COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss

Docket No. 2021-P-0828

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

Plaintiffs/Appellants,

v.

DANIEL KOLENDA, Individually and as he is a Member of the SOUTHBOROUGH BOARD OF SELECTMEN, ET AL.

Defendants/Appellees

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
(Lower Ct. Docket No. Worcester 2085CV00382

BRIEF OF THE PLAINTIFFS/APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of the Worcester Superior Court's decision allowing the Defendants' Motion for Judgement on the Pleadings prior to the commencement of discovery.

STATEMENT OF FACTS

The Amended Complaint alleges the following. For nearly four decades, Louise Barron and her husband Jack have been residents the Town of Southborough ("the Town"). Appendix at 2-3 ("A. 2-3"). They sent their two children through the Town's public school system, and have been volunteers and participants in the schools and Town government since the mid-1980s. Id. Throughout that time, they have been active and engaged in local issues. Id.

Like all Massachusetts towns, the chief executive of the Town is an elected five-member Board of Selectmen ("the Board"). A. 3. The Board appoints the members of the Advisory Committee (a/k/a Finance Committee), which is charged with consideration of all questions of municipal finance. Id. The Advisory Committee makes budget recommendations to the Town Meeting, which serves as the Town's legislative body.

Id. The chief executive of the school district is the School Committee. Id.

Defendant Daniel Kolenda, an attorney licensed to practice law in Massachusetts and a Judge Advocate for the U.S. Army, is also a long-time Southborough resident. Id. For many years, Mr. Kolenda has held positions of power in local government, including on the School Committee, the Advisory Committee, and most recently, the Board. Id.

Over the years, the Barrons have exposed several episodes of governmental incompetence and/or malfeasance in Southborough. Id. Several of these episodes involved Mr. Kolenda, and their exposure resulted in substantial criticism of him. A. 3-9.

Most recently, Ms. Barron exposed the fact that Kolenda had facilitated a series of closed-door meetings between Town leaders and a connected private developer who had a problem: he needed a second point of access to a large parcel of land he wanted to develop that was almost entirely land locked. A. 7-8. And he had a massive development proposal pending before the Town, the success of which was threatened by the access problem. Id. The subject of the meetings was the Town's potential taking of private property to

construct a road that would provide the developer with the access he needed. Id. Notably, the Town never notified the Southborough resident who owned and resided on the land over which the road was proposed—he had no idea these meetings were happening. Id. After learning about these secret discussions in early 2018, Ms. Barron posted the following on a popular local news blog, MySouthborough.com:

> MEMO TO MR. KOLENDA ET AL:
> • Stop having these meetings and conversations behind the taxpayers'/public's back. It skirts the whole purpose and spirit of Open Meeting Law.
> • You have lost major voter support (and your mind) if you think the taxpayers (through a grant or otherwise) [are] paying for a private developer's roadway.
> • Butt out: stop using taxpayer's money, BOS's valuable time, the public's valuable time, and town hall resources, before any developer has figured out their own access and infrastructure issues. NOT OUR PROBLEM!
>
> Mr. Barron posted the following:
>
> Starting back in 2016, [the Town Administrator], Kolenda, and [the Town Clerk] are actually helping the developer (actions speak louder than words!) by ENDORSING the concept of a north - south road in favor of a private developer without ever contacting the actual private owner of the property - no necessary, I guess??!! Just so outrageous.

A 7-8. The Barrons learned that, while the connected developer's massive development proposal was pending, in addition to holding secret meetings, the Board

violated the Open Meeting Law ("OML") on numerous occasions. A. 8-9. In fact, in November of 2018, the Attorney General's Office ("AGO") ruled that the Board had committed dozens of OML violations. A. 10. The AGO issued a scathing letter, castigating the Board for attempting to minimize its violations, stating: "the issues raised here are significant and the violations we find go to the heart of the Open Meeting Law." A. 10-11. In an unusual rebuke, the AGO also ordered every member of the Board to attend an in-person OML training that it scheduled to be held at Southborough Town Hall. Id.

After learning about the AGO's letter, Ms. Barron decided to attend the Board's next meeting on December 4, 2018, which began at 6:30pm. A. 9. On that evening, Ms. Barron sat quietly in the audience awaiting the "public comment" segment of the Board's meeting. Public comment near the very end of the Agenda. A. 12. Prior to public comment, the Town Treasurer/Collector, Brian Ballantine, gave a budget presentation to the Board. A. 10-11. He advised the Board that, in order to maintain just the current level of Town services, the Board had to substantially increase local real estate taxes for the

next fiscal year. Id. Members of the Board indicated that they were open to voting significant tax increases. Id. Mr. Kolenda even advocated for fully funding the Recreation Department's proposed budget—which included a $270,000 line item for the installation of artificial turf in a water detention basin that was periodically used as an athletic field. Id. The Board also discussed reducing the road improvement line item by $250,000, indicating willingness to both increase taxes and fund non-essential projects while slashing core services such as road maintenance. Id.

After the budget presentation, the Board began to review numerous sets of meeting minutes that it had failed to timely review and approve as required by the OML. A. 10. The Town Administrator cryptically and very quickly acknowledged the AGO's latest findings of the Board's OML violations, and stated that he expected additional OML complaints would be filed. Id. Neither he nor any member of the Board made any mention of the AGO's extraordinary letter or its plan to hold a training at Town Hall and order that all Board members attend. Id. Instead, Mr. Kolenda, a licensed attorney who is presumably capable of

understanding the OML's basic requirements, again minimized the dozens of violations, stating "we are a group of volunteers" and "public servants" who "do their best." A. 11.

