IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

H.W., a minor, by and through her parent and next friend Phil Wells, Plaintiff, v. BREWER SCHOOL DEPARTMENT, GREGG PALMER, in his personal and official capacities, BRENT SLOWIKOWSKI, in his personal and official capacities, MICHELLE MACDONALD, in her personal and official capacities, Defendants.	Case No. 1:24-cv-00062-LEW **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, AN INJUNCTION PENDING APPEAL**

Plaintiff H.W. files this Reply in support of her Motion for a Temporary Restraining Order and for a Preliminary Injunction or, in the Alternative, an Injunction Pending Appeal (Dkt. No. 4) and in response to the Oppositions filed by the Defendants (Dkt. Nos. 16-17). Plaintiff has asserted valid claims for relief and has asked this Court to enjoin the Defendants from further infringing on her Constitutional rights. Despite the Defendants' hollow assurances, without this Court's intervention, the Defendants will continue to squelch Plaintiff's rights to free speech.

1.0 Introduction

The Defendants' Oppositions talk circles around the obvious conclusion that: (1) H.W. circulated the petition, and (2) Defendants used their authority to tell H.W. to stop doing so. Defendants then disclaim, emptily, the clear threat that follows: When a school administrator orders you to stop doing something and yet you continue, what can you expect other than some

form of punishment? Although this rhetorical question need not be actually answered for H.W. to receive relief, the Defendants provided one, referencing hate crime charges and bullying statutes.[1]

Defendants unquestionably stifled Plaintiff's ability to circulate a petition on a matter of concern among her fellow students. They admit it. ECF No. 16, PageID #169. Defendants had no authority to demand that Plaintiff cease circulating the petition. It was not disruptive, and the alternatives to circulating the petition on school grounds would be significantly less effective. Trying to create a factual dispute where none exists, however, Defendants cite to alleged disruptions on campus related to the same topic, but unrelated to Plaintiff's petition and certainly unrelated to Plaintiff's conduct. Such a heckler's veto does not warrant wholesale suppression of Plaintiff's petitioning activities, as Defendants can not show that any disruption has occurred or will occur as a result of her petition. Accordingly, this Court should grant Plaintiff's motion for injunctive relief and allow her to continue circulating her petition with her speech unsuppressed.

2.0 Argument

In opposition to Plaintiff's Motion, Defendants raise three main arguments: (1) that Plaintiff does not have standing, (2) that Defendants had authority to forbid Plaintiff's speech, and (3) that Plaintiff's request for injunctive relief was not sufficiently specific. As discussed herein, none of these arguments validly support Defendants' unconstitutional restraint on Plaintiff's First Amendment rights.

[1] That Defendants' cite Maine's bullying statute is notable. Since courts "may not rely on *post hoc* rationalizations for [ ] speech restrictions, but rather must rely only on the reasons originally provided to [the student]," either Defendants are admitting that their original demand was based on this statute and thus Plaintiff's standing argument is vindicated, or this Court may otherwise safely choose to ignore this line of argument. *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25-26 (1st Cir. 2020).

2.1 Plaintiff's Claims are Ripe and She Has Standing

Defendants argue that because Plaintiff has not actually been punished yet for circulating the petition, after they told her that she was not allowed to do so, that she has no standing. This is not how the law works. H.W. need not be punished to have standing. A "chill on speech" is a "cognizable injury" for standing purposes where there is a "specific present objective harm or a threat of specific future harm." *Osediacz v. City of Cranston*, 414 F.3d 136, 142 (1st Cir. 2005) (citation omitted). "A plaintiff can also assert First Amendment standing to seek injunctive relief by plausibly alleging that [s]he 'is chilled from exercising [her] right to free expression or forgoes expression in order to avoid enforcement consequences.'" *McBreairty v. Miller*, 2024 U.S. App. LEXIS 3991, *10 n.1 (1st Cir. Feb. 21, 2024) quoting *New Hampshire Right to Life Pol. Action Comm. v. Gardner,* 99 F.3d 8, 13 (1st Cir. 1996). Similarly, one who has alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but [which is] proscribed" where there "exists a credible threat of prosecution" also possesses standing to seek injunctive relief. *McBreairty, supra* at * 10, quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 297-98 (1979). Courts consider "a government's preliminary efforts to enforce a speech restriction or its past enforcement of a restriction to be strong evidence … pre-enforcement plaintiffs face a credible threat of adverse state action." *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). Courts engage in "pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List,*, 573 U.S. 149, 159 (2014); *see also MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128-129 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat").

