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January 28, 2022

Julie Howard, Clerk  
York County Superior Court  
45 Kennebunk Road  
Alfred, ME 04002

**Re: Regional School Unit 21 v. Town of Kennebunk, et al.;  
York County Superior Court; Civil Action, Docket No. CV-22-7**

Dear Ms. Howard:

Enclosed for filing in the above-captioned matter please find Defendant-Town of Kennebunk's Answer to Complaint as well as Defendant-Town of Kennebunk's Opposition to Plaintiff's Motion for Preliminary Injunction.

If you have any questions, please give me a call. Thank you.

Sincerely,

Natalie L. Burns

NLB/ars

Enclosures

cc: Timothy S. Murphy, Esq.  
Thomas Danylik, Esq.  
Russell B. Pierce, Jr., Esq.  
Michael Pardue, Town Manager



5. Defendant admits the allegations contained in Paragraph 5 of the Complaint.

### **JURISDICTION AND VENUE**

6. Paragraph 6 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 6 contains factual allegations that require a response, Defendant denies those allegations.

7. Paragraph 7 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 7 contains factual allegations that require a response, Defendant denies those allegations.

### **STATEMENT OF THE CLAIM**

8. Defendant responds to the allegations contained in Paragraph 8 of the Complaint by stating that the statutes referenced therein speak for themselves.

9. Defendant responds to the allegations contained in Paragraph 9 of the Complaint by stating that the statutes referenced therein speak for themselves.

10. Defendant responds to the allegations contained in Paragraph 10 of the Complaint by stating that the statute referenced therein speaks for itself.

11. Defendant admits the allegations in Paragraph 11 of the Complaint.

12. Defendant admits the allegations in Paragraph 12 of the Complaint.

13. Defendant responds to the allegations contained in Paragraph 13 of the Complaint by stating that the statutes referenced therein speak for themselves and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 13 of the Complaint.

14. Defendant responds to the allegations contained in Paragraph 14 of the Complaint by stating that the statutes referenced therein speak for themselves.

15. Defendant responds to the allegations contained in Paragraph 15 of the Complaint by stating that the statutes referenced therein speak for themselves and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 15 of the Complaint.

16. Defendant responds to the allegations contained in Paragraph 16 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 16 of the Complaint.

17. Defendant responds to the allegations contained in Paragraph 17 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 17 of the Complaint.

18. Defendant responds to the allegations contained in Paragraph 18 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 18 of the Complaint.

19. Defendant responds to the allegations contained in Paragraph 19 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 19 of the Complaint.

20. Defendant responds to the allegations contained in Paragraph 20 of the Complaint by stating that the statute referenced therein speaks for itself.

21. Defendant responds to the allegations contained in Paragraph 21 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 21 of the Complaint.

22. Defendant responds to the allegations contained in Paragraph 22 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 22 of the Complaint and therefore denies the same.

23. Defendant responds to the allegations contained in Paragraph 23 of the Complaint by stating that the statutes referenced therein speak for themselves.

24. Defendant responds to the allegations contained in Paragraph 24 of the Complaint by stating that the Plan speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 24 of the Complaint.

25. Defendant responds to the allegations contained in Paragraph 25 of the Complaint by stating that the statute referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 25 of the Complaint.

26. Defendant responds to the allegations contained in Paragraph 26 of the Complaint by admitting that two affidavits were submitted to the Kennebunk Select Board on November 29, 2021, and that the target of the affidavits were two elected directors of the RSU School Board. Defendant is without sufficient knowledge or information to form a belief as to the truth or

falsity of the allegations contained in Paragraph 26 of the Complaint and therefore denies the same.

27. Defendant responds to the allegations contained in Paragraph 27 of the Complaint by stating that the affidavits referenced therein speak for themselves.

28. Defendant responds to the allegations contained in Paragraph 28 of the Complaint by stating that the affidavits and the statutes speak for themselves and, to the extent that further responsive pleading is necessary, Defendant states that Paragraph 28 of the Complaint contains conclusions of law. To the extent that Paragraph 28 of the Complaint contains factual allegations that require a response, Defendant denies those allegations.

29. Paragraph 29 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 29 of the Complaint contains factual allegations that require a response, Defendant denies those allegations.

30. Paragraph 30 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 30 of the Complaint contains factual allegations that require a response, Defendant denies those allegations.

31. Defendant denies the allegations in Paragraph 31 of the Complaint.

32. Paragraph 32 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 32 contains factual allegations that require a response, Defendant denies those allegations.

33. Paragraph 33 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 33 contains factual allegations that require a response, Defendant denies those allegations.

34. Defendant admits the allegations in Paragraph 34 of the Complaint.

35. Defendant admits the allegations in Paragraph 35 of the Complaint.
36. Defendant admits the allegations in Paragraph 36 of the Complaint.
37. Defendant admits that a recall election could be held as early as March for the subject of the recall petition determined to be sufficient if the pending challenges to signatures on that recall petition do not result in a determination that the petition is insufficient. Defendant denies the remaining allegations in Paragraph 37 of the Complaint.

### **COUNT I-DECLARATORY JUDGMENT**

38. Defendant repeats and realleges its responses to Paragraphs 1-37 of the Complaint as if fully set forth herein.

39. Paragraph 39 of the Complaint contains conclusions of law that do not require a response.

40. Defendant denies the allegations in Paragraph 40 of the Complaint.

41. Defendant denies the allegations in Paragraph 41 of the Complaint.

42. Defendant denies the allegations in Paragraph 42 of the Complaint.

43. Defendant admits that the RSU 21 School Board directors are elected directors of the body politic and corporate of RSU 21 and states that the remaining allegations in Paragraph 43 of the Complaint contain conclusions of law. To the extent that the remaining allegations in Paragraph 43 of the Complaint contain factual allegations that require a response, Defendant denies those allegations.

