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**08-22-2018**

**SUPREME COURT OF WISCONSIN**

**JOHN McADAMS,**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

**Plaintiff-Appellant,**

**v.**

**Appeal No. 2017AP001240**

**MARQUETTE UNIVERSITY,**

**Defendant-Respondent.**

**On Appeal from the Circuit Court for Milwaukee County**

**Hon. David A. Hansher Presiding**

**Case No. 2016CV3396**

**BRIEF OF UNIVERSITY ACADEMIC SENATE OF MARQUETTE  
UNIVERSITY, AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

**REINHART BOERNER VAN DEUREN S.C.**

Amy L. MacArdy, WI SBN 1063685

Attorney for *Amicus Curiae* University Academic  
Senate of Marquette University

1000 North Water Street, Suite 1700

Milwaukee, WI 53202

Telephone: (414) 298-1000

Facsimile: (414) 298-8097

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## **INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT**

The University Academic Senate of Marquette University (“UAS”) is the primary vehicle through which the faculty of Marquette exercises its role in decisions that affect the academic mission of the University, a process known as “shared governance.” The principle of “shared governance” is based on the recognition that the faculty have interests and responsibilities that are distinct from those of the administrators of a university, and that the optimal governance structure requires faculty participation in important decisions concerning curriculum, programs, promotion and tenure, and other academic matters. Shared governance includes, as a necessary component, prior faculty review of any attempt by the University administration to override the protections of tenure and dismiss or suspend a tenured faculty member. The UAS seeks to file this brief to emphasize that prior faculty review of the proposed dismissal or suspension of a tenured faculty member is an essential element of both

the concept of academic freedom and the contractual protections afforded to faculty members at Marquette. The review that occurred in this case met the requirements of shared governance by being fair, independent, and thorough.

### **ARGUMENT**

The Marquette University Academic Senate is constituted under the Statutes of the University Academic Senate (“UAS Statutes”), last approved by the President of Marquette University on August 27, 2013, and endorsed by the Marquette University Board of Trustees.<sup>1</sup> The UAS is a deliberative body composed of twenty-eight elected members of the faculty; three of Marquette’s eleven Deans; three elected students; two Vice Provosts; and the Provost. Although the Senate’s members include administrators and students, the UAS is composed primarily of faculty members, and its purpose and function are to provide “leadership and governance on behalf of the faculty through

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<sup>1</sup> A copy of the current version of the UAS Statutes may be found at <http://www.marquette.edu/provost/documents/STATUTESOFTHEUNIVERSITYACADEMICSENATEupdated012317.pdf>.

participation in decisions on the academic life of the University and obtaining the information needed to fulfill its responsibilities.”<sup>2</sup>

Under the UAS Statutes, the UAS must be provided with a prior opportunity to review and approve for recommendation to the Provost various matters substantially affecting the academic mission of Marquette, including major curricular changes; organizational changes such as establishing or eliminating schools, colleges, centers, or programs; changes to the UAS Statutes; changes in the University norms for faculty appointment, promotion and tenure, and faculty evaluation policies; and changes in the University’s student evaluation forms. Although in the usual course such deliberations are collaborative in nature, the UAS guards its independent role and reserves the right to insist upon sufficient consultation and consensus on such matters.

That includes matters affecting the issue of academic freedom. One of the more important qualities

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<sup>2</sup> UAS Statutes, at 1.

of a university is that it provides a space in which scholars and students are free to inquire and to explore various avenues to the truth. But that spirit of free inquiry is put in jeopardy if professors are treated as at-will employees who can be disciplined for any reason. The granting of tenure helps protect some senior faculty members from the vicissitudes of public opinion and administrators' favor, but even tenure is a weak protection if it amounts to simply automatic renewal of an employment contract until terminated. The concept of academic freedom thus developed alongside the protection of tenure, first arising in the early twentieth century in response to several instances in which faculty members were fired for saying or writing things that disturbed university officials or prominent donors.<sup>3</sup> Academic freedom places strict limits on the suspension or dismissal of both tenured and untenured faculty members for their speech or research.

