CALL ME BY MY NAME: PROTECTING CHOSEN NAME AND PRONOUN POLICIES IN THE FACE OF FIRST AMENDMENT CHALLENGES*

I. INTRODUCTION

In January of 2018, Professor Nicholas Meriwether of Shawnee State University was teaching his first Political Philosophy class of the semester.[1] While replying to a question, Meriwether addressed one of his new students as "sir."[2] The student approached Meriwether after class, informed him that she was a woman, and asked to be addressed with feminine titles and pronouns only.[3] This seemingly minor correction launched a flood of grievances and litigation.[4] Meriwether insisted on continuing to misgender his student despite the university's policy, introduced in 2016, that all professors must address students by their preferred names and pronouns or face disciplinary action.[5] Throughout the semester, Meriwether addressed the student only by her last name, despite the fact that he habitually used titles for all of his cisgender students.[6] The student was singled out for differential treatment, and her claim that this treatment created a hostile environment in violation of Title IX[7] was affirmed by the school's administration.[8] Meriwether was subjected to formal disciplinary action—a single written warning.[9]

In response to this warning, Meriwether filed a grievance against the university seeking to reverse the disciplinary action.[10] This grievance was denied.[11] Meriwether then chose to pursue the issue in court rather than commit to addressing his students by

* Linnea Kelly, J.D. Candidate, Temple University Beasley School of Law, 2023. I would like to thank my family and friends (both those in law and those in other professions who somehow still put up with me) for their support and encouragement. I would also like to thank my cats, even though they have not been especially supportive and one of them frequently disrupted the writing process by sitting on my laptop while I was working. Finally, I would like to thank the rest of the Volume 95 Editorial Board for their thoughtful comments and guidance, and our Staff Editors for their hard work.

1. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021).
2. *Id.*
3. *Id.*
4. *See id.* at 499–503.
5. *See id.* at 498–500.
6. *Id.* at 499.
7. Title IX of the Education Amendments Act of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).
8. *Meriwether*, 992 F.3d at 500–01.
9. *Id.* at 501.
10. *Id.*
11. *Id.* at 502.

pronouns aligning with their gender identities.[12] In March of 2021, the United States Court of Appeals for the Sixth Circuit reversed the district court's decision to dismiss all of Meriwether's federal claims, theorizing that the academic freedom of professors under the First Amendment was impermissibly burdened by the university's requirement that faculty address students in keeping with their stated gender identities.[13] The court concluded that Meriwether's interest in misgendering students outweighed the university's interests in protecting students from disparate treatment on the basis of gender identity and in facilitating an effective learning environment.[14]

This case is emblematic of a recent wave of media focus and court battles surrounding discrimination against transgender individuals.[15] In July of 2021, the Third Appellate District of California decided that a law that prohibits staff at long-term care facilities from intentionally misgendering residents in their care constituted an infringement on the First Amendment rights of staff members.[16] In this case and others, the willful use of incorrect names and pronouns for trans people is considered political speech on a matter of public concern and is therefore protected.[17] These arguments view the identity and existence of transgender and nonbinary individuals as a topic open to debate rather than a fact, leaving the door open for targeted discrimination to be categorized as an essential expression of a recognized right.[18]

Meriwether v. Hartop[19] and *Taking Offense v. State*[20] depart significantly from existing First Amendment jurisprudence by ignoring the impact of the speaker's actions on targeted individuals.[21] These judicial decisions have ignored the documented effects of misgendering on the health and well-being of trans individuals[22] and the increasing prevalence of violence against the trans community,[23] considerations that bring this category of speech within the power of the government and public institutions to regulate selectively.[24] The First Amendment does not protect intentional and targeted

12. *See id.*

13. *See id.* at 506–07.

14. *See id.* at 509.

15. *See* Karen Levit, *Anti-Trans Legislation and Rulings Are Part of a Bigger Picture: The Legal Profession Can and Must Mobilize in Opposition to These Efforts*, ABOVE THE L. (Apr. 16, 2021, 10:47 AM), https://abovethelaw.com/2021/04/anti-trans-legislation-and-rulings-are-part-of-a-bigger-picture/ [https://perma.cc/Y3M2-T5YH].

16. Taking Offense v. State, 281 Cal. Rptr. 3d 298, 319 (Cal. Ct. App. 2021), *cert granted*, 498 P.3d 90 (Cal. Nov. 10, 2021).

17. *See id.* at 313.

18. *See* Levit, *supra* note 15.

19. 992 F.3d 492 (6th Cir. 2021).

20. 281 Cal. Rptr. 3d 298 (Cal. Ct. App. 2021).

21. *See* Levit, *supra* note 15.

22. Stephen T. Russell, Amanda M. Pollitt Gu Li, & Arnold H. Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 505 (2018).

23. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, HUM. RTS. CAMPAIGN (2021), https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021 [https://perma.cc/R7MZ-822U].

24. Even protected speech may be subject to time, place, and manner restrictions as long as these restrictions "serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

misgendering of trans individuals by public employees. Regulation is both permissible and appropriate for preventing discrimination and addressing the very real concerns of health, well-being, and freedom from violence for the trans community.

This Comment argues that targeted prohibition of misgendering and deadnaming in the workplace and educational and healthcare settings do not violate recognized First Amendment free speech rights. Section II explores the social and political context surrounding transgender rights in the United States, the scope and limitations of First Amendment freedom of speech rights, and emerging jurisprudence involving the misgendering and deadnaming of trans individuals. Section III applies existing First Amendment limitations on chosen name and pronoun policies in the workplace and educational settings. The Comment contends that due to the compelling government interest in preventing discrimination and violence against trans individuals and the private nature of misgendering and deadnaming individuals in institutional settings, prohibitions against misgendering and deadnaming are permissible restrictions of speech.

II. OVERVIEW

The tension between individuals' First Amendment rights and the government's need to regulate to preserve orderly operations is amplified when it involves the expression of discriminatory ideas.[25] This tension is also magnified in other areas where the government has an especially strong interest in maintaining efficient operations that may be interrupted by certain categories of speech.[26] The doctrine of freedom of speech has evolved to account for settings where speech may be more restricted, including government-funded institutions and places of employment.[27] The following discussion explores the context of current misgendering and deadnaming disputes and outlines the existing limitations to freedom of speech that informs ongoing debates.

Part II.A discusses the social and political backdrop to current legal debates concerning transgender rights and antidiscrimination efforts. Part II.B explores the First Amendment doctrine's legal history and current application in employment and education contexts concerning hate speech and antidiscrimination efforts. Part II.B also touches on the First Amendment right to religious freedom and how this right interacts with free speech. This Section is designed to present a full picture of the social context and legal background of recent cases involving First Amendment rights related to transgender rights to understand how these cases arise and how courts should resolve them.

25. *See* John C. Knechtle, *When To Regulate Hate Speech*, 110 PENN STATE L. REV. 539, 552 (2006).

26. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–84 (1992).

27. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech To Protect Its Own Expression*, 59 DUKE L.J. 1, 3–4 (2009).

A. The Political and Social Landscape Affecting Transgender Rights[28]

The United States is in the midst of a social and political reckoning on transgender rights.[29] Growing awareness of gender variance has led to both vocal support for the transgender community and increased animosity towards transgender individuals.[30] The increased divisiveness in political messaging about the trans community and the serious consequences of this discourse helps to explain why misgendering is a topic of interest to activists on both sides of the political divide.[31] Part II.A.1 discusses upticks in anti-transgender legislation and targeted violence against the trans community. Part II.A.2 explores the documented effects of social and political animus on the health and well-being of transgender individuals.

1. The Rise of Anti-Trans Legislation and Violence Against the Trans Community

The year 2021 set a record for anti-transgender legislation in the United States.[32] In 2021, a total of 147 anti-transgender bills were introduced, surpassing the 79 bills introduced in all of 2020.[33] In May 2021, the Human Rights Campaign announced that 2021 had surpassed 2015 as the worst year in recent history for anti-LGBTQ+ measures enacted into law, with 18 bills enacted.[34] These bills targeted transgender healthcare, participation in sports, education about LGBTQ+ identities, the ability of trans individuals to alter name and gender markers on birth certificates, and the use of chosen pronouns.[35] Continuing this disturbing trend in legislation, 2022 saw even more new

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28. The following discussion contains mentions of violence against the trans community and of suicidal ideation and behavior within the community. The accompanying statistics are disturbing and upsetting, particularly to trans and gender-nonconforming individuals. If you or someone you know need support, please call Trans Lifeline at (877) 565-8860. You do not need to be experiencing a crisis to use this resource.

29. *See* Levit, *supra* note 15.

30. *See* Ivan Natividad, *Why Is Anti-Trans Violence on the Rise in America?*, BERKELEY NEWS (June 25, 2021), https://news.berkeley.edu/2021/06/25/why-is-anti-trans-violence-on-the-rise-in-america/ [https://perma.cc/WHQ6-YURH].

31. *See infra* Part II.A.1; Part II.A.2.

32. Wyatt Ronan, *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (Mar. 13, 2021), https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation [https://perma.cc/T8T7-WUVJ].

33. Aryn Fields, *Human Rights Campaign Foundation Releases State Equality Index After Most Anti-Transgender State Legislative Season in History*, HUM. RTS. CAMPAIGN (Jan. 20, 2022), https://www.hrc.org/press-releases/human-rights-campaign-foundation-releases-state-equality-index-after-most-anti-transgender-state-legislative-season-in-history [https://perma.cc/573M-QLS2]; *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, *supra* note 32.

34. Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law [https://perma.cc/K5XP-58ZC].

35. *See id; see also* Wyatt Ronan, *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (Mar. 13, 2021), https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation [https://perma.cc/7UX3-K7LU]; *e.g.*, Shelby Rose, *Bill Allowing Arkansas Teachers To Misgender Students Passes the House*, KATV (Apr. 8, 2021),

anti-trans legislation than the previous year.[36] The enaction of legislation criminalizing physicians and parents for helping trans minors access gender-affirming care lends credence to this prediction.[37]

Legislation against the LGBTQ+ community as a whole has surged in the wake of *Obergefell v. Hodges*,[38] largely due to the lobbying power of national anti-LGBTQ+ organizations such as the Heritage Foundation, Alliance Defending Freedom, and Eagle Forum.[39] These bills have had largely negative economic and reputational effects on the states in which they have been passed.[40] Despite suggestions that recent anti-trans legislation has been driven by lobbying groups rather than by constituents,[41] the recent increase in anti-trans legislation has been met with a corresponding increase in violence against transgender and gender-nonconforming people.[42]

The number of transgender and gender nonconforming people killed violently increased in 2021,[43] surpassing 2020 as the deadliest year on record for transgender individuals in the United States.[44] This uptick in violence has not abated in 2022.[45] The transgender community faces horrific levels of physical and sexual violence.[46] This

https://katv.com/news/local/bill-allowing-arkansas-teachers-to-misgender-students-passes-the-house [https://perma.cc/45FQ-MYY8].

36. Nico Lang, *2022 Was the Worst Year Ever for Anti-Trans Bills. How Did We Get Here?*, THEM (Dec. 29, 2022), https://www.them.us/story/2022-anti-trans-bills-history-explained [https://perma.cc/AC6T-HHF3]; *see also* Phillip M. Bailey, *Exclusive: 2022 Could Be Most Anti-Trans Legislative Years in History, Report Says*, USA TODAY (Jan. 20, 2022, 11:14am), https://www.usatoday.com/story/news/2022/01/20/2022-anti-trans-legislation/6571819001/ [https://perma.cc/Y9VW-WTYX].

37. Katherine L. Kraschel, Alexander Chen, Jack L. Turban & I. Glenn Cohen, *Legislation Restricting Gender-Affirming Care for Transgender Youth: Politics Eclipse Healthcare*, 3 CELL REP. MED. 1, 2 (2022); Rachel Monroe, *At Home with the Families Affected by Texas's New Anti-Trans Orders*, NEW YORKER: LETTER FROM SW. (Mar. 9, 2022), https://www.newyorker.com/news/letter-from-the-southwest/at-home-with-the-families-affected-by-texass-new-anti-trans-orders [https://perma.cc/PVN7-W572].

38. 576 U.S. 644 (2015) (holding that same-sex marriage is constitutionally protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

39. *See BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, *supra* note 32.

40. *See 'Bathroom Bill' To Cost North Carolina $3.76 Billion*, CNBC (Mar. 27, 2017), https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html [https://perma.cc/RRB2-BHJD] (detailing the negative impacts of anti-transgender restroom use laws on the North Carolina economy); *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, *supra* note 32.

41. *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, *supra* note 32.

42. *See* Natividad, *supra* note 30.

43. HUM. RTS. CAMPAIGN, *supra* note 23.

44. *Id.*; Natividad, *supra* note 30.

45. *See* James Factora, *At Least Five Trans Women Have Been Killed in 2022 So Far: Almost All of Them Were Black or Latina*, THEM (Mar. 2, 2022), https://www.them.us/story/at-least-five-trans-women-have-been-killed-in-2022-so-far [https://perma.cc/8BLD-VHSR]; *see also* Heather Cassell, *Two Trans Women Murdered in First Week of 2022*, GAY CITY NEWS (Jan. 19, 2022), https://gaycitynews.com/year-begins-with-pair-of-transgender-murders/ [https://perma.cc/T92B-589L].

