UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JEFFREY T. WORTHLEY,

Plaintiff,

v.

SCHOOL COMMITTEE OF GLOUCESTER; and BEN LUMMIS, in his official and personal capacities,

Defendants.

Civil Action No. 1:22-cv-12060

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AS TO THE MODIFIED NO TRESPASS ORDER

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1.0 INTRODUCTION

Defendants could not issue their original, blanket, unconstitutional no trespass order ("NTO"). Anticipating the adverse injunction, Defendants issued a modified NTO. This is not enough. No order should ever have issued for engaging in First Amendment protected speech. If Defendants see something improper in a wholesome communication between a City Councilor and a young constituent, it is either an over-active imagination on the Defendants' part, or it is a pretext to kneecap a political opponent. They cannot deprive Mr. Worthley of his liberty. This Honorable Court should restore that Liberty to the state it was in before Defendants violated it.

Defendants' modified NTO does not address the Plaintiff's concerns nor the Court's determinations. Although it is not a blanket NTO with the same breadth as the enjoined one, it is no less unconstitutional. It raises significant new and particularized First Amendment issues. As the Defendants refuse to lift it through good faith efforts at negotiation, Plaintiff requires injunctive relief from this Court.[1]

2.0 FACTUAL BACKGROUND

2.1 Worthley's Constitutionally Protected Conversation with a Constituent

Although the Court is familiar with the facts, they are recited for ease of reference. On November 8, 2022, Worthley went to Gloucester High School ("GHS") to vote, as this is his polling station. Doc. No. 1-2 ("Compl.") at ¶ 8.[2] Although school was not in session, GHS students set up a table for a bake sale adjacent to the line to enter the polls. *Id.* at ¶ 9. He was one of approximately 15-20 voters in proximity to the bake sale at the time. *Id.*

[1] Plaintiff has not sat on his rights in challenging the modified NTO dated January 13, 2023. Doc. No. 28-1. This Court issued its order on the initial NTO on January 24, 2023. Doc. No. 29. The parties attempted to negotiate. After the negotiations fell apart on March 3, 2023, Plaintiff swiftly moved to file the present motion. *Id.*

[2] All of the allegations in the Complaint are verified by Mr. Worthley's declaration. *See* Doc. No. at 1-2 at 19-27.

Worthley introduced himself to the students manning the bake sale and commended them for their efforts. *Id.* at ¶10. One student ("KF") identified herself as a student leader. *Id.* Worthley informed KF that he would purchase some baked goods after he voted. *Id.* at ¶ 11. Worthley, as a public servant and civic-minded individual, related his own experiences in student government at the same high school and shared ideas about how to increase civic engagement and fundraising. *Id.* at ¶ 12. KF was genuinely interested in hearing Worthley's experienced suggestions. *Id.* KF expressed disappointment that she was unable to generate involvement from classmates. *Id.* at ¶ 13. Worthley responded that handwritten notes from the Drama Club inviting the City Councilors to performances was impactful. *Id.* KF proceeded to offer Worthley the phone number of her friend in the Drama Club, who wrote the notes, so that he could thank her himself, but Worthley declined. *Id.* Worthley also declined KF's request that she give his number to her friend. *Id.*

After voting, Worthley mentioned that the City Council President was interested in reinstituting "student government day" and KF expressed keen interest in it. *Id.* at ¶ 14. Worthley had been unsuccessfully attempting to reach Defendant Lummis since January 2022 about inspiring volunteerism in the soon-to-be voters in the High School. *Id.* at ¶ 15. Worthley further explained to KF that he had worked on a volunteer project to clean up a local field, and that he plans to create a volunteer corps ("Gloucester Volunteer Corps") similar to the Peace Corps. *Id.* Worthley further shared that he has approximately 50 Gloucester citizens already involved with his initiative and that he inspired 84 volunteers to help with a downtown clean-up event. *Id.*

Eager to network with similarly civic-minded leaders, KF expressed interest in the project and asked Worthey for his phone number. *Id.* Worthley's number was easily accessible through his public Facebook page, the City's website, and his City of Gloucester business cards. *Id.* at ¶ 16. As such, Worthley gave her his number in lieu of her bothering to find it online in seconds.

