COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-13284

WORCESTER, ss.

_____

LOUISE BARRON, JACK BARRON, and ARTHUR ST. ANDRE,

Plaintiffs-Appellants,

v.

DANIEL L. KOLENDA, Individually and as he is a Member of the SOUTHBOROUGH BOARD OF SELECTMEN, et al.,

Defendants–Appellees.

_____

On Appeal from a Judgment of The Superior Court
(Lower Ct. Docket No. Worcester 2085CV00382)

_____

BRIEF OF PIONEERLEGAL, LLC AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS AS TO ARTICLES 16 AND 19 OF THE MASSACHUSETTS DECLARATION OF RIGHTS

_____

Frank J. Bailey – BBO# 026485
Selena Fitanides – BBO# 645974
John C. La Liberte – BBO# 556046
PioneerLegal, LLP
185 Devonshire Street
Boston, Massachusetts 02110
Ph: 617-410-5200
frank.bailey@pioneerlegal.org
selena.fitanides@pioneerlegal.org
john.laliberte@pioneerlegal.org
Counsel for Amicus Curiae PioneerLegal, LLC

October 12, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Amicus Curiae PioneerLegal, LLC ("PioneerLegal") hereby discloses that it is a non-profit, non-partisan, legal research and litigation entity organized under the laws of the Commonwealth of Massachusetts that defends and promotes accountable government, economic opportunity, and educational opportunities across the country. Through legal action and public education, PioneerLegal works to preserve and enhance constitutional and civil liberties. Pioneer Institute, LLC is the parent of PioneerLegal. PioneerLegal does not have any publicly held stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

PioneerLegal respectfully submits this brief pursuant to the Court's May 16, 2022 Announcement requesting amicus briefs. As amicus curiae, PioneerLegal respectfully urges the Court to reverse the Superior Court's decision in favor of the Appellees, Daniel L. Kolenda and others, individually and as a members of the Southborough Board of Selectman, *et al*. allowing Defendants' Motion for Judgment on the Pleadings.

INTEREST OF THE AMICUS CURIAE[1]

PioneerLegal is a non-profit, non-partisan, public interest law firm that defends and promotes freedom of speech, freedom of association, open and accountable government, economic opportunity, and educational opportunities. PioneerLegal believes that the right to criticize public officials during the public comment period of a public meeting is protected by, among other things, the Massachusetts Declaration of Rights, and that this right is essential to promote governmental accountability and a healthy and well-functioning democracy.

---

[1] Pursuant to Mass. R. App. P. 17(c)(5), the undersigned counsel declares that (1) no party's counsel has authored this Brief in whole or in part; and (2) no party, person or entity has contributed money to fund preparation or submission of this Brief. The undersigned counsel for the amicus curiae has prepared and submitted this Brief on a pro bono basis. Counsel and their law firm do not represent any party in this case or in any other proceeding or legal transaction.

SUMMARY OF ARGUMENT

Well-intentioned though they may be, civility policies like the one at issue in this case do not preserve decorum in public meetings; rather, by imposing content and viewpoint-based restrictions on the highest value political speech, they interfere with the agency relationship between the people and their representatives that is established by Article 5 and maintained by Article 19 of the Massachusetts Declaration of Rights. On its face and as applied, Southborough's 2017 "Policy and Guidelines on Public Participation at Public Meetings" is utterly inconsistent with the core political speech rights protected by Article 16 (as amended by Article 77) and Article 19 of the Massachusetts Declaration of Rights. The Policy is neither necessary to serve a compelling state interest, nor is it narrowly drawn to advance Southborough's stated interest in avoiding disruptions during public meetings. Instead, the Policy interferes with the workings of representative government by suppressing the communication of ideas and viewpoints that are essential to our constitutional rights to free expression, to assemble and consult upon the public good, to give instructions to governmental representatives, and to petition for redress of grievances. PioneerLegal respectfully urges the Court to reverse the Superior Court's erroneous decision granting Defendants' Motion for Judgment on the Pleadings.

