IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PEN AMERICAN CENTER, INC., ET AL., **PLAINTIFFS,** **VS.** **ESCAMBIA COUNTY SCHOOL BOARD,** **DEFENDANT.**	**CASE NO.: 3:23-CV-10385-TKW-ZCB**

PLAINTIFFS' SUR-REPLY TO
DEFENDANT'S MOTION TO STAY PROCEEDINGS

Plaintiffs PEN American Center, Inc., et al., file this sur-reply to Defendant's Motion to Stay Proceedings (ECF 158), pursuant to this Court's Order Requiring Additional Briefing ("Order") (ECF 167). For the reasons set forth in Plaintiffs' Partial Opposition to Defendant's Motion to Stay Proceedings ("Opposition" or "Opp'n") (ECF 165), Plaintiffs believe the Restricted Books claims should move forward while the Removed Books claims are stayed. However, should this Court decide otherwise, any stay should be conditioned on the expeditious review of the Restricted Books.

I. The Court Can and Should Condition Any Stay on the Expeditious Review of the Restricted Books.

This Court can and should condition any stay on the expeditious review of the Restricted Books by at least a District Review Committee ("DRC"). Left to its own devices, Defendant could leave the 119 Restricted Books in purgatory for the extra months, year, or more it could take to resolve the unrelated issue of whether the Board Members may be deposed—a result that is harmful to Plaintiffs and the public interest. Indeed, Defendant has acknowledged it does not expect to complete its review of the 119 Restricted Books until May 2026—nearly *four* years after the first Restricted Books were challenged and removed from shelves and more than three years after this lawsuit was filed. *See* Def.'s Reply in Support of Motion to Stay ("Reply") at 13, ECF 168. Despite infringing on Plaintiffs' First Amendment rights, Defendant appears to be in no hurry to complete these reviews.

Defendant recognizes that the Court's broad discretion to manage its docket includes its authority to condition a stay on the expeditious review of the Restricted Books. Reply at 2; *see Clinton v. Jones*, 520 U.S. 681, 706 (1997). Crafting a stay that is appropriate for a case "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). Thus, "[a] court may, in appropriate situations, specify protective conditions in balancing the hardship necessarily imposed on the party whose suit . . . has been stayed pending appeal." *Hamoud v. Bush*, No. 05-1894,

2006 U.S. Dist. LEXIS 48894, at *3 (D.D.C. July 5, 2006). Such protective conditions are especially appropriate where they are "neither heavy nor unexpected." *Id.* (quoting *Cooks v. Fowler*, 459 F.2d 1269, 1273 (D.D.C. 1971) (conditioning stay of eviction on tenant's continued rent payments is "neither heavy nor unexpected" because it "require[s] only that he fulfill an obligation which he voluntarily assumed at an earlier date")).

This is such an appropriate situation. As explained in Plaintiffs' Opposition, it is *Defendant's* burden to establish that a stay of the entire case is warranted. *See* Opp'n at 6. Defendant failed to do so. *Id.* at 7–13 (Defendant failed to establish it would suffer irreparable harm if Restricted Books claims proceed, that Plaintiffs would not be substantially harmed, or that the public interest favors a stay of Restricted Books claims). If this Court nonetheless grants Defendant's Motion, it is certainly appropriate to specify conditions that would maintain an even balance: Defendant gets the stay it seeks, while at least not exacerbating the harm suffered by Plaintiffs and the public. Additionally, it is neither a heavy nor unexpected burden for Defendant to fulfill an obligation it assumed at an earlier date. *Cooks*, 459 F.2d at 1273. Defendant assumed the obligation of reviewing challenged books long before it asked for a stay of the proceedings. Escambia Cnty. Sch. Bd. Policy 2522, Oct. 15, 2024 (creating procedure for review of challenged materials).[1] There is no

[1] Policy 2522 replaced Policy 4.06 with respect to book challenges.

reason this Court cannot condition a stay of the proceedings on the Board complying with its own Policy in a timely and meaningful way.

