UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICHOLAS K. MERIWETHER,	:	
	:	
Plaintiff,	:	
	:	Case No. 1:18-cv-753
vs.	:	
	:	Judge Susan J. Dlott
THE TRUSTEES OF SHAWNEE STATE UNIVERSITY, ET AL.	:	Magistrate Judge Karen L. Litkovitz
	:	
Defendants.	:	

REPLY MEMORANDUM IN SUPPORT OF JANE DOE AND SEXUALITY AND GENDER ACCEPTANCE'S MOTION TO INTERVENE AS DEFENDANTS

Jane Doe and SAGA easily satisfy the requirements for both intervention of right under Rule 24(a) and permissive intervention under Rule 24(b). Their motion to intervene should therefore be granted.

A. Ms. Doe and SAGA are entitled to intervene as defendants as of right.

Jane Doe and SAGA have established the four requirements for intervention as of right: "(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

Timeliness of application to intervene. Neither Plaintiff nor Shawnee disputes that the motion to intervene is timely.

Substantial legal interest in the case. Ms. Doe's legal interest is straightforward: "She is a transgender student who asserts an interest in being treated in a non-discriminatory matter." Mem. in Support of Motion to Intervene ("Mot."), Doc. 18, at PageID 497. Indeed, this case is

about her. Shawnee disciplined Plaintiff because its investigation into Ms. Doe's complaint concluded that he discriminated against *her*. Plaintiff asks the Court to declare that he has a constitutional right to discriminate against *her* (and other transgender students). Ms. Doe seeks to vindicate *her* interest in receiving an education without discrimination, as well as *her* right to maintain the privacy of her transgender status. SAGA, too, has an interest in preventing discrimination against its transgender members, including Ms. Doe. This interest easily falls within the "rather expansive notion of the interest sufficient to invoke intervention as of right." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (internal quotation marks omitted).

Plaintiff's response is a classic case of question-begging. He assumes the conclusion that he is *not* discriminating against her—a conclusion this Court certainly has not reached—and then argues, based on that untested assumption, that Ms. Doe should not even be permitted to intervene so as to *argue* that she is the victim of discrimination. In particular, Plaintiff begins his analysis with the assertion that he "treats all students equally," and that Ms. Doe and SAGA "seek special treatment, not equal treatment under the law." Pltf. Opp. to Motion to Intervene ("Pltf. Opp."), Doc. 26, at PageID 600. Based on that assumption, Plaintiff asserts that the sole interest that Ms. Doe and SAGA seek to vindicate is "avoiding subjective offense," an interest that, he claims, is insufficient to establish intervention as of right. *Id.* at PageID 602. Of course, Ms. Doe and SAGA reject that assumption. The complaint alleges blatant discrimination against Ms. Doe and demonstrates Plaintiff's intent to treat all transgender students in that same discriminatory manner. Among other things, Plaintiff referred to all students as "Sir" or "Ma'am" *except* Ms. Doe, who he referred to only by her last name because she is transgender. Compl., Doc. 1, at PageID 20, ¶ 150. A victim of discrimination surely has a legal interest in preventing that discrimination. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dept. of Educ.* ("*Highland*"), No. 2:16-CV-524,

2016 WL 4269080, at *3 (S.D. Ohio Aug. 15, 2016) (transgender student's "interest in being treated in a non-discriminatory manner by her school … easily satisfied" substantial interest requirement).

Further, Plaintiff overlooks the very real harms that he inflicted on Ms. Doe. As the motion to intervene explained, Plaintiff's conduct caused Ms. Doe significant psychological strain and distress, including an increase in both the severity and duration of her gender dysphoria. Mot., Doc. 18, at PageID 493. She had regular crying spells outside of class and was in a constant state of emotional exhaustion. *Id.* Ms. Doe surely has an interest in protecting herself from those harms, just as SAGA has an interest in preventing those harms from occurring to any of its other transgender members.

Finally, although Plaintiff minimizes the harm to Ms. Doe arising from his refusal to use female titles and pronouns when referring to *her*, he alleges that it is Shawnee's response to that very use of titles and pronouns that violates his First Amendment rights and causes actionable harm to *him*. Plaintiff cannot simultaneously contend that pronoun use is an important enough interest for him to bring this lawsuit, and that it is an insufficiently important interest for Ms. Doe and SAGA to participate in this lawsuit.

Impairment of the applicant's ability to protect that interest in the absence of intervention. Jane Doe and SAGA easily satisfies the "minimal requirements of the impairment element." *Grutter*, 188 F.3d at 400 (quotation marks omitted). If Plaintiff wins this case, there will be a court order conferring Plaintiff the right to discriminate against transgender students—effectively preventing Jane Doe and SAGA from seeking recourse against such discrimination. That result plainly would impair their interest in ensuring that transgender students be able to obtain an education at Shawnee without discrimination on the basis of their gender identity.

Plaintiff asserts that he "does not challenge the constitutionality of Title IX." Pltf. Opp., Doc. 26, at PageID 603. But Plaintiff may—indeed, almost certainly will—argue that his statements could not violate Title IX at all. If Plaintiff prevails on that theory, Jane Doe and SAGA would be impaired in their ability to argue that the failure to prevent such conduct *does* violate Title IX, as Shawnee could rely on such a ruling to justify future inaction on complaints of sex discrimination filed against Plaintiff. *Highland*, 2016 WL 4269080, at *3 (possibility that a ruling in the district's favor would prevent the transgender student from asserting her own constitutional and statutory rights was sufficient to establish impairment).

