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 Hon. Regina M. Rodriguez
(Dist. Ct. No. 1:24-cv-00913-RMR)

APPELLANTS' OPENING BRIEF

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Oral Argument Requested

DISCLOSURE STATEMENT

No additional disclosures required.

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, as the dispute arises under the United States Constitution and 42 U.S.C. § 1983. JA016.

Plaintiffs Gays Against Groomers, Rocky Mountain Women's Network, Rich Guggenheim, and Christina Goeke appeal the district court's final judgment entered on November 27, 2024, including, without limitation, the orders entered on that same date (1) granting Defendants' Rule 12(b)(6) motion to dismiss; (2) denying Plaintiffs' motion for preliminary injunction; and (3) denying Plaintiffs' motion to suspend practice standards mandating the use of government-prescribed ideological language. JA230-250. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Plaintiffs filed their notice of appeal on November 27, 2024. JA251-252. This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Does the First Amendment prohibit state actors from engaging in viewpoint discrimination during the public comment portions of legislative committee hearings, which the parties agree are limited public fora?

2. Do legislators enjoy absolute legislative immunity for enforcing a viewpoint-based censorship regime during a public comment period on pending legislation that results in the silencing of individuals who dissent from transgender ideology, including the concepts of "misgendering" and "deadnaming?"

3. Is legislative immunity a personal defense available to legislators sued in their official capacities for declarative and injunctive relief?

4. Are claims for injunctive and declaratory relief moot where defendant legislators still maintain vague and subjective decorum rules, have previously censored disfavored views on a current topic, do not disavow future enforcement, and have erased, but not restored, a public comment due to the viewpoint expressed?

5. In a case involving a dispute about transgender ideology, is it unlawful and prejudicial for the district court to require parties and their counsel to adhere to transgender ideology, including to conform their speech to the ideology by mandating the use of preferred pronouns contrary to their conscience and providing for a reporting mechanism for those who do not comply?

STATEMENT OF THE CASE

The Colorado General Assembly is the state legislature for Colorado and is a bicameral legislature, comprised of the House of Representatives and Senate. JA019. During the 74th regular session,

Colorado's legislators considered several bills concerning transgender issues. *Id.* The Assembly provides citizens with an opportunity to provide public comment on pending legislation during committee hearings. JA020; JA043-047. Although the Assembly calls these public comments "testimony," comments are not under oath and instead resemble the public-comment period at other governmental meetings. The Assembly invites members of the public to sign up to speak, via an online portal which requires speakers to indicate their name, phone, email address, whether the speaker is representing him or herself or an organization, and whether they wish to speak in favor, against, neutrally, for amendment, or questions only on a pending bill. JA021. Speakers also have the option to select their pronouns. *Id.*

In addition, the Colorado House and Senate have both published an identical online Guide to Public Hearings, which provides administrative rules that prohibit booing, cheering, or applauding during the hearing, and states the chair can have the sergeant-at-arms remove disruptive persons. JA022; *see also* https://perma.cc/5L6L-GRBQ and https://perma.cc/DGU2-WYCX. One administrative rule governing public speech before legislative committees states that the "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." JA021; JA047.

HB24-1071 made it easier for transgender individuals with felony convictions to legally change their names. JA022. The Prime Sponsors of HB24-1071 included Defendants Rep. Garcia and Sen. Michaelson Jenet. JA023; *see also:* https://perma.cc/55LY-4FBB**.** HB24-1071's sponsors and supporters also referred to it as "Tiara's law"—Tiara being the assumed name of a biological male with a criminal record. JA023. Tiara is legally known as Duane Powell, a.k.a. Duane Antonio Kelley or Tiara Latrice Kelley, and has numerous criminal convictions, which identify him as a male. *Id.;* JA093; JA143. Because Powell's criminal history prevented him from legally changing his name in Colorado, Powell advocated for a change in the law. JA023.

Plaintiffs Rich Guggenheim and Christina Goeke, both as individuals and as members of Gays Against Groomers (GAG) and Rocky Mountain Women's Network (RMWN), respectively, opposed HB24-1071 because they believe it will make it easier for transgender individuals to conceal criminal convictions, posing a danger to children, women, and vulnerable populations. JA023. They also disagree with the concepts of "misgendering" or "deadnaming." *Id.* Plaintiffs consider adherence to a transgender person's pronoun preferences, assumed gender, or assumed name to be a form of lying. JA024. And both Guggenheim and Goeke consider pronoun rituals, and the concepts of deadnaming and misgendering, to be degrading and demeaning to themselves. *Id.*

Both Goeke and Guggenheim signed up to speak on HB24-1071 before the House Judiciary Committee on January 30, 2024, although Guggenheim signed up to comment remotely. JA024. When the bill came up for comment, Defendant Rep. Garcia thanked her colleagues "for engaging in respectful discourse by not using derogatory language or misgendering witnesses or using a witness's deadname, but rather referring to the witnesses as their stated names and gender pronouns." JA025; JA050-051. Chair Weissman "affirmed and ratified" these rules. *Id*.

Upon hearing these rules, Guggenheim left his place in line. JA025. He could not deliver his views and GAG's views if he could not use language he was certain would be deemed "derogatory" about the bill's namesake, or use language denying the validity of trans ideology. JA025-026.

Goeke, who had been patiently waiting her turn to speak, did not get through her presentation before being repeatedly interrupted by Defendant Rep. Weissman for violating Defendants' rules against deadnaming, misgendering, and using allegedly "disrespectful" language about "Tiara," the bill's namesake. JA026-028; JA065-067. In particular, the legislators took issue with Goeke correctly pointing out that "Tiara" is "an admitted former prostitute" who "works with children . . . young boys . . . who . . . they do burlesque with." JA066-067; JA026-027. After Weissman recessed the hearing without letting

Goeke use her allotted time, she vented her frustration at the discriminatory treatment by stating "I let them spew their bullshit about gender" and Rep. Herod yelled at Goeke to "stop" and gestured to the sergeant-at-arms to remove her. JA028; JA147; JA253 (video on thumb drive).

When pro-trans audience members booed or hissed at Goeke during her speech, Chair Weissman did not enforce his decorum rule against them. JA065-067; JA253 (video with hissing). Goeke was not allowed to use her full three minutes of allotted speaking time. JA028. Other speakers representing pro-trans viewpoints were able to give their testimony without being interrupted, having their time limited or terminated, or being excluded from the hearing—including Duane Powell/Kelley/Tiara and representatives from pro-trans groups such as Bread and Roses, the ACLU, Parasol Patrol, and Black Sex Workers of Colorado. JA028-029; JA054-064, JA068-087.

On March 27, 2024, the Senate Judiciary Committee held a hearing on HB24-1071, which provided for public comment. JA029. Both Goeke and Guggenheim signed up to speak in-person and in opposition to the bill. *Id.* At the opening of public comment about the bill, Defendant Chair Gonzalez announced that she would not allow witnesses to fail to treat others with dignity and respect or a lack of decorum, and she threatened to have witnesses removed if they failed to exhibit decorum, dignity, or respect. JA029; JA084. Sen. Michaelson Jenet spoke next

and purported to "elevate" the words of Chair Gonzalez by announcing that witnesses should not use "derogatory language," "misgender," "deadname," or otherwise "disparage" those present. JA029; JA085-086. Chair Gonzalez adopted Sen. Michaelson Jenet's speech restrictions. JA030; JA086.

Goeke spoke in opposition to the bill arguing that it would allow felons to conceal their criminal history and endanger single moms, young women, or children. JA030; JA101-102. When she attempted to refer to "Tiara" as "Mr. Duane Powell," Chair Gonzalez gaveled Goeke down and interrupted her. *Id.* Goeke attempted to state her opinion that Duane Powell was impersonating a woman and appropriating a female name. *Id*.

In response, Chair Gonzalez enforced her speech rules against deadnaming or misgendering. JA030; JA101-102.[1] Goeke stated that she would not tell a lie and that "[a] man is a man." JA101. Chair Gonzalez reminded Goeke that she was not allowed to deadname or misgender. JA102. Goeke responded that she would not lie and could not advocate for women if she is not allowed to say what a woman is. *Id.*

[1] Paragraphs 56-58, 60-62 of the Complaint contain several typos incorrectly identifying the chair as "Chair Garcia." JA030-032. The chair of that hearing was Sen. Gonzalez, who is correctly identified as the chair earlier in the Complaint on JA029, and in the hearing transcripts filed as Exhibits C and D to the Complaint. JA082-098; JA099-JA103; JA008 (Dkt. 1 entry: listing exhibits).

Chair Gonzalez told Goeke she had 24 seconds left to testify, but she again gaveled over Goeke's speech and cut-off Goeke's time as soon as Goeke dissented from trans ideology by saying "Mr. Duane Powell," and Goeke was not allowed to complete her public comment. JA030; JA102-103. Significant portions of Ms. Goeke's speech were later erased from the state's audio record of the Senate Judiciary Committee hearing. JA030-031; *compare* JA092-093 *with* JA099-103.

Guggenheim also spoke in opposition to the bill. JA031; JA096. Guggenheim stated he was speaking as a homosexual man, and he attempted to share historical facts about the gay liberation movement from Stonewall in 1969 by discussing Malcom Michaels Jr., and Tony Rivera, two (long-deceased) black gay male sex workers and drag queens often falsely referred to as transgender women named Marsha P. Johnson and Sylvia Rivera. JA031; JA096. Chair Gonzalez interrupted Guggenheim, attempted to cut his microphone, and reminded Guggenheim of the rule against deadnaming or misgendering. JA032; JA096. Guggenheim was not allowed to complete his testimony and Chair Gonzalez cut off almost half of his time to speak against the bill. JA031-032; JA096-097.

During the hearing, proponents of the bill were not interrupted or silenced. JA032. At times, at least one pro-trans audience member raised his hands or attempted to signal when he believed a witness was

transgressing the speech restrictions against deadnaming or misgendering. JA032; JA088-091.

At the time Plaintiffs filed their Complaint, the legislative session had not yet ended (JA033). The First Regular Session of the 75th General Assembly began on January 8, 2025.[2] Defendants, along with others in the Colorado legislature, are expected to continue to push trans ideology in their proposed laws. JA033. Both Guggenheim and Goeke intend to keep submitting public comments on bills and other legislative issues that would promote trans ideology. JA034. Thus, both face the prospect of self-censorship or state censorship during future public comments on trans issues. *Id*.

On April 4, 2024, Plaintiffs filed this suit against Defendants for nominal damages, injunctive, and declaratory relief in the U.S. District Court for the District of Colorado. JA008. On April 16, 2024, Plaintiffs moved for a preliminary injunction, resulting in re-assignment of the case to Judge Regina Rodriguez. JA009. Judge Rodriguez maintains civil practice standards that require the use of preferred pronouns. JA166 (citing RMR Civ. Practice Standards 43.1A(a)(1) & (2)(D)). On

[2] COLARDO GENERAL ASSEMBLY, *Session Schedule* (last visited Jan. 8, 2025), https://perma.cc/62UH-4XQW. This Court may take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

April 26, 2024, Plaintiffs filed a motion to suspend those civil practice standards during the pendency of the case. JA010

On May 14, 0224, Defendants moved to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6). JA010. The district court did not immediately act on any of the pending motions, and the case sat dormant for almost six months. JA011. On November 27, 2024, the district court granted Defendants' motion to dismiss based on absolute legislative immunity, reasoning that the alleged acts were related to the legislative function of overseeing public testimony on pending legislation. JA234-243. The court alternatively held that the case was moot because the legislation had been signed into law and the legislature was no longer in session. JA243-247. In the same order, the district court also denied as moot Plaintiffs' motion for preliminary injunction and motion to suspend practice rules on pronoun usage. JA248.

