

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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SHAWN MCBREAIRTY,

CIVIL ACTION

Plaintiff,

Docket No: 1:24-cv-00053-LEW

-versus-

BREWER SCHOOL DEPARTMENT,  
GREGG PALMER, in his personal  
and official capacities,  
BRENT SLOWIKOWSKI, in his  
personal and official capacities,  
MICHELLE MACDONALD, in her  
official and personal capacities,

Defendants.

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Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for  
**Hearing re. Motion No. 59**, held before **THE HONORABLE LANCE E.  
WALKER**, United States District Court Judge, in the United  
States District Court, Edward T. Gignoux Courthouse, 156  
Federal Street, Portland, Maine, on the 4th day of December,  
2024, at 11:21 a.m. as follows:

Appearances:

For the Plaintiff: Marc Randazza, Esquire  
Robert Joseph Morris, II, Esquire

For the Defendants: Melissa Hewey, Esquire  
James Haddow, Esquire

Michelle R. Feliccitti, RPR  
Official Court Reporter

(Prepared from manual stenography and  
computer-aided transcription.)

1 (Open court.)

2 THE COURT: Good morning, folks. We're here in the  
3 matter of McBreaity versus the Brewer School Department. This  
4 is Civil Case No. 1:24-53-LEW.

5 I'll have counsel please introduce themselves for the  
6 record.

7 MR. RANDAZZA: Your Honor, this is Marc Randazza on  
8 behalf of the plaintiff. And if I could ask the Court for an  
9 indulgence, a new recruit from my Florida office, Ms. Kylie  
10 Werk, is here, and I'd like her to have the experience of  
11 sitting at counsel table, even though she's not admitted pro  
12 hac in this case.

13 THE COURT: Of course. Are you sure you want to sit  
14 this close to the line of fire?

15 MS. WERK: I'm going to take it, Your Honor.

16 THE COURT: Okay. Okay. All right. Well, very good.  
17 Welcome.

18 MR. HADDOW: Thank you, Your Honor. My name is James  
19 Haddow. I'm here on behalf of the defendant, Michelle  
20 MacDonald.

21 MS. HEWEY: Melissa Hewey for the Brewer School  
22 Department, Gregg Palmer, and Brent Slowikowski.

23 THE COURT: Right. Good morning. Good to see you all  
24 again.

25 Mr. Randazza, this is your motion. I'm ready to hear from

1     you when you're ready.

2             MR. RANDAZZA: Do you prefer us from table or podium?

3             THE COURT: Podium would be nice. Thank you.

4             MR. RANDAZZA: Thank you for seeing us again, Your  
5 Honor. May it please the Court, Your Honor, this case is a  
6 very simple matter when you boil down, move aside all of the  
7 extraneous information. It's really a case about freedom of  
8 the press, freedom of expression, our most cherished freedom.

9             The article, itself, in question came to be because there  
10 was some students who circulated a petition at their school in  
11 opposition to a school policy. What we think about that policy  
12 is irrelevant. These students had a right to discuss that, and  
13 they felt that their speech was unlawfully suppressed. So they  
14 spoke to a journalist, Mr. McBreairty. Mr. McBreairty  
15 published an opinionated article about the situation and used a  
16 photograph that had been circulating widely. And it is part of  
17 the record here that Mr. -- and relevant that Mr. McBreairty  
18 did not create that article. And for reference at ECF 25-1,  
19 paragraphs four through eight in the complaint, at 63 and 64  
20 establish that. And that has not been controverted.

21             Mr. McBreairty then, after publishing, received a threat  
22 from the school department, through its attorney, of further  
23 action. Now, that threat, itself, is in the record at ECF 1-5.  
24 Now in that threat, Ms. Hewey references 17-A M.R.S.  
25 Section 511, a criminal statute, then references other

1 statutes, somewhat implying that there would be a civil claim.

2 Now the TRO hearing we heard some I don't know if we call  
3 it testimony or argument from Ms. Hewey that perhaps this  
4 didn't mean legal action. I don't know what, We will be forced  
5 to take further action against you, means other than that.  
6 There was some implication that it might be something other  
7 than legal action; but I don't find that credible, not in the  
8 least.

9 Now I have -- I have brought an exhibit here to add to the  
10 record that I have provided to my friends. They have not  
11 stipulated to its entry, so we may wish to deal with that. I  
12 have also provided a copy to the Court.

13 At the TRO hearing, this Court did not have the benefit of  
14 the Berge decision out of the First Circuit. The Berge  
15 decision is really on all fours here. Except I would say that  
16 the threat from the Gloucester Public Schools to Mr. Berge is  
17 probably a little less ominous coming from the director of  
18 human resources. But in this threat, which is an identical  
19 legal situation to what we see here, Mr. -- well, actually  
20 Mr. Berge was perhaps on a little less solid footing because  
21 Mr. Berge actually created the content at issue that the  
22 Gloucester School Department objected to. The Gloucester  
23 School Department claimed that it was illegally created and,  
24 thus, could not be published. Mr. Berge waived the issue of  
25 whether it was legally created or not and simply sat on the

1 right to publish it. And the First Circuit held, in no  
2 uncertain terms, that he had every right to publish it and said  
3 that was clearly established in Bartnicki and in Jean, a First  
4 Circuit case.

5 Bantam Books versus Sullivan, 372 U.S. 58, pinpoint at 68,  
6 has a very nice quote. It says: People do not lightly  
7 disregard public officer's thinly-veiled threats to institute  
8 criminal proceedings. This threat from Ms. Hewey on behalf of  
9 the school department is hardly thinly veiled. Here is a  
10 criminal statute, and we're going to take further action.

11 Now with respect to the photograph, that's really what  
12 we're very keyed in on. This Court asked for supplemental  
13 briefing on whether that photograph was protected. I think, in  
14 no uncertain terms, it is. Even if -- let's just presume for  
15 the moment that that photograph was created illegally. I don't  
16 see how it could be created illegally. They seem to be resting  
17 on the issue that the statute says if a photograph was taken in  
18 a bathroom, it is a violation of the law.

19 And I thought of an absurd example, but an example might  
20 be let's say Donald Trump and Joe Biden happen to be in that  
21 bathroom at the same time and got into a fistfight and somebody  
22 took a photo of that. That photograph would be illegal?  
23 Unpublishable? Under what exception to the First Amendment?  
24 Wouldn't be obscene. Wouldn't be defamatory.

25 THE COURT: It would be highly marketable, but I'm not

1     sure it would be obscene or defamatory.

2             Let me try to -- let me try to jump in, Mr. Randazza, and  
3     move this along a little bit. I want to get back to the issue  
4     of the -- of the photograph. And I also want you to start to  
5     think a little bit about whether the relief that you're seeking  
6     needs to be tailored a bit. And what I'm thinking about  
7     specifically is you seem to want me to give a blessing piece by  
8     piece to the lawfulness or at least the nonactionable nature of  
9     every single statement contained in the late Mr. McBreairty's  
10    article. Is that a fair -- first of all, is that a fair  
11    observation by me?

12            THE COURT: It's fair, but I think what I'm seeking is  
13    a very -- is a much narrower bit of relief here.

14            THE COURT: Tell me.

15            MR. RANDAZZA: Yes. For starters, I -- I want to make  
16    it clear that if any individual involved in this feels that  
17    they have a claim, I don't think it would be proper for me to  
18    ask nor for you to enjoin them from taking their own action.  
19    I'm only here to fight the Government. And to the extent that  
20    any individual here is acting as an agent of the Government,  
21    then I want them enjoined. If they want to bring a separate  
22    claim, I can't really see how you could pre -- preemptively  
23    issue an order that somebody couldn't bring a personal civil  
24    claim.

