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When Teachers Misgender: The Free Speech Claims of Public School Teachers

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WHEN TEACHERS MISGENDER: THE FREE SPEECH CLAIMS OF PUBLIC SCHOOL TEACHERS

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INTRODUCTION

To misgender someone is to call someone by the wrong sex. It can happen accidentally. When my son was a baby, people regularly assumed he was a girl, perhaps because he had long eyelashes or because he was dressed in yellow or green. I didn't much care and just thanked people for their compliments.

Misgendering can also happen deliberately, as has been occurring with a rash of public school teachers in their classes despite school policies to the contrary. Whether seeking to comply with legal bans on gender identity discrimination or simply trying to make classrooms inclusive for all students,[1] public schools are starting to require teachers to address their students with the pronouns matching their gender identity.[2]

Some teachers have refused. These educators insist that sex is binary and set at the moment of conception. One high school teacher, "a professing evangelical Christian,"[3] believes that "God created human beings as either male or female, that

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[1] *Cf. Student Nondiscrimination Policies*, GAY LESBIAN & STRAIGHT EDUC. NETWORK (GLSEN) (May 2021), https://perma.cc/UAE2-YVE2 (map showcasing states with laws prohibiting gender identity discrimination against K-12 students).

[2] These policies may soon be required by federal law. Moriah Balingit & Nick Anderson, *Sweeping Title IX Changes Would Shield Trans Students, Abuse Survivors*, WASH. POST (June 23, 2022), https://perma.cc/AP9M-AWP6 (reporting that proposed Department of Education guidelines to protect transgender students would "ban bullying based on their gender identity and ensure they are addressed by their correct pronouns").

[3] Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 833 (S.D. Ind. 2020) ("Mr. Kluge 'is a professing evangelical Christian who strives to live by his faith on a daily basis.'").

this 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."[4] A university professor who identifies as a "devout Christian"[5] expressed the exact same sentiment.[6] They are not alone. Myriad middle school and high school teachers in the public school system, including math teachers,[7] French teachers,[8] and orchestra teachers,[9] have refused, based upon their religious beliefs, to recognize transgender students' gender identity by using their relevant pronouns in the classroom.

These public school teachers claim that they have a free speech right to decide which pronouns to use when addressing the students in their class.[10] That is, while

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[4] Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021). Most of these teachers are represented by the same law firm, Alliance Defending Freedom, and have phrased their objections using similar language. *See also, e.g.*, *Kluge*, 432 F. Supp. 3d at 833; Andrea Salcedo, *A Christian Teacher Was Suspended for Refusing to Call Students by the Pronouns They Use. Now She Is Suing*, WASH. POST (Mar. 15, 2022), https://perma.cc/D4R9-6X7M (describing Christian middle school math teacher alleging in her complaint that "Ms. Ricard believes that God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed").

[5] *Meriwether*, 992 F.3d at 498.

[6] *Kluge*, 432 F. Supp. 3d at 833 ("Mr. Kluge believes that God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed.").

[7] Salcedo, *supra* note 4; "*I Will NOT Refer to You with Female Pronouns": Duval Teacher Snubs Transgender Student's Request*, FIRST COAST NEWS (Aug. 14, 2019), https://perma.cc/38BQ-GJZG.

[8] Vlaming v. West Point Sch. Bd., 480 F. Supp. 3d 711 (E.D. Va. 2020) (French teacher at West Point high school refused to address students by their preferred pronouns); *see also* Charlene Aaron, *Fired for Refusing to Use a Student's "Preferred Pronoun": Why Every American Should Be Concerned*, CBN NEWS (June 16, 2019), https://perma.cc/F968-HLAK (fired public school French teacher in Virginia explaining, "I could not, in good conscience based on my Christian faith, call a girl a boy").

[9] *Kluge*, 432 F. Supp. 3d at 832 (music and orchestra teacher at Brownsburg High School who refused to address transgender students by their preferred pronouns).

[10] Note this Article focuses solely on how teachers interact with students in the classroom, and therefore does not cover, for example, a teacher voicing their opposition to inclusive policies at a school board meeting. *See, e.g.*, Hannah Natanson, *Va. Supreme Court Affirms Judge's Ruling Reinstating Loudoun Teacher Who Refused to Use Transgender Pronouns*, WASH. POST (Aug. 31, 2021),

their opposition may be grounded in religion, their First Amendment claims are grounded in speech.[11] Because using certain pronouns clash with their Christian views on gender, they argue, forcing them to speak in this manner forces them to speak untruths. Consequently, these teachers maintain, requiring them to use pronouns matching students' identified gender amounts to unconstitutional compelled speech. At least one Court of Appeals agreed, albeit in a case involving a university professor.[12]

Generally, government attempts to control the content of someone's speech are presumptively unconstitutional.[13] That principle applies equally to regulations that compel speech as it does to regulations that censor speech.[14] In other words, the Free Speech Clause protects the right not to speak as well as the right to speak. If these teachers were speaking purely as private citizens outside the school context, they would have a formidable free speech case: content-based regulations generally trigger strict scrutiny and rarely survive that scrutiny.[15]

These teachers are government employees, however, and the applicable free speech rules—at least when they are acting as government employees—are markedly different. In fact, under existing doctrine, their classroom teaching is most likely not private speech but government speech. That is, when the bell rings and Ms. Smith enters the classroom in PS 156, the words she utters during her lesson are, for the most part, deemed the state's, not her own. Because the government has

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https://perma.cc/7J99-8LLC (Christian gym teacher Tanner Cross represented by Alliance Defending Freedom who was placed on leave after sharing his views at a school board meeting).

[11] Free Exercise Clause claims should fail against regulations that do not target religion because they are neutral and generally applicable. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

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

[13] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional.").

[14] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (stating that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

[15] *Cf.* Caroline Mala Corbin, *The Pledge of Allegiance and Compelled Speech Revisited: Requiring Parental Consent*, 97 IND. L.J. 967, 971 (2022) ("There is nothing more anathema to a democracy than the government censoring perspectives it disapproves or forcing people to parrot perspectives it espouses.").

complete control over its own speech,[16] the Free Speech Clause would not apply at all.[17] According to the Supreme Court, if the public does not like the current government's message, it can elect a different one that says different things.[18]

Not all of a public employee's on-the-job speech is unprotected. The Court long ago abandoned that view, embodied by a quip from Justice Holmes that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[19]

At the same time, although government employees do not forsake all free speech rights when they clock into work, the government as employer has much more leeway to regulate than the government as sovereign. Ever since the Supreme Court decided *Garcetti v. Ceballos* in 2006, government employees must pass three hurdles in order to prevail on a free speech claim.[20] First, the speech in question cannot be made pursuant to official duties.[21] If it is, then it is essentially the government's speech, and the government has the right to control it. Second, the speech must cover a matter of public concern rather than a purely personal matter.[22] Third, the government employee's speech cannot unduly disrupt the workplace.[23]

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[16] *Reed*, 576 U.S. at 178 (Breyer, J., concurring) ("'[G]overnment speech' escapes First Amendment strictures.").

[17] Matal v. Tam, 137 S. Ct. 1744, 1757 (2017) ("[O]ur cases recognize that '[t]he Free Speech Clause . . . does not regulate government speech.'").

[18] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("[I]t is the democratic electoral process that first and foremost provides a check on government speech.").

[19] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

[20] 547 U.S. 410 (2006).

[21] *Id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[22] City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) ("[A] public employee's speech is entitled to [First Amendment protection] only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'" (citations omitted)).

[23] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting the interests of "the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

This Article argues that public school teachers do not and should not have a free speech right to deliberately misgender students in the classroom.[24] Transgender students are already a vulnerable at-risk population, and studies show that misgendering at school increases that risk. Misgendering also deprives transgender students of an equal educational opportunity. For a teacher to intentionally misgender students subject to their authority is not only unprofessional but potentially unlawful under federal and state laws banning discrimination in education.[25]

As a matter of doctrine, how teachers address their students in the classroom during class should be considered speech pursuant to their official teaching duties. Under *Garcetti*, it is essentially government speech with no free speech protection.[26] Granted, the *Garcetti* Court acknowledged the possibility of an academic

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[24] This Article, like the cases, will focus on deliberate misgendering, but its arguments may extend to negligent misgendering as well. At the same time, most of its arguments do not apply to free speech challenges to state laws like Florida's "Don't Say Gay" law that bans lower school teachers from discussing sexual orientation or gender identity. *Florida House Bill 1557*, LEGISCAN, https://legiscan.com/FL/text/H1557/id/2541706 (last visited Oct. 4, 2022) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade three . . . .").

[25] None of these concerns are raised by discussing sexual orientation or gender identity in school. Acknowledging and affirming LGBTQ people can help reduce the mental health risks of LGBTQ students. *See infra* notes 54–61 and accompanying text. Welcoming LGBTQ students and incorporating LGBTQ families and history into the curriculum promotes equal access to education by making it more inclusive. There is nothing unprofessional about discussing gender identity and sexual orientation in age-appropriate ways, and it certainly does not discriminate against anyone. On the contrary, it is the Florida ban on mentioning same-sex couples or transgender people but not opposite-sex couples or cisgender people that raises questions about discrimination on the basis of sexual orientation or gender identity.

[26] That teachers' in-classroom speech is pursuant to official duties and therefore government speech seems to support the constitutionality of laws like "Don't Say Gay." There are several caveats to this doctrinal conclusion. First, their out-of-classroom speech supportive of the LGBTQ community may not be pursuant to official duties. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424–35 (2022) (holding that coach's prayer was not pursuant to official duties even though he was on duty at school game on school premises). Second, students also have free speech rights, and censoring classroom speech arguably implicates both their right to speak and their right to receive information. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S.

freedom exception, but as a descriptive matter it is unlikely that academic freedom covers elementary and high school teachers' deliberate misgendering of the students in their care. As a normative matter, the cloak of academic freedom should not protect classroom speech that is tangential, inaccurate, and harms students, particularly marginalized ones.[27]

In any event, misgendering speech fails the other two requirements for a government employee speech claim: While questions of gender identity are issues of public concern, the teacher's use of pronouns to address a specific student is not a discussion of it.[28] Finally, a teacher's deliberate misgendering is highly disruptive to the school's responsibilities and goals.[29] It is a hindrance to both educating students in the designated curriculum and training them for citizenship. Moreover, the additional responsibilities a school has with regard to the young impressionable students entrusted to its care and captive to their teachers' speech means that its interests in providing an environment where those students can learn and thrive outweigh the slight free speech value of the teacher's misgendering.

853, 866, 867 (1982) (four-Justice lead opinion) (noting that "we have held that in a variety of contexts the Constitution protects the right to receive information and ideas" and finding that "we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library"). Third, the Supreme Court has acknowledged potential limits to the state's control over curriculum. *See, e.g.*, *id.* at 865 ("[L]ocal school boards must discharge their 'important, delicate, and highly discretionary functions' within the limits and constraints of the First Amendment."). Fourth, even if a "Don't Say Gay" law does not violate the Free Speech Clause, it may violate other constitutional provisions such as the Equal Protection Clause.

[27] In contrast, discussing sexual orientation or gender identity (e.g., same-sex families or LGBTQ history) as currently forbidden by "Don't Say Gay" laws harms no one and can be done in a way that is accurate and relevant to course material. And insofar as academic freedom is about ensuring educators can welcome free and open debate about topics covered by their course, the "Don't Say Gay" laws clash with academic freedom.

[28] The same is not true for actual conversations about sexual orientation and gender identity currently barred by "Don't Say Gay" laws.

[29] In contrast, acknowledging and talking about different types of families and people may foster educational goals, whether it be improving learning outcomes by making classrooms more inclusive or training future citizens to discuss novel or uncomfortable topics with civility.

I. MISGENDERING

For transgender people, pronouns matter. They matter a lot.[30] As one young transgender man explained: "I get that for a cisgender person who has never wished to step out of their body and leave it like crumpled-up laundry at the foot of the bed, pronouns are simply words. . . . They seem to forget that being seen—truly seen as who we are, the truth of our being—is a fundamental human need. . . . [I]f you cannot be seen, who's to say you can ever be loved, ever be understood, ever belong?"[31]

In the United States, people are assigned a sex at birth. Every baby is designated a boy or a girl, and the decision is based solely on external sex organs.[32] This assignment at birth assumes that this one particular marker of gender is always both clear and sufficient. It is not. There may be uncertainty—which may occur with intersex babies who have ambiguous or both male and female genitalia.[33] Moreover, the concept of sex is much more complex than a person's external sex organs, and encompasses "chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries,

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[30] *See generally* Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2262 (2021); Joli St. Patrick, *What You're Really Saying When You Misgender*, THE BODY IS NOT AN APOLOGY (May 26, 2017), https://perma.cc/N475-45SJ ("I'm not certain the majority of cisgender people fully grasp, at a gut level [that] . . . [b]eing referred to by our right name and pronouns is so much more than a point of etiquette for us. It is a daily necessity for our mental health and our survival.").

[31] Sam Dylan Finch, *Op-Ed, Doctors Using a Transgender Patient's Correct Pronouns Is a Life-or-Death Matter*, TEEN VOGUE (Sept. 27, 2019), https://perma.cc/AAD9-H5GQ.

[32] M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 952 (2015) ("[T]he doctor's determination of sex made at the time of birth . . . is currently based on the appearance of genitals.").

