MISUNDERSTANDING *MERIWETHER*

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Meriwether v. Hartop *is widely seen as one of the most important academic freedom and transgender rights cases of recent years. Whether praising it as a victory for free speech or condemning it as a threat to educational equality, commentators across the political spectrum have agreed on one thing: the U.S. Court of Appeals for the Sixth Circuit did something big when it held that professors at public universities have a First Amendment right to misgender their students in class. But contrary to popular belief,* Meriwether *held no such thing. In fact, the Sixth Circuit could not have held what nearly everyone believes it did, given the case's procedural posture.* Meriwether *has been misunderstood, and this Article aims to put a halt to the false narrative that has emerged around* Meriwether *before its consequences continue to spread.*

Whereas previous work has explained why Meriwether*'s holding is wrong, this Article delves into the complicated intersection of civil procedure and government employee speech claims to show why* Meriwether*'s holding is different, and far less important, than its foes and friends alike seem to think. In doing so, the Article also shows how a false legal narrative can develop, spreading from an opinion that encourages the mistake, to advocates and press who eagerly report it, to commentators, legislators, and courts each with reasons of their own for inflating the opinion's importance, eroding gender identity protections along the way. This Article, finally, situates the widespread misunderstanding of* Meriwether *alongside other precedential mistakes and offers insight into how they might be counteracted before further distorting the law and threatening important equality rights.*

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INTRODUCTION

Professors at public universities have a First Amendment right to misgender their students in class. So the U.S. Court of Appeals for the Sixth Circuit is said to have held in *Meriwether v. Hartop*,[1] a free speech case that Professor Nicholas Meriwether brought against Shawnee State University, the public college in Ohio where he teaches. Since the Sixth Circuit issued its opinion in March 2021, this story of free speech trumping transgender rights has been told, repeatedly, by advocates,[2] reporters,[3] scholars,[4] state legislators, and attorneys general[5]—as well as by judges[6] across the country—whether they like the holding or not. But this story is wrong. *Meriwether* held no such thing. A case many have heralded as one of recent years' most important academic freedom victories, and many others have derided as one of the worst setbacks for transgender rights, is actually neither. *Meriwether* has been misunderstood.

This Article aims to clear up the misunderstanding—in fact, to stop it in its tracks before its consequences continue to widen. The false narrative around *Meriwether* has already led universities to change policies that

1. 992 F.3d 492 (6th Cir. 2021). Unless otherwise noted, all references to "*Meriwether*" refer to the Sixth Circuit's March 2021 opinion reversing the district court's dismissal of the case.
2. *See infra* Part II.A.
3. *See infra* Part II.B.
4. *See infra* Part II.B.
5. *See infra* Part II.C.
6. *See infra* Part II.C; *infra* notes 209–16 and accompanying text.

previously protected trans students from being misgendered;[7] it has provided a springboard for legislation aiming to broaden the (nonexistent) right to misgender from university professors to K–12 teachers;[8] it has provided fodder for states opposing the Biden Administration's proposed expansion of Title IX[9] protections at federally funded schools;[10] and it has been relied upon by litigants and judges to make new precedent on the basis of an inflated view of what *Meriwether* itself held.

To understand why *Meriwether* did something far narrower than most have assumed requires a close look at the intersection of civil procedure and government employee speech doctrine, the complexities of which have generally been overlooked in the press releases, media reports, and legislative debates about *Meriwether*, but also (for different reasons) in the amicus briefs, scholarly commentary, and judicial reliance on the case.

Whereas most have agreed—whether with excitement or dismay—that the Sixth Circuit established a constitutional right for professors to choose what pronouns and honorifics to use when referring to their transgender students, the *Meriwether* decision did not do so. In fact, the *Meriwether* decision *could not* have done so. It could not because the free speech rights of government employees hinge on a balancing of their speech's value against its potential for disruption. And at the point at which *Meriwether* was decided, the court did not have any facts, or even allegations, about potential disruptions to the university or affected students.[11]

At most, then, *Meriwether* stands for the proposition that professors can choose what pronouns to use if doing so will not disrupt their students' educational experience, expose their school to legal liability, or cause other disruption. These, to put it mildly, are enormous ifs. But each assumption is necessary for professors like Meriwether to have the rights they claim. The upshot of *Meriwether*, then, amounts to this: professors can misgender their students if and only if the students do not care and Title IX and the Equal Protection Clause do not apply. This, of course, does not have quite the same force as the story too often told about *Meriwether*.

Part I of this Article explains the collision between free speech and educational equality at issue in the *Meriwether* case. It looks closely at the procedural and substantive doctrines that intersect when a public university tries to dismiss a professor's free speech claim. It then shows how these intersecting doctrines limit the possibilities for what courts can hold and,

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7. Settlement Agreement and Release, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753 (S.D. Ohio Mar. 29, 2022), https://ohiocapitaljournal.com/wp-content/uploads/2022/04/Meriwether-Final-Settlement-w_Meriwether-signature.pdf [https://perma.cc/WU48-EJLS]; *infra* notes 301–01 and accompanying text.

8. TENN. CODE ANN. § 49-6-5102 (2023); *see infra* notes 237–43 and accompanying text.

9. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–07, 86 Stat. 235, 373–75 (codified in scattered sections of 20, 29, and 42 U.S.C.).

10. Letter from Jonathan Skrmetti, Tenn. Att'y Gen. & Rep., to Hon. Miguel Cardona, Sec'y of Educ., U.S. Dep't of Educ. (Sept. 12, 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-34-letter.pdf [https://perma.cc/83MA-G55W]; *see infra* text accompanying notes 247–49.

11. *See infra* Part I.D.

more specifically, what was possible for the Sixth Circuit to hold when it rejected Shawnee State's motion to dismiss Meriwether's claim. Part I, in short, explains what the *Meriwether* decision actually did.

Part II describes what everyone seems to think *Meriwether* did and how that came to be. It offers a detailed account of a false legal narrative emerging from a variety of sources, often opposing ones, each with their own motivation or justification for inflating the case's importance. Judges, litigators, reporters, commentators, other government officials, and academics all are implicated—one of this Article's authors included.[12]

Recognizing how a false narrative about a case like *Meriwether* can spread helps show how such misunderstandings or distortions can be prevented. That is the work of Part III, which situates this case within a broader literature about precedential mistakes, while also using the specificity of this particular case study to show how the conventional wisdom about *Meriwether* might have been, and might still be, otherwise. As the consequences of *Meriwether* continue to ripple outward, the stakes of misunderstanding are high—both for academic freedom and for trans students, whose educational opportunities are under increasing threat. Part III offers insight into what can be done, not just here, but in similar cases to come.

I. WHAT *MERIWETHER* HOLDS

Remarkably little of the press, commentary, and subsequent reliance on *Meriwether* gets its holding right. As Part II will show, *Meriwether* is broadly seen as holding that public university professors have a right under the First Amendment to misgender their students in class. But *Meriwether* did not hold that, and in fact, the Sixth Circuit could not have done so given the case's procedural posture.

To see this, however, requires some doctrinal background, both about free speech claims by government employees—university professors in particular—and about the procedural particulars of Meriwether's case at the time the Sixth Circuit weighed in. Part I offers the necessary doctrinal background, applies it to Meriwether's particular case, and then explains what, given the doctrinal constraints, the Sixth Circuit actually held in its 2021 *Meriwether* opinion.

A. The Case

Nicholas Meriwether is a philosophy professor at Shawnee State University, a small public university in Portsmouth, Ohio.[13] Meriwether teaches using the Socratic method, calling on his students using the formal honorifics "Mr." or "Ms."[14] Meriwether believes this is an "important

12. *Amici Curiae* Brief of L. Professors Darren Rosenblum & Brian Soucek et al. in Support of Petition for Panel Rehearing or Rehearing En Banc, Meriwether v. Hartop, No. 20-3289 (6th Cir. May 14, 2021) ECF No. 111; *see infra* text accompanying notes 276–78.

13. Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021).

14. *Id.* at 499.

pedagogical tool," as it "foster[s] an atmosphere of seriousness and mutual respect that is befitting the college classroom."[15] A devout evangelical Christian, Meriwether also believes that God immutably fixed biological sex at the moment of conception regardless of an individual's feelings about their gender.[16] And he maintains that he cannot "affirm as true ideas and concepts that are not true."[17]

In 2016, Shawnee State issued a new policy that required all of its faculty to refer to students using the students' preferred pronouns, "regardless of the professor's convictions or views on the subject."[18] Infractions would incur disciplinary action.[19]

In January 2018, a transgender woman, Jane Doe, showed up for the first day of Meriwether's political philosophy course.[20] As was his practice with all of his students, Meriwether referred to her using honorifics.[21] However, despite Jane Doe explicitly informing Meriwether that she is a woman (as her school records reflected), Meriwether would only call on her using male honorifics and pronouns.[22] According to later court filings, Meriwether called Jane Doe "sir" in class because "Doe appeared male."[23]

Jane Doe complained to Shawnee State's Title IX office, which ordered Meriwether either to cease using honorifics for all students or to refer to Jane Doe as female.[24] Meriwether refused, and Shawnee State officially reprimanded him.[25] After exhausting administrative remedies, which included two unsuccessful requests for accommodations,[26] Meriwether turned to the courts.[27]

In November 2018, Meriwether filed a complaint in the U.S. District Court for the Southern District of Ohio against Shawnee State's trustees and several

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15. Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2019 WL 4222598, at *4 (S.D. Ohio Sept. 5, 2019), *report and recommendation adopted*, No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020), *rev'd sub nom.* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

16. *Meriwether*, 992 F.3d at 498.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 499.

21. *Id.*

22. *Id.*

23. Plaintiff's First Amended Verified Complaint at 18, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020). In fact, Meriwether's federal court complaint alleges that "Doe appeared male to the point that, in Dr. Meriwether's opinion, no one upon seeing Doe would have assumed that he [*sic*] was female (*i.e.*, that he was biologically female)." *Id.*

24. *Meriwether*, 992 F.3d at 501.

25. *Id.*

26. The first accommodation that Meriwether attempted was simply referring to Jane Doe using her last name "Doe," but still using honorifics to refer to the rest of his students. *Id.* at 499. After this proved unsatisfactory to the school, Meriwether offered to refer to Doe using her preferred pronouns but clarify in his syllabus that he was doing so under compulsion. *Id.* at 500. Under this accommodation, Meriwether also requested to list his own religious beliefs about gender identity on the syllabus. Shawnee State, again, found this unsatisfactory. *Id.*

27. *Id.* at 502.

of its administrators, alleging that they had violated his First Amendment rights to free speech and free exercise of religion.[28] The following month, Jane Doe moved to intervene along with Sexuality and Gender Acceptance (SAGA), a student group at Shawnee State dedicated to LGBTQ issues and students.[29] They were represented by lawyers at the National Center for Lesbian Rights (NCLR), a leading LGBTQ rights organization based in San Francisco.[30]

Before the district court allowed Jane Doe and SAGA to join the case as intervenor defendants in May 2019, the Shawnee State defendants had already moved to dismiss the case for failure to state a claim.[31] After intervening, Jane Doe and SAGA filed a 12(b)(6) motion of their own, giving rise to the tension between procedural doctrine and government employee speech doctrine at the heart of the district court's opinion dismissing the case[32] and the Sixth Circuit's opinion, which reversed and allowed the case to proceed to discovery.[33] This latter opinion is the decision referred to throughout this Article as "the *Meriwether* opinion." This is the opinion that has been so broadly misunderstood, not least because of the complexity of the procedural and substantive issues at stake. The following section delves into each.

B. The Doctrine

Every 1L in law school knows the test courts are to apply when considering a Rule 12(b)(6) motion to dismiss: assume that all of the factual allegations in the plaintiff's complaint are true and ask whether, together, they "state a claim to relief that is plausible on its face."[34] The plausibility standard for pleading comes from the U.S. Supreme Court's *Bell Atlantic Corp. v. Twombly*[35] and *Ashcroft v. Iqbal*[36] decisions of 2007 and 2009—two of the

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28. Plaintiff's First Amended Verified Complaint, *supra* note 23, at 3. *Meriwether v. Hartop* takes its name from Francesca Hartop, one of the trustees of Shawnee State. *Id.* at 4.

29. *Meriwether*, 992 F.3d at 502.

30. *Id.*; Press Release, Nat'l Ctr. For Lesbian Rts., District Court Holds Public University Professor Does Not Have a Constitutional Right to Discriminate Against Transgender Students (Feb. 13, 2020), https://www.nclrights.org/about-us/press-release/meriwether-press-release/ [https://perma.cc/5U9H-Y7GB].

31. *Meriwether*, 992 F.3d at 502.

32. Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615, at *2 (S.D. Ohio Feb. 12, 2020).

33. *Meriwether*, 992 F.3d at 502.

34. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The claims for relief that Meriwether alleged included violations of his free exercise and free speech rights under the First Amendment, claims arising under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and two claims under Ohio law. *See* Plaintiff's First Amended Verified Complaint, *supra* note 23, at 3. This Article only examines Meriwether's free speech claims, which include allegations of retaliation, content and viewpoint discrimination, compelled speech, and unconstitutional conditions on employment.

35. 550 U.S. 544 (2007).

36. 556 U.S. 662 (2009).

most cited opinions of all time.[37] Both were cited by the district court when it granted the motion to dismiss Meriwether's case in early 2020.[38]

Somewhat shockingly, however, the *Twombly*-*Iqbal* plausibility standard was not the test that the Sixth Circuit recited in its opinion in *Meriwether*—even if it may have been the test that the appellate court ultimately applied. To our knowledge, no previous discussion of *Meriwether* has pointed out that the Sixth Circuit applied a procedural test that was fourteen years out of date. As the court of appeals wrote: "[W]e must reverse the district court's dismissal unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[39] This is indisputably wrong: the "no set of facts" standard, taken from *Conley v. Gibson*[40] of 1957, is the very thing the *Twombly* Court famously retired fifty years later.[41] How could this have happened? In an embarrassing game of judicial telephone,[42] the Sixth Circuit was borrowing its own language from two 2012 opinions,[43] which in turn cited a 2003 Sixth Circuit opinion,[44] written four years before *Twombly* changed the standard.[45]

By ignoring the heightened pleading standard of *Twombly* and *Iqbal*, the Sixth Circuit held Meriwether's claims to a lower standard than current law requires. We point this out, however, not because the error ended up making a difference in the outcome. The difference between conceivability and plausibility did not dictate the outcome in *Meriwether*, and the Sixth Circuit's opinion goes on to say, several times, that Meriwether had "plausibly alleged

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37. *See* Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III*, HEINONLINE BLOG (Sept. 26, 2018), https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii/ [https://perma.cc/CEG8-CMZB].

38. Because the motion to dismiss was referred to a magistrate judge, who wrote a Report and Recommendation for the district court, see Report and Recommendation, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2019 WL 4222598 (S.D. Ohio Sept. 5, 2019), that the district court judge adopted in full, see Order Adopting Report and Recommendation, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020), this Article refers throughout to the magistrate's opinion as that of the district court.

39. Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021) (citing Handy-Clay v. City of Memphis, 695 F.3d 531, 538 (6th Cir. 2012)).

40. 355 U.S. 41 (1957).

41. 550 U.S. 544, 563 (2007) ("[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement.").

42. *Cf.* Adam D. Chandler, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2191 n.44 (2011) (referring to "chain[s] of iterated inaccuracies" in a series of Eleventh Amendment cases).

43. *Handy-Clay*, 695 F.3d at 538 (quoting Guzman v. U.S. Dep't of Homeland Sec., 679 F.3d 425, 429 (6th Cir. 2012)).

44. *Guzman*, 679 F.3d at 429 (quoting Marks v. Newcourt Credit Grp., 342 F.3d 444, 452 (6th Cir. 2003)).

45. Other Sixth Circuit panels recognized what *Twombly* did to the *Conley* standard almost immediately after it happened. *See, e.g.*, Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) ("[T]he [*Twombly*] Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, characterizing that rule as one 'best forgotten as an incomplete, negative gloss on an accepted pleading standard.'" (citations omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007))).

that Shawnee State violated his First Amendment rights."[46] The point is rather to show how easily a court can copy and paste an erroneous statement of law[47]—even on a point as basic and well-known as the test for dismissal for failure to state a claim. If a panel of federal appellate judges can get even *this* wrong, the likelihood of misrepresenting the far more nuanced holding of a case like *Meriwether*—this Article's central concern—is surely higher.

Getting back, then, to the procedural background of that holding: when courts ask whether a complaint has stated a plausible claim—as opposed to a factually deficient one or one that fails purely as a matter of law—they generally do so based on the factual allegations that the plaintiff includes in their complaint, taking all as true. In some cases, a plaintiff might amplify their complaint with attached exhibits,[48] as Meriwether did twenty-seven times over. But either way, the important point is that a court decides a motion to dismiss based only on the facts alleged by the plaintiff. Because a motion to dismiss comes before defendants answer the complaint, courts decide the motion at a stage when defendants have not even admitted or denied the facts alleged against them, much less asserted defenses or offered factual allegations of their own. To be sure, defendants' briefs in support of their motion to dismiss can make legal arguments about why the plaintiff's complaint falls short, whether factually or legally. But what defendants cannot do is challenge the truth of the plaintiff's asserted facts or allege facts of their own. This is crucial to keep in mind when examining the substantive standards governing Meriwether's free speech claim.

State employees like Nicholas Meriwether do not give up their constitutional rights when they take a government job, but neither do they have all the constitutional speech protections that ordinary citizens enjoy. The government has to function, after all, and this means that its functionaries cannot always say whatever they please.[49] Since the Supreme Court's decision in *Garcetti v. Ceballos*[50] in 2006, a three-part test governs the free speech protections of government employees under the First Amendment.

First, *Garcetti* clarified that, to be protected, the speech in question must be made as a "citizen," not pursuant to the employee's official duties; if the

46. Meriwether v. Hartop, 992 F.3d 492, 503 (6th Cir. 2021); *see also id.* at 507 ("We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment."); *id.* at 512, 514–15, 517 (mentioning plausibility in the context of Meriwether's free exercise claim).

47. *See generally* Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012).

48. *See* Gavitt v. Born, 835 F.3d 623, 640 (6th Cir. 2016).

49. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." (citation omitted)).

50. 547 U.S. 410 (2006).

speech "owes its existence to [the] public employee's professional responsibilities," it is not protected.[51]

Second, the employee's speech must have touched on "matters of public concern,"[52] which is to say, "any matter of political, social, or other concern to the community."[53] Like the first part of the test, this is a question of law, and it is up to the employee to show that the form, content, and context of his speech shows it to be of more than private or personal interest.

Finally, at step three, the balancing test from *Pickering v. Board of Education of Township High School District 205*,[54] the court balances an employee's expressive interests against the government's interest in providing efficient public services. As the *Garcetti* Court put it: "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[55]

Importantly, at the *Pickering* balancing stage, the burden is on the government to show that any restrictions it imposes are necessary for its efficient operation.[56] According to the Sixth Circuit, the question is "whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees."[57]

The three steps just canvased apply to government employees generally—everyone from the high school teacher in *Pickering* to the deputy district attorney in *Garcetti*. But *Garcetti* itself set aside one particular set of government employees as potentially different: public university professors. In the *Garcetti* majority's words:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.[58]

In *Garcetti*'s wake, circuits have split as to whether professors' teaching and scholarship, which is obviously part of a professor's job, are thereby unprotected, as they would be under step one of the usual three-part test

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51. *Id.* at 421.
52. *Id.* at 420.
53. Connick v. Myers, 461 U.S. 138, 146 (1983); *see also* Handy-Clay v. City of Memphis, 695 F.3d 531, 543 (6th Cir. 2012).
54. 391 U.S. 563 (1968).
55. *Garcetti*, 547 U.S. at 419.
56. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("The State bears a burden of justifying the discharge on legitimate grounds.").
57. Rodgers v. Banks, 344 F.3d 587, 601 (6th Cir. 2003) (quoting Williams v. Kentucky, 24 F.3d 1526, 1536 (6th Cir. 1994)).
58. *Garcetti*, 547 U.S. at 418, 425.

applied to government employees.[59] *Garcetti* held that such speech ordinarily goes unprotected because government managers need control over the content of the memos, reports, and other speech that they pay their workers to provide.[60] But that rationale applies awkwardly to academic work, which is not ordinarily commissioned or directed by anyone within a university in the way other bosses direct their subordinates' workplace activity and expression.[61]

In circuits where *Garcetti*'s first step is not applied to teaching and research at public universities, professors at least have a shot at First Amendment protection for their expression in the classroom as well as in their scholarship. But even then, two hurdles remain: to be protected, professors still need to show that their speech is on a matter of public concern, and the government then must fail to show that its managerial interests outweigh the professor's expressive ones.[62]

Enter Professor Meriwether.

C. The Doctrine Applied by the District Court

With its motion to dismiss, Shawnee State was asking the district court to decide that, even taking Meriwether's alleged facts to be true, his claim still failed, and for two reasons: he misgendered Jane Doe while carrying out his professional duties; and moreover, calling on or referring to a student using the wrong pronoun or honorific does not count as speech on a matter of public concern. Were the district court to side with Shawnee State on either point, dismissal would follow. And in fact, the district court sided with Shawnee State on both points.

As to the first, the district court decided that *Garcetti* fully applies to public university professors.[63] So under *Garcetti*'s first prong, speech made pursuant to one's government job—speech that owes its existence to that job—does not receive First Amendment protection. When Meriwether misgendered Jane Doe in class or refused to acknowledge her gender by

59. *Compare* Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (declining to apply *Garcetti* to a professor's speech), *and* Adams v. Trs. of Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) (same), *with* Renken v. Gregory, 541 F.3d 769, 774 (7th Cir. 2008) (applying *Garcetti* to a professor's classroom speech).

60. *See Garcetti*, 457 U.S. at 425.

61. According to the American Association of University Professors' foundational 1915 Declaration of Principles, faculty "are the appointees, but not in any proper sense the employees" of a university. ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 91–92 (2012) (quoting AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 295 (9th ed. 2001)).

62. *See Demers*, 746 F.3d at 412.

63. Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2019 WL 4222598, at *23–25 (S.D. Ohio Sept. 5, 2019), *report and recommendation adopted*, No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020), *rev'd sub nom.* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

using just her last name, he did so as part of his professional duties as a professor.[64]

The district court went on to hold in the alternative that addressing particular students in class does not constitute speech on a matter of public concern.[65] The use of gendered pronouns and honorifics is surely related to politically fraught questions of gender identity, but, according to the district court, Meriwether's "speech did not take place in the context o[f] a broader discussion, and there was no admitted academic purpose or justification."[66]

Having found for the defendants as a matter of law on prongs one and two of the government employee speech test, the district court did not reach the question of *Pickering* balancing—the weighing of Meriwether's expressive interests against the workplace disruption his speech caused.[67] This was just as Shawnee State had asked; in its briefing, it preserved the argument for later, should it be needed.[68] By contrast, Jane Doe and Meriwether both engaged on the *Pickering* issue in their briefs on the motion to dismiss. And given what was to come, their arguments are important to consider, even if the district court declined to do so.

According to Jane Doe, "Shawnee's interest in maintaining its nondiscrimination policy outweigh[ed] Plaintiff's interest in addressing Ms. Doe using particular honorifics."[69] As a recipient of federal funding, Shawnee State is prohibited under Title IX from denying any educational benefits "on the basis of sex."[70] Doe noted that Shawnee State, as a public university, is also subject to the Equal Protection Clause, which prohibits sex discrimination that is not substantially related to an important governmental interest.[71] "Shawnee has a compelling interest in complying with federal nondiscrimination law," Doe argued.[72] Were instructors' First Amendment rights allowed to trump this interest, "a college could not discipline a professor who, based on his sincerely held beliefs, uses derogatory terms to

64. *Id.*

65. *Id.* at *29.

66. *Id.* at *31.

67. *Id.* at *33 n.7.

68. Defs.' Motion to Dismiss Plaintiff's First Amended Complaint at 10 n.2, *Meriwether*, 2020 WL 704615 (No. 18-CV-753).

69. Def.-Intervenors Jane Doe & Sexuality & Gender Acceptance's Motion to Dismiss Plaintiff's First Amended Complaint at 12, *Meriwether*, 2020 WL 704615 (No. 18-CV-753).

70. 20 U.S.C. § 1681. In the related Title VII context, the Sixth Circuit and Supreme Court have both held that discrimination based on someone's gender identity necessarily constitutes discrimination on the basis of sex. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1744, 1754 (2020), *aff'g* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

71. A plaintiff can bring both Title IX and equal protection claims, which allow for different defendants and involve somewhat different substantive standards. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 257 (2009). Furthermore, courts in both the Sixth Circuit and the Southern District of Ohio have treated discrimination against transgender individuals as sex discrimination under the Equal Protection Clause. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 577 (6th Cir. 2004); Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 870 (S.D. Ohio 2016).

72. Def.-Intervenors Jane Doe & Sexuality & Gender Acceptance's Motion to Dismiss Plaintiff's First Amended Complaint, *supra* note 69, at 13.

address all nonwhite students, or women, or students from a minority faith, or students on financial aid."[73]

Though Jane Doe did not put it in quite these terms, her argument amounts to the seemingly straightforward proposition that a public university cannot be required to allow speech by its employees that would expose the university to liability under constitutional or statutory antidiscrimination law. The Free Speech Clause surely cannot force state actors to violate the Equal Protection Clause. And since government employees enjoy far narrower speech rights than the public at large—the rights of the former hinge on the potential disruption caused by their expression—government employers do not need to wait for equal protection liability to be established against them before they can act to stop it from arising. Exposure to a lawsuit is itself a disruption, not just in terms of the cost of marshaling a defense, but also insofar as it turns schools and their students into legal adversaries.[74]

Meriwether's response to this was to deny that any disruption had occurred. In support, he pointed to nine paragraphs in his complaint.[75] One asserted that "Dr. Meriwether's speech on matters of public concern in the context of teaching and scholarship never prevented Defendants from efficiently providing services to the public (or even threatened to do so)."[76] The others alleged that Doe had remained in Meriwether's political philosophy class throughout the semester, had frequently participated, and was ultimately "awarded . . . a high grade."[77]

In addition to these factual allegations, Meriwether offered legal arguments as well. Writing before the Supreme Court connected gender identity discrimination to sex discrimination in its 2020 *Bostock v. Clayton County*[78] decision, Meriwether argued that Title IX does not extend to "transgender status"[79] and, in any event, has not been held to cover choices about gendered pronouns and honorifics.[80] He noted correctly, if question-beggingly, that Title IX cannot trump a constitutional right like freedom of expression.[81] But Meriwether did not even mention the

73. *Id.* at 14.

74. For more on the potential for a lawsuit by Doe against Shawnee State and the effect this might have had on our understanding of *Meriwether*'s holding, see *infra* Part III.C.

75. Plaintiff's Response in Opposition to Def.-Intervenors' Motion to Dismiss the First Amended Verified Complaint at 9, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020) ("[T]he Complaint pleads facts showing that his speech caused no disruption at all. Compl. ¶¶ 176–83, 312 . . . .").

76. Plaintiff's First Amended Verified Complaint, *supra* note 23, at 39.

77. *Id.* at 23. *But see* Inara Scott, Elizabeth Brown & Eric Yordy, *First Do No Harm: Revisiting* Meriwether v. Hartop *and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1015 (2022) ("A student's ability to excel in classes where she experiences prejudice or discrimination does not obviate the prejudice or discrimination. It simply attests to the fortitude of the student under challenging circumstances . . . .").

78. 140 S. Ct. 1731 (2020).

79. Plaintiff's Response in Opposition to Def.-Intervenors' Motion to Dismiss the First Verified Complaint, *supra* note 75, at 10 (quoting Wittmer v. Phillips 66 Co., 915 F.3d 328, 335 (5th Cir. 2019) (Ho, J., concurring)).

80. *Id.* at 11–12.

81. *Id.* at 12–13.

possibility that his speech might expose the university (or Meriwether himself) to a constitutional equal protection claim by Doe.

It is important to remember here that, at the motion to dismiss stage, the only facts being considered were those alleged by Meriwether in his complaint. Moreover, those factual allegations had to be taken as true—at least insofar as they truly were allegations of fact as opposed to legal conclusions.[82] The facts about Jane Doe's participation and success in class thus had to be taken as true for purposes of the motion to dismiss.

On the other hand, Meriwether's claims that his speech was on a matter of public concern or that it never threatened to disrupt Shawnee State's efficient operations both could be set aside as conclusory. To find a lack of disruption for *Pickering* purposes, after all, a whole series of facts about the effects of Meriwether's speech would need to be alleged and assumed true (at the motion to dismiss stage) or established (at trial). It certainly does not follow from the single fact that Jane Doe thrived in Meriwether's class, even if we assume that to be true, that Meriwether's speech was nondisruptive to the school in general. If, say, the university had been preparing itself for a potential Title IX or equal protection lawsuit because of Meriwether's treatment of Doe, potential disruptions of this sort would not likely be before the court yet.[83] And even if the university was not in fact preparing for such a lawsuit but should have been—that is to say, if the facts that Meriwether alleged in the complaint provide a strong basis in evidence for potential liability under Title IX or the Equal Protection Clause[84]—there is no reason why the court could not find disruption as a matter of law, even on a motion

82. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.").

83. Another potential disruption appeared in SAGA's affidavit that accompanied the organization's motion to intervene: other transgender students at Shawnee State were said to be avoiding Meriwether's classes, making it harder for them to fulfill certain graduation requirements. *See* Declaration of Jae Ezra Keniston in Support of Motion to Intervene as Defendants at 3, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020). Although these allegations would have been considered by the district court when it decided the motion to intervene, they were not among the materials considered for purposes of the dismissal motion.