44. Defendant admits that the RSU 21 School Board is the governing body of RSU 21 and states that the remaining allegations in Paragraph 44 of the Complaint contain conclusions of law. To the extent that the remaining allegations in Paragraph 44 of the Complaint contain factual allegations that require a response, Defendant denies those allegations.

45. Defendant responds to the allegations contained in Paragraph 45 of the Complaint by stating that the statutes referenced therein speak for themselves and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 45 of the Complaint.

46. Defendant responds to the allegations contained in Paragraph 46 of the Complaint by stating that the Charter provision referenced therein speaks for itself and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 46 of the Complaint.

47. Defendant admits the allegations in Paragraph 47 of the Complaint.

48. Paragraph 48 of the Complaint contains conclusions of law that do not require a response. To the extent that Paragraph 48 contains factual allegations that require a response, Defendant responds to those allegations by stating that the Charter and ordinance provisions referenced therein speak for themselves and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 48 of the Complaint.

#### **COUNT II-INJUNCTIVE RELIEF**

49. Defendant repeats and realleges its responses to Paragraphs 1-48 of the Complaint as if fully set forth herein.

50. Defendant responds to the allegations contained in Paragraph 50 of the Complaint by stating that the rule referenced therein speaks for itself.

51. Defendant denies the allegations in Paragraph 51 of the Complaint.

52. Defendant denies the allegations in Paragraph 52 of the Complaint.

53. Defendant responds to the allegations contained in Paragraph 53 of the Complaint by stating that the Charter provision speaks for itself; Defendant denies the remaining allegations in Paragraph 53 of the Complaint.

54. Defendant denies the allegations in Paragraph 54 of the Complaint.

55. Defendant denies the allegations in Paragraph 55 of the Complaint.

56. Defendant denies the allegations in Paragraph 56 of the Complaint.

57. Defendant responds to the allegations contained in Paragraph 57 of the Complaint by stating that the Charter provisions referenced therein speak for themselves and, to the extent that further responsive pleading is necessary, Defendant denies the allegations contained in Paragraph 57 of the Complaint.

58. Defendant denies the allegations in Paragraph 58 of the Complaint.

59. Defendant denies the allegations in Paragraph 59 of the Complaint.

#### **AFFIRMATIVE DEFENSES**

##### FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

##### SECOND DEFENSE

Plaintiff lacks standing to request injunctive relief preventing the recall election.

##### THIRD DEFENSE

Plaintiff's claims are not ripe for consideration.

WHEREFORE, Defendant asks that Plaintiff's request for preliminary injunction be denied, that judgment be entered for Defendant, and that Defendant be awarded such appropriate relief as justice requires, including, without limitation, its reasonable costs and attorney's fees.

Date: January 28, 2022

By:

  
Natalie L. Burns, Bar No. 3687

By:



Mark A. Bower, Bar No. 4132  
Attorneys for Defendant Town of Kennebunk

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STATE OF MAINE  
YORK, ss.

SUPERIOR COURT  
Civil Action  
Docket No. CV-22-7

REGIONAL SCHOOL UNIT 21	)
	)
Plaintiff,	)
	)
v.	)
	)
TOWN OF KENNEBUNK,	)
	)
Defendant,	)
	)
and	)
	)
TOWN OF ARUNDEL and TOWN OF	)
KENNEBUNKPORT,	)
	)
Parties-in-Interest.	)

**DEFENDANT TOWN OF  
KENNEBUNK’S OPPOSITION TO  
PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

Defendant Town of Kennebunk (the “Town”), by and through its undersigned counsel, submits this opposition to the motion for preliminary injunction filed by Plaintiff Regional School Unit 21 (the “RSU”) in this case.

INTRODUCTION

This case involves the Town’s authority, through a charter-authorized process, to hold elections for the recall of public officials who were elected by the Town’s voters. Here, the elected official at issue is one of the Town’s representatives to the RSU 21 Board of Directors, Timothy Stentiford, who is not a party to this litigation.<sup>1</sup> The RSU has brought this lawsuit against the Town, seeking a declaratory judgment RSU board members are not subject to recall under the Town of Kennebunk Charter, as well as a preliminary injunction that would prevent a recall election from occurring in the coming months.

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<sup>1</sup> Mr. Stentiford’s term of office expires in June 2022.

The RSU's two central arguments are: (1) the Town's voters do not have the authority to remove from office certain officials that they have elected, despite the clear authority under the Town Charter to recall any locally elected officials; and (2) the RSU 21 Board of Directors cannot "function efficiently" if its directors are subject to recall procedures in the member towns by voters who have lost confidence in them, despite the fact that the RSU has offered no evidence with its motion to support that argument. For the reasons that follow, the Town respectfully requests the Court to deny the RSU's motion for preliminary injunction for failing to meet the four-part test for preliminary injunctive relief set forth in *Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691, 693 (Me. 1982).

#### FACTUAL BACKGROUND

##### ***Recall Procedure under Town of Kennebunk Charter***

The Town is governed by the Town of Kennebunk Charter, which the voters of the Town originally adopted on November 6, 1984, revised on January 27, 2009, and amended on several occasions since then (hereinafter, the "Charter"). Among other things, the Charter provides the process for the election (and recall) of locally elected officials.

