UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

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

Plaintiffs,

vs.

ESCAMBIA COUNTY SCHOOL BOARD,

Defendant.
_____ /

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

NON-PARTY TOM HARRELL'S MOTION TO QUASH SUBPOENA AND MOTION FOR PROTECTIVE ORDER

Pursuant to Federal Rules of Civil Procedure 26(c) and 45(d)(3), non-party Tom Harrell ("Mr. Harrell"), by and through undersigned counsel, hereby files this Motion to Quash Subpoena and Motion for Protective Order, and in support states:

I. BACKGROUND

This case arises from the Escambia County School Board's ("Board") decisions to either remove or restrict access to certain books from the libraries in the Escambia County School District ("District"), and Plaintiffs' subsequent challenge to these actions. [D.E. 219]. Plaintiffs allege violations of their First Amendment rights based on purported viewpoint discrimination, violation of an alleged right to receive information in public schools, and their due process rights based on the Board's actions. *Id.* at ¶¶ 228–48.

As the Court is well aware, Plaintiffs have, in relation to their claims, sought to depose three of the Board's current members as well as two former members who were Board members during events relevant to this matter ("original Board members"). The original Board members opposed Plaintiffs' efforts, seeking a protective order and to quash the subpoenas served on them. The Court denied those motions, which are now the subject of an appeal. *See generally* [D.E. 226, 227].

The original Board members' current appeal is the second for this issue: the Board and the original Board members previously took an interlocutory appeal of this Court's earlier order denying their requests for a protective order, pursuant to 28 U.S.C. § 1291 and *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015). [D.E. 157]; *see also Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd.*, No. 24-13896 (11th Cir.).

After briefing, the Eleventh Circuit dismissed the appeal for lack of jurisdiction, finding neither the Board nor original Board members had standing. [D.E. 192].

After the Eleventh Circuit issued its decision, and during discussions with Plaintiffs' counsel pursuant to this Court's order on case management and how to proceed with the matter, [D.E. 193], the undersigned indicated their intent to file new motions for protective order and/or to quash—this time on behalf of the original Board members—and to reassert the legislative privilege. During this conferral, the undersigned inquired as to whether Plaintiffs' counsel sought to depose the two new Board members who had since been elected during the pendency of this litigation: Carissa Bergosh and Tom Harrell ("new Board members").[1] Plaintiffs' counsel indicated they did not seek to depose the new Board members, and memorialized their intent to only depose "the 5 Board members previously noticed," i.e., the original Board members, as well as the renewed depositions of the Board's Superintendent and Federal Rule of Civil Procedure 30(b)(6) witness, and the Rule 30(b)(6) witness of Plaintiff Pen American Center Inc. *See* July 28, 2025 Email from Ori Lev, **attached as Exhibit A**.

[1] *See* Escambia County Public Schools, *District 4, Carissa Bergosh*, https://www.escambiaschools.org/district-leadership/school-board/district-4-carissa-bergosh (reflecting Ms. Bergosh's election to the Board in November 2024); Escambia County Public Schools, *District 5, Tom Harrell*, https://www.escambiaschools.org/district-leadership/school-board/district-5-tom-harrell (similarly reflecting Mr. Harrell's election to the Board in 2024).

Pursuant to the Court's order, [D.E. 193], the Parties filed separate proposed case management schedules. Plaintiffs' schedule confirmed what they had previously represented to the undersigned: that they sought leave to file a supplemental or amended complaint, but that "Plaintiffs do not intend to promulgate any additional discovery requests in connection with the supplemental complaint." [D.E. 197 at p. 4]. Rather—and in line with their previous correspondence—the only "outstanding depositions" Plaintiffs sought to complete were the Board's Superintendent, its Rule 30(b)(6) witness, "and taking the depositions of the Board members *that were the subject of the recently dismissed appeal*." *Id.* at p. 5 (emphasis added).

At the following case management conference with the Court to discuss the Parties' proposed schedules, Plaintiffs reiterated that by amending or supplementing their claims, "[w]e don't believe it expands the scope of discovery." [D.E. 207 at 7:22–7:23]. The undersigned pointed out the fact that, "with the passage of time, we don't even have the same decision-makers. There have been two board members that have retired. Two new ones that were elected. So we have a new board." *Id.* at 9:16–9:19. But while Plaintiffs' counsel identified the new Board members as custodians from whom they sought ESI in relation to discovery, *id.* at 39:09–39:10, at no point did they amend their previous representation that they were only seeking depositions of the original Board members or notify the Court that they would be seeking to

depose the new Board members in addition to the original ones. *See generally id.* Given this, the Court's supplemental scheduling order unsurprisingly does not reference any depositions of the new Board members. [D.E. 200].

