

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

KEVIN McKENNA,
Plaintiff,
v.
THE TOWN OF OYSTER BAY and JOE
SALADINO, individually and in his official
capacity as Supervisor of THE TOWN OF OYSTER
and Presiding Officer of the Oyster Bay Town
Board.

Defendants.

2:20 CV 4905

COMPLAINT

INTRODUCTION

1. This is an action for declaratory and injunctive relief as well as monetary damages against The Town of Oyster Bay and for the violation of the United States and New York State Constitutions' protection of free speech, freedom of association, and freedom of the press.

2. On October 6, 2020, the Town of Oyster Bay unanimously passed Town of Oyster Bay Resolution No. 567-2020 allowing the presiding officer, at his sole discretion, to have arrested and charged with disorderly conduct anyone making "offensive, insulting, threatening, insolent, slanderous or obscene remarks or gestors, or who becomes boisterous, or who makes threats against any person or against public order, and security while in the Board Room, either while speaking at the podium or as a member of the audience..."

3. Within this resolution, there are no definitions or explanations to help determine what constitutes such broad terms as "boisterous", "insulting", or "offensive", nor are there any determinations as what grants of authority permit a "presiding officer" to order the arrest of anyone.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 (1)-(4) and 42 U.S.C. §§ 1983, 1985(2), (3) and § 1988 (civil rights statutes) and the First Amendment of the United States Constitution.

5. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and has general legal and equitable powers.

VENUE

6. Venue is proper in this Court under 28 U.S.C. § 1391. Plaintiffs further invokes the pendent jurisdiction of this Court to consider claims arising under state law.

PARTIES

7. Plaintiff Kevin McKenna is a resident of the Town of Oyster Bay and editor and chief of the Town of Oyster Bay News, which is a blog with a vast readership of over twelve thousand (12,000) subscribers and a general readership of sixty thousand (60,000) residents of the Town of Oyster Bay. As an illustrative point Newsday has the highest suburban readership in the entire United States with roughly four hundred thousand (400, 000) readers. Thus, the Town of Oyster Bay News with sixty thousand (60,000) readers is substantial and qualifies it as a legitimate news source.

8. Defendant Joseph Saladino is the current Supervisor of the Town of Oyster Bay who was appointed Supervisor of the Town of Oyster Bay after the indictment of former supervisor John Venditto. As Supervisor of the Town of Oyster Bay, Defendant Saladino is also the presiding officer of the Town Board meetings.

9. Defendant Town of Oyster Bay is a municipality in the County of Nassau in the State of New York that was rocked by a series of corruption and pay to play scandals over the last decade.

Facts

The town has a long and established history of violating New York State Open Meetings Law and blocking members of the press

10. Defendant Town of Oyster Bay has been embroiled in several high-profile political scandals over the last decade leading to the indictment and conviction of many Town officials, including its former Supervisor John Venditto.

11. After the indictment of former Supervisor John Venditto, the Board appointed Defendant Joseph Saladino as interim Supervisor.

12. The Town has a long history of difficulties with transparent government under former Supervisor Venditto and current Supervisor Defendant Saladino.

13. The Town Board has a long and established history of conducting its business in secrecy and without oversight, regularly blocking the press from gaining routine information from Freedom of Information requests.

14. The Town of Oyster Bay has found itself, numerous times, reprimanded by the Nassau County Supreme Court and also by the New York State Committee on Open Government. However, for the purposes of this complaint, the following two (2) cases are illustrative of recent and egregious obfuscation of the press and citizen advocates:

- In 2016, New York State Supreme Court Ordered the Town to comply with Freedom of Information Laws as a result of an Article 78 proceeding Newsday brought to get routine financial data. See, Matter of Newsday, LLC v. Town of Oyster Bay, 2016 NY Slip Op 32749 (U) July 8, 2016.

