UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1337

SHAWN MCBREAIRTY,

Plaintiff - Appellant,

v.

BREWER SCHOOL DEPARTMENT, GREGG PALMER, BRENT SLOWIKOWSKI, and MICHELLE MACDONALD

Defendants- Appellees.

OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

INTRODUCTION

In a motion that is rife with inaccuracies and dripping with a lack of respect for the District Court, Plaintiff asks this Court to enter an injunction "protecting him from government retaliation if he republished [a blog post]." Motion at 1. This is a request that has twice been rejected by the District Court. In his motion to the District Court, McBreairty did not specify exactly what it is he was asking for and the District Court presumed that what McBreairty wanted was for the Court to enter a prior restraint prohibiting the Brewer School Department from filing suit against him in a Maine state court. In his motion to this Court, McBreairty

clarifies that he was actually seeking "*much more than that.*" Motion at 18 *(emphasis in original)*. The lack of specificity in his request alone makes it impossible for the Court to comply with the requirement in Rule 65 of the Federal Rules of Civil Procedure that an injunction order "describe in reasonable detail []the act or acts being restrained or required." Furthermore, even if this Court has the authority to enjoin a party from filing a suit in state court, even if doing so would not violate the Appellees' right to petition the courts, and even if this Court could fashion some sort of order with the required specificity, McBreairty has failed to meet the "strong showing," that he must make that he has a likelihood of success on the merits, that he will suffer irreparable harm absent an injunction, that the balance of equities tips in his favor and that injunctive relief in in the public interest. *Together Employees v. Mass General Brigham Inc.,* 19 F.4th 1, 7 (1st Cir. 2021). His emergency motion should therefore be denied.

FACTUAL BACKGROUND[1]

The Defendant-Appellees in this case are the Brewer School Department, its Superintendent, Gregg Palmer, the Principal of the Brewer High School Brent Slowikowski and Michelle MacDonald, who is a teacher at the Brewer High

[1] In his Complaint and in his motion to this Court, McBreairty devotes substantial ink to the description of a student petition that has absolutely no relevance to his motion for injunctive relief. Appellees will not address that situation, which is being litigated by a different Plaintiff and in a different docket.

School. On February 12, 2024, McBreairty put a lengthy blog post on the internet. Complaint, Exhibit 3, ECF Doc. 1-3. He criticized Brewer administrators for "pushing this trans-nonsense on minor children" *id.* at PageID #: 31; asserted that Gender and Sexuality Alliances "are indeed 'like a religion,' but more like a cult. These cults are full of useful idiots[,]" *id.* at PageID #: 32; accused the superintendent of being a "sexual narcissist," *id.* at PageID #: 33; and characterized Brewer as being "pathetic," *id.* at PageID #: 34. He exhorted parents to "[p]ull your kids now . . . as your local schools are being run by trans-stripper, groomer-clowns performing in female blackface," *id.* at PageID # 33, concluding that "[u]ntil these school boards fear the will of parents with same kids more than they fear parents of insane kids, this crap will continue," *id.* at PageID #: 34. In addition to sharing his views on these and other issues, he included a picture of four children in the girls' bathroom at Brewer High School, two defamatory comments about a particular student he calls HD in his complaint, and a defamatory statement making fun of the child of a Brewer High School teacher. *Id.*

The Brewer School Department has an obligation imposed by Maine law and its own Board polices to protect its students and employees from bullying and harassing behavior. *See, e.g.*, 20-A M.R.S. § 6554 (requiring that public schools adopt policies prohibiting bullying of students); 20-A M.R.S. § 1001(20) (same requirement for the protection of employees). Therefore, in response to complaints

not only by HD's parent but also the parents of the three other students pictured in the bathroom, as well as to concerns raised by its employee, co-defendant Michelle MacDonald, the Brewer School Department, though counsel, wrote McBreairty an email. Complaint, Exhibit 5, ECF Doc. 1-5, PageID #: 40. Because McBreairty has repeatedly mischaracterized what that email said, Brewer quotes it in its entirety below:

> Dear Mr. McBreairty,
>
> I am writing on behalf of our client the Brewer School Department to demand that you remove certain content from your February 12, 2024 online post entitled "Girl's Bathrooms Are not 'Safe Spaces' When Males are Present." If you are represented by counsel in this matter, please let me know and I will be glad to direct my correspondence to them.
>
> Although we acknowledge that much of that post contains your opinions on matters of public concern and recognize your right to express them, there are certain portions that are protected because they are either false or an impermissible invasion of the privacy of minors and have the effect of bullying and hazing a student and a teacher at the Brewer Hish School in violation of Board Policies ACAD, ACAF and JICK and Maine Law. In particular:
>
> First, there is a picture of Brewer High School students in the restroom. As we understand it, this picture was taken without their consent, presumably in violation of 17-A M.R.S. Section 511.
>
> Second, there are the following two statements concerning a Brewer High School student that identifies the student specifically:
>
>> [HD] , aka "Jax" is a senior at Brewer High School. He goes by the pronouns they/them on Instagram and his profile name is "dumbjaxdawson." He's been allowed by the administration to continue to enter females spaces for the last three months. Even after students concerns were reported.

Third, there is a statement concerning the minor child of one of our teachers.:

MacDonald has a transgender child who attends a different school (Hampden Academy). She's a girl who pretends to be a boy on the male track team, usually coming in dead last).

All of the above are invasions of privacy of the students you have referred to and are causing the Brewer High School student and the Brewer High School staff member who is the parent of the other student you refer to severe distress within the meaning of Maine Statute, 20-A M.R.S. Sections 6553 and 6554.

