UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

YOUNG AMERICA'S FOUNDATION,

Plaintiff

vs.

REBECCA CUNNINGHAM, in her official capacity as President of the University of Minnesota; DOUGLAS A. HUEBSCH, RUTH E. JOHNSON, PENNY A. WHEELER, JOEL E. BERGSTROM, JAMES T. FARNSWORTH, ELLEN G. LUGER, ROBYN J. GULLEY, SAMUEL D. HEINS, TADD M. JOHNSON, KOWSAR D. MOHAMED, MARY C. TURNER, and KODI J. VERHALEN in their official capacities as members of the Board of Regents; MERCEDES RAMIREZ FERNANDEZ, in her official capacity as Vice President, Office for Equity and Diversity; CALVIN D. PHILLIPS, in his official capacity as Vice President for Student Affairs at the University of Minnesota-Twin Cities; TINA MARISAM, in her official capacity as the Associate Vice President, Office of Equity and Diversity, Director of Title IX & ADA Coordinator for the University, and Director of the Equal Opportunity & Title IX Office for the University of Minnesota-Twin Cities; COREY CHRISTENSEN, in his official capacity as Equal Opportunity Associate and Title IX Coordinator at the University of Minnesota-Duluth; LAUREN ADAMSKI, in her official capacity as Director of the Office for Community Standards at the University of Minnesota-Twin Cities; and CHRIS KABERLINE, in her official capacity as Director of the Office of Student Conduct and Conflict Resolution at the University of Minnesota-Duluth,

Defendants.

Court File No. 26-cv-03016 (ECT/LIB)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff Young America's Foundation ("YAF") challenges the University of Minnesota's Sexual Harassment, Sexual Assault, Stalking and Relationship Policies and Equity and Access Policy on several First Amendment grounds. YAF alleges that these policies impinge on protected speech because its members are not free to express their views about gender identity. But the policies do not prohibit protected speech; YAF's members are free to express their views about gender identity. Nor do the policies compel speech as YAF's members may refer to individuals directly by name instead of pronouns. The policies do, however, prohibit harassing conduct based on an individual's gender identity. The University is legally obligated to prevent such harassment under both state and federal anti-discrimination law, and the policies align with well recognized standards that comport with the First Amendment to achieve this objective.

The Court should dismiss the matter on two independent grounds. First, YAF lacks standing because its members do not face certainly impending injury under the challenged policies and YAF's alleged injury is not redressable through this litigation. Second, YAF's claims fail on their merits because the policies do not constitute viewpoint discrimination, the Sexual Harassment, Sexual Assault, Stalking and Relationship Policies are not vague, and the Equity and Access Policy does not compel speech.

BACKGROUND

The University has a duty, under federal and state law, to protect all University members from harassment and discrimination on the basis of sex, as well as other protected characteristics. This includes protecting employees and students from discrimination on

the basis of gender identity. *See* Minn. Stat. §§ 363A.08; 363A.11; 363A.13; *Horton v. Midwest Geriatric Mgmt., LLC*, 963 F.3d 844, 847 (8th Cir. 2020) ("[T]he [Supreme] Court held that it 'defies' Title VII for 'an employer to discriminate against employees for being homosexual or transgender,' because to do so, it 'must intentionally discriminate against individual men and women in part because of sex.'" (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 662 (2020)). To fulfill these legal obligations and cultivate a respectful learning environment, the University adopted the following policies.

I. Gender Identity, Gender Expression, and Pronoun Policy

The University implemented the "Equity and Access: Gender Identity, Gender Expression, and Pronouns" in December 2019. (ECF 1 at ¶ 86; Veit-Carter Dec. Ex. A, hereinafter "Gender Equity Policy".) The University adopted this policy to demonstrate its commitment to "providing equal access and opportunity to individuals of all gender identities and gender expressions" and to "maintain an environment for University members that is free from discrimination based on gender identity and gender expression." (*Id.*; ECF 1 at ¶ 86.) The Gender Equity Policy states that all individuals associated with the University, including students, are "expected to use the names, gender identities, and pronouns specified to them by other University members[.]" (Veit-Carter Dec. Ex. A.)

The Gender Equity Policy specifically states that it "is designed, and will be implemented, to uphold free speech and academic freedom principles." (Veit-Carter Dec. Exs. A & B.) Should a person have concerns that complying with the policy would infringe on their First Amendment rights, the policy directs them to "consult with the Equal Opportunity & Title IX Office and the Office of the General Counsel." (Veit-Carter Dec.

Exs. A & B.) YAF does not allege that any of its members have contacted the Equal Opportunity & Title IX ("EOT") Office or the General Counsel with their First Amendment concerns. (*See generally* ECF 1.) The Frequently Asked Questions for the Gender Equity Policy note that using an individual's chosen name instead of pronouns is acceptable and "an example of a way to respect and accommodate different perspectives consistent with the University's values of free speech and academic freedom." (Veit-Carter Dec. Ex. B.)