Inadequate representation of that interest by parties already before the court. Jane Doe and SAGA satisfy this "minimal" burden as well. *Grutter*, 188 F.3d at 400. Jane Doe and SAGA can establish inadequate representation by showing that "the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* The motion to intervene argued that Shawnee would be unlikely to take the position that disparate treatment of students solely because they are transgender is barred by, among other laws, Title IX, because such an argument could expose Shawnee to liability. Mot., Doc. 18, at PageID 500. This has now been confirmed. While Shawnee states generally that "[t]he nondiscrimination policies challenged by the Complaint are part of the University's obligations under Title IX and Title VII," Shawnee Mot. to Dismiss, Doc. 22, at PageID 578, it does not specifically argue that discrimination against transgender students violates Title IX. Nor does it argue that Title IX requires professors to use pronouns consistent with transgender students' gender identity—despite Shawnee's own Title IX office having reached that exact conclusion. Because Ms. Doe and SAGA will make this argument that the State has not made, the State's representation is inadequate.

Indeed, this case is virtually identical to *Grutter*. In *Grutter*, the Sixth Circuit held that the

university's representation was inadequate because it would be unlikely to make an argument that the intervenors intended to make and would expose it to liability. 188 F.3d at 401 (university's representation was inadequate because it was "unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria"). Ms. Doe and SAGA advance the identical argument for inadequate representation here. Neither Shawnee nor Plaintiff even cites, much less attempts to distinguish, this portion of *Grutter*.

Further, Ms. Doe and SAGA may argue that the Equal Protection Clause or laws prohibiting disability discrimination require Plaintiff to be treated in accordance with her gender identity—again, an argument Shawnee has not yet made and is unlikely to make. Plaintiff's actions also implicate Ms. Doe's *own* right to keep her transgender status private. She should have the opportunity to assert this interest because it is *hers*, not Shawnee's. SAGA's transgender members should also be afforded that same opportunity.

Finally, the motion to intervene cited several cases, from both the Sixth Circuit and this District, in which courts have held that public entities do not adequately represent private entities because their arguments have a different focus. Mot., Doc. 18, at PageID 501. Neither Plaintiff nor Shawnee distinguishes these cases or cites any contrary authority.

B. Ms. Doe and SAGA meet the standard for permissive intervention.

Alternatively, the Court should grant permissive intervention because Jane Doe and SAGA's defenses of Shawnee's policy share a "common question of law or fact" with the main action. Fed. R. Civ. P. 24(b)(1)(B). The "common question of law" is whether Plaintiff has the constitutional right to violate Shawnee's nondiscrimination policy. The "common question[s] of fact" are questions about the veracity of the allegations in the complaint that relate to Jane Doe herself. Plaintiff faults Ms. Doe and SAGA for failing to point to "specific facts" showing common

questions of fact, Pltf. Opp., Doc. 26, at PageID 606, but the dozens of "specific facts" in the complaint that are *about* Ms. Doe are more than sufficient to show common questions. *See Highland*, 2016 WL 4269080, at *2 (in lawsuit challenging policies intended to protect transgender students from discrimination, transgender student's claims "undoubtedly share common legal and factual questions with Plaintiff's claims"). Several courts have held that transgender students or organizations can permissibly intervene in suits addressing discrimination against those students. Mot., Doc. 18, at PageID 502-503. The Court should grant the same relief here.

Intervention would not cause undue delay, complication, or prejudice. If this case proceeds past the motion to dismiss stage, the parties are likely to demand that Ms. Doe be deposed anyway, so allowing her to participate in the litigation as a party rather than as a witness will not delay or complicate the case. Plaintiff points to the possibility that he may be "compelled to respond to multiple parties' different arguments," have to settle with multiple parties, and have to take additional discovery, Pltf. Opp., Doc. 26, at PageID 608, but the same could be said in every case in which intervention is sought. Plaintiff makes no allegations of *undue* delay, complication or prejudice beyond these boilerplate arguments.

C. The Court Should Permit Ms. Doe and SAGA to Move to Dismiss.

Ms. Doe and SAGA do not seek to prolong this case in discovery; they believe this case does not require discovery and should be resolved on the pleadings. If granted the right to intervene, they should have the opportunity to file a motion to dismiss. Plaintiff argues that such a motion would introduce delay. Pltf. Opp., Doc. 26, at PageID 608. Ms. Doe and SAGA did not previously file a motion to dismiss out of a concern that it would be premature, given that the motion to intervene remained pending. But in view of Plaintiff's concern, Ms. Doe and SAGA are attaching a proposed motion to dismiss so that the Court may consolidate the briefing schedules

and argument so as to avoid duplicative work and delay. *See* Ex. A. Alternatively, if the Court denies intervention, Ms. Doe requests that the Court construe the proposed motion to dismiss as an amicus brief in support of the State's motion to dismiss.

Date: January 16, 2019

Respectfully Submitted,

/s/ Adam G. Unikowsky
Adam G. Unikowsky (admitted *pro hac vice*)
Michael E. Stewart
Jennifer J. Yun
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000 (tel)
(202) 639-6066 (fax)
aunikowsky@jenner.com

Jennifer L. Branch #0038893
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100 (tel)
(513) 345-5543 (fax)
Jbranch@gbfirm.com

Shannon P. Minter (admitted *pro hac vice*)
Asaf Orr (admitted *pro hac vice*)
Christopher F. Stoll (admitted *pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257 (tel)
(415) 392-8442 (fax)
sminter@nclrights.org
aorr@nclrights.org
cstoll@nclrights.org

Attorneys for JANE DOE and SEXUALITY AND GENDER ACCEPTANCE

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2019, a copy of the foregoing pleading and exhibit was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Asaf Orr
Attorney for Defendant-Intervenors

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICHOLAS K. MERIWETHER, Plaintiff, vs. THE TRUSTEES OF SHAWNEE STATE UNIVERSITY, ET AL. Defendants and JANE DOE and SEXUALITY AND GENDER ACCEPTANCE, Proposed Defendant-Intervenors.	:	Case No. 1:18-cv-753 Judge Susan J. Dlott Magistrate Judge Karen L. Litkovitz

