



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

KRIS W. KOBACH
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

October 6, 2023

The Honorable Jerome A. Holmes, Chief Judge
U.S. Court of Appeals for the Tenth Circuit
Old Post Office Bldg., Rm. 315
215 Dean A. McGee Ave.
Oklahoma City, OK 73102

Dear Chief Judge Holmes:

I write to express concern over a troubling trend in practice standards within the Tenth Circuit: a growing number of district court judges are requiring people to use the preferred pronouns of counsel, litigants, and witnesses during court appearances, regardless of the speaker's personal beliefs.

This is a new but expanding problem. As far as I am aware, no judge within the Tenth Circuit required any such practice before 2022. But now at least five district court judges explicitly require those appearing before the court to use the selected pronouns of counsel, litigants, and witnesses.¹ Two other judges have policies that pressure litigants into the same posture (but without explicitly requiring use of such pronouns).²

¹ D. Colo. Uniform Practice Standards, Civ. Practice Standard 43.1A(a)(1), (2)(D), *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/Uniform_Civil_Practice_Standards_CMA_RMR_CNS_NYW_2212.pdf (adopted by Senior Judge Arguello and Judges Rodriguez, Sweeney, and Wang); *accord* D. Colo, Hon. Gordon P. Gallagher, <http://www.cod.uscourts.gov/JudicialOfficers/ActiveArticleIIIJudges/HonGordonPGallagher.aspx> (linking to aforementioned practice standards); *see also* Magistrate Judge Reid Neureiter, Practice Standards for Civil Cases Pt. A.3, *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/NRN/NRN_Civil_Practice_Standards.pdf?ver=2023-01-03-093340-523 (stating practice standards of referring judge control appearances before magistrate judge in certain situations).

² *See* Magistrate Judge Kathryn A. Starnella, Practice Standards Pt. II.E, *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/KAS/KAS_Practice_Standards.pdf; Magistrate Judge Daphne A. Oberg, Practices & Procedures Pt. IV, *available at* <https://www.utd.uscourts.gov/magistrate-judge-daphne-oberg>; *see also* District Judge Gordon P. Gallagher, Standing Order Regarding Pretrial and Trial Procedures Pt. III.F.5.d, *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/GPG/GPG_Civil_Standing_Ord

As the attorney general for one of the states within the Tenth Circuit, my office is a frequent litigant both in your Court and in its subordinate district and bankruptcy courts. There are lawyers in my office who, for both religious and non-religious reasons, reject the idea of individuals dictating their own applicable pronouns. And I suspect the other Attorneys General in our Circuit employ such lawyers as well.

Sex-specific pronouns are words of ancient provenance and long usage in the English language.³ The idea that a person can dictate his or her own pronouns based on internal feelings and then expect others to go along with that choice is a quite recent development.⁴ The use of the plural pronouns “they” and “them” to refer to a single individual is also problematic because court filings demand maximum clarity and accuracy. But regardless of the merits of this idea as an abstract matter, enlisting the power of the state to *force* others to affirm such individual choices or feelings crosses a line and raises major questions regarding compelled speech and the First Amendment.⁵

Many people have religious beliefs that would prevent them from using pronouns that do not correspond to a person’s sex. In Christianity (the most common religion in the United States), this position generally proceeds from interpretations of Genesis 1:27 and other scriptures that speak of a male/female dichotomy among persons.⁶ Other major world religions

[er.pdf?ver=2023-08-07-101832-733](#) (asking counsel to “be mindful of a party’s preferred pronouns” in proposed jury instructions).

³ *E.g.*, *He*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003) (stating “he” is a pronoun dating from before the twelfth century, referring to a “male . . . who is neither speaker nor hearer”); *She*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003) (stating “she” is a pronoun dating from the twelfth century, referring to a “female . . . who is neither speaker nor hearer”).

⁴ This trend is not limited to assigning male pronouns to biological females and vice versa. *See United States v. Varner*, 948 F.3d 250, 257 (5th Cir. 2020) (discussing not only “they” as a gender-neutral singular pronoun, but also neologisms like “fae,” “per,” and “ve,” and concluding that “[d]eploying such neologisms could hinder communication among the parties and the court”).

⁵ *See generally Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995) (“[The state generally] may not compel affirmance of a belief with which the speaker disagrees. . . . [T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.”)

⁶ *E.g.* Comm. on Doctrine, U.S. Conference of Cath. Bishops, *Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body* 3–4 (2023); Coal. for Biblical Sexuality, Nashville Statement art. 11, available at <https://cbmw.org/nashville-statement>; Andrew T. Walker, *He, She, Ze, Zir? Navigating Pronouns While Loving Your Transgender Neighbor*, Ethics & Religious Liberty Comm’n of the S. Baptist Convention (Dec. 4, 2017), available at

likewise have doctrines that point in the same direction.⁷ While not all professed adherents to such religions may agree on the topic,⁸ it would be hard to deny that a significant portion of Americans—including many who appear in our Circuit’s courts—adhere to this view. To force these individuals to violate their religious beliefs in order to be heard in court is a restriction on their free exercise of religion.⁹

Furthermore, a court “compel[ing] the use of particular pronouns at the invitation of litigants . . . raise[s] delicate questions about judicial impartiality.”¹⁰ That is because requiring the use of counsel’s, litigants’, and witnesses’ selected pronouns stakes out a position on a controversial issue that is unsettled in law and society.¹¹

<https://erlc.com/resource-library/articles/he-she-ze-zir-navigating-pronouns-while-loving-your-transgender-neighbor/>; see also The Church of Jesus Christ of Latter-Day Saints, *General Handbook: Serving in the Church of Jesus Christ of Latter-Day Saints* § 38.6.23 (2022) (stating “[l]eaders . . . counsel against social transitioning . . . includ[ing] . . . changing a name or pronouns[] to present oneself as other than his or her biological sex at birth” and noting that “those who socially transition will experience some Church membership restrictions for the duration of this transition.”).