The Gender Equity Policy does not have any specific enforcement provisions or investigation requirements. (*See generally* Veit-Carter Dec. Exs. A & B.) Individuals are directed to report concerns about potential policy violations to the EOT Office, which is the University office designated to respond to sex discrimination and sex-based harassment reports. (*Id.* at Ex. B.) The Policy's FAQs state that, while "[u]nintentional and occasional misuse of a pronoun will not constitute discrimination, . . . [m]alicious and repeated misuse of pronouns that is intended to degrade or humiliate someone could, depending on the circumstances, constitute harassment based on gender identity or gender expression[.]" *Id.* Such allegations may be investigated as potential sex-based harassment under the Administrative Policy: Sexual Harassment, Sexual Assault, Stalking and Relationship Violence, which applies the Title VII and Title IX regulatory definitions for sex-based harassment. *Id.*

YAF does not allege that any of its members have ever been reported or investigated for refusing to use a person's chosen pronouns. (*See generally*, ECF 1.) Nor does it allege that *anyone*—YAF member or otherwise—has ever been disciplined for violating the Gender Equity Policy. (*Id.*)

II. Board of Regents and Administrative Policies on Sexual Harassment, Sexual Assault, Stalking and Relationship Violence

The Board of Regents Sexual Harassment, Sexual Assault, Stalking and Relationship Violence Policy and the University's Administrative Sexual Harassment, Sexual Assault, Stalking and Relationship Policy (collectively referred to as "Sexual Misconduct Policies") prohibit discriminatory conduct based on sex, including gender and gender identity. (Veit-Carter Dec. Exs. C & D.) The University adopted these policies to fulfill the University's commitment to "preventing, and addressing sexual harassment, sexual assault, stalking, [and] relationship violence" (*Id.* Ex. C) and to take "prompt and effective steps" to address incidents of such conduct and "prevent their recurrence and, as appropriate, remedy their effects." (*Id.* Ex. D.) These policies apply across all University campuses. (ECF 1, ¶¶ 31 & 57.)

The University adopted the Board policy in October 2017, which directed the University to "adopt procedures on each campus for investigating and resolving complaints of prohibited conduct. (ECF 1, ¶¶ 26 & 39.) Accordingly, the University adopted the Administrative Policy in January 2018. (ECF 1, ¶ 49 & 50.)

The Administrative policy details how individuals may report concerns and, if necessary, how an investigation is conducted. (ECF 1, ¶¶ 49 & 65.) Investigations are conducted by the EOT Office. (ECF 1, ¶ 67.) Tina Marisam leads the EOT Office, which serves all five University campuses. (ECF 1, ¶ 40.) Corey Christensen serves as the Title IX Coordinator for the Duluth campus. (ECF 1, ¶¶ 68-71.) If an investigation is initiated, the investigator will send notice of the investigatory process to the subject of the

investigation. (ECF 1, ¶ 73.) YAF does not allege that any of its members have ever received notices of investigations into their conduct. (*See generally*, ECF 1.)

The Sexual Misconduct Policies prohibit conduct including sexual assault, stalking, relationship violence, and sexual harassment, both quid pro quo and hostile environment. (Veit-Carter Dec. Exs. C & D.) As relevant here, YAF specifically challenges the Sexual Misconduct Policies' definition of hostile environment as:

> [U]nwelcome ***conduct*** on the basis of sex, gender, pregnancy or related conditions, gender identity, gender expression, or sexual orientation [that] is severe, persistent or pervasive and
> - unreasonably interferes with an individual's employment or educational performance,
> - creates a work or educational environment that an individual finds, and a reasonable person would find, to be intimidating, hostile or offensive, or
> - effectively denies an individual equal access to a University program or activity.

(Veit-Carter Dec. Ex. D (emphasis added); ECF 1, ¶ 52.) On its face, the policy only prohibits conduct that creates a hostile environment that is both subjectively and objectively hostile or intimidating. The Administrative Sexual Harassment Policy further provides that nothing in the policy "should be interpreted to abridge academic freedom or principles of free speech." (Veit-Carter Dec. Ex. D.)

A violation of the Sexual Misconduct Policies may constitute a violation of the University's Student Code of Conduct. (ECF 1, ¶ 162.) Lauren Adamski, Director of the Office for Community Standards, responds to and resolves allegations of Student Code of Conduct violations on the Twin Cities campus. (*Id.* ¶ 23.) Chris Kaberline, Director of the

Office of Student Conduct and Conflict Resolution, responds to and resolves allegations of Student Code of Conduct violations on the Duluth campus. (*Id.* ¶ 24.)

III. The University's Administrative Discrimination Policy

The University adopted its Discrimination Administrative Policy in 2022 to "foster a welcoming community that values belonging, equity, diversity, and dignity in people and ideas." (ECF 1, ¶ 121; Veit-Carter Dec. Ex. E, hereinafter "Discrimination Policy".) The Discrimination Policy specifically provides that "[n]othing in this policy should be interpreted to abridge academic freedom or principles of free speech." (*Id.*) The policy applies across all University campuses. (ECF 1, ¶ 124.) Defendants Lauren Adamski and Chris Kaberline are charged with enforcing the Discrimination Policy. (ECF 1, ¶¶ 146-50.)

