No. 22-10297

In the United States Court of Appeals for the Eleventh Circuit

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et al.,

Plaintiffs-Appellants,

v.

BREVARD PUBLIC SCHOOLS, et al.,

Defendants-Appellees.

Appeal from an order of the United States District Court
for the Middle District of Florida, The Hon. Roy B. Dalton, Jr.
(Dist. Ct. No. 6:21-cv-01849-RBD-GJK)

APPELLANTS' BRIEF

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March 16, 2022

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AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1 (addition in bold):

1. Astor, Martha – Counsel for Appellants
2. Brevard County Public Schools Office of Legal Services – Counsel for Appellees
3. Brevard Public Schools – Appellee
4. Bridges, Gennifer – Counsel for Appellees
5. Burr & Forman LLP – Law firm representing Appellees
6. Campbell, Katye – Appellee
7. Cholewa, Joseph – Appellant
8. Dalton, Jr., Hon. Roy B. – United States District Judge
9. Delaney, Katie – Appellant
10. Gibbs, Paul – General Counsel for Brevard County School Board
11. Goldstein Law Partners, LLC – Law firm representing Appellants

12. **Gura, Alan – Counsel for Appellants**

13. Haggard-Belford, Misty – Appellee

14. Hall, Ashley – Appellant

15. Institute for Free Speech – Organization representing Appellants

16. Jenkins, Jennifer – Appellee

17. Kneessy, Amy – Appellant

18. Londono, Valerie – Assistant General Counsel for Brevard County School Board

19. Marks, Howard – Counsel for Appellee

20. McDougall, Cheryl – Appellee

21. Moms for Liberty – Brevard County, FL – Appellant

22. Moms for Liberty, Inc. – National affiliate of Appellant

23. Morrison, Ryan – Counsel for Appellants

24. Osborne, David – Counsel for Appellants

25. Susin, Matt – Appellee

26. Thakrar, Sheena – Counsel for Appellees

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Alan Gura
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Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request that the case be orally argued. This case concerns a matter of significant public concern: the First Amendment speech and petition rights of Florida parents, taxpayers, and other community members in addressing their local school boards at public meetings, criticizing officials and official policy and demanding change. The district court declined to follow precedent striking down identical speech restrictions, from the Sixth Circuit and from the Eastern District of Pennsylvania, asserting that this Court's precedent requires a different outcome. Affirmance would create a circuit split with respect to important questions of federal law. Plaintiffs believe oral argument would assist the Court in deciding the consequential issues presented by this appeal.

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INTRODUCTION

The First Amendment guarantees people the right to tell their school board that its policies are "evil," and to criticize school board members for their alleged infidelity to the Constitution. It guarantees people the right to mention the names of school board members and school employees when criticizing them or petitioning them for a redress of grievances. It guarantees people the right to read from a school library book at a school board meeting, even (and perhaps especially) if the school board believes that the book's language is not "clean." And it guarantees everyone the right to access a public school board meeting on neutral terms, so that everyone has an equal chance to participate in that meeting regardless of their viewpoint.

Defendant Brevard Public Schools and its Board members agree with none of this. Without judicial intervention, they will continue to silence Plaintiffs and other members of the public for presenting officially-disfavored viewpoints at Board meetings—if they can manage to enter the meeting room before the Board's allies are granted preferred access. Plaintiffs are entitled to a preliminary injunction against Defendants' unconstitutional policies and practices.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this First Amendment challenge to Defendants' regulations and practices under 28 U.SC. §§ 1331, 1343 and 42 U.S.C. § 1983. The district court entered its order denying Plaintiffs' motion for a preliminary injunction on January 24, 2022. Plaintiffs timely filed their notice of appeal on January 26, 2022. This Court has jurisdiction over this appeal per 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether regulations banning "abusive" and "personally directed" speech at school board meetings, on their face and as-applied by Defendants; and Defendants' application of an obscenity prohibition against allegedly "unclean" speech; constitute viewpoint discrimination in violation of the First Amendment rights of free speech and petition;

2. Whether regulations banning "abusive" and "personally directed" speech at school board meetings are unconstitutionally vague and overbroad;

3. Whether Plaintiffs are irreparably harmed by Defendants' enforcement of regulations banning "abusive," "personally directed," and "obscene" speech;

4. Whether the balance of equities and public interest favor enjoining Defendants' prohibitions of "abusive," "personally directed," and "obscene" speech; and

5. Whether the district court should hold an evidentiary hearing on Plaintiffs' factually disputed claim that Defendants grant preferential access to school board meetings based on viewpoint.

STATEMENT OF THE CASE

A. The Board's Public Speaking Policy.

Brevard Public Schools ("BPS"), Brevard County, Florida's public school district, is administered by an elected board. The Board meets regularly and schedules a public comment period for each meeting pursuant to FLA. STAT. § 286.0114(2). "Members of the public shall be given a reasonable opportunity to be heard on a proposition before the Board." Public Participation at Board Meetings, Brevard Sch. Bd. Policy Manual § 0000 Bylaws, Code po0169.1 (the "Policy").[1]

[1] "[A] proposition is an item before the Board for a vote, and includes, but is not necessarily limited to, all items on the agenda noted as unfinished business, consent, and nonconsent. A proposition may also include a vote on a motion to rescind or to amend action previously taken but does not generally include items on the special order agenda. A proposition does not include items wherever found on the agenda upon which the Board votes in its quasi-judicial capacity." *Id.*

To speak at a Board meeting, an individual must register with the Board. *Id.* Each speaker is recognized to speak by the presiding officer "in the order in which the requests were received," and allotted three minutes of speaking time. *Id.*

All speakers must direct their comments "to the presiding officer; no person may address or question Board members individually." *Id.* The presiding officer may "interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, obscene, or irrelevant." *Id.* The presiding officer may also expel from the meeting any person who "does not observe reasonable decorum," and may call in law enforcement to help remove "disorderly" people. *Id.*

B. Moms for Liberty

Plaintiff Moms for Liberty – Brevard County, FL ("M4L") is the Brevard County, Florida chapter of Moms for Liberty, a nonprofit organization that advocates for parental rights at all levels of government. Doc. 1 at 4.[2] Plaintiff Ashley Hall, the mother of a child

[2] In accordance with Circuit Rule 28-5, references to the record conform to the following format: Doc. <district court docket number> at <page number>.

who attends a BPS school, heads M4L as its Chair. Doc. 1 at 5. Plaintiffs Katie Delaney and Joseph Cholewa are also parents of BPS students and members of M4L. *Id.* Plaintiff M4L member Amy Kneessy is a former BPS Board Member. Doc. 1 at 5, 22.

