UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

SCHOOL BOARD OF RSU22; HEATH MILLER, in his personal and official capacities,

Defendants.

Civil Action No. 1:22-cv-00206-NT

DEFENDANTS' OPPOSITION TO EMERGENCY EX-PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COME Defendants School Board of RSU22 and Heath Miller, in his personal and official capacities (collectively, "Defendants"), through their attorneys, Rudman Winchell, and hereby oppose Plaintiff Shawn McBreairty's ("Plaintiff") Emergency Ex-Parte Motion for a Temporary Restraining Order and Preliminary Injunction (the "Motion").

INTRODUCTION

Pursuant to Maine law, Regional School Unit 22 ("RSU 22") has adopted a public participation policy governing public comment at meetings of its School Board. After repeated violations of RSU 22's public participation policy, and after being warned that further violations would result in appropriate action, Plaintiff has been temporarily restricted from attending school meetings held on RSU 22 property or by video or audio means. Plaintiff attempts to portray his temporary exclusion as retaliatory, or based on disagreement with his views, in violation of his constitutional rights. The record shows, however, that Plaintiff has routinely been permitted to freely voice his opinions both at School Board meetings and otherwise, provided he follows the

rules applicable to all speakers. Because Plaintiff has not made the extraordinary showing required to justify preliminary injunctive relief, his Motion should be denied.

BACKGROUND

In accordance with State law and RSU 22 Policies, School Board meetings include a limited public comment period. (Miller Dec. ¶ 6.) The public is limited to three minutes of comments, subject to RSU Policy BEDH. (Miller Dec. ¶ 7.) During this public comment period, the School Board typically employs the assistance of a person sitting near the podium to keep time using a time-keeping device which emits a beep at the expiration of the three minutes that is audible to the speaker and the School Board. (Miller Dec. ¶ 8.)

At the School Board meeting on August 18, 2021,[1] Plaintiff made public comments and was not interrupted. (Miller Dec. ¶¶ 11-12.) On or about August 25, 2021, Plaintiff called Miller. (Miller Dec. ¶¶ 13-14.) Plaintiff opined that Miller was not performing his job as Chair of the School Board; demanded the School Board hold an emergency hearing concerning the "woke book list"; and complained about Superintendent Regan Nickels ("Nickels"). (Miller Dec. ¶ 15.) At the School Board meeting on October 20, 2021, Plaintiff made public comments and was not interrupted. comments during an opportunity for public comment. (Miller Dec. ¶¶ 17-18.)

At the School Board meeting on November 17, 2021, Plaintiff made public comments. (Miller Dec. ¶¶ 22-23.) After more than three minutes had elapsed since Plaintiff began speaking, Miller instructed him to "finish up your statement, sir." (Miller Dec. ¶¶ 24-25.) After Plaintiff

[1] Plaintiff's Complaint refers the Court to what he asserts are videos of some of the relevant School Board meetings. (Verified Complaint ¶¶ 6, 12, 16, 18, 21, 23, 35, 37 nn.1-8 & Exs. A, B, C, D, F, G, L, M.) In fact, these videos are from Plaintiff's YouTube channel, and are edited and interspersed with commentary from Plaintiff that is not part of any School Board proceeding. Full videos of the relevant proceedings, without Plaintiff's extraneous commentary, are available on the RSU 22 School Board's YouTube channel, located at https://www.youtube.com/channel/UC7pq9YA1EPdqoDDMYaJID-w/videos.

continued to speak, Miller told him that he was out of time. (Miller Dec. ¶ 26.) Miller said this before Plaintiff requested Miller's resignation. (Miller Dec. ¶ 27.)

At the School Board meeting on December 15, 2021, Plaintiff was not interrupted during the initial two minutes of his public comment regarding what he perceived as problems with RSU 22. (Miller Dec. ¶¶ 30-31.) Plaintiff then began reading from a book entitled "Johnny the Walrus": Miller interrupted Plaintiff and instructed him that reading a book out loud to the School Board is an activity, not a public comment. (Miller Dec. ¶¶ 32-33.) When Plaintiff continued to read from the book, Miller instructed Plaintiff that if he kept reading the book, Miller would demand he sit down. (Miller Dec. ¶¶ 34-35.) Plaintiff responded, "okay," and resumed reading. (Miller Dec. ¶ 36.) Miller then informed him that his public comment period was over and instructed him to sit down, at which point he responded "thank you, Chairman Miller. Outstanding. Thank you." (Miller Dec. ¶ 37.) On his way back to his seat, he raised the book in front of the audience and promoted it again by restating the title. (Miller Dec. ¶ 38.) Miller believed he was authorized by RSU 22 Policy BEDH to terminate Plaintiff's reading of the book because that policy only permits comments; activities, such as reading a book aloud or singing a song, are not comments. (Miller Dec. ¶ 40.) Further, Miller believed that reading the book was not appropriate or suitable or relevant for the public comment period, and too lengthy. (Miller Dec. ¶ 40.)

