No. 19-1234

In the Supreme Court of the United States

JEFFERSON MOORE UNIVERSITY,

Petitioner,

v.

DR. A.J. RODRIGUEZ

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

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March 8, 2019

QUESTIONS PRESENTED

1. Whether the First Amendment applies to protect Dr. Rodriguez's concerns about the medical industry's myopic focus on pharmaceuticals, which he spoke out about on a school holiday, from his home, on his privately-owned blog?

2. If so, whether—as the Court of Appeals held—Jefferson Moore University violated Dr. Rodriguez's free speech rights by terminating his employment despite the absence of facts showing disruption or disharmony occurring as a direct result of the opinions he expressed?

PARTIES TO THE PROCEEDINGS

Petitioner, Jefferson Moore University, was the defendant before the United States District Court for the District of Gonzalez, and the appellee before the United States Court of Appeals for the Fourteenth Circuit.

Respondent, Dr. A.J. Rodriguez, was the plaintiff before the United States District Court for the District of Gonzalez, and the appellant before the United States Court of Appeals for the Fourteenth Circuit.

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The United States District Court for the District of Gonzalez's Opinion and Order Granting Petitioner's Motion to Dismiss with Prejudice is unpublished. R. 14. The United States Court of Appeals for the Fourteenth Circuit's Opinion and Order reversing the lower court's decision is unpublished. R. 17.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on January 6, 2017. R. 18. After Petitioner filed a Petition for Writ of Certiorari, this Court granted the Petition on November 13, 2018. R. 19. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STANDARD OF REVIEW

This Court reviews a district court's fact findings for clear error and its legal conclusions *de novo*.

PROVISIONS INVOLVED

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Dr. A.J. Rodriguez ("Rodriguez") began teaching classes at Jefferson Moore University ("JMU") in 2003. R. 4. Over the next thirteen years, Rodriguez gained increased responsibilities which included chairing a task force to improve public access to medical care, and conducting research, scholarship, and discourse. R. 6. He received several faculty-wide student appreciation awards and gained a reputation as being well-liked throughout the campus community. R. 4.

On December 25, 2014, Rodriguez was at home and posted on his privately owned and operated blog. R. 6. In the post, he gave his personal and private opinion on the current state of the American medical system, critiquing what he sees as a pervasive and myopic overreliance on prescribing pharmaceuticals in lieu of useful and less invasive alternative treatments. R. 6, 8. The post fostered meaningful debate amongst commenters who both agreed and disagreed with Rodriguez's views, many of whom were medical providers or students at JMU. R. 2. The post enjoyed significant web traffic—50,000 views—and even received local news coverage. R. 3.

Unbeknownst to Rodriguez, another physician independently prescribed Rodriguez's blog opinion to a client. *See* R. 3, 6 (implying the physician prescribed chiropractic treatment to a patient with epilepsy). That physician, Dr. Felan-Garcia, later blamed the blog for causing her patient's death. R. 6. JMU was subject to adverse publicity following a wrongful death trial, leading to a handful of concerns from undergraduate students, an isolated student protest, one class cancelation, and a JMU donor discussing the possibility of withdrawing their support. R. 3.

Rodriguez never had contact or was involved with the physician or patient, JMU has no social media policy, Rodriguez opinions were widely known by his colleagues, and he never discussed his opinions in class. R. 3, 4, 6. Despite this, several colleagues submitted a derogatory letter to the dean of students, expressing their disagreement with Rodriguez's views and

ultimately calling for his termination. R. 3, 10. JMU fired Rodriguez on April 25, 2016, three weeks after the letter was written and sixteenth months after his blog post. R. 6, 9, 10.

Rodriguez later sued JMU in the United States District Court for the District of Gonzalez. R. 5. In his complaint, he maintained JMU violated his First Amendment right to freedom of speech. R. 7. The district court granted JMU's motion to dismiss with prejudice, and Rodriguez appealed. R. 16. On appeal, the Fourteenth Circuit Court of Appeals reversed the district court's decision, holding Rodriguez's speech was entitled to First Amendment protection. R. 17. JMU filed a Petition for Writ of Certiorari, which this Court granted on November 13, 2018. R. 19.

