UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PEN AMERICAN CENTER, INC., SARAH BRANNEN, BENJAMIN GLASS, on behalf of himself and his minor child, GEORGE M. JOHNSON, DAVID LEVITHAN, KYLE LUKOFF, ANN NOVAKOWSKI, on behalf of herself and her minor child, PENGUIN RANDOM HOUSE LLC, SEAN PARKER, on behalf of himself and his minor child, ASHLEY HOPE PÉREZ, and CHRISTOPHER SCOTT SATTERWHITE, on behalf of himself and his minor child,

Plaintiffs,

vs.

ESCAMBIA COUNTY SCHOOL BOARD,

Defendant.
_____ /

CASE NO.: 3:23-CV-10385-TKW-ZCB

NON-PARTY KEVIN ADAMS' MOTION TO QUASH SUBPOENA AND MOTION FOR PROTECTIVE ORDER

Pursuant to Federal Rules of Civil Procedure 26(c) and 45(d)(3), and this Court's Supplemental Scheduling Order, [D.E. 200], non-party Kevin Adams ("Mr. Adams"), by and through undersigned counsel, hereby files this Motion to Quash Subpoena and Motion for Protective Order, and in support states:

I. BACKGROUND

This case arises from the Escambia County School Board's ("Board") decisions to either remove or restrict access to certain books from the libraries in the Escambia County School District ("District"), and Plaintiffs' subsequent challenge to these actions. [D.E. 204-1]. Plaintiffs allege violations of their First Amendment rights based on purported viewpoint discrimination, violation of an alleged right to receive information in public schools, and their due process rights based on the Board's actions. *Id.* at ¶¶ 228–48.

On May 31, 2024, Plaintiffs served notices of taking deposition of the Board's then-members—Kevin Adams, Paul Fetsko, Patricia Hightower, William Slayton, and David Williams (collectively, "Board members")—and its Superintendent, Keith Leonard. *See* [D.E. 82-1]. On August 15, 2024, Plaintiffs served amended notices of taking deposition as well as subpoenas. Adams Subpoena, **attached as Exhibit A**; *see also* [D.E. 113 at p. 4 n.2, 197 at p. 7]. The Board filed a motion for protective order, [D.E. 82], and later a renewed motion for protective order, [D.E. 107], seeking to preclude the compelled depositions of the Board members. Plaintiffs responded in opposition both times. [D.E. 95, 113].

In its renewed motion for protective order, the Board asserted the legislative privilege on behalf of the Board members.[1] [D.E. 107 at pp. 19–22]; *see also* [D.E. 107-1–107-5]. A hearing was held before the magistrate judge, where Plaintiffs confirmed they were not challenging the sufficiency of either the Board's raising of the legislative privilege on behalf of the Board members, nor were they challenging the declarations submitted on behalf of the Board members confirming their desire to have it raised on their behalf.[2] [D.E. 133 at 31:03–31:19].

After hearing, the magistrate judge granted the Board's renewed motion for protective order. [D.E. 138]. Plaintiffs filed objections to this order, [D.E. 143], the Board responded, [D.E. 151], and another hearing was held. [D.E. 152]. At that hearing, the Court sustained Plaintiffs' objections. [D.E. 156 at 136:06–136:09]. The Court memorialized this ruling via written order. [D.E. 155].

At the hearing, after the Court announced its ruling, the undersigned indicated they would be taking an interlocutory appeal to the Eleventh Circuit. [D.E. 156 at 138:07–138:08]. The undersigned also stated they would be seeking to stay the case

[1] In a similar case before Judge Allen Winsor in the Tallahassee Division of this Court, the Board also filed a motion for protective order on behalf of the Board members seeking to preclude their depositions; that motion was granted and the Board filed the transcript from the hearing on its motion there and the Court's order granting the Board's motion as supplemental authority in this matter. [D.E. 123, 125].

[2] The Court has acknowledged Plaintiffs "acquiesced to th[is] process." [D.E. 207 at 17:15–18:11].

pending a ruling by the Eleventh Circuit, *id.* at 138:12–138:14, an approach the Court agreed with, saying "it certainly makes sense that the order allowing the depositions to go forward would reasonably be stayed so the appellate court can sort out whether they should happen at all." *Id.* at 139:04–139:07. The Court caveated this by noting it was unsure whether it made sense to only stay that component of the case or the entire matter. *See id.* at 139:07–139:17. The Parties briefed the matter, [D.E. 158, 165, 168, 169], and the Court first partially stayed the case, [D.E. 160], before completely staying it pending resolution of the Board and Board members' interlocutory appeal. [D.E. 170].

The Board and Board members took an interlocutory appeal of the Court's order, pursuant to 28 U.S.C. § 1291 and *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015). [D.E. 157]; *see also Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 24-13896 (11th Cir.). After briefing, the Eleventh Circuit dismissed the appeal for lack of jurisdiction, finding neither the Board nor Board members had standing. [D.E. 192]. The Court then ordered the Parties to file a proposed case management schedule. [D.E. 193]. The Parties submitted competing documents. [D.E. 195, 197]. The Board's filing indicated that, based on the Eleventh Circuit's decision, "the individual Board members must be afforded the opportunity to file motions on their own behalf asserting legislative privilege." [D.E. 195 at p. 2 n.2].

A case management conference was then held, at which time the Court indicated its inclination to allow the individual Board members to file motions to quash and/or for protective order. *See* [D.E. 200 at 25:05–26:25]. The Court memorialized this via written order, permitting the Board members until August 22, 2025, to file a motion to quash and/or for protective order on the issue of legislative privilege. [D.E. 200 at p.2]. The Court's order instructed these motions "shall include argument as to why the motion should be allowed at this point, as well as argument on the merits." *Id.* Mr. Adams, pursuant to the Court's Order, now files his motion to quash and for protective order ("Motion"), and asks the Court to consider his Motion on the merits and find he is protected by the legislative privilege, and preclude his compelled testimony in this case.

