Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13284

Worcester, ss.

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

v.

SOUTHBOROUGH BOARD OF SELECTMEN and
TOWN OF SOUTHBOROUGH,
Appellees

On Appeal From A Judgment Of The Superior Court

APPELLEES' BRIEF FOR SOUTHBOROUGH BOARD OF SELECTMEN and TOWN OF SOUTHBOROUGH

Date: 03/14/2022

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II. WHETHER THE SUPERIOR COURT PROPERLY DECLARED THAT THE BOARD OF SELECTMEN'S PROHIBITION AGAINST "RUDE, PERSONAL, OR SLANDEROUS REMARKS" AS SET FORTH IN PARAGRAPH 3 OF ITS "POLICY AND GUIDELINES ON PUBLIC PARTICIPATION AT PUBLIC MEETINGS" IS A CONSTITUTIONAL PROHIBITION ON SPEECH UNDER MASSACHUSETTS LAW WHEN IT IS EMPLOYED TO MAINTAIN ORDER AND DECORUM OR PREVENT DISRUPTIONS OF BOARD MEETINGS.

STATEMENT OF THE CASE

This case arises out of a verbal confrontation between plaintiff, Louise Barron, a resident of the Town of Southborough, and defendant, Daniel Kolenda, an elected member of the Southborough Board of Selectmen (hereinafter the "Board"). The confrontation occurred during the "Public Comment" segment of a Board meeting held at Southborough Town Hall on December 4, 2018. When Ms. Barron yelled at Mr. Kolenda, "Look, you need to stop being a Hitler! You're a Hitler!" Mr. Kolenda (serving as acting Chair) said "Alright, we are moving into recess" and suspended the meeting. Pursuant to the "Policy and Guidelines on Public Participation at Public Meetings" (hereinafter the "Public Participation Policy")

previously adopted by the Board and the provisions of G.L. c. 30A, § 20(g), Mr. Kolenda then instructed the plaintiff to withdraw from the meeting. Ms. Barron complied.

Plaintiffs filed this action in Worcester Superior Court on April 3, 2020. In their original Complaint, plaintiffs sued the Town of Southborough and five sitting Board members in four Counts. In Count I, Ms. Barron sought relief against the Board members in both their individual and official capacities under the Massachusetts Civil Rights Act ("MCRA"), G.L. c. 12, §§ 11H & 11I, for the alleged violation of her rights to freedom of speech, freedom of assembly and freedom to petition for redress of grievances as protected under Articles XVI and XIX of the Massachusetts Declaration of Rights and the First Amendment to the United States Constitution. In Count II, Ms. Barron sought relief against all defendants under 42 U.S.C. § 1983 for the same Constitutional violations.[1] In Count III, Ms. Barron and two other plaintiffs, Jack Barron and Arthur St. Andre, sued the Board for alleged violations of the Open Meeting Law,

[1] Again, in Count II, Ms. Barron sued the Board members in both their individual and official capacities.

G.L. c. 30A, § 23(f). In Count IV, all plaintiffs sought relief against the Town in the form of a judicial declaration that paragraph 3 of the Public Participation Policy was overbroad in its infringement on protected speech and, therefore, unconstitutional on its face under both state and federal law.

On May 21, 2020, defendants filed a notice of removal to the United States District Court pursuant to 28 U.S.C. § 1441(a). Shortly thereafter, defendants filed an Answer to plaintiffs' Complaint. (App. 26-58). On July 13, 2020, the federal court granted plaintiffs' unopposed Motion to Amend the Complaint to remove all claims pled under federal law. On the same date, the federal court granted plaintiffs' unopposed Motion to Remand the case back to state court. On July 20, 2020, plaintiffs' case was re-docketed in Worcester Superior Court.

In plaintiffs' First Amended Complaint,[2] Ms. Barron narrowed her MCRA claim (Count I) to allege

[2] The First Amended Complaint contained in the Appendix is not identical to the First Amended Complaint entered on the docket, as the version in the Appendix appears to contain additional numbered paragraphs. To minimize confusion, defendants, when citing to the First Amended Complaint, will first cite to the applicable Appendix page and paragraph number, but will also include in brackets the corresponding

interference with her Massachusetts Constitutional rights only, and deleted two sitting Board members (Marty Healey and Sam Stivers) as named defendants.[3] (App. 18-19). Ms. Barron also dismissed her First Amendment claim under 42 U.S.C. § 1983 (former Count II). Ms. Barron further added tort claims against Mr. Kolenda individually for negligent infliction of emotional distress (Count II), intentional infliction of emotional distress (Count III), and defamation (Count IV). (App. 19-22). All plaintiffs reasserted their claims against the Board for alleged violations of the Open Meeting Law, G.L. c. 30A, § 23(f) (Count V) (App. 22-23), and for a judicial declaration that paragraph 3 of the Public Participation Policy was unconstitutional on its face under Massachusetts law only (Count VI). (App. 23-24).

On September 23, 2020, defendants filed a Motion for Judgment on the Pleadings under Mass. R. Civ. P. 12(c) on all Counts of plaintiffs' First Amended Complaint. (App. 59-61). On January 4, 2021, the Superior Court held a hearing on the Rule 12(c) Motion

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paragraph number from the docketed First Amended Complaint, when the numbers are different. For example: (App. 18, ¶ 163 [160]).

[3] Mr. Healey and Mr. Stivers were not yet members of the Board on December 4, 2018.

via the Zoom platform. On March 8, 2021, the Court (Frison, J.) issued a Memorandum of Decision and Order allowing defendants' Motion for Judgment on the Pleadings in full. (App. 137-152). In her decision, the Judge ruled, with respect to Count I,[4] that Board members could not be sued under MCRA in their official capacities. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 593 (2001). (App. 142). Nor could Ms. Barron recover against individual Board members Lisa Braccio or Brian Shea for their alleged silence or subsequent adoption of allegedly false meeting minutes. (Id.). Regarding Mr. Kolenda, the Judge concluded that plaintiff failed to allege conduct "that could plausibly amount to 'threats, intimidation, or coercion' under the MCRA." (App. 142-143).

With respect to Count VI (declaratory judgment), the Judge found that the "Public Comment" segment of the Board meeting constituted a limited public forum. (App. 149). She then upheld the prohibition in

[4] Plaintiffs appeal from the dismissal of Counts I (MCRA) and VI (declaratory judgment) only. Appellants' Brief, at 20 n.4. Any appeal from the dismissal of Counts II – V is thereby waived. Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass. App. Ct. 378, 389 (2019); Mass. R. App. P. 16(a)(9)(A). Consequently, defendants do not address the Superior Court's dismissal of Counts II – V of the First Amended Complaint.

paragraph 3 of the Public Participation Policy against the use of "rude, personal, or slanderous" remarks as a "reasonable, viewpoint-and-content neutral, restriction" to the extent it focused on the prevention of disruptive conduct at Board meetings. (App. 150-151). Based on such findings, the Court made the following declarations:

> 1. The Board's prohibition against "rude, personal or slanderous remarks" under paragraph 3 of the Board's "Public Participation At Public Meetings" policy is a constitutional prohibition on speech under Massachusetts law when it is employed to maintain order and decorum or to prevent disruptions of the Board's meeting. (Footnote and citations omitted).
>
> 2. The Board may not prohibit speech under paragraph 3 of the Board's "Public Participation At Public Meetings" policy based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism. (App. 151).
>
> Final Judgment entered on April 1, 2021.

(App. 152). This appeal ensued. (App. 154).

STATEMENT OF THE FACTS

On December 4, 2018, Ms. Barron attended a Board meeting held at Southborough Town Hall.[5] At the start

[5] Plaintiffs insist the facts alleged in paragraphs 9 – 110 of the First Amended Complaint are somehow relevant to Ms. Barron's MCRA claim (Count I) and/or plaintiffs' request for declaratory relief (Count VI). (Appellants' Brief, at 7-11). Such allegations detail (for the most part) the Barrons' alleged involvement in local politics "over the

of the "Public Comment" segment of the meeting, the acting Chair, Daniel Kolenda, reminded would-be speakers to adhere to the Board's Public Participation Policy during their presentations.[6] (App. 13, ¶ 115 [112]). Adopted by the Board in 2017, the Public Participation Policy was designed to allow active public participation at all public meetings, while at the same time maintain relevancy and civility during public discourse. (App. 65). Ms. Barron approached the lectern with a home-made sign and addressed the Board, first by objecting to proposed budget increases discussed earlier in the meeting, then asking for an explanation regarding the benefits of a Town Manager versus a Town Administrator. (App. 14, ¶¶ 116-118 [113-115]). Mr. Kolenda reminded Ms. Barron that, per

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decades" on issues ranging from the regionalization of the local high school, to the Town's purchase of land from a private school, to an affordable housing project known as Park Central. (App. 4-13). Defendants deny such allegations bear any relevance to the claims asserted in Counts I or VI. The Superior Court did not address such allegations but nonetheless accepted them as true for the purposes of defendants' Motion. (App. 137).

[6] Plaintiffs' counsel played a video of the "Public Comment" segment of the meeting during the January 4, 2021 hearing on defendants' Rule 12(c) Motion. Defendants raised no objection. The video can be found at **https://www.youtube.com/watch?v=lF6GQafHGL8**. The "Public Comment" segment begins at 2:33:02.

the Policy, the Board did not intend to engage in a discussion on any specific subject raised during "Public Comment." Nonetheless, another Board member responded to Ms. Barron's inquiry. (App. 14, ¶ 120 [117]).

Ms. Barron then proceeded to her second topic – Open Meeting Law ("OML") violations. She said she "appreciated" that Board members were merely volunteers, "but you've still broken the law …." She mockingly mimicked the Board's response: "This is the best we can do." "That is not the best you can do." "[B]reaking the law is breaking the law." (App. 14, ¶¶ 121 & 122 [118 & 119]). Her remaining exchange with Mr. Kolenda went as follows:

> Mr. Kolenda: So Ma'am, if you want to slander Town officials who are doing their very best ….
>
> Ms. Barron: I'm not slandering.
>
> Mr. Kolenda: … then we're going to go ahead and stop the Public Comment session now.
>
> Mr. Barron: Look, you need to stop being a Hitler! You're a Hitler! I can say what I want.
>
> Mr. Kolenda: Alright, we are moving into recess. Thank you.