Despite widespread agreement on the importance of academic freedom, however, the line between what is

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<sup>3</sup> See Matthew W. Finkin & Robert C. Post, *For the Common Good: Principles of Academic Freedom* 30-32, 45-46 (2009).

protected and what is punishable proved difficult to define.<sup>4</sup> Over several decades, a compromise emerged between academic institutions and professors, first encapsulated in the 1940 *Statement of Principles on Academic Freedom and Tenure* agreed to by the American Association of University Professors and the Association of American Colleges, and then later significantly modified by the 1970 *Interpretive Comments*.<sup>5</sup> Under that compromise, a university maintains the right to insist that its faculty members honor their obligations to students, colleagues, the university, and society, but it cannot discipline professors for controversial statements that are made within the scope of their roles as scholars, teachers, or citizens unless those statements clearly demonstrate their lack of “fitness” to serve “in their professional

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<sup>4</sup> See, e.g., American Association of University Professors (AAUP) & Association of American Colleges (AAC), *Statement on Procedural Standards in Faculty Dismissal Proceedings*, 44 AAUP Bull. 270, 271 (1958) (“One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member.”).

<sup>5</sup> AAUP & AAC, 1940 *Statement of Principles on Academic Freedom and Tenure*, With 1970 *Interpretive Comments*, reprinted in AAUP, *Policy Documents and Reports* 13-19 (11th ed. 2015).



capacities as teachers or researchers,”<sup>6</sup> considering the “faculty member’s entire record as a teacher or scholar.”<sup>7</sup> Findings of a lack of fitness should be rare.<sup>8</sup>

Marquette has incorporated these principles of academic freedom into its Faculty Handbook.<sup>9</sup> But the protections for academic speech and inquiry cannot end there. The determination of whether a professor has violated the norms of the academic profession, or lacks “fitness” to continue serving, is necessarily imprecise and subjective. It is therefore a critically important matter of shared governance that the faculty have the prior opportunity to approve or disapprove of the proposed suspension or dismissal of a tenured faculty

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<sup>6</sup> AAUP, Recommended Institutional Regulations on Academic Freedom and Tenure, *reprinted in* AAUP, *Policy Documents and Reports* 79, 83 at § 5.a (11th ed. 2015) (“Adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers.”).

<sup>7</sup> AAUP & AAC, 1940 Statement of Principles, *supra* note 5, at 15 n.6 (quoting AAUP, Committee A Statement on Extramural Utterances, *reprinted in* AAUP, *Policy Documents and Reports* 31 (11th ed. 2015)).

<sup>8</sup> *Id.* (“Extramural utterances rarely bear upon the faculty member’s fitness for the position.”).

<sup>9</sup> See Marquette University Faculty Handbook 45 (Aug. 27, 2013), *available at* <http://www.marquette.edu/provost/rights-and-responsibilities.php>.

member for cause, in order to act as a check on administrative discretion.

Marquette has therefore adopted, in addition to the definition of academic freedom, the AAUP's recommended procedural protections for faculty members.<sup>10</sup> Those procedural protections require that any proposed suspension or dismissal of a tenured faculty member be brought before an independent faculty committee for prior review. The UAS Statutes delegate that role to a UAS standing committee, the Faculty Hearing Committee (FHC), whose members are tenured faculty elected for three-year terms.<sup>11</sup> The AAUP's recommended procedural protections also include one of the provisions at issue in this case, the provision that "[d]ismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States

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<sup>10</sup> Compare Marquette University Faculty Statutes § 307.07 with AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, reprinted in AAUP, *Policy Documents and Reports* 79, 83-84 at § 5 (11th ed. 2015).

<sup>11</sup> See UAS Statutes art. 4 § 1.01.1.

