No. 17AP1240

In the Supreme Court of Wisconsin

JOHN MCADAMS,
PLAINTIFF-APPELLANT,

v.

MARQUETTE UNIVERSITY,
DEFENDANT-RESPONDENT

On Appeal From The Milwaukee County Circuit Court, The Honorable David A. Hansher, Presiding, Case No. 16-CV-003396

NON-PARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF JOHN MCADAMS

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INTRODUCTION

This case offers the Court an opportunity to guarantee academic freedom in Wisconsin and to adopt a comprehensive doctrinal framework for First Amendment academic-speech claims. *See* A.139–40 (adoption of First Amendment safeguards in Marquette University's faculty statutes). This Court should hold that the Constitution generally protects academic expression that touches upon matters of public concern—including speech about the basic purposes of postsecondary teaching—and that a university subject to the First Amendment cannot take adverse employment action against such a speaker unless its interest in promoting workplace efficiency both outweighs the employee's considerable free-speech interests and required nothing less than the particular adverse employment action that it undertook. Under this test, Professor John McAdams should prevail.

STATEMENT OF INTEREST

The State of Wisconsin runs a statewide university system comprising over 175,000 students and 39,000 faculty and staff. *See* University of Wisconsin System, *What Is the UW System*, https://www.wisconsin.edu/about-the-uw-system/ (last visited Feb. 26, 2018). The University of Wisconsin "has a longstanding tradition of support for academic freedom, dating back to 1894 and the famous 'sifting and winnowing' statement contained in the University [o]f

Wisconsin Board [o]f Regents' Final Report on the Trial of Richard Ely." University of Wisconsin Regent Policy Document 4-21, *Commitment to Academic Freedom and Freedom of Expression* (Oct. 6, 2017), https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression (last visited Feb. 26, 2018). Although Marquette University is a private institution, it has chosen to afford First Amendment protections to faculty. A.139–40. The State of Wisconsin therefore has a direct interest in any doctrinal framework that this Court may wish to adopt for academic-speech cases.

ARGUMENT

I. The First Amendment Protects Academic Speech Related To Scholarship Or Teaching

The principle of academic freedom—that teachers and scholars should be "protect[ed] . . . from hazards that tend to prevent [them] from meeting [their] obligations in the pursuit of truth"—is fundamental to the Western and American tradition. Russell Kirk, *Academic Freedom: An Essay in Definition* 1, 139 (1955) (quotation marks omitted). Martin Luther King, Jr., traced its history back to Socrates. Martin Luther King, Jr., "Letter from Birmingham Jail" (Apr. 16, 1963), in Martin Luther King, Jr., *The Autobiography of Martin Luther King, Jr.* 194 (1998). It gained strength with the Enlightenment's "new attitudes toward knowledge," which supported the "independen[t]" pursuit of learning fostered by universities. Matthew W. Finkin & Robert C.

Post, *For the Common Good: Principles of American Academic Freedom* 21 (2009). And it took roots in the American continent in the eighteenth century, most clearly in Thomas Jefferson's founding vision of the University of Virginia, established "to follow truth wherever it may lead." University of Virginia, *Comprehensive Standards 3.7.4: Academic Freedom*, http://www.virginia.edu/sacs/standards/3-7-4.html (last visited Feb. 26, 2018) (citation omitted). By the nineteenth century, American scholars understood academic freedom to protect their "right to express their opinions even outside the walls of academia, even on controversial subjects." Geoffrey R. Stone, *A Brief History of Academic Freedom*, in Bilgrami & Cole, eds., *Who's Afraid of Academic Freedom?* 5 (2015).

The U.S. Supreme Court has made clear that the First Amendment protects academic freedom. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 Yale L.J. 251, 252 (1989); Rodney A. Smolla, 2 *Smolla and Nimmer on Freedom of Speech* § 17:31.50. In 1957, the Court called the "essentiality of freedom in the community of American universities . . . almost self-evident," concluding that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Ten years later, the Court again stressed that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us

and not merely to the teachers concerned." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Hence this right is "a special concern of the First Amendment." *Id.*; *see also Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *Rust v. Sullivan,* 500 U.S. 173, 200 (1991).

Invoking those cases, courts and respected jurists across the country agree that the core of constitutional academic freedom is the right of faculty "to disseminate publicly [their] views as . . . teacher[s] or scholar[s]." *Omosegbon v. Wells*, 335 F.3d 668, 677 (7th Cir. 2003); *see Wagner v. Jones*, 664 F.3d 259, 269 (8th Cir. 2011); *Urofsky v. Gilmore*, 216 F.3d 401, 435 (4th Cir. 2000) (Wilkinson, C.J., concurring in the judgment); *cf. Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 15 (D.C. Cir. 2008) (Edwards, J., concurring). The defense of this right is especially urgent when such views "fall outside the mainstream." *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010). After all, "intellectual advancement has traditionally progressed through disc[ord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular." *Id.* Universities—"sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale." *Id.* Accordingly, "the desire to maintain a sedate academic environment . . . [does not] justify

limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." *Id.* at 708–09 (citation omitted). While this right does not at all "place restrictions on a public university's ability to control its curriculum," *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998), or "to regulate the content of what is or is not expressed when it is the speaker" in general, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833–34 (1995), or to evaluate teachers, *see* Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. Chi. L. Rev. 1055, 1068–69 (2010), it does constrain a university's ability to retaliate against academic speech on matters of public concern outside the classroom, *see* Vikram Amar & Alan Brownstein, *Academic Freedom*, 9 Green Bag 2d 17, 25 (2005). "No citizen can be punished for writing a book that angers the state legislature—no matter how outrageous or offensive the book might be," and teachers at universities should be no exception. *Id.*