ARGUMENT

The type of speech at issue in this case—political speech at a town meeting—is the most highly valued, most zealously protected category of free expression under our state and federal constitutions. In fact, this type of speech is so fundamental to our democracy, so iconic, that American artist Norman Rockwell made it the subject of one of his most celebrated paintings, "Freedom of Speech." Painted in 1943 as part of an effort to encourage Americans to purchase war bonds, the painting depicts a working man standing to speak at a town meeting, a folded copy of the town's annual budget sticking out of his jacket pocket. Rockwell portrays the speaker as an American hero, surrounded by men in suits and ties looking up at him and listening respectfully as their fellow citizen "consult[s] upon the common good," as Article 19 of the Massachusetts Declaration of Rights puts it. "Freedom of Speech" portrays one of the precious, core values that Americans were fighting for in 1943, a value that is equally worth protecting to this day.[2]

We don't have a painting of appellant Mrs. Barron's attempt to consult upon the common good during the public comment session of Southborough's

---

[2] See Normal Rockwell Museum website, https://www.nrm.org/2012/01/norman-rockwells-four-freedoms/ (last visited Sept. 26, 2022).

December 2018 Board of Selectmen meeting, but there is a video recording and it paints quite a different picture from "Freedom of Speech."[3] Like her counterpart in Rockwell's painting, Mrs. Barron, a "disabled senior citizen and a grandmother," came to the Town Hall prepared to discuss the town's finances, and related topics. (App. 14, ¶ 113; App. ¶ 135). Having waited patiently for almost three hours for her chance to speak, Mrs. Barron addressed the Board respectfully and in a measured tone; but, as she turned to the topic of the Board's repeated violations of the Open Meeting Law, ironically, she was abruptly silenced. (App. 14, ¶¶ 113-23; see Meeting Video, n.3, supra). According to the Board Chairman, Mrs. Barron, who was exercising her constitutional rights under Article 19 of the Declaration of Rights to consult upon the common good, give instructions to her representatives, remonstrate with, and petition them for redress of grievances, had run afoul of a

[3] Appellant has provided the Court with an electronic copy of Southborough's video recording of the relevant portion of the December 2018 Selectman's Meeting ("Meeting Video"). (Appellant's Brf. at 6, n.1). In addition, the Court is entitled to take judicial notice of the Meeting Video since it is publicly available on the Town's website. YouTube at https://www.youtube.com/watch?v=lF6GQafHGL8 (relevant portion of meeting from 2:36:01-2:36:50); see Bogertman v. Attorney General, 474 Mass. 607, 616 (2016) (explaining that the SJC may take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned" (quoting Mass. G. Evid. § 201(b) (2016))); Richards v. McKeown, 9 Mass. App. Ct. 838, 838 (1980) (taking judicial notice of standard mortality tables that, on their face, are reliable).

purported civility policy that places content and viewpoint-based restrictions on the most highly valued political expression. (App. 15, ¶¶ 120-128)

Regardless of how one classifies the forum in which this outrage took place, content and viewpoint-based restrictions placed on the most highly valued form of political expression must face the rigorous strict scrutiny test, and that is a test that policies like Southborough's Public Participation at Public Meetings Policy ("Policy") cannot pass.

I. SOUTHBOROUGH'S POLICY IS INCONSISTENT WITH FUNDAMENTAL POLITICAL SPEECH RIGHTS GUARANTEED BY ARTICLE 16 (AS AMENDED BY ARTICLE 77) AND ARTICLE 19 OF THE MASSACHUSETTS DECLARATION OF RIGHTS

