

IN THE SUPREME COURT OF WISCONSIN
Case No. 2017AP1240

John McAdams,

Plaintiff-Appellant,

v.

Marquette University,

Defendant-Respondent.

On Appeal from the Circuit Court for Milwaukee County
Honorable David A. Hansher
Case No. 2016CV3396

**CORRECTED BRIEF OF AMICUS CURIAE
ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES
IN SUPPORT OF MARQUETTE UNIVERSITY**

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INTRODUCTION

Private, non-profit colleges and universities—many religiously affiliated—comprise half of the four-year-degree-granting institutions in the United States, almost 1,300 nationwide.¹ These private schools pursue diverse educational, religious, and social objectives, often reflected in their “mission statements.”

For example, Harvard College emphasizes civic leadership, announcing its mission “to educate the citizens and citizen-leaders for our society.”² Others incorporate explicitly-religious themes; Hillsdale College states that its foundational goal is to “develop the minds and improve the hearts of its pupils” through “the immemorial teachings and practices of the Christian faith.”³

¹ Joel McFarland, et al., THE CONDITION OF EDUCATION 2017 242, U.S. Department of Education (May 2017), <https://nces.ed.gov/pubs2017/2017144.pdf> (last accessed February 22, 2018).

² *Mission, Vision, and History*, Harvard College, <https://college.harvard.edu/about/mission-and-vision> (last accessed February 22, 2018).

³ *Mission*, Hillsdale College, <https://www.hillsdale.edu/about/mission/> (last accessed February 22, 2018).

The Milwaukee School of Engineering highlights the prominence of technology and career development to its educational objectives.⁴

The members of *amicus curiae* Association of Jesuit Colleges and Universities, including Marquette University, consider their Catholic—particularly Jesuit—foundations to be far more than historical artifacts. Rather, they remain the cornerstones of the schools’ institutional identities:

Being ‘Catholic, Jesuit universities’ is not simply one characteristic among others but is our defining character, what makes us to be uniquely what we are. . . . As Jesuit colleges and universities, we are a continuation of the Ignatian heritage and of the distinctive tradition of Jesuit education.⁵

This is reflected in Marquette’s mission statement, prominently proclaimed at the beginning of Marquette’s Faculty Handbook—

⁴ *Vision and Mission Statements*, Milwaukee School of Engineering, <https://www.msoe.edu/about-msoe/vision-and-mission/> (last accessed February 22, 2018).

⁵ THE JESUIT, CATHOLIC MISSION OF U.S. JESUIT COLLEGES AND UNIVERSITIES 3-4, Association of Jesuit Colleges & Universities (Jan. 2010), https://www.xavier.edu/jesuitresource/online-resources/documents/TheJesuitCatholicMissionofJesuitCollegesandUniversities_PDF.pdf (last accessed February 22, 2018) (emphasis in original).

its contract with its full-time faculty members: “Marquette University is a Catholic, Jesuit university dedicated to serving God by serving our students and contributing to the advancement of knowledge.” (R.25:1, 4; R.44:14.) To this end, Marquette pledges “to offer personal attention and care to each member of the Marquette community.” (R.44:14.)

In stark contrast, Dr. McAdams’ appeal focuses exclusively on his individual rights, failing to account for the context surrounding the disciplinary process to which he contractually agreed and which was followed assiduously. (Brief of Plaintiff-Appellant John McAdams, hereinafter Plts. Br., at 23-31.) Dr. McAdams asks the Court to invalidate the considered findings and conclusions of his peers on the Faculty Hearing Committee and of Marquette’s president, to whom the ultimate decision was committed by contract. (Plts. Br. at 20-21, 31; R.25:7-10.)

Instead, Dr. McAdams wants the Court to adopt his views of how this faith-based educational institution should carry out its mission and to impose those views on Marquette from the

bench, as a matter of law. (Plts. Br. at 40.) What he asks the Court to do is improper, both under his contract and as a matter of Wisconsin's public policy.

There is no one-size-fits-all mold of a college or university. Marquette's institutional values are different from Harvard's, Hillsdale's, MSOE's, and, of course, those of the state-operated University of Wisconsin, which, unlike private universities, must conform its relations with its employees to the requirements of the state and federal constitutions. The diversity of colleges and universities in Wisconsin and throughout this country—with respect to their missions and values—is itself the source of tremendous strength to our civil society.