M4L is committed to civil advocacy. Plaintiffs do not engage in or condone any threatening words, behavior, or violence. Indeed, Plaintiffs believe the most effective advocates are "joyful warriors" that share their views in a positive, respectful, and peaceful manner, and rise above any scorn or intolerance from individuals that disagree with them. Doc. 3-2 at 2. Prior to Board meetings, M4L reminds its members of their commitment to civil discourse. *See e.g.*, *id.* at 2-3.

C. Censorship at Defendants' meetings

Defendants censor public speakers at their school board meetings, primarily in three ways: First, Defendants frequently interrupt individuals that criticize their preferred policies, often by objecting to the use of particular words, under the Policy's prohibition of "abusive" or "obscene" statements, or statements deemed "personally directed." Second, Defendants apply the Policy's directive against making "personally directed" comments to selectively prohibit mentioning their

names or the names of school employees, which frustrates the ability to criticize and petition the Defendants. Third, the Defendants have granted preferential access to Board meetings to those who share their views, thereby limiting critics' ability to participate in public debate.

1. *Censorship of "abusive," "personally directed" or "obscene" statements*

Defendants often censor speakers for expressing particular statements deemed "abusive," "personally directed," or "obscene." For example, one speaker was censored because Defendant Haggard-Belford objected to his criticism of their policies as "this evil LGBTQ agenda." Doc. 3-3 at 1 (March 23, 2021 meeting, https://bit.ly/3oT6DY4, Item E, Part 2 of 2 at 14:25-15:16). When he asked, "Is there a problem with the word 'evil?'", Haggard-Belford responded, "Yes sir. You are calling a group of people evil and the policy evil." *Id.*

Defendants stopped and censored another speaker after she referred to a policy's advocates as the "liberal left." Doc. 3-1 at 1 (March 9, 2021 meeting, https://bit.ly/3p1I8YO, Item E part 1 of 2 at 9:42-10:45). And when one M4L member questioned the propriety of certain books being made available at Brevard elementary school libraries by reading aloud from one of the books, Defendant Haggard-Belford cut her off because

the book's language was not "clean." Doc. 3-2 at 2 (October 26, 2021 meeting, https://bit.ly/2ZsO2YF, Item E10 at 50:00-50:34).

Plaintiff Cholewa tried to express his dismay at Defendants' mask mandate for children, which he criticized as being in line with various policies allegedly endorsed by the Democratic Party, but Defendant Haggard-Belford ejected him from the meeting before he could finish his remarks. *See* Doc. 3-4 at 1, 4-5 (September 21, 2021 meeting, https://bit.ly/ 3aEvDd2, Item E at 1:06:19-1:07:55). Haggard-Belford first interrupted Cholewa for criticizing the Party's alleged notion that babies are born racist. *Id.* at 4. Cholewa continued, only to be interrupted again when, per Haggard-Belford, he "insult[ed] half of [the] audience" by adding criticism of parents that help their children transition their gender to his litany of masking comparisons. *Id.* at 4-5.

After threatening to eject everyone from the meeting room when audience members became upset at her treatment of Cholewa, Defendant Haggard-Belford allowed Cholewa resume his remarks. *Id.* at 5. But she abruptly ended Cholewa's speaking time, with approximately one minute remaining, and ordered him to leave the meeting after he questioned the Defendants' fidelity to First

Amendment free speech values. *Id*. Cholewa's statement that Defendant Haggard-Belford ultimately found intolerable: "This is America. I know you don't like freedom. I know you don't like liberty. I know you don't like the Constitution. Guess what? I'm going to keep talking." *Id.*

2. *Censorship of "personally directed" comments*

Defendants selectively employ their prohibition of "personally directed" statements to forbid some speakers from mentioning them or other BPS personnel. On one occasion, Plaintiff Cholewa criticized Defendants' COVID mask policies, and directed his comments to the individual Defendant that represents his school district. Doc. 3-4 at 2-4. But Defendant Susin interrupted him by stating, "Don't call out one of our school board members." *Id*. at 2. After some discussion, Cholewa asked, "So I can't talk about my representative from my district?" *Id*. at 3. Defendant Haggard-Belford replied, "No you cannot." *Id.*

Plaintiff Hall was also forbidden from speaking directly to Defendants. *See* Doc. 3-2 at 3. She attempted to thank Defendant Susin for his assistance in a matter at a school, stating "Mr. Susin I wanted to thank you personally," but she was interrupted by Defendant Haggard-

Belford. *Id*. She instructed Plaintiff Hall to "not focus on individual board members, and keep it focused on the chair of the board as a whole." *Id*. Defendants applied the ban to other individuals as well, including a speaker that explained Defendant Jenkins was responsible for giving Board supporters preferred access to a previous meeting. *See* Doc. 3-3 at 1 (March 23, 2021 meeting, https://bit.ly/ 3oT6DY4, Item E, Part 2 of 2 at 13:36-14:20). As soon as the speaker stated Defendant Jenkins's name, Defendant Haggard-Belford interrupted him with instructions to direct his comments to the Board chair instead of individual Board members. *Id*.

At one meeting, a student criticizing Defendant Jenkins began her comments by stating, "Jennifer Jenkins personally showed up to my school," but she was interrupted by the presiding officer who interjected, "So hold on just one second everything needs to be directed to me and not calling out any individual board members for me if you would. Okay? Thank you so much." Doc. 3-2 at 1 (April 13, 2021 meeting, https://bit.ly/3jBdUs0, Item E10 at 29:25-29:37). The student continued her criticism of Defendant Jenkins, but was forced to refer to her as "one board member," "this specific board member," and "this

board member," and identified other individual Defendants as "a few school board members." *Id.* at 29:40-30:48.