At its annual town meetings, Town voters elect a number of public officials by secret ballot. Section 2.05 of the Charter specifies the categories of officials who are required to be elected by the Town Meeting voters: (1) members of the Board of Selectmen (*i.e.*, the "municipal officers"); and (2) quasi-municipal and district officials, which includes representatives to the Kennebunk Sewer District, the Kennebunk, Kennebunkport & Wells Water District, the Kennebunk Light & Power District, and Regional School Unit 21. Kennebunk, Me., Charter § 2.05 (2014); *see also* Kennebunk, Me., Charter § 2.02 (2014) (specifying the terms of office of those individuals elected by Town Meeting voters, including for the "School Board Directors, including those elected to a Regional School Unit, or a successor organization"). These elections occur in accordance with the Charter, which specifies the

authority of the Town Meeting to elect these public officials, among other powers. *See* Kennebunk, Me., Charter § 2.05(a)-(b) (2014).

While Article II of the Charter addresses the election of officials, Article VII governs the recall of those elected officials. *See generally* Kennebunk, Me., Charter Art. VII (2014). To begin with, Section 7.01 provides:

Any elected official may be recalled and removed from office by the qualified voters of the Town as herein provided. Recall is intended to be used when, in the opinion of the number of voters hereinafter specified, an elected official, acting as such, has caused a loss of confidence in that official's judgment or ability to perform the duties and responsibilities of the office.

Kennebunk, Me., Charter § 7.01 (2014) (emphasis added). In Sections 7.02-7.07, the Charter goes on to provide a multi-step process for recalling elected officials, which commences with the filing of an affidavit by 25 qualified voters of the Town. Kennebunk, Me., Charter § 7.02 (2014). The Town Clerk then issues a petition to those qualified voters, who have 30 days to gather signatures from “registered voters of the Town equal to at least 10% of the number of votes cast in the Town for Governor in the last gubernatorial election.” *Id.* Once the Town Clerk certifies that a sufficient petition has been filed, the Select Board must order an election to be held 50-60 days after the Town Clerk's certification, unless any other Town election is to occur within 75 days of the certification. Kennebunk, Me., Charter § 7.03 (2014). If the elected official is recalled, he/she is deemed removed from office upon the certification of the election results, and the candidate receiving the greatest number of votes (at the same election) is elected as the replacement elected official for the remainder of the term of office. Kennebunk, Me., Charter §§ 7.04, 7.06 (2014).

### ***Recall Certifications at Issue***

As asserted in the Complaint, on November 29, 2021, two affidavits, each signed by 30 voters, were submitted to the Town Clerk to initiate the recall process against two of the Town's representatives to the RSU 21 Board of Directors. (Compl. ¶¶ 26, 27.) On December 31, 2021, the

two petitions were returned to the Town Office. (Compl. ¶ 34.) Prior to the certification of those petitions, the RSU filed the Complaint seeking declaratory and preliminary injunctive relief, along with a motion for preliminary injunction.

The Town Clerk has certified only one of the two petitions to be sufficient under Section 7.03 of the Kennebunk Town Charter.<sup>2</sup> The Town Clerk determined that the other petition did not have the requisite number of signatures to move forward with a recall election. *See* Kennebunk, Me., Charter §§ 7.03, 7.04 (2014).

## ARGUMENT

### **I. RSU 21 HAS FAILED TO ESTABLISH ENTITLEMENT TO A PRELIMINARY INJUNCTION UNDER THE *INGRAHAM* STANDARD.**

#### **A. Standard of Review.**

##### *1. Ingraham Standard.*

As the party seeking a preliminary injunction, the RSU bears the burden to demonstrate each of the following criteria under the well-established “*Ingraham* standard”:

- (1) that the RSU will suffer irreparable injury if the injunction is not granted;
- (2) that such injury outweighs any harm that granting the injunctive relief would inflict on the Town;
- (3) that the RSU has exhibited a likelihood of success on the merits; and
- (4) that the public interest will not be adversely affected by granting the injunction.

*Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691, 693 (Me. 1982). While a motion to dismiss is judged solely on the basis of the allegations made in the Complaint, a plaintiff has to offer evidence to meet its burden of proof under a motion for a preliminary injunction. *UIG, Inc. v. Guerin*, Docket No. CV-19-

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<sup>2</sup> Section 7.03 of the Charter establishes a 5-day period for filing “legal challenges to the signatures” on a petition the Town Clerk has certified as having a sufficient number of signatures. Several challenges were filed during that period and have been reviewed by the Town Clerk, who has determined that there are still sufficient signatures to proceed with the recall process against one of the two subjects of the initial petitions.

98, 2019 Me. Super. LEXIS 117, at \*8 (July 12, 2019). In this case, the RSU has not filed any affidavits in support of its motion for preliminary injunction, and has requested only a non-testimonial hearing; therefore, it does not appear that the RSU intends to offer any evidence to meet its burden of proof for its injunction request.<sup>3</sup>

2. *Charter Interpretation.*

The interpretation of a municipal charter is a question of law reviewed *de novo*. See *McGettigan v. Town of Freeport*, 2012 ME 28, ¶ 13, 39 A.3d 48 (citing *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶¶ 10-17, 856 A.2d 1183); see also *Passamaquoddy Water Dist. v. City of Eastport*, 1998 ME 94, ¶¶ 5-7, 710 A.2d 897. Courts must “construe the words of a charter according to their plain and ordinary meaning and, when that meaning is clear, [] only look beyond those words if the result is illogical or nonsensical.” *Id.* (citation omitted). Additionally, “the interpretive principle that nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible” guides the Court’s assessment of a charter’s language. *Passamaquoddy Water Dist.*, 1998 ME 94, ¶ 5, 710 A.2d 897.

