STATE OF VERMONT

SUPERIOR COURT WASHINGTON UNIT		CRIMINAL DIVISION Docket No. 22-CR-4870
STATE OF VERMONT	*	
	*	
v.	*	
	*	
STEPHEN WHITAKER	*	

MEMORANDUM OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VERMONT IN SUPPORT OF STEPHEN WHITAKER'S MOTION TO DISMISS

Defendant Stephen Whitaker is before this honorable Court on criminal charges of disorderly conduct, unlawful trespass, resisting arrest, and violation of his conditions of release. The sole event precipitating these charges is Mr. Whitaker's delivery of public comments during a Montpelier City Council meeting on June 8, 2022.

The American Civil Liberties Union Foundation of Vermont (ACLU-VT) submits this memorandum as amicus curiae because those charges must be dismissed. Both the Vermont and U.S. Supreme Courts have made clear that First Amendment protections are at their strongest where, as here, a citizen addresses their assembled representatives about matters of public concern. Simply put, Mr. Whitaker's protected speech to the City Council during public comment—even if sharply critical and extending beyond his allotted time—cannot form the predicate for either a disorderly conduct or trespass conviction. Because all charges flow from that invalid arrest, the Court should dismiss the information in its entirety.

ARGUMENT

"[T]he traditional American town meeting," Alexander Meiklejohn famously observed, "is self-government in its simplest, most obvious form." Alexander Meiklejohn, *Free Speech and*

Its Relation to Self-Government 22 (1948). As Alexis de Tocqueville wrote while attending early New England town meetings, "[a] nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty." Alexis de Tocqueville, *Democracy in America* 49 (D. Appleton and Co., 1899). The legacy of town meetings—and the values of democratic participation they instill—are "stitched into the fabric of New England and dominate[] the patchwork of its public past." Frank M. Bryan, *Real Democracy: The New England Town Meeting and How it Works* 3 (2003). Nowhere is that tradition of local advocacy and self-governance stronger than here in Vermont.

As that tradition makes clear, the public town meeting is more than an assembly of private citizens. It is an essential "opportunity for free political discussion to the end that government may be responsive to the will of the people," *Stromberg v. California*, 283 U.S. 359, 369 (1931)—a means of effectuating the guarantee enshrined in the Vermont Constitution that "all officers of government . . . are [the people's] trustees and servants . . . and accountable to them." Vt. Const. ch. 1, art. 6; *see also* 1 V.S.A. § 311 ("[C]ouncils and other public agencies in this State exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont Constitution.").

"[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people." *Terminiello v. City of Chi*., 337 U.S. 1, 4 (1949). When a citizen like Mr. Whitaker participates in the public comment portion of a town meeting and directly addresses their elected officials "on matters of public concern," *Lane v. Franks*, 573 U.S. 228, 235 (2014), First Amendment values of speech, assembly, and petitioning are at their apex. Those intertwining freedoms preclude criminal liability here.

A. Public Comments About Matters of Public Concern Cannot "Disturb" an Assembly Under 13 V.S.A. § 1026.

The State has charged Mr. Whitaker with disturbing a lawful assembly under 13 V.S.A. § 1026(a)(4). Chief Brian Peete's affidavit of probable cause explains the behavior comprising that "disturbance": Mr. Whitaker was "standing at a microphone addressing the City Council during public comment," Def.'s Mot. to Dismiss Ex. A (Peete Affidavit), raising concerns about topics including street sweeping, enforcement of regulations, river pollution, and outstanding public records requests. According to Chief Peete's affidavit, Mr. Whitaker allegedly "became argumentative" when told that his time had expired, was "asked by the Chair of the City Council Meeting, Mayor Anne Watson . . . to leave," and then "refused." *Id.* By the time the police approached Mr. Whitaker, he had concluded his comments and was already "sitting down." *Id.*

As Mr. Whitaker explains in his principal brief, the State cannot make out a *prima facie* case that he violated 13 V.S.A. § 1026, since the de minimis delay caused by his extended speech does not rise to the level of a "substantial" impairment—a necessary element of the crime. *See State v. Colby*, 2009 VT 28, ¶¶ 9-10. That is of course correct—and enough, standing alone, to mandate dismissal of the Count. But the State's 13 V.S.A. § 1026 charge also fails for another, more fundamental reason: under the First Amendment, delivering invited public comments about matters of public concern cannot criminally "disturb" a public town meeting at all.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Although the First Amendment protects a wide spectrum of expression, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145