During the School Board meeting on January 19, 2022, Plaintiff used the public comment opportunity to accuse Nickels of being ignorant or lying, and discussed what he believed to be examples of the training and teaching of critical race theory in RSU 22, and then turned toward the audience and camera to preview the potential future sale of a t-shirt he was wearing. (Miller Dec. ¶ 47.) The Board did not interrupt Plaintiff. (Miller Dec. ¶ 46.)

During the School Board meeting on March 16, 2022, Katherine Collins provided an uninterrupted comment alleging "hyper-sexualization" of students. (Miller Dec. ¶ 49.) When Ms. Collins began reading a passage from a book, Miller interrupted her on the basis that she was no longer commenting and was now reading from a book. (Miller Dec. ¶ 50.) Miller instructed Ms. Collins that her time had expired multiple times before providing her one final warning, after which she ended her comment and returned to her seat. (Miller Dec. ¶ 51.) Miller believed he was authorized by RSU 22 Policy BEDH to interrupt or terminate Ms. Collins' reading of the book because he concluded that reading a book is an activity, not a comment, not appropriate or suitable or relevant for the public comment period, and too lengthy. (Miller Dec. ¶¶ 52-53.)

At that same meeting, Plaintiff raised a complaint concerning RSU 22 employee; Miller and School Board members repeatedly asked Plaintiff not to raise specific complaints about a RSU 22 employee because it is against RSU 22 policies to raise those matters before the School Board during the public comment section of the meeting. (Miller Dec. ¶¶ 54-56.) When Plaintiff alleged that someone in the room threated to rape his wife, Miller instructed him that his comments were not permitted because they included gossip. (Miller Dec. ¶ 57.) Miller made this ruling because RSU 22 Policy BEDH prohibits gossip and defamatory comments. (Miller Dec. ¶ 57.)

When Plaintiff refused to stop, Miller instructed him to sit down. (Miller Dec. ¶ 58.) Plaintiff responded by turning his body away from the Board and towards the camera and continued his statements. (Miller Dec. ¶ 58.) Plaintiff then walked towards Miller to deliver his written grievances and reports, and stated he "looked forward to [Miller's] lack of response." (Miller Dec. ¶ 58.) These documents were the exact same documents provided to Miller the prior week, which suggested to Miller that the intent of the delivery was entirely performative and not an attempt to deliver comments. (Miller Dec. ¶ 59.) Other Board members subsequently told Miller

that they were fearful about what would happen to Miller or them when Plaintiff physically approached Miller. (Miller Dec. ¶ 60.) At this meeting, like many other meetings that Plaintiff attended, Plaintiff was accompanied conservative activist Lawrence E. Lockman, who recorded his public comments and later uploaded them to YouTube and other social media platforms, accompanied by play-by-play commentary. (Miller Dec. ¶ 61.)

On March 29, 2022, a special meeting was held for the sole purpose of entering into executive session, but the executive session was preceded by an opportunity for public comment. (Miller Dec. ¶ 62.) Plaintiff was one of two members of the public that wished to speak. (Miller Dec. ¶ 63.) During his comments, he asked about the absence of a camera. (Miller Dec. ¶ 64.) Miller explained that there was no School Board business to discuss and they had only called the meeting to order so that the School Board could motion to enter executive session. (Miller Dec. ¶ 64.) Plaintiff then talked about an alleged altercation between students at a recent Hampden Academy dance. (Miller Dec. ¶ 65.) Miller responded that this was gossip, which is not allowed to be discussed under RSU 22 Policy BEDH, and asked him to stop speaking about this topic. (Miller Dec. ¶ 66.) When Plaintiff asked who he should talk to about this incident, Miller told him he could call Miller tomorrow. (Miller Dec. ¶ 66.)

Miller arranged a phone call with Plaintiff on March 30, 2022. (Miller Dec. ¶ 67.) During the call, Plaintiff alleged that passages from certain books were pornography and asked me if I was okay with pornography and "hardcore anal sex books." (Miller Dec. ¶ 68.) Miller explained that he did not support the library providing pornography, but that there was a difference between pornography and the scenes depicted in the books. (Miller Dec. ¶ 69.) Miller explained that when read in the context of the entire book, he believed the book scenes Plaintiff was concerned about had different meanings and intent than pornography. (Miller Dec. ¶ 69.)

