UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00913-RMR

GAYS AGAINST GROOMERS, a nonprofit corporation;
ROCKY MOUNTAIN WOMEN'S NETWORK, an unincorporated association;
RICH GUGGENHEIM, an individual; and
CHRISTINA GOEKE, an individual,

Plaintiffs

v.

LORENA GARCIA, in her individual and official capacities as a Colorado State Representative;
MIKE WEISSMAN, in his individual and official capacities as a Colorado State Representative and Chair of the House Judiciary Committee;
LESLIE HEROD, in her individual and official capacities as a Colorado State Representative;
JULIE GONZALES, in her individual and official capacities as a Colorado State Senator and Chair of the Senate Judiciary Committee; and
DAFNA MICHAELSON JENET, in her individual and official capacities as a Colorado State Senator,

Defendants

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6)

Defendants Lorena Garcia, Mike Weissman, Leslie Herod, Julie Gonzales, and Dafna Michaelson Jenet, through undersigned counsel, respectfully request the Court to dismiss Plaintiffs' Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. In support of this request, these Defendants submit as follows:

I. Plaintiffs' Claims

Plaintiffs have sued each of the Defendants under 42 U.S.C §1983 in their individual and official capacities as members of the Colorado General Assembly. The Complaint asserts that the Defendants – chairs of the Colorado House and Senate Judiciary Committees, a member of the House Judiciary Committee, and the House prime sponsor and one of the Senate prime sponsors of a pending legislative bill – collectively deprived the Plaintiffs of their First Amendment rights during public testimony sessions regarding the bill before both the House and Senate Judiciary Committees. The bill under consideration – House Bill 24-1071 – expanded the conditions (or "good cause") upon which a person with a prior felony conviction could obtain a legal name change in Colorado to include "changing the petitioner's name to conform with the petitioner's gender identity."[1]

The Plaintiffs are two organizations and two individuals who, per their Complaint, reject "transgender ideology" and the related concepts of "misgendering" and "deadnaming." Compl., ¶¶ 4-7.[2] On behalf of themselves and their organizations (Gays Against Groomers and Rocky Mountain Women's Network respectively), Plaintiffs

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[1] HB24-1071 ultimately passed both Houses of the Colorado General Assembly and was signed into law by the Governor on April 19, 2024.

[2] Per the Plaintiffs' descriptions, "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;" while "deadnaming" is "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.'" Compl. ¶¶ 34-36.

Guggenheim and Goeke signed up to testify against HB24-1071 in public testimony sessions before both the House and Senate Judiciary Committees – Compl. ¶¶ 37, 38, 52. As the Plaintiffs accurately state, these sessions "provide[] citizens with an opportunity to provide public comment on pending legislation in the form of testimony at a committee hearing." Compl. ¶17.

On the occasions of both of these committee sessions, the Plaintiffs claim to have run afoul of "decorum" and "respectful discourse" guidelines – specifically requesting participants to refrain from "misgendering" or "deadnaming" other individuals during their testimony. When the Plaintiffs refused to comply with those guidelines – and proceeded to directly and repeatedly "misgender" and "deadname" other individuals in the room and/or associated with the legislation under consideration – they were interrupted by the Chairs of the respective committees and ultimately curtailed their testimony. Compl. ¶¶ 39-51, 52-64. The Plaintiffs further claim to have been effectively chilled – specifically and exclusively through implementation of these guidelines on these two occasions – from expressing their views in future public comment sessions regarding other "trans issues." Compl. ¶¶ 65-74. Per the Plaintiffs, all of this amounts to an ongoing deprivation of their rights under the First and Fourteenth Amendments for which they are entitled under 42 U.S.C. §1983 to declaratory and injunctive relief, together with nominal damages, costs, and attorney fees.