After the very brief discussion of the OML violations, Mr. Kolenda announced a series of donations and payments that Town had received. Id. As part of that list, he said he would "assign OML complaint to town counsel as is standard practice." Id. Because he announced a new OML complaint as part of a list of payments, and because he used the acronym "OML" instead of the words "Open Meeting Law," Ms. Barron was concerned that most residents watching would not understand that "assign OML complaint to Town Counsel" meant that the Town had received yet another complaint that the Board violated the law, or that residents would again have to pay for Town Counsel's review and response to yet another asserted violation. A. 11. To Ms. Barron, this was a vivid display of the Board's purposeful lack of transparency that sought to hinder the understanding that local officials were routinely violating the law.

As the meeting continued, the Board discussed creating a committee to consider the elevation of the

Town Administrator to the position of Town Manager. Id. Because Town Managers have greater authority, the change in title would presumably come with a salary increase. Id. Thus the Board was considering increasing personnel expenses at the same time it had been informed that tax increases would be required to provide just level Town services. A. 10-11.

After that discussion, more than two and a half hours after the start of the meeting, Mr. Kolenda, who was acting as chair, announced that the Board would entertain public comment. A. 12. First, however, he read a portion of the Board's Policy and Guidelines on Public Participation at Public Meetings ("the Policy"): "All remarks must be respectful and courteous, free of rude, personal or slanderous remarks." A. 12.

Ms. Barron stood and approached the microphone with her hand-made sign that read "Stop Spending" on one side and "Stop Breaking Open Meeting Law" on the other. Id. She first politely voiced her objection to the proposed budget increases and expressed her view that the Board was engaged in irresponsible spending. Id. She next asked for an explanation of the benefit of having a Town Manager as opposed to a Town

Administrator. Id. In response, Kolenda refused to respond, stating there would be "no back and forth during public comment." Id. Ms. Barron accepted this, stating "very good," but another member of the Board offered Ms. Barron a substantive response. Id. Ms. Barron then turned her attention to the AGO's findings and order, stating:

> 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.

A 12-13. Mr. Kolenda immediately interrupted Ms. Barron, stating: "So ma'am if you want to slander town officials who are doing their very best—" to which Ms. Barron interjected: "I'm not slandering." A. 13. Kolenda immediately cut her off again, stating: "Then we're going to go ahead and stop this public comment session now and go into recess." Id. Thus, in response to Ms. Barron's criticism, Mr. Kolenda unilaterally terminated both her speech on matters of public concern and the meeting itself. Id.

Ms. Barron was extremely frustrated--not only by being silenced after waiting more than two and a half hours to speak, but also by Kolenda's characterization

of her factually accurate comments as "slander"; she knew very well she had made no false statements. A. 12-13. In response to Kolenda's attempt to silence her, she said: "You need to stop being a Hitler. You're a Hitler. I can say anything I want." A. 13. Kolenda again immediately cut her off, stating "We are moving into recess. Thank you." Id. Contrary to proper and usual procedure, there was no motion by any Board member, no second, and no vote to recess, adjourn, suspend, or otherwise discontinue the meeting; Kolenda had simply unilaterally terminated the meeting in response to Ms. Barron's criticism. Id.

Up until Kolenda's unilateral termination, the meeting had been captured by audio and video recordings and live streamed by Southborough Access Media ("SAM") through the Town's public access cable channel. A. 13. Kolenda looked pointedly at the SAM staffer, indicating that he should immediately stop recording the meeting and turned off his own microphone. A. 14. The audio abruptly ended. Id. The video, however, lasted an additional 13 seconds. Id.

During that silent video, Kolenda can be seen rising up in fury, leaning forward over the Board's table, and menacingly pumping his arm repeatedly and

point at Ms. Barron while very clearly shouting. Id. The Board's chair was roaring at Ms. Barron in front of all those assembled and all those watching at home: "You're disgusting! You're disgusting! You're disgusting!" while Ms. Barron stood there, frozen and aghast. Id. Kolenda then threatened to have Ms. Barron, a disabled senior citizen and a grandmother, physically removed from the room if she did not leave on her own. Id.

Kolenda's actions were a clear response to Ms. Barron's exercise of her right to criticize the Board, which Kolenda found intolerable. His intimidating, aggressive, and humiliating rant took place in front of two other members of the Board, Brian Shriffrin and Bonnie Phaneuf, neither of whom did anything to stop the abusive and threatening conduct. Id. The Town Administrator was also present, as was the Board's secretary, other Southborough residents, and the SAM staff. Id. Ms. Barron stood stunned, scared, and humiliated. Id. Worried that Kolenda would follow through on his threat to have her physically removed, Ms. Barron left the meeting, shaken and in extreme distress. Id.

