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

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

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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:

1. Adams, Kevin – Appellant
2. Agarwal, Shalini Goel – Counsel for Plaintiffs
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 – Former 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.
9. Bertelsmann Verwaltungsgesellschaft (BVG) – Voting shareholder of Bertelsmann SE & Co. KGaA.
10. Bolitho, The Honorable Zachary C. – United States Magistrate Judge
11. Bouzat, Facundo – Counsel for Plaintiffs
12. Boyd, Kamera Ella – Former Counsel for Plaintiffs
13. Brannen, Sarah – Former Plaintiff
14. Buschel, Robert C. – Counsel for Amici Florida State Conference NAACP and Equality Florida Action, Inc.
15. Buschel Gibbons, P.A. – Law Firm for Amici Florida State Conference NAACP and Equality Florida Action, Inc.
16. BVG-Stiftung – Shareholder of Bertelsmann SE & Co. KGaA.
17. Calvert, Clay – Amicus
18. Compton, Kyle – Amicus
19. Corbin, Caroline Mala – Amicus

20. Costello, David Matthew – Counsel for Amicus State of Florida
21. Covington & Burling LLP – Law Firm for Amici Florida State Conference NAACP and Equality Florida Action, Inc.
22. Duke, Samantha Crawford – Counsel for Appellants
23. Durtschi, Lindsay – Former Plaintiff
24. Easton, Eric B. – Amicus
25. Ekstrand, Victoria Smith – Amicus
26. Epstein, Michael M. – Amicus
27. Equality Florida Action – Amicus
28. Escambia County School Board – Defendant/Appellant
29. Escambia County School District – Former Defendant
30. Fehlan, Kirsten Elizabeth – Counsel for Plaintiffs
31. Fetsko, Paul – Appellant
32. Fields, Goldie Felice – Counsel for Plaintiffs
33. Florida State Conference NAACP – Amicus
34. Florida Center for Governmental Accountability – Amicus

35. Fugate, Rachel Elise – Counsel for Amicus Calvert and Individual Amici
36. Glass, Benjamin – Plaintiff
37. Grosholz, Jeffrey J. – Counsel for Appellants
38. Hans, G.S. – Amicus
39. Hein, Jayni Foley – Counsel for Amici Florida State Conference NAACP and Equality Florida Action, Inc.
40. Hightower, Patty – Appellant
41. Johnson, George M. – Plaintiff
42. Karp, David A. – Counsel for Amicus Florida Center for Governmental Accountability
43. Kilgarriff, Michael Robert – Counsel for Plaintiffs
44. Kitrosser, Heidi – Amicus
45. Kussmaul, Matthew Gerard – Counsel for Plaintiffs
46. Langford, Johns Thomas – Counsel for Plaintiffs
47. Lev, Ori – Counsel for Plaintiffs
48. Levithan, David – Former Plaintiff

49. Lidsky, Lyrissa – Amicus

50. Ludington, Sarah – Amicus

51. Lukoff, Kyle – Plaintiff

52. Magarian, Gregory P. – Amicus

53. Marceau, Justin – Amicus

54. Marsey, John David – Counsel for Appellants

55. Martin, C. Amanda – Amicus

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

57. Niehoff, Len – Amicus

58. Novakowski, Ann – Plaintiff

59. Oberlander, Lynn Beth – Counsel for Plaintiffs

60. O'Hickey, Bridget K. – Counsel for Amicus State of Florida

61. Parker, Kristy L. – Counsel for Plaintiffs

62. Parker, Sean – Plaintiff

63. Patrow, Kristin A. – Amicus

64. Peltz-Steele, Richard J. – Amicus

65. PEN American Center, Inc. – Plaintiff

66. Penguin Random House LLC – Plaintiff

67. Perez, Ashley Hope – Plaintiff

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

69. Piety, Tamara – Amicus

70. Protect Democracy – Law Firm for Plaintiffs

71. Reinhard Mohn Stiftung – Shareholder of Bertelsmann SE & Co., KGaA.

72. Roy, Erica – Former Plaintiff

73. Rumberger, Kirk & Caldwell, P.A. – Counsel for Appellants

74. Safier, Paul Joseph – Counsel for Plaintiffs

75. Safstrom, Jennifer – Amicus

76. Satterwhite, Christopher Scott – Plaintiff

77. Schwartzmann, Katie M. – Amicus

78. Seager, Susan E. – Amicus

79. Shapiro, Lena – Amicus

80. Slayton, William – Appellant

81. Smith, Carin – Former Plaintiff, on behalf of herself and her minor children, in underlying case
82. Smith, Nicole Sieb – Counsel for Appellants
83. State of Florida – Amicus
84. Summers, Shawn F. – Former Counsel for Plaintiffs
85. Ugland, Erik – Amicus
86. Warren, Catherine Jane – Counsel for Plaintiffs
87. Weinberg, Jonathan – Amicus
88. Wetherell, The Honorable Kent T., II – United States District Court Judge
89. Whitaker, Henry Charles – Former Counsel for Amicus State of Florida
90. 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.

