No. 23-50668

In the United States Court of Appeals for the Fifth Circuit

BOOK PEOPLE, INC., VBK, INC. D/B/A BLUE WILLOW BOOKSHOP, AMERICAN BOOKSELLERS ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, AUTHORS GUILD, INC., COMIC BOOK LEGAL DEFENSE FUND,

Plaintiffs-Appellees

v.

MARTHA WONG IN HER OFFICIAL CAPACITY AS CHAIR OF THE TEXAS STATE LIBRARY AND ARCHIVES COMMISSION, KEVEN ELLIS IN HIS OFFICIAL CAPACITY AS CHAIR OF THE TEXAS BOARD OF EDUCATION, MIKE MORATH IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

DEFENDANTS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND FOR A TEMPORARY ADMINISTRATIVE STAY

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Certificate of Interested Persons

No. 23-50668

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

Plaintiffs-Appellees

v.

Martha Wong in her official capacity as chair of the Texas State Library and Archives Commission, Keven Ellis in his official capacity as chair of the Texas Board of Education, Mike Morath in his official capacity as Commissioner of Education,

Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Lanora C. Pettit
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Defendants-Appellants

Nature of Emergency

In 2023, the Texas Legislature passed the Restricting Explicit and Adult-Designated Educational Resources Act ("READER"), 88th Leg., R.S., ch. 808, H.B. 900 (2023) (codified at Tex. Educ. Code §§ 33.021, 35.001-.008), which relates to the labeling of school library books that are "sexually explicit" or "sexually relevant." The labels assist state and school-district officials in administering library-collection policies required by READER. *See* Tex. Educ. Code § 35.002. Ratings are not due until April 1, 2024, and those booksellers who do not wish to provide labels remain free to sell any book anywhere to anyone—other than to public schools. *Id.* § 35.002(c). Though the Plaintiffs-booksellers concede that READER will prevent "obscene and harmful material" from entering schools, Ex. B ¶ 91, they nevertheless insist that READER violates the First Amendment, *id.* ¶ 1. Moreover, they express concern that they cannot list (let alone label) the books they have sold to school libraries without suffering irreparable harm. Pls.' Mot. for Prelim. Inj., ECF No. 6 at 20.

But Defendants, state officials who have authority to set statewide standards for school library books but who otherwise have no role in contracting with booksellers, are likely to succeed in this appeal. At the outset, Plaintiffs have not established jurisdiction. They lack standing because any dispute over whether a particular book is "sexually explicit" is purely hypothetical: Defendants have not even set the standards that would apply in that determination. And their suit is barred by familiar principles of sovereign immunity. Instead of suing the local officials who might enforce READER, Plaintiffs seek to "control an officer in the exercise of his [or her]

discretion" in setting statewide policy. *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 242 (5th Cir. 2020). Such relief falls outside the scope of the narrow exception to sovereign immunity recognized in *Ex Parte Young*, 209 U.S. 123 (1908). *E.g.*, *Haverkamp v. Linthicum*, 6 F.4th 662, 670 (5th Cir. 2021) (per curiam).

On the merits, Defendants are also likely to establish that Plaintiffs fell far short of the high bar for the "extraordinary remedy" of a preliminary injunction. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs' conduct—contracting with public schools for the sale of library books without labeling their contents—enjoys no First Amendment protection, and READER's labeling system would satisfy any level of First Amendment scrutiny that applies. Plaintiffs have also failed to show that they will suffer irreparable injury, that their injury outweighs the harm to Defendants' ability to enforce a state law designed to protect children from exposure to sexually explicit material, or that granting the preliminary injunction will serve the public interest.

