UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

YOUNG AMERICA'S FOUNDATION, *Plaintiff*, v. REBECCA CUNNINGHAM, in her official capacity as President of the University of Minnesota, et al., *Defendants*.	)	No. 26-cv-3016-ECT-LIB

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF CONTENTS **1**

INTRODUCTION **3**

MATERIAL FACTS **5**

I. YAF challenges portions of four University policies. 5

A. Board of Regents and Administrative Sexual Harassment, Sexual Assault, Stalking & Relationship Violence Policy. 5

B. Pronoun Policy. 7

C. Discrimination Policy. 9

D. Student Conduct Code. 10

E. Defendants' roles in creating and enforcing the policies. 11

II. The beliefs and desired speech of YAF and its members. 12

A. YAF's organizational purpose and membership. 12

B. The beliefs of YAF members. 12

C. YAF members' desired speech and self-censorship. 13

III. YAF members' fear of enforcement is exacerbated by the University's history of enforcement. 15

STANDARD OF REVIEW **17**

ARGUMENT **17**

I. The Pronoun Policy expressly outlaws one viewpoint in favor of an opposing viewpoint the Supreme Court declared "hotly contested." 17

II. The Pronoun Policy violates the First and Fourteenth Amendments because it compels speech. 21

III. The Sexual Harassment and Discrimination policies violate the First and Fourteenth Amendments because they are vague. 24

A. The law governing vagueness challenges. 24

B. Title IX standard governing harassment allegations on university campuses. 25

C. The University's Sexual Harassment and Discrimination Policies suffer the same vagueness pitfalls as the Biden Rule. 27

1. The University's policies deviate from the *Davis* standard in three ways that resulted in federal courts vacating the Biden Rule. 27

2. The University's policies deviate from the *Davis* standard in two additional ways, making them even vaguer than the vacated Biden Rule..... 32

IV. The Sexual Harassment and Discrimination Policies violate the First and Fourteenth Amendments because they are viewpoint discriminatory..... 33

V. Policies that discriminate on viewpoint or compel speech are per se unconstitutional, but the University's policies also fail strict scrutiny. 35

CONCLUSION 36

INTRODUCTION

Back in the 1960s, the University of Minnesota (University) was a vanguard of free expression, with the Board of Regents stating: "From the first days of our independence the giants of American history have revered the principle of free speech; they have had enough faith in our form of government to state affirmatively that if truth and error were allowed to contest in free debate, truth would triumph." Regents of the Univ. of Minn., *Freedom and the University* (Dec. 14, 1963), https://perma.cc/Z2BP-YCXS. But "[f]reedom is a fragile thing and is never more than one generation away from extinction." Ronald Reagan, *First Inaugural Address* (Jan. 5, 1967), https://perma.cc/LYK2-JPYK.

Against the backdrop of attempts to change the definition of "sex" in Title IX to include gender identity, the University has adopted harassment, discrimination, and pronoun policies advancing one viewpoint over another. Thus, instead of allowing the battle between truth and error, the University silences speech it disfavors and compels speech with which its students disagree.

Plaintiff Young America's Foundation (YAF) brings this lawsuit to restore the First Amendment rights of its members. YAF promotes individual freedom and traditional values among young Americans and seeks to inspire them to hold and advance such values. YAF has members on college campuses across the country, including in the University of Minnesota system. These students hold traditional beliefs on gender identity and transgender issues. They want to speak their viewpoints. And they want to use biological pronouns, not "preferred" pronouns. Four University policies prohibit their desired speech and cause them to self-censor and use "preferred" pronouns.

The University has a policy on pronoun usage requiring students to use the pronouns and "other gendered personal references" "preferred" by transgender, genderfluid, and non-binary individuals. The policy subjects YAF members to discipline for intentionally or repeatedly "misgendering" an individual. But the pronouns a speaker uses "convey a powerful message implicating a sensitive topic of public concern." *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021). And the First Amendment prohibits a public university from compelling speakers to voice its preferred message. Thus, the University's pronoun policy is viewpoint discriminatory and compels speech, in violation of the First Amendment. *See Defending Educ. v. Anguiano*, No. 8:26-cv-01574-FWS-AYP, 2026 U.S. Dist. LEXIS 213850, at *4, 20 (C.D. Cal. Sep. 15, 2026) (*Anguiano*).

Meanwhile, the Board of Regents and the University have adopted sexual harassment policies using a series of unconstitutionally vague terms to define "hostile environment sexual harassment." *See, e.g.*, *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 548 (E.D. Ky. 2024) (*Tennessee I*). These two policies also define "hostile environment sexual harassment" to prohibit speech that merely creates an "offensive" environment. But the First Amendment has long protected speech that offends listeners. *Matal v. Tam*, 582 U.S. 218, 243 (2017). The University's discrimination policy uses a nearly identical definition of "discriminatory harassment" which suffers the same flaws. These portions of these policies violate YAF's and its members' First Amendment rights.

For these reasons, YAF moves for summary judgment, seeking a declaration that the challenged portions of these University policies facially violate the First Amendment rights of YAF and its members, and enjoining the University from enforcing the policies.

MATERIAL FACTS

I. YAF challenges portions of four University policies.

The challenged University policies sharply conflict with the beliefs and desired speech of YAF members who are University students.

A. Board of Regents and Administrative Sexual Harassment, Sexual Assault, Stalking & Relationship Violence Policy.

The Board of Regents adopted a Sexual Harassment, Sexual Assault, Stalking & Relationship Violence policy (Board of Regents Sexual Harassment Policy). (Miller Decl. ¶3, Ex. 2 at YAF0070-75.) It applies to students and guests who interact with the University community across all University campuses. (*Id.* at YAF0074.) It prohibits harassment, including "hostile environment sexual harassment." (*Id.* at YAF0072.) It directs the University to (1) address prohibited conduct or speech "through disciplinary or other responsive action up to and including…academic dismissal" and (2) "adopt procedures on each campus for investigating and resolving complaints of prohibited conduct." (*Id.* at YAF0074-75.)

To "implement" the Board of Regents policy, the University enacted an administrative policy entitled Sexual Harassment, Sexual Assault, Stalking & Relationship Violence (Administrative Sexual Harassment Policy). (Miller Decl. ¶4, Ex. 3 at YAF0091.) This policy also applies to students and guests who interact with the University community across all University of Minnesota campuses. (*Id.* at YAF0076.) It prohibits sexual harassment, including "hostile environment sexual harassment." (*Id.* at YAF0076, YAF0099.)