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"It is the law of this circuit that one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit." *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015). "[This Court's] precedent is clear that government officials may appeal from the discovery order itself without waiting for contempt proceedings to be brought against them." *Id.* Despite this Court's clear, succinct, and explicit holding, Plaintiffs argue the Board and Board members lack standing to appeal the District Court's Order. Resp. Br. pp. 12-19. Plaintiffs are wrong.

The Board brought the MPO on behalf of the Board members—something Plaintiffs did not challenge in their Response or before the magistrate judge. (D.E. 113); (D.E. 133, 6:01-6:06, 31:08-31:15). Plaintiffs likewise did not raise this in their Objections. (D.E. 152). Plaintiffs at no point challenged the Board members' level of involvement or participation, or otherwise argued they had not sufficiently intervened to have the legislative privilege invoked on their behalf. Yet on appeal, Plaintiffs for the first time challenge the standing of the Board and Board members. This claim is not supported by applicable precedent, nor the caselaw Plaintiffs cite. This Court should find it has jurisdiction.

A. *In re Hubbard* Provides Appellate Standing

The question of the Board and Board members' standing begins and ends with *In re Hubbard*, where this Court made clear 28 U.S.C. § 1291 provides jurisdiction under the collateral order doctrine for discovery orders concerning an unsuccessful invocation of governmental privilege by a nonparty. *See* 803 F.3d at 1305. That is exactly what happened here: the Board invoked the legislative privilege on behalf of the nonparty Board members. (D.E. 107). The Board members all affirmatively asserted and confirmed their intent to invoke the legislative privilege, via the Board. *See* (D.E. 107-1–107-5).

The Board's standing is supplied through the Board members, who "are all present or former government officials whom the district court has ordered to [sit for deposition] in spite of their assertion of various governmental privileges." *In re Hubbard*, 803 F.4th at 1305. "None of the [Board members] is a party to the lawsuit," and under this Court's precedent, "they may immediately appeal the district court's discovery order." *Id.*

Plaintiffs' efforts to distinguish *In re Hubbard* fail. They attempt to add a gloss to it by arguing a nonparty government official only has an immediate right to appeal a discovery order "where the governmental nonparty participated in the action below." Resp. Br. p. 14. But *In re Hubbard* says no such thing concerning participation; the word "participate" does not even appear in the decision. *See*

generally 803 F.3d at 1298. The opposite in fact: this Court held the denial of legislative privilege was sufficient to vest a government official with standing to immediately appeal an adverse discovery order without waiting for contempt proceedings to be brought against them. *Id.* at 1305.

For their "participation" argument, Plaintiffs note the lawmakers in *In re Hubbard* "promptly filed motions to quash the subpoenas." 803 F.3d at 1304. The same occurred here: the Board promptly filed a motion for protective order on behalf of the Board members when Plaintiffs served notices of taking deposition, (D.E. 82), and again promptly filed a renewed motion for protective order on behalf of the Board members—with sworn declarations by each Board member affirming their intent to raise the legislative privilege and for the Board to raise it on their behalf—when the magistrate judge denied the first motion without prejudice.[1] (D.E. 107). Nothing more was required.

Plaintiffs correctly state *In re Hubbard* supports jurisdiction for nonparties. The Board members are nonparties. And because the Board raised the legislative privilege *on behalf of the Board members*, the Board itself has standing just as the

[1] As pointed out in the MPO, no subpoenas had yet been served. (D.E. 107 p. 2). And as Plaintiffs explain in their brief, they subsequently served subpoenas "[i]n an abundance of caution," but agreed these were unnecessary. Resp. Br. pp. 7-8 n.3. That is, the district court's decision on the MPO would resolve the matter, and no motions to quash were needed. *See id.*

Board members do. This makes sense as the Board is comprised of the five Board members Plaintiffs seek to depose, *see* Fla. Stat. § 1001.34, and therefore the Board's interests are aligned with the nonparty Board members' interests.[2] *See Powers v. Ohio*, 499 U.S. 400, 413 (1991) (discussing third party standing).

In re Hubbard makes clear the immediate appealability of discovery orders by government officials under the collateral order doctrine does not merely extend to a nonparty governmental agency. 803 F.3d at 1305-06. Such a "position cannot be squared with [*Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973)[3]], which held that executive officials—not just government entities—may immediately appeal a discovery order denying a claim of executive privilege." *Id.* at 1306. This Court determined "[n]o difference between executive and legislative privilege would justify" treating them inconsistently in this regard. *Id.*

In re Hubbard's holding is clear and settled. For example, in *Pernell v. Florida Board of Governors of State University*, 84 F.4th 1339 (11th Cir. 2023)—also involving nonparty officials who appealed an adverse discovery order after

[2] Even had the Board members been named as defendants in their official capacity, this would have been redundant as the Board is the proper entity to suit. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991); Fla. Stat. § 1001.41(4). The interests between the two align.