Where, as here, this Court is likely to uphold its existing precedent by reversing the district court's order, a stay is amply justified. *E.g.*, *Vote.Org v. Callanen*, 39 F.4th 297, 309 (5th Cir. 2022). Consistent with Federal Rule of Appellate Procedure 8(a)(1), Defendants initially sought a stay in district court before seeking relief from this Court. Ex. D. The district court denied that relief orally on August 31, and did not revisit the issue in its written order. *Compare* Ex. C at 5-6, *with* Ex. A. Defendants have not re-asserted the already-denied request because READER imposes an obligation on them to adopt new library-collection standards by January 1, 2024, and to comply with existing notice-and-comment laws, Defendants would need to begin

that process no later than October 4, *see* Tex. Educ. Code § 33.021. As the district court has already delayed issuing orders more than once in this case, *see* Ex. C at 6-7; Ex. E at 16, Defendants ask for this Court to grant a stay—or, in the alternative an administrative stay—by no later than **October 4** to permit Defendants to comply with their state-law obligations.

BACKGROUND

1. In 2023, the Legislature enacted READER, which requires the Texas State Library and Archives Commission ("TSLAC"), with approval by majority vote of the State Board of Education ("SBOE"), to adopt standards that a school district must adhere to in developing or implementing the district's own library collection development policies. READER requires the standards developed by TSLAC to include a number of provisions intended to protect children from inappropriate library material, including library material rated as "sexually explicit." Tex. Educ. Code § 33.021(b). The standards must prohibit, among other things, the "possession, acquisition, and purchase of [] library material rated sexually explicit material by the selling library vendor." *Id.* § 33.021(d)(2)(A)(ii). Those new standards must be promulgated and adopted by January 1, 2024. READER § 4.

READER also requires library-material vendors, no later than April 1, 2024, to submit a list of materials that were previously sold to a school district and still in active use that would be rated as "sexually explicit" and "sexually relevant" under TSLAC's forthcoming rules. Tex. Educ. Code § 35.002(c). Going forward, a library-material vendor also cannot sell "sexually explicit" material to a school district. *Id.* § 35.002(b). To effectuate this rule, READER requires vendors to issue appropriate

ratings regarding "sexually explicit" and "sexually relevant" materials before they sell new materials to school districts. *Id.* § 35.002(a). The Texas Education Agency is also empowered to review library material that is not rated or incorrectly rated by the vendor. *Id.* § 35.003. If the agency determines the material is required to be rated "sexually explicit" or "sexually relevant" or should receive no rating, it will provide notice to the vendor, so the vendor can correct its rating. *Id.*

2. Though TSLAC has yet to establish the library collection standards, a group of booksellers filed suit alleging that READER violates the First Amendment. Plaintiffs complained that READER constitutes compelled speech, is vague, is a prior restraint, is unconstitutional both facially and as-applied, is overbroad, and is an unconstitutional delegation of authority. Ex. B ¶¶ 55-98. Plaintiffs also sought a preliminary injunction. *See supra*, ECF 6. Defendants filed a consolidated opposition to the preliminary injunction and motion to dismiss under Rules 12(b)(1) and 12(b)(6). Opposition, ECF 19. Defendants argued that Plaintiffs' claims failed for lack of standing and were barred by sovereign immunity. *See id.* at 6-10, 10-15. Moreover, Defendants argued that Plaintiffs had not plausibly alleged—let alone shown a likelihood of success on the merits—that READER violated the First Amendment. *See id.* at 16-32. Finally, Defendants argued that Plaintiffs had not established any factor necessary for a preliminary injunction. *See id.* at 33-35.

3. The district court held hearings on August 18 and 28, 2023. Then, on August 31, the court held a status conference in which it indicated that it would later issue a written order enjoining the Defendants from enforcing READER in its entirety. Ex. C at 5-6. The court also orally denied a stay. *Id.* at 5-6. After Defendants

filed a written stay request, Ex. D, the court held another status conference on September 11 in which it expressed doubts about the potential scope of the injunction. Ex. E at 4-5. On September 18, the district court reverted to its original provision of August 31: crediting Plaintiffs' allegations that they would suffer irreparable harm and that READER is vague, an unconstitutional prior restraint, and compels speech, the court entered a preliminary injunction preventing READER from going into effect as to sections 35.001, 35.002, 35.0021, and 35.003. Ex. A at 59. The district court did not revisit its prior denial of Defendants' request for a stay.

