

CASE NO. 25-13298-EE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PEN AMERICAN CENTER, INC., et al.,

Plaintiffs-Appellees,

v.

KEVIN ADAMS, et al.,

Appellants.

Appeal from the United States District Court
for the Northern District of Florida

MOTION TO EXPEDITE APPEAL

Lynn B. Oberlander
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019-5820
Telephone: 212.223.0200
Facsimile: 213.223.1942

Shalini Goel Agarwal (FBN 90843)
Ori Lev
**PROTECT DEMOCRACY
PROJECT**
2020 Pennsylvania Ave. NW, Suite 163
Washington, DC 20006
Telephone: 202.579.4582
Facsimile: 202.769.3176

Attorneys for Movant

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for movant hereby certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Adams, Kevin. Appellant.
2. Agarwal, Shalini Goel. Counsel for Appellees.
3. Ballard Spahr LLP. Counsel for Appellees.
4. Bertelsmann Management SE. General partner and manager of Bertelsmann SE & Co. KGaA.
5. Bertelsmann SE & Co. KGaA. Parent corporation of Penguin Random House.
6. Bertelsmann Stiftung. Shareholder of Bertelsmann SE & Co. KGaA.
7. Bertelsmann Verwaltungsgesellschaft (BVG). Voting shareholder of Bertelsmann SE & Co. KGaA.
8. Bolitho, Hon. Zachary C. United States Magistrate Judge. Judge in underlying case.

9. Bouzat, Facundo. Counsel for Appellees.
10. Bowles, Amy. Counsel for Appellees.
11. Brannen, Sarah. Former Plaintiff in underlying case.
12. BVG-Stiftung. Shareholder of Bertelsmann SE & Co. KGaA.
13. Duke, Samantha. Counsel for Appellant.
14. Durtschi, Lindsay. Former Plaintiff, on behalf of herself and her minor children, in underlying case.
15. Escambia County School Board. Defendant in underlying case and former Appellant.
16. Fehlan, Kirsten. Counsel for Appellees.
17. Fetsko, Paul. Appellant.
18. Fields, Goldie F. Counsel for Appellees.
19. Glass, Benjamin. Former Plaintiff, on behalf of himself and his minor child, in underlying case.
20. Grosholz, Jeffrey. Counsel for Appellant.
21. Hightower, Patricia. Appellant.
22. Johnson, George M. Appellee.
23. Kussmaul, Matthew G. Counsel for Appellees.
24. Lev, Ori. Counsel for Appellees.
25. Levithan, David. Former Plaintiff in underlying case.

26. Lukoff, Kyle. Appellee.
27. Marsey, John. Counsel for Appellants.
28. Moseley, Cayla. Counsel for Appellant.
29. The Mohn Family. Shareholder of Bertelsmann SE & Co. KGaA.
30. Novakowski, Anne. Appellee, on behalf of herself and her minor child.
31. Oberlander, Lynn. Counsel for Appellees.
32. Parker, Sean. Appellee, on behalf of himself and his minor child.
33. PEN American Center, Inc. Appellee.
34. Penguin Random House LLC. Appellee.
35. Pérez, Ashley Hope. Appellee.
36. Petagna, Kristen. Counsel for Appellees.
37. Protect Democracy. Counsel for Appellees.
38. Reinhard Mohn Stiftung. Shareholder of Bertelsmann SE & Co. KGaA.
39. Roy, Erica. Former Plaintiff, on behalf of herself and her minor children,
in underlying case.
40. RumbergerKirk. Counsel for Appellant.
41. Satterwhite, Christopher Scott. Appellee, on behalf of himself and his
minor child.
42. Slayton, William. Appellant.
43. Smith, Caren. Former Plaintiff, on behalf of herself and her minor

children, in underlying case.

- 44. Smith, Nicole Sieb. Counsel for Appellant.
- 45. Warren, Catherine J. Counsel for Appellees.
- 46. Washburn, Taylor. Counsel for Appellees.
- 47. Wetherell, Hon. Kent T. II. United States District Judge, Northern District of Florida Pensacola Division. Judge in underlying case.
- 48. Williams, David. Appellant.

Dated: October 9, 2025

/s/ Shalini Goel Agarwal

APPELLEES' MOTION TO EXPEDITE APPEAL

Pursuant to 28 U.S.C. § 1657(a), Federal Rule of Appellate Procedure 27, and 11th Cir. R. 27-1, I.O.P. 3, Appellees respectfully request the Court expedite the briefing, oral argument, and decision in this matter. Appellants Adams, Fetsko, Hightower, Slayton, and Williams oppose this motion.