SUMMARY OF THE ARGUMENTS

Jefferson Moore University violated Dr. Rodriguez's rights under the First Amendment by terminating his employment in retaliation for speaking on matters of public concern from his home on his personal, privately-owned blog. To hold otherwise would enable the government to wield an Orwellian police power over academic speech of public employees; speech which the Court has held essential to the First Amendment by furthering and fostering public debate.

In every sense under *Pickering* and *Connick*, Rodriguez spoke as a private citizen on matters of public concern. The content spoke to medical issues at the heart of public debate. The context and form—an informed opinion shared from his home on a privately-owned blog—likewise establishes the public nature of the speech. Further, Rodriguez's speech can only be viewed as having been made as a citizen and not as a JMU employee. There is no support any of Rodriguez's duties included maintaining a blog for the university; JMU does not have a social media policy, and JMU could not have, by any authority, required Rodriguez to use his personal blog and funds to support speaking on their behalf. While *Garcetti* placed limits on free speech protection for speech made pursuant to official duties, the Court explicitly reserved deciding

whether academic speech would be so constrained. The Court must hold academic speech, even if made pursuant to official duties, is an exception in order to preserve academic freedom.

When balanced, the immense importance of protecting Rodriguez's academic speech outweighs any potential showing by JMU that operations were compromised. The sixteen-month delay between when Rodriguez shared his opinion and when he was fired shows no actual disharmony or disruption occurred at JMU as a direct result of his speech. Even if viewed as the direct cause, Rodriguez's speech so significantly discussed matters of public concern the Court must hold its value outweighs any negative effect JMU can claim to have suffered.

On the merits of Rodriguez's claim, the district court committed reversible error in holding his speech was not entitled to free speech protection. The Court must affirm the court of appeals, which held Rodriguez's speech was entitled to First Amendment protection and as such JMU violated his free speech rights, and remand for further proceedings.

ARGUMENTS

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment, at its core, protects speech by citizens on matters of public concern. *Lane v. Franks*, 573 U.S. 228, 235 (2014). Even unorthodox and controversial ideas at odds with the prevailing opinion of the day still merit full protection when shared for public debate and to spark desired political and social change. *See Roth v. United States*, 354 U.S. 476, 484 (1957) (holding all ideas with even slight social importance, short of obscenities, have full First Amendment protection). Perhaps no field of speech has been more recognized as protected by the First Amendment throughout the history of the Court—because of its importance to the public—than speech which is academic in nature. *See Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014) (interpreting holdings of the Court

since 1967 as stressing the recognition of speech by professors and universities as academic freedom protected by the First Amendment). Academic speech is so protected because the Court has held the informed opinions of public employees like professors is essential to fostering public debate on matters of public concern, requiring they be able to speak without fear of retaliatory dismissal. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968). In such termination actions, the public employer's burden to justify the firing increases the more the employee's speech involves matters of public concern. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

I. DR. RODRIGUEZ'S ACADEMIC SPEECH TRIGGERED FIRST AMENDMENT PROTECTION BECAUSE IT DISCUSSED MATTERS OF PUBLIC CONCERN

The Court has held the right to speak on matters of public concern is a fundamental right guaranteed by the First Amendment. *Lane*, 573 U.S. at 235. This right is not denied to public employees merely by government employment; rather the employee's interests in maintaining their free speech rights must be balanced against the interests of the employer in preserving an efficient agency free from disharmony and disruption. *Pickering*, 391 U.S. at 568. The Court in *Garcetti v. Ceballos* fashioned a multi-step approach for determining the applicability of First Amendment protection to public employees' speech. 547 U.S. 410, 418, 421 (2006). Protection applies if the employee is held to be speaking as a private citizen on matters of public concern. *Id.* at 418. But *Garcetti* held speech made pursuant to official duties is not protected by the First Amendment. *Id.* at 421. However, the Court has also suggested a special exception may exist for speech which is academic in nature. *Id.* at 425.

