

No. 23-1389

In the
UNITED STATES COURT OF APPEALS
for the
FIRST CIRCUIT

SHAWN MCBREAIRTY

Plaintiff-Appellant,

v.

**HEATH MILLER, IN HIS PERSONAL AND
OFFICIAL CAPACITIES; SCHOOL BOARD OF RSU22**

Defendants-Appellees.

*On Appeal from the United States District Court
for the District of Maine
No. 1:23-cv-00143
The Honorable Nancy Torresen*

APPELLANT'S OPENING BRIEF

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to L.R. 34.0(a), Appellant Shawn McBairty provides his statement as to why this Court should conduct oral argument in this appeal:

This appeal concerns significant questions going to the heart of the First Amendment, namely whether a school board may suppress speech that is critical of government actors while permitting laudatory speech, as well as broad and vague content-based restrictions that contradict public policy. Given the arguments Defendants-Appellees have made in this Court and in the District Court attempting to justify their viewpoint-based restrictions on speech, oral argument will assist the Court in deciding this appeal by allowing a more thorough explanation of the implications of Appellees' positions.

STATEMENT OF JURISDICTION

Pursuant to Fed. R. App. P. 28(a)(4), Plaintiff-Appellant Shawn McBreairty makes the following jurisdictional statement:

A) The District Court possessed subject-matter over the action per 28 U.S.C. § 1331, as this is a civil action on a federal question under 42 U.S.C. § 1983 and the First Amendment to the U.S. Constitution.

B) This Court has jurisdiction over this appeal because it relates to an interlocutory order refusing an injunction. *See* 28 U.S.C. § 1292(a)(1). An order denying a preliminary injunction is immediately appealable. *See S.F. Real Est. Inv'rs v. Real Est. Inv. Tr. of Am.*, 692 F.2d 814, 816 (1st Cir. 1982).

C) The Order denying the preliminary injunction was entered April 26, 2023 (ADD001). The Notice of Appeal was filed one day later, on April 27, 2023 (ADD030). Thus, this appeal is timely.

D) Plaintiff-Appellant Shawn McBreairty asserts that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1), as set forth above, as this is an appeal of a denial of a preliminary injunction.

STATEMENT OF ISSUES

1. Whether the District Court committed reversible error when it denied Plaintiff's motion for injunctive relief under Fed. R. Civ. P. 65.
2. Whether RSU22's BEDH Public Participation Policy Rule 2 is facially unconstitutional for violating the First Amendment freedoms from viewpoint-based and content-based discrimination.
3. Whether RSU22's BEDH Public Participation Policy Rule 2 is unconstitutionally vague.
4. Whether RSU22's BEDH Public Participation Policy Rule 2 is unconstitutional as applied to Appellant.

STATEMENT OF THE CASE

1.0 FACTUAL BACKGROUND

1.1 Governing Law and Rule

Maine law requires that school boards permit public comment at their meetings:

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-A M.R.S. § 1001(20). This statute has the effect of creating a limited public forum at school board meetings. Maine law permits school boards to limit the time a speaker may use, and it permits limitations on irrelevant speech, but the meetings must be open to “school and education matters.” There is no authorization for other content-based restrictions within this category of speech.

Defendant-Appellee School Board of Regional School Unit 22 (“RSU22”) is a school committee organized pursuant to 20-A M.R.S. § 1001 that exercises control and management of RSU22 public schools. Verified Complaint (AA001) at ¶ 3. The Chair of RSU22’s School Board is Defendant-Appellee Miller. *Id.* at ¶ 2. RSU22 promulgated BEDH Public Participation Policy Rule 2 (“Rule 2”):¹

¹ Upon information and belief, the BEDH Public Participation Policy was amended on June 14, 2023. However, as discussed below, the amended policy does not moot this appeal; both versions are constitutionally infirm and must be enjoined.

Confidential personnel information will not be shared in a public session. **No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system** or against particular students. Personnel matters or **complaints concerning** student or **staff issues** will not be considered in a public meeting but will be referred through established policies and procedures.

AA002 at ¶ 8; AA010 (emphasis added). Plaintiff-Appellant Shawn McBreairty is an educational advocate and journalist. AA001 at ¶ 1. McBreairty attends RSU22 meetings and speaks during the state-mandated public comment period. AA003 at ¶¶ 13-21. *See also McBreairty v. Sch. Bd. of RSU22*, 616 F. Supp. 3d 79 (D. Me. 2022). McBreairty now challenges the bolded portions of this rule as viewpoint discriminatory restrictions on speech and petition. The state created a public forum; the school committee may not, on the fly, limit the contours of that public forum’s content on a viewpoint-discriminating basis. It cannot even limit the context of the content-based metes and bounds absent a state law or injunction that modifies 20-A M.R.S. § 1001(20).

1.2 October 19, 2022 Meeting

On October 19, 2022, Dolly Sullivan, a Program Director for Educate Maine, made a public comment at the RSU22 School Board meeting. AA002 at ¶¶10-12; AA014 & Dkt.No. 1-3 (video exhibit). She provided an assessment of RSU22 employee Kelsey Stoyanova’s service as the 2022 Maine Teacher of the Year, referring to her as “thoughtful,” “intentional,” “brave,” and “brilliant.” *Id.*

Defendants-Appellees permitted Sullivan to praise Stoyanova without censure and even applauded her. *Id.* Defendants-Appellees did not invoke Rule 2 against Sullivan. *Id.*

1.3 February 15, 2023 Meeting

At the RSU22 School Board meeting on February 15, 2023, during the public comment period, McBreairty played a prerecorded statement criticizing Stoyanova. AA014 & Dkt.No. 1-3 (video exhibit); AA003 at ¶13. Defendant-Appellee Miller objected to McBreairty criticizing Stoyanova. *Id.* ¶¶14-16. Miller ordered McBreairty to stop his critical public comment and sit down. *Id.* ¶16. The School Board cut the video feed, stopped the meeting, and called the Hampden Police Department to remove McBreairty. *Id.*

Miller told officers McBreairty violated Rule 2 and ordered that McBreairty leave. *Id.* at ¶17. The police report states:

Heath [Miller] then spoke up and said that he had violated the policy and Shawn was warned . . . Heath said Shawn mentioned employee names. [sic] and was warned but Shawn continued to do it. Mentioning employee names is against policy.

. . .

Heath advised before the public portion he reads the policy and the list of bullet points. Heath read one that says in substance no confidential personal information wont [sic] be shared about persons employed at the school. Complaints and allegations will be aloud [sic] at board meetings about concerning any person employed by the school or students. Heath said Shawn played a recording of himself which is perfectly fine and he let him do it until he mentioned a teachers name

and an allegation towards that teacher, Heath then told him to sit down and Shawn then mentioned another staff members name in a negative manner. He then told Shawn he could not continue.

Id.; AA018 – AA019. But for Rule 2, McBreairty would not have been stopped or removed.

1.4 March 15, 2023 Meeting

McBreairty returned to RSU22 for the School Board meeting on March 15, 2023, making public comments, hoping that Defendants-Appellees would have realized their unconstitutional error made in the prior meeting. AA022 & Dtk.No. 1-5 (video exhibit); AA004 ¶¶18-19. Miller again prevented McBreairty from finishing speaking and ordered him to leave once McBreairty uttered the name of an RSU22 employee. *Id.* at ¶¶19-21.

2.0 PROCEDURAL HISTORY

On March 24, 2023, Plaintiff filed his Verified Complaint, attaching thereto a copy of Rule 2, video recordings of the three aforementioned meetings, and a police report from the February 15, 2023 incident. AA001. That same day, McBreairty filed an Emergency Motion for a Temporary Restraining Order and for a Preliminary Injunction. AA023. Defendants-Appellees filed their opposition on April 4, 2023 (AA039), and McBreairty filed his reply on April 6, 2023 (AA079). The District Court heard argument on the motion on April 25, 2023 (AA093). The following

day, on April 26, 2023, the District Court denied Plaintiff's Motion (ADD001). This appeal was filed on April 27, 2023 (ADD030).

3.0 RULING PRESENTED FOR REVIEW

McBreairty contests the Order of April 26, 2023, (ADD001) denying the preliminary injunction.

SUMMARY OF THE ARGUMENT

Rule 2 forbids speech criticizing the school board or staff in a public forum dedicated to discussing educational matters.² Appellees enforced Rule 2 against Appellant McBreairty to stifle his criticisms of RSU22 employees, causing ongoing irreparable harm to his First Amendment rights.

The District Court committed reversible error by concluding that, despite the language of Rule 2, this Rule was permissible and viewpoint-neutral because it applied only to “personnel matters” and only barred comments that specifically named staff. The District Court’s rewriting of the Rule is not consistent with the canons of statutory construction and does not account for RSU22’s demonstrated practice of allowing laudatory comments. Appellees also applied Rule 2 in an unconstitutional manner against McBreairty specifically by prohibiting his critical speech due to disagreement with his, and only his, message. Furthermore, Rule 2, as interpreted by Appellees and the District Court, is unconstitutionally vague in that it fails to provide any notice as to which comments are forbidden, so much so that for 10 years even the RSU22 School Board Chair did not know what it prohibited. Even as amended, the Policy suffers constitutional infirmities, and mere voluntary

² 20-A M.R.S. § 1001(20) creates a public forum and makes the municipalities adapt to it. RSU22 took its mandate to discuss educational matters, but then prohibited these subjects in the public forum created by the state of Maine, where educational matters are supposed to be discussed. 20-A M.R.S. § 1001(20). This is as absurd as creating a pickleball court where they prohibit the use of racquets.

cessation does not preclude the relief sought by McBreairty. The District Court thus committed reversible error in finding McBreairty had not shown a likelihood of success on the merits of his First Amendment claim.

The District Court erroneously found that, because McBreairty had not shown a likelihood of success, he had not shown that irreparable harm would result from the failure to issue injunctive relief. Any loss of one's First Amendment rights establishes irreparable harm, and the District Court committed reversible error in finding a lack of irreparable harm.

The balance of equities and public interest favor the requested injunction. Appellees have no legitimate interest in continuing to enforce an unconstitutional restraint on speech, and the public has no interest in allowing an unconstitutional rule to survive. The harm to McBreairty's First Amendment rights is ongoing, and the District Court erroneously credited completely unsupported arguments that Appellees needed to enforce their unconstitutional rule to protect themselves from legal liability and prevent harassment of their staff.

The District Court committed reversible error at every step of the preliminary injunction analysis, and this Court should reverse the District Court's order denying Appellant's motion for a preliminary injunction.

STANDARD OF REVIEW

This Court reviews the District Court’s factual findings for clear error, its legal conclusions *de novo*, and its ultimate decision to deny the preliminary injunction for abuse of discretion. *See Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 21 (1st Cir. 2020). Abuse of discretion occurs where a District Court makes “a material error of law, ‘ignor[es] pertinent elements deserving significant weight, consider[s] improper criteria, or, through assessing all appropriate and no inappropriate factors, plainly err[s] in balancing them.’” *Ryan v. U.S. Immigr. & Customs Enf’t*, 974 F.3d 9, 18 (1st Cir. 2020) (quoting *Ross-Simmons v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996)). The District Court abused its discretion in denying the preliminary injunction and committed numerous legal and factual errors.

ARGUMENT

Shawn McBreairty wants to talk about what teachers are doing right and wrong in the public-school classroom. His remarks are at the heart of the fundamental First Amendment right to speak out on matters of public importance. “The intended audience of those participating and speaking at a school board meeting is not isolated to district personnel, but includes community members as well.” *Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 549 (D. Vt. 2014) (cleaned up).

The Supreme Court observed that “public school teachers may be regarded as performing a task ‘that go[es] to the heart of representative government.’” *Ambach v. Norwick*, 441 U.S. 68, 75–76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). Public schools are an important institution “in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests.” *Id.* at 76-77. School attendance “is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). As summarized by the Connecticut Supreme Court:

Robust and wide open debate concerning the conduct of the teachers in the schools of this state is a matter of great public importance . . . [T]eachers’ positions, if abused, potentially might cause serious psychological or physical injury to school aged children.

Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms. Further, teachers exercise almost unlimited responsibility for the daily implementation of the governmental interest in educating young people. In the classroom, teachers are not mere functionaries. Rather, they conceive and apply both policy and procedure.

Kelley v. Bonney, 606 A.2d 693, 710 (Conn. 1992).³ “[E]ducation is perhaps the most important function of state and local governments.” *Brown*, 347 U.S. at 493.

