CONSTITUTIONAL LAW — FIRST AMENDMENT — SIXTH CIRCUIT HOLDS PUBLIC UNIVERSITY PROFESSOR PLAUSIBLY ALLEGED FREE SPEECH RIGHT NOT TO USE TRANS STUDENT'S PRONOUNS. — *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), *reh'g en banc denied*, No. 20-3289, 2021 BL 257656 (6th Cir. Jul. 8, 2021).

Fierce debate surrounds campus speech that is harmful toward minority groups — and universities' attempts to regulate it.[1] Particularly, when professors' speech effects that harm, are professors protected by the First Amendment? Recently, in *Meriwether v. Hartop*,[2] the Sixth Circuit held that a public university professor plausibly alleged that his First Amendment rights were infringed when the university disciplined him for refusing to refer to a transgender student with "she/her" pronouns, in violation of the school's nondiscrimination policy.[3] By failing to recognize the significance of the university's interest in preventing discrimination, the court skewed its analysis in favor of the professor's interests. However, the university's interest in ensuring a welcoming classroom environment is well supported and serves, rather than undermines, academic freedom.

In 2016, Shawnee State University informed its faculty that its nondiscrimination policy required all professors to refer to students using pronouns that "reflect[] a student's self-asserted gender identity."[4] But in 2018, when a transgender student, Jane Doe,[5] told her philosophy professor, Nicholas Meriwether, to refer to her with "she/her" pronouns, Meriwether would not.[6] According to Meriwether, compliance with the school's pronoun policy forced him to violate his religious belief that gender is fixed at conception.[7] For the rest of the semester, Meriwether addressed all other students with the honorifics "Ms." or "Mr.," which he did to "foster[] an atmosphere of seriousness and mutual respect," but referred to Doe by only her last name.[8] In response, Doe complained

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[1] *See, e.g.*, Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, 43 HUM. RTS., no. 4, 2018, at 1, 4, https://www.americanbar.org/content/dam/aba/administrative/crsj/human-rights-magazine/hr-v43-n4.pdf [https://perma.cc/2HBU-394U].

[2] 992 F.3d 492 (6th Cir. 2021).

[3] *See id.* at 511–12. The court's holding is circumscribed. Ruling on a motion to dismiss, the court concluded the professor *plausibly alleged* that the university policy violated his free speech rights — not that such a violation had occurred. *Id.* at 503.

[4] *Id.* at 498.

[5] Doe is a pseudonym used throughout the litigation. *See* Order at 8, Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753 (S.D. Ohio Jan. 30, 2019).

[6] *Meriwether*, 992 F.3d at 499.

[7] *Id.* at 498–99.

[8] *Id.* at 499. Meriwether proposed this "compromise," *id.*, as "an accommodation . . . given his sincerely held beliefs," but school officials said it violated the nondiscrimination policy, *id.* at 500. Officials likewise vetoed his request to refer to Doe with "she/her" pronouns but to note in his syllabus that he was doing so "under compulsion" despite his religious beliefs. *Id.* at 500.

she suffered disparate treatment — that referring to Doe alone by last name only was not "in line with [Meriwether's] practice of addressing other female members in the class."[9] The school's Title IX investigation concluded that Meriwether's refusal to recognize Doe's gender identity created a discriminatory and hostile learning environment.[10] Meriwether was issued a written warning instructing him to use trans students' requested pronouns "to avoid further corrective actions."[11]

After exhausting the faculty union's grievance process, Meriwether filed suit in the Southern District of Ohio, alleging the university's disciplinary action violated his First Amendment free speech and free exercise rights, among other claims.[12] The district court dismissed both claims.[13] Turning first to free speech, the court rejected Meriwether's argument that professors' speech comprises a carveout from the general rule[14] articulated in *Garcetti v. Ceballos*.[15] The *Garcetti* Court held that public employees' speech is susceptible to employer discipline unless the speech addressed "matters of public concern" and was made "as a citizen"[16] — that is, was not made pursuant to an employee's "official duties."[17] Applying *Garcetti*, the district court concluded Meriwether's speech was made pursuant to his official duties and not on a matter of public concern.[18] His speech was related to gender identity, but it did not actually influence or invite public debate; Meriwether addressed only one student only within the classroom, and it was unlikely someone hearing his pronoun use would perceive he was expressing views about gender identity.[19] As to free exercise, the court held Meriwether failed to allege facts showing that the university's nondiscrimination policies "were anything but neutral, generally applicable policies without a system of ad hoc exemptions," which do not violate the First Amendment.[20]

The Sixth Circuit reversed in relevant part.[21] Writing for the panel, Judge Thapar[22] first addressed the unsettled threshold question: Does

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[9] Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 4222598, at *5 (S.D. Ohio Sept. 5, 2019).

