Case 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 RESPONDENT

Melissa Fullmer
One Camino Santa Maria
San Antonio, Texas 78228

Counsel for Respondent

March 8, 2019

QUESTIONS PRESENTED

I. Whether statements made on Dr. Rodriguez's personal, self-funded blog are protected by the First Amendment?

II. Whether Jefferson Moore University violated Dr. Rodriguez's free speech rights by terminating his employment due to the statements made on his unaffiliated blog?

PARTIES TO THE PROCEEDING

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.

TABLE OF CONTENTS

QUESTIONS PRESENTED **1**

PARTIES TO THE PROCEEDING ..... **ii**

TABLE OF CONTENTS ..... **iii**

TABLE OF AUTHORITIES ..... **v**

CITATIONS TO THE OPINIONS BELOW ..... **vi**

STATEMENT OF JURISDICTION ..... **vi**

STANDARD OF REVIEW ..... **vi**

PROVISIONS INVOLVED ..... **vi**

STATEMENT OF THE CASE **1**

SUMMARY OF THE ARGUMENTS **1**

ARGUMENTS **3**

I. Dr. Rodriguez's statements made on his personal blog are protected by the First Amendment. **3**

A. Dr. Rodriguez was a private citizen when he spoke on his blog because he did not speak pursuant to his official duties. 3

1. Dr. Rodriguez spoke as a private citizen because his blog post was not pursuant to his official duties as a professor. 4

2. Dr. Rodriguez did not speak while in his role as a member of the JMU medical task force. 5

B. Dr. Rodriguez's statements warrant First Amendment protection because they were a matter of public concern. 6

1. Dr. Rodriguez's statements were of public concern, regardless of whether or not they are commonly shared. 6

2. Dr. Rodriguez was especially qualified to speak on the topic of medicine to the public. 7

C. Dr. Rodriguez's speech is protected by an Academic Exception because his blog was scholarly in nature. 8

II. Dr. Rodriguez's First Amendment rights were violated by JMU because they failed to adequately justify his termination. 9

A. Dr. Rodriguez wrote his blog when JMU was not operating, wasting no agency time or resources. 10

B. The context of Dr. Rodriguez's speech weighs in favor of his First Amendment interest. 11

C. Dr. Rodriguez wrote an opinion piece, undeserving of scrutiny applied to published academic materials. 11

D. The relationship between Dr. Rodriguez and his superiors was unaffected by the blog post when it was made. 12

E. At the time of its posting, Dr. Rodriguez's speech existed neutrally between himself and his coworkers. 13

F. No actual disruption to Petitioner's ability to raise revenue was demonstrated. 14

G. The balancing test weighs in Dr. Rodriguez's favor. 14

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX 17

TABLE OF AUTHORITIES

Cases

Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011)..... 3, 4, 5, 8

Connick v. Myers, 461 U.S. 138 (1983).....3, 9, 10, 11, 12, 13

Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).....8, 9

Garcetti v. Ceballos, 547 U.S. 410 (2006).....3, 6, 9

Keyishian v. Bd. Of Regents of Univ. of State of N.Y., 385 U.S. 689 (1967). 8

Lane v. Franks, 573 U.S. 228 (2014).....4, 6, 7

Pickering v. Bd. of Educ., 391 U.S. 563 (1968). 3, 8, 9, 10, 11, 12, 13, 14

Rankin v. McPherson, 483 U.S. 378 (1987).....6, 7, 9

Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015).....13

Sexton v. Martin, 210 F.3d 905 (8th Cir. 2000) 12, 13

Statutes

42 U.S.C. § 1983 (2018). .....vi, 3, 17

Constitutional Provisions

U.S. Const. amend. I. .....vi, 3

CITATIONS TO THE OPINIONS BELOW

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

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on January 6, 2017. R. at 18. Petitioner filed a Petition for Writ of Certiorari which was granted on November 13, 2018. R. at 19. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

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, or of the press…." U.S. Const. amend. I.

"Every person who, under color of any statute…subjects, or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the injured in an action at law…." 42 U.S.C. § 1983 (2018).