(App. 14-15, ¶¶ 123-125, 127-129 [120-122, 124-126]). At this point, the sound on the Southborough Access Media video of the meeting was turned off. (App. 16,

¶ 135 [132]). While the parties dispute who turned the sound off, it is undisputed that a posted screen message read: "The Board of Selectmen is taking a brief recess and will return shortly." For approximately 12 to 13 seconds, a video camera directed at the Board continued to broadcast images, during which time Mr. Kolenda can be seen gesturing in Ms. Barron's direction. (App. 16, ¶ 136 [133]). Ms. Barron's off-camera movements are not visible. The parties dispute the statements made by Mr. Kolenda and Ms. Barron during this brief period. Ms. Barron claims Mr. Kolenda called her "disgusting" and threatened to have her "escorted out" of the meeting if she did not leave voluntarily. (App. 16, ¶¶ 137 & 138 [134 & 135]). Ms. Barron left the meeting unescorted. (App. 16, ¶ 143 [140]). The Board meeting ended abruptly shortly thereafter. Precisely how the meeting ended was the subject of plaintiffs' OML claim. (App. 22, Count V).

SUMMARY OF ARGUMENT

This Court should affirm the Judgment of dismissal entered below on Counts I and VI of plaintiffs' First Amended Complaint. In Count I, plaintiff, Louise Barron, sought relief under the MCRA

against defendants, Daniel Kolenda, Lisa Braccio and Brian Shea, in both their individual and official capacities as members of the Southborough Board of Selectmen. In support of her claim, Ms. Barron alleged that defendants interfered with her right to free speech, right of assembly and right to petition for redress of grievances as protected under the Massachusetts Declaration of Rights when the acting Chair instructed her to withdraw from the December 4, 2018 Board meeting. Further, such interference (plaintiff alleged) was accomplished by means of "threats, intimidation or coercion."

At the outset, Ms. Barron failed to sufficiently allege that she was deprived of a protected right. A citizen's rights to free speech, freedom of assembly and to petition government for redress of grievances are not absolute. Rather, they are subject to reasonable time, place and manner restrictions. Whether such restrictions pass muster under the Massachusetts Declaration of Rights depends on the nature of the forum involved. See, *infra*, at 24-26. Here, the Superior Court ruled that the "Public Comment" segment of the December 4, 2018 Board meeting constituted a limited public forum. This finding was

supported by the terms of the Public Participation Policy which defined the "Public Comment" segment as "a time when town residents can bring matters before the Board that are not on the official agenda." (App. 65). In short, "Public Comment" is not open to all members of the general public to raise whatever matters they wish to discuss. This finding was also consistent with prevailing case law. See, *infra*, at 26.

Because "Public Comment" was a limited public forum, any restrictions placed on speakers (such as Ms. Barron) were constitutional so long as they were reasonable in light of the purpose served by the forum and viewpoint-neutral. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985). The Policy prohibition against "rude, personal or slanderous remarks" was reasonable in light of the purpose of the forum – *i.e.*, to conduct Town business with order and decorum and without disruptions. Moreover, as evidenced by plaintiff's video, Ms. Barron was not shut down because of her viewpoint; she was shut down because she disrupted the meeting by yelling "You're a Hitler!" at the acting chair. See, *infra*, at 27-40.

Even if Ms. Barron adequately alleged the deprivation of a protected right, the individual defendants are entitled to the defense of qualified immunity. It was not clearly established that Mr. Kolenda violated the Massachusetts Declaration of Rights when he instructed Ms. Barron to withdraw from the meeting. See, *infra*, at 40-43.

Additionally, or alternatively, Ms. Barron failed to plead sufficient facts to plausibly show that defendants' interference with such rights (if any) was by means of "threats, intimidation or coercion." Mr. Kolenda's alleged "threat" to have Ms. Barron "escorted out" of the meeting was no more than a warning to use lawful means to accomplish a legitimate end. See, *infra*, at 43-48. G.L. c. 30A, § 20(g). Further, after Ms. Barron twice provoked Mr. Kolenda by yelling "You're a Hitler!" no reasonable person would view defendant's response as actionable "intimidation." Finally, in the absence of alleged force (either physical or moral) or any attempt by defendants to compel her to act in a way she would not have otherwise acted, plaintiff failed to sufficiently allege coercion. See, *infra*, at 48-49.

In Count VI, plaintiffs raised a facial challenge to the Public Participation Policy prohibition against "rude, personal or slanderous remarks." The Superior Court properly rejected it. Facial challenges are disfavored by the courts; to prevail, plaintiffs must show there is no set of circumstances under which the prohibition would be valid or that the challenged prohibition lacks any "plainly legitimate sweep." Here, where the prohibition restricts speech during a limited public forum, where the prohibition is tempered by language designed to maintain order and decorum and to limit disruptions of government business, and where the government body has a significant interest in conducting orderly, efficient meetings, the prohibition is constitutional. See, *infra*, at 49-55.

ARGUMENT

I. STANDARD OF REVIEW.

An appeals court reviews the allowance of a motion for judgment on the pleadings *de novo*, based on a review of the allegations in the complaint. Hovagimian v. Concert Blue Hill, LLC, 488 Mass. 237, 172 N.E.2d 728, 732 (2021); Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600 (2010). A

Rule 12(c) motion "effectively functions as a 'motion to dismiss … [that] argues that the complaint fails to state a claim upon which relief can be granted.'" Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 775 (2007) (quoting Jarosz v. Palmer, 436 Mass. 526, 529 (2002)). The Court must accept the truth of all well-pleaded facts and "draw every reasonable inference in favor" of the nonmoving party. UBS Financial Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019) (quoting Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011)).

In order to withstand a motion to dismiss (or motion for judgment on the pleadings), "the complaint must contain enough factual allegations 'to raise a right to relief above the speculative level … [based] on the assumption that all the allegations in the complaint are true ….'" Doherty v. Admiral's Flagship Condo. Trust, 80 Mass. App. Ct. 104, 106 (2011) (quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008)). See Flomenbaum v. Comm., 451 Mass. 740, 742 (2008) ("Judgment on the pleadings may be entered if a plaintiff fails to present sufficient facts in the complaint to support the legal claims made.") To determine whether a complaint states a claim upon

which relief can be granted, a court should "look beyond the conclusory allegations in the complaint and focus on whether the factual allegations plausibly suggest an entitlement to relief." Curtis, 458 Mass. at 676.

II. THE SUPERIOR COURT PROPERLY DISMISSED MS. BARRON'S CLAIMS UNDER THE MASSACHUSETTS CIVIL RIGHTS ACT (COUNT I).

To recover under the MCRA, Ms. Barron must show that each individual defendant (1) interfered (2) with a right protected under the Constitution or laws of Massachusetts (3) by means of "threats, intimidation or coercion."[7] G.L. c. 12, § 11I; Kennie v. Natural Resource Dep't of Dennis, 451 Mass. 754, 759 (2008); Bally v. Northeastern Univ., 403 Mass. 713, 717 (1989). Ms. Barron failed to make the requisite showing below.

[7] Ms. Barron raised no allegation that defendants "attempted" to interfere with her protected rights. Rather, she alleged only that defendants actually "interfered" with, and thereby deprived her of, protected rights. (App. 18, ¶ 163 [160]).

A. Defendants Did Not Interfere with Ms. Barron's Protected Rights.

1. Ms. Barron Failed to State a Claim Under Article XVI of the Massachusetts Declaration of Rights for the Violation of her Right to Free Speech.

The right of free speech is protected under Article XVI of the Massachusetts Declaration of Rights. See Mass. Const., Pt. 1, Art. XVI ("The right of free speech shall not be abridged.") The Massachusetts Declaration of Rights is "generally coextensive" with the First Amendment when it comes to freedom of expression "and thus a breach of the latter constitutes a breach of the former." Flaherty v. Knapik, 999 F. Supp. 2d 323, 332 (D. Mass. 2014); Walker v. Georgetown Hous. Auth., 424 Mass. 671, 674 (1997). See Smith v. Commissioner of Mental Health, 409 Mass. 545, 552 (1991) (noting consistency between federal and Massachusetts law respecting freedom of speech). Recently, the SJC explained that criteria established by the U.S. Supreme Court for judging claims under the First Amendment "are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution," such as Article XVI. Commonwealth v. Odgren, 483 Mass. 41, 61 (2019) (quotation omitted). See Mendoza v. Licensing Bd. of

Fall River, 444 Mass. 188, 201 (2005) ("analysis under art. 16 [of the Declaration of Rights] is generally the same as under the First Amendment …."); In re Opinion of the Justices to the Senate, 430 Mass. 1205, 1209 n.3 (2000) (analysis of free speech issues under Article XVI same as analysis under First Amendment); Shurtleff v. City of Boston, 2020 WL 555248, at *3 (D. Mass. Feb. 4, 2020) (applying same standard for analysis of free speech claims under Declaration of Rights as under U.S. Constitution).[8]

The U.S. Constitution does not require government to grant access to all who wish to exercise their right of free speech on government property "without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius, 473 U.S. at 799-800. The extent to which government can exercise control over speech on its property depends on the nature of the relevant forum. United States Postal Serv. v. Council

[8] While the SJC has not ruled out that the protections of Article XVI may (under certain circumstances) extend further than comparable provisions of the First Amendment, see Roman v. Trustees of Tufts Coll., 461 Mass. 707, 713 (2012) (citation omitted); this Court need not address the issue here in the absence of further guidance from the SJC, particularly where plaintiff raises no such argument. (Appellants' Brief, at 39-40).

of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) ("First Amendment does not guarantee access to property simply because it is owned or controlled by the government.")

First Amendment law recognizes three types of fora; the traditional public forum, the designated public forum, and the limited or non-public forum. Ridley v. MBTA, 390 F.3d 65, 76 (1st Cir. 2004). The traditional public forum consists of "places which by long tradition or by government fiat have been devoted to assembly and debate …," such as streets, parks and public sidewalks. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In a traditional public forum, content-neutral time, place and manner restrictions are subject to strict scrutiny and will only be upheld if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id.

A designated public forum consists of public property that government has, by both expressed intention and actual practice, opened up as a place for expressive activity. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009). Content-neutral restrictions on speech in a designated public forum

"are subject to the same strict scrutiny as restrictions in a traditional public forum." Id., at 469-70; New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002).

A limited or non-public forum is created "when the government opens its property only to use by certain groups or for the discussion of certain subjects." Lu v. Hulme, 133 F. Supp. 3d 312, 324-325 (D. Mass. 2015) (citing Christian Legal Soc. Chap. of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 679 n.11 (2010)). Government has the right to preserve public property for the use to which it is lawfully dedicated and, therefore, reasonable restrictions on non-public fora are permitted. In a limited public forum, control over access "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." Cornelius, 473 U.S. at 806; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-107 (2001).

