UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00913-RMR

GAYS AGAINST GROOMERS, a non-profit corporation;
ROCKY MOUNTAIN WOMEN'S NETWORK, an unincorporated association; RICH GUGGENHEIM, an individual; and
CHRISTINA GOEKE, an individual,

Plaintiffs,

v.

LORENA GARCIA, in her individual and official capacities as a Colorado State Representative;
MIKE WEISSMAN, in his individual and official capacities as a Colorado State Representative and Chair of the House Judiciary Committee;
LESLIE HEROD, in her individual and official capacities as a Colorado State Representative;
JULIE GONZALES, in her individual and official capacities as a Colorado State Senator and Chair of the Senate Judiciary Committee; and
DAFNA MICHAELSON JENET, in her individual and official capacities as a Colorado State Senator,

Defendants.

PLAINTIFFS' MOTION TO SUSPEND RMR CIV. PRACTICE STANDARDS 43.1A(a)(1) & (2)(D)

INTRODUCTION

Plaintiffs' lawsuit squarely asks whether the government may compel Americans to use a trans-identifying person's preferred pronouns when doing so violates their beliefs about the nature of a person's sex, gender, or identity. This Court's RMR Civil Practice Standards 43.1A(a)(1) & (2)(D) invite litigants, witnesses, and counsel to share their "applicable pronouns" and require that all parties "[r]efer to all other persons by their . . . applicable pronouns." Those standards require compliance with trans ideology—the very act that Plaintiffs claim is unconstitutional—materially interfere with Plaintiffs' ability to present their case, and take sides in an ongoing ideological debate.

Plaintiffs respectfully request that this Court suspend the pronoun provisions of these civil practice standards because they (1) burden Plaintiffs' (and counsel's) First Amendment rights to speak and associate; (2) improperly limit Plaintiffs' presentation of the case by forcing counsel and parties to refer to biological males with female or other pronouns (and vice versa); and (3) create the perception that the Court has prejudged a central issue in this case.

FACTS & BACKGROUND

Plaintiffs' Complaint (Dkt. 1) alleges that the Defendant legislators illegally discriminate against viewpoints that dissent from transgender ideology—including the concepts of "misgendering" and "deadnaming." *Id.* at 12, 22, 25, 27. "Misgendering" can include calling a person the "wrong" pronoun. *Id.* at 12 (¶ 35). And the very concept of "misgendering" is part of trans ideology. *Id.* Both Rich Guggenheim and Christina Goeke reject the concept of "misgendering." *Id.* at 11 (¶ 33). Plaintiffs also allege that the Defendants' custom, policy, or practice of prohibiting misgendering and deadnaming amounts to compelled speech. *Id.* at 27-28.

Plaintiffs have already filed a motion for preliminary injunction (Dkt. 8) asking this Court to enjoin Defendants from restricting their viewpoints during public comments or from compelling their adherence to trans ideology, including the concept of "misgendering." *Id.* at 10-13, 14-15. Upon filing of that motion, this matter was reassigned from Magistrate Judge Varholak to District Court Judge Regina Rodriguez. Dkt. 9, 10.

This Court maintains Civil Practice Standards that supplement the Federal Rules of Civil Procedure and Local Rules of Practice. RMR Civ. Practice Standard 1.1(a), (c); Uniform Civil Practice Standards - Effective January 18, 2024, http://www.cod.uscourts.gov/Portals/0/Documents/Judges/Uniform_Civil_Practice_Standards_2023.pdf?ver=2024-01-19-124517-580. Failure to follow those standards "may result in in an order striking non-compliant filings or other appropriate sanctions." RMR Civ. Practice Standard 1.1(c). The Civil Practice Standards include a decorum rule encouraging the disclosure of "applicable pronouns of counsel, litigants and witnesses" and requiring the use of "applicable pronouns." RMR Civ. Practice Standards 43.1A(a)(1) & (2)(D). As of the time of this filing, Defendants have not yet responded to Plaintiffs' motion for preliminary injunction. That response is now due on May 14, 2024. Dkt. 14.

ARGUMENT

I. PRONOUN USE IMPLICATES CORE SPEECH RIGHTS MERITING SPECIAL PROTECTION

A. Gender identity and pronoun use is a political matter that is of public importance

The broader issue of gender identity is unquestionably a "sensitive political topic[]" that is a matter of "profound 'value and concern to the public.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (quoting *Snyder* v. *Phelps*, 562 U.S. 443, 453 (2011)). Such speech "'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'" *Id.* And the conscious use (or non-use) of pronouns is unquestionably a subset of the disputed topic of gender identity.