[10] *Meriwether*, 992 F.3d at 500–01.

[11] *Id.* at 501.

[12] *Meriwether*, 2019 WL 4222598, at *7. Meriwether also brought claims under the Ohio Constitution, his contract with the university, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* The district court rejected his constitutional claims on the merits, *id.* at *28–29, and dismissed his state law claims on jurisdictional grounds, *id.* at *30.

[13] *Id.* at *30.

[14] *Id.* at *10.

[15] 547 U.S. 410 (2006).

[16] *Id.* at 416 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

[17] *Id.* at 421.

[18] *Meriwether*, 2019 WL 4222598, at *12, *14.

[19] *Id.* at *14–15.

[20] *Id.* at *25.

[21] *Meriwether*, 992 F.3d at 518.

[22] Judge Thapar was joined by Judges McKeague and Larsen.

Garcetti, which held that public employees' speech is not protected by the First Amendment when made pursuant to their official duties,[23] apply to academic speech?[24] The panel concluded that it does not.[25] Reading Supreme Court precedent to recognize both the "essentiality of freedom in the community of American universities"[26] and universities' crucial role in exposing future leaders to ranging viewpoints and ideas, the court determined that the First Amendment safeguards these values.[27] These precedents, according to the court, established that public university professors "retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."[28]

Having concluded that *Garcetti* did not bar Meriwether's free speech claim, the court applied the two-pronged *Pickering-Connick*[29] test, asking first whether Meriwether's speech involved a matter of public concern and second whether his interest in speaking outweighed the school's interest in regulating that speech.[30] In the panel's view, Meriwether's free speech claim cleared the first *Pickering-Connick* prong. Emphasizing that pronoun usage is a "hot issue," the court concluded that Meriwether's speech "waded into a matter of public concern."[31] The court then balanced the interests of the professor "as a citizen, in commenting upon matters of public concern" against the interests of the government employer "in promoting the efficiency of the public services it performs through its employees."[32] The Sixth Circuit stressed Meriwether's academic freedom interest and the principles bolstering Meriwether's claim, such as the importance of exposure to and protection of "contrarian views" under the First Amendment, particularly in the classroom.[33] The court briefly considered and dismissed the school's interest in "stopping discrimination against transgender students."[34] Judge Thapar reasoned that, even assuming such an interest existed, it was not shown to be implicated in this case. On the facts of his complaint, Meriwether neither created a hostile learning environment nor impeded the operations of the school, so the

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[23] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[24] *Meriwether*, 992 F.3d at 504. The Supreme Court expressly left unanswered whether *Garcetti*'s holding applied in the university context. *Garcetti*, 547 U.S. at 425.

[25] *Meriwether*, 992 F.3d at 505.

[26] *Id.* at 504 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)).

[27] *Id.* at 504–05.

[28] *Id.* at 505. The Sixth Circuit joined the Fourth, Fifth, and Ninth Circuits in recognizing some sort of academic freedom exception to *Garcetti*. *Id.* (citing Adams v. Trs. of the Univ. of N.C.–Wilmington, 640 F.3d 550, 562 (4th Cir. 2011); Buchanan v. Alexander, 919 F.3d 847, 852–53 (5th Cir. 2019); Demers v. Austin, 746 F.3d 402, 411 (9th Cir. 2014)).

[29] Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983).

[30] *Meriwether*, 992 F.3d at 507–08.

[31] *Id.* at 509.

[32] *Id.* (quoting *Pickering*, 391 U.S. at 568).

[33] *Id.* at 510.

[34] *Id.*

school's regulation of Meriwether's speech would mostly serve to prohibit merely "offensive" speech.[35] For the same reasons, the university's interest in complying with Title IX was not implicated by Meriwether's violation of the pronoun policy.[36]

Finally, the panel held that Meriwether plausibly alleged the university's application of its nondiscrimination policy was not religiously neutral, in violation of his free exercise rights.[37] The court noted that school adjudicators' comments exhibited hostility toward Meriwether's religious beliefs and that irregularities in the school's adjudication process permitted an inference of nonneutrality.[38] Likewise, the school's changing reasons for disciplining Meriwether[39] and changing policy surrounding accommodations[40] permitted an inference that the school had targeted his religious beliefs.[41] The panel also explained that the school's proposal that he stop using pronouns altogether, to avoid an expression violating his religious beliefs, constituted at least indirect coercion and compelled silence.[42] Applying strict scrutiny to the university's actions, the court held Meriwether's free exercise claim could proceed.[43]

As commentators have noted, the court's predicate conclusions that there is an academic freedom exception to *Garcetti* and that Meriwether was speaking on a matter of public concern are debatable.[44] But even if one were to accept the panel's framing of the issue, the court gave short shrift to its *Pickering* balancing by failing to properly account for the university's strong interest in preventing discrimination. The panel's failure to precisely define the school's interest doomed the university un-

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[35] *Id.* at 511.

