CASE NO. 25-13298-E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Pen American Center, Inc., et al. v. Kevin Adams, et al

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO. 3:23-cv-10385-TKW-ZCB

APPELLANTS' MOTION TO STAY APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Appellants, Kevin Adams, Paul Fetsko, Patricia Hightower, William Slayton, and David Williams, certify that, to the best of their knowledge, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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5. Bell, Daniel William – Former Counsel for Amicus State of Florida in district court
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7. Bertelsmann SE & Co., KGaA – Parent corporation of Penguin Random House

8. Bertelsmann Stiftung – Shareholder of Bertelsmann Se & Co. KGaA

9. Bertelsmann Verwaltungsgesellschaft (BVG) – Voting shareholder of Bertelsmann SE & Co. KGaA

10. Bolitho, The Honorable Zachary C. – United States Magistrate Judge

11. Bouzat, Facundo – Counsel for Plaintiffs

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25. Durtschi, Lindsay – Former Plaintiff, on behalf of herself and her minor children

26. Easton, Eric B. – Amicus in district court

27. Ekstrand, Victoria Smith – Amicus in district court

28. Epstein, Michael M. – Amicus in district court

29. Equality Florida Action – Amicus in district court

30. Escambia County School Board – Defendant

31. Escambia County School District – Former Defendant

32. Fehlan, Kirsten Elizabeth – Counsel for Plaintiffs

33. Fetsko, Paul – Appellant

34. Fields, Goldie Felice – Counsel for Plaintiffs

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37. Fugate, Rachel Elise – Counsel for Amicus Calvert and Individual Amici in district court

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42. Hightower, Patricia – Appellant

43. Johnson, George M. – Plaintiff

44. Karp, David A. – Counsel for Amicus Florida Center for Government Accountability in previous appeal

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46. Kitrosser, Heidi – Amicus in district court

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50. Levithan, David – Former Plaintiff

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53. Lukoff, Kyle – Plaintiff

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57. Martin, C. Amanda – Amicus in district court

58. McDonald, Michael – Counsel for Plaintiffs

59. Niehoff, Len – Amicus in district court

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66. Peltz-Steele, Richard J. – Amicus in district court

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68. Penguin Random House LLC – Plaintiff

69. Pérez, Ashley Hope – Plaintiff

70. Phillips, Clarence William – Counsel for Amici Florida State Conference NAACP and Equality Florida Action, Inc., in district court

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89. Ugland, Erik – Amicus in district court

90. Warren, Catherine Jane – Former Counsel for Plaintiffs

91. Weinberg, Jonathan – Amicus in district court

92. Wetherell, The Honorable Kent T., II – United States District Court Judge

93. Whitaker, Henry Charles – Former Counsel for Amicus State of Florida in district court

94. Williams, David – Appellant

CIP CERTIFICATION

Appellants, pursuant to 11th Circuit Rule 26.1-3(b), hereby certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

APPELLANTS' MOTION TO STAY APPEAL

Appellants, Kevin Adams, Paul Fetsko, Patricia Hightower, William Slayton, and David Williams (hereinafter "Board members"), move to stay this appeal, pending the Court's resolution of other, pending appeals that may be dispositive of this matter. Appellees—Plaintiffs below (hereinafter "Plaintiffs")—oppose this Motion.

I. INTRODUCTION AND BACKGROUND[1]

This case involves challenges by Plaintiffs to votes by the non-party Board members to remove or restrict certain books in the libraries of the Escambia County School District ("District"). The Defendant in this matter is the Escambia County School Board ("Board"), which was at relevant times made up of the Board members. Plaintiffs allege these actions by the Board violate the First Amendment. During discovery, Plaintiffs sought to depose the Board members.[2] The Board members filed motions to quash and/or for protective orders, arguing they were protected from giving compelled testimony by the legislative privilege. (D.E. 210, 211–15). The district court denied these motions. (D.E. 226). The Board members

[1] Citations to documents ("Doc.") designate the original docket entry in this Court, unless otherwise indicated. Citations to documents in the district court are in turn designated as (D.E. XX).