The original Board members then proceeded to file motions for protective order and to quash. [D.E. 210, 212–15]. Plaintiffs responded in opposition, [D.E. 225], and on September 8, 2025, the Court denied the motions on the merits for the same reasons as before, *see* [D.E. 155], while nonetheless finding them procedurally proper and timely. *See* [D.E. 226].

Then, on September 19, 2025, after the Court denied the original Board members' motions—and despite their numerous representations to the undersigned and the Court to the contrary—Plaintiffs served a notice of taking deposition of Mr. Harrell, **attached as Exhibit B**. After further correspondence between counsel in which the undersigned insisted Plaintiffs also serve subpoenas on the new Board members, Plaintiffs served subpoenas on them on September 30, 2025, **attached as Exhibit C**. Plaintiffs' counsel acknowledged that the dates in the notices of taking depositions and subpoenas were placeholders, anticipating the instant Motion as well as one that is being contemporaneously filed by Ms. Bergosh.

It is the undersigned's understanding that, in seeking to depose Mr. Harrell, Plaintiffs do not intend to alter or expand the scope of discovery per the Court's supplemental scheduling order, or otherwise alter the briefing deadlines contained

therein. *See* [D.E. 200]. Thus, similar to the original Board members, Mr. Harrell now seeks a protective order from this Court, as well as an order quashing Plaintiffs' subpoena. Mr. Harrell asks the Court find he is protected by the legislative privilege and preclude his compelled testimony in this case. Should the Court deny Mr. Harrell's Motion, he would ask the Court stay his deposition so that he may take an appeal of the Court's ruling, similar to the original Board members.

II. MEMORANDUM OF LAW

A. Legal standard.

Federal Rule of Civil Procedure Rule 26(c)(1) allows "any person" from whom discovery is sought to move for a protective order, which may be granted for good cause. *Odom v. Roberts*, 337 F.R.D. 359, 362 (N.D. Fla. 2020). "Rule 26(c) gives the district court discretionary power to fashion a protective order." *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985). Under the "good cause" standard, the Court must balance the competing interests of the parties and has broad discretion in determining whether a protective order is warranted. *Odom*, 337 F.R.D. at 362. Rule 26 protects those from whom discovery is sought from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Good cause exists to prevent Plaintiffs from taking the deposition of Mr. Harrell pursuant to the legislative privilege.

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

Plaintiffs' notice of taking deposition lists October 13, 2025, as the date Mr. Harrell's deposition shall commence, which Plaintiffs acknowledge was a placeholder. *See* Ex. B. Same for the subpoena. *See* Ex. C. Mr. Harrell's Motion is therefore timely under Rules 26 and 45. *See CCB LLC v. Banktrust*, No. 3:10cv228/LAC/EMT, 2010 WL 4038740, at *1 (N.D. Fla. Oct. 14, 2010); *Kanter v. Cont't Airlines, Inc.*, 2010 WL 11601555, at *2 (S.D. Fla. Apr. 16, 2010); *Morock v. Chautauqua Airlines, Inc.*, No. 8:07-cv-210-T-17-MAP, 2007 WL 4322764, at *1 (M.D. Fla. Dec. 11, 2007).

B. This Court should find the legislative privilege protects Mr. Harrell.[2]

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

[2] Mr. Harrell adopts and restates herein the Board's arguments from its renewed motion for protective order concerning legislative privilege. *See generally* [D.E. 107]. To the extent it is relevant and helpful to the Court's review, Mr. Harrell also incorporates herein the arguments from the hearing before the magistrate judge, [D.E. 133], and this Court, [D.E. 156], the briefing filed before the Eleventh Circuit, *see Pen Am. Ctr., Inc.*, No. 24-13896, Doc. 23 at pp. 37–54 (Feb. 6, 2025); *id.* Doc. 39 at pp. 22–27 (Apr. 18, 2025), as well as the motions filed by the original Board members. [D.E. 210, 212–15].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Given the Eleventh Circuit's description of the privilege as "unqualified" in civil matters, *Pernell*, 84 F.4th at 1341, it indisputably applies here. Plaintiffs have made clear they intend to depose Mr. Harrell as to, inter alia, his "subjective states-of-mind," *Byrd*, 374 F. Supp. 3d at 1104, and the circumstances and motivations surrounding his decision to vote in favor, *vel non*, of removing or restricting certain books. *See, e.g.*, [D.E. 219 at ¶ 5 (alleging the Board is ordering books to be removed from libraries based on ideological reasons and engaging in viewpoint discrimination); D.E. 40 at 5–9 (Plaintiffs' Response in Opposition to the Board's Motion to Dismiss, recounting allegations of purported viewpoint discrimination with respect to Board's actions towards removed and restricted books); D.E. 95 at 15–16 (Plaintiffs' response in opposition to the Board's initial motion for protective

