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Geneva City Council
City Hall
47 Castle Street
Geneva, NY 14456

VIA FEDEX and EMAIL

Re: Reinstatement of James McCorkle and Robert Maclean to Police Budget Review Board

Dear Councilors:

We represent Mr. James McCorkle and Mr. Robert Maclean with respect to their June 1, 2022 removal from the City of Geneva Police Budget Advisory Board (“PBAB”).¹ We respectfully request that the City Council reinstate Mr. McCorkle and Mr. Maclean to their positions on the PBAB as soon as practicable and extend their tenure accordingly to account for the time passed since they were removed.

Based on our review of a video recording of the June 1, 2022 City Council meeting and discussions with our clients, the City Council appears to have removed Mr. McCorkle and Mr. Maclean from their positions in retaliation for expression of their opinions, in violation of Article I, Section 8, of the New York Constitution and the First Amendment to the United States Constitution.² The First Amendment protects these opinions and prohibits retaliation. Moreover, when it removed Mr. McCorkle and Mr. Maclean, the City Council violated its own Rules of Procedure, the PBAB Bylaws, and the City Charter—procedural issues that raise additional concerns around the Due Process Clause of the Fourteenth Amendment.

¹ City documents use both “Police Budget Advisory Board” and “Police Budget Review Board” to reference this body. We understand that both names refer to the same entity. For clarity’s sake, we will use “PBAB” throughout this letter.

² The speech protections of New York’s free speech clause are even broader than those of the U.S. Constitution. See *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (quoting *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988)).



Mr. McCorkle and Mr. Maclean should be restored to their positions on the Board to remedy their unconstitutional and procedurally deficient removal.

1. Factual Background

1.1 The Origins of the PBAB

The Geneva City Council established the PBAB on July 1, 2020, and adopted the PBAB's bylaws on October 7, 2020. The PBAB serves an exclusively advisory function—it has no independent authority. Its main ambit is to make recommendations to the City Council about funding for the Geneva Police Department. The City Council appoints citizens to the Board. Board members serve in an unpaid, volunteer capacity for two-year terms. On July 7, 2021, the City Council appointed James McCorkle and Robert Maclean to serve on the PBAB until December 31, 2022.³

The City Council can remove members of the PBAB upon a referral from the PBAB itself. The PBAB can make a referral to remove a member by majority vote. According to the minutes of the October 7, 2021, meeting at which the City Council adopted the PBAB's Bylaws, "Councilor Noone again stressed that city representatives will have no voting power." This emphasizes that City Councilors would not have a direct hand in the operation of the PBAB, highlighting the PBAB's autonomy.

1.2 McCorkle's and Maclean's First Amendment Protected Speech and Opinions

Both McCorkle and Maclean were vocal about their views on policing in the months leading up to their removal from the PBAB. Both men shared these opinions in their personal capacities on various public platforms.

On April 30, 2022, McCorkle published an open letter to the City Council in the *Finger Lakes Times* in his capacity as a private citizen.⁴ McCorkle was a member of the PBAB at the time. McCorkle expressed concern for the City Council's management of the Police Department, highlighting two recent incidents involving Department conduct. In one instance, McCorkle claimed that police officers teased and harassed fellow Officer Patrick Nolin over his ongoing battle with depression. In the second instance, McCorkle wrote that police officers shared an image of City Councilor Laura Salamendra which derided her and, to McCorkle, appeared to call for violence against her. McCorkle pointed out that less than 1% of the Police Department's budget went to "training," and only a fraction of that went toward wellness and bias training. The letter closed by calling on the police

³ See City of Geneva, *City Council and Boards & Commissions*, <https://cityofgenevany.com/DocumentCenter/View/318/2022-City-Council-and-Boards-and-Commissions-PDF> (2021).

⁴ James McCorkle, *Guest Appearance: GPD 'mismanaged . . . out of control'*, THE FINGER LAKES TIMES, April 30, 2022 (available at https://www.fltimes.com/opinion/guest-appearance-gpd-mismanaged-out-of-control/article_7d0f2954-1942-53e9-a8ca-3b9037098829.html).

chief to resign and advocating that the City should “fire the entire department,” given that no active officers had reported the alleged misconduct. The letter also suggested the City rehire those who would commit to “accountability and decency.” McCorkle included a disclaimer in the letter that he was sharing a First Amendment protected opinion and that it did not represent the opinion of “any board or institution he may be associated with.” Indeed, the published version of McCorkle’s letter does not mention his position on the PBAB at all.

