HAYNES BOONE

October 16, 2023

Federal Court Strikes Down Texas Book Ban, but Constitutional Challenges Remain Across Country

By Michael J. Lambert

What's old is new again, as book bans have been on the rise in the United States since 2021. Once thought to be relics of our nation's history, governments across the country have resurrected efforts to ban or restrict access to books in public libraries and school libraries. Several states, including Texas, Arkansas, Missouri, and Utah, have recently enacted laws banning books in libraries.

In 2023, Texas passed an unprecedented book banning law, House Bill 900, that requires booksellers to review all public school library books in "active use" for their sexual content and rate them as "sexually explicit," "sexually relevant," or "no rating." Books rated "sexually explicit" would be removed from public school libraries and banned from being sold to schools. Books rated "sexually relevant" would require parental consent for students to access them outside of the library. On Aug. 31, 2023, one day before the law was set to take effect, the United States District Court for the Western District of Texas enjoined the enforcement of HB 900 after finding that it violated the First Amendment. *Book People, Inc. v. Wong*, No. 1:23-CV-00858-ADA, 2023 WL 6060045 (W.D. Tex. Sept. 18, 2023) (enjoining proposed Tex. Educ. Code §§ 33.021, 35.001-002, 35.0021, 35.003-008). Haynes Boone team, including Laura Prather, Catherine Robb, Michael Lambert, and Reid Pillifant, brought the lawsuit on behalf of two independent booksellers and four publishers, authors, and booksellers association. Chair of the Haynes Boone media practice group, Laura Prather, argued the case. The State has appealed to the Fifth Circuit, No. 23-50668, which issued an administrative stay of the injunction, and expedited the case for oral argument on November 29, 2023. At the same time, litigation challenging book bans in other states is continuing to wind its way through courts, while some book bans remain unchallenged.

I. History of book bans and censorship

Recent efforts to ban or restrict access to books harken back to our nation's history when First Amendment rights were restricted and licensing regimes were rampant. A century ago, state and local governments actively used "censorship boards" to control the dissemination of books and other expressive works. By the end of the 1920s, eight states and nearly 100 municipalities developed censorship regimes.[1] But the tide turned in the mid-21st century as the U.S. Supreme Court began declaring that these censorship efforts violated the First Amendment. For instance, in *Joseph Burstyn, Inc. v. Wilson*, the U.S. Supreme Court held that a New York censorship board that issued film licenses was unconstitutional. 343 U.S. 495, 505 (1952) ("New York cannot vest such unlimited restraining control over motion pictures in a censor."). In *Bantam Books, Inc. v. Sullivan*, the U.S. Supreme Court struck down a Rhode Island law establishing a Commission that reviewed and rated certain books as "objectionable" for minors. 372 U.S. 58, 71 (1963). Maryland was the final state to shut down its censorship board in 1981.[2] Calls for book bans were largely kept at bay over the following decades.

II. Book bans accelerate since 2021

But significant changes occurred starting in 2021 in the wake of the COVID-19 pandemic. According to the American Library Association (ALA), attempts to ban or restrict library materials held steady from 2003 to 2020, ranging between 100 and 500 each year. These numbers have skyrocketed since then. In 2021, there were 729 attempts to ban or restrict library materials, and a whopping 1,269 book banning efforts in 2022, the

[1] *See* Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 676 (2012).

[2] *See* Ben A. Franklin, *Last Board of Censors Fades Away After 65 Years*, THE NEW YORK TIMES, June 29, 1981.

highest since ALA began compiling data more than 20 years ago.[3] This year is on pace to exceed 2021's numbers as there have been 695 attempts to ban or restrict library materials between January 1 and August 31, 2023.[4] Pen America reported that during that time, 41% of bans include books involving LGBTQ+ themes, 40% include protagonists or characters of color, 20% include sexual content, 21% include issues of race and racism, 10% include titles with themes of rights and activism, and 5% are biographies and memoirs.[5]

Pen America found that Texas led the nation with between 751-1000 book banning efforts between July 1, 2021 and June 30, 2022 covering a variety of topics.[6] ALA reported that attempts to ban 2,349 books were made in Texas in 2022.[7] *Gender Queer: A Memoir* was the most challenged book, followed by *All Boys Aren't Blue*, and *The Bluest Eye* by Toni Morrison, a classic American novel from 1970.[8]

III. Book bans challenged in court

Recent book banning efforts are facing pushback as booksellers, publishers, authors, librarians, parents, and students seek to vindicate their First Amendment rights and overturn the bans in court.

A. Federal court blocks Texas' Book Ban, HB 900

In Texas, a coalition of booksellers, publishers, and authors represented by Haynes and Boone ("Plaintiffs")[9] filed a Complaint and Motion for Preliminary Injunction on July 25, 2023 challenging the constitutionality of HB 900, also known as the Restricting Explicit and Adult-Designated Educational Resources (READER) Act.