On or about April 8, 2022, the law firm Rudman Winchell sent Plaintiff a letter on behalf of RSU 22 informing Plaintiff that his past public comments had violated RSU 22 Policy BEDH. (Miller Dec. ¶ 70.) Miller's intent in sending this letter was to explain to Plaintiff the reasons Miller had repeatedly interrupted his public comments and to hopefully deescalate the situation such that it would not be necessary to prevent him from attending future RSU 22 School Board meetings. (Miller Dec. ¶ 71.)

During the School Board meeting on April 27, 2022, Miller interrupted Plaintiff when he pulled out his phone and began playing a recording. (Miller Dec. ¶ 73.) Miller explained that the playing of a recording or video is not allowed under RSU 22 policy. (Miller Dec. ¶ 74.) Miller believed playing a video or recording was not allowed under the policy because a video or audio recording is not a public comment. (Miller Dec. ¶ 75.) When Plaintiff played a portion of the recording that contained audio of him repeating the phrase "hardcore anal sex," Miller objected to his continuing to play the recording on the basis that it constituted vulgarity, which is not permitted under RSU 22 Policy BEDH. (Miller Dec. ¶ 76.) When Plaintiff refused to stop playing the recording, Miller demanded that he leave the premises and declared a recess until he did that. (Miller Dec. ¶ 77.) Plaintiff then proceeded to continue to play the recording by lifting it above his shoulders, presumably to make it as audible as possible to the audience. (Miller Dec. ¶ 78.) At no point was Miller ever motivated to stop Plaintiff because Miller feared allowing Plaintiff to speak or play a recording would endanger Miller's re-election prospects. (Miller Dec. ¶ 79.)

Miller, along with Nickels, was involved in the decision to temporarily prohibit Plaintiff from entering RSU 22 property, as described in the May 4, 2022, letter. (Miller Dec. ¶ 80; Nickels Dec. ¶ 6.) RSU 22 did not intend to bar Plaintiff from entering school property for non-school-related functions like football games or concerts, or to use the community track. (Miller Dec. ¶ 81;

Nickels Dec. ¶ 7.) RSU 22 determined the temporary prohibition was warranted because Plaintiff repeatedly and willfully violated the policies over several months by exceeding his allotted time, performing activities that were not comments, and playing a recording with obscene and vulgar speech, in violation RSU 22 Policy BEDH. (Miller Dec. ¶ 82.)

On June 15, 2022, Nickels requested that Hampden PD issue Plaintiff a criminal trespass notice that included the same temporary prohibition language stated in the letter if he attempted to attend the School Board meeting that day. (Nickels Dec. ¶¶ 8-10.) When Nickels saw that the notice issued applied to "All RSU 22 buildings [and] grounds," she told Hampden PD that the notice should be corrected to reflect the scope and intent of the May 4, 2022, letter. (Nickels Dec. ¶¶ 12-13.) The second Criminal Trespass Notice issued to Plaintiff from the Hampden PD was intended to correct the overly broad prohibition included in the June 15, 2022, notice, so that it aligned with the May 4, 2022, letter. (Raymond Dec. ¶ 7; Nickels Dec. ¶ 14.) RSU 22 did not intend for the temporary prohibition to block Plaintiff from entering RSU 22 school property for functions such as football games, concerts, or running on the track. (Raymond Dec. ¶ 8.)

ARGUMENT

A "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 188 (D. Me. 2008) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)). Therefore, in order to succeed on this Motion, the law requires that Plaintiff prove each of the following:

> (1) a substantial likelihood of success on the merits; (2) a significant risk of irreparable harm if the injunction is withheld; (3) a favorable balance of hardships; and (4) a fit (or lack of friction) between the injunction and the public interest.

Id. (quoting *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003). "The likelihood of success on the merits is the sine qua non of this four-part inquiry." *Id*. (quoting *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). "[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (quoting *New Comm Wireless*, 287 F.3d at 9). The inverse, however, is not true: "as a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *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 *28 (D. Me. Oct. 16, 2021) (alteration and quotation marks omitted).

I. Plaintiff Has Not Shown a Substantial Likelihood of Success on the Merits.

"To demonstrate likelihood of success on the merits, plaintiffs must show 'more than mere possibility' of success—rather, they must establish a 'strong likelihood' that they will ultimately prevail. *Raimondo*, 2021 U.S. Dist. LEXIS 199440, at *28 (quoting *Respect Me. PAC*, 622 F.3d at 15). Plaintiff has failed to carry this significant burden.

