A NAME OF ONE'S OWN:[1] CRITIQUING PUBLIC SCHOOL TEACHERS' FREE SPEECH CLAIMS TO INTENTIONALLY MISGENDER

Veronica Cihlar*

[1] VIRGINIA WOOLF, A ROOM OF ONE'S OWN (1929).

* J.D., University of Virginia School of Law, 2024. I would first like to thank my family and friends for their unwavering support, as well as Prof. A. Sprightley Ryan, Veronica Percia, Aria Vaughan, Natacha Lam, and Bennett Cho-Smith for their encouragement and insight. I would also like to thank Madison Zardiackas and Brad Bennett at the *Virginia Journal of Social Policy & the Law* for their hard work and thoughtful feedback. Finally, I would like to dedicate this Note to the memory of Prof. Frederick Schauer.

A NAME OF ONE'S OWN: CRITIQUING PUBLIC SCHOOL TEACHERS' FREE SPEECH CLAIMS TO INTENTIONALLY MISGENDER

Veronica Cihlar

In Bostock v. Clayton County*, the Supreme Court held that workplace sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and gender identity. Since then, several federal courts and executive agencies have interpreted that holding to also extend to sex discrimination in education under Title IX of the Education Amendments of 1972. This Note examines one example of that discrimination: the intentional misgendering of transgender students by public school teachers and professors. Specifically, it discusses public school teachers' and professors' free speech claims under the First Amendment against school policies that require them to address transgender students by their preferred pronouns and chosen names. Part I of this Note provides relevant context for this issue by surveying the legal sources (and limits) of public school teachers' and professors' free speech rights, and transgender students' rights to an education free from discrimination on the basis of gender identity. Part II examines both decided and active cases arising out of these rights, which largely take place in the kindergarten-through-twelfth grade ("K-12") context, save for one university case. Finally, Part III analyzes and critiques these free speech arguments before drawing on weaknesses of the K-12 – university distinction, the use of slurs as a potential legal analogue, and legal and scientific evidence of intentional misgendering's harms, to assert that these claims do not deserve First Amendment protection.*

INTRODUCTION

Pronoun use has in recent years ascended to the top of the American political divide as an issue in the ongoing debate surrounding the rights of transgender students. Despite the value of preferred pronoun and chosen name use as a form of gender exploration and identity affirmation during the critical years of adolescence, the idea of referring to all students by pronouns and names they prefer has continued to draw troubling criticism. In 2021, the Becket Fund for Religious Liberty, a non-profit legal and educational institute, found that 54 percent of survey respondents "shared the opinion that public schools should be able to require students and staff to use a

person's preferred gender pronouns."[2] However, two years later the Becket Fund found that 58 percent of respondents "oppose[d] school policies mandating preferred pronoun usage."[3]

This sudden reversal in majority opinion has spilled into increased First Amendment litigation challenging such policies as well. This Note examines the use of specifically free speech claims by public school teachers and professors against public school policies requiring them to address students by their preferred pronouns and chosen names, and argues that these claims should not receive constitutional protection.

Part I of this Note begins by introducing the constitutional, statutory, and case law sources of both public school teachers' and professors' free speech rights and transgender students' rights to an education free from discrimination on the basis of gender identity. Next, Part II examines active and decided federal cases discussing the free speech claims by teachers and professors challenging school pronoun and name policies, at both the kindergarten-through-twelfth grade ("K-12") and university levels. Part III then examines similarities between public K-12 and university-level teachers in the context of addressing students, the use of slurs as a potential discriminatory analogue, and both court references to and scientific studies of intentional misgendering's human harms, to argue that the intentional misgendering of transgender students by public school teachers does not deserve First Amendment free speech protection.[4]

It is important to address the precise scope of this Note, which discusses intentional misgendering and leaves out the variety that is accidental or inadvertent. Additionally, I only address free speech claims by teachers from public schools and not private schools; nor do I examine claims made by peer students or parents

---

[2] THE BECKET FUND FOR RELIGIOUS LIBERTY, RELIGIOUS FREEDOM INDEX: AMERICAN PERSPECTIVES ON THE FIRST AMENDMENT 52 (Montse Alvarado et al. eds., 3d. ed. 2021), https://becketnewsite.s3.amazonaws.com/2021-Religious-Freedom-Index.pdf.

[3] THE BECKET FUND FOR RELIGIOUS LIBERTY, RELIGIOUS FREEDOM INDEX: AMERICAN PERSPECTIVES ON THE FIRST AMENDMENT 8 (Mark Rienzi et al. eds., 5th ed. 2024), https://becketnewsite.s3.amazonaws.com/20240117205008/RFI-2023-Report.pdf.

[4] Moving forward, this Note will use the term "teacher" to encompass both teachers who teach at public K-12 schools and professors who teach at public universities.

filing complaints on behalf of students.[5] Furthermore, arguments in this Note focus on teachers' claims rooted in the Free Speech clause of the U.S. Constitution, rather than those rooted at the state level.[6] Claims arising out of the Free Exercise clause of the First Amendment and similar state-level claims are also outside of the scope of this Note (though these claims are often paired with their free speech counterparts).

[5] For a case addressing First Amendment claims in private education *see* Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163 (D. Colo. 2023) (granting a preliminary injunction for a private Christian preschool alleging First Amendment free speech and free exercise violations under the anti-discrimination provisions of Colorado's Universal Preschool Program). For cases addressing First Amendment challenges of both free speech and free exercise violations from students or parents *see* Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 684 F. Supp. 3d 684 (S.D. Ohio 2023), *aff'd*, 109 F.4th 453 (6th Cir. 2024) (denying an organization of parents and students a preliminary injunction against a school board's policy against intentionally misgendering students); Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658 (8th Cir. 2023) (finding that an organization of parents is likely to succeed on the merits of its First Amendment challenge to a policy requiring students to respect other students' gender identities, and remanding with directions to grant a preliminary injunction); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250 (D. Wyo. 2023) (granting in part and dismissing in part a preliminary injunction against a school board's preferred pronoun and communications policy for a parent who brought First Amendment claims in her roles as parent and teacher, as the mother of a child attending school in the school district in which she teaches).

[6] There are currently two relevant, state-level cases, both in Virginia and one in active litigation, that concern school policies on preferred pronoun use and public school teacher's First Amendment claims against those policies. *See* Vlaming v. W. Point Sch. Bd., 10 F.4th 300 (4th Cir. 2021) (on appeal in the Supreme Court of Virginia, after the trial court dismissed a public school teacher's state free speech and free exercise claims for being fired after refusing to follow a school's preferred pronoun policy); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021) (affirming the trial court's granting of a public school teacher's injunction on state free speech and free exercise claims, against a school disciplining him and firing him for his comments at a public comment meeting on a school's proposed preferred pronouns policy). In both *Vlaming* and *Loudoun County,* the plaintiff teachers made free speech and free exercise claims under the Virginia Constitution claims and under the Virginia Act for Religious Freedom (Va. Code § 57-2.02). *See generally* Caitlin R. Carlson & Emma Hansen, *Pronoun Policies in Public Schools: The Case Against First Amendment Exceptions for K-12 Teachers,* 32 Geo. Mason U. Civ. Rts. L.J. 261 (2022) (for additional analysis of these two Virginia cases).