[36] *Id.*

[37] *Id.* at 512.

[38] *Id.* (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018)).

[39] As alleged, the university first said it was disciplining Meriwether for creating a hostile learning environment, before shifting to allegations of disparate treatment. *Id.* at 514–15.

[40] As alleged, school officials initially allowed Meriwether to refer to Doe by only her last name while referring to classmates with titles and pronouns, but during litigation "the university claim[ed] that its policy d[id] not permit *any* religious accommodations." *Id.* at 515.

[41] *Id.*

[42] *Id.* at 517.

[43] *Id.* In addition, the panel affirmed the dismissal of Meriwether's claim under the Due Process Clause, but vacated the dismissal of his state law claims. *Id.* at 518.

[44] *See* Karen Levit, *Anti-trans Legislation and Rulings Are Part of a Bigger Picture*, ABOVE THE L. (Apr. 16, 2021, 10:47 AM), https://abovethelaw.com/2021/04/anti-trans-legislation-and-rulings-are-part-of-a-bigger-picture [https://perma.cc/4UJE-GH8U] ("[T]he Sixth Circuit contorted itself into finding that *how one refers to a student in class* is a matter of academic freedom that supercedes the limitations of *Garcetti*."); Steve Sanders, *Pronouns, "Academic Freedom," and Conservative Judicial Activism*, AM. CONST. SOC'Y: EXPERT F. (Apr. 12, 2021), https://www.acslaw.org/expertforum/pronouns-academic-freedom-and-conservative-judicial-activism [https://perma.cc/S7CF-PJMH]; *see also* Brief of Defendants-Appellees at 14–33, *Meriwether*, 992 F.3d 492 (No. 20-3289).

der the fact-specific interest balancing *Pickering-Connick* requires, making the court's conclusion that "the *Pickering* balance strongly favors Meriwether"[45] practically inevitable. But universities *do* have an interest in preventing discrimination, as courts have recognized. Further, ensuring students receive equal opportunities in "hostile-free" learning environments[46] serves the academic freedom principles the panel underscored.

In balancing the interests of the university and professor as required at the second step of the *Pickering-Connick* test, the court first defined each party's interests at the conceptual level — the "interest-definition" stage — and then "[t]urn[ed] to the facts"[47] to balance those interests as they were implicated by the facts of this case — the "interest-balancing" stage. At the interest-definition stage, in a strikingly cramped, one-paragraph analysis of the university's "side of the ledger,"[48] the court failed to adequately consider the university's interest in "ensur[ing] transgender students do not suffer discrimination."[49] Judge Thapar wrote that the university "relie[d] on" a case it cited in its brief, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[50] to support the proposition that it has a compelling nondiscrimination interest.[51] Subtly, Judge Thapar dismissed the self-evident nature — or at least the clear plausibility — of a university's interest in stopping discrimination against its students. He framed the university's nondiscrimination interest as dubious, suggesting that it required direct support in case law and that *Harris* offered the only possible support for such an interest.[52]

The panel then rejected *Harris* as irrelevant because it "did not hold — and indeed, consistent with the First Amendment, could not have held — that the government always has a compelling interest in regulating employees' speech on matters of public concern."[53] However, that *Harris* does not support the proposition that the government "always" has a compelling interest in regulating employees' speech "on matters of public concern" is immaterial. The university needed only to, and purported only to, assert a compelling interest in stopping discrimination against trans students, which it asserted outweighed the professor's interests.[54] Yet in shifting its analytical focus to the notion that the government does not "always" have a compelling interest in

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[45] *Meriwether*, 992 F.3d at 511.
[46] Bonnell v. Lorenzo, 241 F.3d 800, 822 (6th Cir. 2001).
[47] *Meriwether*, 992 F.3d at 510.
[48] *Id.*
[49] Brief of Defendants-Appellees, *supra* note 44, at 35.
[50] 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
[51] *Meriwether*, 992 F.3d at 510.
[52] *See id.*
[53] *Id.*
[54] *See* Brief of Defendants-Appellees, *supra* note 44, at 34.

regulating employee speech, the panel failed to even allow for the possibility that the university had a compelling nondiscrimination interest in this specific situation. In framing *Harris* first as the only possible support for the university's nondiscrimination interest and then as irrelevant for failing to support an unasserted proposition, the panel undermined the validity of the university's nondiscrimination interest.