(1983) (internal quotation marks omitted), since "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). And when that speech occurs in the context of a public comment period, directly before elected officials exercising public power, it takes on additional protection under the First Amendment's right "to petition the Government for a redress of grievances"— a freedom "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).[1]

Against this backdrop, Mr. Whitaker's exchange with the Montpelier City Council—even if beyond his allotted time—cannot constitute "disturbing" an assembly within the meaning of 13 V.S.A. § 1026. *Colby*, the Vermont Supreme Court's leading case on that crime, shows why. There, the Court ordered the dismissal of § 1026 charges against two defendants who had interrupted a speech at St. Johnsbury Academy to criticize the speaker, then-Director of National Intelligence John Negroponte. The Court concluded that § 1026(4)— what is § 1026(a)(4) today—was "overbroad on its face" in violation of the First Amendment. 2009 VT 28, ¶ 8. The statute's plain language, explained the Court, "treats brief outbursts of speech—the content of which may merely be objectionable to the sensibilities of some (or all) of those assembled—the same as prolonged, voluminous speech that, for example, drowns out the primary speaker," and, read literally, "criminalize[s] 'heckling, interrupting, harsh questioning, [or] booing,' and all manner of speech that has been tolerated pursuant to the rights accorded to the peoples of free societies." *Id.* (quoting *In re Kay*, 464 P.2d 142, 147 (1970)).

[1] Indeed, the Vermont Constitution offers even greater protection for an individual's right to petition their government. *See McDonald v. Smith*, 472 U.S. 479, 483 (1985) (comparing federal protection with the "absolute position of the Vermont court" in *Harris v. Huntington*, 2 Tyler 129 (1802)); *see also State v. Read*, 165 Vt. 141, 155–56 (1996) (same). As explained *infra*, however, the information against Mr. Whitaker cannot survive even First Amendment scrutiny.

Nevertheless, the Court recognized that the statute also *effectuated* First Amendment interests, since it "reflect[ed] the State's legitimate interest in preserving the right of peaceful assembly" by protecting participants from "those who seek to hinder others' exercise of this right through disturbances." *Id.* Rather than invalidate the statute, the Court narrowed § 1026(a)(4) to require that "the State must prove that a defendant's conduct . . . substantially impaired the effective conduct of a meeting." *Id.* ¶ 10 (internal alterations and quotation omitted). As the Court explained, that narrow reading "strikes the proper balance between the two fundamental rights implicated by the statute"—an individual speaker's freedom of speech on one side, and meeting attendees' freedom of assembly on the other. And the Court gave guidance on the narrow circumstances when a speaker's free speech might infringe on others' freedom of assembly: when behavior, for example, is so unruly that it "causes a lawful meeting to terminate prematurely" or consists of "numerous and sustained efforts to disrupt a meeting after being asked to desist." *Id.* ¶ 12.

A valid § 1026(a)(4) charge, in other words, is limited to scenarios where there is a "clash of two fundamental First Amendment rights—freedom of speech and freedom of assembly." *Id.* ¶ 9. *Colby*'s essential logic is that § 1026(a)(4) is unconstitutional by its plain terms but can be narrowed to apply in limited circumstances where First Amendment rights are in tension—to "ensure that neither fundamental right is unnecessarily sacrificed for the sake of the other." *Id.*

To be sure, *Colby* necessarily imagined circumstances where these First Amendment rights may conflict, in which case a limitation on free speech may be necessary to preserve the right of free assembly. But not here. When a speaker like Mr. Whitaker participates in a public comment period, First Amendment values of speech and assembly are aligned, not opposed. Fundamentally unlike the valid § 1026(a)(4) defendant imagined by *Colby*—who sets out to

interfere with an event and "seek[s] to hinder others' exercise of [their] right[s] through disturbances," *id.* ¶ 8—Mr. Whitaker did not speak to interrupt, derail, or otherwise undermine a lawful assembly. Instead, he used the designated phase of the meeting to address his representatives *as part* of that assembly. Where, as here, a speaker engages in protected speech consistent with the purpose of a lawful assembly, they cannot violate § 1026(a)(4) as a matter of law.

