IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

NICHOLAS K. MERIWETHER, *Plaintiff*, *v.* **THE TRUSTEES OF SHAWNEE STATE UNIVERSITY**, *et al.*, *Defendants.*	Case No: 1:18-cv-00753-SJD **THE HONORABLE SUSAN J. DLOTT** **THE HONORABLE KAREN L. LITKOVITZ**

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
THE FIRST AMENDED VERIFIED COMPLAINT

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INTRODUCTION

Can the government force a philosophy professor, whose calling is to discern truth and reality, to say things he does not believe to be real or true? Can it force him to speak words that he believes falsely communicate basic principles about humanity? Of course not. No more than the government can force a pro-choice women's studies professor to refer to what is inside a pregnant woman as an "unborn baby" (rather than fetus). The "fixed star in our constitutional constellation" is that "no official, high or petty," including Defendants, "can prescribe what shall be orthodox in . . . matters of opinion," including gender identity, or "force citizens to confess by word or act their faith therein." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Defendants deploy a web of contradictions to obscure this "fixed star." On campus, they claim to respect professors' First Amendment rights. Compl. ¶¶ 200–01, 203, 205, Doc. 34, PageID.1481. In court, they claim these rights do not exist. Defs.' Mot. to Dismiss ("MTD"), Doc. 36, PageID.1883–85. On campus, they say written warnings are "disciplinary actions," and "formal" ones at that. Compl. Ex. 4, Doc. 34-4, PageID. 1645–46. In court, they deem them inconsequential. Defs' MTD, Doc. 36, PageID. 1886. On campus, they say Dr. Meriwether's use of sex-based terms communicates so much that it creates a hostile environment, Compl. ¶¶ 230, 234, 239, PageID.1485–86, is discrimination, *id.* ¶¶ 240, 276, PageID.1486, 1491, and produces an "[un]safe educational experience for students." Compl. Ex. 27, Doc. 34-27, PageID.1799. In court, they say it communicates nothing and is so *de minimis* it falls outside the First Amendment. Defs.' MTD, PageID.1883–84, 1891. They can't have it both ways.

But this web unravels, especially on a motion to dismiss, when two threads are pulled. First, the written warning—threatening "further corrective actions," Compl. ¶ 248, Doc. 34, PageID.1487—is disciplinary and sets the stage for more severe and sudden punishment, making it an adverse action. *Id.* ¶¶ 164, 251, 263, PageID.1477, 1487, 1489. Second, Dr. Meriwether's speech, which was part of his teaching and on

a matter of public concern, falls well within the First Amendment's protections.

Defendants seek to force Dr. Meriwether to convey ideas about human nature that he believes are false. If he were to comply with their demands, he would be forced to communicate that gender identity fundamentally shapes and defines who we truly are as humans, that our sex can change, and that a man who identifies as a woman *really is* a woman. But if he refers to students based on their biological sex (as he has), he communicates the views he actually believes—that our sex shapes who we are as humans, that "this sex is fixed in each person," and that "it cannot be changed, regardless of [our] feelings or desires." Compl. ¶¶ 89, 204, Doc. 34, PageID.1469, 1481. Hence, this case is about far more than titles or pronouns; it is about dueling views of human nature. Defendants cannot compel one side to voice the other's beliefs.

For the "essentiality of freedom in the community of American universities is almost self-evident," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), and "safeguarding academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967). That is why Defendants cannot use what faculty say in their teaching and scholarship against them, converting "publish or perish" into "publish and perish." Nor can they treat professors, the "priests of our democracy," *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring), as instructional jukeboxes by micromanaging their speech to fit the latest ideological fad, lest they create what the First Amendment prohibits—"a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. For these reasons, Defendants' motion should be denied.[1]

ARGUMENT

A "motion to dismiss . . . is disfavored, especially when one's civil rights are at stake." *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012). Thus, they are "rarely granted." *Nuchols v. Berrong*, 141 F. App'x 451, 453 (6th Cir. 2005).

[1] Dr. Meriwether incorporates by reference his response to Intervenors' Motion to Dismiss, Doc. 44.

This Court must "construe the complaint in the light most favorable to [Dr. Meriwether], accept its allegations as true, and draw all reasonable inferences in [his] favor." *Girl Scouts of Middle Tenn., Inc. v. Girl Scouts of U.S.A.*, 770 F.3d 414, 418 (6th Cir. 2014). These motions "turn purely on legal issues, not an assessment of the evidence." *Lozar v. Birds Eye Foods, Inc.*, 678 F. Supp. 2d 589, 597 (W.D. Mich. 2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (dismissing is improper "even if it strikes a savvy judge that actual proof of those facts is improbable"). FED. R. CIV. P. 8(a)(2) requires "a short and plain statement . . . showing that [Dr. Meriwether] is entitled to relief." He "need only give [Defendants] fair notice of what the . . . claim[s] [are] and the grounds upon which [they] rest[]." *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (cleaned up). Dr. Meriwether's Complaint does this and more, "raise[s] [his] right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and creates more than an "inference" that Defendants are liable, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Hence, Defendants' motion should be denied.

