NOTES

Call Me By My Pronouns: A Professor's Refusal and the Sixth Circuit's Acquiescence in *Meriwether v. Hartop*

I. OVERVIEW

The way Professor Nicholas Meriwether sees it, referring to students by Mr. or Ms. fosters "mutual respect" within his classroom.[1] That is, if the student identifies with the title he prescribes. Meriwether has been a professor at Shawnee State University, a public college in Ohio, for twenty-five years.[2] He was first confronted with the question of a student's gender identity in January 2018.[3] After class, a student approached him and requested the professor "refer to [her] as a woman" and use "feminine titles and pronouns."[4] Citing the student's "appearance as a man," as well as his faith, Meriwether refused.[5] The student sought intervention from the university.[6] When confronted by school officials, Meriwether again declared his religious views barred him from properly addressing the

1. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021).
2. *Id.* at 498.
3. *Id.* at 499.
4. *Id.*
5. *Id.*
6. *Id.*

student.[7] With all due respect, he would not recognize gender identities that "he believes are false.[8]"

Meriwether's refusal to honor the student's gender identity resulted in multiple disciplinary actions from the university.[9] The Provost of Shawnee State expressed Meriwether's behavior did not support a "safe educational environment."[10] A Title IX report found Meriwether in violation of the university's nondiscrimination policy.[11] A formal warning was added to his file.[12] Still, Meriwether maintained his defense; he could not comply with the university's protective policies because of his religious convictions.[13]

In response to his interactions with the school, Meriwether filed a lawsuit.[14] He argued Shawnee State had violated his First Amendment right to free speech and free exercise, his Fourteenth Amendment right to due process and equal protection, his rights as designated in the Ohio Constitution, and his contract with the university.[15] The case was first heard by a magistrate judge who recommended it be dismissed.[16] The district court agreed and dismissed the case.[17] Meriwether appealed and the case was taken up by the United States Court of Appeals for the Sixth Circuit.[18] In *Meriwether v. Hartop*, the Sixth Circuit *held* Shawnee State University violated Professor Meriwether's First Amendment right to free speech, Meriwether's First Amendment free exercise claim was viable but was to be determined by the district court on remand, and that the policy could not be challenged under the Fourteenth Amendment for due process vagueness.[19] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

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7. *Id.*
8. *Id.* at 499-502.
9. *Id.* at 501.
10. *Id.* at 500.
11. *Id.* at 501.
12. *Id.*
13. *Id.* at 499-502.
14. *Id.* at 502.
15. *Id.*
16. *Id.*
17. *Id.* at 503.
18. *Id.* at 518.
19. *Id.*

II. BACKGROUND

A. Free Speech in the Context of Public Academia's Pedagogy

While the First Amendment is clear "Congress shall make no laws . . . abridging the freedom speech," the Constitution is mum on Congress's freedom of speech while making said laws.[20] More broadly, there is little guidance for government employees while speaking in their official capacity. The leading jurisprudence applying the First Amendment to the speech of government employees comes from *Garcetti v. Ceballos*.[21] In *Garcetti*, the Supreme Court provided "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[22] A government employee's speech is only constitutionally protected when expressing a personal opinion on a matter of public concern.[23]

The application of *Garcetti* becomes complicated in the context of public academia. The Supreme Court has maintained a special deference to free speech at universities.[24] Many of the landmark cases that situated the First Amendment in academia were decided during the McCarthy era.[25] During that time, litigation blossomed as legislation attempted to snuff out communist ideation on college campuses.[26] The Court renounced such attempts at censorship and ideological control, providing "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned," and must be vehemently protected.[27] The Court established both the personal beliefs of professors and the content of their lectures are constitutionally protected.[28] Academic freedom was

