

2022 WL 4243921

United States District Court, S.D. Florida.

HUMAN RIGHTS DEFENSE CENTER, Plaintiff,
v.
Ricky DIXON, et al., Defendants.

CASE NO:

21-81391-CV-MIDDLEBROOKS/Matthewman

Signed August 24, 2022

Attorneys and Law Firms

Katherine Norman, Pro Hac Vice, Shriram Harid, Pro Hac Vice, Dechert LLP, New York, NY, Eric D. Hageman, Pro Hac Vice, Dechert LLP, Washington, DC, Jesse Woodson Isom, Daniel Lucas Marshall, Human Rights Defense Center, Lake Worth, FL, Michael H. McGinley, Pro Hac Vice, Dechert LLP, Philadelphia, PA, for Plaintiff.

Barbara Ann Junge, Christopher Kondziela, Office of the Attorney General, Fort Lauderdale, FL, Lori Ann Huskisson, Joe Belitzky, Kristen Jennifer Lonergan, Office of General Counsel Department of Health, Tallahassee, FL, for Defendants Mark S. Inch, Jose Colon.

Barbara Ann Junge, Christopher Kondziela, Office of the Attorney General, Fort Lauderdale, FL, Lori Ann Huskisson, Joe Belitzky, Office of General Counsel Department of Health, Tallahassee, FL, for Defendant Ricky Dixon.

**ORDER GRANTING IN PART DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

Donald M. Middlebrooks, United States District Judge

*1 THIS CAUSE comes before the Court on Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (DE 103), and Plaintiff’s Motion for Summary Judgment (“Plaintiff’s Motion”) (DE 105), both filed June 23, 2022. Defendants’ Motion (DE 112; DE 113) and Plaintiff’s Motion (DE 110; DE 111) are fully briefed. For the reasons set forth below, Defendants’ Motion is granted in part and denied in part, and Plaintiff’s Motion is denied.

I. BACKGROUND

The Human Rights Defense Center (“Plaintiff” or “HRDC”) is a nonprofit organization whose mission includes educating the prison population and the public on the societal and economic harms caused by prisons. (DE 105-4 ¶ 1; DE 110 ¶ 1). In furtherance of that mission, HRDC publishes and distributes several publications, including to subscribers in Florida prisons. (DE 105-4 ¶¶ 1–3; DE 110 ¶¶ 1–3).¹ Relevant here, Plaintiff publishes *Prison Legal News* (“PLN”) and *Criminal Legal News* (“CLN”)—monthly publications—and the *Disciplinary Self-Help Litigation Manual* (“DSHLM”)—a book that helps prisoners in disciplinary proceedings. (*Id.*).

At issue is the Admissible Reading Material Rule (“ARM Rule”), F.A.C. § 33-501.401(15). Plaintiff alleges that the Florida Department of Corrections (“FDOC”) censors PLN, CLN, and DSHLM by arbitrarily and unnecessarily applying the ARM Rule and fails to provide notice of all such impoundments. (DE 39 at 2).

The ARM Rule, in pertinent part, provides: “inmate[s] can possess a publication that is not detrimental to the security, order or disciplinary or rehabilitative interests of” FDOC facilities, and [a] publication will be rejected if” it meets certain enumerated criteria. F.A.C. § 33-501.401(15) (effective May 4, 2022). Three of those criteria are at issue in this litigation:

(e) The publication encourages, provides instructions on, or facilitates gambling.

(i) The publication is dangerously inflammatory in that it advocates or encourages riot, insurrection, rebellion, organized prison protest, disruption of the institution, or the violation of federal law, state law, or Department rules.

- (o) The publication contains an advertisement promoting any of the following: 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.

During the pendency of this action, FDOC amended the first sentence of subsection (o) preceding the colon. (DE 104 ¶¶ 40–41; DE 112-1 ¶¶ 40–41). The prior version read: “The publication 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.*” F.A.C. § 33-501.401(15) (effective until May 3, 2022) (emphasis added). Plaintiff premises its claims on both versions of the ARM Rule and asks the Court to declare both versions violative of Plaintiff’s First and Fourteenth Amendment rights. (See DE 39 ¶¶ 70–73, 79–81) (*see also id.* at 21).

*2 Plaintiff brought this action against Ricky D. Dixon in his official capacity as FDOC Secretary, March S. Inch, in his individual capacity as former FDOC Secretary, and Jose Colon in his individual capacity and official capacity as Warden of Everglades Correctional Institution (collectively, “Defendants”).² (DE 39 at 1). The Amended Complaint brings an as applied First Amendment challenge to the ARM Rule (Count I), void for vagueness (Count II) and overbreadth (Count III) challenges, and claims for violations of procedural (Count IV) and substantive (Count V) due process.

II. LEGAL STANDARD

A. Summary Judgment

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A disputed fact is “material[]” if it “might affect the outcome of the suit under the governing law.” (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute over a material fact is “genuine” if it could lead a reasonable jury to return a verdict in favor of the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). “Credibility determinations, the weighing of the evidence, and the

drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment. Thus, [the court] do[es] not determine the truth of the matter, but instead decide[s] only whether there is a genuine issue for trial.” *Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358 (D.C. Cir. 2013) (citation omitted).

The moving party bears the “initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the nonmoving party must “go beyond the pleadings” and by “affidavits, or depositions, answers to interrogatories, and admissions on file, ‘designate’ specific facts showing that there is a genuine issue for trial.” *Id.* at 324 (internal citations omitted). If the non-moving party fails to “establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial[,]” summary judgment is warranted. *Id.* at 322. “The court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant.” *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1557–58 (11th Cir. 1990) (citation omitted).

