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**SUPREME COURT
STATE OF WISCONSIN**

Appeal No. 2017-AP-1240

JOHN MCADAMS,
Plaintiff-Appellant,

v.

MARQUETTE UNIVERSITY,
Defendant-Respondent.

On Appeal from the Circuit Court of Milwaukee County
Honorable David A. Hansher Presiding
Case No. 16-CV-003396

**BRIEF OF THE NATIONAL ASSOCIATION OF
SCHOLARS, EDWARD J. ERLER, DUKE PESTA, AND
MARK ZUNAC, AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT JOHN McADAMS**

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Introduction

Amicus National Association of Scholars is an nonprofit membership organization devoted to academic freedom. Edward J. Erler, Duke Pesta, and Mark Zunac are university professors. (See Appendix.) We submit this brief to rebut Marquette's false premise that university norms enforce a "safe space" for students which protects them against faculty criticism.

In American universities there is a long tradition of professors and administrators criticizing students for allegedly bigoted speech. Dr. McAdams, a political science professor, drew on that tradition in publishing his civil, factually accurate blog post about a philosophy graduate student instructor's alleged bigotry. He criticized her for calling an undergraduate "homophobic," and muzzling his in-class speech. He rebuked her department heads for tolerating such bigotry. In so doing, he helped equalize the power imbalance between an undergraduate and his instructor (and her department). He should not be fired for his criticism of alleged bigotry and academic silencing.

Background and Summary of Argument

In recent decades university campuses have become hotbeds of ideological controversy, especially regarding matters pertaining to personal identity. As students, professors, and administrators have grappled with issues of race, sex, sexual preference, and other core aspects of identity, complaints have been lodged against students for statements perceived as bigoted. Sometimes such claims come to public attention, leading various members of the university community — students, professors, and administrators — to weigh in on the side of the accuser, or of the accused. Often such controversies devolve into public shaming rituals coupled with a debate over whether those doing the shaming have gone too far in denouncing the target.

As demonstrated by **Part I-A**, it has long been accepted that when a student has openly engaged in speech that might plausibly be viewed as bigoted, there is no “safe space” for that student shielding the student from criticism. All members of a university community (including professors) have routinely commented on student speech of this nature.

Academic freedom to comment on such statements exists even when the accused student did not *intend* his or her statements to become publicly known, as shown in **Part I-B**. During the past several decades, often university students have been “outed” by fellow students for alleged bigotry reflected in private statements. Once a fellow student chooses to make an issue of previously private statements, others in the university community, including professors and administrators, have enjoyed the unfettered right to criticize the alleged bigotry.

This is such a case, as **Part II** summarizes. Dr. McAdams merely blogged about statements made by one student to a second student, which the second student independently elected to publicize to five professors and several national media outlets.

ARGUMENT

I. University Students Who Engage in Allegedly Bigoted Speech — Whether in Public or in Private — Have Long Been Subjected to Criticism by Professors and Administrators

Central to Marquette’s defense to the lawsuit brought by Dr. McAdams after it terminated him¹ is that the subject of his commentary, Cheryl Abbate, was not just the instructor in J.D.’s philosophy class, but also a Ph.D. student. Thus, Marquette emphasizes that Cheryl Abbate was “a female Marquette graduate student[]” who was “named” by Dr. McAdams in a blog post that was “drafted in a way to hold her up for public contempt” Marquette Br. at 1, 39. This, Marquette insists, “clearly violate[d] the professional norms of academia,” in particular, “a professor’s obligations to . . . students.” *Id.* at 48.

¹ Marquette’s letter of March 24, 2016 (R.4:10) stated that Dr. McAdams would not be permitted to teach again unless *within 10 days* he admitted violating his professorial obligations, thereby waiving his right to file a lawsuit. Marquette had bound itself by contract to First Amendment principles, and thus by attempting to coerce McAdams into waiving his First Amendment right to file a lawsuit (*e.g.*, *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983)), Marquette effected an outright termination. *See also* McAdams Br. at 36 n.12; R.66:21, 24.