Finally, the language I use in this Note refers to the rights of transgender students, which should not be interpreted to exclude the rights of students that identify outside of the gender binary (including gender fluid, gender non-binary, and gender non-conforming students). The identities of transgender and gender non-binary students are not mutually exclusive, including within the pronoun and name space[7]– and I believe the below analysis can apply to all students experiencing gender identity discrimination through intentional misgendering. However, this linguistic choice is intended to mirror the language of the case law on our immediate subject, which is limited in its analysis to the rights of transgender students. None of the relevant cases mention or apply their analysis to specifically gender non-binary students, save to mechanically quote an inclusive school policy. This choice may be because courts consider the label "transgender" to encompass all gender minorities, but that question is not addressed in these cases. I acknowledge this aspect of the case law and this Note, as well as that advocating for the rights of students identifying outside of the gender binary is equally as important as for those identifying within it, and I hope those rights specifically are the subjects of additional legal scholarship.[8]

While some scholarship has previously analyzed First Amendment claims challenging preferred pronoun and chosen name policies in K-12 and university settings separately, few have combined them together, and none for the purpose of breaking down the K-12 and university distinction in the context of this issue.[9] Furthermore, scholarship that has analyzed K-12 and university cases together tends to look more broadly at the First Amendment

---

[7] Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 957 (2019) ("Most transgender people, including many who identify as nonbinary, use gendered pronouns such as he and she. However, 29% of transgender respondents to the USTS stated they use "they/them" pronouns.").

[8] *See generally id.*

[9] *See* Inara Scott et. al., *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1019 (2022); *see also* Carlson, *supra* note 6; *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,* 135 HARV. L. REV. 2005 (2022); Brian Soucek & Ryan Chen, *Misunderstanding Meriwether*, 92 FORDHAM L. REV. 57 (2023); Leah N. Rodriguez, Esq., *An Academic Freedom Exception to Garcetti: A Pronoun-Ced Standard to Protect the Free Speech and Academic Freedom Rights of Public University Professors Facing Transgender Pronoun Mandates,* 36 REGENT U. L. REV. 86 (2024).

to include free exercise claims (as well as analogous state-level claims), and further broadens its analysis to contexts like healthcare or employment.[10] Many articles also do not primarily focus on Title IX as a source of civil rights in education for transgender students, instead choosing to ground those rights in implied rights, compelling state interest, or third-party effect analysis.[11]

Finally, no articles on the subject incorporate all three cases of *Willey, Ricard,* and *Dambrot* collectively into their argument for why intentional misgendering in schools should not be constitutionally protected free speech.[12] Given the rapid evolution of this issue in the legal world (for context, *Willey* was decided on June 20, 2023), this Note adds a novel contribution to the discussion by adding newer and previously undecided cases, while also further developing the analogy between intentional misgendering and the use of slurs in schools.

I. ESTABLISHED CIVIL LIBERTIES IN NEW TENSION

A. A Transgender Student's Right to an Education Free from Discrimination on the Basis of Sex and Gender Identity

The specific legal source of transgender students' rights to an education free from discrimination on the basis of sex flows from Title IX of the Education Amendments of 1972, though the state of this right is still somewhat in flux, as there remains a circuit split on whether the reasoning of *Bostock* applies to Title IX.[13] Furthermore,

---

[10] *See* Linnea Kelly, *Call Me by My Name: Protecting Chosen Name and Pronoun Policies in the Face of First Amendment Challenges,* 95 TEMP. L. REV. 327 (2023); *see also* Zachary A. Kayal, *He/she/they "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality,* 57 COLUM. J.L. & SOC. PROBS. 57 (2023); *and* Erin E. Clawson, *I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN ST. L. REV. 247 (2019); *and* Chan Tov McNamarah, *Misgendering,* 109 CAL. L. REV. 2227 (2021).

[11] *See* Bradley A. MacDonald, *What's in A Name?: The Constitutionality of Using Personal Pronouns in Public Schools,* 56 UIC L. REV. 477 (2023); Kelly, *supra* note 11; Kayal, *supra* note 11.

[12] This article is current as of March 1, 2024.

[13] Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731 (2020). *See e.g.,* Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (finding that the reasoning of *Bostock* only applies to Title VII and workplaces and not Title IX and schools, thus declining to extend protections against discrimination "on the basis of sex" to gender identity). *But see* U.S.

Title IX incorporates an Equal Protection Clause framework, and thus this right arguably flows from the Constitution as well.[14] The specific sources of law that interpreted the words "discrimination on the basis of sex" in Title IX to encompass discrimination on the basis of sexual orientation and gender identity are the Supreme Court case *Bostock v. Clayton County, Georgia;* President Joe Biden's Executive Order 13988; respective notices of interpretation and memoranda guidance issued by both the Department of Education (DOE) and the Department of Justice (DOJ); and federal district and circuit court cases.[15]

Dep't of Just. C.R. Div., Title IX Legal Manual § Title IX Cover Addendum post-Bostock: Editor's Note (2023) ("Indeed, in the months following the *Bostock* decision, several federal courts have reached the same conclusion as to Title IX, holding that Title IX protects transgender students from discrimination on the basis of gender identity) (citing e.g., Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 616-17 (4th Cir. 2020) ("Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX."), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (June 28, 2021)).

[14] *See* U.S. Dep't of Just. C.R. Div., Title IX Legal Manual § Lack of States' Eleventh Amendment Immunity Under Title IX (2023) ("42 U.S.C. 2000d-7 contains an express statutory abrogation of Eleventh Amendment immunity for Title IX suits. This abrogation is a valid exercise of Congress' power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Title IX. In addition, Section 2000d-7 is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact 'appropriate legislation' to 'enforce' the Equal Protection Clause. Under either power, the abrogation for Title IX suits is constitutional.").

[15] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731(2020); Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023-25 (Jan. 20, 2021) ("Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation"); 86 Fed. Reg. 32637, 32637-39 (Jun. 22, 2021) (to be codified at 34 C.F.R. ch. I) ("Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County"); Letter from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., C.R. Div. U.S. Dep't of Just., to Fed. C.R. Directors and General Counsels (Mar. 26, 2021) ("Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972"); *See* U.S. Dep't of Just., C.R. Div., Title IX Legal Manual § Title IX Cover Addendum post-Bostock: Editor's Note (Sept. 14, 2023) ("Indeed, in the months following the *Bostock* decision, several federal courts have reached the same conclusion as to Title IX, holding that Title IX protects transgender students from discrimination on the basis of gender identity"); *See, e.g.*, *Grimm v. Gloucester*

In an opinion written by Justice Neil Gorsuch, the Supreme Court held in *Bostock* that "an employer who fires an individual merely for being gay or transgender defies the law" of Title VII of the Civil Rights Act of 1964.[16] In further extending *Bostock*'s holding, President Biden issued Executive Order 13988 shortly after his inauguration, which tasked federal agencies with incorporating the Supreme Court's holding of "sex" to include "sexual orientation and gender identity" into other federal laws that touch on discrimination on the basis of sex, including Title IX.[17] Following President Biden's executive order, the DOE and the DOJ also issued their own interpretive and regulatory guidance supporting that same interpretation.[18]

Cty. Sch. Bd., 972 F.3d 586, 616-17 (4th Cir. 2020) ("Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX."), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (June 28, 2021); *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); *Koenke v. Saint Joseph's Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020). Other circuits reached this conclusion before *Bostock*, relying on their own Title VII jurisprudence. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys' restroom); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (*per curiam*) (school district that sought to exclude transgender girl from girls' restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity"); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, No. 23-CV-069-SWS, 2023 WL 4297186, at 25 (D. Wyo. June 30, 2023) ("Given these considerations, the Court refuses to ignore the possibility that enjoining the [Preferred Names] Policy could subject the District to Title IX sanctions.").

