IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

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

Plaintiffs,

CASE NO.: 6:21-cv-1849-RBD-GJK

vs.

BREVARD PUBLIC SCHOOLS, et al.,

Defendants.
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION (DOC. 3) AND INCORPORATED MEMORANDUM OF LAW

Defendants, Brevard Public Schools, Misty Haggard-Belford, Matt Susin, Cheryl McDougall, Katye Campbell, and Jennifer Jenkins (collectively, "Defendants"), by and through undersigned counsel, hereby respond in opposition to the Motion for Preliminary Injunction (Doc. 3) ("Motion") filed by Plaintiffs, Moms for Liberty – Brevard County, FL, Amy Kneessy, Ashley Hall, Katie Delaney, and Joseph Cholewa (collectively, "Plaintiffs"), and state:

INTRODUCTION

Much to Plaintiffs' dismay, the public comment portion of the Brevard County Public School Board's ("Board") meetings are not public free-for-alls. Board meetings are, at their core, business meetings, and maintaining decorum at these meetings is vital. As such, the Board Chair must have the

necessary tools to enable the Board to conduct its public business safely and securely. The Public Participation at Board Meetings Policy ("Policy")[1,2] does not forfend heated comments and participation or obstruct rights guaranteed by the First Amendment at its meetings. In fact, on its face, it does not outright prohibit any speech at all; instead, the Policy strikes an appropriate balance of permitting public input and maintaining decorum in a limited public forum.

ARGUMENT AND INCORPORATED MEMORANDUM OF LAW

I. Standard for Issuance of Preliminary Injunction

In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant can establish lack of each of the four prerequisites. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). "The Court must find in favor of movant on all four factors in determining whether or not a preliminary injunction should be issued." *Hernandez v. Bd. of Regents*,

---

[1] The Policy is attached as **Exhibit 1** to Affidavit of Misty Haggard-Belford ("Belford Affidavit") (**Exhibit A** hereto). The Belford Affidavit contains a description of the Policy and its application, as well as the functioning of Board meetings and Plaintiffs' public comments at meetings. The Business Records Certification attached as **Exhibit B** hereto includes the Board meeting minutes, public comment forms, and hyperlinks to the meeting videos. Each meeting video is multiple hours in length. Should the Court require, Defendants will provide a thumb drive or hard drive containing the videos.

[2] The Policy is consistent with § 286.0114(2), Florida Statutes, which "does not prohibit [the Board] from maintaining orderly conduct or proper decorum during a meeting" and establishes that "[t]he opportunity to be heard is subject to the rules or policies adopted by the [Board]."

96-1051-CIV-T-17B, 1997 WL 391800, at *1 (M.D. Fla. July 7, 1997).

II. Plaintiffs are Not Substantially Likely to Succeed on the Merits.

"[T]o impose § 1983 liability on a municipality, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). Plaintiffs cannot show that their constitutional rights were violated by the facial language of the Policy or by the manner in which it was applied. Plaintiffs therefore lack a substantial likelihood of success on the merits.

A. School Board Meetings are Limited Public Forums.

As Plaintiffs concede, the public comment portions of the Board's meetings are limited public forums. *See* Doc. 3 at 13; *Cambridge Christian Sch. Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1237 (11th Cir. 2019). "[C]ontent-based discrimination . . . is permitted in a limited public forum if it is viewpoint neutral and reasonable in light of the forum's purpose." *Barrett v. Walker County Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017); *see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("The State is not required to . . . allow persons to engage in every type of speech" in limited public forum).

B. On its Face, the Policy Does Not Violate Plaintiffs' Constitutional Rights.

1. The Policy is Viewpoint-Neutral.

The contested Policy provisions (1) require that all comments be directed to the Board Chair and (2) permit, but do not require, the Chair to interrupt, warn, or terminate a speaker's abusive or personally directed statements. Plaintiffs argue that these provisions constitute viewpoint discrimination because they bar speech that opposes or offends members of the Board. Not so.

"The government's purpose in limiting one's speech in a public forum constitutes the 'controlling consideration' in determining content neutrality." *Jones v. Heyman*, 888 F.2d 1328, 1331-32 (11th Cir. 1989). "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (emphasis in original)). This is true "[e]ven if a limitation on speech incidentally affects only some speakers." *Id.* at 1332.

