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Sixth Circuit finds that the First Amendment protects the academic freedom of a public university professor to express his religious beliefs

By Steven M. Richard

In important ruling requiring close examination by public universities, the United States Court of Appeals has held that a university professor plausibly pled claims that his employer's enforcement of its gender-pronoun policy violated his constitutional rights under the Free Speech and Free Exercise Clauses. The panel determined that the professor may proceed with his lawsuit, which contends that the public university infringed upon his First Amendment rights by requiring him to refer to students by their preferred pronouns and declining to permit him from stating on his syllabus that doing so contravenes his religious beliefs.[1]

Background[2]

Nicholas Meriwether, a devout Christian, has served as a philosophy professor for over twenty-five years at Shawnee State University, a public university. He has taught classes in philosophy, religion, ethics, and history of Christian thought. Meriwether has been active in the faculty senate and led various educational programs and activities on and off campus.

In 2016, the university emailed its faculty informing them that they had to refer to students by their "preferred pronoun[s]." Meriwether believes that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's freedom or desires." He requested university officials' explanation of the pronoun policy, and they confirmed that professors would be disciplined for refusing to use a student's "self-asserted gender." Meriwether expressed his concerns about the policy to his department chair, who was derisive and scornful by telling him that the "presence of religion in higher education is counterproductive."

[1] *Meriwether v. Hartop*, No. 20-3289, 2021 WL 1149377, 2021 U.S. App. Lexis 8876 (6th Cir. Mar. 26, 2021).

[2] The facts stated in this section reflect the allegations as pled in the professor's complaint, which were accepted as true at the motion to dismiss stage.

While subject to the policy, Meriwether taught students without incident until January 2018. On the semester's first day of class, Meriwether used the Socratic method to lead a discussion in a political philosophy course, addressing students as "Mr." or "Ms." "Doe", a female transgender student, was enrolled in the class, and Meriwether referred to Doe as "sir" when responding to a question. After the class, Doe demanded that Meriwether refer to Doe as a women and use female titles and pronouns. Meriwether explained that he could not comply with Doe's demands, prompting Doe to react in an angry and threatening manner.

Meriwether reported the incident to university officials, including the dean of students and his department chair. The university's Title IX office also became involved in the matter. The university's administrators accepted a compromise proposed by Meriwether. He would keep using pronouns in class, but would refer to Doe by last name.

Shortly thereafter, Doe complained to university officials again. The dean informed Meriwether that he would be violating the university's policy if he did not address Doe as a woman. Soon after, Meriwether accidentally referred to Doe as "sir" before correcting himself, prompting Doe to complain again and threaten to retain counsel if the university did not take corrective action. The dean again visited Meriwether, threatening disciplinary action if he did not comply with the policy.

Facing the possibility of discipline, Meriwether asked whether the university's policy would allow him to use students' preferred pronouns but place a disclaimer in his syllabus, "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." The dean rejected this proposal by stating the syllabus disclaimer would itself violate the policy. Meriwether continued to call on Doe by last name only, and Doe performed well in the class earning a high grade.

As the semester progressed, Meriwether sought an accommodation of his personal and religious views that would satisfy the university. The university was unwilling to compromise, and the dean sent him a written demand that he must address Doe in the same manner as other students who identify themselves as female. The university warned of an investigation if Meriwether did not comply, which would subject him to informal or formal disciplinary action. Before Meriwether responded, the university initiated a formal investigation, after it had received another complaint from Doe. The dean offered two options to Meriwether: (1) stop using all sex-based pronouns in referring to students (a practical impossibility in the classroom), or (2) refer to Doe as a female in violation of his religious beliefs.

The Title IX office conducted an investigation, by interviewing Meriwether, Doe, and two other transgender students. The investigation concluded that Meriwether's treatment of Doe created a "hostile environment" violating the university's non-discrimination policy. The dean informed Meriwether that a formal charge would be brought against him under the faculty's collective bargaining agreement, with a recommendation that a formal warning be placed in his file. The recommendation was sent to the provost, who reacted negatively toward Meriwether's religious beliefs.

The university placed a written warning in Meriwether's file, directing him to change how he addresses transgender students, prompting the faculty union to file a grievance. The provost, who had already rejected Meriwether's claim, was tasked with deciding the grievance, which he denied. As the next step, the faculty union filed an appeal to the president. Coincidentally, the provost had been recently appointed as the university's interim president, who directed the matter to a university labor relations director and the general counsel. These officials concluded that the

matter was not a "hostile environment case" (as the Title IX investigation concluded), but instead a "disparate impact" case. The officials justified the university's refusal to accommodate Meriwether's religious views, by "equating his view to those of a hypothetical racist or sexist." The interim president denied the grievance again.

Facing the ongoing threat of suspension or termination, Meriwether steers clear of classroom discussion about gender identity issues and refuses to address the subject when students have raised it in class. The warning letter in his file impedes his ability to obtain employment elsewhere. Meriwether sued university officials asserting violations of the Free Speech and Free Exercise Clauses of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3]

An Ohio federal district court dismissed Meriwether's complaint, finding his federal constitutional claims to be implausible and abstaining from considering his state law claims. Meriwether appealed the decision, except for the dismissal of the equal-protection claim. As analyzed below, the United States Court of Appeals for the Sixth Circuit reversed the dismissal in substantial part, concluding that Meriwether has pled plausible free-speech and free-exercise claims while affirming the dismissal of the due-process claim.

The free-speech claim

Meriwether asserts that the university's application of its gender-identity policy violated the Free Speech Clause, but the district court held that a professor's speech in the classroom is not protected by the First Amendment. The Sixth Circuit disagreed and ruled that the First Amendment protects the academic speech of university professors. Meriwether has plausibly alleged that the university violated his right to free speech by "compelling his speech or silence and casting a pall of orthodoxy over the classroom."

