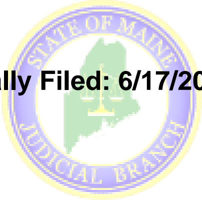

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STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2022-00056

HERMON SCHOOL DEPARTMENT

Plaintiff,

v.

SHAWN MCBREAIRTY,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S SPECIAL MOTION TO DISMISS

1.0 Introduction

Defendant Shawn McBreairty ("Mr. McBreairty") hosts a podcast called "Maine Source Of Truth" and is the Director of Special Projects at the Maine First Project. (McBreairty Decl. at ¶ 2.) Mr. McBreairty's work centers around using his First Amendment rights to influence the government to adopt policies that he believes are positive – in other words, petitioning the government for positive change. One is free to regard his positions in any light they wish, but there is no room to call them anything short of "petitioning the government."

Plaintiff Hermon School Department ("Plaintiff" or "Hermon School") is a school district that is attempting to silence Mr. McBreairty by asking this court to impose a prior restraint on his speech and petitioning activities – presumably because they believe that Mr. McBreairty's opinions on how the government should function are contrary to how they wish for the government to function. However, that judgment call is not one the government should be able to translate into a prior restraint. *See, e.g., Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

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citizens to confess by word or act their faith therein.")

The Maine Anti-SLAPP statute stands in the Plaintiff's way. This Court should hold that the Anti-SLAPP statute applies and mandates dismissal of this case, with prejudice. This Court should also, pursuant to the Anti-SLAPP statute, award fees and costs to the Defendant.

2.0 Factual Background

Pursuant to 20-A M.R.S. § 1001(22), public school boards are required to implement a policy "to address the negative effects of" workplace bullying. Hermon School has taken this mandate and crafted a policy that defines bullying as "humiliating, mocking, name-calling, insulting, maligning, or spreading rumors about an employee." (Compl. Exhibit 1.). Hermon School now takes its anti-bullying workplace policy and attempts to apply it to members of the public. It has no legal basis to do so.

2.1 The Freedom of Access Act (FOAA) Request

Mallory Cook is an English teacher at Hermon High School and advises the Gender and Sexuality Alliance ("GSA"). (Compl. at ¶¶ 27-28.) On April 14, 2022, Mr. McBreairty sent an FOAA request to the school Superintendent requesting public records relating to training Ms. Cook provided to Bangor area schools. (Compl. ¶ 30.) In the public records request, Mr. McBreairty stated that Ms. Cook "appears to be grooming children" and that she is attempting "to co-parent the children of Hermon High School, while not concentrating on the very basics of education." (Compl. ¶ 31.)

Plaintiff alleges in early April 2022, Mr. McBreairty sent emails to several people stating that Ms. Cook was "grooming children" and "running a shadow organization by pushing hyper-sexualization of minors in the Gay Sexuality Alliance (GSA) club s faculty sponsor." (Compl. at ¶ 44.) The email and respective quotes are part of an email chain regarding the FOAA request

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identified in the preceding paragraph. (McBreairty Decl. at ¶ 6; **Exhibit 1**). On April 7, 2022, Superintendent Grant sent a letter denying Mr. McBreairty's request for public records. On April 14, 2022, Mr. McBreairty sent a response email to Superintendent Michael Grant regarding the denial of his FOAA request. (*Id.*) The email was also sent to FOAA Ombudsman and Assistant Attorney General Brenda Kielty, Hermon Town Manager Howard Kroll, Chairman of Hermon School Board Steve Thomas, Penobscot County Sheriff Troy Morton, Maine House Representative Jim Thorne. (*Id.*)

2.2 The Audio Broadcasts to the Electorate

On February 16, 2022, Mr. McBreairty appeared on a radio show. (Compl. at ¶ 34.). On the radio broadcast, Mr. McBreairty sought to raise awareness to parents in Maine about what is taking place in the Hermon School Department and convince Maine government officials to reevaluate their school policies and focus on the basics of educations when he stated that Ms. Cook "wanted to distribute a book of pronouns to her classes and that she conducted pronoun surveys in her classroom." (Compl. at ¶ 34.)

On March 18, 2022, Mr. McBreairty hosted a podcast. The complaint alleges that during the podcast, Mr. McBreairty shared his opinion of Ms. Cook. (Compl. at ¶ 38.) Through the podcast, and all of his activism, Mr. McBreairty sought to speak on behalf of teachers and parents who are scared to speak out. Mr. McBreairty was drawing attention to what is going on in public schools to raise public awareness to get public involvement and for government entities to review what is occurring in public schools for government officials to reevaluate their school policies and focus on the basics of education.

