

No. 26-120

IN THE
Supreme Court of the United States

GAYS AGAINST GROOMERS, *et al.*,

Petitioners,

v.

LORENA GARCIA, INDIVIDUALLY AND AS A
COLORADO STATE REPRESENTATIVE, *et al.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether legislative immunity, which predates the enactment of 42 U.S.C. § 1983, applies to legislators acting in their legislative capacity when those legislators are sued in their official capacity?
2. Whether promulgating and enforcing rules of decorum in a legislative committee hearing held for the sole purpose of receiving public comment directed to the merits of pending legislation are legislative acts entitled to legislative immunity?

LIST OF PARTIES TO THE PROCEEDING

Petitioner are Gays Against Groomers, a non-profit corporation (“GAG”), Rocky Mountain Women’s Network, an unincorporated association (“RMWN”), Rich Guggenheim, a natural person, and Christina Goeke, a natural person.

Respondents are 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; Dafna Michaelson Jenet, in her individual and official capacities as a Colorado State Senator.

LIST OF RELATED PROCEEDINGS

Gays Against Groomers, et al. v. Garcia, et al., D.C. No. 1:24-CV-00913-RMR), United States District Court for the District of Colorado (Nov. 27, 2024).

Gays Against Groomers, et al. v. Garcia, et al., No. 24-1473, United States Court of Appeals for the Tenth Circuit (Mar. 10, 2026, rehearing en banc denied Apr. 23, 2026).

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING	ii
LIST OF RELATED PROCEEDINGS	iii
TABLE OF CONTENTS.....	iv
TABLE OF CITED AUTHORITIES	vi
RESPONDENTS' BRIEF IN OPPOSITION	1
INTRODUCTION.....	1
OPINIONS BELOW.....	2
JURISDICTION.....	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	8
1. The Tenth Circuit faithfully applied this Court's precedents that legislative immunity is available for official-capacity suits	8
2. There is no circuit split warranting this Court's review	14

Table of Contents

	<i>Page</i>
3. The legislators were acting in their legislative capacity	21
4. This case is not an appropriate vehicle to address the questions presented.....	24
CONCLUSION	26

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Abick v. State of Michigan</i> , 803 F.2d 874 (6th Cir. 1986).....	16
<i>Alia v. Michigan Supreme Court</i> , 906 F.2d 1100 (6th Cir. 1990).....	16
<i>Bi-Metallic Inv. Co. v. State Bd. of Equalization</i> , 239 U.S. 441 (1915).....	21
<i>Board of County Commissioners v. Umbehr</i> , 518 U.S. 668 (1996).....	12-14
<i>Bogan v. Scott-Harris</i> , 523 U.S. 44 (1998).....	11-13, 21-23
<i>Bols v. Newsom</i> , No. 22-56006, 2024 U.S. App. LEXIS 1276 (9th Cir. Jan. 19, 2024).....	17, 18
<i>Church v. Missouri</i> , 913 F.3d 736 (8th Cir. 2019).....	17
<i>Colon Berrios v. Hernandez Agosto</i> , 716 F.2d 85 (1st Cir. 1983).....	15
<i>Consumers Union of the United States v.</i> <i>Virginia State Bar</i> , 688 F.2d 218 (4th Cir. 1982).....	16

Cited Authorities

	<i>Page</i>
<i>Cushing v. Packard</i> , 30 F.4th 27 (1st Cir. 2022)	15
<i>Dombrowski v. Eastland</i> , 387 U.S. 82 (1967)	10
<i>Eastland v. United States Servicemen’s Fund</i> , 421 U.S. 491 (1975)	11, 20
<i>Empress Casino Joliet Corp. v.</i> <i>Balmoral Racing Club, Inc.</i> , 651 F.3d 722 (7th Cir. 2011)	17
<i>Empress Casino Joliet Corp. v. Blagojevich</i> , 638 F.3d 519 (7th Cir. 2011)	17
<i>Gravel v. United States</i> , 408 U.S. 606 (1972)	23, 24
<i>Hafer v. Melo</i> , 502 U.S. 21 (1991)	12-14
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	14
<i>Houston Community College System v. Wilson</i> , 595 U.S. 468 (2022)	19
<i>Kent v. Ohio House of Representatives</i> <i>Democratic Caucus</i> , 33 F.4th 359 (6th Cir. 2022)	16

