Case No. 2019-1234

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 PETITIONER

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March 8, 2019

QUESTIONS PRESENTED

I. Do the statements Dr. Rodriguez made on his blog trigger possible First Amendment protection?

II. If so, did Jefferson Moore University violate Dr. Rodriguez's free speech rights by terminating his employment due to the statements he made on his blog?

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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CITATIONS TO THE OPINIONS BELOW

The United States District Court for the District of Gonzalez's Opinion and Order granting Respondent's Motion to Dismiss with Prejudice is unpublished. R. at 14. The United State Court of Appeals for the Fourteenth Circuit's Opinion and Order reversing the lower court's decision is unpublished.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 United States Court of Appeals for the Fourteenth Circuit entered judgment on January 6, 2017. R. at 17. After Petitioner filed a Petition for Writ of Certiorari, this Court granted the Petition on November 13, 2018. R. at 19. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2018).

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 respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

42 U.S.C. § 1983 (2012).

28 U.S.C. § 1254(1) (2018).

STATEMENT OF THE CASE

This Court has granted academic institutions like JMU a right to autonomy in deciding for themselves who may teach for them and what they may teach. This Court has also expressed its disdain for citizens using federal courts as a forum to air work grievances following their dismissal. Nevertheless, Dr. Rodriguez insists on presenting a weak argument that his speech is deserving of constitutional protection that this court has never granted in the past. Dr. Rodriguez was an Assistant Professor of Medicine and a faculty member in the department of surgery at JMU. R. at 6. Dr. Rodriguez made the mistake of posting online a grievance that he himself wished to only be a "Personal and Private Rant" where he advocated for holistic medicine, spoke of his colleagues as "pill pushers" and went as far as advising the public to use chiropractic treatments for epilepsy patients. R. at 8. When Dr. Rodriguez's unsupported advice resulted in a wrongful death trial and extremely disruptive negative attention for JMU, JMU correctly terminated his employment to protect its status as the second oldest medical school in the nation. R. at 9-11, 4. Dr. Rodriguez's speech resulted disruption for JMU which included student protests leading to class cancellation, the threat of a donor to withdraw support from JMU and a letter from the faculty calling for his dismissal. R. at 8-9. Dr. Rodriguez chose to file suit against JMU arguing that the First Amendment protects his speech; that he had the right to post such dangerous information on his blog linking him to JMU in every post and that JMU did not have the right to let him go. R. at 6. The United States District Court for the District of Gonzales granted a motion to dismiss the case and held that that Dr. Rodriguez was speaking pursuant to his official duties when he made the post. R. at 15. Further, the court observed that when Dr. Rodriguez posted the statements on his blog about medical topics, he was working as an employee on JMU's taskforce on improving public access to medical care. *Id.*

The Fourteenth Circuit disagreed and mistakenly decided that JMU's interest in maintaining efficiency in the workplace did not outweigh Dr. Rodriguez's interests in speaking out on this matter that was clearly not a matter of public concern. R. at 17. Further, the Fourteenth circuit erroneously suggested that *Garcetti* does not apply to this case because the statements in Dr. Rodriguez's blog are academic speech. R. at 18. The Fourteenth Circuit recognized an exception from *Garcetti* for academic speech, even though this Court has never done so. If this Court wishes to grant professors an academic exception one day, this case is not worth the honor of it in any way. *Connick*'s court, for example did not allow an employee's speech to become protected simply because a small fraction of it may have concerned the public, instead it made clear that speech will not be qualified on its face and that the surrounding circumstances around the dispute are factors in determining the speaker's intent. Dr. Rodriguez's speech is not a matter of public concern, nor should the First Amendment protect it.

SUMMARY OF THE ARGUMENT

This Court's has established that when an employee makes his speech pursuant to his official duties, and not related to matters of public concern, the First Amendment affords it no protection. In cases where the speech is a matter of public concern and not made pursuant to the employee's official duties, the government employer may discipline its employees if it can show that the speech's disruptive effects on the government institution outweigh the employee's interest in making the statements. Dr. Rodriguez fails to state a claim upon which relief can be granted because his blog speech does not trigger any First Amendment protection.

First, Dr. Rodriguez made his blog speech pursuant to his official duties, indicating that the First Amendment does not protect the speech from employer discipline. Dr. Rodriguez wrote about holistic medicinal practices, including chiropractic care for epileptics. Dr. Rodriguez spoke

as a JMU professor in making this blog speech when he connected this blog with is profession, and therefore, he spoke pursuant to his official duties.