[33] The condition where someone's chromosomes/gonads/anatomy are not all male or all female is called intersex or DSDs (differences or disorders of sex development). Estimates for the number of people with DSDs vary. "Some researchers now say that as many as 1 person in 100 has some form of DSD." Claire Ainsworth, *Sex Redefined: The Idea of 2 Sexes Is Overly Simplistic*, SCIENTIFIC AMERICAN (Oct. 22, 2018); Ari Berkowitz, *Our Biology Is Not Binary*, PSYCHOL. TODAY (June 19, 2020) ("Collectively, depending on how you count, intersex people make up somewhere between less than 0.1% and more than 1% of the population.").

uterus, testes), . . . hypothalamic sex (i.e., sexual differentiations in brain development and structure), sex of assignment and rearing, pubertal hormonal sex, and gender identity and role."[34] The scientific consensus is that sex is not actually binary but more accurately described as a spectrum.[35] Accordingly, and as one *Scientific American* article noted, "[s]ex can be much more complicated than it at first seems."[36]

Nevertheless, the rather simplistic means of designating gender works for most people. For this majority, termed "cisgender," the gender assigned to them at birth comports with their gender identity, which is their internal sense of their gender. But for a minority, termed "transgender," their assigned sex does not so align. Either they identify with the opposite sex, or they identify as nonbinary or otherwise gender nonconforming.[37]

According to the Williams Institute at UCLA School of Law, approximately 1.6 million transgender people live in the United States, including 300,000 transgender youth (or 1.4%) between thirteen and seventeen.[38] Thus, for every thousand students, about fourteen will be transgender. Or put yet another way, roughly one out

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[34] Levasseur, *supra* note 32, at 980–81.

[35] Ainsworth, *supra* note 33; Simón(e) D. Sun, *Stop Using Science to Justify Transphobia*, SCIENTIFIC AMERICAN (June 19, 2019) ("Actual research shows that sex is anything but binary."); Goran Štrkalj & Nalini Pather, *Beyond the Sex Binary: Towards the Inclusive Anatomical Sciences Education*, 14 ANAT. SCI. EDUC. 513 (2021) ("Anatomical sciences curricula need to adopt a more current approach to sex including the introduction of the category of 'intersex'/'differences in sexual development' and present sex as a continuum rather than two sharply divided sets of characteristics."); Amanda Montanez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, SCIENTIFIC AMERICAN (Sept. 1, 2017) ("The more we learn about sex and gender, the more these attributes appear to exist on a spectrum."). *But see* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 273 (2005) (arguing that "the linear conception of a line or spectrum is not adequate and offer[ing] a non-linear conceptualization of gender").

[36] Ainsworth, *supra* note 33; *see also* Levasseur, *supra* note 32, at 946 ("This simplistic understanding of sex, as two fixed binary categories, is medically, scientifically, and factually inaccurate.").

[37] Vade, *supra* note 35, at 260 ("[T]here are many transgender people who do not identify as either female or male . . . .").

[38] Jody Herman et al., *How Many Adults and Youth Identify as Transgender in the United*

of every seventy-two children in school is transgender. That means just about every public school in the United States is probably caring for and educating a transgender child.

Not surprisingly, transgender people will often express their gender to match their gender identity. "While gender identity refers to someone's internal sense of their gender, gender expression refers to the ways in which a person presents themselves through their appearance."[39] This may include their hair, makeup, clothing, body language, voice, and most relevant here, their name and pronouns.[40]

Unfortunately, transgender youth often face hostility, and life at school, where young people spend much of their time, can be fraught. In one comprehensive survey from 2006, almost all the transgender students heard negative comments at school about someone's gender expression.[41] School administrators rarely intervened;[42] on the contrary, school personnel were regularly a source of these biased remarks.[43] On top of that, the survey found that sometime during the previous year, almost nine out of ten transgender students at school had been harassed, half had

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States?, WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW 1 (June 2022), https://perma.cc/3CP3-8VQZ. Some estimates are higher. *See, e.g.*, Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP., Jan. 25, 2019, at 3 (noting approximately 1.8% high school students surveyed responded "[y]es, I am transgender").

[39] Olivia Mendes, *Gender-Neutral Pronouns: They Are Here to Stay*, 52 SETON HALL L. REV. 317, 320 (2021).

[40] *See, e.g.*, SEPARATION AND STIGMA: TRANSGENDER YOUTH AND SCHOOL FACILITIES (2017), https://perma.cc/8KL6-BKNK ("Gender expression refers to a person's characteristics and behaviors such as appearance, dress, mannerisms, and speech patterns.").

[41] Emily A. Greytalk, Joseph G. Kosciw & Elizabeth M. Diaz, *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools*, GLSEN 10 (2009), https://perma.cc/4NXR-CZZE (finding that 90% of transgender students heard negative comments about gender expression in school sometimes, often, or frequently).

[42] *Id.* at 11 (finding that 11% of students reported that school staff intervened most of the time or almost always in response to negative comments on gender expression).

[43] *Id.* at 10 (finding that 39% of students heard school personnel make negative comments about someone's gender expression sometimes, often, or frequently).

been pushed or shoved, and a quarter had been punched, kicked, or hurt with a weapon—all due to their gender expression.[44] About two-thirds of transgender students reported that they felt unsafe because of how they expressed their gender.[45] Although rates of violence at school have fallen, this overall hostile environment has persisted.[46] Whether due to the intense stigma, discrimination, violence, or a combination of these and other factors, transgender youth in the United States are considered at-risk.[47] The 2015 U.S. Transgender Survey—the largest of its kind—found that four out of five transgender adults had seriously contemplated suicide

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[44] *Id.* at 18 (finding that 87% of surveyed transgender students had been verbally harassed at school in the past year because of their gender expression; 53% had been pushed or shoved at school in the past year because of their gender expression; and 26% had been punched, kicked, or injured with a weapon at school in the past year because of their gender expression).

[45] *Id.* at 14 (65% of transgender students said they felt unsafe due to their gender expression); *see also The Gender Expansive Youth Report*, HUMAN RIGHTS CAMPAIGN 18 (2018), https://perma.cc/9NB9-3QNQ (finding that only 16% of transgender youth "always felt safe in the classroom").

[46] In *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender and Queer Youth in Our Nation's Schools*, a survey of LGBTQ youth rather than transgender youth, 91.8% heard negative remarks about gender expression, with 53.2% hearing them frequently or often. As in the earlier survey, school officials rarely intervened: only 9% of LGBTQ students said that school staff intervened most of the time or always in response to biased remarks about gender expression. Instead, 66% heard negative remarks about gender expression from teachers or other school staff; 56.9% were verbally harassed on account of their gender expression; 21.8% were physically harassed (pushed or shoved) in the past year due to gender expression; 9.5% were physically assaulted (punched, kicked, or injured with a weapon) due to gender expression. Joseph G. Kosciw et al., *2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender and Queer Youth in Our Nation's Schools*, GLSEN (2020), https://perma.cc/43DV-JZGC.

[47] *See, e.g.*, Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Transition*, 137 PEDIATRICS *2 (Mar. 2016) (noting that studies of adult and adolescent transgender people "consistently report dramatically elevated risks of anxiety, depression, and suicidality among transgender people"); Arnold Grossman, Jung Yeon Park & Stephen T. Russell, *Transgender Youth and Suicidal Behaviors: Applying the Interpersonal Psychological Theory of Suicide*, 20 J. GAY & LESBIAN MENTAL HEALTH 329 (2016) ("Previous studies link compromised mental health among TGNC [transgender and gender nonconforming] youth to their disproportionately high experiences of harassment, bullying, discrimination, gender minority stress, oppression, stigma, victimization, violence, and vulnerability.").

at least once in their lives.[48] Numerous studies find that transgender youth likewise contemplate suicide or attempt suicide at distressingly high levels,[49] with some finding rates as high as 86% having contemplated suicide[50] and 56% having ever attempted suicide.[51] These alarming rates for transgender youth are at least twice as high—and often significantly more—than rates for their non-transgender counterparts.[52] For example, one study found six out of ten (61.3%) transgender youth it questioned had thought about killing themselves, a rate that was three times

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[48] Jody L. Herman, Taylor N.T. Brown & Ann P. Haas, *Suicide Thoughts and Attempts Among Transgender Adults*, WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW 1 (Sept. 2019), https://perma.cc/FY4D-YR3J (finding that 81.7% of transgender adults had seriously considered suicide at some point in their lives, and 48.3% had seriously contemplated it in the past year).

[49] Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth and Life-Threatening Behaviors,* 37 SUICIDE & LIFE-THREATENING BEHAVIOR 527 (2007) (finding 45% of transgender youth between 15–21 had seriously contemplated suicide); Kristen Clements-Nolle, Rani Marx & Mitchell Katz , *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimizations*, 51 J. HOMOSEXUALITY 52 (2006) (finding 47% of transgender people under 25 had a history of attempted suicide).

[50] Ashley Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. INTERPERSONAL VIOLENCE 5, 5–6 (2020) (asking whether transgender youth contemplated suicide in the last six months).

[51] *Id.*

[52] Johns et al., *supra* note 38 (finding that 43.9% of transgender students had seriously considered suicide in the past year compared to 11% of cisgender male students and 20.3% of cisgender females students and that 34.6% of transgender students had attempted suicide in the past year, compared to 5.5% for cisgender male students and 9.1% for cisgender female students); Amaya Perez-Brumer et al., *Prevalence and Correlates of Suicidal Ideation Among Transgender Youth In California: Findings from a Representative, Population-Based Sample of High School Students*, 56 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 739 (2017) (finding that 33.73% of transgender youth in California reported contemplating suicide in the past year, which was close to double that of the 18.85% non-transgender youth who had); Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, 56 J. ADOLESC. STUDY 274 (2015) (finding that among youth in care, transgender youth had at least double the risk for depression, anxiety, and suicide compared to their cisgender matched controls); Grossman, Park & Russell, *supra* note 47 (finding that while the rates contemplating suicide and attempting suicide was 12.1% and 4.1% for a national sample of adolescents, the rates were 49.5% and 24.4% for transgender and gender nonconforming adolescents).

higher than their cisgender counterparts.[53]

Research shows that affirming gender identity alleviates the mental health risks of transgender children and teens. "Given the mental health vulnerability of many transgender and nonbinary youth, gender identity affirmation is vital."[54] One of the most basic ways to affirm someone's gender is to address them by their correct name and pronouns.[55] One study found that pre-adolescent transgender children who were supported in their gender identity and had socially transitioned—"a reversible medical intervention that involves changing the pronouns used to describe a child, as well as his or her name and (typically) hair length and clothing"[56]—had almost the same levels of anxiety and depression as their cisgender counterparts.[57]

Another study found that a transgender youngster's mental health dramatically improved for each additional environment (home, friends, work, and school) where people used their name and pronouns.[58] For each context that affirmed their

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[53] Marla E. Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/Gender Nonconforming Adolescents*, 61 J. ADOLESC. HEALTH 521 (2017) (finding "almost two-thirds (61.3%) of TGNC youth reported suicidal ideation, which is over three times higher than cisgender youth"); *see also* Brian C. Thoma et al., *Suicidality Disparities Between Transgender and Cisgender Adolescents*, 144 PEDIATRICS *6 (Nov. 2019) (finding that twice as many transgender youth had actually attempted suicide at some point during their life compared to their cisgender heterosexual counterparts).

[54] Sarah Steadman, *"That Name Is Dead to Me": Reforming Name Change Laws to Protect Transgender and Nonbinary Youth*, 55 U. MICH. J.L. REFORM 1, 6 (2021).

[55] Jae M. Sevelius et al., *Gender Affirmation Though Correct Pronoun Usage: Development and Validation of the Transgender Women's Importance of Pronouns (TW-IP) Scale*, 17 INT. J. ENVTL. RES. PUB. HEALTH 9525 (2020), https://perma.cc/4YQA-DNMZ ("Social interactions where a person is addressed by their correct name and pronouns, consistent with their gender identity, are widely recognized as a basic yet critical aspect of gender affirmation.").

[56] Olson et al., *supra* note 47.

[57] *Id.* ("[A]llowing children to present in everyday life as their gender identity rather than their natal sex is associated with developmentally normative levels of depression and anxiety.").

[58] Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth,* 63 J. ADOLESC. HEALTH 503 (2018) ("For transgender youth who choose a name different than the one given at birth, use of their chosen name in multiple contexts affirms their gender identity and reduces mental health risks known to be high in this group.").

gender, depression decreased and suicidal ideation/behavior fell by half.[59] The lead researcher remarked, "I've been doing research on LGBT youth for almost twenty years, and even I was surprised how clear the link was."[60] Accordingly, it is not hyperbole to conclude that "[t]ransgender people's names are literally a matter of life and death."[61]

In contrast, disaffirming experiences like deliberate misgendering worsens the mental health of these at-risk youngsters.[62] "Addressing someone by the wrong name or misgendering them through use of incorrect pronouns can feel disrespectful, harmful, and even unsafe to the person being misgendered, since misgendering results in marginalization and communicates that a person's identity is not being seen or respected."[63] Indeed, an unwelcome environment where misgendering is rampant likely contributes to their at-risk status in the first place.

Not only is gender affirmation essential to the well-being of transgender students, but it is also essential to their education. The anxiety and humiliation of being misgendered in class may make it difficult to concentrate.[64] One student explained that "the first time being misgendered by a professor is like being snapped with a rubber band" and that with successive experiences, "the feeling gets worse,

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[59] *Id.* (finding that one additional gender-affirming context resulted in a 29% decrease in suicidal ideation and a 56% decrease in suicidal behavior).