25            THE COURT: Right. I agree with you, so far as that's

1 concerned. I don't think there's any such thing as an official  
2 capacity lawsuit by a municipal office. In other words, if one  
3 of the defendants as a sole defendant wanted to bring a claim,  
4 they could, I suppose. But I understand you've now refined  
5 your request --

6 MR. RANDAZZA: Yes.

7 THE COURT: -- for relief so it would run against the  
8 individual defendants exclusively in their official capacity.

9 MR. RANDAZZA: Correct.

10 THE COURT: Okay.

11 MR. RANDAZZA: Now as far as whether the Government  
12 can bring a civil claim, well, we -- we have a pending case in  
13 Hermon versus McBreaity.

14 THE COURT: Right.

15 MR. RANDAZZA: Where the Government has done that.

16 THE COURT: Right. So -- so let me -- I don't want to  
17 steal your thunder, and I want you to -- I want to allow you as  
18 much time as you need to get to what you perceive to be the  
19 likelihood of success on the merits of the case. And I read  
20 everyone's submissions carefully and repeatedly.

21 But let me just share this. I think -- I think that your  
22 client stands a reasonable chance of demonstrating, for  
23 purposes of the motion for preliminary injunction, a likelihood  
24 of success on the merits.

25 Before we get to merits, we have the issue of standing,

1 and that's more vexing to me. And I want to spend a little bit  
2 of time on standing, because I see that as a potentially -- I  
3 haven't been able to resolve it satisfactory to me yet, and I'm  
4 wondering if you can help me.

5 What is the ongoing constitutional deprivation to  
6 Mr. McBreairty?

7 MR. RANDAZZA: The article, itself, remains  
8 unpublished.

9 THE COURT: Right. He doesn't have a constitutional  
10 right anymore to publish the article; true? I mean, that seems  
11 like a fairly uncontroversial statement.

12 MR. RANDAZZA: I don't see why not.

13 THE COURT: He's deceased.

14 MR. RANDAZZA: Correct.

15 THE COURT: So he can be -- you can seek a remedy for  
16 historical deprivation of a constitutional right, of course.  
17 But I'm not sure, for purposes of enjoining the school  
18 department from threatening an action, making him withdraw the  
19 article is an ongoing deprivation of a constitutional right  
20 that he no longer has.

21 So now we're talking about whether Mrs. McBreairty or the  
22 estate has that -- can maintain that right for purposes of  
23 preliminary injunction.

24 MR. RANDAZZA: I believe that they can, and I think we  
25 briefed that.



1           THE COURT:  You did.  So I'm -- so -- but I -- before  
2 we leave that, I just want to be sure that I'm being clear.  
3 The preliminary injunction is to cease an ongoing deprivation  
4 of the constitutional right, at least in this context.

5 That is to say, my relief would be something like the school  
6 department can't stand in the way from publishing -- from  
7 Mr. McBreairty publishing the article that he wants to publish,  
8 that he withdrew upon threat from the Brewer School Department.

9           If we use that as sort of a foundation, now we're moving  
10 to whether or not there -- there is an ongoing constitutional  
11 deprivation that is possessed now by either Mrs. McBreairty as  
12 the personal representative of the estate, or the estate, or  
13 Mrs. McBreairty as a successor.

14          Now, she's not a party.  Mrs. McBreairty is not a party to  
15 the case as a successor.  So we're limited to whether or not  
16 there's an ongoing actionable First Amendment claim that the  
17 estate can claim for purposes of preliminary injunction.  I  
18 know you've requested money damages.  I'm not saying that that  
19 affects --

20          MR. RANDAZZA:  Yes.

21          THE COURT:  -- the request for money damages.

22          What I'm saying is for purposes of preliminary injunction,  
23 isn't it true that we would have to be satisfied that the First  
24 Amendment claim is now owned, essentially, by the PR of the  
25 estate, Mrs. McBreairty?

1 MR. RANDAZZA: Yes.

2 THE COURT: How -- how does that work?

3 MR. RANDAZZA: Mrs. McBreairty now possesses, the  
4 estate possesses the copyright to the work. Every right that  
5 was within that work has now descended to her as the personal  
6 representative.

7 Now she intends to -- upon having this cloud of a threat  
8 of criminal prosecution or civil prosecution removed, she  
9 intends to republish it. Not only in its original place,  
10 but there has been some talk in publishing it in a more  
11 widely-circulated publication.

12 Now we can look at this one of two ways. Is the threat  
13 against just Mr. McBreairty? If they wish to admit that on the  
14 record, that it wasn't about the content, it was about the  
15 person, then we would be amending our complaint, and we would  
16 probably be bringing an abuse of process claim. But what we're  
17 looking at here is this is a threat against the content. This  
18 doesn't say, Mr. McBreairty can't publish this photograph. It  
19 doesn't say, Mr. McBreairty can't make these statements. It is  
20 that these are illegal. So I would think even a third party  
21 could walk in here and claim a right that if they wish to  
22 publish it, if they got that right from Mrs. McBreairty, to do  
23 so and they'd even have standing.

24 So the question here is, you have an article, a matter of  
25 public concern, that has remained suppressed for months now

1 because it is under this cloud that anyone who publishes this  
2 may be facing criminal prosecution or threat of criminal  
3 prosecution from the Government, which they should not take  
4 lightly. Mrs. McBreairty is ready to pull the trigger on  
5 publication upon getting that clearing of that cloud.

6 THE COURT: So if Mr. McBreairty sold the intellectual  
7 property rights to his best friend Joe, and this was after the  
8 school department made him withdraw the article --

9 MR. RANDAZZA: Yes.

10 THE COURT: -- then he sold the intellectual property  
11 rights to his best friend Joe, and Joe came to court suing the  
12 school department and the array of defendants we have before us  
13 now claiming much in the same way you're claiming now that  
14 because his intellectual property right in the article that he  
15 wants to publish is under the cloud of potential legal action  
16 by the school, that he, nevertheless -- Joe, nevertheless, has  
17 standing to bring a claim?

18 MR. RANDAZZA: Not just potential, but threatened.  
19 But, yes, I would make that argument. I might even make the  
20 argument that if he released this to the public domain, any  
21 member of the public that wished to publish it should be able  
22 to come in here. Or this photograph, for example, is something  
23 that other press outlets would have every right to publish.

24 THE COURT: Mm-hmm.

25 MR. RANDAZZA: So if the Press Herald wanted to come

1 in here and seek -- seek an injunction against any criminal  
2 prosecution or criminal threat of publishing this, I think  
3 they'd have standing. But Mrs. McBreairty, I think, has a very  
4 clear line of standing here. I mean, that would be a somewhat  
5 novel --

6 THE COURT: Yeah.

7 MR. RANDAZZA: -- novel case if we came in either for  
8 Joe or for the Press Herald, or for just some person off the  
9 street. But Mrs. McBreairty is simply --

10 THE COURT: Right.

11 MR. RANDAZZA: -- the receiver of the pass here upon  
12 Mr. McBreairty's demise. All of his rights have descended to  
13 her.

14 THE COURT: So Mr. Randazza, I think I have a slightly  
15 different question. I think I recall during either a  
16 conference of counsel we had last summer or it might have also  
17 occurred during our last argument, that the school's  
18 position -- I think it was relatively settled that the reaction  
19 by the school was a result of the fact that there was one  
20 transgender student who was affected by the petitioning  
21 activity and by the commentary in Mr. McBreairty's article. My  
22 understanding is that that student has and did graduate from  
23 the school last spring. Is that also your understanding?

24 MR. RANDAZZA: That is my understanding, Your Honor.

25 THE COURT: Okay. And so how can the threat be

1 certainly likely to occur in the absence of the transgender  
2 student as part of the student body at Brewer High School?