STATEMENT OF THE CASE

Dr. A.J. Rodriguez (Dr. Rodriguez) was employed as a professor and medical task-force member at Jefferson Moore University (JMU) in Jamestown, Gonzales. R. at 6. Dr. Rodriguez taught courses and chaired the school's task force for improving public access to medical care. R. at 6. On his own time, he maintained a self-funded website and blog on which he made personal posts, though he occasionally shared links to peer-reviewed academic journals. R. at 6. The blog was never shared in class. R. at 3-4. In one of his posts, Dr. Rodriguez expressed his desire for other practitioners to explore and talk about less-invasive treatments for their patients. R. at 8. Sometime after the blog was posted, Dr. Rosa Felan-Garcia, whom Dr. Rodriguez had never met or spoken to, claimed to be inspired by his post. R. at 3, 6. As a result of Dr. Felan-Garcia's treatment, her patient, Loren Pretzold, died. R. at 3.

Following the televised wrongful death trial, JMU received negative publicity, resulting in a student protest, class cancellation, and at least one threat from a major donor to withdraw support. R. at 3. On April 6, 2016, several of Dr. Rodriguez's colleagues wrote a letter urging for his dismissal. R. at 10-11. On April 25, 2016, JMU publicly announced their decision to fire him. R. at 9.

Dr. Rodriguez filed a complaint in the United States District Court for the District of Gonzalez seeking damages from JMU for retaliation against his exercise of constitutionally protected speech. R. at 5-7. The District Court granted JMU's motion for summary judgment. R. at 14. On appeal, the Fourteenth Circuit reversed, finding alternative views are not necessarily proper grounds for termination. R. at 17. JMU has made this appeal the Supreme Court, and certiorari was granted. R. at 19.

SUMMARY OF THE ARGUMENTS

In this case, a professor, who deliberately abided by the Court's standards for First Amendment protection by speaking as a private citizen on a matter of public concern, fights for Constitutional protection after his employer punished him for another's actions.

On Christmas Day over four years ago, on a self-funded and personally maintained website, Dr. Rodriguez wrote a blog post about a problem he genuinely perceived within the medical industry. Minor pieces of identifying information on the blog have led JMU to erroneously conclude he spoke through his blog as their employee. But the law does not permanently inhibit public employees from speaking their mind. What truly matters is the role Dr. Rodriguez occupied at the time of his speech.

Dr. Rodriguez, properly engaging his professional background, used his personal blog as a platform to opine on healthcare—something that unquestionably calls public interest. JMU may disagree with his suggestions or find them offensive, but *they* do not determine whether the speech was on a matter of public concern. And even if the blog was found to be official speech, it sparked scholarly thinking and discussion, earning itself special protection under an academic exception.

Although he followed all the rules, JMU has unfairly scapegoated Dr. Rodriguez for a total stranger's actions under the guise of maintaining efficiency, all while failing to recognize their own actions caused the very disruption they punished him for. The offended opinions of a few are not sufficient to justify terminating Dr. Rodriguez's employment.

While the loss of a patient at the hands of a doctor is tragic in any scenario, it is unfair to strip Dr. Rodriguez of his constitutional rights when he is not to blame. Speech should be properly analyzed for what it is, at the time of its creation. As a man speaking independently from his employer on a matter of public concern, Dr. Rodriguez satisfies the Court's requirements for First Amendment protection.

ARGUMENTS

I. Dr. Rodriguez's statements made on his personal blog are protected by the First Amendment.

The First Amendment of the Constitution states, "Congress shall make no law…abridging the freedom of speech, or of the press…." U.S. Const. amend. I. It has been long-established by the Court that citizens do not relinquish their First Amendment protections in consideration for public employment. *Connick v. Myers*, 461 U.S. 138, 142 (1983). Government employers are not immune from liability for violating the First Amendment rights of their employees. Under 42 U.S.C. § 1983, any person who deprives someone of any Constitutional rights under color of law is liable to the injured party. 42 U.S.C. § 1983 (2018).

A public employee's speech is protected by the First Amendment if 1) he spoke as a private citizen at the time, and 2) the speech voiced a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Furthermore, speech of an academic nature has been held to warrant more constitutional protection than non-academic speech. *Id*. at 425. Each of these prongs will be analyzed separately in the following discussion.

A. Dr. Rodriguez was a private citizen when he spoke on his blog because he did not speak pursuant to his official duties.

