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. 1:22-cv-00206-NT **REPLY IN SUPPORT OF PLAINTIFF'S EMERGENCY EX-PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

1.0 BACKGROUND

RSU22 Policy allows citizens to speak during "time to voice opinions or problems" to the RSU22 School Board. ECF 4-2. The Policy gives the Chair unfettered discretion to silence speakers if he determines that a comment is irrelevant, vulgar, or "gossip" or if it is critical of RSU22 personnel. In addition to the written policies, Defendant Miller has also invented unwritten policies against reading or playing recordings. Miller re-defined "reading" and "playing recordings" as "activities" and not as "speech." Pursuant to both the written and ad-hoc policies, Miller silenced McBreairty (Miller Aff. ¶¶ 40 & 73-75.). Subsequently, RSU22 punished McBreairty by not only banning him from speaking at RSU22 meetings, but from even attending them or attending any events at all on RSU22 property. In fact, a plain reading of RSU22's threats and trespass notices shows that McBreairty is not only banned from such events, but can not even enter the curtilage of any RSU22 property. The letter said McBreairty is "*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*." ECF 4-4.

McBreairty seeks an injunction against RSU22 from enforcing the written prohibitions on "gossip," "irrelevance," "vulgarity," "abusive[ness]," criticism, and the ad-hoc unwritten

prohibitions on reading or playing recordings; and, voiding the banishment that RSU22 enacted in order to punish McBreairty for his advocacy in violation of his right to Due Process.

2.0 Likelihood of Success on the Merits

McBreairty has shown that the government's actions infringed on First Amendment rights. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 294 n.5 (1984). The burden now shifts to the government to justify its restrictions. *See Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004). As its restrictions are content based, they are subject to heightened scrutiny. Content based restrictions "pose a high risk that the sovereign is, in reality, seeking to stifle unwelcome ideas rather than to achieve legitimate regulatory objectives." *McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001). "The government bears the burden of proving the [Policy] is constitutional." *Greater Phila. Chamber of Commerce v. City of Phila*., 949 F.3d 116, 113 (3d Cir 2020). The government has failed to do so, and thus the plaintiff is likely to prevail. *Id*.

2.1 – First Amendment Analysis - The Forum and the Restrictions

Defendants claim that comment is limited to "school and education matters" in seeking a lower standard of scrutiny. But nothing in the Policy actually says this – it only says that the comments can not be "irrelevant." And this term has been applied to speech that is clearly relevant to school business – namely, the content of books promoted to the student body.

McBreairty does not seek an injunction that he be permitted to engage in complete irrelevancies, but lack of any textual limitations suggests a general public forum. However, even if it is a limited public forum, the First Amendment protects freedom of speech at public school board meetings. *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174-175 (1976). If it is a limited forum, RSU22 could have restrictions designed to protect the limits of that forum, but can not engage in viewpoint discrimination directed against speech otherwise within the forum's *legitimate* limitations. *Rosenberger v. Univ. of Va*., 515 U.S. 819, 829-30 (1995). "When government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is … blatant." *Id*. at 829.

No matter what kind of forum this is, McBreairty always commented on "school and education matters" and the Defendants applied the Policy in an unconstitutional manner.

2.1.1 - The Policies Were Applied Unconstitutionally

The record shows that the policies were applied selectively toward McBreairty. *See* 3-4 (video exhibit to Compl.). It would not be unfair to call McBreairty RSU22's most vocal critic. In fact, the Defense raises this in a vain attempt to argue that since he has other platforms from which to speak, they need not permit him to speak freely here. [1]

Facially, a restriction on irrelevant comments might be permissible. However, this restriction was used to engage in viewpoint discrimination against McBreairty. Defendant Miller in his sole discretion deemed comments like reading from a book to be "irrelevant." It is difficult to square the logic of calling it irrelevant for a citizen to critique a book, and then read from that book. *See* ECF 3. Or for a citizen to read from a book that covers the same subjects in a child-appropriate manner. *Id.* The irrelevance prohibition seems to hinge on whether Defendant wants to hear the comment or not – and not whether it is truly irrelevant. Nothing in the Opposition should convince the court that RSU22 applied "irrelevance" in anything other than a viewpoint-discriminatory manner. The prohibitions on "gossip" or "vulgarity" seem less likely to survive facial challenges, given how vague such terms are. However, for the purposes of the as applied analysis, let us presume they pass facial muster.