3 MR. RANDAZZA: Well, if the school is now taking the  
4 position, which they've had every opportunity to do so up until  
5 now, if they're now taking the position that since this student  
6 has graduated they no longer will seek any legal sanction  
7 against anyone for this, well, that might be a different story.  
8 That would be a very convenient admission here at this hearing.  
9 They could have done it at any point up until today. And I  
10 don't know that they have time to conference with their client  
11 about it, nor do I think that any such promise would be  
12 something that I would -- I would take unless it was part of a  
13 stipulated injunction.

14 The fact it was only one student affected I don't think  
15 changes the legal landscape. We might recall from, you know,  
16 what I thought was -- your Cape Elizabeth case, which was  
17 upheld by the First Circuit, which had some of the best First  
18 Amendment language I've ever read. And not just to butter you  
19 up.

20 THE COURT: No, I'm open -- I'm open to that.

21 MR. RANDAZZA: You should be proud of that. And it  
22 was one student affected there, yet they -- they still argued  
23 that a student should not be -- not be able to express  
24 themselves because it might bother one student. And, you know,  
25 in the LM case out of the First Circuit up on appeal to the

1 supreme court, maybe the rules are different when there's a  
2 transgender student involved. That seems to be the First  
3 Circuit's position right now. Which I'm -- the future's market  
4 on that being upheld is not paying off very well.

5 Nevertheless, I don't think that's relevant. I think  
6 what's relevant here is this school department, like the  
7 Gloucester school system, seems to think when it doesn't like  
8 an article, it can simply make threats of criminal prosecution.  
9 The only difference here is they're also threatening civil  
10 prosecution. So we changed our mind now. If that's their  
11 argument at the preliminary injunction stage, I -- you know,  
12 we'll -- I'll leave it up to them to make that -- to make that  
13 representation.

14 THE COURT: Right. So the first -- you remember when  
15 we were before -- how did you pronounce that? I'm pronouncing  
16 it Berge. Am I pronouncing that --

17 MR. RANDAZZA: Berge.

18 THE COURT: Berge. The Berge case, when that came  
19 down -- before that came down, you and I were in Bangor, and we  
20 were having a hearing. And the Berge case, I'll concede -- and  
21 I'm going press your colleagues on the side on this point --  
22 seems to be a significant development from the circuit, at  
23 least as it applies to in this case. But it also seems to me  
24 to be slightly a more robust framing of the standard, which is  
25 the standard was whether it could be seen to be sham litigation

1 against the person threatened who is claiming a First Amendment  
2 retaliation claim.

3 Now Berge says that it has to be -- I have to find that it  
4 is clearly a threat. Further action has to be under a clearly  
5 inapt statute, which I think can be expanded, probably  
6 reasonably, to just says, there's no reasonable cause of action  
7 to be had in any case. I wanted to ask you about that.

8 MR. RANDAZZA: I think Berge -- I think Jean was --  
9 Jean seemed clear to me, but it didn't seem clear to, I think,  
10 the lower court in Massachusetts. So I think Berge simply  
11 really, really sharpens --

12 THE COURT: I agree.

13 MR. RANDAZZA: -- Jean and Bartnicki to the point not  
14 only is it very clear that a threat of -- even a threat, as  
15 shown in this, which I think is much lighter than the one shown  
16 in this case, is enough.

17 Now Berge went on further to say, this is clearly  
18 established unless there's no qualified immunity. If we're  
19 analyzing whether it's a threat of sham litigation, which I  
20 don't think we have to get that far, you know, I think that --  
21 that will be resolved if we -- I mean, that question can be  
22 sharpened, I think, by the defense if this is simply a matter  
23 of a threat directed at Mr. McBairty and not at the content,  
24 well, that would seem to be an admission of sham litigation  
25 right there. It's simply, we don't like Mr. McBairty, not we

1 think this content was actually illegal.

2 THE COURT: What kind of behind the curtains, behind  
3 the record forecasting do I need to do, do you suppose? What  
4 does the First Circuit mean when it says if I find that the  
5 threat was made under a clearly inapt statute? What does  
6 that -- what does that mean? What do I have to be satisfied  
7 of?

8 MR. RANDAZZA: Well, I think you would look at the  
9 three levels of threat in this -- in this letter. And you have  
10 to answer -- probably have to answer that question three times.  
11 So one would be -- is publication, not creation. So, again,  
12 Mr. McBreairty is not arguing about the propriety of the  
13 creation of that photograph.

14 THE COURT: Right.

15 MR. RANDAZZA: If the photographer were to reveal  
16 themselves and ask me to come and argue that, I would argue  
17 that it was inapt as opposed to them.

18 THE COURT: But as to each of those components, do I  
19 have to get down on hands and knees and look at the grains of  
20 sand and determine that there is very little likelihood of  
21 success on the threatened claims of further action? No  
22 success? What kind of qualitative analysis do I need to do to  
23 conclude that the threat was made pursuant to a clearly inapt  
24 statute?

25 MR. RANDAZZA: Your Honor, if you're talking about



1 getting down to the grains of sand, I think you could go to  
2 orbit and look through no telescope at a beach and still come  
3 to that conclusion. You think -- just think about the  
4 question. There's a photograph. Can someone be prosecuted  
5 criminally for publishing the photograph. If that -- forget  
6 about what statute. Never mind the statute. If it's not child  
7 pornography and thus subject to Ferber, and it's not obscene,  
8 which prior to a trial nothing is obscene until after the jury  
9 applies the Miller test and says it's obscene, or maybe, just  
10 maybe, if it violated a state secret of some capacity that I  
11 can't even fathom.

12 THE COURT: Right.

13 MR. RANDAZZA: So grain of sand, we don't need that.  
14 You just need to look at the entire coastline.

15 THE COURT: Okay.

16 MR. RANDAZZA: There's no possible way that this  
17 threat could have been made in good faith.

18 THE COURT: Right. Can you talk to me about Defendant  
19 MacDonald's -- at least the content in the article pertaining  
20 to Defendant MacDonald's child that was -- as I understand it,  
21 there was --

22 MR. RANDAZZA: Yes.

23 THE COURT: -- a portion of Mr. McBreairty's article  
24 which commented on Ms. MacDonald's child, who McBreairty  
25 alleged was a transgender student at another -- at another

1 school. Not at -- not at Brewer, as I understand it, at  
2 another --

3 MR. RANDAZZA: Yes.

4 THE COURT: -- at another school.

5 I'm wondering if you could talk to me a little bit about  
6 why I should regard that as a matter of speech which is a  
7 matter of public concern and, therefore, protected.

8 MR. RANDAZZA: Well, it's part of the ongoing  
9 discussion in the article. Mr. McBreaity had very strong  
10 opinions, as many people do, about the -- we'll call it the  
11 transgender question. Now, his statement, the statement that  
12 they sought to suppress, was simply, she's a girl who pretends  
13 to be a boy on the male track team, usually coming in dead  
14 last. I'm at a loss as to what exception to the First  
15 Amendment that would fall under where the Government gets to  
16 make a threat about it.

17 Now if Ms. MacDonald, herself, has some theory, some civil  
18 claim -- again, back to the beginning of our colloquy -- I  
19 don't think the Court should step in the way of this. But this  
20 did not come from her, personally. This came from the  
21 Government, threatening further action.

22 What right does the Government have to say that you can't  
23 publish that. Everything is presumptively First Amendment  
24 protected. Is it obscene? Of course not. We don't even  
25 have -- I don't even think you could colorably say that. It's

1 not child pornography. It's not a state secret. It's not a  
2 traditionally-covered topic that the First Amendment would say,  
3 you know, you're not welcome here.

