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No. SJC-13284

Commonwealth of Massachusetts
Supreme Judicial Court

LOUISE BARRON and others,
PLAINTIFFS-APPELLANTS,
v.

SOUTHBOROUGH BOARD OF SELECTMEN and others,
DEFENDANTS-APPELLEES

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC. IN SUPPORT OF APPELLANTS AS TO FREE SPEECH AND THE MASSACHUSETTS CIVIL RIGHTS ACT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21 and Mass. R. App. P. 17(c)(1), the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") represents that it is a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. ACLUM does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

MASS. R. APP. P. 17(c)(5) CERTIFICATION

ACLUM certifies that (a) no party or a party's counsel authored this brief in whole or in part; (b) no party or a party's counsel contributed money to fund preparing or submitting the brief; (c) no person or entity other than the amicus curiae contributed money that was intended to fund preparing or submitting a brief; and (d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal, other than the undersigned was counsel for the plaintiffs in *Spaulding v. Town of Natick Sch. Comm.*, No. 2018-01115 (Mass. Super. Ct. 2018)(R.A. 106-134), discussed below.

INTRODUCTION

The freedom to express criticism to and about public officials is foundational to our form of government. It separates us from totalitarian regimes. Its preservation is always vital, but never more than when faith in government may be at an ebb.

The Southborough "Public Participation" Policy is facially unconstitutional. It imposes a "civility" code applicable solely to "remarks and dialogue" and "language" in portions of public meetings specifically created for input from members of the public. It allows public servants to censor criticism from those to whom they are accountable merely because they do not want to hear it. It was used in this case to silence a recognized speaker solely because she criticized the Select Board and its Chair. The Policy should not be allowed to stand.

QUESTIONS PRESENTED

1. Is the Southborough "Public Participation at Public Meetings" Policy, which provides that "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks," and not include "[i]nappropriate language," facially unconstitutional and how does public

forum doctrine inform the analysis?[1]

2. Does Ms. Barron state a claim that the Chair acted by means of "threats, intimidation or coercion" when he threatened to have her forcibly removed from the public meeting if she did not leave?

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") is a statewide membership organization dedicated to protecting civil liberties, including freedom of speech. ACLUM has a history of defending free expression rights before this Court. See, e.g., *Mass. Coal. For the Homeless v. City of Fall River*, 486 Mass. 437 (2020)("MCH"); *Shak v. Shak*, 484 Mass. 658 (2020); *Commonwealth v. Lucas*, 472 Mass. 387 (2015); *Benefit v. City of Cambridge*, 424 Mass. 918 (1997).

STATEMENT OF FACTS

The Select Board of Southborough (the "Board") has established a "Policy and Guidelines on Public Participation at Public Meetings" (the "Policy")

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[1]This question combines the two questions in the Court's amicus solicitation. Because the solicitation asked only for input on the facial constitutionality of the Policy, this brief directly addresses the facial challenge, but Ms. Barron also states a valid as-applied claim.

applicable to all town public bodies. Record Appendix (R.A.) 63. The Policy opens: "The [Board] recognizes the importance of active public participation at all public meetings, at the discretion of the Chair, on items on the official agenda as well as items not on the official agenda." It provides that the Chair may set time limits on comments from the public in order to allow sufficient time for official business to be conducted, that no one can address the meeting without first being recognized by the Chair and that "all persons shall, at the request of the Chair, be silent." It anticipates that the agenda of any meeting may include a segment expressly entitled "Public Comment" which is "a time when town residents can bring matters before the Board that are not on the official agenda." The Policy references the provisions of the Open Meeting Law that authorize the Chair to order someone who "disrupts" the meeting to leave and, if they do not, have them removed by a law enforcement officer, while indicating "no meeting should ever come to that point."

At issue in this case are the portions of the Policy mandating that "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language

and/or shouting will not be allowed." The Policy also prescribes that members of the public must "act in a professional and courteous manner" when addressing the Board.

On December 4, 2018, Louise Barron was recognized to speak during the portion of a meeting expressly designated for "Public Comment." She rose with a handmade sign that on one side said "Stop Spending" and on the other "Stop Breaking Open Meeting Law," a reference to several past violations documented by the Attorney General. She calmly stated her opposition to proposed budget increases and, as to the Open Meeting Law violations, simply said:

> [Y]ou say you're just merely volunteers and I appreciate that, but you've still broken the law with Open Meeting Law and that is not the best you can do. When you say 'this is the best we can do' I know it's not easy to be volunteers in town but breaking the law is breaking the law.

R.A. 12-13. At that point, the Chair cut her off, saying: "so ma'am, if you want to slander town officials who are doing their very best [Ms. Barron interjected, stating, "I'm not slandering"] . . . then we're going to go ahead and stop the Public Comment session now and go into recess." R.A. 13. Ms. Barron responded, "You need to stop being a Hitler. You're a Hitler. I can say what I

want." *Id.* The Chair then threatened to have Ms. Barron forcibly removed from the meeting if she did not remove herself, which she did. R.A. 14, ¶¶ 138, 143.[2]

SUMMARY OF ARGUMENT

This case raises core free speech issues, as it involves expression directed towards public officials on matters of public concern in historically significant forums expressly created for such input. (pp. 16-20).

The public comment periods at issue here are designated, albeit limited, public forums. In such forums, governments may establish objective and reasonable topic or speaker-based boundaries for the forum as a whole, but cannot discriminate based on the content of comments within the forum's scope without satisfying strict scrutiny. (pp. 20-36). This is the proper view under the First Amendment, but, in any event, the Court should declare it is the law under Article 16. (pp. 26-38). The "civility" provisions at issue are unconstitutional because they draw distinctions based on the content of speech within the scope of the forum and

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[2]Video of the exchange can be found at Southborough Access Media, *Southborough Board of Selectmen Meeting December 4, 2018*, YOUTUBE(Sept 20, 2022), https://www.youtube.com/watch?v=lF6GQafHGL8. The Public Comment period begins at 2:33:02.

are not narrowly tailored to serve a compelling state interest. (pp. 39-46). Moreover, the Policy is so standardless and viewpoint-based that it is unconstitutional regardless of what kind of forum is at issue. (pp. 46-51).

The Superior Court erred in declaring the Policy constitutional. It also erred in concluding that the Chair did not interfere or attempt to interfere with Ms. Barron's rights by means of "threats, intimidation or coercion." (pp. 51-53).

