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 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (DOC. 91) AND INCORPORATED MEMORANDUM OF LAW

Defendants, Brevard Public Schools ("BPS") and Misty Haggard-Belford ("Belford" or "Chair") (collectively, "Defendants"), pursuant to Rule 56, Fed. R. Civ. P., and Local Rules 3.01(b) and (c), hereby respond in opposition to the Motion for Summary Judgment (Doc. 91) filed by Plaintiffs, Moms for Liberty – Brevard County, FL ("MFL"), Ashley Hall ("Hall"), Amy Kneessy ("Kneessy"), Katie Delaney ("Delaney"), and Joseph Cholewa ("Cholewa") (collectively, "Plaintiffs"), and state:

INTRODUCTION

Plaintiffs' violations of BPS' constitutional Public Participation Policy ("Policy") are not protected speech. However, even if they are protected, Plaintiffs' hyperbolic claims that they were "silenced" or "censored" do not

change the fact that Defendants' application of the Policy was reasonable and viewpoint-neutral, and thus constitutional. Furthermore, the manner in which Defendants applied the Policy did not "objectively chill" Plaintiffs' expression. The Court should therefore deny Plaintiffs' Motion for Summary Judgment.[1]

ARGUMENT

The Court must analyze three questions in ruling on Plaintiffs' Motion for Summary Judgment. First, were Plaintiffs' violations of the facially constitutional Policy protected? If so, was Defendants' application of the Policy in the limited public fora of Board meetings constitutional because it was reasonable under the circumstances and viewpoint-neutral? And finally, was Defendants' application of the Policy constitutional because it would not cause a reasonable public commenter to fear punishment for expressing her beliefs?

The answer to the first question is no, which ends the analysis and requires denial of Plaintiffs' Motion for Summary Judgment. However, if the Court assesses the remaining two questions, the Court should find that Defendants' application of the Policy was reasonable and viewpoint-neutral and did not objectively chill Plaintiffs' speech. For these reasons, the Court should thus deny Plaintiffs' Motion for Summary Judgment.

[1] For the sake of brevity, Defendants incorporate by reference the Statement of Undisputed Facts contained in their Motion for Summary Judgment (Doc. 90).

A. Plaintiffs' Violations of the Constitutional Policy Are Not Protected.

1. Defendants Apply the Policy to Maintain Safety and Decorum.

This Court already dismissed Plaintiffs' claims that the Policy is facially unconstitutional, overbroad, and vague, finding that the Policy is both content- and viewpoint-neutral. (Doc. 63 at 8.) Plaintiffs' violations of the constitutional Policy were not protected. *See Charnley v. Town of S. Palm Beach*, No. 13-81203-Civ-Rosenberg/Hopkins, 2015 WL 12999749, *8 (S.D. Fla. Mar. 23, 2015) ("*Charnley I*"), *report and recommendation adopted*, 2015 WL 12999750 (S.D. Fla. Apr. 9, 2015), *aff'd*, *Charnley v. Town of S. Palm Beach, Fla.*, 649 F. App'x 874 (11th Cir. 2016) (plaintiff's violations of township meeting policy were "not protected, and thus, her First Amendment rights were not violated"). On the many occasions when Plaintiffs spoke at Board meetings but did not violate the Policy, the Chair did not interrupt them. Plaintiffs complain only of a few occasions when they were interrupted for violating the Policy, and because such instances are not constitutionally protected, the Court should deny Plaintiffs' Motion for Summary Judgment.