II. MEMORANDUM OF LAW

A. Legal standard.

Federal Rule of Civil Procedure Rule 26(c)(1) allows "any person" from whom discovery is sought to move for a protective order, which may be granted for good cause. *Odom v. Roberts*, 337 F.R.D. 359, 362 (N.D. Fla. 2020). "Rule 26(c) gives the district court discretionary power to fashion a protective order." *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985). Under the "good cause" standard, the Court must balance the competing interests of the parties, and has broad discretion in determining whether a protective order is

warranted. *Odom*, 337 F.R.D. at 362. Rule 26 protects those from whom discovery is sought from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Good cause exists to prevent Plaintiffs from taking the deposition of Mr. Adams pursuant to the legislative privilege.

Rule 45(d)(3), in turn, states that "[o]n timely motion," the Court "must quash or modify a subpoena that" "requires disclosure of privilege or other protected matter." Fed. R. Civ. P. 45(d)(3)(A)(iii); *see also In re Hubbard*, 803 F.3d at 1307. The Eleventh Circuit allows non-parties such as Mr. Adams to file motions to quash based on the assertion of a governmental privilege. *See In re Hubbard*, 803 F.3d at 1307–08.

B. Mr. Adams' Motion is timely.

i. There was no need for motions to quash until now.

Plaintiffs contend the Court "should not allow the Board members to belatedly file motions seeking to prevent their depositions." [D.E. 197 at p. 6]. Plaintiffs argue any motion to quash and/or protective order, filed by the individual Board members, would be untimely. *See id.* at pp. 6–10. Plaintiffs are incorrect.

In its renewed motion for protective order, the Board presented arguments as to why it was permitted to raise the legislative privilege on behalf of the Board members. [D.E. 107 at pp. 19–22]. Plaintiffs did not object to this invocation, [D.E. 113], and confirmed before the magistrate judge they were not challenging the

Board's invocation of the legislative privilege on behalf of the Board members. [D.E. 133 at 31:03–31:19]. Thus, there was no need for additional and unnecessary motion practice by the individual Board members, a fact Plaintiffs conceded in their response to the Board's renewed motion for protective order: "Plaintiffs do not believe further motions practice is needed [by way of motions to quash the subpoenas served after the Board filed its renewed motion] for the Court to reach the merits of whether or not the Board Members may be deposed by Plaintiffs." [D.E. 113 at p. 4 n.2].

Plaintiffs' correspondence to the Board's counsel confirms this as well, noting they believed the "formality" of serving subpoenas was unnecessary, and that "[w]e don't really think [the Board] need[s] to file a motion to quash apart from your existing two motions on the board member depositions." [D.E. 197-1 at p. 36]; *see also id.* at p. 35 (again stating "we do not believe that further motions practice is needed on the subpoenas at all"). The undersigned, in its correspondence with Plaintiffs' counsel, indicated they were seeking a potential agreement as to an extension for "Defendant to respond to the subpoenas until after the court rules on the pending motions." *Id.* at p. 34. Plaintiffs first stated "[w]e can enter into some agreement on this if that would help," and later stated they "[took] no position on Defendant's request for an extension of time to file a motion to quash the subpoenas, as Plaintiffs believe the motion to quash is unnecessary in light of the motions

already pending before the court." *Id.* Given Plaintiffs' position that motions to quash were unnecessary, the undersigned wrote "[a]s long as Plaintiffs are not opposing such an extension to respond to the subpoenas, [the Board's counsel] [was] fine with avoiding unnecessary motion practice at this point." *Id.* Indeed, Plaintiffs concede "the parties agreed to an extension of time to respond to the subpoenas." [D.E. 197 at pp. 7–8]; *see also id.* at p. 8 ("Plaintiffs agreed to an extension of time for Defendant [to move to quash the subpoenas].").

That the subpoenas were nothing more than placeholders—and the Parties had agreed to an extension of time to move to quash—is also evidenced by the fact the date and time for Mr. Adams to comply with the subpoena came and went without Plaintiffs ever raising the issue of his non-compliance, or moving to enforce the subpoena. Specifically, Mr. Adams' subpoena commanded him to appear on September 20, 2024, at 10:00 am for deposition. *See* **Exhibit A**. Plaintiffs did not seek relief when Mr. Adams did not comply with their subpoena because they too were operating under the belief the Parties were litigating the issue of his legislative privilege through the Board's renewed motion for protective order.

Following these correspondences, the magistrate judge granted the renewed motion for protective order, [D.E. 138], and Plaintiffs filed objections. [D.E. 143]. In their objections, Plaintiffs did not argue the magistrate judge erred in finding the Board had sufficiently invoked the legislative privilege on behalf of the Board

members, nor did they argue the magistrate judge's order was clearly erroneous or contrary to law for lack of any motions to quash individually filed by the Board members. *See generally id.*; *see also* [D.E. 197 at pp. 9–10 n.5 ("Plaintiffs did not challenge whether the Board appropriately asserted the legislative privilege[.]"). After the Court sustained Plaintiffs' objections, it orally pronounced its intention to stay the case with respect to the depositions; it shortly thereafter partially—then fully—stayed the case. [D.E. 160, 170].

Accordingly, and given the stay in place and that "the parties agreed to an extension of time to respond to the subpoenas," [D.E. 197 at pp. 7–8], there was no need for Mr. Adams to file his Motion until now to quash the extant subpoena/seek protection from it because it was only after the Eleventh Circuit's decision that the stay was lifted. *See* [D.E. 207 at 14:19–14:22 (Court commenting issue is ripe for motion to quash or to seek protective order)].

ii. There has been no waiver by Mr. Adams.