The Discrimination Policy prohibits discriminatory conduct based on one or more protected classes, including harassment that would constitute a hostile environment as defined in the same manner as the Sexual Misconduct Policies. (Veit-Carter Dec. Ex. E.) The policy states that allegations of discriminatory harassment based on sex or gender identity are typically investigated under the Sexual Misconduct Policies. *Id.* Allegations of discriminatory harassment based on sex or gender identity are investigated under the Discrimination Policy only when "1) the allegations would not constitute sexual harassment" under the Sexual Misconduct Policies "*and* 2) the allegations may constitute discrimination under this policy when considered in conjunction with allegations of discrimination based on other protected characteristics." *Id.* (emphasis added). In other words, this policy would not apply to situations that YAF is concerned about because YAF

makes no allegations that its members want to discriminate against individuals based on protected classes besides gender/gender identity. (*See generally*, ECF 1.)

IV. YAF's Lawsuit

YAF alleges that it is a nonprofit organization whose mission "is to ensure that young Americans are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values." (ECF 1, ¶ 16.) YAF claims to have members at four of the five University campuses but does not identify any of its members in the Complaint. (*Id*.) Despite not having members enrolled at all campuses, YAF requests relief system wide. (*Id*. ¶ 11.)[1]

YAF alleges that its members seek to express views on gender, including that "there are only two genders," "sex is immutable," or "a man cannot become a woman." (*Id*. ¶¶ 7, 101.) YAF claims that its members do not want to use a University members' specified pronouns when the YAF member believes that the pronouns do not correspond to that individual's "biological sex." (*Id*. ¶ 9.) YAF alleges that its members do not express these views because they fear disciplinary action. (*Id*.) YAF also claims that its members are too fearful to invite speakers whose views align with its members' views for fear of disciplinary action. (*Id*. ¶¶ 8, 190.) YAF does not allege that its members have ever been reported, investigated, or disciplined under the challenged policies for statements about gender identity or for refusing to use a University members' specified pronouns. (*See generally*, *Id*.)

[1] YAF's Complaint does not even allege that it is a registered student organization on any University campus.

Based on these allegations, YAF asserts four First Amendment Claims: (1) the Sexual Harassment and Discrimination Policies are void for vagueness, (2) the Sexual Harassment and Discrimination Policies constitute viewpoint discrimination, (3) the Gender Equity Policy constitutes viewpoint discrimination, and (4) the Gender Equity Policy compels speech. YAF names University President Rebecca Cunningham, individual members of the Board of Regents, and various individuals charged with enforcing the challenged policies at the Twin Cities and Duluth campuses as defendants. Defendants bring a motion to dismiss all four claims.

MOTION TO DISMISS STANDARD

Defendants move to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The same standard governs facial challenges to subject matter jurisdiction under Rule 12(b)(1) and motions to dismiss for failure to state a claim under Rule 12(b)(6). *Wong v. Minnesota Dep't of Hum. Servs*., 820 F.3d 922, 927 (8th Cir. 2016). For both, the court must construe the complaint in the light most favorable to the nonmoving party; assume the factual allegations in the complaint are true; and then assess whether the facts (a) establish subject matter jurisdiction, and (b) state plausible claims for relief. *Id.* In evaluating a motion to dismiss, courts may consider materials that are part of the public record or subject to judicial notice as well as materials that are necessarily embraced by the pleadings. *Miller v. Redwood Toxicology Lab'y, Inc.*, 688 F.3d 928, 931 & n.3 (8th Cir. 2012).

ARGUMENT

As an initial matter, YAF cannot establish standing because its members do not face a credible threat of enforcement, nor can its asserted injury be redressed by this litigation. The Court should therefore dismiss this action for lack of subject matter jurisdiction. Even if the Court exercises jurisdiction, YAF's claims fail on the merits: the challenged policies do not engage in viewpoint discrimination; the Sexual Misconduct Policies are not impermissibly vague; and the Gender Equity Policy does not compel speech.

I. YAF LACKS STANDING.

A plaintiff must demonstrate standing to sue by showing that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation omitted). An injury-in-fact is the "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up).

Here, YAF seeks judicial relief not for its own injury but for alleged injury to its members. To invoke standing as a representative of its members, or "associational standing," YAF must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's

purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 18199 (2023). YAF lacks standing because its members do not face a credible threat of enforcement and its alleged injury is not redressable.

A. YAF's Members Do Not Face a Credible Threat of Enforcement.

A plaintiff claiming an abridgment of free speech is permitted to seek pre-enforcement review "under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). YAF claims that its members have "self-censored and will continue to self-censor to avoid any academic issues or risk being subject to investigation or punishment under the [challenged] policies." (ECF 1 at ¶ 204.) A plaintiff can establish sufficiently imminent injury "by identifying protected speech in which it would like to engage but that is proscribed by statute, or by self-censoring to avoid the credible threat of prosecution." *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1000 (8th Cir. 2022). These two theories "overlap" and "[b]oth require a plaintiff to allege a credible threat of enforcement []." *McDonald v. Trustees of Indiana Univ.*, 186 F.4th 917, 926 (7th Cir. 2026). YAF does not meet this standard for several reasons.

