IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

MARCH FOR OUR LIVES FLORIDA; the **FLORIDA STUDENT POWER NETWORK**; **DREAM DEFENDERS**; **KINSEY AKERS**, through her next friends **CHARLIE** and **KIRSTEN AKERS**; **ARYANA BROWN**, through her next friend **CASSANDRA BROWN**, **DAVID CAICEDO**; **COURTNEY PETERS**; and **CHRISTOPHER ZOELLER**,
Plaintiffs,

Case No. 2020-CA-000075

THE MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY COMMISSION,

Defendant.

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OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs are individuals and organizations who wish to exercise their fundamental right under the Florida Constitution to participate in the decision-making process of their government. Defendant Marjory Stoneman Douglas High School Public Safety Commission denied them that right in two ways: First, it held a public meeting in a remote luxury resort that was expensive and time-consuming to reach for most Plaintiffs and that posted unreasonably high parking fees, which deterred members of the organizational Plaintiffs and the public from attending. This violated Section 286.011, Florida Statutes, which requires public bodies to hold meetings in places where members of the public have a "reasonable opportunity" to attend and prohibits them from holding meetings at any facility which discriminates on the basis of economic status or operates in such a manner as to unreasonably restrict public access. Second, Plaintiffs were

misled by the Commission's actions: publicizing in advance of and throughout the meeting one time for public comment, on which Plaintiffs relied, but then actually taking comments hours earlier, before Plaintiffs arrived. This denied Plaintiffs the "reasonable opportunity to be heard" guaranteed by Section 286.0114, Florida Statutes.

Plaintiffs filed suit to ensure that this does not happen again and to vindicate the core purpose of Florida's open meetings laws and the open meetings provision of its constitution: to ensure that government business is transacted in the light and with public input. The Commission's motion to dismiss, in contrast, urges this court to adopt a cramped and perverse interpretation of Sections 286.011 and 286.0114. It asks the Court to rule that public bodies can hold meetings in remote locations, far from all but a few of the people they serve, even when more centrally-located and publicly-accessible facilities are available. It asks the Court to rule that public bodies can charge exorbitant amounts—several times Florida's hourly minimum wage—for parking. It asks the Court to rule that public bodies require that members of the public miss school and work to sit through days of testimony on matters unrelated to their concerns in order to exercise their right to make a three-minute comment on the matters that do concern them. And, last but not least, it asks the Court to rule that public bodies can announce times for public comment and then, when members of the public rely on those announcements, perform a bait-and-switch, taking comments hours earlier without any prior notice of the change.

Plaintiffs respectfully request that the Court reject all of these propositions because they are inconsistent with the state's open government laws. Those laws were passed to protect "[t]he right of the public to be present and to be heard during all phases of enactments by boards and commissions … to maintain the faith of the public in governmental agencies." *Bd. of Pub. Instruction of Broward Cty. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). Plaintiffs ask the Court

only to give effect to that purpose by allowing them to proceed with their case and, if they prove the allegations in their complaint, ensure that the Commission is open to the public and the public's comments in future meetings. Doing so will protect not only Plaintiffs' interests but also those of all members of the public in Florida who wish to participate in their government's decision-making.

II. BACKGROUND

After the tragic events at Marjory Stoneman Douglas High School in 2018, the Florida Legislature created the Marjory Stoneman Douglas High School Public Safety Commission to investigate the shooting and develop school safety policies to prevent it from reoccurring. Amended Complaint ("Compl.") ¶ 31. In 2018, the Commission held seven public meetings to develop its first set of recommendations, which it made in a report before the 2018-19 legislative session. Compl. ¶ 40. In 2019, it held another six meetings before submitting its report for the 2019-2020 session. *Id.* Plaintiffs are individuals and youth groups who felt the impact of the Commission's recommendations directly and wished to influence them. Compl. ¶¶ 18-25.

The Commission held its most recent public meeting at the Omni Orlando Resort at ChampionsGate, a secluded "Four Diamond" resort and golf destination, on October 15 and 16 2019. Compl. ¶ 41. The resort is in a semi-rural area 30 miles from Orlando and a 30-60-minute drive by a toll road from the city. Compl. ¶¶ 42-43. It cannot be reached by public transit and charges $18 to $32 per day for parking. Compl. ¶¶ 44, 49. While this fee could be waived for attendees at the meeting, that fact was not publicly disclosed by the Commission except in-person to people who had already parked and risked (as far as they knew) paying it and then thought to ask Commission staff if parking could be validated. Compl. ¶¶ 49-51.

