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Fifth Circuit Court of Appeals Affirms That Texas Book Rating System is Unconstitutional

By: Laura Lee Prather[1]

Fifth Circuit Finds Texas Book Rating Requirements Unconstitutional in Victory for Coalition of Booksellers, Authors, and Publishers

The Fifth Circuit Court of Appeals declared unconstitutional the Texas "READER ACT". A three judge panel issued the ruling earlier this year, affirming a preliminary injunction granted by U.S. District Judge Alan D. Albright, and in April the full Court denied a request for en banc rehearing. The full ruling can be found here. Book People, Inc. v. Wong, No. 23-50668, 2024 WL 175946 (5th Cir. Jan. 17, 2024).

Background

In 2023, the Texas Legislature enacted an unprecedented law requiring independent bookstores, national chain bookstores, large online book retailers, book publishers and other vendors to review and rate millions of books and other library materials – literally every book they had every sold to public schools that were still in "active use" -- as "sexually explicit," "sexually relevant," or "no rating," and to do so according to vague labels dictated by the state without any process for judicial review. 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. All ratings would be posted on the Texas Education Agency ("TEA") website and would be reviewed by TEA to determine if they needed to be "corrected." If a bookseller refused to initially rate or correct a rating, it would be prohibited from doing business with Texas public schools.

On the eve of its effective date, Judge Albright enjoined the rating system under the law, holding that it violated the First Amendment because it compels speech, is unconstitutionally vague, and is an impermissible prior restraint. *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).

Judge Albright found that HB 900 impermissibly seeks to compel booksellers to create speech that it does not wish to make and in which it does not agree, which is "textbook compelled speech." *Id*. at *1, 17. The Court also determined 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 Court also held that HB 900 is an unconstitutional prior restraint because it prohibits all future sales of books rated "sexually explicit" without any procedural safeguards or judicial oversight. *Id*. at *25; TEX. EDUC. CODE § 35.002(b).

[1] Ms. Prather is a partner at Haynes Boone and the Chair of the Media Practice Group. She is lead counsel in the case *Book People, Inc. v. Wong*, Cause No. 23-50668 (5th Cir. 2024) and argued the case at the trial and appellate level.

On September 18, 2023, Judge Albright issued a written order which was appealed to the 5th Circuit the same day.

5th Circuit Proceedings and Oral Argument

The 5th Circuit appeal was fast-tracked from the start. Immediately after the record was filed, the case was set on an expedited docket with oral argument scheduled for November 8, 2023. Due to conflicts, the argument was moved slightly to November 29, 2023. The panel consisted of Judge Don Willett, a Trump appointee, Judge Dana Douglas, a Biden appointee, and Senior Judge Jacques Weiner, a George H. W. Bush appointee. Despite the brake-neck speed at which the case proceeded, amicus support for the booksellers was filed in droves with 25 organizations from both sides of the aisle weighing in.

Judge Willett presided over the argument which was held in the imposing 5th Circuit en banc courtroom. At the argument, the State relied heavily on its arguments that the Plaintiffs had no standing to bring the claims and that, because the ratings were not due until April 1, 2024, the claims were not ripe. Judge Willett, however, cut their arguments off fairly quickly and asked them to discuss the problematic procedures under and definitions in the READER Act. He also gave short shrift to the State's new theory (brought for the first time on appeal) that the required ratings were nothing more than warning labels like those included on tobacco products. Recognizing the subjective standards under the definitions, including the requirement to evaluate local community standards, he did not adopt the State's argument.

During the booksellers' presentation, the Court spent a small amount of time asking how the implementation of the library standards, a separate portion of the statute that was not enjoined, impacted the appeal and inquiring into the assertion of sovereign immunity. The bulk of the argument was spent answering questions about the difficulty in applying the fact-intensive definitions and the financial impact the rating scheme would have on small businesses. At the end of the questioning, Judge Willett commented on the national trend in trying to grapple with the appropriateness of books in student libraries and asked if this law was similar to other state's or if it was a "unicorn." Counsel responded it was a "unicorn" but one that, according to the House sponsor, the Texas Legislature hoped would be a template for other states. To listen to the full oral argument: https://www.ca5.uscourts.gov/OralArgRecordings/23/23-50668_11-29-2023.mp3

5th Circuit Ruling

Less than four months from the date of appeal, the 5th Circuit issued its unanimous panel ruling authored by Judge Willett and affirming Judge Albright's earlier preliminary injunction. Unlike the oral argument which focused primarily on the unconstitutional definitions and the workings of the rating scheme, the ruling leaned into a surgical analysis of standing, ripeness, and sovereign immunity that dissected each of the State's arguments as to government speech, the government operations doctrine, and warning labels in great detail. After rejecting each of those arguments, Judge Willett explained why the booksellers were likely to succeed on their claim that the law was unconstitutional compelled speech, noting that "Plaintiffs have an interest in selling books without being coerced to speak the State's preferred message," and going on to say that he was "unpersuaded" by the State's argument that the READER Act does not implicate Plaintiffs' First Amendment rights.