Cited Authorities

	<i>Page</i>
<i>Kentucky v. Graham</i> , 473 U.S. 159 (1985)	12-14, 18
<i>Larsen v. Senate of the Commonwealth</i> , 152 F.3d 240 (3d Cir. 1998)	15
<i>Minton v. St. Bernard Parish School Board</i> , 803 F.2d 129 (5th Cir. 1986)	18-20
<i>Sable v. Myers</i> , 563 F.3d 1120 (10th Cir. 2009)	15
<i>Schmidt v. Contra Costa County</i> , 693 F.3d 1122 (9th Cir. 2012)	18
<i>Scott v. Taylor</i> , 405 F.3d 1251 (11th Cir. 2005)	15
<i>State Employees Bargaining Agent Coalition v.</i> <i>Rowland</i> , 494 F.3d 71 (2d Cir. 2007)	15
<i>Supreme Court of Virginia v.</i> <i>Consumers Union of the United States</i> , 446 U.S. 719 (1980)	9-20, 22, 23
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951)	1, 2, 8-13, 19
<i>Wilson v. Houston Community College System</i> , 955 F.3d 490 (5th Cir. 2020)	18-20

Cited Authorities

	<i>Page</i>
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957).....	15

Statutes and Other Authorities

U.S. Const. Art. I, § 6	8
8 U.S.C. § 43.....	9
8 U.S.C. § 47(3).....	9
28 U.S.C. § 1254(1).....	2
42 U.S.C. § 1983.....	1, 2, 5, 9, 10, 12, 14-16, 19
42 U.S.C. § 1985.....	9
42 U.S.C. § 1988.....	13
H.B. 24-1071	3-5
II Works of James Wilson (Andrews ed. 1896)	9

RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the petition for writ of certiorari and respectfully urge the Court to deny the petition.

INTRODUCTION

The petition asks this Court to resolve a circuit split that does not exist and seeks to severely curtail the scope of legislative immunity, which this Court has recognized to be robust and historically established for centuries. *See Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951) (recognizing the “privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries”). Addressing the question whether Congress’ 1871 enactment of what is now 42 U.S.C. § 1983 meant “to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here?,” *id.* at 376, the Court answered “no.” *See id.* “We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.” *Id.*

Despite *Tenney*’s emphatic language and precedent to the contrary, Petitioners assert that legislative immunity is not available in official-capacity claims. Petitioners ask this Court to reject both history and contrary case law from this Court and the circuits to undermine the scope of legislative immunity. Setting aside the fact that Petitioners’ position is contrary to case law, were legislative immunity held to be unavailable in official-capacity actions, the

floodgates would open to the federal judiciary intervening in countless state and local legislative matters thereby gutting the policy and principles underlying the legislative immunity recognized in *Tenney* and other decisions of this Court. This Court should decline Petitioners' invitation to uproot this centuries-old protection and should therefore deny the petition.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a-38a) is available at 169 F.4th 981 (10th Cir. 2026). The order denying rehearing (Apr. 23, 2026) is at Pet. App. 61a-62a. The district court's final order (Pet. App. 39a-60a) is at 758 F. Supp. 3d 1298 (D. Colo. 2024).

JURISDICTION

The court of appeals issued its opinion on March 10, 2026. Pet. App. 1a-38a. The court denied a petition for rehearing on April 23, 2026. Pet. App. 61a-62a. The petition for a writ of certiorari was filed July 21, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners, plaintiffs below, brought this action under 42 U.S.C. § 1983 against each of the Respondent Legislators, defendants below, in both their individual and official capacities. Respondent Legislators were all elected members of the Colorado General Assembly, the legislative branch of the government of the State of Colorado. Respondents Weissman and Gonzales,

respectively, were Chairs of the Colorado House and Senate Judiciary Committees. Respondents Garcia and Herod were members of the House Judiciary Committee. Respondent Michaelson Jenet was a member of the Senate Judiciary Committee. Respondents Garcia and Michaelson Jenet, respectively, were the prime House and Senate sponsors of legislation denominated House Bill 24-1071 (“HB 24-1071”). *See* Pet. App. 68a-69a, 73a.

HB 24-1071 expanded the conditions upon which a person with a felony conviction could obtain a legal name change. A person convicted of a felony must show good cause to be able to change their name if the new name would differ from the name under which the person was convicted. Pet. App. 41a-44a. HB 24-1071 provided that good cause includes changing the name to conform with the person’s gender identity. *Id.* The bill’s sponsors and supporters also refer to it as “Tiara’s law.” *Id.* Tiara is the preferred name of a transgender woman with criminal convictions who advocated for a change in the law to obtain a legal name change to Tiara. *Id.*

Petitioners alleged that their First Amendment rights were violated during public testimony sessions of the committee hearings on HB 24-1071 before both the Colorado House and Senate Judiciary Committees. Pet. App. 41a. Petitioners Guggenheim and Goeke, individually and as members of GAG and RMWN, respectively, signed up to testify on HB 24-1071 before both the House and Senate Judiciary Committees. *Id.* at 41a-42a. 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.* at 42a.