To review a public employee's First Amendment rights, the Court first determines whether an employee spoke as a public or private citizen, as stated in *Garcetti*. 547 U.S. at 421. When analyzing this prong of the *Garcetti* rule, it is crucial to note the role the employee occupies *at the time the speech is made*, not simply whether the contents bear vague resemblance to speech made pursuant to official duties. *See Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 561

(4th Cir. 2011) (holding the district court erred when it "converted" originally protected speech into unprotected speech based on events occurring after the speech was made). The Court should find that Dr. Rodriguez's speech, while related to medical practice, was not made pursuant to his official duties based on its topic alone.

1. Dr. Rodriguez spoke as a private citizen because his blog post was not pursuant to his official duties as a professor.

The Court should first note Dr. Rodriguez's blog, while also about medicine, was otherwise completely unrelated to his professional responsibilities. *Lane v. Franks* demonstrates speech can be made *related* to official duties while still under the protection of the First Amendment. 573 U.S. 228, 240 (2014) (stating *Garcetti* only applies where speech falls within the scope of an employee's duties). In *Lane*, the Court held Lane spoke as a private citizen during sworn testimony, even though the subject matter pertained to his job. *Id*. at 239. Here, the District Court makes an erroneous conclusion similar to the one reversed in *Lane*: because Dr. Rodriguez's job description included "public debate" and "discourse," he acted pursuant to his official duties. *Id*. at 239; R. at 14. This conclusion ignores the fact Dr. Rodriguez's blog was posted on a holiday and not advertised at JMU—impossibly an official duty. R. at 6.

This point is further supported by *Adams*, in which a professor made a first amendment claim after he was denied tenure, allegedly for his outspoken Christian beliefs. 640 F.3d at 556. The appellate court reversed the district court's holding, which implicitly treated Adams' external work as within the scope of his official duties because they were included in his application. *Id*. at 561. They held it is expected professors will participate in extracurricular activities within their specializations, but this does not necessarily place such work within the context of their official duties. *Id.* at 564. Adams' speech was protected because of when his speech took place. *Id.* at 562.

Thus, mere affiliation with one's public employer does not remove the ability to speak as a private citizen. *Id.* at 562.

Likewise, Dr. Rodriguez is naturally expected to engage in personal research and commentary simply because he enjoys it, and he should not have to engage in these hobbies under the constant discretion of his employer. *Id.* at 562. Petitioner's misguided attempts at characterizing Dr. Rodriguez's "personal, private ranting" as an official duty rely on immaterial facts: the email address below the date and time and his credentials listed in his autobiography. R. at 8, 15. But it is clear error to emphasize these details because they do not change the *role* in which he spoke. *Id*. at 561. Dr. Rodriguez made many posts that were personal in nature, yet it would be obviously mistaken to label those posts as employee speech simply because his blog referenced his profession. R. at 6. It is also commonplace to introduce one's self with their occupation, as Dr. Rodriguez did by including his credentials in his biography, yet we refuse to characterize statements following such introductions as official speech. R. at 6.

The central point is Dr. Rodriguez, like Adams, performed his speech on his own time and will, independently from his employer. *See id*. at 554 (listing Adam's writings and appearances unaffiliated with his employer). Because Dr. Rodriguez was not in the role of professor while writing his blog, the Court should rightly find his speech was made as a private citizen.

2. Dr. Rodriguez did not speak while in his role as a member of the JMU medical task force.

Because the blog was so personal in nature, it was not pursuant to Dr. Rodriguez's role as a task force member to "improve public access to medical care." R. at 2. While the blog concerned healthcare, Dr. Rodriguez's only purpose was to encourage exploration of alternative treatments. R. at 8. *Lane* noted that *Garcetti*'s holding was not made because an internal memoranda *related*

to official subject matter. *Lane*, 573 U.S. at 239; *Garcetti*, 547 U.S. at 421 (emphasis added). It was an official duty because it was something the employee was expected to do at work. *Garcetti*, 547 U.S. at 422. Unlike *Garcetti*, Dr. Rodriguez certainly did not "[go] to work" to write the blog. *Id*. at 422; R. at 8 (showing the blog was posted on Christmas Day, when JMU was not in session). He did not speak of his efforts as a task force member, much less reference JMU by name, clearly demonstrating the disconnect between his speech and official duties. R. at 8. It is hard to imagine one could help the public gain access to health care by posting a single-paragraph blog post to his employer's ignorance. *See* R. at 2 (stating faculty were unaware of the blog when it was posted). The Court should find any attempts at claiming Dr. Rodriguez's blog pursuant to his official duty as a task force member are tenuous, unfounded, and false.