Each private institution of higher education has the right to incorporate its distinctive characteristics—particularly the faith-based principles that define a university like Marquette—into its contractual arrangements with its employees, as an important way of effectuating them. When a university and its faculty have agreed that a panel of faculty members will

determine whether a professor's conduct meets the university's mission-informed standards of professional conduct, this Court should honor that arrangement. To do otherwise would be to invite disruption of private colleges' and universities' pursuit of their distinctive missions by a judicial system that should uphold them.

ARGUMENT

1. The Tradition and Values of a Jesuit Education Are Lived Out at Marquette.

The Society of Jesus, popularly known as the Jesuits, opened its first school in 1548 and, in the 470 years since then, has founded hundreds of other educational institutions across the globe.⁶ In 1599, the Jesuits committed their educational

⁶ John W. O'Malley, S.J., *How the First Jesuits Became Involved in Education*, in *THE JESUIT RATIO STUDIORUM: 400TH ANNIVERSARY PERSPECTIVES* 56 (Vincent J. Duminuco, S.J. ed. 2000), <https://www.bc.edu/content/dam/files/top/church21/pdf/HowtheFirstJesuitsBecameInvolvedinEducation.pdf> (last accessed February 22, 2018).

philosophies to writing in the *Ratio Studiorum* (Plan of Studies),⁷ a comprehensive statement of Jesuit educational objectives.

During the 1980s, a worldwide committee of Jesuit educators restated these traditional values for modern schools, publishing *The Characteristics of a Jesuit Education* (hereinafter, *The Characteristics*).⁸

The Jesuits and the educational institutions that they operate emphasize what is known as “Ignatian pedagogy.” Based on the teachings of St. Ignatius of Loyola, the founder of the Jesuits, Ignatian pedagogy focuses on contextualizing education in the life of the student as an individual.⁹

⁷ Michael W. Maher, S.J., et al., *From 1599 – 1999: Celebrating the Ratio Studiorum at Saint Louis University*, 16 CONVERSATIONS ON JESUIT HIGHER EDUCATION 47 (September 1999), <https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1454&context=conversations> (last accessed February 22, 2018).

⁸ International Commission on the Apostolate of Jesuit Education, *THE CHARACTERISTICS OF A JESUIT EDUCATION* (1986), http://www.sjweb.info/documents/education/characteristics_en.pdf (last accessed February 22, 2018).

⁹ Dr. Susan Mountin, *What Is Ignatian Pedagogy?*, Marquette University Explore Series, <http://www.marquette.edu/mission/IgnatianPedagogy.php> (last accessed February 22, 2018).

A distinctive feature of Jesuit education is its focus on care for each individual member of the institution: “Jesuit education, therefore, probes the meaning of human life and is concerned with the total formation of each student as an individual personally loved by God.” The Characteristics at ¶25. This concept is known as *cura personalis* (care of the individual), a term originally “used to describe the responsibility of the Jesuit Superior to care for each man in the community with his unique gifts, challenges, needs, and possibilities,” but now “applied more broadly to include the relationship between educators and students, and the professional relationships among all those who work in the University.”¹⁰

While students and teachers are entrusted with freedom to explore academic and educational interests in the search for

¹⁰ *Mission and Ministry: Spirit of Georgetown Values*, Georgetown University, <https://missionandministry.georgetown.edu/thespiritofgeorgetown/values> (last accessed February 22, 2018); see also The Characteristics at ¶43.

truth, that freedom carries with it corresponding responsibilities to others in the educational community:

Freedom includes responsibilities within the community. ‘Cura personalis’ is not limited to the relationship between teacher and student; it affects the curriculum and the entire life of the institution. *All members of the educational community are concerned with one another and learn from one another.* The personal relationships among students, and also among adults—lay and Jesuit, administrators, teachers, and auxiliary staff—evidence this same care.¹¹

Based on centuries of experience, Jesuit institutions recognize that an environment conducive to personal growth requires that the faculty be “keenly conscious of and sensitive to the institutional environment of the school or learning center; being alert as teachers and administrators to the complex and often subtle network of norms, expectations, behaviors and relationships that create an atmosphere for learning.”¹² Thus,

¹¹ The Characteristics at ¶44 (emphasis added).