Id. KF immediately dialed Worthley's number and said "now you have my number too." *Id.* at ¶ 17-18. Defendants falsely maintain that Worthley requested her number. Doc. No. 17 at 2-3. This is not true. Doc. No. 1-2 at 22, ¶ 12. Nevertheless, it is legally immaterial.[3]

After returning to his car, Worthley saw that KF's number auto-identified as KF's mother. *Id.* at ¶ 19. Worthley was Facebook friends with KF's mother. *Id.* at ¶ 20. About 15 minutes after KF called Worthley's phone, Worthley sent KF a message about volunteering and the importance of inspiring the next generation. *Id.* at ¶ 22. The full text of these messages is in the record. Doc. No. 1-2 at 28-33. Worthley was establishing a point of contact for the Gloucester Volunteer Corps within GHS. *Id.* at ¶ 23.

KF responded that evening stating that she could not then get involved with Worthley's volunteer initiatives, but explicitly stated she might want to in the future. *Id.* at ¶ 24. Worthley replied, assuaging KF's concerns about the late time of the text, noting that he would either be up late, or his phone would be on silent—either way, the time was of little concern. *Id.* at ¶ 25. Regarding the Gloucester Volunteer Corps, Worthley indicated that he didn't need her to dedicate any time at this point, but that he wanted to consult "periodically" based on "what [her] schedule would allow." Worthley indicated that he was looking for data and how to best communicate with other student leaders. Worthley further stated that he "completely understand[s]" if KF does not have the time and that he would pursue Gloucester Volunteer Corps "through class advisors." *Id.*

The following morning, Worthley received a call from KF's father who said that KF was over-extended and unavailable to participate. *Id.* at ¶ 27. Worthley accepted KF's father's declination and told him that he would delete her number from his phone. *Id.* at ¶ 28. Worthley

[3] Nevertheless, Defendants continue to perpetrate this falsehood publicly, because it helps frame this false narrative about the incident.

then summarized the discussion in a text message to KF's father. *Id.* This should have ended the matter. No reasonable person could review these communications and come to the conclusion that they are anything other than what is stated here.

2.2 The Defendants' Issuance of the Initial No Trespass Order

On November 14, 2022, Worthley received a phone call from Gloucester General Counsel Suzanne Egan insisting that Worthley come in for a meeting that afternoon. *Id.* at ¶ 29. Worthley assumed that Egan was calling with respect to legislative work.[4] *Id.* Egan did not tell Worthley what this meeting was about. When he arrived for the meeting, Egan was present with Human Resources Director Holly Dougwillo and Police Chief Ed Conley. *Id.*

Egan stated the meeting was in reference to "inappropriate communications with a female minor student." *Id.* at ¶ 30. Worthley provided and read the text messages. *Id.* at ¶ 32. Chief Conley explicitly stated no crime had been committed and that he was no under investigation for a crime. *Id.* at ¶ 33. Nonetheless, Egan ambushed Worthley with an unsigned no trespass letter from Lummis. *Id.* at ¶ 34. Egan stated the communications with KF were "inappropriate" and that while his constituent communications with KF had violated neither a law nor any other rule, Worthley was banned from the GHS campus for the remainder of the school year. *Id.*

In response to Worthley inquiring how a NTO could issue without an investigation, Chief Conley responded that Worthley "may feel as though [his] due process rights have been violated, and I would likely agree with [him], but that this is a much better result than the alternative." *Id.* at ¶ 36. This "alternative" to a NTO was never discussed. *Id.* at ¶ 37. Worthley was further told that the matter was "private" and would not be disclosed to third parties. *Id.* at ¶ 39. Egan said

[4] This is what Defendants have attempted to call a hearing with due process, well after this suit was filed. However, there are neither hallmarks of due process in this "hearing" nor even the slightest hint of due process.

that the letter would not be sent by official means, because she wanted to keep it off city servers or out of city files, because then it would be a public record. *Id.* at ¶ 40. It remains unclear why Egan knowingly and willfully sought to violate the Massachusetts Open Records Law. *See Id.*

That evening, Worthley emailed Egan requesting clarification about the letter. *Id.* at ¶ 41. Egan responded with the no trespass letter signed by Defendant Lummis, dated November 14, 2022. *Id.* at ¶41-42. It prohibited Worthley from entering GHS grounds or attending any school sponsored events until the end of the school year based on the allegation that Worthley's discussions with KF "poses a threat to the safety of the Gloucester High School community." *Id.* at ¶¶ 42-44. This "threat" is unarticulated, and no "safety" concerns were implicated.

