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

DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND/OR FOR RESTRICTIONS AS TO DEPOSITIONS OF BOARD MEMBERS CARISSA BERGOSH AND TOM HARRELL

Pursuant to Federal Rule of Civil Procedure 26(c), Defendant, Escambia County School Board ("Board"), files this Motion for Protective Order seeking to protect Board members Carissa Bergosh and Tom Harrell ("Ms. Bergosh" and "Mr. Harrell," respectively) from being deposed in this case, pursuant to the apex

doctrine. Alternatively, in the event the Court declines to enter a protective order, the Board seeks an order imposing restrictions for any depositions of Ms. Bergosh and Mr. Harrell. In support, the Board states:[1]

I. INTRODUCTION AND BACKGROUND

This case arises from the Board's 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.

Plaintiffs have, in relation to their claim, sought to depose Board members Bergosh and Harrell. *See* [D.E. 234-2, 234-3, 235-2, 235-3]. Ms. Bergosh and Mr.

[1] The Board previously filed a motion for protective order on behalf of other Board members, asserting the apex doctrine. [D.E. 82]. The Board also moved prior for restrictions as to the permissible length and scope of any depositions of the Board members. [D.E. 108]. Those motions were denied. [D.E. 98, 201]. Because these motions were filed prior to the election of Ms. Bergosh and Mr. Harrell to the Board, *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), the Board is filing the instant Motion merely to preserve these arguments on behalf of Ms. Bergosh and Mr. Harrell for appellate purposes.

Harrell have individually moved for protective orders and/or for orders quashing the subpoenas served on them. [D.E. 234, 235].

The Board separately seeks an order from this Court protecting Ms. Bergosh and Mr. Harrell—elected officials who serve as the highest-ranking officers of the Board and District—from compelled testimony, pursuant to the apex doctrine. In the alternative, and in the event the Court denies the Board's request for a protective order, the Board seeks a ruling from this Court limiting any deposition of Ms. Bergosh and Mr. Harrell in terms of length and scope.

II. MEMORANDUM OF LAW

a. Legal Standard

Rule 26(c) of the Federal Rules of Civil Procedure allows a person or party from whom discovery is sought to move for a protective order, which may be granted upon a showing of 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). As shown herein, good cause exists to prevent Plaintiffs from taking the depositions of Ms. Bergosh and Mr. Harrell.

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). Ordinarily, "[t]he burden is on the movant to show the necessity of the protective order, and the movant must meet this burden with a 'particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.'" *Ekokotu v. Fed. Exp. Corp.*, 408 F. App'x 331, 336 (11th Cir. 2011) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)).[2] However, "when it comes to a high-ranking official's deposition, the default is to disallow it." *Harvard v. Dixon*, No. 4:19-cv-212-AW-MAF, ECF No. 400, at p. 2 (N.D. Fla. May 26, 2022) (citing *In re United States (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993)).

This is because "courts have held that depositions of high-ranking officials are disfavored." *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21-CV-186-MW-MAF, 2021 WL 4962109, at *1 (N.D. Fla. Oct. 19, 2021) (citing *Kessler*, 985 F.2d at 512) (explaining that "[t]he reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses")); *see also In re United States (Jackson)*, 624 F.3d 1368, 1372 (11th Cir. 2010) (finding courts must "review the record to determine whether it supports a finding of extraordinary circumstances

[2] 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).

or a 'special need' for compelling the appearance of a high-ranking officer in a judicial proceeding," because of the "obvious practical implications of requiring high government officials to appear in judicial proceedings").[3]

"Courts have generally restricted parties from deposing high-ranking officials because (by virtue of their position) they 'are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.'" *Brown v. Branch Banking & Tr. Co.*, No. 13-81192-CIV, 2014 WL 235455, at *2 (S.D. Fla. Jan. 22, 2014) (quoting *In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002)); *see also United States v. Morgan*, 313 U.S. 409, 422 (1941); *Celorio v. Google Inc.*, No. 1:11-CV-79-SPM-GRJ, 2012 WL 12861605, at *1 (N.D. Fla. Nov. 19, 2012). "As a result, the burden is on the party seeking to depose a high-ranking official to demonstrate why a protective order should not issue." *Harvard*, ECF No. 400, at p. 3 (citations omitted).

