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First Amendment Liability Concerns for Disruptive Public Meetings

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The intent of this presentation is to provide the local government attorney with a better understanding of public comment policies and practices and the limitation imposed by the First and Fourteenth Amendments to the U.S. Constitution.

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The test of whether government has unconstitutionally "abridged the freedom of speech" depends on the forum where the speech occurred. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n. 11, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018).

PUBLIC FORUMS

In determining whether a limitation on speech is permissible under the First Amendment, courts apply a forum analysis. *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020). The U.S. Supreme Court has recognized four types of public forums for First Amendment purposes: nonpublic[1], public, designated public, and limited public. *Hartman v. Thompson*, 931 F.3d 471, 478 (6th Cir. 2019) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009)).

A "quintessential public forum," is typically described as government-controlled property such as public streets and parks, where members of the public retain strong free speech rights. Likewise, a government entity creates a designated public forum when it intentionally designates property that traditionally has not been regarded as a public forum for use as a public forum. *Southersby Dev. Corp. v. Borough of Jefferson Hills*, 852 F. Supp. 2d 616 (W.D. Pa. 2012). An example of a designated public forum is holding a public hearing where the public is invited to come and give comment and where comments can be limited to solely

[1] Non-public fora, for First Amendment purposes, encompasses government-owned property that hasn't been opened to the public for expressive activity; non-public fora include, but are not limited to, airport terminals, military bases, and jails. *McDonald v. City of Pompano Beach, Florida*, 20-60297-CIV, 2021 WL 3741646 (S.D. Fla. Aug. 24, 2021)

one topic. Holding a public meeting creates constitutional rights to attend and record under the First Amendment and recent caselaw.

If a regular meeting agenda includes an opportunity for the public to comment on items not on the agenda (e.g. a "Public Comment" section), a limited public forum is created. Limited public forums exist where the government "makes its property generally available to a certain class of speakers." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). Content-based restrictions are permissible in a limited public forum, but viewpoint-based restrictions are not. That is, in a limited public forum a speaker can be limited to speaking about a particular topic but not limited to speaking in favor or against it.

Generally, public testimony at governing body meetings is given in limited public forums. Governing bodies are afforded greater freedom to restrict speech in limited public forums. *American Freedom Defense Initiative v. Suburban Mobility*, 978 F.3d 481, 491 (6th Cir. 2020), and may apply restrictions to the time, place, and manner of speech so long as those restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020). Access may be restricted by the government, without violating the First Amendment, by content-neutral conditions for the time, place, and manner of access, as long as these conditions are narrowly tailored to serve some significant government interest. *Harris v. City of Valdosta, Ga*., 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

The furtherance of the government's purpose of conducting orderly, efficient, and productive meetings has been deemed a satisfactory governmental interest to justify curtailing certain free speech. See *Davis v. Colerain Twp.,* 119CV00455WOBSKB, 2021 WL 3271792 (S.D. Ohio July 30, 2021), and *Harris v. City of Valdosta, Ga.,* 616 F. Supp. 2d 1310 (M.D. Ga. 2009) (There is a "significant governmental interest," of kind sufficient to support content-neutral time, place and manner restrictions, in conducting orderly, efficient meetings of public bodies.)

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Regulations that serve purposes unrelated to the content of the expression is deemed neutral, even if they have an incidental effect on some speakers or messages but not others. *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187 (D. Conn. 2005). Content restrictions are allowed in limited public forums even though directed at the content of the message. For example, comments may be restricted to items not already on the agenda. Similarly, policies on employee complaints can be invoked to keep people from addressing a governing body during public comment. *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187 (D. Conn. 2005) (First selectman of town board of selectman did not deprive citizen of constitutionally protected liberty interest at board meeting, for purpose of citizen's civil rights procedural due process claim, by preventing citizen from

commenting on possible unethical conduct of high-level town employee during unrestricted "public comment" portion of regularly scheduled meeting. While not articulated well at the meeting, the reason the citizen was not allowed to make allegations against an employee at the board meeting was due to the rights of an employee covered by a collective bargaining agreement to challenge claims of employment misconduct before discipline could be applied to him.)