Both the Board of Regents and the Administrative Sexual Harassment Policies (collectively "Sexual Harassment Policies") define "hostile environment sexual harassment" as "unwelcome conduct on the basis of sex" that "is severe, persistent, *or* pervasive" and either (1) "*unreasonably interferes* with an individual's employment or educational *performance*" or (2) "creates a work or educational environment that an individual finds, and a reasonable person would find, to be intimidating, hostile or *offensive*."[1] (Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099 (emphasis added to both).) The Administrative Sexual Harassment Policy adds that "unwelcome conduct" may be "verbal." (Miller Decl. ¶4, Ex. 3 at YAF0100.) In other words, speech. Hammering this home, one example of harassment is a "pattern of disparaging comments…based on gender stereotypes." (*Id.*) Finally, "unwelcome" is defined with "a subjective standard"—specifically, "whether the complainant viewed the conduct as unwelcome." (*Id.*)

Under the Administrative Sexual Harassment Policy, "unwelcome conduct on the basis of sex" includes conduct "on the basis of…gender identity [and] gender expression." (*Id.* at YAF0099.) But the Administrative Sexual Harassment Policy does not define gender identity and gender expression. (*See* Miller Decl. ¶4, Ex. 3 at YAF0076-103.) Likewise, neither sexual harassment policy defines "offensive." (*See* Miller Decl. ¶3, Ex. 2 at

[1] YAF facially challenges only the definition of "hostile environment sexual harassment" in these policies, combined with protection based on "gender identity" and "gender expression." YAF does not challenge the quid pro quo sexual harassment or Title IX sexual harassment definitions of harassment because these provisions target behavior unrelated to YAF members' desired speech.

YAF0072; *id.* ¶4, Ex. 3 at YAF0099.) Nor do they define what amounts to "severe," "persistent," "pervasive," or "unreasonably interferes." (*See* Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099-100.)

Under the Administrative Sexual Harassment Policy, a purported victim of another's speech may file a formal complaint, an anonymous complaint, or a request for informal problem-solving processes. (Miller Decl. ¶4, Ex. 3 at YAF0077.)

B. Pronoun Policy.

The University also adopted an administrative policy entitled "Equity and Access: Gender Identity, Gender Expression, Names and Pronouns" (Pronoun Policy). (Miller Decl. ¶5, Ex. 4. at YAF0104-08.) This policy applies to students and guests alike. (*Id*. at YAF0104, YAF0107.) It states that "University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members." (*Id.* at YAF0104.) "University members and units are also expected to use other gendered personal references…that are consistent with the gender identities and pronouns specified by University members." (*Id.*). "Gendered personal references" include "pronouns," "titles (e.g., Mrs., Ms., Mr., Mx.)," and "other terms denoting a person's gender identity." (*Id.* at YAF0106.)

The Pronoun Policy broadly defines gender identity as:

> An individual's own understanding of themselves in terms of gendered categories that may include female, male, transgender, genderqueer, genderfluid, gender nonconforming, Two Spirit, intersex, non-binary, agender, genderless, and many others. Gender identity cannot be reliably determined by looking at an individual. An individual's gender identity may be consistent over their lifetime or may shift over time….

(*Id.*) Further, a linked FAQ page on the Pronoun Policy instructs that a person may use "more than one set of pronouns." (Miller Decl. ¶6, Ex. 5 at YAF0109.) A person can also request pronouns such as fae/faer/faers, which are associated with mythical or fantasy beings. (*See id.*) And the FAQ page highlights that the Pronoun Policy applies within foreign language classes where students "may opt to use gender expansive pronouns, such as **elle** and **elles**," which are ungrammatical, gender-neutral, neopronouns (*Id.*) Foreign language instructors must "provide students with available non-binary structures in the language being learned so that students can communicate their gender identification in that language." (*Id.* at YAF0110.)

The Pronoun Policy can force a YAF member to use multiple different "preferred" pronouns, titles, or other gendered personal refences for someone claiming a gender "shift" within the same academic year. This is because a student must use "preferred" pronouns, and because the University claims that a person's gender "may shift over time" and a person may use "more than one set of pronouns." Per the FAQ page, a YAF member's use of a biological pronoun or other gendered personal reference "could … constitute discrimination or harassment based on gender identity or gender expression." (*Id.* at YAF0115.) This, in turn, violates the University's discrimination policy and/or the Board of Regents Student Conduct Code.[2] (*Id.*)

The FAQ page also directs: "intentional or repeated misuse of pronouns should be reported." (*Id.* at YAF0114.) The University requires certain employees to report

[2] *See infra* at Sec. I(C); I(D).

misgendering. (*Id.*) The FAQ page also provides instructions on how University members can report "misgendering" and obtain "support…through the reporting process" from the Gender and Sexuality Center for Queer and Trans Life. (*Id.* at YAF0114-16.) A student may file a report of "misgendering" to a campus Equal Opportunity Office or the University's central Equal Opportunity & Title IX Office. (*Id.* at YAF0115.)

C. Discrimination Policy.

The University's Administrative Discrimination Policy (Discrimination Policy) applies to students and guests alike. (Miller Decl. ¶7, Ex. 6 at YAF0117-18.) It identifies "gender identity" and "gender expression" as protected characteristics. (*Id.* at YAF0125.) And like the Sexual Harassment Policies, it does not define these terms. (*Id.* at YAF0123-26.)

The Discrimination Policy lists "discriminatory harassment" as one form of prohibited "discrimination." (*Id.* at YAF0124.) The policy defines "discriminatory harassment" similar to "hostile environment sexual harassment" in the Sexual Harassment Policies:

> When unwelcome conduct based on a protected characteristic is *severe, persistent, or pervasive* and (1) *unreasonably interferes* with an individual's employment, *education, or participation* in a University program or activity; (2) creates a work, employment, or other University environment that a reasonable person would find to be intimidating, hostile, or *offensive*….

(*Id.* at YAF0124 (emphasis added).) To determine when conduct rises to the level of "unwelcome," "consideration is given both to the complainant's subjective experience and to whether a reasonable person would have perceived the complainant as welcoming the conduct." (*Id.*) Further, "[d]iscrimination can include conduct that is verbal"—again,

speech—and "a pattern of behavior" can amount to discrimination. (*Id.*) Examples of discrimination listed in the policy include "conduct that is verbal" that (1) "belittles, demeans, or undermines an individual or group because of a protected characteristic"; (2) "communicates that people with a certain protected characteristic do not belong in the community"; or (3) "treat[s] an individual or group differently because they conform or do not conform with what is perceived to be a stereotypical representation of a protected characteristic." (*Id.* at YAF0124-25.) As noted above, the University considers purported "misgendering" a possible violation of the Discrimination Policy. (Miller Decl. ¶6, Ex. 5 at YAF0115.)

