenue, 18th Floor
New York, NY 10011,

Plaintiffs,

-v.-

LORETTA LYNCH, in her official capacity as
Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530,

Defendant.

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the constitutionality of a provision of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.*, a federal statute that prohibits and chills academics, researchers, and journalists from testing for discrimination on the internet. This chill arises because the CFAA makes it a crime to visit or access a website in a manner that violates that website's terms of service, while

robust audit testing and investigations to uncover online discrimination require violating common website terms of service.

2. Without online audit testing, policymakers and the American public will have no way to ensure that the civil rights laws continue to protect individuals from discrimination in the twenty-first century.

3. In the offline world, audit testing has long been recognized as a crucial way to uncover racial discrimination in housing and employment and to vindicate the civil rights laws, in particular the Fair Housing Act ("FHA") and Title VII's prohibition on discrimination in employment. This testing involves pairing individuals of different races to pose as home- or job-seekers to determine whether they are treated differently. The law has long protected such socially useful misrepresentation in the offline world. In the online world, however, conducting the same kind of audit testing generally violates websites' terms of service, which often prohibit providing false information, creating multiple user profiles, or using automated methods of recording the information displayed for different users.

4. The CFAA creates liability when an individual, in accessing a protected computer, does so in a manner that "exceeds authorized access." 18 U.S.C. § 1030(a)(2)(C) (the "Challenged Provision"). Courts and federal prosecutors have interpreted the prohibition on "exceed[ing] authorized access" to make it a crime to visit a website in a manner that violates the terms of service or terms of use (hereinafter "terms of service" or "ToS") established by that website. The Challenged Provision thereby delegates power to companies that operate online to define the scope of criminal law through their own terms of service. As a result, individuals and organizations risk

prosecution for conducting research into online discrimination where ToS prohibit their research techniques. They face prosecution even where, as in the case of Plaintiffs' activities, their research will not cause material harm to the target websites' operations and where they have no intent to commit fraud or to access any data or information that is not made available to the public.

5. The CFAA's prohibition on conducting robust research into online discrimination is of real concern given growing indications that proprietary algorithms are causing websites to discriminate among users, including on the basis of race, gender, and other characteristics protected from discrimination under the civil rights laws. Transactions involving the core social goods covered by federal and state civil rights laws—e.g., housing, credit, and employment—are increasingly taking place online. Simultaneously, actions on the internet are losing much of their anonymity, as "cookies" and other tracking technologies allow websites to access all kinds of information about visitors, including information that may reveal race, gender, age, and sexual orientation.

6. Companies that operate commercial websites have access to massive amounts of data about internet users and can employ sophisticated computer algorithms to analyze that data. Such "big data" analytics are used by many websites, and usage is constantly increasing and expanding. Big data enables behavioral targeting, meaning that websites can steer individuals toward different homes or credit offers or jobs—including based on their membership in a class protected by civil rights laws. Behavioral targeting opens up vast potential for discrimination against marginalized communities, including

people of color and other members of protected classes. The potential scope of this problem has been repeatedly acknowledged by the federal government.[1]

7. The Plaintiffs in this case, academics and a media organization, wish to conduct audit testing or related investigative work to determine whether online websites—including those that advertise or provide a means by which individuals can apply for housing and employment—are treating users differently based on their membership in a protected class, but they are limited by the ToS of target websites. Some of the Plaintiffs have already engaged in such research and testing activities and must now fear prosecution under the Challenged Provision.

8. The Plaintiffs' research and testing activities, which include posing as online users of different races and recording the information they receive, constitute speech and expressive activity that is protected by the First Amendment, and that is prohibited by the Challenged Provision. The overbroad and indeterminate nature of the Challenged Provision prohibits and chills a range of speech and expressive activity protected by the First Amendment, because it prevents Plaintiffs and other individuals from conducting robust research on issues of public concern when websites choose to proscribe such activity.

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[1] *See* Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* 51-53 (May 2014), https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf; Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf (hereinafter "FTC Report on Big Data"); Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* (May 2016), https://www.whitehouse.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf.

9. Plaintiffs therefore bring this action to enjoin the enforcement of the Challenged Provision, on its face and as applied to them, as violating the First Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Jurisdiction and Venue

10. This action arises under the U.S. Constitution, including the First Amendment and the Due Process Clause of the Fifth Amendment.

11. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331. This Court may award Plaintiffs declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and this Court's inherent equitable jurisdiction.

12. Venue is proper in the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1391(b). Defendant, who is sued in her official capacity, resides in this judicial district. This action challenges the constitutionality of a statute that applies in this judicial district.

Parties

13. Plaintiff Christian W. Sandvig is an Associate Professor at the University of Michigan. He resides in Ann Arbor, Michigan.

14. Plaintiff Kyratso "Karrie" Karahalios is an Associate Professor at the University of Illinois. She resides in Urbana, Illinois.

15. Plaintiffs Sandvig and Karahalios are conducting a study to determine whether the computer programs that determine what housing to display on real estate websites are discriminating against users by race or other factors.

16. Plaintiff Alan Mislove is an Associate Professor at Northeastern University. He resides in West Roxbury, Massachusetts.

17. Plaintiff Christopher "Christo" Wilson is an Assistant Professor at Northeastern University. He resides in Roslindale, Massachusetts.

18. Plaintiffs Wilson and Mislove are conducting a study to test whether the ranking algorithms on major online hiring websites produce discriminatory outputs by systematically ranking specific classes of people (e.g., people of color or women) below others.

19. Plaintiff First Look Media Works, Inc. ("Media Works") is the non-profit journalism arm of First Look Media, which has its principal place of business in New York, New York. First Look Media is a new-model media company devoted to supporting independent voices across all platforms. Media Works, a federally-recognized 501(c)(3) tax-exempt organization, publishes The Intercept, an online news and journalism platform. Its sister company, First Look Productions, Inc., produces and finances content for all screens and platforms including feature films, television, digital series, and podcasts.

20. Plaintiff Media Works and its journalists wish to engage in robust investigations of online companies and websites. They wish to investigate websites' business practices and outcomes, including any discriminatory effects of websites' use of big data and algorithms.

21. Defendant Loretta Lynch is the Attorney General of the United States and is sued in her official capacity. The Attorney General oversees the enforcement of federal

criminal statutes. As the head of the Department of Justice, she supervises its officers and employees, including the United States Attorneys.

The Computer Fraud and Abuse Act

22. The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq*., prohibits unauthorized access to "protected computer[s]" under certain circumstances.

23. The term "protected computer" includes a computer "which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." 18 U.S.C. § 1030(e)(2)(B).

24. A protected computer includes any website that is accessible on the internet. *See*, *e.g.*, *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007).

25. 18 U.S.C. § 1030(a)(2)(C) (the "Challenged Provision") provides that:

> Whoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer . . . shall be punished as provided in subsection (c) of this section.

26. A first violation of the Challenged Provision carries a one-year maximum prison sentence and a fine. 18 U.S.C. § 1030(c)(2)(A). A second or subsequent violation carries a prison sentence of up to ten years and a fine. *Id*. § 1030(c)(2)(C).