Plaintiffs claim that Defendants apply the Policy to prevent them from giving "offense." Specifically, Plaintiffs characterize Belford's deposition testimony as stating that "she enforces the Policy prohibitions based on the reaction of listeners in the boardroom and to protect the sensibilities of

children and those watching on television." (Doc. 91 at 13.) However, a review of Belford's testimony reveals that her discussion of audience reactions is tied to the maintenance of decorum and safety in the Boardroom. (*See* Belford Tr. at 159:17-25, 161:14-24, 167:10-13, 169:5-13, 171:12-20, 185:10-15.)[2] Belford's testimony reveals that she does not apply the Policy to prevent "offense," as Plaintiffs claim. Instead, Belford applies the Policy to ensure that the Boardroom is an orderly and safe place for the Board to conduct its business and for public commenters to share their viewpoints. When Plaintiffs (or any public speaker) violate the Policy, such violations create safety and order concerns that the Constitution does not protect.

Plaintiffs' sweeping arguments regarding the Constitution's protection of offensive ideas miss the mark. At the risk of repeating the nature of Board meetings *ad nauseum*, they are limited public fora.[3] In such a forum, "the State is not required to and does not allow persons to engage in every type of speech." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *see also Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) ("The freedom of expression protected by the First Amendment is not inviolate; the Supreme Court has

[2] The deposition transcripts of the following individuals are attached as exhibits to Plaintiffs' Motion for Summary Judgment and referenced herein: Belford (Ex. 1); Hall (Ex. 2); Delaney (Ex. 3); Cholewa (Ex. 4); Kneessy (Ex. 5); Cheryl McDougall (Ex. 6); Katye Campbell (Ex. 7); Matt Susin (Ex. 8); and Jennifer Jenkins (Ex. 9).

[3] Plaintiffs concur that Board meetings are limited public fora. (Doc. 91 at 11.)

established that the First Amendment does not guarantee persons the right to communicate their views 'at all times or in any manner that may be desired.'"). In a limited public forum, the government "is justified in . . . imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business," as long as such a restriction does not discriminate based on viewpoint. *Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 385 (4th Cir. 2008); *see also Rowe v. City of Cocoa, Florida*, 358 F.3d 800, 803 (11th Cir. 2004) ("There is a significant governmental interest in conducting orderly, efficient meetings of public bodies."); *Jones*, 888 F.2d at 1333 ("[T]he mayor's interest in controlling the agenda and preventing the disruption of the commission meeting" was "sufficiently significant" to satisfy the governmental interest prong of the court's First Amendment analysis).

Defendants are permitted to apply the Policy to prevent disruptions to Board meetings. For example, in *Dyer v. Atlanta Independent School System*, 852 F. App'x 397 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 484 (2021), the school system established policies "[t]o maintain proper decorum and avoid disruptive meetings." *Id.* at 398. The speaker in *Dyer* "directed racially-charged, derogatory epithets like the 'N-word,' 'coons,' and 'buffoons'" toward the school board, marking the first of several suspensions from speaking at, and later attending, board meetings. *Id.* The board suspended the speaker again for

"inappropriate and disruptive behavior" at another meeting, and a third suspension came after the speaker "again used racial slurs." *Id.* at 398-99.

The board "insisted that it removed Dyer from its community meetings 'not because it disagreed with Dyer's message, but because it regarded his use of racially-insensitive language to be . . . *disruptive* to the meeting.'" *Id.* at 399. The Eleventh Circuit agreed, finding the "policies outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum" to be "content-neutral" and concluding that the board "did not regulate Dyer's speech based on its content." *Id.* at 402. Instead, the board "regulated Dyer's offensive speech because it was disruptive." *Id.* Thus, neither the board's policies nor its application of the policies in its treatment of the speaker was unconstitutional. *See id.*

Dyer demonstrates the Eleventh Circuit's recognition of the distinction between regulating speech simply because it is offensive, and regulating the disruption that offensive speech causes to an otherwise-orderly meeting. The First Amendment does not offer a blanket protection for offensive speech when it disrupts the ability to carry on orderly business in a limited public forum.