I. Defendants' technicalities do not justify dismissing any federal claims.

A. All Defendants were personally involved in (and thus are liable for) violating Dr. Meriwether's rights.

Defendants claim the Trustees had no role in violating Dr. Meriwether's rights. Defs.' MTD, Doc. 36, PageID.1882. To be liable in their official capacities (the only one at issue, Compl. ¶ 52, Doc. 34, PageID.1464), the Trustees "must have, by virtue of their office, some connection with the alleged unconstitutional act." *Top Flight Entm't, Ltd. v. Schuette*, 729 F.3d 623, 634 (6th Cir. 2013). The Complaint states the Trustees "approved and adopted" the policy at issue. Compl. ¶ 59, Doc. 34, PageID. 1465; Compl. Ex. 1, Doc. 34-1, PageID.1509 ("Approved by: Board of Trustees"). Adopting the policy used to punish Dr. Meriwether, Compl. Ex. 20, Doc. 34-20, PageID. 1771 (referencing this policy), establishes this connection, making the Trustees "proper part[ies] to the lawsuit in [their] official capacities." *Top Flight*, 729 F.3d at 634.

They claim Defendant Pauley had no role, citing solely her collective bargaining

status. Defs.' MTD, Doc. 36, PageID.1877 n.1, 1883. But only the facts in the Complaint matter here, and they state she has "authority and responsibility for governing and regulating" faculty, including Dr. Meriwether. Compl. ¶¶ 36–37, Doc. 34, PageID. 1462. Plus, her involvement "at least in part in . . . enforcing" the policy establishes personal (and also official) capacity liability. *Peatross v. City of Memphis*, 818 F.3d 233, 244 (6th Cir. 2016); *id.* at 241; *Estate of Young v. Martin*, 70 F. App'x 256, 260 n.3 (6th Cir. 2003) (noting officials can be liable for "implementing policy" that results in a constitutional violation). She was Dr. Meriwether's chair, oversaw him, and helped enforce the policies. Compl. ¶¶ 36–38, 46, 49, Doc. 34, PageID.1462–63. It alleges she shared the hostility towards his religious beliefs, *id.* ¶¶ 117–22, PageID. 1473; and that she relayed the Doe incident to other officials, *id.* ¶¶ 145–46, PageID. 1475–76; Compl. Ex. 7, Doc. 34-7, PageID.1700, emphasizing that Dr. Meriwether "was using male pronouns when recounting [it]." Compl. Ex. 13, Doc. 34-13, PageID. 1720. Hence, the Complaint pleads facts, which must be taken as true, showing she was "involved at least in part in . . . enforcing" the policies. *Peatross*, 818 F.3d at 244.

B. Dr. Meriwether complied with the Eleventh Amendment.

Despite Defendants' claims, Defs.' MTD, Doc. 36, PageID.1882, 1894, Dr. Meriwether sued not the University, but Defendants in their official capacities for prospective equitable relief. Compl. ¶ 52 & Prayer for Relief, Doc. 34, PageID.1464, 1503–04. "[A] federal court may, without violating the Eleventh Amendment, issue a prospective injunction against a state officer to end a continuing violation of federal law." *Price v. Medicaid Dir.*, 838 F.3d 739, 746–47 (6th Cir. 2016) (citing *Ex Parte Young*, 209 U.S. 123, 159 (1908)). When sued in this way, Defendants are "person[s] under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 637 & n.3 (6th Cir. 2005).[2]

[2] Dr. Meriwether concedes that the state law claims for equitable relief must be dismissed under

II. Dr. Meriwether pleaded strong, not just plausible, claims for relief.

A. Defendants retaliated against Dr. Meriwether due to his speech.

Dr. Meriwether pleaded First Amendment retaliation because (1) he "engaged in a constitutionally protected activity" and (2) suffered "adverse action" that (3) "was motivated at least in part as a response to the exercise of [his] constitutional rights." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 585–86 (6th Cir. 2008).

1. Dr. Meriwether engaged in constitutionally protected speech.

Dr. Meriwether's speech is protected because it was related to teaching on "a matter of public concern," and his interest in speaking outweighed the University's interest "in promoting the efficiency of [its] public services." *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017).

a. Dr. Meriwether spoke "as a citizen" for *Garcetti's* "official duties" test does not apply to faculty speech "related to teaching."

Though public employees speaking "pursuant to their official duties" are typically "not speaking as citizens for First Amendment purposes," *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this "official duties" test does not apply to faculty speech that is "related to . . . teaching." *Id.* at 425. Thus, for First Amendment purposes, Dr. Meriwether spoke "as a citizen." *See, e.g.*, *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 564–65 (4th Cir. 2011) (concluding that, because the "official duties" test does not apply to speech related to teaching, a professor's speech "was clearly that of a citizen" (*i.e.*, "that of a public employee, speaking as a citizen")).

i. The First Amendment has long protected faculty speech.

For almost seven decades, the Supreme Court has recognized that public school teachers—especially professors—play a special role in our democracy and must be free to speak consistently with their views. Indeed, "[t]o regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole." *Wieman*, 344 U.S. at 196–97 (Frankfurter, J., concurring). Given their vital role, "[t]hey must have the freedom

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1994).

of responsible inquiry . . . into the meaning of social and economic ideas, into the checkered history of social and economic dogma." *Id.* But to Defendants, a professor risks losing his job if he questions social dogma on gender identity.

