



Massachusetts

May 10, 2022

Via Email

Members of the Mashpee Select Board
16 Great Neck Road North
Mashpee, MA 02649
bos@mashpeema.gov

Re: Retaliation for exercise of free speech and religious freedom rights

Dear Members of the Mashpee Select Board:

It has come to the attention of the American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) that, at the Mashpee Select Board meeting on April 11, 2022, a member of the Board, in his official capacity, publicly denigrated a Mashpee resident for exercising well-established constitutional rights not to stand for or recite the Pledge of Allegiance. He chose to take this action even after learning that the decision not to participate in the Pledge ceremony was based on the resident’s religious beliefs. No other member of the Board expressed any concern about this encroachment on civil liberties. And when the resident objected, she was ruled out of order and escorted from the meeting.¹

This incident raises serious issues of discrimination and retaliation on the basis of free speech and free exercise of religion. To begin to redress this offense to basic constitutional values, we call upon the Select Board to issue private and public apologies and to clarify for the public that, going forward, constitutional liberties will be honored at Select Board meetings.

Legal Background and Analysis

Strong free speech protections are enshrined in both the First Amendment to the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights. As has long been established, these protections are violated when a government official attempts to coerce others to stand for the Pledge, say the Pledge, or otherwise take part in the Pledge of Allegiance ceremony.

It was almost 80 years ago that the Supreme Court ruled that government actors may not force individuals to say the Pledge of Allegiance:

¹ Video of the meeting is available at <https://www.youtube.com/watch?v=zayNUabDEko>.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943). The Court concluded that “action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* See also *Spence v. Washington*, 418 U.S. 405 (1974) (punishment for not showing proper respect for the American Flag was unconstitutional); *Opinion of the Justices*, 372 Mass. 874 (1977) (proposed law compelling teachers to say or lead the pledge would be unconstitutional.).

These free speech protections apply regardless of the reason someone may not wish to participate in the Pledge, and government demands that members of the public disclose their reasons are themselves a burden on free speech. But when government actors knowingly chastise conduct motivated by religious belief, freedom of religion is also put into play. See *Shurtleff v. Boston*, ___ U.S. ___, 2022 WL 1295700 at *7 (May 2, 2022) (government may not discriminate in public forums against religious views); see also *id.* at * 14 (Alito, concurring) (government body’s “hostility to religion” is both a free speech and religious freedom issue). Government bodies “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018). And for one member of a governmental entity to express overt hostility to an exercise of religion—while other members sit idly by—has been found to violate the federal Free Exercise Clause. *Id.* at 1729-30.²

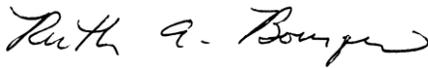
What occurred here is no different than if attendees wearing head coverings, crosses, or other religiously significant symbols or attire were forced to undergo an official tongue-lashing as a condition of participating in democratic processes. Our constitutions do not allow such conduct. And our democracy should not abide it.

² The Massachusetts Constitution also provides protection for the exercise of religion. Indeed, Article 2 of the Massachusetts Declaration of Rights states that “no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.” See also Amend. Art. 46, § 1 (No law shall be passed prohibiting the free exercise of religion.”). Where, as here, government seeks to dictate what forms of religious expression are acceptable, the Establishment Clause of the First Amendment may also be implicated. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

Conclusion

We urge the Board to take immediate steps to clarify to the public that no one is required to stand for or say the Pledge of Allegiance at Mashpee Select Board meetings or will in the future be chastised for choosing not to participate in the Pledge ceremony—and to provide an appropriate apology to the resident recently subjected to verbal abuse for the exercise of core constitutional rights.³

Sincerely,



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³ We also note that banning or officially condemning comments from the public that a Board member deems “disrespectful,” but which do not include true threats or other types of unprotected speech—as also occurred on April 11—is also a free speech problem. The freedom of speech provisions in the First Amendment and Article 16 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). See also *Spaulding v. Natick School Committee*, No. 2018-01115, pp. 18-25 (Mass. Super. Ct. Nov. 21, 2018) available here https://www.aclum.org/sites/default/files/field_documents/spaulding-natick_psj-decision.pdf. Indeed, the Town’s own policy—unlike the Board member’s comments on April 11—recognizes that “consistent with constitutional free speech principles [] a public body does not have the authority to prevent all speech that may be upsetting and/or offensive to others.” https://www.mashpeema.gov/sites/g/files/vyhlif3426/f/pages/81public_participation_at_public_meetin_gs.pdf