On May 7, 2022, McCorkle wrote on his personal Facebook page that, “the establishment has brought out the pundits in force to reprimand me for stating that the police are mismanaged and misogynistic.”⁵ He went on to add that, “Maybe if the chief and the city council and these apologists for police mismanagement had spoken out about either case mentioned in my article, I would not have written it.” Maclean re-shared the post on the same day.⁶

Robert Maclean maintains an active social media presence and frequently comments on current affairs on his personal Facebook page. For example, he has shared posts from “Party for Socialism and Liberation – Finger Lakes,” “Anti-Imperialist Parentposting,” and “Socialist Sopranos Memes.” He shared articles critical of policing as a whole, such as *One Rochester Cop’s Abuses Reveal a Culture of Police Impunity*, by Meg O’Connor, and *Law Enforcement’s Facebook Posts Promote Racism in Opioid Epidemic*, by Alexis Pleus and Kevin Revier.

In April of 2022, Maclean circulated a Facebook post calling for an “emergency rally” to urge the City Council to appeal a judicial ruling which invalidated the City’s Police Review Board (a different entity than the PBAB).⁷ He shared another post from McCorkle on April 21, 2022, calling on the police chief to resign.⁸

1.3 The Council’s Retaliation Against McCorkle and Maclean for Their Political Views

At a June 1, 2022, City Council meeting, approximately one month after McCorkle published his open letter, Mayor Stephen Valentino moved to remove McCorkle and

⁵ Available at

<https://www.facebook.com/james.mccorkle.505/posts/pfbid0k4zMzA5vpR2keeTJ2fVHGBlw3jBJahi67Q1wce2KmzGLNWVhh1ng9KrluV6rBm4l>.

⁶ Available at

<https://www.facebook.com/robert.maclean.5811/posts/pfbid02eUdmb1d88WgHL7amwDmBTibESLKcbGymrq6qpr8CXognSoFCqKz5FkpYQea4jTDPl>.

⁷ Available at

<https://www.facebook.com/robert.maclean.5811/posts/pfbid021nZnpbDe5eFBA6kHpNEq3JT1CYK9KZbsKMhpzg1HChbjWo2U4MAnnCvbc9iA1Spkl>.

⁸ Available at

<https://www.facebook.com/robert.maclean.5811/posts/pfbid02rbwvrC7iq34sQBubE2Uz2gz4vYWd7wqwaVHuRM2iNjzptHMoCDs8pobtWQoS5sBLl>.

Maclean from the PBAB. Mayor Valentino stated that he did not support their initial appointment to the PBAB—a viewpoint Councilor Anthony Noone echoed. The Mayor added that he did not “feel that they can provide an unbiased opinion.”⁹

After receiving a second, Mayor Valentino asked the Clerk to call the roll. Councilor Jan Regan interjected, asking if there would be discussion of the motion. Councilor Regan stated that “I think varying opinions on these boards is a good thing,” and noted that “I didn’t know it [removal of two PBAB members] was going to come up.”¹⁰ Councilor Anthony Noone stated that he wanted to remove McCorkle and Maclean “due to their strong anti-police sentiments in social media.”¹¹ Councilor Noone specifically referenced McCorkle’s public statements, including reading a lengthy quotation from McCorkle’s open letter.

Councilor R. Ken Camera asked if this item had been on the agenda, to which the Mayor replied that “appointments to boards and commissions are on the agenda.” Councilor Camera, however, maintained that action against McCorkle and Maclean was a “complete surprise.” Councilor Salamendra began a statement in which she claimed that the City Councilors attempting to remove McCorkle and Maclean were making clear that they would not tolerate criticism of policing.¹² During her remarks, Councilor Noone stated, “please resign.”

1.4 The Deficient Removal Procedure

The agenda for the June 1 City Council meeting indeed only mentions “appointments,” with no mention that removals would also be considered at the meeting. When Councilor Camera noted that he was surprised to hear the question of McCorkle and Maclean’s removal come up, Councilor Noone interjected, “well, just vote no.” Mayor Valentino’s explanation for the surprise agenda item was, “we are the appointing body.” Notably, neither McCorkle nor Maclean were informed before this meeting that the City Council would be considering and voting on their removal from the PBAB at the meeting.

The Mayor’s motion carried by a vote of 5 to 4. According to the meeting’s minutes, “No Public Comment was offered at this time,” even though the meeting’s agenda stated that public comment would be offered to “receiv[e] comments from non-residents on any topics.” Instead, a Councilor made a motion to adjourn, which was approved immediately after the Clerk finished calling the roll for removal. After adjournment, Councilor William J. “Bill” Pealer, Jr. added, “there will be a line at the end of the meeting so I can start licking your boots!”