Southborough's 2017 Policy is typical of the raft of such policies being implemented throughout the country as intensified partisan polarization has moved into the arena of local government. See Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 20-24 (2018). The Policy applies at all public meetings and hearings at which residents of Southborough have the opportunity to exercise their Article 16 and 19 political speech rights. (App. 65, ¶1). It purports to serve the laudable goal of bringing greater civility to public meetings, but as the facts of this case demonstrate, it is destined to do just the opposite. By mandating that the public's political expression be "respectful and courteous, free of rude, personal or slanderous remarks," and "inappropriate

language" (App. 65, ¶4), the Policy gives local officials unfettered discretion to silence political speech whose content and viewpoint they find unpleasant, challenging, critical, or otherwise "inappropriate." Thus, the Policy on its face, and as applied, is an unconstitutional affront to the most sacrosanct, "indubitable" free speech values protected by Articles 16 and 19 of the Massachusetts Declaration of Rights. Commonwealth v. Surridge, 265 Mass. 425, 427 (1929) (stating that "[t]he importance to the public welfare of [Article 19's] constitutional guaranty has been recognized and scrupulously upheld by the courts."); Commonwealth v. Bigelow, 475 Mass. 554, 562 (2016) (noting that, in considering the reach of free speech protections, it is critical to examine "the context and content of the speech at issue"); Wheelock v. Lowell, 196 Mass. 220, 227-28 (1907) (describing the importance of public meetings in preserving "government by free men . . . which shall in fact preserve the blessings of liberty").[4] See also

[4] Wheelock contains an ode to the exercise of Article 19 rights in the context of a public meeting that still speaks to what is at stake in the present case:

> 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. No small part of the capacity for honest and efficient local government manifested by the people of this Commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) (stating that "public discussion is a political duty, and that this should be a fundamental principle of the American government"), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969) (adopting Justice Brandeis's reasoning in relevant part).

So obvious is the Policy's constitutional infirmity, that it may not be necessary for the Court to "forge into the murky waters of forum analysis" before striking it down. See Ridley v. Massachusetts Bay Trans. Auth, 390 F.3d 65, 96-97 (1st Cir. 2004) (Torruella, J., concurring) (arguing that it is unnecessary to conduct the traditional forum analysis because "regardless of the nature of the forum involved, the MBTA's rejection of [a religious advertisement] was unreasonable and constitutes viewpoint discrimination, abuses made possible by the vague and subjective nature of the MBTA's 'demean[ing] and disparag[ing]' standard" for approving ads). While "the analysis under art. 16 [of the Massachusetts Declaration of Rights] is generally the same as under the First

---

> the opportunity to exercise the right still survives. The practical instruction of the citizen in affairs of government through the instrumentality of public meetings and face to face discussions may be regarded quite as important as their amusement, edification or assumed temporal advancement in ways heretofore expressly authorized by statue and held constitutional.

196 Mass. at 227 (finding that city's expenditure to construct a meeting hall has a legitimate public purpose, in part, because of Article 19's protection of the people's right to assemble to consult upon the common good).

Amendment," this Court has recognized that, in some cases, "art. 16 will call for a different result." Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 201 (2005) (holding Article 16's protection of right to freedom of expression extends beyond that of the First Amendment and required invalidation of city's public indecency ordinance). In Walker v. Georgetown Hous. Auth., 424 Mass. 671 (1997), this Court wrote that it "need not decide whether [it] would find the [U.S.] Supreme Court's public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under the [Massachusetts Declaration of Rights]." Id. at 675. The Court further noted that "[t]here is concern about these classifications," and that "it might be more helpful if the "[U.S.] Supreme Court were to focus more directly and explicitly on the degree to which the regulation at issue impinges on the first amendment interest in the free flow of information." Id. at 675, n.9 (quoting L.H. Tribe, American Constitutional Law, Secs. 12-24 at 993 (2d ed. 1988); see also Ridley, 390 F.3d at 97 (Torruella, J., concurring); AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth., 42 F.3d 1, 12 (1st Cir. 1994) (finding forum analysis unnecessary when restriction violates prohibition on viewpoint discrimination). Given what is at stake in this case, the notion that the scope of core political speech rights in Massachusetts could turn on trivial, irrelevant questions (such as whether Southborough's public comment period is a

limited public forum because only town residents are allowed to speak)[5] should inspire this Court to "adhere to the principle that [it] will exercise its independent judgment to uphold the cherished protections of the Declaration of Rights as a matter of State constitutional law."[6] See Commonwealth v. Lucas, 472 Mass. 387, 397 (2015) (quoting Mendoza, 444 Mass. at 201).

