IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY, Plaintiff, v. SCHOOL BOARD OF RSU22; HEATH MILLER, in his personal and official capacities, Defendants.	Case No. _____ **EMERGENCY EX-PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff Shawn McBreairty files this motion on an *ex-parte emergency basis* for a temporary restraining order to enjoin Defendants from banning Plaintiff from RSU22 property for purposes of attending any RSU22 school-related meeting or function in-person, or participating in any RSU22 school-related meeting or function held electronically via video or audio, and enforcing the unlawful Criminal Trespass Notice issued against Plaintiff.[1]

MEMORANDUM OF LAW

1.0 INTRODUCTION

Plaintiff Shawn McBreairty ("McBreairty") is an educational advocate and journalist. Defendant Chair of the RSU22 School Board Heath Miller and Defendant RSU22 School Board, collectively ("Defendants"), have barred McBreairty from entering RSU22 government run school property until December 31, 2022. This prevents McBreairty from exercising his right to petition the government, and is a direct violation of his First Amendment and due process rights.

[1] While this motion has been filed ex-parte, it has been served upon counsel for the Defendant, School Board of RSU22, by E-mail. Given that the next board meeting is July 20, 2022, Plaintiff needs emergency relief prior to that date. Should the Court not have time for a hearing before that date, the Court should issue the requested relief ex-parte until such a time as a hearing can be held.

Defendants' justification for unconstitutionally barring McBreairty from entering RSU22 government run property and attending RSU22 school board meetings, on its surface, purports to be "disruptive, obscene, and vulgar language." But this is not true. The truth is that Defendants are attempting to silence McBreairty because he challenges them and disagrees with them, and they wish to govern without criticism. It is not disputed that McBreairty has criticized these public officials. As Americans, we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[2]

McBreairty has spoken at RSU22 School Board meetings regarding his concerns about age-inappropriate materials available in the RSU22 school system. McBreairty has also filed documents petitioning RSU22 seeking review of age-inappropriate materials.

There are no administrative processes for McBreairty to appeal the unilateral decision made by Defendants barring him from RSU22 government run property.

2.0 FACTS

2.1 RSU22 School Board Policies

Pursuant to RSU22 School Board Policy BEDH ("Public Participation Policy") – Public Participating at School Board Meetings – individuals are allowed to comment during school board meetings. *See* **Exhibit A**. Each individual who wishes to make public comment is limited to a maximum of three minutes when there is a large audience. Other than the eight guidelines that speakers are asked to observe, there are no restrictions on what can be discussed during this three-

[2] Justices Kagan, Thomas, and Gorsuch have all raised questions as to whether *New York Times v. Sullivan* should be overturned. However, not one of them has questioned this statement about this profound national commitment. Plaintiff trusts that this Honorable Court does not question it either.

minute period. It is a completely open public forum. However, the Public Participation Policy permits the Chair to "interrupt, or terminate an individual's statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant."

Other than that, this is a completely open public forum. Should a speaker wish to do so, there is no restriction on them using their three minutes to recite the Declaration of Independence, the Lord's Prayer, or for that matter, to sing Rick Astley's "Never Gonna Give You Up."[3]

2.2 The Intimidation Letter

On April 8, 2022, Defendants, through counsel, sent an intimidation letter ("Intimidation Letter") to McBreairty. **Exhibit B**. The Intimidation Letter states, in relevant part, the following:

> **Speakers are expected to observe common rules of etiquette.** The Chair may interrupt or terminate an individual's statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant. The Chair can also order a person who disrupts a meeting to leave, and may seek assistance of law enforcement to restore order.
>
> **Over the past several months, the Chair has notified you on a number of occasions that you are in violation of these standards and asked you to stop your presentation.** Yet, you persisted with your comments a number of times. Such behavior will not be tolerated in the future.

The Intimidation Letter provides no specific examples of how McBreairty violated appropriate etiquette at the RSU22 School Board meetings. In essence, the Intimidation Letter stated that McBreairty must obey the whims of Defendant Miller or face repercussions including the loss of First Amendment protected freedoms.

