RECEIVED
03-07-2018
CLERK OF SUPREME COURT
OF WISCONSIN

Appeal No. 2017AP001240

**IN THE
WISCONSIN
SUPREME COURT**

JOHN McADAMS,

Plaintiff-Appellant.

-vs.-

MARQUETTE UNIVERSITY,

Defendant-Respondent.

On Review from the Circuit Court of Milwaukee, Wisconsin,
Case No. 2016 CV 003396.
The Honorable David A. Hansher Presiding.

BRIEF OF THOMAS MORE SOCIETY, AS *AMICUS CURIAE*, IN SUPPORT OF JOHN McADAMS, PLAINTIFF-APPELLANT

THOMAS MORE SOCIETY
Andrew Bath, Esq.
WBN 1000096
19 South LaSalle Street, Suite 603
Chicago, IL 60603
(312) 782-1680
abath@thomasmoresociety.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions

Cases

Statutes

Articles

Books and Other Authorities

INTEREST OF THE AMICUS CURIAE

The Thomas More Society is a non-profit, national public interest law firm whose mission is the defense of First Amendment rights, including freedom of speech and religious freedom. It accomplishes its mission through litigation, education, and related activities. It has represented many individuals and groups in the courts of this nation, and filed many *amicus curiae* briefs, all with the aim of protecting the rights of individuals and groups to freely exercise their right to speak and to practice their religions as guaranteed by the First Amendment.

INTRODUCTION

This case affords this Court with an opportunity to confirm the bedrock principles of constitutional law which the U.S. Supreme Court has forged and re-emphasized during times of crisis and conflict in our nation's history. For example, during World War II, the Court struck down a law compelling saluting and pledging allegiance to the flag, proclaiming,"[i]f 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 or force citizens to confess by word

or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Again, in the crucible of the Cold War, the Court reinforced those constitutional principles by nullifying a law requiring university professors to certify that they were not communists, emphasizing that "academic freedom" is "of transcendent value to all of us, not merely to the teachers concerned," and that the First Amendment prohibits laws that would "cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

We are living in a time of cultural conflict in which constitutional principles enshrining freedom of expression are again threatened. Author James Davison Hunter famously observed in 1991 that our nation is embroiled in "culture wars" over the definition of family, education, law and politics.[1] Others have offered their own accounts of these culture wars,[2] and news reports daily confirm their ongoing fact and fury. Ideological conflicts are being waged with

[1] James Davison Hunter, *Culture Wars: The Struggle to Define America*, (Basic Books 1991).

[2] See, e.g. Andrew Hartman, *A History of the Culture Wars: A War for the Soul of America*, (University of Chicago Press 2015); *Kill All Normies: Online Culture Wars From 4Chan and Tumblr to Trump and the Alt-Right*, Angela Nagle (Zero Books, 2017).

particular ferocity on college campuses, where dissent from opinions deemed "politically correct" have been countered with speech codes, and unpopular speakers are silenced through actual or threatened mob action. Typical examples include the recent pillorying of Professor Amy L. Wax at the University of Pennsylvania Law School, and Larry Alexander of the University of San Diego Law School, for an op-ed they wrote,[3] and mob action to shut down speakers like Charles Murray and Alan Dershowitz.[4] Unless this Court follows the U.S. Supreme Court's example in upholding principles of free speech in times of trouble, McAdams will be the latest victim in an ongoing witch-hunt aiming to "prescribe what shall be orthodox . . . in . . . matters of opinion," *Barnette*, 319 U.S. at 642.

McAdams' comments protested the browbeating of an undergraduate student by his teacher after the teacher stifled

[3]See https://imprimis.hillsdale.edu/are-we-free-to-discuss-americas-real-problems (last visited February 11, 2018).