McBreairty was discussing a teacher's claim that discussions about the reading created "concerns for her safety." *See* ECF 3-5 (video exhibit to Compl.) McBreairty responded to this criticism by pointing out that the only person in the room with a safety issue was his wife, who an RSU22 proponent threatened with rape. Miller, perhaps embarrassed by this threat by one of his supporters, quickly ruled that discussion of the threat was "gossip." *Id*. At 2:30. Meanwhile, it was the subject of a police report and the subject at hand. McBreairty Aff. ¶¶ 1-3. This is hardly

[1] Defendants argue that McBreairty has ample alternative channels for communication. (Opp. Mot. at 12.). Defendants reason that McBreairty has a YouTube channel and twitter account and therefore, he can be arbitrarily excluded from a public forum. Does this hold for anyone who has the ability to speak somewhere else? If credited, then any member of the press could be excluded, because they can just speak in their newspaper column. The government does not need to cut out a speaker's tongue in order to finally cross the line.

"information about the behavior and personal lives of other people,"[2] which is a reasonable definition of "gossip." Miller re-defined it to mean "something I do not want to hear." Even if this regulation is constitutional, it was applied unconstitutionally as to McBreairty's speech.

With respect to "vulgarity" this term is even less likely to survive a facial challenge. However, with respect to McBreairty's speech, he was describing a book distributed to 11 year olds. The quote from the book that McBreairty described as discussing "anal sex" was correctly described as so. "*I put on some lube and got him up on his knees and I began to slide into him from behind. I eased in slowly until I heard him moan. I finally came and let out a loud moan to the point where he asked me to quiet down for the neighbors.*" Would it have been less vulgar to Defendants for McBreairty to simply use the content of this book? The Board tolerated others stating similar terms. Miller was not analyzing the term "anal sex" as "vulgar" and thus impermissible. And at the same time, Miller immediately invented a "policy" against the playing of recordings.[3] *See* ECF 3-11 (video exhibit to Compl.) There is no known evidence of this "policy" having ever existed prior to this exchange.

Similarly, the Defense claims that there was a "policy" against *reading*. According to Miller reading is either "irrelevant" and/or "not a public comment." (Miller Aff. at ¶¶ 40 & 73-75.) However, this "policy" only applies to speakers who criticize the Board.[4] Speakers favoring the Board's positions are permitted to read at the podium, without interruption.[5] Accordingly, even if such a policy existed and was valid, it was applied in a viewpoint discriminatory manner.

[2] https://www.britannica.com/dictionary/gossip

[3] *Post-hoc* revisions are a theme here. Defendants state that McBreairty "then turned to toward the audience and camera to preview the future sale of a t-shirt he was wearing." (Opp. Mot at 3.). This is a false characterization of what happened. The teacher's union called McBreairty a "toxic force." So, someone gave him a t-shirt that said "toxic force" on it. During public comment, to make a point about the teacher's union, he said "Thanks for the t-shirt idea, I may be selling them to fund my work." (*See* https://www.youtube.com/watch?v=Y6t2Tr0yLdY at 3:05.) The Court can easily view this exchange and conclude that the Defense's characterization is false.

[4] Another critical speaker was also shut down for reading, as can be seen here: https://www.youtube.com/watch?v=SblB29t0Lms at 2:56.

[5] An example can be seen at https://www.youtube.com/watch?v=gEv28BbQnIU at 1:48.

2.1.2 The Policy Provisions are Facially Unconstitutional

Defendant cites *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n* for the proposition that "public bodies may confine their meetings to specified subject matter ...." 429 U.S. 167, 175 n.8 (1976). But the metes and bounds of such confinement must be viewpoint neutral. "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

The Policy prohibits "*complaints or allegations concerning any person employed by the school system*." A citizen can praise someone at a school board meeting, but may not not complain about them. The right to petition should never be limited to only praise for government employees. Defendants have "permit[ted] one side of a debatable public question to have a monopoly in expressing its views to the government [which] is the antithesis of constitutional guarantees." *Madison at 176.* This portion of the Policy was applied to McBreairty and is a rationale for the punishment levied against him. ECF 3-5 at 0:50; 1:40; and 2:20. It must be struck down.

The Policy also prohibits "gossip", "vulgarity", "abusive[ness], and irrelevance – all of which are unconstitutionally vague. A policy is impermissibly vague (and thus violates due process) if (1) "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Out of concern for arbitrary suppression of free speech, "the Constitution requires a 'greater degree of specificity' in cases involving First Amendment rights." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011). "The vagueness of such a regulation raises special First Amendment concerns because of the obvious chilling effect on speech." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

A nearly identical recent case highlights the obvious – that what may be considered "irrelevant" "varies from speaker to speaker and listener to listener." *Marshall v. Amuso*, 2021 U.S. Dist. LEXIS 222210, *19, 111 Fed. R. Serv. 3d (Callaghan) 364, 2021 WL 5359020 (E.D.