In an article published on November 22, 2022, Lummis issued a public statement to the Gloucester Daily Times regarding the matter, where he provided just enough information to call Worthley's character into question, but omitting the full truth. *Id.* at ¶ 48. Even in spite of his coy public statement, Lummis expressly stated that "no student was ever in danger[.]" Doc. No. 1-2 at 41. Plaintiff sought to enjoin that NTO. The Court agreed the NTO was unconstitutional. Doc. No. 29.

2.3 The Defendants' Issuance of the Modified No Trespass Order

Recognizing that the original NTO would be enjoined, Defendants issued a modified NTO, dated January 13, 2023. *See* Doc. No. 28-1.[5] The modified NTO falsely states that "on or about November 14, 2022" Worthley was offered a hearing before a designee of the Superintendent.

In an attempt to justify this unconstitutional modified NTO, in a footnote, Lummis stated that "Plaintiff did not seek permission from the GHS Principal or the Superintendent prior to

[5] In its January 24, 2023, order, the Court observed that the enforceability of the modified NTO was not before it. Doc. No. 29 at 16 n.2. Thus, this motion is filed. Hopefully, the Court's order will forestall third, fourth, and fifth attempts at issuing a NTO that retaliates for the exercise of protected speech, as no NTO can lawfully issue under the facts and circumstances of this case.

soliciting student volunteers for the group." *Id.* at 3 n.2.[6] Not only was there never a policy prohibiting such, any such policy would run afoul of the First Amendment and the practice in Gloucester (and in most municipalities). Outside individuals and groups soliciting students is commonplace—Boy Scout troops across the country are a testament to this normal practice.

The modified NTO permits Worthley to "appear at" at GHS Sponsored events that are generally open to the public provided that he "agree to conform to all applicable Gloucester Public School ("GPS") policies;" to "appear at" expressly stated GHS sponsored events to which Gloucester City Councilors are customarily invited; and to "appear at" GHS sponsored events and activities related to his parental duties. *Id.* at 1. But, he can only "appear" if he abides unconstitutional conditions, and he can only appear for certain "listed exceptions." *Id.* at 2.

Under the modified NTO, Worthley, unlike anyone else, is prohibited (*i.e.* given a prior restraint) from "solicit[ing] personal information from Gloucester High School Students while on Gloucester High School property."[7] *Id.* at 1. The modified NTO is a prior restraint, prohibiting Plaintiff from representing himself as "being a representative of, or involved in, Gloucester Public School-sponsored volunteer events to students, their families, or Gloucester Public School staff" even if he is actually involved or his office as a Councilor makes him a *de jure* representative. *Id.* The modified NTO also demands that Worthley comply with GPS policies, even ones that, on their face, would not seemingly apply to him.[8] Nor do they apply to anyone else who is not a school

[6] This mirrors prior argument in this litigation that "Plaintiff did not seek the permission of an adult before obtaining Jane Doe's phone number." Doc. No. 17 at 2-3. No such permission is required and there has never been a policy, constitutional or otherwise, requiring it. And, it shows that there are shifting explanations—first it was about phone numbers, now it is about volunteers.
[7] Such information gathering is common for petitions, campaign signups, and civic volunteer activities.
[8] Ironically, though Defendants took issue with texting, GPS policies encourage and provide guidance for adults to communicate with students through electronic means.

employee. As an example, if Governor Healey were to visit Gloucester High, would they apply to her? Of course not. This modified NTO is unconstitutional.