First, to face a credible threat of enforcement, the "allegedly chilled course of conduct must be proscribed by the challenged [policy]." *Ft. Des Moines Church of Christ v. Jackson*, 215 F.Supp. 3d 776, 786-87 (S.D. Iowa 2016); *see also Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004) (self-censorship may amount to an injury in fact if the plaintiff has been "objectively reasonably chilled from exercising his

First Amendment right to free expression in order to avoid enforcement consequences"). Yet, most of the allegedly chilled speech is not proscribed by the challenged policies. For example, YAF claims its members are too scared to voice opinions such as "there are only two genders," "sex is immutable," or "a man cannot become a woman." (ECF 1 ¶¶ 7, 101.) But there is nothing in any of the challenged policies that even arguably prohibits anyone from voicing such opinions. (*See generally*, Veit-Carter Dec. Exs. A, C, & D.) Therefore, the members' alleged fear of enforcement for stating such opinions is not objectively reasonable. *See Jackson*, 215 F.Supp. 3d at 787 (finding no objective fear of prosecution when conduct is not proscribed by challenged statute); *Turkish Coalition of America, Inc. v. Bruininks*, 678 F.3d 617, 622 (8th Cir. 2012) (same).

The only allegedly chilled speech arguably proscribed by any of the challenged policies would be YAF's members' refusal to use University members' pronouns when the members believe that the pronouns do not correspond to an individual's "biological sex." Such conduct could potentially violate the Gender Equity Policy to the extent it is sufficiently malicious and frequent so as to create a hostile environment under University policy, which applies the Title VII, Title IX, and Minnesota Human Rights Act ("MHRA") hostile environment standards. But YAF alleges no facts suggesting that its members would face "certainly impending" disciplinary action for any refusal to use University members' pronouns that falls short of violating this legal and policy standard. *Susan B. Anthony*, 573 U.S. at 158. The Gender Equity Policy was implemented in 2019 (ECF 1 ¶ 86). The Complaint alleges that there have been complaints about "bias incidents" relating to gender, gender identity, and gender expression (*see* ECF 1 ¶180-86), but it includes no

allegations that *anyone* has ever been investigated and/or disciplined for misgendering a University member. (*See generally* ECF 1.) Under these circumstances, YAF cannot plausibly allege that its members are at "substantial risk" of discipline or that disciplinary action is "certainly impending" should they misgender another University member in a manner that is not sufficiently malicious or frequent so as to create a hostile environment under the legal and policy standard.

Contrast this with *Parents Defendant Education v. Linn Mar Comm. Sch. District*, where the plaintiff challenged a policy that had been implemented just four months previously. 83 F.4th 658, 663 (8th Cir. 2023). There, the Eighth Circuit found the plaintiff had standing because there was "no established practice of non-enforcement that could assuage concerns about the imposition of discipline." *Id.* at 667. Here, YAF failed to allege any University enforcement efforts targeting pronoun usage or other speech on matters of gender identity in the more than six years since implementation of the Gender Equity Policy. Given this, YAF's members do not face any certainly impending injury, and YAF's speculative allegations of possible future enforcement do not satisfy the requirements of Article III. *See Sch. of Ozarks, Inc. v. Biden*, 41 F.4th 992, 1007 (8th Cir. 2022) (finding no credible threat of enforcement when government agency had never sought to enforce the challenged measure); *McDonald*, 186 F.4th at 927 (finding no credible threat of injury because defendants had not enforced challenged policies for over a year).

YAF lacks standing and its claims should be dismissed because its members do not face a credible threat of enforcement and their speech is not objectively chilled.

B. YAF Fails to Establish Redressability.

YAF also fails to meet its burden on the third prong of standing, redressability. "To determine whether an injury is redressable," courts "consider the relationship between the judicial relief requested and the injury suffered." *California v. Texas*, 593 U.S. 659, 671 (2021). Here, YAF asserts its members have been injured because they have censored their speech for fear of disciplinary action by the University. The relief it seeks is having several University policies struck down, including its Sexual Misconduct Policies.

As an initial matter, and previously discussed, there is nothing in any of the challenged policies that prohibits YAF's members from sharing beliefs such as "a man cannot be a woman" or "sex is immutable." *See supra* § I.A. What the challenged policies prohibit is conduct, including speech, that satisfies the well-established Title VII, Title IX, and MHRA hostile environment frameworks. *Id.* To the extent YAF's members wish to engage in harassing conduct based on gender identity that meets this standard, a favorable decision from this Court striking down the policies would not redress YAF's injury. This is because even without the policies, the University would still be legally obligated under state and federal law to provide a learning and working environment that is free from unlawful discrimination—including hostile environment based on gender identity. *See* Minn. Stat. §§ 363A.08, 363A.11; 363A.13; *Horton., LLC*, 963 F.3d at 847. Thus, a favorable decision from this Court would not protect YAF's members from potential disciplinary action should their conduct meet the severe and/or pervasive standard outlined by the policies.