2.3 RSU22 School Board Meeting – April 27, 2022

On April 27, 2022, McBreairty made public comments at the RSU22 School Board meeting. *See* Compl. at ¶¶ 36. During his allotted 3-minutes, McBreairty played an audio recording of a conversation between Defendant Miller and himself. *Id.*

[3] The speaker would need to end 32 seconds early if he were to faithfully recite it, including the introductory instrumentals and final repetitive refrains, but it could be done a cappella in three minutes. - *See* https://www.youtube.com/watch?v=dQw4w9WgXcQ

As soon as the audio recording began, Defendant Miller stated that "playing of a video or recording is not permitted per our policy." *Id.* at ¶ 38. The policy has no such rule.

In the recording, McBreairty can be heard asking Defendant Miller, "are you okay with hardcore anal books that are on her [teacher] list … hardcore anal sex books." *Id* at ¶ 36.

Defendant Miller spoke over the audio recording, stating "this is vulgarity, it is not part of our policy." He repeated, "you are talking about vulgarity that is not part of our policy." *Id.* Defendant Miller continued, "I've asked you to sit down, if you don't sit down, I am going to ask you to leave the premises." *Id.* The RSU22 School Board then took a recess and asked Plaintiff to leave the premises. McBreairty complied under protest. *Id.*

On the same day, prior to McBreairty's public comment, Katherine Collins approached the podium and made public comment to the RSU22 School Board regarding her concerns with the hyper-sexualization of students in the RSU22 government run school. *Id.* at ¶¶ 34-35. During her public comment, Ms. Collins used the word "sodomy." *Id.* There was no public reprimand against Ms. Collins, and she was not stopped from speaking during her allotted three minutes for public comment. *Id.* Ms. Collins did not receive special treatment – McBreairty was singled out, because Miller and his colleagues do not wish to be questioned.

2.4 The RSU22 School Ban Letter

On May 4, 2022, Defendants, through counsel, sent a letter ("School Ban Letter") to McBreairty informing him that he was "temporarily prohibited from entering RSU 22 property for purposes of attending any RSU 22 school-related meeting or function in-person, or participating in any RSU 22 school-related meeting or function held electronically via video or audio ... until December 31, 2022." **Exhibit C**.

The School Ban Letter further states the reason McBreairty is barred from RSU22 is "blatant and repeated failure to comply with reasonable RSU 22 policies regarding meeting attendance." *Id.* According to the letter, the audio recording McBreairty played contained "patently **obscene** and vulgar language" (emphasis added) and Defendant Miller "exercised his discretion" to call McBreairty "out of order and ask him to stop the presentation and take a seat." *Id.* Further, the School Ban letter continues, "[t]his prohibition is not based on any viewpoint expressed by McBreairty; rather, it is based on his use of truly obscene speech and his willful violation of School Board policies over an extended period of time." *Id.* Of course, the letter can say what it wants, but it is ennobled with as much candor as a police officer beating a prone suspect while screaming "stop resisting" when the cameras start rolling.

2.5 Criminal Trespass Notice

On June 13, 2022, McBreairty met with Director of Public Safety Christian D. Bailey and the Town Manager Paula Scott to discuss the School Ban Letter that he received from the Defendants barring him from RSU22. Compl. at ¶ 43; Declaration of Shawn McBreairty ("McBreairty Decl.") ¶ 2. McBreairty notified Director Bailey and Town Manager Scott that he believed that the ban violated his right to due process and his First Amendment rights, and that he intended to attend the next RSU22 School Board meeting on June 15, 2022. *Id.* His purpose for doing so was to give the government an opportunity to reconsider its position.

On June 15, 2022, McBreairty attempted to attend the RSU22 School Board meeting. *Id.* at ¶ 44. Upon arrival, McBreairty was prevented from attending the RSU22 School Board meeting, and he was issued a Criminal Trespass Notice by the Hampden Police Department informing him that he was forbidden to enter "All RSU22 buildings and grounds." *See* **Exhibit D**.

On July 7, 2022 RSU22 tripled-down and issued a second Criminal Trespass Notice stating that "Mr. McBreairty is prohibited from entering RSU22 property for the purpose of attending any RSU22 School related meeting or functions in person or participating in any RSU22 function held electronically on video or audio." *See* **Exhibit E.**