Constitution.”<sup>12</sup> Many other universities have adopted the AAUP’s model procedures as well, meaning that a decision in this case may affect the faculty contracts at a number of Wisconsin colleges and universities.<sup>13</sup>

Academic freedom is, like many rights, not absolute.<sup>14</sup> Professors recognize that while academic freedom is broad, at its margins it must be balanced against their obligations to the university, to colleagues, to students, and even to the society at large. The determination of whether that line has been crossed is necessarily specific to the facts of each case. It is therefore a key component of shared governance at Marquette and at other universities that the faculty be given an opportunity to engage in a thorough review of

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<sup>12</sup> Marquette University Faculty Statutes § 307.07(2); *see also* AAUP, Recommended Institutional Regulations, *supra*, at 83 § 5.a (“Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.”).

<sup>13</sup> *See, e.g.*, Wis. Admin. Code § UWS 4.01(2) (“A faculty member is entitled to enjoy and exercise all the rights and privileges of a United States citizen . . . . This policy shall be observed in determining whether or not just cause for dismissal exists.”).

<sup>14</sup> *See* Marquette University Faculty Hearing Committee, In re Contested Dismissal of Dr. John C. McAdams Final Report 68-70 (Jan. 18, 2016).

any proposed suspension or termination of a tenured faculty member.

That thorough review was performed in this case. The FHC spent more than one hundred hours over the course of a summer, Fall semester, and Christmas break to carefully consider the evidence and the applicable rules. Despite representing a diversity of viewpoints, the FHC rendered a unanimous recommendation in this case, and meticulously documented its rationale in a detailed and thorough report. While there have been allegations in this case that the FHC proceedings were “fraught with irregularity” (Pl’s Reply Br. at 14) due in part to the failure to recuse a single member of the FHC (Pl’s Br. at 52-53), the FHC unanimously rejected Dr. McAdams’s motion for recusal and provided its reasons for doing so. (R.3:149-151.) The UAS is confident that its committee, the FHC, discharged its duty in good faith and that due process was observed.

### **CONCLUSION**

Prior review by a committee of the faculty is a critical procedural protection for academic freedom at Marquette and elsewhere, and is an important

component of the shared governance structure that faculty members and the university have contractually arranged. Whatever opinion this Court reaches on the issue of whether summary judgment was properly granted in this case, it should preserve the contractually bargained-for role of the faculty in reviewing dismissals for cause.

Dated this 21st day of March, 2018.



Amy L. MacArdy  
WI State Bar No. 1063685  
*Attorney for Amicus Curiae University  
Academic Senate of Marquette  
University*

Reinhart Boerner Van Deuren s.c.  
1000 North Water Street  
Suite 1700  
Milwaukee, WI 53202  
Telephone: 414-298-1000  
Facsimile: 414-298-8097

Mailing Address:  
P.O. Box 2965  
Milwaukee, WI 53201

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Appeal No. 2017AP001240

MARQUETTE UNIVERSITY,

Defendant-Respondent.

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CERTIFICATE OF COMPLIANCE WITH  
WIS. STAT. § 809.19(8)(b)

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I hereby certify this brief conforms to the rules contained in Wis. Stat.

§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,650 words.

Dated this 21st day of March, 2018.

Reinhart Boerner Van Deuren s.c.  
1000 North Water Street  
Suite 1700  
Milwaukee, WI 53202  
Telephone: 414-298-1000  
Facsimile: 414-298-8097

By



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

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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. § 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 opposing parties.

Dated this 21st day of March, 2018.

Reinhart Bomer Van Deuren s.c.  
1000 North Water Street  
Suite 1700  
Milwaukee, WI 53202  
Telephone: 414-298-1000  
Facsimile: 414-298-8097

By



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**CERTIFICATE OF THIRD PARTY COMMERCIAL DELIVERY**

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I certify that, pursuant to Wis. Stat. § 809.80(3)(b), on March 21, 2018, the University Academic Senate of Marquette University's Brief was delivered to Federal Express for delivery to the Clerk of the Supreme Court of Wisconsin within three calendar days. I further certify that the brief was correctly addressed.

Dated this 21st day of March, 2018.

Reinhart Boerner Van Deuren s.c.  
1000 North Water Street  
Suite 1700  
Milwaukee, WI 53202  
Telephone: 414-298-1000  
Facsimile: 414-298-8097

By 