The "Public Comment" segment of Board meetings is not open to the general public. Rather, "is a time when town residents can bring matters before the Board

that are not on the official agenda." (App. 65).[9] Moreover, the Chair may set time limitations and maintain order, "as it is important that the Board allow themselves enough time to conduct their official town business." (Id.) Given such restrictions, the Superior Court (citing abundant case law in support) found the "Public Comment" segment of the Board meeting to be a limited public forum. (App. 149). See Galena v. Leone, 638 F.3d 186, 199 (3rd Cir. 2011) (county council meeting held a limited public forum); Steinburg v. Chesterfield Cty. Planning Comm'n, 527 F.3d 377, 385 (4th Cir. 2008) (planning commission meeting held a limited public forum); Fairchild v. Liberty Ind. Sch. Dist., 597 F.3d 747, 759 (5th Cir. 2010) (public comment session of school board meeting held a limited public forum); Youkhanna v. City of Sterling Heights, 934 F.3d 508, 518-519 (6th Cir. 2019), *cert. den.*, 140 S.Ct. 1114 (2020) (city council

[9] Despite such express language, Ms. Barron still disputes whether participation in the "Public Comment" segment of Board meetings is restricted to Town residents only. (Appellants Brief, at 40-41). The Public Participation Policy also requires that all persons addressing the Board during "Public Comment" "shall state their name and address prior to speaking." (App. 65). As the Superior Court noted, this requirement further supports the contention that the "Public Comment" segment is for Town residents *only*. (App. 149 n.7).

meeting held limited public forum); Rowe v. City of Cocoa, Fla., 358 F.3d 800, 803 (11th Cir. 2004) (public comment session of city council meeting held a limited public forum).[10]

While court decisions on the issue are admittedly not unanimous, "[t]he prevailing view is that a public-comment session is more akin to a limited public forum, in which content discrimination is permissible and government restrictions are viewed more deferentially." F. LoMonte, "The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods," 69 Case W. Res. L. Rev. 19, 33 (Fall 2018).[11] The First Circuit has not yet decided the issue, but has stated: "[Town Meetings are] neither a traditional nor a designated public

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[10] In Spaulding v. Town of Natick Sch. Comm., Middlesex Super. Ct., C.A. No. 2018-01115 (Nov. 21, 2018), cited in Appellants' Brief, at 44 n.13, a Superior Court ruled, on cross-motions for summary judgment, that the "Public Speak" segment of the Natick School Committee meeting qualified as a designated public forum. (App. 124). In so doing, the Superior Court cited three Ohio cases and one New Jersey case, but did not address the numerous U.S. Circuit Court cases cited above.

[11] In addition to Galena and Fairchild, LoMonte cites two additional Circuit Court decisions where public comment sessions were held to be limited public fora: Reza v. Pearce, 806 F.3d 497, 503 (9th Cir. 2015); Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1232 (11th Cir. 2017).

forum." Curnin v. Town of Egremont, 510 F.3d 24, 29 n.4 (1st Cir. 2007), *cert. den.*, 128 S.Ct. 2936 (2008) (quoting United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003)). If a Town Meeting is a limited public forum, a Board of Selectmen meeting, by analogy, is a limited public forum as well.

Restrictions placed on Ms. Barron's speech were both "reasonable in light of the purpose served by the forum …," Good News, 533 U.S. at 106 (quoting Cornelius, 473 U.S. at 806); and viewpoint-neutral. Eichenlaub v. Township of Indiana, 385 F.3d 274, 280 (3rd Cir. 2004). Therefore, such restrictions did not violate Ms. Barron's right of free speech. As the First Circuit has explained: "The reasonableness standard is not a particularly high hurdle; there can be more than one reasonable decision, and an action need not be the most reasonable decision possible in order to be reasonable." Ridley, 390 F.3d at 90.

The main purpose of the December 4, 2018 Board meeting was to conduct the business of the Town. A government body, like the Board, has a "significant governmental interest in conducting orderly, efficient meetings …." Carlow v. Mruk, 425 F. Supp. 2d 225, 242 (D.R.I. 2006) (quoting Rowe, 358 F.3d at 803). See

Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266, 271 (9th Cir. 1995) (Board has "legitimate interest in conducting efficient orderly meetings"). Thus, any speech that disturbs or disrupts a meeting of a government body may be restricted. See Jones v. Heyman, 888 F.2d 1328, 1333 (11th Cir. 1989) (upholding ejection of speaker from city commission meeting based on "irrelevant" and "disruptive" speech); Steinburg, 527 F.3d at 385 ("disruption of the orderly conduct of public meetings is indeed one of the substantive evils that [government] has a right to prevent") (internal citation and quotation omitted). Yelling "You're a Hitler!" at the acting Chair clearly disrupted the December 4 Board meeting.[12] Furthermore, the acting Chair's admonition that Ms. Barron must leave the meeting or else be escorted out, was not based on her viewpoint – *i.e.*, that the entire Board must "do better" to comply with the OML. Rather, it was based on Ms. Barron's choice of words and tone of delivery.[13]

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[12] The Public Participation Policy expressly states that "shouting [at public meetings] will not be tolerated." (App. 65).

[13] In Van Liew v. Stansfield, 474 Mass. 31 (2016), the SJC characterized defendant's accusations that a local government official was "corrupt and a liar" as

The Massachusetts Legislature has made it clear that a government body need not tolerate disruptive speech or behavior at public meetings. The OML states, in part:

> (g) No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.

G.L. c. 30A, § 20(g).[14] Mr. Kolenda gave Ms. Barron a clear warning that, if she refused to follow the Public Participation Policy, the "Public Comment" segment would come to an end.[15] When she responded to the warning by yelling "You're a Hitler! I can say

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protected "political speech." Id., at 38. Such statements were made at an event held at the town library which qualifies as a designated public forum. Lu v. Hulme, 133 F. Supp. 3d at 325.

[14] Town meeting moderators are also empowered to order disorderly persons to withdraw and, if they refuse, to "order a constable or any other person to remove [the disorderly person] and confine him in some convenient place until the meeting is adjourned." G.L. c. 39, § 17.

[15] Plaintiff maintains Mr. Kolenda terminated her remarks and the meeting *before* she twice called him a "Hitler." (Appellants' Brief, at 26). Plaintiff's argument ignores Mr. Kolenda's preliminary warning "if" as well as the dialogue sequence revealed in the video shown to the Superior Court.

what I want," the acting Chair called a recess. He was entitled to do so under both Article XVI and the OML. Defendants did not violate Ms. Barron's right to freedom of speech.

2. Ms. Barron Failed to State a Claim Under Article XIX of the Massachusetts Declaration of Rights for the Violation of her Right to Assemble in an Orderly and Peaceable Manner.

Article XIX of the Massachusetts Declaration of Rights states as follows:

> The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Mass. Const., Pt. 1, Art. XIX. Historically, the SJC has interpreted the protections afforded under Article XIX "to be 'comparable to those guaranteed by the First Amendment.'" 1A Auto, Inc. v. Director of Off. of Campaign and Pol. Fin., 480 Mass. 423, 440 (2018) (quoting Opinion of the Justices, 418 Mass. 1201, 1212 (1994)).

In recent years, the right to peaceably assemble has largely been subsumed by the freedom of association. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 658 (10th Cir. 2006). Today,

the First Amendment is generally interpreted to protect two types of associative freedom – the right to expressive association, and the right to intimate association. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984); URI Student Senate v. Town of Narragansett, 631 F.3d 1, 13-14 (1st Cir. 2011). Expressive association remains closely affiliated with the right to free speech. People have the right to associate together for expressive purposes, often political purposes. NAACP v. Alabama, *ex rel.* Patterson, 357 U.S. 449, 463 (1958). But people also have the right to associate with others for the purpose of maintaining certain intimate or private relationships free from state interference. Roberts, 468 U.S. at 619; Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544-545 (1987).

This is a case about expressive association – *i.e.*, freedom of speech – not about plaintiff's right to associate with others free from state interference. For the reasons set forth above, plaintiffs' First Amended Complaint fails to state a claim for the interference with Ms. Barron's right of expressive association. Mr. Kolenda's enforcement of the Public Participation Policy was a reasonable restriction not

based on the content of plaintiff's speech. Even if enforcement of the Public Participation Policy somehow interfered with Ms. Barron's freedom of expressive association, the burden of compliance with the Policy was "insubstantial" and the Board had a "compelling" state interest in enforcing it. Carlow, 425 F. Supp. 2d at 242. Ms. Barron was not "assembling" … "in an orderly and peaceable manner" when she shouted, "You're a Hitler!" at Mr. Kolenda. Defendants did not violate Ms. Barron's right to freedom of assembly.

3. Ms. Barron Failed to State a Claim Under Article XIX of the Massachusetts Declaration of Rights for the Violation of her Right to Petition for Redress of Grievances.

Nor did Mr. Kolenda, Ms. Braccio or Mr. Shea violate Ms. Barron's petitioning rights. Article XIX protects the right of the people to petition the "legislative body" for redress of grievances. This right is echoed in Article XXII: "The legislature ought frequently to assemble for the redress of grievances … as the common good may require." Mass. Const., Pt. 1, Art. XXII. A board of selectmen, however, is not the "legislative body" of a town; rather, it is the executive branch of town government. D.H.L. Assocs., Inc. v. O'Gorman, 199 F.3d 50, 52 (1st

Cir. 1999); Syrjala v. Town of Grafton, 2020 WL 1429854, at *4 (D. Mass. March 24, 2020). Traditional powers of the legislative branch are vested in town meeting. Lawless v. Town of Freetown, by and through Thomas, 2021 WL 878083, at *2 & n. 1 (D. Mass. March 9, 2021). Therefore, Ms. Barron's petitioning rights were not at stake when she addressed the Board on December 4, 2018. Defendants did not violate Ms. Barron's right to petition for redress of grievances.

4. Ms. Barron Failed to Allege Sufficient Facts to Show that Defendants, Ms. Braccio and Mr. Shea, Interfered with her Protected Rights.

As individual defendants, Ms. Braccio and Mr. Shea must be treated separately and independently from Mr. Kolenda. Even under a liberal interpretation of the First Amended Complaint, it cannot be read to allege that Ms. Braccio or Mr. Shea, who were not even sitting on the dais at the time of the verbal exchange between Ms. Barron and Mr. Kolenda,[16] interfered with Ms. Barron's protected rights, let alone by means of "threats, intimidation or coercion." Indeed, no such misconduct on their part is even alleged in plaintiffs' First Amended Complaint. The Superior

[16] Plaintiffs admit this fact. (Appellants Brief, at 16-17).

Court properly dismissed Count I as against Ms. Braccio and Mr. Shea. (App. 142).