2.6 Other School Board Meetings, Meetings with School Administrators, Filing Grievances, and Filing FOAA Requests

At the RSU22 School Board meeting on October 20, 2021, McBreairty quoted passages from two books available in RSU22 government run school libraries during his 3-minute allotted time for public comment. *See* Compl. at ¶ ¶ 5-9. McBreairty first read the following passage from a book titled *It's Perfectly Normal* and informed the RSU22 School Board that the book contains illustrations of sexual positions. Quoting from the text, he read: "*Masturbation is perfectly normal. A girl often rubs her clitoris. The boy his penis. A female's vagina becomes moist and slippery. The male's penis becomes erect and the moisture from the vagina makes it easier to go in*." *Id.* at ¶ 8. In a second book titled *The Blue Eye*, a story that includes a graphic description of a father raping his daughter, McBreairty quoted the following passage from the book: "*A bolt of desire ran down his genitals and softening the lips of his anus. He wanted to fuck her tenderly. The tightness of her vagina was more than he could bear. Removing himself from her was so painful to him that he snatched his genitals out of the dry harbor of her vagina*." *Id.* at ¶ 9. McBreairty was not stopped from speaking about the books available in the school libraries and quoting from the books.

On Nov. 18, 2021, McBreairty appeared before the RSU22 School Board to make public comment. *Id.* at ¶ 11. This time he directly asked Defendant Miller to resign from his position as Chair of the RSU22 School Board for his failure to address the vulgar materials available in the RSU22 government run school libraries. Then everything changed. Coincidence? *We think not.*

December 15, 2021, McBreairty appeared before the RSU22 School Board to make public comment. *Id.* at ¶ 15. This time McBreairty presented a book he believed would be a good fit for the RSU22 school library and began to read from it. Defendant Miller abruptly stopped him stating "*This is an activity … reading from a book is an activity …*" and did not allow Plaintiff to continue reading from the book during his 3-minute allotted time for public comment. *Id.* at ¶16. McBreairty complied and stopped reading, despite there being no rule in the Public Participation Policy that prohibits individuals from reading passages from books. *Id.* Notably, reading vulgar passages from approved books was permitted, but reading from a book McBreairty found to be "wholesome" was stopped with no stated valid reason. However, let us remember that this was the first meeting after McBreairty called for Miller to step down. This was no coincidence. Miller is now playing the part of the despot in this story. He will continue to do so without this Court's intervention.

On March 16, 2022, Ms. Collins appeared before the RSU22 School Board to make public comment. *Id.* at ¶ 20. Ms. Collins raised her concern about the hyper-sexualization of students in the RSU22 government run school system and quoted from a book. *Id.* She quoted from a book that is on an RSU22 teacher recommend book list titled *All Boys Aren't Blue*, quoting the following passage from the book:

> *You told me to take off my pajama pants which I did. Then you took off your shorts followed by your boxers. Then you stood in front of me fully erect and said taste it. At first, I laughed and refused but then you said come on Matt taste it. This is what boys like to do when they like each other. Finally, I listened to you. Then you got down on your knees and told me to close my eyes. That's when you began oral sex on me as well.*

Ms. Collins was not interrupted or otherwise prevented or stopped from speaking during her allotted three minutes for public comment. *Id.* at ¶ 21.

In addition to his public comments at RSU22 School Board meetings, McBreairty has given nationally televised interviews about age-inappropriate pornographic books available in the RSU22 government run school system, filed FOAA requests, met with school principals, and filed

formal grievances consistent with RSU22 School Board policy. *Id.* at ¶¶ 10, 14, 19, & 28-33. All of this has certainly irked the RSU22 Board and Defendant Miller – and they are retaliating for it.

3.0 LEGAL STANDARD

Rule 65 of the Federal Rules of Civil Procedure provides for temporary restraining orders and preliminary injunctions in federal courts upon notice to the adverse party. *See* Fed. R. Civ. P. 65(a) and (b). A temporary restraining order or preliminary injunction must (1) state the reasons why it issued; (2) state its specific terms; and (3) describe in reasonable detail the act or acts restrained or required. Fed. R. Civ. P. 65(d). The principal function of a temporary restraining order or preliminary injunction is to maintain the status quo. *Dist. 4 Lodge of the Int'l Ass'n of Machinists & Aero. Workers Local Lodge 207 v. Raimondo*, No. 1:21-cv-00275-LEW, 2021 U.S. Dist. LEXIS 199440, at *38 (D. Me. Oct. 16, 2021) (citation omitted).

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 if the injunction did not issue; (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).

4.0 LEGAL ARGUMENT

4.1 Plaintiff Has Standing

Two types of injuries provide standing without the challenger having undergone criminal prosecution. First, when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Second, when a plaintiff "is chilled from exercising her right to free expression or forgoes expression in order to

avoid enforcement consequences. *Id.* at 57; (collecting cases).