D. Student Conduct Code.

The Board of Regents enacted a Student Conduct Code governing all University students. (Miller Decl. ¶8, Ex. 7 at YAF0129-38.) The Code "convey[s] behavioral expectations" in the name of "equity and diversity." (*Id.* at YAF0129.) Prohibited behaviors include a "Violation of University Rules," i.e., "University, collegiate, or departmental regulations that have been posted or publicized." (*Id.* at YAF0131-32.) The University posted the above-described policies, including the Pronoun Policy and accompanying FAQ page, on its website. Thus, a YAF member who violates any one of them violates a University rule and can be punished under the Code. The Code also identifies "discriminatory harassment" and "sexual harassment" as violations subject to University enforcement. (*Id.* at YAF0132-33.) Punishments for Code violations include probation, required compliance, restriction of privileges, suspension, expulsion, and the withholding or revocation of a degree. (*Id.* at YAF0135-36.)

E. Defendants' roles in creating and enforcing the policies.

The Board of Regents, in enacting its Sexual Harassment Policy and Student Conduct Code, tasked Defendant Cunningham with implementing those policies, including adopting University policies, addressing complaints of prohibited conduct, and remedying violations. (Miller Decl. ¶3, Ex. 2 at YAF0075; Miller Decl. ¶8, Ex. 7 at YAF0138.) To implement the Board of Regents Sexual Harassment Policy, the University, "in coordination with" Defendant Marisam, as Director of the Office of Equal Opportunity and Title IX, adopted the Administrative Sexual Harassment Policy. (Miller Decl. ¶3, Ex. 2 at YAF0074.) Under the procedures in the Administrative Sexual Harassment Policy, Defendants Fernandez, Marisam, and Christensen head the offices that receive and investigate complaints alleging "hostile environment sexual harassment." (Miller Decl. ¶4, Ex. 3 at YAF0092-93; *see id.* at YAF0096.)

As to the Pronoun Policy, a violation of this policy is a violation of the Discrimination Policy and/or the Student Conduct Code. The Discrimination Policy identifies Defendant Fernandez as the "Responsible Officer" and Defendant Marisam as the "Primary Contact." (*See* Miller Decl. ¶7, Ex. 6 at YAF0123.) Moreover, Defendants Adamski and Kaberline head the offices that receive and investigate discrimination complaints. (*See id.* at YAF0120-21.) Finally, under the University policy implementing the Student Conduct Code, Defendants Phillips, Adamski, and Kaberline head the offices charged with investigation and resolving Code violations. (Miller Decl. ¶10, Ex. 9 at YAF0150.)

II. The beliefs and desired speech of YAF and its members.

A. YAF's organizational purpose and membership.

YAF members are enrolled at the Duluth, Rochester, and Twin Cities campuses of the University. (Byrnes Decl. ¶6.) YAF's mission includes promoting individual freedom and traditional values among young Americans and inspiring those young Americans to hold and advance such values. (*Id.* ¶¶10, 12.) The values YAF promotes related to gender identity include: (1) sex is determined at birth; (2) sex is inextricably intertwined with gender; (3) there are only two sexes/genders; (4) a person cannot change his or her sex/gender; and (5) biological sex should determine usage of sex-separated facilities and participation in sex-separated sports. (*Id.*)

Consistent with its mission, YAF provides college students with access to educational resources, campus flyers, and tabling materials. (*Id.* ¶13.) It also facilitates its members bringing speakers to campus, including Chloe Cole, Paula Scanlan, Abby Roth, and Matt Walsh, who discuss gender identity and transgender issues consistent with YAF's values. (*Id.* ¶¶13-14.) The University's policies impede YAF's mission by restricting the ability of members to speak, advocate for, or host speakers who share YAF's values on gender identity and transgender issues. (*Id.* ¶15.) This, in turn, hinders YAF from reaching and recruiting potential new members. (*Id.*) YAF sues to protect the constitutional rights of its current and future members. (*Id.* ¶16.)

B. The beliefs of YAF members.

YAF members enrolled at the University hold strong traditional values on gender identity and transgender issues consistent with YAF's organizational beliefs. (*Id.* ¶12; *see*

also Barrick Decl. ¶6; Carlson Decl. ¶7; Voit Decl. ¶7.) Common beliefs among members include: (1) sex, and therefore gender, are determined at birth; (2) a man cannot become a woman or vice versa; (3) biological sex, not purported gender identity, should determine access to sex-separated spaces and competition in sex-separated sports; and (4) allowing people to use sex-separated spaces and play on sex-separated sports teams based on gender identity harms the University community by causing women to feel uncomfortable and unsafe and by subordinating the viewpoints of part of the University community, including YAF members. (Barrick Decl. ¶6; Carlson Decl. ¶7; Voit Decl. ¶7.) Some YAF members also question the legitimacy of a person's claim to identify as a gender, or genders, different from the person's biological sex. (Carlson Decl. ¶7a.) YAF members likewise believe using "preferred" pronouns and other gendered personal references, instead of biological pronouns and gendered personal references based on biology, endorses the idea that a person can change sex and/or choose a gender or genders inconsistent with biological sex. (Barrick Decl. ¶6d; Carlson Decl. ¶7d; Voit Decl. ¶7e.)

C. YAF members' desired speech and self-censorship.

Consistent with these beliefs, YAF members wish to freely speak their views on gender identity and transgender issues. (Barrick Decl. ¶13; Carlson Decl. ¶14; Voit Decl. ¶14.) They wish to bring YAF-associated speakers to campus to talk with their University communities about gender identity and transgender issues. (Barrick Decl. ¶¶5, 14; Carlson Decl. ¶¶6, 15; Voit Decl. ¶¶6, 18; *see also* Byrnes Decl. ¶¶13-14.) And they want to use only biological pronouns and gendered personal references based on biology, like Mr. and Mrs. (Barrick Decl. ¶16; Carlson Decl. ¶16; Voit Decl. ¶¶16-17.)