Second, this Court has only protected an institutional academic freedom, and JMU merely exercised it when it decided for itself that Dr. Rodriguez was unfit for the position he held. Third, Dr. Rodriguez's speech also fails to address a matter of public concern because his blog speech was meant as a grievance and a "Personal, Private Rant."

Finally, Dr. Rodriguez not only fails to prove that his speech triggers and First Amendment protection but his interests in making this speech fail to outweigh JMU's interest in efficiently running the nation's second oldest medical school. Dr. Rodriguez's speech proved to hamper harmony among associates, it had an adverse impact on cohesive relationships within JMU, it disrupted Dr. Rodriguez's performance of his duties and fully interfered with JMU's regular operation of the medical school. JMU requests that this Court reverse the Fourteenth Circuit's decision and remand for entry of judgement in JMU's favor.

ARGUMENT

A government employer may not condition public employment on the employee giving up his constitutionally protected right to freedom of speech. *Connick v. Myers*, 461 U.S. 138, 142 (1983). To do the public's work and provide efficient services, government employers need a significant amount of authority over their employees' actions and words. Lacking this authority makes it difficult for an institution to provide efficient services. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This Court has identified two inquiries to address its analysis of the constitutional protections afforded to government employee speech. *Id*. at 418. First, if the employee made the statements pursuant to his official duties, then the First Amendment does not protect the employee from employer discipline. *Lane v. Franks*, 573 U.S. 228, 234 (2014).

However, if the employee is speaking as a citizen and his speech is on a matter that concerns the public, then the court must move to the second inquiry and balance the interests of the parties to determine if the employer violated the First Amendment when it disciplined the employee for the speech. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In performing this balancing, the court must consider the interests of the employee in speaking out on a matter of public concern and weigh them against the interests of the government entity in efficient delivery of the services it must provide to the public. *Id*. at 568. Dr. Rodriguez spoke as an employee pursuant to his official duties when he made the speech in question on his blog. *See Lane*, 573 U.S. at 234. This blog speech does not address a matter of public concern. In any event, JMU's interest in providing efficient services to the public severely outweighs Dr. Rodriguez's interest in making his speech.

I. Dr. Rodriguez's speech fails to trigger any First Amendment protection

The First Amendment grants public employees a right, in certain circumstances, to speak as citizens when addressing matters of public concern. *Garcetti*, 547 U.S. at 417. For a court to consider a public employee's speech a constitutionally protected expression, the speaker must speak not as an employee but as a citizen, and the speech in question must involve a matter of public concern. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 466 (3d Cir. 2015). If the employee makes statements pursuant to his official duties, he is not speaking as a citizen, and the First Amendment does not afford him protection from employer discipline. *Garcetti*, 547 U.S. at 421. Speech that pertains to any issues of social, political or other concerns to society is speech addressing a matter of public concern. *Connick*, 461 U.S. at 146. If the court deems the public employee's speech as citizen speech but the statements fail to involve a matter of public concern, the speaker's employer may still regulate it without violating the First Amendment. *Urofsky v.*

Gilmore, 216 F.3d 401, 406 (4th Cir. 2000). Further, the Supreme Court has never restricted a state from regulating speech on grounds that it infringed an employee's First Amendment privilege to academic freedom. *Id.* at 412. Dr. Rodriguez's made his blog statements pursuant to his official duties, they do not involve a matter of public concern, and consequently they fail to trigger any First Amendment protection from his employer's discipline.

A. Dr. Rodriguez spoke pursuant to his official duties

In making the blog post, Dr. Rodriguez spoke pursuant to his official duties, and therefore, the First Amendment offers him no protection from JMU's discipline. Formal employment descriptions generally do not resemble the scope of the duties that an employer expects of his employee. *Garcetti*, 547 U.S. at 424-25. The speaker does not have to make the speech in the workplace for the court to consider it pursuant to official duties. *Urofsky*, 216 F.3d at 407. In deciding if the speech in question is pursuant to employee duties, the court must focus on the role the employee occupies in making his speech and not only on the content within the speech. *Adams v. Univ. of N.C.-Wilmington*, 640 F.3d 550, 561 (4th Cir. 2011). If an employee takes deliberate steps to link his activities to his work, and those activities bring the mission of his employer and professionalism of the other employees into disrepute, those activities are unprotected. *See San Diego v. Roe*, 543 U.S. 77, 81 (2004) (plaintiff's activities took place outside the workplace, he purported that they were not related to his employment, but the Supreme Court deemed them unprotected).

