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' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (CM/ECF Dkt. No. 8)

Defendants Lorena Garcia, Mike Weissman, Leslie Herod, Julie Gonzales, and Dafna Michaelson Jenet, through undersigned counsel, respectfully request the Court to deny Plaintiffs' Motion for Preliminary Injunction (CM/ECF Dkt. No. 8). In support of this request, Defendants submit as follows:

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir.

2019). Such relief may be granted 'only when the movant's right to relief is clear and unequivocal." *McDonnell v. City and County of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018). In the present case, Plaintiffs' Complaint fails to state any claim against these Defendants upon which relief can be granted, and is subject to a pending Motion to Dismiss submitted concurrently by these Defendants under Fed.R.Civ.P. 12(b)(6).

I. Plaintiffs' claims are not substantially likely to succeed on the merits

As discussed in detail in these Defendants' Motion to Dismiss, Plaintiffs claims fail on three counts. First, each of the named Defendants is entitled to absolute immunity – in both their individual and official capacities – from the claims asserted in this action. The actions complained of were purely and exclusively legislative acts, taken wholly "in the sphere of legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Sable v. Myers*, 563 F.3d 1120, 1123-24 (10th Cir. 2009); *Kamplain v. Curry County Board of Comm'rs*, 159 F.3d 1248, 1251 (10th Cir. 1998); *Fry v. Board of County Comm'rs*, 7 F.3d 936, 937 (10th Cir. 1993). As with Plaintiffs' claims in general, their requested prospective preliminary relief – asserted against the Defendants (1) necessarily and wholly in their official capacities as state legislators and (2) with regard to wholly speculative possible future legislative acts – constitutes a request for an improper prospective judicial intrusion into an exclusively legislative sphere. Respectfully, this is a step this Court should not take.

Second, as also addressed in the pending Motion to Dismiss, the Plaintiffs have not pled facts sufficient to establish a First Amendment violation even were the Defendants somehow deprived of their immunity. The non-viewpoint-based civility and

decorum standards they adopted in the last session of the state legislature were tailored to ensure the efficient conduct of the legislative committee meetings on the particular legislation before the committees at that time.

Finally, there is a very real preliminary question – also raised in the Motion to Dismiss – as to the mootness of the entirety of Plaintiffs' claims.

II. Plaintiffs have made no showing that they will suffer irreparable injury if their motion is denied.

Plaintiffs' request for a preliminary injunction rests upon their speculation that a new session of the Colorado General Assembly, commencing next January, will be considering legislation – similar enough to the legislation that gave rise to the now-inapplicable restrictions to which they object – that such focused civility and decorum restrictions will inevitably be imposed upon them once again. This is by no means certain – either as to (1) what legislation may be introduced and placed into consideration by the General Assembly next year or (2) what, if any, restrictions future committee chairs may deem appropriate to adopt. Should a situation similar enough to this year's events arise, the Plaintiffs will have ample opportunity – either in the context of pending litigation or anew – to seek prompt judicial intervention at that time and in that specific context. This would also enable a court to consider such a request based upon more than a prospective hypothetical state of affairs.

III. Plaintiffs' "threatened injury" without an injunction at this point does not outweigh the injury to the Defendants of being required to conform to an injunction tailored to a hypothetical state of affairs.

Any preliminary injunction at this point would be directed to a hypothetical future state of affairs. Plaintiffs suffer no injury unless and until circumstances arise anew that they believe implicate their asserted First Amendment rights – at which point they would have immediate access to the Court. Defendants, on the other hand, would be operating under an injunction – unhinged from any particular or tangible set of circumstances – for violation of which they could be subject to immediate sanction for contempt. This uncertainty would inevitably affect and chill their ability to perform their legislative functions.

IV. A preliminary injunction under these circumstances would be adverse to the public interest.

As was stated by the Supreme Court in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." While that comment addressed the issue of "absolute immunity" – an issue relevant to this case – it is also applicable to the placement of legislators, necessarily in their official capacities (thus implicating their successors and the institution), under a prospective preliminary injunction for violation of which they may be held in contempt or otherwise sanctioned. This is particularly the case where the injunction is necessarily non-specific in nature. It is not so much the individual legislators who will suffer, but – by virtue of the uncertainty and impact upon the legislators' willingness to act – the public interest which they serve.

Also, as noted by the Supreme Court in *Nken v. Holder*, 556 U.S. 418, 435 (2009), the third and fourth preliminary injunction factors "merge" when the government is the party opposing the injunction.

For the reasons addressed in this Response, the Defendants respectfully request the Court to deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this 14th day of May, 2024.

By: *s/Edward T. Ramey*
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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' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** by e-filing with the CM/ECF system maintained by the Court.

s/Edward T. Ramey