Defendant strangely argues that conditioning a stay on expeditious review of the Restricted Books would amount to granting Plaintiffs preliminary injunctive relief, requiring Plaintiffs to show a likelihood of success on the merits. Reply at 2–4. This argument ignores that a "stay is not a matter of right . . . . It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (cleaned up).

Plaintiffs have *no* burden in opposition to Defendant's motion for a stay. But conditioning a stay on Defendant taking action to lessen the harm *that the stay would cause* would not be "a *de facto* grant of injunctive relief." Reply at 5. It would merely be a means of balancing the hardships to the parties. *See Landis*, 299 U.S. at 255 (noting concerns about granting a stay where "there is even a fair possibility that [it] will work damage to someone else"). Imposing protective conditions on the stay would alleviate some of the damage to Plaintiffs and the public by requiring Defendant to do what it claims it intends to do anyway—review the books that it has removed from access for two years. Moreover, conditioning the stay on prompt review of the Restricted Books could streamline the proceedings moving forward—for example, if some of the Restricted Books are reviewed and returned to shelves

before the case proceeds to summary judgment,[2] claims regarding those books would no longer need to be litigated. If Defendant finds such a condition objectionable, it can withdraw its motion for a stay. But it should not be heard to both seek affirmative relief and complain about equitable conditions placed on such relief.

Defendant also raises, in a single sentence, concerns about separation of powers. Reply at 5–6. Contrary to Defendant's assertion, conditioning the stay on Defendant reviewing the Restricted Books *according to its own policies* and within a reasonable time period is not "dictating the terms" of such review. *Id.* at 6. It is simply requiring Defendant to follow the procedures it created in a timely fashion. *See* Policy 2522, *supra*. The Court has the responsibility and authority to craft a stay that will balance the interests of the parties and the public. *See Landis*, 299 U.S. at 254–55. The Court acting within this authority does not raise federalism concerns.

II. This Action is Properly Before the District Court, Notwithstanding That the Board's Decision to Remove and/or Indefinitely Restrict a Book May Be "Agency Action" Under the APA.

There are colorable arguments that the Board is acting as an agency when restricting and removing books, such that adversely affected parties may challenge those decisions under Florida's Administrative Procedure Act ("APA"). Fla. Stat. §

[2] Plaintiffs maintain that the Restricted Books claims should proceed to summary judgment to avoid further delay. *See* Opp'n at 1.

120.68(1)(a). But Florida courts have not addressed the issue since *Decker v. University of West Florida* excluded some university actions from the APA. 85 So. 3d 571 (Fla. 1st DCA 2012). Defendant's arguments, however, go too far—attempting to exempt the Board from the APA entirely.

Regardless, this action is properly before this Court because Plaintiffs need not exhaust administrative remedies before pursuing a First Amendment claim in federal court. *See Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 980 F.3d 799, 806 (11th Cir. 2020); *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982). Plaintiffs are not required to raise their constitutional claims before the very people whom they assert violated their rights before seeking redress in federal court. *Felder v. Casey*, 487 U.S. 131, 147, 153 (1988).

A. Defendant is an "Agency" Under the APA.

The APA defines an "agency" as a governmental entity "acting pursuant to powers other than those derived from the constitution." Fla. Stat. § 120.52(1). This includes "local school districts," Fla. Stat. § 120.52(1), (6), and school boards. *See McIntyre v. Seminole Cnty. Sch. Bd.*, 779 So. 2d 639, 641 (Fla. 5th DCA 2001) (applying APA to school board's termination of employee); *Sch. Bd. of Broward Cnty. v. Bennett*, 771 So. 2d 1270, 1270 (Fla. 4th DCA 2000) (applying APA procedural requirements to invalidate school board's adoption of unwritten policy).

