UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00913-RMR

GAYS AGAINST GROOMERS, a non-profit corporation;
ROCKY MOUNTAIN WOMEN'S NETWORK, an unincorporated association; RICH GUGGENHEIM, an individual; and
CHRISTINA GOEKE, an individual,

Plaintiffs,

v.

LORENA GARCIA, in her individual and official capacities as a Colorado State Representative;
MIKE WEISSMAN, in his individual and official capacities as a Colorado State Representative and Chair of the House Judiciary Committee;
LESLIE HEROD, in her individual and official capacities as a Colorado State Representative;
JULIE GONZALES, in her individual and official capacities as a Colorado State Senator and Chair of the Senate Judiciary Committee; and
DAFNA MICHAELSON JENET, in her individual and official capacities as a Colorado State Senator,

Defendants.

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Enforcing unconstitutional speech restrictions against citizens is not *legislating.* Neither is altering a public record. As a result, Defendants' blanket assertion of legislative immunity fails to cover their misconduct.

Plaintiffs seek to enjoin the enforcement of Defendants' speech restrictions, not an injunction to force Defendants to amend or repeal those restrictions. Similarly, Plaintiffs seek nominal damages for past applications of those restrictions, not for the decisions to adopt them. Legislators do not enjoy absolute immunity when they act as speech enforcers or administrators.

Nor may Defendants avoid liability by recasting their speech restrictions as content-based but viewpoint neutral. By inviting the public to comment about "Tiara's law," Defendants were required to tolerate criticism of the bill and its namesake, including commenting on those topics in ways that some might find offensive. Moreover, Defendants have not met the heavy burden of showing mootness, because they claim the right to enforce those same restrictions again.

FACTS AND BACKGROUND

Plaintiffs are two citizens and their affiliated organizations who hold strong views on transgender ideology and public policy. Dkt. 1. Their claims are explicated in detail in their Complaint. *Id.; see also* Dkt. 8.

In summary, they sought to exercise their right to speak about "Tiara's law"—a transgender name-change bill—during the "public testimony" portions of the House and Senate Judiciary Committee meetings where that bill was open to public comment. Dkt. 1 at 5-12. The Colorado General Assembly opened this forum before its legislative committees, inviting citizens to "express their views." Dkt. 1-1 at 1; Dkt. 1. at 8-10.

Defendants announced that no "misgendering," "deadnaming" or "disrespectful" comments would be allowed, and then proceeded to enforce those rules by interrupting and cutting off Plaintiffs for, among other things, discussing "Tiara's" criminal record,

calling "Tiara" by his legal name, refusing to use "Tiara's" preferred pronouns, and referring to two illustrative historical figures in a way that trans audience members disliked. Dkt. 1 at 13-21. In at least one instance, Plaintiff Christina Goeke was "confronted by the sergeant at arms and asked to leave." Dkt. 1 at 16 (¶ 46).

Speakers, including "Tiara" himself, who supported the bill and used terminology consistent with transgender ideology were not interrupted, cut off, or asked to leave. Defendants also partly erased the recording of one of Goeke's speeches. Dkt. 1 at 18; Dkt. 1-3 at 12 (no audio).

On May 4, 2024, during the legislative session, Plaintiffs filed suit alleging (1) vagueness as to enforcement of subjective decorum rules (2) enforcement of viewpoint discriminatory speech restrictions; (3) viewpoint discriminatory erasing of the hearing audio record; and (4) compelled adherence to trans ideology. Dkt. 1 at 23-28. Plaintiffs requested orders preliminarily and permanently enjoining Defendants, and persons acting in concert with them, from "enforcing" their speech restrictions, compelled speech requirements, or editing dissenting speech from the public record. *Id.* at 28-29. They also requested declaratory relief and nominal damages for past enforcement. *Id.* at 29.

Plaintiffs allege that they expect trans-related issues to arise in future legislative sessions and that they would like to speak in opposition to trans ideology, but expect to speak less or differently because of Defendants' undisputed speech restrictions. Dkt. 1 at 21-22 (¶¶ 73-74). Defendants have "certainly not" disavowed future enforcement of those restrictions. Dkt. 19 at 10.