Please remove the referenced material by noon on February 14, 2024 and confirm to me that you have done so or we will be forced to take further action against you.

M

Contrary to McBreairty's contention in his brief, this email does not accuse him of a crime, does not threaten him with criminal prosecution,[2] and indeed, does not constitute a threat of any specific action.

After McBreairty received this email, he took down his entire post rather than merely redacting the portions Brewer objected to and posted the email in its place. Brewer responded:

Dear Mr. McBreairty:

---

[2] It is important to keep in mind that despite McBreairty's repeated characterization of the Brewer School Department as "the government," it is just a municipal school district. It has no more power than a private citizen to initiate a criminal charge or do anything else to a member of the public such as McBreairty.

> As an initial matter, I want to thank you for complying with our request to remove the image and certain content from your post in response to the email I sent you yesterday. I understand that instead, you posted a screenshot of the email I sent you. What you may not have been aware of is that my email quoted verbatim the inappropriate content so by posting the email on X, you have effectively re-posted the inappropriate content.
>
> Please redact the information regarding the BHS student from your second picture and the information regarding the staff member's child on the third page.
>
> Thank you for your prompt attention to this demand.

Complaint Exhibit 6, ECF Doc. 1-6, PageID #: 42.

McBreairty then removed the picture and filed an action against the Brewer School Department, its Superintendent, the Principal of the Brewer High School and the teacher he referenced in his post. He accompanied his complaint with a motion for a temporary restraining order and preliminary injunction that did not specify exactly what relief he was requesting.

After briefing and argument, the District Court issued an order on March 28, 2024 denying McBreairty's motion for a temporary restraining order but reserving judgment on his request for a preliminary injunction. McBreairty chose not to pursue his right to supplement the record in a preliminary injunction hearing and instead filed a notice of appeal to this Court and a motion for an injunction pending appeal to the District Court. By order dated April 10, 2024, the District Court denied McBreairty's motion, finding that he failed to meet the standard for an injunction pending appeal and further noting that there was nothing to "foreclose[]

Plaintiff from simply requesting a prompt hearing on his motion for a preliminary injunction if his aim is to efficiently remedy his alleged constitutional injury." ECF Doc. 41, PageID #: 513. Five days later, McBreairty filed the instant motion with this Court.

ARGUMENT

I. The Standard for Injunctive Relief Pending Appeal.

"The applicable standards for a party seeking a stay of an injunctive order pending appeal are (1) a strong showing that he is likely to succeed on the merits of the appeal; (2) a showing that unless a stay is granted he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties, and (4) a showing that a stay will do no harm to the public interest." *Martinez Rodriguez v. Jiminez,* 537 F.2d 1, 1 (1st Cir. 1976), s*ee also* *Together Employees*, 19 F.4th at 7 ("To be entitled to an injunction pending appeal, the appellant[] must make a strong showing that [he is] likely to succeed on the merits, that [he] will be irreparably injured absent emergency relief, that the balance of the equities favors [him], and that an injunction is in the public interest."). Even when awarded on a temporary basis pending appeal, injunctive relief "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

II. **McBreairty Has Failed to Establish That He will be Irreparably Harmed.**

As this Court held in *Together Employees*, "[i]f the appellant[] cannot demonstrate irreparable harm, [this Court] need not discuss the other factors." 19 F. 4th at 7. In moving for an injunction pending appeal, McBreairty addresses the irreparable injury prong only perfunctorily, suggesting that because his claim is for violation of his First Amendment rights, he is automatically irreparably injured. This, however, is not the law. *See Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) ("The only irreparable injury claimed by appellants is that to their First Amendment rights. The fact that appellants are asserting First Amendment rights does not automatically require a finding of irreparable injury. Whether there is any such harm is the issue that will ultimately be addressed on the merits of the case. We recognize the importance of rights asserted under the First Amendment, but every case depends on its own facts.") (cleaned up).

The facts of this case demonstrate that McBreairty faces no likelihood of incurring irreparable damages in the absence of an injunction. What McBreairty wants, he asserts, is the ability to repost his blog post including the picture of students in the Brewer High School bathroom and the three defamatory statements about two children. And as the District Court noted in its decision denying the temporary restraining order and the motion for an injunction pending appeal, he is free to do so. *See* ECF Doc. 30, PageID #: 320, ECF Doc. 41, PageID #512.

McBreairty claims he is afraid the Brewer School Department will bring a frivolous lawsuit against him but even if that were to occur, the damages McBreairty would suffer – legal fees incurred in defending against this hypothetical lawsuit – are not irreparable damages. They are damages at law and indeed, under Maine's anti-Strategic Lawsuit Against Public Participation ("anti-SLAPP") statute, 14 M.R.S. § 556, those fees would be recoverable if indeed McBreairty's rights were violated. In short, the damage McBreairty claims here is of his own making and does not justify this Court taking the extraordinary step of entering an injunction before reaching the merits of his appeal.

III. McBreairty Has No Likelihood of Success

Because the District Court denied McBreairty's request for a temporary restraining order, he must now demonstrate a "significantly higher justification" for injunctive relief where his request "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld" by the District Court. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) (cleaned up). Rather than meeting this significantly higher justification for injunctive relief, McBreairty's motion for an injunction pending appeal merely faults the District Court for taking two weeks to decide the motion, suggests that it did not sufficiently analyze or explain why he is

unlikely to succeed on the merits, and feigns shock that it recognized that the Brewer School Department has rights too.

