

2023

## Misgendering, Academic Freedom, the First Amendment, and Trans Students

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### Recommended Citation

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# MISGENDERING, ACADEMIC FREEDOM, THE FIRST AMENDMENT, AND TRANS STUDENTS

*Laura Beth Nielsen,<sup>†</sup> Elsinore Kuo,<sup>††</sup> and Evan Zhao<sup>†††</sup>*

## ABSTRACT

This Article explores the intersection of First Amendment claims (religious and speech) and the social science research about the harms of misgendering transgender people in the classroom and beyond. Using medical and social science data about the harms of misgendering transgender and non-binary people, we show that misgendering dramatically and negatively impacts transgender students in the classroom and in society. We show that the harms are not individualized but are collective; they derive from being part of a stigmatized minority population. After demonstrating the harms of misgendering, we consider the First Amendment claims that seek to offer constitutional protection to misgendering. We argue that on balance, the First Amendment claims of free speech, academic freedom, and freedom of religion provide no basis on which professors should be allowed to misgender trans students in the classroom. As we show, debates about the First Amendment, when analyzed through a lens that considers social hierarchy, fail to provide a constitutional mandate for speakers or religious practitioners to engage in misgendering. Rather, we point out that the law does not provide a consistent principle to determine what is protected speech, but instead privileges the claims of already privileged groups, in this case white evangelical Christians. Given the troubled history of First Amendment law that purports to be “neutral” but protects privileged social statuses, it is disingenuous and constitutionally suspect to allow a First Amendment claim to cover misgendering students in the classroom. We argue that transgender students should be protected by their institutions from faculty members who prefer to stubbornly misgender students in the classroom. Even assuming for the sake of argument that misgendering is “protected”

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speech, professors who choose to misgender are intentionally harming their students, a breach of professional norms and most schools' policies.

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## INTRODUCTION

In 2016, an undergraduate student at Shawnee State University, located in Ohio, requested that her philosophy professor, Nicholas Meriwether, use gendered feminine titles and pronouns when addressing her.<sup>1</sup> Being “a devout Christian,” and convinced that “no one would have assumed that [Doe] was female based on Doe’s outward appearances,” Meriwether refused to refer to the student as “Ms. Doe.”<sup>2</sup> He preferred instead to “compromise” and just refer to Doe as Doe (with no honorific), although the other students in the class were addressed as “Mr. or Ms. LastName.”<sup>3</sup> Ms. Doe complained to the school administration.

After mistakenly misgendering Ms. Doe as “Mr. Doe” about two weeks into the term, Ms. Doe made a second complaint to the school, despite Professor Meriwether’s immediate correction and apology. An investigation of Professor Meriwether was undertaken at Shawnee State’s Title IX office for violation of the school’s gender identity discrimination policy. As the investigation went on, Ms. Doe completed Professor Meriwether’s class, earning a “high grade” that reflected her “very good work and frequent participation in class.”<sup>4</sup>

The Title IX investigation was minimal at best. After all, Professor Meriwether was not denying that he misgendered Ms. Doe. During the discussions associated with the investigation, Professor Meriwether

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1. In keeping with Doe’s request to the professor, we will refer to Doe using she/her pronouns and using the honorific “Ms.” as she requested. Throughout this Article we refer to transgender students by the pronouns the students themselves use. Where necessary, but as infrequently as possible, we may need to refer to a student’s gender assigned at birth for clarity in writing, but we seek to honor the gender claimed by any person.
  2. Meriwether v. Hartop, 992 F.3d 492, 498–99 (2021).
  3. *Id.* at 499.
  4. *Id.* at 500.

proposed a second “compromise” for his compliance with the school’s Title IX policy going forward. Meriwether’s proposed compromise was that he would use students’ “preferred” pronouns, but only if he could include a statement in his syllabus that noted Professor Meriwether was “doing so under compulsion and set[] forth his personal and religious beliefs about identity.”<sup>5</sup> Shawnee State rejected the proposed compromise, instructing Professor Meriwether that he would need to refer to students according to the gender they declare and that he may not put the disclaimer on his syllabus.<sup>6</sup>

Professor Meriwether was found to be in violation of Shawnee State’s prohibition of discrimination based on gender identity for refusing to use the pronouns and honorifics that reflect students’ gender identities.<sup>7</sup> After exhausting his appeals within the university (in other words, he was found to be in violation of the policy at multiple levels of adjudication), Professor Meriwether filed a lawsuit in the United States District Court for the Southern District of Ohio, claiming Shawnee State was violating his First Amendment rights of free speech and expression as well as his religious freedom. The case was dismissed, but the U.S. Court of Appeals for the Sixth Circuit reversed the dismissal. We await the trial in the district court.<sup>8</sup>

The case is unique for a variety of reasons, but most significantly, Ms. Doe is not a party to the suit. The dispute is between Meriwether and Shawnee State, which leaves little room for considering the impact of the misgendering on Ms. Doe directly. Rather, the case has the school making those arguments for her, alongside their own arguments about managerial authority, educational purpose, and the like.<sup>9</sup>

The *Meriwether* case exemplifies the constitutional and social conflicts that are increasingly dominating the United States’ jurisprudential landscape for trans students. Barring something dramatic happening in the composition of the Supreme Court, we can expect more and more of these cases. White Christian evangelicals have mounted a coordinated effort to use the courts to argue that “religious freedom” *requires* religious conservatives to shun and dehumanize LGBT+ people at every opportunity.<sup>10</sup> This means assuming the gender of everyone around them based on appearance and then using that imputed gender to limit the freedom of trans people, such as by refusing

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5. *Id.*

6. *Id.*

7. *Id.* at 500–01.

8. *Id.* at 502–03, 518.

9. *Id.* at 502.

10. We use the acronym “LGBT+” throughout the Article for consistency. LGBT+ refers to lesbian, gay, bisexual, and transgender persons. The plus is meant to include gender nonbinary people (GNB) as well.

access to commercial transactions<sup>11</sup> and by making access to public toilets incredibly fraught.<sup>12</sup> Not only do religious conservatives like Professor Meriwether insist that their own assessment of any person's gender is correct (a folly, at the very least), they insist on calling those individuals by incorrectly assumed gender pronouns and honorifics.

We first examine the landscape of test-case litigation that is seeking to establish constitutional protections based on religious and free speech grounds for teachers who seek to misgender their students. We then consider a considerable body of social science evidence about the harms of misgendering in schools and other contexts. We then offer an alternative constitutional analysis to current trends. If we consider the impact of misgendering on trans students and analyze misgendering from the standpoint of relational rights, we move beyond the crude First Amendment absolutism of current cases.

This Article proceeds in three parts. Part I examines the process and harms of misgendering to provide the reader with an overview of the social science and medical evidence about what happens when trans or gender-nonbinary (GNB) people are misgendered with a particular focus on misgendering by those in positions of power. With a broad understanding of the significance of the proven harms of misgendering, Part II of the Article assesses the First Amendment claims for professors to misgender students in the classroom. This Part begins with a description of the political and social-movement landscape of the anti-trans movement and goes on to decouple the freedom of religion and the freedom of speech claims to show that neither could be fairly conceived to offer the right to misgender. Part III continues to consider an alternative theory of rights—what we call “relational rights”—to thinking through the freedoms and obligations of the First Amendment

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11. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018).
  12. See Dana Goldstein & Colbi Edmonds, *Florida Approves Tough Discipline for College Staff Who Break Bathroom Law*, N.Y. TIMES (Aug. 23, 2023), <https://www.nytimes.com/2023/08/23/us/florida-colleges-transgender-bathroom-law-desantis.html> [<https://perma.cc/E5MF-F4WG>] (describing the Florida State Board of Education's implementation of Florida's new bathroom law, which prohibits transgender people from using bathrooms that do not align with their assigned sex at birth); Hannah Schoenbaum & Gary D. Robertson, *North Carolina Laws Curtailing Transgender Rights Prompt Less Backlash than 2016 "Bathroom Bill,"* AP NEWS (Aug. 18, 2023 2:56 PM ET), <https://apnews.com/article/transgender-health-north-carolina-new-laws-b28aed0d20d363c22b1107135125c2d6> [<https://perma.cc/4SP5-FMZU>] (“When [North Carolina's bathroom bill] passed, major sports tournaments, businesses and conventions pulled out of North Carolina, costing the state hundreds of millions of dollars in revenue before the policy was eventually rolled back in 2017 and settled in federal court in 2019.”).

(both speech and religion) and in which misgendering would not be a cognizable claim being outweighed by the harms associated with it.

## I. THE PROCESS AND HARMS OF MISGENDERING

No rights are absolute. Despite widespread misunderstanding of the First Amendment among laypeople,<sup>13</sup> “free speech” and “freedom of religion” are not absolute. First Amendment rights are limited by constitutional balancing. We weigh the value of forms of expression, like cigarette advertising, libel, and inciting lawless action, and the benefits of allowing such speech (expression) against the harms associated with addicting products, ruining a person’s career with a lie, and the public order. Before a doctrinal analysis of the First Amendment “right” to purposely misgender trans and GNB people we must understand the harms of misgendering. After some definitional work, this Part of the Article analyzes the body of social science and medical research that demonstrates the harms of misgendering trans and GNB people.

What is misgendering? And, how does it occur? What’s at stake with misgendering in the college classroom and in society more broadly?

“Misgendering” is “to use the wrong pronouns or other gender-specific words when referring to or speaking to someone, especially a transgender person.”<sup>14</sup> But misgendering is not limited to transgender persons—GNB people also experience misgendering.<sup>15</sup> According to the National Institutes of Health, *deadnaming* refers to the use of a transgender person’s name given at birth.<sup>16</sup> It is considered harmful to use because “first names are often gender-specific,” and the “chosen name . . . is part of the social transition to align one’s gender presentation with one’s gender identity.”<sup>17</sup> “Gender-affirmation,” in many ways the opposite of misgendering, refers to social interactions in

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13. LAURA BETH NIELSEN, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 26–27 (Austin Sarat ed., Princeton University Press 2004); *see generally* CATHARINE MACKINNON, *ONLY WORDS* (1993).
  14. *Misgendering*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/misgender> [<https://perma.cc/4WLG-NUDD>] (last visited Mar. 27, 2023).
  15. For this reason, this Article will sometimes refer to “TNB persons” (for “transgender nonbinary”) or simply transgender people.
  16. *Understanding the Impact of Misgendering and Deadnaming*, NAT’L INSTS. HEALTH: OITE BLOG (July 31, 2023), <https://oitecareersblog.od.nih.gov/2023/07/31/understanding-the-impact-of-misgendering-and-deadnaming/> [<https://perma.cc/2TSA-QX7J>].
  17. Stephen T. Russell, Amanda M. Pollitt, Gu Li & Arnold H. Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503 (2018).

which transgender people are referred to by their correct name and pronouns.<sup>18</sup>

Misgendering can happen intentionally or unintentionally. While in modern popular usage the term refers to things like using the wrong pronouns for trans and GNB people, misgendering can also occur in other everyday contexts to those born cis: babies in neutral clothing (or, even worse, in clothing for the opposite gender! Eek!); to young girls who present a particular way with short hair, wearing “boys’ clothes, or otherwise breaching gendered norms of appearance (as “tomboys”); and to boys who present as effeminate, have long hair, or otherwise cross gendered boundaries of appearance.