McBreairty’s desire to speak about what teachers do goes to the heart of this most important function. As the District Court observed, “Defendants do not dispute that Mr. McBreairty’s public comments at School Board meetings are protected speech. *See City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm’n*, 429 U.S. 167, 174–75 (1976) (holding that the First Amendment protects the rights of speakers at school board meetings that are opened for direct citizen involvement and permit public participation).” *McBreairty v. Miller*, 2023 U.S. Dist. LEXIS 72379,

³ At oral argument below, Appellees attempted to distinguish *Kelley* by referring to *True v. Ladner*, 513 A.2d 257, 263–64 (Me. 1986). *See* AA115 at 1–11. *Kelley* and *True* were cases about whether a public school teacher is a “public official” for purposes of actual malice *under defamation law*. Even if the Maine Law Court was right in *True* (which McBreairty does not concede), it is immaterial, because that test noted a lack of access to channels of communication, a greater state interest in protecting teachers, and a lack of an assumption that a teacher has voluntarily exposed himself to increased risk of defamation, 513 A.2d at 263–264, factors that have nothing to do with the First Amendment interest in the public debating what teachers do. If McBreairty defames a teacher, whether that government employee has a permissible defamation claim is different from whether the government can ban the public from criticizing individual government employees at all.

*9 (D. Me. Apr. 26, 2023). Defendants-Appellees, however, will only allow praise. They will use government force if any citizen criticizes any employee. This is antithetical to the need for robust, wide-open debate about this most important state function.

1.0 Plaintiff Has a Strong Likelihood of Success

To obtain a preliminary injunction, the court evaluates “(1) whether the plaintiff is likely to succeed on the merits, (2) whether he is likely to suffer irreparable harm in the absence of immediate relief, (3) the balance of equities, and (4) whether granting the injunction is in the public interest.” *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 22 (1st Cir. 2020). “In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis,” such that “irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim.” *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10-11 (1st Cir. 2012) (*per curiam*). At this stage, the “court need not conclusively determine the merits of the movant’s claim; it is enough for the court simply to evaluate the likelihood . . . that the movant ultimately will prevail on the merits.” *Ryan*, 974 F.3d at 18. McBreairty is likely to prevail in his claim that Rule 2 is unconstitutional.

1.1 Rule 2 is Facially Invalid

Rule 2 would not even pass rational basis analysis, let alone viewpoint- and

content-based strict scrutiny.⁴ The District Court noted “the parties agree that the public comment portion of the School Board meeting is a limited public forum.” *McBreairty v. Miller*, 2023 U.S. Dist. LEXIS 72379, at *9; *see also McBreairty*, 616 F. Supp. 3d at 93 (“Taken together, [20-A M.R.S. § 1001(20)] and the [Public Participation] Policy show that the School Board opened up a limited public forum for the purpose of inviting public comment on school-related matters”). Earlier in this appeal, Appellees admitted that the public comment portion is a limited public forum “on the broad yet confined topic of ‘school or education matters.’” Opp. to Motion for Injunction Pending Appeal at 10 (quoting 20-A M.R.S. § 1001(20)).

The District Court also correctly identified the standards governing speech in a limited public forum:

A limited public forum is what it sounds like—a forum that has been opened to the public but is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (citation omitted). A restriction based on subject matter “may be permissible if it preserves the purposes of that limited forum.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). But “viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum’s limitations.” *Id.*; *see Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on

⁴ “[C]ontent-based and viewpoint-based restrictions are subject to strict scrutiny, which requires the government to demonstrate the restriction advances a compelling interest and is narrowly tailored to achieve that interest.” *McCoy v. Town of Pittsfield*, 59 F.4th 497, 505-506 (1st Cir. 2023)(citations omitted and cleaned up).

speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

2023 U.S. Dist. LEXIS 72379, *9-10. However, the District Court erred when it found a rule that prohibits only “complaints and allegations” is not viewpoint-based. And, the restrictions in the rule, purportedly on personnel matters and “personally directed” remarks, are otherwise an unjustified content-based restriction.

1.1.1 Rule 2 is an Impermissible Viewpoint-Based Regulation

On its face, Rule 2 prohibits “complaints” and “allegations,” while allowing laudatory comments and compliments. The District Court erroneously determined that this was not viewpoint discrimination. Rule 2 is not merely a *content*-based restriction, which *may* (but not always) be permissible in limited public forums so long as they are consistent with the purposes of the forum. Rather, the rule impermissibly allows discussion of an employee’s performance, but *only* if that discussion is *complimentary*. See *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996) (“It is difficult to imagine a more [viewpoint-discriminatory] prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance)”). Appellees used Rule 2 to prohibit McBreairty from criticizing RSU22 and they promised to do so again if anyone else does so.

RSU22 does not want its employees criticized—only praised. Below, Appellees argued that the rule was not viewpoint based, because it prohibited criticism of teachers who did X and criticism of teachers who did not do X. (AA047). But, “[t]o prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.” *Matal*, 582 U.S. at 249 (Kennedy, J., concurring) (citation omitted).⁵ “When government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is ... **blatant.**” *Rosenberger*, 515 U.S. at 829-30 (emphasis added). “[D]isfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment.” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (internal quotation marks omitted). “A viewpoint need not be political; any form of support or opposition to an idea could be considered a viewpoint.” *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021) (quoting *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring in part) (“The First Amendment’s viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses”)).

⁵ Although the District Court cited favorably to *Davison v. Rose*, 19 F.4th 626 (4th Cir. 2021), which determined that a policy against “personal attacks” was viewpoint neutral, mere criticism is not an “attack.” Moreover, the opposite of a personal attack is effusive praise—it is a viewpoint, and this Court should not follow the mistakes of the Fourth Circuit.

Viewpoint discrimination occurs when there is a “governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic.” *Ridley v. M.B.T.A.*, 390 F.3d 65, 82 (1st Cir. 2004). Dictating how a speaker may present a criticism during public comment is viewpoint discrimination. *Morse v. Frederick*, 551 U.S. 393, 436 (2007) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction”) (quoting *Rosenberger*, 515 U.S. at 828-829); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (a restriction is content neutral if it is “justified without reference to the content of the regulated speech”). It is dictating viewpoint when a speaker is prohibited from criticizing a teacher by name, or even uttering a teacher’s name, during public comment, especially in this forum that *requires* Appellees to allow the public to speak on school and education matters. *See* 20-A M.R.S. § 1001(20). That the District Court determined that Rule 2 was not, by its express terms, viewpoint discrimination is reversible error.

In *Marshall*, the court found unconstitutional viewpoint discrimination in a challenge to a school board’s policy that permitted “positive and complementary personally-directed comments supportive of Board and school employees[,]” but prohibited “negative, challenging, or critical personally-directed comments.” 571 F. Supp. 3d at 422. Here, as in *Marshall*, Rule 2 expressly prohibits “complaints and

allegations . . . concerning any person employed by the school system[.]” AA010. On its face, Rule 2 bans a single viewpoint and is facially unconstitutional.

The District Court erroneously determined that Rule 2 was viewpoint neutral because it does not explicitly endorse positive comments about RSU22 personnel. ADD014. In other words, the District Court held that a policy can prohibit criticism, but as long as it does not simultaneously and explicitly endorse praise, then there is no First Amendment violation. This is an untenable proposition. Explicit permission for positive comments is not needed; *the Rule only prohibits negative comments*. For there to be viewpoint discrimination, a regulation does not need to openly address both points of view; it can simply ban one viewpoint. *See, e.g., Matal v. Tam*, 582 U.S. 218 (law banning “disparaging” trademarks struck down, even though it did not openly endorse “laudatory” trademarks). Further, there is unrebutted record evidence that Appellees permit positive comments regarding RSU22 employees at meetings. AA002 ¶¶ 10-12; AA014 & Dkt.No. 1-3 (video exhibit).

The District Court wrongly determined Rule 2 was not a viewpoint-based restriction on speech because Appellees engaged in the Orwellian exercise of re-defining criticism as “personnel matters,” while not redefining praise similarly. The District Court agreed with Appellees and mistakenly relied on *Fairchild v. Liberty*

Indep. Sch. Dist., 597 F.3d 747 (5th Cir. 2010).⁶ Unlike *Fairchild*, where “personnel matter” was defined, Appellees’ policy here fails to define “personnel matter.” Instead, Appellees have a moving-target definition that they use to stifle criticism. The District Court effectively re-drafted Rule 2 to forgive the specific viewpoint-based language. ADD011. Rather than looking at the language of the Rule, which only addresses complaints and allegations, the District Court found that the Rule only prohibited discussion of “personnel matters.” *Id.* This was incorrect—it specifies complaints and allegations as distinct from personnel matters.

Moreover, one cannot seriously expect that Rule 2 would be interpreted as prohibiting praising a teacher for winning Teacher of the Year, while also prohibiting awarding someone “Worst Person of the Year” in their remarks, even though the District Court creatively defined both as “personnel matters.”

The District Court’s rewriting of Rule 2 in an effort to make it pass constitutional muster, however, is not permissible. “When the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or

⁶ *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 760 n.47 (5th Cir. 2010) (“*Fairchild*’s examples of publically [*sic*] spoken “praise” at Board meetings do not alter the analysis of the facial attack. Indeed, the cited laudatory comments – which included thanking certain people for painting a gym (R. at 1775) – did not deal with personnel matters such as “appointment, employment, evaluation, reassignment, duties, discipline, or dismissal” – and so did not fall under a District policy. They do not contemplate further action by the Board and hint of no focused dispute to be resolved”).

excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.” *Caminetti v. United States*, 242 U.S. 470, 471 (1917); accord *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Courts only apply the canon of constitutional avoidance, imposing a “limiting construction,” if regulatory language is “readily susceptible to such a construction;” courts “will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish [the legislative] incentive to draft a narrowly tailored law in the first place.” *United States v. Stevens*, 559 U.S. 460, 481 (2010) (cleaned up). The canon of constitutional avoidance does not permit the courts to avoid the plain language of a regulation and rewrite a rule to save an authoritarian policy. Yet this is what the District Court did, redefining all criticism of a teacher as “personnel matters.”⁷

In fact, by lumping the “complaint” provision in with the “personnel matter” provision, the Court made the former superfluous, thereby “violat[ing] the cardinal

⁷ Appellees’ contention below that allowing McBreairty to speak implicated the government’s obligation to keep charges of misconduct under 20-A M.R.S. § 6101 confidential was particularly unfounded. McBreairty did not file a charge of misconduct and he was not providing confidential information. But even if he had, that statute binds only the government, not private citizens. By Appellees’ argument, if a teacher assaults a student, the student and her parents would be prohibited from reporting such “confidential” criminal misconduct to the police; fortunately, Appellees are wrong.

rule that, if possible, effect shall be given to every clause and part of a statute.” *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). In addition, “[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012) (quoting *Popkin*, 285 U.S. at 208). The prohibition on complaints and accusations is not merely an example of a personnel matter—it is its own separate prohibition. This is the plain reading—that same provision prohibits complaints and accusations against students, who are not employees and not subject to personnel actions. And, notably, complaints about staff before the existence of a “personnel matter” that may never come to bear, are nonetheless prohibited.

The District Court’s construction of Rule 2 also violates 20-A M.R.S. § 1001(20), which establishes the contours of the limited public forum at issue. As the court in *McBreairty*, 616 F. Supp. 3d at 92, noted, the “primary purpose of the meeting is for the Board to conduct its business as charged by law,” the law “allows the public limited time ‘to voice opinions or problems,’ and gives the Chair discretion to limit ‘irrelevant’ speech.” Maine law *mandates* a right to speak about “school and education matters” subject to “reasonable standards.” Restricting irrelevant comments is reasonable. Prohibiting criticism is not. Criticism of what a public-school employee does on the job is a “school and education matter” at the

heart of the forum’s very purpose. There is nothing *reasonable* about prohibiting criticism of public-school employees in a limited public forum created for “school and education matters.” If there is criticism about a dangerous building condition, could Appellees avoid criticism by decreeing “building operation matters” as outside the rules? Can they eliminate budget matters from the forum if they receive flak for wasteful spending? Can they narrow the forum to exclude *all* potential for criticism? If the District Court’s decision stands, the answer to these questions is “yes.” The government will be allowed to retroactively narrow the scope of their public forums in response to litigation. Neither the First Amendment nor 20-A M.R.S. § 1001(20) abide this outcome.