B. Defendants are Protected Under the Doctrine of Qualified Immunity in Their Individual Capacity.

The defense of qualified immunity is available to all individual defendants – Ms. Braccio, Mr. Shea and Mr. Kolenda – under the MCRA. Rodriques v. Furtado, 410 Mass. 878, 881-882 (1991). See Duarte v. Healy, 405 Mass. 43, 46 (1989) (MCRA incorporates federal system of immunity for public officials under 42 U.S.C. § 1983). To determine whether an official enjoys qualified immunity, a court must decide "whether a reasonable official [in the defendant's position] could have believed his actions were lawful in light of clearly established law." Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 91 (1st Cir. 1994). The doctrine of qualified immunity "requires a constitutional right to be clearly established so that public officials are on notice that this conduct is in violation of that right." Frazier v. Bailey, 957 F.2d 920, 930 (1st Cir. 1992). The focus is not on the merits of the underlying claim but, instead, on the objective legal reasonableness of the official's conduct as measured by reference to clearly

established law and the information the official possessed at the time of the allegedly unlawful conduct. Lowinger v. Broderick, 50 F.3d 61, 65 (1st Cir. 1995). The qualified immunity standard "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." Id.; Ahmad v. Department of Corr., 446 Mass. 479, 484-485 (2006). See Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003) ("The bottom line is that the qualified immunity defense prevails unless the unlawfulness of the challenged conduct is 'apparent.'")

The framework for analyzing qualified immunity consists of three inquiries: "(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable [official], situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." Limone v. Condon, 372 F.3d 39, 44 (1st Cir. 2004).

As set forth above, defendants did not violate Ms. Barron's rights to free speech under Article XVI, nor did they violate her rights to peaceably assemble or to petition for redress of grievances under Article XIX. But even if they did, it was not clearly established that, by abruptly ending the "Public Comment" segment of the BOS meeting after Ms. Barron shouted, "You're a Hitler!" at the acting Chair, Mr. Kolenda violated any rights protected under the Declaration of Rights. "The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." Mullenix v. Luna, 577 U.S. 7, 12 (2015) (internal citations and quotations omitted) (emphasis in original).

If the "Public Comment" segment of the Board meeting was not a limited public forum (as defendants maintain) and/or if this Court should choose to extend the protections of Articles XVI and XIX beyond those afforded under the First Amendment, defendants are entitled to qualified immunity as the alleged

unlawfulness of their conduct was not apparent on December 4, 2018.[17] Count I was properly dismissed.[18]

C. Defendants Did Not Interfere with Ms. Barron's Protected Rights by Means of "Threats, Intimidation or Coercion."

Even if the individual defendants allegedly interfered with Ms. Barron's protected rights, to recover under the MCRA, plaintiff must further show that such interference was accomplished by means of "threats, intimidation or coercion." G.L. c. 12, § 11I; Murphy v. Town of Duxbury, 40 Mass. App. Ct. 513, 518 (1996). Plaintiff made no such showing here.

The SJC interprets "threats" as "the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 474, *cert den.*, 513 U.S. 868 (1994). "Intimidation" is the "putting [of another] in fear for the purpose of compelling or deterring conduct." Id. Threats and intimidation "usually require actual or threatened physical force." Ayasli v. Armstrong, 56 Mass. App.

[17] Indeed, the OML expressly authorized such conduct. G.L. c. 30A, § 20(g).

[18] This Court may affirm the dismissal of plaintiffs' First Amended Complaint on "any ground apparent on the record that supports the result reached in the lower court." Gabbidon v. King, 414 Mass. 685, 686 (1993).

Ct. 740, 750-751 (2002). "Coercion" is defined as "the application to another of such force, either physical or moral, as to constrain [a person] to do against his will something he would not otherwise have done." Daes v. Dempsey, 403 Mass. 468, 471 (1988).

Importantly, whether conduct constitutes "threats, intimidation or coercion" is measured under a "reasonable person" standard. Glovsky v. Roche Bros. Supermarkets, Inc., 469 Mass. 752, 763 (2014); Ayasli, 56 Mass. App. Ct. at 749. A plaintiff's subjective fear or apprehension of harm or injury is irrelevant. See Commonwealth v. DeVincent, 358 Mass. 592, 595 (1971) ("[T]he state of mind of the person threatened is not controlling.") Where the allegations of a complaint fail to satisfy this objective standard, a MCRA claim is properly dismissed. Glovsky, 469 Mass. at 763.

Finally, a direct violation of a person's rights (even if unlawful) does not alone qualify as threats, intimidation or coercion under the MCRA. See Longval v. Commissioner of Corr., 404 Mass. 325, 333 (1989) (shackling and handcuffing inmate to cot held insufficient to state MCRA claim); Sepulveda v. UMass Correctional Health, Care, 160 F. Supp. 3d 371, 391

(D. Mass. 2016) (failure to provide inmate with adequate medical care, unaccompanied by threats, intimidation or coercion, held insufficient to state MCRA claim).

In Count I, Ms. Barron alleged that Mr. Kolenda "threaten[ed] to have her forcibly removed from the Board's meeting" after her verbal attack. (App. 18, ¶ 163 [160]).[19] He also "angrily" and "menacingly" pointed at her (App. 16, ¶ 136 [133]), "shouted" and "yelled" at her (App. 16 & 17, ¶¶ 137 & 153 [134 & 150]), and "verbally and physically intimidat[ed] her …." (App. 18, ¶ 163 [160]).

In the face of these allegations, the Superior Court ruled that plaintiffs' First Amended Complaint failed to allege conduct that could plausibly amount to "threats, intimidation, or coercion" within the meaning of the MCRA. (App. 143). First, Mr. Kolenda's alleged "threat" to have Ms. Barron "escorted out" of the December 4, 2018 meeting was nothing more than a warning to use lawful means to order Ms. Barron's

[19] Earlier, Ms. Barron alleged Mr. Kolenda threatened to have plaintiff "'escorted out' of the meeting if she did not leave …." (App. 16, ¶ 138 [135]). By placing "escorted out" in quotation marks, plaintiff intends to convey that these were Mr. Kolenda's precise words.

withdrawal after she disrupted the proceedings. G.L. c. 30A, § 20(g) (chair may authorize constable or other officer to remove disruptive person from public meeting). (App. 142). As the SJC has explained "a threat to use lawful means to reach an intended result is not actionable …" under the MCRA. Sena v. Commonwealth, 417 Mass. 250, 263 (1994). See Buster v. George W. Moore, Inc., 438 Mass. 635, 648 (2003) (threat to foreclose on plaintiffs' mortgage to induce withdrawal of DEP appeal held not actionable where defendants were lawfully entitled to foreclose).

Second, Mr. Kolenda's alleged outburst at Ms. Barron, after she twice provoked him by calling him a "Hitler," could not reasonably be understood as "intimidation." (App. 143). No reasonable observer would have understood (reasoned the Superior Court) that Mr. Kolenda was putting Ms. Barron in fear for the purpose of compelling or deterring conduct. See Meuser v. Federal Express Corp., 564 F.3d 507, 520 (1st Cir. 2009) (slamming hands on desk and shouting at plaintiff held insufficient to state MCRA claim); Martone Place, LLC v. City of Springfield, 2017 WL 5889222, at **9 & 23 (D. Mass. Nov. 29, 2017) (angrily pounding on development plan and shouting "[I]t's not

going there!" held insufficient to support allegation of coercion); Orwat v. Maloney, 360 F. Supp. 2d 146, 164 (D. Mass. 2005) (exchange of words and obscene gestures did not rise to level of threats, intimidation or coercion).

Third, Ms. Barron alleged insufficient facts to permit an inference that Mr. Kolenda acted to coerce her from exercising protected rights. (App. 143). Plaintiff alleged no use of force by Mr. Kolenda (either physical or moral), nor any attempt to compel plaintiff to act in a way she would not have otherwise acted. Farrah, *ex rel*. Estate of Santana v. Gondella, 725 F. Supp. 2d 238, 248 (D. Mass. 2010)(no MCRA claim stated absent showing that alleged violation was intended to coerce plaintiff into refraining from exercising protected rights). Again, even if Mr. Kolenda's alleged conduct was unlawful, it lacked the objective quality of "coercion" where defendant allegedly took plaintiff's rights away directly. See Currier v. National Bd. of Med. Examiners, 462 Mass. 1, 13 (2012) (where employer offered plaintiff alternatives, denial of additional break time to express breast milk held insufficient to state element of coercion).

Ms. Barron's conclusory allegations that Mr. Kolenda "threatened" and "intimidated" her are insufficient to state a claim under the MCRA. Count I was properly dismissed.

D. Ms. Barron Cannot Recover Against Defendants in Their Official Capacity.

The MCRA provides a cause of action for the interference with plaintiff's protected rights by threats, intimidation or coercion against "any person or persons" responsible for same. G.L. c. 12, § 11H. A municipality, however, is not a "person" within the meaning of the statute and, therefore, cannot be sued under the MCRA. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 592 (2001); Kelley v. LaForce, 288 F.3d 1, 11 n.9 (1st Cir. 2002). A suit against a public official in his "official" capacity is, in all respects but name, the same as a suit against the municipality itself. Kentucky v. Graham, 473 U.S. 159, 166 (1985). Thus, the MCRA does not provide a cause of action against public officials in their official capacities. O'Malley v. Sheriff of Worcester Cty., 415 Mass. 132, 141 (1993); Howcroft, 51 Mass. App. Ct. at 593. The Superior Court properly dismissed Count I as

against Mr. Kolenda, Ms. Braccio and Mr. Shea in their official capacities. (App. 142).

III. THE SUPERIOR COURT PROPERLY DECLARED PARAGRAPH 3 OF THE PUBLIC PARTICIPATION POLICY CONSTITUTIONAL (COUNT VI).

In Count VI of their First Amended Complaint, plaintiffs mount a facial challenge to paragraph 3 of the Public Participation Policy under the Massachusetts Declaration of Rights. (App. 23-24, ¶¶ 212-219 [209-216]). Paragraph 3 of the Policy states, in part:

> All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks.

(App. 65). In plaintiffs' view, such language violates the freedom of speech guaranteed under Article XVI of the Massachusetts Declaration of Rights. (App. 24). The Superior Court agreed that such language, if read in isolation, "borders close to an unconstitutional prohibition on speech." (App. 150). However, when read in conjunction with the remainder of paragraph 3, the Court found the prohibition was not unconstitutional.[20] (Id.). Immediately following the language quoted above, paragraph 3 continues:

[20] Notably, plaintiffs did not attach a copy of the Public Participation Policy to their First Amended Complaint.

> Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the Chair, and all persons shall, at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting.

(App. 65). Reading paragraph 3 as a whole, the Superior Court found the Policy's prohibition on speech to be "a reasonable, viewpoint-and-content neutral, restriction that serves the legitimate government interest of preventing disruptions of the Board's meetings." (App. 150-151). To ensure the Board continues to enforce paragraph 3 in a lawful manner, the Court made the following declarations:

> 1. The Board's prohibition against "rude, personal or slanderous remarks" under paragraph 3 of the Board's "Public Participation At Public Meetings" policy is a constitutional prohibition on speech under Massachusetts law when it is employed to maintain order and decorum or to prevent disruptions of the Board's meeting.[21]
>
> 2. The Board may not prohibit speech under paragraph 3 of the Board's "Public Participation At Public Meetings" policy based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism.