[60] Zack Ford, *Chosen Names Are Vital to Transgender Youth, Per Study*, THINK PROGRESS (Mar. 30, 2018), https://perma.cc/6G3P-MS7K (quoting lead author Stephen T. Russell from University of Texas).

[61] Alex Bollinger, *Transgender People's Names Are Literally a Matter of Life and Death*, LGBTQ NATION (Apr. 6, 2018), https://perma.cc/N2HT-YTSH.

[62] *The Gender Expansive Youth Report*, *supra* note 45 ("Being forced to use incorrect names [and] pronouns . . . has a devastating effect on their mental health and their personal safety.").

[63] Sevelius et al., *supra* note 55.

[64] Anna Bayuk & Marisol Martinez, *Transgender Students Struggle with Misgendering*, EAGLE EYE (Dec. 12, 2019), https://perma.cc/7HTT-73GK ("When I first came out, I had this teacher who absolutely refused to call me by they/them pronouns," junior Caspen Becher said. "She'd frequently misgender me in front of other students, and call me by the wrong name. It was humiliating."); *see also id.* ("You know, at the end of the day, it doesn't hurt you to respect me. It doesn't cost you anything to show a little bit of compassion for another person.").

until it makes him want to vomit."[65]

Students may opt to avoid class rather than subject themselves to constant misgendering. As one transgender student recounted: "It made me not like school and not want to go there."[66] A survey of transgender students found that students who experienced more verbal harassment at school were more likely to skip school.[67] Those transgender students with more negative experiences also had lower grade point averages than transgender students who had not suffered as much in school.[68]

In sum, by exacerbating the mental health risks for transgender students and compromising their education, misgendering in the classroom potentially carries serious and negative life consequences. At the very least, addressing students by their appropriate pronouns implicates concerns about basic decency and professionalism. All these considerations would play a part when balancing a teacher's free speech interests against the school's interests in ensuring the students entrusted to its care thrive and learn. Courts, however, might never reach this balancing question if they find the public school teachers' speech to be pursuant to their official job responsibilities.

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[65] Blaise Mesa, *Transgender Students Allege Mistreatment, Lack of Support on Campus*, COLUMBIA CHRON. (Apr. 22, 2019), https://perma.cc/KM5V-LTCA; *cf.* St. Patrick, *supra* note 30 (describing the feeling of being misgendered as "a potent split-second mixture of anxiety and helplessness and fury and shame and dread and resignation. It arrives in my body as a flinch that tenses my shoulders, heats my forehead, and clenches my gut.").

[66] Bobby Hristova, *Transgender Student Says Teachers Keep Using Wrong Pronouns and Name, and Wants More Done About It*, CBC NEWS (Feb. 2, 2022), https://perma.cc/A66D-YV8P.

[67] *Harsh Realities*, *supra* note 41, at 26 (56% of transgender students who experienced high levels of verbal harassment due to their gender expression missed at least one day of school in the last month because they felt unsafe or uncomfortable, compared to 32% of transgender students experiencing low levels of harassment).

[68] *Id.* at 27 (finding that students who reported that they were verbally harassed frequently due to their gender expression had a GPA of 2.2 compared to the GPA of 2.8 of students verbally harassed less frequently). The more frequently verbally harassed transgender students also had lower educational aspirations, with 40% who suffered more severe verbal harassment not planning on post-secondary education versus 32% of transgender students who suffered less severe verbal harassment. *Id.*.

II. PURSUANT TO OFFICIAL DUTIES

A pivotal question in these cases is whether the teacher's misgendering speech is pursuant to their official duties. If it is, then it is considered "the government's own speech."[69] Under the government speech doctrine, such speech is not protected.[70]

A. The Garcetti *Rule of Government Speech*

Garcetti v. Ceballos established that when government employees speak pursuant to their official duties, that speech is government speech and therefore not protected by the Free Speech Clause.[71] Although the boundary demarcating what is and is not pursuant to official duties may be fuzzy, teachers addressing their students in class lies at the core of teachers' official duties and therefore triggers no free speech scrutiny.

Before *Garcetti*, the *Pickering-Connick* balancing test controlled government employee speech claims. This test required courts to weigh the government's needs as employer in managing its workplace against the free speech benefits of the employee's speech.[72] Like other employers, the government must exert some control over its workers' speech. At the same time, the government is not just any employer—it is also the state whose conduct should be discussed and monitored. Government employees, by virtue of their experience in government and access to inside information, may have important insights that the public ought to hear. "Government employees are often in the best position to know what ails the agencies for

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[69] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022) ("If a public employee speaks 'pursuant to [his or her] official duties,' the Court has said [that] the Free Speech Clause will not shield the individual from an employee's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech.").

[70] *Id.*

[71] 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[72] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting Court described this as a "balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

which they work."[73] Thus, a schoolteacher's opinion on whether the school board was spending too much money on sports as opposed to academics was an informed viewpoint that deserved protection as long it did not interfere with his teaching responsibilities.[74]

Garcetti swept this balancing approach aside in favor of a more categorical one based on the government speech doctrine.[75] The basic tenet of the government speech doctrine is straightforward: the Free Speech Clause does not apply to the government's own speech.[76] The government must be able to decide what it does or does not say in order to function, especially if it is executing the policies it was elected to promote.[77] For example, a government elected to promote vaccines should not be required to provide a platform for anti-vaxxers as well.[78]

According to *Garcetti*, some government employee speech is essentially that of the government and should be treated as government speech. After all, government employees are hired to implement government policies. The government cannot effectively provide the services it was elected to provide, whether they be medical,

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[73] Waters v. Churchill, 511 U.S. 661, 674 (1994); *see also* City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam) ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public.").

[74] *Cf. Pickering.*

[75] *Rust v. Sullivan*, 500 U.S. 173 (1991), is recognized as the first government speech case, though the case itself did not use the term. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."). More recent cases have cemented the doctrine. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015); Matal v. Tam, 137 S. Ct. 1744 (2017); Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

[76] *Summum*, 555 U.S. at 469 ("[G]overnment speech is not restricted by the Free Speech Clause.").

[77] *Id.* at 208 ("But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.").

[78] *Walker*, 576 U.S. at 207–08.

legal,[79] or educational,[80] without some control over what its representatives say in the process of providing those services—that is, their speech pursuant to their official duties.[81] If an employee's official communications will derail the government's mission—if, for example, a government nurse hired to administer vaccines spouts anti-vaccine conspiracies to patients—the government ought to be able to take corrective action.[82] If nothing else, a functioning government needs workplaces that run smoothly. That the government as employer successfully fulfills its mission is particularly important because the government-as-employer was elected in order to accomplish it. As Justice Breyer observed, "efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will."[83] Even the dissent in *Garcetti* acknowledged that "the government, like any employer, must have adequate authority to direct the activities of its employees."[84]

The *Garcetti* rule is not without controversy, and deservedly so. The *Pickering-Connick* test enabled the government to react to disruptive government employees without stripping their speech pursuant to official duties of all protection. Government employee speech pursuant to official duties can be extremely valuable, espe-

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[79] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

[80] *Cf.* Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968).

[81] *Id.* at 422 ("The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.").

[82] *Id.* at 422–23 ("Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."). Additionally, allowing individual government employees to say whatever they like risks diluting and confusing the government's message.

[83] *Id.* at 445. Note that the check on government speech is political rather than constitutional: the Supreme Court has regularly emphasized that the government's greater control over its own message is checked by accountability at election time. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 468–69 (2009).

[84] *Garcetti*, 547 U.S. at 445 (Breyer, J., dissenting).

cially if the employee's job responsibilities include bringing to light otherwise unavailable information or uncovering government misconduct.[85] Public school educators misgendering their students is not that type of valuable whistleblower speech.[86] Whatever the flaws of *Garcetti*, they are not implicated when teachers misgender their students.

B. The Garcetti *Rule Applied Generally*

Although the *Garcetti* rule itself is clear enough—speech pursuant to official duties is not protected by the Free Speech Clause—the line between speech that is and speech that is not pursuant to official duties is not always so.[87] The *Garcetti* Court did not need to develop a framework for evaluating whether a government employee's speech was "pursuant to official duties" because no one disputed that the employee's speech in that case qualified.[88] (The speech that caused a deputy district attorney trouble was a disposition memorandum, where he recommended that a case be dismissed because it depended upon a questionable search warrant.[89])

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[85] Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 36 (2008) ("The academic reaction to [*Garcetti*] has been harshly negative; scholars argue that the holding will prevent the public from learning of governmental misconduct that is known only to those working within the bowels of the government itself."); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 12 (2009) ("[The *Garcetti* rule] frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices.").

[86] Given the science, their misgendering arguably represents an example of government misconduct rather than exposure of it. Granted, the Christian teachers may believe they are pointing out the fallacies associated with gender transition, but an op-ed or letter to the editor is a more appropriate venue rather than inflicting it on a student.

[87] *See, e.g.*, Benes v. Puckett, 602 F. App'x 589, 593 (5th Cir. 2015) ("There is no bright line rule for determining whether an employee acts in his official capacity or in his capacity as a citizen.").

[88] *Garcetti*, 547 U.S. at 424 ("[T]he parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.").

[89] After conducting his own investigation, Garcetti questioned the accuracy of an affidavit used to procure the critical search warrant. *Id.* at 413–14.

The Supreme Court did, however, provide some guidelines. To start, it emphasized that the inquiry was a practical one rather than a formal one.[90] That is, whether speech is pursuant to official duties will depend on what the employee's actual job duties are rather than on any overly broad job description the employer may be tempted to write.[91] In fact, the Court explicitly cautions government employers against trying to augment their control by writing expansive job descriptions.[92]

The Court next stated that speech pursuant to official duties is speech that "owes its existence to a public employee's professional responsibilities."[93] The facts of *Garcetti* provide a clear-cut case of such speech: Ceballos's disposition memorandum was pursuant to his official duties "because that is part of what he, as a calendar deputy, was employed to do."[94] On the other hand, the public school teacher in *Pickering v. Board of Education* was not acting pursuant to official duties when he wrote a letter to the editor of a newspaper because such correspondence was not "among the things that the employee was employed to do."[95] Thus, if an employee is being paid for the speech because it occurred in order to fulfill their job responsibilities, then it should be considered pursuant to official duties.

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[90] *Id.* at 424.

[91] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) ("It is an inquiry this Court has said should be undertaken 'practical[ly]' rather than with a blinkered focus on the terms of some formal and capacious written job description.").

[92] *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."); *see also id.* at 424–25 ("Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.").

[93] *Id.* at 421–22 ("Restricting 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."); *see also Kennedy*, 142 S. Ct. at 2411 (holding that Kennedy's prayer was not government speech because it did not "owe its existence to Mr. Kennedy's responsibilities as a public employee" (internal citations omitted)).

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

[95] *Id.*

This formulation is not precise. The Court's description of what is *not* dispositive in determining whether speech was pursuant to official duties might actually be more useful. First, it is not dispositive that the employee's speech occurred at work.[96] After all, not every utterance is related to their employment. They may be chatting on a break.[97] Nor is it dispositive if the employee's speech is about work.[98] Workers moaning and groaning about an assignment is not "pursuant to official duties."[99] It is not even dispositive if the speech concerns something that the employee learned because of their job.[100] The speech has to be the work itself.

The last caveat—that speech about information learned due to professional responsibilities is not automatically pursuant to official duties—is the holding of *Lane v. Franks*.[101] In that case, Edward Lane worked as the director of a community college program for underprivileged youth.[102] This position allowed him to audit his program's finances and discover someone on the payroll who never appeared for work. At issue was whether his testimony in court about corruption at his workplace was "pursuant to official duties." The Court concluded that it was not. Lane's "truthful sworn testimony, compelled by subpoena" was "outside the course of his

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[96] *Id.* at 420–21 (rejecting the rule that "all speech within the office is automatically exposed to restriction").

[97] *Kennedy*, 142 S. Ct. at 2425 (holding that public high school coach's prayer on the football field after games was not pursuant to his official duties because it occurred during a break when "coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands").

[98] *Garcetti*, 547 U.S. at 421 ("The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job.").

[99] In fact, "[t]he Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id.* at 419.

[100] Lane v. Franks, 573 U.S. 228, 240 (2014) ("In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.").

[101] *Id.*

[102] *Id.* at 231–32.

ordinary job responsibilities."[103]

Lane can be read as adding a gloss to *Garcetti*'s formulation of "pursuant to official duties." In its analysis, the *Lane* Court noted repeatedly that testifying in court was outside Lane's "ordinary job responsibilities." The Court's repeated use of the word "ordinary"[104] suggests that the rule going forward is that speech "pursuant to ordinary official duties" is not protected, rather than speech "pursuant to official duties."[105] Only subsequent cases will illuminate whether this is simply different phrasing or a different standard.[106]

The bottom line is that when government employees speak as required by their ordinary job responsibilities, they are speaking as the government, and their speech is not protected. Otherwise, they are speaking as citizens, whose speech may or may not be protected, depending on whether it concerns a matter of public interest and whether it disrupts the government workplace's mission. The lack of clarity ultimately does not affect the misgendering analysis. Just as it was uncontroversial that writing disposition memoranda was part of *Garcetti*'s everyday work responsibilities, it ought to be uncontroversial that calling on and engaging with students in the classroom is part of a public school teacher's everyday responsibilities.

C. Doctrinal: The Garcetti *Rule Applied to Teacher Misgendering*

It is hard to escape the conclusion that teaching students lies at the heart of a public school teacher's ordinary duties. Furthermore, interacting with students is part and parcel of those official teaching responsibilities. Thus, as a doctrinal matter, a teacher's misgendering is government speech.