Yet a different student was allowed to address Defendant Jenkins by name and speak to her directly about access to schools for theatrical production rehearsals. *See Id*. (Feb. 23, 2021 meeting, https://bit.ly/3ayunrX, Item E at 19:03-19:18). And pro-LGBTQ activists are allowed to gesture at and speak directly to Defendants and audience members without interruption. *See* Doc. 3-1 at 1-2 (March 9, 2021 meeting, https://bit.ly/3p1I8YO, Item E, Part 1 of 2 at 18:47-18:52; Part 2 of 2 at 2:59-3:07; 7:27-7:37; 8:32-8:44; 10:48-10:56; 27:15-27:19).

Other examples of Board-friendly speakers being allowed to address and mention individual board members and school personnel abound. *See id*. at 2 (April 27, 2021 meeting, https://bit.ly/3pVknSP, Item E9 at 4:01-4:21) ("I'm going to talk about thanking the Board. I think I've emailed [Defendant] Ms. Jenkins, if not, everybody else and you all responded to me."); *id*. (July 13, 2021 meeting, https://bit.ly/3BGafQP, Item E at 5:01:5:03) ("Dr. Mullins [BPS Superintendent] thank you so much for working with our community."), 10:13-10:30 ("I've had the opportunity to meet and work with a few of Brevard's very capable

leaders, Mrs. Bowman [BPS Director of Secondary Leading and Learning], a few members of the teaching staff, Dr. McKinnon [BPS Director of Equity and Diversity], Dr. Mullins, and I'm familiar with the work that they do. And I thank them for the leadership that they provide."), 21:14-21:22 ("First, I'd like to thank Dr. Mullins for all you have done for our county."), 24:42-24:55 ("First, Dr. Mullins thank you for your work, your service. The, uh, Board. And I am so encouraged by the statements that [Defendant] Ms. Jenkins made."), 28:18-28:22 ("Thank you Dr. Mullins for your willingness to listen to the need of our community…."), 30:39-30:41 ("Thank you Superintendent Mullins and Board."), and 33:36-33:58 ("To this Board, this hard working Board, Dr. Mullins, your staff, Dr. Sullivan [BPS Assistant Superintendent], Mrs. Cline [BPS Assistant Superintendent], and the like, I just want to say thank you for all that you continue to do for our students here in Brevard County."); Doc. 3-2 at 2 (October 26, 2021 meeting, https://bit.ly/ 2ZsO2YF, Item E10 at 53:44-56:42 (effusive praise and support of Defendant Jenkins by name).

3. *Preferential meeting access to the Board's political allies*

Defendants have provided preferential access to a Board meeting to people aligned with their views and, consequently, limited the access of some individuals with views that diverged from the Board.

Several pro-LGBTQ activists whose views align with the Board were escorted into the March 9, 2021 school board meeting while Brevard residents who had arrived earlier and were waiting for the room to open, including M4L members, were excluded from the meeting. Doc. 3-1 at 1 (March 9, 2021 meeting, https://bit.ly/ 3p1I8YO, Item E, Part 1 of 2 at 18:47-18:52; Part 2 of 2 at 2:59-3:07; 7:27-7:37; 8:32-8:44; 10:48-10:56; 27:15-27:19); Doc. 3-3 at 1 (March 23, 2021 meeting, https://bit.ly/ 3oT6DY4, Item E, Part 2 of 2 at 0:13:36-0:14:18); Doc. 3-4 at 1-2. Law enforcement officials positioned at the meeting room doors kept these community members with disfavored views (including Plaintiff Cholewa), from attending the meeting while the activists with viewpoints favorable to the Board's policies were admitted. *Id*. Defendants disputed these allegations, and claimed "students" were ushered into the meeting separately as a safety measure. Doc. 19 at 16.

D. Continuing Impact on Plaintiffs' Speech

Plaintiffs self-censor their comments or do not speak at all due to the Policy. Doc. 3-1 at 3; Doc. 3-2 at 4; Doc. 3-3 at 2; Doc. 3-4 at 5-6. Plaintiff Kneessy wants to criticize each Defendant's performance individually, but the prohibition on so-called "abusive" and "personally directed" statements prevents her speech. Doc. 3-1 at 2-3. Accordingly, she does not speak at all. *Id*. And Plaintiffs Hall, Delaney, and Cholewa self-censor their comments when they speak at Board meetings to avoid Defendants' ire. Doc. 3-2 at 4; Doc. 3-3 at 2; Doc. 3-4 at 5-6.

Additionally, Defendants now begin each meeting with threats of criminal prosecution under FLA. STAT. § 877.13 if attendees "disrupt" the meeting. Doc. 3-1 at 3. Given Defendants' demonstrated intolerance of opposing views, Plaintiffs fear that Defendants will deem their speech criminally disruptive. These threats further lead Plaintiffs to modify their speech and, in Plaintiff Kneessy's case, to refrain from speaking completely. Doc. 3-1 at 2-3; Doc. 3-2 at 3-4; Doc. 3-3 at 1-2.

E. Procedural history

On November 5, 2021, Plaintiffs filed this lawsuit in the United States District Court for the Middle District of Florida against BPS and

its individual school board members, seeking declaratory and injunctive relief from Defendants' violation their First Amendment rights, as well as nominal damages. Doc. 1. Plaintiffs challenge Defendants' restrictions on "abusive" and "personally directed" speech, on their face and as-applied, for violating their rights to free speech and petition by discriminating against officially disfavored viewpoints. They likewise challenge Defendants' application of the prohibition of "obscene" speech, and argue that all three of these speech restrictions are void for vagueness. Plaintiffs also challenge Defendants' practice of granting preferential access to Board meetings based on the attendees' perceived viewpoints.

Along with the complaint, Plaintiffs moved for a preliminary injunction. Doc. 3. The district court set the motion for hearing on December 21, 2021, but ordered that "no evidence will be taken at the hearing." Doc. 7 at 3. It also barred Plaintiffs from filing "rebuttal affidavits, or other evidence" in reply to the opposition. Doc. 7 at 2.