B. Dr. Rodriguez's statements warrant First Amendment protection because they were a matter of public concern.

Having satisfied the first part of the *Garcetti* test, the Court then determines whether the speech was a private grievance or public concern. 547 U.S. at 418. To determine whether speech is of public concern, the Court looks to whether speech is related to social or political concerns, or generally of value. *Lane*, 573 U.S. at 241. One must recognize speech made as a matter of public concern is protected even when the statements are controversial in nature. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

1. Dr. Rodriguez's statements were of public concern, regardless of whether or not they are commonly shared.

Dr. Rodriguez's blog, touching on problems he perceived in the American medical system, was of public concern. R. at 8. Healthcare, riddled with political and social debate, affects all citizens. Thus, healthcare is unquestionably of public interest. *See Lane*, 573 U.S. at 241 (stating

if speech is related to social or political concerns, it is of public concern). The District Court discredits Dr. Rodriguez's statements because they are "soundly rejected by the medical community." R. at 15. However, it is immaterial that Dr. Rodriguez supported fringe beliefs. *See Rankin*, 483 U.S. at 387 (stating the controversial nature of a statement does not negate its public concern). In *Rankin*, a public employee was fired after commenting on a recent Presidential assassination attempt, "I hope they get him." *Id.* at 387. The Court, refusing to narrow the First Amendment to agreeable speech alone, held the employee's speech as protected. *Id*. at 388. Here, Dr. Rodriguez's statements, while unconventional, were pleas toward a cause he passionately advocated: less intrusive medical treatments. R. at 6. If the Supreme Court found value in protecting McPherson's bold statement about an attempt on the President's life, there is no reason Dr. Rodriguez's well-meaning blog should not be extended the same treatment. *Id*. at 387.

American health care, affecting our entire population, is undoubtedly a matter of public concern, and speech concerning it should be "uninhibited, robust, and wide-open." *Id*. at 387 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Dr. Rodriguez saw a need for change in the way we practice medicine, and whether or not his readers were offended or disagreed does not negate his constitutional right to speak his mind. *Id*. at 387.

2. Dr. Rodriguez was especially qualified to speak on the topic of medicine to the public.

The Court should also recognize Dr. Rodriguez's expertise, making him especially qualified to speak on behalf of his concerns. *Lane*, 573 U.S. at 240. The District Court claimed Dr. Rodriguez "exploited his position" to "lend credence to his statements," yet precedent supports this very practice. *Id*. at 240; R. at 15. In *Lane*, the Court recognized the value of employees' speech pertaining to their specialties because of their superior knowledge. 573 U.S. at 236 (quoting

Waters v. Churchill, 511 U.S. 661 (1994)); R. at 15. Employees' speech is not just valuable—it has been held essential they speak on certain issues without fear of dismissal. *See Pickering*, 391 U.S. at 572 (advocating teachers should be freely permitted to "speak out" because they have informed opinions about the allocation of school funds). This holding supports the use of Dr. Rodriguez's credentials when speaking on a matter of public concern because it demonstrates he is especially qualified to speak on the topic. *Id*. at 572.

C. Dr. Rodriguez's speech is protected by an Academic Exception because his blog was scholarly in nature.

In *Garcetti*, the Court stated First Amendment analysis should not threaten freedom of speech when pertaining to academic scholarship or classroom instruction. 547 U.S. at 425. While the Court did not establish firm boundaries for the application of this exception, it is far from unclear as to whether it was established at all. *See Demers v. Austin*, 746 F.3d 402, 414 (9th Cir. 2014) (holding an academic exception applies); *see also Adams*, 640 F.3d at 556 (holding an academic exception applied to a professor's external writings); R. at 15 (stating it is unclear whether the exception exists at all). In respect of our country's "transcendent value" of protecting academic freedom, the Court should adopt a broader view of the academic exception established in *Garcetti* than that applied by the District Court. *Keyishian v. Bd. Of Regents*, 385 U.S. 689 (1967).