2.3 The Social Media Posts

On April 12, 2022, Mr. McBreairty posted the following on his Facebook page, which

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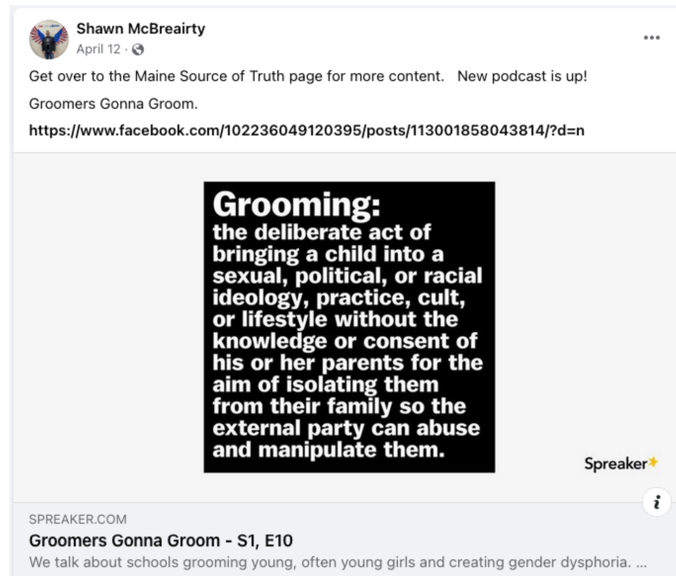
contains a link to his podcast and a definition for grooming, (Compl. at ¶ 45.):



The complaint alleges that on March 2, 2022, Mr. McBreairty posted on Twitter that Ms. Cook and two other unnamed employees of Hermon School were "groomers."[1] (Compl. at ¶ 46.)

Mr. McBreairty posted the following on Twitter, stating that Ms. Cook is "the head of a hyper-sexualization movement" and has a "secret" Twitter account (Compl. at ¶ 39):

[1] On June 3, 2022, a search of Mr. McBreairty's Twitter profile was conducted, and there were no Twitter posts supporting this allegation. *See* https://twitter.com/ShawnMcBreairty.

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3.0 Legal Standard

The anti-SLAPP statute, 14 M.R.S. § 556, is intended to provide for the swift and early dismissal of lawsuits that are meant to discourage the defendant's exercise of his or her First Amendment right to petition. *Hamilton v. Drummond Woodsum*, 2020 ME 8, ¶¶ 15, 17, 223 A.3d 904; *Desjardins v. Reynolds*, 2017 ME 99, ¶ 6, 162 A.3d 228. To that end, the statute provides that "[w]hen a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss." 14 M.R.S. § 556.

First, "the defendant must file a special motion to dismiss and establish, based on the pleadings and affidavits, that the claims against him are based on his exercise of the right to petition pursuant to federal or state constitutions." *Gaudette v. Davis (Gaudette I)*, 2017 ME 86, ¶ 16, 160 A.3d 1190 (alterations and quotation marks omitted); *see Thurlow v. Nelson*, 2021 ME 58, ¶ 22, 263 A.3d 494.

If the defendant meets the burden of establishing that the claims are based on petitioning activity, the burden shifts to the plaintiff to establish, "through the pleadings and affidavits, prima facie evidence that the defendant's petitioning activity was devoid of any reasonable factual support or any arguable basis in law *and* that the defendant's petitioning activity caused actual injury to the plaintiff." *Gaudette I*, 2017 ME 86, ¶ 17, 160 A.3d 1190 (quotation marks omitted); *see* 14 M.R.S. § 556; *Thurlow*, 2021 ME 58, ¶¶ 25-26, 263 A.3d 494. The plaintiff's failure to meet either portion of this burden requires that the court grant the special motion to dismiss with no further procedure. *Gaudette I*, 2017 ME 86, ¶ 17, 160 A.3d 1190.

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4.0 Argument

4.1 Mr. McBreairty's Conduct Was Petitioning Activity

At step one, the burden is on the defendant/moving party to establish that their activity constituted petitioning activity. *Thurlow v. Nelson*, 2021 ME 58, 15 (ME. 2021) *citing Gaudette I*, 2017 ME 86, ¶ 8, 160 A.3d 1190. While there is no Maine decision directly on point, there is a Massachusetts decision that is. Maine's and Massachusetts' anti-SLAPP statutes are "substantively identical," and the Maine Law Court recognizes that the Massachusetts Supreme Judicial Court's interpretation of the Massachusetts anti-SLAPP "provides useful guidance for interpreting Maine's statute." *Gaudette I*, 2017 ME 97, ¶ 15 & n.2, 160 A.3d 1190.

Petitioning activity under § 556 is defined, in relevant part, as the following:

> 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.

In determining whether statements constitute petitioning, "we consider them in the over-all context in which they are made." *North Am. Expositions Co. Ltd. Partnership v. Corcoran*, 452 Mass. 852, 862 (Mass. 2009). To fall under the "in connection with" definition of petitioning under the anti-SLAPP statute, a communication must be "made to influence, inform, or at the very least, reach governmental bodies—either directly or indirectly." *Id.* quoting *Global Naps, Inc. v. Verizon New England, Inc.*, 63 Mass. App. Ct. 600, 605 (Mass. App. Ct. 2005). The key

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requirement of this definition of petitioning is the establishment of a plausible nexus between the statement and the governmental proceeding.