[2] While Board members Hightower and Slayton have stepped down from the Board, Plaintiffs still seek to take their deposition.

now appeal the district court's order under 28 U.S.C. § 1291 and *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015), in which this Court held that denial of legislative privilege claims are immediately appealable. *See* (D.E. 227).

This is the second appeal of this issue: the previous appeal by the Board members and the Board (who is not a party to the instant appeal) was dismissed for lack of standing. *See Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist.*, No. 24-13896, 2025 WL 1937264 (11th Cir. July 15, 2025). The prior procedural history of this matter is recounted therein. *See id.* at *1–2.

After the Board members filed their appeal, Plaintiffs moved this Court to expedite the appeal. (Doc. 13). The Board members have opposed that request. (Doc. 16).[3] Namely, the Board members argue that good cause is lacking to expedite this appeal because: (1) Plaintiffs sought a stay of dispositive proceedings below, a request the Board did not object to, (D.E. 240, 248), and which the district court has now granted, (D.E. 249); (2) the Board member depositions have likewise been stayed pending resolution of this appeal, (D.E. 226, 249); and (3) as a result the entire case has been effectively stayed. *See generally* (D.E. 249); *see also* (Doc. 16).

[3] The procedural posture of this case following this Court's dismissal of the first appeal leading up to and including Plaintiffs' motion to expedite proceedings is laid out in greater detail in the Board members' response in opposition to that motion. *See generally* (Doc. 16).

And the reason good cause is lacking is essentially the same reason why this Court should stay this appeal: that is, this Court's resolution of pending appeals in *Parnell v. Sch. Bd. of Escambia Cnty.*, No. 25-13485 (11th Cir.) ("*Parnell*"), and, potentially, *Penguin Random House, LLC v. Gibson*, No. 25-13181 (11th Cir.) ("*Gibson*"), "seem[] likely" to "either resolve this case or inform its resolution," as the district court noted. (D.E. 243 at p. 2 n.1). Given this, the district court has determined that "[t]he Court finds good cause for a stay," as it "sees no reason for summary judgment briefing on the 'threshold' issues to proceed in this case while the Eleventh Circuit is considering the appeals in *Gibson* and . . . *Parnell* . . . because those appeals are likely to resolve the main 'threshold' issue in this case." (D.E. 249 at p. 2).

In *Parnell*, the district court determined the plaintiffs there had no First Amendment rights concerning the Board's selection of library books, and entered judgment in the Board's favor. *Parnell v. Sch. Bd. of Escambia Cnty.*, No. 4:23-cv-414-AW-MAF, ECF No. 261 (N.D. Fla. Sept. 30, 2025). Conversely, in *Gibson*, a different district court effectively held opposite—albeit while also deciding the constitutionality of a state statute not at issue here—and entered judgment in the plaintiffs' favor. *Penguin Random House, LLC v. Gibson*, No. 6:24-cv-1573, ECF No. 129 (M.D. Fla. Aug. 13, 2025).

Both those matters are now before this Court on appeal; should this Court affirm the district court in *Parnell*, it will "likely" resolve or, at the least, inform the dispute in this case. (D.E. 243 at p. 2 n.1, 249 at p. 2). Plaintiffs conceded as much: in seeking a stay of the proceedings below pending this Court's resolution of the appeal in *Gibson*—although, as the district court noted, they should have premised their request based on the appeal in *Parnell*, *id.* at pp. 1–2 n.1—they acknowledged the Court's decision(s) will affect threshold matters in this case, including whether a school board's curation of library books is government speech. *See* (D.E. 240 at pp. 7–8). Plaintiffs also agreed certain standing requirements may be resolved in the appeals now pending before this Court that would inform the district court's standing analysis in this case. *See id.* at pp. 8–9. And, staying the underlying case pending resolution of these appeals will, Plaintiffs acknowledge, promote judicial economy and consistency. *Id.* at pp. 9–11. Finally, Plaintiffs argued a temporary stay would not harm either party. *Id.* at pp. 11–12.

