

No. 20-3289

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NICHOLAS K. MERIWETHER,

Plaintiff – Appellant

v.

FRANCESCA HARTOP, et al.,

Defendants – Appellees

JANE DOE, et al.,

Intervenor Defendants – Appellees

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 1:18-cv-00753-SJD
The Honorable Susan J. Dlott

**MOTION FOR LEAVE TO FILE
NATIONAL ASSOCIATION OF SCHOLARS' AMICUS CURIAE
BRIEF SUPPORTING PLAINTIFF-APPELLANT AND URGING
REVERSAL OF THE LOWER COURT**

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The National Association of Scholars respectfully moves this Court for leave to file its contemporaneously lodged amicus curiae brief in support of Plaintiff-Appellant Nicholas K. Meriwether under the authority of Federal Rule of Appellate Procedure 29(a).

The Association requested consent of the parties to file the proposed brief. Counsel for the Plaintiff-Appellant Nicholas K. Meriwether and for Defendants-Intervenors Jane Doe and Sexuality and Gender Acceptance granted their consent. Counsel for Defendants-Appellees Francesca Hartop, et al. (collectively, “University”) declined consent.

IDENTITY OF AMICUS CURIAE

The National Association of Scholars is a non-profit organization that seeks to reform higher education. Founded in 1982 as Campus Coalition for Democracy and known since 1987 as the National Association of Scholars, it is a leading advocate for academic freedom, disinterested scholarship, and excellence in American higher education.

INTEREST OF AMICUS CURIAE

The passion for academic freedom, disinterested scholarship, and excellence in higher education unites the Association’s members—over

three thousand superb professors holding beliefs spanning the political spectrum. The associated professors believe that the pursuit of understanding and truth falters when the government wrongly suppresses free speech on campus. Indeed, suppressing the freedom to question and think independently risks replacing education with ideological indoctrination.

The National Association of Scholars advocates its views in several ways: it publishes hundreds of articles through its respected quarterly journal, *Academic Questions*, as well as issuing reports on current academic freedom issues. Two notable recent reports are an explanation of *The Architecture of Intellectual Freedom* (2016) and an historical summary of debates relevant to that freedom in *Charting Academic Freedom* (2018).¹

The Association also testifies in Congress and in state legislatures to support sound legislation to advance excellent education. And the Association serves regularly as amicus curiae, bringing its scholarly views forward to defend the freedoms of speech and conscience of

¹ *Architecture* is available at https://bit.ly/NAS_Arch_Intell_Freedom, and *Charting* is available at https://bit.ly/NASCharting_Acad_Freedom.

instructors like Professor Nicholas K. Meriwether and of students as well.

It has served as amicus within this Circuit and at other federal circuits, including cases such as *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *rev'd in part*, 539 U.S. 244 (2003); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir.); *Fisher v. Univ. of Texas at Austin*, 644 F.3d 301 (5th Cir. 2011); and *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

Public advocacy, scholarly writing, legislative testimony, and serving as amicus curiae to various courts each address different facets of improving education. And amicus engagement becomes particularly important when novel questions arise in court—such as whether to deny First Amendment protection to the use of sex-based pronouns when administrators decree that gender-based pronouns must be used.

DESIRABILITY OF AMICUS CURIAE'S BRIEF

This case is particularly appropriate for the associated scholars to speak to the Court, as the University administrators are insisting that a professor speaking sex-based and pronouns “is not ‘speech’ protected

by the First Amendment.” Def’s Mot. to Dismiss, RE 22, PageID 569.

The action was dismissed on the University’s motion, with the lower court rejecting Professor Meriwether’s free speech claims on just that ground, saying that “[h]is speech—the manner by which he addressed transgender students—was not protected under the First Amendment.”

Ord. Adopting Rep. and Rec’n, RE 60, PageID 2403. The University instead deems Professor Meriwether’s use of pronouns and titles as a “simple, ministerial act . . . that “is not part of academic discourse....”

Defs’ Mot. to Dismiss, RE 22, PageID 568.

If this is so, one may wonder why University officials have worked so hard and so long to force one professor to speak one pronoun—a word that must be so inconsequential in its meaning that it is not “free speech” under the First Amendment?

The answer is that when it comes to gender identity, pronouns are something of an elephant in a mousehole, being freighted with meaning far beyond their size.

Consider that when the distinguished linguists of the American Dialect Society sought the “Word of the Millennium” in 1999—the “one word that has been so significant, and so characteristic and so

fundamental in the entire millennium”—they landed on “she.” VOA Learning English, (Feb. 1, 2002), https://bit.ly/ADS_Millennium_Word (quoting Alan Metcalf, executive secretary for the American Dialect Society).

Odd that a word that is no more than a ministerial moving of the lips so influenced a thousand years of human history. But then, maybe not so odd: pronouns have long been used to inculcate worldviews—even at the cost of conscience, as in Professor Meriwether’s case.

That was exemplified through the dark years of the Cold War, where Communist battled Capitalist for, frankly, world domination. Thus, we saw noted American author Arthur Koestler use a fictitious protagonist, Rubashov—a party official who had fallen from grace and faced show trial and execution—to reflect on how a totalitarian society permitted its citizens to think of themselves only as “we.” Rubashov mused about how the ruthless ruling power had “inoculated everyone against employing the first-person singular.” Arthur Koestler, *Darkness at Noon* 226 (Simon & Schuster 2019). In one vignette, as Rubashov taps a message to an adjacent cell, he realizes that “[h]e had never tapped the word ‘I’ in a conversation.” *Id.*

In much the same way, during the Spanish Civil War, the use of formal pronouns was banished in areas controlled by Communist and anarchist forces—no doubt to emphasize the primacy of the proletariat under the new regime. Duncan White, *Cold Warriors* 22-23 (Harper Collins 2019). That suppression was noted by a young Englishman, Eric Blair, on his way to fight Spanish fascists in 1937. *Id.* And that may be a telling point, as Blair is remembered now not for fighting fascism, but for fighting totalitarianism under his pen name of George Orwell.