The claims against Mr. McBreairty are based on his exercise of his First Amendment right to petition and Art. 1, § 15 of the Maine Constitution. The Government casts a wide net, claiming a variety of activity by Mr. McBreairty violates their anti-Bullying policy[2] and defames a third-party.[3] Mr. McBreairty's petitioning activity falls into three categories: (1) public records requests and follow up email, (2) audio broadcasts, and (3) social media posts.

Mr. McBreairty's activity was "reasonably likely to encourage consideration or review of an issue." The central theme of Hermon School's Complaint is that Mr. McBreairty's spoke publicly about teacher involvement with LGBTQIA+ issues. It is indisputable that LGBTQIA+ is a topic of national debate,[4] and wide-spread, robust debate within Maine.[5] Mr. McBreairty's

[2] The Hermon School Department lacks standing because there is no particularized harm for the Hermon School Department, especially as they admit that the anti-bullying policy does not apply to Mr. McBreairty. *Collins v. State*, 2000 Me. 85, ¶ 5, 750 A.2d 1257 ("We can raise the issue of standing *sua sponte* as it is jurisdictional.") (citation omitted). Plaintiff asks this court to construe their policy in a way that applies to Mr. McBreairty and violates the First Amendment, including through imposing a prior restraint on speech.

[3] The portion of declaratory judgment asking this court to declare that Mr. McBreairty's statements about Ms. Cook are in violation of her rights lacks standing because the Hermon School District cannot bring a claim on behalf of a third party. *Collins*, 2000 Me. 85, ¶ 11, 750 A.2d at 1261 (Calkins, J. concurring) ("I would not reach the standing issue, and I would affirm the Superior Court's dismissal on the merits. While I agree that we can raise the issue of standing sua sponte as we have done here, I do not believe that we should reach to dispose of a case on standing where the merits are more easily determined than standing.").

[4] *See* Melissa Murray, *Sex and the Schoolhouse*, 132 Harv. L. Rev. 1445 (Mar 8, 2019), https://harvardlawreview.org/2019/03/sex-and-the-schoolhouse/; *see also* Bloomberg, *Anti-LGBTQ proposals are flooding US state legislatures at a record pace,* (April 9, 2022), Bangor Daily News, https://bangordailynews.com/2022/04/09/news/nation/anti-lgbtq-proposals-are-flooding-us-state-legislatures-at-a-record-pace/ ("This year is heating up to be another record-breaking one for anti-LGBTQ legislation in U.S. state legislatures.").

[5] Bill Trotter, *More than 150 people demand Stonington school board member resign over anti-gay remarks*, Bangor Daily News, (August 3, 2021), https://bangordailynews.com/2021/08/03/news/hancock/more-than-150-people-demand-stonington-school-board-member-resign-over-anti-gay-remarks/ ("The comments that prompted the letter include Bible references and criticisms of same-sex marriage and celebrating Pride in June, according to Genevieve McDonald, who represents Stonington and other towns in the Maine House of Representatives."); Camille Fine, *York School Committee candidates discuss transgender students, school rankings, more*, Seacoastonline, (April 21, 2021), https://www.seacoastonline.com/story/news/politics/elections/local/2021/04/21/york-me-school-committee-candidates-discuss-transgender-students-more/7245868002/, ("The candidates were asked about their understanding of the Maine Principal's Association policy on transgender athletes and how they think York schools should go about

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petitioning activity was reasonably likely to influence governmental consideration and review of an issue, enlist public participation in an effort to affect such consideration, and otherwise fell within the constitutional protection of the right to petition the government. *Nery v. Miller*, No. CV-2018-34, 2019 Me. Super. LEXIS 142 at *12 (March 18, 2019) ("Moreover, given the nature of what [plaintiff] alleges [defendant] told the School, alcohol consumption on school property and that [plaintiff] was forbidden on school property, these statements are reasonably likely to