Apart from disputing Plaintiffs' preferential access allegations, Defendants argued that their Policy and its application are lawful and

necessary for maintaining meeting decorum. Doc. 19 at 4-6. On December 20, 2021, Defendants moved to dismiss the case. Doc. 41.

On January 24, 2022, the district court denied Plaintiffs' motion for a preliminary injunction. It claimed that "[o]n its face, the Policy is both content- and viewpoint-neutral." Doc. 46 at 5 (footnote omitted). "Requiring the speaker to address the Chair rather than individual Board members is not based on the speech's content, but because members do not possess the power of the Board." *Id.* (footnote omitted). Moreover, the court asserted that this rule facilitates speech, "because it 'turns down the heat' and 'gives people a sense of fairness' in hearing all viewpoints." Doc. 46 at 6 n.7 (internal quotation marks omitted).

"And prohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption, preserve 'reasonable decorum,' and facilitate an orderly meeting," which are "permissible" goals. Doc. 46 at 6 (citations omitted).

In a footnote, the district court asserted that Plaintiffs' facial viewpoint discrimination argument "barely warrants mention, as it is based on wholly inapposite and unpersuasive out-of-Circuit cases that directly conflict with binding and persuasive Eleventh Circuit

authority." Doc. 46 at 6 n.8 (citations omitted). In the district court's view, the Sixth Circuit and the Eastern District of Pennsylvania erred in crediting Justice Alito's observation that "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion). The district court limited *Tam* to its facts and asserted that there is no Supreme Court majority for the proposition that offensive speech is protected by the First Amendment. Doc. 46 at 6 n.8.

Likewise, the court found that Plaintiffs' as-applied argument was unlikely to succeed. It came to this conclusion because M4L members were often allowed to speak unimpeded on the occasions when they were not interrupted; because Defendants' censorship was "brief and respectful," with Plaintiffs often eventually being able to finish; and because "the Policy was evenhandedly applied," with Defendants censoring some people who agreed with them, and allowing their opponents to "speak uninterrupted when they followed the policy." Doc. 46 at 7. The district court hesitated to engage in "Monday-morning quarterbacking of calls made by a presiding officer without the benefit of leisure[ly] reflection." *Id.* n.10 (internal quotation marks omitted).

The district court further asserted that the speech for which Defendants ejected Cholewa from a meeting was "abusive and disruptive," and it claimed that Plaintiffs were not chilled by the censorial policy because they had not been completely dissuaded from speaking. Doc. 46 at 8 & n.11. In a footnote, the district court brushed aside as a "passing assertion" Plaintiffs' claim that they had been discriminated against in accessing the meeting room, and credited Defendants' account of the event. Doc. 46 at 8 n.12.

The district court also held that the Policy is not overbroad or vague, because it does not "affect a substantial amount of constitutionally protected conduct," and because it "precisely lists what it expects of speakers." Doc. 46 at 9. And in a final footnote, the district court ruled against Plaintiffs on the remaining preliminary injunction factors. It held that Plaintiffs were not irreparably harmed because not all of them have completely stopped speaking, that "there is a significant public interest in the Board conducting orderly public business, and the First Amendment does not require endless public commentary." Doc. 46 at 10 n.13 (internal quotation marks omitted).

Plaintiffs noticed their appeal of the district court's order on January 26, 2022. Doc. 47. On January 31, 2022, Plaintiffs moved to stay further district court proceedings pending this appeal's outcome. Doc. 50.

SUMMARY OF ARGUMENT

The First Amendment does not exist to protect the speech that government officials find inoffensive. The rights of free speech and petition come into play only where, as here, government officials seek to silence views that they dislike. Of course, the First Amendment does not require Defendants to enjoy criticism, or feel comfortable in having their views challenged. It does, however, require Defendants to tolerate such speech. Labeling political speech "abusive," "personally directed," or "obscene" does not grant government the license to silence dissent.

School board meetings are limited public fora. School officials may thus restrict the content of debate to school matters. But in doing so, they must tolerate all viewpoints. Americans cannot silence each other in a limited public forum by taking offense. But the record is clear: Defendants interrupt, silence, and even expel speakers they find disagreeable from school board meetings when finding speech "abusive," "personally directed," or "obscene." The first two categories are facially

defective, explicitly allowing for viewpoint discrimination. The third category can be lawfully applied, but not against the kind of speech that Defendants place on school library bookshelves.

The district court erred in equating allegedly offensive speech with disruptive conduct, thereby sanctioning Defendants' viewpoint discrimination. It also erred in upholding Defendants' censorship on grounds that it has been applied either evenly (against everyone) or inconsistently (only sometimes). Under the First Amendment, unlawful censorship should not be practiced at all. Moreover, regardless of the Board's structure or how people may feel about "personally directed" speech, the fact remains that Americans are guaranteed the right to mention specific government officials in public hearings. These concepts apply equally in securing Plaintiffs' petition rights as well.

Contrary to the district court's decision, a bar on "abusive" and "personally directed" speech is also inherently vague and overbroad. The district court erred in finding that Plaintiffs are not irreparably harmed by such censorship because most of them still manage to speak, much of the time. Defendants' policies and practices, including threats of criminal prosecution, plainly impact the words people choose and the

course of public debate. And the district court erred in finding a public interest in violating First Amendment rights. Plaintiffs are entitled to preliminary injunctive relief against Defendants' speech policy.

Finally, to the extent that a factual dispute exists with respect to whether Defendants restrict access to their public meetings based on viewpoint, it erred in tossing aside that dispute, rather than holding an evidentiary hearing. The district court's order should be vacated.

STANDARD OF REVIEW

"[W]e examine the district court's decision to deny a preliminary injunction for an abuse of discretion, reviewing *de novo* any underlying legal conclusions and for clear error any findings of fact." *Fla. v. HHS*, No. 21-14098, 2021 U.S. App. LEXIS 35998, *14 (11th Cir. Dec. 6, 2021).

"A plaintiff seeking a preliminary injunction 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." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). "The third and fourth factors merge when, as here, the [g]overnment is the opposing party." *Gonzalez*

v. Governor of Georgia, 978 F.3d 1266, 1271 (11th Cir. 2020) (internal quotation marks omitted).