The "cherished" and robust protections for political expression in the Declaration of Rights mean that civility codes like the Policy at issue in this case cannot pass constitutional muster. Id. Like analogous provisions in other states' constitutions which have been found to provide greater protection for political speech than does the First Amendment, Article 19 confers upon the people of Massachusetts an *affirmative* "right . . . to assemble to consult upon the common good; give instructions to their representatives," and "by way of remonstrances" (precisely what Mrs. Barron was so effectively delivering) to request "redress of the wrongs done to them, and of the grievances they suffer." MASS. CONST. Art.

---

[5] See Appellee's Brf. at 21-22 and Memorandum of Decision at 13 & n.7 (App. 149-150).

[6] The period in which Massachusetts courts adjudicating state free expression claims have relied heavily upon stable First Amendment precedent may be coming to an end. According to some commentators, divisions within the current U.S. Supreme Court are making "free-expression jurisprudence even more muddled today than in the past" because the Justices "are not operating from the same First Amendment playbook." Clay Calvert, *Dissent, Disagreement and Doctrinal Disarray: Free Expression and the Roberts Court in 2020*, 28 WM. & MARY BILL RTS. J. 865, 865 (2020).

XIX; see, e.g., Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 88 (1980) (affirming California Supreme Court decision that the state constitution, which provides an affirmative right to engage in political expression, grants broader free speech protection than does the First Amendment); State v. Schmidt, 84 N.J. 535, 557-60, 423 A.2d 615, 626-28 (1980) (holding that New Jersey's constitution is more protective of the rights to free speech and assembly than the First Amendment because those rights are affirmatively guaranteed); Davenport v. Garcia, 834 S.W.2d 4, 8 (Tex. 1992) (explaining that the First Amendment speaks in terms of restricting government, whereas the Texas Constitution grants an affirmative right to "speak, write or publish opinions on any subject," thus providing broader protections against prior restraint).[7] Article 19 doesn't merely prohibit the government from abridging political speech rights, as does the First Amendment; it affirmatively enshrines those crucial and cherished rights in our state constitution. This is one of several reasons why, under the Massachusetts

[7] This Court adopted the "affirmative right" reasoning in Batchelder v. Allied Stores Int'l, Inc. where it discussed Pruneyard and noted that Article 9 of the Declaration of Rights, which provides for free and fair elections, and, like Article 19, "is not by its terms directed only against governmental action" confers broader constitutional protections than does the First Amendment. 388 Mass. 83, 88-89 (1983). However, this Court has also recognized that Article 16, which does not confer an affirmative right, is more protective of free expression than its federal counterpart in some cases. See, e.g., Mendoza v. Licensing Bd. of Fall River, 444 Mass. at 201.

Constitution, civility codes like Southborough's that are bound to be used as content and viewpoint-based restrictions on political speech cannot stand.

A. The Policy is undoubtedly a content and viewpoint-based restriction on political speech.

To determine whether Mrs. Barron violated the ban on making "slanderous remarks" during the Southborough town meeting, one would need to know the substance of her remarks, whether her remarks either constituted an opinion or had previously been adjudicated to be truthful, and, since they were directed at public officials, whether they were made with "actual malice." See Lucas, 472 Mass. at 394-395. Because the applicability of the Policy's requirements "'can only be determined by reviewing the contents of the proposed expression,'" the Policy is, by definition, a "'content-based regulation of speech.'" Id. at 395 (quoting Opinion of the Justices, 436 Mass. 1201, 1206 (2002)) (holding that a restriction on speech is content neutral "only if 'it is justified without reference to the content of the regulated speech.'"); see also Mass. Coalition for the Homeless v. Fall River, 486 Mass. 437, 442 (2020) (explaining that a regulation is content-based on its face if its restrictions "depend entirely on the communicative content" of the expression it regulates). A content-based restriction on political speech is "presumptively invalid" and its proponent "bears the heavy burden of establishing its

constitutionality." Lucas, 472 Mass. at 395 (2015) (quoting Opinion of the Justices, 436 Mass. at 1206).