3. *Separation of Powers.*

Maine courts do not take lightly the possibility of enjoining the ongoing functions of another branch of government out of respect for the separation of powers among the three branches of government and the doctrine of primary jurisdiction. See, e.g., *Nasberg v. City of Augusta*, 662 A.2d 227, 229 (Me. 1995) (affirming Superior Court’s denial of plaintiff’s motion for preliminary injunction to order the city to place a proposed charter amendment on the municipal ballot); *Littlefield v. Inhabitants of*

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<sup>3</sup> Additionally, it does not appear that RSU 21 has submitted security or a surety bond in accordance with M.R. Civ. P. 65(c) (“No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, provided, however, that for good cause shown and recited in the order, the court may waive the giving of security.”).

*Town of Lyman*, 447 A.2d 1231, 1235 (Me. 1982) (strong policy of judicial restraint in mandating the activities of a coordinate branch of government); *Me. Human Rights Comm’n v. City of Auburn*, 425 A.2d 990, 995 (Me. 1981) (“An equity court should proceed with restraint in issuing an injunctive order against a governmental body.”); *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 77 (Me. 1980) (court is to exercise caution in issuance of orders that may intrude upon separation of powers under the Maine Constitution); *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972) (reaffirming the principle that one coordinate branch of government must refrain from ordering another branch to perform its official duty); cf. A. Horton & P. McGehee, *Maine Civil Remedies* § 5-6 at 122 (4th ed. 2004) (Maine courts are reluctant to interfere with on-going legislative deliberations in deference to the separation of powers doctrine).

**B. RSU 21 Has Not Demonstrated a Likelihood of Success on the Merits of its Declaratory Judgment Claim.**

In its memorandum of law, the RSU first addresses the likelihood of success on the merits, which the Law Court has called the “*sine qua non*” of the *Ingraham* standard. See *National Org. of Marriage v. Comm’n on Gov’t Ethics and Elections Practices*, 2015 ME 103, ¶ 28, 121 A.3d 792 (quoting *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 46 (1st Cir. 2005) (“[t]he *sine qua non* of this four-part inquiry is likelihood of success on the merits.”); *New Comm Wireless Servs. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) (“if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.”). However, as explained below, the RSU has failed to demonstrate that it is likely to succeed with regard to any of its arguments on the merits of its claim.

1. *Preemption*

The RSU’s first argument is, in essence, a preemption argument—making reference to the “comprehensive legislative scheme” under Title 20-A that provides for the organization of regional school units. (Pl.’s Mot. 3, 5, 7, 9.) The RSU cites *Sch. Comm. of Town of Winslow v. Inhabitants of the Town of Winslow*, 404 A.2d 988 (Me. 1979), for the proposition that education is a matter of state concern.

(Pl.'s Mot. 18.) In *Winslow*, the issue was whether the town had authority under the municipal home rule provision of the State Constitution to modify its charter to change the term of office for school board members from three years to two years, and from “at large” elections to district elections. *Id.* at 989. The Law Court noted that the three-year term for school board members was specified by statute (in the predecessor of Title 20-A), and that the town was not entitled “to pursue its own wishes with respect to what is clearly a state matter and as to which the state has already prescribed.” *Id.* at 993 (further noting that “the clear thrust of every action by the Legislature in this regard suggests an intention to occupy the field in the subject of [school board] terms”).

*Winslow* is not a controlling authority in this case. To begin with, it is distinguishable from the current case because, unlike terms of office, Title 20-A neither specifies nor prohibits any mechanism for removal of school board members from office; therefore, the Legislature has not expressed its “intention to occupy the field” with regard to the subject of recall. Put differently, there is no recall or removal provision within that “comprehensive legislative scheme” to which RSU 21 repeatedly refers. More significantly, however, *Winslow* is no longer good law. As later noted by the Law Court in *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935 (Me. 1993), the holding in *Winslow* was legislatively overruled by the enactment of 30-A M.R.S. § 3001, which “grants plenary authority to municipalities to legislate in matters beyond those exclusively ‘local and municipal in character.’” *Id.* at 940 (emphasis added). The opinion states:

[S]ection 3001 constitutes an independent and plenary grant of power to municipalities to legislate on matters beyond those exclusively “local and municipal,” and is not limited by the Constitution’s narrower home rule provision. Municipal legislation will be invalidated only where the Legislature has expressly prohibited local regulation, or where the Legislature has intended to exclusively occupy the field and the legislation would frustrate the purpose of a state law.

*Id.* at 939 (citations omitted). The Law Court quoted from the Legislative Committee Report, which stated that “municipal and state enactments may peacefully co-exist within any given subject area unless

a conflict arises, in which event the state statute will control.” *Id.* at 944 (citation omitted); *see also E. Perry Iron & Metal Co. v. City of Portland*, 2008 ME 10, ¶ 24, 941 A.2d 457 (“There is a rebuttable presumption that action taken pursuant to the home rule statute is a valid exercise of authority.”) (citing 30-A M.R.S. § 3001(2)).

The RSU fails to articulate clearly how a recall provision allowing for the removal of a member of the RSU Board of Directors representing a single municipality (and the replacement of him/her with a new member) would frustrate the legislative purpose of Title 20-A (the regionalization of educational services). Nor does the RSU explain how there is a conflict between the provisions of Title 20-A and the Charter, such that the two cannot “peacefully co-exist.” Moreover, the RSU has not offered any evidence in support of its position, as it is required to do. *See UIG, Inc. v. Guerin*, Docket No. CV-19-98, 2019 Me. Super. LEXIS 117, at \*8 (July 12, 2019).

The preemption argument advanced by the RSU is further undermined by Law Court holdings subsequent to its decision in *York*. As confirmed in *Biddeford Bd. of Educ. v. Biddeford Teachers Ass’n*, 1997 ME 17, 688 A.2d 922, the Legislature has not denied to municipalities the right to legislate in the area of education:

As we have stated, given the broad delegation of home rule authority and the standard of review of municipal legislation set out in section 3001, we conclude that Title 20-A is not an exclusive legislative scheme that implicitly preempts municipal legislation on education matters in the absence of an express grant of authority.