At its next meeting, the Board reviewed a draft of the minutes from December 4, which falsely stated: "Mr. Kolenda moved the meeting to adjournment at 9:06 P.M., seconded by Mrs. Phaneuf." Id. (emphasis supplied). Although the draft minutes stated: "Mrs. Barron told Mr. Kolenda to stop being a 'Hitler' and called him a 'Hitler," they made no reference to his violent and disturbing response--as if it had simply not occurred. Board member Brian Shea requested that the words "Mr. Kolenda ended public comment" be deleted because, although he'd left the room prior to public comment, he stated that he heard the end of "the discussion" and Mr. Kolenda did not end public comment. A. 15. Another member, Lisa Braccio, agreed, despite the fact that she had also left the meeting prior to public comment. A. 66, n. 4. Board member Bonnie Phaunef "recalled" that Kolenda had "adjourned" and she had "seconded" that "motion." A. 15. Despite the fact that these "recollections" were flatly contradicted by the audio and video recordings, which by then had been widely viewed, all members of the Board unanimously voted to amend the minutes to reflect these lies. Id.

The incident was reported in the MetroWest Daily News and in a well-read on-line publication, MySouthborough.com. Id. These news outlets reported that Kolenda was calling "for greater civility in public discussion of town business" and described his "exchange" with Ms. Barron as merely "an uncomfortable incident." Id. Ms. Barron remained much more than uncomfortable, however. Id. She was shaken and utterly distraught. Id.

Mr. Kolenda's abusive attack on Ms. Barron and the Board's inaction and later attempt to whitewash his behavior have caused Ms. Barron ongoing humiliation in the Town that has been her home for more than 35 years. Id. In fact, since that meeting, Ms. Barron has been unable to bring herself to attend any municipal public meeting; even the thought of doing so gives her overwhelming anxiety. As a result, Ms. Barron is unable to participate in local affairs, an activity she has always viewed as her civic responsibility and pursued her entire adult life. Id.

PROCEDURAL HISTORY

The Plaintiffs' original complaint filed April 3, 2020, asserted several causes of action, one under the Massachusetts Civil Rights Act ("MCRA") for violation

of Ms. Barron's rights under the First Amendment of the United Sates Constitution and Article XIX of the Declaration of Rights of the Massachusetts Constitution, and one under G.L. c. 231A, seeking declaratory relief to enjoin the Town from enforcing its policy titled "Public Participation at Public Meetings" due to constitutional infirmities. A. 154. The Defendants removed the case to federal court, but it was remanded after the Plaintiffs filed the First Amended Complaint and Jury Demand, which asserted claims only under state law. A. 155. Specifically, Ms. Barron asserted that the defendants violated her Article 19 rights to free speech, to assemble and consult upon the common good, and to petition her local government for redress of her grievances. A. 1-22. Based on these violations, Ms. Barron claimed she was entitled to relief under the MCRA and G.L. c. 231A.

Prior to any discovery, the Defendants filed a motion for judgment on the pleadings on all claims, A. 57-83, which the Plaintiffs opposed.[1] A. 85 et seq.

[1]The Town's motion was filed under Rule 12(c) instead of 12(b) because it asked the court was to consider the Policy, a matter outside of the pleadings. A. 59, 63.

The Superior Court (Frison, J.) held a hearing at which the video of the end of the Board's December 4th meeting was played by agreement of the parties.[2] By decision dated March 8, 2021, the court granted the motion as to all counts of the complaint. A. 135 et seq. The court also entered a declaration that the "Board's prohibition against 'rude, personal, or slanderous remarks' . . . 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." A. 150. The court further declared that the "Board may not prohibit speech [under the] policy based solely on the viewpoint or message of a speaker or the Board's desire to avoid criticism." Id. Final judgment entered on April 1, 2021, and the Plaintiff filed the Notice of Appeal was entered four days later.[3] A. 151, 152.

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[2] The Plaintiffs will file with this Court the audio/visual recording of the incident, which was considered by the Superior Court.

[3] The Plaintiff appeals the order only with respect to her constitutional claims and her claim for declaratory judgment.

ARGUMENT

I. IN GRANTING JUDGMENT IN THE TOWN'S FAVOR ON THE CONSTITUTIONAL CLAIMS, THE TRIAL COURT MISCONSTRUED PRECEDENT AND IMPROPERLY FOUND FACTS CONTRARY TO THOSE ALLEGED IN THE COMPLAINT.

Count I set forth a claim under G.L. c. 12, §§ 11H, 11I, the MCRA, for violation of Article 19 of the Massachusetts Declaration of Rights. A. 16. Both federal and state courts have long held that freedom of speech protections represent "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129, 131 (1998)(as to "public figures," the First Amendment "absolutely prohibits punishment of truthful criticism.")(citation omitted). Ms. Barron also asserted that her "right, in an orderly and peaceable manner, to assemble to consult upon the common good; [and] give instructions to their representatives" was violated. A. 16. Those are rights that have been described as "indubitable." Commonwealth v. Surridge, 265 Mass. 425, 427 (1929).

"The importance to the public welfare of this constitutional guaranty has been recognized and scrupulously upheld by the courts." Id. (citations omitted). Finally, Ms. Barron claimed that the Town infringed upon her right to petition for redress of grievances, A. 16, which is highly protected speech. Indeed, criticism of government is at the center of free speech as "speech concerning public affairs is more than self-expression; it is the essence of self-government." Rosenblatt v. Baer, 383 U.S. 357, 375-76 (1927); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

The MCRA provides recovery for "[a]ny 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" by "threats, intimidation or coercion" G.L. c. 12, §§ 11H, 11I. The MCRA, "like other civil rights statutes, is remedial . . . [and] entitled to liberal construction of its terms." Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985). "Accordingly, cases within the reason, although not within the letter, of a remedial statute are embraced by its provisions." Redgrave v.