[16] *Bostock*,140 S. Ct. at 1754.

[17] Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023-25 (Jan. 20, 2021) ("Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation"). *See generally* Rachel N. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 FEDERALIST SOC'Y REV. 85 (2022) (providing additional analysis on President Biden's gender identity policies, including in employment and healthcare, as well as information on previous policies from the Obama and Trump Administrations).

[18] 86 Fed. Reg. 32637, 32637-39 (Jun. 22, 2021) (to be codified at 34 C.F.R. ch. I) ("Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County"); Letter from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., C.R. Div. U.S. Dep't of Just., to Fed.

Finally, a number of courts have already begun grappling with the application of *Bostock*'s Title VII interpretation of sex discrimination as inclusive of sexual orientation and gender identity to Title IX. The case law on a variety of issues within the broader question of whether Title IX protects students against discrimination on the basis of gender identity (including gender identity-aligned bathroom usage, athletic participation, and preferred pronoun or chosen name use) is generally trending towards agreement with the Biden Administration's application of *Bostock* to Title IX,[19] though has resulted in a circuit split with at least one circuit (the Eleventh) distinguishing *Bostock* from Title IX.[20] Additionally, a recent case from the Eastern District of Tennessee "enjoined enforcement of the Department of Education's interpretation [of *Bostock* as applying to Title IX] in twenty

---

C.R. Directors and General Counsels (Mar. 26, 2021) ("Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972.").

[19] *See* U.S. Dep't of Just., C.R. Div., Title IX Legal Manual § Title IX Cover Addendum post-Bostock: Editor's Note (Sept. 14, 2023) ("Indeed, in the months following the *Bostock* decision, several federal courts have reached the same conclusion as to Title IX, holding that Title IX protects transgender students from discrimination on the basis of gender identity. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020) ("Although *Bostock* interprets [Title VII], it guides our evaluation of claims under Title IX."), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F. 3d 399 (4th Cir. 2020), *cert. denied*, No. 20-1163 (June 28, 2021); *B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); *Koenke v. Saint Joseph's Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020). Other circuits reached this conclusion before *Bostock*, relying on their own Title VII jurisprudence. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) (transgender boy was likely to succeed on his claim that school district violated Title IX by excluding him from the boys' restroom); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016) (*per curiam*) (school district that sought to exclude transgender girl from girls' restroom was not likely to succeed on the claim because Title IX prohibits discrimination based on sex stereotyping and gender nonconformity"); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, No. 23-CV-069-SWS, 2023 WL 4297186, at 25 (D. Wyo. June 30, 2023) ("Given these considerations, the Court refuses to ignore the possibility that enjoining the [Preferred Names] Policy could subject the District to Title IX sanctions.").

[20] Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (finding that the reasoning of *Bostock* only applies to Title VII and workplaces and not Title IX and schools, thus declining to extend protections against discrimination "on the basis of sex" to gender identity).

states."[21] Circuit courts that have decided cases supporting the Biden, DOE, and DOJ application of *Bostock* to Title IX include the Fourth, Sixth, and Seventh Circuits (the latter two of which reached the conclusion that Title IX includes protections for discrimination on the basis of gender identity before *Bostock* was even decided).[22]

Given the combined authority of *Bostock,* Executive Order 13988, the interpretive guidance from the DOE and DOJ, and the number of federal district and circuit courts that have interpreted *Bostock* as applying to Title IX, the case for the existing federal right of a transgender student to an education free from discrimination on the basis of gender identity is strong. This Note evaluates one specific instance of discrimination on the basis of gender identity: the refusal to use preferred pronouns and chosen names by public school teachers in the classroom, also known as "misgendering."

B. A Teacher's Right to Free Speech as a Public Employee

The second right that this Note explores is a public school teacher's right to free speech in their role as a teacher. This right flows from the Free Speech clause of the First Amendment of the Constitution, which reads "Congress shall make no law… abridging the freedom of speech…" and remains one of our most important individual liberties.[23] Our free speech rights are further incorporated through the Fourteenth Amendment, so they are applicable against state governments as well.[24] The First and Fourteenth Amendments bestow upon everyone those same individual liberties, but with certain limiting principles. Among these limitations are ones that apply specifically to public employees, including public school teachers.

One such limitation is the threshold inquiry created by the Supreme Court's holding in *Garcetti v. Ceballos,* in which the Court held that while public employees (which include public school teachers) have general free speech rights just like you and I, these rights are less absolutely protected when they are acting "pursuant to their official duties" as employees of the state.[25] It is true, and

---

[21] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250, 1289 (D. Wyo. 2023) (citing Tennessee v. U.S. Dep't of Educ., 615 F.Supp.3d 807 (E.D. Tenn. 2022)).

[22] *See supra* note 12.

[23] U.S. CONST. amend. I.

[24] Gitlow v. People of State of New York, 268 U.S. 652 (1925).

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

validated by earlier case law, that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[26] As a counterweight, however, the Court in *Garcetti* held that "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."[27] Because the "pursuant to their official duties" test is a threshold inquiry, if a court finds that a public school teacher was indeed speaking pursuant to their official duties, their First Amendment free speech claim is barred.

If a teacher's claim survives the *Garcetti* "pursuant to their official duties" test, however, the claim must pass another two-prong test for public employees. That test is the *Pickering-Connick* test (from two cases that preceded *Garcetti*), and asks first, whether what teachers are speaking on is a "matter of public concern" and second, if the interest in that free speech on a "matter of public concern" outweighs the state's interest as that teacher's employer in "promoting efficiency of the public services it performs through" them.[28] The *Pickering-Connick* test creates a route after the threshold inquiry for public school teachers to plausibly allege that their in-class speech enjoys First Amendment free speech protection. The *Connick* portion of the *Pickering-Connick* test also elaborates on what speech "on a matter of public concern" might constitute, describing it as speech that may be "fairly considered as relating to any matter of political, social, or other concern to the community."[29] Finally, *Connick* also states that courts should look to the "content, form, and context of a given statement, as revealed by the whole record," to assess whether speech is "on a matter of public concern."[30]

There are thus two key inquiries in drawing a line between teachers' free speech rights and transgender students' rights from being intentionally misgendered. The first is to determine if, when teachers use pronouns or names to address or refer to transgender students, they are speaking "pursuant to their official duties."[31] I,

---

[26] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[27] *Garcetti*, 547 U.S. at 421.

[28] Connick v. Myers, 461 U.S. 138, 146 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[29] *Connick*, 461 U.S. at 146.

[30] *Id.* at 147-48.

[31] *Garcetti*, 547 U.S. at 421.

and two federal district courts, argue that they are, meaning their speech is not protected from states regulating it at public schools.[32] The second, should the first threshold inquiry fail, is to determine whether, when teachers engage in that same conduct, they are speaking "on a matter of public concern."[33] I (and the same two courts) argue below that they are not, and thus that their speech also is not and should not be constitutionally protected.[34]

II. A SURVEY OF CURRENT CASE LAW INVOLVING TEACHERS' FREE SPEECH CLAIMS AGAINST ADDRESSING TRANSGENDER STUDENTS BY THEIR PREFERRED PRONOUNS AND NAMES

Part II of this Note provides a survey of the relevant federal case law on misgendering in schools to orient my arguments in Part III. One of the cases involves a public university professor, while the remaining three involve public school teachers at the K-12 level. In the university case, the court ruled in favor of the professor, while in two of the K-12 cases, the court issued holdings in favor of the defendant school district and its pronoun and name policy on free speech grounds. In the final K-12 case, the court did not reach the merits of the case, as an arrangement between the teacher and the school allowing the teacher to use chosen names while avoiding using pronouns altogether mooted the issue. In Part III, I argue that the approach taken by the K-12 cases on the issue of misgendering should also apply to the university case, despite the potential suitability of a K-12 – university distinction in other contexts.