Dr. Rodriguez, boldly attempting to push the boundaries of conventional medical wisdom, should be afforded the same protections granted to professors as seen in *Demers*. 746 F.3d at 414. Demers, a mass communications professor, prepared a "7-Step Plan" to improve the education of his field. *Id*. at 414. The court held there was an academic exception because of its potential influence on the university's teachings, refusing to narrow the exception to traditional classroom

instruction and scholarship. *See id*. at 414-15 (quoting Demers' plan, which included steps to increase the influence of professionals within the university). Similar to Demers' attempt at changing the structure of his department, Dr. Rodriguez bravely sought to educate fellow doctors and faculty about alternative medical practices. *Id*. at 414-15; R. at 8. While neither professor lectured inside a classroom, both have challenged the norm within their academic spheres. *Id*. at 414-15; R. at 8. Hence, the Court should recognize similar value in Dr. Rodriguez's speech, regardless of whether it is scholarly writing in the purest sense. *See id*. at 416 (stating academic writing includes "academic duties," not just scholarship).

Because Dr. Rodriguez satisfies both elements of the *Garcetti* analysis and is protected by an academic exception, Dr. Rodriguez's statements are protected by the First Amendment. *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568).

II. Dr. Rodriguez's First Amendment rights were violated by JMU because they failed to adequately justify his termination.

In *Pickering* and *Connick*, the Court introduced a balancing test applicable to cases involving First Amendment suits brought by public employees. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 150. While the Court recognizes government employers' interest in maintaining effective performance, the employer has the burden of proving they were adequately justified in terminating an employee, which is substantially more difficult when the employee's speech touches on matters of public concern. *Rankin*, 483 U.S. at 388 (citing *Connick*, 461 U.S. at 150). Courts will consider factors such as the time, place, and manner of the speech, the context in which the conflict arose, veracity of the speech, working relations, and financial needs. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 150. Here, the Court should find Dr. Rodriguez's First Amendment rights were violated by Petitioner because his interests, as a private citizen speaking on a matter of grave public

concern, far outweigh Petitioner's pretextual interests in maintaining efficiency. *See Connick*, 461 U.S. at 152 ("we caution that a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved manners of public concern").

A. Dr. Rodriguez wrote his blog when JMU was not operating, wasting no agency time or resources.

The time, place, and manner of Dr. Rodriguez's blog post is further proof that his termination was unwarranted. R. at 8. In *Connick*, a prosecutor was fired for distributing a questionnaire scrutinizing her superiors immediately following a dispute about transferring to another department. 461 U.S. at 141. The Court held the time, place, and manner of the plaintiff's survey, at the office and during office hours, interrupted performance of her duties and encouraged others to do the same. *Id*. at 153. Here, the Court should find a narrow look at the time, place, and manner of Dr. Rodriguez's blog does not demonstrate disruption. *Id*. Dr. Rodriguez wrote his blog on a federal holiday off campus, rendering it impossible to interrupt Petitioner's daily routine. R. at 8. It would be comically wrong to accuse Dr. Rodriguez, writing a blog post while enjoying his Christmas Day, of impairing JMU's operations. R. at 8.

Our facts are more akin to those in *Pickering*, in which a school teacher was unjustly terminated for writing a letter criticizing the school board's history of improperly allocating funds. 391 U.S. at 574. Like Dr. Rodriguez, Pickering wrote his protected speech far from the operations of his employer. *See Connick*, 461 U.S. at 153 (distinguishing *Pickering* because of the location of the employee's speech); R. at 8. Similarly, Dr. Rodriguez did not distract colleagues by forcing them to read it while working. *See* R. at 8 (showing the blog was dated on a holiday). In fact, it states JMU faculty and students were ignorant of the blog's existence until JMU's extreme response. R at 6. The record is silent on damages occurring because of the blog at the time it was

made because there were none. *See* R. at 10-11 (alleging damages after the wrongful death trial, not blog posting). Thus, it is clear error to conclude the time, place, and manner of Dr. Rodriguez's speech impaired Petitioner's operations in any way.