20. U.S. Const. amend. I.
21. Garcetti v. Ceballos, 547 U.S. 410 (2006).
22. *Id.* at 421.
23. *Id.*
24. *See e.g.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (stating actors in academia do not "shed their constitutional rights to freedom of speech or expression at the [university] gate").
25. *See* Sweezy v. New Hampshire, 354 U.S. 234, 236, 239-50 (1957) (stating a professor's right to lecture was a "constitutionally protected freedom[] which had been abridged through [an] investigation" required by an anti-Communist act); *see also* Keyishian v. Bd. of Regents, 385 U.S. 589, 592, 609 (1966) (holding a statute requiring professors disclose current or former communist association was unconstitutional).
26. *See Sweezy*, 354 U.S. at 236; *see also Keyishian*, 385 U.S. at 592.
27. *Keyishian*, 385 U.S. at 603.
28. *See generally Sweezy*, 354 U.S. at 236; *see also Keyishian*, 385 U.S. at 592, 609.

designated "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[29]

Whereas protections for a public university professor's free speech are strong, *Pickering v. Board of Education* establishes a boundary.[30] The Court in *Pickering* identified public educators as government employees, but determined they still enjoy their First Amendment right to free speech when discussing public matters.[31] The Court supplied, "free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment."[32] Nevertheless, the Court recognized there is a valid interest for government entities, including schools, to maintain order.[33] Accordingly, a *Pickering* balancing test provides a public employee's speech must be balanced against their employer's interest to bar speech to "promot[e] the efficiency of the public services" the employer performs.[34] Courts have applied this test to the speech of public university professors.[35] Because the interest in protecting academia's marketplace of ideas is mighty, this test typically weighs in favor of protecting the professor's speech.[36]

The Sixth Circuit has used *Pickering* to hold not only that a professor's lecture content is protected by the First Amendment, but also their teaching style.[37] In *Hardy v. Jefferson Community College*, a professor sued a college after he was dismissed for using bombastically offensive language during a class discussion.[38] The language was employed pedagogically as a part of the lesson.[39] The professor contended his dismissal violated his First Amendment right to free speech.[40] Using a

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29. *Keyishian*, 385 U.S. at 603; *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960) (declaring "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

30. Pickering v. Board of Education, 391 U.S. 563, 573 (1968); *see e.g.* Hardy v. Jefferson Community College, 260 F.3d 671, 678 (6th Cir. 2001) (applying *Pickering* to the speech of a public university professor).

31. *Pickering*, 391 U.S. at 573.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* D'Andrea v. Adams, 626 F.2d 469, 471 (5th Cir. 1980) (using a *Pickering* balancing analysis to hold retaliation by a public university for a professor's critical statements violated the First Amendment); *see also* Powell v. Gallentine, 992 F.2d 1088 (5th Cir. 1993) (employing a *Pickering* balancing test to determine a professor's Free Speech right was violated because the university failed to show disruption in its services resulting from the speech).

36. *Pickering*, 391 U.S. at 573.

37. *Hardy*, 260 F.3d at 682-83.

38. *Id.* at 675 (The challenged lesson included the words "n—r, f—ggot" b—tch).

39. *Id.*

40. *Id.*

Pickering balancing test, the Sixth Circuit determined that, because the pedagogy contained an "academic message," the professor's unusual teaching method was protected.[41] The court held the necessity of protecting this message outweighed the college's interest in prohibiting the speech.[42]

B. The Free Exercise Clause Balanced Against Protecting People

The First Amendment provides the free exercise of religion shall receive most stringent protection.[43] The intertwining of business, policy, and religion, however, has produced circumstances where one person's religious exercise affects others operating in a non-religious capacity.[44] Consequent litigation has demanded the Court juggle the protection of religious exercise, the intent of policymakers, and the interests of secular individuals who are affected by both religious exercise and the policies that hinder it.[45] Most recently, the Supreme Court has protected free exercise at cost to the secular citizen.[46]

As is indicated in recent free exercise precedent, "to determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law."[47] To uphold a policy argued to violate the Free Exercise Clause, the Court must find a compelling state interest that justifies burdening religious exercise.[48] When analyzing challenged laws and policies, the Supreme Court has tangentially determined whether an actor or employer has the right to discriminate against particular customers or employees on the basis of religion.[49] For example, in *Fulton v. City of Philadelphia*, the Court