ARGUMENT

Article 16 of the Declaration of Rights, as amended by Amend. Art. 77, provides that "the right of free speech shall not be abridged." It can be and has been interpreted to provide greater protection for speech than the First Amendment. *MCH*, 486 Mass. at 440; *Roman v. Trustees of Tufts Univ.*, 461 Mass. 707, 713 (2012); *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 201 (2005).

"In contrast to the general rule that a facial challenge can succeed only if a [government regulation] is unconstitutional in all of its applications, '[i]n the [free speech] context, . . . [there is a] second type of facial challenge, whereby a [regulation] may be

invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the [regulation]'s plainly legitimate sweep.'" *MCH*, 486 Mass. at 446 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Contrary to the Superior Court's assumption (R.A. 148) and the Town's argument (Appellees Br. 50), where, as here, government regulations curtail speech on the basis of its content, they are presumed unconstitutional and the burden is on the government to justify them. *United States v. Alvarez*, 567 U.S. 709, 716-17 (2012); *Lucas*, 472 Mass. at 392.

The Policy is unconstitutional because it imposes content-based restrictions on speech within the scope of the created forum and is not narrowly tailored to serve a compelling interest. But regardless of forum type, its standardless and viewpoint-based restrictions are unconstitutional.

I. Core free speech issues are at stake in this case given the vital role of public comment periods in our representative democracy.

"Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position . . . ." *R.A.V. v. City of St. Paul*,

505 U.S. 377, 422 (1992). See also *Carey v. Brown*, 447 U.S. 455, 467 (1980)(Speech on matters of public interest "has always rested on the highest rung of the hierarchy of First Amendment values.").

In a representative democracy, feedback to public officials, including harsh criticism, is at the apex of political speech. The First Amendment thus reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" even when such debate "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed,

> [t]he vitality of civil and political institutions in our society depends on free discussion. . . . [and] it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely . . . is therefore one of the chief distinctions that sets us apart from totalitarian regimes. . . .

Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Addressing government officials freely and openly in the hopes that "changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369

(1931).[3] This Court has previously recognized that even virulent criticism "directed at an elected political official and primarily discussing issues of public concern" constitutes core, protected speech. *Commonwealth v. Bigelow*, 475 Mass. 554, 561-563 (2016); *Van Liew v. Stansfield*, 474 Mass. 31, 38-39 (2016).

Public comment periods at governmental meetings are specifically created for such feedback. They provide a forum for "speech concerning public affairs" which "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Accord *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997) ("Central to these principles is the ability to question and challenge the fitness of the administrative leader of a school district, especially in a forum created specifically to foster discussion about a community's school system").[4]

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[3] "The right of an American citizen to criticize public officials and policies . . . is 'the central meaning of the First Amendment.'" *Glasson v. Louisville,* 518 F.2d 899, 904 (6th Cir 1975) (quoting *Sullivan*, 376 U.S. at 273). See also *Houston Comm. Coll. System v. Wilson,* 142 S. Ct. 1253, 1261 (2022) (public officials expected to shoulder criticism).

[4] Restriction of expression in such forums not only affects the speaker but impinges on the rights of other members of the public to receive information, which is a corollary of free speech. See, e.g., *Board*

Public comment periods have a particularly long and important history in Massachusetts. In 1641, the Massachusetts colony's liberties guaranteed that "'[e]very man[,] whether Inhabitant or fforreiner, free or not free[,] shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question." A Coppie of the Liberties of the Massachusets Collonie in New England, in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES 216, 218 (Charles C. Little & James Brown eds., Bos., Freeman & Bowles 1843). Even when not all residents could vote, "most people in colonial Massachusetts were allowed to participate in town meetings." Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1736 (2021). It is "hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution." *Wheelock v. City of Lowell*, 196 Mass. 220, 227 (1907). Public input at public meetings is an embodiment of the values undergirding Article 19 of the Declaration of Rights.

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of Educ., Island Trees Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982)(and authority cited).

Suppression of in-person public input on a topic within the objective scope of such historic and vital forums, based solely on a public official's subjective assessment that the speaker's input is not sufficiently "courteous or respectful" or contains "rude, personal or slanderous remarks" or "inappropriate language" therefore strikes at the heart of our form of government.

II. Public comment periods are designated, albeit limited public forums in which the types of restrictions at issue are subject to strict scrutiny.

The U.S. Supreme Court developed public forum analysis to assess, under the First Amendment, the constitutionality of government-imposed restrictions on private speech on public property. See, e.g., *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). This Court has questioned the value of rigid application of that analysis under Article 16, *Walker v. Georgetown Hous. Auth.*, 424 Mass. 671, 675 n.9 (1997), and for good reason. The doctrine has led to confusion, particularly with regard to the proper analysis of speech restrictions in forums, such as the ones at issue here, which are intentionally opened by government officials for public discourse yet are subject to some external

boundaries as to topics or speaker qualifications.[5] But, the doctrine, properly construed, forbids content-based restrictions on comments within the scope of the forum that has been created. The Policy here is unconstitutional, under the First Amendment and, in any event, Article 16, because it imposes content-based restrictions on comments within the scope of the forum.

A. Forums that are open to members of the public as such but subject to topic or speaker-based boundaries are limited, designated public forums.

Under federal forum analysis, courts first categorize the governmental property by forum type. For

[5] See, e.g., *Del Gallo v. Parent*, 557 F.3d 58, 69 n.6 (1st Cir. 2009) ("The utility and coherence of the forum analysis doctrine have been the subject of criticism."); *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10th Cir. 2007)("it is not entirely clear whether a city council meeting should be treated as a 'designated public forum' or a 'limited public forum.'"); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001)(meditating on the "analytic ambiguity" of the public forum doctrine); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345-46 (5th Cir. 2001) (same); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) ("[t]he designated public forum has been the source of much confusion"); *Justice for All v. Faulkner,* 410 F.3d 760, 765 n. 5 (5th Cir. 2005)("precise taxonomic designation" of limited forums "remains elusive"); *Fighting Finest v. Bratton*, 95 F.3d 224, 228-29 (2d Cir. 1996) (commenting on the Supreme Court's "mixed signals" as to the criteria for establishing a limited public forum). See also Rohr, *The Ongoing Mystery of the Limited Public Forum,* 33 NOVA L. REV. 299 (2009).

many years, and again recently, the Supreme Court has identified the three relevant categories as (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums. *Minnesota Voters All.*, 138 S. Ct. at 1885; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("*Cornelius*"). But the term "limited public forum" is also regularly used, sometimes in ways that has led to a misunderstanding as to its proper scope and the extent to which content-based restrictions are allowed in such a setting.