Thus, the complaint should be dismissed for lack of standing.

II. YAF'S FIRST AMENDMENT CHALLENGES SHOULD BE DISMISSED ON THE MERITS.

YAF brings four facial First Amendment challenges to the University's Gender Equity Policy and Sexual Misconduct Policies. Facial challenges like YAF's are generally disfavored because "they often rest on speculation and raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Roach v. Stouffer*, 560 F.3d 860, 869 n.5 (8th Cir. 2009) (quotation omitted). YAF can only prevail on its facial challenge if it shows "that application of [the policies] will lead to the suppression of speech." *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 337 (8th Cir. 2011).

Here, YAF claims that the Sexual Misconduct Policies are void for vagueness, that the Gender Equity Policy compels speech, and that the policies constitute viewpoint discrimination. These claims should all be dismissed for failure to state a claim.

A. YAF Fails to State a Claim That the Sexual Misconduct Policies are Void for Vagueness (Count I).

First, YAF contends that the "hostile environment" definitions in Sexual Misconduct Polices are void for vagueness. (ECF 1, ¶ 219.)[2] To survive a vagueness challenge, a policy must satisfy a two-prong test: the policy must "provide adequate notice of the proscribed conduct" and "not lend itself to arbitrary enforcement." *Nygard v. City of*

[2] YAF also challenges the identical hostile environment definition in the Discrimination Policy. (ECF 1, ¶¶ 221-22.) As previously explained, these policies are inapplicable to the speech that YAF claims its members wish to engage in. *Supra* § III. Even if the policies applied, YAF's vagueness claim would fail for the same reasons that its challenge to the Sexual Misconduct Policies fail.

Orono, 39 F.4th 514, 519 (8th Cir. 2022) (quotation omitted). "[F]lexibility and reasonable breadth" are acceptable if it is "clear what the [policy] as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

"If the enactment does not impose criminal penalties, due process requires less specificity—and even less specificity is required for public school disciplinary rules." *Iowa Safe Schools v. Reynolds*, 172 F.4th 589, 596 (8th Cir. 2026). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 78794 (1989). Here, the Court should dismiss YAF's vagueness challenge because the Sexual Misconduct Policies provide sufficient notice and do not permit arbitrary enforcement.

The YAF specifically challenges the Sexual Misconduct Policies' definition of hostile environment as:

> Hostile environment sexual harassment occurs when unwelcome conduct on the basis of sex, gender, pregnancy or related conditions, gender identity, gender expression, or sexual orientation is severe, persistent or pervasive and:
>
> - unreasonably interferes with an individual's employment or educational performance,
> - creates a work or educational environment that an individual finds, and a reasonable person would find, to be intimidating, hostile or offensive, or
> - effectively denies an individual equal access to a University program or activity.

(Veit-Carter Dec. Ex. D).

This standard is not incomprehensible for a person of ordinary intelligence as it closely aligns with the long-standing Title VII and Title IX hostile-environment standards endorsed by the Eighth Circuit and the Supreme Court. To meet the standard, an

environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so" *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (internal citation omitted). The conduct must also alter the conditions of employment or unreasonably interfere with an individual's educational performance. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67-68 (1986) (defining actionable sexual harassment as "severe or pervasive" as to "alter the conditions of the victim's employment and create an abusive working environment"); *Schmit v. Trimac Transportation, Inc.*, 172 F.4th 612 (8th Cir. 2026) (stating that hostile work environment claim under the ADA requires proof that "the harassment was severe enough to affect the terms, conditions, or privileges of his employment"); *Harris v. Forklift* Sys., Inc., 510 U.S. 17, 23 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances, which may include . . . whether it unreasonably interferes with an employee's work performance."); *Mungai v. Univ. of Minnesota*, 141 F.4th 959, 965 (8th Cir. 2025) (stating that hostile educational environment claim under Title IX requires that "[t]he harassment must be so severe, pervasive and objectively offensive that it deprives the victim of access to the educational opportunities or benefits provided by the school") (quotation omitted).

Several federal and state laws employ the same or similar language for hostile environments. *See, e.g.*, Minn. Stat. § 363A.03, subd. 43 (defining sexual harassment as "unwelcome . . . verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with

an individual's employment. . .[or] education"); 29 CFR § 1604.11(a) (defining harassment on the basis of sex in a Title VII action as: "Unwelcome . . . verbal or physical conduct of a sexual nature [where] . . . such conduct has a purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment"); 34 C.F.R. § 106.30 (Title IX regulations defining sexual harassment as "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity").

In *Rowles v. Curators of Univ. of Missouri*, the Eighth Circuit rejected a similar First Amendment challenge against a public university's sexual harassment policy. 983 F.3d 345, 352 (8th Cir. 2020). The challenged sexual harassment policy prohibited conduct that was deemed "sufficiently severe or pervasive and objectively offensive that it interferes with, limits or denies the ability of an individual to participate in or benefit from educational programs or activities or employment access, benefits or opportunities." *Id.* at 352. The plaintiff also challenged the stalking policy, which prohibited conduct that would cause a "reasonable person" to be "frightened, intimidated, or emotionally distressed." *Id.* at 356. The court found that the challenged definitions contained several qualifiers, including objective and subjective components, and therefore provided adequate notice. *Id.* at 356.