Because direct penalization of protected speech inflicts irreparable harm, and because the government has no interest enforcing an unconstitutional law, plaintiffs who establish a likelihood of success on such claims "also meet the remaining [preliminary injunction] requirements as a necessary legal consequence of [the] holding on the merits." *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020); *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010).

"While an evidentiary hearing is not always required before the issuance of a preliminary injunction, where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003) (internal quotation marks omitted). "A district court's decision to issue a preliminary injunction without holding an evidentiary hearing is reviewed for abuse of discretion." *Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1169 (11th Cir. 2018) (internal quotation marks omitted).

ARGUMENT

I. PLAINTIFFS WILL PREVAIL ON THE MERITS.

A. The First Amendment forbids Defendants from discriminating against speech at school board meetings on the basis of viewpoint.

"The government's power to restrict First Amendment activities depends on 'the nature of the relevant forum.'" *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548 (11th Cir. 1997) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)). "A limited public forum . . . exists where a government has reserv[ed a forum] for certain groups or for the discussion of certain topics." *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017) (internal quotation marks omitted). Public comment periods of school board meetings are limited public fora. *Id.* at 1225*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 & n.7 (1983).

Speech restrictions in a limited public forum "must be reasonable and viewpoint neutral." *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011). While "a limited public forum may rightly limit speech at the forum to only certain content, the First Amendment does not tolerate viewpoint-based discrimination against speech within the scope of the forum's subject matter." *Barrett*, 872 F.3d at 1225 n.10. Government

officials "cannot engage in bias, censorship or preference regarding [another] speaker's point of view." *Otto*, 981 F.3d at 864 (internal quotation marks omitted).

Viewpoint discrimination, "an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), "goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Ath. Ass'n*, 942 F.3d 1215, 1241 (11th Cir. 2019) (internal quotation marks and citation omitted).

"[G]overnment must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Otto*, 981 F.3d at 864 (quoting *Rosenberger*, 515 U.S. at 829). This Court "[has] not shied away from the same point: 'The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis.'" *Id.* (quoting *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989)). And while this Court has not gone so far as to adopt the argument that viewpoint discrimination is unconstitutional *per se*, it acknowledges that holdings such as

Rosenberger and *Searcey* "do not leave a lot of breathing room for viewpoint-based speech restrictions." *Id.* Viewpoint discrimination is presumptively unconstitutional. *Rosenberger*, 515 U.S. at 830.

Thus, neither BPS, nor any of its board members, may control the terms of the debate about gender theory, critical race theory, covid restrictions, the propriety of particular library books, or any other matter properly up for public discussion. "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 515 U.S. at 831. Defendants also may not insulate themselves from criticism—which they understandably may dislike, but which constitutes a First Amendment-protected viewpoint.

B. Key terms in Defendants' speech policy are incapable of reasoned application and invite subjective viewpoint discrimination.

Defendants' prohibitions on "personally directed" and "abusive" speech are invalid on their face, and as-applied by Defendants to squelch viewpoints that they dislike. And while the Supreme Court recognizes obscenity as a class of unprotected speech, its understanding of that concept differs markedly from Defendants' application of an "obscene" speech prohibition to school books.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Otto*, 981 F.3d at 872 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). "Speech may not be banned on the ground that it expresses ideas that offend." *Tam*, 137 S. Ct. at 1751. "[A] law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (quoting *Tam*, 137 S. Ct. at 1751). The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Tam*, 137 S. Ct. at 1763 (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (collecting cases); *see Brunetti*, 139 S. Ct. at 2299, 2301. "Giving offense is a viewpoint." *Tam*, 137 S. Ct. at 1763 (plurality opinion).

Defendants do not define the terms "abusive" and "personally directed," but their meanings are readily discernible and have been applied as such. "Abusive" means "harsh insulting language." *Gooding v. Wilson*, 405 U.S. 518, 525 (1972) (internal quotation marks and

citation omitted). And as the record amply demonstrates, Defendants understand "personally directed" speech to mean speech that mentions anyone by name.

The legal status of such speech is not controversial. Simply put: "abusive" and "personally directed" speech is constitutionally protected—even if it offends Defendants and their allies. The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "At the heart of [its] guarantee is the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Otto*, 981 F.3d at 861 (internal quotation marks omitted).

Moreover, the First Amendment "protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Tam*, 137 S. Ct. at 1766 (Kennedy, J., concurring); *see Brunetti*, 139 S. Ct. at 2299, 2301. Speakers cannot be stymied in their

efforts to criticize officials under a sort of "Voldemort Rule" that reduces them to mention individuals only in obtuse, indirect ways, or forces speakers to refrain entirely from mentioning political actors in the course of public debate.[3] The First Amendment secures "the ability to question the fitness of the community leaders, including the administrative leaders in a school system, especially in a forum created specifically to foster discussion about a community's school system." *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (internal quotation marks omitted). And because these prohibitions of "abusive" and "personally directed" speech are facially unconstitutional, it follows that their application against Plaintiffs is also unconstitutional.

Other courts have struck down identical school board bans on "abusive" and "personally directed" speech. The Sixth Circuit facially invalidated a school board's prohibition of such speech "because it

[3] In the Harry Potter universe, a taboo condemns mentioning the evil wizard Voldemort by name. *See, e.g.*, J.K. Rowling, HARRY POTTER AND THE CHAMBER OF SECRETS 15 (1999) ("'Harry Potter speaks not of his triumph over He-Who-Must-Not-Be-Named—' 'Voldemort?' said Harry. . . . 'Ah, speak not the name, sir! Speak not the name!' 'Sorry,' said Harry quickly. 'I know lots of people don't like it . . . .'")

opposes, or offends, the Board or members of the public, in violation of the First Amendment." *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021). As-applied invalidation followed. *Id.* And relying on *Ison*, the Eastern District of Pennsylvania preliminarily enjoined a school board's similar policy barring "personally directed" and "abusive" speech at its meetings as a form of impermissible viewpoint discrimination. *Marshall v. Amuso*, No. 21-4336, 2021 U.S. Dist. LEXIS 222210 (E.D. Pa. Nov. 17, 2021).