Statement of Jurisdiction

This Court has appellate jurisdiction over the district court's denial of sovereign immunity under 28 U.S.C. § 1291 under the collateral-order doctrine, *Haverkamp*, 6 F.4th at 669, and over its grant of injunctive relief under 28 U.S.C. § 1292(a)(1).

Argument

The Court has "inherent" power to stay an order "while it assesses the legality of the order." *Nken v. Holder*, 556 U.S. 418, 426 (2009). All four stay factors are met here: Defendants are likely to succeed on the merits; they will suffer irreparable harm without a stay; Plaintiffs will not be substantially harmed by a stay; and the public interest favors a stay. *See id.*

I. Defendants Are Likely to Succeed on Appeal.

Defendants are likely to prevail on appeal. Plaintiffs fail Article III's case-or-controversy requirement twice over, their claims are barred by sovereign immunity, and they failed to show that READER violates the First Amendment.

A. The district court lacked subject-matter jurisdiction.

1. Plaintiffs lack standing, and their claims are unripe.

a. To start, Plaintiffs have failed to show standing. They must make a "clear showing," *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017), that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Moreover, Plaintiffs "must assert [their] *own legal rights*" and "cannot rest [their] claim to relief on the legal rights or interests of third parties." *Abdullah v. Paxton*, 65 F.4th 204, 210 (5th Cir. 2023) (per curiam). And those injuries must be "concrete, particularized, and actual or imminent"—speculation about potential, future injury is not enough. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013); *Abdullah*, 65 F.4th at 208.

Plaintiffs' alleged injury regarding READER's obligation to create an initial list of ratings is not actual, imminent, concrete, and particularized. *See Clapper*, 568 U.S. at 409. Plaintiffs claim they will be unable to sell books unless their initial ratings capture every book sold to and still used by any school. ECF 6 at 8. But READER does not outline, nor do Plaintiffs set forth, how an unrated book that the vendor could not identify can nonetheless be traced back to that particular vendor. Purchasing decisions by third parties are "too speculative to confer Article III standing." *Little v. KPMG LLP*, 575 F.3d 533, 541 (5th Cir. 2009). Likewise, Plaintiffs' contention that they will be required to acquiesce in book ratings based on yet-to-be-promulgated standards may never crystalize into a dispute. ECF 6 at 9. Such a theory is too "speculative, conjectural, [and] hypothetical" to support

standing. *Abdullah*, 65 F.4th at 208. So, too, are allegations of abstract stigmatic injuries, which "cannot be manufactured for the purpose of litigation." *Barber*, 860 F.3d at 354.

Plaintiffs fare no better by invoking "compelled speech." ECF 6 at 9. Plaintiffs have not sued to protect their right to convey any particular "dissenting" message. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023). And they "do not contend that they carefully curate" any speech in the books they sell or "'select[] . . . expressive units . . . from potential participants.'" *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 461 (5th Cir. 2022) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995)). They merely wish to be able to sell books to public schools. But unlike other recent compelled-speech cases, there is no pattern of "nearly identical" instances of past sanction to adjudge the likelihood of their injury. *303 Creative*, 143 S. Ct. at 2310. Because READER's standards have not yet been implemented, any disputes about those standards are entirely speculative.