II. In Academic-Speech Cases, This Court Should Apply The Pre-*Garcetti* Version Of The *Pickering-Connick* Test

To determine whether a state employee has been "impermissibl[y] discipline[d] for exercising his freedom of speech," this Court and others ordinarily "undertake[ ] a four-step analysis." *Burkes v. Klauser*, 185 Wis. 2d 308, 324, 517 N.W.2d 503 (1994). The first two steps, which make up the *Pickering-Connick* test, begin by asking whether the

employee spoke "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Burkes*, 185 Wis. 2d at 324–25. If the speech touches upon matters of only personal interest, then it is usually unprotected. *Burkes*, 185 Wis. 2d at 324–25. If, on the other hand, "the employee was speaking on a matter of public concern, the court must then balance the employee's interests in making the statement against the public employer's interest" in the adverse employment action that it undertook. *Burkes*, 185 Wis. 2d at 324–25 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). If the *Pickering* balancing favors the speech, then, proceeding to the third step, "the employee must . . . prove that the protected speech was a motivating factor in th[e] detrimental employment decision." *Burkes*, 185 Wis. 2d at 325 (quotation marks omitted) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977)). And, fourth, "[i]f the employee proves the motivating factor, the burden then shifts to the public officials to show by a preponderance of the evidence that they would have reached the same decision in the absence of the protected speech." *Burkes*, 185 Wis. 2d at 325 (citing *Mt. Healthy*, 429 U.S. at 287).

The U.S. Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), altered this analysis, particularly the *Pickering-Connick* half of the framework. *See Demers v. Austin*, 746 F.3d 402, 410 (9th Cir. 2014). Moving

away from the distinction between speech "as a citizen" and speech "as an employee," the Court adopted an "official duties" test: "[W]hen public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421 (emphasis added). Because the plaintiff in that case did not act "as a citizen" when "writing a memo that addressed the proper disposition of a pending criminal case," just as he did not act as a citizen "when he went about conducting his [other] daily professional activities," the First Amendment did not protect him. *Id.* at 422.

Yet "*Garcetti* left open the possibility of an exception" to its official-duties test. *Demers*, 746 F.3d at 411. This was in response to Justice Souter's dissent, which raised a concern about the scope of the Court's new rule: "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). Seemingly just as troubled by this prospect, the Court exempted academic speech from its sweeping holding, recognizing "some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that

are not fully accounted for by this Court's [doctrine]." *Id.* at 425 (majority op.).

Seizing on this caveat, some courts correctly have held that the "official duties" test does not apply to academic speech and that, instead, "academic employee speech" is subject to the *Pickering-Connick* framework. *Demers*, 746 F.3d at 412; *see also Adams v. Trs. of the Univ. of N.C.–Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011). As the leading case explains, "teaching and academic writing are at the core of the official duties of teachers and professors." *Demers*, 746 F.3d at 411. Hence "if applied to . . . academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* Indeed, "[f]ar from having *greater* protection for their speech than the average citizen under the rubric of academic freedom, . . . education workers [under *Garcetti*] would actually have much, much *less*. Most citizens do not risk their livelihood when they publish articles or books or speak out on public issues." Vikram David Amar & Alan E. Brownstein, *A Close-Up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 Minn. L. Rev. 1943, 1974 (2017). On the other hand, all agree that academic speech that does *not* bear on a matter of public concern is unprotected, and so public universities are generally free to restrict it. *See infra* pp. 9–10.

III. Marquette Violated McAdams' Academic Freedom

A. McAdams' Speech Is Protected Because It Addressed A "Matter Of Public Concern"

Courts have identified a few principles to guide *Pickering*'s first-step inquiry into whether academic speech relates to "a[ ] matter of political, social, or other concern to the community" and thus addresses a matter of "public concern." *Connick*, 461 U.S. at 146. For one thing, "protected academic writing is not confined to scholarship." *Demers*, 746 F.3d at 416; *see* Huq, *supra*, at 1060 (describing typical fora for professor speech, including "the increasingly common blog"). Second, the "manner in which" the speech is "distributed" bears on whether it is of public concern. *Demers*, 746 F.3d at 416. To illustrate, speech is more likely to be protected if it is "posted . . . on [the professor's] website, making it available to the public." *Id.* Third, and most obviously, "not all speech by a teacher or professor" meets this standard. *Id.* at 415. The academy is no stranger to personal grievances and intramural turf wars. That these protests might involve speech by professors—even speech arguably related to scholarship or teaching—does not, however, make them a concern of the Constitution. An instructor's objection to curricular changes, for example, might be nothing more than "a classic personnel struggle—infighting for control of a department—which is not a matter of public concern." *Brooks v. Univ. of Wis. Bd. of Regents*, 406 F.3d 476, 480 (7th Cir.