The term "obscene" is not so open-ended as to require facial invalidation. But Defendants apparently employ it to stop inconvenient or uncomfortable criticism. Surely Defendants would agree that books placed in BPS libraries do not meet the Supreme Court' definition of obscenity—speech that "depict[s] or describe[s] sexual conduct … in a patently offensive way" without any "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 20 (1973). But when M4L members read these books aloud at public comment periods, Defendants stop and admonish them to use "clean" language. The First Amendment does not tolerate this result. Defendants cannot invoke an obscenity ban to place their library books beyond criticism.

The district court erred repeatedly in finding that government officials may ban whatever speech they determine to be offensive. Each justification for its remarkable holding fails. First, the district court equated offensive *speech* with disruptive *behavior*. To be sure, the government has an interest in preventing disruption, maintaining a level of decorum that supports an exchange of views, and facilitating order. But "[t]he government cannot regulate speech by relabeling it as conduct." *Otto*, 981 F.3d at 865.

Nothing in this Court's precedent allows a school board to label speech it dislikes "abusive," etc., and then prohibit it as a form of disruption. The cases upon which the district court relied for this proposition, *Rowe v. City of Cocoa Beach*, 358 F.3d 800 (11th Cir. 2004) (per curiam); *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (per curiam); and *Dyer v. Atlanta Indep. Sch. Sys.*, 852 F. App'x 397 (11th 2021) (per curiam), do not support it. *Rowe* stands only for the undisputed proposition that "[t]here is a significant governmental interest in conducting orderly, efficient meetings of public bodies." *Rowe*, 358 F.3d at 803. It upheld a city's power to restrict council

meeting participation to its residents, which has nothing to do with viewpoint discrimination. *Id.* at 803-04.

In *Jones*, the plaintiff was ejected from a city commission hearing because of his "disruptive conduct and failure to adhere to the agenda item under discussion." 888 F.2d at 1332. The "disruptive conduct" consisted of Jones telling the mayor that he had a "problem" for requiring on-topic speech, followed by a threat to fight the mayor. *Id.*

The district court's reliance on *Dyer* was also misplaced. *Dyer* is an unpublished opinion arising from a case brought *in pro se* by a plaintiff who had "failed to brief" one of his issues "adequately or failed to raise it below in the district court." 852 F. App'x at 401 (citations omitted). Dyer had engaged in extremely offensive speech, to be sure, but that was not the direct cause of his problems. The school acknowledged, and this Court agreed, that Dyer's speech was constitutionally protected. *Id.* Dyer's conduct, including refusing to leave the podium when instructed, and shouting and cursing, *id.* at 399, was not.

> We agree . . . that [the school] did not regulate Dyer's speech based on its content, *i.e.*, because it was offensive. Rather, [the school] regulated Dyer's offensive speech because it was disruptive. The letters sent by [the school] explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse."

Id. at 402. In the end, "the fact that [the school] also told Dyer that his comments were 'abusive, abhorrent, [and] hate-filled' was merely support for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension." *Id.*

None of the speech that Defendants censor is accompanied by anything approaching the misconduct in *Jones* and *Dyer*. Defendants are regulating viewpoints, not behavior. And neither *Jones* nor *Dyer* contradict the long line of established Supreme Court precedent, followed in cases such as *Ison* and *Marshall*, establishing that offensive speech does, indeed, convey a protected viewpoint.

Indeed, the district court should have followed rather than warred with Supreme Court precedent. It expended much effort limiting *Tam* to its facts and discounting the plurality opinion, but it ignored *Brunetti*, wherein the Supreme Court adopted *Tam* without reservation: "[A]s the Court made clear in *Tam*, a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Brunetti*, 139 S. Ct. at 2301 (quoting *Tam*, 137 S. Ct. at 1751) (citations omitted).

"[A]ll the [*Tam*] Justices agreed" that the "disparagement bar" at issue in that case "was viewpoint-based." *Id.* at 2299 (citations omitted). Laws that "reflect[] the Government's disapproval of" speech "it finds offensive" is "the essence of viewpoint discrimination." *Id.* (quoting *Tam*, 137 S. Ct. at 1766 (op. of Kennedy, J.)) (quotation marks omitted). It is a "bedrock First Amendment principle that the government cannot discriminate against ideas that offend." *Id.* (quoting *Tam*, 137 S. Ct. at 1763 (op. of Alito, J.) (quotation marks omitted). Therefore, speech regulations that "bar" "disparagement," codify viewpoint discrimination. *Id.*

Indeed, *Tam* would have controlled this case even absent *Brunetti*. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), courts "are required to impose the narrowest ground of [a] Supreme Court[ ] plurality decision." *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1222 n.31 (11th Cir. 2020). In *Tam*, four justices joined both Justice Alito's and Justice Kennedy's opinions. 137 S. Ct. at 1751, 1765. And while each justice phrases the rule differently, both opinions agree that censoring speech because it is offensive is viewpoint discrimination. *Compare Tam*, 137 S. Ct. at 1763 (op. of Alito, J.)

(censorship of offensive speech is viewpoint discrimination because "[g]iving offense is a viewpoint.") *with id.* at 1766 (op. of Kennedy, J.) ("The law [ ] reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination."). Contrary to the district court's view, Doc. 46 at 6 n.8, the Sixth Circuit in *Ison*, and the Eastern District of Pennsylvania in *Marshall*, correctly followed *Tam* (and *Brunetti).*

To the extent the district court suggested Plaintiffs' allegedly offensive speech may be censored lest it *cause* disruption, this, too, was error. If someone disrupts a meeting because they do not appreciate a speaker's point of view, the fault lies with the disruptor, not the speaker. "Listeners' reaction to speech is not a content-neutral basis for regulation," *Forsyth County. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), or for censoring a peaceful speaker. *See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger . . . that their critics might react with disorder or violence."). "Speech cannot be … punished or banned, simply because it might offend a [crowd]." *Nationalist Movement*, 505 U.S. at 134-35. "Desirable as [the prevention of conflict]

is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

Also erroneous was the district court's belief that Defendants' policies and practices were not viewpoint discriminatory because they allegedly applied to the Board's supporters and opponents alike. Even if true, that would be irrelevant. *Tam*, 137 S. Ct. at 1766 (op. of Kennedy, J.); *see Brunetti*, 139 S. Ct. at 2299, 2301. "[P]rohibit[ing] all sides" from using offensive speech "makes a law more viewpoint based, not less so." *Id*. Nor does it help Defendants that they only sometimes engage in improper censorship. As *Marshall* held in rejecting this argument, "allowing a viewpoint to be offered on some occasions without interruption does not prove the policy viewpoint neutral. Indeed, selective enforcement of a policy only when a presiding officer is feeling provoked does not help to support the policy's constitutionality." *Marshall*, 2021 U.S. Dist. LEXIS 222210 at *13-*14.