The Sixth Circuit addressed the Supreme Court's precedent applicable to governmental employees' speech in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Supreme Court held that normally "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[4] *Garcetti* expressly declined to address whether its analysis applies "to a case involving speech related to scholarship or teaching."[5]

In analyzing whether *Garcetti* applies, the Sixth Circuit stressed longstanding judicial recognition that "universities occupy a special niche in our constitutional tradition." Consequently, "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." The Sixth Circuit joined the Fourth, Fifth, and Ninth Circuits in concluding that the rule announced in *Garcetti* does not apply in the academic context of a public university. Professors retain academic-freedom rights under the First Amendment. "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity." The academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern. Meriwether's disagreement with the fact

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[3] Meriwether also brought claims under the Ohio Constitution and his contract with the university, which are not addressed in this alert.

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

[5] *Id.* at 425.

that persons can have a gender identity inconsistent with their sex at birth is a matter of academic speech. The university "silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion."

While the free-speech claim is not barred by *Garcetti*, its plausibility must be analyzed under the Supreme Court's balancing framework that asks two questions: (1) Was Meriwether speaking on a matter of public concern? and (2) Was his interest in doing so greater than the university's interest in "promoting the efficiency of the public services it performs through" him?[6] The state may limit speech "only when its interest in restricting a professor's in-class speech outweighs his interest in speaking."

On the first question, the Sixth Circuit devoted several pages of analysis and citations noting that titles and pronouns have been closely scrutinized and debated, especially in current discourse for their "power to validate—or invalidate—someone's perceived sex or gender identity." Meriwether took a side in this debate of public concern, which is protected free speech.

On the second question, the balance weighed in Meriwether's favor, especially where his speech relates to his core religious and philosophical beliefs. The university's interests appear less persuasive, especially where it rejected Meriwether's compromise of the syllabus disclaimer. Of significance, the Sixth Circuit rejected the university's argument that Title IX compels a contrary result, concluding that Meriwether's actions did not impair Doe's participation and success in his class nor clearly demonstrate a hostile educational environment as defined by Title IX.

The free-exercise claim

The First Amendment requires that the government commit "itself to religious tolerance." Governmental actions that burden religious exercise do not pass constitutional muster, unless they are both neutral and generally applicable.

The Sixth Circuit concluded that the university's application of its gender-identity policy was not neutral because its officials exhibited and expressed hostility to Meriwether's religious beliefs, as evidenced by derogatory remarks and mistreatment by the dean and provost. This hostility infected the university's interpretation and application of its gender-identity policy. Also, irregularities in the university's adjudication and investigation permit a plausible inference of non-neutrality. The university's alleged basis for disciplining Meriwether was a moving target, first characterized as a "hostile environment" case and later relabeling as "disparate treatment." Another moving target was the university's willingness to accept accommodations that would have respected both Meriwether's beliefs and the policy. Finally, the Title IX investigation raises additional procedural irregularities in its lack of thoroughness and quick conclusions against Meriwether.

The Sixth Circuit rejected the university's contention that Meriwether could have simply complied with its compromise: Don't use any pronouns or sex-based terms at all. But, that proposal would prohibit Meriwether from speaking in accordance with his belief that sex and gender are conclusively linked. Plus, it would likely be impossible for Meriwether to comply in the heat of classroom discussion on emotionally charged topics, with Meriwether facing discipline even if he accidentally uttering "Mr." or "Ms." "The effect of this Hobson's Choice is that Meriwether must adhere to the university's orthodoxy (or face punishment). This is coercion, at the very least of the

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[6] This framework is known as the *Pickering-Connick* analysis. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

indirect sort. And we know the Free Exercise Clause protects against both direct and indirect coercion." Thus, Meriwether has stated a plausible violation of his free exercise of his religious beliefs.

No due process violation

Meriwether contended that the university's gender pronoun policy violates due process because of its vagueness. Yet, Meriwether had clear notice and fully understood that the policy prohibited his conduct, so his due process claim fails as implausible.

Takeaways

To start, the Sixth Circuit's ruling should be put in its procedural context, as it addressed the university's motion to dismiss the complaint and Meriwether's factual allegations were assumed to be true. On remand, his allegations and the university's defenses will be tested and fully developed through record evidence. Still, the ruling sends clear signals regarding the heightened protections afforded to academic freedom, where universities should be "fierce guardians of intellectual debate and free speech."

While the ruling sets precedent in the Sixth Circuit (governing federal district courts in Kentucky, Michigan, Ohio, and Tennessee), the circuit joined three other circuits in concluding that *Garcetti* does not apply to the teaching and academic writing that are performed pursuant to a professor's official duties. If other circuits follow this interpretation, the precedent will become a clear national mandate. To the extent that other circuits rule otherwise or more narrowly, the issue would certainly appear to merit eventual clarification by the Supreme Court.

Particularly, under the balancing test, difficult questions may arise regarding the intersection of First Amendment rights and Title IX concerns. The lines of distinction of how to characterize "severe, pervasive, and objectively offensive" conduct or speech on the basis of sex could pose vexing challenges for administrators. The Department of Education's preamble to the recently amended Title IX regulations warned against applying the definition of actionable sexual harassment to chill or infringe upon First Amendment freedoms of faculty, teachers, and students by broadening the scope of prohibited speech and expression. The distinctions between what is protected free expression and a prohibited hostile environment will be fact-specific and require careful thoughtful examination in often highly charged circumstances with campus-wide impacts.

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