Even more concerning from a constitutional perspective, the Policy, on its face and as applied, discriminates based on viewpoint. Under its terms, speakers cannot express disrespect for town officials, their policies, or even voice disapproval of something as undeniable as town officials' repeated failure (as was documented by the Attorney General) to adhere to the Open Meeting Law's requirements. Thus, praising town officials for their efforts to comply with the Open Meeting Law would be allowed, but criticizing their failure to do so constitutes making disrespectful, "rude, personal or slanderous remarks" in violation of the Policy. (App. 12-13, ¶¶ 97-107; App.14, ¶¶ 118-122)). This is classic viewpoint discrimination. See Matal v. Tam, 582 U.S. __, 137 S. Ct. 1744, 1763 (2017) (explaining that "giving offense is a viewpoint"). The Policy's amorphous ban on "inappropriate language," (App. 65, ¶4), while not invoked specifically against Mrs. Barron, is also susceptible to viewpoint discrimination. See, e.g., Marshall v. Amuso, 571 F. Supp.3d 412, 418-19, 422 (E.D. Pa. 2021) (describing how school board had deemed that "comments escalated from expressing a viewpoint to expressing beliefs and ideas that were abusive and coded in racist terms, also knowns as 'dog whistles,'" thus violating the civility code); Bachrach v. Sec. of the Commonwealth, 382 Mass. 268, 276 (1981) (recognizing

that censoring the use of certain words might become a "convenient guise for banning the expression of unpopular views"). By allowing town officials to silence viewpoints that, in their opinion, are not respectful or which involve "inappropriate language," the Policy gives those officials unfettered discretion to impose *ad hoc*, subjective, viewpoint-based restrictions on speech—something that Massachusetts courts have found unconstitutional even in the comparatively restrictive prison context. See, e.g., Champagne v. Comm'r of Correction, 395 Mass. 382, 391 (1985) (finding prison regulation unconstitutional where it "gives too much discretion to [the superintendent] to determine . . . what [expressive conduct] warrants censorship"); Manor v. Rakiey, 2 Mass. L. Rptr. 506, 509 1994 WL 879790 at *5 (Mass. Super. Ct., 1994) (holding that prison regulation violates Article 16 rights because "expressive conduct is subject to the superintendent's unfettered discretion"). Neither the Amended Complaint nor the video of the meeting so much as suggests that Mrs. Barron delivered her comments in a *manner* disruptive to the meeting. Rather, it was the *content* and the *viewpoint* of Mrs. Barron's criticism of her elected officials—her charges of irresponsible spending and lack of transparency—that provoked the Chairman's ire according to the Amended Complaint. (App. 14). With an unconstitutional Policy at his disposal, Southborough's Board Chairman used his unfettered discretion to place a prior restraint on the very highest value political speech.

B. Under the Declaration of Rights, content and viewpoint-based restrictions on political speech are presumptively invalid and are subject to strict scrutiny.

The Superior Court below recognized that "[v]iewed in isolation, the Board's prohibition against 'rude, personal, or slanderous' remarks borders close to an unconstitutional prohibition on speech." (App. 150, lines 15-16). However, the court went on to find that the town's "legitimate" interest in "preventing disruptions to the Board's meetings" cures the Policy of its potential constitutional infirmity. (App. 150-151). In so doing, the Superior Court erroneously applied a particularly toothless rational basis test to a content and viewpoint-based restriction on core political speech—a restriction meant to be imposed in the very setting in which Article 16 and 19 rights are most likely to be exercised, public meetings. (App. 150-151). If the wording of the restriction was too anodyne for the court to appreciate its unconstitutional import, the way in which town officials wielded their censorious Policy against Mrs. Barron should have made its dangers perfectly clear. The Policy was used to silence core political speech critical of elected officials and to disrupt and terminate the Board meeting—not to "prevent disruptions." Clearly, the only "disruption" at the meeting was the heavy-handed action by the Chairman when he rudely interrupted Mrs. Barron to invoke the Policy, and abruptly ended the meeting so as to silence her criticism of him and his colleagues. (App. 14-15. ¶ 114-128). The Board Chairman's assault on

