IS GRAMMAR RELIGIOUS EXERCISE? ADDRESSING TRANSGENDER STUDENTS AND THE LIMITS OF THE COMPLICITY DOCTRINE

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INTRODUCTION

May teachers reject transgender students' names and pronouns on religious grounds?[1] Across the United States, many schools and universities have adopted policies calling on staff to use all students' designated first names and gender-congruent pronouns. A number of conservative Christian teachers have claimed that they cannot address transgender students in this way without violating their religious beliefs.[2] In several cases, after unsuccessful attempts by administrators to accommodate these objections, teachers who were subject to employment consequences have brought lawsuits alleging violation of their religious liberty and free speech rights.[3]

This Note employs two recent cases to examine courts' reasoning on the claims for religious exemption from using gender-congruent language.[4] Typically, teachers claim that addressing transgender students according to gender identity would violate a sincere religious belief in

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1 I use *transgender* and *trans* interchangeably and intend to include people who were previously called transsexual, as well as nonbinary and gender-nonconforming people. One definition provides that "'transgender' can be loosely understood to include anyone whose sense of themselves as gendered is at odds with what would be normatively expected from someone with their particularly 'sexed' body." JOHANNA SCHMIDT, MIGRATING GENDERS 6 (2010).

2 White evangelical Protestants are typical plaintiffs in the pronoun cases, and are the only sizeable religious group with a majority who say that "society has gone too far in accepting transgender people." Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s [https://perma.cc/U3S8-MX6Y].

3 Two cases are discussed in depth in Part II: *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), and *Kluge v. Brownsburg Community School Corp.*, No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024), *appeal docketed*, No. 24-1942 (7th Cir. May 31, 2024); *see also* Vlaming v. West Point Sch. Bd., 10 F.4th 300 (4th Cir. 2021); Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 22-cv-04015, 2022 WL 1471372 (D. Kan. May 9, 2022).

4 Gender-congruent forms of address align with an individual's gender identity. Describing a pronoun as "preferred" obscures the durability of gender identity and implies that it is at will. You, the reader, may prefer to be referred to as "he," "she," "they," or another pronoun, but if you are referred to by a different pronoun you will probably see it as a matter of *accuracy*, not *preference*. (It probably does not seem like a matter of public concern, either.) Since nicknames and name changes are common, the distinction between "preferred" and "legal" names is also uninformative.

binary, immutable sex.[5] This Note examines these cases against the backdrop of an increasingly blurred boundary between First Amendment speech and free exercise analyses, waning concern in church-state separation by the Supreme Court, and a proliferation of religious exemptions from neutral, generally applicable laws.[6]

The religious exercise-speech blurring is part of a doctrine I term "religious exemptionalism"[7] that diverges from traditional First Amendment jurisprudence, which distinguished between free exercise and freedom of speech claims.[8] This Note contends that the Court has improperly mixed principles from each line of precedent,[9] creating a "complicity of conscience zone" that extends religious exercise protections far beyond what was deemed religious conduct in the past.[10] This expansion is possible because courts have gradually set aside any nexus inquiry for religious liberty claims, taking only minimal steps to examine the connection between an asserted religious belief and the conduct a party seeks to avoid. Courts have thus upheld religious exemptions that lack a concrete link between a plaintiff's tenets of faith and the requirements of law.[11]

This Note places the school pronoun cases in the broader landscape of First Amendment jurisprudence, as a site of conservative Christian resistance to sexual and gender minority rights.[12] It contends that teachers' refusal to call transgender students by their names or refer to them with gender-congruent terms is a poor fit for the free exercise framework, because speaking to or about an individual student is not

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5 *See infra* Section II.A.

6 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."); *see infra* Section I.B.

7 *See infra* Section I.B. This Note analyzes courts' reasoning on the religious exercise claims, but neither of the main cases reached a final determination. *See infra* Sections II.B–C.

8 *See infra* Sections I.C, III.B.

9 *See, e.g.*, Kennedy v. Bremerton Sch. Dist, 597 U.S. 507, 523 (2022) (describing free speech and free exercise as overlapping).

10 This term is coined here, to the best of the author's knowledge, drawing on the concept of complicity in sin as a basis for religious liberty claims developed by other scholars. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) [hereinafter NeJaime & Siegel, *Conscience Wars*].

11 *Id.* at 2518–19; *id.* at 2516 ("Persons of faith are now seeking religious exemptions . . . on the ground that the law makes the objector complicit in the assertedly sinful conduct of others.").

12 *See, e.g.*, William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 659–60 (2011) ("[F]undamentalists . . . maintain that equal rights for sexual minorities ought to be rejected . . . to accommodate the fundamental liberties of religious minorities."); Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 658–68 (2020) (surveying the use of religious exemptions to oppose LGBTQ rights over the past thirty years).

religious practice, nor does it express a specific belief.[13] The mode of speaking to a student lacks a plausible nexus with religious beliefs about the nature of sex and gender[14] because, grammatically, personal pronouns merely refer to other nouns, while first names are inherently individual and do not convey a speaker's beliefs.[15]

Though courts may not evaluate the truth or content of a religious belief when they decide whether a person's free exercise rights have been violated,[16] this Note contends that they must evaluate whether a conflict actually exists between the sincerely held religious belief and the law or policy at issue.[17] This Note proposes that courts revisit and strengthen the nexus inquiry in religious liberty cases by (1) evaluating whether the objected-to conduct has a concrete relationship to a claimant's religious practice interests;[18] (2) treating free speech claims as distinct, unrelated to the sincerity and religious nature of a claimant's beliefs;[19] and (3) accounting for whether the purpose of the exemption is fundamentally coercive.[20]

Part I of this Note provides historical and legal context for school pronoun cases in terms of past litigation over transgender people's rights, the shifting balance in free exercise versus separation of church and state at the Supreme Court, and the First Amendment rights of government employees.[21] As background for discussion of how blurring free speech

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13 U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to 2000bb-4, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5; *see infra* Section III.A; *see also* Chan Tov McNamarah, *Misgendering*, 109 CALIF. L. REV. 2227, 2227–28, 2304–05 (2021) (countering arguments about compelled or restricted speech used in opposition to gender-aligned pronouns).

14 Typically, the religious belief is that sex is binary and immutable. *See infra* Part III.

15 DAVID CRYSTAL, A DICTIONARY OF LINGUISTICS AND PHONETICS 248, 259–60, 295 (2d ed. 1985) (explaining the grammatical purpose of pronouns as referents); *see also infra* Section III.A.1. First names may obliquely express the named person's (or their parents') beliefs, but using the referent's first name is hardly an expression of a belief by the *speaker*. *See generally* Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159 (2011) (exploring the legal limits of parents' rights to name their children).

16 *See* Heller v. EBB Auto Co., 8 F.3d 1433, 1438–39 (9th Cir. 1993) (delineating permissible evaluation of Title VII religious accommodation claims).

17 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 2519–20 (stating that the social logic of earlier free exercise and RFRA claims differs from that of complicity-based claims, although they may be sincerely held, because the latter are aimed at the conduct of third parties).

18 Since the school policies regulate interactive conduct, this Note sets aside the subject of punishment for one's religious *beliefs*.

19 Sincerity and nexus inquiries are only relevant to free exercise claims. *See infra* Section I.B.

20 *See infra* Part IV.

21 *See infra* Section I.B.1; Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315 (2022).

and free exercise doctrines expands religious exemptionalism, it also delineates traditional interpretation of speech versus free exercise protections and the traditional distinction between expressive conduct and pure speech.

Part II sketches the typical school pronoun cases and presents courts' reasoning on free exercise claims for two illustrative cases.[22] Subsequently, Part III contends that courts failed to adequately inquire into the nexus between teachers' asserted religious beliefs and the exemptions they request. It explains how non-expressive speech-acts can cause concrete harm through differential treatment even when the words themselves lack an inherent message. Further, it critiques courts' mixing religious liberty and free speech analyses,[23] and concludes by arguing that even if misgendering were constitutionally protected, the balance of interests would weigh heavily in favor of educational institutions[24] based on analysis of third party harms.[25]

Part IV considers the broader ramifications of blurring free speech and free exercise analyses and concomitant expansion of religious exemptions. Finally, it proposes a framework for distinguishing religious exemption claims that are properly protected from those that are not.[26] This Note ends with remarks on the implications of religious exemptionalism and blurred free speech–free exercise analyses for minority protections, including religious interests.

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22 Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024).

23 *Meriwether*, 992 F.3d 492; *see infra* Section II.B.

24 *See* Inara Scott, Elizabeth Brown & Eric Yordy, *First Do No Harm: Revisiting* Meriwether v. Hartop *and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977, 1013–16 (2022) (discussing the balance of interests in *Meriwether v. Hartop* under the *Pickering-Connick* test and the meaning of the state's interest in "effective" provision of public education).

25 *See infra* Section III.C (discussing harm caused by misgendering); McNamarah, *supra* note 13, at 2252–53 (describing forms of linguistic rejection of transgender people's identities); Kristina Howansky, Natalie Wittlin, Darla Bonagura & Shana Cole, *Him, Her, Them, or None: Misgendering and Degendering of Transgender Individuals*, 13 PSYCH. & SEXUALITY 1026, 1036 (2022) ("[D]egendering is likely to represent identity denial stemming from negative biases towards transgender individuals.").

26 U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

I. BACKGROUND

A. *Gender Identity and the Christian Right*

Transgender people have been a socially cognizable group, part of the American public's awareness, for about seventy years.[27] Roughly three million American adults are transgender or nonbinary—more than fifteen states' populations.[28] As public visibility has grown, litigation over transgender people's rights has expanded apace. United States federal court opinions first mentioned transgender people explicitly about fifty years ago.[29] Since the first decade of the twenty-first century, the frequency of federal courts mentioning transgender people has increased from forty-one opinions per year to over five hundred per year in the

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27 Of course, there is no single start date for recognition of a social group such as transgender people, nor for any other social group. For comparison, consider the history of the social category Hispanic, which is closely tied to the U.S. Census Bureau's categorizations. *See, e.g.*, G. Cristina Mora, *Cross-Field Effects and Ethnic Classification: The Institutionalization of Hispanic Panethnicity, 1965 to 1990*, 79 AM. SOCIO. REV. 183 (2014). Third gender and other people we might today call transgender have been recognized across history and the globe. In the United States in the early 1950s, Christine Jorgensen returned from "sex-reassignment" surgery in Denmark and became a well-known and popular public figure. *See* Christine Jorgensen, *Christine Jorgensen: A Personal Autobiography*, *in* SEXUAL METAMORPHOSIS: AN ANTHOLOGY OF TRANSSEXUAL MEMOIRS 55, 55–77 (Jonathan Ames ed., 2005). Medical treatment for physical transition became available in Western Europe in the 1920s and 1930s. William Byne et al., Data Supplement, *Assessment and Treatment of Gender Dysphoria and Gender Variant Patients: A Primer for Psychiatrists*, 175 AM. J. PSYCHIATRY ds1, ds1–3 (2018). In the 1960s and 1970s, over twenty universities had established gender clinics, but most closed under the Reagan administration for lack of funding. William Byne et al., *Gender Dysphoria in Adults: An Overview and Primer for Psychiatrists*, 3 TRANSGENDER HEALTH 57, 57–58 (2018) [hereinafter Byne et al., *Gender Dysphoria in Adults*]. Medicare categorically excluded transition-related surgery (then termed "sex reassignment surgery") from 1981 to 2014. *Id.* at 58.

28 *What Percentage of the US Population Is Transgender?*, USAFACTS (June 3, 2024), https://usafacts.org/articles/what-percentage-of-the-us-population-is-transgender [https://perma.cc/KJV2-S9U2] (reporting that three million adults (1.1%) are transgender according to a U.S. Census Bureau survey); *United States Indicators: Total Population*, POPULATION REFERENCE BUREAU (July 2020), https://www.prb.org/usdata/indicator/population/snapshot [https://perma.cc/6CG3-PDU6] (providing state population estimates).

29 The first federal court opinions to use the word "transsexual" were published in 1975; both denied Title VII employment protection to trans women. Grossman v. Bernards Twp. Bd. of Educ., 1975 WL 302 (D.N.J. 1975); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456 (N.D. Cal. 1975). While the word "homosexual" appeared first in a federal court opinion in 1942 and was used 286 times before 1970, "transgender" first appeared in 1990. Drake v. Werdegar, 907 F.2d 154 (9th Cir. 1990); WESTLAW (last visited Jan. 15, 2024) (search results filtered for federal jurisdictions: *<homosexual! & date(bef 1/1/1970)>*, *<transsexual!>*, and *<transgender!>*).

2020s.[30] Many recent lawsuits have arisen through the efforts of anti-transgender legal activists.[31]

In the United States, as in much of the world, transgender people are targets of harassment, criminalization, and hate violence,[32] even as legal recognitions expand.[33] They experience deep, persistent economic disadvantages, with a poverty rate double the population average.[34] High rates of poverty are no surprise given that transgender people are not federally protected from housing discrimination, have difficulty finding employment and medical care, and generally experience a dearth of social support and safe, welcoming communities.[35] Trans people's legal status is characterized by precarity, with a patchwork of rapidly shifting rights at local and state levels.[36]

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30 WESTLAW (last visited Apr. 27, 2024) (search results filtered for federal jurisdictions for <*transgender! OR transsexual! OR transexual! & date(aft 12/31/1999) & date(bef 1/1/2010)*>, n=411, and for <*transgender! OR transsexual! OR transexual! & date(aft 12/31/2019) & date(bef 1/1/2024)*>, n=2,057).

31 *See* sources cited *infra* note 106.

32 Fifteen countries explicitly criminalize non-cisgender gender identity or nonconformity under laws that in most cases derive from Shari'a law or British colonial law. JONATHON EGERTON-PETERS, JO JIMENEZ, ALISTAIR STEWART & LARA GOODWIN, HUM. DIGNITY TRUST, INJUSTICE EXPOSED: THE CRIMINALISATION OF TRANSGENDER PEOPLE AND ITS IMPACTS 815–17 (2019), https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf [https://perma.cc/AG8S-QXWQ]; Andrew R. Flores, Rebecca L. Stotzer, Ilan H. Meyer & Lynn L. Langton, *Hate Crimes Against LGBT People: National Crime Victimization Survey, 2017–2019*, 17 PLOS ONE, Dec. 2022, at 1, 6–7 (reporting that LGBT Americans are at eight times higher risk of hate crime victimization than non-LGBT Americans).

33 *See, e.g.*, Ley de identidad de género, Law No. 26743, May 23, 2012, 32.404 B.O. 3 (Arg.) (permitting legal name and gender marker change); Ley de identidad de género, Law No. 21120, Dec. 10, 2018, D.O. (Chile) (similar); Nat'l Legal Svcs. Authority v. Union of India, 2014 INSC 275 (2014) (India) (recognizing a right to third gender self-identification).

34 M.V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES 7–8, 13, 39 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf [https://perma.cc/D865-FULD] (estimating a poverty rate of 34% for trans men, 30% for trans women, and 16% for cis straight people, but no gay-straight disparity).

35 *See generally* SANDY E. JAMES, JODY L. HERMAN, LAURA E. DURSO & RODRIGO HENG-LEHTINEN, NAT'L CTR. FOR TRANSGENDER EQUAL., EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY 21 (2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf [https://perma.cc/K4VP-TLC9].

36 Twenty-six states have restricted medical treatment for trans youth since 2021. MOVEMENT ADVANCEMENT PROJECT, LAWS & POLICIES: BANS ON BEST PRACTICE MEDICAL CARE FOR TRANSGENDER YOUTH (2024), https://www.lgbtmap.org/equality-maps/healthcare_youth_medical_care_bans [https://perma.cc/V5SD-GLYS]. Circuits are split as to the constitutionality of denying transition care in prisons. *See* Samantha Braver, Note, *Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals*, 120 COLUM. L. REV. 2235, 2265–67 (2020) (arguing that categorical bans are unconstitutional because the Eighth Amendment requires case-by-case determinations).

There are also wide partisan gulfs and intergenerational differences in both self-identification and attitudes about gender diversity.[37] Young adults and youth are more likely than older adults to identify as trans or nonbinary and are more likely to express neutral or positive attitudes toward gender variety.[38] Transgender and nonbinary youth are at greater risk of an array of harms relative to their cisgender peers.[39] This Note focuses on one source of stigma and psychological harm: teachers' refusal to acknowledge their students' gender identities.[40]

The past decade has witnessed a rapid rise in both legislation[41] and litigation about the lives, behavior, and legal protections of transgender people in the United States—on everything from employment,[42] college admissions,[43] and middle school cross-country running,[44] to running for state office.[45] Prior to the social recognition of transgender people as a

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37 *See* SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/L3KL-WCHQ]; Anna Brown, *About 5% of Young Adults in the U.S. Say Their Gender Is Different from Their Sex Assigned at Birth*, PEW RSCH. CTR. (June 7, 2022), https://www.pewresearch.org/fact-tank/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth [https://perma.cc/8TXQ-ZSUZ].

38 JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 4 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/C6X6-7AD4]; Brown, *supra* note 37; Ryan J. Watson, Christopher W. Wheldon & Rebecca M. Puhl, *Evidence of Diverse Identities in a Large National Sample of Sexual and Gender Minority Adolescents*, 30 J. RSCH. ON ADOLESCENCE 431, 431 (2020).

39 Brian C. Thoma, Taylor L. Rezappa, Sophia Choukas-Bradley, Rachel H. Salk & Michael P. Marshal, *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, 148 PEDIATRICS, August 2021, at 1, 1 (reporting rates of child abuse); JAMES ET AL., *supra* note 37, at 4–5 (reporting on intrafamily violence and homelessness); *see infra* Section III.C.

40 Misgendering "humiliates gender minorities" and "deprives them of privacy, safety, and autonomy." McNamarah, *supra* note 13, at 2293. Cumulative stress contributes to poorer health. *See, e.g.*, Lauren Freeman, *Micro Interactions, Macro Harms: Some Thoughts on Improving Health Care for Transgender and Gender Nonbinary Folks*, 11 INT'L J. FEMINIST APPROACHES TO BIOETHICS 157, 160 (2018).

41 In 2015, 21 bills were introduced to restrict trans people's rights, rising to 85 in 2020 and over 650 in the first eight months of 2024. *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGIS. TRACKER (2024), https://translegislation.com/learn [https://perma.cc/B7GH-DUY5].

42 *See, e.g.*, Bostock v. Clayton County, 590 U.S. 644 (2020) (holding that Title VII protection from discrimination on the basis of sex includes sexual orientation and gender identity).

43 SARAH WARBELOW & REMINGTON GREGG, HUM. RTS. CAMPAIGN, HIDDEN DISCRIMINATION: TITLE IX RELIGIOUS EXEMPTIONS PUTTING LGBT STUDENTS AT RISK 5 (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf [https://perma.cc/95UV-DYUG].

44 B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 563 (4th Cir. 2024).

45 Matt Lavietes, *Transgender Woman Is Disqualified from Ohio House Race for Not Disclosing Her Former Name*, NBC NEWS (Jan. 5, 2024, 11:14 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/transgender-woman-disqualified-ohio-house-race-not-using-

group, there was little to litigate or legislate; social recognition necessarily precedes legal recognition.[46] (It also precedes conservative cultural backlash.)[47] This is not to say that gender variance itself, or societal awareness of it, is new by any means.[48] Rather, being trans can be understood as *a way of being a person* within a particular cultural context.[49] Once a group identity is legible, the group's rights may become the subject of adjudication and codification.[50]

Early transgender rights cases in the 1960s through 1980s mostly addressed adults' personal rights: to marry,[51] obtain and maintain employment,[52] change their names and amend identification

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former-name-rcna132325 [https://perma.cc/KJ8G-72BQ] (discussing a law that effectively forces trans candidates to disclose their gender identity for five years after a name change but imposes no disclosure requirement for marriage-based name changes); OHIO REV. CODE § 3513.271 (2024).

46 Asylum law reflects the social recognition principle: judges evaluate membership in a "particular social group" and the petitioner must demonstrate the group is "perceived within the given society as . . . sufficiently distinct." *In re* M-E-V-G-, 26 I. & N. Dec. 227, 238 (B.I.A. 2014); Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(a)(42)(A) (defining refugee status to include those fleeing persecution due to "membership in a particular social group").

47 A church handbook used by one plaintiff noted: "Since the mid-twentieth century, rebellion against God's divine pattern of sex within the loving union of lifelong, monogamous, heterosexual marriage has become widespread. . . . [I]t has become necessary . . . to declare our Scriptural convictions and commitments concerning sexuality and marriage." Excerpts from the Evangel Presbytery Book of Church Order Ex. 4, at 8, Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 31, 2024).

48 *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 898 & n.18, 930–33 (2019) (discussing recognition and marginalization of third genders across cultures and historical eras); Byne et al., *Gender Dysphoria in Adults*, *supra* note 27, at 57–58.

49 *See* IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 104–08 (2000) (discussing categorization of people and distinguishing between "human kinds" and "natural kinds").

50 *Id.* at 9–11. Where gender minorities have long been recognized, social inclusion and rights have shifted over time. *See, e.g.*, SCHMIDT, *supra* note 1, at 4–7; Williams v. Kincaid, 45 F.4th 759, 767, 769–70 (4th Cir. 2022) (holding that an incarcerated trans woman was entitled to medical care under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213, and noting that the statute's text could not have included "gender dysphoria" because the diagnosis "did not exist").

51 *See, e.g.*, M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding a marriage valid where one spouse was transgender and had undergone so-called sex reassignment surgery). *But see In re* Marriage License for Nash, Nos. 2002–T–0149, 2002–T–0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003) (refusing to recognize an amended Massachusetts birth certificate for marriage purposes); Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (voiding a trans man's parental rights because state law did not "authorize a . . . transsexual to marry in the reassigned sex").