The Colorado General Assembly publishes a Memorandum that provides the administrative rules for members of the public who wish to speak before legislative committees. Pet. App. 42a. One rule provides 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.* (quoting Complaint ¶ 22). The state House and Senate each publish their own guides to public hearings, which also establish administrative rules prohibiting disruptive behavior. *Id.*

On January 30, 2024, the House Judiciary Committee heard public testimony on HB 24-1071. Guidelines were established for the session 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.” Pet. App. 42a. Upon hearing these rules, Petitioner 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.* Petitioner Goeke began giving her testimony but was interrupted for violating these rules and allegedly using “derogatory” and “disparaging” language about witnesses. *Id.* Though Goeke was urged to abide by the rules, she refused to comply. *Id.* at 42a-43a. Her testimony was stopped when the committee went into recess. *Id.* at 43a. She alleged that her speaking time was prematurely terminated and that, after expressing her frustration, she was asked to leave by the sergeant-at-arms.¹ *Id.* at 43a.

1. The sergeant-at-arms was not named a defendant in this action.

On March 27, 2024, the Senate Judiciary Committee held a hearing on HB 24-1071. Pet. App. 43a. At the opening of public comment, witnesses were instructed to treat others with dignity and respect. If they did not do so, they would be removed. *Id.* Witnesses were instructed not to use derogatory language, misgender, deadname, or otherwise disparage those present. *Id.* Petitioner Goeke spoke in opposition to the bill and repeatedly attempted to refer to “Tiara” as “Mr. Duane Powell.” *Id.* As a result, she was interrupted and reminded she could not “deadname” or “misgender.” *Id.* Her testimony was cut short when she again referred to Tiara as “Mr. Duane Powell.” *Id.* Portions of Goeke’s speech in which she used this derogatory language were erased from the official audio record of the Senate Judiciary Committee hearing. *Id.* Petitioner Guggenheim also spoke in opposition to the bill and was interrupted when he proceeded to “deadname” and “misgender” people. *Id.* He was invited to proceed with his comments in accordance with these rules, but he would not abide by the rules, and as a result he was not allowed to complete his testimony. *Id.*

A week after the Senate hearing, Petitioners filed this 42 U.S.C. § 1983 action, asserting a deprivation of their First and Fourteenth Amendments rights and seeking nominal damages, declaratory and injunctive relief, and attorney’s fees. They sued Respondents in their individual and official capacities. *See* Pet. App. 63a-92a. Respondents moved to dismiss all claims, asserting legislative immunity, mootness, and failure to state a claim. Pet. App. 44a.

The district court held that that the Respondents’ acts were within the sphere of legislative activity and

therefore they were entitled to legislative immunity. Pet. App. 45a-54a. The district court also held that even if legislative immunity did not bar Petitioners' claims, the claims for prospective relief were moot. Pet. App. 54a-59a. The court therefore granted the motion to dismiss and dismissed the claims with prejudice.

Petitioners appealed to the Tenth Circuit. The Tenth Circuit affirmed, concluding the Respondents were entitled to legislative immunity. Pet. App. 2a-38a. The court concluded that legislative immunity extended "not only to damages suits, but also to requests for injunctive or declaratory relief." *Id.* at 16a-17a. The court rejected Petitioners' argument that legislative immunity is a personal defense that is unavailable for official-capacity claims for declaratory and injunctive relief. *See id.* at 17a-18a. The court concluded, "Legislative immunity remains available to legislators acting within their legislative capacity regardless of whether they are sued in their individual or official capacity." *Id.* at 18a. The court also concluded that "the Legislators' conduct here—both the adoption of the misgendering and deadnaming rules as well as the implementation of those rules within the context of legislative hearings—falls within the sphere of legitimate activity." *Id.*

Judge Carson concurred in part (parts II, III-A, and III-B-1 of the opinion of the court) and concurred in the judgment, noting:

Although the founders created our divided system of government with checks and balances in mind, they did not design the system for federal courts to police the internal workings

of legislatures—state or federal. *And this case at its core involves the internal workings of a state legislature.* For that reason, I agree with the majority that, in this case, the legislators have immunity.