PA 2021) (attached as **Exhibit A**). As in the *Marshall* case, RSU22 "presents no evidence of 'objective, workable standards' to guide the presiding officer's exercise of discretion." *Id*. Citing *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). Allowing nothing more than Miller's views to shape what is "irrelevant" "openly invites viewpoint discrimination." *Id*.

Similarly, "gossip" is not defined in the Policy, but it is defined in the dictionary. "information about the behavior and personal lives of other people." [6] However, what definition the Defendants apply to it is unclear. And, what purpose would even this definition serve? By this definition, which is as good as any, if a school principal were arrested for molesting children, it would fit this definition. Could a citizen not comment on this, for fear of violating the "gossip" prohibition (as well as the prohibition on complaints or allegations concerning any person employed by the school system)? Similarly, "abusive" comments are undefined, and while not applied against McBreairty, yet, there is a reasonable fear that if this is permitted to survive, it will be the new justification for further censorship. *See Marshall* (enjoining prohibitions on "irrelevant" or "abusive" comments at school board meetings)

"Vulgarity" is similarly defective. "Vulgarity" is prohibited, but not defined nor are there any guidelines of any kind. We are reminded of the seminal case. *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric."). Perhaps a well-defined policy against "profanity" or articulating "seven dirty words" could be facially valid, but this is not. Of course any such re-drafting of the Policy would require a justification – and "protecting the children" will not fly given that far more "vulgar" or "profane" subjects are on the school's reading list. RSU22 should not take this as license to craft a policy shielding their sensibilities from more tame content than their 11 year old students are expected to read.[7] "[T]he School Board cannot hide behind the possible presence of children to justify an unconstitutional policy." *Marshall v. Amuso* at 14.

[6] https://www.britannica.com/dictionary/gossip

[7] The censor's desire to use children as Constitutional human shields should always be resisted. "Some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. *FCC v. Pacifica Fdn*., 438 U.S. 726, 770 (1978) (Brennan, J. dissenting).

"Vulgarity" here is simply another vague term used to cover discussion that challenges the Defendants' political views, and not a term used to determine proper confines for the public forum. It along with the "irrelevant" and "gossip" restrictions, are is not only vague, but overbroad as they do a Cobra Kai "sweep the leg"[8] against constitutionally protected speech along with whatever legitimately restricted speech one could even hypothetically imagine. Merely "offensive" speech may not be constitutionally limited without a compelling governmental interest. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019). None is shown here.

2.2 Due Process Violations

Procedural due process "assures individuals who are threatened with the deprivation of a significant liberty or property interest by the state notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Ford v. Bender*, 768 F.3d 15, 24 (1st Cir. 2014) (quoting *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990)). The right to substantive due process "protects individuals from state actions that are arbitrary and capricious, run counter to the concept of ordered liberty, or appear shocking or violative of universal standards of decency." *Ford*, 768 F.3d at 23. RSU22's actions violated both.

On the basis of vague and selectively enforced restrictions on the right to freedom of speech and the right to petition, McBreairty was arbitrarily targeted, censored, and "banished from public life." There are few things that are more counter to the concept of ordered liberty than the government arbitrarily censoring and punishing a critic for his advocacy. The result is that McBreairty is now banned from all participation in both RSU22 meetings, but from even attending them, and (no matter how the Defense tries to recast the banishment) from attending any events at all on school grounds. Even if he had received procedural due process, this excessive punishment would shock the conscience. The multiple threats that the government sent provide little, if any guidance, to McBreairty on what he did that violated the Policy. *See* ECF 4-3 & 4-4.

[8] The Karate Kid (1984) ("Sweep the leg" has entered popular culture as a term meaning to "fight dirty". However, the franchise reboot "Cobra Kai" paints a more nuanced picture of that film's villain, Johnny Lawrence. Nevertheless, the practice is inherently troubling – like government censorship is)

How can due process exist when a citizen is deprived of the right to petition the government or speak freely on the basis of vague policies, much less those invented on the fly?

Even if the Policy prohibited playing a recording, what would be the purpose of such a restriction?[9] Nevertheless, the prohibition (which Miller created on the fly) against playing an audio recording is a "policy" that does not exist, and can not be created ad hoc. Defendants also argue reading a book should not be considered to be "speech" but is an "activity" with neither legal nor logical support for this position.