A. Public Universities and Academic Freedom (Meriwether v. Hartop, 6th Cir. 2021)

Most of the cases that involve teacher claims of free speech against the mandated use of transgender students' preferred pronouns and names have occurred in the K-12 context. In fact, only one case to date has been decided on the same issue in the context of public university education: *Meriwether v. Hartop.*[35] In *Meriwether v. Hartop,* the U.S. Court of Appeals for the Sixth

[32] *See* Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823 (S.D. Ind. 2020); *and* Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250 (D. Wyo. 2023).

[33] *Pickering*, 391 U.S. at 568.

[34] *See Kluge* 432 F. Supp. 3d 823; *and Willey*, 680 F. Supp. 3d 1250.

[35] Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

Circuit reversed the district court's dismissal and held that a university professor plausibly alleged that the university at which he was employed violated his First Amendment rights by compelling his speech through a policy that required professors to address students by their preferred pronouns.[36] The court reasoned that the *Garcetti* threshold rule did not apply to Meriwether's free speech claims, because the Supreme Court in *Garcetti* did not address claims that involved free speech "related to scholarship or teaching."[37] The court then turned to several cases to argue that a professor's "right to lecture," a "core academic function" of university professors, is protected under the First Amendment and to which the *Garcetti* rule cannot apply.[38]

Effectively, the circuit court created an "academic-freedom exception" to the *Garcetti* rule that "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not," and concluded that the rule did not apply to this case.[39] The court then held that Meriwether plausibly alleged a First Amendment free speech claim, first, because through the non-use of the student's preferred pronouns, he had spoken on a "matter of public concern;" and second, because Meriwether's academic freedom and philosophical-religious interests outweighed those of the state in promoting the efficiency of public services (as prescribed by the *Pickering-Connick* framework).[40]

B. Public K-12 Schools

Although only one case to date touches on professors' free speech claims in the university context, several cases do so on the analogous rights of teachers in public K-12 schools. These cases include *Kluge v. Brownsberg Community School Corporation, Willey v. Sweetwater County School District,* and *Ricard v. USD 475 Geary County, KS School Board.*[41]

---

[36] *Id.*

[37] *Meriwether,* 992 F.3d at 504 (quoting *Garcetti,* 547 U.S. at 425).

[38] *Id.* at 504 (quoting Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 249-50 (1957)); *Id.* at 505.

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

[40] *Id.* at 508-10 ("Through his continued refusal to address Doe as a woman, he advanced a viewpoint on gender identity.").

[41] Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823 (S.D. Ind. 2020); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp.

1. Kluge v. Brownsberg Community School Corporation (S.D. Ind. 2020)

The original complaint in *Kluge v. Brownsberg Community School Corporation* contained 13 different claims, including claims under Indiana state law, the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, and the First Amendment.[42] The U.S. District Court for the Southern District of Indiana dismissed Kluge's free speech claims with prejudice, which Kluge did not appeal.[43] The court in fact dismissed all of Kluge's claims save for his Title VII claims of failure to accommodate and retaliation.[44]

On Kluge's free speech claims, the court held that Kluge failed to state a First Amendment free speech claim because his speech was not constitutionally protected, as it was part of his "official duties" as a public employee per *Garcetti.*[45] The court reasoned that while "addressing a student by name may not be part of the… curriculum, it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students."[46] The court concluded that because addressing students is a "core" part of running a classroom, which in turn was a part of Kluge's official duties, the speech at issue was not protected under the First Amendment per *Garcetti,* which alone would have precluded Kluge's free speech claim.[47]

3d 1250 (D. Wyo. 2023); Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 522CV04015HLTGEB, 2022 WL 1471372 (D. Kan. May 9, 2022).

[42] *Kluge*, 432 F. Supp. 3d 823.

[43] *Id.*

[44] As procedural background, the same district court then denied Kluge's motion for summary judgement on his Title VII failure to accommodate and retaliation claims. Kluge appealed, and the circuit court affirmed the district court's holding on Kluge's two Title VII claims. The same circuit court, however, vacated its ruling on denial of rehearing and rehearing *en banc,* before remanding back to the district court after the Supreme Court created a new standard for claims of Title VII religious discrimination under *Groff v. DeJoy*. The case is currently on remand. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021), *aff'd,* 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh'g,* No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023); Groff v. DeJoy, 600 U.S. 447 (2023).

[45] Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 838-39 (S.D. Ind. 2020).

[46] *Id.* at 839.

[47] *Id.*

The court, however, went further and applied the *Pickering-Connick* test despite having the opportunity to dispose of Kluge's claims per *Garcetti* alone. It reasoned that Kluge's choices about addressing students did not involve a matter of public concern, thereby failing the first prong of the *Pickering-Connick* test.[48] It argued that "Mr. Kluge's speech – merely stating (or refusing to state) names and pronouns without explaining that his opposition to "affirming" transgender students was the reason for doing so – adds little to the public discourse on gender identity issues, and therefore is not the kind of speech that is valuable to the public debate."[49] The court characterized the non-use of preferred names or pronouns as "a private interaction" with a student and "a private statement" of Kluge's "subjective perception of that student."[50]

2. Willey v. Sweetwater County School Board (D. Wyo. 2023)

In *Willey v. Sweetwater County School Board,* Willey (the mother of a student who attended school in the same school district in which she taught as a public school teacher) filed a motion for a preliminary injunction against two distinct parts of a school board preferred pronouns policy.[51] The first was a provision (the "Preferred Names Policy") that required teachers to "use a student's preferred name or pronoun at their request," and the second was a provision (the "Student Privacy Policy") that directed teachers to "respect the privacy of all students regarding such choice and not disclose their request to others absent consent."[52] Only the first provision is relevant to the scope of this Note. Willey filed complaints both as a parent along with her husband (known as the "Joint Claims"), and as a teacher in the school district (known as her "Individual Claims").[53] Her Individual Claims included one free speech claim under the First Amendment.[54]

On her free speech claim against the Preferred Names Policy, the U.S. District Court for the District of Wyoming found that Willey's speech was pursuant to her official duties under

[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250 (D. Wyo. 2023).
[52] *Willey,* 680 F. Supp. 3d at 1266.
[53] *Willey,* 680 F. Supp. 3d at 1263-64.
[54] *Id.* at 1264.

