CASE NO. 24-13896-F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PEN AMERICAN CENTER, INC., ET AL. v.
ESCAMBIA COUNTY SCHOOL BOARD

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

INITIAL BRIEF OF DEFENDANT/APPELLANTS ESCAMBIA COUNTY SCHOOL BOARD, KEVIN ADAMS, PAUL FETSKO, PATTY HIGHTOWER, WILLIAM SLAYTON, DAVID WILLIAMS

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Pen American Center, Inc., et al. v. Escambia County School Board, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel of record for Appellants certify that, to the best of their knowledge, the following is a complete list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or this 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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3. Ballard Spahr LLP – Law Firm for Plaintiffs
4. Baer, Nicholas Eli – Counsel for Amici Florida State Conference NAACP and Equality Florida Action, Inc.
5. Bell, Daniel William – Counsel for Amicus State of Florida
6. Bertelsmann Management SE – General partner and manager of Bertelsmann SE & Co. KGaA.

7. Bertelsmann SE & Co. KGaA. – Parent corporation of Penguin Random House
8. Bertelsmann Stiftung – Shareholder of Bertelsmann SE & Co. KGaA.
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10. Bolitho, The Honorable Zachary C. – United States Magistrate Judge
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12. Boyd, Kamera Ella – Former Counsel for Plaintiffs
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16. BVG-Stiftung – Shareholder of Bertelsmann SE & Co. KGaA.
17. Calvert, Clay – Amicus
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22. Duke, Samantha Crawford – Counsel for Appellants
23. Durtschi, Lindsay – Former Plaintiff
24. Easton, Eric B. – Amicus
25. Ekstrand, Victoria Smith – Amicus
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27. Equality Florida Action – Amicus
28. Escambia County School Board – Defendant/Appellant
29. Escambia County School District – Former Defendant
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48. Ludington, Sarah – Amicus

49. Lukoff, Kyle – Plaintiff

50. Magarian, Gregory P. – Amicus

51. Marceau, Justin – Amicus

52. Marsey, John David – Counsel for Appellants

53. Martin, C. Amanda – Amicus

54. The Mohn Family – Shareholder of Bertelsmann SE & Co. KGaA.

55. Niehoff, Len – Amicus

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60. Parker, Sean – Plaintiff

61. Patrow, Kristin A. – Amicus

62. Peltz-Steele, Richard J. – Amicus

63. PEN American Center, Inc. – Plaintiff

64. Penguin Random House LLC – Plaintiff

65. Perez, Ashley Hope – Plaintiff

66. Phillips, Clarence William – Counsel for Amici Florida State Conference NAACP and Equality Florida Action, Inc.

67. Piety, Tamara – Amicus

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76. Seager, Susan E. – Amicus

77. Shapiro, Lena – Amicus

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79. Smith, Carin – Plaintiff

80. Smith, Nicole Sieb – Counsel for Appellants

81. State of Florida – Amicus

82. Summers, Shawn F. – Former Counsel for Plaintiffs

83. Ugland, Erik – Amicus

84. Warren, Catherine Jane – Counsel for Plaintiffs

85. Weinberg, Jonathan – Amicus

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

87. Whitaker, Henry Charles – Counsel for Amicus State of Florida

88. Williams, David – Appellant

CIP CERTIFICATION

Counsel of record for 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.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument will aid the Court in resolving the issues regarding this appeal.

Namely, oral argument will be helpful in showing how the district court applied the wrong standard of review to the magistrate judge's order. The district court noted its order runs contrary to other district courts in this circuit which have, under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A)—and in line with this Court's precedent—applied a deferential standard of review in determining whether a magistrate judge's finding is contrary to law, in comparison to the district court's application of a de novo standard of review.

Appellants also submit oral argument will assist the Court in its determinations as to why the magistrate judge's order was not contrary to law, as the district court conceded the magistrate judge's legal determinations were at least fairly debatable yet failed to explain why the magistrate judge's order was in fact contrary to law.

Finally, Appellants believe oral argument will benefit the Court because the issue of whether the legislative privilege shields school board members who vote to remove or restrict school library books is a novel one and is, to Appellants' knowledge, an issue of first impression in this Court.

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STATEMENT OF JURISDICTION

Plaintiffs' suit invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Appellants are Defendant Escambia County School Board and the nonparty members of the Escambia County School Board ordered by the district court to sit for compelled deposition over their objections based on legislative privilege. Appellants have appealed the district court's orders under 28 U.S.C. § 1291 and the collateral order doctrine. *See In re Hubbard*, 803 F.3d 1298, 1305-07 (11th Cir. 2015); *see also id.* at 1307 n.8 (holding this Court has "jurisdiction under § 1291" over immediate appeal of discovery order denying governmental privilege); *accord Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339 (11th Cir. 2023).

The district court entered its initial order on November 18, 2024, (D.E. 153), and then an amended order on November 20, 2024. (D.E. 155). Appellants timely filed a notice of appeal on November 26, 2024. (D.E. 157). Pursuant to this Court's precedent, the district court's order serves as a "final decision," 28 U.S.C. § 1291, which is immediately appealable under the collateral order doctrine and for which this Court has jurisdiction. *See In re Hubbard*, 803 F.3d at 1305-07.

STATEMENT OF THE ISSUES

1. Whether the district court applied the wrong standard of review to the magistrate judge's legal findings.

2. Whether the district court erred in failing to explain how the magistrate judge's legal conclusions were contrary to law.

3. Whether the legislative privilege extends to school board members voting to remove or restrict library books.

STATEMENT OF THE CASE[1]

I. Nature of the Case

This appeal arises from a First Amendment challenge to votes by the Escambia County School Board's ("Board") to remove/restrict various books in its school libraries. Plaintiffs allege these actions violate the First Amendment's prohibition against viewpoint discrimination and the right to receive information. As part of their challenge, Plaintiffs sought to depose the individual Board members. The Board moved for a protective order on behalf of its members based on legislative privilege, arguing the actions under scrutiny were shielded from examination.

After briefing, the magistrate judge granted the Board's motion. Plaintiffs filed objections under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A) and, after more briefing and a hearing, the district court sustained Plaintiffs' objections, quashed the magistrate judge's order, and denied the Board's motion for protective order. As such, the Board members are now required to provide compelled testimony over their legislative privilege claims. The Board and Board members timely appealed to this Court.

The district court erred in three ways. First, it applied the wrong standard of review to the magistrate judge's order because it reviewed the order de novo, which

[1] Citations to the record designate the original docket entry ("D.E.") and, where applicable, the document page number and/or paragraph.

is contrary to this Court's precedent that holds "non-dispositive discovery orders" by magistrate judges pursuant to 28 U.S.C. § 636(b)(1)(A) "are not subject to a de novo determination." *Merritt v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1016-17 (5th Cir. Unit A June 1981).[2] Second, the district court failed to show how the magistrate judge's order was contrary to law. Third, the district court abused its discretion in holding the actions under scrutiny are administrative, not legislative, and therefore not protected by the legislative privilege.

For these reasons, this Court should reverse the district court's order, and remand with instructions to grant the Board's motion for protective order on behalf of its Board members.

II. Course of Proceedings

Plaintiffs sued the Board in May 2023, before amending in July 2023, claiming First Amendment violations. (D.E. 27). The Board moved to dismiss, which was partially granted. (D.E. 65). The Board answered Plaintiffs' Amended Complaint and generally denied Plaintiffs' allegations. (D.E. 68). At one point, Plaintiffs moved for a preliminary injunction, (D.E. 87), before withdrawing it. (D.E. 111).

[2] Decisions of the former Court of Appeals for the Fifth Circuit handed down 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) (en banc).

During discovery, Plaintiffs served notices of taking deposition of the Board members. (D.E. 82-1). The Board sought a protective order on many grounds, including legislative privilege. (D.E. 82). The Board's initial motion was denied without prejudice. (D.E. 98). The Board filed a renewed motion for protective order, (D.E. 107), which Plaintiffs opposed. (D.E. 113).

A hearing was held on the Board's renewed motion for protective order before the magistrate judge to which the matter was referred, (D.E. 115), who, after consideration, granted the Board's motion. (D.E. 138). Plaintiffs filed objections to the magistrate judge's order, (D.E. 143), and the Board responded. (D.E. 151). A hearing was held before the district court, (D.E. 152), at the conclusion of which the district court sustained Plaintiffs' objections and quashed the magistrate judge's order. (D.E. 156, 133:05-136:21). The district court entered an order memorializing this ruling, (D.E. 153), then entered an amended order, (D.E. 155), which contained the same findings as the first order but added a footnote detailing the standard of review the district court applied under Rule 72(a) and 28 U.S.C. § 636(b)(1)(A), and its interpretation that the contrary to law standard "authorize[d] [a] plenary review of legal conclusions in the magistrate judge's order." *Id.* pp. 4-5 n.1.

The Board timely appealed the district court's order to this Court, pursuant to 28 U.S.C. § 1291 and this Court's collateral order doctrine precedent articulated in

In re Hubbard, 803 F.3d at 1305-07. (D.E. 157). The district court later stayed the case below pending resolution of this appeal. (D.E. 170).