84. The "strong basis in evidence" standard comes from U.S. Supreme Court cases in which disparate treatment based on race would be allowable if there is a strong basis in evidence that a state actor would otherwise face statutory disparate impact liability or a constitutional equal protection claim for past discrimination. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 585 (2009) ("[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion) (stating that courts "must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary" if they are to permit a remedial affirmative action program in public employment).

to dismiss.[85] Were it to do so, *Pickering* balancing would provide a third reason why Meriwether's misgendering of Jane Doe would not count as protected speech.

But again, the district court did not make this finding. It did not reach *Pickering* balancing at all. It did not need to do so, as it had already found that Meriwether's speech failed on the first two prongs of the *Garcetti* test.

D. The Doctrine Applied by the Sixth Circuit

Given the outcome in the district court, the parties mainly focused on the first two prongs of *Garcetti* when Meriwether appealed the dismissal of his claims to the Sixth Circuit. Meriwether did not even mention *Pickering* balancing in his initial brief.[86] Shawnee State and Jane Doe both did,[87] however, and Meriwether eventually responded to their *Pickering* arguments in his reply brief.[88]

Here is how the university described the *Pickering* balancing: "Meriwether's interest in inconsistently using gender-based titles to convey opaquely his belief that gender is immutable is plainly outweighed by Shawnee State's compelling interest in complying with this Court's and the Supreme Court's precedent related to the protections against discrimination set forth in federal law."[89] Agreeing, Jane Doe argued that the expressive

85. Consider, for example, *Moser v. Las Vegas Metro. Police Dep't*, where the U.S. Court of Appeals for the Ninth Circuit considered how the threat of future litigation exposure might affect a government employer's ability to limit or punish its employee's speech. 984 F.3d 900 (9th Cir. 2021). In *Moser*, a police department worried that an officer's post on social media could expose it to future legal liability. *Id.* at 904. But there the threat of liability depended on a "long chain of speculative inferences," which it found insufficient to tip the *Pickering* scales. *Id.* at 911. In particular, the police officer would need to shoot someone, his deleted post would have to be discovered and admitted at trial, and a jury would have to rely on it in finding the department liable. *Id.* The Ninth Circuit said, "[c]ourts . . . are more likely to accept a government employer's prediction of future disruption if some disruption has already occurred." *Id.* at 909. Unlike in *Moser*, where a future shooting would be needed to trigger the potential liability, the possibility of litigation against Shawnee State—a Title IX or equal protection suit from Jane Doe or other trans students on campus—would arise from actions of Meriwether's that had already occurred. *Moser* therefore suggests that potential liability of this sort *should* factor into the *Pickering* analysis.

86. *See generally* Brief of Plaintiff-Appellant Nicholas K. Meriwether, *Meriwether*, 992 F.3d 492 (No. 20-3289).

87. *See, e.g.*, Brief of Defs.-Appellees: Francesca Hartop, Tr. of Shawnee State Univ., in her official capacity; Jeffrey A. Bauer, in his official capacity; Roberta Milliken, in her official capacity; Jennifer Pauley, in her official capacity; Tena Pierce, in her official capacity; Douglas Shoemaker, in his official capacity; Malonda Johnson, in her official capacity; Joseph Watson, Tr. of Shawnee State Univ., in his official capacity; Scott Williams, Tr. of Shawnee State Univ., in his official capacity; David Furbee, Tr. of Shawnee State Univ., in his official capacity; Sondra Hash, former Tr. of Shawnee State Univ., in her official capacity; Robert Howarth, Tr. of Shawnee State Univ., in his official capacity; George White, Tr. of Shawnee State Univ., in his official capacity; Wallace Edwards, Tr. of Shawnee State Univ., in his official capacity at 21, 34, *Meriwether*, 992 F.3d 492 (No. 20-3289); Brief of Intervenors-Appellees Jane Doe & Sexuality & Gender Acceptance at 40, *Meriwether*, 992 F.3d 492 (No. 20-3289).

88. *See* Reply Brief of Plaintiff-Appellant Nicholas K. Meriwether at 12–15, *Meriwether*, 992 F.3d 492 (No. 20-3289).

89. Brief of Defs.-Appellees, *supra* note 87, at 36.

interests on Meriwether's side were especially weak, as he could still teach and write on any subject, including gender identity, and he could avoid the controversy entirely if he simply chose to call on students by their first or last names in class.[90]

Responding, Meriwether stressed that *Pickering* balancing is a "fact-intensive inquiry" that should be left for the district court to conduct after discovery.[91] Dismissing the case based on *Pickering* would be inappropriate, he argued, because at the motion to dismiss stage, "Defendants cannot allege, much less prove, that they have any interest worth protecting."[92]

Meriwether's argument here was not quite right. To be sure, courts generally do not grant motions to dismiss based on *Pickering*—and for the reason Meriwether identified: on a motion to dismiss, as we have seen, only the plaintiff has provided factual allegations, and a court assumes that they are true.[93] So for the defendant to prevail, the court would need to find in their favor as a matter of law, decided solely on the basis of facts alleged by the plaintiff. This could happen if the *Pickering* balancing were so lopsided on the facts alleged that disruption was obvious. Imagine, for instance, a case in which the employee was berating customers or using offensive slurs when referring to coworkers.[94] Surely a court could assume the disruptiveness of racial epithets without waiting for evidence to be submitted.[95] Similarly, a decision as a matter of law should also be possible when the facts alleged by the plaintiff suggest that his employer would face legal liability if it tolerated

90. Brief of Intervenors-Appellees Jane Doe & Sexuality & Gender Acceptance, *supra* note 87, at 41.

91. Reply Brief of Plaintiff-Appellant Nicholas K. Meriwether, *supra* note 88, at 13.

92. *Id.*

93. The U.S. Court of Appeals for the Fifth Circuit has addressed this issue. Burnside v. Kaelin, 773 F.3d 624, 628 (5th Cir. 2014) ("[A]t the motion-to-dismiss stage of a case, there is a rebuttable presumption that no balancing is required to state a claim. The rebuttable presumption applies because reasonable inferences drawn from a complaint, obviously drafted by the aggrieved employee, will generally lead to a plausible conclusion that the employee's interest in commenting on matters of public concern outweighs the employer's interest in workplace efficiency. The presumption also adheres because a plaintiff-employee is not in a position to plead defensive reasons for its employment decisions."). The Sixth Circuit has held similarly, agreeing with the Ninth Circuit that "[i]n many cases, due to inadequate factual development, the prong two balancing test 'cannot be performed on a 12(b)(6) motion.'" Perry v. McGinnis, 209 F.3d 597, 607 (6th Cir. 2000) (quoting Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 (9th Cir. 1997)).

94. The Ninth Circuit is in agreement. Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (citing examples from the U.S. Courts of Appeals for the Second, Seventh, Tenth, and D.C. Circuits of *Pickering* balancing decided at the pleading stage) ("It is illogical to say that something is a question of law, and that it is reviewed de novo, yet that it can never be decided on the pleadings. 'The inquiry into the protected status of speech is one of law, not fact.' Connick v. Myers, 461 U.S. 138, 148 n.7 (1983). Whether the case can be dismissed on the pleadings depends on what the pleadings say . . . . If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.").

95. *Cf.* Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 910 n.8 (9th Cir. 2021) ("Some statements may be so patently offensive (*e.g.*, racial slurs) that the government can reasonably predict they would cause workforce disruption and erode public trust.").

his speech. That is the crux of the Title IX and equal protection arguments Shawnee State and Jane Doe raised.

Meriwether's reply brief sidestepped the equal protection argument entirely, offering only a series of wan arguments against Shawnee State's potential Title IX liability. Unlike in *Bostock*, he said, Meriwether's case did not involve a firing. Title IX, he observed, sometimes requires recognition of sex. And according to Meriwether, his expression did not "adversely impact his classroom performance."[96]

These arguments were enough, however, to convince the Sixth Circuit. After reversing the district court's decisions on prongs one and two of *Garcetti*—holding that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship,"[97] and that Meriwether's use (or nonuse) of particular pronouns and honorifics in class counts as speech on a matter of public concern[98]—the court of appeals was then left with the question that the district court had been able to sidestep: whether *Pickering* balancing favors the university as a matter of law, or whether its motion to dismiss should be denied to allow for further factual development.

On Meriwether's side of the *Pickering* scale, the Sixth Circuit placed the longstanding protection given to academic freedom concerns at colleges and universities[99] and its perception that Meriwether's speech "relate[d] to his core religious and philosophical beliefs."[100]

On the university's side, the Sixth Circuit found only what it described as the "comparatively weak" interest in limiting Meriwether's speech in order to prevent discrimination against transgender students.[101] The Sixth Circuit's reasoning here, which is central to this Article's analysis, is worth pausing over.

The *Meriwether* court rejected the notion that Sixth Circuit precedent (later affirmed by the Supreme Court) prohibiting gender identity discrimination

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96. Reply Brief of Plaintiff-Appellant Nicholas K. Meriwether, *supra* note 88, at 13–14 (citing Bostock v. Clayton County, 140 S. Ct. 1731, 1753–54 (2020)). The problem with these arguments is that the analogy to *Bostock* is not based on the severity of the adverse employment (or analogously, educational) impact but rather on the fact that Title IX, like Title VII (the law at issue in *Bostock*), prohibits sex-based discrimination. The fact that Title IX sometimes requires recognition of sex does not mean that professors can impose on students whatever gender identity they feel is most appropriate. And whether or not Meriwether's misgendering of Jane Doe affected the education he provided her is less a factual allegation than a legal conclusion, not assumed true on a motion to dismiss. Or at any rate, Meriwether's diminished "classroom performance" is not the only way he might have exposed Shawnee State to Title IX liability.

97. Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021).

98. *Id.* at 508–09.

99. *Id.* at 508. For criticism of the Sixth Circuit's understanding of academic freedom in *Meriwether*, see *Amici Curiae* Brief of L. Professors Darren Rosenblum & Brian Soucek et al. in Support of Petition for Panel Rehearing or Rehearing En Banc, *supra* note 12, at 2–9 ("*Amici* submit this brief to clarify . . . why the *Meriwether* panel's opinion . . . stretches academic freedom to the point that it would disrupt education itself.").

100. *Meriwether*, 992 F.3d at 509.

101. *Id.* at 510.

under Title VII dictated a similar result in a Title IX case involving students and professors.[102] Because Title IX requires consideration of sex in ways Title VII does not—in the context of athletic scholarships and living facilities, for example—the court said that "it does not follow that principles announced in the Title VII context automatically apply."[103] Nor, it said, did its precedent imply that "the government always has a compelling interest [based on antidiscrimination law] in regulating employees' speech on matters of public concern."[104] If it did, the court said, universities would be able to "discipline professors, students, and staff any time their speech might cause offense."[105]

As others have noted, whether nondiscrimination law always allows the government to regulate its employees' speech hardly answers the question of whether it permits (or even compels) it to do so in this case.[106] And the worry about universities imposing discipline "any time" speech causes offense is irrelevant, since "speech [that] might cause offense" is not what American nondiscrimination law proscribes.[107]

The point here, though, is not to criticize *Meriwether*'s reasoning, flawed as it is; instead, the point is to make clear what holding the opinion's reasoning can possibly support. To that end, consider the specific reasons the Sixth Circuit offered for not finding that *Pickering* balancing favored the university at the motion to dismiss stage—the point at which the *Meriwether* opinion was written.

First, Meriwether had been willing, in what he described as a compromise, to call Jane Doe by her last name alone, thereby avoiding pronouns and honorifics when addressing her, but not the other students in the class.[108] According to the Sixth Circuit, this lessened the disruption, as any harm to Jane Doe was not (or would not have been) that of being directly misgendered in class.[109]

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102. *See id.* (discussing EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020)).

103. *Id.* at 510 n.4.

104. *Id.* at 510.

105. *Id.*

106. *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)*, 135 HARV. L. REV. 2005, 2009–10 (2022) ("[I]n shifting its analytical focus to the notion that the government does not 'always' have a compelling interest in regulating employee speech, the panel failed to even allow for the possibility that the university had a compelling nondiscrimination interest in this specific situation.").

107. *Meriwether*, 992 F.3d at 510.

108. *Id.*

109. *Id.* at 501. That said, Doe would still have been treated differently than her peers based solely on her gender identity, and Meriwether's "compromise" threatened to highlight or even reveal Doe's gender identity to her fellow students. *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/W9TL-PLAJ] (describing Jane Doe's belief that Meriwether conveyed "a message about [her that] improperly disclosed to [her]

Second, the court said that "[a]t this stage of the litigation"—a crucial qualification—"there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."[110] In other words, the appellate court's *Pickering* balancing, and thus its holding, was tied to the absence of any factual allegations about disruption at that particular "stage of the litigation."[111]

The holding of *Meriwether* is therefore cabined by multiple assumptions: that classroom duties were not inhibited, school operations not hampered, and educational benefits not denied. Put differently, the holding of *Meriwether* is not that professors have an unqualified First Amendment right to misgender students in class. At best, *Meriwether* holds that public university professors have a First Amendment right to avoid using pronouns or honorifics for transgender students in class if they can do so without inhibiting their job duties, hampering school operations, or denying educational opportunities. To put it mildly, those are some important ifs.

Third and finally, the Sixth Circuit reasoned that Shawnee State's obligations under Title IX did not affect the *Pickering* balancing—again "at this stage of the litigation"—only because there had not yet been any "indication . . . that Meriwether's speech inhibited Doe's education or ability to succeed in the classroom."[112] Here again, the *Pickering* balancing came out the way it did only because there were not yet factual allegations of any adverse effects on Jane Doe's education in the pleadings. Fill in that gap, and the *Pickering* balancing necessarily changes—along with *Meriwether*'s holding about the free speech rights of public university professors.

These are the limits on *Meriwether*'s precedential reach that stem from the *Meriwether* court's reasoning. But another limit comes from what was left out of the *Meriwether* opinion. The Sixth Circuit's *Pickering* balancing analysis treated Title IX as the only potential source of liability (or in *Pickering* terms, disruption) for Shawnee State. In reality, though, Title IX does not stand alone. The Equal Protection Clause also exposes Shawnee State to legal liability, and an equal protection claim does not share the same requirements that a Title IX claim does.[113]

The Sixth Circuit's blatant failure even to mention the potential equal protection violations in this case affects *Meriwether*'s holding somewhat differently than does the absence of evidence about Title IX harms. Whereas the latter involves a factual gap that could still be filled in later through discovery, the former is just a failure on the Sixth Circuit's part to answer a question of law that already stood squarely before it: Does a professor's disparate treatment of students based on their gender identity give rise to potential equal protection litigation and liability, and would this be disruptive

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peers that [she is] transgender, private information [she] first shared with Meriwether as part of [her] Title IX complaint").