Garcetti, and thus her free speech claim did not pass the threshold inquiry and was unlikely to succeed on its merits.[55] Additionally, the court found her speech was not "as a citizen on a matter of public concern," under the *Pickering-Connick* test.[56] While the court conceded that the Preferred Names Policy operated to compel Willey's speech and that "issues of transgenderism are of 'political, social, or other concern to the community'," it concluded that Willey's speech was pursuant to her official duties and that the potential speech's "content, form, and context" did "not give rise to matters of public concern."[57]

The court found that Willey's references as a teacher to individual students by their preferred names and pronouns happened in a "purely private sphere," unlike, for example, if she was conveying "large-scale messages to her students on transgender rights" or was speaking in a public setting.[58] The court found that Willey would be unlikely to succeed on the merits of her individual free speech claim because her potential speech would be pursuant to her official duties and she was not speaking on a matter of public concern.[59] Thus, the court did not feel the need to address the second *Pickering* step of balancing employee free speech and the state's interest in efficiency of public services performed through her.[60]

While the court granted an injunction on the claims against the Student Privacy Policy provision, it denied an injunction as to all other provisions, including on Willey's Individual Free Speech Claim against the Preferred Names Policy provision.[61]

3. Ricard v. USD 475 Geary County, KS School Board (D. Kan. 2022)

---

[55] *Id.* at 1287-88.

[56] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250, 1287 (D. Wyo. 2023).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1287-88.

[60] *Willey* at 1287.

[61] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250, 1288-91 (D. Wyo. 2023). In addition to finding that Willey would be unlikely to be successful on the merits of her Individual Free Speech Claim, the court found that the remaining three factors in deciding whether to grant a preliminary injunction – likelihood of irreparable harm, balance of the harms, and public interest – also weighed against Willey in her free speech claim against the Preferred Names Policy.

The final case involving free speech claims against school policies mandating preferred pronoun and chosen name use is *Ricard v. USD 475 Geary County, KS School Board.*[62] Like *Willey, Ricard* also addresses two policies: a "Preferred Names and Pronouns Policy," which was essentially identical to the "Preferred Name Policy" in *Willey,* and a "Communication with Parents Policy," which prohibited teachers from "referring to a student by the student's preferred names and pronouns in her communications with the student's parents unless the student requests the administration or counselor to do so."[63] This Note again only discusses the first policy.

In this case, Ricard, a public school teacher, was disciplined and suspended after refusing to use a student's preferred name per the Preferred Names and Pronouns Policy.[64] The following school year, however, Ricard had two new transgender students in her class and referred to both by their preferred first names, while avoiding the use of pronouns in class for any of her students (and therefore, avoiding the use of these two students' preferred pronouns, as consistent with her stated beliefs).[65]

While Ricard made a free speech claim against the school's Preferred Names and Pronouns Policy, the school district also represented that "(1) an employee is not required to use preferred pronouns and may refer to students only by their preferred first name, provided the employee elects not to use pronouns for any student; and (2) inadvertent or unintentional use of pronouns to refer to some students, where an employee's standard practice is to refer to all students only by preferred first name, will not transform the employee's standard practice into a policy violation."[66] Ricard testified that she would continue her practice of referring to all students using their preferred names but not their preferred pronouns, and the district indicated this practice would not violate the policy provided that occasional use of pronouns was "inadvertent or unintentional."[67] Because both parties agreed that this practice was acceptable, the court denied a preliminary

---

[62] Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 522CV04015HLTGEB, 2022 WL 1471372 (D. Kan. May 9, 2022).

[63] *Ricard*, 2022 WL 1471372 at *1.

[64] *Id.* at *1-2.

[65] *Id.*

[66] *Id*. at *3.

[67] Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 522CV04015HLTGEB, 2022 WL 1471372 at *3 (D. Kan. May 9, 2022).

injunction without prejudice and did not rule on the merits of Ricard's free speech claim as it pertained to the Preferred Names and Pronouns Policy.[68]

III. WHY MERIWETHER WAS WRONG AND WHY DISCRIMINATORY SPEECH SHOULD NOT ENJOY FREE SPEECH PROTECTION

Of the four cases I address – *Meriwether, Kluge, Willey,* and *Ricard* – only the *Meriwether* court ruled in favor of a public university professor.[69] Additionally, the pre-trial facts of *Meriwether* included a Title IX complaint and investigation procedure, which the other three cases did not (perhaps because Title IX complaints and investigation procedures may be less common at the K-12 level, though the reasons are unclear).[70] However, similar arguments were found in *Meriwether, Kluge,* and *Willey*.[71] By suspending the K-12 and university distinction, as relied upon in *Meriwether* and implicitly affirmed in *Willey,* I critique *Meriwether*'s legal arguments using the reasoning of the *Kluge* and *Willey* courts below.[72] I then turn to the use of slurs as a potential legal analogue to intentional misgendering and complete my argument by presenting the concrete harms of that misgendering.

A. *"Pursuant to their official duties" and the K-12 – University Distinction*

The courts of *Meriwether, Kluge,* and *Willey* all addressed whether a teacher was speaking "pursuant to their official duties" when they were mandated by a school district to use a student's preferred pronouns or chosen names, per the *Garcetti* rule.[73]

The court in *Willey* focused on Willey's role as a public employee to establish that she was speaking pursuant to those

---

[68] *Id.*

[69] Meriwether v. Hartop, 992 F.3d 492, 499-500 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823 (S.D. Ind. 2020); Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d 1250 (D. Wyo. 2023); *Ricard,* 2022 WL 1471372.

[70] *Meriwether*, 992 F.3d at 500-02, 514-15.

[71] *Ricard* unfortunately lacked substantial analysis of Ricard's free speech claims, as the Court did not rule on their merits given the previous agreement between the two parties. *Ricard,* 2022 WL 1471372 at *3.

[72] *Willey,* 680 F. Supp. 3d at 1287; *Meriwether,* 992 F.3d at 505.

[73] Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1960 (2006).

duties.[74] The court noted, per the *Garcetti* rule, that the policy in question only touched on her communications inside the classroom with students or their parents (that her communications occurred "only in her capacity as a teacher in the private sphere"); and that she was only asked to refer to a small group of students, as individuals, in her role as a teacher.[75] By contrast, the *Kluge* court began with noting a concession Kluge himself made, stating that Kluge's own allegations established "that the way in which he addresses students is part of his official duties as a teacher."[76] The court reasoned that teaching students classroom material necessarily requires addressing them to communicate with and relate to them, and that running a classroom is a "core academic duty."[77] While both *Willey* and *Kluge* reached the same conclusion – that pronoun and name use was pursuant to the plaintiffs' official duties as teachers – they did so in different ways. The court in *Willey* used negative reasoning to show that Willey was not speaking as a private citizen in the public sphere (how her speech was limited as a state employee with "official duties"), while the court in *Kluge* affirmatively focused on how Kluge was speaking as a teacher engaged in the core functions of public school teaching (what those "official duties" concretely were).

The *Meriwether* court eschewed this reasoning altogether in creating its academic-freedom exception to *Garcetti*. It emphasized the importance of academic freedom when university professors are engaged in lecture and in "core academic functions, such as teaching and scholarship."[78] In regard to scholarship through research or classroom lecture content, the court's argument is not entirely without merit. Excessive state interference in universities, as opposed to K-12 schools, produces different results, and while the court's comparison of McCarthyism and the banning of "subversive" activities to the required use of preferred pronouns and names seems like an analogical stretch, it remains true that academic freedom operates at a different caliber at universities than at K-12 institutions.[79]

---

[74] *Willey,* 680 F. Supp. 3d at 1285 (citing *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951).