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[103] *Id.* at 231.

[104] *See, e.g.*, *id.* ("ordinary job responsibilities"); *id.* at 235 ("ordinary job responsibilities"); *id.* at 238 ("ordinary job responsibilities"); *id.* ("ordinary job duties"); *id.* at 243 (ordinary job responsibilities").

[105] *See, e.g.*, Mpoy v. Rhee, 758 F.3d 285, 295 (D.C. Cir. 2014) ("In particular, the use of the adjective 'ordinary'—which the court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*.").

[106] *See, e.g.*, Gibson v. Kilpatrick, 773 F.3d 661, 668 (5th Cir. 2014) ("Whatever may come of *Lane*'s use of the 'ordinary' modifier, at this point it likely has not altered the rule in *Garcetti* . . . ."). *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), relied on both formulations.

Whether the court relies on a formal description or the actual activities of elementary or high school teachers, classroom instruction is part of their ordinary, official duties. Teaching students is the primary function of teachers. It is right there in the name. And there is nothing extraordinary about it. It is the teacher's ordinary, bread and butter responsibility. As the Seventh Circuit has observed, "[t]he core of the teacher's job is to speak in the classroom on the subjects she is expected to teach."[107]

None of the many issues that may bedevil other government speech cases arise with teachers who misgender in their classroom. There is no question that the teachers are at work and on the clock:[108] The speech occurs on school grounds school during classroom time. There is no question that their speech involves a clear, central responsibility—classroom instruction—as opposed to more nebulous or ancillary duties such as serving as a role model.[109] Nor is this a case where the speech is about work or learned at work but in the end not part of work (as with Pickering's letter to the editor or Lane's courtroom testimony). Teaching is the work itself. Thus, whatever uncertainty may surround other cases, teachers' speech as they lead classes in their subject matter during school hours in the school classroom is speech pursuant to their primary, ordinary, official responsibilities as teachers.[110]

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[107] Brown v. Chi. Bd. of Educ., 824 F.3d 713, 715 (7th Cir. 2016); *see also* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967 (9th Cir. 2011) ("Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee.").

[108] This was an issue in *Kennedy*, 142 S. Ct. at 2407. A public school athletic coach brought a free speech claim after he was disciplined for praying immediately after games in the middle of the school's football field surrounded by his team. The school has claimed that the coach's responsibilities did not abruptly end when the game clock does, while the Court characterized the coach as on a post-game personal break.

[109] *Id.* (noting that although coaches and teachers were "vital role models" that function was an "excessively broad job description" and did not convert everything they said at school into speech pursuant to official duties).

[110] *Cf. Johnson*, 658 F.3d at 966 ("But if Johnson's speech 'owes its existence' to his position as a teacher, then Johnson spoke as a public employee, not as a citizen, and our inquiry is at an end.").

Moreover, "teaching" necessarily encompasses how to address individual students. Merely imparting educational subject matter does not capture all that a teacher does. The act of teaching requires teachers to engage with their students. This interaction is not merely incidental to teaching—it is teaching. Interaction is essential to the learning process; otherwise, we could sit students in front of YouTube videos for hours upon end. The two-way nature of the relationship plays out in myriad ways: the teacher must ask questions, answer questions, guide the classroom discussion, provide encouragement and feedback, ensure discipline, and ultimately gauge whether students are learning. All of these interactions require that teachers address their students in some form or another. As one court noted, "it is difficult to imagine how a teacher could perform his teaching duties on any subject without a method by which to address individual students."[111] In short, a teacher's address of a student during classroom instruction fits the Supreme Court's definition of speech pursuant to official duties: "speech that the government itself had commissioned . . . and speech [that] the employee was expected to deliver in the course of carrying out his job."[112]

D. Normative: The Garcetti *Rule Applied to Teacher Misgendering*

Is designating the public school teacher's classroom address of students government speech normatively correct? Ultimately, while perhaps not the best view of the speech, it nevertheless falls on the government side rather than private side of the divide.

Theoretically, government employee speech may be best characterized as a mix of private and government speech. I have argued elsewhere that in addition to private speech and government speech we ought to recognize a third category of "mixed speech" when there is a fair share of both.[113] Content-based regulations of mixed speech would typically be subject to intermediate scrutiny rather than the

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

[112] *Kennedy*, 142 S. Ct. at 2424.

[113] *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

strict scrutiny applied if private speech or no scrutiny if government speech. Specialty license plates are my prime example,[114] but government employee speech can be another.[115] On the one hand, public employee speech in the course of fulfilling their responsibilities is paid for by the government, represents the government, and performs the government's missions. On the other hand, the words are being spoken by individual human beings, not automatons, with minds and views of their own, and audiences may therefore attribute the messages they utter to them as individuals as opposed to them as government representatives.

The *Pickering-Connick* test could be viewed as implicitly acknowledging the mixed nature of government employee speech. It not only took into account the interests of both the employee and the government, but also it applied neither strict scrutiny nor abandoned scrutiny altogether for content-based regulations. Of course, the argument is not seamless. For example, perhaps it undervalues private speech interests. The three traditional justifications for protecting private speech include encouraging a marketplace of ideas in our search for knowledge; facilitating democratic self-governance; and promoting autonomy and self-expression.[116] In the *Pickering-Connick* balancing, the value to private autonomy does not enter the calculus—if the speech is not on a matter of public concern, the private interests lose, no matter how much it may enhance the speaker's autonomy to recognize them.[117] But this may be more a quibble about which free speech justification is ascendent rather than a failure to recognize the importance of the private speech

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[114] *Id.* at 619–22 (noting that while specialty license plates bear the state's name and are owned, approved, and manufactured by the state, private individuals select them, pay extra for them, and affix them to their private cars).

[115] *Id.* at 625 ("Finally, speech by government employees is often mixed.").

[116] Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1217 (2017) ("To make the constitutional cut, public employee speech has to be valuable to its audience.").

[117] *Id.* ("[A]utonomy considerations do not enter the government employee speech calculus. For example, it is irrelevant whether government employees derive more autonomy-related benefits from speaking on private matters compared to public matters. The value to the speaker's autonomy is not measured, only the value to the public is.").

side of the mixed speech.[118] Still, the *Pickering-Connick* balancing test does consider both private speech interests and the government speech interests and, as such, can be seen as reflecting the view that government employee speech is a mix of the two.

The superseding *Garcetti* rule, which deems speech pursuant to official duties to be purely government speech, can be viewed as either retreating from that insight or seeking to impose a more predicable rule-based approach (or both). Either way, this approach presents a real risk of First Amendment capture—the term I use for a worrying maneuver: "classifying contested speech as government speech and then clamping down on certain viewpoints."[119] That is, categorizing mixed speech as government speech may be used as pretext for censoring unpopular speech.

This risk may certainly arise in the public school setting, given states' propensity to ban unpopular books or topics under the guise of serving students.[120] That is, if a teacher's classroom instruction equals government speech, teachers would have a difficult time challenging laws like Florida's "Don't Say Gay" law forbidding them from even mentioning sexual orientation or gender identity in lower school classes. The existence of a mixed speech category would avoid this dilemma, as the mixed speech would trigger intermediate scrutiny. A return to the *Pickering-Connick* balancing test would also avoid the problem of government capture.[121]

But if forced to make the theoretical choice of categorizing misgendering as wholly government speech or wholly private speech, I would opt for the former. Such a designation would not leave the "Don't Say Gay" law's censorship impervious to constitutional challenges: teachers might still be able to challenge it if the ban

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[118] For those who reject the autonomy justification for free speech, such an omission is appropriate.

[119] Caroline Mala Corbin, *Government Speech and First Amendment Capture,* 107 VA. L. REV. ONLINE 224, 226 (2021).

[120] Florida, for example, has passed laws banning public school teachers from discussing gender identity and sexual orientation in the lower grades. *See supra* note 26.

[121] Thus, if I were only allowed to make a minor tweak to doctrine rather than the major one of creating a new category like mixed speech, I would eliminate the *Garcetti* test and reinstate the *Pickering-Connick* balancing test.

reaches speech that is not pursuant to official duties,[122] and students may bring free speech suits as well.[123] Indeed, free speech may not be the only grounds for challenge either, given the equal protection concerns raised.[124] Moreover, the theoretical alternative is also problematic: If purely private speech (as opposed to the implicitly mixed speech of the *Pickering-Connick* balancing), schools would have little ability to control what viewpoints teachers air in the classroom as content restriction would be subject to strict scrutiny. In any event, prohibiting misgendering students in public school classrooms does not represent an example of suspect government capture. On the contrary, the government's rules legitimately further the school's educational missions—indeed are necessary to accomplish them. Moreover, because a teacher serves as the government's representative in the classroom, the ban on misgendering ensures that the government is not violating any anti-discrimination norms.

Thus, if pressed to choose between classifying this particular speech as purely private or purely governmental,[125] jurists should opt for the latter not only because (1) the government has paid for the teacher's speech, but also because (2) the speech directly furthers the government's educational missions by ensuring a welcoming learning environment, and (3) the teacher is the government's representative in the classroom and the government can be held responsible (both as a legal and political matter) for the teacher's misgendering. Notably, these reasons are also government interests relevant for the final balancing prong of the analysis, but they also inform the normative question of whether it is appropriate to consider the speech on the government side of the ledger as opposed to the private side.

1. Speech pursuant to official duties is funded by the government

The government hired and paid the teacher to teach. The Seventh Circuit reasoned that "[w]hen a teacher teaches, 'the school system does not "regulate" [that]

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[122] Especially if the Supreme Court continues to narrow the scope of "pursuant to official duties," as *Kennedy v. Bremerton School District* seems to do. *See supra* note 108.

[123] *See supra* note 26.

[124] *See supra* note 26.

[125] Again, the best option would probably be to eliminate *Garcetti* and return to the mixed speech treatment of the *Pickering-Connick* test.

speech as much as it hires that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary.'"[126]

At the very least, the government as employer ought to be able to set certain minimal standards for its workers in direct contact with the public. Even outside the school context, the government should be allowed to demand that its employees treat customers with respect as they deliver the services they have been hired and paid to deliver. As the Supreme Court observed in one of its government employment decisions, "surely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers.'"[127]

2. Speech pursuant to official duties advances government's educational mission

The exchange of money for services does not, and should not, end the analysis.[128] It is also critical that this speech represents the government's fulfillment of the mission it was elected to perform, namely the care and education of the children in the school district. Because it is the school district that the electorate will hold accountable for the success or failure of that mission,[129] it needs to be able to exercise a degree of control to ensure it is carried out.

The mission of the public schools is well recognized. It includes teaching certain knowledge and instilling certain values in America's children.[130] So important

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[126] Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007); *see also* Garcetti v. Ceballos, 547 U.S. 410, 422 (2006) (arguing government speech designation "simply reflects the exercise of employer control over what the employer itself has commissioned or created").

[127] Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion) (citation omitted).

[128] Although at least with schoolteachers the government fully paid for the speech, unlike the physicians in *Rust v. Sullivan*, the case now identified as the first government speech case. *See supra* note 75. Although the doctors whose speech was censored received Title X funds, they were not government employees and were not fully subsidized by the federal government.

[129] If the electorate is displeased with their children's schooling, they will vote for a different board. For example, after a school board in Pennsylvania tried to smuggle creationism into its schools, they were replaced with a new school board. David Charter, *Voters Eject School Board That Ordered Creationist Lesson*, THE TIMES (U.K.) (Nov. 10, 2005).

[130] James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000) ("[S]chools have traditionally been considered places not only to teach students about particular

are these goals that states mandates attendance at school. Given this compulsion, schools assume additional responsibilities vis-à-vis the children while in their care: Not only must public schools educate these youngsters, but they must also ensure their safety and well-being.

Framed more broadly, public education has long been understood to have two main goals: preparing students for work and preparing them for citizenship.[131] This first requires teaching students the information and skills necessary to support themselves and avoid dependence on the state. "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."[132] Most states have decided that knowledge and skills in the fields of math, science, history, and English, among others, are necessary to help students become productive members of society. Consequently, if part of the government's mission is to teach U.S. history to students in its public schools, then it must be able to discipline history teachers who decide to teach the Celtic language instead during their history class, or even teach Celtic history instead of U.S. history.[133]

Just as public school teachers should not have total control over what they teach, they should lack total control over how they teach to the extent their preferred methods interfere with the state's educational mission. That is, to ensure that its lessons take, elementary and high schools may require that teachers adopt a proven pedagogical approach.[134] If rote memorization is shown to be ineffective for

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bodies of knowledge, but also to teach them to be responsible and participatory members of society.").

[131] Grutter v. Bollinger, 539 U.S. 306, 331 (2003) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic.").

[132] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[133] Teachers ought not be stripped of all control over what is covered in class. First, the regulations should not be a pretext for censoring unpopular but relevant and appropriate materials. Second, the chosen materials should meet certain agreed upon pedagogical and professional standards. The details of these caveats are beyond the scope of this Article.

[134] For the same reasons listed *supra* note 133, teachers ought not be stripped of all control over the pedagogical method chosen.

learning history compared to the Harkness Method, then a school board should be able to insist that history teachers adopt the method proven to work over the alternative.

