

**In the
Supreme Court of the United States**

GAYS AGAINST GROOMERS, *et al.*,

Petitioners,

v.

LORENA GARCIA, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This Court has long held that personal immunity defenses are not available in official-capacity actions because such actions are effectively claims against the underlying government entity.

But the Tenth Circuit treated legislative immunity as a type of absolute super-immunity, available to both individuals and government entities. And in doing so, the court deepened a circuit split over the scope of legislative immunity.

Respondents' arguments against certiorari are unavailing. They first assert that there is no circuit split, before admitting that, in fact, there is a circuit split. *Compare* BIO 1, 14, *with id.* at 15, 20. Further, they fail to adequately respond to the proposition that official-capacity claims do not expose individual legislators to liability, because those claims are directed at the bodies on which they serve. And they incorrectly assert that litigating and adjudicating Petitioners' facial claims would burden individual legislators' time and energy. It is undisputed that the General Assembly maintains a facially viewpoint discriminatory public-comment policy that categorically bans misgendering, so there would be no such burden.

I. Respondents inaccurately claim that there is no circuit split, before conceding that there is a split on the scope of legislative immunity.

Petitioners open their brief in opposition with the spurious assertion that this “petition asks this Court to

resolve a circuit split that does not exist[.]” BIO 1; *see also* BIO 14 (“There is no circuit split warranting this Court’s review.”). But further reading reveals that Respondents only quibble about the split’s extent. BIO 14-21. And ultimately, they admit that a split exists: “*Minton* got the immunity analysis wrong, and the Fifth Circuit is thus the outlier among the circuits.” BIO 20 (citing *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129 (5th Cir. 1986)).¹

Outlier or not, *Minton*’s holding is consistent with this Court’s jurisprudence distinguishing between individual- and official-capacity claims. *See, e.g., Karcher v. May*, 484 U.S. 72, 78, 83 (1987); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Unlike the Tenth Circuit’s decision below, *Minton* accounts for the legal reality that individual- and official-capacity defendants are different legal personages. *See Karcher*, 484 U.S. at 78 (holding that the acts performed by the same person in two different capacities are treated “as the transactions of two different legal personages”) (cleaned up).

Thus, the Fifth Circuit correctly holds 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.” *Minton*, 803 F.2d at 133. That its holding conflicts with several other circuits that functionally extend the personal defense of legislative immunity to government entities underscores the need for this Court

1. Although Respondents call the Fifth Circuit “the outlier,” the Fifth and Ninth Circuits agree on this issue. *See Bols v. Newsom*, No. 22-56006, 2024 U.S. App. LEXIS 1276, at *2 (9th Cir. Jan. 19, 2024); *Schmidt v. Contra Costa Cty.*, 693 F.3d 1122, 1131 n.10 (9th Cir. 2012).

to grant certiorari and reassert appropriate limits to immunity defenses.

II. Official-capacity claims do not subject individual legislators to liability.

Respondents suggest that Petitioners argue 42 U.S.C. § 1983 abrogated or overruled legislative immunity (BIO 9, 10), but Petitioners make no such argument. Rather, they argue that legislative immunity is a personal defense, and this Court has repeatedly held that personal defenses are unavailable to government entities. Pet. for Writ of Cert. 10-18 (collecting cases).

Respondents similarly muddy the waters by treating Petitioners' official-capacity claims as if they were claims for civil damages against the individual Colorado legislators. *See* BIO 9 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), for the proposition that Congress did not intend “to subject legislators to *civil liability* for acts done within the sphere of legislative activity.”) (emphasis added).

It is true that *Tenney* and *Bogan v. Scott-Harris*, 523 U.S. 44, 52-53 (1998), foreclose individual-capacity claims against legislators for legislative functions. But both *Tenney* and *Bogan* concerned plaintiffs who sought significant money damages from the government officials—not injunctive or declaratory relief. *Tenney*, 341 U.S. at 371; *Scott-Harris v. City of Fall River*, 134 F.3d 427, 432 (1st Cir. 1997) (\$156,000 compensatory damage award, and punitive damage awards totaling \$75,000).

Bogan was a damages case—not a reinstatement case—and the plaintiff sought money for losing her job when her position was eliminated due to a budgetary decision that was deemed to be legislative in function. *Bogan*, 523 U.S. at 47-48. In *Bogan*, this Court did not explicitly discuss the damages amounts awarded below, but those money damages are evident from the circuit decision on appeal. *Scott-Harris*, 134 F.3d at 432. Moreover, this Court’s immunity discussion in *Bogan* makes no mention whatsoever of any form of equitable relief.

Likewise, *Tenney* was also a money damages case. 341 U.S. at 371 (requesting \$10,000 damages for expenses related to investigative committee appearance as well as punitive damages). *Tenney* did not involve a claim for injunctive or declaratory relief.

These holdings rest on the plausible rationale that potential civil liability could deter legislative service. *Bogan*, 523 U.S. at 52-53; *Tenney*, 341 U.S. at 377.