Content restrictions in a *limited* public form, such a public hearing, are also allowed. *American Freedom Defense Initiative*, 978 F.3d at 491 (If the speech falls outside the purview of the topic, then a government can restrict speech if the restriction is "reasonable" and viewpoint neutral).

Once the government opens the debate, it may only "regulate features of speech unrelated to its content" through reasonable "time, place, or manner" restrictions only. *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014). Any restriction or exclusion must be reasonable in light of the purpose served by the forum and viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806 (1985)

Viewpoint discrimination in limited public forums is wholly impermissible and never allowed. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021). The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. *Cornelius,* 473 U.S. at 811.

TIME, PLACE AND MANNER REGULATIONS

Time.

Allowing for "public comment" agenda items doesn't require a public board to allow every angry person to "comment," however. When government creates a designated or limited public forum, for First Amendment purposes, it is not required to indefinitely retain open character of facility. *McDonald v. City of Pompano Beach, Florida*, 20-60297-CIV, 2021 WL 3741646 (S.D. Fla. Aug. 24, 2021). Limiting the total time devoted for public comment as well as limiting the time of each speaker to three minutes has been deemed a reasonable time restriction. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007).

Place (on the agenda)

Content-related restrictions on speech in public meetings have been upheld when the speaker is meant to speak only during a specific part of the agenda but wanders off topic into free expression. If you ask someone to lead the public body in the pledge of allegiance and they go off-script, the chair can cut them off. Only the "public comment" portion of the meeting provides a limited public forum for purposes of free speech. In *Gundy v. City of Jacksonville Florida*, 528 F. Supp. 3d 1257 (M.D. Fla. 2021), the council president appropriately interrupted

a pastor and turned off the pastor's microphone during the prayer invocation at a council meeting when the pastor started to criticize the council and mayor. The action was not deemed to be viewpoint discrimination, as would support municipal liability under § 1983 for violating the pastor's right to free speech, because the action was sought to preserve the invocation's intended purpose of solemnizing the proceedings by inviting lawmakers to reflect upon shared ideals and common ends. Asking the pastor to "keep it spiritual," was consistent with the municipality's viewpoint-neutral policy on invocations.

Manner.

While restrictions on speech in a limited public forum necessary for the orderly conduct of business have been deemed reasonable, when the restrictions become viewpoint-based and/or are applied in a heavy handed or ham-fisted manner, courts tend to look unfavorably on the policy itself. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is ... blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

You can enforce time restrictions on speakers by turning off the microphone when their time has expired, but don't name the cut-off switch after a particular gadfly. In *Zinna v. Bd. of Cty. Comm'rs of Cty. Of Jefferson*, CIV.A.05-CV-01016-RP, 2008 WL 2185907 (D. Colo. May 23, 2008), a County Commissioner who was the subject of "investigative journalism" by Mr. Zinna directed County resources toward research on Zinna's background and a private investigator to report on Zinna, sheriff's officers began following Zinna, and the county commissioner muted Zinna's microphone at a public meeting, naming the kill switch after him. (Zinna also suspected that the website ColoradoWackoExposed.com "ColoradoWacko" was launched with the support of county officials. This website included a mugshot of Zinna, his criminal history, a list of civil judgments against him, a warning not to engage in business with him, and a note encouraging Zinna's girlfriend to "move on." Apparently to ensure that the information was received as intended, several of Zinna's friends and business associates were also sent anonymous packages containing paper copies of the materials posted on the ColoradoWacko website.) *Zinna v. Congrove*, 680 F.3d 1236, 1238 (10th Cir. 2012). Despite all of this, a jury only awarded Zinna $1709 in damages and $8000 in attorneys' fees, despite his claim for $503,000 in fees and damages.

One of the most challenging aspects of this from the attorney's perspective is that the rules are managed by the presiding officer. Cutting off a person when time is up is easier when the presiding officer disagrees with the person. It is human

nature to allow people making positive or innocuous comments go one while muting those shouting at the board.