Hence, as far as any member of the public knew, the only guaranteed way to attend the meeting was either to drive to it (over a toll road if coming from Orlando) and pay between $18

and $32 per day for parking, or to pay a comparable amount, if not more, for rides to and from the resort. Eighteen dollars is more than twice Florida's minimum wage of $8.56 an hour and $32 is nearly four times that amount.[1] Thus, a member of the public earning minimum wage could, as far as they knew, only attend the meeting by committing 4 to 8 hours of earnings just for parking, in addition to other transportation costs and the expense of missing two full days of work. The Commission could have held its meeting at similarly-priced and more-accessible hotels. Compl. ¶ 48. And it did not consider holding the meeting at an accessible public facility such as a school, library, or university. Compl. ¶ 60. The organizational plaintiffs had members who were prevented from attending the meeting, and providing comment, by its location. Compl. ¶ 54.

The Orlando meeting was for the purpose of preparing the Commission's report making legislative recommendations for the 2020 legislative session and it was the public's last opportunity to comment before those recommendations were finalized. Compl. ¶¶ 42, 92-94. The agenda for the meeting specified that public comments could be made to the Commission on October 16 at 4:45 p.m. Compl. ¶ 77. The Commission, however, announced at 2:00 p.m. that it had finished its other work and would take public comments immediately, instead of at the regularly-scheduled time. Compl. ¶ 79. Some of the few people who were there and ready to comment at that time asked the Commission to honor its posted agenda and take comments at 4:45 p.m. Compl. ¶ 81. Nonetheless, the Commission ignored them and ended its proceedings while most of the people who planned to comment were still *en route*. Compl. ¶ 82.

The individual plaintiffs, Kinsey Akers, Christopher Zoeller, David Caicedo, Aryana Brown, and Courtney Peters would all have arrived at the hearing well in advance of 4:45 p.m.

[1] *See* United States Department of Labor, State Minimum Wage Laws: Florida, (Jan 1., 2020), https://www.dol.gov/agencies/whd/minimum-wage/state#fl.

Compl. ¶ 83. Some were already *en route* when they learned of the Commission's changed time, while others had not yet left their homes. *Id.* One plaintiff, Kinsey Akers, lived just minutes away from the resort, but still did not have time to make it there to testify in time after the Commission announced the sudden change of time. *Id.*

Plaintiffs were denied the opportunity to provide the Commission with important information that could have helped it shape its recommendations for the 2020 legislative session. For example, Plaintiff Kinsey Akers, a current high school student, wanted to share her negative experience with an unstable teacher, who could have endangered students' lives had he been allowed to carry a gun on campus, a policy the Commission has advocated. *Id.* Plaintiff Aryana Brown, also a current high school student, intended to testify about the dangers of over-policing to youth in schools. And Plaintiff Courtney Peters, an organizer with Dream Defenders, an organization that represents the needs and concerns of youth of color, intended to testify about how some of the Commission's prior recommendations put children of color at greater risk of police violence.

Plaintiffs therefore brought a two-count complaint seeking to prevent what occurred at the October meeting from happening in the future. The First Cause of Action alleges violations of Section 286.011, Florida Statues, which provides:

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, … at which official acts are to be taken are declared to be public meetings *open to the public at all times*, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

(emphasis added). The October meeting was not "open to the public" because its location was unreasonably difficult and expensive for Plaintiffs to reach.

The Second Cause of Action alleges violation of Section 286.0114, Florida Statutes,

which provides:

> (2) Members of the public *shall be given a reasonable opportunity to be heard* on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action. … The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

(emphasis added). The Commission denied Plaintiffs the opportunity to comment by announcing one time for public comment then taking comment at an earlier, unannounced time. The public's next opportunity to be heard was not until *after* the Commission finalized and voted on its proposals to the Florida Legislature for the 2019-2020 legislative session. Compl. ¶¶ 92-95.