ARGUMENT

I. LEGISLATIVE IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIMS

As the officials claiming absolute immunity, Defendants bear the burden of establishing that legislative immunity applies to the *function* in question. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Antoine v. Byers & Anderson*, 508 U.S. 429,

432 n.4 (1993); *Howards v. McLaughlin*, 634 F.3d 1131, 1140 n.6 (10th Cir. 2011). The default presumption is that qualified immunity suffices to protect officials, and the Supreme Court has been "quite sparing" in its recognition of absolute immunity. *Antoine,* 508 U.S 432 n.4. It is "the nature of the function performed, not the identity of the actor who performed it" that informs immunity analysis. *Forrester v. White*, 484 U.S. 219, 229 (1988). Moreover, personal defenses apply only to individual-capacity claims. *Sable v. Myers,* 563 F.3d 1120, 1123 (10th Cir. 2009).

A. Legislative immunity does not apply to official-capacity claims

Although Defendants cited *Sable,* they did not acknowledge that the Tenth Circuit concluded that legislative immunity is a *personal* defense not applicable to official-capacity claims for declaratory and injunctive relief. "[Legislative immunity] applies . . . *only to legislators sued in their individual capacities,* not to the legislative body itself." *Id.* at 1123 (citing *Minton v. St. Bernard Parish Sch. Bd*., 803 F.2d 129, 133 (5th Cir. 1986)) (emphasis added); *S. Utah Drag Stars, LLC v. City of St. George*, No. 4:23-cv-00044-DN-PK, 2024 U.S. Dist. LEXIS 34465, at *8-9 (D. Utah Feb. 27, 2024) (relying on *Sable*); *see also Russell v. Town of Buena Vista,* Civil Action No. 10-cv-00862-JLK-KMT, 2011 U.S. Dist. LEXIS 156912, at *11 n.3 (D. Colo. Jan. 12, 2011) (quoting *Sable).*

Official capacity suits are a way of pleading an action against the government entity of which the officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). "It is *not* a suit against the official personally, for the real party in interest is the entity." *Id.* at 166. "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment [sovereign immunity]." *Id.* at 167; *S. Utah Drag Stars, LLC,* 2024 U.S. Dist. LEXIS 34465, at *8-9 ("Plaintiffs are not seeking to impose liability against the Individual Defendants personally. The claims are in all respects other than name, claims against the City").

Sovereign immunity precludes Plaintiffs from suing the General Assembly directly, but *Ex parte Young* provides the remedy: sue the enforcement officials in their official capacities.[1] Thus, Plaintiffs' official capacity claims in this case are really claims against the General Assembly and its committees, which may not rely on a personal defense, such as legislative immunity. Defendants did not acknowledge *Sable's* binding precedent, and instead cite out-of-circuit authority that diverges from *Sable*. *See* Dkt. 19 at 4 (citing First and Third Circuit cases). It may well be that there is a circuit split, but as the U.S. District Court for the District of Utah recently noted: an out-of-circuit "opinion is not binding, and is not [even] persuasive in light of the Tenth Circuit's precedent." *S. Utah Drag Stars, LLC,* 2024 U.S. Dist. LEXIS 34465, at *8 n.30. If Defendants want *Sable* overruled, they should state so explicitly and seek that remedy from the en banc Tenth Circuit or the Supreme Court. Barring such relief, this Court is bound by *Sable.* Defendants err in urging this Court to apply legislative immunity to Plaintiffs' official-capacity claims for injunctive and declaratory relief.

B. Enforcing censorship in a limited public forum is not legislating

Even if legislative immunity applied to official-capacity claims, it does not apply to any of Plaintiffs' claims—whether individual or official—because the act of enforcing their unconstitutional customs, policies, or practices is an executive activity, distinct from legislating. Perhaps Defendants are immune from actions seeking to hold them liable for the mere act of adopting their unconstitutional censorship regime or forcing them to rescind or amend it. But what Plaintiffs seek to enjoin (and have the Court declare unconstitutional) is Defendants' enforcement of their speech restrictions. Dkt. 1 at 23,

[1] Defendants did not assert sovereign immunity and so waived it, but it would not apply here. *See Hill v. Kemp,* 478 F.3d 1236, 1258-59 (10th Cir. 2007) (sovereign immunity avoided where complaint alleges an ongoing violation of federal law and seeks prospective relief).

26, 28-29. Plaintiffs have not sought relief forcing Defendants to legislate in a certain way.