46. *Issues: Anti-Violence*, NAT'L CTR. FOR TRANSGENDER EQUAL. (last visited Feb. 1, 2023), https://transequality.org/issues/anti-violence [https://perma.cc/S686-N6DD].

violence disproportionately targets Black, Latina, and Indigenous trans women.[47] The National Center for Transgender Equality states that "[m]ore than one in four trans people has faced a bias-driven assault, and rates are higher for trans women and trans people of color."[48]

Anti-trans legislation and violence against the transgender community appear to be linked to increasing anti-trans rhetoric in American politics and media.[49] In the words of Eric Stanley, a professor in gender and women's studies at the University of California-Berkeley, "The culture war has landed on trans communities, and that violence is specifically brutal and very corporal."[50] The New York Times foreshadowed Professor Stanley's sentiments in 2017, noting, "Advocates say the violence is inseparable from the social climate: that anti-transgender violence and anti-transgender laws—like so-called bathroom bills, which aim to police who may use gender-specific public facilities—are outgrowths of the same prejudice."[51] Prejudice against the trans community brought to the surface by increased visibility has innumerable consequences for both individuals and the larger trans community.[52]

2. Health and Well-Being Effects of Discrimination Against the Trans Community

Transphobia, cisgenderism,[53] and broader discrimination contribute to and are associated with serious socially-produced health inequities.[54] In addition to elevated rates of violence, trans people also face high levels of depression, post-traumatic stress disorder, and suicidal ideation and behavior.[55] A 2020 survey revealed that over sixty percent of trans and nonbinary youth reported engaging in self-harm in the past twelve months.[56] Over fifty percent of trans and nonbinary youth reported having considered

47. *See* Natividad, *supra* note 30. ("We must also be clear that Black, brown and Indigenous trans women continue to be hyper-impacted by these and other forms of violence."); *see also* HUM. RTS. CAMPAIGN, *supra* note 23 ("While the details of these cases differ, it is clear that fatal violence disproportionately affects transgender women of color—particularly Black transgender women . . . .").

48. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 46.

49. *See* Natividad, *supra* note 30.

50. *Id.*

51. Maggie Astor, *Violence Against Transgender People Is on the Rise, Advocates Say*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/us/transgender-women-killed.html [https://perma.cc/862C-2DDX].

52. *See* Natividad, *supra* note 30.

53. Cisgenderism is defined as "a multilevel and systemic prejudicial ideology that delegitimizes or denies a person's ability to self-determine their own gender." Athena D. F. Sherman et al., *Trans* Community Connection, Health, and Wellbeing: A Systematic Review*, 7 LGBT HEALTH 1, 1 (2020).

54. *Id.*

55. *Id.*

56. TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020, at 1 (2020), https://www.thetrevorproject.org/survey-2020/ [https://perma.cc/6VJG-VG9N]. In comparison, in a 2012 study of self-harm behavior in youth found that only 8% of participants reported engaging in self-harm over their lifetime. Andrea L. Barrocas, Benjamin L. Hankin, Jami F. Young, & John R. Z. Abela, *Rates of Nonsuicidal Self-Injury in Youth: Age, Sex, and Behavioral Methods in a Community Sample*, 130 PEDIATRICS 39, 41 (2012).

suicide seriously.[57] Rates of suicidal ideation are comparable in adult transgender populations, and suicide attempts are correspondingly serious.[58] Discrimination against trans individuals within the healthcare system exacerbates this problem, limiting access to healthcare for trans people.[59]

Social support can significantly mitigate the negative health impacts of stress caused by discrimination.[60] Social support may be shown by acknowledging and accepting individuals' gender identity, including using chosen names and pronouns.[61] Transgender and gender-nonconforming youth experience better mental health outcomes when they can socially transition at school and work, as well as at home with family and friends.[62] The use of a chosen name appears to have unique importance, as studies have shown that using a chosen name in multiple social contexts is associated with lower depression, suicidal ideation, and suicidal behavior in transgender youth.[63] This effect extends to pronoun use as well.[64] In a recent survey, trans and nonbinary youth who reported that most or all of the people in their lives respected their pronouns attempted suicide at half the rate of youth who reported that their pronouns were not respected.[65] In adults, frequent misgendering has been associated with psychological distress.[66]

The data clearly shows that transgender people are particularly vulnerable to adverse health and well-being outcomes due to stigma and discrimination—these effects are worsened by misgendering and deadnaming.[67] In contrast, the health and well-being of trans individuals benefit from the use of chosen names and pronouns in work and

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57. TREVOR PROJECT, *supra* note 56, at 2. In a 2019 study of high school students, 18.8% of participants overall reported having seriously considered suicide while students who reported engaging in sex with members of the same gender and students who self-identified as LGBTQ+ had much higher rates of suicidal ideation (54.2% and 46.8% respectively). Asha Z. Ivey-Stephenson, Zewditu Demissie, Alexander E. Crosby, Deborah M. Stone, Elizabeth Gaylor, Natalie Wilkins, Richard Lowry, & Margaret Brown, *Suicidal Ideation and Behaviors Among High School Students—Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY AND MORTALITY WEEKLY REPORT SUPPLEMENT 47, 51 (2020).

58. *See* Noah J. Adams & Ben Vincent, *Suicidal Thoughts and Behaviors Among Transgender Adults in Relation to Education, Ethnicity, and Income: A Systematic Review*, 4.1 TRANSGENDER HEALTH 226, 226 (2019).

59. Sherman et al., *supra* note 53, at 1.

60. *See* Michael Fuchs & Jennifer Potter, *Societal Experiences of Lesbian, Gay, Bisexual, and Transgender People*, *in* THE PLASTICITY OF SEX: THE MOLECULAR BIOLOGY AND CLINICAL FEATURES OF GENOMIC SEX, GENDER IDENTITY AND SEXUAL BEHAVIOR 243, 261 (Marianne J. Legato ed., 2020).

61. *See* Russell et al., *supra* note 22, at 503.

62. *See id.* at 504–05.

63. This effect remains after adjusting for broader measures of social support. *Id.* at 505.

64. *See* TREVOR PROJECT, *supra* note 56, at 9.

65. *Id.*

66. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA AND HEALTH 53, 53 (2016).

67. Russell et al., *supra* note 22, at 505. To "misgender" an individual is to "mistake or misstate (a person's) gender; *esp.* to address or refer to (someone, esp. a transgender person) in terms that do not reflect the gender with which that person identifies." *Misgender,* v., OED (last visited Jan. 25, 2023), https://www-oed-com.libproxy.temple.edu/view/Entry/64848599?isAdvanced=false&result=1&rskey=yhz8Fe&. Similarly, "deadnaming" refers to "address[ing] or refer[ing] to (someone, esp. a transgender person, who has chosen a new name) by a former name." *Deadname*, v., OED ((last visited Jan. 25, 2023), https://www-oed-com.libproxy.temple.edu/view/Entry/64231847?rskey=F306Rj&result=2&isAdvanced=false#eid.

school environments.[68] While deadnaming and misgendering are only two forms of discrimination faced by transgender individuals, studies suggest that enacting and enforcing broad antidiscrimination legislation is crucial to improving health outcomes and combatting economic and housing disparities that affect the trans community.[69] The full implementation of this legislation would partly depend on the ability to enforce agencies to regulate discriminatory employee behavior, including the use of names and pronouns.[70]

B. The First Amendment and Freedom of Speech Rights and Limitations

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances."[71] Although these forty-four words may seem clear at first glance, their meaning and proper application has been debated in the legal field since the Amendment was first introduced.[72] The provision against "abridging the freedom of speech" is no exception.[73]

The right of individuals to engage in and speak freely on matters of public concern has always been a central consideration of free speech doctrine.[74] However, the scope of free speech protections and the activities to which these protections apply are by no means static.[75] As changes occur in societal values, internal and external conflicts, methods of communication, and commercial practices, First Amendment and free speech case law and theory evolve as well.[76]

This social responsiveness is encoded in First Amendment jurisprudence through the discussion of "public concern."[77] It is generally understood that speech on matters of public concern is more valuable, and therefore more protected, than speech on matters

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68. *See id.* at 503, 505.

69. CAROLINE MEDINA, THEE SANTOS, LINDSAY MAHOWALD & SHARITA GRUBERG, PROTECTING AND ADVANCING HEALTH CARE FOR TRANSGENDER ADULT COMMUNITIES, CTR. FOR AM. PROGRESS 1, 20 (2021), https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/08/18/502181/protecting-advancing-health-care-transgender-adult-communities/ [https://perma.cc/UL85-CRK6].

70. *See FACT SHEET: The Equality Act Will Provide Long Overdue Civil Rights Protections for Millions of Americans*, WHITE HOUSE (June 25, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-the-equality-act-will-provide-long-overdue-civil-rights-protections-for-millions-of-americans/ [https://perma.cc/PD72-GVAN]; Danielle Kurtzleben, *House Passes The Equality Act: Here's What It Would Do*, NPR (Jan. 24, 2021, 5:00 AM), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do [https://perma.cc/3FLF-4VQ8].

71. U.S. CONST. amend. I.

72. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991) (detailing the history of First Amendment theory and jurisprudence from its drafting to its modern interpretation).

73. *See id.* at 1704–05.

74. *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

75. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 321 (2018).

76. *Id.* at 326.

77. *See* Karin B. Hoppmann, *Concern with Public Concern: Toward a Better Definition of the* Pickering/Connick *Threshold Test*, 50 VAND. L. REV. 993, 1013 (1997) ("[The public concern test] creates an ever-changing definition of public concern—what is news today may not be news tomorrow, nor may it be news somewhere else—that further decreases the predictability of the public concern test.").

of personal interest.[78] However, what concerns the public is necessarily dependent on fluid temporal and cultural perspectives.[79] The Supreme Court acknowledged the vagueness of what constitutes a matter of public concern in a recent decision, but offered the following guideposts: speech may be of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it is "a subject of general interest and of value and concern to the public."[80] Due to the emphasis placed on matters of public concern and their importance to self-governance,[81] the types of speech given special protection often turn not on set categorical guidelines, but on current social mores.[82]

Part II.B.1.a explores the free speech rights of public employees generally and how these rights can be exercised. Part II.B.1.b discusses how freedom of speech has been further limited by Title VII and Title IX in employment and educational settings. Next, Part II.B.2 reviews freedom of speech doctrine as it has been applied to hate speech and the First Amendment's protection of inflammatory or discriminatory language. Part II.B.3 further explores free speech doctrine in the context of what is known as compelled speech. Finally, Part II.B.4 discusses the intersection of free speech doctrine and religious expression under the First Amendment.

1. Limitations to First Amendment Rights for Public Employees

Before the mid-twentieth century, "unchallenged dogma" dictated that public employees were at the mercy of the conditions placed upon them by their employer, even those that might restrict constitutional rights.[83] This dogma was finally addressed in 1968 by *Pickering v. Board of Education*,[84] a case involving the free speech rights of a public school teacher in Illinois.[85] Since *Pickering*, the Supreme Court has recognized that the First Amendment "protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[86]

However, the extent of this right and its "certain circumstances" are still hotly debated.[87] While the Court's 2006 decision in *Garcetti v. Ceballos*[88] indicates that the free speech rights of a public employee are still limited when the speaker is acting in the capacity of their employment,[89] disagreement over the proper scope and application of

78. This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Snyder*, 562 U.S. at 451–52 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

79. *See* Hoppmann, *supra* note 77, at 1013.

80. *Snyder*, 562 U.S. at 452–53.

81. *Id.* at 452.

82. *See* Hoppmann, *supra* note 77, at 1013.

83. Connick v. Myers, 461 U.S. 138, 143 (1983).

84. 391 U.S. 563 (1968).

85. *Id.*

86. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

87. *See, e.g.*, Hanna Diamond, *The Sixth Circuit Joins the Split: Higher Education Freedom of Speech and the Breadth of Academic Freedom Remain in Limbo*, 12 WAKE FOREST L. REV. ONLINE 111 (2022); *Mary Lindsay Krebs, Can't Really Teach: CRT Bans Impose upon Teachers' First Amendment Pedagogical Rights*, 75 VAND. L. REV. 1925 (2022).

88. 547 U.S. 410, 417 (2006).

89. *Id.* at 421–22.

Garcetti has left open the question of how and when a public employee is protected while commenting on a matter of public concern.[90]

a. On-the-Job Speech: Guidance from Garcetti and the Pickering-Connick Balancing Framework

In February 2000, Deputy District Attorney Richard Ceballos was subjected to retaliatory employment action after he testified about the inaccuracies in a search warrant used in a case being prosecuted by Ceballos's supervisors.[91] Ceballos initiated an employment grievance after this incident, stating that he had been subjected to retaliatory employment actions after his testimony.[92] Ceballos's grievance was denied.[93] He chose to pursue the matter in court, asserting that his supervisors violated his First Amendment rights by subjecting him to retaliatory action based on a memo he had written detailing the inaccuracies of the warrant and recommending the dismissal of the case.[94] Ceballos argued that his memo addressed a matter of public concern—government misconduct—and therefore constituted protected speech under the First Amendment.[95]

In the landmark decision authored by Justice Anthony Kennedy, the Supreme Court in *Garcetti* concluded that so long as a public employee speaks in an official capacity, employers may restrict their speech.[96] As stated in the opinion, "[w]hen 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."[97] This is true even when the topic of the speech is a matter of public concern.[98] The Court justified this conclusion by claiming that these limitations do not diminish the rights of public employees to engage in public discourse.[99] In this case, while Ceballos may have been protected in speaking out against government conduct had he done so outside of the responsibilities of his job, he was not protected while writing a memo or testifying in court pursuant to his official duties.[100]

Three dissenting Justices expressed concerns about the categorical exception to free speech rights *Garcetti* seemed to carve out and called for a more flexible case-by-case

90. *See* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMPLOYMENT AND LAB. L. 175, 180–81 (2008); *but see* Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. UNIV. L. REV. 125, 129 (2009).