In both traditional and designated public forums, reasonable and content-neutral time, place, and manner restrictions are acceptable, but content-based restrictions must generally satisfy strict scrutiny and viewpoint-based restrictions are prohibited. Content-based restrictions on speech that is within the scope of such forums are allowed only if they are narrowly drawn to achieve a compelling governmental interest. *Minnesota Voters All.*, 138 S. Ct. at 1885; *International Soc'y for Krishna Consciousness*, *Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("ISKC"); *Cornelius*, 473 U.S. at 800; *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983). In a nonpublic forum, content-based restrictions are permissible, but regulations on speech must be

reasonable and viewpoint neutral. *Minnesota Voters All.*, 138 S. Ct. at 1885; *Perry Educ. Ass'n.*, 460 U.S. at 46. Courts evaluate the reasonableness of speech restrictions based on "whether they are reasonable in light of the [forum's] purpose." *Perry Educ. Ass'n*, 460 U.S. at 49.

Government meetings open to the public, and the public comment periods designated within them, are certainly not "nonpublic" forums and, given their history and importance, they come close to being traditional forums. Traditional public forums include places such as streets, sidewalks and parks which "have immemorially" and for "time out of mind" "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 45 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)). See also *MCH*, 486 Mass. at 441. Nonpublic forums are at the other end of the spectrum. They are government property dedicated to non-communicative purposes or to communicative purposes but not by members of the public as such. *Minnesota Voters All.*, 138 S. Ct. at 1885 (polling station not created for speech); *Perry Educ. Ass'n.*, 460 U.S. at 47 ("The internal [school] mail system, at least by policy, is

not held open to the general public" but to school personnel and their representatives).[6]

In between are designated public forums which are forums that have "not traditionally been regarded as a public forum," but which the government has "intentionally opened up for that purpose." *Minnesota Voters All.*, 138 S. Ct. at 1885 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009)).

The public comment sessions at issue in this case fall into this category, notwithstanding certain limitations as to allowed topics and speakers. The Supreme Court has repeatedly said that a designated public forum can be "unlimited," meaning it is open to the general public as a whole without any limitation as to the topics that can be discussed and is functionally identical to a traditional public forum. Or – as is much

[6]See also *Cornelius*, 473 U.S. at 803 (government property is a nonpublic forum "when the nature of the property is inconsistent with expressive activity"); *ISKC*, 505 U.S. at 680 (airports are nonpublic forums because they have not historically or intentionally "been made available for speech activity"); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (postal sidewalks are nonpublic forums because "[t]he Postal Service has not expressly dedicated its sidewalks to any expressive activity"); *Lincoln Police Dep't v. Strahan*, 93 Mass. App. Ct. 1120 at *2 (2018)(unpublished)(courthouses are nonpublic forums because "they do not customarily provide a forum for . . . speech related purposes").

more common – a designated forum can be "limited," in that it is opened to part but not all of the public or the range of topics that can be addressed is circumscribed. *ISKC*, 505 U.S. at 678 ("The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public"); *Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7.

A "limited public forum" is thus best understood as a subset of designated public forums in which the government has opened a forum for speech by members of the public, but has adopted objective topic-based or speaker-based parameters, e.g. to allow only comments that are within the government body's jurisdiction or are delivered by a member of the general public to whom the forum is opened. In such a forum, the general parameters of the forum can of course be content-based, but government otherwise may not discriminate based on content without satisfying strict scrutiny. Thus, even if the government allows discussion only of items on (or not on) the agenda, or permits input only by some relevant subset of the general population, so long as speech falls within those parameters it cannot lawfully

be restricted on the ground that its content is deemed inappropriate.

At times, however, the Supreme Court has suggested (in *dicta* and never in the specific context of the issues raised in this case) that "limited public forums" are the functional equivalent of nonpublic forums. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (listing limited public forum as a separate third category and not discussing nonpublic forums at all).[7] In *Pleasant Grove*, the Court wrote that in a forum limited as to topics or speakers "a government entity may impose restrictions on speech that are reasonable and viewpoint neutral." 555 U.S. at 470 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)). This statement, which was *dicta*, did not address whether the cited standards apply only to restrictions setting the scope of the forum or to any and all restrictions.

Such statements have created uncertainty as to if and when content-based restrictions are allowed. As the

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[7]See also *American Freedom Def. Initiative v. King Cnty.*, 136 S. Ct. 1022, 1022 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (noting that limited public forum is "also called a nonpublic forum").

Third Circuit has articulated, "[t]here appears to be some inconsistency in federal courts' opinions, even those of the Supreme Court, as to whether a limited public forum is a separate category or a subset of a designated public forum with a third category of forums being 'nonpublic forums.'" *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011). See also *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 280 (3d Cir. 2004).

As a result of this inconsistency, some lower federal courts have concluded that a public forum that is expressly designated for public comment cannot qualify as a "designated public forum" unless it is as fully open to the public as a traditional public forum; that content-based discrimination is allowed as to *any* type of restriction in a designated but limited public forum; and that there is no greater protection for free speech than in a forum that is nonpublic.[8]

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[8]Cases to this effect cited by the Superior Court include *Griffin v. Bryant,* 30 F. Supp. 3d 1139, 1179, (D.N.M. 2014) ("designated forums are open to all speech and are subject-neutral, meaning that the government cannot restrict the topics on which individuals speak" and therefore content-based limitations allowed in limited public forums); *Fairchild v. Liberty Ind. Schl. Dist.,* 597 F.3d 747, 757-758 (5th Cir. 2010)(describing the three categories as (1) traditional and designated forums, (2) limited public forums and (3) nonpublic forums and

The Superior Court essentially adopted this view (R.A. 147-149), but this Court should reject it. It fails adequately to distinguish between, on the one hand, nonpublic forums that have *not* been designated for *any* speech by members of the public and, on the other, designated, albeit limited public forums, such as the one at issue here, which *have* been *specifically* created for public speech and play a vital role in our democracy. And it fails adequately to distinguish between content-based rules that set the topic and speaker-based contours of the forum, i.e. set the scope of the designation, and those that apply to what an individual speaker to whom the forum is opened may say on a topic within the objective scope of the designation.

