

CONTROVERSIES OVER THE FREE SPEECH RIGHTS  
OF EDUCATORS TO AVOID USING PRONOUNS  
INCONSISTENT WITH THEIR RELIGIOUS BELIEFS:  
“THE BEGINNING OF THE END” OR “THE END OF  
THE BEGINNING?”<sup>1</sup>

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“[F]rom the beginning of creation, ‘God made them male and female.’”<sup>2</sup>

An emerging hot-button issue generating a significant amount of attention in education, in particular, involves whether instructional personnel can be required to refer to their students by pronouns inconsistent with individuals’ biological sexes, if so doing would violate the beliefs of the teachers. These cases involve the intersection of human sexuality as it

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1. *News Improves for the Britain on the Eastern Front and North Africa*, INT’L CHURCHILL SOC’Y (Mar. 12, 2015), <https://winstonchurchill.org/the-life-of-churchill/war-leader/1940-1942/autumn-1942-age-68/> (Churchill’s 1942 comment on World War II developments in light of fighting in North Africa).

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2. *Mark* 10:6; *see also Genesis* 5:2 (“Male and female he created them.”).

conflicts with the First Amendment religious free exercise and speech<sup>3</sup> rights of educators coupled with their academic freedom.<sup>4</sup>

At the same time, disagreements over pronouns are likely to expand in light of Colorado's having adopted a statute which completely ignores educators' speech rights not to be compelled to address students' by their preferred pronouns regardless of their own ethical or religious beliefs objecting to having to do so.<sup>5</sup> Similarly, California enacted a law, at least in part, in response to Attorney General Rob Bonta's having successfully challenged local school board transgender policies.<sup>6</sup> These statutes and accompanying policies stand parental rights on their ear because they require educators not to inform parents if their children asked to be identified in school other than by their biological sexes or genders, be addressed by pronouns not aligned with their biological genders, or be able to use bathrooms not aligned with their genders.

Nascent disputes over pronouns are taking place as school officials and activists seek to compel educators to violate their beliefs and rights by acquiescing to the demands of students while ignoring parental rights to direct the upbringing of their children.<sup>7</sup> The issue is also set against the background of President Trump's having signed an Executive Order on January 20, 2025, declaring that "[i]t is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and

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3. According to the relevant language of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. CONST. amend. I.

4. See *infra* notes 38, 39, 42, 50, 52, and accompanying text.

5. See Charles J. Russo, *Colorado Law Allows Students to Change "Chosen Names" Without Parental Input*, CATH. WORLD REP. (May 19, 2024), <https://www.catholicworldreport.com/2024/05/19/colorado-law-allows-students-to-change-chosen-names-without-parental-input/>. See also Charles J. Russo, *Parents in CO File Suit over Troubling Gender Identity Law and School Policy*, CATH. WORLD REP. (Oct. 2, 2024), <https://www.catholicworldreport.com/2024/10/02/parents-in-co-file-suit-over-troubling-gender-identity-law-and-school-policy/>.

6. For a commentary on this situation, see Charles J. Russo, *California Runs Roughshod Over Parental Rights*, CATH. WORLD REP. (July 22, 2024), <https://www.catholicworldreport.com/2024/07/21/california-runs-roughshod-over-parental-rights/>.

7. For the seminal case on parental rights, see *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925), unanimously upholding the rights of non-public schools to operate. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." For a commentary on this case, see Charles J. Russo, *Pierce v. Society of Sisters at 100: Reflections on Parental Rights in Transition*, 51 U. DAYTON L. REV. (forthcoming Spring 2025).

are grounded in fundamental and incontrovertible reality.”<sup>8</sup> Because opponents are likely to challenge President Trump’s actions, it is a situation that bears watching.

In light of emerging and ongoing litigation over pronoun use, the remainder of this article is divided into four substantive sections. While a consensus appears to be emerging in favor of upholding the rights of educators not to be compelled to speak in ways inconsistent with their religious beliefs, it remains to be seen whether recent developments represent the beginning of the end or the end of the beginning over the use of pronouns. To this end, this article provides some background against which President Trump’s recent executive orders are set and their potential impact on educational settings.

The first part of this article reviews Supreme Court cases involving compelled speech more broadly than requiring educators and students to use the pronouns peers demand even if they are inconsistent with their birth sexes. The second section starts with a brief excursus on academic freedom, at least as pertaining to faculty members in higher education because to the extent that teachers in K-12 education lack such protection, their arguments are better grounded in claims surrounding freedom of religion and from compelled speech. The third part examines recent litigation wherein transgender students sought to require educators to violate their religious beliefs and possible academic freedom rights by referring to them using pronouns inconsistent with their sexes. The fourth section reflects on what the “pronoun wars” mean for educators’ freedom of speech and religion moving forward. The article rounds out with a brief conclusion.

