A WISH UPON A MONKEY PAW FOR ACADEMIC FREEDOM: *MERIWETHER* AND THE RIGHT TO MISGENDER TRANSGENDER STUDENTS

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I. INTRODUCTION

Schools are currently a hotbed of political conflict.[1] From debates over transgender students using the bathroom[2] or playing sports[3] to masking guidelines[4] and misguided concerns over the teaching of Critical Race

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1. *See generally* Gabriella Borter et al., *School Boards Get Death Threats Amid Rage Over Race, Gender, Mask Policies*, REUTERS, (Feb. 15, 2022, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-education-threats/ [https://perma.cc/H2XL-28GZ].

2. Katy Steinmetz, *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, TIME (July 28, 2015, 8:00 AM), https://time.com/3974186/transgender-bathroom-debate/ [https://perma.cc/6S7U-GUXX].

3. Evie Blad, *Transgender Students and School Sports: Six Things to Know About a Raging Debate*, EDUCATIONWEEK (Oct. 22, 2021), https://www.edweek.org/leadership/transgender-students-and-school-sports-six-things-to-know-about-a-raging-debate/2021/10 [https://perma.cc/4Z5V-W7B6].

4. Marlene Lenthang, *How School Board Meetings Have Become Emotional Battlegrounds for Debating Mask Mandates*, ABC NEWS (Aug. 29, 2021, 10:06 AM),

Theory,[5] schools and their administrations have been working on the front lines of the culture wars.[6] Like their K-12 counterparts, public universities have dealt with similar political issues.[7] Teachers and faculty navigate these political landmines within a unique legal setting: as public employees.[8] They interact with the government both as citizens and employees.[9]

The limits of free speech at work are delineated within this legal framework.[10] Understanding this framework better informs our understanding of the First Amendment protections available to all citizens.[11] This Note examines the First Amendment implications of the government as employer at a public university.[12] Specifically, it explores the erroneous decision in *Meriwether v. Hartop*[13] as a case study for understanding the balance of employees' First Amendment rights and transgender students' rights.[14] Part II of this Note details the history of First Amendment protected speech, particularly for public school employees under the jurisdiction of the Sixth Circuit Court of Appeals.[15] Part III of this Note analyzes the *Meriwether* decision's rationale, language, implications, and potential future meanings.[16] Though the

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https://abcnews.go.com/US/school-board-meetings-emotional-battlegrounds-debating-mask-mandates/story?id=79657733 [https://perma.cc/4LU9-JG8W].

5. Tyler Kingkade, et al., *Critical Race Theory Battle Invades School Boards—With Help from Conservative Groups*, NBC NEWS (June 15, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/critical-race-theory-invades-school-boards-help-conservative-groups-n1270794 [https://perma.cc/D3CG-FEDS].

6. *See generally* Borter et al., *supra* note 1.

7. *See* Nick Anderson & Susan Svrluga, *College Faculty Are Fighting Back Against State Bills on Critical Race Theory*, WASH. POST (Feb. 19, 2022, 2:07 PM), https://www.washingtonpost.com/education/2022/02/19/colleges-critical-race-theory-bills/?utm_campaign=wp_main&utm_source=twitter&utm_medium=social [https://perma.cc/RY7Q-S9DJ]; Eric Levenson, *How an Ivy League Swimmer Became the Face of the Debate on Transgender Women in Sports*, CNN, (Feb. 23, 2022, 10:56 AM), https://www.cnn.com/2022/02/22/us/lia-thomas-transgender-swimmer-ivy-league/index.html [https://perma.cc/J8BL-5QT3]; Anne Dennon, *Debate over Campus Mask Mandates Stretches into Fall Semester*, BEST COLLEGES (Sept. 16, 2021), https://www.bestcolleges.com/news/analysis/2021/09/15/debate-over-college-campus-mask-mandates-covid-19/ [https://perma.cc/AK5G-JD9G].

8. *See generally* Leonard M. Niehoff, *Peculiar Marketplace: Applying* Garcetti v. Ceballos *in the Public Higher Education Context*, 35 J.C. & U.L. 75 (2008).

9. *Id*.

10. *Id.*

11. *Id.*

12. *See infra* Part II.

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

14. *See infra* Part III.

15. *See infra* Part II.

16. *See infra* Part III.

surface-level reading of the case provides strong First Amendment protections for faculty at public universities, the hidden danger of the case is that it provides a safe haven for faculty—and potentially K-12 teachers—who wish to misgender or mistreat transgender students.[17]

II. BACKGROUND

In 2018, after the first class session of the semester, a Shawnee State University student approached philosophy professor Nicholas Meriwether to inform him that he misgendered her during a class discussion, calling her "sir."[18] Meriwether rebuffed the student, informing her that he would not use feminine pronouns or titles when referring to her in class.[19] The student was a transgender woman.[20] Meriwether claimed his Christian faith did not allow him to use pronouns and titles that did not align with the sex of a person at birth. [21]

When Meriwether met with his supervising dean after the class incident, she advised him to eliminate "all sex-based references" in his classes.[22] Meriwether believed this would be too difficult, so he proposed only referring to the student by her last name.[23] The dean initially accepted this proposal, but after a couple of weeks, it was clear to the student that this was not a workable compromise.[24] She complained to the school's administration, prompting another meeting between Meriwether and the dean.[25] At this meeting, the dean instructed Meriwether to follow the university's gender-identity policy by using feminine pronouns and titles for the female student. [26] Meriwether again misgendered the female student by referring to her by the title "Mr."[27] At a subsequent meeting with the dean, Meriwether asked to place a disclaimer on his syllabus that he was using students' pronouns "under compulsion."[28] The dean did not

17. *See infra* Part III.