PROPOSED DEFENDANT-INTERVENORS JANE DOE AND SEXUALITY AND GENDER ACCEPTANCE'S MOTION TO DISMISS

Jennifer L. Branch #0038893
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100 (tel)
(513) 345-5543 (fax)
Jbranch@gbfirm.com

Shannon P. Minter (admitted *pro hac vice*)
Asaf Orr (admitted *pro hac vice*)
Christopher F. Stoll (admitted *pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257
sminter@nclrights.org
aorr@nclrights.org
cstoll@nclrights.org

Adam G. Unikowsky (admitted *pro hac vice*)
Michael E. Stewart
Jennifer J. Yun
JENNER & BLOCK LLP
1099 New York Avenue, NW #900
Washington, DC 20001
(202) 639-6000 (tel)
(202) 639-6066 (fax)
aunikowsky@jenner.com

Proposed Defendant-Intervenors Jane Doe and SAGA respectfully move this Court to dismiss all of Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND

Defendant Shawnee State University ("Shawnee") is a public, four-year college in the University System of Ohio. Compl., Doc. 1, at PageID 8, ¶ 53. Shawnee enforces written nondiscrimination policies that apply to all Shawnee employees. Compl., Doc. 1, at PageID 8-9 ¶¶ 55, 59; Compl. Ex. 1, Doc. 1-1, at PageID 47-48; Compl. Ex. 2, Doc. 1-2, at PageID 58-59. Among other policies, Shawnee prohibits "Sex and Gender Based Discrimination," including "adverse treatment on based on . . . gender identity," which is defined as treatment that "denies or limits [an] individual's ability to obtain the benefits of Shawnee State's programs or activities." Compl. Ex. 2, Doc. 1-2, at PageID 60.

Plaintiff Nicholas Meriwether is employed as a professor at Shawnee. Compl., Doc. 1, at PageID 13, ¶¶ 91-93. Like other employees, he is required to comply with Shawnee's nondiscrimination policy. Compl. Ex. 2, Doc. 1-2, at PageID 58. In 2016, Plaintiff received guidance that, in order to comply with Shawnee's nondiscrimination policies and its obligations under Title IX, employees must address transgender students in accord with the student's requested gender pronouns, and that failure to do so could result in discipline. Compl., Doc. 1, at PageID 15-17, ¶¶ 104-109, 111, 121.

On January 9, 2018, Plaintiff began teaching a course in Political Philosophy at Shawnee. Compl., Doc. 1, at PageID 17, ¶ 122. Among the students in his class was Defendant-Intervenor Jane Doe, Compl., Doc. 1, at PageID 17, ¶ 124, a transgender woman. During the first class session, Plaintiff referred to Ms. Doe as "sir." Compl., Doc. 1, at PageID 17, ¶ 124. After class, Ms. Doe approached Plaintiff to inform him of this mistaken gender identification, and to request

that Plaintiff refer to her using female honorifics and pronouns. Compl., Doc. 1, at PageID 18, ¶¶ 133-134. Plaintiff refused to do so. Compl., Doc. 1, at PageID 18, ¶ 134. In subsequent class periods, Plaintiff singled out Ms. Doe by referring *only* to her by her surname,[1] while continuing to use honorifics for other students whose gender identities matched Plaintiff's assumptions. Compl., Doc. 1, at PageID 19, ¶¶ 146-147. Despite her distress at being singled out in this stigmatizing manner, Ms. Doe was required to continue participating in Plaintiff's class, lest her nonparticipation affect her grade. Compl., Doc. 1, at PageID 22, ¶ 171 (acknowledging that "participation in class discussions" affects a student's grade).

Plaintiff's refusal to comply with Shawnee's nondiscrimination policies in his treatment of Ms. Doe ultimately led to formal disciplinary proceedings. Compl., Doc. 1, at PageID 28-29, ¶¶ 222, 228. Plaintiff was issued a written warning, and advised to comply with Shawnee's nondiscrimination policies when addressing students. Compl., Doc. 1, at PageID 30, ¶¶ 235-237. Plaintiff then filed a union grievance against Shawnee, which was denied, Compl., Doc. 1, at PageID 31, ¶ 251, and this lawsuit followed.

ARGUMENT

Shawnee's nondiscrimination policies require that when its employees address a student, they respect the student's requested gender pronouns. The policy applies to *all* employees, regardless of their religion or personal beliefs, and regardless of whether they are professors or not. The policy does not apply to an employee's scholarship nor does it limit any employee's freedom to express views on any subject or to teach any subject. Plaintiff may disagree with this workplace policy, but it does not violate the Constitution. A public employer, like a private

[1] Plaintiff did subsequently refer to Ms. Doe as "Mr." Doe in at least one later class period, but alleges this was "inadvertent[]." Compl., Doc. 1, at PageID 21, ¶ 157.

employer, may insist that its employees adhere to a nondiscrimination policy when undertaking their job-related duties.

I. Plaintiff Has Not Stated a Claim Under the Free Speech Clause.

Plaintiff brings four free speech claims: "Retaliation" (Count One), "Content & Viewpoint Discrimination" (Count Two), "Compelled Speech" (Count Three), and "Unconstitutional Conditions" (Count Five). Each claim boils down to the same theory: that the Free Speech Clause prevents Shawnee from requiring him to use female pronouns when addressing Ms. Doe.