In their Oppositions, Defendants waffle back and forth as to the degree with which they demanded that H.W. cease her petitioning activities. When it serves their desire to avoid accountability, Defendants claim that they merely had a gentle conversation with H.W. wherein she agreed to cease the activities all on her own. In other places, Defendants admit that they ordered H.W. to cease her petitioning, but they leave out the next logical step. Leaving aside the threats of punishment which H.W. and her father already testified to receiving, when the authority figure in charge of a school makes a clear and direct demand, what option does a kid have? Of course there is an implicit threat of enforcement of the demand, otherwise, why would it be made? The threat is sufficient to sustain a claim for violation of a student's First Amendment rights.

As an initial matter, Defendants admit that they demanded that Plaintiff stop circulating the petition. ECF No. 16, PageID #169. Gregg Palmer and Brent Slowikowski both swear under penalty of perjury that that they agreed to forbid Plaintiff from circulating the petition and actually communicated that demand to Plaintiff. *See* ECF No. 16-2, PageID #194, at ¶ 20; ECF No. 16-5, PageID #203, at ¶¶ 9-10 ("… we told the students that they could not circulate the petition in school ….") What more does a high school kid need to show that the school has given her a command, with at least an implied threat of punishment? They then have the unmitigated gall to call this merely a case of "education." ECF No. 16, PageID #184. The only "education" in this case will be the civics lesson that H.W. and the entire Brewer student body learns when this Court issues its order. They will either learn the promises made to them by Madison and *Tinker* and everyone in between remain intact, or that authority figures can lie their way out of responsibility when they make mistakes. That is the lesson that this "education" will confer.

Even if Defendants' demand was not sufficient, Defendants' threatened punishment, whether stated directly or implied, is sufficient to give Plaintiff standing; she need not actually be

punished to sue. "[A] defendant need not explicitly threaten suit so long as his or her conduct effectively coerces the plaintiff to refrain from exercising claimed rights." *Sevigny v. United States*, 2014 U.S. Dist. LEXIS 98600, *14 (D.N.H. Jul. 21, 2014) (citing *MedImmune,* 549 U.S. at 132 n. 11); *see also Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha*, 57 F.3d 1051, 1053 (Fed. Cir. 1995) ("[O]ne who may become liable ... should not be subject to manipulation by [a defendant] who uses careful phrases in order to avoid explicit threats, thus denying recourse to the courts ..."). "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 68 (1963).

In her Complaint and Motion, Plaintiff alleges that Defendants employed threats to coerce her to stop circulating the petition. Specifically, Plaintiff alleges that they told her that her petition was a form of "hate speech," and that she could be prosecuted criminally for a "hate crime," sued by the school, or discipline if she did not stop circulating the petition. *See, e.g.,* Declaration of H.W., ECF No. 1-2, PageID #19, at ¶ 21. Moreover, Plaintiff and her father both allege that Defendants strongly implied that they would suffer adverse action if they did not comply and came away with the belief that if Plaintiff did not cease her petitioning activity, she could end up suspended, sued, or in jail. *Id.* at ¶¶ 25-29; Declaration of Phil Wells, ECF No. 1-3, PageID #25-26, at ¶¶ 4-9. Even if Defendants wish to deny threatening Plaintiff with prosecution, civil liability, or suspension, which Plaintiff disputes, the Defendants' implied threats are sufficient to give Plaintiff standing. Further, the Defendants' explanations and shifting rationales should demonstrate that their credibility is (to be charitable) properly described as "strained."