18. *See* Derek Hawkins, *A Professor Was Reprimanded for Refusing to Use a Transgender Student's Pronouns. A Court Says He Can Sue*, WASH. POST (Mar. 27, 2021, 4:54 PM), https://www.washingtonpost.com/education/2021/03/27/transgender-pronouns-shawnee-state-professor/ [https://perma.cc/F8QQ-W9SR].

19. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 499–500.

26. *Id.* at 500.

27. *Id.*

28. *Id.*

accept this suggested compromise.[29] Meriwether completed the semester using the female student's last name only.[30]

In response to Meriwether's refusal to use the student's correct pronouns and titles, Shawnee State University's Title IX office conducted an investigation.[31] The investigation concluded Meriwether's treatment of the female student "created a hostile environment" and violated the university's policies against discrimination based on gender identity. [32] The dean ultimately believed Meriwether should be disciplined and recommended giving Meriwether a formal warning.[33] After Meriwether's union grievance failed to remove the warning from his file, Meriwether filed a lawsuit against Shawnee State for violations of his First Amendment rights to free speech and free exercise of religion, his Fourteenth Amendment rights to due process and equal protection, his rights under the Ohio Constitution, and his employment contract. [34] Following the Sixth Circuit's ruling for Meriwether, Shawnee State settled with Meriwether for $400,000 and agreed that he may use pronouns with students in any manner he chooses.[35]

This Note examines Meriwether's claim that his misgendering of a female student is protected speech under the First Amendment.[36] Meriwether argued that the university would even "stop him from espousing a view—held by most Americans—that allowing males who identify as female to compete in women's sports denies women equal opportunities."[37] Shawnee State framed it differently, arguing that the First Amendment does not protect public university professors from discriminating against students.[38] Though the magistrate judge and district court agreed with Shawnee State, the Sixth Circuit accepted Meriwether's argument.[39] The Sixth Circuit framed the issue similar to Meriwether, noting that the university punished the professor for his position on a

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 500–01.
33. *Id.* at 501.
34. *Id.* at 501–02.
35. Amir Vera et al., *A Public University in Ohio Will Pay a Professor $400,000 After Disciplining Him for Refusing to Use a Transgender Student's Pronouns*, CNN, (Apr. 19, 2022, 8:46 AM), https://www.cnn.com/2022/04/18/us/ohio-professor-transgender-lawsuit-settlement/index.html [https://perma.cc/CZ7Z-22DJ].
36. *Meriwether*, 992 F.3d at 501–02.
37. Brief for Plaintiff-Appellant at 56, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (No. 1:18-cv-00753-SJD).
38. Brief for Defendant-Appellee at 2, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (No. 1:18-cv-00753-SJD).
39. *Meriwether*, 992 F.3d at 498.

"hotly contested issue."[40] The Sixth Circuit placed Meriwether's speech into a broad exception to traditional public employee free speech jurisprudence, holding the First Amendment protects public university professors engaging in academic speech.[41]

A. The Rights of Public Employees

Free speech rights become complicated when the government acts as the employer.[42] In the first major United States Supreme Court case to address free speech of government employees, the Court in *Pickering v. Board of Education* held that public employees do not relinquish their free speech rights merely by virtue of their employment.[43] In that case, a district fired a teacher after he wrote into a local newspaper critiquing the allocation of money in the district.[44] The Court ruled for the teacher, Pickering, holding that public employees retain their freedom to speak on matters of "public concern," but "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" balances that right.[45] In *Givhan v. Western Line Consolidated School District*, the Supreme Court expanded *Pickering* to protect speech made privately to the employee's supervisor on a matter of public concern—in this case racist employment practices.[46]

In *Connick v. Myers*, the Court allowed the government employer to punish an employee speaking on a matter of public concern because Myers was speaking as an employee, not as a citizen.[47] Myers was an assistant district attorney that was fired for circulating a questionnaire regarding Connick's office management.[48] The resulting *Pickering-Connick* balancing test asked whether the individual was speaking as a citizen or as an employee, whether they were speaking on a matter of public concern,

40. *Id.*

41. *Id.* at 503.

42. *See* Robert S. Rosborough IV, *A "Great" Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court's Decision in* Garcetti v. Ceballos, 72 ALB. L. REV. 565 (2009).