These claims fail for three independent reasons. First, under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Shawnee does not violate the Free Speech Clause by requiring its employees to adhere to workplace policies when acting in their capacity as employees. That rule forecloses Plaintiff's free speech claim: his in-classroom speech while teaching Shawnee students plainly occurs in his capacity as an employee. Second, even for speech made as a citizen rather than an employee, the First Amendment protects public employees' speech only when it addresses a matter of "public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The only speech at issue here—which is solely about how to address a particular student—falls far short of meeting the "public concern" requirement. Third, even if Plaintiff's speech were on an issue of public concern, the First Amendment would permit Shawnee to establish and enforce a nondiscrimination policy to ensure that its transgender students have an equal opportunity to get a university education.

A. Plaintiff Cannot Base A First Amendment Claim on Speech Made Pursuant To His Official Duties.

1. *A State Employer May Require Its Employee To Adhere To Workplace Rules, Including Those That Affect Work-Related Speech.*

Plaintiff's free speech claims are precluded by *Garcetti*. In *Garcetti*, the Supreme Court held 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." *Id.* at 421. *Garcetti* is controlling here, where Plaintiff's in-class speech referring to a particular student falls squarely within "statements [made] pursuant to [his] official duties" as a Shawnee employee. *Id.* Plaintiff alleges that he "regularly calls on students to answer questions about the assigned readings and to participate in class discussions." Compl., Doc. 1, at PageID 17, ¶ 123. "To him, using the Socratic method of instruction is fundamental to teaching philosophy." *Id.* Plaintiff's use of male pronouns in addressing Ms. Doe, which led to this dispute, occurred in connection with one such Socratic dialogue. Compl., Doc. 1, at PageID 17, ¶ 124. Thus, Plaintiff's speech was made in class, while leading class discussion, in his capacity as a professor. Under *Garcetti*, that resolves this case. When, as here, an employee is "simply performing his or her job duties," there is "no warrant" for a "delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti*, 547 U.S. at 423. Plaintiff's status as facilitator of classroom discussions "owe[d] its existence to [Plaintiff's] professional responsibilities," and therefore Shawnee's enforcement of a nondiscrimination code placing certain limits on that interaction "does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22; *see also id.* at 422 (the First Amendment does not give public employees "a right to perform their jobs however they see fit.").

Garcetti'*s* holding that the First Amendment does not generally exempt public employees from having to comply with rules about workplace speech is particularly compelling here, where Plaintiff exercised authority over Jane Doe as a direct result of his official position as a Shawnee employee. To be clear, *Garcetti* applies even when an employee is not exercising such authority—for instance, in *Garcetti* itself, the plaintiff was a whistleblower, writing a memorandum to get his supervisor's attention. Here, however, Plaintiff *is* exercising authority—making the claim for

immunity from workplace rules even weaker. In his capacity as professor, Plaintiff decides which students may speak, what questions they must answer, and how the student's participation will affect the student's grade. Public institutions that confer authority are entitled to regulate the exercise of that authority, including to ensure that students are treated fairly and respectfully and are able to participate in and benefit from their courses. Shawnee employs Plaintiff as a professor and grants the authority to call upon students in class and to grade them on their classroom participation. The Free Speech Clause does not give Plaintiff a right to exercise that authority on behalf of the university in whatever manner he sees fit.

2. *Plaintiff's Role as a Professor Does Not Exempt Him from* Garcetti *or Shawnee's Nondiscrimination Policies.*

Plaintiff's contention that he is exempt from *Garcetti* because he is a professor has no merit. As the Sixth Circuit has explained, public universities may require professors to adhere to university policies regarding in-class instruction without running afoul of the First Amendment. "Academic freedom implicates the freedom of a university to make its own judgments as to education, requiring deference to a university's academic decisions." *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010). "In the context of in-class curricular speech," even "in the university arena," "a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions." *Id.* (citations and quotation marks omitted). Indeed, a school may go as far as to dismiss a professor based on a professor's teaching methods without implicating the First Amendment. *See id.* (a school "may constitutionally choose not to renew the contract of a nontenured professor when that professor's pedagogical attitude and teaching methods do not conform to institutional standards").

Here, Shawnee is merely requiring that he use honorifics consistent with students' gender identity while interacting with them, if he chooses to refer to his students using honorifics. This

requirement applies identically to him as it does to every other Shawnee employee, *see* Compl. Ex. 2, Doc. 1-2, at PageID 58, and to all official-capacity interactions, not just classroom interactions, *see* Compl., Doc. 1, at PageID 15, ¶ 106. Plaintiff alleges that referring to Ms. Doe with female pronouns violates Plaintiff's "sincerely held religious beliefs as a Christian . . . related to gender identity," Compl., Doc. 1, at PageID 25, ¶ 197, but these allegations are unrelated to his status as a professor. On-campus police officers, secretaries, and custodians may have equally sincere religious objections to referring to Ms. Doe with female pronouns, yet Plaintiff does not appear to dispute that under *Garcetti*, Shawnee can require those employees, while on the job, to adhere to its nondiscrimination policy. The fact that Plaintiff is a professor does not entitle him to an exemption from Shawnee's requirement that employees refrain from treating students unequally on the basis of their gender identity, including when addressing students in class.

Plaintiff characterizes Shawnee's nondiscrimination policy as an attack on academic freedom, as though Shawnee were seeking to censor his scholarship or freedom to express any views he wishes on gender, transgender issues, or anything else. *E.g.*, Compl., Doc. 1, at PageID 24, ¶¶ 191, 193. But the Complaint alleges no facts that support that assertion. While Plaintiff's course may be related to "ethics and human nature," Compl., Doc. 1, at PageID 24, ¶ 191, Plaintiff does not allege that Shawnee has required him to voice, or refrain from voicing, any positions or views on those topics. Being required to refer to transgender students in a manner consistent with students' requested pronouns in order to ensure that all students are able to participate in and benefit from their courses does not infringe upon Plaintiff's scholarly freedom, any more than similar rules requiring professors to hold classes on time, post office hours, or avoid subjecting students to harassing speech or behavior. *See, e.g.*, *Johnson Kurek v. Abu-Absi*, 423 F.3d 590, 595 (6th Cir. 2005) ("While the First Amendment may protect Johnson-Kurek's right to express her

ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.").