4 THE COURT: So your position is, as an initial  
5 starting point, it's -- unless it falls into one of those  
6 exceptions, all speech is de facto protected speech; is that  
7 your position?

8 MR. RANDAZZA: That is my position.

9 THE COURT: Okay.

10 MR. RANDAZZA: Yes.

11 THE COURT: All right. Mr. Randazza, is there  
12 anything else you'd like to direct my attention to?

13 MR. RANDAZZA: At this time, no, Your Honor.

14 THE COURT: All right.

15 MR. RANDAZZA: Thank you.

16 THE COURT: Thank you, sir.

17 I care not -- you know, I'd like to hear from  
18 Ms. MacDonald's counsel.

19 MR. HADDOW: Thank you, Your Honor.

20 THE COURT: Good morning.

21 MR. HADDOW: I'd just like to begin with the elements  
22 of this case that are unique to Michelle MacDonald. As the  
23 Court is aware and as the verified complaint establishes,  
24 Ms. MacDonald is a teacher at Brewer High School. She's not  
25 any part of the administration, not a principal. There's no

1 indication here that she is a decisionmaker in any capacity on  
2 behalf of either the high school or the school department.  
3 Furthermore, the statements that were made about Mrs. MacDonald  
4 specifically -- about Ms. MacDonald specifically in  
5 Mr. McBreairsty's article, which are detailed at some  
6 length in the verified complaint, were not the subject of  
7 any of the takedown requests. As to her, personally, nothing.  
8 So he was never asked to stop talking about Michelle MacDonald.  
9 To date, there is nothing in the record in this case that makes  
10 any link between Michelle MacDonald and counsel for the Brewer  
11 School Department.

12 The -- the seminal e-mail, if you will, Exhibit 5 to the  
13 complaint, starts out with, I'm counsel for the Brewer -- I  
14 represent the Brewer School Department. The only argument in  
15 opposition to the statement that Michelle MacDonald had nothing  
16 to do with what the plaintiff characterizes as a threat is in  
17 the reply memorandum where counsel for the plaintiff says that  
18 the Court should consider the possibility of a parent  
19 authority. Which is to say, somehow or another, counsel for  
20 the school department had a parent authority on behalf of  
21 Michelle MacDonald.

22 A parent authority, however, is a concept that arises from  
23 the conduct or statements of the principal. In other words,  
24 the principal has to have done something to create, in the mind  
25 of a third party, the idea that someone is acting as their

1 agent. And there's nothing. So fundamentally, there is simply  
2 no connection between Michelle MacDonald and the -- the  
3 communication from counsel for the school department that is  
4 the basis for the plaintiff's claims. And that's really the  
5 primary reason why there can be no likelihood of success on the  
6 merits in this case against her as a defendant.

7 THE COURT: Thank you.

8 MR. HADDOW: So I don't have anything further.

9 THE COURT: I don't have any questions.

10 MR. HADDOW: Thank you, Your Honor.

11 THE COURT: Ms. Hewey.

12 MS. HEWEY: Thank you. Good morning, Your Honor.

13 THE COURT: Good morning.

14 MS. HEWEY: With the Court's permission, I'd like to  
15 just start by talking a little bit more about the facts.

16 THE COURT: Sure.

17 MS. HEWEY: I know plaintiff's counsel has outlined  
18 them in some -- some detail, but I think that they're  
19 important.

20 So we start here with Mr. McBreairty, who I would dispute  
21 the characterization of him being a journalist -- but we'll put  
22 that aside -- publishing online a lengthy article entitled,  
23 Girls bathrooms are not safe spaces when males are present.

24 THE COURT: Ms. Hewey, can you pull the microphone  
25 down? Not so much because I can't hear you, but I can't see.

1 It's distracting because it's in front of your face.

2 MS. HEWEY: I don't like people to see me too closely.

3 So he talks about the issue of -- of males and females  
4 being in -- in bathrooms in schools. He talks about mental  
5 health issues of gender incongruent youth. He is very critical  
6 of the school principal and the school superintendent. Calls  
7 the school superintendent a trans/stripper/groomer/clown  
8 performing in female blackface. Lot of -- a lot of things  
9 going on there. But in addition, he -- he talks about a few  
10 things that were particularly disturbing to the people in the  
11 school.

12 So there's the picture of students in the bathroom. There  
13 are two specific discussions of one student, one trans student.  
14 One of which accuses that trans student falsely of sexual  
15 assault. And then is the very unkind -- then I think I would  
16 agree with the suggestion of the Court, not a matter of public  
17 concern -- statement about Ms. MacDonald's daughter being a  
18 girl who pretends to be a boy on the male track team, usually  
19 coming in dead last. Just mean, and nothing else.

20 So what happened, as was established in the TRO record,  
21 was that this caused significant distress to the student who  
22 was then unable to come to school, and to the employee. That,  
23 in turn, gave rise to, in the school's judgment, an obligation  
24 to address what was clearly bullying, which is prohibited by  
25 Maine State Statute 28 M.R.S. Section 6553 and 6554.

1           So now the school needs to, it believes, do something  
2 about it. And so it wrote this e-mail to -- wrote, through  
3 counsel, an e-mail to Mr. McBreaity. That e-mail, very  
4 importantly, starts with, Although we acknowledge that much --  
5 much of that post contains your opinions on matters of public  
6 concern and recognize your right to express them. So all of  
7 this information on -- most of the information in that post is  
8 clearly acknowledged to be his right to publish.

9           And all that was asked was to remove those three topics:  
10 One, the picture of the students in the bathroom. And it is  
11 true that the criminal statute was cited. There is no threat  
12 in this e-mail to criminally prosecute anyone. The purpose of  
13 citing 17 M.R.S. -- 17-A M.R.S. Section 511, it was simply to  
14 underscore that publishing that was an invasion of students'  
15 privacies. So that was number one. Number two is the two  
16 specific things that were targeting the one student. And  
17 number three was the thing that was upsetting the staff member.  
18 That was all. Everything else, all of your views you can  
19 keep -- you can publish.

20           And then came what has been characterized over and over  
21 again by plaintiff's counsel as the threat. If you don't take  
22 them down, we will be forced to take further action against  
23 you. That doesn't say we're going to criminally -- pursue you  
24 criminally. It doesn't say we're going to sue you. It just  
25 says, we're going to do something else. That's what happened.

1 So those are the facts that were before the Court and the TRO.

2 Two things, both of which have been eluded to in  
3 plaintiff's -- in the -- the argument by plaintiff's counsel  
4 occurred since then: One is that Mr. McBreairty passed away,  
5 and his PR was substituted as a plaintiff; and the other is  
6 that the student who was targeted graduated. And when that  
7 student who was targeted graduated, that removed any reason for  
8 the school department to be involved further in publications  
9 about them. That, clear and simply, moots the request for  
10 preliminary injunction, I would say. But let me talk a little  
11 bit --

12 THE COURT: Do I need to -- put a pin in that for a  
13 second, if you would, Ms. Hewey, because if I don't ask you  
14 now, I'll forget.

15 If -- so I traveled down this road a bit with  
16 Mr. Randazza. Why wouldn't -- how is this case not mooted?  
17 It seems that Mr. Randazza is open to the possibility that it  
18 be mooted. Of course, he wants the assurance that I think you  
19 just gave, which is the school, now with the graduation of the  
20 trans student, has no interest in policing the publication of  
21 the article. Is that, in fact, the position of your client?

