ACLU Massachusetts

May 9, 2022

Via Email

Residents of Town of Mansfield
c/o Neil J. Rhein, Select Board Chairman
Kevin J. Dumas, Town Manager
Koustos Loukos, Town Moderator
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Re: Legal Issues with Annual Town Meeting Warrant Article 20 ("Divisive Concepts") and Article 17 ("Prohibited Signs Amendment")

Dear Residents of the Town of Mansfield:

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") writes to identify substantial legal concerns about articles 20 and 17 on the warrant for the May 19 Annual Town Meeting. We ask the officials to whom this letter is being sent to make it available to residents of the Town, and we urge participants at the Town Meeting to reject these articles, as adoption of either would undermine important constitutional rights and likely expose the Town to costly litigation.

As set forth below, warrant article 20, which seeks to restrict what can be taught in public schools with regard to race and gender, is sharply at odds with the free speech protections enshrined in Article 16 of the Massachusetts Declaration of Rights and the First Amendment to the U.S. Constitution. It is a sweeping measure that would broadly and vaguely restrict what can be taught in public schools, potentially including the Women's Suffrage Movement, the Civil Rights Movement, racial segregation and the Tuskegee Airmen and other past acts of discrimination as well as triumphs in the ongoing struggle for racial and gender equity. The proposal also raises serious issues of equal access to educational opportunities.

Warrant article 17, which was proposed by the Select Board, would require pre-approval by the Select Board before any sign can be posted on town property. This article too is inconsistent with fundamental free speech principles. It would impose an unlawful prior restraint on free speech in traditional public forums, and it contains no standards to guide decisions about when such approval will and will not be granted, thereby opening the door to viewpoint- and content-based discrimination.

Background and Analysis Relevant to Article 20

A. State and Federal Landscape ("Divisive Concepts" Laws)

Massachusetts has long been revered as a hub of intellectual and academic achievement.[1] Consistent with that history and without creating a mandate, the Massachusetts Board of Elementary and Secondary Education has set statewide academic standards designed to avoid "perpetuating gender, cultural, ethnic or racial stereotypes" and to "inculcate respect for the cultural, ethnic and racial diversity of the commonwealth and for the contributions made by diverse cultural, ethnic and racial groups to the life of the commonwealth." G.L. c. 69, §§ 1D; *see also* 603 CMR 26.05(1) (curricula must encourage respect for the human and civil rights of all individuals regardless of race).

Nationally, in a movement at odds with our state standards and seemingly advancing political and potentially partisan interests, in September 2020, Former President Donald Trump signed an Executive Order on "Combating Race and Sex Stereotyping" ("EO 13950") which restricted the teaching, training, or promotion of "divisive concepts," "race and sex stereotyping," and "race and sex scapegoating" within the federal government and by federal contractors.[2] Since then, several states have passed laws aimed at these so-called "divisive concepts," particularly in schools, resulting in litigation.[3]

These bans on "divisive concepts" interfere—and are apparently designed to interfere—with the honest teaching of this country's history and with student discussion and classroom debate about that history. Indeed, members of a major Massachusetts political party recently attempted to certify an initiative petition that would have asked voters whether the state should prohibit these concepts from being taught in our schools. But the Attorney General's Office rightfully rejected the initiative petition as inconsistent with the free speech rights enshrined in our constitutions.[4]

B. Warrant Article 20

Warrant article 20 is seemingly in line with these national efforts to interfere with the free exchange of ideas at school. As described in the warrant document, the article seeks to "prohibit public K-12 schools in the Town of Mansfield from teaching, instructing or training students to adopt or believe, or causing anyone else to teach, instruct or train any students to adopt or believe, certain 'divisive concepts', regarding race or sex." The article would prohibit, among other things,

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[1] *See, e.g.*, Jeremy Stern, et al., *The State of State Standards for Civics and U.S. History in 2021*, Fordham Institute (June 23, 2021), https://fordhaminstitute.org/national/research/state-state-standards-civics-and-us-history-2021, (recognizing Massachusetts civics and U.S. History standards as exemplary "based on the quality, completeness, and rigor of their content and the clarity of its presentation").

[2] The Order was revoked by President Joe Biden on January 20, 2021, with the signing of Executive Order 13985 on "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government." Before its revocation, Former President Trump's Executive Order was the subject of numerous legal challenges. *See, e.g.*, *Santa Cruz Lesbian and Gay Community Center, et al. v. Trump*, No. 5:20-cv-07741-BLF (N.D. Cal. Dec. 22, 2020); *National Urban League v. Trump*, 2020 WL 6391278 (D.D.C. Oct. 29, 2020).

[3] States have been sued on the grounds that these laws violate state and federal constitutions and other laws, including recently New Hampshire. *See, e.g.*, *Mejia v. Edelbblut*, No. 1:21-cv-01077 (D.N.H. Dec. 10, 2021).