Plaintiff cannot characterize this as an academic freedom case merely by alleging that uttering "Ms. Doe" implicitly conveys his views about gender. Shawnee's policy does not restrict Plaintiff's freedom to write scholarly articles about gender or to teach his philosophical views about gender or anything else. Plaintiff cannot credibly claim that there is any scholarly interest in disclosing his views about the gender of a particular student in his class as male or female. Complying with Shawnee's policy does not affect the content of his instruction; it merely requires Plaintiff—while exercising his university-conferred authority—to treat transgender students in accord with their gender identity. Academic freedom does not preclude a public university from requiring professors to adhere to basic norms of civil classroom behavior. *See Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012) (speech that "was only loosely, if at all, related to academic scholarship … does not fall within the realm of speech that might fall outside of *Garcetti*'s reach").

Accepting Plaintiff's position would have far-reaching implications. For instance, a professor who believes that women should not be pursuing higher education could refuse to call upon them in class, or call men by their surnames and refer to all women by their first names or simply as "woman." A professor who believes that married women must be subservient to their husbands could insist on calling all married women by their husband's surnames even if they have not changed their surnames after marriage. And he could declare that the college is powerless to stop him because such statements "communicate[] his own personal views on these subjects." Compl., Doc. 1, at PageID 24, ¶ 193. Likewise, a college professor hostile to a student's religion

could refer to the student as a "heathen" every time he raised his hand—and declare that the Constitution affords him the right to do so because he personally believes the student to be a heathen. The Constitution does not require that college classrooms be free from all restrictions on professors' conduct, including evenhanded applications of nondiscrimination policies that simply seek to ensure that all students are able to participate in and benefit from their courses.

B. Plaintiff's Speech Was on a Matter of Private Concern.

Plaintiff's claims also fail because referring to a student in order to call upon her in class to answer a question or contribute to the class discussion is not speaking on a "matter[] of public concern." *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017). As such, Shawnee may respond to that speech without "intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

Speech addresses a matter of public concern if it relates to a "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." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (citations and internal quotation marks omitted). "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." *Connick*, 461 U.S. at 147–48.

This is a paradigmatic case of speech on a matter of private concern. Plaintiff's speech exclusively involves workplace interactions. It is directed to one person, who is not a public figure: Ms. Doe. The purpose of referring to a student in class is to inform the student that she is being called upon to answer a question—not to express the professor's views on a particular group of people or on anything else. *See* Compl., Doc. 1, at PageID 23, ¶¶ 182-84 (alleging that "potential violation" of nondiscrimination policy involved only Plaintiff's matter of addressing Ms. Doe

individually). It is no more a "matter of public concern" than any other situation in which a public employee addresses a member of the public in the course of the employee's official duties.

Plaintiff insists that the *reason* he referred to Ms. Doe with a male pronoun is that he holds personal views on an issue of public concern: whether being transgender is "a lie" and a "mental illness." But Plaintiff misunderstands the "public concern" test. The purpose of that test is to encourage discourse on "issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *Farhat v. Jopke*, 370 F.3d 580, 590 (6th Cir. 2004). Thus, whether speech is on a matter of "public concern" turns on the *information* that the speech imparts—which necessarily requires an analysis of what was *said*, rather than the internal motivations of the speaker for saying it. *See id.* at 591 ("the pertinent question is not *why* the employee spoke, but *what* he said," and the argument that "subjective motivations are dispositive when determining whether … speech addresses a matter of purely personal concern is in direct conflict with the Supreme Court's holding in *Connick*" (citation omitted)). Thus, a letter to the editor denouncing corruption in government is of "public concern" even if the writer's subjective motivation is to advance his or her career. *See, e.g.*, *Westmoreland v. Sutherland*, 662 F.3d 714, 719 (6th Cir. 2011) (statements about public safety were on matters of public concern, even if motivated by plaintiff's own financial losses); *Rodgers v. Banks*, 344 F.3d 587, 600 (6th Cir. 2003) ("Although Plaintiff's underlying motive in writing the memo might have been to complain about incompetent management, our duty is not to discern her underlying motive, but rather to evaluate her point as it is presented in the speech."). Conversely, a statement of private concern is not transformed into a statement of public concerns even if it is motivated by broader public considerations. *See, e.g.*, *Nair v. Oakland County Cmty.*

Mental Health Auth., 443 F.3d 469, 479-80 (6th Cir. 2006) (subjective motivations for authoring letter were irrelevant when letter itself did not touch on issue of public concern).

Thus, the Court must analyze not Plaintiff's personal motives for using male honorifics or calling Ms. Doe by her last name only, but the utterances themselves—*i.e.*, his referring to Ms. Doe as "Mr. Doe" or "Doe." And they do not address a matter of public concern. They tell Ms. Doe a question is coming. That Plaintiff possesses personal opinions on broader social questions that, if conveyed, might be of "public concern" does not transform his routine honorifics into statements that "enable the members of society to make informed decisions about the operation of their government." *Farhat*, 370 F.3d at 590. Indeed Plaintiff's use of pronouns did not convey *any* information of public concern—even his own beliefs about gender—because a reasonable listener would understand the use of female pronouns to reflect nothing more than respect for Ms. Doe's request. *See, e.g., R.G. & G.R.*, 884 F.3d at 566 n.1 ("We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.").