SPECIFIC POLICIES and REGULATIONS

Content-related Restrictions

As previously stated, content-related restrictions are allowed during public hearings on a specific topic. That is, public comment can be confined to the matter being heard. Limiting comments and discussion that may likely "wander from the subject in question and unduly prolong the meeting" is a judgment call that a presiding officer and parliamentarian must make without the benefit of leisure reflection." *Jones v, Heyman*, 888 F.2d 1328, 1334 (11th cir. 1989).

Prohibiting public comment about matters under current litigation is also okay, even if the rule is imposed after the litigation has begun. *Weinberg v. Vill. of Clayton, New York*, 537 F. Supp. 3d 344 (N.D.N.Y. 2021) (Rule deemed viewpoint neutral and reasonable for a limited public forum as it did not selectively silence any particular view or message.)

Likewise, prohibitions regarding allegation of employee misconduct are allowed where there is a policy addressing how employee complaints are handled. *Piscottano v. Town of Somers*, 396 F. Supp. 2d 187 (D. Conn. 2005).

Subjective Restrictions

Public participation rules for township meetings disallowing "profane", "disrespectful", or "threatening" language have been deemed viewpoint-neutral and reasonable restrictions by a township where the speaker merely asked to stop speaking disrespectfully, policy invited residents to present critical comments so long as they were not done in a disruptive manner, and policy furthered the government's purpose of conducting orderly, efficient, and productive meetings. *Davis v. Colerain Twp.,* 119CV00455WOBSKB, 2021 WL 3271792 (S.D. Ohio July 30, 2021).

But prohibition of "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate," or "personally-directed" comments" have not passed constitutional scrutiny. In *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021), the school board (NOTE – a disproportionate amount of these First Amendment cases involve school boards…) had a rule (Policy 903) that prohibited "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate," or "personally-directed" comments from the public. Positive comments about the board were of course allowed. The school board's solicitor cut off certain speakers/plaintiffs solely because, in his opinion, their comments were "irrelevant" and "abusive." The Federal District Court hearing the motion for injunction against enforcement of Policy 903 stated that, "The government

must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Likewise, restrictions prohibiting speech that is "offensive," have been deemed unconstitutional. The Supreme Court has specifically held that prohibiting "offensive" speech is an unconstitutional restriction on protected speech. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300, 204 L.Ed.2d 714 (2019); *see also Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") Similarly, the Supreme Court has also found the term "abusive" overly broad in other contexts, reaching conduct outside the "fighting words" category of unprotected speech. *Gooding v. Wilson*, 405 U.S. 518, 525, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). The phrases "intolerant," "inappropriate" and "otherwise inappropriate" would appear to thwart even more protected speech than "abusive." *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *7 (E.D. Pa. Nov. 17, 2021).

A somewhat contrary opinion came out of the Southern District of Ohio in *Davis v. Colerain Twp.,* 119CV00455WOBSKB, 2021 WL 3271792 (S.D. Ohio July 30, 2021) that same year when that court deemed a policy disallowing "inappropriate, offensive, hateful, or racist speech" and rules of public participation for township meetings disallowing disrespectful speech not to significantly compromise recognized First Amendment protections.

But consider the facts of *Davis* versus facts of *Marshall.* How the speakers are treated seems to have something to do with the outcome of the case.

Marshall involved a school board, and worse, its attorney, prohibiting people from commenting for the fully allotted five minutes at public meetings if their comments were deemed to violate the school board's Policy 903 prohibiting "abusive," "irrelevant," "offensive," "intolerant," or "inappropriate," comments or comments "personally-directed" at board members. After being told by the board's attorney that they "were done" at one meeting, the plaintiffs were allowed to speak for their full five minutes at future meetings, but there was a police presence that the Plaintiffs argued chilled their free speech. They sought an injunction from the Court barring the school board from enforcing Policy 903.

