COURT REPORT

October 2026

Eleventh Circuit Court of Appeals

First Amendment – Legislative Privilege

***Pen American Center v. Escambia County School District*, --- F.4th ----, 2026 WL 3120773 (11th Cir. October 19, 2026)**

This case involves a Florida school board's decision to remove books from its school libraries pursuant to Florida statutes and local policies governing instructional and library materials. Between 2023 and 2025, the school board voted to remove groups of books involving topics such as LGBTQ/sexual identities, race/racism, coming of age and other extreme content. Authors, publishers, parents and a free-speech organization sued the school board, alleging that the removal of the books violated the First Amendment. The plaintiffs then sought to depose individual board members about their votes. The board members moved for protective orders and to quash the subpoenas, arguing that legislative privilege shielded the board members from being questioned about their votes. The trial court denied the motions, concluding that the votes were administrative acts, not legislative ones. The board members appealed.

On appeal, a divided panel of the Eleventh Circuit affirmed the trial court's decision and rejected the board members' appeal. The Court explained that legislative privilege protects government officials from being compelled to testify about legislative acts, meaning legislative activities such as proposing, formulating, and adopting policies or laws. The Court highlighted that legislative privilege does not protect administrative acts, and the official claiming the privilege has the burden of proving it applies. The Court said the issue was whether an act involves making policy or simply applying existing policy. Applying that test, the Court separated two kinds of board action. The Court held that the board's action to adopt the book-review policies was legislative. However, the Court determined that the board's action to vote to remove specific books under those policies was administrative. The Court pointed out that the board's agendas described the book removal votes as considering challenges to particular books and approving the superintendent's recommendations under existing policy. In casting those votes, the Court stated the board did nothing more than the superintendent was already allowed to do under the same policies.

The Court rejected the board members' argument that voting is inherently legislative. According to the Court, what matters is what the vote is about, not the fact that a vote was taken. The Court also rejected the argument that the members' discretion in deciding how to vote made the act of removing books legislative. The Court emphasized that applying a policy to particular facts may involve judgment, but the ultimate question is whether the act was an exercise of policymaking discretion. The Court called its decision "a narrow one." It did not decide whether other privileges or discovery rules might limit the depositions, and it did not suggest that every decision to stock or remove a book is administrative. As a result, the Court concluded that the school board members may be deposed about their particular vote to remove specific books under existing policies, but not about why they adopted the policies themselves.

Legal Department
Alabama Association of School Boards
Email: legal@alabamaschoolboards.org
Phone: (334)277-1570