In *Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 732-36 (1980), the Supreme Court distinguished between the Virginia Supreme Court's professional-conduct rulemaking function (like a legislative function) and its enforcement function (not like a legislative function). Reviewing the plaintiffs' challenge to a portion of the state bar code, the Court concluded that the Virginia Supreme Court was legislatively immune from suit for "for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid . . ." *Id.* at 733-34.[2] But the Supreme Court went on to hold that the "Virginia Court and its chief justice properly were held liable in their enforcement capacities." *Id.* at 736.

As in *Consumers Union,* Plaintiffs are not asking this Court to direct the Colorado General Assembly, or its two Judiciary Committees, to formally repeal speech restrictions on "misgendering," "deadnaming," or "disrespectful" speech.[3] Instead, Plaintiffs request an injunction that is comparable to what the plaintiffs obtained in *Consumers Union*—one barring enforcement of the illegal speech restrictions. *Compare id.* at 727 (On May 8, 1979, the District Court declared DR 2-102 (A)(6) [of the bar code] unconstitutional on its face and permanently enjoined defendants from enforcing it.) *with* Dkt. 1 at 28-29.

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[2] Plaintiffs acknowledge that some language in *Consumers Union* indicates that claims for injunctive and declaratory relief are sometimes subject to legislative immunity, but that opinion pre-dates both *Graham* and *Sable. See United States v. Ladeaux,* 454 F.3d 1107, 1111 n.4 (10th Cir. 2006) (circuit panel decisions are binding absent en banc reconsideration or superseding contrary decision by the Supreme Court). More importantly, *Consumers Union* squarely holds that enforcement functions are not subject to legislative immunity.

[3] Such relief might be foreclosed by *Consumers Union,* but that issue is not before the Court because Plaintiffs have not requested it.

When civil rights plaintiffs challenge a government restriction, they ordinarily sue the enforcement officials, not the legislators or rule-making body. *See, e.g., Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 151-52 (2014); *Steffel v. Thompson,* 415 U.S. 452, 469-70 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971)) ("Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear"); *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1239 (10th Cir. 2023) ("We often see pre- enforcement challenges in the First Amendment context").[4] Usually legislative roles are separated from enforcement roles, but executive officials do not obtain derivative immunity because they are enforcing the legislature's law. *See Borde v. Bd. of Cty. Comm'rs,* 423 F. App'x 798, 803 (10th Cir. 2011) ("We disagree that an executive official who implements legislation necessarily engages in legislative activity protected by absolute immunity. Indeed, almost every act of an executive official can be characterized as implementing or enforcing legislation"). But in this case, Defendants acted as *both* rule-makers and enforcers, and they lack immunity for the latter function. To hold otherwise would allow states to avoid judicial review of illegal regimes simply by assigning the enforcement function to legislators.

C. Administering censorship in a limited public forum and erasing public comments is not legislating

The Tenth Circuit has repeatedly held that restricting speech at public hearings is an administrative act, outside the bounds of legislative immunity. *Kamplain v. Curry Cty. Bd. of Com'rs*, 159 F.3d 1248, 1253 (10th Cir. 1998) (". . . because Defendants were acting in an administrative capacity when they banned Plaintiff's attendance, participation, and speech at Commission meetings, they are not entitled to absolute legislative

[4] Plaintiffs further discuss pre-enforcement standing in section III(A), *infra.*

immunity."); *Borde,* 423 F. App.'x at 802 ("Unlike preparing legislation or voting on legislation, the acts of providing notice of a legislative meeting to interested parties and providing those parties with an opportunity to be heard do not implicate the legislative function."); *see also Weise v. Colo. Springs*, 421 F. Supp. 3d 1019, 1034-35 (D. Colo. 2019) (Voting to authorize the filing of attorney-misconduct complaints "is more similar to *Kamplain* than it is to *Sable"); cf. Jama Invs., L.L.C. v. Inc. Cty. of Los Alamos,* No. CIV 04-1173 JB/ACT, 2006 U.S. Dist. LEXIS 27651, at *22-23 (D.N.M. Feb. 20, 2006) (Immunity applied where legislators' "statements do not involve the disciplining of audience members; instead, the comments merely expressed disagreement with Jeff West's statements without punishing him, such as by ejecting him from the room").[5]

Interrupting, cutting off, and erasing Plaintiffs' public comments have the same effect as acting to exclude a speaker because they deprive Plaintiffs of an opportunity to be heard on terms equal to other citizens. Taking away someone's time to speak is tantamount to ejecting or temporarily banning a speaker.[6] So is letting pro-trans audience members boo, hiss, and jeer unchecked while Goeke attempted to speak. Dkt. 1 at 15.