But YAF members have read the University's policies governing sexual harassment, pronoun usage, and discrimination, as well as the Student Conduct Code. (Barrick Decl. ¶11; Carlson Decl. ¶12; Voit Decl. ¶12.) They know they face punishment, including having to respond to a report or investigation, suspension, or expulsion, for expressing their views or hosting speakers who share their views. (*See* Barrick Decl. ¶11; Carlson Decl. ¶12; Voit Decl. ¶12.) To avoid punishment, they must remain silent or are compelled to speak contrary to their beliefs about gender identity and transgender issues. (Barrick Decl. ¶¶12-13; Carlson Decl. ¶¶13-14; Voit Decl. ¶¶13-14.) At the same time, they see University departments and LGBTQ+ groups on campus openly advocating for the opposite views. (Barrick Decl. ¶¶9-10; Carlson Decl. ¶¶10-11; Voit Decl. ¶¶10-11.) Those departments and groups appear free to affirm that people can change gender without any threat to the expression of those viewpoints. (*See* Barrick Decl. ¶¶9-10; Carlson Decl. ¶¶10-11; Voit Decl. ¶¶10-11.)

Likewise, rather than expressing their views by using biological pronouns, YAF members usually avoid using pronouns and other gendered personal references when referencing people who identify as transgender, genderfluid, or non-binary. (*See* Barrick Decl. ¶15-16; Carlson Decl. ¶¶16-17; Voit Decl. ¶¶15-16.) But they have each faced situations where it was impossible to avoid pronoun usage and they were compelled to use "preferred" pronouns and other gendered personal references. (Barrick Decl. ¶15; Carlson Decl. ¶16; Voit Decl. ¶15.) They have used that language only because they did not want to violate the University's policies and face investigation and discipline. (Barrick Decl. ¶16; Carlson Decl. ¶16; Voit Decl. ¶16.) For instance, classroom exercises in a German

class required one YAF member to use "preferred" pronouns. (Voit Decl. ¶15.) Another was forced to use "preferred" pronouns to refer to a non-binary teaching assistant in a class that met a requirement for his major. (Barrick Decl. ¶15.)

YAF members have reason to fear fellow University students or employees reporting them for violating these policies. They often encounter people, including classmates, who identify as transgender, genderfluid, or non-binary in the University community. (Barrick Decl. ¶7; Carlson Decl. ¶8; Voit Decl. ¶8.) Additionally, two of the three YAF declarants have taken classes taught by faculty identifying as transgender, genderfluid, or non-binary. (Barrick Decl. ¶15; Carlson Decl. ¶17.) And two of the three YAF declarants have routine interactions with members of the University community outside of the classroom setting who identify as transgender, genderfluid, or non-binary. (Barrick ¶7; Voit ¶8.) Finally, each YAF member is aware of members of the University community using restrooms and locker rooms based on gender identity instead of biological sex. (Barrick Decl. ¶8; Carlson Decl. ¶9; Voit Decl. ¶9.)

III. YAF members' fear of enforcement is exacerbated by the University's history of enforcement.

The University regularly fields complaints and investigates violations of the challenged policies. In fiscal years 2020 to 2023, the University's Bias Response and Referral Network (BRRN) received an average of nearly twelve reports a year alleging gender-identity bias. (*See* Miller Decl. ¶13, Ex. 12 at YAF0169.) In 2024, the BRRN received ten reports alleging bias based on gender identity or gender expression. (*See* Miller Decl. ¶12, Ex. 11 at YAF0162.) And nine reports in 2025. (Miller Decl. ¶11, Ex. 10

at YAF0156.) There were also eleven reports of bias incidents during campus events. (*Id.*) Over the last three academic years, the University has received close to twenty reports alleging individuals used biological pronouns or other biological references to identify a transgender or non-binary person. (*See* Miller Decl. ¶2, Ex 1; *see also* Miller Decl. ¶2a (table appended to Miller Declaration summarizing bias reports provided to counsel through Minnesota Government Data Request Act response).) While some of these reports were filed with the BRRN, others were submitted to University Equal Opportunity & Title IX offices at both the University of Minnesota-Twin Cities and the University of Minnesota-Duluth. (*See* Miller Decl. ¶2a) The reports have even included instances of repeated but seemingly unintentional "misgendering." (Miller Decl. ¶2, Ex. 1 at YAF0053-54.)

University members have also reported speech similar to YAF members' viewpoints about gender identity and transgender issues, such as:

- Stickers saying "Terf …. I know what a woman is." (*See id.* at YAF0015, YAF0057-58 (report to the Equal Opportunity and Affirmative Action Office));
- A sticker on a door in an academic building that read "Woman … noun … adult human female." (*See id.* at YAF0017-18 (report to the Equal Opportunity & Title IX Office));
- A notecard reading "God's design guarantees that a gender change will ruin you," which the reporter labeled a "hate posting." (*Id.* at YAF0008-9); and
- An individual saying that being transgender is "a 'trend' or a 'fad'" and the individual did "not believe trans people are valid." (*See id.* at YAF0033-34 (filing of Equal Opportunity & Title IX Sexual Misconduct and Discrimination report)).

Against this backdrop of reporting, it is unsurprising that YAF members self-censor their views on gender identity and transgender issues.

STANDARD OF REVIEW

The Court should grant summary judgment to YAF if it "shows that there is no genuine dispute as to any material fact and [YAF] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the court must "view the evidence and draw all reasonable inferences in favor of the nonmoving party," it does "not credit mere allegations, unsupported by specific facts or evidence." *Onyiah v. St. Cloud State Univ.*, 5 F.4th 926, 930 (8th Cir. 2021) (quoting *Williams v. UPS*, 963 F.3d 803, 807 (8th Cir. 2020)).

ARGUMENT

YAF moves for summary judgment on each of its four counts: (1) its viewpoint discrimination challenge to the Pronoun Policy; (2) its compelled speech challenge to the Pronoun Policy; (3) its vagueness challenge to the Sexual Harassment and Discrimination Policies; and (4) its viewpoint discrimination challenge to the Sexual Harassment and Discrimination Policies. YAF facially challenges the identified portions of each policy.

I. The Pronoun Policy expressly outlaws one viewpoint in favor of an opposing viewpoint the Supreme Court declared "hotly contested."

The First Amendment "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). A public university may not "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one,

however enlightened either purpose may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995). A policy discriminates based on viewpoint when it allows the expression of some viewpoints but not others. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

"Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Meriwether*, 992 F.3d at 508. A speaker's use of biological pronouns and gendered personal references based on biology rather than "preferred" pronouns "is an honest expression of how they view reality" and at "the core of protected speech." *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 778 (6th Cir. 2025) (en banc) (*Olentangy*) (Bush, J., concurring). That one may choose their gender or multiple genders and "prefer" one or more sets of accompanying pronouns is a "hotly contested view of sex and gender." *Mahmoud v. Taylor*, 606 U.S. 522, 552-53 (2025). In other words, pronoun use can and does express a viewpoint.