Finally, the lawfulness of a prohibition against mentioning board members (or others) by name does not turn on whether members "possess the power of the Board," Doc. 46 at 5, or whether banning such speech makes other people more comfortable, Doc. 46 at 6 n.7. The First Amendment protects speech mentioning individuals, especially government officials. Barring such speech hinders rather than advances the proper functioning of a school board meeting, and invariably impedes the expression of viewpoints critical of officials. Unsurprisingly, as applied by Defendants, the rule stops a great deal of critical speech, but relatively little praise.

C. Defendants' policies and practices discriminating on the basis of viewpoint violate Plaintiffs' First Amendment petition right.

"The right to petition the government for a redress of grievances is one of the most precious of the liberties safeguarded by the Bill of Rights, and is high in the hierarchy of First Amendment values." *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1288 (11th Cir. 2019) (internal punctuation marks and citations omitted). The right "is such a fundamental right as to be implied by the very idea of a government, republican in form," *id.* at 1288 (internal punctuation marks and citations omitted), because it "allows citizens to express their ideas,

hopes, and concerns to their government and their elected representatives." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011).

"A petition may consist of a 'personal grievance addressed to the government' and may be an oral grievance." *Floyd v. Cty. of Miami-Dade*, No. 17-cv-21709, 2017 U.S. Dist. LEXIS 76631 at *9 (S.D. Fla. May 18, 2017) (quoting *Guarnieri*, 564 U.S. at 394, and citing *Mack v. Warden, Loretto FCI*, 839 F.3d 286, 299 (3d Cir. 2016)). And although "[c]ourts should not presume there is always an essential equivalence in the [Speech and Petition] Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims," *Guarnieri*, 564 U.S. at 388 (citation omitted), Petition Clause claims may be decided using Speech Clause analysis. *Id*. at 389; *Grigley v. City of Atlanta*, 136 F.3d 752, 754-55 (11th Cir. 1998).

Much if not most public comment at school board meetings qualifies as petitioning for redress of grievances. Under the present circumstances, the viewpoint discrimination analysis for Plaintiffs' speech claims also governs—and proves—their petition claims.

D. The Policy is overbroad and void for vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A regulation can be "impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)). And "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal punctuation marks and citations omitted).

"The void-for-vagueness doctrine addresses 'at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do

not act in an arbitrary or discriminatory way.'" *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1349 (11th Cir. 2021) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). Indeterminate prohibitions create opportunities for abuse through open-ended interpretation. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). The discretion of a board meeting's presiding officer "must be guided by objective, workable standards. Without them [the official's] own politics may shape his views on what counts as [prohibited speech]." *Id.*

"In First Amendment free speech cases . . . 'rigorous adherence to th[e]se requirements is necessary to ensure that ambiguity does not chill protected speech.'" *Burns*, 999 F.3d at 1349 (quoting *Fox Television Stations*, 567 U.S. at 253-54). "Content-based regulations thus require a more stringent vagueness test." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1320 (11th Cir. 2017) (en banc) (internal quotation marks omitted). The "'government may regulate in the area' of First Amendment freedoms 'only with narrow specificity.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Relatedly, "a law is facially invalid if it 'punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Fla. Ass'n of Prof'l Lobbyists Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008) (quoting *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)). A regulation is overbroad when the government allows the "scope" of the rule "to reach both unprotected expression as well as, at least potentially, protected speech." *American Booksellers v. Webb*, 919 F.2d 1493, 1502 (11th Cir. 1990). Speech regulations "may not 'sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Wacko's Too, Inc. v. City of Jacksonville*, 522 F. Supp. 3d 1132, 1159 (M.D. Fla. 2021) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). "In First Amendment cases, there exists a serious concern that overbroad laws may lead to a chilling effect on protected expression." *Id.* (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965)). Prohibiting "words offensive to some who hear them [ ] sweeps too broadly." *Wilson*, 405 U.S. at 527.

The *Marshall* court struck down a school board's prohibition of "abusive" and "personally directed" comments not only for sanctioning

viewpoint discrimination, but also on vagueness and overbreadth grounds. 2021 U.S. Dist. LEXIS 222210 at *20, *23. It correctly held that these terms, as here, were unconstitutionally vague because that policy lacked "'objective, workable standards' to guide" enforcement. *Id.* at *20 (quoting *Minn. Voters All.*, 138 S. Ct. at 1891). The lack of defined terms allowed "little more than the presiding officer's own views" to determine what violated the public speaking policy, which "openly invite[d] viewpoint discrimination." *Id.*

And the prohibitions of "'personally directed'" and "'abusive'" statements rendered the public speaking policy overbroad because they prevented criticism of a school employee's "wrongful conduct or competence." *Id.* at *23. Expressing "[a]n opinion that a school employee is incompetent in performing school duties or violating the law governing the performance of the employee's duties is in fact relevant [at school board meetings] and presents a viewpoint against which the [s]chool [b]oard may not discriminate." *Id.* The public speaking policy was unconstitutional because it prohibited these opinions "under any reasonable interpretation" of its terms. *Id.*

As in *Marshall*, Defendants' Policy is unconstitutionally vague and overbroad. It sets no boundaries for its prohibitions on speech that is "abusive," "personally directed," or "obscene." Instead of providing "objective, workable standards," the Policy allows Defendants' "own politics" to shape their views of what is prohibited. *Minn. Voters All.*, 138 S. Ct. at 1891. The rules' scope allows Defendants to prohibit "both unprotected expression as well as, at least potentially, protected speech." *American Booksellers*, 919 F.2d at 1502. These terms' "[u]ncertain meanings" cause speakers to steer further from the unlawful speech zone than might be necessary. *Grayned*, 408 U.S. at 109. The Policy's overbreadth raises "serious" First Amendment concerns that its application "may lead to a chilling effect on protected expression." *Wacko's Too,* 522 F. Supp. 3d at 1159 (citing *Nat'l Endowment for the Arts*, 524 U.S. at 580; *Dombrowski*, 380 U.S. at 487).