91. *Garcetti*, 547 U.S. at 413–415.

92. *Id.* at 415.

93. *Id.*

94. *Id.*

95. *Id.* at 415–16.

96. *Id.* at 421.

97. *Id.*

98. *Id.* at 421–22.

99. *Id.* ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employees might have enjoyed as a private citizen.").

100. *Id.* at 421 ("The significant point is that the memo was written pursuant to Ceballos' official duties.").

approach.[101] However, these dissenting opinions did not go so far as to claim that public employees should be fully protected by the First Amendment in all instances when an employee's on-the-job speech results in disciplinary action.[102] In his dissent, Justice John Paul Stevens explicitly acknowledged that employers might take corrective action against "inflammatory or misguided" employee speech when spoken in the employee's official capacity.[103] Justice David Souter also concluded that government employers have legitimate and persuasive reasons to adhere to chosen policies and demand sound employee judgment.[104] Justice Stephen Breyer pointed out the common ground shared by both the majority and dissenting opinions, noting, "[w]here the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration."[105]

While *Garcetti* provided a clear rule for the protection of government employee speech by separating on-the-job speech from speech made as a private citizen, it is debatable whether this rule applies in educational contexts.[106] Indeed, the majority opinion in *Garcetti* declined to address whether and to what extent courts should apply the decision to cases involving teaching or scholarship.[107] Although the Constitution does not codify the concept of academic freedom, many legal scholars and practitioners view freedom of speech and thought in colleges and universities as particularly deserving of constitutional protection.[108] In light of the debate as to whether *Garcetti* should apply to educational settings, it is necessary to analyze whether an earlier conceptual framework allows employees to be constitutionally protected when speaking in the course of their professional duties.[109]

From the 1960s until the *Garcetti* decision, the Supreme Court utilized an ad hoc balancing test to decide First Amendment cases in which a public employee's speech was at issue.[110] This test was first articulated in *Pickering v. Board of Education* in 1968.[111] The plaintiff in *Pickering*, a public high school teacher, was fired after a letter he wrote regarding a proposed tax increase was published in a local newspaper.[112] This letter was critical of how the defendant and the superintendent of schools had dealt with proposals to raise new revenue for schools.[113] Pickering sued the Board of Education

101. *See id.* at 426 (Stevens, J., dissenting).

102. *See id.* (Stevens, J., dissenting); *id.* at 428 (Souter, J., dissenting); *id.* at 445 (Breyer, J., dissenting).

103. *Id.* at 426 (Stevens, J., dissenting).

104. *Id.* at 428 (Souter, J., dissenting).

105. *Id.* at 445 (Breyer, J., dissenting).

106. *See* Tepper & White, *supra* note 90, at 129–130.

107. *Garcetti*, 547 U.S. at 425.

108. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

109. *See* Nicholas K. Tygesson, *Cracking Open the Classroom Door: Developing A First Amendment Standard for Curricular Speech*, 107 NW. L. REV. 1917, 1925–26 (2013) (noting that courts are divided on whether *Garcetti* should apply to educational settings and that some instead apply pre-*Garcetti* standards).

110. *Garcetti*, 547 U.S. at 417–18.

111. 391 U.S. 563, 564 (1968).

112. *Id.*

113. *Id.*

responsible for his termination, claiming that the Board violated his First Amendment rights by firing him based on the letter's contents.[114] The Supreme Court stated that the proper inquiry in these cases is to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and interest, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[115]

The Court struck this balance in Pickering's favor, concluding that the First Amendment protects public employees when addressing matters of public importance, provided that they have not knowingly or recklessly made false statements that would amount to defamation.[116] The opinion emphasized that Pickering's letter writing had not interfered with his performance as a teacher and had not "interfered with the regular operation of the schools generally."[117] Under *Pickering*, public employees may have restricted First Amendment rights in situations related to their employment.[118] However, they are still permitted to express opinions on matters of public concern without reprisal when their actions do not impede their job performance or substantially interfere with the efficient operations of their employer.[119]

The Court further developed this framework in *Connick v. Myers*,[120] a case in which an assistant district attorney was fired for circulating a questionnaire to coworkers about office policies and morale.[121] The Supreme Court concluded that when a public employee's speech does not relate to a matter of public concern and does not constitute political speech, such speech is not generally protected by the First Amendment, meaning that the employer may take disciplinary action.[122] The Court decided that "if Myers's questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."[123] The Court justified its decision by stating that when speech is not on a matter of public concern, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[124] This decision clarified that while public employees may receive First Amendment protection, the protection afforded is substantially lessened when the circumstances involve speech made "as an employee upon matters only of personal interest."[125]

The test derived from *Pickering* and *Connick*, together, is known as the *Pickering-Connick* balancing test.[126] The test involves two steps: (1) determining

114. *Id.* at 567.
115. *Id.* at 568.
116. *Id.* at 574.
117. *Id.* at 572–73.
118. *See id.* at 568.
119. *Id.* at 571–72.
120. 461 U.S. 138 (1983).
121. *Id.* at 141.
122. *Id.* at 146.
123. *Id.*
124. *Id.*
125. *Id.* at 147.
126. Helen Norton, *Constraining Public Employee Speech: Government's Control of its Workers' Speech To Protect its Own Expression*, 59 DUKE L. J. 1, 8–10 (2009).

whether the speech in question involves a matter of public concern, and (2) weighing the value of the employee's speech against the impact of the speech on efficient operations by government employers.[127] If employee speech does not touch on a matter of public concern, the government interest in efficiency will almost always outweigh the First Amendment value of the employee's speech.[128] The *Pickering-Connick* test is still an integral part of First Amendment analysis as it relates to public employees.[129] While *Garcetti* added a dispositive step preceding the others, the inquiry of whether the speech was made within the employee's official duties,[130] the *Pickering-Connick* test is still applied in cases involving off-duty speech and in educational contexts where *Garcetti* may not apply.[131] Taken as a whole, *Garcetti*, *Pickering*, and *Connick* show the protections afforded to government employees under the First Amendment—and, most importantly, identify the circumstances in which these protections do and do not apply.[132]

b. Title VII and Title IX Hostile Environment Sexual Harassment Law

While the First Amendment generally protects speech on matters of public concern regardless of how unpopular the opinion is,[133] this does not mean all speech that implicates publicly debated issue is uniformly permissible.[134] It is recognized that some regulation of speech is necessary to achieve legitimate government objectives.[135] Where regulation of speech is not tailored to discriminate against a specific viewpoint, it is typically allowable.[136] Title VII of the Civil Rights Act of 1964,[137] which prohibits discrimination on the basis of sex in the workplace,[138] is an example of a permissible content-based regulation because it helps achieve a legitimate government objective and any prohibited speech is included within a category of prohibited conduct.[139] Since Title VII was introduced, the definition of discrimination has been broadened to include sexual harassment, as sexual harassment that creates a hostile work environment is tantamount to discrimination on the basis of sex.[140]

The Equal Employment Opportunities Commission (EEOC) defines sexual harassment as follows:

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127. *Id.*

128. *Id.* at 9–11.

129. *Id.* at 13.

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

131. *See* Tepper & White, *supra* note 90, at 150.

132. *See supra* notes 92–96, 106–126; *Garcetti*, 547 U.S. 410; Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983).

133. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

134. *Id.* at 456.

135. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 27 (5th ed. 2019).

136. *See id.*

137. 42 U.S.C. § 2000e.

138. 42 U.S.C. § 2000e-2(a).

139. Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEXAS J. WOMEN & L. 67, 87–88 (2002). The prevention of discrimination in schools and workplaces is considered a compelling government interest. *Id*. at 87.

140. *Id.* at 68.

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[141]

This definition shows that Title VII's prohibition against sexual harassment singles out sexually based speech for differential treatment under the law.[142] Although content-based restrictions on speech are presumptively invalid as a general rule, the Court had recognized an exception for types of speech that are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by social interest in order and morality."[143] The issue has not been addressed directly by the Court, but dicta suggest Title VII may restrict sexually explicit or derogatory language as behavior within reach of statutes directed at conduct.[144] Under this theory, sexually derogatory language is considered discrimination on the basis of sex that can be penalized.[145]

The rationale used to allow workplaces to prevent sexually harassing speech and other forms of speech-based discrimination under Title VII has also been extended to Title IX, which prohibits discrimination on the basis of sex in any educational program that receives federal funds.[146] In federally funded schools, it is largely permissible to regulate speech to the extent that the speech discriminates against an individual on the basis of sex and creates a hostile learning environment.[147] Title IX has been used to hold institutions accountable for sexual harassment and misconduct by both employees and

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141. 29 C.F.R. § 1604.11(a) (2022).

142. *See id.*

143. Kirshenbaum, *supra* note 139, at 70 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Speech that falls into this category, such as obscenity, is not considered a matter of public concern. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 399–401 (1992) (White, J., concurring) ("[T]he court has held that the First Amendment does not apply to [these categories] because their expressive content is worthless or of *de minimis* value to society." (alteration in original)).

144. *See R.A.V.*, 505 U.S. at 389.

145. The Court has concluded that Title VII protects individuals from discrimination on the basis of sexual orientation and gender identity, as well as on the basis of sex assigned at birth. Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020). Although it remains to be seen whether, under this more expansive definition of "on the basis of sex," verbal harassment based on sexual orientation or gender identity can be prohibited as sexual harassment, recent cases suggest this interpretation is plausible. *See* Felhaber Larson, *Minnesota Employer To Pay Transgender Worker $115K, Apologize for Misgendering Her*, 26 NO. 6 MINN. EMP. L. LETTER 7 (M. Lee Smith Publishers LLC, Brentwood, Tenn.), Aug. 2016, at 1.

146. 20 U.S.C. § 1681(a).

147. *See* Rowles v. Curators of Univ. of Mo., 983 F.3d 345, 356–57 (8th Cir. 2020); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366–67 (10th Cir. 2000). *But see* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001) (stating that overbroad antidiscrimination provisions are unconstitutional under the First Amendment).

students in situations where the administration demonstrates deliberate indifference to the discrimination.[148]

Under Title IX, schools that receive federal funding have a powerful incentive to regulate discrimination on the basis of sex closely—if a school does not comply with its requirements, it risks losing federal funding.[149] For this reason, schools are likely to impose restrictions on speech that may amount to sexual harassment or discrimination on the basis of sex.[150] While these policies are not universally upheld,[151] policies that are sufficiently narrow to prohibit only speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" are considered permissible speech restrictions.[152]

2. Limitations to the Protection of Hate Speech Under the First Amendment

While morally detestable, hate speech is largely protected for private citizens.[153] As articulated by the Supreme Court, "[s]peech may not be banned on the ground that it expresses ideas that offend."[154] However, there are limits to the general tolerance of the law towards offensive and bigoted language.[155] The Supreme Court has articulated multiple circumstances where hate speech may be prohibited and even criminalized.[156]

While the government generally cannot regulate based on the content of speech, it is permissible to regulate content "[w]hen the basis for the content discrimination consists entirely of the very reason the class of speech at issue is proscribable . . . ."[157] Speech aimed at inciting imminent lawless action may also be proscribed, provided that it is sufficiently likely to incite the action it endorses.[158] In addition, content restrictions may be permissible where the speech in question is associated with the so-called

148. Ann K. Wooster, *Sex Discrimination Under Title IX—Supreme Court Cases*, 158 A.L.R. FED. 563 § 2(a) (1999).

149. *See id.* §§ 9, 15.

150. *See* Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-on-Student Sexual Harassment and the First Amendment in Schools*, 75 N.D. L. REV. 205, 211–12 (1999).

151. *See* DeJohn v. Temple Univ., 537 F.3d 301, 317–18 (3d. Cir. 2008) (holding that a policy prohibiting "gender-motivated" speech or conduct that "has the purpose or effect of creating an intimidating, hostile, or offensive environment" was facially invalid under the First Amendment).

152. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

153. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011). The United States stands apart from the international community with respect to its treatment of hate speech and affords considerably more protection to hate speech than its international counterparts. *See, e.g.*, Anne-Marie Beliveau, *Hate Speech Laws in the United States and the Council of Europe: The Fine Balance Between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization Through Social Media Sites*, 51 SUFFOLK UNIV. L. REV. 565, 566 (2018).

154. Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

155. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that states may prohibit speech that advocates imminent unlawful conduct and is likely to produce such unlawful conduct).

156. *See Brandenburg*, 395 U.S. at 447; R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

157. *R.A.V.*, 505 U.S. at 388. This refers to categories of speech that are traditionally proscribable, such as obscenity and defamation. *Id.* at 383.