Plaintiffs' violations of the Policy (or, in the case of Kneessy, purportedly intended violations of the Policy) are not protected because the Policy is in place to further BPS' interest in maintaining order and decorum at Board meetings. The record demonstrates that Defendants applied the Policy in an

effort to prevent disruption and ensure safety, not because Plaintiffs' speech is "offensive." The Court should therefore find that Plaintiffs failed to demonstrate a constitutional violation and deny Plaintiffs' Motion for Summary Judgment.

2. The Cases on Which Plaintiffs Rely are Distinguishable.

The cases on which Plaintiffs rely are distinguishable from the instant matter and do not demonstrate that Plaintiffs' violations of the Policy are constitutionally protected.

Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022), on which Plaintiffs rely heavily, involved whether claimants had standing to challenge the facial constitutionality of a "discriminatory harassment" policy and a "bias-related incidents" policy at a university. *See id.* at 1113. *Speech First* also examined whether the claimants were entitled to a preliminary injunction because the discriminatory harassment policy likely violated the First Amendment as overbroad and a content- and viewpoint-based regulation of constitutionally-protected expression. *See id.* The policies at issue in *Speech First* were "astonishing[ly]" broad and clearly designed to target content and viewpoints that university students could find "discriminatory." *Id.* at 1122. The content-based nature of the policies required the application of strict scrutiny, and it was apparent on the face of the policies that they were aimed at "offensive" speech. *See id.* at 1125-26. A forum analysis was unnecessary.

Speech First is therefore distinguishable from the instant case, which involves claims that a viewpoint-neutral time, place, and manner restriction designed to prevent disruption in a limited public forum was allegedly unconstitutional "as applied."

Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992) examined whether a prior restraint was facially constitutional. *See id.* at 130. The prior restraint in question required a permit authorizing public speaking, parades, or assemblies—*i.e.*, "the archetype of a traditional public forum"—and assessed fees based on the anticipated cost of maintaining public order, which the government assessed based on the views being expressed. *See id.* at 126-27. Similarly, *Florida Cannabis Action Network v. City of Jacksonville*, 130 F. Supp. 2d 1358 (M.D. Fla. 2001), involved a prior restraint requiring issuance of a permit for those who wish to stage, promote, or conduct a festival. *See id.* at 1360. Likewise, *Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317 (M.D. Fla. 1998), analyzed a prior restraint requiring a special events permit to use a public forum, and the policy in question, which only allowed events that advertised or promoted the city or "family values" was not content-neutral and did not pass strict scrutiny. *See id.* at 1323-25. Plaintiffs do not allege that the Policy or its application constitutes a prior restraint, and this case does not involve a traditional public forum. It also no longer involves a facial unconstitutionality claim.

Bach v. School Board of City of Virginia Beach, 139 F. Supp. 2d 738 (E.D. Va. 2001) has, at the least, been called into question by the Fourth Circuit in *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377 (4th Cir. 2008), if not disapproved altogether. In *Bach*, the district court found that a provision in a school board's bylaws prohibiting "personal attacks" was an unconstitutional prior restraint. *See Bach*, 139 F. Supp. 2d at 739, 744. Specifically, the provision instructed speakers to avoid "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group."[4] *Id.* at 741.

However, the Fourth Circuit in *Steinburg* found that *Bach* is "inconsistent with [its] jurisprudence." *Steinburg*, 527 F.3d at 387. The Fourth Circuit also found that a policy like the one in *Bach* (which was similar to the one at issue in *Steinburg*) "is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order." *Id.* Furthermore, while the *Steinburg* court recognized that its holding "does not preclude a challenge premised on misuse of the policy

[4] BPS' Policy, on the other hand, merely provides the Chair with discretion to limit public comments that are "personally directed." Unlike the bylaws provision in *Bach*, the Policy is not directed toward negative comments such as "personal attacks" concerning the "honesty, character, [or] integrity" of any individual or group, but is instead neutral in nature. Belford also construes the Policy neutrally, applying it to comments that disclose personal information of an absent person or implicate the safety or decorum of Board meetings, regardless of whether the comment is positive or negative. (Belford Tr. at 153:11-155:3, 159:17-25, 161:14-24, 167:10-13, 169:5-13, 171:12-20, 185:10-15.)