Abbate had finished all her own coursework and had total authority over teaching this course, which she had taught several times. (R.34:92-97.) So to classify her as a “student” appears to be little more than a tactical move.² But even accepting this framing of the case, Marquette never demonstrates the *existence* of any professional norm that a professor must refrain from public criticism of a student not in his or her class, based on statements the student has made which have come to public light.³ For decades university professors and administrators have held up students to public contempt for allegedly bigoted speech activities, both when they speak out publicly and when they speak privately but are later “outed” by fellow students.

² A focus on Abbate’s “student” status appears to have originated with Brandon Buck, a Ph.D. student at Columbia University who wrote Dean Richard Holz early on: “You guys HAVE to stress and make abundantly clear that McAdams would not similarly be facing sanction if Abbate were a professor. Even if that’s not true, you need to say that.” R.56:26. Abbate apparently was amused that “everyone seems to think I was just the TA for this class” *Id.* at 31.

³ Obviously teaching professionals should refrain from public criticism of students who are, or have been, under their personal instruction or supervision. *E.g.*, *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 470-73 (3d Cir. 2015). Dr. McAdams adheres to this principle. *E.g.*, R.64:30 (no blogging about “students I had any relationship with whatsoever”); *id.* at 32 (“I never blog about students as students”). *See also id.* at 47-48, 55-56.

A. Condemnation of Students Who Publicly Engage in Allegedly Bigoted Speech

Just last year the chancellor of UW-Madison held up for public contempt an Hispanic student, Daniel Dropik, for allegedly bigoted speech activities.⁴ In 2016, Dropik published numerous blog posts setting forth concerns about the school's new "hate/bias" reporting system and the danger that, by encouraging students to report on each other anonymously, it would stifle free expression and harm race relations.⁵ In October, 2016, *College Fix* reported that UW administrators had repeatedly denied Dropik permission to post satirical flyers criticizing the "hate/bias" reporting system, as counterspeech to UW flyers urging use of the system.⁶

⁴ In a blog post Dropik mentioned his "Mexican and European heritage" (goo.gl/SzCvDt), and his LinkedIn profile (goo.gl/F5qe4G) indicated he'd received a scholarship for Hispanic students, under the Philip Arreola Scholarship Program (named for Milwaukee's first Hispanic police chief).

⁵ See, e.g., blog posts of Apr. 26, 2016 (goo.gl/XhGW5p), Sept. 20, 2016 (goo.gl/rWtv4e), Sept. 24, 2016 (goo.gl/fdt9Lc), Sept. 29, 2016 (goo.gl/S7Gwp6), Oct. 27, 2016 (goo.gl/Ttn3aB), and Oct. 31, 2016 (goo.gl/p2xUrJ).

⁶ Dr. Jason Morgan, "Student Denied Permission to Post Flyers Questioning UW-Madison's 'Orwellian Speech Policing,'" *College Fix*, Oct. 17, 2016 (<http://www.thecollegefix.com/post/29488>).

In a further effort to promote his message, in January, 2017, Dropik announced plans to form a student group to guard against anti-white abuse of the “hate/bias” reporting system.⁷ With no mention that Dropik was an Hispanic student, or that school officials had blocked his effort to publicize his concerns through flyers, the UW chancellor issued a press release villifying Dropik as some kind of white-supremacist hate-group leader, and stating that she was “heartened” that so many students had stated “their strong disagreement” with Dropik.⁸ Apparently only one student publicly criticized the chancellor for holding Dropik up to public contempt.⁹

⁷ E.g., Alice Vagun, “UW Student Wants to Bring Alt-right Movement to Campus,” *Badger Herald*, Jan. 24, 2017 ([goo.gl/8WqTsM](https://www.badgerherald.com/story/news/2017/01/24/uw-student-wants-to-bring-alt-right-movement-to-campus/351111000270001)); Noah Habenstreit, “Students Denounce Possible ‘Alt-right’ Movement on UW-Madison’s Campus,” *Daily Cardinal*, Jan. 25, 2017 ([goo.gl/TUJV9Z](https://www.dailycardinal.net/news/students-denounce-possible-alt-right-movement-on-uw-madison-s-campus/2017-01-25)).