But manipulating pronouns and titles to inculcate values is not just the stuff of sparring superpowers: it is alive and well in academia today—typically as part of “social transitioning,” in which a person claiming a gender discordant with their sex insists on being affirmed in their perceived gender. World Prof. Ass’n for Transgender Health, *Standards of Care* 16 (2011) (noting use of gender-based pronouns in social transition).

As used here, “sex” is binary, fixed, objectively determined, and grounded in primary sex characteristics. The University admits that sex is a “medical term designating a certain combination of gonads, chromosomes, external genitalia, secondary sex characteristics, and

hormonal balances.” University LGBTQIA web page, Am. Compl. Ex. 3, RE 31-3, PageID 779. This is consistent with the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* statement that sex “refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia”). *DSM-5* 451 (5th ed. 2013).

Importantly “gender” is not sex but rather a “social combination of identity, expression, and social elements all related to masculinity and femininity. Includes gender identity (self-identification), gender expression (self-expression), social gender (social expectations), gender roles (socialized actions), and gender attribution (social perception).” University LGBTQIA page, Am. Compl. Ex. 3, RE 31-3, PageID 777. Gender is solely subjective: “There are a wide range of gender identities, including man, woman, transgender, genderqueer, etc. Since gender identity is internal, one's gender identity is not necessarily visible to others.” *Id.*

GLSEN (a leading gender identity advocacy group) explains: it is possible “to develop, live and express a gender that feels truer and just

to oneself.” *Pronouns: A Resource*, <https://bit.ly/GLSENpronoun>. To that end, one may insist that others use the “pronoun or set of pronouns that a person identifies with and would like to be called when their proper name is not being used.” *Id.* And, we are told, [s]ome people prefer no pronouns at all.” *Id.*

Recently, speaking of a litigant who identified with a sex-discordant gender, the Fifth Circuit observed that “ordering use of a litigant’s preferred pronouns may well turn out to be more complex than at first it might appear. It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex—‘her’ instead of ‘his,’ or ‘his’ instead of ‘her.’” *United States v. Varner*, 948 F.3d 250, 256–57 (5th Cir. 2020). The court pointed out that a person’s gender “may include alternative gender identities beyond binary stereotypes.” *Id.* (citation omitted).

Nor does it stop with the selection of an individual gender; as one college gender guide cautions, “[i]t is common for someone to switch their pronouns to something else based on context.” *Gender Pronouns Information*, Wash. Univ., https://bit.ly/WashU_Gender_Pronouns. And

there is still more: a person's pronouns may change over time as well.

Id.

Think about that: If there is no substantive, important meaning embedded in pronouns, then there would be no reason to vary one's pronoun to respond to changed context or to express one's gender one way at one time and another way at another time.

In sum, government-ordered use of gender-based pronouns is no small thing. That is seen in a contemporary gender identity case dealing with males competing in girl's high school track, where counsel for the female athletes have moved to recuse the judge who had ordered them to use subjective gender identity terminology rather than objective sex-based terminology in their arguments. *See* Memo. in Support of Plfs' Mot. to Disqualify ECF 103, *Soule v. Connecticut Assoc. of Schools*, no. 3:20-cv-00201 (D. Ct. Feb. 12, 2020).

All of this points to the First Amendment conflict here: Is the University justified in forcing its professor to speak gender-based titles and pronouns when that conflicts with Professor Meriwether's conscientious and religious convictions as to sex?

Answering that largely turns on whether pronouns have more than a rote ministerial role in English, and particularly in the gender identity context. And this is where the associated scholars may be of substantial benefit to the Court.

As the scholars explain in their brief, pronoun use has been deployed to shape values by advocates ranging from feminists to Quakers to revolutionaries. Pronouns embed metaphysical and ontological meaning—such that authors may intentionally misuse a pronoun to communicate a deeper meaning. And in this case, the use (or non-use) of gender-based titles and pronouns implicate the same value-shaping, metaphysical, and ontological concerns and thus merit First Amendment protection.

CONCLUSION

This highlights the value of allowing the National Association of Scholars to offer its scholarly viewpoint on the importance and meaning of titles and pronouns in this context. Such terms are rife with meaning and merit full First Amendment protection. And when Professor Meriwether's free speech claims were denied because such titles and pronouns were denoted as mere ministerial conduct that is a stranger to

First Amendment protection, then understanding the depth and breadth of meaning embedded in the use of titles and pronouns is certainly relevant to properly deciding the case.

Thus, scholarly views from a well-established and credible scholars' association are most apropos to providing "information on matters of law about which there [is] doubt, especially in matters of public interest." *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991). And to that end, the National Association of Scholars respectfully seeks this Court's leave to file its amicus curiae brief supporting Professor Meriwether and urging reversal of, and remand to, the lower court.

Respectfully submitted,

/s/ Gary S. McCaleb

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2020, the foregoing motion was sent electronically to the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit for uploading to the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Gary S. McCaleb _____
Gary S. McCaleb