52 *See* cases cited *supra* note 29; *see also* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977) (holding that Title VII did not protect a worker who initiated the "process of sex transformation"); Terry v. EEOC, No. 80-C-408, 1980 WL 334, at *2 (E.D. Wis. Dec. 10, 1980) (similar). Most trans workers "actively hide . . . their identity to avoid mistreatment." Leslie M.G. Hayes & Emma C. Nowacki, *Discrimination Based on Gender: Reconciling* Bostock *in a Rapidly Evolving Workplace*, 65 ADVOCATE 24, 24 (2022).

documents,[53] and be free of criminal penalties for nonconforming gender expression.[54] Access to transition-related medical care was upheld by several courts in those years, although some courts (and legislatures) have since reversed course.[55] Such cases rarely, if ever, involved religious freedom, and the typical plaintiffs were transgender people seeking to exercise their rights, not cisgender people objecting to those rights.[56] The legal landscape has thus changed in terms of the identity of litigants, and in the widespread use of the First Amendment by cisgender plaintiffs seeking religious exemption from recognizing, being in the presence of, or otherwise refraining from discrimination against transgender individuals.[57]

Conflict between advocates of equal protection for gender and sexual minorities and evangelical Christian conservatives seeking to violate nondiscrimination laws continues to escalate.[58] At universities, dozens of religiously-affiliated institutions have been granted exemptions from equal treatment of LGBTQ applicants, students, and employees.[59]

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53 *See, e.g.*, Anonymous v. Weiner, 270 N.Y.S.2d 319, 323 (N.Y. Sup. Ct. 1966) (deferring to the Board of Health's denial to amend a birth certificate); *In re* Anonymous, 293 N.Y.S.2d 834, 835 (N.Y. Civ. Ct. 1968) (allowing a change to an "obviously 'female' name"); *In re* Richardson, 23 Pa. D. & C.3d 199, 200 (Pa. Com. Pl. 1982) (denying a name change where the petitioner had not had surgery).

54 Cross-dressing was largely decriminalized in the 1970s and 1980s. *See* Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & HIST. REV. 679, 701–03, 714–15 (2022). *But see* Kathleen Carlson, *Drag Show Laws*, FREE SPEECH CTR., MIDDLE TENN. STATE UNIV. (Oct. 17, 2023), https://firstamendment.mtsu.edu/article/drag-show-laws [https://perma.cc/54FL-44AP] (describing recriminalization efforts through bans on drag shows).

55 *Compare* Pinneke v. Preisser, 623 F.2d 546, 549 (8th Cir. 1980) (rejecting Iowa's Medicaid exclusion of transition-related surgery), *with* Smith v. Rasmussen, 249 F.3d 755, 760 (8th Cir. 2001) (upholding Iowa's Medicaid exclusion of the same).

56 *See In re* Heilig, 816 A.2d 68, 85 n.9 (Md. 2003) ("Most cases in which the gender of a transsexual is at issue have arisen in the context of marriage."); *see also* cases cited *supra* notes 51–53.

57 *See, e.g.*, WARBELOW & GREGG, *supra* note 43 (discussing exemptions to prevent trans people's presence on college campuses through Title IX); Downtown Soup Kitchen v. Mun. of Anchorage, 576 F. Supp. 3d 636, 641 (D. Alaska 2021) (holding that a Christian-run homeless shelter that turned away trans women was not a public accommodation for nondiscrimination ordinance purposes).

58 *See, e.g.*, NeJaime & Siegel, *Conscience Wars*, *supra* note 10, 2542–44; *Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186, 2186–87 (2021) [hereinafter *Reframing the Harm*]; Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1377 (2016).

59 WARBELOW & GREGG, *supra* note 43, at 12, 23–24 (listing thirty-three religiously-affiliated colleges granted Title IX religious exemptions to discriminate based on gender identity, and twenty-three based on sexuality); *see* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12 (2024) (implementing regulation to permit religious exemptions);

Bisexual, gay, lesbian, and other sexual minorities continue to face discrimination,[60] but social attitudes and legal equality have trended toward acceptance over the past half-century.[61] The same is not yet true for transgender and gender nonconforming people, who "remain astoundingly vulnerable" to violence and discrimination.[62]

How transgender youth in particular are treated has become a point of intense focus among conservative Christian activist and legal groups.[63] Particularly contentious issues include medical treatment,[64] gender-segregated facilities like school bathrooms,[65] school sports participation,[66]

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see also, e.g., YU Pride Alliance v. Yeshiva Univ., 180 N.Y.S.3d 141 (N.Y. App. Div. 2022) (denying a Jewish university an exemption from the New York City Human Rights Law to discriminate against LGBTQ undergraduates).

60 LGBTQ people continue to face prejudice and concomitant minority stress that contributes to a suicide attempt rate for sexual minority youth three times that of straight youth. Ester di Giacomo et al., *Estimating the Risk of Attempted Suicide Among Sexual Minority Youths: A Systematic Review and Meta-Analysis*, 172 JAMA PEDIATRICS 1145 (2018).

61 *Introduction: Sexual Orientation and the Law*, 127 HARV. L. REV. 1682, 1696 (2014) ("Sexual orientation and gender identity law is swiftly moving in the direction of equality."). But the trend is in question given the Supreme Court's sharp conservative turn. *See infra* Section I.B.

62 Brian F. Harrison & Melissa R. Michelson, *Using Experiments to Understand Public Attitudes Towards Transgender Rights*, 5 POL. GRPS. & IDENTITIES 152, 152 (2017). *See generally* Dustin T. Duncan & Mark L. Hatzenbuehler, *Lesbian, Gay, Bisexual, and Transgender Hate Crimes and Suicidality Among a Population-Based Sample of Sexual-Minority Adolescents in Boston*, 104 AM. J. PUB. HEALTH 272 (2014).

63 *See supra* note 51. On Christian legal activism, see Jessica Glenza, *The Multimillion-Dollar Christian Group Attacking LGBTQ+ Rights*, GUARDIAN (Feb. 21, 2020, 2:20 PM), https://www.theguardian.com/world/2020/feb/20/alliance-defending-freedom-multimillion-dollar-conservative-christian-group-attacking-lgbtq-rights [https://perma.cc/VV2Z-BU7H].

64 *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 36 (discussing bans on medical care for trans youth). The number of trans adolescents who had surgery was vanishingly small even prior to state bans. A study of insurance records found that from 2019 to 2021, approximately 260 per year had "top surgery" (breast or chest procedures) and about 20 per year had "bottom surgery" (e.g., hysterectomy, genital-reconstructive surgery) while most received no medical treatment. Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS (Oct. 6, 2022, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-transyouth-data [https://perma.cc/FHF3-82WN].

65 *See* Kristie L. Seelman, *Transgender Individuals' Access to College Housing and Bathrooms: Findings from the National Transgender Discrimination Survey*, 26 J. GAY & LESBIAN SOC. SERVS. 186, 188–89 (2014); *see, e.g.*, Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) (recognizing a trans boy's right to use the boys' bathrooms at school under Title IX); Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (holding that a school's policy barring a transgender boy from the boys' bathrooms did not violate his equal protection rights or Title IX).

66 *See, e.g.*, Soule v. Conn. Ass'n of Schs., 90 F.4th 34 (2d Cir. 2023) (holding that cisgender girls who lost track races against transgender girls had a plausible Title IX claim); B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542 (4th Cir. 2024) (holding that barring a girl from the middle school cross-country team for being trans violated Title IX).

nondiscrimination and anti-bullying laws,[67] school staff outing trans and questioning youth to parents,[68] and the use of names and personal pronouns.[69]

This Note addresses the last of these: teachers' use of, or refusal to use, trans students' names and pronouns in public educational institutions where policies have been implemented to prevent gender identity-based discrimination and harassment. The policies typically require staff to call students by the first names and pronouns consistent with school records,[70] and have become a cultural and political flashpoint. While some schools are faced with instructors' lawsuits alleging that nondiscrimination policies violate their religious liberties, a number of state legislatures have passed laws that prohibit schools from creating similar policies entirely.[71] The questions raised here would be of considerably less import if gender nonconforming and transgender people were assured of their physical safety; had equal access to housing, bathrooms, and medical care; and were legally protected from discrimination in education and employment.[72] However, the trend in much of the United States is against, not toward, well-being and equal treatment for trans people.[73]

B. *Religious Exemptionalism*

Concurrent with increasing trans visibility and litigation over transgender people's rights has been a marked rise in religious

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67 *E.g.*, Sacred Heart of Jesus Parish v. Nessel, No. 23-1781, 2023 WL 8176070 (6th Cir. Aug. 28, 2023) (suing to enjoin state nondiscrimination law). *See* Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 325, 326 (2011).

68 *See* MOVEMENT ADVANCEMENT PROJECT, FORCED OUTING OF TRANSGENDER YOUTH IN SCHOOLS (2024), https://www.lgbtmap.org/equality-maps/youth/forced_outing [https://perma.cc/TEZ2-Z972] (listing states that require schools to report students' gender identity to parents).

69 *See, e.g.*, Naaz Modan, *Bills Limiting Student Pronoun Use Introduced in Almost Half the States*, K–12 DIVE (May 1, 2023), https://www.k12dive.com/news/Bills-half-states-regulate-LGBTQ-student-pronoun-use/649046 [https://perma.cc/GK7C-5GK4].

70 Many universities allow students to designate the name that appears on rosters. *See* Gabrielle Dohmen, Comment, *Academic Freedom and Misgendered Honorifics in the Classroom*, 89 U. CHI. L. REV. 1557, 1560–61 (describing universities' pronoun use policies).

71 *See, e.g.*, H.B. 1468, 94th Gen. Assembly, Reg. Sess. (Ark. 2023) (enacting the "Given Name Act" to "protect teachers . . . from compelled speech" and barring use of a "preferred pronoun, name, or title without parental consent"); N.D. CENT. CODE § 15.1-06-21 (2023) (similar); KY. REV. STAT. § 158.191 (2023) (barring school discretion to use terms that "do not conform to a student's biological sex as indicated on the student's original, unedited birth certificate").

72 *See generally* JAMES ET AL., *supra* note 37.

73 *See* McNamarah, *supra* note 13; Byne et al., *Gender Dysphoria in Adults*, *supra* note 27, at 57–58 (discussing historical trends in restriction on medical care access and funding).

exemptionalism.[74] The term religious exemptionalism is coined here (to the best of the author's knowledge) to refer to a legal doctrine and set of cases wherein plaintiffs refuse to abide by neutral, generally applicable laws, alleging that their religious practices are hampered by doing so.[75] This strategy is not statute- or amendment-specific, but exemption claims are often brought under the banner of the Free Exercise Clause of the First Amendment, Religious Freedom Restoration Acts, or statutes with specific religious accommodation provisions.[76] Before more closely examining this doctrine, an overview of the broader expansion of religion in the public sphere is warranted.

1. Shift in the Establishment–Free Exercise Balance

Freedom to practice a religion would seem to align with freedom from an established state religion, and some legal scholars suggest that the Free Exercise and Establishment Clauses of the First Amendment ought to be read as two elements of a single clause.[77] Nevertheless, the two religion clauses are often marshaled by parties on opposite sides of a dispute.[78] Tension often arises when conflicts around prayer, religious activities, and religious displays in public schools, courts, and other public spaces, and public funding for religious education.[79]

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74 *See* Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 177 (2015) ("A storm is brewing. Two fronts are colliding: . . . equality for [LGBT] people and women . . . and claims of religious liberty . . . ."); Netta Barak-Corren, *Taking Conflicting Rights Seriously*, 65 VILL. L. REV. 259, 262–63 (2020) ("Conflicts between religious liberty and gender and LGBTQ equality . . . [have] a slot of their own on the Supreme Court docket.").

75 This strategy is common in cases involving a right to discriminate against LGBTQ people. *E.g.*, cases cited *supra* note 3; Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 617–19 (2018); *see* Eskridge, Jr., *supra* note 12, at 659, 715–16 (discussing the Christian Legal Society's claim that it "only exclud[ed] *unrepentant* gay people" (emphasis added)).

76 *E.g.*, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 571 (N.D. Tex. 2021) (seeking Title VII exemption on behalf of "church[es] and Christian-owned business[es] that did not wish to hire or retain employees who engaged in gay or transgender conduct").

77 *See, e.g.*, Gregory Velloze, *The Single Religion Clause: Non-Established, Free, and Independent Exercise*, 75 S.C. L. REV. 413, 415–16, 419–20 (2024) (arguing that the intent was a "single Religion Clause presum[ing] parity" and arguing that "free exercise is better understood as a narrower limit on prohibitions of free, independent exercise, rather than a[n] . . . individual right of conscience").

78 *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 ("[O]ur government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 713 (1871))).

79 *See cases* cited *infra* notes 87–89.

The balance between the two provisions has changed starkly since the mid-twentieth century.[80] Thirty-five years ago, the Supreme Court held that laws could constitutionally impose a degree of burden on individuals' religious practices.[81] In response to the Court's holding Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), lowering the bar for religious liberty challenges by requiring courts to apply strict scrutiny even to neutral, generally applicable laws,[82] once the challenger had preliminarily demonstrated a substantial burden on their free exercise of religion.[83] Notably, RFRA did not explicitly include the traditional free exercise factor involving harm done to others that had historically been part of free exercise jurisprudence.[84]

After RFRA was held unconstitutional as applied to the states in 1997, Congress again fortified the status of religious exercise in 2000 by including activities that are neither central to nor required by a belief system in the definition of religion and directed courts to construe the statute to protect religious exercise "to the maximum extent permitted by the terms of this chapter and the Constitution."[85] Moreover, the Court has stated that any indication of disadvantageous treatment based on religious status would "trigger[] the most exacting scrutiny."[86]

As Congress lowered the burden for religious liberty claimants, the Supreme Court has consistently rejected allegations of Establishment Clause violations, reversing precedent with respect to public funding for

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80 Under Chief Justices Warren, Burger, and Rehnquist, the Supreme Court ruled in favor of religious claimants about half the time, whereas the rate is approaching 90% under Chief Justice Roberts. Epstein & Posner, *supra* note 21, at 324–26. Religious claimants have lost twice: *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), and *Trump v. Hawaii*, 585 U.S. 667 (2018). The "Muslim travel ban" was upheld under a rational basis test despite Trump's public anti-Muslim statements. *Trump v. Hawaii*, 585 U.S. at 697.

81 Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" (quoting United States v. Lee, 455 U.S. 252, 255 n.3 (1982))).

82 To defend a challenged law, the government must show it serves "a compelling . . . interest" and is "the least restrictive means" of achieving its legitimate goal. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to 2000bb-4; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-1.

83 "Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 . . . . [It] operates as a kind of super statute, displacing . . . the normal operation of other federal laws . . . ." Bostock v. Clayton County, 590 U.S. 644, 682 (2020).

84 Marci A. Hamilton, *The Cognitive Dissonance of Religious Liberty Discourse: Statutory Rights Masquerading as Constitutional Mandates*, 41 HARV. J.L. & PUB. POL'Y 79, 93 (2018).

85 City of Boerne v. Flores, 521 U.S. 507, 519, 535–36 (1997) (holding RFRA unconstitutional as applied to states); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-3.

86 Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017).

religious education and activities,[87] displays of religious symbols and monuments in government spaces and on public land,[88] and permitting prayer at local government meetings and public school events.[89] Though the Court has suggested reading the free exercise and establishment elements as a unit, its application has nevertheless been highly favorable toward free exercise claims.[90] In a case upholding a public school football coach's prayer at games, the Court shrugged off the school district's concern about violating the Establishment Clause as a "'mere shadow' of conflict"[91] and further holding that "a government entity's concerns about phantom constitutional violations [could never] justify actual violations of an individual's First Amendment rights."[92] These trends set the stage for religious claims for pronoun rejection.

2. History of Religious Exemptions

A century ago, the Supreme Court applied a rational basis test to First Amendment claims and tolerated statutes restricting individual rights to a greater extent than does today's Court.[93] The Court weighed heavily the dangers of excusing individuals from acting in accordance with generally applicable laws, reasoning that to excuse individuals from acting in accordance with laws would make "religious belief superior to the law of the land, and . . . every citizen to become a law unto himself."[94] The Court interpreted the religion clauses to encompass "freedom to

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87 *E.g.*, Carson v. Makin, 596 U.S. 767, 789 (2022) (extending tuition vouchers to religious schools); *Trinity Lutheran*, 582 U.S. at 453–54, 466 (permitting public funding for a church playground).

88 *Compare* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29 (2019), *and* Salazar v. Buono, 559 U.S. 700 (2010), *with* McCreary County v. ACLU of Ky., 545 U.S. 844 (2005), *and* Allegheny County, Greater Pittsburgh ACLU, 492 U.S. 573 (1989).

89 *Compare* Lee v. Weisman, 505 U.S. 577 (1992) (holding a public school's graduation benediction unconstitutional), *with* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543 (2022) (holding that a public school football coach had a right to pray on the field during games).

90 *Kennedy*, 597 U.S. at 566–67 (Sotomayor, J., dissenting) (stating that majority applied "an erroneous understanding of the Religion Clauses"); Carson v. Makin, 596 U.S. at 807 (Sotomayor, J., dissenting) (stating that the majority ignored the prohibition on funding religious exercise).

91 *Id.* (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

92 *Id.*

93 "[T]hrough the early twentieth century, even state action that encroached on constitutionally protected rights was lawful as long as it possessed a rational relationship to some legitimate end." Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling– and Important–Interest Inquiries*, 129 HARV. L. REV. 1406, 1406 (2016).

94 Reynolds v. United States, 98 U.S. 145, 167 (1878) (rejecting the claim by an adherent to the Latter-day Saints that polygamy, as a religious duty, was protected by the First Amendment).

believe and freedom to act," but that while the "first is absolute . . . the second cannot be."[95]

Religion-based claims for the right to discriminate became more common in the decades following the Civil Rights Era[96] but the Supreme Court dismissed those defenses of anti-Black discrimination as not just insufficient, but "patently frivolous."[97] The Court has recently reiterated a position that religious beliefs cannot serve to justify racist actions.[98] Yet similar First Amendment claims for a right to discriminate against LGBTQ people fare better: the Court has gone so far as to say that if a government actor draws a parallel between religious motivations for racist beliefs and for anti-LGBTQ animus, the commentary is itself evidence of non-neutrality towards religion.[99]

Interpreting RFRA's statutory requirements expansively,[100] the Supreme Court has increasingly granted religious exemptions to generally applicable laws.[101] Through the 1990s, the Court evinced concern about the consequences of over-individualized legal obligations.[102] However, the presumption that neutral, generally applicable public laws generally have priority over private religious conflicts has since faded.[103]

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95 Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); *see also* United States v. Ballard, 322 U.S. 78, 81 (1944).

96 303 Creative, LLC v. Elenis, 600 U.S. 570, 619 (2023) (Sotomayor, J., dissenting) ("Backlashes to race and sex equality gave rise to legal claims of rights to discriminate, including claims based on First Amendment freedoms of expression and association.").

97 Newman v. Piggie Park Enters., 390 U.S. 400, 403 n.5 (1968) (quoting 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring), *aff'd*, 390 U.S. 400 (1968)) (rejecting restaurant owner's argument that he had a free exercise right to refuse to serve Black customers); Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983) (rejecting a Christian college's free exercise defense of racist admissions policies).

98 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014); Transcript of Oral Argument at 112, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123).

99 Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 635 (2018) (holding the statement "religion has been used to justify all kinds of discrimination throughout history" showed anti-religious hostility); Meriwether v. Hartop, 992 F.3d 492, 513–14 (2021) (similar).

100 Under RFRA's amended definition, a law may not burden religious exercise, even if it is generally applicable and neutral to religion, unless it serves a legitimate government interest and it reflects the narrowest available means to achieve that goal. 42 U.S.C. § 2000bb-1. The law is sometimes misunderstood to be a constitutional standard. Hamilton, *supra* note 84, at 84–85.

101 Compare the concerns of *Reynolds v. United States*, 98 U.S. 145 (1878), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), with *Sherbert v. Verner*'s presumption that a law burdening religious exercise must be justified by a "compelling state interest." 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); Barak-Corren, *supra* note 74, at 262–64.

102 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

103 Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 69 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2018) [hereinafter NeJaime & Siegel, *Religious Accommodation*].

3. Contemporary Exemptionalism

The rise of religious exemptions can be located within a repoliticization of religion beginning in the 1980s.[104] In the United States, this comes in the form of profoundly antipluralist religious nationalism, an inherently exclusionary ideology rooted in the idea that the United States is a Christian nation.[105] A thirty-year wave of litigation by conservative Christian legal organizations has constricted equal protection principles in favor of a particular conception of religious liberty that stands in opposition to the principle of separation of church and state.[106] As some scholars have characterized it, the fundamentalist Protestant approach is "to fight for laws and to advocate for constitutional interpretations that accord with its . . . understanding of biblically prescribed morality."[107]

The exemptionalism doctrine is one mode by which today's courts favor the interests of religious parties over the interests of others.[108] It expands the universe of religious exemptions by bringing conduct into the protected realm when parties allege that an act *implies* expression of a belief that those parties reject. As Douglas NeJaime and Reva Siegel observe, "religious liberty claims offer a way to oppose emergent legal orders and newly protected rights" through complicity arguments, thus avoiding compliance with reproductive care regulations and nondiscrimination laws.[109]

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104 *See* Susanna Mancini & Michel Rosenfeld, *Nationalism, Populism, Religion, and the Quest to Reframe Fundamental Rights*, 42 CARDOZO L. REV. 463, 465–466 (2021) (characterizing the movement as "the use of religion as the basis for forging identitarian bonds that are strongly exclusionary of those cast as the 'Other'").

105 *Id.* at 466, 485. *See* Town of Greece v. Galloway, 572 U.S. 565, 584–86 (2014). The dissent maintained that the town prayers imbued "participatory government . . . with one (and only one) faith." *Id.* at 632–33 (Kagan, J., dissenting). *See* Paul Horwitz, Comment, *The* Hobby Lobby *Movement*, 128 HARV. L. REV. 154 (2014) (describing the shift from religious minorities to Protestant and Catholic claimants).