As it happens, the modern consensus among educators is that active learning is key to student education.[135] That is, students should not be just passive recipients of a teacher's lectures; rather, they should grapple with the material in classroom discussions and activities.[136] The precondition for this type of learning is that students feel comfortable enough to participate. "Importantly, the science of teaching and learning tells us that students learn best when they are engaged and feel like they are part of a supportive learning community."[137]

A transgender student will not feel welcome and supported if their teacher cannot even be bothered to use their proper pronouns, or worse, insist on misgendering them.[138] As documented in Part I, the failure to properly gender trans students harms their well-being and their education. Accordingly, a school as an employer should be able to prevent its hired representatives in the classroom from affirmatively undermining the educational experience of transgender students—especially since the state compelled the students' attendance in the first place. In short, because a student is unlikely to thrive academically if they feel negated, gender affirmation can be viewed as a precondition for accomplishing the first, academic goal

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[135] *See, e.g.*, Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. ENGINEERING EDUC. 223, 223 (2004) ("Active learning is generally defined as any instructional method that engages students in the learning process. In short, active learning requires students to do meaningful learning activities and think about what they are doing.").

[136] *Cf.* Charles D. Morrison, *From Sage on the Stage to Guide on the Side: A Good Start*, 8 INT'L J. SCHOLARSHIP TEACHING & LEARNING 1 (2014) ("It is now a well-worn cliché that the role of the teacher has changed in a significant and positive way; no longer a 'sage on the stage,' the teacher now functions more as a 'guide on the side.'"). For this reason, the Socratic method is usually the default in law schools.

[137] Inara Scott, Elizabeth Brown & Eric Yordy, *First Do No Harm: Revisiting* Meriwether v. Hartop *and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1024 (2022).

[138] *Id.* ("Just as we would not expect the college or university to allow faculty members . . . to beat students who failed to grasp certain concepts, common sense suggests the university has an interest in creating environments in which basic and accepted principles of effective teaching and learning are administered.").

of public school education.

The second recognized goal of public school education is to train students for success as citizens in our democracy.[139] Since *Brown v. Board of Education*, the Supreme Court has insisted that education "is the very foundation of good citizenship."[140] Education provides the knowledge needed to vote wisely, and again, the academic curriculum is meant to provide this. But public school students are also meant to learn essential skills like the ability to engage in civil discourse and the ability to understand and coexist with a wide range of people.[141]

The Supreme Court has explicitly held that public schools are responsible for teaching young citizens "socially appropriate behavior:"[142] "[P]ublic education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[143] That includes socially appropriate civil discourse. Indeed, the Court detailed how congressional "rules prohibit[] the use of expressions offensive to other participants in the debate."[144] It closes with the rhetorical question, "[c]an it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?"[145]

Of course, the Court does answer its question, and in the affirmative. In certain circumstances—such as when students are a captive audience—schools should

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[139] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[A]s Thomas Jefferson pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.").

[140] Grutter v. Bollinger, 539 U.S. 306, 331 (2003) ("This Court has long recognized that 'education . . . is the very foundation of good citizenship.'" (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954))).

[141] *Brown*, 347 U.S. at 493 ("[Education] is a principal instrument . . . in preparing [children] for later professional training, and in helping [them] to adjust normally to [their] environment.").

[142] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

[143] *Id.*

[144] *Id.* at 681–82.

[145] *Id.*

have the power to limit speech that fails to meet the requisite standards.[146] Thus, the Court has rejected the free speech claim of a student whose sexual-innuendo-laden speech at a school assembly was deemed lewd and vulgar. In finding for the school, the Court concluded that "the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others."[147]

A teacher's misgendering likewise contravenes the rules of civil debate that public schools are charged with teaching. Granted, a teacher's classroom misgendering differs from a student's vulgar school assembly speech in at least two ways, but neither defeats the school's justifications. On the contrary, they strengthen them. First, misgendering not only inflicts incivility on a captive audience, as lewd speech does, but it also inflicts harm. Second, while the speaker is a teacher rather than a student, teachers have an even greater responsibility to model appropriate discourse.[148] "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[149] No one is more responsible for setting a positive example than those who students come into regular, direct

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[146] *Id.* at 683 ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

[147] *Id.*

[148] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022) ("Teachers and coaches often serve vital role models."); *Bethel Sch. Dist.*, 478 U.S. at 683 ("Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.").

[149] *Bethel Sch. Dist.*, 478 U.S. at 683. It may also be part of the educational mission of public schools to teach students how to interact respectfully with the diverse citizens that make up the United States. Again, one way to do that is have the teacher model the desired behaviors, which means eschewing insulting and demeaning address, including calling a transgender student by the wrong pronoun. Even under a more narrow view of education as simply the means to ensure economic self-sufficiency, misgendering contravenes the school's attempt to "better prepare students for an increasingly diverse workforce and society." Grutter v. Bollinger, 539 U.S. 306, 330 (2003); *cf. id.* ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

contact with: their classroom teachers.[150] "[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."[151]

As noted earlier, the Supreme Court has held that government employers could bar their employees from being "rude to customers." If ensuring that government employees acquit themselves with a minimal degree of civility to the public as they pursue their official duties does not violate the Free Speech Clause, then surely ensuring that government employee teachers address their students during class with a minimal degree of civility, professionalism, and compassion likewise fully comports with the Free Speech Clause.

3. Speech pursuant to official duties is by government's representative in the classroom

Teachers speaking pursuant to their official duties serve as the government's representatives in the classroom. Certainly, no government wishes to convey, via their representatives, that some students are not equal to others. Always an aspiration, this may also be a legal requirement. Thus, the obligation to use a student's proper pronouns might also be mandated by law.

It might be required by Title IX of the Education Amendments Act of 1972 or state law equivalents. Title IX prohibits discrimination on the basis of sex in federally funded educational programs,[152] which today comprise all public schools since all receive some federal financial assistance.[153] Discrimination based on sex encom-

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[150] Ambach v. Norwick, 441 U.S. 68, 78 (1979) ("Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school.").

[151] *Id.* at 78–79.

[152] Section 901(a) of Title IX provides: "No 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) (2018).

[153] *Sex Discrimination*, U.S. DEP'T EDUC., https://perma.cc/A4TS-L8XW (last visited May 30, 2022).

passes discrimination based on gender identity because, as the Supreme Court recently held, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[154]

Treating transgender students less favorably than cisgender students because of their trans status is discriminatory on its face and therefore amounts to a facial violation of Title IX. For example, political science professor Meriwether of *Meriwether v. Hartop* had the option of calling his students by last names only. Instead, he chose to address everyone in his class as Ms. or Mr. except for Jane Doe, a transgender woman.[155] Jane Doe, who had legally changed her name and had registered as a woman,[156] requested that she too be addressed with the honorific Ms. like the other women in the class.[157] Meriwether refused.[158] Imagine if a teacher used Mr. or Ms. for everyone in his class except for the one Asian-American student or the lone Black student. We would view that discrimination as both facial and palpably hostile.

Further, a teacher's deliberate misgendering could create a hostile classroom

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[154] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020); *see also id.* at 1741–42 ("Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.").

[155] Meriwether v. Trs. of Shawnee State Univ., No. 1:18-CV-753, 2020 WL 704615, at *1 (S.D. Ohio Feb. 12, 2020) (noting that Meriwether "had referred to the transgender student by the student's last name only, while he addressed other students by the title 'Mr.' or 'Ms.' followed by their last names").

[156] Brief of Intervenors-Appellees Jane Doe and Sexuality and Gender Acceptance, Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021), 2020 WL 5044756, at *2. She also had updated her driver's license. *Id.*

[157] Meriwether v. Hartop, 992 F.3d 492, 499–500 (6th Cir. 2021); *see also* Brief of Intervenors-Appellees, *supra* note 156, at *2.

[158] *Meriwether*, 992 F.3d at 500.

environment,[159] which is also barred by Title IX.[160] Such a claim exists when a student is effectively denied an equal educational opportunity due to objectively hostile and abusive conduct.[161] The Department of Education has previously ruled that a "school's failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX."[162]

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[159] *Cf.* McNamarah, *supra* note 30, at 2288–89 ("Studies find that the use of the incorrect pronoun, name, or gendered title are experienced as microaggressions—'subtle forms of discrimination that communicate hostile or derogatory messages particularly to and about members of marginalized groups.'").

[160] Title IX prohibits sexual harassment. *Cf.* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005) ("[A] recipient's deliberate indifference to a teacher's sexual harassment of a student also 'violate[s] Title IX's plain terms.'"); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999) ("[A] recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher."). One type of sexual harassment is creation of a hostile environment due to sex. As the Supreme Court has described in the employment context, this occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Applying this standard to schools, circuit courts have found that "verbal abuse" that is "'so severe, pervasive, and objectively offensive' that it deprived [a student] of an educational benefit" amounted to illegal harassment. Sewell v. Monroe City Sch. Bd., 974 F.3d 577, 584 (5th Cir. 2020).

[161] Ripa v. Stony Brook Univ., 808 F. App'x 50, 51 (2d Cir. 2020) ("To state a hostile educational environment claim under Title IX, a plaintiff must plausibly allege that sex-based discriminatory conduct "created an educational environment sufficiently hostile as to deprive [him] of 'access to the educational opportunities or benefits' provided by his school"); Hayut v. State Univ. of N.Y., 352 F.3d 733, 750 (2d Cir. 2003) ("We also find that, to the extent the evidence suggests that Professor Young's conduct (a) discouraged Hayut from more active involvement in his classroom discussions, (b) compelled her to avoid taking additional courses taught by Professor Young, (c) caused her to withdraw from SUNY New Paltz altogether, or (d) simply created a disparately hostile educational environment relative to her peers, the above-described harassment could be construed as depriving Hayut of the benefits and educational opportunities available at SUNY New Paltz.").

[162] Bradley Domangue, *Transgender Issues in Public Schools*, 79 TEX. B.J. 626 (2016). While federal courts have not yet addressed misgendering in the Title IX hostile school environment context, the EEOC has held that intentionally misgendering in the workplace contributes to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964. *See, e.g.*, Jameson v. Donahoe, No. 0120130992, 2013 WL 2368729, at *2 (E.E.O.C. May 21, 2013) ("Intentional misuse of

In addition to statutory mandates, a school policy prohibiting misgendering might be required under the Equal Protection Clause. Public school teachers fulfilling their official teaching responsibilities in the classroom are acting under color of state law, and therefore their actions amount to state action.[163] State action, of course, must comply with the U.S. Constitution, and discrimination on the basis of sex triggers heightened constitutional scrutiny.[164]

In sum, the teacher in the classroom is acting pursuant to official duties, and therefore her speech is the government's when she discharges those duties. As the state's representative in the classroom, teachers must promote the government's missions rather than violate anti-discrimination norms and laws.[165] In order to successfully teach the state's designated curriculum, teachers must create an environment conducive to learning. That precludes misgendering. In order for students to learn to debate and interact with civility and respect, teachers must model those qualities themselves, which again precludes misgendering. That is, not only is gender affirmation a precondition for students to learn the state's designated curriculum, but it is also a necessary component to accomplish the state's goal of preparing future citizens.

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the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); Lusardi v. McHugh, No. 0120133395, 2015 WL 1607756, at *11 (E.E.O.C. Apr. 1, 2015) ("S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.").

[163] West v. Atkins, 487 U.S. 42, 50 (1988); 2 RODNEY SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14: 9 (3d ed.) ("Actions taken under color of law—Relationship to the state action doctrine") ("It is axiomatic that actions of a public official in the performance of his or her duties constitute 'state action,' even when those actions are not authorized by state law.").

[164] State actions that discriminate on the basis of sex trigger intermediate scrutiny, which means that the state must have a very important government interest in misgendering a student. *See* Caroline Mala Corbin, *The Government's Speech and the Constitution: Public School Teachers & Transgender Students & Pronouns*, BALKINIZATION (Mar. 19, 2020), https://perma.cc/WP39-GAW8 (examining the ways that misgendering might violate the Equal Protection Clause).

[165] *Cf.* Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 172 (3d Cir. 2008) (finding that "the teacher is acting as the educational institution's proxy during his or her in-class conduct").

III. ACADEMIC FREEDOM

The question of academic freedom looms large over the misgendering debate. In holding that a college professor had a free speech right to misgender a student in his class, the Sixth Circuit argued that even if the speech was pursuant to official duties, it fell within an academic freedom exception to the *Garcetti* rule.[166] There is a vast literature on academic freedom, and it is not the goal of this Article to comprehensively review it. Academic freedom is the notion that speech in the academy must be free in order to ensure the robust exploration, experimentation, and exchange of ideas necessary to promote learning and knowledge[167]—a result that benefits all of society.[168] As a teaching professor, I strongly support academic freedom,[169] and believe all teachers should enjoy some measure of independence in the classroom, especially in pursuit of teaching students sound academics and developing their citizenship skills.[170] However, as a descriptive matter, there is reason to

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

[167] Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 531 (2015) ("Academic freedom is at root about how universities might be able to fulfill the function of producing new knowledge."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.").

[168] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *1940 Statement on Academic Freedom and Tenure (with 1970 Interpretive Comments)*, AAUP, https://perma.cc/J272-3USN (last visited May 10, 2022) ("The common good depends upon the free search for truth and its free exposition.").

[169] Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907 (2006) ("It is hardly surprising that most American academics believe that academic freedom is important.").

[170] For example, teachers ought to be able to select age-appropriate supplemental material in their subject matter so long as it meets established academic standards. Thus, a state should not be able to ban U.S. history teachers from teaching historically accurate information on American history or compel science teachers to teach scientifically inaccurate information in science class. *Cf.* Edwards v. Aguillard, 482 U.S. 578, 586 (1987) ("Even if 'academic freedom' is read to mean 'teaching all of the evidence' . . . [t]he goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science."). *See infra* notes 217–218, 220 (emphasizing that classroom instruction should meet certain academic standards). Nor should schools be able to force teachers to misgender their students and

doubt that K-12 teachers enjoy academic freedom in the classroom.[171] As a normative matter, they may deserve more, but there are limits to academic freedom, and a teacher misgendering their students should not fall into any First Amendment protection for academic freedom.