Defendants sent the School Ban Letter to McBreairty, through counsel, that informed him that he is banned from attending RSU22 school related meetings and functions, whether physically or electronically, until December 31, 2022. *See* **Exhibit C**. If he participates in public life, he is on notice that he will go to jail. What greater harm is there than that in a free society?

On June 13, 2022, McBreairty met with Director Bailey and Town Manager Scott to inquire about the RSU22 school ban and notify them of his intention to attend the June 15, 2022 RSU22 School Board meeting. *See* Compl. at ¶ 43. On June 15, 2022, McBreairty attempted to attend the RSU22 School Board meeting but was prohibited. *Id.* at ¶ 44. At the insistence of Defendants, the Hampden Police Department issued to McBreairty a Criminal Trespass Notice that forbids him from entering all RSU22 buildings and grounds, which Defendants intend to enforce until December 31, 2022. *Id.* They then issued another such notice on July 7, 2022 to ensure that McBreairty knows that he will indeed see the inside of a jail cell if he petitions the government or participates in public life before that.

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

Defendants violated McBreairty's First Amendment rights by threatening him with criminal prosecution if he engaged in conduct protected under the First Amendment of the U.S Constitution and Article I, Sections 4 and 15 of the Maine Constitution. McBreairty was deprived of the ability to enter and participate in a public forum, and no Due Process was afforded.

4.2.1 Free Speech Claim

Government actions that infringe upon free speech in a public forum are evaluated under strict scrutiny if they are content-based. They are evaluated under an intermediate scrutiny if they are facially neutral time, place, and manner restrictions. Content-neutral time, place, and manner

restrictions are subject to intermediate scrutiny, meaning they must be "narrowly tailored to serve and significant government interest, and … leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

A limited public forum exists "where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Hotel Emples. & Rest. Emples Union, Local 100 v. City of N.Y. Dep't of Parks and Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) (internal quotation marks and citation omitted). In such public forums, regulation of the designated subject matter of the forum receives strict scrutiny, but regulation of matters outside of that forum's purpose must only be "viewpoint neutral and reasonable." *Id. at 546*. Legislative meetings that permit public comment are typically considered limited public forums. *See, e.g.*, *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-76 (1976)). However, when there are printed rules regarding the public forum, and they contain no limitations at all on the subject, it is more properly considered to be a full public forum, not a limited public forum. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *see also Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985). In this case, the rules of the forum do not even limit comment to school business, but simply permit anything at all to be discussed during the speaker's three minutes.

Prohibiting someone from *continuing to testify* at a public meeting because they have disrupted or otherwise interrupted the meeting is a "[r]easonable time, place and manner restriction[] on speech in limited public fora." *See Devine v. Village of Port Jefferson*, 849 F. Supp. 185, 190 (E.D.N.Y. 1994) (upholding the expulsion of an individual from an open public meeting for shouting, drowning out other members of the community from speaking and interrupting members of the Board). Such exclusions are only constitutional if they are content-neutral, serve

a significant government interest, and leave open alternative channels for expression. *Id.* However, McBreairty's conduct did not rise to this level, and even Mr. Devine did not receive a full expulsion from all public life or future meetings because of his outbursts.

For time, place, and manner restrictions to be valid they must not delegate overly broad discretion to a government official, must be narrowly tailored to serve a substantial governmental interest, and must leave open ample alternatives for communication. *See Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 182 (1st Cir. 1996). In order for a time, place, and manner restriction to be narrowly tailored it must further a substantial government interest. *See Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974).

The RSU22 School Board Public Participation Policy provides that individuals making public comment "are expected to follow rules of common etiquette, including refraining from using vulgar and/or abusive language, yelling, arguing or making defamatory comments." The Public Participation Policy, on its face, delegates overly broad discretion to the Chair of the RSU22 School Board. *Cohen v. California*, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric."). In the School Ban Letter, the Defendants state that "patently obscene and vulgar language" is the reason McBreairty is barred from RSU22. *See* **Exhibit C**. Meanwhile, the pattern and practice of the Board meetings was to permit such conduct, and to even permit far more vulgar discussion. McBreairty was never even warned, much less given due process. *His only real violation was lèse majesté against Miller.*

McBreairty's speech was not obscene. To be so, it must meet the Miller test. *See Miller v. California*, 413 U.S. 15 (1973). It is hardly worth even this much analysis to point out the absurd claim that his speech could have met this test. If Defendants wish to stick with this claim, they are

invited to bring it before this Court. It should be met with incredulousness by anyone familiar with *Miller*, what that case says, or what it means.