A. Free Speech

"The freedom of expression protected by the First Amendment is not inviolate; the Supreme Court has established that the First Amendment does not guarantee persons the right to communicate their views 'at all times or in any manner that may be desired.'" *Rowe v. City of Cocoa*, 358 F.3d 800, 802 (11th Cir. 2004) (quoting *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989)). In a limited public forum,[2] the government has "wide[] leeway" to impose time, place,

[2] Plaintiff appears to contend that meetings of the School Board are a limited public forum, but then goes on to suggest that they "are more properly considered to be a full public forum" because there are "no limitations at all on the subject" of speech. (Mot. at 10.) This is not accurate. School Board proceedings are open to public comment "on school and education matters." 20 M.R.S. § 1001(20). RSU 22's rules make public comment subject to exclusion on

or manner restrictions, and such restrictions are constitutional so long as they "serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Crucially, the government may also impose content-based restrictions that are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *see also Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976) ("Plainly, public bodies may confine their meetings to specified subject matter . . . ."). The restrictions imposed on Plaintiff are entirely consistent with these standards.

Under Maine law, school boards are required to provide an opportunity for public comment, but are expressly permitted to place reasonable restrictions on such public comment. Title 20 M.R.S. § 1001(20) provides:

> **20. School board meeting public comment period.** A school board shall provide the opportunity for the public to comment on school and education matters at a school board meeting. Nothing in this subsection restricts the school board from establishing reasonable standards for the public comment period, including time limits and conduct standards.

20 M.R.S. § 1001(20). Pursuant to section 1001(20), RSU 22 adopted Policy BEDH, entitled "Public Participation in Board Meetings." (Mot. Ex. A.) That policy provides, in part:

> The Board recognizes its responsibility to conduct the business of the district in an orderly and efficient manner and will therefore require reasonable controls to

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grounds of relevance, and specifically prohibit discussion of certain subjects, including personnel matters. (Mot. Ex. A.) At least one court has questioned whether local government board meetings are limited public fora as opposed to nonpublic fora. *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270 (9th Cir. 1995) ("It seems to us that the highly structured nature of city council and city board meetings makes them fit more neatly into the nonpublic forum niche.") However, because the relevant standards are the same for limited public and nonpublic fora, Defendants assume for purposes of argument that School Board meetings are a limited public forum. *See id.* 270-71 ("Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact . . . . [L]imitations on speech at [local government] meetings must be reasonable and viewpoint neutral, but that is all they need to be.").

> regulate public presentations to the Board. The primary purpose of the meeting is for the Board to conduct its business as charged by law. Spontaneous discussion, as well as disorder and disruptions, prevent the Board from doing its work and will not be permitted.
> . . .
> The Chair is responsible for the orderly conduct of the meeting and shall rule on such matters as the time to be allowed for public discussion, the appropriateness of the subject being presented and the suitability of the time for such a presentation. A speaker in violation of these rules may be required to leave in order to permit the orderly consideration of the matters for which the meeting was called. Persons who disrupt the meeting may be asked to leave, and the Chair may request law enforcement assistance as necessary to restore order.
> . . .
> 3. . . . . Gossip, defamatory comments, or abusive or vulgar language will not be permitted.
> . . .
> 7. The Chair has the authority to stop any presentation that violates these guidelines or the privacy rights of others.
> . . .
> All speakers must observe rules of common etiquette. The Chair may interrupt or terminate an individual's statement when it is too lengthy, personal directed, abusive, obscene, or irrelevant.

(Mot. Ex. A.)

The rules regarding public participation in RSU22 School Board proceedings are reasonable time, place, and manner restrictions that serve a significant government interest and leave open ample alternative channels for communication. "There is a significant governmental interest in conducting orderly, efficient meetings of public bodies." *Carlow v. Mruk*, 425 F. Supp. 2d 225, 242-43 (D.R.I. 2006) (quoting *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004)); *see also Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 271 (9th Cir. 1995) (noting rent control board's "legitimate interest in conducting efficient, orderly meetings"); *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring) ("Disruption of the orderly conduct of public meetings is indeed one of the substantive evils that government has a right to prevent." (alteration and quotation marks omitted)). It is entirely reasonable, in light of the purpose

served by School Board meetings, to limit public comment to those that are relevant to the business of the School Board and delivered in an orderly and efficient manner.