Jurisdictional Arguments

Standing – The Court focused its standing analysis on the two bookseller plaintiffs because the presence of any one plaintiff with standing to pursue injunctive relief … satisfies Article III's case-or-controversy requirement. Following the analysis in *Speech First v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), the Court found that the booksellers could establish an injury in fact. First, selling books is arguably affected with a First Amendment

interest, and Plaintiffs have an interest in selling books without being coerced to speak the State's preferred message – *i.e.* ratings. Second, the READER Act arguably prohibits Plaintiffs' continued sale of books to public schools so the statute "facially restrict[s]" Plaintiffs' intended future conduct. *Book People, Inc. v. Wong*, No. 23-50668, 2024 WL 175946, *11 (5th Cir. Jan. 17, 2024). Third, there is a credible threat of enforcement. Although the State argued this prong could not be met because school districts were not a party in the lawsuit (and they were the ones prohibited from purchasing un-rated or "mis-rated" books), the Court saw through this argument and explained that courts have found that plaintiffs have standing to sue government entities that injure them through another entity as was the case here. *Id.* The Texas Education Agency was empowered to enforce READER against school districts, which means the school districts' purchasing decisions are determined or coerced by the State through READER. *Id.*

The Court continued by explaining that independent of the constitutional injuries, the booksellers had established an injury in fact by alleging an economic injury. The record was replete with undisputed testimony about the estimated cost to review prior books sold: one bookseller estimated the cost of compliance at between $4 million and $500 million which would assuredly put it out of business. *Id.* The State contended that the economic injuries could not confer standing because no bookseller was required to participate in the rating system. *Id.* at 12. The Court was not persuaded, explaining the dilemma booksellers like Plaintiff Blue Willow face when 20% of their sales come from schools. If Plaintiffs try to comply, it could cost them potentially millions of dollars, and if they don't comply it they will lose a significant portion of their revenue. "These are concrete, cognizable injuries sufficient to confer standing, and the fact that the vendors are not required to participate in the program does not change that." *Id.*

The Court found that the Plaintiffs' injuries are traceable to the TEA Commissioner because he "oversee[s] the [challenged] process and because his actions are "among those [that] would contribute to Plaintiffs' harm." *Id.* Judge Willett commented on the "good point" made by the ACLU of Texas and Constitutional Law Scholars, as amicus curiae, "that enjoining the Commissioner from enforcing READER would free Plaintiffs from the injurious dilemma that READER creates: either submit unconstitutionally compelled ratings to the Agency at great expense or refuse to comply and lose customers and revenue." *Id.*

Ripeness – Rehashing a failed argument from the trial court, the State once again tried to preclude a ruling on the merits by arguing that the controversy would not be ripe until there was a disagreement over a particular rating, but the Court made short shrift of that argument stating that "the State ignores Plaintiffs' immediate economic injury of having to assign ratings to library materials *at all.*" *Id.* at 13. An hardship to Plaintiffs, which "would not be minimal, as the State contends." *Id.*

Sovereign immunity - The ruling also swiftly rejected the State's sovereign immunity argument explaining that the actions required by READER compel them to submit ratings with which they disagree or constrain them from doing business with school districts if they fail to submit the required ratings or decline to acquiesce in the State's "corrected" ratings.

State's Arguments that First Amendment Was Not Implicated

In addition to the panoply of jurisdictional arguments, the State had a myriad of arguments as to why the First Amendment did not apply under these circumstances. All of which were rejected by the Court.

First, the State argued the rating system was government speech, similar to movie and video game ratings; but, their argument ignored that those ratings are entirely voluntary. *Id.* at 14. The State also tried to equate the system to government-created warning labels, like tobacco or alcohol warnings, glossing over the fact that those labels are "purely factual and uncontroversial." *Id.* READER is neither. Because READER requires

vendors to undertake a fact-intensive process of weighing and balancing factors to rate library materials, it cannot be considered a "purely ministerial task." *Id.* at 15. Finally, because it is the bookseller who is issuing the ratings which will be attributable to them on the TEA website, the Court held the ratings to be the bookseller's speech, not the government's. *Id.*

Second, the State argued that action contemplated by READER fell within the government-operations exception to the compelled speech doctrine. However, the requirements of READER go well beyond the disclosure of demographic or similar factual information to which this narrow doctrine has applied. *Id.* at 15-16.

