SUPREME COURT OF WISCONSIN

Appeal No. 2017AP1240

JOHN MCADAMS,

Petitioner-Appellant,

v.

MARQUETTE UNIVERSITY,

Defendant-Respondent.

On Appeal from the Circuit Court of Milwaukee County
Honorable David A. Hansher Presiding
Circuit Court Case No. 16-CV-3396

BRIEF OF *AMICI CURIAE* LAW AND UNIVERSITY PROFESSORS AND ACADEMICS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

INTEREST OF *AMICI CURIAE*

Amici Curiae, Law and University Professors and Academics, as representatives of the academic and legal communities, have a vital interest in protecting our fundamental rights enshrined in the First Amendment of the United States Constitution. Specifically, *Amici Curiae* seek to protect the free speech and academic rights afforded to university professors and scholars, through the First Amendment's protection of free speech and through their employment contracts, in order to protect the sanctity of the learning environment, which only flourishes and properly serves its students by welcoming open and honest debate free of draconian university sanctions and punishment.

INTRODUCTION

Marquette University ("Marquette") is a Catholic, Jesuit university founded to provide Catholic, Jesuit education . (http://marquette.edu/about/catholic-jesuit.php, *last visited* Oct. 29, 2017). While teaching a philosophy there, a graduate student Instructor ("Instructor Abbate") told her class that everybody agrees on gay rights, so there's no need to discuss it. Decision and Order ("D&O") at 1. At least one of her students, J.D., was understandably perplexed by this assertion and sought

discussion with her after class. *Id*. Instructor Abbate told J.D. that questioning the gay rights' agenda might offend someone and encouraged J.D. to drop the class.[1] *Id*. at 2. The student brought the matter to an Associate Dean and the Chair of the Philosophy Department. Both sided with Instructor Abbate. *Id*. at 3.

Assume that the student returned to his dorm room and told his story on his website. Assume he did so in a balanced and civil manner, making rational arguments in favor of a more open-minded approach to the issue and highlighting the intolerance he reasonably believed he had experienced. Assume he identified his Instructor by name and included a link to her website. Should that student be punished or expelled?

Alter the hypothetical slightly and have the student relate his story to a trusted older friend, who then authors the same blog post. In this case, the "trusted older friend" was Professor John McAdams. And Marquette terminated Professor John McAdams and stripped him of his tenured

[1] Marquette's contractual guarantee of free speech and academic freedom protects discourse regarding the nature of marriage—especialy in light of this discussion taking place in the context of a philosophy course at a Catholic university. Instructor Abbate's position on "gay marriage" opposes official Catholic teaching. *See* Catechism of the Catholic Church at ¶¶ 2357-61, available at (http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm, *last visited* Oct. 29, 2017).

position—supposedly for his 'offense' of naming Instructor Abbate while defending a student's right to engage in open discourse. Marquette did this despite the fact that Professor McAdams' contract expressly protected his academic freedom and his First Amendment right to free speech. We respectfully ask this Court to reverse this patent error.

ARGUMENT

The plain meaning of the contract's express incorporation of First Amendment protections is that if Professor McAdams' speech is protected from government restriction under the First Amendment, he is likewise protected from termination under the "discretionary dismissal" standards. Because Professor McAdams had the right to discuss a fellow instructor's oppressive tactics and hold her accountable, Marquette, not Professor McAdams, breached the employment contract.

A. THE FIRST AMENDMENT PROTECTIONS INCORPORATED INTO MARQUETTE'S EMPLOYMENT CONTRACT PROHIBIT PROFESSOR MCADAM'S TERMINATION.

In *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court held that the exchange of personal and academic opinions must be freely shared amidst intellectual pursuit. The Court famously proclaimed, "If there is any fixed star in our constitutional constellation, it is that no official, high

or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id*. at 642. Debate on public issues, such as gay rights, must be uninhibited, robust, and wide-open.[2] Professor McAdams' speech in this case lies at the core of First Amendment values because it involves on a matter of public concern, namely "gay marriage."[3]

"American schools" are "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). The Supreme Court has "long recognized . . . the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).[4]

The First Amendment protects speech of university employees when that speech involves "matters of public concern," meaning speech that "fairly [may be] considered as relating to" issues "of political, social, or other concern to the community." *Connick*, 461 U.S. at 143. In no case does the Supreme Court require this speech be limited to anonymous debate. Just as

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[2]*See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004).