Pet. App. 34a (emphasis added). Judge Carson did not join the majority opinion. *See id.* He viewed the complaint as taking issue with the enforcement not the promulgation of the rules of decorum. *See id.* He concluded that judicial relief would be available here “*if* such relief did not interfere with legislative independence” Pet. App. 37a (emphasis added). While not agreeing with the majority opinion in part, he did agree that “legislative immunity applies to the enforcement actions in this case” *Id.* at 38a. The majority noted that “the Legislators’ enforcement of the committees’ rules was also a quintessential legislative activity.” *Id.* at 28a. Adopting rules would be “meaningless” if the legislators overseeing the hearings “could not enforce the rules in the very forum they were designed for.” *Id.* The majority opinion addressed each allegation of alleged impermissible enforcement and concluded each was “amply insulated from judicial scrutiny.” Pet. App. 30a. The court thus unanimously held that legislative immunity barred Petitioners’ claims.

Petitioners petitioned for rehearing en banc, but the court denied the petition for rehearing, with no member of the panel and no active judge calling for the court to be polled. Pet. App. 61a-62a. Petitioners filed a petition for writ of certiorari with this Court. That petition should be denied.

REASONS FOR DENYING THE PETITION

1. **The Tenth Circuit faithfully applied this Court’s precedents that legislative immunity is available for official-capacity suits.**

In *Tenney*, the Court emphasized:

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: “Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress” Article I, § 6, of the Constitution provides: “. . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”

341 U.S. at 372-73. The Court said the reason for the privilege is clear:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

Id. at 373 (quoting II Works of James Wilson (Andrews ed. 1896) 38).

Addressing sections 1 and 2 of “the 1871 statute”—*i.e.*, the Civil Rights Act of 1871, now codified as 42 U.S.C. §§ 1983 and 1985²—the Court asked:

Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity?

Tenney, 341 U.S. at 376. The Court answered emphatically “no.” *See id.* “We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.” *Id.*

Thus, this Court held that § 1983 did not affect the long-established tradition of legislative immunity, which is common sense. The policy behind legislative immunity protects the legislators and legislatures from interference in the legislative sphere—interference demonstrated by the instant litigation, which is nearly two-and-a-half years old and still ongoing.

This Court reaffirmed *Tenney*’s conclusion in *Supreme Court of Virginia v. Consumers Union of the*

2. At the time of *Tenney*, sections 1 and 2 were codified as sections 43 and 47(3) of Title 8. *See Tenney*, 341 U.S. at 376.

United States, 446 U.S. 719, 732-33 (1980). There, the Court held that the Supreme Court of Virginia and its chief justice, who the Court determined were acting in a legislative capacity, were legislatively immune from suit in a § 1983 action challenging the Virginia Court’s disciplinary rules governing attorney conduct. 446 U.S. at 731-34. In so holding, the Court noted that the purpose of legislative immunity “is to insure that the legislative function may be performed independently without fear of outside interference.” *Id.* at 731. To preserve such legislative independence, “legislators engaged in the sphere of legitimate activity, should be protected not only from the consequences of the litigation’s results but also from the burden of defending themselves.” *Id.* at 731-32 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (internal citation and quotation marks omitted)).

Addressing *Tenney*, the Court in *Consumers Union* noted that “[i]n *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, *its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.*” 446 U.S. at 732 (emphasis added). Importantly, the Court emphasized that in “holding that § 1983 does not create civil liability for acts unknown in a field where legislators traditionally have power to act, we did not distinguish between actions for damages and those for prospective relief. *Id.* at 732-33 (internal citation and quotation marks omitted). The Court further noted, “we have recognized elsewhere that ‘a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.’” *Id.*

at 733 (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)) (brackets in original).

Legislative immunity thus exists to protect the legislator from the distraction and diversion of time, attention, and energy whether the lawsuit is for damages or for injunctive relief. The Tenth Circuit faithfully applied this Court's precedents and determined that Petitioners' claims were barred by legislative immunity. Those precedents establish that official-capacity suits are subject to legislative immunity. Petitioners ask this Court to grant review in order to upend this settled law. This Court should decline Petitioners' request.

In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), this Court, unanimously, reaffirmed the principles of *Tenney* and *Consumers Union*. Justice Thomas's opinion for the Court emphasizes the settled nature of legislative immunity:

It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.

523 U.S. at 46. The Court in *Bogan* again recognized that the "principle that legislators are absolutely immune

from liability for their legislative activities has long been recognized in Anglo-American law.” *Id.* at 48. The Court extended legislative immunity to local legislators noting, “Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason.” *Id.* at 52. The Court noted that the “rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.” *Id.*

Bogan supports the application of legislative immunity even in official-capacity suits. While defendant legislators in an official-capacity suit cannot be personally liable, they are still subject to “judicial interference” that can inhibit their “exercise of legislative discretion” and distract and divert their time, attention, and energy away from performing their legislative functions and duties. Petitioners’ argument to the contrary is unconvincing.