⁹ July 6, 2022, City Council Meeting Minutes, p. 18.

¹⁰ Unless otherwise noted, quotes are based on our best efforts to transcribe the City’s video recording of the meeting, which is available online at https://youtu.be/UCEW_-07NLc.

¹¹ July 6, 2022, City Council Meeting Minutes, p. 18.

¹² *Id.*

As a result of the City Council’s arbitrary and retaliatory conduct, McCorkle and Maclean lost their positions on the PBAB. In order to protect their rights guaranteed under the New York Constitution, the First Amendment and the Fourteenth Amendment, the City Council must reinstate McCorkle and Maclean to the Police Budget Review Board.

2. The City Council Violated McCorkle’s and Maclean’s First Amendment Rights by Removing Them from the PBAB in Retaliation for Their Speech

The City Council violated McCorkle’s and Maclean’s First Amendment rights when it retaliated against them for their political speech by removing them from the PBAB.

A plaintiff can show that he suffered retaliation because of his speech protected by the First Amendment if (1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech. *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011).

2.1 Both McCorkle’s and Maclean’s Personal Facebook Posts and McCorkle’s Open Letter Are Protected Speech

McCorkle’s personal Facebook posts and open letter published in *The Finger Lakes Times*, along with both men’s Facebook posts concerning police mismanagement and politics, are protected speech for purposes of the First Amendment.

First Amendment retaliation claims by unpaid volunteers such as McCorkle and Maclean proceed under the same analysis as retaliation claims by paid public employee plaintiffs. *See Langton v. Town of Chester*, 168 F. Supp. 3d 597, 604 (S.D.N.Y. 2016). A public employee’s speech is protected against retaliation by the First Amendment if (1) the speech concerned “matters of public concern rather than ... personal interest ...”, *id.*, and (2) the plaintiff did not make the concerning statement as a part of his or her official duties, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

2.1 (a) McCorkle’s and Maclean’s Speech Addressed Matters of Public Concern

Both McCorkle’s and Maclean’s Facebook posts and McCorkle’s open letter addressed issues in the Geneva Police Department, a matter of public concern. The management and conduct of police departments are matters of public concern long recognized by the Second Circuit. *See, e.g., Golodner v. Berliner*, 770 F.3d 196, 199 (2d Cir. 2014); *Novick v. Vill. of Wappingers Falls*, 376 F. Supp. 3d 318, 334 (S.D.N.Y. 2019) (holding that “policies that touch on being able to effectively hire and retain police officers” address matters of public concern).

2.1 (b) McCorkle and Maclean Spoke as Private Citizens and Not as Part of Their Official PBAB Duties

Both men's posts on their personal Facebook accounts, as well as McCorkle's open letter, constitute speech made as private citizens, not as part of their official PBAB duties.

A public employee speaks as a private citizen if (1) the speech is neither part of his job description nor part of the practical reality of his everyday work and (2) the speech is made through "channels available to citizens generally." *Matthews v. City of New York*, 779 F.3d 167, 174-75 (2d Cir. 2015). In *Matthews*, the Second Circuit held that a police officer spoke as a private citizen when he expressed concerns about a quota system to commanders who regularly met with community members and heard civilian complaints. *Id.* at 175-76. Similarly, the Second Circuit has stated in dicta that a letter to the editor is private speech, as it is "a form or channel of discourse available to non-employee citizens." *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 204 (2d Cir. 2010).

McCorkle and Maclean were not acting pursuant to their official duties as members of the PBAB when they posted on Facebook and when McCorkle wrote his open letter. The PBAB makes recommendations about the police budget. Neither the PBAB members' job descriptions, nor the practical reality of the PBAB members' actual work, extends to expressing concerns about the overall management of the Police Department by writing an open letter in a newspaper or posting on social media. Further, both McCorkle's open letter, as suggested by the *Weintraub* court – and both men's Facebook posts – use channels of discourse available to non-employee citizens. Moreover, McCorkle's disclaimer included at the end of his open letter, along with his decision not to mention his PBAB membership in his letter, underscore that he was speaking purely as a private citizen.

2.2 The City Council Took Adverse Action Against McCorkle and Maclean by Removing Them from the PBAB

In the First Amendment retaliation context, conduct toward an employee constitutes "adverse action" if it "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 224-25 (2d Cir. 2006). The lack of a salary does not bar a First Amendment claim because "our system of law recognizes that employment has valuable benefits other than salary." *Cirulli v. Astorino*, No. 14-cv-5459 (NSR), 8 (S.D.N.Y. Jul. 31, 2015). For example, the *Cirulli* court found that an unpaid board position in a healthcare corporation carried intangible benefits such as "the powers and privileges of governing a significant network of hospitals, and/or prestige, status, and respect in the community and the industry," such that deprivation of such benefits could plausibly "deter a person of ordinary firmness from exercising her constitutional right." *Id.* at 4.