Critically, unlike, say, the graduation speech in *Colby*, the very purpose of a local meeting's public comment period is for citizens to engage in robust First Amendment activity. As the Vermont Supreme Court has explained, these periods "keep public officials accountable by granting members of the public the right not only to hear, but also to be heard," *Severson v. City of Burlington*, 2019 VT 41, ¶ 14. Speech like Mr. Whitaker's here cannot "disturb" that assembly, since the assembly is itself designed to facilitate that expression. Indeed, so long as an invited public comment remains non-threatening and relevant—that is, about matters of public concern—it enables, rather than "clash[es]" with, the rights of assembly envisioned in *Colby*. 2009 VT 28, ¶ 9. Those remarks simply cannot "disturb" the City Council as the Vermont Supreme Court has defined that term.

The two-minute rule does not alter that calculus. Even assuming that the two-minute time limit is valid—a questionable premise given the government's interest in hearing from its constituents, *see Hill v. Colorado*, 530 U.S. 703, 710 (2000) (explaining how time, place, and manner restrictions must be "narrowly tailored to serve a significant government interest"); *see also* Def.'s Mot. to Dismiss 6 n.1—a speaker cannot violate 13 V.S.A. § 1026(a)(4) just by violating the rule. As *Colby* again makes clear, an individual does not criminally "disturb" an assembly simply by failing to adhere to its protocols, however arbitrary. Instead, the inquiry

turns on the "*actual* impact of that misconduct on the course of the meeting," 2009 VT 28, ¶ 11 (quoting *Kay*, 464 P.2d at 151), assessed with particular attention to "the nature and character of each particular kind of meeting" and "the purposes for which it is held," *id.* (quoting *State v. Mancini*, 91 Vt. 507, 511 (1917)).

Importantly, that inquiry is divorced from the "subjective" "assertions" of participants or elected officials about the content of the speech, including their views about the importance of the public matters raised, or the relative attention given to the topics presented. *Id*; *see also Terminiello*, 337 U.S. at 4 ("[Speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."). Given the robust First Amendment purpose served by the public comment period, extended remarks—even those that may subjectively annoy or try the patience of officials—cannot criminally "disturb" a public comment period absent an actual showing that the rights of others were impaired. *See Colby*, 2009 VT 28, ¶ 14 ("[C]onjecture will not suffice."). The State has not made, and cannot make, that showing here. There is therefore no basis for a 13 V.S.A. § 1026 charge.

B. Public Commentors Discussing Matters of Public Concern Cannot Be Trespassers Under 13 V.S.A. § 3705

The State has also charged Mr. Whitaker with unlawful trespass under 13 V.S.A. § 3705(a) after the Mayor demanded he leave an open City Council meeting. This charge is similarly invalid. A trespass notice that lacks procedural protections and fails to consider the important individual and governmental interests in public participation is unconstitutional under the Due Process Clause. Within that inquiry, similar First Amendment interests preclude the State from weaponizing a trespass notice to punish an individual for attending and voicing his opinion at a

public meeting. Accordingly, Mr. Whitaker's criminal charge for violating a deficient trespass notice cannot stand.

To determine whether an individual's exclusion from a public meeting comports with the Fourteenth Amendment's due process protections, the court balances the procedural safeguards in place, the individual's private liberty interest, and the government's interest at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 296–97 (D. Vt. 2013) (applying *Mathews* factors to trespass notice forbidding parent from attending Vermont school board meeting). Addressing the *Mathews* factors in his principal motion, Mr. Whitaker describes the dearth of procedural safeguards for issuing and challenging the trespass notice. But this is not the only factor in Mr. Whitaker's favor.

As with the 13 V.S.A. § 1026 analysis above, the unique context of a public town meeting carries special First Amendment weight in the trespass calculus. Specifically, at a city council meeting where the government invites comments, the private interest and the government's interest in the public's participation align. As history and case law demonstrate, participation at a public meeting—particularly impassioned participation that brings controversial issues to the community's attention for discussion—is not a hinderance to the meeting, but rather *necessary* for the government's proper functioning. Because the government has an obligation of accountability to its citizenry, criminalizing public participation undermines the meeting's essential purpose.

Since its first town meeting in Bennington in 1762, Vermont has maintained a robust tradition of public participation and civic engagement. *See* New England Historical Society, *A Brief History of New England Town Meeting Controversies* (2002), https://www.newenglandhistoricalsociety.com/a-brief-history-of-town-meeting-controversies/. Against this historical backdrop, Mr. Whitaker, like all Vermonters, has an important private

liberty interest in exercising his rights to attend and participate in public meetings in his community.