Under Eleventh Circuit Rule 27, I.O.P. 3, there is good cause to expedite this appeal. 11th Cir. R. 27-1, I.O.P. 3 (“[A]n appeal may be expedited only by the court upon motion and for good cause shown.”). This is the second interlocutory appeal of the same issue in a case challenging the ongoing restriction and removal of books from public school libraries. The books at issue have been off library shelves for nearly three years in many cases and Plaintiffs cannot effectively resolve their claims while missing critical evidence from Appellant School Board Members as to how and why they decided to remove the books at issue from school libraries. The appeal itself presents a single primary legal issue—whether the School Board’s decisions to remove books from school libraries pursuant to the Board’s pre-existing policy constituted legislative or administrative acts. Expedited briefing, argument, and decision will serve the interests of justice by allowing the district court to more timely consider and resolve whether the books at issue should be returned to the shelves.¹

¹ Separately, Plaintiff-Appellees expect to move to stay the currently scheduled summary judgment briefing on threshold issues of government speech and standing

Background

Appellees brought this lawsuit to challenge the School Board's removal of nine books from Escambia County Public School libraries, its restriction of other books pending resolution of book challenges, and most recently its mass removal of over 100 other books. Many of these books have been off library shelves for over two and half years. Second Amended Compl., ¶¶ 19, 22, 76, 78, 80, 104-108, 170, 198, 200, 201, Dist. Ct. Docket Entry ("D.E.") 219. Plaintiffs allege that the Board's actions are based on hostility to the ideas the books express and/or their authors or themes. Many of these books are classics of American literature which have been in school libraries for years, if not decades. The Board's removals and restrictions have disproportionately targeted books by or about people of color and/or LGBTQ people. The issue in this interlocutory appeal relates to denial of a protective order for deposition testimony from the Appellants and whether legislative privilege applies to the School Board decisions at issue.

Plaintiffs—parents of Escambia County Public School students; authors of

in the district court (*see* D.E. 200 at 3) pending the resolution of the appeal to this Court in *Penguin Random House LLC v. Gibson*, No. 25-13181, which raises similar arguments to those raised by the Defendant in this case as to whether public school libraries amount to government speech and whether students have a right to receive information. The appellate briefs in that case are scheduled to be submitted before the appellate briefs here. And even if *Gibson* is still pending by the time of the Court's decision in this case, a decision affirming the district court here will allow Plaintiffs to move forward with depositions of Appellant School Board Members and to complete discovery while they await a ruling in *Gibson*.

some of the books at issue; Penguin Random House, publisher of some of the books at issue; and PEN American Center, a nonprofit membership organization that works to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to access the views, ideas, and literature of others, and whose members include additional authors of the books at issue—assert that the School Board’s actions violate the First Amendment, among other claims. *Id.* ¶¶ 228-248.

The district court denied Defendant’s Motion to Dismiss, D.E. 65, and discovery below is nearly complete, but for the discovery dispute at the center of this appeal: whether Plaintiffs are entitled to depose the individual Appellant School Board Members about their decision-making with respect to the books at issue.

After Plaintiffs sought to depose the School Board Members in the spring of 2024, the School Board filed a motion for protective order to preclude these depositions based, in part, on alleged legislative privilege. D.E. 82. When this motion was dismissed by the Magistrate Judge, the School Board filed a renewed motion for protective order, this time with affidavits from each individual School Board Member asserting the privilege. D.E. 107. The Magistrate Judge granted the School Board’s renewed motion, finding that legislative privilege applied to the Board’s book removal decisions. D.E. 138.

Appellees timely filed Rule 72(a) objections to the Magistrate Judge’s order, arguing, inter alia, that the School Board’s actions in voting to remove specific books from Escambia County public school libraries were administrative rather than legislative acts. D.E. 143. On November 20, 2024, after briefing and oral argument, the district court sustained Appellees’ Rule 72(a) objections, finding that the School Board Members’ acts were administrative in nature, quashed the Magistrate Judge’s order, and denied the School Board’s renewed motion for protective order. D.E. 155 (“Amended Order”).²

On November 26, 2024, the School Board and Appellants filed a notice of appeal, D.E. 157, and a motion to stay proceedings in the district court pending resolution of the appeal, D.E. 158, which the district court granted. D.E. 170. On appeal, Appellees moved to expedite the proceedings, which this Court granted in part. *PEN v. Escambia County School Dist.*, No. 24-13896, App. Ct. Docket Entry (“App. D.E.”) 26 (Feb. 11, 2025 11th Cir.). On July 15, 2025, a panel of this Court dismissed the appeal for lack of jurisdiction, holding that an interlocutory appeal was improper in this circumstance, where the Board lacked standing to assert legislative privilege and the Board Members had failed to participate in the case below. No. 23-13896, App. D.E. 52-1 at 3 (July 15, 2025 11th Cir.).