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8. Proclamation No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025). *See, e.g.*, Peter Laffin, *Trump Signs Executive Order Affirming ‘Biological Reality of Sex’*, CATH. NEWS AGENCY (Jan. 21, 2025), <https://www.catholicnewsagency.com/news/261677/trump-signs-executive-order-affirming-biological-reality-of-sex>; Steven Nelson, *Trump Issued Executive Order Defining Sex As ‘Male and Female’: ‘These Are Sexes that Are Not Changeable,’* N.Y. POST (Jan. 20, 2025), <https://nypost.com/2025/01/20/us-news/trump-executive-order-to-define-sex-as-male-and-female/>. *See also* David Zimmermann, *Trump Administration Orders Federal Employees to Remove Pronouns from Email Signatures*, NAT’L REV. (Jan. 31, 2025), <https://www.nationalreview.com/news/trump-administration-orders-federal-employees-to-remove-pronouns-from-email-signatures/>. (In the “memo issued Wednesday [January 29, 2025], the U.S. Office of Personnel Management ordered the heads and acting heads of federal departments and agencies to ‘[r]eview agency email systems such as Outlook and turn off features that prompt users for their pronouns’ no later than 5 p.m. Friday.”). U.S. Off. of Pers. Mgmt., Memorandum on Initial Guidance Regarding President Trump’s Executive Order *Defending Women* (Jan. 29, 2025), <https://www.opm.gov/media/yv1h1r3i/opm-memo-initial-guidance-regarding-trump-executive-order-defending-women-1-29-2025-final.pdf>.

## COMPELLED SPEECH

The Supreme Court has reviewed the status of compelled speech in six cases, protecting the rights of individuals and groups to be free from having the government mandate that they speak in accord with its dictates, albeit none of which involve instructional personnel directly.

In *Minersville School District v. Gobitis* the Supreme Court rejected the claim of Jehovah's Witnesses in Pennsylvania that requiring their children to salute the flag was equivalent to compelling them to worship an image contrary to their core religious beliefs.<sup>9</sup> The Court explained that the students lacked the right not to participate in the Pledge in deferring to Pennsylvania's legislature, which had not granted religious exemptions from reciting the Pledge, in deciding how best to instill respect for the flag as a means of demonstrating national unity and patriotic values in students.

Three years later, in the midst of World War II and the fight against totalitarianism but not acknowledging it, in response to significant criticism of *Gobitis*, in *West Virginia Board of Education v. Barnette*<sup>10</sup> the Court revisited its earlier judgment. This time the Court reasoned that public officials could not compel students who were Jehovah's Witnesses to salute the flag because doing so violated their religious beliefs. Here Jehovah's Witnesses and others challenged the constitutionality of a state regulation requiring students to participate or risk being charged with insubordination and expulsion on the basis that its recitation violated their rights to religious freedom.

The Justices, torn between the conflict over the limits of state power and personal rights, ruled that students could not be compelled to salute the flag. The Court affirmed that requiring children to salute and pledge to the flag exceeded constitutional limits on governmental power because doing so invaded their spheres of intellect and spirit that the First Amendment protects.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>11</sup> a unanimous Supreme Court affirmed the right of the organizers of a St. Patrick's Day parade who refused to include a group of gay, lesbian,

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9. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

10. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

11. James C. Farrell offers a representative commentary on this case. See James C. Farrell, *Should Irish Eyes Be Smiling? The Hidden Issue of State Action in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 70 ST. JOHN'S L. REV. 313 (1996).

and bisexual individuals in their event. The Justices observed that requiring organizers to permit the plaintiffs to display their message would have “alter[ed] the expressive content of their parade.”<sup>12</sup> The Court also recognized that the organizers had the First Amendment right to present their message without having to include views they neither shared nor supported.

The Supreme Court subsequently upheld the exclusion of an assistant scoutmaster after he announced publicly that he was gay in *Boy Scouts of America v. Dale*.<sup>13</sup> Rejecting the former scoutmaster’s claims for reinstatement and damages, the Justices specified that he could not rely on New Jersey’s Law Against Discrimination in challenging the Boy Scouts, a private, not-for-profit organization. The Court pointed out that forcing organizational leaders to have included the plaintiff scoutmaster would have “interfere[d] with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.”<sup>14</sup>

*Janus v. American Federation of State, County, and Municipal Employees Council 31*,<sup>15</sup> a case from Illinois, involved so-called fair share fees that non-members must pay to unions that represent them during bargaining. A child support specialist who worked for the state of Illinois successfully challenged fair share fees because his monies were used in large part to support positions on political and other issues with which he disagreed. The Supreme Court invalidated the practice of allowing unions to collect fair share fees as a violation of the First Amendment. The Justices remarked that forcing nonunion members to pay fair share fees was a form of impermissible compelled speech because it required them to subsidize private speech on matters of substantial public concern with which they might not have agreed.

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12. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572-73 (1995).

13. Arthur S. Leonard offers a representative commentary on this case. See Arthur S. Leonard, *Boy Scouts of America v. Dale: The “Gay Rights Activist” as Constitutional Pariah*, 12 STAN. L. & POL’Y REV. 27 (2001).

14. *Boy Scouts of America v. Dale* 530 U.S. 640, 654 (2000).

15. *Janus v. American Federation of State, Cnty., and Municipal Employees* 585 U.S. 878, 884-85 (2018). See Charles J. Russo & Allan G. Osborne, Jr., *Janus v. American Federation of State, County, and Municipal Employees, Council 31 and the Demise of Fair Share Fees: A Victory for Free Speech*, 356 EDUC. L. REP. 877 (2018) (offering commentary on the *Janus* case); Alexandra J. Gilewicz, Note, *A More Perfect Pickering Test: Janus v. AFSCME Council 31 and the Problem of Public Employee Speech*, 53 U. MICH. J.L. REFORM 671 (2020) (presenting commentary on the *Janus* case).