41. *Id.* at 682-83.
42. *Id.* at 683.
43. U.S. Const. amend. I.
44. *See e.g.* Burwell v. Hobby Lobby, 573 U.S. 682, 684-87 (2014) (dissecting constitutionality of legislation that compelled a company to supply health insurance coverage for birth control against their religious convictions. The Court determined the Constitution protects for-profit corporations' exercise of religion); *see also e.g.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S.Ct. 1719, 1721 (2018) (evaluating whether a public accommodations law may compel a baker to create a cake for a same-sex marriage against religious belief. The Court held the law was hostile towards the baker's free exercise of religion); *see also e.g.* Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1881-82 (2021) (holding the City of Philadelphia violated the Free Exercise rights of a Catholic foster care service by refusing to contract with them unless they certify same-sex couples as foster parents).
45. *Id.*
46. *Id.*
47. *Meriwether*, 992 F.3d at 512 (6th Cir. 2021) (citing *Masterpiece*, 138 S.Ct. 1719).
48. *Fulton*, 141 S.Ct. at 1881.
49. *See generally Burwell*, 573 U.S. 682; *see also Masterpiece*, 138 S.Ct. 1719.

determined a foster care agency had the constitutional right to discriminate against same-sex couple applicants.[50] The foster care agency had sued the city for refusing to contract with them.[51] The city argued their refusal was based on the foster care agency's breach of the city's non-discrimination policy, which stated "Provider shall not reject a child or family [based on] their . . . sexual orientation . . ."[52] The Court held, given the foster care agency's demonstrated religious convictions, the city's application of the discrimination policy violated their free exercise right.[53] The Court suggested the state's interest in protecting gay and lesbian couples did not overcome the foster care agency's right to exercise their religious beliefs, even though this exercise was, in effect, blatant discrimination against the LGBTQ+ community.[54] The Court thus determined the city's discrimination policy was, ironically, unjustly discriminatory.[55]

Meanwhile, the Sixth Circuit Court has held requiring observance of protective policy does not amount to an infringement on free exercise.[56] In *Equal Employment Opportunity Commission v. R.G. &. G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit held a funeral home could not discriminate against a transgender employee under the guise of religiously motivated free exercise.[57] The funeral home argued their religious convictions barred them from recognizing a transgender employee's transition to female.[58] Because the employee would not comply with the funeral home's dress code, she was terminated.[59] The court held this termination violated state employment policy that protects employees against discrimination on the basis of sex.[60] The court declared, "as a matter of law, bare compliance with [the policy]—without actually assisting or facilitating [employee's] transition efforts—does not amount

50. *Fulton*, 141 S.Ct. at 1881.
51. *Id.* at 1875.
52. *Id.* at 1878, 1881.
53. *Id.*
54. *Id.*
55. *Id.*
56. Equal Employment Opportunity Commission v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589-90 (6th Cir. 2018) *aff'd* Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (The Supreme Court consolidated these cases and affirmed that transgender individuals may not be discriminated against by their employer. However, because the Sixth Circuit does not address the Supreme Court's decision in their *Meriwether* holding, this discussion will only consider the Sixth Circuit's holding).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 574-75.

to an endorsement of [employee's] views."[61] Thus, adherence to such policies does not "amount to an endorsement" of views that may be contrary to one's religious beliefs.[62] According to the Sixth Circuit, protective policy is not intended to protect viewpoints, but to protect people.[63]

C. Due Process Vagueness in Discrimination Policy

Under the Fourteenth Amendment's due process prong, laws may not be so vague as to allow discretionary application.[64] A law is unconstitutionally vague "when it either fails to inform ordinary people what conduct is prohibited, or allows for arbitrary and discriminatory enforcement."[65] For a law to survive a vagueness challenge, its language must be explicit and its enforcement universal.[66] When a law is challenged, the Court must analyze the law as applied to the particular individual and not consider the application of the law unto others.[67]