⁸ “A Message from Chancellor Rebecca Blank,” Jan. 26, 2017 (<https://news.wisc.edu/a-message-from-chancellor-rebecca-blank>). Further, in a meeting with students, the chancellor repeatedly stated that she found Dropik’s words and actions “personally offensive.” Susan Maloney, “Blank Stands Her Ground on Confronting ‘Alt-right’ Movement,” *Badger Herald*, Feb. 1, 2017 (goo.gl/Bt6bFG).

⁹ Glenn Thurston, “Letter to the Editor: Founder of UW ‘Alt-right’ Doesn’t Deserve to be Vilified,” *Badger Herald*, Jan. 30, 2018 (goo.gl/LywUfv).

Many other universities have held students up to public contempt for speech viewed as bigoted.¹⁰ Indeed, “[m]ost of America’s elite universities today . . . are places where shaming rituals are conducted against ideological enemies.”¹¹ Examples:

● In 1987, James Taranto, a California student journalist, was suspended from his editorial position. His offense? Editorializing against officials at *another* college, who had suspended a student editor for criticizing affirmative action.¹²

● In 1988, a Washington State college suspended a student editor on a bigotry-by-inaction theory. The student’s offense? A “‘lack of coverage’ of ethnic and minority issues.”¹³

¹⁰ This is a core feature of campus leftism, animated by the “repressive tolerance” theory articulated in the 1960s by Herbert Marcuse, who argued that authentic “tolerance” requires that conservative views be repressed. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES* 68-71 (1998). On this view, “[i]t is now deemed necessary, even noble, to be intolerant in the cause of tolerance.” KIM R. HOLMES, *THE CLOSING OF THE LIBERAL MIND: HOW GROUPTHINK AND INTOLERANCE DEFINE THE LEFT* 92 (2016). Much of this intolerance is directed against Christians and Christianity. *Id.* at 85.

¹¹ *Id.* at 205.

¹² DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 144-45 (1991).

¹³ *Id.* at 145.

● In 1988, Dartmouth's president and at least one professor held the conservative editors of the *Dartmouth Review* up to public contempt, calling them racists. Their offense? Publishing an article documenting that in class sessions, a music professor who happened to be black had spent class time repeatedly criticizing the *Review* editors, even calling them "motherf**kers" and "c**ksuckers."¹⁴

● In 1989, Duke's president condemned articles written by a student magazine editor, Martin Padgett, criticizing Duke's food service. Padgett was accused of being racist (many food-service employees happened to be black) and he lost his position.¹⁵

● In 1995, the dean and many prominent professors at the University of Pennsylvania Law School threatened the student editors of the *Penn Law Forum* with dire consequences (including bar admission trouble) if they failed to condemn an article that had vulgarly satirized a popular female professor.¹⁶

¹⁴ Kors & Silvergate, *supra* note 10, 239-42.

¹⁵ *Id.* at 161.

¹⁶ *Id.* at 361-62.

B. Condemnation of Students Who Privately Engage in Allegedly Bigoted Speech

Nor, in American universities, is there any “safe space” for students who make allegedly bigoted statements *in private*, never intending wider circulation, or who do so anonymously. If a fellow student learns of allegedly bigoted speech and decides to make an issue of it, professors and administrators routinely criticize the alleged bigotry. This is how the campus “culture of victimhood” operates.¹⁷ Examples:

● In 1986, a conservative Christian student at Yale, Wayne Dick, was accused of being a homophobe, found guilty by administrators of harrassment and intimidation against gays, and put on two years’ probation. His offense? A week after gay students held their Gay and Lesbian Days (GLAD), he anonymously put up posters satirizing the GLAD posters, and

¹⁷ According to two sociologists who have studied the phenomenon, the “culture of victimhood” which “is currently most entrenched on college campuses” is “characterized by concern with status and sensitivity to slight combined with heavy reliance on third parties. People are intolerant of insults, even if unintentional, and react by bringing them to the attention of authorities or to the public at large.” Bradley Campbell and Jason Manning, *Microaggressions and Moral Cultures*, 13 COMPARATIVE SOCIOLOGY (Jan. 2014), at 692, 715 (goo.gl/D3dDtm).