Plaintiff's statement conveys one additional piece of information: it "outs" Ms. Doe as a transgender woman. This confirms that his statement is not on a matter of "public concern." Whether a person is transgender is the antithesis of information of "public concern"—it is intensely private, personal information. There is a fundamental difference between gender as a general matter—a matter of public concern—and a particular person's status as transgender—a matter of private concern. Conveying the latter information does not transform Plaintiff's speech into information of public concern merely because the speaker is motivated by opinions about gender, any more than publicly disclosing a specific person's cancer diagnosis is a matter of "public concern" because the speaker intends to educate the public that cancer diagnoses are widespread.

If Plaintiff's argument were correct, then public employees could convert any refusal to comply with a workplace policy into speech on a matter of public concern simply by claiming that their violation is intended to "send a message" about some broader issue. For example, a professor who believes that second marriages are sinful could claim a free speech right to refuse to use a student's married name in order to convey that belief. Or a professor who believes that a particular religion or nationality is "a lie" could claim a free speech right to convey that belief by refusing to refer to a student by a name that signals adherence to that religion or nationality. Neither the Sixth Circuit nor any other court has adopted such extreme reasoning.

C. Even under First Amendment balancing, Plaintiff's claim fails.

Even if Plaintiff were speaking as a citizen rather than as an employee, *and* his statements were on a matter of public concern, his Free Speech claim would fail. Plaintiff's "interests . . . in commenting upon matters of public concern" do not outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Evans-Marshall*, 624 F.3d at 338 (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). Here, Shawnee's interest in maintaining its nondiscrimination policy outweighs Plaintiff's interest in addressing Ms. Doe using particular honorifics.

Shawnee has a powerful interest in maintaining its nondiscrimination policy. Colleges are "legally required to maintain a hostile-free learning environment and must strive to create policies which serve that purpose," and have every right to protect their students' "right to learn in a hostil[ity]-free environment." *Bonnell v. Lorenzo*, 241 F.3d 800, 823-24 (6th Cir. 2001). "Speech that rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing." *Id.* at 824.

In this case, Title IX[2] requires Shawnee to maintain a nondiscrimination policy that ensures that transgender students are treated by their professors in accordance with their gender identity. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A university violates Title IX when "an official of the institution who had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct." *Mallory v. Ohio Univ.*, 76 F. App'x 634, 638 (6th Cir.2003); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015). Shawnee would be liable under that standard if it knowingly allowed its employees to discriminate against transgender students.

The Sixth Circuit has held that discrimination against transgender individuals is discrimination "on the basis of sex" for Title VII purposes. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018) ("discrimination on the basis of transgender and transitioning status violates Title VII."). Title IX similarly prohibits discrimination "on the basis of sex," so discrimination against transgender individuals violates Title IX as well. *See Miles v. N.Y. Univ.*, 979 F. Supp. 248, 250 n.4 (S.D.N.Y. 1997) ("[T]he Title IX term 'on the basis of sex' is interpreted in the same manner as similar language in Title VII"); *see also Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (school policy that "punishes that individual for his or her gender non-conformance . . . violates Title IX"). Shawnee has a compelling interest in complying with federal nondiscrimination law.

[2] Because Shawnee is a public institution, the Equal Protection Clause similarly prohibits discrimination against Jane Doe on account of her gender identity. *See City of Salem*, 378 F.3d at 577; *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016). The Americans with Disabilities Act may also prohibit such discrimination. *See Tate v. Wexford Health Source Inc.*, No. 3:16-cv-92, 2016 WL 687618, at *5 (S.D. Ill. Feb. 19, 2016).

Even if federal law did not require Shawnee to maintain and enforce its nondiscrimination policy, Shawnee has every right to enact a nondiscrimination policy more protective than federal law. Shawnee has a powerful interest in ensuring that its students receive the education they pay for, and it was entitled to conclude that protecting transgender students from discrimination is necessary for those students to learn and thrive. If Plaintiff's statements undermine Shawnee's mission—ensuring that its students are educated—then the First Amendment allows Shawnee to prioritize its mission and regulate the speech of its employees. *See Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671-72 (7th Cir. 2006) (college had an interest in ensuring that instructors "stay on message" in class and not create environment where student "avoided" instructor and "was unhappy that he still had to go to a class" that instructor taught); *Poulard v. Trs. of Ind. Univ.*, No. 2:16-cv-115, 2018 WL 4680010, at *11 (N.D. Ind. Sept. 28, 2018) (university has "strong interest in eliminating [harassing statements] in order to foster an inclusive learning environment.").

To permit Plaintiff's personal preferences regarding the manner in which he will address students to outweigh Shawnee's interest in nondiscrimination would vitiate any public university's ability to enforce nondiscrimination protections in the classroom. Plaintiff's position has no limiting principle: if the manner in which professors address individual students in the classroom is exempted from nondiscrimination laws, then a college could not discipline a professor who, based on his sincerely held beliefs, uses derogatory terms to address all nonwhite students, or women, or students from a minority faith, or students on financial aid. The Sixth Circuit has held that the First Amendment may not "be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected." *Bonnell*, 241 F.3d at 824. Nor may it be used as a shield by teachers who choose to use their unique and superior positions to discriminate against transgender students.

II. The Free Exercise Clause Does Not Allow Plaintiff to Violate a Neutral, Generally Applicable Rule Not Targeted at Any Religious Beliefs or Practices.

Plaintiff's Free Exercise claim (Count Four) also fails as a matter of law. Shawnee's nondiscrimination policy is a neutral and generally applicable policy that was applied to Plaintiff's conduct without targeting particular religious practices or views. The nondiscrimination policy therefore did not violate Plaintiff's right to exercise his religion.

An individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," because "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 878-79 (1990) (citation omitted), *superseded in part by statute as stated in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Therefore, neutral, generally applicable laws do not violate the Free Exercise Clause unless "the object of [the] law is to infringe upon or restrict practices because of their religious motivation," or if "the purpose of [the] law is the suppression of religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Based on this principle, the Supreme Court in *Smith* found Oregon's ban on the use of a hallucinogen did not infringe Smith's right to exercise religion freely even if he used it for religious reasons because the ban was neutral, generally applicable law, and not aimed at religious practices. *Smith*, 494 U.S. at 877-78.