27. The Challenged Provision contains no requirement of intent to cause harm, or of actual harm stemming from the prohibited conduct, before imposing criminal penalties.

28. While "without authorization" is not defined by the statute, "exceeds authorized access" means "to access a computer with authorization and to use such

access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

29. The "exceeds authorized access" language has been repeatedly interpreted by courts and the federal government to prohibit accessing a publicly-available website in a manner that violates that website's terms of service.

30. The U.S. Department of Justice's manual for CFAA prosecutions notes, in explaining the definition of the phrase "exceeds authorized access," that it is "relatively easy to prove that a defendant had only limited authority to access a computer in cases where the defendant's access was limited by restrictions that were memorialized in writing, such as terms of service [or] a website notice . . ." Office of Legal Education, Executive Office for United States Attorneys, Department of Justice, Prosecuting Computer Crimes, http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf. It provides citations to caselaw for the proposition that violating such restrictions can suffice to prove the "exceeds authorized access" element of the Challenged Provision. *Id.* at 8–9.

31. The Department of Justice has brought at least two prosecutions alleging violations of 18 U.S.C. § 1030(a)(2) based on accessing a website in a manner that violates that website's ToS. *See United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009); *United States v. Lowson*, No. CRIM. 10-114 KSH, 2010 WL 9552416 (D.N.J. Oct. 12, 2010).

32. The CFAA also provides for civil liability where a person "suffers damage or loss by reason of a violation" of its provisions. 18 U.S.C. § 1030(g). Courts adjudicating such civil actions have also interpreted "exceeds authorized access" to

encompass accessing information in violation of a website's terms of service. *See EF Cultural Travel BV v. Zefer Corp*., 318 F.3d 58, 62 (1st Cir. 2003); *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 Fed. App'x 116, 129–30 (3d Cir. 2015).

33. Criminal liability under the CFAA extends to "any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity" that violates its provisions, 18 U.S.C. § 1030(e)(12), and to any of these for "conspir[ing] to commit" an offense, *id*. § 1030(b).

34. In addition to prohibiting the research and investigations that Plaintiffs wish to conduct, the Challenged Provision prohibits actions in furtherance of a plan to conduct such research and investigations. 18 U.S.C. § 1030(b).

35. Plaintiffs have an objectively reasonable belief that conducting the research and investigations they have designed to uncover discrimination online would subject them to criminal liability. They also have an objectively reasonable fear of criminal prosecution under the Challenged Provision.

Audit Testing and the Fair Housing Act

36. For more than three decades, testing has been central to enforcement of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.* Testing has also played an important role in the enforcement of Title VII, 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination in employment.

37. The Fair Housing Act has as its goal "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. To that end, the FHA prohibits discrimination in "the sale or rental of . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C.

§ 3604(a). It also prohibits actions that "otherwise make unavailable or deny" a dwelling to a person on those bases. *Id.*

38. The FHA further prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling" on a prohibited basis, 42 U.S.C. § 3604(b), and the making of representations on a prohibited basis "that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," *id.* § 3604(d).

39. The FHA also makes it illegal "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on" membership in a protected class. 42 U.S.C. § 3604(c).

40. The FHA prohibits both intentional discrimination and practices that, while facially neutral, disproportionately harm members of a protected class without sufficient justification. *See* 24 C.F.R. § 100.500 (practice has a prohibited discriminatory effect under the FHA "where it actually or predictably results in a disparate impact on a group of persons . . . because of race, color, religion, sex, handicap, familial status, or national origin," and it is either not "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests," or any such interests "could be served by another practice that has a less discriminatory effect").

41. Since the FHA's passage, explicit statements of racial discrimination by housing providers and their agents have become much rarer, but discriminatory treatment and steering persist. Because it is nearly impossible for an individual to determine that she has been a victim of this more subtle discrimination without knowing about the

experiences of other prospective renters or buyers, paired testing has become the standard procedure for determining whether a housing provider is discriminating.

42. In a paired test, two people, one of whom is a member of a protected class and one of whom is not (e.g., a white tester and a Black tester) pose as equally qualified homeseekers and make the same inquiry about available homes. Multiple pairs may be sent to test the same housing provider or real estate agency.

43. Since the 1970s, the U.S. Department of Housing and Urban Development ("HUD") has conducted a nationwide, comprehensive study of racial and ethnic discrimination in housing approximately once per decade. The most recent such study, published in 2013, applied paired-testing methodology in twenty-eight metropolitan areas and found that Black, Latino, and Asian testers were told about and shown fewer homes than white testers. U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research, *Housing Discrimination Against Racial and Ethnic Minorities 2012* xi, http://www.huduser.gov/portal//Publications/pdf/HUD-514_HDS2012.pdf.

44. The Supreme Court recognized that fair housing testers have standing to sue for FHA violations in *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373 (1982). Courts regularly acknowledge the importance of testing to achieving the FHA's aims. *See, e.g.*, *Smith v. Pac. Properties & Dev. Corp*., 358 F.3d 1097, 1102 (9th Cir. 2004); *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir. 1983).

45. Five years after *Havens*, Congress and the President affirmed and codified the importance of testing when Congress passed and the President signed the Housing and Community Development Act of 1987 ("HCDA"). Pub. L No. 100–242, 101 Stat

1815. The HCDA created the Fair Housing Initiatives Program, through which the Department of Housing and Urban Development funds private nonprofit fair housing enforcement organizations to enforce the FHA, including specifically "testing and other investigative activities" and "special projects, including the development of prototypes to respond to new or sophisticated forms of discrimination against persons protected" by the FHA. 42 U.S.C. §§ 3616a(b)(1), (b)(2)(A), (C).

Testing and Title VII

46. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it illegal for an employer or an employment agency to engage in a number of prohibited employment practices because of the "race, color, religion, sex, or national origin" of an employee or prospective employee. 42 U.S.C. § 2000e-2(a)-(b).

47. Prohibited employer practices include refusing to hire, discharging, or applying different terms and conditions of employment to an individual because of a protected characteristic, and segregating individuals on those grounds. 42 U.S.C. § 2000e-2(a).

48. Title VII prohibits both intentional discrimination and any employment practice that causes a disparate impact on a prohibited basis if the practice is not "job related for the position in question and consistent with business necessity" or if there exists an "alternative employment practice" that could meet the employer or employment agency's needs without causing the disparate impact. 42 U.S.C. § 2000e-2(k)(1).

49. Under Title VII, an employment agency is an entity "regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of

such a person." 42 U.S.C. § 2000e(c). Employment agencies may not "fail or refuse to refer for employment, or otherwise [ ] discriminate against" individuals on a protected basis. 42 U.S.C. § 2000e-2(b).

50. Paired testing for employment discrimination can be conducted in the form of correspondence tests or audit studies. In a correspondence test, auditors submit two job applications for fictional applicants that vary only with respect to racial or gender signifiers or other protected characteristics. In an in-person audit study, pairs of real testers apply for jobs, presenting equal credentials. *See* Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. of Social Issues 221, 223 (2012).

51. Recent paired tests of employment discrimination have consistently found white testers to receive approximately twice as many callbacks or job offers as Black testers. *Id.* at 226.