[4] *See* 21-19 Initiative Petition for a Law Relative to Our Country's History, https://www.mass.gov/info-details/ballot-initiatives-filed-for-the-2022-biennial-statewide-election-proposed-laws-and-2024-biennial-statewide-election-proposed-constitutional-amendments#21-19-initiative-petition-for-a-law-relative-to-our-nation%E2%80%99s-history-. For ease of reference, a copy of the declination letter is attached to the email.

any insinuation that an individual, by virtue of their race or sex, can or potentially does bear any responsibility for actions committed in the past (whether distant or near); that any fault can ever be assigned to a particular race or sex, or to members of a race or sex (seemingly without regard to historical group-based actions); or that racial or sex-based groups may possess separate, inherent or learned character traits, values, moral and ethical codes, privileges, status, or beliefs.

While the proposed law does purport to allow an "objective" discussion of otherwise forbidden concepts, there is nothing in the article that clearly defines what is or is not considered "objective" as opposed to endorsing. For example, nothing in the article makes clear whether a high school teacher who invites a special speaker to share their experience with internment during the Holocaust must also invite a Holocaust denier in order to make the discussion "objective."

The proposal would make this nebulous prohibition binding on teachers, administrators, and school council members at the risk of their employment. It explicitly threatens the continuance or advancement of a school official's career. For teachers, violation of the law's vague clauses "shall constitute good cause for which adverse action may be taken." For school administrators, including the superintendent, causing a student to believe a prohibited idea, no matter how inadvertently, can be grounds for termination. And any school committee member deemed to have violated the article can be recalled.

ACLUM does not purport to identify here all the suppressive impacts this proposed law might have, but its mandate could be construed to encompass anything from an accurate teaching of the arduous road to adoption of the Nineteenth Amendment securing for women the right to vote to the discussion of pending congressional bills regarding reparations to a discussion of cases before the U.S. Supreme Court concerning the use of race as a factor in college admissions. The chilling effect of Article 20[5] would not only leave Mansfield children less well educated, it would violate the law in multiple ways.

C. Free Speech and Discrimination Issues.

Article 20 is inconsistent with free speech rights of both students and educators and the right of students to educational opportunities without discrimination on the basis of race and gender.

Our constitutions do not allow governments to quash or punish speech which they do not wish to hear or which may at the moment be unpopular. Warrant article 20 seeks to do just that; it is "quite straightforwardly an attempt by government officers to punish a person for what that person has said," or here may say, "and this squarely implicates the First Amendment." *Hosford v. Sch. Comm. of Sandwich*, 421 Mass. 708, 713 (1996). A bedrock principle of our system of governance is that the answer to speech that may be perceived by some as hurtful, problematic or controversial is more speech, not forced silence, and our basic constitutional freedoms may not be reversed by simple majority vote. Put simply, members of your town may not "invade the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control" and call it freedom. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

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[5] Laura Meckler and Hannah Natanson, "New critical race theory laws have teachers scared, confused and self-censoring," *The Washington Post* (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/

Instead, students have a right to be free from official conduct that is intended to suppress their access to certain ideas. The First Amendment and Article 16 do not allow localities to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *Bd. of Educ., Island Trees Free School Dist. v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion). *See also Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771, 773 (8th Cir. 1982) ("school board cannot . . . ban [curriculum material] because a majority of its members object to the . . . ideological content and wish to prevent the ideas . . . from being expressed in the school"). Efforts, such as warrant article 20, to promote "narrowly political" and arguably "partisan" objectives and to remove from the realm of student learning and thought subjects which an interested few deem divisive are inconsistent with these protections. *See Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) and *Gonzalez v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017) (striking down Ariz. law that eliminated Mexican American Studies, which lawmakers saw as creating "racial warfare").

Our constitutions also protect the right of teachers to impartially instruct their pupils and to teach without vague laws chilling classroom speech. *See Hosford*, 421 Mass. at 712 (recognizing teachers' right to academic freedom). "Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching." *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993). School committees may not "substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute." *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980). They may not act with a desire "to eliminate a particular kind of inquiry." *Id.* Courts have been clear that "First Amendment rights must be zealously guarded in our schools in order to promote the free exchange of ideas that is central to the development of this country's younger citizens." *Commonwealth v. Bohmer*, 374 Mass. 368, 374 (1978).

But adoption of this article would remove from teachers the ability to instruct honestly, and from students the ability to receive truthful information concerning, broad swaths of American history such as the treatment of Indigenous Peoples in North America, American Slavery, abolition and Reconstruction, Japanese Internment, marriage equality, and more. For example, under warrant article 20, it is unclear whether a teacher could say or assign reading along the following lines:

> A century ago . . . , [the U.S. Supreme] Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: [Those cases] have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.