III. Statement of the Facts

A. Legislative Background

Florida law charges schools boards with "the specific duty and responsibility [to be] responsible for the content of any materials made available in a school library." Fla. Stat. § 1006.28(2)(a)1. (2022) (cleaned up).[3] This law requires school boards to maintain a policy allowing individuals to object to the use of materials, including library materials, and have in place a process to "handle all objections and provides for resolution." *Id.* § 1006.28(2)(a)2. Materials are required to be discontinued if they:

> [C]ontain[] content that is pornographic or prohibited under s. 847.012, [are] not suited to student needs and their ability to comprehend the material presented, or [are] inappropriate for the grade level and age group for which the material is used.

Id. § 1006.28(2)(a)2.b.

The Board met the requirements of this law through its Policy 4.06. (D.E. 87-1 pp. 44-62). The Board's procedures for reconsideration of library materials were contained in section 10.B. of Policy 4.06: if any library material was objected to, a

[3] Plaintiffs only challenge actions taken prior to July 1, 2023, when revisions to section 1006.28 by the Florida Legislature became effective. *See* (D.E. 27 ¶ 214 & n.11).

district materials review committee would be appointed to review the challenge, read the material, evaluate it, and render a decision on whether to retain the book, move it to a different grade level, or remove it. *Id.* pp. 59-62. If the complainant was dissatisfied with the committee's decision, they could appeal that decision to the Board. *Id.* p. 62. The Board reviewed evidence and materials given to the committee; the public was also given an opportunity to provide input on the challenge at a publicly noticed meeting. *Id.* The Board would then vote on the challenge, which was the final decision. *Id.* Board decisions stood for five years before any new requests for reconsideration would be entertained, and applied to all schools in the Escambia County School District ("District"). *Id.* at pp. 62-63. Decisions by the Board made under this policy are what Plaintiffs challenge. (D.E. 27 ¶¶ 215-30).

B. The Parties

Plaintiffs in this case are a nonprofit organization and publishing company ("Organizational Plaintiffs"), parents whose children attend school within the District and who sue on their behalf and on behalf of their children ("Parent Plaintiffs"), and authors whose books have been removed or restricted by the Board ("Author Plaintiffs"). (D.E. 27 ("Complaint") ¶¶ 10-31). The Board is the only named Defendant, *id.* ¶¶ 32-33, as it is the entity with the capacity to be sued under Florida law. Fla. Stat. § 1001.41(4). Appellants Kevin Adams, Paul Fetsko, Patty

Hightower, William Slayton, and David Williams ("Board members") are the Board members Plaintiffs seek to depose.[4] *See* (D.E. 82-1).

C. Plaintiffs' Allegations

Plaintiffs challenge, in part, the Board's decisions, via vote, to remove or restrict certain books within the District's public school libraries. *See* Compl. pp. 1-2. Plaintiffs allege the Board's actions were driven by impermissible discriminatory animus. *Id.* Plaintiffs allege these actions violate the First Amendment on the basis of viewpoint discrimination against the Organizational Plaintiffs and the Author Plaintiffs, *id.* ¶¶ 215-22, and a violation of the so-called right to receive information in the context of a public school library, with respect to the Parent Plaintiffs.[5] *Id.* ¶¶ 223-30.

D. Plaintiffs' Attempts to Depose the Board Members

As part of the discovery process, Plaintiffs sought to depose the Board members regarding their motivation and decisionmaking behind their votes on the books which the Board determined to remove/restrict. *See* (D.E. 82 p. 14, 82-1). The Board filed a motion for protective order on multiple grounds, among them that the Board members were protected by the legislative privilege. (D.E. 82 pp. 8-19).

[4] Board members Hightower and Slayton are no longer members of the Board, yet Plaintiffs still seek to depose them for their actions while Board members.

[5] Plaintiffs also brought a challenge under the Fourteenth Amendment's equal protection clause, but this was dismissed by the district court. (D.E. 65 p. 10).

Plaintiffs opposed the Board's request, arguing the privilege did not apply to the actions under scrutiny, i.e., votes on whether to remove or restrict books in the District's libraries. (D.E. 95 pp. 8-13). The magistrate judge to which the matter had been referred issued an order denying the Board's motion without prejudice. (D.E. 98). With respect to the legislative privilege issue, the magistrate judge found it unclear whether the individual Board members had consented to the Board raising the privilege on their behalf, and whether the Board could indeed raise the privilege on their behalf.[6] *Id.* pp. 6-7.

E. The Board's Renewed Motion for Protective Order

The Board then filed a renewed motion for protective order, in line with the magistrate judge's order. (D.E. 107 ("MPO")). The Board's MPO argued: (1) that the Board members were local officials who fell within the umbrella of officials afforded protection by the legislative privilege, *id.* pp. 5-9, and that the act of voting to remove or restrict library books was legislative in nature, and therefore not subject to examination. *Id.* pp. 9-19. The Board also argued it was permitted to raise legislative privilege on behalf of the Board members, and that it had the consent of the Board members to do so, as evidenced by signed declarations attached to its MPO. *Id.* pp. 19-22; *see also* (D.E. 107-1–107-5). Finally, the Board maintained it

[6] The Board sought leave to file a reply to its initial motion for protective order, (D.E. 97), which the magistrate judge denied as moot. (D.E. 99).

had not waived any claim of legislative privilege on behalf of the Board members. MPO pp. 22-23.

Plaintiffs again opposed the Board's MPO. (D.E. 113 ("Response")). Plaintiffs' Response did not contest that the Board members were officials who could claim legislative privilege and that, if the privilege applied, it would shield the Board members from testifying. *Id.* pp. 4-5. Plaintiffs instead argued the decisions at issue were administrative, not legislative, and therefore not subject to the privilege. *Id.* pp. 4-12. Plaintiffs also argued the Board had waived any legislative privilege that might apply. *Id.* pp. 12-14.

A hearing was set on the Board's MPO. (D.E. 115). Before the hearing, the Board filed as supplemental authority a hearing transcript from a materially similar case—in which the Board is also a named defendant and that also concerns a vote over whether to remove a school library book—currently before Judge Allen C. Winsor in the Tallahassee Division of the United States District Court for the Northern District of Florida. (D.E. 123 (transcript from *Parnell v. School Board of Lake County*, Case No. 4:23-cv-414-AW-MAF (N.D. Fla.) (hereinafter referred to as "*Parnell*" or the "*Parnell* case"))). In the *Parnell* case, the Board—like in this case—sought a protective order on the grounds of legislative privilege to protect the Board members from forced examination about the underlying motivations behind their votes regarding a removed library book. *See generally* (D.E. 123-1).

At the hearing before the magistrate judge, Plaintiffs' counsel agreed "the only issue at stake is are these book-removal decisions legislative or administrative." (D.E. 133, 30:20-30:21). Plaintiffs' counsel also agreed they were not challenging whether the Board had appropriately asserted the privilege, nor were they challenging whether the declarations submitted by the Board were sufficient for the Board members to state their desire to have the legislative privilege asserted on their behalf. *Id.* 31:08-37:15.

After the hearing, the Board filed an order from the *Parnell* case in which the *Parnell* district court judge granted the Board's motion for protective order, finding the acts in question were legislative in nature—and therefore protected by the legislative privilege—and that the Board had not waived the privilege on behalf of the Board members. (D.E. 125).

F. The Magistrate Judge Grants the Board's MPO, Plaintiffs File Objections, and the Board Responds

After consideration, the magistrate judge entered an order granting the Board's MPO. (D.E. 138 ("Magistrate Judge's Order")). The Magistrate Judge's Order determined—like Judge Winsor in the *Parnell* case—that the actions of the Board members were legislative in nature, *id.* pp. 8-11, and that the Board had not waived the privilege on behalf of its members. *Id.* pp. 11-14.

Plaintiffs filed objections to the Magistrate Judge's Order under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A). (D.E. 143 ("Objections")). Plaintiffs' Objections argued the Magistrate Judge's Order was contrary to law insofar as it found the act of voting to remove or restrict access to school library books was legislative in nature, *id.* pp. 5-10, and that the Magistrate Judge's Order was contrary to law and clearly erroneous with respect to its findings on waiver. *Id.* pp. 10-17. Plaintiffs did not challenge any other findings of the Magistrate Judge's Order. *See generally id.*

The district court ordered the Board to respond to Plaintiffs' Objections, imposing a shortened response timeline so as to allow the district court to hear argument on Plaintiffs' Objections at a hearing already set on Plaintiffs' concurrently filed motion to amend their Complaint. *See* (D.E. 136, 145).

The Board responded, asking the district court to overrule Plaintiffs' Objections. (D.E. 151). The Board noted the deferential standard the district court was required to adopt in reviewing a magistrate judge's nondispositive order. *Id.* pp. 8-9. The Board also defended the Magistrate Judge's Order's findings as to legislative privilege and waiver. *See id.* pp. 9-23.