As the District Court explained "this case presents nuanced questions, and the current record and briefing do not allow me to find that Plaintiff has demonstrated a likelihood of success on the merits." Order at 2, ECF Doc. 30, PageID #: 321. McBreairty, as the movant, bore the burden of "establishing that a temporary restraining order should issue." *McBreairty v. Sch. Bd. of RSU 22*, No. 1:22-cv-00206, 2022 WL 2835458, at *5 (D. Me. July 20, 2022). The Court explained that it could not, again on the record before it, "enjoin Defendants' exercise of First Amendment freedoms (their right to petition the courts) in favor of his exercise of First Amendment freedoms (the right to criticize the government)." Order at 2, ECF Doc. 30, PageID #: 321.

Indeed, there is a high evidentiary bar to justify a likelihood of success on the merits when seeking a prior restraint. *See, e.g.*, *Cowhig v. West*, 181 F.3d 79, No. 98-1705, slip op. at 1 (1st Cir. 1999) (upholding a prior restraint on future filings against a litigant with a demonstrated "propensity to file repeated suits ... involving the same or similar claims" of a "frivolous or vexatious nature," where the court made adequate findings demonstrating the need for an injunction, and the record was "'sufficiently developed' to support those findings") (cleaned up); *Sires v. Gabriel*, 748 F.2d 49, 51 (1st Cir. 1984) ("limitation of an individual's access to the courts

may be upheld if supported by similar kinds of findings" that party "had filed many similar complaints" for "frivolous and vexatious lawsuits" against "identical or similar defendants."); *Pavilonis v. King,* 626 F.2d 1075, 1079 (1st Cir. 1980) (upholding prior restraint against filing additional pleadings or new lawsuits without permission from a district judge upon a District Court finding that "its docket was being burdened" with "multiple, impenetrable complaints."); *Spickler v. Dube,* 644 A.2d 465, 468–69 (Me. 1994) ("A court properly may enjoin a party from filing 'frivolous and vexatious lawsuits.' The party seeking the injunction, however, must make a detailed showing of a pattern of abusive and frivolous litigation, and the court must not issue a more comprehensive injunction than is necessary.") (citing and quoting *Spickler v. Key Bank of S. Maine*, 618 A.2d 204, 207 (Me.1992)). There is simply no factual record that could support these types of findings against the Brewer School Department. Here, there has been no adjudication and no detailed showing that the Brewer School Department or the individual defendants have a pattern of abusive and frivolous litigation that would warrant such a prior restraint. McBreairty does not intend to develop such evidence in this case and, indeed, could not develop such evidence even if he tried.

McBreairty, however, argues that because the Brewer School Department's counsel is also counsel for the Hermon School Department in an unrelated case against McBreairty, that somehow proves Brewer is likely to file a frivolous lawsuit

against him. There is no merit to that argument. In the first place, of course, it is Brewer, not Hermon that is a party to this case, and McBreairty has no evidence that Brewer has ever brought suit against him or anyone else – let alone that it has engaged in a pattern of frivolous and vexations litigation. Additionally, McBreairty's representations about the *Hermon* case are inaccurate. As illustrated by the very first page of Hermon's brief to the Maine Law Court, a copy of which is attached hereto as Exhibit A,[3] Hermon's request in that suit was "both limited and specific: The School Department request that the Superior Court enjoin Defendant-Appellant Shawn McBreairty from defaming, harassing, and bullying its employee, English teacher Mallory Cook by accusing her among other things, of sexual misconduct and child abuse. It does so because it has a statutory obligation to protect its employees from bullying and harassment. It does so because Mr. McBreairty's mistreatment of Ms. Cook has caused her to miss school, thereby requiring the School Department to incur the expense and disruption of finding substitute teachers for her classes. And it does so in an effort not to lose a good teacher in a time when good teachers are particularly hard to find. That this is all the School Department asks for is reflected in black and white in the record." Contrary to McBreairty's

[3] This Court can take judicial notice of a filing in that court. *See, e.g.*, *Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.")

allegations, Hermon did not claim that its board policies applied to McBreairty,[4] it did not ask that he be restrained from making public records requests and – most importantly from the standpoint of whether the suit is frivolous – it won at the Superior Court level, causing McBreairty to file an appeal.

In the end, the critical failing of McBreairty's position is his mischaracterization of the nature of the case. He states that the Brewer School Department threatened him with criminal prosecution when it did not. He acts like this is a selective enforcement case, citing to cases where the government has either threatened or commenced criminal proceedings and arguing that those cases are *in pari materia* with this one when they are not because unlike the police in *Jean v. Mass. State Police*, 492 F.3d 24(1st Cir. 2007), the Brewer School Department has no more power than any citizen to commence a criminal prosecution against McBreairty. And he goes on at great length about how the government may not prevent criticism when there is no dispute that the email specifically acknowledged his right to voice his criticisms. In short, McBreairty fails to carry his burden to show a strong likelihood of success on the merits of his claims.

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[4] Whether McBreairty's confusion is feigned or genuine is not clear but his repeated assertion that Hermon and Brewer have sought to enforce their policies against McBreairty is just plain wrong. What both school departments have done is take the steps that those policies require of *them* to protect their employees and students from bullying and harassment. Hermon brought suit asking for court assistance; Brewer asked that McBreairty stop.

IV. McBreairty Cannot Meet The Remaining Factors

In his motion, McBreairty fails entirely to address the balancing of the harms,[5] presumably because given his complete lack of harm, he cannot argue that the balancing of harms tip in his favor. Thus, as discussed above, there is nothing preventing McBreairty from publishing his blog post, so there is no need for an injunction. By contrast, if this Court were to enter the broad injunction requested by McBreairty (prohibiting Appellees from taking *any* action to protect its students and employees, Motion at 18) that would prevent the Brewer School Department from taking even modest action to protect its students and staff from privacy violations and bullying and hazing. The Brewer School Department has an obligation to protect its students and staff. Moreover, it is consistent with the underlying principles of the First Amendment that a governmental entity be allowed to tell an individual if his speech is believed to be harmful and not protected and for the governmental entity to inform the individual that it may take further action of some kind if the individual disagrees.