Plaintiff contends that Defendants' were motivated by retaliatory animus or because Defendants do not agree with his views, but presents no evidence of this other than his own speculative opinion. "The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech, rather it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic." *Carlow*, 425 F. Supp. 2d at 244 (quoting *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004)). Nothing the public participation rules, either on their face or as applied to Plaintiff, is viewpoint-based.

Plaintiff points to only two instances—the meetings of December 15, 2021, and April 27, 2022—where his public comment was cut short. (Verified Complaint ¶¶ 16-17, 37-41.) Neither instance was based on Plaintiff's viewpoint. At the meeting of December 15, 2021, Plaintiff gave a public comment about books available in RSU 22 libraries, and then began to read from a book entitled "Johnny the Walrus." (Verified Complaint ¶ 16.) Notably, *this was not a book available at RSU 22 libraries, nor one with which Plaintiff had concerns*; rather, it was simply a book Plaintiff found to be "wholesome." (Mot. at 7; Verified Complaint ¶ 16.) The Chair reasonably deemed a reading of a book Plaintiff liked to be an "activity" rather than public comment, and irrelevant. (Miller Dec. ¶¶ 33, 40; Verified Complaint ¶ 17.)

As to the meeting of April 27, 2022, Plaintiff made public comment, and then began playing an audio recording in which Plaintiff repeatedly referring to "hardcore anal sex."[3] (Miller

[3] Contrary to Plaintiff's later argument, he has not alleged, much less shown, that this recording was "quoting from books" available in RSU 22 libraries. (Mot. at 12; Verified Complaint ¶ 37.) Plaintiff's Complaint claim that he and Ms. Collins were not interrupted when they quoted from such books. (Verified Complaint ¶¶ 8-10, 21-22.)

Dec. ¶¶ 72-76; Verified Complaint ¶ 37.) The Chair reasonably determined that this violated the policy's prohibition against vulgar or obscene language, and directed Plaintiff to stop his presentation and take his seat. When Plaintiff repeatedly refused to do so, the Chair asked him to leave the premises. When Plaintiff refused to leave, the Chair called a recess. Plaintiff ultimately left, but when doing so kept the audio recording playing so loudly that it could be heard by those attending the meeting. (Miller Dec. ¶¶ 76-79; Mot. Ex C; Verified Complaint ¶ 37.)

Plaintiff also complains that Katherine Collins was not interrupted or told that she was in violation of the rules despite espousing the same views as Plaintiff regarding supposedly "hyper-sexualiz[ed]" or "pornographic" books in RSU 22 libraries. (Verified Complaint ¶¶ 21, 22, 29, 32, 35-36.) This does not aid Plaintiff's argument—in fact, it cuts against it. A review of the entire course of events reveals that Defendants permitted Plaintiff, and others that share his views, to freely voice their opinions, and took action only when Plaintiff's repeated violations of the rules threatened the integrity of the School Board's proceedings.[4] At no point was that action based on Plaintiff's "viewpoint" (i.e., his opinion that certain books in RSU 22 libraries are inappropriate), but rather on lack of relevance in one case and violation of the rules against vulgarity and obscenity in the other. As to the claim that Chair Miller acted in retaliation for Plaintiff's demand that he resign, Plaintiff's failure to abide by the rules—and Miller noting Plaintiff's noncompliance—began *before* Plaintiff made any such demand. (Miller Dec. ¶¶ 24-27.)

Ample alternative channels for communication of information are available to Plaintiff, both during and after his temporary exclusion from RSU 22 school meetings. Plaintiff remains free to speak with school officials and other members of the community outside of the context of school meetings. Specific to Plaintiff's stated concern regarding books available in RSU 22

[4] Collins was also interrupted and stopped from reading a book for the same reasons as Plaintiff. (Miller Dec. ¶¶ 49-53.)

libraries, RSU 22 policies permit (and indeed, require) submission of written requests for reconsideration of the use of books used in school curricula or made available in libraries, as Plaintiff acknowledges in his Complaint. (Verified Complaint ¶¶ 26-34 & Exs. I, J, K.)