[75] *Id.*

[76] Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020)

[77] *Id.*

[78] Meriwether v. Hartop, 992 F.3d 492, 504-05 (6th Cir. 2021)

[79] *Id.*

Nevertheless: for the court in *Meriwether* to sustain the breadth of it academic-freedom exception regarding the non-use of preferred pronouns and names, it had to conflate other idea- and content-driven "official duties" of professors (like scholarship, research, or lecture) with the essential and rather rote "official duties" of running a classroom. It is here that the *Meriwether* court's reasoning begins to strain. Practically speaking, the necessity of academic freedom applies quite differently to the *contents* of a lecture, live discussion, research paper, or book, than it does to *how* a professor addresses students as a logistical requirement to teach material or lead a discussion – even if that discussion pertains to gender identity issues.[80] It is reasonable for a court to create an academic-freedom exception for university professors, but that exception should not be so far-reaching as to require "academic freedom" for something as non-academic and frankly unexpressive as directly addressing students. It remains unclear the degree to which pronoun or name use requires academic freedom at the level required by the production of scholarly or course material – or how it requires it at all. The court in *Meriwether* "obviated the important distinction between method and content" by "conflating the way in which the class was conducted with the subject matter of the course."[81] In doing so, it over-broadened what academic freedom really means and blurred the definition of the expressive content to which it should apply.

Furthermore, the distinction for addressing students between the university and K-12 levels demands examination, which eventually breaks down the need for a university-specific, academic-freedom exception for the non-use of preferred pronouns and names. While K-12 teachers perhaps may not engage in the same kind of production of scholarship or "marketplace-of-ideas" content, K-12 classrooms do still engage in substantive, thought-provoking discussion, particularly at the high school level. And while the content of material certainly changes from K-12 to university (as it does within K-12 itself), the act of effectively teaching by interacting with students – where the use of preferred pronouns and names finds its flashpoint – is remarkably similar.

Aside from, for example, individual but class-wide preferences for addressing all students by honorifics and last names

[80] *Id.* at 506 (noting that in Meriwether's class, gender identity was a "hotly contested matter of public concern that 'often' [came] up during class").

[81] Scott, *supra* note 10, at 1019.

instead of by first names,[82] how K-12 teachers and university professors use names and pronouns when addressing or referring to students is in fact identical, as is their purpose: to speak directly to or somehow about a student. And as both the *Willey* and *Kluge* courts made clear, addressing students is speech that is pursuant to public school teachers' official duties. It is thus challenging to see precisely why, then, the court of *Meriwether* chose to include how a professor interacts with students – speaks with them, speaks about them – in its creation of an academic-freedom exception to the *Garcetti* rule specific to universities, when that type of interaction is hardly different at K-12 schools.[83]

B. "On a matter of public concern" and "Non-ideological ministerial tasks"

The court in *Meriwether,* however, erred in a more crucial way that does not require establishing the similarities between pronoun and name use in addressing students at universities and K-12 schools. The court began by writing that "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character," somewhat conflating their *Garcetti* exception and part of the *Pickering-Connick* test.[84] The court then gave an example of the kind of speech that would not enjoy the free speech protection that it granted to the non-use of preferred pronouns and names.[85] The court wrote, "A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment."[86] What the court failed to address in making this argument is how referring to a student during

[82] *Meriwether,* 992 F.3d at 499 ("On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political Philosophy. When using that method, he addresses students as "Mr." or "Ms." He believes "this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor" and "foster[s] an atmosphere of seriousness and mutual respect.""").

[83] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d at 1288 (D. Wyo. 2023) (the Court in *Willey* affirmed the academic-freedom exception as university-specific and it declined to extend it to the K-12 context); *Meriwether,* 992 F.3d at 505.

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

[85] *Id.*

[86] *Id.*

lecture or during class discussion is any different than referring to a student when calling roll.

This argument was also one that the defendant university made, but that the court disposed of without properly examining.[87] In response, the court only argued that "titles and pronouns carry a message" and in support, cited feminist critiques of historical deference to masculine pronouns as linguistically contributing to women's ongoing social invisibility.[88] That response, however, does not erase the court's prior admission that calling roll – or, more specifically, calling the names of students in a way identical to addressing them during class discussion or lecture – is a "non-ideological ministerial task" that does not itself constitute speaking on a matter of public concern. The court in *Meriwether* cannot simultaneously sustain that calling roll is non-ideological and ministerial[89] – which in Meriwether's actual class, would have included gendered titles, names, and possibly pronouns – and that "titles and pronouns carry a message."[90] The lack of any tangible difference between calling roll and addressing students as a teacher or professor renders those arguments mutually exclusive, and the court's reasoning contradictory.

Moreover, the court's reasoning about calling roll produces an absurd result. Its logic would constitutionally allow for a university to regulate a professor's speech in referring to students by their preferred honorifics, pronouns, or names during roll call, but not require that practice during lecture or class discussion. That practice would undoubtedly produce confusion in the classroom, leading to inefficiency. Given the inefficiency (if nothing else) of the practice, it is one that would likely also fail the second prong of the *Pickering-Connick* test (the balancing of a public school teacher's free speech interests with the state's interest of providing public services efficiently through them).[91]

---

[87] *Id.*

[88] *Meriwether,* 992 F.3d at 507, 509.

[89] In conducting further research to find additional tests for what "non-ideological ministerial tasks" could be, little to no guidance was found informative to our present case. *Meriwether*, 992 F.3d at 507.

[90] *See Meriwether,* 992 F.3d at 499 ("On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political Philosophy. When using that method, he addresses students as 'Mr.' or 'Ms.' He believes 'this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor' and 'foster[s] an atmosphere of seriousness and mutual respect.'"); *and Meriwether* at 507.

[91] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

As with their analysis of "pursuant to their official duties," the courts in *Willey* and *Kluge* took different routes to come to the same conclusion that the non-use of preferred pronouns and names does not constitute speech "on a matter of public concern."[92] The court in *Willey* drew a clear distinction between speaking on transgender issues in the classroom and using pronouns and names. It stated that "[w]hile it could fairly be said issues surrounding transgenderism are of 'political, social, or other concern to the community,' the 'content, form, and context' of the potential speech at issue in this case do not give rise to matters of public concern."[93] The court further wrote, "[h]ad Mrs. Willey been disciplined (or even faced with the threat of discipline) for speaking out against the Policy or its justifications in a *public setting*—such as speaking at a school board meeting or a rally as a concerned citizen—it would present an entirely different set of circumstances."[94] Though the court could have elaborated on its brief reasoning (and perhaps deliberately did not so as not to run afoul of *Meriwether,* which it distinguished based on *Meriwether*'s university context), it is clear that the *Willey* court did not think that addressing students in class constituted speech on a matter of public concern.

The court in *Kluge* came to a similar conclusion by emphasizing more specifically how little the act of using preferred pronouns or names adds to the substantive discussion over transgender issues. The court first conceded that precedent demanded "recognizing that "gender identity" is a "sensitive political topic[ ]" that is "undoubtedly [a] matter[ ] of profound value and concern to the public.""[95] Whether or not it is effective to consider a public political debate over the rights of a historically marginalized class as a factor in possibly circumscribing that same class's legal rights is a separate, though significant, matter. However, the court did find that "the act of referring to a particular student by a particular name does not contribute to the broader public debate on transgender issues. Instead, choosing the name to call a student constituted a private interaction with that individual

[92] Connick v. Myers, 461 U.S. 138, 146 (1983).

[93] Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F. Supp. 3d at 1285 (D. Wyo. 2023) (citing Connick, 461 U.S. at 146).

[94] *Willey,* 680 F. Supp. 3d at 1287.