Petitioners rely on *dicta* from three decisions of this Court—all of which pre-date *Bogan*—to create an illusion of unsettled law in this area: *Kentucky v. Graham*, 473 U.S. 159 (1985), *Hafer v. Melo*, 502 U.S. 21 (1991), and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). Petitioners contend that these decisions establish that personal defenses are available only in individual-capacity suits, and therefore legislative immunity cannot be a defense in an official-capacity action. But none of those decisions involved legislative immunities and they do not undermine the principle expressed in *Tenney*, *Consumers Union*, and *Bogan*, that legislative immunity applies to all suits against legislators acting in their

legislative capacities, whether those suits are for damages or for injunctive relief.

The Petitioners claim that *Graham* and *Umbehr* “limited the reach of *Consumers Union*.” Pet. 17. But *Bogan*, which came after both *Graham* and *Umbehr*, strongly reinforced the broad scope of legislative immunity from *Tenney* and *Consumers Union*. *Umbehr* does not cite or mention *Consumers Union* at all, so it is hard to see how it could have limited *Consumers Union*. And, as the Tenth Circuit noted, Pet. App. 24a n.9, *Graham* “approvingly cited and discussed *Consumers Union* in one part of its opinion, but did not acknowledge it at all in the part of the opinion that GAG relies most heavily on.”³ Moreover, and also as the Tenth Circuit noted, *Graham* predated *Bogan*, which established that legislative immunity applies to local as well as state and federal legislators. Pet. App. 23a-24a.

Umbehr and *Graham* did not alter the holding of *Consumers Union* that legislative immunity is equally applicable in § 1983 actions seeking declaratory or injunctive relief. 446 U.S. at 732. The Tenth Circuit’s decision faithfully applied *Consumers Union* and upheld the dismissal of Petitioners’ claims on legislative immunity grounds. This ordinary act by the Tenth Circuit indicates that certiorari should be denied.

Petitioners also rely on *Hafer v. Melo*, 502 U.S. 21 (1991), which addressed whether state officials are

3. The question presented in *Graham* was “whether 42 U.S.C. § 1988 allows attorney’s fees to be recovered from a governmental entity when a plaintiff sues governmental employees *only in their personal capacities* and prevails.” 473 U.S. at 161 (emphasis added).

“persons” within the meaning of § 1983. *See id.* at 23. Petitioners assert that under *Graham* and *Hafer*, the “only immunities available in an official-capacity action are those of the entity.” Pet. 13. But *Hafer* expressly recognizes absolute legislative immunity: “This Court has refused to extend absolute immunity beyond a very limited class of officials, including . . . , *legislators carrying out their legislative functions*, . . . ‘whose special functions or constitutional status *requires complete protection from suit*.’” 502 U.S. at 29 (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)). *Hafer* did not suggest that it was limiting *Consumers Union* or legislative immunity to only individual-capacity claims, and in light of the quoted language, *Hafer* cannot be reasonably read to do so.

At bottom, this Court has recognized that legislative immunity applies to legislators acting in their legislative capacities whether the plaintiff’s § 1983 claims are brought against the legislators in their individual or official capacity. *See Consumers Union*, 446 U.S. at 732-33. *Graham*, *Umbehr*, and *Hafer* do not change or undermine that immunity in any way. Put simply, legislative immunity is available to legislators acting in their legislative capacities. Period.

2. There is no circuit split warranting this Court’s review.

Petitioners claim “a circuit split persists as to whether official-capacity defendants may assert legislative immunity,” and that the decision below “adds to that divide” Pet. 9. The claimed circuit split as described by Petitioners does not exist. Petitioners assert that a split

exists between the First, Second, Tenth, and Eleventh Circuits, on the one hand, and the Fifth and Ninth Circuits, on the other. Pet. 18-21. But the courts that have held legislative immunity to be available in official-capacity actions are the vast majority of circuits, not the four-versus-two split Petitioners claim.

As Petitioners recognize, the First, Second, Tenth, and Eleventh Circuits all recognize official-capacity legislative immunity. *See Cushing v. Packard*, 30 F.4th 27, 39 (1st Cir. 2022); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 88 (1st Cir. 1983); *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 83 (2d Cir. 2007); *Gays Against Groomers v. Garcia*, 169 F.4th 981 (10th Cir. 2026);⁴ *Scott v. Taylor*, 405 F.3d 1251, 1255 n.6 (11th Cir. 2005). But so too do other circuits omitted from the petition. The Third Circuit has recognized that “the Supreme Court has unambiguously held that the legislative immunity enjoyed by state, as well as federal, officials is ‘applicable to § 1983 actions seeking declaratory and injunctive relief.’” *Larsen v. Senate of the Commonwealth*, 152 F.3d 240, 253 (3d Cir. 1998) (concluding that Pennsylvania state senators were entitled to legislative immunity from a suit for prospective relief by a former state supreme court justice) (quoting *Consumers Union*, 446 U.S. at 732)). On remand from this Court in

4. Petitioners claim the Tenth Circuit below failed to follow its own earlier decision in *Sable v. Myers*, 563 F.3d 1120 (10th Cir. 2009). *See* Pet. 14. To the extent there is an intra-circuit conflict in the Tenth Circuit—a contention Respondents do not agree with—that is a matter for the Tenth Circuit to sort out, not this Court. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).