The district court, however, failed to engage these arguments, and instead ruled *ipse dixit* that the laws were neither overbroad nor vague. It simply asserted that the Policy is not overbroad "because abusive, irrelevant, and disruptive speech is permissibly restricted in a limited public forum," Doc. 46 at 9, and the Policy is not vague because it "lists

five concrete reasons for which the Chair may interrupt speakers," *id.*, without addressing the argument that some of those listed reasons are not at all "concrete." Indeed, Plaintiffs do not even challenge two of the "listed reasons"—the time limit, and the requirement that speech be relevant, nor do Plaintiffs challenge any prohibition on "disruptive" behavior.

Given its lack of analysis, it is unsurprising that the cases listed by the district court as supporting its conclusions are inapposite. None of them addressed bans on "abusive," "personally directed," or "obscene" speech in the context of a public forum. *Dyer*, as noted *supra*, involved a person who was expelled from a meeting for being actually disruptive, threatening, and offering speech that might have been protected in other fora but which was irrelevant to a city council meeting. The definition of "street performance" was the subject of *Horton v. City of St. Augustine*, 272 F.3d 1318 (11th Cir. 2001). "Abusive" and "obscene" telephone calls featured in *United States v. Eckhardt*, 466 F.3d 938 (11th Cir. 2006), where a criminal defendant "called his victim approximately 200 times during a year and a half period," with sexually explicit language meant to threaten and harass. *Id.* at 944. And *Doe v.*

Valencia Coll., 903 F.3d 1220 (11th Cir. 2018), a case about a college stalking prohibition, did not reference any of the speech categories challenged here. The *Doe* prohibition only required, among other elements of stalking, that the proscribed "knowing course of conduct" be "directed at a specific person." *Id.* at 1228.

Marshall is directly on-point, and correctly so. Defendants' speech prohibitions are unconstitutionally vague and overbroad.

II. THE REMAINING PRELIMINARY INJUNCTION ELEMENTS FAVOR EQUITABLE RELIEF.

A. Defendants irreparably harm Plaintiffs by silencing their speech.

"Because the [Policy is] an unconstitutional 'direct penalization' of protected speech, continued enforcement, 'for even minimal periods of time,' constitutes a *per se* irreparable injury." *Otto*, 981 F.3d at 870 (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983)) (citations and footnote omitted).

The district court nonetheless erred in ruling that Plaintiffs are being irreparably harmed because "even if" their speech is chilled, "the Policy has not stopped them" from participating at Board meetings. Doc. 46 at 10 n.13; *see also* Doc. 46 at 8 n.11 ("The fact that Cholewa was permitted to return [to meetings after being ejected], plus the

hundred other times M4L members spoke unimpeded, contradicts Plaintiffs' brief assertion that Defendants' actions chilled Plaintiffs from expressing themselves."). Even if this were factually correct—recall that Plaintiff Kneessy is completely refraining from speaking under these circumstances, *see* Doc. 3-1 at 2-3—it would be wrong. Some Plaintiffs may be showing up to speak, but their speech is altered owing to the Policy. Indeed, the district court's citation justifying its rationale captures the problem. *See* Doc. 46 at 10 n.13 (irreparable harm where speech "will be chilled *or* prevented altogether") (quoting *Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000) (en banc)) (emphasis added).

B. The public interest favors enforcing fundamental rights.

"It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance." *Otto*, 981 F.3d at 870.

III. THE DISTRICT COURT SHOULD HOLD AN EVIDENTIARY HEARING CONCERNING PLAINTIFFS' PREFERENTIAL ACCESS CLAIM.

The district court abused its discretion when it failed to conduct an evidentiary hearing concerning Plaintiffs' preferential access claim. "Where conflicting factual information places in serious dispute issues

central to a party's claims and much depends upon the accurate presentation of numerous facts, the trial court errs in not holding an evidentiary hearing to resolve these hotly contested issues." *Four Seasons*, 320 F.3d at 1211 (internal punctuation marks omitted).

Plaintiffs' preferential access claim is a count in their complaint, Doc. 1. at 38-39, was argued in their motion, Doc. 3 at 2, 5, 10-11, 14, and was supported by evidence, Doc. 3-3 at 1 (March 23, 2021 meeting, https://bit.ly/3oT6DY4, Item E, Part 2 of 2 at 13:36-14:20); Doc. 3-4 at 1-2. This was more than a "passing assertion." Doc. 46 at 8 n.12. Defendants deny these allegations and claim preferred access was given to some individuals for reasons of public safety. Doc. 19 at 16. Defendants also claim that they provide opportunities to participate in meetings if a person cannot access the meeting room. *Id*. Plaintiffs dispute all of these factual assertions. But the district court did not allow Plaintiffs to provide additional evidence with affidavits or testimony at an evidentiary hearing to establish their claims.[4]

[4] Plaintiffs did not initially request an evidentiary hearing when they filed their motion, as they could not anticipate that Defendants would create this factual issue. But once the conflict became apparent, the district court should have refrained from adopting one side's view without a hearing.

Nevertheless, the district court ruled Defendants' evidence was more credible and denied Plaintiffs' motion. Doc. 46 at 8 n.12.

"However, where, as here, the material facts underlying the complaint and the injunction are disputed, the district court is required to hold a[n] [evidentiary] hearing." *Four Seasons Hotels & Resorts*, 320 F.3d at 1212. The district court's failure to do so was an abuse of discretion.

CONCLUSION

The district court's order should be vacated, and the case remanded with instructions to enter a preliminary injunction against the challenged Policy provisions, and hold an evidentiary hearing with respect to the preferential access claim.

Dated: March 16, 2022

Respectfully submitted,

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Dated: March 16, 2022

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