106 The Christian legal organization Alliance Defending Freedom (ADF) represented plaintiffs in many cases opposing trans rights, e.g., cases cited *supra* notes 3, 66–67, and *infra* note 359.

107 Mancini & Rosenfeld, *supra* note 104, at 473. These goals are pursued through both legislative action and through the courts. *See supra* Section I.B.1.

108 *See supra* Section I.B.1.

109 NeJaime & Siegel, *Religious Accommodation*, *supra* note 103, at 73 (observing that "this approach to religious exemptions has become so common that [a newspaper] . . . referr[ed] to 'exemptions for religious believers, schools and corporations *to federal laws they disagree with*'" (quoting Sarah Pulliam Bailey, *Many Religious Freedom Advocates Are Actually Disappointed with Trump's Executive Order*, WASH. POST (May 5, 2017, 7:00 AM), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/05/05/many-religious-freedom-advocates-are-disappointed-with-trumps-executive-order [https://perma.cc/J38C-MVZ])).

To illustrate this, consider the degrees of attenuation in types of conduct a religious individual might claim is prohibited by the sincere beliefs that zygotes are legal persons,[110] and that one must not kill another human being.[111] These beliefs clearly prohibit ending one's own pregnancy, so a law requiring an abortion would directly conflict with the adherent's religious practice (not to mention the right to bodily integrity and to be free from violence). Expanding the concept of religious exercise, an adherent might claim that the beliefs conflict with performing an abortion for a patient, prescribing emergency contraceptives, or, more attenuated still, checking the patient's vitals during an operation or monitoring the patient on a postoperative unit afterward.[112] Such healthcare refusals are increasingly enshrined in law,[113] in practice extending to refusal to provide medical care to patients based on gender identity.[114]

A religious person who deems someone else's actions to be sinful might assert a right to be exempt from laws that would force them to "endorse" the other's actions.[115] Under religious exemptionalism, "religious exercise" encompasses not just an individual's own beliefs and conduct, but also an individual's objections to others' conduct.[116] In the absence of a standard for evaluating the belief-conduct nexus, any act that the adherent says "endorses" offensive behavior could be protected

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110 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 223–24, 263 (2022) (announcing the Court's adoption of fetal "personhood" doctrine and ending the constitutional right to an abortion).

111 "[W]hen lawmakers in Indiana fought over . . . [banning abortions], Republicans argued at length that a fertilized egg was a human life . . . citing their Christian principles—that 'human life begins at conception' and 'our creator says you shall not murder.'" Elizabeth Dias & Bethany Mollenkof, *When Does Life Begin?*, N.Y. TIMES (Dec. 31, 2022), https://www.nytimes.com/interactive/2022/12/31/us/human-life-begin.html [https://perma.cc/HX3L-WETY].

112 Laws permitting medical workers to refuse to provide abortions have expanded to cover an array of medical procedures. *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 2538–39.

113 42 U.S.C. § 300a-7(c)–(d) (allowing healthcare workers to "refus[e] to perform or assist" an abortion or participate in "any part of a health service program" if doing so "would be contrary to [their] religious beliefs or moral convictions").

114 For example, a surgeon might refuse to perform a hysterectomy on a patient if the surgeon believed the patient was a transgender man. *See* Eric Plemons, *Not Here: Catholic Hospital Systems and the Restriction Against Transgender Healthcare*, 68 CROSSCURRENTS 533, 536–37 (2019) (discussing Catholic hospitals' refusal to provide some surgeries to transgender patients).

115 Complicity exemptions extend as far as permission to obstruct strangers' access to medical care that one considers sinful. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014) (holding that employers have a free exercise right not to comply with federal law requiring that health insurance include certain reproductive care benefits). *Hobby Lobby* garnered attention for holding that a corporation is a "person" with free exercise rights and for its deference to the plaintiffs' view that covering contraception would force employers to violate their religion. *Id.*

116 NeJaime & Siegel, *Religious Accommodation*, *supra* note 103.

religious exercise.[117] Merging the jurisprudence of religious exercise and free speech expands the complicity zone.[118] The question for courts is how to determine where this zone ends—prior, that is, to either anarchy or theocracy.[119]

In theory, the nexus analysis rests on factors including the sincerity of the proffered beliefs, whether the basis is in fact *religious* or simply reflects a personal preference, whether the alleged burden on religious exercise is substantial, and how much harm an exemption would cause to third parties.[120] In practice, though, these are not necessarily given much weight.[121] One scholar observed that "the Court seemed to shrug off the third-party harm analysis altogether" in a recent religious exemption case.[122] With respect to the inquiry into the allegedly sincere belief, Xiao Wang has shown that the Supreme Court's recent attitude is highly deferential: over the past thirty years it has never found a plaintiff's religious belief insincere.[123] Wang concluded that a litigant who "profess[es] a sufficiently specific 'sincere' belief . . . can all but ensure the government action at issue is a substantial burden."[124]

Free speech protection applies to conduct only when an actor intends to send a particular message and the message is likely to be received by onlookers.[125] The further away from a nexus—that is, the

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117 For example, a nurse with a religious belief in binary, immutable sex might refuse to use transgender patients' names, impeding access to medical care. *See* JAMES ET AL., *supra* note 35, at 16 (reporting that almost half of trans people were misgendered, mistreated, or denied care in the year prior to being surveyed).

118 Dissenting from the *Hobby Lobby* opinion, Justice Ginsberg wrote, "[u]ndertaking the inquiry [into the alleged burden on free exercise] . . . I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial." *Hobby Lobby*, 573 U.S. at 760 (Ginsberg, J., dissenting); *see also infra* Section III.C.

119 *See* Mancini & Rosenfeld, *supra* note 104, at 472 n.33 (distinguishing religious nationalism from fundamentalist "regimes . . . subsum[ing] all governance and rights to religious precepts").

120 *See* United States v. Ballard, 322 U.S. 78, 81 (1944); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that secular considerations would not suffice to "interpose[] a barrier to reasonable state regulation of education"); *Hobby Lobby*, 573 U.S. at 759 (Ginsburg, J., dissenting) (stating that the majority had "forgo[ne]" the inquiry on whether the burden was substantial).

121 *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94 (2017) (advocating for courts to more closely examine the burden that religious claimants allege).

122 *See Reframing the Harm*, *supra* note 58, at 2187.

123 Xiao Wang, *Religion as Disobedience*, 76 VAND. L. REV. 999, 1055 (2023) (describing the emptiness of the "sincerity" requirement in free exercise jurisprudence). Federal appellate courts found that religious parties were sincere in 93% of cases. *Id.* at 1037.

124 *Id.* at 1031–32 ("That is exactly what happened in *Hobby Lobby*: the plaintiffs insisted that complying with the contraceptive mandate, in any form, would be an unacceptable degree of complicity."); *Hobby Lobby*, 573 U.S. 682.

125 Spence v. Washington, 418 U.S. 405, 410–11 (1974).

more attenuated the relationship between the religious commitment and the conduct governed by law—the weaker the justification for exemption.[126] Like religious exemptions from medical care provision, exemptions from antidiscrimination laws are based on highly attenuated connections between religious belief and the conduct governed by law.[127]

The acceptance of exemptions from nondiscrimination laws breaks with courts' historical refusal to give credence to arguments that religious beliefs justify categorically unequal treatment based on race and ethnicity.[128] Contrast the Supreme Court's rejection of religion-based justifications for racist university admissions policies with acceptance of the expulsion of students and firing of staff based on LGBTQ status,[129] and a similar pattern in public accommodations case law.[130]

In the latter cases, the plaintiffs sought and were granted exemptions based on hybridized First Amendment claims, mixing speech- and religious belief-based arguments to circumvent facially neutral and generally applicable laws.[131] Religious exemptionalism expands the scope of the religious liberty arguments through hybrid free speech and free exercise claims wherein conduct is alleged to express support for disapproved-of (i.e., sinful) behavior. By labelling conduct as an expression of a religious belief, a plaintiff can seek protection based on both viewpoint and religious observance.[132] Under "endorsement of sin" arguments, this type of claim is regularly recognized.[133]

Cases aimed at restricting transgender individuals' rights rely on various legal theories, and many include religious liberty justifications

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126 NeJaime & Siegel, *Religious Accommodation*, *supra* note 103, at 70–72.

127 In *Hobby Lobby*, the Court rejected an attenuation argument against an exemption, accepting religious claimants' asserted nexus between belief and regulated conduct. 573 U.S. at 723, 727.

128 *See Reframing the Harm*, *supra* note 58, at 2189–90, 2200; *supra* notes 96–98 and accompanying text.

129 WARBELOW & GREGG, *supra* note 43, at 6, 23–24; Hunter v. U.S. Dep't of Ed., 650 F. Supp. 3d 1104 (D. Or. 2023) (holding anti-LGBTQ Title IX religious exemptions constitutional).

130 *See* cases cited *supra* note 97. The Supreme Court has held repeatedly that Christian business owners in the wedding industry may refuse to serve same-sex couples. In *303 Creative, LLC v. Elenis*, a website designer successfully asserted a free speech right to express her religious disapproval of same-sex couples marrying by denying them services. 600 U.S. 570, 580 (2023).

131 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

132 Some acts that could hypothetically be said to express support for someone else's behavior have nothing to do with religious practice. When a belief is highly attenuated from an act it is unlikely the act would send a relevant message to an outside observer, but a comprehensible message is required for an act to be protected as *expressive conduct*. *See infra* Section III.C.

133 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 2523.

either implicitly or explicitly.[134] Some plaintiffs also invoke religious liberty *without* bringing free exercise claims, inviting courts to blend free exercise considerations with other legal claims.[135] The following Section attempts to disentangle these First Amendment rights.

C. *Conduct and Speech Under the First Amendment*

The First Amendment Free Speech and Free Exercise Clauses differ in that the former is directed principally toward expression in words, and the latter toward beliefs and conduct within a more narrowly circumscribed set of meanings.[136] The distinction between speech and religious exercise is crucial to the argument presented in this Note because courts afford them different degrees of deference, particularly post-RFRA and in the context of public education.[137]

The Supreme Court has ruled that the Constitution's protection of religious beliefs is absolute and the government may not punish someone for those beliefs.[138] Accordingly, free exercise claims are typically brought

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134 Reviewing the constitutional right to privacy and transgender people's access to traditionally sex-segregated spaces one scholar observed, "typical[ly] . . . students and parents [bring] a potpourri of claims." Note, *Constitutional Privacy and the Fight Over Access to Sex-Segregated Spaces*, 133 HARV. L. REV., 1684, 1685 (2020) (citing Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211, 377 F. Supp. 3d 891, 893–94 (N.D. Ill. 2019)). *See, e.g.*, Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (bringing claims under Title IX and the right to privacy for cisgender children); Brief of Appellant at 2–3, Sacred Heart of Jesus Parish v. Nessel, No. 23-1781, 2023 WL 8176070 (6th Cir. 2023) (asserting violations of the First and Fourteenth Amendments and parents' rights, i.e., for parents of cisgender children).

135 John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 132 n.9 (D. Md. Aug. 18, 2022), *vacated on other grounds*, 78 F.4th 622 (4th Cir. 2023), *cert. denied*, No. 23-601, 2024 WL 2262333 (May 20, 2024) ("Parents [suing under Title IX] allude to religious concerns but do not raise a Free Exercise claim."); Bostock v. Clayton County, 590 U.S. 644, 682 (2020) (noting that the employer who fired a transgender woman based on gender identity had "pursue[d] a RFRA-based defense . . . . [but] declined to seek review of that adverse decision"); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 618–19 (2018) (stating in a free speech case that "the government . . . cannot impose regulations that are hostile to . . . [nor] act in a manner that passes judgment upon . . . religious beliefs and practices").

136 U.S. CONST. amend. I. That the two clauses are amenable to this distinction is admittedly controversial, but the general pattern stands. Justice Gorsuch, for one, has interpreted the two clauses as if they were both intended to protect religious activity. *See infra* notes 148–149 and accompanying text.

137 RFRA automatically confers a broad definition of religion and requires "strict scrutiny" in all cases where religious observance is implicated under federal law. 42 U.S.C. § 2000bb-1; *see also infra* Section III.A.

138 Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("Heresy trials are foreign to our Constitution."); McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.").

by individuals who wish to *act* or *refrain from acting* in ways that are required or prohibited by law, where the mandated act or non-act would conflict with the individual's adherence to religious rules of conduct.[139] Historically, most conduct that was protected (or was sought to be protected) was specific to individual or family decisions and collective rituals: marriage, school attendance, Sabbath observation, ritual slaughter, or wearing personal indicia of religion such as jewelry, head coverings, and facial hair.[140] Religious speech such as prayer or preaching constitutes an exception to the speech-conduct division, though such worship typically also involves ritual conduct.[141] Traditionally, lawsuits about prayer in public schools centered on church-state separation rather than free exercise, since prayer in a group setting comes with an expectation of participatory conduct (even if only by remaining silent with one's head bowed).[142] Free speech claims, by contrast, typically involve verbal or written communication, along with some symbolic

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139 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10; Grant P. Patterson, *Constitutional Law—The Supreme Court Declines to Revisit the* Smith *Test for Violations of Free Exercise—*Fulton v. City of Philadelphia, *141 S. Ct. 1868 (2021)*, 45 AM. J. TRIAL ADVOC. 245 (2021).

140 Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (holding that Amish parents could keep children out of high school despite the state's mandatory age); Sherbert v. Verner, 374 U.S. 378, 403 (1963) (holding that a Seventh-day Adventist fired for refusing to work on Saturdays was entitled to jobless benefits); Groff v. DeJoy, 600 U.S. 447 (2023) (holding that termination of a religious postal worker who refused to work on Sundays was unconstitutional where the employer did not show accommodation would lead to "substantial increased costs" of operation); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (holding that an ordinance banning certain ritual slaughter was unconstitutional as non-neutral, purposeful suppression of Santeria); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that a prohibition on an Orthodox Jewish doctor wearing a yarmulke while on military duty was constitutional); EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768 (2015) (holding that an employer violated Title VII by failing to hire a Muslim woman because her veil was not within the employee style policy); Holt v. Hobbs, 574 U.S. 352 (2015) (holding that an incarcerated Muslim man had a religious right to grow a beard despite prison rules).

141 If any speech is clearly religious practice, it is the mandated, ritual utterance of particular words—that is, prayer—which is often a literal verbal statement of faith. While prayer is expressed in words, it is also often enactment of a ritual. Prayer in public spaces has been evaluated under the Establishment Clause and public school students have been treated as in need of protection from the potentially coercive effect of officially sanctioned prayer. *Compare* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–23 (1963) (striking down a law that required reading Bible verses and reciting Christian prayer in public schools under the Establishment Clause), *with* Marsh v. Chambers, 463 U.S. 783 (1983) (holding that Christian prayers at the opening of Nebraska legislature's sessions did not violate the Establishment Clause), *and* Town of Greece v. Galloway, 572 U.S. 565 (2014) (upholding Christian prayer at town meetings).

142 "[F]or many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise." Lee v. Weisman, 505 U.S. 577, 593 (1992).

acts.[143] Most conduct that is protected as speech involves symbols such as flags or politically salient items of clothing used to convey ideas.[144]

The two clauses also differ in that free exercise is meant to protect a narrower category of expression of beliefs, purportedly limited to the deeper questions in life, rather than the broader set of political and social views protected by freedom of speech.[145] However, in cases raising free exercise claims, courts rarely give much attention to the content of the sincerely held religious beliefs relied upon to justify discrimination,[146] or to the link between a party's asserted beliefs and the exemption sought.[147]

Complicity arguments, however, merge speech and religious exercise claims when adherents allege that their own acts endorse another person's acts. The *Kennedy* Court did little to distinguish First Amendment protection for religious exercise and speech.[148] Indeed, Justice Gorsuch explicitly chose not to do so: "These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[149] The implication is that pure speech on matters of public concern—such as speech in civil or political spheres—need not be distinguished from "expressive religious activities" for analytic purposes and, instead, both

143 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind.").

144 *See, e.g.*, Stromberg v. California, 283 U.S. 359 (1931) (holding that a state law prohibiting the display of a red flag was unconstitutional); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that public school students had a right to wear armbands in protest of the war in Vietnam); Texas v. Johnson, 491 U.S. 397, 402–04 (1989) (striking down a Texas law that criminalized burning the American flag at a political protest).

145 *See* United States v. Seeger, 380 U.S. 163, 184 (1965) (upholding an exemption from the draft based on conscientious objection and providing a test: "[D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"); United States v. Meyers, 906 F. Supp. 1494, 1504–05 (D. Wyo. 1995) (describing religious beliefs as typically about issues like "life, purpose, and death").

146 *See* United States v. Ballard, 322 U.S. 78, 81 (1944). Federal statutes are to be interpreted to encompass even idiosyncratic beliefs, including those not central to one's sect. *See* 42 U.S.C. § 2000bb-1.

147 *See* Gedicks, *supra* note 121, at 112 ("[W]hen religiously contradictory behavior is evidence, the courts defer to the claimant's explanations.").

148 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 531 n.2 (2022) ("[T]he parties[] conce[de] . . . that Mr. Kennedy's prayer constituted private speech on a matter of public concern, [so] we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework.").

149 *Id.* at 523. Since prayer is clearly religious exercise, the free speech holding was redundant.

simply fall under the Free Speech Clause.[150] The Court did not discuss the fact that expressive or symbolic conduct does not necessarily warrant the same First Amendment protection as pure speech.[151] Justice Gorsuch's noteworthy elision of the distinctions between free speech and free exercise, and between speech and conduct, are key to the expansion of complicity claims.[152]

D. *First Amendment Rights in Public Education*

Public employees' religious exercise is protected by federal statute and the Constitution.[153] Courts traditionally give considerable weight to the Establishment Clause in the "special context of the public elementary and secondary school system,"[154] where courts have held that public school pupils are entitled to be free from school officials' religious influence due to children's susceptibility to coercion.[155] Nevertheless, free exercise claims and church-state separation challenges in schools have followed the more general pattern of a narrowing scope for the Establishment Clause.[156]

To make a prima facie Title VII failure to accommodate claim, an employee must show that their sincere religious belief or practice conflicted with a requirement of employment, and that their "religious observance or practice was the basis for the discriminatory treatment or

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150 In *Shurtleff v. City of Boston*, Justice Gorsuch similarly suggested this view, referring to "*so-called* separation of . . . church and state." Transcript of Oral Argument at 78, 596 U.S. 243 (2022) (No. 20-1800) (emphasis added).

151 Spence v. Washington, 418 U.S. 405, 410–11 (1974) (protecting the display of a flag with a peace sign because it reflected "[a]n intent to convey a particularized message" and "the message would be understood by those who viewed it"); Texas v. Johnson, 491 U.S. 397, 402–04 (1989) (striking down a Texas law that criminalized burning the American flag as symbolic speech).

152 *Kennedy*, 597 U.S. at 531–32 ("Whether one views the case through the lens of the Free Exercise or Free Speech Clause, . . . the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny' . . . . *A similar standard generally obtains under the Free Speech Clause.*" (emphasis added) (first citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); then citing Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015))); *see also infra* Part III.

153 Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1); U.S. CONST. amend. I.

154 Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (striking down a state law that mandated teaching creationism in science classes). "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584. *Compare* Marsh v. Chambers, 463 U.S. 783 (1983), *with* Lee v. Weisman, 505 U.S. 577, 586, 592 (1992).

155 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 317 (2000); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 210 (1963).

156 *See supra* Section I.B.1.

adverse employment action."[157] Employers must reasonably accommodate employees' observance or practice, but they may defend against a failure to accommodate claim by showing that no reasonable accommodation was possible without causing undue hardship on the conduct of business.[158] Courts have sometimes limited complicity-based claims under Title VII when employees refused to carry out administrative tasks not closely tied to their averred beliefs.[159]

The Title VII prohibition on religious discrimination does not protect employees' observances based on beliefs "merely because they are strongly held."[160] Rather, religious beliefs "typically concern[] 'ultimate ideas' about 'life, purpose, and death.'"[161] Although the rationality or truth of a religious belief is outside courts' evaluative purview, courts may evaluate the sincerity of a belief and the connection between the alleged belief and accommodation.[162] Thus, a person engaged in certain practices for deeply held non-religious reasons would not be protected by Title VII, even if a religious person would be entitled to accommodation of the same practices.[163]

As with religion, public schools and universities occupy a singular place in First Amendment free speech jurisprudence.[164] Courts have

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157 Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1); *see* Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 845 (S.D. Ind. 2020), *vacated and aff'd in relevant part*, No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024). I follow the U.S. District Court for the Southern District of Indiana in using vacated decisions for reference to the record. *Kluge*, 2024 WL 1885848, at *12 n.2.

158 *Id.* §§ 2000e(j), 2000e-2(a)(1). Congress amended Title VII in 1972, defining religion as "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j); *see also* Groff v. DeJoy, 600 U.S. 447 (2023) (articulating the hardship standard employers must meet).

159 *E.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589 (6th Cir. 2018) (holding that discrimination for being gay or transgender violated Title VII), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020)); Davis v. Ermold, 936 F.3d 429 (6th Cir. 2019) (denying accommodation to a county clerk who refused to sign marriage licenses for same-sex couples); Summers v. Whitis, No. 15-cv-00093, 2016 WL 7242483 (S.D. Ind. Dec. 15, 2016) (similar).

160 *Section 12: Religious Discrimination*, EEOC (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/TSW2-37T2].

161 *Id.* (quoting United States v. Myers, 906 F. Supp. 1494, 1502 (D. Wyo. 1995)).

162 Summers v. Whitis, 2016 WL 7242483, at *7 (stating that plaintiffs "alleged that requiring them to process certain forms violated their religious beliefs").