Here, the provisions at issue were enacted and exist to facilitate an orderly and efficient business meeting of the Board. *See* Policy at 2, subsection E ("This is the Business meeting of the Board, as such, all statements shall be directed to the presiding officer . . ."). First, requiring speakers to direct their

comments, whatever they may be, to the Board Chair does not prohibit any speech whatsoever. This viewpoint-neutral restriction makes sense because "Board members as individuals do not separately possess the powers that reside in the Board," nor can individual members' statements or actions bind the Board. *See* Bylaws, Brevard Cnty School Bd., Policy 0122.1.

Second, affording the Chair discretion, but not the requirement, to interrupt, warn, and terminate abusive and obscene comments is critical to preventing disruption. *See Steinburg v. Chesterfield Cnty Planning Comm'n*, 527 F.3d 377, 386-87 (4th Cir. 2008) (noting that personal attacks inevitably lead to "argumentation" which "has the real potential to disrupt the orderly conduct of the meeting"). This provision, while not banning any speech, balances the importance of public input and the Board's need to conduct its business in an orderly manner. Together, the challenged provisions keep the focus of the meeting on the business of the Board. Any incidental effect they may have is irrelevant. *Jones*, 888 F.2d at 1332.

The 11th Circuit recently agreed, recognizing that a school board's public comment policy prohibiting "speech that 'defames individuals'" was implemented to "maintain proper decorum and avoid disruptive meetings." *Dyer v. Atlanta Indep. Sch. Sys.*, 852 Fed. Appx. 397, 398 (11th Cir. 2021), *cert. denied sub nom. Dyer v. Atlanta Indep. Sch. Sys.*, 21-213, 2021 WL 5284619 (U.S. Nov. 15, 2021) ("*Dyer II*"); *see also Brown v. City of Jacksonville, Fla.*, No.

3:06-CV-122-J-20MMH, 2006 WL 385085, at *3 (M.D. Fla. Feb. 17, 2006) ("[B]oth the City's Council Rule and the City's directive [which permitted barring any member of the public who made personal, impertinent or slanderous remarks or who became boisterous was] content-neutral"); *Charnley v. Town of S. Palm Beach*, No. 13-81203-CIV, 2015 WL 12999749, at *8 (S.D. Fla. Mar. 23, 2015), *report and recommendation adopted sub nom. Charnley v. Town of S. Palm Beach Fla.*, 2015 WL 12999750 (S.D. Fla. Apr. 9, 2015), *aff'd*, 649 Fed. Appx. 874 (11th Cir. 2016) (questioning individual council members, speaking beyond her allotted time, and making disparaging personal remarks was not protected by the First Amendment).

Ignoring 11th Circuit case law, Plaintiffs rely on cases from the 6th Circuit and Eastern District of Pennsylvania, arguing that restrictions on "abusive" and "personally directed" speech discriminate on the basis of viewpoint. *See* Doc. 3 at 14-15 (quoting *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 891-95 (6th Cir. 2021)); *see also* Doc. 18 (quoting *Marshall v. Amuso*, No. 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021)). Plaintiffs' reliance is misplaced.

Ison and *Marshall* reach the wrong result, but in any event, are not binding on this Court because they are inconsistent with the precedent in this Circuit for two reasons. First, *Ison* and *Marshall* are inconsistent with holdings in this Circuit that uniformly applied content-based restrictions do not equate

to viewpoint discrimination. *See Rowe v. City of Cocoa, Fla.*, 2003 WL 22102150, at *9 & n.13 (M.D. Fla. 2003), *aff'd*, *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800 (11th Cir. 2004) (noting the plaintiff "confuses the terms content-neutral and viewpoint-neutral" and confirming that a uniformly-applied policy was viewpoint-neutral); *see also M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense*, 791 F.2d 1466, 1474 (11th Cir. 1986).

Secondly, *Ison* and *Marshall* are inconsistent with the "meaningful" distinction in the 11th Circuit between prohibiting "abusive, abhorrent, [and] hate filled" comments because of the views expressed and prohibiting those comments because of their disruptive effect to a board meeting. *See Dyer II*, 852 Fed. Appx. at 402; *see also Jones*, 888 F. 2d at 1332 (finding that "the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion").[3] The same distinction is applicable here. Requirements that