[95] Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d at 839 (S.D. Ind. 2020) (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018)).

student and a private statement about Mr. Kluge's subjective perception of that student."[96]

Both the reasoning of *Willey* and *Kluge* should apply to *Meriwether* and future university cases like *Meriwether* because there is no reason make a university – K-12 distinction when it comes to addressing students by their preferred pronouns or names. Thus, there is no reason that those courts' reasonings should only apply to K-12 teachers and not to university professors on that issue. Finally, another potential absurd result of *Meriwether* is that students could retain a right to be free from intentional misgendering by teachers – to be free from discrimination on the basis of their gender identity – at K-12 schools, only to suddenly lose those rights when they enter university. In fact, for transgender students attending public school in the Southern District of Indiana or the District of Wyoming and hoping to attend a public university in the Sixth Circuit, that result may no longer just be potential.

C. Slurs by Public School Employees as a Potential Analogue to Intentional Misgendering

While this Note has put forth critiques of the free speech claims in *Meriwether*, that court's reasoning, and arguments for why that case should have come out like *Kluge* and *Willey*, it now shifts to potential legal points of comparison for intentional misgendering as discriminatory language.

In making the argument that the non-use of preferred pronouns carries a message whose expression ought to be protected at universities, the *Meriwether* court opined that "[n]ever before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity."[97] The court here is not wrong. What presents a greater challenge is why, given established civil rights protections for students under statutes like the Civil Rights Act and Title IX, we should make an exception allowing professors to invalidate transgender identities while validating cisgender ones – to, essentially, discriminate against transgender students – while

[96] *Id.*

[97] Meriwether v. Hartop, 992 F.3d 492, 509 (6th Cir. 2021).

we rightfully prohibit that discrimination for other protected classes.[98]

For example, in *Dambrot v. Central Michigan University,* the U.S. Court of Appeals for the Sixth Circuit (the same court that decided *Meriwether*) found that a university basketball coach's use of the "n word" as a way to motivate student athletes was not protected speech under the First Amendment.[99] Although the court in *Dambrot* ruled in favor of the plaintiff university coach on his overbreadth and vagueness claims against the university's non-discrimination policy, it affirmed the district court's denial of his motion for summary judgement on his First Amendment free speech and academic freedom claims.[100] The court found that the defendant university's termination of the plaintiff coach did not violate the First Amendment, because the coach's repeated use of a racial slur did "not touch on a matter of public concern," nor did it "enter the marketplace of ideas or the realm of academic freedom."[101]

In holding that the coach's use of a racial slur was not protected by the First Amendment,[102] the court reasoned that "… [Coach] Dambrot's locker room speech imparted no socially or politically relevant message to his players," and, "assuming but not deciding, Dambrot is subject to the same standards as any teacher in a classroom… Dambrot's speech served to advance no academic message and is solely a method by which he attempted to motivate – or humiliate – his players."[103] In striking down Dambrot's attempt at creating an academic freedom exception (though to the *Pickering,* rather than the *Garcetti,* rule), the court went so far as to say that "Dambrot's resort to the First Amendment for protection is not well taken."[104]

To create a similar analogy to *Meriwether*: had, for example, Meriwether "…refused to address Black male students by the honorific "Mr." but accorded that honor to White students, on the basis of a religious belief about the superiority of White people, it is hard to imagine the court justifying that differential treatment in

---

[98] *See, e.g.*, Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c; *and* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; *and* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

[99] Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1185-91 (6th Cir. 1995).

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1185.

[103] *Id.* at 1187, 1190.

[104] Dambrot v. Cent. Michigan Univ., 55 F.3d 1177, 1191 (6th Cir. 1995).

the same way it has justified Meriwether's behavior here."[105] Though that hypothetical analysis pertains to free speech specifically as an expression of an alleged religious belief, it remains applicable to Meriwether's free speech claim.

I concede that the analogy of the intentional misgendering of transgender students to both (a) the use of racial slurs by public school employees to address Black student athletes as well as (b) the hypothetical refusal to address Black students in class by honorifics, remains imperfect. Not only are the etymologies, lived realities, and political and social histories of race and sex discrimination different, but the formal legal protections against discrimination on the basis of race and sex (including gender identity) are also structurally different. The majority opinion in *Meriwether* also attempts to distinguish *Dambrot* by stating that the plaintiff professor "advanced a viewpoint on gender identity" by refusing to address a transgender student as a woman, while a "basketball coach using racial epithets to motivate players [did] not" (though its reasoning behind this distinguishing goes no further).[106]

Nevertheless, the similarities between discriminatory language like racial slurs and intentional misgendering can overcome their differences in a way that allows courts to apply *Dambrot* to cases like *Meriwether,* in the same way they should apply the reasoning of *Kluge* and *Willey*. Like with the use of slurs to address students, public school teachers that intentionally misgender transgender students both dehumanize and discriminate against those students.[107] *Dambrot* supports the assertion that discriminatory language does not meaningfully contribute to fruitful discussions about social issues, which broadly include the rights of historically marginalized groups, in the same way *Kluge* and *Willey* do.[108] Indeed, to conflate those meaningful discussions with using

---

[105] Scott, *supra* note 10, at 1020.

[106] Meriwether v. Hartop, 992 F.3d 492, 508-09 (6th Cir. 2021).

[107] Kelly, *supra* note 11, at 327 ("Aidyn Sucec, one of the trans students impacted by his teacher's disparate treatment of transgender students in *Kluge*, stated that Kluge's behavior left him feeling 'alienated, upset, and dehumanized'" (citing Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d at 872 (S.D. Ind. 2020))).

[108] *Dambrot,* 55 F.3d at 1180, 1187. *Kluge,* F. Supp. 3d at 839 (finding that "Mr. Kluge's speech – merely stating (or refusing to state) names and pronouns without explaining that his opposition to "affirming" transgender students was the reason for doing so – adds little to the public discourse on gender identity issues, and therefore is not the kind of speech that is valuable to the public debate"). Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, 680 F.

discriminatory language directly addressing and stereotyping members of those groups is a mistake. The generalized existence of conversations around issues of public concern that are particularly relevant to specific demographics is not a carte blanche for the targeted verbal humiliation of those demographics' members.

Moreover, while public school teachers and coaches certainly play different roles in school settings, they both sit at points of power and authority over their students and their futures.[109] In schools, teachers speak in settings where "students are a 'captive audience' who may find themselves intimidated by the person who has the ability to pass upon them a poor grade" and by extension to potentially affect their academic and even economic futures.[110] Similarly, the Court in *Dambrot* noted that the school coach "controls who plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place."[111] Coaches may also hold the keys to student athletes' academic and economic futures not only through that gametime discretion, but also through relationships with athletic recruiters, both of which implicate ongoing athletic development and potential scholarships to universities. These dynamics contribute to coaches and teachers sharing the commonality of a "captive audience," where the "'degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'" to discriminatory language.[112]

Supp. 3d at 1287 (D. Wyo. 2023) (finding that Willey's references as a teacher to individual students by their preferred names and pronouns happened in a "purely private sphere," unlike, for example, if she was conveying "large-scale messages to her students on transgender rights" or was speaking in a public setting).

[109] Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. FREE SPEECH L. 615, 655-57 (2022).

[110] Bonnell v. Lorenzo*,* 241 F.3d 800, 819 (6th Cir. 2001) (partially quoting Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986)) (holding *inter alia* that a college professor's use of various vulgar terms in a classroom setting was not protected speech under the First Amendment). Importantly, the court in *Bonnell* also relied significantly on *Dambrot*'s holding about a sports coach's speech to conclude that this professor's speech was not protected, which further implies that both sports coaches and professors are subject to similar standards in this context and in turn weakens *Meriwether's* distinguishing away of *Dambrot*. *See Bonnell*, 241 F.3d at 819-820 (citing *Dambrot,* 55 F.3d at 1180). *But see* Meriwether, 992 F.3d at 508.