The school board argued at trial that it had to continue enforcing its rule because "allowing such speech would undoubtedly lead to violence, etc., which does not occur now as a result of the limited application of [Policy 903] by the District." However, the District provided no evidence to support its assessment that the requested relief would "undoubtedly" cause "violence, etc." and the Court pointed out that the primary instances in which speakers became heated at the school

board meetings involved yelling by Board representatives over the disputed invocations of the Policy over "disruptive" or "abusive" or "offensive" speech when it was deemed critical of the board. It was the Court's opinion that the requested injunctive relief could actually *decrease* the risk of violence at the meetings and granted the preliminary injunction enjoining the District from enforcing the specifically challenged Policy terms (not all of them, just the problematic ones). Terms that were not challenged were the prohibition of "obscene" comments, the "reasonable decorum" requirement, or the requirement to notify law enforcement of threats. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *10 (E.D. Pa. Nov. 17, 2021)

In *Davis* – not a school board case - the Rules of Public Participation for public meetings stated that "[t]he use of profane, disrespectful, or threatening language or gestures will not be tolerated." If a citizen's comment is declared disruptive by a member of the Board, then a majority of the Board may consent to law enforcement escorting the citizen from the meeting. Ms. Davis was upset about a video she posted being removed by the Police Department's Facebook page, and from being told that she could not make "disrespectful" comments during a public meeting. Unlike the plaintiffs in *Marshall*, however, the Board in *Davis* did not use their policy to prevent Davis from speaking at the public portions of its meetings, but merely told her to stop speaking disrespectfully at several meetings. *Davis v. Colerain Twp.,* 119CV00455WOBSKB, 2021 WL 3271792, at *5 (S.D. Ohio July 30, 2021).

The *Davis* court also differed from the decision of the 6th Circuit Court of Appeals in *Ison v. Madison Local Sch. Dist. Bd. of Educ.,* 3 F.4th 887, 891 (6th Cir. 2021). In *Ison* - yet another school board case - the policy authorized the presiding officer to:

> 1. prohibit public comments that are frivolous, repetitive, and/or harassing;
> 2. interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, off-topic, antagonistic, obscene, or irrelevant;
> 3. request any individual to leave the meeting when that person does not observe reasonable decorum; [and]
> 4. request the assistance of law enforcement officers in the removal of a disorderly person when that person's conduct interferes with the orderly progress of the meeting.

The 6th Circuit held that the school board's restrictions on "abusive," "personally directed," and "antagonist" statements were unconstitutionally viewpoint based in accordance with two recent Supreme Court cases, *Matal v. Tam,* 137 S. Ct. 1744, 198 L.Ed.2d 366 (2017) and *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300, 204 L.Ed.2d 714 (2019), involving trademark restrictions that "impermissibly

distinguished between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." In short, the 6th Circuit held that *Matal* and *Iancu* stand for the proposition that the government may not censor speech merely because it is "offensive to some." Matal, 137 S. Ct. at 1763 (quoting Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)).

Signs

Signs, so long as they don't block anyone's view, should be welcomed. They are most certainly free speech, and holding a sign enables a speaker to express their view without the need to take up precious time at the podium.

Not surprisingly, the school board in *Marshall* prohibited signs, placards, or banners that were "offensive, obscene or otherwise inappropriate… or that contain personal attacks" ed. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *1 (E.D. Pa. Nov. 17, 2021).

Powerpoints and Video Broadcasts

If within time limits and not obscene or otherwise violative of any reasonable rule or regulation, better off allowing them than litigating it. If a jurisdiction allows video broadcast, there is the risk of "zoom bombing." See, e.g., *Profanity-laced Zoom bombing disrupts Granite Shoals City Council meeting,* DailyTrib, October 29, 2021, (available at https://www.dailytrib.com/2021/10/29/profanity-laced-zoom-bombing-disrupts-granite-shoals-city-council-meeting/); *Pornographic 'Zoom bomb' disrupts West Springfield Town Council meeting,* MassLive, May 5, 2021 (available at https://www.masslive.com/news/2021/05/pornographic-zoom-bomb-disrupts-west-springfield-city-council-meeting.html); *'Zoombombing' attack interrupts a live Spartanburg city council meeting,* WYFF4, September 15, 2021 (available at https://www.wyff4.com/article/zoombombing-attack-interrupts-spartanburg-city-council-meeting/37608559#). While it is possible for a jurisdiction to cut off the broadcast of inappropriate material, this would place a government employee in the position of judging what is or is not appropriate. This raises the risk of first amendment liability.