110. *Meriwether*, 992 F.3d at 511.

111. *Id.* at 510.

112. *Id.*

113. *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256–58 (2009) (describing the differences between the requirements for a Title IX claim and an equal protection claim).

enough to outweigh the professor's expressive interests? *Pickering* demands an answer to this question before the limits of a public university professor's speech rights can be known. And there is no reason the Sixth Circuit could not have answered that question, even on the one-sided facts available on a motion to dismiss.

Since the court did not answer that question, however, we have to treat it as another of the assumptions that cabin *Meriwether*'s holding. Under *Meriwether*, we can only be sure that university professors have a First Amendment right to misgender (or avoid gendering) their students in class if doing so would not offend the Equal Protection Clause—or perhaps even if doing so would not expose the university to nonfrivolous equal protection litigation.

To summarize, then, what the Sixth Circuit actually held in *Meriwether*: public university professors have a right, under the Free Speech Clause, to avoid using pronouns or honorifics for the transgender students in their class if they can do so without inhibiting their job duties, hampering school operations, denying educational opportunities to their students, or violating (or, possibly, provoking litigation under) Title IX or the Equal Protection Clause. If any of those conditions is not met, *Meriwether*'s holding no longer applies.

As a practical matter, this matters immensely, especially for universities seeking to understand what exactly *Meriwether* requires of them. An article discussed in Part II quotes Jane Doe as saying that "the 6th Circuit has prevented the university"—and presumably other universities as well—"from requiring professors to treat transgender students equally."[114] That is false. Unless universities operate in a world in which the unequal treatment of transgender students would not affect their educational opportunities or otherwise give rise to Title IX or equal protection liability, *Meriwether* does nothing to prevent public universities from acting to protect their students from discrimination.

II. WHAT EVERYONE THINKS *MERIWETHER* HOLDS

The conventional wisdom about *Meriwether*, wrong as it is,[115] did not arise from a single source. The shared notion that *Meriwether* grants public

114. Stern, *supra* note 109.

115. To be sure, the error is widespread but not universal. Several sources have accurately reported *Meriwether*'s holding. For example, a case note in the *Harvard Law Review* criticized the Sixth Circuit's reasoning in *Meriwether*. *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)*, *supra* note 106, at 2008 ("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."). When discussing the holding, the note explicitly clarified that the Sixth Circuit held that Meriwether "plausibly alleged" that his First Amendment rights were infringed. *Id.* at 2005. Another article in the *American University Law Review* consistently noted that the Sixth Circuit only reversed the district court's dismissal of Meriwether's free speech claims, even as it condemned the decision and

university professors the right to misgender their students in class sprang from sources across the political spectrum, as well as from those in the media or judiciary who claim to be off the spectrum entirely. From advocates exaggerating their win (or ignoring their loss), to reporters explaining the Sixth Circuit's decision, to academics criticizing the opinion or seeking to get it overturned, to judges and legislators subsequently citing it, the conventional wisdom about *Meriwether* stemmed from statements that differed vastly in their motives but ultimately had a common effect. Part II traces these varied, even opposed, determinants of what is now a widespread, and wrong, belief about the meaning of *Meriwether*.

A. Advocates

On March 26, 2021, the day the Sixth Circuit issued its decision in *Meriwether*, the Alliance Defending Freedom (ADF) published a celebratory press release.[116] The conservative Christian legal advocacy group, which represented Meriwether, proudly (and falsely) titled its statement "6th Circuit Upholds First Amendment Rights of Shawnee State Professor."[117] Among other claims, it declared that the Sixth Circuit "ruled that, based on the allegations in the complaint, the university violated Meriwether's First Amendment rights."[118] John Bursch, an ADF lawyer, was "very pleased that

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suggested other factors to be used to assess academic freedom. *See* Scott et al., *supra* note 77, at 1011, 1020. Similarly, Vikram Amar and Alan Brownstein have explained why they believe the Sixth Circuit should have found for the university instead of Meriwether. 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*, 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/95SG-LET4]. But their description of the case was characteristically precise, stating accurately that the Sixth Circuit held that "Meriwether had stated a valid claim under both the Free Speech and Free Exercise Clauses of the First Amendment." *Id.* Coming from the other direction, reporting on the case favorably and claiming that it "powerfully protects" academic freedom, Eugene Volokh also characterized the holding accurately, stating that the Sixth Circuit "allowed [Meriwether's] case to go forward" and further clarifying that because of the particular facts, the appellate court "did *not* decide whether a professor could insist on *actually using a pronoun that didn't match* the student's preferred pronoun." Eugene Volokh, *Pronouns in the University Classroom & the First Amendment*, VOLOKH CONSPIRACY (Mar. 26, 2021, 4:33 PM), https://reason.com/volokh/2021/03/26/pronouns-in-the-university-classroom-the-first-amendment/ [https://perma.cc/7KJZ-UTVC] (emphasis added). As admirably correct as each of these sources is, none of them emphasizes the limitations on *Meriwether*'s holding that stem from its procedural stance and the assumptions the Sixth Circuit made in order to reach its decision. In other words, these sources each avoided the common error of claiming that *Meriwether* gives professors a First Amendment right to misgender their students, but unlike the present Article, they did not explain the reasons why the Sixth Circuit *could not* have held that in *Meriwether*.

116. *See 6th Circuit Upholds First Amendment Rights of Shawnee State Professor*, ALL. DEFENDING FREEDOM (Mar. 26, 2021), https://adflegal.org/press-release/6th-circuit-upholds-first-amendment-rights-shawnee-state-professor [https://perma.cc/5C3Q-CBMZ].

117. *Id.*

118. *Id.*

the 6th Circuit affirmed the constitutional right of public university professors to speak and lead discussions, even on hotly contested issues."[119]

Three days later, the Foundation for Individual Rights in Education (FIRE), subsequently renamed the Foundation for Individual Rights and Expression, "applaud[ed]" the Sixth Circuit for its decision and the way this decision strengthened First Amendment protections.[120] The organization, which had filed an amicus brief advocating for stronger free speech rights,[121] discussed the Sixth Circuit's application of the *Pickering* analysis, which weighs "the employee's First Amendment interest" against "the government's need for efficiency as an employer."[122] Ignoring the facts that were assumed and the potential legal liabilities that were set aside in the Sixth Circuit's *Pickering* balancing, FIRE described the decision as coming out in "Meriwether's favor based upon the importance of academic freedom to our democracy."[123] FIRE wrote that Meriwether "prevailed" under the *Pickering* test, failing to note that he had, at best, been found to have plausibly alleged facts that might lead to his prevailing down the line.[124]

Shortly after, on April 9, 2021, Bursch, the ADF lawyer, turned to Newsweek to share further thoughts about the case.[125] Praising Meriwether as a champion of free speech, Bursch concluded categorically (if misleadingly): "Because Dr. Meriwether had the courage to take a stand, all professors at public colleges and universities have a clear precedent for their rights to be protected."[126] The Sixth Circuit, he said, issued "clear, uncompromising language" that upheld the "free speech rights of all professors."[127] Bursch expressed confidence that whether or not the lawsuit continued past the Sixth Circuit's opinion, the court had already "effectively said that [Meriwether] should win."[128]

ADF was not done trumpeting its success. On April 14, 2022, the day Shawnee State University agreed to settle the case, ADF put out a press release that proudly proclaimed "[v]ictory."[129] It reiterated its prior

119. *Id.*

120. Greg Harold Greubel, *In* Meriwether v. Hartop*, the Sixth Circuit Recognizes an Academic Exception to Restrictions on the First Amendment Rights of Public Employees*, FIRE (Mar. 29, 2021), https://www.thefire.org/in-meriwether-v-hartop-the-sixth-circuit-recognizes-an-academic-exception-to-restrictions-on-the-first-amendment-rights-of-public-employees/ [https://perma.cc/HBN9-26X6].

121. *Amicus Curiae* Brief of Found. for Individual Rts. in Educ. in Support of Neither Affirmance nor Reversal, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (No. 20-3289).

122. Greubel, *supra* note 120.

123. *Id.*

124. *Id.*

125. John Bursch, *Sixth Circuit Free Speech Ruling Stems Tide of Cancel Culture Opinion*, NEWSWEEK (Apr. 9, 2021, 7:00 AM), https://www.newsweek.com/sixth-circuit-free-speech-ruling-stems-tide-cancel-culture-opinion-1582029 [https://perma.cc/HG5V-9HZJ].

126. *Id.* Part I provides a detailed explanation of why this opinion's holding is unlikely to apply to any professors in the real world.

127. Bursch, *supra* note 125.

128. *See id.*

129. *Victory: Shawnee State Agrees Professors Can't Be Forced to Speak Contrary to Their Beliefs*, ALL. DEFENDING FREEDOM (Apr. 14, 2022), https://adflegal.org/press-

description of the Sixth Circuit's holding: "The U.S. Court of Appeals for the 6th Circuit ruled in March 2021 that the university violated Meriwether's free speech rights when it punished him because he declined a male student's demand to be referred to as a woman."[130] And it quoted another ADF lawyer, Travis Barham, who was "pleased to see the university recognize that the First Amendment guarantees Dr. Meriwether—and every other American—the right to speak and act in a manner consistent with one's faith and convictions."[131]

Meanwhile, on the other side of the case, transgender rights advocates were noticeably quiet in the wake of *Meriwether*. The NCLR, which represented Jane Doe and SAGA, published a press release after the district court ruled in their favor, saying they were "pleased" with the district court's decision.[132] But the NCLR failed to release any statement at all after the Sixth Circuit's decision.[133] Its online summary of the *Meriwether* case now includes a brief paragraph about the Sixth Circuit opinion,[134] stating (incorrectly)[135] that the Sixth Circuit "concluded that Meriwether's speech was likely protected by his constitutional rights to free speech and free exercise of religion."[136] However, the NCLR did correctly note that "because the parties had not yet developed a full factual record, the panel decided to send the case back to the trial court for further developments of the facts."[137] Other transgender rights advocates declined to comment on the case.[138]

release/victory-shawnee-state-agrees-professors-cant-be-forced-speak-contrary-their-beliefs [https://perma.cc/GD4V-X776].

130. *Id.* This is wrong. Aside from the offensive misgendering in ADF's press release, their statement is also wrong because the Sixth Circuit did not hold that Shawnee State violated Meriwether's rights; rather, it held that *if* the facts turned out to be exactly as Meriwether alleged and *if* no countervailing considerations were raised, *then* a constitutional violation would have occurred.

131. *Victory: Shawnee State Agrees Professors Can't Be Forced to Speak Contrary to Their Beliefs*, *supra* note 129.

132. Press Release, *supra* note 30 ("We are pleased the Court affirmed that schools can ensure that all students are able to learn and the access educational opportunities available to all students without fear of discrimination.").

133. *See generally Press Releases*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/about-us/press-media/ [https://perma.cc/7UV3-9DZY] (last visited Sept. 3, 2023).

134. *Meriwether v. Shawnee State University*, NAT'L CTR. FOR LESBIAN RTS., https://www.nclrights.org/our-work/cases/meriwether-v-shawnee-state-university/ [https://perma.cc/N7DH-BVNH] (last visited Sept. 3, 2023).

135. Courts use the likelihood of success on the merits when deciding whether to grant a preliminary injunction, not a 12(b)(6) motion like the one before the court in *Meriwether*. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 21 (2008). On his 12(b)(6) motion, Meriwether only needed to show that the facts he had alleged, taken as true, together stated a *plausible* claim, not that his claim was likely to succeed. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

136. *Meriwether v. Shawnee State University*, *supra* note 134.

137. *Id.*

138. Colleen Flaherty, *'A Hotly Contested Issue'*, INSIDE HIGHER ED (Mar. 28, 2021), https://www.insidehighered.com/news/2021/03/29/court-sides-professor-who-repeatedly-misgendered-trans-student [https://perma.cc/6YNL-VLV5].

Before proceedings resumed in the district court, the defendants asked the Sixth Circuit to rehear the case en banc, and a group of 101 law professors submitted an amici curiae brief in support.[139] The professors worried about what their colleagues might do were they "[a]rmed with the First Amendment protection the panel opinion provides."[140] In their view, "if academic freedom were untethered from pedagogical concerns, as the *Meriwether* panel envisions, the consequences would be dire indeed."[141] Specifically, such consequences could include professors openly demeaning students in class, enacting "race or sex segregation," and "highjack[ing]" classes "to proselytize for any agenda."[142] "[Meriwether's] act of misgendering . . . should not be protected by academic freedom," the law professors concluded, urging the court to "vacate the panel's opinion to the contrary,"[143] thereby reinforcing the notion that the panel's opinion had in fact protected misgendering. This inflation of the opinion's holding is perhaps unsurprising, given the context: after all, the Sixth Circuit only grants rehearing en banc to cases involving "precedent-setting errors of exceptional public importance."[144]

B. Commentators

Others beyond those participating in the case soon weighed in as well, to similar effect. Journalist Mark Joseph Stern, who reports on the courts for *Slate* Magazine, quickly seized the opportunity to blame *Meriwether* on the Trump Administration. Just three days after the decision was issued, Stern wrote a scathing article, (incorrectly) headlined "Trump Judge: Professor Has a First Amendment Right to Misgender a Trans Student in the Classroom."[145] In Stern's telling, by ruling that "public university professors have a constitutional right to intentionally misgender trans students in the classroom"—something the *Meriwether* court did not do—the Sixth Circuit "wield[ed] the First Amendment as a weapon against LGBTQ students' access to equal treatment in education."[146] The holding of the decision came as "no surprise" to Stern because the Sixth Circuit panel was made up of "two Donald Trump nominees" and one "George W. Bush nominee."[147] Stern worried that professors might take advantage of (what he took to be)

139. *Amici Curiae* Brief of L. Professors Darren Rosenblum & Brian Soucek et al. in Support of Petition for Panel Rehearing or Rehearing En Banc, *supra* note 12. As the title of the brief suggests, one of this Article's coauthors was also a coauthor of the amicus brief.

140. *Id.* at 6–10.

141. *Id.* at 7.

142. *Id.* at 6.

143. *Id.* at 9.

144. 6th Cir. I.O.P. 35(a), https://www.ca6.uscourts.gov/rules-and-procedures/local-rules-frap-local-rules-iops [https://perma.cc/B22G-KK2D] (last visited Sept. 3, 2023).

145. Mark Joseph Stern, *Trump Judge: Professor Has a First Amendment Right to Misgender a Trans Student in the Classroom*, SLATE (Mar. 29, 2021, 2:47 PM), https://slate.com/news-and-politics/2021/03/amul-thapar-meriwether-trump-transgender-first-amendment.html [https://perma.cc/CM4H-SYFF].