Misgendering, therefore, is not new. And yet there is a newly reinvigorated struggle to police traditionally binary gendered boundaries using the law. These laws come in a broad variety of forms, including laws to prevent cross-dressing near children,<sup>19</sup> to prevent gender-affirming (transition) medical and psychological care,<sup>20</sup> and to police gendered bathroom usage.<sup>21</sup> This politically motivated panic around the treatment of trans and GNB persons represents a new vigilance and fixation on gender assigned at birth even as social science, history, and medical research continue to erode the fixed categories of male- and female-only genders.

Misgendering is frequent and carries with it significant psychological, physical, and social harms. The frequency and perceived sleight associated with being misgendered are positively associated with higher rates of depression and stigma, as well as suicidal ideation. Differences exist between genders, but psychological trauma and mental illness are associated with increased severity of PTSD symptoms, riskier sexual behaviors, anxiety, psychological distress, eating concerns, and suicidal ideation and risk, among many other factors.<sup>22</sup>

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18. Jae M. Sevelius, Deepalika Chakravarty, Samantha E. Dilworth, Greg Rebhook & Torsten B. Neilands, *Gender Affirmation Through Correct Pronoun Usage: Development and Validation of the Transgender Women’s Importance of Pronouns (TW-IP) Scale*, 17 INT’L J. ENV’T RSCH. & PUB. HEALTH 9525, 9526 (2020).
  19. Mariah Timms & Laura Kusisto, *Tennessee Governor Signs Bill Restricting Transgender Healthcare for Minors*, WALL ST. J. (Mar. 2, 2023, 7:31 PM), <https://www.wsj.com/articles/tennessee-governor-signs-bill-restricting-transgender-healthcare-for-minors-9e178c33> [<https://perma.cc/LPF7-32CE>].
  20. *Attacks on Gender-Affirming and Transgender Health Care*, AM. COLL. OF PHYSICIANS (NOV. 11, 2022), <https://www.acponline.org/advocacy/state-health-policy/attacks-on-gender-affirming-and-transgender-health-care> [<https://perma.cc/2QS2-GC35>].
  21. See sources cited *supra* note 12.
  22. Puja Seth, Delia L. Lang, Ralph J. DiClemente, Nikia D. Braxton, Richard A. Crosby, Larry K. Brown, Wendy Hadley & Geri R. Donenberg,

Social psychologists and scholars of higher education have long known that invoking a vulnerable stereotype negatively impacts academic performance.<sup>23</sup> For women and racial minorities, negative stereotypes have repeatedly been shown to decrease academic performance significantly.<sup>24</sup>

Although relatively more recent than the scholarship on stereotype threat to racial and cisgender academic performance, research following this tradition suggests the same effects for trans and GNB students.<sup>25</sup> Some scholars indicate that “trigger warnings” could or should be used to mitigate harms of difficult conversations in the classroom.<sup>26</sup> Trigger warnings are statements made aloud or printed in syllabi that seek to forewarn students prior to discussing or reading, intended to “allow trauma survivors to adequately prepare to engage with difficult material,” but unfortunately they do not seem to mitigate the psychological distress experienced by target groups.<sup>27</sup>

Misgendering, a form of stereotyping that produces threat, introduces a unique discriminatory factor into the classroom that sets trans and GNB students back academically and creates an environment of hostility and distrust. Misgendering has been singled out as one of the most frequent forms of verbal harassment experienced by trans students at multiple levels in higher education and in various disciplines.<sup>28</sup>

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*Gender Differences in Sexual Risk Behaviours and Sexually Transmissible Infections Among Adolescents in Mental Health Treatment*, 9 SEX HEALTH 1 (2012).

23. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCH. 797, 808 (1995).
24. Charlotte R. Pennington, Derek Heim, Andrew R. Levy & Derek T. Larkin, *Twenty Years of Stereotype Threat Research: A Review of Psychological Mediators*, 11 PLOS ONE 1, 2 (2016).
25. See Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51 (2014).
26. India Bryce, Nicola Horwood & Jessica Gildersleeve, *Pulling the Trigger: A Systematic Literature Review of Trigger Warnings as a Strategy for Reducing Traumatization in Higher Education*, TRAUMA, VIOLENCE & ABUSE 1, 10 (Aug. 2022).
27. Payton J. Jones, Benjamin W. Bellet & Richard J. McNally, *Helping or Harming? The Effect of Trigger Warnings on Individuals with Trauma Histories*, 8 CLINICAL PSYCH. SCI. 905, 905 (2020).
28. See Cameron T. Whitley, Sonny Nordmarken, Simone Kolysh & Jess Goldstein-Kral, *I've Been Misgendered So Many Times: Comparing the Experiences of Chronic Misgendering Among Transgender Graduate Students in the Social and Natural Sciences*, 92 SOCIO. INQUIRY 1001–02, 1013, 1017–20 (2022).



In an Australian survey of 704 LGBT+ students, researchers found that the lack of support of trans students' identities harms students' academic self-concept and makes them less confident and motivated learners. Not only did gender-diverse students have lower feelings of connection and belonging in their schools, but they also considered themselves worse students and suffered lower motivation and confidence in their ability to learn. It was also found that gender-diverse students who had supportive teachers were more confident learners and had better relative academic performance.<sup>29</sup>

Surveys report that nearly a third of trans and GNB graduate students are chronically misgendered in their graduate programs, and in the most extreme of cases, this misgendering has been cited as a reason for students dropping out or considering dropping out of their programs.<sup>30</sup>

In a qualitative study with twenty-eight LGBT+ students and nineteen school health professionals (including school psychologists, nurses, and guidance counselors), misgendering was singled out as one of the most frequent forms of verbal harassment experienced by trans students at multiple levels of schooling.<sup>31</sup>

Trans students' sense of belonging in a school community is also significantly hurt when professors in positions of authority refuse to recognize their personhood. The lack of affirmation of trans students inhibits their ability to focus on their studies and diminishes their capacity to develop healthy social lives in a school setting, as outlined in the previous paragraph. Interviews with students between the ages of seventeen and twenty-six demonstrated that misgendering was one more thing they had to worry about in their lives as students participating in a school community.<sup>32</sup>

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29. Jacqueline Ullman, *Teacher Positivity Towards Gender Diversity: Exploring Relationships and School Outcomes for Transgender and Gender-Diverse Students*, 17 *SEX EDUC.* 276, 277–78, 281–82, 285 (2017); see also Tracey Peter, Catherine Taylor & Tamara Edkins, *A Call for "Trans-Action": The Role of Enacted Stigma in Mediating the Relationship Between School Climate and School Attachment Among Gender Minority Students*, 63 *ALBERTA J. EDUC. RSCH.* 328, 331, 335, 337 (2017) (discussing how transgender students experience lower school attachment, which correlates with depression and dropping out of school).
30. Whitley et al., *supra* note 28, at 1018; Ullman, *supra* note 29, at 280.
31. V.A. Earnshaw, D.D. Menino, L.M. Sava, J. Perrotti, T.N. Barnes, D.L. Humphrey & S.L. Reisner, *LGBTQ Bullying: A Qualitative Investigation of Student and School Health Professional Perspectives*, 17 *J. LGBT YOUTH* 280, 280, 288, 291 (2020); Whitley et al., *supra* note 28, at 1013, 1018–20.
32. See India Evans & Victoria Rawlings, "It Was Just One Less Thing that I Had to Worry About": *Positive Experiences of Schooling for Gender Diverse and Transgender Students*, 68 *J. HOMOSEXUALITY* 1489, 1499 (2021).

Recognition of trans students' names and pronouns on campus has been linked to a stronger sense of belonging, school attachment, and a more positive perception of campus climate, and the opposite effect has also been established in survey research of trans students in higher education.<sup>33</sup> In a Canadian survey of over 3,700 high school students, it was found that among trans high schoolers, harassment and victimization led to lower levels of school attachment, which has been connected to worse academic performance. Not only that, but the highest predictor of school attachment was trans students' comfort in speaking to school staff about their gender identity, while the second-highest predictor linked disaffirming language about their gender expression to school detachment.<sup>34</sup>

The Australian survey of 704 LGBT+ teens aged fourteen to eighteen also showed that when students' teachers demonstrated positivity toward gender diversity (the recognition of gender-diverse identities), students experienced higher levels of school connection, stronger student/teacher connections, higher academic self-concept, and higher confidence and motivation in learning, while the absence of teacher positivity toward gender diversity exhibited the inverse effects.<sup>35</sup>

A mixed-methods study of 507 trans and gender-diverse (TGD) graduate and undergraduate students also corroborated these findings, linking trans-inclusive policies on campus (such as the ability to change one's name on campus records without a legal name change) to a greater sense of belonging and a positive perception of campus climates for TGD students. On the other hand, misgendering led to stress for many TGD students, who oftentimes feared that speaking out about it would spark retaliation.<sup>36</sup> This mixed-methods study also revealed that trans students are placed into a position where they are either forced to be vocal self-advocates and educators (and thus vulnerable to harassment)

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33. Peter et al., *supra* note 29, at 331; Ullman, *supra* note 29, at 285; Abbie E. Goldberg, Genny Beemyn & JuliAnna Z. Smith, *What Is Needed, What Is Valued: Trans Students' Perspectives on Trans-Inclusive Policies and Practices in Higher Education*, 29 J. EDUC. & PSYCH. CONSULTATION 27, 59 (2019) [hereinafter Goldberg et al., *Perspectives*].