52. Courts have recognized the role of paired testing in the enforcement of Title VII. *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 292 (7th Cir. 2000) (finding that recognizing testers' standing in Title VII context "is consistent with the statute's purpose"); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277–78 (D.C. Cir. 1994) (finding organization alleged a cause of action under Title VII against an employer based in part on evidence obtained by testers).

53. For more than two decades, the Equal Employment Opportunity Commission ("EEOC") has also determined, based on caselaw and statutory construction, that testers have standing to bring claims of employment discrimination. EEOC Notice,

No. 915.002 (May 22, 1996), http://www.eeoc.gov/policy/docs/testers.html; EEOC Policy Guidance No. 915.062 (Nov. 20, 1990).

54. The above-described federal programs, under the auspices of federal civil rights statutes, as well as court cases upholding testers' standing and affirming the importance of testing, demonstrate the executive, congressional, and judicial understanding that such testing and investigations are socially valuable and, indeed, necessary.

The Need for Online Discrimination Testing and Investigation

55. In recent years, real estate, finance, and employment transactions have increasingly been initiated on the internet, and the trend will continue.

56. Simultaneously, the rise of "big data" has allowed for new forms of targeted marketing. Data brokers compile consumers' information from public records, social media sites, online tracking, and retail loyalty card programs and sell this information for marketing purposes.

57. Data brokers also place individual consumers into models that include inferences about them, including racial and ethnic inferences. Some of these models "primarily focus on minority communities with lower incomes, such as 'Urban Scramble' and 'Mobile Mixers' . . . which include a high concentration of Latino and African-American consumers with low incomes." Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* 20 (May 2014), http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf. Some segments are explicitly race-based, such as "African-American Professional" or

"Native American Lifestyle." *Id.* at 21 and Appendix B-5. Other factors considered by data brokers are less explicit, but serve as proxies for race—such as "purchase behavior data" sorted by consumers interested in "Kwanzaa/African-Americana Gifts." *Id.* at Appendix B-6. Data brokers also offer the ability to "append" additional information about consumers for retailers and other clients including race, age, gender, religion, and ethnicity. *Id.* at 24.

58. These profiles can follow individuals online, enabling websites and advertisers to display content targeted at, for example, African-American visitors or women.[2]

59. Tracking technologies, which allow websites and advertisers to compile records of individuals' browsing histories, also allow for targeting. A "cookie," for example, is a small piece of data sent from a web server to a user's browser, stored there, and sent back from the browser on future requests to the same web server. Websites and advertisers can insert tracking cookies, thereby enabling them to see and analyze which websites a user has visited. Individuals who use websites that allow them to create accounts may have their browsing, purchasing, or social media history tracked and linked to their accounts. Such methods of tracking individuals allow companies to target marketing materials to them in the form of advertisements on websites that they visit, or

[2] *See* Tim McGuire, *et al*., "Why Big Data is the New Competitive Advantage," IvyBusinessJournal (Jul./Aug. 2012), http://iveybusinessjournal.com/publication/why-big-data-is-the-new-competitive-advantage/; U.S. Senate Committee on Commerce, Science, and Transportation, A Review of the Data Broker Industry: Collection, Use, and Sale of Consumer Data for Marketing Purposes (Dec. 18, 2013), http://www.commerce.senate.gov/public/_cache/files/0d2b3642-6221-4888-a631-08f2f255b577/AE5D72CBE7F44F5BFC846BECE22C875B.12.18.13-senate-commerce-committee-report-on-data-broker-industry.pdf; FTC Report on Big Data, *supra* note 1.

through selective display of opportunities on housing and employment websites, for example.

60. These tracking technologies make it possible for a website or advertiser to decide to show particular content to, for example, users who have visited the Black Entertainment Television ("BET") website, or who have recently purchased feminine hygiene products, or who have clicked on an article about LGBT rights.

61. Given the long and deep history of racial discrimination in housing and employment, and the contemporary persistence of such discrimination, Plaintiffs and the public have reason to wonder whether this new technology is being harnessed for discriminatory purposes.

62. Moreover, when algorithms automate decisions, there is a very real risk that those decisions will unintentionally have a prohibited discriminatory effect on members of a protected class.

63. Scholars have identified various ways in which algorithms encode discrimination. *See.*, *e.g.*, Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact,* 104 Calif. L. Rev. (forthcoming 2016). Algorithms seek to discern correlations in existing data sets in order to predict which factors correlate with desired outcomes. But the use of such algorithms could result in disparate outcomes for members of protected classes.

64. For example, if an existing data set concerning past hiring decisions reflects past discrimination, a hiring algorithm may avoid Latinos because Latinos were historically less likely to be hired. Similarly, if a data set reflects that people who live in certain zip codes are likely to have lower credit scores, a creditworthiness algorithm may

tag all people in those zip codes as less creditworthy, disproportionately affecting people of color who tend to live in poorer neighborhoods regardless of socioeconomic status. A patent has already been granted for a method enabling lenders to make credit decisions based on the credit ratings of members of an individual's social network. Such a patent has the potential to create a disparate impact in lending based on race.

65. When groups of people are systematically underrepresented in a data set, perhaps due to differential rates of internet access or use, error rates for those groups are likely to be higher, potentially causing additional discriminatory effects.

66. Additionally, a "machine learning" technique allows for modifying the analysis and outputs on the basis of the "training data," which may include outside data sources, individual user interactions with the website, or feedback from vendors or other corporate partners. The training data may itself change over time. In such cases, an algorithm may initially produce outcomes that are not discriminatory, but, over time, behavior on the part of users, vendors, or other data suppliers can "teach" the algorithm to discriminate in ways that harm members of protected classes.

67. Accordingly, although many advocates seek various forms of increased algorithmic transparency, the best way to determine whether members of protected classes are experiencing discrimination in transactions covered by civil rights laws is via outcomes-based audit testing, which enables researchers to discover how websites appear to different users. Without such outcomes-based audit testing of certain online websites there may be no way to determine whether discrimination is occurring.

68. These illustrative examples of the ways in which the use of algorithms and big data could lead to discrimination against members of protected classes are not exhaustive.

69. Given the risks of both intentionally and unintentionally discriminatory outcomes, online testing with the same goals as the testing that has long been conducted offline is necessary to enforce the civil rights statutes and to ensure their continuing viability. Additionally, new forms of journalistic investigations or academic research are crucial to discovering and documenting online business practices and outcomes that implicate civil rights and other matters of public concern.

The Impact of Website Terms of Service on Online Audit Testing

70. A common method of outcomes-based audit testing of algorithms involves using automated technology to access a website or other network service repeatedly, generally by creating false or artificial user profiles, in order to examine whether and how websites and the algorithms that govern them respond. But most websites' terms of service prohibit the use of automated technology and the creation of artificial user profiles, preventing researchers from auditing algorithms and publishing their findings. As a result, ToS effectively prohibit the use of the very research tools and methods that are necessary to determine whether discrimination is taking place.