G. The District Court Sustains Plaintiffs' Objections, Quashes the Magistrate Judge's Order, and Denies the Board's MPO

A hearing was then held on Plaintiffs' Objections. (D.E. 152). At the hearing, Board counsel again highlighted the deferential standard of review to be applied to Rule 72(a) objections, including by citing to past decisions of the district court. (D.E. 156, 120:06-120:25). The district court first stated it "read [contrary to law] as more of a de novo-type review, misapplying relevant case law," before acknowledging, "[c]ertainly there's deference, and given the fact that Judge Winsor came to the same conclusion [in the *Parnell* case], that may factor into it as well." *Id.* 120:13-120:16, 121:01-121:03. The district court recognized "there is some level of" "deference" given to "magistrate judges' decisions," and "in deciding whether [the magistrate judge] misapplied case law, [the district court] give[s] [the magistrate judge] the deference" that is due, "particularly since [the magistrate judge] based his decision, in some part at least, on the similar decision that Judge Winsor reached [in the *Parnell* case]." *Id.* 133:07-133:14.

Despite apparently noting the deference owed to the Magistrate Judge's Order, the district court nonetheless determined the acts under scrutiny were administrative in nature, not legislative, and sustained Plaintiffs' Objections. *Id.* 136:01-136:09. The district court did not comment on why the magistrate judge's findings were contrary to law beyond stating "I just think [the magistrate judge]

came to the wrong conclusion based upon the general standards that are laid out by the Eleventh Circuit." *Id.* 136:01-136:05.

The district court also noted if the acts were legislative in nature, he would not have found the magistrate judge clearly erred or was contrary to law in determining the Board had not waived the legislative privilege. *Id.* 136:10-136:16.

H. The District Court's Orders

The district court issued a written order memorializing its findings shortly thereafter. (D.E. 153). Two days after entering its first order, the district court entered an amended order on Plaintiffs' Objections. (D.E. 155 ("District Court's Order")). The District Court's Order was amended "[o]nly to add a new footnote 1." *Id.* *. In the added footnote 1, the district court wrote—contrary to the district court's statements at the hearing that it owed deference to the magistrate judge—that it instead "interpret[ed] the 'contrary to law' standard in Rule 72(a) to authorize plenary review of legal conclusion in the magistrate judge's order," relying on non-Eleventh Circuit caselaw for this position. *Id.* p. 4 n.1. The district court "recognize[d]" that this Court "has held that Rule 72(a) does not *require* the district court to conduct a de novo review of a magistrate judge's order on a dispositive matter," but that it did "not read those cases to *prohibit* plenary review" of legal conclusions. *Id.* The district court cited to an unpublished decision of this Court in

which the Court "appears to have equated the 'contrary to law' standard to de novo review of the legal conclusions in the order." *Id.*

The district court also recognized its decision was contrary to other district courts in this circuit, which have applied a deferential standard of review to nondispositive magistrate judge's orders. *See id.* p. 5 n.1. And had the district court applied a more deferential than de novo level of review, it "would have ruled differently on Plaintiffs' objection[s]." *Id.*

I. The Board and Board Members Appeal the District Court's Order

The Board and Board members filed a notice of appeal six days after the District Court's Order. (D.E. 157). The Board and Board members appealed the District Court's Order, as well as the initial order entered by the district court. *Id.* The appeal was taken pursuant to this Court's precedent in *In re Hubbard*, 803 F.3d at 1298. *See id.*

IV. Standard of Review

The standard of review for the district court's ruling on discovery matters is for abuse of discretion. *Khoury v. Miami-Dade Cnty. Sch. Bd.*, 4 F.4th 1118, 1125 (11th Cir. 2021). "A ruling based on an error of law or one that reflects a clear error of judgment is an abuse of discretion." *In re Hubbard*, 803 F.3d at 1307. It is "an error of law, and therefore an abuse of discretion," to deny a claim of "legislative privilege" without a "proper basis." *Id.* at 1307-08.

SUMMARY OF THE ARGUMENT

Plaintiffs seek to depose the five members of the Board to examine their underlying reasons and mental processes behind their decisions whether to remove or restrict access to school library books. These actions are unequivocally legislative in nature, and are therefore shielded from examination. The district court abused its discretion by sustaining Plaintiffs' Objections and denying the Board's MPO.

First, the district court did not afford the Magistrate Judge's Order the required deference in reviewing objections made under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A). Circuit precedent clearly establishes that nondispositive orders from magistrate judges are not subject to de novo review. Even if this Court were to disagree with that principle, this is not the case to undo that precedent, as the parties did not even brief the issue. In engaging in a de novo standard of review, departing from this Court's precedent, the district court abused its discretion.

Second, the district court failed to explain how the Magistrate Judge's Order was contrary to law with respect to the magistrate judge's determination that the acts in question are legislative in nature. That is, while the district court disagreed with the magistrate judge, respectfully, the District Court's Order does not contain any analysis of how or why the Magistrate Judge's Order was contrary to law; it simply

supplants the district court's reasoning in favor of the magistrate judge's. This, too, was an abuse of discretion.

Finally, because the actions under scrutiny are legislative in nature, the district court committed an error of law—and therefore abused its discretion—in finding they were administrative and not shielded by the legislative privilege.

ARGUMENT

I. The District Court Abused Its Discretion When It Applied the Wrong Standard of Review to the Magistrate Judge's Order.

A. The District Court Never Addressed the Proper Interpretation of the "Contrary to Law" Standard

As a threshold matter, the issue of the appropriate interpretation of the "contrary to law" standard was not raised by the district court prior to issuing the District Court's Order, nor were the parties asked to brief the matter before or after the hearing on Plaintiffs' Objections. *See, e.g.*, (D.E. 145). At the hearing on the Board's MPO, respectfully, the district court was inconsistent in its interpretation: it signaled it understood the Magistrate Judge's Order was owed deference, *see* (D.E. 156, 74:04-74:10), before later contradicting itself by stating it believed it was instead a de novo review. *Id.* 120:13-120:16. The Board's counsel argued the standard, in line with relevant caselaw, was a deferential one. *Id.* 120:17-120:23. Plaintiffs' counsel supported a de novo standard of review. *Id.* 131:24-131:25.

The district court's belief as to the standard's interpretation was also absent from the district court's initial order on the Board's MPO. (D.E. 153). It first appeared in the District Court's Order, which added a footnote making clear the district court believed it was authorized to review the Magistrate Judge's Order de novo. *See* Dist. Ct.'s Order pp. 4-5 n.1.

Of note, the District Court's Order commingled the terms plenary and de novo. *See id.* The Board would submit this is a distinction without any meaningful difference, as the district court stated at the hearing it read contrary to law "as more of a de novo-type review." (D.E. 156, 120:15-120:16). And the added footnote shows the district court intended plenary to mean de novo review:

> The Court recognizes that the Eleventh Circuit has held that Rule 72(a) does not require the district court to conduct a de novo review of a magistrate judge's order on a nondispositive matter, but the Court does not read those cases to prohibit plenary review of the legal conclusions in the order. Indeed, in an unpublished opinion, the Eleventh Circuit appears to have equated the "contrary to law" standard to de novo review of the legal conclusions in the order.

Dist. Ct.'s Order p. 4 n.1 (citations omitted)). Further, both terms indicate the review is full, complete, or like new. *Compare Plenary*, Black's Law Dictionary (12 ed. 2024) ("Full; complete; entire"), *with De Novo*, Black's Law Dictionary (12th ed. 2024) ("Anew, afresh, or over again"); *see also Plenary*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/plenary (last visited on February 5, 2025) ("Complete in every respect: Absolute, Unqualified"). And this Court has also used the terms interchangeably. *See, e.g.*, *Telcy v. United States*, 20 F.4th 735, 737 (11th Cir. 2021) (stating court was "not authorized to conduct a plenary, *de novo* resentencing"); *Bell v. Sheriff of Broward Cnty.*, 6 F.4th 1374, 1376 (11th Cir. 2021) ("Our review of the dismissal order [under Rule 12(b)(6)] is plenary."); *see also Harris v. Lincoln Nat'l Life Ins. Co.*, 42 F.4th 1292, 1295 (11th

Cir. 2022) (characterizing review of summary judgment by the Court in *Kirwan v. Marriott Corp.*, 10 F.3d 784, 789 (11th Cir. 1994), as "plenary").

Thus, whether termed plenary or de novo, it is clear the district court afforded the magistrate judge no deference when considering Plaintiffs' Objections and instead subjected the Magistrate Judge's Order to a de novo review. This was an abuse of discretion as it was contrary to this Court's precedent.

B. Plaintiffs' Objections Were Subject to the "Clearly Erroneous or Contrary to Law" Standard of Review, Not De Novo

Plaintiffs' Objections were made under Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A).[7] Thus, the district court was only permitted to "reconsider" the Magistrate Judge's Order if it was "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a). This Court's predecessor was explicit in the difference between a review under section 636(b)(1)(A) and section 636(b)(1)(B):

> Despite appellants' contentions to the contrary, the magistrate possessed the authority under 28 U.S.C. s 636(b)(1)(A) to enter non-dispositive discovery orders. Pretrial orders of a magistrate under s 636(b)(1)(A) are reviewable under the "clearly erroneous and contrary to law" standard; *they are not subject to a de novo determination* as are a magistrate's proposed findings and recommendations under s 636(b)(1)(B)."

[7] Plaintiffs did not dispute that the Magistrate Judge's Order was a nondispositive order, nor could they as it did not dispose of a claim or defense of any party. *See Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1365 (11th Cir. 2007).