Upon remand to the district court, where the case had been stayed, the

² The district court originally issued an Order, D.E. 154, but subsequently issued an Amended Order adding a new footnote 1.

district judge decided to give School Board Members an opportunity to and move for a protective order or to quash, effectively giving Appellants a second shot at an interlocutory appeal of his decision on legislative privilege. D.E. 200 at 3. On August 22, 2025, Appellant School Board Members each filed a motion to quash subpoena and for protective order. D.E. 210-215. On September 4, 2025, the court denied these motions for the same reasons it had earlier denied the School Board's motion for a protective order against Board Member depositions. *See* D.E. 155 at 5-7.

On September 22, 2025, the individual School Board Members filed a notice of appeal. D.E. 227. On October 7, 2025, this Court set a briefing schedule for the parties, providing that the School Board file its initial brief by November 3, 2025, and that briefing would be complete by December 24, 2025. App. D.E. 8.

Grounds to Expedite Appeal

A motion to expedite any action may be granted upon a showing of good cause. 28 U.S.C. § 1657(a) (“Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of . . . any other action if good cause therefor is shown.”); Cir. Rule 27-1 IOP 3 (“[A]n appeal may be expedited only by the court upon motion and for good cause shown.”). “[G]ood cause’ is shown if a right under the Constitution of the United States or a

Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit.” 28 U.S.C. § 1657(a).

There is good cause to expedite this appeal for several reasons. First, expediting the appeal will serve the interests of justice. This case revolves around the fundamental right to read books. Each day this case is pending, books stay off the shelves of the Escambia County Public School libraries. Many of the books have been removed from student access for close to three years at this point. Expediting this appeal will hasten the conclusion of discovery and the ultimate resolution of this suit. Appellees allege that the School Board removed the books at issue for viewpoint-discriminatory reasons, violating the First Amendment. A violation of the First Amendment is a continuing irreparable harm. *See, e.g., FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017) (“[A]n ongoing violation of the First Amendment constitutes an irreparable injury.”); *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) (“[C]ontinued enforcement, ‘for even minimal periods of time,’ constitutes a per se irreparable injury.”) (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983)). Every day that this case remains pending without resolution is another day that Plaintiffs’ First Amendment rights are infringed. Irreparable harm has already occurred to students who have been denied access to books, to parents who want their children to have such access, to authors who cannot convey their messages to

students, and to the other plaintiffs. The longer this case remains pending, the greater that harm will be.

Second, the legal issues have already been fully briefed three times—once by the Appellants in this Court and twice below by the same counsel for Appellants. Accordingly, Appellants should not need extensions of time for briefing or argument. This appeal involves, at its core, a single legal issue—whether the district court erred in determining that the School Board’s decisions to remove specific books from Escambia County Public School libraries were administrative, as opposed to legislative, acts.

Third, and in a similar vein, Appellants face no prejudice from this Court expediting this appeal and granting no extensions of time. Appellants’ counsel has fully briefed the legal issue underlying this appeal—not only here and before the district court but also in a parallel litigation, *Parnell, et al. v. School Board of Escambia County*, Case No. 4:23-cv-00414-AW-MAF, (N.D. Fla.) (“*Parnell Case*”). Therefore, Appellants should be fully prepared to present their positions to the Court and will not be prejudiced by current deadlines.

Requested Relief

Appellees respectfully request the Court not allow any extensions to briefing deadlines and hear argument on this appeal at its earliest convenience, whether that be on the first available calendar date after the end of the briefing schedule or

through a special sitting. Appellees respectfully request that this Court expedite this appeal for the good cause shown in this Motion.

Dated: October 9, 2025

/s/ Shalini Goel Agarwal

Lynn B. Oberlander

BALLARD SPAHR LLP

1675 Broadway, 19th Floor

New York, NY 10019-5820

Telephone: 212.223.0200

Facsimile: 212.223.1942

Shalini Goel Agarwal (FBN 90843)

Ori Lev

PROTECT DEMOCRACY PROJECT

2020 Pennsylvania Ave. NW, Suite 163

Washington, DC 20006

Telephone: 202.579.4582

Facsimile: 202.769.3176

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,773 words. This motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared in a proportionally-based typeface using Microsoft Word 2016, 14-point Times New Roman.

/s/ Shalini Goel Agarwal

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2025, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Shalini Goel Agarwal