

CASE NO. 24-1473

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

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

**APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR
REHEARING EN BANC**

Respectfully submitted,
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The Appellees respectfully submit the following Response to Appellants' Petition for Rehearing En Banc.

STATEMENT OF THE ISSUES

The Appellants' Petition for Review En Banc presents the following issues:

1. Is the Panel Opinion consistent with binding precedent from the Supreme Court, and application of that precedent by this and other Circuit Courts, that absolute legislative immunity is applicable to official capacity claims?
2. Does the Panel Opinion extend legislative immunity to “enforcement activity” outside the scope of legitimate “legislative activity”?

SUMMARY OF THE ARGUMENT

The Panel Opinion is consistent with and adheres to binding precedent from the Supreme Court. It is further consistent with uniform application of that precedent in this and each of the other Circuits that have addressed these issues. Importantly, the Panel Opinion does not extend the concept or application of “absolute legislative immunity” beyond the sphere of legitimate legislative activity.

ARGUMENT

I. The Panel Opinion accurately reflects binding precedent from the Supreme Court, and is consistent with uniform precedent from this and other Circuits, regarding application of absolute legislative immunity to “official capacity” claims.

The Panel Opinion – and the District Court decision before it – accurately identified the primary disconnect between the parties’ arguments on the question of immunity from suit. Appellees do not assert, and have not asserted, Eleventh Amendment sovereign immunity in this case. Nor have they, the District Court, or the Panel questioned the practice of allowing claims for prospective (declaratory and injunctive) relief to proceed against states and state agencies, notwithstanding Eleventh Amendment immunity, by invocation of the *Ex Parte Young*¹ “fiction” of naming individual state officers, employees, or other actors in their “official capacity” as defendants.

The Panel (and the District Court) correctly understood the Appellees to be asserting a wholly different form of immunity – *legislative immunity* – with its roots extending back to the English Bill of Rights in the Seventeenth Century and its landmark exposition in this country in the Supreme Court’s decision in *Tenney*

¹ 209 U.S. 123 (1908).

v. Brandhove, 341 U.S. 367, 370-72 (1951). Panel Op. pp. 17-18. While *Tenney* involved only a claim for damages, the Panel Opinion correctly noted that “[t]his legislative immunity extends not only to damages suits, but also to requests for injunctive and declaratory relief” – Panel Op. p. 18 – citing the U.S. Supreme Court’s decision in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980). The Panel – quoting the Supreme Court – noted that reading a distinction between damage and prospective relief claims into *Tenney* “would undermine the very policy concerns that justified the *Tenney* doctrine: the risk that civil liability would ‘create a distraction and force legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation.’” Panel Op. pp. 18-19. With specific regard to claims under 42 U.S.C. §1983 (at issue in *Tenney* as well under a prior codification), the Panel correctly stated that “whether legislative officials are sued in their official or individual capacity, whether the relief sought is prospective or retrospective, so long as they are sued for the exercise of a legislative function, they are entitled to absolute legislative immunity.” Panel Op. p. 23.²

² In so holding, the Panel noted that “We thus join all our sister circuits that have considered the issue in holding that prospective relief is not available against a legislative official performing a legislative function.” Panel Op. pp 25-26. By Appellees’ count at the time of submission of their Answer Brief – pp. 16-18 – that

II. The Panel Opinion does not extend legislative immunity to “enforcement activity” outside the sphere of legitimate “legislative activity.”

The Panel’s Opinion did not extend immunity to the legislator Appellees for any actions outside the sphere of “legitimate legislative activity” – in this case the conduct of legislative committee hearings convened and directed exclusively for consideration of the merits of pending legislation. The Panel noted that adoption and enforcement of the rules of conduct for the legislative committee hearings at issue were “integral steps in the legislative process.” Panel Op. p. 32, quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). The Panel further noted that “the Legislators’ enforcement of the committees’ rules was a quintessential legislative activity. The entire purpose of adopting committee rules was to govern conduct at legislative hearings. That adoption would be meaningless if legislators, as the ones overseeing such hearings, could not enforce those rules in the very forum they were designed for.” Panel. Op. p. 32 (noting that the *Tenney* decision itself addressed state legislative committee hearings and extended to the use of subpoena power to compel attendance at those hearings). As this Court has previously held, legislative immunity is applied to “functions involving legislative speech and

included at least the First, Second, Third, Fourth, Fifth (recognizing *Minton* – discussed below), Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits.

debate, voting, preparing committee reports, *conducting committee hearings*, and other ‘integral steps in the legislative process.’” *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (emphasis added).

None of the opinions cited by the Appellants in their Petition contradict these points or the Panel’s analysis. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. at 732, absolute immunity was accorded the Virginia Supreme Court and its Chief Justice for engaging in legislative actions related to adopting the State Bar Code – but not for adjudicating disciplinary cases or enforcement actions taken under that Code. *Id.* at 734-36. Addressing this Court’s own decision in *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009) – itself citing *Consumers Union* – the Panel emphasized that absolute legislative immunity was not available for actions taken outside the legislative sphere (even by persons otherwise exercising a legislative function). Panel Op. pp. 23-25. The same point was noted with regard to the Fifth Circuit’s opinion in *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 133 (5th Cir. 1986) – Panel Op. p. 25. And the Panel was similarly attentive to overly broad actions insufficiently related to facilitating legislative activities. Panel Op. pp. 35-36 – noting the excessive and overreaching sanctions imposed by the Board in *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248 (10th Cir. 1998). Panel Op. pp. 35-36. The Panel’s opinion here was narrowly and

appropriately directed to protecting actions taken by legislators clearly and wholly within the sphere of legitimate legislative activity – in this case requiring nothing more than a basic level of decorum and outward respect for other participants in the specific context of legislative committee hearings directed exclusively to facilitating productive and informative testimony and discussions before the committee on the merits of and possible concerns with pending legislation.

CONCLUSION

For the reasons presented above, and noting that “rehearing en banc is not favored” – Fed. R. App. Proc. 40(a) – Appellees respectfully request this Court to deny Appellants’ Petition for Rehearing En Banc.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Under Fed. R. App. P. 40(d)(3), the length of this Response is limited to 3,900 words. This Response contains 1,170 words.

CERTIFICATE OF SERVICE

I hereby certify that:

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

On _____ I sent a copy of this Response to:

at _____,
the last known address/email address, by

_____.

[state method of service]

Date: April 2, 2026

s/ Edward T. Ramey

Signature