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.

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

Entered and Copies Mailed 3/9/21

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.

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[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.
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> 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;
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> 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

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[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.

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[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