Consumers Union, the Fourth Circuit recognized that under the Supreme Court’s decision, “the Virginia Court and its members are immune from suit when acting in their legislative capacity.” *Consumers Union of the United States v. Virginia State Bar*, 688 F.2d 218, 220-21 (4th Cir. 1982).

In *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990), the Sixth Circuit held that a § 1983 action against the Michigan Supreme Court and its justices alleging the defendants violated plaintiffs’ civil rights by promulgating a court rule was barred by legislative immunity. The court quoted at length from an earlier Sixth Circuit decision, *Abick v. State of Michigan*, 803 F.2d 874 (6th Cir. 1986), which had addressed a similar challenge against the justices of the Michigan Supreme Court. *Abick* had held that in promulgating the rule at issue in that case, “the Justices of the Michigan Supreme Court were acting in their legislative capacity and therefore are entitled to legislative immunity.” 803 F.2d at 878. In holding again that the Michigan Supreme Court justices were entitled to legislative immunity, the Sixth Circuit said its “ruling in *Abick* is dispositive of plaintiffs’ claim here. The immunity granted is immunity from suit and applies whether the relief sought is money damages or injunctive relief.” *Alia*, 906 F.2d at 1102 (emphasis added); see also *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 364 (6th Cir. 2022) (noting that regional and local legislators and even non-legislators who act in a legislative capacity enjoy immunity in § 1983 actions in suits for money damages and for prospective relief).

The Seventh Circuit has also recognized legislative immunity in a suit against a governor for damages and

injunctive relief where the governor was acting in a legislative capacity. *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 527-29 (7th Cir. 2011), *reh'g granted in part on other grounds and partially vacated on other grounds by Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722 (7th Cir. 2011) (en banc). In *Church v. Missouri*, 913 F.3d 736 (8th Cir. 2019), the Eighth Circuit addressed a suit against the governor of Missouri over appropriation-reduction actions to the state's indigent defense budget. The governor asserted legislative immunity, among other immunities, and the court agreed that legislative immunity foreclosed the suit. *Id.* at 751-53 (citing *Consumers Union*).

Thus, legislative immunity for official-capacity actions has essentially been recognized by the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. And while Petitioners contend that the Ninth Circuit comes to the opposite conclusion, Petitioners rely on an unpublished, nonprecedential decision to support that contention, *Bols v. Newsom*, No. 22-56006, 2024 U.S. App. LEXIS 1276 (9th Cir. Jan. 19, 2024). *See* Pet. 19. *Bols* was an appeal from a grant of summary judgment in favor of the Mayor of San Diego on the plaintiffs' claim that San Diego's moratorium on evicting commercial tenants during the pandemic was unconstitutional. The Ninth Circuit affirmed in a memorandum decision. The sum total of the court's "analysis" of the legislative immunity issue was this single short paragraph:

The Mayor claims that he has legislative immunity from Bols's lawsuit. The Mayor, however, was sued only in his official capacity. "[A]n official-capacity suit is, in all respects

other than name, to be treated as a suit against the entity.” *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). “[P]ersonal immunity defenses”—such as absolute legislative immunity—are therefore “unavailable” in “an official-capacity action” *Id.* at 166-67; *see also Schmidt v. Contra Costa County*, 693 F.3d 1122, 1131 n.10 (9th Cir. 2012).

Bols, 2024 U.S. App. LEXIS 1276, at *2. Besides not being circuit precedent, *Bols* does not cite *Consumers Union* or any other of this Court’s legislative immunity decisions. *Bols* is a thin reed for a purported circuit split.

Petitioners also cite to the *Schmidt* decision cited in *Bols*. *See* Pet. 19. While it is true that in footnote 10 of *Schmidt*, the Ninth Circuit noted that legislative immunity was inappropriate for one defendant because that defendant was sued only in his official capacity, 693 F.3d at 1131 n.10, the court did not address at any length why that immunity was inappropriate. And the court in *Schmidt* recognized, consistent with *Consumers Union*, that legislative immunity applies to actions for damages and for injunctive relief, and that legislators are entitled to “absolute common-law immunity against civil suits for their legislative acts” 693 F.3d at 1132. The Ninth Circuit’s passing remark in the footnote in *Schmidt* does not reveal a substantial circuit split warranting review of the decision below by this Court.