constitutional rights here cannot be attributed to his innocent misapplication of a Policy capable of some constitutional construction. Appellee Kolenda is an attorney (App. 5, ¶¶ 20-21); presumably, he should have known better. If an attorney cannot (or will not) apply the Policy in a manner consistent with our constitutionally-protected political speech rights, there is something wrong with the Policy.

"[U]nder our Declaration of Rights, the applicable standard for content-based restrictions on political speech is clearly strict scrutiny." Lucas, 472 Mass. at 397 (citing Bachrach, 382 Mass. at 276 (holding that "[a]s a substantial restriction of political expression and association . . . the legislation at bar should attract 'strict scrutiny'")); see also Mass. Coalition for the Homeless, 486 Mass. at 442 (holding that strict scrutiny applies to content-based regulation of protected speech). The Superior Court clearly erred when it used a toothless rational basis test to evaluate the Policy's constitutionality.

C. The Policy is unconstitutional because it is not necessary to serve a compelling state interest, nor is it narrowly drawn to achieve that end.

To withstand strict scrutiny, the Policy must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." See Lucas, 472 Mass. at 398 (quoting Opinion of the Justices, 436 Mass. at 1206). It is far from clear that Southborough has a legitimate interest—let alone a compelling

interest—in preventing "disruptions" at public meetings that consist of disrespectful, discourteous, "rude, personal or slanderous" remarks or "inappropriate language" (See App. 65). "[P]reserving 'the freedom to think for ourselves' must be elevated over even those well-intentioned laws that have the effect of 'censoring pure speech or speakers in order to 'improve the quality'. . . of public debate." Lucas, 472 Mass. at 399 (quoting Bachrach, 382 Mass. at 281) (citations and internal quotations omitted). When balanced against the strong public interest in allowing free discussion of issues of public concern, Southborough's interest in minimizing any emotional disruption that might be caused by disrespectful speech at public meetings is not a compelling one. See Bigelow, 475 Mass. at 562 (reversing conviction for criminal harassment of elected official because abusive letters were directed primarily at issues of public concern—official's qualifications for and performance as selectman—and, therefore, fell "within the category of constitutionally protected speech at the core of the First Amendment"); see also Van Liew v. Stansfield, 474 Mass. 31, 38-39 (2016) (publicly calling a planning board member a "corrupt liar" is protected political speech). The Policy's supposed goal of preventing disruptions conflates constitutionally protected *disruptive* ideas with *disruptive* conduct. See Commonwealth v. Bohmer, 374 Mass. 368, 376 (1978) (distinguishing between an interruption at school that results from speech or conduct that is expressive, and an

interruption that results purely from disruptive conduct, independent of any message being conveyed).

In evaluating the government's interest here, it is important to remember that civility at public meetings is a two-way street. Just as this Court recognizes that attorneys, as officers of the court, have an enhanced obligation to conduct themselves in a professional manner, see Mass. R. Prof. Conduct, pmbl. [9] (2022), we should expect our elected officials to exhibit tolerance, patience and forbearance in accepting the criticism that members of the public have an affirmative constitutional right to offer—not to summarily silence them, threaten them with expulsion, and publicly berate and humiliate them, as Southborough officials are alleged to have done in this case. (App. 14-15, ¶¶ 120-140); see MASS. CONST., Article XIX ("the people have a right . . . to . . .give instructions to their representatives . . . and by way of . . . remonstrances" request redress of grievances). As this court recognized in Commonwealth v. Bigelow, it is not unusual for politicians to receive criticism from disgruntled constituents, and a person who decides to seek public office "must accept certain necessary consequences of that involvement in public affairs" and the "risk of closer public scrutiny than might otherwise be the case." 475 Mass. at 563. In our multicultural democracy, we should expect our leaders to practice tolerance and forbearance, and to model the civility they would like to see in others when receiving feedback