Core legislative activity includes proposing and signing legislation, and voting on resolutions and legislation. *Borde,* 423 F. App'x at 801 (citations omitted). It also extends

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[5] Functionally, administrative acts may well overlap or be co-extensive with enforcement acts, but these related concepts arise from slightly different lines of cases. Plaintiffs submit that Defendants lack immunity for their censorship activities whether they are called enforcement acts, administrative acts, or both.

[6] Defendants incorrectly state that "no one was ejected" from a committee meeting. Dkt. 19 at 5. Plaintiff Goeke alleged that she was confronted by the sergeant-at-arms and asked to leave the House Judiciary Committee Hearing after Defendant Weissman gaveled it into recess during her speech. Dkt. 1 at 16 (¶ 46). And as Chair, Defendant Weissman ostensibly had the authority to ask the sergeant to remove persons he deemed "disruptive." *Id.* at 9 (¶ 22). *See also* Dkt. 8-1 (¶ 45), 8-2 (¶ 22).

to the actions of special investigative committees, *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (summoning another politician to appear before California Senate Fact-Finding Committee on Unamerican Activities who then invoked his right to silence), and to traditional legislative functions such as funding decisions, eliminating public agencies, vacating roadways, or the scope of public works. *Sable,* 563 F.2d at 1126-27. But forcing citizens to use—and refrain from using—certain words and erasing comments from the record are not traditional legislative functions—at least not in America.

Defendants are of course free to express their own views on trans issues, to openly disagree with Plaintiffs, and to sponsor and vote on trans-related legislation—to suggest that Plaintiffs claim otherwise is not supported by the record. To be sure, Defendants' statements during the hearing are evidence of both motive and intent to discriminate, but they are not themselves actionable. What is actionable is the conduct of interrupting, stealing time, cutting off speakers, and erasing speech.

II. DEFENDANTS' SPEECH RESTRICTIONS ARE TEXTBOOK VIEWPOINT DISCRIMINATION

Defendants attempt to evade what amounts to almost per se liability for viewpoint discrimination by mischaracterizing their speech restrictions as merely content based, but viewpoint neutral. Dkt. 19 at 7-8. They admit that they restricted misgendering, deadnaming, and "disrespectful" discourse, but claim these were reasonable and legal content-based restrictions "so that all witnesses felt comfortable coming forward to state their reasons for supporting or opposing the bill without fear of being treated derogatorily." *Id.* at 8.

But this admits to viewpoint discrimination because Defendants were adopting the views of pro-trans audience members as to what constitutes "respectful" discourse or proper terminology. *See, e.g., Matal v. Tam,* 582 U.S. 218, 247 (2017) (Kennedy, J., concurring); *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 252 (6th Cir. 2015) ("Simply

stated, the First Amendment does not permit a heckler's veto.") (collecting cases); *Seattle Mideast Awareness Campaign v. King County,* 781 F.3d 489, 502-03 (9th Cir. 2015) (audience reaction may be a pretext for viewpoint discrimination, especially "where speech on only one side of a contentious debate is suppressed."); *McMahon v. City of Panama City Beach*, 180 F. Supp. 3d 1076, 1110 (N.D. Fla. 2016) (prohibiting hecklers' vetoes prevents the government from effectuating the complaining citizen's viewpoint discrimination).

To be sure, Defendants' restrictions are *also* content based, because they require the enforcer to examine the content of the speech to determine if the rule was violated. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1228-29 (10th Cir. 2021) (citation omitted). Viewpoint-based rules are a subset of content discrimination. "A speech regulation is viewpoint-based when it goes beyond general discrimination against speech about a specific topic and instead regulates one perspective within a debate about a broader topic." *Brown v. Kemp*, 86 F.4th 745, 780 (7th Cir. 2023) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (explaining that a distinction is viewpoint based if "it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

Here the topic was expressing the speakers' views on "Tiara's law"—the trans-name change bill. While some speakers were allowed to criticize the bill, no one was allowed to do so in a way that was "disrespectful" (such as using "Tiara's" birth name or disfavored pronouns), referring to his criminal history, or upsetting the legislators or audience members by dissenting from trans ideology on the ideological issues of misgendering and deadnaming. But elected officials may not "tone police" citizens speaking on issues of public importance or choose their words for them. Offensive ideas are protected speech. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Matal*, 582 U.S.

at 243(plurality) ("Giving offense is a viewpoint."); *Cohen v. California*, 403 U.S. 15, 25 (1971).