III. COURT'S DECISION

In the noted case, the Sixth Circuit held the First Amendment protected Meriwether's speech as a public university professor. This included his chosen verbiage to address students and "refusal to use gender-identity-based pronouns."[68] Next, the court held Meriwether's free exercise claim was viable because the university's discrimination policy was likely applied adversely against Meriwether's sincere religious beliefs. They left a final determination to the district court on remand. Lastly, the Sixth Circuit held the "professor's clear notice of college's gender-pronoun policy precluded [his Fourteenth Amendment] due process vagueness challenge."[69]

61. *Id.* at 589.
62. *Id.*
63. *Id.* at 578.
64. U.S. Const. amend. XIV; Kolender v. Lawson, 461 U.S. 352, 357 (1983).
65. *Meriwether*, 992 F.3d at 512 (6th Cir. 2021) (citing *Kolender*, 461 U.S. at 357).
66. *Id.* at 512.
67. Holder v. Humanitarian Law Project, 561 U.S. 1, 18-19 (2010).
68. *Id.* at 508.
69. *Id.* at 516.

A. The Unbridled Power of Professors Extending Beyond Substance to Pedagogy

The Sixth Circuit first addressed Meriwether's First Amendment free speech claim.[70] Recalling their decision in *Hardy v. Jefferson Cmty. Coll.*, the court articulated, "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction," is "totally unpersuasive."[71] Inciting attitudes from the age of McCarthy, the court stated, "we have recognized that 'a professor's rights to academic freedom and freedom of expression are paramount in the academic setting.'"[72] The Sixth Circuit disagreed with Shawnee State's argument that Meriwether's use of titles did not serve a core function within his "teaching and scholarship."[73] The court elaborated;

> [Shawnee State] argues that even if there is an academic-freedom exception to Garcetti, it does not protect Meriwether's use of titles and pronouns in the classroom. As they would have it, the use of pronouns has nothing to do with the academic-freedom interests in the substance of classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the content of the instruction enormously.[74]

Using this foundation, the court concluded *Garcetti* did not bar Meriwether's free speech claim because he was not speaking pursuant his official duties.[75] Instead, his use of pronouns conveyed a personal viewpoint.[76] The court identified gender identity as a matter public concern.[77] As such, Meriwether's use of titles was protected even if not "germane to the contents of the lecture."[78] According to the Sixth Circuit, given the national debate surrounding gender identity, "pronouns carry a message."[79] Because Meriwether found issue with the conclusion "people can have a gender identity inconsistent with their sex at birth," the court stipulated his refusal to use student's self-indicated pronouns was not merely a tactic of "classroom management." Instead, his use of titles

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70. *Id.* at 508.
71. *Meriwether*, 992 F.3d at 512 (quoting *Hardy* 260 F.3d at 680).
72. *Id.* at 506 (citing Bonnell v. Lorenzo, 241 F.3d 800, 823 (6th Cir. 2001)).
73. *Id.* at 505.
74. *Id.* at 506.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 507.
79. *Id.*

expressed his viewpoint on a "controversial [and] sensitive political issue."[80]

The court employed *Pickering* to balance Meriwether's right to free speech against the university's interest in barring the speech to maintain efficiency.[81] According to the court, the university provided no proof Meriwether's speech had hindered students' educational experience.[82] The scale thus tipped in favor of Meriwether.[83] The court held the university could not require the professor to change the way he addresses his students.[84] To do so would violate his First Amendment right to free speech.[85]

B. The "Religious Reasons" Exception Within Protective Policy

The Sixth Circuit continued their constitutional crusade against Shawnee State by heeding plausibility into Meriwether's First Amendment free exercise claim.[86] The court left a final determination as to whether the discrimination policy was unconstitutionally applied to the district court on remand.[87] Underlying this decision was recognition of circumstances where "the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions."[88]