Mr. Adams is unaware whether Plaintiffs will argue he somehow waived his ability to assert the legislative privilege.[3] However, to the extent Plaintiffs contend Mr. Adams has waived the right to raise legislative privilege because he failed to file

[3] Even if the Court finds Mr. Adams waived his ability to file a motion to quash and/or for protective order based on procedural grounds, Mr. Adams could still invoke the privilege at deposition. A finding of waiver would therefore only prolong this matter.

a motion to quash and/or for protective order on their timeline, such an argument should be disregarded. "Waiver is the voluntary, intentional relinquishment of a known right." *Glass v. United of Omaha Life Ins.*, 33 F.3d 1341, 1347 (11th Cir. 1994). "While waiver may be implied from conduct, nonetheless, there must be conduct evidencing an intention to waive a right." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, No. 3:07–cv–62–MCR–EMT, 2011 WL 13193287, at *16 (N.D. Fla. Oct. 21, 2011). The facts here do not demonstrate Mr. Adams waived his right to invoke the legislative privilege, even if the Court finds he failed to timely move for protection. Rather, they clearly show an intent by Mr. Adams and the other Board members to *not* relinquish their right to legislative privilege.

Mr. Adams, along with the other four Board members, all affirmatively declared their intent to raise the legislative privilege, and their intent for the Board to do so on their behalf. [D.E. 107-1–107-5]. They then reaffirmed that intent when they joined the Board's interlocutory appeal before the Eleventh Circuit. [D.E. 157]. At no point has Mr. Adams voluntarily or intentionally relinquished his right to raise legislative privilege, and so there should be no finding of waiver.

Supporting this is the fact that the privilege at issue "belongs to the individual [Board] members, not the Board itself." [D.E. 192 at p. 11 (citation omitted)]. Because the Board did not have standing "to assert the legislative privilege of its

members, who each individually possess the privilege insofar as they are entitled to it," *id.*, it follows that the Board could not have waived the legislative privilege of its members because the Board's actions cannot stand in for those of its members. *See Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1264 (11th Cir. 2023) (finding county's assertion of immunity on behalf of county commissioner did not equate to "participation" because "it wasn't the county's immunity to assert," "[a]nd the county's assertion of the immunity doesn't equate to the commissioner's participation in the case"); *see also Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1313 (11th Cir. 2021) ("The attorney-client privilege belongs solely to the client, who may waive it either expressly or by implication." (citation modified)).

iii. There is no law of the case precluding Mr. Adams' Motion.

Mr. Adams anticipates Plaintiffs may argue the Eleventh Circuit's opinion constitutes law of the case, somehow precluding this Motion. This is incorrect. The Eleventh Circuit's opinion is clear it was a dismissal based solely for lack of jurisdiction; there was no consideration of the merits. [D.E. 192 at pp. 3, 7 ("We agree with Plaintiffs and find we have no appellate jurisdiction to consider the merits of this appeal.")]. As such, there has been no adjudication by the Eleventh Circuit of the underlying legislative privilege issue. *See Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1284 (11th Cir. 2016) ("[A] dismissal for lack of jurisdiction ordinarily does not—indeed, cannot—express any view on the merits."). No merits

ruling means no law of the case on this issue. *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000) (The law of the case doctrine bars consideration *of only those legal issues that were actually decided* in the former proceeding." (citation modified)).

The Eleventh Circuit did not preclude—or even mention—future litigation by the Board members in challenging the subpoenas, and the law of the case doctrine presents no bar to this either. *Arizona v. California*, 460 U.S. 605, 618 (1983) (law of the case doctrine "directs a district court's discretion, it does not limit the tribunal's power"). Accordingly, there are no law of the case issues barring this Motion.

iv. The Board and Board members asked the Eleventh Circuit to construe their appeal as a petition for mandamus.

At the case management conference, Plaintiffs' counsel stated that "in addition to moving to quash the subpoenas, the Defendant also . . . could have sought mandamus." [D.E. 207 at 28:16–28:24]. But the Board and Board members did ask the Eleventh Circuit, in their reply brief, to construe their appeal as a petition for writ of mandamus in the event the court determined it lacked appellate jurisdiction:

> Should the Court determine it lacks appellate jurisdiction under the collateral order doctrine, it should construe the Board and Board members' appeal as a petition for writ of mandamus pursuant to 28 U.S.C. § 1651(a). Because the Board members have no adequate means to challenge the District Court's Order, mandamus would be appropriate should the Court find the collateral order doctrine does not apply.

Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 24-1389, Doc. 39 at pp. 15–16 n.10 (Apr. 18, 2025) (citation modified). The Eleventh Circuit declined to address this request by the Board and Board members in its opinion. *See generally* [D.E. 192].

Moreover, even if the Board and Board members had separately sought a petition for writ of mandamus, this would not have changed the outcome on appeal. That is, the Eleventh Circuit dismissed for lack of standing. *Id.* at p. 3. The Article III standing requirement applies to all forms of judicial relief, including petitions for writs of mandamus. *See, e.g.*, *Morales v. U.S. Dist. Ct. for S. Dist. of Fla.*, 580 F. App'x 881, 885 (11th Cir. 2014) ("Before we consider the merits of Morales's petition, we first must determine if Morales has standing to 'invoke the power of the federal courts.'" (quoting *Steele v. Nat'l Firearms Act Branch*, 755 F.2d 1410, 1413 (11th Cir. 1985))); *United States v. U.S. Dist. Ct., S. Dist. of Tex.*, 506 F.2d 383, 384 (5th Cir. 1974) (finding no authority which "would allow a non-party standing to seek a writ of mandamus" based on circumstances of that matter)[4]; *see also Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (discussing

[4] Decisions of the Fifth Circuit decided prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

"fundamentals of standing"). The lack of a petition for writ of mandamus does not render Mr. Adams' Motion untimely.

v. Asking the Court to certify an interlocutory appeal was unnecessary.

