CASE NO. 24-1473

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GAYS AGAINST GROOMERS, et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
LORENA GARCIA, et al.,	)
	)
Defendants-Appellees.	)

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Regina M. Rodriguez
D.C. No. 1:24-CV-00913-RMR

APPELLEES' ANSWER BRIEF

Respectfully submitted,

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Oral Argument is requested

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

COLORADO CONSTITUTION

STATUTES

RULES

PRIOR OR RELATED APPEALS

None.

The Appellees – hereinafter referred to as the "Defendant Legislators" – respectfully submit the following Answer Brief:

STATEMENT OF THE ISSUES

1. Are the Defendant Legislators entitled to absolute legislative immunity from suit regarding all claims asserted against them in this case?

   a. Were the actions complained of performed within "the sphere of legitimate legislative activity"?

   b. Does absolute legislative immunity apply to both individual-capacity and official-capacity claims?

The Defendant Legislators respectfully submit that this is the controlling and dispositive issue in this case; neither issues 2 nor 3, below, need be addressed if the Court decides this question in the affirmative.

[2. Even were legislative immunity not applicable, would the actions complained of by the Plaintiffs have infringed upon their rights under the First Amendment?]

[3. Even were legislative immunity not applicable, are Plaintiffs' claims for prospective relief moot?]

4. The Defendant Legislators respectfully do not address the 5th issue posed in the Plaintiffs' Statement of Issues as it is addressed to practice standards adopted by the federal judicial branch.

STATEMENT OF THE CASE

The Plaintiffs brought this action under 42 U.S.C. §1983 in the District Court against each of the Defendant Legislators in both their individual and official capacities. As explained in the District Court's Order granting Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) – hereinafter "Order" – the Plaintiffs are two organizations (Gays Against Groomers and Rocky Mountain Women's Network) and two individuals (Guggenheim and Goeke) who "reject transgender ideology" and the related concepts of "misgendering" and "deadnaming." Order p. 2 (JA231).[1]

The Defendant Legislators were all elected members of the Colorado General Assembly – the legislative branch of the government of the State of

[1] Plaintiffs' complaint defines "misgendering" as "the act of referring to others, usually through pronouns or form of address, in a way that does not reflect their self-perceived gender identity," and "deadnaming" as "the act of referring to a transgender person by a name they used prior to 'transitioning,' such as their birth name. Plaintiffs claim these actions "to be a form of lying." Order, p.2, ftn. 2 (JA231).

Colorado[2] – specifically the Chairs of the House and Senate Judiciary Committees (Weissman and Gonzales), a member of the House Judiciary Committee (Garcia), and the House and Senate prime sponsors (Jenet and Herod) of a piece of legislation denominated House Bill (or "HB") 24-1071. Order, p.2 (JA231). HB 24-1071 sought to expand the conditions (or "good cause") upon which a person with a prior felony conviction could obtain a legal name change in Colorado – specifically to include "changing the petitioner's name to conform with the petitioner's [gender] identity." Order, p. 2 (JA231).[3] The Plaintiffs opposed that change "because they believe it will make it easier for transgender individuals to conceal criminal convictions and thus pose a danger to children, women, and vulnerable populations." Order, p. 3 (JA232). They also disagree with the concepts of "misgendering" and "deadnaming." Order, p. 3 (JA232), citing Plaintiffs' Complaint ¶33 (JA023).

[2] Colo. Const. art. V, Sec. 1(1): "The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people" [subject to the reserved powers of initiative and referendum].

[3] HB24-1071's sponsors and supporters referred to the bill as "Tiara's law" – the preferred name of a biological male with criminal convictions who had advocated for a change in the law to allow a name change to "Tiara". Order, p.3 (JA232).

To express their opposition to HB 24-1071, Plaintiffs Guggenheim and Goeke – as individuals and on behalf of the organizational Plaintiffs – signed up to testify against HB24-1071 before both the House and Senate Judiciary Committees. Order, p. 3 (JA232). Per Art. V, §20 of the Colorado Constitution, "No bill shall be considered or become a law unless referred to a committee, returned therefrom, and printed for the use of the members."