Expression of such a viewpoint is constitutionally protected, as the Eighth Circuit acknowledged. *See Beard v. Falkenrath*, 97 F.4th 1109, 1117 (8th Cir. 2024); *see also Arkansas v. U.S. Dep't of Educ.*, 742 F. Supp. 3d 919, 945 (E.D. Mo. 2024) (citing and quoting *Beard* for proposition that "the Constitution does not require government officials to use 'preferred gender pronouns' 'in part because the speaker has a First Amendment right' to even 'the misuse of a pronoun'").

And where a school policy "bars its students from referring to transgender and nonbinary classmates using the pronouns that match their biological sex if the classmates prefer to go by different pronouns," it "raises the most serious red flags under the First

Amendment." *Olentangy*, 158 F.4th at 738, 755; *see also Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. ed 1163, 1186-87, 1189 (D. Colo. 2023) (preliminarily enjoining state anti-discrimination provision requiring preferred pronoun usage). Likewise, a public educational institution cannot require its students to respect a person's "gender identity." *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023) (*Linn Mar*). In fact, very recently, a California district court enjoined a University of California policy that, like the Pronoun Policy, prohibited "intentional or repeated use of a name or pronoun inconsistent with the individual's gender identity" because it was viewpoint discriminatory. *Anguiano*, 2026 U.S. Dist. LEXIS 213850, at *4, 20.

These precedents firmly uphold the First Amendment right for YAF members to use biological pronouns and other personal references based in biology to identify, talk to, or discuss a transgender, genderfluid, or non-binary individual, both in class, out of class, on campus, and off campus because doing so is an expression of their belief that sex and gender are intertwined and immutable.

In two ways, the Pronoun Policy violates these principles and puts a thumb on the scale against YAF members' viewpoints. First, it states, "University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members."[3] (Miller Decl. ¶5, Ex. 4 at YAF0104.) Second, the FAQ page states, "intentional or repeated misuse of pronouns should be reported," and then links to another

[3] The Pronoun Policy's use of "expected" mirrors the Student Conduct Code's use of "behavioral expectations." (Miller Decl. ¶8, Ex. 7 at YAF0129.) It conveys a requirement, not merely a hope or desire. The Pronoun Policy confirms this by threatening reporting and a charge of discrimination if one does not comply with the University's expectation.

FAQ page about reporting discrimination. (Miller Decl. ¶6, Ex. 5 at YAF0114.) Combining these two statements, a YAF member may be reported for discrimination simply for using biological pronouns to express a view on the immutable nature of sex and gender. And because the policy reaches "intentional…misuse of pronouns," a speaker's knowing, one-time use of a biological pronoun rather than a "preferred" pronoun runs afoul of the policy and opens the speaker to being reported. Members of the University community certainly understand the Pronoun Policy reaches such speech because the University has received about twenty reports of misgendering over the last three academic years. (*See* Miller Decl. ¶2, Ex. 1; *see also* Miller Decl. ¶2a (table summarizing reports obtained through data request).) The Pronoun Policy is written and actively enforced, and any reasonable YAF member or other University student would self-censor given the threat of enforcement.

Not only does the Pronoun Policy threaten to punish YAF members for expressing their viewpoint, but it freely allows the opposite viewpoint that "preferred" pronouns are legitimate and should be used. Neither the Pronoun Policy nor its associated FAQ page threatens reporting for using "preferred" pronouns or other gendered personal references. In fact, as argued next, that view is *required*. Prohibiting one viewpoint while requiring another is quintessential viewpoint discrimination. The Court should permanently enjoin the Pronoun Policy as unconstitutional per se. *See Olentangy*, 158 F.4th at 756 (noting that in contexts outside of K-12 schools, "a viewpoint-discrimination finding suffices—without more—to hold a government action unconstitutional").

II. The Pronoun Policy violates the First and Fourteenth Amendments because it compels speech.

The Supreme Court has long recognized that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018). A public university therefore "may not compel a person to speak its own preferred messages." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). Nor may it "force an individual to speak in ways that align with its views but defy [the individual's] conscience about a matter of major significance." *Id.* at 602-03. Yet the Pronoun Policy unconstitutionally compels YAF members to use "preferred" pronouns and other gendered personal references against their consciences. And it is not feasible for YAF members to avoid using pronouns and other gendered personal references in all University settings—nor should they have to.

First, as recognized in *Beard*, *Meriwether*, *Olentangy*, and *Anguiano*, pronouns and other gendered personal references convey a message obviously protected by the First Amendment. *See supra* at 17-18. Specific to compelled speech, "[o]ur Constitution forbids mandatory use of certain titles to refer to others." *Olentangy*, 158 F.4th at 782 (Bush, J., concurring). A university policy that requires a student "to 'affirm a [person's] sexual or gender identity' and 'use a [person's] preferred pronouns' 'quite clearly restrict[s] and

compel[s] speech based on both content and viewpoint.'" *Anguiano*, 2026 U.S. Dist. LEXIS 213850, at *20 (quoting *Bates v. Fariborz Pakseresht*, 146 F.4th 772, 784-85 (9th Cir. 2025)). Forcing the use of "preferred" pronouns and other gendered personal references also "effectively compel[s] a new form of grammar." *Olentangy*, 158 F.4th at 778 (Bush, J., concurring).

Second, the Pronoun Policy and associated FAQ page plainly regulate the pronouns and other gendered personal references YAF members may use.[4] It states, "University members and units are *expected* to use the names, gender identities, and pronouns specified to them by other University members." (Miller Decl. ¶5, Ex. 4 at YAF0104 (emphasis added).) "Expected" conveys more than just a hope or desire—it conveys a requirement. (*See* Miller Decl. ¶8, Ex. 7 at YAF0129 (Student Conduct Code discussing requirements and violations in terms of "behavioral expectations").) The FAQ page explicitly threatens that "intentional or repeated misuse of pronouns should be reported" and then links to another FAQ page about reporting discrimination. (Miller Decl. ¶6, Ex. 5 at YAF0114.) By regulating the "intentional…misuse of pronouns," the Pronoun Policy compels speech each and every time a YAF member wishes to use a biological pronoun or gendered personal reference based on biology to identify someone the YAF member knows identifies as transgender, genderfluid, or non-binary.

Third, the use of pronouns and other gendered personal references is unavoidable as "pronouns are central to everyday speech." *Olentangy*, 158 F.4th at 791 (Bush, J.,

[4] *See also supra* at 18 n.3.

concurring); *see also Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 484 (6th Cir. 2024) (Batchelder, J. dissenting) ("Pronouns are ubiquitous in everyday speech. A sentence without pronouns would read awkwardly and sound unnatural compared to one with them."), *vacated for rehearing en banc by Olentangy*, 120 F.4th 536. There is no way around it. And even if someone were inclined to engage in constant mental gymnastics to avoid using any pronouns, the policy would still compel the speaker to change their speech on a "hotly contested" matter of public concern. *Mahmoud*, 606 U.S. at 552-53.