to chill or silence speech in a given circumstance," the court rejected the claimant's argument that the policy "was in fact used to silence him." *Id.* The video of the meeting in question showed that the chair of the county planning commission excluded the claimant "because of his refusal to remain on subject and because of Chairman Litton's observation . . . that the discussion was degenerating quickly into a situation which would disrupt the parliamentary order." *Id.* The court therefore concluded that "[a]ll of the evidence in the record is consistent with Chairman Litton's intent to cut off the irrelevant, off-topic discussion, to restore order, and to prevent the meeting from spiraling out of control, as was his right and duty as chair." *Id.* at 387. Therefore, the evidence was "insufficient to prove that Steinburg was silenced because of the policy." *Id.* Instead, the chairman exercised his discretion, which "is precisely what . . . presiding officers may do" in cutting off speech "which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner." *Id.* at 390 (internal quotations omitted). The instant case is much like *Steinburg* in that the Chair utilized her discretion to employ the Policy in a neutral manner to maintain order and decorum at Board meetings, rather than to "silence" Plaintiffs for their viewpoints.

Butler v. State of Michigan, 352 U.S. 380 (1957) involved a defendant charged with violating a statute precluding the sale of books containing

"obscene, immoral, lewd, lascivious language, or descriptions, intending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." *Id.* at 381. The Supreme Court criticized the law as "reduc[ing] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. Obviously, the instant case does not involve the censorship of books. By implementing the Policy, Belford does not seek to "reduce" the adults present at Board meetings to "children." The limited public forum of a school board meeting, at which children are often present, requires the utilization of parameters for the maintenance of decorum—an issue that does not affect adults selecting reading material.

On this note, Plaintiffs dismiss Defendants' assertion that the Policy, and Defendants' application thereof, is intended in part to ensure the suitability of Board meetings for the presence of children.[5] However, "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). The Board has an interest in

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[5] The incongruence of Plaintiffs criticizing Belford's application of the Policy's restriction on "obscene" speech is worth noting. Plaintiffs argue that the MFL member who read from a book purportedly found in a BPS school library did so to denounce the availability of the book to children. However, Plaintiffs apparently believe that the MFL member should have been allowed to read material that MFL finds unfit for children at a meeting at which children were present or watching online.

protecting minors "from exposure to sexually explicit, indecent, or lewd speech." *Id.*

In summary, the case law cited by Plaintiffs does not demonstrate that Plaintiffs engaged in protected speech or that Defendants' application of the Policy violated their constitutional rights. The Court should therefore deny Plaintiffs' Motion for Summary Judgment.

B. Defendants Applied the Policy in a Reasonable and Viewpoint-Neutral Manner.

Plaintiffs frequently expressed a range of viewpoints at Board meetings. They repeatedly challenged the Board's authority to implement policies and the policies themselves, criticized Board members, and addressed issues ranging from schoolbooks to critical race theory. Plaintiffs even spoke on topics as irrelevant as the federal administration and their views on "liberal" beliefs. It was only when Plaintiffs violated the Policy by delivering their comments in a personally directed, abusive, obscene, and/or irrelevant manner that the Chair interrupted their comments. After each interruption, Plaintiffs completed their comments with the sole exception of when the Chair asked Cholewa to leave. On that occasion, Cholewa's conduct actually incited disruption in the audience.

A limited public forum is not "open to the public at large for discussion of any and all topics." *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224

(11th Cir. 2017); *see also Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004) ("As a limited public forum, a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand."). A government may therefore "restrict speech in a limited public forum if the restriction is 'reasonable and viewpoint neutral.'" *Jenner v. Sch. Bd. of Lee Cnty., Fla.*, No. 2:22-cv-85-SPC-NPM, 2022 WL 1747522, *4 (M.D. Fla. May 31, 2022) (quoting *Keister v. Bell*, 29 F.4th 1239, 1252 (11th Cir. 2022)).