3.0 LEGAL STANDARD

Rule 65 provides for preliminary injunctions upon notice. *See* Fed. R. Civ. P. 65(a) & (b). Injunctive relief should be issued if: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm; (3) the balance of equities tips in plaintiff's favor; and (4) the injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). "In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (*per curiam*). At this stage, the "court need not conclusively determine the merits of the movant's claim; it is enough for the court simply to evaluate the likelihood . . . that the movant ultimately will prevail on the merits." *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 18 (1st Cir. 2020); *see also*, Wright & Miller, 11 Federal Practice & Procedure, § 2948 ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

4.0 LEGAL ARGUMENT

4.1 Plaintiff Has Standing

In First Amendment cases, there is standing when the plaintiff intends to engage in a protected activity, which has been proscribed and with a credible threat of prosecution. *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003). The modified NTO imposes prior restraints with threats of criminal prosecution.

4.2 Plaintiff is Likely to Prevail on the Merits of His Claims

4.2.1 The Modified NTO was Issued in Response to Protected Activity and it is an Unconstitutional and Overbroad Prior Restraint

Defendants violated Worthley's rights by issuing the modified NTO and its enforcement presents further infringement of his rights. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws abridging the freedom of speech." *Mass. Coal. for the Homeless v. City of Fall River*, 486 Mass. 437, 440 (2020) (quoting *Reed v. Gilbert*, 576 U.S. 155, 163 (2015)) (quotation marks omitted). "Article 16 of our Declaration of Rights provides analogous protections, and in some instances, provides more protection for expressive activity than the First Amendment." *Id.* (citation omitted). The plaintiff must show the state action infringes their First Amendment rights, and then the state must then justify its actions. *Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F. Supp. 228, 233 (D. Me. 2019) (citing *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017)).

Engaging future civic leaders regarding actual or potential civic projects is protected speech. "It is beyond question that soliciting contributions is expressive activity that is protected by the First Amendment." *Benefit v. City of Cambridge*, 424 Mass. 918, 922 (1997). While Plaintiff was not asking for donations, he was discussing volunteer activities with a constituent. Standards to evaluate justifications by the state of a restriction on speech turn, *inter alia,* on whether the restriction focuses on content, that is, if it applies to "particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* The NTO, even as modified, is in response to the content of Worthley's speech, treating asking for a cookie different from asking for volunteers and/or trading contact information. Defendants do not contend

Worthley's speech falls within one of the few "historic and traditional categories of expression long familiar to the bar" for which content-based restrictions on speech are clearly permitted. *United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (cleaned up). Content-based regulations are subject to strict scrutiny, which requires the government to demonstrate "a compelling interest and . . . narrow[] tailor[ing] to achieve that interest." *Reed, supra* at 2231 (*quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). Narrow tailoring in the strict scrutiny context requires the restriction to be "the least restrictive means among available, effective alternatives." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004).

Defendants' actions fail strict scrutiny. There is no compelling interest in restricting a citizen, let alone a City Councilor, from seeking to engage community members in civic projects, whether they are high school students or otherwise. Although Defendants argued the first NTO was not motivated by the constitutionally protected conduct, Doc. No. 17 at 11, the modified one admits it on its face. And, Defendants articulated no interest, let alone a compelling one, in retaliating against Plaintiff for the speech at issue—they admit there was no "danger" and there is no government interest in restricting civic engagement. Defendants identify no rule that Worthley has allegedly violated. Defendants claimed that "Plaintiff did not seek the permission of an adult before obtaining Jane Doe's phone number." Doc. No. 17 at 2-3. He neither needed such permission, nor could he avoid it—she gave her number to him. In a footnote, Defendants stated that "Plaintiff did not seek permission from the GHS Principal or the Superintendent prior to soliciting student volunteers for the group." *Id.* at 3 n.2. These are neither policies of general applicability nor representative of any government interest. There is no rule requiring anyone to obtain such permission. Further, Defendants' Social Networking Policy provides for the exact opposite, no permission is required. *See* Doc. No. 26-1 at 8-12. Defendants' School Volunteers

Policy further encourages communication between community leaders and GPS students. *See Id.* at 13. Defendants' Volunteers Policy also states that community leaders are "important sources of support and expertise to enhance the instructional program and vital communication links with the community." Doc. No. 26-1 at 13. The Volunteers Policy shows that GPS's policy promotes community leaders, like Worthley, to engage in communications with student leaders, like KF. There is no legitimate government interest in this modified NTO.