Defendant acts pursuant to a statutory mandate when it restricts or removes

library books. Fla. Stat. § 1006.28(2)(a)2, (d). Yet, in its attempt to avoid the APA, Defendant now asserts its book restriction and removal actions stem from its constitutional authority. Reply at 9. But this is contrary to its continued position throughout this case that it restricted books pursuant to HB 1069 and its predecessor's statutory mandate. *See, e.g.*, Answer, Affirmative Defense 11, ECF 68 ("The actions of the Board were taken pursuant to its duty to follow Florida law"); Def.'s Oppn' to Mot. for Prelim. Inj. at 23–24, ECF 105; Mot. to Dismiss Hr'g Tr. at 9–10, 17, ECF 66 (explaining Restricted Books were previously restricted based on School Board's statutorily-granted discretion but are now restricted subject to HB 1069, and District's "hands are tied" pending review).

Moreover, Defendant's argument that it is acting pursuant to its constitutional authority to "operate, control and supervise all free public schools," Fla. Const. art. IX, § 4b, taken to its logical conclusion, would exempt all of its actions from the APA and nullify the legislature's explicit inclusion of local school districts in its definition of educational units, which are agencies under the APA. *See* Fla. Stat. § 120.52(6). By Defendant's logic, taking *any* action to comply with a statutory mandate in the operation of schools (the Board's entire job) would be action taken pursuant to its constitutional authority, which would exempt it from the APA entirely.

Nor is *Decker*, which Defendant relies upon, clearly to the contrary. *Decker*

found that disciplining a university student "plainly falls" within the constitutional mandate that the state board of governors "operate, regulate, control, and be fully responsible for the management of the whole university system." 85 So. 3d 571, 573 (Fla. 1st DCA 2012) (quoting Fla. Const. art. IX, § 7(d)). But in *Decker*, the disciplinary decision was made pursuant to the university's Academic Misconduct Code, not pursuant to a specific statute. *Id.* at 572. Defendant's decisions to restrict and remove books, in contrast, are made pursuant to Florida statute.

Since *Decker*, courts have continued to allow claims against school boards under the APA. *See, e.g.*, *S.J. v. Thomas*, 233 So. 3d 490 (Fla. 1st DCA 2017) (school board's decision to impose disciplinary reassignment falls under APA). Defendant even defended its own rule regarding disqualifying offenses for school employees within the framework of the APA in recent litigation. *Escambia Cnty. Sch. Bd. v. Warren*, 337 So. 3d 496, 499–500 (Fla. 1st DCA 2022). For Defendant to now claim its decisions when applying its policies pursuant to statute stem only from its constitutional authority strains credulity. Notably, the Florida Legislature would not exempt school boards from the APA so broadly. *See, e.g.*, Fla Stat. § 1001.42(29) (requiring school boards to "Adopt rules pursuant to [two APA provisions]" for operation and management of schools).

B. Defendant's Decisions to Remove and Indefinitely Restrict Books are Challengeable under the APA.

The Board's decisions to remove and/or indefinitely restrict books are agency

actions challengeable under the APA. "'Agency action' means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order." Fla. Stat. § 120.52(2).

Clearly, with respect to the Removed Books, Defendant has acted. It voted and issued an order to remove the books from district libraries. This is final agency action.

With respect to the indefinite restriction of books, Defendant argues it has taken no formal action. Reply at 9. But while Defendant has not taken a vote or issued a final order on any of the Restricted Books, it has acted: It established a policy to remove challenged books pending review, then abrogated that policy by suspending the DRCs for sixteen months.

Even if these decisions are not "final" agency actions, non-final agency actions are also immediately reviewable under the APA "if review of the final agency decision would not provide an adequate remedy." Fla. Stat. § 120.68(1); s*ee also*, *Field v. Dep't of Health*, 902 So. 2d 893 (Fla. 1st DCA 2005) (reviewing non-final emergency suspension of license). Here, although Defendant has not made a final decision on the Restricted Books, it halted its review process altogether for sixteen months and has no current plan to review the Restricted Books. Adversely affected parties may be waiting for the final Board decision indefinitely. When a "final" decision may never come, it will never be reviewable.