146. *Id.*

147. *Id.*

Meriwether's holding "to use racial epithets in class" or "misogynistic language in front of students."[148]

Just ten days later, Paul Gordon, senior legislative counsel for People for the American Way, cited and reinforced Stern's overblown claims.[149] On April 9, 2021, he published a post titled "Trump Judges Rule That Public University Professors Have a Constitutional Right to Publicly Demean Transgender Students in Class."[150] This post was a part of Gordon's blog series called "Confirmed Judges, Confirmed Fears," in which Gordon documented the harmful impact of Trump-appointed judges on Americans' rights and liberties.[151] He reiterated the title in his piece and requoted Stern's warning that professors might take advantage of *Meriwether* to use racial epithets or misogynistic language in class.[152]

Four days after Gordon's post, Stern published a second article in *Slate* about the Sixth Circuit's opinion—this one an interview with Jane Doe titled "What It Feels Like When a Federal Court Gives a Professor the Right to Misgender You."[153] Doubling down on the rhetoric of his previous article, Stern claimed that "a conservative panel of judges on the 6th U.S. Circuit Court of Appeals [had] ruled that the First Amendment grants professors a right to intentionally misgender trans students in class."[154] In the interview, Jane Doe described the holding of the Sixth Circuit's opinion similarly.[155] She worried that "other professors may adopt the same discriminatory practice as Meriwether" because "the 6th Circuit has prevented the university from requiring professors to treat transgender students equally."[156]

Even before the Sixth Circuit's decision in *Meriwether*, Professor Andrew Koppelman had sounded alarm bells. He warned that "if the plaintiff in *Meriwether v. The Trustees of Shawnee State University* prevails, teachers at public colleges will have a constitutional right to subject their students to bigoted slurs. Much of anti-discrimination law would be deemed unconstitutional."[157] In the opinion's wake, Koppelman wrote that it had

148. *Id.*

149. Paul Gordon, *Trump Judges Rule That Public University Professors Have a Constitutional Right to Publicly Demean Transgender Students in Class: Confirmed Judges, Confirmed Fears*, PEOPLE FOR AM. WAY (Apr. 9, 2021), https://www.pfaw.org/blog-posts/trump-judges-rule-that-public-university-professors-have-a-constitutional-right-to-publicly-demean-transgender-students-in-class-confirmed-judges-confirmed-fears/ [https://perma.cc/K8NL-B2NY].

150. *Id.*

151. *Id.*

152. *Id.*

153. Stern, *supra* note 109.

154. *Id.*

155. *Id.*

156. *Id.* As Part I explained, the Sixth Circuit did no such thing, though Part III will argue that the widespread misperception that the Sixth Circuit did do so in *Meriwether* could cause Jane Doe's fears to be realized going forward.

157. 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/VPU8-BYEA].

confirmed his worst fears: "abuse as a constitutional right," he called it.[158] Koppelman accused the court of not thinking "through the meaning of [its] sweeping statements in future cases."[159] He also worried that "[t]he logic of the court's decision casts doubt on Title IX itself," with "alarming implications" for the future of transgender rights.[160] Koppelman ended on a solemn note: "Let's hope that the court does not intend the disastrous entailments of its decision."[161]

Professor Steve Sanders, writing for the "Expert Forum" of the liberal American Constitution Society, echoed Koppelman's concerns, worrying specifically about the judicial activism of conservative judges.[162] In Sanders's words, "[i]f you want to see what federal courts look like when they are controlled by activist-conservative judges who bend law to carry out their own agendas, you could find no better example than *Meriwether*."[163] This, in Sanders's view, was the best explanation for why the Sixth Circuit invoked "academic freedom" to grant college professors the right to "insult a transgender student by denying her gender identity" without being disciplined.[164] Because the Sixth Circuit held that the university "violated the First Amendment by compelling Meriwether's speech and imposing a substantive political viewpoint," the cause of "genuine academic freedom" was harmed, according to Sanders.[165] This, of course, overstates what the Sixth Circuit held. But Sanders ended his article with a well-founded warning: unless criticism of *Meriwether* is vigorous, we can expect more of its brand of judicial activism.[166]

Misunderstanding of the *Meriwether* opinion extended beyond academia. *Them Magazine*, an online LGBTQ+ outlet covering pop culture, fashion, and politics, published an article titled "Trump Judges Say Professor Has Free Speech Right to Misgender Student."[167] The article bemoaned the fact, or what it saw as a fact, that a "pair of Trump-appointed judges agreed with an Ohio professor who claims his employer's pronoun policy violated his first amendment rights."[168]

158. Andrew Koppelman, Opinion, *Abuse as a Constitutional Right: The Meriwether Case*, THE HILL (Apr. 5, 2021, 2:30 PM), https://thehill.com/opinion/judiciary/546444-abuse-as-a-constitutional-right-the-meriwether-case/ [https://perma.cc/L539-B778].

159. *Id.*

160. *Id.*

161. *Id.*

162. Steve Sanders, *Pronouns, "Academic Freedom," and Conservative Judicial Activism*, AM. CONST. SOC'Y (Apr. 12, 2021), https://www.acslaw.org/expertforum/pronouns-academic-freedom-and-conservative-judicial-activism/ [https://perma.cc/2GZD-CGAU].

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Julie Compton, *Trump Judges Say Professor Has Free Speech Right to Misgender Student*, THEM (Apr. 2, 2021), https://www.them.us/story/trump-judges-say-professor-has-free-speech-right-misgender-student [https://perma.cc/D26M-QLJ5].

168. *Id.* Other coverage from LGBTQ+ news sources included a similarly straightforward (and mistaken) description of the case: "The U.S. Court of Appeals for the Sixth Circuit reversed a district court's decision in March 2021, ruling Shawnee State University professor

Whereas much of the commentary on *Meriwether* came from sources that either supported or denounced the decision, some reports managed to inflate the importance of *Meriwether*'s holding even while remaining neutral on its merits. Shortly after the opinion came out, the Religion Clause blog (which touts its "objective coverage of church-state and religious liberty developments") published an update titled "6th Circuit: Prof Has 1st Amendment Right to Refuse to Call Transgender Student by Preferred Pronoun."[169] The author summarized *Meriwether*'s holding broadly: "[T]he U.S. 6th Circuit Court of Appeals held that Shawnee State University violated the free speech and free exercise rights of a philosophy professor when the school insisted that the Professor address a transgender student by her preferred gender pronoun."[170]

Columbia University's academic initiative, Global Freedom of Expression, published an overview and case analysis of *Meriwether*.[171] The analysis began with an account of the "facts" that was really just a recitation of the allegations from Meriwether's complaint, including the so-called "fact" that Jane Doe "did not respond negatively to Mr. Meriwether calling her by her last name."[172] The case note claimed that "[w]ithout any evidence to the contrary," the *Pickering* balance had favored Meriwether and that "the Court held that the university violated [Meriwether's] free-speech rights."[173] Notably, the "Decision Direction" section, which discussed the case's implications for future litigation, claimed (incorrectly) that "[*Meriwether*] expands expression by ruling that disciplining a university professor for refusing to use a student's preferred pronoun on the basis of sincere religious beliefs is a violation of his/her free-speech and free-exercise rights."[174]

Laws, an international academic journal, published an article about the implications of *Meriwether* in which it reported that the Sixth Circuit found that "the university violated [Meriwether's] First Amendment rights."[175] The authors claimed that the Sixth Circuit analyzed four important questions

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Nicholas Meriwether's First Amendment rights to free speech and religion were violated when the school disciplined him for misgendering a Trans student." Zachary Jarrell, *University in Ohio to Pay $400k to Professor Who Misgendered Student*, S. FLA. GAY NEWS (Apr. 21, 2022), https://web.archive.org/web/20221207174037/https://southfloridagaynews.com/National/ohio-university-to-pay-400k-to-professor-who-misgendered-student.html.

169. Howard Friedman, *6th Circuit: Prof Has 1st Amendment Right to Refuse to Call Transgender Student by Preferred Pronoun*, RELIGION CLAUSE (Mar. 29, 2021), https://religionclause.blogspot.com/2021/03/6th-circuit-prof-has-1st-amendment.html [https://perma.cc/PJ6W-JNHN].

170. *Id.*

171. *Meriwether v. Hartop*, GLOB. FREEDOM EXPRESSION, https://globalfreedomofexpression.columbia.edu/cases/meriwether-v-hartop/ [https://perma.cc/C8GC-JJLJ] (last visited July 15, 2023).

172. *Id.*

173. *Id.*

174. *Id.*

175. David Hoa Khoa Nguyen, Jeremy F. Price & Duaa H. Alwan, *The Influence of Christian Nationalism on U.S. Public Educators' Speech: Implications from* Meriwether vs. Hartop, LAWS (Nov. 30, 2021), https://www.mdpi.com/2075-471X/10/4/91 [https://perma.cc/95Z5-CWGY].

in *Meriwether*, including a conclusive question about free speech rights under the First Amendment: "[D]o a teacher's religious beliefs or freedom of speech supersede a student's right to be recognized according to their gender identity?"[176] According to the authors, the answer to this question was yes. They concluded by saying that the "court's opinion (without dissent) stated that the university had punished Meriwether for speaking on an issue of public concern, thereby denying his First Amendment rights."[177]

Private attorneys at law firms also covered the *Meriwether* decision. For example, an article written for the *National Law Review* took as its headline the now familiar, yet wrong claim: "Sixth Circuit Affirms First Amendment Protections for University Professor Refusing to Use Transgender Pronouns."[178] This title paralleled claims in articles written for *JD Supra*. For example, a July 2021 *JD Supra* piece claimed that "[t]he Sixth Circuit ruled that the public university violated the professor's freedom of speech."[179] Almost two years later, another *JD Supra* article similarly concluded that the Sixth Circuit had "sided with Professor Meriwether and ruled that the University had violated his First Amendment free speech and free exercise rights."[180]

The next wave of case commentary arrived after the university settled with Meriwether in April 2022. For example, Equality Ohio, an LGBTQ+ advocacy organization, issued a statement in which it expressed that it was "disappointed in the outcome of the recent Shawnee State lawsuit."[181] It clearly affirmed its opposition to (what it implied to be) the opinion's holding, declaring that "[t]he right of free speech is not the right to be free from the existence of other identities, and it must give way to the right of dignity that every individual holds."[182] And it used the opportunity to remind people to vote, issue public statements, and "send financial support to organizations in states that are the most impacted by racist and anti-LGBTQ+ legislation."[183]

A May 2022 article in *Politico* warned of the consequences the Sixth Circuit decision could have on Biden Administration policies to protect

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176. *Id.*
177. *Id.*
178. Matthew High & William S. Cook, *Sixth Circuit Affirms First Amendment Protections for University Professor Refusing to Use Transgender Pronouns*, NAT'L L. REV. (July 1, 2022), https://www.natlawreview.com/article/sixth-circuit-affirms-first-amendment-protections-university-professor-refusing-to [https://perma.cc/H6YS-DXPC].
179. Marshall Grate, *Accommodation Under Title VII of a Public School Teacher's Religious Belief Created an Undue Hardship in Educating Transgender Students*, J.D. SUPRA (July 27, 2021, 8:45 PM), https://www.jdsupra.com/legalnews/accommodation-under-title-vii-of-a-9344605/ [https://perma.cc/HSD3-2D5N].
180. Chris Gilbert, *The Great Pronoun Debate: Can Public Schools Require Employees to Use the Pronouns with Which Students Identify?*, J.D. SUPRA (Jan. 10, 2023), https://www.jdsupra.com/legalnews/the-great-pronoun-debate-can-public-7907390/ [https://perma.cc/9XUS-8X3J].
181. Md Spicer-Sitzes, *Shawnee State Response from Equality Ohio*, EQUAL. OHIO (Apr. 20, 2022), https://equalityohio.org/shawnee-state-response/ [https://perma.cc/4RXS-C8GZ].
182. *Id.*
183. *Id.*

transgender students.[184] Journalist Bianca Quilantan reported that although U.S. Secretary of Education Miguel Cardona may believe that students have the right to be called by the pronouns that match their gender identity, "the courts see it differently," and pointed to *Meriwether* to support this claim.[185] The article predicted "more legal battles over competing philosophies on gender ideology, forcing institutions to tiptoe between potentially costly settlements in courts and protecting transgender students on campus."[186] The president of the Association of Title IX Administrators, Brett Sokolow, agreed with this somber outlook.[187] He acknowledged that transgender students are othered and mistreated by being called their incorrect pronouns but concluded (wrongly) that "we as an institution can't do anything about it."[188]

Returning to academic commentary,[189] Professor Clifford Rosky brought up *Meriwether* in an article condemning anti-LGBT curriculum laws, such

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184. *See* Bianca Quilantan, *Legal Fights over Pronouns May Thwart Cardona's Plan to Help Trans Students*, POLITICO (May 25, 2022, 4:31 AM), https://www.politico.com/news/2022/05/25/biden-protect-trans-students-00034488 [https://perma.cc/3M37-5BTN].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. In addition to the articles written by professors and canvased above, important commentary about *Meriwether* has also come from student notes and blog posts. However, commentary in student notes and blog posts have often overstated *Meriwether*'s holding. For example, a note in the Spring 2022 issue of the *Tulane Journal of Law & Sexuality* claimed that "the Sixth Circuit *held* Shawnee State University violated Professor Meriwether's First Amendment right to free speech." Gabrielle M. Boissoneau, Note, *Call Me by My Pronouns: A Professor's Refusal and the Sixth Circuit's Acquiescence in* Meriwether v. Hartop, 31 TUL. J.L. & SEXUALITY 149, 163 (2022). The author further reported: "According to the court, the university provided no proof Meriwether's speech had hindered students' educational experience." *Id.* While true, this fails to recognize that the university did not have the opportunity to provide evidence at the motion to dismiss stage. *See supra* Part I.D. The note ultimately claims that the *Pickering* balancing test "tipped in favor of Meriwether" and the court "held that the university could not require the professor to change the way he addresses his students." Boissoneau, *supra*, at 157.