A. The First Amendment Applies Because the Blog Statement on Medical Treatment Options Discussed a Matter of Public Concern

The first inquiry for the Court is determining if Rodriguez's speech discussed matters of public concern. *Lane*, 573 U.S. at 237. Such speech may involve social, policy, or other valuable community concerns. *Id.* at 241. The content, context, and form of the speech informs this

determination. *Connick*, 461 U.S. at 147-48. A review of Rodriguez's blog post surely convinces the Court it addressed matters of public concern. *See Jackson v. Leighton*, 168 F.3d 903, 910 (6th Cir. 1999) (quoting *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 937 (3d Cir. 1990)) (holding healthcare quality and availability as a vitally important and debated issue).

1. The Content, Context, and Form of Rodriguez's Speech Indicate He Spoke on a Matter of Public Concern

Rodriguez's blog post clearly addresses matters of public concern when considering its context, content, and form. *See*, *e.g.*, *Pickering*, 391 U.S. at 574 (holding a teacher's informed speech in a newspaper addressing public school funding was a matter of public concern); *Jackson*, 168 F.3d at 910 (holding a medical director's speech criticizing the provision of medical care at a hospital addressed a matter of public concern).

In *Pickering*, a high school teacher criticized his school board's publicized funding plans by writing a letter to a newspaper. 391 U.S. at 566. The Court held the teacher's opinion on the allocation of public funds addressed a matter of public concern because his opinion was likely informed and it supported public debate. *Id.* at 571-72. A similar holding is seen in *Jackson*, where a plaintiff criticized a hospital merger proposal because of its potential negative impact on patient care. 168 F.3d at 906-10. The Sixth Circuit held the plaintiff's speech a matter of public concern because it stressed the quality, availability, and cost of health care. *Id.* at 910.

Rodriguez's speech should be viewed as a matter of public concern because of its similarly to the speech in *Jackson*; in both cases the speech discussed the quality and availability of healthcare. 168 F.3d at 910; R. 8. Rodriguez's speech is also similar to *Pickering*, where the plaintiff's speech was held a matter of public concern because it was informed by his academic position and it generated public debate. *Pickering*, 391 U.S. at 571-72; *see* R. 6 (stating Rodriguez was an assistant professor of medicine at JMU, whose private blog post fostered

debate). The thousands of views and public debate the post entertained also support holding the speech as a matter of public concern. *See Demers*, 746 F.3d at 416 (holding the plaintiff speech was a matter of public concern in part because it was made on his public website); R. 2-3. His opinions also need not be widely endorsed when determining if his speech merits protection. *See Pickering*, 391 U.S. at 574 (holding the teacher's right to speak on matters of public concern is protected absent knowingly or recklessly making false statements); *Roth*, 354 U.S. at 484 (according First Amendment protection to controversial opinions on matters of public concern).

B. The Blog Statement Was Not Made Pursuant to Any of His Official Duties

The second inquiry for the Court is determining whether Rodriguez spoke as a private citizen. *Lane*, 573 U.S. at 237. Rodriguez's speech is not protected by the First Amendment if the Court finds, absent an exception, he spoke pursuant to his official duties. *Garcetti*, 547 U.S. at 421. Rodriguez's personal blog cannot be considered part of his duties at JMU when examined explicitly or as a matter of practical inquiry. *See Garcetti*, 547 U.S. at 420-21 (holding the speech subject matter discussing the plaintiff's job was not dispositive); *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (holding the plaintiff's speech was not made pursuant to his duties merely because he was a professor writing about his expert field).

1. Rodriguez's Speech Was Not Made Pursuant to Any of His Duties Explicitly

This Court has held public employees' speech when made pursuant to their official duties, absent an exception, does not invoke First Amendment protection. *Garcetti*, 547 U.S. at 421. However, employers may not restrict free speech rights by creating overly broad duty descriptions. *Id.* at 424. Further, public university faculty do not speak pursuant to official duties whenever they speak on issues generally related to their academic field. *Adams*, 640 F.3d at 564.