SUMMARY OF ARGUMENT

"If liberty means anything at all, it means the right to tell people what they do not want to hear." *303 Creative LLC v. Elenis*, 600 U.S. 570, 602 (2023) (quoting George Orwell) (cleaned up). During the last General Assembly, the defendant legislators enforced an illegal censorship regime against citizens who wished to comment about "Tiara's law." Defendants openly proclaimed their intent to censor

disfavored speech and then operationalized their restrictions. And now, the next session is just getting under way.

The district court incorrectly held that Defendants were entitled to legislative immunity for the function of enforcing their speech restrictions. Moreover, legislative immunity is not a personal immunity defense available to avoid equitable relief against state legislators sued in their official capacities. The parties agreed that the public-comment portions of legislative committee hearings constitute limited public fora, in which viewpoint discrimination is illegal. Allowing legislative immunity to take precedence over well-established First Amendment jurisprudence would unsettle the law by effectively repealing free speech protections at many public hearings, and invite viewpoint-based censorship by whichever party controls the legislative majority.

The district court also erred in finding that Plaintiffs' equitable-relief claims were moot because the General Assembly's vague and subjective decorum rules remain extant—as does the erasure of Christina Goeke's comments—and Defendants have expressly *not* disavowed future enforcement of their viewpoint-based restrictions. Moreover, the district court overlooked Fed. R. Civ. P. 25(d), which provides for automatic substitution of officers sued in their official capacity, in the event any such officers cease to hold office.

This Court should reverse the order granting Defendants' motion to dismiss, and remand the case with instructions to grant Defendants'

motions for preliminary injunction and suspension of the district court's pronoun mandate.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews grants of Fed. R. Civ. P. 12(b)(6) motions to dismiss, mootness, immunity and other legal questions on a de novo basis. *InfoCision Mgmt. Corp. v. Griswold*, No. 22-1264, 2024 U.S. App. LEXIS 20168, at *13 (10th Cir. Aug. 9, 2024) (mootness); *Yassein v. Lewis*, No. 21-1436, 2022 U.S. App. LEXIS 19706, at *3 (10th Cir. July 18, 2022) (motions to dismiss); *Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019) (immunity); *Kamplain v. Curry Cty. Bd. of Com'rs*, 159 F.3d 1248, 1250 (10th Cir. 1998) (legislative immunity). Preliminary injunction denials are reviewed for abuse of discretion, but the district court's legal conclusions are reviewed de novo, while its factual findings are reviewed for clear error. *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1249 (10th Cir. 2024).

II. THE USE OF PRONOUNS AND NAMES IN SPEECH REFLECT IDEOLOGICAL VIEWPOINTS

A. Gender ideology proscribes the concepts of "misgendering" and "deadnaming"

A central issue in this case is whether government officials can require citizens to employ approved terminology when discussing

transgender policy and persons, so as to avoid "misgendering" and a subset of misgendering referred to as "deadnaming."

As explained in the Complaint, "'Misgendering' is 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." JA024. "'Deadnaming' is the act of referring to a transgender person by a name they used prior to 'transitioning,' such as their birth name." *Id.; see also* Chan Tov McNamarah, *Misgendering*, 109 Calif. L. Rev. 2227, 2254-2255, 2261-2264 (2021) (discussing deadnaming and various levels of "culpability" for misgendering). In practical terms, that means using a trans person's preferred pronouns and name, even if those terms do not match their biological sex[3] or legal name.

To Plaintiffs, these concepts are part of "gender ideology." Yet even the use of that terminology is itself contested, providing further evidence of an ongoing debate.[4] This resistance to categorization is not

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[3] "Humans and most other mammals have two sex chromosomes, X and Y, that in combination determine the sex of an individual." NIH: NATIONAL HUMAN GENOME RESEARCH INSTITUTE, *Sex Chromosome,* https://perma.cc/J8LD-JKZN.

[4] *Compare* Jay Richards, *Heritage Commentary: What is Gender Ideology?* (July 7, 2023), https://perma.cc/2AZ4-V9BP ("The charge is not so much that the term gender ideology is unfair or inaccurate . . . rather, that it doesn't refer to anything at all. Yet clearly such an ideology exists and can be named."), *with* GLAAD, *Fact Sheet for Reporters – Term to Avoid: "Gender Ideology"* (Dec. 3, 2024),

surprising from an ideology based on resistance to categories.[5] For example, if one believes that gender is fluid, then other categories can be fluid too. And for its proponents, denying the existence of "gender ideology" has the added benefit of insulating that ideology from criticism.

But whether "misgendering" is based on an ideology, morality, or other set of beliefs, this concept has an unmistakable political valence. Indeed, proscribing the use of words to discuss people and ideas is of

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https://perma.cc/2TES-VKXF ("'Gender ideology' is not a term transgender people use to describe themselves, it is an inaccurate term deployed by opponents to undermine and dehumanize transgender and nonbinary people"); *see also* Ernie Walton, *Gender Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools,* 34 Regent U.L. Rev. 219, 221 (2021-22).

[5] Queer theory calls for "queering" existing categories. *See* Florence Ashley, *Genderfucking as a Critical Legal Methodology,* 69 McGill L.J. 177, 206-208 (2024) (discussing queer theory as "defined by its emphasis on queering as a methodology that blurs the boundaries of gender and sexual belonging"). The author similarly advocates "messiness" and resisting gender categories "on the path towards gender liberation." *Id.* at 177, 179. As the name implies, "gender liberation" is not just a utopian end-state, but a direct-action political movement with professed tenets. GENDER LIBERATION MOVEMENT, Home (last visited Dec. 30, 2024), https://perma.cc/Q962-85AU (describing the "Four Pillars of Gender Liberation" as bodily autonomy, self-determination, collectivism, and fulfillment).

obvious sociopolitical significance, touching on identity, epistemology, and the speaker's self-respect.[6]

The broader issue of gender identity is unquestionably a "sensitive political topic[]" that is a matter of "profound 'value and concern to the public.'" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 914 (2018) (quoting *Snyder* v. *Phelps*, 562 U.S. 443, 453 (2011)). Such speech "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Id.* (quotation marks omitted). And the conscious use (or non-use) of pronouns is unquestionably a subset of the disputed topic of gender identity.

For example, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), the Sixth Circuit held that a state university professor had stated a viable free-speech claim where administrators had disciplined him for failing to use a student's preferred pronouns in class. *Id.* at 507-09. "[T]he '*point* of his speech' (or his refusal to speak in a particular manner) was to convey a message." *Id.* at 508 (citations omitted). "[H]is speech concerns a struggle over the social control of language in a

[6] It is a feature of authoritarian systems that people are required to parrot the government's lies to maintaining their status. During Soviet times, Solzhenitsyn advocated non-participation in lying as an act of resistance. Aleksandr Solzhenitsyn, *Live Not By Lies* (1974), https://www.solzhenitsyncenter.org/live-not-by-lies. Plaintiffs Christina Goeke and Rich Guggenheim both sought to exercise an analogous non-participation in lying.

crucial debate about the nature and foundation, or indeed real existence, of the sexes." *Id.* (internal quotation marks omitted). "That is, his mode of address *was* the message." *Id.*

Similarly, in *Darren Patterson Christian Academy v. Roy*, 699 F. Supp. 3d 1163 (D. Colo. 2023), another District of Colorado judge held that the plaintiff was likely to succeed on the merits of its 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." *Id.* at 1187; *see also Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.,* 83 F.4th 658, 668 (8th Cir. 2023) (holding that because the policy does not define or limit the term, it could cover any speech about gender identity that a school administrator deems "disrespectful" of another student's gender identity); *Schmidt v. Siedel,* 717 F. Supp. 3d 1147, 1160 (D. Wyo. 2023) (finding viewpoint discrimination in limited public forum where university prevented speaker from stating that female-identifying trans student was a male); *id.,* Case No. 2:23-cv-00101-NDF, Dkt. 29 (Dist. Wyo. Oct. 30, 2023) (permanently enjoining university officials from censoring plaintiff's "views on the sexual identity of Artemis Langford").

The proposition that there is an ongoing debate about gender identity and pronouns is illustrated by Judge Duncan's opinion in *United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020) as well as the knock-on effects of that opinion. First, it elicited a strongly worded

dissent from Judge Dennis, *id.* at 258, showing that even Fifth Circuit judges disagree on this topic. Second, some students (and administrators) at Stanford Law School also vocally disagreed with Judge Duncan when he later attempted to address the school's Federalist Society chapter. Aaron Sibarium, *'Dogs—t': Federal Judge Decries Disruption of His Remarks by Stanford Law Students and Calls for Termination of the Stanford Dean Who Joined the Mob,* The Washington Free Beacon (March 10, 2023), https://perma.cc/QPW9-C4Q7 ("One source of the students' ire was Duncan's refusal, in a 2020 opinion, to use a transgender sex offender's preferred pronouns."). The resulting free-speech meltdown in Palo Alto led to the Diversity Dean losing her job, and it caused at least two other circuit court judges to boycott Stanford Law for clerk hiring. Aaron Sibarium, *Federal Judges Say They Won't Hire Clerks From Stanford Law School,* The Washington Free Beacon (April 1, 2023), https://perma.cc/VG8Y-BBRY; Greta Reich, *DEI dean leaves Stanford Law School,* The Stanford Daily (Aug. 23, 2023), https://perma.cc/BTF8-8UMH.

These recent events show that there is an ongoing, heavily contested debate about pronouns and gender identity in America. And that's because pronouns and language about gender identity express moral and political viewpoints that many people—like the plaintiffs here—hold deeply.

B. Pronoun battles are not new

Debates over pronouns have been around for centuries. Even before the Founding of the United States, the abolitionist and pacifist Quakers succeeded in offending many contemporaries by rejecting their pronoun rituals. "Pronouns are the most political parts of speech." Teresa M. Bejan, *What Quakers Can Teach Us About the Politics of Pronouns*, N.Y. Times (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/sunday/pronouns-quakers.html. Seventeenth-century Quakers rebelled against the pronoun standards of their day, which proscribed what was then the second-person plural pronoun, "you," to address a higher-class individual, while assigning "thou" and "thee" to commoners; the egalitarian and humble Quakers used "thou" and "thee" with everyone, to some people's consternation. *Id.* "[Some] Quakers produced pamphlets . . . to argue that their use of 'thee' and 'thou' was grammatically—as well as theologically and politically—correct." *Id.*

Quakers were not alone in being "sensitive to the humble pronoun's ability to reinforce hierarchies by encoding invidious distinctions into language itself." *Id.* "[I]n the latter half of the twentieth century, gendered pronouns became imbued with new meaning," as "[t]he feminist movement came to view the generic use of masculine pronouns as 'a crucial mechanism for the conceptual invisibility of women'" and a

means of reenforcing prejudice. *Meriwether*, 992 F.3d at 508-09 (citation omitted).