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serving transgender students."); Michael Kelley, *Portland school board wants teachers to address LGBTQ injustices*, Portland Press Herald, (Jan. 26, 2021), https://www.pressherald.com/2021/01/26/portland-school-board-wants-teachers-to-address-lgbtq-injustices/ ("[T]he board, as part of a resolution being drafted, also would like to see 'pride stickers, posters, flags and other queer-positive images in the classrooms and elsewhere in our schools.'"); Mike Tipping, *Opinion: Corporations Celebrating Pride gave thousands to Maine anti-LGBTQ candidates*, Maine Beacon, (June 18, 2021), https://mainebeacon.com/opinion-corporations-celebrating-pride-gave-thousands-to-maine-anti-lgbtq-candidates/ ("During the past two election cycles they've given at least $3,150 to Maine politicians who have sponsored anti-trans bills, backed conversion therapy and opposed LGBTQ rights."); *Maine removes LGBTQ teaching video assailed in Republican ad*, AP News, (May 19, 2022), https://apnews.com/article/2022-midterm-elections-education-maine-government-and-politics-93881917389cf3d93710446ee53e2e84 ("The Maine Department of Education removed from its website a video containing an LGBTQ lesson plan for kindergarten students that was the subject of a Republican ad targeting Democratic Gov. Janet Mills."); Caitlin Andrews, *Advocates says Maine needs to develop LGBTQ-rights curriculum after removing lesson*, Bangor Daily News, (May 23, 2022), https://bangordailynews.com/2022/05/23/politics/advocates-maine-needs-lgbtq-curriculum-n6hjn1me0n/ ("The situation highlighted gaps in how LGBTQ issues are discussed across the state, top officials at two Maine advocacy groups said. Both called for the state to give more instruction to schools and to stand by teachings to ensure children and teachers are supported."); Lauren Abbate, *Rockland LGBTQ organization helping school libraries to shelve more inclusive books*, Bangor Daily News, (February 7, 2022), https://bangordailynews.com/2022/02/07/news/midcoast/rockland-lgbtq-organization-helping-school-libraries-to-shelve-more-inclusive-books/ ("In 47 Maine schools, the diversity of characters and experiences in books just got broader thanks to a Rockland organization's campaign to distribute more inclusive books to school libraries. Through the "Read the Rainbow" campaign, OUT Maine — which works to support LGBTQ youth in Maine — has purchased more than 900 books with LGBTQ themes for school libraries across the state and is currently working to fundraise to fulfill additional requests from schools."); BDN Community, *The Cigna Foundation grants $50,000 to OUT Maine to support LGBTQ+ youth in Maine Schools*, Bangor Daily News, (March 9, 2022), https://bangordailynews.com/2022/03/09/bdn-maine/the-cigna-foundation-grants-50000-to-out-maine-to-support-lgbtq-youth-in-maine-schools/ ("The Cigna Foundation grant will enable OUT Maine to provide training and coaching to GSTA advisors as they, in turn, support and empower LGBTQ+ students in their schools."); Kelley McDaniel, *Letter: Janet Mills is a part-time LGBTQ ally*, Bangor Daily news, (May 30, 2022), https://bangordailynews.com/2022/05/30/opinion/letters/letter-janet-mills-is-a-part-time-lgbtq-ally/, ("I applaud Gov. Janet Mills for her support of some pro-LGBTQ policies. But LGBTQ Mainers face constant attacks — in our personal lives, as well as in the media, and sadly in local political discourse. Showing up as an ally only sometimes (when it's easy and convenient) is being a fair-weather friend, which I think is the best that can be said about Mills as an LGBTQ ally.").

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encourage review by the School.")

In Maine, the legislature has taken several actions regarding LGBTQIA+ issues within the last several years including the following:

- In June 2018, Maine Legislature passed a bill to ban conversion therapy on minors. L.D. 912 (128th Legis. 2018), https://legislature.maine.gov/legis/bills/display_ps.asp?LD=912&snum=128. Governor Paul LePage vetoed the bill, stating that the bill was "[a] threat to an individual's religious liberty and that parents "have the right to seek counsel and treatment for their children from professionals who do not oppose the parents' own religious beliefs." Governor's Veto Message for L.D. 912, at 1 (July 6, 2018). "We should not prohibit professionals from providing their expertise to those who seek it for their own personal and basic questions such as, 'How do I deal with these feelings I am experiencing.'" *Id.*
- On May 8, 2019, the Legislature again passed a bill to ban conversion therapy on minors. L.D. 1025 (129th Legis. 2019), https://legislature.maine.gov/legis/bills/bills_129th/billtexts/HP075501.asp. Governor Janet Millis signed the legislation into law on May 29, 2019. Chelsea Bard & Beth McEvoy, *Maine becomes the 17th state to ban conversion therapy*, New Center Maine, (May 29, 2019), https://www.newscentermaine.com/article/news/governor-mills-to-sign-conversion-therapy-ban-bill/97-b9896e97-efd8-4acd-9a35-3bf6a1a6b10d.
- In June 2019, the Maine Legislature passed a bill to ban the "gay and trans panic defense" which is a legal strategy in which defendants accused of violent offenses claim that unwanted same-sex sexual advances provoked them into reaction by way of self-defense. L.D. 1632 (129th Legis. 2019); *see also Ending "Gay Panic" and "Trans Panic" Defenses in Maine*, GLAD Legal Advocates & Defenders, (May 13, 2019), https://www.glad.org/cases/ending-gay-panic-and-trans-panic-defenses-in-maine/; *see also* Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, ABA, (March 31, 2020), https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/.
- Beginning November 2019, Maine residents were no longer required to obtain certification from a medical provider in order to change the gender marker on their driver's license and state ID cards. Judy Harrison, *Medical Form No Longer Required to Change Gender on Driver's License*, Bangor Daily News, (Nov. 6, 2019), https://www.mainepublic.org/maine/2019-11-06/medical-form-no-longer-required-to-change-gender-on-drivers-license.
- In July 2020, the Maine Department of Health and Human Services revised the "Application to Change the Name and/or Sex on a Record of Live Birth to Support Gender Identity" to permit persons to use "X" as a gender choice in additional to male and female. *EqualityMaine Applauds DHHS Rule Simplifying Process for Changing Gender Designation on Birth Certificates, Adding X Option*, EqualityMaine, (July 23, 2020), https://www.equalitymaine.org/equalitymaine-applauds-dhhs-rule-simplifying-process-changing-gender-designation-birth-certificates.