While school safety is a significant government interest, Defendants purported concern of an adult and a minor exchanging text messages is window dressing for viewpoint discrimination. Lummis has refused to respond to Worthley's phone calls for over a year. Compl. at ¶ 15. Worthley's civic vision conflicts with Lummis's. Doc. No. 022-12. Worthley has not done anything that would arise to "serious evil" that justifies the restrictions imposed by Defendants. *See United States v. Treasury Employees*, 513 U.S. 454, 475 (1995). Defendants have no reasonable justification their actions. Lummis admitted that "no student was ever in danger." Doc. No. 1-2 at 41. The only explanation is viewpoint discrimination.

The Court noted that Defendants "articulated concern about obtaining a minor's cell phone number and communicating with her without the permission of an adult." Doc. No. 29 at 11. The Court stated Defendants have a "legitimate government interest in preventing an exchange of phone numbers and text messages with a minor child without the permission of an adult." *Id.* Although Plaintiff respectfully disagrees that there is such an interest, let alone a legitimate one, especially where Defendants' written policies encourage the exact opposite,[9] it is not a compelling one. The Court need only pause for a moment to consider Defendants' position—if Plaintiff or a

[9] When the Court opined that this might be an interest, neither the Court nor Worthley had these policies in hand to show that this "interest" was not one that the Defendants actually hold dear. The policies they seek to impose on Worthley abandon this as an interest at all.

group were to seek volunteers to get the Principal or Superintendent fired, one would hardly expect them to grant permission. Or, more common, high school students from historically underrepresented groups, whose parents cannot afford to donate buildings to colleges, would lose out on distinguishing themselves through community engagement if there is no ability for civic leaders to identify and work with them. Defendants had no lawful basis to issue the original NTO, the modified one, or any future one, on the basis of the interaction between KF and Plaintiff.

4.2.1.1 Defendants' Modified NTO is an Overbroad Prior Restraint

Even if there were a compelling government interest, the modified NTO is not narrowly tailored to the issue of communicating with a minor or identifying community volunteers during off-school hours. And, it both explicitly and implicitly restrains speech.

There are few things more offensive to our Constitution than a prior restraint. "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 530, 559 (1976).

The modified NTO states that Worthley "shall not solicit personal information from Gloucester High School students while on Gloucester High School property." Doc. No. 28-1 at 3. The modified NTO also prohibits Worthley from representing himself "as being a representative of, or involved in, Gloucester Public School-sponsored volunteer events to students, their families, or Gloucester Public School staff." *Id.* Prior restraints "bear a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *accord In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986). There is no justification here that can overcome this heavy presumption. Further, the Defendants fail to even define the contours of these prior restraints so that a reasonable person could understand what they would mean.

For example, Worthley, a City Councilor, has been asked to work on Student Government Day, an event that is in the Gloucester Charter. *See* Gloucester Charter § 2-7; *see also* Doc. No. 22-12 at ¶ 15. By necessity, he is required to work with GPS in leading a volunteer event. Yet, he is prohibited from making truthful statements about his role in government. And, there is no reason why Worthley cannot do what other political candidates might do on school property vis a vis students—identify possible campaign volunteers or solicit signatures on a petition, all of which any other citizen might do at a baseball or soccer game at the school.

Defendants demand that Worthley comply with IJNDD Social Networking Policy ("Social Networking Policy"). Doc. No. 26-1 at 8-12. This policy permits staff and volunteers to engage in electronic communication with students, including through text messages. *See Id.* at 10-12. If communication between a staff member and student is (as Defendants claim) "inappropriate, undermines the staff member's authority to instruct or maintain control and discipline with students, compromises the staff member's objectivity, or harms students, the school district reserves the right to impose discipline for such behavior." *Id.* at 11. This is an overbroad and unjustified prior restraint that has no relationship to Plaintiff's interaction with KF. There is no guidance as to what "harms students"—the theory of evolution may harm a religious fundamentalist and wishing a "Merry Christmas" may harm a radical atheist--yet both are permissible speech. As Justice Harlan suggested, it is "often true that one man's vulgarity is another's lyric". *Cohen v. California*, 403 U.S. 15, 25 (1971). What is "inappropriate," therefore, is vague and likely to chill a wide range of protected speech. "It is clear, however, that speech that is merely offensive to the listener is not enough" upon which schools may impose discipline. *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 n. 18 (1st Cir. 2020) (citing *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969)). Just as "[i]t can hardly be

argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," neither does Mr. Worthley shed his. *Tinker*, *supra* at 506.