Additionally, Plaintiffs allege business and reputational harms, ECF 6 at 8-9, which are not fairly traceable to these Defendants. Although changing one's plans "in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). The only *actual* economic harm identified by Plaintiffs is that "one school district, Katy ISD, ceased all library book purchases, including from Plaintiffs, after [READER's] passage." ECF 6 at 8. But Katy ISD's purchasing decisions are neither mandated by READER nor controlled by Defendants. Moreover, although READER establishes a process

that Katy ISD may ultimately use to refuse to buy unspecified books, Plaintiffs cannot identify a single book rating with which they disagree—because none has been issued. As a result, any business decisions that Plaintiffs may have made cannot be fairly traced to the State's non-existent but allegedly "subjective criteria." ECF 6 at 9. Instead, Plaintiffs "can only speculate" they will be harmed. *Clapper*, 568 U.S. at 410-12. That is not enough.

b. For similar reasons, Plaintiffs' claims are not yet ripe or fit "for judicial decision." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987). Plaintiffs fear that they might inadvertently omit or eventually dispute a book's rating. ECF 6 at 8-9. But because READER does not penalize the absence of an initial rating for a particular book, any harm is unripe because it is entirely "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (citation omitted).

2. Defendants enjoy sovereign immunity.

Assuming there is a justiciable controversy, sovereign immunity bars subject-matter jurisdiction over the named Defendants. *See Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Although sovereign immunity may be overcome when a suit "seeks prospective, injunctive relief from a state actor, in [his] official capacity, based on an alleged ongoing violation of the federal constitution," *K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013), that rule does not apply here for at least three reasons.

First, Defendants lack the required connection to the enforcement of READER. An official must have more than "the general duty to see that the laws of the state are implemented." *City of Austin v. Paxton*, 943 F.3d 993, 999-1000 (5th Cir. 2019); *see also Ostrewich v. Tatum*, 72 F.4th 94, 100 (5th Cir. 2023); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467-68 (5th Cir. 2020). "'[E]nforcement' means 'compulsion or constraint.'" *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022) (citation omitted). "If the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation." *Id.* (citing *Air Evac EMS, Inc. v. TDI*, 851 F.3d 507, 520 (5th Cir. 2017)). Plaintiffs chose to sue only statewide officials who *set* policy under READER—not the school districts with whom Plaintiffs contract and who would ultimately enforce the policy. But this Court has squarely held that the "authority to promulgate [policy], standing alone, is not the power to enforce that policy" within the meaning of *Ex parte Young*. *Haverkamp*, 6 F.4th at 670.

Second, any threat of "enforcement" alleged is not *imminent*, *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992), meaning that Plaintiffs have not established "an ongoing violation of federal law," *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 395 (5th Cir. 2015). The imminence in "Article III standing analysis and *Ex parte Young* analysis 'significant[ly] overlap.'" *City of Austin*, 943 F.3d at 1002; *see NiGen*, 804 F.3d at 394 & n.5. But nothing that Plaintiffs have alleged "intimat[es] that formal enforcement was on the horizon," *NiGen*, 804 F.3d at 392—for among other reasons there are not yet any standards to enforce.

Third, Plaintiffs improperly seek to "'control an officer in the exercise of his [or her] discretion.'" *Richardson*, 978 F.3d at 242 (citation omitted). Because *Ex parte Young* applies only to those actions "not involving discretion," 209 U.S. at 158, Plaintiffs cannot force "[an] agency to determine when and how to take action," *Richardson*, 978 F.3d at 242 (citation omitted)—especially when a statute "leaves [officials] considerable discretion and latitude" for implementing uniform standards, *id.* Texas has the "high responsibility for education," which includes the obligation to set standards to protect schoolchildren. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Discretion inheres in "impos[ing] reasonable regulations for the control and duration of basic education." *Id.*[1]

B. Plaintiffs never plausibly alleged that READER violates the First Amendment.

Plaintiffs also plead no plausible First Amendment claim that READER compels their speech, is vague, or operates as a prior restraint.[2]

[1] The injunction is also improper because it is "not narrowly tailor[ed]" to "remedy the specific action which gives rise to the order"—namely, Katy ISD's decision to pause buying new library books until standards are set and books have been rated. *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam).

[2] Plaintiffs' complaint included other claims, which Defendants do not address because they do not form the basis of the injunction.

1. READER does not trigger constitutional scrutiny because Plaintiffs have no First Amendment rights in this context.

a. Because implementing school-library policy is government speech, Plaintiffs cannot claim a First Amendment right to sell unlabeled sexually explicit books to public schools.