A comment published in the October 2022 issue of the *University of Chicago Law Review* similarly stated that the Sixth Circuit "held that Meriwether's use of misgendered honorifics was protected under his First Amendment right to academic freedom." Gabrielle Dohmen, Comment, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557, 1563 (2022). *Meriwether*, the comment claimed, provided "broad protection of the professor's academic freedom in the classroom" which was "unique among other academic-freedom cases." *Id.*

Another piece inflated the holding of *Meriwether* when discussing a Virginia policy that required school personnel to defer to the parents of a child when choosing what name and pronouns to use for the child. *See* Sean McDonough, *Virginia Wants to Force School Employees to Harm Trans Students*, ONLABOR (Oct. 25, 2022), https://onlabor.org/virginia-wants-to-force-school-employees-to-harm-trans-students/ [https://perma.cc/3CRF-3DV3]. The post argues that the Virginia policy violated the First Amendment because it required teachers to misgender their students. *Id.* According to the author's creative argument, *Meriwether* "held [that] the university could not discipline" a professor for refusing to use the pronouns of a trans student in his class; if a professor cannot be forced to gender their students correctly, then a professor surely cannot be forced to purposefully misgender their students. *See id.*

as the "Don't Say Gay" bills in Florida and Alabama.[190] Rosky maintained that, in *Meriwether*, the Sixth Circuit "ruled that the Free Speech Clause protects a professor's right not to use female pronouns when addressing a transgender student."[191] Rosky found it strange that the Sixth Circuit "did not seem to take seriously" the university's Title IX obligations,[192] and he rightly raised the question that *Meriwether* sidestepped of "whether government speech can violate the Equal Protection Clause."[193]

Soon after, Professor Caroline Mala Corbin published an article in the *Journal of Free Speech Law* in which she argued that public school teachers "do not and should not have a free speech right to deliberately misgender students in the classroom."[194] Corbin began by describing the opposing argument to her viewpoint: that forcing public school teachers to speak in a way that "clash[ed] with their Christian views" amounts to "unconstitutional compelled speech."[195] For her, *Meriwether* was an example of courts upholding this opposing argument: "[A]t least one Court of Appeals agreed, albeit in a case involving a university professor."[196] She reaffirmed this interpretation of the *Meriwether* holding later on in her article, claiming outright that the Sixth Circuit had held "that a college professor had a free speech right to misgender a student in his class."[197]

In December 2022, Koppelman returned to the subject, expanding on his previous position in an article published in *The Chronicle of Higher Education*.[198] The article's heading warned that "[c]onservative courts are establishing . . . dangerous new precedent to discriminate and abuse."[199] *Meriwether* was one of the two such "precedents" Koppelman used to exemplify this claim. According to Koppelman, quite right on this point, the *Meriwether* court "refused to acknowledge the harm to students" and gave "zero weight" to the "enormous stress" that misgendering puts on transgender students.[200] But from this, he jumped to the claim that in "the states where Sixth Circuit precedent is binding, it is uncertain whether a university may constrain a faculty member in any way that would 'alter the pedagogical environment in his classroom.'"[201] To be sure, there may be uncertainty—and there should be concern—about what future courts will make of *Meriwether*, but given the assumptions baked into the *Meriwether*

190. Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1858 (2022).

191. *Id.*

192. *Id.*

193. *Id.*

194. Caroline Mala Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, J. FREE SPEECH L. 615, 618 (2022).

195. *Id.* at 617.

196. *Id.*

197. *Id.* at 641.

198. Andrew Koppelman, Opinion, *Do Professors Have a Right to Mistreat Students?*, CHRONICLE HIGHER EDUC. (Dec. 9, 2022), https://www.chronicle.com/article/do-professors-have-a-right-to-mistreat-students [https://perma.cc/87UZ-Q52U].

199. *Id.*

200. *Id.*

201. *Id.* (quoting Meriwether v. Hartop, 992 F.3d 492, 500 (6th Cir. 2021)).

opinion itself, there should be no uncertainty about whether it currently stands as precedent preventing universities from constraining faculty speech regardless of its consequences. *Meriwether*, after all, reached the result it did only by assuming away the classroom effects that Koppelman rightly finds concerning.[202]

Finally, in a forthcoming article in the *University of Pennsylvania Law Review*, Professor Katie Eyer provides the "first systematic account" of what she calls transgender constitutional law.[203] There, amid a chronicle of victories for transgender plaintiffs' equal protection and due process claims, Eyer puts aside constitutional claims by opponents of transgender rights, which she acknowledges "could certainly affect the 'big picture' take of transgender rights' success in the courts."[204] Her one example: *Meriwether*, which she describes in a parenthetical as "finding that [a] professor's First Amendment rights were violated by [a] University policy requiring him to use gender-identity appropriate pronouns."[205]

C. Courts, Litigants, and Other Government Officials

Advocates and commentators are not the only ones who have addressed *Meriwether*; courts, litigants, legislators, and state attorneys general have done so as well, and often not accurately.

In August 2021, the Supreme Court of Virginia cited *Meriwether* in *Loudon County School Board v. Cross*,[206] a case about an elementary school teacher put on leave after he spoke out at a school board meeting against a proposed policy on the "Rights of Transgender Students and Gender-Expansive Students."[207] In *Cross*, the Supreme Court of Virginia agreed with the trial court that the teacher was likely to succeed on the merits of his free speech claims.[208] For *Pickering* purposes, the court said—citing *Meriwether*—that the teacher's expressive interests were especially strong because he was speaking out against a policy that "might burden his freedoms of expression and religion."[209] And on the disruption side of the balance, the court noted that there was no evidence that the teacher might "contravene any anti-discrimination policy or law."[210] Here again it cited *Meriwether*, describing it as having rejected the "university's assertion that its purported interests in preventing discrimination against transgender students and

202. *See supra* Part I.D.
203. Katie Eyer, *Transgender Constitutional Law*, U. PA. L. REV. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4173202 [https://perma.cc/YP9N-HWJ2].
204. *Id.* at 7.
205. *Id.* at 7, 7 n.29.
206. No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021).
207. *Id.* at *1.
208. *Id.* at *6, *8.
209. *Id.* at *6.
210. *Id.* at *8.

complying with anti-discrimination laws outweighed a professor's interest in refusing to use students' preferred pronouns."[211]

Each of these citations is technically accurate: *Meriwether* did hold that Shawnee State's actions might violate Meriwether's First Amendment rights, and it did reject the school's disruption argument at the motion to dismiss stage. But implied in *Cross* is the notion that the teacher's First Amendment rights were actually at stake in the proposed trans rights policy, something *Meriwether* is not sufficient to support. Another implication is that Shawnee State's disruption arguments would have been found meritless even once evidence had been considered—as it had been in the preliminary injunction request in *Cross* but of course had not been in the motion to dismiss in *Meriwether*. The limiting assumptions that allowed the *Meriwether* court to reach the *Pickering* outcome that it did are nowhere to be found in the Supreme Court of Virginia's opinion.

A December 2021 case in the U.S Court of Appeals for the Fifth Circuit, *Oliver v. Arnold*,[212] involved a high school student's First Amendment claim that her teacher violated her rights by forcing her to write the Pledge of Allegiance and retaliating against her when she refused.[213] The Fifth Circuit held that the student's claim could proceed in court and refused to rehear the case en banc.[214] In his dissenting opinion, Judge Stuart Kyle Duncan argued that the speech at issue in *Oliver* was not compelled.[215] He pointed out that there are cases in which students or teachers were "actually compelled to express themselves in violation of the First Amendment";[216] he used *Meriwether* as an example, claiming that it had held that a "public university violated [a] teacher's Free Speech and Free Exercise rights by compelling him to address students by their 'preferred pronouns.'"[217]

Litigants and amici curiae have also begun to misstate *Meriwether*'s holding in their pleadings and briefs. For example, in a recent case out of Iowa, amici argued to the U.S. Court of Appeals for the Eighth Circuit that the Sixth Circuit had "upheld [Meriwether's] free speech rights to refer to students with standard pronouns."[218] They urged the court to "follow the Sixth Circuit's opinion in *Meriwether* and enjoin the compelled use of the government's preferred pronouns."[219] (*Meriwether*, of course, never resulted in an injunction.)

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211. *Id.*
212. 19 F.4th 843 (5th Cir. 2021).
213. *Id.* at 846 (Ho, J., concurring).
214. *Id.* at 843 (majority opinion).
215. *Id.* at 862 n.10 (Duncan, J., dissenting).
216. *Id.* at 862.
217. *Id.* at 862 n.10.
218. Brief of Amici Curiae Moms for Liberty & Inst. for Free Speech in Support of Plaintiff-Appellant & Reversal at 14, Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist., No. 22-2927 (8th Cir. Nov. 14, 2022), 2022 WL 17184515.
219. *Id.* at 20.

Another brief from a case out of New Hampshire similarly misstated *Meriwether*'s holding.[220] Specifically, it claimed that the Sixth Circuit "[found] a university's policy requiring a professor to use students' preferred pronouns compelled speech and violated the First Amendment's Free Exercise Clause."[221] Likewise, a brief from a case in Minnesota stated that the Sixth Circuit "[held] a university's discipline of a professor for refusing to use a student's chosen gender pronouns which did not correspond with the student's biological sex violated the professor's First Amendment rights against compelled speech."[222] But the Sixth Circuit did not make any conclusions about whether or not the university's policy actually violated the First Amendment.[223]

A recent wrongful termination complaint also relied on this exaggerated version of *Meriwether* for one of its claims.[224] Valerie Kloosterman was employed at a hospital in Michigan that mandated diversity training.[225] Due to her religious convictions, Kloosterman refused to pledge that she would use transgender patients' correct pronouns or make referrals related to gender transitioning.[226] She requested a religious accommodation, which was denied, and then she was terminated.[227] In her October 2022 complaint against the hospital, Kloosterman claimed that the hospital's policy that she use transgender patients' correct pronouns "violated the Free Speech Clause, as construed by the Sixth Circuit in [*Meriwether*] . . . ."[228] According to the complaint, the Sixth Circuit had found that "public universities violate the First Amendment when they coerce their employees to use sex-obscuring pronouns while performing job duties that require freedom of expression."[229] The case is still pending.

And it is not only private litigants who are misstating *Meriwether*'s holding. In March 2022, the State of Texas filed a complaint challenging guidance issued by the Equal Employment Opportunity Commission (EEOC) that interpreted employers' obligations under Title VII.[230] Specifically, the guidance extended Title VII protections to prohibit

220. Reply Brief for the Petitioners at 5, Doughty v. State Emps.' Ass'n of N.H., 141 S. Ct. 2760 (2021) (mem.) (No. 20-1534).

221. *Id.*

222. Plaintiffs-Appellants' Brief at 30, Huizenga v. Indep. Sch. Dist. No. 11, 44 F.4th 806 (8th Cir. 2022) (No. 21-2418).

223. *See* Meriwether v. Hartop, 992 F.3d 492, 514 (6th Cir. 2021) ("Meriwether has *plausibly alleged* that religious hostility infected the university's interpretation and application of its gender-identity policy. Whether this claim ultimately prevails will depend on the results of discovery and the clash of proofs at trial. For now, we simply hold that Meriwether has plausibly alleged a free-exercise claim based on religious hostility." (emphasis added)).

224. Complaint at 4, Kloosterman v. Metro. Hosp., No. 22-CV-0944 (W.D. Mich. Oct. 11, 2022).

225. *Id.* at 2.

226. *Id.*

227. *Id.*

228. *Id.* at 4.

229. *Id.* at 37.

230. First Amended Complaint at 16, Texas v. EEOC, 633 F. Supp. 3d 824 (N.D. Tex. 2022) (No. 21-CV-194).

discrimination against individuals based on sexual orientation or gender identity.[231] Purposefully using pronouns inconsistent with an individual's gender identity constituted harassment under the new guidance.[232] In its first amended complaint, Texas flatly claimed that "[b]y purporting to require that employers and their employees use [] an individual's preferred pronouns based on subjective gender identity rather than biological sex, the June 15 Guidance unconstitutionally compels and restrains speech."[233] Its only citation in support of this claim: *Meriwether*.[234] Ultimately, the district court set aside the guidance as unlawful without referencing *Meriwether*.[235] But as a result, it also failed to clarify that *Meriwether* did not hold what Texas had claimed it did.[236]

Inflated claims about *Meriwether* have also been made by legislators and other state officials outside the courts. About a year after the decision was issued, conservative state legislators began using the Sixth Circuit's ruling as a legal basis to justify new antitrans legislation.

In May 2023, the Tennessee legislature passed a bill that prohibits public schools from requiring teachers to refer to students by their preferred pronouns.[237] The bill affects not just higher education, but also K–12 schools.[238] In Senate hearings for an earlier version of the bill, legislators such as Senator Mike Bell invoked *Meriwether* in support of the proposed law.[239] In Bell's (accurate) view, *Meriwether*'s most important holding was that "titles and pronouns express a message."[240] But he went on to (inaccurately) conclude: "If a teacher is bound to call a student by a pronoun that does not match their biological sex, when you put that with the Sixth Circuit . . . you can't compel somebody to express a message . . . they may or may not agree with."[241] In Bell's opinion, "the principles [expressed in *Meriwether*] apply to K-12 education as well."[242] This sparked a debate focused not on what the actual holding of *Meriwether* was, but on whether it should apply to K–12 schools.[243] No one at the hearing seemed to question

231. U.S. EQUAL EMP. OPPORTUNITY COMM'N, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/U4E5-6DMF].

232. *Id.*

233. First Amended Complaint, *supra* note 230, at 16.

234. *Id.*

235. *EEOC*, 633 F. Supp. 3d at 841 (holding that the June 15 Guidance was invalid based on the EEOC's failure to follow the procedural rules of Title VII).

236. *See id.*; *see also infra* Part III.A (discussing the EEOC's various responses to these arguments).

237. *See* TENN. CODE ANN. § 49-6-5102 (2023).

238. *See id.*

239. *See Senate Education Committee Hearing*, 2022 Leg., 112th Gen. Assemb. (Tenn. 2022) (statement of Sen. Mike Bell, Member, S. Educ. Comm.), https://tnga.granicus.com/player/clip/26777?view_id [https://perma.cc/EZK2-UEXC]. Senator Bell's discussion of *Meriwether* begins at 2:11:14.

240. *Id.* at 2:11:35.

241. *Id.* at 2:12:49.

242. *Id.* at 2:14:29.

243. *See id.* at 2:16:48.

that *Meriwether* stood for the idea that professors could purposefully misgender their students.[244]

Other conservative state officials have cited *Meriwether* in advocacy against the Biden Administration's efforts to protect transgender students. In September 2022, twenty state attorneys general came together to oppose the U.S. Department of Education's proposed regulations implementing Title IX.[245] In particular, the regulations would confirm that Title IX's prohibition on sex-based discrimination extends to sexual orientation and gender identity, as Title VII was held to do in the Supreme Court's decision in *Bostock*.[246]

The attorneys general urged the federal government not to read Title IX to include "gender identity," which, they said, would require professors to refer to students by their preferred pronouns.[247] According to their letter, the result would be "unreasonable, unlawful, and counter-productive."[248] Unsurprisingly, the attorneys general cited *Meriwether* in support of the claim that "whether motivated by faith, pedagogical theory, or simple disagreement," college faculty who resist using people's preferred pronouns "have a right to express themselves under the First Amendment."[249] *Meriwether*, in fact, provides the letter's sole authority for what the attorneys general treat as an established First Amendment right to misgender.[250]

The number of sources contributing to the false narrative around *Meriwether* is outshone only by their variety. Religious freedom and free speech advocates on the right, LGBTQ+ advocates on the left, scholars critical of the decision, reporters simply aiming to summarize the decision, law professors wanting to clarify the meaning of academic freedom, commentators using the decision as a data point in a larger political story, judges looking for relevant precedent, litigants trying to shape judges' understanding of that precedent, and state legislators and attorneys general seeking to use the decision to erode trans rights—each has contributed to the misimpression that *Meriwether* granted public university professors a First Amendment right to misgender their students in class. Part III looks at whether and how these kinds of false narratives can be avoided or put to rest.