III. ARGUMENT

The Commission's motion should be denied because Plaintiffs have alleged facts which, if true, show that it violated Florida's open meeting laws. *See Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734–35 (Fla. 2002) ("When presented with a motion to dismiss, a trial court is required to 'treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs.'" (quoting *Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood*, 676 So. 2d 500, 501 (Fla. 4th DCA 1996))). Plaintiffs allege facts that demonstrate that their ability to attend and comment at the Commission's October meeting was unreasonably and illegally burdened by the Commission's actions. On a Motion to Dismiss, the Commission cannot prevail without showing that, if those facts are true, it is legally entitled to impose such unreasonable burdens. Because it cannot do so, its motion should be denied. *See Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991) (plaintiff stated cause of action sufficient to overcome motion to dismiss where it filed a complaint "making a *prima facie* showing that the [defendant] held a public meeting at which official acts or formal

action took place, without providing reasonable notice to the public").

A. Florida's Open Meetings Laws Are Construed Broadly to Prevent Public Entities from Subverting the Intent of the Law

Florida's "Sunshine Law[2] was enacted in the public interest to protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose." *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983). Like other "[s]tatutes enacted for the public benefit" it "should be interpreted most favorably to the public." *Bd. of Pub. Instruction of Broward Cty. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). *Doran* and other opinions "recognize that boards should not be allowed, through devious methods, to 'deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.'" *Law & Info. Servs., Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) (quoting *Doran*, 224 So. 2d at 699)).

This case presents multiple issues of first impression in Florida on the meaning of provisions of its open meeting laws. In considering these questions, the Court may not, as the Commission correctly observes, "construe the unambiguous Sunshine Act 'in a way which would extend, modify, or limit, its express terms *or its reasonable and obvious implications*….'" *Dascott v. Palm Beach Cty.*, 988 So. 2d 47, 48 (Fla. Dist. Ct. App. 2008) (emphasis added) (quoting *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 986 (Fla. 1994)). Plaintiffs do not ask the Court to extend those laws, instead they ask it to allow the facts of this case to be determined so the Court can then decide if the Commission's actions met the requirements for meetings to be "open" to the public and for the public to be provided a "reasonable opportunity to be heard." If any party is departing from the text of the statute, it is the Commission, which seeks to "limit"

[2] The term "Sunshine Law" is generally used to refer to Section 286.011, which contains most of the state's open meeting and open records laws. But the logic of cases arguing for a broad interpretation of that section applies equally to Section 286.0114, which was enacted in 2012, after the decisions discussed in this section.

the express terms and the reasonable and obvious implications of Sections 286.011 and 286.0114. The Court should reject this effort to minimize the scope of the laws and instead look to the principles of broad construction of open meetings laws announced by the Florida Supreme Court in *Wood* and *Doran*.

B. Holding a Meeting Without Justification in a Location that Is Difficult and Expensive to Reach for Members of the Public, Particularly Low-Income Members of the Public, Violates Florida's Sunshine Law

1. Section 286.011 requires that public meetings be actually, not merely theoretically, open to the people who are affected by what transpires in them

The Commission adopts the extraordinary position that Florida's Sunshine Law, Section 286.011, Fla. Stat., allows it to hold its meetings at any location in the state, however inconvenient, inaccessible, and unaffordable for the overwhelming majority of those who might wish to attend, so long as it is theoretically possible for the public to attend. But a controlling Florida case has already rejected the logic upon which the Commission relies. In *Rhea v. Sch. Bd. of Alachua Cty.* 636 So. 2d 1383 (Fla. 1st DCA 1994), the defendant school board held a public meeting not in the regular location for such meetings—a school district building in Alachua county—but in a hotel 100 miles outside the county. The Commission here likewise held its most recent meeting in a hotel that is hard to reach for most members of the public in the region in which the meeting was held. Compl. ¶¶ 41-51. The school board, like the Commission, argued that its meeting "complied with the mandates of the Sunshine Law by publicly advertising the meeting in advance, and providing a reasonable opportunity for the public to attend by holding the meeting in an open and public meeting room at a hotel convention facility." *Id.* at 1385; Mot. at 8 (arguing that Section 286.011 was satisfied because "[t]here is no allegation that anybody was prevented from entering the meeting facility or different classes of persons were treated differently by facility staff").