McBreairty was not shouting, drowning out anyone else from speaking, nor interrupting the School Board. Simply put, the government used the pretext that his language was vulgar – when it was certainly more mild than that which had been permitted before – and which was quoted from language the government had deemed acceptable for *children*.

Any argument that Defendants sought to shield the public, or themselves, from vulgar language is a house of cards resting on quicksand during a hurricane. Defendants seek to shield their fragile adult ears from language more tame than they otherwise make available to children. How do Defendants propose that McBreairty draw attention to the hypersexualized books available at RSU22 without discussing the subject-matter and quoting from books which the RSU22 government run school system endorsed by making them readily available to students?

At the heart of the issue is Defendant Miller and the RSU22 School Board do not like McBreairty, his opinions, his content, or his viewpoint. Defendants prefer that McBreairty be exiled from the RSU22 School Board meetings where he cannot draw attention to RSU22 evangelizing pornography to young and impressionable students behind their parents' backs. Therefore, Defendants banned McBreairty from RSU22 because they do not approve of his speech, and they did so unconstitutionally on the basis of content and viewpoint discrimination.

Moreover, Defendant Miller's reelection bid may have otherwise been thwarted had McBreairty been permitted to play the audio recording of Defendant Miller defending child pornography during the April 27, 2022 School Board meeting, informing voters that not only is Defendant Miller aware that RSU22 makes pornography available to students, but he approves of it. Compl. at ¶¶ 36-40. Proactively, Defendant Miller ensured that McBreairty would be banned

from RSU22 School Board meetings prior to the next meeting in May 2022 and unable to inject political opinions in opposition to Defendant Miller's upcoming reelection bid on June 14, 2022.

Assuming *arguendo*, Defendants ban of McBreairty from RSU22 was a reasonable time, place, and manner restriction, then the burden is on Defendant's to provide "concrete evidence" that the restriction furthers the government's claimed substantial interest. *Kuba*, 387 F.3d at 858 (citing *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002)); *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 20000) (holding that burden is on the state to prove restriction is necessary); *Carreras v. City of Anaheim*, 768 F.2d 1039, 1046 (9th Cir. 1985) (holding that mere inconvenience, annoyance, and loss of revenue are not sufficient justifications to warrant restriction). Defendants were annoyed that McBreairty opposed the government's authority and chosen orthodoxy. There is no substantial interest in the government prohibiting an adult member of the public from discussing a subject-matter that the government makes available to children.

Even if there was a substantial government interest in limiting McBreairty's speech, there is no justification for the extent to which Defendants restricted it. An alternative form of communication is not "ample" if it does not allow the party to reach its desired audience. *See Globe Newspaper Co.*, 100 F.3d at 192.

Based on the arbitrary ban, McBreairty is barred from attending all school-related meetings and functions in-person or electronically until December 31, 2022 for "disruptive, obscene, and vulgar behavior." **Exhibit C**. This ban is unduly restrictive and does not provide alternative avenues of communication. Not only is McBreairty prohibited from attending RSU22 School Board meetings, but he can not meet with school officials or advocate on school grounds. This ban also prohibits McBreairty from attending football games (at his alma mater) or any other community related events held on RSU22 property. There is no governmental interest in

prohibiting McBreairty from attending school plays or high school football games. It is Miller and his band of offended government apparatchiks over-wielding their petty powers, in a petty way.

4.2.1.1 The Government's Actions Constitute a Prior Restraint

Our Constitution rarely, if ever, tolerates 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 Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87, 91 n.7 (Tex. 2014) (citing Sobchak, W., *The Big Lebowski*, 1998). Prior restraints "bear a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "[P]rior restraints require an unusually heavy justification under the First Amendment." *Commonwealth v. Barnes*, 461 Mass. 644, 652 (2012) (quotation marks omitted). There is a "heavy presumption" against their constitutional validity. *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986).

Here, the Defendants decision to bar McBreairty from RSU22 is a prior restraint. Based on their disapproval of his speech at prior RSU22 School Board meetings, Defendants seek to give McBreairty a "time out" until December 31, 2022, barring him from attending or speaking at RSU22 School Board meetings. McBreairty was not threatening to anyone nor was he abusive. McBreairty was discussing age-inappropriate pornographic material available to children in the RSU22 government run school system. McBreairty did not cross the threshold into obscenity. **Exhibit C**. ("This prohibition … is based on his use of **truly obscene speech** and his willful violation of School Board policies over an extended period of time.").