22 MS. HEWEY: That is absolutely correct. The school  
23 has --

24 THE COURT: Why are we here?

25 MS. HEWEY: Because the plaintiff --



1 THE COURT: Because I called you here, but --

2 MS. HEWEY: Well, I didn't want to say that. I  
3 thought that would be a little --

4 THE COURT: But why -- why are we here?

5 MS. HEWEY: There -- that is a big question in my  
6 mind. I don't -- I think that the preliminary injunction part  
7 of this case is clearly moot for a number of reasons. One  
8 being that -- and what we've said all along is that the only  
9 reason that the school department took the action it did was  
10 because it felt it had an obligation under state law to address  
11 the bullying of its student and its faculty. So now that the  
12 student is gone, it doesn't have that obligation. It would  
13 have -- it has no reason to become -- to be involved in this  
14 issue anymore.

15 THE COURT: You don't need to tell me the answer to  
16 this question, but you could if you wanted to. Has that been  
17 communicated by you and your client to Mr. Randazza and his  
18 client, or is this coming as news to him today?

19 MS. HEWEY: I -- it sounded like it was; but I didn't  
20 understand why it was. I think we -- we -- in fact, I think we  
21 specifically said that in our -- in our brief in opposition to  
22 the motion for preliminary injunction. So this is not news.

23 THE COURT: Okay. Go ahead.

24 MS. HEWEY: So I think, that for that reason, that the  
25 school department has no dog in the fight, so to speak, anymore

1     there is -- the request for preliminary injunction is -- is  
2     moot.

3             THE COURT:   So your client has withdrawn the threat --  
4     let's just call it the threat of further action regarding the  
5     publication of the article and takes no position about its  
6     future publication.

7             MS. HEWEY:   Right.   Because we have no real standing  
8     to complain about an article about somebody who is not a  
9     student in our school.

10            THE COURT:   Okay.

11            MS. HEWEY:   So that's number one.   Number two, I  
12     think, is -- and I don't -- we don't need to go any further,  
13     I think.   But to the extent that we did, the fact that  
14     Mr. McBreairty is deceased, he has no constitutional rights  
15     anymore, as the Court has -- has observed, means that there  
16     can be no reason for a preliminary injunction.   And I think the  
17     First Circuit was really clear about that in the Goodwin case.  
18     If you're not moving forward to protect a constitutional right,  
19     then there's no reason for an injunction.   I think I would just  
20     say, sort of parenthetically in response to the discussion  
21     about intellectual property rights of Joe, I think it was  
22     Joe --

23            THE COURT:   Yeah, I think so.

24            MS. HEWEY:   -- that what we -- what we are talking  
25     about here is not intellectual protection of intellectual

1 property rights. We're talking about protection of  
2 constitutional rights because those constitutional rights no  
3 longer exist in the future. And I agree with you that to the  
4 extent the plaintiff wants to continue this case for damages  
5 for whatever Mr. McBreairty suffered in the past, I -- I don't  
6 think that claim is moot, but I do think that any claim for  
7 injunctive relief has to be moot because he's no longer here.

8 The fact that -- I think the suggestion that anybody could  
9 jump into this case because they felt like they might want to  
10 publish this is -- I don't think there's any case law anywhere  
11 that would support that. The -- the alleged threat was made to  
12 one specific person, and that's the only person that can pursue  
13 the arguments that are occurring here.

14 THE COURT: So putting that out to its logical  
15 conclusion, I take it that your analysis is something along the  
16 lines of the forward-looking constitutional deprivation of  
17 Mr. McBreairty's First Amendment rights, if there are any,  
18 don't pass to the estate, don't pass to Mrs. McBreairty, even  
19 if she were to avail herself to amend the pleadings to be a  
20 successor rather than a PR. The bottom line is those rights do  
21 not pass to her, at least for prospective injunctive relief, of  
22 prospective constitutional depravations.

23 MS. HEWEY: So that's part of it. But the other part  
24 of it is that -- and --

25 THE COURT: That's a pretty big part of it.

1 MS. HEWEY: That's not entirely accurate, because I do  
2 think that any right for any claim for damages for the past  
3 does pass to her.

4 THE COURT: I am only limiting my observation to  
5 injunctive relief for ongoing constitutional harms. They do  
6 not pass to an entity such as an estate. They do not pass to  
7 Mrs. McBreairty as the PR of the estate. And they don't even  
8 pass -- and this is more of a question than a statement, but  
9 it's framed as a statement -- do they pass to Mrs. McBreairty  
10 as a successor. In other words, if she was a beneficiary of  
11 the intellectual property rights of the article and wanted to  
12 push the button and publish them this afternoon, could she come  
13 into court and ask, as she is asking, that she deserves to have  
14 a preliminary injunction to protect her from threats which have  
15 already been made to Mr. McBreairty?

16 MS. HEWEY: I don't think. So the threats were not  
17 made to her.

18 THE COURT: They were made to him.

19 MS. HEWEY: They were made to him. And he no longer  
20 has any continuing rights. And, also, I -- I mean, I think  
21 that to the extent that she wants to publish this --

22 THE COURT: She's free to publish it.

23 MS. HEWEY: She's free to publish it.

24 THE COURT: And the school --

25 MS. HEWEY: And if she gets a threat for doing that,

1 she's free to come to court. She is not going to get that  
2 threat, but she -- if that would occur --

3 THE COURT: Well, don't bury the lead. Let's focus on  
4 whether or not your client is going to threaten further action  
5 against Mrs. McBreairty in the way that Mr. Randazza tells me  
6 that the department threatened Mr. McBreairty. I think we  
7 started out this discussion somewhat optimistically on the note  
8 that because the trans student has graduated, the school  
9 department has no dog in this fight, as you put it. In other  
10 words, they're not interested in threatening anyone, much less  
11 Mrs. McBreairty.

12 If she wants to publish the article tomorrow, she's free  
13 to publish it because the impetus, from the school's  
14 perspective, was not to do battle on a First Amendment issue in  
15 a vacuum, in the air. In other words, in the absence of actual  
16 harm to an actual trans student who was attending Brewer High  
17 School, their interest was provoked by the fact that they did  
18 have a member of their student body community who was trans,  
19 who felt cornered, and that's the reason the school department  
20 sprang into action. In the absence of that student being in  
21 the student body, there's no reason for the school department  
22 to take any further action or threaten any further action if  
23 this article is published this afternoon. Is that right?

24 MS. HEWEY: That's precisely accurate.

25 THE COURT: Is that the position of -- thank you for

1 the precisely accurate. I like to be precisely.

2 Is that the position of the school department? And if it  
3 is, I'm back to, why are we here?

4 MS. HEWEY: The only reason we're here is because  
5 there's -- as -- as counsel said, he wouldn't accept that  
6 statement. He would only accept an injunction that includes an  
7 order to that -- that effect. That's why we're here, in -- to  
8 my understanding.

9 THE COURT: Okay. So let me turn this turn of events  
10 around and ask you this. Why wouldn't -- I mean, this sounds a  
11 little bit like an impromptu judicial settlement conference.  
12 It's not. I'm just making the observation. Why wouldn't the  
13 school department be amenable to a stipulated judgment or a  
14 settlement wherein the school department takes that position?  
15 Meaning, we won't threaten any further action if this article  
16 is published.

17 MS. HEWEY: So to the extent we're talking about a  
18 settlement, I -- I can't --

19 THE COURT: Yep.

20 MS. HEWEY: I don't know what would happen.

21 THE COURT: Yep.

22 MS. HEWEY: But to the extent there would be an  
23 agreement that there's an injunction, I don't think that my  
24 client would be amenable to that because that implies that  
25 there had been some sort of threat that violated

1 Mr. McBreairty's rights, and we very strongly contest that.  
2 And just to --

3 THE COURT: We settle cases all the time without  
4 admission of liability. I mean, you could settle without an  
5 admission of liability.