A. Doctrinal: No Precedent for Academic Freedom in Schools

In *Meriwether v. Hartop*, the Sixth Circuit noted that "the threshold question is whether the rule announced in *Garcetti* [precluding free speech coverage of speech pursuant to official duties] bars Meriwether's free-speech claim."[172] The court concluded, "It does not" because of an academic freedom exception to the *Garcetti* rule.[173] Meriwether, however, was a college professor. Precedent does not unequivocally support an academic freedom exception for teachers in primary and secondary schools. (In fact, it is not guaranteed for professors either.)

When establishing the *Garcetti* rule, the Court acknowledged a potential carveout for academic freedom: "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[174] The Sixth Circuit cited pre-*Garcetti* Supreme Court cases to support its conclusion,[175] but *Garcetti* may well have overruled them. In short, the existence of any academic freedom exception is widely

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create a hostile learning environment or otherwise violate their professional responsibilities toward students. *See infra* notes 207–210 and accompanying text (discussing teachers' ethical responsibilities).

[171] Even if academic freedom does not limit state control over classroom teaching, other free speech considerations might, including students' free speech rights. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (holding that local school board's removal of books from the library violated Free Speech Clause).

[172] 992 F.3d 492, 504 (6th Cir. 2021).

[173] *Id.*

[174] Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

[175] *Meriwether*, 992 F.3d at 504 (first citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (plurality opinion), and then citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)).

recognized to be an open question.[176]

Moreover, any academic freedom exception probably applies only to the university level[177] if meant to protect the intellectual endeavors of researchers and scholars, "work not generally expected of elementary and secondary school teachers."[178] Justice Souter, whose *Garcetti* dissent triggered the caveat, envisioned it as a privilege for post-secondary professors: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"[179] The cases cited to support academic freedom by Justice Souter and the Sixth Circuit—including the seminal cases of *Sweezy v. New Hampshire*

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[176] Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom?*, 46 J.C. & U.L. 223, 226 (2021) ("[T]he Supreme Court has never issued a square holding on the question whether academic freedom is constitutionally protected."); Michael K. Park, *A Matter of Public Concern: The Case for Academic Freedom Rights of Public University Faculty*, 26 COMM. L. & POL'Y 32, 34 (2021) ("To this day, the Supreme Court has not established a First Amendment right of academic freedom that belongs to university professors."); Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1971 (2017) ("Notwithstanding talk in some Supreme Court cases about the importance of 'academic freedom' and the special role university faculties play in American democracy and society, it is not clear that even tenured public university professors enjoy any special expressive latitude, at least under the First Amendment.").

[177] 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.").

[178] Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 343–44 (6th Cir. 2010) ("As a cultural and a legal principle, academic freedom 'was conceived and implemented in the university' out of concern for 'teachers who are also researchers or scholars—work not *generally* expected of elementary and secondary school teachers.'" (quoting J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 288 n.137 (1989))). On the contrary, education at that level is partly about acquiring knowledge but partly about inculcating values. At the same time, one of those values is intellectual inquiry, so whether the right is grounded in academic freedom specifically or free speech generally, there should be some First Amendment protection for students and teachers outside the university.

[179] *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

(1957)[180] and *Keyishian v. Board of Regents* (1967)[181]—likewise refer to colleges and universities. In fact, the circuits courts have been extremely hesitant to acknowledge that K–12 schoolteachers have similar academic freedom protections.[182]

In addition, it is not clear that the Constitution protects the academic freedom of individual professors as opposed to their universities, at least not when there is a clash between the instructor and institution. To start, the Supreme Court regularly describes the right as belonging to the institution rather than the individuals within it. For example, Justice Frankfurter, a former Harvard law professor, wrote in his *Sweezy* concurrence that the four essential freedoms of a university are the rights "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[183]

The two Supreme Court cases that do involve claims by professors had no conflict between the institution and its employees.[184] In *Sweezy*, an economics professor, in defiance of the New Hampshire Subversive Activities Act, refused to answer

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[180] 354 U.S. 234 (1957) (plurality opin.).

[181] 385 U.S. 589 (1967).

[182] *See, e.g.*, Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 172 (3d Cir. 2008) ("We have held that a teacher's in-class conduct is not protected speech. . . . The rationale for this holding is that the teacher is acting as the educational institution's proxy during his or her in-class conduct, and the educational institution, not the individual teacher, has the final determination in how to teach the students."); Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1305 (7th Cir. 1980) ("[A]t the secondary school level the need for educational guidance predominates over many of the rights and interests comprised by 'academic freedom.'"); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 n.12 (9th Cir. 2011) ("As the Sixth Circuit recognized in *Evans-Marshall*, Ceballos's 'academic freedom' carve-out applied to teachers at 'public colleges and universities,' not primary and secondary school teachers." (internal citations and quotations omitted)); Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991) ("[T]he caselaw does not support Miles' position that a secondary school teacher has a constitutional right to academic freedom."); Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 82 n.80 (2002) ("[T]he same right to academic freedom does not exist at the primary and secondary school levels.").

[183] *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

[184] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 298 (1989) ("These two cases exhaust the Supreme Court's development of a university

the state attorney general's questions about his political affiliations and whether he advocated Marxism during an invited lecture at the University of New Hampshire, among other things.[185] In *Keyishian*, a professor refused to swear a loyalty oath as required by New York state law. Both professors won their red scare cases. But although each case emphasized the importance of academic freedom, neither actually turned on that doctrine for its outcome.[186]

In lower court cases where professors invoke free speech rights against the university with regard to teaching, the university generally prevails.[187] This sometimes occurs because the lower court concludes that academic freedom is a right belonging to the university only: "The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs."[188] But even if not, the university

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faculty member's right of academic freedom.").

[185] *Sweezy*, 354 U.S. at 243–44, 245–46 (1957) (noting that Sweezy refused to answer questions such as "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?" and "Did you advocate Marxism at that time?").

[186] *Sweezy* was decided on due process grounds. Byrne, *supra* note 184, at 293 ("The [*Sweezy*] Court's decision not to ground its ruling on a positive right of academic freedom, moreover, presaged the Court's refusal to give this right the practical force that its rhetorical enthusiasms promised."). *Keyishian* was decided on vagueness and overbreadth grounds. *Id.* at 295 ("The Court's preference for deciding academic freedom cases on other grounds was continued in *Keyishian v. Board of Regents* . . . ."); *see also* Carol N. Tran, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 945, 964 (2012) ("The principles of academic freedom have rarely formed the sole basis for court decisions and serve instead as a policy argument in support of their decisions.").

[187] Byrne, *supra* note 184, at 301–02 ("In short, as far as the courts are concerned, administrators may exercise extensive control over curricular judgments so long as they do not penalize a professor solely for his political viewpoint."); Scott, Brown & Yordy, *supra* note 137, at 1004 ("Courts considering the scope of faculty authority within the classroom have consistently upheld limits on the rights of faculty in both choosing the content of the course and the way in which that content is administered."); Rosenthal, *supra* note 176, at 240 ("This characterization of academic freedom in institutional and not individual terms has taken root in constitutional doctrine.").

[188] Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000), *noted in* Rodney A. Smolla, *Academic Freedom and Political Correctness in Uncivil Times*, 14 FIRST AMEND. L. REV. 267, 281 (2016); Park, *supra* note 176, at 33 ("[T]he current public employee speech framework offer[s] no special expressive privileges to the public university professoriate, but instead has recognized institutional-based

still usually wins. When on the Third Circuit, Justice Alito held that academic freedom might protect a professor's advocacy but not their teaching[189] and that "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates."[190] Other circuits agree.[191] The Eleventh, for example, agreed that professors had academic freedom but still held that right did not extend to interjecting Christian viewpoints into class discussion: "In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute."[192]

Finally, most teachers' academic freedom cases do not involve a conflict between teachers and students. When the *Sweezy* plurality wrote that "[t]eachers and students must always remain free to inquire, to study and to evaluate, [and] to gain

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academic freedom.").

[189] Edwards v. Cal. Univ. of Pa., 156 F.3d 488, 491 (3d Cir. 1998) ("[A]lthough a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (quoting Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1776 (3d Cir. 1990))).

[190] *Edwards*, 156 F.3d at 491 (quoting *Bradley*, 910 F.2d at 1776); Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 184 (3d Cir. 2020) ("Teachers do not have a protected First Amendment right to decide the content of their lessons or how the material should be presented to their students.").

[191] Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 370 (4th Cir. 1998) (en banc) ("We agree . . . that the school, not the teacher, has the right to fix the curriculum."); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 800 (5th Cir. 1989) ("Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula."); Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 342 (6th Cir. 2010) ("In concluding that the First Amendment does not protect primary and secondary school teachers' in-class curricular speech, we have considerable company."); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 970 (9th Cir. 2011) ("Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire.").

[192] Bishop v. Aronov, 926 F.2d 1066, 1076 (11th Cir. 1991); *see also id.* ("Dr. Bishop's interest in academic freedom and free speech do not displace the University's interest inside the classroom."); *cf.* Edwards v. Aguillard, 482 U.S. 578, 586 n.6 (1987) ("[I]n the State of Louisiana, courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from what is required. 'Academic freedom,' at least as it is commonly understood, is not a relevant concept in this context.").

new maturity and understanding; otherwise[,] our civilization will stagnate and die,"[193] it assumed alignment of their academic interests, not a clash as in the case of a teacher misgendering a student.

As a matter of doctrine, the academic freedom exception, if it exists at all, probably does not extend to K-12 teachers, and certainly not when their free speech rights conflict with school policy and student interests. In short, primary and secondary school teachers misgendering their students in the classroom cannot find shelter in academic freedom as the doctrine exists today. Nor should they.

B. Normative: Academic Freedom Should Not Cover Misgendering

Even if teachers did enjoy academic freedom with regard to their teaching—as they should, at least to some degree[194]—it should not extend to misgendering their students during class. The most influential articulation of academic freedom comes from the American Association of University Professors (AAUP).[195] Not surprisingly, its view of educators' rights is more expansive than that recognized by the Supreme Court and most lower courts.[196] Yet, as envisioned by the AAUP, academic freedom does not give educators carte blanche to do whatever they like in the classroom. On the contrary, academic freedom protects classroom speech that relates to their expertise and meets professional standards. In addition, their authority as teachers comes with certain responsibilities, especially towards their students.

According to the still-controlling 1940 statement on Academic Freedom Principles and Tenure, "Teachers are entitled to freedom in the classroom in discussing

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[193] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[194] *See supra* notes 133–134, 170.

[195] Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145, 179 (2009) (noting that "the overwhelming majority of public colleges and universities" have adopted the AAUP's principles).

AAUP Statement on Academic Freedom, *supra* note 168 (declaring that "Teachers are entitled to full freedom in research and in the publication of the results" and that "Teachers are entitled to freedom in the classroom in discussing their subjects").

their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."[197] The 1970 comment clarifies that the statement was not intended to chill examination of controversial issues.[198] After all, "Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster."[199] Instead, it was meant to "underscore the need for teachers to avoid persistently intruding material which has no relation to their subject."[200]

As a result, the AAUP's conception of academic freedom fails to cover a right to misgender students, given that misgendering seems to directly contradict its second principle that teachers should not interject extraneous controversial matter unrelated to their subject matter expertise. Gender identity certainly was not a curricular topic covered by, for example, the math, French, or orchestra teachers who lodged First Amendment complaints.[201] Nor is it within these teachers' area of expertise.

Moreover, according to the AAUP, "Professors have long recognized that membership in the academic profession carries with it special responsibilities."[202] These responsibilities include fostering a classroom environment that facilitates student learning. After all, academic freedom is meant to benefit both the professor and the student: "Academic freedom in its teaching aspect is fundamental for the

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[197] *Id.*

[198] *Id.* at n.4 ("The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.").

[199] *Id.*

[200] *Id.*

[201] This is not to say that the topic of gender identity cannot be discussed in an age-appropriate way at young ages. However, even if part of the lesson plan, how a teacher addresses a student is not an academic discussion of the topic, as explained in greater detail in Part III. In any event, gender identity is unlikely to be an issue in every class, as the teacher's address of the student is.

[202] *AAUP Statement on Academic Freedom*, *supra* note 168, at n.3; *see also id.* at n.4 (noting teachers' "responsibilities to their subject, to their students, to their profession, and to their institution").

protection of the rights of the teacher in teaching and of the student to freedom in learning."[203] Students cannot learn in a hostile or unwelcome environment.[204] Indeed, "nothing in the concept of academic freedom permits teachers to harass or bully students. Bullying and harassment are the most extreme forms of bad teaching; they do not exhaust the category."[205]

The responsibility to create a supportive classroom environment is also central to professional ethics. That is, misgendering not only falls outside academic freedom, but is contrary to professional fitness.[206] According to multiple codes of ethics, teachers have a professional responsibility to treat their students with respect.[207] For example, according to the National Education Association, teachers have an obligation to "not intentionally expose the student to embarrassment or disparagement."[208] The Association of American Educators agrees,[209] and adds that "[t]he professional educator makes a constructive effort to protect the student from conditions detrimental to learning, health, or safety."[210] Intentional misgendering is

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[203] *Id.*

[204] *See supra* notes 64–68 and accompanying text.