The court's skepticism toward the school's nondiscrimination interest sharply contrasted with its sympathy toward the professor's interests. In its three-paragraph analysis of Meriwether's interests,[55] the court gave Meriwether the benefit of the assumption — undefended and unacknowledged — that his desire to not use "she/her" pronouns implicated academic freedom.[56] Judge Thapar stressed "the robust tradition of academic freedom in our nation's post-secondary schools"[57] and portrayed that tradition as powerful enough to "alone offer[] a strong reason to protect" Meriwether's speech.[58] Yet he did not mention any comparable institutional tradition of nondiscrimination for universities.

Despite the court's framing, universities do have a strong interest in preventing discrimination against students.[59] In *Bonnell v. Lorenzo*,[60] the Sixth Circuit explained that a university's "interest in maintaining a hostile-free learning environment, particularly [but not only] as it relates to its Title IX funding, is well recognized."[61] The *Bonnell* panel concluded a Michigan college's interest in disciplining a professor for his obscene and harassing language outweighed the professor's academic freedom interest and free speech rights under *Pickering*.[62] The Supreme Court also has recognized that nondiscrimination policies may ensure that "leadership, educational, and social opportunities . . . are available to all students" and may "encourage[] tolerance, cooperation, and learning among students."[63] The Court thus validated that such institutional

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55 *Meriwether*, 992 F.3d at 509–10.

56 *See id.*; *see also* Sanders, *supra* note 44.

57 *Meriwether*, 992 F.3d at 509 (quoting Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001)).

58 *Id.*

59 Indeed, one law professor described *Meriwether* as an "easy case" because "[r]ules against discrimination obviously promote the delivery of educational services." Andrew Koppelman, Opinion, *Free Speech Gone Wild: The* Meriwether *Case*, THE HILL (Aug. 17, 2020, 11:30 AM), https://thehill.com/opinion/judiciary/512306-free-speech-gone-wild-the-meriwether-case [https://perma.cc/CW6G-XQC9]; *see also* Vikram David Amar & Alan E. Brownstein, *Analyzing the Recent Sixth Circuit's Extension of "Academic Freedom" Protection to a College Teacher Who Refused to Respect Student Gender-Pronoun Preferences*, JUSTIA: VERDICT (Apr. 16, 2021), https://verdict.justia.com/2021/04/16/analyzing-the-recent-sixth-circuits-extension-of-academic-freedom-protection-to-a-college-teacher-who-refused-to-respect-student-gender-pronoun-preferences [https://perma.cc/HK6M-AS7M].

60 241 F.3d 800 (6th Cir. 2001).

61 *Id.* at 822.

62 *Id.* at 824.

63 Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 688–89 (2010). The Court held that a university's "all-comers policy," requiring that Registered

interests may support reasonable restrictions on free speech rights.[64] Finally, the *Pickering-Connick* framework itself provides an opportunity to recognize the role of nondiscrimination policies in "promoting the efficiency of the public services [that a public university] performs through its employees."[65] Indeed, the public services and "mission" of universities is "ensuring that all students, including transgender students, have equal access to a quality education."[66]

The panel similarly ignored that the academic freedom principles it valorized are themselves served when students experience "hostile-free" learning environments. If academic freedom encompasses that "free exchange of ideas in the college classroom"[67] on which "[o]ur nation's future 'depends,'"[68] as the panel described, then academic freedom depends on more than professors' ability to speak freely on matters of public concern.[69] Academic freedom depends equally, if not more, on students' sense of safety and dignity in the classroom that enables them to speak freely during classroom discussions.[70] As courts have long recognized, universities possess an institutional academic freedom interest in "provid[ing] that atmosphere which is most conducive to speculation, experiment[ation] and creation."[71] Accordingly, nondiscrimination and academic freedom are not diametrically opposed interests as the panel suggested; the university is invested in both and understands that nondiscrimination policies benefit academic freedom.

Although the court would respond that Doe at least "was an active participant in class and ultimately received a high grade,"[72] that

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Student Organizations accept all interested students as members to comply with the school's nondiscrimination policy, did not violate the Christian Legal Society's free speech rights. *Id.* at 669.