Six decades ago, a professor was punished for refusing to answer questions about his Marxist views. *Sweezy*, 354 U.S. at 238–45. The Supreme Court reversed, saying: "The essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250. This rests on professors' free speech: "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

A decade later, the Supreme Court voided a statute barring employment of any person who "'advocates, advises or teaches the doctrine' of forceful overthrow of government" because it could "prohibit the employment of one who merely advocate the doctrine in the abstract," such as a "teacher who informs his class about the precepts of Marxism or the Declaration of Independence" or who "writ[es] articles" on the subject. *Keyishian*, 385 U.S. at 599–600, 602. The Court's concerns were amplified because the university conducted an "*annual review* of every teacher to determine whether any utterance or act of his, *inside the classroom or out*, came within the sanctions of the laws." *Id.* at 602 (emphasis added). This would "stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice.'" *Id.* at 601. The Court recognized professors, like Dr. Meriwether, have First Amendment rights over their *teaching and scholarship* and that universities may not enforce policies that infringe upon these "precious freedoms" in or out of the classroom. *Id.* at 603.

Defendants simply ignored this long history of the Supreme Court protecting

faculty speech. In fact, they never once mentioned any of these cases.

ii. The *Garcetti* Court refused to extend the "official duties" test to faculty speech "related to . . . teaching."

This backdrop is vital to applying *Garcetti*. The majority there recognized that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests." *Garcetti*, 547 U.S. at 425. So it declined to extend the new "official duties" test to faculty: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching"—not just scholarship and teaching but any "speech *related to* scholarship or teaching." *Id.* (emphasis added).

Defendants just ignored this critical caveat. But Dr. Meriwether's remarks in class to his students are by definition "related to . . . teaching" and "classroom instruction." *Id.* at 425. The Complaint states he made them in class, Compl. ¶¶ 128, Doc. 34, PageID.1474, and explains how they impact his class and "communicate his own views," *id.* ¶¶ 133–39, 155–56, 204, PageID.1474–77, 1481. Thus, *Garcetti* itself establishes that the "official duties" test does not apply to Dr. Meriwether's speech.

iii. Federal appellate courts have ruled that *Garcetti's* "official duties" test does not apply to faculty speech.

Given this precedent and *Garcetti's* caveat, federal appellate courts have refused to apply the "official duties" test to faculty engaged in teaching and scholarship. Defendants failed even to cite these cases, let alone distinguish them.

Dr. Adams, a criminology professor, was denied a promotion because colleagues objected to views he expressed on his own time off campus. *Adams*, 640 F.3d at 553–55. Applying *Garcetti,* the district court ruled against him, reasoning that referencing this speech in his promotion papers made it part of "his official duties." *Id.* at 561.

The Fourth Circuit reversed because "the district court applied *Garcetti* without acknowledging, let alone addressing, [its] clear language . . . that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."

Id. It ruled "*Garcetti* would not apply in the academic context of a public university as represented by the facts of this case." *Id.* at 562. While it "may apply" to faculty when "declaring or administering university policy," it does *not* when they are engaged in "teaching and scholarship." *Id.* at 563. Otherwise, "many forms of speech or service a professor engaged in during his employment" would be "beyond the reach of First Amendment protection." *Id.* at 564. "That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment." *Id.*

Dr. Adams' expression did not occur in his classes and did not involve his students or his "duties." *Id.* at 563–64. But because it was still "related to scholarship or teaching," *Garcetti*, 547 U.S. at 425, *Pickering*, not the "official duties" test, applied. *Adams*, 640 F.3d at 564–65. The same test applies to Dr. Meriwether's speech to students in class. Compl. ¶¶ 125–39, 165, Doc. 34, PageID.1474–75, 1477–78.

The Ninth Circuit has taken a similar view. *Demers v. Austin*, 746 F.3d 402, 409–10 (9th Cir. 2014). It recognized that "teaching and academic writing are at the core of the official duties of teachers and professors" and "a special concern of the First Amendment." *Id.* at 411. "[I]f applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* Thus, "*Garcetti* does not—*indeed, consistent with the First Amendment, cannot*—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher or professor." *Id.* at 412 (emphasis added). That speech is instead "protected under the First Amendment, using the analysis established in *Pickering*." *Id.*

Likewise, the Sixth Circuit has recognized *Garcetti's* caveat for "speech related to scholarship or teaching." To be sure, that court has refused to extend that speech protection to high school teachers because they are not professors and to librarians selecting books because they were not teaching or researching. *Evans-Marshall v. Bd.*

of Educ., Tipp City Exempted Vill. Sch. Dist., 624 F.3d 332, 343 (6th Cir. 2010); *Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012). But the Complaint states that Dr. Meriwether is a professor, Compl. ¶ 11, Doc. 34, PageID.1460, and that his speech was related to his teaching, *id.* ¶¶ 133–39, 155–56, PageID.1474–77, as Defendants concede. *See, e.g.*, Defs.' MTD Br., Doc. 36, PageID.1888 (Dr. Meriwether's speech "occurred during [his] class, during a course . . . , in a University classroom. . . ."). It is thus undisputed that this case, unlike *Evans-Marshall* or *Savage*, involves speech related to teaching. Hence, for First Amendment purposes, Dr. Meriwether spoke "as a citizen." *Adams*, 640 F.3d at 564–65.

b. Dr. Meriwether spoke on a matter of public concern.