34. Ullman, *supra* note 29, at 277; Peter et al., *supra* note 29, at 335–38.

35. See Earnshaw et al., *supra* note 31, at 282, 293–94; Whitley et al., *supra* note 28, at 1021.

36. Goldberg et al., *Perspectives*, *supra* note 33, at 30, 32–33, 58–59; Jack D. Simons, Leeann Grant & Jose M. Rodas, *Transgender People of Color: Coping and Support During the School-Age Years*, 15 J. LGBTQ ISSUES COUNSELING 16, 29 (2020); Abbie E. Goldberg, Katherine A. Kovalanka, Stephanie L. Budge, Madeline B. Benz & JuliAnna Z. Smith, *Health Care Experiences of Transgender Binary and Nonbinary University Students*, 47 COUNSELING PSYCH. 59, 63, 73–74 (2019) [hereinafter Goldberg et al., *Health Care*].

on topics of gender or to hide their identities in order to participate in the community.<sup>37</sup>

Ultimately, this denial of TGD students' identities takes a toll and makes graduate school a hostile place for people whose identities are not recognized.

Across the board, misgendering has also been linked to worse mental health and increased suicide risk among trans people. Survey research shows that 85 percent of transgender students report mental health challenges and “name[] fear of violence and nonsupport as distal stressors,” and further research in public health has confirmed linkages between misgendering, gender minority stress, and poor mental health.<sup>38</sup> A survey of 1,896 youth and young adults revealed links between misgendering and anxiety, depression, psychological distress, social anxiety, and eating concerns for TGD people.<sup>39</sup> In the worst cases, gender-related harassment has been linked to suicide ideation, risk, and attempt among TGD adults and youth using data from 1,896 TGD people between the ages of fourteen and thirty.<sup>40</sup> What has been shown time and time again in research on mental health is that internalized transphobia, anticipated stress, gender identity concealment, and gender dysphoria are all increased by misgendering and are all linked to gender minority stress that leads to poor mental health for TGD people.<sup>41</sup> Misgendering is not to be confused with the other many sources of minority stress faced by TGD people, but is a novel psychological stressor that predicts depression, stress, negative affect, and anxiety.<sup>42</sup>

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37. Goldberg et al., *Perspectives*, *supra* note 33, at 32; *see also* Simons et al., *supra* note 36, at 17–18, 20–21; Goldberg et al., *Health Care*, *supra* note 36, at 73–76.
38. Goldberg et al., *Health Care*, *supra* note 36, at 59, 86.
39. Laura E. Kuper, Noah Adams & Brian S. Mustanski, *Exploring Cross-Sectional Predictors of Suicide Ideation, Attempt, and Risk in a Large Online Sample of Transgender and Gender Nonconforming Youth and Young Adults*, 5 *LGBT HEALTH* 391, 394, 396–98 (2018); *see* Goldberg et al., *Health Care*, *supra* note 36, at 71, 73 (discussing survey results indicating that participants' diagnosed difficulties included major depressive disorder, social anxiety, and eating disorders).
40. Kuper et al., *supra* note 39, at 394, 396–98.
41. *Id.* at 392, 396–97; Louis Lindley & M. Paz Galupo, *Gender Dysphoria and Minority Stress: Support for Inclusion of Gender Dysphoria as a Proximal Stressor*, 7 *PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY* 265, 267 (2020).
42. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 *STIGMA & HEALTH* 53, 57–59, 61 (2018); Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 *SELF & IDENTITY* 51, 70 (2015); Jae A. Puckett, Alix B. Aboussouan, Allura

The effect of misgendering in health care contexts provides a strong parallel to its effects in educational contexts. In health care settings, institutional distrust leads to trans people being less likely to seek out care at a health system. Even knowledge of someone else who had a negative experience was sufficient to trigger this effect.<sup>43</sup> If this effect were to be mirrored among educational institutions, practices of misgendering would effectively “steer” trans students away from pursuing legal education at certain institutions.

Public-health research has shown that misgendering by health care providers leads to loss of trust in providers, identity concealment, and trauma for trans people.<sup>44</sup> Research on PTSD among trans people using cross-sectional data from 575 individuals shows that PTSD symptoms’ severity increases with higher levels of anti-transgender bias and non-affirmation experiences, even in cases controlling for other exposure to trauma.<sup>45</sup> Public-health research has repeatedly pointed to trans and GNB people becoming less likely to reach out for help or seek emergency care when they believe they need it, turning to self-medication instead because of the effects of distrust and stigma created by transphobic interactions in health care settings.<sup>46</sup>

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L. Ralston, Brian Mustanski & Michael E. Newcomb, *Systems of Cissexism and the Daily Production of Stress for Transgender and Gender Diverse People*, 24 INT’L J. TRANSGENDER HEALTH 113, 113–14 (2021).

43. See *infra* note 46 and accompanying text; Earnshaw et al., *supra* note 31, at 290–92.
44. Ash B. Alpert, Jamie E. Mehringer, Sunshine J. Orta, Emile Redwood, Tresne Hernandez, Lexis Rivers, Charlie Manzano, Roman Ruddick, Spencer Adams, Catherine Cerulli, Don Operario & Jennifer J. Griggs, *Experiences of Transgender People Reviewing Their Electronic Health Records, a Qualitative Study*, 38 J. GEN. INTERNAL MED. 970, 975 (2022).
45. Sebastian Mitchell Barr, *Understanding the Relationship Between Anti-Transgender Bias, Non-Affirmation, and Post-Traumatic Stress: A Model of Internalized Transphobia-Mediated Post-Traumatic Stress* (Oct. 5, 2018) (Ph.D. dissertation, Smith College) (on file with the University of Louisville Institutional Repository).
46. M. Kathryn Allison, S. Alexandra Marshall, Gray Stewart, Melissa Joiner, Creshelle Nash & M. Kathryn Stewart, *Experiences of Transgender and Gender Nonbinary Patients in the Emergency Department and Recommendations for Health Care Policy, Education, and Practice*, 61 J. EMERGENCY MED. 396, 400 (2021); Sari L. Reisner, Seth T. Pardo, Kristi E. Gamarel, Jaclyn M. White Hughto, Dana J. Pardee & Colton L. Keo-Meier, *Substance Use to Cope with Stigma in Healthcare Among U.S. Female-to-Male Trans Masculine Adults*, 2 LGBT HEALTH 324, 330 (2015); Erin C. Wilson, Sean Arayasirikul & Kelly Johnson, *Access to HIV Care and Support Services for African American Transwomen Living with HIV*, 14 INT’L J. TRANSGENDERISM 182, 191–92 (2013); Jessica Xavier, Judith Bradford, Michael Hendricks, Laretta Safford, Ryan McKee, Elaine Martin & Julie A. Honnold, *Transgender Health Care Access in Virginia: A Qualitative Study*, 14 INT’L J. TRANSGENDERISM 3, 11–12 (2013).

This literature makes abundantly clear that misgendering does significant harm to trans students. Misgendering by those in authority is exclusionary and is seen by its targets as an act that robs them of dignity and personhood. Affirmation of gender identity has the opposite and more positive educational effects. Trans students are, therefore, placed in the impossible position of having to choose between being their full authentic selves or trying to pass by hiding it. To be authentic is to open oneself to the possibility of harassment and to hide it is to deny one's very identity in exchange for community acceptance.

In the classroom, it is not only a lack of recognition and respect that gender-diverse students experience, but a denial of their equal standing to other students. When students are misgendered, they are no longer able to participate openly and learn at the same rate as their cisgender peers. By allowing these active harms toward gender-diverse students, their status as students suffers, as well as their own self-concept. Stigmatization from professors who hold positions of authority over law students significantly diminishes the ability for TGD students to excel to the same degree as their cisgender counterparts.

Misgendering and other forms of stigmatization also place trans people in a position of bargaining in relationships they feel they must preserve, such as their families.<sup>47</sup> This inherently disadvantages trans students when they feel they begin in a lower position and must sacrifice to receive comparable recognition from their peers and people in positions of authority in order to achieve a sense of belonging.

The recognition granted by the simple discursive act of correctly addressing a student, as professors would respectfully address any other student, has the potential to reverse many of the deleterious effects that misgendering has on TGD students' lives in the classroom and in society at large.

## II. THE FIRST AMENDMENT "RIGHT" TO MISGENDER

Knowing the extent to which misgendering harms its targets in the world and in the classroom, we turn to the question of whether the First Amendment offers the right to misgender students in the classroom either under the Free Exercise Clause or the Free Speech Clause of the First Amendment to the U.S. Constitution, which read in relevant part:

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47. Bailey Troia, *"I'm Technically Not Disowned": Familial Strain, Trans Resilience, and Bargaining for Belonging*, in 32 *ADVANCES IN TRANS STUDIES: MOVING TOWARD GENDER EXPANSION AND TRANS HOPE* 173 (Austin H. Johnson, Baker A. Rogers & Tiffany Taylor eds., 2021).

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .<sup>48</sup>

In addition to the doctrinal elaboration of this text, the First Amendment and the notion of “freedoms” have social meaning, cultural force, and the ability to mobilize political actors. This Part of the Article elaborates not just the doctrinal approach to understanding freedom of speech and religion claims embodied in the claim of a right to misgender a student. The social, cultural, and political weight of this aspect of the culture war and cultural meanings and understandings are powerful. First Amendment claims to misgender come in an intertwined set of speech and religious claims. Here, we analyze the doctrines separately to show that what we think of as freedom of religion and speech is not as broadly applied to the general public once the social context is taken into account. In other words, when people with privilege (in the case of religion, white evangelical Christians and in the case of speech, white male business owners) press First Amendment claims, they are far more successful than their counterparts who are making claims from a position of subordination when they make similar claims for liberty and equality.

White cis-male heteronormative Christian dominance wins. And, we have become so accustomed to the inequality in the application of our First Amendment freedoms that this bias often goes unnoticed. Put crudely, those addressing businesspeople in the form of panhandling do not have free speech, whereas Klansmen and those who seek to sexually harass women in public do. Similarly, white evangelical Christianity is traditionally privileged in First Amendment jurisprudence, whereas observant Muslims, Jewish people, and Indigenous people somehow never seem to merit that First Amendment protection we value in part because “everyone” enjoys it.