[3] 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).

unsuccessfully asserting legislative privilege—the question of jurisdiction was not even discussed, likely because the plaintiffs there recognized the futility of questioning the officials' standing. *See generally id.* Plaintiffs fail to even mention *Pernell*. *See generally* Resp. Br. Nonetheless, this Court's precedent is plain: the Board members can immediately appeal the District Court's Order and have standing. So too does the Board, on whose members' behalf it brought the MPO.

B. *Kimberly Regenesis* Is Distinguishable, as Is Plaintiffs' Out-of-Circuit Caselaw

Plaintiffs principally rest their flawed standing arguments on *Kimberly Regenesis, LLC v. Lee County*, 64 F.4th 1253 (11th Cir. 2023). But this case is distinguishable. First, it concerned an entity and nonparty official appealing denial of quasi-judicial immunity. *Id.* at 1255-56. But this interlocutory appeal is about the legislative privilege, so *In re Hubbard* is the appropriate lens through which the Board and the Board members' standing is analyzed. *See Drummond Co. v. Terrance P. Collingsworth, Conrad & Scherer, LLP*, 816 F.3d 1319, 1327 (11th Cir. 2016) ("*Except in cases involving the assertion of governmental privilege*, we have 'never exercised jurisdiction under the collateral order doctrine to review any discovery order involving any privilege.'" (emphasis added) (footnote omitted) (quoting *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1053 (11th Cir. 2008))).

Second, this Court found the government entity in *Kimberly Regenesis*—a county—lacked standing because "it was not aggrieved by the district court's order denying immunity." 64 F.4th at 1260. This was because the immunity in question "belong[ed] to the commissioner, not the county." *Id.* Here, however, the Board invoked the privilege on behalf of its members—with their intent and affirmation for doing so. The Board members' individual aggrievement at being denied the legislative privilege is concomitant with the Board's own aggrievement.

Third, the *Kimberly Regenesis* county suffered no additional aggrievement because the depositions "were narrowly tailored" in both scope and time. *Id.* No such tailoring has been ordered here.[4] And there it was only one commissioner who was to be deposed, as the other two had passed away during the appeal and were dismissed. *See id.* at 1258. Here, all five Board members—the entirety of the Board affected by the District Court's Order[5]—have been ordered to sit for deposition. Even setting aside its standing via the Board members, the Board is appropriately aggrieved to have standing itself.

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[4] The Board's motion to impose restrictions on the Board members' depositions was initially denied as moot considering the Magistrate Judge's Order granting MPO; it was referred back to the magistrate judge following the district court's sustaining of Plaintiffs' Objections. (D.E. 156, 136:20-137:10). No ruling has been issued as the case is stayed pending appeal. (D.E. 170).

[5] As noted in the Initial Brief, Board members Hightower and Slayton are no longer members of the Board yet are still subject to deposition by Plaintiffs.

Fourth, this Court's "discussion in *Kimberly Regenesis* about the possibility of a nonparty appeal exception was only dicta." *Finn v. Cobb Cnty. Bd. of Elections & Registration*, 111 F.4th 1312, 1317 (11th Cir. 2024). To the extent this Court discussed an appeal exception "that might allow a nonparty who participated to appeal," such was "not necessary to the result *Kimberly Regenesis* reached, which was that the nonparty who did not participate could not appeal." *Id.* at 1318. This Court drove the point home by stating, "to reiterate, any suggestion we made in *Kimberly Regenesis* about whether and when 'a nonparty may sometimes appeal when he has participated before the district court,' was nonbinding dicta." *Id.* (citation omitted) (quoting *Kimberly Regenesis*, 64 F.4th at 1256).

Because *Kimberly Regenesis*' "participation" exception for nonparties was mere dicta, it cannot override *In re Hubbard*'s holding that a nonparty who unsuccessfully asserts a governmental privilege has an immediate right of appeal, especially given *In re Hubbard* was decided prior to *Kimberly Regenesis* and was law of this Circuit under the prior panel precedent rule.[6] *See Smith v. GTE Corp.*,

[6] For example, the *Kimberly Regenesis* Court suggested one means "the commissioner could have participated [was] by sitting for the deposition and asserting a privilege in response to concrete questions," in order to force the district court to hold him in contempt, creating an appealable issue. *See* 64 F.4th at 1263-64. This is directly at odds with this Court's proclamation from *In re Hubbard* that "government officials may appeal from the discovery order itself without waiting for contempt proceedings to be brought against them." 803 F.3d at 1305.

236 F.3d 1292, 1300 n.8 (11th Cir. 2001); *see also Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003) (noting "intra-circuit split[s]" are resolved by "look[ing] to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel" (quotation omitted)); *Auto-Owners Ins. Co. v. Loveless*, No. 2:23-cv-333-ACA, 2023 WL 5418740, at *4 (N.D. Ala. Aug. 22, 2023) (dicta cannot override precedent).