Because the District Court rewrote the Rule to avoid addressing its facial distinction between complaints and praises, the remainder of its analysis, based on that revision, is flawed. The District Court cited a series of cases regarding “personnel” matter prohibitions, asserting that since those cases deemed there to be no viewpoint discrimination, there was none here. But, the outcome reached by the District Court is a straw-man argument, based on that court’s impermissible hypothetical revision. Further, the District Court’s reliance on these out-of-circuit cases was improper, as they were all plainly distinguishable – not only on their face, but because none of those courts were required to reach a result consistent with 20-A M.R.S. § 1001(20).

Viewpoint-based regulations “may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Rule 2 is not so tailored. The District Court held that shielding employees from criticism was necessary to serve RSU22’s interest in keeping educators “safe” and the School Board conducting its orderly business.⁸ *McBreairty v. Miller*, 2023 U.S. Dist. LEXIS 72379, at *33. However, to openly characterize criticism as a “threat to safety” is a shockingly authoritarian error. There is no evidence that subjecting employees to criticism makes them “unsafe.” Notably, the District Court explicitly found that the speech was protected under the First Amendment, *i.e.*, neither a true threat nor fighting words. Appellees claim they “believe” they have a duty to silence criticism pursuant to a workplace bullying policy.⁹ AA061 at ¶ 14. Workplace bullying is defined in Appellees’ policy as “intentional behavior that a reasonable person would expect to interfere with an employee’s work performance or ability to work.” AA067. Speech at a meeting

⁸ These interests were only identified in the balance of interests discussion. However, Appellees have referred to this as their alleged governmental interest in their Opposition to the Motion for Expedited Briefing at 4, and their Opposition to the Motion for an Injunction Pending Appeal at 14.

⁹ Appellees argued below that they have an obligation to protect their employees from “bullying” and there is possible legal liability in allowing citizens to criticize. The District Court credited their argument. AA049 – AA-050; ADD028. This is nonsensical. Rule 2 prohibits *any* criticism of RSU22 employees, not just “bullying” or “harassing” behavior.

would not interfere with performance or ability to work. Public education employees are supposed to be professionals and receptive to feedback. If “criticism” is “bullying,” then teachers are bullies every time they give a bad grade, and that cannot be the case.

Moreover, even the workplace bullying policy carves out an exception for criticism “when the intent is to address unsatisfactory work performance[.]” AA067. The workplace bullying policy provides employers the ability to criticize their employees, but *McBreairty*, a member of the public, is prohibited from criticizing a public employee. There is no justification for such discrimination between speakers. And, in any event, neither the workplace bullying policy nor 20-A M.R.S. § 1001(22), the anti-bullying statute, abrogate the First Amendment.

The only concern of “orderly business” identified by the District Court was when *McBreairty* refused to let Appellees violate his rights, calmly waiting for the police to arrive and direct him to leave, which he did. This Court recognizes that “[t]he consequences [a] defendants’ initial illegality and continuing irresponsibility should fall on them. ... [I]t is not the function of the federal courts to extricate defendants from a mess of their own making.” *Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49, 59 (1st Cir. 2004); *see also United States v. Cordero-Rosario*, 786 F.3d 64, 73 (1st Cir. 2015) (noting that the Constitution does not allow government

officials “to rely on an error of their own making.”) (citation omitted). Appellees cannot use their own constitutional violation as the basis for an unconstitutional rule.

Although below, RSU22 identified an “interest in encouraging citizen participation,” AA050, forbidding speech of one flavor to promote other speech is not a legitimate government interest. “It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if the government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.” *Rosenberger*, 515 U.S. at 895. As the rule at issue is an impermissible viewpoint-based restriction, it violates the First Amendment, and *McBreairty* is likely to succeed on his claims.

1.1.2 Rule 2 is an Impermissible Content-Based Regulation

Even if, assuming *arguendo*, the rule is not viewpoint-based, it is still an impermissible content-based restriction, to the extent it restricts discussion of “personnel matters.” In a limited public forum, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.” *Perry*, 460 U.S. at 46. Rule 2 is not narrowly drawn, nor does it effectuate a compelling state interest.

The plain language of Rule 2 is much broader than what the District Court imagined. Not every complaint is a personnel matter. The curriculum, a teacher’s

political views, a teacher’s syllabus, or books a teacher assigns are not “personnel matters.” For the District Court’s redefined version of Rule 2 to be plausible, it would have to consider all such subjects to be “personnel matters,” and would also have to ban all *mention* of personnel matters.¹⁰ Yet criticism of a teacher is prohibited under Rule 2, while praise of a teacher is not. Appellees do not dispute this.

Personnel matters, in common usage and under Maine law, means “employment matters.”¹¹ There is a pattern, practice, and policy of allowing

¹⁰ At the same time, the District Court accepted Appellees’ new interpretation of “personnel matters” as prohibiting even the utterance of a staff member’s name in the as-applied challenge. ADD022 – ADD023. The District Court found that the Chair never specified which provision he was relying on to prevent McBreairty from uttering staff member names. *Id.* at 22. When meeting with police officers during the February meeting, Miller told officers that McBreairty violated the personnel-matter rule. AA018 – AA019 (“Heath read one that says in substance no confidential personal information wont [*sic*] be shared about persons employed at the school . . . [Heath] let him do it until he mentioned a teachers [*sic*] name and an allegation towards that teacher”). Appellees’ definition of “personnel matters” is overbroad to the extent that it prohibits the mere utterance of an employee’s name. Even the case the District Court relied on found the same. *Pollak v. Wilson*, No. 22-8017, 2022 U.S. App. LEXIS 35636, at *30 (10th Cir. Dec. 27, 2022) (“[T]o the extent that the mere mention of an administrator’s name is deemed ‘personnel’ and barred under the policy, the policy is overbroad”); *see also United States v. Hansen*, 216 L. Ed. 2d 692, 717 (Jun. 23, 2023) (“A statute is overbroad—and thus facially invalid—if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’ The overbreadth inquiry thus generally requires comparing the First Amendment- protected expression that a statute impermissibly punishes, on the one hand (let’s call that ‘category one’), with the unprotected speech and conduct that the statute validly prohibits, on the other (‘category two’)”) (Jackson, J., dissenting) (quoting *Stevens*, 559 U.S. at 473).

¹¹ If it means mere “criticism,” then this appeal would be deemed a “personnel matter” pertaining to Judge Torresen. That cannot be the case.

discussion of personnel matters. At the hearing on April 24, 2023, the Record included Appellees' agenda for the upcoming meeting on April 26, 2023. AA090. On the agenda, there is a "personnel" section where the school board discusses employment matters, including resignations, nominations, and transfers. AA090. Appellees openly and continually discuss personnel matters, while claiming that criticism of employees is a "personnel matter" and that personnel matters are prohibited from discussion. This is a galling inconsistency.

Under Maine Law, "personnel matter" discussions are only limited by 20-A M.R.S. § 6101(b), which prohibits discussing *confidential information*. Confidential personnel information includes personnel evaluations and complaints. *See* 20-A M.R.S. §§ 6101(b)(3)&(6). In common usage, personnel evaluations and complaints are employment matters between an employer and its employees, separate and distinct from negative opinions by the public about them. If personnel evaluations and complaints included opinions by the public, that would render the confidentiality provision under 20-A M.R.S. § 6101 superfluous and/or meaningless. As such, the District Court erred in interpreting Rule 2's "personnel matter" expansively to cover public opinions. ADD011 – ADD012.

The District Court also relied on *Pollak v. Wilson*, 2022 U.S. App. LEXIS 35636 (10th Cir. Dec. 27, 2022), in support of its determination that the content-based restriction was permissible. ADD014 – ADD016. However, it overlooked

significant differences between the policies at issue in *Pollak* and in this case. The policy in *Pollak* provided that “[p]ersonnel matters are not appropriate topics to be discussed at regular board meetings.” 2022 U.S. App. LEXIS 35636 at *18. Meanwhile, here, “personnel matters” are *actually an agenda item at the meetings*. Rule 2 does not simply govern the public comment period—by its terms, it is supposed to cover the entirety of the meeting. Yet, every agenda for meetings of the School Board this school term had personnel matters as an action item.¹² Appellees claim Rule 2’s unconstitutional restriction is reasonable based on a requirement that personnel information remain confidential pursuant to 20-A M.R.S. § 6101. *See* AA046; AA061 at ¶ 15. But, their own discussions of personnel matters at these meetings belie this purported justification. Moreover, Appellees’ reliance on 20-A M.R.S. § 6101 is misplaced. Some employment information is available to the public. For example, disciplinary decisions against school employees are publicly available, but the internal investigative process “pertaining to disciplinary action” is

¹² Each agenda had a section:

- “VIII. Personnel
 - A. Resignations
 - B. Nominations – Transfers”

See, *e.g.,*
<https://drive.google.com/drive/folders/1BeDuSo4tXX8qQBP0sVRp9RjEqWbUIyDi>. A court of appeals “may take judicial notice of facts which are ‘capable of being determined by an assuredly accurate source.’” *Pietrangelo v. Sununu*, 15 F.4th 103, 106 n.1 (1st Cir. 2021) (quoting *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 570 (1st Cir. 2004)); *see also* Fed. R. Evid. 201(b)(2).

subject to confidentiality. *See* 20-A M.R.S. § 6101(2); *see also* *Hamilton v. Drummond Woodsum*, 223 A.3d 904, 905 (Me. 2020) (adopting the common usage of personnel matters where there is an internal investigation by a governmental entity into a governmental employee). Thus, there is no proper basis for the restriction.

Further, in *Pollak*, the restriction said “[s]peakers will not be permitted to participate in gossip, make defamatory remarks, use abusive or vulgar language.” 2022 U.S. App. LEXIS 35636, at *5-6. The *Pollak* court reasonably confined “personnel-matter” to “personal and performance evaluation information[.]” *Id.* at *23. Rule 2, on the other hand, specifically forbids “complaints,” not simply statements about “personnel matters” (which, incidentally, Appellees and the District Court define as “any negative statement about an RSU22 employee”).

In *Prestopnik v. Whelan*, another case relied on by the District Court, the Second Circuit noted that the school board had a policy that “explicitly excludes speech about specific personnel decisions, which presumably would include decision to deny the appellant tenure[.]” 83 F. App’x 363, 364 (2d Cir. 2003). Tenure is an *employment* matter. However, this is not equivalent to the public sharing its opinions about government employees, especially when state law requires the freedom to voice concerns about the employees.

In *Pollak* and *Prestopnik*, the Tenth and Second Circuits followed the common and logical meaning of “personnel matters” as limited to employment

matters. *Fairchild*, as discussed above, specifically confined personnel matters to “appointment, employment, evaluation, reassignment, duties, discipline, or dismissal.” 597 F.3d at 757. Here, the District Court defined “personnel matters” in a novel and expansive manner that defies common usage and prohibits the public from expressing their opinions.

While overlapping with the issue of vagueness, if “personnel matters” are prohibited, the rule is so imprecisely and broadly drawn that no person of ordinary intelligence can understand what is permitted. If Appellees want to bar discussion of a pending disciplinary proceeding or union grievance, for example, that might be sufficiently narrow, but the rule, especially as interpreted, is not.

Neither is the justification on naming employees constitutionally sound—and Appellees did not claim it was. Instead, Appellees only attempted to justify “restricting personnel matters or complaints.” AA106 at 11-13. Rule 2 prohibits “personally directed” criticism (but not personally directed praise), which the District Court deemed permissible in the forum. *McBreairty v. Miller*, 2023 U.S. Dist. LEXIS 72379, at *26-27. This, too, is not a narrowly-drawn rule. By its own terms (and overlapping with vagueness concerns), it prohibits talking about specific government employees, but it is unclear where the line is drawn. Perhaps it restricts talking about third grade teachers or the teachers at School X. Perhaps it restricts talking about a small cohort. Maybe it restricts talking about a specific teacher if

one does not use their name. Or, as apparently instituted here, it restricts talking about a teacher if, and only if, one mentions their name.

