UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00913

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' REPLY RE: MOTION FOR PRELIMINARY INJUNCTION

REPLY ARGUMENT

1. Defendants concede that they censored Plaintiffs' speech and would do so again

Defendants do not contest that they restricted Plaintiffs' speech. In their response to Plaintiff's motion for preliminary injunction (Dkt. 20), Defendants offer no argument, or evidence, contesting Plaintiffs' core factual assertions: that during the public comment portion of two separate Judiciary Committee meetings, the Defendants restricted misgendering, deadnaming, and "disrespectful" public comments on a bill then under consideration; and proceeded to apply those restrictions by interrupting and cutting off Plaintiffs' speeches, going so far as to retroactively erase one of Christina Goeke's speeches from the official audio record. *See* Dkt. 8 at 3-7 (MPI brief fact section); Dkt. 8-1, 8-2 (Plaintiffs' declarations); Dkt. 1-2, 1-3, 1-4 (transcripts). Defendants filed no declarations of their own. As a result, this Court should accept Plaintiffs' factual assertions as uncontested verities for purposes of deciding this motion. *See Hinsdale v. City of Liberal*, 19 F. App'x 749, 769 (10th Cir. 2001).

Defendants' response is limited to legal arguments, and even there Defendants did not respond to all of Plaintiffs' claims. The parties apparently agree on the facts, but disagree about some of the conclusions to be drawn from those facts.

2. Defendants have not met their burden to show their speech restrictions are lawful

The First Amendment right to speak about matters of public concern warrants special protection. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018). The government *always* bears the burden of showing that its speech restrictions are lawful. *Doe v. City of Albuquerque,* 667 F.3d 1111, 1130-31 (10th 2012) (citing *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000)). That burden applies also when considering the likelihood of success of a First Amendment claim in the preliminary injunction context. *Doe v. Bd. of Regents of the Univ. of Colo.*, Nos. 21-1414, 22-1027, 2024 U.S. App. LEXIS 11190, at *32-33 (10th Cir. May 7, 2024). "'[B]urdens at the

preliminary injunction stage track the burdens at trial,' so the Administration 'bears the burden of proof on the ultimate question of the challenged [rules'] constitutionality." *Id.* Defendants have not shown they are likely to succeed in proving that their speech restrictions were lawful or viewpoint neutral.

The elected officials advance an unconvincing argument that the restrictions were "non-viewpoint-based civility and decorum standards[.]" Dkt. 20 at 2-3. But as Plaintiffs have explicated elsewhere, those speech restrictions were obviously viewpoint-based, elevated one set of ideological views over another, and operated to codify the views of one side to a contentious debate about preferred pronouns, gender identity, and "respectfulness." *See* Dkt. 8 at 10-13 (viewpoint discrimination is presumptively illegal); Dkt. 23 at 9-12 (hecklers' veto amounts to viewpoint discrimination). Nor do they contest that Plaintiffs' views on gender identify, pronouns, or deadnaming are matters of public importance, where Plaintiffs enjoy a First Amendment right to speak—or not speak—in accordance with their own views. *See* Dkt. 15 at 4-7; *Meriwether v. Hartop,* 992 F.3d 492, 508 (6h Cir. 2021) (plaintiff's *"mode* of address was the message"); *Darren Patterson Christian Acad. v. Roy*, Civil Action No. 1:23-cv-01557-DDD-STV, 2023 U.S. Dist. LEXIS 198528, at *48-49 (D. Colo. Oct. 20, 2023) (plaintiff was likely to succeed on the merits of free speech claim "to the extent that the state would require Plaintiff and its staff to use a student's or employee's preferred pronouns as a condition of participating in the program"). Defendants have cited no authority for the proposition that they could invite the public to comment on "Tiara's law," but condition that invitation on the requirement to only speak about it in a certain way. Even if the issue of viewpoint discrimination were a close one (and it is not), any ambiguity should be resolved in favor of the right to speak freely, because Defendants bear the burden here.