In a somewhat protracted discussion, the Sixth Circuit suggested Meriwether did not receive "neutral and respectful consideration" of his "sincerely held religious beliefs."[89] The court attributed this non-neutrality to "irregularities in the university's adjudication and investigation processes."[90] To bolster this conclusion, the court pulled "intolerant" statements from the parties involved in Meriwether's disciplinary adventure.[91] Particularly damning was Department Head Jennifer Pauley's assertion that "Christian professors 'should be banned' from teaching

80. *Id.* at 506 (quoting Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S.Ct. 2248, 2476).
81. *Id.* at 507.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 511.
86. *Id.*
87. *Id.* at 514.
88. *Id.*
89. *Id.*
90. *Id.* at 512.
91. *Id.*

courses on Christianity . . ."[92] The court sustained "hostility infected the university's interpretation and application of its gender-identity policy" thus validating Meriwether had a plausible free exercise claim.[93]

The Sixth Circuit had to distinguish this case from their prior decision involving transgender individuals and discrimination policy in *Harris Funeral Homes*.[94] The somewhat flimsy reasoning applied depended heavily on the facts of each case rather than the like goals of the discrimination policies and the parallel state interest in protecting transgender folks.[95] The Sixth Circuit proposed "[requiring an] employer not fire an employee for expressing a transgender identity is a far cry from what we have here—a requirement that a professor affirmatively change his speech to recognize a person's transgender identity."[96] The Sixth Circuit then reiterated, because the university demonstrated animus towards Meriwether's faith, his First Amendment claim was viable.[97] In doing so, the Sixth Circuit firmly situated their "religious reason" exception to otherwise indiscriminate protective policy.

C. Defined Discrimination Policy is Not Unconstitutionally Vague

The Sixth Circuit reserved little room to discuss its dismissal of Meriwether's Fourteenth Amendment Due Process claim.[98] Using the Supreme Court's vagueness framework, the Sixth Circuit held the claim lacked support.[99] First, Meriwether was on notice of "what conduct [was] prohibited."[100] When he asked the university administration for clarification, they told him how to conform to the policy.[101] Second, his argument that "the policy allowed for arbitrary and discriminatory enforcement" was unfounded. Simply stating the university had "unbridled discretion" was not enough to satisfy this prong.[102] Thus, with little fanfare, the Fourteenth Amendment claim was dismissed.[103]

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92. *Id.* The Department Head also remarked "religion oppresses students" and its presence is "counterproductive."
93. *Id.*
94. *Id.* at 510.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 518.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

IV. ANALYSIS

The Sixth Circuit's decision in *Meriwether v. Hartop* belies the intent of the Bill of Rights: to protect the American people.[104] All American people. He, she, they, Mr., and Ms. In this case, the court misinterpreted both the free speech and free exercise clauses of the First Amendment and misapplied the Fourteenth Amendment.

To begin, the Sixth Circuit's application of free speech jurisprudence was erroneous. First, per the confounds of *Garcetti*, a government employee's speech is only protected when it relays their opinion on a "matter of public concern."[105] Recognizing another person's gender identity does not communicate an opinion. Likewise, an individual's self-identified gender is not a matter for society at large to debate. It is a deeply personal matter. Thus, the use of another person's proper pronouns does not communicate the speaker's viewpoint on a "disputed matter of public import." Rather, the use of titles aids to indicate whom the speaker is referring to or recognizing. Just as one could hardly argue Meriwether's label as an "evangelical Christian" is a matter of public concern, it is erroneous to stipulate a person's self-selected titles are a matter of public concern.[106] A public university professor's use of titles preceding a student's name serves simply as a sign of respect—which according to Meriwether—is paramount.[107]

Even if the claim were to pass muster by *Garcetti*, a proper application of *Pickering* would have surely found in favor of Shawnee State. The weights assigned by the Sixth Circuit during their *Pickering* analysis were grossly askew. The government always has a very strong interest in protecting its citizens.[108] This interest is heightened for students.[109] Admittedly, the state has an equally important state interest in maintaining academic freedom.[110] However, contrary to the Sixth Circuit's suggestion, this interest was not promoted by allowing Meriwether to misgender his students. The academic marketplace was not diminished by enforcing Shawnee State's discrimination policy. Enforcing discrimination policy actually enriches the academic marketplace as it ensures all students feel welcome to engage and share ideas without the