Thus, the contemporary debate about pronouns and gender identity is but the latest iteration in a disagreement about the interplay of politics, identity, hierarchy, self-expression, and modes of address. But in America, it is not for the government to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), however tempting it might be for those who are convinced that they are on the correct side of history.

III. VIEWPOINT DISCRIMINATION IS ILLEGAL IN LIMITED PUBLIC FORA

A. Defendants admit that the public-testimony portions of legislative committee meetings are limited public fora

When citizen speech occurs on actual or metaphysical government property, forum analysis determines the applicable constitutional standard and thus constitutes a natural analytical starting point. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Pollak v. Wilson*, No. 22-8017, 2022 U.S. App. LEXIS 35636, at *3 (10th Cir. Dec. 27, 2022); *Swanson v. Griffin*, No. 21-2034, 2022 U.S. App. LEXIS 5179, at *7-9 (10th Cir. Feb. 25, 2022). Here the parties agreed that the relevant forum was a limited public forum, but the district court skipped forum analysis, an important step in First

Amendment cases.[7] *See Pollak,* 2022 U.S. App. LEXIS 35636, at *17 ("The parties agree that the Board Meeting was a limited public forum, where restrictions on speech are constitutional if they are viewpoint neutral and reasonable.") (cleaned up).

The forum at issue is the "public testimony" or public comment portion of Colorado legislative committee hearings, where the House and Senate have opened part of their committee hearings to input from members of the public. These legislative bodies have provided citizens with "an opportunity to express their views and have them incorporated into the official legislative record[,]" and speak for or against bills, speak neutrally, answer questions, or advocate for amendment. JA0220-021; JA043; JA156. These characteristics support the conclusion that the public-comment portions of the hearings are limited public fora.

In limited public fora, the state may impose reasonable, content-based speech restrictions that preserve the purposes of the forum, but it may not engage in viewpoint discrimination. *Pollak,* 2022 U.S. App. LEXIS 35636, at *17-18; *Summum v. Callaghan*, 130 F.3d 906, 917 (10th Cir. 1997) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995)).

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[7] Defendants: "There appears to be *no real dispute* that the legislative committee hearing in question *were limited public forums."* JA225 (emphasis added); *see also* JA183 ("To serve the purposes of this limited forum, the Defendant legislators requested participating members to confine their comments to 'respectful discourse'…").

"Legislative meetings that permit public comment are typically considered limited public forums." *Komatsu v. City of N.Y.*, No. 20-CV-7046 (ER), 2021 U.S. Dist. LEXIS 14522, at *4 (S.D.N.Y. Jan. 26, 2021) (citations omitted); *Young v. Cortune*, No. 17-329 (NLH/KMW), 2019 U.S. Dist. LEXIS 107928, at *12-13 (D.N.J. June 26, 2019) (State Senate Budget and Appropriations Committee hearing on state takeover of Atlantic City was a limited public forum); *see also Wenthold v. City of Farmers Branch*, No. 3:11-CV-0748-B, 2012 U.S. Dist. LEXIS 18452, at *24-26 (N.D. Tex. Feb. 14, 2012) (collecting cases).

While this Court has never directly addressed whether the public-comment portions of legislative hearings are limited public fora, other courts have, and that conclusion comports with this Court's precedents. *Compare Shero v. City of Grove,* 510 F.3d 1196, 1202-03 (10th Cir. 2007) (not reaching question of whether a city council meeting is a designated or limited public forum); *Griffin v. Bryant*, 677 F. App'x 458, 462 n.7 (10th Cir. 2017) (not deciding forum issue in village-council context) *with Doe v. City of Albuquerque*, 667 F.3d 1111, 1129-30 (10th Cir. 2012) (city libraries are designated public fora); *Pollak,* 2022 U.S. App. LEXIS 35636, at *17-18 (accepting parties conclusion that school-board meeting was a limited public forum); *Galena v. Leone*, 638 F.3d 186, 198-99 (3d Cir. 2011) (county council meeting is a limited public forum); *Norse v. City of Santa Cruz*, 629 F.3d 966, 975-76 (9th Cir. 2010) (city council meeting is a limited public forum); *Griffin v. Bryant*, 30 F. Supp.

3d 1139, 1180-81 (D.N.M. 2014) (holding that city council meetings are limited public fora; collecting out-of-circuit cases).

That conclusion is similarly supported by this Court's test for determining the type of forum: "(1) the purpose of the forum; (2) the extent of use of the forum; and (3) the government's intent in creating a designated public forum." *Callaghan,* 130 F.3d at 915; *City of Albuquerque*, 667 F.3d at 1129. The stated purpose for "public testimony" at legislative committee hearings is so that *"citizens* have an opportunity to *express their views* and have them incorporated into the official legislative record." JA043 (emphasis added). This is phrased as an invitation to the public. Moreover, both the online sign-up interface for public comment, as well as the transcript of both committee hearings establish a practice of allowing members of the public to use that forum to speak in support of a bill, criticize a bill, express neutrality, or advocate for amendment. JA048-081; JA082-098; JA156. But Defendants improperly used their decorum rules to limit the way in which the public could criticize HB24-1071, while letting proponents speak freely.[8]

[8] Of course, Defendants can enforce reasonable restrictions in that forum, such as limiting public comments to the bills on the committee agenda, enforcing time-limits, or preventing audience members from interrupting others' testimony. But that is not what is happening here. Likewise, the legislators are obviously free to express their own opinions during these hearings, but at issue here are the citizen's views, whose expression the legislators invited.

Even if this Court concluded that the public-comment portions of legislative committee hearings are not limited public fora, but are instead non-public fora, it would not matter because Defendants violate a cardinal rule of the First Amendment by engaging in viewpoint discrimination. *Callaghan*, 130 F.3d at 916 (explaining that viewpoint discrimination is still prohibited in non-public fora).

B. Defendants' policy and practice of prohibiting "misgendering" and "deadnaming" and requiring "respectfulness" as a matter of decorum during public comments is viewpoint-based

While Defendants invited the public to comment on "Tiara's" law, they made it clear that no speaker could "deadname" or "misgender" the bill's namesake by, for example, arguing that "Tiara" is a man named Duane Powell (a.k.a. Duane Kelley), or "disparage" Powell by noting his extensive criminal history and arguing that he should not be featuring minors in burlesque shows. This is textbook viewpoint discrimination.

When the government opens a forum for discussion on a topic—in this case "Tiara's law"— the government may not pick and choose which viewpoints will be heard. "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger,* 515 U.S. at 831. While Defendants could restrict speakers to the topic of "Tiara's law" (a content restriction), they could not restrict which viewpoints

speakers expressed on that topic or proscribe how speakers chose to craft their message. Nor could they require speakers to be "respectful" in their criticisms.[9]

"In the realm of private speech or expression, government regulation may not favor one speaker over another . . . Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger,* 515 U.S. at 828-29 (cleaned up); *see also Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1233 (10th Cir. 2021) (striking down state law because it "places pro-animal facility viewpoints above anti-animal facility viewpoints"). "Except possibly with respect to topics such as obscenity, viewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny." *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999); *see also Moms for Liberty v. Brevard Pub. Sch.*, 118 F.4th 1324, 1332 (11th Cir. 2024) (noting that the Supreme Court has come close to a categorical prohibition on viewpoint discrimination).[10]

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[9] Defendants selectively restricted "disparagement" and called for "civility," "respect," and "decorum" from gender-ideology dissenters. Plaintiffs refer to these requirements interchangeably as Defendants' "decorum" and "respectfulness" rules.

[10] Unprotected speech, such as criminal threats, fighting words, or legal obscenity, can of course be restricted, but Plaintiffs' speech was protected political opinion. *See Animal Legal Def. Fund,* 9 F.4th at 1229. Even when restricting fighting words, the government may not discriminate among viewpoints. *R. A. V. v. St. Paul*, 505 U.S. 377, 391-92 (1992).

Defendants also may not rely on the canard that offensive speech can be banned because it might upset some listeners or because speakers could choose to express their views in ways government officials find to be nicer or more civil. The government may not discriminate against ideas that offend. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019); *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality) ("Giving offense is a viewpoint."). "A viewpoint need not be political; any form of support or opposition to an idea could be considered a viewpoint." *Marshall v. Amuso*, 571 F. Supp. 3d 412, 421 (E.D. Pa. 2021) (citations omitted). So too with the concepts of misgendering or deadnaming.

The First Amendment "protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Matal,* 582 U.S. at 249 (Kennedy, J., concurring). And the government may not rely on "audience reaction" (or the "hecklers veto") to restrict speech. *Id.* at 250.

Defendants claim that their restrictions were in place "so that all witness felt comfortable coming forward to state their reasons for supporting or opposing the bill without fear of being treated derogatorily." JA183. But this attempt to create a metaphysical "safe space" is just another form of viewpoint discrimination and had the practical effect of blunting political criticism.

Tellingly, Defendants even censored Rich Guggenheim from expressing his views about the gender identities of Malcom Michaels Jr.

and Tony Rivera, two historical figures and drag queens, neither of whom were present nor able to be offended because they are both deceased. JA031-032; JA096-097; JA138; JA159-160. Defendants' application of their "decorum rules" to protect the "feelings" of dead public figures illustrates that these rules are just a pretext for censoring disfavored viewpoints.

Likewise, Colorado legislators may not prevent Americans from criticizing favored groups such as government employees, trans people, or the namesakes of proposed bills in order to protect those groups from uncomfortable ideas. Defendants' selective application of their decorum rules is indistinguishable from anti-disparagement and respectfulness rules that have been held to be viewpoint-based in analogous contexts.

Thus, Defendants' argument that "being asked to be respectful of others within the context of the forum and not personally and publicly disparage other member of the community by engaging in personal references that were known to be *offensive* and *hurtful to those persons* . . . is not viewpoint discrimination" (JA227-228) (emphasis added) is contrary to well-established First Amendment law.

"Restrictions that bar offensive or otherwise unwelcome speech are impermissible, regardless of the forum in which the government seeks to impose them." *Moms for Liberty,* 118 F.4th at 1334; *see also Am. Freedom Def. Initiative v. King County*, 904 F.3d 1126, 1131 (9th Cir. 2018) (transit ad policy's anti-disparagement clause in limited public

forum discriminated on the basis of viewpoint). Officials cannot restrict discourse to "happy-talk." *Moms for Liberty,* 118 F.4th at 1334 (citing *Matal,* 582 U.S. at 246 (plurality opinion); *id.* at 249 (Kennedy, J., concurring in part and concurring in the judgment)).

Similarly, proscribing comments that are "abusive" or "personally directed" is a form of impermissible viewpoint discrimination. *Ison v. Madison Local Sch. Dist. Bd. of Educ.,* 3 F.4th 887, 895 (6th Cir. 2021) (policy's "restrictions on abusive, personally directed, and antagonistic speech, facially and as-applied, violate the First Amendment"); *Marshall,* 571 F. Supp. 3d at 422 (enjoining school board's restriction on so-called 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).

To fully exercise their rights to criticize government actors or proposed legislation, Americans must be able to name names and talk about specific people when relevant to the topic at hand. For example, in this case, the bill in question was promoted by its supporters as "Tiara's law," meaning that a robust discussion about who Tiara is and why that matters was open to debate—even on terms some might find uncomfortable or unkind. For future trans-related bills, it may well be

that Kelly Loving[11] or another person's name is used to promote legislation or whose experience provides a salient anecdote or reason to support or oppose a bill. Government officials should not be allowed to name a bill after someone and then declare that topic off-limits to criticism.