In Maine, the Legislature and administrative agencies have crafted statutes, regulations, and polices pertaining to LGBTQIA+ issues. Regardless of an individual's position on these issues and the government's corresponding actions, the right to petition includes a right to influence the electorate and their representatives. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 395 (2011) ("Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole."); *see also Miller v. SBA Towers V, LLC*, 391 F. Supp. 3d 123, 134-35 (D. Mass. 2019) ("Petitioning includes all statements made to influence, inform, or at the very least, reach governmental bodies — either directly or indirectly.") (citation and quotation marks omitted); *see also Leuthy v. LePage*, 1:17-cv-00296-JAW, at *38-39 (D. Me. Aug. 29, 2018) ("The right allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . [and is] generally concerned with expression directed to the government seeking redress of a grievance.") (citation and quotation marks omitted). Mr. McBreairty has taken an adversarial position to government activity related to LGBTQIA+ issues within Hermon School, for which the government now seeks to silence him and encumber him with legal fees, in an un-winnable case.

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4.1.1 FOAA Requests Are Petitioning Activity

On April 1, 2022, Mr. McBreairty sent a public record request to the Superintendent of the Hermon School Department requesting information related to trainings that Ms. Cook provided in various Bangor area schools. (Compl. at ¶ 30.) In the letter, Mr. McBreairty expressed various opinions such as "[t]here are 2 genders, not the 63 Hermon HS library displayed recently" and "microaggressions is simply a nicer sounding term of teaching children racism." (Compl. at ¶ 31.) Specifically, in regard to Ms. Cook, Mr. McBreairty expressed his opinion that her actions

constituted grooming children and attempting to co-parent rather than "concentrating on the very basics of education." (Compl. at ¶ 31.)

Submitting a public records request is at the heart of petitioning the government. "[A] party's exercise of petition means any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding." 14 M.R.S. § 556.

In *Nery v. Miller*, No. CV-2018-34, 2019 Me. Super. LEXIS 142 (March 18, 2019), in reviewing a Special Motion to Dismiss under 556, the court considered whether a defendant's statement to public school department officials at Great Salt Bay public schools that the plaintiff was drinking alcohol and was forbidden on school property amounted to protected petitioning activity. The court ruled that "Great Salt Bay is a public school, as opposed to a private school, and therefore [defendant's statements] fall within section 556's inclusion as a statement to a governmental entity . . . This court determines that [defendant's] statements to the School, as alleged in [plaintiff's] complaint, amount to petitioning within the broad meaning of the anti-SLAPP statute." *Id.* at *12; s*ee also Godin v. Schencks*, 629 F.3d 79, 81-82 & 81 n.1 (1st Cir. 2010) (complaints about a teacher to the public school superintendent and school board fell within the anti-SLAPP statute's broad definition of a party's exercise of the right to petition.)

Here, Mr. McBreairty submitted a public record request to an executive body, Herman School, requesting information about actions taken by a government actor, a Hermon School teacher. In that request, he expressed his concerns to the government about Ms. Cook's conduct. There is no clearer example of petitioning activity. *Desjardins v. Reynolds*, 2017 Me. 99, ¶ 11 162 A.3d 228 ("[T]here can be no legitimate argument but that [defendant's] statements to the sheriff's office regarding [plaintiff's] alleged history of arriving at Town meetings—and having driven his vehicle to those meetings—while under the influence of alcohol qualify as petitioning activity.")

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Further, after Mr. McBreairty was denied access to public records, he escalated the situation to raise awareness and petition more public officials including FOAA Ombudsman and Assistant A.G. Brenda Kielty, Hermon Town Manager Howard Kroll, Chairman of Hermon School Board Steve Thomas, Penobscot County Sheriff Troy Morton, Maine House Representative Jim Thorne. (McBreairty Decl. at ¶ 6; **Exhibit 1**).