The correct view is that, when government opens a forum to members of the public as such, it creates a designated public forum and content-based restrictions are allowed only "so long as the content is tied to the limitations that frame the scope of the designation . .

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saying that limited public and nonpublic forums subject to same standards). See also *American Freedom Defense Initiative v. Washington Metro. Area Transit Auth.,* 901 F.3d 356, 364 (D.C. Cir. 2018)(designated forum exists only if it is subject to "no limitations"), *cert. denied*, 137 S. Ct. 2669 (2019).

. ." *Eichenlaub*, 385 F.3d at 281 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).[9] As described by the Fourth Circuit, in a designated but limited public forum there are "two levels" of analysis: the "external" and "internal" standards. The external standard is the objective boundary of the forum as a whole; the government may limit the discussion to certain topics and classes of speakers allowed, provided such restrictions are reasonable and viewpoint neutral. The internal standard relates to restrictions applied to speech that falls within the external boundaries, like the Policy provisions at issue in this case. And unlike the latitude afforded to government in setting the external standard, content-based restrictions on speech that falls within any external boundary are subject to strict scrutiny.

[9]Whether the *Eichenlaub* court consistently applied this test is hard to discern. While it understandably condoned restrictions on speaking without recognition or on topics outside the scope of the forum, it also talked about the speaker being "repetitive and truculent," which are content-based distinctions not limited to any topic or speaker-based restrictions on the forum. This is problematic as repetition is often a valuable way to drive home an important point. And it causes no disruption if it keeps within neutral time limits. See Part D.2 below.

Goulart v. Meadows, 345 F. 3d 239, 250 (4th Cir. 2003).[10] See also *Fighting Finest*, 95 F.3d at 229 ("Where a speaker comes within [the forum's] purpose, the State is generally subject to the same strict scrutiny that applies to traditional public forums").

This approach is consistent with Supreme Court pronouncements. In *Good News Club*, cited in *Pleasant Grove*, the Court was clear that "[t]he restriction" that must be reasonable and must not discriminate based on viewpoint (but, by implication, can discriminate based on content) is a restriction that "reserve[s] [the forum] for certain groups or the discussion of certain topics." 533 U.S. at 106-07. In *Arkansas Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998), the Court said "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." Similarly, in *Rosenberger*, the Court

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[10]The distinction was also noted in *Youkhanna v. City of Sterling Heights,* 934 F.3d 508, 518-19 (6th Cir. 2019), *cert. denied,* 140 S. Ct. 1114 (2020), cited by the Superior Court, where the court distinguished between "relevance" rules and those prohibiting "attacks," although, wrongly we think, implied the same standard applied to both. The relevance rule was constitutional because it was reasonable and viewpoint neutral, but the rule against attacks was "a more difficult case." *Id.* at 519-20.

distinguished between content-based restrictions that preserve the legitimate scope of the forum and others. 515 U.S. at 829-830 ("content discrimination [ ] may be permissible if it preserves the purposes of [a] limited forum"). And the Supreme Court has never affirmatively held that content-based restrictions are allowed as to comments by qualified speakers on topics that are within the objective scope of a limited forum.[11] Nor has it disavowed or overturned the cases establishing that designated forums can be limited in scope but are otherwise subject to the rules on content discrimination, e.g. *ISKC*, 505 U.S. at 678; *Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7.

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[11]In *Rosenberger,* the Court indicated that content-based "subject matter" limitations were constitutional in a "limited public forum" and distinguished those from viewpoint distinctions. 515 U.S. at 831. It did not address content-based restrictions other than subject matter limitations and seemed to assume that any such restrictions would be viewpoint-based. Here, as discussed in Part III below, the "civility" restrictions in the Policy do differentiate based on viewpoint. But it is important to ensure content as well as viewpoint neutrality because not all anti-democratic restrictions are clearly viewpoint-based. For instance, a restriction that a speaker at a meeting of the Select Board can never mention the conduct of the Board or refer to a public official whose conduct relates to a relevant topic may not be facially viewpoint-based, but it is content-based and would stifle too much valuable feedback within the core scope of the forum.

Hence, under the First Amendment, the term "limited public forum" appropriately refers to a type of designated forum. In such a forum, reasonable content-based limitations are allowed as to what topics may be discussed or who may speak, but content-based criteria dictating how a qualified speaker on a relevant topic expresses themselves are subject to strict scrutiny.[12]

B. Public participation sessions have been held to be designated yet limited public forums.

The Supreme Court has explicitly indicated that public participation sessions at public meetings are designated public forums where content-based discrimination is impermissible so long as the content falls within the forum's scope, such as "school business." *Perry Educ. Ass'n.*, 460 U.S. at 45, 46 n.7 (citing *City of Madison Joint Sch. Dist. No. 8 v.*

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[12]Even the law review article on which Appellees rely, Br. 55, concludes that "[g]overnment entities may constitutionally limit discussion of topics and groups consistent with their subject matter jurisdiction, but, beyond this, rules should be content neutral." Day & Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency,* 10 FIRST AMEND. L. REV. 57, 98 (2011). Rather than suggesting that a policy prohibiting personal attacks is constitutional, Appellees' Br. 55, the article itself takes the position that rules against personal attacks are "content-based speech restrictions" which, like others, are "doomed to fail a constitutional challenge." *Id.* at 94.

Wisconsin Emp. Rels. Comm'n, 429 U.S. 167, 174 (1976)); *Cornelius*, 473 U.S. at 803 (same). In *City of Madison*, concurring Justices highlighted that "when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation . . . the state body has created a public forum dedicated to the expression of views by the general public" where "selective exclusions" cannot be based on "content alone." 429 U.S. at 178-79 (Brennan, J., joined by Marshall, J., concurring). Cf. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (vacating conviction for use of profanity during public comment portion of meeting).[13]

Many lower courts have reached the same conclusion. For example, in *Jones v. Heyman*, 888 F.2d 1328, 1331, 1333 (11th Cir. 1989), the court recognized that a city commission meeting was a designated public forum where

[13]All portions of meetings other than executive session are designated forums, G.L. c. 30A, § 20(a), although only the public comment portions are designated for *oral* expression subject to recognition by the Chair. In other portions of the meeting, attendees can generally express themselves by what they wear or holding signs, subject only to reasonable content-neutral time, place or manner restrictions. Cf. *Norse v. City of Santa Cruz,* 629 F.3d 966, 975-976 (9th Cir. 2010)(free expression rights attach throughout a public meeting).