2005); *see also Clinger v. N.M. Highlands Univ., Bd. of Regents*, 215 F.3d 1162, 1166 (10th Cir. 2000); *Goffer v. Marbury*, 956 F.2d 1045, 1050 (11th Cir. 1992). Still, courts should "hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego." *Demers*, 746 F.3d at 413. For example, while some might dismiss as petty a fight over which works "should have pride of place in [an English] department's curriculum," those observers would miss "the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied." *Id.*

Clarifying the analysis, several cases have adopted a blanket rule that *all* academic speech about "the basic functions and missions of the university" addresses a matter of public concern. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1263 (10th Cir. 2005) (citation omitted); *see also, e.g.*, *Demers*, 746 F.3d at 416–17. Courts have derived this proposition from *Pickering* itself. There, administrators disciplined a teacher for writing a letter to a newspaper that critiqued the operation and budget of the school district. *Id.* at 412. The Court had little trouble concluding that since the letter addressed "the preferable manner of operating the school system," it "clearly concern[ed] an issue of general public interest" and therefore fell within the First Amendment's defenses. *Pickering*, 391 U.S. at 571.

Under this rule, McAdams' public speech on whether alternative viewpoints on a moral question should be open for discussion in a basic course on ethics is clearly protected. A.134–37. Far from a "mere squabble" over the meaning of an esoteric text, McAdams' critique offered a perspective on the purpose of higher education in a free society. *See Demers*, 746 F.3d at 413. Since it addressed "the basic functions and missions of the university," it "f[e]ll well within the rubric of 'matters of public concern.'" *Schrier*, 427 F.3d at 1263; *see also Pickering*, 391 U.S. at 571.

B. Marquette Has Not Shown That Its Claimed Interests As Employer Outweigh The Rights Of McAdams And Required His Termination

Proceeding to the second step under *Pickering-Connick*, a court must determine whether the employee's interest "in commenting upon matters of public concern" outweighs "the interest [of the] employer"—if any—"in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142, 146.

Several principles inform the proper application of this standard in the academic setting. First, to test whether the university's asserted interest is mere pretext concealing a desire to retaliate against the speech, courts should be particularly attuned to whether the university had articulated ex ante limitations on the kind of speech at issue: "[U]nlike conventional free speech orthodoxy which is

suspicious of all content-based regulations and supports after-the-fact sanctions over prior restraints . . . [public university] restrictions on teacher speech should emphasize substantial before-the-fact control, while curtailing the availability of after-the-fact sanction." Amar & Brownstein, 9 Green Bag 2d at 24. Second, for the same reason, courts should consider not merely whether the employer's asserted interest outweighs that of the employee but also, and more precisely, whether the asserted interest in fact *required* the specific adverse employment action that the employer undertook—and no less. *See Dixon v. Kirkpatrick*, 553 F.3d 1294, 1304, 1309 (10th Cir. 2009) (holding that termination was "necessary" to prevent the harm caused by the protected speech); *accord Pickering*, 391 U.S. at 574 ("[T]he threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."). Third, since the determination that the academic speech satisfies the "public concern" test triggers a heightened form of scrutiny, broad deference to the employer is generally inappropriate. *See Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002) ("[*Pickering* step two] is not like 'rational basis' review . . . ."). Fourth, "[t]he greater the component of comment on issues of public concern, the greater the showing the government must make that the comment is disruptive." Nimmer & Smolla, *supra*, at § 18:18 (citation omitted); *see also Porter v. Dawson Educ. Serv. Co-op.*, 150 F.3d 887, 893 (8th Cir. 1998) (employer's burden).

The circuit court's decision does not withstand scrutiny under this standard. Not only did it incorrectly defer to Marquette's conclusion that its interests outweighed those of Professor McAdams, A.107–116, but it also failed to explain how Marquette's asserted interests required the *termination* of the Professor rather than a more modest, tailored means of discipline. *See Pickering*, 391 U.S. at 574 ("[I]n a case such as this . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."). In addition, the court failed to appreciate the significance of Marquette's concession that it had not issued "explicit" "before-the-fact" restrictions on public speech critical of a co-instructor's approach to classroom discussion on an important topic, Amar & Brownstein, 9 Green Bag 2d at 24. *See* A.126. It is clear, given that McAdams spoke directly and openly on a matter of high public concern, that Marquette cannot make the requisite "greater . . . showing" that terminating McAdams' employment was necessary to support its administrative interests. Nimmer & Smolla, *supra*, § 18:18.

CONCLUSION

The decision of the circuit court should be reversed.

Dated: February 27, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated: February 27, 2018.

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RYAN J. WALSH
Chief Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: February 27, 2018.

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