*Id.* ¶ 12 (emphasis added); *cf. Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 27, 760 A.2d 257 (“municipal action will be viewed as preempted only where application of the municipal ordinance prevents the efficient accomplishment of a defined state purpose”). Therefore, the Legislature does not need to expressly authorize municipalities to enact local laws (by charter or ordinance), provided that they comply with 30-A M.R.S. § 3001 and do not “frustrate the purpose of any state law.” Here, the Town’s recall provision contained in the Charter is not in conflict with any

provision of Title 20-A (which is silent on the question of recall), nor does it frustrate the purpose of state educational policy or regionalization. The Charter simply allows the Town's voters to remove their representative to the RSU Board of Directors whom they elected into office.

In conclusion, RSU 21 has failed to demonstrate a likelihood of success in its position that the Town's application of the Charter's recall provision to the petitions to remove the Town's representatives to the RSU Board of Directors "prevents the efficient accomplishment of a defined state purpose." *York*, 626 A.2d at 938 n.8 (Me. 1993). Therefore, the Court has no basis for restricting the Town's home rule power as requested by RSU 21.

2. *Election of Directors.*

The RSU next argues that, under the provisions of Title 20-A, a regional school unit is a self-governing body and, therefore, should not be subject to the "idiosyncratic" charter provisions of its member municipalities. (Pl.'s Mot. 10.) This argument is unpersuasive, however, because Title 20-A does not actually specify the manner of election of RSU directors; rather, it delegates that authority to municipalities. *See* 20-A M.R.S. § 1473 ("For the purpose of nominations, regional school unit board directors are considered municipal officials and must be nominated in accordance with Title 30-A, chapter 121 or with a municipal charter, whichever is applicable."). Therefore, the statute itself expressly contemplates compliance with local charters, "idiosyncratic" as they may be.

Moreover, for its method of representation under 20-A M.R.S. § 1472, the RSU operates under "Method B," which specifies that each director is elected by the municipality that he/she represents, and if a municipality is represented by multiple directors, "the directors are elected at large within the municipality unless otherwise provided by municipal charter." 20-A M.R.S. § 1472(2) (emphasis

added). Under Method B, RSU 21 directors are representatives of the municipality, not of the RSU as a whole.<sup>4</sup>

Therefore, not only are RSU directors considered “municipal officials” for purposes of elections, the language in § 1472 clearly contemplates that municipal charters may provide differing instructions as to how to elect directors. This undermines RSU 21’s argument that its board of directors should not be subject to “idiosyncratic ‘recall’ provisions of any other municipal town charter.” (Pl.’s Mot. 8.)

3. *Vacancy in Office.*

The RSU next addresses the topic of vacancies in office, arguing that the statute governing regional school units does not include recall as a cause of vacancy. *See* 20-A M.R.S. § 1474 (providing that a vacancy occurs as a result of (1) expiration of term of office; (2) change of residency; (3) death; or (4) resignation). As a threshold matter, this argument does not apply to the Town’s situation, because the Charter’s recall procedure does not actually result in a vacancy in office. Under Section 7.06 of the Charter, voters at the recall election vote “yes” or “no” on the question of whether to recall the official, and if they vote “yes,” they then select from a list of candidates and “the candidate receiving the greatest number of votes shall be deemed elected for the balance of the term of the official recalled.” Kennebunk, Me., Charter § 7.06. In other words, if an elected official is recalled, his/her replacement is chosen at the very same election, which means that the RSU board member’s seat would never

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<sup>4</sup> The RSU makes a puzzling reference to 20-A M.R.S. § 1473(2)(B). (Pl.’s Mot. 11.) That provision merely states that a reduction or addition in the number of directors must be done “in accordance with this chapter,” meaning Chapter 103-A governing regional school units. Namely, § 1461 requires review and approval of a reorganization plan by the Commissioner of the Department of Education, and a subsequent referendum vote by the municipalities comprising the RSU. Here, nobody is proposing to reduce or increase the number of directors on the RSU 21 Board. A recall under the Charter does not constitute a “reduction in the number of directors,” or even a vacancy for that matter, because the replacement director is selected at the very same election where the director is recalled.

actually be vacant. If recalled, the board member's term would end immediately, and the replacement board member would be sworn in at the next RSU board meeting.

Notwithstanding this preliminary issue, the RSU compares § 1474 against the vacancy-in-office provision in Title 30-A, pointing out that the latter includes “recall pursuant to 30-A M.R.S. § 2505” as a way of creating a vacancy in office. According to the RSU, the fact that recall is mentioned in Title 30-A, but not in Title 20-A, means that “recall is not a basis to create a vacancy on an RSU board.” (Pl.’s Mot. 11.) The RSU’s argument is unpersuasive for at least two reasons. The first is a matter of timing. While Chapter 103-A of Title 20-A, which includes § 1474, was enacted in 2007 under a sweeping legislative effort to mandate the regionalization of schools, the recall provision in 30-A M.R.S. § 2505 was not enacted until 2011, which explains why there is no reference to § 2505 in the vacancy in office provision (20-A M.R.S. § 1474) that was enacted four years prior, with no subsequent amendments. Second, the RSU misapplies the general/specific rule of statutory construction to this question, asking the Court to consider 20-A M.R.S. § 1474 to be the “specific” provision, and 30-A M.R.S. § 2602 to be the “general” provision. (Pl.’s Mot. 12.) The Town does not disagree with the RSU’s statement that “specific statutes prevail over general ones when the two are inconsistent.” (Mot. at 13); *see also MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 29, 229 A.3d 514. There is no inconsistency here, because Title 20-A does not deny municipalities the ability to recall school board members; indeed, it is silent on the matter. The RSU’s statement that Title 20-A provides that “RSU directors are not subject to municipal recall” (Pl.’s Mot. 13),<sup>5</sup> is not grounded in any provision under Title 20-A. Moreover, this is a curious application of the general/specific rule of statutory construction

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<sup>5</sup> RSU 21 makes reference to its Reorganization Plan without actually providing it to the Court to review.

by the RSU, given its contention that RSU board members are not “municipal officials” and therefore would not be subject to recall under § 2602 in any event.