YAF members' experiences prove that pronouns are unavoidable. Each YAF declarant has first-hand experience with having to use "preferred" pronouns to avoid violating the Pronoun Policy. (Barrick Decl. ¶15; Carlson Decl. ¶16; Voit Decl. ¶15.) One declarant was forced to use "preferred" pronouns and other gendered personal references to identify a teaching assistant in a class that satisfied a requirement for his major. (Barrick Decl. ¶15.) Another had to use "preferred" pronouns as part of classroom exercises in a German class. (Voit Decl. ¶15.)

The Pronoun Policy affects YAF members' everyday speech because they regularly interact with individuals on campus who identify as transgender, genderfluid, and non-binary. It compels members to use "preferred" pronouns and other gendered personal references against their belief that sex and gender are intertwined and immutable. The Pronoun Policy compels speech in violation of the First Amendment and should be permanently enjoined.

III. The Sexual Harassment and Discrimination policies violate the First and Fourteenth Amendments because they are vague.

A. The law governing vagueness challenges.

An unconstitutionally vague policy is, at heart, one whose "prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "To survive a vagueness challenge, a governmental policy…'must first provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement.'" *Rowles v. Curators of the Univ. of Mo.*, 983 F.3d 345, 356 (8th Cir. 2020) (quoting *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009)). A policy cannot "forbid[]…the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Policies suffering this defect are unconstitutional because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (ellipsis and internal quotation marks omitted). Such uncertainty causes a "deterrent, or 'chilling' effect" actionable under the First Amendment. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). And policies that "interfere[] with the right of free speech" trigger "a more stringent vagueness test." *Vill of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). They "demand[] a greater degree of specificity than in other contexts." *Linn Mar*, 83 F.4th at 668 (quoting *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308-09 (8th Cir. 1997)).

B. Title IX standard governing harassment allegations on university campuses.

Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex" in "any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court has announced a standard that both complies with First Amendment requirements and defines when "harassment" amounts to "discrimination": where conduct is (1) "so severe, pervasive, and objectively offensive" (the conduct threshold) and (2) "that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school" (the impact threshold). *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). This "*Davis* standard" is a high one, but it "account[s] for both a school's need to exercise 'disciplinary authority' and limit exposure 'to constitutional or statutory claims.'" *Oklahoma v. Cardona*, 743 F. Supp. 3d 1314, 1327 (W.D. Okla. 2024) (quoting *Davis*, 526 U.S. at 649). Put another way, the combination of the "conduct" and "impact" thresholds in *Davis* protects universities from claims of deliberate indifference to students' rights while giving students clarity that only certain types of conduct will lead to enforcement.

Despite the Supreme Court drawing this balance in *Davis* and announcing a standard that survives First Amendment concerns, the U.S. Department of Education under prior administrations and the University have chartered their own course. To that end, in 2024, the Biden Administration engaged in rulemaking attempting to simultaneously (1) redefine "on the basis of sex" to include "gender identity" and (2) lower the standard for when harassment can constitute discrimination. *See* Nondiscrimination on the Basis of Sex in

Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33,818 (Apr. 19, 2024) ("Biden Rule").[5] The Biden Rule employed a threshold for prohibited conduct—conduct that is "subjectively and objectively offensive and is so severe or pervasive." 89 Fed. Reg. at 33,884. And it employed a threshold for measuring impact—anything that "limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." *Id.* These two thresholds arguably prohibited students from voicing opinions protecting women's sports and women's private spaces in schools, and prohibited students from using biological pronouns and titles when referring to individuals identifying as transgender.

Federal courts across the country quickly and unanimously held the conduct and impact thresholds in the Biden Rule produced an unconstitutionally vague standard. *See, e.g., Tennessee v. Cardona*, 762 F. Supp. 3d 615, 625 (E.D. Ky. 2025) (*Tennessee II*) (vacating Biden Rule in part because "several of the terms used in this regulation are so vague"); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, Civ. Action No. 4:24-cv-00461-O, 2025 U.S. Dist. LEXIS 124115, at *10-11 (N.D. Tex. Feb. 19, 2025) (agreeing with *Tennessee II* reasoning as to First Amendment and vacating Biden Rule); *see also Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 21358, at *15-17 (11th Cir. Aug. 22, 2024) (unpublished); *Oklahoma*, 743 F. Supp. 3d at 1328 (preliminary enjoining Biden Rule in part because "[w]hether conduct or speech is considered harassment under the [Biden] Rule is dependent on broad statements and vague terminology"); *Arkansas*,

[5] While case law referred to this rule as the "Final Rule," Plaintiff refers to it as the "Biden Rule" because courts and the Department of Education have vacated the Rule.

742 F. Supp. 3d at 945 (preliminarily enjoining Biden Rule in part on First Amendment grounds); *Kansas v. U.S. Dep't of Educ.*, 739 F. Supp. 3d 902, 926-28 (D. Kan. 2024) (preliminarily enjoining Biden Rule in part because of its vague definition of "hostile environment sexual harassment"); *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 400-01 (W.D. La. 2024) (preliminarily enjoining Biden Rule in part on First Amendment grounds).[6]

C. The University's Sexual Harassment and Discrimination Policies suffer the same vagueness pitfalls as the Biden Rule.

The University's Sexual Harassment and Discrimination Policies and the Biden Rule deviate from the *Davis* standard in three ways such that the University's policies suffer from the same vagueness pitfalls. Moreover, the University's polices create two additional vagueness problems not found in the Biden Rule.

1. The University's policies deviate from the *Davis* standard in three ways that resulted in federal courts vacating the Biden Rule.

First, the concept of gender identity and gender expression is inherently vague because of its subjective nature—it is "based entirely" on a transgender, non-binary, or genderfluid individual's "own internal sense of self." *Kansas*, 739 F. Supp. 3d at 927 (quoting *Tennessee I*, 737 F. Supp. 3d at 548). Defining "gender identity" based on an "individual's sense of their gender….*offers no guidance whatsoever*" as to the full class of

[6] Several of these cases included organizational plaintiffs like YAF. In *Kansas*, YAF and other organizational plaintiffs (not the states) won the First Amendment challenge to the Biden Rule for similar reasons to YAF's arguments here. *Kansas*, 739 F. Supp. 3d at 926; *see also id.* at 935 (when tailoring injunction, stating that "[t]he Plaintiff Organizations demonstrated standing in their own right; thus, they could have brought this suit on their own without joining with Plaintiff States").

individuals protected, especially where a person's internal sense of gender may change. *Tennessee I*, 737 F. Supp. 3d at 548. But even if "gender identity" or "gender expression" could be clarified, neither the Sexual Harassment Policies nor the Discrimination Policy provide the necessary clarity.