Notably, the District Court omitted any discussion of how prohibiting praise or criticism by name furthers the interests of safety, orderly business, or public participation. Instead, the District Court pointed obliquely to *Moms for Liberty v. Brevard Pub. Schs.*, 582 F. Supp. 3d 1214 (M.D. Fla. Jan. 24, 2022) *aff'd* 2022 U.S. App. LEXIS 32064, at *1 (11th Cir. Nov. 21, 2022), to determine that a rule that prohibited “personally directed” remarks survived constitutional scrutiny. That case is inapposite to this case as a matter of fact and law. In *Moms for Liberty* “personally directed” meant that the speaker must direct their remarks to the chair—it was not a prohibition against talking about someone. 582 F. Supp. 3d at 1218-1220. RSU22 wants to prohibit talking *about* someone. Brevard prohibited talking *at* someone. RSU22’s rule is content-based. Brevard’s rule was content-neutral. Thus, there is no precedent to support the constitutionality of a rule against talking about someone by name.

Further, the government interests in the cases cited by the District Court and Appellees were not the same. Appellees lack a compelling interest for their content-based restriction. Again, the only interests identified are a) safety, for which there is no real concern, b) orderly business, for which the example had nothing to do with the content, only a non-violent protest against the unconstitutional rule, and c)

encouraging citizen participation, yet 20-A M.R.S. § 1001(20) itself fosters such participation and the Rule only restricts it. These facts were absent in the cited cases. Thus, Rule 2 is a facially unconstitutional content-based regulation.

1.2 Rule 2 is Unconstitutional As Applied

Even if Rule 2 were “neutral and constitutional in all fact situations, ... it has been enforced selectively in a [content or] viewpoint discriminatory way” against McBreairty. *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004). There is a “pattern of unlawful favoritism.” *Id.* (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002)). RSU22 must be enjoined from selective enforcement of the rule. McBreairty is and will continue to be singled out and silenced “because of [his] political activities related to educational and other school-related issues.” *Baca*, 936 F. Supp. at 726. As the District Court judge found in the previous case between the parties, “it is hard to shake the sense that the School Board is restricting the speech because the Board disagrees with both Mr. McBreairty’s opinions and the unpleasantness that accompanies them.” *McBreairty v. Sch. Bd. of RSU22*, 616 F. Supp. 3d at 96. Appellees were forced to rescind their total ban, but they are still trying to stop McBreairty’s opinions.

In the prior case between the parties, where McBreairty obtained an injunction against RSU22’s unconstitutional ban on attending meetings, the District Court noted a case where a school board unconstitutionally permitted “positive

complimentary personally-directed comments supportive of Board and school employees” while prohibiting “negative, challenging, or critical personally-directed comments.” *Id.*, at *23 n.14 (citing *Marshall*, 571 F. Supp. 3d at 422). Such unconstitutional action was taken against McBreairty here. Miller decided to enforce his own version of Rule 2 which involves “warning and interrupting speakers as soon as they mention an employee’s name during public comment period[.]” AA062 at ¶ 20. The only speaker interrupted, of course, is McBreairty.

While Miller “generally read[s] or summarize[s]” the public participation policy prior to public comment, he never announced that Rule 2 would be enforced differently moving forward. AA060 at ¶ 8. Appellee Miller sprung his new interpretation on McBreairty during the February 15, 2023, School Board meeting. And he did not explain his new application of Rule 2, banning even the mere utterance of employee names, until after this present lawsuit was filed. Appellee Miller provided no evidence that he applied, or intended to apply, his new interpretation to anyone other than McBreairty. He applied Rule 2 to McBreairty in a viewpoint-discriminatory manner based on evident animus.

During the October 19, 2022, School Board meeting, Appellees broke out in a thunderous applause and thanked the speaker for praising a government employee because they support this government employee and her ideology. AA025. A member of the public was permitted to praise a government employee for her

performance as Maine Teacher of the Year during the school board meeting. AA002– AA003. On the other hand, Appellees called the police on McBreairty for criticizing the same government employee during the School Board meeting on February 15, 2023, because they are hostile to McBreairty and his expressed ideology. AA003. Appellees contacted the police to remove McBreairty from the premises for violating Rule 2, which prohibits “allegations and complaints” of public employees but permits praise. AA010. A month later, on March 15, 2023, McBreairty criticized other government employees. AA004. Again, Appellees contacted the police to remove McBreairty from the premises for violating Rule 2. Appellees discuss personnel matters during public meetings and allow others to praise public employees, but McBreairty, alone, is prohibited from criticizing and naming public employees. That is targeted enforcement.

The District Court erred in conflating Rule 2 with a separate policy that permits the Chair to “interrupt or terminate an individual’s statement when it is too lengthy, *personally directed*, abusive, obscene, or irrelevant.” ADD023 (emphasis in original). The District Court concluded that the Chair realized the policy prevented positive feedback relating to personnel matters just as it prohibited complaints. *See* ADD022. If this were true, there would be no reason for Appellees to consider adopting a new policy. *See* AA061 at ¶¶ 17-20. Appellees never claimed, argued, or alleged that McBreairty violated the “personally directed” rule.

See ADD026 – ADD028. Appellees only claimed that McBreairty violated Rule 2 generally. *See* AA053–AA055. This further shows that McBreairty was individually targeted. Thus, the rule is unconstitutional as applied and Appellees must be enjoined from unconstitutional enforcement.

1.3 Rule 2 is Unconstitutionally Vague

No one knows the full scope of what Rule 2 prohibits. A regulation is impermissibly vague 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). Because of the potential 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).

As discussed in Section 1.1.2, *supra*, Appellees and the District Court attempted to save Rule 2 by claiming it applied only to “personnel matters” and then defining that term so broadly that it encompassed any criticism of school staff or even simply naming them. As redrafted by the District Court, Rule 2 is so broadly drawn, relying on a completely novel definition of the term “personnel matters” that no ordinary person can understand what speech it prohibits.

Appellees silenced McBreairty by using unconstitutionally vague criteria. By Miller's own admissions, Rule 2 is vague and everyone must guess at its meaning. *See* Miller Decl., AA061 ¶ 17. Miller served on the School Board since 2013. AA059 ¶1. Yet, it took him ten years to ascertain that positive comments “would be included in the prohibition of ‘personnel matters.’” AA061 ¶17. Defendant Miller only became aware that allowing positive comments, while prohibiting negative comments, was problematic “sometime in the winter[.]” *Id.* According to Defendant Miller, another board member returned from a seminar “*with the recommendation that the District change its policy BEDH such that prohibition on discussion of personnel matters relate not only to negative discussion but also positive discussion.*” *Id.* (emphasis added). If the rule fails to provide the School Board Chair reasonable notice as to its meaning for 10 years, it must be vague for the average citizen.

Even with the revised interpretation that the policy merely prohibits stating the name of an employee to be “personally directed,” the rule remains vague. At what point does a statement critical of RSU22 educational policy and practices become “personally directed?” Using a hypothetical example of corporal punishment, can McBreairty say “I know of some teachers who use corporal punishment?” What about “A Teacher in Class 123 uses corporal punishment, and I disapprove?” Or, is it only “Mr. Smith uses corporal punishment” that violates the

rule? And, notably, as in the case at bar, McBreairty is not asking for disciplinary action to be taken; rather, he is lodging his displeasure at what one or more teachers do in the classroom. No person of ordinary intelligence can tell where the line is, since it is far from clear from the text of Rule 2 that it is a mere prohibition on “naming names.”

The District Court did not address McBreairty’s vagueness argument, erroneously finding it was first raised in the reply brief and was waived, citing an inapposite case referring to *this Court’s* rules for appellate briefs. ADD018 at n.16. It is true that when “a moving party raises an argument for the first time in a reply brief, that argument is waived.” *Napert v. Gov’t Emps. Ins. Co.*, No. 13-cv-10530, 2013 U.S. Dist. LEXIS 108077, *2 n.4 (D. Mass. Aug. 1, 2013). But, contrary to the District Court’s misreading of the record, the record demonstrates McBreairty raised a vagueness argument in his moving brief. AA033 – AA035. While McBreairty then expanded on this argument in his reply in response to Appellees’ arguments, it was not a *new argument*. AA083 – AA084. McBreairty did what litigants are supposed to do. A moving party may “use a reply brief to clarify arguments previously made or to respond to an argument an opposing party raises in an opposition.” *Allied Home Mortg. Cap. Corp. v. Mark*, No. 12-cv-10158, 2014 U.S. Dist. LEXIS 139436, *12 (D. Mass. Sept. 30, 2014). Furthermore, McBreairty’s vagueness rebuttal arguments were responding to claims Appellees

made in their opposition, namely Miller’s declaration – arguments McBreairty could not have made in the Motion. AA083 – AA084 (citing AA059). The District Court applied incorrect law and ignored the record in declining to consider McBreairty’s vagueness argument, thus committing reversible error.

1.4 The Relief Sought is Not Moot

During the pendency of this appeal, it appears that Appellees considered and adopted a revised BEDH Public Participation Policy.¹³ This revision does not preclude the injunctive relief sought, and so the relief requested is not moot. *Compare Worthley v. Sch. Comm. Of Gloucester*, No. 22-cv-12060-DJC, 2023 U.S. Dist. LEXIS 11508, at *11-12 (D. Mass. Jan. 24, 2023) (granting preliminary injunction against no trespass order, despite that order having been superseded, under the voluntary cessation doctrine). When a defendant asserts mootness, “it bears the heavy burden of persuading the court that there is no longer a live controversy.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc.*, 528 U.S. 167, 189 (2000). There is no reason to believe this revised policy, like Rule 2, would not continue to be enforced unconstitutionally. *Compare* AA062 at ¶¶ 19-20.

¹³ See <https://drive.google.com/file/d/1G-gnSSK8y3AWY3VI1-6hK0X55NIJM9Ew/view> (Policy); and <https://drive.google.com/drive/folders/1BeDuSo4tXX8qQBP0sVRp9RjEqWbUIyDi> (Agenda for June 14, 2023, meeting, to “[d]iscuss and act on the second reading Policy BEDH – Public Participation in Board Meetings”).

Meanwhile, McBairty intends to exercise his rights under the First Amendment and under Maine law.

Even under the revised rule, the voluntary cessation doctrine prevents the matter from being moot. The doctrine applies “when a ‘defendant voluntar[ily] ceases the challenged practice’ in order to moot the plaintiff’s case and there exists ‘a reasonable expectation that the challenged conduct will be repeated following dismissal of the case.’” *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016) (alteration in original) (quoting *Am. Civ. Liberties Union of Massachusetts v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 56 (1st Cir. 2013)). There is no legitimate dispute that the revision was adopted because of McBairty’s challenge to Rule 2. As to the second consideration, the amendment restricts McBairty, and there “exists a reasonable expectation that the challenged conduct will be repeated.” *See Knox v. Employees Intern. Union, Local 1000*, 567 U.S. 298, 307-08 (2012). After all, while *McBairty v. School Bd. of RSU22*, 616 F. Supp. 3d 79 (D. Me. 2022) did not explicitly enjoin Rule 2, the fact that these very Appellees could not refrain from infringing on McBairty’s First Amendment rights (even after being served with the prior injunction) makes it clear that Appellees are not interested in any non-court-ordered restraint.

Under the revised policy, Rules 3(b) and (c) suffer nearly the same constitutional infirmities. Rule 3(b) prohibits “defamatory comments,” no matter

how truthful, but does not prohibit “laudatory comments,” no matter how false. This is patent viewpoint-based discrimination. Rule 3(b) restricts the use of “vulgar” language, but this is vague and is otherwise an unreasonable content-based restriction. *See, e.g., Iancu*, 139 S. Ct. at 2301-02 (finding Lanham Act’s bar on registration of “immoral or scandalous” trademarks, which was often interpreted to include “vulgar” marks, was an unconstitutional viewpoint-based restriction on speech, and rejecting government’s request for a limiting construction); *accord Cohen v. California*, 403 U.S. 15, 25 (1971)(Harlan, J., concurring)(“[O]ne man’s vulgarity is another’s lyric”). Under the new rule, a member of the public reading material from books in the school library might be found in violation.

Similarly, Rule 3(c) prohibits discussion of “personnel matters,” but Appellees are expected to continue using an overbroad interpretation of that phrase. Notably, it prohibits discussion of “conduct” of an employee, which essentially precludes all discussion of curriculum, classroom outcomes, or even the heroic or criminal acts of a teacher inside *or outside* the classroom. Discussion of curriculum or instruction is discussion of an employee’s performance. Discussion of test scores is a discussion of performance. Even criticizing Miller for his unconstitutional conduct is a discussion of his performance.