[3]When Professor McAdams wrote his personal blog on November 9, 2014, the Supreme Court had not yet considered the constitutionality of gay marriage. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (decided June 26, 2015).

[4]*See also Wieman v. Updegraff*, 344 U.S. 183 (1952); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Professor McAdams ascribed his name to his beliefs, thereby subjecting himself to criticism for his position, Instructor Abbate's name is fairly associated with her position. This fair and open debate is protected by the First Amendment.

Indeed, "a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life." *Zamecnik v. Indian Prairie School Dist. # 204*, 636 F.3d 874, 876 (7th Cir. 2011). Inherent in the rule that individuals like Instructor Abbate "do not have a right to prevent criticism of their beliefs" is the concept that they have no right to anonymity to avoid criticism. Instructor Abbate had no right to oppress Marquette students anonymously. Professor McAdams needn't pretend that she did. If Marquette found criticism of Instructor Abbate disruptive, the proper solution was to require her to stop censoring students, not provide insulation from criticism for her wrongful acts that violated others' rights.

Marquette unilaterally prescribed "what shall be orthodox" in matters of opinion by permitting its employees to anonymously promote certain viewpoints on political and social issues, while censoring J.D. and Professor

McAdams' viewpoints. This violated Professor McAdams' First Amendment rights as guaranteed in his Employment Contract.

B. THE LOWER COURT ERRONEOUSLY ELIMINATED PROFESSOR MCADAMS' FREE SPEECH RIGHTS.

The lower court erred by finding that Professor McAdams had no First Amendment rights beyond his academic freedom; the contract expressly incorporated *both* protections. D&O at 23-29. The court held Professor McAdams had no right to identify Instructor Abbate in his blog, *id*. at 25-27, and erroneously concluded that this was the crux of this case, *id*. at 28.[5] The lower court believed that the dispositive fact establishing Professor McAdams' alleged breach was that no dispute or alleged harm would have occurred if Professor McAdams had not put the Instructor's contact information in his blog. *Id*. This reasoning fails as a matter of logic, law, and fact.

Logically, if what Instructor Abbate did is somewhere between innocuous and praiseworthy—as she, the Associate Dean of Students, and the

[5] Marquette and the lower court essentially concluded that third party "hate speech" directed toward Instructor Abbate was actionable harm. But the Supreme Court has held that the First Amendment protects such scornful talk. *See Matal v. Tam*, 582 U.S. ___ (2017). If third parties reacting tastelessly to a blog posting are immunized by the First Amendment, *a fortiori*, the blog poster—who was moreover, entirely civil in his own discourse—is also protected.

Philosophy Department Chair believed—then what is the harm in telling people? And if her actions were not so laudable, who is to blame—the person who commits the acts, or the person who reports them?

Legally, the First Amendment allows Professor McAdams to not only oppose Instructor Abbate's views and her censorship of Marquette students, but also to identify the source of the problem his entire exposition discussed**.** Marquette's Faculty Statutes do not even attempt to prohibit the exercise of such free speech rights. *See* Rec. at 3:74.

Factually, the lower court's reasoning was unfounded. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding summary judgment is only appropriate when no genuine issue of material fact exists). Nowhere in the 123 pages of the Faculty Hearing Committee ("FHC") Final Report is there any evidence to support that *but for* Professor McAdams' identifying Instructor Abbate, no one would have figured out that she committed the transgressions. One can go on the Marquette website even today and search for "Theory of Ethics" (Philosophy Course #2310, section 114) and find that the Instructor was "Abbate, C."[6] During her tenure, if one simply went to

[6](http://www.marquette.edu/mucentral/registrar/snapshot/fall14/ss.php?s=COREHUMANNATR&by=core, last visited 11/1/17).

the link for "Current Graduate Students,"[7] one would have found Instructor Abbate's email address. FHC Report at 59 ("Findings of Fact" #120). And regardless, entering her name in any search engine would surely produce her web postings. *Cf. id.* at 61 (#129.6). Thus, had Professor McAdams not given her contact information—which the lower court baselessly asserted was a critical secret he had no First Amendment right to discuss—and even if he had not given her name, but *only the course name*, the same results would likely occur. The lower court effectively held that a professor can be fired simply for relaying events that occurred in a specific course. If there is no freedom to report professorial abuses, First Amendment protections are simply illusory. The lower court's holding on this disputed core factual assertion is wrong—just as its holding on the law was wrong.