In *Haidak v. Univ. of Mass.-Amherst*, the court held that a university violated a student's due process rights by suspending him without a hearing when there were no exigent circumstances. 933 F.3d 56, 71, 72 (1st Cir. 2019). There were no exigent circumstances here requiring summary punishment. Here, McBreairty was deprived of significant liberty interests. Assuming *arguendo* that the restrictions were valid and fairly applied to McBreairty, RSU22 does not even try to suggest that it has the authority to ban McBreairty from school grounds, much less summarily.

Where in any Policy does the Board have the authority to banish McBreairty from government property at all? Even if had this power, it exercised it without procedural due process. There was no notice and opportunity to be heard in any way – he never had the opportunity to challenge Miller's decrees that the violated either written (vulgarity, criticism, or gossip) or simply made-up policies against reading or playing a recording. Defendants punished McBreairty for comments relating to school issues and Miller stopped him from reading from a book because he called reading from a book to be an 'activity' rather than public comment, and also "irrelevant." (Miller Aff. ¶ 40.). McBreairty played an audio recording, which Defendant Miller again construed as "not a public comment." (*Id* at ¶ 75.) He certainly had no opportunity to challenge the determination that his punishment for these "violations" was total banishment until 2023.

[9] If there were such a policy, it should be struck down – what if a speaker has anxiety and wishes to play pre-recorded statements? What if someone is verbally impaired? What if a recording communicates the point a citizen wishes to show in order to exercise their right to petition? It serves no rational purpose.

2.3 Irreparable Harm

"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) (plurality opinion). McBreairty lost his right to petition the government, to speak, and even to associate with other citizens, if the association was on RSU22 grounds. There is a presumption of harm. But, McBreairty could (but does not) waive the presumption and show actual harm. On June 18, there was a community barbecue that he could not attend. McBreairty Aff. ¶ 5. On July 12, there was a Policy Committee meeting he could not attend. *Id.* at ¶ 6. On July 14, there was a Community Relations Meeting, which McBreairty could not attend. *Id.* at ¶ 7. Harm has been done, and will continue to be done if he can not even attend, much less speak at the upcoming July 20 meeting or any other future community events that take place on any curtilage of a school property. Despite the Defense's characterization that Plaintiff is using "histrionics", how is this not McBreairty being exiled or banished? (Opp. Mot. at 13.).

Defendants claim the second Trespass Notice was supposed to limit the prior one. (Opp. Mot. at 7.) This seems to be a *post-hoc* rationale because the Defense sees just how absurdly broad the banishment is. No reasonable person would think that receiving a second criminal trespass notice was intended to grant you *more* liberties. Defendants backtrack "RSU22 did not intend … to block Plaintiff from entering RSU 22 school property for *functions* such as football games, concerts, or running on the track." (Opp. Mot. at 7.) A high school football game is not a "school related function?" Then what in the world does this language mean?

Further, *Defendants just don't get it*. They argue "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." (Opp. Mot. at 14.) Agreed! Watching a football game or jogging is not "speech." But punishing a citizen for exercising his First Amendment rights by ending his right to do these things *is* a violation of the First Amendment and his due process rights. Even the Hampden Police understood it to be a total ban (no matter which ban instrument we consider). Plaintiff was barred from further speech or petition on a wafer-thin

justification. Even if the Defense's position is credited, it does not cure the First Amendment and Due Process ailments by saying that McBreairty is free go for a run on the track to burn off the frustration he feels by being exiled from participating in public meetings and community events. Retaliating against a citizen for exercising his First Amendment rights is a violation of the First Amendment – even if the retaliation goes beyond restricting further use of his First Amendment rights. If the Defendant's logic is credited, then locking McBreairty up in jail wouldn't be a First Amendment violation either – since walking around in the sunshine isn't speech.

3.0 CONCLUSION

The Court should enter a preliminary injunction enjoining the Defendants from infringing upon McBreairty's constitutional rights.[10] The Plaintiff requests that the court enter an injunction that, at the very least, permits him to be on RSU22 grounds, attend public meetings, and to make comment like everyone else. The Court should strike down the vague and unconstitutional portions of the Policy. The Court should further enjoin RSU22 from ad-hoc creations of "policies" that do not exist (such as reading or playing recordings). McBreairty has lost his ability to speak freely in a public forum, limited or otherwise, because of non-existent and nonsensical violations of a Policy. However, the Policy's components that he allegedly violated are unconstitutional on their face, or at the very least, as applied to McBreairty. They can not stand.

Dated: July 17, 2022.

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[10] There should be no bond required. The Defendant requests none, and waiving it would be appropriate. *See, e.g., Marshall v. Amuso, supra.*

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of July, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Marc J. Randazza
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