Dr. Meriwether addressed "a matter of public concern"—whether a male who identifies as female is really a woman. *Mayhew*, 856 F.3d at 462. The Supreme Court's "broad conception of 'public concern,'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001), includes anything that "can be fairly considered as relating to any matter of political, social, or other concern to the community" or "is a subject of legitimate news interest." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up).[3]

Some may find Dr. Meriwether's speech "inappropriate or controversial," but this is "irrelevant to the question of whether it deals with a matter of public concern." *Id.* "Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id.* at 458. It "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452.

i. In-class speech is presumptively a matter of public concern.

"[T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction"—Defs.' MTD, Doc. 36, PageID.1884—"is totally unpersuasive." *Hardy*, 260 F.3d at 680. A "teacher's

[3] In contrast, matters of private concern involve "no public issue," *Snyder*, 562 U.S. at 453, and are "only of personal interest," *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 256 (6th Cir. 2006), such as "internal personnel disputes or complaints about an employer's performance." *Rodgers v. Banks*, 344 F.3d 587, 596 (6th Cir. 2003). Dr. Meriwether's speech does not fit this description.

in-class speech deserves constitutional protection" due to his role in preparing responsible citizens. *Id.* at 679–80. This is especially true for professors, given "the robust tradition of academic freedom in our nation's post-secondary schools."[4] *Id.*

Defendants seek to dub Dr. Meriwether's speech only a "teaching method." Defs.' MTD, Doc. 36, PageID.1884–85. But the Complaint states that it "also communicates his own views on [gender identity and transgenderism]." Compl. ¶ 204, Doc. 34, PageID.1481. Nor do their cases support their position. *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014), assumed that a professor's in-class middle finger was speech on a public concern and resolved the claim on the causation issue. *Parate v. Isibor*, 868 F.2d 821, 827–28 (6th Cir. 1989), ruled that a professor's grades are "entitled to some measure of First Amendment protection" due to the message they send to students. Those cases take nothing away from the protected nature of Dr. Meriwether's in-class speech. *See, e.g.*, Compl. ¶¶ 128, 133–39, PageID.1474–75.

ii. Gender identity is a quintessential public concern.

Gender identity easily constitutes a matter of public concern given the news attention and debate it attracts. *See, e.g.*, *Cockrel*, 270 F.3d at 1051 (surveying media and politicians). Some, like Martina Navratilova and Olympian Sharron Davies, question whether men who identify as women should compete against women athletically.[5] Others, like Andrew Sullivan, note how transgenderism undermines feminism and homosexuality.[6] Some focus on the issue Dr. Meriwether faced: how to

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[4] The Sixth Circuit has repeatedly ruled that a high school teacher's in-class speech on curricular issues constitutes a public concern. *See, e.g.*, *Cockrel v. Shelby Cty. Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) (finding that hemp-related instruction "most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest"); *Evans-Marshall v. Bd. of Educ., Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 230 (6th Cir. 2005) ("[T]he disputed materials—three well-respected novels and a movie adaptation of a Shakespeare play—are clearly protected by the First Amendment."). Even after *Garcetti*, the Sixth Circuit still emphasizes that a "teacher's curricular speech . . . ordinarily covers . . . matters [of public concern]." *Evans-Marshall*, 624 F.3d at 343.

[5] *See, e.g.*, Libby Emmons, *Tennis Legend Martin Navratilova Under Fire for Saying Only Women Should Compete in Women's Sports*, FEDERALIST, Feb. 22, 2019, https://bit.ly/2SfvpxH; Pat Eaton-Robb, *Transgender Sprinters Finish 1st, 2nd at Connecticut Girls Indoor Track Championships*, WASH. TIMES, Feb. 24, 2019, https://bit.ly/2SWcInW; Rich Lowry, *In Defense of Women's Sports*, NAT'L REV., Mar. 5, 2019, https://bit.ly/2C7mdpJ; Tyler O'Neil, *Trans 'Woman' Demolishes World Records; Olympian Decries 'Pointless, Unfair Playing Field*,' PJ MEDIA, Apr. 29, 2019, https://bit.ly/30J1Fib. (Last visited May 30, 2019).

[6] Andrew Sullivan, *The Nature of Sex*, INTELLIGENCER MAGAZINE, Feb. 1, 2019,

refer to men who identify as women.[7] "[T]his debate . . . affects virtually every school, college, dormitory, athletic activity, and locker room in America." *Wittmer v. Phillips 66, Co.*, 915 F.3d 328, 337–38 (5th Cir. 2019) (Ho, J., concurring).