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

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

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

Under Florida law, the Board "has the specific duty and responsibility [to be] responsible for the content of any materials made available in a school library." § 1006.28(2)(a)1., Fla. Stat. (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.[4] Pursuant to that duty, the Board was therefore required to offer a "resolution" when the books at issue were challenged. *Id.* Tellingly, however, the votes of each Board member, including Mr. Harrell, were an act of individual discretionary policymaking because they implicated the priorities of the Board. *Bogan*, 523 U.S. at 55.

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

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

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

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

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

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

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

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

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

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

This Court should find likewise. This is because "voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties," all actions Mr. Harrell and his fellow Board members engaged in here. *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989). "[T]he Eleventh Circuit has concluded that 'the vote of a city councilman constitutes an exercise of legislative decision-making,' which entitles such city council member to absolute immunity since voting is a legislative function." *Hudgins v. City of Ashburn*, 890 F.2d 396, 406 n.20 (11th Cir. 1989)[6] (quoting *Espanola*, 690 F.2d at 829); *accord Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987). A vote by a school board member as to whether to remove or restrict a book yields the same conclusion: it is "conduct in the furtherance of their duties," *Hernandez*, 643 F.2d at 1193, and therefore it serves as a legislative function. *Hudgins*, 890 F.2d at 406 n.20; *see also Yeldell*, 956 F.2d at

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

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

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

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

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

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

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

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

CERTIFICATE OF WORD COUNT

The undersigned certifies that this Motion complies with the word count limitation set forth in Local Rule 7.1(F) because this Motion contains 3,974 words, excluding the parts exempted by said Local Rule.

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

The undersigned certify that they have met and conferred with Plaintiffs by email on September 19, 22, 25, 26, and 30, 2025, and October 2, 2025, as well as via telephonic and video conference on September 29, 2025. Plaintiffs oppose this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 8, 2025, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Kristy L. Parker at kristy.parker@protectdemocracy.org; Shalini Goel Agarwal at shalini.agarwal@protectdemocracy.org; Kirsten Elizabeth Fehlan at fehlank@ballardspahr.com; Lynn Beth Oberlander at oberlanderl@ballardspahr.com; Paul Joseph Safier at safierp@ballardspahr.com; Ori Lev at ori.lev@protectdemocracy.org; Goldie Fields at fieldsg@ballardspahr.com; Facundo Bouzat at bouzatf@ballardspahr.com; Matthew Kussmaul at kussmaulm@ballardspahr.com; Amy Bowles at amy.bowles@protectdemocracy.com; and Taylor Washburn at washburnt@ballardspahr.com (Counsel for Plaintiffs).

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EXHIBIT A

From: ori.lev@protectdemocracy.org
Sent: Monday, July 28, 2025 2:02 PM
To: Smith, Nicole; Duke, Samantha; Grosholz, Jeffrey; Duquette, Carlie; Moseley, Cayla; Stolba, Pam; Scott, Aundrea
Cc: 'Kussmaul, Matthew' via PEN-legal-team; ori.lev@protectdemocracy.org; Amy Bowles
Subject: PEN v Escambia - Scheduling Order Follow Up

Nicole,

We are writing to follow up on our discussion on Friday.

1) We intend to file a motion to supplement our complaint by next Friday, August 8. The supplemental complaint will address the events that have transpired since the Amended Complaint was filed, including the Board's vote in July to remove all books on the state list, and will add a First Amendment claim regarding that action. Our claims will still be limited to the books that have been part of this case all along. To be clear, we continue to believe that our extant claims apply to the July actions as well; we will simply be adding an additional claim in that regard.

2) You asked for specifics about which discovery the plaintiffs believe the Board needs to supplement. While your obligation to supplement discovery applies to all outstanding discovery requests, plaintiffs are willing to limit supplementation to the following requests:

    a. Requests For Production (RFPs): 1-3, 6, 8-10, 13, 15, 17, 23, 26, 30, 33, 37-43, 52-54, 60, 66-67
    b. Interrogatories: 9, 2, 16-17
    c. Requests For Admission (RFAs): All RFAs for which the Board invoked legislative privilege
    d. Custodians: For RFPs, we agree to limit custodians to the following: Keith Leonard, Kevin Adams, Paul Fetsko, David Williams, Patty Hightower, Bill Slayton, Victoria Baggett, Bradley Vinson, Linda Sweeting, Brian Alabeck, Carissa Bergosh, Tom Harrell. This is a substantially shortened list of custodians, and adds the two new school board members who have been involved in actions regarding the restricted books at issue in the case.
    e. Search terms: We propose to use the same previously-agreed search terms for each of the ESI collection and the separate collection of Board member communications from personal devices, with the following changes to the ESI search terms: delete the names of any parents who are no longer plaintiffs, and add "Judge", "Wetherell", "Whetherell" "Wetherall" & "Whetherall" to capture references to Judge Wetherell.

