COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

WORCESTER, 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

REPLY BRIEF OF THE PLAINTIFFS/APPELLANTS

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DATE April 11, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. The MCRA Claim Was Improperly Dismissed.

By not addressing (let alone refuting) the Appellants' argument that the trial court improperly made findings of fact, the Town's brief can be viewed only as an admission that the court failed to adhere to the appropriate standard of review--to take all alleged facts as true and make all reasonable inferences in the Plaintiffs' favor. Instead, the Town seizes on the judge's inappropriate findings of fact and runs with them--asserting at the very outset of its argument that Kolenda "suspended the meeting" because Ms. Barron said "Look, you need to stop being a Hitler." Town's Brief p. 12.

This Court cannot ignore that, Contrary to the Town's assertion, the Amended Complaint alleges that Kolenda silenced Ms. Barron--and unilaterally terminated the Board's meeting--when and because her statements brought attention to the Board's recent, additional violations of the Open Meeting Law, a fact she alleges Kolenda and the Board wished to keep

quiet.[1] Ms. Barron alleges that Kolenda thus violated her Article XIX rights, and that the other Board members collaborated and approved of Kolenda's constitutional violations--not only by sitting idly by as Kolenda silenced her and repeatedly yelled "you're disgusting!" at her in a public forum, but also by engaging in a cover up of those violations by voting to falsify and sanitize the meeting minutes to cover up Kolenda's shocking conduct. A. 15-17.

The Town's argument that the plaintiff suffered no loss of her various free speech rights, see Brief at 42 et seq., is strikingly similar to the defense recently rejected by the U.S. Supreme Court when it recognized the "right to petition as one of the most

[1] The Complaint alleges that Kolenda ended the meeting as soon as Ms. Barron mentioned stated "breaking the law is breaking the law," at which point Kolenda immediately interrupted her and accused her of "slander." A. 14-15. When she protected that she was "not slandering," Kolenda again immediately cut her off, stating: "Then we're going to go ahead and stop this public comment session now and go into recess." Id. Thus, the Complaint alleges that in response to her criticism of the Board, Mr. Kolenda unilaterally terminated both her speech on matters of public concern and the meeting itself. Id. 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).

precious of the liberties safeguarded by the Bill of Rights."[2] Lozman v. City of Riviera Beach, 138 S.Ct. 1945, 1955 (2018). In Lozman, the plaintiff, an outspoken critic of the city on matters of public concern, stepped to the podium of a city council meeting during its public comment segment. Id. at 1550. When he began to discuss the arrest of a former city official, a council member interrupted him and directed him to cease making those remarks. Id. When Lozman continued speaking and refused to leave voluntarily, a council member directed a police officer to remove him. Id. After his arrest, Lozman filed suit, alleging retaliation for his public criticism and activism; as here, the city's defense was that Lozman violated the city's procedural rules—in that case by "discussing issues unrelated to the City and then refus[ing] to leave the podium." Id. The Supreme Court held that Lozman's First Amendment retaliation claim against the city survived--even though in that case Lozman conceded that his refusal

[2] The defendants concede that the protection of free speech under the Massachusetts Declaration of Rights is coextensive with the First Amendment and federal law. Defendants' Brief at 27.

to leave the podium after a lawful order to do so constituted probable cause for his arrest. Id.

As in Lozman, Ms. Barron here alleges that the Town violated her rights pursuant to an official municipal policy--and then attempted to cover up the violation by unanimously voting to approve false and sanitized minutes. A. 16-17. Like Lozman, Ms. Barron alleges that the defendants acted in reaction to her and her spouse's long history of activism in Town governmental affairs. A. 4-11, 16-17, Lozman at 1955. Unlike Lozman—whose case proceeded to a jury--the lower court here has precluded Ms. Barron from even engaging in discovery. But as the Supreme Court recognized, where "retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress." Lozman at 1954. Here, the judge's decision blocks any avenue of redress, even if Ms. Barron can prove that she was silenced because the Board objected to the content of her speech. That is error.[3]

[3] The Town asserts that the court properly dismissed Count I because the MCRA does not provide a cause of action against officials who are sued in their official capacities. Defendants' Brief at 48. That is correct, as far as stated--but Count I names the

II. The Entirety of the Town's Argument Rests on the Erroneous Determination, Prior to any Discovery, that the Board's Public Comment Segment is a Non-Public Public Forum.