Plaintiffs further argued at the case management conference "Defendant also could have sought from [the Court] to certify this – for interlocutory appeal, that would have been another way for them to get this resolution from the Eleventh Circuit." [D.E. 207 at 28:16–28:24]. Mr. Adams presumes by "certify" Plaintiffs were arguing the Board and/or Mr. Adams should have requested the Court certify its order for interlocutory review, pursuant to 28 U.S.C. § 1292(b).[5]

Plaintiffs are incorrect that certification would have cured the jurisdictional issues identified by the Eleventh Circuit. [D.E. 192 at p. 3]. The Eleventh Circuit's opinion stated the Board could not appeal "because it lack[ed] standing"; and the Board members "failed to participate in the case below," so they also lacked standing. *Id.*; *see also id.* at p. 10 ("[I]t is clear that under our prior precedent neither the Board nor the Board's members have standing to appeal."). Even if the Board and Board members had asked the Court to certify its order, it would not have provided the requisite standing to supply appellate jurisdiction. *Id.* at p. 8 ("For us

[5] In the event Plaintiffs were referencing some other procedure, Mr. Adams respectfully asks the Court permit him to file a reply addressing this argument.

to properly exercise jurisdiction, Article III of the Constitution also requires us to ensure there is a real controversy between the parties at each stage of the litigation.").

Beyond the lack of standing, there was no need to seek certification because the Court's order fell within the collateral order doctrine, which recognizes a small category of decisions—including those which deny assertion of a governmental privilege—for which an immediate interlocutory appeal can be taken. *In re Hubbard*, 803 F.3d at 1305. To that end, resorting to 28 U.S.C. § 1292(b) was unnecessary, as it is intended to provide a "potential avenue[] of review *apart from* [the] collateral order doctrine." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110 (2009) (emphasis added). Demanding the Board and/or its members petition the Court for certification of a question for which there already existed a clear interlocutory avenue of relief would be an inefficient use of judicial economy and resources.

In addition, this matter would not have been the proper subject of § 1292(b) certification. Such appeals "should be reserved[] for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Further:

> The antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case. . . . *The legal question must be stated at a high enough level of abstraction to*

> *lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law*.

Id. (emphasis added). The issue here—whether legislative privilege applies to votes and actions taken by school board members voting to remove or restrict library books—cannot be extrapolated from the facts giving rise to this dispute. *See* [D.E. 155 at pp. 6–8 (comparing legislative privilege precedent to facts of this matter)]. Thus, beyond not curing the standing issue, it is unlikely the Court would have exercised its discretion and certified this matter under 28 U.S.C. § 1292(b) given the fact-intensive nature of the inquiry.

vi. The equities favor allowing Mr. Adams to file his Motion now.

Finally, the equities favor Mr. Adams. Rule 45(d)(3) merely requires that a motion to quash be "timely" filed. And Rule 26(c) gives district courts broad discretion in fashioning protective orders for good cause shown. Under either standard, and considering the Court's discretion in this field, the Court should consider Mr. Adams' Motion timely and review it on the merits.

First, as discussed above, Plaintiffs at no time challenged the Board's invocation of the legislative privilege on behalf of Mr. Adams or the other Board members. It was only on appeal that the question of standing became an issue based on Plaintiffs' own urging. As the Court noted at the case management conference, "the equities [would be] in a different boat if the Eleventh Circuit on its own

initiative came up with this jurisdictional problem, *but when it was the first issue in [Plaintiffs'] answer brief*," it raises concerns. [D.E. 207 at 25:06–25:13 (emphasis added)].

These concerns become compounded when, as the Court recognized, there currently exists a split in this judicial district on the question of legislative privilege's application to Board members voting to remove/restrict library books. *Compare* [D.E. 125 (Judge Winsor's order granting motion for protective order)], *with* [D.E. 155]. Given the split between this Court and Judge Winsor, the Court is rightly concerned at the lack of resolution, *see* [D.E. 207 at 25:12–25:19], and as it observed, "this is an important enough issue in this case and broader than this case, that warrants the Eleventh Circuit to weigh in." *Id.* at 40:23–40:25. Precluding Mr. Adams' Motion from proceeding on the merits means the Parties, and this Court, are left without "a substantive ruling." *Id.* at 40:19. To borrow the Court's words: "[t]here's a reason the Eleventh Circuit allows interlocutory appeals in circumstances like this," and the need for a substantive ruling on this "significant" issue becomes even more imperative "given the split amongst two district judges." *Id.* at 40:20–40:22.

Second, and relatedly, should the Court agree with Plaintiffs and decline adjudicating Mr. Adams' Motion on the merits, Mr. Adams will be effectively foreclosed from raising legislative privilege and must either risk contempt sanctions

or disclose information he contends is privileged—something which cannot be remedied on appeal. This would work irreparable harm on Mr. Adams. *Cf. Nowak v. Lexington Ins.*, No. 05-21682CIV-MORENO, 2006 WL 3613760, at *2 (S.D. Fla. June 22, 2006) (staying discovery order requiring production of documents party contended were privileged because once documents were disclosed, "the cat is out of the bag"); *Sandalwood Ests. Homeowner's Ass'n v. Empire Indem. Ins.*, No. 09-CV-80787-RYSKAMP/VITUNAC, 2010 WL 11505438, at *2 (S.D. Fla. June 3, 2010) (finding party would be irreparably harmed if required to produce documents pending resolution by Eleventh Circuit of claim of privilege); *contrast United States v. Cross Senior Care Inc.*, No. 8:19-mc-008-T-33TGW, 2020 WL 7407559, at *1 (M.D. Fla. Feb. 27, 2020) (finding party failed to establish irreparable harm because court only ordered production of non-privileged communications).