43. Pickering v. Bd. of Educ., 391 U.S. 563, 568, 588 S. Ct. 1731, 1734 (1968).

44. Rosborough IV, *supra* note 42, at 577–78.

45. *Pickering,* 391 U.S. at 568; *see also* Rosborough IV, *supra* note 42, at 577–78.

46. Rosborough IV, *supra* note 42, at 577–78.

47. Connick v. Myers, 461 U.S. 138, 147 (1983); *see also* Hilary Habib, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDISC. L. J. 509, 511.

48. Habib, *supra* note 47, at 516–17.

and whether the right to speech outweighed the rights of the government as employer.[49]

The *Pickering-Connick* test determined the adjudication of the free speech of public employees for over two decades, until the Supreme Court added an additional step in *Garcetti v. Ceballos*.[50] In *Garcetti*, Ceballos, a California prosecutor, wrote a memo about his concerns over the veracity of an affidavit his office prepared and that the affidavit supported the prosecution moving forward.[51] Ceballos claimed he suffered retaliatory employment actions for producing this memo.[52] The Court held that public employees have no First Amendment protections as citizens if they are speaking pursuant to their "official duties."[53] Immediately, some people showed concern for public educators, starting with Justice Souter in his dissent.[54] The majority left academic freedom issues to another day, but it suggested that speech concerning scholarship or classroom instruction may raise constitutional issues.[55]

This "caveat" has produced much concern from academics and legal scholars who fear that the lack of clarity in the *Garcetti* decision could threaten academic freedom.[56] One scholar characterized the decision as one that "cast into doubt the degree to which the U.S. Constitution protects academic freedom."[57] Another called it "perhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years."[58] However, not all

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49. *See* Lara Geer Farley, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights*, 46 WASHBURN L.J. 603 (2007).

50. See Garcetti v. Ceballos, 547 U.S. 410 (2006).

51. *Id*. at 414–15.

52. *Id.*

53. *Id.* at 421; *see also* Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post*-Garcetti *World*, 37 SEATTLE U. L. REV. 1 (2013).

54. *See Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'").

55. *Id*. at 425.

56. Griffin, *supra* note 53, at 50–54; Harvey Gilmore, *Has Garcetti Destroyed Academic Freedom?* 6 U. MASS. ROUNDTABLE SYMP. L. J. 79 (2011); Niehoff, *supra* note 8.

57. Mark P. Strasser, *The Onslaught on Academic Freedom*, 81 UMKC L. REV. 657, 657 (2013).

58. Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CIN. L. REV. 1281, 1282 (2008); *see, e.g.,* Habib, *supra* note 47, at 536 (stating that the *Garcetti* decision is one that "basically eliminates any possibility of a public university professor having First Amendment speech protection"); Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54 (2008) (stating that the *Garcetti* decision "appears to leave little breathing space for First Amendment protection for teacher speech in the classroom and for academic scholarship"); Gilmore, *supra* note

writing on the topic saw *Garcetti* as a threat. [59] One commentator, for instance, interpreted *Garcetti* as an opportunity "to add academic freedom to the rights that teachers may assert through their classroom speech."[60]

B. Academic Freedom

The concern over the legal status of academic freedom is warranted given the Supreme Court's sweeping language on the importance of education to this nation's democracy.[61] The Supreme Court in *Sweezy v. New Hampshire* stated, "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth."[62] The Court in that case protected faculty who refused to cooperate with the New Hampshire Attorney General's investigation into "subversive activities."[63] The Court believed that placing a "strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[64]

Similarly, in *Keyishian v. Bd. of Regents*, the Court explained that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."[65] *Keyishian* pertained to faculty members who refused to certify that they were not and never were a Communist.[66] The Court held that the law compelling faculty speech was a violation of the faculty's First Amendment rights.[67]

Further, the Court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* did not only provide First Amendment rights to students at school but

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56, at 101(2011) (stating that *Garcetti* is "a serious threat to the concept of academic freedom"); Bridget R. Nugent & Julee T. Flood*, Rescuing Academic Freedom From* Garcetti V Ceballos*: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115, 149 (2014) ("core academic speech is in peril").

59. Benjamin C. Galea, *Getting to "Sometimes": Expanding Teachers' First Amendment Rights Through "Garcetti's Caveat,"* 62 CASE W. RES. L. REV. 1205, 1235 (2012).

60. *Id.*

61. "[T]he Court in *Keyishian* and several other cases has explained that teachers at universities need to be able to test and question ideas, theories, and viewpoints." Victoria Jones, *Developing a Speech Standard for Public University Faculty in the Academic Environment*, 87 MISS. L. J. SUPRA 37, 51 (2018).

62. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

63. *Id.* at 236.

64. *Id.* at 250.

65. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

66. *Id.* at 678.