158. *Brandenburg*, 395 U.S. at 447.

secondary effects of that speech such that regulation is "*justified* without reference to the content of the . . . speech."[159]

The potential application of the secondary effects doctrine to antidiscrimination regulations is compelling.[160] This rationale for proscribing certain speech may apply to provisions that attempt to prevent discriminatory violence.[161] The doctrine is referenced in *R.A.V. v. City of St. Paul*,[162] a case in which the Supreme Court considered the constitutionality of an ordinance prohibiting the knowing display of a symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[163] The defendant and his conspirators had burned a cross inside the fenced yard of a Black family, an act that is widely associated with white supremacist organizations and targeted violence against Black people.[164]

While the Court concluded that the ordinance was overbroad and impermissibly content based,[165] it described circumstances in which more narrowly tailored prohibitions on speech would be appropriate.[166] Justice Antonin Scalia, writing for the Court, stated that, "a valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'"[167] When the government targets conduct based on a content-neutral rationale, rather than its expressive content, the incidental prohibition of certain categories of speech is permissible.[168]

The secondary effects doctrine first evolved in the context of sexually oriented businesses and adult entertainment.[169] When assessing restrictions involving adult businesses and content, courts have used the secondary effects doctrine to impose a more deferential level of review, intermediate scrutiny, than the strict scrutiny usually required for content-based distinctions in the law.[170] In practice, laws subjected to intermediate scrutiny rather than strict scrutiny are far more likely to survive.[171] Under this analysis, certain laws that aim not to prevent "offensive" speech but instead to target a secondary effect of speech that the government has a significant interest in regulating can be

159. *R.A.V.*, 505 U.S. at 389 (omission in original) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

160. *See* Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1200–01 (2002) (explaining that while the secondary effects doctrine originated in zoning regulations for sexually based businesses, it has also been applied to discrimination issues).

161. *See id.*

162. 505 U.S. 377 (1992).

163. *Id.* at 380.

164. *Id.* at 379.

165. *Id.* at 391.

166. *Id.* at 388–90.

167. *Id.* at 389 (omission in original) (quoting Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986)).

168. *Id.* at 390.

169. *See* Leslie Gielow Jacobs, *Making Sense of the Secondary Effects Analysis After* Reed v. Town of Gilbert, 57 SANTA CLARA L. REV. 385, 386 (2017).

170. *See* Andrew, *supra* note 160, at 1181.

171. *See id.* at 1178.

upheld.[172] Lower courts have applied the secondary effects doctrine to adult businesses and content, as well as to workplace harassment incidents,[173] commercial contexts,[174] and discrimination.[175] The proper scope and definition of the doctrine are still debated.[176] However, the debate appears to be leaning towards a more expansive definition as seen in *R.A.V.*[177] The secondary effects doctrine may provide a promising avenue for tackling types of speech that are particularly harmful because of their context rather than their content.[178]

Beyond the secondary effects doctrine, common law places additional limitations on hate speech.[179] The context in which the speech occurs can be determinative: hate speech that occurs in public and addresses topics of public concern in a general manner is protected, while hate speech targeted at individuals may give rise to liability in tort.[180] These principles are detailed in *Snyder v. Phelps*,[181] in which the father of a soldier killed in combat sued Fred Phelps for intentional infliction of emotional distress after the Westboro Baptist Church picketed the soldier's funeral.[182] The Court ruled that the First Amendment protected Phelps because of (1) the public forum;[183] (2) the broad rather than targeted messages;[184] and (3) the demonstrators' adherence to time, place, and manner restrictions.[185]

While Phelps' speech on homosexuality in the military was considered a matter of public concern by the Court, speech that "concerns no public issue" is considerably less protected, and speakers may be liable when this kind of speech causes an injury.[186] This allows for tort claims like intentional infliction of emotional distress, libel, and defamation.[187] Although intentional infliction of emotional distress requires extreme and outrageous conduct, courts have held that racially and sexually derogatory speech can meet this high bar in some circumstances.[188]

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172. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976).

173. *See* Andrew, *supra* note 160, at 1181–82.

174. *See* Am. Future Sys., Inc. v. Pa. State Univ., 618 F.2d 252 (3d Cir. 1984).

175. *See* Presbytery of N.J. v. Florio, 902 F. Supp. 492 (Dist. N.J. 1995), *aff'd*, 99 F.3d 101 (3d Cir. 1996).

176. *Compare* Andrew, *supra* note 160 (arguing that the doctrine will continue to be extended in the future), *with* Jacobs, *supra* note 169 (applying the doctrine only to adult-oriented businesses and content).

177. *See* Andrew, *supra* note 160, at 1213–14.

178. *Presbytery of N.J.*, 902 F. Supp. at 492.

179. *See* Snyder v. Phelps, 562 U.S. 443, 451 (2011).

180. *See id.* at 455–56.

181. 562 U.S. 443 (2011).

182. *Id.* at 448.

183. *Id.* at 456.

184. *Id.* at 454.

185. *Id.* at 456.

186. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985) (holding that punitive damages are not limited by the First Amendment in defamation actions involving matters of purely private concern).

187. *See Snyder*, 562 U.S. at 451–53.

188. *See* Taylor v. Metzger, 706 A.2d 685, 694–95 (N.J. 1998); Flizack v. Good News Home for Women, Inc., 787 A.2d 228, 234–35 (N.J. Super. Ct. 2001).

3. Compelled Speech as a Violation of First Amendment Rights

Under the First Amendment, the government generally cannot compel the speech of individuals.[189] This doctrine depends not on the ideological message of the compelled content but on its infringement on the speaker's right to refrain from speaking.[190] However, this right is not absolute, and the state's countervailing interest in compelling speech is weighed against the individual right to refrain from speaking.[191] Recently, compelled speech has been examined in the context of abortion laws imposing "speech-and-display" requirements on doctors.[192] These requirements compel doctors providing abortions to give information about the attendant health risks of abortion and the gestational age of a fetus to patients seeking an abortion, and in some cases to perform and display ultrasounds that are not medically necessary.[193]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[194] the plurality upheld requirements compelling "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus[.]"[195] The Court concluded that these requirements would not be an undue burden provided that they do not create a substantial obstacle to the right to seek an abortion and are reasonable.[196] Although the plurality acknowledged that "the physician's First Amendment rights not to speak are implicated" by speech-and-display statutes, it stated that these rights were only impacted "as a part of the practice of medicine, subject to reasonable licensing and regulation by the State."[197] While the Court addressed this issue in a three-sentence paragraph in the *Casey* decision, the plurality's decision to allow states to compel a doctor to give specified information to patients (even when the information is not medically necessary) has wide-reaching implications.[198]

In the wake of the *Casey* decision, both the Fifth and Eighth Circuit Courts of Appeal have expanded the undue burden test to any infringement of the First Amendment rights of physicians.[199] The Fifth Circuit reasoned that "[t]he only reasonable reading" of *Casey*'s compelled speech discussion "is that physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the

189. Wooley v. Maynard, 430 U.S. 705, 714–15 (1977).

190. *Id.* at 714.

191. *See id.* at 715–16.

192. Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right To Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 601 (2012).

193. *Id.*

194. 505 U.S. 833 (1992). While *Casey* was overturned by *Dobbs v. Jackson Women's Health Org.*, the majority's approach under *Dobbs* will still allow states to compel physician speech through speech-and-display statutes. *See* 142 S. Ct. 2228, 2284 (2022).

195. *Casey*, 505 U.S. at 882.

196. Gaylord & Molony, *supra* note 192, at 603. These statutes are considered reasonable if they require disclosure of nonmisleading, relevant, and truthful information. *Id.*

197. *Casey*, 505 U.S. at 884.

198. *See* Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2356–57 (2013).

199. *Id.* at 2357.

State.'"[200] Commentators note that the comparison made to *Whalen v. Roe*,[201] where the Court concluded that states may require physicians to report prescription information to the state without violating the Fourteenth Amendment, suggests that "the state has broad discretion to regulate the conduct of professionals," and that this discretion may extend to the regulation of speech.[202]

Courts have held that legitimate state interests in nondiscrimination may override individual First Amendment rights, including in circumstances where individuals must engage with ideas they oppose.[203] In *In re Rothenberg*,[204] the Minnesota Supreme Court decided that requiring an attorney to participate in a continuing legal education course about eliminating bias did not violate the lawyer's First Amendment rights.[205] The court reasoned that because the lawyer was not forced to manifest agreement with the substance of the courses, the requirement did not constitute compelled speech and did not violate the First Amendment.[206]

Similarly, courts have held that schools may condition official recognition of a student organization on compliance with nondiscrimination policies without violating the First Amendment.[207] Student organizations may also be required to certify intent to comply with nondiscrimination policies, and this certification is not considered compelled speech.[208] The compelled speech doctrine recognizes circumstances where policies or laws that arguably require manifestation of agreement with ideologies to which the speaker is opposed do not violate the First Amendment.[209] Where a law requires a public institution to allow certain expressive activity on its premises, but the public institution has a reasonable opportunity to dissociate from the expressive activity, First Amendment concerns are generally less persuasive.[210] As workplace speech regulations typically do not prevent employees from manifesting differing ideologies outside of work, these regulations are less likely to be considered compelled speech than more broadly applicable laws.[211]

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200. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575 (5th Cir. 2012) (alteration in original) (quoting *Casey*, 505 U.S. at 882).

201. 429 U.S. 589 (1977).

202. Keighley, *supra* note 198, at 2355.

203. *See* In re Rothenberg, 676 N.W.2d 283, 286 (Minn. 2004).

204. 676 N.W.2d 283 (Minn. 2004).

205. *Id.* at 286.

206. *Id.* at 291.

207. Every Nation Campus Ministries v. Achtenberg, 597 F. Supp. 2d 1075, 1096–97 (S.D. Cal. 2009), *aff'd in part, rev'd in part sub nom.* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011).

208. *Id.*

209. *See* Rumsfeld v. Forum for Acad. and Institutional Rts., Inc., 547 U.S. 47 (2006) (upholding a law requiring law schools and universities to allow military recruiters equal access to campus provided to nonmilitary recruiters, despite the school's ideological opposition to the military).

210. *See id.* at 65 (holding that a law requiring law schools to host military recruiters did not violate the law schools' First Amendment rights because nothing about recruiting suggested that the law schools agreed with any speech by recruiters and nothing in the law restricted what the law schools could say about the recruiters' policies).

211. *See* Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL OF RTS. J. 219, 236–41 (2017) (arguing that in employment contexts, employers have adequate space and means available to dissociate themselves from compelled speech).

4. The Intersection of the Freedom of Speech and Free Exercise Clauses

In the draft of the First Amendment James Madison presented at the First Congress, freedom of speech and freedom of religious communication seemed to be united in the phrase "nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[212] "[R]ights of conscience" were thought to include the right to act and speak in accordance with one's own moral code, whether religious or secular, without government interference.[213] For this reason, alleged violations of freedom of expression and free exercise of religion often coincide.[214]

First Amendment jurisprudence shows that even religious speech is commonly regulated to further legitimate government interests.[215] In fact, public institutions such as schools and government organizations *must* at times limit religious speech not to run afoul of the First Amendment's Establishment Clause.[216] In public school settings, students' religious speech is broadly permitted unless it is considered school sponsored.[217] However, public school personnel have more limited rights regarding religious speech.[218] Whether a teacher's speech is protected largely depends on whether the forum is considered public or nonpublic and whether the speech in question is school sponsored.[219] Generally, school classrooms are not a public forum, and schools may regulate a teacher's in-class speech provided that doing so furthers a legitimate pedagogical interest.[220]

Other public employees are similarly restricted in their religious expression in the workplace.[221] Title VII anti-harassment laws may be applied to limit religious speech that amounts to harassment.[222] In addition, the government as an employer must restrict the speech of its agents when their speech can be reasonably perceived as a state endorsement of a particular religion or religious activity.[223] Thus, government employers generally have the right and the affirmative duty to place reasonable restrictions on the religious speech of employees, and doing so is not seen as a violation of the employee's right to free exercise.[224]

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212. Lee v. Weisman, 505 U.S. 577, 612 (1992) (Souter, J., concurring).

213. Laura E. Little, *First Amendment Pedagogy: Teaching New Challenges and Old Doctrine*, (Temp. Univ. Legal Stud. Rsch. Paper Series, 2021), https://ssrn.com/abstract=3835298.

214. *See id.*

215. *See, e.g.*, Theresa Lynn Sidebotham, *Expression of Religion in Public Schools*, 40 COLO. LAW. 47 (2011); Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J. L. & PUB. POL'Y 959, 974 (1999).

216. *See, e.g.*, Sidebotham, *supra* note 215, at 47; Berg, *supra* note 215, at 974.

217. Sidebotham, *supra* note 215, at 49.

218. *Id.* at 51–52.

219. *Id.*

220. *Id.* at 52.

221. Berg, *supra* note 215, at 974.

222. *Id.* at 966–67.

223. *Id.* at 974.

224. *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 165 (2d Cir. 2001); Berg, *supra* note 215, at 974.

C. Challenges to Anti-Misgendering and Anti-Deadnaming Statutes and Policies

In response to the prevalence of violence against trans individuals and to promote equal treatment in institutional settings, some lawmakers and institutions have put into place laws or policies requiring the use of chosen names and pronouns when referring to transgender individuals.[225] These laws and policies have been challenged under the First Amendment on multiple theories, including that they abridge freedom of expression and violate religious freedom protections.[226] Some of these challenges have been successful—notable cases in Ohio, California, and Virginia overturned rules prohibiting misgendering and deadnaming.[227] However, a similar challenge to a university policy in Indiana has failed.[228] Additionally, the California Supreme Court has recently agreed to review a lower court decision that deemed an anti-misgendering provision unconstitutional.[229] As of 2022, it remains to be determined whether anti-misgendering and anti-deadnaming provisions are prohibited under the First Amendment.

Part II.C.1 of this Comment addresses the challenges to anti-misgendering policies that have arisen in public school contexts. Part II.C.2 explores challenges to similar policies in public employment and healthcare settings. Finally, Part II.C.3 describes reactions to these recent decisions from legal spheres and the public.