Leaving no ambiguity on this point, the Supreme Court recently said that "gender identity" is "undoubtedly [a] matter[] of profound 'value and concern to the public.'" *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018); *accord Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 2004 WL 2008954, *9 (D. Ariz. Jun. 3, 2004) (finding transgender professor's "expression of her gender and change of gender" a matter of public concern). Add the fact that the Complaint states Dr. Meriwether's speech expresses his religious views on these issues, Compl. ¶¶ 86–90, 134–35, 204, Doc. 34, PageID.1469, 1474–75, 1481, and Defendants cannot credibly deny that he addressed a matter of public concern. *Scarborough*, 470 F.3d at 258 ("[Principal's] speech on his religious views and on homosexuality are matters of public concern.").

iii. Defendants' word games do not change the fact that Dr. Meriwether spoke on matters of public concern.

Defendants try to obscure how the Constitution protects Dr. Meriwether's speech. But their "labels cannot be dispositive of [the] degree of First Amendment protection." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018).

First, they dub his speech "conduct." Defs.' MTD, Doc. 36, PageID.1888. But the Complaint states that they punished him only for uttering words. *See, e.g.*, Compl. ¶ 239, Doc. 34, PageID.1486 ("refus[ing] to change the way he referred to [Doe]"). Uttering words is speech. BLACK'S LAW DICTIONARY 1407 (7th ed.) ("speech" is the "expression . . . of . . . opinions in spoken words"). When a teacher invites a speaker to class, it is speech, not conduct. *Cockrel*, 270 F.3d at 1049. The same is true if a professor addresses the class himself.

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https://nym.ag/2D2r5w9 (last visited May 30, 2019).

[7] *See, e.g.*, Daniel Moody, *Why You Shouldn't Use Transgender Pronouns*, FEDERALIST, Oct. 18, 2016, https://bit.ly/2XGU8i6; Michael Booker, *Why I Don't Use Female Pronouns for My Transgender Brother*, FEDERALIST, Sept. 11, 2017, https://bit.ly/2fik536; Graham Hillard, *Conservatives Shouldn't Use Transgender Pronouns*, NAT'L REV., Apr. 4, 2019, https://bit.ly/2WMINM6. (Last visited May 30, 2019).

Next, Defendants assert that his speech is too *de minimis* to be protected. Defs.' MTD, Doc. 36, PageID.1891 ("[T]he ministerial act of referring to a student . . . is not . . . protected speech."). But they cite no cases because none exist. They cannot create new categories of unprotected speech, and those that exist do not include anything known as *de minimis* speech. *United States v. Stevens*, 559 U.S. 460, 468–70 (2010).

They imply that using titles and pronouns has "no advocative purpose." *Cockrel*, 270 F.3d at 1049. That argument misses the mark for the First Amendment protects not only "expressions of value, opinion, or endorsement" (including those without a "narrow, succinctly articulable message"), "but equally . . . statements of fact." *Hurley v. Irish-Am. Gay, Lesbian, & Bi-Sexual Grp. of Bos.*, 515 U.S. 557, 569, 573 (1995).

Defendants also ignore the Complaint, which states Dr. Meriwether's use of titles and pronouns "communicates his own views." Compl. ¶ 204, Doc. 34, PageID.1481. Thus, he has always used sex-based terms, *id.* ¶¶ 134–35, PageID.1474–75, and objects to communicating views he does not believe to be true, *id.* ¶¶ 89–92, PageID. 1469; Compl. Ex. 11, Doc. 34-11, PageID.1707. Groups have long used honorifics to express a message. The Jacobins eschewed "monsieur" for "citizen" to communicate equality, as the Communists did by adopting "comrade" and the Quakers did by avoiding titles generally. Courts recognize that they have this communicative effect. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 582 (2014) (noting that certain religious "[h]onorifics . . . might strike a Christian audience as ecumenical, yet these titles might have no place in the vocabulary of other faith traditions"); *Duwenhoegger v. King*, 2013 WL 646235, *19 (D. Minn. Jan. 28, 2013) (allowing an inmate to use "the title 'Pastor' may cause the other inmates to treat him as a religious leader").

Defendants' re-labeling efforts do not change the fact that Dr. Meriwether spoke on topics and in contexts that courts recognize as involving matters of public concern.

c. The *Pickering* balancing test favors Dr. Meriwether.

Defendants do not contest, Defs.' MTD, Doc. 36, PageID.1885 n.2, that Dr.

Meriwether's interest in speaking outweighs theirs in efficiently serving the public. *Mayhew*, 456 F.3d at 462. Dr. Meriwether pleaded facts showing that his speech did not disrupt his own class, let alone the University, Compl. ¶ 312, Doc. 34, PageID. 1495; and that Doe stayed in the class, contributing to discussions frequently and voluntarily. *Id.* ¶¶ 176–83, PageID.1479. Defendants do not even suggest that Dr. Meriwether "will be unable to show that his interest in First Amendment expression outweighed [Defendants'] interest in the efficient operation of [their] workplace." *Crawford v. Columbus State Cmty. Coll.*, 196 F. Supp. 3d 766, 777 (S.D. Ohio 2016) (quoting *Ridpath v. Bd. of Govs. of Marshall Univ.*, 447 F.3d 292, 318 (4th Cir. 2006)). Hence, Dr. Meriwether's speech is constitutionally protected.