Similarly, a position on the PBAB carries intangible benefits such as the power to advise on the budgeting of the Geneva Police Department, the ability to advocate for one's

positions, the opportunity to develop professional relationships, and the potential for increased status and respect in the community.

It follows that removing members from the PBAB in retaliation for their political views, then, would necessarily deter a person of ordinary firmness from exercising his or her First Amendment rights. Therefore, the City Council's removal of McCorkle and Maclean constitutes an adverse action.

2.3 A Causal Connection Exists Between the Removal of McCorkle and Maclean from the PBAB and Their Protected Speech

The causal connection between the City Council's removal of McCorkle and Maclean and their opinions about the Geneva Police Department could not be more explicit. A causal connection can be established (1) by direct evidence of retaliatory animus *or* (2) by circumstantial evidence of temporal proximity that shows "the protected activity was followed by the adverse treatment in employment". *Stajic v. City of New York*, 214 F. Supp. 3d 230, 235 (S.D.N.Y. 2016) (citing *Mandell v. County of Suffolk*, 316 F.3d 368, 383 (2d Cir. 2003)).

Here, the City Council directly demonstrated retaliatory animus when voting to remove McCorkle and Maclean. Councilor Noone read a lengthy quotation from McCorkle's open letter and expressly stated that "I opposed those two individuals [McCorkle and Maclean] from the beginning due to their strong anti-police sentiments in social media, in print and at our meetings."

In addition, the City Council voted to remove McCorkle and Maclean approximately one month after they engaged in protected speech. A one-month gap is short enough to support a causal connection in a First Amendment retaliation claim. *See Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 555 (2d Cir. 2001) (holding that a period as long as four months can support an allegation of a causal connection strong enough to survive summary judgment).

Therefore, the City Council retaliated against McCorkle and Maclean for their protected speech by removing them from the PBAB, thus violating their First Amendment rights.

3. The City Council's Procedurally Deficient Removal Raises Due Process Concerns

By removing McCorkle and Maclean from the PBAB without following the proper procedures, the City Council's actions also implicate the Fourteenth Amendment's Due Process Clause.

When it removed McCorkle and Maclean from the PBAB, the City Council also violated its own Rules of Procedure, the PBAB Bylaws, and the City Charter. The Council cannot deprive persons of their property or liberty interests without due process of law. *See, e.g.,*

Bd. of Regents v. Roth, 408 U.S. 564, 571-71 (1972); *Perry v. Sindermann*, 408 U.S. 593, 603 (1972); *Patterson v. City of Utica*, 370 F.3d 322, 335 (2d Cir. 2004) (holding that stigmatizing statements made during and after removal violate liberty interests protected by the Due Process Clause of the Fourteenth Amendment).

3.1 The City Council Improperly Removed McCorkle and Maclean in Violation of the PBAB By-Laws It Adopted

The City Charter allows the appointing authority to “remove any officer or employee appointed by him or her at any time *except as otherwise provided by law* or this Charter *and in accordance with all provisions of law applicable thereto.*” § 2.9 (emphasis added). Here, however, the City Council excluded the PBAB from this general removal power when it resolved to adopt the PBAB By-Laws—thus “provid[ing] by law” a specific, different removal process. *Id.*¹³

3.3 The City Council Did Not Follow the Removal Process Set Forth in the PBAB By-Laws

The process “provided by law” in the PBAB By-Laws dictates that the PBAB initiates removal of its members by a majority vote of the PBAB. After that internal PBAB vote, the City Council can approve the removal with its own majority vote. “A PBAB member may be recommended for removal from the PBAB upon a majority vote of the PBAB Removal shall be effective upon City Council approval.”¹⁴

We are unaware of any vote by the PBAB itself to remove McCorkle or Maclean. Rather, we understand that the impetus to remove them from the PBAB came from the City Council, not the PBAB. Thus, the City Council appears to have acted outside of its authority based on its own local law.

¹³ Resolutions qualify as law when “adopted pursuant to [the Municipal Home Rule Law] or to other authorization of a state statute or charter by the legislative body of a local government.” N.Y. Mun. Home Rule Law § 2(9). When no local general provision requires “all powers to be implemented by ordinance, but some parts of the statute expressly require an ordinance, then there is an implication that other powers may be implemented without an ordinance”—with, for instance, a resolution.” *Jewett v. Luau-Nyack Corp.*, 31 N.Y.2d 298, 305 (1972). For its part, the Code of the City of Geneva includes in its local laws both ordinances and resolutions. *See, e.g.*, §§ 1-1, 1-2.