Reasonableness "must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985)). "This is a 'forgiving test.'" *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1243 (11th Cir. 2019) (quoting *Minn. Voters All. v. Mansky*, 138 S.Ct. 1876, 1888 (2018)); *see also Keister*, 29 F.4th at 1257 ("The reasonableness standard is not demanding; a restriction on expression is reasonable even if it is not the most reasonable or the only reasonable limitation on expression.") (internal quotations omitted).

As for viewpoint-neutrality, "[a] restriction on speech constitutes viewpoint discrimination when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Vir.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132

L.Ed.2d 700 (1995). In other words, viewpoint discrimination "targets not subject matter, but *particular views* taken by speakers on a subject." *Id.* (emphasis added). Where a facially viewpoint-neutral policy is applied evenhandedly, without regard to the particular message that the speaker seeks to convey, the policy is constitutional as applied. *See Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875, 879 (11th Cir. 2007).

The evidence demonstrates that Defendants apply the Policy in a manner that is both reasonable and viewpoint-neutral. The videos of Board meetings speak for themselves and show that Belford consistently allows Plaintiffs—and any public commenter, for that matter—to voice a wide variety of opinions without interruption. Plaintiffs themselves spoke at least 109 times during Board meetings between January 19, 2021 and October 26, 2021, and were interrupted only four times. Except for the one time when the Chair asked Cholewa to leave a Board meeting, Plaintiffs completed their comments every time they spoke. As this Court already found, the videos show that Belford's "few interruptions" of Plaintiffs "were regularly brief and respectful, and Plaintiffs freely finished speaking." (Doc. 46 at 7.)

On the few occasions when Belford interrupted Plaintiffs, they violated the Policy by making comments that were irrelevant, personally directed, abusive, or obscene. When Cholewa was asked to leave, his comments violated the Policy as irrelevant, abusive, and disruptive. (*See* Doc. 46 at 8.)

Plaintiffs were not the only speakers that Belford occasionally interrupted. The Chair also interrupted other speakers who voiced viewpoints that differed with those presented by Plaintiffs for violating the Policy. (*See* Doc. 20 at ¶¶ 69, 74, 157, 158, 160, 162, 221.)

In *Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875, 879 (11th Cir. 2007), the Eleventh Circuit analyzed whether a mayor unconstitutionally applied a policy against the display of campaign messages in a city council meeting. The court observed that the mayor "restricted the promotional campaign materials evenhandedly, without regard to the particular candidate that was being endorsed," and thus, the mayor's application of the policy was constitutional. *Id.* at 879. Here, too, Defendants applied the Policy without regard to the particular message or viewpoint that public speakers espoused.

Plaintiffs point to instances on which Belford did not interrupt speakers who identified BPS personnel or Board members by name, arguing that such occasions demonstrate Belford's lack of evenhandedness in applying the Policy against "personally directed" comments. However, as Belford testified, she applies the "personally directed" provision of the Policy to comments that either create safety concerns or disclose personal information about individuals—regardless of the viewpoint that the speaker is communicating. (Belford Tr. at 153:11-155:3, 159:17-25, 161:14-24, 167:10-13, 169:5-13, 171:12-20, 185:10-15.) The instances cited by Plaintiffs did not implicate

confidentiality concerns for the named individuals, nor did they impact safety or decorum at the Board meetings. (*Id.* at 188:1-9.)