content-based rules as to the scope of the forum, including those requiring comments be about an agenda item, are acceptable, but content neutrality is required with regard to the substance of speakers' remarks.[14] The Massachusetts Superior Court previously held that public comment sessions at School Committee meetings are designated, albeit limited public forums. *Spaulding v. Town of Natick Sch. Comm.*, *supra* (R.A. 106-134). Because the school committee had opened the public comment sessions for use by the public as a place to assemble

[14]See also, e.g., *Mesa v. White,* 197 F.3d 1041, 1044-45 (10th Cir. 1999)(comment period at county commissioners meeting a designated public forum); *Zapach v. Dismuke*, 134 F.Supp.2d 682, 693 (E.D. Pa. 2001) (Zoning Hearing Board meeting was designated public forum for public comment on proposal for motor home park where relevant comments could not be restricted because they were offensive to a "sense of propriety"); *I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 923-924 (N.D. Ill. 2009) ("Municipal council meetings that allow public participation are designated public fora"; neutral time limits and subject limits can be applied); *Pesek v. City of Brunswick*, 794 F. Supp. 768, 782-83 (N.D. Ohio 1992) (where council opened meeting to public and allowed public to speak on items on the agenda a limited public forum subject to designated public forum standards created); *Paridon v. Trumbull Cnty. Child. Servs. Bd.*, 988 N.E.2d 904, 908-909 (Ohio Ct. App. 2013) ("A meeting of government officials, when opened to the public, is a limited public forum for discussion of subjects relating to the duties of those officials," in which limits on speech must be content-neutral, which a security-based sign-in requirement was found to be).

and discuss School Committee-related topics, the sessions constituted a designated public forum, R.A. 121-22, even though the forum was "expressly limited to 'topics within the scope of responsibility of the School Committee.'" R.A. 125. The court recognized that restricting speech because it is deemed by a layperson to be "defamatory" is overbroad as to speech that has not been adjudicated as such. R.A. 127-129. It ruled that a policy mandating that comments not be "improper" or "defamatory" or "abusive" or include "personal complaints" was content-based, subject to strict scrutiny, and unconstitutional. R.A. 125-130.

Just as topic-based limits do not change the fact that strict scrutiny applies to content-based restrictions on speech within a forum's objective scope, neither does a residency requirement.[15] *ISKC*, 505 U.S. at 678 (designated forum created where "the State has

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[15]A residency limit may be unreasonable in some instances, e.g. if it excludes those who are equally affected by a government entity's decisions. See *Wisconsin Emp. Rels. Comm'n*, 429 U.S. at 175 n.8 (explaining that while public bodies may confine meetings to specified subject matter, a State may not "open[] a forum for direct citizen involvement" and exclude a group of individuals "who are most vitally concerned with the proceedings"). But the validity of any residency limit is not an issue directly raised in this appeal.

opened [the forum] for expressive activity by part . . . of the public"). See also *Perry Educ. Ass'n*, 460 U.S. at 45, 46 n.7 (designated public forum may be for "a limited purpose such as use by certain groups"); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (content-based restrictions in forum opened only to university students subject to strict scrutiny); *Rowe v. City of Cocoa*, 358 F.3d 800, 802-803 (11th Cir. 2004)(residency requirement at public meetings was "content-neutral" rule that, like topic limits, defines the scope of forum); *Crowder v. Housing Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993) (auditorium open only to tenants was limited, designated public forum).

Thus, under the First Amendment as properly construed, the public comment portions of meetings covered by the Policy are designated albeit limited public forums and content-based discrimination as to the substance of comments within the forum's general scope is subject to strict scrutiny.

C. The Court should clarify that under Article 16 content-based restrictions on speech within the scope of a limited public forum are subject to strict scrutiny.

The First Amendment sets the floor but not a ceiling on protection of free speech rights under Article 16.

MCH, 486 Mass. at 440. An independent construction is warranted when the "Federal rule does not adequately protect the rights of the citizens of Massachusetts." *Mendoza*, 444 Mass. at 201.[16]

In light of the inconsistency in the federal case law, and the vital importance of public comment in a representative democracy, the Court should clarify that, under Article 16, public comment sessions at government meetings are designated public forums of the limited type because they are expressly created to allow for in-person input by members of the public. In such forums, content-based restrictions on speech within the objective topic-based or speaker-based boundaries of the forum, such as the challenged provisions of the Policy, are subject to strict scrutiny and can be justified only if narrowly tailored to serve a compelling governmental interest.[17]

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[16]Given the Court has already suggested that forum analysis applies under Article 16, *Roman,* 461 Mass. at 713-714, 717, the solicitation for *amicus* briefs in this case assumes it does, and the benefits of the analysis in terms of guiding expectations of both the public and government officials, this brief assumes the doctrine applies.

[17]This Court may have been addressing this issue when in *Roman,* 461 Mass. at 715, it said that speech limitations in a "limited public forum" must be "reasonable and neutral" not only as to viewpoint but

This result is consistent with prior interpretations of Article 16. *Lucas*, 472 Mass. at 397 ("under our Declaration of Rights, the applicable standard for content-based restrictions on political speech is clearly strict scrutiny").[18] And no other result adequately prevents public officials from suppressing relevant input from those to whom they are accountable.[19]

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also as to "content," reflecting that some content-neutrality is required in such forums. There, the court also referred to restrictions on "access," *id.* at 716, as did the Supreme Court in *Christian Legal Soc'y Chapter of the Univ. of Cal.,* when it emphasized that any "access barrier" need only be reasonable and viewpoint neutral, 561 U.S. at 679, seemingly referring to the criteria setting the outer boundaries of the forum.

[18]See also *Bigelow,* 475 Mass. at 555-556 & n.4, 562 (letters sent to official's home calling official a "fucking loser" and "not capable" were protected speech that could not be basis for conviction); *Van Liew,* 474 Mass. at 38-39 (calling public official "corrupt and a liar" and similar in phone calls and public mailings was protected speech on which harassment order could not be based).

[19]Content-based restrictions that set objective topic or speaker-qualification boundaries of the forum are allowed if they are reasonable and do not authorize viewpoint discrimination. Such boundaries may include, for instance, that comments must be directed to matters within the relevant body's jurisdiction, relate (or not relate) to agenda items or other specific topics, and be made by residents or some other relevant subset of the general public. Content-*neutral* and reasonable time, place or manner rules, such as uniform time limits and the need for recognition of the chair, are also acceptable.