Further, these policies present a direct inconsistency. The IJOC School Volunteers policy ("Volunteer Policy") that the Defendants wish Worthley to abide encourages communication between community leaders and students because leaders are "important sources of support and expertise to enhance the instructional program and vital communication links with the community." Doc. No. 26-1 at 13. If Worthley abides it, then he runs into the prohibition of being a representative and, as being a communication "link" requires the means to contact, he would run afoul of the contact information prohibition. Defendants encourage communication unless it is Worthley, and Worthley alone,[10] and he cannot be singled out for contradictory treatment.

The KI Visitors to the Schools policy ("School Visit Policy") encourages "parents and guests to visit classrooms to observe and learn about the instructional programs taking place in our school." Doc. No. 26-1 at 18. There is a safety protocol for guests to visit a school, including reporting to the Principal's office for "security purposes" when entering and leaving. *Id.* Defendants' policy is to encourage guests to visit classrooms. However, Worthley, a "parent of a rising eighth grader" and a City Councilor tasked with appropriations for the school budget is singled out as unwelcome to visit GHS campus, except for specific, itemized appearances. He is expressly not allowed to generally be at GHS otherwise. This ban serves no purpose related to the purported shifting reasons for issuing the original and modified NTO; it would prevent any student organization from having a notable civic leader address them.

[10] These policies do apply to Gloucester school employees. While Worthley does not likely have standing to challenge them on behalf of the school employees, if they were challenged by a school employee, they should be deemed unconstitutional. But, Worthley simply seeks an injunction against them applying to him. Should the Defendants impose them on all citizens, equally, this would assuage his current as-applied concerns.

Additionally, per the GBJA Criminal Offender Record Information Checks policy ("CORI Policy"), GPS does not require a background check for persons "having only the potential for incidental unsupervised contact with students in the commonly used areas of the school grounds, such as hallways" because they are "not considered to have the potential for direct and unmonitored contact with students." Doc. No. 26-1 at 4. Ordinary visitors and other politicians are not subjected to the indignity of a CORI check. Defendants admit Worthley poses no danger, yet treat him worse than actual registered sex offenders.

In sum, the modified NTO serves only to unconstitutionally punish and chill speech, bearing no relationship to the purported basis for issuing it. It must be enjoined.

4.2.2 The Modified NTO was Issued Without Due Process

The constitutional guarantee of due process requires that laws give individuals reasonable notice of prohibited conduct. Procedural due process is protected by the Fourteenth Amendment to the United States Constitution, which reads, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." Procedural due process is also protected under the Massachusetts Constitution. "Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution, and arts. 1, 10 and 12 of its Declaration of Rights, are the provisions in our Constitution comparable to the due process clause of the Federal Constitution." *Duarte v. Commissioner of Revenue*, 451 Mass. 399, 412 n.20 (2008) (quoting *Pinnick* v. *Cleary*, 360 Mass. 1, 14 n.8 (1971)). "The fundamental requirement of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 412 (quotation marks and citation omitted). "[T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Aime v. Commonwealth*, 414 Mass. 667, 675 (1993) ("the individual interest at stake must be balanced against the nature of the governmental interest and the risk of an erroneous deprivation of liberty or property under the procedures which the State seeks to use").

