IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

SHAWN MCBREAIRTY 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-00053-LEW **REPLY IN RESPONSE TO BREWER SCHOOL DEPARTMENT, PALMER, AND SLOWIKOSKI IN SUPPORT OF PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL**

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McBreairty is a journalist and opinion writer who wrote a piece containing uncontroverted facts, protected opinions, and a lawfully obtained photograph. The government dislikes his opinions, so they threatened him with criminal, civil, and administrative action if he did not edit his article to their liking, and if he did not remove the illustrating (lawfully obtained) photograph. In other words, they imposed an unconstitutional prior restraint. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.") Now, they claim he is free to publish, but still *threaten* to "take action." That mocks what it means to be "free." Imagine if the government said "*you're free to vote as you like, but we may audit your taxes if you vote the way we don't like*." Or "*say what you want, but we'll investigate you if you say something against us.*" That is what the government is doing here. McBreairty asks nothing more than the limited relief of telling them "he may restore publication of what he previously published *without fear of* ***government*** *reprisals.*" This relief should not be controversial nor require an evidentiary hearing

– and to the extent the Court believes one is necessary, it should at least be clear about what evidence it believes is needed, since neither party has been able to guess what it could be.

The parties and the Court already agreed that no evidence was necessary for the Court to determine, on a Rule 65 motion, whether or not a journalist can publish opinions, facts, and a lawfully obtained photo. There was a full adversarial hearing (including supplemental briefing). Two weeks of the news cycle burned off and the Court issued an order declaring that potentially the full measure of litigated discovery, followed by a full jury trial, would likely need to occur before injunctive relief might issue. Yet, there are no facts that need be heard for it to issue, and nobody has yet identified a material factual dispute. Meanwhile, the journalist remains silenced.

This is a "hot news" situation. Speed is vital, as this is a day by day developing news issue. As the news value of the information McBreairty seeks to publish would decline over time, injunctive relief is urgent. *See Soto v. Romero-Barcelo (In re San Juan Star Co.)*, 662 F.2d 108, 113 (1st Cir. 1981). As the Ninth Circuit observed in *Courthouse News Serv. v. Planet*:

> Before us, amici the Reporters Committee for Freedom of the Press and twenty-seven media organizations press the point that "news" is not even "news" if it is not timely, that is, immediate and contemporaneous. *See* Janet Kolodzy, CONVERGENCE JOURNALISM 59 (2006) ("It is, after all, called the 'news' business and not the 'olds' business."); Fred Fedler et al., REPORTING FOR THE MEDIA 123 (8th ed. 2005) (identifying timeliness as a central characteristic of news). Thus, that "old" news is not worthy of, and does not receive, much public attention has been widely recognized. Moreover, as amici argue, the need for immediacy of reporting news "is even more vital in the digital age," where timeliness is measured in terms of minutes or seconds.

947 F.3d 581, 594 (9th Cir. 2020). The delay thus far has harmed Plaintiff and the public. In a hot news situation like this, an injunction pending appeal is not just proper, but necessary. *See, e.g., TGP Communs., LLC v. Sellers*, No. 22-16826, 2022 U.S. App. LEXIS 33641, 2022 WL 17484331, at *4-5 (9th Cir. Dec. 5, 2022) (granting emergency relief to a journalist seeking access in a hot news situation). This Court should issue an injunction pending appeal on an emergency

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basis to lift the prior restraint. No American, let alone an American journalist, should have to wait *minutes*, let alone *months*, to publish opinions and facts in order to report on and contribute to a raging and timely public debate, without having to do so under the cloud of government issued coercive threats. The government silenced dissent, and it will not relent unless so ordered.

1.0 The Motion is Ripe

The government correctly asserts that denial of a temporary restraining order is not *ordinarily* appealable (a necessary predicate for likely success on appeal), but this was not an *ordinary* denial of a TRO. This is not the denial of an *ex parte* TRO motion the day after it is filed, that is ordinarily contemplated. There was full briefing and two rounds of supplemental briefing. A fully-contested, lengthy hearing was held. And, the Court issued a reasoned decision.