D. The "civility" requirements are content-based and not narrowly tailored to achieve a compelling governmental interest.

The Policy's prohibitions on speech that the Board deems not to be "courteous and respectful" or to be "rude, personal or slanderous" or contain "inappropriate language" (the "civility" standards) are content-based and unrelated to any objective, external boundaries of the forum. They are therefore subject to and cannot withstand strict scrutiny because they are not narrowly tailored to serve a compelling state interest.

1. The provisions are clearly content-based.

Government regulation of speech is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015). A law is content-based if "the applicability of [its] requirements can only be determined by reviewing the contents of the proposed expression." *Opinion of the Justices to the Senate*, 436 Mass. 1201, 1206 (2002); see also *MCH*, 486 Mass. at 442.

Some portions of the Policy are content-neutral on their face, such as the Chair's ability to "control the time available to individual speakers" and the requirement that individuals speak only after receiving

permission from the Chair. They may qualify as reasonable time, place and manner restrictions, provided they are applied in a neutral manner and survive intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989).[20]

The same cannot be said of the Policy's demands that comments must be "courteous and respectful," and not contain "rude, personal or slanderous remarks" or "inappropriate language." To determine compliance with these conditions (pursuant to whatever undisclosed criteria they might be judged, see Part III below), one must make "reference to the content of the regulated speech." *Reed*, 576 U.S. at 164. In this case, the Chair cut off Ms. Barron after listening to her because he deemed the substance of her comments to be "slander." Appellees Br. 19. Her speech could just as easily have been deemed not "courteous and respectful" or "rude" or "personal" or to contain "inappropriate language." Such an assessment necessarily requires referencing the content of the speech. See, e.g. *Zapach*, 134 F. Supp. 2d

[20]The rule against "shouting" is facially content neutral but may burden substantially more speech than is necessary to serve any legitimate interest, *id.*, including because it contains no objective standards to measure prohibited noise levels. See Part III.

at 682; see also Appellees Br. 34 (admitting action based on "choice of words and tone of delivery").[21]

"It is difficult to imagine a more content-based prohibition on speech than [a] policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter." *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996); see also *Spaulding*, at 19, R.A. 124. Here, it is hard to imagine any speech that is highly critical of the Board's work that could not be deemed to violate one or more of the Policy's restrictions, or any praise that would transgress them. But, of course, to decide one would have to *hear* the actual words in the context of the specific message being delivered. The provisions are content-based.

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[21]The conclusions in *Steinburg v. Chesterfield County Planning Comm'n,* 527 F.3d 377 (4th Cir. 2008) and *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362, 1371 (D. Kan. 1998) that rules barring "personal attacks" are content-neutral are simply wrong, particularly in light of the *Reed*'s subsequent clarification of what is content-based. Similarly, a conclusion that a rule requiring "decorum" is content-neutral is wrong, *Dyer v. Atlanta Ind. School System,* 852 Fed. Appx. 397, 402 (11th Cir.), *cert. denied,* 142 S. Ct. 484 (2021), particularly if applicable specifically and only to "remarks and dialogue" and "language" as are the civility rules in the Policy.

2. The Policy is not narrowly tailored.

The Policy's "civility" restrictions cannot withstand strict scrutiny because they are not "necessary to serve a compelling state interest" or "narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270; accord *Spaulding*, at 21-25, R.A. 126-130. The only interests the Board cited below were the intertwined ones of preventing "speech that disturbs or disrupts a meeting of a public body," R.A. 71, and maintaining "the orderly conduct" of the meeting. R.A. 83. While the Select Board has a legitimate interest in conducting its meetings without actual disruption, cf. *Cornelius*, 473 U.S. at 811, it has chosen a wildly overbroad and not sufficiently tailored means of serving that interest that creates an "unacceptable risk of a chilling effect." *MCH*, 486 Mass. at 447.[22]

The Board constitutionally may prevent actual

[22]Given the breadth of the Policy and the Board's stated interest, this case does not raise the question of whether a much more narrowly tailored restriction on racist, homophobic, anti-Semitic or similar status-based slurs could survive strict scrutiny, for instance, in connection with certain school-related meetings to serve the interest in affording equal access to the advantages of a public education, G.L. c. 76, § 5.

disruption and preserve order by requiring comments to comply with content-neutral rules. Such rules may include a uniformly enforced and reasonable limit on individual speakers (commonly three to five minutes),[23] the need for recognition by the Chair before comment begins,[24] and an overall time limit on the Public Comment session as a whole. The Board can also require that comments be addressed to matters within its jurisdiction or otherwise set reasonable topic or speaker-based boundaries. But comments that occur only after a speaker is recognized, are on a topic within the scope of the forum, and keep within a consistently enforced time limit do not "disrupt" the meeting. *Acosta v. City of Costa Mesa*, 718 F. 3d 800, 813-815 (9th Cir. 2013) ("insolent" language restriction not justified by an interest in preventing disruption); *Norse*, 629 F.3d at 976 (city cannot constitutionally deem every violation

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[23]*Wright v. Anthony*, 733 F.2d 575, 576 (8th Cir. 1984) (5 minute time limit a content-neutral and reasonable time, place or manner restriction); M*arshall v. Amuso,* 571 F. Supp. 3d 412, 425-426 (E.D. Pa. 2021) (discussing 5-minute time limit).