#### *A. Religious Claims and the “Right” to Misgender*

Meriwether’s tactic—justifying opposition to gender-recognition policies on the basis of religious belief—is not new. Since *Obergefell v. Hodges*<sup>49</sup> in 2015, anti-LGBT+ groups have increasingly turned to a “religious freedom” strategy in their efforts to deny the LGBT+ community certain freedoms.<sup>50</sup> This strategy, pursued in legislation and courts, seeks to permit discrimination against LGBT+ persons as a matter of the free exercise of religion. Although unpopular with the

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48. U.S. CONST. amend. I.

49. 576 U.S. 644 (2015).

50. Clyde Wilcox, *Anti-LGBT and Religious Right Movements in the United States*, OXFORD RSCH. ENCYCLOPEDIA POLS., July 30, 2020, at 3, <https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1170> [<https://perma.cc/Q27H-ZB9D>].

general public,<sup>51</sup> the strategy has met with moderate success in opposing trans rights<sup>52</sup>—such as a 2019 expansion to the “conscience rule,” allowing health care workers to refuse to participate in activities that violate their personal beliefs.<sup>53</sup>

Still, the “religious freedom” strategy represents only a small facet of a far broader, well-organized, ideologically mixed anti-trans social and legal movement. The contemporary anti-trans movement in the United States merges three smaller movements: (1) moral panics about “gender ideology” as a threat to children, (2) “trans-exclusionary radical feminism,” and (3) evangelical fundamentalism. Groups such as the Heritage Foundation, the Kelsey Coalition, and Parents of ROGD Kids advance fearmongering narratives about “Rapid-Onset Gender Dysphoria” (ROGD),<sup>54</sup> rates of suicide and regret among transitioning

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51. Emily Kazyak, Kelsy Burke & Mathew Stange, *Logics of Freedom: Debating Religious Freedom Laws and Gay and Lesbian Rights*, 4 *SOCIUS* 1, 13 (2018).
  52. *Far-Right Groups Flood State Legislatures with Anti-Trans Bills Targeting Children*, S. POVERTY L. CTR. (Apr. 26, 2021), <https://www.splcenter.org/hatewatch/2021/04/26/far-right-groups-flood-state-legislatures-anti-trans-bills-targeting-children> [<https://perma.cc/KCN6-XHLY>].
  53. Margot Sanger-Katz, *Trump Administration Strengthens “Conscience Rule” for Health Care Workers*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/upshot/conscience-rule-trump-religious-exemption-health-care.html> [<https://perma.cc/4DXT-742C>].
  54. *See Rapid-Onset Gender Dysphoria*, PARENTS OF ROGD KIDS, <https://www.parentsofrogdkids.com> [<https://perma.cc/4FDQ-YD38>] (last visited Dec. 7, 2023) (defining ROGD as children “seemingly out of the blue” deciding “they identify strongly with the opposite sex” and describing ROGD as an “epidemic”); Emilie Kao, *Woke Gender*, THE HERITAGE FOUND. (July 7, 2021), <https://www.heritage.org/gender/commentary/woke-gender> [<https://perma.cc/2W9M-V2MF>] (equating sex changes to mutilation and describing gender-affirming care as a “horror[] of the gender industry”). *See generally* ABIGAIL SHRIER, IRREVERSIBLE DAMAGE: THE TRANSGENDER CRAZE SEDUCING OUR DAUGHTERS (2020); MINN. FAM. COUNCIL, GENDER RESOURCE GUIDE (2019), [https://genderresourceguide.com/wp-content/themes/genderresource/library/documents/NPRG\\_Full\\_Document\\_Links\\_V18.pdf](https://genderresourceguide.com/wp-content/themes/genderresource/library/documents/NPRG_Full_Document_Links_V18.pdf) [<https://perma.cc/N9EG-748Z>] (inciting parents to speak out against gender-affirming policies in schools).

youth,<sup>55</sup> and “invasions” into girls’ sports.<sup>56</sup> Self-described “radical feminist” organizations like the Women’s Liberation Front (WoLF) oppose the expansion of trans rights,<sup>57</sup> which they see as an effort to attack, endanger, or erase women.<sup>58</sup> “Radical feminism” (in this sense) reanimates the “anti-sex” movement of the late Second Wave,<sup>59</sup> in which feminists allied with Christian conservatives in pursuing an anti-pornography agenda,<sup>60</sup> at the cost of other feminist projects (in particular, the passage of the Equal Rights Amendment). Finally, Christian fundamentalist organizations like Focus on the Family (and its lobbying arm, Family Policy Alliance) oppose trans rights<sup>61</sup>—not to mention same-sex marriage, abortion rights, nontraditional gender roles, and the Equal Rights Amendment—on religious (typically evangelical) grounds.<sup>62</sup>

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55. The Heritage Foundation, for instance, published a 2022 “report” (without peer review) claiming that trans youth commit suicide at higher rates if granted access to gender-affirming health care. Jay Greene, *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide*, THE HERITAGE FOUND. (June 3, 2022), <https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide> [https://perma.cc/SLB3-HG65]. The report has received thorough criticism for its shoddy methods and flimsy reasoning from doctors, social scientists, and trans activists. See Brooke Migdon, “Absurd:” *LGBTQ+ Advocates, Medical Professionals Respond to Conservative Study Linking Gender-Affirming Care to Greater Risk of Youth Suicide*, THE HILL (June 14, 2022), <https://thehill.com/changing-america/respect/equality/3523225-absurd-lgbtq-advocates-medical-professionals-respond-to-conservative-study-linking-gender-affirming-care-to-greater-risk-of-youth-suicide/> [https://perma.cc/M52S-8LU9].
56. *See Is Biden Cancelling Women’s Sports?*, THE HERITAGE FOUND. (Apr. 17, 2022) (audio transcription), <https://www.heritage.org/gender/heritage-explains/biden-cancelling-womens-sports> [https://perma.cc/8F6E-JC3F].
57. *See Our Work*, WOMEN’S LIBERATION FRONT, <https://womensliberationfront.org/our-work> [https://perma.cc/9G4Z-JRBR] (last visited Aug. 29, 2023).
58. Samantha Schmidt, *Conservatives Find Unlikely Ally in Fighting Transgender Rights: Radical Feminists*, WASH. POST (Feb. 7, 2020, 7:00 AM), <https://www.washingtonpost.com/dc-md-va/2020/02/07/radical-feminists-conservatives-transgender-rights/> [https://perma.cc/N6DD-PVFM].
59. Ruth Pearce, Sonja Erikainen, and Ben Vincent, *TERF Wars: An Introduction*, 68 SOCIO. REV. MONOGRAPHS 677, 682–84 (2020).
60. See Carisa R. Showden, *Feminist Sex Wars*, in THE WILEY BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES 1–3 (Nancy A. Naples ed., 2016).
61. *See LGBTQ+ Agenda*, FAM. POL’Y ALL. <https://familypolicyalliance.com/issues/tag/lgbt-agenda/> [https://perma.cc/5GPU-2JU2] (last visited Aug. 29, 2023).
62. See Neela Banerjee, *Church Groups Turn to Sonogram to Turn Women from Abortions*, N.Y. TIMES (Feb. 2, 2005), <https://www.nytimes.com/2005>



Opposition to transgender rights in the United States is greatest among evangelical Christians. Self-reported religiosity and religious fundamentalism consistently predict prejudice against trans people.<sup>63</sup> Religion predicts support or opposition for policies related to trans issues, such as so-called “bathroom bills” (which prohibit trans people from using bathrooms matching their gender identity), prohibitions against discussing gender identity in public elementary schools, prohibitions against trans athletes competing on teams matching their identified gender, and adding new (nonbinary) gender markers to government documents.<sup>64</sup> Evangelicals, and particularly *white* evangelicals, report the greatest opposition to trans-inclusive policies and support for anti-trans policies.<sup>65</sup> Thus, the “religious freedom” strategy may appear to be the natural, grassroots outcropping of widespread anti-trans sentiment among evangelicals. Not so.

In fact, a surprisingly small handful of organizations are responsible for the recent preponderance of “religious freedom” arguments against transgender rights. Three organizations—all designated as anti-LGBT hate groups by the Southern Poverty Law Center (SPLC)—spearhead the use of this strategy in the public mobilization, lobbying, and legal domains.

The American Family Association (AFA) pursues the religious freedom strategy through mass mobilization efforts.<sup>66</sup> An evangelical

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/02/02/us/church-groups-turn-to-sonogram-to-turn-women-from-abortions.html [https://perma.cc/VF9H-7SEL]; Stephanie Curry, *Erasing Women—The ERA*, FAM. POL’Y ALL. (Feb. 15, 2020), https://familypolicyalliance.com/issues/2020/02/15/erasing-women-the-era/ [https://perma.cc/CY8N-XZLK]; *Equal Rights Amendment*, FAM. POL’Y ALL., https://familypolicyalliance.com/issues/tag/equal-rights-amendment/ [https://perma.cc/3RP9-ZL6B] (last visited Aug. 29, 2023); TODD M. BRENNEMAN, *HOMESPUN GOSPEL: THE TRIUMPH OF SENTIMENTALITY IN CONTEMPORARY AMERICAN EVANGELICALISM* 135–36, 138 (2013).

63. Marianne Campbell, Jordan D.X. Hinton & Joel R. Anderson, *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-Variant People*, 20 INT’L J. TRANSGENDERISM 21, 25 (2019).

64. Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious “Nones” in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://www.pewresearch.org/fact-tank/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/ [https://perma.cc/VTC2-PFSX].