Finally, there is other language in § 1474 that supports the Town’s position: “In addition to paragraphs A, B, C and D, except in municipalities having a municipal charter, when a director is absent without excuse from 3 consecutive regular board meetings, the regional school unit board may declare that a vacancy exists.” 20-A M.R.S. § 1474 (emphasis added). This provision recognizes that a municipal charter might have provisions that differ from the statute on this topic, in which case the charter applies.<sup>6</sup> Therefore, the statute establishes a baseline, generally applicable vacancy provision, but allows charter municipalities to establish additional provisions, including ones to modify the non-attendance requirements. If the Legislature had wanted to expressly override recall provisions contained in municipal charters, it could have done so. Moreover, when there is a vacancy in office, it is the municipal officers (*i.e.*, the Select Board) of the municipality who select an interim director until a replacement is elected, not the RSU Board of Directors. 20-A M.R.S. § 1474(2). This cuts against the RSU’s argument that the RSU is entirely self-governing, and that its board members are not “municipal officials.” (Pl.’s Mot. 10.)

#### 4. *Applicability of Statutory Recall Provision.*

Regardless of the RSU’s position on the matter, it is clear—under the plain language of applicable statutes—that RSU board members are, in fact, subject to recall under 30-A M.R.S. § 2505. This conclusion is the result of a three-step statutory analysis. First, § 2505 states: “Except as otherwise provided by the municipality’s ordinances or charter, an elected official of a municipality may be recalled from office pursuant to this section. For purposes of this section, ‘official’ has the same meaning as section 2604, subsection 2.” 30-A M.R.S. § 2505. Second, the definition of the term

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<sup>6</sup> Title 20-A is clear when it is overriding municipal charters or local law. *See, e.g.*, 20-A M.R.S. § 15693(2)(C) (“Notwithstanding any municipal charter provision, ordinance or other law to the contrary....”).

“official” is “any elected or appointed member of a municipal or county government or of a quasi-municipal corporation.” 30-A M.R.S. § 2604(2) (emphasis added). And third, the definition of “quasi-municipal corporation” is “any governmental unit embracing a portion of a municipality, a single municipality or several municipalities which is created by law to deliver public services but which is not a general purpose governmental unit. This definition includes, but is not limited to . . . school administrative districts.”<sup>7</sup> 30-A M.R.S. § 2604(3) (emphasis added). Therefore, under 30-A M.R.S. § 2505, an elected official of a municipality, including an elected member of an RSU board of directors, is subject to recall under a municipal charter or, if there is no charter, then according to § 2505. Here, because the Town has a Charter with recall provisions, those provisions control.

5. *Kennebunk Charter.*

In the final part of its argument, the RSU discusses the charter language of each member municipality, including the Kennebunk Charter. In that discussion, RSU 21 begins by wrongly stating that the “only elected officials referenced in the [Kennebunk] charter are the Board of Selectmen – the other officials being appointed.” (Pl.’s Mot. 14.) That statement is at odds with Section 2.05 of the Charter, which specifically references and provides for the election of members of the Select Board as well as quasi-municipal and district officials. Kennebunk, Me., Charter, § 2.05 (2014). Therefore, the general term “elected official,” as used in Section 7.01, would mean any official elected by Town voters under the Charter—which includes the Town’s representatives to the RSU Board of Directors.<sup>8</sup> If the Town of Kennebunk had intended to limit the reach of its recall provision only to members of the Select Board, it certainly could have drafted the Charter that way, but it did not. Instead, the Town

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<sup>7</sup> Note that, at the time this provision was adopted in 1987, there were no regional school units, only school administrative districts (such as the former SAD #71 comprising Kennebunk and Kennebunkport) which were the functional equivalent of RSUs at the time. Moreover, the language is non-exclusive, so it applies to an RSU because it meets the definition of a quasi-municipal corporation.

<sup>8</sup> This interpretation is further supported by the statutory provision in 30-A M.R.S. § 2604(2), which defines “official” to include elected members of quasi-municipal corporations.

chose to use the broader term “elected official,” which includes RSU board members elected by Town voters. While it is true that the Charter “does not expressly state that its general recall provisions apply to RSU School Board directors,” it does not need to. Section 7.01 of the Charter says that it applies to elected officials, and RSU board members meet that definition.

Additionally, the RSU’s discussion of the language in the Town of Arundel charter supports the Town’s position. (Pl.’s Mot. 15-16.) In the case of Arundel, the charter expressly carves out school board members from its recall provision, indicating the legislative intent on the part of the drafters of the charter that RSU directors would not be subject to recall. While Arundel elected to exclude RSU directors from its recall provision, Kennebunk did not. Rather than supporting the RSU’s position, that fact actually undermines it.

In conclusion, the RSU has failed to meet its burden to demonstrate that it is likely to succeed on the merits of its claim that members of the RSU Board of Directors are not subject to recall under applicable municipal charter provisions. The RSU’s position is based on a faulty preemption analysis and a misapplication of various canons of statutory interpretation. Having failed to establish the “*sine qua non*” of the preliminary injunction analysis, the Court must deny the RSU’s motion.