1. Challenges to Anti-Misgendering Policies in Academic Settings

Given the unique position of public schools within the First Amendment doctrine, it is unsurprising that claims by teachers and professors have been at the forefront of the debate over anti-misgendering policies.

Part II.C.1.a discusses *Meriwether v. Hartop*, the Sixth Circuit decision discussed above in which a public university professor's refusal to comply with his university's anti-misgendering policy was upheld on First Amendment grounds. Part II.C.1.b addresses *Loudoun County School District v. Cross*,[230] a Virginia Supreme Court order affirming a lower court decision to reinstate an elementary school physical education teacher after he was suspended for making public claims that he would not comply with the school's policy concerning transgender students.[231] Lastly, Part II.C.1.c discusses *Kluge v. Brownsburg Community School Corporation*,[232] in which an Indiana high school teacher was forced to resign from his position because of his treatment of transgender students.[233]

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225. *See In 2021, Our Fight for LGBTQ Rights Moved to the States*, AM. C.L. UNION (Dec. 16, 2021), https://www.aclu.org/news/lgbtq-rights/in-2021-our-fight-for-lgbtq-rights-moved-to-the-states [https://perma.cc/WE7V-9N67].

226. *See* Levit, *supra* note 15.

227. *See* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Taking Offense v. State of Cal., 281 Cal. Rptr. 3d 298 (Cal. Ct. App. 2021), *cert. granted*, 498 P.3d 90 (Cal. 2021); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, WL 9276274 (Va. Aug. 30, 2021).

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

229. Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Cal. Ct. App.), *cert. granted*, 498 P.3d 90 (Cal. 2021).

230. No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021).

231. *Id.*

232. 432 F. Supp. 3d 823 (S.D. Ind. 2020).

233. *Id.* at 2–3.

a. Meriwether v. Hartop

This case involved a college professor's claim that the disciplinary measures taken against him after he intentionally misgendered a student for a prolonged period violated his First Amendment rights.[234] The Sixth Circuit Court of Appeals reversed the district court's decision to dismiss the case for failure to state a claim.[235]

The court's reasoning rested on the argument that by "compelling [Meriwether's] speech or silence and casting a pall of orthodoxy over the classroom," the university had plausibly violated Meriwether's First Amendment rights.[236] The court relied on previous decisions emphasizing the importance of academic freedom in university settings.[237] Although the court acknowledged that *Garcetti* set a generally applicable rule for the speech of government employees, including state university professors, it concluded that the Supreme Court's previous decisions relating to freedom of speech and public education suggest that *Garcetti* does not apply in this setting.[238]

The court then applied the *Pickering-Connick* balancing test and concluded that Meriwether's speech was a matter of public concern, stating that "Meriwether's speech manifested his belief that 'sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires.'"[239] In the eyes of the Sixth Circuit, the university's interest in preventing discrimination against transgender students was "comparatively weak" when balanced against Meriwether's interest in speaking on a matter of public concern.[240]

The university cited *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*[241] to support the argument that the government has a compelling interest in stopping this kind of discrimination.[242] In response, the court stated that "[t]he panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern."[243] This answer does not seem to address whether the specific goal of stopping discrimination against transgender students is compelling, but rather suggests that allowing the university to regulate with this goal in mind would "allow universities to discipline professors, students, and staff any time their speech might cause offense."[244]

234. *Meriwether*, 992 F.3d at 498. See *supra* Section I for a more extensive discussion of the facts and circumstances of the case.

235. This case has not yet been decided on its merits. *Id*.

236. *Meriwether*, 992 F.3d at 503.

237. *Id.* at 504–06.

238. The cases relied on by the court took place in 1957 and 1967, and both held that university professors are protected by the First Amendment when lecturing on "subversive" topics. *Id.* at 504–05 (first citing Sweezy v. New Hampshire, 354 U.S. 234 (1957); then citing Keyishian v. Bd. Of Regents, 385 U.S. 589 (1967)).

239. *Id.* at 509.

240. *Id.* at 510.

241. 884 F.3d 560 (6th Cir. 2018), *aff'd*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

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

243. *Id.*

244. *Id.*

The court further held that Meriwether's actions did not impede the proper performance of his duties,[245] despite the conclusions of the school's Title IX office, Labor Relations Director, and General Counsel that Meriwether's behavior interfered with the learning environment and warranted disciplinary action.[246] To justify this conclusion, the court stated that there was "no suggestion" that Meriwether's refusal to use his student's chosen pronouns "inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits."[247] The court also dismissed the university's stated interest in Title IX compliance, stating that the discrimination was not sufficiently serious for Title IX to be implicated as evidenced by inconsistencies in statements about whether the claim was based on disparate treatment or hostile environment.[248]

In addressing Meriwether's free exercise claims, the court stated Meriwether had plausibly claimed that the university was motivated by religious hostility and that its actions impermissibly infringed on his religious beliefs.[249] This conclusion was based largely on the allegation of religious hostility made in Meriwether's complaint, primarily focusing on comments equating his convictions to racism and sexism.[250] In the court's view, these comparisons made an inference of religious hostility plausible.[251]

This decision did not include any discussion of the impact that Meriwether's behavior had on the student in question or on other transgender students on campus.[252] Furthermore, the court did not address how this decision relates to other antidiscrimination measures commonly enacted by universities.[253] Instead, the court held that "the university's position on titles and pronouns goes both ways," and that by the university's logic, a university "could likewise *prohibit* professors from addressing university students by their preferred gender pronouns—no matter the professors' own views."[254] The decision contained no discussion of the broader social context of antidiscrimination provisions that aim to protect the transgender community. Finally, the text of the decision itself refused to use gendered pronouns for Jane Doe.[255] Although the court referred to Meriwether as "he" throughout the decision whenever a personal pronoun would normally be used, the court referred to Jane only as "Doe"—the compromise suggested by Meriwether that the university had rejected.[256]

245. *Id.* at 511.

246. *Id.* at 502.

247. *Id.* at 511. The conclusion that Doe was not denied any educational benefits was based solely on the fact that Doe had completed the course and received a high grade. *Id.*

248. *Id.*

249. *Id.* at 512.

250. *Id.* at 512–14.

251. *Id.* at 514.

252. *Id.* at 492.

253. *Id.*

254. *Id.* at 506.

255. *Id.* at 498–518.

256. *Id.* at 510–11.

b. Loudoun County School Board v. Cross

In August 2021, the Virginia Supreme Court affirmed a lower court's decision to temporarily reinstate an elementary school teacher, Byron Cross, who publicly stated he would not comply with a school board-proposed policy that staff must use students' chosen names.[257] Cross was placed on administrative leave after his comments at a school board meeting, including the following: "I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it's against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God."[258] Cross's suspension followed multiple complaints from parents and requests that Cross have no contact with their children.[259]

Cross filed various claims against the school board, including free speech complaints under the Virginia Constitution, alleging that the board violated his right to speak publicly as a private citizen.[260] In addition, Cross alleged that his suspension substantially burdened his free exercise rights and diminished his ability to "profess and maintain his opinions on religious matters."[261] Cross sought an injunction against the board to reinstate him to his teaching position and to prevent the board from "punishing him for speaking about the transgender policy."[262]

In their response, the school board detailed the continuing and significant disruption caused by Cross's comments, including complaints from parents that forced the school to have other teachers assume some of Cross's responsibilities.[263] Members of the community also made complaints, including a youth suicide prevention advocate concerned about Cross's intention to refuse to follow the policy and the impact it would have on transgender students.[264] The lower court granted an injunction for Cross, finding that he was likely to succeed on his claim that his suspension was "an act of retaliation" for his comments.[265] The lower court further concluded that Cross was speaking on a matter of public concern, and his comments were made as a private citizen.[266]

257. Mark Walsh, *Virginia Supreme Court Backs Teacher Who Spoke Against Transgender Policy at Board Meeting*, EDUC. WEEK (Aug. 31, 2021), https://www.edweek.org/policy-politics/virginia-supreme-court-backs-teacher-who-spoke-against-transgender-policy-at-board-meeting/2021/08 [https://perma.cc/L8TQ-D97E].

258. Loudoun Cnty. Sch. Bd. v. Cross, No. 210584 at 2 (Va. Aug. 30, 2021).

259. *Id.*

260. *Id.* at 3. Virginia Constitution's free speech provisions are described as "coextensive with the free speech provisions of the federal First Amendment." *Id.* at 9 (quoting Elliott v. Commonwealth, 593 S.E.2d 263, 269 (Va. 2004)).

261. *Id.* at 3.

262. *Id.*

263. *Id.* at 4.

264. *Id.* at 5.

265. *Id.* at 6.

266. *Id.* The evidence on which the court relied to conclude that Cross was speaking as a private citizen was not discussed. *Id.*

The court employed the *Pickering* balancing test to conclude that Cross's free speech interests outweighed the board's interest in regulating Cross's speech.[267] In doing so, the lower court considered nine factors taken from *Ridpath v. Board of Governors*[268]:

> [W]hether Cross' comments (1) impaired the maintenance of discipline by supervisors, (2) impaired harmony among coworkers, (3) damaged close personal relationships, (4) impeded the performance of Cross' duties, (5) interfered with the operation of Loudoun County Public Schools, (6) undermined the mission of Loudoun County Public Schools, (7) were communicated to the public or to coworkers in private, (8) conflicted with Cross' responsibilities within Loudoun County Public Schools, and (9) abused the authority and public accountability Cross' role entailed.[269]

Despite the detailed description of the disruption to the school's regular activities given by the board, the Court determined that Cross's speech caused only a "de minimis disruption to the school's operations" and did not justify suspension.[270]

In relation to Cross's free speech claims, the lower court stated that the board had a "premature and misplaced expectation that Cross would violate the transgender policy" if it were adopted.[271] The court made this finding despite Cross's public comments that he would "not affirm that a biological boy can be a girl and vice versa because it's against [his] religion" and an email Cross sent to the board stating that his religious beliefs would "prevent him from treating a child as other than their biological gender."[272] The Virginia Supreme Court upheld the decision of the lower court to grant a temporary injunction, citing *Meriwether* to support the position that Cross had a compelling interest in commenting on the proposed policy.[273] The court explained that the lower court did not improperly discount the Defendants' interests in ensuring students' well-being and in ensuring its employees comply with existing and proposed policies and corollary antidiscrimination laws.[274]

c. Kluge v. Brownsburg Community School Corporation

Presented with a similar situation to *Meriwether*, an Indiana court reached the opposite conclusion.[275] Unlike the decisions in *Meriwether* and *Cross*, the Southern District of Indiana's decision focuses on the impact of teacher behavior on transgender students:

> What's in a name? William Shakespeare suggested maybe not much, for "that which we call a rose, by any other name would smell as sweet." But a transgender individual may answer that question very differently, as being

267. *Id.*
268. Ridpath v. Bd. Of Governors, 447 F.3d 292 (4th Cir. 2006).
269. *Cross*, No. 210584 at 6.
270. *Id.* at 6–7.
271. *Id.* at 7.
272. *Id.* at 2, 4.
273. *Id.* at 10, 12.
274. *Id.* at 12.
275. *See* Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 841–843 (S.D. Ind. 2021).

> referred to by a name matching one's identity can provide a great deal of support and affirmation.[276]

From this starting point, the court presents the facts of the case—John Kluge was a former teacher at Brownsburg Community School Corporation (BCSC) and was forced to resign because he refused to address transgender students by their chosen names and pronouns per school policy.[277] Kluge then sued BCSC, claiming discrimination based on failure to accommodate his religious beliefs and retaliation under Title VII.[278] The court granted BCSC's motion to dismiss both claims.[279]

While this case did not directly address the First Amendment implications of Kluge's speech, the arguments made by the court are directly applicable to First Amendment questions.[280] Kluge was initially granted an accommodation to the school's policy allowing him to address students by their last names only.[281] However, this accommodation was rescinded after student complaints made it clear that the practice made both transgender and cisgender students uncomfortable.[282] Mr. Kluge was forced to resign as he refused to comply with the school's name policy for transgender students, and the accommodation failed to ameliorate the situation.[283]

In addressing Kluge's contention that BCSC failed to accommodate his religious beliefs, the court concluded that Kluge's failure to comply with BCSC's name and pronoun policy created undue hardship for the school by interfering with its mission to educate students.[284] "Mr. Kluge's religious opposition to transgenderism is directly at odds with BCSC's policy of respect for transgender students, which is grounded in supporting and affirming those students."[285] The court also stated that last names only accommodation resulted in undue hardship for BCSC by making students feel targeted and uncomfortable.[286] The decision also noted that allowing Kluge to continue to use an accommodation that resulted in complaints that transgender students felt "targeted and dehumanized" could have exposed BCSC to liability under Title IX, and the school was not required to bear this risk.[287]

2. Challenges to State Statute Penalizing Misgendering and Deadnaming in Healthcare Settings in *Taking Offense v. State*

In the wake of rising violence against the transgender community and the proliferation of anti-trans legislation, some states have reacted to this trend by introducing legislation to protect transgender individuals.[288] In 2017, California enacted

276. *Id.* at 818–819 (S.D. Ind. 2021) (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2).
277. *Id.* at 819.
278. *Id.*
279. *Id.* at 849.
280. *See id.* at 841.
281. *Id.* at 822–823.
282. *Id.* at 828.
283. *Id.* at 829–30.
284. *Id.* at 844.
285. *Id.* at 843–44.
286. *Id.* at 844.
287. *Id.* at 846.
288. *See* AM. C.L. UNION, *supra* note 225.