65. *See id.*

66. *E.g.*, *AMA: Taxpayers Should Subsidize Trans Reproductive Surgeries*, AM. FAM. ASS’N (Aug. 23, 2023, 9:50 AM), https://www.afa.net/activism/action-alerts/2023/ama-taxpayers-should-subsidize-trans-reproductive-surgeries/ [https://perma.cc/S9AY-QLNG] (urging readers to sign petition against “uterus transplants on biological men”—a surgery that is not even included in gender-affirming care); *see also Action Alerts*, AM.

organization, the AFA has garnered press attention for inciting boycotts against Target, PayPal, Walgreens, and the personal care brand Dove (through its subsidiary, One Million Moms), in response to, for instance, corporate policy changes permitting trans employees to use the bathrooms matching their gender identity.<sup>67</sup> The AFA's calls to action rely on a narrative that legal protections for transgender Americans represent an attack on Christians' religious freedom and freedom of speech.<sup>68</sup> That said, the organization also relies heavily on other transphobic tropes, such as the (widely discredited) "bathroom predator" myth—the claim that allowing trans people to use gender-appropriate bathrooms will lead to increased sexual harassment and assault (of cisgender people) in public restrooms.<sup>69</sup> The AFA sometimes

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FAM. ASS'N, <https://www.afa.net/activism/action-alerts/> [<https://perma.cc/E2AQ-RQDD>] (last visited Dec. 7, 2023) (providing up-to-date list of similar calls to action); *Yes, The American Family Association Is Still a Hate Group*, HUM. RTS. CAMPAIGN (Feb. 3, 2015), <https://www.hrc.org/press-releases/yes-the-american-family-association-is-still-a-hate-group> [<https://perma.cc/E55D-D6J5>] (“[T]here’s no putting lipstick on this pig. The AFA has more than earned their label as a hate group . . . .” (quoting Vice President of Communications Fred Sainz)).

67. See *American Family Association*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/american-family-association> [<https://perma.cc/447S-36CY>] (last visited Aug. 29, 2023).
68. See, e.g., *American Family Association Spokesperson Laments Declining Religious Freedom and the Loss of Tolerance in America*, AM. FAM. ASS'N (July 25, 2022, 8:39 AM), <https://www.afa.net/who-we-are/press-releases/2022/american-family-association-spokesperson-laments-declining-religious-freedom-and-the-loss-of-tolerance-in-america/> [<https://perma.cc/ECB8-VRLZ>]; *American Family Association Urges Christians to Fight for Religious Freedoms*, AM. FAM. ASS'N (Oct. 26, 2021, 9:27 AM), <https://www.afa.net/who-we-are/press-releases/2021/american-family-association-urges-christians-to-fight-for-religious-freedoms/> [<https://perma.cc/7BG7-FHZZ>].
69. See *Make It Safe for Young Girls to Go to the Bathroom*, AM. FAM. ASS'N (Mar. 28, 2022, 11:34 AM), <https://www.afa.net/activism/action-alerts/2022/make-it-safe-for-young-girls-to-go-to-the-bathroom/> [<https://perma.cc/7FPZ-RC4M>]; see also Katy Steinmetz, *Why LGBT Advocates Say Bathroom “Predators” Argument Is a Red Herring*, TIME (May 2, 2016, 4:29 PM), <https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<https://perma.cc/FS5A-DDH4>]; Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk “Bathroom Predator Myth,”* ABC NEWS (Apr. 22, 2016), <https://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019> [<https://perma.cc/9CNT-PZPL>]; Jule Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS: NBC OUT (Sept. 19, 2018, 12:33 PM), <https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n911106> [<https://perma.cc/5XQC-3H3A>]; *Florida Experts Debunk the Transgender “Bathroom Predator” Myth*, EQUAL. FLA. (Jan. 12, 2016), <https://www.eqfl.org/florida-experts-debunk>

works with the Illinois Family Institute, a public policy-focused anti-LGBT hate group (as designated by the SPLC).<sup>70</sup>

Liberty Counsel is a nonprofit organization that engages in lobbying and provides pro bono legal counsel with the goal of “advancing religious freedom, the sanctity of life, and the family.”<sup>71</sup> Liberty Counsel has participated in four Supreme Court cases, including *Madsen v. Women’s Health Center, Inc.*,<sup>72</sup> in which Liberty Counsel represented Judy Madsen and other anti-abortion protesters who regularly protested in front of the Women’s Health Center and in front of the homes of clinic employees. In 2003, Liberty Counsel submitted an amicus curiae brief in *Lawrence v. Texas*<sup>73</sup> in favor of upholding Texas’s anti-sodomy law. More recently, in 2015, Liberty Counsel threatened suit on behalf of “concerned parents” against a Wisconsin school that had planned to read *I Am Jazz*, a semi-autobiographical children’s book describing the experiences of Jazz Jennings, a trans woman.<sup>74</sup> Liberty Counsel also (unsuccessfully) represented Kim Davis, the county clerk who refused to issue marriage licenses to same-sex couples, in *Miller v. Davis*.<sup>75</sup> Liberty Counsel takes a somewhat more aggressive stance in legislative lobbying; the organization filed suit against the city of Jacksonville, Florida, in 2017 after the passage of a human rights ordinance that included sexual orientation and gender identity as

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-transgender-bathroom-predator-myth [https://perma.cc/DJ8Y-64G6]; Beatriz Pagliarini Bagagli, Tyara Veriato Chaves & Mónica G. Zoppi Fontana, *Trans Women and Public Restrooms: The Legal Discourse and Its Violence*, 6 FRONTIERS SOCIO. (Mar. 31, 2021), https://www.frontiersin.org/articles/10.3389/fsoc.2021.652777/full/ [https://perma.cc/QLL7-45LZ].

70. *About*, ILL. FAMILY INST., https://illinoisfamily.org/about/ [https://perma.cc/AGX8-HE5M] (last visited Aug. 29, 2023); Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, S. POVERTY L. CTR. (Nov. 4, 2010), https://www.splcenter.org/fighting-hate/intelligence-report/2010/18-anti-gay-groups-and-their-propaganda [https://perma.cc/TP3A-E9EW].
71. *About Liberty Counsel*, LIBERTY COUNS., https://lc.org/about [https://perma.cc/6CNW-8L5Q] (last visited Apr. 1, 2023).
72. 512 U.S. 753 (1994).
73. 539 U.S. 558 (2003).
74. Victor Luckerson, *Wisconsin School Cancels Book Reading About Transgender Teen After Lawsuit Threat*, TIME (Nov. 28, 2015, 1:25 PM), https://time.com/4128498/wisconsin-school-cancels-transgender-book-lawsuit/ [https://perma.cc/DWV4-XJXA].
75. *See Miller v. Davis*, Nos. 15–5880, 15–5961, 15–5978, 2015 WL 10692638 (6th Cir. Nov. 5, 2015); Amanda Holpuch, *Defiant Kentucky Clerk Summoned to Federal Court over Gay Marriage Refusal*, THE GUARDIAN (Sept. 1, 2015, 12:38 PM), https://www.theguardian.com/us-news/2015/sep/01/kentucky-clerk-kim-davis-same-sex-marriage-supreme-court [https://perma.cc/4YAC-JMEU].

protected categories.<sup>76</sup> Liberty Counsel’s website also hosts numerous news articles that repeat transphobic talking points, sparking anxieties surrounding suicide,<sup>77</sup> detransition,<sup>78</sup> and men in women’s sports.<sup>79</sup> These stories are followed by calls to sign various petitions in favor of the group’s anti-trans legislative agenda—and to donate to Liberty Counsel.

Finally, and perhaps most prominently,<sup>80</sup> the Alliance Defending Freedom (ADF), a nonprofit legal interest group,<sup>81</sup> provides representation and legal aid in high-profile court cases. As of 2020, the organization’s total assets exceed \$48 million, with a total annual revenue exceeding \$65 million.<sup>82</sup> ADF’s website claims the organization represents “minority religious beliefs” in general, but makes frequent references to Christian (and specifically evangelical) imagery.<sup>83</sup> ADF and its partner organization, ADF International, have opposed decriminalization of homosexuality in the United States and Belize, supported *recriminalization* in India, opposed legalization of same-sex marriage, and supported eugenicist sterilization requirements for

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76. *Parsons v. City of Jacksonville*, 293 So. 3d 892 (Fla. Dist. Ct. App. 2020); *see also Liberty Counsel Sues to Invalidate Jacksonville Human Rights Ordinance*, 104.5 WOKV: LOCAL (Mar. 1, 2017, 10:53 PM), <https://www.wokv.com/news/local/liberty-counsel-sues-invalidate-jacksonville-human-rights-ordinance/ZR3gNct3zXIzJgrnYaj8MP/> [<https://perma.cc/ZK9W-JWGM>].
77. Mat Staver, *They Killed My Daughter*, LIBERTY COUNS. ACTION (Oct. 11, 2022), <https://lcaction.org/detail/221011-they-killed-my-daughter> [<https://perma.cc/S9M7-AFCF>].
78. Mat Staver, *This Is “Medical Violence,”* LIBERTY COUNS. (Oct. 18, 2022), <https://lc.org/newsroom/details/221013-this-is-medical-violence> [<https://perma.cc/5EZJ-6BFF>].
79. *No Men in Women’s Sports*, LIBERTY COUNS. (July 29, 2019), <https://lc.org/newsroom/details/072919-no-men-in-womens-sports-1> [<https://perma.cc/VBC9-PVB5>].
80. *See generally* Hatewatch Staff, *Far-Right Groups Flood State Legislatures with Anti-Trans Bills Targeting Children*, S. POVERTY L. CTR.: HATEWATCH (Apr. 26, 2021), <https://www.splcenter.org/hatewatch/2021/04/26/far-right-groups-flood-state-legislatures-anti-trans-bills-targeting-children> [<https://perma.cc/6GVZ-4ZDB>]; Hatewatch Staff, *Alliance Defending Freedom Through the Years*, S. POVERTY L. CTR.: HATEWATCH (July 24, 2017), <https://www.splcenter.org/hatewatch/2017/07/24/alliance-defending-freedom-through-years> [<https://perma.cc/5XM8-R5HA>] [hereinafter Hatewatch Staff, *ADF*].
81. Hatewatch Staff, *ADF*, *supra* note 80.
82. *Alliance Defending Freedom*, PROPUBLICA: NONPROFIT EXPLORER, <https://projects.propublica.org/nonprofits/organizations/541660459> [<https://perma.cc/6USN-N3HF>] (last visited Sept. 7, 2023).
83. *Who We Are*, ALL. DEFENDING FREEDOM, <https://adflegal.org/about-us/who-we-are> [<https://perma.cc/4JEW-UCJB>] (last visited Sept. 7, 2023).

transgender people seeking legal recognition of their gender.<sup>84</sup> And recently, ADF represented Meriwether.<sup>85</sup>