⁷ See Fiqh Council of N. Am., *Fatwa Regarding Transgenderism*, <https://fiqh-council.org/fatwa-regarding-transgenderism/> (last visited Sept. 19, 2023).

⁸ See, e.g., Hum. Rights Campaign Found., *What Does the Bible Say About Transgender People?*, <https://www.hrc.org/resources/what-does-the-bible-say-about-transgender-people> (last visited Sept. 19, 2023)

⁹ See generally Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2020) (government may only burden religious exercise where such burden serves a compelling governmental interest and is narrowly tailored to that interest).

¹⁰ *Varner*, 948 F.3d at 256.

¹¹ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (identifying “sexual orientation and gender identity” as “sensitive political topics”); *Green v. Miss U.S. of Am., LLC*, 52 F.4th 773, 784 n.12 (9th Cir. 2022) (“[F]or controversies regarding transgenderism . . . an individual’s use or omission of certain words and phrases . . . often reflects a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.” (internal quotes omitted)).

Indeed, “gender identity” is the subject of a growing wave of legislation¹² and litigation.¹³ So requiring those appearing in court to use (or refrain from using) certain pronouns may reveal a prejudgment on issues in litigation. “In cases like these, a court may have the most benign motives Yet in [referring to a party by non-traditional pronouns] the court may unintentionally convey its tacit approval of the litigant’s underlying legal position.”¹⁴ Adhering to the traditional use of the English language with respect to pronouns is the clearest indicator of a court’s neutrality on the matter.

Finally, even if one were to sweep away the constitutionality and impartiality concerns just discussed, there remains the question of what authority a district court has to order the use of individually selected pronouns. At least one other circuit has determined that “no authority supports the proposition that [courts] may require litigants, judges, court personnel, or anyone else to refer to . . . litigants with pronouns matching their subjective gender identity.”¹⁵

Given all these concerns, it is neither proper nor prudent for judges to expect that parties refer to counsel, litigants, or witnesses by idiosyncratically selected pronouns.

I do not think any of the judges who have outlined their pronoun expectations have done so out of ill will. Rather, they are likely acting based on a personal sense of politeness;¹⁶ most judges (let alone most people) have not spent a lot of time thinking through the legal dimensions of the pronoun controversy. But “the point of all speech protection . . . is to shield

¹² For example, most of the states in the Tenth Circuit require that students participate in sex-segregated sports consistent with biological sex rather than felt gender identity. *See* Fairness in Women’s Sports Act, 2023 Kan. Sess. L. ch. 13; Okla. Stat. tit. 70, § 27-106 (2023); Utah Code Ann. § 53G-6-902 (LexisNexis 2023); Wyo. S.F. 013, 2023 Wyo. Sess. Laws ch. 191; *see also* N.M. Activities Ass’n, *Handbook* § 6.1 (“Participating students are required to compete in the gender listed on their original or amended birth certificate.”).

¹³ *See, e.g., Green*, 52 F.4th 773 (dispute over participation in beauty pageant); *Foster v. Stanek*, No. 18-2552-DDC-KGG, 2023 WL 5625433 (D. Kan. Aug. 31, 2023) (dispute over sex displayed on birth certificates); *Fowler v. Stitt*, No. 22-cv-115-JWB-SH, 2023 WL 4010694 (N.D. Okla. June 8, 2023) (same); *Griffith v. El Paso Cty.*, No. 21-cv-00387-CMA-NRN, 2023 WL 2242503 (D. Colo. Feb. 27, 2023) (dispute over inmate housing); *Roe v. Utah High Sch. Activities Ass’n*, No. 220903262, 2022 WL 3907182 (D. Utah Aug. 19, 2022) (dispute over participation in girls’ sports); *Ricard v. USD 475*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372 (D. Kan. May 9, 2022) (dispute over teacher’s refusal to comply with school district’s policies of (a) using students’ preferred names and pronouns and (b) hiding such practice from parents); *Taking Offense v. State*, 66 Cal. App. 5th 696 (Ct. App. 2021) (dispute over law prohibiting use of non-preferred pronouns).

¹⁴ *Varner*, 948 F.3d at 256.

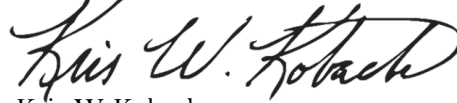
¹⁵ *Id.* at 254–55.

¹⁶ *Accord id.* at 256.

just those choices of content that in someone's eyes are misguided, or even hurtful.”¹⁷
“[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.”¹⁸

For the aforementioned reasons, the spread of this novel requirement is both problematic and potentially unconstitutional. It has moved me to ask you to act. Now that the issue has been brought to your attention, I hope that effective, prompt resolution can be achieved through informal corrective action.

Respectfully,

A handwritten signature in black ink that reads "Kris W. Kobach". The signature is written in a cursive, flowing style with a large initial "K".

Kris W. Kobach

Kansas Attorney General

¹⁷ *Hurley*, 515 U.S. at 573.

¹⁸ *Barnette*, 319 U.S. at 642.