The order had the practical effect of denying the preliminary injunction. McBreairty does not assert that his plans for the hearing retroactively convert the order into a denial; rather, it is plain that the Court already had all that was necessary to decide the preliminary injunction as a matter of law. The loss of the protected right to free speech, even if momentary, constitutes irreparable harm. That the Court did not issue an explicit denial does not mean it did not constructively deny the relief. McBreairty was chilled in February. He is chilled today. And, he will remain chilled until injunctive relief issues. The Philosopher William James said "No decision is, in itself, a decision." The limbo that McBreairty is placed in by the current Order is the least Constitutionally protective thing the Court could have done.

Much for the same reason, the refusal of the TRO is causing serious and irreparable harm. While the denial of First Amendment rights does not automatically require such a finding, per *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010), in which an appellant did not have specific plans that were threatened, and there was nothing to enjoin. Here, McBreairty has an

article he would like to republish. It is in the record. (ECF No. 1-3). Defendants' threats chill him from doing so. Thus, unlike in *McKee*, there is hot news, there is a threat and there is something to enjoin, and McBreairty suffers irreparable injury in the absence of an injunction. Defendants claim that McBreairty is free to publish, but this is disingenuous–they demanded he not do so and he abided their request out of fear. If he was "free," then the demand was a baseless threat in violation of the Rules of Professional Conduct, and counsel for Defendants is surely not admitting to such a violation. If so, then that should not simply be handwaved here, but should be addressed.

And, appellate review is thwarted, unless immediate review occurs. The Court has not set a hearing date for a preliminary injunction. Instead, the Court indicated that such might not even occur until after complete discovery and it may be merged with the jury trial. The only testimony that could be even remotely reasonable to consider would be deposing Attorney Hewey, who would need to explain why she now claims that the words in her demand do not mean what they say. But she has indicated that she would fight such efforts – which adds more weeks and months to the process. At that point, there would be nothing "preliminary" left. By the time this process plays out as this Court seems to contemplate, there will be no story left–many of the subject students will have graduated. The news cycle will run its course and no appellate review, months or years from now, will effectively restore the lost opportunity. The appeal is ripe and an injunction pending appeal may issue.

2.0 An Injunction Pending Appeal Should Issue

The government argues that, because the TRO was denied, it automatically means that McBreairty does not have a strong likelihood of success in his appeal. If this were the standard, then no litigant could ever obtain such an injunction, and the rules of procedure requiring a party to first ask the district court are inherently futile. McBreairty, however, has faith that the Court

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can impartially recognize that it may have erred and likely will be reversed on appeal.

The government attempts to wave away McBreairty's rights by focusing on its so-called "right to petition the courts" and asking the Court to ignore its threatened criminal and administrative actions. First, the government points to no "right to petition the courts" belonging to governments—they have none.[1] Thus, the cases cited about restraining the right to petition the courts are inapposite—none of them involve the government as a putative litigant. And, while Defendants attempt to distance themselves from counsel, they do not deny that these same attorneys literally designed the playbook used against McBreairty for their other clients.[2] Nor do these Defendants disavow filing the same type of frivolous lawsuit their counsel filed for Hermon where they sued to enforce their own policies.[3] *See Hermon School Dep't v. McBreairty*, Case No. PENSC-CIV-2022-00056 (Me. Super. May 16, 2023).

Similarly, Defendants' assertion that they *would not* apply their policies to McBreairty is disingenuous. This is presented as if nobody is capable of reading the actual demand. Why cite violations of them as the basis for removal and threats of "further action?" The claim that it means Defendants have a duty to act and make a, therefore, legally baseless demand is shocking.[4] It would have been unethical for counsel, dealing with an unrepresented party, to do so. Moreover, application of policies in a punitive government action is precisely what Defendants' counsel did

[1] This is distinct from any rights individual defendants may have in their personal capacities.
[2] Defendants note that DrummondWoodsum and Hewey are not defendants. If Defendants believe such is necessary for complete relief, McBreairty will amend and join them.
[3] It is notable that Defendants appear to take the position that the policies cannot be enforced against McBreairty. If DrummondWoodsum believes this, then their arguments that they "absolutely can" apply the policies to McBreairty in the *Hermon* case are inconsistent. They cannot, ethically, maintain these simultaneous contradictory positions.
[4] Could McBreairty write a "policy" of his own, and threaten Defendants that if they don't follow his policy, he *might just come down to that school and take a little action of his own*? How quickly would the Defendants concoct a story about this being a "threat?" How quickly would this very court conclude that it was?