4.1.2 Radio Broadcasts and Podcasts Are Petitioning Activity

On February 16, 2022, Mr. McBreairty appeared on a radio broadcast where he repeated his statements made to the government that Ms. Cook wanted to distribute a book of pronouns and conducted pronoun surveys in her classes. (Compl. at ¶ 34.). The complaint alleges on March 18, 2022, Mr. McBreairty hosted a podcast where he again repeated these petitioning statements.

On the Maine Dep't of Ed. ("DOE") website, there is a section devoted to LGBTQ+.[6] The DOE supports "gender expansive and questioning students, families, and school staff." One version of pronoun and gender ideology is directly supported by the DOE. By distributing a book of pronouns to her classes and conducting pronoun surveys, Ms. Cook was following DOE policy. When Mr. McBreairty commented on Ms. Cook's actions, he was citing DOE policy in action.

In *Schelling v. Lindel*, the Law Court held a letter to the editor published in a newspaper qualified as petitioning activity where the letter was "**arguably intended to effect reconsideration of purchasing requirements by the Legislature, and to enlist public support to that end**." 2008 Me. 59, ¶ 13, 942 A.2d 1226. Similarly, here, Mr. McBreairty's radio interview and podcasts qualify as petitioning activity because the broadcasts were intended to effect reconsideration of LGBTQIA+ policies by government officials, to enlist public support to that end, and fell within constitutional protection of the right to petition the government.

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[6] *LGBTQ+ and Genderal Expansive Resources*, Maine Department of Education, (accessed June 6, 2022), https://www.maine.gov/doe/lgbtq.

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4.1.3 Social Media Posts Are Petitioning Activity

On May 10, 2022, Mr. McBreairty again repeated his petitioning statements that Ms. Cook has a secret Twitter account and that she heads a hyper-sexualization movement. (Compl. at ¶ 39.) The complaint alleges that on May 2, 2022, Mr. McBreairty posted his opinion on Twitter that Ms. Cook and two other unnamed employees of the Hermon School Department were "groomers." (Compl. at ¶ 46.) On April 12, 2022, Mr. McBreairty posted his definition of grooming on his Facebook page along with a link to his podcast. (Compl. at ¶ 45.) One can freely debate whether this is "grooming" or not, but Mr. McBrearity shared his definition of this term. Doing so provides context to his claims and is protected activity. *Adelson v. Harris*, 973 F. Supp. 2d 467, 488 (S.D.N.Y. 2013) ("determining whether a statement is capable of being proven false, it is paramount that courts look not just at the allegedly defamatory words themselves, but also at the context in which they were stated."); *see also Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

Mr. McBreairty's opinions were directly relevant to statutes passed by the Maine Legislature, DOE policy, and how Cook implemented those policies and statutes. Mr. McBreairty, an advocate, was raising awareness to how LGBTQIA+ policy is applied in Maine's schools. By raising awareness of these issues, Mr. McBreairty's social media posts were petitioning activity under 14 M.R.S. § 556 because the statements were reasonably likely to encourage consideration or review of LGBTQIA+ policies by all branches of the government, reasonably likely to enlist public participation in an effort effect such consideration, and fell within constitutional protection of the right to petition the government.

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4.2 Hermon School Cannot Establish That Mr. McBreairty's Petitioning Activity Was Devoid Of Any Factual Support or Any Arguable Basis in Law *and* That It Caused Actual Injury.

At step two, the burden is on the plaintiff/non-moving party to present prima facie evidence that (1) defendant's activity was devoid of any factual support or any arguable basis in law and (2) that it caused actual injury. *Thurlow v. Nelson*, 2021 Me. 58, ¶ ¶ 16-17, 263 A.3d 494. The government can not possibly do either, as a matter of law.

4.2.1 Mr. McBreairty's Petitioning Activity Was Not Devoid of Any Factual Support or Any Arguable Basis in Law

At this step, the focus is on whether the plaintiff presented facts, if believed, that would prove that the defendant's allegations are devoid of any factual support or any arguable basis in law. *Thurlow v. Nelson*, 2021 Me. 58, ¶ ¶ 16-17, 263 A.3d 494.

It is the Hermon School's application of its bullying policy to Mr. McBreairty that is devoid of any factual support or arguable basis in law. Hermon School admits as much in its Complaint. (Compl. at ¶ 59.) ("Because McBreairty is not associated with the Hermon School Department in any way, without intervention by this Court, the Hermon School Department has no way to enforce its anti-bullying policy against him and to provide Ms. Cook and its other employees with the protection they deserve and are entitled to under 20-A M.R.S.A. 10001.").