The same is true of the University's Sexual Misconduct Policies. The hostile environment definition contains both subjective qualifiers ("unwelcome") and objective qualifiers ("severe, persistent or pervasive" and "reasonable person"). *See also Davis v.*

Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999) (finding that peer harassment must be "not only severe and pervasive, but also objectively offensive" to win monetary damages under Title IX); *DeJohn v. Temple Univ.*, 537 F.3d 30320 (3d Cir. 2008) ("[U]nless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech." (citation and footnote omitted)). Thus, the policies provide adequate notice of prohibited conduct.

Nor do the Sexual Misconduct Policies invite arbitrary enforcement. Student conduct policies always require some degree of judgment. While marginal instances of conduct might generate debate over a policy's reach, the simple reality that enforcement necessitates a "degree of judgment" does not render the Sexual Misconduct Policies impermissibly vague. Again, *Rowles* is instructive. There, the court held that a policy is not impermissibly vague just because "borderline conduct may prompt disagreement about whether the policy applies in a given case." 983 F.3d at 357. Thus, while the University's Sexual Misconduct Policies involve some "degree of judgment," that does not demonstrate that the policies are subject to arbitrary enforcement. *Id*. at 357-58; *see also Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("As always, enforcement requires the exercise of some degree of police judgment, but as confined that degree of judgment here is permissible.").

YAF primarily bases its vagueness challenge on reasoning from *Tennessee v. Cardona*, 762 F. Supp.3d 615 (E.D. Ky. 2025). There, the district court considered a vagueness challenge to the proposed Title IX rulemaking that redefined "sex" to include gender identity. *Id.* at 624-25; *see also Tennessee v. Cardona*, 762 F.Supp.3d 615, 549

(E.D. Ky. 2025). The court reasoned that in the context of gender identity, the objective standard is inherently *not* objective because it imposes a viewpoint consistent with the affirmation of gender identity, or a viewpoint that sex and gender can be separate and distinct. *Tennessee*, 762 F.Supp.3d at 549; *see also Kansas v. U.S. Dep't of Educ*., 739 F. Supp.3d 902, 926-28 (D. Kan. 2024) (adopting the reasoning from *Cardona*).

This reasoning is neither binding nor persuasive. The objective standard for all types of discrimination is considered from the perspective of the complainant; discrimination based on gender identity is not unique in this regard. *See Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81 (1998) ("[T]he objective severity of harassment should be judged from the perspective of a reasonable person *in the plaintiff's position*, considering all the circumstances.") (emphasis added) (internal quotation omitted); *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 n.3 (8th Cir. 1993) ("In adopting a 'reasonable person' test under Title VII, the EEOC has stressed that objective criteria should be utilized from the victim's perspective and not stereotyped notions of acceptable behavior.") (internal quotation omitted).[3] Accordingly, when considering allegations of discrimination based on gender identity, the reasonable person would have "a viewpoint consistent with the affirmation of gender identity." An alleged harasser's subjective belief is immaterial to the

[3] *See also* MANUAL OF MODEL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, § 8.41 "Elements of Claim: Harassment (By Supervisor With No Tangible Employment Action)" defining the fifth element of a hostile work environment claim to be "such conduct was sufficiently severe or pervasive that a reasonable person *in the plaintiff's position* would find the plaintiff's work environment to be [(hostile)(abusive)]." (emphasis added) (July 30, 2025) (https://juryinstructions.ca8.uscourts.gov)

hostile environment standard and does not render the hostile environment standard void for vagueness.

YAF also alleges that the policies "lack precise definitions, detail, context, and notice to students about what speech about gender identity and transgender issues constitute discrimination or 'discriminatory harassment.'" (ECF 1 para 221). But the Sexual Misconduct Policies need not contain "precise definitions, detail, context, and notice" about what speech regarding sex would meet the standard. *See, e.g., Rowles*, 983 F.3d at 356 (rejecting vagueness challenge to hostile environment definition). Nor does the Discrimination Policy need to contain detailed explanations of what speech about national origin, religion, or any other protected class would constitute a hostile environment.

Moreover, the FAQs for the Gender Equity Policy provide the very guidance that YAF claims its members need. The FAQs provide several definitions, including definitions for "gender expression" and "gender identity." (Veit-Carter Dec. Ex. B.) It also explains that "malicious and repeated misuse of pronouns that is intended to degrade or humiliate someone" could potentially violate the Sexual Misconduct Policies. *Id.* These FAQs make clear that general opinions such as "men cannot become pregnant" or "there are only two genders" would not violate the policy. Neither would occasional misgendering. But malicious misuse of pronouns intended to degrade another University member could potentially violate the Sexual Misconduct Policies. *Id.* Which, again, is consistent with the University's responsibility under federal and state law to protect all University members from harassment and discrimination on the basis of sex and gender identity. *See, e.g., Copeland v. Georgia Dept of Corr.*, 97 F.4th 766, 778 (11th Cir. 2024) (holding that

persistent intentional misgendering can meet the severe or pervasive threshold to establish hostile work environment under Title VII). Thus, the Sexual Misconduct Policies provide adequate notice and do not permit arbitrary enforcement. YAF's vagueness challenge should be dismissed.