Finally, on the issue of the public interest, McBreairty argues without a factual basis that the email Brewer sent to him will chill other members of the public. In fact, as Brewer established before the District Court, this is not the case.

[55] The section in McBreairty's brief titled "The Balance of Equities Tips in Plaintiff's Favor" addresses the public interest prong not the balancing for harms.

The material McBreairty posted has appeared on other social media sites and shortly after McBreairty removed his post, he appeared on a podcast where the picture of students in the bathroom was displayed and McBreairty spoke at length. *see* Carolin Declaration, ECF Doc. 16-3. By contrast, the damage to the public interest were this Court to wade without the benefit of full briefing into the complex issue of whether it is permissible to enjoin a party from pursing its rights in state court, *see, e.g. Quackenbush v. Allstate Ins. Co.,* 121 F.3d 1372, 1377 (9th Cir. 1997) (holding that an in injunction against a litigant rather than a court may still violate the Anti-Injunction Act), is self-evident.

CONCLUSION

For all of the foregoing reasons, this Court should deny Plaintiff-Appellant Shawn McBreairty's motion for an injunction pending appeal.

Dated: April 18, 2024

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CERTIFICATE OF COMPLIANCE

1. This opposition to motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this opposition contains 3,634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using serifs in Times New Roman 14 point font.

Dated: April 18, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2024, I electronically filed the Opposition to Motion with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system which will send notification of such filing(s) to counsel of record. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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EXHIBIT A

STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PEN-13-191

HERMON SCHOOL DEPARTMENT

Plaintiff / Appellee

v.

SHAWN MCBREAIRTY

Defendant / Appellant

ON APPEAL FROM THE PENOBSCOT COUNTY SUPERIOR COURT

BRIEF OF APPELLEE HERMON SCHOOL DEPARTMENT

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STATE OF MAINE

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INTRODUCTION

The relief requested by Plaintiff-Appellee Hermon School Department ("Hermon" or the "School Department") in this case is both limited and specific: The School Department requests that the Superior Court enjoin Defendant-Appellant Shawn McBreairty from defaming, harassing, and bullying its employee, English teacher Mallory Cook by accusing her, among other things, of sexual misconduct and child abuse. It does so because it has a statutory obligation to protect its employees from bullying and harassment. It does so because Mr. McBreairty's mistreatment of Ms. Cook has caused her to miss school, thereby requiring the School Department to incur the expense and disruption of finding substitute teachers for her classes. And it does so in an effort not to lose a good teacher in a time when good teachers are particularly hard to find. That this is all the School Department asks for is reflected in black and white in the record, including in the Complaint and the Affidavits of Mallory Cook and Micah Grant. There is no request that the Court prevent McBreairty from speaking at school board meetings, or expressing his views on LGBTQ+ matters, or critical race theory, or other issue that is or may be before the Hermon School Committee. All it asks is

that he be required to stop trying to make a dedicated employee miserable.

In his appeal Mr. McBreairty ignores the record. He paints himself as an educational advocate, argues stridently and repeatedly that the School Department is trying to silence him and implores this Court to reverse the Superior Court's decision denying his special motion to dismiss the School Department's complaint on the theory that the First Amendment of the United States Constitution gives him the right to bully, harass and defame a defenseless public school teacher. The First Amendment does not provide such protection and Mr. McBreairty's contentions find no support in the record or the law. His appeal should therefore be denied.

STATEMENT OF FACTS

14 M.R.S. § 556 provides that in deciding a motion to dismiss under Maine's anti-SLAPP ("Strategic Lawsuits Against Public Participation") law, "the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Those facts are as follows.

The Herman School Department is a Maine municipal school district responsible for serving students from Hermon, Carmel, Levant, and Glenburn Maine. App. 070 (Cook Aff. ¶¶ 2, 3). As required by Maine law, 20-A M.R.S. § 1001(22), the School Department maintains a Workplace Bullying Policy. App. 078 (Grant Aff. ¶ 6). Under that policy, "[a] ll employees and students in the school unit, as well as parents, community members, and others involved with the schools are prohibited from engaging in workplace bullying." App 015 (Complaint ¶ 14); App. 044 (Complaint, Exhibit 1). [1] Workplace bulling is defined as "humiliating, mocking, name-calling, insulting maligning, or spreading rumors about an employees." App. 044 (Complaint, Exhibit 1).

[1] Exhibits 1 and 2 to the Complaint appear to have been mistakenly placed in the Appendix after Mr. McBrearity's brief rather than after the Complaint.

Hermon also maintains a policy prohibiting injurious hazing, which tracks Maine law and defines hazing as "any action or situation, including harassing behavior, that recklessly or intentional endangers the mental or physical health of any school personnel or student enrolled in a public school." App. 047 (Complaint, Exhibit 2); 20-A M.R.S. § 6553(1)(A).

The School Department has enacted these policies not only because they are required by Maine law, *see* 20-A M.R.S. §1001(22) and 6553, but also because failure to protect its employees as the policies require would have very real negative consequences. Employees who are victims of bullying, harassment or hazing may have contractual rights against the school, the violation of which could lead to assessment of monetary damages against it but even more importantly, when employees are subjected to unaddressed bullying and harassment they are likely not to be at work. When they call out temporarily, the School Department must pay someone else to provide substitute instruction and when they resign, the School Department must find someone else to replace them. It goes without saying that both of these scenarios are both costly and disruptive.