Petitioners rely heavily on the Fifth Circuit’s decisions in *Minton v. St. Bernard Parish School Board*, 803 F.2d 129 (5th Cir. 1986), and *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020), *rev’d on other*

grounds, Houston Community College System v. Wilson, 595 U.S. 468 (2022).

In *Minton*, the plaintiffs obtained a judgment against a parish School Board and tried unsuccessfully to obtain an appropriation of funds from the School Board to satisfy the judgment. Plaintiffs brought a § 1983 action against the School Board and its individual members alleging they deprived them of property without due process and violated equal protection by refusing to pay the judgments of nonresidents, while paying those of residents. The district court dismissed the action for failure to state a claim. The Fifth Circuit affirmed the dismissal of the due process claim but reversed on the equal protection claim.

The School Board asserted that the failure of its members to appropriate funds requested by plaintiffs was a legislative action absolutely immune from federal court inquiry. The Fifth Circuit noted that “[q]ualified official immunity and absolute legislative immunity are doctrines that protect individuals acting within the bounds of their official duties, not the governing bodies on which they serve.” 803 F.2d at 133. The court further noted that under *Tenney*, state legislators acting within the scope of their legislative duty are absolutely immune to civil suits for damages, and that the immunity had later been extended to local legislators. *Id.* at 133-34. But *Minton* did not address *Consumer Union*’s conclusion that legislative immunity is equally applicable to § 1983 actions seeking declaratory or injunctive relief. *Consumers Union*, 466 U.S. at 732. *Minton*’s only reference to *Consumers Union* was a footnote citation for the proposition that legislative immunity applies to justices of a state supreme court exercising legislative functions. 803 F.2d at 135 and n.33.

Minton remanded to the district court the issue of whether the defendants were being sued in their individual or official capacity or both. *Id.* at 134. The court instructed the district court on remand that if the individual School Board members were named defendants only in their official capacities, then neither qualified nor absolute immunity would apply since the individual Board members would not be threatened by personal liability. *Id.*

Minton got the immunity analysis wrong, and the Fifth Circuit is thus the outlier among the circuits.⁵ Legislative immunity exists, as this Court has noted, to protect legislators and others acting in a legislative capacity from lawsuits because “a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.” *Consumers Union*, 466 U.S. at 733 (quoting *Eastland v. United States Servicemen’s Fund*, 421 U.S. at 503) (brackets in original). Legislative immunity exists to protect the legislator from the distraction and diversion of time, attention, and energy whether the lawsuit is for damages or for injunctive relief. Whether the legislator is sued in an official or individual capacity, the lawsuit distracts and interferes with that legislator, taking time, energy, and effort away from the legislator’s legislative activities and duties. Thus, it makes no sense to make legislative immunity unavailable for official-capacity actions. To the contrary, to allow suits against legislators

5. The *Wilson* decision is inapposite because there the plaintiff had sued only an entity, not an individual representative of that entity, and legislative immunity protects only individuals acting in a legislative capacity not the entity itself. See *Wilson*, 955 F.3d at 499-500.

in their official capacity would upend centuries of legislative immunity in derogation of the common law, this Court’s precedents, and the decisions of the vast majority of the circuits. Under the circumstances, the petition is not well taken and review by this Court is unnecessary.

3. The legislators were acting in their legislative capacity.

The applicability of legislative immunity “turns on the nature of the act, rather than on the motive or intent of the official performing it.” *Bogan*, 523 U.S. at 54. *Bogan* listed several non-exhaustive factors for identifying legislative activity subject to immunity, like the “discretionary, policymaking” nature of the act, the “prospective implications” of the act, and whether the act occurred “in a field where legislators traditionally have power to act.” *Id.* at 55-56.

Here, Respondents adopted and enforced rules of decorum to be followed by all speakers during the legislative committee hearings, rules designed to promote respectful discourse and avoid personal references that would be disparaging to persons in attendance at the committee hearing. *See* Pet. App. 75a. In promulgating these rules, Respondents exercised their “discretionary, policymaking” function “in a field”—the conduct of legislative committee hearings—“where legislators traditionally have power to act.” *Bogan*, 523 U.S. at 55-56. The rules also had “prospective implications” because they apply to all speakers at legislative committee hearings, not just the Petitioners. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (identifying the general nature of a “rule of conduct” that “applies to more than a few people” as a legislative characteristic).