Video Recording

Prohibitions of recording meetings and livestreaming (for safety reasons ostensibly) could be both a pre-emption of the right of access (recording) and the right of expression (livestreaming with contemporaneous comments). *Knight v. Montgomery Cty., Tennessee,* 470 F. Supp. 3d 760, 762 (M.D. Tenn. 2020) (remanded); *Zink v. City of Mesa*, 17 Wash. App. 2d 701, 710, 487 P.3d 902, 907, reconsideration granted in part (July 15, 2021), review denied, 198 Wash. 2d

1029, 498 P.3d 961 (2021)(prohibition on video recording violated state open meetings law).

Requiring Speakers to Provide Their Address

Requiring a speaker to state their name and address has been held impermissible. *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021) In *Marshall,* the school board policy which required attendees of board meetings to publicly state their home address before speaking during period for public comment was found to be facially invalid under Free Speech Clause, since being forced to announce to all present attendee's actual home address before speaking on hotly contested issue had chilling effect on protected speech. The court went as far as to say that "The right to free speech encompasses the right to refrain from speaking," and that "compelled speech is subject to same analysis as prohibitions from speaking."

DUE PROCESS - POLICY AND ITS APPLICATION

Due Process

The Due Process Clause states, "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. An alleged violation of the procedural due process required by this clause prompts a two-step inquiry: (1) whether the plaintiff has shown the deprivation of an interest in "life, liberty, or property" and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with "due process of law." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

Violating anyone's rights under the state or federal constitution is also a violation of substantive due process under the 14th Amendment. Substantive due process claims brought under the Fourteenth Amendment, however, survive only where no other specific constitutional amendment explicitly protects against the conduct alleged. *Graham v. Connor*, 490 U.S. 386, 395 (1989). *Bralley v. Albuquerque Pub. Sch. Bd. of Educ.,* 13-CV-0768 JB/SMV, 2015 WL 13650553, at *1 (D.N.M. Oct. 7, 2015), report and recommendation adopted, CIV 13-0768 JB/SMV, 2016 WL 10590454 (D.N.M. Mar. 15, 2016) (Claims for alleged violation of Plaintiff's substantive due process right under the Fourteenth Amendment should be dismissed because they already have been or should be analyzed under the applicable, specific constitutional amendments and not under the Fourteenth Amendment.)

Substantive due process does not protect against government action that is incorrect or ill-advised; rather, the protections of substantive due process are

available only against **egregious conduct which goes beyond merely offending some fastidious squeamishness or private sentimentalism and can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience**. *Piscottano v. Town of Somers,* 396 F. Supp. 2d 187 (D. Conn. 2005).

Prohibitions on disruptive, disrespectful speech and conduct are reasonable restrictions meant to further the government's significant interest in conducting orderly, efficient, and productive meetings. But, before you adopt such language in a policy, counsel your elected board well on implementation, starting with the fact that the First Amendment protects offensive speakers. The Policy terms invoked to terminate the offensive comments ("abusive" and "personally directed") "prohibit speech purely because it disparages or offends." *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 894 (6th Cir. 2021); *see also Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("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.").

Applying a policy prohibiting "disrespectful" speech with a heavy hand can land a public body in court. Courts acknowledge that it is impossible to conduct a meeting when people are shouting at each other or when someone won't leave the podium so that the next item on the agenda can be addressed. However, if the microphone is cut off or someone told to leave or is removed solely because of what is being said (or expressed) versus how it is being said or how many times it is being said, trouble can arise. See *Marshall v. Amuso*, CV 21-4336, 2021 WL 5359020, at *6 (E.D. Pa. Nov. 17, 2021). The meeting in *Marshall* that gave partial rise to the lawsuit against the school board was clearly shows that the Plaintiff, Mr. Marshall, was not being disruptive, but was speaking in a normal tone of voice and the only person doing the interrupting was the board's solicitor who cut him off and told him that he "was done" and that he was being "disruptive" or "irrelevant" solely because he called the "equity survey" by the wrong name. Because the evidence showed that the School Board applied the term "disruptive" to disruptive *ideas* rather than disruptive *conduct*, viewpoint discrimination was found to have occurred.

