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.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE STATEMENTS, DOCUMENTS, AND OTHER PROFFERED EVIDENCE OFFERED IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant's Motion to Exclude Statements, Documents, and Other Proffered Evidence Offered in Support of Plaintiffs' Motion for Preliminary Injunction filed February 7, 2025 (ECF No. 27), should be denied because it is contrary to the law governing preliminary injunctions.[1] It is well-settled that the Federal Rules of Evidence do not apply at the preliminary injunction stage, which is just that—preliminary. *See, e.g.*, *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). It is *not* a trial on

[1] Defendant's motion is also procedurally improper. The motion is eight pages longer than the Court's fifteen-page limit for motions, and it should be stricken on that basis alone. *See* Uniform Civil Practice Standard 10.1(c)(1).

the merits. The parties are not in discovery, have had minimal time to develop the facts of the case, and are proceeding on a limited record. Challenges to the admissibility of evidence at this stage are thus inappropriate, and any concerns as to the reliability of evidence go only to its weight. Defendant does not cite to a single authority holding that the Federal Rules of Evidence apply at this stage, because Defendant's position is not the law. The Motion should be denied.

ARGUMENT

I. THE FEDERAL RULES OF EVIDENCE DO NOT APPLY AT THE PRELIMINARY INJUNCTION STAGE.

"[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Given the procedural posture of such hearings, which take place before the parties are able to develop a fulsome factual record, the Tenth Circuit has explicitly stated: "The Federal Rules of Evidence do not apply to preliminary injunction hearings." *Heideman*, 348 F.3d at 1188.

This rule means that "challenges to the admissibility of [evidence] are inappropriate at this stage in the proceedings." *Heartland Animal Clinic, P.A. v. Heartland SPCA Animal Med. Ctr., LLC*, 503 F. App'x. 616, 620 (10th Cir. Nov. 28, 2012). Evidentiary issues pertaining to Plaintiffs' supporting declarations or the District's own emails and records go only to the weight of the evidence at the preliminary injunction stage, not to its admissibility before the court. *See, e.g.*, *DigitalGlobe, Inc. v. Paladino*, 269 F. Supp. 3d 1112, 1119 (D. Colo. 2017) ("The fact that evidence might be excludable [under the Federal Rules of Evidence] goes to the weight of that evidence,

not necessarily its admissibility."); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed.) ("Once received, the question of how much weight an affidavit will be given is left to the trial court's discretion and the quality of the affidavit will have a significant effect on this determination.").

Defendant cites hearsay as the basis for the majority of its objections, but courts in the Tenth Circuit have found that sworn declarations and potential hearsay may be considered in deciding a motion for preliminary injunction. *See, e.g.*, *EIS Ultimate Holding, LP v. Huset*, No. 23-CV-02323, 2024 WL 4472008, at *9 (D. Colo. Sept. 19, 2024) (applying *Heideman* and finding hearsay statements summarized in a declaration are "fair game" at the preliminary injunction stage); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, 680 F. Supp. 3d 1250, 1268 (D. Wyo. 2023) (finding "a court may consider affidavits based on hearsay when evaluating requests of preliminary injunctions"). Notably, Defendant does not contest the basic facts in Plaintiffs' declarations and has submitted its own competing declarations to try to explain away the language used in its own documents and in public meetings.

Defendant cites no authority in support of its position that the Court should refuse to consider sworn declarations and indisputably authentic documents from Defendant's own files in deciding Plaintiffs' motion for preliminary injunction. Instead, it argues (again without authority) that the rule governing preliminary injunction proceedings should not apply here because Plaintiffs did not move expeditiously enough in bringing their motion. (ECF No. 27 at 2.) That is factually incorrect and legally irrelevant. The rules and procedures for addressing a motion for preliminary injunction do not change based

on how quickly a motion is brought. And a request for a preliminary injunction is just that—a request for expedited relief.

In sum, the Court should deny Defendant's Motion to exclude Plaintiffs' evidence because it is contrary to the law in the Tenth Circuit, is wholly unsupported by legal authority, and is inappropriate at this early stage in the proceedings.

II. EVEN IF THE RULES OF EVIDENCE APPLIED, MANY OF DEFENDANT'S OBJECTIONS FAIL.

Even if the law were different and the Court was obligated to strictly apply the Federal Rules of Evidence as if this were a jury trial after full discovery, rather than a request for a preliminary injunction before any formal discovery, many of Defendant's evidentiary objections are wrong. This includes objections to (i) emails written by Elizabeth School District Board members and employees, and (ii) book review forms written by members of the community.

Defendant objects to its own emails as hearsay. This is incorrect. The District's own emails are party admissions under Rule 801(d)(2)(D) and thus not hearsay in any event. (*See* Exhibits 9-12 and 14-18, ECF Nos. 9-9–9-12, 9-14–9-18.) Many also are not offered to establish the truth of the matter asserted, and are not hearsay for that reason as well. Notably, Defendant does not dispute the authenticity of the emails.

Defendant also erroneously objects on hearsay grounds to book review forms solicited and maintained by the District. Defendant does not dispute the authenticity of the book review forms or the fact that the book review forms are records it maintained as part of its process for banning the at-issue books. Hearsay does not bar these forms for at least two reasons. First, the forms are not being offered for the truth of the matter

asserted. Second, even if they were being offered for the truth asserted in them, the book review forms are business records under Rule 802(6).

CONCLUSION

Defendant's effort to exclude virtually all of Plaintiffs' evidence offered in support of their motion for a preliminary injunction is inconsistent with the evidentiary rules, the nature of motions for preliminary injunction, and Tenth Circuit authority. The Federal Rules of Evidence do not apply to preliminary injunction proceedings. The Court should deny Defendant's Motion to Exclude (ECF No. 27).

Dated: February 21, 2025.

Respectfully submitted,

s/ Celyn D. Whitt

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on February 21, 2025, I electronically filed the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE STATEMENTS, DOCUMENTS, AND OTHER PROFFERED EVIDENCE OFFERED IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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