C. Notwithstanding applicability of the APA, this action is properly before the District Court.

Whether or not the APA applies to Defendant's book removals and indefinite restrictions, this action is properly before this Court. Plaintiffs do not need to exhaust administrative remedies to raise First Amendment challenges based on Defendant's book removals and restrictions. Plaintiffs seeking "vindication of a federal right" under § 1983 need not exhaust state administrative remedies unless required by federal statute. *Felder v. Casey*, 487 U.S. 131, 147, 149 (1988) (state law cannot condition right of recovery upon statute that "directs injured persons to seek redress in the first instance from the very targets of" § 1983); *see also Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1226 (11th Cir. 2006) (citing *Patsy*, 457 U.S. at 516) ("The Supreme Court and this Court have held that there is no requirement that a plaintiff exhaust his administrative remedies before filing suit under § 1983."). Congress included no exhaustion requirement in § 1983. *See Patsy*, 457 U.S. at 515–16. Thus, applicability of the APA does not affect Plaintiffs' claims, which are properly before this Court.

III. Plaintiffs' Motion for Sanctions Should Proceed.

Plaintiffs' Motion for Sanctions ("Sanctions Mot.") (ECF 159) should proceed because the Eleventh Circuit's decision on legislative privilege has no bearing on whether Defendant should be subject to sanctions. As a sanction for Defendant's spoliation of evidence, Plaintiffs seek, *inter alia*, depositions of Board

Members about their document preservation efforts. Sanctions Mot. at 30. Nothing about the pending appeal before the Eleventh Circuit—which concerns only whether Board Members should be deposed about their book-removal decisions—should impact the Court's decision on the Motion for Sanctions.

Defendant appears to argue that if Plaintiffs win the appeal and are allowed to depose Board Members about their book-removal decisionmaking, Plaintiffs could also inquire into the circumstances surrounding the spoliated evidence and that would impact the Motion for Sanctions. Reply at 10–11. But Defendant is conflating the discovery depositions at issue on appeal with the spoliation depositions Plaintiffs seek as a sanction. Whether Plaintiffs should be entitled to depose Board Members about their document preservation efforts has nothing to do with the issues before the Eleventh Circuit. Plaintiffs have filed a fully briefed and supported Motion for Sanctions, and there is no reason to hold that Motion in abeyance. That will simply engender greater delay. A ruling on the Motion for Sanctions might also prompt a renewed settlement effort should Plaintiffs succeed.

While the discovery depositions subject to the appeal could provide further evidence of viewpoint discrimination, they will not replace the evidence that was lost, nor will they affect this Court's determination that the lost evidence cannot be replaced. *See* Fed. R. Civ. P. 37(e). Deposing individuals "well after an event is not a perfect substitute for reviewing their contemporaneous text messages." *Skanska*

USA Civ. Se. Inc. v. Bagelheads, Inc., 75 F.4th 1290, 1313 (11th Cir. 2023) (deposing custodians whose data was destroyed does not change the fact that lost data cannot be replaced). Thus, even if the Eleventh Circuit allows Plaintiffs to depose Board Members about their book-removal decisions, such depositions will not replace the lost evidence. Put simply, the possible book-removal depositions have no bearing on the Motion for Sanctions.

Importantly, the pending appeal, which concerns a single collateral issue, will not obviate the need for further litigation in this case. The rest of the case will proceed regardless of the appeal's outcome. Accordingly, there is no reason for delay. In addition to deciding the pending Motion for Sanctions, the Court should make clear that the remaining discovery in this case should continue, even if the Court stays the Restricted Books claims. For example, the Court should direct Defendant to produce the materials that the Magistrate Judge ordered (ECF 154) and that Defendant agreed to produce in resolving Plaintiffs' Motion to Compel. *See* Opp'n at 5. There is no reason to stay such discovery, yet Defendant has taken the position that the Court's Order staying the Board Members' depositions and discovery deadlines (ECF 160) also alleviated it of its obligations to comply with the Magistrate's Order and its commitment to produce certain discovery. Declaration of Ori Lev ("Lev Decl.") (attached as Exh. A), Exh. 3 (Email from N. Smith to S. Agarwal, December 13, 2024) ("My understanding is that the present stay applies to

all discovery.").