**C. RSU 21 Has Not Demonstrated Irreparable Injury.**

The next element of the *Ingraham* standard requires the RSU to demonstrate that it will suffer “irreparable injury” if the Court does not issue a preliminary injunction to prevent the recall election from occurring. On this point, the RSU has failed in two respects: (1) on its burden of proof, having submitted no evidence in support of its argument; and (2) on its burden of persuasion, having limited its discussion of this prong to two paragraphs in its memorandum of law. (Pl.’s Mot. 16-17.) Because there is no immediate, concrete harm to the RSU (as an entity) that would justify the extreme remedy of an injunction to prevent the Town from holding a duly called election, the Court must deny the request for preliminary injunction.

For purposes of analyzing irreparable injury, it is important to keep in mind that the Plaintiff in this case is the RSU itself, not the individual board members who are the subjects of the recall petitions. This is of utmost significance, as the RSU's central arguments are from the perspective of the individual directors, who are not Plaintiffs. For example, the RSU asserts that "the targeted director of the RSU 21 School Board will be required to engage in the lengthy, potentially time-consuming and disruptive process of contending with recall procedures, legal challenges, and a recall election relating to a seat rightfully and presently held." (Pl.'s Mot. 16.) Even if this (unsupported) assertion were sufficient to establish irreparable harm, which the Town disputes, it alleges such harm on behalf of individuals who are not parties to the action.

The next significant flaw in the RSU's argument is that its motion includes no affidavits or other evidence supporting its position that it will be irreparably injured by the recall election that will allegedly cause "unnecessary distraction and a drain on resources." (Pl.'s Mot. 17.) As the Law Court has instructed, "the moving party has the burden of proof to present evidence sufficient to support its claims of irreparable injury." *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 12, 837 A.2d 129 (denying a preliminary injunction where the plaintiff offered only "vague generalities" asserting injury, and determining that there was "insufficient evidence in the record to support a finding of irreparable injury"); *see also Town of Charleston v. Sch. Admin. Dist. No. 68*, 2002 ME 95, ¶ 7, 798 A.2d 1102 (vacating the Superior Court's grant of a temporary restraining order preventing the closure of a school where the plaintiff town "provided no record support for a finding of irreparable injury" relating to the closure of the school).

To the extent that the RSU is relying upon unsworn allegations contained in the Complaint, which are not "evidence," *S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 3 (1st Cir. 2010), those are merely conclusory statements that the recall election will be "disruptive," a "drain on resources," and a "distraction" to the RSU Board of Directors and to "all of RSU 21's constituents." (Compl. ¶ 52, 54.)

There is no explanation by the RSU as to how a recall election, conducted entirely at the municipal level at the Town's expense, would "drain" the RSU's resources; such fears and speculation are not only unsupported by evidence, but patently overstated. Furthermore, to the extent that the RSU will experience some disruption as a result of "legal challenges" related to the recall election, such harm is self-inflicted, as it is the RSU that brought this litigation to challenge the recall election, not the Town. *See San Francisco Real Estate v. Real Estate Invest. Tr. of America*, 692 F.2d 814, 818 (1st Cir. 1982) (a party seeking a preliminary injunction does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted). The RSU also fails to explain why a recall election would be any more disruptive to the RSU (as an entity) than (1) any other election that RSU board members are subjected to at the end of their terms or (2) any of the reasons for vacancy under the statute (death, resignation, change in residency). As argued above, at least with a recall under the Charter, there is not actually a vacancy in office because the Town's voters choose a successor at the same election in which the official is recalled—resulting in less disruption than an actual vacancy.

Finally, any "injury" that the RSU asserts in its motion is entirely speculative, and therefore does not meet the legal standard for a preliminary injunction. *See Friends of Merrymeeting Bay v. United States Dep't of Comm.*, 810 F. Supp. 2d 320, 322 (D. Me. 2011) ("a showing of irreparable harm must be 'grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store'") (quoting *Charlesbank Equity Fund II v. Blinds to Go*, 370 F.3d 151, 162 (1st Cir. 2004); *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) ("Although there is no mechanical test that permits a court to make an exact calculation of the quantum of hard-to-measure harm that will suffice to justify interim injunctive relief, . . . the plaintiff's showing must possess some substance; a preliminary injunction is not warranted by a tenuous or overly speculative forecast of anticipated harm."). The RSU argues in its memorandum of law that "the performance of its duties and responsibilities for the benefit of the students, teachers, and all employees of RSU 21, will

be irreparably disrupted” by the recall election (Pl.’s Mot 17), but fails to explain how the conduct of a municipal recall election could have such a far-reaching impact.

As noted above, the RSU has offered no evidence in the form of affidavits, documents or proposed testimony, and therefore has failed with regard to its “burden of proof to present evidence sufficient to support its claims of irreparable injury.” *See Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 12, 837 A.2d 129. There is simply no substance to the assertion that the RSU (as an entity) will suffer irreparable injury if the Court does not issue a preliminary injunction in this case.