- The Board's meetings operate in such flagrant disregard for Open Meetings Laws that in 2017, the Nassau County Supreme Court took the extreme step of ordering the Town Board members to receive training from the New York State Committee on Open Government after several blatant attempts to conduct business without public oversight. See, Matter of Ripp v. The Town of Oyster Bay, Index No. 1834-17, Supreme Court, Nassau County (June 2, 2017).

15. Despite the court ordered training on Open Government, the Town still routinely blocks members of the press from gaining access to Town documents through Freedom of Information Requests.

16. The Town's willful blocking of document requests reached a boiling point when the former Oyster Bay Town Clerk indicated that he could no longer certify the records requested from the press would be supplied accurately, reasoning that FOIL requests from the media were directed to the Town Attorney and not the Clerk's Office as required by New York State Law.

17. In a shocking moment of candor, the former Town Clerk wrote a letter to the New York State Committee on Open Government stating the following, "I am prevented from certifying that I have seen all of the original documents. On FOIL requests that go through the town attorney, it prevents me from doing my job because I cannot verify the chain of custody."

18. The Former Clerk indicated that Freedom of Information requests from Newsday News 12 Long Island and citizen advocates were diverted to the Town Attorney's office instead of the Clerk's Office in violation of Open Meetings Law. *See, Town Clerk: Info Responses May Not Be Accurate*, "Newsday" October 23, 2018

The Town of Oyster Bay's one-party rule allows the current regime to suppress First Amendment rights without oversight

19. The Town of Oyster Bay has a unique one-party rule system that allows a policy and practice of suppression of free speech and obfuscation of New York State Open Meetings Law without any meaningful opposition.

20. The Town of Oyster Bay is unique in that every elected position in the Town is Republican held and has been so for decades. Virtually every resolution that comes before the Board is passed unanimously, without opposition or oversight.

21. Although nearly forty-eight percent (48%) of the residents of the Town of Oyster Bay are not registered Republicans, the Town's elected offices are only Republican because voting is "at large" instead of councilmanic.¹ Furthermore, Defendant Saladino has since been elected after being appointed, although by slim margins since his appointment garnering only 51% of the vote in 2017. Although no one has challenged the current "at large" system yet, this Court has found such at large districts to lead to a monopoly of one-party rule. See, *Goosby v. Town Bd. of the Town of North Hempstead*, NY 956 F. Supp. 326 (E.D.N.Y. 1997). It should be noted that in other locations such as New York City where there is a one-party rule, there are least meaningful primary elections.

22. Essentially 48% of the town are officially unrepresented. As a result of this one party rule, the only way that the residents of the Town of Oyster Bay who do not agree with the current regime have a voice in town action is by going to town board meetings and speaking on the record during the portion where public comment is permitted.

23. Despite this fact, many individuals have been blocked from speaking at Town Board Meetings based on their viewpoint and not in regard to procedure.

¹ Councilmanic is a particular district that a councilperson represents. The Town of Oyster Bay comprises a Board of council people who represent the whole district.

24. Most Notably, on May 28, 2019, in retaliation for the Town Clerk's candor on FOIL requests, Defendant Saladino prohibited the Town Clerk of Oyster Bay from making a statement on the record during a Town Board Meeting. See, "Town Supervisor halts Clerk Speaking at Hearings", Newsday, May 28, 2019.

25. The Town Clerk routinely spoke on the record prior to raising opposition to the Town's policies on Freedom of Information Requests and was permitted to speak so long as it was in agreement with the regime.

26. As a result of the Town Board regularly conducts censorship of those who oppose the position of the regime.

27. Plaintiff Kevin McKenna is one such citizen advocate who regularly comments at Town Board meetings.

28. Mr. McKenna is also the editor and chief of an The Town of Oyster Bay News which is a blog that provides transparent political coverage of the Town of Oyster Bay's Town Board Meetings for the viewers who are unable to attend meetings.

29. The Town of Oyster Bay News has a readership of over sixty thousand (60,000) residents of the Town of Oyster Bay and constitutes one of the major sources of information regarding town Board actions.