Even if Belford made the occasional error in applying the Policy, such mistakes do not establish a constitutional violation. *See Jones*, 888 F.2d at 1334 (presiding officers must make "judgment call[s] . . . without the benefit of leisure[ly] reflection," and "[a]n erroneous judgment call on the part of a presiding officer does not automatically give rise to liability for a constitutional tort"). The evidence before the Court demonstrates that any such error was not due to the viewpoint that the speaker in question espoused. Belford regularly applied the Policy to speakers that asserted both positive and negative comments on any side of a given issue. The Constitution does not require Belford to be an automaton that perfectly applies the Policy in every instance, so long as Defendants do not discriminate based on viewpoint.

For these reasons, the Court should find that Defendants applied the policy reasonably and evenhandedly and deny Plaintiffs' Motion.

C. A Reasonable Public Commenter Would Not Fear Punishment for Voicing Her Viewpoints Based on Defendants' Application of the Policy.

Defendants' application of the Policy does not "objectively chill" Plaintiffs' viewpoint expression. *See Speech First*, 32 F.4th at 1121 (analyzing whether discriminatory harassment policy "objectively chills" speech). For the application of the Policy to cause an "objective chill," it must cause a *reasonable*

speaker to fear expressing her viewpoints. *See id.* In this case, Defendants' application of the Policy would not cause a reasonable speaker to fear making public comments at Board meetings.

As discussed above, and as this Court previously found, Belford's interruptions of commenters at Board meetings are rare, respectful, and brief. While Plaintiffs emphasize Belford's reference to § 877.13, Florida Statutes, in her opening remarks at Board meetings, as well as the presence of law enforcement officers at Board meetings, Belford has never asked law enforcement to arrest or charge a public commenter. (*See* Belford Tr. at 58:10-19.) There is no basis in the record for Plaintiffs' purported "fear [of] the threat of criminal prosecution if they violate the Policy." (Doc. 91 at 19.) Plaintiffs did not "suffer[] such adverse actions that would deter a person of ordinary firmness from continuing to assert her First Amendment rights." *Charnley I*, 2015 WL 12999749 at *8. In fact, Plaintiffs' continued public comments at Board meetings demonstrate that they were "undeterred by the purported infringement on [their] speech." *Id.*

Plaintiffs also point to "[t]he Policy's 'imprecision'" in claiming that Defendants unconstitutionally chill their expression. (*Id.* at 20.) This argument goes more toward the facial constitutionality of the Policy rather than to the manner in which it is applied. However, even if this argument were applicable to Plaintiffs' as-applied challenges, the fact that the Policy does not

define the terms "personally directed," "abusive," or "obscene" is "not dispositive" of whether it, or Defendants' application of it, is unconstitutional. *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 980 F.3d 799, 807 (11th Cir. 2020), *cert. denied*, 142 S.Ct. 584 (2021). "When a term is left undefined, 'we normally construe it in accord with its ordinary or natural meaning.'" *Id.* (quoting *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 308 (1994)). These terms are part of the mainstream vernacular and are not legal terms of art. A person of common intelligence can readily discern what "personally directed," "abusive," and "obscene" mean so that they may avoid making comments at Board meetings that the Chair may interrupt or terminate.[6]

Plaintiffs rely on *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021) (a case involving the denial of a building permit), for the proposition that they "should know what is required of them so they may act accordingly." (Doc. 91 at 20.) The portion of *Burns* on which Plaintiffs rely discusses the void-for-vagueness doctrine. *See id.* at 1349. Upon the dismissal of Plaintiffs' vagueness claim, this discussion in *Burns* became inapposite. But even if it still applied to this case, *Burns* does not support Plaintiffs' argument that Defendants apply the Policy in an unconstitutionally imprecise way. Defendants' application of

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[6] For example, the term "abusive" appears repeatedly in the Florida Statutes to prohibit conduct in certain situations, without need for a definition of the term. Presumably, the Florida Legislature believes the term to be commonly understood. *See, e.g.*, §§ 559.72, 1002.20, 1003.04, Fla. Stat. (2022).