2. Defendants took adverse action against Dr. Meriwether.

Next, Dr. Meriwether must demonstrate that he suffered an "adverse action . . . that would deter a person of ordinary firmness from the exercise of the right at stake." *Maben v. Thelen*, 887 F.3d 252, 266 (6th Cir. 2018). "Whether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a question of fact." *Id.* To prevail on this point, all Dr. Meriwether has to do is plead facts showing something more than a *de minimis* (*i.e.*, inconsequential) violation. *Id.* For "[o]nly *de minimis* violations should be dismissed as a matter of law; in general, the adverseness question should survive the pleading stage." *Id.*

Dr. Meriwether need not prove that his speech *was* chilled, but only that Defendants' acts are "capable of deterring a person of ordinary firmness from exercising his . . . right[s]." *Ctr. for Bioethical Reform, Inc. v. City of Springboro ("CBR")*, 477 F.3d 807, 822 (6th Cir. 2007). It suffices for Dr. Meriwether to show that he "suffered or is in jeopardy of suffering" tangible consequences due to Defendants' acts. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008).

Dr. Meriwether established actual chill. Due to Defendants' actions, their threats, and the risk of suspension or termination, the Complaint pleads he has "not discussed

. . . gender identity or transgenderism" in his classes and other settings, has "steered class discussions" away from these topics, and "has refused to address these issues when students have raised them." Compl. ¶¶ 291–97, Doc. 34, PageID.1492–93.

Also, Defendants' written warning is a "credible threat to the nature and existence of [his] ongoing employment." *Stolle v. Kent State Univ.*, 610 F. App'x 476, 483 (6th Cir. 2015). The Complaint states that he has repeatedly been warned of suspension without pay or termination if he does not change his speech. Compl. ¶¶ 164, 246–49, 263, 287–89, Doc. 34, PageID.1477, 1487, 1489, 1491–92.

Defendants insist this punishment is *de minimis*. Defs.' MTD, Doc. 36, PageID. 1886. But unlike the cases they discuss, this case has nothing to do with "time sheets" and "records," small offices and old phones, or solely an investigation. *Id.* Rather, the Complaint states they took what they describe as "formal" "disciplinary actions." Compl. Ex. 4, Doc. 34-4, PageID.1645–46; Compl. ¶¶ 240, 245–49, Doc. 34, PageID. 1486–87. This formal act included a threat of more severe punishment—"further corrective actions—if Dr. Meriwether continues to express his view. Compl. Ex. 20, Doc. 34-20, PageID.1771. A "threat of disciplinary action" "in a written statement" like the one Defendants issued here is without question an adverse action, *Magley v. Wright*, 2001 WL 36126924, *10 (W.D. Mich. Mar. 30, 2001), that is not *de minimis* but "capable of deterring a person of ordinary firmness." *CBR*, 477 F.3d at 822.

Professors have cleared this test citing even lesser or comparably punitive actions. *See Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183, *2–4, 11–12 (E.D. Ky. Jul 22, 1998) (finding censure that was "not a [recognized] disciplinary action" was "sufficiently adverse to support . . . retaliation" due to impact on appointments); *Speers v. Univ. of Akron*, 189 F. Supp. 2d 759, 761–63, 771–72 (N.D. Ohio 2002) (same for placing "letter of reprimand into [professor'] file" for unprofessional conduct). Here, the Complaint makes clear that Defendants punished Dr. Meriwether using a "formal" disciplinary action, which they will doubtlessly consider when awarding

future assignments. If a written reprimand for unprofessional conduct constitutes adverse action, a written warning that reprimands Dr. Meriwether for alleged discrimination certainly constitutes the same here. Consistent with past decisions, that more than suffices to constitute an adverse action.

The Complaint's facts, and the inferences from them, must be taken as true. *Girl Scouts*, 770 F.3d at 418. They amply demonstrate that Dr. Meriwether has "suffered or is in jeopardy of suffering" tangible consequences due to Defendants' actions. *White*, 533 F.3d at 402. Reasonable people do not ignore written warnings from their employers (especially ones threatening further punishment). Thus, Defendants' actions are far from inconsequential and would chill an ordinary person.

3. Defendants punished Dr. Meriwether for his speech.

The Complaint alleges, and Defendants implicitly concede, that they punished Dr. Meriwether "at least in part as a response to the exercise of [his] constitutional rights." *Jenkins*, 513 F.3d at 586. This is wise because this is a factual issue, *Leary v. Daeschner*, 349 F.3d 888, 898 (6th Cir. 2003) (noting causation prongs "are issues of fact"); *Perry v. McGinnis*, 209 F.3d 597, 604 n.4 (6th Cir. 2000) (noting causation is "normally reserved for the jury"), and the Complaint states it was precisely his decision not to refer to Doe using female terms that caused them to punish him. Compl. ¶¶ 239–40, 246–49, Doc. 34, PageID.1486–87. Thus, he stated a plausible First Amendment retaliation claim. Defendants' motion should be denied.