Boston Symphony Orchestra, Inc., 399 Mass. 93, 99 (1987) (citing Batchelder, supra at 822).

To establish a claim under the MCRA, a plaintiff must prove that her exercise or enjoyment of constitutional rights has been "interfered with, or attempted to be interfered with," and that the interference or attempted interference was by "threats, intimidation, or coercion." G.L c. 12, §§ 11H, 11I; Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 395 (1996). For the purposes of 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 of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" Glovsky v. Roche Bros. Supermarkets, Inc., 469 Mass. 752, 762 (2014) quoting Haufler v. Zotos, 446 Mass. 489, 505 (2006).

In the years since the enactment of the MCRA, the terms "threats, intimidation or coercion" have been interpreted through case law which has extended the bounds of the MCRA's protection to allegations like

those made in Ms. Barron's complaint. See, e.g., Reproductive Rights Network v. President of Univ. of Massachusetts, 45 Mass. App. Ct. 495 (1998)(standard met where university prevented students, faculty and activists from using a room for political meeting by closing the building and denying plaintiffs access); Batchelder, supra at 823 (standard met where security guard implied that he might arrest or remove plaintiff); Bell v. Mazza, 394 Mass. 176, 179 (1985)(standard met where defendants threatened to do "anything," "at any cost" to keep plaintiffs from constructing a tennis court); Redgrave, 399 Mass. at 100 (1987)(standard met where third party's threat of disruption motivated cancellation of contract); Planned Parenthood League v. Blake, 417 Mass. 467, 474 (1994)(standard met where defendant protestors physically blocked clients and staff from exercising their rights).

This Court reviews *de novo* the order allowing the Town's motion for judgment on the pleadings. Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600 (2010). Every fact alleged in the complaint must be treated as true—even if a reviewing court may doubt the allegations--as was clearly the case here.

Iannachino v. Ford Motor Co., 451 Mass. 623, 636 (2008). In addition, the reviewing court must make all inferences that may be drawn from the factual allegations in favor of the plaintiff. Id. at n. 7 (citations omitted); Minaya v. Massachusetts Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984). All that is required for a claim to survive at the very inception of the case is that the plaintiff allege facts that "plausibly suggest" an entitlement to relief. Iannachino at 636 (citations omitted). In this case, the trial court not only failed to view the allegations and reasonable inferences in the light most favorable to Ms. Barron, it made at least four factual findings that are contrary to those alleged.

First, the trial court found that Mr. Kolenda did not unilaterally terminate Ms. Barron's public comment (and the meeting) until after Ms. Barron's "Hitler" comment. A. 137 ("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 Ms. Barron's public comment and the meeting."). That is a factual finding that directly contradicts the allegation that Mr. Kolenda terminated Ms.

Barron's speech and the meeting prior to those comments because Ms. Barron had criticized the Board and exposed their penchant for serial violations of law. A. 12-13 ("Ms. Barron had waited nearly three hours to speak but was now being prevented from doing so . . . Mr. Kolenda made clear he was unilaterally terminating both Ms. Barron's public comment and the Board's meeting" prior to Ms. Barron's statement "stop being a Hitler."). Thus, the Complaint alleges that Mr. Kolenda unilaterally, and without authority, ended Ms. Barron's speech as the direct result of her statements that the Board had committed serial violations of the OML. A. 16-17.

The trial court's finding was an acceptance of the Town's argument that Kolenda ended the meeting only because Ms. Barron compared him to a dictator. A. 71 ("Yellng 'You're a Hitler!' at [Kolenda] clearly disrupted the December 4 Board meeting. Furthermore, [Kolenda's] admonition to [Ms. Barron] that she must leave the meeting or else be escorted out was not based on her viewpoint" regarding the OML violations, but rather on her "choice of language and tone of delivery."). Thus, the court improperly accepted the Defendants' framing of the facts, and found that

Kolenda's act of censorship and intimidation were a reasonable response to an offensive comment. That represents the trial court's substitution of its own facts and inferences for those alleged in the Complaint. A. 140-41.[4]

Second, the trial court improperly found that the Complaint failed to allege "intimidation."

> [Kolenda's] alleged outburst toward Ms. Barron could not be reasonably understood as Kolenda seeking to "intimidate" Barron to deter her from exercising her constitutional rights . . .

A 141, citing Glovsky, 469 Mass. at 763. Although the court correctly stated that Glovsky holds that a "reasonable person" standard should be employed to determine whether conduct constitutes "threats, intimidation or coercion." But the Glovsky case is factually distinguishable. There, the plaintiff alleged that the manager of the defendant supermarket had simply informed him that he could not solicit

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[4] The court found "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." A. 141. Although Ms. Barron's comment may be characterized as a "vehement, caustic, [or] unpleasantly sharp attack[] on [a] public officials" Sullivan, 376 U.S. at 270, even if she had made it prior to his termination of her speech and the meeting, it would still constitute a constitutional violation.

signatures outside of the store pursuant to store policy. Although the Court found the policy unconstitutional, it held that the allegations were insufficient to state a claim under the MCRA because they did not allege conduct that could be considered threats, coercion, or intimidation. The court contrasted the plaintiff's allegations with a case in which the plaintiff alleged that a person in authority threatened of "forceable ejection," had been found to constitute allegations of "threats, coercion or intimidation" for purposes of the MCRA. Id.