Defendants have also failed to contest Plaintiffs' forum analysis *(see* Dkt. 19 at 8, citing legal standard), so this Court should consider the public-comment portions of the Colorado General Assembly's committees to constitute limited public fora. And

Defendants did not offer *any* legal argument refuting Plaintiffs' claims of vagueness (Dkt. 8 at 14) or compelled speech (*Id.* at 14-15.) and thus should consider those legal matters to have been conceded. *See Pittman v. Wakefield & Assocs., Inc.*, No. 16-cv-02695-RBJ-KMT, 2017 U.S. Dist. LEXIS 192506, at *13-14 (D. Colo. Nov. 21, 2017). Indeed, Defendants all but concede that they have behaved illegally and instead rely completely on legislative immunity.

3. Enforcement and administrative functions are not subject to legislative immunity

The lynchpin of Defendants' response isn't really to argue that their actions were innocent or legal. Rather they seek to gloss over their illegal conduct and raise the shield of absolute legislative immunity. But as Plaintiffs explicated elsewhere, legislative immunity does not cover administrative or enforcement roles, such as censoring and deleting public comments. Dkt. 23 at 3-9 (detailed analysis refuting applicability of legislative immunity); *Kamplain v. Curry Cty. Bd. of Com'rs*, 159 F.3d 1248, 1253 (10th Cir. 1998); *Borde v. Bd. of Cty. Comm'rs,* 423 F. App'x 798, 801 (10th Cir. 2011).

Nor does Plaintiffs' requested injunction restrict core legislative activities. Plaintiffs seek only to prevent Defendants from enforcing their illegal censorship regime. Such an injunction would have no impact on Defendants' ability to express their own views on trans issues, or to propose or vote on legislation. The relief Plaintiffs seek would prevent censorship, not legislating.

4. Defendants have not met their heavy burden to show their censorship is not reasonably likely to reoccur in the future

In the recent decision *FBI v. Fikre*, 144 S. Ct. 771, 778-779 (2024), the Supreme Court emphasized that it is always the defendant's burden to establish "that it cannot reasonably be expected to resume *its* challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or at some more propitious moment." There, the Court held the case was not moot,

even though the FBI had removed the plaintiff from the no-fly list and declared "that it will not relist Mr. Fikre based on 'currently available information.'" *Id.* at 778. Here, Defendants have done nothing to walk-back or prevent a re-occurrence of their prior conduct. Indeed, they are proud of it.

Moreover, in urging that Plaintiffs' request for a preliminary injunction is moot, they argue that it is Plaintiffs' burden to prove that Defendants' "civility and decorum restrictions will *inevitably* be imposed upon them once again." Dkt. 20 at 3 (emphasis added). But under *Fikre,* it is the government that must show it cannot "reasonably be expected" to resume its challenged conduct, not vice versa. Here the government censored and erased public comments and reserves the right to do so again in the future. Dkt. 19 at 10 ("certainly not" disclaiming future applications of civility and decorum standards).

Nor need the challenged conduct be imminent. *Fikre,* 144 S. Ct. at 778 (". . . whether the challenged conduct might recur immediately *or later* . . . ") (emphasis added); *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1239-40 (10th Cir. 2023) ("A plaintiff need not show the specific content or likely timing of their desired speech.") (quoting *Rio Grande Found. v. Oliver,* 57 F.4th 1147, 1164 (10th Cir. 2023)).

Defendants have declared their intent to keep speaking on trans issues and their intention to self-censor by speaking less or differently without the benefit of legal protection from the Court. Dkt. 8-1 at 14-16; Dkt. 8-2 at 12-14. It is reasonably plausible that trans issues will be discussed at an interim session or the next regular session. Dkt. 8-1 at 15 (¶ 54). Moreover, as trans-identifying individuals are a part of our society, it is virtually inevitable that Plaintiffs will use pronouns and names, and share perspectives, that reflect views in conflict with Defendants' rules. Again, it is the Defendants who bear the burden of convincing the Court that they will not censor Plaintiffs' trans-dissenting speech again, whether at an interim session or regular session—and whether that should occur next month or next year, or even later. Moreover, the next regular session

is a little over six months away, which does not leave much time for Plaintiffs to litigate this matter at either the district court or appellate levels. As a result, this Court should act now to enjoin the Defendants' speech restrictions.

CONCLUSION

This Court should grant Plaintiffs' motion for preliminary injunction enjoining Defendants' speech restrictions on "deadnaming," "misgendering," and "respectful discourse" and as otherwise set forth in the proposed order.

Dated: May 24, 2024

Respectfully submitted,

s/Endel Kolde
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