2.2 Defendants Lacked the Right to Prevent H.W.'s Speech

Plaintiff's petitioning did not disrupt any school activities, and Defendants did not have authority to censor her speech. Moreover, Defendants can not forbid Plaintiff's speech just because they claim another, unnamed student, may have caused disruptions related to the same topic.

Plaintiff engaged in protected speech and nothing Defendants argue seriously challenges that presumption. The Supreme Court famously articulated in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969). Since then, other courts have interpreted the range of students' protected speech to be broad, extending beyond core political speech. *See Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 23-24 (1st Cir. 2020) ("No Supreme Court case has held that *Tinker's* protections are limited to only core political speech.")

In *Norris*, the First Circuit examined a case where the speech at issue was a Post-it note published anonymously in a bathroom urging action relating to an allegation of sexual assault. 969 F.3d at 24. The Court found that the speech was entitled to protection. *See id*. Likewise, in *Pinard v. Clatskanie Sch. Dist. 6J*, the Ninth Circuit decided that circulating a petition—which it referred to as "pure speech"—was entitled to protection. 467 F.3d 755, 764 (9th Cir. 2006). Accordingly, so long as the speech at issue here, Plaintiff's petition, did not lead to "substantial disruption of or material interference with school activities," Defendants' demand for Plaintiff to cease circulating the petition would be wrongful. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). Plaintiff's petition did not do so, and Defendants' opposition cites no likelihood that the petition might cause substantial disruption or material interference in the future.

Instead of citing to instances of where Plaintiff's *petition* caused any sort of chaos in the school, Defendants instead only point to other students causing unrelated disruptions. To that end,

Defendants cite two rationales for banning Plaintiff's speech: (1) a single instance where an unnamed third party allegedly attempted to take a poll of students present in the school cafeteria as to whether they believed H.D. should be allowed to use female restrooms, and (2) the purported impact that the petition and general discourse in the school about transgenderism and restrooms had on H.D.

As to the first argument, Defendants may not attempt to hold Plaintiff responsible for the conduct of third parties, regardless of whether the conduct of that third party was related to the same subject matter of the petition. Plaintiff's speech was neutral and did not target any student; it merely contained speech on a matter of public concern. The fact that other students chose to independently disrupt on-campus activities has no bearing on whether Plaintiff's speech was protectable or not.[2]

In *Tinker*, the Supreme Court examined this same sort of problem, where the school's actions were premised on concerns of what third parties might do as a result of the speech instead of what could reasonably result from the speech itself:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, ***in the lunchroom***, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk …; and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969) (emphasis added). There, the students' arm bands may have sparked debate and outrage among the students, but that

[2] This is not to suggest that taking a poll is "disruption." But if the Court assumes that it is, that is not H.W.'s problem nor fault. The Defendants can not seriously claim that if one student acts negatively, that all discussions pertaining to the subject matter of that negativity can be suppressed.

was not a result of the students' speech—it was a result of third parties' decisions to share their opinions on the *substance* of the students' speech, their dissatisfaction with the war in Vietnam. Here, other students' speech on the topic of transgenderism in bathrooms, although perhaps related as to the subject matter of the petition, can not license Defendants to censor the petition.

As to Defendants' remaining argument, they claim offense on H.D.'s part. However, this "hostage taking" was anticipated in the opening brief, and predictably, it rears its head. Plaintiff's petition did not target H.D., as any fool can see by reading it. Defendants can not censor Plaintiff's speech because of some feigned offense they have on someone else's part – especially when that person has expressed the exact opposite. The student Defendants claim to be protecting with their censorious action was not even bothered by the petition.[3] Plaintiff has obtained a recording of H.D. expressing pride and delight over the petition.