163 *See Section 12: Religious Discrimination*, *supra* note 160. For example, vegetarianism based on commitment to mitigating one's ecological footprint would not be protected, but vegetarianism as a practice of Hinduism would be. *Id.* at n.32 (citing Spies v. Voinovich, 173 F.3d 398, 406–07 (6th Cir. 1999) (ruling that there is no obligation to accommodate a vegan diet unrelated to religious beliefs)). *Contra* LaFevers v. Saffle, 936 F.2d 1117 (10th Cir. 1991) (holding that a Seventh-day Adventist's vegetarian diet was constitutionally protected because it was based on religious belief).

164 *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that public school students have a right to refuse to say the Pledge of Allegiance); Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969) (holding that the school administration infringed on students'

limited free speech rights for elementary and secondary school students and teachers,[165] but emphasized academic freedom for university students and instructors.[166] The schoolteacher role is viewed through a different lens because younger students are seen as more "impressionable" and out of consideration for parents' roles in child-rearing.[167] Children's speech protection depends on interference with classwork, disruption of the school's orderly operation, and whether the speech significantly invades the rights of others.[168] Such disruption by instructors falls under the general balancing of public employer-employee interests.[169]

The extent of protection for government employees' speech depends on the nature and context of the speech: whether it is within an employee's work duties or a matter of purely private concern, and whether it would be so damaging to an entity's operation as to outweigh the value of the speech to the employee or to the public.[170] Courts traditionally apply the *Pickering-Connick* test, asking whether an employee was speaking as the voice of government or as a citizen on a matter of legitimate public concern, and, if the latter, whether the employer has adequate justification to treat the employee differently than any other citizen.[171]

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free speech by suspending students for symbolic demonstration of an anti-war stance in the absence of showing a substantial disruption or interference with school activities).

165 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988) (holding that a school may censor students' speech if "reasonably related to legitimate pedagogical concerns"). *But see* Hosty v. Carter, 412 F.3d 731, 734–35 (7th Cir. 2005) (applying the *Hazelwood* standard to censorship of a college newspaper).

166 Grutter v. Bollinger, 539 U.S. 306, 329 (describing the "special niche" of free speech in academia). Courts are likely to give more weight to professors' arguments for a right to misgender than to the same arguments by schoolteachers. *See* Scott et al., *supra* note 24, at 1018.

167 Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families . . . condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the [family's beliefs].").

168 Student opinions are protected by the First Amendment if they do not "materially and substantially interfer[e] with . . . the operation of the school." *Tinker*, 393 U.S. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); *Barnette*, 319 U.S. at 630 (holding it unconstitutional to require students to salute the American flag and noting that refusal did not "colli[de] with rights asserted by any other individual").

169 Pickering v. Bd. of Educ., 391 U.S. 563, 569–73 (1968) (considering whether a public school teacher's speech was on a matter of public concern and balancing the teacher's interests against the state's interests in rendering a public service without disruptive interference).

170 *See id.* at 568–73; Connick v. Myers, 461 U.S. 138, 143–46 (1983) (holding that the First Amendment protects employee speech on matters of public but not private concern).

171 *Pickering*, 391 U.S. at 563; *Connick*, 461 U.S. at 145 (stating that speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" (quoting Carey v. Brown, 447 U.S. 445, 467 (1980))); Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that a public employee's statements made in an official role are not insulated from employer discipline).

In *Garcetti v. Ceballos*, the Supreme Court further limited government officials' First Amendment speech protections, holding that "statements [made] pursuant to their official duties" are subject to regulation by employers.[172] The *Garcetti* standard makes it unlikely that schoolteachers will succeed in challenging sanctions for classroom speech, but its impact on university instructors' speech is not yet settled.[173] Academic freedom concerns may give professors stronger claims than schoolteachers that the decision to misgender or degender students is protected,[174] but even with a *Garcetti* exception classroom speech remains subject to the *Pickering-Connick* balancing test.[175]

Unlike religious exercise claims, employees cannot avail themselves of statutory exemptions for opinions or ideological objections to employer policies.[176] Thus, an employer would not be required to consider a teacher's ideological moral or political objection to a school's nondiscrimination policy, nor search for an accommodation as school administrators have done in the misgendering cases.[177] The question of whether misgendering could be considered speech, as opposed to non-expressive conduct, turns on whether misgendering expresses any particular message to observers; if it were held to be protected as speech, that protection would depend on whether the act of misgendering expresses a message about an issue of importance to the public.[178] In the analysis that follows, each of these questions is answered in the negative.

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172 547 U.S. at 421.

173 *Id.* at 425; *see* Brian Soucek & Ryan Chen, *Misunderstanding* Meriwether, 92 FORDHAM L. REV. 57, 65–66 (2023); David L. Hudson, Jr., *The Supreme Court's Worst Decision in Recent Years*—Garcetti v. Ceballos*, the Dred Scott Decision for Public Employees*, 47 MITCHELL HAMLINE L. REV. 375, 392–94 (2021).

174 *See* Scott et al., *supra* note 24, at 1018–20. *See generally* Caitlin Ring Carlson & Emma S. Hansen, *Pronoun Policies in Public Schools: The Case Against First Amendment Exceptions for K–12 Teachers*, 32 GEO. MASON U. C.R. L.J. 261 (2022) (discussing the particular potential for harm by schoolteachers who misgender students compared to college students).

175 *See* Dohmen, *supra* note 70, at 1566–70 (considering the impact of *Garcetti* on a free speech argument for professors' right to misgender students). Dohmen suggests that if courts were to apply *Garcetti*, misgendering students would likely be unprotected because it falls within professors' official duties, but if courts held that *Garcetti* did not apply to academics then misgendering would require further free speech analysis. *Id.*

176 *But see* 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023) (allowing a religious plaintiff to refuse to serve gay couples on a free speech basis rather than evaluate her religious exercise claim).

177 Meriwether v. Hartop, 992 F.3d 492, 498, 512–14 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 823, 839–41 (S.D. Ind. 2020); *see* Scott et al., *supra* note 24, at 1018.

178 *See supra* Section I.C; Connick v. Myers, 461 U.S. 138, 143–46 (1983).

II. EXEMPTIONS FROM ADDRESSING TRANS STUDENTS: ILLUSTRATIVE CASES

A. *Policies and Exemptions*

The basic pattern of school pronoun cases is as follows.[179] A school or university administration introduces a nondiscrimination policy directing teachers to use students' names and pronouns in accordance with the name and gender listed in the school database. A teacher objects that they believe it is wrong to address trans students this way and that doing so would be a sin according to their religious convictions. In some cases, a teacher is temporarily granted permission not to comply with the policy, such as by using no first name or title for trans students, but school administrators rescind that permission when the exemptions prove disruptive. Eventually, the teacher faces employer disciplinary consequences for failing to follow the policy and responds by suing the school for allegedly violating their religious liberty rights. In each case, facing adverse employment consequences, the plaintiff teachers argue that the use of certain forms of personal address constitutes "complicit[y] in sin," or a similar religious conscience-type objection.[180]

This Part recounts two recent cases in which evangelical Christian instructors refused to use transgender students' first names, pronouns, and titles.[181] Each was initially permitted to use a last-names-only approach as an accommodation to their objections, but when administrators found the solution to be unworkable, they were sanctioned for failure to follow the policy calling for teachers to use the names and pronouns each student provided.[182] Both subsequently sued their employers.[183]

In each case, the teacher claimed he should have been granted a religious accommodation exempting him from addressing some students—those whose identities he rejected—by gender-congruent first

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179 *See* cases cited *supra* note 3 (all plaintiffs represented by ADF lawyers); *supra* note 106; *infra* notes 189, 208 (quoting nearly identical statements of belief provided by the plaintiffs).

180 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 2523.

181 *Meriwether*, 992 F.3d at 499; Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848, at *1 (S.D. Ind. Apr. 30, 2024). Titles (sometimes called honorifics) are prefixes such as Mr., Ms., Mx., Mrs., Dr., and the like.

182 *Meriwether*, 992 F.3d at 515; *Kluge*, 2024 WL 1885848, at *3.

183 *Meriwether*, 992 F.3d at 502–03 (listing Meriwether's nine initial claims); Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 836–40 (S.D. Ind. 2020) (dismissing the First Amendment claims but allowing Title VII to proceed). Kluge's Title VII claims survived a motion to dismiss in district court. *Id.* at 836, 844–46; *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

names, pronouns, and titles (or to use the language the teacher deemed appropriate).[184] As discussed in the subsequent Sections, the reasoning of the respective courts differed regarding whether free speech was implicated and in their analyses balancing school and employee interests.[185]

B. Meriwether v. Hartop

Plaintiff Nicholas Meriwether, a college professor at a small state university in Ohio, referred to a student, Jane Doe, as "sir" on the first day of class.[186] Doe, a transgender woman who had transitioned five years before, approached the professor after class to tell him he had made a mistake.[187] But the professor refused to acknowledge a misunderstanding, even after Doe showed him that her driver's license was consistent with her gender and legal name.[188] Meriwether told her that he would not address her as a woman because of his religious belief that sex is given by God and fixed at conception.[189] Doe complained to university administrators about Meriwether's statements, and they initiated a discussion with Meriwether in which he argued that he could not call the student "Ms. Doe."[190] The administrators granted him permission to call Doe by her last name and refer to his other students with titles, then withdrew that permission after Doe filed a Title IX complaint.[191]

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184 The former would be permission to degender students; the latter, to misgender them. *Meriwether*, 992 F.3d at 500–01; *Kluge*, 2024 WL 1885848, at *3–4.

185 *Meriwether*, 992 F.3d at 500–01; *Kluge*, 432 F. Supp. 3d at 832–35; *Kluge*, 2024 WL 1885848, at *5.

186 *Meriwether*, 992 F.3d at 499. Meriwether stated that he assumed the student's gender from her appearance. *Id.*

187 *Id.* Doe recounted: "At first, I thought it was a mistake, either mix-up of words or a miscue based on my clothes or appearance. When it is the latter, it is particularly painful . . . ." Mark Joseph Stern, *What It Feels Like When a Federal Court Gives a Professor the Right to Misgender You*, SLATE (Apr. 13, 2021, 4:02 PM), https://slate.com/news-and-politics/2021/04/transgender-student-misgender-amul-thapar-jane-doe.html [https://perma.cc/6QGZ-XK67].

188 "[T]here was no way for professor [sic] Meriwether to know that I am transgender. All my documents and school records reflect my correct name and female gender marker." Stern, *supra* note 187. Note that Jane Doe's name is no more a matter of preference than anyone else's legal name. An anti-feminist equivalent would be a professor refusing to use a woman's last name because he believed it sinful for her not to take her husband's name. *See In re* Hauptly, 312 N.E.2d 857 (Ind. 1974) (granting a married woman's application to change her name back to her maiden name).

189 *Meriwether*, 992 F.3d at 498–99 (reporting plaintiff's belief that sex "cannot be changed, regardless of an individual's feelings or desires," and assertion that "he cannot 'affirm as true ideas and concepts that are not true'").

190 *Id.* at 499–501.

191 *Id.* at 501.

Following an unsuccessful discussion about a different religious accommodation, Meriwether was told that he risked being fired if he refused to abide by the policy, to which he responded by filing a suit against the university.[192]

The district court dismissed all of Meriwether's claims,[193] but the Sixth Circuit reversed on the First Amendment claims,[194] holding that the plaintiff had plausibly alleged free exercise and freedom of speech violations.[195] In holding these claims plausible, the court necessarily accepted Meriwether's assertion that calling Jane Doe "Ms. Doe" was equivalent to "endorsing" a viewpoint about the nature of sex and gender, but the opinion did not state what viewpoint that would be.[196] Despite being bound by Supreme Court precedent holding that an employer cannot defend firing a transgender person by asserting that employing her "endorses" a belief that contradicts the employer's views, the *Meriwether* court reasoned that employing someone imposed less burden on religious exercise than "chang[ing] [one's] speech to recognize a person's transgender identity."[197]

The court further held that a proposal for Meriwether to refrain from using any pronouns would violate the Free Exercise Clause because "it would prohibit [him] from speaking in accordance with his belief[s]."[198] The court did not provide reasons for the conclusion that the professor's decision to misgender students expressed an opinion or a religious belief, however.[199] Its basis for holding that the free exercise claim was plausibly alleged rested instead on Meriwether's allegations of hostility and "irregularities" in the procedures around Title VII and Title IX proceedings.[200]

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192 *Id.* at 501, 518.

193 Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2020 WL 704615, at *1 (S.D. Ohio Feb. 12, 2020), *rev'd in relevant part sub nom.* Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (holding that Meriwether failed to state a claim on constitutional rights violations).

194 *Meriwether*, 992 F.3d at 518.

195 *Id.* at 498, 512–14 (noting that protecting speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). But the court's opinion is at odds with the procedural posture, e.g., holding that misgendering is speech on a matter of public concern. Soucek & Chen, *supra* note 173, at 93.

196 *See Meriwether*, 992 F.3d at 516.

197 *Id.* (citing EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020)).

198 *Id.* at 517. This is incorrect as a matter of terminology, since "gender" refers to socially meaningful aspects of being a person. To oversimplify: gender is enacted, expressed, and reinforced through interaction, while, loosely speaking, sex inheres in the body, with categorization based on socially agreed-upon biological traits. *See, e.g.*, Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 127 (1987).

199 *Meriwether*, 992 F.3d at 507.

200 *Id.* at 514–16.

Taking the alleged facts as true, the court assumed that calling on students is speech rather than conduct and further determined that denying a student a linguistically conventional title and pronouns is protected speech on a matter of public concern.[201] It interpreted the decision to withhold such language as expressing a viewpoint, or as rejecting a viewpoint that Meriwether ascribed to the university.[202] The Sixth Circuit therefore reversed the dismissal of both First Amendment claims, and the parties reached a settlement agreement out of court.[203] Importantly, this outcome has been widely misinterpreted as establishing a professor's right to misgender students, but it did not. No court reached a final ruling on the merits of these claims.[204]

C. Kluge v. Brownsburg Community School Corporation

John Kluge was the sole orchestra and music theory teacher at a public high school in Indiana beginning in 2014.[205] School administrators learned that among the incoming freshmen there were several transgender students, and in 2017 issued a policy (the "Name Policy") directing staff to address students according to the name and gender indicated in the school's database.[206] Kluge, an evangelical Christian, refused to follow the Name Policy, claiming that "it was against his sincerely held religious beliefs to use anything other than the names recorded on the students' original birth certificates."[207] He asserted that using a name or pronoun that he deemed "opposite sex" would contradict

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201 According to this logic, Jane Doe's identity was a "hotly contested" issue. *Id.* at 506. The court also applied an exception to the *Garcetti* standard based on academic freedom concern. *Id.* at 504–09.

202 *Id.* at 507 ("The university . . . wants its professors to use pronouns to communicate a message . . . . Meriwether does not agree with that message.").

203 Settlement Agreement and Release, Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753 (S.D. Ohio Mar. 29, 2022) (awarding $400,000 to Meriwether from the university).

204 Soucek & Chen, *supra* note 173, at 58–68 (discussing the widespread misinterpretation of the *Meriwether* holding and the development of a "false legal narrative," noting that the reported outcome was impossible in the procedural posture, and that the panel misapplied the free speech tests for public employees); *see, e.g.*, Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 741 (Va. 2023) (relying in part on *Meriwether* to hold that a teacher's rejection of trans students' names constituted speech on "an ideological topic that has engendered fierce public debate").

205 Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848, at *2 (S.D. Ind. Apr. 30, 2024).

206 *Id.* at *3. Students could modify the name and gender marker in the database if they had support from parents and treatment providers. *Id.*

207 Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861, 867–68 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023). As a classroom teacher, Kluge would not have had access to children's birth certificates, and coupled with the general legality of name changes, the argument undermines Kluge's credibility and sincerity. *See id.*

his belief in God-given sexes[208] and would be a sin.[209] Thus, he could not "affirm students who were experiencing gender dysphoria"[210] nor "affirm as true ideas and concepts that he deem[ed] untrue and sinful, as this would violate Biblical injunctions against dishonesty, lying, and effeminacy."[211] In essence, Kluge's concern about affirming a sinful idea appeared to be a question of affirming the notion that transgender people exist, i.e., that a person can be transgender.[212]

Kluge received initial permission to address students by their last names only, but parents, students, and teachers complained about the practice and the school decided not to extend the accommodation for the next school year.[213] Aware that he would be subject to sanctions for refusing to follow the policy in the future, Kluge resigned at the end of the school year and filed a lawsuit alleging religious discrimination under Title VII, First Amendment violations, and other claims.[214] All but the Title VII claims were dismissed.[215]

The district court dismissed the free exercise claim for failure to show that the policy targeted a religion or was motivated by animus.[216] It dismissed the free speech claim because Kluge's speech was not protected under *Garcetti*, as he was speaking in his role as a government employee.[217] On summary judgment, the district court held in 2021 that

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208 First Amended Complaint ¶ 34, Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823 (S.D. Ind. 2020) (No. 19-cv-2462), 2019 WL 11071619 (describing the belief that "God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires").

209 Kluge referred to his church handbook to clarify his theology: "The proper conception of 'sexual identity' is a matter of being and obeying the genetic sex God made us . . . . Any attempt of a man to play the woman or a woman to play the man violates God's decree . . . and constitutes sin so serious that God himself pronounces it an 'abomination' . . . ." Deposition Excerpts of John Kluge at 38–40, *Kluge*, No. 19-cv-02462 (S.D. Ind. Apr. 30, 2024).

210 First Amended Complaint, *supra* note 208, ¶ 29. Kluge "believe[d] encouraging students to present themselves as the opposite sex by calling them an opposite-sex first name is sinful and potentially harmful to the students." *Id.* ¶ 53.

211 *Id.* ¶ 35. *See infra* text accompanying notes 295–298.

212 Due to his idiosyncratic and sometimes incorrect use of gender- and sex-related terms, Kluge's positions are sometimes not clear. *See infra* text accompanying notes 295–298.

213 Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 834 (S.D. Ind. 2021).

214 Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *9–11 (S.D. Ind. Apr. 30, 2024); *Kluge*, 548 F. Supp. 3d at 819.

215 Defendant's Brief in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment at 5, *Kluge*, 548 F. Supp. 3d 814 (No. 19-cv-2462).

216 Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 842 (S.D. Ind. 2020). The district court explained that "[b]ecause the Policy is neutral and generally applicable and Mr. Kluge has not alleged facts showing that it targeted or otherwise was motivated by an animus toward any particular religion or religious belief, he has not stated a claim for violation of the Free Exercise clause." *Id.* at 841.

217 *Id.* at 839 (citing Garcetti v. Ceballos, 547 U.S. 410, 420 (2006)).

the school district had not violated Title VII because the policy was neutral and of general applicability, and no possible accommodation could be found that would not cause undue hardship.[218]

In the 2021 judgment, the district court rejected the school administration's argument that pronoun and name use are non-ideological, finding that there was "an objective conflict" between the school's policy and Kluge's religious beliefs.[219] However, it provided little explanation for this determination because the outcome was decided in the defendant's favor on undue hardship grounds.[220] Following an appeal to the Seventh Circuit, which affirmed, and subsequent remand in light of the newly-announced *Groff* standard for Title VII religious accommodations, the district court reaffirmed its initial holding on Kluge's Title VII claim.[221] The court held that the religious accommodation had substantially burdened the school by causing substantial harm to transgender students and put the school on "'the razor's edge' of liability."[222] In the final *Kluge* disposition, the court noted that a question of fact remained as to Kluge's sincerity,[223] but did not determine whether there was a cognizable conflict between Kluge's beliefs and the school policy because the extent of undue hardship on the school was dispositive.[224]

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218 *Kluge*, 548 F. Supp. 3d at 840. The court held that the school had shown that it could not accommodate Kluge's "belief against referring to transgender students using their preferred names and pronouns without incurring undue hardship." *Id.* at 846.

219 *Id.* at 842. "[T]he Court rejects [the school district]'s administrative task argument and concludes that Mr. Kluge's religious beliefs objectively conflict with the Name Policy and [the district]'s other requirements concerning how faculty and staff address and refer to transgender students." *Id.*

220 *Id.*

221 *See* Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024). The court granted summary judgment in favor of the school on the Title VII claims. *Kluge*, 548 F. Supp. 3d 814. Kluge appealed the Title VII failure to accommodate determination, and the Court of Appeals for the Seventh Circuit affirmed. Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2023). After staying a rehearing petition, the Seventh Circuit vacated in light of *Groff v. DeJoy*, 600 U.S. 447 (2023) (articulating a new religious accommodation standard requiring significant hardship on employers' part). Kluge v. Brownsburg Cmty. Sch. Corp., No. 21-2475, 2023 WL 4842324, at *1 (7th Cir. July 28, 2023). On remand, the district court affirmed summary judgment for the school district under the *Groff* standard. *Kluge*, 2024 WL 1885848.

222 *Kluge*, 2024 WL 1885848, at *20 (quoting Matthews v. Wal-Mart Stores, Inc., 417 F. App'x 552, 554 (7th Cir. 2011)); *Kluge*, 548 F. Supp. 3d at 846 ("[T]o allow Mr. Kluge an accommodation that resulted in complaints that transgender students felt targeted and dehumanized could potentially have subjected [the school district] to a Title IX [suit]."). Some courts have interpreted the *Bostock* decision on Title VII to mean that Title IX also covers gender identity and sexual orientation. *See, e.g.*, *Kluge*, 2024 WL 1885848, at *21.

223 *Kluge*, 2024 WL 1885848, at *14.