Here, the Board's initial burden of demonstrating that its members are high-ranking, *Odom*, 337 F.R.D. at 364, is easily met. Ms. Bergosh and Mr. Harrell are constitutional officials duly elected by the citizens of Escambia County, Florida. *See* Art. IX, § 4, Fla. Const.; § 1001.361, Fla. Stat. Control of the District is vested in

[3] As this Court has noted, the ability of high-ranking officials to "seek mandamus to challenge orders requiring their testimony" "is another indication of how disfavored the discovery is." *Harvard*, ECF No. 400, at p. 2 n.1.

the Board. §§ 1001.41–.42, Fla. Stat. Thus, "the burden [i]s on [P]laintiffs from the outset" to justify depositions of Ms. Bergosh and Mr. Harrell. *Harvard*, ECF No. 400, at p. 3 n.3. As argued herein, Plaintiffs cannot meet this burden.

Alternatively, as to any restrictions as to length and/or scope, courts routinely impose such reasonable restrictions as to depositions of apex officials, even if they do not preclude the taking of the deposition altogether. *See, e.g.*, *Florida*, 625 F. Supp. 3d 1242, 1249 (N.D. 2022) (limiting deposition to three hours); *Odom*, 337 F.R.D. at 366 (limiting deposition to two hours); *Apple Inc. v. Corellium, LLC*, No. No. 19-81160-CV-Smith/Matthewman, 2020 WL 1849404, at *5 (S.D. Fla. Apr. 13, 2020) (limiting deposition to four hours "and only on the limited topics" enumerated by the court). This comports with the broad discretion granted trial courts to decide whether to issue protective orders and/or decide what degree of protection is required for any deposition. *Odom*, 337 F.R.D. at 362; *see also* Fed. R. Civ. P. 26(b)(2)(C)(i). The Court has imposed restrictions as to the deposition of one of the minor Parties in this matter. [D.E. 100]. The Board submits the Court should similarly exercise its discretion here as to any depositions of Ms. Bergosh and Mr. Harrell. *See id.* at p. 8 ("District courts have the discretion to limit the scope of discovery to ensure a deponent is not subjected to an undue burden or annoyance.").

b. <u>Argument</u>

i. Plaintiffs cannot overcome the apex doctrine.

For purposes of judicial economy, the Board incorporates and adopts herein the arguments raised in its previous motion for protective order which asserted the apex doctrine on behalf of the Board members, this time on behalf of Board members Bergosh and Harrell. [D.E. 82 at § II.B.iii.]. The Board asks that the Court find Ms. Bergosh and Mr. Harrell not be subject to compelled deposition testimony based upon the apex doctrine and enter an order precluding any such deposition.

ii. In the alternative, any depositions of Ms. Bergosh and Mr. Harrell should be limited in length and/or scope.

For purposes of judicial economy, the Board incorporates and adopts herein the arguments raised in its previous motion for restrictions which requested that any depositions of the Board members be reasonably restricted as to length and scope. [D.E. 108]. The Board asks that, should the Court decline to enter a protective order based on the apex doctrine, that it limit any deposition of Ms. Bergosh and Mr. Harrell in length and scope, as argued therein.

While the Court has previously found the apex doctrine to be inapplicable in terms of shielding the Board members *from deposition entirely*, [D.E. 98 at pp. 5–6], the apex doctrine still provides support for restricting any depositions of Ms. Bergosh and Mr. Harrell in terms of length and scope. *See In re Municipality of Mariana*, No. 24-CV-22918-BLOOM/Elfenbein, 2024 WL 4949031, at *3 (S.D. Fla. Dec. 3, 2024) (“If a district court allows the deposition of an apex witness to

proceed, it nonetheless retains the power to limit the scope and duration of a deposition to ensure a deponent is not subjected to an undue burden or annoyance." (citation modified)); *see also Kaleta v. City of Holmes Beach*, No. 8:22-cv-2472-CEH-JSS, 2024 WL 493000, at *1 (M.D. Fla. Feb. 8, 2024). As argued above, it cannot be reasonably contested that Ms. Bergosh and Mr. Harrell are high-ranking officials for apex purposes. To that end, some restrictions as to their depositions are warranted, even if they are not precluded from testifying entirely. Caselaw supports this argument.