Most recently in *303 Creative v. Elenis*,<sup>16</sup> the Supreme Court reasoned that Colorado Civil Rights Commission (Commission)<sup>17</sup> could not enforce the state's Anti-Discrimination Act<sup>18</sup> to compel a wedding website designer to provide her professional services to a same-sex couple.<sup>19</sup> Although not directly dealing with the designer's claims about her religious rights, the Justices did decide that the Commission lacked the authority to compel her to speak through her work in a manner contrary to her sincerely held religious "belief that marriage should be reserved to unions between one man and one woman"<sup>20</sup> because doing so "contradicts biblical truth."<sup>21</sup> The Court further acknowledged that the Commission could not compel the designer to act because this would have required her to violate her conscience and First Amendment rights to free speech<sup>22</sup> by having to create expressive designs for a couple entering a same-sex union.

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16. For commentary on *303 Creative v. Elenis*, see Charles J. Russo, *The Supreme Court Gets it Right in 303 Creative v. Elenis: People of Faith Cannot Be Compelled To Create Expressive Messages Violating Their Religious Beliefs*, U. DAYTON L. REV. May 14, 2024, at 1, <https://ecommons.udayton.edu/udlr/vol49/iss0/>; Charles J. Russo, *How 303 Creative v. Elenis Exposed the Ideology of Activist SCOTUS Justices*, CATH. WORLD REP. (July 17, 2023), <https://www.catholicworldreport.com/2023/07/17/how-303-creative-v-elenis-exposed-the-ideology-of-activist-scotus-justices/>. For a related development, see Charles J. Russo, *Controversy Continues Over Compelled Speech and "Same-Sex Weddings"*, CATH. WORLD REP. (Aug. 4, 2023), <https://www.catholicworldreport.com/2023/08/04/controversy-continues-over-compelled-speech-and-same-sex-weddings/>.

17. *Colorado Civil Rights Commission*, COLO. C.R. DIV., <https://ccrd.colorado.gov/ccrd-home/regulatory-information/colorado-civil-rights-commission>.

18. COLO. REV. STAT. § 24-34-601 (2014), invalidated by *303 Creative, LLC v. Elenis*, 600 U.S. 570, 603 (2023) (holding under the First Amendment of the U.S. Const., subsection (2)(a) is unconstitutional as applied to a website designer by forcing the designer to create expressive designs speaking messages with which the designer disagrees).

19. Earlier, in *Masterpiece Cakeshop*, while again avoiding the merits of the constitutional question, the Supreme Court ruled that the same Civil Rights Commission violated a baker's rights by demonstrating "clear and impermissible hostility toward his sincere religious beliefs that motivated his objection" to preparing a cake for a same-sex couple. See *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 625, 634 (2018). The Court found that requiring the baker to prepare the cake would have violated his religious beliefs which opposed the legitimacy of same-sex unions. *Id.* For a commentary on this case, see Charles J. Russo, *Kicking the Can Down the Road in Masterpiece Cakeshop: Is Finding a Happy Medium Possible or Will the Solution Remain Half-Baked?*, 44 U. DAYTON L. REV. 399 (2019).

20. *303 Creative*, 600 U.S. at 580.

21. *Id.* at 582.

22. *Id.* at 602-03. The Supreme Court initially applied the First Amendment right to free speech to states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (upholding a conviction for criminal anarchy) (stating "[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and

## A BRIEF EXCURSUS IN ACADEMIC FREEDOM IN HIGHER EDUCATION

This second part of the article briefly reviews the nature and source of academic freedom. It almost goes without saying that any examination of academic freedom in American higher education<sup>23</sup> must begin with the bedrock document in this area.

The 1940 *Statement of Principles on Academic Freedom and Tenure* (*Statement*) promulgated by the American Association of University Professors (AAUP) traces its origins to an organizational meeting giving birth to the original proclamation of its *1915 Declaration of Principles*.<sup>24</sup> Declaring that “[t]he common good depends upon the free search for truth and its free exposition,”<sup>25</sup> the *Statement* examines academic freedom in the context of research and service along with the place of tenure. In perhaps its most relevant provision on academic freedom, the *Statement* stipulates:

[t]eachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. *Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.*<sup>26</sup>

As important as it is, academic freedom is not explicitly identified in the First Amendment. Even so, academic freedom relies on the First Amendment because it is designed to liberate faculty members to pursue the truth<sup>27</sup> in

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‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

23. See generally RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955) (providing a seminal study of this issue).

24. *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP, 13, <https://www.aaup.org/file/1940%20Statement.pdf>.

25. *Id.* at 14.

26. *Id.* (emphasis added). A 1970 comment in the *Statement* adds: “Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 ‘Statement,’ and we do not now endorse such a departure.” *Id.* at 14 n.5.

27. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (affirming convictions for conspiring to violate the 1917 Espionage Act). Justice Oliver Wendell Holmes penned a relevant description of truth: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”

their writing and teaching as forms of free speech and expression<sup>28</sup> within the boundaries of their disciplines, free from outside interference.<sup>29</sup> Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, highlighted the essence of academic freedom:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>30</sup>

Writing for the Supreme Court's majority in *Keyishian v. Board of Regents*, Justice Brennan was of the opinion that:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>31</sup>

In *Garcetti v. Ceballos* the Supreme Court held that because the complaints a deputy district attorney in California voiced about supervisors were not on matters of public concern, his speech lacked First Amendment protection. According to the Justices, because public employees who speak pursuant to their official duties are not acting as private citizens for First Amendment purposes, the Constitution is unavailable to insulate their

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28. See GREG LUKIANOFF, UNLEARNING LIBERTY CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012) (examining wider attacks on freedom of speech and religion).

