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' REPLY BRIEF

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**Oral Argument Requested**

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## REPLY ARGUMENT

### I. DEFENDANTS INVITE THIS COURT TO ADOPT AN EXPANSIVE FORM OF LEGISLATIVE IMMUNITY THAT WOULD ALLOW ELECTED OFFICIALS TO CENSOR FIRST AMENDMENT RIGHTS WITH IMPUNITY

Defendants invoke legislative immunity as an all-powerful talisman to ward off all of Plaintiffs' civil-rights claims, even if the defendant legislators intentionally censored disfavored viewpoints in a limited public forum of their own creation. But Defendants do not reconcile well-established First Amendment forum-analysis law with their expansive view of legislative immunity. Nor do they offer a persuasive explanation for their theory that they are legally censoring content, but not viewpoints.

Defendants' immunity argument also depends on assessing legislative activity at too high a level of generality, while ignoring the specifics of the challenged enforcement function. Finally, Defendants misunderstand the role of legislative immunity as a personal-immunity defense, misconstrue the holding of *Sable v. Myers,* 563 F.3d 1120 (10th Cir. 2009), and mistakenly rely on divergent out-of-circuit authority.

The practical effect of adopting Defendants' expansive view of legislative immunity would be to deny gender-ideology dissenters the right to speak and petition on equal terms to other Colorado citizens.

### A. Legislators cannot invite citizens to express their own opinions in a limited public forum and then claim immunity when the legislators opt not to honor the terms of the forum they created

Defendants essentially claim that they can simultaneously create a limited public forum for public comments on pending legislation *and* disregard the ground rules that apply to all other state actors who are not legislators. This would place Colorado state legislators above the First Amendment.

In the abstract, perhaps there could be situations where legislators could pick and choose which views they want heard. But as to Colorado's legislative committees, the legislators have specifically invited citizens "to express *their views* and have them incorporated into the legislative record." JA043 (emphasis added). "Public input is an important part of this process." JA046. "[C]ommittee members appreciate hearing the *perspective* of citizens and organizations on issues." *Id.* (emphasis added). The online sign-up interface similarly asks citizens to provide their "position on the hearing item." JA021; JA156 (listing options: For, Against, Neutral, Amend, Questions Only). Thus, the legislators are inviting citizens to express the citizens' own viewpoints, not just provide evidence or information. In doing so. Defendants are providing a forum to those citizens, not merely investigating a legislative issue.

In determining the nature of a forum, this Court looks at the purpose, use, and intent in creating it. *See Summum v. Callaghan*, 130 F.3d 906, 915 (10th Cir. 1997). The history and documentation pertaining to Colorado General Assembly legislative committee hearings show that an important purpose of the public testimony is to allow citizens to provide comments reflecting their own viewpoints on pending legislation. This supports the existence of a limited public forum—a conclusion that Defendants agree with. JA183, JA225.

Having opened this limited public forum by inviting the citizens to comment, the legislators have also invited in the First Amendment. If this Court allows Defendants to pick and choose which views are heard on otherwise relevant topics, while raising the shield of legislative immunity, the consequences for freedom of expression will be dire.

Defendants' reliance on *Tenney v. Brandhove,* 341 U.S. 367 (1951), is thus misplaced because that case involved a special investigative committee, not open public comment on pending legislation. *Tenney* centered on California's "Senate Fact-Finding Committee on Un-American Activities, colloquially known as the Tenney Committee." *Id.* at 369. The committee "summoned [the plaintiff] to appear before them at a hearing . . ." *Id.* at 370. "The plaintiff appeared with counsel, but refused to give testimony." *Id.* The plaintiff alleged that the hearing was not legislative in purpose, but designed to intimidate and silence him. *Id.* at 371. The Supreme Court disagreed, holding that

investigations by standing or special committees do not create civil liability under the "statute of 1871." *Id.* at 377-79.[1]