Defendants' conduct here, issuing the modified NTO that bars him from certain GHS events, from entering GHS buildings or surroundings while school is in session, and issuing prior restraints on discussing certain topics while "appearing" at GHS events, is arbitrary and capricious. The modified NTO claims that "[o]n or about November 14, 2022, Worthley was offered a hearing before a designee of the Superintendent." Doc. No. 28-1 at 3. This is an outright fabrication. On November 14, 2022, Worthley was ambushed by the Gloucester City Attorney Egan, Human Resources Director Holly Dougwillo, and Police Chief Ed Conley. *See* Compl. at ¶¶ 29-38. There was a pre-written no trespass letter, which pre-determined that Worthley's communications with a GHS student were inappropriate. *Id.* at ¶ 34. The decision was already made. There were no standards. Worthley had no fair opportunity to demonstrate the lawfulness or propriety of his speech nor argue the contours of the NTO. He had no notice of the claims against him. Chief Conley expressly told Worthley during the meeting that he may feel like his due process rights were violated. *Id.* at ¶ 36. The modified NTO rests on the same due process violations.[11]

[11] As the Court is aware, Defendants offered a *post suit* "hearing" to be conducted by Lummis's subordinate. As that purported hearing officer's job and career would appear to require agreeing with Lummis, such a "hearing" would be but a sham. Due process "requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Worthley cannot receive a fair hearing before such a body. Moreover, not even that purported hearing has a lawful policy against which Worthley's speech could be assessed.

4.3 Enforcement of the Modified NTO Violates Due Process

The modified NTO itself and as incorporating school policies against a non-school-employee, is unconstitutionally vague. To survive a vagueness challenge, a regulation must define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A great degree of specificity and clarity is required when First Amendment rights are at stake. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir. 1986). A regulation is vague if it either fails to place people on notice of which conduct is prohibited, or, if the possibility for arbitrary enforcement is present. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Regulations which rely on a viewer's subjective interpretation of facts are void for vagueness. *Morales*, 527 U.S. at 56-64 (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554-55 (9th Cir. 2004) (holding a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others").

The Defendants' modified NTO provides a variety of restrictions that an ordinary person of reasonably intelligence would not be able to understand, and the restrictions provide for arbitrary and discriminatory enforcement. The modified NTO provides that Worthley may not "solicit personal information." Doc. No. 28-1. It is not clear what solicit means in this context

means, nor what personal information means. Does this prohibit Worthley from asking a GHS student their name? When a person asks Worthley his name, is he permitted to respond in kind to ask theirs? What if Worthley is not sure whether the person is a GHS student? May he ask whether they are a GHS student? If he says they can call him as their City Councilor, is that solicitation because Caller ID exists? Is he permitted to ask ages so as to identify 16 & 17 year olds who might be interested in pursuing the right to vote, as in Boston, or to encourage 18 year olds to register to vote? If an 18 year old student wants to donate to his campaign, is he limited to accepting only cash? Can he ask an 18 year old student to vote for him? Can he encourage an 18 year old student to run for office? All of this is swept up in the Defendants' zeal to harm Worthley.

Furthermore, the modified NTO prohibits Worthley from representing himself as "a representative of, or involved in, Gloucester Public School-sponsored volunteer events to students, their families, or Gloucester Public School staff." *Id.* It is not clear how this restriction works. Does this also prohibit Worthley from being involved in Gloucester Public School-sponsored volunteer events? If Worthley is involved in a Gloucester Public School-sponsored volunteer event, like Student Government Day, then is Worthley supposed to lie to his constituents and state he was not involved?

The Defendants also limit Worthley's attendance to GHS sponsored events in a subjective manner. The Defendants permit Worthley to "appear" at GHS sponsored events which are "generally open to the public" and related to his "parental duties of a rising eighth grader." Doc. No 28-1 at 2. The Defendants fail to articulate what "generally open to the public" indicates in a sufficient manner that a reasonable person would understand. The school, for example, is open daily to visitors. The threat of criminal prosecution looms over Worthley's head. Defendants must clearly articulate the contours of permissible conduct so that an ordinary person would understand.