As the Appellate Court correctly stated, much of the media attention and negative publicity was the result of Petitioner's own public reactions, which transpired long after the publication of Dr. Rodriguez's post. R. at 18. These consequences do not change the fact that the blog, at the time of its creation, spawned absolutely no disruption for Petitioner. R. at 18.

B. The context of Dr. Rodriguez's speech weighs in favor of his First Amendment interest.

The *Pickering-Connick* balancing test also considers context of the speech. *Connick*, 461 U.S. at 153. Here, there is nothing in the record indicating Dr. Rodriguez's blog came immediately following a conflict with Petitioner. *See id*. at 153 (stating it was significant that plaintiff's survey "followed upon the heels" of a dispute with her boss). Surely no dispute could have immediately preceded Dr. Rodriguez's writings on Christmas Day. R. at 8. Dr. Rodriguez is also supported by *Pickering*, where a letter sent to a newspaper explicitly criticizing the Board did not weigh against the plaintiff. 391 U.S. at 565. Dr. Rodriguez's blog is even less direct and abrasive than Pickering's letter because, unlike Pickering, he was not responding to any particular action by JMU. *Id*. at 565. For this reason, the Court should find Dr. Rodriguez's speech was not responsive to any dispute between himself and JMU, and conclude this factor weighs in his favor. R. at 8.

C. Dr. Rodriguez wrote an opinion piece, undeserving of scrutiny applied to published academic materials.

Courts may also consider the veracity of the speech when weighing the interests of a public employee and employer. *See Pickering*, 391 U.S. at 569 (stating an opinion, absent of knowingly

or recklessly made false statements, cannot be the basis termination from public employment). Dr. Rodriguez prevails in this factor because his work was merely an opinion piece, not researched, peer-reviewed, published work. *Id*. at 569. Note here that Dr. Rodriguez, along with posts personal in nature, shared links to peer-reviewed medical journal articles, but not falsely-produced medical journals for the treatments he suggested. R. at 8. Clearly, Dr. Rodriguez understands the nature of his opinions and knows how one would go about researching and publishing their own theories. R. at 8. Dr. Rodriguez's competence is further evidenced by the fact he did not teach his alternative beliefs in class. R. at 4. In reality, Dr. Rodriguez simply shared an opinion on a matter of public concern, which is highly valued by the Court. *Connick*, 461 U.S. at 152. Thus, the veracity of Dr. Rodriguez's speech is an unfair excuse for his termination. *Id*. at 152.

D. The relationship between Dr. Rodriguez and his superiors was unaffected by the blog post when it was made.

Pickering stated maintaining discipline by immediate supervisors is a potential interest if "personal loyalty and confidence" are essential to agency functioning. 391 U.S. at 570. Petitioner claims Dr. Rodriguez was insubordinate by violating their very general mission statement, adopted long after the blog was posted. *See* R. at 11 (stating JMU's mission statement was created one month before the April, 2016 letter). This is exactly the type of conclusory allegation rejected by the Eighth Circuit in *Sexton v. Martin*, which held the city department of public safety (DPS) was not justified in firing an employee because they did not provide enough evidence of disruption regarding supervisory relationships. *See* 210 F.3d 905, 912-13 (8th Cir. 2000) (concluding the director's affidavit stating supervisors were angered by the employee's actions was too vague to demonstrate disruption to working relationships).

Similar to *Sexton*, the record here does not demonstrate substantial disruption, as evidenced by the time elapsed between the blog post and termination. *See* R. at 8-9 (displaying date of the blog post in 2014, compared to Dr. Rodriguez's termination in 2016). If the blog truly caused disruption when it was posted, perhaps Dr. Rodriguez would have been fired sooner. R. at 8-9. Thus, Petitioner's statements aren't just vague. They completely fail to defend any interest in this factor of the *Pickering* test. *See id*. at 912-13 (stating vague statements did not support a finding of disruption).