*Tenney* is easily distinguished because the California Senate did not create a forum for voluntary public comment—rather it compelled the plaintiff to appear against his will, ostensibly to investigate a conspiracy or other misconduct. In contrast, Plaintiffs—along with all members of the public—were invited to give their views, but then told they could not use their own words or express views some found disrespectful. Moreover, *Tenney* long precedes the Supreme Court's forum-analysis jurisprudence, which did not crystallize until the early 1980s. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983) (categorizing different speech forums). California's committee did not set up a limited public forum, under the present analytical framework. There is no basis for reading *Tenney* to hold that creating a limited public forum falls within the sphere of legitimate legislative activity, triggering absolute immunity. Thus, *Tenney,* provides no useful guidance for evaluating the application of speech restrictions in what all parties agree is a limited public forum.

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[1] Section 1983 was enacted as part of the Civil Rights Act of 1871.

### B. Prohibiting "misgendering" and "deadnaming" is viewpoint-based and content-based

Defendants' attempt to characterize their speech restrictions as merely content-based, but not viewpoint-based, is simply wrong. To be sure, content-based (or topic-based) restrictions are permissible in a limited public forum, so long as they are reasonable and related to the purposes of the forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995). But within a permissible content category (topic), state actors may not pick and choose which viewpoints will be allowed. *Id.; see also Reed v. Town of Gilbert*, 576 U.S. 155, 168-69 (2015) ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter").[2]

Here the permissible content-based restriction is the topic of the bill on the respective committee's agenda that is open for public comment. Within that topic, however, the legislators cannot exclude some views about pending bills, while allowing others. Defendants also cannot avoid liability by allowing some (more respectful or acceptable) people to speak in opposition, while censoring those who voice their opposition

[2] Viewpoint discrimination is a sub-set of content discrimination. *Rosenberger*, 515 U.S. at 830-31.

with language that Defendants deem "offensive" or "hurtful" to some listeners or constituents:

> 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. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

*Rosenberger,* 515 U.S. at 831; *see also, e.g., Iancu v. Brunetti,* 588 U.S. 388, 393, 395 (2019) (government may not discriminate against ideas that offend); *Snyder v. Phelps,* 562 U.S. 443, 458 (2011) (public debate must tolerate insulting, even outrageous speech).

State actors may not give preferential treatment to citizens expressing viewpoints that comport with gender ideology, while restricting those who do not. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1233 (10th Cir. 2021) ("the Act places pro-animal facility viewpoints above anti-animal facility viewpoints"). The defendant legislators do just that by restricting how those opposing transgender-related legislation voice their views on transgender policy, including mandating the use of preferred pronouns and forcing speakers to lie about what they consider to be biological reality. JA024; JA030-033. This amounts to blatant viewpoint discrimination.

### C. Enforcing viewpoint-based speech restrictions during public comments is not legislating

Defendants would have this Court hold that because their wrongful conduct occurred in the context of a committee hearing where citizens commented on pending legislation, it must therefore be integral to the legislative process. Dkt. 20 at 19; JA242. But the focus is on the nature of the act, not the title of actor, and even the district court noted that neither "the Tenth Circuit nor the Supreme Court has squarely addressed" whether enforcing decorum rules and restrictions during public comments is legislative in nature. JA240.

Defendants' censorship activities are an enforcement (or administrative) function performed by legislators, and therefore not subject to legislative immunity.[3] Notably, in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the defendant's acts of "voting for an ordinance" and "introduc[ing] of a budget and signing into law an ordinance" were traditional legislative functions. *Id.* at 55. In contrast, in *Borde v. Bd. of Cty. Comm'rs*, 423 F. App'x 798 (10th Cir. 2011) (unpublished) (emphasis added), this Court held that "[u]nlike preparing legislation or voting on legislation, the acts of providing notice of a legislative meeting

[3] This would be true whether or not this Court agrees that legislative immunity is a personal defense not available for official-capacity claims. If the act is not legislative, then legislative immunity is unavailable, even the if the actor happens to carry the title legislator.

to interested parties and providing those parties with an opportunity to be heard do *not* implicate the legislative function." *Id.* at 802.