These rights are firmly rooted in both federal and state law. At the federal level, "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). That constellation of freedoms includes the right not to be excluded from fora opened to the public. *Rowe v. Brown*, 157 Vt. 373, 376 (1991) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). State law, too, preserves these important liberty interests in attendance at and participation in public meetings. Not only does the Vermont Constitution expressly protect the right to free speech and to petition, Vt. Const. ch I, arts. 13, 20, but the Legislature has further bolstered the constitutional guarantee of government accountability through its open meeting law. *See Trombly v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 104 (1993) (quoting Vt. Const. ch. 1, art. 6). This statute grants members of the public the "right-to-know" what occurs at public meetings as well as "the right to be present, to be heard, and to participate," *State v. Vt. Emergency Bd.*, 136 Vt. 506, 508 (1978), including at open city council meetings, *see* 1 V.S.A. § 311. The right to participate specifically requires that "the public be given a reasonable opportunity to express their views on matters considered by the public body during a public meeting." *Severson*, 2019 VT 41, ¶ 14 (citing 1 V.S.A. § 312(a)(1), (h)).

The importance of the liberty interests at stake, alone, weighs heavily against the constitutionality of such a notice and the subsequent prosecution. But, critically, participation in public meetings is not merely a private interest to be balanced against a conflicting government interest; it is for the benefit of both. Simply put, a government that criminalizes participation after inviting public comment cannot do its job.

As the Vermont Supreme Court has explained, public meetings provide the opportunity for the government to learn the people's will by hearing directly from the public:

> Those who govern have every bit as much of an interest in open and transparent public meetings as those who are governed. To do their job properly, officers of the government need to hear from members of the public on matters being considered by a public body. Public meetings provide the opportunity for members of the public to give their input on such matters. Without the sharing of opinions and concerns, public bodies would be less able to fully and competently serve the public and construct beneficial decisions for the people.

Severson, 2019 VT 41, ¶ 15. This interest goes to the heart of representative democracy: public comment creates an essential opportunity for elected officials to become "cognizant of and responsive to [the] concerns" of the community; "[s]uch responsiveness," the U.S. Supreme Court has observed, "is key to the very concept of self-governance through elected officials." *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014).

Of course, the government has an interest in the orderly and efficient conduct of its meetings as well. Vermont open meeting law itself clarifies that order should be maintained, even during public comment. 1 V.S.A. § 312(h). But, as discussed above, the metric of disorder must be the risk to the essential function of government responsiveness. When a participant marginally exceeds the two-minute time limit, the government interest in participation at a public meeting outweighs an abstract interest in "order." *See City of Houston v. Hill*, 482 U.S. 451, 472 (1987) ("[T]he First Amendment recognizes . . . that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive."). Indeed, a very "function of free speech under our system of government is to invite dispute." *Terminiello*, 337 U.S. at 4.

Here, with no procedural protections in place, a private liberty interest at its apex, and a governmental interest *in favor of* public participation, the trespass notice was unconstitutional.

Violating that notice by attempting to remain in attendance at a public meeting cannot form the basis for a legitimate trespass charge.

CONCLUSION

As the ACLU and others have described elsewhere, the First Amendment's values—including its pillars of free speech, assembly, and petition—intend to "form a set of concentric circles with the democratic citizen at the focus." Brief of Amici Curiae the American Civil Liberties Union and the Brennan Center for Justice at NYU School of Law, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02–1580), 2003 WL 22069782, at *20. "The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government." *Id.* When an individual breathes life into this cycle by attending a public city council meeting and answering the invitation to address the government about matters of public concern, these interlocking freedoms are at their apogee. Accordingly, Mr. Whitaker's protected conduct "cannot serve as the basis for criminal liability without running afoul of the First Amendment." *Colby*, 2009 VT 28, ¶ 13. The criminal charges against him should be dismissed.

Respectfully Submitted,

/s/ Harrison Stark
Harrison Stark, Esq.
Hillary Rich, Esq.
Lia Ernst, Esq.
ACLU Foundation of Vermont
P.O. Box 277
Montpelier, VT 05601
hstark@acluvt.org
hrich@acluvt.org
lernst@acluvt.org
(802) 223-6304