Mr. McBreairty publicly shared his opinions of Ms. Cook's conduct and implementation of state and DOE policies. *Caron v. Bangor Pub. Co.*, 470 A.2d 782, 784 (Me. 1984) ("The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law.") (collecting cases); *Bose Corp. v. Consumers Union*, 692 F.2d 189, 194 (1st Cir. 1982) ("The proposition that an opinion can be neither true nor false also is reasonable as a matter of common sense."); *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015) ("Because defamation requires a false statement at its core, opinions typically do not give rise to liability since they are

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not susceptible of being proved true or false.") (citation omitted).

In the public records request, Mr. McBreairty stated Ms. Cook "*appears* to be grooming children" and "What Mallory Cook is *appearing* to be doing … is to *attempt* to co-parent the children of Hermon High School, while not concentrating on the very basics of education." (Compl. at ¶ 31.) The government alleges that through podcasts, social media, and email, Mr. McBreairty criticized Ms. Cook's conduct, along with stating she has a "secret" Twitter account and that she heads a hyper-sexualization movement. (Compl. at ¶¶ 38, 39, 44, & 46.) Mr. McBreairty's statements were opinions, not susceptible to being proved true or false. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (concluding that a statement of opinion cannot be defamatory, as the First Amendment recognizes that there is no such thing as a "false" idea); *Stevens v. Tillman*, 855 F.2d 394, 402-03 (7th Cir. 1988) (holding that neither general statements charging a person with being racist, unfair, or unjust, nor references to general discriminatory treatment, without more, constitute provably false assertions of fact); *Overkill Farms, Inc. v. Lopez*, 119 Cal.Rptr.3d 127, 140 (Ct. App. 2010) ("We agree that general statements charging a person with being racist , unfair, or unjust. .. constitute mere name calling and do not contain a provably false assertion of fact."). *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995) ("when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.")

Moreover, Mr. McBreairty's opinions are far from uncommon, they are opinions expressed within the national debate on LGBTQIA+ policies in education and are relevant considerations for parents who entrust their students to the public school system.

Only two of Mr. McBreairty's petitioning statements could possibly be construed as

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providing facts rather than opinions. During the February 16, 2022 radio broadcast, the complaint alleges that Mr. McBreairty stated that Ms. Cook wanted to distribute a book of pronouns to her classes and that she conducted pronoun surveys in her classrooms. This activity falls squarely in line with DOE's policy on supporting "gender expansive and questioning students."[7] The Hermon Transgender Students Guidelines, which provides that under Section D Part 3 any "student who has been identified as transgender under these guidelines should be addressed by school staff and other students by the name and pronoun corresponding to their gender identity…"[8] In support of the DOE's policy and Hermon Transgender Student Guidelines, the 2021 High School Maine Integrated Youth Survey specifically asks students whether they identify as transgender under questions 10.[9] The Hermon School Department received 40 books on the topic of transgender for its high school library through a grant from the Maine Education Association (MEA). (McBreairty Decl. at ¶ 7.) These facts coupled with Ms. Cook serving as the paid faculty adviser for GSA provides factual support for the proposition that Ms. Cook wanted to distribute a book of pronouns to her class and that she conducted pronoun surveys in her classrooms. Second, in an email, Mr. McBreairty stated that Ms. Cook is the faculty sponsor of the GSA club. Hermon School admits that Ms. Cook is an advisor to the GSA club in their Complaint. (Compl. at ¶ 44.)

4.2.2 Herman School Cannot Prove that Mr. McBreairty's Petitioning Activity Caused Actual Harm

Even if the government can meet the standard in Section 4.2.1, it must still demonstrate actual harm, or the Anti-SLAPP motion must be granted, as a matter of law.

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[7] *Supra* note 5.
[8] Transgender Students Guidelines – Maine, Hermon School Department, (July 11, 2016), https://www.hermonmaine.gov/wp-content/uploads/2016/11/Transgender-Students-Guidelines-Maine.pdf.
[9] 2021 High School Maine Integrated Youth Survey, Maine Department of Health and Human Services and Maine Department of Education, (2021), https://www.maine.gov/miyhs/sites/default/files/2021SurveyInformation/2021%20HS-A.pdf.

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Actual injury must be more than "purely emotional or psychic harm" and the amount claimed must be more than "mere guess or conjecture." *Camden Nat'l Bank v. Weintraub*, 2016 ME 101, ¶ 14, 143 A.3d 788. Emotional injury "in the form of embarrassment, shame, humiliation, emotional distress, and harm to his reputation" is not "actual injury for anti-SLAPP purposes", *Weinstein v. Old Orchard Beach Fam. Dentistry, LLC*, 2022 ME 16, ¶ 8, 271 A.3d 758, "unless it is so severe that no reasonable person could be expected to endure it." *Schelling v. Lindell*, 2008 ME 59, ¶ 25, 942 A.2d 1226 (citation omitted).

The government argues that if it is "unable to comply with its obligations to protect its employees from bullying, harassment and hazing, it will suffer cognizable damages in that it will be in violation of state law and its own policies. (Compl. at ¶ 20.). In essence, the government speculates that it has exposure to lawsuits from its employees because members of the public are exercising their rights to petition and criticize the government and its employees.