71. For example, the ToS of Zillow.com, Trulia.com, Realtor.com, Redfin.com, Homes.com, Apartments.com, Curbed.com, ApartmentGuide.com, Hotpads.com, and ForRent.com— ten commonly-visited housing websites—all prohibit the automated recording of information from their sites (known as "scraping"). Homes.com even purports to prohibit manually copying any content or information

displayed on its website. Seven of those ten sites prohibit users from providing false information. Similarly, the ToS of LinkedIn.com, Indeed.com, Glassdoor.com, Monster.com, CareerBuilder.com, SimplyHired.com, SnagAJob.com, Beyond.com, Dice.com, and TheLadders.com—ten commonly-visited employment websites—all prohibit scraping and providing false information. Four of those employment websites prohibit the creation of more than one account.

72. Furthermore, a private website can set the conditions of when a visitor may speak about any information learned by visiting the website, including speech subsequent to visiting the site which is made in other forums. The private website can make it a condition of access to a website that a visitor never speak negatively about the website or company on another forum, for example, such as through a non-disparagement clause, but may allow positive speech about the website or company. Such non-disparagement clauses are often used in form contracts governing the sale of consumer goods or services, and they restrict consumers' ability to communicate regarding those goods or services. *See* Report of the U.S. Senate Committee on Commerce, Science, and Transportation on S. 2044: Consumer Review Freedom Act of 2015 (Dec. 8, 2015), https://www.congress.gov/congressional-report/114th-congress/senate-report/175/1.

73. Some websites have terms of service that require advance permission before using the site for research purposes. It is therefore far more likely that speakers who wish to portray a website in a positive light will receive authorization from the website owner to engage in research activities, including publication, than will those who wish to criticize the website. In such cases, speech critical of a website (e.g., speech

concerning discrimination in which a website may be engaged) is criminal, while speech supportive of that website is not, because the owner has authorized the latter.

74. It is virtually impossible for internet users to locate and read the content of the thousands of lengthy ToS to which they are subject. *See* Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S J.L. & Pol'y for Info. Soc'y 543, 558 (2009) (the average person visits 1,462 unique websites per year, each with their own terms of service); Casey Fiesler & Amy Bruckman, *Copyright Terms in Online Creative Communities* 2551, 2554 (ACM CHI Conference on Human Factors in Computing Systems, Working Paper, 2014) (reviewing ToS for 30 websites and finding that understanding them requires, on average, the reading level of a college sophomore and, collectively, would take nearly eight hours). Moreover, because websites frequently reserve the right to, and do, change their ToS without notifying users, even a user who did read and understand the complete ToS at the time she first used the website could be subjected to criminal liability for conduct that was not prohibited in the ToS at the time she read them. For example, of the twenty commonly used housing and employment websites listed above, 18 of those websites reserve the right to modify their ToS at any time.

Plaintiffs' Research Plans

Christian W. Sandvig and Karrie Karahalios

75. Plaintiff Christian W. Sandvig is an Associate Professor at the University of Michigan in Ann Arbor, Michigan. He is appointed at the Department of Communication Studies within the College of Literature, Science, and the Arts and the School of Information.

76. Plaintiff Sandvig holds a Ph.D. in Communications from Stanford University.

77. Plaintiff Sandvig's research investigates communication and information technology infrastructure and public policy. Among other areas, he focuses on algorithmic discrimination in the online context.

78. Plaintiff Karrie Karahalios is an Associate Professor of Computer Science at the University of Illinois.

79. Plaintiff Karahalios holds a Ph.D. in Media Arts and Sciences from the Massachusetts Institute of Technology.

80. Plaintiff Karahalios' research focuses on social computing, social network analysis, social spaces, and smart infrastructure.

81. Plaintiffs Sandvig and Karahalios have frequently collaborated; they have jointly conducted multidisciplinary research studies that investigate the potential for harmful online discrimination by internet platforms. Both plaintiffs are affiliates of The Center for People & Infrastructures at the University of Illinois, a research center dedicated to this purpose.

82. Plaintiffs Sandvig and Karahalios are in the process of designing and conducting a study that would investigate whether the computer programs that determine what to display on real estate websites are discriminating against users by race or other factors.

83. Online residential real estate websites ("sites") maintain a database of available properties by purchasing property listings from multiple listing services; they also may allow landlords, brokerages and realtors to directly submit listings. These

"organic listings" are usually displayed in response to a search query (e.g., "Capitol Hill" or "1 bedroom"). The same listings are typically displayed for every visitor that makes the same query at the same time.

84. These sites make money by accepting advertising, much of which advertises available properties and related services (such as real estate agents and mortgages). Some advertising is managed directly by the sites themselves, but real estate sites also participate in online advertising exchanges and networks, which manage a large inventory of advertisements for a variety of products and decide which advertisements to display on a designated portion of a web page. When individuals visit real estate websites to search for housing, they are shown properties from all of the above sources, including both organic listings and advertisements.

85. Online advertising networks and exchanges show different advertisements to different people. It is thus much more likely that advertising networks and exchanges could unintentionally discriminate in a harmful way: they already profile users to determine what advertisements to show them.

86. To study this problem in the context of racial discrimination, Plaintiffs Sandvig and Karahalios will vary the race of multiple "visitors" to real estate sites and measure any corresponding differences in the properties they are shown, holding other potential differences between visitors constant.

87. Plaintiffs Sandvig and Karahalios will first determine how race correlates with behavior that could be detected by an advertising network's profiling apparatus by consulting published research and marketing statistics, which indicate that certain Web browsing behaviors are very highly associated with particular races. They will then

identify sites that are very likely indicators of race and the subset of these sites that participate in the same advertising networks used by online residential real estate sites, such that the networks use visits to these sites to determine which advertisements to show a user who later visits a real estate site.

88. Plaintiffs Sandvig and Karahalios will write a computer program that will act as though it is a real person browsing the Web. This program is an automated program or agent browsing the Web, referred to as a "bot." Each bot represents an individual person and is designed to interact with a website as a user might. It can visit websites, click links, fill out and submit forms, collect and store information from a web page, and do other things automatically, based on scripts written by Plaintiffs Sandvig and Karahalios.

89. The bot will be instructed to behave as a number of different users; each of these profiles is a "sock puppet."

90. The bot will first visit an online residential real estate site and search for properties, recording the properties offered to the sock puppet via advertising. Both the organic listings displayed and properties offered in advertisements to the bot will constitute the baseline for the experiment.

91. Plaintiffs Sandvig and Karahalios will then instruct the bot to perform the exhibiting behaviors associated with a particular race, so that, for instance, one sock puppet would browse like a Black user, while another would browse like a white user. All the sock puppets will browse the Web for several weeks, periodically revisiting the initial real estate site to search for properties.

92. At each visit to the real estate site, Plaintiffs Sandvig and Karahalios will record the properties that were advertised to that sock puppet by scraping that data from the real estate site. They will scrape the organic listings and the Uniform Resource Locator ("URL") of any advertisements. They will also record images of the advertisements shown to the sock puppets.

93. Finally, Plaintiffs Sandvig and Karahalios will compare the number and location of properties offered to different sock puppets, as well as the properties offered to the same sock puppet at different times. They seek to identify cases where the sock puppet behaved as though it were a person of a particular race and that behavior caused it to see a significantly different set of properties, whether in number or location.