This Court reached a similar conclusion in *Kamplain v. Curry Cty. Bd. of Com'rs*, 159 F.3d 1248 (10th Cir. 1998), where it held that a County Board of Commissioners' action to censure the plaintiff and prevent him from attending future meetings were administrative and not legislative. *Id.* at 1252. This Court relied, in part, on *Hansen v. Bennett*, 948 F.2d 397, 402 (7th Cir. 1991), where the Seventh Circuit noted that legislative immunity was ordinarily limited to voting or speaking on legislation or subpoenaing records and did not extend to activities incidentally related to legislative affairs. The court went on to conclude that the defendant official was not acting in a legislative capacity when he "regulated an open public discussion of various issues[.]" *Id.* at 403.

It also matters that the legislators were not merely gathering factual information or conducting an investigation—they had specifically asked members of the public to "express their views" on the pending legislation. JA043. Perhaps committee hearings have additional purposes as well, but having asked citizens to state their own opinions during public comments, it's wrong to characterize Defendants' application of speaking rules as legislative activity, immunizing legislators for censoring disfavored viewpoints, while allowing other citizens to speak freely. Moreover, Plaintiffs do not assert that the First

Amendment requires Colorado's General Assembly's committees to hear public comments—only that, having decided to open a limited public forum, the legislature cannot discriminate based on viewpoint by calling an ordinary public-comment period "legislative activity."

Indeed, the Supreme Court itself has held: "[W]hen the board [of education] sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech." *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 176 (1976).[4] Boards of Education and school boards also exercise legislative functions, such as approving collective bargaining agreements. Thus, a teacher had the right to address the board about a pending collective bargaining agreement, on terms equal to other citizens, even if her union did not want her to speak. *Id.* at 175-76. "Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers[.]" *Id.* at 175.

That is comparable to what Plaintiffs are requesting here—the right to comment on pending legislation on terms equal to other members of the public, without having alter their views or adopt an ideology they disagree with.

[4] This case predates the Supreme Court content versus viewpoint jurisprudence, so it does not discuss viewpoint-based restrictions.

### D. Personal-immunity defenses do not apply to official capacity claims

Defendants argue that legislative immunity is a defense available to block all official-capacity claims for equitable relief, so long as the named defendant is a *state* legislator, but not a *municipal* legislator. Dkt. 20 at 21-24. Why this should be so is not clear, but Defendants appear to argue that the separate doctrine of sovereign immunity makes legislative immunity available to state legislative officials, but not municipal legislative officials, at least for official-capacity claims. *Id.* This novel approach would make legislative immunity a form of derivative immunity—dependent on the Eleventh Amendment—a confusing argument that contradicts Supreme Court precedent and Defendants' own brief.

To make this argument, Defendants must discount the plain language of *Sable*, ignore this Court's doctrine of horizontal stare decisis, and rely heavily on divergent out-of-circuit authority. *Sable's* holding that legislative immunity "applies . . . only to legislators sued in their individual capacities, not to the legislative body itself"[5] did not purport to overrule *Supreme Court of Virginia v. Consumers Union of the U.S.*, 446 U.S. 719 (1980), and Plaintiffs have not argued that it did.

Rather, *Sable* is fully consistent with Supreme Court decisions after *Consumers Union,* clarifying that personal-immunity defenses are not

[5] *Sable,* 563 F.3d at 1123.

available for official-capacity claims. *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 677 n.* (1996) ("Because only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants only in their *individual* capacities . . . the legislative immunity claim is moot.") (cleaned up). Such claims are claims against the official in name only and are functionally claims against the entity that the official represents.