B. Local Rule 56.1 and Statements of Material Facts

Local Rule 56.1 normally needs no introduction, but these cross-motions prove to be exceptional. A significant number of facts and opposition facts submitted by both sides are not limited to a single factual statement per paragraph and many are argumentative. Argumentative facts draw argumentative opposition facts, and so this issue in part implicates both sides.

But while both Parties have run afoul of Local Rule 56.1, they are not equal offenders. A significant amount of Plaintiff’s facts are deficient to the point where the Court’s ability to efficiently rule on these Motions has been frustrated. Here are the overarching, non-exhaustive problems: First, an unacceptably large amount of Plaintiff’s opposition facts purport to dispute Defendants’ facts without explaining what is actually disputed and why.³ S.D. Fla. L.R. 56.1(a)(2) (“An opponent’s

Statement of Material Facts shall *clearly challenge* any purportedly material fact asserted by the opponent contends is genuinely in dispute.”). Second, Plaintiff’s opposition facts repeatedly refer to Plaintiff’s responses to other facts, which in turn make reference to more facts. *See id.* at 56.1(2)(C) (“*Each fact*” must be “supported by *specific*, pinpoint references to particular parts of the record material,” and “the evidentiary citations supporting the opponent’s position must be *limited to evidence specific to that particular dispute*.”). After following several of these bread crumb trails through layers of vague and evasive answers, it became apparent that the ultimate evidence cited generally does not contradict the initial fact it is purportedly disputing, nor is it even responsive to the initial fact.⁴ Third, Plaintiff violates the clear directive that “[w]hen a material fact requires specific evidentiary support, a general citation to an exhibit without a page number or a pincite (e.g., ‘Smith Affidavit’ or ‘Jones Deposition’ or ‘Exhibit A’) is noncompliant.” *Id.* at 56.1(a)(2).⁵

*3 The essence of the Court’s role at the summary judgment stage is to determine whether disputes of material fact exist. “Local Rule 56.1 protects judicial resources by ‘mak[ing] the parties organize the evidence rather than leaving the burden upon the district judge’ ” and “streamlines the resolution of summary judgment motions by ‘focus[ing] the district court’s attention on what is, and what is not, genuinely controverted.’ ” *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008) (citation and internal quotation marks omitted) (discussing the Northern District of Georgia’s Local Rule 56.1, which is substantively similar to that of this District). For obvious reasons, then, when a Party repeatedly obscures its position on the opponent’s material facts and fails or refuses to clearly explain what facts it disputes, why it disputes them, and what evidence supports its position, the Court’s job becomes exponentially more difficult.

To that end, Local Rule 56.1 provides that “[a]ll material facts ... may be deemed admitted unless controverted by the other party’s Statement of Material Facts,” provided the initial fact is supported by the cited record evidence. S.D. Fla. L.R. 56.1(c). District courts have considerable discretion in applying the Local Rules, and in an exercise of that discretion, I find it necessary to deem facts undisputed that substantially fail to comply with the Local Rules and are otherwise evasive, non-responsive and do not clearly controvert the opponent’s fact. *See Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (“Plaintiffs’ failure to comply with local rule 56.1 is not a mere technicality ... Plaintiffs’ answers were

convoluted, argumentative and non-responsive.”); *Reese*, 527 F.3d at 1268–69; *Williams v. Slack*, 438 F. App’x 848, 850 (11th Cir. 2011); *Marantes v. Miami-Dade Cnty.*, 776 F. App’x 654, 662 (11th Cir. 2019); *Cheatham v. DeKalb Cnty., Ga.*, 682 F. App’x 881, 884 (11th Cir. 2017). Procedurally undisputed facts are identified as such in this Order.

III. DISCUSSION

A. Individual Capacity Claims

Defendants Inch and Colon, against whom individual capacity claims are brought, argue that they are entitled to qualified immunity.⁶ The qualified immunity doctrine shields governmental officials performing discretionary acts “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their *individual capacities*.” *Lassiter v. Ala. A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994), *overruled on other grounds*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (emphasis in original).

*4 Initially, the defendant seeking qualified immunity bears the burden of proving that he was acting within the scope of his employment when the allegedly wrongful acts occurred. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). There is no debate over whether the conduct attributed to Defendants Inch and Colon—overseeing FDOC’s impoundments—occurred during the scope of employment with FDOC.

Once this showing is made, the burden shifts to the Plaintiff to establish that qualified immunity is not appropriate because: (1) a constitutional right was violated; and (2) the right was clearly established at the time of the violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). As explained below, Plaintiff fails to establish the violation of a constitutional right with respect Counts II through V. That leaves Count I—the First Amendment as applied challenge to the ARM Rule. I will first analyze whether the constitutional right was clearly established.

Grider v. City of Auburn, Ala., 618 F.3d 1240, 1254 (11th Cir. 2010) (either prong can be reviewed first). Because it is not, I need not assess whether Defendants Inch and Colon violated a constitutional right.

To meet the “clearly established” requirement, “a plaintiff must show that when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful.” (*Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993)). There are three ways to show that a right was clearly established: (1) a “materially similar” case has already been decided; (2) a broad statement of principle within the Constitution, statute, or case law clearly establishes the right; or (3) the conduct at issue “so obviously violates the constitution that prior case law is unnecessary.” *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005).