30. The Town has attempted to bar Mr. McKenna from Town Board meetings on a number of occasions for having dissenting opinions.

31. On July 5, 2018, the Town informed Mr. McKenna that he would be banned for six (6) months from attending Town Board Meetings. See, Exhibit A.

32. As a result of this unconstitutional ban, Mr. McKenna filed an action in this Court to overturn the ban. See, Docket No. 2:18-cv-04106.

33. In act of gamesmanship, the Town of Oyster Bay revoked the ban just before a hearing on the Order to Show Cause to moot the issue and evade Federal Court review of its clearly unconstitutional ban. See Exhibit B.

34. The letter lifting the ban indicates in pertinent part, “As indicated during that conversation, the Town will not enforce the ban...Consequently, in view of the foregoing, the Town deems any request for relief as against the Town as moot.” *Id.*

35. On September 10, 2020, Mr. McKenna reported in his blog, The Town of Oyster Bay News, that Defendant Saladino was illegally sending dogs from the Town of Oyster Bay Animal Shelter to be euthanized in upstate New York.

36. On September 11, 2020, in retaliation for releasing the euthanasia story, the Town of Oyster Bay informed Mr. McKenna that he was once again banned from attending Town Board Meetings. See Exhibit C.

37. Mr. McKenna promptly emailed the Town Attorney for clarification as to why he was banned but never received a response.

38. On September 15, 2020, Mr. McKenna went to the next scheduled town board meeting. He did not attempt to enter the meeting hall but instead asked permission to enter the meeting hall.

39. Mr. McKenna was granted permission to enter but was not permitted to speak on the record.

40. Despite being permitted to attend the meeting, Defendant Saladino prohibited Mr. McKenna from speaking on the record.

41. Despite following the Town of Oyster pay procedure required for speaking on the record, Mr. McKenna was the only person barred from speaking on the record that day.

42. After this meeting, The Board released their intention to vote on a resolution to change its “decorum” policy which would allow the presiding officer, at his discretion, to have residents who violate the towns resolution *removed, arrested, and/or charged with disorderly conduct.*

43. The Statute reads in its entirety as follows:

“Any person making offensive, insulting, threatening, insolent, slanderous or obscene remarks or gestures, or who becomes boisterous, or who makes threats against any person or against public order, and security while in the Board Room, either while speaking at the podium or as a member of the audience, shall be forthwith removed at the direction of the presiding officer. Any person removed from a public meeting at the direction of the presiding officer may be charged with disorderly conduct in accordance with New York State Penal Law Section 240.20”

44. This resolution is clearly violative of the freedom of speech, the freedom of association, and the freedom of the press protected under the New York State Constitution and the First Amendment of the United States Constitution. Furthermore, the Town’s interpretations of the much narrower previous resolution show the facial unconstitutionality as not being narrowly tailored to meet a compelling state interest.

45. At the meeting on October 6, 2020, the resolution was introduced, and “boisterous” public comment ensued.

46. Several citizen advocates, including Mr. McKenna, spoke against the passage of the resolution. Public Safety officers removed Mr. McKenna from the meeting.

47. Despite the public outcry of those in attendance, the resolution passed unanimously.

48. After passage of this law, the District Attorney of Nassau County vehemently spoke out against the resolution, “These rules appear to provide for charging a board meeting attendee if the presiding officer believes they violate vague and subjective rules of decorum,

which lack required elements of the charge of disorderly conduct... The First Amendment strongly protects speech petitioning the government, and laws that seek to punish those exercising their free speech rights must be scrutinized very carefully.”

49. Furthermore, The Press Club of Long Island wrote a letter to the Town Board saying, “First Amendment rights are not subject to the discretion of the town supervisor. The rule puts journalists in the position of choosing between doing their work effectively and facing a punishment of up to 15 days in jail.”