The Court in *Garcetti v. Ceballos* distinguished citizen speech from employee speech made pursuant to official duties. 547 U.S. at 421. In the case, the Court held a memo written by

the underlying plaintiff was not protected First Amendment speech because it was made in the course of his job duties as a prosecutor. *Id.* at 414-15. But the Court specifically noted the case turned on whether the speech would ordinarily occur within the employee's duties, not whether the speech simply related to the subject matter of the duties. *Id.* at 421. The difference between citizen and employee speech was further clarified in *Lane v. Franks*. 573 U.S. at 237. The underlying plaintiff was fired after testifying in two prosecutions related to his employment. *Id.* at 233. The Court held the First Amendment applied to his speech because testifying was not part of his official duties, despite the fact his testimony directly discussed those duties. *Id.* at 240-41.

Rodriguez's official duties included teaching classes, chairing a task force to improve public access to medical care, and engaging in research, scholarship, and discourse. R. 6. However, the Fourteenth Circuit specifically noted the record is insufficient to support holding the blog post was made pursuant to Rodriguez's official duties. R. 18. Rodriguez was known to discuss his opinions socially but he never taught the opinions shared on his blog as part of classroom instruction. R. 3-4. This clearly aligns with *Lane*. *See id.* at 240 (holding the speech was made outside the plaintiff's official duties). Similar to the *Lane* plaintiff, the Court cannot hold Rodriguez's blog engaged his official duties merely because he discussed medical topics tangentially related to his duties. *See Lane*, 573 U.S. at 240 (holding dispositive whether the speech itself is typically within the scope of his duties, not if it merely concerns those duties).

2. Rodriguez's Speech Was Also Not Made Pursuant to Any of His Duties as a Matter of Practical Inquiry

The Court in *Garcetti* did not limit official duties to what is expressly stated in a formal job description when considering First Amendment claims. *See Garcetti*, 547 U.S. at 424-25 (mentioning a practical inquiry is proper to determine an employee's official duties). Official duties can be determined practically by considering what is expected of the employee by nature

of their position and the special knowledge and experience acquired through employment. *See Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (declaring a practical inquiry is proper and holding special knowledge and experience can be considered in determining official duties).

The Third Circuit demonstrated the practical inquiry approach in *Gorum*. 561 F.3d at 183-84. The Third Circuit held the underlying plaintiff's speech as a university professor was not protected because his special knowledge gained through his employment and use of university resources informed his speech as a matter of practical inquiry. *Id.* at 185-86.

Rodriguez's blog post cannot be considered as having been made pursuant to his official duties when analyzed as a practical inquiry. *See id.* at 185 (asserting what is practical considers duties employees are expected to perform). The record contains at most a scintilla of facts to show what Rodriguez might be expected to perform as a professor and chairman; JMU did not have a social media policy and Rodriguez privately owned and operated his blog from home. *See* R. 6 (listing Rodriguez's duties). This supports holding Rodriguez was not expected to maintain his blog in accordance with any of his official duties. *See Gorum*, 561 F.3d at 186 (holding the plaintiff's speech was made pursuant to his official duties as a matter of practical inquiry because it was informed by special knowledge obtained by relying on university resources and policies).

C. The Blog Statement Is Academic in Nature and Should Qualify for an Exception to *Garcetti* Regarding Employee Speech Made Pursuant to Official Duties

The Court has consistently held academic speech is protected by the First Amendment because of its importance to public interest and concern. *See Demers*, 746 F.3d at 411-12 (interpreting the Court's holdings since 1967 as recognizing speech by professors as academic freedom protected by the First Amendment). The holding in *Garcetti* left open the possibility to officially recognize, in a future case, an academic exception to speech made pursuant to official duties. *See Adams*, 640 F.3d at 563 (holding the *Garcetti* ruling did not decide if its holding

would apply to academic speech). By adopting an academic exception to *Garcetti*, the Court will resolve a circuit split and protect academic speech it has repeatedly held is fundamental to the functioning of a free society. *See id.* at 562 (holding *Garcetti* does not apply to speech made pursuant to official duties); *but see Renken v. Gregory*, 541 F.3d 769, 773-75 (7th Cir. 2008) (declining to consider an exception to *Garcetti* for academic speech).

1. Rodriguez's Opinions in His Blog Post Are Academic in Nature

Several circuit courts have opined on the applicability of *Garcetti* in cases involving employee speech which is academic in nature and therefore potentially exempt from its holding. *Compare Adams*, 640 F.3d at 563 (refraining from applying *Garcetti* to academic speech made pursuant to official duties) *and Demers*, 746 F.3d at 412 (holding the same), *with Renken*, 541 F.3d at 773-75 (declining to recognize an academic exception to *Garcetti*).