Defendants cannot survive strict scrutiny or justify their viewpoint discrimination. They openly announced their viewpoint-based speech restrictions and unreservedly applied them. And they have not disavowed that they will do so again. It is not a compelling interest to say that they wanted to silence critics to spare their constituents or political supporters from feeling uncomfortable or unsafe because they heard ideas they disliked. And it is not as if trans individuals do not already know that some Coloradans have different views on trans issues. Adult transgender citizens ought not be shocked or mentally incapacitated by learning that people disagree with them about controversial political topics. If they are, it is not the First Amendment which must yield.

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[11] In August 2024, a Denver-based trans-rights group announced plans to advocate for legislation to be called the "Kelly Loving Transgender Bill of Rights." Jaleesa Irizarry, *Colorado group plans to introduce transgender bill of rights in honor of Club Q victim,* 9News (Aug. 15, 2024), https://www.9news.com/article/news/local/lgbtq/colorado-group-plans-to-introduce-transgender-bill-of-rights-in-honor-of-club-q-victim/73-613a9c25-282b-4ad6-b766-360200c68379.

There is also no dispute that Defendants acted intentionally when the record shows that they sought to limit Plaintiffs' speech about "Tiara's law" by banning "deadnaming" and "misgendering," and by mandating "respectful discourse." JA050-051; JA083-084, JA086. And they acted on these openly stated intentions. JA064-067; JA092-103. Even worse, they later went back and erased much of Christina Goeke's Senate speech from the official audio record. *Compare* JA093 ("No audio from 6:34:41 PM to 6:36:35 PM"), *with* JA099-103 (transcribing erased comments). Defendants found Goeke's comments so offensive that it was not enough to interrupt her and cut her off—her partially expressed sentiments had to be scrubbed from history altogether.[12]

IV. DEFENDANTS DO NOT ENJOY LEGISLATIVE IMMUNITY FOR CENSORING CITIZENS' PUBLIC COMMENTS

As the officials claiming absolute immunity, Defendants bore 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

[12] Defendants' literal erasure of Goeke's views brings to life the workings of Orwell's Ministry of Truth. "In the walls of the cubicle there were three orifices . . . . Similar slits existed in thousands or tens of thousands throughout the building, not only in every room but at short intervals in every corridor. For some reason they were nicknamed memory holes." GEORGE ORWELL, ANIMAL FARM AND 1984 122 (Houghton Mifflin Harcourt 2003) (1949).

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, this Court has held that personal defenses like legislative immunity apply only to individual-capacity claims. *Sable v. Myers,* 563 F.3d 1120, 1123 (10th Cir. 2009).

The district court erred in holding that legislative immunity applied to Defendants' actions enforcing their censorship regime. While those enforcement acts may have occurred while legislation was pending, they are distinct from the functions of preparing or voting on legislation, and Defendants' wrongful conduct occurred in a limited public forum where the legislators had invited members of the public to provide their own views. "Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829. Defendants' status as legislators does not immunize them from the limitations imposed by the First Amendment when they censor citizens in this way.

The practical effect of the district court's holding is to allow elected officials to open a limited public forum and openly discriminate against disfavored views simply because their title is "legislator," rather than "Secretary" or "Governor." Such a result is contrary to this Court's (and

the Supreme Court's) precedent limiting legislative immunity to personal-capacity claims aimed at true legislative activity, and it invites whichever political party holds the majority to censor disfavored views with impunity. This would effectively end the First Amendment's well-established protection of speech during many public comment periods.

A. Enforcing or administering a censorship regime in a limited public forum is not legislating

Even if legislative immunity applies to some official-capacity claims, it does not apply to any of Plaintiffs' claims—whether individual or official—because the act of enforcing unconstitutional customs, policies, or practices is an executive activity, distinct from legislating. Arguably Defendants are immune from actions seeking to hold them personally liable for the legislative act of adopting their unconstitutional censorship regime or from an injunction directing legislators to rescind or amend it. But what Plaintiffs sought to enjoin (and asked the district court to declare unconstitutional) is Defendants' *enforcement* of their speech restrictions. JA035, JA038, JA040-041. That makes this lawsuit no different than any other pre-enforcement suit to stop a government official from enforcing an unconstitutional law or policy.

In *Supreme Court v. Consumers Union of United States*, 446 U.S. 719 (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).

Id. at 732-36. 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. 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 its decorum rules or its restrictions on "misgendering," "deadnaming," or "disrespectful" speech.[13] Instead, Plaintiffs request an injunction that is analogous to the one that 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* JA040-041; JA161-162.

When civil rights plaintiffs challenge a government speech restriction, they ordinarily sue the enforcement officials, not the legislators or rule-making body. And while courts "cannot make even an unconstitutional [rule] disappear," they can prevent enforcement of

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

those rules through declaratory or injunctive relief restraining the enforcers. *Steffel v. Thompson,* 415 U.S. 452, 469-70 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring)). Often, 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) (unpublished) ("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"). Likewise, legislators are not immune when enforcing unconstitutional laws or policies simply because their title is "legislator."

Defendants act 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. And it would effectively end free speech protections at a wide array of public meetings presided over by officials possessing legislative authority.

This Court has also repeatedly held that restricting speech at public hearings is an administrative act, outside the bounds of legislative immunity. *Kamplain*, 159 F.3d at 1253 (". . . 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 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.") (emphasis added); *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").[14]

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 little different from

[14] Functionally, administrative acts may often be co-extensive with enforcement acts, but these related concepts arise from slightly different lines of cases. Plaintiffs submit that Defendants lack immunity whether these are called enforcement acts, administrative acts, or both.

ejecting or temporarily banning a speaker.[15] So is letting pro-trans audience members boo, hiss, and jeer unchecked while Goeke attempted to speak. JA026-029.

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 to the actions of special investigative committees, *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (summoning another politician against his will 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 Defendants have cited no cases where legislators were held to have absolute immunity in an official-capacity suit seeking equitable relief for openly enforcing viewpoint discriminatory speech restrictions in a limited public forum. Forcing citizens to use—and refrain from using—certain words and erasing comments from the record are not

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[15] Defendants incorrectly stated that "no one was ejected" from a committee meeting. JA180. 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. JA028; JA253 (video). And as Chair, Defendant Weissman ostensibly had the authority to ask the sergeant to remove persons he deemed "disruptive." JA021.

traditional legislative functions—especially where the legislature has invited those citizens to express their own views.

Legislators are of course free to express their own views and disagree with Plaintiffs, to use constituents' favored pronouns, and to sponsor and vote for trans-related legislation. While Defendants' hostile statements during the hearing are evidence of both motive and intent to discriminate, they are not themselves actionable. What is actionable is the conduct of interrupting, stealing time, cutting off disfavored speech, and erasing public comments.

B. Legislative immunity is a personal defense that does not apply to official-capacity claims for injunctive and declaratory relief

While legislative immunity is a personal defense available to protect individual state legislators from civil damages allegedly caused by core legislative activity, in this circuit, that immunity is not available for an official-capacity claim seeking injunctive or declaratory relief because such claims are deemed to be against "the legislative body itself." *Sable,* 563 F.3d at 1123.

Although both Defendants and the district court cited *Sable* in passing, neither really grappled with this Court's conclusion that legislative immunity is a *personal* defense. "[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).* Indeed, the district ignored binding circuit authority and incorrectly relied on out-of-circuit decisions to hold otherwise. JA238.

The district court also contradicted long-standing precedent establishing that official-capacity suits naming officials are functionally suits against the government entity when it effectively converted those claims into personal claims. The district court held that "because Plaintiffs' official capacity claims are claims against the officials and not the state, it follows that they may not assert state sovereign immunity but may assert the personal defense of legislative immunity." JA238 But *Sable* held otherwise, and so has the Supreme Court.

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;

Hafer v. Melo, 502 U.S. 21, 25 (1991) ("[T]he *only* immunities available to the defendant in an official-capacity action are those that the government entity possesses.") (emphasis added); *Harrell v. Ross*, No. 23-8007, 2024 U.S. App. LEXIS 2317, at *14 (10th Cir. Feb. 2, 2024) ("An official capacity suit is, in all respects other than name, to be treated as a suit against the entity") (quoting *Prince v. Sheriff of Carter Cnty.*, 28 F.4th 1033, 1048 (10th Cir. 2022)); *Coates v. Reigenborn*, Nos. 22-1339, 22-1434, 2023 U.S. App. LEXIS 27456, at *9 (10th Cir. Oct. 16, 2023) ("The Supreme Court has instructed that official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.") (cleaned up).[16]

Unlike a case against a local-government entity, state sovereign immunity precludes Plaintiffs from suing the General Assembly or its committees directly, but *Ex parte Young* provides the remedy: sue the enforcement officials in their official capacities. Defendants did not assert sovereign immunity, but such immunity would not apply here, even if they had. *See Hill v. Kemp,* 478 F.3d 1236, 1258-59 (10th Cir. 2007) (no sovereign immunity where complaint alleges an ongoing

[16] Plaintiffs acknowledge that some language in *Consumers Union* indicates that claims for injunctive and declaratory relief can sometimes subject to legislative immunity—for instance, if they are directed at forcing elected officials to legislate in a certain way—but more recent Supreme Court decisions depart from that view, indicating that doctrine in this area is unsettled.

violation of federal law and seeks prospective relief). Nevertheless, the district court, sua sponte, went through a sovereign immunity analysis and correctly found that it did not apply. JA235-237.

But the court erred when it took the added step of converting Plaintiffs' equitable-relief claims against Defendants in their official capacity into personal-capacity claims against the individual legislators. JA238. An important distinction must be maintained between claims for money damages and equitable relief. Plaintiffs' individual-capacity claims are for nominal damages, and the official-capacity claims are for equitable relief. *See, e.g., Brown v. Buhman*, 822 F.3d 1151, 1162 n.10 (10th Cir. 2016) ("With respect to state officials . . . section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief") (cleaned up).

While, as a matter of form and pleading, a plaintiff must *name* state officials with enforcement responsibility when seeking prospective equitable relief, such claims are not legally considered personal-capacity claims. Naming an official as a party is distinct from the capacity in which that official is sued. "A government official may be sued in an official or individual, sometimes termed personal, capacity." *Hinkle Family Fun Ctr., LLC v. Grisham*, No. 22-2028, 2022 U.S. App. LEXIS 35747, at *6-7 (10th Cir. Dec. 28, 2022) (unpublished) (citing *Graham*, 473 U.S. at 165). State officials sued in their *personal* capacities do not

enjoy sovereign immunity for money damages, although they may enjoy a personal defense such as qualified immunity, prosecutorial immunity, or legislative immunity. *Butler v. Rainbolt*, No. 23-7091, 2024 U.S. App. LEXIS 18480, at *3-4 (10th Cir. July 26, 2024) (unpublished).