As stated in the Plaintiffs' Complaint, the purpose of the public comment sessions conducted by these legislative committees is to provide citizens "with an opportunity to offer public comment *on pending legislation* in the form of testimony at a committee hearing." Order, p. 3 (JA232), quoting Plaintiffs' Complaint ¶17 (JA020) (emphasis added). The Colorado General Assembly publishes a Memorandum on Public Participation in the Legislative Process – Plaintiffs' Complaint ¶21 (JA021) – the full text of which is attached as Exhibit A to Plaintiffs' Complaint (JA043-047). Per this Memorandum, members of the public may participate in committee hearings by submitting written testimony, testifying via Zoom, or testifying in person (JA044). A "Committee Protocol" section of this Memorandum emphasizes that "[t]he purpose of a committee hearing is to gather information so that the committee can make an informed recommendation on a given bill or resolution." (JA046). The Memorandum also

clearly states that "[t]he chair has the discretion and authority to limit testimony, ask the sergeant-at-arms to remove a disruptive person from the committee room, and clear the public from any hearing in the event of a disturbance that is *disruptive to legislative proceedings*." (JA047) (emphasis added); *see also*, Order at p. 3 (JA232).

On January 30, 2024, the House Judiciary Committee heard public testimony on HB24-1071. Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶39 (JA025). During the session, guidelines were established that requested that participants "engage in respectful public discourse and share their perspectives and opinions on this bill" by not using derogatory language, "misgendering" a witness, or using a witness' "deadname". Order, p. 4 (JA233), quoting Plaintiffs' Complaint ¶40 (JA025). Upon hearing these guidelines, Plaintiff Guggenheim left his place in line and did not testify. Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶42 (JA025-26); Plaintiff Goeke's testimony was interrupted when she refused to comply with these guidelines,[4] the Committee went into recess, and she was asked

[4] The Court is respectfully referred to the exchange between Committee Chair Weissman and Plaintiff Goeke in the official transcript of the Committee hearing submitted by the Plaintiffs as Exhibit B to their Complaint (JA066, line 1 – JA067, line 16).

to leave by the sergeant at arms. Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶¶43-47 (JA026-028).

On March 27, 2024, the Senate Judiciary Committee heard public testimony on HB24-1071. Order p. 4 (JA233), citing Plaintiffs' Complaint ¶52 (JA029). Again, guidelines were provided to participants as to treating one another with dignity and respect – and not using derogatory or disparaging language, "deadnaming," or "misgendering" – failing which they would be removed from the hearing. Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶¶53, 54 (JA029). In response, Plaintiff Goeke repeatedly "deadnamed" the legislation's namesake – Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶56 (JA030) – and her testimony was cut short.[5] Order, p. 4 (JA233), citing Plaintiffs' Complaint ¶58 (JA030). Plaintiff Guggenheim attempted to speak, proceeded to "deadname" and "misgender" multiple people, refused to comply with the Committee guidelines,

[5] The Court is respectfully referred to the exchange between Committee Chair Gonzales and Plaintiff Goeke in the official transcript of the Committee hearing submitted by the Plaintiffs as Exhibit C to their Complaint (JA093, line 14 – 21), as well as short exchange during the recess – apparently separately recorded as committee microphones are routinely turned off during recesses (*i.e.*, nothing was "erased" as Plaintiffs suggest) – in Exhibit D (JA099-104). When the Chair turns off the microphones in the Committee room, the tape recording is automatically stopped as well.

and was not allowed to complete his testimony. Order, p. 5 (JA234), citing Plaintiffs' Complaint ¶¶60-61 (JA031-32).[6]

Eight days after adjournment of the Senate Judiciary Committee meeting, the Plaintiffs filed this action. "Complaint for Injunctive, Declaratory, and Other Relief" (JA013-107). This was followed shortly by a Motion for Preliminary Injunction (JA108-163), and shortly thereafter by a second Motion requesting the District Court to suspend its own civil practice standards encouraging the disclosure and use of "applicable pronouns of counsel, litigants and witnesses" in court proceedings. (JA164-175). The Defendant Legislators responded with a Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) – (JA176-187); they took no position regarding the Court's practice standards other than to indicate they intended to comply with them (JA193-195).