In *Adams v. Trustees of the University of North Carolina-Wilmington*¸ the plaintiff was a public university professor whose speech included books, an internet column, and television appearances unrelated to the courses he taught. 640 F.3d at 553-56. The Fourth Circuit held the speech involved scholarship and teaching, making the *Garcetti* rule not applicable. *Id.* at 564. In contrast, in *Savage v. Gee* the underlying plaintiff argued his speech was academic in nature and therefore exempt from the typical constraint on public employees speaking pursuant to official duties. 665 F.3d 732, 738-39 (6th Cir. 2012) . The Sixth Circuit held First Amendment protection did not apply because the speech was not academic in nature as it did not relate to classroom instruction and only minimally related to academic scholarship. *Id*. at 739.

Rodriguez's case is similar to *Savage* and *Adams* despite the opposite holdings; his blog was not related to classroom instruction which is seen in both cases. R. 4; *see also Savage*, 665 F.3d at 739 (holding the plaintiff's speech was not related to classroom instruction and was

loosely related to academic scholarship); *Adams*, 640 F.3d at 564, 565 (ruling the plaintiff's speech on civil rights and religion as academic scholarship unrelated to his assigned teaching duties). The difference in the holdings was the extent to which the speech was related to academic scholarship; while lacking in *Savage*, the plaintiff's speech in *Adams* was held academic in nature. *Id.* Rodriguez's blog is analogous to the internet column in *Adams* because the context, content, and form are similar to Rodriguez's speech. *See* 640 F.3d at 563-64, 565 (holding the plaintiff's speech was scholarly even when unrelated to his teaching duties); R. 2, 4 (holding the blog discussed medical topics Rodriguez never mentioned in class).

2. The Court Should Officially Recognize an Academic Exception to Garcetti

In his dissent in *Garcetti*, which was given significant deference in the majority opinion, Justice Souter strongly advocated holding in accordance with the history of the Court's rulings which have safeguarded academic freedom as a special First Amendment concern. *See Garcetti*, 547 U.S. at 425 (noting Justice Souter's dissent and the potential impact of the ruling on public education). Justice Souter warned the majority's ruling might jeopardize the academic freedom of teachers who inherently speak pursuant to official duties on matters of public concern, emphasizing the need to protect such situations as a matter of special interest. *Id.* (Souter, J., dissenting) (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). With this special interest in mind, the Court must hold Rodriguez's speech protected by the First Amendment because of its academic nature. *Id.* (holding academic freedom is a special First Amendment concern).

II. THIS COURT'S PRECEDENCE IN *PICKERING* AND *CONNICK* REVEAL JMU VIOLATED RODRIGUEZ'S FREE SPEECH RIGHTS

In *Pickering*¸ the Court held the crux of determining whether an employee's First Amendment rights were violated was to reach a balance between the employee's interests in speaking on matters of public concern and the interests of the government employer in

preserving an efficient agency free from disharmony and disruption. 391 U.S. at 568. Several factors are considered when balancing these interests. *Pickering*, 391 U.S. at 570-73; *Connick*, 461 U.S. at 152. Factors, which in the present case are implicated by the delay in time between when Rodriguez made his speech and when JMU fired him, include the extent to which the speech impaired Rodriguez's harmonious relationships with his colleagues, disrupted the operations at JMU, and impeded Rodriguez's ability to perform his job duties. *Id.*; *see also Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) (holding the government had to show actual disruption occurred as a result of the plaintiff's speech because of the delay in terminating him). Also in the present case, and predominant among the factors, is the degree to which Rodriguez's speech involved a matter of public concern. *Connick*, 461 U.S. at 152.