[4] See *e.g.*, P. Beinart, "A Violent Attach on Free Speech at Middlebury," available at: https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/ (last visited 2/13/18); see also, https://www.nytimes.com/2017/04/15/opinion/sunday/charles-murrays-provocative-talk.html (last visited 2/13/18); see also, http://www.businessinsider.com/alan-dershowitz-thinks-student-protesters-dont-want-true-diversity-in-colleges-2015-11 (last visited 2/17/18).

classroom discussion about the definition of marriage. Posting his comments on his personal blog, an online soapbox he erected to reach the browsing public, McAdams argued that the incident illustrated the disturbing "pall of orthodoxy" that oppresses higher education today. For those comments, Marquette stripped McAdams of tenure, the only professor it has so treated in its 135 year history. The pile of paperwork Marquette offers to justify its wrongdoing conjures Orwell's observation that, as rhetoric replaces reality, "a mass of…words falls upon the facts like soft snow, blurring the outline and covering up all the details."[5]

This Court should hold that Marquette breached its contract with McAdams, in which it promised to respect his "rights guaranteed by the United States Constitution." Those rights include the First Amendment right to speak as a private citizen on matters of public concern. The First Amendment protects dissenters like McAdams who refuse to parrot present orthodoxies. A decision for McAdams will likewise preserve the academic freedom of those who seek to educate - a process which requires vibrant discussion and debate of

[5] George Orwell, Politics and the English Language, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1945–1950 127 (Sonia Orwell and Ian Angus, eds., Harcourt, Brace 1968).

important matters of public interest, even when those matters touch upon controversial issues.

FACTUAL BACKGROUND

McAdams is a tenured professor at Marquette University. (R. 66:1) Marquette has contractually promised McAdams that it will not discharge him for his exercise of "rights guaranteed by the United States Constitution." Faculty Statute §307.07(2). (R. 57:8; P. App. 137) McAdams' speech was on his own blog (R. 66:2), where he conveyed his personal views about the browbeating a Marquette undergraduate, after defending traditional marriage, received from his teacher. McAdams expressed his concern that the dismissive treatment the undergraduate student received was all too typical in the modern university. (R. 66:4-7; P. App. 142-145) In expressing his views, McAdams was speaking as a private citizen about a matter of public concern: what he viewed to be the disturbing close-mindedness and intolerance displayed by some faculty members and students at institutions of higher learning that seeks to foreclose any discussion or debate of viewpoints deemed not "politically correct."

Notably, this case does not involve McAdams' speech in the classroom, or his speech as a representative of Marquette. Nor at issue are McAdams' views advanced in bona fide academic scholarship as a Marquette University faculty member. Rather, this case concerns solely McAdams' speech criticizing post-secondary education at Marquette and other institutions of higher learning throughout this nation. Such speech is quintessential expression by a private citizen on a matter of public concern. *See, e.g. Snyder v. Phelps*, 562 U.S. 443 (2011). As punishment for his speech about such matters of public concern, Marquette stripped McAdams of tenure and refuses to reinstate him unless he apologizes for that speech. (R. 3:2; 4).

ARGUMENT

Marquette contractually promised it would not penalize McAdams for his exercise of "rights guaranteed by the United States Constitution." That promise limits Marquette's treatment of McAdams in three important ways. First, Marquette may not use vague and subjective policies, including policies regarding "care of the person," to burden McAdams' well-defined right under the U. S. Constitution to free speech. Second, Marquette may not retaliate against

McAdams by stripping him of his contractual rights because he exercised his right of free speech. Third, Marquette may not condition McAdams' reinstatement on his giving up his right to free of speech. As demonstrated below, Marquette's action against McAdams violates each of these limitations.

I. Marquette Does Not Have A Contractual Right To Burden McAdams' First Amendment Rights.

Marquette's treatment of McAdams implicates a body of established precedent, crafted in 1950s, that rejected laws enacted to restrict academics' ability to engage in free speech and association. While the laws were justified by proponents as essential to protect education from Communist infiltration, the U.S. Supreme Court consistently found those laws to violate "rights…guaranteed…by the Constitution of the United States," because they operated to punish professors for nothing more than their beliefs, speech, or association. McAdams is entitled to the protection of these precedents.