The District Court entered its Order dismissing Plaintiffs' Complaint under Fed.R.Civ.P. 12(b)(6) on November 27, 2024. (JA230-48). The Order addressed two issues raised by the Legislators in their Motion to Dismiss – legislative immunity and prospective-claim mootness. Most pertinent to this appeal, the

[6] The Court is respectfully referred to the exchange between Committee Chair Gonzales and Plaintiff Guggenheim in the official transcript of the Committee hearing submitted by the Plaintiffs as Exhibit C to their Complaint (JA096, line 2 – JA097, line 22).

District Court concluded that the actions of the Defendant Legislators were within the sphere of legitimate legislative activity and that they were entitled to absolute legislative immunity from all of Plaintiffs' claims regarding those matters. Order, pp. 6-14 (JA235-43); the Court also found that Plaintiffs' prospective relief claims against the Legislators to be moot. Order, pp. 14-18 (JA243-47).

SUMMARY OF THE ARGUMENTS

1. The Defendant Legislators are entitled to absolute legislative immunity from all of the claims asserted against them by the Plaintiffs. [The Legislators respectfully submit that this is the dispositive and controlling issue in this case.]

   a. The actions complained of were performed within "the sphere of legitimate legislative activity."

   b. Absolute legislative immunity applies to both individual-capacity and official-capacity claims.

2. Even were absolute legislative immunity not dispositive of this case, the Legislators did not infringe upon the Plaintiffs' rights under the First Amendment.

3. Even were absolute legislative immunity not dispositive of this case, the Plaintiffs' prospective relief claims would be moot.

ARGUMENT

I. Legislative Immunity

The District Court appropriately commenced its analysis by addressing the issue of absolute legislative immunity. (JA235-243). If this immunity is applicable to the actions complained of in this case – as determined by the District Court – that should be the end of the matter.

A. Basis of legislative immunity.

The seminal case on legislative immunity at the state level is *Tenney v. Brandhove*, 341 U.S. 367 (1951). As with the present case, *Tenney* involved an action against state legislators under the 1871 civil rights statutes directed to enforcing the guarantees of the Fourteenth Amendment – particularly the statute then codified as 8 U.S.C. §43 (341 U.S. at 369) – now 42 U.S.C. §1983. The petitioners (defendants in the §1983 action below) were members of a committee of the California state legislature investigating "un-American activities." The relief requested against them was exclusively for damages. 341 U.S. at 371. Reversing the Ninth Circuit, the Supreme Court presented an extensive analysis of the development and application of the "privilege of legislators to be free from arrest *or civil process* for what they do or say in legislative proceedings" – *Id*. at 372

(emphasis added) – from the foundational struggles of the English Parliament and adoption of the English Bill of Rights in the Sixteenth and Seventeenth Centuries – *Id*. – through the Articles of Confederation and various state constitutions in the early days of this country – *Id*. at 372-75 – and in the Constitution itself (particularly the "Speech or Debate Clause" at Art. I, §6) – *Id*. at 372-73. Noting that a "claim of unworthy purpose does not destroy the privilege," the Court emphasized that "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* at 377.

In the wake of *Tenney*, the Supreme Court has extended application of legislative immunity to legislators at the regional – *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) – and local – *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) – government levels.

The only qualification is that their actions must be within "the sphere of legitimate legislative activity." *Tenney*. 341 U.S. at 376."