Here, Plaintiff has failed to state a claim that Shawnee's nondiscrimination policy was not neutral, or that the policy was applied to target and suppress his religious beliefs. The nondiscrimination policy is neutral and generally applicable on its face: Shawnee's nondiscrimination policy applies to "all employees, students, visitors, agents, and volunteers," in "all aspects of the University's programs and operations." Compl. Ex. 2, Doc. 1-2, PageID 50.

The Sixth Circuit's decision in *Kissinger v. Board. of Trustees. of Ohio State University*, 5 F.3d 177 (6th Cir. 1993) establishes that such policies do not violate the Free Exercise Clause, even if they may burden a particular person's religious beliefs. In *Kissinger*, a veterinary student objected to operating on live animals due to her religious beliefs. The Sixth Circuit found that there was no evidence that the state used its curriculum requirement for operating on live animals before graduating from the veterinary program to "attack or exclude any individual on the basis of his or her religious beliefs." *Kissinger*, 5 F.3d at 179. Similarly, Plaintiff here fails to allege that Shawnee used the nondiscrimination policy to attack or exclude Christians who do not want to refer to transgender students by their requested gender pronouns. Shawnee applied its policy without regard to Plaintiff's religion; it is Plaintiff who introduced his religious beliefs as a basis for seeking an exception to the policy. Compl., Doc. 1, PageID 12-13, 21, 25, 28, 30, ¶¶ 84, 90, 162, 197, 226, 241. Plaintiff's unilateral invocation of his religious beliefs to avoid complying with a generally applicable, neutral policy does not demonstrate improper motivation by *Shawnee*.

Plaintiff alleges that Shawnee's enforcement of its nondiscrimination policy reflects hostility towards his religious beliefs, but his conclusory allegations do not plausibly state a free-exercise claim. First, Plaintiff alleges that Defendant Pauley, the department chair, expressed "hostility" to his religious beliefs. But this discussion occurred in November 2016, well over a year before Ms. Doe even took his class and lodged a Title IX complaint, and even Plaintiff's allegations draw no connection between this alleged conversation and the nondiscrimination policy or his warning for violating it. Compl., Doc. 1, PageID 16-17, ¶¶ 115-118.

Second, Plaintiff alleges that Defendant Bauer expressed hostility towards his religious beliefs when he stated that he would not grant a religious accommodation to Plaintiff because such an accommodation would then be available to any faculty member with sincerely held religious

beliefs that may discriminate on the basis of sex or race. Compl., Doc. 1, PageID 33, ¶¶ 266-68. Despite Plaintiff's allegation to the contrary, Defendant Bauer's statements reaffirmed the fact that the nondiscrimination policy was neutral and generally applicable. As Defendant Bauer recognized, public officials should not decide what religious beliefs are good and what religious beliefs are bad—such distinctions are repugnant to the Free Exercise Clause, which requires the state to be neutral between religions and "forbids subtle departures from neutrality." *City of Hialeah*, 508 U.S. at 534. If Plaintiff was entitled to an exemption from nondiscrimination laws based on his religious beliefs, other professors would be too—even if those professors' religious beliefs mandated other forms of discrimination on the basis of race or sex. Defendant Bauer's expression of this elementary principle of neutrality did not *violate* the Free Exercise Clause.

Third, Plaintiff alleges that Defendant Bauer laughed when the Union president explained how disciplinary actions against Plaintiff would violate his religious beliefs. Compl., Doc. 1, PageID 31, ¶ 246. Even accepting this factual allegation as true, it is not the basis for a free-exercise claim. *See, e.g.*, *A'la v. Cobb*, 208 F.3d 212 (6th Cir. 2000) ("De minimis events simply do not state constitutional claims"). Nor does Plaintiff even attempt to establish that this alleged "laughter" is relevant to Shawnee's consistent enforcement of the nondiscrimination policies, which were adopted and explained to Plaintiff well before he violated the policy. Compl., Doc. 1, PageID 8-9, 15, ¶¶ 53, 57, 62, 105. In sum, Plaintiff's allegations do not plausibly show that the nondiscrimination policy was "aimed at any particular individual, group, religious practice, or religious belief," *Kissinger*, 5 F.3d at 179, or that the object of the rule was "to infringe upon or restrict practices because of their religious motivation." *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999).

Finally, Plaintiff cannot state a free-exercise claim based on the conclusory allegation that the nondiscrimination policy represents "a system of individualized assessments." Compl., Doc. 1, at PageID 39, ¶ 310. Plaintiff does not allege that Shawnee has ever, or will ever, grant any exemption from its policy that transgender students must be treated in conformance with their gender identity. *See Kissinger*, 5 F.3d at 179 (finding that plaintiff failed to show that the school had a system of exemptions that allowed students to graduate without completing the required surgical coursework). To the extent Plaintiff is referring to the fact that Shawnee performs an individualized *investigation* before deciding whether a faculty member has violated university policy, the Free Exercise Clause does not prohibit Shawnee from giving its professors due process.

III. Plaintiff's State Free Exercise Claim Must Be Dismissed.

Plaintiff's free exercise claim under Article I, § 7 of the Ohio Constitution (Count Eight) also fails as a matter of law. First, the state law claim is foreclosed by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); Def. Mot. to Dismiss, Doc. 22, at PageID 583-584. Even if *Pennhurst* does not apply, the Court should still decline to exercise its supplemental jurisdiction over this state law claim if all federal law claims are dismissed. *Gamel v. City of Cincinnati*, 625 F.3d 949, 952 (6th Cir. 2010) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed." (internal citation omitted)); *see also* 28 U.S.C. § 1367(c)(3) (stating that a district court may decline to exercise supplemental jurisdiction if it has "dismissed all claims over which it ha[d] original jurisdiction").