Petitioners concede that Respondents “may well be immune from actions seeking to hold them personally liable for the legislative act of adopting their [rules of decorum],” but contend that it is the enforcement of those rules that falls outside legislative immunity. Pet. 22. Petitioners rely on *Consumers Union*, 446 U.S. at 732-37, which drew a distinction between the Supreme Court of Virginia’s adoption of disciplinary rules, for which they had absolute immunity, and enforcement of those rules for which they did not. But *Consumers Union* does not support Petitioners’ claim. *Consumers Union* recognized that the Virginia Court performed more than a legislative role when it promulgated rules prohibiting attorney advertising, because it had broader enforcement authority, including the authority to hear appeals from lower court decisions in disciplinary cases, in addition to the independent discipline enforcement authority of its own, tempered by the requirement that a commonwealth attorney pursue any prosecution. 446 U.S. at 722-24.

In contrast, Respondents here do not have the authority to seek civil damages from violators, prosecute violators, or ban violators of the rules from ever speaking before a committee of the legislature again. Respondents had and exercised authority only over their own legislative committee hearings, and everything of which Petitioners complain took place in two legislative committee meetings conducted solely to receive public comment on the merits of a specific piece of pending legislation. Pet. App. 75a-82a. The “enforcement” of which Petitioners complain falls within the scope of the *Bogan* factors and Respondents are entitled legislative immunity. *Bogan*, 523 U.S. at 55-56.

Even Judge Carson in his concurrence found legislative immunity here, despite disagreeing with the majority in part. He concluded that Respondents' enforcement actions were within the scope of legislative immunity to protect legislative independence. Pet. App. 36a (citing *Consumers Union*, 446 U.S. at 731-32). Specifically, Judge Carson explained that a determination of whether Respondents (1) "enforced the rule in a selective, subjective, and viewpoint-discriminatory manner," (2) that their "custom, policy, or practice" is to apply their decorum rule "in ways that discriminate against dissenters from trans ideology" and "compels citizens to mouth support for trans ideology," and (3) that the rule is "not designed to confine the forum to the limited and legitimate purpose for which it was created, but rather, to suppress ideologies and opinions," will require an inquiry into the "motives or purposes" underlying the rule and "threaten the Colorado legislature's independence in considering pending legislation before it." Pet. App. 37a n.2 (citing *Gravel v. United States*, 408 U.S. 606, 621 (1972)). These types of allegations would necessitate an inquiry into the Respondents' motives in violation of *Bogan's* instruction that immunity "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. Thus, Respondents are entitled to legislative immunity, as the Tenth Circuit properly concluded. The Petitioners' proposed judicial intrusion in the actions of legislators acting in a legislative capacity should be rejected and the petition should be denied.

4. This case is not an appropriate vehicle to address the questions presented.

Finally, contrary to Petitioners' claim, this case would not be a good vehicle for addressing the questions presented. Virtually every decision in this area, save a couple of questionable outliers relied on by Petitioners, recognizes that legislators are entitled to legislative immunity from civil suits when those legislators are acting within their legislative capacities. Moreover, here, Judge Carson disagreed with parts of the majority's analysis, yet he concurred in the judgment and determined that despite his disagreement, the legislators were entitled to legislative immunity.

Judge Carson noted:

Plaintiff's Complaint demonstrates why judicial review in this case would require "proof of a legislative act or the motives or purposes underlying such an act" and threaten the Colorado legislature's independence in considering pending legislation before it. *See Gravel*, 408 U.S. at 621. The legislative rule at issue applies to "public comment on pending legislation." Plaintiffs would have us find that Defendants have "enforced the rule in a selective, subjective, and viewpoint-discriminatory manner," that Defendants' "custom, policy, or practice" is to apply their decorum rule "in ways that discriminate against dissenters from trans ideology" and "compels citizens to mouth support for trans ideology," that the rule is "not designed to confine the

forum to the limited and legitimate purpose for which it was created, but rather, to suppress ideologies and opinions,” and that Defendants censored Plaintiffs in an “Orwellian fashion.” *Judicial review of Defendants’ enforcement activity based on these allegations would necessitate an inquiry into the Defendants’ motives in conducting a committee hearing on pending legislation. Relief might require us to enjoin this activity based on Defendants’ views on pending legislation. Relief might also see us force the Colorado legislature to consider views and ideologies before voting on pending legislation. Such inquiries and interventions into the legislative process pose too great a risk to legislative independence, requiring immunity in this case.*

Pet. App. 37a n.2 (emphasis added).

To resolve this case would require intrusion into the legislative process and undermine legislative independence. It would be an affront to state and local legislatures to allow such intrusion.

If additional similar cases were to arise in the future and a true circuit split were to develop, this Court could of course revisit these issues then. But here and now, review is unwarranted, and therefore, this Court should deny the petition.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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