29. See J. Peter Byrne, *Academic Freedom: A 'Special Concern of the First Amendment'*, 99 YALE L.J. 251, 252-53 (1989) (offering further commentary on the issue of freedom from interference).

30. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (internal citations omitted) (ruling that placing the plaintiff in contempt for refusing to answer questions about the content of his lectures and his knowledge of a political party was an invasion of his liberties in the areas of academic freedom and political expression).

31. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (invalidating statutes and regulations making membership in specified organizations prima facie evidence of disqualification for employment in public colleges and universities).

communications from employer discipline.<sup>32</sup> At the same time, the Court acknowledged that:

Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>33</sup>

It remains to be seen how this may play out, especially in K-12 schools, where educators typically lack the academic freedom enjoyed by faculty members in higher education.

Efforts to limit the academic freedom rights of faculty members, particularly in colleges and universities by attempting to compel them to speak or express views inconsistent with their sincerely held religious beliefs, would indeed cast a pall of orthodoxy on the academy. Limits of this kind would cause inestimable damage to both the "marketplace of ideas"<sup>34</sup> as protected by academic freedom specifically, and religious freedom more broadly. Further, although educators in K-12 lack academic freedom, it seems to be a clear violation of the right to be free from compelled speech by obligating them to refer to students, or others, using pronouns inconsistent with their births where their objections are based on their sincerely held religious beliefs.

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32. The Supreme Court first upheld the rights of public employees to speak out on matters of public concern in their private capacities as citizens in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). See Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5 (1999) (offering commentary on the *Pickering* case).

33. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). See also Jessica Reed, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y.C. L. REV. 95 (2007) (offering commentary on *Ceballos*); Ronald D. Wenkart, *The Free Speech Rights of K-12 Teachers After Garcetti*, 269 EDUC. L. REP. 1 (2011) (commenting on the *Ceballos* case).

34. *Keyishian*, 385 U.S. at 603. The full quote reads as follows: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* (internal citations omitted).

## LITIGATION ON PRONOUN USE

As the following case discussions briefly highlight, in addition to parties reaching out-of-court settlements,<sup>35</sup> there has been a growing body of litigation over whether educators,<sup>36</sup> in K-12 and higher education have the free speech right, coupled with academic freedom, to refrain from being compelled to use pronouns inconsistent with students' birth sexes or their deeply held religious beliefs. To date, a consensus seems to be emerging in favor of the educators.<sup>37</sup>

In *Meriwether v. Hartop* the Sixth Circuit ruled in favor of a Christian philosophy professor in Ohio in litigation over whether he could be required to use students' preferred pronouns in class.<sup>38</sup> As the controversy emerged, campus officials and the transgender student rejected the faculty member's effort at compromise by using pronouns when addressing most in his class but using only the transgender student's last name. Reversing an earlier order in favor of campus administrators, the court was convinced that the institutional officials violated the faculty member's right to academic freedom in sending him a written reprimand claiming he failed to comply with university policies requiring instructors to call on or speak with transgender students by their preferred pronouns.

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35. See, e.g., Rachel Bowman, *Christian School Teacher Who Was Fired for Refusing to use Trans Student's Preferred Pronouns Settles Lawsuit*, DAILY MAIL ONLINE (UK) (May 15, 2024), <https://www.dailymail.co.uk/news/article-13422437/christian-school-teacher-fired-trans-student-pronouns-lawsuit.html> (reporting that a physical education teacher in Riverside County, California, who was accused of refusing to refer to a middle school student by the child's preferred pronoun even though she said she was never asked to do so, received a \$360,000 settlement). For a briefer treatment of this dispute, see Cameron Kiszla, *Inland Empire Gym Teacher Fired for Anti-LGBTQ 'Religious Beliefs' Gets \$360K*, KTLA5 (May 15, 2024), <https://ktla.com/news/local-news/inland-empire-gym-teacher-fired-for-anti-lgbtq-religious-beliefs-gets-360k/>.

36. For a case not involving education, see *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020) (holding that a federal judge lacked the authority to compel a litigant, here the Federal government, to use the pronouns a criminal defendant preferred during his sentencing after pleading guilty to a child pornography charge). For a brief commentary on this case, see *United States v. Varner: Fifth Circuit Holds that Courts Cannot Compel Use of Preferred Pronouns*, 134 HARV. L. REV. 2275 (2021).

37. Some of the case descriptions are adapted from Charles J. Russo's article. *Five Recent Cases in the Pronoun Wars in Education*, CATH. WORLD REP. (Oct. 17, 2024), <https://www.catholicworldreport.com/2024/10/17/five-recent-cases-in-the-pronoun-wars-in-education/>.

38. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). For representative commentary on this case, see Brian Soucek & Ryan Chen, *Misunderstanding Meriwether*, 92 FORDHAM L. REV. 57 (2023); Inara Scott et al., *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 AM. U. L. REV. 977 (2022). See also *Meriwether v. Hartop: Sixth Circuit Holds Public University Professor Plausibly Alleged Free Speech Right Not to Use Trans Student's Pronouns*, 135 HARV. L. REV. 2005 (2022).