But *Rhea* rejected this cramped and perverse reading of the statute, recognizing that "[f]or a meeting to be 'public,'" and hence satisfy the requirements of Section 286.011, "it is essential that the public be given … a reasonable opportunity to attend." *Id.* at 1384–85. To determine if the public has been afforded such an opportunity, the court held, "[t]he interests of the public in having a reasonable opportunity to attend" had to be "balanced against the Board's need to conduct a workshop at a site beyond the county boundaries." *Id.* at 1385. It then suggested various factors that would impact each side of this balancing process, such as whether transportation was provided from Alachua county to the meeting location, and whether there was any particular reason why the meeting had to be held in that location. *Id.* at 1385-86. Most importantly, it recognized that the "expense and inconvenience of the public" imposed by the meeting location was an important consideration in determining whether the public had a reasonable opportunity to attend.

Rather than engage with this balancing process, the Commission seeks to limit *Rhea* to a simple rule: meetings held within the geographical boundaries of the area a public body serves are always in a reasonably accessible location so long as the public is not physically barred from entering. *Rhea* indeed did not discuss when a meeting inside a county might unreasonably deny people in that county an opportunity to attend. But nothing in its analysis of Section 286.011 is limited to meetings outside the area a body serves. Indeed, it explicitly rejected the "bright line rule" the plaintiffs wanted (limiting meetings to within 100 miles of the meeting place) and instead held that the proper approach was a case-by-case balancing test. *Id*.; *see also Kennedy v. Water*, No. 2009-0441-CA, 2010 WL 8427317 (Fla. 7th Cir. Ct. Sep. 27, 2010) (*Rhea* "stands for the notion that meeting venues should be determined case-by-case, based on a weighing of the public's interest in having a reasonable opportunity to attend the meeting and the collegial

body's need to conduct the meeting in specific place."); *Informal Advisory Legal Opinion*, 1997 WL 33492422, at *3 (Fla. A.G. Sept. 5, 1997) (Opining that in *Rhea* "the court determined that a balancing of interests test is the most appropriate method to determine whether public or governmental interest should predominate in a particular situation" and advising a similar rule for storing city records outside a city).

Narrowing *Rhea* as the Commission proposes would produce absurd results: A statewide entity could hold a meeting on a boat in the middle of Lake Okeechobee, in the middle of the Everglades, or on one of the Dry Tortugas islands (located off the end of the Florida Keys) and, so long as that meeting was properly noticed and any members of the public who managed to make it to the location were allowed in, Florida's Sunshine Law would have nothing to say about it. Such a ruling would provide a roadmap for evasion of the Sunshine Law and undermine its purpose of promoting openness in government.

Plaintiffs do not contend, as the Commission suggests, that meetings must always be held in locations accessible by public transportation or "that everyone in Florida could attend by car in less than an hour." Mot. at 8. Instead, they ask the Court to engage in the balancing *Rhea* requires. The Commission reasonably wished to hold meetings in an area of the state where it had not previously met—central Florida. In determining where in that area it was reasonable for that meeting to occur, the Court should ask whether the inconvenience the meeting location imposed on most members of the public in that region was balanced out by some government interest in holding the meeting in that location. Here, Defendants do not attempt to argue that such a balancing approach would come out in their favor. Nor could they: the Commission considered and rejected hotels that were more accessible than the Omni and did not explore at all whether public facilities might be more available and convenient than private ones. Compl. ¶ 10.

Plaintiffs do contend, however, that there should be a categorical rule that if a public meeting location can only be reached by car, free[3] parking must be offered and that fact must be disclosed to the public beforehand if the venue usually charges for parking. Commission staff indeed seem to have understood the reasonableness of the first part of this position, negotiating free parking when selecting the Omni as the meeting location. Compl. ¶ 51. But they then did not disclose this to the public, deterring members of the public who otherwise would have been interested in attending. Compl. ¶ 54.

The Commission does not attempt to argue that free parking, without any notice thereof, is all that the Sunshine Law requires. Nor could it—the public is as deterred from attending a meeting it thinks charges $32 as one that actually does. Instead, it claims that it can hold meetings in locations that can only be accessed by paying for parking, arguing that "section 286.011 does not contain guarantees of … any particular parking rate." Mot. at 9. That simply cannot be right—if $32 is an acceptable parking rate, what about $100 or $1000? Could a public meeting be held on the passenger side of security in an airport, requiring members of the public to purchase a plane ticket to attend, or inside Disneyworld, requiring the public to buy an admission ticket? Allowing the government to charge attendees to attend public meetings, which parking fees effectively do, unreasonably burdens the public's attendance at a meeting of its own government and is precisely the wrong that the Sunshine Law was intended to prevent.