A. The Delay Between Rodriguez's Speech and His Termination Clearly Indicates His Speech Did Not Directly Cause Disharmony or Disruption, nor Impacted His Job Performance

Connick held government employers may discipline preemptively to prevent disharmony and disruption from occurring as a result of an employee's speech. 461 U.S. at 152. But they must show actual disruption occurred if there is a delay between when the speech occurred and when disciplinary measures were taken. *See Pickering*, 391 U.S. at 570-71 (holding the government erred in taking action absent direct evidence of actual disruption); *see also Hulen*, 322 F.3d at 1239 (holding preemptive action does not apply if the speech occurred several months prior). The record indicates JMU cannot show actual disruption occurred as a direct result of Rodriguez's speech. *See* R. 2-3 (showing JMU fired Rodriguez sixteen months after his speech, but only three weeks after Dr. Felan-Garcia's wrongful death trial).

1. There Are No Facts to Show Disharmony Occurred Among Rodriguez's Relationships with JMU Faculty and Students as a Direct Result of His Speech

The Court has held maintaining harmonious working relationships among co-workers is

validly of utmost interest to government agencies. *Pickering*, 391 U.S. at 570. As such, JMU may reference the letter submitted by the School of Medicine faculty as proof Rodriguez's speech harmed working relationships. R. 10-11. This might be a compelling argument if not for the fact Rodriguez's blog opinions were already well known by his colleagues, and the post generated significant attention at the time of publication. *See* R. 3 (indicating Rodriguez's beliefs were well known to the faculty, and the post went viral and generated news coverage). The lack of facts showing Rodriguez's colleagues had any disagreements with his opinions or distrusted him as a colleague at any time before the wrongful death trial, especially given the publicity surrounding his beliefs and the post, shows a lack of correlation between the speech and the disharmony. *See* R. 2-3 (showing Rodriguez was fired sixteen months after posting his speech); *see also Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1265 (10th Cir. 2005) (holding a doctor's speech caused disharmony because the medical staff at a university lost trust in him).

The Court cannot view the letter of grievance as a direct fact showing disharmony resulted from Rodriguez's speech; rather, it was a result of the wrongful death trial. *See* R. 2-3 (showing Rodriguez was fired three weeks after the trial); *see also Schrier*, 427 F.3d at 1265 (holding evidence of disharmony resulting from the speech was needed because of the five-month delay in firing the plaintiff). Even if the Court viewed the letter as a direct fact showing disharmony, it would be improper to blame Rodriguez for his colleague's reactions. *See Pickering*, 391 U.S. at 571 (holding different opinions on matters of public concern is of public interest); *see also Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (holding it improper to attach responsibility to a speaker because his peers have no self-control). Rodriguez's speech also did not negatively impact the relationships with his students. *See* R. 2, 3-4 (confirming he never mentioned his views or blog in class and he received several student appreciation awards).

2. There are No Facts Showing Actual Disruption Occurred as a Direct Result of Rodriguez's Speech

The Court has also held the government has an interest in maintaining their agency free from disruptions in order to fulfill their responsibilities to the public. *Connick*, 461 U.S. at 150. Here, there are no facts in the record showing actual disruption to JMU operations during the sixteen-months between when Rodriguez's speech occurred and the time of the wrongful death trial. *See* R. 3 (listing concerns from undergraduates, one class cancelation, and a donor contemplating withdrawal of their support as all occurring after the wrongful death trial). Similar to disharmony, this delay shows a lack of correlation between the speech and any disruption that occurred. *See Schrier*, 427 F.3d at 1264 (requiring the employer to show actual disruption occurred as a result of the speech because the employee was terminated five-months later). Even if the Court viewed the disruptions occurred as a direct result of the speech, the impact to JMU operations from concerns and one or a few class cancelations would essentially equate to the impact of foreseeable disruptions like a professor sick day or inclement weather. *See* R. 3 (recording one class was canceled); *but see* R. 10 (stating potentially more than one class was canceled). Further, the record is insufficient to indicate the extent of disruption on operations, if any, a single donor might have had by withdrawing their support of JMU. *See* R. 3, 10 (failing to indicate if the donation at issue was sizable or miniscule, and what impact on JMU could result from either scenario). The Court cannot hold that level of disruption would be significant enough to trounce speech on a matter of public concern, especially given disruption is anticipated at universities due to differences in academic opinions of professors. *See Hulen*, 322 F.3d at 1239 (holding conflict amongst professors in university settings is expected).