**D. Granting a Preliminary Injunction Would Impose a Greater Harm upon the Town than any Harm Suffered by the RSU.**

“The third prong of a Court’s review of a request for injunctive relief is a balancing of the harms that either party will face from an adverse result. Put simply, this Court must determine who will suffer more harm: [the RSU] if an injunction is not entered, or [the Town] if [the RSU’s] request is granted.” *NECEC Transmission LLC v. Bureau of Parks & Lands*, Docket No. BCD-CIV-2021-00058, slip op. at 48 (Me. B.C.D. Dec. 16, 2021). Here, where the Town is a public entity, the Court must consider “harm to the public as synonymous with harm to Defendant[.]” *Id.* at 48 n.29 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

If a preliminary injunction were to issue and prevent the Town from calling a municipal election, the harm to the Town would significantly outweigh any alleged injury to the RSU. To begin with, the recall process specified in the Charter involves a number of actions to be taken by Town officials: (1) the Town Clerk issues the petitions to the qualified voters; (2) the completed petitions are reviewed by the Registrar of Voters; (3) the Town Clerk certifies and submits the petition to the Select Board; (4) the Select Board gives notice to the affected elected official and orders the recall election to take place; and (5) if requested by the affected elected official, the Select Board holds a public hearing. The issuance of an injunction would constitute a significant encroachment of these public officials’ authorized acts under the Charter, would call into question the validity of the Charter, and would

undermine the ability of the Town to self-govern through the conduct of local elections. This, in turn, could erode public confidence in local government. These harms are far greater than any potential injury that the RSU claims it will suffer due to the inconvenience and disruption caused by the relatively brief recall election process.

The RSU's argument on this prong is exceedingly limited, and simply refers back to its argument on irreparable injury—that the recall election will cause a disruption in the RSU's "public service work." (Pl.'s Mot. 17.) For the reasons explained above in Part C, the RSU's claim of injury/harm is unsupported, and fails to outweigh the significant harms to the Town if an injunction issues to prevent the recall election.

**E. The Public Interest Does Not Require Granting of the Preliminary Injunction.**

The final prong in the *Ingraham* standard "requires this Court to inquire whether there are public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief." *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 193 (D. Me. 2005) (citing *United States v. Zenon*, 711 F.2d 476 (1st Cir. 1983)).

On this prong, the RSU harkens back to its argument on irreparable harm, asserting "the greater public's interest in the undistracted, efficient, working RSU 21 School Board" (Pl.'s Mot. 20), and further contending that the public has an interest in "preserving the integrity of the regional school unit organization and governance" (Pl.'s Mot. 19.) These are bald assertions, and provide no detail to explain how the Town's recall election will result in a nonfunctional RSU Board of Directors or loss of integrity. They even assert that this public interest extends to the other RSU member towns, although that claim is undermined by the fact that the Town of Kennebunkport, which is a party-in-interest in this action, joins in the Town's opposition to the RSU's motion for a preliminary injunction. If

anything, its support for the Town's position demonstrates a significant public interest in allowing the recall election to go forward.

Finally, the RSU asserts that there is "no public interest in the Select Board proceeding to hold a municipal recall election that threatens to remove a school board director based on the director's legitimate performance of duties in office." (Pl.'s Mot. 19.<sup>9</sup>) Obviously, a significant segment of the public (at least 665 of the Town's registered voters) would disagree with this statement, as they have signed a petition to bring about a recall election to remove that director from office.

On this particular point, the Business & Consumer Court's recent decision in *NECEC Transmission LLC v. Bureau of Parks & Lands*, provides some useful comparison. In that case, which dealt with the CMP corridor referendum question, the plaintiff asked the Business & Consumer Court to issue a preliminary injunction to block the enactment of the statute that would prevent the construction of the corridor. The Court denied the plaintiff's injunction request after applying the *Ingraham* standard, including the public interest prong. Because the statute was introduced by citizen's initiative, the Court found that the issuance of a preliminary injunction would be contrary to the public's interest in the matter: "The public's directive, as announced by 59% of Maine voters, is clear: enact LD 1295, *i.e.*, the Initiative, by way of ballot question one. A decision to issue an injunction foreclosing the Initiative's enactment would directly affect this public interest." *NECEC Transmission LLC v. Bureau of Parks & Lands*, Docket No. BCD-CIV-2021-00058, slip op. at 52 (Me. B.C.D. Dec. 16, 2021); *cf. Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶ 9, 91 A.3d 601 (noting that courts are to "liberally construe grants of initiative and referendum powers so as to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate" (quotation marks and

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<sup>9</sup> The RSU asserts that the recall election is "based upon false affidavits and/or affidavits that are groundless as a basis for 'recall' by failing to set forth objective facts which would reasonably meet the 'recall' standard in the Kennebunk Charter at Article VII, section 7.01." (Pl.'s Mot. 19.) Not only is this assertion unsupported by any record evidence, it also does not relate to any remedy sought by the RSU in the Complaint, as the adequacy of the affidavits in relation to the recall election for either RSU board member is not an issue in this case.

citation omitted)); *McGee v. Sec'y of State*, 2006 ME 50, ¶ 25, 896 A.2d 933 (“The broad purpose of the direct initiative is the encouragement of participatory democracy.”). Similarly here, the recall petitioners have gathered 665 valid signatures in order to have a recall election to remove a member of the RSU 21 Board of Directors. Just as the Court in *NECEC* declined to ignore the interest of the public as expressed at the ballot box, the Court here should not ignore the interest of the Town voters who have signed petitions to call a recall election.

In this case, while there are “public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief,” *Everett J. Prescott, Inc.*, 383 F. Supp. 2d at 193, those interests support the denial of injunctive relief, which would validate the citizen initiative process and maintain public confidence in the legitimacy of the Charter and its processes—including the procedure for recall of elected officials.

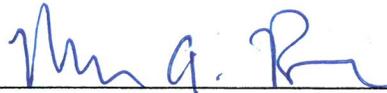
#### CONCLUSION

For the reasons set forth above, Defendant Town of Kennebunk respectfully submits that Plaintiff Regional School Unit 21 has failed to meet its burden to demonstrate that each of the four prongs of the *Ingraham* standard necessary for a preliminary injunction have been satisfied, and therefore requests that the Court deny the pending motion for preliminary injunction.

DATED at Portland, Maine this 25<sup>th</sup> day of January, 2022.



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