For example, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), the Sixth Circuit held that a state university professor had stated a viable free-speech claim where administrators had disciplined him for failing to use a student's preferred pronouns in class. *Id.* at 507-09. "[T]he '*point* of his speech' (or his refusal to speak in a particular manner) was to convey a message." *Id.* at 508 (citations omitted). ". . . [H]is speech 'concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.' . . . That is, his mode of address *was* the message." *Id.* at 508 (citations omitted).

Similarly, in *Darren Patterson Christian Academy v. Roy*, Civil Action No. 1:23-cv-01557-DDD-STV, 2023 U.S. Dist. LEXIS 198528, (D. Colo. Oct. 20, 2023), another judge in the District of Colorado recently held that the plaintiff was likely to succeed on the merits of its free speech claim "to the extent that the state would require Plaintiff and its staff to use a student's or employee's preferred pronouns as a condition of

participating in the program." *Id.* at *48-49; *see also Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.,* 83 F.4th 658, 668 (8th Cir. 2023) (holding that because the policy does not define or limit the term, it could cover any speech about gender identity that a school administrator deems 'disrespectful' of another student's gender identity); *Schmidt v. Siedel,* Case No. 2:23-cv-00101-NDF, Dkt. 23 at 15 (Dist. Wyo. Aug. 18, 2023) (finding viewpoint discrimination in limited public forum where university prevented speaker from stating that female-identifying trans student was a male); *id.,* Dkt. 29 (Dist. Wyo. Oct. 30, 2023) (Consent order permanently enjoining university officials from censoring plaintiff's "views on the sexual identity of Artemis Langford").

The proposition that there is an ongoing ideological debate about gender identity and pronouns is illustrated by Judge Kyle Duncan's opinion on pronoun usage in *United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020) as well as the knock-on effects of that opinion. First, it elicited a strongly worded dissent from Judge Dennis, *id.* at 258, showing that even Fifth Circuit judges disagree on this topic. Second, some students (and administrators) at Stanford Law School also vocally disagreed with Judge Duncan when he later attempted to give a talk to the Federalist Society there. Aaron Sibarium,*'Dogs—t': Federal Judge Decries Disruption of His Remarks by Stanford Law Students and Calls for Termination of the Stanford Dean Who Joined the Mob,* THE WASHINGTON FREE BEACON (March 10, 2023), https://perma.cc/QPW9-C4Q7 ("One source of the students' ire was Duncan's refusal, in a 2020 opinion, to use a transgender sex offender's preferred pronouns."). The resulting free-speech meltdown in Palo Alto led to the Diversity Dean losing her job, and caused at least two other circuit court judges to boycott Stanford Law for clerk hiring. Aaron Sibarium, *Federal Judges*

Say They Won't Hire Clerks From Stanford Law School, THE WASHINGTON FREE BEACON (April 1, 2023), https://perma.cc/VG8Y-BBRY; Greta Reich, *DEI dean leaves Stanford Law School,* THE STANFORD DAILY (Aug. 23, 2023), https://perma.cc/BTF8-8UMH.

These events, unfolding barely a year ago, show that there is an ongoing, heavily contested debate about pronouns and identity in America. Although some people (such as Defendants) present this matter as settled, there is presently no established consensus on pronoun usage. Americans do not agree on this issue. Nor should they be required to agree, at least not as a First Amendment matter.

B. The political debate about pronoun usage stretches back to the Founding Era and beyond

Pronoun debates are not new. They have been around for centuries. Even before the Founding of the United States, the abolitionist and pacifist Quakers succeeded in offending many contemporaries by rejecting their pronoun rituals.

"Pronouns are the most political parts of speech." Teresa M. Bejan, *What Quakers Can Teach Us About the Politics of Pronouns*, N.Y. TIMES (Nov. 16, 2019), https://www.nytimes.com/2019/11/16/opinion/sunday/pronouns-quakers.html. Seventeenth-century Quakers rebelled against the pronoun standards of their day, which proscribed what was then the second-person plural pronoun, "you," to address a higher-class individual, while assigning "thou" and "thee" to commoners; the egalitarian and humble Quakers used "thou" and "thee" with everyone, to some people's consternation. *Id.* "[Some] Quakers produced pamphlets . . . to argue that their use of 'thee' and 'thou' was grammatically—as well as theologically and politically—correct." *Id.*

Quakers were not alone in being "sensitive to the humble pronoun's ability to reinforce hierarchies by encoding invidious distinctions into language itself." *Id.* "[I]n the latter half of the twentieth century, gendered pronouns became imbued with new meaning," as "[t]he feminist movement came to view the generic use of masculine pronouns as 'a crucial mechanism for the conceptual invisibility of women'" and a means of reenforcing prejudice. *Meriwether*, 992 F.3d at 508-09 (citation omitted).