II. Each of the named Defendants is entitled to absolute immunity from the claims asserted against them in this action

Accepting Plaintiffs' Complaint as pled – and respectfully according them the benefit of all inferences – their claims fall squarely within the scope of absolute

legislative immunity as recognized and accorded by the Supreme Court in 1951 specifically to state legislators "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). "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. 44, 54 (1998) (noting the deep Parliamentary-American roots and rationale for the privilege – 523 U.S. at 48-49 – and further extending it to local legislators – 523 U.S. at 52). "Legislative immunity enables 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. 719. 733 (1980). The absolute legislative immunity applies both to claims for retrospective (damage) relief – *e.g., Tenney*, 341 U.S. at 371 – and prospective (injunctive or declaratory) relief – *e.g., Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 88 (1st Cir. 1983), citing *Supreme Court of Virginia,* 446 U.S. at 733-34; *Fry v. Board of County Comm'rs*, 7 F.3d 936, 937 (10th Cir. 1993); *accord, Larsen v. Senate of the Commonwealth*, 152 F.3d 240, 250, 253 (3rd Cir. 1998).

The key initial question, then, is whether the actions of the Defendant legislators as alleged in Plaintiffs' Complaint occurred "in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. The Tenth Circuit – noting some variation among the Circuits regarding the breadth of this concept (particularly at the county or municipal

level where boards and councils routinely perform a mix of legislative and executive functions) – has instructed that "the sphere of legitimate legislative activity" necessarily includes "legislative speech and debate, voting, preparing committee reports, *conducting committee hearings*, and other integral steps in the legislative process." *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (emphasis added), citing *Bogan*, *supra*.[3] The Court specifically noted the distinction between ejecting a person from a public meeting concerning "the enactment or promulgation of public policy" (*i.e.*, *within* the "legislative" ambit) and the blanket ban at issue in that case (barring the plaintiff from attending any and all future County Board meetings on *any* topic – legislative or nonlegislative – whatsoever); *Kamplain*, 159 F.3d at 1252.

In the present case, no one was ejected from a committee meeting or any other forum. As recited in detail in the Plaintiffs' Complaint, everything occurred wholly within the context of two formal legislative committee meetings convened specifically and exclusively for the purpose of obtaining public comment on the merits of a piece of pending legislation – and for no other purpose. "In Colorado, every bill receives a public hearing by one of the legislature's committees." Compl. ¶17. This is wholly and quintessentially within "the sphere of legitimate legislative activity."

[3] *Kamplain* distinguished such non-"legislative" activities as removing a participant from a portion of a local City Council meeting "open to comments from the general public on any topic" and involving debate "on non-legislative matters" – *cf.*, *Hansen v. Bennett*, 948 F.2d 397, 398, 400-401 (7th Cir. 1991).

Per the Plaintiffs' Complaint, in the House committee meeting, the prime sponsor of the legislation requested participants to "engage in respectful discourse and share their perspectives and opinions *on the bill* by not disparaging other members of our community or other witnesses." Compl. ¶40 (emphasis added). The Committee Chair adopted these rules by stating "as Chair I affirm and ratify your comments." Compl. ¶41. This prompted one of the Plaintiffs to immediately leave the meeting of his own volition (as his intent was to speak in what he knew would be viewed as a "derogatory" manner about the bill's unofficial namesake – not the bill). Compl. ¶42. The other individual Plaintiff – despite requests from the committee Chair to confine her comments to the legislation – launched a personal attack on the bill's unofficial namesake ("they're an admitted former prostitute" who "works with children"), precipitating a recess. Compl. ¶¶43-46. [The only allegation concerning Defendant Herod was that during this exchange she objected to comments by that Plaintiff. Compl. ¶44.]