Here the allegations fall into the latter category. The allegations are that, in response to Ms. Barron's criticism, Mr. Kolenda silenced her, stood up, leaned menacingly over the Board's table towards Ms. Barron and repeatedly shouted "you're disgusting!" A. 13-14. The Complaint further alleges that Kolenda, acting as chair of chief executive Board of the Town, "then threatened to have Ms. Barron, a disabled senior citizen and a grandmother 'escorted out' of the meeting if she did not leave at the very time she was exercising her rights to freedom of speech, assembly, and petition." Id. Viewing these allegations as true,

there is no question that they meet the standard of threats, intimidation, and/or coercion.[5]

Third, in light of the above allegations, it was clear error for the court to find that "there were

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[5] The trial court also stated: "And a direct deprivation of rights, even if unlawful, that is accomplished without threats, intimidation or coercion is also not actionable under the MCRA. citing Swanset, 423 Mass. at 396 (1996). That is a misreading of the law because Swanset is also readily distinguishable. There, the SJC held that City's denial of the plaintiff's property development permit application was non-coercive enforcement of lawful zoning regulations. Swanset cited Pheasant Ridge Assocs. Ltd. Partnership v. Burlington, 399 Mass. 771 (1987), in which the Court held that the bad faith taking of plaintiff's property was unlawful but not coercive. Pheasant Ridge is often cited for the proposition that a direct deprivation of a right, without threats, intimidation, or coercion, is not violative of the MCRA. But as the Reproductive Rights court observed, Swanset and Pheasant Ridge must be distinguished from cases in which the right to *free speech* is invoked, rather than a property right or an "amorphous substantive due process" right. Reproductive Rights, supra at 509 (defendants' violation of the plaintiffs' First Amendment and Article XVI rights violated the MCRA because the defendants used a threat of police intervention to assert their authority). Here, Ms. Barron alleges that Mr. Kolenda terminated her speech and threatened to have her removed from a public meeting because of her criticism, which sufficiently meets the MCRA's standard to survive a Rule 12(c) motion. See, e.g., Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 92 (1999) (where defendants told plaintiffs they would be arrested if they did not [leave], the fact that they used a "business-like tone [to express] their intent to have others physically engage the plaintiffs does not alter the nature of their conduct.").

insufficient facts alleged to permit the inference that Kolenda acted to coerce Barron from exercising her rights." A. 141. Once more, this is a factual determination that is completely at odds with the allegation that Kolenda's angry public rant--and threat to have Ms. Barron removed--occurred after he unilaterally silenced her because of her criticism, while other Town leaders sat passively by.[6] A. 12-13. The Complaint alleges that Ms. Barron was frightened, shocked, and humiliated by Kolenda's very public language, conduct, and threats. A. 13-14. The

[6] Although Kolenda's actions constitute a display of overtly menacing behavior, neither the Batchelder nor the Redgrave decisions required proof of a specific intent or overtly menacing behavior. "In Redgrave, the court stated that the MCRA imposes no requirement that 'an actor specifically intend[s] to deprive a person of a secured right.'" Redgrave, 399 Mass. at 99, as quoted in Reproductive Rights, 45 Mass. App. Ct. at 508. "The court in Redgrave determined that the statute's coercion requirement was met because 'the *natural effect* of the defendant's action was *to coerce* [the plaintiffs] in the exercise of [their] rights" Id. at 100. See also Breault v. Chairman of the Bd. of Fire Commrs. of Springfield, 401 Mass. 26, 36 n. 12 (1987)(threats, intimidation or coercion could be found where the defendant "desires to cause [the] consequences of the act, or that he believes that the consequences are substantially certain to result from it."). Here, the trial court found that Kolenda's conduct was a reasonable response, failing to recognize that the allegations fit squarely within the purview of the MCRA's protections.

Complaint specifically alleges that Ms. Barron was "[w]orried that Mr. Kolenda would follow through on his threat to have her removed, [and she] left the meeting, shaken and in distress." A. 14. The court inappropriately failed to take any of these allegations as true, and instead found facts that were completely contrary.[7]

Fourth, the trial court incorrectly found that the Complaint failed to allege sufficient facts to support an inference that Kolenda coerced Ms. Barron

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[7] In dismissing Ms. Barron's MCRA claim, the judge also cited Sena v. Com., 417 Mass. 250 (1994), a case that is also wholly distinguishable. In Sena, an officer told a person under investigation that the next time they met, the officer would "have warrants." The SJC held that although that language could be considered a threat, because it is lawful for an officer to make an arrest pursuant to a warrant, the threat was not actionable under the MCRA. Relying on Sena, the trial court held that Mr. Kolenda's threat to remove Ms. Barron was lawful because the OML allows the chair, "after clear warning" to remove "a person [who] continues to disrupt the [meeting]. . . " G.L. c. 30A, § 20(g). That provision is inapplicable, however, because the Complaint alleges that Kolenda silenced Ms. Barron because she criticized the Board, and she was in no way "disrupting the proceedings." A. 12-13. In fact, the Complaint alleges that it was Kolenda who was disruptive, abusive, and frightening. Id. In any event, to the extent that § 20(g) purports to authorize the chair to silence a person or threaten to remove her because she is making critical (but factually accurate) statements as alleged here, the statute is inconsistent with free speech jurisprudence.

into forgoing her right to speak in criticism of her Town leaders. Decision at 7 (finding Kolenda did not apply "physical or moral force" to compel Ms. Barron to alter her actions, "[n]or did Kolenda compel or attempt to compel Barron to act in a way she otherwise would not have."). This is wholly inappropriate where the Complaint alleges that Ms. Barron knew she had the right to criticize the Board, but left the room in distress after being silenced and threatened. A. 13. (alleging Ms. Barron said "I can say anything I want" but "[w]orried that Mr. Kolenda would follow through on his threat to have her removed, Ms. Barron left the meeting, shaken and in distress.")