94. A finding of automated discrimination by online residential real estate websites would produce important new scientific knowledge about the operation of computer systems, discrimination, and cumulative disadvantage.

95. Plaintiffs Sandvig and Karahalios are aware that this experimental design will violate websites' terms of service. The use of bots is prohibited by many websites that the bot would visit in the course of building the racially-identifiable sock puppets. Scraping is prohibited by the terms of service of virtually all real estate websites. The particular real estate websites they will test prohibit scraping.

96. This experimental design will have no impact, or at most a minimal impact, on the target websites' operations.

97. Plaintiffs Sandvig and Karahalios were among the authors of a 2014 paper concerning methods for auditing algorithmic discrimination, in which they expressed their concerns about liability under the CFAA. Christian Sandvig, Kevin Hamilton,

Karrie Karahalios, & Cedric Langbort, *Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms* 12–13, May 22, 2014.

98. Plaintiffs Sandvig and Karahalios are concerned that violating terms of service in the course of their work will subject them to criminal prosecution under the Challenged Provision. Plaintiffs Sandvig and Karahalios have already begun some of the activities that are part of their research plan described above, including the activities that require violating websites' terms of service. They plan to continue to engage in this research because they believe it to be socially valuable and important.

99. Plaintiffs Sandvig and Karahalios do not wish to be exposed to criminal prosecution as a result of conducting research into online discrimination.

Alan Mislove and Christopher Wilson

100. Plaintiff Alan Mislove is an Associate Professor of Computer Science at Northeastern University, in the College of Computer and Information Science.

101. He holds a Ph.D. in Computer Science from Rice University.

102. Plaintiff Mislove's research investigates systems, networking, network measurement, and security and privacy issues associated with online social networks. Among other areas, he focuses on auditing the algorithms of large-scale systems.

103. Plaintiff Christopher ("Christo") Wilson is an Assistant Professor of Computer Science at Northeastern University, in the College of Computer and Information Science.

104. He holds a Ph.D. in Computer Science from the University of California, Santa Barbara.

105. Plaintiff Wilson's research focuses on auditing algorithms, security and privacy, and online social networks.

106. Plaintiffs Mislove and Wilson have frequently collaborated. They work together as part of the Algorithmic Auditing Research Group at Northeastern University and have co-authored several papers measuring personalization and discrimination online. They have used the knowledge gained from measurements of the internet to build systems that improve security, privacy, and transparency for internet users.

107. Plaintiffs Mislove and Wilson plan to conduct research into algorithmic discrimination in the employment context. They have designed and plan to conduct a study that would determine if the algorithms used by hiring websites produce results that discriminate against job seekers by race, gender, and other factors.

108. Job seekers create personal profiles on online hiring websites, upload their resumes, and apply for open positions. At the same time, companies and recruiters post open positions onto these sites, and use the sophisticated tools the websites provide to screen candidates.

109. Hiring websites provide recruiters with a search engine-like interface that allows recruiters to query, filter, and browse all of the job seekers on the website. Like any search engine, these recruiter tools use proprietary algorithms to rank job seekers by opaque measures of "relevance." The order of the ranking may influence who gets offered employment and who is passed over.

110. Plaintiffs Mislove and Wilson seek to determine whether the ranking algorithms on major online hiring websites produce discriminatory outputs by

systematically ranking specific classes of people (e.g., people of color or women) below others. This could happen intentionally or inadvertently.

111. Their audit study will test the hypothesis that these hiring websites may produce discriminatory outputs by relying on data that includes real-world biases. For example, a hiring website could rank job candidates in search results in a racially disparate manner if the algorithm that determines which results are displayed take into account factors—gleaned from a user's resume, browsing history, or social networking profiles—that correlate with race.

112. On each hiring website, Plaintiffs Mislove and Wilson will investigate whether there are correlations between the rank ordering of job candidates in search results and race, gender, or age. If they observe that candidates with specific attributes are consistently ranked lower, this may indicate that the algorithm is discriminatory.

113. To investigate this problem in the context of racial discrimination, they will employ a hybrid auditing methodology.

114. First, in the observational stage of the study, they will create baseline demographic data by "crawling" a large random sample of users on the target websites using a bot. A bot can, among other things, visit websites and click links automatically, based on scripts written by Plaintiffs Mislove and Wilson. The bot will allow them to gather information about the random sample of users.

115. Second, Plaintiffs Mislove and Wilson will create employer accounts and then systematically run queries for job seekers, recording the ranked lists of candidates returned by the search engine. They will vary the keywords used in searches (e.g., "programmer," "software developer," "software engineer") as well as the search filters

(e.g., years of experience, previous employer). Once ranked lists of candidates are returned in response to search queries, they will "scrape" the website as a method of recording the lists of candidates. Scraping means that the webpages returned by the search engine will be stored to a hard drive, and relevant information (e.g., the ranked list of job candidates) will be automatically extracted from the stored pages by software.

116. In addition to recording the ranked lists of candidates returned by the search engines, Plaintiffs Mislove and Wilson will crawl each candidate's personal profile to collect any available information such as age, location, education, and experience. They will then label the attributes of users based on their profile data. To obtain a label for the race of each candidate, they plan to have multiple people label each user's photograph. They will then quantify the distribution of users by race.

117. Plaintiffs Mislove and Wilson will then build statistical models that attempt to explain the observed rank orderings of candidates in search results, examining the impact of demographic variables (including race) on rank in the search results.

118. Second, in the experimental stage of their study, Plaintiffs Mislove and Wilson will create profiles for fictitious job seekers, post fictitious job opportunities, and have the fictitious users apply for the fictitious jobs. The goal in this phase is to examine how the websites rank the fictitious candidates who apply for their fictitious jobs.

119. Plaintiffs Mislove and Wilson will create sock puppet job-seeker accounts with varying attributes (e.g., race, gender, age). These accounts will always include one uniform, globally unique attribute (e.g., attendance at a fictitious high school) so that they can search for the sock puppets as distinct from genuine jobseekers. These sock puppet accounts will then be used to search for fictitious jobs that they will post on the websites.

120. Plaintiffs Mislove and Wilson will use all available mechanisms to prevent real people from applying for their fictitious jobs, including giving the job an explicit title (e.g., "This is not a real job, do not apply"). Once the experiments are over, they will delete all of the fictitious accounts and jobs that were created.

121. Plaintiffs Mislove and Wilson will systematically conduct searches as the employers of the fictitious jobs they have posted (in other words, using the employer accounts they have created), using the same keywords that were tested earlier, with the addition of a filter corresponding to the uniform attribute (e.g., the fictitious high school). This will ensure that the search results contain only the sock puppets.

122. By comparing the sock puppets' rankings to the baseline search result distributions (i.e., those they found in their observational study), Plaintiffs Mislove and Wilson will be able to examine how specific user attributes—in this case, race—impact search rank.

123. In addition to publishing their findings in academic papers, Plaintiffs Mislove and Wilson plan to bring the results of this research to the public. They plan to develop a tool that will analyze a person's profile on major hiring sites and rank it compared to various sock puppets. The tool will rank users using the same features as the true algorithms. The tool will teach people about the algorithms underlying hiring sites.