B. "Sphere of legitimate legislative activity."

Plaintiffs' Complaint (JA013-107) and their Opening Brief here (at pp. 2-10) are clear that the actions complained of in this case involved – exclusively – application of rules of decorum at legislative committee hearings convened and

conducted by the two chambers of the Colorado General Assembly (the State's legislative body) *for the sole purpose of receiving public comment exclusively directed to the merits of a specific piece of pending legislation*. Their Opening Brief is equally clear on this point (at pp. 2-9). And the District Court, in granting the Defendant Legislators' Motion to Dismiss, emphasized that the actions complained of fell "within the sphere of legitimate legislative activity" for which the Legislators "are entitled to legislative immunity from Plaintiff's Claims against them." JA238-243.

As noted by the District Court (JA239) – quoting the Supreme Court in *Bogan*, at 523 U.S. at 54 – "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." As this Court has explained, even the more restrictive interpretations of the scope of legislative immunity apply it to "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 Board of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (emphasis added).[7] Indeed, a

[7] *Kamplain* distinguished actions, particularly at the local government level, where the circumstances "did not concern the enactment or promulgation of public policy" and were not, therefore, "related to any legislation or legislative function" – in that case banning the Plaintiff from all future County Commission meetings convened for any purpose on any topic. 159 F.3d at 1252.

committee hearing was the subject of *Tenney* itself – with the Supreme Court stating that "[t]he courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Tenney*, 341 U.S. at 378. *Cf.*, *National Assoc. of Social Workers v. Harwood*, 69 F.3d 622, 631-32 (1st Cir. 1995) ("The short of it is that the doctrine of legislative immunity . . . attaches when solons' actions are 'an integral part of the deliberative and communicative processes by which Members participate in Committee and House proceedings with respect to consideration and passage or rejection of proposed legislation or with respect to other matters [committed to their jurisdiction]'"); *Doe v. McMillan*, 412 U.S. 306, 311-12 (1973), quoting *Gravel v. United States,* 408 U.S. 606, 624 (1972), regarding the Speech or Debate Clause ("a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity'"; *Hira Educational Services North America v. Augustine*, 991 F.3d 180, 189 (3d Cir. 2021) (stating that the "sphere of legitimate legislative activity" includes acts "that are 'integral steps in the legislative process" including "legislative factfinding and investigation"); *Atwood v. Clemons*, 818 Fed. Appx. 863, 869-70 (11th Cir. 2020) (distinguishing "activities that further an

elected official's legislative duties" such as "voting, speechmaking on the legislative floor, committee reports, *committee investigations and proceedings*" (emphasis added) – for which absolute legislative immunity is accorded – from activities like press releases, newsletters, personnel decisions, and social media communications).

There appears to be no real dispute in this case that the actions complained of fell wholly within the "sphere of legitimate legislative activity."

C. Application to "official capacity" claims.

Plaintiffs submit, however, that legislative immunity – at least in this Circuit – does not apply to prospective "official capacity" claims – *i.e.*, requests for declaratory and injunctive relief (rather than damages) effectively (even if not nominally) directed to the governmental entity (the Colorado *legislature* in this case). The Supreme Court, however, has held precisely the opposite in *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980): "Although *Tenney* involved an action for damages under §1983, its holding is equally applicable to §1983 actions seeking declaratory or injunctive relief." 446 U.S. at 732.[8]

[8] The Supreme Court distinguished three separate capacities within which the Virginia Supreme Court and its Chief Justice were acting in this case: (1) "legislative" – *subject to absolute legislative immunity* from claims for both

Notwithstanding *Consumers Union*, Plaintiffs assert that this Court is bound by contrary Circuit precedent – absent *en banc* review – established in *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009). [Appl. Br. pp. 36-44]. *Sable* – in the wake of the Supreme Court's further recognition of absolute legislative immunity for "local legislators" in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) – involved two §1983 (and two state law) *damage claims* against a municipality *and* individual members of its City Council (563 F.3d at 1123). Though allowing the claims against the municipality to proceed – noting importantly that "a municipality . . . is subject to suit under §1983" (*Id*. at 1127) (*i.e.*, not shielded by Eleventh Amendment *sovereign* immunity) – this Court directed that the §1983 damage claims against the individual Council members be dismissed on grounds of *legislative* immunity. *Id*. In doing so, the Court noted that legislative immunity "applies, however, only to legislators sued in their individual capacities, not to the legislative body itself." *Id*. at 1123. It is this sentence that the Plaintiffs invoke as overriding – at least in this Circuit – the Supreme Court's clear statement in *Consumers Union* that legislative immunity "is