IV. Defendant's Spreadsheet Is Inaccurate

Defendant's response to the Court's request for detailed information about each Restricted Book reflects a cavalier attitude to the facts of this case and disrespect to the Court. The Court directed Defendant to state, with respect to each book, (i) "whether the challenge was based on one of the grounds in §1006.28(2)(a)2.b.(I) or (II)," (ii) "whether the book was reviewed under §1006.28(2)(d) and found to have content described in §1006.28(2)(a)2.b.(I) or (II)," (iii) "whether the book is currently restricted based on the challenge, librarian review, or both," and (iv) "the date the DRC review was conducted, is scheduled, or is expected." Order at 2. Remarkably, Defendant answers the first two of those questions with a "Yes" for every Restricted Book and asserts that each is restricted based on both the challenge and librarian review. And Defendant doesn't bother to provide a book-by-book response to the fourth question. The record in this case demonstrates Defendant's response is replete with errors.

A. The Vast Majority of Restricted Books Were Not Challenged Based on the Grounds in § 1006.28(2)(a)2.b.(I) or (II).

Defendant's chart shows each Restricted Book was challenged before July 1, 2023, the date when HB 1069 came into effect, adding sub-subparagraph (II) to Section 1006.28(2)(a)2.b. Reply Exh. 1, ECF 168–1. At the time the challenges were made, therefore, sub-subparagraph (II) was not part of Florida Law. Unsurprisingly,

not one challenge form for the Restricted Books asserts that the book "depicts or describes sexual conduct as defined by s. 847.001(19)," as provided for by sub-subparagraph (II). Lev Decl. ¶ 3. Before July 2023, Florida law only required school districts to allow a challenge based on material being pornographic or prohibited under § 847.012. *See* Fla. Stat. § 1006.28(2)(a)2.b (2022). A small number of the Restricted Books' challenge forms assert the book violates section 847.012 or contains "pornography." Lev Decl., ¶ 3 (identifying 15 challenge forms alleging violations of, or otherwise referencing, 847.012, and five challenge forms appearing to allege "pornography").[3] But other than these 20 challenge forms, none of the 99 other challenges can fairly be said to be "based on one of the grounds in § 1006.28(2)(a)2.b.(I) or (II)."[4]

It is true that many of the challenge forms allege, e.g., "sexual activity." But the language of § 1006.28(2)(a)2.b.(II) is very precise—it references "sexual conduct as defined in [section] 841.001(19)," which identifies specific kinds of conduct that qualify as "sexual conduct." Fla. Stat. § 847.001(19). A reference to

[3] Another four challenge forms state: "Not appropriate for minors in a public school setting, according to pornographic definitions of sexual stimulation (all levels)." Plaintiffs do not understand this nonsensical sentence to constitute a challenge to the book as pornographic.

[4] Because the challenges pre-dated the enactment of HB 1069, Plaintiffs do not believe the requirement to remove the challenged books pending a resolution of the challenge applies to the referenced 20 books.

"explicit sex" or "sexual activities" on a challenge form simply does not suffice to register as "sexual conduct" based on the statutory definition. *See also* Mot. for Prelim. Inj. at 12–13, ECF 87.

Even if the Court concludes that some of the challenge forms' allegations of sexual activity meet the statutory definition of "sexual conduct," many of the challenge forms contain no such allegation. For example, the books that were the subject of Plaintiffs' withdrawn Motion for Preliminary Injunction all involved challenge forms that could not fairly be read as asserting a challenge based on the book depicting "sexual conduct" as defined by Florida law. *Id.* at 16 (chart of language from challenge forms, including, e.g., "anti-cop agenda; age inappropriate"). Depending on what allegations are sufficient to bring a form within HB 1069's ambit, many additional challenge forms similarly are not fairly read as being based on the statutory definition of "sexual conduct." For example, the challenge to *Deogratias* alleges the book contains "graphic sexual language; graphic novel pictures; race baiting"; the challenge form for *Little and Lion* states "LGBTQ with sex scenes"; and the challenge form for *Where I End and You Begin* states "sexual nudity; alternate sexualities; profanity." Lev. Decl., Exhs. 1–Y, 1–FFF, 1–AAL (challenge forms). While these forms all reference sex, none actually alleges the book contains depictions or descriptions of sexual conduct as defined in 847.001(19). Plaintiffs do not believe *any* of the challenges to Restricted Books are

based on 1006.28(2)(a)2.b.(II), but even if the court considers certain allegations to trigger the statutory definition, it is abundantly clear that not *all* Restricted Books were challenged on this basis.