C. THE COURT ERRED IN DEFERRING TO ONE PARTY'S INTERPRETATION OF ITS OWN CONTRACT.

The standard of review is often the most critical aspect of a case. The lower court got this crucial factor wrong, therefore fatally tainting its whole analysis. Judicial deference for an agency that the legislature has charged with authority to administer that statute is based on "the comparative

[7](http://www.marquette.edu/phil/CurrentGraduateStudents.shtml, last visited 11/1/17).

institutional qualifications and capabilities of the court and the administrative agency." *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 292 Wis. 549, 562 (2006).

An agency interpretation deserves "due weight" deference when it has some experience in the relevant area but lacks greater expertise than the court. *Id*. at 564-65. This deference "is based on the fact that the legislature has charged the agency with enforcement of the statute in question." *Id*. at 565. Under this standard, a court will accept an agency interpretation that does not contradict the statute "unless the reviewing court determines that a more reasonable interpretation exists." *Id*.

A court gives an agency no deference if *any* of the following factors is present: 1) the issue is one of first impression for the agency, 2) the agency has no experience or expertise in deciding the issue, or 3) the agency's position on the issue has not been sufficiently consistent to provide substantial guidance. *Id.* All three factors are present in this case.

In *Racine,* the Wisconsin Supreme Court held "Under both due weight deference and no deference, *the reviewing court may adopt, without regard for the agency's interpretation, what it views as the most reasonable interpretation of the statute*." *Id*. at 565-66 (emphasis added). This case, of

course, does not involve review of a public agency decision. Equating the deference accorded to an expert governmental agency interpreting a statute with which it is intimately familiar to an *ad hoc* group of college faculty trying, for the first time, to interpret an employment contract to which their employer is a party and that incorporates constitutional protections is clear error.[8] Since Marquette's own actions threaten academic freedom, there is no basis to defer to Marquette as the adjudicator of academic freedom rights here.

Marquette had no expertise in deciding employment contract or First Amendment cases.[9] There are no indicia of deferential agency action. The "no deference" standard applies.

As Justice Roggensack noted in *Racine*, "Construction of a contract is a question of law to which we give no deference to the decision of an administrative agency." *Id.* at 611 (Roggenstock, J., concurring.).[10]

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[8]The heart of the problem is deference to Marquette's President, who rejected the FHC conclusion that termination was unwarranted, FHC Report at 85, and who is even less qualified to adjudicate these contractual and constitutional issues.

[9]There was one Law Professor on the FHC, Bruce Boyden, but he specializes in intellectual property. (https://law.marquette.edu/sites/default/files/Boyden%20Resume%202017-1_0.pdf, *last visited* Oct. 29, 2017).

[10]The lower court rejected the leading case on this issue, *McConnell v. Howard Univ.*, 818 F.2d 58 (D.C. Cir. 1987), claiming it "is based on fact-specific facts that are readily distinguishable." D&O at 8. Not only is that not a valid factual distinction, inasmuch as there were gross due process violations in this case, but it is also legally irrelevant.

Moreover, the *Racine* court, also rejected the lower court's argument that internal administrative concerns required deference to Marquette's interpretation of its own contract. *Id*. at 565-66 (holding that a reviewing court has authoritative expertise in determining the legal implications of a contract); *see also McConnell*, 818 F.2d at 69. The lower court ignored this precedent from both the Supreme Court and Court of Appeals.

a. The "Due Weight" Standard.

The "due weight" standard that the lower court misapplied requires a court to uphold an agency decision *only if* it is the most reasonable interpretation of the statute it administers. *Racine*, 292 Wis. at 565-66. This requires a court to consider alternative interpretations. The lower court did not. So even if it were correct in applying "due weight" deference, it did not actually apply that standard.

McConnell provides the best precedent on this issue. The only material distinction that the lower court found is that: "the professor in *McDonnell* [sic] was clearly not given a fair hearing," but the lower court claimed that Professor McAdams was. The *McConnell* Court held that no deference was due to a university's interpretation of its own contract. *Id*. at 202. *McConnell's* holding was predicated on: 1) the legal principle that the court decides matters of law, and 2) that the university's self-interested opinion bore no equivalence to the decisions of an administrative agency, regardless of the process the university employed in reaching its decision. *Id*. at 201-04. It was not contingent on a defective hearing process. *McConnell* is apposite and strongly supports Appellant's position.