This distinction is consistent with the rationale of *Ex parte Young,* which relies on the "fiction" that when a federal court commands a state official to refrain from violating the law he is not the state—for sovereign immunity purposes. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Guttman v. Khalsa*, 669 F.3d 1101, 1126-27 (10th Cir. 2012); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908) (state has no power to impart its officer with immunity when he violates Constitution). This exception is called a "fiction," because, of course, an injunction against the state official with enforcement authority is effectively an injunction against the state itself. Thus, Plaintiffs' official-capacity claims for equitable relief in this case operate as claims against the General Assembly and its committees, which are government bodies that may not rely on a personal defense, such as legislative immunity. *See Bogan v. Scott-Harris,* 523 U.S. 44, 52-53 (1998) (explaining that even when municipal legislators have legislative immunity the municipality itself can still be liable under § 1983); *Sable*, 563 F.3d at 1127 (same). That is what is required by *Ex parte Young's* fiction.

And this also makes sense considering that one of the core rationales for legislative immunity is that prevent civil liability for damages from deterring public service. *Bogan*, 523 U.S. at 52-53*; Sable,* 563 F.3d at 1123 ("Legislative immunity enables officials to serve the public without fear of personal liability").

To see this rationale more clearly, it bears noting that both *Bogan* and *Sable* involved cases where the plaintiffs sought significant money damages from the government officials—not injunctive or declaratory relief. *Id.* at 1123 (reciting Sable's complaint for two § 1983 damages claims and making no mention of equitable relief); *Scott-Harris v. City of Fall River*, 134 F.3d 427, 432 (1st Cir. 1997) ($156,000 compensatory damage award, and punitive damage awards totaling $75,000).[17]

Bogan was a damages case—not a reinstatement case—and the plaintiff sought money for losing her job when her position was eliminated due to a budgetary decision that was ultimately deemed to be legislative in function. *Bogan*, 523 U.S. at 47-48. In *Bogan*, the Supreme Court did not explicitly discuss the damages amounts awarded below, but those money damages are evident from the circuit decision on appeal. *Scott-Harris*, 134 F.3d at 432.

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[17] Likewise, *Tenney* was also a money damages case. 341 U.S. at 371 (requesting $10,000 damages for expenses related to investigative committee appearance). *Tenney* did not involve a claim for injunctive or declaratory relief, one that in today's parlance would be called an official-capacity claim.

Moreover, the Supreme Court's immunity discussion in *Bogan* makes no mention whatsoever of the plaintiff seeking equitable relief. And the fear-of-liability rationale does not carry the same heft with equitable relief as it does for money damages. Indeed, one would hope that elected officials would not refrain from service because of the possibility of being enjoined from violating civil rights secured by the Constitution. Rather, such relief is a feature of our system of checks and balances. *See Ex parte Young,* 209 U.S. 123, 159-60 ("The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.").

Thus, the district court misstated *Bogan's* holding in citing it for the proposition that "absolute legislative immunity also applies to suits brought pursuant to § 1983, even where the remedy sought is declaratory or injunctive relief." JA239 (citing *Bogan).* *Bogan* did *not* address equitable relief. Moreover, this Court's decision in *Sable* post-dates *Bogan* and is binding on this issue.

Neither the district court, nor Defendants, acknowledged *Sable's* binding precedent. Defendants instead cited out-of-circuit authority that diverges from *Sable*. *See* JA179 (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 correctly 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.[18]

In this circuit, a panel is bound by prior panel decisions unless there is an en banc decision or "intervening Supreme Court" decision that "contradicts or invalidates" a panel's prior analysis. *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apts., LLC*, 843 F.3d 1225, 1242 (10th Cir. 2016) (quoting *United States v. Brooks*, 751 F.3d 1204, 1209-10 (10th Cir. 2014)). "Intervening" typically means the Supreme Court's decision comes *after* a panel decision. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1183 (10th Cir. 2018). An exception to that is if the panel decision "did not mention or address the Supreme Court decision." *Id.* (citing *Auraria Student Hous.*, 843 F.3d at 1242). But here, *Sable* repeatedly cites *Bogan* when addressing legislative immunity. 563 F.3d at 1124-25, 1127.

In fact, *Sable* cites *Bogan* for a proposition directly contrary to the district court's conclusion. The Court in *Sable*—relying on *Bogan*—held that legislative immunity does not apply to a municipality even when it applies to personal suits against individual municipal legislators. *Sable*,

[18] The district court also relied on the out-of-circuit case *Timmon v. Wood*, 633 F. Supp. 2d 453, 461 (W.D. Mich. 2008). JA242-243. But that was also a damages case. The pro se plaintiff alleged a ". . . § 1983 action for money damages in the amount of thirty million dollars against individual legislators . . ." *Id.*

563 F.3d at 1127 (citing *Bogan*, 523 U.S. at 53). Because an official-capacity suit seeking equitable relief is a suit against the office itself, *see Graham*, 473 U.S. at 165-66, it necessarily follows that legislative immunity does not extend to such official-capacity suits, either.

If Defendants wanted *Sable* overruled, they should have stated so explicitly and sought that remedy from this Court via the en banc process. Barring such relief, the district court was bound by *Sable,* and horizontal stare decisis now also applies to this Court. The district court thus erred in applying absolute legislative immunity to Plaintiffs' official-capacity claims for injunctive and declaratory relief.

V. PLAINTIFFS' EQUITABLE-RELIEF CLAIMS ARE NOT MOOT

A. Plaintiffs had standing at the time they filed their complaint

It is undisputed that Plaintiffs had standing at the time this lawsuit was filed on April 4, 2024. JA013. The General Assembly was in session then and several trans-related bills were still under consideration. JA033-034. Plaintiffs alleged (and Defendants have not disputed) that they were already silenced for violating Defendants' speech restrictions and that they reasonably fear being silenced again when attempting to comment on future trans-related bills. JA034. Moreover, Plaintiffs alleged that they "expect to speak less, and differently" so long as the legislature's speech restrictions remain in place. *Id.*

Pre-enforcement chilled-speech claims enjoy a more relaxed standing analysis in part because of the inherent difficulty of showing an inchoate injury that has not occurred due to the government's threats of enforcement. *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1160 (10th Cir. 2023). "Typically, the plaintiff would like to speak on some matter but fears punishment. That amounts to 'chilled speech,' which satisfies the 'injury-in-fact' prong for Article III standing." *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1239 (10th Cir. 2023) (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.* at 1240 (citation omitted)*; Rio Grande Found.,* 57 F.4th at 1164 (". . . a plaintiff on a chilled-speech claim by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future.") (cleaned up) (citations omitted); JA034; JA139-140; JA152-153.

Plaintiffs enjoyed standing because they reasonably feared their speech will be restricted again when they give public comments on trans-related legislation in the future. This was not an abstract fear, because the legislators had already enforced their restrictions and did not disavow future enforcement.

B. Defendants have not met their burden of proving mootness

In *all* cases it is the defendants' burden to show that it "cannot reasonably be expected to resume *its* challenged conduct . . . whether the challenged conduct might recur immediately or later at some more propitious moment." *FBI v. Fikre*, 601 U.S. 234, 243 (2024). While Plaintiffs must show standing at the time of filing, the burden shifts to defendants to show that a case has become moot due to events after the case was filed. *Doe v. Bd. of Regents of the Univ. of Colo.*, 100 F.4th 1251, 1261, 1263-64 (10th Cir. 2024); *Rio Grande Found.*, 57 F.4th at 1165; *WildEarth Guardians v. Pub. Serv. Co.*, 690 F.3d 1174, 1183 (10th Cir. 2012); *Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012).

Thus, the Defendants bore the burden of showing that Plaintiffs' pre-enforcement chilled speech claims were moot because, for example, the General Assembly's decorum rules had been rescinded or modified, or that no transgender-related legislation would be considered in upcoming legislative sessions. The district court improperly shifted the mootness burden, holding that Plaintiffs were engaging in "speculation" about the existence of future trans-related bills, their own desire to testify about them, whether the same speech restrictions will be put in place, or whether Defendants would be re-elected or serve in the same positions. JA246-247. Of course it is always possible for officials or courts to speculate that speakers may lose interest in civic

participation, or that our politics will change, but that is not how mootness functions.

The district court erred when it misallocated the burden of proof, ignored this Court's chilled-speech pre-enforcement standing jurisprudence, and misapprehended the nature of Plaintiffs' official-capacity claims against the "Chair of the House Judiciary Committee" and "Chair of the Senate Judiciary Committee" which allow for automatic succession by operation of Fed. R. Civ. P. 25(d), regardless of who serves in that position. Moreover, as a factual matter, all of the named defendants remain elected legislators, serving in the Colorado General Assembly. And the district court should have accepted as true Plaintiffs stated future intent to speak on trans-related legislation—more specificity and certainty is not required for First Amendment claims, especially on a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Finally, the district court could have provided Plaintiffs effective relief by way of an injunction or declaration that would prospectively affect the relationship between the parties.[19]

[19] The district court correctly held that Plaintiffs' nominal damages claims were not moot (JA244), but incorrectly held that those claims were subject to legislative immunity. If this Court agrees with Plaintiffs that legislative immunity does not apply to the challenged enforcement acts, nominal damages provide further actual relief the district court could provide.

1. The challenged decorum rules remain vague and subject to excessive enforcement discretion

In addition to challenging the Defendants' viewpoint discrimination, Plaintiffs' complaint also separately challenged the House's and Senate's (identical) written decorum rules for public hearings because those rules are vague, subjective, and invite excessive enforcement discretion. JA035-036 ("FIRST CLAIM FOR RELIEF VAGUENESS, EXCESSIVE DISCRETION…"). "Defendants' decorum rule is vague and lacks objective criteria to prevent viewpoint discriminatory enforcement." JA035; JA022 (providing links to the Senate and House Guides); *see also* https://perma.cc/5L6L-GRBQ; https://perma.cc/DGU2-WYCX; JA047 ("The chair has the *discretion* and authority to limit testimony, ask the sergeant-at-arms to remove a disruptive person . . . ") (emphasis added).

These administrative speech rules invite selective enforcement and do not contain objective criteria to cabin the committee chair's enforcement discretion. *See Minn. Voters All. v. Mansky,* 585 U.S. 1, 21 (2018) (official discretion must be guided by "objective, workable standards")*; see also Wyo. Gun Owners,* 83 F.4th at 1233-34, 1237-38 (noting that vague laws invite "resolution on an ad hoc and subjective basis" and that a "lack of guardrails invites arbitrary enforcement."); *Summum,* 130 F.3d at 920 (lack of criteria or guidelines as to who may speak on county property "strongly suggests the potential for unconstitutional conduct, namely favoring one viewpoint over another");

Parents Defending Educ., 83 F.4th at 668 (vague policy does not give students notice of what speech an administrator may deem "disrespectful" of another student's gender identity).

These vague administrative rules remain in place today and Defendants have not met *their* burden of showing the rules have been rescinded or that the committee chairs use written, objective criteria to cabin enforcement discretion and prevent selective enforcement of the decorum and disruption standards. The district court ignored this claim entirely, which was error.

2. Defendants have not disavowed future enforcement of their censorship regime

Far from meeting their burden to show mootness, Defendants have indicated that they retain the option of silencing Plaintiffs' viewpoints during future committee hearings. "[N]o-one is disclaiming possible future application of civility standards similar to – or different from – those at issue in this case . . . . [P]ossible future application of similar civility and decorum standards has *certainly not* been disclaimed by the legislative Defendants in this case . . . ." JA185 (emphasis added).