224 *Id.* at *22; *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

III. THE MISSING NEXUS: PERSONAL ADDRESS AS SIN

Sincerely-held religious beliefs, no matter how illogical or absurd they may seem to others, are protected by the Free Exercise Clause of the First Amendment.[225] However, there are limits to the deference courts give to religious claimants who allege that the free exercise of their religion has been burdened.[226] The *Kluge* and *Meriwether* courts erred in reasoning that a sincere belief in binary, immutable sexes could justify an exemption from school nondiscrimination policies for using students' names and gender-congruent language.[227] With little inquiry, each court determined that the alleged conflict between the plaintiff's beliefs and the school policy was plausible.[228] A nexus inquiry would distinguish a highly attenuated, complicity-based claim such as these from typical protected observances like attending religious services.[229] That missing inquiry is crucial to a reasoned analysis of future misgendering cases and has implications for other claims where religious claimants allege that they are forced into complicity with sin via expressive conduct.

Some courts have applied limits to complicity-based claims in religious liberty cases opposing LGBTQ people's rights.[230] The Sixth Circuit's opinion in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.* is perhaps most relevant.[231] The court determined that there was no nexus in a sin-through-endorsement argument where an employer asserted that employing a transgender

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225 *See* Redmond v. GAF Corp., 574 F.2d 897, 900 (7th Cir. 1978); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

226 *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020); Davis v. Ermold, 936 F.3d 429 (6th Cir. 2019); Summers v. Whitis, No. 15-cv-00093, 2016 WL 7242483 (S.D. Ind. Dec. 15, 2016).

227 Meriwether v. Hartop, 992 F.3d 492, 514–16 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 841–42 (S.D. Ind. 2021.

228 The district court found that the school policy objectively conflicted with Kluge's religious beliefs in its 2021 disposition. *Kluge*, 548 F. Supp. 3d 814. That decision was vacated but is a useful example of judicial reasoning. The court affirmed the judgment in 2024, assuming arguendo that Kluge's belief was sincere and conflicted with the policy, since the undue hardship analysis was dispositive for summary judgment. *Kluge*, 2024 WL 1885848, at *14. The Sixth Circuit held that Meriwether had alleged a plausible free exercise claim based on non-neutral acts by university administrators. *Meriwether*, 992 F.3d at 502, 512; U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to -4; Religious Land Use and Institutionalized Persons Act of 200, 42 U.S.C. §§ 2000cc to 2000cc-1.

229 The Equal Employment Opportunity Commission describes observances and practices like praying, wearing religious symbols, attending services, and following dietary rules. *See Section 12: Religious Discrimination*, *supra* note 160.

230 *See* cases cited *supra* note 226.

231 884 F.3d 560.

woman burdened his right to free exercise.[232] Put differently, prohibiting employment discrimination based on gender identity is not equivalent to forcing an employer to endorse a transgender employee's beliefs about sex or gender,[233] even if an employer sincerely believes they are equivalent.[234] Thus, to show a substantial burden requires more than simply alleging that one would be forced to "endorse" others' views through equal treatment.[235]

Claiming that compliance with a law is expressive conduct is a common strategy among individuals seeking legal permission to discriminate, most notably among Christian wedding service vendors who claim that providing goods or services is equivalent to endorsing a couple's marriage—"communicating a message" they do not believe in.[236] But conduct is not speech "whenever the person engaging in the conduct intends thereby to express an idea."[237] Even weaker than the wedding services endorsement argument is the analogous argument for rejecting a transgender person's name and pronouns, since it is unclear what message would be endorsed by calling an individual by their name or referring to them in conversation.[238] Protection of expressive conduct as speech is predicated on the intent to express a message and the likelihood that an audience would receive the message. Indeed, the conduct that religious claimants object to in misgendering cases is perhaps nothing more than the existence of transgender people in their presence.

Similarly, a viewpoint is not conveyed by addressing individuals with gendered language simply because a plaintiff alleges that the language endorses some viewpoint.[239] The key distinction is between factual allegations about the belief itself and legal allegations of a

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232 *Id.* at 569, 589.

233 Similarly, a gender-conforming cisgender person may hold beliefs that contradict a plaintiff's, but using gender-congruent terms to refer to that person does not endorse their views, either.

234 The court rejected the claim, reasoning that employing her would not amount to "endorsing her views" on the nature of sex. *Id.* at 589. Further, "the fact that [the employer] sincerely believes that he is being compelled to make such an endorsement *does not make it so*." *Id.*

235 *Id.*

236 *303 Creative, LLC v. Elenis*, 6 F.4th 1160, 1170 (2021) ("I will not be able to create websites for same-sex marriages . . . . Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage.").

237 United States v. O'Brien, 391 U.S. 367 (1968).

238 *Meriwether* and *Kluge* involve only binary (masculine and feminine) terms. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 826 (2021). Other arguments might arise where a student's identity is nonbinary. *See generally* Clarke, *supra* note 48; Karolina Hansen & Katarzyna Żółtak, *Social Perception of Non-Binary Individuals*, 51 ARCHIVES SEXUAL BEHAV. 2027 (2022).

239 Honorifics convey respect, but gendered honorifics do not convey a message that men and women are equal; they only convey equal treatment. *See Meriwether*, 992 F.3d at 498, 500.

substantial burden.[240] Refraining from discrimination, such as misgendering or degendering, does not constitute a substantial burden on one's religious liberty—at least not under a complicity or endorsement theory.[241]

Although explicit statements of disapproval regarding transgender people or transition would constitute protected pure speech, free exercise claims require more than a bare assertion that one finds another person (or their conduct) offensive, whether or not rooted in religious convictions. This is the point at which freedom of speech and free exercise diverge. And this is the point where courts must be vigilant in their considerations of exemption from antidiscrimination law. To the extent that the *Meriwether* and *Kluge* courts reasoned that name and pronoun policies implicate free exercise, they erred in finding a nexus between the alleged beliefs and the policies' requirements.[242] Neither Kluge nor Meriwether attempted to show their classroom conduct related to a religious practice.[243]

This is a clear contrast to traditional free exercise claims, where the practice is closely tied to the requested exemption.[244] An exemption from dress code so that one can wear a symbolic, mandatory item of clothing follows directly from the religious mandate to wear that item.[245] Such a nexus is lacking between a belief that a deity has assigned unchangeable sex to each person[246] and the conversational terms a teacher uses to address an individual student. Since the former is about an adherent's conduct, its effects on coworkers are indirect; but short of physical contact there is hardly an act more directed at another person than how

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240 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 759 (2014) (Ginsburg, J., dissenting) ("RFRA . . . distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept . . . and the 'legal conclusion . . . that [their] religious exercise is substantially burdened,' *an inquiry the court must undertake*." (emphasis added) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).

241 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 844 F.3d 560, 589 (6th Cir. 2018) ("[R]equiring the Funeral Home to refrain from firing an employee with different religious views from [the employer] does not, as a matter of law, mean that [the employer] is endorsing or supporting those views.").

242 *Meriwether*, 992 F.3d at 498, 503–05, 514 (holding that a free exercise claim was supported by "a plausible inference [of] . . . pretext for targeting [plaintiff's] beliefs"); *Kluge*, 548 F. Supp. 3d at 820–21, 841–42, *vacated and aff'd*, No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024).

243 *Meriwether*, 992 F.3d at 501. Kluge claimed that using last names was a neutral practice, *Kluge*, 2024 WL 1885848, at *9, but his intent was belied by his request to "talk directly to students about their eternal destination." *Id.* at *3.

244 *See supra* Section I.B–C.

245 *See, e.g.*, Groff v. DeJoy, 600 U.S. 447 (2023); *Exodus* 20:8–10 ("Six days you shall labor and do all your work, but the seventh day is a sabbath of the Eternal your God . . . .").

246 Deposition Excerpts of John Kluge, *supra* note 209, at 38–40; First Amended Complaint, *supra* note 208, ¶ 34.

one addresses that person. The impact of such an exemption is imposed onto particular others—not just by happenstance, as with coworkers. The effect is directed and intentional, even if the harm is not.

The *Meriwether* court held that the professor had plausibly alleged a free exercise right to "speak[] in accordance with his belief that sex and gender are conclusively linked."[247] Therein, the court's reasoning slides from religious freedom to freedom of speech, and, in doing so, wrongfully extends the protection of religious practice and belief to the protection of allegedly expressive conduct in an educational setting, so long as a party claims it is an expression of an opinion based in religious conviction.[248] The interpretation of the professor's decision to misgender students as an expression of opinion or religious belief, meanwhile, went unexamined.[249] The Sixth Circuit erred when it ignored the *content* of Meriwether's belief because the plaintiff must show a connection between the belief itself and the action to which the individual objects.[250] A statutory mandate to interpret religious freedom broadly does not do away with this nexus requirement.[251]

Applying strict scrutiny, the *Meriwether* court held that the university's pronoun and name policy was not narrow enough to be justified and that administrators improperly denied an individualized exemption.[252] But the court jumped the gun in applying strict scrutiny on reversal of a motion to dismiss; that standard would not apply to a religious exercise claim until a later stage, nor would it apply to speech protection for a government employee.[253] The court based this conclusion on the fact that the university had made a prior attempt to work out a compromise with the professor, permitting him to use names instead of pronouns for transgender students. But even by this expanded understanding of exemptions from neutral laws, the use of students'

247 *Meriwether*, 992 F.3d at 517. This is incorrect as a matter of vocabulary, since "gender" refers to socially meaningful aspects of being a person and exists in interactions. Oversimplifying for the sake of brevity: gender is enacted, expressed, and reinforced through interaction, while, loosely speaking, sex inheres in the body, with categorization based on socially agreed-upon biological traits. *See, e.g.*, Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 127 (1987).

248 Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Cal. Ct. App. 2021) (applying strict scrutiny and holding that a law barring staff from misgendering facility residents was a "content-based" restriction not narrowly tailored to the state's interest in preventing discrimination).

249 *Meriwether*, 992 F.3d at 507.

250 *Compare id.*, *with* Davis v. Ermold, 936 F.3d 429 (6th Cir. 2019), *and* Summers v. Whitis, No. 15-cv-00093, 2016 WL 7242483 (S.D. Ind. Dec. 15, 2016).

251 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4.

252 *Meriwether*, 992 F.3d at 517–18.

253 *Id.* at 499–500; Soucek & Chen, *supra* note 173, at 58–68 (critiquing the court's application of legal principles given the procedural posture).

pronouns and names by educators is outside the realm of religious exercise under either the First Amendment or RFRA.[254]

A. *Personal Address Is Not Exercise of Religion*

For a form of personal address to burden one's free exercise of religion, the act of addressing someone must either prevent the adherent from carrying out a religious practice or compel them to carry out a prohibited action (i.e., in Christianity, to sin). Here, the teachers do not argue that they are religiously obligated to address students in a specific way; they must show the converse: that to use a particular form of address is to sin.

Meriwether and Kluge's allegations that they would be forced to violate their religious beliefs[255] by using gender-congruent language fall into two rough categories: forced untruthfulness[256] and forced encouragement of sin.[257] For a nexus to exist between belief and exemption, there must be a conflict between the two—but the plaintiffs failed to articulate a nexus, and the courts did not pursue the matter.[258]

First, take untruthfulness. Whether one is forced to lie depends on what message is expressed through a name or pronoun, and on what religious belief is contradicted by the message. One possibility is that a plaintiff believes that any viewpoint other than the one the plaintiff draws from Christian scriptures constitutes a sinful message; another is that the plaintiff specifically wished to avoid communicating views they ascribed to their transgender students.[259] The record is silent on the views of the transgender students, though, and it is doubtful that either Kluge or

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254 *See infra* Section III.A.

255 Each plaintiff argued that his opposition to school policies was rooted in his Christian beliefs. *Meriwether*, 992 F.3d at 498; Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 820–21, 834–35 (S.D. Ind. 2021).

256 Meriwether contended that his "religious beliefs prevented him from communicating messages about gender identity that he believes are false." *Meriwether*, 992 F.3d at 499. The court accepted his assertion that using gender-congruent pronouns for transgender students sends a message that "[p]eople can have a gender identity inconsistent with their sex at birth," and stated that "Meriwether does not agree with that message." *Id.* at 507.

257 *Kluge*, 548 F. Supp. 3d at 821 (asserting that "because being transgender is a sin, it is sinful for him to 'encourage[] students in transgenderism'"). Following the policy "would require him to tell a dangerous lie to his students and would be perilous to his own soul." Appellant's Opening Brief at 4, *Kluge*, 548 F. Supp. 3d 814 (No. 19-cv-2462).

258 *See supra* Part II.

259 *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020) (assuming that the employer's concern was being compelled to endorse his transgender employee's views about sex and gender, but without considering what views she actually held).

Meriwether knew what their transgender students thought about sex and gender, God, or the origins of humanity.[260] Moreover, individuals' pronouns and names do not convey such things; if they did, one could discern cisgender people's views on these matters from their names, which is plainly not the case.[261]

Another possible "lie" might be an implicit statement about the referent student's gender or sex, but that claim triggers an epistemological problem regarding the status of particular students.[262] In addition, the "forced to lie" objection raises concerns about whether the exemption would be for religious reasons or individual preference, and raises questions of sincerity.[263] Finally, use (or non-use) of gendered language does not send a clear message to an audience, as would be necessary for either version of the belief-exemption nexus (i.e., for lying or encouraging sin).[264]

If, instead, the alleged conflict is about being forced to encourage a student to sin, a similar question arises: what conduct is encouraged or endorsed through titles, names, and pronouns?[265] The plaintiffs do not specify.[266] And transgender people are not united by actions, but only by identity. Further, no factual basis was presented that a teacher's

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260 The transgender students' testimony shows that they dreaded interacting with their respective teachers, so this inference seems reasonable. Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *6 (S.D. Ind. Apr. 30, 2024); Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 2052110, at *6 (S.D. Ohio May 9, 2019).

261 *See supra* note 233.

262 *See, e.g.*, Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 741 (Va. 2023) (assuming at the pleadings stage that a non-party student's "biolog[y]" was relevant to teacher's claim that his religious practice was burdened by "lying" through pronoun use).

263 In Kluge's case, he specifically decided with a school administrator to obfuscate his reason for using last names if and when a student asked why he was doing so. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 823 (S.D. Ind. 2021) ("[I]f any student were to directly ask why he used last names only, he would respond that he views the orchestra class like a sports team and was trying to foster a sense of community.").

264 For example, if a professor did not specifically treat a transgender student *differently* in the classroom, they could not make a plausible argument that calling students "Ms. Last Name" or "Mr. Last Name" would be informative as to the students' views on human origins. Calling Jane "Ms. Doe" would not do so, either, unless a professor explicitly stated a view on human origins and sexes, *and* linked those views specifically to Jane.

265 Courts may not conduct an inquiry into the truth of a religious belief. United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("[People] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). Yet, as this Note stresses, courts may inquire into the matter of a link between belief and exemption. *See infra* Part IV.

266 The closest indication of objectionable conduct is Kluge's objection to handing out boys' and girls' orchestra uniforms to transgender students. Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *4 (S.D. Ind. Apr. 30, 2024); *see* Dara Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 441–42 (2024) (discussing court cases where transgender students' expression through hairstyle and dress were held protected by the First Amendment).

compliance with a name policy had any connection to students' "sinful" conduct.[267] Although, again, rationality is not required for religious beliefs to be legitimately protected, the absence of a factual connection between the complainant's conduct and the beliefs is relevant to an inquiry about whether a posited burden on one's religious practice is truly substantial.[268]

1. Pronouns Are Non-Expressive

Meriwether and Kluge argued that addressing or referring to an individual trans student in a particular way amounts to "affirming" gender transition, either specifically about that student or more generally by communicating a message.[269] A student's name or pronoun cannot itself be a *profession* or *endorsement* of a religious belief.[270] Rather, pronouns are empty of content in the sense that, by definition, they stand in for other nouns.[271] It is by no means necessary, in linguistic terms, for English speakers to make gender distinction in the third person singular.[272] Hundreds of languages—including the two most common native languages in the world, Mandarin and Hindustani—do not use gendered personal pronouns at all.[273] It would be painfully illogical to

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267 Thus, the link between using one student's first name and what that student then chooses to do regarding self-presentation and gender expression is purely conjectural.

268 *See infra* Part IV for a proposal on reinvigorated inquiries into sincerity and substantial burden.

269 Meriwether v. Hartop, 992 F.3d 492, 499, 507 (6th Cir. 2021).

270 Perhaps there are exceptions for naming. "Satan," for example, is a permissible name in at least some states. Larson, *supra* note 15, at 193–94. A Tennessee magistrate judge rejected "Messiah," but the decision was reversed in chancery court. Ashley N. Moscarello, Note, *Because I Said So: An Examination of Parental Naming Rights*, 90 CHI.-KENT L. REV. 1125, 1125–26, 1126 n.10 (2015) (citing Martin v. McCullough, No. 2013-cv-100 (Tenn. Ch. Oct. 7, 2013) (vacating the magistrate's order)).

271 Personal pronouns stand in for (i.e., express the same content as and can be substituted for) a person or persons, where the referent person is recoverable from the context. *See* CRYSTAL, *supra* note 15, at 248, 257, 295.

272 Many languages do not make this gender distinction. Anna Siewierska, *Gender Distinctions in Independent Personal Pronouns*, WORLD ATLAS LANGUAGE STRUCTURES ONLINE (2013), http://wals.info/chapter/44 [https://perma.cc/V3VC-2VAY] (click "go to map" to see each language). For centuries, English speakers used singular *they* to refer to a singular antecedent if general or unknown (e.g., someone, no one). Grammarians objected to its use in the 1700s and successfully campaigned to replace *they* with *he* as a pseudo-generic form (and to reinforce the social hierarchy of men over women). Dennis E. Baron, *The Epicene Pronoun: The Word That Failed*, 56 AM. SPEECH 83, 83 (1981).

273 Among the five most common native languages on the planet, which account for an estimated 2.5 billion people (almost one-third of all humans)—Mandarin (941 million native

assume that this type of linguistic variation could predict speakers' conceptions of sex and gender.[274]

Pronouns function to reduce repetition of the referent individual's name and convey additional information about whether the referent person is acting, being acted upon, or is in possession of something.[275] Using a pronoun does not carry an *inherent* meaning about the nature (or culture) of sex and gender.[276] Pronouns are empty referents *even though* a gender is traditionally attached to the third person singular form in English.[277] The fact that the third person singular carries a gender is, however, only incidental to its use.[278]

Pronouns are not divinely inspired; they are not used to express one's belief in the story of Genesis, wherein a deity created a man and a

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speakers), Spanish (486 million), Hindustani (415 million, including both Hindi and Urdu dialects), English (380 million), and Bengali (237 million)—only Spanish and English distinguish third-person singular gender. SIL INT'L, ETHNOLOGUE: LANGUAGES OF THE WORLD (David M. Eberhard, Gary F. Simons & Charles D. Fening eds., 27th ed. 2024). Grammatical gender is distinct from whether personal pronouns are gendered; Hindi, for example, is a gendered language but does not use gendered personal pronouns. MICHAEL C. SHAPIRO, A PRIMER OF MODERN STANDARD HINDI 40–41 (1994) (describing personal pronouns in Hindi); Ruth Laila Schmidt, *Urdu*, *in* THE INDO-ARYAN LANGUAGES 315, 319 (George Cardona & Dhanesh Jain eds., 2007) (describing personal pronouns in Urdu).

274 The shift from the married/unmarried distinction in Mrs./Miss also provoked indignation and protest. Public grammarian William Safire took umbrage when Geraldine Ferraro, the first woman to be nominated for Vice President, asked that media outlets refer to her as "Ms. Ferraro." He opined that Ms. "seems like propaganda for the women's movement," and "conveys less information" than Mrs./Miss. William Safire, *On Language; Goodbye Sex, Hello Gender*, N.Y. TIMES, Aug. 5, 1984 (§ 6), at 8. Today, a religious person might argue that since marriage is sacred and must not be erased, and the compulsion to use "Ms." thus violates the First Amendment; it is hard to imagine such a claim succeeding. I am grateful to Edward Stein for suggesting this parallel.

275 *See id.*

276 *See id.*

277 *See* Siewierska, *supra* note 272.

278 The quirk of the English language, in its lack of a gender-neutral third-person singular pronoun, is what leads to the general use of singular *they* (prior to its use for nonbinary gender identity). *See* Clarke, *supra* note 48, at 962. For a non-English example of linguistic change in pronouns, consider that Norwegian recently borrowed the gender-neutral third-person pronoun from Finnish. *See* Weronika Strzyżyńska, *New Gender-Neutral Pronoun Likely to Enter Norwegian Dictionaries*, GUARDIAN (Feb. 2, 2022, 7:52 AM), https://www.theguardian.com/world/2022/feb/02/new-gender-neutral-pronoun-norwegian-dictionaries-hen-official-language [https://perma.cc/43UJ-GCKV] (reporting on the addition of a gender-neutral pronoun to the official Norwegian lexicon); *Hen*, ORDBØKENE, SPRÅKRÅDET & UNIVERSITETET I BERGEN, https://ordbokene.no/nob/bm,nn/hen [https://perma.cc/TD9G-GKJN] (explaining that the Norwegian pronoun derives from the gender-neutral Finnish third-person singular pronoun); *Hän, Est. 1543*, FIN. PROMOTION BD., https://finland.fi/han [https://perma.cc/EUL3-PF2H] (touting the absence of gendered pronouns in Finnish).

woman.[279] For a person looking to a biblical source, consider the story of the Tower of Babel, explaining the origin of the world's mutually unintelligible languages but says nothing of pronouns.[280] Certainly, some religious people order their lives according to binary systems of thinking about sex and gender, reflecting those beliefs in decisions about how to divide household labor, or whether to divide schools or temples along gender lines.[281] But here the issue is not how religious individuals choose to enact gender roles; it is how they use language to address and refer to others.[282]

The link between using students' names and pronouns and religious exercise, a profession of faith or endorsement of a sin, is simply too attenuated to support the religious liberty claims that Kluge, Meriwether, and others have asserted to avoid calling transgender students by their names and speaking to them like their cisgender classmates.[283]

The *Meriwether* court accepted the professor's claim that by speaking and interacting with trans students in a particular way—using their first names and gender-congruent pronouns—he would "affirm" gender transition.[284] However, the same court came to the opposite conclusion in *R.G. & G.R. Harris Funeral Homes, Inc.*, rejecting the argument that continuing to employ the transgender employee would be endorsement of beliefs the employer did not hold: "[C]ompliance with [the law]—without *actually assisting or facilitating . . . transition efforts*—does not amount to an endorsement of [specific] views."[285] The *Meriwether* court held that this did not apply to its analysis of Meriwether's claims, but that depends on at least one of the following assumptions: (1) one may disregard a student's gender identity, but not

279 *See Genesis* 1:26–27 (telling the Abrahamic story of the beginning of humanity). A Southern Baptist university articulated its belief in a request for leave to discriminate because "God made people in male and female form, and [] the 'gift of gender is thus part of the goodness of God's creation.'" Letter from Catherine E. Lhamon, Assistant Sec'y for CR, U.S. Dep't of Educ., to J. Randall O'Brien, President, Carson-Newman Univ. (July 10, 2015).