In its motion, the Town asserted that the allegations relevant to plaintiffs' claims "begin at Paragraph 110 of the Amended Complaint." A. 65. That was an invitation to the court to ignore the detailed allegations of the long history of the Barrons' exposure of corruption and incompetence, including specifically in relation to Kolenda. A. 2-11. The court's recitation of the facts shows that it accepted that invitation, because this long history goes unmentioned. Thus, the judge utterly failed to "recite the facts . . . in the light most favorable to the

plaintiff[]." Eck v. Kellem, 51 Mass. App. Ct. 850, 851 (2001).

The lower court also ignored Kolenda's public accusation that Ms. Barron was committing "slander," when he knew that every word she had said was factually accurate. The lower court never even mentioned--let alone assumed the truth of--the pivotal allegations that the Town Administrator and the Board were intentionally obscuring the AGO's findings of serial OML violations by using cryptic language and including the referral of a new OML complaint to Town Counsel as part of a list of payments and donations. A. 10-11. Thus, it was Mr. Kolenda who was committing slander by in effect publicly accusing Ms. Barron of lying while silencing and threatening her. By entering judgment in the Town's favor at the very inception of the case, the judge rewarded that behavior, slamming the courthouse doors in Ms. Barron's face before she even had the opportunity to conduct discovery.

In sum, although the trial court recited the correct standard for reviewing a 12(c) motion, it improperly drew inferences in favor of the Town as the moving party. Iannachino, supra at 636 (quotation

omitted). For this reason alone, the Court should reverse that decision.

II. THE TRIAL COURT APPLIED AN IMPROPER ANALYSIS IN GRANTING JUDGMENT TO THE TOWN ON THE PLAINTIFF'S CLAIM FOR DECLARATORY JUDGMENT

The Complaint seeks declaratory relief with respect to the Board's Public Participation at Public Meetings policy ("the Policy"), which provides:

> All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks … and that all persons shall, at the request of the Chair, be silent. 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.

A 12, 63. The Complaint alleges that these provisions--on their face and as applied—served to silence Ms. Barron's speech criticizing the Board for its serial violations of the OML because, pursuant to the Policy, Kolenda unilaterally decided that her criticism was "slanderous." The Complaint alleges that, immediately before Ms. Barron spoke, Kolenda stated the following: "All remarks must be respectful and courteous, free of rude, personal, or slanderous remarks."[8] A. 12. As soon as Ms. Barron criticized the

[8] Discovery will reveal whether Kolenda made this statement specifically because he saw Ms. Barron

Board for its serial violations of the OML, Kolenda promptly accused her of "slandering" town officials and said "we are going to go ahead and stop this public comment session now and go into recess." Id.

Based on these allegations, the Complaint asserts that Kolenda's violations of Ms. Barron's rights were intentional, resulted in part from his personal animosity towards her, and was intended to chill not only Ms. Barron's speech, but that of other residents who could reasonably fear similar abusive treatment. A. 16. The Complaint asserts that the Policy is not narrowly tailored to serve any permissible interest, is not the least restrictive means to serve any legitimate interest, and that Kolenda violated Ms. Barron's rights while the other town officials sat passively by--in part in reliance on the unconstitutional policy. Id. The Complaint seeks a declaration that the Town may not regulate protected speech during public comment based on the content of the message, the speaker, or the viewpoint of the

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sitting in the room with her sign that read "Stop Breaking Open Meeting Law"--and was braced for her meritorious criticism--but the court's dismissal precluded the plaintiffs' ability to develop the evidence.

speaker. A. 21-22. The complaint also seeks a declaration that the Board may not prohibit speech due to any members' desire to avoid public 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. Id.

Even the trial court recognized that "the Board's prohibition against 'rude, personal or slanderous remarks' borders close to an unconstitutional prohibition on speech." A. 148. Minimizing that prohibition, however, the court went on to use a subsequent provision of the Policy that prohibits "disruption" as the framework for analyzing whether speech is "rude, personal or slanderous." Id. The court then found that the Policy's "focus" on "disruptive conduct" makes the prohibition on speech reasonable, viewpoint-and-content neutral, and "serves the legitimate government interest of preventing disruptions of the Board's meetings." A. 148-49.

The court's analysis is misguided. The Plaintiff does not dispute that the Board has an interest in preventing disruption of its meetings. That interest does not, however, allow the chair to classify a true

statement about the Board's serial violation of the law as "slanderous" or disruptive, as Kolenda did here. Again, the court's finding that Ms. Barron's speech was "disruptive" was based on her comparison of Kolenda to a dictator, but Kolenda had already silenced her and ended the meeting before she made that comment. Thus, this was clearly a content-based restriction on Ms. Barron's speech.