Discretion in applying public speaking policies "must be guided by objective, workable standards" to avoid the moderator's own beliefs shaping his or her "views on what counts" as a policy violation. *Marshall,* citing *Minnesota Voters All. v. Mansky,* 138 S. Ct. 1876, 1888, 201 L.Ed.2d 201 (2018). Despite the policy in *Marshall* expressly requiring the development of "administrative guidelines implementing this policy" including "examples of conduct/behavior that is in violation of this policy," the School Board had not developed any such guidelines.

As important as knowing what the policy is and conducting training or providing examples is following it. In *Marshall,* the school board solicitor didn't follow the board's own policy, which says in essence that [only] "The Board's presiding

officer may interrupt or terminate public comments deemed "too lengthy, personally directed, abusive, obscene, or irrelevant..." and that the presiding officer may also "[r]equest any individual to leave the meeting when that person does not observe reasonable decorum." Instead, it was the School Board's attorney who appointed himself presiding officer and enforcer of the rule on public speakers and cut the plaintiffs off, telling them they "were done."

Arrest.

Under the fourth amendment, an arrest must be supported by probable cause. *Manuel v. City of Joliet, Ill*., 137 S. Ct. 911, 918, 197 L. Ed. 2d 312 (2017). Generally, council rules of procedure do not have the force of law. If a person is arrested for violating a rule, there must be a clearly articulable criminal violation. *See, e.g., Norse v. City of Santa Cruz,* 629 F.3d 966 (9th Cir. 2010)(en banc)(Probable cause for arrest of an individual who gave a Nazi salute at a council meeting existed under California Penal Code § 903 prohibiting disturbance of a public meeting); *Jones v. Heyman*, 888 F.2d 1328, 1329 (11th Cir. 1989)(probable cause existed for violation of a municipal ordinance prohibiting disruption of city commission meetings); *Com. v. Franklin*, 2013 PA Super 153, 69 A.3d 719, 724 (2013)(probable cause existed to arrest for disorderly conduct). The existence of probable cause will not a preclude a claim for first amendment retaliation if there was an actual conspiracy to suppress a person's speech. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1955, 201 L. Ed. 2d 342 (2018)

Curtailing First Amendment Rights of Other Board Members or Employees

Municipal employees and elected official do not relinquish their citizenship when they take on those roles, so they cannot be denied their constitutional right to speak. *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976). "Speech by citizen on matters of public concern lies at the heart of the First Amendment, and public employees do not renounce their citizenship when they accept employment." *Knopf v. Williams*, 884 F.3d 939, 952 (10th Cir. 2018).

But there are rules for how much an elected official gets to pontificate.

> ROBERTS RULES: Unless the assembly has a special rule providing otherwise, no member can speak more than twice to the same question on the same day.... Merely asking a question or making a brief suggestion is not counted as speaking in debate....

Consider this exchange:

> Council President Tarlini: Excuse me, Mr. Mobley. In the Robert's Rules of Order, each Council person is allowed to speak twice on the same subject.
> Board Member Mobley: That's not true.
> Council President Tarlini: It is true.
> Board Member Mobley: (looking to solicitor) Russ, can you give me an opinion on that, please?[3]
> Council President Tarlini: Mr. Mobley. Mr. Mobley, I have the floor at the moment. I'll tell you what it says.
> Board Member Mobley: Dictatorship all over again. [applause in the background]
> Council President Tarlini: Mr. Mobley, I'm reading from the Robert's Rules of Order.
> Board Member Mobley: It's amazing, Linda. When you want to speak, you always had your opportunity to speak ...
> Council President Tarlini then turned off Mobley's microphone "solely because he attempted to speak for a third time regarding the same motion," in violation of Robert's Rules, and not because of any personal animosity or because of the content of his speech, and certainly not because they were running for election against each other.