But that is beside the point, because Petitioners, through their official-capacity claims, seek neither money damages, nor civil liability against any individual legislator. Instead, they employ their official-capacity claims to seek equitable relief against the government entity represented by the Respondents’ official-capacity positions: the Colorado General Assembly. *See* App. 91a-92a.

There is no personal liability in an official-capacity suit. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 (1986); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). That is because official-capacity claims are

directed at a different legal personage than the individual legislator. *See Karcher*, 484 U.S. at 78. Such claims are directed at the government entity. *Id.*; *Graham*, 473 U.S. at 165-66. “It is *not* a suit against the official personally, for the real party in interest is the entity.” *Id.* at 166.

In this case, that entity is the Colorado General Assembly. But the Assembly, as a body, does not enjoy legislative immunity. In a personal-capacity suit, an official may be able to assert personal defenses, including claims of qualified and absolute immunity. *Graham*, at 166-67. “In an official-capacity action, these defenses are unavailable.” *Id.* at 167.

While the General Assembly may well enjoy sovereign immunity for non-enforcement activities (*see Ex parte Young*, 209 U.S. 123, 159-60 (1908)), Respondents rely on legislative immunity, as did the Tenth Circuit. App. 25a. *Young* says nothing about extending legislative immunity or other personal defenses to government entities. And Petitioners allege (and show) that they are harmed by the Assembly’s actual and threatened enforcement of its misgendering ban, not its promulgation. App. 85a, 88a, 89a, 90a. Moreover, as explicated further below, the legislators’ motives for banning misgendering are irrelevant where the restriction facially discriminates based on viewpoint.

III. Adjudicating Petitioners' claims for facial relief would not divert the time and attention of individual legislators.

Respondents also allege that litigating Petitioners' official-capacity claims would divert individual legislators' time and attention and intrude on legislative independence by inquiring as to legislative motives. BIO 11, 23, 25.

But the central facts of this lawsuit are undisputed. The Assembly agrees that it bans misgendering. BIO 4, 5. In fact, its representatives are proud of that ban and plan to apply it going forward. *Id.* at 21 (“[R]ules designed to promote respectful discourse and avoid personal references that would be disparaging to persons in attendance at the committee hearing.”), App. 11a (“[T]he Legislators have not disclaimed an intent to engage in the challenged conduct again. Indeed, they have confirmed that the challenged conduct will continue.”). The Assembly also agrees that its personnel erased Petitioner Goeke’s testimony from the public record. BIO 5 (“Portions of Goeke’s speech in which she used derogatory language were erased from the official audio record of the Senate Judiciary Committee hearing.”).

The ideological nature of Respondents’ misgendering ban is aptly illustrated by the actual record of what Goeke said, or attempted to say, which caused Petitioners to enforce the ban against her. App. 145a-148a. Ms. Goeke attempted to call the bill’s namesake by his real legal name, refer to his actual biological sex, and discuss his known criminal history. *Id.* Respondents categorize this speech as “derogatory language” and not only cut short her speaking time, but erased her comments from the

public record. BIO 5.² These facts are undisputed, even if the parties draw different legal conclusions from them.

As a practical matter, no further evidence would be required to adjudicate Petitioners' viewpoint discrimination claim. The hearings where the ban was enforced against Petitioners have already been transcribed and are in the record. App. 103a-148a.

Moreover, the Assembly's ban on "misgendering" facially discriminates based on viewpoint. *See Iancu v. Brunetti*, 588 U.S. 388, 396 (2019) (invalidating disparagement clause where "the Lanham Act's language, on its face, disfavors some ideas."); *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (strict scrutiny always applies "when the regulation facially differentiates on the basis of viewpoint."); *cf. Vidal v. Elster*, 602 U.S. 286, 293-94 (2024) ("The names clause does not facially discriminate against any viewpoint."). This makes further inquiry into motives unnecessary because the viewpoint-discriminatory nature of the misgendering ban is self-evident. *See Iancu*, 588 U.S. at 398-99 (rejecting the need for overbreadth analysis: "The Court's finding of viewpoint bias ended the matter.").

This is not a case that will require testimony to a jury. *Cf. Bogan*, 523 U.S. at 54-55 (noting that a purpose of legislative immunity is to protect legislators from "the hazard of a judgment against them based upon a

2. It is similarly doubtful whether the Assembly would allow a citizen to quote from this Court's recent concurring opinion: "Men and boys with gender dysphoria are not women or girls, even if they believe that they are." *West Virginia v. B.P.J.*, 146 S. Ct. 2356, 2382 (2026) (Thomas, J., concurring).

jury's speculation as to motives.") (quoting *Tenney*, 341 U.S. at 377). The claims for injunctive or declaratory relief would all be decided by a Court sitting in equity. And no factfinder will second-guess legislators' motives, because motive is irrelevant where the restriction facially discriminates based on viewpoint.

Accordingly, this case presents this Court a good vehicle with which to resolve the lingering circuit split and clarify the proper scope of legislative immunity as a personal defense that is not available to government entities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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