[64] *See id.* at 669–70.

[65] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); *see also* Brief of Intervenors-Appellees at 17, *Meriwether*, 992 F.3d 492 (No. 20-3289).

[66] Brief of Intervenors-Appellees, *supra* note 65, at 9; *see also Bonnell*, 241 F.3d at 822 (concluding that college's interests in enforcing sexual harassment policy and "protecting a complaining student from retaliation . . . are all interests which we find to be significant in 'promot[ing] efficiency and integrity in the discharge of [the College's] official duties'" (quoting Connick v. Myers, 461 U.S. 138, 150–51 (1983) (alterations in original))).

[67] *Meriwether*, 992 F.3d at 507.

[68] *Id.* at 505 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[69] *But see id.* at 504–05 (considering only professors' ability to speak freely).

[70] For Doe, that required that she receive equal treatment via the use of an honorific, have her gender identity validated, and not be forcibly outed to her classmates. *See* Brief of Intervenors-Appellees, *supra* note 65, at 5–6.

[71] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also id.* at 250 (plurality opinion) (recognizing academic freedom as a right belonging to both individuals and universities); Parate v. Isibor, 868 F.2d 821, 826 (6th Cir. 1989) (same).

[72] *Meriwether*, 992 F.3d at 511. *But see* Brief of Intervenors-Appellees, *supra* note 65, at 6 (explaining that Doe participated because "in-class participation counted for a portion of [her] final grade").

formulation not only ignored the power differentials at play[73] and the harm Doe experienced[74] but also exhibited a double standard. The court appreciated that the professor's inability to freely express his beliefs was consequential even if he was not wholly *silenced* in the classroom, yet it did not acknowledge that although the student participated she may have still felt unsafe or unwelcomed such that she did not contribute as meaningfully as she otherwise could have. The court's "academic freedom" framing obligated it to a good faith, full consideration of all the academic freedom interests involved — not solely those of Meriwether. As the Sixth Circuit has recognized, "[t]his is particularly so when one considers the unique context [of] . . . a classroom where a college professor is speaking to a captive audience of students."[75]

The court's minimization of the university's nondiscrimination interest matters, partly because it made the outcome of the court's *Pickering* balancing inevitable.[76] It also led the court to likewise minimize the psychological and dignitary harm that Doe experienced, which suppressed her participation and in turn undermined the free exchange of ideas in the classroom.[77] The stakes for academic freedom are high, and they extend beyond *Meriwether*. More classrooms than just Doe's are losing out on the voices and perspectives of trans students — and in some cases, trans students' experiences of harassment push them out of postsecondary education altogether.[78] To ensure that expression of varying and competing viewpoints characterizes campuses, it is crucial to appreciate the complementary relationship between university antidiscrimination policies and academic freedom goals. Indeed, when trans students are excluded, it is academic freedom that suffers, not free speech that wins.

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[73] *See, e.g.*, Abbie E. Goldberg et al., *Transgender Graduate Students' Experiences in Higher Education: A Mixed-Methods Exploratory Study*, 12 J. DIVERSITY HIGHER EDUC. 38, 39 (2019).

[74] *See* Mark Joseph Stern, *What It Feels Like When a Federal Court Gives a Professor the Right to Misgender You*, SLATE (Apr. 13, 2021, 4:02 PM), https://slate.com/news-and-politics/2021/04/transgender-student-misgender-amul-thapar-jane-doe.html [https://perma.cc/D8PJ-8WMZ]. The panel downplayed the fact that Meriwether even misgendered Doe, emphasizing he "accidentally" used "he/him" pronouns for Doe only twice. *Meriwether*, 992 F.3d at 499–500. But misgendering can be unintentional. KC Clements, *What Does It Mean to Misgender Someone?*, HEALTHLINE (Sept. 18, 2018), https://www.healthline.com/health/transgender/misgendering [https://perma.cc/GG6C-2TK5].

[75] Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001).

[76] The panel's interest balancing made no mention of the university's interest in ensuring nondiscrimination apart from Title IX compliance — an unsurprising omission given its lack of precision at the interest-definition stage. *See Meriwether*, 992 F.3d at 511.

[77] *See* Brief of Intervenors-Appellees, *supra* note 65, at 5–6; *cf.* Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (stating that a policy that chills trans individuals' speech "hurts society as a whole by depriving all from the voices of the transgender community").

[78] *See* SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 136 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/G9LU-LLL9] ("Of respondents who were out or perceived as transgender and who experienced some form of harassment, 16% left college or vocational school because the harassment was so bad.").