Plaintiff's histrionic claims that he has been "barred from public life" or "exiled" (Mot. at 9, 11-12, 16) fall particularly flat where Plaintiff brags that he "appeared on a nationally televised news show, viewed by over 2 million viewers" in November 2021 "to inform the public about books available in the RSU22 government run school system." (Verified Complaint ¶ 11.) Indeed, Plaintiff has a considerable media presence. Plaintiff's YouTube channel, which he links to in his Complaint, had, at the time of writing this memorandum, 253 subscribers, and his videos have been viewed hundreds or even thousands of times. (Raymond Dec. ¶ 9(a); Verified Complaint ¶¶ 6, 12, 16, 18, 21, 23, 35, 37 nn.1-8 & Exs. A, B, C, D, F, G, L, M.) Plaintiffs' videos include three nationally televised interviews of Plaintiff on Fox News and one on Sky News Australia. Plaintiff's YouTube page links to a political group called the "Maine First Project," of which Plaintiff is its "Director of Special Projects"; the group has a website as well as a Facebook page with 2784 followers. (Raymond Dec. ¶ 9(f)-(g).) Plaintiff has a podcast, which has its own Facebook page with 488 follows. (Raymond Dec. ¶ 9(d)-(e).) He has a Twitter account with 816 followers, and accounts on virtually every other social media service, including Facebook, Instagram, Parler, GETTR, and Truth Social. (Raymond Dec. ¶ 9(b)-(c), (h)-(k).) Plaintiff has ample means of communicating with RSU 22 officials, the community, and the public at large.

As to Plaintiff's claim that he is prohibited from "attending school plays or high school football games" (Mot. at 13-14), this is simply not the case. He is prohibited only from entering RSU 22 property "*for the purpose of attending any RSU 22 school-related meeting or function*." (Mot. Ex. C (emphasis added); Mot. Ex. E (emphasis added).) Nothing prohibits Plaintiff from

attending other events on RSU 22 property. (Nickels Dec. ¶¶ 6-14; Raymond Dec. ¶¶ 7-8.) Even if Plaintiff were prohibited from "attending school plays or high school football games," such activities are not in any sense "speech," and Plaintiff makes no case that they are.

In an attempt to avoid the conclusion that his First Amendment rights have not been violated, Plaintiff contends that Defendants' conduct should be subjected to heightened scrutiny as a prior restraint on speech. "A prior restraint is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity." *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). The "classic" form of a prior restraint is an administrative licensing scheme that restricts speech unless the speaker first obtains approval. *Id.* (citing *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1326-27 (1st Cir. 1993). Courts look less favorably upon prior restraints, contrasted against "restrictions on speech imposed by subsequent penalties." *Id.* This is because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," and "[i]t is always difficult to know in advance what an individual will say." *Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)).

Plaintiff's temporary restriction from school-related meetings is not a prior restraint, but rather a penalty imposed on his prior conduct in violation of RSU22's Public Participation Policy. Plaintiff is not being temporarily restricted from such proceedings because of what he *might* say in the future, but because of his past conduct. The rationale for treating prior restraints differently than other restrictions on speech is therefore simply not present. There is no attempt here to broadly "throttle" public comment in advance based on what speakers might say. Rather, Plaintiff is being temporarily restricted from RSU22 proceedings as a result of his past violations of policy.

There is no need to divine in advance what Plaintiff or anyone else might say, because Plaintiff's violations have already occurred, and have nothing to do with any future speech. *See id.*

B. Due Process

Plaintiff next alleges violations of his rights under the Due Process Clause of the Fourteenth Amendment. However, the nature of Plaintiff's claim is unclear. Plaintiff first recites case law relating to the vagueness doctrine, but never makes any attempt to apply the doctrine to the facts of the case at bar or to explain what he contends is vague and why. Where Plaintiff has failed to develop this argument in any meaningful way, he has failed to demonstrate a likelihood of success on the merits of this claim. *Cf. United States v. Pabon*, 819 F.3d 26, 33 (1st Cir. 2016) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). However, out of an abundance of caution, Defendants briefly address vagueness doctrine.

"The vagueness doctrine, a derivative of due process, protects against the ills of laws whose prohibitions are not clearly defined." *March v. Frey*, 458 F. Supp. 3d 16, 39 (D. Me. 2020) (internal quotation marks omitted) (quoting *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011)). A greater degree of specificity is required in cases involving First Amendment rights, but courts are "more tolerant of enactments that impose civil—rather than criminal—penalties."[5] *Id.*; *see also, e.g.*, *Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."); *Tucson Woman's Clinic*, 379 F.3d at 554 (noting that vagueness review is "more

[5] Nearly all of the case law upon which Plaintiff relies relate to criminal statutes. *See City of Chi. v. Morales*, 527 U.S. 41, 56 (1999) (discussing when "[v]agueness may invalidate a criminal law"); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (discussing requirement that a "penal statute define the criminal offense with sufficient definiteness"); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005) (same); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 537, 554 (9th Cir. 2004) (reviewing for vagueness statutory scheme that imposed criminal penalties).

exacting" if a statute "subjects transgressors to criminal penalties" (quoting *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000)).