Merritt, 649 F.2d at 1016-17 (emphasis added); *accord Grimes v. City & Cnty. of S.F.*, 951 F.2d 236, 241 (9th Cir. 1991) ("Pretrial orders of a magistrate under 636(b)(1)(A) are reviewable under the clearly erroneous and contrary to law standard; they are not subject to *de novo* determination. The reviewing court may not simply substitute its judgment for that of the deciding court." (cleaned up) (citing *Merritt*, 649 F.2d at 1017)); *see also In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2022 WL 2436843, at *1 (N.D. Fla. Mar. 11, 2022) ("In short, when reviewing a nondispositive pretrial order, courts afford 'broad discretion' to the magistrate judge.").

Merritt's holding, which has not been overruled or receded from, is precedent in this circuit and binds the district court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Indeed, this Court has explained the difference between objections made under section 636(b)(1)(A) and those under section 636(b)(1)(B). *See Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020). In *Jordan*, this Court stated:

> The standard of review the district court was required to apply depends on whether [the matter under consideration was] a dispositive or a non-dispositive matter. Pursuant to the Federal Magistrate's Act, a district court reviews a magistrate judge's ruling on non-dispositive matters under the clearly-erroneous or contrary-to-law standard. But if the matter is dispositive, the district court must review any objected-to portion of the magistrate judge's ruling de novo.

Id. (citations omitted); *see also Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 (5th Cir. 1980) ("As stated previously, s 636(b)[(1)(A)] made nondispositive matters subject to 'clearly erroneous or contrary to law' review by the district court. The statute requires the district court to make a 'de novo determination' of the enumerated dispositive matters which are referred to the magistrate under s 636(b)[(1)(B)].").

This distinction is key, as the former requires a level of deference to the magistrate judge's determinations—including legal conclusions—whereas the latter permits de novo review. *See Merritt*, 649 F.2d at 1016-17; *Malibu Media, LLC v. Doe*, 923 F. Supp. 2d 1339, 1347 n.9 (M.D. Fla. 2013) ("In this Circuit, however, the 'contrary to law' standard has been distinguished as more deferential than de novo review.").

The district court appeared to recognize that a degree of deference was owed to the magistrate judge at the hearing, yet the District Court's Order abandoned this and made clear the district court believed the contrary to law standard permitted it to engage in "plenary," or de novo review. Dist. Ct.'s Order p. 4 n.1. And review of the District Court's Order shows it engaged in such a de novo review of the Magistrate Judge's Order. *See generally id.* This legal error was an abuse of discretion. *In re Hubbard*, 803 F.3d at 1307.

C. The Overwhelming Weight of Caselaw Supports the Board's Position

The District Court's Order recognized that other district courts in this circuit have held the contrary to law standard is more deferential than de novo review. Dist. Ct.'s Order p. 5 n.1. This is true: scores of district court cases have followed this Court's precedent from *Merritt* that the contrary to law standard is more deferential and therefore magistrate judge's orders appealed under section 636(b)(1)(A) are not subject to de novo review. *See, e.g.*, *Santiago v. Lizenbee*, No. 3:23-cv-211-MMH-LLL, 2024 WL 3161836, at *1 (M.D. Fla. June 25, 2024); *Secs. & Exch. Comm'n v. Charnas*, 717 F. Supp. 3d 1233, 1238 (S.D. Fla. 2024) ("The clearly erroneous or contrary to law standard of review is extremely deferential." (cleaned up)); *Barron v. EverBank*, No. 1:16-CV-4595-AT, 2019 WL 1996697, at *2 (N.D. Ga. Mar. 15, 2019) ("Significantly, unlike those portions of a Magistrate Judge's Report and Recommendation to which a party timely objects—which are subject to a *de novo* review—a Magistrate Judge's discovery rulings are considered final orders that are subject to Rule 72's 'clearly erroneous' or 'contrary to law' standard."); *El-Saba v. Univ. of S. Ala.*, No. 15-00087-KD-N, 2016 WL 11700794, *1 (S.D. Ala. Aug. 15, 2016) ("A Magistrate Judge's discovery rulings are a final decision which is not subject to a *de novo* determination, as is a Report and Recommendation."); *Gupta v. U.S. Att'y Gen.*, No. 6:13-cv-1027-Orl-40KRS, 2015 WL 5687829, at *3 (M.D. Fla. Sept. 25, 2015) ("In reviewing the decision [under Rule 72(a)], the district judge

affords the magistrate judge considerable deference and will only set aside those portions of the decision that are contrary to law or [clearly erroneous].”); *Leo v. Alfa Mut. Ins. Co.*, No. 1:13-CV-1826-VEH, 2014 WL 12919434, at *1 (N.D. Ala. June 6, 2014) (“[T]he ‘clearly erroneous or contrary to law’ standard of review is extremely deferential.” (cleaned up)); *Factory Direct Tires Inc. v. Cooper Tire & Rubber Co.*, No. 3:11-cv-255-RV/EMT, 2012 WL 12873552, at *1 (N.D. Fla. July 27, 2012) (“A district court does not review non-dispositive discovery orders entered by the Magistrate Judge de novo.”); *Boldstar Tech., LLC v. Home Depot, Inc.*, No. 07–80435–CIV, 2008 WL 9907300, at *1 (S.D. Fla. Apr. 14, 2008) (“The court applies a more deferential standard of review than the *de novo* standard applied to reports and recommendations of magistrate judges rendered pursuant to 28 U.S.C. § 636(b)(1)(B).”); *Perdue v. Westpoint Home, Inc.*, No. 5:07cv192-RS-AK, 2008 WL 11462844, at *5 (N.D. Fla. Jan. 31, 2008) (“Under [the clearly erroneous or contrary to law] standard of review, a magistrate judge’s ruling is presumptively correct and deserves substantial deference by the district judge.”); *Vill. Spires Condo. Ass’n v. QBE Ins. Corp.*, No. 06-14191-CIV-MARTINEZ-LYNCH, 2008 WL 11408524, at *2 (S.D. Fla. Jan. 15, 2008) (“Pretrial orders of a magistrate judge issued pursuant to a district court referral under 28 U.S.C. § 636(b)(1)(A) are reviewable only for abuse of discretion or for clear error.”); *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566-WS-B, 2007 WL 987457, at *1 (S.D. Ala. Mar. 30, 2007) (“Plaintiffs ask

the Court to examine this issue *de novo*. That is not the correct standard of review. To the contrary, the instant appeal is governed by Rule 72(a), which provides that the district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order ***found to be clearly erroneous or contrary to law***." (cleaned up) (bolding and emphasis in original)); *Featherston v. Metro. Life Ins. Co.*, 223 F.R.D. 647, 650-51 (N.D. Fla. 2004) ("In the case of a discovery motion or other nondispositive pretrial order, the decision of the magistrate judge is a final decision. Final decisions of a magistrate judge are subject to a clearly erroneous or contrary to law standard of review by the district court. A magistrate judge's decision on discovery motions is not subject to a *de novo* determination as is a report and recommendation." (cleaned up)); *see also Hasbrouck v. BankAmerica Housing Servs., Inc.*, 190 F.R.D. 42, 44 (N.D.N.Y. 1999) (declining "to give plenary, *de novo* review" to legal decisions in magistrate judge's nondispositive order, as "the magistrate judge is afforded broad discretion which a court should not overrule unless this discretion is clearly abused," and collecting cases adopting this approach); *Graham v. Mukasey*, 247 F.R.D. 205, 207 (D.D.C. 2008); *Dochniak v. Dominium Mgmt. Servs., Inc.*, 240 F.R.D. 451, 452 (D. Minn. 2006).[8]

[8] *Accord Rzepokoski v. Nova Se. Univ., Inc.*, No. 22-cv-61147-WPD, 2024 WL 4003687, at *2 (S.D. Fla. Apr. 14, 2024); *Bales v. Bright Solar Mktg. LLC*, No. 5:21-

With respect to the district court, the undersigned have located no district court decisions in this circuit, reported or otherwise, in which the district court held that review of a nondispositive order by a magistrate judge pursuant to section 636(b)(1)(A) and Rule 72(a) permits a plenary, de novo review. Although not binding, that the overwhelming weight of district courts have construed this Court's holding in *Merritt* to require a level of deference is persuasive authority in support of the Board's position. *See Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1258 n.10 (11th Cir. 2001).