2. Section 286.011(6) prohibits holding meetings at locations which are costly for members

[3] The Commission argues, without evidence, that a ruling that free parking is required in locations without public transportation would create a burden for "every state and local public body in Florida, including local city councils and county commissions in metropolitan areas where there are designated paid public parking lots" because they would be required to "somehow ensure that parking fees are waived or reduced for all persons who announce an intent to attend the meeting" and "[t]he logistics would be impractical and unduly burdensome to public bodies and their staffs." Mot. at 10. But Plaintiffs' proposed rule would not affect any of these bodies which are in locations with public transportation or where there is free street parking. For the rest, it is unclear why simply posting a sign at a public parking lot that usual parking fees were waived for meeting attendees or the duration of a public meeting would be so logistically challenging. In any event, the Court need not reach the question of whether a modest parking fee is permissible since here the fee was far higher than that.

of the public to reach

In addition to being unlawful under Section 286.011(1), which *Rhea* interpreted, the Commission's actions also violate Section 286.011(6), which specifically forbids holding public meetings in exclusionary locations:

> All persons subject to subsection (1) are prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to such a facility.

§ 286.011(6), Fla. Stat.[4] Both aspects of the meeting location which Plaintiffs challenge—its location and parking fees—imposed an unreasonable barrier on attendance with no countervailing justification. To attend, most Plaintiffs, and most members of the public in the region, would have had to drive there in their vehicles, paying for gas and, likely, tolls and then (as far as they knew) pay $18-32 for parking. Or, if they did not have a vehicle of their own, members of the public would have had to pay a comparable or greater amount for a taxi or ridesharing service to attend the meeting.

A meeting location that imposes a significant cost on potential attendees—the kind of money that for an ordinary person could be the difference between being able to pay a utility bill or fill a prescription or not—is necessarily "discriminat[ing] on the basis of … economic status." If it isn't, what possibly could be? Defendants argue that because the parking rates "apply equally to all persons" they are not discriminatory. Mot. at 11. This is like arguing that a meeting on the second floor of a building without an elevator does not discriminate on the basis of disability because all people, not just those in wheelchairs, are required to climb stairs to enter it,

[4] This provision has not been substantively analyzed by a Florida court, though it was cited once in *Kennedy v. Water*, which held that, if a meeting is held in its regular location and that is the largest room available to the body, subsection 286.011(6) is not violated even if that location is not expected to be able to hold all who wish to attend. No. 2009-0441-CA, 2010 WL 8427317 (Fla. 7th Cir. Ct. Sep. 27, 2010).

or that a meeting in a venue that requires everyone entering to remove head coverings does not discriminate against those Muslims and Jews whose religions require them to wear head coverings in public. And because the same provision of the statute applies to "sex, age, race, creed, color, [and] origin," adopting the Commission's view of economic status discrimination would necessarily legalize holding public meetings at facilities that adopt these other discriminatory policies, and many more.

Moreover, even if the Commission were right that its conduct was not discriminatory on the basis of economic status, that would not resolve the question because the statute prohibits holding meetings in locations that discriminate *or* that "operate in such a manner as to unreasonably restrict public access." When determining whether a restriction on public access is reasonable, the Court should do the same balancing *Rhea* calls for. The Commission mounts no explanation for why high advertised rates for parking do not "unreasonably restrict public access." It does suggest that the meeting's location is not part of the "manner" in which the facility "operates," but it provides no explanation for this position. Nor could it: the place a facility is located is necessarily part of its operations (i.e., a restaurant in a downtown area will "operate" differently from one on a rural road). Moreover, the fact that the Omni charges high rates for parking is surely part of the manner in which it operates—a point the Commission entirely overlooks.

C. Advertising Public Comment at One Time and Then Providing an Opportunity to Comment at a Substantially Different Time Violates Section 286.0114

The Commission can only prevail on Plaintiffs' claim under Section 286.0114 if it is permissible for public bodies to trick the public out of their right to comment at public meetings—announcing a time for public comment and then taking comments at a much earlier, unannounced time. Such a rule would defeat the statute's purpose of providing all members of

the public a "reasonable opportunity to be heard." This Court's decision will be the first of which Plaintiffs are aware interpreting this section. It would be unfortunate if that first decision had the effect of dramatically limiting the provision's scope and the public's right of participation.