B. YAF Fails to State a Claim That the University's Sexual Misconduct Policies and Gender Equity Policy Constitute Viewpoint Discrimination (Counts II & III).

YAF also alleges that both the Sexual Misconduct Policies and the Gender Equity Policy constitute viewpoint discrimination. (ECF Counts II & III.) A university discriminates based on viewpoint when the "rationale for its regulation of speech is the specific motivating ideology or the opinion or perspective of the speaker." *Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017) (citation and internal quotation marks omitted). But where a university policy "draws no distinction between groups based on their message or perspective," it is "textbook viewpoint neutral" and in accord with the First Amendment. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez*, 561 U.S. 661, 694–95 (2010).

i. Sexual Misconduct Policies

YAF alleges that the hostile environment definition contained in the Sexual Misconduct Policies constitutes viewpoint discrimination. (ECF 1 at ¶ 228.)[4] YAF

[4] Again, YAF alleges that the Discrimination Policy's hostile environment definition also constitutes viewpoint discrimination (ECF 1 at ¶ 229), but this policy is inapplicable for the reasons discussed *supra* Section III. Even if the policies applied, YAF's viewpoint discrimination claim would fail for the same reasons that its challenge to the sexual harassment policies fail

specifically claims that the Sexual Misconduct Policies prohibit YAF's members from expressing ideas such as "a man cannot become a woman, and a woman cannot become a man" or that "sex is immutable." (ECF 1, ¶¶ 192 & 235.) YAF further alleges that the Sexual Misconduct Policies allow a person to make belief statements such as "there are more than two genders" while prohibiting someone from stating that "there are only two genders." (ECF 1, ¶¶ 234 & 235.) This is simply untrue and is a misreading of the policies. There is nothing in the Sexual Misconduct Policies that would prohibit any University member from making either statement or advancing any of the views that YAF claims its members are too frightened to espouse. *See generally* Veit-Carter Dec. Exs. C & D. YAF's members are free to express their political or moral beliefs.

YAF also challenges the first and second prong of the hostile environment definition which prohibit conduct, including speech, that "[u]nreasonably interferes with an individual's employment or educational performance" or "creates a work or educational environment that an individual finds and a reasonable person would find, to be intimidating, hostile, or offensive." (ECF 1, ¶¶ 232 & 233.) As previously noted, this language tracks long-endorsed Title VII, Title IX hostile-environment standards requiring an objective standard of severity and/or pervasiveness. *See Davis*, 526 U.S. at 651 (finding that peer harassment must be not only severe and pervasive, but also "objectively offensive" to win monetary damages under Title IX); *DeJohn*, 537 F.3d at 320 ("[U]nless harassment is qualified with a standard akin to a severe or pervasive requirement, a harassment policy may suppress core protected speech.") (citation and footnote omitted).

YAF does not explain why this well-established standard constitutes viewpoint discrimination when considering gender identity but not in the context of race, national origin, religion, or any other protected classes. Nor could it as the hostile environment standard does not prohibit individuals from expressing their viewpoints about religion or race or gender identity even if those opinions are offensive. What it does prohibit is targeted harassment that is objectively severe and/or pervasive and otherwise meets the legal definition of hostile environment—which is not protected First Amendment speech. Thus, YAF has failed to state a claim that the Sexual Harassment Policies constitute viewpoint discrimination.

ii. Gender Equity Policy

YAF also alleges that the Gender Equity policy requires that students and guests use "preferred" pronouns and that this requirement constitutes viewpoint discrimination. (ECF 1, ¶¶ 194 & 244.) This is because someone could be subject to a discrimination complaint for not using a preferred pronoun but would not be if they used a preferred pronoun. (ECF 1 at ¶ 234.)

In so arguing, YAF misconstrues the policy as only prohibiting their members' viewpoint. But that is not how the policy is drafted. Although the Gender Equity Policy is geared toward protecting transgender and nonbinary University members, a plain reading shows that it applies to misuse of any student's name or pronouns, including those that identify as cisgender. *See* Veit-Carter Dec. Ex. A (stating that University members are "expected to use the names, gender identities, and pronouns specified to them by other University members"). For example, a University member student may violate the policy

if they maliciously and repeatedly use she/her pronouns to degrade a cisgender male or vice versa under circumstances that meet the definition of hostile environment contained in the Sexual Misconduct Policies. The policy is drafted this way because misgendering is a form of sex stereotyping and may constitute actionable harassment regardless of the gender identity of the victim. *See, e.g., Nichols v. Azteca Rest. Enters., Inc*., 256 F.3d 864, 874–75 (9th Cir. 2001) (citation omitted) (holding that repeated use of she/her pronouns to degrade a cisgender male employee was harassment on the basis of sex stereotypes).