124. Plaintiffs Mislove and Wilson are aware that this experimental design violates websites' terms of service. Use of crawling and scraping is prohibited by many of the websites that they would crawl or scrape to develop baseline data or record results. The use of sock puppets is prohibited by the terms of service of all hiring websites, which prohibit users from creating profiles containing false information.

125. This experimental design will have a minimal impact, if any, on the target websites' operations.

126. Plaintiffs Mislove and Wilson are concerned that violating terms of service in the course of this work will subject them to criminal prosecution under the Challenged Provision. Plaintiffs Mislove and Wilson have already begun some of the activities that are part of their research plan described above, including those activities that require violating websites' terms of service.

127. Plaintiffs Mislove and Wilson plan to continue to engage in this research because they believe that it may have significant social value. First, individual algorithm audits may uncover harmful discriminatory practices that, once exposed, force the relevant parties to change their behavior. This may also deter other organizations from using similar algorithms. Second, the tools and data that Plaintiffs Mislove and Wilson create during this project will aid academics and regulators who wish to expand on their findings or conduct their own audits. Finally, by educating computer scientists and the general public, Plaintiffs Mislove and Wilson hope to inform an important societal debate about the role and norms of algorithms in daily life.

128. Plaintiffs Mislove and Wilson do not wish to be exposed to criminal prosecution as a result of conducting research into online discrimination.

Plaintiff First Look Media Works

129. Media Works conducts investigative journalism through The Intercept, a website that publishes long-form investigative articles based on its journalists' original reporting and research. Among the subject matters of interest to the journalists at The Intercept are criminal justice, corporate practices, national security, and technology. The

Intercept has published a series of articles (now collected in a book, *The Assassination Complex: Inside the Government's Secret Drone Warfare Program*) about the United States' use of targeted drone attacks, and a multi-part investigation of how the DuPont company harmed communities' water sources while manufacturing Teflon. Working with large data sets has been a key component of many of The Intercept's articles.

130. Plaintiff Media Works and its journalists wish to engage in robust investigations of online companies, websites, and platforms. They wish to investigate websites' business practices and outcomes, including any discriminatory effects of websites' use of big data and algorithms.

131. Plaintiff Media Works and its journalists wish to violate certain website terms of service in order to conduct their investigations, including by scraping data from websites that is available either to the general public or to individual website users.

132. Plaintiff Media Works does not wish to be exposed to criminal prosecution as a result of engaging in necessary journalistic activity in order to inform the public about online business practices.

Plaintiffs' Injuries

133. Plaintiffs Sandvig, Karahalios, Mislove, and Wilson have the goal of conducting research and testing that would determine whether housing or employment websites are discriminating based on race, gender, or membership in other protected classes. Plaintiff Media Works has the goal of engaging in investigative journalism to research websites' business practices and outcomes.

134. Plaintiffs wish to gather and analyze data that is made available by the targeted websites and report on their findings to the public.

135. The research, testing, and investigative methods they have designed would, if carried out, violate the Challenged Provision, because they all require violating the terms of service of the targeted website. The research, testing, and investigative methods Plaintiffs wish to conduct would not be criminal but for the Challenged Provision.

136. None of the Plaintiffs' activities are done with the intent to defraud or cause material harm to any targeted website's operations, but instead with the intent to determine whether targeted websites are engaging in discrimination. To the extent, if any, that Plaintiffs' activities might burden a website's operations, the burden would be de minimis. To the extent any reputational or similar harm arises from Plaintiffs' subsequent publication of truthful information about their research findings, including any findings of discrimination, the government does not have a legitimate interest in preventing such harm.

137. Plaintiffs are injured because they are placed in the position of either refraining from conducting their research, testing, or investigations—all of which constitute constitutionally-protected speech or expressive activity, or conduct necessarily antecedent to such speech or expressive activity—or of exposing themselves to the risk of prosecution under the Challenged Provision. Refraining from conducting their research, testing, or investigations constitutes self-censorship and a loss of Plaintiffs' First Amendment rights.

138. Plaintiffs Sandvig, Karahalios, Mislove, and Wilson have already begun some of the activities described in their research plans, which include those activities that

violate websites' terms of service, and they reasonably fear prosecution under the Challenged Provision.

139. The Challenged Provision chills the Plaintiffs and others who wish to conduct similar online research, testing, or investigations for the following reasons: 1) because they are placed in reasonable fear of being prosecuted for engaging in constitutionally-protected expressive activity to uncover and report on discrimination and related matters, or 2) because they must alter or modify their research and testing design in a manner that may be less methodologically rigorous to accommodate terms of service in a way that reduces or eliminates their risk of prosecution, or 3) because they must refrain from conducting research or testing that violates websites' terms of service to avoid the risk of prosecution.

The Challenged Provision Violates the First Amendment on Its Face and As Applied

140. The Challenged Provision is unconstitutionally overbroad.

141. The Challenged Provision impermissibly burdens speech about business practices and other activity on the internet because websites can determine what speech and expressive activity to prohibit, and these prohibitions become criminal violations of the Challenged Provision. In other words, a website can *explicitly* target speech or expressive activities. For example, if a website's terms of service provide that access by certain types of speakers (such as researchers) is unauthorized, or that engaging in certain speech (false or misleading speech, for example, or subsequent disparaging speech about the website) renders access unauthorized, then violations of those private terms of service become crimes through the phrase "exceeds authorized access" in the Challenged

Provision. Such speech or expressive activity thus becomes prohibited under pain of criminal sanctions simply because it occurred on the internet.

142. Because the Challenged Provision incorporates websites' terms of service into the federal criminal code, its applications are virtually infinite; any speech or expressive activity that the private operator of a website has prohibited as a condition of access to its website becomes a criminal violation, even where that prohibition covers speech subsequent to the visit and in a different forum. In a good number of cases, a website's ToS will prohibit speech that cannot constitutionally be prohibited. Accordingly, although the Challenged Provision may have legitimate applications, its unconstitutional applications are substantial in relation to its legitimate scope.

143. The Challenged Provision is also overbroad because it prohibits a wide variety of conduct that is commonplace on the internet, from overstating one's height to copying information from real estate or job listings to be shared with others.

144. The Challenged Provision is overbroad because it prohibits the Plaintiffs' activities. Plaintiffs wish to gather, disseminate, and publish information about discrimination, activities constituting speech under the First Amendment but prohibited by the Challenged Provision at a website's behest. In order to gather the necessary information, they wish to create artificial "tester" profiles, violating ToS prohibitions on populating accounts with false information.

145. Plaintiffs wish to engage in anonymous speech and misrepresentation for the purpose of testing for discrimination. In this context, anonymous speech and misrepresentation enjoy First Amendment protection. However, the Challenged Provision renders such anonymous speech and misrepresentation criminal, simply because the

tester is evaluating an online business that has terms of service prohibiting such activity, or because the online business does not wish to be the target of such testing.

146. Some of Plaintiffs' research, testing, or investigation entails automated recording or collection of publicly-available information from websites, prohibited as data "scraping" by terms of service, but protected by the First Amendment.