Plaintiff relies on a single case—*Prison Legal News*—which involved these same Parties. (DE 112 at 19). Plaintiff argues that Defendants are applying the ARM Rule “in precisely the manner that they had repeatedly told the Court that they would *not* apply it—that is by impounding publications based on ‘merely incidental’ advertisements.” (*Id.*). This one-sentence argument reveals little about how Plaintiff contends the constitutional right it asserts is clearly established and, in that regard, Plaintiff substantively fails to meet its burden. But in any event, *Prison Legal News* does not place the constitutional question “beyond debate.” *Ashcroft*, 563 U.S. at 741.

In *Prison Legal News*, the Eleventh Circuit found that FDOC’s impoundment of *PLN* based on certain offending ads did not violate the First Amendment. 890 F.3d at 975–76. It does not clearly establish that impounding publications based on ads that are incidental to the overall publication violates a publisher’s free speech rights. For one, what it means for an ad to be “incidental” in this context is up for debate. Indeed, I view that as a significant question to be resolved in this litigation. Notably though, the Eleventh Circuit suggested that prison officials would be constitutionally permitted to impound an entire publication based on a single objectionable ad in certain circumstances. *See id.* at 972 & n.16. “[The] ‘clearly established’ standard demands that a bright line be crossed.” *Gaines v. Wardynski*, 871 F.3d 1203, 1213 (11th Cir. 2017). No bright line was crossed here. Accordingly, Defendants Inch and Colon are entitled to qualified immunity.

B. Official Capacity Claims

*5 Plaintiff and Defendants move for summary judgment on each of Plaintiff’s five constitutional claims. I address each in turn.

1. As Applied First Amendment Claim (Count I)

Count I is an as applied challenge to the application of the ARM Rule. Under *Turner v. Safley*, a prison regulation is valid so long as “it is reasonably related to legitimate penological interests.” 482 U.S. 78, 89 (1987). Four factors are considered: “(1) whether there is a ‘valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it’; (2) whether the publisher has alternative means to exercise its right of access to its inmate subscribers; (3) what ‘impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally’; and (4) whether [the publisher] ‘can point to ... alternative[s] that fully accommodate[] [its] rights at *de minimis* cost to valid penological interests.’ ” *Prison Legal News*, 890 F.3d at 967 (quoting *Turner*, 482 U.S. at 89). FDOC must show “more than a formalistic logical connection between [the impoundments] and a penological objective,” *Beards v. Banks*, 548 U.S. 521, 535 (2006) (plurality opinion), but “considerable deference” is afforded to the decisions of prison officials, *Thornburgh v. Abbott*, 490 U.S. 401, 407–408 (1989); *Overton v. Bazetta*, 538 U.S. 126, 132 (2003) (“substantial deference”); *Prison Legal News*, 890 F.3d at 965 (“wide-ranging and substantial deference”).

On *Turner* factor one, Plaintiff argues that the incidental nature of the ads—in terms of size, scope and relation to the rest of the publication—severs any rational link to any penological interest. (DE 105-1 at 7–9); (DE 112 at 6). For example, Plaintiff claims that *DSHLM*, a 358-page book, has been impounded based on two ads on the last few pages. (DE 105-1 at 8). Plaintiff asserts that issues of *PLN* and *CLN* have been impounded for just a single ad, which Defendants dispute. (DE 105-4 ¶ 32; DE 110 ¶ 32). Critically, Defendants dispute that the ads are “merely incidental;” rather, according to Defendants, they “present clear risks to FDOC’s penological interests.” (DE 113 at 4); (DE 103 at 10–11).

Defendants’ position is that preventing inmates from obtaining information about prohibited services and activities like three-way calling, pen pal solicitation, using postage as currency and running businesses in prisons all stem from legitimate security concerns. (DE 103 at 10–11). Plaintiff suggests FDOC’s security concerns are overstated and pretextual. (DE 112 at 4–6). Plaintiff argues that FDOC “allows—indeed encourages—those very activities to continue unabated,” which makes “clear that Defendants have used the ARM Rule as a fig leaf to consistently and systematically override HRDC’s constitutional right[s].” (*Id.* at 4–5). For example, Plaintiff cites to the testimony of one FDOC official for the proposition that FDOC allows inmates to make three-way calls so that FDOC can monitor those calls for intelligence gathering and crime prevention purposes. (*Id.* at 5) (citing 105-6, Kirkland Dep. Tr. 30:5–31:15). Defendants dispute Plaintiff’s characterization of, and inferences drawn from, the evidence on which it relies. (DE 113 at 3–3).

*6 These genuine disputes of material fact preclude me from finding, at this stage, whether the first *Turner* factor favors Plaintiff or Defendants. The remaining *Turner* factors are not separate factors to balance with the first, but they rather “provide more angles from which to view the fundamental inquiry: whether the prison regulation is reasonably related to legitimate penological interests.” *Rodriguez v. Burnside*, 38 F.4th 1324, 1331 (11th Cir. 2022). It would therefore be inappropriate to consider the Parties’ arguments and evidence with respect to the second, third and fourth *Turner* factors at this time. As such, the Parties’ cross-motions are denied on Count I.

2. Void for Vagueness (Count II) and Overbreadth (Count III)

Plaintiff brings vagueness and overbreadth challenges based both on the current version of the ARM Rule and the prior version—barring certain ads that are “prominent and prevalent” or “the focus of” publication. (DE 39 ¶¶ 37–38, 70–73, 79–81). The new version without this language went into effect on May 4, 2022. (DE 104 ¶ 41; DE 112-1 ¶ 41).