Plaintiffs request this Court look to out-of-Circuit caselaw; but this offers no aid because *In re Hubbard* is binding precedent in this Circuit. *United States v. Ware*, 69 F.4th 830, 855 (11th Cir. 2023) (noting out-of-Circuit precedent "cannot supersede contrary Eleventh Circuit precedent"). Their foreign caselaw is also inapposite. For example, *Texas Brine Co., LLC v. Occidental Chemical Corp.*, 879 F.3d 1224, 1226-27 (10th Cir. 2018), involved a motion to quash filed by a party to suit on behalf of a nonparty from which it was distinct. *See* 879 F.3d at 1226-27. The same cannot be said here given the Board filed its MPO on behalf of its constituent members, i.e., the five individuals who comprise the totality of the Board. Fla. Stat. § 1001.34.[7] The affidavit in that motion to quash also apparently only stated that the receiving entity objected to it. *See id.* at 1228 n.4. No indication of invoking any

[7] Further distinguishing *Texas Brine* is there the affidavit submitted was in relation to a subpoena—not a notice of taking deposition—and considered to fall short of the requirements for quashing a subpoena under Rule 45. 879 F.3d at 1228 n.4.

privilege is mentioned, nor is there any discussion of the affidavit containing the specifics that the Board members' declarations do, both confirming their intent to raise the legislative privilege and their assent for the Board to invoke it on their behalf. A case decided upon an entirely different factual scenario does not divest the Board and Board members of their appellate standing here.

C. The Board Members Satisfy *Kimberly Regenesis*' Dicta Test

To the extent *Kimberly Regenesis*' nonbinding "participation" test even applies to the Board members, they clear it. There, the county moved for the protective order, not the commissioner. *Kimberly Regenesis*, 64 F.4th at 1262. Here, the Board moved for a protective order *on behalf of* the Board members, with their signed declarations affirming their intent to raise the legislative privilege and relying on the Board to invoke the privilege on their behalf. *See* (D.E. 107-1–107-5). Plaintiffs' claim that this appeal is the Board members' first appearance, Resp. Br. p. 17, is incorrect.

More importantly, Plaintiffs concede subpoenas were unnecessary because they served notices of taking deposition. *See* Resp. Br. pp. 7-8 n.3. Plaintiffs cannot claim "whatever the court decides on the protective order motion will determine whether [they] can depose the board members," *id.*, but then argue the Board members' declarations were too "boilerplate" in nature—especially because they

waived any challenge to the sufficiency of these declarations by not contesting them below. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

Looking to *Kimberly Regenesis*' dicta, it "include[d] the observation that some other circuits had allowed nonparties to appeal when: (1) the nonparty 'actually participated' in the district court proceedings; (2) the nonparty has 'a personal stake in the outcome' of the proceedings; and (3) 'the equities weigh in favor of hearing the appeal.'" *Finn*, 111 F.4th at 1318 (quoting *Kimberly Regenesis*, 64 F.4th at 1261). All three of those factors are met here.

First, the Board members actually participated via signaling their direct intention to raise legislative privilege and for the Board to raise it on their behalf. *Cf. id.* at 1319 (noting nonparty school district failed participation prong because it did not participate in the proceedings leading up to the preliminary injunction it was appealing).

Second, the Board members clearly have a personal stake in the outcome of the proceedings, as they are the individuals ordered to sit for deposition and also because they comprise the legal entity that is the Board, the party being sued. Fla. Stat. § 1001.34.

Third, the equities clearly favor hearing this appeal because, absent interlocutory relief, the District Court's Order will "(1) conclusively determine[] the disputed question; (2) resolve[] an important issue completely separate from the

merits of the action; and (3) [will be] effectively unreviewable on appeal from a final judgment." *Doe No. 1 v. United States*, 749 F.3d 999, 1006-07 (11th Cir. 2014) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009)). This is the exact purpose the collateral order doctrine serves for nonparties such as the Board members. *See In re Hubbard*, 803 F.3d at 1305; *cf. In re E.E.O.C.*, 709 F.2d 392, 394-95 (5th Cir. 1983) (issuing writ of mandamus to vacate discovery order that was essentially unreviewable on final appeal). Absent interlocutory relief, the Board members' depositions will be taken; no appeal following final judgment can cure that, and so the equities favor hearing this appeal. *Kimberly Regenesis*, 64 F.4th at 1261; *cf. Finn*, 111 F.4th at 1319 (noting equities did not weigh hearing interlocutory appeal because nonparty school district "sought and obtained nonparty status at its own urging by securing a dismissal of the claim against it," and therefore "it got what it asked for").

The Board members here are no mere amicus, *see Finn*, 111 F.4th at 1319; they are nonparties with a direct interest in the stake of this appeal and the overall outcome of this case. They actually participated below by declaring their intent to invoke the legislative privilege, and affirmatively did so via the Board. Plaintiffs' unavailing and incorrect assertion that "participation in the district court proceedings must be active and substantial," Resp. Br. p. 18, is premised on nonbinding dicta and squarely rebutted by this Court's precedent which says the Board members can

immediately seek an appeal after an unsuccessful assertion of legislative privilege. *In re Hubbard*, 803 F.3d at 1305; *accord League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 n.1 (5th Cir. May 20, 2022) (concluding court had jurisdiction to hear motion related to interlocutory appeal filed by legislators who unsuccessfully asserted legislative privilege in response to deposition subpoenas, favorably citing *In re Hubbard*).