Mr. McBreairty is a self-described "Father, Husband, Dog-Dad, patriot, Lion, Warrier, Anti-CRT OG" who "approves of toxic masculinity." App. 016 (Complaint ¶ 21). In his affidavit, he contends that he "advocate[s] for students, parents, taxpayers and teachers across the state of Maine and the nation, to raise public awareness and provide encouragement and confidence for others to get involved in what is occurring in these Maine K-12 government run schools." App. 049 (McBreairty Aff. ¶ 5). Although he does not live in Hermon and has no children in the Hermon School Department, he frequently attends its school board meetings. App. 079 (Grant Aff. ¶ 11). He has always been permitted to speak at those meetings consistent with the School Department's Public Participation Policy and he will continue to be welcome to participate in those meetings to advocate to his government whatever views he may have. *Id.*

Mallory Cook is an English teacher at the Hermon High School. App. 016 (Complaint ¶ 27). Presumably because of her position as advisor the school's Gay Straight Alliance ("GSA"), Ms. Cook became a focus of McBrearty's attention and he has engaged in a campaign of bullying, harassing, and hazing her as those terms are defined in the School Department's policies. In the words of the Superior Court

"[b]oth the time and the specifics of his communications could support a conclusion that his single objective [was] to make Ms. Cook miserable." App. 010 (Decision at 4). In furtherance of that objective, he wrote to the Superintendent in the context of making a records request under the Freedom of Access Act, accusing her of "grooming children," App. 074 (Cook Aff. ¶ 34), and of being incompetent and dangerous by "attempting to co-parent the children of Hermon High School, while not concentrating on the very basics of education." App. 074-075 (Cook Aff. ¶ 36). He also wrote to several people in the community that Ms. Cook was "grooming children" and "running a shadow organization by pushing hyper-sexualization of minors." App 075 (Cook Aff. ¶ 40). And he took to Twitter, accusing Ms. Cook publicly of having a "secret" account by which she was running a "hypersexualization movement" App 073 (Cook Aff. ¶26), and being a groomer. Finally, on a publicly broadcast podcast, he referred to her as a "sexual predator." App. 073-074 (Cook Aff. ¶¶ 28-29).

Mr. McBreairty's false and very hurtful attacks took their toll on Ms. Cook and her students. Ms. Cook missed several days of school, started counselling, and began thinking of leaving her job. App. 077 (Cook Aff. ¶¶ 49-50). She also felt unable to teach as effectively for

fear of further harassment by Mr. McBreairty. App. 076 (Cook Aff. ¶47). And, as explained by Superintendent Micah Grant, all these effects on Ms. Cook also adversely affected the School Department in both pecuniary ways (the need to hire substitute teachers) and non-pecuniary ways (including Ms. Cook's fear of continuing to fully do her job). App. 080 (Grant Aff. ¶ 18).

Faced with no other option, the School Department turned to the Maine court system for help in protecting its employee. On May 3, 2022, it filed a one count complaint against Mr. McBreairty requesting a declaration that the false and defamatory statements Mr. McBreairty made about Ms. Cook were a violation of her rights and asking that the Court preliminarily and permanently be enjoined from making similar false statements about Ms. Cook and its other teachers. Mr. McBreairty responded on June 15, 2022 with a Special Motion to Dismiss pursuant to 14 M.R.S. § 556 supported by a short affidavit of Mr. McBreairty about his background (i.e. that he hosts a podcast, works for Maine First Project and advocates for issues involving Maine schools), an allegation that he sent an email to a number of individuals about a Freedom of Access Act request that he did not think was appropriately responded to, and a statement that

he believes the Hermon School Department received 40 books "on the topic of transgender." App 050 (McBreairty Aff. ¶ 7). Nowhere in his affidavit did he mention, much less provide evidence to justify his bullying behavior toward Ms. Cook.

The Hermon School Department responded to Mr. McBreairty motion on August 11, 2022, supporting its opposition with an affidavit from Ms. Cook in which she outlined the statements made by Mr. McBreairty, explained that they were false and why they were false, and described the effect his statement had on her, as well as an affidavit from Hermon' s Superintendent Micah Grant explaining the damage the School Department had suffered as a result of Mr. McBreairty's wrongful conduct. *See* App. 080 (Grant Aff. ¶18). The Superior Court issued its order denying Mr. McBreairty's motion on May 16, 2023, after which he filed a timely appeal.

STATEMENT OF THE ISSUES ON APPEAL

1. Does the conduct complained of in the Complaint constitute petitioning activity under Maine's anti-SLAPP law, 14 M.R.S. § 556?
2. If so, did the Hermon School Department present prima facie evidence that at least one of those petitioning activities was devoid of any reasonable factual support or any arguable basis in law and caused actual injury to the School Department?

SUMMARY OF THE ARGUMENT

A "Strategic Lawsuit Against Public Participation (SLAPP) refers to litigation instituted not to redress legitimate wrongs, but instead to dissuade or punish the defendant's First Amendment exercise of rights through the delay, distraction, and financial burden of defending the suit." *Hearts with Haiti, Inc. v. Kendrick,* 2019 ME 26, 202 A.3d 1189, 1193, *quoting Gaudette v. Davis,* 2017 ME 86, ¶ 4, 160 A.3d 1190. This suit is not a SLAPP suit. To the contrary, the School Department instituted this suit to redress a very legitimate and serious wrong: the merciless harassment and bullying of a defenseless public school employee. This suit has nothing to do with Mr. McBreairty's First Amendment right. He has always been – and will continue to be – welcome to exercise his First Amendment right to express his views to the Hermon School Board.