Defendants argue generally that the Eleventh Amendment bars Plaintiff from seeking retrospective relief from Defendants Dixon or Colon in their official capacities for the prior version of the ARM Rule. (DE 104 at 20–21).⁷

That argument has traction here.

The Eleventh Amendment prohibits federal suits against state officials for retrospective relief, but under the *Ex Parte Young* doctrine, suits against state officials for “ongoing and continuous violations of federal law” are permitted. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999) (citing *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986)). Vagueness and overbreadth challenges to a regulation no longer in effect, at bottom, ask the Court to declare prior actions unlawful. *See Summit Med. Assoc.*, 180 F.3d at 1337 (“a plaintiff may not use the [*Ex Parte Young*] doctrine to adjudicate the legality of past conduct.”); *see also Fla. Ass’n Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1220 (11th Cir. 2000) (“*Ex parte Young* applies to cases in which the relief against the state official directly ends the violation of federal law[.]”). The declaratory and injunctive relief Plaintiff seeks, then, is entirely backward looking. It cannot be characterized as “prospective in nature, *i.e.*, designed to prevent injury that will occur in the future[.]” *Summit Med. Assoc.*, 180 F.3d at 1338. Plaintiff’s vagueness and overbreadth claims premised on the prior version of ARM Rule are therefore dismissed on Eleventh Amendment grounds.

i. Vagueness

Plaintiff’s vagueness challenge to the current version of the ARM Rule appears to focus on the “dangerously inflammatory” language in subsection (15)(i). (DE ¶ 39); (DE 105-1 at 13–16). A prison regulation “is void for vagueness if it ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’ ” *Torres v. Fla. Dep’t of Corr.*, 742 F. App’x 403, 408 (11th Cir. 2018) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *see also High Ol’ Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir.1982) (“Facial vagueness occurs when a statute is utterly devoid of a standard of conduct so that it ‘simply has no core’ and cannot be validly applied to any conduct.” (citation omitted)). “The Constitution does not require perfect clarity;” it requires “fair notice” such that “persons of ordinary intelligence [can] avoid conduct which the law forbids.” *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1176 (11th Cir. 2018) (citation and internal quotation marks omitted). Subsection (15)(i) does that. It reads:

*7 An inmate can possess a publication that is not detrimental to the security, order, or disciplinary or rehabilitative interests of any institution of the Department A publication will be rejected if The publication is *dangerously inflammatory* in that it advocates or encourages riot, insurrection, rebellion, organized prison protest, disruption of the institution, or the violation of federal law, state law, or Department rules.

F.A.C. § 33-501.401(15)(i) (emphasis added).

“Inflammatory” is a word of common understanding, particularly in the prison context. *See Pesci v. Budz*, 935 F.3d 1159, 1163, 1168, 1171–72 (11th Cir. 2019) (finding no First Amendment violation under *Turner* when a civil commitment facility banned a newsletter for being “inflammatory”). Vagueness is not a mechanical test—“[t]he degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Vil. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Several Courts of Appeal have recognized that the limited nature of free speech rights in prisons results in a more limited vagueness and overbreadth doctrines with respect to prison regulations.⁸ *See Koutnik v. Brown*, 456 F.3d 777, 782–83 (7th Cir. 2006) (“We have explained, however, that ‘the concepts of overbreadth and vagueness in the jurisprudence of the First Amendment were devised in order to prevent the slightest discouragement of free speech, and therefore have only limited relevance to a sphere where the right of free speech is limited.’ ” (citation omitted)); *Wolfel v. Morris*, 972 F.2d 712, 717 (6th Cir. 1992) (“[T]he degree of specificity [to satisfy due process] required in prison regulations is not the same as that required in other circumstances”). As the Seventh Circuit explained, “[s]ome open-ended quality is essential if a prison is to have any guidelines; it is impossible to foresee all literature that may pose a threat to safety and security.” *Koutnik*, 456 F.3d at 783.

Subsection (15)(i) is somewhat open-ended, but not unconstitutionally so. The meaning of the phrase “dangerously inflammatory” is elucidated by looking to

the list that follows it: “advocates or encourages riot, insurrection, rebellion, organized prison protest, disruption of the institution, or the violation of federal law, state law, or Department rules.” *See Torres*, 742 F. App’x at 408 (finding a prison regulation not vague where it “fairly describes the specific ... materials prohibited”). What this list clearly conveys is that a publication is “dangerously inflammatory” if it advocates or encourages specific conduct that is considered dangerous in a prison. *See Vodicka v. Phelps*, 624 F.2d 569, 571 (5th Cir. 1980) (finding a prison regulation barring publications that “constitute an immediate threat to the security of the institution” not vague and facially valid). People of ordinary intelligence understand the type of conduct that is considered dangerous in a prison. Subsection (15)(i) is not void for vagueness.

Plaintiff argues that the regulation is not easily understood because FDOC officials are not applying the regulation uniformly as to Plaintiff, citing the impoundment of *DSHLM*, and because FDOC employees cannot articulate a single definition, citing to the testimony of just one individual. (DE 105-1 at 13–16). Neither changes the fact that the subsection (15)(i) facially provides fair notice as to the prohibited publication and is not standardless as a matter of law. As such, Defendants’ Motion is granted, and Plaintiff’s is denied, on Count II.

ii. Overbreadth

*8 A regulation is constitutionally overbroad if it “punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the [regulation’s] plainly legitimate sweep.’ ” *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). To bring a facial overbreadth challenge, Plaintiff must show that “ ‘every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker.’ ” *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1331 (11th Cir. 2001) (quoting *Forsyth Cnty. v. Nat. Mvmt.*, 505 U.S. 123, 129 (1992)).