In its brief the Town doubles down on its pivotal assertion below that the Board's "public comment" segment allows comment by only Southborough citizens, and thus actually constitutes a "non-public" (or "limited") forum. Without the illumination provided by discovery, however, it was error to simply accept the Town's conclusory, self-serving statement--made with no citation--that the "public comment" segment of Board meetings "is not open to the general public." See Town's Brief at 30. The Plaintiffs are entitled to discover what the Board's actual conduct has been regarding allowing various speakers at this segment of its meetings.

Additionally, the cases the Town cites in support of its argument that the public comment segment of the

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defendants in their official and individual capacities. Complaint at 1, 15. Plaintiffs may obtain equitable relief against officials sued in their official capacities, which the Plaintiffs seek in this case. O'Malley v, Sheriff of Worcester County,415 Mass. 141, 142 (1993) (citations omitted). Monetary damages are also available because the defendants are named in their individual or personal capacities. Id.

Town's Board meeting was a non-public forum are inapposite because none of those decisions were reached on a motion to dismiss. See Town's brief at 32 et seq. In Galena v. Leone, 638 F.3rd 186, 199 (3d Cir. 2011), the court rejected the plaintiff's argument that he presented legally sufficient evidence to support a jury finding after trial that a council member acted with intent to suppress his speech based on his viewpoint and identity, and found in any event that the plaintiff waived the argument that the council meeting was not a limited public forum. In Steinberg v. Chesterfield County City Planning Commission, 527 F. 3d 377 (4th Cir 2008) the court affirmed the district court's entry of summary judgment in favor of commission where the parties agreed that the comment period, which explicitly limited any comment to a single subject, was a "limited public forum." In Fairchild v. Liberty Ind. Sch. Dist., 597 F.3d 747 (5th Cir. 2010), the court affirmed the grant of summary judgment in the school board's favor after discovery, brushing aside the board's "self-serving statements regarding the purpose of its meetings", but finding that plaintiff's speech veered into "quarrels between employees and rehearsals

of disputes moving through the administrative process" which were "not here reflective of viewpoint preference". In Youkhana v. City of Sterling Heights, 934 F. 3d 5-8, 518-19 (6th Cir. 2019); cert denied 140 S.Ct. 114 (2020), the court affirmed summary judgment for the city, noting that "[e]ach plaintiff had the opportunity to testify as to what they would have said, absent the speech restriction, at a deposition" and only then agreeing that the council had not engaged in viewpoint discrimination. And finally, in Rowe v. City of Cocoa, Fla., 358 F.3d 800, 803 (11th Cir. 2004), the court affirmed, per curium, the district court's grant of summary judgment in city's favor where the plaintiff, who was not a city resident, made a facial challenge to city policy that explicitly limited the speech to only city residents.

It is telling that the only First Circuit case that the Town cites is Curnin v. Town of Egremont, 510 F.3d 24 (1st Cir. 2007), which concerned a Town Meeting, not a board meeting. Curnin is not, as the Town urges, applicable "by analogy" see Town's brief at 33, because Town Meeting is a legislative body. Thus Town Meeting members--who act as legislators--must be registered voters of the Town. See In re Opinion of