280 *Genesis* 11:1–9. Genesis provides an origin for the variety and non-static nature of languages in the story of the Tower of Babel. *Id.* (recounting that "the world had one language and a common speech," but God "confused the language of the whole world" and "scattered [them] all over the face of the earth").

281 *See id.* at 1:25–26.

282 *See* CRYSTAL, *supra* note 15, at 248, 257, 295.

283 A better analogy might be the claim that stating "Jane and Josefina are married" endorses the marriage, constituting a sin. Objecting to the legal status of same-sex marriage is one thing; refusing to say that two women are married to each other is another.

284 Meriwether v. Hartop, 992 F.3d 492, 516 (6th Cir. 2021).

285 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 589 (6th Cir. 2018) (emphasis added), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020).

an employee's;[286] (2) one may disregard the gender identity of a person one meets *post*-transition, but not of a person who is *currently* transitioning;[287] or (3) employers may refuse to use their employees' legal names and use gender-congruent pronouns, but may not fire them for their gender expression and self-presentation or for going through a transition.[288]

Moreover, the name by which a teacher calls a specific student in a specific interaction is not—contrary to the *Meriwether* court's conclusion—a matter of expressing one's opinion.[289] Rather, it is a linguistic prerequisite for communicating ideas, and a central task of the teacher's role is to call on students.[290] When teachers who claim that addressing students in this way is "endorsement" of sin, lying, or expressing a viewpoint, they must show that the endorsement is a message that others will receive.[291] However, refusing to directly address or refer to transgender students according to typical linguistic formulations only sends a clear message that the teacher prefers not to do so, while compliance with a policy does not impose a burden on free exercise because it does not convey (and thus does not endorse) a

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286 *Meriwether*, 992 F.3d at 510, 516 (rejecting defendants' argument that *R.G. & G.R. Harris Funeral Homes, Inc.* controls). With respect to the student-employee distinction, *Bostock*'s implications for Title IX protection are uncertain. Circuits are split as to what protection Title IX affords transgender students. It is lawful to bar students from school bathrooms based on gender identity. *See* cases cited *supra* note 65.

287 In *R.G. & G.R. Harris Funeral Homes, Inc.*, the employee was fired after she told her employer that she planned to transition. 884 F.3d at 566. By contrast, in *Meriwether*, the student had transitioned five years before starting college, had changed her legal name, and was female according to the law. *See supra* text accompanying notes 186–189. Kluge, who taught high school, was aware of one freshman's transition because he had worked with middle school students. Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *2, *4 (S.D. Ind. Apr. 30, 2024). Another transgender boy did not know he could change his name until partway through the school year, so Kluge was aware of the change. *Id.* at *7.

288 The implication is that one may not fire an employee for changing her name from John to Jane, but one may continue to call her John based on one's religious convictions. *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977) (stating that Title VII did not apply because plaintiff's claim was for discrimination not "because she is male or female, but rather because she is a transsexual who chose to change her sex"). The *Holloway* dissent pointed out that the majority's logic places trans people outside of all sex categories for Title VII purposes. *Id.* at 664 (Goodwin, J., dissenting) (stating that when a person completes a transition from one sexual identity to the other "that person will have a sexual classification").

289 *Id.*

290 Addressing students, including with pronouns and titles, is an element of "classroom management" whose purpose "is to establish an environment where students can engage in meaningful academic learning." Dohmen, *supra* note 70, at 1564; McNamarah, *supra* note 13, at 2300–03 (discussing the difficulty with arguments that pronoun laws could be compelled speech). Meriwether said much the same. Meriwether v. Hartop, 992 F.3d 492, 503 (6th Cir. 2021).

291 Spence v. Washington, 418 U.S. 405, 410–11 (1974); Texas v. Johnson, 491 U.S. 397, 404 (1989).

particular viewpoint.[292] If "tolerating [an employee's] understanding of her sex and gender identity is not tantamount to supporting it" in violation of the employer's religious beliefs, then presumably tolerating students' understanding of their sex and gender identity is not tantamount to supporting similar conduct even if the teacher considers it sinful.[293]

The district court determined in its free exercise inquiry that Kluge's sincerity was a matter of dispute.[294] Aside from sin, Kluge claimed that he was motivated by concern that "affirmation" would harm students, yet he "d[id] not dispute that refusing to affirm transgender students . . . can cause emotional harm."[295] Further, Kluge's counsel demonstrated misunderstanding of the concept of gender dysphoria, suggesting willful ignorance of a central issue in the case. In a brief, Kluge's counsel wrote that "Mr. Kluge has a sincerely held religious belief against encouraging gender dysphoria by regularly using transgender names and pronouns."[296] But misgendering or degendering *does* encourage gender

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292 *See supra* text accompanying notes 232–241.

293 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 588 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 590 U.S. 644 (2020).

294 Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 837 (S.D. Ind. 2021). Kluge articulated his position without religious underpinnings, exhorting the school administration not to "suggest that teachers encourage transgender students in their folly *by playing along with their psychiatric disorder* in referring to them by their preferred pronoun." Defendant's Brief in Support of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment at 11, *Kluge*, 548 F. Supp. 3d 814 (No. 19-cv-2462) (emphasis added).

295 Other plaintiffs voiced very similar concerns. *See supra* note 179; *see also* Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 WL 9276274, at *1 (Va. Aug. 30, 2021) ("We condemn school policies like [these] . . . because it will damage children . . . . I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child.").

296 Plaintiff's Motion for Summary Judgment, Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848, at *5–6 (S.D. Ind. Apr. 30, 2024). Another failure to use terms correctly is the phrase "transgender name." Names and pronouns have no internal sense of self, so the phrase is nonsensical. The phrase nevertheless implies that a different name or pronoun is the *real* (i.e., cisgender) version. *See supra* note 4; *Kluge*, 548 F. Supp. 3d at 822, 823 & n.4.

dysphoria.[297] But using the names and pronouns that the individual supplies is an antidote to—not encouragement of—gender dysphoria.[298]

The point is not merely to note mistakes in Kluge's testimony and briefs, but to illustrate the misuse of mainstream and medical terms in opposition to transgender people's rights.[299] The resulting incoherence of views is a failure by the plaintiff to articulate a conflict between their religious exercise and their tasks as employees.[300] Misuse of relevant terms undermines the plaintiff's sincerity and allegedly substantial burden on free exercise.[301] To make a successful complicity argument based on expressive conduct, e.g., pronoun refusal to avoid "affirming" another's gender identity, a plaintiff must at a minimum show that uttering (or not uttering) a name or pronoun would send a message that would very likely be understood by observers.[302] To assert protection of expressive conduct, a party must show intent to send a particular message, and that the message is very likely to be received, so "endorsing" or "affirming" beliefs about sex and gender must involve communication to onlookers.[303]

If a plaintiff cannot articulate the message they believe they will be forced to convey by following the law, it is unlikely that a nexus exists to

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297 Gender dysphoria is an intense feeling of unease and discomfort due to being perceived as a gender *other than that with which one identifies*. Kluge's refusal to address students with language congruent with their identities would tend to increase dysphoria. *See* Kate Cooper, Ailsa Russell, William Mandy & Catherine Butler, *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, 80 CLINICAL PSYCH. REV., June 2020, at 1, 1 (defining gender dysphoria as "distress due to a discrepancy between one's assigned gender and gender identity"). Kluge "disagree[d] with th[e] definition" of gender dysphoria. *Kluge*, 548 F. Supp. 3d at 821 n.2. Kluge claimed that the meaning of gender dysphoria is "what scripture refers to as effeminacy which is for a man to play the part of a woman or a woman to play the part of a man and so that would include acting/dressing like the opposite sex." *Id.*

298 *See* Natalie M. Wittlin, Laura E. Kuper & Kristina R. Olson, *Mental Health of Transgender and Gender Diverse Youth*, 19 ANNUAL REV. CLINICAL PSYCH. 207, 213–14, 217–18 (2023) (reviewing evidence that transgender children are more likely to be bullied and assaulted at school).

299 Whether out of ignorance or malice, the flaw in the legal claims remains the same. *See infra* notes 407–410 and accompanying text (discussing misgendering transgender litigants).

300 It is unclear what these teachers oppose in relation to their trans students, perhaps because they do not quite know. In Kluge's case, the evidence strongly suggests Kluge (and counsel) purposefully chose to use terms incorrectly. *Kluge*, 548 F. Supp. 3d at 821 & n.2, 822, 823 & n.4.

301 *See*, Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848, at *14 (S.D. Ind. Apr. 30, 2024) (stating that a plaintiff must show that "to observe [one's] religion appropriately, it [is] necessary for [the plaintiff] to participate" in the religiously motivated conduct (quoting Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 452 (7th Cir. 2013))).

302 Texas v. Johnson, 491 U.S. 397, 402–04 (1989).

303 Spence v. Washington, 418 U.S. 405, 410–11 (1974) (protecting the right to display a flag with a peace sign as symbolic expression because it reflected "[a]n intent to convey a particularized message" and "the message would be understood by those who viewed it"); *Johnson*, 491 U.S. at 402–04 (holding that the plaintiff could invoke the First Amendment because burning a flag constituted expressive conduct where the act was intended to send a message that was very likely to be understood by those who observed it).

support a religious exemption claim.[304] This also suggests that the allegedly religious practice would appear to be fundamentally coercive and thus less likely to deserve exemption.[305]

In these cases, the plaintiffs posited that using a first name or pronoun in reference to a particular transgender person conveys to an audience a message like, "I believe sex is mutable and that there are sexes other than man and woman."[306] To the extent that the educators believe that using these terms conveys something about the binary nature of physical bodies, they are mistaken as to how pronouns function in everyday social life, since the conversational choice of gendered personal pronouns is based on gender *expression*, not sex-linked biological traits.[307]

2. Addressing Students Is an Administrative Task

Addressing students in class is an inevitable and vital aspect of classroom teaching.[308] In both *Meriwether* and *Kluge*, administrators argued that their policies did not violate free speech because name and pronoun use were not affirmative speech but merely administrative or ministerial tasks; however, each court rejected their arguments.[309] The *Meriwether* court acknowledged that "some classroom speech falls

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304 In an order granting summary judgment to the school administration, the court stated: "Mr. Kluge and his counsel often use the terms 'transgender names' and 'transgender pronouns' . . . . The Court finds this terminology imprecise and often confusing. People can be transgender, but names and pronouns cannot." *Kluge*, 548 F. Supp. 3d at 823 n.4 ("Mr. Kluge testif[ied] that he uses 'transgender names' to mean '[t]he opposite sex first name that [the transgender students] had switched to that was not their legal name,'" and used "legal names" to mean "[t]he name that's on their birth certificate, the one that was stored on their birth records." (alterations in original) (quoting Deposition Excerpts of John Kluge, *supra* note 209, at 15)). Differences in vocabulary reflect the absence of a coherent, cognizable nexus between religious belief and conduct.

305 See *infra* Part IV.

306 The court reasoned that Meriwether's speech "reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and 'has become an issue of contentious political . . . debate.'" Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021) (quoting Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1051 (6th Cir. 2001)).

307 Gender expression includes cues like appearance, name, and voice. *See generally* West & Zimmerman, *supra* note 198; McNamarah, *supra* note 13. Teachers and classmates typically do not know anything about a particular student's reproductive organs, hormone levels, name on a birth certificate, etcetera. Without more information, peers would be unlikely to infer a teacher's views on sex and gender from addressing a particular student.

308 The *Meriwether* court stated that to "stop using all sex-based pronouns in referring to students [would be] a practical impossibility that would also alter the pedagogical environment in his classroom." *Meriwether*, 992 F.3d at 500. Certainly, eliminating a viewpoint could alter the richness of a discussion, and doing so would sometimes violate the First Amendment; here, the point is simply that any opinion is inherently one of many possible expressive statements.

309 *Id.* at 506; *Kluge*, 548 F. Supp. 3d at 833, 835.

outside" the First Amendment's protection, offering roll-call as an example of a "non-ideological ministerial task."[310] Its example belies its reasoning; if calling students' names for attendance is unprotected as an administrative task, how might calling on students during class become protected speech? Further, how might using grammatical referents to those same individuals convey viewpoints requiring constitutional protection, and how might using students' names convert from an administrative task to a viewpoint-laden speech act, conveying a whole sex and gender belief system?

To clarify the unprotected, administrative nature of using, addressing, or referencing students, consider the example of county clerks who refused to process marriage licenses for same-sex couples.[311] Courts held that producing a document certifying a marriage did not have a sufficient nexus with the clerks' religious disapproval of same-sex marriage to support a religious exercise claim.[312] Similarly, referring to students by names and pronouns is a non-endorsing task inherent in teaching.

In *Kluge*, the school argued that using students' names and genders listed in the school's database was administrative and required no endorsement of a viewpoint.[313] The court rejected the assertion in its first disposition, holding that it was irreconcilable with the school's assertion that failure to use the students' names would mean "students do not feel affirmed in their identities."[314] But that difficulty is illusory; differential treatment can cause harm without that treatment conveying any particular message, as explained in the following Section.

3. Reconciling Non-Endorsement and Third-Party Harms

The apparent conflict between pronouns being empty referents and misuse of names and pronouns causing real harm to students is superficial. Pronouns may be empty in terms of conveying a speaker's system of beliefs about sex and gender and nevertheless have material impacts, because differential treatment *itself* can cause harm without the

310 *Meriwether*, 992 F.3d at 507.

311 Summers v. Whitis, No. 15-cv-00093, 2016 WL 7242483, at *2 (S.D. Ind. Dec. 15, 2016); *id.* at *7 (stating the allegation that "requiring them to process certain forms violated their religious beliefs").

312 *Id.* at *5.

313 *Kluge*, 548 F. Supp. 3d at 842 (rejecting argument that using names "is a purely administrative duty").

314 *Id.*

form of that differential treatment expressing a particular message.[315] The Supreme Court has recognized stigmatic injury as a cognizable harm that stems from being "personally denied equal treatment" based on one's membership in a disfavored group.[316] Harm is not caused by the content of the words used (or unused), but by the stigma of being treated differently from one's peers.[317] One need not be a public health expert to recognize that being repeatedly singled out by a teacher, in front of one's peers, would harm a student's well-being.

Each plaintiff was granted a last-names-only accommodation as a way to avoid using gendered pronouns, titles, and first names.[318] Although using last names is not harmful per se,[319] in this context it drew attention to the transgender students, caused confusion, promoted misgendering by other students, and led to harassment that caused one trans student to leave the high school altogether.[320] Students reported that Kluge "avoided acknowledging transgender students who raised their hands," or did not use "any name, instead simply nodding or waving in [the student's] direction."[321] According to another teacher, students understood why Kluge had begun to use last names, and "it made the

315 Imagine that an orchestra teacher distributes old, worn-out instruments to Catholic students and reserves new ones for Protestant students. In doing so, she communicates her disapproval of Catholic students' identities, harms them through conspicuous stigmatization, and makes it more difficult for them to excel. It does not follow that the *mode of differential treatment* carries the message. Conversely, had she distributed the instruments randomly, it would not have amounted to endorsement of Catholicism. Similarly, not calling transgender students by their names harms them even though their names do not convey any specific belief.

316 Allen v. Wright, 468 U.S. 737, 754 (1984) (quoting Heckler v. Mathews, 465 U.S. 728, 739–40 (1984)); Hunter v. U.S. Dep't of Educ., 650 F. Supp. 3d 1104 (D. Or. 2023) (finding that students had adequately alleged stigmatic injury, but Title IX exemptions did not violate the Equal Protection Clause).

317 Meriwether proposed that he "would keep using pronouns to address most students in class but would refer to Doe using only Doe's last name." Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021).

318 *Meriwether*, 992 F.3d at 499–500; Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *6–7 (S.D. Ind. Apr. 30, 2024).

319 Last names are the norm in certain contexts associated with masculinity: sports teams, the military, and formerly the Bluebook. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV., 829, 829 (1990) (critiquing the Bluebook editors' "adher[ence] to the 'time-honored' Bluebook convention of using last names only," and noting that "[f]irst names have been one dignified way in which women could distinguish themselves from their fathers and their husbands").

320 Jane Doe and Sexuality and Gender Acceptance's Motion to Intervene as Defendants at 6, Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753 (S.D. Ohio Sept. 5, 2019); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 825 (S.D. Ind. 2021). Kluge told students: "We're all a team and a sports coach calls their team members by last name only. I want to foster that community." Deposition Excerpts of John Kluge, *supra* note 209, at 130–31.

321 *Kluge*, 548 F. Supp. 3d at 825.

transgender students in Mr. Kluge's orchestra class stand out"[322]—not something sought after by adolescents who are already at greater risk of social ostracism.[323]

Policies that require instructors to use all students' self-reported first names and gender-congruent pronouns do not mandate special or "affirmative" treatment of specific students.[324] They merely require that teachers address each student by linguistic norms, regardless of teachers' perceptions of the student's gender conformity or extrinsic knowledge or assumptions. That is, the policies require treating students equally.[325]

First names deserve a bit of attention apart from pronouns. Names may reflect social, cultural, or other identities, besides sometimes indicating the bearer's probable gender.[326] Addressing someone by name—whether a gender-neutral name or a name associated with women or men—cannot convey a whole system of beliefs about the nature of human origins, sex, gender identity, or sex or gender roles. At most, such beliefs would be attributed not to the person addressing a named individual, but to the referent person.[327]

A person whose name has been rejected will find relief in being called by their name. Rather than being a matter specific to transgender individuals, *anyone* who is called by the wrong name—or whose name is never used at all—would likely feel affirmative social support in being called by their name.[328] Meriwether and Kluge made no attempt to cloak

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322 *Id.*

323 *See* Wittlin et al., *supra* note 298, at 213–14, 217–18.

324 Kluge's counsel described Kluge's refusal to address trans students according to linguistic conventions as being "neutral and silent" on a controversial topic. Oral Argument at 4:50, Kluge v. Brownsburg Cmty. Sch. Corp., 64 F.4th 861 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023). But silence is not neutral: it is well-established that such rejection causes harm. *See* Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51 (2015).

325 "[T]erms of reference and address . . . are *ordinary signs* of social equality. . . . widely used, commonplace, and generally thought of as inconsequential. We might think of withholding these terms as . . . [conveying] that the person the speaker is referring to or addressing does not deserve the due regard that is typically given to all other[s] . . . ." McNamarah, *supra* note 13, at 2270 (footnotes omitted).

326 *See* Larson, *supra* note 15.

327 *Id.*

328 Teachers also react negatively to students' names for reasons other than gender-policing, at a cost to the students. *See* Rita Kohli & Daniel G. Solórzano, *Teachers, Please Learn Our Names!: Racial Microaggressions and the K–12 Classroom*, 15 RACE, ETHNICITY & EDUC. 441, 447–48 (2012) (describing the impact of teachers mispronouncing or ridiculing the names of children from immigrant families and children of color such as negative effects on children's ethnic identity and in turn on their self-esteem); *see also* McNamarah, *supra* note 13 at 2235, 2248–49.

their hostility to the students' status as transgender; the rejection of students' self-identification was precisely the goal.[329]

B. *Blurring Freedom of Speech and Free Exercise*

Meriwether and Kluge both claimed that their free speech rights had been violated under the First Amendment, but their claims were fundamentally about religiously-motivated opposition to school nondiscrimination policies.[330] Had they expressed their objections in purely ideological terms or in terms of sincere personal concerns about students' mental health, their objections would have gone nowhere, since public employees have no statutory right to exemption from policies based on sincere opinions and ideological commitments.[331]

The *Meriwether* court's analysis used an overinclusive concept of speech, because individual words such as names and pronouns do not inherently express a comprehensible message.[332] Given that the terms do not convey any such message, plaintiffs must rely on a theory of protected speech based on expressive conduct rather than on pure speech. In addition, the claim is legally plausible only if an individual student's first name or gender is something over which reasonable minds might disagree.[333] But gender identity is an *internal* sense of one's gender, so the speech at issue here would be about a particular student's internal sense of self.[334]

Self-identification is at the heart of transgender status. In this way, rejection of pronouns differs from refusal to provide wedding services or

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329 Kluge claimed he was concerned about the harm he believed "affirmation" would cause to students, but he "d[id] not dispute that refusing to affirm transgender students in their identity can cause emotional harm." Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 845 (S.D. Ind. 2021). Meriwether's differential treatment conveyed disrespect by his own account given his assertion that using honorifics "is an important pedagogical tool" that "foster[s] an atmosphere of seriousness *and mutual respect*." Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021) (emphasis added).

330 *Meriwether*, 992 F.3d at 498; Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *19 n.4 (S.D. Ind. Apr. 30, 2024).

331 *Meriwether*, 992 F.3d at 498, 512–14; Kluge v. Brownsburg Cmty. Sch. Corp., 432 F. Supp. 3d 823, 823, 830–41 (S.D. Ind. 2020); *see* Scott et al., *supra* note 24, at 1018.