Plaintiff’s argument on summary judgment is that FDOC’s “sweeping” impoundment of HRDC publications establishes that the ARM Rule is overbroad and facially invalid. (DE 105 at 16–17). Even if this is true, which I do not decide, that the regulation has been arbitrarily applied as to Plaintiff does not establish a *facial* overbreadth

claim. Prohibiting publications that are “dangerously inflammatory in that [they] advocate[] or encourage[] riot, insurrection, rebellion, organized prison protest, disruption of the institution, or the violation of federal law, state law, or Department rules” does not penalize a substantial amount of constitutionally protected speech. *See Koutnik*, 546 F.3d at 780, 783 (finding a prison regulation barring various conduct, including possessing literature, related to “gangs” not overbroad); *see also Vodicka v. Phelps*, 624 F.2d at 571 (finding a prison regulation barring publications that “constitute an immediate threat to the security of the institution” not overbroad).

With respect to subsection (15)(o), without the “prominent or prevalent” language, Plaintiff’s argument seems to be that the ARM Rule remains overbroad because it “allow[s] the impoundment of an entire publication based on a single ad.” (DE 105-1 at 17). But as explained, it is not per se unconstitutional to impound a publication based on a single objectionable ad. *Prison Legal News*, 890 F.3d at 972. That the ARM Rule could allow such impoundments does not render it constitutionally overbroad.

The overbreadth doctrine is applied “sparingly and only as a last resort.” *Horton*, 272 F.3d 1318, 1331. It is not applicable here, as Defendants have shown. Accordingly, Defendants’ Motion is granted, and Plaintiff’s denied, on Count III.

3. Procedural Due Process (Count IV)

Due process requires notice and an opportunity to be heard when prison officials impound a publisher’s publications. *Prison Legal News*, 890 F.3d at 954. The ARM Rule requires, *inter alia*, notice to the publisher upon the first instance of impoundment of a publication. F.A.C. § 33-501.401(16)(b).⁹ Plaintiff does not challenge the constitutionality of the procedures set forth in the ARM Rule (DE 39 ¶¶ 86–94), which the Eleventh Circuit found satisfies due process “on its face.” *Prison Legal News*, 890 F.3d at 976. Rather, Plaintiff moves for summary judgment on the grounds that FDOC failed to provide notice and an opportunity to be heard regarding certain impoundments. (DE 105-1 at 17–18). Defendants move for summary judgment on the grounds that FDOC provided notice and an opportunity to be heard with respect to all impoundments, and even if several of those

notices are disputed, the overall error rate is negligible. (DE 103 at 23–27).

*9 First, with respect to *DSHLM*, Plaintiff contends that *Prison Legal News* requires FDOC to provide notice of every impoundment. (DE 105-1 at 17–18; DE 112 at 21). That is incorrect. In fact, *Prison Legal News* rejected this argument. 890 F.3d at 976 n.20. Due process requires notice of impoundment of “each impounded *issue*” of a publication. *Id.* at 977 (emphasis added). As the Fifth Circuit explained, once a prison’s decision to impound a specific publication becomes final, “*subsequent* denials of identical publications” amount to “non-individualized” and “routine enforcement of a rule with general applicability.” *Prison Legal News v. Livingston*, 683 F.3d 201, 223 (5th Cir. 2012) (cited by the Eleventh Circuit in *Prison Legal News*, 890 F.3d 976 n.20) (emphasis in original). Unlike *PLN* and *CLN*, which are monthly publications, *DSHLM* is a book. (DE 105-4 ¶¶ 2–4); (DE 110 ¶¶ 2–4).¹⁰ Due process required FDOC to notify Plaintiff of the *first* instance of impoundment of *DSHLM*. Defendant contends it did just that, which Plaintiff fails substantively and procedurally to dispute. (DE 104 ¶ 73) (citing DE 104-24); (DE 112-1 ¶ 73);¹¹ (*see generally* DE 105-2). The number of times FDOC subsequently impounded *DSHLM* is therefore not a material fact. *See Anderson*, 477 U.S. at 248.

Now turning to *PLN* and *CLN*, it is undisputed that a total of 111 issues were impounded. (DE 104 ¶ 72); (DE 112-1 ¶ 72).¹² Plaintiff claims that it did not receive notice of impoundment of one issue of *PLN* (May 2020) and five issues of *CLN* (November 2019; October 2020; December 2020; May 2021; June 2021). (DE 105-1 at 17) (citing DE 105-2 ¶¶ 15–20).