The Commission maintains that it is free under Section 286.0114 to announce a time for public comment, then take comment at a different time, so long as there is some time during its two-day meeting when public comment is taken. Mot. at 11-12. It relies for this proposition on case law interpreting Section 286.011, which suggests that public bodies generally need not announce or abide by announced agendas. That reliance is mistaken for three reasons: First, Section 286.0114, unlike Section 286.011, establishes a procedure by which public bodies can announce a policy about when to take public comment, a policy the Commission adopted and violated here; second, the Commission is wrong that existing case law establishes a categorical and unlimited right to violate published agendas under Section 286.011; and, third, even if there were a categorical right to violate published agendas under Section 286.011, the logic of the cases on which the Commission relies suggests the opposite conclusion with respect to Section 286.0114.

1. *Section 286.0114, unlike Section 286.011, anticipates public bodies will announce agendas for public comment and conditions liability for violating the section in part on whether the bodies follow those rules or policies*

Section 286.0114, unlike Section 286.011, specifically contemplates that public bodies *will* announce in advance "rules or policies," including times, for public participation in meetings. *See* § 286.0114(2), Fla. Stat. ("The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4)."). Among the "rules or policies" expressly contemplated by the statute are those which "[d]esignate a specified period of time for public comment." *Id.* at § 286.0114(4)(d). Finally, the statute says that if a commission follows its own rules or policies on the time for comment, it is immune from suit:

"If a board or commission adopts rules or policies in compliance with this section and follows such rules or policies when providing an opportunity for members of the public to be heard, the board or commission is deemed to be acting in compliance with this section." *Id*. at § 286.0114(5).

Here, however, the Commission violated the policies it adopted. Hence, the statute implies that the Commission is *out of* compliance with the statute if its actions denied Plaintiffs a "reasonable opportunity to be heard." The Commission claims that Plaintiffs' straight-forward interpretation of the text would "create a heavy-handed set of regulations on state and local collegial bodies about the way they conduct public meetings." Mot. at 12. But all the Commission would have had to do here to comply with the law was adjourn for less than three hours before reconvening at a time it had originally planned and prepared to meet. In any event, the Commission's argument, to the extent it has one, is with the statute. Adopting the Commission's interpretation, not Plaintiffs', would be the modification of the statute's express terms the Commission's motion decries. Mot. at 12.

The Commission's other response to Plaintiffs' straightforward reading of the statute is that subsections (4) and (5) are irrelevant because the term "rule" refers to formal rulemaking under the Florida Administrative Procedure Act, in which only agencies, and not the Commission, have the power to engage. Mot. at 12-13. But this argument ignores the fact that those subsections refer to "rules *or* policies" (emphasis added). Here, even if the announced time for public comment could not be a "rule," it could still be a policy and have the same effect under subsection (4). And, in fact, the Commission announced in its agenda for the October meeting a policy of holding public comment at 4:45 p.m. on the second day of the meeting, a policy it also announced and followed in previous meetings. Compl. ¶¶ 77-78.

Moreover, the Commission's position that only state agencies can adopt binding "rules or policies" would render the statutory text absurd. Subsection (1) of the statute defines "board or commission" as a "a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision." Subsection (4) then refers to "[r]ules or policies of a board or commission." The Commission's interpretation would suggest that the statute was giving effect to rules or policies the Commission says all "board[s] or commission[s]" except for state agencies lack the power to enact. The Commission's interpretation of Section 286.0114 would also, thereby, strip all local and county public bodies of the safe harbor from litigation the statute creates for public bodies that comply with their own stated rules or policies.

Moreover, even if the Commission were correct about the definition of "rules or policies," the fact that the section clearly anticipates public bodies will announce times for public comment in advance suggests that failure to do so is relevant to whether the public has been given a "reasonable opportunity" to make a public comment. The Commission's citations to cases interpreting Section 286.011 are hence unhelpful: Section 286.0114, unlike Section 286.011, anticipates that public bodies will give guidance about when in their meetings they will take comments.