For example, in *Wieman v. Updegraff*, 344 U.S. 183 (1952), the Court held unconstitutional a state law requiring a faculty member to take a loyalty oath in order to teach at a state college. *Id.* at 184. In the Court's view, the state statute penalized the faculty member based on membership in an

organization holding controversial views, regardless of whether the faculty member himself knew of or endorsed any illegal objective of the organization. *Id.* at 190-191. The Court reasoned that "[t]o thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." It held that the punishment of innocent association was an "assertion of arbitrary power," that "offend[ed] due process." *Id.* at 191.

Five years later, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the U.S. Supreme Court again addressed efforts to penalize an academic for controversial views and associations. The Court reversed Sweezey's contempt conviction for failing to answer questions about his political associations, his statements during guest-lectures at the University of New Hampshire, and his political beliefs. *Id.* at 238-245. Emphasizing Sweezey's roles as an academic and as a private citizen, the Court noted, "[h]istory has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices

would be a symptom of grave illness in our society." *Id.* at 255. The Court reversed the conviction as inconsistent with due process. *Id.* at 255.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court confronted a state statute requiring every teacher, as a condition of employment, to file an affidavit listing every organization to which he or she had belonged or regularly contributed in the preceding five years. Although the case concerned teachers and the Court recognized the importance of academic freedom, perhaps the most striking feature of the case was the Supreme Court's decision to place its discussion within the broader context of free speech, thought, assembly and association. *Id.* at 485-89. It quoted *Wieman*, *supra*, for the broad proposition that "[b]y limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, *no matter what their calling*." *Id.* at 487. (emphasis supplied). The Court reaffirmed its observation in *Wieman* that:

> in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights … inhibition of freedom of thought, and of action upon thought, in the case of

> teachers brings the safeguards of those amendments vividly into operation.

Id. The Court struck down the statute on the ground that its "comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

Finally, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the State of New York conditioned renewal of contracts at the State University of New York on a certificate that a faculty member was not, and had never been, a member of the Communist Party. *Id.* at 597-596. Citing *Shelton* as well as *Sweezy*, *supra*, the Court observed:

> [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. 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.

Id. at 603. The Court emphasized that "standards of permissible statutory vagueness are strict in the area of free expression," *id*. at 604, and held that the statute lacked the required precision of regulation.

Marquette's contractual promise not to take adverse action against McAdams for his exercise of "rights

guaranteed by the United States Constitution" is controlled by these precedents, which define the rights McAdams enjoys under the First Amendment. Any other interpretation of the contract would render the University's contractual promise a nullity. In accordance with these precedents, Marquette had no contractual right to burden McAdams' speech by requiring him to conform to vague and subjective standards such as the requirement to give sufficient "personal attention and care to each member of the Marquette community" (P. App. 128, citing Faculty Hearing Committee "FHC" Report at 76-77). Simply put, Marquette was not entitled, under its contract with McAdams, to ignore the First Amendment protection McAdams' speech enjoyed, and to apply its own contrary subjective evaluation of the merits of McAdams' speech as a basis for punishing him. Doing so violated the contract.

II. Marquette May Not Use Its Contract To Retaliate Against McAdams For Exercising His First Amendment Rights.

Marquette stripped McAdams of tenure for his blog post, and in doing so it violated its contract with McAdams. In *Perry v. Sinderman*, 408 U.S. 593 (1972), the U.S. Supreme Court emphasized that its earlier decisions prevented state institutions from retaliating against academics who

exercise their right to free speech on matters of public concern. In that case, an untenured professor alleged that his contract was not renewed because he opposed positions taken by the college administration. *Id*. at 598. The Court held that a professor who alleged even *de facto* tenure could advance a claim against a university for terminating him because he exercised his free speech rights. *Id.* The Court explained:

> For at least a quarter-century, this Court has made clear that … the government may not … deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. *Id.* at 597 (*citing Shelton* and *Keyishian, supra*).

As stated in *Perry*, the principle -- that one may not be denied a benefit on a basis that infringes upon their exercise of the freedom of speech -- applies to all citizens, not just academics. True to its word, the U.S. Supreme Court has applied this principle in contexts less august than academia. See *e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 715-717 (1996); *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674 (1996).