Moreover, merely mentioning the name of someone you criticize is not a “personnel matter.” Appellees take the position that they will continue to enforce

this prohibition. See AA062 at ¶¶ 19-20. With this backdrop, the Court “cannot say” Appellees carry their ““formidable burden”” of ““showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”” *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157-158 (1st Cir. 2021) (quoting *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 55 (1st Cir. 2013)) (finding voluntary cessation doctrine precluded mootness claim over COVID restrictions where Maine Governor indicated imposition of similarly strict requirements could issue). The revised policy is full of impermissible content- and viewpoint-based restrictions, all written so that the government can use the policy to avoid criticism. It is likely (in fact certain) that McBreairty will remain targeted by Miller. The voluntary cessation doctrine applies in full. Therefore, the revised policy has no effect on the relief sought.

2.0 The Remaining Factors Favor Injunctive Relief

In the absence of a preliminary injunction, McBreairty will suffer irreparable harm, the balance of equities favors him, and the public interest necessitates an injunction.

On the question of irreparable harm, the District Court recognized that 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 Svcs., 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, he necessarily also establishes irreparable harm. *Fortuño*, 699 F.3d at 15. Appellees have enacted a *de facto* ban and a prior restraint on speech that only allows praise. When criticized, Appellees use the police to remove McBreairty. However, as the District Court committed error on the likelihood of success factor, it committed the same error as to irreparable harm. ADD027.

As for the balance of equities, when the government restricts protected speech, the balance of hardships weighs heavily in a plaintiff's favor. *See Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 251 (D.P.R. 2002) (concluding 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 and 20-A M.R.S. § 1001(20). Appellees have continued to hold regular School Board meetings throughout the

pendency of this litigation, and each meeting under the rule, no matter the version, is an irreparable injury to McBreairty's First Amendment rights. Appellees 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. Allowing criticism by name will not affect "the orderly and undisrupted business of the School Board," employees are not harassed or bullied by mere criticism, and Appellees face no risk of a defamation claim.¹⁴ The balance strongly favors McBreairty.

¹⁴ Appellees claimed that prohibiting criticism of government employees shields them from liability for defamation. AA061 at ¶ 16. It is unclear how they could be liable—they are not speakers or publishers. Even if they could be, such statements would necessarily be about public officials, and thus any potential plaintiff would have to prove RSU22 employees acted with actual malice in allowing such speech. But, this is immaterial because the Maine Tort Claim Act does not permit suits against government employees for defamation. 14 M.R.S. § 8111(1)(E).

Further, even if Appellees could be liable, the only time they become a "publisher" is when they publish School Board meetings online, and they are insulated from liability pursuant to 47 U.S.C. § 230. Moreover, there is no precedent suggesting a school board could be responsible for public comments during a public comment period. Nor should there be—threat of a defamation suit is simply an improper heckler's veto. *See Gerber v. Herskovitz*, 14 F.4th 500, 517 (6th Cir. 2021) (recognizing that "lawsuits may be the means of effecting a heckler's veto"); *accord iMatter Utah v. Njord*, 774 F.3d 1258, 1271 n. 8 (10th Cir. 2014) (same).

Public comments are not government speech and cannot be regulated as such. "[W]hile the government-speech doctrine is important – indeed, essential – it is a doctrine that is susceptible to dangerous misuse." *Matal*, 582 U.S. at 235. "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.*

As for the public interest, “[p]rotecting rights to free speech is *ipso facto* in the interest of the general public.” *McBreairty v. School Bd. of RSU22*, 616 F. Supp. 3d at 98 (citations and quotation marks omitted). The District Court recognized this. *McBreairty v. Miller*, 2023 U.S. Dist. LEXIS 72379 at *33 (quoting *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 U.S. Dist. LEXIS 17481, at *10 (D. Me. Feb. 12, 2014) *aff’d*, 802 F.3d 79 (1st Cir. 2015)). Moreover, the unconstitutional regulation being enforced by Appellees in this case has the potential to harm nonparties to the case because it will limit or infringe upon their rights as well. *See Wolfe Fin. Inc. v. Rodgers*, No. 1:17cv896, 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)). Other members of the public are chilled from speaking their minds. They see McBreairty shut down and hustled out of the meeting by armed police for merely mentioning government employees, much less criticizing them. Which citizen of ordinary firmness would risk speaking critically at a government meeting if such criticism means ejection by armed officers of the state? Further, members of the public who are too shy to speak have a right to hear McBreairty’s criticisms. There has been no disruption, except when Appellees disrupted their own meetings instead of simply letting McBreairty speak. There is no risk to safety or disorder merely by letting McBreairty speak—the concerns of the District Court arose because Rule 2 exists, not because it is enjoined. Authoritarians cannot claim it is “unsafe” to have

to weather criticism. The notion is constitutionally outrageous. The public interest favors the issuance of the injunction, just as it did in the prior case of *McBreairty v. School Bd. of RSU22*, 616 F. Supp. 3d 79 (D. Me. 2022).

CONCLUSION

In light of the foregoing, the Order denying the motion for preliminary injunction should be reversed and Rule 2 and its revision should be immediately enjoined.

Date: July 26, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 10,583 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: July 26, 2023.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza

Marc J. Randazza

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 26, 2023.

RANDAZZA LEGAL GROUP, PLLC

/s/ Marc J. Randazza
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ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

| | | |
|------------------------|---|-----------------------------|
| SHAWN MCBREAIRTY, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Docket No. 1:23-cv-00143-NT |
| |) | |
| HEATH MILLER and |) | |
| SCHOOL BOARD OF RSU22, |) | |
| |) | |
| Defendants. |) | |

**ORDER ON PLAINTIFF’S EMERGENCY MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Before me is Plaintiff Shawn McBreairty’s motion (ECF No. 3) for a temporary restraining order and preliminary injunction to enjoin the Defendants—the RSU 22 School Board (“**School Board**”) and its chair, Heath Miller—from prohibiting Mr. McBreairty from public comment and from enforcing the School Board’s Public Participation Policy. Mr. McBreairty is seeking injunctive relief on an emergency basis because he intends to criticize RSU 22 employees by name at an upcoming School Board meeting on April 26, 2023. For the reasons outlined below, the Plaintiff’s motion for a temporary restraining order and preliminary injunction is **DENIED**.

BACKGROUND¹

Shawn McBreairty resides in Hampden, a town within Regional School Unit 22 (“**RSU 22**”). Compl. ¶ 1 (ECF No. 1). RSU 22 is governed by the School Board, which is chaired by Defendant Heath Miller. Compl. ¶¶ 2–3. The School Board holds monthly meetings, which are open to the public to attend and are also livestreamed on RSU 22’s website. Decl. of Heath Miller (“**Miller Decl.**”) ¶¶ 3–4 (ECF No. 9-1). RSU 22 has enacted School Board-related policies, as permitted under Maine law, including a policy identified as “BEDH” and titled “Public Participation in Board Meetings” (the “**Public Participation Policy**”).² Compl. Ex. A (“**Public Participation Policy**”) (ECF No. 1-1). In the Public Participation Policy, the School Board “recognizes its responsibility to conduct the business of the district” and states that “the primary purpose of [School Board] meeting[s] is for the Board to conduct its business as charged by the law.” Public Participation Policy 1.

Pursuant to the Public Participation Policy, “[t]he public is invited to attend Board meetings and will be given limited time to voice opinions or problems.” Public Participation Policy 1. People who speak at a school board meeting are asked to

¹ The following facts are drawn from the verified complaint and exhibits thereto, and the exhibits submitted with the preliminary injunction briefing. I also have reviewed the videos of the relevant school board meetings, which are referenced in the briefs and included in shortened form as exhibits, and which are publicly available online. I also considered the arguments presented at the April 25, 2023 preliminary injunction hearing.

² The relevant Maine law states: “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-A M.R.S. § 1001(20).

observe several rules of conduct under the Public Participation Policy. At issue in this case is Rule 2 (the “**personnel-matter rule**”), which states:

Confidential personnel information will not be shared in a public session. No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.

Public Participation Policy 1. The referenced “established policies and procedures” are found in Board Policy KE (the “**Public Concerns & Complaints Policy**”), which outlines the escalating process by which citizens may raise “complaints or concerns regarding any aspect of RSU #22 or an employee thereof.”³ Miller Decl., Ex. E (ECF No. 9-6). The Public Participation Policy also states that “[a]ll speakers must observe rules of common etiquette” and “[t]he Chair may interrupt or terminate an individual’s statement when it is too lengthy, personally directed, abusive, obscene, or irrelevant.” Public Participation Policy 2.

A speaker who violates any of the Public Participation Policy’s rules “may be required to leave in order to permit the orderly consideration of the matters for which the meeting was called.” Public Participation Policy 1. The Chair of the School Board “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

³ Citizens raising concerns under the Public Concerns & Complaints Policy are first “expected to seek a resolution at the lowest possible level” before appealing to the next level, from staff to principal to superintendent to the School Board. Decl. of Heath Miller (“**Miller Decl.**”), Ex. E (ECF No. 9-6). The Public Concerns & Complaints Policy does not apply to “complaints that concern School Board actions, operations, or policy. Such complaints should be addressed to the Board Chair.” Miller Decl., Ex. E

being presented and the suitability of the time for such a presentation.” Public Participation Policy 1. The Chair “has the authority to stop any presentation that violates these guidelines or the privacy rights of others,” may ask anyone who disrupts a School Board meeting to leave, and “may request law enforcement assistance as necessary to restore order.” Public Participation Policy 1–2.

During the public comment session at a School Board meeting on February 15, 2023, Mr. McBreairty played an audio recording of himself. Compl. ¶ 13.⁴ In his recorded statement, he expressed concerns about “how horrific RSU 22 is for . . . children.” Compl. Ex. C (ECF No. 1-3).⁵ In the recording, Mr. McBreairty paraphrased comments that he says he received from two unnamed middle school students and an unnamed teacher at RSU 22 complaining about the treatment of the concepts of LGBTQ+ and gender identity in the schools, including what the unnamed teacher allegedly perceived as the “sexual grooming” of students. Compl. Ex. C. Mr. McBreairty then twice mentioned an RSU 22 teacher by name, and referred to her as “groomer, I mean, teacher of the year,” saying that she should be locked up and not allowed within five hundred feet of a school.⁶ Compl. Ex. C. At the first mention of

⁴ Mr. McBreairty opened by stating that he previously won a federal First Amendment lawsuit against the Chair, “galvanizing my right to say whatever I want about whomever I want in whatever medium I want.” Compl. Ex. C (ECF No. 1-3). Later, in some verbal sparring with an audience member, he stated: “The absolute is I can say whatever I want as long as I don’t incite violence or use obscenities. Anything I want. Anytime. Anywhere.” This is incorrect. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

⁵ The full video of the February 15, 2023 meeting is available on the RSU 22 School Board’s YouTube channel at https://www.youtube.com/watch?v=EZoXb_Clxy4.

⁶ He also began saying that the named teacher participated in giving out “prizes and incentives pushed daily during announcements” but the remainder of his recorded statement is inaudible.

the teacher's name, the Chair warned Mr. McBreairty not to use names, and when Mr. McBreairty continued playing his recording about the named teacher, the Chair asked him to sit down and then called for a recess as Mr. McBreairty continued playing the recording over him. Compl. Ex. C. The full video shows that the School Board meeting recessed for approximately thirty minutes following Mr. McBreairty's statement. During this time, the School Board cut the video feed of the meeting and contacted the Hampden Police Department, and when the responding police officers eventually asked Mr. McBreairty to leave, he obliged. Compl. ¶¶ 16–17; Compl. Ex. D (ECF No. 1-4).

Mr. McBreairty then spoke at the School Board's March 15, 2023 meeting. Compl. ¶ 18. In his public comment, he again voiced concerns about specific named RSU 22 staff members. Compl. ¶ 19. He mentioned two teachers by name and complained that one teacher displayed "an LGBTQ cult war flag on the classroom wall" and that the other employee "taught sex" after school to students. Compl. Ex. E (ECF No. 1-5).⁷ At the mention of the first teacher by name, the Chair gave Mr. McBreairty a warning. Compl. ¶ 20. After this warning, Mr. McBreairty spoke uninterrupted for approximately twenty seconds about issues he had with an after-school program before he mentioned the second employee by name. Compl. Ex. E. At that point, the Chair asked Mr. McBreairty to stop speaking and step down, but Mr. McBreairty continued speaking into the microphone. Compl. Ex. E. Again, the School

⁷ The full video of the March 15, 2023 meeting is available on the RSU 22 School Board's YouTube channel at https://www.youtube.com/watch?v=f_-snd64INc.