[21] The Superior Court cited two cases in which Courts upheld restrictions on speech at public meetings. (App. 151 n.9). See Shero v. City of Grove, Okl., 510 F.3d 1196, 1202 (10th Cir. 2007) (upholding three-minute time limitation); Scroggins v. City of Topeka, Kan., 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) ("[City Council] rule against personal and slanderous remarks, like other rules of decorum, serves the important governmental interest of preventing disruptions to its meetings.")

(App. 151). Such declarations are consistent with the Massachusetts Declaration of Rights and should be upheld.

When assessing a facial challenge, a Court presumes that the statute or policy under attack is constitutional. Blair v. Department of Conserv. & Rec., 457 Mass. 634, 639 (2010); Blixt v. Blixt, 437 Mass. 649, 652 (2002). (App. 150). Thus, to succeed in challenging paragraph 3, plaintiffs must establish that "'no set of circumstances exists under which [the prohibition on speech] would be valid,' … or that the [prohibition on speech] lacks any 'plainly legitimate sweep.'" Chief of Police of City of Worcester v. Holden, 470 Mass. 845, 860 (2015) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987), and Washington v. Glucksberg, 521 U.S. 702, 704 n.7 (1997)).

Courts disfavor facial challenges. See Blixt, 437 Mass. at 652 ("A facial challenge to the constitutional validity of a statute is the weakest form of challenge ….) First, they "often rest on speculation. As a consequence, [claims of facial invalidity] raise the risk of 'premature interpretation of statutes on the basis of factually

barebones records.'" Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442, 450 (2008) (quoting Sabri v. United States, 541 U.S. 600, 609 (2004)). Second, such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Id. (quoting Ashwander v. TVA, 297 U.S. 288, 346-347 (1936)) (quotations omitted).

To prevail under Count VI, plaintiffs bear the burden of demonstrating that the Board's prohibition on "rude, personal or slanderous remarks," even when employed to maintain order and decorum, or to prevent disruptions in meetings, "lacks any plainly legitimate sweep." Hightower v. City of Boston, 693 F.3d 61, 77-78 (1st Cir. 2012). See Commonwealth v. Harris, 481 Mass. 767, 771 (2019) ("A facial challenge fails when the statute at issue has a plainly legitimate sweep.") (internal citation and quotation omitted); Gaspee Project v. Mederos, 13 F.4th 79, 92 (1st Cir. 2021) (facial challenge must fail "as long as the challenged regulation has any legitimate application.") This

burden is heightened in the context of the First Amendment where a statute will not be struck down as facially invalid unless "it prohibits a substantial amount of protected speech." Doe v. Hopkinton Pub. Schools, 19 F.4th 493, 509 (1st Cir. 2021) (quoting United States v. Williams, 553 U.S. 285, 292 (2008)).

Plaintiffs cannot demonstrate that the Board's prohibition on "rude, personal or slanderous remarks," lacks any "plainly legitimate sweep" or prohibits a "substantial amount of protected speech." As stated above, the "Public Comment" segment of a Board meeting is a limited public forum during which the Board may impose reasonable restrictions on speech, provided such restrictions are viewpoint-neutral. The challenged prohibition in paragraph 3 of the Public Participation Policy is both reasonable and viewpoint-neutral whenever the "rude, personal or slanderous" speech interferes with order and decorum or becomes disruptive.

To be clear, members of the public do not have a guaranteed right "to be heard by public bodies making decisions of policy." Minnesota State Bd. for Community Coll. v. Knight, 465 U.S. 271, 284 (1984).

See Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 647 (1981) ("First Amendment does not guarantee [persons] the right to communicate [their] views at all times and places or in any manner that may be desired."); Kindt, 67 F.3d at 269 ("Citizens are not entitled to exercise their First Amendment rights whenever and wherever they wish.") Admittedly, when government creates a forum for citizen input at public meetings, constitutional guarantees apply. Still, government may require speakers to adhere to reasonable rules of civility during its meetings or proceedings, provided it does not do so in a way that silences viewpoints that it disfavors. See Rowe, 358 F.3d at 803 ("There is a significant governmental interest in conducting orderly, efficient meetings of public bodies."); Steinburg, 527 F.3d at 387 ("[A] content-neutral policy against personal attacks is not facially unconstitutional" so long as it serves "the legitimate public interest … of decorum and order"); White v. City of Norwalk, 900 F.2d 1421, 1426 (9th Cir. 1990) (rules of decorum that proscribe against "personal, impertinent, slanderous or profane" remarks at city council meeting held not unconstitutional).

"[L]ocal entities can adopt rules of decorum that require speakers at government meetings to maintain relevancy and civility when commenting." T. Day & E. Bradford, "Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency," 10 First Amend. L. Rev. 57, 63 (2011).

> The "policy against 'personal attacks' focuses on two evils that could erode the beneficence of orderly public discussion." These policies further the dual interests of keeping public discussion on topic and reducing defensiveness and counter-argumentation. Both of these interests serve to maintain the orderly conduct of the meeting.

Id., at 63-64 (footnotes omitted). And any public speaker who violates such rules or policy may be excluded from a meeting provided the exclusion is not an effort to suppress the expression of views contrary to public officials. Cornelius, 473 U.S. at 800.

Paragraph 3 of the Public Participation Policy does not on its face violate Article XVI of the Massachusetts Declaration of Rights. The Superior Court's dismissal of Count VI should be affirmed.

CONCLUSION

The Superior Court properly allowed defendants' Motion for Judgment on the Pleadings under Rule 12(c). This Court should, therefore, affirm the Judgment entered below.

Respectfully submitted,

The Defendants,

SOUTHBOROUGH BOARD OF SELECTMEN and
TOWN OF SOUTHBOROUGH,

By their attorneys,

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2085CV00382

LOUISE BARRON & others[1]

vs.

DANIEL L. KOLENDA[2] & others[3]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Louise Barron ("Barron"), sued defendant Daniel Kolenda ("Kolenda"), and other individuals, each individually and as a member of the Southborough Board of Selectmen ("Board"), and the Town of Southborough ("Town") (collectively, "defendants"), alleging civil rights violations after Kolenda publicly chastised Barron and unilaterally adjourned a 2018 Board meeting. Barron asserted several tort-based claims against Kolenda, individually. In addition, Barron, along with plaintiffs Jack Barron and Arthur St. Andre, sued the Board for violating the Open Meeting Law and challenged the Board's public participation policy as unconstitutional under Massachusetts law. The defendants have moved for judgment on the pleadings under Mass. R. Civ. P. 12(c). For the reasons discussed below, the defendants' motion is ALLOWED.

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BACKGROUND

The facts are taken from the plaintiffs' first amended complaint. The court assumes the factual allegations in the first amended complaint to be true. *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008).

[1] Jack Barron and Arthur St. Andre
[2] Individually, and as a member of the Southborough Board of Selectmen
[3] Brian Shea, Marty Healey, Lisa Braccio, and Sam Stivers, individually, and as members of the Southborough Board of Selectmen, and The Town of Southborough

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On December 4, 2018, Barron attended a Board meeting at the Southborough Town Hall. During the meeting, the Town's Treasurer/Collector presented on the Town's budget for the following fiscal year. The presentation concerned topics related to potential tax increases.

After the budget presentation, the Board reviewed meeting minutes that it had failed to timely review and approve as required by the Open Meeting Law ("OML"), G. L. c. 30A, §§ 18-25. During that review, the Town Administrator noted that the Massachusetts Attorney General's Office had recently determined that the Board had committed dozens of OML violations.

Near the end of the meeting, Kolenda began the public comment period. The Board had adopted a policy entitled "Public Participation at Public Meetings" ("policy") which states:

> "All 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 tolerated. Furthermore, no person may offer comment without permission of the Chair, and all persons shall, at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting.
>
> Finally, while it true that State law provides that the Chair may order a disruptive person to withdraw from a meeting (and, if the person does not withdraw, the Chair may authorize a constable or other officer to remove the person from the meeting), it is the position of the [Board] that no meeting should ever come to that point."[4]

Before opening the meeting for public comment, Kolenda re-read the following portion of the Board's public participation policy: "All remarks must be respectful and courteous, free of rude, personal or slanderous remarks."

Soon after, Barron approached the audience lectern with a homemade sign. The sign read on one side "Stop Spending," and on the other side "Stop Breaking Open Meeting Law." Barron began her time by voicing her objection to the proposed budget increases discussed earlier in the

[4] The policy is not attached to the plaintiffs' amended complaint but is Exhibit 1 to the defendants' motion for judgment on the pleadings. The court has considered this exhibit in deciding this motion. See *Marram* v. *Kobrick Offshore Fund, LTD.*, 442 Mass. 43, 45 n.4 (2004) (court may rely on document outside pleadings without converting motion to dismiss into one for summary judgment, when plaintiff had notice of document and relied on it in framing complaint).

meeting and expressed her view that the Board had engaged in irresponsible spending. Barron later turned to the Board's OML violations. In response to one of Kolenda's earlier comments about the Board's violations, Barron stated:

> "And you 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. And 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."

Kolenda then interrupted Barron and said, "So ma'am if you want to slander town officials who are doing their very best . . . then we're going to go ahead and stop this public comment session now and go into recess." Barron responded and said, "You need to stop being a Hitler. You're a Hitler. I can say anything I want." This prompted Kolenda to stand up and state, "We are moving into recess," ending the public comment session at that time.

According to the first amended complaint, Kolenda unilaterally ended the Board's meeting and did not motion to move into recess or to end the Board's meeting, nor did any other present Board member. The Board took no vote to adjourn, suspend, or otherwise discontinue the meeting. Instead, Kolenda allegedly signified that the video recording of the meeting should stop. Kolenda then touched the power button on his microphone, presumably shutting off the audio. Kolenda then began to yell at Barron. This was video recorded only, as the audio feed for the Town's public access channel had cut at that time. According to the complaint, during the silent video broadcast, Kolenda stands up and angrily points and yells in Barron's direction. Kolenda allegedly yelled at Barron "You're disgusting! You're disgusting! You're disgusting!" and then threatened to have Barron "escorted out" of the Board's meeting. Barron later left the meeting voluntarily.

At the Board's next meeting, on December 18th, the Board reviewed the draft minutes from its December 4th meeting. The draft minutes allegedly falsely state that "Kolenda moved the meeting to adjournment at 9:06 P.M., seconded by Mrs. Phaneuf." The draft minutes also did not

mention Kolenda's alleged outburst toward Barron. While discussing the draft minutes, Selectmen Brian Shea ("Shea") reportedly noted that he heard Kolenda state that the Board was "going into recess" before ending the public comment period. Selectwoman Bonnie Phanuef also allegedly noted that Kolenda had "adjourned the meeting" on December 4th. The Board later approved the draft minutes of its December 4th meeting by a unanimous vote. This suit followed.