Plaintiffs challenge two types of purported "speech": labelling the books they sell and selling books to public schools. Neither triggers First Amendment scrutiny. Selling books is conduct—not speech. And any speech involved is that of the government—not Plaintiffs.

Plaintiffs do not have a First Amendment right to have the government buy their books. That argument depends on a putative "First Amendment right to receive information." *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 188 (5th Cir. 1995) (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (plurality)). But any such right belongs to *students*, *see id.*, not vendors. Plaintiffs lack standing to assert the rights of others. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991). Moreover, a school's actions raise no First Amendment concern unless a "substantial motivation" was "to deny [library users] access to ideas with which [the government] disagreed." *Campbell*, 64 F.3d at 188, 190. READER does not prohibit students from accessing any book from any source other than a school library.

Moreover, as the *Pico* plurality noted, the First Amendment does not preclude school districts from removing library books that are vulgar or educationally unsuitable. 457 U.S. at 871. This flows from the rule that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484

U.S. 260, 273 (1988). And "[w]hen government speaks," such as through setting curricula, "it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207, 215 (2015). As a result, educational policies are typically "free from forum analysis or the viewpoint-neutrality requirement." *Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005). And this Court has applied that principle to dismiss a First Amendment claim against entities that devise state curricula and select books because "it is the state speaking, and not the textbook author." *Id.* at 614. Library-book policies are no different, and Plaintiffs have no likelihood of success on the merits.

This conclusion is further buttressed by the fact that States may regulate "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). READER tracks *Miller* by defining "sexually explicit material" as material that "describes, depicts, or portrays," Tex. Educ. Code § 33.021(a), various forms of sexual contact, conduct, or organs, Tex. Penal Code § 43.25(a)(2), in a way that is "so offensive on its face as to affront current community standards of decency," Tex. Penal Code § 43.21(4). Such material is obscene and unprotected by the First Amendment. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973).

b. Plaintiffs have no First Amendment rights in the public-school library, which is a nonpublic forum.

Even if READER implicated protected speech, it would not violate the First Amendment. Typically, schools are not public fora, "and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." *Kuhlmeier*, 484 U.S. at 267 (citation omitted). Educators "exercise greater control over" speech in a school environment to ensure that "readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school"—including speech that "might reasonably be perceived to advocate . . . irresponsible sex.'" *Id.* at 271-72.

Nor does the First Amendment guarantee "an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). Indeed, Defendants are particularly likely to succeed on the merits of this appeal because when it came to "the authority of public schools to remove books from a public school library, all Members of the [*Bethel*] Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar." *Id.*

2. Even if the First Amendment applied to READER, Plaintiffs allege no plausible violation.

Even if the First Amendment were implicated, Defendants are still likely to succeed on the merits of this appeal because READER comports with the Supreme Court's compelled-speech jurisprudence, is not a prior restraint, and is not unconstitutionally vague.

a. The compelled-speech doctrine does not help where any alleged "speech" concerns government operations or commercial speech.

To start, even if the First Amendment were implicated, READER does not violate the general rule that "the government may not compel a person to speak its own preferred messages." *303 Creative*, 143 S. Ct. at 2312; *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Assuming Plaintiffs have standing to sue these Defendants on such a theory, *but see supra* at 6-10, the claim would fail for at least two other reasons.

First, "[t]here is no right to refrain from speaking when 'essential operations of government require it for the preservation of an orderly society.'" *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (citation omitted) (discussing sex-offender registry); *see also United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (finding that compulsion of information requested on an IRS tax form constituted "an essential operation of government"). READER addresses one of the most essential operations of government: the education of the next generation. *See San Antonio ISD v. Rodriguez*, 411 U.S. 1, 35 (1973). And Plaintiffs are merely being required to provide information to be used in reviewing the sexual content of books in Texas public-school libraries, not to "disseminate publicly a message with which [they] disagree[]." *Sindel*, 53 F.3d at 878.