The district court initially entered an order indicating it was inclined to agree, noting that, "it seems likely that the Eleventh Circuit's decision in the appeal of [*Parnell*] will either resolve this case or inform its decision." (D.E. 243 at p. 2 n.1). The Board filed a notice of non-objection to the request for a stay, (D.E. 248), and the district court has now stayed the case as concerns summary judgment briefing

until this Court issues the mandates in *Parnell* and *Gibson*. (D.E. 249 at p. 3). The district court also noted the Board members' depositions remain stayed. *Id.* at p. 1.

Given these factors, it only makes sense to stay this appeal pending this Court's decisions in *Parnell* and *Gibson*, rather than proceed at a piecemeal pace wherein a non-dispositive discovery appeal advances beyond the briefing and appellate decisions for dispositive issues that may moot this appeal entirely. It is within this broader framing the Board members now seek to stay this appeal pending resolution of the appeals in *Parnell* and *Gibson*. The same arguments that militate in favor of a stay below exist here. A stay of this appeal will be the most efficient use of this Court's and the Parties' resources, and will promote judicial economy. Nor will any party be prejudiced by a stay given all relevant proceedings below have also been stayed pending resolution of these appeals. (D.E. 249).

II. ARGUMENT

A. Legal Standard

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done 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). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant

in another settles the rule of law that will define the rights of both." *Id.* at 255. However, "await[ing] a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case," is "at least a good [reason to stay a case], if not an excellent one." *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009); *see also Ferrari v. N. Am. Credit Servs.*, 585 F. Supp. 3d 1334, 1336 (M.D. Fla. 2022); *cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting "the general principle [as between district courts] is to avoid duplicative litigation").

B. The Same Reasons Supporting a Stay in the District Court Support a Stay in this Court

Plaintiffs argued below that the *Gibson* decision "will directly grapple with government speech," and therefore a stay was appropriate. (D.E. 240 at p. 7). The district court recognized this issue is one of "threshold" importance. (D.E. 243 at p. 1 n.1, 249 at p. 2). The Board members agree, but believe—like the district court—that the decision for review more akin to this matter is *Parnell*, not *Gibson*. *See* (D.E. 243 at pp. 1–2 n.1). This is so not only due to the obvious similarities—namely, the Board is the only defendant in both cases, and the book at issue in *Parnell* is also one of the books at issue here—but also because, as the district court observed, *Gibson* involves a constitutional issue "not in this case where the issue decided [in *Parnell*] is." *Id.* That is, the reasoning in *Parnell* "was based on the same 'threshold'

issue that the parties are going to be briefing in this case—i.e., 'government speech / applicability of the First Amendment to school library book removals.'" *Id.* at p. 2 n.1 (emphasis in original) (quoting (D.E. 200 at ¶ 4.a.)).

That said, regardless if the Court reaches the issue in *Gibson* or *Parnell*, the principle remains the same: if the Board's curation of books in its libraries is government speech, no First Amendment rights of Plaintiffs have been implicated, and so the Board's actions would not be unlawful. *See Parnell*, No. 4:23-cv-414-AW-MAF, ECF No. 261, at p. 6; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Alternatively, if the Court concludes, like the district court did in *Parnell*, that the First Amendment does not apply to the Board's decisions regarding the books in its libraries, Plaintiffs' First Amendment rights are likewise not implicated. *See Parnell*, No. 4:23-cv-414-AW-MAF, ECF No. 261, at p. 6.