Plaintiffs argued that HB 900 unconstitutionally compels booksellers to review *every* book *ever* sold to public schools (and any book to be sold in the future) and issue ratings based on a series of arbitrary definitions and instructions, including determining whether books are in "active use" or "directly related to the curriculum," and to perform a confusing and subjective "contextual analysis" as a condition of selling books to public schools. TEX. EDUC. CODE §§ 35.002, 35.0021. The law also allows the Texas Education Agency ("TEA") to review booksellers' ratings and requires booksellers to adopt the government's "corrected" ratings that will be published on the TEA's website as the booksellers' own ratings. *Id.* § 35.003. Booksellers that refuse or fail to comply with

---

[3] *See* *American Library Association reports record number of demands to censor library books and materials in 2022*, AMERICAN LIBRARY ASSOCIATION, March 22, 2023; *see also* chart of bans over the years.

[4] *See* *American Library Association Releases Preliminary Data on 2023 Book Challenges*, AMERICAN LIBRARY ASSOCIATION, September 19, 2023.

[5] *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA, September 19, 2023.

[6] *Id.*

[7] *Censorship by the Numbers*, AMERICAN LIBRARY ASSOCIATION.

[8] *Top 13 Most Challenged Books of 2022*, AMERICAN LIBRARY ASSOCIATION.

[9] Plaintiffs included Book People, Inc., VBK, Inc. d/b/a Blue Willow Bookshop, American Booksellers Association, Association of American Publishers, Authors Guild, Inc., and Comic Book Legal Defense Fund.

these onerous requirements are permanently prohibited from selling *any* books to Texas public schools. *Id*. § 35.002(a).

On September 18, 2023, Judge Alan D. Albright issued a 59-page Order preliminarily enjoining HB 900, holding that the law likely violated the First Amendment because it compels speech, is unconstitutionally vague, and is an impermissible prior restraint. *Book People, Inc.*, 2023 WL 6060045, at *27.

1. HB 900 compels speech

Judge Albright found that HB 900 impermissibly seeks to compel individuals and businesses to create speech that they do not wish to make and in which they do not agree, which is "textbook compels speech." *Id*. at *1, 17. The Court held that HB 900 compelled speech "in at least two ways." *Id*. at *9. First, HB 900 requires Plaintiffs to review school library books and issue ratings based on criteria in which they disagree. *Id*. at *17; TEX. EDUC. CODE § 35.002. Second, if the TEA determines that Plaintiffs' ratings are "incorrect," the TEA has the "unilateral ability" to alter the ratings and "force Plaintiffs to allow the TEA to publish the rating as if the revised rating were Plaintiffs' own." *Id*. at *17; TEX. EDUC. CODE § 35.003. If Plaintiffs fail to provide ratings or do not update their initial ratings with the State's ratings, they will face "substantial financial harm" by being prevented from selling books to public schools and could also incur "reputational harm" because their ratings, which will be published online, may be held against them by potential buyers across the country. *Id*. at *17; TEX. EDUC. CODE § 35.002(a). Although HB 900 involves rating the content of speech rather than the creation of websites, the Court concluded that *303 Creative*, a U.S. Supreme Court case from this past term, and *Hurley*, a 1995 decision, "compels a conclusion that the statute is unconstitutional." *Id.; 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995).

2. HB 900 is unconstitutionally vague

The Court found that the definitions of "sexually relevant" and "sexually explicit" were unconstitutionally vague because, among other reasons, they excluded the "critical backstop" of the third prong of the *Miller* test for obscenity—whether the material "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id*. at *20–23; *Miller v. California.* 413 U.S. 15, 24 (1973); TEX. EDUC. CODE §§ 33.021, 35.001(3). The law also failed to explain how to make a "contextual determination." *Id*. at *21. "Without knowing what constitutes context, and by not including or evaluating the third prong of the *Miller* test, [HB 900] results in nothing more than a highly personal and subjective test and is unconstitutionally vague," the Court wrote. *Id*.

The Court added that the vagueness of HB 900's exception for material "directly related to the curriculum" provided a "separate, independent reason" that the law is unconstitutionally vague. *Id*. at *23. Because there is no statewide curriculum in Texas across its 1,025 school districts and curricula "vary from classroom-to-classroom within a district as well as from day-to-day or year-to-year within a single classroom, requiring consistent reevaluation," it is "impossible for vendors to ascertain what content falls within this exception, or how to determine its scope on a statewide basis." *Id*. at *3.