50. Prosecutors and journalist are all in agreement that this rule will lead to arbitrary arrests and curtailments on the freedom of the press.

51. As a result, injunctive relief is necessary to prevent a chilling effect of speech at Town Board meetings as ordinary citizens and members of the press will fear imprisonment for the simple act of speaking at a Town Board Meeting.

52. At all times relevant to the allegations of this Complaint, and in all actions described, the defendants acted under color of law and under the authority bestowed upon them as municipal, county or state officials.

Count I

Town of Oyster Bay Resolution No. 567-2020 is Facially Invalid

53. The Plaintiff adopts and incorporates by reference paragraphs “1” through “52” as if fully stated. The First Amendment of the United States Constitution states that “Congress shall make no law... abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

54. Article 1 § 8 of the New York State Constitution states that “Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the

abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”

55. Facially, Town of Oyster Bay Resolution No. 567-2020 is Constitutionally Invalid Under the United States and New York State Constitutions.

56. Town of Oyster Bay Resolution No. 567-2020 states that:

“Any person making offensive, insulting, threatening, insolent, slanderous or obscene remarks or gestures, or who becomes boisterous, or who makes threats against any person or against public order, and security while in the Board Room, either while speaking at the podium or as a member of the audience, shall be forthwith removed at the direction of the presiding officer. Any person removed from a public meeting at the direction of the presiding officer may be charged with disorderly conduct in accordance with New York State Penal Law Section 240.20”

57. Oyster Bay Resolution No. 567-2020 is facially unconstitutional because it is not viewpoint neutral, is not narrowly tailored to meet a compelling state interest, is unconstitutionally overbroad and vague. It impedes or threatens to impede the federally protected rights of freedom of speech and association the Plaintiff seeks to achieve and practice.

58. Oyster Bay Resolution No. 567-2020 is not viewpoint neutral because the Town only bans only individuals speaking out against the board’s current regime.

59. Furthermore, Oyster Bay Resolution No. 567-2020 can result in criminal prosecution which would cause a chilling effect on speech.

60. An actual live controversy exists between the Plaintiff and the Defendants in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

61. As a result, the Plaintiff requests this Court to declare Oyster Bay Resolution No. 567-2020 facially unconstitutional as violative of the First Amendment of the United States Constitution and the New York State Constitution.

COUNT II

Town of Oyster Bay Resolution is Preempted by New York State Law

62. The Plaintiff adopts and incorporates by reference paragraphs “1” through “61” as if fully stated.

63. The New York State Constitution Art. IX, § 2, subd. [c] pars. [i], [ii], cl. [10], the Municipal Home Rule Law Art. II, § 10, [subd. 1], pars. [i], [ii], cl. [11] prohibit municipalities from passing laws preempted by New York State Law.

64. New York Penal Law 240.20 is as follows:

“A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.”

65. Oyster Bay Resolution attempts to expand the reach of Penal Law 240.20 by adding “insulant”, “boisterous”, “insolent”, “insulting”.

66. Oyster Bay Resolution empowers the “presiding officer” to direct the arrest of an individual as well.

67. Oyster Bay Resolution No. 567-2020 is preempted by New York State Law.

COUNT III

**Violation of the First Amendment of the United States Constitution and
Threats to the Plaintiffs' Freedom of Speech**

68. The Plaintiffs adopts and incorporates by reference paragraphs “1” through “67” as if fully stated.

69. The First Amendment of the United States Constitution guarantees individuals the right to free speech and association.

70. All the actions taken against Mr. McKenna are in retaliation for his advocacy and for his statements on The Town of Oyster Bay news, including but not limited to his exposing of the illegal euthanize of dogs and the failure to disclose pay raises to patronage employees.

71. The Defendants either intentionally, recklessly, or with callous indifference to the federally protected rights of the Plaintiffs have threatened, silenced, or chilled their rights to freedom of speech and association by the improper adoption of policies allowing for the arbitrary expulsion and arrest of those speaking at Town Board meetings.