D. The District Court's Cited Caselaw Is Inapplicable or Inapposite

The district court sought to circumvent the deference it owed to the magistrate judge by first citing to decisions outside the Eleventh Circuit as justification for conducting a plenary review of the Magistrate Judge's Order. *See* Dist. Ct.'s Order p. 4 n.1. For example, the district court cited *Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014), for the proposition that legal conclusions are reviewed de

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cv-00496-MMH-PRL, 2023 WL 2553953, at *1 (M.D. Fla. Mar. 17, 2023); *Fox Haven of Foxfire Condo. IV Ass'n v. Nationwide Mut. Fire Ins. Co.*, No. 2:13-cv-399-FtM-29CM, 2014 WL 7405758, at *1 (M.D. Fla. Dec. 30, 2014); *Malibu Media*, 923 F. Supp. 2d at 1347 n.9; *Melech v. Life Ins. Co. of N. Am.*, 857 F. Supp. 2d 1281, 1283 (S.D. Ala. 2012); *Pensacola Firefighters' Relief & Pension Fund Bd. of Dirs. v. Merrill Lynch*, No. 3:09cv53/MCR/MD, 2010 WL 11519376, at *2 (N.D. Fla. June 28, 2010); *Tracy P. v. Sarasota Cnty.*, No.8:05-CV-927-T-27EAJ, 2007 WL 1364381, at *2 (M.D. Fla. May 9, 2007); *United States v. Walden*, No. 03-20566-CR-LENARD/SIMONTON, 2003 WL 27385605, at *4 (S.D. Fla. Dec. 10, 2003).

novo. But *Moore* relied on *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993), which in turn relied on *Chance v. Rice University*, 984 F.2d 151, 153 (5th Cir. 1993), and *Palmco Corp. v. American Airlines, Inc.*, 983 F.2d 681, 684 (5th Cir. 1993), for this position. Neither *Chance* nor *Palmco* involved an appeal under section 636(b)(1)(A): the former was an appeal of a directed verdict under Rule 52(a), *see* 984 F.2d at 153, and the latter involved a direct appeal of a magistrate judge's interpretation of Texas law in a breach of contract case. *See* 983 F.2d at 684. These cases cannot abrogate *Merritt*'s holding under the prior precedent rule. *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001); *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). And, to the extent they conflict, the older opinion—*Merritt*—governs. *Cohen v. Off. Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir. 1990).

Moreover, out-of-circuit caselaw is not binding on the district court; only the decisions of this Court and the Supreme Court are. *Arriaga v. Fla. Pac. Farm., L.L.C.*, 305 F.3d 1228, 1240 n.15 (11th Cir. 2002). To the degree this out-of-circuit caselaw conflicts with this Court's precedent in *Merritt*, the district court was bound to follow *Merritt*. *Id.*; *B-Smith Enters., LP v. Bank of Am., N.A.*, No. 22-11383, 2023 WL 2034419, at *3 (11th Cir. Feb. 16, 2023).

The district court attempted to justify its use of plenary review by stating its interpretation was "consistent with the well-established principle" that if a "lower

court misapplies the law, the reviewing court will review and correct the error without deference." Dist. Ct.'s Order p. 4 n.1 (cleaned up). This was also incorrect because it relied on distinguishable holdings from this Court. *See id.* (first citing *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1505 (11th Cir. 1992), and then citing *United States v. Shamsid-Deen*, 61 F.4th 935, 944 (11th Cir. 2023)). Neither of the cited cases were reviewed under section 636(b)(1)(A): *Haitian Refugee Center* was a review by this Court of the district court's grant of a preliminary injunction, 953 F.2d at 1505, and *Shamsid-Deen* concerned review by this Court of the district court's decision to exclude evidence of a prior conviction per the statutory exception found in 18 U.S.C. § 921(2)(33)(B)(i)(II)(bb). 61 F.4th at 943.

Neither of these are analogous or neatly fit a district court's review of a magistrate judge's nondispositive ruling under Rule 72(a) or section 636(b)(1)(A). The district court tacitly recognized this, writing "the Eleventh Circuit has held that Rule 72(a) does not *require* the district court to conduct a de novo review of a magistrate judge's order on a nondispositive matter." Dist. Ct.'s Order p. 4 n.1 (first citing *Crawford's Auto Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 945 F.3d 1150, 1162 (11th Cir. 2019), then citing *Rodriguez v. Powell*, 853 F. App'x 613, 618 (11th Cir. 2021), and then citing *Merritt*, 649 F.2d at 1017). Respectfully, where the district court erred was in "read[ing] those cases to [not] *prohibit* plenary review of

the legal conclusions in the [Magistrate Judge's Order]." *Id.* This is a misinterpretation of *Merritt*, which explicitly commands that review of magistrate judge orders under section 636(b)(1)(A) "are not" subject to plenary or de novo determination. 649 F.2d at 1017.

Moreover, it is a misinterpretation of *Crawford's Auto Center*, which in no way authorized or said de novo review of a magistrate judge's order was permissible. Rather, this Court merely stated that because the objections there were made under Rule 72(a), the district court "was not required to perform a de novo review and neither [was this Court]." 945 F.3d at 1162. This comment by the Court would appear, at best, to be dicta, as it was not necessary to deciding the case before it. *See United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009); *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1335 (11th Cir. 2013). Even if not dicta, equating the language "was not required to perform a de novo review" to mean district courts are not prohibited from and therefore can engage in plenary, de novo review adds an impermissible gloss to the Court's opinion.

The next case, *Rodriguez*, directly contradicts the District Court's Order because there, this Court noted that the "'*de novo* review requirement is essential to the constitutionality of section 636' because it ensures that the ultimate disposition of cases is reserved to the judgment of an Article III judge." 853 F. App'x at 618 (quoting *Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507,

512-13 (11th Cir. 1990)). Thus, the distinction between de novo and the more deferential clearly erroneous or contrary to law standard is clear: the former is reserved for those rulings which are dispositive (absent consent by the parties), whereas the latter is used for nondispositive rulings. *See id.* This Court observed this when rejecting the appellant's contention "that *de novo* review was required [t]here," as the order under review was of a nondispositive nature. *Id.*

Finally, the district court's reliance on this Court's unpublished opinion in *Illoominate Media, Inc. v. CAIR Florida, Inc.*, No. 22-10718, 2022 WL 4589357 (11th Cir. Sept. 30, 2022), while ignoring the binding precedent of *Merritt*, was at the very least an abuse of discretion. Unpublished decisions are not binding and cannot overrule or supersede earlier published decisions. *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1358 n.15 (11th Cir. 2006); *see also In re Hines*, 799 F. App'x 743, 747 (11th Cir. 2020). *Illoominate Media* states this Court reviews a district court's factual findings for clear error but legal conclusions de novo—the same standard of review the district court believed it could apply to the magistrate judge's legal conclusions below. *See* Dist. Ct.'s Order p. 4 n.1 (citing 2022 WL 4589357, at *2); *but see Smith v. United States*, No. 22-13645, 2023 WL 5011730, at *3 (11th Cir. Aug. 7, 2023) ("The [district] court explained that it reviewed the magistrate judge's order under a deferential standard of review—asking whether the

decision was clearly erroneous or contrary to law—because the *Daubert* motion was not a dispositive motion.").

In so finding, *Illoominate Media* relied on this Court's decision in *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246 (11th Cir. 2002). But *Johnson & Johnson* does not stand for this proposition and in fact was only examining the district court's *factual findings* for clear error. *See* 299 F.3d at 1246. The *Johnson & Johnson* Court did not even consider any *legal conclusions* or the contrary to law standard, let alone the appropriate standard of review or deference applicable to the latter. *See generally id.* Thus, the district court's relied-upon caselaw does not change the fact that under *Merritt* and its progeny, de novo review was incorrect.

E. Canons of Statutory Construction Also Support the Board's Position

The text of 28 U.S.C. § 636 also supports the Board's position. The "cardinal canon" of construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). A second well-known canon is "the mention of one thing implies the exclusion of another." *United States v. Castro*, 837 F.2d 441, 442 (11th Cir. 1988); *see also Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1193 (11th Cir. 2011). And "considerations of *stare decisis* weigh heavily

in the area of statutory construction." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

Taken together, the explicit decision by Congress to distinguish between review of dispositive and nondispositive orders of magistrate judges—via creation of sections 636(b)(1)(A) and 636(b)(1)(B)—cannot be overlooked. *See Jordan*, 947 F.3d at 1327. Nor can the fact that Congress chose to assign different standards of reviews to these different types of orders. *Id.*; *cf. United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1287 (11th Cir. 2002) ("Congress delineates with great specificity in § 636(b)(1)(A) and § 636(b)(1)(B) the circumstances in which a magistrate judge has authority to conduct evidentiary hearings on a report and recommendation basis . . . ."). This Court's precedent via *Merritt* correctly construed this distinction, 649 F.2d at 1016-17. Respectfully, the district court did not.

F. The District Court's Failure to Afford the Magistrate Judge Deference Was an Abuse of Discretion

In sum, the district court exceeded the scope of its permissible review by reviewing the Magistrate Judge's Order under a plenary, de novo standard of review. *See White v. State of Alabama*, 74 F.3d 1058, 1061 (11th Cir. 1996) (finding that in exceeding its authority, district court abused its discretion). "[E]ven to the extent the 'contrary to law' standard may invite some level of plenary review, it is evident that because a magistrate judge is afforded broad discretion as to discovery matters,

reversal as to a magistrate judge's discovery-related order is appropriate only where that discretion is abused." *Santiago*, 2024 WL 3161836, at *1 n.4 (collecting cases and authority). Here, the district court found no abuse of discretion by the magistrate judge, which would similarly compel reversal even assuming *arguendo* a plenary level of review was authorized. This violated the requirements of Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A). The application of an incorrect legal standard or application of the law in an unreasonable or incorrect manner is an abuse of discretion. *F.T.C. v. Nat'l Urological Grp., Inc.*, 785 F.3d 477, 481 (11th Cir. 2015).