Plaintiffs may contend Mr. Adams should "refuse to [answer the questions posed to him] and accept the sanction the Court imposes as a result." [D.E. 197 at p. 10]. But that is at odds with the Eleventh Circuit's precedent on governmental privileges, which is that "government officials may appeal from the discovery order itself without waiting for contempt proceedings to be brought against them." *In re Hubbard*, 803 F.3d at 1305. Precluding Mr. Adams from raising legislative privilege now and instead forcing him to incur contempt sanctions is antithetical to this

circuit's approach to issues like legislative privilege, and weighs heavily in favor of reviewing the merits of Mr. Adams' Motion.

Third, and further weighing in favor of permitting the Motion to be considered now, is that any delay in filing it can be considered excusable. As the Court commented at the case management conference, once it sustained Plaintiffs' objections, the Court "stayed the case, so the clock stopped." *Id.* at 23:11–23:12. Indeed, the Court immediately observed at the hearing in which it sustained Plaintiffs' objections that staying the case as to the Board members' depositions "certainly makes sense . . . so the appellate court can sort out whether they should happen at all." [D.E. 156 at 139:04–139:07]. That hearing occurred on November 15, 2024. [D.E. 152]. The Court entered its order on Plaintiffs' objections on November 18, 2024, [D.E. 153], before entering an amended order on November 20. 2024. [D.E. 155]. And after orally indicating it would stay the matter, at least with respect to the Board members' depositions, the Court formally entered a partial stay on November 27, 2024, [D.E. 160], the day after the Board and Board members filed their notice of appeal. [D.E. 157].[6]

At the case management conference, the Court questioned Plaintiffs' counsel about the correspondence between them and the undersigned; specifically, they were

[6] While the Court only fully stayed the case on January 13, 2025, [D.E. 170], after additional briefing by the Parties, its partial stay covered its order on the Board's renewed motion for protective order. [D.E. 160].

asked whether there was ever an expression of intent to "file a motion to quash before [the Board and Board members] appeal?" [D.E. 207 at 22:10]. Plaintiffs' counsel conceded there was never any agreement on this. *Id.* at 22:11. So, as the Court recognized, what the Board and Board members "were preserving, what they were getting an extension and preserving to has now come to fruition." *Id.* at 23:02–23:03. To the extent Plaintiffs argue any motion to quash is untimely, the equities cut against this. *Cf. Estate of SF v. Fla. Dep't of Child. & Fams.*, No. 4:22cv278-MW/MAF, 2023 WL 11760560, at *1–2 (N.D. Fla. May 17, 2023) (noting that whether neglect is excusable is usually an equitable inquiry taking into account all relevant circumstances).

Fourth, as the Court has observed, Plaintiffs' arguments about delay, *see* [D.E. 197 at p. 6], must be considered against their own actions. As early as the Court's order on the Board's motion to dismiss in January 2024, the Court proposed the state administrative review process as a potential alternative remedy for their sought-after relief. *See* [D.E. 65 at pp. 10–11 n.4]. The Court noted this again in January 2025 in its order staying the case, *see* [D.E. 170 at pp. 5–6 & n.6], and again in May 2025 when it declined to hold a status conference at Plaintiffs' request, finding "it is hard to take seriously Plaintiffs' complaints about the harm resulting from the pace of the review if (as it appears) they have not even attempted to utilize the state administrative process to ameliorate that harm." [D.E. 186 at p. 2]. And most

recently, at the case management conference, the Court again commented that "you could get [a resolution] from a DOAH administrative law judge a heck of a lot quicker than you've gotten it from me[,] [a]nd so I hear what you're saying about delay . . . but I'm also a little bit unsympathetic to it to the degree that you'd like me to be for those reasons." [D.E. 207 at 58:01–58:06].

Plaintiffs' failure to take advantage of the state administrative process renders their complaints about delay hollow. The equitable decision is to consider Mr. Adams' Motion timely, and review it on the merits.[7]

C. This Court should find the legislative privilege protects Mr. Adams.[8]

i. Mr. Adams is covered by the legislative privilege.

[7] Mr. Adams has endeavored to preemptively address all arguments raised in Plaintiffs' proposed case management schedule and at the case management conference. In the event Plaintiffs raise new arguments in their response in opposition to this Motion, Mr. Adams respectfully asks leave of Court to file a reply to address and rebut them.

[8] At the case management conference, the undersigned confirmed to the Court that the grounds for this Motion would be the same as the Board's renewed motion for protective order. [D.E. 207 at 16:06–16:10, 27:05–27:08]. As such, Mr. Adams adopts and restates herein the Board's arguments from its renewed motion for protective order concerning legislative privilege. *See generally* [D.E. 107]. To the extent it is relevant and helpful to the Court's review, Mr. Adams also incorporates herein the arguments from the hearing before the magistrate judge, [D.E. 133], and this Court, [D.E. 156], as well as his briefing filed before the Eleventh Circuit. *See Pen Am. Ctr., Inc.*, No. 24-13896, Doc. 23 at pp. 37–54 (Feb. 6, 2025); *id.* Doc. 39 at pp. 22–27 (Apr. 18, 2025).

The concept of legislative privilege against testifying is well-established in federal courts. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). As the Supreme Court has recognized, "judicial inquiries" into the motivations underlying legislative decisions "represent a substantial intrusion into the workings of other branches of government." *Id.* at 268 n.18. This privilege has been described as protecting officials from having "to testify in [a] civil case about the reasons for their votes." *Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012).

In recognizing such a privilege for state legislators in *Florida*, this Court denied a motion to compel legislators and their staff to appear for depositions. *See id.* ("The privilege is broad enough to cover all the topics that the intervenors propose to ask [the legislators] and to cover their personal notes of the deliberative process."); *see also Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1343–44 (11th Cir. 2023) (noting legislative privilege extends to discovery requests, including requests for factual information). Nothing here compels a different result.