D. Plaintiffs Waived Any Objection to the Board Members' "Participation" by Failing to Timely Raise It

As a final reason to reject Plaintiffs' arguments—and another sign of the equities favoring the Board and Board members—Plaintiffs' strategic change in position with respect to the Board's invocation of the legislative privilege, by and through the Board members, should not be rewarded. Federal Rule of Civil Procedure 72(a) is clear: "[a] party may serve and file objections to the [magistrate judge's] order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to." Plaintiffs raised no objections to the Board members' "participation," nor did they challenge the Board's invocation of the privilege on behalf of the Board members. "[W]here a party fails to timely challenge a magistrate's nondispositive order before the district court, the party waived his right to appeal those orders in this Court." *Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1365 (11th Cir. 2007); *see also* Fed. R. Civ. P. 72

advisory committee's note to 1991 amendment (noting amendment is "intended to assure that objections to magistrate's orders that are not timely made shall not be considered").

Below, when directly questioned by the magistrate judge, Plaintiffs' counsel confirmed they were not challenging the sufficiency of either the Board's raising of the legislative privilege on behalf of the Board members, nor were they challenging the declarations submitted on behalf of the Board members confirming their desire to have it raised on their behalf:

> THE COURT: Well, let me ask you this, because there might be some more that maybe are important to me --
> [PLAINTIFFS' COUNSEL]: Okay.
> THE COURT: -- that they may be inherent in your first statement that the only issue is if they're legislative or administrative. *You're not challenging whether the School Board has appropriately asserted the legislative privilege?*
> [PLAINTIFFS' COUNSEL]: *We are not, Your Honor.*
> THE COURT: Okay. *And you're not challenging whether the affidavit[s] submitted by the board members are sufficient for them to state their desire to have the legislative privilege asserted on their behalf?*
> [PLAINTIFFS' COUNSEL]: *We are not, Your Honor.*
> THE COURT: Okay. Good. That is helpful, at least -- hey, any narrowing is helpful.
> [PLAINTIFFS' COUNSEL]: Always helpful. Always happy to be of service.

(D.E. 133, 31:03-31:19) (emphases added). Plaintiffs likewise did not challenge this in their Response, instead merely taking issue with the nature of the acts, and arguing the legislative privilege had been waived. (D.E. 113). And Plaintiffs again did not

challenge the Board's invocation of the legislative privilege or sufficiency of the declarations submitted by the Board members in their Objections or at the hearing before the district court.[8] *See* (D.E. 143, 156). Plaintiffs' brief is the first—and to date only—instance they have ever challenged the degree to which the Board members "participated."

The Board and Board members reasonably relied on Plaintiffs' representations regarding the sufficiency of the Board members' participation and involvement and, put simply, Plaintiffs have waived any challenge to the Board members' participation in this case or the Board's invocation of the legislative privilege on behalf of its members. *Smith*, 487 F.3d at 1365. It is inappropriate for Plaintiffs to make representations to the magistrate judge (and then remain silent before the district court) that they were not challenging the Board's invocation of the legislative privilege, only to strategically change their mind on appeal because they (wrongly) believe it will strip this Court of jurisdiction. Such tactics should not be sanctioned by this Court. *See, e.g.*, *Slate v. Kamau*, No. 4:21cv390-MW/MJF, 2023 WL 9103708, at *1 n.1 (N.D. Fla. Oct. 11, 2023) (declining defendant's "offer" "to condone her gamesmanship").

[8] Nor did Plaintiffs challenge Judge Winsor's findings in the related *Parnell* case, which the Board filed with the district court. (D.E. 125). In his order, Judge Winsor found the declarations by the Board members were "sufficient to allow the Board to assert the privilege on its members' behalf." (D.E. 125-1 pp. 1-2).

Given their actions previously—and the Board and Board members' reliance thereupon—Plaintiffs should be estopped from reversing course now simply because they believe it will offer them an advantage in this litigation. *Cf. Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). To permit Plaintiffs to do so—i.e., take materially inconsistent positions—would cut against the integrity of the judicial process and make a mockery of the judicial system. *See Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1336 (11th Cir. 2005).[9] *In re Hubbard* supplies this Court with the jurisdiction to hear this appeal. 803 F.3d at 1305. Plaintiffs' standing arguments lack merit and should be rejected.[10]

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[9] *Accord Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571 (Fla. 2005) ("[A]n appellee cannot hide behind the 'presumption of correctness' of an order that the appellee itself procured by misrepresenting the law or the facts. The presumption of correctness is necessarily based on another presumption: that the appellee correctly informed the trial court of the facts and applicable law. Busy judges managing overloaded motion calendars often depend on the attorneys appearing before them to provide them with accurate information about the issues involved, the facts relevant to those issues, and the law applicable to those facts.").