67. *Id.* at 609–10.

referenced teachers possessing those rights as well (albeit in dicta).[68] Although the case affirmed the rights of students to peacefully protest, the court also observed that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[69] *Tinker* protected the rights of students to peacefully protest, provided that they did not cause a "substantial disruption."[70]

C. The Sixth Circuit's Approach

How free speech rights are applied to educators has largely been left up to the circuits.[71] The First, Second, Seventh, Eighth, and Tenth Circuits followed *Tinker* and its progeny for governing teachers' classroom speech, while the Third, Fourth, Fifth, and Ninth Circuits followed the *Pickering-Connick* test.[72]

The Sixth Circuit first addressed these concerns in *Hetrick v. Martin*, in which the defendant university fired a nontenured assistant professor after she made statements that bothered administrators, including her discussion of the Vietnam War.[73] The Sixth Circuit said it was "not a case of dismissal of a teacher for exercising her right as a citizen to comment on matters of public concern."[74] Instead, the court held that the First Amendment and academic freedom "[do] not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession."[75]

In *Dambrot v. Central Mich. Univ.*, a basketball coach claimed First Amendment protections after he was fired following his use of the word "nigger" to refer to his coaches and players in the locker room.[76] The Sixth Circuit applied the *Pickering-Connick* test and determined that Dambrot's "locker room speech" conveyed no socially or politically relevant speech to his players.[77] The court also examined Dambrot's claim in light of academic freedom and held that, "[t]he analysis of what constitutes a

68. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).

69. *Id.*

70. *Id.* at 514.

71. *See* Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 63–64 (2008).

72. *Id.*

73. Hetrick v. Martin, 480 F.2d 705, 706 (6th Cir. 1973).

74. *Id.* at 708.

75. *Id.* at 709.

76. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1181 (6th Cir. 1995).

77. *Id.* at 1187.

matter of public concern and what raises academic freedom concerns is of essentially the same character."[78]

In *Hardy v. Jefferson Cmty. Coll.*, the Sixth Circuit returned to profanity in higher education, determining that Hardy's classroom discussion of words such as "nigger" and "bitch" would be constitutionally protected.[79] On the other hand, the Court found against a professor's use of "fuck," "cunt," and "pussy" in *Bonnell v. Lorenzo*.[80] Importantly, the court did not take issue with the language but rather the "context and form" in which the professor used the speech.[81] Because "the language was not germane to course content" the college could find that the professor violated the sexual harassment policy.[82]

After *Garcetti*, the Fourth, Fifth, Sixth, and Ninth circuits have addressed academic freedom in light of the new precedent. In *Demers v. Austin*, the Ninth Circuit explicitly held "that *Garcetti* does not apply to 'speech related to scholarship or teaching.'"[83] Instead, courts should still look to *Pickering* when determining the free speech rights of professors engaged in teaching or scholarship.[84] Though clear, it was not a confident holding; the court highlighted "the uncertain state of the law in the wake of *Garcetti*."[85] Similarly, the Fourth Circuit also uses the *Pickering-Connick* test to determine whether the First Amendment protects a professor's speech.[86] The court did not believe the Supreme Court intended *Garcetti* to apply to professors at public universities and declined to apply the precedent to its ruling in *Adams v. Trs. of the Univ. of N.C.-Wilmington*.[87] Likewise, the Fifth Circuit highlighted the importance of academic freedom and applied the *Pickering-Connick* test without ever referencing the *Garcetti* holding in *Buchanan v. Alexander*.[88]

The Sixth Circuit first applied *Garcetti* to public education employees in *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*[89] The court upheld a district court ruling that held Fox, a teacher who complained about class size, spoke as an employee about her employment conditions.[90] At both

78. *Id.* at 1188.
79. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 675, 683 (6th Cir. 2001).
80. Bonnell v. Lorenzo, 241 F.3d 800, 819 (6th Cir. 2001).
81. *Id.*
82. *Id.*
83. Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014) (quoting Garcetti v. Ceballos, 547 U.S. 410, 425); *see also* Jones, *supra* note 61, at 53.
84. Jones, *supra* note 61, at 53.
85. *Demers*, 746 F.3d at 406.
86. Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 564 (4th Cir. 2011).
87. *Id.*
88. Buchanan v. Alexander, 919 F.3d 847, 852–53 (5th Cir. 2019).
89. Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345 (6th Cir. 2010).
90. *Id.* at 346–47.

levels, the court found *Garcetti* applied to *Fox*.[91] The court did not consider *Garcetti*'s caveat that academic freedom may be protected in this case.[92]

The Sixth Circuit also applied *Garcetti* to public school teachers in *Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District*.[93] The Sixth Circuit used the official duties test from *Garcetti* to reject a teacher's claim that free speech rights protected her ability to select books and instruction methods.[94] In that case, the school board did not renew English teacher Evans-Marshall's contract after parents complained about several assignments, including a banned books unit after reading *Fahrenheit 451*.[95] The court found that Evans-Marshall's claim satisfied the *Pickering-Connick* test but not the new requirements *Garcetti* added.[96] Evans-Marshall could not overcome *Garcetti* because she was punished for teaching, the official duties for which she was hired in the first place.[97] Further, the court distinguished *Evans-Marshall* by noting that academic freedom did not "apply to in-class curricular speech at the high school level."[98] Instead, academic freedom was reserved for colleges and universities.[99]

Legal scholars noted the importance of *Evans-Marshall* because it was a series of two Sixth Circuit decisions, one before and one after *Garcetti*.[100] One scholar criticized the decision for leaning too heavily on *Garcetti* and not recognizing the uniqueness of the educational environment.[101] Instead, the court could have built on *Tinker* in addition to the *Pickering-Connick* test to devise a new balancing test without barring the claim under

91. *Id.* at 348.