"Even under the heightened standard for First Amendment cases, though, not all vagueness rises to the level of constitutional concern." *McKee*, 649 F.3d at 62. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). "[A] statute is unconstitutionally vague only if it 'prohibits . . . an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.'" *McKee*, 649 F.3d at 62 (quoting *United States v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005) (en banc)). Laws are not impermissibly vague because they require interpretation, state flexible standards, or grant officials discretion. *Ward*, 491 U.S. at 794.

Assuming Plaintiff's challenge, if he stated any challenge at all, would be to the language of the public participation policy permitting the Chair to "interrupt or terminate an individual's statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant," this language is broad, but not unconstitutionally vague. As discussed above with respect to Plaintiff's First Amendment claim, the state has a significant interest in promoting orderly and efficient proceedings before public boards. *Carlow*, 425 F. Supp. 2d at 242-43. Given the wide range of behaviors that can disrupt a public meeting, the standard must necessarily be flexible and allow a fair amount of discretion. The policy is inherently limited both in time and place (during School Committee meetings), and does not subject violators to criminal sanctions. *See Grayned*, 408 U.S. at 111 (concluding that noise ordinance was not impermissibly vague in part because it prohibited

activity at "fixed times" and a "sufficiently fixed place.") When read as a whole, the policy adequately communicates to a person of average intelligence what is expected of them. *Id.*

Suddenly departing from his void-for-vagueness argument, Plaintiff pivots to a procedural due process argument, complaining that there is "no process to appeal or contest" his temporary exclusion from school meetings, and that he was not afford a "hearing, nor any opportunity for review." (Motion at 16.) Plaintiff cites no authority that he is entitled to a hearing or appeal. Due process is not a one-size-fits-all concept. Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Zell v. Ricci*, 957 F.3d 1, 8 (1st Cir. 2020) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, (1972)). Where Plaintiff has failed to develop this argument in any meaningful way, he has failed to demonstrate a likelihood of success on the merits. *Cf. Pabon*, 819 F.3d at 33; *Zannino*, 895 F.2d at 17.

C. Equal Protection

Plaintiff next alleges a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. However, Plaintiff's claim is entirely derivative of his First Amendment Claim. Plaintiff suggests that because his First Amendment rights are implicated, the First and Fourteenth Amendment analyses are "fused," and strict scrutiny applies. (Mot. at 16-17.) Plaintiff cites *Burson v. Freeman* for the proposition that "[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." 504 U.S. 191, 197 n.3 (1992). The key language in that quotation, however, is "in a public forum." The Court in *Burson* was referring to a *traditional* public forum, such as a park, street, or sidewalk, in which First Amendment rights are at their height and content-based distinctions are prohibited. *Id.* at 196-97. This standard does not apply in a *limited* public forum. As discussed above with respect to free speech, the government may draw distinctions between

different subjects in limited public fora, provided it does not engage in *viewpoint* discrimination. (*See supra* Part I.A.) Plaintiff's Equal Protection claim therefore fails for the same reasons as his First Amendment claim. *See Shurtleff v. City of Bos.*, 337 F. Supp. 3d 66, 78 (D. Mass. 2018) (noting that, outside of a traditional public forum, "not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used" (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983)).

D. State Law Claims

In addition to federal claims under 42 U.S.C. § 1983, Plaintiff purports to state claims under Maine law pursuant to the Maine Civil Rights Act, 5 M.R.S. § 4682 ("MCRA") in Counts II, IV, VI, and VIII. (*See* Verified Complaint ¶¶ 55-58, 63-66, 72-76, 80-82.) However, the MCRA, on its face, provides a private right of action only in cases involving the use or threat of "physical force or violence against a person, damage or destruction of property or trespass on property" in an attempt to intentionally interfere with a person's civil rights. 5 M.R.S. § 4682(1-A); *see also Bagley v. Raymond Sch. Dep't*, 1999 ME 60, ¶ 10 n.5, 728 A.2d 127 (concluding parents could not make out a claim against school under the MCRA where there was "[n]o claim of violence, real or threatened"). As Defendants have not used or threatened to use physical force or violence against Plaintiff, and have not damaged or trespassed on Plaintiff's property or threatened to do so, Plaintiff cannot maintain a private action under the MCRA. Accordingly, Plaintiff has not shown a likelihood of success on the merits of his state law claims, Counts II, IV, VI, and VIII.

