

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

AMERICAN CIVIL LIBERTIES UNION of
LOUISIANA,

Plaintiff,

v.

GOVERNOR M.J. FOSTER and DAN RICHEY,

Defendants.

CIVIL ACTION NO.: 02-1440

SECTION: "T"

MAG. "4"

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CIVIL CONTEMPT**

Defendants are in blatant violation of this Court's order banning them from promoting religion. *See* Pl. Br. Ex. 3 (Amended Order of Dismissal, dated December 18, 2002) ("the Order"). Defendants concede that a valid court order bars the Governor's Program on Abstinence ("GPA") from "convey[ing] religious messages or otherwise advanc[ing] religion in any way." *See* Def. Br. at 3. Yet item after item on the GPA AbstinenceEdu.com website clearly conveys religious messages – from a GPA expert advising readers that "God's plan is for us not to be alone, but to have one spouse for

life”¹ to an article described by the GPA as offering “good advice” telling parents to pray for their children.²

ARGUMENT

A. The GPA Website Advances Religion.

Defendants’ first line of defense – that material on the GPA website merely mentions religion rather than promotes religion in violation of the Court Order – is unavailing. Defendants start by claiming that Plaintiff has done nothing more than compile a list of materials on the GPA website that use the word God. *See* Def. Br. at 3. As an initial matter, the articles cited in Plaintiff’s brief are but a fraction of articles presented and linked on the website that mention God, Jesus, or religion.³ In addition,

¹ An adult asked the GPA expert, “What about people like me (now in my 40’s), and there are many like me, who have no desire to get married Are we supposed to stay abstinent all of our lives?” The GPA’s expert answered: “Why would you want to have a series of monogamous relationships instead of marriage? God’s plan is for us not to be alone, but to have one spouse for life. When you are 55 and have a heart attack or cancer of the colon, which of these many women will be there for you? No one. Your commitment is to self-indulgence, not to wholly loving a woman – and being loved – as God intended.” *See* Affidavit of Caroline Mala Corbin, dated January 19, 2005 (“Corbin Aff.”) Ex. H (“Ask the Experts”).

² In Marcia Ford, “Daughters Under Fire,” *Today’s Christian*, November/December 2004), Corbin Aff. Ex. AA, website readers are advised “there are measures parents can take to help their daughters navigate their way through adolescence and empower them to withstand the pressures of their ‘tween’ and teenage years: Pray. Christian parents know this, but often they’re oblivious to the spiritual warfare they need to engage in.” In its preview to the article, the GPA website editors comment that the article provides “Good advice for parents – rooted both in faith and common sense.” *See* Corbin Aff. Ex. V (article previews found under “Library: Family Time: Articles”).

³ For example, of the roughly 90 articles with working links posted under the “Articles” section of “Student Coffeehouse” on January 1, 2005, well over half mention God, Jesus, or religion. Plaintiff’s brief focuses on eight of them. Other articles from this section not previously discussed include:

- o Matt Kaufman, “Sex in the Real World,” *Boundless Webzine* (“Enough already. God made us for better things than this . . . [W]e’d better accept that God’s plan is

the excerpts Plaintiffs quoted from these articles *on their face* make clear that the articles go far beyond merely mentioning religion. *See* Pl. Br. at 6-10. Defendants cannot in good faith deny that an article that advocates “[a]fter repenting, ask God to forgive you through Jesus Christ,” advances religion. *See* Affidavit of Caroline Mala Corbin, dated January 19, 2005 (“Corbin Aff.”) Ex. J (J. Budziszewski, “What if We Love Each Other,” *Boundless Webzine*); *see also* Corbin Aff. Ex. S (“Teens Advice,” *Lifeway Biblical Solutions for Life*) (“Whatever may have happened or whatever your sin, God offers second chances! . . . When you decide you want to stay sexually pure from this day forward, then you can experience a second virginity. This second virginity comes by asking for God’s forgiveness through Jesus . . .”).