Two years later, the Supreme Court of Virginia's judgment in *Vlaming v. West Point Board of Education*,<sup>39</sup> upheld the religious freedom and speech rights of a popular, successful tenured high school French teacher whose board fired him for insubordination over his unwillingness to call a biological female transitioning to male by the student's preferred male pronouns. In an attempt to avoid violating his faith while accommodating, and not offending, the student, the teacher used the masculine French name he assigned Doe in class in lieu of a pronoun. Further, "[t]o limit the risk of Doe feeling singled out, Vlaming 'also rarely, if ever, used third person pronouns to refer to any students during class or while the student being referred to was present.'"<sup>40</sup>

Reversing earlier orders in favor of the board, the court decided that it violated the teacher's rights to free speech and due process. Moreover, the court reinstated the teacher's claim that officials violated his right to the free exercise of religion, pointed out that they could not compel him to speak in a way inconsistent with his beliefs. The board subsequently agreed to pay the teacher \$575,000 in damages and attorney fees, remove his firing from his employment history, and change its policies in order to meet Virginia's new education standards safeguarding parental rights to direct the upbringing of their children.<sup>41</sup>

In an ongoing battle, *Kluge v. Brownsburg Community School Corp.*, the Seventh Circuit vacated its original opinion upholding the dismissal of a teacher in Indiana.<sup>42</sup> The former music and orchestra teacher, in an effort to compromise with a student who was transitioning, referred to all of his students by their last names rather than their preferred pronouns due to his religious beliefs objecting to transgenderism. The court relied on Supreme

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39. *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 748 (Va. 2023). *But see* *Ibanez v. Albemarle Cnty. Sch. Bd.*, 897 S.E.2d 300, 326 (Va. Ct. App. 2024) (attempting to distinguish *Vlaming* in rejecting parental claims that their board's anti-racism policy violated their rights to due process, equal protection, and free speech as well as forcing them to engage in compelled speech under Virginia and Federal Constitutions as well as a commonwealth statute).

40. *Vlaming*, 895 S.E.2d at 713-14.

41. *See Virginia Department of Education Releases Model Policies to Ensure Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools*, VA. DEP'T. EDUC. (July 18, 2023), <https://www.doe.virginia.gov/Home/Components/News/News/308/227>. *See also* Kate Anderson, *Virginia's New Education Policies Protect Children, Parental Rights*, ALL. DEFENDING FREEDOM (July 18, 2023), <https://adflegal.org/press-release/virginias-new-education-policies-protect-children-parental-rights/>.

42. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir.), *vacated*, 2023 WL 4842324 (7th Cir. 2023).

Court precedent from *Groff v. DeJoy*<sup>43</sup> requiring the Postal Service to accommodate an employee by granting him time off for worship on Sundays. In its brief opinion, the court found that the board violated the teacher's rights by failing to accommodate his religious beliefs.

On remand, though, a federal trial court in Indiana ruled that while an issue of fact as to whether the teacher's religious beliefs were sincere precluded summary judgment in his favor, his use of students' last names only, as accommodation to his religious belief, created undue hardship for the public school corporation.<sup>44</sup> Insofar as the Seventh Circuit heard a further appeal on January 22, 2025, its judgment is pending as this article goes to press.<sup>45</sup>

In the first of a pair of cases from Ohio, *Parents Defending Education v. Olentangy Local School District Board of Education*,<sup>46</sup> over a strident dissent,<sup>47</sup> a divided Sixth Circuit upheld the denial of a challenge to anti-harassment policies and code of conduct bar discrimination based on "sexual orientation and transgender identity."<sup>48</sup> The plaintiffs unsuccessfully maintained that the policies mandating the use of transgender students' preferred pronouns violated the First Amendment.

The majority argued that the policies were constitutionally permissible because they did not compel specific speech insofar as students could have avoided using pronouns when referring to classmates who are transgenders. Because university officials rejected such a compromise in *Meriwether*, it is ironic that the Sixth Circuit suggested such an alternative. However, on further review, as this article heads to press the Sixth Circuit vacated and remanded for further consideration.<sup>49</sup>

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43. *Groff v. DeJoy*, 600 U.S. 447, 473 (2023). See also Allan G. Osborne, Jr. & Charles J. Russo, *Groff v. DeJoy: Implications for Accommodating School Employees*, 412 EDUC. L. REP. 417, 419-22 (2023).

44. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F.Supp. 3d 943, 970 (S.D. Ind. 2024). Appeal filed.

45. Oral Argument, *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943 (S.D. Ind. Apr. 30, 2024) (No. 24-1942), <https://www.courtlistener.com/audio/96324/john-kluge-v-brownsburg-community-school-corporation/>.

46. See *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (6th Cir. 2024).

47. *Id.* at 495 (Batchelder, J., dissenting) (concluding "The First Amendment forbids the District from compelling students to use speech that conveys a message with which they disagree, namely that biology does not determine gender.").

48. *Id.* at 472.

49. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 120 F.4th 536, 537 (6th Cir. 2024).

Next, in *Geraghty v. Jackson Local School District Board of Education*,<sup>50</sup> a federal trial court in Ohio largely ruled in favor of a middle-school English teacher who resigned under pressure when her board required her to use the preferred names and pronouns of students socially transitioning genders even though this would have violated her religious beliefs. Allowing the suit to proceed, the court explained that officials could not compel the teacher to refer to students in a manner inconsistent with her faith because this was not part of her ordinary duties on the ground that “[i]t was not her job ‘to teach anything with regard to LGBTQ issues.’”<sup>51</sup> The court added that the board’s name and pronoun practice violated the teacher’s rights to religious freedom by failing to meet the constitutional standard of being neutral and generally applicable.