These representations cut strongly against mootness. *See Peck v. McCann*, 43 F.4th 1116, 1132-33 (10th Cir. 2022) ("Defendants do not disavow an intent to prosecute Ms. Peck"); *Wyo. Gun Owners*, 83 F.4th

at 1240 (chilling effect can be justified by showing a credible threat of prosecution or other consequence).[20]

Defendants also suggested below that the capable-of-repetition-yet-evading review exception to mootness might apply. JA184-185; *see Rio Grande Found.,* 57 F.4th at 1166 (discussing test for the exception). Perhaps Defendants were hoping Plaintiffs would assume the burden of proving this exception, but Plaintiffs maintain that their lawsuit never became moot because (1) the vague and subjective decorum rules remain in place; (2) Defendants did not disavow future discriminatory enforcement; (3) Goeke's testimony has not been restored; and (4) Plaintiffs alleged in their complaint (which must be taken as true) that they intend to speak in ways that likely violate the rules when the legislature "assuredly" introduces trans-related bills. JA033-034.

But even if this Court disagrees, Plaintiffs alternatively request that this Court apply that exception, because the short timing of a legislative session (much like an election campaign) makes it difficult to complete litigation during a single session. This Court, however, should only apply that exception if it first finds that Defendants have otherwise met *their* burden of showing that some or all of Plaintiffs' claims are moot.

[20] *Peck* and *WyGO* were standing cases, but mootness is a related doctrine, sometimes referred to as "standing set in a time frame." *See Rio Grande Found.*, 57 F.4th at 1165.

3. *Rule 25(d) provides for automatic substitution of whoever is named chair of the House or Senate Judiciary Committee*

The district court's holding that it is "entirely speculative—if not unlikely—that the same defendants would oversee the public testimony hearings" of future trans-related bills because they might not be chairs or members of the relevant committees was also erroneous because both committee chairs were sued in their official capacities as "chairs" of the respective judiciary committees. JA013; JA018. Officials may come and go, but that does moot an official-capacity lawsuit. The civil rules address—and easily resolve—this fairly common occurrence in government-related litigation. Fed. R. Civ. P. 25(d) provides:

> An action *shall not abate* when a public officer who is a party in an official capacity dies, resigns, *or otherwise ceases to hold office* while the action is pending. The officer's successor is automatically substituted as a party.

(emphasis added).

As the Supreme Court noted over 30 years ago: "Suits against state officials in their official capacity therefore should be treated as suits against the State. Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation." *Hafer*, 502 U.S. at 25; *see also* Fed. R. App. P. 43(c)(2) (providing for automatic substitution on appeal). Thus, at a minimum, the official-capacity claims against the two chairs of the respective judiciary committees should proceed because those are

legally claims against the General Assembly and its committees. *See Karcher v. May*, 484 U.S. 72, 78 (1987) (distinguishing between a legislator's official capacity as a presiding officer and a legislator's official capacity as an ordinary legislator). "[A]cts performed by the same person in two different capacities are generally treated as the transactions of two different personages." *Id.* (cleaned up) (citations omitted). In *Karcher,* the presiding legislative officers in the official capacities were also considered to represent the "incumbent legislature." *Id.* at 79-81.

But only one automatic substitution is needed because Sen. Gonzalez has been re-appointed chair of the Senate Judiciary Committee for the 75th General Assembly, and newly minted Sen. Weissman has been appointed Vice-Chair of that same committee,[21] while Rep. Garcia has been re-appointed to the House Judiciary Committee.[22] Unsurprisingly, Rep. Garcia has publicly announced that she has "big goals this

[21] COLORADO SENATE DEMOCRATS, *Majority Leader Rodriguez Announces Senate Committee Appointments,* https://perma.cc/4K7M-LUX3.

[22] COLORADO HOUSE DEMOCRATS, *Speaker McCluskie Announces Committee Appointments* (Dec. 9, 2024), https://perma.cc/3TBE-WJNV. If Rep. Garcia now wishes to show that the equitable claims against her are moot, she should show that she will not serve as chair of the committee or again seek to influence the application of the decorum rules against disfavored views.

legislative session:" listing "Trans rights" as the top item.[23] Far from speculative, these issues have not gone away, and many of the same players will be wielding power in the current legislative session.

For the same reasons, the district court's reliance on *Jordan v. Sosa,* 654 F.3d 1012 (10th Cir. 2011) is misplaced. JA246-247. Plaintiffs are not like inmates in federal custody who have been conveniently sent to another facility, far away from the wrongdoers. They remain willing and able to comment on transgender legislation before the General Assembly. And crafting meaningful declaratory relief would not be hard: declare that the legislators cannot enforce speech restrictions in a way forbids "misgendering," "deadnaming," or mandates avoiding pointed criticism of the namesakes of bills, including their criminal history or other past history. Doing so would be a less-intrusive alternative to enjoining the restrictions.

4. Christina Goeke's public comments have not been restored to the public record

The district court's mootness analysis also ignored the still-extant erasure of Goeke's comments before the Senate Judiciary Committee from the public record. This was a separate claim for relief. JA038-039. And Plaintiffs' proposed PI order specifically requested restoration of the erased content. JA162 ("…within 24 hours of this Order, Defendants

[23] @replorenagarcia.bsky.social (Jan. 1, 2025 at 7:06 PM), https://perma.cc/NCH3-2877.

shall restore the entire audio recording of Plaintiff Goeke's testimony…"). Thus, a live controversy existed between the parties when the district court issued its order, and practical relief was available to be granted. In addition to adjudicating Plaintiffs' pre-enforcement challenge to the General Assembly's vague and subjective decorum rules, the district court was able to reverse Plaintiffs' memory holing of Goeke's disfavored views.

VI. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS' CLAIM FOR A PRELIMINARY INJUNCTION IS MOOT

A. Plaintiffs are likely to succeed on their First Amendment claims because Defendants seek to engage in blatant viewpoint discrimination

Preliminary injunction movants bear the burden of establishing that four factors weigh in their favor: (1) a likelihood of success on the merits; (2) a likelihood that they will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20-21 (2008)). "In the First Amendment context, the likelihood of success on the merits will often be the determinative factor because of the seminal importance of the interests at stake." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016). Moreover, the government bears the

burden of proving that speech restrictions are constitutional. *City of Albuquerque*, 667 F.3d at 1130-31 (citations omitted).

Plaintiffs meet this standard because Defendants openly declared their intent to restrict viewpoints during public comment—and then applied those speech restrictions. JA048-106; JA132-138; JA 144-151. Moreover, they have attempted to legally justify those restrictions as sparing the feelings of their trans constituents—and have expressly refused to disavow future enforcement of those same restrictions. JA185, JA224-225. Doubling down on censorship does not meet the state's burden of proving that its speech restrictions' legality. As a result, this Court should direct the district court to enter a preliminary injunction in Plaintiffs' favor. *See* JA161-163.

B. All of the other preliminary injunction factors favor Plaintiffs

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020); *Verlo,* 820 F.3d at 1126. In balancing the equities, courts "must give the benefit of any doubt to protecting rather than stifling speech . . . [and] [w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisc. Right to Life*, 551 U.S. 449, 469, 474 (2007); *see also Awad v. Ziriax,* 670 F.3d 1111, 1131-32 (10th Cir. 2012). The public interest favors the enforcement of

constitutional rights, especially when it comes to political speech. *Citizens United v. Gessler,* 773 F.3d 200, 212, 218-19 (10th Cir. 2014). "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad,* 670 F.3d at 1132 (internal quotation marks omitted). That includes legislators who are censoring disfavored viewpoints in a forum they opened to hear citizens' opinions.

VII. THE DISTRICT COURT'S PRACTICE STANDARDS THAT MANDATE ADHERENCE TO GENDER IDEOLOGY UNDERSCORE THE EXISTING THREAT TO FIRST AMENDMENT RIGHTS

Plaintiffs also moved the district court to suspend its practice standard requiring adherence to gender ideology by mandating the use of preferred pronouns. JA164-175. The motion was effectively unopposed (JA193-195), but the district court denied the motion as moot. JA248. These practice standards interfere with Plaintiffs' and Plaintiffs' counsels' rights to associate and speak for the purposes of pro bono litigation against the state. *See NAACP v. Button,* 371 U.S. 415, 452-53 (1963). They also compel them to mouth adherence to a government official's preferred ideology. *See Janus,* 585 U.S. at 892-93 (compelled speech coerces individuals into betraying their convictions). Lawyers and parties should no more be compelled to adopt the rituals of gender ideology than they should be required to express fealty to the ruling party in order to advocate for clients or testify in court. Plaintiffs

request that this Court remand this case with instructions to the district court to grant the motion to suspend the practice rules.

CONCLUSION

Defendants request that this Court reverse the district court's order granting Defendants' motion to dismiss and remand the case with instructions to grant Defendants' motion for preliminary injunction and motion to suspend civil practice standards regarding pronoun usage.

ORAL ARGUMENT STATEMENT

This case presents important issues regarding the First Amendment and Colorado elected officials attempting to force their ideological views about contested issues on members of the public seeking to participate in the democratic process.

Dated: January 9, 2025

Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) excluding the parts exempted by Fed. R. App. P. 32(f), because this document contains 12,706 words, as calculated by Microsoft Word; and

2. This document complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in size 14-point Century Schoolbook, a proportionally spaced font, using Microsoft Word.

Dated: January 9, 2025

s/Endel Kolde

ATTACHMENT 1: DISTRICT COURT'S ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6) & FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:24-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.

ORDER

This matter is before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed.R.Civ.P. 12(b)(6), ECF No. 19. The Motion is fully briefed and ripe for review. For the reasons set forth below, the Motion is GRANTED.

I. BACKGROUND[1]

Plaintiffs are two organizations and two individuals who "reject transgender ideology" and the related concepts of "misgendering" and "deadnaming."[2] ECF No. 1 ¶¶ 4-7. Plaintiffs bring this action under 42 U.S.C. § 1983 against Defendants Lorena Garcia, Mike Weissman, Leslie Herod, Julie Gonzales, and Dafna Michaelson Jenet in their individual and official capacities as members of the Colorado General Assembly. *Id.* ¶¶ 8-12. Plaintiffs assert that Defendants – chairs of the Colorado House and Judiciary Committee, a member of the House Judiciary Committee, and the House prime sponsor and Senate prime sponsor of House Bill ("HB") 24-1071 – collectively deprived Plaintiffs of their First Amendment rights during public testimony sessions of the committee hearings regarding HB 24-1071 before both the Colorado House and Senate Judiciary Committees.

HB 24-1071 expanded the conditions upon which a person with a prior felony conviction could obtain a legal name change. *Id.* ¶ 27. Specifically, the Bill Summary states that a person convicted of a felony "must show good cause to be able to change the person's name to a name different from the name the person was convicted under." *Id.* ¶ 28. "The bill states that good cause includes changing the petitioner's name to conform with the petitioner's identity." *Id.* HB 24-1071's sponsors and supporters also

[1] The facts are drawn from the allegations in Plaintiffs' Amended Complaint, which must be taken as true when considering a motion to dismiss. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

[2] Plaintiffs' complaint defines "misgendering" is "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;" the Plaintiffs consider rejection or exclusion of these acts "to be a form of lying.'" ECF No. 1 ¶¶ 34-36.

refer to it as "Tiara's law." *Id.* ¶ 30. Tiara is the preferred name of Duane Antonio Kelley, a biological male with criminal convictions who has advocated for a change in the law to allow him to legally change his name to Tiara. *Id.* ¶ 31.