Content in other articles parallels content that led this Court to issue its Orders in the first place. In its Preliminary Injunction Order, dated July 24, 2002, this Court found

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- one that works.”), Supplemental Affidavit of Caroline Mala Corbin (Supp. Aff.) Ex. 36.
- Charles W. Colson, “Lord Make Me Chaste . . . Later!: Developing a Passion for Purity,” *WorthyOpinions.com* (“The secular world says it’s okay to fool around . . . But God says to guard the sacredness of sexual intimacy between husband and wife.”), Supp. Aff. Ex. 37.
 - Charles W. Colson, “The Way It Isn’t: Fighting Temptation,” *pfm.org*, Aug. 18, 2004 (“Scripture identifies some behaviors as sin and warns us not to try them. Sex outside marriage is one of these.”), Supp. Aff. Ex. 17.
 - Joanne Brokow, “An Immodest Proposal,” *Breakaway Focus on the Family Magazine for Teen Guys* (“Gail Hayes is an author and international speaker who helps women understand that they are created by God with special identity and purpose. . . . She explains that God created women with a natural desire to please the opposite sex, and that desire is appropriate within God’s boundaries.”), Supp. Aff. Ex. 24.
 - Jerry Gramckow, “Britney’s Unlearned Lesson,” *Family News In Focus*, Nov. 20, 2003 (“Britney’s right; the Bible does have a rule about sex: It’s designed to be exclusive to a one-man, one-woman marriage.”), Supp. Aff. Ex. 28.

More religious articles can be found in this and other sections of the GPA website as well. All materials in violation of the Court Order are provided as exhibits in the Supplemental Affidavit of Caroline Mala Corbin filed with this Reply.

that statements in GPA materials such as “God desire[s] sexual purity as a way of life” and “God wants more for you than a one night stand. We belong to Him and He has plans for us that go beyond Saturday night” were “designed to inculcate the views of a particular religious faith.” *See* Pl. Br. Ex. 1 at 7, 10-11. Similar espousal of God’s plans and standards are found in countless articles linked on the GPA website:

- “What is not okay? . . . God’s standard draws the line at lustful *thoughts*.” *See* Corbin Aff. Ex. N (William Cutrer & Sandra Glahn, “How Far Is It OK to Go Before Marriage?” Focus on the Family’s family.org);
- “Sex can’t be separated from God’s order of creation, and when we try to pretend otherwise, we’re trying to make God go away so we can re-order creation to suit our own lusts or other emotional desires.” *See* Corbin Aff. Ex. P (Matt Kaufman, “Sex in the Real World, Revisited,” *Boundless Webzine*);
- “God intends that sexual intercourse should take place only between a man married to a woman.” *See* Corbin Aff. Ex. U (“The Flawed Condom,” American Life League, 2002);
- “God expects His creation to practice self-control.” *See* Corbin Aff. Ex. W (Chris Turner, “First Person: Battling AIDS: Biblical Principle or Billions of Dollars?,” *Baptist Press News*, August 24, 2004);
- “God ordained marriage and singleness as the best forms to contain our sexual natures.” *See* Corbin Aff. Ex. CC (Tim Stafford, “Let’s Talk Sex: What Christian Books on the Topic Are, and Are Not, Communicating,” *Christianity Today*, May 28, 2004).

In finding that the GPA was funding specifically religious activities, this Court also pointed to statements such as “you can ask the Lord to give you the strength to keep your convictions” and “you can call on Jesus to help you find the way.” *See* Pl. Br. Ex. 1 at 11. Similar statements advocating God or Jesus as a source of strength appear repeatedly in the articles linked on the GPA website. Examples include: “[A]s saved people we can discipline ourselves to combat sin on a daily basis; . . . God has given us

the means to fight back,” *see* Corbin Aff. Ex. M (Marshall Allen, “Fighting Sexual Temptation – and Winning,” *Boundless Webzine*); “You must encourage your teen to stand before God and to say, ‘OK, teach me to say no,’” *see* Corbin Aff. Ex. X (Dannah Gresh, “How to Raise Sexually Pure Kids,” *CBN.com*).