As this Court has explained, "legislative immunity and privilege are parallel concepts, and the privilege exists to safeguard the immunity." *Florida v. Byrd*, 674 F. Supp. 3d 1097, 1103 n.2 (N.D. Fla. 2023) (citation modified); *In re Hubbard*, 803 F.3d at 1310 (noting the "importan[ce]" of the legislative privilege). And it does not matter to the existence of the legislative privilege that Mr. Adams is not a party to

suit, as the privilege applies even if he has not personally been sued. *In re Hubbard*, 803 F.3d at 1308 (citation omitted).

Given the parallel nature of these concepts, it only follows that just as legislative immunity attaches to local officials, *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998), so too does legislative privilege. *See Byrd*, 647 F. Supp. 3d at 1103 n.2. Further, there is no reason to consider Mr. Adams—a duly elected constitutional officer, representing a local geographic area within the District—as falling outside the universe of local officials protected by the legislative privilege; he should therefore be protected from compelled depositions in this matter. *See, e.g.*, *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, Nos. 3:20-cv-01023, 3:21-cv-00038, 3:21-cv-00122, 2021 WL 5882653, at *4 (M.D. Tenn. Dec. 13, 2021) ("[T]he Court finds that the legislative privilege precludes the noticed depositions of the school board members . . . ."); *Cunningham v. Chapel Hill ISD*, 438 F. Supp. 2d 718, 722 (E.D. Tex. 2006) (protecting school board member from being deposed as to legislative act, finding "that the rationales for applying the testimonial privilege to federal, state, and regional legislators apply with equal force to local legislators," and such officials "are protected by the testimonial privilege from having to testify about actions taken in the sphere of legitimate legislative activity").

Any question as to whether the privilege can extend to Mr. Adams is dispelled given he is a duly elected official, who acts in legislative capacities in service of his

duties to the District. *Cf. Spallone v. United States*, 493 U.S. 265, 279 (1990) (noting legislative privilege is "derive[d]" "from the will of the people" (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808))). The Court should therefore find it is undisputed that Mr. Adams falls within the umbrella of officials afforded protection by legislative privilege.

ii. The act of voting to remove or restrict books is legislative in nature.

"The legislative privilege protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *In re Hubbard*, 803 F.3d at 1310 (citation modified). Here, the Court should find that "the factual heart" of Plaintiffs' claims "and the scope of the legislative privilege [a]re one and the same." *Id.* at 1311.[9] That is, "[a]ny material, documents, or information [including testimony] that d[o] not go to legislative motive [are] irrelevant," and "any that d[o] go to legislative motive [are] covered by the legislative privilege." *Id. In re Hubbard*, which concerned a First Amendment retaliation claim, found as much and the Court should find likewise here given this is also a First Amendment matter. *Id.* at 1311–12.

And as the Eleventh Circuit recently clarified in *Pernell*:

> The Supreme Court has *never* expanded the *Gillock* exception beyond criminal cases. For purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and

[9] The Court has already implicitly recognized as much, given its acknowledgment that the Board members' individual motives are relevant. [D.E. 98 at p. 4].

> criminal prosecutions by the federal government. Although the legislative privilege does not presumptively apply in the latter kind of case, the presumption otherwise holds firm. *And it is insurmountable in private civil actions under section 1983*.

84 F.4th at 1344 (cleaned up) (emphases added). Like *In re Hubbard*, "[t]his is not a federal criminal investigation or prosecution." 803 F.3d at 1312. This is a civil matter under 42 U.S.C. § 1983, and thus "the presumption [of applying the privilege] holds firm." *Pernell*, 84 F.4th at 1344; *see also League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 456 (N.D. Fla. 2021) ("[M]erely asserting a constitutional claim is not enough to overcome the privilege.").

Given the Eleventh Circuit's description of the privilege as "unqualified" in civil matters, *Pernell*, 84 F.4th at 1341, it indisputably applies here. Plaintiffs have made clear they intend to depose Mr. Adams as to, inter alia, his "subjective states-of-mind," *Byrd*, 374 F. Supp. 3d at 1104, and the circumstances and motivations surrounding his decision to vote in favor, *vel non*, of removing or restricting certain books. *See, e.g.*, [D.E. 204-1 at ¶ 5 (alleging the Board is ordering books to be removed from libraries based on ideological reasons and engaging in viewpoint discrimination); D.E. 40 at 5–9 (Plaintiffs' Response in Opposition to the Board's Motion to Dismiss, recounting allegations of purported viewpoint discrimination with respect to Board's actions towards removed and restricted books); D.E. 95 at 15–16 (Plaintiffs' response in opposition to the Board's initial motion for protective

order, arguing the motivations of individual Board members are relevant and discoverable)].

These "topics strike at the heart of legislative privilege." *See Byrd*, 674 F. Supp. 3d at 1104. "The testimony Plaintiffs seek all relates to . . . thought processes, and decision making processes in voting [whether or not to remove or restrict access to the books at issue]." *Id.* (citation omitted). "The privilege thus 'applies with full force'" to Plaintiffs' sought testimony. *Id.* (quoting *In re Hubbard*, 803 F.3d at 1310).

Despite the unqualified and unequivocal manner in which the legislative privilege applies to Mr. Adams in this matter, Plaintiffs have argued the acts in question—voting to remove or restrict the books at issue—were not legislative in nature. *See* [D.E. 95 at pp. 8–13; 113 at pp. 4–12]. Not so. "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. For example, certain personnel decisions are not considered legislative. *Forrester v. White*, 484 U.S. 219, 229–30 (1988). On the other hand, employment decisions "accomplished through traditional legislative functions such as policymaking and budgetary restructuring" are considered legislative. *Bryant v. Jones*, 575 F.3d 1281, 1306 (11th Cir. 2009) (quoting *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000)). An analysis of the Board members' actions reveal their legislative nature.