> **"I wanted to frame it and put it in my dorm room because it makes me feel so famous, and I love it. But there was no writing on it, it was so boring."**

Exhibit 1, Audio Recording.

Defendants' opposition argues that Plaintiff's petition constituted bullying as to H.D., and that the petition "fostered bullying of [H.D.] within Brewer High School." *See* ECF No. 16, PageID #177. However, the petition neither mentions H.D., nor is Plaintiff even singularly concerned with H.D. Instead, the petition simply stated that the students signing the petition believed that restrooms should be restricted to the biological sex of the occupant:

> Petition to Keep Mens and Womens
> Biological Spaces to Their Respected Gender
>
> We want to bring awareness to the fact that womens and mens public spaces should be biologically separated, it's about the privacy and restrictions that need to be upheld for both men and women, things such as bathrooms, locker rooms, sports,

[3] Plaintiff has obtained a recording of H.D. discussing the petition. Rather than objecting to the petition, H.D. expressed pride. *See* Declaration of Phil Wells, attached hereto as **Exhibit 2**, at ¶¶ 3-4.

> and types of changing areas or sanitary stations should all be based on whether you are a biological girl or boy. When these rights of privacy are taken away from anybody it is unfair. This is a petition to keep the basic human rights of privacy and comfort that have been around for hundreds of years, untouched and unchanged.

Complaint at ¶ 17. That H.D. is supposedly the only transgender person at Brewer High School is both statistically impossible and of no importance here. That H.D. is the only publicly-known transgender person at Brewer High School is not a given – the students' petition addresses not only H.D., but also any other transgender person who might attend Brewer High School in the future. This policy will presumably not expire if H.D. chooses to use a different bathroom or graduates. Moreover, the petition does not mention that it is limited to the student's wishes as to Brewer High School only, it expresses Plaintiff's and the signatories' general opinions as to use of restrooms in general. Accordingly, the petition did not target H.D.

Furthermore, Plaintiff's speech can not be censored just because Defendants claim that H.D.'s feelings were hurt, particularly when H.D. has expressed excitement for the petition rather than dismay. In her declaration, H.D.'s mother states that the alleged confrontation in the cafeteria dealt a "devastating blow" to H.D., and caused H.D. to leave school as a result. *See* ECF No. 16-1, PageID #189, at ¶¶ 9-10. She also attributes that this harm was allegedly exacerbated by an internet post made by yet another person. *See id.* at ¶¶ 11-12. Notably, H.D.'s mother does not attribute any of H.D.'s supposed anguish to Plaintiff or her petition. Whatever woes that H.D.'s mother is trying to conjure are not attributable to the petition. Her child considered the existence of the petition to be ego stroking ("it makes me feel so famous, and I love it") and the actual content of the petition to be "boring."

In *Norris*, the First Circuit looked at a similar case where, although the plaintiff's speech was related to a subject which had been talked about at length on school campus—an alleged sexual assault, the plaintiff's speech was found to be acceptable even though it purportedly targeted

a single student, the alleged and well-known perpetrator of the sexual assault. *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 31 (1st Cir. 2020). As here, even if the student body may only know of one transgender person at the school, this fact does not change Plaintiff's petition into a form of bullying – especially when the supposed victim of this bullying is alternatively loving the petition and then finding it dull.

The Defendants had no valid basis to restrict Plaintiff's speech, and this Court should enjoin Defendants' censorship of Plaintiff's petitioning.

2.3 Plaintiff's Requested Relief is Sufficiently Specific

Plaintiff has sought specific and clear relief: the freedom to continue to circulate the petition as before without Defendants' interference. Such an order would give sufficient notice to the Defendants of what they can and can not do under the order. Fed. R. Civ. P. 65's "reasonable detail" requirement is not meant to be "'mere[ly] technical' but [is] 'designed to prevent uncertainty and confusion … and to avoid' basing a 'contempt citation on a decree too vague to be understood.'" *NBA Props., Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974)).