Second, any "speech" is—at most—commercial speech. Commercial speech is expression related solely to the economic interests of the speaker and its audience, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980), and "does no more than propose a commercial transaction," *Pittsburgh Press Co. v.*

Pittsburgh Comm'n on Hum. Relations, 413 U.S. 376, 385 (1973) (citation omitted). *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), upheld commercial disclosure requirements because they were "purely factual and uncontroversial" and "reasonably related to the State's interest." 471 U.S. at 651. Courts have clarified that *Zauderer* applies to disclosures that inform "purchasers about what the [government] has concluded is appropriate use of the product they are about to buy," so long as they do not require the company to "take sides in a heated political controversy." *CTIA–The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019); *see Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc). *Zauderer* triggers only rational-basis review. *Oles v. City of New York*, No. 22-1620-CV, 2023 WL 3263620, at *3 (2d Cir. May 5, 2023); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 283 (4th Cir. 2013) (en banc).

Here, the "speech" (a product label) informs public schools about how the product they are purchasing compares to READER's standards. Providing such information does not require the seller of the book to pass judgment or express a view on the validity of the standard or a book's propriety to be shown to children. Rather, like a nutrition label's food-allergen warning, the label tells the buyer what they are receiving. Such a label is rationally related to the governmental interest of protecting children from sexually explicit materials at school by establishing criteria for the books to enter the schoolhouse doors. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 641-43 (1968) (finding a rational basis for a statute criminalizing distribution of obscene material to minors).

Even without *Zauderer*, the Constitution still "accords a lesser protection to commercial speech." *Cent. Hudson*, 447 U.S. at 563. Here, the "speech" (a product label) relates solely to the economic interests of Plaintiffs and their "audience" (potential purchasers). A State may regulate such commercial speech if it has "a substantial interest to be achieved by restrictions" and "the regulatory technique" is "in proportion to that interest." *Id.* at 564. Public education's importance is indisputable. *E.g.*, *Rodriguez*, 411 U.S. at 35. And requiring Plaintiffs to inform schools how books are rated against a scale set by the BOE proportionally advances that interest. Plaintiffs complain that READER would require them to know and label what is in the items they wish to sell to Texas public schools. But, even outside the ambit of *Zauderer*, those basic expectations of commercial speech are constitutional.

b. Plaintiffs' prior-restraint claim fails.

For similar reasons, READER does not represent an unlawful prior restraint on Plaintiffs: it forbids no "communications" to any audience outside of Texas schools. *Alexander v. United States*, 509 U.S. 544, 550 (1993). Plaintiffs rely instead on a right of students to receive information, which ostensibly flows from the First Amendment as an "inherent corollary of the rights of free speech and press." *Pico*, 457 U.S. at 867 (plurality). But restraints may validly apply to any such interest. *See Kuhlmeier*, 484 U.S. at 268-69; *Henerey ex rel. Henerey v. City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1134 (8th Cir. 1999). Review "depend[s] on the restraint at issue," *Catholic Leadership Coal. v. Reisman*, 764 F.3d 409, 438 (5th Cir. 2014) (citing *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749 (7th Cir. 1999)), and those in

schools need only be "reasonably related to legitimate pedagogical goals," *Milwaukee*, 192 F.3d at 749. READER satisfies that minimal standard for the reasons discussed above, *supra* p. 14-16.

c. READER is not unconstitutionally vague.

Sounding in the Due Process Clause rather than the First Amendment, a claim that a law is void for vagueness requires Plaintiffs to show the law "is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). A law need not "'delineate the exact actions a [person] would have to take to avoid liability,'" *Doe I v. Landry*, 909 F.3d 99, 118 (5th Cir. 2018), or give "'perfect clarity and precise guidance,'" *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). "[O]nly a reasonable degree of certainty is required" to survive scrutiny. *United States v. Tansley*, 986 F.2d 880, 885 (5th Cir. 1993); *accord Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001).