Earlier, in a still to be resolved dispute, a high school English teacher in Wisconsin, in *Cerneck v. Argyle School District*,<sup>52</sup> sued his board for various claims,<sup>53</sup> most notably, violating his First Amendment right to the free exercise of religion in not renewing his contract. Ignoring the teacher’s religious objections, the board refused to reemploy him for not complying with its policy of using the preferred names and pronouns of transgender students.<sup>54</sup>

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50. *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-02237, 2024 WL 3758499, at \*24 (N.D. Ohio Aug. 12, 2024).

51. *Id.* at \*13.

52. Complaint at 1, *Cerneck v. Argyle Sch. Dist.*, No. 3:24-cv-00447 (W.D. Wisc. July 8, 2024).

53. See Corrinne Hess, *Wisconsin Teacher Suing School District After Being Fired for not Using Students’ Preferred Pronouns*, WISC. PUB. RADIO (Aug. 7, 2024, 7:51 AM), <https://www.wpr.org/news/wisconsin-teacher-suing-school-district-fired-not-using-students-preferred-pronouns>; Grace Porto, *Wisconsin Teacher Sues School That Fired Him for Not Using Preferred Pronouns*, CATHOLICVOTE (Aug. 9, 2024), <https://catholicvote.org/wisconsin-teacher-sues-school-that-fired-him-for-not-using-preferred-pronouns/>.

54. Porto, *supra* note 53. For a related issue from Wisconsin, see *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, 506 (7th Cir. 2024), *cert. denied*, 145 S. Ct. 14 (2024) (rejecting the claim of a parents’ advocacy group that their school board’s gender identity support policy violated their right to due process and the free exercise of religion by interfering with their exclusive right to make decisions with and on behalf of their children on the basis that they lacked standing because “they failed to allege facts showing that their ‘threatened injury’ was ‘certainly impending’”) (internal citations omitted). See also *John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 626, 636 (4th Cir. 2023) (similarly, parents unsuccessfully challenged board guidelines in Maryland creating support plans for transgender students not requiring parental knowledge or consent on the basis that it violated the fundamental right to determine the care and upbringing of their children; the Fourth Circuit affirmed that the parents lacked standing insofar as had not alleged either that they had been, or were likely to be, denied information about their children well-being under the county’s guidelines). An unrelated dispute on another aspect of human sexuality in schools from Montgomery County, *Mahmoud v. Taylor*, is now on appeal to the Supreme Court, *Mahmoud v. McKnight*, 102 F.4th 191, 197-200 (4th Cir.

Most recently, the outcome of a case from Massachusetts involving an eleven-year-old middle-school student is nothing short of incredulous as it completely ignores parental rights. In a per curiam opinion stretching to seventeen pages in *Foote v. Ludlow School Committee*,<sup>55</sup> the First Circuit ignored *Pierce v. Society of Sisters*' clear assertion about parental rights, namely that "those who nurture [children] and direct [their] destiny have the right, coupled with the high duty, to recognize and prepare [them] for additional obligations."<sup>56</sup>

In a per curiam opinion without any of the judges being willing to sign their names to their convoluted order, the court unanimously upheld the actions of school officials in not informing parents whose children wish to be referred to by the pronouns of their choice with the prior consent of the students involved. It is unclear whether this permission must be granted in writing or orally.

The dispute arose in *Foote* when parents challenged a school Protocol, an unwritten policy, requiring, as noted, staff members to use students' requested names and gender pronouns in school without notifying their caregivers of these requests unless their children consented to disclosure. The court affirmed that the Protocol violated neither the parents' substantive due process right to direct medical treatment or education of their daughter, who announced that "I am genderqueer"<sup>57</sup> nor did the Due Process Clause afford them the right to veto the curricular and administrative actions of educators with regard to how they carried out their duties.

Adding that because the Protocol was rationally related to school officials' interest in cultivating safe, inclusive, and educationally conducive environments for students, but completely ignoring, if not trammeling, heretofore legitimate parental rights and interests, the First Circuit agreed that the trial court properly dismissed their complaint for failure to state a claim for which relief could be granted because "parental rights are not

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2024), *cert. granted*, No. 24-297, 2025 WL 226842 (Jan. 17, 2025) (challenging board policies prohibiting parents from opting their children's out of explicit, age inappropriate instruction on human sexuality for young children). For a commentary on this case, see Charles J. Russo, *SCOTUS To Review Case Over Explicit Sex-Ed Materials for Children*, CATH. WORLD REP. (Jan. 29, 2025), <https://www.catholicworldreport.com/2025/01/29/scotus-to-review-case-over-explicit-sex-ed-materials-for-children/>.

55. *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 340 (1st Cir. 2025). In Massachusetts school boards are called "school committees."

56. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). *See also supra* note 7 (offering more details on *Pierce*).

57. *Foote*, 128 F.4th at 341.

unlimited.”<sup>58</sup> It is unclear how the court could expect parents to accede to the demands of their eleven-year-old child.<sup>59</sup> If this decision is allowed to stand, where will this movement end? Although there has yet to be an announcement, one would hope that the parents will seek further review.

#### REFLECTIONS

As an initial matter, it is important to review an issue not yet examined, namely the reach of the First Amendment’s Free Exercise Clause.<sup>60</sup> In a seminal dispute, *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court upheld the dismissal of drug counselors who ingested peyote as part of a sacramental ritual in the Native American Church, a legally organized religious movement recognized by the federal government of which they were members.<sup>61</sup> The *Smith* Court decided that generally applicable, religion-neutral laws<sup>62</sup> with the effect of burdening

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58. *Id.* at 357.