Plaintiffs Rich Guggeinheim and Christina Goeke (members of Plaintiffs Gays Against Groomers ("GAG") and Rocky Mountain Women's Network ("RMWN"), respectively), opposed the adoption of HB 24-1071 "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. They also disagree with the concepts of 'misgendering' or 'deadnaming.' " *Id.* ¶ 33. To express their opposition to HB 24-1071, Guggeinheim and Goeke, both as individuals and as members of GAG and RMWN, respectively, signed up to testify on HB 24-1071 before the House Judiciary Committee and Senate Judiciary Committee. *Id.* ¶¶ 36-38, 52. The stated purpose of the public comment sessions is to provide citizens "with an opportunity to provide public comment on pending legislation in the form of testimony at a committee hearing." *Id.* ¶ 17.

The Colorado General Assembly publishes a Memorandum that provides the administrative rules for members of the public who wish to speak before legislative committees. *Id.* ¶ 21. One of these rules is that the "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." *Id.* ¶ 22. The Colorado House and Colorado Senate each publish their own guides to public hearings, which also establish administrative rules prohibiting disruptive behavior. *Id.* ¶¶ 25-26.

On January 30, 2024, the House Judiciary Committee heard public testimony on HB 24-1071. *Id.* ¶ 39. During the session, guidelines were established that requested that participants "engage in respectful discourse and share their perspectives and opinions on this bill" by not using derogatory language, misgendering a witness, or using a witness's deadname. *Id.* ¶ 40. Upon hearing these rules, Guggenheim left his place in line and did not testify because he felt he could not deliver his views if he could not use "derogatory" language. *Id.* ¶ 42. Goeke began giving her testimony but was interrupted for violating these rules and allegedly using "derogatory" and "disparaging" language about witnesses. *Id.* ¶ 43-44. Goeke was urged to abide by the rules, but she refused to comply. *Id.* Her testimony was stopped when the committee went into recess. *Id.* ¶ 45. Goeke alleges that her speaking time was prematurely terminated and that, after expressing her frustration, she was asked to leave by the sergeant at arms. *Id.* ¶ 46-47.

On March 27, 2024, the Senate Judiciary Committee held a hearing on HB 24-1071. *Id.* ¶ 52. At the opening of public comment, witnesses were instructed to treat others with dignity and respect. *Id.* ¶ 53. If they did not do so, they would be removed. *Id.* Specifically, witnesses were instructed not to use derogatory language, misgender, deadname, or otherwise disparage those present. *Id.* ¶ 54. Goeke spoke in opposition to the bill and repeatedly attempted to refer to "Tiara" as "Mr. Duane Powell." *Id.* ¶ 56. As a result, she was interrupted and reminded that she could not "deadname" or "misgender." *Id.* ¶ 57. Her testimony was cut short when she again referred to Tiara as "Mr. Duane Powell." *Id.* ¶ 58. Further, portions of Goeke's speech wherein she used this derogatory language were erased from the official audio record of the Senate Judiciary Committee

hearing. *Id.* ¶ 59. Guggenheim also spoke in opposition to the bill and was interrupted when he proceeded to "deadname" and "misgender" people. *Id.* ¶ 60. He was invited to proceed with his comments in accordance with these rules. *Id.* But Guggenheim would not abide by the rules, and as a result he was not allowed to complete his testimony. *Id.*

Plaintiffs filed this lawsuit on April 4, 2024. ECF No. 1. Plaintiffs assert an ongoing deprivation of their rights under the First and Fourteenth Amendment for which they are entitled under 42 U.S.C. § 1983 to declaratory and injunctive relief, together with nominal damages, costs, and attorneys' fees. Defendants move to dismiss all claims, asserting absolute legislative immunity. ECF No. 19. Defendants also argue for dismissal on the basis that Plaintiffs have not alleged a sufficient factual basis to support a claim for deprivation of their First Amendment rights and because Plaintiffs' claims are moot. *Id.*

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (internal citations omitted). But the Court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief

that is plausible on its face." *Id.* at 678 (internal quotation marks omitted). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quotation omitted). As a result, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Id.* (quoting *Twombly*, 550 U.S. at 556 (internal quotation omitted)).

III. ANALYSIS

A. Legislative Immunity

Defendants argue that they are entitled to legislative immunity on all claims against them. *See* ECF No. 19 at 3. Plaintiffs respond that legislative immunity does not apply to the official capacity claims and even if it did, Defendants are not entitled to legislative immunity on any of Plaintiffs' claims. ECF No. 23 at 3-4.

1. Availability of Legislative Immunity for Official Capacity Claims

The Court first addresses Plaintiffs' argument that legislative immunity does not apply to their official capacity claims, which requires the Court to consider the interplay between sovereign immunity—specifically, the *Ex parte Young* exception to sovereign immunity—and legislative immunity.

Sovereign immunity is grounded in the Eleventh Amendment, which grants states sovereign immunity from suit. *See Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021); U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). This immunity extends "to suits brought by citizens against their own state." *Hendrickson*, 992 F.3d at 965. And it applies not just to suits brought against states themselves but also to "suit[s] against a state official in his or her official capacity." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). "But *Ex parte Young* created an exception under which individuals can sue state officers in their official capacities if the lawsuit seeks prospective relief for an ongoing violation of federal law." *Free Speech Coal., Inc. v. Anderson*, 119 F.4th 732, 736 (10th Cir. 2024) (citing *Ex parte Young*, 209 U.S. at 159–60, 28 S.Ct. 441).

Ex parte Young allows plaintiffs to sue state officials even if the officials claim to be acting under valid state law because, if the officials' conduct constitutes an ongoing violation of federal law, the state "cannot cloak their actions with state authority or state immunity." *Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 609 (10th Cir. 1998). That is, when state officials are arguably violating federal law, "[t]he state is not the real party in interest because the state cannot 'authorize' the officials to violate federal law." *Id.* at 610. Thus, in allegedly violating federal law, the officials are stripped of their state authority and the Eleventh Amendment will not protect them from suit. *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 976 (10th Cir. 2001); *see also Idaho v.*

Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 264, 117 S. Ct. 2028, 2043, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring) ("The [*Ex parte*] *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.").

Plaintiffs contend that the *Ex parte Young* exception applies to their official capacity claims. To determine if the *Ex parte Young* exception applies, the Court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). Thus, "plaintiffs must show that they are: (1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). Viewing the allegations in the light most favorable to Plaintiffs, the Court finds that their allegations are sufficient to fall within the *Ex parte Young* exception.[3] Accordingly, Plaintiffs' official capacity claims are not barred by sovereign immunity.

But Defendants do not assert sovereign immunity; they assert legislative immunity, a completely distinct doctrine. And Plaintiffs' argument that legislative immunity cannot apply to the official capacity claims is mistaken. Plaintiffs incorrectly argue that their "official capacity claims in this case are really claims against the General Assembly and

[3] At this stage of the jurisdictional analysis, the Court "should not analyze the merits of the claim." *Fowler v. Stitt*, 104 F.4th 770, 782 (10th Cir. 2024) (internal quotations and citation omitted).

its committees, which may not rely on a personal defense, such as legislative immunity." ECF No. 23 at 3-4. But as explained above, for *Ex parte Young* to apply, the claims must be against the "state officials rather than the state." *Pruitt*, 669 F.3d 1167 (emphasis added). Accordingly, because Plaintiffs' official capacity claims are really claims against the officials and not the state, it follows that they may not assert state sovereign immunity but may assert the personal defense of legislative immunity. Plaintiffs have not cited any case finding that *Ex parte Young* overcomes legislative immunity. And cases from around the country have reached the opposite conclusion. *See, e.g.*, *Tolman v. Finneran*, 171 F. Supp. 2d 31, 37–38 (D. Mass. 2001) ("Short of the exceptional case, it is unlikely that *Ex Parte Young* is broad enough to abrogate legislative immunity and authorize suit against a legislator acting in a purely legislative capacity."); *Chase v. Senate of Virginia*, 539 F. Supp. 3d 562, 569 (E.D. Va. 2021) (even if *Ex parte Young* exception applied, defendant "would also be protected by absolute legislative immunity.") *Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005) (state legislators who acted in their legislative capacities "are entitled to absolute legislative immunity . . . regardless of whether a suit seeks damages or prospective relief and regardless of whether the state legislators are named in their individual or official capacity."). Therefore, if Defendants were acting in their legislative capacity, they are entitled to legislative immunity, regardless of whether the claims are asserted against them in their individual or official capacities.

2. Whether Defendants Are Entitled to Legislative Immunity

"It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*,

523 U.S. 44, 46, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). This absolute legislative immunity also applies to suits brought pursuant to § 1983, even where the remedy sought is declaratory or injunctive relief. *Id*. at 48-49, 118 S.Ct. 966; *see also Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); *Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719, 732, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). Legislative immunity exists to "enable[] officials to serve the public without fear of personal liability. Not only may the risk of liability deter an official from proper action, but the litigation itself 'creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation.'" *Sable v. Myers*, 563 F.3d 1120, 1123-24 (10th Cir. 2009) (quoting *Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. at 733). Accordingly, state legislators, such as Defendants here, enjoy absolute immunity for their "legitimate legislative activity." *Tenney*, 341 U.S. at 376.

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. at 54. The "legislative sphere" reaches things "generally done in a session of the [legislature] by one of its members in relation to the business before it." *Gravel*, 408 U.S. at 623–24, 92 S.Ct. 2614 (quotation omitted). Signing an ordinance into law is "quintessentially legislative," *Bogan*, 523 U.S. at 55, but the definition is broader and covers other aspects of the legislative process, including a legislative committee's "deliberative and communicative processes." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503-04 (1975); *see also National Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 630 (9th Cir. 1995) (absolute immunity covers "not only speech and debate per se, but also voting, ... circulation of

information to other legislators, ... participation in the work of legislative committees, ... and a host of kindred activities.") (citations omitted). The Tenth Circuit has identified acts within the legislative sphere as "legislative speech and debate, voting, preparing committee reports, conducting committee hearings, and other integral steps in the legislative process." *See Kamplain*, 159 F.3d 1248, 1251 (10th Cir. 1998) (emphasis added). The inquiry does not extend to the legislators' purpose in performing the act, because "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377.

Here, the acts alleged by Plaintiffs occurred in the context of two formal legislative committee meetings. See ECF No. 1 at ¶ 39-64. Defendants contend that their acts are therefore "wholly within the sphere of legitimate legislative activity." ECF No. 19 at 7. In response, Plaintiffs argue that Defendant's actions with respect to the enforcement of their speech restrictions were executive actions, distinct from legislating. ECF No. 23 at 4. Thus, the question is before the Court is "whether, stripped of all considerations of intent and motive, [Defendants'] actions were legislative." *Bogan*, 523 U.S. at 55. That is—do Defendants' acts of enforcing decorum rules and restrictions against Plaintiffs during public testimony on pending legislation fall within the legislative sphere?