In the Senate committee meeting, the Committee Chair generally announced that she would not allow witnesses to fail to treat others with dignity and respect or a lack of decorum. Compl. ¶53. She then adopted the Senate sponsor's suggestion "that witnesses should not use 'derogatory language,' 'misgender,' 'deadname,' or otherwise 'disparage' those present." Compl. ¶¶54, 55. One of the Plaintiffs, after briefly addressing the legislation, proceeded to repeatedly "deadname" and attack the bill's unofficial namesake despite requests (and ultimate gaveling) from the committee Chair. Compl. ¶¶56-58. The other individual Plaintiff addressed the "gay liberation movement" and ultimately proceeded to "deadname" and "misgender" the bill's unofficial namesake

as well. Compl. ¶¶60-61.[4] For these actions, five state legislators are being subjected to a federal civil rights lawsuit for actions wholly within the context of two legislative committee meetings convened specifically and exclusively for the purpose of addressing the merits of a single piece of pending legislation – *i.e.*, wholly within "the sphere of legitimate legislative activity." Respectfully, this is precisely the point of absolute legislative immunity.

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

Immunity issues aside, Plaintiffs' Complaint does not allege a sufficient factual basis to support a claim for deprivation of their rights under the First Amendment.

Plaintiffs' claims rest on their characterization of the legislative committee public comment sessions as a "limited public forum." Compl. ¶76. Per the Supreme Court, "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects…[*citation omitted*]…In such a forum a government entity may impose restrictions on speech that are reasonable and viewpoint neutral." *Pleasant Grove City v. Summon*, 555 U.S. 460, 470 (2009). "[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have created a distinction between, on the one hand, *content* discrimination, which may be permissible if it serves the purposes of that limited forum, and, on the other hand, *viewpoint* discrimination,

[4] It is not clear from the Complaint whether the prime sponsors of the bill are being sued because of their sponsorship of the bill. Clearly, sponsoring legislation is at the heart of the "sphere of legitimate legislative activity."

which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995) (emphasis added). "In a limited public forum, a reasonable restriction 'need not be the most reasonable or the only reasonable limitation." *Tyler v. City of Kingston*, 74 F.4th 57, 65 (2nd Cir. 2022).

In the present case, the Colorado House and Senate Judiciary Committees – whose role (unlike city councils, boards of county commissioners, school boards, etc.) is purely legislative – invited members of the public to provide comment at dedicated committee sessions on the merits of a piece of pending legislation – House Bill 24-1071. Compl. ¶¶17-26. To serve the purposes of this limited forum, the Defendant legislators requested participating members of the public to confine their comments to "respectful discourse" directed to the proposed legislation and refrain from "using derogatory language or misgendering witnesses, or using a witness's deadname." Compl. ¶¶40-41, 53-55. This was so that all witnesses felt comfortable coming forward to state their reasons for supporting or opposing the bill without fear of being treated derogatorily. These limited content-based restrictions were "narrowly tailored to serve a significant governmental interest" in the conduct of productive committee sessions focused on the merits of the legislation (as opposed to individuals), were clear as to their content, and left open "ample alternative channels for communication"[5] of relevant information from all viewpoints and perspectives regarding the merits of the legislation under

[5] *Ward v. Rock* Against *Racism*, 491 U.S. 781, 791 (1989) – regarding "restrictions on the time, place, or manner of protected speech."

consideration. *Cf, Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 387 (4th Cir. 2008) ("The Commission has significant interest in maintaining civility and decorum during the public comment sessions of its public meetings, both to ensure the efficient conduct of the people's business and to maximize citizen participation in the discussion").[6]

Plaintiffs' response to these reasonable "decorum" and "courtesy" standards is clearly described in their own Complaint and summarized above.[7]

IV. Mootness

Finally, this case obviously also poses a question about mootness. The legislation at issue has been finally passed and signed into law by the Governor. The Second Regular Session of the Seventy-Fourth Colorado General Assembly adjourned on May 8, 2024. The First Regular Session of the Seventy-Fifth General Assembly will not convene until January 8, 2025. There are no pending considerations of an intervening special session, and assuredly not regarding any issues or legislation relevant to the subject matter of interest to the Plaintiffs. Compl. ¶¶4-7. The question of

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[6] The Court in *Steinburg* also noted – "Moreover, denying a speaker at the podium in a Commission hearing the right to launch personal attacks does not interfere with what that speaker could say without such attacks. The same message could be communicated, indeed probably more persuasively . . ."