[3] Outside the 11th Circuit, *Ison* and *Marshall* are hardly dispositive on the issue. *Dayton v. Brechnitz*, No. 2:20-CV-307-SPC-MRM, 2021 WL 5163225, at *7 (M.D. Fla. Nov. 5, 2021) (collecting cases); *see also Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737, 747 (1996) (statutory language allowing the prohibition of "patently offensive" or "indecent" material was "viewpoint-neutral"); *cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) ("[S]peech that is vulgar, offensive, and shocking is not entitled to absolute constitutional protection under all circumstances.") (internal quotation marks omitted); *Milestone v. City of Monroe, Wis.*, 665 F.3d 774, 783-84 (7th Cir. 2011) (holding that a "prohibition against abusive, vulgar, or demeaning language" was unrelated to content and focused on the manner of the speech); *Ballard v. Patrick*, 163 Fed. Appx. 584 (9th Cir. 2006) (holding

comments be relevant to the business at hand, decorum be observed, and comments be addressed to the Board Chair serve the limited purpose for which the meetings are convened and apply to every speaker, regardless of viewpoint. Thus, the Policy provisions at issue are the type of viewpoint-neutral restrictions permitted in a limited public forum.

3. The Policy is Narrowly Tailored to Serve a Significant Government Interest.

The Board has a significant governmental interest in maintaining decorum, preventing disruptions, and conducting efficient meetings. *See Jones*, 888 F.2d at 1332 ("The Supreme Court has recognized the significance of the government's interest in conducting orderly, efficient meetings of public bodies") (citing *City of Madison, Joint Sch. Dist. v. Wis. Emp. Rel. Comm'n*, 429 U.S. 167 (1976)). The Policy is narrowly tailored to serve the Board's interest.

The Policy "need not be the least-intrusive or least-restrictive means" to be narrowly tailored. *Id.* at 1333. Rather, "'the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 1332 (quoting *Ward*, 491 U.S. 781).

---

that policy prohibiting "profane, abusive, or slanderous speech" at county commission board meetings was viewpoint-neutral). Also, the district court denied the *Ison* Plaintiffs' motion for preliminary injunction. *Ison v. Madison Local Sch. Bd.*, 395 F. Supp. 3d 923, 939 (S.D. Ohio 2019).

As explained above, the Policy consists of viewpoint-neutral restrictions that further the compelling Board interest in orderly and efficient meetings. It cannot fairly be argued that allowing speakers to directly address and question Board members, and affording the Chair no discretion to limit abusive, obscene, and personally directed remarks, would lead to a more efficient and orderly meeting. Accordingly, because the contested Policy provisions allow the Board to more effectively further its interest of efficient and orderly public school board meetings, the provisions are narrowly tailored, and Plaintiffs lack a substantial likelihood of success on the merits as to this issue.[4]

4. The Policy is Not Unconstitutionally Vague or Overbroad.

The U.S. Supreme Court has "repeatedly expressed its reluctance to strike down a statute on its face . . . even if there are marginal applications in which a statute would infringe on First Amendment values." *Parker v. Levy*, 417 U.S. 733, 760 (1974) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Assn. of Letter Carriers*, 413 U.S. 548, 580-81 (1973)). "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether

[4] Plaintiffs argue that the Policy violates their First Amendment right to petition the government for redress of grievances for the same reasons it violates their right to free speech. Because Plaintiffs' right to petition argument rises and falls on the basis of their free speech argument and Plaintiffs do not allege any new or different arguments as to their right to petition claim, Defendants submit that the Plaintiffs' petition argument fails for the same reasons described above.

the enactment reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). If not, the overbreadth challenge fails and "[t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Id.*

To the extent that Plaintiffs' conduct violates the reasonable viewpoint-neutral restrictions imposed by the Board over its limited public forum, the conduct is not protected by the First Amendment. *See Charnley*, 2015 WL 12999749, at *8. The Policy only implicates disruptive conduct outside of the First Amendment's protection in a limited public forum and therefore does not reach a substantial amount of constitutionally protected conduct.[5] *See Jones v. City of Key West, Fla.*, 679 F. Supp. 1547, 1559 (S.D. Fla. 1988), *rev. on other grounds*, 888 F.2d at 1332 (concluding that public meeting policy prohibiting "obscene or profane speech" and "loud or boisterous behavior," "while not the model of draftsmanship" was nevertheless not unconstitutionally overbroad or vague); *see also Milestone*, 665 F.3d at 784-85 (policy against "abusive, vulgar,

[5] Contrary to Plaintiffs' characterizations, as explained above, the Policy does not expressly prohibit any speech that is abusive, personally directed, or obscene, but rather affords the chair the discretion to limit disruptive conduct. *See* Policy at H1.

or demeaning language" was neither overbroad nor vague); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, (5th Cir. 2010) (policy prohibiting disruption of public school board meetings was neither overbroad nor vague); *White v. City of Norfolk*, 900 F.2d 1421, 1425 (9th Cir. 1990) (policy that prohibited "loud, threatening, personal or abusive language" and disorderly conduct was not unconstitutionally overbroad). Thus, the Policy is not unconstitutionally overbroad.