[10] Should the Court determine it lacks appellate jurisdiction under the collateral order doctrine, 28 U.S.C. § 1291, it should construe the Board and Board members' appeal as a petition for writ of mandamus pursuant to 28 U.S.C. § 1651(a). *See Jackson v.*

II. The District Court Applied the Wrong Standard of Review.

Plaintiffs are wrong that the district court applied the correct standard of review and that the contrary to law standard means de novo review of legal conclusions with respect to a district court's review of a magistrate judge's nondispositive order under 28 U.S.C. § 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a). Resp. Br. pp. 19-33. Plaintiffs may disagree with the wisdom of *Merritt v. International Brotherhood of Boilermakers*, 649 F.2d 1013 (5th Cir. Unit A June 1981), but that does not change its ruling: "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)." *Id.* at 1017.

Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997) (mandamus lies "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion"); *see also In re Exec. Off. of President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (recognizing "mandamus relief may be appropriate to challenge a District Court's discovery order" when disclosure of privileged material would result, as "the cat is out of the bag" (quotation omitted)); *cf. In re United States*, 985 F.2d 510, 511 (11th Cir. 1993) (acknowledging that when subpoenas are served on high government officials, they need not wait for contempt proceedings to seek appellate review and can instead petition for a writ of mandamus to request an appellate court order the subpoenas be quashed). Because the Board members have no adequate means to challenge the District Court's Order, mandamus would be appropriate should the Court find the collateral order doctrine does not apply.

A. Contrary to Law Does Not Mean De Novo

Plaintiffs argue contrary to law equals de novo. This is incorrect. Their claim that this Court has "recognized" legal issues are reviewed de novo by a district court reviewing Rule 72(a) objections is premised on unpublished and nonbinding caselaw. Resp. Br. pp. 20-21. The reality is "[t]he standard of review the district court was required to apply depends on" whether a motion is a dispositive or nondispositive matter. *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020). This Court in *Jordan* specifically delineated the differences between the standards of review in section 636(b)(1).[11] To the extent other Circuits have found contrary is of no import. *Ware*, 69 F.4th at 855.

Moreover, in writing section 636(b)(1)(A), Congress explicitly chose to use the words "contrary to law" when referring to nondispositive issues under review by a district court. 28 U.S.C. § 636(b)(1)(A). It then explicitly chose to use the words "de novo" when referring to review of dispositive matters. 28 U.S.C. § 636(b)(1)(B). As Plaintiffs recognize, Resp. Br. p. 25, different words have different meanings. *See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1089 (11th Cir. 2017) (en banc) ("When Congress uses 'different language in similar sections,'

[11] Plaintiffs fail to cite or even attempt to materially distinguish *Jordan*. This omission is telling.

we should give those words different meanings." (quoting *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: An Interpretation of Legal Texts* 170 (2012). Congress' conscious decision to demand one form of review for nondispositive orders versus a different standard for dispositive orders cannot be ignored.

Plaintiffs' own statutory interpretation arguments are flawed, as the Board and Board members did not "conflat[e] [the] phrases 'clearly erroneous' and 'contrary to law.'" Resp. Br. p. 25. Rather, the Board and Board members argued Congress' differentiation between dispositive and nondispositive orders matters, as does Congress' assignation to each different standards of review. By demanding contrary to law be read as equivalent to de novo, Plaintiffs impermissibly collapse any distinction between subsections 636(b)(1)(A) and (B). *See United States v. Raddatz*, 417 U.S. 667, 673-74 (1980) ("Review by the district court of the magistrate's determination of these nondispositive motions is on a 'clearly erroneous or contrary to law' standard. It should be clear that on dispositive motions, the statute calls for a *de novo* determination." (cleaned up)).

The history of the 1976 expansion to the Federal Magistrates Act also supports the distinction, as it "explicitly permit[ted] a district judge to refer non-dispositive pretrial matters to a magistrate for determination [that] is subject to a 'clearly erroneous or contrary to law.'" *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d

352, 354 (5th Cir. 1980). This is also embodied in Rule 72, whose "deviation from the language of [28 U.S.C. § 636(b)(1)] is not merely stylistic or a result of the distinct functions of the Act and the Federal Rules," but "is meant to reflect the legislative history of the 1976 amendments, the considerations underlying the differing standards of review, and the body of case law that developed in practice under the provisions of Section 636(b)(1)." 12 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3068.2 (3d ed. Apr. 2025 update). As this treatise explains:

> Motions thought "dispositive" of the action warrant particularized objection procedures and a higher standard of review because of the possible constitutional objection that only an article III judge may ultimately determine the litigation. Other motions and matters which can arise in the preliminary processing of a civil case do not warrant this treatment; in those nondispositive cases a magistrate's determination is intended to be final unless a judge of the court exercises his ultimate authority to reconsider the magistrate's determination. Thus, in all pretrial matters the magistrate acts under the direct supervision of the district judge, but in "dispositive" matters Congress chose to provide a framework for objection and substantial review so as to avoid any constitutional concerns.

