UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00913-RMR

GAYS AGAINST GROOMERS, a nonprofit 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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6)

Defendants Lorena Garcia, Mike Weissman, Leslie Herod, Julie Gonzales, and Dafna Michaelson Jenet, through undersigned counsel, respectfully submit this Reply in support of their Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. [Motion at Dkt. No. 19 (May 14, 2024); Response at Dkt. No. 23 (May 24, 2024)].

I. Each of the named Defendants is entitled to absolute legislative immunity from all claims asserted in this action.

A. Application to "official-capacity" claims.

Plaintiffs' first response to Defendants' invocation of absolute legislative immunity is simply that it "does not apply to official-capacity claims." Respectfully, this confuses two very distinct immunity doctrines and related terminology.

On the one hand, state *sovereign* immunity is a limitation on "[t]he judicial power of the United States" grounded in the Eleventh Amendment. To invoke the jurisdiction of this Court (under 28 U.S.C. §§ 1331 and 1343) to address their 42 U.S.C. § 1983 claims at all, Plaintiffs understandably employ the linguistic framework grounded in *Ex Parte Young* – 209 U.S. 123 (1908) – and *Hafer v. Melo* – 502 U.S. 21, 31 (1991). They have asserted both "official capacity" (prospective declaratory and injunctive) and "individual capacity" (retrospective damage) claims against each of the Defendants.[1]

Absolute *legislative* immunity, however, is a completely distinct doctrine. It arises under common law, is reflected in the federal "speech and debate clause" – U.S. CONST. art. 1, §6 – and was specifically extended by the Supreme Court to state legislators in *Tenney v. Brandhove*, 341 U.S. 367 (1951). Its application is dependent solely upon whether the actions in question were "in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. It is an absolute – not qualified – immunity, and, per the

[1] Contrary to Plaintiffs' suggestion in footnote 1 of their Response, this immunity is jurisdictional, and not one that the Defendants would have the power to "waive" even if they wished to. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

Supreme Court, is accorded legislators "not for their private indulgence but for the public good." *Tenney*, 341 U.S. at 377.

Plaintiffs now submit that assertion of a claim against individual state legislators in their "official capacities" solves not only the sovereign immunity problem (per *Ex Parte Young*) but the legislative immunity problem as well – allowing at least their prospective "official-capacity" claims to go forward. For this proposition they cite the Tenth Circuit's opinion in *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009). Yet the Supreme Court has clearly held precisely the opposite:

> "Although *Tenney* involved an action for damages under §1983, its holding is equally applicable to §1983 actions seeking declaratory or injunctive relief. In holding that §1983 'does not create civil liability' for acts unknown 'in a field where legislators traditionally have power to act,' . . . we did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'"

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 732-33 (1980) (involving a state Supreme Court's exercise of a "legislative" function in promulgating disciplinary rules), quoting *Eastland v. U.S. Servicemen's Fund*, 503 U.S. 491, 503 (1975) (specifically involving the "speech and debate clause").[2]

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[2] Rather than presume that the Tenth Circuit elected in *Sable* to disregard the Supreme Court's guidance – particularly two lines after specifically citing *Supreme Court v. Consumers Union* in its own opinion – it is apparent in context that the quotation lifted by the Plaintiffs from *Sable* – that legislative immunity "applies only to legislators sued in their individual capacities, not to the legislative body itself" – addresses situations where the "legislative body" also performs actions outside "the sphere of legitimate legislative activity." This is common with local governmental bodies such as city councils, boards of county commissioners, school boards, etc. *Cf., Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 131 (5th Cir. 1986) (where a local school board refused to pay judgments) – cited in *Sable* at 563 F.2d at 1123 – with the Tenth Circuit's opinion in *Fry*

B. "The sphere of legitimate legislative activity."

Plaintiffs' next response – to Defendants' invocation of legislative immunity – is to characterize the subject legislative committee meetings as a "limited public forum" and accuse the Defendants of "censorship." This wholly begs the question of absolute *immunity* from having to respond to and litigate such questions. The appropriate initial – and determinative – question is whether Defendants' actions took place "in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. If so, that ends the inquiry.