II. Plaintiff Has Not Shown a Significant Risk of Irreparable Harm.

Plaintiffs seeking a preliminary injunction must do more than show a possibility of irreparable harm. Rather, plaintiffs must show that "irreparable injury is *likely* in the absence of an injunction." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). "The fact that [a party is] asserting

First Amendment rights does not automatically require a finding of irreparable injury." *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (quoting *Pub. Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987)); *see also All. for Retired Ams. v. Sec'y of State*, 2020 ME 123, ¶ 11, 240 A.3d 45 (same). "Whether there is any such harm is the issue that will ultimately be addressed on the merits of the case." *Respect Me. PAC*, 622 F.3d at 15. Where Plaintiff has not shown a substantial likelihood of success on the merits of his First Amendment claim,[6] it follows that he has not shown a substantial likelihood of irreparable injury.

III. The Balance of Equities Favors Defendants, and the Sought Injunction Is Not in the Public Interest.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24 (citations and quotation marks omitted). Rather, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (citations and quotation marks omitted). Where RSU 22 is a public entity, there is considerable overlap between these two factors, and Defendants address them together.

As discussed above, "there is a significant governmental interest in conducting orderly, efficient meetings of public bodies." *Carlow*, 425 F. Supp. 2d at 242-43 (D.R.I. 2006) (quoting *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004)). It is in the public's interest that Defendants achieve that goal. Where Plaintiff has proven himself to be unable or unwilling to comply with the rules safeguarding the integrity of meetings of the School Board, the balancing of equities favors Plaintiff's temporary exclusion from such meetings.

[6] Plaintiff does not argue irreparable harm as to his Due Process or Equal Protection claims. (Mot. at 18.)

Plaintiff's understanding of the equities is overly simplistic and ignores the impacts of his behavior on Defendants and the public—including *others'* opportunity to make public comments. For example, at the meeting of April 27, 2022, Plaintiff was gaveled out of order after attempting to play a recording discussing "hardcore anal sex." (Miller Dec. ¶ 76.) Plaintiff refused to terminate his comments, and the School Board meeting had to be recessed until Plaintiff left the premises. (Miller Dec. ¶ 77.) Plaintiff eventually did so, but only after further disrupting the proceedings by continuing to blare the recording at a high volume on his way out. (Miller Dec. ¶ 78.) Continued disruption of the business of the School Board—including public comment by others—is not in the public interest.[7]

CONCLUSION

Because Plaintiff has not carried his burden of proving that he is entitled to the extraordinary remedy of preliminary injunctive relief, Defendants respectfully request that this Court deny Plaintiff's Motion.

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[7] In closing, Defendants must comment on the tenor of Plaintiff's filings in this Court. Plaintiff's pleadings are replete with needlessly belligerent invective, ad hominem attacks on Defendants, inflammatory characterizations, and superfluous commentary more befitting of a social media post than a filing in the U.S. District Court. To name only a few examples, Plaintiff:

- Compares Defendants' letter of May 4, 2022, to "a police officer beating a prone suspect while screaming 'stop resisting' when the cameras start rolling" (Mot. at 5);
- Says that Miller is "playing the part of the despot in this story" (Mot. at 7);
- Suggests that Plaintiff's "only real violation was lèse majesté against Miller" (Mot. at 11);
- Refers to Defendants as a "band of offended government apparatchiks over-wielding their petty powers, in a petty way" (Mot. at 14);
- Suggests that Defendants are "power-drunk" and need to be "sobered up with an injunction," lest they "become Peter-O'Toole-level-schnockered-out-of-their-minds" (Mot. at 19)
- Characterizes Defendants' letter of April 8, 2022, as an "intimidation letter" (Mot. at 3 and passim);
- Refers to literature—including books from Nobel Prize-winning authors—as "pornography" and even "child pornography" (Mot. at 12 and passim);
- Directs the Court to a YouTube video of Rick Astley's "Never Gonna Give You Up" (Mot. at 3); and
- Attaches as an exhibit to his Complaint a YouTube video in which he refers to Miller as a "groomer" (i.e., a pedophile) (Verified Complaint ¶ 37 n.8 & Ex. M).

Plaintiff's performative combativeness suggests that he views this Court much like he views RSU 22 School Board meetings—not as a forum in which to seek relief in good faith, but simply as an opportunity to generate content for his online audience, at the expense of limited public resources.

Dated: July 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document entitled *Defendants' Opposition to Emergency Ex-Parte Motion for a Temporary Restraining Order and Preliminary Injunction* via the Court's CM/ECF system, which will serve a copy of same upon all counsel of record.

Dated: July 15, 2022

/s/ Allison A. Economy
Allison A. Economy, Esq.