6 MS. HEWEY: And, again, settlement is one thing, but a  
7 court order is something different.

8 THE COURT: Yep.

9 MS. HEWEY: And -- and I think it's a very important  
10 something different because these kinds of cases are not  
11 uncommon, and a court order would have -- could have effects on  
12 this school department, other school departments, et cetera, et  
13 cetera.

14 THE COURT: I would never impose an order enjoining  
15 the school merely on the statement by you today and in your  
16 brief, I think, that the school department has no ongoing  
17 desire to quash Mr. McBreairty's article. I'm just  
18 exploring the idea of there's two ways to look at it. One  
19 is Mr. Randazza can stand up and say, that's acceptable to  
20 me and my client. We'll file a stipulation of dismissal.  
21 The other way you can do it is to settle it affirmatively,  
22 without an admission of liability. I'm just offering that as  
23 an observation, not really as a basis upon which I'll rule one  
24 way or the other. I did want to ask you, did -- I'm sorry,  
25 did -- Ms. Hewey, did I cut you off?

1 MS. HEWEY: Well, I just wanted to -- I think this --  
2 this is a good segue into --

3 THE COURT: Go ahead.

4 MS. HEWEY: -- one specific point that I want to make  
5 on that -- the merits.

6 THE COURT: Yep.

7 MS. HEWEY: The likelihood of success on the merits.  
8 And I know that the Court has indicated a leaning towards there  
9 being a likelihood of success on the merits, and I want to push  
10 back a little bit on that. Because this is not a case like the  
11 Berge case where there was an inapt statute, a threat of  
12 prosecution under an inapt statute. And the Berge -- the First  
13 Circuit mentions that at least twice in the opinion. Once it  
14 talks about inapt statute.

15 THE COURT: Yep.

16 MS. HEWEY: And then once on page 44 it talks about an  
17 obviously groundless legal action. That's that case.

18 THE COURT: Yep.

19 MS. HEWEY: That is not this case. There was no  
20 specific threat in this case to pursue an obviously groundless  
21 action.

22 THE COURT: Well, which part of that -- which clause  
23 are you focusing on in that statement you just made? There was  
24 no threat of any kind under any statute, or we threatened but  
25 it was under a statute or a cause of action that had legs?



1 MS. HEWEY: So I'm going to object to the form of that  
2 question because it gives me an or, and I think there's a third  
3 option.

4 THE COURT: Okay. Go ahead.

5 MS. HEWEY: I don't think that it was a threat. I  
6 think that it was -- it was notification that this is an  
7 important issue that needs to be addressed.

8 THE COURT: Okay.

9 MS. HEWEY: And that we're going to do something else.  
10 But I want to -- I want to look at and assume for a moment that  
11 the something else might be litigation. Because I think that's  
12 what the Court and counsel for plaintiff has pretty much  
13 focused on. If that's the case, then the only way that an  
14 injunction could be entered in this case would be for the Court  
15 to determine that there is no possible claim that the school  
16 department could bring. And in that regard, I think the Hermon  
17 case is instructive. That's a case that pushes the envelope  
18 farther than this case.

19 And I think one of the arguments that could be made, and  
20 it is not groundless and it is inapt, is that the Maine State  
21 Legislature imposed upon schools the obligation to address  
22 bullying. Not just by people in the school community, but by  
23 everybody. And because schools have no ability to affect  
24 people in the community, the only way they can do that is  
25 through the court. So the argument would be that if the

1 legislature imposes a duty that implies a possible cause of  
2 action that has not been decided by the state courts, it may be  
3 decided by the state courts someday, but I don't think that --

4 THE COURT: I'm -- I've been hearing about this Hermon  
5 case at the law court for what seems like an eternity.

6 MS. HEWEY: It pretty much has been an eternity.

7 THE COURT: Are they going to land this plane any time  
8 soon? Or where does that case stand?

9 MS. HEWEY: Well, it's resting.

10 THE COURT: It's resting. Okay.

11 MS. HEWEY: And I will say that even if they land it,  
12 the only issue before the Court at the law court is whether the  
13 denial of the plaintiff's Anti-SLAPP motion should be reversed.  
14 So it's not going to be decided for a while. But it is an  
15 articulable, not clearly inapt, and not obviously groundless  
16 legal action. But that's important, too, for -- by what I'm  
17 saying. Because once the student is removed from the school  
18 population, that obligation to protect the student from  
19 bullying disappears, and the school no longer really has  
20 standing to bring a claim. We all agree on that.

21 So I think -- I think there -- there is not -- I don't  
22 think it's fair to say that there's no likelihood of success --  
23 I mean, that there is a likelihood of success on the merits. I  
24 don't agree that -- with counsel for plaintiff that the Berge  
25 case is on all fours with this case because it's very clear

1     that there was an inapt statute, it was almost stipulated to,  
2     and here there is a -- there are a number of things that the  
3     school department could have done.

4             THE COURT: Right. In the -- so I think you -- you  
5     answered my question, Ms. Hewey, on the -- I asked Mr. Randazza  
6     the clearly inapt statute component of Berge, assuming that we  
7     got that far in the analysis. My question to him was, what  
8     does that mean on the continuum of sort of the qualitative  
9     analysis? What do I need to find? What do I need to conclude  
10    about it? And I think what I've heard from you is I have to  
11    conclude there is no cognizable claim at all, not an evaluation  
12    of the relative prospective merits of any such claim, which  
13    could be a slippery exercise; is that right?

14            MS. HEWEY: I think so. And I think -- and I think  
15    part of that is it's a -- sort of a comedy issue. I mean,  
16    the -- the estate law claim or any kind of a claim that might  
17    be brought is something that's going to be brought in the  
18    case -- or maybe it's due process. I don't know. Something.  
19    Due process sounds good too. Anyway, that's going to be  
20    brought in the action that it's brought in. And for this court  
21    to -- before the case has been even -- before a claim has even  
22    been made and before it's been developed to decide that there's  
23    no possible way that it can -- it can survive, I don't -- I  
24    think Berge is saying only if you can -- you can see on the  
25    face of the claim that there's no possible way or it's inapt or

1 it's frivolous or it's obviously groundless --

2 THE COURT: So --

3 MS. HEWEY: -- to go forward.

4 THE COURT: By my count, and I could be off by one,  
5 but I think there were four content -- four categorical content  
6 claims regarding the publication -- regarding the content of  
7 the article. So my question is, with respect to those content  
8 areas, would it be accurate for me to say that if you are  
9 wrong, if your client is wrong in terms of the legality of even  
10 one of those areas, then there's a viable claim under Berge.

11 MS. HEWEY: I don't --

12 THE COURT: In other words, I don't have to rule them  
13 all out.

14 MS. HEWEY: I'm not sure if I'm getting -- you're  
15 saying that if -- if there's a claim as to even one --

16 THE COURT: If there's not a claim as to even one.

17 MS. HEWEY: No. I don't think that is --

18 THE COURT: Under Berge?

19 MS. HEWEY: And that's because -- and that's the  
20 highlights of really important critical difference between  
21 Berge and this case, which is Berge you have, here is the  
22 claim.

23 THE COURT: Yep.

24 MS. HEWEY: Here we don't know what the claim is.  
25 And so if it came out that the school department were to demand

1 or ask that he -- and it was a nice, polite request that he  
2 remove these things. If he didn't remove them and then they  
3 proceeded on case -- on points one and two, but not three and  
4 four, and -- and they had a good claim under points one and  
5 two, then there would be no violation. So you can't determine  
6 right now what the claim is, so you can't determine right now  
7 whether any of those claims are groundless.