was eventually “outed” for it.¹⁸

● In 1992, fifteen liberal Harvard Law School professors issued a letter criticizing several conservative editors of the *Harvard Law Review* (including Cedarburg native Paul Clement) as “misogynists,” and calling for an investigation.¹⁹ Their offense? They had helped put together a never-published parody issue of the *Review* which included a tasteless and mean-spirited piece satirizing a controversial feminist article which liberal editors had published over the conservatives’ strenuous objections.²⁰ The printed parody issue was only handed out at a private dinner

¹⁸ The parody posters advertised a schedule of activities for the fictitious Bestiality Awareness Days (BAD). Kors & Silverglate, *supra* note 10, at 148. *See also* Matthew Silversten, *What’s Next for Wayne Dick? The Next Phase of the Debate Over College Hate Speech Codes*, 61 OHIO ST. L.J. 1247, 1248-55 (2000).

¹⁹ ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL 253-55 (1994). One professor likened the students to Ku Klux Klan members. *Id.* at 229, 243-44. Another urged his colleagues “to withdraw letters of recommendation for clerkships” for the editors. *Id.* at 248.

²⁰ The feminist article being parodied was a “crude polemic” against the patriarchy, “full of raw profanity” (e.g., “f**k,” “c**t”), which the conservative editors believed “had undercut the prestige” of the *Review*. The parody was their retaliation. ANDREW PEYTON THOMAS, THE PEOPLE V. HARVARD LAW: HOW AMERICA’S OLDEST LAW SCHOOL TURNED ITS BACK ON FREE SPEECH 79-80 (2005). *See also* Kerlow, *supra* note 19, at 8, 27-30, 57-71, 174-75, 180-81, 193, 195-97.

(never published),²¹ but it, and eventually the identity of those who wrote it, were leaked by liberals seeking retribution.²² One professor even filed formal charges against the parody authors.²³

● In 1993, a Sarah Lawrence College student was branded a homophobe, put on social probation for a year, and ordered into a “reeducation” exercise (forced to watch a video and read materials on homophobia, and then write a paper). His offense? When one student called another a “faggot,” he laughed.²⁴

● In 2002, the dean of Harvard Law School “emphatically condemn[ed]” the “appalling” conduct of a 16-year-old student (the youngest in the school’s history), Kiwi Camara.²⁵ His offense? In notes he’d taken for property class, he’d used racially insensitive shorthand. After Camara uploaded the notes to an outline bank for others’ use (after being encouraged to do so), a

²¹ *Id.* at 188, 197-98.

²² *Id.* at 181, 199-202, 211-13, 216-17, 220, 223.

²³ *Id.* at 255-56; Kors & Silvergate, *supra* note 10, at 152.

²⁴ *Id.* at 153-54; “Free Speech Woes at Sarah Lawrence,” *N.Y. Times*, Dec. 13, 1993 (goo.gl/o1rJQQ).

²⁵ Thomas, *supra* note 20, at 86.

black student had complained to him. Camara immediately deleted the notes but, unsatisfied with that resolution, the Black Law Students Association insisted on him being censured.²⁶

● In 2007, an Indiana university work-study student was charged with racial harassment. His offense? A co-worker complained that during a break he'd read a book celebrating the defeat of the KKK in a 1924 street fight at Notre Dame. The black co-worker said the book's cover offended him.²⁷

● In April, 2010, Harvard Law School's dean publicly denounced a top student, Stephanie Grace (a *Law Review* editor who would soon begin a prestigious clerkship), as a bigot who had supposedly "suggested that black people are genetically inferior to white people." In fact, Grace had merely stated, months earlier in a private e-mail sent to two friends, that she had an open mind

²⁶ *Id.* at 3-6, 43, 66, 165-66. See also Jason L. Steorts, "Shades of Offense," *Harvard Crimson*, Apr. 26, 2002 (goo.gl/cFjJsN).