Nothing in *Graham* or *Umbehr* stands for the proposition that legislative immunity is somehow more robust if the official sued is a state legislator, rather than a mere local-government legislator. Defendants' analysis thus conflates sovereign immunity with legislative immunity. In so doing, it largely ignores *Ex parte Young*. *See Guttman v. Khalsa,* 669 F.3d 1101, 1126-27 (10th Cir. 2012) ("By proceeding on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state itself, the *Ex parte Young* doctrine enables federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States") (cleaned up). But of course, official-capacity claims against state officials are functionally claims against the state. *See e.g, Graham,* 473 U.S. at 165 ("Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent"); *Hafer v. Melo*, 502 U.S. 21, 25 (1991)

("Suits against state officials in their official capacity therefore should be treated as suits against the State"). And the Supreme Court made clear after *Consumers Union* that personal defenses are not available for official-capacity claims. *Graham*, 473 U.S. at 166-67.

Moreover, because *Sable* post-dates *Consumer's Union* and cites to it, this Court is bound by *Sable's* holding that legislative immunity is a personal defense unavailable to legislative bodies. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1183 (10th Cir. 2018). Indeed, *Sable's* holding is consistent with *Graham, Hafer*, and *Umbehr,* Supreme Court decisions that also post-date *Consumers Union.* "[T]he *only* immunities to the defendant in an official-capacity action are those that the governmental entity possesses." *Hafer,* 502 at 25 (emphasis added); *Graham,* 473 U.S. at 167 ("In an official-capacity action, [personal-immunity] defenses are unavailable"); *see also Umbehr,* 518 U.S. 668, 677 n.* (claim of legislative immunity moot where only official-capacity claims are before court). Defendants ignore more recent cases that make this distinction.

According to the Supreme Court, an official-capacity defendant is entitled only to "forms of *sovereign immunity* that the entity, *qua* entity, may possess." *Graham,* 473 U.S. at 167 (emphasis added). Thus, for legislative immunity to apply to the official-capacity claims in this case, Defendants must show that legislative immunity is a form of sovereign immunity possessed by the Colorado General Assembly as a legislative body.

Perhaps their best case for this proposition is the First Circuit's decision in *Cushing v. Packard*, 30 F.4th 27 (1st Cir. 2022) (en banc), which cites *Consumers Union* for the proposition that "a legislative body may itself assert legislative immunity."[6] *Id.* at 42. But this out-of-circuit authority squarely contradicts *Sable*'s holding that legislative immunity is available to legislators, personally, but not legislative bodies. 563 F.3d at 1123. Obviously, this Court must apply its own precedent absent any intervening Supreme Court decision. And because *Consumers Union* arose before *Sable*, and *Sable* cited it when discussing this exact issue, it is not intervening authority allowing this Court to ignore *Sable*. *See Lincoln*, 900 F.3d at 1183.

Nor did the First Circuit explain how legislative immunity is a form of sovereign immunity, as required by *Graham*. Instead, the *Cushing*

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[6] Defendants also overstate the extent of other out-of-circuit precedent supporting their expansive view of legislative immunity. Neither the Fifth Circuit nor the Ninth Circuit agree that legislative immunity applies to official-capacity claims. *Laird v. Spencer*, No. 20-30237, 2025 U.S. App. LEXIS 696, at *4-5 (5th Cir. Jan. 13, 2025) (unpublished) ("[A]bsolute immunities are personal defenses inapplicable to official-capacity actions"); *Bols v. Newsom*, No. 22-56006, 2024 U.S. App. LEXIS 1276, at *2 (9th Cir. Jan. 19, 2024) (unpublished) ("Personal immunity defenses—such as absolute legislative immunity—are . . . unavailable in an official capacity action") (cleaned up). In fact, while Defendants cite *Schmidt v. Contra Costa County*, 693 F.3d 1122 (9th Cir. 2012), for support, Dkt. 20 at 18, Defendants overlook the footnote in that decision explaining that "legislative immunity is inappropriate for [the defendant] because [the plaintiff] sued him in his *official* capacity." *Id.* at 1131 n.10. *Sable's* holding is thus consistent with those circuits.