[205] Rosenthal, *Academic Freedom*, *supra* note 176, at 245–46.

[206] Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1979 (2017) ("But if a public school law professor is a KKK leader, can he really be effective and credible in teaching minority (or white) students? Even protectors of academic freedom values that chafe against 'civility' being used to rescind a faculty job offer distinguish between 'civility' and 'professional fitness.'").

[207] *See, e.g.*, *Code of Ethical Conduct*, NAT'L ASS'N EDUC. YOUNG CHILDREN (May 2011), https://perma.cc/LT7L-SMEK ("Principle 1.1: Above all, we shall not harm children. We shall not participate in practices that are emotionally damaging, physically harmful, disrespectful, [or] degrading . . . . This principle has precedence over all others in this Code.").

[208] *Code of Ethics for Educators*, NAT'L EDUC. ASS'N (Sept. 14, 2020), https://perma.cc/6A3Q-PRC6.

[209] *Code of Ethics for Educators*, ASS'N AM. EDUCATORS, https://perma.cc/5HXC-FKQP ("The professional educator does not intentionally expose the student to disparagement.").

[210] *Id.*; *see also Model Code of Ethics, Principle III: Responsibility to Students*, NAT'L ASS'N STATE DIRS. TCHR. EDUC. & CERTIFICATION, https://perma.cc/8JQX-7SX6 ("The professional educator has a primary obligation to treat students with dignity and respect. The professional educator promotes

humiliating, disparaging, and detrimental to both learning and health.[211]

Ultimately, academic freedom is a means to an end, and that end is to promote inquiry and the acquisition of knowledge.[212] In the classroom, it does this by ensuring free ranging debate.[213] As the *Keyishian* Court observed, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas." Accordingly, professors should not be hampered when discussing their areas of expertise. At the same time, students should not be hampered either. Misgendering students, however, is likely to have a significant chilling effect on the participation of transgender students: as documented earlier, it may even lead them to avoid the class altogether.[214] Therefore, in addition to being professionally irresponsible, it undermines the broader goals of academic freedom for the educator to create an unwelcome classroom for transgender students.

But what about censoring the professor? As discussed, if gender identity is not

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the health, safety, and well-being of students . . . .").

[211] *See generally* Part I; McNamarah, *supra* note 30, at 2268 ("[A]s a rejection of gender minorities' claim to their gender, particularly when repeated and defiant, misgendering can serve to humiliate its target."). It might also make transgender students less safe, as it cements the outsider status of transgender students already vulnerable to bullying and violence in school. *See id.* at 2273–74 ("To start, misgendering is dehumanizing in that it not only denies gender minorities' rights, qua persons, to assert their identity but also otherizes them. . . . In being dehumanizing, misgendering is a precursor to and justification for injustices towards gender minorities.").

[212] Robert Post, *Why Bother with Academic Freedom?*, 9 FIU L. REV. 9, 12 (2013) ("The traditional justification for academic freedom is that scholars produce knowledge that is valuable to society at large, and that scholars can produce this knowledge only if they are given the freedom to follow the disciplinary norms that define their scholarly enterprise.").

[213] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'").

[214] *See supra* Part I. Being stuck in a class with a teacher who misgenders you day in and day out is not an environment conducive to learning. That any student manages to persevere and learn despite their teacher's refusal to acknowledge their identity is a testament to their fortitude in the face of adversity, not the lack of adversity. Some students may not be able to overcome, especially if they are younger, or still struggling with their transition.

part of their course or area of expertise, it simply does not implicate academic freedom.[215] Finally, what exactly is lost to the marketplace of ideas by forbidding teachers' deliberate misgendering? Those bringing free speech claims argue that it is the idea that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires."[216]

To the extent that it is meant as a factual claim, it is scientifically inaccurate and has no place in public school classrooms. The point of academic freedom is to advance knowledge, but that knowledge should be grounded in certain professional standards.[217] "Academic freedom comes with the responsibility to act based on peer reviewed science and genuine expertise . . . ."[218] Granted, a science class may be an appropriate forum to address challenges to an existing scientific consensus if this is a regular feature of the class. But to interject factual inaccuracies into courses in

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[215] *See supra* notes 197–200 and accompanying text; *see also* Ailsa W. Chang, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915, 956–57 (2001) ("Justifications for academic freedom are strongest when the expression at issue directly relates to a professor's particular expertise or designated role at a university. . . . Statements by a professor that do not directly clarify or present course material presumptively deserve less protection than do other remarks uttered in the classroom . . . .").

[216] *See supra* notes 4–6 and accompanying text.

[217] Rosenthal, *supra* note 176, at 254 ("[N]o one thinks that academic freedom amounts to a license to teach, speak, or write ineptly, irresponsibly, or free from meaningful accountability."); Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 215 (2012) ("If a university penalizes professors in ways that are inconsistent with the disciplinary standards that define knowledge, it is acting inconsistently with academic freedom. Similarly, if an individual faculty member acts in ways inconsistent with disciplinary standards, she does not merit the protection of academic freedom.").

[218] Scott, Brown & Yordy, *supra* note 137, at 992 (quoting MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 39 (2009)); Post, *supra* note 167, at 533 ("Although the First Amendment would prohibit government from sanctioning an editorialist for the New York Times if he were inclined to write that the moon is made of green cheese, no astronomy department could survive if it were unable to deny tenure to a young scholar who was similarly convinced. . . . Academic freedom of research is thus nothing at all like a First Amendment right to say what one pleases without fear of legal repercussions.").

unrelated fields is a disservice to education.[219] Preventing a math teacher from misgendering students based on the discredited and erroneous belief that sex is fixed at conception should be no more problematic than preventing an English teacher from telling students that the earth is flat or that vaccines cause autism.[220]

And make no mistake, the reductive view that a person's sex is fixed at conception and determined only by their external sex organs at birth is not scientifically sound. Yes, many of us learned that XX chromosomes make you female with female genitalia, while XY chromosomes make you male with male genitalia. But we now know this is an overly simplistic view of sex.[221] As an initial matter, XY are XX are not the only combinations of sex chromosomes, which include XXY, XYY, just X, and many others.[222] So based on chromosomes, sex is not binary. In addition, sex development is a complex process, so that whether XY chromosomes develop into males and XX develop into females depends on a series of events, not all of which may occur.[223] This complicated interplay means that not all infants with external

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[219] Even the most zealous proponents of academic freedom, who insist on protection for professor's propagating blatant lies outside the classroom like Holocaust denial, do not claim professors have a right to misinform inside their classrooms. *See, e.g.*, Robert M. O'Neil, *Academic Freedom to Deny the Truth: Beyond the Holocaust*, 101 MINN. L. REV. 2065, 2072–73 (2017) (describing Northwestern's tolerance of a Holocaust denying engineering professor so long as he made no mention of his views in his classroom or to his students); *see also id.* ("Such remarkable impunity has persisted under two administratively imposed constraints: that Butz never mention Holocaust denial in his classroom or during student discussions, and that he continue to adequately teach the subject matter of his assigned courses.").

[220] Scott, Brown & Yordy, *supra* note 137, at 992 ("Academic freedom comes with the responsibility to act based on peer reviewed science and genuine expertise, and subject to oversight by other professional scholars—it is not limitless and not equivalent to the free speech rights of citizens in a public forum."); *cf.* Post, *supra* note 212, at 15 ("Constitutional principles of academic freedom . . . safeguard the disciplinary standards by which expert knowledge is recognized and produced.").

[221] Simón(e) D. Sun, *Stop Using Phony Science to Justify Transphobia*, SCIENTIFIC AMERICAN (June 13, 2019) ("The popular belief that your sex arises only from your chromosomal makeup is wrong."); Kim Elsesser, *The Myth of Biological Sex*, FORBES (June 15, 2020), https://perma.cc/U9LV-XTZZ ("The biology of sex is real, but it's extremely complicated, and there is sometimes no easy way to draw a line between the biologically male and female.").

[222] Sun, *supra* note 221.

[223] *See generally* Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex*

male genitalia have XY chromosomes and not all infants with external female genitalia have XX chromosomes.[224] In short, "[a]n XX baby can be born with a penis, an XY person may have a vagina, and so on."[225] In addition, as explained earlier, external genitalia at birth can be ambiguous and variable, rather than binary.[226] And chromosomes and external genitalia are only two of several markers (such as internal genitalia and secondary sex characteristics) that help determine sex.[227] Thus, according to the best scientific evidence available now, the religiously based binary view is simply inaccurate.[228] There may be two clusters along a spectrum, but there is still a spectrum.[229]

To the extent the teacher's understanding of sex represents an expression of religious belief, public school teachers ought not be promoting their religious viewpoints during instructional periods. The teacher is the school's representative in the classroom, and the state should not be imposing religious doctrine onto a captive student audience.[230] As feeble as the Establishment Clause is, it still bars religious

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Determination, SCIENTIFIC AMERICAN (Sept. 1, 2017) (illustrating complex processes and concluding "[d]etermination of biological sex is staggeringly complex, involving not only anatomy but an intricate choreography of genetic and chemical factors that unfolds over time").

[224] Risa Aria Schnebly, *Sex Determination in Humans*, EMBRYO PROJECT ENCYCLOPEDIA (July 16, 2021), https://perma.cc/7H4J-MF36.

[225] Ann Fausto-Sterling, *Why Sex Is Not Binary*, N.Y. TIMES (Oct. 25, 2018), https://perma.cc/SZ7Z-WWY7. *See also* Sun, *supra* note 221 ("XX individual could present with male gonads; XY individuals can have ovaries."); Katrina Karkazis, *The Misuses of "Biological Sex,"* LANCET (Nov. 23, 2019) ("Someone with what are understood as female-typical genitals and 46 XY chromosomes would be classified as female if genitals are used as the indicator but male if chromosomes are used.").

[226] *See supra* note 33 and accompanying text.

[227] *See supra* note 34 and accompanying text.

[228] Liza Brusman, *Sex Isn't Binary, and We Should Stop Acting Like It Is*, MASSIVE SCIENCE (June 14, 2019), https://perma.cc/98H6-BWTY ("The science is clear—sex is a spectrum.").

[229] Brusman, *supra* note 228 (arguing that "our biology isn't binary either: it, too, exists on a spectrum"); Montanez, *supra* note 223 ("The more we learn about sex and gender, the more these attributes appear to exist on a spectrum.").

[230] *See infra* notes 265–272271 and accompanying text (describing captive audience doctrine).

indoctrination of public school youngsters.[231] Even the Supreme Court's most recent Establishment Clause decision on private prayer in school recognized that a school teacher's religious speech rights are more constrained when the speech comprises instructing students in fulfillment of their paid job responsibilities.[232]

The goal of academic freedom is to promote knowledge. It therefore ensures that educators have free range to explore their area of expertise, even if controversial. But it is meant to protect discussion of the course topics, not all topics. And it is meant to foster discussion that meets professional standards, not those that interject inaccuracies, denigrates students, or chills participation. Simply put, academic freedom does not reach misgendering students in the classroom.

IV. THE FULL GOVERNMENT EMPLOYEE ANALYSIS

Even if the teacher's misgendering were not pursuant to official duties or fell into the academic freedom exception, that does not end the analysis. Under the *Garcetti* framework, it simply means that the teacher does not automatically lose. To prevail, a teacher must further establish that their speech was on a matter of public concern and that it was not unduly disruptive.[233] Neither should be taken as a given here.

A. Matter of Public Concern

"[A] public employee's speech is entitled to [First Amendment protection] only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'"[234] A teacher's misgendering is ultimately not speech on a matter of public concern; indeed, it may not be speech at all.

Words do not always equal "speech" for Free Speech Clause purposes. This

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[231] *Cf.* Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991) ("[T]he University's restrictions of him are not directed at his efforts to practice religion, *per se*, but rather are directed at his practice of teaching.").

[232] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (distinguishing the coach's private prayer from "instructing players" or other speech "the District paid him to produce as a coach").

[233] *See supra* notes 20–23 and accompanying text.

[234] City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) (citations omitted).

may be the case when "words . . . violate laws directed not against speech but against conduct."[235] Thus, according to the Supreme Court, words that amount to treason do not trigger free speech review.[236] Likewise, words that amount to discrimination do not either. That might include a written sign at a restaurant that reads "no transgender customers allowed."[237] It may also include speech that creates a hostile work environment in violation of Title VII:[238] In *R.A.V. v. City of St. Paul*, the Court noted that Title VII's ban on hostile work environments—environments often created by hostile words—did not violate the Free Speech Clause.[239] Along those lines, speech that contributes to a hostile educational environment in violation of Title IX may not violate the Free Speech Clause either. Although the Court has not fully explained this conclusion, it suggested in a subsequent case that discrimination by words is best characterized as the conduct of discrimination,[240] just as treason by

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[235] R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("Moreover, since words can in some circumstances violate laws directed not against speech but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.").

[236] *R.A.V.*, 505 U.S. at 389 ("[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets).").

[237] *Cf.* Rumsfeld v. Forum for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

[238] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 958 (2009) ("[T]he illegality of speech that contributes to a hostile work environment is a fait accompli."); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 705 (1997) ("[T]he [*R.A.V.*] Court suggested in dicta an exception of sorts for Title VII's prohibition of verbal workplace harassment[.]").

[239] *R.A.V.*, 505 U.S. at 389–90. The *R.A.V.* Court distinguished between laws targeting speech and those directed at conduct that incidentally sweep up certain speech and then intimated that Title VII was the latter: "[S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 389 (majority opinion).