Senate Bill No. 219.[289] This bill amended the Health and Safety Code, adding the Lesbian, Gay Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights.[290] Taking Offense, an association affiliated with anti-LGBTQ+ organizations such as Focus on the Family, challenged a portion of the bill referred to as "the pronoun provision."[291] This provision made it unlawful for any long-term care facility to "willfully and repeatedly" refuse to use a resident's chosen pronouns or name.[292] Taking Offense claimed that this portion of the statute violated the First Amendment rights of long-term care facility employees.[293]

The state appeals court ultimately concluded that the bill's pronoun provision constituted an unconstitutional content-based speech restriction.[294] Because the court categorized the provision as content based, it applied strict scrutiny.[295] Although the court found that the state had a compelling interest in preventing discrimination against transgender residents of long-term care facilities, they found that the pronoun provision was not narrowly tailored to achieve this interest.[296] In the court's analysis, the pronoun provision "test[ed] the limits of the government's authority to restrict pure speech that, while *potentially* offensive or harassing to the listener, does not *necessarily* create a hostile environment."[297] The court recognized that the provision did not compel employees to use residents' chosen pronouns, as employees were free to refrain from using pronouns entirely, but reasoned that "[f]or purposes of the First Amendment, there is no difference between a law compelling an employee to utter a resident's preferred pronoun and prohibiting an employee from uttering a pronoun the resident does not prefer."[298]

The court rejected the state's argument that pronouns are merely stand-ins for nouns and thus are not ideological messages necessitating First Amendment protection[299]:

> We recognize that misgendering may be disrespectful, discourteous, and insulting, and used as an inartful way to express an ideological disagreement with another person's expressed gender identity. . . . At the very least, willful refusal to refer to transgender persons by their preferred pronouns conveys general disagreement with the concept that a person's gender identity may be different from the sex the person was assigned at birth.[300]

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289. Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Cal. Ct. App. 2021), *cert granted*, 498 P.3d 90 (Cal. Nov. 10, 2021).

290. *Id.*

291. The organization also challenged a portion of the bill forbidding staff at long-term care facilities from assigning, refusing to assign, or reassigning rooms based on gender, other than in accordance with a transgender resident's gender identity. This Fourteenth Amendment challenge was defeated. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 308.

296. *Id.*

297. *Id.* at 310

298. *Id.* at 312.

299. *Id.* at 313.

300. *Id.*

While the decision acknowledged that numerous free speech doctrines apply in specified circumstances to allow restrictions that may not meet strict scrutiny, it concluded that none of these established doctrines apply to the circumstances of this case.[301] The court did not consider the secondary effects doctrine.[302]

Examining the statute through the lens of strict scrutiny, the court found that the legislative findings showed a compelling government interest in eliminating discrimination based on sex, including preventing the misgendering of LGBTQ+ residents in long-term care facilities.[303] The court noted that their state supreme court has repeatedly held that preventing sex-based discrimination is a compelling interest and that California has recognized a compelling state interest in "ensuring full and equal access to medical treatment irrespective of sexual orientation."[304]

However, the court reasoned that the statute was not narrowly tailored to serve this compelling interest, as required to survive strict scrutiny.[305] To be narrowly tailored, a law must represent the least restrictive means of achieving the government interest.[306] The opinion concluded that while Taking Offense failed to show that civil penalties would be a less restrictive means of accomplishing the same goal,[307] the statute was overbroad because it restricted both misgendering amounting to the conduct of harassment or discrimination and "occasional, isolated, off-hand instances of willful misgendering."[308]

3. Responses to Recent Name and Pronoun Provision Decisions

The decisions discussed in this Section have received significant criticism from both legal scholars and laypeople. Of these cases, *Meriwether* has received the most attention from both the media and the legal field.[309] In an article for the American Constitution Society, Professor Steve Sanders of Indiana University Maurer School of Law called the *Meriwether* decision "a classic example of motivated reasoning," and argued that the court misapplied the theory of academic freedom, which "protects scholarly expertise, not mere personal (or religious) opinion."[310] Shortly after the decision was published, *LGBT Law Notes* published a summary of the case, concluding, "[t]he court's opinion lacks any discussion or understanding concerning the concept of

301. *Id.* at 313–16.

302. *See id.*

303. *Id.* at 317.

304. *Id.* (quoting N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 968 (Cal. 2008)).

305. *Id.* at 320.

306. *Id.* at 317–18.

307. *Id.* at 319.

308. *Id.*

309. While *Taking Offense*, *Cross*, and *Kluge* all received some amount of media attention, *Meriwether* has been the focal point of much of the commentary surrounding First Amendment challenges to chosen name and pronoun policies. *See* Arthur S. Leonard, *6th Circuit Panel Says University Professor May Have 1st Amendment Right To Misgender Transgender Students*, 2021 LGBT L. NOTES 7 (2021) (discussing the ramifications of *Meriwether* on First Amendment challenges to misgendering transgender students).

310. Steve Sanders, *Pronouns, "Academic Freedom," and Conservative Judicial Activism*, AM. CONST. SOC'Y: EXPERT FORUM (April 12, 2021), https://www.acslaw.org/expertforum/pronouns-academic-freedom-and-conservative-judicial-activism/ [https://perma.cc/3AVE-GMUK].

'misgendering' and the harm that inflicts on transgender individuals. In the court's view, the victim here is Professor Meriwether, not Doe."[311]

Commentators have also expressed concerns that the *Meriwether* decision could jeopardize antidiscrimination provisions more generally.[312] In 2020, Professor Andrew Koppelman of the Northwestern Pritzker School of Law commented that "[t]he Sixth Circuit Court of Appeals is being invited to invalidate the entire field of hostile environment harassment law."[313] Koppelman further suggested that if Meriwether's arguments were to succeed, "[m]uch of anti-discrimination law would be deemed unconstitutional."[314] These concerns were echoed by Asaf Orr, Doe's attorney in the *Meriwether* case, who stated that "[t]he decision opens the door to discrimination generally. . . . Nothing in the opinion's reasoning is limited to discrimination against transgender students."[315]

Advocates have raised concerns that decisions allowing public employees to deliberately misgender trans individuals will exacerbate already existing health disparities for the trans community and expose the community to a heightened risk of abuse.[316] California Senator Scott Wiener criticized the *Taking Offense* decision:

> The court's decision is disconnected from the reality facing transgender people. . . . Deliberately misgendering a transgender person isn't just a matter of opinion, and it's not simply "disrespectful, discourteous, or insulting." Rather, it's straight up harassment. And, it erases an individual's fundamental humanity, particularly one as vulnerable as a trans senior in a nursing home.[317]

These concerns also apply to educational contexts. Mental health and LGBTQ+ advocates have stated that students perform better when they are addressed by their chosen names and pronouns and are not isolated from other students.[318] Aidyn Sucec, one of the trans students impacted by his teacher's disparate treatment of transgender

311. Arthur S. Leonard, *6th Circuit Panel Says University Professor May Have 1st Amendment Right To Misgender Transgender Students*, 2021 LGBT L. NOTES 7, 9.

312. *See, e.g.*, Andrew Koppelman, *Free Speech Gone Wild: The Meriwether Case*, THE HILL (Aug. 17, 2020), https://thehill.com/opinion/judiciary/512306-free-speech-gone-wild-the-meriwether-case/ [https://perma.cc/WZ7J-PGX7].

313. *Id.*

314. *Id.*

315. Colleen Flaherty, *'A Hotly Contested Issue': In a Case with Far-reaching Implications for Both Students and Faculty Members, a Federal Appeals Court Sides with a Professor who Refused To Refer to Transgender Student by Her Preferred Pronoun*, INSIDE HIGHER ED (May 29, 2021), https://www.insidehighered.com/news/2021/03/29/court-sides-professor-who-repeatedly-misgendered-trans-student.

316. Canela López, *California Court Says It's OK To Intentionally Misgender and Deadname Trans People*, INSIDER (July 23, 2021), https://www.insider.com/california-court-says-legal-to-misgender-deadname-trans-people-2021-7 [https://perma.cc/RFK6-TZ7C].

317. KQED News Staff and Wires, *California Court Rules Nursing Home Employees Can Deadname Transgender Seniors*, KQED (July 20, 2021), https://www.kqed.org/news/11881770/california-court-rules-nursing-home-employees-can-deadname-transgender-seniors [https://perma.cc/T47Z-BPP6].

318. Katie Reilly, *'This Isn't Just About a Pronoun.' Teachers and Trans Students Clash Over Whose Rights Come First*, TIME (Nov. 15, 2019), https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/ [https://perma.cc/T34H-EV8D].

students in *Kluge*, stated that Kluge's behavior left him feeling "alienated, upset, and dehumanized."[319]

The reactions to recent cases involving chosen name and pronoun policies show a consistent tension between the courts' understanding and the lived experiences of the trans community.[320] There appears to be a disconnect between the courts' perception of the impact of plaintiff behavior and the accounts of those directly affected.[321] As the nature and extent of harm caused by a type of speech is a relevant consideration as to whether the speech is proscribable,[322] bridging this gap in understanding may help to create a consistent and legally sound path forward for the adjudication of First Amendment claims challenging chosen name and pronoun policies and laws.

III. DISCUSSION

Despite the construction of First Amendment rights proffered by fundamentalist lobbying organizations, the history of free speech supports an interpretation that would allow the government to regulate the use of names and pronouns in certain settings to prevent discrimination and promote efficiency. This Section argues that recent decisions protecting misgendering and deadnaming by professors, teachers, and healthcare professionals ignore and misconstrue free speech doctrine. It argues that name and pronoun use falls within an area of speech that the government may regulate under established restrictions to freedom of speech for government employees and the secondary effects doctrine.

Part III.A argues that the free speech rights of public employees, including teachers and professors at public institutions, do not protect misgendering or deadnaming, as the government is permitted to restrict the on-the-job speech of employees to promote efficient operations or to further a legitimate interest. Part III.B then demonstrates that government regulation of misgendering and deadnaming can also be appropriate in select settings involving captive audiences, such as healthcare environments. Part III.C further contends that interpretations of the First Amendment's free speech clause endanger established antidiscrimination and anti-harassment laws by allowing for the discriminatory treatment of transgender individuals by misgendering or deadnaming. Also, these interpretations can potentially jeopardize additional protections for transgender individuals and other minoritized groups.

A. Misgendering or Deadnaming by Public Employees Is Not Protected by the First Amendment

Government employees' freedom of speech is necessarily more limited than that of private citizens.[323] While government employees do not give up all free speech rights for the sake of their positions, their speech may be significantly curtailed to further the government interest in efficient operations or to serve another significant or compelling

319. *Id.*

320. *See e.g.*, Leonard, *supra* note 309, at 9.

321. *See id.*

322. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

323. *See* discussion *supra* Part II.B.1.

purpose.[324] Part III.A.1 argues that misgendering by public employees is proscribable under both the *Garcetti* and *Pickering-Connick* tests. Part III.A.2 further contends that anti-misgendering provisions do not constitute compelled speech. Finally, Part III.A.3 shows that misgendering and deadnaming are not protected by the free exercise clause for public employees.

1. Misgendering or Deadnaming by Public Employees Is Proscribable Under *Garcetti* and the *Pickering-Connick* Framework

It is broadly recognized that First Amendment free speech rights of government employees while they are acting in the course of their employment are limited.[325] Under *Garcetti*, the speech of government employees is not generally protected while the speaker is acting in their official capacity.[326] In situations in which *Garcetti* applies, it is clear that the government is permitted to require employees to use chosen names and pronouns while on the job.[327]

Under the *Garcetti* framework, speech by a public employee made while acting in their official capacity can be broadly regulated by their employer to facilitate efficient operations.[328] To avoid causing difficulty with public relations or causing offense to recipients of government services, an employer may conclude that prohibiting misgendering and deadnaming in the workplace is a reasonable measure that will promote efficient operations. Such policies would be permitted under *Garcetti*, as they apply to employees acting in their official capacity and not speaking as private citizens for First Amendment purposes.

While the *Garcetti* test requires that an employee be speaking pursuant to official responsibilities for the government to be granted wide latitude to regulate,[329] addressing clients, students, or coworkers by name and/or using personal pronouns is an essential function of most positions that must be done with respect to avoid conflict. As stated by the *Garcetti* court, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[330] Communications between employees and their clients or students exist only under that employee's profession and are within the power of the employer to manage or restrict.

Despite the disagreement over whether *Garcetti* applies to all government workplaces, namely whether *Garcetti* also binds teachers and professors, government employers should still be permitted to regulate misgendering and deadnaming by employees under alternate frameworks. Although *Garcetti* allows government employees to restrict speech more broadly than in previous decisions, earlier Supreme Court jurisprudence also gives less protection to the speech of government employees

324. *See* Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006).

325. *See supra* Part II.B.1.a.

326. *See supra* Part II.B.1.a..

327. *See id.*

328. *See supra* Part II.B.1.a.

329. *Garcetti*, 547 U.S. at 411.