These issues will almost certainly be decided in the appeals pending before this Court currently: the plaintiffs in *Parnell* have identified an issue for appeal as "[w]hether the [Board's] removal of a children's book from public school libraries constitutes government speech." *Parnell*, No. 25-13485, Doc. 7-1 at p. 2. The *Parnell* plaintiffs have also identified for appeal the exact issue upon which the district court decided the matter in the Board's favor: "[w]hether the First Amendment applies to the removal of books from public school libraries." *Id.* The

Gibson State defendants have raised the issue of whether the removal of "obscene" books in a school library falls within the government speech doctrine. *Gibson*, No. 25-13181, Doc. 10-1 at p. 2. These defendants have also raised the issue of whether the removal of "obscene" books is considered the removal of a "government benefit" under the First Amendment. *Id.*

It is thus clear, as Plaintiffs here recognized, "the arguments presented [in those appeals] are practically identical to those at issue in this case." (D.E. 240 at p. 7). This Court's ruling in *Parnell* (and potentially *Gibson*), "therefore, will be directly relevant to the issues before this Court." *Id.* at p. 8. Just as these similarities and overlap warranted a stay before the district court—a request the Board did not object to and which the district court has granted, (D.E. 248, 249)—so too does it warrant a stay of this appeal. Indeed, Plaintiffs concede this appeal only concerns a "discovery dispute," (Doc. 13 at p. 7), and so the benefits of staying this appeal in favor of allowing dispositive appeals to play out elsewhere clearly favor a stay.

As another argument advanced by Plaintiffs below for why the district court proceedings should be stayed is the question of standing for similarly situated plaintiffs. (D.E. 240 at p. 8). Again, the Board members agree, as there is overlap in that the plaintiffs in *Gibson*, like Plaintiffs here, include students bringing suit through their parents, authors, as well as publishers—including Plaintiff Penguin Random House, LLC, which is a party in both *Gibson* and this matter. *Parnell* will

similarly be instructive because those plaintiffs also include authors and a student bringing suit through their parent. Thus, the Court's standing analysis in *Parnell* and *Gibson* will "benefit" the district court and provide it "appellate guidance on similarly situated plaintiffs before resolving dispositive motions addressing the same threshold question." *Id.* at p. 9; *see also Ferrari*, 585 F. Supp. 3d at 1336 (staying case pending appellate decision in this Court because this Court's decision "will address whether individuals have Article III standing to sue for violations of . . . the very claim [the plaintiff] brings here"). Again, Plaintiffs' own arguments show why a stay of this appeal is warranted.

C. A Stay Will Promote Judicial Economy and Consistency

A stay will preserve this Court's and the Parties' resources, and likewise promote judicial economy and consistency by allowing this Court to decide threshold, dispositive issues which may obviate the need for this Court to consider this appeal at all. *See Ferrari*, 585 F. Supp. 3d at 1337 ("Awaiting an upcoming appellate opinion, on the same dispositive issue, is a valid reason to stay." (citation modified)). That is, if this Court affirms the district court's order in *Parnell*, it need not even reach the merits of this appeal because Plaintiffs will have no First

Amendment rights implicated by the Board's actions and thus the discrete, discovery issue underlying this appeal will be moot.[4]

This is buttressed by the fact that the parties in *Parnell* and this matter are similar—i.e., the Board is the sole defendant in both cases, the plaintiffs in both include authors and students bringing suit through their parents—and there is significant overlap with the facts, down to the fact that the book at issue in *Parnell*, a book titled *And Tango Makes Three*, is also a book at issue in this matter. *Compare Parnell*, No. 4:23-cv-414-AW-MAF, ECF No. 261, at p. 1, *with* (D.E. 219-1 at p. 65). Again, to borrow Plaintiffs' own words, "staying cases during pending dispositive appellate decisions is beneficial." (D.E. 240 at p. 9); *see also id.* at pp. 9–10 (arguing to stay dispositive briefing below to await this "Court's interpretation of threshold issues," and collecting cases).