3. HB 900 is an unconstitutional prior restraint

The Court also determined that HB 900 is an unconstitutional prior restraint because it "acts as a prohibition of distributing literature" by allowing the government to prohibit all *future* sales of books rated "sexually explicit" to public schools and contains an "utter lack of procedural safeguards," such as an opportunity to appeal TEA's determinations or have them judicially reviewed. *Id*. at *25; TEX. EDUC. CODE § 35.002(b). Once TEA decides that a book should be rated "sexually explicit," all future sales of that book to school districts are prohibited

under HB 900, which constitutes a prior restraint. *Id*.; *Alexander v. United States*, 509 U.S. 544, 550 (1993) (prior restraints forbid communications "in advance of the time that such communications are to occur"). Because the definition of "sexually explicit" does not consider whether books have "literary, artistic, political or scientific value," as required by *Miller*, the Court opined that a wide swath of constitutionally protected works are at risk of being banned from being sold to public schools. *Id*. at *25. This is not a "narrowly defined exception" to the rule against prior restraints. *Id*. Finally, the Court reasoned that HB 900 "effectively makes TEA's ratings final, and unappealable, which is unconstitutional." *Id*. at *25.

4. The balance of harms and public interest favor injunctive relief

The Court explained that HB 900's implementation would cause Plaintiffs to face three types of irreparable harm—violations of their First Amendment rights, reputational harm, and non-recoverable compliance costs. *Id*. at *25–26; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The Court also wrote that the balance of harms and public interest, which "merge when the Government is the opposing party," support an injunction because "First Amendment freedoms are always in the public interest." *Id*. at *27; *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Opulent Life Church v. City of Holly Springs, Miss*., 697 F.3d 279, 298 (5th Cir. 2012).

5. Conclusion

Judge Albright concluded by emphasizing that while children should be protected from obscene content in schools, HB 900 "misses the mark on obscenity with a web of unconstitutionally vague requirements. And the state, in abdicating its responsibility to protect children, forces private individuals and corporations into compliance with an unconstitutional law that violates the First Amendment." *Id*. at *27.

On September 20, 2023, Defendants filed a Notice of Appeal and an Emergency Motion to Stay Preliminary Injunction Pending Appeal and for a Temporary Administrative Stay. Case No. 23-50668. The Fifth Circuit entered an administrative stay on September 25, 2023. On October 2, 2023, Plaintiffs filed a Response in Opposition to the Motion to Stay. The Fifth Circuit will hear oral arguments on November 29, 2023.

B. Lawsuits filed to end book bans in Arkansas, Missouri, Florida, and South Carolina

Constitutional challenges are working their way through courts in other states with recently enacted book banning laws or policies.

1. Arkansas – Act 372

In Arkansas, a coalition of libraries, bookstores, publishers, and authors are seeking to stop the enforcement of Act 372, which imposes criminal penalties on librarians, booksellers, and others for distributing books that are "harmful to minors" and creates a procedure in which anyone "affected" by a book may challenge its inclusion or placement in a library because of its "appropriateness." The law also requires public libraries to have written policies on the withdrawal or relocation of books and establishes a library committee to vote on whether a book should be withdrawn or relocated. On July 29, 2023, a federal court issued a preliminary injunction preventing the law from being enforced after finding it unconstitutional. *Fayetteville Pub. Library v. Crawford Cnty., Arkansas*, No. 5:23-CV-05086, 2023 WL 4845636 (W.D. Ark. July 29, 2023).

2. Missouri – SB 775

In Missouri, librarians represented by the ACLU of Missouri filed suit in February 2023 challenging SB 775, codified as Mo. Rev. Stat. § 573.550, that imposes criminal penalties on librarians, professionals, and other community members "affiliated" with schools if they provide "explicit sexual" materials to students, regardless of whether the materials are provided in or outside of school. *Missouri Association of School Librarians v. Baker*, No. 23-cv-536 (W.D. Mo.)

3. Florida – HB 1557

In Florida, at least two cases are being litigated. On May 17, 2023, Pen America filed a Complaint on behalf of authors, a book publisher, and two parents challenging a Florida school district's removal of 10 books from public school libraries related to race and LGBTQ issues. *Pen American Center v. Escambia County School District*, No. 23-cv-10385 (N.D. Fla.). A month later, a children's book author and six students challenged the constitutionality of HB 1557, the Parental Rights in Education Act, after a school district removed the book *And Tango Makes Three* from school libraries. *Parnell v. School Board of Lake County*, No. 23-cv-00381 (M.D. Fla.).

4. South Carolina – School board removal decision

In South Carolina, a local branch of the NAACP launched a First Amendment challenge in April 2023 against the Pickens County School Board's decision to remove books from school districts. *NAACP v. School District of Pickens County*, No. 23-cv-01736 (D. S.C.).

IV. Conclusion

Recent book bans show that the fight against censorship is far from over. Although Supreme Court decisions from the past paved the way to today's robust marketplace of ideas, expansive free speech rights are not guaranteed, as public opinion and judicial philosophies shift over time. Vigilance is required to ensure that today's freedoms continue for future generations.