Similarly, the Policy is not unconstitutionally vague. It is informed by its dual purposes: ensuring (1) that members of the public have the right to participate in Board meetings; and, (2) the orderly and efficient conduct of meetings. These purposes serve as guiding principles, informing the Chair in exercising her authority to interrupt, warn, or terminate abusive, personally directed, obscene, irrelevant, and lengthy speech. Accordingly, the Policy, while "flexible" and allowing for the "exercise of considerable discretion," is limited by its focus on disruptive conduct regardless of viewpoint and is therefore not vague in every respect, thus withstanding Plaintiffs' facial challenge. *Ward*, 491 U.S. at 794-96 (noting that "[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered" and concluding standards were not unconstitutionally vague even though they were flexible and provided for the exercise of considerable discretion). Indeed,

"perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*[6]

For the above reasons, Plaintiffs cannot show any likelihood of success, let alone a substantial likelihood, on the merits of their facial challenge to the Policy. Plaintiffs are not entitled to the extraordinary relief they seek.

C. The Policy is Not Unconstitutional As Applied.

The Policy is not applied in a manner that discriminates against speakers' viewpoints. *See* Ex. A at ¶ 23 ("[T]he Policy is applied to all speakers, regardless of their position or point-of-view on an issue.").

The Belford Affidavit describes the minimum of 109 times that Moms for Liberty members addressed the Board between January 19, 2021 and October 26, 2021, including the four interruptions of Moms for Liberty members and one instance of a Moms for Liberty member (Cholewa) being asked to leave a meeting, on which Plaintiffs base the Complaint and Motion. As Belford attests, these minimal instances were due to violations of the neutral Policy

[6] Plaintiffs argue that the Policy has a chilling effect on protected speech because "if Defendants will engage in viewpoint discrimination against their critics, then they may deem criticism of Board policies a disruption under the criminal statute." However, the Plaintiffs do not challenge the criminal statute upon which their fear of prosecution is premised in this case. Accordingly, Plaintiffs' arguments regarding the potential chilling effect of the Policy based upon fear that they may be criminally prosecuted under an entirely separate statute, not at issue in this case, are unfounded.

and not due to the viewpoints espoused by Plaintiffs. The Belford Affidavit also describes in detail numerous instances in which speakers (both Moms for Liberty members and non-members) conveyed views akin to those of Plaintiffs and were not interrupted or asked to leave. Furthermore, the Belford Affidavit includes occasions in which individuals who expressed opinions ***opposite*** to those of Plaintiffs ***were*** interrupted for violating the viewpoint-neutral Policy.

As Belford attests, the Policy was applied to prevent disruption to the Board's ability to conduct its business, rather than to chill the expression of viewpoints. As the 11th Circuit recently affirmed, the application of a neutral policy to prevent the disruption of a school board meeting is not a constitutional violation. *See Dyer II*, 852 Fed. Appx. at 402 ("We agree with the district court's determination that AISS did not regulate Dyer's speech based on its content, *i.e.*, because it was offensive. Rather, AISS regulated Dyer's offensive speech ***because it was disruptive***.") (emphasis added).

Furthermore, like the plaintiff in *Dyer*, Plaintiffs have repeatedly addressed the Board uninterrupted when their comments do not violate the Policy and disrupt Board meetings. *See Dyer v. Atlanta Indep. Sch. Sys.*, 426 F. Supp. 3d 1350, 1359-60 (N.D. Ga. 2019) ("*Dyer I*") ("Here, APS officials were not regulating Dyer's speech because they were offended by and attempting to silence his criticism of APS. Other attendees had previously expressed criticism of APS without incident. Dyer himself before and since the incidents

in question—has been allowed to freely criticize APS policy decisions and board members when he has done so without the use of racial slurs."). This reflects that Defendants did not apply the Policy to discriminate against Plaintiffs based on their viewpoints, which Plaintiffs repeated each time they spoke to the Board, typically without interruption. When restrictions on a speaker at a limited public forum result "not from disapproval" of the speaker's message but from "disruptive conduct," the speaker's constitutional rights are not violated. *Jones*, 888 F.2d at 1332.