Neither the Tenth Circuit nor the Supreme Court has squarely addressed this issue. In *Kamplain*, cited by both parties, the Tenth Circuit considered whether local government officials were entitled to legislative immunity for their decision to prohibit plaintiff from speaking before or participating in any future board of commissioner meetings. 159 F.3d 1248. The board's decision came two weeks after plaintiff protested

the board's award of a bid to a competitor of his employer and was ejected from that meeting. *Id*. The Tenth Circuit began its legislative immunity analysis by explicitly noting that the "issue here is not the Board's ejection of Plaintiff from the public meeting 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 at Curry County Commission meetings." *Id.* at 1252. The Tenth Circuit held that the board's decisions to ban the plaintiff and its subsequent decision to prohibit his participation or speech at future county commission meetings were not legislative "[b]ecause the circumstances of this case did not concern the enactment or promulgation of public policy," and thus were not "related to any legislation or legislative function." *Id*. In reaching this conclusion, the Tenth Circuit reasoned that even though the Board was acting during a regularly scheduled meeting, "the Board members were not voting on, speaking on, or investigating a legislative issue." *Id.* Thus, the acts were of an administrative nature. *Id.* But *Kamplain* is distinguishable.

Here, unlike in *Kamplain*, Defendants' acts occurred in the context of two formal legislative committee meetings convened exclusively for the purpose of obtaining public comment on a specific piece of pending legislation. As stated in Plaintiffs' complaint, [t]he Colorado General Assembly provides citizens with an opportunity to provide public comment on pending legislation in the form of testimony at a committee hearing." ECF No. 1 ¶ 17. "In Colorado, every bill receives a public hearing by one of the legislature's committees. At a legislative committee hearing, citizens have an opportunity to express their views and have them incorporated into the official legislative record." *Id.* A

Memorandum from the Colorado Legislative Council Staff regarding public participation in the legislative process states 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. Public input is an important part of this process." ECF No. 1-1 (emphasis added).

Under the circumstances of this case, the Court finds that Defendants' alleged acts were related to Defendants' legislative function of overseeing public testimony on pending legislation and gathering relevant information and input from the public. These are "integral steps in the legislative process." *Bogan*, 523 U.S. at 55; *see also Timmon v. Wood,* 633 F. Supp. 2d 453, 460 (W.D. Mich. 2008) ("Public comment is a useful way for a legislative body to gather necessary information to address the priorities of its constituents, and public comment has become a routine and legitimate part of modern-day legislative process."). Defendants' alleged acts were specifically related to public comment on HB 24-2071 and were therefore "done 'in relation to the business before' the legislative body." *Kamplain*, 159 F.3d at 1251 (quoting *Powell v. McCormack*, 395 U.S. 486, 502 (1969)). During their public testimony on the HB 24-2071, Defendants repeatedly warned Plaintiffs to abide by the decorum rules and keep testimony to the bill. *See* ECF No. 1 ¶ 44. For example, Defendant Weissman told Goeke "I am going to urge you to keep your testimony please to the bill, do not get into individual personalities." *Id.* By limiting Plaintiffs' testimony on pending legislation only when it violated decorum rules and was not focused on the bill at issue, Defendants were acting in their legislative capacity to establish a legislative record and gather information regarding the bill. *See*

Timmon v. Wood, 633 F. Supp. 2d at 461 (local legislators entitled to legislative immunity when they cut plaintiff's comments short and directed her to speak only on relevant matters because legislators' role in gathering information during public comment period was "an integral part of the Council's gathering of information necessary to effect wise and effective legislation."). And because the published audio is simply a reflection of the hearing, the publishing of such audio is likewise a reflection of Defendants' acts within the legislative sphere. Thus, the Court concludes that Defendants' acts are within the sphere of legitimate legislative activity and Defendants are entitled to legislative immunity from Plaintiffs' claims against them.

B. Mootness

Additionally, even if legislative immunity did not bar Plaintiffs' claims, the Court would find Plaintiffs' claims for prospective relief moot.

"Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' " *Defs. of Wildlife v. Everson*, 984 F.3d 918, 944–45 (10th Cir. 2020) (quoting U.S. Const. art. III, § 2, cl. 1). Article III is the basis for the mootness doctrine, which "provides that although there may be an actual and justiciable controversy at the time the litigation is commenced, once that controversy ceases to exist, the federal court must dismiss the action for want of jurisdiction." *Jordan v. Sosa*, 654 F.3d 1012, 1023 (10th Cir. 2011) (citation omitted). Thus, a case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022) (cleaned up).

The court must decide whether a case is moot as to "each form of relief sought." *Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (explaining the plaintiff's "burden to demonstrate standing for each form of relief sought . . . exists at all times throughout the litigation.") (quotations omitted). "Thus, interim developments that moot a claim for prospective relief do not necessarily moot a claim for damages." *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 880 (10th Cir. 2019). And "[t]he mootness of a plaintiff's claim for injunctive relief is not necessarily dispositive regarding the mootness of his claim for a declaratory judgment." *Jordan v. Sosa*, 654 F.3d at 1025.

Here, Plaintiffs seek an order enjoining Defendants from enforcing their decorum standards and similar speech restrictions during public testimony at legislative committee hearings and from censoring Plaintiffs' right to speak and petition by editing speech from the public record of those hearings, as well as declaratory relief consistent with the injunction. See ECF No. 1 at 28-29. Defendants contend all of Plaintiffs' claims for relief are moot. ECF No. 19 at 9-12. Plaintiffs argue their claims are not moot because "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." ECF No. 23 at 13. Having considered each form of relief sought, the Court finds that Plaintiffs' claims for injunctive and declaratory relief are moot.[4]

"Generally, a claim for prospective injunction becomes moot once the event to be enjoined has come and gone." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 907 (10th Cir. 2014).

[4] Plaintiffs' claims' claims for nominal damages are not moot. *See Uzuegbunam v. Preczewski,* 592 U.S. 279 (2021) (a claim for nominal damages can save a case from mootness because any amount of money—no matter how trivial—"can redress a past injury."). However, because all claims are dismissed on legislative immunity grounds, the Court does not address the claim for nominal damages any further.

Thus, "[w]here a plaintiff seeks an injunction, his susceptibility to continuing injury is of particular importance—'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' " *Jordan v. Sosa*, 654 F.3d at 1024 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-95 (1974)). "Moreover, 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.' " *Id.* (quoting *O'Shea*, 414 U.S. at 497).

Even if a claim for injunctive relief is moot, that does not necessarily mean the claim for declaratory judgment is moot. *See id.* at 1025. Where a plaintiff seeks both an injunction and declaratory relief, "the District Court ha[s] '[a] duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of [an] injunction.' " *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974) (*quoting Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). A plaintiff cannot maintain a declaratory action "unless he or she can demonstrate a good chance of being likewise injured in the future." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir.1991). Otherwise, a declaratory judgment could be an improper advisory opinion. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 212–13, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (holding that in order to avoid advisory opinions, a court may not hear a case if the underlying dispute loses its character as a present, live controversy). "It is well established that what makes a declaratory judgment action 'a proper judicial resolution of a 'case or controversy' rather than an advisory opinion is the settling of some

dispute which affects the behavior of the defendant toward the plaintiff.' " *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (alteration omitted)). "The crucial question is whether granting a present determination of the issues offered . . . will have some effect in the real world." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (quotation omitted).

In this case, Plaintiffs' claims for both injunctive relief and declaratory judgment are moot. It is undisputed that the legislation at issue, HB 24-1071, has been passed and signed into law by the Governor, and the General Assembly is no longer in session.[5] According to Plaintiffs' allegations, the challenged decorum rules and restrictions were announced specifically for the two committee hearings on HB 24-1071. *See* ECF No. 1 ¶¶ 40, 41, 53-55. Plaintiffs have not pointed to any "continuing, present adverse effects" beyond speculation that there will potentially be future bills that implicate transgender concerns, that Plaintiffs will likely want to testify on these potential bills, and that the same decorum rules and restrictions may be put in place for any public testimony hearings on these potential bills. Given this level of speculation, the Court finds that Plaintiffs' "continued susceptibility to injury" is far from "reasonably certain" and Plaintiffs' claims for injunctive relief are therefore moot. *Jordan v. Sosa*, 654 F.3d at 1024.

The same is true with respect to Plaintiffs' claims for declaratory relief. Because of the level of speculation involved, the Court cannot presently craft a declaratory judgment

[5] "That the courts are allowed to take judicial notice of statutes is unquestionable." *United States v. Coffman*, 638 F.2d 192, 194 (10th Cir.1980).

that would have any known "effect on the real world." *Citizens for Responsible Gov't State Political Action Comm*, 236 F.3d 1174, 1182 (10th Cir. 2000) (quotation omitted). Crucially, "where a plaintiff seeks a declaratory judgment against his opponent, he must assert a claim for relief that, if granted, would affect the behavior of the particular parties listed in his complaint." *Jordan v. Sosa*, 654 F.3d at 1025 (citing *Rhodes v. Stewart,* 488 U.S. 1, 4 (1988) (per curiam)); *see also North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ((("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.") (emphasis added)).

Here, it is entirely speculative—if not unlikely—that the same Defendants would oversee the public testimony hearings of any potential bills on which Plaintiffs may wish to testify. These legislators may not be re-elected, may not be chairs or members of the relevant committees, and/or may not sponsor any potential bills implicating Plaintiffs' concerns. In other words, the Defendants are not "actually situated to have their future conduct toward the plaintiff altered by the court's declaration of rights." *Jordan v. Sosa*, 654 F.3d at 1026. Accordingly, the Court finds that Plaintiffs' requested declaratory relief would be nothing more than an advisory opinion and the claims for declaratory relief are therefore moot. *See id.* ("If the plaintiff has not named such individuals or entities, courts are likely to determine that they cannot accord the plaintiff effective declaratory relief and that the action is moot.").[6] For these reasons, Plaintiffs' claims for injunctive and declaratory relief are moot.

[6] In their motion, Defendants suggest that Plaintiffs' argument against mootness may hinge on the "capable of repetition yet evading review" mootness doctrine. *See* ECF No. 19 at 9-10. Defendants contend that even if Plaintiffs asserted this exception, it would not apply. *Id*. However, Plaintiffs do not address this argument in their response or otherwise assert that this exception applies. Thus, Plaintiffs have waived this

IV. CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss, ECF No. 19, is GRANTED. All claims are DISMISSED WITH PREJUDICE. Accordingly, Plaintiffs' Motion for Preliminary Injunction, ECF No. 8, and Plaintiffs' Motion for Order to Suspend RMR Civil Practice Standards, ECF No. 15, are DENIED AS MOOT.

DATED: November 27, 2024

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge

argument. *See Jiying Wei v. Univ. of Wyoming Coll. of Health Sch. Pharmacy*, 759 F. App'x 735, 739 (10th Cir. 2019) (arguments not raised in response to 12(b)(6) motion are waived). And in any case, having failed to address the argument, Plaintiffs have not met their burden of establishing that the exception applies. *Ind v. Colorado Dep't of Corr.*, 801 F.3d 1209, 1215 (10th Cir. 2015) ("[T]he plaintiff bears the burden of establishing the issue is a wrong capable of repetition yet evading review.")).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:24-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.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to Order entered by United States District Judge Regina M. Rodriguez on November 27, 2024 [ECF No. 29] it is

ORDERED that Defendants' Motion to Dismiss [ECF No. 19] is GRANTED and all claims are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction, [ECF No. 8], and Plaintiffs' Motion for Order to Suspend RMR Civil Practice Standards, [ECF No.

15], are DENIED AS MOOT.

This case will be closed.

Dated at Denver, Colorado this 27th day of November, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/K. Myhaver
K. Myhaver
Deputy Clerk