72. The Defendant have a long history constituting a policy or practice of suppressing First Amendment rights.

73. The Defendants' policies were established causing irreparable harm to the federally protected rights of the Plaintiffs' freedom of speech and association and were intended to harass, threaten, silence, and chill these constitutional rights by granting broad powers to the presiding officer to expel and arrest anyone on a whim according to vague terms such as “insulant”, “boisterous”, “insolent”, or “insulting”.

74. Further, the enforcement of the Defendants' directives threatens to deprive the Plaintiff and others similarly situated of their First Amendment Rights.

75. An actual live controversy exists between the Plaintiff and the Defendants in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

76. The Plaintiff requests this Court to issue declaratory and injunctive relief under 42 U.S.C. §1983 to cease and prevent the Defendants' conduct of intentional, reckless, and oppressive disregard of Plaintiffs' First Amendment rights, and further award appropriate monetary damages against the Defendants, with the exception of the Secretary of State, inclusive of costs, attorney fees, and any other relief as this Court deems justified.

COUNT IV

Violation of Article 1 § 8 of the New York State Constitution of Freedom of Speech and Association and Threats to Plaintiffs' Freedom of Speech

77. The Plaintiffs adopts and incorporates by reference paragraphs "1" through 76" as if fully stated.

78. Article 1 § 8 of the New York State Constitution guarantees individuals the right to free speech, association and free press.

79. The Defendants either intentionally, recklessly or with callous indifference to New York's constitutionally protected rights of the Plaintiff have threatened, silenced, or chilled his rights to freedom of speech and association by the improper adoption of policies prohibiting a broad range of speech.

80. The Defendants' policies were established causing irreparable harm to New York State's constitutionally protected rights of the Plaintiffs freedom of speech and association, to harass, threaten, silence, and chill these constitutional rights.

81. Further, the enforcement of the Defendants' directives threatens to deprive the Plaintiffs of their right to free speech without due process of law.

82. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

83. Plaintiffs request this Court to declare under the New York State Constitution that the Defendants have violated constitutionally protected rights and enjoin them to cease and prevent them from conducting any intentional, reckless, and oppressive act resulting in the disregard of Plaintiff's rights to freedom of speech and association, and award appropriate monetary damages, against the Defendants inclusive of costs, attorney fees, and any other relief as this Court deems justified.

JURY DEMAND

84. Plaintiffs demand a jury trial.

REQUEST FOR RELIEF

1. Plaintiffs have no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and threatened irreparable harm from the Defendants' present and threatened irreparable harm to their constitutional rights.

2. An actual live controversy exists between the Plaintiffs and the Defendants in which the parties have genuine and opposing interests that are direct and substantial and of which a judicial determination will be final and conclusive.

3. The Plaintiffs have a likelihood of success on the merits of their claims.

4. The public interest and equities favor entry of a court order granting the Plaintiffs the following described declaratory relief, as well as temporary, preliminary, and permanent injunctive relief

WHEREFORE, the Plaintiff prayer fully request that this Court:

- A. Declare that the Defendants are acting in violation of the First Amendment of the United States Constitution;
- B. Declare that the Defendants are acting in violation of Article 1 § 8 of the New York State Constitution;
- C. Declare Oyster Bay Resolution No. 567-2020 is facially unconstitutional under the United States Constitution and the New York State Constitution;
- D. Enjoin all of the Defendants from the enforcement of policies preventing any resident from freely speaking at Town Board Meetings;
- E. Order all of the Defendants to immediately provide training and instruction on New York State Open Government Laws;
- F. Award compensatory damages and punitive damages against Defendants;
- G. Award Plaintiffs their reasonable attorney fees, litigation expenses, and costs as allowed under 42 U.S.C. § 1988, and other applicable laws, and grant such other relief as this Court deems just to the Plaintiffs and their attorneys.

Respectfully submitted,
Clarke and Fellows

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