DISCUSSION

Barron sued Kolenda, Shea, and selectwoman Lisa Braccio ("Braccio"), both individually and as members of the Board, under the Massachusetts Civil Rights Act ("MCRA") for violating her civil rights (Count I). Barron also sued Kolenda, individually, for negligent infliction of emotional distress (Count II), intentional infliction of emotional distress (Count III), and defamation (Count IV). The plaintiffs also sued the Board under G. L. c. 30A, § 23(f), for violating the Open Meeting Law (Count V), and seek a declaration against the Board and the Town that the Board's policy violates the Massachusetts Declaration of Rights (Count VI). The defendants move for judgment on the pleadings under Mass. R. Civ. P. 12(c).

I. Legal Standard

A motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) is "actually a motion to dismiss . . . [that] argues that the complaint fails to state a claim upon which relief can be granted." *Jarosz v. Palmer*, 436 Mass. 526, 529 (2002) (citation omitted). The court will grant a motion for judgment on the pleadings "if a plaintiff fails to present sufficient facts in the complaint to support the legal claims made." *Flomenbaum* v. *Commonwealth*, 451 Mass. 740, 742 (2008). To survive dismissal, a complaint must plead more than "labels and conclusions" and allege facts with "enough heft to show that the pleader is entitled to relief." *Iannacchino*, 451 Mass. at 636 (quotation omitted).

II. General Laws c. 12, §§ 11I and 11H, Violation of Article XIX – Count I

Barron first sues Kolenda, Shea, and Braccio, individually and as Board members, under G. L. c. 12, §§ 11I, 11H, of the MCRA for violating her civil rights under Article XIX of the Massachusetts Declaration of Rights. This argument lacks merit.

Article XIX of the Massachusetts Declaration of Rights provides all Massachusetts residents with the "right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done to them, and of the grievances they suffer." "To establish a claim under the [MCRA], 'a plaintiff must prove that (1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion.'" *Glovsky* v. *Roche Bros. Supermarkets. Inc.*, 469 Mass. 752, 762 (2014). The issue here is whether Barron has alleged facts to show that Kolenda, Braccio, and Shea tried to interfere with or deprived her of a constitutional right by threats, intimidation, or coercion. See *id.*

Under the MCRA, "a 'threat' consists of 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'; 'intimidation' involves 'putting in fear for the purpose of compelling or deterring conduct'; and 'coercion' is 'the application to another of such force, either physical or moral, as to constrain [them] to do against [their] will something [they] would not otherwise have done." *Id.* at 762-763, citing *Haufler* v. *Zotos*, 446 Mass. 489, 505 (2006). "Generally, by itself, a threat to use lawful means to reach an intended result is not actionable under [G. L. c. 12,] § 11I." *Sena* v. *Commonwealth*, 417 Mass. 250, 263 (1994) (citation omitted). And a direct deprivation of rights, even if unlawful, that is accomplished without threats, intimidation, or coercion is also not actionable under the MCRA. See *Swanset Dev. Corp.* v. *City*

of Taunton, 423 Mass. 390, 396 (1996).

A. Barron's Claims Against Kolenda, Braccio, and Shea as Board Members

Public officials must be sued in their individual capacities to be found liable under the MCRA. See *Howcroft* v. *Peabody*, 51 Mass. App. Ct. 573, 593 (2001), citing *O'Malley* v. *Sheriff of Worcester Cnty.*, 415 Mass. 132, 141 n.13 (1993) ("[T]o avoid a State's sovereign immunity to a damages suit, a plaintiff must sue the State official in [their] individual and not [their] official capacity."). For that reason, Count I of the complaint is dismissed as to defendants Kolenda, Braccio, and Shea in their official capacities as members of the Board.

B. Barron's Claims Against Braccio and Shea, Individually

Barron's claims against Braccio and Shea, individually, also fail. The only allegations under Count I of the amended complaint that could reasonably be attributed to Braccio and Shea is Barron's allegation that the Board accepted Kolenda's conduct through its silence and its adoption of allegedly false meeting minutes. This conduct is a far cry from the "threats, intimidation or coercion" needed to sustain a claim under the MCRA. As a result, Count I also fails to state a claim upon which relief can be granted against Braccio and Shea, individually.

C. Barron's Claim Against Kolenda, Individually

As to Kolenda, Barron contends that he interfered with her constitutional rights by "silencing her, verbally and physically intimidating her, and threatening to have her forcibly removed from the Board's meeting." Barron's allegations fail to show that Kolenda deprived or attempted to interfere with her rights through "threats," "intimidation," or "coercion."

First, Kolenda's threat to have Barron "escorted out" of the Board's meeting was a threat to use lawful means to remove Barron after she called him "Hitler" twice. This is not actionable under § 12I. See G. L. c. 30A, § 20(g) ("If, after clear warning from the chair, a person continues

to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize [an officer] to remove the person from the meeting."); *Sena*, 417 Mass. at 263 (officer's statement that he would have warrants next time he saw the plaintiffs was an implicit threat to arrest the plaintiffs through lawful means).

Second, Kolenda's alleged outburst toward Barron could not be reasonably understood as Kolenda seeking to "intimidate" Barron to deter her from exercising her constitutional rights. See *Glovsky*, 469 Mass. at 763 ("[Courts] employ a reasonable person standard in determining whether a defendant's conduct constitutes such threats, intimidation, or coercion."). Any reasonable observer would understand that Kolenda's conduct and statements directed toward Barron was his reaction to Barron twice accusing him of being "a Hitler." It was not Kolenda trying to place Barron "in fear for the purpose of compelling or deterring conduct." *Id.*

Lastly, there are insufficient facts alleged to permit the inference that Kolenda acted to coerce Barron from exercising her rights. Kolenda did not apply "physical or moral force" against Barron to constrain her from acting in a way she otherwise would have. Nor did Kolenda compel or attempt to compel Barron to act in a way she otherwise would not have. Thus, even if Kolenda's alleged conduct was unlawful, it does not amount to coercion. See *Currier* v. *National Bd. of Med. Examiners*, 462 Mass. 1, 13 (2012) ("We have determined that the direct violation of a right by itself is not the equivalent of coercion.").

In conclusion, because the first amended complaint fails to allege conduct by Kolenda that could plausibly amount to "threats, intimidation, or coercion" under the MCRA, Count I of the amended complaint fails to state a claim upon which relief can be granted. See *Glovsky*, 469 Mass. at 763 ("A claim under the [MCRA] is properly dismissed where the allegations in the plaintiff's complaint fail to satisfy this standard.").

III. Barron's Tort Claims

Barron next alleges three tort claims against Kolenda based on his conduct at the Board's December 4th meeting. All three claims lack merit.

A. Negligent Infliction of Emotional Distress – Count II

Barron contends that Kolenda negligently caused her to suffer from emotional distress when he called her "disgusting" and threatened to have her physically removed from the Board's meeting. The Massachusetts Tort Claims Act ("MTCA") provides that no public employee "shall be liable for any injury or loss of property or personal injury or death caused by [their] negligent or wrongful act or omission while acting within the scope of [their] office or employment . . . ." G. L. c. 258, § 2. During Kolenda's alleged outburst directed at Barron, he was serving as acting Chair of the Board and is therefore immune from liability for claims of negligence. See *McNamara* v. *Honeyman*, 406 Mass. 43, 46 (1989). Count II of the first amended complaint is dismissed.

B. Intentional Infliction of Emotional Distress – Count III

Barron next contends that Kolenda's outburst toward her at the December 4th meeting amounted to extreme and outrageous conduct that he knew would cause Barron to suffer from emotional distress and suffer from damages.

"The standard for making a claim of intentional infliction of emotional distress is very high." *Polay* v. *McMahon*, 468 Mass. 379, 385 (2014) (citation omitted). To establish this claim, Barron must show "(1) that [Kolenda] intended, knew, or should have known that his conduct would cause emotional distress; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress; and (4) that the emotional distress was severe." *Id.* (citation omitted). "Conduct qualifies as extreme and outrageous only if it goes beyond all possible bounds of decency, and is regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at

386. (citation and internal quotation marks omitted).

Kolenda's reaction to Barron openly denouncing him as "Hitler" twice was not "beyond all possible bounds of decency," nor was it "atrocious" or "utterly intolerable." See *id.* The court concludes that the facts alleged cannot sustain this claim and therefore Count III is dismissed. *Id.* ("A judge may a grant a motion to dismiss where the conduct alleged in the complaint does not rise to [the extreme and outrageous] level." [citation omitted]).

C. Defamation – Count IV

Barron next sues Kolenda for defamation based on his statement regarding Barron slandering members of the Board after Barron brought up the Board's OML violations at the December 4th meeting. Barron alleges that Kolenda labeled her as a liar at a publicly broadcasted meeting when he knew her statements were true given the attorney general's then-recent determination that the Board had committed several OML violations.

"Statements made by public officials while performing their official duties are conditionally privileged . . . ." *Barrows* v. *Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 630 (2012). "[A] publisher is conditionally privileged to publish defamatory material . . . if the publisher and the recipient share a common interest 'and the communication is of a kind reasonably calculated to protect or further it.'" *Sklar* v. *Beth Israel Deaconess Med. Ctr.*, 59 Mass. App. Ct. 550, 558 (2003) (citation omitted). A conditional privilege can be forfeited by publication "with knowledge of falsity or with reckless disregard of the truth," "unnecessary, unreasonable or excessive publication," or "when it is determined that the defendant has acted with actual malice." *Barrows*, 82 Mass. App. Ct. at 631.

Kolenda made his comment—or, as argued by the defendants, his warning—about Barron slandering members of the board while in his official capacity as acting Chair of the Board. His

statement concerned the Board's policy, which requires speakers' remarks to be respectful and free from "rude, personal or slanderous remarks." The public has a common shared interest in the Board's policies and its meetings. Kolenda's statement can be reasonably calculated to protect or further that interest through the enforcement of—or warning about—the Board's policies at its meeting. The plaintiffs' first amended complaint lacks persuasive allegations that could show that Kolenda abused and lost his conditional privilege by making the statement with knowledge and reckless disregard for the truth, or with actual malice. The court is also not persuaded that Kolenda's statement "could be reasonably understood as an assertion of actual fact about" Barron. See *Tech Plus, Inc.* v. *Ansel*, 59 Mass. App. Ct. 12, 26 (2003) (plaintiff could not recover under defamation when statements could not reasonably be understood as assertions of fact about the plaintiff). Count IV is also dismissed.