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damages and prospective relief – when exercising the State's legislative power to regulate the State Bar and issue the Bar Code (446 U.S. at 734); (2) "judicial" when adjudicating disciplinary cases (which they declined to address – *Id*. at 734-35); and (3) "enforcement" actions for violations of the Bar Code for which actions they could be sued for declaratory and injunctive relief (*Id*. at 736).

equally applicable to §1983 actions seeking declaratory or injunctive relief" (*i.e.*, "official capacity" claims). And this is notwithstanding direct citations to *Consumers Union* in both *Bogan* (523 U.S. at 55) and – notably – by this Court in *Sable* itself (immediately prior and again a few lines after the sentence invoked above).

The Defendant Legislators respectfully submit that the Plaintiffs are misreading *Sable* – and confusing two very distinct immunities. Local governing bodies and their officials (at issue in *Sable*) are not protected by Eleventh Amendment *sovereign* immunity; they can be sued directly under 42 U.S.C. §1983 "for monetary, declaratory, or injunctive relief" resulting from actions taken to *implement or execute* official policy or pursuant to governmental custom. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-91 (1978). Such suits can name the local governing body directly, and/or they can (unnecessarily) follow the convention of naming one or more of its officials "in their official capacity."[9] This is different from *legislative* immunity – a wholly distinct *common law* immunity available at both the state (*Tenney*) and local (*Bogan*) level – specifically and only for actions taken "*in the sphere of legitimate legislative activity*." *Tenney*, 341 U.S. at 376. *Sable* involved

[9] This convention reflects the "fictional" mechanism adopted to allow assertion of prospective federal declaratory and injunctive claims effectively against a *state* or its agencies notwithstanding Eleventh Amendment *sovereign* immunity. *Ex Parte Young*, 209 U.S. 123 (1908).

only damage ("individual capacity") claims – and this Court allowed those claims to proceed directly against the municipal entity, while ordering them dismissed on *legislative immunity* grounds against the individual city council members (noting "[h]istory has shown that the greater good comes from protecting legislators from suit based on their legislative acts." 563 F.3d at 1127). There were no declaratory or injunctive (*i.e.*, "official capacity") claims at issue in *Sable* – so this Court appropriately confined its attention to the "individual capacity" (damage) claims before it. And it assuredly did not purport to evade *Consumers Union* within the same breath as directly citing it.[10]

Precedent from other Circuits is consistent. *Cf.*, *Cushing v. Packard*, 30 F.4th 27, 39 (1st Cir. 2022) (citing the "express holding in *Consumers Union* that legislative immunity may be asserted as a defense against an official capacity suit

[10] *Sable* references similar (and instructive) language from a Fifth Circuit opinion – *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 133 (5th Cir. 1986) – noting that legislative immunity "protect[s] individuals acting within the bounds of their official duties, not the governing bodies on which they serve" (a local school board with both legislative and executive functions). Tellingly, *Minton* notes that "not everything an official with legislative duties does is protected by absolute immunity. When an official possessing legislative responsibilities engages in official activities *insufficiently connected to the legislative process* to raise genuine concern that an inquiry into the motives underlying his actions will thwart his ability to perform his legislative duties vigorously, openly, and forthrightly, he is not entitled to absolute immunity . . ." (emphasis added). 803 F.2d at 135. And this, again, is preceded by a citation to *Consumers Union – Id*. at ftn. 33.