If the University intends to borrow from elsewhere for its definitions of these terms—which is entirely unclear—it fares even worse. The Pronoun Policy has one such definition, which does not resolve vagueness concerns with the terms "gender identity" and "gender expression." The Pronoun Policy defines "gender identity" using a non-exhaustive list of eleven different "gendered categories" before saying there are "many others." (Miller Decl. ¶5, Ex. 4 at YAF0106.) It fails to explain the difference between some of the categories like "genderfluid" and "non-binary" or "agender" and "genderless." (*See id.*) It adds that gender identity "may shift over time." (*Id.*) It relies entirely on the subjective: an individual's "own understanding of themselves." (*Id.*) Meanwhile, the Pronoun Policy FAQ page adds one more "gender identity" to the mix by suggesting individuals may identify as fairies by requiring others to refer to them with "fae/faer/faers" pronouns. (Miller Decl. ¶6, Ex. 5 at YAF0109.) And the Pronoun Policy's definition of "gender expression" is even less definite: "characteristics and behaviors that *may* convey *something* about an individual's gender identity, or that *others interpret* as conveying *something* about an individual's gender identity." (Miller Decl. ¶5, Ex. 4 at YAF0106 (emphasis added).)

Regardless of whether the Sexual Harassment and Discrimination Policies are silent on defining these terms or borrow from the Pronoun Policy, they fail the vagueness test. Against the backdrop of a never-ending, undefined number of gender identities that an

individual may convey through an amorphous gender expression, YAF members must guess when, to whom, and what, if any, arguments they may advance regarding biological sex without risking being accused of violating the Sexual Harassment and Discrimination Policies. For instance, if a YAF member in a literature class takes the once-uncontroversial position that fairies only exist in fictional stories, will a classmate who identifies as a fairy report the YAF member for hostile environment sexual harassment? What about stating in a biology class that there are only two sexes and gender is immutably tied to sex, so a person cannot change gender or subscribe to multiple genders? As described above, that is exactly the type of speech YAF members would say if they did not fear the University's enforcement.

Second, courts held the Biden Rule's "so severe or pervasive" conduct threshold imparted vagueness into the definition by deviating from and lowering the *Davis* standard of "so severe, pervasive, and objectively offensive." *See Tennessee I*, 737 F. Supp. 3d at 549-50; *see also Carroll Indep. Sch. Dist.*, 2025 U.S. Dist. LEXIS 124115, at *11; *Arkansas*, 742 F. Supp. 3d at 945. They reasoned nothing in the Biden Rule clarified what amounted to "severe" or "pervasive" such that repeated use of biological pronouns could fall within its scope. *See, e.g.*, *Tennessee I*, 737 F. Supp. 3d at 549.

The further away from the *Davis* standard a policy strays, the more uncertain the policy. The Sexual Harassment and Discrimination policies are vaguer than the Biden Rule because they use a "severe, persistent, or pervasive" standard. They turn the "so severe, pervasive, and objectively offensive" conjunction from *Davis* into a disjunction. And over

and above the Biden Rule, they (1) remove the introductory "so" and (2) insert "persistent" into the disjunction:

Policy	Conduct Threshold
Davis standard 526 U.S. at 651	"***so*** severe, pervasive, ***and*** objectively offensive"
Biden Rule 89 Fed. Reg. at 33,884	"subjectively and objectively offensive and is ***so*** severe ***or*** pervasive"
Sexual Harassment & Discrimination Policies Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099; Miller Decl. ¶7, Ex. 6 at YAF0124	"severe, ***persistent or*** pervasive"

Because of these deviations from the *Davis* standard, YAF members are left to wonder if consistent usage of biological pronouns to identify a transgender, genderfluid, or non-binary individual or frequently wearing a shirt with the saying "there are only two genders," is persistent or pervasive conduct.[7] If the Biden Rule arguably restricted speech of this nature, the Sexual Harassment and Discrimination Policies arguably do as well.

Third, courts held the Biden Rule's impact threshold of "limits or denies" instead of just "denies" added to its vagueness. *Kansas*, 739 F. Supp. 3d at 928; *Tennessee I*, 737 F. Supp. 3d at 550; *see also Carroll Indep. Sch. Dist.*, 2025 U.S. Dist. LEXIS 124115, at *11; *Arkansas*, 742 F. Supp. 3d at 945. Notably, the Biden Rule did not attempt to define

[7] If the Sexual Harassment and Discrimination Policies even arguably reach this type of speech, then they are viewpoint discriminatory as well. *See infra* at 32-34. But if these policies do not definitively sweep in such speech, they still violate the First Amendment on vagueness grounds because a person of reasonable intelligence must guess what speech they reach.

"limits." *Kansas*, 739 F. Supp. 3d at 928. So, adding "limits" to the standard could set a bar too low to safeguard protected speech. *Tennessee I*, 737 F. Supp. 3d at 550. For instance, harassment under a "limits" standard may occur "where a student simply complained that he could not concentrate in class due to another student's statements on the topic of gender identity." *Kansas*, 739 F. Supp. 3d at 928.

The Sexual Harassment and Discrimination Policies similarly depart from the *Davis* "effectively denies" standard:

Policy	Impact Threshold
Davis standard 526 U.S. at 651	"***effectively denied*** equal access to an institution's resources or opportunities."
Biden Rule 89 Fed. Reg. at 33,884	"***limits or*** denies a person's ability to participate in or benefit from the recipient's education program or activity"
Sexual Harassment Policies Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099	"***unreasonably 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***"
Discrimination Policy Miller Decl. ¶7, Ex. 6 at YAF0124	"***unreasonably interferes*** with an individual's employment, ***education***, or participation in a University program or activity" -or- "***creates a*** work, employment, or other ***University environment*** that a reasonable person would find to be intimidating, ***hostile, or offensive***"

In addition to deviating from the *Davis* standard, the University policies make no effort to define what constitutes "unreasonably" or "interferes." (*See* Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099; Miller Decl. ¶7, Ex. 6 at YAF0124.) "Interfere" is a lower and more indefinite standard than "deny." *Compare Interfere*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/interfere (last visited Oct. 26, 2026) ("to interpose in a way that hinders or impedes") (def. 2) *with Deny,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/deny (last visited Oct. 26, 2026) ("to refuse to grant") (def. 3b). Thus, just as the phrase "limits" in the Biden Rule makes the standard vague when compared to the *Davis* standard, so too does the University's use of "unreasonably interferes." And the vagueness problem is heightened as to the Sexual Harassment Policies where they focus on unreasonable interference with "employment or educational performance" rather than "access" like the *Davis* standard. (*See* Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099.)