Plaintiffs' Complaint is quite clear and detailed that everything of which they complain took place in two legislative committee meetings conducted by the Colorado General Assembly solely to receive public comment on the merits of a specific piece of pending legislation. Compl. ¶¶39-64. Plaintiffs clearly had notice of the committee meetings and were provided the opportunity to speak. In each case all participants were simply asked to engage in "respectful discourse" and "treat others with dignity and respect" within – and only within – the committee meeting. Both committee meetings were convened as a part of the formal legislative process specifically and solely to address the merits of the legislation pending before the committee (not broader social issues). Compl. ¶¶40, 53-55.

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v. Board of County Commissioners, 7 F.3d 936, 942 (10th Cir. 1993), according legislative immunity to a local government entity (a Board of County Commissioners) *and each member of the Board sued exclusively in their official capacity* regarding a legislative decision to vacate roads. *Fry* at 936, 937.

In determining the scope of "the sphere of legitimate legislative activity" the Tenth Circuit – applying the narrower of competing interpretations – has been clear that it incorporates "functions involving legislative speech and debate, voting, preparing committee reports, *conducting committee hearings*, and other 'integral steps in the legislative process.'" *Kamplain v. Curry County Bd. of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (emphasis added), citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998), and *Hansen v. Bennett*, 948 F.2d 397, 402 (7th Cir. 1991).

Kamplain is a useful template – albeit in the local government context – in that it illustrates this Circuit's understanding of the distinction between "legislative" and non-legislative spheres. The Court noted that "[a]t issue here is *not* the Board's ejection of Plaintiff from the public meeting" – *i.e.*, "the circumstances of this case did not concern the enactment or promulgation of public policy" – "but its vote to ban Plaintiff from all future Commission meetings and its subsequent decision to prohibit Plaintiff from participating in or speaking before the Board of County Commission meetings" (irrespective of context and deemed an "administrative" act). 159 F.3d at 1252 (emphasis added). Nothing of this sort occurred in the present case.

In the present case none of the Defendants are alleged to possess – let alone have exercised – any "enforcement" or "adjudicative" authority outside the conduct of the specific legislative committee meetings convened solely to address a particular piece of legislation. *Contrast,* both *Kamplain* and the independent and *post-legislative adjudicative authority* of the Virginia Supreme Court discussed and treated separately in *Supreme Court of Virginia supra*, 446 U.S. at 735-37. Everything that is alleged to have

occurred in the present case took place within a state legislative committee hearing convened exclusively to address the merits of a specific piece of pending legislation and wholly within "the sphere of legitimate legislative activity."

II. The Plaintiffs have not alleged a sufficient factual basis to support a claim for deprivation of their First Amendment rights

Even in the absence of legislative immunity, Plaintiffs' allegations would not support a claim for violation of their First Amendment rights. There appears to be no real dispute that the legislative committee hearings in question were limited public forums. The crux of the dispute is whether the Defendants' decorum standards requested from witnesses and attendees during the course of public testimony on the pending legislation crossed the line from acceptable "content discrimination" into unacceptable "viewpoint discrimination." *Cf.*, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995).

Critically, as noted by the Supreme Court in *Rosenberger*, "in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, *which may be permissible if it preserves the purposes of that limited forum*, and, on the other hand, viewpoint discrimination, *which is presumed impermissible when directed against speech otherwise within the forum's limitations*." *Id*. (emphasis added). *Cf.*, *Tyler v. City of Kingston*, 74 F.4th 57 (2nd Cir. 2022) (upholding a restriction on bringing signs and posters into a city council

meeting)[3]; *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377 (4th Cir. 2008) (noted in these Defendants' Motion to Dismiss, p. 9)[4].

Plaintiffs' Complaint by itself is sufficient to resolve this issue. The Colorado General Assembly was considering proposed legislation that "would make it easier for transgender individuals with felony convictions to legally change their names." Compl. ¶27. As part of its normal practice, the General Assembly "provides citizens with an opportunity to provide public comment on pending legislation in the form of testimony at a committee hearing." Compl. ¶17. "Speakers are allowed to state their opinions about bills, including urging a yes vote, no vote, neutrality, or amendment of a bill." Id. Attendees are advised in advance that each committee chair "has the jurisdiction and authority to limit testimony" and "ask the sergeant-at-arms to remove a disruptive person from the committee room." Compl. ¶22. In the House Committee hearing on the bill, both a sponsor and the committee chair requested attendees to engage in "respectful discourse and share their perspectives and opinions on the bill by not disparaging other members of our community or other witnesses." Compl. ¶¶40, 41. One Plaintiff then refused to testify. Compl. ¶42. The second Plaintiff launched into a

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[3] "And the *form or manner* in which the public participates at Common Council meetings may certainly undermine the purpose for which the forum was created—*e.g.*, to facilitate meaningful discourse *on matters of the legislative agenda*" and "keeping the tenor of [Common Council] meetings from devolving into a picketing session inside City Hall." 74 F.4th at 62 (emphasis added), 64.