This Court has favorably commented on stay orders in similar circumstances, such as when cases share "extensive similarities," and the district court determined "the interests of justice and judicial economy, including avoiding inconsistent results, the duplication of efforts, and the waste of judicial resources, will be promoted by granting a stay of this proceeding." *Miccosukee Tribe of Indians of*

[4] Conversely, if the Court rules the *Parnell* and/or *Gibson* plaintiffs lack standing, it is likely to inform the district court's standing analysis here, viz, by militating in favor of a finding that Plaintiffs, too, lack standing, also obviating the need for a resolution of this appeal.

Fla., 559 F.3d at 1194. That stay, this Court found, was based on a "good," "if not an excellent" reason: "to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case." *Id.* The district court here recognized the wisdom of staying the case based on similar principles, (D.E. 249), and there is no reason to deviate here.

Staying this appeal pending this Court's decision in *Parnell* (and potentially *Gibson*) will therefore be the most efficient means of this Court's and the Parties' resources, given the significant overlap between the Parties and threshold legal issues in play in the pending appeals, as compared to the non-dispositive discovery issue at the heart of this appeal. *See Ferrari*, 585 F. Supp. 3d at 1337 ("[P]ausing this case will yield a net benefit to the parties and the Court. A stay will save the parties considerable litigation expenses on potentially superfluous issues or foreclosed arguments."); *cf. Marti v. Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641, 648 (11th Cir. 2022) (noting a case is not "in suspended animation" when stayed when "the district court had stayed the case to await the outcome of a parallel appeal—one that was filed in the same federal district court, between the same parties, and relating to largely the same issues").

D. Plaintiffs Will Not Be Harmed by a Stay

"When evaluating stays, courts must also consider 'the danger of denying justice by delay.'" *Marti*, 54 F.4th at 651 (quoting *Gillespie v. U.S. Steel Corp.*, 379

U.S. 148, 153 (1964)). Any stays must generally "be limited and of moderate length." *Ferrari*, 585 F. Supp. 3d at 1337–38 (citing *Landis*, 299 U.S. at 256, 258). "And this one will be." *Id.* at 1338. The Board members are only asking for a stay until this Court decides the appeals in *Parnell* and *Gibson*. "Such a stay is not immoderate—much less indefinite." *Id.* (citation modified); *see also Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). Because the stay requested by the Board members is "so framed in its inception that its force will be spent within reasonable limits," *Landis*, 299 U.S. at 257, Plaintiffs cannot reasonably claim to be harmed by a stay. Indeed, Plaintiffs effectively asked for this very relief before the district court, (D.E. 240), relief the district court granted. (D.E. 249).

Both the appeals in *Parnell* and *Gibson* have been filed. Briefing will begin soon and there is no reason to believe this Court's adjudication will "take longer than any other appellate decision." (D.E. 240 at p. 11). Moreover, the district court has implemented a requirement that the Parties file periodic reports on the status of *Parnell*, *Gibson*, and this appeal. (D.E. 249 at p. 3). It only follows that the same relief Plaintiffs requested below to which the Board did not object and which the district court granted—staying this matter pending this Court's decisions in *Parnell* and *Gibson*—should be implemented here. Doing so will be the most efficient means of this Court's resources, and will not prejudice Plaintiffs.

WHEREFORE, Appellants, Kevin Adams, Paul Fetsko, Patricia Hightower, William Slayton, and David Williams, respectfully request this Court enter an order staying this appeal pending resolution of the appeals currently pending before this Court in the *Parnell* and *Gibson* matters, as argued herein, and for any and all further relief this Court deems just and proper.

CERTIFICATE OF COMPLIANCE

The undersigned certify that this Response complies with the limitations in Federal Rule of Appellate Procedure 27(d)(2)(A) as it is less than 5,200 words. The undersigned further certify this Response 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 using Microsoft Word, 14-point Times New Roman.

Respectfully submitted,

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I HEREBY CERTIFY that on October 21, 2025, I electronically filed the foregoing Response in Opposition to Appellees' Motion to Expedite Appeal by using the Eleventh Circuit Court ECF system which will send by e-mail a Notice of Docket Activity to the following: Kristy L. Parker at

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