from their culturally and socioeconomically diverse constituents. Well-intentioned though they may be, civility policies like the one at issue in this case do not preserve decorum; rather they interfere with the very structure of our representative government because they turn on its head the agency relationship between the people and their representatives that is mandated by Article 5, and maintained by Article 19 of the Massachusetts Declaration of Rights.[8] See 1A Auto, Inc. v. Dir. of Office of Campaign and Polit. Finance., 480 Mass. 423, 444 (2018) (Budd, J. concurring), cert. denied 139 S. Ct. 2613 (2019). Officials cannot be fully accountable to the people when they have the power to silence their constituents based on their viewpoints.

Even if avoiding disruptions of public meetings caused by comments deemed "slanderous" by the authorities were a legitimate goal, the Policy is not narrowly drawn to effectuate it. In fact, according to the Amended Complaint, when invoked to prevent such an alleged disruption, the Policy had precisely the opposite effect—it resulted in the termination of a public meeting. The Policy is

[8] "The Declaration of Rights . . . clarifies that the relationship between representatives and the people is an agency relationship." "Art. 5 provides as a right: 'All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.'" 1A Auto, Inc., 480 Mass. at 444 (2018) (Budd, J. concurring).

both overinclusive (because it bans speech that does not disrupt public meetings, such as Mrs. Barron's remonstrances regarding the Board's Open Meeting Law violations) and underinclusive (because it encourages speech and conduct by public officials that has been shown to disrupt, and even terminate, a public meeting). Simply put, the poorly tailored Policy flunks strict scrutiny.

While Mrs. Barron's public comments at the December 4th meeting were neither uncivil nor disruptive,[9] public officials have legitimate concerns that the powerful social pressures that may once have helped maintain civility at public meetings are long gone, while political extremism is on the rise. Fortunately, there are constitutionally permissible means by which to prevent disruptions at public meetings. Viewpoint-neutral, time, place, and manner regulations—such as, for

[9] Both Appellees and the Superior Court suggest that Mrs. Barron was silenced because she requested that the Board Chairman "stop being a Hitler." (Appellee's Brf. at 12; App. 139, 143). However, as the Amended Complaint alleges (App. 14, ¶¶ 118-122), and as the video of the Board meeting shows, see footnote 3, supra, Mrs. Barron was silenced under the Policy for her criticism of the Board's serial violation of the Open Meeting Law *before* she compared the Chairman to the infamous dictator. In any event, even by civility standards in place at the time when the Declaration of Rights was written—and certainly in 1943 when Norman Rockwell's painting "Freedom of Speech" was completed—comparing a public official who is allegedly abusing his power to a notorious tyrant, be it King George III or Adolf Hitler, is neither uncivil nor disruptive, and unquestionably it is constitutionally protected speech. See, e.g., Fleming v. Benzaquin, 390 Mass. 175, 183, 186-87 (1983) (finding that radio host's suggestion that a police officer had behaved like a "dictator" or a "Nazi" was not defamatory because, as an opinion, it was protected speech under Gertz v. Rob't Welch, Inc., 418 U.S. 323, 339-40 (1974)).