This Court has adopted a two-prong test for analyzing a special motion brought pursuant to 14 M.R.S. § 556. *See generally Thurlow v. Nelson,* 2021 ME 58, 263 A. 3d 494. First, the moving party must establish that the suit is based on their involvement in petitioning activities. *Id.* at 12; *see also Morse Brothers, Inc. v. Webster*, 2001 ME 70, ¶ 19 , 772 A.2d 842. If the moving party carries that burden,

the special motion to dismiss must still be denied "if the opposing party presents 'prima facie evidence that at least one of the moving party's petitioning activities was 'devoid of any reasonable factual support or any arguable basis in law and ... caused actual injury to the [nonmoving party].'" *Thurlow, 2021 ME 58.* ¶ 19, 263 A.3d 494, 502, q*uoting Nader v. Me. Democratic Party,* 2013 ME 51, ¶ 14, 66 A.3d 571.

Here, Mr. McBreairty's motion fails on both prongs. His statements that Ms. Cook is a "groomer," that she was running a "hypersexualization movement" and that she is a "sexual predator," among other things, were not made to a governmental entity, and, as the superior court noted, were not made for the purpose of petitioning the government but rather "[b]oth the tone and the specifics of his communications could support a conclusion that his single objective is to make Ms. Cook miserable." App. 010 (Decision at 4). As a matter of law, those statements do not constitute petitioning activity.

Additionally, his statements were unquestionably devoid of any reasonable factual or legal support. The School Department submitted evidence to the superior court to establish the falsity of Mr. McBreairty's accusations about Ms. Cook and contrary to Ms.

McBreairty's contention, his statements, including that Ms. Cook is a "sexual predator," a "groomer," are not statements of opinion. They are statements of fact capable of being proven false and that is something the School Department plans to do.

Finally, the School Department carried its burden of showing that it suffered actual injury. In addition to the irreparable injury of being powerless to protect its employees and enforce its Workplace Bullying policy that admittedly drives this lawsuit, the School Department established, through the affidavit of its Superintendent Micah Grant , that it suffered measurable pecuniary damage.

Mr. McBreairty's special motion to dismiss was correctly denied.

ARGUMENT

I. The Standard of Review.

This Court reviews the denial of a special anti-SLAPP motion to dismiss *de novo,* applying the same two-pronged test required of the court below. *Thurlow v. Nelson*, 2021 ME 58, ¶22, 263 A.3d 494, *503; see also* *Weinstein v. Old Orchard Beach Fam. Dentistry, LLC,* 2022 ME 16, ¶ 6, 271 A.3d 758, 764; *Camden Nat. Bank v. Weintraub*, 2016 ME 101¶ 12, 143 A.3d 788, 794.

At the first prong, the moving party must demonstrate, in a motion with accompanying affidavits, that the claims at issue are in fact "based on the moving party's exercise of [its] right to petition," and thus properly the subject of an anti-SLAPP motion. 14 M.R.S. § 556; *Desjardins v. Reynolds*, 2017 ME 99, ¶ 8, 162 A.3d 228. "If the moving party fails to meet this burden, then the special motion to dismiss must be denied." *Hearts with Haiti, Inc.*, 2019 ME 26, ¶ 11, 202 A.3d 1189. If the moving party meets its burden on prong one, the anti-SLAPP motion is not automatically granted. Instead, at prong two, the burden shifts to the non-moving party to show, through its pleadings and accompanying affidavits, "prima facie evidence that at least one of the moving party's petitioning activities

was 'devoid of any reasonable factual support or any arguable basis in law and . . . caused actual injury to the [nonmoving party].'" *Thurlow*, 2021 ME 58, ¶ 19, 263 A.3d 494 (quoting *Nader v. Maine Democratic Party*, 2013 ME 51, ¶ 14, 66 A.3d 571; *see also Leighton v. Lowenberu,* 2023 ME 14, ¶ 32, 290 A.3d 68; 14 M.R.S. § 556. Thus, an anti-SLAPP motion is granted only when the moving party meets its burden at prong one and the non-moving party fails to meet its burden at prong two.

II. McBreairty's Statements Do Not Constitute Petitioning Activity.

The purpose of Maine's anti-SLAPP law, like similar laws around the country, is to protect the right of citizens to petition the government. As this Court explained in *Thurlow*:

> SLAPP lawsuits are lawsuits that are filed with the goal 'to stop citizens from exercising their political rights or to punish then for doing so." George W. Pring, SLAPPS: Strategic Lawsuits Against Public Participation, 7 Pace Env't L. Rev. 3, 5-6 (1989). "SLAPP plaintiffs do not intend to win their suits' rather they are filed solely for delay and distraction , and to punish activists by imposing litigation costs on them from exercising their constitutional right to speak and petition the government for redress of grievance." Morse Brothers, Inc. v. Webster, 2001 ME 70, ¶ 10, 772 A.2d 842.

2021 ME 58, ¶8, 263 A.3d at 498.

Because the statute is meant to protect the right to petition the government, the anti-SLAPP statute only applies to conduct that constitutes petitioning activity. *See id.* Petitioning activity is defined in the statute as "any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government. " 14 M.R.S. § 556.