majority relied on a hypothetical referenced in dicta: "*If* the Virginia Legislature had enacted the State Bar Code and *if* suit had been brought against the legislature, its committees, or members *for refusing to amend the Code* . . . the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity." *Consumers Union,* 446 U.S. at 733-34 (emphasis added); *see also Cushing*, 30 F.4th at 40 n.12, 43 (citing this dicta in *Consumers Union*). But the legislature was not a party and the nature of the relief discussed—ordering the legislature to amend the Code—is different than restraining a legislative body's enforcement of speech rules in a limited public forum, which is what Plaintiffs request here.[7]

Still, this distinction between state and municipal government that the First Circuit and Defendants draw makes no sense. As even Defendants acknowledge, sovereign immunity and legislative immunity are "two very distinct immunities." Dkt. 20 at 23. So whether a state agency has sovereign immunity has no bearing on whether it has legislative immunity. Legislative immunity is "unavailable" to municipal entities for the same reason it is "unavailable" in official-capacity suits: personal defenses do not extend to government agencies.

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[7] There may be federalism or separation of powers concerns distinct from legislative immunity which counsel against Article III courts purporting to direct state legislators to pass or amend state laws, but that issue is not before this Court because Plaintiffs have not requested such relief.

*Graham*, 473 U.S. at 167. And that is precisely what the Tenth Circuit held in *Sable*, 563 F.3d at 1123-24.

To see this distinction more clearly, it is helpful to consider the rationale of *Ex parte Young,* the seminal case that was largely ignored by the First Circuit in *Cushing*. It too considered the problem of limiting government officials' breadth of discretion, and reasoned that permissible official discretion does not include the discretion to act illegally:

> The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment to the injury of complainant. In such case *no affirmative action of any nature is directed,* and the officer is simply prohibited from doing an act which he had no legal right to do.

*Ex parte Young*, 209 U.S. 123, 159 (1908) (emphasis added).

This reasoning applies with equal force to restraining state legislators from enforcing or administering an illegal speech restriction. For these same reasons, Defendants' attempt to graft sovereign immunity onto legislative immunity ignores the rationale underlying *Ex parte Young's* fiction—authority to act unconstitutionally cannot be conveyed by the state *or* a state legislative body. *See id.* at 160 ("The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States").

Perhaps it is also easy to forget that prior to *Graham,* there was confusion about personal- versus official-capacity suits. The Supreme Court acknowledged as much in 1991, in a unanimous opinion that offered this third-person retrospective: "In *Kentucky* v. *Graham* . . . the Court sought to eliminate *lingering confusion* about the distinction between personal- and official-capacity suits." *Hafer,* 502 U.S. at 25 (emphasis added). *Consumers Union* was decided in 1980, some five years before *Graham*, during this period of confusion. While *Graham, Hafer,* or *Umbehr,* did not explicitly overrule *Consumers Union,* their holdings did limit its scope by precluding the application of personal-immunity defenses to official-capacity claims. Accordingly, this Court should reverse the district court and hold that legislative immunity does not apply to Plaintiffs' official-capacity claims.

## II. A LIVE CONTROVERSY EXISTS BETWEEN THE PARTIES

### A. Defendants did not respond to Plaintiffs' arguments regarding their pre-enforcement vagueness challenge

"Issues will be deemed waived if they are not adequately briefed." *Garrett v. Selby, Connor, Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (quoting *Utahns v. United States DOT*, 305 F.3d 1152, 1175 (10th Cir. 2002)); *see also Dig. Ally, Inc. v. Util. Assocs.,* 882 F.3d 974, 978 (10th Cir. 2018) (failure to address arguments results in waiver). Plaintiffs challenged the General Assembly's subjective decorum,