Under Florida law, the Board "has the specific duty and responsibility [to be] responsible for the content of any materials made available in a school library." § 1006.28(2)(a)1., Fla. Stat. (2022) (cleaned up). The Board was thus required to "adopt a policy regarding an objection by a parent or a resident of the county to the use of a specific material, which clearly describes a process to handle all objections and provides for resolution." § 1006.28(2)(a)2., Fla. Stat. (2022).[10] Pursuant to that duty, the Board was therefore required to offer a "resolution" when the books at issue were challenged. *Id.* Tellingly, however, the votes of each Board member, including Mr. Adams, were an act of individual discretionary policymaking because they implicated the priorities of the Board. *Bogan*, 523 U.S. at 55.

Within this statutory mandate, this cannot be considered an administrative act: the Board "in the furtherance of [its] dut[y]," *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. May 1981), pursuant to an established process, followed the law of the State of Florida, and provided the statutorily required resolutions. *See*

[10] Section 1006.28(2)(a)2.b. specifically references "material[s] . . . made available in a school library." The statute further requires any material which a school board finds "contains prohibited content under [section 1006.28(2)(a)2.b.] shall [be] discontinue[d] [from] use . . . for any grade level or age group for which such use is inappropriate or unsuitable." *Id.* To 'discontinue' therefore means the book can no longer be offered or provided, that is, it must be removed and its access cut off. *See, e.g.*, *Discontinue*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/discontinue ("to stop doing *or providing something*" (emphasis added)); *Discontinue*, Britannica Dictionary, https://www.britannica.com/dictionary/discontinue ("to stop making or offering").

Schlegel v. Koteski, 307 F. App'x 657, 660 (3d Cir. 2009). These votes to remove or restrict certain books were prospective in that they were forward-looking because they resulted in removal/restriction of the books in question for the indefinite future, and therefore "had a substantial nexus to the legislative process." *Bryant*, 575 F.3d at 1306. And they had general application because the Board's decisions applied to the entirety of the District, all students and schools alike. *See Crymes v. DeKalb Cnty.*, 923 F.2d 1482, 1485 (11th Cir. 1991).

Just as the decision to remove a road from a list of truck routes was "probably legislative in nature," *id.*, or how eliminating a public employment position "may have prospective implications that reach well beyond the particular occupant of the office," *Bogan*, 523 U.S. at 56, so too is the decision to vote to remove or restrict a book legislative in that it has prospective implications that reach the entirety of the District's libraries. That is, the vote "embod[ied] a policy decision with prospective implication." *Bryant*, 575 F.3d at 1306; *see also Smith*, 641 F.3d at 217 (finding school board engaged in legislative activity when it made decision to eliminate alternative school as a result of weighing budgetary priorities).

While the Eleventh Circuit has stated the act of voting alone is not dispositive as to whether an act is legislative, voting can nonetheless constitute legislative decisionmaking. *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (citing *Hernandez*, 643 F.2d at 1188). That a vote only concerns a single

individual or object does not change this if it nonetheless has broad application. *See Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir. 1989) (affirming district court's grant of legislative immunity to individual defendants who denied plaintiff's application to rezone its property given such actions are legislative in nature); *Smith v. Lomax*, 45 F.3d 402, 406 n.10 (11th Cir. 1995); *cf. Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062 (11th Cir. 1992) ("Legislative acts are those which involve policy-making decision of a general scope or, to put it another way, legislation involves line-drawing." (quoting *Ryan v. Burlington Cnty.*, 889 F.2d 1286, 1290–91 (3d Cir. 1989))).

Just as a county's imposition of a building moratorium on property pursuant to an existing county code provision was deemed legislative in nature, *75 Acres, LLC v. Miami-Dade Cnty.*, 338 F.3d 1288, 1296 (11th Cir. 2003), so too is the decision to remove or restrict a book pursuant to the Board's policy. *See also Ellis v. Coffee Cnty. Bd. of Registrars*, 981 F.2d 1185, 1190 (11th Cir. 1993) (finding county commissioners "clearly were performing their legislative function" when they investigated the voting eligibility of individuals and ultimately participated in the removal of their names from voting lists); *Brown v. Crawford Cnty.*, 960 F.2d 1002, 1011 (11th Cir. 1992).

Plaintiffs may argue none of these cases specifically address school book removals. *See* [D.E. 95 at 11–12 & n.3]. But as this Court has recognized, "[t]he

applicable standard for evaluating alleged First Amendment violations in the school library context is not entirely clear." [D.E. 65 at 7]. It logically follows an unsettled area of law would have a dearth of caselaw concerning Mr. Adams' argument as to legislative privilege. And indeed, another judge in this judicial district has found the very acts under scrutiny are legislative in nature. *See* [D.E. 125].

This Court should find likewise. This is because "voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties," all actions Mr. Adams and his fellow Board members engaged in here. *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989). "[T]he Eleventh Circuit has concluded that 'the vote of a city councilman constitutes an exercise of legislative decision-making,' which entitles such city council member to absolute immunity since voting is a legislative function." *Hudgins v. City of Ashburn*, 890 F.2d 396, 406 n.20 (11th Cir. 1989)[11] (quoting *Espanola*, 690 F.2d at 829); *accord Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987). A vote by a school board member as to whether to remove or restrict a book yields the same conclusion: it is "conduct in the furtherance of their duties," *Hernandez*, 643 F.2d at 1193, and therefore it serves as a legislative function. *Hudgins*, 890 F.2d at 406 n.20; *see also Yeldell*, 956 F.2d at

[11] While the defendants in *Hudgins* asserted qualified immunity, the Eleventh Circuit noted they "should have asserted the defense of absolute or legislative immunity." 890 F.2d at 406 n.20.

1062 ("Acts such as voting . . . are generally deemed legislative and, therefore, protected by the doctrine of legislative immunity." (collecting cases)).