92. "Academic freedom" appears nowhere in the decision. *Fox*, 605 F.3d 345.

93. *See Constitutional Law—First Amendment—Sixth Circuit Holds that Primary and Secondary School Teachers' Curricular Decisions Are Not Entitled to Free Speech Protection.*—Evans-Marshall v. Board Of Education, 624 F.3d 332 (6th Cir. 2010), 124 HARV. L. REV. 2107 (2011).

94. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 334 (6th Cir. 2010).

95. *Id.* at 334–35.

96. *Id.* at 338.

97. *Id.* at 340.

98. *Id.* at 343.

99. *Id.* at 343–44.

100. Ralph D. Mawdsley, Garcetti v. Ceballos *and Classroom Instruction: The Sixth Circuit Creates Diminished Free Speech Protection for Classroom Teachers*, 266 ED. L. REP. 1, 7 (2011).

101. *Constitutional Law—First Amendment, supra* note 93.

Garcetti.[102] However, other scholars argued that K-12 level teaching should be subject to *Garcetti*.[103]

Citing *Evans-Marshall*, the Sixth Circuit addressed *Garcetti* in higher education in *Savage v. Gee*.[104] In *Savage*, a university librarian claimed he suffered retaliation due to exercising his First Amendment rights during work on a committee to select a book for incoming freshmen to read.[105] The Sixth Circuit applied *Garcetti* because the committee work in question was pursuant to Savage's official duties and "not related to classroom instruction and . . . only loosely, if at all, related to academic scholarship."[106] Though the court referenced the *Garcetti* dissent's academic freedom concerns, the court did not endorse the exception, avoiding further comment by labeling it as dicta.[107]

The Sixth Circuit returned to higher education under *Garcetti* in *Meriwether*. The professor in *Meriwether* misgendered a transgender student while addressing her in classroom discussions.[108] Directly addressing a professor's classroom speech, the court gave a full-throated endorsement of the academic-freedom exception in *Garcetti*, stating that it "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[109] The "dicta" in *Savage* became the rule in *Meriwether*.[110]

III. ANALYSIS

A. The Sixth Circuit Wrongly Decided Meriwether

The Sixth Circuit's *Meriwether* opinion expands the academic-freedom exception referenced in *Garcetti* to protect any classroom speech.[111] This decision is unnecessarily broad and ignores past Sixth

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102. *Id.* at 2114.

103. *See* Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687 (2011); Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211 (2013).

104. Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).

105. *Id.* at 734–39.

106. *Id.* at 739.

107. *See* Carol N. Tran, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 949, 976–77 (2012).

108. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021).

109. *Id.* at 507.

110. Tran, *supra* note 107.

111. *Meriwether*, 992 F.3d at 507.

Circuit jurisprudence. Meriwether should have lost under both the *Garcetti* and the *Pickering-Connick* frameworks individually.[112]

If the court had properly followed *Garcetti*, Meriwether would have lost because he was a public employee acting pursuant to his "official duties."[113] As a university professor, his duties include conducting class discussion.[114] The speech at the heart of the case, the honorifics and pronouns he used to misgender Jane Doe, were not relevant to the content of the class but were merely administrative.[115] The academic freedom exception established in *Garcetti* is supposed to protect teaching and scholarship, not simply provide blanket protection for all in-class speech.[116]

In this situation, the Court should have looked to the *Savage* decision.[117] In *Savage*, a university librarian alleged retaliation in violation of his First Amendment rights while on a committee to select a book for incoming freshmen to read.[118] Like *Savage,* the public university employee here spoke on a "matter of public concern," but that speech was pursuant to his "official duties."[119] But the Sixth Circuit did not address *Savage* in its opinion at all.[120] Further, the court should have looked to its own precedent in *Hetrick v. Martin*.[121] *Hetrick* held that professors are not "insulated from review by [their] superiors."[122] The manner in which Meriwether conducted class falls squarely within the realm of class administration and not teaching content, which academic freedom would protect.[123]

In its opinion, the court addressed *Hardy* and *Dambrot*.[124] The court looked to these cases to show that university professors keep their First Amendment rights when "engaged in core academic functions, such as teaching and scholarship."[125] However, the court missed the point of these cases and misapplied the *Pickering-Connick* framework.[126] In *Dambrot*, a

112. *See* Brief for Defendant-Appellee, *supra* note 38.
113. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
114. *Meriwether*, 992 F.3d at 499.
115. *See* Brief for Defendant-Appellee, *supra* note 38.
116. *Meriwether*, 992 F.3d at 507.
117. Savage v. Gee, 665 F.3d 732 (6th Cir. 2012).
118. *Id.* at 734–39.
119. *Id.* at 738.
120. *Meriwether*, 992 F.3d 492.
121. Hetrick v. Martin, 480 F.2d 705, 706 (6th Cir. 1973).
122. *Id.* at 709.
123. *See* Brief for Defendant-Appellee, *supra* note 38.
124. *Meriwether*, 992 F.3d at 505.
125. *Id.*
126. *See generally*, Lara Geer Farley, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights*, 46 WASHBURN L.J. 603 (2007).