against a state officer for the kind of relief that is at issue here" – a preliminary injunction against a state legislator); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 88 (1st Cir. 1983) ("the Supreme Court has clearly held that state legislators acting in a legislative capacity are absolutely immune from the imposition of equitable remedies in a suit brought under 42 U.S.C. §1983" – citing *Consumers Union*); *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 83 (2nd Cir. 2007) (shortly after a Circuit decision to the same effect, "the Supreme Court similarly held that the doctrine of legislative immunity barred claims against state officials for injunctive relief, as well as damages" – citing *Consumers Union*); *Larsen v. Senate of the Commonwealth*, 152 F.3d 240, 253 (3rd Cir. 1998) ("the Supreme Court has unambiguously held that the legislative immunity enjoyed by state, as well as federal, officials is 'applicable to §1983 actions seeking declaratory and injunctive relief'" – citing *Consumers Union*); *Consumers Union v Virginia State Bar*, 688 F.2d 218, 220-21 (4th Cir. 1982) (on remand) ("the Virginia Court and its members are *immune from suit* when acting in their legislative capacity"); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990) ("The immunity granted [to the Michigan Supreme Court for rule promulgation in the wake of *Consumers Union*] is immunity from suit and applies whether the relief sought is money damages or injunctive relief"); *Kent v. Ohio House of Representatives*

Democratic Caucus, 33 F. 4th 359, 364 (6th Cir. 2022) ("These principles hold true for lawsuits for monetary damages as well as for prospective relief" – citing *Consumers Union*); *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 528 (7th Cir. 2011) (citing *Consumers Union* as "extending legislative immunity to claims for injunctive and declaratory relief"); *Church v. State of Missouri*, 913 F.3d 736, 753 (8th Cir. 2019) ("legislative immunity . . . forecloses suit" – citing *Consumers Union*); *Community House, Inc. v. City of Boise*, 623 F.3d 945, 959 (9th Cir. 2010) (Legislative immunity "extends both to claims for damages and claims for injunctive relief" – citing *Consumers Union*); *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1132 (9th Cir. 2012) ("Legislative immunity applies to action for damages and for injunctive relief" – citing *Consumers Union*); *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005) ("The square holding of *Consumers Union* applies with full force here; these state legislator defendants enjoy legislative immunity protecting them from a suit challenging their actions taken in their official legislative capacities and seeking declaratory or injunctive relief").

II. The "limited public forum" issue.

A. The issue.

Plaintiffs based their claims in the District Court – and here – upon the proposition that the legislative committee hearings at issue constituted "limited

public forums." Complaint, ¶¶76, 85 (JA035, JA037). In the context of their Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) – in addition to addressing what they respectfully submit is the dispositive issue of absolute legislative immunity (discussed above) – the Defendant Legislators submitted that, even absent that immunity, the Plaintiffs had not alleged a sufficient basis to support a claim for deprivation of their First Amendment rights as the committee "rules of decorum" were at most "content based" (which is permissible in a limited public forum) – not "viewpoint based." (JA182-184).

Per the Supreme Court, "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects…[citation omitted]…In such a forum a government entity may impose restrictions on speech that are reasonable and viewpoint neutral." *Pleasant Grove City v. Summon*, 555 U.S. 460, 470 (2009). "[I]n 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 created a distinction between, on the one hand, *content* discrimination, which may be permissible if it serves 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." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S.

819, 829-30 (1995) (emphasis added). *Cf*., *Shero v. City of Grove*, 510 F.3d 1196, 1202-03 (10th Cir. 2007) ("Any government restriction on speech in a limited public forum must only be reasonable in light of the purpose served by the forum and be viewpoint neutral") – citing *Rosenberger*. The Defendant Legislators submitted that their "rules of decorum" were at most "content based" – indeed intended and designed to *promote* and *facilitate* (rather than restrict or detract from) open and free discussion of conflicting *viewpoints* directed to (and only to) the proposed legislation under consideration.