E. At the time of its posting, Dr. Rodriguez's speech existed neutrally between himself and his coworkers.

Pickering held harmony among coworkers can be considered when weighing the interests of a public employee and employer. 391 U.S. at 570. Here, Dr. Rodriguez vaguely references his coworkers in a single phrase. R. at 8. This is a stark contrast from the actions seen in *Munroe v. Cent. Bucks Sch. Dist.*, in which a school teacher was fired after making several offensive blog posts about her students. 805 F.3d 454, at 458 (3d Cir. 2015). While the *Munroe* court noted students and parents could easily identify themselves based on her descriptions, stories, and quotes, Dr. Rodriguez's blog did not identify any faculty in particular. *Id*. at 477. Nor did Dr. Rodriguez ask his readers to comment their feelings about his colleagues or question their reliability. *See Connick*, 461 U.S. at 155 (displaying plaintiff's survey, which asks recipients if they could "rely on the word" of five named employees). Rather, Dr. Rodriguez simply intended to support his message with personally-obtained knowledge that many doctors default to writing prescriptions without exploring alternatives. R. at 8.

That *some* faculty were offended by Dr. Rodriguez's actions is not enough. *See Sexton*, 210 F.3d at 912-13 (concluding supervisors' anger was insufficient to prove disruption); R. at 10-

11. To focus on the opinions of a few is to disregard Dr. Rodriguez's accomplishments and contributions to the school since he was hired thirteen years before his dismissal. R. at 4. The Court should remember that Dr. Rodriguez's blog remained unnoticed until he was unfairly pulled into the spotlight, and find he was no threat to harmonious working relationships when his speech was made. R. at 6.

F. No actual disruption to Petitioner's ability to raise revenue was demonstrated.

One factor courts may consider is interference with the government's revenue stream. *Pickering*, 391 U.S. at 571. The record, in one sentence, states JMU was aware of *possibly* one donor who has threatened to pull her support, but has not alleged additional monetary losses since. *See* R. at 10, 12-13 (failing to allege monetary damages in Petitioner's motion to dismiss). Nor did Petitioner aggrandize the significance of this single donor relative to the total number of donors who regularly support them, or just how "major" her contributions were. R. at 10. Petitioner's defense of raising funds is as weak as that raised in *Pickering*. *See* 391 U.S. at 571 (stating Pickering could not have negatively affected the Board's attempt to raise revenue because no proposal to increase taxes was pending at the time of his letter). Likewise, Dr. Rodriguez has not threatened any pressing need to raise funding for the school. *Id*. at 571. Regardless, donors are free to stop giving as they please, and one doctor should not bear the burden of ensuring they stay by censoring his personal beliefs.

G. The balancing test weighs in Dr. Rodriguez's favor.

As demonstrated through a comprehensive look at the *Pickering-Connick* test, it is clear that this is not truly a case in which a government has exercised their ability to terminate employees in the name of efficiency. The time, place, and manner of his blog, coupled with the context in

which it was written, were completely separate from JMU's official affairs as they did not occur on campus, during the operating hours, or following an inter-agency dispute. Dr. Rodriguez's blog was an opinion piece, not a formal reflection on his competence as a doctor. Additionally, any disruption between faculty at JMU is not enough to support a finding of adequate justification for his dismissal. Therefore, the *Pickering-Connick* test unquestionably falls in Dr. Rodriguez's favor.

This discussion in no way serves to minimize the tragedy of Ms. Pretzold's death. However, today we ask the Court to focus on the true issue at hand: whether a public servant should be stripped of his Constitutional right to free speech because he chose to question the status quo on his personal website. Dr. Rodriguez has satisfied every criteria necessary to be deserving of protection. He was a private citizen when he wrote his blog. He spoke on a matter of public concern. His speech was academic in nature. And, he was wrongly terminated for doing all of these things almost two years before a tragedy for which he was not responsible occurred.

CONCLUSION

For the foregoing reasons, Dr. Rodriguez prays this Court affirm the Fourteenth Circuit's judgment finding his speech was protected by the First Amendment and that he was terminated without adequate justification.

Respectfully submitted.

/s/ Melissa Fullmer
Melissa Fullmer
One Camino Santa Maria
San Antonio, Texas 78228

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on March 8, 2019, I electronically filed the preceding brief with the Clerk of the Court using the CM/ECF system, which sent notification of that file to the Petitioner's attorney:

Alessandra Russo, Esq.
Gonzalez Attorney General's Office
61 Fenway Road
Jamestown, Gonzalez 55555

/s/ Melissa Fullmer
Melissa Fullmer
State Bar No. 12345678
Attorney for Dr. A.J. Rodriguez
One Camino Santa Maria
San Antonio, Texas 78228

APPENDIX

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983 (2018).