In *Florida*, for example, even when an official was not considered "a top-level official for purposes of the apex doctrine," this Court nonetheless imposed "some limits" on the deposition. 625 F. Supp. 3d at 1247, 1249. So too in *Odom*, where this Court determined that, although a "brief deposition" of a "sufficiently high-ranking official [who] warrant[ed] heightened protection from depositions" would not "have substantial deleterious consequences or substantially inhibit his ability to perform his duties," it would nevertheless "ameliorate the burden placed on [the] government official by imposing time limitations and restricting depositions to approved subjects." 337 F.R.D. at 364–65.

Here, the Board believes any such depositions—should they be ordered to proceed in the event apex protection is not granted and Ms. Bergosh and Mr. Harrell's motions for protective order and/or to quash are denied—should be limited

to the scope articulated in the prior motion, i.e., the Board members' individual motivations for book removals and restrictions. *See* [D.E. 108]. Namely, given their status as high-ranking officials, any depositions of Ms. Bergosh and Mr. Harrell should be limited to the information Plaintiffs cannot obtain elsewhere: the personal motivations underlying their respective votes to either remove or restrict books at issue in this case. *See League of Women Voters*, 2021 WL 4962109, at *4; *see also In re Paxton*, 60 F.4th 252, 258 (5th Cir. 2023) (noting that when information can be obtained from other witnesses, "apex testimony is justified only in the rarest of cases" (citation modified)). This is buttressed by the fact that Ms. Bergosh and Mr. Harrell are new Board members—only having been elected to the Board in November 2024—and only voted on book removals in June and July 2025. *See* [D.E. 219 at ¶¶ 172–77]. Their limited involvement in the events underlying this suit militate in favor of restricting any depositions for which they are compelled to attend.

WHEREFORE, Defendant, Escambia County School Board, respectfully requests that this Court enter an order under Federal Rule of Civil Procedure 26(c) preventing Plaintiffs from compelling the depositions of Escambia County School Board members Carissa Bergosh and Tom Harrell or, in the alternative, an order limiting any depositions of Ms. Bergosh and Mr. Harrell in terms of length and

scope, as argued herein, 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 2,062 words, excluding the parts exempted by said Local Rule.

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

The undersigned certifies that they have conferred with opposing counsel regarding this issue via email on October 9, 2025. Opposing counsel opposes the relief requested herein.

Respectfully submitted,

/s Nicole Sieb Smith
J. DAVID MARSEY
Florida Bar No.: 0010212
E-mail: dmarsey@rumberger.com
NICOLE SIEB SMITH
Florida Bar No.: 0017056
E-mail: nsmith@rumberger.com
JEFFREY J. GROSHOLZ
Florida Bar No.: 1018568
E-mail: jgrosholz@rumberger.com
RUMBERGER, KIRK & CALDWELL, P.A.
101 North Monroe Street, Suite 1050

Tallahassee, Florida 32301
Tel: 850.222.6550
Fax: 850.222.8783

and

SAMANTHA DUKE
Florida Bar No. 0091403
Email: sduke@rumberger.com
RUMBERGER, KIRK & CALDWELL, P.A.
300 S. Orange Ave., Suite 300
Orlando, Florida 32801
Tel: 407.872.7300
Fax: 407.841.2133

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 9, 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).

/s Nicole Sieb Smith
J. DAVID MARSEY
Florida Bar No.: 0010212
E-mail: dmarsey@rumberger.com
NICOLE SIEB SMITH
Florida Bar No.: 0017056
E-mail: nsmith@rumberger.com
JEFFREY J. GROSHOLZ
Florida Bar No.: 1018568
E-mail: jgrosholz@rumberger.com
RUMBERGER, KIRK & CALDWELL, P.A.
101 North Monroe Street, Suite 1050
Tallahassee, Florida 32301
Tel: 850.222.6550
Fax: 850.222.8783
and

SAMANTHA DUKE
Florida Bar No. 0091403
Email: sduke@rumberger.com
RUMBERGER, KIRK & CALDWELL, P.A.
300 S. Orange Ave., Suite 300
Orlando, Florida 32801
Tel: 407.872.7300
Fax: 407.841.2133

Attorneys for Defendant