Board took a recess, cut the public video broadcast of the meeting, and contacted the police. Compl. ¶ 21; Compl. Ex. E. During this fifteen-minute recess, McBreairty did not leave the podium and kept speaking. *See* Miller Decl., Ex. G (ECF No. 9-8).⁸

On March 24, 2023, Mr. McBreairty filed his Complaint in this Court, along with his Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (“**Motion**”). Emergency Mot. for a TRO and Prelim. Inj. (“**Mot.**”) (ECF No. 3). The Complaint alleges that the School Board’s conduct—stopping Mr. McBreairty’s speech and contacting the police to remove him from RSU 22 school premises—violates his rights under the U.S. and Maine Constitutions to free speech and expression and to petition the government. Compl. ¶¶ 22–42. The Defendants filed an expedited opposition to Mr. McBreairty’s motion for a temporary restraining order on April 3, 2023. Mem. of Law in Opp’n to Emergency Mot. for a TRO and Prelim. Inj. of Defs. School Board of Regional School Unit 22 and Heath Miller (“**Opp’n**”) (ECF No. 9). The Plaintiff filed a reply on April 6, 2023. Pl.’s Reply in Supp. of Mot. for a TRO and Prelim. Inj. (“**Reply**”) (ECF No. 10). Mr. McBreairty has expressed that he would like to speak at the next School Board meeting, which is scheduled for April 26, 2023. Mot. 1. On April 25, 2023, I held a hearing on the Plaintiff’s Motion.

⁸ As the Chair explained in his declaration, although the public broadcast was stopped, the video recording of the School Board meeting continued, so I was able to see what occurred during the recess. *See* Miller Decl. ¶ 28 (ECF No. 9-1); Miller Decl., Ex. G (ECF No. 9-8). Mr. McBreairty did not relinquish the podium and instead continued speaking, looked things up on his phone, and engaged in arguments with other members of the public sitting in the audience. Meanwhile, as Mr. McBreairty kept talking, most of the members of the School Board vacated the room, and multiple audience members put on their coats, gathered up their belongings, and presumably left the meeting. The police eventually arrived and escorted Mr. McBreairty out.

LEGAL STANDARD

“Injunctive relief ‘is an extraordinary and drastic remedy that is never awarded as of right.’” *Monga v. Nat’l Endowment for the Arts*, 323 F. Supp. 3d 75, 82 (D. Me. 2018) (quoting *Peoples Fed. Sav. Bank v. People’s United Bank*, 672 F.3d 1, 8–9 (1st Cir. 2012)). “[T]rial courts have wide discretion in making judgments regarding the appropriateness of” preliminary injunctive relief. *Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 14 (1st Cir. 2009). In deciding whether to issue a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure, courts apply the same four-factor analysis that is used to evaluate a motion for a preliminary injunction.⁹ *Monga*, 323 F. Supp. 3d at 82. For a court to grant injunctive relief, the court must evaluate:

- (1) whether the plaintiff is likely to succeed on the merits, (2) whether he is likely to suffer irreparable harm in the absence of immediate relief, (3) the balance of equities, and (4) whether granting the injunction is in the public interest.

Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 22 (1st Cir. 2020). “In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.” *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam). The School Board “bears the

⁹ “Generally, the distinction between a temporary restraining order and a preliminary injunction is that the former can be awarded without notice to the other party and an opportunity to be heard.” *Glady v. Me. Dep’t of Corr.*, No. 1:20-cv-00449-JDL, 2022 WL 2255947, at *1 (D. Me. June 23, 2022), *R&R adopted*, 2022 WL 3212110 (D. Me. Aug. 9, 2022). Here, the opposing party had notice, an opportunity to respond, and an adversarial hearing was held, so I treat the temporary restraining order request as now merged with the requested preliminary injunction, and I give the Plaintiff the benefit of that slightly less stringent standard. *Id.* (“A temporary restraining order . . . is an even more exceptional remedy than a preliminary injunction . . .”).

burden of proving the constitutionality of its actions,” *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000), and the Plaintiff as the movant shoulders the burden of establishing that a preliminary injunction should issue.

DISCUSSION

I. The Merits of Plaintiff’s First Amendment Speech Claim¹⁰

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The Fourteenth Amendment extends the First Amendment’s restrictions to the actions of the states. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). First Amendment claims proceed in a three-step analysis. First, I must determine whether the Plaintiff’s activity “is speech protected by the First Amendment.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If it is, I next “must identify the nature of the forum” in which the speech occurred “because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.” *Id.* Finally, I “must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.” *Id.*

Here, the first two steps are easily taken. The Defendants do not dispute that Mr. McBreairty’s public comments at School Board meetings are protected speech.

¹⁰ “Because ‘the Maine Constitution is no less restrictive than the Federal Constitution’ with respect to the protections it provides for the freedom of speech,” I do not separately analyze the Plaintiff’s challenge under the Maine Constitution. *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 WL 580155, at *4 n.3 (D. Me. Feb. 12, 2014) (quoting *State v. Janiszczak*, 579 A.2d 736, 740 (Me. 1990)), *aff’d* 802 F.3d 79 (1st Cir. 2015). I also do not address the merits of the Plaintiff’s retaliation or right-to-petition claims because the Plaintiff did not raise either in his Motion. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

See City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n, 429 U.S. 167, 174–75 (1976) (holding that the First Amendment protects the rights of speakers at school board meetings that are opened for direct citizen involvement and permit public participation). Further, the parties agree that the public comment portion of the School Board meeting is a limited public forum. *See* Mot. 6; Opp'n 7; *see also McBreairty v. Sch. Bd. of RSU 22*, No. 1:22-cv-00206-NT, 2022 WL 2835458, at *8 (D. Me. July 20, 2022) (“Taken together, [20-A M.R.S. § 1001(20)] and the [Public Participation] Policy show that the School Board opened up a limited public forum for the purpose of inviting public comment on school-related matters.”).

A limited public forum is what it sounds like—a forum that has been opened to the public but is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (citation omitted). A restriction based on subject matter “may be permissible if it preserves the purposes of that limited forum.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). But “viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum’s limitations.” *Id.*; *see Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”).

Accordingly, the government may restrict expression in a limited public forum so long as the restriction (a) does “not discriminate against speech on the basis of viewpoint” and (b) is “reasonable in light of the purpose served by the forum.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (internal quotation marks omitted). But “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829. As the First Circuit has explained:

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.

Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 82 (1st Cir. 2004). The government discriminates based on viewpoint only if it “denies access to a speaker solely to suppress the point of view he espouses.” *Id.* (quoting *Cornelius*, 473 U.S. at 806).

A. Facial Challenge to the Public Participation Policy

The Plaintiff alleges that the personnel-matter rule of the Public Participation Policy is a facially unconstitutional viewpoint-based restriction because it “prohibits any comments about RSU22 employees or students that the Chair deems is [*sic*] negative, while positive speech is permitted.” Compl. ¶ 31.¹¹ At oral argument, the

¹¹ Although the Plaintiff claims this is a facial attack, his reference to prohibited comments “that the Chair deems . . . negative” undermines that theory and suggests that he is really challenging the personnel-matter rule as it has been applied by the Chair. Nonetheless, I will review the rule to determine whether the Plaintiff is likely to succeed on his claim that this section of the Public Participation Policy is constitutionally infirm on its face.

Plaintiff clarified that he is only challenging the following bolded portions of the personnel-matter rule:

Confidential personnel information will not be shared in a public session. **No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system** or against particular students. Personnel matters or **complaints concerning** student or **staff issues** will not be considered in a public meeting but will be referred through established policies and procedures.

Public Participation Policy 1 (emphasis added). The Plaintiff challenges these parts of the personnel-matter rule on the ground that they render the rule viewpoint-based because it “permits discussion of personnel matters, so long as they are not negative.”

Reply 4.

The problem is that the Plaintiff’s approach takes too myopic a view. “Courts have a ‘duty to construe statutes, not isolated provisions.’” *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). The Plaintiff urges me to look only at the rule’s references to “complaints,” but that would require treating those phrases “as islands unto themselves,” *Graham Cnty.*, 559 U.S. at 290, and the court’s “task is to fit, if possible, all parts into an harmonious whole,” *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). Here, the personnel-matter rule contains many specifics about what will not be permitted at a School Board public meeting, like confidential personnel information¹² and complaints and allegations concerning staff members or students. But, importantly, the personnel matter rule also states: “*Personnel matters*

¹² See 20-A M.R.S. § 6101(2) (listing employee information that must be kept confidential).

or complaints concerning student or staff issues *will not be considered in a public meeting* but will be referred through established policies and procedures.” Public Participation Policy 1 (emphasis added). Therefore, when I read Rule 2 of the Public Participation Policy as a harmonious whole, it prohibits broader content than just complaints or negative comments; it prohibits the category of speech that falls under personnel matters. In other words, “personnel matters” encompasses and subsumes the more specific references to complaints and allegations, and presumably means *all* matters relating to school personnel, regardless of whether they are complimentary or critical of the RSU 22 employee in question.

Further, under the canon of constitutional avoidance, when a question is raised about the constitutionality of an ambiguous statute, I must “first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018); *see United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2011) (“[T]he doctrine . . . comes into play when there are two plausible constructions of a statute; the absence of any ambiguity defeats the constitutional avoidance argument.” (citation and internal quotation marks omitted)). If a “construction of the statute is fairly possible by which the [constitutional] question may be avoided,” I should adopt that construction. *Jennings*, 138 S. Ct. at 842; *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (“Th[e] Court, of course, may interpret ambiguous statutory language to avoid serious constitutional doubts.”) (citation and internal quotation marks omitted).

There is no denying that the personnel-matter rule is not a model of clarity. For example, it contains some ambiguities, inexplicable redundancies, and overlap.

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Regardless, the personnel-matter rule can be construed in a manner which is constitutional. How teachers perform their duties can readily be seen as “personnel matters.” So I read the personnel-matter rule as restricting at a School Board meeting any discussion—whether complimentary or critical—involving the performance of named RSU 22 teachers and staff. Under my reading of the rule, members of the public can still express their pleasure or displeasure with what is happening at the schools, including what is being taught or not taught, but they cannot call out a named teacher either for praise or criticism. That sort of feedback concerns the teacher’s performance as an employee and thus constitutes a comment about a personnel matter, which must be “referred through established policies and procedures.” Public Participation Policy 1; *see* Public Concerns & Complaints Policy.

In support of his position, the Plaintiff cites to a recent case in the Eastern District of Pennsylvania. The policy at issue in that case permitted the school board’s presiding officer to terminate public comments deemed “too lengthy, personally directed, abusive, obscene, or irrelevant.” *Marshall v. Amuso*, 571 F. Supp. 3d 412, 418 (E.D. Pa. 2021). In applying the policy, the board allowed “positive and

¹³ For example, the personnel-matter rule first states: “No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students.” And then in the very next sentence, the rule reiterates: “[C]omplaints concerning student or staff issues will not be considered in a public meeting” Public Participation Policy 1.

complimentary personally-directed comments supportive of Board and school employees” but prohibited “negative, challenging, or critical personally-directed comments.” *Id.* at 422. The *Marshall* court held that this distinction constituted impermissible viewpoint discrimination. *Id.* This case is readily distinguishable from *Marshall* on its facts, however, because the *Marshall* court was not construing a personnel-matter provision like the one at issue here. Further, with respect to the as-applied challenge involved in *Marshall*, the school board there was interpreting its policy to permit praise and prohibit criticism. Here, although the Public Participation Policy expressly states that critical comments of staff are not allowed, it does not say that positive comments are permitted. It prohibits public discussion of personnel matters, and public discussion of “personnel matters” can be construed to cover both critical and complimentary comments.

For their part, the Defendants argue that the rule is not discriminatory on the basis of viewpoint because the rule “restricts allegations of wrongdoing, personal attacks, and criticisms of, on, or against specifically named educators without regard to the content of that allegation or the speaker’s perspective.” Opp’n 9. They point to other courts that have held that restrictions prohibiting discussion of personnel matters during the public comment portion of government meetings are constitutionally permissible.