After a *unanimous* vote approving the motion, Plaintiff filed a Complaint three weeks later, alleging that the Council President's action in turning off his microphone violated his right to free speech under the First Amendment, his right to petition under the First Amendment, constituted official oppression and intimidation, denied him equal treatment in violation of the Fourteenth Amendment, and violated his state constitutional right of free speech under Article I, Section 7 of the Pennsylvania Constitution. *Mobley v. Tarlini*, 641 F. Supp. 2d 430 (E.D. Pa. 2009).

The U.S. District Court for the Eastern District of Pennsylvania ruled that his claims that switching off his microphone amounted to intimidation, oppression, and retaliation for exercising his free speech rights was sufficient to state claim for First Amendment retaliation. *Mobley v. Tarlini*, 641 F. Supp. 2d 430 (E.D. Pa. 2009). However, the Court also held that the town Council President's restriction on the councilman's ability to speak during portion of council meeting dedicated to council discussion, pursuant to rule of order limiting members to speaking no more than twice on same issue in same day, was a content-neutral and permissible restriction on councilman's ability to speak in limited public forum. *Mobley v. Tarlini*, 641 F. Supp. 2d 430 (E.D. Pa. 2009).

What about a board member speaking about a "matter of public concern"? A reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983. *Wilson v. Houston Cmty. Coll. Sys*., 955 F.3d 490 (5th Cir. 2020), cert. granted, 141 S. Ct. 2564 (2021). Supreme Court heard argument on this November of last year. The case involves a member of board of trustees for public community college district,

alleging that board publicly censured him for criticizing other board members for taking positions that differed from his own concerning an overseas campus, including criticism in robocalls, local press interviews, and a website, and for filing a suit alleging that board was violating its bylaws.

LIABILITY

Government officials performing discretionary functions are generally immune from liability for civil damages so long as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harris v. City of Valdosta, Ga.*, 616 F. Supp. 2d 1310 (M.D. Ga. 2009).

A municipality may be held liable under § 1983 if the plaintiff shows that a "custom" or "policy" of the municipality was the moving force behind the constitutional deprivation. but a municipality may not be held liable under § 1983 on the basis of respondeat superior. 42 U.S.C.A. § 1983. *Harris*. Official municipal policy, as required for § 1983 liability, includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. 42 U.S.C.A. § 1983. *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020)

Punitive damages are not available in § 1983 actions against municipalities and other government entities. 42 U.S.C.A. § 1983. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020), cert. granted, 141 S. Ct. 2564 (2021)

The burden of proof is on the public body, as opposed to the plaintiff. A speech regulation's defender, not the challenger, bears the burden on the issue of narrow tailoring of regulation to serve a significant government interest, as required by the First Amendment. *Knight v. Montgomery Cty., Tennessee*, 470 F. Supp. 3d 760 (M.D. Tenn. 2020).

CONCLUSION

There is a liberty interest in attending public meetings, and both designated and limited public forums are created at them, allowing for free speech.

Free speech at public meetings can be "abridged by a governmental body so long as any regulations placed on speech are within the constitutional power of the governmental body, and further an important governmental interest in conducting business in an orderly fashion. Reasonable time (limit) place (podium/agenda) and manner (no disruption of the meeting) restrictions are allowed.

A governmental body should have a policy and should follow it. The body can ignore it if it wishes, but only in favor of free speech.

Don’t adopt policies that prohibit “abusive” or “offensive” speech. “Disruptive” is okay, though, because it gets at the legitimate governmental interest in not have the orderly conduct of business disrupted. Any restrictions that are not directed at disruptive conduct or the orderly administration of the meeting are subject to challenge, and depending on the case and how it is applied, can be shot down.

Counsel your board members and presiding officers on how and how NOT to implement the policy during a meeting.

Don’t forcibly remove anyone from a meeting without probable cause to arrest them. The conduct, as opposed to the speech, must be really disruptive or threatening, not just obnoxious, annoying, or even disrespectful. Thick skins safe taxpayer money.

If someone is kicked out of a meeting, don’t ban them from future meetings unless there is probable cause for a restraining order.