Thus, the contemporary debate about pronouns and gender identity is but the latest iteration in a disagreement about the interplay of politics, identity, hierarchy, self-expression, and modes of address. But in America, it is not for the government to "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), however tempting it might be for those who are convinced that they are on the correct side of history.

II. THE CIVIL PRACTICE STANDARDS MANDATE THE USE OF PREFERRED PRONOUNS

By inviting counsel, litigants, and witnesses, to share their "applicable pronouns" and requiring all parties to use those "applicable pronouns", RMR Civ. Practice Standards 43.1A(a)(1) & (2)(D) take a side in this debate and mandate ideological conformity. Ominously, the practice standards even provide for a reporting mechanism for misgendering: "Should the wrong pronouns be used, counsel are encouraged to bring that to the Court's attention at the time, or through a subsequent email to Chambers." And parties or counsel who fail to adhere to the pronoun mandate risk having their filings stricken or "other appropriate sanctions." RMR Civ. Practice Standard 1.1(c).

Thus, these standards directly limit Plaintiffs' ability to express their political opinions on "misgendering" and also limit Plaintiffs' and their counsels' ability to associate and speak for the purpose of articulating those arguments in this lawsuit against the government. *See NAACP v. Button,* 371 U.S. 415, 452-53 (1963) (freedom of expression includes the right to advocate and join with others for purpose of advocacy). That is especially true in a lawsuit that centers on issues of "misgendering," "deadnaming," and "respectful discourse." *See* Dkt. 1.

Even discussing the evidence in this case potentially violates these practice standards. Consider just one obvious example: If Duane Powell, a.k.a. Duane Kelley or Tiara Latrice Kelley is called as a witness in this case (as is plausible), he could use these standards to demand that everyone call him "Tiara" or refer to him using female pronouns in a lawsuit that is about whether the government can force everyone to call him "Tiara" and refer to him using female pronouns.[1]

III. THE CIVIL PRACTICE STANDARDS ARE INCOMPATIBLE WITH THE COURT'S DUTY OF NEUTRALITY ON A CONTESTED IDEOLOGICAL ISSUE, ESPECIALLY IN THIS CASE

"If liberty means anything at all, it means the right to tell people what they do not want to hear." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321 (2023) (quoting George Orwell). "A commitment to speech for only *some* messages and *some* persons is no commitment at all." *Id.* (citations omitted). That includes declining to use gender-identity based pronouns.

[1] This very sentence is potentially non-compliant.

By mandating adherence to "applicable pronouns," this Court is also potentially signaling that it has pre-judged the issues in this case. As Judge Duncan noted: in honoring a party's request to be addressed with pronouns matching his gender identity, "the court may unintentionally convey its tacit approval of the litigant's underlying legal position." *Varner,* 948 F.3d at 256 (citations omitted). "Even this appearance of bias, whether real or not, should be avoided." *Id.*

The applicable Civil Practice Standards give an appearance of bias because they take as a given that the precepts of trans ideology supply the correct answer to pronoun usage and provide for consequences in the event of non-compliance. While the undersigned counsel doubts that the applicable standards should apply in any case, we propose a more modest solution. That is, for this Court to suspend RMR Civ. Practice Standards 43.1A(a)(1) & (2)(D) during this lawsuit.

CONCLUSION

This Court should grant Plaintiffs' request to suspend RMR Civ. Practice Standards 43.1A(a)(1) & (2)(D) during the pendency of this lawsuit.

Dated: April 26, 2024

Respectfully submitted,

s/Endel Kolde
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CERTIFICATE OF ATTORNEY CONFERRAL

In accordance with D.C.COLO.LCivR 7.1, I hereby certify that, on April 24, 2024, I conferred with defense counsel, Ed Ramey, by telephone regarding this motion. He was not able to agree that his clients were unopposed to the motion, and we agreed that Defendants should seek relief from the Court. Per D.C.COLO.LCivR 5.1, the NEF constitutes the certificate of service.

Executed under penalty of perjury on April 26, 2024.

s/Endel Kolde