330. *Id.*

than is enjoyed by private citizens.[331] In *Pickering* and *Connick*, the Court held that the speech of government employees is protected when the employee is speaking on a matter of public concern, but only to the extent that the employee's interest in speaking outweighs the interest in promoting the efficient provision of government services.[332]

Part III.A.1.a argues that although transgender rights certainly implicate the public concern, an individual's gender identity and pronouns are a matter of private rather than public concern. Furthermore, Part III.A.1.b shows that the documented effects of misgendering and deadnaming suggest that the government's interest in maintaining efficient institutions would be compromised by permitting misgendering and deadnaming by individuals acting in their capacity as government employees. Finally, strong government interest in preserving life and preventing discrimination justifies the relatively minor free speech burden of requiring government employees to use chosen names and pronouns for others while acting in their official capacity.

a. The Chosen Name and Pronouns of an Individual Is Not a Matter of Public Concern

Although there is no one specific test for what is and is not a matter of public concern, the Supreme Court has stated that a topic is a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or is "a subject of general interest and of value and concern to the public."[333] Speech on matters of public concern receives substantially more protection than speech which touches only on private matters.[334] The Court's guidance in *Snyder v. Phelps* indicates that the inappropriate or controversial character of speech is not relevant to whether such speech deals with a matter of public concern.[335] Although courts analyzing misgendering policies have characterized the act of misgendering as a statement on a matter of public concern,[336] this ignores the importance of context in the Supreme Court's analysis of public versus private concerns.[337] While the rights (and in some cases the existence) of transgender people is an issue of public concern, this topic is not what is implicated by restrictions on misgendering and deadnaming for employees. Instead, the topic implicated is the gender of the specific person being spoken to or about by an employee.

In *Snyder v. Phelps*, the Court argued that "even if a few of the signs . . . were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro's

331. *See* Connick v. Myers, 461 U.S. 138, 140 (1983) ("[T]he State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of citizenry in general.'" (quoting Pickering v. Bd. of Educ. of Tp. High School Dist., 391 U.S. 563, 568 (1968))).

332. *See supra* Part II.B.1.a.

333. Snyder v. Phelps, 562 U.S. 443, 452–53 (2011) (first quoting Connick v. Myers, 461 U.S. 138, 146 (1983), then quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).

334. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762–63 (1985).

335. *Snyder*, 562 U.S. at 453 (citing Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

336. Meriwether v. Hartop, 992 F.3d 492, 506 (6th Cir. 2021).

337. *Snyder*, 562 U.S. at 453–54.

demonstration spoke to broader public issues."[338] This broader messaging used by the Court to explain why Westboro's speech was protected is not present in cases where public employees misgender employees or clients. The message conveyed by misgendering or deadnaming is not targeted at society broadly but rather at the specific person addressed.

In *Meriwether v. Hartop*, the speech in question was Professor Meriwether's persistent misgendering of one student.[339] Unlike Phelps's speech on the broader issues of gender and sexuality in the military, the topic of this one student's gender cannot fairly be construed as a matter of public concern.[340] Professor Meriwether's behavior did not express his beliefs regarding the transgender community as part of the greater conversation on trans rights but rather communicated his opinion on one student's gender. Meriwether himself stated that he addressed Jane Doe as "sir" in his first class because "no one . . . would have assumed that [Doe] was female" based on her appearance.[341] This suggests that Meriwether did not misgender Doe because of his beliefs about the transgender community but based on his assumptions about Doe's gender identity specifically. If Doe appeared more traditionally feminine, Meriwether would likely have addressed her by her chosen pronouns with no outside influence, and the issue may never have arisen. Meriwether would address one trans woman by her chosen pronouns and another by male pronouns—selectively observing chosen pronouns based on physical appearance. His beliefs about the transgender community are not a factor.

To support its finding that Meriwether's refusal to use Ms. Doe's pronouns touched on a matter of public concern, the court stated that gender identity is "a hotly contested matter of public concern that 'often' comes up during class discussion in Meriwether's political philosophy courses."[342] In this analysis, the court fails to address the targeted and narrow message conveyed by Meriwether's use of pronouns compared to participation in broader discussion of gender identity. Meriwether may be entitled to facilitate class discussions about gender, but Meriwether misgendered Doe outside the context of broader discussions about gender. Misgendering in the classroom or singling out transgender students for different forms of address alienates individual students and creates conflict within institutions without meaningfully contributing to a larger conversation.

b. Government Interest in Promoting Efficiency Is Impaired by Deadnaming and Misgendering

Government employees are routinely expected to interact with diverse members of the public to deliver services. This is especially true for educators at publicly funded institutions. When educators at publicly funded schools refuse to follow the institution's name and pronoun policies, the consequences are felt not only by individual students,

338. *Id.* at 454.

339. *Meriwether*, 992 F.3d at 499–500.

340. *See Snyder*, 562 U.S. at 452–53 (defining matters of public concern).

341. *Meriwether*, 992 F.3d at 499 (omission in original).

342. *Id.* at 506.

but by the facility as a whole.[343] As evidenced by the facts of *Meriwether*, *Cross*, and *Kluge*, misgendering and deadnaming by public employees disrupts the efficient operations of government institutions.

As described in *Pickering* and *Connick*, the disruption necessary to justify restriction of public employee speech is not particularly high.[344] The *Connick* majority stated that the lower court had erred in placing an "unduly onerous burden" on the government by requiring it to "clearly demonstrate" that the speech "substantially interfered" with official responsibilities.[345] In *Connick*, the Court acknowledged that the plaintiff's behavior had not interfered with her job performance, but concluded that her dismissal was still justified because "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[346] The Court further stated, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."[347] This suggests that government employers may act against speech that has the potential to substantially impact workplace relationships and efficient operations, not only speech that has already caused damage.

The *Meriwether* court emphasized that Meriwether's speech had not substantially interfered with his classroom duties, without considering whether it had the potential to interrupt the university's operations or compromise working relationships.[348] Instead, the court simply stated that "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."[349] This conclusion appears to rest on the fact that Meriwether offered to call Doe only by her last name while still referring to all other students by gendered pronouns and titles, and "Doe was an active participant in class and ultimately received a high grade."[350] The court also inferred from these facts that the university's interest in complying with Title IX was not implicated by Meriwether's speech.[351]

These conclusions are directly contradicted by Doe's own statements when asked about the impact of Meriwether's actions:

> Being discriminated against by [P]rofessor Meriwether negatively affected my experience both in and out of class. Before the semester began, I was excited about Meriwether's class, but quickly started dreading it. Because of professor Meriwether's discriminatory treatment, I had to constantly worry

343. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 835 (S.D. Ind. 2021) ("[I]t is obvious that a high school classroom can only function when teachers address students directly.").

344. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968) (holding that Pickering's speech was not proscribable because there was no evidence that it "either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally" (footnote omitted)); Connick v. Myers, 461 U.S. 138, 150 (1983).

345. *Connick*, 461 U.S. at 149–50.

346. *Id.* at 151–52.

347. *Id.* at 152.

348. *See* Meriwether v. Hartrop, 992 F.3d 492, 511 (6th Cir. 2021).

349. *Id.*

350. *Id.*

351. *Id.*

> about how he would refer to me each time I was called on in class and whether my peers would also start referring to me using male pronouns or otherwise mistreat me. I stopped wanting to participate but felt compelled to because class participation accounted for a significant portion of my grade. The stress from being in class was exhausting. Over the course of the semester, it became harder and harder to focus on classwork. To preserve my energy and attention for school, I stopped socializing with friends and withdrew from campus life. It was a difficult semester for me.[352]

The *Meriwether* opinion failed to consider the impact of Meriwether's contact on Doe, which is relevant regardless of whether the difficulty was reflected in Doe's final grade. The decision did not reference the fact that Meriwether's conduct disclosed her transgender status to other students or that Meriwether publicly used her name repeatedly in the process of filing the lawsuit, which caused Doe to move to secure housing due to concerns that she would be "targeted for further harassment and discrimination, and physical violence."[353] Furthermore, there was no consideration of the strain placed on faculty and administration relationships or the school's concerns about negative publicity and public relations disruptions.[354]

The *Cross* decision likewise failed to follow the *Pickering-Connick* framework by considering the full spectrum of actual disruptions caused by Cross's behavior and the potential for further deterioration of workplace and public relations. In *Cross*, the school learned the morning after Cross's speech at the school board meeting that his behavior was being discussed by parents on social media.[355] That same day, the school's principal received five emails from parents expressing concern about Cross's remarks and asking that their children not be taught by or interact with Cross.[356] As a result of these emails, the principal felt obligated to relieve Cross of his responsibility to greet students as they arrived at school and have another employee take his place.[357] The school continued to receive comments from parents of students and concerned community members.[358] Cross was suspended with pay in response to these complaints.[359]

The Defendants' asserted that, after receiving complaints from parents, "there was a reasonable expectation that parents and students would avoid interacting with Cross to the point he could not fulfill his duties."[360] The court rejected this argument, citing a lack of supporting evidence.[361] This conclusion does not account for any responsibility the school may have to provide alternative options for students whose parents requested that they not attend class with Cross. The court likewise ignored public relations implications. Although the court stated that there was "no evidence that it would have been

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352. Mark Joseph Stern, *What It Feels Like When a Federal Court Gives a Professor the Right To Misgender You: An Interview with "Jane Doe"*, 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/T37B-5J3M].

353. *Id.*

354. *See Meriwether*, 992 F.3d at 511.

355. Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at 4 (Va. Aug. 30, 2021).

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 12.

361. *Id.*

problematic or administratively taxing to accommodate the parents who requested Cross not teach their children," this additional burden represents a disruption to efficient operations on its face.[362] This reasoning does not align with the *Pickering-Connick* framework, which broadly considers interruptions to an institution's operations and relationships.[363] This court failed to engage in this kind of holistic review.

In contrast, the *Kluge* court considered the "custodial and protective role" of public educators and gave significant weight to the disruptions caused by Kluge's refusal to abide by the name and pronoun policy.[364] The court concluded that Kluge's refusal to use chosen names and pronouns for his students created undue hardship for the school, and this hardship was not alleviated by the accommodation of allowing Kluge to use last names only.[365] The burden on the school was characterized by student and teacher complaints and discomfort.[366] While this decision addressed Title VII claims rather than constitutional claims, if this type of interference is sufficient to establish an undue hardship for an employer, it follows that it would also be sufficient to establish an interference with the school's operations. Kluge argued that the interference was de minimis, as many of his students were successful in his class and did not perceive problems within the classroom.[367] The court explicitly rejected this argument:

> BCSC is a public-school corporation and as such has an obligation to meet the needs of *all* of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only. BCSC has presented evidence that two specific students were affected by Mr. Kluge's conduct and that other students and teachers complained. And, given that Mr. Kluge does not dispute that refusing to affirm transgender students in their identity can cause emotional harm, this harm is likely to be repeated each time a new transgender student joins Mr. Kluge's class (or, as the case may be, chooses not to enroll in music or orchestra classes solely because of Mr. Kluge's behavior). As a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of *all* of its students, it is incurring a more than *de minimis* cost to its mission to provide adequate public education that is equally open to *all*.[368]

This reasoning should extend to other public institutions that aim to provide equal access to government services. When an integral part of an organization's mission is to make a service available to all, the differential treatment of a relatively small number of recipients of that service may still cause a substantial disruption. The *Pickering-Connick* framework requires that an institution's interest in regulating employee speech outweighs the employee's interest in speaking on a matter of public concern but does not set a threshold for how many people have to be affected by the speech in question. As shown by *Kluge*, institutional burdens should be weighed by both the severity of the

362. *Id.* at 13.

363. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968); Connick v. Myers, 461 U.S. 138, 151 (1983).

364. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 843 (S.D. Ind. 2021) (quoting Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 979 (Ind. 2002)).

365. *Id.* at 844–45.

366. *Id.* at 845

367. *Id.* at 844.

368. *Id.* at 844–45.

disruption caused and the likelihood of continued disruptions.[369] In these cases, each plaintiff clearly expressed the intent to continue to refuse to comply with name and pronoun policies.[370] The reasonable anticipation of future difficulties and the immediate detrimental effects to targeted transgender individuals make it clear that refusal to comply with chosen name and pronoun policies will interfere with the efficient operations of government employers in most circumstances.

4. Requiring Public Employees to Use Chosen Names and Pronouns Is Not Compelled Speech

While the government generally is not permitted to force individuals to engage in ideological speech,[371] cases like *Planned Parenthood of Southern Pennsylvania v. Casey* show that there are exceptions to this rule.[372] In some professional and educational contexts, speakers may be required to convey messages that do not necessarily reflect their personal beliefs.[373] This decision has been read as expanding states' rights to regulate the speech of professionals.[374] While the doctrine of compelled speech as it relates to professionals is evolving, the same reasoning allowing states to require certain speech from physicians may extend to other professions. In the case of public employees, including teachers and professors, strong state interests in antidiscrimination outweigh the relatively minimal free speech burden of requiring these professionals to use chosen pronouns.

Whether engaging with or endorsing an ideology that does not dovetail with the speaker's personal views constitutes a First Amendment violation depends on the context of the speech in question.[375] Where the state interest in compelling speech is to "essentially disseminate ideology," the state's interest does not outweigh an individual's right to refuse to "becom[e] a 'courier' of that ideology."[376] This doctrinal approach applies to instances in which the state uses individuals to convey its own ideological message or requires speakers to host or accommodate the speech of another without a meaningful opportunity to express disagreement with that message.[377]

In the case of antidiscrimination policies requiring employees to use chosen names and pronouns, the speech in question is not a government message, is not compelled for disseminating a government ideology, and does not abridge the rights of employees to dissociate themselves from the message being communicated.[378] The message conveyed by the use of chosen pronouns is dictated by the expressed request of the person being

369. *See id.* at 845.

