IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:24-cv-03512-CNS-STV

KRISTEN CROOKSHANKS, as parent and next of friend of a minor on behalf of C.C.; MINDY SMITH, as parent and next of friend of a minor on behalf of E.S.; NAACP–COLORADO–MONTANA–WYOMING STATE AREA CONFERENCES; and THE AUTHORS GUILD,

Plaintiffs,

v.

ELIZABETH SCHOOL DISTRICT,

Defendant.

Defendant's Reply in Support of Motion to Exclude Statements, Documents, and Other Proffered Evidence Offered in Support of Plaintiffs' Motion for Preliminary Injunction

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Plaintiffs ask for "extraordinary relief" in their motion for preliminary injunction. They ask the Court to recognize a constitutional right never approved by the U.S. Supreme Court, the Tenth Circuit, or even by any judge in the District of Colorado. They ask the Court to grant preliminary relief for an injury to this unrecognized constitutional right under a three-justice plurality opinion that's doctrinally stale and factually infirm. They ask the Court to apply a standard that is entirely fact based—whether the School Board had unconstitutional "intent"—in their favor based on written statements, not of the School Board members, but of parents of two students, the head of the local NAACP chapter, and select members of another trade group. Finally, they ask the Court to compel the District to spend district resources and to direct district staff in a manner contrary to the prerogative of the District's governing body: the elected School Board. Despite this, Plaintiffs contend it's the District arguing against well-settled law. Not so. The District's position here is simple: based on the standard Plaintiffs have advanced, the Court should—at a minimum—

hold a hearing and take evidence before it considers granting any preliminary relief in this case. And, in doing so, it should apply the Federal Rules of Evidence.

REPLY IN SUPPORT

I. The District and Plaintiffs Dispute the Underlying Facts, Requiring a Hearing and Application of the Federal Rules of Evidence

"[M]ost courts hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided[.]" Wright & Miller, *Federal Practice & Procedure*, § 2949 Procedure on Application for Preliminary Injunction (3d ed.); *see also Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("[I]f there are genuine issues of material fact raised in opposition to a motion for a preliminary injunction, an evidentiary hearing is required." (citing *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997))); *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003) ("While an evidentiary hearing is not always required before the issuance of a preliminary injunction, 'where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held.'"). Indeed, "[p]articularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing." *Cobell*, 391 F.3d at 261 (collecting circuit cases). Otherwise, the court is left to "resolve a factual dispute on affidavits" and "is merely showing a preference for 'one piece of paper to another.'" *Forts v. Ward*, 566 F.2d 849, 851–52 (2d Cir. 1977) (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)). For this reason, when the underlying facts are in dispute, courts may *deny* a motion for preliminary injunction without a hearing, but they cannot grant a preliminary injunction without a hearing.

Here, the paper evidence is in sharp dispute on the School Board's motivations for removing the subject books. While the District maintains that the subjective motivation of the School Board is legally irrelevant (*see* Def.'s Opp'n to Mot. for Prelim. Injunc. 12–24, ECF No. 25), the standard Plaintiffs promote (the *Pico* plurality) is inherently fact-based and requires the Court to sit in judgment of the School Board's "constitutional motives" (*see* Pls.' Mot. for Prelim. Injunc. 17, ECF No. 9 (citing *Pico* and stating "the plurality gleaned the rule that school boards cannot constitutionally exercise their discretion to determine the content of school libraries 'in a narrowly partisan or political manner'")). These disputed facts alone could warrant denying preliminary relief. *See Denver Homeless Out Loud v. Denver*, 514 F. Supp. 3d 1278, 1300 (D. Colo. 2021) ("[C]ourts have consistently held that preliminary injunctions are not appropriate in cases permeated with factual disputes[.]"). But, at a minimum, the Court cannot resolve the factual dispute against the District without a hearing on the Plaintiffs' motion.

If the Court is going to hear evidence on Plaintiffs' motion at a hearing, there is no good reason to avoid the Federal Rules of Evidence. Indeed, Plaintiffs should welcome such procedural and evidentiary consistency, considering the Court must comply with Federal Rule of Civil Procedure 52(a)(2) in ruling on Plaintiffs' motion. "In granting or refusing an interlocutory injunction," the Court must state in writing "the findings and conclusions that support its action." Fed. R. Civ. P. 52(a)(2). And, "without oral evidence on disputed points[,] the trial court [is] unable to make the findings and conclusions required by Rule 52(a)(2)." Wright & Miller, *Federal Practice & Procedure*, § 2949 Procedure on Application for Preliminary Injunction (3d ed.).

It is unclear why Plaintiffs resist applying the Federal Rules of Evidence in any evidentiary hearing on their motion. Plaintiffs offer no reason, which suggests they perceive some sort of advantage to avoiding the rules of evidence in prosecuting the

extraordinary injunctive relief they seek early in this case. In the absence of any prejudice—again, Plaintiffs offer none—the Court should apply the Federal Rules of Evidence in any hearing on Plaintiffs' motion for preliminary injunction.

II. The Need to Apply the Federal Rules of Evidence is Heightened Here

As the District explained in its motion, while there is no textual basis in the rules, some courts relax application of "rules of evidence in expedited preliminary-injunction proceedings (e.g., when the proceedings are 'conducted under pressured time constraints, on limited evidence[,] and expedited briefing schedules'[])]." (Mot. 2 (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003)).) But Plaintiffs have not requested expedited relief. Nor do they disclaim the need for a hearing on their motion, or articulate prejudice from applying the Federal Rules of Evidence in a hearing.

Further, unlike the cases Plaintiffs cite, here Plaintiffs seek a mandatory injunction requiring the District to spend its limited financial resources to purchase the subject books and to use its limited human resources to re-catalogue the books, place them on the shelves of the District's libraries, and address parental concerns about student access to these books. The limited purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Courts have identified certain preliminary injunctions that are disfavored, including mandatory preliminary injunctions—those injunctions that require the nonmoving party to take affirmative action (i.e., the purchase and reshelving of books) before a trial on the merits occurs. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258–59 (10th Cir. 2005). Because these injunctions are disfavored, not only must a plaintiff make a heightened showing under the preliminary-injunction requirements, but these types of injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal

course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). This is another reason to apply the rules of evidence. If the relief requested is going to fundamentally alter the status quo and compel the District to act contrary to its prerogative *before* a trial on the merits, the Court should at least require the same evidentiary minimums that apply to any other evidentiary hearing.

III. The District Intends to Preserve the Issue for Appellate Review

Lastly, the District intends to press this issue on appellate review. The Federal Rules of Evidence broadly apply in federal court, and the prudential court-made exception for preliminary-injunction motions cited by Plaintiffs has no support in the text of the rules or in any decision of the U.S. Supreme Court. To the extent the caselaw of the Tenth Circuit suggests otherwise, those cases are incorrect, and the District intends to preserve its objections for review by the full Tenth Circuit and the U.S. Supreme Court.

CONCLUSION

The District asks the Court to exclude the statements, documents, and other proffered evidence identified in its motion and attached to Plaintiffs' motion for preliminary injunction as inadmissible under the Federal Rules of Evidence. The Court should disregard this proffered evidence in ruling on Plaintiffs' motion for preliminary injunction, and, unless it is prepared to deny the motion, set an evidentiary hearing on the motion.

Dated: February 25, 2025

Respectfully submitted,

s/ Julian R. Ellis, Jr.

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CERTIFICATE OF SERVICE

I certify that on February 25, 2025, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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