Finally, the State claimed the required ratings were commercial speech under *Zauderer v. Off. Of Disciplinary Couns. Of Sup. Ct. of Ohio,* 471 U.S. 626 (1985) and excepted from the compelled speech doctrine. Once again, the analogy to a nutrition label was made, that the ratings are "purely factual and uncontroversial." *Id.* at 16. This argument was summarily rejected:

> **"The ratings READER requires are neither factual nor uncontroversial. The statute requires vendors to undertake contextual analyses, weighing and balancing many factors to determine a rating for each book. Balancing a myriad of factors that depend on community standards is anything but the mere disclosure of factual information. And it has already proven controversial."**

Id.

Constitutional Arguments

The Court finally turned to the constitutional arguments and held that the "Plaintiffs are likely to succeed on the merits of [their compelled-speech] claim. . . '[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . ' But the law requires Plaintiffs to 'either speak as the State demands' or suffer the consequences." *Id.* at 15. "Because READER threatens Plaintiffs' right to be free from compelled speech, Plaintiffs have shown an irreparable injury." *Id.* at 16.

Judge Willett reiterated the nonrecoverable compliance costs at issue and the potential shuttering effect on local businesses. *Id.* at 16. And, while recognizing that the State "has an interest in protecting children from harmful library materials," neither the State nor the public" has any interest in enforcing a regulation that violates federal law." *Id.* at 17. The "Supreme Court has said that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 16. Concluding that Plaintiffs are likely to succeed on the merits of their First Amendment claim, Judge Willett explained "[i]njunctions protecting First Amendment freedoms are always in the public interest."[2] *Id.* at 17.

[2] Because the Court found the compelled speech argument dispositive, it did not reach the vagueness or prior restraint arguments ruled upon by the trial court.

Post Opinion Actions of the Court

Since the opinion was issued on January 17, 2024, the State has not moved for en banc reconsideration; however, the mandate has been withheld by a member of the 5th Circuit. On April 16, 2024, the 5th Circuit issued an order denying the Court's motion for en banc reconsideration after polling the members in regular active service. The vote was 9-8. The eight judges voted who voted in favor of rehearing were Chief Judge Richman and Judges Jones, Smith, Elrod, Ho, Duncan, Engelhardt, and Oldham, and the nine judges who voted against rehearing were Judges Stewart, Southwick, Haynes, Graves, Higginson, Willett, Wilson, Douglas, and Ramirez. Judge Ho issued a separate dissenting opinion joined by Judges Jones, Smith, Duncan, and Engelhardt.

The deadline to file a cert. petition is July 15, 2024. In the meantime, the case has been remanded back to the trial court.

Laura Lee Prather, Catherine Robb, Michael J. Lambert, and Reid Pillifant of Haynes and Boone, LLP in Austin, Texas represented Plaintiffs 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.

Amicus Participants

Joshua J. Bennett of Carter Arnett PLLC and JT Morris of Foundation for Individual Rights and Expression filed an amicus brief on behalf of the Foundation for Individual Rights and Expression, Cato Institute, and National Coalition Against Censorship in Support of Plaintiffs-Appellees and Affirmance.

Peter D. Kennedy of Graves, Dougherty, Hearon & Moody, P.C. filed an amicus brief on behalf of Pen American Center, Inc. in Support of Plaintiffs-Appellees and Affirmance.

Ryan W. Goellner, Thomas F. Allen, Jr., Benjamin A. West, and Kevin Shook of Frost Brown Todd LLP filed an amicus brief on behalf of Freedom to Read Foundation and American Association of School Librarians in Support of Appellees and Affirmance.

Brian Klosterboer, Chloe Kempf, Thomas Buser-Clancy, and Adriana Piñon of ACLU Foundation of Texas, Inc., and Stuart M. Sarnoff, James G. Byrd, Michael McMillin, and Christian Rice of O'Melveny & Myers LLP filed an amicus brief on behalf of the American Civil Liberties Union of Texas and Scholars of Constitutional Law in Support of Plaintiffs-Appellees.

Peter Steffensen of SMU Dedman School of Law First Amendment Clinic and Catherine B. Smith and Garret T. Meisman of Vinson & Elkins LLP filed an amicus brief on behalf of Texas Speech Communication Association in Support of Plaintiffs-Appellees and Affirmance.

Linda Steinman of Davis Wright Tremaine LLP, Thomas S. Leatherbury of Thomas S. Leatherbury Law, PLLC, and Daniel Novack of Penguin Random House LLP filed an amicus brief on behalf of The Association of University Presses, Barnes & Noble, Inc., The Educational Book and Media Association, Freedom to Learn Advocates, Half Price Books, Records, Magazines, Inc., Independent Book Publishers Association, Penguin Random House LLC, and Sourcebooks LLC in Support of Plaintiffs-Appellees and Affirmance.