104. *See generally* U.S. Const.
105. *See Garcetti*, 547 U.S. at 421.
106. *Id.* at 416-17.
107. *See Meriwether*, 992 F.3d at 499.
108. *See Garcetti*, 547 U.S. at 421.
109. *See e.g.* Board of Education v. Earls, 536 U.S. 822 (implying the State has additional power and responsibility to protect student's within their care at school).
110. *Keyishian*, 385 U.S. at 603; *see also Shelton*, 364 U.S. at 487.

unpredictable threat of demeaning misgendering. Just as one would not advocate racist labeling supplements any student's academic experience, the refusal to recognize a student's self-identified gender cannot be said to add meaningful discourse to any university campus. Misgendering only inserts hostility, and as the time dedicated to this debate encapsulates, hinders efficiency. This was not reflected in Sixth Circuit's application of *Pickering*.

All that aside, this case would have been better decided by recognizing misgendering as what it is: harassment. According to renowned First Amendment scholar Erwin Chemerinsky, speech in an educational environment should be considered harassment if it "either be directed at somebody or so pervasive as to materially interfere with educational opportunities based on a protected category like race, sex, religion, or sexual orientation."[111] That standard is certainly satisfied in this case. First, misgendering an individual is direct. Using a label is targeted and precise. Next, misgendering materially interferes with students' educational opportunities based on the protected category of sex. A transgender student becomes obstructed from certain educational experiences by the fear of debilitating humiliation that accompanies blatant misgendering. It is one thing for a professor to imply "I disagree with your ideas." It is another for them to imply "I disagree with who you are." Thus, when faced with class decisions, a transgender student becomes reasonably blocked from all classes taught by professors who have chosen to disregard students' gender identity to use their own imprecise labels.[112]

Next, the Sixth Circuit's disregard for their own free exercise precedent again led the court to incorrectly determine Meriwether presented a viable free exercise claim.[113] Per the Supreme Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, a

111. Erwin Chemerinsky, *Tobriner Memorial Lecture: Free Speech on Campus*, 69 HASTINGS L.J. 1339, 1344-45 (2018).

112. There are a host of issues with allowing professors to label students as they see fit. They exceed the scope of this Note. To identify a few; there is the issue of financial incongruency. Transgender students who can afford certain treatments may be better able to conform to the traditional appearance of their self-identified gender. Resultingly, finances may dictate a degree of immunity from misgendering. There is also the issue of granting professors power to assign a gender to an individual who is gender-nonconforming. Next, there is the broader social result of misgendering; it discourages those questioning their gender-identity from exploring their options. The fear and humiliation that accompany misgendering may obstruct a person from coming out and living their true identity. Lastly, a professor's disregard for a student's self-indicated gender bestows permission to misgender upon students who may be hostile to that student's identity.

113. *Meriwether*, 992 F.3d at 515.

neutral law applied in a neutral fashion is pro se constitutional.[114] In this case, the Sixth Circuit conceded "[t]o determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law."[115] Yet, the court does no such analysis.[116] Buried in a note is the court's assertion they need not analyze the policy under *Smith* because "the complaint sufficiently alleges non-neutrality."[117] This alleged non-neutrality is supported by some personal opinions shared by university officials.[118] The court concluded that comments such as the one made by Department Head Pauly likely colored the application of the policy to Meriwether.[119] Whether or not that is true, a sincere *Smith* analysis would have demonstrated the policy was neutrally applied, as it was not subject to discretionary application.[120] As the Sixth Circuit acknowledged in their discussion of the due process claim, "Meriwether's argument that the policy allowed for arbitrary and discriminatory enforcement fails."[121] Thus, per the Sixth Circuit's own logic, since policy's application to Meriwether was not discretionary, it could not have been motivated by hostility towards of his faith.[122]