That Plaintiffs may argue Mr. Adams' votes were motivated by an improper purpose does not change this analysis, as "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *see also Pernell*, 84 F.4th at 1345. "A court proceeding that probes legislators' subjective intent in the legislative process is a deterrent to the uninhibited discharge of their legislative duty," and courts "cannot create an exception whenever a constitutional claim directly implicates the government's intent" because "that exception would render the privilege of little value." *Pernell*, 84 F.4th at 1345 (cleaned up); *see also Tenney*, 341 U.S. at 377.

Thus, it cannot be disputed that the Board's actions in deciding to remove or restrict certain books were legislative in nature. They involved votes by the Board members taken after hearing public opinion on the books at issue and subsequent debate and deliberation by the Board, as required by law. *DeSisto Coll., Inc.*, 888 F.2d at 765; *accord Woods v. Gamel*, 132 F. 3d 1417, 1420 (11th Cir. 1998) (finding county commissioners' deliberations and vote on budget, as required under state law, was legislative in nature). In deciding to remove or restrict these books, the Board members were exercising their authority under Florida law, and "[i]n casting their votes," the Board members were performing their duties "under state law and

exercising a quintessentially legislative function," *Holley v. City of Roanoke*, 162 F. Supp. 2d 1335, 1342 (M.D. Ala. 2001), and expressing their priorities for the legislative body, creating the requisite nexus to the legislative process. *Bryant*, 575 F.3d at 1306.

Requiring Mr. Adams to testify as to his motives and underlying thoughts concerning his votes to remove or restrict the books at issue would thus eviscerate the privilege's purpose, which is to protect the "legislative process itself." *In re Hubbard*, 803 F.3d at 1307–08. Moreover, it would cut against the privilege's "additional purpose of shielding officials from the costs and distraction of discovery," designed to "enabl[e] them to focus on their duties." *Byrd*, 674 F. Supp. 3d at 1103.

Mr. Adams thus respectfully submits this Court should follow the "long-recognized legislative privilege" which counsels that "courts ought not compel unwilling [officials] to testify about the reasons for specific . . . votes," *Florida*, 886 F. Supp. 2d at 1303, find he is entitled to legislative privilege, and shield him from involuntary examinations in this matter.

WHEREFORE, Non-Party Kevin Adams, respectfully requests that this Court enter an order under Federal Rule of Civil Procedure 26(c) and/or 45(d)(3) preventing Plaintiffs from taking his deposition, and to award any such other relief as this Court deems appropriate.

CERTIFICATE OF WORD COUNT

The undersigned certifies that this Motion complies with the word count limitation set forth in Local Rule 7.1(F) because this Motion contains 7,968 words, excluding the parts exempted by said Local Rule.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B) AND RULE 26(c)

The undersigned certifies that this Motion is permitted and complies with the Court's order on supplemental briefing. [D.E. 200]. Pursuant to Plaintiffs' proposed case management schedule, Plaintiffs oppose this Motion. [D.E. 197].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 22, 2025, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Kristy L. Parker at kristy.parker@protectdemocracy.org; Shalini Goel Agarwal at shalini.agarwal@protectdemocracy.org; Kirsten Elizabeth Fehlan at fehlank@ballardspahr.com; Lynn Beth Oberlander at oberlanderl@ballardspahr.com; Paul Joseph Safier at safierp@ballardspahr.com; Ori Lev at ori.lev@protectdemocracy.org; Goldie Fields at fieldsg@ballardspahr.com; Facundo Bouzat at bouzatf@ballardspahr.com; and Matthew Kussmaul at kussmaulm@ballardspahr.com (Counsel for Plaintiffs).

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Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PEN AMERICAN CENTER, INC., et al., Plaintiffs, v. ESCAMBIA COUNTY SCHOOL BOARD, Defendants.	Case No. 23cv10385-TKW-ZCB **NOTICE OF DEPOSITION OF KEVIN ADAMS**

TO EACH PARTY AND TO EACH ATTORNEY OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, including 26, 30 and 45, Plaintiffs, PEN American Center, Inc., et al., by and through their undersigned counsel, will take the deposition by oral examination of Kevin Adams. Said deposition will commence at 10:00 a.m. on September 20, 2024 at the offices of Anchor Court Reporting, located at 229 South Baylen Street, Pensacola, FL 32502.

The deposition is to continue from day-to-day until such time as it is completed or may be adjourned to be convened at such later date as may be

established therefore by those in attendance at such deposition, and is intended for use at trial or other such purposes as authorized by law. You are invited to attend and participate.

PLEASE TAKE FURTHER NOTICE that the deposition will be taken before an officer authorized by law to administer oaths and will be recorded by audio, audiovisual, and stenographic means.

Date: August 15, 2024

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**Pro hac vice* forthcoming

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this day, I caused a copy of the foregoing document to be served by email upon counsel of record.

Dated: August 15, 2024

/s/ Shalini Agarwal
Shalini Agarwal

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Florida

PEN American Center, INC., et al.,
Plaintiff
v.
Escambia County School Board
Defendant

Civil Action No. 3:23-CV-10385-TKW-ZCB

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Kevin Adams

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Anchor Court Reporting, 229 South Baylen Street, Pensacola, FL 32502	09/20/2024 10:00 am

The deposition will be recorded by this method: stenographically and video

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/15/2024

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ Shalini Agarwal
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* PEN American Center, INC., et al., , who issues or requests this subpoena, are:

Protect Democracy, 2020 Pennsylvan. Ave. NW, Suite 163, Wash., DC 20006, shalini.agarwal@protectdemocracy.org, (850) 860-9344

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:23-CV-10385-TKW-ZCB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: via electronic-mail

_____

_____ on *(date)* 08/15/2024 ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 08/15/2024

Shalini Goel Agarwal

Server's signature

Shalini Agarwal, Special Counsel, Protect Democracy Project

Printed name and title

Protect Democracy Project, 2020 Pennsylvannia Ave. NW, Suite 163, Washington, DC 20006

Server's address

Additional information regarding attempted service, etc.:

Print Save As... Add Attachment Reset

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).