59. For another case involving egregious judicial disregard for parental rights, albeit involving a student claiming to be transgender rather than the use of pronouns, see *In re A.C.*, 198 N.E.3d 1 (Ind. Ct. App. 2022), *reh’g denied* (Dec. 22, 2022), *transfer denied*, 208 N.E.3d 1259, *cert. denied*, M.C. v. Ind. Dep’t of Child Servs., 144 S. Ct. 1084 (2024). The courts ignored the concerns of Roman Catholic parents for their anorexic, then sixteen-year-old son after he informed them he identified as female. The parents objected because they believe God creates each person as immutably male or female and that raising children in line with their biological sexes is in their best interests. An appellate court in Indiana affirmed that even though the parents were fit, the minor could be removed from the home and placed in foster care. The court went so far as to bar the parents from even discussing their child’s transgender identity during visitations. The Supreme Court refused to hear an appeal without offering an explanation, which could be because the student had already turned twenty-one and was an apparently emancipated adult.

60. In an early case involving the Free Exercise Clause, the Supreme Court ruled that individuals have the right to believe as they wish but they could be sanctioned if those beliefs violate the law. *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (rejecting a Free Exercise Clause challenge to the enforcement of a federal polygamy statute). The Supreme Court initially applied the First Amendment religion clauses to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, wherein it invalidated the convictions of Jehovah’s Witnesses for unauthorized soliciting and inciting a breach of the peace. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

61. *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990), *reh’g denied*, 496 U.S. 913 (1990); *Smith v. Emp. Div.* 799 P.2d 148, 149 (Or. 1990). See also David L. Gregory & Charles J. Russo, *Let Us Pray (But Not ‘Them!’): The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN’S L. REV. 273 (1991).

62. *But see* *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527, 546 (1993) (breathing life back into the Free Exercise Clause, invalidating city ordinances in Florida on the ritual slaughtering of animals because they were not neither neutral nor generally applicable). For representative commentary on this case see Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 864 (2001); Renee Skinner, *The Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: Still Sacrificing Free Exercise*, 46 BAYLOR L. REV. 259 (1994).

particular religious practices need not be justified by compelling government interests, rejecting the standard it enunciated in *Sherbert v. Verner*.<sup>63</sup>

In an attempt to reinstate *Sherbert*, in 1993 Congress adopted the Religious Freedom Restoration Act. However, in *City of Boerne v. Flores*, the Catholic Archbishop of San Antonio filed suit after being denied a building permit to enlarge a church in light of an ordinance governing historic preservation which, public officials argued, included the church.<sup>64</sup> The Supreme Court determined that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in applying this statute to the states. Congress later essentially revitalized the Religious Freedom Restoration Act in a law passed in 2000.<sup>65</sup> This Act provides protections for houses of worship, other religious institutions, and individuals from discrimination in zoning and landmarking laws.

The upshot is that unlike their faculty members in higher education, because teachers in K-12 settings lack academic freedom, they are probably wiser to frame their cases under free speech rather than religion. K-12 teachers in particular are better advised to rely primarily on their free speech rights because, as noted, although not unanimously so, the courts are much more receptive to claims that using pronouns with which they differ violates their rights as a form of compelled speech.

Concomitantly, educators may still be able to file free exercise claims if school officials act with hostility towards their religious beliefs as in *Meriwether*.<sup>66</sup> It is important to bear in mind that educators may well have viable free exercise claims, though, because the principles enunciated in *Smith*,<sup>67</sup> and subsequent litigation such as *Geraghty*,<sup>68</sup> only apply when

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63. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963) (holding that states cannot restrict the free exercise rights of individuals unless they survive strict scrutiny, the most stringent form of constitutional review, under which such restrictions must be based on compelling state interests that are narrowly tailored to achieve their ends). For the most cited commentary on this case, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1049 (1989).

64. *City of Boerne v. Flores*, 521 U.S. 507, 511-12 (1997).

65. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5. For a commentary on this statute, see Aaron Keesler, *Religious Land-Use and the Fourteenth Amendment's Enforcement Clause: How the FMLA Paved the Way to the RLUIPA's Constitutionality*, 3 AVE MARIA L. REV. 315 (2005).

66. See *supra* note 38 and accompanying text (discussing *Meriwether*). See also *supra* note 19 (discussing the Supreme Court's holding in *Masterpiece Cakeshop*).

67. See *Emp. Div. v. Smith*, 494 U.S. 872 (1990). For a commentary on this case, see also Russo, *supra* note 7.

68. See generally *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

policies are neutral, generally applicable, and are implemented evenhandedly.

Taking a broad view, the cases on pronoun use, whether framed as violations of educators' rights to freedom of speech or the free exercise of religion represents the latest sets of skirmishes in the continuing culture wars. Many supporters of pronouns use, certainly those in circumstances leading to litigation, have taken a "my way or the highway" mentality as they demand absolute compliance with their unyielding wills as they demonstrate their obliviousness to the twin First Amendment religious and free speech rights of educators.

What those seeking to impose their pronoun preferences on others, whether educators or student peers, fail to realize is that because respect should be mutual, it must be given to be earned and cannot be gained by compulsion. The result is a widespread lack of mutuality of respect for perspectives other than one's own such as when educational officials in *Vlaming*, *Kluge*, and *Meriwether* rejected educators' attempts to compromise by using last names, not referring to anyone via pronouns.