dignity, and respect rules as vague and providing excessive enforcement discretion. JA035. Plaintiffs argued this issue in their opening brief and specifically asserted that those vague rules remain in place today. Dkt. 14 at 60-61; JA022, JA047 ("The chair has the discretion and authority to limit testimony . . . ."); *see also* Senate Guide to Public Hearings, https://perma.cc/DGU2-WYCX; House Guide to Public Hearings, https://perma.cc/5L6L-GRBQ. Defendants failed to respond to this argument or contest the continued existence of the decorum rules that Plaintiffs challenge as vague. As a result, Defendants have conceded that Plaintiffs' lawsuit is not moot.

### B. Defendants did not respond to Plaintiffs' argument regarding automatic substitution of official-capacity defendants

Fed. R. Civ. P. 25(d) provides for automatic substitution of official-capacity defendants by their successor. All the defendants are sued in their official capacities, including two who were sued as chairs of their respective legislative committees. JA013; JA018. Senator Gonzales remains Chair of the Senate Judiciary Committee, with Senator Weissmann now her Vice Chair. COLORADO SENATE DEMOCRATS, Majority *Leader Rodriguez Announces Senate Committee Appointments,* https://perma.cc/4K7M-LUX3. Rep. Garcia remains on the House Judiciary Committee, but that committee now has a new chair. COLORADO HOUSE DEMOCRATS, *Speaker McCluskie Announces*

*Committee Appointments* (Dec. 9, 2024), https://perma.cc/3TBE-WJNV. By operation of Rule 25(d) (and its appellate analogue Fed. R. App. P. 43(c)(2)) the new Chair of the House Judiciary Committee, Rep. Representative Javier Mabrey, succeeds former Chair Weissman.

Defendants did not mention Rule 25(d) or discuss automatic succession in their answering brief. As a result, this Court can take as established that viable official-capacity defendants remain part of this case. As a result, this Court should hold that Plaintiffs' claims for equitable relief are not moot and reverse the district court's holding to the contrary.

### C. Plaintiffs' allegation that Defendants erased part of Goeke's testimony is accepted as true on a Rule 12(b)(6) motion to dismiss

In deciding whether Plaintiffs have stated a viable claim for relief under Fed. R. Civ. P. 12(b)(6), this Court accepts Plaintiffs' well-pleaded facts as true and draws all reasonable inferences in Plaintiffs' favor. *Yussuf Awadir Abdi v. Wray*, 942 F.3d 1019, 1025 (10th Cir. 2019); *Dahn v. Amedei*, 867 F.3d 1178, 1185 (10th Cir. 2017). Moreover, the Complaint may incorporate attached exhibits, referenced documents that are undisputed, and matters subject to judicial notice. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010); *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001).

Plaintiffs' Complaint attached relevant hearing transcripts and the General Assembly's public participation memorandum. JA043-JA106. It also included links to audio recordings and government websites. *See, e.g.,* JA021-022, JA030-033.[8] This linked-to evidence is undisputed and is properly incorporated into Plaintiffs' Complaint for purposes of evaluating Defendants' motion to dismiss.[9]

Moreover, Plaintiffs' allegation that "[s]ignificant portions of Ms. Goeke's speech were erased from the official audio record of the Senate Judiciary Committee hearing" (JA030) is presumed true. *See also* JA038-039 (claim for relief for censoring, editing, or erasing hearing audio record); JA093 ("No audio from 6:34:41 PM to 6:36:35 PM"); JA099-103 (transcript of deleted Goeke speech). Examination of the archived official audio shows that the erasure of Goeke's testimony is

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[8] The official audio recordings of the two respective Judiciary Committee public comment sessions have been archived, but are still publicly available on the General Assembly's website: Senate Judiciary Committee Audio for March 27, 2024, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20250214/73/15772; House Judiciary Committee Audio for Jan. 30, 2024, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20250214/73/15228.