²⁷ GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 47-48 (2012); Keith John Sampson, "My 'Racial Harassment' Nightmare," *N.Y. Post*, May 9, 2008 (goo.gl/oblcr7); "University Says Sorry to Janitor Over KKK Book," *Associated Press*, July 15, 2008 (<http://archive.is/9ZYlj>).

regarding what science might discover regarding genetics and race, including the influence of genetics on intelligence.²⁸ The e-mail apparently was leaked in revenge for a personal slight.²⁹

II. Dr. McAdams Violated No University Norm Protecting Students — He Merely Blogged About Statements One Student Made to a Second Student, Which the Second Student Independently Publicized to Five Professors and Several National Media Outlets

This is a typical case (see note 17, *supra*) in which one student elected to “out” another student for alleged bigotry, by reaching out to professors and the media.

An undergraduate student, “J.D.,” believed that in an after-class discussion a graduate student instructor in the philosophy department, Cheryl Abbate, had called him homophobic and barred him from discussing same-sex marriage in class simply because, holding traditional Roman Catholic

²⁸ Adam Kissel, “Minority Views Unsafe at Harvard Law; Dean Betrays Marketplace of Ideas,” *TheFire.org*, Apr. 30, 2010 (goo.gl/zwvRSK); Eugene Volokh, “2. The Response by the Dean of Harvard Law School to the Student’s E-Mail,” *The Volokh Conspiracy*, Apr. 30, 2010 (goo.gl/FS9qp5).

²⁹ David Lat, “The Harvard Email Controversy: How It All Began,” *Above the Law*, May 3, 2010 (goo.gl/ntNf3R).

views, he opposes same-sex marriage.³⁰ Abbate says J.D.

misunderstood her statements. In particular, she insists she didn't say, or even imply, that J.D. is homophobic.³¹

Evidence suggests otherwise.³² But whatever actually happened between the two, J.D. *believed* that Abbate had made bigoted statements, and he wanted to ensure other students would not be mistreated, so he disclosed what Abbate had said, to five professors and several national media outlets.³³ The national media outlets covered the story, causing nearly all the blowback

³⁰ McAdams Br. at 9-10; R.33:98-110; R.58:19-21.

³¹ R.34:51-56, 60-62, 65-66, 75-76, 98-106, 110-13; R.57:2, 4, 10, 13-15; R.58:37-38.

³² E-mails exchanged between Abbate and fellow leftists suggest that Abbate — a non-Catholic, vegan, feminist animal-rights scholar — is partial to calling white male conservatives “homophobic.” *E.g.*, R.55:4 (“creepy homophobic person”); R.55:6 (“homophobic idiot”). Apparently Abbate and her allies are uncomfortable with the many Catholics at Marquette, one remarking: “90% of Marquette students are extremely wealthy white conservative Catholics who don’t want their simplistic moral views or their position of privilege challenged.” R.56:10. If they are indeed bigoted against Catholics — with bigotry defined as “a negative bias against persons based on their association with a group that is negatively stereotyped,” Holmes, *supra* note 10, at 102 — they are hardly alone. Such bigotry is endemic on the left. *Id.* at 101, 105.

³³ R.58:32; McAdams Br. at 10-12.

suffered by Abbate.³⁴ None of the professors took J.D. seriously except Dr. McAdams, who wrote a blog post summarizing what Abbate had told J.D. In it, he identified Abbate by name, as he had routinely done in earlier blog posts criticizing members of the Marquette community (including students).³⁵

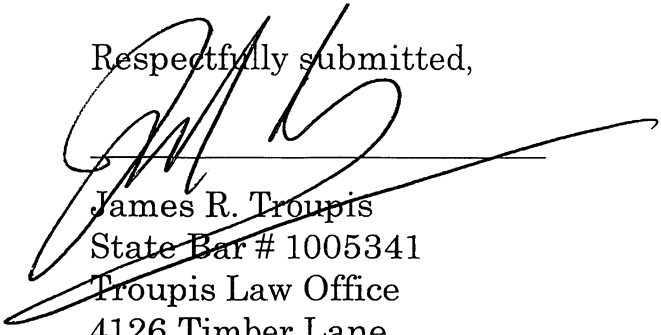
Conclusion

Even if Abbate is considered a “student” (but see p. 5 & note 2, *supra*), no norm protecting students from criticism by professors exists. Marquette cites no precedent for terminating a tenured professor merely for criticizing a student who has been publicly “outed” by a fellow student for allegedly bigoted statements. Instead it seeks to invent a new norm, “in an attempt to fabricate a loophole in the doctrine of academic freedom” (R.53:6, ¶ 31.) Wisconsin has long been a leader in protecting academic freedom for professors. This Court should uphold that tradition by rendering judgment in favor of Dr. McAdams.