Additionally, Defendants' modified NTO is subject to arbitrary and discriminatory enforcement. As Defendants have already characterized innocuous speech as somehow inappropriate, they can call anything inappropriate. Discussing *Cohen v. California*? Inappropriate. Speaking for or against certain books in the school library? Inappropriate. Campaigning to have Lummis removed? Inappropriate. Explaining what is happening in this case? Inappropriate. Anything Defendants don't like can be deemed inappropriate. In the immortal words of Frank Zappa, the modified NTO "is an ill-conceived piece of nonsense which fails to deliver any real benefits to children, infringes the civil liberties of people who are not children, and promises to keep the courts busy for years, dealing with the interpretational and enforcemental problems inherent in the proposal's design." Frank Zappa, "Opening Statement to and Q&A with the Senate Commerce, Science and Transportation Committee on Rock Lyrics and Record Labeling" (Sept. 19, 2985).[12] The modified NTO is an offense to due process.

4.4 Worthley is Entitled to an Injunction

The remaining preliminary injunction factors are met. Plaintiff suffered and suffers irreparable injury. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). When a plaintiff seeks injunctive relief for "an alleged violation of First Amendment rights, a plaintiff's irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Assn'n of Club Owners and Fraternal Srvs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). If the plaintiff demonstrates a likelihood of success on the merits of its First Amendment claim, they necessarily also establish irreparable harm. *Fortuño*, 699 F.3d at 15. The extent of damage to Worthley's reputation and loss of business opportunities will continue to

[12] Available at https://www.americanrhetoric.com/speeches/frankzapparockmusiclyrics.htm.

grow until the Defendants are permanently enjoined from using his innocuous, constitutionally protected communications with a constituent as a basis to issue an unconstitutional NTO.

The balance of equities tips in Plaintiff's favor. When a government regulation restricts protected speech, the balance of hardships tends to weigh heavily in a plaintiff's favor. *See Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 251 (D.P.R. 2002). There is no harm to the Defendants. Worthley had innocent conversations with a constituent. There is no rational basis for the response by the Defendants, and Defendant Lummis's continued refusal to speak with Worthley is inexplicable.

Finally, injunctive relief is in the public interest. Generally, the public interest "favors protecting First Amendment rights." *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624 (S.D. W.V. 2013); *see also Carey v. FEC*, 791 F. Supp. 2d 121, 135-36 (D. D.C. 2011); *Mullin v. Sussex Cnty., Del.*, 861 F. Supp. 2d 411, 428 (D. Del. 2012). The public interest is served by issuing an injunction where "failure to issue the injunction would harm the public's interest in protecting First Amendment rights in order to allow the free flow of ideas." *Magriz v. union do Tronquistas de Puerto Rico, Local 901*, 765 F. Supp. 2d 143, 157 (D.P.R. 2011) (citing *United Food & Commer. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998)). Moreover, the unconstitutional government action by the Defendants in this case has the potential to harm nonparties to the case because it will limit or infringe upon the rights granted to them by the First Amendment of the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. *See Wolfe Fin. Inc. v. Rodgeres*, 2018 U.S. Dist. LEXIS 64335, at *49 (M.D. N.C. April 17, 2018) (*citing McCarthy v. Fuller*, 810 F.3d 456, 461 (7th Cir. 2015). As Lummis stated to the Gloucester Daily Times, "no student was ever in danger." Doc. No. 1-2 at 41.

4.5 At Most, a Minimal Bond Should Be Required

A bond under Rule 65(c) should only be required if Defendants will suffer any harm from the injunction. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002). Here, there is no plausible harm and no bond should be required (and, if any, it should be nominal).

5.0 CONCLUSION

Worthley did nothing wrong. The Court should enter a preliminary injunction against the Defendants precluding them from issuing and enforcing the modified NTO. It was issued in retaliation for constitutionally-protected speech. It is not narrowly tailored and is a prior restraint on constitutionally-protected speech. It was issued without due process and it is unconstitutionally vague. It has no place in a free society. The modified NTO must be enjoined, and Defendants must be told there will be no more do overs, lest we continue like Sisyphus, rolling the Constitution up the hill, only to have to start over every time Defendants see Worthley approach the summit of having his rights and his good name restored by this Honorable Court.

Dated: March 3, 2023.

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477
Jay M. Wolman, BBO# 666053
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: (978) 801-1776
ecf@randazza.com

Attorneys for Plaintiff
Jeffrey T. Worthley

Case No. 1:22-cv-12060

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 3, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza
Marc J. Randazza