the Justices, 229 Mass. 601 (1918), quoting Warren v. Mayor and Alderman of Charleston, 68 Mass. 84, 101 (1854) ("The essential and distinguishing characteristic of the town meeting form of government is that 'all the qualified inhabitants meet, deliberate, [and] act . . . and ha[ve] an indisputable right to vote upon every question presented, as well as to discuss it, or there is no town meeting."). Therefore Curnin's holding that non-residents--who by definition are not Town Meeting members--—have no First Amendment right to speak at Town Meeting has no application whatsoever to this case. Here, Ms. Barron, a town resident, alleged she was silenced because she criticized the Board and brought to public attention the Board's recent legal travails. Far from holding that this scenario presents a non-public forum, the Curnin court held that "forum analysis is inapposite because the town meeting is a legislative body in deliberation." Id. at 26. In short, therefore, the Town cites no relevant applicable authority to support its forum analysis.

III. On This Record, The Town is Not Entitled to the Protection of the Qualified Immunity Doctrine

The Town asserts that it is entitled to qualified immunity with respect to the plaintiffs' claims under Article XIX of the Declaration of Rights. Town's Brief at 40-43. This argument is also unavailing. First, in dismissing the case even prior to discovery, the trial court did not rely upon (or even mention) qualified immunity. Second, to the extent a defendant may assert--which the Town does not--that it is entitled to qualified immunity on appeal on the theory that the judge was right for the wrong reason, see Greeley v. Zoning Bd. of Appeals of Framingham, 350 Mass. 549, 551 (1966), that argument also fails. Here the Town's qualified immunity defense depends on contested facts that cannot be resolved against the plaintiff on a motion to dismiss[4]--because, where an appellate argument "depends on facts not established in the record, we cannot accept the new argument on appeal." Aetna Casualty & Surety Co. v. Continental Casualty Co., 413 Mass. 730, 734-35 (1992). Thus, the Town's entitlement to qualified immunity is an issue that cannot be properly addressed, if at all, until

[4] See n. 1, supra.

after discovery. See Abubadar v. Gross, 542 F.Supp.3d 69, 75 (D.Mass. 2021) ("At the motion to dismiss stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness.")(quotation and citations omitted, emphasis supplied); Anderson v. Creighton, 483 U.S. 635, 641 (1987)(whether official action is entitled to qualified immunity requires inquiry into objective but fact-specific questions, and official's subjective beliefs are irrelevant).

IV. The Town's Entire Declaratory Judgment Argument Fatally Relies on its Incorrect Assertion that the Plaintiff Makes Only a Facial Challenge to the Town's Policy.

The Town relies upon its wholly incorrect assertion that the Plaintiff makes only a facial challenge to the policy at issue. Town's Brief at p. 50. To the contrary, the Complaint alleges that the policy is impermissibly broad and that the Town acted to violate her constitutional rights in reliance on that unconstitutional policy. A. 23-24.[5] Specifically, Ms.

[5] See also Plaintiffs' Brief in chief, which explicitly makes the as applied challenge, at, e.g., p. 34 ("The Complaint alleges that [the Policy's] 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

Barron alleges that under the auspices of the policy, Mr. Kolenda terminated her 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 recent occasions. A. 12-13; 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 v. NAACP, 473 U.S. at 788 800 (1985)(government may not exclude a public speaker in order to suppress the expression of contrary views).

In this case there are sufficient facts alleged to seek a declaratory judgment that the provisions of the policy as applied are unconstitutional. Thus the entirety of the Town's argument, which seeks to refute a facial challenge alone, should be disregarded. See Town's Brief at, e.g., p. 51 ("Courts disfavor facial challenges" because they often "rest on speculation.") Here, speculation is unnecessary; the facts alleged

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'slanderous.'"); p. 46 ("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.")(emphasis in original).

relate not just to potential applications of the policy, but to the Town's interpretation of that policy as it related to Ms. Barron's speech—which was terminated due to her criticism of the Board. A. 12-15. Thus the Town's entire analysis is based on a faulty reading of the Complaint.

CONCLUSION

For all the reasons set forth in the brief in chief and 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 complies 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.

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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.

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