8 THE COURT: What would the claim be?

9 MS. HEWEY: Well, I -- I think it would be --

10 THE COURT: Bullying piece?

11 MS. HEWEY: Protection from bullying.

12 THE COURT: Anything else?

13 MS. HEWEY: I don't know if there are any other  
14 claims.

15 THE COURT: All right. So at least as my exercise --  
16 if I reach this part in the analysis -- if I get to the point  
17 where I'm trying to evaluate under Berge whether this is under  
18 a clearly inapt statute, it's whether or not this admittedly  
19 pushing the envelope of the concept of the -- what was intended  
20 by the state legislature in terms of the bullying claim could  
21 be extended somehow to Mr. McBreairty.

22 MS. HEWEY: So I respectfully disagree with that.

23 THE COURT: It's a question. I don't --

24 MS. HEWEY: Okay. Well, I will, again, point out  
25 that, We will take further action, means that we're going to

1 sit down and analyze what further action we can take. We never  
2 got to that point.

3 THE COURT: Yep.

4 MS. HEWEY: So there may be ten different causes of  
5 action or different things that we can do that we haven't yet  
6 thought of because we didn't get to that point.

7 THE COURT: So I -- but don't I have to be limited in  
8 this litigation, at least as it pertains to this piece of the  
9 analysis, as to what was reasonably contained within the  
10 letter. I can't -- I can't -- I can't rule in the school's  
11 favor, in other words, simply because there's a possibility of  
12 the abstraction of other claims not yet thought of that weren't  
13 in the letter.

14 MS. HEWEY: No. So if you're saying could the school  
15 base its claims on different content in the argument -- I mean,  
16 in the article --

17 THE COURT: Yes.

18 MS. HEWEY: -- the answer to that would be no.

19 THE COURT: Yep.

20 MS. HEWEY: But if you're saying could the school base  
21 its claims on something different than I've articulated here  
22 today, the answer is yes. And, again, that really gets down to  
23 the broad and, sort of, undefined nature of the, quote, threat,  
24 close quote.

25 THE COURT: Okay. And so my last question I have for

1     you, Ms. Hewey, is relating to the e-mail demands that were  
2     sent to Mr. McBreairsty, which said that the article, among  
3     other things, needed to be redacted to the extent that it  
4     specifically identified students. And my question is, is there  
5     any -- and you may have answered this by your response  
6     regarding what claims are -- or might have been available at  
7     the time of the writing of that e-mail limited to bullying, but  
8     is there any legal tradition or any law that makes it unlawful  
9     to specifically identify a minor in a news article if the minor  
10    is a participant in an event or an occurrence that becomes a  
11    matter of public interest?

12           MS. HEWEY: So the answer to that is, schools and  
13    school personnel are prohibited from identifying the minor  
14    under FERPA. Other people are not. There's no doubt about  
15    that.

16           THE COURT: Right.

17           MS. HEWEY: And so in this case, the reason why  
18    identifying the minor was important was because identifying the  
19    name plus the allegation that the person had -- had engaged in  
20    a sexual assault, plus the other allegations about the gender  
21    identity and the emo, and things like that. That's why  
22    identifying the person was an invasion of privacy and it was  
23    bullying. It's not based on any federal or state statute that  
24    I'm aware of.

25           THE COURT: It's not --

1 MS. HEWEY: It's not a FERPA violation.

2 THE COURT: But the connective tissue to the potential  
3 claim that you might have or the school department might have  
4 had against Mr. McBreairty was more related or subsumed by the  
5 concept of bullying.

6 MS. HEWEY: Correct.

7 THE COURT: Because it wasn't simply an identification  
8 of students, it was an identification of students in connection  
9 with other things that were said about those students.

10 MS. HEWEY: Yes.

11 THE COURT: Got it. All right. Ms. Hewey, is there  
12 anything else I should know?

13 MS. HEWEY: No.

14 THE COURT: Thank you. Mr. Randazza, why are we here?

15 MR. RANDAZZA: The lack of candor in this witness's  
16 testimony is shocking. We are here because they are clear  
17 claiming we shouldn't be here because they now have told me at  
18 some point in the past that they no longer want to take any  
19 action against Mr. McBreairty. It's just not true.

20 THE COURT: But she said it today. Assuming that it's  
21 not true and you're right and she's wrong, she said it today.  
22 And I've asked her like it was a deposition, four different  
23 ways, trying to get to the nugget of the truth. So I -- I --  
24 I'm metaphysically certain that her client has no more interest  
25 in pursuing Mr. McBreairty for the publication of his article



1 and, therefore, no interest in pursuing the estate of Mr.  
2 McBreairty or Mrs. McBreairty should she wish to press the  
3 button and publish it this afternoon. I think Ms. Hewey said  
4 that at least four times, and maybe five. And so now I'm  
5 wondering --

6 MR. RANDAZZA: Well, then maybe we're here so we could  
7 finally get that admission from them.

8 THE COURT: I think you got it.

9 MR. RANDAZZA: Maybe.

10 THE COURT: I have a fancy court reporter here and  
11 everything.

12 MR. RANDAZZA: Look, if -- if they are waiving all  
13 claims, but I want to make sure that we're clear that they're  
14 doing that. Because she was careful about that. We're talking  
15 about the fact that Mr. -- or whoever, Jax, the student, has  
16 graduated. The threat is not limited to him -- her. I'm  
17 sorry. I'm not trying to purposefully be disrespectful.

18 THE COURT: I understand.

19 MR. RANDAZZA: I am just unclear.

20 It's not limited to that student. It also makes threats  
21 regarding one of the teachers. I presume the teacher still  
22 works there. So they're going to waive that? Let her come up  
23 here and waive that.

24 As far as that one student, there are five students in  
25 that photograph. Have they graduated, or is this just about

1 the photograph of that one student? She wants to waive that,  
2 we don't need an injunction. If everything is actually waived,  
3 what it says in the briefing here is we don't want to take any  
4 action against Ms. McBreairty for things her husband did. What  
5 she's going to do is publish this article again. Her husband  
6 didn't do that. She's going to publish it. So if Ms.  
7 MacDonald is still there, presumably Ms. MacDonald would still  
8 claim that there's some kind of bullying against her.

9 You know, journalism often is bullying. I don't like a  
10 lot of articles written about me. I would love to -- maybe I  
11 should move to the state of Maine and bring a bullying claim  
12 against every journalist that writes something negative about  
13 me, except they seem to be good for my marketing. So hit  
14 pieces are great. Thank you, Maine Press Herald.

15 But these -- I mean, this claim that this article -- that  
16 this -- this threat letter here was about, we might do  
17 something else, I mean, that was more ominous to me than what  
18 it actually says. So we might have more claims that we think  
19 we're going to bring. What claim do you bring against somebody  
20 publishing a lawfully-obtained photograph?

21 Or opinions you don't like, you want to call them  
22 bullying, call them bullying. Call them nasty. Call them more  
23 pejoratives than that. He, she, we get to express that.  
24 That's what the First Amendment is. I mean, Snyder versus  
25 Phelps, to go to a funeral and hold up a sign that says, God

1 hates fags, at a soldier's funeral, that's not bullying enough  
2 for the First Amendment, well then neither is this.

3 So that -- this -- this testimony that, well, we might  
4 even take other actions, for that to be anything other than  
5 legal action, okay, this doesn't come from a lawyer and then  
6 say, here's the criminal law that you broke, here are the civil  
7 claims we want to bring.