Mr. Kolenda explicitly called Ms. Barron's statement that the Board was breaking the law "slanderous", even though he knew it was factually accurate. He did not call it "disruptive," as the trial court erroneously determined. The moment Ms. Barron called out the Board's serial violations, Kolenda interrupted her and said "So ma'am if you want to slander town officials who are doing their very best . . . then we're going to stop this public comment session now and go into recess." (Emphasis added). This statement is evidence that Kolenda found Ms. Barron in violation of the policy's prohibition of "slanderous remarks." No reasonable person could have considered her words or actions "disruptive" at that point.

Even Ms. Barron's comparison of Mr. Kolenda to one of history's most famous dictators—which she made only after he unilaterally and intentionally silenced her for daring to criticize the Board--constitutes protected speech. Both state and federal jurisprudence recognize that anyone has "the right to express 'unpopular' ideas on public issues, even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful'" because "freedom of speech, including unpopular speech, is essential to our form of self-government." Mahonoy Area Sch. Dist. V. B.L., 54 U.S.__(2021), Concurring Opinion, Slip Op. at 2-3. Here, the court utterly failed to recognize that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. . . ." Connick v. Myers, 461 U. S. 138, 145 (1983) (internal quotation marks omitted). "It is a 'bedrock principle' that speech may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable.'" Id. at 12-13.[9]

[9] See also: FCC v. Pacifica Foundation, 438 U. S. 726, 745 (1978) (opinion of Stevens, J.) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); Young v. American Mini

In reviewing the cases involving speech on government property, both state and federal courts have developed the public forum doctrine, under which "the extent to which the Government may limit access" to those seeking to exercise protected speech in a particular forum on government property "depends on whether the forum is public or nonpublic." Roman v. Trustees of Tufts College, 461 Mass. 707, 713 (2012) (internal quotations and citations omitted). This doctrine recognizes three categories of public forums:

Theatres, Inc., 427 U. S. 50, 63-64 (1976) (plurality opinion) ("Nor may speech be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger"); Street v. New York, 394 U. S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). In fact, speech on matters of public concern "lies at the heart of the First Amendment's protection." Lane v. Franks, 573 U. S. 228, 235 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment"); Schenck v. Pro-Choice Network, 519 U. S. 357, 377 (1997) ("commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"); McIntyre v. Ohio Elections Comm'n, 514 U. S. 334, 347 (1995) ("[A]dvocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression"); Hustler Magazine, Inc. v. Falwell, 485 U. S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern").

1. traditional public forums, such as public streets and squares;
2. designated public forums, places the government opens for use by the public as a place to assemble and speak; and
3. non-public (or limited) forums, which are "limited to use by certain groups or dedicated solely to the discussion of certain subjects."

Id. With respect to categories one and two, strict scrutiny is applied to all restrictions, which must be narrowly tailored to serve a compelling government interest. With respect to category three, restrictions must be "reasonable and be neutral as to content and viewpoint." Id. at 715.

In its motion, the Town asserted that the public comment segment of the Board's meeting was a non-public forum. A. 70. The court accepted that argument, finding that "the forum was opened for local residents [only] to discuss matters related to the town that were not on the Board's agenda." A. 147, citing Lu v. Hulme, 133 F. Supp. 3d, 312, 324 (D. Mass 2015). That finding was improper.

The Plaintiffs disputed the Town's assertion that the Policy prohibits non-Southborough residents from speaking during public comment. A. 95. Although there is a single reference to "residents" in the Policy, viewing it as a whole, it clearly applies to the

public at large. The Policy recognizes "the importance of active public participation at all public meetings"; that comments from the "the public should be directed to or through the Chair once the speaker is recognized"; that once recognized, "all persons addressing the Board shall state their name and address prior to speaking." A. 63 (emphasis supplied). The court found that the Policy's reference to "names and addresses" "supports the [Town's] contention that the public comment period is for town residents, and not the general public." A. 147 n. 7. This finding absurdly suggests that non-Southborough residents lack names and addresses. After the single reference to "town residents," the Policy describes speakers simply as "persons"--at least four separate times. Thus, even if the Board has the authority to prohibit non-residents from speaking during public comment--which the Plaintiffs do not concede--the Policy itself does not do so.

Under the Open Meeting Law, the Board's policy discussions are required to be conducted at public meetings, as are all decisions made and votes taken. See G.L. c. 30A, § 20(a)(all meetings of the Board "shall be open to the public"). "The public," of

course, is not limited to Town residents. The public comment segment of the Board's meeting invites active public participation and thus constitutes a designated public forum. Under the OML, the Town must open its public property-the Board's meeting room--"for use by the public as a place for expressive activity." Lu, 133 F. Supp. 3d at 325 (D. Mass. 2015)(In order to create a designated public forum, the government must intentionally open up property to serve as a public forum).[10]

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[10] The court cited Lu in support of its decision, but that case supports Ms. Barron's position. In Lu, the plaintiff, an unhoused person who tried to take a full shopping cart into the library, was denied entry by a security guard who determined that the shopping cart had a foul odor, and thus violated a library policy that prohibited bringing in "garbage, articles with a foul odor, or articles which . . . impeded the use of the library by other users." Lu, 133 F. Supp. at 317. The City's motion to dismiss the claimed violation of Lu's first amendment rights was rejected because the court found that the "[e]ven assuming that Lu had been excluded in accordance with the written policy, the merits of Lu's First Amendment claim would depend on the reasonableness of the Library's policy . . . [which] must be decided on an evidentiary record, on a motion for summary judgment or at trial, rather than on a motion to dismiss." Id. at 318. Further, Lu confirms that public property that is open to the public as a place for expressive activity is a designated public forum. Id. at 325. But because the library is not intended to be used for the exercise of all First Amendment rights, it was therefore "not required to permit the full range of expressive conduct that is available in other types of public

Here, the Board, as a government actor, explicitly expressed its intention—though both the Policy and the Board member's statements—to designate the public comment portion of the meeting as a public forum. "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." Pleasant Grove City v. Summum, 555 U.S. 460, 469-70 (2009). Strict scrutiny provides reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must be narrowly tailored to serve a compelling government interest; restrictions based on viewpoint are completely prohibited." Id.