ADF has *also* provided representation in two extremely similar cases (to Meriwether's).<sup>86</sup> Both cases involve public high school teachers who were terminated after refusing to comply with school policies requiring the use of students' pronouns and terms of address (Mr. or Ms.). Both cases involved claims that the teacher's free speech and free exercise rights were violated.<sup>87</sup> In the first case, orchestra teacher John Kluge objected to a school policy requiring that teachers refer to transgender students by their chosen names and pronouns.<sup>88</sup> Kluge offered a compromise solution, which the school administration accepted—Kluge would refer to students only by last names (without gendered honorifics) and, if asked why, would explain that he did so to foster a sense of community (though unlike Meriwether, he promised *not* to mention his objections to recognizing trans students' identities). Like Meriwether, Kluge later reneged on his word; students reported that Kluge had repeatedly used first names and appeared to avoid speaking to (or calling on) trans students in class. One of Kluge's trans students described feeling "alienated, upset, and dehumanized" and stated, "It made me dread going to orchestra class each day."<sup>89</sup> Kluge resigned under pressure but later sued on the basis of religious discrimination. The U.S. Court of Appeals for the Seventh Circuit upheld a district court ruling against Kluge. The court's reasoning was based, in part, on the determination that employers may direct

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84. Brief in Support of Respondent on Behalf of Amici Curiae Texas Physicians Resource Council, Christian Medical & Dental Ass'ns and Catholic Medical Ass'ns, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); *Dangerous Liaisons*, S. POVERTY L. CTR. (July 10, 2013), <https://www.splcenter.org/20130709/dangerous-liaisons> [<https://perma.cc/TP2W-X4LU>]; *Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [<https://perma.cc/EQ5A-4FFB>] (last visited Oct. 8, 2023); Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended State-Enforced Sterilization for Transgender Europeans*, S. POVERTY L. CTR. (July 27, 2017), <https://www.splcenter.org/hatewatch/2017/07/27/anti-lgbt-hate-group-alliance-defending-freedom-defended-state-enforced-sterilization> [<https://perma.cc/NRD8-T8RU>].

85. *See Meriwether v. Hartop*, 992 F.3d 492, 497 (6th Cir. 2021).

86. *See Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814 (S.D. Ind. 2021); *Vlaming v. West Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021).

87. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 823, 836 (S.D. Ind. 2020); *Vlaming*, 10 F.4th at 304–05.

88. *Kluge*, 548 F.3d at 821–23.

89. *Id.* at 823–27.

employees (in this case, teachers) to adopt practices that do not harm students.<sup>90</sup>

In the second analogous case, high school French teacher Peter Vlaming was fired for refusing to comply with school administrators' directives to use transgender students' chosen names and pronouns. Like Meriwether, Vlaming had initially agreed to refer to a trans student only by name, avoiding all pronouns or gendered titles for that student, but later misgendered the student (in this case, while the student was absent).<sup>91</sup> As trans activists have pointed out, conspicuously refusing to gender trans persons is little better than outright misgendering; doing so dehumanizes, excludes, and draws unwanted attention to trans people.<sup>92</sup> Amici curiae briefs filed by the National Center for Lesbian Rights and the ACLU (with the ACLU of Virginia) claim Vlaming's behavior nonconsensually "outed" the student to classmates,<sup>93</sup> leading him to be ridiculed and harassed at school.<sup>94</sup> After

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90. Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861, 894–96 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023).
91. *Vlaming*, 10 F.4th at 303–04. Along these lines, Florida high school teacher Thomas Caggiano told transgender students in 2019 that he would refer to them "by any reasonable name you like," but "pronouns are not a negotiable thing for me." "I Will Not Refer to You with Female Pronouns": Duval Teacher Snubs Transgender Student's Request, FIRST COAST NEWS, <https://www.firstcoastnews.com/article/news/education/i-will-not-refer-to-you-with-female-pronouns-duval-teacher-snubs-transgender-students-request/77-7567acd6-1b5c-45eb-a1fd-ba1fc8d89691> [<https://perma.cc/2YRL-E2RH>] (Aug. 14, 2019, 4:35 PM). Caggiano was later suspended for making a series of transphobic and racist posts on his publicly visible Facebook page but has not pursued the issue of student pronouns in court. Emily Bloch, *Sandalwood Teacher Suspended for Slew of Transphobic, Anti-LGBT Facebook Posts*, FLA. TIMES-UNION, <https://www.jacksonville.com/story/news/education/2020/12/02/sandalwood-teacher-suspended-slew-transphobic-anti-lgbtq-facebook-posts-duval-county/3788872001/> [<https://perma.cc/2YRL-E2RH>] (Dec. 3, 2020, 6:32 AM).
92. Alex Hanna, Nikki L. Stevens, Os Keyes & Maliha Ahmed, *Actually, We Should Not All Use They/Them Pronouns*, SCI. AM. (May 3, 2019), <https://blogs.scientificamerican.com/voices/actually-we-should-not-all-use-they-them-pronouns/> [<https://perma.cc/3MQ5-EGK9>]; Lena Wilson, *Why Using They/Them to Avoid Misgendering People Could Do More Harm Than Good*, SLATE (May 3, 2018), <https://slate.com/human-interest/2018/05/using-gender-neutral-pronouns-could-actually-misgender-people.html> [<https://perma.cc/B27L-W7YF>].
93. *Vlaming v. West Point School Board*, NAT'L CTR. FOR LESBIAN RTS., <https://www.nclrights.org/our-work/cases/vlaming-v-west-point-school-board> [<https://perma.cc/GFJ4-JZHF>] (last visited Sept. 7, 2023).
94. *Peter Vlaming v. West Point School Board et al. (Amicus)*, ACLU OF VA., <https://www.acluva.org/en/cases/peter-vlaming-v-west-point-school-board-et-al-amicus> [<https://perma.cc/8EKF-A3QT>] (last visited Mar. 3, 2023).

being fired for persistently refusing to comply with school administrators' instructions to "do whatever the parents ask," Vlaming sued (with representation from ADF), claiming a violation of his free speech and free exercise rights and proper termination procedures.<sup>95</sup> Vlaming's legal team filed an opening brief in the Supreme Court of Virginia on May 23, 2022;<sup>96</sup> a decision remains forthcoming, but the court seems likely to support Vlaming, given its recent treatment of Tanner Cross in 2021. Cross, an elementary school physical education teacher, sued the Loudoun County School Board after he was fired for refusing to comply with a policy requiring teachers to use students' chosen pronouns.<sup>97</sup> Like Meriwether, Kluge, and Vlaming, Cross is represented by ADF and alleged a violation of his free speech and free exercise rights.<sup>98</sup>

ADF has used a similar "compelled speech" argument to support private businesses wishing to discriminate against LGBT+ customers. Perhaps most famously, the argument was used in the highly publicized case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.<sup>99</sup> Jack Phillips, owner of Masterpiece Cakeshop, refused to design a custom wedding cake for a gay couple on the basis of his religious beliefs. ADF argued that designing the cake would constitute compelled speech; the Supreme Court ultimately ruled in Phillips's favor in 2018 on the narrow grounds that the Colorado Civil Rights Commission had violated Phillips's right to free exercise by failing to employ religious neutrality in consideration of his case.<sup>100</sup> Interestingly, Phillips once again refused to sell a cake in 2017, this time to Autumn

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95. Complaint at 3, 9–10, 17–19, 39, *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (2020) (No. 19-cv-00773).
96. *Vlaming v. West Point School Board*, ALL. DEFENDING FREEDOM, (Mar. 16, 2023), <https://adflegal.org/case/vlaming-v-west-point-school-board> [<https://perma.cc/Y9AW-VW2D>].
97. Brief for Equality Va. et al. as Amici Curiae Supporting Defs.' Opp. Pls.' Mot. TRO and Prelim. Inj., *Cross v. Loudoun Cnty. Sch. Bd.*, 2021 WL 9276274 (No. CL-21-3254); see Tanner Cross, *I'm Just a P.E. Teacher Who Cares Deeply About My Students, but When My Legitimate Views Were Silenced, I Had to Fight Back for All of Us, Writes Loudoun County, Virginia Educator*, *Tanner Cross, Who Took On Cancel Culture and WON*, DAILY MAIL (Nov. 19, 2021, 12:59 EDT), <https://www.dailymail.co.uk/news/article-10222189/When-legitimate-views-silenced-fight-Loudoun-County-teacher-TANNER-CROSS.html> [<https://perma.cc/E3KX-DXGK>].
98. Hannah Natanson, *Va. Supreme Court Affirms Judge's Ruling Reinstating Loudoun Teacher Who Refused to Use Transgender Pronouns*, WASH. POST (Aug. 31, 2021), [https://www.washingtonpost.com/local/education/tanner-cross-virginia-supreme-court-transgender-pronouns/2021/08/31/52f94c62-0a71-11ec-9781-07796ffb56fe\\_story.html](https://www.washingtonpost.com/local/education/tanner-cross-virginia-supreme-court-transgender-pronouns/2021/08/31/52f94c62-0a71-11ec-9781-07796ffb56fe_story.html) [<https://perma.cc/7J99-8LLC>].
99. 138 S. Ct. 1719, 1726 (2018).
100. *Id.* at 1723, 1726, 1729.

Scardina, a trans woman wishing to celebrate her transition. Scardina complained to the Colorado Division of Civil Rights.<sup>101</sup> Scardina subsequently brought a civil suit against Phillips in federal district court, where he was once again represented by ADF; Phillips was found in violation of Colorado’s antidiscrimination law and ordered to pay a fine of \$500, though he appealed the ruling to the Colorado Supreme Court in October of 2022.<sup>102</sup> Recently, ADF represented Lorie Smith, a Colorado website designer who wished to expand her business by making web pages for heterosexual weddings—but not for same-sex weddings. Smith preemptively sued the state of Colorado in 2016 but lost in both district and circuit courts.<sup>103</sup> The Supreme Court granted Smith a writ of certiorari in February 2022 and ruled in June 2023 that the application of Colorado’s antidiscrimination law to Smith would violate the Free Speech Clause of the First Amendment.<sup>104</sup>

ADF has also attempted to extend its argument to *prohibitions* against speech. A Kansas school board passed a policy requiring teachers to use students’ chosen names and pronouns in class—and *not* to do so in meetings with parents (so as to avoid “outing” closeted students to their parents). Pamela Ricard, a local middle school teacher represented by ADF and Kriegshauser Ney Law Group (a Kansas law

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101. Trudy Ring, *Jack Phillips Appeals Ruling for Discrimination Against Trans Woman*, ADVOCATE (Oct. 6, 2022), <https://www.advocate.com/law/2022/10/06/jack-phillips-appeals-ruling-discrimination-against-trans-woman> [<https://perma.cc/RM2G-F8PV>]; Nico Lang, *This Trans Woman Won a Major Victory Against Masterpiece Cakeshop After Being Denied Service*, THEM (June 17, 2021), <https://www.them.us/story/trans-woman-won-against-masterpiece-cakeshop-after-being-denied-service> [<https://perma.cc/9SB2-3WXP>]; Scardina v. Masterpiece Cakeshop, ALL DEFENDING FREEDOM (Mar. 16, 2023), <https://adflegal.org/case/scardina-v-masterpiece-cakeshop> [<https://perma.cc/Q574-S36Q>].