Still, an arguably more effective investigation would dive into the purpose of the policy and the compelling state interest to protect all students, regardless of their professor's personal beliefs. Rather than addressing the history and context of the law, however, the court hinted at a constitutional violation but left a final decision to the district court on remand.[123]

Even if just for the sake of consistency, the Sixth Circuit should have analyzed Meriwether's free exercise claim the same way they analyzed the free exercise claim in *Harris Funeral Homes.*[124] That case also involved a religiously motivated violation of discrimination policy.[125] Unlike in this case, however, in *Harris Funeral Homes* the Sixth Circuit held adherence to protective policy does not amount to an endorsement of

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114. Employment Div., Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660, 665 (1990).
115. *Meriwether*, 992 F.3d at 512 (quoting *Masterpiece*, 138 S. Ct. at 1731).
116. *Id.* 512-15.
117. *Id.* at n. 10.
118. *Id.* at 512-13.
119. *Id.* at 515.
120. *Id.* at 518.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Harris Funeral Homes*, 884 F.3d at 589-90.
125. *Id.*

beliefs.[126] The court explained endorsement of the mutability of sex only occurs when an actor is forced to facilitate a transgender person's transition.[127] Calling a person Mr. or Ms. consistent with their self-indicated gender identity is not that. Titles are not a reflection of internalized beliefs; they do not endorse or facilitate anything.[128] They are, as Meriwether accurately indicated, simply a sign of respect.[129] Even if titles were understood to be an endorsement of religion, *their use is not required*. It was Meriwether who demanded permission to use whatever verbiage he pleased to identify his students, with no regard for how his labels may make them feel.[130] The Sixth Circuit had the opportunity to establish enforcing neutral discrimination policy does not amount to a coerced endorsement of religion.[131] They turned it down.[132] Unfortunately, this brazen rejection of LGBTQ+ protections in the name of free exercise is right on trend with recent Supreme Court attitudes.[133]

Lastly, the Sixth Circuit used Fourteenth Amendment jurisprudence to dismiss Meriwether's due process claim.[134] Here was finally a proper application of constitutional law.[135] Still, an invocation of the Fourteenth Amendment's Equal Protection Clause in this case could have served the university, the student, and future litigation involving the rights of transgender individuals.[136] Sex is an established protected class under the Equal Protection Clause.[137] As Justice Kavanaugh suggested in his *Bostock* dissent, issues involving the LGBTQ+ community would be more easily decided under the equal protection framework.[138] This case provided the proper opportunity for the Sixth Circuit to do just that.

126. *Id.*
127. *Id.*
128. *Id.*
129. *Meriwether*, 992 F.3d at 499.
130. *Id.* at 500.
131. *Id.* at 517.
132. *Id.*
133. *See Masterpiece*, 138 S.Ct. 1719; *see generally Fulton*, 141 S.Ct. 1868.
134. *Meriwether*, 992 F.3d at 518.
135. *Id.* (correctly applying the vagueness test from *Kolender* to Meriwether's due process claim).
136. *See* United States v. Virginia, 518 U.S. 515, 531-33 (employing heightened scrutiny to determine constitutionality of laws that classify on the basis of sex).
137. *See* Reed v. Reed, 404 U.S. 71, 75-77 (situating sex within Equal Protection jurisprudence).
138. *Bostock*, 140 S.Ct. at 1833. (Kavanaugh, J. dissenting) (stating, "[a]ll of the Court's cases [involving discrimination on the basis of sexual orientation] would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause.").

However, as Shawnee State or the student central to this case did not assert this counterclaim, this discussion is tabled.

To conclude, the holding in *Meriwether v. Hartop* is frustrating. This decision will likely invite an onslaught of litigation challenging not only protective policy mandating the use of proper pronouns but also broader legal protections for transgender individuals. The Catholic judge in this case squandered an opportunity to entrench the protection of gender identity into modern jurisprudence. Instead, the Constitution was flippantly misapplied, the logic of it devoid from this decision. Unlike the result in this case, one can only hope for future decisions that protect people, or at the very least *respect* people.

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