8 This Hermon case -- I mean, this whole Hermon theory, you  
9 know, I thought it might even be helpful for the Court to ask  
10 the law court to answer that question -- which so far, yes,  
11 they are resting -- as to whether a school system can actually  
12 say, here is our policies. I'll call them the four letter  
13 policies. My eyesight is not even good enough with glasses  
14 here to say what they were. But these -- oh, ACAD and ACAF and  
15 JICK and Maine law. So if you violate those, if you were a  
16 student, we can bring a civil claim against you. It's not  
17 about her saying what we meant to do or why we did it. I mean,  
18 I don't even see how that's -- that's admissible testimony.  
19 The reason they did it is because they wanted this article  
20 edited by the Government. It was very magnanimous of them to  
21 say, sure, some of your article is protected by the First  
22 Amendment, but we, the Government, want to edit your article.

23 Now from Mrs. McBreairty to have a waiver, if they want to  
24 waive all claims against her or anybody she might sell the  
25 article to, you know, theoretically the Maine Wire, I don't

1 know, if she wants to bring that anywhere, why should anybody  
2 be under fear that they'll be attacked by the Government for  
3 it?

4 THE COURT: All right. Excuse me. What I'm hearing  
5 from Ms. Hewey is that Ms. -- Mrs. McBreairty has no cause to  
6 be under any such fear because the school department, with the  
7 graduation of the trans student, has no intention of and no  
8 desire to further pursue threatening taking down the article.  
9 So Mrs. McBreairty, as I understand it, can publish away with  
10 no reprisal from the school department. And so I'm -- I'm just  
11 unclear as to why that wouldn't be enough. I mean, Ms. Hewey  
12 said it in four different ways here, which I think, itself,  
13 probably constitutes a waiver. So I'm not sure --

14 MR. RANDAZZA: If it's a clear stipulation -- if we're  
15 going to say on the record it's a clear stipulation that all of  
16 the content of this, not just the stuff about the graduated  
17 student, the other four students, the teacher, everything in  
18 this article can get republished, no matter by whom, and she  
19 doesn't have a problem, then we don't need an injunction. Yes,  
20 they will stipulate to that. But also, remember, when  
21 Mr. McBreairty published the threat they sent, they further  
22 threatened that. So this threat is going to get published  
23 again.

24 So if we have a stipulation on all of that, yeah, that  
25 covers everything we would want out of an injunction. It

1 wouldn't cover everything we want out of summary judgement.

2 And, you know, as far as I'm concerned, I'm prepared to  
3 collapse this into summary judgment, if you like, if they like,  
4 because, ultimately, we are going to have to answer the  
5 question of whether the Government gets to do this or not, and  
6 they still seem to very firmly believe they can. They, just by  
7 their grace, are now going to tell us to avoid the shame of a  
8 preliminary injunction, we'll scramble for the walls, we'll  
9 scramble for cover and say, okay, you do whatever you want.  
10 They're going to still have to have that question answered at  
11 this court. So if you want to take a 15-minute recess and come  
12 back and do summary judgment on that issue, I'm prepared.

13 THE COURT: No.

14 MR. RANDAZZA: Do it in a month, I'll do it in a  
15 month.

16 THE COURT: But what I would like the attorneys to do  
17 is to confer and report back with the Court within two weeks  
18 before I start writing my decision on the PI.

19 MR. RANDAZZA: Yes.

20 THE COURT: To see if we can come to some sort of  
21 resolution.

22 My last question I had, Mr. Randazza -- and you're welcome  
23 to add anything you'd like, but my last question -- you'd said  
24 something in your initial presentation that caught my ear. And  
25 that was that the First Circuit is apparently dealing with

1 further amendment issues as it relates to transgender people  
2 differently than in every other context. Say -- say more about  
3 that.

4 MR. RANDAZZA: The LM case, it was a case in which a  
5 student wore a shirt to school that said, There are only two  
6 genders. And then I think after being told he couldn't wear  
7 that, he wore some other shirt like that. And the First  
8 Circuit was extremely deferential to the position that this  
9 made some students feel as if their identity was being  
10 questioned. I -- and if you look at that order, it does seem  
11 to create a different standard. So I'm willing to -- to --

12 THE COURT: Was this a -- I can't -- you're going to  
13 have to -- I remember the case, but I can't remember the  
14 precise basis upon which the circuit made its rule and wrote  
15 its opinion. Was it a Tinker substantial disruption basis, or  
16 do you recall?

17 MR. RANDAZZA: It was very close to the argument that  
18 Ms. Hewey made in the companion case to this, which has now  
19 been resolved.

20 THE COURT: Yep.

21 MR. RANDAZZA: That since it affected --

22 THE COURT: Right.

23 MR. RANDAZZA: -- students in a certain -- it wasn't  
24 really that it affected only a certain student, but it affected  
25 students in a certain way. So that --

1           THE COURT: Right.

2           MR. RANDAZZA: I mean, I don't mind making arguments  
3 that I think my opponents could use. I -- that -- that degree  
4 of candor I think is necessary. If there's something in that  
5 LM decision that supports, well, maybe the First Amendment  
6 bends to the gravitational pull of the transgender question, I  
7 find that constitutionally disgusting. But I live in the First  
8 Circuit here, so I'm going to have to follow from what the  
9 First Circuit says. But we all do. And I think that the --  
10 the pull of that might be useful for dicta in your order here,  
11 but I think really this is just copy and paste the word Berge  
12 and replace it with McBreairty, and you've got your decision.

13           THE COURT: Okay. Anything else, Mr. Randazza?

14           MR. RANDAZZA: No, Your Honor. But I would say that  
15 if we do want to go on the record with such a stipulation, we  
16 can probably make this easy. But I will confer with my friends  
17 here in the next two weeks.

18           THE COURT: Why don't we do this. Report back within  
19 two weeks, after you confer, and let the Court know if those  
20 conversations have produced fruit, because it sounds like  
21 we're -- we might be there, and let us know. And if you report  
22 back that the case is ongoing, I'll draft my order.

23           MR. RANDAZZA: Thank you, Your Honor.

24           THE COURT: Okay. Thank you, sir.

25           Counsel, thank you very much. That is very helpful to me.

1 And the matter is under advisement. I'll wait for the two-week  
2 alarm bell to go off, and there will either be a stipulation of  
3 dismissal or I'll start drafting the order. Okay. It's under  
4 advisement.

5       Yep, Mr. Randazza.

6       MR. RANDAZZA: I just want to be clear, I either --  
7 but maybe a stipulation as to the injunction. There might be  
8 an interim stipulation as well.

9       THE COURT: You mean you want somebody to go on the  
10 record right now and say --

11       MR. RANDAZZA: No, no. If I -- maybe I misunderstood  
12 what you said. A stipulation of dismissal or a stipulation the  
13 case goes on. There's a third route. A stipulation that we  
14 don't need the injunction because they've agreed, but I don't  
15 know.

16       THE COURT: Yes. That's what I meant.

17       MR. RANDAZZA: Thank you.

18       THE COURT: Thank you, Mr. Randazza.

19       Counsel, thank you. It's under advisement. Court is in  
20 recess.

21       Oh. Mr. Randazza, I'm reminded that you were waiving  
22 around Exhibit 1, but you never actually moved to admit it.  
23 Would you want it admitted? Is that critical to your point? I  
24 think I take your point. I examined Berge with all my might  
25 and effort. I think I got it.



1 MR. RANDAZZA: I don't think it's necessary for it to  
2 be in the record.

3 THE COURT: Thank you. We're in recess.

4 \* \* \* \* \*

5 **C E R T I F I C A T I O N**

6 I, Michelle R. Feliccitti, Registered Professional  
7 Reporter and Official Court Reporter for the United States  
8 District Court, District of Maine, certify that the foregoing  
9 is a correct transcript from the record of proceedings in the  
10 above-entitled matter.

11 Dated: March 5, 2025

12 /s/ Michelle R. Feliccitti

13 Official Court Reporter  
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