the policy is "'not so general as to be unintelligible to any reasonable'" public commenter. *Id.* at 1351 (quoting *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941, 944 (9th Cir. 1996)). In *Burns*, the Eleventh Circuit held that terms such as "harmony" and "compatible" when issuing a building permit are "not vague and arbitrary." Nor are the terms "obscene," "abusive," "irrelevant," or "personally directed." While Plaintiffs, Belford, and other Board members offered slightly different definitions of those terms, all their proposed definitions fell along the same lines.[7] Also, the meaning of such terms is

[7] Plaintiffs do not contest the fact that the only member of the Board who has ever applied the Policy at the Board meetings at issue was Belford. Any interpretations of the Policy by other Board members are irrelevant to Plaintiffs' as applied claims. However, given Plaintiffs' citation to the definitions provided by other Board members, Defendants reference these definitions to show that even on the merits, Plaintiffs' argument fails.

Belford defines "abusive" as "yelling, screaming, profanity" and "calling people names"; "obscene" as "things that are not appropriate for young children" and "profane"; and "personally directed" as comments that disclose personal information of an absent person or implicate the safety or decorum of Board meetings. (Belford Tr. at 153:11-155:3, 155:6-8, 156:22-24, 157:24-158:1, 159:17-25, 161:14-24, 167:10-13, 169:5-13, 171:12-20, 185:10-15.) Hall described the term "abusive" with an exemplar, stating, "We want to make sure that we are respectful; we are not using terms that will be inflammatory." (Hall Tr. at 13:3-5.) Cholewa defined "abusive" as "any type of threat that insinuates harm"; "obscene" as "cursing, pornographic," and "irrelevant" as not "pertain[ing] to issues that are school related." (Cholewa Tr. at 13:8-17.) Board member Cheryl McDougall defined "abusive" as "being aggressive, . . . using foul language, . . . using derogatory terms"; "obscene" as "using derogatory terms, having negative connotations of maybe some sexual connotations, negative connotations of a person's maybe gender, negative connotations of the person themselves"; and "personally directed" as "when you focus your comments to an individual, not the whole board". (McDougall Tr. at 38:12-13, 40:18-20, 41:3-7.) Board member Katye Campbell defined "abusive" as "foul language, but not necessarily insulting someone"; "obscene" as "foul language and highly inappropriate topics . . . [s]exual topics in particular"; and "personally directed" as "a comment that's made directly to a person." (Campbell Tr. at 42:7-12, 42:19-43:7.) Board member Matt Susin defined "abusive" as using a public speaking opportunity "to just attack, and to use it as an opportunity to say untrue things"; "obscene" as "anything that is pornographic in nature"; and "personally directed" as "a personally directed comment" to someone who may or may not be present. (Susin Tr. at 59:19-60:6, 62:9-13, 65:18-23.) Board member Jennifer Jenkins defined "abusive" as "something that is harassment, threats,

apparently clear enough to be included in the MFL Code of Conduct, which prohibits MFL members from engaging in behavior that is "abusive, offensive, or harassing." (Hall Tr. Ex. 1 at 1.)

In summary, Plaintiffs fail to demonstrate that the manner in which Defendants apply the Policy objectively chills their speech. As a result, the Court should deny Plaintiffs' Motion for Summary Judgment.

CONCLUSION

The handful of interruptions of Plaintiffs' public comments resulted from Plaintiffs' violations of the constitutional Policy and are not protected. However, even if Plaintiffs' violations of the Policy were protected, Defendants apply the Policy in a reasonable and viewpoint-neutral manner. Furthermore, Plaintiffs are unable to demonstrate that Defendants' application of the Policy objectively chills their speech. For these reasons, Plaintiffs' Motion for Summary Judgment is due to be denied.

WHEREFORE, Defendants respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 22nd day of September, 2022.

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aggressive"; and "personally directed" as "when you are calling out somebody by name" whether the person is present or not. (Jenkins Tr. at 53:3-7, 53:25-54:3, 54:7-11.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 2022, 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:

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