3) As we discussed, we propose the following schedule for proceeding:
    a. Discovery supplemented by both parties by August 31.
    b. Depositions completed by September 30. This includes depositions of the 5 Board members previously noticed, as well as the renewed depositions of Keith Leonard, Bradley Vinson, and Summer Lopez. We assume the Magistrate will have decided the motion regarding the Board members' depositions by that time, and we can discuss the scope of the continued Leonard, Vinson and Lopez depositions.
    c. Summary judgment and Daubert motion due October 31; oppositions to SJ due November 25; SJ replies due Dec 8

4) Please let us know what defendant's proposed case management schedule is.

5) We do not believe a case management conference is necessary but do not object to your request to have one.

6) Since it looks like we'll be filing a joint document with separate sections for the plaintiffs' and defendant's proposal for how to proceed, we suggest that we exchange those sections by 6pm tomorrow, so that we can each then adjust our sections as needed in time for a joint filing on Wed.

Best,

Ori

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PEN AMERICAN CENTER, INC., GEORGE M. JOHNSON, KYLE LUKOFF, ANN NOVAKOWSKI, on behalf of herself and her minor child, PENGUIN RANDOM HOUSE LLC, SEAN PARKER, on behalf of himself and his minor child, ASHLEY HOPE PÉREZ, and CHRISTOPHER SCOTT SATTERWHITE, on behalf of himself and his minor child. *Plaintiffs*, v. ESCAMBIA COUNTY SCHOOL BOARD, *Defendant*.	CASE NO.: 3:23-CV-10385-TKW-ZCB

PLAINTIFFS' NOTICE OF DEPOSITION OF TOM HARRELL

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure 26 and 30, Plaintiffs in the above captioned action, by and through their attorneys, will take the deposition upon oral examination of Tom Harrell.

The deposition shall commence at 9:00 a.m. on October 13, 2025 at Anchor Court Reporting located at 229 South Baylen Street, Pensacola, FL 32502. The deposition shall take place before a notary public or other officer authorized by law to administer oaths and will be recorded by audio, audiovisual, and stenographic means. You are requested to produce Mr. Harrell on the above date and designated time.

Dated: September 19, 2025

/s/ Lynn B. Oberlander

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Facsimile: 929.777.8428

**Admitted pro hac vice*
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2025, I caused a true and correct copy of the foregoing Notice of Deposition to be served on counsel of record Defendant via e-mail.

Dated: September 19, 2025

/s/ Lynn B. Oberlander
Lynn B. Oberlander

EXHIBIT C

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

UNITED STATES DISTRICT COURT

for the

Northern District of Florida

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

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

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Tom Harrell

(Name of person to whom this subpoena is directed)

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

Place:	Date and Time:
Anchor Court Reporting, 229 South Baylen Street, Pensacola, FL 32502	10/13/2025 9:00 am

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

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

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

Date: 09/30/2025

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/Lynn B. Oberlander
Attorney's signature

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

Ballard Spahr LLP, 1675 Broadway, 19th Floor, New York, NY 10019, oberlanderl@ballardspahr.com, 646.346.8011

Notice to the person who issues or requests this subpoena

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

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

PROOF OF SERVICE

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

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

on *(date)* _____ .

☑ I served the subpoena by delivering a copy to the named individual as follows: via electronic-mail to Nicole Sieb Smith at nsmith@rumberger.com _____ on *(date)* 09/30/2025 ; or

☐ I returned the subpoena unexecuted because: _____ .

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

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

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

Date: 09/30/2025

/s/Lynn B. Oberlander
Server's signature

Lynn B. Oberlander, Partner, Ballard Spahr LLP
Printed name and title

Ballard Spahr LLP, 1675 Broadway, 19th Floor, New York, NY 10019,
Server's address

Additional information regarding attempted service, etc.:

Print Save As... Add Attachment Reset

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

(c) Place of Compliance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) subjects a person to undue burden.

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

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

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

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

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

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

(e) Duties in Responding to a Subpoena.

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

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

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

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

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

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

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

(i) expressly make the claim; and

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

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

(g) Contempt.

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

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