Id. (citing H. Rep. Report No. 94-1609, 94th Cong., 2d Sess. 16 (1976)) (cleaned up). Plaintiffs' erroneous contention that the Magistrate Judge's Order was subject to a heightened standard of review cannot comport with Rule 72 or section 636(b)(1).

B. Had the District Court Deferred to the Magistrate Judge, It Would Have Upheld the Magistrate Judge's Order

Plaintiffs argue that had the district court reviewed the Magistrate Judge's Order under a more deferential standard, it would still have used a de novo review and reached the same conclusion. This is incorrect,[12] as openly acknowledged by the District Court's Order:

> If, as other district courts in this Circuit have held, the contrary to law standard is more deferential than de novo review, *the Court would have ruled differently on Plaintiffs' objection*[*s*] because the line dividing legislative and administrative decisions is not always clear, and the magistrate judge's conclusion that the board members' book removal decisions are subject to the legislative privilege is at least fairly debatable.

(D.E. 155 p. 5 n.1) (emphasis added) (cleaned up). The district court's admission—i.e., that it literally would have reversed course—sinks any argument by Plaintiffs that its failure to not apply the appropriately deferential standard resulted in a harmless error. Resp. Br. p. 24.

C. Plaintiffs Misunderstand *Merritt* and Caselaw Interpreting It

Plaintiffs contend the language in *Merritt* that pretrial orders under section 636(b)(1)(A) are not reviewed de novo is dicta and, regardless, it is not inconsistent with the District Court's Order. Not so. Setting aside that just because a case's

[12] Plaintiffs repeatedly find themselves in the position of arguing the district court erred or was otherwise wrong, despite claiming its order should nonetheless be affirmed. *See, e.g.*, Resp. Br. pp. 22-23 n.5, 50.

holding is harmful to their position does not render it dicta,[13] Plaintiffs inexplicably claim *Merritt* is "silent" on the issue of whether contrary to law is the equivalent of de novo review. This is unsupportable given *Merritt*'s explicit statement that "[p]retrial 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*." 649 F.2d at 1017 (emphasis added). It is hard to fathom the Court more openly addressing that these two standards are not the same.

And because the district court admitted that had it not applied a de novo standard it would have ruled differently, Plaintiffs are wrong *Merritt* and the District Court's Order can be reconciled. *Compare* Resp. Br. p. 27, *with* (D.E. 155 p. 5 n.1). As an overwhelming number of district courts have recognized, "[i]n this Circuit, [] the 'contrary to law' standard has been distinguished as more deferential than de novo review." *Malibu Media, LLC v. Doe*, 923 F. Supp. 2d 1339, 1347 n.9 (M.D. Fla. 2013) (citing *Merritt*, 649 F.2d at 1016-17). The precise degree or contours of such deference are irrelevant for purposes of this appeal given the district court's concession that *had it deferred to the magistrate at all it would have ruled differently*. This admission alone warrants reversal given the district court's failure to find that

[13] This is not the first instance in which Plaintiffs have attempted to discredit authority contrary to their position by castigating it as dicta or "stray language." (D.E. 156, 93:03-93:10, 98:15-98:20).

the magistrate judge abused his discretion. *See id.*; *accord Garcia v. Benjamin Grp. Enter., Inc.*, 800 F. Supp. 2d 399, 403 (E.D.N.Y. 2011) ("Similarly, under the 'contrary to law' standard of review, a district court may reverse a finding only if it finds that the magistrate failed to apply or misapplied relevant statutes, case law or rules of procedure. Pursuant to this highly deferential standard of review, magistrate judges are thus afforded broad discretion in resolving discovery disputes, and reversal is appropriate only if that discretion is abused." (cleaned up)).

III. The Actions under Scrutiny Are Legislative.

Votes by school board members on whether to remove or restrict a library book are legislative decisions. Plaintiffs' efforts to support the District Court's Order fall flat.

A. *Crymes* Is Not the End-All-Be-All Standard Plaintiffs Purport It to Be

Plaintiffs' Objections complained the Magistrate Judge's Order failed to reference *Crymes v. DeKalb County*, 923 F.2d 1482 (11th Cir. 1991), arguing this was "the leading Eleventh Circuit case on distinguishing legislative from administrative acts." (D.E. 143 p. 5). Yet, when confronted with this by the district court, Plaintiffs "walk[ed] back that statement in the brief," admitted "it's [not] the most analogous in the fact[s]," and conceded that they "don't think *Crymes* is so special." (D.E. 156, 82:15-83:09). Yet now on appeal, Plaintiffs pivot again and

contend *Crymes* establishes the definitive standard by which legislative privilege analyses must be viewed. *See* Resp. Br. pp. 34-36.

This is incorrect and, as Plaintiffs admit, there is a whole host of precedent predating *Crymes* which establishes standards by which to weigh whether actions are legislative or administrative in nature.[14] *Id.* p. 42 n.13. An entire constellation of authority precedes *Crymes* and establishes factors to determine whether actions are legislative or not; they are entitled to equal weight as *Crymes*' standard concerning policymaking and general application. *See, e.g.*, *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. Unit A May 1981); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982); *Healy v. Town of Pembroke Park*, 831 F.2d 989, 993 (11th Cir. 1987); *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 765 (11th Cir. 1989); *Hudgins v. City of Ashburn*, 890 F.2d 396, 406 n.20 (11th Cir. 1989).