IV. The Board's Alleged Violation of the Massachusetts Open Meeting Law – Count V

The plaintiffs next contend that the defendants violated the OML by ending the audio and video feed of the Board's meeting, and by later approving false Board meeting minutes. Because Barron has already filed OML complaints with the Attorney General's Office for the same alleged conduct at issue, Count V is barred and must be dismissed.

General Laws c. 30A, § 23(b), provides a mechanism for a party to enforce the OML. At least thirty days before filing a complaint with the attorney general, a party must file a written complaint with the public body "setting forth the circumstances which constitute the alleged [OML] violation and giving the body an opportunity to remedy the alleged violation[.]" G. L. c. 30A, § 23(b). The public body is then required to send a copy of the complaint to the attorney general within fourteen days. Once received, the attorney general must determine whether there has been an OML violation. See G. L. c. 30A, § 23(c). "As an *alternative* to the procedure in

subsection (b), the attorney general or 3 or more registered voters may initiate a civil action to enforce the open meeting law." G. L. c. 30A, § 23(f) (emphasis added).

On August 5, 2019, the Attorney General's Office issued a decision in response to two OML complaints filed by Barron about the Board's December 4th and December 18th meetings.[5] Barron's arguments in the two referenced complaints nearly mirror those made under Count V. The Attorney General's Office determined that the Board did not violate the OML. The court takes judicial notice of this public document only to establish that Barron has filed OML complaints related to this action with the attorney general. A party aggrieved by an order issued under G. L. c. 30A, § 23, may obtain judicial review through an action in the Superior Court under G. L. c. 249, § 4, within sixty days after the "proceeding complained of." G. L. c. 249, § 4. Barron chose not to appeal the attorney general's August 2019 decision. This court has held that a party may not "avail themselves of the provisions of [G. L. c. 30A, § 23(f)] when complaining of an [OML violation] whe[n] they have already utilized the process provided in [G. L. c. 30A, § 23(b)]. *Siet* v. *Ashland Bd. of Selectmen*, 2017 WL 6040181, at *2 (Mass. Super 2017). As noted in *Siet*, "the language of [G. L. c. 30A, § 23(f)] is crystal clear: it is 'an *alternative* to the procedure in [§ 23](b).'" *Id.* (emphasis added). This reasoning applies here.

In conclusion, Barron is barred from bringing Count V of the plaintiffs' amended complaint. As to plaintiffs Jack and St. Andre, they also cannot proceed under Count V because without Barron, the court lacks jurisdiction. See G. L. c. 30A, § 23(f) ("As an alternative to . . . subsection (b), the attorney general or 3 or more registered voters may initiate a civil action to enforce the open meeting law."). Count V of the plaintiffs' first amended complaint is dismissed.

[5] The decision by the Attorney General's Office is captioned "OML 2019 – 97."

V. Declaratory Judgment – Count VI

Lastly, the plaintiffs move for declaratory relief against the Town and the Board through a facial challenge to the Board's policy.[6] The plaintiffs seek these declarations under Count VI of the first amended complaint:

> "214. The Court should declare that the [paragraph of the policy that states '[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks . . . . Furthermore, no person may offer comment without permission of the Chair, and all persons shall, at the request of the Chair, be silent"] [is] unconstitutional under Massachusetts law.
>
> 215. The Court should declare that Defendants may not regulate protected speech during any time period designated for speech by the public based on the content of the message of the speaker, the view point of the speaker, or their desire to avoid criticism, ensure 'proper decorum,' or avoid 'personal' or derogatory or even defamatory statements, unless such regulation is the least restrictive means necessary to achieve a compelling government interest;
>
> 216. The Court should declare that the Defendants may not regulate speech during any time period designated for speech by the public other than in compliance with valid, constitutional, written policy which includes definite, objective standards for the regulation of speech, adopted by the Board in accordance with all relevant laws and regulations."

The plaintiffs contend that the policy is unconstitutional because it does not allow criticism of public officials if the chair decides that such criticism is not "respectful" or "courteous," or if the Chair finds that the comments are "rude," "personal," or "slanderous."

A. Forum Classification

The Supreme Judicial Court has noted that "[c]riteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under the cognate provisions of the Massachusetts Constitution." *Commonwealth* v. *Odgren*, 483 Mass. 41, 61 (2019) (citation omitted). "[T]he extent to which the Government may limit access [to those seeking to exercise protected speech in a particular forum

[6] The plaintiffs' amended complaint identifies defendants Kolenda, Shea, Braccio, Marty Healey, and Sam Stivers as the current members of the Board.

on government property] depends on whether the forum is public or nonpublic." *Roman* v. *Trustees of Tufts Coll.*, 461 Mass. 707, 713 (2012) (alterations in original; citation omitted). "Where the forum is public, the extent to which the government may permissibly limit speech depends on the nature of the property and the extent to which the public has been given access to the forum." *Id.* at 714. "[T]here are three categories of public forums: [1] traditional public forums, such as public streets and parks; [2] designated public forums, which the government has opened for use by the public as a place to assemble or debate; and [3] limited public forums [or nonpublic forums], which are limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* (citation and internal quotation marks omitted). "In traditional or designated public forums, the government may impose reasonable time, place, and manner restrictions on the exercise of free speech rights, but any such restriction must be narrowly tailored to serve a compelling government interest." *Id.* "In a limited public forum, 'a less restrictive level of scrutiny [is applied than in a traditional public forum]'; restrictions on speech need only be reasonable and neutral as to content and viewpoint." *Id.* at 715 (alterations in original; citation omitted).

The Board's policy states that "'Public Comment' is a time when town residents can bring matters before the Board that are not on the official agenda."[7] The court finds that the "Public Comment" portion of the Board's meeting is a limited public forum, as the forum was opened for local residents to discuss matters related to the town that were not on the Board's agenda. See *Lu* v. *Hulme*, 133 F. Supp. 3d 312, 324 (D. Mass. 2015) ("The limited or nonpublic forum is created when the government opens its property only to use by certain groups or for the discussion of certain subjects.").[8] Given this finding, the Board's policy need "only be reasonable and neutral as

[7] The policy requires that all speakers state their name and address before addressing the Board. This requirement supports the defendants' contention that the public comment period is for town residents, and not the general public.

[8] See also *Youkhanna* v. *City of Sterling Heights*, 934 F.3d 508, 518-519 (6th Cir. 2019) (city council meeting was limited public forum); *Galena* v. *Leone*, 638 F.3d 186, 199 (3rd Cir. 2011) ("It is perfectly clear . . . that the March

to content and viewpoint." *Id.*

B. Facial Challenge

The plaintiffs contend that this provision of the Board's policy is unconstitutional:

> "All 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 tolerated. Furthermore, no person may offer comment without permission of the Chair, and all persons shall, at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting."

In assessing a facial challenge, the court "presumes that statutes are constitutional[.]" *Blair* v. *Department of Conservation & Rec.*, 457 Mass. 634, 639 (2010). "[I]f the statute allows the setting of guidelines that may reasonably be applied in ways that do not violate constitutional safeguards, then [the court] must indulge that presumption and find that the . . . provisions escape a facial constitutional challenge." *Route One Liquors, Inc.*, v. *Secretary of Admin. & Fin.*, 439 Mass. 111, 118 (2003) (citation omitted).

Viewed in isolation, the Board's prohibition against "rude, personal, or slanderous" remarks borders close to an unconstitutional prohibition on speech. See, e.g., *Acosta* v. *City of Costa Mesa*, 718 F.3d 800, 813 (9th Cir. 2013) ("Like the ordinance in *White* [v. *City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990)], § 2-61 [of city ordinance pertaining to public speaking at city council meeting] prohibits the making of 'personal, impertinent, profane, insolent or slanderous remarks.' That, without limitation, is an unconstitutional prohibition on speech."). But considering it with the rest of the paragraph above, which focuses on disruptive conduct, the policy's prohibition on speech is a reasonable, viewpoint-and-content neutral, restriction that serves the

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20th Council meeting was a limited public forum inasmuch as the meeting was held for the limited purpose of governing Erie County and discussing topics related to that governance."); *Fairchild* v. *Liberty Ind. Sch. Dist.*, 597 F.3d 747, 759 (5th Cir. 2010) ("The [School] Board meeting here—and the comment session in particular—is a limited public forum for the limited time and topic of the meeting." [internal quotation marks omitted]); *Board Rowe* v. *City of Cocoa, Fla.*, 358 F.3d 800, 802 (11th Cir. 2004) ("city commission meetings are 'limited public for a'"); *Griffin* v. *Bryant*, 30 F. Supp. 3d 1139, 1178 (D. N.M. 2014) ("The Court concludes that Governing Body meeting—and the public input portions in particular—constitute a limited public forum for First-Amendment purposes.").

legitimate government interest of preventing disruptions of the Board's meetings. See *Roman*, 461 Mass. at 715 ("A policy or regulation that limits expression is deemed viewpoint neutral if it serves purposes unrelated to the content of expression . . ., even if it has an incidental effect on some speakers or messages but not others." [citation and internal quotation marks omitted]). So long as the Board enforces the policy to meet that end, and not to silence speakers based solely on the topic, viewpoint, or message expressed, the policy is facially valid. See *Massachusetts Coal. for the Homeless* v. *City of Fall River*, 486 Mass. 437, 442 (2020) ("[G]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" [citation omitted]).

VI. Declarations

Because Count VI of the plaintiffs' amended complaint is for declaratory relief, "the [Superior] Court judge [is] required to make a declaration of the rights of the parties." *Vergato* v. *Commercial Union Ins. Co.*, 50 Mass. App. Ct. 824, 829 (2001) (first alteration in original; citation omitted). See *Boston* v. *Massachusetts Bay Transp. Auth.*, 373 Mass. 819, 829 (1977) ("[W]hen an action for declaratory relief is properly brought, even if relief is denied on the merits, there must be a declaration of the rights of the parties"). Based on the above findings, the court makes these declarations:

1. The Board's prohibition against "rude, personal, or slanderous remarks" under paragraph 3 of the Board's "Public Participation At Public Meetings" policy is a constitutional prohibition on speech under Massachusetts law when it is employed to maintain order and decorum or to prevent disruptions of the Board's meeting.[9]

2. The Board may not prohibit speech under paragraph 3 of the Board's "Public Participation at Public Meetings" policy based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism.

[9] See, e.g., *Shero* v. *City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007) (noting that a speech restriction "was . . . appropriately designed to promote orderly and efficient meetings"). See also *Scroggins* v. *City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) (city council's prohibition against "personal, rude, or slanderous remarks" serves "important governmental interest of preventing disruptions to its meeting").