4.2.2 McBreairty Deserved Due Process – It Was Denied

Due process requires reasonable notice of prohibited conduct. 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 exactly which conduct is prohibited, or, if the possibility for arbitrary enforcement is present. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Government 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").

Morales provides a useful guidepost for when enforcement of a statute or regulation may be unconstitutionally vague:

> If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.

527 U.S. at 58-59.

Defendants' conduct here, barring McBreairty from RSU22 until December 31, 2022, is arbitrary and capricious. It is apparent from the circumstances that Defendants engaged in selective enforcement and retaliation. McBreairty was not the only concerned parent attending RSU22

School Board meetings. McBreairty was not the only concerned parent quoting from books and discussing the pornography-filled books available in the RSU22 government run school system. He was targeted for engaging First Amendment protected activity. He was afforded no due process rights at all before Defendants deprived him of his right to attend to any aspect of public life that touched RSU22. McBreairty received a vaguely worded Intimidation Letter that generally stated Defendants were upset and disapproved of his conduct. **Exhibit B**. Then, on May 4, 2022, Defendants banned McBreairty RSU22 until December 31, 2022. **Exhibit C**. There is no process to appeal or contest Defendants' arbitrary and capricious decision to bar McBreairty from RSU22 school grounds. On June 15, 2022, when McBreairty attempted to attend an RSU22 School Board meeting, he was issued a Criminal Trespass Notice explicitly stated he was banned from "All RSU22 Buildings & Grounds." **Exhibit D**. On July 7, 2022, On July 7, 2022, McBreairty was issued a second Criminal Trespass Notice from Hampden Police Department that tracks the language of the School Ban Letter. *See* **Exhibit E**. Neither Criminal Trespass Notice provides specifics as to what he did wrong, nor a hearing, nor any opportunity for review.

4.2.3 Equal Protection Claims

The Equal Protection Clause provides that no state shall deny to any person within its jurisdiction equal protection of the laws. *See* U.S. Const. *amend. XIV, § 1*. To bring a successful equal protection claim, a plaintiff must show differential treatment from a similarly situated class. *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 439 (1985) (citation omitted). The test applied depends on the type of classification and the conduct being regulated. If a regulation burdens "fundamental rights" such as free speech or employs "suspect" classifications such as race, the regulation is subject to

strict scrutiny. *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003). If fundamental rights or suspect classifications are not implicated, then the regulation need only satisfy rational basis review. *Hodel v. Ind.*, 452 U.S. 314, 331-32 (1981).

The Supreme Court has at times fused together the analysis under the First and Fourteenth Amendments when dealing with content-based restrictions on speech. *See R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992) (stating "[t]his Court ... has occasionally fused the First Amendment into the Equal Protection Clause"); *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (stating "[u]nder either a free-speech or equal-protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975) (holding that under either the First Amendment or the Equal Protection Clause, there must be "clear reasons" for content-based restrictions).

McBreairty anticipates that Defendants will argue that barring him from RSU22 School Board meetings was necessary due to his inappropriate – constitutionally protected – statements "over an extended period of time." **Exhibit C**. Ms. Collins also attended RSU22 School Board meetings and raised similar concerns about the pornographic material available at RSU22.

On April 27, 2022, during an RSU22 School Board meeting, Ms. Collins made public comment and used the word "sodomy." Compl. at ¶ 34. This occurred during the same meeting where Defendant Miller stopped McBreairty from speaking after he began playing a recording that referenced "hardcore anal sex books that are on her [teacher] list … I mean hardcore anal sex books," Compl. at ¶ 36. Ms. Collins was not prevented from finishing her allotted 3-minutes of public comment, but McBreairty was stopped from speaking and dismissed from RSU22 school property. On March 16, 2022, Ms. Collins quoted from the book *All Boys Aren't Blue* during her public comment, which includes the following language *"[t]hen you got down on your knees and*

told me to close my eyes. That's when you began oral sex on me as well." Compl. at ¶ 20. Again, Ms. Collins was not stopped when quoting from a book. Meanwhile, on several occasions, Defendant Miller stopped McBreairty when he was quoting from books or playing audio recordings during his public comment. *See* Compl. at ¶¶ 15-16, 36-40.