Plaintiff's request is not worded with more specificity because Defendants chose to express a wide and varied barrage of threats against the Plaintiff. Should H.W. continue these activities without injunctive relief, H.W. and her father are left to wonder whether the Defendants might seek to suspend H.W. from school, sue one or both of them civilly, or refer one or both of them for criminal prosecution. There is no question that the parties to this action will easily understand that it means to take adverse action against Plaintiff on account of circulating the petition as these actions are unconstitutional. The Defendants threw everything at the wall to see what would stick in H.W.'s mind and strike enough fear into her that she would stop exercising her First Amendment

rights. This Court's order can clean it all up with one simple instruction – "stop it." But, the Defendants will stop at seemingly nothing to preserve their ability to censor, intimidate, and crush viewpoints they disagree with and to render this civics lesson one that will chill H.W. and her fellow students for years to come.

2.4 Defendant McDonald Should Also Be Enjoined

Plaintiff clearly alleges, without confusion, that Defendant McDonald took part in threatening adverse action up to and including criminal prosecution should she continue circulating her petition. Defendant's denials in the face of sworn testimony by Plaintiff and non-party C.G. are not credible. Although McDonald claims that she only discussed the petition with C.G. to convey the fact that she was "obligated to inform the school administration about the petition," it bears noting that she states no basis for feeling that obligation. ECF No. 17-1, PageID #214, at ¶ 7. She states that "never stated in any way or even suggested to C.G. that C.G. would get in trouble in connection with the petition." Really? An authority figure says "you realize I have to report this to the administration" is just what? Poetic musings? Does she expect this Court to require her to utter the talismanic phrase, "I hope you know that this will go down on your permanent record"[4] before we are sufficiently impressed to all agree that a threat was made? The only logical basis for feeling the obligation to report a student's speech is if the teacher thought that the speech violated some school rule or law. *Id*. at ¶ 8.

As discussed herein, Defendants' broad demands that Plaintiff cease her petitioning activities is enough to create injury in fact. Defendants' threats of suspension, civil lawsuits, and criminal liability, elevate it to another level, but the plane was already broken by conduct that they all admit to, under penalty of perjury.

[4] Violent Femmes, *Kiss Off* (Slash Records 1983).

MacDonald testifies that she felt a need to report Plaintiff's speech to the higher authorities, that she communicated it to a student, yet she then expects this Court to then hold that this conveyed neither threat nor concern.

3.0 Conclusion

Informed and active citizens make our democracy function. Our citizens learn how to become active and informed citizens in our public schools, where teachers and administration are supposed to lead by example. Instead of serving as a model of responsible and reasonable supporters of free speech, Defendants have punished Plaintiff at every turn for attempting to exercise her right to use her voice when she felt threatened; she chose to speak rather than sit quietly. Instead of supporting this urge, Defendants threatened her. This Court must issue an injunction to protect the Plaintiff's right to circulate her petition without further interference. This Court doing otherwise would not only chill H.W.'s speech, but chill all the students in this district from discussing any disfavored topic. They will learn a valuable civics lesson when this Court issues its order. That lesson will either mean that the First Amendment is an empty promise, which only exists at the whim of those in authority, or it is a full throated promise, which when broken will be put right back together by our federal courts.

Dated: March 12, 2024.

Respectfully Submitted,

/s/ Marc J. Randazza
Marc J. Randazza (*pro hac vice*)
Lead Counsel
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
Tel: (888) 887-1776
Email: ecf@randazza.com

/s/ Robert J. Morris
Robert J. Morris, II (ME Bar No. 010402)
HOUSER, LLP
400 TradeCenter, Suite 5900
Woburn, MA 01801
Tel: (339) 203-6498
Email: rmorris@houser-law.com

Attorneys for Plaintiff, H.W.

CERTIFICATE OF SERVICE

I hereby certify that, on March 12, 2024, 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/ Robert J. Morris
Robert J. Morris