ORDER

For the foregoing reasons, the defendants' motion for judgment on the pleadings is ALLOWED on all counts of the plaintiffs' first amended complaint. The court also DECLARES:

1. The Board's prohibition against "rude, personal, or slanderous remarks" under paragraph 3 of the Board's "Public Participation At Public Meetings" policy is a constitutional prohibition on speech under Massachusetts law when it is employed to maintain order and decorum or to prevent disruptions of the Board's meeting.

2. The Board may not prohibit speech under paragraph 3 of the Board's "Public Participation at Public Meetings" policy based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism.

The court shall enter final judgment in favor of the defendants on all counts of the first amended complaint.

Honorable Shannon Frison
Justice of the Superior Court

March 8, 2021

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 11H

§ 11H. Violations of constitutional rights; civil actions by attorney general; right to bias-free professional policing

Effective: July 1, 2021
Currentness

(a)(1) Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(2) If the attorney general prevails in an action under this section, the attorney general shall be entitled to: (i) an award of compensatory damages for any aggrieved person or entity; and (ii) litigation costs and reasonable attorneys' fees in an amount to be determined by the court. In a matter involving the interference or attempted interference with any right protected by the constitution of the United States or of the commonwealth, the court may also award civil penalties against each defendant in an amount not exceeding $5,000 for each violation.

(b) All persons shall have the right to bias-free professional policing. Any conduct taken in relation to an aggrieved person by a law enforcement officer acting under color of law that results in the decertification of said law enforcement officer by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E shall constitute interference with said person's right to bias-free professional policing and shall be a prima facie violation of said person's right to bias-free professional policing and a prima facie violation of subsection (a). No law enforcement officer shall be immune from civil liability for any conduct under color of law that violates a person's right to bias-free professional policing if said conduct results in the law enforcement officer's decertification by the Massachusetts peace officer standards and training commission pursuant to section 10 of chapter 6E; provided, however, that nothing in this subsection shall be construed to grant immunity from civil liability to a law enforcement officer for interference by threat, intimidation or coercion, or attempted interference by threats, intimidation or coercion, with the exercise or enjoyment any right secured by the constitution or laws of the United States or the constitution or laws of the commonwealth if the conduct of said officer was knowingly unlawful or was not objectively reasonable.

Credits
Added by St.1979, c. 801, § 1. Amended by St.1982, c. 634, § 4; St.2014, c. 197, § 1, eff. July 30, 2014; St.2020, c. 253, § 37, eff. July 1, 2021.

Notes of Decisions (378)

M.G.L.A. 12 § 11H, MA ST 12 § 11H
Current through Chapter 14 of the 2022 2nd Annual Session

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 11I

§ 11*I*. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees

Currentness

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Credits
Added by St.1979, c. 801, § 1.

Notes of Decisions (662)

M.G.L.A. 12 § 11I, MA ST 12 § 11I
Current through Chapter 14 of the 2022 2nd Annual Session

End of Document

 KeyCite Yellow Flag - Negative Treatment
Enacted LegislationNote in 2022 Mass. Legis. Serv. Ch. 22 (H.B. 4345) (WEST),

 KeyCite Yellow Flag - Negative TreatmentProposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 20

§ 20. Meetings of a public body to be open to the public; notice of meeting; remote participation; recording and transmission of meeting; removal of persons for disruption of proceedings; office holders to certify receipt of open meeting law and educational materials

Effective: July 1, 2015
Currentness

<[Section impacted by 2020, 53, Sec. 17, as amended by 2020, 201, Secs. 33 to 38 effective November 10, 2020, and 2021, 20, Secs. 20, 27 and 31 as amended by 2021, 29, Sec. 57 effective June 16, 2021 in order to address disruptions caused by the outbreak of COVID-19.]>

(a) Except as provided in section 21, all meetings of a public body shall be open to the public.

(b) Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to the meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to the meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of the meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.

(c) For meetings of a local public body, notice shall be filed with the municipal clerk and posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located.

For meetings of a regional or district public body, notice shall be filed and posted in each city or town within the region or district in the manner prescribed for local public bodies. For meetings of a regional school district, the secretary of the regional school district committee shall be considered to be its clerk and shall file notice with the clerk of each city or town within the district and shall post the notice in the manner prescribed for local public bodies. For meetings of a county public body, notice shall be filed in the office of the county commissioners and a copy of the notice shall be publicly posted in a manner conspicuously visible to the public at all hours in the places as the county commissioners shall designate for the purpose.

For meetings of a state public body, notice shall be filed with the attorney general by posting on a website under the procedures established for this purpose and a duplicate copy of the notice shall be filed with the regulations division in the state secretary's office.

The attorney general may prescribe or approve alternative methods of notice where the attorney general determines the alternative methods will afford more effective notice to the public.

(d) The attorney general may, by regulation or letter ruling, authorize remote participation by members of a public body not present at the meeting location; provided, however, that the absent members and all persons present at the meeting location are clearly audible to each other; and provided further, that a quorum of the body, including the chair, are present at the meeting location. The authorized members may vote and shall not be deemed absent for the purposes of section 23D of chapter 39.

(e) A local commission on disability may by majority vote of the commissioners at a regular meeting authorize remote participation applicable to a specific meeting or generally to all of the commission's meetings. If a local commission on disability is authorized to utilize remote participation, a physical quorum of that commission's members shall not be required to be present at the meeting location; provided, however, that the chair or, in the chair's absence, the person authorized to chair the meeting, shall be physically present at the meeting location. The commission shall comply with all other requirements of law.

(f) After notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. At the beginning of the meeting, the chair shall inform other attendees of any recordings.

(g) No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.

(h) Within 2 weeks of qualification for office, all persons serving on a public body shall certify, on a form prescribed by the attorney general, the receipt of a copy of the open meeting law, regulations promulgated under section 25 and a copy of the educational materials prepared by the attorney general explaining the open meeting law and its application under section 19. Unless otherwise directed or approved by the attorney general, the appointing authority, city or town clerk or the executive director or other appropriate administrator of a state or regional body, or their designees, shall obtain certification from each person upon entering service and shall retain it subject to the applicable records retention schedule where the body maintains its official records. The certification shall be evidence that the member of a public body has read and understands the requirements of the open meeting law and the consequences of violating it.

Credits

Added by St.2009, c. 28, § 18, eff. July 1, 2010. Amended by St.2010, c. 131, § 22, eff. July 1, 2010; St.2010, c. 454, § 18, eff. Jan. 14, 2011; St.2014, c. 485, eff. April 7, 2015; St.2015, c. 46, § 52, eff. July 1, 2015.

Notes of Decisions (2)

M.G.L.A. 30A § 20, MA ST 30A § 20
Current through Chapter 14 of the 2022 2nd Annual Session

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title III. Laws Relating to State Officers(Ch. 29-30b)
Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 23

§ 23. Enforcement of open meeting law; complaints; hearing; civil action

Effective: January 14, 2011
Currentness

(a) Subject to appropriation, the attorney general shall interpret and enforce the open meeting law.

(b) At least 30 days prior to the filing of a complaint with the attorney general, the complainant shall file a written complaint with the public body, setting forth the circumstances which constitute the alleged violation and giving the body an opportunity to remedy the alleged violation; provided, however, that such complaint shall be filed within 30 days of the date of the alleged violation. The public body shall, within 14 business days of receipt of a complaint, send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken. Any remedial action taken by the public body in response to a complaint under this subsection shall not be admissible as evidence against the public body that a violation occurred in any later administrative or judicial proceeding relating to such alleged violation. The attorney general may authorize an extension of time to the public body for the purpose of taking remedial action upon the written request of the public body and a showing of good cause to grant the extension.

(c) Upon the receipt of a complaint by any person, the attorney general shall determine, in a timely manner, whether there has been a violation of the open meeting law. The attorney general may, and before imposing any civil penalty on a public body shall, hold a hearing on any such complaint. Following a determination that a violation has occurred, the attorney general shall determine whether the public body, 1 or more of the members, or both, are responsible and whether the violation was intentional or unintentional. Upon the finding of a violation, the attorney general may issue an order to:

(1) compel immediate and future compliance with the open meeting law;

(2) compel attendance at a training session authorized by the attorney general;

(3) nullify in whole or in part any action taken at the meeting;

(4) impose a civil penalty upon the public body of not more than $1,000 for each intentional violation;

(5) reinstate an employee without loss of compensation, seniority, tenure or other benefits;

(6) compel that minutes, records or other materials be made public; or

(7) prescribe other appropriate action.

(d) A public body or any member of a body aggrieved by any order issued pursuant to this section may, notwithstanding any general or special law to the contrary, obtain judicial review of the order only through an action in superior court seeking relief in the nature of certiorari; provided, however, that notwithstanding section 4 of chapter 249, any such action shall be commenced in superior court within 21 days of receipt of the order. Any order issued under this section shall be stayed pending judicial review; provided, however, that if the order nullifies an action of the public body, the body shall not implement such action pending judicial review.

(e) If any public body or member thereof shall fail to comply with the requirements set forth in any order issued by the attorney general, or shall fail to pay any civil penalty imposed within 21 days of the date of issuance of such order or within 30 days following the decision of the superior court if judicial review of such order has been timely sought, the attorney general may file an action to compel compliance. Such action shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets. If such body or member has not timely sought judicial review of the order, such order shall not be open to review in an action to compel compliance.

(f) As an alternative to the procedure in subsection (b), the attorney general or 3 or more registered voters may initiate a civil action to enforce the open meeting law.

Any action under this subsection shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets.

In any action filed pursuant to this subsection, in addition to all other remedies available to the superior court, in law or in equity, the court shall have all of the remedies set forth in subsection (c).

In any action filed under this subsection, the order of notice on the complaint shall be returnable not later than 10 days after the filing and the complaint shall be heard and determined on the return day or on such day as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of the open meeting law. In the hearing of any action under this subsection, the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by the open meeting law; provided, however, that no civil penalty may be imposed on an individual absent proof that the action complained of violated the open meeting law.

(g) It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel.

(h) Payment of civil penalties under this section paid to or received by the attorney general shall be paid into the general fund of the commonwealth.

Credits

Added by St.2009, c. 28, § 18, eff. July 1, 2010. Amended by St.2010, c. 454, § 19, eff. Jan. 14, 2011.

Notes of Decisions (10)

M.G.L.A. 30A § 23, MA ST 30A § 23
Current through Chapter 14 of the 2022 2nd Annual Session

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure I, John J. Davis, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

> Mass. R. A. P. 16 (a)(13) (addendum);
> Mass. R. A. P. 16 (e) (references to the record);
> Mass. R. A. P. 18 (appendix to the briefs);
> Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
> Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12-point, 10½ characters per inch, and contains 40, total non-excluded pages prepared with Word 2013.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on March 14, 2022, I have made service of this Brief upon the attorney of record for each party, by the Electronic Filing System on:

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