Application of the Policy was also narrowly tailored. *See id.* at 1333 (actions taken to avoid disruption to government meetings must be "narrowly tailored to achieve this interest"). Moms for Liberty members were interrupted due to violations of the Policy on very few occasions. Typically, these interruptions were brief, speaking time was not taken away from the speakers, and the speakers were able to continue their comments without further interruption. On only one occasion, when Cholewa was asked to leave the September 21, 2021 meeting, did an interruption of a Moms for Liberty member escalate past such a brief interruption. This was due to the continued disruption that Cholewa caused to the meeting. Such an application of the Policy is not unconstitutional. *See Brown*, 2006 WL 385085, at *3-4 ("Mr. Hyde had a significant governmental interest in managing an efficient Council meeting agenda, in conserving time, in ensuring that others had an

opportunity to speak, and in preventing Plaintiff's disruption, and thus in having her removed from the meeting as a reasonable attempt to regulate the time, place and manner of the Plaintiff's speech."). Importantly, Cholewa returned to two meetings after this occasion and spoke uninterrupted.

Even if Belford, as Chair of the Board, made an occasional error in implementing the Policy (which Defendants do not concede), such an error does not rise to the level of a constitutional violation:

> An erroneous judgment call on the part of a presiding officer does not automatically give rise to liability for a constitutional tort. The mayor's actions in this case constituted a reasonable attempt to confine the speaker to the agenda item in question, and that conclusion should end the inquiry. We should not inquire whether we as presiding officers would have handled the matter in the same way.

Jones, 888 F.2d at 1334.

Plaintiffs also had "ample channels of communication" remaining when they were interrupted or (on a single occasion) asked to leave a Board meeting. *Id.* Plaintiffs typically continued and finished their public comments if they were interrupted due to a Policy violation. In the one instance where Cholewa was asked to leave a meeting, Cholewa returned for two meetings thereafter and delivered uninterrupted comments. Furthermore, on the rare occasion when a public speaker is asked to leave a meeting due to the disruption that the speaker is causing, the speaker may convey his or her comments to the Board via email, phone, or letter. The speaker may also return for subsequent

Board meetings to express his or her viewpoints verbally so long as the speaker follows the Policy's rules of decorum. Belford Affidavit, at ¶ 21.

Defendants also did not violate Plaintiffs' constitutional rights by limiting entry into meetings. The Board does not limit the number of people who sign up to speak at Board meetings. *Id.* at ¶ 8. If there are more speakers than space in the Board room allows, speakers may wait outside and listen to the Board meeting over a loudspeaker positioned there. *Id.* at ¶ 10. Speakers can hear their names called over the loudspeaker and enter the Board room when it is their turn to speak. *Id.* Contrary to Plaintiffs' claims, Cholewa was not prevented from speaking at the March 9, 2021 meeting when students were escorted into the building to ensure their safety from unruly protesters located outside. *See id.* at ¶¶ 57-58. Actions taken merely to ensure the safety and welfare of citizens do not violate the Constitution. *See Bayside Enters., Inc. v. Carson*, 470 F. Supp. 1140, 1147 (M.D. Fla. 1979) (requirements that "exist merely to advance the City's interests in the safety and welfare of its citizens, and not as a device to suppress free speech or deter mutual association for that purpose . . . are constitutional").

Furthermore, the addition of language relating to § 877.13, Florida Statutes, in Belford's opening statements before each Board meeting is not for the purpose of chilling speech. *Id.* at ¶ 166. Brevard County Sheriff's Office worked with Belford and school district staff to add this language to her

opening remarks in light of audience conduct at the July 29, 2021 Board meeting that led the Sheriff's Office to be concerned about the safety of Board members and the audience. *Id.* at ¶ 165. The language regarding § 877.13 does not prohibit speakers from commenting and merely informs the audience of the requirements of § 877.13—a statute that has been deemed constitutional. *See O.P-G. v. State*, 290 So. 3d 950, 959 (Fla. 3d DCA 2019) (holding that § 877.13 is constitutional).

II. Plaintiffs Cannot Show Irreparable Harm.

Plaintiffs seeking injunctive relief must show a "sufficiently real and immediate" threat of future harm to satisfy the "injury" requirement of standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). "A showing of irreparable injury is 'the sine qua non of injunctive relief.'" *Siegel*, 234 F.3d at 1176. "[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Id.*; *see also Snook v. Trust Co. of Ga. Bank of Savannah, N.A.,* 909 F.2d 480, 486 (11th Cir. 1990) (affirming denial of preliminary injunction even though plaintiff established likelihood of prevailing because plaintiff failed to prove irreparable injury). An "irreparable injury 'must be neither remote nor speculative, but actual and imminent.'" *Siegel*, 234 F.3d at 1176.