¹² Vincent J. Duminuco, S.J., *IGNATIAN PEDAGOGY: A PRACTICAL APPROACH* (hereinafter, *A Practical Approach*) at ¶36, https://www.rockhurst.edu/media/filer_private/uploads/ignatian_pedagogy_a_practical_approach.pdf (last accessed February 22, 2018); *see also id.* at ¶40 (“For an authentic relationship of trust and friendship between teacher and student is an indispensable dispositive condition for any growth in commitment to values.”).

Ignatian pedagogy encourages “the teacher to slow down the activity and quell the noise in the student’s life.”¹³

2. The Marquette FHC Applied These Jesuit Educational Values to Dr. McAdams.

The record shows that Marquette’s Faculty Hearing Committee (FHC) conscientiously applied these values when it considered the disciplinary charges against Dr. McAdams. The unanimous panel of his peers stressed that each Marquette faculty member has a “clear obligation. . . to take care not to recklessly cause harm, directly or indirectly, to other members of the community,” noting that this responsibility arises “from the very essence of the university community and from Marquette’s values.” (R.3:85.) “[N]o faculty member should need a specific warning not to recklessly take actions that indirectly cause substantial harm to others.” (R.3:104.)

As Dr. McAdams acknowledged during the proceeding, it was “certainly” fair for the FHC to consider his “choices against

¹³ Mountin, *What Is Ignatian Pedagogy*, *supra* at n.11 (emphasis added).

the backdrop of Marquette University's values" and whether his treatment of the graduate student in question was "consistent with the core value of cura personalis." (R.33:46.) That is what the FHC's members did in their careful report and what Marquette's president did in rendering his proposed resolution of the matter.

While Dr. McAdams may well believe that Marquette and his peers acted out of hostility to the viewpoints that he expressed in the blog post at issue, the reality is that he operated his blog for 10 years, publishing more than 3,000 posts that regularly engaged with controversial political and social topics, encountering no adverse actions by Marquette. (R.3:86.) Indeed, the FHC made clear that it was Dr. McAdams' decision to publicize a graduate student's name and contact information in an inaccurate and inflammatory post that was the basis for their recommendation, not his viewpoints on the underlying controversy. (R.3:100.) The FHC found that Dr. McAdams' "blog post was reckless and seriously irresponsible in posing a

significant, albeit indirect, risk of harm to both [the graduate student] and to the Marquette community.” (R.3:88.)

Recognizing the broader implications of Dr. McAdams’ behavior for Marquette’s campus, the FHC concluded that he had created an environment of public shaming antithetical to the University’s mission. (R.3:84, 90.) It noted that he had a track record of using publication on his blog as a threat in disagreements with others on campus and that junior faculty members in his own department feared that they might become his next target, chilling Marquette’s intramural discourse. (R.3:62, 65, 93.)

The FHC was also deeply troubled by Dr. McAdams’ refusal to acknowledge the consequences of his actions and to accept his responsibilities as a faculty member:

The record before us clearly demonstrates that Dr. McAdams does not view himself as bound by the fundamental norms of the university, or of the academic profession, or indeed by any consistently applicable body of norms. . . . Dr. McAdams' repeated refusal to recognize or conform his conduct to such obligations as the obligation to take care to avoid harm to others indicates that, without corrective action, such conduct is likely to continue in the future.

(R.3:107, 109.)

These findings were supported by substantial evidence in the record. Moreover, as the FHC emphasized, faculty members' obligations to avoid harm to others in the educational community "take on special resonance at Marquette, which is a Jesuit university that has incorporated the concept of *cura personalis*—care for the whole person—into its foundational values." (R.3:80.)