Despite this promotion of religion, Defendants nonetheless seem to believe such content is permissible because these religious beliefs are consistent with the abstinence-until-marriage concept. *See* Def. Br. at 6, 11; *see also id.* at 9 (GPA expert who advocated “God’s plan is for us not to be alone, but to have one spouse for life” merely “expressing his personal belief, which coincides with the federal required teachings”). In this regard, Defendants fundamentally misunderstand *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Bowen*, the Supreme Court held that teaching abstinence-until-marriage is a legitimate secular purpose even though some religions share this goal. 487 U.S. at 604 n.8, 612-13. However, *Bowen* never approved including religious messages along with secular statements advocating abstinence-until-marriage. On the contrary, the *Bowen* Court remanded to the district court to ensure that no abstinence program used government funds for “specifically religious activit[ies]” or “materials that have an explicitly religious content.” *Id.* at 621.

Defendants also contend that the religious content does not violate the Settlement Agreement because the GPA’s webmaster, Dr. Nancy Victory, screens out certain religious articles. *See* Def. Br. at 5-6. Putting aside for the moment whether Dr. Victory’s decisionmaking guidelines are valid on their face, they clearly have not resulted in compliance with this Court’s Order.

B. Religious Content on the GPA website is attributable to the GPA.

Defendants second line of argument – that even if the content available on the GPA website does promote religion, it is not attributable to the GPA – also fails.

1. Ask the Experts

Defendants begin by suggesting that the religious advice given by their experts does not violate the Order because the GPA did not pay those particular experts; some experts are teens; and the unpaid teen experts were merely exercising their right to free speech in an open Q & A forum. *See* Def. Br. at 6. These arguments are unavailing.

Defendants cannot deny that the statements in question come from individuals the GPA has designated as experts to advise visitors to the website. The GPA introduces its experts as follows:

[W]e don't have Dr. Laura or Ann Landers on staff, but we do know some counselors who are willing to tackle your toughest questions about relationships – even with your parents. We also know some health care pros who will answer your questions quickly and in plain English. Educators, youth workers – you want 'em – we got 'em. . . . So go ahead. Submit a question. This is the answer place.

See Corbin Aff. Ex. G (Introduction to “Ask the Experts”). The authority granted to these experts by the GPA is underscored by the fact that the “Ask the Experts” section is located in the “Research” area of the website.

Whether the GPA pays these experts is irrelevant, as is the percentage of their responses devoted to promoting religion. On a GPA-funded site, the GPA has designated these individuals as experts and presented them as a GPA-endorsed resource. They are the equivalent of GPA-selected instructors in a GPA-funded abstinence class. GPA instructors – salaried or not – may spend no time urging acceptance of Jesus Christ when

they answer questions during a GPA class; and GPA experts – salaried or not – may not promote religion in any way when they answer questions on the GPA website. *See* Pl. Br. Ex. 1 at 15 (GPA ordered to cease and desist from “convey[ing] religious messages or otherwise advan[ing] religion in any way”).

The age of the individuals the GPA has designated as its experts is also irrelevant to the question of whether this Court’s Order has been violated. *See* Def. Br. at 6, 8. The GPA presumably selects experts whom it believes will best get its message to its audience. Pursuant to this Court’s Order, whoever the mouthpiece, that message may not include religious content.⁴

Nor does it matter if a particular violation was singled out in earlier proceedings, *see* Def. Br. at 8, 9, as the Order does not carve out an exception for materials posted before the Settlement Agreement was entered. It prohibits the GPA from promoting religion, period; and religious content is religious content regardless of when it comes to Plaintiff’s attention. Indeed, the Settlement Agreement also requires that the GPA monitor its program for religious content and fix any violations. *See* Pl. Br. Ex. 2 at 1, Ex. 1 at 15 (incorporating the order “to install an oversight program . . . to ensure that the

⁴ Nor by any stretch of the imagination is the “Ask the Experts” section of the website an open discussion forum in which any member of the public can post any message it wants, without editorial review. The only parts of the website that even purport to be open discussion fora are found in the “Message Board” or the “In Your Own Words” sections of the “Student Coffeehouse” area. Even these are not truly open, as only pro-abstinence comments are published. (The “In Your Words” stories are limited to those praising the decision to remain abstinent or lamenting the decision to abandon abstinence. The “Message Board” comments are restricted to four pre-selected categories: (1) “How do you say ‘no’ without hurting his or her feelings?” (2) “What convinced you to wait until you’re married to have sex?” (3) “Have you ever been teased because you’re a virgin (or secondary virgin) and how did you handle it?” (4) “How do you stay out of high-pressure situations?”) The “Ask the Experts” section never even claims to be an open forum. Instead, as discussed above, it is presented as the place where GPA’s own experts give authoritative answers to questions from website readers.