[9] Under Fed. R. Evid. 201(c)(2), it is also appropriate for this Court to take judicial notice of undisputed information posted on official government websites or comparable sources. *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 703 n.22 (10th Cir. 2009); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224-25 (10th Cir. 2007).

still extant. *See* Senate Judiciary Committee Audio for March 27, 2024 at timestamp 6:34:41 PM to 6:36:35 PM.

In their Answering Brief, Defendants for the first time suggest that Goeke's testimony was not erased, because when "the Chair turns off the microphones . . . the tape recording is automatically stopped as well." Dkt. 20 at 14 (footnote 5).[10] But the evidence that Plaintiffs referenced in their Complaint plausibly supports erasure. First, the archived official audio goes completely silent for minutes 6:34:41 PM to 6:36:35 PM. Second, the unofficial recording of the Senate Judiciary Committee Hearing—also incorporated by reference into the Complaint—evidences a spirited exchange between Sen. Gonzalez and Ms. Goeke, with Ms. Goeke attempting to speak while being repeatedly interrupted and gaveled down by the senator. JA030-031 (citing to https://bit.ly/4akyMvP at timestamp 31:44 to 34:54). That audio does not indicate any change in sound amplification during Goeke's speech and Senator Gonzalez can be heard quite clearly enforcing the decorum rules. The official audio recording, however, is completely silent.

Plaintiffs submit that the government's late-breaking assertion that Ms. Goeke's testimony was never actually erased is, at a minimum, inaccurate. And if this Court remands this case—as we hope that it

[10] This argument was forfeited because it was not raised before the district court. Defendants also did not submit any sworn testimony or other admissible evidence supporting this new assertion, nor could they have done so in a Rule 12(b)(6) motion.

does—Plaintiffs will put this questionable new assertion to the test. But for purposes of evaluating this issue on appeal, Plaintiffs are entitled to the presumption that Defendants erased Ms. Goeke's speech from the official audio because it violated their decorum rules and that her partly completed speech has not been restored. As a result, this claim is not moot.

### D. The General Assembly is continuing to consider trans-related legislation and banning misgendering during public comments

Defendants also repeat the contention that Plaintiffs' claims are moot because it "is completely unknowable and speculative" whether there will be future trans-related legislation that will lead to Defendants' enforcing their decorum rules against Plaintiffs. Dkt. 20 at 30-31. But Plaintiffs' complaint plausibly asserted that transgender issues continue to trigger debate, that future "bills concerning transgender issues will assuredly be introduced in future sessions of the Colorado Assembly" and that Goeke and Guggenheim want to comment on such bills without expressing "fealty to trans ideology." JA033-034. Those factual allegations are also entitled to a presumption of truth.

Subsequent events have borne out these allegations. Trans-related issues continue to occupy the Colorado General Assembly, including during the ongoing regular session. *See, e.g.,* HB25-1109, Gender Identity Certificate of Death (2025 Regular Session),

https://perma.cc/6VKH-6NFD (purporting to prevent misgendering on death certificates).[11] And a committee chair recently re-affirmed the mandate that citizens respect preferred pronouns. *See* Colorado House Health & Human Services Committee Hearing on Feb. 5, 2025 regarding HB 25-1068 (Malpractice Insurers Gender-Affirming Care Minors), https://bit.ly/4gBHQ1S.[12] These issues are not going away. As a result, a live controversy remains between the parties.

## 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 Plaintiffs' motion for preliminary injunction and motion to suspend civil practice standards regarding pronoun usage.

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[11] Plaintiffs request that this Court take judicial notice of these undisputed facts.

[12] The full committee proceedings are available from the General Assembly's website at: https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20250205/-1/16551. The chair's instructions mandating preferred pronouns are located at timestamp 2:00:10 to 2:00:14.

Dated: February 27, 2025

Respectfully submitted,

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Dated: February 27, 2025

*s/Endel Kolde*