370. Meriwether v. Hartop, 992 F.3d 492, 501 (6th Cir. 2021); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at 4 (Va. Aug. 30, 2021); Kluge, 548 F. Supp. 3d at 831 (S.D. Ind. 2021).

371. Wooley v. Maynard, 430 U.S. 705, 714–15 (1977).

372. *See* Gaylord & Molony, *supra* note 192, at 603.

373. *See In re* Rothenberg, 676 N.W.2d 283, 291 (Minn. 2004); Every Nation Campus Ministries v. Achtenberg, 597 F.Supp.2d 1075, 1096–97 (S.D. Ca. 2009).

374. Keighley, *supra* note 198, at 2353.

375. *See* Sherman, *supra* note 211, at 236–37.

376. *Id.* at 227.

377. *See id.* at 229–30.

378. *See id.* at 236–41.

addressed, not by the government.[379] The government interest in antidiscrimination generally warrants abridging some First Amendment freedoms.[380] This particular interest weighs heavily in favor of the ability to regulate speech when it implicates serious public health concerns. Finally, these policies do not abridge the right of an individual to express their opinions on gender and the use of gendered pronouns in general terms or in their private lives. As pointed out by previous commentators, "[t]here is no reason here to discount the ability of the public to distinguish between compliance with the law and support for gender nonconformance."[381] In sum, the mandated use of chosen pronouns in professional settings is not the type of compelled speech prohibited by the First Amendment.

5. Misgendering or Deadnaming by Public Employees Is Not Protected by the Free Exercise Clause

As with other First Amendment rights, the right to free exercise of religion is often limited to further legitimate government interests.[382] Moreover, public institutions *must* at times limit religious speech in order not to run afoul of the establishment clause.[383] Regardless of an employee's sincerely held religious beliefs, educational institutions may regulate an instructor's in-class religious speech as long as doing so furthers a legitimate pedagogical interest.[384]

The requirement of a legitimate pedagogical interest is not a difficult burden to meet.[385] When it comes to chosen name and pronoun policies, schools certainly have a legitimate pedagogical interest in promoting student well-being, limiting classroom disruptions that might be caused by misgendering or deadnaming, and preventing possible Title IX infractions. Any of these reasons could independently justify reasonable restrictions on religious speech by school employees. Even outside of educational settings, workplaces may place restrictions on employee speech that may rise to the level of harassment under Title VII.[386] Religious motivation or content does not categorically protect speech from restriction when there are strong countervailing interests in regulation.[387]

Decisions like *Meriwether* place enormous emphasis on the importance of Meriwether's religious convictions and the alleged "religious animosity" of the university,[388] but the fact that a policy is objected to for religious reasons does not mean that a workplace must grant an accommodation or refrain from disciplining an employee

379. *Id.* at 231–32.
380. *Id.*
381. *Id.* at 241.
382. *See, e.g.*, Sidebotham, *supra* note 215, at 47; Berg, *supra* note 215, at 974.
383. *See, e.g.*, Sidebotham, *supra* note 215, at 47; Berg, *supra* note 215, at 974.
384. Sidebotham, *supra* note 215, at 52.
385. *Id.*
386. Berg, *supra* note 215, at 966–67.
387. *Id.* at 963–65.
388. Meriwether v. Hartop, 992 F.3d 492, 512–13 (6th Cir. 2021).

for violating that policy.[389] If granting a religious accommodation is ineffective or creates an undue burden for the employer, the employer is not required to carve out such an accommodation.[390] In recent cases addressing anti-misgendering and anti-deadnaming policies, it is clear that employers can meet the low burden of showing that an accommodation would create more than a de minimis cost or disruption for the employer's business.[391]

While the free exercise clause protects religious expression, it does not protect unfettered expression that conflicts with an employer's policies and goals or subjects the employee to risk of liability.[392] Chosen name and pronoun policies place a relatively small burden on religious expression to serve important objectives like antidiscrimination and equity within workplaces and educational institutions. Religiously neutral antidiscrimination policies should not be thrown out because some religious individuals disagree with the messages they convey.

B. Prohibitions Against Misgendering and Deadnaming in Healthcare Settings Do Not Violate the First Amendment

When First Amendment protections conflict with antidiscrimination statutes that target individual speakers, it is necessary to carefully weigh the government interest in enacting restrictions and closely examine the statue to ensure that it represents a justified and proportional response. However, this does not mean that states should not or cannot enact antidiscrimination provisions restricting speech or that these provisions should not survive judicial review. Antidiscrimination provisions, like those requiring the use of chosen names and pronouns in settings where discriminatory language would be particularly harmful, are reasonable and necessary responses to serious public health and safety concerns.

Courts should uphold these statutes as long as they further an important government interest by means that are substantially related to that interest.[393] Part III.B.1 argues that courts should apply the secondary effects doctrine to statutes enforcing chosen name and pronoun use and that these statutes will generally survive intermediate scrutiny under this doctrine. Part III.B.2 further contends that even if the secondary effects doctrine is not applied, many anti-misgendering and anti-deadnaming statutes will still pass constitutional muster under strict scrutiny.

1. The Secondary Effects of Misgendering and Deadnaming in Healthcare Settings Render Speech Restrictions Permissible

By enacting Senate Bill No. 219, The California legislature sought to establish increased protections for a vulnerable group of trans and gender nonconforming

389. *See* Kluge v. Brownsburg Cmty. Sch. Corp., 548 F.Supp.3d. 814, 844 (S.D. Ind. 2021) (holding that a "last names only" accommodation for a teacher who declined to follow to the school's name and pronoun policy on religious grounds resulted in undue hardship to the school).

390. *Id.*

391. *Id.* at 845.

392. *See id.* at 843–46.

393. See *supra* Part II.B.2 for a discussion of secondary effects analysis and the applicable standard of review.

individuals by forbidding employees of long-term care facilities from intentionally misgendering or deadnaming patients in their care.[394] The *Taking Offense* court acknowledged the compelling government interests in preventing discrimination against this vulnerable population: both the interest in preventing sex-based discrimination and in "ensuring full and equal access to medical treatment irrespective of sexual orientation."[395] However, the court did not consider or discuss the secondary effects doctrine, which allows courts to apply intermediate scrutiny to content-based regulations if "the ordinance is targeted at suppressing the 'secondary effects' of the speech and not the speech itself."[396] Chosen name and pronoun policies and statutes are arguably targeted at the secondary effects of transphobic violence and poor health and well-being outcomes in the trans community, rather than at the expressive content of misgendering or deadnaming.[397] Under intermediate scrutiny, most of these regulations are constitutional.

In applying intermediate scrutiny to First Amendment claims, the Court will uphold a regulation that restricts speech provided that it furthers an "important or substantial" government interest unrelated to the suppression of free speech and the restriction on First Amendment freedoms "is no greater than is essential to the furtherance of that interest."[398] "Important or substantial" is a less stringent standard than the "compelling" test used for strict scrutiny.[399] As preventing gender discrimination has already been recognized by the Court as a compelling interest,[400] it follows that this interest meets the important or substantial test of intermediate scrutiny.

In addition, studies on the effects of misgendering and deadnaming on health and well-being in the trans community show that chosen name and pronoun provisions are likely to further the government interests of preventing discrimination and preserving life.[401] The primary interest spurring government regulation of name and pronoun use in educational environments and workplaces is not an interest in the suppression of free speech as it relates to the topic of gender and the transgender community, as a broad discussion of gender is still permitted in these settings.[402]

The free speech burden associated with chosen name and pronoun policies is no greater than is necessary to further government interests. These policies have only been applied in limited settings. Senate Bill 219, for instance, applies only to staff members

394. Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Cal. Ct. App. 2021), *cert granted*, 498 P.3d 90 (Cal. Nov. 10, 2021).

395. *Id.* at 317 (quoting N. Coast Women's Care Med. Grp., Inc. v. Superior Ct. 189 P.3d 959, 968 (Cal. 2008)).

396. Andrew, *supra* note 160, at 1181.

397. *See Taking Offense*, 281 Cal. Rptr. 3d at 316–17 (discussing the legislative findings behind Senate Bill No. 219).

398. Andrew, *supra* note 160, at 1180 (quoting U.S. v. O'Brien, 391 U.S. 367, 377 (1968)).

399. *Id.* at 1179–1181.

400. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

401. *See supra* Part II.A.2.

402. The policies or proposed policies at issue in *Meriwether*, *Cross*, *Kluge*, and *Taking Offense* did not regulate the discussion of gender but only provided that specified, chosen names and pronouns of individuals were to be used by employees of the specific facility or type of facility. *See* discussion *infra* Parts II.C.1 and II.C.2.

of long-term care facilities.[403] Further, the pronoun provision only addresses the names and pronouns of facility residents and does not require staff members to refer to anyone who is not a resident of the facility in which they work by chosen names or pronouns.[404] Finally, the statute applies only to "willful[]" and "repeated[]" instances of misgendering or deadnaming.[405] These qualifications limit the scope of liability to those caring for a vulnerable captive audience who purposefully and repeatedly choose to misgender or deadname residents. Thus, the law is narrowly tailored to address the risk of discriminatory harm against trans residents with minimal infringement on First Amendment rights.

The provisions at issue in educational settings are similarly limited. These regulations largely apply to the use of students' pronouns and names by employees.[406] If secondary effects analysis is applied, all of the provisions previously discussed are constitutionally valid. These cases do not represent circumstances where the government seeks to suppress a strain of thought simply because it finds it distasteful or offensive—these provisions are necessary to combat the public health and violence crises impacting the trans community. Employees of institutions responsible for the care or education of individuals in their power may reasonably be expected to refrain from behavior likely to contribute to poor outcomes for those under their care when the restriction is as minimal as requiring a specific mode of address.

2. Preventing Discrimination Against the Transgender Community Is a Compelling Government Interest Justifying Restrictions on Free Speech in Healthcare Settings

Even without applying the secondary effects doctrine, carefully drafted antidiscrimination statutes prohibiting misgendering and deadnaming in select settings should survive strict scrutiny. A law must be narrowly tailored to serve a compelling government interest to stand up to strict scrutiny.[407] Preventing sex discrimination has been repeatedly recognized as a compelling government interest.[408] In the *Bostock v. Clayton County*[409] and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* decisions, the Supreme Court clarified that discrimination on the basis of transgender status is considered discrimination on the basis of sex.[410] Because discrimination against transgender individuals falls under the umbrella of discrimination on the basis of sex, the government interest in preventing this kind of discrimination can appropriately justify narrowly tailored speech restrictions.

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403. Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Cal. Ct. App. 2021), *cert granted*, 498 P.3d 90 (Cal. Nov. 10, 2021).

404. *Id.*

405. *Id.*

406. *See* Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021); Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at 1 (Va. Aug. 30, 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d. 814, 821–23 (S.D. Ind. 2021).

407. Andrew, *supra* note 160, at 1180 (quoting U.S. v. O'Brien, 391 U.S. 367, 377 (1968)).

408. *See e.g.*, *Taking Offense*, 281 Cal. Rptr. 3d at 317.

409. 140 S. Ct. 1731 (2020).

410. *Id.* at 1737; EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

Studies show that ensuring the chosen names and pronouns of trans individuals are used by others is necessary to promote the health of trans individuals.[411] Because of the unique significance of chosen name and pronoun usage in determining health and wellness outcomes for trans individuals,[412] preventing intentional and repeated misgendering and deadnaming is essential to alleviate the consequences of anti-trans discrimination.

The narrow tailoring prong of strict scrutiny requires that regulations represent the "least restrictive means to further the articulated interest."[413] The government has a limited set of tools that it can use to combat the rise of anti-trans discrimination and corresponding violence. While discrimination appears in all areas of life, the government has very little power to regulate discriminatory interpersonal interactions outside of institutional or business settings unless and until discriminatory behavior escalates to criminal acts. Regulating select settings such as schools and healthcare facilities, where employees hold positions of power over service recipients, represents the least restrictive means by which the government can further compel antidiscrimination goals.

IV. CONCLUSION

The rise of transphobic rhetoric and violence against the trans community has created a significant public health crisis in the United States. This crisis has been exacerbated by the introduction of anti-trans legislation and the pushback against antidiscrimination policies through the invocation of First Amendment freedoms. As illustrated by this Comment, the First Amendment should not be interpreted to protect targeted transphobia in the form of misgendering and deadnaming in public institutions or healthcare settings. First Amendment jurisprudence shows that policies requiring chosen name and pronoun use in public schools and select workplaces represent permissible restrictions on speech. Such restrictions are necessary to ensure efficient government operations and to address the severe consequences of discrimination on the health and well-being of the trans population.

Treating transgender individuals with dignity and respect in workplaces and classrooms is necessary to curb violence against the transgender community and improve health and well-being outcomes for trans individuals. Despite recent decisions suggesting the contrary, individual free speech and free exercise rights are not impermissibly burdened by chosen name and pronoun policies in workplaces, schools, and healthcare settings. Pronouns and names do carry a message—but this message is a personal one concerning the gender of an individual, rather than one that should be subject to unrestricted commentary in settings that aim to provide equal access to services. These policies are crucial to prevent discrimination, curb the spread of transphobic violence, and improve life outcomes for the trans community. As stated by Jane Doe, "[c]onverting those words, and the meaning professor Meriwether believed those words conveyed, into a statement on 'matters of public concern' gives professors

411. *See supra* notes 55–61 and accompanying text.

412. *See supra* notes 55–61 and accompanying text.

413. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197 (2014).

and other school personnel an unrestricted license to discriminate against students on any number of bases from race to religion."[414]

414. Stern, *supra* note 352.