coach's use of racial epithets was not protected because it did not address a matter of public concern.[127] The First Amendment protected the language in *Hardy*, though, because the language was part of a lecture on a topic of educational importance.[128] The court rationalized that the purpose of Meriwether's misgendering of Jane Doe "was to convey a message."[129] However, Meriwether did not claim the misgendering was connected to a specific discussion in any way.[130]

The coach in *Dambrot* had intentions beyond being offensive.[131] He also wanted to "convey a message."[132] However, his words were not connected to a matter of public concern.[133] Similarly, Meriwether's use of offensive language may have had a purpose for himself but not one connected to the class content.[134] The court created a pronoun exception to the *Pickering-Connick* requirement of speaking on a matter of public concern by allowing Meriwether's speech to qualify simply because it could be publicly relevant somewhere at some time.[135] Under *Meriwether*, professors in the classroom are entitled to First Amendment protection for any speech as long as it could be related to a matter of public concern—whether or not it actually is.[136]

B. A Close Reading of Meriwether Shows Its Intent to Extend the Right to Misgender Students

A close reading of the *Meriwether* decision reveals the judges' intent to extend Meriwether's right to misgender his student to K-12 teachers.[137] The court avoided gendered language when addressing Jane Doe.[138] The court hardly addressed the Sixth Circuit's past jurisprudence on K-12

127. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1187 (6th Cir. 1995).
128. Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 675, 683 (6th Cir. 2001).
129. *Meriwether*, 992 F.3d at 508.
130. Meriwether believes a "'formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor' and 'foster[s] an atmosphere of seriousness and mutual respect.'" *Id.* at 499.
131. *Dambrot*, 55 F.3d at 1187.
132. *Id.*
133. *Id.* at 1188.
134. *Meriwether*, 992 F.3d at 499.
135. *Id.* at 507–09.
136. *Id.* at 507.
137. *See generally* Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).
138. The Court only refers to her as "Doe." *Meriwether*, 992 F.3d 492.

teachers.[139] However, the court still invoked *Tinker* and other language implicating K-12 educational settings.[140]

Through its own language, the court does not afford Jane Doe the respect she should receive as a transgender woman.[141] The court solely refers to Jane Doe as "Doe."[142] In a case revolving around honorifics, the court avoids them and fails to ever refer to her as "Jane Doe," "she," or "her."[143] The court avoids properly gendering Jane Doe as female, committing the same act as Meriwether that lies at the heart of the case.[144] Nor can the Court claim ignorance; the court itself referenced the fact that pronouns are a core issue of gender identity, stating that "[n]ever before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity."[145] Despite this acknowledgement, they only allude to Jane Doe's "preferred pronouns."[146]

This approach is likely a reflection of the political leanings of the judges that decided *Meriwether*. President George W. Bush appointed the author of the *Meriwether* decision, Judge Thapar, to the district court in 2008.[147] President Donald Trump elevated him to the Sixth Circuit in 2017.[148] Judge Thapar was on the shortlist of Supreme Court nominees for President Trump's replacement of Justice Kennedy.[149] President George H. W. Bush nominated the second judge on the panel, Judge McKeague, to the district court in 1991.[150] President George W. Bush then elevated him to the Sixth Circuit in 2005.[151] He then took senior status during President Trump's term in office, which allowed him to replace Judge McKeague in 2017 with Judge Larsen, the third judge on the *Meriwether* decision.[152] Republican Governor Rick Snyder previously appointed Judge Larsen to the Michigan Supreme Court..[153] She was also on

139. The Court only addresses K-12 education in a single footnote. *Id.* at 505 n.1.
140. The Court cites *Tinker* six times throughout the opinion. *Id*. at 503–11.
141. The Court only refers to her as "Doe." *See, e.g.*, *id*. at 509.
142. *Id.* at 498–518.
143. *Id.*
144. *Id.*
145. *Id.* at 509.
146. *Id.* at 511.
147. *Amul Thapar*, BALLOTPEDIA, https://ballotpedia.org/Amul_Thapar [https://perma.cc/5W9N-NCPL] (last visited Oct. 17, 2022).
148. *Id.*
149. *Id.*
150. *David McKeague*, BALLOTPEDIA, https://ballotpedia.org/David_McKeague [https://perma.cc/T5YL-3FVC] (last visited Oct. 17, 2022).
151. *Id.*
152. *Id.*
153. *Joan Larsen*, BALLOTPEDIA, https://ballotpedia.org/Joan_Larsen [https://perma.cc/3ENM-VU28] (last visited Oct. 17, 2022).

President Trump's list of potential Supreme Court nominees.[154] It is unlikely a coincidence that these Republican-appointed, conservative judges neglected to correctly gender Jane Doe. Rather, the political leanings of the judges suggest that the absence of a gendered name and pronouns for Jane Doe was a conscious choice.

