IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

PATRICIA MCBREAIRTY, as personal representative of the Estate of 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 SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court should allow Plaintiff's Motion for Partial Summary Judgment (ECF No. 90) and award Plaintiff declaratory relief as to Count III, ¶¶ 97-98, that, as a matter of law, Brewer School Department Policies ACAD, ACAF, and JICK did not apply to Shawn McBreairty and cannot apply to his Estate upon republication of the materials at issue. Defendants Brewer School District, Palmer, and Slowikowski make only two arguments in opposition to the motion—that there is no actual controversy and that the claim is moot.[1] (ECF No. 101). Defendants are wrong and the motion should be granted.

A mere three days before the Brewer Defendants filed their opposition, the Tenth Circuit, in denying a school superintendent qualified immunity on account of a threat of litigation, made clear that "a government actor threatening frivolous litigation in retaliation for a person's constitutionally protected speech violates the First Amendment." *Tachias v. Sanders*, No. 22-

[1] Defendant MacDonald filed no opposition.

2139, 2025 U.S. App. LEXIS 5473, at *23 (10th Cir. Mar. 10, 2025). In fact, this very Court has held that "[i]t has long been clearly established that the government cannot coerce speech through punitive threats or measures, except in narrowly limited circumstances." *Nass v. Me. Bd. of Licensure in Med.*, No. 1:23-cv-00321-LEW, 2024 U.S. Dist. LEXIS 130343, at *27 (D. Me. July 24, 2024) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942); and *Berge v. Sch. Comm. of Gloucester*, 107 F.4th 33 (1st Cir. 2024)). Nevertheless, Defendants made a frivolous threat to "take further action" against Shawn McBreairty, claiming to be able to enforce Brewer Board Policies ACAD, ACAF, and JICK against him. (ECF No. 1-5). That threat resulted in Mr. McBreairty removing his Article from publication. (ECF No. 1 at ¶ 66). He desired to republish it (*id.* at ¶ 70) and his Estate wishes to do so free of reprisal (ECF No. 59-1 at ¶ 5). While Brewer claims that state law, 20-A M.R.S. § 6554 required them to implement and enforce certain policies, that same provision only prohibits action "on school grounds" (which Mr. McBreairty did not do) and explicitly prohibits Defendants from acting in derogation of the state and federal constitutions. 20-A M.R.S. § 6554(3). Defendants violated Brewer's own policies, state law, and the state and federal constitutions when it sent its chilling demands. It is necessary that the Court declare what Defendants did to have been improper, with specific attention to the frivolous assertion that "further action" could be taken as to Policies ACAD, ACAF, and JICK.

1.0 There Remains an Actual Controversy

Defendants assert that there is no justiciable controversy because they now agree that the policies cannot and could not have been applied. Essentially, they are arguing that they had a self-imposed obligation to make a frivolous threat against Mr. McBreairty, a threat that they seem to now imply that Mr. McBreairty should not have taken seriously. Mr. McBreairty had no idea what the "further action" would have entailed, but he knew that HW and CG had been already threatened

with criminal charges merely for circulating a petition that he republished. (ECF No. 1 at ¶ 31). Further, the threat contained reference to a criminal statute. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them[.]" *Bantam Books*, 372 U.S. at 68. This was not his first experience being threatened by Attorney Hewey and he took her threats seriously, even if they were clearly meritless to anyone with a *juris doctor* degree.

If Defendants admit their threats were frivolous, then, they should consent to the motion. Defendants' opposition effectively demonstrates that Plaintiff is entitled to the requested relief.

Defendants do not argue that there was no justiciable controversy at the time this suit was filed; instead, they are essentially arguing that their incomplete and evasive representations to this Court have rendered the sought-after declaration moot. The "voluntary cessation" doctrine serves as an exception to mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice") (citations omitted). When a defendant voluntarily ceases committing the offending activity, courts impose additional requirements to ensure that the defendant is not "temporarily alter[ing] questionable behavior" in order to evade judicial review. *Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 54 (1st Cir. 2013) (citation omitted). Voluntary cessation does not render a case moot unless the defendant meets the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 55 (citations omitted). They do not meet this burden. They have not repudiated the letter—not a single defendant has.

In *Berge*, the "defendants' counsel represented that no defendant reserves *any* right to take *any* action against him because of the [subject] events." 104 F.4th at 45 (emphasis in original). In

contrast, neither Brewer nor Palmer. Slowikowski, or MacDonald make such disclaimer. They have not retracted their demands, unlike the *Berge* defendants. While their representations here might be dispositive of any "further action" that they do take, they fail to make "it absolutely clear that they will not repeat the challenged behavior." *Id.* Moreover, the First Circuit was satisfied that the *Berge* defendants would not take further action because of the belief they would "ignore binding precedent and repeat the alleged wrong." *Id.* In contrast, the Brewer Defendants do not believe they did anything wrong (ECF No. 92) and there can be no similar such assurances until this Court tells them they are wrong. Thus, in the absence of an unequivocal retraction and waiver of further action, Count III still presents a live controversy.

2.0 The Claim is Not Moot

Defendants assert that Count III is now moot because Mr. McBreairty is deceased. When a defendant asserts that an event has mooted a case, "it bears the heavy burden of persuading the court that there is no longer a live controversy." *Friends of the Earth,* 528 U.S. at 189; *Catholic Bishops*, 705 F.3d at 52; *Conservation Law Found. v. Evans*, 360 F.3d 21, 24 (1st Cir. 2004) (finding that the party invoking the doctrine of mootness has the burden of establishing mootness). Defendants have not met their burden.

With respect to Mr. McBreairty's death, the threats were as to the publication of the Article and the letter—they were not personal to Shawn McBreairty. The Estate plans to republish them. Defendants wrongly assert that Plaintiff did not set this forth in its Statement of Facts, but Plaintiff did. (ECF No. 91 at ¶ 37 ("His estate continues to desire to publish the Article.") and at ¶ 43 ("The Estate does [intend to republish the demand letter] as well."). Defendants even admitted to such plans. (ECF No. 102 at ¶¶ 37 & 43). Thus, Defendants have made a knowingly false and sanctionable argument.

Defendants also claim that an executrix can only administer the estate, not carry on the decedent's business. (ECF No. 101 at 5 citing *Goodwin v. C.N.J*, 436 F.3d 44, 48 (1st Cir. 2006)). That statement does not quite capture the issue in *Goodwin* as that was a case where an injunction was sought relative to Mr. Goodwin needing an accommodation due to his disability—the injunctive relief was personal to him. Naturally, the *Goodwin* executrix was not, herself, going to suddenly start installing carpets. *Goodwin* is, therefore, inapposite. Turning to what the State of Maine actually empowers a personal representative to do, 18-C M.R.S. § 3-709 expressly directs the personal representative to "take all steps reasonably necessary for the management, protection and preservation of the estate in the personal representative's possession." The Article is an asset of the Estate[2] and causing its licensure and publication is part of the management. Casebooks are replete with matters where a decedent's estate is a party to vindicate its rights in the management of the decedent's works and likeness. *See, e.g., Estate of Hevia v. Portrio Corp.,* 602 F.3d 34 (1st Cir. 2010). Thus, Mr. McBreairty's passing does not moot the claim.

The Court should grant Plaintiff's partial motion for summary judgment.

Dated: March 26, 2025.

Respectfully Submitted,

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[2] Attorney Hewey's letter, of course, belongs to her/Defendants. However, the historical fair use publication of the letter by Mr. McBreairty in the framing provided by him is an Estate asset.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2025, 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