*10 As to the November 2019 and May 2021 issues of *CLN*, Defendants contend that those issues were not impounded when received, and therefore no notice was required or issued. (DE 104 ¶ 73) (citing DE 104-22); (DE 110 ¶ 46). Plaintiff does not procedurally or substantively dispute this fact. (DE 112-1 ¶ 73).¹³ In a footnote in its Statement of Material Facts in support of its own Motion, Plaintiff contends that “[t]he December 2019 and April 2021 issues of [*CLN*] were initially impounded by” FDOC. (DE 105-4 ¶ 31 n.1). However, this fact is not followed by a citation to record evidence. (*Id.*). Nor is it otherwise supported by the evidence cited in support of other factual assertions in this footnote.¹⁴

As to the remaining four notices, Defendants contend that notices were indeed mailed. (DE 104 ¶ 73); (DE 110 ¶

46). In support, Plaintiff produced the four notices, which are stamped as “mailed.” (DE 104-23 at 9–10) (May 2020 *PLN*); (*id.* at 3–4) (October 2020 *CLN*); (*id.* at 13–14) (December 2020 *CLN*); (*id.* 5–6) (June 2021 *CLN*). All four are supported by declarations representing that the notices were mailed. (*Id.* at 1–2, 7–8, 11–12). Plaintiff fails, both substantively and procedurally, to dispute the fact that FDOC sent these notices. (DE 104 ¶ 73; DE 112-1 ¶ 73); (*see generally* DE 105-2).¹⁵ Drawing all reasonable inferences from the facts in Plaintiff’s favor, I can infer that while Plaintiff does not dispute that the notices produced by Defendants were sent, it does dispute receiving them.

Based on these undisputed facts, four notices out of 111 in a four-year period were sent by Defendants but not received by Plaintiff. Unlike the repeated and deliberate lack of notice in *Prison Legal News*, *see* 890 F.3d at 977 n.22, a handful of notices undisputedly sent by FDOC but never received amounts to mere negligence. *See Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1162 (10th Cir. 2007) (finding no due process violation where inmates did not receive publications due to Defendants’ negligence and human error).¹⁶ Furthermore, Defendants argue that an adequate post-deprivation remedy exists, namely, the opportunity to seek after-the-fact review. (DE 104 at 25); *see Rittenhouse v. DeKalb Cnty.*, 764 F.3d 1451, 1453 (11th Cir. 1985). Plaintiff fails to offer an explanation as to how or why this is inadequate. (*See* DE 112 at 16–17). At bottom, the undisputed evidence shows that the four notices sent but not received are non-deliberate outliers attributable to simple mistakes. They are not constitutionally actionable.

*11 Even if Plaintiff’s version of the facts were the undisputed facts—i.e., it did not receive a combined six notices of *PLN* and *CLN*—there would still be no due process violation. Under that set of facts, Plaintiff received 105 out of 111 notices, which amounts to a 5.5% error rate. That is a far cry from the “remarkable failure rate” of 42% found violative of due process in *Prison Legal News*, which increased to 87% when the Eleventh Circuit accounted for defective notices failing to identify a reason for the impoundment. 890 F.3d at 977. Plaintiff does not argue that any of the notices were defective, and a 5.5% error rate is akin to “one or two notice letters lost in the mail or mailroom.” *Id.*

Finally, Defendants seek summary judgment on Plaintiff’s “Publisher’s Review” due process claim (DE 104 at 26), to which Plaintiff does not respond and on which Plaintiff does not seek summary judgment. (*See*

generally DE 105-1; DE 112). Plaintiff alleges that it was denied due process when FDOC “refused” to conduct a “Publisher’s Review” for the April 2020 issue of *PLN*. (DE 39 ¶ 91). Plaintiff does not dispute that, to request a Publisher’s Review, a publisher must write to the library services administrator and provide certain additional information, before the request is forwarded to the Bureau Chief of Programs/Education. (DE 104 ¶ 80; DE 112-1 ¶ 80). Plaintiff does not purport to have done this. Rather, Plaintiff undisputedly contacted then-Secretary Inch directly. (DE 104 ¶ 87); (DE 112-1 ¶ 87);¹⁷ (*see also* DE 105-4 ¶ 27) (stating that HRDC contacted Inch via certified mail “and requested that he review and reverse the censorship of those publications under 33-501.401(25)”). What happened next is disputed. (DE 104 ¶¶ 88–89); (DE 112-1 ¶¶ 88–89). But Defendant need only show that Plaintiff cannot succeed on its claim, which it has done by pointing to undisputed evidence showing that Plaintiff never properly initiated the process about which it now complains. I can only interpret Plaintiff’s silence on this as a concession. Defendant is thus also entitled to summary judgment on this aspect of Plaintiff’s procedural due process claim. Accordingly, Defendants’ Motion for Summary Judgment is granted, and Plaintiff’s Motion denied, on Count IV.

4. Substantive Due Process (Count V)

Finally, Plaintiff’s substantive due process claim is premised on the alleged fact that “FDOC’s censorship of Plaintiff’s publications has been arbitrary and capricious and bears no rational relationship with any state interest.” (DE 39 ¶ 99). This claim fails for a “simple[] reason: the text of the First Amendment sets the specific standard for it.” *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019). It is well settled that “[w]here a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’ ” *Albright v. Oliver*, 510 U.S. 266, 373 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The Eleventh Circuit has made clear that constitutional claims must be analyzed under the specific applicable provision and “not under the rubric of substantive due process,” which the Supreme Court is “reluctant to expand.” *Echols*, 913 F.3d at 1236 (first quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998), then quoting *Collins v. Harker Heights*, 503

U.S. 115, 125 (1992) (internal quotation marks omitted)). Plaintiff's Motion is denied, and Defendants' is granted, on Count V.

*12 To the extent Plaintiff contends that Defendants' change of course in purported contradiction to representations made to prior courts is a substantive due process violation (*see* DE 105 at 18), which was not plead (DE 39 ¶¶ 98–103), it would still fail. Such conduct is not “arbitrary, or conscience shocking, in a constitutional sense.” *Morefield v. Smith*, 404 F. App'x 443, 445 (11th Cir. 2010) (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128 (1992)). In any event, Defendants are entitled to summary judgment on Count V.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED and ADJUDGED** that:

(1) Plaintiff's void for vagueness and overbreadth claims premised on the prior version of F.A.C. § 33.501.401(15) effective through May 3, 2022 are **DISMISSED**.