In a similar vein, the language of the *Meriwether* decision suggests applicability to K-12 educational settings even though the court seemingly restricted its decision to higher education.[155] The court waves away *Evans-Marshall* as irrelevant and "limited to schoolteachers."[156] However, when discussing the debate over pronouns for transgender individuals, the court states it takes place "[f]rom courts to schoolrooms."[157] Further, the court quotes *Tinker*, saying, "First Amendment rights . . . are available to teachers[.]"[158] It also invokes "[a]ny teacher" when discussing how leading a discussion shapes the content of the lesson.[159] While technically limited to university professors, the court leaves enough ambiguity in its opinion to suggest to a lower court that K-12 teachers may also fall under the *Meriwether* opinion. Permitting K-12 teachers to misgender their transgender students would create a hostile situation for students across the country.

Even legal scholars read the Court's opinion to apply to teachers. *Meriwether* already appears in two legal encyclopedias.[160] Interestingly, both encyclopedias summarize the case as determining the free speech rights of public school teachers, not only university professors.[161] The implications of protecting teachers that refuse to give equal treatment to transgender students raises legal questions for K-12 in addition to higher education.

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154. *Id.*

155. Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021).

156. *Id.* at 505 n.1 (citing Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332 (6th Cir. 2010)).

157. *Id.* at 508.

158. *Id.* at 505 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

159. *Id.* at 506.

160. 16A AM. JUR. 2D CONSTITUTIONAL LAW § 493 (2022) (claim of retaliation against political employee exercising freedom of speech); 16B C.J.S. CONSTITUTIONAL LAW § 1084 (2022) (public employee standards applicable to First Amendment protection of public school teacher's speech).

161. 16A AM. JUR. 2D, *supra* note 160; 16B C.J.S., *supra* note 160.

C. Courts Permit Teachers to Discriminate Against Transgender Students

The Sixth Circuit's emphasis on academic freedom places liberal justices in a bind. To curtail the *Meriwether* decision would curtail academic freedom.[162] If academic freedom extends to K-12 teachers, so does the right to misgender students.[163] However, if academic freedom does not extend to K-12 teachers, transgender students are still not protected.[164] Then the power rests in popularly elected school boards.[165] Several state governments have already passed laws restricting the participation of transgender students in school athletics.[166] If given a judicial green light, even more laws targeting the gender expression of transgender students could follow.

After *Garcetti*, legal scholars were concerned about the implications for educators.[167] In *Meriwether*, the Court provides broad academic freedom protections for university professors' speech, as many educators might have hoped. [168] However, this decision comes like a wish upon a monkey paw to liberal professors who would otherwise support correctly gendering their transgender students.[169] The Court creates a pronoun exception for misgendering students and clothes it in academic freedom.[170] Directly overturning *Meriwether*, then, would remove the broad academic freedom exception to *Garcetti* for which many legal scholars advocated.[171]

Further complicating the decision's ramifications, it is not settled law to what extent K-12 teachers enjoy academic freedom.[172] In the Sixth Circuit, under *Evans-Marshall*, *Garcetti* does not protect teachers' curricular speech in class.[173] Had Meriwether been a K-12 teacher, the jurisprudence of *Evans-Marshall* and *Fox* would have strongly worked against his free speech claim.[174] Had the *Meriwether* Court considered the K-12 jurisprudence, it may have likewise found against Meriwether since

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162. *Meriwether*, 992 F.3d at 507.
163. *Id.*
164. *See* Stuart, *supra* note 58.
165. *Id.* at 1284.
166. *See* Blad, *supra* note 3, at 1282.
167. *See* Strasser, *supra* note 57.
168. *Meriwether*, 992 F.3d at 507.
169. *See* W. W. JACOBS, *The Monkey's Paw*, *in* THE LADY OF THE BARGE 29 (1902), https://en.wikisource.org/wiki/The_Monkey%27s_Paw [https://perma.cc/YR2S-UYRL].
170. *Meriwether*, 992 F.3d at 507.
171. *See* Strasser, *supra* note 57.
172. *See* Stuart, *supra* note 58.
173. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 338 (6th Cir. 2010).
174. *Id.*; Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345 (6th Cir. 2010).

he failed *Garcetti*'s "official duties" test.[175] This approach would have made higher education function the same as K-12 schools when it came to administrative language in the classroom. However, the Court drew a sharp line that insulated post-secondary educators and left K-12 teachers at the whim of their localities.[176]

D. How Meriwether Impacts the Transgender Community

Importantly, *Meriwether* missed an opportunity, not only to clarify *Garcetti*'s correct application, but also to strengthen Title IX protections for students.[177] Had the Court denied Meriwether's free speech claim, Meriwether would have been subject to the university's Title IX investigation.[178] This precedent would have helped protect transgender students at all school levels as Title IX should protect them from discriminatory teachers or school policies.[179]

Meriwether's failure to strengthen Title IX protections for students has complicated the road to justice for members of the transgender community.[180] Courts and schools are currently fighting over the rights of transgender children.[181] First, a variety of "bathroom bills" sought to restrict the access of transgender children to the bathrooms that match their gender identity.[182] In a recent high-profile case, Gavin Grimm won the right to use the bathroom according to his gender identity in the Fourth Circuit, but the Supreme Court declined to further intervene.[183]

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175. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

176. *Meriwether*, 992 F.3d 492 n.1.