Nor does it suffice for the government to say that it prohibits all speakers from expressing their ideas in a "disrespectful" way. "To prohibit all sides from criticizing their opponents makes a law *more viewpoint based, not less so* . . . [The First Amendment] protects the right to create and present arguments for particular positions in particular ways, *as the speaker chooses.* By mandating positivity, the law here might silence dissent and distort the marketplace of ideas." *Matal,* 582 U.S. at 249 (Kennedy, J., concurring) (emphasis added).

Accordingly, in a public transit advertisement forum (also a limited public forum), the Ninth Circuit applied *Matal*, striking down a disparagement prohibition as viewpoint discriminatory. *Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131 (9th Cir. 2018). "Giving offense is a viewpoint, so Metro's disparagement clause discriminates, on its face, on the basis of viewpoint." *Id.* The fact that no one may express an offensive viewpoint did not "alter the viewpoint-discriminatory nature of the regulation." *Id.* So too here.

In addition, proscribing comments that are "abusive" or "personally directed" toward "Tiara" or other trans-identifying individuals is a form of viewpoint discrimination. *Ison v. Madison Local Sch. Dist. Bd. of Educ.,* 3 F.4th 887, 895 (6th Cir. 2021); *Marshall v. Amuso*, 571 F. Supp. 3d 412, 430 (E.D. Pa. 2021) (enjoining school board's restriction on offensive racial stereotypes); *Mama Bears of Forsyth Cty. v. McCall*, 642 F. Supp. 3d 1338, 1351-52 (N.D. Ga. 2022) (enjoining school board's restrictions on disrespectful or personally directed speech); *People for the Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 196-97 (D. Md. 2022) (prohibition on advertisements that are 'controversial, offensive, objectionable or in poor taste' is viewpoint discriminatory). And that is especially true where Defendants named a bill after "Tiara" and allowed him and his supporters to express their views and announce their names and pronouns. Yet

while Defendants allowed praise of "Tiara," Weissman first interrupted Goeke for mentioning "Tiara's" criminal record without using names or pronouns. Dkt. 1-2 at 19:1-11 (Goeke states the bill is named after an "admitted former prostitute," prompting Weissman to repeatedly interrupt Goeke).

It is also notable that Defendants took no action to admonish the pro-trans individuals from booing, hissing, or jeering during Ms. Goeke's first attempted speech. Dkt. 1 at 10 (¶ 25) (prohibiting booing, cheering, clapping); Dkt. 1 at 15 (no admonition to audience); Dkt. 1-2 at 19 ("Background booing"). That selective non-enforcement of the rules against audience disruption is also evidence of viewpoint discrimination. *See Pahls v. Thomas*, 718 F.3d 1210, 1238-39 (10th Cir. 2013) (selective enforcement of a facially neutral policy is evidence of viewpoint discrimination). Shortly thereafter Ms. Goeke was asked to leave, while the disruptive audience members were allowed to remain, even garnering an apology for having heard unpleasant ideas. Dkt. 1 at 16-17 (¶¶ 46-47, 49-51); Dkt. 1-2 at 19, 29 ("Tiara, you are brave, and you continue to be. What you faced today was – was violence that I'm sure you face on a multitude of magnitudes . . .).

Moreover, a discussion about "Tiara's law" naturally invites speakers to express views about "Tiara's" identity and why that identity warrants supporting, amending, or opposing the bill. Those views are self-evidently relevant to the topic at hand. Before both Judiciary Committees, those speakers (and legislators) who expressed that "Tiara" is a woman were allowed to speak freely, while those speakers who believed "Tiara" is a male felon named "Duane" were prevented from speaking. *See, e.g.,* Dkt. 1-2 at 2, 7-9. 18-20, 27, 30; Dkt. 1-3 at 4, 8-9, 11-12. One set of views was allowed, and a different set was not.