Accordingly, this Court should reverse the District Court's Order. And because the district court held that had it applied the required deferential standard of review, it would have ruled differently on Plaintiffs' Objections, *see* Dist. Ct.'s Order p. 5 n.1, on remand the Court should instruct the district court to: (1) overrule Plaintiffs' Objections, (2) adopt the Magistrate Judge's Order—as the District Court's Order found no merit to Plaintiffs' waiver argument, and therefore would have upheld the Magistrate Judge's Order but for its conclusion that the acts in question were administrative rather than legislative, *see id.* p. 5 n.2—and (3) grant the Board's MPO.

II. The District Court Failed to Explain How or Why the Magistrate Judge's Order Was Contrary to Law.

A. Disagreement by the District Court with the Magistrate Judge Does Not Make the Magistrate Judge's Order Contrary to Law

The district court further abused its discretion because it did not explain how the Magistrate Judge's Order was contrary to law. "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *In re Pons*, 614 F. Supp. 3d 1134, 1143 (S.D. Fla. 2020). A finding is not contrary to law simply because the district court disagrees with the magistrate judge. *See, e.g.*, *Grimes*, 951 F.2d at 241 ("Under the clearly erroneous and contrary to law standard a reviewing court may not simply substitute its judgement for that of the deciding court." (cleaned up)); *cf. Certainteed Corp. v. N.L.R.B.*, 714 F.2d 1042, 1052 (11th Cir. 1983) ("While we are not free to disturb the balance struck by the Board simply because we disagree with it, we are bound to determine if the Board's current resolution of the misrepresentation standard is arbitrary or contrary to law."); *accord Shabazz v. Schofield*, No. 3:13-CV-00091, 2014 WL 6605504, at *1 (M.D. Tenn. Nov. 19, 2014) ("The Court is not empowered to reverse the magistrate judge's finding simply because this Court would have decided the issue differently."); *Merck Sharp & Dohme Corp. v. Actavis Lab'ys FL, Inc.*, No. 15-6541 (WHW)(CLW), 2017 WL 2959241, at *3 (D.N.J. July 10, 2017) (same).

The District Court's Order does not explain how or why the Magistrate Judge's Order was contrary to law, beyond the fact the district court believed the acts in question were administrative whereas the magistrate judge believed they were legislative. *Compare* Dist. Ct.'s Order pp. 6-7, *with* Magistrate Judge's Order pp. 8-11. But the District Court's Order identifies no caselaw to which the Magistrate Judge's Order was *contrary*.[9] *See generally* Dist. Ct.'s Order. And as the parties agreed, there is no case on all fours. (D.E. 156, 82:23-83:03, 132:23-133:03). Further, Plaintiffs and the district court agreed that the magistrate judge articulated the appropriate standard. *Id.* 75:15-75:17, 82:15-82:18.

Yet despite this, the district court failed to explain what relevant caselaw the magistrate judge did not apply or which caselaw the magistrate judge misapplied. Rather, it simply reached an opposite result. In the absence of controlling precedent, the district court's mere disagreement with the magistrate judge's determinations does not raise it to the level of contrary to law. *See In re 3M*, 2022 WL 2436843, at *1 ("Considering the number of cases from other federal district courts in which Rules 43(a) and 45 were read together and absent binding precedent to the contrary, the Magistrate Judge's construction cannot be considered 'contrary to law.'"); *Hite*

[9] It is undisputed there are no applicable statutes or rules of procedure. The only question, therefore, is whether the Magistrate Judge's Order was contrary to relevant caselaw. *See* Objections p. 5.

v. Hill Dermaceuticals, Inc., No. 8:12-cv-2277-T-33AEP, 2013 WL 6799334, at *5 (M.D. Fla. Dec. 23, 2013) ("At this juncture, the Court does not review anew Hite's Motion to Compel, but instead is duty-bound to determine whether [the magistrate judge's] ruling was either clearly erroneous or contrary to law. Given the current state of disagreement among federal trial courts on the issue . . . this Court finds that [the magistrate judge's] decision . . . was neither clearly erroneous nor contrary to law."); *see also Batts v. Cnty. of Santa Clara*, No. C 08-00286 JW, 2009 WL 3732003, at *1 (N.D. Cal. Nov. 5, 2009) (finding in the absence of controlling precedent, magistrate judge's decision to apply one approach over another was not contrary to law); *Carmona v. Wright*, 233 F.R.D. 270, 276 (N.D.N.Y. 2006) ("Although legal authority may support an objection, the critical inquiry is whether there is legal authority that supports the magistrate's conclusion, in which case there is no abuse of discretion. That reasonable minds may differ on the wisdom of a legal conclusion does not mean it is clearly erroneous or contrary to law.").

B. The District Court's Order Does Not Meet the Required Burden to Modify or Set Aside the Magistrate Judge's Order

The burden in "altering a magistrate [judge]'s non-dispositive order[]" has been described as "extremely difficult to justify." *TemPay, Inc. v. Biltres Staffing of Tampa Bay, LLC*, 929 F. Supp. 2d 1255, 1260 n.7 (M.D. Fla. 2013) (quoting 12 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice &*

Procedure § 3069 (2d ed. 2012))[10]; *see also Bradford Emergency Grp., LLC v. Blue Cross & Blue Shield of Fla. Inc.*, No. 21-62139-CIV-SINGHAL/DAMIAN, 2022 WL 4545177, at *1 (S.D. Fla. Sept. 29, 2022) ("The standard for overturning a Magistrate Judge's Order is a very difficult one to meet, because the clearly erroneous or contrary to law standard of review is extremely deferential." (cleaned up) (first citing *NAACP v. Fla. Dep't of Corr.*, 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000), and then citing *Pigott v. Sanibel Dev., LLC*, No. 07-0083-WS-C, 2008 WL 2937804, at *5 (S.D. Ala. July 23, 2008)).

Here, the district court made no effort to justify its decision to alter the Magistrate Judge's Order. It made no findings as to what caselaw was not applied or misapplied. Nor did the district court make any such pronouncements at the hearing on the matter. *See* (D.E. 156, 133:05-136:09). The closest the district court came was stating the magistrate judge "came to the wrong conclusion based upon the general standards that are laid out by the Eleventh Circuit." *Id.* 136:01-136:03. But this directly contradicts the district court's prior statement that it "ha[d] the same struggles that [the magistrate judge] and [the *Parnell* district court] did simply because the Eleventh Circuit has been clear on certain things being legislative,

[10] The current version of this treatise maintains this position. *See* 12 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 3069 (3d ed. 2024)).

certain things being administrative, *and what we're dealing with in this case isn't one of those things.* So it's an open question as to whether – *there's no binding precedent that I can say: See* Smith *case, the issues decided*." *Id.* 133:15-133:21 (emphases added).

In light of the district court's concession that no binding precedent existed, and its acknowledgment that it had the same struggles as the magistrate judge, its decision to supplant its own reasoning in place of the magistrate judge—with no explanation of how the latter's was contrary to law—was an abuse of discretion.

III. The Act of Voting to Remove or Restrict School Library Books Is an Act Protected by the Legislative Privilege.

A. The Legislative Privilege Is Applicable Given the Information Plaintiffs Seek from the Board Members

Finally, this Court should reverse because the act of voting whether to remove or restrict a school library book is one protected by the legislative privilege. The district court's failure to follow applicable precedent and denial of the Board members' privilege was therefore an abuse of discretion. *See Pernell*, 84 F.4th at 1343-44 (improper denial of asserted legislative privilege was abuse of discretion); *F.T.C.*, 785 F.3d at 481.

"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 (quoting *United States v. Brewster*, 408 U.S. 501, 525

(1972)). Here, the information Plaintiffs seek from the Board members via deposition "and the scope of the legislative privilege [a]re one and the same." *Id.* at 1311. 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.* Such was this Court's decision in *In re Hubbard*, which concerned a First Amendment retaliation claim, and the Court should find likewise here given this is also a First Amendment case. *See id.* at 1311-12 (citing *United States v. Gillock*, 445 U.S. 360, 373 (1980)). Even assuming *arguendo* that the Board members were motivated by an improper purpose, this 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).

As this Court recently clarified in *Pernell*, the privilege is insurmountable in private civil actions under section 1983, like this matter. 84 F.4th at 1344. Thus "the presumption [of applying the privilege] holds firm." *Id.* Moreover, Plaintiffs did not dispute—and thus cannot now dispute—that the privilege could be applicable to a school board and its members and that, if applicable, it would prevent the Board members from having to testify about the reasons why they voted to remove or restrict access to certain books. Response pp. 4-5. Plaintiffs similarly did not challenge the Board's invocation of the privilege on behalf of its members or the sufficiency of the declarations the Board submitted. (D.E. 133, 31:08-31:15). To the

extent Plaintiffs may attempt to challenge these positions on appeal, such arguments should be considered waived. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). Accordingly, the privilege is applicable to the Board and its members.

B. The Board's Policy on Book Challenges

The District Court's Order determined the acts in question—that is, the Board's votes on whether or not to remove or restrict access to books in the District's school libraries—are administrative in nature, rather than legislative, and therefore not protected by the legislative privilege. Dist. Ct.'s Order p. 6. This was incorrect.

"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 v. Scott-Harris*, 523 U.S. 44, 54 (1998). An act which "reflect[s] a discretionary, policymaking decision" that implicates the priorities of a public entity bears "all the hallmarks of traditional legislation." *Id.* at 55. Or, as this Court has stated, an act is legislative "when it is policymaking and of general application." *Woods v. Gamel*, 132 F.3d 1417, 1420 (11th Cir. 1998); *Brown v. Crawford Cnty.*, 960 F.2d 1002, 1011 (11th Cir. 1992).