2. The University's policies deviate from the *Davis* standard in two additional ways, making them even vaguer than the vacated Biden Rule.

Beyond sharing the problems that doomed the Biden Rule, the Sexual Harassment and Discrimination Policies suffer from two other problems. Starting with the Sexual Harassment Policies, they use a circular definition of "hostile environment sexual harassment," using "hostile" to define the term. (Miller Decl. ¶3, Ex. 2 at YAF0072; Miller Decl. ¶4, Ex. 3 at YAF0099.) But this fails to meaningfully explain the term. Separately, each of these policies relies heavily on a subjective standard. For instance, whether speech

is "unwelcome" for purposes of the Administrative Sexual Harassment Policy is subjective—it depends on the complainant's viewpoint. (Miller Decl. ¶4, Ex. 3 at YAF0100.) And whether speech is "unwelcome" for purposes of the Discrimination Policy requires balancing subjective and objective considerations such that subjective considerations may predominate. (*See* Miller Decl. ¶7, Ex. 6 at YAF0124.)

When the above five considerations are combined, a reasonable college student is left to wonder what speech about gender identity and transgender issues falls within the contours of the Sexual Harassment and Discrimination Policies. Because these challenged portions of these policies do not provide adequate guidance on the speech they regulate, they are unconstitutionally vague, and the Court should permanently enjoin them.

IV. The Sexual Harassment and Discrimination Policies violate the First and Fourteenth Amendments because they are viewpoint discriminatory.

The Sexual Harassment Policies prohibit speech that "creates a work or educational environment that an individual finds, and a reasonable person would find to be … *offensive*." (Miller Decl. ¶3, Ex. 2 at YAF0072 (emphasis added); Miller Decl. ¶4, Ex. 3 at YAF0099 (emphasis added).) The Discrimination Policy likewise prohibits speech that "creates a work, employment or other University environment that a reasonable person would find to be intimidating, hostile, *or offensive*." (Miller Decl. ¶7, Ex. 6 at YAF0124 (emphasis added).) But the University cannot prohibit speech on the grounds that it is offensive or based on the emotions it causes in the hearer, and it cannot prohibit speech by formalistically labeling it harassment or discrimination.

First, even if it is offensive to state that there are only two immutable genders, "[g]iving offense is a viewpoint." *Tam*, 582 U.S. at 243. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *accord Beard*, 97 F.4th at 1117 ("It is well-settled" that a speaker has a First Amendment right to make "insulting or derogatory comments").

Second, the University cannot punish protected viewpoints by equating them with harassment, and it cannot punish speech because of its emotive impact on a hearer. It "cannot avoid the strictures of the First Amendment simply by defining certain speech as…'harassment.'" *Linn Mar*, 83 F.4th at 667. The University simply "may not prohibit speech under a 'secondary effects' rationale based solely on the emotive impact that its offensive content may have on a listener." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (Alito, J., authoring).

Third, a university cannot restrict speech "that denigrates rather than validates certain characteristics" through a policy that labels the speech "discriminatory." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (concluding plaintiffs were likely to succeed on merits of viewpoint discrimination challenge to university policy that defined "hostile environment harassment" as "[d]iscriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education [or] employment," *id.* at 1114-15); *see also Olentangy*, 158 F.4th

at 778 (Bush, J., concurring) ("Nor can the speech regulation be justified as necessary to prevent bullying….The school district cannot recast ordinary acceptable English usage as bullying in order to ban it. Otherwise, all language is at risk of censorship.").

These established precedents have easy application here. The Sexual Harassment and Discrimination Policies prohibit speech claimed to create an "offensive" environment. If there was doubt as to whether the policies operate this way, one need only look to the examples of harassing and discriminatory speech in the policies. The Administrative Sexual Harassment Policy plainly outlaws "[a] pattern of disparaging comments…based on gender stereotypes." (Miller Decl. ¶4, Ex. 3 at YAF0100.) And the Discrimination Policy prohibits speech that "belittles, demeans, or undermines an individual or group because of [gender identity or gender expression]." (Miller Decl. ¶7, Ex. 6 at YAF0124.) Targeting speech because it allegedly "disparages," "belittles," "demeans," and "undermines" is just viewpoint-based censorship of "offensive" speech. *Cf. Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021) ("The restrictions on 'antagonistic,' 'abusive' and 'personally directed' speech prohibit speech because it opposes, or offends, the Board or members of the public, in violation of the First Amendment."). These three policies engage in impermissible viewpoint discrimination.

V. Policies that discriminate on viewpoint or compel speech are per se unconstitutional, but the University's policies also fail strict scrutiny.

The challenged portions of the University's policies are per se unconstitutional. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) ("[R]estrictions…based on viewpoint are prohibited."); *see also 303 Creative*, 600 U.S. at 602-03 (concluding Colorado law

unconstitutionally compelled speech without performing strict scrutiny analysis). In any event, "regulating speech because it is discriminatory or offensive is not a compelling state interest[.]" *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019). Further, the University's policies are not narrowly tailored to prevent harassment and discrimination where they use a far more sweeping standard than the *Davis* standard. *See, e.g., Texas v. United States*, 740 F. Supp. 3d 537, 550-51 (N.D. Tex. 2024). The University's policies therefore fail strict scrutiny.

CONCLUSION

The Sexual Harassment, Discrimination, and Pronoun Policies violate bedrock First Amendment protections. The Court should therefore grant summary judgment to YAF, declare the challenged portions of the University's policies unconstitutional, and permanently enjoin their enforcement.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

YOUNG AMERICA'S FOUNDATION, *Plaintiff*, v. REBECCA CUNNINGHAM, in her official capacity as President of the University of Minnesota, *et al.*, *Defendants*.	Case No. 26-cv-03016 (ECT/LIB) **LR 7.1 CERTIFICATE OF COMPLIANCE**

I, Jordan R. Miller, certify that the

> Memorandum titled: **Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment**
>
> complies with Local Rules 7.1(f) and 7.1(h).

I further certify that, in preparation of the above document, I:

> Used the following word processing program and version: Microsoft Word 365, Version 2610 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above document, excluding the parts exempted by Local Rule 7.1(f)(1)(C), contains the following number of words: 8824

Dated: November 2, 2026

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