(2) Defendants' Motion for Summary Judgment (DE

103) is **GRANTED IN PART AND DENIED IN PART**.

(a) Defendants Mark S. Inch and Jose Colon are entitled to qualified immunity, and summary judgment is **GRANTED** to Defendants Inch and Colon on the individual capacity claims.

(b) Summary Judgment is **GRANTED** to Defendants on: Count II (void for vagueness); Count III (overbreadth); Count IV (procedural due process); and Count V (substantive due process).

(c) Defendants' Motion for Summary Judgment is **DENIED** in all other respects.

(3) Plaintiff's Motion for Summary Judgment (DE 105) is **DENIED**.

(4) Final Judgment will be entered by separate Order.

All Citations

Slip Copy, 2022 WL 4243921, 29 Fla. L. Weekly Fed. D 75

Footnotes

¹ Defendants dispute various contentions in these facts, but they do not dispute the propositions for which I have cited Plaintiff's Facts ¶¶ 1–3.

² Plaintiff also sued Micha Neal in her individual capacity and seven fictitious defendants in their individual capacities. (DE 39 at 1). Plaintiff declined to pursue these claims and agreed to dismissal (DE 141); (DE 144).

³ For example, in response to Defendants' Fact ¶ 10, that the introduction of contraband that allows inmates to access the internet is an increasing problem, Plaintiff responded: “Disputed: Plaintiff disputes the factual allegations in this paragraph to the extent they imply that the impoundment of the HRDC publications ... was reasonably related to a legitimate security rational or penological purpose. *See infra* at ¶¶ 45, 48, 59.” (DE 112-1 ¶ 10). This “to the extent” language does not even explain whether the fact is indeed disputed, let alone provide any factual basis for the dispute.

- ⁴ To stay with Defendants' Fact ¶ 10 (DE 104 ¶ 10), Plaintiff's above response fact (DE 112-1 ¶ 10) tells me to read Plaintiff's responses located at DE 112-1 ¶¶ 45, 48 and 59. DE 112-1 ¶ 48 is undisputed, so the purpose of referencing that response fact is unclear. DE 112-1 ¶ 45 itself contains more of the unresponsive "to the extent that"-type response I previously described. It then sends me in part to record evidence regarding three-way calls, and in part to one of Plaintiff's facts in support of its Motion (DE 105-4 ¶ 38). DE 105-4 ¶ 38 also contains record evidence regarding three-way calling. Recall that DE 112-1 *also* tells me to read Plaintiff's response located at DE 112-1 ¶ 59. So I go there next. That reads: "Disputed. Plaintiff disputes the factual allegations in this paragraph to the extent they implied that the impoundment of HRDC publications under subsection 15(o)(3) of the ARM Rule is reasonably related to a legitimate security rationale or penological interest. See 'Additional Facts' ¶ 104." Again, 112-1 ¶ 59 is violative of Rule 56.1 in numerous ways and hence unhelpful. But continuing on to Plaintiff's Additional Fact ¶ 104 (DE 112-1 ¶ 104), that fact contains more evasive text, record evidence regarding stamps, and *also* sends me to Plaintiff's Fact ¶ 40 (DE 105-4 ¶ 40). I'll stop there, because the problem is more than clear. Recall that I was led down this road in the first place to determine whether Plaintiff disputes that inmates are obtaining contraband cell phones and other electronic devices, as Defendants contend in DE 104 ¶ 10. Nowhere along the way did I find Plaintiff's position, or even a *hint* as to its position, on whether it disputes or does not dispute that fact and why. This is but one example.
- ⁵ For example, "Disputed. Plaintiff disputes the factual allegations in this paragraph to the extent they contradict the Declaration of Paul Right in support of Plaintiff's Motion for Summary Judgment (ECF No. 105-2). (DE 112-1 ¶ 73).
- ⁶ Prior to the course of briefing on these cross-motions, Plaintiff abandoned all damages claims except a claim for actual and potential lost subscribers and customers against Defendants Inch and Colon in their individual capacities. (DE 104 ¶ 95); (DE 112-1 ¶ 95). Plaintiff abandoned the damages claim against Defendant Colon in its response in opposition to Defendants' Motion. (DE 112 at 18 n.3). Defendant Inch then sought an expedited ruling on Plaintiff's entitlement to a jury trial on its damages claim against Defendant Inch, given the rapidly approaching trial date. (DE 129). I granted in part Defendants' Motion for Summary Judgment on the grounds that Plaintiff lacked sufficient evidence of damages as a matter of law, and I deferred ruling on the remainder of the Parties' cross-motions. (DE 137). Given the size and scope of this litigation and the proximity to the trial date, it was important for the Parties to know whether they need be preparing for a *jury* trial. The Court also maintains an interest in conservation of jury-related resources and judicial efficiency. But qualified immunity must still be addressed. For one, the individual capacity claim against Defendant Colon, despite being abandoned by Plaintiff in responsive briefing, has not been formally addressed by this Court to date. Additionally, qualified immunity presents an alternative and additional supportive reason why the claims against Defendants Inch and Colon in their individual capacities may not proceed.
- ⁷ I do not view the rule change as fatal to Plaintiff's other claims, which are not entirely premised on the text of a regulation no longer in effect. Those alleged violations of federal law are ongoing in the same substantive manner notwithstanding the rule change, and prospective injunctive and/or declaratory relief would thereby remedy those ongoing violations.
- ⁸ At least two Circuits have declined to analyze vagueness and overbreadth challenges to prison regulations separate from the *Turner* standard. See *Waterman v. Farmer*, 183 F.3d 208, 212 (3d Cir. 1999); see also *Bahrapour v. Lampert*, 356 F.3d 969, 975–76 (9th Cir. 2004).