Certain actions have been construed to not be legislative, e.g., personnel decisions such as hiring and firing. *Forrester v. White*, 484 U.S. 219, 229-30 (1988). Other actions, "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's actions reveal their legislative character.

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." Fla. Stat. § 1006.28(2)(a)1. (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." *Id.* § 1006.28(2)(a)2.

Section 1006.28(2)(a)2.b. specifically references materials "made available in a school library," and requires discontinuing the use of:

> Any material used in a classroom, made available in a school library, or included on a reading list contains content that is pornographic or prohibited under s. 847.012, is not suited to student needs and their ability to comprehend the material presented, or is inappropriate for the grade level and age group for which the material is used.

Id. § 1006.28(2)(a)2.b. Pursuant to that duty, the Board was required to offer a "resolution" when the books at issue were challenged. *Id.*

The Board's policy during the relevant period was Policy 4.06. (D.E. 87-1 pp. 44-62); *see also id.* ¶ 18 (Plaintiffs' counsel's affidavit agreeing this policy was in effect from December 19, 2022, until June 20, 2023). The Board's procedures for

the reconsideration of library materials were contained in section 10.B. of this policy. *Id.* pp. 59-62.

The Board's policy stated that, if any library material was objected to, a district materials review committee was to be appointed to review the challenge. *Id.* p. 60. This committee would read the material, evaluate it, and render a decision on whether to retain the book, move it to a different grade level, or remove it. *Id.* p. 61.

If the complainant was dissatisfied, an appeal could be made to the Board for final Board resolution. *Id.* p. 62. The Board would review all evidence and materials presented to the district materials review committee, and, at a publicly noticed Board meeting, afford the public an opportunity to comment. *Id.* The Board would then vote, which was the final decision on the matter. *Id.* Board decisions stood for five years before any new requests for reconsideration would be entertained, and applied to all schools in the District. *Id.* at pp. 62-63.

C. The Acts under Scrutiny Are Legislative, Not Administrative

"Conduct [taken] in the furtherance of [an official's] legislative duties," has been held to be legislative. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. Unit A May 1981) (citing *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 205 (5th Cir. 1980)). Thus, that the Board was required to implement and effectuate a policy in furtherance of its state-mandated duty weighs in favor of it being legislative.

Further—although acting pursuant to duty—the Board members were not bound in how they individually were required to vote on the books coming before the Board for review. *See* Fla. Stat. § 1006.28(2)(a)2.b.; *cf. id.* § 1012.22(1)(a)1.-2. (permitting school boards to only reject personnel recommendations of superintendent for "good cause"). That is, each Board member was allowed to review the factors in section 1006.28(2)(a)2.b. and exercise their individual discretion in deciding how they were to vote, signaling their individual expression of priorities for the Board. *See Bogan*, 523 U.S. at 55. And taken as they were, these votes to remove or restrict certain books were prospective in that they eliminated access to the book, either entirely or for certain grades/age groups, and thus "had a substantial nexus to the legislative process." *Bryant v. Jones*, 575 F.3d 1281, 1306 (11th Cir. 2009).

Just as the decision to eliminate 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. *Bryant*, 575 F.3d at 1306. This decision embodies the Board's expression by weighing various priorities before acting. *Bogan*, 523 U.S. at 55; *see also Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 217 (6th Cir. 2011) (finding school board engaged in legislative activity when it made decision to

eliminate alternative school as a result of weighing budgetary priorities). And given that each decision by the Board "involve[d] line-drawing," i.e., because each Board member had to weigh the appropriateness of each book, this also demonstrates how the Board's actions were legislative. *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1062-63 (11th Cir. 1992).

Consideration of other factors this Court has laid out also show why the Board's actions were legislative. "[V]oting, debate and reacting to public opinion are manifestly in furtherance of legislative duties." *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989). Here, it is undisputed that the Board voted on these books, after deliberation, and that the public was permitted to provide input, *see* (D.E. 87-1 pp. 44-62); this shows the acts were legislative, especially as under Florida law no formal action can be taken by the Board—which acts as one—outside the public eye. Fla. Stat. §§ 286.011(1), 1001.42; *see also Woods*, 132 F.3d at 1420 (noting vote needed to pass county budget was legislative).

The district court acknowledged that the Board's actions bore "some hallmarks of a legislative act." Dist. Ct.'s Order p. 6. But the district court stated at the hearing it was disinclined to give these factors weight because school boards in Florida can only "take [formal] actions at a publicly noticed meeting at which its vote is cast in public." (D.E. 156, 118:02-118:05). But nothing in this Court's legislative privilege precedent has said that these factors are to be given any less

weight simply because the entity in question is required to meet in public, deliberate, and vote in response to public opinion. *See DeSisto*, 888 F.2d at 765. The only indication this Court has given is when it stated that voting is not dispositive. *See Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995).

Yet, this Court has held that a vote can constitute an exercise of legislative decisionmaking. *See Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (citing *Hernandez*, 643 F.2d at 1188). Thus, voting remains a relevant factor, even if not dispositive. *See Hudgins v. City of Ashburn*, 890 F.2d 396, 406 n.20 (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." (quoting *Espanola*, 690 F.2d at 829)); *accord Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987); *see also* (D.E. 125-1 (*Parnell* order) p. 5 n.1).

Moreover, Florida is not unique in requiring its legislative bodies—like the Board—to take action "at a publicly noticed meeting at which its vote is cast in public." (D.E. 156, 118:04-118:05). Like Florida, Alabama and Georgia also impose such requirements. For example, the Alabama Open Meetings Act requires:

> It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to

> the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3.

Ala. Code § 36-25A-1(a); *see generally* Ala. Code, Ch. 36-25A.

Georgia law provides similarly:

> Except as otherwise provided by law, all meetings shall be open to the public. All votes at any meeting shall be taken in public after due notice of the meeting and compliance with the posting and agenda requirements of this chapter.
>
> . . .
>
> The public at all times shall be afforded access to meetings declared open to the public pursuant to subsection (b) of this Code section. Visual and sound recording during open meetings shall be permitted.

Ga. Code Ann. § 50-14-1(b)-(c); *see generally* Ga. Code Ann., Ch. 50-14.

Thus, the district court's statement that it was "not sure how significant" it was that the Board's actions bore the hallmarks of legislation—simply because the Board was required to meet and vote in public, (D.E. 156, 118:06-118:11)—is unsupported by precedent or a review of the other states within this circuit to whom this Court's precedent is applicable.

D. *Crymes v. DeKalb County* Does Not Support the District Court's Order

The district court correctly conceded the Magistrate Judge's Order "accurately described the pertinent factual and procedural background and correctly recognized that the legislative privilege protects the individual school board members from inquiries into their motivations for 'legislative acts,' but not for 'administrative

acts.'" Dist. Ct.'s Order p. 5. The district court also conceded the Board's actions bore "some hallmarks of a legislative act." *Id.* p. 6. Where the district court disagreed was with the application of these standards. *See id.* pp. 6-7.

The district court focused on this Court's decision in *Crymes v. DeKalb County*, 923 F.2d 1482 (11th Cir. 1991), *see id.* pp. 5-6, in which this Court stated:

> A legislative act involves policy-making rather than mere administrative application of existing policies. . . . If the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature.

923 F.2d at 1485 (citations omitted). "Under those standards," the district court found, the Board's decision was "functionally an administrative act" despite the "hallmarks" of legislation its actions nonetheless bore. Dist. Ct.'s Order p. 6. This is incorrect.

Notably, nothing in *Crymes* purported to abrogate, eliminate, or undo this Court's existing precedent on the application of legislative privilege. *See generally* 923 F.2d at 1482. Further, the *Crymes* Court did not purport or contend that its standard was the test by which all legislative actions must be measured. Rather, it laid out standards by which various acts could be measured—just as this Court's precedent discussed *supra* also laid out various standards against which to measure acts. *Crymes* is therefore not the dispositive test the district court made it out to be.

See 75 Acres, LLC v. Miami-Dade Cnty., 338 F.3d 1288, 1296 (11th Cir. 2003) ("[T]his circuit has not articulated a test for distinguishing between legislative and adjudicative action . . . ."). Moreover, an examination of *Crymes*' text shows it does not support the district court's ultimate conclusion.

1. The Board's Actions Involved Policymaking and Were Not Mere Applications of Existing Policies

Starting with the first prong: "[a] legislative act involves policy-making rather than mere administrative application of existing policies." *Crymes*, 823 F.2d at 1485. Here, the Board did not merely administratively apply its existing policies; instead, each Board member undertook considered deliberation, in response to public input, and voted in an expression of their individual discretionary authority, resulting in a decision that created the policy of the Board for the District's libraries. The Board was not mechanically applying its policies and, in many instances, was not acting unanimously; and it often voted contrary to the district materials review committee established to review materials prior to a final appeal to the Board. *See, e.g.*, (D.E. 27 ¶¶ 129, 131 (Board voted 3-2 to restrict a book to 11th and 12th graders, despite its materials review committee unanimously recommending its inclusion in all high school libraries)). And the Board's actions reflected only its policy, in contrast to different decisions made by other school districts around the state undertaking similar considerations under similar procedures. *See* (D.E. 133, 21:05-22:17

(discussing that the Lake County School Board had returned the book *And Tango Makes Three* to the library shelves, whereas the Board voted to remove it, as each school board has different priorities)).