B. Defendants engaged in content and viewpoint discrimination.

Defendants do not argue that their policies or actions are content and viewpoint neutral. Defs.' MTD, Doc. 36, PageID.1886–88. Rather, they insist there was no protected speech. This is both wrong, *see supra* Argument II.A.1, and irrelevant. They cannot limit even unprotected speech in content- or viewpoint-based ways. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381–96 (1992). Here, Dr. Meriwether pleaded claims for both types of presumptively unconstitutional discrimination against speech.

1. Defendants review and seek to alter the content of faculty speech.

A policy or action is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), or "alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Defendants' policies regulate faculty speech in exactly these prohibited ways. Compl. ¶¶ 82–83, Doc. 34, PageID.1468.

This whole case arose due to the content of Dr. Meriwether's speech (*i.e.*, declining to refer to Doe as female). *Id.* ¶¶ 125–44, PageID.1474–75. The Complaint states he did this to avoid expressing ideas about human nature he disbelieves and instead to "communicate[] his own views." *Id.* ¶¶ 92, 204, PageID.1469, 1481. Defendant Milliken pressured him to change the way he addressed students, *id.* ¶ 54, PageID. 1476, stating he must change to comply with Defendants' policies, *id.* ¶¶ 162–63, 168–75, PageID.1477–78, because his speech violated them. *Id.* ¶¶ 186–87, PageID.1480, Compl. Ex. 9, Doc. 34-9, PageID.1702. She formally investigated him for this speech. Compl. ¶¶ 194–95, PageID.1480. She and others even mandated how he must change his speech. *Id.* ¶¶ 212–18, 269–84, PageID.1482–83, 1489–91. She cited the content of his speech (*i.e.*, "repeatedly refus[ing] to change the way he addressed [Doe]") as violating Defendants' policies and meriting a written warning, *id.* ¶¶ 239–40, PageID.1486, an act other Defendants affirmed. *Id.* ¶¶ 244–45, 264, 270, PageID. 1487, 1489. So they punished him "because of . . . the idea or message [he] expressed," *Reed*, 135 S. Ct. at 2227, and tried to alter his speech, *Riley*, 487 U.S. at 795.

Also, the Complaint states that Defendants punished Dr. Meriwether due to one student's complaints. Compl. ¶¶ 149–53, 160–63, PageID.1476–77. But a "[l]istener's reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

These facts, taken as true, *Girl Scouts*, 770 F.3d at 418, show Defendants punished Dr. Meriwether due to the content of his speech. Their motion should be denied.

2. Defendants seek to silence certain viewpoints of faculty speech.

Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject"—that is, "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). As detailed above, *see supra* Argument II.B.1, if Dr. Meriwether had expressed a different viewpoint on gender identity, they never would have punished him. In punishing him for expressing a viewpoint they disliked, Defendants violated this "axiomatic" First Amendment principle. *Rosenberger*, 515 U.S. at 828–29.

Also, the "First Amendment prohibits the vesting of . . . unbridled discretion in a government official." *Forsyth Cty.*, 505 U.S. at 133; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Rules that do so are deemed viewpoint-based. *See, e.g.*, *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) ("[T]he prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement."); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–25 (W.D. Mich. 2014) (finding language granting unbridled discretion to be viewpoint based); *see, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988) (noting vague criteria allow decisions based on "the content of the speech or viewpoint of the speaker"). If they involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion," the danger of censorship is too great to be permitted. *Forsyth Cty.*, 505 U.S. at 131. Instead, they must "contain narrow, objective, and definite standards to guide" officials. *Shuttlesworth*, 394 U.S. at 150–51.

As the Complaint alleges, Defendants' *Nondiscrimination Policies* grant officials unbridled discretion by including an imprecise, subjective, and indefinite definition of gender identity. Compl. ¶ 58, Doc. 34, PageID.1465; *see, e.g.*, *id.* ¶ 64 ("[A] person's innermost concept of self as male or female or both or neither—how individuals perceive themselves and what they call themselves."); *id.* ¶ 66, PageID.1466. As it

states, each person can identify as "neither woman or man, both woman and man, somewhere in between, or in some combination." *Id.* ¶ 68. That identity is not visible and can change based on "mood swings" or "which friend you're with." *Id.* ¶¶ 69–70. With uncertainty comes varying pronouns, *id.* ¶¶ 72–74, PageID.1466–67, which the Complaint states Defendants require professors to use. *Id.* ¶ 112, PageID.1472; *id.* ¶ 195, PageID.1480. Thus, the number of permutations governing how a professor must refer to students is staggering and may fluctuate from day to day. Punishing faculty for violating a restriction this vague and ephemeral ignores the First Amendment's mandate for "narrow, objective, and definite standards."[8] *Shuttlesworth*, 394 U.S. at 150–51. Worse yet, Defendants decide how to proceed based on whether a student is offended, Compl. ¶¶ 161, 166, PageID.1477–78, a standard that is "highly subjective" and viewpoint-based. *Matal v. Tam*, 137 S. Ct. 1744, 1756 n.5, 1763 (2017) (plurality).

Dr. Meriwether pleaded facts, which must be taken as true, showing Defendants punished him due to the viewpoints he expressed using the vast discretion their policies afford. *Girl Scouts*, 770 F.3d at 418. Thus, their motion should be denied.