Although READER delegates to an administrative agency the task of setting rules, the obligation it imposes is not vague: Plaintiffs are to provide ratings by April 2024. *See* Tex. Educ. Code ch. 35. Whether any dispute over a particular book will ever materialize is speculative as noted above in Part I.A. Doubts "about potential applications to constitutionally protected conduct" are properly raised as-applied, *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1328 (11th Cir. 2022), not with "speculation about possible vagueness in hypothetical situations not before the Court," *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

In sum, Plaintiffs' claims are not likely to succeed because READER does not implicate the First Amendment, and even if did, it satisfies the relevant standard of review. Because a likelihood of success on the merits was a vital element of the preliminary injunction, this appeal is likely to prevail.

C. No showing of irreparable injury, the equitable balance, or the public interest favored an injunction.

Defendants are also likely to show that Plaintiffs failed to establish the remaining preliminary-injunction factors. Plaintiffs will suffer no cognizable, irreparable harm in the absence of an injunction. Each library-material vendor has seven months to "develop and submit to the agency a list of library material rated as sexually explicit material or sexually relevant material." Tex. Educ. Code § 35.002(c). Even then, Plaintiffs fail to identify any consequence imposed by READER for failing to capture specific titles in those initial ratings.

On the other side of the balance, the State and state officials always have an interest in enforcing their laws, *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam), but this injunction is particularly harmful because it prevents the State from fulfilling its solemn "responsibility for education of its citizens." *Wisconsin*, 406 U.S. at 213. Moreover, the balance of the equities and the public interest "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Because Plaintiffs have shown no irreparable harm to counter these harms, Defendants are likely to show on appeal that equity favored allowing them to fulfill their charge to protect Texas children from exposure to obscene and sexually explicit materials.

II. The Remaining Factors Favor a Stay.

All remaining factors favor a stay. Texas experiences irreparable harm when its law is enjoined. *Veasey*, 870 F.3d at 391. And Defendants are unable to take steps designed by the Legislature to protect children from sexually explicit material and other educationally inappropriate materials. Tex. Educ. Code §§ 22.021, 35.002. Conversely, a stay will not "substantially injure" Plaintiffs, *Nken*, 556 U.S. at 426, whose obligations under READER would not even arise until April 2024, Tex. Educ. Code § 35.002(c). Finally, a stay is demonstrably in the public interest because it serves the parent and student interests as expressed by the Legislature. "Because the State is the appealing party, its interest and harm merge with that of the public"—as it did in the district court. *Veasey v*, 870 F.3d at 391.

III. The Court Should Enter a Temporary Administrative Stay.

To allow both Defendants and Plaintiffs time to comply with READER, Defendants request relief by October 4. But if the Court requires additional time, Defendants request an administrative stay to allow Defendants to start the process of setting standards while the Court considers the motion for a stay pending appeal. *E.g.*, *Richardson*, 978 F.3d at 227-28. Such relief will not affect Plaintiffs, whose obligations are not triggered until those standards are set.

Conclusion

The preliminary injunction should be stayed pending appeal. Additionally, or alternatively, a temporary administrative stay should be granted.

Respectfully submitted.

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Certificate of Compliance with Rule 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellants contacted the clerk's office and opposing counsel to advise them of Appellants' intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible, but **no later than October 4, 2023.** Appellants respectfully request an immediate temporary administrative stay while the Court considers this motion.
- True and correct copies of relevant orders and other documents are attached as exhibits to this motion.

- This motion is being served at the same time it is being filed.

/s/ Lanora C. Pettit
LANORA C. PETTIT

CERTIFICATE OF CONFERENCE

On September 20, 2023, counsel for Appellants sought to confer with Appellees but were unable to do so. Appellees opposed a stay in the district court.

/s/ Lanora C. Pettit
LANORA C. PETTIT

Certificate of Service

On September 20, 2023, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,145 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Lanora C. Pettit
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