Accordingly, the Magistrate Judge's Order—which agreed with the reasoning of the district court in *Parnell*, *see* (D.E. 125-1 pp. 3-5)—was correct in determining that "deciding what educational materials should be used in schools and what things are age-appropriate for students to be learning is what School Board members are elected to do," and thus "educational suitability questions are the perfect example of a core educational *policy matter* within the exclusive province of local school boards." Magistrate Judge's Order p. 10 (cleaned up) (emphasis added) (quoting *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1225 (11th Cir. 2009)); *see also* (D.E. 125-1 pp. 4-5 ("[The decision to vote to remove a book] was a quintessential policy decision about how best to educate Escambia County children.")).

2. That the Facts Were Specific Does Not Mean the Actions Were Not Legislative

The Board concedes that the next prong in *Crymes*' standard—whether the facts utilized were specific or general in nature—militates in favor of finding the actions were administrative as each determination was individualized. However, the Board would note the Court's statement that this simply means "the decision *is more*

likely administrative." *Crymes*, 923 F.2d at 1485 (emphasis added). Like the other factors discussed herein, this is not dispositive and merely favors a finding of administrative action. Further, this Court has found that acts taken with regard to specific facts can still be legislative in nature. *E.g.*, *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir. 1989). And, when weighed against the multitude of factors, discussed above and below, which lean towards a determination that the Board's actions were legislative, this prong alone cannot sustain the district court's finding that the Board's actions were administrative. *See* Dist. Ct.'s Order p. 6.

3. The Board's Decisions Impacted the General Population of the District

Crymes' final prong supports the Board's position. "[I]f the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature." *Crymes*, 923 F.2d at 1485. Oddly, the District Court's Order gave this factor decreased importance, stating "the fact that a book removal/restriction decision may have district-wide impact does not change the fact-specific nature of the decision." Dist. Ct.'s Order pp. 6-7. But nothing in *Crymes* states one of these factors is more important than the other. *See generally* 923 F.2d at 1485. Indeed, the third factor, like the second, includes caveated language explicitly calling attention to the fact it is not dispositive by noting specific

application make a decision "more apt to be administrative." *Id.* The district court's favoring of one factor over another—with no explanation why other than it supported the district court's result—was in error.

Moreover, that a vote only concerns a single individual or object does not change the nature of the decision's general application. *See, e.g.*, *Baytree*, 873 F.2d 1407 at 1409 (affirming district court's grant of legislative immunity to individual defendants who denied plaintiff's application to rezone specific property); *see also Smith*, 45 F.3d at 406 n.10 (noting the Court had, in *Crymes*, suggested that the "vote to remove a particular road from the list of available truck routes . . . affected the general population, [and] was therefore 'legislative in nature'" (citing 923 F.2d at 1485)).

Rather, the question is the result, i.e., how is the decision applied and who is affected. Here, the Board's vote is District-wide and affects every school and student within the District. *See 75 Acres, LLC*, 338 F.3d at 1297 (noting moratorium was of general applicability because it applied to entirety of Miami-Dade County). Thus, just because it is individual books which may be voted upon, this "does not detract from the fact that the [Board's decisions] resulted from the application of a generally applicable [policy]," which impacted the entire District. *Id.* To that end, the Board's decisions do not merely affect a small number of single individuals; they reach the entirety of the District's libraries. *Cf. Yeldell*, 956 F.2d at 1063-63 ("Where the

decision affects a small number or a single individual, the legislative power is not implicated, and the act takes on the nature of administration.").

Accordingly, when looking at *Crymes*' three factors, two of the three support the Board's actions. The District Court's Order, to the extent it determined the magistrate judge misapplied this standard, was therefore an incorrect application of law and an abuse of discretion. *F.T.C.*, 785 F.3d at 481.

E. The District Court's Order Violates This Court's Decision in *Ellis v. Coffee County Board of Registrars*

Finally, the district court abused its discretion because its order cannot be reconciled with this Court's precedent in *Ellis v. Coffee County Board of Registrars*, 981 F.2d 1185 (11th Cir. 1993). The District Court's Order acknowledged this, stating its "conclusion is hard to square with *Ellis*," in which this Court "held that county commissioners were performing their legislative function when they determined the voting eligibility of specific electors." Dist. Ct.'s Order p. 6 n.3 (citing 981 F.2d at 1190). This concession demonstrates the error of the district court, and why the District Court's Order should be reversed.

In *Ellis*, this Court determined a local county commission was entitled to legislative immunity for its determination regarding the voting status of a family that

moved outside the county.[11] 981 F.2d at 1187. There, the county commission was asked to assist the local board of registrars with ascertaining which voters were qualified to vote in the county. *Id.* As part of this undertaking, the commission investigated the voter eligibility of the appellants, concluded they were not eligible voters in the county, and informed them of this decision. *Id.* at 1187-88. Part of this investigation involved the county commission ordering a survey to be done to determine whether the appellants lived within county boundaries. *Id.* at 1188. The appellants later sued the county commission under 42 U.S.C. § 1983, and the county commission asserted legislative immunity as a defense. *Id.* at 1189.

On appeal, this Court held the county commissioners had acted in their legislative capacity and therefore were entitled to immunity. *Id.* at 1190-92. The Court noted that the county commission had been delegated by state law the task of designating precinct boundary lines. *Id.* at 1190. Thus, in acting pursuant to "statutory guidelines" (as well as a consent decree), the county commissioners

[11] To the extent *Ellis* was concerned with legislative immunity, rather than privilege, this is immaterial as "legislative immunity and privilege are 'parallel concept[s],' and the privilege 'exists to safeguard' the immunity." *Florida v. Byrd*, 674 F. Supp. 3d 1097, 1103 n.2 (N.D. Fla. 2023) (alteration in original) (quoting *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180-81 (4th Cir. 2011)); *see also Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) ("While *Tenney*'s holding rested upon a finding of immunity, its logic supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well.").

"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. *Id.* This was bolstered by the commission's decision to have a survey done of the appellants' property, which aided the commission's decision and helped "clarify any ambiguities." *Id.* at 1191. The Court noted that even had the appellants been able to prove conspiracy or bad faith by the commissioners, "an unworthy purpose does not remove absolute immunity protection from legislators acting in their legislative capacity." *Id.*

Ellis shows how the Board's actions were legislative in nature. The Board—like the county commission—had a statutory duty to maintain responsibility for all library materials in its schools and was required to have a policy on the matter. *Compare* Fla. Stat. § 1006.28(2)(a)1.-2. (2022), *with Ellis*, 981 F.2d at 1190. The Board—like the county commission ordering a survey to help clarify any ambiguities—submitted challenges to a subordinate committee for review and evaluation prior to any rendering of its final decision. *Compare* (D.E. 87-1 pp. 59-62), *with Ellis*, 981 F.2d at 1191. And the Board's decision—like the county commission—had general application because it affected the entire District, just as the county commission's determination had general application to the entire county because it meant anyone who owned appellants' property would be disallowed from voting in the county. *Compare* (D.E. 87-1 p. 62), *with Ellis*, 981 F.2d at 1190; *see*

also 75 Acres, LLC, 338 F.3d at 1297. And the Board's decision—like the county commission—was prospective in nature in that it would stand for the future, with no motions for reconsideration to be entertained for five years. (D.E. 87-1 p. 61); *see also Bryant*, 575 F.3d at 1306 (noting Supreme Court's determination that measures which have "prospective impact" are legislative in nature).

Taken together, the similarities between the actions of the county commission in *Ellis* and the Board cannot be ignored. The district court was aware of this, yet deviated regardless. Dist. Ct.'s Order p. 6 n.3. This failure to follow precedent was an abuse of discretion, *Pernell*, 84 F.4th at 1343-44, and the Court should reverse and remand with instructions to grant the Board's MPO.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's Order, and remand with instructions to overrule Plaintiffs' Objections, affirm the Magistrate Judge's Order, and grant the Board's MPO on behalf of its Board members.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32

The undersigned certify that this Brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(A) and Eleventh Circuit Rule 32-4 because it contains 12,707 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

The undersigned further certify that this Brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface of Times New Roman 14-point font.

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I HEREBY CERTIFY that on February 5, 2025, I electronically filed the foregoing Brief by using the Eleventh Circuit Court ECF system which will send via e-mail a Notice of Docket Activity to the following: Shalini Goel Agarwal at shalini.agarwal@protectdemocracy.org; Robert C. Buschel at buschel@bglaw-pa.com; Rachel E. Fugate rfugate@shullmanfugate.com; John Langford at john.langford@protectdemocracy.org; Kristy Parker at kristy.parker@protectdemocracy.org; and Paul J. Safier at safierp@ballardspahr.com.

I FURTHER CERTIFY that I furnished by U.S. Mail the appropriate copies of the Brief to the **Clerk, U.S. Court of Appeals for the 11th Circuit**, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, this 5th day of February, 2025.

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