177. The Court does not believe Title IX applies because "Meriwether's decision not to refer to Doe using feminine pronouns did not . . . inhibit[] Doe's education or ability to succeed in the classroom." *Meriwether*, 992 F.3d at 511.

178. *Id.*

179. *See* Sarah W. Keller, *Battle of the Sexes: Disagreement About the Definition of Sex in Title IX and the Need for Judicial Review*, 28 VA. J. SOC. POL'Y & L. 135, 138 (2021) (first citing Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) and then citing Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1747 (2020)) (stating that "[a]t present, Executive Order 13988 ("EO 13988"), signed by President Biden on the day of his inauguration, implies that the definition of sex in Title IX is the same definition announced by the Supreme Court in Bostock v. Clayton County, Georgia.").

180. *See* Kyle C. Velte, *Mitigating The "LGBT Disconnect": Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U.J. GENDER, SOC. POL'Y & L. 29 (2019).

181. *See generally* Nathan Hefferman, *Potty Politics: G.G. ex rel. Grimm v. Gloucester County School Board, Title IX, and the Challenges Faced By Transgender Students Under the Trump Administration and Beyond*, 32 WIS. J.L., GENDER & SOC'Y 215, 215 (2017).

182. *Id.*

183. Ariane de Vogue & Chandelis Duster, *Supreme Court Gives Victory to Transgender Student Who Sued to Use Bathroom*, CNN, (June 28, 2021, 12:30 PM),

The debate has turned now to school sports: specifically, whether transgender girls may participate in sports with other girls.[184] Nearly a dozen states have restricted the rights of transgender athletes to participate in sports.[185] Proponents of these restrictions claim to be protecting girls from male athletes unfairly identifying as female.[186] Opponents of the laws, on the other hand, argue the laws are thinly veiled discrimination.[187] Because no national guidelines exist, states are left to create them.[188]

It is not a difficult mental exercise to imagine states or individual school districts passing laws or regulations that prevent teachers from correctly gendering their students, or at least protect the teachers that refuse to correctly gender their students. A District Court in the Seventh Circuit has already ruled on a case similar to *Meriwether* involving a high school teacher in *Kluge v. Brownsburg*.[189] In *Kluge*, the court held that the teacher's pronoun selection was not a matter of public concern and ruled against the teacher.[190] Under the Sixth Circuit's jurisprudence, however, a court could easily interpret pronoun selection as a matter of public concern, even at the high school level.[191]

IV. CONCLUSION

The *Meriwether* decision very well may be a wolf in sheep's clothing. The surface-level representation of the text reads as a victory for academic freedom proponents concerned with the application of *Garcetti* to public university faculty.[192] However, a close reading of the text reveals the bias of the conservative judges against the transgender Jane Doe.[193] This bias poses a threat to transgender students, as the *Meriwether* opinion provides an exception that faculty at public universities may use to refuse to

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https://www.cnn.com/2021/06/28/politics/gavin-grimm-supreme-court/index.html [https://perma.cc/U627-M8LF].

184. *See generally* Blad, *supra* note 3.

185. *Id.*

186. David Pitt, *Restrictive Transgender Sports Bill Heads to Iowa Governor*, AP NEWS (Mar. 2, 2022), https://apnews.com/article/sports-discrimination-iowa-legislature-kim-reynolds-4c85ed6ce142bd82f2f099aa535b945d [https://perma.cc/43K3-CTBF].

187. *Id.*

188. Julie Tamerler, *Transgender Athletes and Title IX: An Uncertain Future*, 27 JEFFREY S. MOORAD SPORTS L.J. 139 (2020).

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

190. *Id.* at 839.

191. Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021).

192. *Id.* at 507 (citing Garcetti v. Ceballos, 547 U.S. 410 (2006)); *see also* Stuart, *supra* note 58 (providing broader discussion of the academics concerned with *Garcetti*'s application on public universities).

193. *See supra* Part III B.

properly gender the students.[194] Further, the missed opportunity to strengthen Title IX protections has negative implications for K-12 students, who would otherwise have been protected.[195]

In an era of culture wars politicizing schools, society must protect transgender students.[196] *Meriwether* does the opposite. The decision makes transgender students more vulnerable by permitting their misgendering in the name of free speech.[197] Schools must strengthen Title IX protections of transgender students. While *Meriwether* ostensibly gives academic freedom a victory in the Sixth Circuit, that victory should not come at the expense of vulnerable students.

194. *Meriwether*, 992 F.3d at 503.
195. *Id.* at 511.
196. *See generally* Borter et al., *supra* note 1.
197. *Meriwether*, 992 F.3d at 503.