3. Rodriguez's Speech Did Not Impede His Job Performance or Conflict with His Job Duties

The Court also holds the extent to which an employee's speech negatively impacts job

performance or conflicts with their job duties as determinative in the *Pickering* balancing test. 391 U.S. at 572-73; *Connick*, 461 U.S. at 151. This factor again weighs in favor of Rodriguez; the only facts available in the record discussing Rodriguez's job performance indicates he was appreciated by his students and aptly conducted all of his assigned duties until the day he was fired. *See* R. 4, 6 (discussing Rodriguez's student appreciation awards and his job duties at JMU); *see also Pickering*, 391 U.S. at 572-73 (holding the plaintiff's published statements in the newspaper did not conflict with his teaching duties in the classroom). Further, as previously discussed, Rodriguez's blog post cannot have conflicted with his assigned duties as he posted his speech at home, during a holiday, on his privately owned and operated blog, for which JMU had no policy governing, limiting, or prohibiting its use. R. 6; *see also Connick*, 461 U.S. at 153 (holding a violation of office policy as supporting the government's argument).

B. The Degree to Which Rodriguez's Speech Involves Matters of Public Concern Outweighs JMU's Ability to Show Any of Their Interests Were Harmed

A predominant factor of the *Pickering* balancing test requires the Court to consider the extent to which the employee's speech discussed matters of public concern. *Connick*, 461 U.S. at 152; *Lane*, 573 U.S. at 242. The government's burden in proving their interests were harmed increases the more an employee's speech implicates matters of public concern. *Id.* Rodriguez's speech, which discussed the current state of American medicine from the viewpoint of a learned professor and doctor, merit holding it amongst the highest degree to which speech can address matters of public concern. *See* R. 8 (discussing the American medical system and reliance on pharmaceuticals); s*ee also Jackson*, 168 F.3d at 910 (quoting *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 937 (3d Cir. 1990)) (classifying healthcare quality, availability, and cost as among the most debated and vital issues of our time); *Pickering*, 391 U.S. at 573 (holding the professor's opinion as essential for informing debate on matters of public concern);

Adams, 640 F.3d at 565 (holding speech on academic topics was a matter of public concern). The Court, like the Fourteenth Circuit, should uphold it accordingly. R. 18.

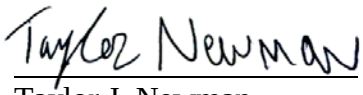
1. The Extent to Which Rodriguez's Speech was on a Matter of Public Concern is Dispositive When Balanced Against JMU's Interests

Rodriguez's speech is the exact type of speech to which courts have consistently accorded First Amendment protection. *Id.* The extent to which his speech touches on matters of public concern validates the Court's recognition of teachers' vital contributions to these matters, and the innumerable ways their learned opinions elevate public debate. *Pickering*, 391 U.S. at 572. Rodriguez suggesting a need for dialogue on alternative treatments due to potential overreliance on pharmaceuticals only serves to contribute to debate on current medical issues. *See* R. 8 (urging discussion on the efficacy of alternative treatments in lieu of pharmaceuticals); *Garcetti*, 547 U.S. at 425 (citing whistleblower statutes as a tool dictating public employers be receptive to employee criticism). Notably, JMU fired Rodriguez instead of choosing to engage his speech in debate. R. 6, 9; s*ee also Pickering*, 391 U.S. at 572 (holding the underlying plaintiff's employer could have easily chosen to publicly counter his statements). In doing so, JMU's actions directly violated Rodriguez's free speech rights. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (holding tolerance of and debate over different opinions is the basis of the freedom of speech). When, as here, there is ample time to address disagreements over important academic issues of public concern, the proper method is more speech—not forced silence. *Id.* (holding only emergency can justify repression).

CONCLUSION

For the above reasons, Dr. Rodriguez prays this Court affirms the Fourteenth Circuit's order finding his speech was entitled to First Amendment protection and as such JMU violated his constitutional rights by terminating him, and remand for further proceedings.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent certifies this brief has been prepared and served upon all opposing counsel in compliance with the Rules of the Supreme Court of the United States by certified mail on this the 8th day of March, 2018 to:

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