³⁴ McAdams Br. at 13-16.

³⁵ *Id.* at 30, 34-35; R.33:115-17, 128-34, 142-53.

Respectfully submitted,



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February 27, 2018

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**Certificate of Compliance
With Section 809.19(8)(b) & (c)**

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) & (c) for a brief produced with proportional serif font. This brief is 2,997 words, calculated using the word count function of WordPerfect 12.

Dated: February 27, 2018


Kenneth Chesebro

APPENDIX

Qualifications of *Amici Curiae*

National Association of Scholars is a nonprofit membership organization comprised of scholars and citizens united by their commitment to academic freedom, disinterested scholarship, and excellence in American higher education. It publishes a journal and has state and regional affiliates. More information is available at <https://www.nas.org/about/overview>.

Edward J. Erler is Professor of Political Science (Emeritus) at California State University, San Bernardino, and a Senior Fellow of the Claremont Institute for the Study of Statesmanship and Political Philosophy. His many works on constitutional law and on the history of the American political system include *THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA* (2007) (coauthor); and *THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT* (1991). Professor Erler received his B.A. from San Jose State University and his M.A. and Ph.D. in government from the Claremont Graduate School.

Duke Pesta is an Associate Professor of English at the University of Wisconsin — Oshkosh, where he teaches Shakespeare and Renaissance literature, among other subjects. Before receiving tenure at UW-Oshkosh he taught both at major research institutions (Purdue University and Oklahoma State University) and small liberal arts colleges (e.g., Ursinus College), on a wide variety of subjects at the graduate and undergraduate levels, receiving numerous teaching awards. His most recent publications include *THE RENAISSANCE AND THE POSTMODERN: A STUDY IN COMPARATIVE CRITICAL VALUES* (2016); and “*Deeper Reasons*”: *The Politicization of Academic Publishing*, 30 *ACADEMIC QUESTIONS* 335 (2017). He is perhaps best known nationally for his role opposing Common Core, having testified

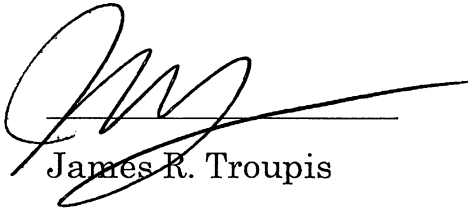
before several state legislatures, delivered over 500 talks in 46 states, and participated in thousands of radio, television, and online media interviews. Videos featuring him (collected on Youtube at goo.gl/JUJZsY & goo.gl/1wBc9N) have garnered millions of views. Professor Pesta received his B.A. and M.A. from John Carroll University and his Ph.D. from Purdue University.

Mark Zunac is an Associate Professor of English at the University of Wisconsin — Whitewater, where he teaches eighteenth and nineteenth-century British literature, and multiple levels of composition. His research interests include the rise of intellectual conservatism in Britain following the French Revolution, and the state of the American academy and how the liberal arts might be preserved as a means of sustaining and extending human freedom. His most recent publications include *LITERATURE AND THE CONSERVATIVE IDEAL* (2016) (ed.) and *Radicalism's Yield: Politics and the Illiberal Academy*, 29 *ACADEMIC QUESTIONS* 428 (2016). He is a member of the National Association of Scholars and Heterodox Academy, organizations dedicated to the free exchange of ideas and the unimpeded pursuit of truth in academia. Professor Zunac received his B.A., M.A., and Ph.D. from Marquette University.

**Certificate of Compliance
With Section 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Section 809.19(12). I further certify that 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 parties.

Dated: February 27, 2018



James R. Troupis