[111] *Dambrot*, 55 F.3d at 1190.

[112] Corbin, *supra* note 110, at 656 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

Additional legal scholarship further supports the general similarities between intentional misgendering and the use of derogatory slurs.[113] In an article for the *California Law Review* titled "Misgendering," author Chan Tov McNamarah writes that misgendering "portrays gender minorities as inferior to their cisgender counterparts," and thus, "the otherwise inoffensive language acts as a slur against gender minorities."[114] McNamarah reasons that while pronouns and names are not "by themselves derogatory, they are when they are applied as such," in a way that is similar in derogation to slurs. [115]

Ultimately, both slurs and intentional misgendering are forms of speech that public schools should be able to regulate, and especially their use in reference to students by their employees – which include teachers, professors, and coaches. The use of such language behind a false justification of speaking on matters of public concern should not be protected by the First Amendment.

D. The Harms of Misgendering

Although this Note has already presented arguments grounded in legal reasoning as to why the intentional misgendering of transgender students by public school teachers and professors should not be considered protected free speech under the First Amendment, the last section of this Note presents scientific evidence of the substantial harms of that misgendering. This analysis is not only relevant to a procedural "irreparable harm" inquiry in a motion for injunctive relief, but also humanizes the issue at hand.

Multiple cases have provided evidence for why misgendering at school causes tangible harm to transgender students. The court in *Hecox v. Little,* a case that examined athletic participation by transgender women athletes on teams aligned with their gender identities, noted that "courts have denounced such misgendering as degrading… and potentially mentally devastating to transgender individuals."[116] It cited another case, *Hampton v.*

---

[113] Chan Tov McNamarah, *Misgendering,* 109 CAL. L. REV. 2227 (2021).

[114] *Id.* at 2259.

[115] *Id.*

[116] Hecox v. Little, 479 F. Supp. 3d 930, 957 (D. Idaho 2020), *aff'd*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023), and *aff'd*, 79 F.4th 1009 (9th Cir. 2023), and *aff'd in part*, *vacated in part, remanded*, 104 F.4th 1061 (9th Cir. 2024), *as amended* (June 14, 2024)

Baldwin, which noted through expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating."[117] A separate case also relied on expert testimony from "a developmental and clinical psychologist who specializes in working with children and adolescents with gender dysphoria," who testified that "it would be psychologically damaging for a transgender child [identifying as a girl] to be… repeatedly referred to by her birth name and male pronouns."[118] Finally, yet another case characterized misgendering as a type of harassment when describing the alleged harassment of a transgender teacher: "The harassment included frequent misgendering—being referred to with names, pronouns, or terms associated with a different gender identity."[119]

Apart from case refences to and categorization of the harms of misgendering, there also exists ample scientific evidence of the depth of these harms. In a peer-reviewed research journal titled *Stigma and Health* published by the American Psychological Association, researchers found a positive association between the perceived frequency of misgendering, feelings of stigmatization, and psychological distress.[120] Furthermore, in an annual study published by the Trevor Project, a leading non-profit organization focused on suicide prevention among LGBTQ+ youth, researchers found that transgender and nonbinary youth "who reported having their pronouns respected by all or most of the people in the lives attempted suicide at *half* the rate of those who did not have their pronouns respected."[121] Finally, in a study published by the *Journal of Adolescent Health,* a peer-reviewed medical journal, researchers led by a team at The University of Texas at Austin found that for transgender and gender non-confirming youth, "chosen name use in more contexts was associated with lower depression, suicidal ideation, and suicidal behavior" and "reduce[d] mental health

---

[117] Hampton v. Baldwin, 2018 WL 5830730, at *2 (S.D. Ill. Nov. 7, 2018).

[118] Bd. of Educ. of the Highland Loc. Sch. Dist. v. United States Dep't of Educ., 208 F. Supp. 3d 850, 855, 857 (S.D. Ohio 2016).

[119] Eller v. Prince George's Cnty. Pub. Sch., 580 F. Supp. 3d 154, 162 (D. Md. 2022).

[120] K.A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering,* 3 STIGMA & HEALTH 53 (2018).

[121] THE TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020 at 2, 10 (2020) (emphasis added); *See also* THE TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020: INTRODUCTION https://www.thetrevorproject.org/survey-2020/?section=Introduction.

risks."[122] News citations to that same study reported that specifically, the study found that "[c]ompared with peers who could not use their chosen name in any context, young people who could use their name in all four areas [of school, home, work, and with friends] experienced 71 percent fewer symptoms of severe depression, a 34 percent decrease in reported thoughts of suicide and a 65 percent decrease in suicidal attempts."[123] Furthermore, the study found that "having even one context in which a chosen name could be used was associated with a 29 percent decrease in suicidal thoughts."[124]

The clear evidence of the harms of misgendering and the benefits of using preferred pronouns and chosen names only further strengthens the argument for why intentional misgendering of students by teachers should not be First Amendment-protected free speech.

CONCLUSION

Free speech sits in the very first of the constitutional amendments for good reason: it is a cornerstone individual right. This right allows us to exchange and refine ideas, which lead to academic, entrepreneurial, and creative developments that improve and fulfill our lives and those of others; it fuels a functioning democracy by protecting us when we hold governments accountable by speaking truth to power; and perhaps most intimately, it frees us from the corruptive forces of regimes built on fear of self-expression instead of trust. This Note would not exist without it.

Importantly, however, no free speech is absolute; it must compromise with other important interests whose lines may be difficult but worthwhile to draw. To that end, a school requirement to address all students by the pronouns and names they prefer, which most relevantly protects students of gender minorities as it is simply assumed for their cisgender peers, does not endanger any of the above free speech values. Addressing a student without discriminating against them does not prevent a public school teacher

---

[122] Stephen T. Russell, et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth,* 63 J. ADOLESCENT HEALTH 503 (2018).

[123] THE UNIVERSITY OF TEXAS AT AUSTIN, *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths*, UT NEWS (Mar. 30, 2018), https://news.utexas.edu/2018/03/30/name-use-matters-for-transgender-youths-mental-health/ (citing Russell, *supra* note 123, at 503).

[124] *Id.*

or professor from maintaining their own views or discussing those views with others. Moreover, the values of free speech cannot be used as a cloak to discriminate against or harass those under the state's charge, who either cannot leave that charge or for whom it would be impractical to do so. No student should have to carry the dignitary burdens of humiliation, stigma, and attitudes of social inferiority or outright nonexistence each time they are addressed as a price for their education.

I began this Note began by introducing the legal landscape of both transgender students' rights to an education free from discrimination on the basis of gender identity, and public school teachers' rights to free speech at public schools and universities. I provided a survey of the current case law applying these rights to teachers' free speech claims of intentional non-use of students' preferred pronouns and names (also known as misgendering). Finally, by breaking down the K-12 – university distinction on the issue of addressing students, analogizing misgendering to the use of slurs at schools, and demonstrating the scientifically studied harms of misgendering, I argued that the intentional misgendering of students at K-12 schools and universities should not be constitutionally protected free speech under the First Amendment.

Transgender students, just like all students, deserve schools free from discrimination – and it is my hope that if nothing else, this Note has been able to contribute, in any small way, to that point.

***