III. AVOIDING MISUNDERSTANDING

Meriwether is hardly the first judicial opinion to be read for more than it is worth. In a 2015 article, Professors Jonathan S. Masur and Lisa Larrimore Ouellette offered an entire typology of what they called "deference

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244. *See generally id.*

245. Letter from Jonathan Skrmetti to Hon. Miguel Cardona, *supra* note 10.

246. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

247. Letter from Jonathan Skrmetti to Hon. Miguel Cardona, *supra* note 10, at 3, 6. Note that the *Meriwether* decision explicitly refused to extend *Bostock*'s gender identity protections under Title VII to Title IX. Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

248. Letter from Jonathan Skrmetti to Hon. Miguel Cardona, *supra* note 10, at 1.

249. *Id.*

250. *Id.*

mistakes": distortions that occur when judicial decisions are made under limiting conditions that get ignored when the decision is later cited.[251]

For example, if court 1, applying a qualified immunity test, says that a government official's action is not clearly established as unconstitutional, and court 2 then cites court 1 for the proposition that the action is constitutional, a deference mistake has occurred.[252] Similarly, if court 1 upholds a lower court's evidentiary or procedural decision on an abuse of discretion or clear error standard, and court 2 acts as if court 1 actually agreed with the decision below, court 2 has made a deference mistake.[253] Masur and Ouellette catalog the occurrence of deference mistakes in areas of law ranging from habeas corpus petitions to employment discrimination to patent law, and they model how, over time, deference mistakes in certain areas can systematically distort the law in a particular direction.[254]

The mistaken readings of *Meriwether* detailed in Part II can be seen as deference mistakes, or at least a close cousin. Masur and Ouellette's examples all show courts leaving out some crucial context in which prior courts' decisions were made: perhaps the burden of proof or the standard of review. So, to take a now familiar example, plaintiffs can defeat a motion to dismiss if their claim is plausibly alleged; it would clearly be a deference mistake to then act as if their claim had been proven when really it had only cleared a much lower hurdle.

That's not quite the way *Meriwether* has been misunderstood, however, which is why this is perhaps just a close cousin to Masur and Ouellette's examples. The mistakes canvased in Part II stem not from the motion to dismiss standard, but instead from the assumptions that were necessary in order for the Sixth Circuit to rule as it did. When those assumptions—namely, that there was no disruption to students' educational opportunities or school operations—get ignored in future citations to *Meriwether*, the opinion takes on a far greater importance than it merits. So too with the *Meriwether* court's complete omission of the potential equal protection claims against Shawnee State or Meriwether himself. This is a limiting condition on the original opinion—a way of deferring to the plaintiff by putting off consideration of one of the potential obstacles to his claim. To

251. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 662 (2015).

252. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

253. *See, e.g.*, United States v. Castano, 906 F.3d 458, 467 (6th Cir. 2018) ("[C]lear error . . . requires a 'definite and firm conviction that a mistake has been committed.'" (quoting Easley v. Cromartie, 532 U.S. 234, 242 (2001))); Memphis A. Philip Randolph Inst. v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021) ("Under the abuse-of-discretion standard, [the court of appeals] will reverse the district court 'if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact.'" (quoting City of Pontiac Retired Emps. Ass'n v. Schimmel, 751 F.3d 427, 430 (6th Cir. 2014))).

254. *See* Masur & Ouellette, *supra* note 251, at 701–09.

state *Meriwether*'s holding without including such an important limitation is again to exaggerate what the Sixth Circuit actually held.

Where this Article goes beyond Masur and Ouellette's important analytical work is by showing exactly how mistakes of this sort get made. At one point in their article, Masur and Ouellette puzzle at why courts would make such errors.[255] Perhaps judges or their clerks are sometimes sloppy, particularly in an age of electronic searching that allows readers to jump past sections of the opinion that discuss a case's procedural posture or standard of review.[256] Judges and litigants, Masur and Ouellette acknowledge, "may have strategic reasons for citing precedents misleadingly."[257] But ultimately the authors conclude that "[t]racing the source of deference mistakes would be a useful avenue for further research."[258]

The examples of Part II can be read in that spirit. And one thing they show is that courts and litigants are not the only ones who make consequential mistakes and misrepresentations about the holding of a case. Reporters, commentators, academics, legislators, and executive branch officials do so too, and for reasons that go well beyond sloppiness or haste. Seeing the many different, even conflicting, sources and motives that together help create a false legal narrative can help us identify the points at which the mistake might have been avoided, corrected, or mitigated. The goal, then, of this final part is to draw out, from the many examples offered in Part II, insight into how the widespread misunderstanding of *Meriwether* and cases like it might be combatted before its consequences spread.

We divide the discussion below into those spreaders of misunderstanding who benefit from the misunderstanding, those whose motives are in some ways divided, and those who should be fully invested in stopping the misunderstanding and limiting *Meriwether*'s reach as much as possible.

A. For Misunderstanding

There is not much to be done about some of those who have contributed to the misunderstanding of *Meriwether*. The advocates representing the plaintiff provide the most obvious example. We should probably expect that the party notching a win in the court of appeals—even a preliminary win, like surviving a motion to dismiss (as here) or getting a preliminary injunction—are likely to leave out some of the procedural niceties and simply declare victory, as ADF repeatedly did in press releases and opinion pieces after the *Meriwether* opinion came out.[259]

255. *See id.* at 664. Masur and Ouellette note that "courts" here include also administrative agencies whose nonbinding decisions "can nonetheless influence the law." *Id.* "Past practice and facts on the ground can exert a powerful influence even when they have no binding legal effect," they write. *Id.* Thus, this Article's consideration of deference mistakes outside the courts should be fully consistent with Masur and Ouellette's project.

256. *See id.* at 665.

257. *Id.* at 666 ("[P]arties, like courts, may sometimes be resource-constrained or may even purposely attempt to introduce deference mistakes.").

258. *Id.*

259. *See supra* text accompanying notes 116–18, 125–30.

More troubling, but equally unlikely to change, is the fact that the *Meriwether* opinion itself was written in a way that encourages the misunderstanding. Consider its opening paragraph:

> Traditionally, American universities have been beacons of intellectual diversity and academic freedom. They have prided themselves on being forums where controversial ideas are discussed and debated. And they have tried not to stifle debate by picking sides. But Shawnee State chose a different route: It punished a professor for his speech on a hotly contested issue. And it did so despite the constitutional protections afforded by the First Amendment.[260]

A reader could hardly be blamed for coming away from the court's introduction with the impression that Shawnee State had punished Meriwether in violation of the First Amendment, though this is not what the opinion goes on to hold. So too when the court ends its discussion of the free speech claim: "Taking the allegations as true, we hold that the university violated Meriwether's free-speech rights."[261] Contrast this with the court's conclusion about Meriwether's free exercise claims: "Whether this claim ultimately prevails will depend on the results of discovery and the clash of proofs at trial. For now, we simply hold that Meriwether has plausibly alleged a free-exercise claim based on religious hostility."[262] The latter makes clear that the Sixth Circuit is merely deciding that this claim will move forward to fact finding. That is a clarification notably lacking in the Sixth Circuit's discussion of Meriwether's free speech rights. In its place is the repeated implication that Shawnee State betrayed the ideals of the founding fathers[263] by casting a "pall of orthodoxy over the classroom."[264]

Without speculating too much about any political motives that two Trump-appointed judges (Judges Amul R. Thapar and Joan Larsen) and one judge (Judge David W. McKeague) appointed by President George W. Bush might have had for encouraging overly broad readings of their opinion in *Meriwether*, we might just note a general incentive on the part of appellate judges to ensure that their opinions will have the broadest influence possible. Often this desire is stymied by constraints that appellate judges operate within. Established standards of appellate review often mean that courts of appeals are not deciding issues de novo in the way that judges might want. Similarly, decisions built on assumptions that might not survive the procedural posture in which they were made—the motion to dismiss stage at which *Meriwether* was decided, for example—come with built-in limits to their breadth of application. The opinion is likely to be supplanted once

260. Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021).

261. *Id.* at 511–12.

262. *Id.* at 514–15 ("If this inference is supported through discovery and trial, a jury could conclude that the university's refusal to stick to its accommodation is 'pretext for punishing [Meriwether's] religious views and speech.'" (alteration in original) (quoting Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012))).

263. *See id.* at 503, 511.

264. *Id.* at 503; *see also id.* at 505–07, 509, 511 (returning to the orthodoxy theme in the free speech section of the opinion).

assumptions are replaced by facts—unless those reading and applying the opinion are made to forget the limiting assumptions that were there in the first place.

Some need little encouragement to disregard these limiting assumptions. The litigators and government officials who have cited *Meriwether* in their briefs, administrative comments, and legislative debates all have good reasons of their own to use the opinion for more than it is worth.[265] Nothing in this Article is likely to convince "red state" attorneys generals to be more nuanced in their treatment of *Meriwether*, especially given that it is currently the only support that they (incorrectly) cite for the proposition that professors at public schools have a First Amendment right to misgender their students.[266] But this just makes it all the more important for advocates on the other side—whether in court, in responses to comments during the rulemaking process, or at legislative hearings—to clarify what *Meriwether* actually holds.[267]

B. Ambivalence About Misunderstanding

As Part II showed, even *Meriwether*'s foes—one author of this Article included[268]—have contributed to the inflated narrative around it. We have found ourselves in positions where it made sense to emphasize the opinion's importance. But given our support of trans rights, it also of course makes sense to point out the opinion's limitations. Hence the ambivalence.

Reasons for emphasizing, or perhaps over-emphasizing, *Meriwether*'s importance are varied. Some, for example, have highlighted the case as evidence of what "Trump judges" are likely to do during their time on the

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265. *See supra* Part II.C.

266. *See, e.g.*, Letter from Jonathan Skrmetti to Hon. Miguel Cardona, *supra* note 10, at 6.

267. Consider, for example, the EEOC's response to the State of Texas's use of *Meriwether* in its challenge to the EEOC's guidance on Title VII's application to sexual orientation and gender identity. *See generally* Texas v. EEOC, 633 F. Supp. 3d 824 (N.D. Tex. 2022) (No. 21-CV-194). Texas cited *Meriwether* for the proposition that employees cannot be told what pronouns to use; instead of contesting that statement of *Meriwether*'s holding, the EEOC merely argued that its guidance reaches only intentional and repeated misgendering that rises to the level of harassment. Defs.' Opposition to Plaintiff's Cross-Motion for Summary Judgment & Reply in Support of Defs.' Motion for Summary Judgment at 32, *EEOC*, 633 F. Supp. 3d 824. A far stronger response was made in the EEOC's own summary judgment brief, where the agency accurately pointed to the limits of *Meriwether*, observing that "*Meriwether* recognizes that government employers may nevertheless regulate workplace speech if the regulations are 'directed at speech that has some potential to affect the entity's operations' and are 'necessary for the[] employers to operate efficiently and effectively.'" Defs. Memorandum in Support of Their Motion for Summary Judgment at 22, *EEOC*, 633 F. Supp. 3d 824 (quoting Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006)). The brief goes on to conclude: "If anything, the *Meriwether* decision simply underscores the fact-intensive nature of Title VII cases and highlights why Texas' pre-enforcement challenge—devoid of any concrete facts—cannot prevail." *Id.* at 23. Briefs like this, hammering home the fact-dependent limits of *Meriwether*, will be necessary going forward if the inflated narrative around its holding is to be corrected.

268. *See Amici Curiae* Brief of L. Professors Darren Rosenblum & Brian Soucek et al. in Support of Petition for Panel Rehearing or Rehearing En Banc, *supra* note 12.

federal bench.[269] Here, a narrative about what kinds of precedent certain judges might want to establish becomes a not entirely accurate story about what precedent a particular decision actually established. However well-intentioned and accurate the larger narrative may be, articles like these give the public the wrong idea about what *Meriwether* itself did and the wrong perception of the rights of professors versus those of their transgender students.

Similarly, academic commentary critical of *Meriwether* has often overstated the opinion's holding in order to make it a more important target for criticism[270] or to fit it into a larger story of rights under threat.[271] Academics obviously have professional reasons for training their sights on significant legal developments. And to be sure, *Meriwether*'s holding does include several significant moves: it deepens a circuit split about whether *Garcetti* applies to professors at public universities;[272] it decides that gendered modes of address in the classroom count as speech on a matter of public concern;[273] and it denies that precedent about Title VII's coverage of gender identity discrimination applies to Title IX.[274] The academic commentary described in Part II provides important and devastating responses to the second and third of these moves.[275] And it does valuable work in preempting any future efforts to give professors a First Amendment right to misgender their students.

The only problem is the claim, made so often in the commentary, that the Sixth Circuit has already upheld such a right. Outside of the vanishingly narrow conditions assumed for the sake of the motion to dismiss decision, *Meriwether* does no such thing. Making the opinion's limitations explicit might marginally decrease the perceived importance of academic arguments that challenge it, but doing so would also avoid a situation in which catastrophizing on the part of progressives helps to bring about the catastrophe. Authors who are as committed to fighting discrimination as are those whose work is cited in Part II surely want to avoid contributing to a false narrative about *Meriwether*, especially one that opponents of transgender rights can then rely on to erode those rights.

Pointing the criticism inward now: the amicus brief from law professors seeking en banc reconsideration of *Meriwether* provides another example of

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269. Stern, *supra* note 145; Gordon, *supra* note 149; Compton, *supra* note 167 and accompanying text.

270. *See, e.g.*, Koppelman, *supra* note 158 and accompanying text; Sanders, *supra* note 162 and accompanying text.

271. *See, e.g.*, Corbin, *supra* note 194; Eyer, *supra* note 203; Koppelman, *supra* note 198.

272. *See* Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021); *supra* note 59 and accompanying text (describing the circuit split).

273. *See Meriwether*, 992 F.3d at 508.

274. *See id.* at 510, 510 n.4.

275. *See, e.g.*, Amar & Brownstein, *supra* note 115; Koppelman, *supra* note 157; Sanders, *supra* note 162*; 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)*, *supra* note 106, at 2008, 2010.

conflicted motives at work.[276] The brief asked the Sixth Circuit to vacate its opinion and replace it with one that recognizes well-established limits on academic freedom.[277] But since the Sixth Circuit treats en banc reconsideration as "an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance,"[278] getting *Meriwether* vacated and corrected also required emphasizing its importance as precedent.

Because the amicus brief was focused on the expressive value side of the *Pickering* balancing test—not the disruption side, which is where the *Meriwether* opinion's limiting assumptions did their work—the brief itself does not explicitly misstate *Meriwether*'s holding. Nor, however, does it acknowledge the holding's limits, and bringing together over 100 law professors in opposition to a circuit court opinion clearly sends a signal about its perceived danger. In fact, correspondence with potential signatories to the brief unintentionally overstated what *Meriwether* did by asserting that the decision "allows a professor to deliberately misgender a student as a matter of academic freedom" and describing it as a "travesty."[279]

In retrospect, would the energies of these 101 law professors have been put to better use by explaining to other academics and to the public the complicated procedural context in which *Meriwether* was decided, emphasizing the limits of its holding, and supporting the litigation efforts back in the district court on remand? Perhaps by refusing to treat *Meriwether* as more important than it was, we might not have helped make it seem as important as it now is.