An alleged violation of constitutional rights does not conclusively

establish irreparable harm. *Id.* at 1177. "The only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." *Id.* at 1178. Here, not only have Plaintiffs failed to allege that the Policy, either facially or as applied, will wholly chill or prevent imminent public commentary at Board meetings, but the evidence before the Court demonstrates that Plaintiffs have previously voiced, and will continue to voice, their comments regardless of the Policy. If the "conduct sought to be enjoined [is] not the type of conduct that would cause any great injury, [it is] certainly not irreparable injury." *Lewis v. S. S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976).

Injunctions serve to "forestall future violations" rather than punish for actions that occurred in the past. *See U.S. v. Ore. State Med. Soc'y,* 343 U.S. 326, 333 (1952). If Plaintiffs suffered an injury from the manner in which the Policy was previously applied, they have recourse for damages under § 1983. *See Lyons*, 461 U.S. at 112-13 ("[W]ithholding injunctive relief does not mean that the federal law will exercise no deterrent effect in these circumstances. If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983."). Therefore, Plaintiffs have an adequate remedy at law for any alleged violations of their constitutional rights due to

the application of the Policy. As discussed above, the Policy is viewpoint-neutral, and there is no evidence to support Plaintiffs' speculation that the Policy will be applied in a manner going forward that violates their constitutional rights. Therefore, Plaintiffs cannot show irreparable harm and lack standing to seek injunctive relief.[7]

III. Balancing of Hardships and Public Interest

The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987). This element goes to "the power of the [Court] to do equity and to mold each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Often, when a party seeks to enjoin the government, such analysis is combined with the "public interest" prong of the test.

"Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling." *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 338 (1933) (finding public interest would not be served because of the high and unreasonable cost to the taxpayers of abating the nuisance at issue). The price of "continuing superintendence" by

[7] Plaintiffs also lack standing to the extent that they seek relief based on alleged constitutional violations allegedly suffered by individuals who are not Moms for Liberty members. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964,

the Court to enforce an injunction is also an important consideration as to whether an injunction should be granted. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000).

Should the Court grant the relief that Plaintiffs seek, Defendants would be prohibited from utilizing the Policy in governing Board meetings. The result would be a free-for-all in which speakers would be unlimited in time and could intentionally incite audience members and disrupt the function of Board meetings. The Constitution does not mandate mayhem. *See Rowe*, 358 F.3d at 803 ("'[T]o deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting . . . would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions.'") (quoting *Jones*, 888 F. 2d at 1333). Both the Board and other public speakers have a vested interest in ensuring the orderly procession of Board meetings and the ability for ***all*** speakers to present their views. The balancing of harms and the interests of the public weigh against granting the Motion.

CONCLUSION

The Court should deny the Motion because Plaintiffs lack a substantial likelihood of success on the merits; Plaintiffs cannot show an irreparable harm and lack standing; and the balance of hardships and the public interest weigh against entry of a preliminary injunction.

Respectfully submitted this 29th day of November, 2021.

/s/ Howard S. Marks
HOWARD S. MARKS
Florida Bar No.: 0750085
Email: hmarks@burr.com
Secondary Email: echaves@burr.com
GENNIFER L. BRIDGES
Florida Bar No.: 0072333
Email: gbridges@burr.com
Secondary Email: nwmosley@burr.com
SHEENA A. THAKRAR
Florida Bar No.: 871141
Email: sthakrar@burr.com
Secondary Email: echaves@burr.com
BURR & FORMAN LLP
200 S. Orange Avenue, Suite 800
Orlando, Florida 32801
Tel: (407) 540-6600
Fax: (407) 540-6601
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of November, 2021, a true and correct copy of the foregoing was filed via the CM/ECF system, which will provide electronic notice to the following counsel of record:

David Osborne (dosborne@goldsteinlp.com)
Goldstein Law Partners, LLC
4651 Salisbury Rd., Suite 400
Jacksonville, FL 32256

Ryan Morrison (rmorrison@ifs.org)
Martha Astor (astorm@ifs.org)
Institute for Free Speech,
1150 Connecticut Ave., NW, Suite 801, Washington, DC 20036

/s/ Howard S. Marks
HOWARD S. MARKS
Florida Bar No.: 0750085