GPA is not being administered in a manner that violates the constitution”). Thus, the GPA is in contempt of this provision as well.

Finally just because a questioner asks about God does not mean the GPA is then free to promote religion. On the contrary, the Settlement Agreement spells out that the proper response is to refer the questioner to a spiritual advisor from his or her faith or system of belief.⁵

2. Articles

Defendants next suggest that articles from the “Student Coffeehouse” and “Library” areas do not violate the Order because students must click on a link to access the full article. However, the GPA cannot escape accountability by arguing it is merely posting links to articles. Most obviously, the GPA has explicitly approved the content of several articles that it provides to students by way of a link. The GPA summary to William Cutrer & Sandra Glahn, “How Far Is It OK to Go Before Marriage,” *Focus on the Family’s family.org*, for example, reads: “This excerpt from a faith-based book frankly addresses the question on many young couples’ minds: ‘How far is too far?’ The authors offer advice that is both spiritual and practical that should help those of great faith (or no faith at all) draw healthy guidelines.”⁶ *See* Corbin Aff. Ex. I. According to

⁵ In the Settlement Agreement, the GPA agreed to include the following language in all contracts and on all materials: “If you have any spiritual or religious questions that arise in the context of events sponsored by the GPA, the GPA encourages you to consult with a spiritual advisor from your faith or system of belief.” *See* Pl. Br. Ex. 2 at 2, 3, 6.

⁶ The authors of this article advise: “What is not okay? Anything that stirs desire to sin. (That would include just about anything accompanied by moaning.) The standard is spelled out for us in 1 Thessalonians 4:3-8, which tells us not to defraud each other sexually. ‘Defrauding’ is intentionally creating or sustaining a desire that cannot rightfully and righteously be met. . . . God’s standard draws the line at lustful *thoughts*, requiring moment-by-moment dependence on God’s power and commitment to His

the GPA, Nick Cirmo, “Just for Guys: How to Stay Sexually Pure,” *Family Research Council’s Ideas & Energy Website*, “[m]akes a lot of sense,”⁷ *see id.*, and Marcia Ford, “Daughters Under Fire,” *Today’s Christian*, November/December 2004 offers “[g]ood advice for parents – rooted both in faith and common sense.”⁸ *See id.* Ex. V; *see also id.* Ex. I. J. Budziszewski, “Is it God, or Is it Estrogen?,” *Boundless Webzine* (“Professor Theophilus answers three female college students’ questions about sexual relationships with guys. The Professor offers plain-spoken, common-sense advice from a faith perspective.”).⁹

Word.” *See* Corbin Aff. Ex. N (William Cutrer & Sandra Glahn, “How Far Is It OK to Go Before Marriage?” *Focus on the Family’s family.org*).

⁷ The author of this article wrote: “Another secret though that men don’t let out is as simple as it is devastating: ‘There are two kinds of women. Those you have sex with and those you marry’ If you want a virgin wife, you have the best chance of attracting her by keeping your pants zipped up yourself. . . . The Bible tells us that all other sins are outside the body but the man who has sex with a woman who is not his wife sins against himself. God chooses this one sin above all others as the most destructive to your soul and spirit.” *See* Corbin Aff. Ex. O (Nick Cirmo, “Just for Guys: How to Stay Sexually Pure,” *Family Research Council’s Ideas & Energy website*).