Here, with the sole exception of his Freedom of Access Act request, none of McBreairty's statements were made to the School Department or any other governmental entity. Rather, they were made to people who follow McBreairty on social media or listen to his podcast. In support of his motion, McBreairty points to no record evidence upon which this Court could find that false charges such as that Ms. Cook is a "sexual

predator" or Ms. Cook is a "groomer" in those fora were likely to encourage review of any issue by the government or to enlist public participation in any issue being considered by the government. Rather, he focuses on different statements– not the subject of the School Department's claims in this case – that he has made to the Hermon School Board and its Superintendent. And on this point he is correct: Mr. McBreairty's letter to Hermon Superintendent Micah Grant proclaiming that there are only two genders, that equity is unattainable, and that conversations about race may be racist, App. 053, is unquestionably petitioning activity. So, too, is McBreairty's advocacy against LGBTQ+ issues which, as he points out at great length in his brief, is a controversial issue. See Blue Brief at 11-15. But all of this is beside the point because McBreairty's activism against LGBTQ+ rights, critical race theory, and the like is not the subject of the School Department's lawsuit. Rather, what the School Department seeks to prevent here is McBreairty falsely claiming that Ms. Cook is a sexual predator, a groomer, and similar hurtful things to the public at large on social media.[2]

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[2] The United States District Court for the District of Maine has already held, in litigation involving McBreairty and a different district, that the First Amendment does not require a school board to let him make charges of this type against school employees during the public comment section of school

The distinction between petitioning the government and defamation was the subject of this Court's decision in *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, 202 A.3d 1189 where the defendant contacted donors of the plaintiff and spoke out publicly falsely accusing its founder of sexual abuse. Noting that "[f]ew of the statements include any call to action; rather, the statements include multiple threatening or derogatory messages" *id.* at 13, this Court held that the majority of conduct complained of was not petitioning activity and denied the defendant's special motion.

The same is true here. As Superintendent Grant stated in his affidavit, McBreairty is free to air his views to the Hermon School Board. The School Department does not seek to prevent him from petitioning and it is uncontroverted that he has been welcome to espouse his views to the School Board at its meetings. Because the School Department's complaint is aimed at Mr. McBreairty's bullying behavior toward its employee, not to petitioning activity, Mr. McBreairty is not entitled to dismissal of the complaint.

Board meetings. *McBreairty v. Miller,* No. 1:23-CV-00143-NT, 2023 WL 3096787 (D. Me. Apr. 26, 2023)

III. McBreairty's Statements Were Devoid of Reasonable Factual Support or Arguable Basis in Law.

The Superior Court began its decision by correctly defining the two-step procedure for analyzing an anti-SLAPP special motion explained by this Court in *Leighton v. Lowenberg,* 2023 ME 14, ¶ 32, 290 A.3d 68. After determining that McBreairty met his burden to show that he was engaged in petitioning activity, the Court turned to the second step of the analysis, examining whether the School Department was able to bear its burned to show that McBreairty's statements about Ms. Cook were devoid of any factual or legal basis *and* that the defendant's petitioning activity caused actual injury to the plaintiff. App. 009.[3]

The record evidence presented by the School Department to carry its burden on the first part of prong two – whether the statements complained of were devoid of any factual or legal basis – included the following:

[3] In his brief, Mr. McBreairty accuses the Court of inventing a new standard because it stated elsewhere in the decision that elements of Mr. McBreairty's petitioning activity were "factual statements without reasonable support." App. 011 (Decision at 5). It is clear from reading the opinion as a whole, however, that it applied the correct standard.

1. Allegations in the Complaint. Among other things, the School Department alleged in the Complaint that Mr. McBreairty falsely called Ms. Cook a sexual predator on his podcast on March 18, 2022 and that he said she we the "head of the hypersexualization movement," App. 018 (Complaint ¶¶3, 39); that he falsely accused her of running a shadow organization pushing hyper-sexualization of minors," *id.* (Complaint ¶ 39, 44); and that she was grooming children. *Id.* (Complaint ¶ 45).

2. Statements in the Affidavit of Mallory Cook. In her affidavit, Ms. Cook methodically went through the defamatory statements outlined in the Complaint and provided specific facts to support their falsity, (e.g. "my work with LGBTQ+ student is part of my duty as a teacher to ensure a safe and welcoming learning environment for all students, and to provide opportunities for all students to succeed" to refute the allegation that she was grooming children, App. 074 (Complaint ¶ 30); to support her denial that she was pushing hyper-sexualization of minors in the GSA club as a faculty sponsor, she explained that her job

as GSA advisor was "to ensure that students follow school rules and supervise students," App. 075 (Complaint ¶ 40); and she also explained that rather than being a "shadow organization," the GSA is listed on the school's website. App. 075 (Complaint ¶ 40).

Mr. McBreairty submitted nothing to dispute these facts at the Superior Court level, and on appeal his primary argument is that the statements complained of are not actionable because they are not facts, they are statements of opinion. Whether a statement is one of opinion or fact is a question of law. *Caron v. Bangor Publishing* Co., 470 A.2d 782, 78_ (Me. 1984). A statement is an opinion if it is not capable of being proven true or false, *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 339 (1974) or "if it is clear from the surrounding circumstances that the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation of the facts." *Caron* 470 A.2d at 784; *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Ballard v. Wagner*, 2005 ME 86 ¶ 11, 877 A.2d 1083; *Garrett v. Tandy Corp.,* 2003 U.S. Dist. LEXIS 8975, *39 (D. Maine 2003) ("A comment is an opinion if it is clear from the surrounding circumstances that the maker of the statement did not

intend to state an objective fact, but intended rather to make a personal observation of the facts."). Opinions, however, may be defamatory if they imply the existence of undisclosed defamatory facts. *True v. Ladner*, 513 A.2d 257, 261-262 (Me. 1986); *Lester v. Powers,* 596 A.2d 65,