[240] Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) ("In Hishon, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in R.A.V. v. St. Paul, we

words is best characterized as the conduct of treason. Accordingly, discrimination in the form of words might simply be categorized as discriminatory conduct.[241]

Even assuming that misgendering constitutes speech rather than conduct, it must still constitute a matter of public concern. Note that what matters for this factor is not so much the value to the speaker and their autonomy, but the value to the audience and the free flow of information.[242] The Court has held speech involves a matter 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 legitimate news interest; that is, a subject of general interest and of value and concern to the public."[243]

Despite this imprecise definition, the topic of gender identity is unquestionably an issue of great political importance.[244] However, school rules on pronoun use do not regulate classroom discussions on the topic of gender identity, transgender rights, or related social and political issues. They regulate how teachers call on students in the midst of discussions on different topics, be it French, math, or political science. As one district court astutely observed when rejecting a teacher's free

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cited Title VII . . . as an example of a permissible content-neutral regulation of conduct."); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 46 (2007) ("The *R.A.V.* Court explained that Title VII is 'directed not against speech but against conduct.'").

[241] Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 614 (2001) ("[T]he Court itself has suggested that some discriminatory speech is not protected speech but is instead harmful conduct."); *see also id.* at 614 n.72 (summarizing *R.A.V.*, 505 U.S. at 389–90, as concluding "Title VII's prohibition on sexual harassment is not a restriction on speech because discrimination is conduct not speech").

[242] *See supra* notes 116–118 and accompanying text (noting how this factor seems to view speech as primarily about the free flow of information in the marketplace of ideas and democratic governance rather than promoting the expressive autonomy of the speaker).

[243] Lane v. Franks, 573 U.S. 228, 241 (2014) (quotations omitted).

[244] Janus v. Am. Fed'n of State, County & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018) (describing "sexual orientation and gender identity" as "sensitive political topics" that "are undoubtedly matters of profound value and concern to the public" (internal quotations and citations omitted)).

speech right to misgender: "the act of referring to a particular student by a particular name does not contribute to the broader public debate on transgender issues. Instead, choosing the name to call a student constituted a private interaction with that individual student."[245]

Moreover, content alone is not dispositive, given that the Supreme Court has held that "content, form, and context" of contested speech should all be considered when deciding whether speech constitutes a matter of public concern.[246] One of the contextual factors that circuits consider is the point of the challenged speech. Is it meant to bring public attention to government misconduct? Or is it merely the latest volley in a personal workplace dispute?[247] Thus, for example, the Ninth Circuit concluded that "the fact that [a statement] was made because of a grudge or other private interest . . . may lead the court to conclude that the statement does not substantially involve a matter of public concern."[248]

Motive may likewise inform whether a teacher's speech in the classroom is on a matter of public interest. Speech meant to illuminate the topic of academic inquiry points towards being on a matter of public concern. For example, one professor's listing of various common slurs was held to be on a matter of public concern because they were part of a discussion in his Interpersonal Communication class on how language was used to oppress and marginalize minority groups.[249]

But that is not the case with teachers insisting on a free speech right to misgender. The misgendering is not designed to illuminate the topics addressed in class. Rather, these teachers are not so much explaining their religious point of view

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

[246] Connick v. Myers, 461 U.S. 138, 147–48 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

[247] *Id.* at 148 (holding that with one exception, a questionnaire about district attorney's office was not on a matter of public concern because "the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors").

[248] Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 965 (9th Cir. 2011).

[249] Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 675 (6th Cir. 2001).

as they are imposing it on their students.[250] Furthermore, as the teachers themselves argued, the misgendering was meant to fulfill a personal religious obligation, and "[c]ontroversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection."'[251] Thus, the typical misgendering teacher is not trying to stir debate on the topic of gender identity; they are acting on a belief they think is beyond debate.[252] As one trio of scholars explained, what really was at issue was "a personal matter relating to his religious beliefs."[253]

B. Balancing of Interests

The last step of the government employee speech analysis requires weighing its free speech value against its disruptiveness to the government workplace and its goals.[254] The Supreme Court has described this as "balanc[ing] between the interests of the [government employee], as a citizen, in commenting upon matters of

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[250] Chan Tov McNamarah, *Preliminary Report and Recommendation Rejects Professor's Faith-Based Excuses for Misgendering Transgender Student*, LGBT L. NOTES, Oct. 2019, at 17, 18 ("But even accepting Plaintiff's portrayal, she observed the speech did not advance a viewpoint that informed or influenced public debate. Rather, it sought to impose Plaintiff's personal beliefs on Doe.").

[251] *Hardy*, 260 F.3d at 678.

[252] "Like one's viewpoint on politics and politicians, one's viewpoint on religion is arguably always a matter of public concern . . . ." Corbin, *supra* note 116, at 1218. Consequently, some courts have taken the position that an inherently religious practice like praying or wearing religious symbols satisfies the matter of public concern requirement by expressing a viewpoint on religion. *See, e.g.*, Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003) (holding that teacher's religious jewelry "is an expression of her personal religious convictions and viewpoint, which is a matter of social and community concern entitled to the full protection of the First Amendment"). However, other courts do not. *See, e.g.*, Daniels v. City of Arlington, 246 F.3d 500, 504 (5th Cir. 2001) (holding that police officer's "communication of his personal religious views through the [cross] pin is not speech addressing a 'legitimate public concern'"). In any event misgendering is not an obvious religious practice, and therefore does not benefit from this approach.

[253] Scott, Brown & Yordy, *supra* note 137, at 982.

[254] Lane v. Franks, 573 U.S. 228, 242 (2014) ("[T]he next question is whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer." (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006))).

public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[255] Here, the school's interests, not least of which is ensuring that all students have an equal opportunity to learn and thrive at school, should tip the scales against the teacher.

This weighing of interests is a true balancing act. The less valuable the speech, the less disruption the Free Speech Clause tolerates, and vice-versa.[256] Given uncertainty over whether the teacher's misgendering of students qualifies as a matter of public concern in the first place, even a minimal amount of interference with school missions should mean the teacher loses. In fact, a public school teacher's misgendering is extremely disruptive.

The Supreme Court has recognized various and sometimes overlapping government interests that have prevailed over an employee's free speech interests. The most obvious is when the government employee's speech renders the employee incapable of effectively carrying out their official duties. Another is when the speech destroys necessary close working relationships.[257] A third is speech that brings the government entity into serious disrepute.[258] All are implicated when a teacher misgenders a student.

A teacher's misgendering of students in their class greatly interferes with the performance of their designated job.[259] As described earlier, teachers are responsi-

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

[256] Connick v. Myers, 461 U.S. 138, 164 n.4 (1983) ("The degree to which speech is of interest to the public may be relevant in determining whether a public employer may constitutionally be required to tolerate some degree of disruption resulting from its utterance."); *see also Lane*, 573 U.S. at 242 ("[A] stronger showing . . . may be necessary if the employee's speech more substantially involve[s] matters of public concern.").

[257] *Connick*, 461 U.S. at 151–52 ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.").

[258] City of San Diego v. Roe, 543 U.S. 77, 81 (2004) (balancing favored employer in part because employee's speech "brought the mission of the employer and the professionalism of its officers into serious disrepute").

[259] It is also contrary to their professional responsibilities. *See supra* notes 206–211 and accompanying text (describing codes of conduct).

ble for both teaching certain curriculum as well as modeling appropriate civil discourse.[260] Misgendering hampers the misgendered students' ability to learn the academic material covered in class.[261] Indeed, it is hard to imagine a transgender student developing the necessary trust and close working relationship with a teacher who refuses to affirm their gender.[262] Meanwhile, other students will fail to learn about basic civility. In sum, teachers who deliberately misgender their students are unprofessional, subpar teachers.[263]

In addition, school administrators that permit teachers to misgender their students invite litigation and damage the school's reputation. The Supreme Court was willing to find in the government's favor when a government employee sold sexually explicit videos of himself in uniform that greatly embarrassed his government entity but did not harm anyone.[264] How much greater the damage to reputation when a government entity allows an employee to harm someone entrusted to its care. The reputational hit is greater still if the school knowingly permits discrimination. Of course, it need not reach that level to tarnish a school's reputation. In any event, ensuring compliance with Title IX is on its own a government interest that would justify a minimal intrusion on a teacher's free speech rights.

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[260] Miles v. Denver Pub. Sch., 944 F.2d 773, 778 (10th Cir. 1991) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.").

[261] *See supra* notes 54–68 and accompanying text (describing transgender students in school).

[262] *Cf.* Sam Dylan Finch, *What You're Actually Saying When You Ignore Someone's Gender Pronouns*, LET'S QUEER THINGS UP! (Sept. 15, 2014), https://perma.cc/J9FU-3NGT ("When I choose to misgender you, I have decided my own interests are far more important than your safety, validation, and dignity. And when I made that decision, I probably gave you the impression that I am not someone you can trust.").

[263] *Cf.* Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986) ("Repeated failure by a member of the educational staff . . . to exhibit professionalism degrades his important mission and detracts from the subjects he is trying to teach.").

[264] City of San Diego v. Roe, 543 U.S. 77, 81 (2004) (describing a police officer's sale of videos of himself stripping off a police uniform and masturbating as a "debased parody" that "brought the mission of the employer and the professionalism of its officers into serious disrepute").

In fact, there are several reasons why the government's interests are particularly strong in the school context. First, students are a captive audience. The Supreme Court has recognized that a speaker's free speech rights may be diminished when speaking to captive audiences who have no ability to avoid unwelcome speech. Specifically, under the captive audience doctrine, even private speakers may have to silence themselves if "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[265] Examples of people recognized as captive include people at home,[266] patients at a medical facility,[267] and even people stuck on public transportation.[268]

Public school students in class are about as captive as it gets;[269] and unlike the examples above, their captivity is due to the government. The government mandates that children attend school, and then requires students to be in the classroom

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[265] Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."); *see also* Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

[266] Frisby v. Schultz, 487 U.S. 474, 484 (1988) (upholding a ban on picketing a private residence and observing that, "Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different."); Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 737 (1970) ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . .").

[267] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 945–46 (2009) (explaining that while the Supreme Court has not expressly labeled patients as captive to abortion protesters, it tacitly did in *Hill v. Colorado*, 530 U.S. 703 (2000), when arguing that the right to avoid unwanted speech existed outside the home and that while speakers have a right to try and persuade others, listeners have "'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined").

[268] Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (plurality opin.) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." (internal quotations and citations omitted)).

[269] *See, e.g.*, Martin v. Parrish, 805 F.2d 583, 586 (5th Cir. 1986) (holding that college students in class were a captive audience); Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 968 (9th Cir. 2011) (describing students in teacher's classroom as captive).

with a teacher they most likely did not choose.[270] Given the captive audience doctrine countenances restricting the speech of purely private citizens without offending the Free Speech Clause, then surely it countenances restricting the speech of government employees inflicted on students thanks to the government's own exercise of power. In fact, the Supreme Court in *Bethel School District v. Fraser* pointed to the captivity of students at a school assembly[271] to help justify curtailing a student's raunchy speech.[272] If a student must watch their speech due to the captivity of their student audience, then so too should a teacher.

Moreover, students are not just exceptionally captive, they are also exceptionally vulnerable to their teacher's words. They are vulnerable due to their age, which makes them "impressionable" and "susceptible."[273] They are also vulnerable due to the influence and power that their teachers wield. Teachers are influential because they are adult role models that students see day after day; they are powerful because they mete out grades and punishment.[274] Finally, as explained in Part I, transgender students are more vulnerable still. A teacher should not be able to exploit their position to impose on "the impressionable and 'captive' minds before him."[275]

Taken together, the school's interests in educating children, in ensuring they thrive, in molding them into civil citizens, in avoiding discrimination and disrepute, in protecting captive audiences, especially young impressionable ones, all

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[270] *Cf.* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements . . . .").

[271] 478 U.S. 675, 684 (1986) (describing "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").

[272] *Id.* at 689 (Brennan, J., concurring) ("Respondent's speech may well have been protected had he given it in school but under different circumstances [i.e., not a school assembly] . . . .").

[273] *Edwards*, 482 U.S. at 584 (describing students at school as impressionable).

[274] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 116 (2001) ("In *Edwards*, we mentioned that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models."); *see also supra* notes 148–151 and accompanying text (discussing teachers as influential role models).

[275] *Cf.* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 968 (9th Cir. 2011) ("Johnson took advantage of his position to press his particular views upon the impressionable and 'captive' minds before him.").

these interests surmount the questionable claim that a state employee entrusted with educating the nation's young has a right to violate professional guidelines and misgender students. In short, if a court ever reached this question, the balance does not favor the teachers.

Conclusion

Public school teachers do not have and should not have a free speech right to misgender their students. Numerous studies find that misgendering at school harms both the mental health and the education of trans students. Doctrinally, teachers' instructional speech is pursuant to official duties, and therefore is essentially the government's own speech. And the government should be able to prevent its paid representatives from undermining its valid educational missions, as a teacher misgendering their students surely will. Indeed, misgendering clashes with a teacher's code of ethics barring the intentional humiliation of their charges. Even assuming academic freedom reaches the K–12 classroom, academic freedom does not give educators the right to say whatever they want in the classroom. First, academic freedom is meant to benefit both teachers and students. Second, academic freedom is meant to encourage unencumbered debate on the educator's area of expertise, not their religious views on tangential topics that would never pass peer review. In any event, the school's weighty interests in protecting and educating the captive and impressionable students in its care outweighs the slim free speech value to the community of the teacher's misgendering.