⁸ This article advises: “[T]here are measures parents can take to help their daughters navigate their way through adolescence and empower them to withstand the pressures of their ‘tween’ and teenage years: Pray. Christian parents know this, but often they’re oblivious to the spiritual warfare they need to engage in. Danae Dobson . . . remains convinced that her parents’ relentless prayer protected her and her brother from harm and from many of the temptations tweens and teens face.” *See* Corbin Aff. Ex. AA (Marcia Ford, “Daughters Under Fire,” *Today’s Christian*, November/December 2004).

⁹ In the article, the author writes: “Obedience to God is possible even when our desires go the other way. If we are obligated to chastity (and we are), then we are also obligated to do what is necessary to preserve it. The discipline of obeying God, even against your desires, is honored by God, and will pay dividends throughout your coming marriage. Trust Him; it’s true.” *See* Corbin Aff. Ex. Q (J. Budziszewski, “Is it God, or Is it Estrogen?” *Boundless Webzine*).

But even for the other articles, the content is attributable to the GPA. The GPA hand-picks particular articles; organizes the articles based on targeted audience or topic;¹⁰ provides a summary or excerpt of each article; and then links to the full text of the article (as opposed to linking to an entire, dynamic website). The summaries provide an overview of the article. The excerpts may run over a hundred words long and be taken from anywhere in the article. See Corbin Aff. Ex R (article previews found under “Student Coffeehouse: Fresh Start”), Ex. I (article previews found under “Student Coffeehouse: Articles”), Ex. T (article previews found under “Library: Medical Info: Safe Sex”), Ex. V (article previews found under “Library: Family Time: Articles”) & Ex. BB (article previews found under “Library: Teacher’s Lounge: Articles”).

A comparable situation would exist if a student walked into a GPA room with a long GPA table holding stacks of carefully organized articles available for the student to take. Above each stack would be the GPA’s preview of that article. While the articles may originate from outside the GPA, the GPA would have selected and organized them, provided previews, and made them readily available. Not surprisingly, the GPA contractor charged with maintaining the website describes one of her services as “development of website articles.” See Corbin Aff. Ex. F (Monthly reports submitted by Nancy Victory). Thus, the GPA’s treatment of articles cannot be viewed as anything other than an endorsement of those materials, and the website cannot evade this Court’s Order by requiring one extra click to reach its religious content.

¹⁰ Articles in the “Student Coffeehouse” are geared towards students, while those in the Library’s “Teacher’s Lounge” target teachers. Articles in the “Fresh Start” section examine second virginity while those in the “Medical info: Safe sex” are meant to provide particular medical information.

In fact, the Fifth Circuit Court of Appeals has rejected the view that a website can automatically avoid responsibility for content made available through a link rather than directly. *See TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004). At issue in *TMI* was whether a website owner had used another company's mark for commercial purposes in violation of the Lanham Act. Citing *Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003), the Fifth Circuit held that in determining whether a website was commercial, both the website proper and its links must be examined: "[S]o long as the defendant's fan website contained no links to commercial sites, and contained no advertising or other specifically commercial content, his site was not commercial." *TMI*, 368 F.3d at 437. The Fifth Circuit concluded that defendant had not violated the Lanham Act because "Maxwell's site contained neither advertising *nor links* to other [commercial] sites." *Id.* at 438 (emphasis added); *see also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1019 (9th Cir. 2004) (computer company website used Nissan's mark for commercial purposes in violation of Lanham Act because website linked to auto-related websites) ("Although nissan.com did not provide the information about automobiles, it provided direct links to such information. Due to the ease of clicking on a link, the required extra click does not rebut the conclusion that Nissan Computer traded on the goodwill of Nissan Motor's marks.").