B. The Restricted Books Have Not Been "Found" to Have Content Described in § 1006.28(2)(a)2.b.(I) or (II).

The Court's order directed Defendant to state for each book "whether the book was reviewed under §1006.28(2)(d) and *found* to have content described in § 1006.28(2)(a)2.b.(I) or (II) (Yes/No)." Order at 2 (emphasis added). Defendant answered "Yes" for each Restricted Book. But Defendant's own corporate witness, Coordinator of Media Services Bradley Vinson, testified that no such finding has been made. At her deposition, Ms. Vinson was carefully questioned about the nature of the school district's decision to restrict books. She expressly—and repeatedly—clarified that no finding had been made regarding the books actually containing sexual conduct as defined by statute.[5]

When asked about the meaning of a "Y" in the "Restricted Access Yes/No During Review Process" column of the district's spreadsheet of challenged books, Ms. Vinson first stated that a Y meant "it is a book that we have *determined* contains

[5] None of the books are prohibited by 847.012, which applies to material that is harmful to minors, defined as material lacking any serious literary, artistic, political or scientific value. Fla. Stat. §§ 847.012, 847.001(7). Defendant has never claimed that any of the Restricted Books are prohibited by 847.012 or are pornographic.

sexual conduct as defined through HB 1069." Lev Decl., Exh. 2, Vinson Dep. 37:12–14 (emphasis added). Ms. Vinson then asserted the standard was actually that a librarian had "determined that it *may* contain sexual conduct." *Id.* 37:20–38:1 (emphasis added). Given Ms. Vinson's use of two different standards—"contains" and "may contain"—counsel clarified which standard applied, and Ms. Vinson confirmed it was the "may contain" standard. *Id.* 38:2–3. Later, counsel again expressly clarified this distinction:

> **Q:** I want to be really specific because you've said this two different ways. It's been found by one media specialist *to contain* sexual conduct under 1069, or it's been found by one media specialist who determined that it *may contain* sexual conduct under 1069?
>
> **A**: May contain.

Id. 52:13–19 (emphasis added). Throughout the deposition, Ms. Vinson consistently confirmed this distinction. *Id.* 39:12–16; 51:15–52:2; 95:6–10 ("These are books that at least one media specialist has indicated *may* contain sexual conduct." (emphasis added)); 112:7–16; 113:3–13; 116:8–12; 422:9–14; 449:11–17; *see also* Vinson Decl. ¶¶ 39 ("After preliminary review, it was determined all *may* contain sexual conduct." (emphasis added)), 43, 49, 54, 59, 65, 70, 75, ECF 105–1.

Moreover, Ms. Vinson testified that for challenged books—unlike other library books subject to HB 1069 review—if the challenge "indicated sexual anything, if it indicated that their challenge was based on the sexual situations or sexual content in the book, then we did err on the side of caution and keep it

restricted, I believe." Lev Decl., Exh. 2, Vinson Dep. 147:11–15. That is, for the Restricted Books it was enough that the challenge alleged "sexual anything" to cause the book to be restricted. That is a far cry from the book having been "found" to contain sexual conduct as defined by Florida law.

Defendant completely ignores this factual record in falsely asserting that every Restricted Book has been "found" to contain depictions or descriptions of sexual conduct as defined by Florida law.