2. *No Florida court has considered whether multi-day meetings must have agendas*

In a hearing lasting two full days, like the one at issue in this case, a "reasonable opportunity to be heard" should include some idea of when that opportunity can be exercised. A member of the public who wants to participate in the decision-making process of a public body on a specific point should not be required to miss school and work and spend two full days listening to proceedings that are irrelevant to them to preserve their right to participate. While agendas need not be followed exactly and unanticipated new issues may arise, it is reasonable to

require public bodies to provide some guidance to the public about the structure of such long meetings. Otherwise, members of the public without the job, school, or child-care flexibility to spend two full days awaiting their opportunity to comment will be denied any opportunity to be heard, let alone a reasonable one. The right to public access to public meetings should not be limited to the childless and wealthy.

The Commission cites several cases for the proposition that Section 286.011 does not require public bodies to post agendas, but none of these cases, or any others of which Plaintiffs are aware, concern multi-day meetings like the one at issue here. *See Grapski v. City of Alachua*, 31 So. 3d 193, 195 (Fla. 1st DCA 2010) (Referring to meetings at issue by single dates and not making clear how long each was); *Law & Info. Servs., Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) (same); *see also Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973) (same); *Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. Dist. Ct. App. 1985).[5] The longer the hearing, the more time the public must spend to attend and the greater the burden imposed on the public without an accurate agenda. Moreover, these cases all concern the substantive content of agendas, not when in a meeting a particular topic is addressed.

3. *The logic of the cases rejecting an agenda requirement under Section 286.011 supports requiring agendas under Section 286.0114*

   The reasoning of the line of cases on which the Commission relies, moreover, actually

[5] The Commission also cites a 2003 Attorney General opinion which concluded that "while Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not required." Op. Att'y Gen. Fla. 2003-53 (2003). But that opinion went on to say that "*this office would strongly recommend that the city commission postpone formal action on controversial matters coming before the board at a meeting where the public has not been given notice that such an issue will be discussed*. The purpose of the notice requirement of the Sunshine Law is 'to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wished.' In the spirit of the Sunshine Law, the city commission should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before the commission." *Id.* (emphasis added) (quoting *Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991)).

supports Plaintiffs' interpretation of Section 286.0114. The first case to consider whether public meetings must have and abide by a previously-posted agenda, on which subsequent decisions including those cited by the Commission rely, was *Hough v. Stembridge*. It held that requiring "items to appear on an agenda before they could be heard at a meeting would foreclose easy access to such meeting to members of the general public who wish to bring specific issues before the governmental body." 278 So. 2d 288, 291 (Fla. 3d DCA 1973). Under Section 286.0114, in contrast, the *absence* of notice of a specific time for public comments is what "foreclose[s] easy access to" a meeting. The more time the public must devote to attending a meeting in order to provide a comment, even if the comment is unrelated to most of the meeting, the less "easy access" the public has to providing comment.

Subsequent cases rejecting an agenda requirement likewise support requiring public bodies to specify a period for public comment at least for multiple-day meetings. *Yarbrough* held that "forcing a public body to postpone deliberations on a given topic" because a press report indicated that the topic would not be discussed at the meeting was unreasonable. 462 So. 2d at 517. But, here, if the Commission abided by its posted schedule for comment, it would not have had to postpone anything. Commissioners would have been required only to abide by their original schedule. As noted above, the Commission cites no cases for the proposition that simply following an announced schedule burdens a public body. In *Law and Info. Services*, the court noted that it was "concerned that a board's failure to publicize an agenda item may mislead interested citizens into assuming that a matter will not be addressed at a scheduled public meeting" but held that "whether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature." 670 So. 2d at 1016. Here, again, Plaintiffs seek not to prohibit consideration of an

unnoticed agenda item but to exercise the right to comment on matters that the Commission promised them, a right the legislature has already decided to grant the public. Finally, *Grapski* simply relied on the prior cases without further analysis. 31 So. 3d at 200.

IV. CONCLUSION

What Plaintiffs ask of the Commission is simple: make a reasonable effort to hold future meetings at locations Plaintiffs and others like them can reach and to afford them the opportunity to appear and present their views at those meetings. That opportunity to participate in government decision-making is the core interest which Florida's open meeting laws were created to protect. For this reason, and all those above, the Commission's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing on May 21, 2020, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notifications for this case including the following:

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