The District Court's Order below – at JA230-248 – did not address this issue. Rather, it (appropriately the Defendant Legislators submit) dismissed Plaintiffs' Complaint upon grounds of legislative immunity (JA235-243) and prospective mootness (JA243-247).

B. Relevance of the issue on appeal.

If this Court concurs with the District Court on the issue of absolute legislative immunity, there is no need to continue to address the "limited public forum" question (though the Plaintiffs prematurely do so at pages 19-29 of their Opening Brief). As addressed in Section I of this Answer Brief, legislative immunity is *absolute immunity from suit* – from both retrospective (damage) and prospective (declaratory and injunctive) claims. This is irrespective of the arguable merits of the claim. Even

were the Defendant Legislators to be viewed as having clearly violated the Plaintiffs' rights under the First Amendment by their actions, they would not be subject to suit under 42 U.S.C. §1983 – for either retrospective or prospective relief. If that determination is sustained on this appeal, that – as noted at the beginning of the legal argument in this brief – should be the end of the matter. *Cf*., *Bogan*, 523 U.S. at 56, ftn. 6.

III. Mootness.

The District Court's Order dismissing this case contains a thorough analysis of the issue of whether or not Plaintiffs' prospective relief claims have become moot. (JA243-247).[11] If they have, this Court has noted that the issue is jurisdictional. *Wildlife Guardians v. Public Service Co. of Colorado*, 690 F.3d 1174, 1182 (10th Cir. 2012. And – as with the "limited public forum" issue – questions of mootness (regarding either damage or prospective relief claims) are irrelevant if the Defendant Legislators are and have been entitled to absolute legislative immunity from suit in this case.

[11] The Defendant Legislators agree with the District Court that Plaintiffs' claims for nominal damages would not be moot – though they should be wholly foreclosed by either or both legislative immunity and the absence of a cognizable First Amendment violation. (JA244, ftn. 4).

Regarding claims for injunctive relief, "a plaintiff's continued susceptibility to injury must be reasonably certain; a court will not entertain a claim for injunctive relief where the allegations 'take it into the area of speculation and conjecture.'" *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011), quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). "A federal court must order dismissal for mootness if the controversy ends prior to a decision even if a justiciable controversy existed when the suit began." *Citizen Center v. Gessler*, 770 F.3d 900, 906 (10th Cir. 2014), quoting *Jordan*, 654 F.3d at 1023. "Generally, a claim for prospective injunction becomes moot once the event to be enjoined has come and gone." *Citizen Center*, 770 F.3d at 907. Even in the context of "capable of repetition" scenarios, the "wrong . . . must be defined in terms of the precise controversy it spawns." *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005).

In the present case, the legislation at issue has been finally passed and signed into law by the Governor. The Second Regular Session of the Seventy-Fourth Colorado General Assembly has permanently adjourned. Most importantly, the prospect and content of similar (and presently unknowable) future legislation being introduced and reaching a legislative committee and public comment session – together with the formulation, content, adoption, and application by that committee of sufficiently comparable "decorum standards" – accompanied by objections from

the Appellants involved in the present case – is completely unknowable and speculative. It is virtually impossible to know the circumstances and content of what we would be enjoining and who would be affected. *Cf.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) ("Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles").

As the District Court explained in its Order, the same is true of Plaintiffs' request for declaratory relief. (JA245-247). As the District Court noted, "A plaintiff cannot maintain a declaratory action 'unless he or she can demonstrate a good chance of being likewise injured in the future'" – quoting *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991). "To be cognizable in a federal court, a suit 'must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

CONCLUSION

For the reasons discussed above, the Legislator Defendants respectfully request this Court to affirm the decision of the District Court to dismiss this case with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that:

X All other parties to this litigation are either: (1) represented by attorneys; or (2) have consented to electronic service in this case; or

On _____ I sent a copy of this Entry of Appearance Form to:

_____

at_____,
the last known address/email address, by

_____.
[state method of service]

Date: February 10, 2025

s/ Edward T. Ramey
Signature