C. Not All Restricted Books Were Restricted Due to the Challenge.

Defendant's sloppy response to the Court's inquiry extends to its assertion that every Restricted Book was restricted based on both the challenge to the book and librarian review. Reply Exh. 1. Once again, the factual record and Defendant's own testimony demonstrates the falsity of Defendant's assertion. Ms. Vinson's declaration and her deposition testimony make clear that the books *Speak*, *The Hate U Give*, and *Lady Midnight* "had not been restricted as a result of the challenge to the books but only as a result of the 1069 [i.e., librarian] review process." Lev Decl., Exh. 2, Vinson Dep. 361:8–12; *see also id.* 423:1–10; 428:19–430:3 (discussing distinction between books restricted due to challenge and those restricted due to librarian review); Vinson Decl. ¶¶ 48–49, 58–59, 64–65 (stating for each of the three books that "at the time of the challenge until implementation of HB 1069, this title would have circulated as normal" and that it was pulled from circulation due to

librarian review). Defendant's statements to the contrary are indefensible given its own corporate witness's clear testimony.[6]

D. There is Still No End to the Process.

Rather than using its spreadsheet to respond to the Court's final query regarding scheduling of DRC reviews (which would have required stating "TBD" or "no date" or "by May 2026" over 100 times), Defendant explained in prose that "As for the 119 Restricted Books, no specific DRC date has been scheduled" and that it "expects" (not commits) to have DRCs review the Restricted Books by *May 2026*. Reply at 13. Thus, absent action by the Court, the district does not even "expect" to complete the DRC process for these books (let alone potential Board review of DRC decisions) for another year and a half. At that time, *nearly four years* will have passed since the first Restricted Books were challenged.

* * *

Plaintiffs respectfully submit that the lack of seriousness with which Defendant undertook to respond to the Court's inquiries, coupled with the extraordinary delay Defendant envisions to complete the review process, strongly support denial of the Motion for a Stay and the continued progress of this case.

---

[6] Based on data provided in discovery, it appears that all other Restricted Books were initially restricted because of the challenge. Based on Ms. Vinson's testimony, she and her assistant also determined that these books were challenged for "sexual anything" or "may" contain depictions or descriptions of sexual conduct as defined by Florida law as part of the librarian review process for challenged books. Lev Decl., Exh. 2, Vinson Dep. 112:7–113:13, 147:11–15.

V. Conclusion

For the reasons set forth above and in their Opposition, Plaintiffs believe the Court should deny the Motion to Stay with respect to the Restricted Books. If the Court decides to stay the Restricted Books claims, Plaintiffs respectfully request that the Court condition such a stay on expeditious review of the Restricted Books, deny Defendant's Motion to Stay Proceedings with respect to Plaintiffs' Motion for Sanctions, and direct Defendant to complete the remaining outstanding discovery.[7]

[7] If the Court stays the Restricted Books claims, Plaintiffs agree that the renewed depositions of Defendant's 30(b)(6) witness and Superintendent Keith Leonard should likewise be stayed. See Opp'n at 8 n.4.

CERTIFICATE OF WORD COUNT

The undersigned certify that this Motion complies with the word count limitation set forth in the Court's Order Requiring Additional Briefing (ECF 167) because it contains 4,690 words, excluding the parts exempted by Local Rule 7.1(F).

Respectfully submitted,

Dated: January 7, 2025

/s/Lynn B. Oberlander
Lynn B. Oberlander*
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019-5820
Telephone: 212.223.0200
Facsimile: 212.223.1942

Mike Kilgarriff*
Catherine Warren*
Ballard Spahr LLP
1225 17th Street, Suite 2300
Denver, CO 80202
Telephone: 303.292.2400
Facsimile: 303.296.3956

Matthew G. Kussmaul*
Facundo Bouzat*
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.864.8500
Facsimile: 215.864.8999

Kirsten Fehlan*
BALLARD SPAHR LLP
999 Peachtree Street, Suite 1600
Atlanta, GA 30309
Telephone:678.420.3000

Facsimile: 678.420.9401

Goldie Fields*
BALLARD SPAHR LLP
2029 Century Park East, Suite 1400
Los Angeles, CA 90067
Telephone: 424.204.4338
Facsimile: 424.204.4350

Shalini Goel Agarwal (FBN 90843)
Ori Lev*
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Ave. NW, Suite 163
Washington, DC 20006
Telephone: 202.579.4582
Facsimile: 929.777.8428

**Admitted pro hac vice*

Attorneys for Plaintiffs