Here, the statements Mr. McBreairty has made about Ms. Cook are absolutely capable of being proven false. Mr. McBreairty accused Ms. Cook and two colleagues of being groomers. App. 075 (Cook Aff. ¶ 42). The Merriam-Webster Dictionary defines groomer as "someone who grooms[] a minor for exploitation and especially for nonconsensual sexual activity." *Groomer*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/groomer (last visited Oct. 26, 2023). It is flat out false to say that Ms. Cook ever groomed minors for exploitation or nonconsensual sexual activity and, if necessary, the Hermon School Department is prepared to prove that. Furthermore, even if we use the definition of groomer advanced by McBreairty in his brief, the School Department is prepared to prove that Ms. Cook did not teach children at the School Department sexual, political racial ideology without the knowledge or consent of parents. *See* Blue Brief at 23. Similarly,

Mr. McBreairty's statement that Ms. Cook is a sexual predator is a factual statement that the School Department can prove is false. And the same goes for his charges that she is leading a hyper-sexualized movement or a shadow group. These are all false, hurtful, and bullying statements that would be actionable as defamation.

In short, the School Department has borne its burden of establishing that the statements McBreairty made that are the subject of this lawsuit were devoid of factual or legal merit. McBreairty's anti-SLAPP motion was therefore correctly denied.

IV. <u>**The School Department Was Injured by Mr. McBreairty's Conduct.**</u>

To meet its burden as to the second part of prong two – the requirement that the Plaintiff show that it suffered actual injury -- this Court has said:

> "We have interpreted the statutory requirement that the nonmoving party must demonstrate 'actual injury' to mean that 'the record must contain evidence from which damage in a definite amount may be determined with reasonable certainty . . . [T]h facts in the record must allow the amount of damages to be determined with 'reasonable, as distinguished from mathematical certainty.' And have expressly stated that the amount cannot be left to 'mere guess or conjecture.'"

Camden Nt. Bank v. Weintraub, 2016 ME 101, ¶ 12, 143 A.3d 788, *quoting Schelling v. Lindell,* 2008 ME 59, 17, 943 A.2d 1226. This case is a little bit different from most anti-SLAPP cases because here, the School Department is not asking for an award of damages but rather a declaration and injunctive relief and part of the basis of that request is that it cannot be made whole with just an award of damages. It needs injunctive relief to protect its employee in the future. Regardless, however, it can prove that it suffered measurable damages and it offered such proof in opposition to Mr. McBreairty's motion in the form of Superintendent Grant's Affidavit.

Specifically, he has explained that the School Department has suffered measurable damages in paying substitute teachers during Ms. Cook's absences. App 080 (Grant Aff. ¶ 18). He has also outlined the potential for employment claims brought by her because of the School Department's inability to protect her from bullying and harassment.

In his brief, Mr. McBreairty appears confused about this prong. He includes a lengthy and completely irrelevant discussion of what level of severity must be reached to be recoverable emotional harm. This claim is brought by the Hermon School Department, not Ms.

Cook so what level of emotional harm she suffered is not the issue.[4] The burden on the School Department, for the purpose of the special motion to dismiss, is to show that it was injured and that is what it did.

V. The Complaint States a Claim.

Finally, Mr. McBreairty argues that the superior court should have dismissed the complaint under M.R. Civ. P 12(B)(6) for failure to state a claim. This argument should be rejected because that was not relief Mr. McBreairty requested in his initial motion. *See* App. 022 (motion made pursuant to 14 M.R.S. § 556 only). Furthermore, it is an argument is not well developed in McBreairty's brief, *see* Blue Brief p. 39, and therefore, pursuant to the "settled appellate rule" it is waived. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290, 293.

In any case, this argument simply reprises Mr. McBreairty's earlier argument that the School Department lacks standing because is not injured. For the reasons discussed above, the School Department has suffered quantifiable injury because of Mr. McBreairty's bullying behavior directed at its employee. Moreover –

[4] McBreairty contention that "criticism comes with the territory of public employment" is nothing short of offensive. Blue Brief at 34. So too is his suggestion that he "helped" her because his hurtful words got her promoted.

and perhaps more important for the ultimately relief requested in this action – the School Department has suffered significant irreparable injury in its inability to protect its employees from bullying by those outside of the school. In his brief, Mr. McBreairty falsely states that the School Department admitted that its Workplace Bullying Policy does not apply to him. Blue Brief at 39. In fact what the School Department pled is not that the policy does not apply to Mr. McBreairty – it unquestionably does – but that the School Department lacks the ability to enforce the policy with respect to McBreairty because he is not a part of the school community. That is really the crux of this case. In enacting subsection 22 of 20-A M.R.S. § 1001, the Maine legislature specifically recognized the negative effects that bullying of school employees can have and enacted the provision to "ensure the safety of employees and an inclusive environment for all employees and students in public school." Mr. McBreairty's apparent belief that because he is not connected to the school, he should be given free rein to bully and harass its employees is contrary, to the purpose of the statute and exactly why the Hermon School Department needs judicial intervention. The School Department has the obligation – both

morally and by statute – to protect its employees from being bullied, harassed and defamed and without the help of the court it cannot do so. This case is not about the First Amendment, it is about the safety of public school employees. The decision of the Superior Court should be affirmed.

CONCLUSION

For all of the foregoing reasons, the appeal of Defendant-Appellant Shawn McBreairty should be dismissed.

Dated: October 27, 2023

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CERTIFICATE OF SERVICE

I, Melissa A. Hewey, hereby certify that on this 27th day of October, 2023, I served two copies of the foregoing Brief of Appellee Hermon School Department upon counsel for Appellant Shawn McBreairty per agreement of counsel, by email and by U.S. Mail, pre-paid postage.

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