¹⁴ Separately, PBAB members “who miss more than one meeting in a calendar year for non-emergency reasons shall be recommended for removal.” We are aware of no facts suggesting this separate provision is at issue here.

3.4 The City Council Improperly Moved to Reconsider—and Ultimately Rescind—McCorkle’s and Maclean’s Appointments in Violation of Its Rules of Procedure

The City Council Rules of Procedure allow for a Motion to Reconsider prior legislative action. R. 4(e). A “non-prevailing councilor” may move to reconsider such actions provided that “one year has passed since the action was taken.” *Id.* In the alternative, the moving party may bypass the one-year waiting period by “provid[ing] substantial new information.” *Id.* The presiding official determines the substantiality of new information, but that decision is appealable to the entire Council. *Id.*

Here, the City Council did not have the authority to remove the PBAB members with its Motion to Reconsider on June 1, 2022.

First, the Mayor did not wait a full year from the initial legislative action, as required by the Council’s Rules of Procedure. The City Council appointed McCorkle and Maclean on July 7, 2021, and he moved to reconsider on June 1, 2022. The Mayor could not move to do so for another 36 days.¹⁵

Second, to our best knowledge, the Mayor failed to provide any “substantial new information” to bypass this mandatory one-year waiting period. Rather, the Mayor merely reiterated that he had not originally supported McCorkle’s and Maclean’s appointments, notably basing his opposition, yet again, on their protected speech.¹⁶

Without substantial new information, and prior to passage of a year since McCorkle’s and Maclean’s appointments to the PBAB, the Mayor was not entitled to move to reconsider their appointment.

The City Council’s Rules of Procedure also hold that “a question may not be called to interrupt or cut off a particular speaker” and that “neither the moving party nor the seconding party may call for the question.” R. 4(f). Mayor Valentino was the moving party on the question of removal and attempted to call the question twice – first without

¹⁵ We understand that City Councilor Jan Regan requested an opinion on the legality of their removal from City Attorney Emil Bove, reportedly on this basis: “Clearly, a year had not passed since Mayor Valentino cast his non-prevailing vote.” Steve Buchiere, *Geneva City Councilor Jan Regan criticizes removal of Police Budget Review Board members*, FINGER LAKE TIMES, July 6, 2022, https://www.fltimes.com/news/geneva-city-councilor-jan-regan-criticizes-removal-of-police-budget-advisory-board-members/article_8615ee17-305e-517d-b181-7e671951f2cf.html.

¹⁶ Councilor Jan Regan also reportedly noted as much in her letter to City Attorney Emil Bove. Steve Buchiere, *Geneva City Councilor Jan Regan criticizes removal of Police Budget Review Board members*, FINGER LAKE TIMES, July 6, 2022, https://www.fltimes.com/news/geneva-city-councilor-jan-regan-criticizes-removal-of-police-budget-advisory-board-members/article_8615ee17-305e-517d-b181-7e671951f2cf.html (“The mayor provided no ‘substantial new information for consideration,’ instead offering that he had not been supportive of the appointments from the start due to what he considered a bias against the police.”).

discussion, and again after Councilor Salamendra's remarks. Immediately after Councilor Salamendra finished speaking, the Mayor said, "Clerk, please call the roll." There was no vote to call the question, nor an opportunity for anyone else to speak. Despite this, the Clerk called the roll after the Mayor's second procedurally deficient attempt to call the question. Thus, the Council's removal of McCorkle and Maclean was defective under its own Rules of Procedure.

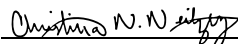
4. McCorkle and Maclean Must Be Reinstated to the Board as Soon as Practicable

For all of these reasons, we request that the Geneva City Council immediately reinstate James McCorkle and Robert Maclean to the Police Budget Review Board. Please be advised that both Mr. McCorkle and Mr. Maclean reserve all their rights, both legal and equitable, with respect to this matter.

We invite the opportunity to discuss this matter further. Please advise by Monday, October 17, 2022 when Mr. McCorkle and Maclean can expect to be reinstated to the PBAB. Should you have any questions or concerns for discussion, please advise us by October 17 of your availability for a conference to discuss further.

Sincerely,

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¹⁷ Clinic students James Pezzullo, Yifei Yang, and Patrick George drafted portions of this letter. Cornell Law School First Amendment Clinic is housed within Cornell Law School and Cornell University. Nothing in this letter should be construed to represent the views of these institutions, if any.