[7] This case is remarkably similar to the situation discussed in the recent case of *Spiehs v. Larsen*, 2024 U.S. Dist. Lexis 63780, 2024 WL 1513669 (D. Kan. 2024) – in which the Plaintiffs similarly refused to comply with minimal "decorum" and "germane" standards adopted by the Board of City Commissioners for the City of Lawrence, Kansas, insulted and talked over Board members, insulted transgender individuals, disrupted the Board meeting, and declined multiple opportunities to de-escalate the situation – resulting in the Court's denial of their request for a preliminary injunction on First Amendment grounds.

mootness would then appear to turn on the exception from the mootness doctrine of "capable of repetition yet evading review." The Plaintiffs highlight this in paragraph 73 of their Complaint.

The Tenth Circuit has recently provided some guidance on this issue. In *Doe v. Board of Regents of the University of Colorado*, __ F.4th __, 2024 U.S. App. Lexis 11190, 2024 WL 2012317 (10th Cir. May 7, 2024), the Court concluded that it retained jurisdiction to adjudicate a claim regarding a University policy notwithstanding assurances by the University that it was no longer being enforced (expressing skepticism regarding this assurance). 2024 U.S. App. Lexis 11190 at *26-27. That is not particularly pertinent here as no-one is disclaiming possible future application of civility and decorum standards similar to – or different from – those at issue in this case. And in *Rio Grande Foundation v. Oliver*, 57 F.4th 1147 (10th Cir. 2023), the Court found application of a campaign finance disclosure requirement to be moot as to one Plaintiff (who expressed no intent to engage in affected political activity in that forum in the next election cycle), yet not moot as to another (who did express such an intent). 57 F.4th at 1166-67. While possible future application of similar civility and decorum standards has certainly not been disclaimed by the legislative Defendants in this case, the prospect of future legislation that would implicate such standards – as well as participation in the legislative process by these Plaintiffs – is more problematic.

Another relevant consideration is illustrated in a recent decision from the Fifth Circuit – *Empower Texans, Inc. v. Geren*, 977 F.3d 367 (5th Cir. 2020). Here, though the challenged action was too short in duration to be fully litigated prior to cessation, the

Court found the Plaintiff's claims to be moot due to his own dalliance in pursuing them. 977 F.3d at 370-71. In the present case, it may be noted that the civility and decorum standards at issue were first communicated and applied to the Plaintiffs at the request of HB24-1071's sponsors by the House Judiciary Committee on January 30, 2024 – Compl. ¶39 – yet no judicial relief (preliminary or permanent) was sought until April 4, 2024 (notwithstanding the imminence of a second committee hearing regarding precisely the same bill and the certainty of a similar request from the sponsors).

Perhaps most important, at this point – despite Plaintiffs' predictions that more such legislation is inevitable in future sessions (albeit with different sponsors and committee chairs and addressing topics quite different from the name-change authorizations addressed in HB24-1071), and that these Plaintiffs will become involved and be subjected to the same or similar civility and decorum standards at issue here – the prospect of a repeat scenario posing the same litigable issues is speculative at best. And – should the scenario arise – these Plaintiffs, and any other affected persons, would certainly be capable of seeking prompt judicial intervention.

V. Conclusions

For the reasons discussed above, the Defendants respectfully request the Court to dismiss Plaintiffs' Complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Respectfully submitted this 14th day of May, 2024.

By: *s/Edward T. Ramey*
Edward T. Ramey
Martha M. Tierney
Tierney Lawrence Stiles LLC
225 East 16th Avenue, Suite 350
Denver, Colorado 80203
Phone: (303) 949-7676
E-mail: eramey@TLS.legal
mtierney@TLS.legal

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2024. I filed with the Court and served upon all parties herein a true and complete copy of the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FED.R.CIV.P. 12(B)(6)** by e-filing with the CM/ECF system maintained by the Court.

s/Edward T. Ramey