102. Lang, *supra* note 101; Colleen Slevin, *Colorado Baker Fighting Ruling over Gender Transition Cake*, AP (Oct. 5, 2022), <https://apnews.com/article/religion-lawsuits-colorado-discrimination-deaccfb6277ac8671726398f0e40b761> [<https://perma.cc/NN7Z-EWVA>].

103. See Complaint, 303 Creative LLC v. Elenis, No. 16-cv-02372 (D. Colo. Sept. 20, 2016); 303 Creative LLC v. Elenis, 600 U.S. 570, 583 (2023); see also Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sex-marriage.html> [<https://perma.cc/GDT7-R6NE>]; Lawrence Hurley, *U.S. Supreme Court Takes Up Clash Between Religion and LGBT Rights*, REUTERS (Feb. 22, 2022), <https://www.reuters.com/legal/government/us-supreme-court-takes-up-web-designers-bid-rebuff-gay-weddings-2022-02-22/> [<https://perma.cc/KEQ8-XM5V>]; Amy Howe, *Justices Will Hear Free-Speech Claim from Website Designer Who Opposes Same-Sex Marriage*, SCOTUSBLOG (Feb. 22, 2022), <https://www.scotusblog.com/2022/02/justices-will-hear-free-speech-claim-from-website-designer-who-opposes-same-sex-marriage> [<https://perma.cc/H5Z5-Q3JV>].

104. *Elenis*, 600 U.S. at 588–89.



firm), sued, alleging a violation of her free speech and free exercise rights.<sup>105</sup> On May 9, 2022, the U.S. Court of Appeals for the Tenth Circuit published a memorandum affirming that Ricard could simply address transgender students exclusively by their preferred names (avoiding the use of gendered pronouns for those students) without violating school district policy; the memorandum also granted a temporary injunction allowing Ricard to disclose students' chosen pronouns to parents.<sup>106</sup> Shortly thereafter, the school board voted to revoke the "parental communication policy" (the main issue of Ricard's suit) and agreed to settle, paying Ricard \$95,000 in damages and attorneys' fees and issuing a statement that she was "in good standing without any disciplinary actions against her at the time of her retirement in May."<sup>107</sup>

ADF's strategy is by no means limited to speech acts (and dubiously construed "speech" in the form of cakes, website layouts, or prohibitions against disclosing personal information). ADF relied on a variation of their free exercise argument in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*.<sup>108</sup> Although the ultimate 2020 Supreme Court ruling hinged on the applicability of Title VII protections (of the Civil Rights Act of 1964<sup>109</sup>) to gay and transgender persons,<sup>110</sup> ADF argued at the district court level that as a religious organization, Harris Funeral Homes could fire a transitioning employee for nonconformity with the owner's religious beliefs under the 1993 Religious Freedom Restoration Act.<sup>111</sup>

To be sure, the religious freedom strategy has seen use in courts by organizations other than ADF. ADF applauded, but did not assist,

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105. *See Ricard v. Geary Cnty. Sch. Bd.*, No. 22-cv-04015, 2022 WL 1471372 (D. Kan. 2022); Andrea Salcedo, *A Christian Teacher Was Suspended for Refusing to Call Students by the Pronouns They Use. Now She Is Swing.*, WASH. POST (Mar. 15, 2022), <https://www.washingtonpost.com/nation/2022/03/15/kansas-teacher-lawsuit-gender-pronouns-religion/> [<https://perma.cc/P8C5-F6NB?type=image>].

106. *Ricard*, 2022 WL 1471372, at \*10; *Court: Kansas Teacher Free to Speak Consistent with Her Religious Beliefs*, ALL. DEFENDING FREEDOM (May 10, 2022), <https://adflegal.org/press-release/court-kansas-teacher-free-speak-consistent-her-religious-beliefs> [<https://perma.cc/H6DE-3T36>].

107. *Kansas Public School Pays \$95K After Suspending Teacher for Refusing to Deceive Parents*, ALL. DEFENDING FREEDOM (Aug. 31, 2022), <https://adflegal.org/press-release/kansas-public-school-pays-95k-after-suspending-teacher-refusing-deceive-parents> [<https://perma.cc/5Y7Z-D2N7>].

108. 140 S. Ct. 1731, 1738, 1754 (2020).

109. 42 U.S.C. § 2000.

110. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

111. *Id.*; *see* Religious Freedom Reformation Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to 2000bb-4).

when the EEOC sued on behalf of two employees who were fired from an Arkansas Kroger for refusing to wear employer-provided aprons featuring an embroidered rainbow heart.<sup>112</sup> Both employees had previously submitted requests for a religious accommodation (one employee asked to be permitted to cover the heart) on the basis of their opposition to homosexuality.<sup>113</sup>

The Supreme Court heard a similar argument in *Fulton v. City of Philadelphia*.<sup>114</sup> In this case, a Catholic foster care agency sued the City of Philadelphia when it was denied a renewed contract because the agency refused to certify married same-sex couples on religious grounds.<sup>115</sup> The foster agency claimed religious discrimination, citing the Free Exercise Clause; the Supreme Court ultimately ruled in favor of the foster agency, but on the narrow grounds that the City of Philadelphia had inconsistently applied its Fair Practices Ordinance, having previously granted exceptions for individual religions.<sup>116</sup> The foster agency, Catholic Social Services, was represented by the Becket Fund for Religious Liberty, which also provided counsel to the plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*<sup>117</sup>

Private citizens have also used the religious freedom argument, as in *Brennan v. Deluxe Corp.*<sup>118</sup> In this case, Frederick Brennan sued his former employer after he was fired for refusing to complete an ethics training course that included questions related to pronouns and other “transgender issues.”<sup>119</sup> The court dismissed Brennan’s claim of religious

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112. Page Smith, *EEOC Kroger Suit Shows Rift at Border of Religious Rights, Bias*, BLOOMBERG L. (Dec. 2, 2020, 6:16 AM), <https://news.bloomberglaw.com/daily-labor-report/eec-kroger-suit-shows-rift-at-border-of-religious-rights-bias> [<https://perma.cc/WEG7-UUTF>].

113. Complaint at ¶¶ 13(f)–(g), 30(f)–(g), *EEOC v. Kroger Co.*, No. 20-cv-1099 (E.D. Ark. filed Sept. 14, 2020); *Kroger Company Sued by EEOC for Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM’N (Sept. 15, 2020), <https://www.eeoc.gov/newsroom/kroger-company-sued-eeoc-religious-discrimination> [<https://perma.cc/XVT8-872Y>].

114. 141 S. Ct. 1868 (2021).

115. *Id.* at 1875–76.

116. *Id.* at 1882; Trudy Ring, *What the Supreme Court Ruling on Foster Care Means for LGBTQ+ Parents*, ADVOCATE (June 17, 2021, 3:44 PM), <https://www.advocate.com/news/2021/6/17/what-supreme-court-ruling-foster-care-means-lgbtq-parents> [<https://perma.cc/6EPC-LRS7>].

117. 573 U.S. 682 (2014); Rebecca Bratek, *Becket Fund Law Firm Gaining a Reputation as Powerhouse After Hobby Lobby Win*, WASH. POST (July 20, 2014), [https://www.washingtonpost.com/politics/becket-fund-law-firm-gaining-a-reputation-as-powerhouse-after-hobby-lobby-win/2014/07/20/c28931a4-104c-11e4-8936-26932bcfd6ed\\_story.html](https://www.washingtonpost.com/politics/becket-fund-law-firm-gaining-a-reputation-as-powerhouse-after-hobby-lobby-win/2014/07/20/c28931a4-104c-11e4-8936-26932bcfd6ed_story.html) [<https://perma.cc/FF7S-5FEW>].

118. 361 F. Supp. 3d 494 (D. Md. 2019).

119. *Id.* at 499.

discrimination, but granted a federal jury trial to assess his religious accommodation request. The jury ruled in March 2022 that although Brennan held (and adequately informed his employer of) a sincere religious belief, his belief did not conflict with the requirement to complete the ethics training course.<sup>120</sup>

Perhaps most strikingly, the religious freedom strategy has even been used overseas. Dr. David Mackereth, an employee of the British Department for Work and Pensions and formerly a full-time evangelist, claimed that using transgender clients' chosen pronouns would violate his religious beliefs. A 2019 employment tribunal found Dr. Mackereth's stance "incompatible with human dignity" and ruled that his employer had not engaged in discrimination by requiring Mackereth to use clients' chosen pronouns or lose his job.<sup>121</sup>

*B. Speech Claims and the "Right" to Misgender*

The relationship between the First Amendment and what we think of as "academic freedom" is complex. Whereas U.S. First Amendment jurisprudence emerged in the early part of the nineteenth century, the origins of academic freedom precede the U.S. Constitution by hundreds of years.<sup>122</sup> Free speech and academic freedom are sometimes conflated or misunderstood because they have similar goals: to advance knowledge and understanding and to fulfill individual expressive imperatives. In the United States, they operate with similar seemingly universally accepted principles: that censorship is presumptively undesirable because it necessarily inhibits those goals.

And while most Americans tend to think free speech and academic freedom are broadly protected by the Constitution, in fact they are not. Local, state, and federal laws limit all kinds of speech with the blessing (or blind eye) of the judiciary. We regulate many different forms of speech with relatively little First Amendment friction: commercial speech, obscene speech, slander, libel, panhandling, verbal sexual harassment that creates a hostile work environment, and speech that incites lawless action, to name just a few.

And how do we do it? We balance benefits and harms. When the "harm" of speech is constructed as one person's (or even 100 persons') "hurt feelings," the idea that we should limit a core constitutional value

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120. *Id.* at 508–09; Kate Tornone, *Jury: Employer's DEI Training Didn't Conflict with Worker's Religious Beliefs*, HRDIVE (Mar. 20, 2022), <https://www.hrdiver.com/news/jury-employers-dei-training-didnt-conflict-with-workers-religious-beliefs/620675/> [<https://perma.cc/4UHQ-JEEH>].