It would be particularly appropriate to decline supplemental jurisdiction here, given that no Ohio case has applied Article I, § 7 of the Ohio Constitution in analogous circumstances. The Ohio Supreme Court has held that a prison guard had the state constitutional right to wear his hair

long for religious reasons even if this violates a generally applicable grooming policy. *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000). In that context, the court applied the rule that "the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest." *Id.* But this case presents a very different scenario. In *Humphrey*, the plaintiff did his job as dictated by the state—he simply wanted to wear his hair long while doing so. Here, Plaintiff seeks to discriminate in the *exercise of* his state-conferred authority. *Supra*, at Part I.A.1. Thus, Plaintiff is analogous to a prison guard who argues that the state constitution protects his right to discriminate against transgender inmates because this is required by his religious beliefs. The Ohio Supreme Court should have the chance to consider this unprecedented claim in the first instance.

Even if the state-law claim were properly before this Court, it would lack merit. Even assuming the compelling-state-interest test of *Humphrey* applies here, the state satisfied it as a matter of law: the state has a compelling state interest in preventing discrimination against transgender students and ensuring that professors do not abuse their authority over students, and the nondiscrimination policy is the least restrictive means of achieving that policy. *Supra*, Part I.C. Further, even if the enforcement of Shawnee's nondiscrimination policies violated Article I, § 7, the application of Article I, § 7 would be preempted by Title IX. As explained above, federal law requires Shawnee to maintain a nondiscrimination policy that ensures that transgender students are treated by their professors in accordance with their gender identity, and that they are not subject to a hostile learning environment. *Supra*, Part I.C. Any state law that prevents Shawnee from enforcing Title IX stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress," because it is impossible for Shawnee to comply with both federal law

(Title IX) and state law (the state Free Exercise Clause). *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). Therefore, if Ohio's Free Exercise Clause were to be interpreted as protecting Plaintiff's discriminatory conduct, it is preempted.

IV. Plaintiff's Remaining Claims Lack Merit.

Due Process. Plaintiff's due process claim (Count Six) must be dismissed because Shawnee's nondiscrimination policy is not unconstitutionally vague. The Due Process Clause requires "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), though it does not require legislating in "encyclopedic terms." *United States v. Jenkins*, 770 F.3d 507, 510 (6th Cir. 2014).

Plaintiff has not plausibly alleged that the nondiscrimination policy is unconstitutionally vague. Plaintiff argues that "what constitutes 'gender identity' and 'gender identity discrimination'" is vague because the terms are "inherently subjective and elude any precise and objective definition." Compl., Doc. 1, at PageID 41, ¶ 327. To the contrary, the policy is crystal clear: all students, transgender or not, must be treated in accordance with their gender identity. Moreover, Plaintiff's own factual allegations show that Shawnee has clearly communicated what the policy required multiple times and that Plaintiff was on notice. In August 2016, over a year before Ms. Doe started taking his class, faculty members of the University were informed that they could face disciplinary action if "they refused to use a student's requested name or pronoun." Compl., Doc. 1, at PageID 15, ¶ 105. In October 2016, Defendant Milliken personally informed Plaintiff that the nondiscrimination policies meant that professors must utilize a student's requested pronoun, "regardless of the professor's convictions or views." Compl., Doc. 1, at PageID 16, ¶ 109 at PageID 16. Defendant Milliken then personally informed Plaintiff that he

could be "subject to administrative disciplinary procedures if he refused to use a pronoun that reflects a student's self-asserted gender identity." Compl., Doc. 1, at PageID 16, ¶ 111. This same interpretation of the policy—requiring faculty members to utilize a student's requested pronoun—was communicated to Plaintiff again in 2018, during the disciplinary process. Compl., Doc. 1, at PageID 25-26, ¶ 204. Thus, the University enforced the policy in a clear, non-arbitrary manner, and Plaintiff was given ample notice as to what it required. Because the nondiscrimination policy is not unconstitutionally vague, and because Plaintiff was clearly on notice of what the policy required, Plaintiff's Due Process claim must be dismissed.

Equal protection. Plaintiff's equal protection claim (Count Seven) must be dismissed because Plaintiff failed to allege any disparate treatment. To state a valid Equal Protection claim, Plaintiff must allege that he was treated differently from others who are similarly situated. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006). Here, Plaintiff has not made any factual allegation that any other professor at the University refused to call on students according to their gender identity but was not disciplined for doing so; nor has Plaintiff alleged that Shawnee deliberately failed to discipline other professors at the University who violated the nondiscrimination policy.[3]

* * *

For the foregoing reasons, Proposed Defendant-Intervenors respectfully move the Court to dismiss Plaintiff's complaint in its entirety.

[3] Ms. Doe and SAGA adopt the State's arguments regarding Plaintiff's breach of contract claim (Count Nine). Def. Mot. to Dismiss at 27-29.

Date: January 16, 2019

Respectfully Submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky (admitted *pro hac vice*)
Michael E. Stewart
Jennifer J. Yun
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000 (tel)
(202) 639-6066 (fax)
aunikowsky@jenner.com

Jennifer L. Branch #0038893
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100 (tel)
(513) 345-5543 (fax)
Jbranch@gbfirm.com

Shannon P. Minter (admitted *pro hac vice*)
Asaf Orr (admitted *pro hac vice*)
Christopher F. Stoll (admitted *pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257 (tel)
(415) 392-8442 (fax)
sminter@nclrights.org
aorr@nclrights.org
cstoll@nclrights.org

Attorneys for JANE DOE and SEXUALITY AND GENDER ACCEPTANCE