The University has a strong "compelling interest" in creating an environment that is free from such harassment and discrimination. *DeJohn,* 537 F.3d at 319; *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) ("Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest). The University also has affirmative legal obligations to ensure that its employees and students are free from harassment based on any protected status, including gender identity. *See, e.g.*, *Bostock*, 590 U.S. at 662; Minn. Stat. § 363A.13. Fulfilling these obligations by prohibiting conduct that targets individuals based on their membership of protected class does not violate the First Amendment because violating the policy is specifically tied to the severe and pervasive standard. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices[.]"); *Jenson v. Eveleth Taconite Co*., 824 F. Supp. 847, 884, n. 89 (D. Minn. 1993) ("Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive

working environment. That expression is 'swept up' in this proscription does not violate First Amendment principles.").

The Gender Equity Policy is narrowly tailored to satisfy these legal obligations. The policy states that University members are expected to engage with each other in a respectful and nondiscriminatory manner, including using pronouns that another University member chooses. The FAQs further explain the reasoning behind the policy and the prevalence of verbal and physical harassment that transgender individuals face and that using identified pronouns conveys "a basic level of respect" for them. (Veit-Carter Dec. Ex. B.) If a University member has a concern about doing so, the policy suggests using names as a respectful alternative to pronouns and invites the member to consult with the EOT office. (Veit-Carter Exs. A & B.) YAF does not allege that any of its members have followed this advice and consulted EOT. *See generally*, ECF 1. Nothing in the policy requires YAF's members to demonstrate support for beliefs they do not hold. Asking University members to refer to other members by their specified pronouns is a matter of respect that does not violate the First Amendment.

C. The Gender Equity Policy Does Not Compel Speech (Count IV).

For similar reasons, YAF's claim that the Gender Equity Policy compels speech should also be dismissed. The compelled speech doctrine limits the government's ability to force an individual to personally "speak the government's message." *Rumsfeld v. Forum for Acad. And Instit. Rights, Inc.*, 547 U.S. 47, 61 (2006). The Gender Equity Policy, however, does not require anyone to share a specific message. Instead, the policy focuses

on conduct, requiring that all University members treat people equally regardless of protected status.

Moreover, the policy also does not *compel* anyone to use an individual's specified pronouns. It sets the expectation of interacting respectfully but also clearly states that the policy will be interpreted consistent with the First Amendment. (Veit-Carter Dec. Ex. A.) To address the concerns of YAF's members and others, the FAQs suggest using names to refer to individuals instead of pronouns as an "example of a way to respect and accommodate different perspectives consistent with the University's values of free speech and academic freedom." (Veit-Carter Dec. Ex. B.) YAF's members may also choose to not speak about other University members. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("[F]reedom of speech includes both the right to speak freely and the right to refrain from speaking at all."). Thus, Count IV should be dismissed for failure to state a claim because the Gender Equity Policy does not compel speech.

CONCLUSION

For the reasons stated above, the University asks that the Court dismiss YAF's complaint in its entirety

Dated: November 2, 2026

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

YOUNG AMERICA'S FOUNDATION,

Plaintiff

vs.

REBECCA CUNNINGHAM, in her official capacity as President of the University of Minnesota; DOUGLAS A. HUEBSCH, RUTH E. JOHNSON, PENNY A. WHEELER, JOEL E. BERGSTROM, JAMES T. FARNSWORTH, ELLEN G. LUGER, ROBYN J. GULLEY, SAMUEL D. HEINS, TADD M. JOHNSON, KOWSAR D. MOHAMED, MARY C. TURNER, and KODI J. VERHALEN in their official capacities as members of the Board of Regents; MERCEDES RAMIREZ FERNANDEZ, in her official capacity as Vice President, Office for Equity and Diversity; CALVIN D. PHILLIPS, in his official capacity as Vice President for Student Affairs at the University of Minnesota-Twin Cities; TINA MARISAM, in her official capacity as the Associate Vice President, Office of Equity and Diversity, Director of Title IX & ADA Coordinator for the University, and Director of the Equal Opportunity & Title IX Office for the University of Minnesota-Twin Cities; COREY CHRISTENSEN, in his official capacity as Equal Opportunity Associate and Title IX Coordinator at the University of Minnesota-Duluth; LAUREN ADAMSKI, in her official capacity as Director of the Office for Community Standards at the University of Minnesota-Twin Cities; and CHRIS KABERLINE, in her official capacity as Director of the Office of Student Conduct and Conflict Resolution at the University of Minnesota-Duluth,

Defendants.

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this memorandum complies with the type-volume and size limitations of D. Minn. LR 7.1(f) and (h). The memorandum has 6,963 words of type, font size 13, including all text, including headings, footnotes, and quotations. The memorandum was prepared using Microsoft Word 365.

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CERTIFICATE OF SERVICE

Undersigned hereby affirms that the foregoing was served on all counsel of record this 2nd day of November, 2026 by and through the ECF electronic filing system approved by the Court.

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