332 *See supra* Section III.A.1.

333 *See id.*; *see also* McNamarah *supra* note 13, at 2227–28 (arguing that to sanction misgendering would neither compel nor restrict speech under the First Amendment).

334 *See supra* note 1. Meriwether argued that "he could not use female pronouns to refer to Doe" and suggested that "reasonable minds" might differ "on this 'newly emerging cultural issue,'" but did not teach courses on those subjects. *Meriwether*, 992 F.3d at 501.

healthcare.[335] McNamarah describes misgendering as an act in which "the speaker rejects the referent's identity and imposes the speaker's own [terms]."[336] Courts face an epistemological problem when they evaluate legal issues on gender-congruent language because the plaintiff's objection is always predicated on the plaintiff knowing a student's "real" gender or sex.[337] A concrete (or at least coherent) basis for disagreement with a potentially endorsed message must underlie an alleged conflict with a religious belief; its absence is fatal to a complicity claim. The objection cannot be to the student's gender identity per se, because it is by definition internal and, as an unobservable trait, identity cannot itself be affirmed (or disaffirmed) by an outside observer.[338]

But if not a student's identity per se, then what sinful behavior is allegedly encouraged through pronouns? Consider these candidates: name change, clothing or hairstyle, use of puberty inhibitors or hormones, or undergoing surgery.[339] None can independently underlie religious complicity, because each suffers from over- or under-inclusivity, or both.[340] Regarding medical treatment, most youth diagnosed with gender dysphoria receive no physical intervention, and others undergo gender-congruent puberty.[341] Relevant surgeries are also available

335 In wedding services cases, the religious parties claim to discriminate based on conduct rather than status. According to the conduct account, refusing to provide wedding services to same-sex couples is discrimination on the basis of the *act* of getting married; the status account says that such discrimination is fundamentally status-based, because wedding services that exclude people based on a trait *inherent in weddings* means the exclusion is inextricable from sexuality. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018); 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023). A conduct-based objection to another person's *gender identity* rings hollow for the reasons explained below—there is no essential conduct to object to.

336 McNamarah, *supra* note 13, at 2253.

337 *Id.* at 2280 (arguing that misgendering "implicates testimonial injustice").

338 Educators are not always aware of students' gender identities. *E.g.*, Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021) ("[T]he university had not provided Meriwether with any information about Doe's sex or gender identity.").

339 Surely the *conduct* is not the growth of a beard, or the redistribution of fat from the belly to the thighs or vice versa, which is not an intentional act, and some transgender people do not go through a transition of secondary sex characteristics, by choice or because they had access to inhibitors at the onset of puberty. *See infra* note 341.

340 The name basis fails to account for the fact that people change their name for various reasons, and that names are not decisively gendered, while gender nonconforming self-presentation is constitutionally protected. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (holding that an employer acted unlawfully by passing over a woman for partnership based on sex stereotypes where the partnership committee recommended she walk and talk "more femininely").

341 The Fourth Circuit noted that the plaintiff, a middle schooler who took hormone blockers, had never experienced male-typical puberty or increased testosterone, so "the fact that [boys] benefit from increased strength and speed provides no justification . . . for excluding [her] from the girls cross country and track teams." B.P.J. v. West Virginia State Bd. of Educ., 98 F.4th 542, 561 (4th Cir. 2024); *see also* Respaut & Terhune, *supra* note 64.

cosmetically or for unrelated conditions,[342] and teachers are, in any case, not privy to students' medical histories. Perhaps the objection is to "affirming" a student's rejection of a divinely sanctioned gender role, or a student's refusal or psychic failure to identify with the teacher's assessment of the student's biological traits.[343] Teachers who object to pronoun use as a form of endorsement will struggle to articulate what conduct they are forced to affirm, and if the objection is not to particular conduct, then one can infer it is to transgender status itself—an indication that the exemption serves a fundamentally coercive purpose, rather than serving to protect religious liberty.[344]

1. Teachers' Lack of Free Speech Interest

The *Kluge* court dismissed the First Amendment free speech claim out of hand under *Garcetti*,[345] but the Sixth Circuit held that Meriwether had sufficiently alleged his free speech claim because the Court categorized personal address as speech on a matter of public concern.[346] On this point, the *Meriwether* opinion is in error. The court's reasoning failed because it assumed that misgendering is speech as opposed to conduct, and subsequently failed to distinguish between expressing a viewpoint on sex and gender identity generally and expressing a view about the gender of a *particular* student.[347]

Educators' speech must be related to a matter of public concern to be protected by the First Amendment.[348] For misgendering to fit within

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342 *See* AM. SOC'Y PLASTIC SURGEONS, PLASTIC SURGERY STATISTICS REPORT 15 (2020), https://www.plasticsurgery.org/documents/News/Statistics/2020/plastic-surgery-statistics-full-report-2020.pdf [https://perma.cc/NKR8-KS95] (reporting that approximately 9,000 teenagers had breast or chest operations and nearly 900 had cosmetic genital surgery in 2020).

343 Consider the unhelpful immutability concept in *Kantaras v. Kantaras*: "We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth." 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004). On the perils of legal arguments based on biology and immutability in the LGBTQ rights context, see generally Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597 (2014).

344 *See* discussion *infra* Part IV.

345 Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-02462, 2024 WL 1885848, at *63 n.4 (2024) (citing Garcetti v. Ceballos, 457 U.S. 410, 421 (2006)).

346 Meriwether v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021). The panel emphasized academic freedom and implied that classroom speech had been suppressed, but did not cite to supporting facts. *Id.* at 500, 504–10.

347 Scott et al., *supra* note 24, at 1018 (arguing that the *Meriwether* court did not address whether the professor "was expressing his views on the subject of gender identity and whether transgender people should be humanized in the classroom, or whether he was simply acting on a personal religious belief that he did not perceive Doe to be 'female'").

348 Pickering v. Bd. of Educ., 391 U.S. 563, 566, 569–70 (1968).

this category, one must take a particular person's name and pronouns to be an important public matter; and this it cannot be.[349] As legal scholar Luke Boso has explained, the alternative "effectively renders all speech regarding any transgender person's identity of 'public concern,' politicizing in perpetuity the very existence of a marginalized group."[350] Thus, in the teaching context, no transgender student could be *present* in a classroom without their presence becoming a matter of general debate, given that personal address cannot be avoided in teaching.[351]

By the Sixth Circuit's characterization, the administration's actions amounted to "punish[ing] a professor for his speech on a hotly contested issue."[352] This court assumed that addressing an *individual student* constitutes speech on a *public* issue, but whether or not a student's name is, say, Jane, is hardly of public concern; it is difficult to conjure a matter more *private* than one's gender or name.[353] Prayer cases thus offer no support for misgendering cases, because direct address of students in the classroom is not even remotely private speech.[354] Moreover, the language of prayer[355] contrasts starkly with the words at issue in using (or refusing to use) gendered language.[356] The *Kennedy* holding does not extend to the concept of religious exercise in *Meriwether* or *Kluge* because prayer

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349 Note that both Kluge and Meriwether declined to use transgender students' first names, but neither brought this up in their legal arguments. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 823–24 (S.D. Ind. 2021); *Meriwether*, 992 F.3d at 501. Meriwether used titles for his other students, but he called his trans student only by her last name. *Meriwether*, 992 F.3d at 499.

350 Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 392–93 (2021) (discussing *Bostock*, *Meriwether*, and other cases where religious freedom and free speech claims are pitted against antidiscrimination protection of LGBT people). Boso makes a case for an antisubordination approach to assessing competing equality and liberty claims, asserting that "if the triumph of a free speech claim would enforce a status hierarchy that positions historically marginalized groups as inferior, that free speech claim should fail." *Id.* at 341.

351 "Meriwether pointed out that *eliminating pronouns altogether was next to impossible*, especially when teaching." *Meriwether*, 992 F.3d at 499 (emphasis added). The court also stated that to "stop using *all* sex-based pronouns in referring to students . . . [would be] a practical impossibility that would also alter the pedagogical environment in his classroom" *Id.* at 500.

352 *Id.* at 498 (emphasis added).

353 Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 2392958, at *3 (S.D. Ohio Jan. 30, 2019) (granting a motion to proceed anonymously and stating, "Doe's identity as a transgender woman is a matter of 'the utmost intimacy'" (quoting Doe v. Porter, 370 F.3d 558, 560 (6th Cir. 2004))); Hersom v. Crouch, No. 21-cv-00450, 2022 WL 908503, at *1 (S.D. W. Va. Mar. 28, 2022) ("A person's transgender status is a highly sensitive and personal matter.").

354 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 533, 540–41 (2022). The majority opinion characterized the coach's prayer sessions as "private" or "quiet" religious activity. *Id.* at 516–17. This was vigorously disputed by the dissent. *Id.* at 550 (Sotomayor, J., dissenting).

355 *E.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981) (stating that private religious worship and discussions implicate freedom of speech and association); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that distributing religious literature implicates the religion and speech clauses).

356 *See generally* Clarke, *supra* note 48. Kinship terms (e.g., niece and nephew) and professional role titles indicate the referent's gender obliquely. McNamarah, *supra* note 13.

sessions are quintessential religious practice,[357] and were cast by the Court as *private* speech, not government speech.[358]

Another useful contrast is *Loudoun County School Board v. Cross*, another case wherein a Christian public school teacher voiced opposition to school guidelines on how to treat transgender students, claimed that complying would force him to sin, and was subject to employer sanctions following disruption and complaints.[359] Cross's asserted religious beliefs and arguments about the policy's burden on his religious convictions closely resembled those of Meriwether and Kluge.[360] But Cross was disciplined for his criticism of the policy at a school board meeting, a context that differs sharply from speech directed at individual students in the classroom.[361] Cross had a considerably stronger argument that he spoke on a matter of public concern than Meriwether or Kluge. In *Meriwether*, the court erroneously found a plausible free speech claim by presuming that pronouns constitute speech rather than conduct, failed to consider whether it would therefore be expressive conduct, and misinterpreted the "public concern" prong of government employees' free speech protection.[362] Given that misgendering falls outside the protection of the Free Speech Clause, it cannot be protected by the Free Exercise Clause, because it would only be a burden on religion if it

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357 *See* Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J. F. 399, 406 (2016) ("Religious freedom includes nothing if not the right[] to worship, proselytize, and convert . . . ."). But note that while this characterization may describe proselytizing religions well, it does not reflect the practices of all religions and sects.

358 *Compare Kennedy*, 597 U.S. at 557–58 (Sotomayor, J., dissenting) ("[T]his case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event."), *with id.* at 509 (majority opinion) ("Kennedy's prayers represented his own private speech.").

359 No. 21-0584, 2021 WL 9276274 (Va. Aug. 30, 2021). Cross, a public elementary school gym teacher, opposed a proposed policy on transgender students' rights. *Id.* at *1.

360 *Id.* at *1; Meriwether v. Hartop, 992 F.3d 492, 502 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 820–21 (S.D. Ind. 2021); *see also Cross*, 2021 WL 9276274, at *29 (alleging disparate treatment based upon his "refusal to 'endorse' concepts of 'gender identity'").

361 *Cross*, 2021 WL 9276274, at *1; *Meriwether*, 992 F.3d at 499–500; *Kluge*, 548 F. Supp. 3d at 823–24. The Supreme Court of Virginia granted a preliminary injunction, holding that Cross was likely to succeed on the merits because he spoke as a citizen on a matter of public concern. *Cross*, 2021 WL 9276274, at *1; *see also* VA. CONST. art. 1, § 16; VA. CODE § 57-2.02 (2022).

362 *Meriwether*, 992 F.3d at 508. Even as speech on a matter of public concern, misgendering could fall outside of free speech protection as akin to teachers' use of slurs to refer to their students under the fighting words doctrine. McNamarah, *supra* note 13, at 2261; Julius Menacker, *Teacher Racist Speech: A Canada-United States Comparison*, 107 ED. L. REP. 427, 438 (1996). Intentional misgendering may be so provocative or offensive as to fall outside of First Amendment protection. *See, e.g.*, Loudoun Cnty. Sch. Bd. v. Cross, No. 21-0584, 2021 WL 9276274, at *6 (Va. Aug. 30, 2021) (considering whether the teacher's remarks were so offensive as to constitute fighting words).

constituted a form of religious exercise—in other words, if it were expressive conduct.[363]

2. Blurring Analysis of First Amendment Claims

The Free Exercise Clause clearly protects rituals, observances, and personal, bodily symbols with religious meaning, and protects certain spoken acts if they are inherently religious, such as sermonizing or prayer.[364] Protection of conduct that allegedly expresses a religious belief is based on the free speech doctrine for expressive conduct, which does not appear in the text of the Constitution, but increasingly appears alongside religious liberty claims in the permissive opinions of the current Supreme Court.[365]

The convergence of free speech and free exercise arguments was illustrated by Kluge's counsel when, in oral argument,[366] he invoked academic freedom concerns, likening Kluge's refusal to use trans students' first names and pronouns as remaining "silent and neutral on a controversial topic" and alleging that the school was "forcing Mr. Kluge to speak out in a way that violate[d] his faith."[367] These points might be relevant to free speech claims, but Kluge was not advancing one; his only live claim was for Title VII religious exemption from addressing students according to school records.[368]

In the public employment context, if an act is categorized as speech for First Amendment purposes, it is weakly protected,[369] but categorized as religious practice it is afforded strong protection by RFRA.[370] However, a religious exercise claim under Title VII requires showing a need for accommodation because one's free exercise is burdened, and a plaintiff must convince a court that the need for exemption is based on a sincere

363 *See supra* Sections I.B, III.A.

364 *See* Section I.C; cases cited *supra* note 140.

365 *E.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018); 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023).

366 Oral Argument, *supra* note 324, at 2:05.

367 *Id.* at 2:09, 2:14.

368 Kluge v. Brownsburg Cmty. Sch. Corp, No. 19-cv-02462, 2024 WL 1885848, at *19 n.4 (S.D. Ind. Apr. 30, 2024) ("[A]rguments rooted in the First Amendment are inapt and beyond the scope of the mandate on remand.").

369 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

370 Groff v. DeJoy, 600 U.S. 447 (2023); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1; *see also* Hamilton, *supra* note 84, at 88 (discussing the "verbal slippage that portrays RFRA as though it is a constitutional mandate").

religious conviction.[371] If a plaintiff meets preliminary hurdles, religious exercise claims will be granted great deference.[372]

Religious exemptions require a concrete nexus between religious belief or practice and a legal exemption, but no analogous restrictions exist for speech; the message need not be sincere, nor even particularly meaningful to the speaker, to fall within the First Amendment's ambit.[373] If the conduct at issue is evaluated as protected speech, courts need only glancingly consider the message's meaning and underlying motives, as long as an expressed message is discernable.[374] Thus, someone who wished to be relieved of following a given law would ideally convince a court to mix these standards.[375] Complicity exemptions arise when courts begin by evaluating religiously-motivated, allegedly expressive conduct first in terms of a speech interest—which requires little attention to the content of the alleged message or the underlying motive and sincerity of the claimant (i.e., a lower bar for freedom of speech than for free exercise)—and *then* treat the conduct as protected religious exercise warranting a strict scrutiny standard (again lowering the plaintiff's burden).[376] In sum, the Supreme Court's blurred free speech–free exercise boundary eases the burden on religious exemption plaintiffs by allowing them to evade the greater evidentiary requirements of each in turn.[377]

C. *Balancing Private and Public Interests*

This Part has argued that misgendering is not protected as free exercise of religion under the First Amendment or under Title VII's religious accommodation provision, but even if a court were to find an objective conflict between a neutral law and an individual's religious belief or practice, a claim would be subject to balancing of individual and state interests.[378] In evaluating governmental interests in

371 *See supra* Section I.D.

372 *See* Epstein & Posner, *supra* note 21.

373 Speech that falls outside of First Amendment protection is categorized, e.g., as fighting words. Gitlow v. New York, 268 U.S. 652, 666 (1925). The speaker's sincerity or commitment to the expressed message is rarely part of the court's evaluation of free speech claims.

374 Spence v. Washington, 418 U.S. 405 (1974); Texas v. Johnson, 491 U.S. 397 (1989).

375 Compare the *Garcetti* standard for evaluating public employees' civil liberties on *non-religious* speech with the view of religiously expressive speech expressed in *Kennedy v. Bremerton School District*, 597 U.S. 507, 532 (2022).

376 *See generally* Velloze, *supra* note 77 (discussing the difference between "freedom of speech" and "free exercise," and arguing that "free exercise" does not enumerate a freedom).

377 *See supra* notes 120–123 and accompanying text.

378 U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to -4; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-1.

nondiscrimination laws, courts must account for the interests of the affected third parties: the students themselves.[379] Here, intentional misgendering harms students to an extent irreconcilable with the purpose of public education.[380]

Kluge argued that the denial of a religious accommodation was unjustified because student complaints were not properly a factor in a Title VII analysis, relying on the Supreme Court's decision in *Groff*.[381] But in *Groff*, the Court's concern was the impact of accommodations on coworkers—not on the people who relied on the employer's services.[382] In school misgendering cases, the accommodation per se alters the manner of interacting with students, which is a central task for educators.[383] Third-party harm is, or should be, a potential limiting factor for religious liberty exemptions, even when it does not undermine the basis for the accommodation claim in the first place.[384] In *Meriwether* and *Kluge*, the accommodations caused clear and particularized harm to transgender students.[385]

The exemption here is about differential—worse—treatment of a particular class, so, by definition, it entails third-party harm.[386] Earlier free exercise cases, by contrast, generally imposed little direct harm on those around them, and seemingly did not seek exemptions for the

379 *See* Carlson & Hansen, *supra* note 174, at 291; Lund, *supra* note 58, at 1377–81 (describing analysis of third-party harms in religious exemption cases including both degree and likelihood of harm). In free speech analysis, public employees' speech protection takes into account the potential disruption of government functioning. Connick v. Myers, 461 U.S. 138, 143, 153–54 (1983).

380 *See, e.g.*, Carlson & Hansen, *supra* note 174.

381 Appellant's Second Supplemental Brief at 3, Kluge v. Brownsburg Cmty. Sch. Corp., No. 21-2475 (7th Cir. July 20, 2023) ("[A]n accommodation's impact is relevant only if it 'go[es] on to affect the conduct of the [employer's] business.'" (alterations in original) (quoting Groff v. DeJoy, 600 U.S. 447, 472 (2023))).

382 The *Groff* court explained that the undue hardship analysis requires inquiry into "the overall context of an employer's business." 600 U.S. at 468; *see also id.* at 470, 472. Where the context is education, students are more akin to patrons than to coworkers. *See* Kluge v. Brownsburg Cmty. Sch. Corp, No. 19-cv-02462, 2024 WL 1885848, at *17 (S.D. Ind. Apr. 30, 2024).

383 *See* Smiley v. Columbia Coll. Chi., 714 F.3d 998, 1002 (7th Cir. 2013) (upholding professor's termination for failure to teach "in a . . . manner that does not distress students").

384 *See* NeJaime & Siegel, *Conscience Wars*, *supra* note 10, at 2529.

385 Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 2052110, at *6 (S.D. Ohio May 9, 2019); *Kluge*, 2024 WL 1885848, at *6–7. At least one freshman quit orchestra to avoid being in Kluge's class, was harassed by other students, and ultimately left the school. *Id.* at *6.

386 In *Meriwether*, the professor made an explicit decision to treat his transgender student differently than her classmates. Meriwether v. Hartop, 992 F.3d 492, 499 (6th Cir. 2021). Kluge's stated intention was to "maintain a 'neutral' position on the issue." *Kluge*, 2024 WL 1885848, at *9. But the court noted that the accommodation "might have been intended as neutral but it ultimately was perceived as intentional." *Id.* at *20; *see* Lund, *supra* note 58, at 1377; NeJaime & Siegel, *Conscience Wars*, *supra* note 10 (discussing third-party harms stemming from complicity-based claims).

purpose of controlling others.[387] Moreover, Kluge's and Meriwether's accommodations harm the students they teach, undermining the purpose of their employment and the mission of their respective employers.[388] And it bears mentioning that little evidence suggests that devaluing a student's identity would lead to a change in their identity, so even if teachers' concerns about that outcome are genuine, their tactics are poorly suited to their goal.[389]

Failing to speak to trans people using conventional forms of address and grammar can cause psychological harm.[390] The effect of misgendering, particularly when it is intentional, public, and ongoing, is to dehumanize the referent.[391] Some scholars would go further and say that the goal is to render trans people nonexistent.[392] Certainly, imposing moral stigma is one purpose of denying students' gender identities.[393] As Sherif Girgis would have it, "to worship, proselytize, and convert . . . can express the conviction that outsiders are wrong. Perhaps not just wrong,

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387 Earlier free exercise cases generally did not impose direct harm on the people around them or did so minimally. *See* cases cited *supra* note 140; NeJaime & Siegel, *Religious Accommodation*, *supra* note 103, at 70 ("[Complicity] claims for religious exemption . . . differ from accommodation claims involving ritual observance in dress or prayer, most importantly in their capacity to inflict targeted harms on other citizens who do not share the claimant's beliefs.").

388 *Kluge*, 2024 WL 1885848, at *16 (explaining that the school district's business is "educating all students" by "fostering a safe, inclusive learning environment for all students"). Kluge made no secret of the fact that he knew his pronoun choices caused transgender students distress. He stated that "this persecution and unfair treatment I was undergoing was a sign that my faith as witnessed by my using last-names-only to remain neutral *was not coming back void, but was being effective*. [The principal] didn't seem to understand why I was encouraged." Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 827 (S.D. Ind. 2021) (emphasis added).

389 Devaluation does contribute to risk of suicide, which, if one thinks bleakly, is a kind of identity change in the sense that the identity ceases to exist. *See Kluge*, 2024 WL 1885848, at *7 (quoting a transgender student saying: "[I]f everyone in my life had refused . . . to use my corrected name . . . I would not be here today.").