Interestingly, *Crymes*' own standard was drawn from *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 135 (5th Cir. 1986), which merely commented in dicta that, on remand, if the school board members sought immunity, then the district court must examine whether the school board members' decisions "involve[d] the degree of discretion and public-policy-making traditionally

[14] And any standard created by *Crymes* must align with the standards articulated in this Court's earlier precedent; to the extent *Crymes* contradicts those precedents, it must yield. *Morrison*, 323 F.3d at 929.

associated with legislative functions or merely an administrative application of existing policies." Thus, even the progenitor of *Crymes* recognized that discretion was a key factor in determining the legislative character of an act, contrary to Plaintiffs' claim that this standard and the other factors drawn from this Court's precedent represent a mere "hodgepodge." Resp. Br. pp. 39-42.

Plaintiffs also insist on a brittle reading of the term "policymaking," but as Judge Winsor recognized in *Parnell*, the Board's votes were "forward-looking policy decisions." (D.E. 125-1 p. 4). Or, as this Court noted: "questions [over the educational suitability of library books] are the perfect example of a core educational policy matter within the exclusive province of local school boards." *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1225 (11th Cir. 2009). Nothing within this Court's precedent confines the term to such a narrow construction. Regardless, as the Initial Brief makes clear, *Crymes* supports a finding that the Board's actions were legislative. *See* Initial Br. pp. 45-51.

B. Plaintiffs Misapprehend *Ellis*

Plaintiffs accuse the Board and Board members of misunderstanding *Ellis v. Coffee County Board of Registrars*, 981 F.2d 1185 (11th Cir. 1993). Resp. Br. pp. 48-51 Oddly, before the district court, Plaintiffs' counsel conceded:

> *Ellis* is a difficult case for us. It's not very clear what's happening there. I think I understand what's happening, but I acknowledge it's not – there's not a lot of analysis there. And so I think if Ellis is a one-off,

> that's not a reason to reject the standard and throw out the baby with the bathwater.

(D.E. 156, 86:15-86:22). Plaintiffs' counsel likely took this position because they recognized that, in the absence of any case on all fours, *Ellis* is the most factually analogous to this matter.

The district court also admitted its decision was at odds with *Ellis*. (D.E. 156 p. 6 n.3). In attempting to distinguish *Ellis*, the district court stated it was "hard to square with earlier Eleventh Circuit precedent holding that local government decisions impacting specific individuals *tend to be* administrative in nature, not legislative." *Id.* (emphasis added). But "tend to be" does not equal "always are." Even assuming the Board's decisions impacted specific individuals—they did not, because their votes reached the entirety of the school district by removing/restricting the ability of all students to access the books in question, *see* (D.E. 125-1 p. 4) (discussing how Board's book removal decision "did not affect just these Plaintiffs," but rather "made the book unavailable in all Escambia school libraries and thus to all Escambia students," a decision which "made [the book] unavailable forever," and was "unlike an individual personnel decision or some other administrative decision that affected only a few people")—they would still fall within *Ellis*' carveout from *Crymes*' general pronouncement that decisions affecting specific individuals are "more apt" but, crucially, not always "administrative." 923 F.2d at 1485.

And despite previously professing confusion as to what was "happening" in *Ellis*, Plaintiffs now assert the "key" to understanding this case is that it involved "the legislative function of conducting an *investigation*, as opposed to legislating." Resp. Br. p. 48. Plaintiffs' hair splitting is illogical because to say investigating is a legislative function but is apart from "legislating" would create subclasses of legislative acts with some afforded more weight than others given Plaintiffs' efforts to cast *Ellis* as some sort of judicial aberration. *Id.* p. 51.

The proper scope through which the case is viewed is that the Board—like the *Ellis* county commission—pursued a statutory mandate by employing its discretionary authority, that is, reviewing any challenged books in its libraries, and providing ultimate determinations as to whether these books ran afoul of the law. Fla. Stat. § 1006.28(2)(a)1.-2. (2022). Just as the county commission employed its investigatory power, 981 F.2d at 1187-89, the Board employed its authority to review the suitability of books in its libraries. Fla. Stat. § 1006.28(2)(a)1.-2. (2022). The Board's votes are therefore quintessentially legislative acts. *Ellis*, F.2d at 1190.

Plaintiffs attempt to diminish *Ellis*' vitality by arguing it is "inapposite" and pointing to the purported amount it has been cited. Resp. Br. p. 51. But to borrow Plaintiffs' language: "[*Ellis*] is perfectly good law that is binding on this Court." *Id.* p. 43. That it does not support their position does not change this. The Board members were acting in their legislative capacity when voting to remove or restrict

library books. The district court's decision otherwise was an abuse of discretion and should be reversed.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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 6,495 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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