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in the *Hermon* case. And, while Defendants do not enforce criminal law, they threatened him with it. Nor do Defendants show that any threatened or contemplated petition to the courts would have merit. They do not attempt to actually file suit, as such would likely violate Rule 11, let alone state a claim. However, McBreairty should not need to sit under the Sword of Damocles, threatened with "further action" if he re-publishes his work. The very threat of another expensive, frivolous suit is part of what is chilling McBreairty's speech. The threat itself was expansive, so "further action" again is undefined by the government. But, the government is *lying* when it claims that "further action" was merely a threat that they might say unkind words about him.

> We know that they are lying, they know that they are lying, they even know that we know they are lying, we also know that they know we know they are lying too, they of course know that we certainly know they know we know they are lying too as well, but they are still lying. - Aleksandr Solzhenitsyn.

Defendants argue that McBreairty is free to re-publish, but there will be adverse government action. That is not freedom. The First Amendment "guarantees not only freedom from government censorship, but also freedom from official retaliation on the basis of protected speech." *Mattei v. Dunbar*, 217 F. Supp. 3d 367, 373 (D. Mass. 2016) (*citing Hartman v. Moore*, 547 U.S. 250, 256 (2006)). They're still at it, threating official retaliation.

The government says that McBreairty can publish as long as he censors certain portions. The government does not get to edit the *New York Times*, nor does it get to edit McBreairty's work. Even the government does not argue that his work is unprotected. (Presumably, it realizes that *Bartnicki* and *Jean* protect the publication of the lawfully-acquired photograph,[5] and that the

[5] The record already shows that the photo was already published on social media. (ECF No. 25-1; and in *H.W. v. Brewer*, 124-cv-00062-LEW (ECF No. 16-1) (parent testifying to it being on social media prior to it being published by McBreairty). **Exhibit 1**.

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remaining statements do not fit any category of unprotected statement.[6]) The government ignores its demand that the demand letter itself be removed (the publication of which is protected). Meanwhile, any word remains unpublished for any amount of time is an irreparable injury.

In the balance of hardships, the *government* suffers no harm. The factor is the "balance of hardships *as between the parties*." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013) (emphasis added). The opposition speaks of non-parties' rights. But, government does not stand in their shoes, unless it plans to take criminal or administrative action – which it dishonestly claims it never threatened. Defendants threat (Opp. at 10) "that [Defendants] will take some unspecified further action if the speech continues" is a chilling threat of retaliation. Defendants are not harmed when enjoined from unconstitutional coercion.

"Protecting rights to free speech is *ipso facto* in the [public interest]." *Cutting v. Portland*, 2014 U.S. Dist. LEXIS 17481, at *36 (D. Me. Feb. 12, 2014) (internal quotation marks omitted), *aff'd*, 802 F.3d 79 (1st Cir. 2015). The government is not muzzled. It would be enjoined from violating the constitution. Should the First Circuit say the article, photo, and/or threat letter are not protected, the Government will suffer no harm. It could then engage in its contemplated, but as of now, secret retaliation. The motion for injunction pending appeal should be granted.[7]

[6] The right to publish even illegally produced material, recognized in *Bartnicki* and *Jean*, is *potentially* subject to a narrow exception when the publisher "illegally" or "unlawfully" acquired the material. *Bartnicki*, 532 U.S. at 517, 528. Even then, it is not enough to show a violation of a statute; the state may not punish the publisher unless "the First Amendment . . . permits [the state] to criminalize [the publisher's] conduct." *Jean*, 492 F.3d at 31. As recognized in *Jean*, the First Amendment does not abide suppression where the publisher was not complicit in an illegal act. *Id*. at 32–33. Here, there is not even allusion to this, and in *Jean*, like here, the government threatened nebulous action, and was enjoined from doing so. This Court's denial will be analyzed under *Jean* and will be reversed.

[7] The Court certainly has the option of entering the preliminary injunction, mooting the appeal.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of April, 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
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