C. Defendants compel Dr. Meriwether to speak an unwanted message.

For decades, it has been clear that the state cannot "force[] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). This is the "fixed star in our constitutional constellation." *Barnette*, 319 U.S. at 642. "Compelling individuals to mouth support for views they find objectionable"—as Defendants do here—"violates that cardinal constitutional command." *Janus*, 138 S. Ct. at 2463.

Dr. Meriwether has explained his views on gender identity and his objection to Defendants' demands, both to this Court, Compl. ¶¶ 89–92, Doc. 34, PageID.1469,

[8] Nor can Defendants evade this doctrine by saying that they have not abused their discretion. They punished Dr. Meriwether for violating this provision of their policies, and just the potential for such abuse renders the policy unconstitutional. *See, e.g.*, *Forsyth Cty.*, 505 U.S. at 133 n.10 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.").

and to Defendants. *See, e.g.*, *id.* ¶¶ 206–11, 237, PageID.1482, 1486; Compl. Ex. 12, Doc. 34-12, PageID.1710–11, 1714; Compl. Ex. 18, Doc. 34-18, PageID.1766. Yet they punished him for refusing to express their preferred message. *See, e.g.*, Compl. ¶¶ 239–40, PageID.1486 (faulting "Dr. Meriwether [for] repeatedly refus[ing] to change the way he addressed [Doe]"). If he does not start now, they threaten "further corrective actions," *id.* ¶ 248, PageID.1487, including possible suspension without pay or dismissal. *Id.* ¶¶ 251, 263, 287–90, PageID.1487, 1489, 1491–92. Thus, they seek to "coerce [him] into betraying [his] convictions" and endorsing ideas he finds objectionable, which is "always demeaning." *Janus*, 138 S. Ct. at 2464.

Defendants insist that Dr. Meriwether's speech is not protected. Defs.' MTD, Doc. 36, PageID.1889. But it is. *See supra* Argument II.A.1. If merely displaying a license plate is protected speech that cannot be compelled, *Wooley*, 430 U.S. at 715, being forced to utter words to an audience must also be protected. If a professor's grades cannot be compelled, *Parate*, 868 F.2d at 827–30, neither can his speech to students.

Defendants note that Dr. Meriwether had choices. Defs.' MTD, Doc. 36, PageID. 1889. But they would not even let him state his views in his syllabus. Compl. ¶¶ 170–71, 260–61, 282, Doc. 34, PageID.1478, 1488–89, 1491. And their only non-speech-compelling "option" was unreasonable. In a class discussion, a professor has no choice but to refer to what one student said while talking with another, and these Socratic discussions have been part of philosophical instruction since, well, Socrates. Yet Defendants demand Dr. Meriwether eliminate pronouns. *Id.* ¶¶ 217–18, 283–84, PageID.1483, 1491. But as the Complaint states, banning one of the eight parts of speech is unreasonable, as is punishing a professor who refuses to accede to such an impossible demand. *Id.* ¶¶ 75, 156, 218, 284, PageID.1467, 1476–77, 1483, 1491.

These "choices" exist in every compelled speech case. For example, the Barnettes could have opted for private schools to avoid the mandatory Pledge of Allegiance. *Barnette*, 319 U.S. at 650 (Frankfurter, J. dissenting) (noting it applied only to "those

who choose to attend the public schools"). But this "choice" did not nullify their compelled speech claims. Nor does Defendants' "option" undermine Dr. Meriwether's claims, especially on a motion to dismiss.

D. Defendants subject Dr. Meriwether to unconstitutional conditions.

As the Supreme Court already ruled in a faculty speech case, even if a person is not entitled to a particular benefit, the government "may not deny [it] to [him] on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Here, Defendants punished Dr. Meriwether for exercising his right to free speech, and they threaten to do so again unless he changes his expression. Compl. ¶¶ 239–40, 248, Doc. 34, PageID.1486–87. The only way he can regain his status as a professor in good standing is to surrender his right, which lies at "the heart of the First Amendment," to "decide for himself . . . ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Again, these facts must be taken as true. *Girl Scouts*, 770 F.3d at 418. Defendants just recycle already rebutted arguments. Defs. MTD, Doc. 36, PageID.1890–91. For the same reason that they failed above, *see supra* Argument II.A.1–2, they fail here.

E. Defendants are trampling Dr. Meriwether's religious freedom, enforcing overbroad and vague restrictions on faculty speech, and treating similarly situated professors differently.

On free exercise, overbreadth, vagueness, and equal protection issues, Defendants and Intervenors make similar, if not identical arguments. Thus, Dr. Meriwether incorporates by reference the relevant portions of his response to Intervenors' motion.

CONCLUSION

Dr. Meriwether pleaded facts showing Defendants punished him for saying things they found objectionable on gender identity, a matter of public concern. These facts must be accepted and construed in his favor. *Girl Scouts*, 770 F.3d at 418. They plead plausible claims for numerous legal violations. Defendants' motion should be denied.

Respectfully submitted this 30th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2019, I filed a true and accurate copy of the foregoing document with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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