[4] "The Commission has a significant interest in maintaining civility and decorum during the public comment sessions of its public meetings, both to ensure the efficient conduct of the people's business and to maximize citizen participation in the discussion." 527 F.3d at 387.

personal attack upon the bill's informal namesake – including "deadnaming," "misgendering," and related commentary about the moral propriety of recognizing gender transition rather than the merits of the bill – precipitating a negative response from others in the room and causing a recess. Compl. ¶¶43-50. The Senate Committee hearing commenced similarly – Compl. ¶¶52-55 – following which one of the Plaintiffs spoke briefly about the bill – Compl. ¶56 – then immediately digressed into an argument with the committee chair about "deadnaming" – Compl. ¶¶56-58. The second Plaintiff commenced with a discussion "about the gay liberation movement" and sex-trafficking that also degenerated quickly into a dispute with the chair about the practice of "deadnaming" other individuals. Compl. ¶60.

There is nothing whatsoever in the Complaint – or its attached exhibits – to suggest that anyone was being prevented or obstructed or disfavored in any fashion from addressing their support of, opposition to, or concerns with, the merits of the legislation under consideration. This was the entire and exclusive purpose of the forum. There is also no apparent reason why anyone – whatever their viewpoint about the legislation, gender transition, or any other perceived moral imperative – should have felt or thought themselves compelled to conform with or accept a viewpoint or adopt a moral position or practice with which they did not agree.[5] All were invited and allowed to participate. The forum did not favor one viewpoint over another. Participants were only

[5] Most particularly in this case, there was no reason in the context of this limited forum why any participant needed to refer to or benefitted from referring to any other person – including the bill's unofficial namesake – by name or with any gender identification at all. The matter before these two legislative committees was the merits of the proposed legislation.

being asked to be respectful of others within the context of the forum and not personally and publicly disparage other members of the community by engaging in personal references that were known to be offensive and hurtful to those persons. That is not viewpoint discrimination.

III. Plaintiffs' Claims are Moot

Plaintiffs' response to these Defendants' suggestion of mootness poses the issue in more compelling terms than the Defendants' own Motion. The precipitating dispute regarding the application of the contested decorum standards within the legislative committee hearings on House Bill 24-1071 has obviously come and gone, and no similar proceedings are in the pipeline. The relief the Plaintiffs seek is overwhelmingly prospective – declaratory and injunctive. Compl. "Prayer for Relief." And – though grounded in the concept of the "capable of repetition yet evading review" exception – the *context* for any such "repetition" is vague and undefined at best. And the context may make all the difference. "[A] party asserting that a legal issue is capable of repetition must frame this issue with specificity." *Patrick G. v. Harrison School District No. 2*, 40 F.4th 1186, 1203 (10th Cir. 2022). "The 'wrong' that is, or is not, 'capable of repetition' must be defined in terms of the precise controversy it spawns." *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005).

Plaintiffs request broad injunctive protections against restrictions on "deadnaming," "misgendering," "disparaging or derogatory language," "raising unwelcome facts about legislative namesakes," not being "respectful," "discriminating on the basis of viewpoint or selectively enforcing decorum rules," "failing to enforce

generally applicable decorum rules," and "censoring" "the right to speak." Compl., Prayer for Relief. The circumstances and specific contexts in which any of these situations could arguably arise is virtually infinite, and this Court is being asked to anticipate – and force the Defendants to anticipate at risk of significant consequences – all possible contexts, scenarios, and arguable applications. Respectfully, this is not a reasonable, or even possible, application of the "capable of repetition" doctrine.

IV. Conclusion

In consideration of the points raised above, Defendants respectfully renew their request to the Court to dismiss Plaintiffs' Complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted this 6th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2024. I filed with the Court and served upon all parties herein a true and complete copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED.R.CIV.P. 12(B)(6)** by e-filing with the CM/ECF system maintained by the Court.

s/Edward T. Ramey