Nor can adding a disclaimer that an article contains "faith-based content" shield the GPA from the plain terms of the Order. Under Defendants' logic, the GPA could install a huge cross in a GPA classroom so long as there is a disclaimer on the door that the room contained religious objects. Just as ineffective is the GPA disclaimer buried in the "Privacy Statement" link. In eight-point font and located only in the bottom left-hand

corner of the website homepage, right above the “Powered by DynasiteXP.com” link, this link is small and difficult to find. Even if a disclaimer could have force, one hidden away in a link unlikely to be noticed by website visitors would not. As it is, the GPA cannot avoid the consequences of religious material available on their website simply by disavowing responsibility for it. *See TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004).¹¹

3. Wedding Skit

Finally, Defendants also claim that the Wedding Skit does not violate the Settlement Agreement in part because it merely reflects the reality that eighty percent of teenagers believe in God and eight-six percent of Americans are married in a religious ceremony. *See* Def. Br. at 12. Even if the vast majority of Americans supported the GPA’s religious message or were married by clergy, the GPA may not avoid the mandates of this Court’s Order by funding the writing of skits in which religious figures convey religious messages.¹² And Defendant’s claim that the minister’s sermon is dramatically necessary, *see* Def. Br. at 12-13, is belied by Defendant’s own completely secular version of the otherwise identical skit. *See* Supp. Aff. Ex. 2 (“How Many People

¹¹ Even if Defendants’ questionable interpretation of copyright law were valid, they are still in contempt. If copyright law in fact requires a link to the full text of articles summarized, then the GPA must find different articles.

¹² As explained in Plaintiff’s opening brief, there is no question that the skit advances religion. The skit begins with a minister opening his Bible. He then gives a short sermon: “Dearly beloved, we are gathered here today to join this man and this woman in holy matrimony. When God began His wonderful work on this world he made man and woman to have a special bond. This bond would be a connection that would not be with any other human. The bond between a man and a woman would somehow in God’s eyes connect them forever.” The remainder of the skit demonstrates the consequences of not heeding God’s plan.

Does It Take To Get Married” Skit).¹³ Furthermore, because the GPA is barred from advancing religion in any manner, it does not matter if the GPA is promoting religion in general rather than one particular religion – though in no religion other than Christianity would a *minister* read from the *Bible*. Defendants’ remaining points are equally meritless. Whether the GPA has made good faith attempts to comply with the Settlement Agreements is irrelevant because good faith is not a defense to civil contempt. *See, e.g., Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir. 2002). Likewise, if GPA skits promote religion, it is irrelevant who produces the skits or that GPA readers have discretion whether to use the skits.

C. There is No Need to Amend the Settlement Agreement.

The Settlement Agreement did not incorporate the Court’s order to “cease and desist from disbursing funds to institutions in which religion is so pervasive that a substantial portion of its function are subsumed in the religious mission.” On the contrary, the Settlement Agreement vacated this part of the Court’s Preliminary Injunction Order. *See* Pl. Br. Ex. 2 at 1-2, Ex. 1 at 15. Therefore, Defendants’ argument about the need to modify the Settlement Agreement in light of Executive Order 13,279 is inapposite. *See* Def. Br. 14-15.

¹³ This skit begins with a minister opening his manual, and reading “Dearly beloved, we are gathered here today to join this man and this woman in matrimony. When a man and a woman get married, they have a special bond. This bond is a connection that isn’t with any other human. The bond between a man and a woman will somehow connect them forever.” The remainder of the skit is identical to “The Wedding” skit.

CONCLUSION

For the foregoing reasons, the GPA is in contempt of this Court's Order. Plaintiffs respectfully request that this Court enter an Order declaring that Defendants are in civil contempt of this Court's Order dated December 18, 2002, and requiring Defendants to comply forthwith with that Order. In particular, Plaintiff requests that the GPA be ordered to remove all materials cited in Plaintiff's opening and reply briefs and as well as those included with the Supplemental Affidavit of Caroline Mala Corbin. Plaintiffs further request that the GPA be ordered for a period of two years to pay for the cost of a third-party to monitor Defendants' compliance. Finally, Plaintiff requests reasonable attorneys fees and costs, in addition to any other remedy this Court deems appropriate.

Dated: New Orleans, Louisiana
March 21, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2005, I caused to be served by U.S. Mail, postage prepaid, and by facsimile (excluding attachments), a true copy of the Reply Memorandum of Law in Support of Plaintiff's Motion for Civil Contempt and the Supplemental Affidavit of Caroline Mala Corbin on the following counsel of record:

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DATED: New Orleans, Louisiana
 March 21, 2005