In *Pollak v. Wilson*, No. 22-8017, 2022 WL 17958787 (10th Cir. Dec. 27, 2022), the Tenth Circuit upheld the district court’s denial of a plaintiff’s motion for a preliminary injunction based on a similar First Amendment claim. Under the school

board policy at issue, “[p]ersonnel matters are not appropriate topics to be discussed at regular board meetings.” *Id.* at *2. When the plaintiff mentioned a school employee by name during the public comment period, the chair “seized on the mention of [the employee’s] name as making a comment on a personnel matter, proceeded to shut down [the plaintiff]’s comment, and had [the plaintiff] removed from the premises.” *Id.* at *3 (internal quotation marks omitted). Like Mr. McBreairty, the plaintiff challenged the constitutionality of the policy both facially and as it was applied to him, arguing that the school board engaged in viewpoint discrimination because “favorable comments about school employees were welcome, while unfavorable speech was a banned ‘personnel matter.’” *Id.* at *4.

The Tenth Circuit held that the personnel-matter restriction was facially viewpoint neutral because it “prohibits the discussion of a subject—personnel matters—but does not draw a distinction based on viewpoint.” *Id.* at *7; *see id.* at *8 (“[T]he text of the Policy is viewpoint neutral because it forbids discussion of all personnel matters, regardless of the speakers’ perspective.”). It also concluded that, in light of the purpose served by board meetings (conducting the official business of the school district), the policy “reasonably prevents discussion of personnel matters during the public comment period.” *Id.* The Tenth Circuit held that the board “establish[ed] the reasonableness of the Policy’s personnel-matter restriction” given the purpose of the school board meetings and the board’s stated need to protect personal information. *Id.* at *9. Because the school board had shown “the personnel-matter restriction is viewpoint neutral and reasonable,” the district court “did not

abuse its discretion in concluding that [the plaintiff] had not shown a substantial likelihood of success on the merits of this claim.” *Id.* at *11.

Likewise, in *Fairchild v. Liberty Independent School District*, 597 F.3d 747 (5th Cir. 2010), the Fifth Circuit found personnel-matter restrictions to be constitutional under the limited public forum analysis. In that case, the school board policies “exclude[d] from public discourse certain topics of speech—including individualized personnel matters—which the Board channels into more effective dispute resolution arenas, before it hears the matter and resolves it.” *Id.* at 759. The Fifth Circuit held that the policies “plainly” were “both viewpoint-neutral and reasonable in light of the forum’s purpose.” *Id.* at 760. The court reasoned that there was no evidence that the school board discriminated “based on the view or identity of a given speaker” because “[a] speaker may discuss concerns generally (as [the plaintiff] did),” and that the rule was reasonable because the school board had “a legitimate interest, if not state-law duty, to protect student and teacher privacy and to avoid naming or shaming as potential frustration of its conduct of business.” *Id.* Similarly, in *Prestopnik v. Whelan*, 83 F. App’x 363 (2d Cir. 2003), the Second Circuit affirmed a district court’s finding that a teacher’s First Amendment rights had not been violated by a school board’s refusal to allow her to speak, through counsel, about her tenure issue during the public comment portion of a meeting. The school board policy in that case “explicitly exclude[d] speech about specific personnel decisions” and the plaintiff had not shown that the policies “either were not viewpoint neutral or were unreasonable.” *Id.* at 365.

Here, I find that the Defendants have met their burden of demonstrating that the personnel-matter rule contained in the Public Participation Policy is likely to be found constitutional on its face. Although, as noted above, the rule could have been better written, it expressly prohibits discussion of any personnel matters during the public comment portion of the RSU 22 School Board meetings. I find the decisions of the Courts of Appeals to be persuasive and agree that “personnel matters” is likely a viewpoint-neutral restriction because it does not take into account the speaker’s view but instead prohibits all personnel-related comments, whether positive or negative.¹⁴

¹⁴ Even if I were to read the personnel-matter rule more narrowly and analyze only the restriction against raising “complaints or allegations” about school staff or students, the rule is likely still constitutional. In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65, 91 (1st Cir. 2004), the First Circuit upheld an MBTA regulation that governed the type of advertising that would be allowed in buses and subway cars and “prohibit[ed] the use of advertisements that ‘demean or disparage an individual or group of individuals,’ without listing any particular protected groups” The First Circuit stated “the guideline is just a ground rule: there is no viewpoint discrimination in the guideline because the state is not attempting to give one group an advantage over another in the marketplace of ideas.” *Id.* It explained that, although “[s]ome kinds of content (demeaning and disparaging remarks) are being disfavored, . . . no viewpoint is being preferred over another” because “[a]ll advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks.” *Id.* So too here. Mr. McBreairty and other critical speakers are free to promote their perspectives and to complain about the positions taken by RSU employees so long as they do not identify individuals in their attacks. “Reasonable ground rules, so long as they are not intended to give one side an advantage over another, can be set without falling prey to viewpoint discrimination.” *Id.* at 91–92.

One wrinkle is that the First Circuit decided *Ridley* before the Supreme Court’s decisions in *Matal v. Tam*, 582 U.S. 218 (2017) and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019). But those cases—both involving trademark applications—are distinguishable. In *Tam* the Court analyzed a provision of the Lanham Act that prohibited the registration of trademarks that may “disparage persons . . . or bring them into contempt or disrepute” and held that the provision was facially unconstitutional because “[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” 582 U.S. at 223, 227. “Giving offense is a viewpoint,” so denying registration to any mark that offends a particular group “is viewpoint discrimination.” *Id.* at 243. Similarly, in *Brunetti*, the Court held that another Lanham Act provision, this one prohibiting the registration of “immoral or scandalous” trademarks, violated the First Amendment for the same reason, that it “disfavors certain ideas.” 139 S. Ct. at 2297. The *Brunetti* Court explained that the statute was viewpoint-based, not viewpoint neutral, on its face, because it “distinguishes between two opposing sets of ideas” and favors “those aligned with conventional moral standards and . . . those inducing societal nods of approval” while disfavoring those hostile to them[] and those provoking offense and condemnation. *Id.* at 2299–2300. The personnel-matter rule challenged by Mr. McBreairty, however, does not on its face prohibit comments that give offense, or permit praise while disallowing complaint. Here, unlike in these two trademark cases, the offensive ideas themselves are not banned,

I also find that the restriction is likely to be found reasonable. The primary purpose of the School Board meetings is for the School Board to conduct the business of the school district. Permitting anyone with a comment about a particular individual at the school to voice it at a School Board meeting “could derail the agenda for the meeting and risk unnecessary disclosure of private information about employees or students.” *Fairchild*, 597 F.3d at 760.¹⁵ Further, alternative channels for such speech are available. Mr. McBreairty could voice his displeasure—as he has done repeatedly—without naming specific individual employees. Or he could raise his concerns about individuals under RSU 22’s Public Concerns & Complaints Policy, which provides the process for such grievances. As the Fifth Circuit put it, that “leaves the public ample opportunity to be heard—just not here and now.” *Id.*¹⁶

only the connecting of those complaints to “any person employed by the school system or . . . particular students.” Public Participation Policy 1. In addition, when asked to distinguish *Tam* and *Brunetti* at oral argument, counsel for the Defendants pointed out that both cases involved trademark registrations, not singling out people at a school board meeting. A school board meeting is a limited public forum, and the First Amendment must be understood in the context of the forum at issue. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985) (explaining that “[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities” and “the extent to which the Government can control access depends on the nature of the relevant forum”). Therefore, the personnel-matter rule is likely viewpoint neutral.

¹⁵ That sort of derailing is what occurred in February and March when the Board had to take recesses totaling forty-five minutes before resuming its agenda when Mr. McBreairty broke the rules during those two meetings.

¹⁶ Before leaving the Plaintiff’s facial challenge, two additional points bear mentioning. First, in his Complaint, the Plaintiff alleges that the personnel-matter rule is unconstitutionally vague, Compl. ¶ 30 (ECF No. 1), but then neglects to raise any vagueness argument again until his reply brief, *see* Reply 5–6. “But, arguments developed for the first time in a reply brief are waived.” *Small Just. LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 323 n.11 (1st Cir. 2017). Second, the Defendants suggest that the Plaintiff’s viewpoint-discrimination argument will soon be mooted because the Public Participation Policy has been amended “to make crystal clear that the restriction on comments relating to ‘personnel matters’ prohibits any public comments related to named RSU 22 employees,” and the amended policy is expected to be adopted by the School Board in May. But in considering the Plaintiff’s Motion, I am concerned with the version of the Public Participation Policy that is currently in force and that will be

B. As-Applied Free Speech Claim

The Plaintiff alleges that the personnel-matter rule of the Public Participation Policy has been unconstitutionally applied to Mr. McBreairty because other members of the public are permitted to address their opinions about teachers but Mr. McBreairty has been silenced and ordered to leave. Compl. ¶ 32. He also suggests that the personnel-matter rule “seems to only be used to stop criticism” and thus it has not been applied in a viewpoint-neutral way. Mot. 12 n.2. The Defendants counter that Mr. McBreairty’s speech was not interrupted based on his viewpoint, but because he named individual school personnel. Opp’n 17.

In an as-applied challenge, I must consider the constitutionality of a statute as it was “applied in a particular instance.” *Reno v. Flores*, 507 U.S. 292, 300 (1993). The constitutional test I use is the same for this as-applied challenge as it is for the facial challenge—the School Board must apply the personnel-matter rule in a way that is both viewpoint neutral and reasonable. Here, the Chair stopped Mr. McBreairty’s public remarks and had him removed from the School Board meetings in February and in March. I have watched the entire public comment portion of both meetings. At the beginning of each meeting, the Chair read out the ground rules for public comment. During the public comment period of the February meeting, three speakers (including Mr. McBreairty) addressed the School Board. The other two speakers raised concerns similar to those voiced by Mr. McBreairty, about the school allegedly

enforced at the upcoming April meeting. Therefore, the anticipated amended policy plays no role at this preliminary injunction stage of the litigation, and I need not determine if or how the voluntary-cessation doctrine applies to the ultimate merits of the Plaintiff’s claims in this case.

“pushing” certain sexual ideologies, hypersexualizing children, encouraging students to question gender identities, and teaching material the speakers did not agree with. Only Mr. McBreairty was interrupted and removed from the meeting, but only Mr. McBreairty broke the School Board’s personnel-matter rule and named a specific RSU 22 teacher. Neither of the other two speakers identified RSU 22 personnel by name, and they were allowed to give their full statements, which closely matched the viewpoint that Mr. McBreairty expressed. The School Board even thanked one speaker, a legislative representative for some of the towns within the RSU 22 school district, for her service as representative. Mr. McBreairty himself was allowed to fully express his opinion, criticizing RSU 22, until he mentioned the RSU 22 employee by name thereby violating the personnel-matter rule, and even then, he was given one verbal warning by the Chair before he was asked to stop speaking.

Similarly, at the March meeting, there were three additional speakers during the public comment portion. Two of three speakers again espoused views like Mr. McBreairty’s, discussing their alleged concerns about sexual predators being in the schools, RSU 22 promoting books with sexual content, students being exposed to suggestive ideology about their gender identities, and the schools waging an assault on parental rights. Neither of these public commenters identified any RSU 22 staff or students by name so they were permitted to fully voice their opinions.¹⁷ Mr. McBreairty expressed displeasure with the School Board and its members, and he

¹⁷ The third additional speaker did not share these views, but he too refrained from naming any names and thus was allowed to speak.

was allowed to complain about their past actions and to criticize the Chair. He also was permitted to voice his disagreement with the books in the library, the RSU 22 strategic plan, the current superintendent, students' math scores, a flag hanging on a classroom wall, certain afterschool programming he disliked, a national organization of so-called "groomers," and students being able to discuss sex during extracurriculars. It was only when he mentioned a teacher by name that he was interrupted with a warning, and it was only when he named a second RSU 22 employee that the Chair cut off Mr. McBreairty's time at the podium and took a recess. Contrary to Mr. McBreairty's contention, the record unequivocally reveals that he was not shut down because of his viewpoint. He was shut down because he—unlike any of the other speakers—could not follow the School Board's rules for public comment. As the Plaintiff admits in his Motion, "[t]he moment Mr. McBreairty uttered an employee's name, [Chair] Miller immediately interrupted him." Mot. 11; *see also* Mot. 10 ("McBreairty was stopped by Defendants from speaking for even *mentioning the name of an employee*, even prior to uttering any criticism."). So it was McBreairty's repeated use of employees' names in violation of the rule, not his viewpoint, that prompted the Chair's actions. *See Moms for Liberty – Brevard Cnty.*, 582 F. Supp. 3d 1214, 1220 (M.D. Fla. 2022) (upholding a similar policy that was "was evenhandedly applied as a whole" where the Chair let commenters "purportedly disaligned with her view speak uninterrupted when they followed the policy"), *aff'd*, 2022 WL 17091924 (11th Cir. Nov. 21, 2022).