example, limiting individual public comments to a few minutes, or prohibiting interruptions and shouting—promote efficiency and decorum without impinging upon free speech rights. See Bachrach, 382 Mass. at 277 (observing that, where the government claims that its legislation is at most a regulation of the "time, place, or manner" of expression," but the regulation actually strikes at "the very content of the communication," it is "inherently suspect"). There is an added benefit to this approach. Our constitutional protections are based on the pragmatic idea that freedom of political expression—rather than being dangerous or a threat to order—acts as a "safety valve" which tends to diffuse frustration instead of letting it build up pressure and eventually explode into violence. See, e.g., Eisner v. Stamford Bd. of Educ., 314 F. Supp. 832, 836 (D. Conn. 1970) (citing Whitney, 274 U.S. at 375 (Brandeis, J. concurring) (arguing that "those who won our independence. . . knew that order cannot be secured merely through fear of punishment . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies")), aff'd as modified 440 F.2d 803 (2d Cir. 1971). Had Mrs. Barron been allowed to publicly air her concerns about financial mismanagement and lack of transparency at her local Board of Selectmen Meeting, there would have been no disruption. What was disruptive was the enforcement of a viewpoint restriction that was not necessary to serve a legitimate state interest, let alone a compelling one, and which was not narrowly drawn to achieve its supposed end. The Policy's

content and viewpoint-based restrictions on political expression cannot survive strict scrutiny.

CONCLUSION

On its face and as applied, Southborough's 2017 "Policy and Guidelines on Public Participation at Public Meetings" is inconsistent with the fundamental political speech rights that are protected by Article 16 (as amended by Article 77) and Article 19 of the Massachusetts Declaration of Rights. The Policy is neither necessary to serve a compelling state interest, nor is it narrowly drawn to advance Southborough's stated interest in avoiding disruptions during public meetings. Instead, the Policy impinges upon the very communication of ideas that gives meaning to our constitutional rights to free expression, to assemble and consult upon the public good, to give instructions to governmental representatives, and to petition for redress of grievances. PioneerLegal respectfully urges the Court to reverse the Superior Court's erroneous decision granting Defendants' Motion for

Judgment on the Pleadings, and to remand this matter for further proceedings.

Respectfully submitted,

/s/ Frank J. Bailey
Frank J. Bailey – BBO # 026485
Selena Fitanides – BBO #645974
John C. La Liberte – BBO# 556046
PioneerLegal, LLP
185 Federal Street
Boston, Massachusetts 02110
Ph: 617-657-6813
frank.bailey@pioneerlegal.org
selina.fitanides@pioneerlegal.org
john.laliberte@pioneerlegal.org
Counsel for Amicus Curiae PioneerLegal, LLC

Dated: October 12, 2022

CERTIFICATE OF COMPLIANCE (Mass. R. App. P. 16(k))

This Amicus Brief complies with the rules of court that pertain to the filing of Amicus Briefs, including, but not limited to: Mass. R. App. P. 16(a)(13)(B) (appealed judgment and decision), 16(a)(13)(C) (reproduction of statutes, rules, regulations), 16(a)(13)(D) (copy of unpublished decisions cited), 16(a)(13)(E) (copy of plans or maps), 16(e) (references to the record), 17(c) (Amicus Briefs), and 20 (form and length of briefs). Rule 21 (redaction) is not applicable to this Amicus Brief.

For the purposes of the length limitation contained in Appellate Rule 20, this Amicus Brief contains 5,124 non-excluded words and uses Times New Roman 14-point font in Microsoft Word 2013.

/s/ Frank J. Bailey
Frank J. Bailey – BBO# 026485

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he served a copy of the foregoing Amicus Brief of the PioneerLegal, LLC on counsel of record for the parties hereto through the Tyler-filing system, directed to their counsel of record:

Ginny Sinkel Kremer, Esq. BBO# 629147
Kremer Law, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
(617) 312-2323
Ginny@kremerlaw.net
Counsel to Plaintiffs/Appellants

John J. Davis, Esq. BBO# 115890
Pierce Davis & Perritano LLP
10 Post Office Sq., Suite 1100N
Boston, MA 02109
(617) 350-0950
jdavis@piercedavis.com
Counsel to Defendants/Appellees

/s/ Frank J. Bailey
Frank J. Bailey

Dated: October 12, 2022