121. Iliana Magra, *He Opposed Using Transgender Clients' Pronouns. It Became a Legal Battle*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/world/europe/christian-transgender-uk.html> [<https://perma.cc/4QBM-8EGX>].

122. ERWIN CHEMERINSKY & HOWARD GILMAN, FREE SPEECH ON CAMPUS 28 (2018).

like *speech* or *religion* seems ridiculous. But we want to broaden our focus by bringing empirical research to these debates. We want to put microaggressions and intentional misgendering in their broader social contexts so that we can conduct the kind of constitutional balancing required when something as important as restricting speech is in the balance. A broader analysis reveals that there is inequality in how the First Amendment is currently applied.

Legally, right now, we tell members of traditionally disadvantaged groups (like trans and gender-nonconforming people) that the regulation of hate speech is unconstitutional (except under very limited circumstances). Cross burning is protected speech unless done with the intent to intimidate;<sup>123</sup> college women are told that a crowd of fraternity boys chanting “no means yes and yes means anal” at an orientation event is something they must tolerate in the name of “free speech,” even if it makes them feel like they are no longer equal members of the campus community; and trans and gender-nonconforming students are told they have to “tough it out” when being bullied in school—even when the bully is their professor.<sup>124</sup>

At the same time, we see a regime of free speech that protects the powerful and popular. In judicial circuits where panhandling regulation is allowed (and has been for decades), part of the justification is that the TARGETS of panhandling (working commuters in Grand Central Station) have an important and legitimate purpose for being in public—to get to work.<sup>125</sup> Chambers of commerce and city governments

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123. *Virginia v. Black*, 538 U.S. 343, 347–48 (2003).

124. Abby Jackson, *The Frat Barred from Yale for 5 Years Is Back—And Women Are Saying They Warn One Another to Stay Away*, BUS. INSIDER (Jan. 25, 2018, 11:18 AM), <https://www.businessinsider.com/yale-delta-kappa-epsilon-2018-1> [<https://perma.cc/5EYD-DZE2>] (reporting that despite a five-year ban on the fraternity, women still do not feel safe on campus); see also Sandra Y.L. Korn, *When No Means Yes*, HARV. CRIMSON (Nov. 12, 2010), <https://www.thecrimson.com/article/2010/11/12/yale-dke-harvard-womens/> [<https://perma.cc/9WK9-7HUS>] (describing a *Yale Daily News* editorial, which has since been removed from the internet, that dismissed female students’ outcry over the incident as an “overreaction”); *Yale University: Fraternity Suspended Five Years for “Intimidating” Satirical Chant*, FIRE, <https://www.thefire.org/cases/yale-university-fraternity-suspended-five-years-intimidating-satirical-chant> [<https://perma.cc/R7YR-H7FT>] (last visited Dec. 7, 2023) (describing Yale’s suspension of the fraternity after the incident as “censorship”); Jordi Gassó & Sam Greenberg, *DKE Apologizes for Pledge Chants*, YALE NEWS (Oct. 15, 2010, 2:32 AM) (quoting the head of another Yale fraternity, who “said he thought despite the campus reaction, [the chanting fraternity pledges] did not intend to offend anyone”).

125. *See Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 158 (2d Cir. 1990) (“The subway is not a domain of the privileged and powerful. Rather, it is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and

interested in presenting customers with tidy shopping and tourism districts also have laws banning begging that have been upheld in the federal courts.<sup>126</sup> So workers, tourists, and consumers are protected from requests for money.

Consider also the First Amendment protections afforded soldiers' families when members of the Westboro Baptist Church sought to use soldiers' funerals as a platform for their religious ideology that homosexuality is a sin. In *Snyder v. Phelps*,<sup>127</sup> the Supreme Court case upholding their right to protest, we see again the Court upholding speech targeted at another traditionally disadvantaged group—members of the LGBT+ community.<sup>128</sup>

Either way, the issue wasn't finished with the *Snyder* case. Ultimately, it inspired congressional override in the form of the Honoring America's Veterans Act,<sup>129</sup> which prohibits any protests 300 to 500 feet from veterans' funerals two hours before, during, and two hours after a soldier's funeral.<sup>130</sup> So the powerful and revered are protected without a word in the statute about protecting the LGBT+ community that was the target of the protesters' hate speech.

So soldiers and workers are protected from troubling speech, while white women and people of color (among others) just walking down public streets or just living in their dorms on college campuses are NOT protected from troubling speech. Shifting the focus from the speaker to the target reveals that we expect white women, people of color, and gender-nonconforming individuals to tolerate public harassment, but find a way to justify speech regulation when the targets are businesses, businesspeople, or soldiers.

The policy driver here is our conception of "harm." If we only view these events in isolation, it becomes harder to see the social origins and consequences of these kinds of speech events. Using empirical data, we will argue that continually harassing members of disadvantaged groups is NOT "just speech," it is *DOING* something. It is resulting in a harm—the harm of subordination. The harm of perpetuating discrimination. Just like we understand that hate speech in the

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elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation.").

126. *See, e.g., Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015) (upholding detailed ordinance that prohibits specific forms of panhandling).

127. 562 U.S. 443 (2011).

128. *Id.* at 448, 461.

129. Pub. L. No 112-154, 126 Stat. 1165 (2012).

130. *Id.* § 601.

workplace is a violation of equal employment rights, we know that hate speech in other contexts contributes to inequality. And responsible institutions like schools and health care providers should be able to regulate in ways that foster equality.

This should be all the more apparent when we look at the discourse of the ordinary people who support anti-trans causes. Their rationale for doing so is not largely framed as religious. It is framed as a “right” to discriminate.

In recent years, we have seen a new series of cases that highlight the tension between antidiscrimination policies and claims related to the Free Exercise and Establishment Clauses of the First Amendment. To make the cases all the more complex, each has an element of free speech, expression, or compelled speech. Like the First Amendment analysis above, it is helpful to think about the holdings of these cases from a more macro perspective than simply digging into the minutiae (important though it is) of the legal reasoning. We also want to look at the power dynamics involved in these cases. As explored above, the U.S. Supreme Court has engaged in a renewed effort to consider “religious freedom” for white evangelical Christians. Recent cases include *Hobby Lobby* and *Masterpiece Cakeshop*.<sup>131</sup>

In the seminal case *Employment Division v. Smith*,<sup>132</sup> the Supreme Court ruled that prohibiting Indigenous Americans from using peyote during religious ceremonies was not a violation of their First Amendment right to the free exercise of religion. In *Smith*, employees of a private rehabilitation facility were fired for using peyote in an off-work religious ceremony and were denied unemployment compensation because the termination was due to “work-related ‘misconduct.’”<sup>133</sup>

The similarities between *Smith* and the more recent religious freedom cases are many. *Masterpiece Cakeshop*, *303 Creative LLC v. Elenis*,<sup>134</sup> and *Hobby Lobby* all focus on employers and businesspeople (the cake shop owner, the web designer, and the family business owners, respectively). The plaintiffs are all winning their cases by claiming to be victims, as even as they approach the courts as the parties with power. Once again, we see First Amendment jurisprudence proclaiming a neutral principle while it serves the interests of the powerful.

### III. RELATIONAL RIGHTS AS AN ALTERNATIVE FRAMEWORK

There is an easy solution to the policy question presented in cases like *Meriwether*. We should ask all incoming students to specify their

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131. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723 (2018).

132. 494 U.S. 872 (1990).

133. *Id.* at 874.

134. 600 U.S. 570 (2023).

titles and pronouns. For professors like Meriwether who address their students more formally, the students should be asked for their title: Dr., Mr., Mrs., Ms., Mx., and other titles as times change (Ms. became an option for a title in the 1970s,<sup>135</sup> for instance). Like many universities already require, enrollment forms should include which pronouns to use when referring to a student (she/her; he/him; they/them).

Professors should treat students evenhandedly by using the specified pronouns. Absent genetic testing or required viewing of students' genitals, it is impossible for a professor to fully "know" anyone's biological sex. (To be clear this is exactly what many religious conservatives want to do—establish biological sex as a binary boundary and then use biological sex as the one and only way to refer to the gender of other people, even if such a boundary is a reified construct rather than a given.)

Let us be clear, chromosomal and physical variation make even these measures far less reliable than conservative Christians like to pretend, but that discussion is beyond the scope of this Article. The point is that conservative Christianity (not to mention the Constitution and loads of federal laws) forbid requiring a genetic test or a physical examination of the genitals for entry to a public school.

The resolution of this conflict we propose is an example of what we assert is a more just and rational balancing of constitutional interests: a relational framework that examines the effects of legal rules on relationships within a community. Rather than retreat behind a wall of absolutes concerning free speech or freedom of religion, this approach would weigh the costs and benefits of recognizing certain kinds of rights. A paramount value in this framework is social justice—that is, a consideration of the distribution of power in a particular context. It would, in contrast to the claims of religious conservatives, consider the interests of trans students, the schools charged with creating equal educational opportunities for all their students, and teachers.

## CONCLUSION

Medical and social science research demonstrates that the misgendering of trans students in educational settings does them significant harm. Despite the efforts of conservative groups to build a constitutional argument that creates a right to misgender by faculty members on religious grounds, a balanced constitutional analysis should reject such a claim given the profound effects on trans students and the ephemeral limits on the religious freedoms of faculty members. Universities should not be intimidated by the prospect of constitutional

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135. Steven Petrow, *Civilities: Is It Time to Include "Mx." in the Mix with "Ms." and "Mr."?*, WASH. POST (Aug. 3, 2015), [https://www.washingtonpost.com/lifestyle/style/civilities-is-it-time-to-include-mx-in-the-mix-with-ms-and-mr/2015/07/31/b0b91868-37b5-11e5-9739-170df8af8eb9\\_story.html](https://www.washingtonpost.com/lifestyle/style/civilities-is-it-time-to-include-mx-in-the-mix-with-ms-and-mr/2015/07/31/b0b91868-37b5-11e5-9739-170df8af8eb9_story.html) [https://perma.cc/4F5C-EMFK].

litigation in these cases. Universities have an obligation under law and as institutions charged with promoting the public interest to protect vulnerable populations among their students. And the Constitution, properly interpreted, allows them to do that.