147. Plaintiffs also wish to use websites for research purposes and to have the option of subsequently publishing the findings of their research, even when website terms of service do not allow doing so. However, the Challenged Provision renders such activities criminal.

148. The Challenged Provision's broad delegation of criminal regulation to private parties also impairs the First Amendment rights of many other people.

149. Terms of service, including those on social media websites, often require that users provide their real names when creating accounts, as is the case with seven of the ten housing websites and all of the employment websites listed in paragraph 71 of this Complaint. By criminalizing any violation of these rules, the Challenged Provision chills a broad range of important expressive activity. Members of marginalized groups, or victims of abuse and harassment, may seek to operate pseudonymously online in order to protect themselves. For example, real name policies chill the speech of lesbian, gay, bisexual, or transgender individuals who wish to keep this aspect of their identities private or separate from their offline lives, and they chill the speech of victims of domestic violence who would speak online but for fear of response from abusers. Transgender individuals whose legal names do not reflect their gender identities may be deterred from speaking online under such policies. Critics of employers, governments, or

other powerful actors may desire the safeguard from retribution that pseudonymity provides. Artists, writers, and others engaged in creative expression often desire pseudonymity, and some forms of satire, such as fictional Twitter accounts, depend upon misrepresenting the user's identity. The Challenged Provision criminalizes violations of websites' real name policies, chilling this entire range of constitutionally protected activity.

150. The Challenged Provision also criminalizes violations of websites' requirements that users provide truthful information in other aspects of their profiles. Thus, it threatens prosecution for false speech about a dating website user's age, height, or weight, and for a false declaration of party affiliation by a commenter on a news website, to name just two examples.

151. Some websites' terms of service explicitly prohibit criticism of the website or company in any forum as a condition of use. Such a straightforward prohibition on speech is also rendered criminal by the Challenged Provision.

152. Many more unconstitutional applications of the Challenged Provision exist, including those stemming from terms of service prohibitions on recording publicly-available content on websites, or sharing or providing access to information available through use of personal accounts.

153. Because it incorporates websites' prohibitions on speech and expressive activity, including speech and expressive activity protected by the First Amendment, the Challenged Provision prevents or chills speakers from exercising their First Amendment rights online and is overbroad.

154. The Challenged Provision violates the First Amendment as applied to the Plaintiffs. In order to conduct their proposed research, testing, and investigations, Plaintiffs wish to engage in protected speech or expressive activity prohibited by terms of service, in turn rendered criminal by the Challenged Provision. The online research that Plaintiffs wish to conduct includes accessing websites using artificial tester profiles, in violation of terms of service that prohibit providing false information. But such conduct enjoys First Amendment protection.

155. The freedom to conduct academic research, and the freedom of the press, are of paramount public importance and entitled to full protection under the First Amendment. The Plaintiff researchers and journalists wish to study the subject of online discrimination using the methodologies of their professions, and they should not be restricted in using otherwise lawful tools and techniques simply because they pursue their research on the internet.

156. As applied to Plaintiffs, the Challenged Provision fails strict scrutiny. The government, far from having a compelling interest in preventing Plaintiffs' speech and expressive activity, has an interest in ensuring the enforcement of anti-discrimination laws online. The government's interest in preventing computer crime is more than adequately served by other provisions of the CFAA, which prohibit accessing protected computers when, *inter alia*, damage is caused or there is an intent to defraud. *See, e.g.*, 18 U.S.C. §§ 1030(a)(4), (a)(5)(B), (a)(5)(C).

157. Plaintiffs also wish to use automated methods of recording publicly-available data or data available to individual users from the audited websites that are

prohibited by terms of service, even though such recording constitutes protected First Amendment activity.

158. Plaintiffs wish to record algorithms' outputs using an automated "scraping" technique, which allows for rapid gathering of large amounts of data that would take far longer to gather manually. Automated scraping is generally barred by ToS. Similarly, ToS often restrict sharing information gleaned by an individual account holder, by, for example, prohibiting the sharing of passwords which would allow multiple people to view the information that the site displays to a particular user.

159. Recording and retaining publicly-available information from websites, like video or audio recording of public places, is expressive activity protected by the First Amendment. Furthermore, sharing information that a website makes available to a particular user is critical to comparing outputs based on membership in a protected class, and constitutes speech or recording protected by the First Amendment.

160. Plaintiffs wish to have the option of publishing the results of their research, including any findings of discrimination, even if a target website's ToS prohibit doing so. Such publication is protected by the First Amendment.

161. As applied to the Plaintiffs in conducting their proposed research plans and journalistic activities, the Challenged Provision violates the First Amendment.

The Challenged Provision Criminalizes Speech Necessary to Petition the Government

162. The Challenged Provision makes it a criminal violation to petition the government for a redress of grievances where a website's terms of service prohibit the speech necessary to engage in such petitioning.

163. For example, if a website conditions access based on a requirement that the user not make any subsequent negative, critical, or disparaging speech about that website, then the user cannot report discrimination by that website to the government.

164. Where visiting or using a website triggers a ToS restriction on subsequent speech to petition the government, then no petition for redress of grievances can be based on the type of research Plaintiffs wish to conduct. Without this type of research, it is impossible to determine whether housing and employment websites, and the businesses that post and advertise through them, are violating Fair Housing Act or Title VII rights, or are otherwise discriminating against members of groups protected by the civil rights laws. By preventing individuals from subsequently speaking about such research, the Challenged Provision precludes knowledge of the scope and extent of online discrimination.

165. This is especially true when algorithms are in the position to automate discrimination. Even if the private companies that operate housing- and employment-related websites could somehow be compelled to share the computer code underlying their algorithms, that code would not give a full picture of how the algorithm works in practice. Some additional factors that could influence outcomes include: unshared or dynamic datasets; interactions with outside vendors; and patterns of behavior that arise from interactions with users. Moreover, some modern algorithms (including many machine-learning algorithms) can be both dynamic and complex, such that they are simply not comprehensible to any human auditor at any particular point in time by looking at the code itself. Observations and analysis of algorithmic behavior are

necessary in these cases to understand the nature of the constructed systems, and such observations and analysis necessitate visiting a website.

166. In other words, online websites, by controlling their terms of service, can control whether or not potentially adverse information about their practices is reported to the government by any user who has ever visited.

167. The Challenged Provision bars engaging in legislative and administrative advocacy, or in litigation, alleging discrimination by a website where its ToS prohibit such advocacy or litigation. Thus individuals cannot identify for HUD, the EEOC, or other relevant agencies the particular discrimination problems that exist on a particular website and lobby those agencies for rules or other guidance that would ensure the robust enforcement of current law online. Should online audit testing reveal discrimination that falls outside the reach of the existing law, individuals could not lobby Congress for new protections specific to the online context.

168. Individuals could not access the courts to enforce Fair Housing Act and Title VII rights after visiting a website with ToS that prohibit doing so. Thus, any victim of online discrimination by a website, who must necessarily have visited or used that website, will be precluded from making a claim of discrimination and will be unable to pursue such a claim in court.