Assuming *arguendo* that Hermon School's faces legal exposure for the public exercising their constitutional rights, then Hermon School's exposure is a government-created problem because it merely speculates that it could be in violation of its own policies. And Hermon School's proposed remedy to its self-created problem is to violate the Defendant's right to petition the government and speak freely under the U.S. and Maine constitutions. Moreover, Hermon School admits that their anti-bullying policy does not apply to Mr. McBreairty but asks this Court to invent a cause of action to enforce their policy by applying a prior restraint on speech against Mr. McBreairty. There are few things more offensive to our Constitution than a prior restraint.

"Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 530, 559 (1976). "The Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87, 91

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n.7 (Tex. 2014) (citing Sobchak, W., *The Big Lebowski*, 1998)). Prior restraints "bear a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "[P]rior restraints require an unusually heavy justification under the First Amendment." *Commonwealth v. Barnes*, 461 Mass. 644, 652 (2012) (quotation marks omitted). There is a "heavy presumption" against their constitutional validity. *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986). As the First Circuit *Providence Journal* astutely observed,

> Of all the constitutional imperatives protecting a free press under the First Amendment, the most significant is the restriction against prior restraint upon publication. "The chief purpose of [the First Amendment's free press] guaranty [is] to prevent previous restraints upon publication." Indeed, "prior restraints upon speech and publication are the most serious and least tolerable infringement on First Amendment rights". Prohibiting the publication of a news story or an editorial is the essence of censorship. The power to censor is the power to regulate the marketplace of ideas, to impoverish both the quantity and quality of debate, and to restrict the free flow of criticism against the government at all levels. It is plain now as it was to the framers of the Constitution and Bill of Rights that the power of censorship is, in the absence of the strictest constraints, too great to be wielded by any individual or group of individuals.

Id. at 1345.

The government fails to explain how it could be liable to one of its teachers for Mr. McBreairty exercising his constitutional rights, beyond mere conjecture. That a teacher may be upset because the public criticizes them is a perfectly human reaction. But for Hermon School to suggest that criticism is the reason that the school would lose employees and that silencing the public by using the weight of the government and tax dollars to go after private individuals shreds the U.S. Constitution and the Maine Constitution in order to shield the government from criticism. The lack of connective tissue between Hermon Schools' parade of horribles and Mr. McBreairty's public criticism of their public school system and its respective teachers is enough to make *Palsgraf* blush.[10] One should equally expect, and hope, that petitioning the government would

[10] *See Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

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enable the government to hear grievances from the public and then improve itself, not fold like a house of cards and degrade in quality as Hermon School suggests. Because there is no actual damage alleged by Mr. McBreairty's petitioning activity this Complaint must be dismissed.

4.3 The Government Fails to State a Claim on Which Relief Can Be Granted

A complaint can be dismissed if it "fail[s] to state a claim upon which relief can be granted . . . ." M.R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) tests "the legal sufficiency of the complaint"; the Court views the factual allegations in the complaint "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action that would entitle the plaintiff to relief pursuant to some legal theory." *Carey v. Bd. Of Overseers of the Bar*, 2018 ME 119, ¶ 29, 192 A.3d 589.

The government fails to state a claim for relief. Interpreted charitably, the government seeks to protect the sensibilities of its teachers and their desire to remain free of criticism "because of the stress caused by severe and outrageous bullying behavior by McBreairty." (Compl. at ¶ 58.). The government "therefore brings this action requesting that the Court declare that McBreairty's statements about Ms. Cook *are in violation of her rights*" and requests this Court to impose a prior restraint on his speech. (Compl. at ¶ 60.) At its essence, the government is filing a claim on behalf of a third-party and lacks standings as explained *supra* note 2 and 3. The government acknowledges that it is "without adequate remedy at law to prevent" Mr. McBreairty from exercising his constitutional rights to petition the government and freedom of speech. (Compl. at ¶ 62.) The government admits that its workplace anti-bullying policy does not apply to Mr. McBreairty, unless this court were to create both a cause of action and a remedy that imposes a prior restraint. (Compl. at ¶ 59.) This Complaint is defective and this Court cannot invent this unconstitutional remedy. *Neb. Press Ass'n v. Stuart*, 427 U.S. 530, 559 (1976) ("Prior restraints on

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speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); *Kinney v. Barnes*, 443 S.W.3d 87, 91 n.7 (Tex. 2014) ("The Supreme Court has roundly rejected prior restraint.").

5.0 Conclusion

For all the reasons set forth above, Defendant respectfully requests that the Court grant the Special Motion to Dismiss and dismiss the Complaint in its entirety, awarding fees and costs to the Defendant.

Dated: June 15, 2022.

/s/ Brett D. Baber, Esq.

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