The president accepted the FHC's factual findings and recommendation and made clear that the sanctions he imposed were based exclusively on Dr. McAdams' actions, rather than on the underlying ideological expressions in his blog. (R.4:2.) It was the president's responsibility to "be focused on ensuring and enhancing the institution's core values" as expressed in the university's mission and vision statements. (R.4:9.) As thoroughly

detailed in the findings of the FHC, there was abundant reason to conclude that Dr. McAdams did not “fully embrace [Marquette’s] values,” which posed “a major cause for concern,” and the president acted well within his role in requiring assurance that Dr. McAdams would at least acknowledge Marquette’s foundational values before returning to the faculty. (R.4:9.)

3. As a Matter of Wisconsin’s Public Policy, the Court Should Give Effect to the Procedures Contractually Agreed to by a Faith-Based Institution and Its Faculty.

In light of Marquette’s distinctive Jesuit tradition and educational values, and given the FHC’s and the president’s conclusion that Dr. McAdams’ conduct violated core responsibilities of Marquette faculty members, this Court should reject Dr. McAdams’ invitation to override the considered outcome of the parties’ contractual arrangement. Without judicial deference to the results of the proceedings prescribed by Section 307.07 of the Faculty Handbook, the parties’ contractually-agreed-upon method for resolving disciplinary matters becomes meaningless.

Moreover, private institutions should be afforded latitude to pursue their foundational missions when monitoring and disciplining their employees' behavior. A university does not forfeit its interest in maintaining its educational environment simply because a professor enjoys academic freedom. *See Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991) (holding that a professor's "interest in academic freedom and free speech do not displace the University's interest inside the classroom"). Rather, educational institutions—even public schools—have a legitimate interest in defining the academic atmosphere on their campuses. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (granting "deference to a university's academic decisions" regarding attainment of "its educational mission").

The Supreme Court of Pennsylvania adopted the correct approach to this issue in *Murphy v. Duquesne Univ. of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2000). A number of female law students at a Catholic university accused a tenured professor of inappropriate sexual advances. The university initiated

termination proceedings, and a faculty committee conducted a thorough hearing. *Id.* at 578-79. The committee issued a report finding that the professor had engaged in inappropriate behavior, but recommending that he not be terminated. *Id.* at 579. As in the present case, the faculty handbook gave the final decision to the university president, who decided to terminate the plaintiff's tenure. *Id.* at 580. Like Dr. McAdams, the professor sued for breach of contract.

The Supreme Court held that the faculty handbook provided the exclusive procedure for determining whether a professor's misconduct warranted termination, a procedure not to be overridden by the courts:

[T]he Contract was clear and unambiguous in setting out a process in Statute IV exclusively reserved to the University and its faculty for arriving at a conclusive determination as to whether Murphy's tenure had been forfeited for serious misconduct. Thus, while Murphy is free to assert in a court of law that the process of forfeiture that was afforded him did not comply with the Contract's terms, he is not free to demand that a jury re-consider and re-decide the merits of his termination.

Id. at 596.

The *Murphy* court explained why such a rule made sense *ex ante* for private parties who do not want courts and juries to intermeddle with “matter[s] of the University’s self-governance,” such as tenure termination, which require “an intimate understanding of the teacher, and of the University’s philosophy, policies, and day to day life.” *Id.* at 597. The court stressed that the university was dedicated to promoting Catholic values:

It comes as no surprise that the University and its faculty agreed not to cede to any lay outsider or secular institution the right to define and determine what behavior on the part of a faculty member was so antithetical to its mission that he could not remain a member of the University’s community, and instead, concurred that the process set out in the Contract would finally decide whether a faculty member’s actions rose to the level of serious misconduct and whether forfeiture was in order.

Id.

Similarly, this Court has long exercised great caution to avoid state interference in private religious institutions’ employment decisions. While the Court’s recent cases typically involve “ministerial employees” and First Amendment Religion Clause principles, the same underlying policy concerns that weigh against interfering with churches’ employment decisions

on constitutional grounds also mandate deference to the contractual disciplinary process agreed to by a religiously based university and its faculty.