390 Being referred to by the wrong pronouns has a negative impact on trans people's mental health, as does complete avoidance of pronouns to refer to trans people. *See* McLemore, *supra* note 324; Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA & HEALTH 53 (2018).

391 McNamarah drew a parallel between "a trans man's assertion that he is a man and should be addressed as such" and "a Black man's Civil Rights Era mantra that, like his White counterparts, he too was a man and should be treated that way." McNamarah, *supra* note 13, at 2256–57. *Kluge*, 2024 WL 1885848, at *6 (quoting a student testifying that "Mr. Kluge's behavior made me feel alienated, upset, and dehumanized").

392 Misgendering may be intended not to offend but to render transgender people *nonexistent*. *See, e.g.*, Knauer, *supra* note 12, at 655 ("The goal of [anti-trans legislative efforts] . . . is the eradication of transgender identity, plain and simple."); Boso, *supra* note 350, at 393.

393 According to Sherif Girgis, in seeking religious exemptions targeting LGBTQ equality, "political potency and moral stigma are *part of the point*." Girgis, *supra* note 357, at 407; *see* NeJaime & Siegel, *Religious Accommodation*, *supra* note 103, at 4 (quoting *id.*).

but deluded about matters of cosmic importance around which they have ordered their lives—even *damnably* wrong."[394]

Note that Cross was quite explicit in his disbelief that transgender people *exist* (apparently believing that trans students were delusional).[395] Yet Kluge's position—that his religious exemption would be no great burden on the school—was a woefully inadequate mischaracterization of how misgendering impacts students according to a large and growing body of research.[396] Refusal to use transgender students' names and pronouns resembles the use of slurs and derogatory terms for other minority groups.[397] Given the extensive evidence that trans people are at heightened risk of violence and harassment, it stands to reason that differential treatment by teachers would put trans students in greater danger.[398] If teachers treat trans students differently from cisgender students as conspicuously as failing to use their first names or (any) titles and pronouns, their classmates will inevitably notice the discrepancy and are likely to be confused at the least.[399] A teacher who believed a student's gender identity was "wrong"[400] and refused to address the student by

394 Girgis, *supra* note 357, at 296.

395 Cross asserted that the policy would require him to violate his Christian beliefs by requiring him to treat transgender students as if gender transition was real. Loudoun Cnty. Sch. Bd. v. Cross, No. 21-0584, 2021 WL 9276274, at *1 (Va. Aug. 30, 2021) (recounting that Cross "object[ed] to . . . the idea that someone can be transgender").

396 Kluge's counsel described the impact as a "feeling of unhappiness or offense," and argued that ruling against Kluge would mean that "anything students find irritating or unwelcome rises to the level of undue hardship under Title VII's religious accommodation test." Oral Argument, *supra* note 324, at 6:45. He also stated that Kluge was "not trying to proselytize," *id.* at 8:22, but Kluge sought permission to talk to students about their "eternal destination." *Kluge*, 2024 WL 1885848, at *3.

397 McNamarah, *supra* note 13, at 2253 ("Mistitling, mispronouncing, and mislabeling are offensive for many of the same reasons emphasized in earlier examples. The imposition of gendered terms with which gender minorities do not identify is insulting in the very same way that the renaming of Black persons or ethnic minorities is: the speaker rejects the referent's identity and imposes the speaker's own.").

398 *See* Flores et al., *supra* note 32; HUM. RTS. CAMPAIGN, DISMANTLING A CULTURE OF VIOLENCE: UNDERSTANDING VIOLENCE AGAINST TRANSGENDER AND NON-BINARY PEOPLE AND ENDING THE CRISIS (Oct. 2021), https://reports.hrc.org/dismantling-a-culture-of-violence [https://perma.cc/XX46-B9MC].

399 Kluge claimed to be acting neutrally by addressing all students by their last names only, but a judge on the Court of Appeals observed that "the students discerned [Kluge's] true intentions immediately and accurately." Oral Argument, *supra* note 324, at 9:10. After Meriwether misgendered Doe, "her classmates . . . copied Meriwether's incorrect use of male honorifics and pronouns." Jane Doe and Sexuality and Gender Acceptance's Motion to Intervene as Defendants at 6, *supra* note 320; Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 4222598 (S.D. Ohio Sept. 5, 2019).

400 "[M]isgendering tells gender minorities 'I know your body better than you do.'" McNamarah, *supra* note 13, at 2281 n.296 (quoting M.J. Eckhouse, *He Identifies as a Journalist: Language's Importance in Discussing Trans People*, FUSION, Spring 2017, at 13, 14).

usual conversational conventions could also out the student to the class, as occurred in *Kluge* and *Meriwether*.[401] This, in turn, puts trans students at greater risk of harassment and violence, and mental and physical harm broadly.[402] Some students may adopt the negative attitudes expressed by their teachers' differential treatment of trans students, or be emboldened to mistreat their trans classmates after observing the classroom's central authority figure treating them less well—precisely the type of effect anticipated in the Supreme Court's past concern in Establishment Clause cases about public school officials' religiosity.[403]

Misgendering has been recognized as disrespectful or as harassment in a range of governmental contexts, including federal and state agencies,[404] immigration courts,[405] and state[406] and federal courts.[407] Judges have used congruent pronouns for transgender litigants since at least the 1970s,[408] but transgender people's treatment in court, like their legal status writ large, is inconsistent across jurisdictions.[409] Some

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401 *Kluge*, 2024 WL 1885848, at *6 ("Mr. Kluge's behavior was noticeable to other students in the class. At one point, my [orchestra] stand partner asked me why Mr. Kluge wouldn't just say my name. I felt forced to tell him that it was because I'm transgender."); Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 2392958, at *1 (S.D. Ohio Jan. 30, 2019) (explaining that Meriwether effectively disclosed Doe's identity to her classmates).

402 Some courts grant motions to proceed anonymously for this reason. *See Meriwether*, 2019 WL 2392958; Hersom v. Crouch, No. 21-cv-00450, 2022 WL 908503, at *1 (S.D. W. Va. Mar. 28, 2022) ("A person's transgender status is a . . . personal matter and revealing it can subject them to mental and physical harm.").

403 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987).

404 U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL § 12 (2022) ("Deliberately and repeatedly mis-gendering an inmate is not permitted."); N.Y. DEP'T OF CORR. & CMTY. SUPERVISION, EMPLOYEES' MANUAL § 2.7 (2019) (noting that intentional misgendering "may be considered sexual harassment").

405 *See, e.g.*, Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (suspending deportation of a transgender woman because the Board of Immigration Appeals had failed to fully evaluate her vulnerability, finding that the immigration judge's misgendering was evidence of bias).

406 *In re* M.E.B., 126 N.E.3d 932 (Ind. Ct. App. 2019) (admonishing lower court for failure to treat petitioners respectfully); *In re* R.E., 142 N.E.3d 1045, 1052 (Ind. Ct. App. 2020) (similar).

407 A Supreme Court clerk admonished attorneys who submitted amicus briefs that intentionally used the wrong pronouns: "[Y]our cover is to reflect the caption of the case. Please ensure careful compliance . . . ." Letter from Scott S. Harris, Clerk, Sup. Ct. of the U.S., to Matthew D. Staver, Liberty Counsel (Feb. 24, 2017).

408 *Compare* Supre v. Ricketts, 792 F.2d 958, 964 n.1 (10th Cir. 1986) (Seymour, J., dissenting) ("I choose the female pronouns 'she' and 'her' as a matter of courtesy to [the plaintiff]."), *with* Brooks v. Berg, 270 F. Supp. 2d 302, 303 n.1 (N.D.N.Y. 2003), *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) ("The Court recognizes that Plaintiff prefers to be referred to with female pronouns. . . . [but] has decided to use male pronouns.").

409 The Fifth Circuit is an outlier in misgendering litigants. *See, e.g.*, Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019) (refusing to use an incarcerated trans woman's name and feminine pronouns and denying medical care); United States v. Varner, 948 F.3d 250, 254–55 (5th Cir. 2020) (refusing a trans woman's request to be referred to as "she").

attorneys misgender as a legal strategy, possibly violating rules of professional conduct.[410] Given the cross-contextual acknowledgment that misgendering constitutes injurious bias that impedes justice, mars asylum hearings, and constitutes sexual harassment in prisons, the harm done to trans students by teachers who intentionally refuse to speak to them in the same way as cis students is difficult to justify.

It would be hard to overstate the vulnerable position in which young transgender people find themselves. They are at greater risk of family violence and homelessness, more likely to consider and attempt suicide, and less likely to seek help from police if they are assaulted.[411] The costs in physical and mental well-being imposed on young people through hostile political decisions must not be minimized when weighing state interests in anti-misgendering rules and name-use policies.[412]

Several particularities of the school context should also be borne in mind. Students' speech protection depends on whether it invades the rights of others; the same could apply to teachers' speech.[413] While discrimination by businesses and employers burdens a targeted party,[414] some resources can be more easily replaced than others; there are many sources of contraceptives and wedding cakes, but a trans student who wants to play violin in a school with just one orchestra teacher is out of

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410 Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISC. 40, 58–66 (2020) (citing MODEL RULES OF PRO. CONDUCT r. 3.4(e), 4.4, 8.4 (AM. BAR ASS'N 2018)).

411 JAMES ET AL., *supra* note 35, at 71, 74; Cameron K. Ormiston, *LGBTQ Youth Homelessness: Why We Need to Protect Our LGBTQ Youth*, 9 LGBT HEALTH 217 (2022) (reporting high rates of homelessness among LGBTQ youth); di Giacomo et al., *supra* note 60 (reporting trans youth are nearly six times as likely to attempt suicide as straight cis youth); Marla E. Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/Gender Non-Conforming Adolescents*, 61 J. ADOLESCENT HEALTH 521 (2017) (finding that trans youth feel less connected to family, are three times as likely to report suicidal ideation, and are more likely to be bullied (especially children assigned female at birth) than cisgender youth); JAMES ET AL., *supra* note 35, at 14.

412 A meta-analysis of fifty-five research studies found that fifty-one demonstrated positive effects of transition on well-being, four mixed or null results, and zero with negative effects. *What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?*, CORNELL UNIV.: WHAT WE KNOW (2018), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people [https://perma.cc/A23C-H6T6].

413 Student speech is protected if it does not "'substantially interfer[e] with . . . the operation of the school' and without colliding with the rights of others." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) (stating that refusal to salute the flag did not lead to a "collision with rights asserted by any other individual").

414 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 765–66 (2014) (Ginsburg, J., dissenting); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 518 U.S. 617, 670–72 (2018) (Ginsburg, J., dissenting).

luck.[415] Furthermore, there are clear legitimate reasons to require school nondiscrimination policies to be upheld: providing a safe and functional educational environment, upholding sex discrimination protections,[416] and public health considerations for gender-minority students.[417]

IV. LEGAL IMPLICATIONS BEYOND SCHOOL PRONOUN CASES

School pronoun cases such as *Meriwether* and *Kluge* bear on the lives of socially vulnerable transgender students at public schools and universities, but the underlying logic of misgendering claims also has implications for a broader swath of litigation.[418] When courts hold that religion-based views can serve as a legitimate basis for objecting to non-expressive acts, they undermine both antidiscrimination laws and the legitimacy of free exercise principles.[419] Broadly, free exercise jurisprudence trends toward a complicity-based doctrine that recognizes a protected right to *demonstrate* one's discriminatory views as a religious practice.[420] Individuals can thus assert religious exemption from any law that would require them to treat members of a disfavored group equally.[421]

This Note proposes that courts consider three aspects of a religious exercise nexus inquiry. First, courts should evaluate whether the legal act or prohibition that a plaintiff refuses to follow is concretely related to the plaintiff's religious exercise interests. This could be achieved through a deeper sincerity inquiry that encompasses more than commitment to the asserted belief.[422] Since exemptions apply to conduct and not belief per se, courts could inquire into both objective and subjective aspects of the exemption: whether the conduct is objectively and logically tied to the alleged belief, and whether the claimant sincerely believes that an exemption is imperative to fulfill one's religious obligations.

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415 Dignitary harm is the main problem in both cases, as wedding cakes and orchestra classes are not fundamental rights. However, school environments are closed social universes where stigmatizing information can spread quickly. *See supra* notes 389, 405.

416 *See* Bostock v. Clayton County, 590 U.S. 644 (2020).

417 *See, e.g.*, Sari L. Reisner et al., *Legal Protections in Public Accommodations Settings: A Critical Public Health Issue for Transgender and Gender-Nonconforming People*, 93 MILBANK Q. 484, 485 (2015); Freeman, *supra* note 40, at 160.

418 *See Reframing the Harm*, *supra* note 58, at 2197–200 (describing implications of the Court's recent decisions narrowing the third-party harm principle).

419 *See* Philip Hamburger, *More Is Less*, 90 VA. L. Rev. 835, 858–92 (2004).

420 Discriminatory opinions are often controversial, so they may seem superficially to be "matter[s] of public concern." Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 4222598, at *14 (S.D. Ohio Sept. 5, 2019).

421 Boso, *supra* note 350, at 341.

422 *See* Wang, *supra* note 123, at 1059–64.

Second, courts should evaluate speech interests as distinct from free exercise. Free speech does not need to be based on a sincere belief, so it is improper to weigh a religious or other sincere belief when determining whether the right was violated. Unlike free speech, free exercise primarily protects practices, so religious exemptions are more likely to have material impacts on others than free speech. And, free exercise encompasses a more circumscribed set of ideas and actions than free speech, so any special deference given to religious speech is viewpoint discrimination if it disadvantages non-religious messages.[423]

Third, when evaluating a religious exemption claim, courts should consider whether the purpose of the exemption is fundamentally coercive, i.e., where the central aim is to control or to harm third parties (usually non-co-religionists).[424] Whereas the Free Exercise Clause properly protects individual or collective practices, courts invite greater externalized risk by extending that protection to conduct based on bare assertions of complicity, i.e., objections to others' behavior. A religious liberty interest should be recognized as legitimate when there is a logical nexus between a religious observance or practice and the law to which the claimant objects, the underlying belief is sincere, and the exemption amounts to more than license to coerce others into conformity with one's religious precepts.

Maintaining a distinction between freedom of speech and free exercise jurisprudence would also protect religious people's interests. In advocating for special deference to religious individuals' asserted right to break generally applicable laws, Girgis asserts that religious rights are "more fragile" and more in need of protection than the rights of others with strongly held secular beliefs, because laws restricting religious practice may leave an individual with no adequate alternatives.[425] Yet his defense of religious exemptions relies on a critical claim: that the pursuit of religious interests "has to be funneled into *the narrow range of behaviors* dictated by a believer's particular creed."[426] As the zone of

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423 United States v. Seeger, 380 U.S. 163, 184 (1965).

424 Others have called for the Court to return to pre-RFRA and pre-*Smith* consideration of third-party harm. *See Reframing the Harm*, *supra* note 58, at 2187. Harm done to others must be evaluated by an objective standard, because good intentions to "save" another person can co-occur with causing harm by stigmatizing supposedly sinful conduct. *See* Kluge v. Brownsburg Cmty. Sch. Corp., No. 19-cv-08462, 2024 WL 1885848, at *3–4, *9 (S.D. Ind. Apr. 30, 2024).

425 Sherif Girgis, *Fragility, Not Superiority? Assessing the Fairness of Special Religious Protections*, 171 U. PA. L. REV. 147, 147, 150 (2022). Girgis argues that "protections for religion might be warranted not because religion is more important, but because it is more needful of protection." *Id.* at 154–56. Further, "[i]f a law makes it hard for [one] to live as a Muslim, [one] can't make up for that by living as a Mennonite." *Id.* at 156. This argument fits orthodox sects better than religious creeds that value pluralism and flexibility.

426 *Id.* at 156 (emphasizing that religious interests require a narrow set of beliefs and behaviors).

complicity expands, it undermines this posited justification for special protection of orthodoxy's narrow, rigid practice, because if religious commitments require a narrow range of behavior and deserve protection because they are inflexible, then they ought not require an ever-expanding zone of complicity simply because they believe that *others* must conduct their lives per a particular dogma.[427]

Unlike narrow rigidity, expansive rigidity gives maximum power to those with strong, sincere, and intolerant beliefs. Complicity exemptions in particular protect adherents with inflexible ideas about how non-adherents should conduct their lives.[428] In theory, we tolerate exemptions because we value pluralism and because exemptions are, hypothetically, reciprocal.[429] But religious exemptions are unavailable to those with secular, ethical, and moral convictions, a significant and growing share of the population.[430] This Note proposes that courts revisit complicity claims to rein in religious exemptionalism, which will otherwise erode the principles of equal protection that underlie concern for religious minorities in the first place.

CONCLUSION

Teachers' claims for a First Amendment religious exercise right to misgender students fail, as there is no protected liberty interest in refusing to address or refer to a student according to conversational and grammatical norms.[431] In the context of teaching, refusing to address a student is not unlawful, but it is no more protected than expelling a student based on a religious objection to their identity. This Note has shown that addressing students does not conflict with the religious convictions of pronoun-policy objectors because using students' names only conveys information to identify the student; it does not convey ideas. Using gender-congruent terms does not provide information about one's

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427 Justice Black wrote of the Establishment Clause that "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*." Engel v. Vitale, 370 U.S. 421, 431 (1962) (emphasis added).

428 *See supra* Section I.B.3.

429 Exemptions are reciprocal in theory, at least: if you have the right to an exemption, I also have the right to one, should I need it. In practice, exemptions disproportionately benefit those who subscribe to the most inflexible orthodoxies. In the aggregate, expanding the types of conduct qualifying for exemptions undermines the overall fairness of a shared set of laws.

430 Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated [https://perma.cc/C4MH-K4FQ] (reporting that 29% of Americans are religiously unaffiliated).

431 *See supra* Section III.A.

beliefs or ideas beyond indicating that one accepts, rejects, or is mistaken about the gender of the individual. If the religious belief is that one must not lie or affirm a sin, using gender-congruent language must either communicate a falsehood or affirm, encourage, or endorse a sin; but to do so it must be expressive.[432]

This Note advocates for courts to halt the arrogation of free speech jurisprudence to religious liberty claims, especially at the outer bounds of what could constitute symbolic conduct, to prevent further expansion of a complicity zone and rein in harms caused by a relaxed standard for exemptions.[433] Rather than equal protection, greater deference to religious claimants disadvantages a growing share of religiously unaffiliated Americans.[434] If religious claims are to be afforded greater protection, deference should be reserved for essential tenets. Courts can evaluate the need for protection through inquiry into sincerity, the substantiality of the burden on religion, or broader consideration of third-party harms.[435] Courts should also evaluate whether exemptions are intended to protect the claimant's own observance or to control non-adherents' conduct. If the central or sole purpose is to stigmatize, mistreat, or control, exemption should not extend so far.[436]

In the misgendering context, some litigants frame their arguments as a conflict between "religious rights" and "transgender rights."[437] But is being addressed by one's name or referred to by pronouns a *right*? Perhaps being called by one's name, or referred to with language corresponding to one's sense of self, is more than that: a recognition of one's humanity.[438] Calls for others to use gendered pronouns that accurately reflect one's self-identification are sometimes dismissed as demands for "special rights,"[439] but the converse is true: the school

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432 *See supra* Sections I.B, III.A.

433 *See supra* Sections I.B.3, II.A.1, III.D.

434 *See* Smith, *supra* note 430

435 Wang, *supra* note 123, at 1059–60, 1062–64; Gedicks, *supra* note 121, at 130 (advocating for courts to "decide substantiality without challenging the claimant's own religious understanding of complicity"); *Reframing the Harm*, *supra* note 58, at 2200 (critiquing the narrowing harm principle).

436 Girgis, *supra* note 357, at 407 (arguing that "political potency and moral stigma are part of the point" of seeking to block nondiscrimination laws that would protect LGBTQ people).

437 Kluge complained that the policy gave "accommodations to those students to the detriment of employees' sincere religious beliefs . . . suggest[ing] 'that *transgender rights overrule religious rights*.'" Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814, 835 (S.D. Ind. 2021), *vacated and aff'd in relevant part*, No. 19-cv-08462, 2024 WL 1885848 (S.D. Ind. Apr. 30, 2024).

438 *See* McNamarah, *supra* note 13, at 2276; Boso, *supra* note 350, at 377–78; Knauer, *supra* note 12, at 622–23.

439 *See* McNamarah, *supra* note 13, at 2227–28; Weddle & New, *supra* note 67, at 326 (noting a politician's view that anti-bullying laws "giv[e] special protection" to gay students); Romer v. Evans, 517 U.S. 620, 635–36 (1996) (rejecting a similar argument).

policies at issue apply to *all* students, regardless of gender identity.[440] Although using students' names and pronouns is a non-expressive task, it is also a matter of conveying basic respect to trans students by treating them no better or worse than their cisgender peers.[441]

As litigants press for exemptions from speaking to and about transgender people in keeping with grammar and social norms of respect, courts should distinguish professions of belief from the *direct address of another individual* by pronoun and name. By applying a legal standard that distinguishes religious conduct and expressions of religious belief from complicity *via* speech, courts can maintain the bounds of statutory protections for religious exercise and long-recognized First Amendment principles.[442] In doing so, they protect the equal rights and human dignity of gender-diverse people—or, at least, will recognize the legitimate authority and purpose of school boards and state legislatures in crafting policies to protect students against anti-transgender discrimination by their teachers.

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440 Meriwether v. Trs. of Shawnee State Univ., No. 18-cv-753, 2019 WL 4222598, at *25 (S.D. Ohio Sept. 5, 2019) ("[A]ll students, transgender or not, must be treated in accordance with their gender identity.").

441 McNamarah, *supra* note 13, at 2272; Howansky et al., *supra* note 25, at 2.

442 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to -4; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5; U.S. CONST. amend. I.