Here, the Complaint alleges that the Board allowed Ms. Barron to comment on proposed budget increases and inquire about the benefits of having a Town Manager, but Mr. Kolenda thereafter unilaterally prohibited Ms. Barron from criticizing the Board for its repeated Open Meeting Law violations. A. 12-13. Kolenda characterized Ms. Barron's statement that the Board had broken the law as "slander," when he knew it

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forums." Id. at 326. The court analyzed the policy under that framework.

was in fact a true statement. Mr. Kolenda abruptly halted the public comment segment of the meeting and stated that the Board was going into "recess"--despite Ms. Barron's objection that she was entitled to "say anything I want." A. 13. The court was required to infer that the purpose of Mr. Kolenda's actions was plainly to prevent Ms. Barron from publicly broadcasting the fact that the AGO had found the Board committed serial violations of the OML, a fact that the Board was laboring to keep under the public's radar. Such a government restriction is not content neutral and serves no legitimate public purpose whatsoever.[11]

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[11] Many courts have found that meetings comparable to the Board meeting here are designated public forums and thus require strict scrutiny analysis. See, e.g., Paridon v. Trumbull Cty. Children Srvc. Bd., 998 N.E. 2d 904, 908 (Ohio Ct. App. 2018) ("A meeting of government officials, when opened to the public, is a [designated] public forum"); Besler v. Bd. of Ed., 2008 WL 3890499 at *17 (N.J. Super. Ct. App. Div. 2008) (school board meeting is a designated public forum). Any place that the government designates as a place for public communication is a designated public forum. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800 (1995) ("when the government has intentionally designated a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental interest."); Jones v. Heyman, 888 F. 2d 1328 (11th

The provisions of the Policy that prohibit remarks that the Chair unilaterally feels are not "respectful and courteous," or are "rude, personal or slanderous" Simply cannot withstand strict scrutiny. "Government regulation of speech is content based if [the regulation] applies to particular speech because of the topic discussed or the idea or message

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Cir. 1989) (city commission designated their meeting a public forum when it intentionally opened it to the public and permitted public discourse on agenda items; "although the commission need not have created this forum in the first place, once it did so, the commission became bound by the same standards that apply in the case of a traditional public forum."); Spaulding v. Natick School District, Middlesex Superior CA No. 2018-01115, Decision and Order on Summary Judgment, p. 15-17 (Kirpali, J. 11/21/2018)(attached to the Plaintiff's opposition, A. 106-134). Even if the public comment segment constitutes a "limited public forum," any restriction on speech is allowed only to the extent that such restrictions are content neutral. The Complaint alleges that Mr. Kolenda restricted Ms. Barron's speech due to its content. A. 16-17. Again, it is inappropriate to focus solely on Ms. Barron's dictator reference. She referenced an authoritarian dictator only after Kolenda stated he was unilaterally terminating her right to speak. Thus, the first amendment violation had already occurred before Ms. Barron uttered those words. Likewise, Mr. Kolenda's threat to have Ms. Barron removed from the meeting also occurred after she was prevented from criticizing the Board for its serial violations of the law. Government actors in public forums are required to respect the public's right to free speech.

expressed." Reed v. Gilbert, 135 S. Ct. 2218, 2227 (2015). The Complaint alleges that under the auspices of these provisions, Mr. Kolenda terminated Ms. Barron's right to speak--and the Board's meeting--when all she had done was make the factually correct statement that the Board had violated the law on numerous occasions. A. 16-17. Clearly, the Complaint sufficiently alleges that the Policy, and Mr. Kolenda's actions, acted to silence a viewpoint it disfavored. That is not permissible. See Rowe v. City of Cocoa, 358 F. 3d 800, 803 (11th Cir. 2004) (the government may not require that speakers adhere to "reasonable rules of civility" when it does so in a way that "silences viewpoints it disfavors"); Cornelius, 473 U.S. at 800 (1985)(government may not exclude a public speaker in order to suppress the expression of contrary views). The Complaint alleges sufficient facts to state a claim for a declaratory judgment that those provisions of the Policy are unconstitutional.

CONCLUSION

For all the reasons set forth herein, the Court should reverse the Superior Court's decision and remand this matter for further proceedings.

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

I, Ginny S. Kremer, hereby certify that the within brief and accompanying appendix comply with the rules of court that pertain to the filing of briefs and appendices, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers); and the Rules regarding e-filing.

_____
Ginny Sinkel Kremer

CERTIFICATE OF SERVICE

I, Ginny S. Kremer, hereby certify that I have caused the within brief and accompanying appendices to be served on all other counsel of record as required by the Rules.

_____
Ginny Sinkel Kremer