That passage, accusing the Supreme Court of racial stereotyping, was written last month by Supreme Court Justice, and Trump-appointee, Neil Gorsuch. *See U.S. v. Madero*, 596 U. S. ____ (2022) (Gorsuch, J. concurring). Yet, if warrant article 20 passes, teachers in Mansfield might reasonably fear that inviting Justice Gorsuch to speak about his opinion or just discussing it would be a fireable offense.

Further, because warrant article 20 would suppress—and seemingly is designed to suppress—any discussion in schools of the realities and ongoing legacies of oppression and discrimination historically faced by women, people of color and other communities in this country, it would violate anti-discrimination protections. Under Massachusetts law, students may not be denied "the advantages, privileges and courses of study of [a] public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation." G.L. c. 76, § 5. By

depriving students access to a full range of accurate information and discourse, the article would deprive students of an education that explores the histories and realities that students of color and other groups and their ancestors have experienced and continue to experience. It therefore is inconsistent with G.L. c. 76, § 5, as well as basic principles of equal protection enshrined in the Fourteenth Amendment to the U.S. Constitution and the Massachusetts Declaration of Rights. S*ee* Article 1 of the Declaration of Rights, as amended by Amendment Article 106 ("Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.").

In short, consistent with its unacceptable objective, warrant article 20 would have a chilling effect on discussing or teaching *any* aspect of American history in which one group visited egregious behavior on another—on the theory that the teacher may, inadvertently or not, train or cause a student to believe that anyone could be responsible for past acts by virtue of their race or gender. If it were to be adopted, warrant article 20 would violate constitutional free speech protections and equal opportunities laws. We urge the Town of Mansfield to resoundingly reject article 20.

Background and Analysis Relevant to Article 17

Warrant article 17 would add to Zoning By-Law Section 230-4.7 E, governing "prohibited signs," a pre-approval requirement for any sign posted on town-owned property. Specifically, "[a]ll signs (permanent or temporary) on or within the Town-owned street right-of-way or Town-owned land shall be subject to Select Board approval." But such unbridled discretion and such a prior restraint on free speech cannot pass constitutional muster.

In public forums, prior restraints on free speech like that proposed by warrant article 17 are presumptively unconstitutional and can rarely be justified.[6] *Shak v. Shak,* 484 Mass. 658, 661-63 (2020). "[A] prior restraint is one in which a party must apply to a government body for a permit or license before it can engage in the protected activity." *Int'l Union of Operating Engineers, Loc. 150, AFL-CIO v. Vill. of Orland Park*, 139 F. Supp. 2d 950, 959 (N.D. Ill. 2001), citing *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552–53 (1975). "They enable the government to deny the ability to engage in protected speech in advance of actual expression." *Id.*

Even in the limited circumstances in which a permitting requirement can be imposed—for instance to allow for provision of public safety services when large crowds will be gathering—a government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Any law that subjects free speech to restraint or punishment must have "narrow, objective, and definite standards…" to guide discretion. *Id.* at 131. *See also, e.g., Cantwell v. Connecticut,* 310 U.S. 296, 516 (1940); *Lakewood v. Plain Dealer Publ. Co.,* 486 U.S. 750, 755 (1988); *Saia v. People of New York,* 334 U.S. 558 (1948).

[6] It is well settled that public thoroughfares are considered "quintessential public forums" for free speech activities, *Mass. Coalition for the Homeless v. City of Fall River*, 486 Mass. 437, 441 (2020), and that the posting of signs is a protected form of free speech. *Reed v. Gilbert,* 576 U.S. 155 (2015); *Flaherty v. Knapik,* 999 F. Supp. 2d 322 (D. Mass. 2014). While time, place or manner restrictions can be imposed in such forums, they must be content-neutral and reasonable, narrowly tailored to serve a substantial governmental interest, and leave open adequate alternative means of communication. *Desrosiers v. Governor*, 486 Mass. 369, 390-391 (2020).

Warrant article 17 fails to meet these constitutional requirements and is clearly inconsistent with free speech protections. It requires a prior permit without sufficient justification and it does so while being utterly devoid of standards to guide when the Select Board will or will not grant such a permit. It would ban all expression through signs on public property unless approved in advance by the Select Board pursuant to no definite standards. It therefore is an unconstitutional restriction on free expression.

Conclusion

ACLUM calls on the Town of Mansfield to reject warrant articles 20 and 17. Both violate fundamental free speech principles and are inconsistent with good public policy, and warrant article 20 is inconsistent with fundamental principles of non-discrimination in education. A vote to reject these articles will honor fundamental constitutional principles and ensure the Town is not embroiled in litigation that could result if either article were to be adopted.

Sincerely,

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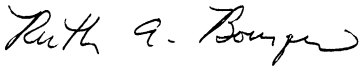

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