As required by the Court's decision in *Perry* and its progeny, Marquette's promise not to take adverse action against McAdams for his exercise of "rights guaranteed by the United States Constitution," prohibits it from stripping McAdams of his tenure as a consequence of his exercise of his First Amendment rights. Marquette claims that it is entitled to discharge McAdams because his published comments did not exhibit "personal attention and care to each member of the Marquette community." P.App. 128 (citing FHC at 76-77). Marquette's attempt to justify its action on the basis of an amorphous, high-sounding principle cannot hide the fact that, contrary to its contractual promise to McAdams, Marquette punished him because it disagrees with his private speech.

III. Marquette May Not Force McAdams To Forfeit His Contractual Right To Exercise His First Amendment Rights.

The principle at the heart of the above-cited cases also prevents government (and Marquette by reason of its contractual promise to McAdams), from coercing individuals to forfeit their constitutional rights as a condition to a contract. For example, in *Agency for International Development v. Alliance for Open Society International*, Inc.,

570 U.S. 205 (2013), the Court addressed a governmental grant program designed to combat sexually transmitted diseases. *Id.* at 208-210. Private organizations were invited to participate in the program based on their involvement with the issue of sexually transmitted diseases. *Id.* 209-210. But the government prohibited participation by groups that did not have a policy explicitly opposing specific practices, *e.g.*, prostitution (the "Policy Requirement.") *Id.* at 210. Alliance for an Open Society ("AOS") sued because it believed the Policy Requirement would reduce its ability to reach prostitutes who were at risk for disease and sex-trafficking. *Id.* at 210-211. AOS argued that a "condition that compels recipients to espouse the government's position on a subject of international debate could not be squared with the First Amendment." *Id.* at 212 (quotations omitted).

The U.S. Supreme Court agreed. Although the Court acknowledged the government had an unquestioned right to control how its funds were used (*Id.* at 213-14), it also acknowledged that, "[i]n some cases, a funding condition can result in an unconstitutional burden on First Amendment rights." *Id.* at 214. The Court held that the Policy Requirement violated the First Amendment because it

"compel[ed] a grant recipient to adopt a particular belief as a condition of funding." *Id.* at 218. Striking down the Policy Requirement, the Court explained the Policy Requirement impermissibly forced grant recipients to "pledge allegiance to the Government's policy." *Id.* at 220-21.

As this decision teaches, Marquette's promise to respect McAdams' exercise of "rights guaranteed by the United States Constitution," requires that it not compel McAdams to adopt a particular belief system, resulting in his forfeiture of his First Amendment rights. Marquette's effort to extract an apology from McAdams as a condition of his reinstatement was a blatant effort to do just that and therefore a breach of its contract with him.

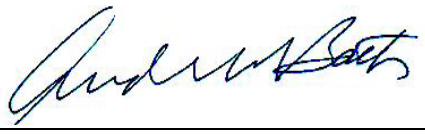
CONCLUSION

This Court should hold that when Marquette stripped McAdams of his contract right to tenure in order to punish him for his speech as a private citizen on a matter of public concern it deprived him of "rights guaranteed by the United States Constitution" and so breached its contract with him. The decision below should be reversed, and the Court should order the court below to enter judgment for McAdams as a matter of law.

Respectfully Submitted,

THOMAS MORE SOCIETY

By:

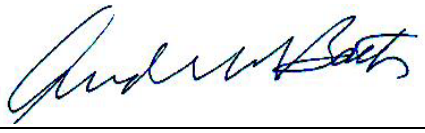


Andrew Bath, Esq. WBN 1000096
19 South LaSalle Street, Suite 603
Chicago, IL 60603
(312) 782-1680
abath@thomasmoresociety.org

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2961 words.

Dated this 7th day of March, 2018.



Andrew Bath, Esq. WBN 1000096

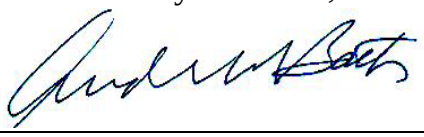
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief as filed.

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 this 7th day of March, 2018.



Andrew Bath, Esq. WBN 1000096