[24]This type of rule was applied in *Galena v. Leone,* 638 F.3d at 204, where a member of the public spoke without recognition during a portion of the meeting not designated for public input and without recognition. Although cited by the Superior Court, R.A. 147 & n.8, *Galena* does not support the decision below.

of rules of "decorum" as disturbance or disruption; "[a]ctual disruption means actual disruption"). So "civility" rules of the sort at issue here are not necessary to the stated goal, let alone narrowly tailored to achieve it.[25]

The Superior Court's conclusion that the Policy is constitutional "[s]o long as the Board enforces" it to prevent disruptions, R.A. 148, 149, actually highlights that, as written, the Policy prevents more than actual

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[25]The Superior Court adopted, but this Court should reject, the reasoning of *White v. City of Norwalk,* 900 F.2d 1421 (9th Cir. 1990), which in material ways is inconsistent with the Ninth Circuit's more recent decisions in *Acosta* and *Norse. White* upheld against an overbreadth challenge a prohibition on "personal, impertinent, slanderous or profane" remarks, reasoning that the restrictions prevented disruption in the form of "speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies." *Id.* at 1426. But the challenged, content-specific rule was not at all tailored to the kinds of disruption cited by the court, which can be addressed by enforcement of objective topic limitations and reasonable time limits. Likewise, the reasoning of *Steinburg,* 527 F.3d at 387, that pointed comments cause disruption because the target may feel compelled to respond must be rejected. Anyone who responds without being recognized by the Chair would be the one disrupting the meeting, and holding the original speaker responsible for that disruption would impose an unconstitutional heckler's veto. *Brown v. Louisiana,* 383 U.S. 131, 133 & n.1, 141-142 (1966); *Bible Believers v. Wayne Cty.,* 805 F.3d 228, 242-243, 247-248, 252 (6th Cir. 2015).

disruptions.[26] It also fails to recognize that speech on a topic within the forum's scope delivered within an allotted time limit does not actually disrupt a meeting. And because G.L. c. 30A, § 20(g), constitutionally construed, separately authorizes curtailment of actual disruptions based on conduct or unprotected speech,[27] the Policy's content-based "civility" restrictions on speech are not necessary to serve the stated interest.[28]

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[26]*MCH,* 486 Mass. at 444 n.11 (quoting *Stevens,* 559 U.S. at 480)("where facial challenge under First Amendment is concerned,'[t]he Government's assurance that it will apply [the statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading'").

[27]The Board does not and could not contend that the Policy's restrictions apply only to speech outside the scope of constitutional protection, such as true threats, *Virginia v. Black*, 538 U.S. 343, 359–360 (2003), incitement to imminent lawless conduct, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), or other "well-defined and narrowly limited classes of speech." *Lucas*, 472 Mass. at 393 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Certainly, Ms. Barron's speech, including calling the Chair "a Hitler," was constitutionally protected. See *Bigelow,* 475 Mass. at 561-563; *Van Liew,* 474 Mass. at 38–39.

[28]The Superior Court declared that the Policy is constitutional "when it is employed to maintain order *or decorum* or to prevent disruptions" (emphasis supplied), but did not identify (and the Appellees have not proffered) any legitimate government interest in maintaining "decorum" other than "preventing disruptions at Board meetings." R.A. 148. As discussed in Part III, an asserted interest in "decorum" – related solely to speech, as are the Policy's "civility" provisions, and

The Policy is overbroad, not narrowly tailored and does not pass constitutional muster.

III. Even if public comment periods were nonpublic forums, the Policy's speech restrictions are unconstitutional because they lack objective standards and are not viewpoint neutral.

In any forum, even a nonpublic forum, regulations must be "reasonable and viewpoint neutral." *Pleasant Grove City*, 555 U.S. at 470. Under these standards, the Policy is unconstitutional for two independent but related reasons: (1) there are no objective standards to guide decisions on when speech is "courteous and respectful" or "rude, personal or slanderous" or "inappropriate," and (2) the criteria are not viewpoint neutral.

1. The Policy is not reasonable given its standardless and subjective terms.

Speech restrictions in any forum, including a nonpublic forum, must contain "narrow, objective, and definite standards" to guide an official's discretion. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); see also *Minnesota Voters All.*, 138 S. Ct. at 1881, 1888. Such standards must preclude "the 'potential

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unrelated to actual disruption – is simply too vague and overbroad to be reasonable or legitimate. *Marshall v. Amuso,* 571 F. Supp. 3d at 425-426.

for arbitrarily suppressing First Amendment liberties.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Shuttlesworth*, 394 U.S. at 91). "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid, time, place or manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Its mere existence "intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).[29]

In *Minnesota Voters All.*, the Supreme Court held that a regulation prohibiting "political" attire at a polling place — a nonpublic forum — was not reasonable because it lacked objective standards. 138 S. Ct. at 1880-1881. The rule unconstitutionally permitted the

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[29]The absence of standards to guide discretion also raises issues of vagueness, a principle that applies with particular force when free speech is implicated. *United States v. Williams*, 553 U.S. 285, 304 (2008); *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 499 (1982); *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581 (2006) ("An additional principle to be noted is that '[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.'").

government to apply *ad hoc* discretion and allowed for viewpoint discrimination. *Id.* The rule prohibiting "political" attire carried "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Id.* at 1891 (quoting *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987)). See also *ISKC*, 452 U.S. at 649 (warning of the "more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority").[30]

The Policy's mandates that speech be "courteous and respectful" and not contain "rude, personal, or slanderous remarks" or "inappropriate language" are ripe for "virtually open-ended interpretation." *Minnesota Voters All.*, 138 S. Ct. at 1891. The Policy does not define them, their dictionary definitions provide no

[30]Similar principles were applied in the public meeting context in *Draego v. City of Charlottesville,* 2016 WL 6834025 (W.D. Va. Nov. 18, 2016). There, the city council had created periods during which members of the public could speak for three minutes each, but also had a rule against "defamatory attacks on groups." *Id.* at *1. The court enjoined the latter rule because it granted unfettered discretion unbounded by sufficient standards, *id.* at 20, and was overbroad as it "would countenance prohibiting a wider array of clearly on-topic statements on matters of public concern." *Id.* at 21.

meaningful guidance,[31] and they are so "irreparably clothed in subjectivity" and overbroad, *Marshall v. Amuso*, 571 F. Supp. 3d at 424, 425-426, that defining them in a constitutionally sufficient way may be "an impossible task." Contrast *Minnesota Voters All.*, 138 S. Ct. at 1891. Certainly, Appellees' litigation position that the Policy is designed to mandate "civility" is of no help to their cause. Appellees' Br. 54. That term is as overbroad, subjective and standardless as the terms used in the Policy. The Policy simply is not "reasonable."

2. *The Policy is not viewpoint neutral.*

Even in a nonpublic forum, speech may not be suppressed "merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46; see

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[31] "Rude" can encompass being "uncouth," "ignorant" or "unlearned." https://www.merriam-webster.com/dictionary/rude. "Personal" encompasses anything related to a particular person. https://www.merriam-webster.com/dictionary/personal. "Inappropriate" means merely unsuitable. https://www.merriam-webster.com/dictionary/inappropriate. And "slanderous" merely refers to "defamation," https://www.merriam-webster.com/dictionary/slander, which requires a whole host of judgments about intent, truth and whether something is a matter of opinion, https://www.merriam-webster.com/dictionary/defame. *Sholz v. Delp*, 473 Mass. 272 (2015), and that are not susceptible to snap assessment by a layperson. See *Spaulding,* 22-24, R.A. 127-129.

also *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 579 (1995) (a governmental entity "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government").