"The prohibition on viewpoint discrimination is black letter law[.]" *Gilmore v. Beveridge*, No. 2:22-cv-02032-HLT-RES, 2022 U.S. Dist. LEXIS 140026, at *15-17 (D. Kan. Aug. 5, 2022) (applied in a limited public forum). This Court should decline

Defendants' invitation to evade that prohibition by mischaracterizing the restrictions at issue as only content based, but viewpoint neutral.[7]

III. PLAINTIFFS' CLAIMS ARE NOT MOOT BECAUSE DEFENDANTS CLAIM THE RIGHT TO ENFORCE THEIR RESTRICTION IN THE FUTURE

A. Plaintiffs had standing at the time of filing

It is undisputed that Plaintiffs had standing at the time this lawsuit was filed on April 4, 2024. Dkt. 1. The General Assembly was in session then and several trans-related bills were still under consideration. *Id.* at 21-22. Plaintiffs alleged (and Defendants do not dispute) that they were already censored for violating Defendants' speech restrictions and that they reasonably fear being censored again when attempting to comment on future trans-related bills. "That amounts to 'chilled speech,' which satisfies the 'injury-in-fact' prong for Article III standing." *Wyo. Gun Owners*, 83 F.4th at 1239-40 (citation omitted) (analyzing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006), factors regarding sufficiency of chilling effect). And Plaintiffs "need not show the specific content or likely timing of their desired speech"— a general statement of intent is enough. *Id.* (citation omitted); Dkt. 1 at 22 (¶¶ 70, 73-74); Dkt. 8-1, 8-2.

B. Defendants bear the burden of proving mootness

While Plaintiffs must show standing at the time of filing, the burden shifts to Defendants to show post-filing mootness, and that burden is a heavy one. *Doe v. Bd. of Regents of the Univ. of Colo.*, Nos. 21-1414, 22-1027, 2024 U.S. App. LEXIS 11190, at *15-16, *19, *21 (10th Cir. May 7, 2024); *Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012). In *all* cases it is the defendants' burden to show that it "cannot reasonably be

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[7] Nor is it a compelling government interest to restrict speech in order to spare audience members' feelings or please a vocal constituency. Defendants have provided no legally cognizable basis for surviving strict scrutiny (or presumptive invalidity) and their censorship regime is not a time, place, and manner restriction, because it requires consideration of the content and viewpoint expressed.

expected to resume its challenged conduct . . . whether the challenged conduct might recur immediately or later at some more propitious moment." *FBI v. Fikre*, 144 S. Ct. 771, 778 (2024).

"The crux of the mootness inquiry in an action for prospective relief is whether the court can afford meaningful relief that 'will have some effect in the real world.'" *Rezaq*, 677 F.3d at 1008 (citation omitted). Here the Court can meaningfully protect Plaintiffs' right to speak by granting injunctive and declaratory relief against Defendants' speech restrictions; as well as providing nominal damages for past censorship.

Significantly, Defendants continue to claim their actions were legal and have taken no steps to rescind or disavow their speech restrictions, or restore the erased public audio of Goeke's testimony.[8] On the contrary, Defendants admit that "possible future application of similar civility and decorum standards has *certainly not been disclaimed* by the legislative Defendants in this case[.]" Dkt. 19 at 10 (emphasis added). This admission is significant. *See, e.g., Colo. Union of Taxpayers, Inc. v. Griswold*, No. 22-1122, 2023 U.S. App. LEXIS 22168, at *11 (10th Cir. Aug. 23, 2023) (failure to disavow was relevant to fear of enforcement); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023). And unlike the Plaintiffs in *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 960-61 (10th Cir. 2021), Guggenheim and Goeke have specifically alleged that they intend to speak less or differently while Defendants' restrictions are extant. Dkt. 1 at 22 (¶¶ 73-74). That harm is

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[8] *Fikre,* 144 S. Ct. at 779 ("Yes, a party's repudiation of its past conduct may sometimes help that conduct is unlikely to recur"); *Hartnett v. Pa. State Educ. Ass'n,* 963 F.3d 301, 306 (3d Cir. 2020) (court will be skeptical of mootness claims where defendant claims "its conduct was lawful all along"). Although the voluntary cessation doctrine is implicated here, Defendants have not ceased anything—they are just waiting for the next opportunity to apply their existing rules.

both credible and ongoing, presenting a live controversy. Trans-identified individuals, and the issues that their identification raises, will remain a fixture of public comment policed by Defendants for the foreseeable future.

CONCLUSION

This Court should deny Defendants' motion to dismiss.

Dated: May 24, 2024

Respectfully submitted,

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