There is only one example in the record that arguably shows a speaker violating the personnel-matter rule and being treated differently than Mr. McBreairty. During the October 2022 School Board meeting, the program director for Educate Maine, which conducts the Maine Teacher of the Year program, recognized that an RSU 22 employee had received the award. She “provided an assessment of [the named teacher]’s services as the 2022 Maine Teacher of the Year, including referring to her as ‘thoughtful,’ ‘intentional,’ ‘brave,’ and ‘brilliant.’” Compl. ¶ 10.¹⁸ According to the Plaintiff, this proves that the School Board engages in viewpoint discrimination because it permits praise of teachers but prohibits criticism. Reply 2. But the October meeting does not help the Plaintiff for several reasons.

First, in the fall of 2022, the Public Participation Policy was applied to Mr. McBreairty in the same way it was applied to the Educate Maine speaker and others. Specifically, at the September 2022 meeting, at which Mr. McBreairty and three other speakers shared comments, Mr. McBreairty named several RSU 22 school counselors and one teacher by name. Miller Decl., Ex. F (ECF No. 9-7). The Chair did not interrupt him. Further, the Chair did not realize until several months later that the policy prevented positive feedback relating to personnel matters just as it prohibited complaints. Miller Decl. ¶¶ 17–20. Since then, the record reflects that he continued to apply the personnel-matter rule in an even-handed, non-viewpoint-

¹⁸ In the video of the October 2022 meeting, the Educate Maine director also told the School Board that, during the RSU teacher’s reign as 2022 Maine Teacher of the Year, the organization “feared for her safety” so much that “at every public-facing event” the organization “had police or security present because ill-intentioned people made ludicrous accusations about her” and they did not know “if these preposterous claims would spur someone to harm her.”

discriminatory way, now cutting off speakers at the mention of identified RSU 22 personnel. And the fact that the Chair may have mistakenly permitted the identified-by-name Teacher of the Year comments at one meeting in 2022 does not mean that he had to also allow Mr. McBreairty to name teachers at the February and March 2023 meetings. *See Ridley*, 390 F.3d at 92 (noting that even if the transportation authority “made a mistake under its guidelines” by accepting two earlier ads, that “does not mean it was required to accept the third ad”).

In addition, the Public Participation Policy contains more than just the personnel-matter rule. It also provides that “[t]he Chair may interrupt or terminate an individual’s statement when it is too lengthy, *personally directed*, abusive, obscene, or irrelevant.” Public Participation Policy 2 (emphasis added). The Chair never specifies which provision—the personnel-matter rule or the “personally directed” rule—he was relying on when he told Mr. McBreairty he could not name individual staff members. A nearly identical policy provision was at issue in a recent district court case out of Florida. *See Moms for Liberty*, 582 F. Supp. 3d at 1217. In that case, the plaintiffs sought a preliminary injunction based on the school board’s policy, which they alleged was unconstitutional facially and as applied. *Id.* at 1218. The court found that the policy, which allowed the chair to interrupt speech when it is “too lengthy, personally directed, abusive, obscene, or irrelevant,” was viewpoint neutral on its face and was “critical to prevent disruption, preserve reasonable decorum, and facilitate an orderly meeting.” *Id.* at 1219 (internal quotation marks omitted). The record in that case also showed that the policy “was evenhandedly

applied” and the chair let commenters “purportedly disaligned with her view speak uninterrupted when they followed the policy.” *Id.* at 1220. Further, the court determined that one noncompliant speaker was “permissibly excluded” because his speech was “abusive and disruptive” and he refused to stop speaking after being warned by the chair that he was “pushing the limit.” *Id.* On appeal, the Eleventh Circuit affirmed “the district court’s thorough, well-reasoned order.” *Moms for Liberty – Brevard Cnty. v. Brevard Pub. Schs.*, No. 22-10297, 2022 WL 17091924, at *1 (11th Cir. Nov. 21, 2022).

Here, in Mr. McBreairty’s case, the Chair interrupted Mr. McBreairty only when he personally directed his comments to specific named employees. The Chair reviewed the rules of the Public Participation Policy at the meetings before opening up the public comment sessions, and he warned Mr. McBreairty specifically on both the February and March occasions to refrain from using names. Both times, Mr. McBreairty ignored the Chair’s warning and continued speaking about named individuals. And it was only because Mr. McBreairty continued speaking and refused to sit down that the School Board recessed, asked him to leave, and called the police. Based on my review of the videos of the February and March School Board meetings, it appears that Mr. McBreairty was willfully disobeying the rules of the Public Participation Policy. On both occasions he had preplanned what he was going to say; in February he played a previously recorded statement from his phone and in March he read from a written statement. So he did not inadvertently slip up at the podium by mentioning those staff members by name. Further, according to his Motion, he

plans to criticize RSU 22 employees by name again at the next meeting. Mot. 1. This type of personally directed speech is expressly prohibited under the Public Participation Policy, and the Chair applied the policy in an evenhanded viewpoint-neutral way. He allowed Mr. McBreairty to criticize staff members anonymously and only interrupted Mr. McBreairty's critiques when he mentioned names. Yet he permitted other members of the public, who seemingly shared Mr. McBreairty's general negative views of the goings-on at RSU 22 schools, to speak because they followed the rules. It is clear from the record that the School Board is not suppressing Mr. McBreairty's speech, which he was free to publicly share within the confines of the Public Participation Policy, based on his viewpoint.

I also find that the way the School Board applied the policy was reasonable. As noted above, RSU 22's School Board meetings are primarily held to allow the Board to conduct the business of the school district "in an orderly and efficient manner." Public Participation Policy 1. Although the Public Participation Policy invites members of the public to attend and to voice their opinions, the public comment period is not the main focus of the School Board's business during its meetings. The restriction placed on Mr. McBreairty (and all public speakers) permits complaints and criticisms of RSU 22 and its employees generally, as long as individual personnel are not identified in these public comments. During the February and March meetings, the Chair stayed within the bounds of the policy and did not interrupt Mr. McBreairty's speech until he identified RSU 22 employees by name. *See Davison v. Rose*, 19 F.4th 626, 636 (4th Cir. 2021) ("[D]enying a speaker at the podium in a . . .

hearing the right to launch personal attacks does not interfere with what that speaker could say without employing such attacks.” (quoting *Steinburg v. Chesterfield Cnty. Planning Comm’n*, 527 F.2d 377, 387 (4th Cir. 2008)). Even then, he was first given warnings that he was not to name individuals. It was only when Mr. McBreairty crossed the line and became disruptive—not following the personnel-matter rule, both written and as announced orally by the Chair at the start of the meeting, and leveling personally directed attacks at RSU 22 employees; not heeding the Chair’s warning during Mr. McBreairty’s comments to not use names and continuing to name individuals over the Chair’s admonishment; not obeying the direction of the Chair when he told Mr. McBreairty to stop speaking and sit down—that Mr. McBreairty was asked to leave. Because Mr. McBreairty disrupted the ability of the School Board to conduct its meeting in an orderly and efficient way, the Chair’s response under the policy was reasonable, particularly in light of the School Board’s statutory obligation to ensure the safety of its employees and to protect their personal information.

For all these reasons, I find that the Plaintiff is unlikely to succeed on the merits of his constitutional challenge to the personnel-matter rule and the way in which the School Board applied the Public Participation Policy to Mr. McBreairty.

II. Remaining Factors

Likelihood of success, which the Plaintiff here lacks, “is the main bearing wall of th[e preliminary injunction] framework.” *W Holding Co. v. AIG Ins. Co.-P.R.*, 748 F.3d 377, 383 (1st Cir. 2014). “[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle

curiosity.” *Esso Standard Oil Co. (P.R.) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006). I will not dwell on the other factors, but they are worth mentioning.

A. Irreparable Harm

Irreparable harm is measured on “a sliding scale, working in conjunction with a moving party’s likelihood of success on the merits, such that the strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.” *Braintree Lab’ys, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 42–43 (1st Cir. 2010) (internal citation and quotation marks omitted). Although “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” *Fortuño*, 699 F.3d at 10–11 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), here I have found that the Plaintiff is unlikely to succeed on the merits of his First Amendment claims. Further, the Plaintiff’s alleged harm absent injunctive relief—his inability to criticize named RSU 22 staff at School Board meetings—is mitigated because Mr. McBreairty is free either to continue to voice his concerns at School Board meetings in accordance with the Public Participation Policy (i.e., speak his piece but refrain from identifying individuals) or to lodge his personally directed complaints in accordance with the Public Concerns & Complaints Policy (i.e., critique the named employee in that forum and seek resolution from school staff before appealing to the principal, superintendent, and School Board).¹⁹

¹⁹ It bears mention that, rather than seeking run-of-the-mill injunctive relief to preserve the status quo until the merits are resolved, the Plaintiff here seeks to change the current state of affairs. He is asking me to force the School Board to effectively change its policy as he wants, to allow him to criticize teachers by name during public comment at meetings, which is not permitted now. “Because a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only in those circumstances when the exigencies of the situation demand such relief.” *Atl. Salmon Fed’n U.S. v. Merimil Ltd. P’ship*, No. 1:21-cv-00257-JDL, 2022 WL 558358, at *4 (D. Me. Feb.

B. Balance of Harms and Public Interest

As to the balance-of-harms inquiry, that too favors the Defendants. I balance the minimal viewpoint-neutral and reasonable interference with Mr. McBreairty’s right to unfettered free speech—outlined above—against the harm the School Board will suffer if an injunction is granted. As I have previously observed, there is no question that the School Board’s interest—conducting the orderly and undisrupted business of the School Board, governing RSU 22’s public school system—is significant. In addition, the Defendants point to their interest, and statutory obligation, in protecting RSU 22’s employees from harassment and bullying and in shielding RSU 22 from potential defamation claims. Meanwhile, the Plaintiff can still say whatever he wants about the schools and what is being taught; he just cannot name individuals in this forum and instead has to provide such comments through the forum established by the Public Concerns & Complaints Policy. The balance-of-harms factor thus strongly favors the Defendants.

As to the public interest, on the one hand, “[p]rotecting rights to free speech is ipso facto in the interest of the general public.” *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 WL 580155, at *10 (D. Me. Feb. 12, 2014) (internal quotation marks omitted), *aff’d*, 802 F.3d 79 (1st Cir. 2015). But on the other hand, “the First Amendment does not require endless public commentary,” the Maine Legislature has

24, 2022) (quoting *Man Against Xtinction v. Comm’r of Me. Dep’t of Marine Res.*, 478 F. Supp. 3d 67, 71 (D. Me. 2020)). “Nevertheless, those exigencies should still be measured according to the same four-factor test, as the focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.” *Braintree Lab’s, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 41 (1st Cir. 2010) (internal quotation marks omitted).

established there is a substantial public interest in keeping RSU 22’s educators safe, and “there is a significant public interest in the School Board conducting orderly public business.” *Moms for Liberty*, 582 F. Supp. 3d at 1221 n.13. Granting the Plaintiff his requested injunctive relief would frustrate these public interests. Indeed, the public has already suffered from Mr. McBreairty’s behavior at meetings. When Mr. McBreairty refused to cede the floor at the last meeting, School Board members were left no choice but to temporarily abandon the business of the meeting. In addition, public audience members (who presumably attended that meeting to observe the School Board conduct its business) put on their coats and left rather than wait out Mr. McBreairty’s removal, and at-home viewers likewise could have tuned out and not returned to the interrupted broadcast. Therefore, I find that denying the preliminary injunction is in the public interest.

CONCLUSION

For the reasons stated above, the Court **DENIES** the Plaintiff’s motion for a temporary restraining order and preliminary injunction.

SO ORDERED.

/s/ Nancy Torresen
United States District Judge

Dated this 26th day of April, 2023.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY,

Plaintiff,

v.

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

Defendants.

Case No. 1:23-cv-00143-NT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff, Shawn McBreairty, (“Plaintiff”) appeals to the United States Court of Appeals for the First Circuit from the Order (ECF No. 17) entered by the United States District Court for the District of Maine on April 26, 2023, including all adverse findings, holdings, and orders set forth therein.

Dated: April 27, 2023.

Respectfully Submitted,

/s/ Marc J. Randazza

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Case No. 1:23-cv-00143-NT

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of April, 2023, 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
Marc J. Randazza

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