169. The Challenged Provision essentially delegates to potential defendants in such lawsuits the ability to prevent speech about relevant evidence. Because it is these potential defendants who draft terms of service, violations of which the Challenged Provision renders criminal, the recipe for avoiding Fair Housing Act and Title VII liability for algorithmic discrimination is straightforward: merely employ terms of service

that preclude subsequent speech about such discrimination, and it can continue unchecked.

The Challenged Provision is Vague, In Violation of the Due Process Clause

170. The Challenged Provision, which prohibits accessing a protected computer in a manner that "exceeds authorized access" is, on its face, void for vagueness.

171. The Challenged Provision fails to notify ordinary people of what conduct is criminal because the phrase "exceeds authorized access" does not provide sufficient notice that an individual must comply with a website's written terms of service at all times. The plain meaning of the phrase "exceeds authorized access" does not clearly cover instances where a website places no barriers, such as technological or physical barriers, to access by individuals.

172. Because the Challenged Provision chills speech and expressive activity as described above, the Due Process Clause requires a heightened degree of statutory specificity. The vagueness of the Challenged Provision fails to give reasonable notice of what conduct is prohibited, invites arbitrary and discriminatory enforcement, and deters constitutionally-protected speech. It thus violates the Due Process Clause.

The Challenged Provision Represents an Unconstitutional Delegation of Authority to Private Parties

173. The Challenged Provision delegates to website owners the legislative power to determine which conduct is criminal.

174. The Challenged Provision makes it a federal crime to visit a website in a manner that "exceeds authorized access." The private parties that draft terms of service determine the conditions under which access is authorized; as a result, they wield the power to define the conduct that violates the Challenged Provision, including conduct

that occurs subsequent to accessing a website or is unrelated to any legitimate access restriction.

175. The Challenged Provision does not merely provide for the enforcement of private contractual arrangements: It renders conduct a separate, federal crime if it violates a website's ToS.

176. The private processes through which terms of service are drafted and approved are closed and nontransparent, with no requirement for public comment or participation. Because terms of service can be and are constantly revised, members of the public lack even the most basic notice that revisions are in progress, and have no right to participate in defining what terms of service require.

177. The government retains no control over the lawmaking process because terms of service prohibitions, drafted by private parties without public input, effectively become criminal prohibitions backed by federal law. The Challenged Provision allows private parties unilaterally and undemocratically to define the conduct that constitutes a crime.

178. The Challenged Provision fails to notify ordinary people of what conduct is criminal because there is no requirement that ToS be drafted with the requisite clarity or precision required for defining conduct that is criminal.

179. For these reasons, the Challenged Provision's delegation of the legislative power to private parties completely removes the lawmaking function from the political process and from the mechanisms for democratic accountability, and is unconstitutional.

CLAIMS FOR RELIEF

First Cause of Action

FREE SPEECH

[U.S. Const., amend. 1 (Freedom of Speech and Freedom of Press Clauses)]

180. Plaintiffs re-allege and incorporate by reference all allegations set forth above.

181. The Free Speech and Free Press Clauses of the First Amendment to the U.S. Constitution provide: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

182. The Challenged Provision prevents speech and expressive activity necessary to inform and influence the decisions of the public and the government on online discrimination.

183. The Challenged Provision is unconstitutionally overbroad. By prohibiting access to websites that "exceeds authorized access," the Challenged Provision incorporates the terms of service of each and every website into its text. It thereby creates virtually limitless restrictions on speech and expressive activity, including the speech and expressive activity that Plaintiffs here wish to engage in. The Challenged Provision is unconstitutionally overbroad on its face because its unconstitutional applications are substantial in relation to its legitimate applications.

184. As applied to the Plaintiffs, the Challenged Provision unconstitutionally restricts their protected speech, recording activities, and other protected expressive activities as described above. The Plaintiffs' research plans and journalistic activities are

not done with the intent to cause harm to any target websites' operations, and any harm that may result is de minimis.

185. The Challenged Provision is not narrowly tailored to any legitimate, compelling, or overriding government interest. The government in fact has an interest in the completion of Plaintiffs' research, an interest expressed through the Fair Housing Act and Title VII.

186. The Challenged Provision violates the Free Speech and Free Press Clauses of the First Amendment.

Second Cause of Action

RIGHT TO PETITION

U.S. Const., amend. 1 (Petition Clause)

187. Plaintiffs re-allege and incorporate by reference all allegations set forth above.

188. The Petition Clause of the First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . .to petition the Government for a redress of grievances." U.S. Const., amend. I.

189. The Challenged Provision prohibits the speech necessary to communicate with HUD, the EEOC, and other federal and state government entities concerning the enforcement of the Fair Housing Act, Title VII, and other civil rights laws online. Such communications are protected by the Petition Clause.

190. The Challenged Provision prohibits the speech necessary to access the courts in order to enforce rights granted by the Fair Housing Act, Title VII, and other civil rights laws in the online context.

191. The Challenged Provision is not justified by a legitimate, compelling, or overriding government interest.

192. The Challenged Provision is not narrowly tailored to achieve any such legitimate, compelling, or overriding government interest.

193. The Challenged Provision violates the Petition Clause of the First Amendment.

Third Cause of Action

VOID FOR VAGUENESS

U.S. Const., amend. 5 (Due Process Clause)

194. Plaintiffs re-allege and incorporate by reference all allegations set forth above.

195. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

196. The Challenged Provision is unconstitutionally vague, as it fails to define a criminal offense in a manner definite enough to notify an ordinary person what conduct is prohibited.

197. The vagueness of the Challenged Provision chills and deters speech and expressive activity protected by the First Amendment.

198. The Challenged Provision violates the Due Process Clause of the Fifth Amendment.

Fourth Cause of Action

UNCONSTITUTIONAL DELEGATION

U.S. Const., amend. 5 (Due Process Clause)

199. Plaintiffs re-allege and incorporate by reference all allegations set forth above.

200. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

201. The Challenged Provision unconstitutionally delegates lawmaking authority to private actors—the website owners who draft terms of service. These private actors, and not any democratically accountable government entity, unilaterally determine which conduct is prohibited. The Challenged Provision does not place limits on what website owners may designate to be prohibited—and therefore, criminal—conduct.

202. The Challenged Provision violates the Due Process Clause of the Fifth Amendment.

Prayer for Relief

Plaintiffs respectfully request a judgment:

1. Declaring that the challenged provision, 18 U.S.C. § 1030(a)(2)(C), on its face and as applied to Plaintiffs, violates—
    a. the Free Speech and Free Press Clauses of the First Amendment to the U.S. Constitution;
    b. the Petition Clause of the First Amendment to the U.S. Constitution; and
    c. the Due Process Clause of the Fifth Amendment to the U.S. Constitution;

2. Permanently enjoining the Defendant Attorney General, as well as her officers, agents, employees, attorneys, and all other persons in active concert or participation with her, from enforcing 18 U.S.C. § 1030(a)(2)(C);
3. Awarding Plaintiffs attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412; and
4. Awarding such other and further relief as this Court deems just and proper.

Dated: June 29, 2016

Respectfully submitted,

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