- ⁹ Defendants cite subsections (8)(b), which appears to be the subsection at which this particular rule was previously located. At present, that language appears at (16)(b).
- ¹⁰ This is procedurally undisputed. Defendants dispute Plaintiffs' Facts ¶¶ 2 through 4 with respect to other representations contained therein. They do not dispute that *PLN* and *CLN* are monthly magazines, or that *DSHLM* is a soft-cover book.
- ¹¹ This is procedurally undisputed. Defendants' Fact ¶ 73 states that FDOC provided notice to HRDC when *DSHLM* was first impounded, citing to the notice of impoundment dated March 27, 2018. (DE 104 ¶ 73) (citing (DE 104-24)). Plaintiff's response fact reads: "Disputed. Plaintiff disputes the factual allegations in this paragraph to the extent they contradict the Declaration of Paul Wright in support of Plaintiff's Motion for Summary Judgment. (ECF No. 105-2)." (DE 112-1 ¶ 73). This violates L.R. 56.1 in that it (1) fails to "clearly challenge any purportedly material fact asserted by the movant that the opponent contends is genuinely in dispute," S.D. Fla. L.R.(a)(2), and (2) refers generally to an entire declaration with no pinpoint cite, *id.* (b)(1)(B). Nevertheless, I reviewed the Wright declaration. Wright represents during the limitations period, HRDC sent 14 copies of *DSHLM* to FDOC prisoners, at least 8 of which were rejected. (DE 105-2 ¶ 15). He further represents that HRDC received notices of two impoundments: March 24, 2020 and March 27, 2018. (*id.* ¶ 16). Nothing in the Wright declaration disputes that the March 27, 2018 notice, which Plaintiff undisputedly received, was the *first* impoundment of *DSHLM*. Furthermore, in Plaintiff's Fact ¶ 24, Plaintiff describes the March 27, 2018 notice as "the form providing notice of the *initial* rejection or impoundment" of *DSHLM*. (DE 105-4 ¶ 24) (emphasis added).
- ¹² This is procedurally undisputed. Defendants' Fact ¶ 72 represents that a total of 111 issues were impounded, citing to a three-page chart of such impoundments. Plaintiff's response fact reads: "Disputed. Plaintiff disputes the factual allegations in this paragraph to the extent they contradict Plaintiff's verified answer to Defendants' Interrogatory No. 14." This violates L.R. 56.1 in that it (1) fails to "clearly challenge" any purportedly material fact asserted by the movant that the opponent contends is genuinely in dispute, S.D. Fla. L.R.(a)(2), and (2) does not include a pincite to the location of the record evidence. It appears that the interrogatory response is embedded either in whole or in part into Defendants' Fact ¶ 72, so I assume that is the portion of the record to which Plaintiff refers. That response merely states that HRDC did not receive notice for certain listed issues of *PLN* and *CLN* and "all issues" were impounded. (See DE 104 at 11). It does not identify a number that is contrary to the number Defendants represent or point to anywhere in the record where that information could be found. (*id.*).
- ¹³ Plaintiff's response to Defendants' Fact ¶ 73 is procedurally improper as explained *supra* at n.11. Nevertheless, I reviewed the Wright declaration to which Plaintiff generally gestures. Wright lists certain issues for which HRDC never received notices of impoundment. (DE 105-2 ¶ 20). This is not responsive to Defendants' contention that the November 2019 and May 2021 issues of *CLN* were not impounded and therefore no notices were required.
- ¹⁴ After the unsupported sentence claiming that the November 2019 and May 2021 issues of *CLN* were initially impounded, Plaintiff continues to say that "those impoundments were overturned by the Literature Review

Committee (“LRC”) before being reinstated at” two special LRC meetings, citing to an LRC form (DE 105-20). This LRC form says nothing about whether November 2019 and May 2021 *CLN* issues were initially impounded. (*See generally* DE 105-20).

¹⁵ Plaintiff’s response to Defendants’ Fact ¶ 73 is procedurally improper as explained *supra* at n.11. Nevertheless, I reviewed the Wright declaration. Wright represents that “HRDC received notices of impoundment from FDOC for every issue of” *PLN* and *CLN* “from August 2017 until this lawsuit was filed, except for” the six notices described above. (DE 105-2 ¶¶ 18, 20). Wright does not challenge or address whether those notices were ever sent.

¹⁶ I recognize that the Eleventh Circuit distinguished *Jones* in *Prison Legal News*. 890 F.3d at 977 n.22. However, the facts in the instant matter are meaningfully different from those in *Prison Legal News*. Namely, the undisputed facts show that Defendant did not *deliberately* fail to send notices of impoundment to Plaintiff. Likewise, in *Jones*, the Tenth Circuit found that it was the defendant’s negligence and human error that caused the non-delivery. 503 F.3d at 1162–63. I therefore view *Jones* as persuasive authority here.

¹⁷ Plaintiff disputes other aspects of Defendants’ Fact ¶ 87, but does not dispute that it contacted then-Secretary Inch directly. (*See* DE 112-1 ¶ 87)