Marquette conveniently focused on alleged subjective harms to a "student", Instructor Abbate, while ignoring very real harms J.D. That is unreasonable. In fact, Marquette—Instructor Abbate, the Assistant Dean, and the Department Chair in particular—have the same duty to prevent harm to J.D. and all students who might be subjected to the type of intolerance that J.D. suffered. It is only because Marquette abandoned its duty to prevent that harm that Professor McAdams was stirred to action.

Moreover, Professor McAdams' interactions with Instructor Abbate were not merely relations between a Professor and "a student," as the lower Court disingenuously maintained.[11] Abbate was an Instructor. *Her* interaction *as an Instructor* with a Marquette student who was disturbed and offended by her intolerant rejection of Catholic teaching and of its intelligent discussion led that student to seek assistance from a more mature and trustworthy Professor. Professor McAdams fulfilled his professional duty to prevent harm to students and Marquette by holding accountable a fellow teacher who was undermining Marquette's mission by dismissing Catholic teachings as

[11]The lower court mentioned on the first page of its D&O that Ms. Abbate was an Instructor, but the remainder of its analysis ignores this fact, not mentioning her professorial status again until page 28. The lower court disingenuously characterized the underlying encounter solely as "a graduate student … talking to a student after class." D&O at 26.

anachronistic and intimidating a student who sought to openly discuss and defend those teachings. The lower court ignored these critical facts. Marquette's self-serving misinterpretation of the contract on these issues is unreasonable and not entitled to deference or enforcement.

b. The "No Deference" Standard.

The lower court opined, "De novo review amounts to no deference and would render the Faculty Statutes and the hearing as required by the Faculty Statutes null and void." D&O at 13. The Supreme Court squarely rejects this reasoning:

> [I]n a no deference review of an agency's statutory interpretation, the reviewing court merely benefits from the agency's determination and may reverse the agency's interpretation even when an alternative statutory interpretation is equally reasonable to the interpretation of the agency.

Racine, 292 Wis. at 566.

The "no deference" agency review standard is the most analogous given the relative expertise of the President and the courts. The FHC violated the rule that the plain meaning of contractual language must be enforced as the expression the parties' intent. *See Tufail v. Midwest Hosp., LLC*, 348 Wis. 2d 631, 643 (2013); *Columbia Propane, L.P. v. Wisconsin Gas Co.,* 261 Wis.2d 70, 85 (2003). Instead, it concluded that the contract's protection of

Professor McAdams' Free speech rights had no meaning at all, *because the FHC found Free speech law difficult to understand*. FHC Report at 118-20.

This also violated the fundamental precept that every term in a contract should be given meaning and not rendered nugatory. *Kasten v. Doral Dental USA, LLC*, 301 Wis. 2d 598, 628 (2007). The two independent protections should instead be harmonized and given effect.[12] *Id*. Marquette's self-serving interpretation is not one that any court should tolerate, much less one to which it should defer. These legal errors are critical, given that the Faculty Statutes provide that Professor McAdams' exercise of his free speech rights preclude dismissal for discretionary cause. *See* D&O at 27.

CONCLUSION

For the reasons above, *Amici Curiae* respectfully request that this Honorable Court reverse the ruling of the lower court.

[12]Academic freedom exists to further the search for truth through vigorous open inquiry, discourse, and debate. *See, e.g.*, *Healy*, 408 U.S. 180. It is logical, then, to understand that free speech protections should be greater in an *academic* employment context than they might otherwise be. Liberty in speaking means a greater and more robust search for truth. Academic freedom reasonably enhances free speech rights rather than cancels them out, which is what Marquette and the lower court erroneously found.

Respectfully submitted this 15th day of February 2018.

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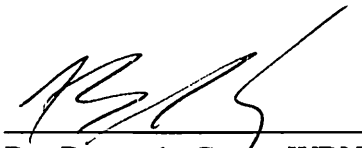
February 15, 2017.

Bernardo Cueto



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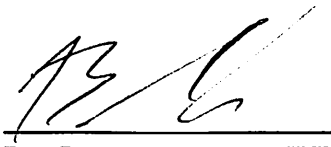
February 15, 2017.

Bernardo Cueto



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