For example, in *DeBruin v. St. Patrick Congregation*, a plurality of this Court took the position that a schoolteacher at a Catholic grade school cannot bring a breach of contract claim based on the school's termination of employment. 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878. The opinion stressed that "religious institutions [are granted] independence from secular control or manipulation" and disapproved the teacher's seeking "state court enforcement of a provision in a private contract in order to invalidate [the school's] reason for terminating her employment." *Id.* at 98. Dr. McAdams is not, of course, a "ministerial employee" under First Amendment case law, but he similarly asks Wisconsin's courts to override a religious

institution's assessments meant to insure protection of its mission through its employment decisions.¹⁴

This Court has also exercised this same restraint in cases decided before current First Amendment Religion Clause doctrine became well-established. In *Olston v. Hallock*, this Court refused to review a decision by the Episcopal Diocese of Milwaukee to terminate a church rector. 55 Wis. 2d 687, 201 N.W.2d 35 (1972). As with the rule laid down in *Murphy*, *Olston* stressed the narrow scope of judicial review of a religious organization's employment-termination decision and deferred to the church committee's factual findings: "civil court review is limited to determining whether the ecclesiastical tribunal had authority to proceed, and whether it proceeded according to its rules and procedures." *Id.* at 696. *Olston* stands for the proposition that, under Wisconsin law, the "province of judicial review" does not

¹⁴ As with this case, the *DeBruin* decision addressed a teacher's breach of contract claim; this Court had previously adopted the same rule for statutory anti-discrimination claims brought by teachers. See *Coulee Catholic Schools v. LIRC*, 2009 WI 88, 320 Wis. 2d 275, 299, 768 N.W.2d 868.

reach the merits of contract-based disciplinary proceedings involving religious organizations.

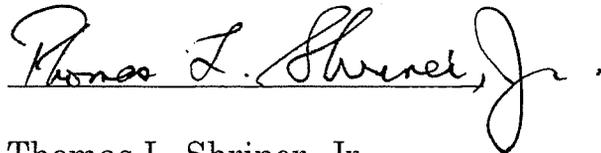
As these cases illustrate, Wisconsin courts are properly wary of overriding decisions made by faith-based institutions with respect to employee conduct implicating institutional values.

CONCLUSION

The Court should decline Dr. McAdams' invitation to interfere with the contractual mechanism by which Marquette advances its Jesuit mission, by insuring that those whom it invests with the responsibility and privilege of teaching its students abide by its governing principles.

Dated this 6th day of March, 2018.

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A handwritten signature in black ink that reads "Thomas L. Shriner, Jr." with a stylized flourish at the end.

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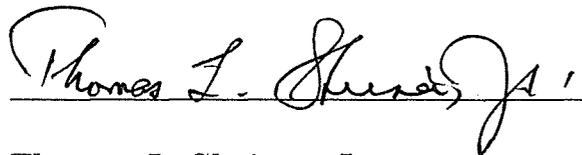
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FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this brief conforms to the rules contained in § 809.19(8)(b)&(c) for a brief produced using proportional serif font. The length of this brief is 2,995 words, excluding the caption, tables, signature block, and certifications.

Dated this 6th day of March, 2018.

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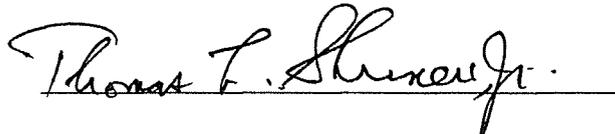
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E-FILING CERTIFICATION

Pursuant to Wis. Stat. § 809.19(12)(f), I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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CERTIFICATE OF PAPER FILING AND SERVICE

Pursuant to Wis. Stat. § 809.80(4)(a), I certify that on March 6, 2018, I caused 22 copies of the Corrected Brief of Amicus Curiae Association of Jesuit Colleges and Universities in Support of Marquette University to be delivered to a third-party commercial carrier for delivery to the clerk within three days.

I also hereby certify that on March 6, 2018, I served three copies of the Corrected Brief of Amicus Curiae Association of Jesuit Colleges and Universities in Support of Marquette University via United States mail, postage pre-paid, on each of the following attorneys for the parties and interested parties of record:

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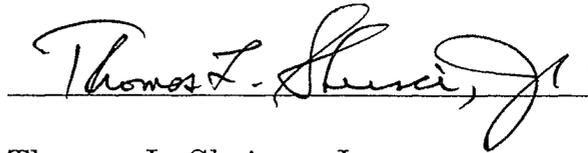
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