Viewpoint discrimination occurs when speech is restrained "because the ideas [expressed] are themselves offensive to some of their hearers," because "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). See also *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). Thus, banning speech because it is disparaging, offensive, or expresses harsh criticism is viewpoint discrimination. *Matal*, 137 S. Ct. at 1763; *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893-895 (6th Cir. 2021) (policy prohibiting "antagonistic," "abusive" and "personally directed" speech at public meetings constituted unconstitutional viewpoint discrimination because it allows criticism to be suppressed); *Youkhanna*, 934 F.3d at 520 (rule against "attacks" arguably viewpoint discriminatory).

The "civility" provisions authorize suppression of speech because it expresses a viewpoint that public

officials deserve criticism without flattery or other sugar coating. *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. at 960 (a policy prohibiting criticism of school district employees "effectuates a classic form of viewpoint discrimination" as it "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and, ultimately, dynamic political change"). The Policy is therefore viewpoint discriminatory.[32]

For these reasons, the Policy is unconstitutional regardless of what type of forum is at issue.

IV. Ms. Barron states a claim of "threats, intimidation or coercion."

The Superior Court wrongly held that Ms. Barron failed to state a claim under the Massachusetts Civil Rights Act, G.L. c. 12, §11I ("MCRA") because she did not sufficiently identify interference with a secured

[32] The Superior Court's declaration that under the Policy the "Board may not prohibit speech . . . based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism" (R.A. 150), like the declaration about disruptions, *supra* at note 26, provides no more protection or guidance than would a promise by the Board that it will not apply the Policy in an unconstitutional way again in the future, which cannot solve a free speech overbreadth problem. It ignores what happened in this very case and, in spite of it, the Board admits it will "continue[]" such applications. Appellees Br. 50.

right via “threats, intimidation or coercion.”

The Chair here did not merely ask Ms. Barron to stop speaking. Nor did he simply end the meeting. Instead, he expressly threatened to have Ms. Barron forcibly and immediately removed if she did not leave altogether. Appellants Br. 10; Appellees Br. 13.[33] As a result of this, Ms. Barron, as a reasonable person would have done, removed herself in spite of her right to remain. This interfered with her free speech rights, her right to assemble under Article 19 of the Declaration of Rights, and her liberty interest to remain on public property opened to the public. See, e.g. *Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015); cf. *Commonwealth v. Weston W.*, 455 Mass. 24, 33 (2009)(“Inherent in the right to life, liberty, and happiness is the right to move freely and peacefully in public without interference by police.”). And it did so by means of “threats, intimidation or coercion.”

Interfering or attempting to interfere with secured rights by explicitly or even implicitly threatening “forcible ejection” or “physically to remove” someone

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[33]Depending on the tone and context, an order to stop speaking could constitute “threats, intimidation, coercion” even if a threat of forcible removal is not expressly emphasized.

for exercise of protected rights is "threats, intimidation or coercion." *Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752, 763 (2014); see also *Batchelder v. Allied Stores*, 393 Mass. 819, 823 (1985); *Reproductive Rts. Network v. President of Univ. of Mass.*, 45 Mass. App. Ct. 495, 507 (1998)(invocation of police power to curtail free speech rights is threats, intimidation or coercion). So is "'the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Planned Parenthood League of Mass. v. Blake*, 417 Mass. 467, 474 (1994).

Ms. Barron clearly states a claim that her rights were interfered with by "threats, intimidation or coercion."[34]

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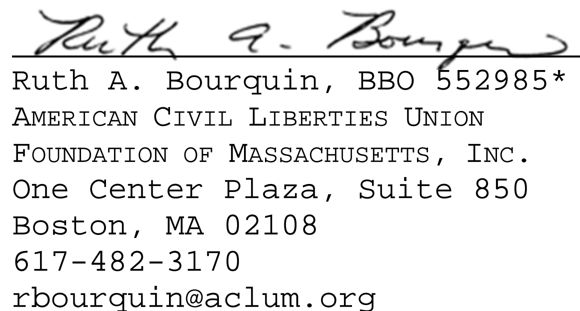
[34]The Court should take this opportunity to reinforce the well-established principle that qualified immunity has no applicability with regard to requests for declaratory or injunctive relief. *Longval v. Commissioner of Corr.*, 404 Mass. 325, 332 (1989). But it should not endorse the lower court's conclusion (R.A. 140) that MCRA claims cannot be stated against individual public employees in their official capacities. Since the Appeals Court opinion in *Howcroft v. Peabody,* 51 Mass. App. Ct. 573, 593 (2001), this Court has expressly reserved judgment on this important issue. *American Lithuanian Naturalization Club v. Board of Health of Athol*, 446 Mass. 310, 325-326 (2006)("it is not resolved whether the Civil Rights Act applies to municipalities"). Given Appellants do not brief the issue, this case is not an appropriate vehicle for resolution.

CONCLUSION

The Policy violates Article 16 because it authorizes content-based discrimination in a forum specifically created for members of the public to provide feedback — including criticism — to their public officials. The Policy is also unconstitutional because its key terms are standardless and viewpoint-discriminatory. The Superior Court's contrary conclusion, as well as the dismissal of the MCRA claim, should be reversed.

Respectfully submitted on behalf of the American Civil Liberties Union of Massachusetts, Inc.,



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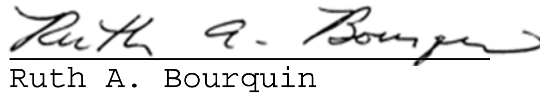
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure, except that it exceeds the generally applicable length limit for an amicus brief, containing 45 pages of non-excluded pages in Courier New 12-point font, and therefore is accompanied by a Motion for Leave to Exceed Length Limit.



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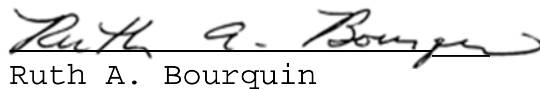
I hereby certify that I have today, October 12, 2022, made service of this amicus brief by directing copies through the electronic filing service provider to all counsel of record.



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