These clashes over pronoun use ultimately boil down to a clash of values. Accordingly, it thus remains to be seen whose values will prevail. On the one hand are those defending their long-held sincere religious beliefs who refuse to be compelled to comply with the politically correct trends of the day by communicating messages inconsistent with their values. On the other hand are activists, some in the guise of board members and educational officials who seek to trammel the religious and speech rights of instructional personnel regardless of their rights, let alone students and parents with whom they have differences of opinion.

Attempting to force faculty members to speak in ways violating their rights to free speech, consciences, and religious beliefs calls to mind a concern Justice Alito raised in his dissent in *Obergefell v. Hodges*<sup>69</sup> wherein the Supreme Court discovered a heretofore unidentified Fourteenth Amendment right to same-sex marriage. To this end, in his lengthy dissent Justice Alito expressed dismay that "people of faith can take no comfort in

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69. *Obergefell v. Hodges*, 576 U.S. 644, 736 (2015) (Alito, J., dissenting). See Charles J. Russo, *Respect for Me But Not for Thee: Reflections on the Impact of Same-Sex Marriage on Education*, *BYU EDUC. & L.J.*, 471 (2011) (offering commentary on *Obergefell*). See also Charles J. Russo, *Catholic Schools and "Same-Sex Marriages:" An Emerging Legal Clash*, *CATH. WORLD REP.* (July 30, 2023), <https://www.catholicworldreport.com/2023/07/30/catholic-schools-and-same-sex-marriages-an-emerging-legal-clash/>.

the treatment they receive from the majority today.”<sup>70</sup> Alito then cautioned that it remains to be seen whether those who “cling” to their Christian beliefs will be limited to being able “to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”<sup>71</sup>

In light of the litigation discussed throughout this manuscript it appears that the dystopian situations of which Justice Alito warned are occurring on many campuses and in many schools throughout the nation. A bit of a wild card in this dilemma is whether educational officials will comply with President Trump’s recent executive orders on pronoun use and what litigation it might engender.

Individuals who are transgender certainly have the right to live as they wish, but at what cost? Is it just for officials to compel people of faith to ignore their constitutionally protected beliefs in obligating them to use students’ preferred pronouns? As such, a key question concerns why educational officials and individuals think they can ignore the twin freedoms of religion and speech by seeking to compel others to communicate using words with which they disagree, especially if their objections are faith-based.

As the *Vlaming* court reasoned, “[i]t would be alarming indeed to think that in the Commonwealth of Virginia, a religious person needs a constitutional right merely to hold a silent belief or opinion that does not change a thing he does or does not do.”<sup>72</sup> This observation should serve as a reminder for educational officials to respect diversity of perspective of teaching personnel, including on religion, rather than insisting on rigid conformity with the politically correct flavors of the day, as long as they perform their duties well. The key, then, is for all to respect the diversity of opinion of which the *Vlaming* court eloquently wrote rather than demand rigid conformity to the in-vogue orthodoxies du jour.

To the extent that life is not usually a zero-sum game in which one side “wins” and the other loses, it is unclear why administrators often remain so inflexible in demanding that educators forfeit their rights, preventing them from living out their faiths freely. In fact, as evidence of their unwillingness to compromise in *Vlaming*, *Kluge*, and *Meriwether*, officials stridently refused, for example, to allow educators to use last names rather than refer to

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70. *Obergefell*, 576 U.S. 644 at 712 (Alito, J., dissenting).

71. *Id.* at 741.

72. *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 725 (Va. 2023).

students via pronouns. One must ask what message the actions of school officials and activists send to instructional personnel, parents, and students about the need to keep open minds while demonstrating respect for the beliefs of others.

In seeking to uncover a middle ground acceptable to all sides in these disputes, what some educational officials qua activists fail to recognize is that instructional personnel, whether in K-12 schools or higher education, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>73</sup> In addition, as the Justices emphasized in *303 Creative*, Americans cannot be compelled to speak or communicate beliefs or positions inconsistent with their religious values.

The litigation to date reflects how those trying to compel educators to use pronouns inconsistent with their beliefs apparently miss the unintended irony displayed in their behavior. More specifically, these activists lack the very “tolerance” they demand from others when faced with views different from their own as they expect compliance with their dictates. Instead of accepting differences of opinion, these activists try to force educators to use pronouns inconsistent with their beliefs, not to mention the biological realities of individuals who wish to be referred to using pronouns inconsistent with their sexes at birth.

At this point it is unclear where the apparent judicial consensus emerging in *Vlaming*, *Kluge*, and *Meriwether* leads while waiting to see how *Geraghty* and *Cernek* play out. Hopefully the judicial victories to date will be accompanied by legislative responses dealing with pronoun use that will help to ensure educators’ freedom of religion and speech by not forcing them to violate their deeply held beliefs.

## CONCLUSION

Moving forward, hopefully open-minded individuals on both sides of this debate over pronoun use demonstrate not only respect for freedom of religion and speech but also embrace different perspectives, especially on matters of faith. Thus, in light of Churchill’s words cited in the title to this article, it seems that legal developments have turned the corner in protecting

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73. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (establishing the free speech rights of students). See Martha M. McCarthy, *Student Expression that Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 EDUC. L. REP. 1 (2009) (offering comment on *Tinker*).

the free speech rights of educators not to be compelled to refer to students using pronouns inconsistent with their sexes. Still, because controversies continue over pronoun use in educational settings and elsewhere, the battle to protect believers from being compelled use pronouns inconsistent with their faiths is joined but not yet won.