On the other hand, given that Shawnee State went on to settle, en banc reconsideration turned out to be the one opportunity to correct *Meriwether* before the case closed. Even in retrospect, then, it is hard to know which of the mixed motives should have prevailed. What does become clear though is how critically the subsequent settlement mattered in solidifying the false narrative about *Meriwether*. The final section thus looks at the role the defendants played, and might have played, in shaping what *Meriwether* has come to mean.

C. Against Misunderstanding

No one had a more straightforward motive to emphasize the narrowness of *Meriwether*'s holding than those who were defending against Meriwether's claims. The defendant, Shawnee State, and the intervenor

276. *See Amici Curiae* Brief of L. Professors Darren Rosenblum & Brian Soucek et al. in Support of Petition for Panel Rehearing or Rehearing En Banc, *supra* note 12, at 2–9.

277. *Id.* at 3 ("Academic freedom is not just freedom of speech for people who happen to be academics. In the context of teaching, academic freedom protects professors' right to make *pedagogical* judgments, informed by their scholarly expertise, about how best to *discuss* issues that are *relevant* to the courses they have been hired to teach.").

278. 6th Cir. I.O.P. 35(a), https://www.ca6.uscourts.gov/rules-and-procedures/local-rules-frap-local-rules-iops [https://perma.cc/B22G-KK2D] (last visited Sept. 3, 2023).

279. Email from Brian Soucek, Professor of L., Univ. of Cal., Davis, to multiple recipients (May 11, 2021, 10:39 AM) (on file with authors).

defendants, Jane Doe and SAGA, might have been expected to do all that they could to clarify the opinion's limitations. Yet that is not what happened. And recognizing this leads to perhaps the most important insight about how to avoid false, rights-endangering legal narratives going forward.

To start, as Part II discussed, the defendants stayed silent in the wake of the Sixth Circuit's opinion. Meriwether's attorneys at ADF thus were able to mischaracterize the opinion's holding without correction from the other side. Given that the defendants would soon seek en banc consideration of the decision, they might have had incentives like their law professor amici did to avoid minimizing the opinion's importance. But the result was that in the immediate aftermath of the decision, no one associated with the case was speaking out in public about their next steps. No one was explaining that this was just a temporary setback for Shawnee State, Jane Doe, and SAGA, since going forward they could simply produce evidence about the disruption caused by Meriwether's expression—the very thing that was assumed away in the *Meriwether* opinion's *Pickering* analysis. Finally, no one was clarifying that universities could still enforce their nondiscrimination policies, even in the Sixth Circuit.

Jane Doe's interview with Mark Joseph Stern in *Slate*,[280] sympathetic as it was, actually had the opposite effect. Like so many of us described above, Jane Doe rang the alarm bells about the decision: "Now that the 6th Circuit has prevented the university from requiring professors to treat transgender students equally, I am concerned that other professors may adopt the same discriminatory practice as Meriwether."[281] But the Sixth Circuit's decision denied a motion to dismiss; it did not grant a preliminary injunction. And however deep this might be in the civil procedural weeds, the distinction is crucial. Nothing in *Meriwether*, after all, prevented Shawnee State from continuing to enforce its nondiscrimination policies against Professor Meriwether, much less against any other professors not party to the case. The Sixth Circuit did not even conclude that Meriwether was likely to win such an order down the line.[282] The Sixth Circuit, in short, had not done anything to prevent Shawnee State "from requiring professors to treat transgender students equally."[283] So although Doe's message surely got progressives' attention, it also likely affected what professors and students came to believe about their rights in the classroom. The defendants' response to *Meriwether* contributed to the damagingly false perception about the case that still persists.

None of this would have mattered as much, however, if the parties had returned to the district court and proceeded past the pleading stage to discovery and summary judgment. Doing so was unlikely to change much on Meriwether's side; no one contested what he said or why he did so, and

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280. Stern, *supra* note 109.
281. *Id.*
282. *See supra* note 135 (distinguishing the likelihood of success on the merits test for preliminary injunctions from the plausibility standard governing motions to dismiss).
283. Stern, *supra* note 109.

the Sixth Circuit had already established that any protection for his speech would turn on *Pickering* balancing, as he had already won on the first two steps of the *Garcetti* test.[284]

Where discovery promised to make a difference was on the other side of the *Pickering* scale: the employer's interest in avoiding disruption to its operations. Evidence was already present in the record—though not available for consideration at the motion to dismiss stage—suggesting the extent to which Meriwether's speech disrupted transgender students' educational opportunities at Shawnee State. In the sworn statement accompanying Jane Doe and SAGA's motion to intervene, the vice president of SAGA said that one of the club's transgender members had dropped out of one of Meriwether's previous classes because Meriwether had misgendered him; other of the nine transgender student members of SAGA were said to be avoiding Meriwether's classes, which in some cases made it difficult for them to fulfill graduation requirements.[285]

Similarly, Jane Doe filed a sworn declaration with her motion to intervene in which she detailed the ways that Meriwether's misgendering had affected her.[286] She dreaded raising her hand in his class but forced herself to do so because students' grades were a function of their class participation.[287] Some of her classmates followed Meriwether's lead and referred to her with male pronouns and honorifics.[288] Doe's anxiety spiked, leading to crying spells and emotional exhaustion and causing her to withdraw from friends, student groups, and campus activities.[289] And Doe refused to take other classes with Meriwether despite being interested in their subject matter.[290]

Evidence of this sort—about the effects Meriwether's speech has had on the transgender students of Shawnee State—would certainly have affected the *Pickering* balancing if the case had continued to a point at which evidence, not just plaintiff's factual allegations, was being considered. Evidence of this sort would be direct proof of disruption to the school's operations. But it would also be relevant insofar as it suggests that Shawnee State faced—and continues to face—liability under Title IX, as it was aware that students' educational opportunities were being affected on account of their gender and gender identity.[291] Exposure to litigation and potential liability would be an additional type of disruption tipping the *Pickering* balance away from Meriwether. And all of this would be in addition to potential litigation under the Equal Protection Clause, which as Part I

284. *See supra* notes 97–98 and accompanying text.
285. *See* Declaration of Jae Ezra Keniston in Support of Motion to Intervene as Defs., *supra* note 83, at 3.
286. Declaration of Jane Doe in Support of Motion to Intervene as Defs. at 3–6, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020).
287. *Id.* at 4.
288. *Id.*
289. *Id.* at 4–5.
290. *Id.* at 5.
291. 20 U.S.C. §§ 1681–1688.

explained, could be brought against Meriwether directly and paired with a Title IX claim against the school.[292]

None of this happened, however, because in April 2022, Shawnee State settled, paying Meriwether $5,000 and his attorneys $395,000 and agreeing that Meriwether "has the right to not use pronouns or titles when addressing or referring to any person, including students, who request pronouns or titles that conflict with the person's biological sex, even if he uses pronouns or titles for other persons, including students."[293]

In a statement at the time, the university said that it was making "an economic decision to settle" a case that "was being used to advance divisive social and political agendas at a cost to the university and its students."[294] However, two curious things about the settlement stand out.

First, as part of the agreement, the university's president added a memorandum to Meriwether's personnel file rescinding the written warning he had received in 2018 "[i]n light of the ruling of the U.S. Court of Appeals for the Sixth Circuit and the subsequent settlement."[295] "Had similar precedent existed in 2018," the president wrote, "the warning would not have been issued."[296] This is an extraordinary claim, as it implies incorrectly that the *Meriwether* opinion affects the way that the university is able to apply its nondiscrimination policies. *Meriwether* does no such thing.

Second, in its public statement, Shawnee State maintained that, in its dealings with Meriwether, it had "followed its policy and federal law that protects students . . . from bigotry and discrimination."[297] But if this is true, if its earlier actions were pursuant to Title IX, then how is Shawnee State not violating federal nondiscrimination law now through the terms of its settlement?

Unfortunately, no one has held Shawnee State responsible for this violation by bringing a claim in court. After intervening as defendants, Jane Doe and SAGA presumably could have brought crossclaims[298] against Shawnee State, alleging a violation of Title IX and the Equal Protection Clause, as well as an equal protection counterclaim[299] against Meriwether

292. *See supra* note 71 and accompanying text.

293. Settlement Agreement and Release, *supra* note 7. Shawnee State did not, however, admit that Meriwether's constitutional rights had been violated. *See id.*; *see also Statement from Shawnee State University on the Settlement of the Meriwether Case*, SHAWNEE STATE UNIV., https://www.shawnee.edu/about-us/administrative-offices/general-counsel/settlement-statement [https://perma.cc/2S8S-C92E] (last visited Sept. 3, 2023) ("[W]e adamantly deny that anyone at Shawnee State deprived Dr. Meriwether of his free speech rights.").

294. *Statement from Shawnee State University on the Settlement of the Meriwether Case*, *supra* note 293.

295. Exhibit A, Settlement Agreement & Release, Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753 (S.D. Ohio Mar. 29, 2022), https://ohiocapitaljournal.com/wp-content/uploads/2022/04/Meriwether-Final-Settlement-w_Meriwether-signature.pdf [https://perma.cc/6HHU-4WUR].

296. *Id.*

297. *Statement from Shawnee State University on the Settlement of the Meriwether Case*, *supra* note 293.

298. FED. R. CIV. P. 13(g).

299. *Id.* 12(a).

himself. And though Jane Doe has since graduated, SAGA presumably still has standing to bring these claims.

Bringing claims like these would make clear that a university cannot just trade away its students' rights as Shawnee State did in the settlement agreement. A school cannot violate federal nondiscrimination law in order to sidestep litigation over a merely alleged violation of the First Amendment—a violation Shawnee State continues to deny. Most importantly, by making Shawnee State face actual litigation, not just the threat of it, with factual allegations about the effects of Meriwether's speech—by making tangible the disruption that Meriwether's speech has caused—claims like these have the potential to shift what First Amendment rights courts are likely to recognize in the first place. These discrimination claims would make it impossible to ignore or assume away, as the Sixth Circuit did, the disruptions that tip the *Pickering* balance away from Meriwether and strip his speech of First Amendment protection.

Meriwether is just one of many recent cases weaponizing the First Amendment to attack university discrimination policies. In the past few years, a newly formed conservative speech advocacy organization, Speech First, has won preliminary injunctions against universities in the U.S. Courts of Appeals for the Fifth, Sixth, and Eleventh Circuits, with another case currently under review in the U.S. Court of Appeals for the Tenth Circuit.[300] In each of these cases, and in another in the Eighth Circuit, major universities settled rather than proceeding to discovery, summary judgment, or trial. Even in one circuit (the U.S. Court of Appeals for the Seventh Circuit) where Speech First lost, the University of Illinois still went on to settle.[301] As a result, in case after case, university nondiscrimination policies are being abandoned based on a one-sided presentation of alleged harms to free speech, before courts have the chance to hear countervailing allegations or evidence from those who were harmed by speech. As with *Meriwether*, these preliminary opinions in the courts of appeals are getting the last word.[302]

Perhaps it might seem as if Shawnee State should have been put in Part III.B, with the other ambivalent parties. Of course the school wants *Meriwether* to be interpreted narrowly, but unlike Jane Doe and SAGA, it also seems to have an economic incentive to stop arguing the issue. We feel this is wrong. By settling, the university may have avoided additional legal fees and the potential, however small, of ultimately losing to Meriwether. But the settlement has itself opened the university to potential litigation and liability, this time under Title IX and the Equal Protection Clause. Recognizing that should change the calculus and bring Shawnee State back into the camp that is wholeheartedly interested in fighting to limit

300. *See Court Battles*, SPEECH FIRST, https://speechfirst.org/court-battles/ [https://perma.cc/G2A4-7K77] (last visited Sept. 3, 2023); *see also* Brian Soucek, *Speech First, Equality Last*, 55 ARIZ. ST. L.J. (forthcoming 2023) (manuscript at 334, 385), 633 F. Supp. 3d 824 [https://perma.cc/C53F-HTPF].

301. Notice of Dismissal, Speech First, Inc. v. Killeen, No. 19-CV-3142 (C.D. Ill. 2021).

302. *See, e.g.*, Preliminary Injunction at 3, Speech First, Inc. v. Khator, 603 F. Supp. 3d 480 (S.D. Tex. 2022) (No. 22-CV-582).

Meriwether's reach. However, this will only happen if parties are willing to hold universities to their obligations under federal nondiscrimination law. In other words, this will only happen if the third parties affected by the settlement make their voices heard.

Many of us are to blame for the false narrative that has emerged about *Meriwether*. As Part III has shown, different choices might have been made at a number of points, and even now, litigators, academics, and commentators can correct the way we describe what the decision actually holds. But the single most effective way to poke holes in the inflated view of opinions like *Meriwether* is to continue litigating those cases beyond the pleadings. For only then will a motion to dismiss ruling get supplanted by a decision that takes actual facts into account and balances speech interests against the disruption and harm that speech can sometimes cause.

CONCLUSION

This Article began by claiming that *Meriwether* is not nearly as important of a decision as it is widely assumed to be. Far from holding that public university professors have a First Amendment right to misgender their students in class, *Meriwether* actually stands for something much more modest. Given its procedural stance before the Sixth Circuit and the assumptions that stance required, the most the court could have decided in *Meriwether* is that professors have a right to misgender their students if doing so will not cause disruption to the school, if they can do so without affecting educational opportunities for trans students there, and if doing so does not raise equal protection concerns. These are three enormous ifs; in fact, they are requirements that will likely never be met. If they are not, *Meriwether* then stands only for the modest idea that a professor who misgenders his students in class and sues under the First Amendment can get past the motion to dismiss stage, only to then face a loss once evidence of disruption and legal liability is offered to outweigh the professor's expressive interests.

That said, having argued that *Meriwether*'s holding is not as legally important as most of its supporters and foes think it is, it must also be said that *Meriwether*'s actual importance will ultimately depend on whatever consequences we allow it to have. If universities stop requiring instructors to properly gender their students, if legislators use *Meriwether* as a springboard for expanded speech rights and fewer equality rights in K–12 schools, and if future courts cite *Meriwether* for something broader than its actual holding, the mistaken perception of what *Meriwether* did will have given rise to things that *Meriwether* actually did—developments for which *Meriwether* ends up being responsible. The consequences of *Meriwether* may prove to be important even if the holding of that opinion in fact was not.

This Article's goal has been to stop that from happening. And in tracing how the misunderstanding of *Meriwether* has taken hold, this Article has also tried to show how to prevent similar mistakes—and similarly grave effects on equality rights—from occurring again.