4.3 There is Irreparable Injury and the Injury Will Continue if Not Enjoined

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). Thus, 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*.

Defendants deprived McBreairty of his First Amendment rights on several occasions, including on April 27, 2022 by not allowing McBreairty his allotted 3-minutes of comment and ordering him to leave the RSU22 School Board meeting. Compl. at ¶¶ 36-40. Defendants further deprived McBreairty of his First Amendment rights by sending the Ban Letter, issuing the Criminal Trespass Notice, and banning McBreairty from RSU22 school grounds. Compl. at ¶¶ 41-44.

Defendant's decision to enforce the Criminal Trespass Notice that prohibits McBreairty from all RSU22 buildings and grounds is an ongoing deprivation of McBreairty's constitutional rights. McBreairty respectfully requests that the Court issue injunctive relief to restore the status quo that existed before the issuance of Defendants' RSU22 school ban against McBreairty.

4.4 The Balance of Equities Tips in Plaintiff's Favor

When the government restricts First Amendment rights, the balance of hardships weighs in a plaintiff's favor. *See Firecross Ministries v. Municipality of Ponce*, 204 F. supp. 2d 244, 251

(D.P.R. 2002) (holding that "insofar as hardship goes, the balance weighs heavily against Defendants, since they have effectively silenced Plaintiffs' constitutionally protected speech").

Here, the balance of equities tips in McBreairty's favor. Failing to grant the requested injunction will continue to deprive McBreairty of his constitutional rights pursuant to the First Amendment of the Constitution and Article I Sections 4 and 15 of the Maine Constitution. Defendants will suffer no harm if McBreairty is granted the requested injunctive relief. Rather, an injunction will merely restore the rights guaranteed by the U.S. and Maine Constitutions. A temporary restraining order, to be converted into a preliminary injunction, must issue.

4.5 Injunctive Relief is in the Public Interest

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) (citation omitted). Moreover, the unconstitutional actions here will harm nonparties to the case because it will limit or infringe upon their rights as well. *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). Miller and RSU22 are already power-drunk. If they are not sobered up with an injunction, they will become Peter-O'Toole-level-schnockered-out-of-their-minds.

4.6 At Most, a Minimal Bond Should Be Required

Rule 65 provides that a court cannot enter injunctive relief unless the moving party "gives security in the amount that the court considers proper to pay the costs and damages sustained by

any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). In other words, a bond should only be required if the enjoined party will suffer any harm from the issuance of the injunction. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002).

Defendants will suffer no damages if the Court issues the requested injunction, which will simply allow McBreairty to attend RSU22 School Board meetings, continue to petition RSU22 school staff, file FOAA requests, and otherwise enter RSU22 school buildings and grounds, activity that is necessary to his ability to exercise his constitutional rights. All that the injunction will do is repair the *status quo* and allow McBreairty to exercise his constitutional rights. For this reason, McBreairty requests that the injunction issue with no bond required. If a bond is required, McBreairty requests that it be a token of $1.

5.0 CONCLUSION

The Court should enter a preliminary injunction against the Defendants from enforcing a ban against McBreairty from entering RSU22 buildings and grounds, permitting him to attend the meeting on July 20, 2022 and each monthly meeting thereafter, and voiding the re-election of Defendant Miller and requiring a re-vote after a public meeting in which all members of the public, including McBreairty, are afforded their rights to free speech and to petition the government.

REQUEST FOR ORAL ARGUMENT

Plaintiff believes that oral argument may assist the court. This matter involved significant Constitutional issues that oral argument will help to address. It is respectfully requested that if there is oral argument, that it be held prior to 18 July, as lead counsel is bound for a wedding in Sardinia on 19 July, and the requested relief is imperative by 20 July. Counsel is available all days leading up to, and including, 18 July 2022.

Dated: July 8, 2022.

Respectfully Submitted,

/s/ *Brett D. Baber*
Brett D. Baber, Bar No. 3143
Lanham Blackwell & Baber, PA
133 Broadway
Bangor, ME 04401
Tel: (207) 942-2898
Email: bbaber@lanhamblackwell.com

Marc J. Randazza (*pro hac vice* forthcoming)
Lead Counsel
Robert J. Morris II (*pro hac vice* forthcoming)
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: (702) 420-2001
Email: ecf@randazza.com

Attorneys for Plaintiff,
Shawn McBreairty