The role Dr. Rodriguez takes on in making his blog speech is that of a medical professor, and therefore, his speech was pursuant to his official duties. Dr. Rodriguez served as chairman of JMU's taskforce on improving public access to medical care; the blog post he made regarding his view that the medical community relied too much on pharmaceuticals was in deliberate contrast

to JMU's mission for that taskforce. R. at 6, 8. Dr. Rodriguez occupies the role of a JMU professor in making his speech; he deliberately mentioned his employment in the biography page of his blog, he displayed his work e-mail at the bottom of every post in his blog and his speech resulted in negative publicity for JMU. R. at 6, 10; *see San Diego*, 543 U.S. at 81 (police officer mentioned his employment on eBay listing and this Court found the First Amendment did not protect his actions). Dr. Rodriguez was responsible for engaging in research, scholarship and discourse to further JMU's academic mission, which includes improving public access to medical care. R. at 6. Dr. Rodriguez making a blog post that undermined the school's mission of improving public access to medical care and then linking that blog post with his employment at JMU affirms he was speaking as a public employee, pursuant to his official duties. *Id*; *see San Diego*, 543 U.S. at 81. Contrast this with *Pickering* where a teacher wrote a letter to a newspaper, like many private citizens do, to release his opinion about money budgeting at his school, and the Supreme Court held that the school board must regard the teacher as a member of the public like he wished to be. *Pickering*, 391 U.S. at 574. In making his speech in a public blog and adding where he worked to his biography page, Dr. Rodriguez attached the importance of his speech to his profession. R. at 6. Dr. Rodriguez then made statements that the public would regard as professional speech, even mentioning his dissatisfaction for his colleagues' actions. R. at 8. Dr. Rodriguez linked his blog speech with his profession because he knew that people would listen to the speech when it came from someone who the public expects to speak as a collegiate educator, not because he was hoping for the public to regard him as just another speaker on the internet. *See Pickering*, 391 U.S. at 574.

B. Dr. Rodriguez's speech is not deserving of an academic exception

This Court recognizes academic freedom in terms of an institutional right of self-governance in academic affairs and not a right of academic freedom belonging to professors as

individuals. *Urofsky*, 216 F.3d at 412. The AAUP (American Association of University Professors) published a statement explaining that a professor's position in the community comes with special obligations and professors should make every attempt to indicate to the public when they are making statements that are not on behalf of their institution. *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 730 (Wisc. 2018) (discussing the AAUP's statement pertaining to academic freedom and describing that a professor must remember that the public may judge the professor's institution by his statements); American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, https://www.aaup.org/file/1940%20Statement.pdf. Justice Frankfurter enumerated four essential freedoms that a university holds, one of which includes determining for itself who may teach. *See Sweezy v. New Hampshire*, 354 U.S. 262, 263 (1957) (Frankfurter, J., concurring)).

JMU exercised an essential freedom to dismiss Dr. Rodriguez when it realized that both the publicly posted online blog speech and the professor's choice in disseminating that speech were inconsistent with JMU's academic mission. R. at 3, 9. Dr. Rodriguez's post threatened to harm JMU's ability fulfill its duty to serve the public and the mission it chose for itself in the exercise of self-governance so JMU diligently exercised its right to determine for itself Dr. Rodriguez's suitability to represent the university. R. at 9. Dr. Rodriguez made the choice of adding his employment information onto his biography page and made no attempt to indicate that he was not making his statements on behalf of JMU in direct contravention of the AAUP statement warning professors of the public tying their speech with their professions. R. at 8; *see* AAUP Statement, *supra*. Rodriguez knew that his profession as a medical professor would make people listen and they did, his post went viral with 50,000 views and a patient dead as a result; he did exactly what the AAUP seeks to avoid in making this speech. R. at 6; AAUP Statement,

supra. The Court should not afford Dr. Rodriguez's speech an academic exception if there has not been one afforded to professors as individuals; this is exactly the kind of issue this Court was wary of when it made the decision to not afford this kind of protection in the past. Doing so would open the door for many other appropriately dismissed public employees to bring grievances to the courts like Dr. Rodriguez has done with an attempt to thinly veil their statements as academic speech.

C. Dr. Rodriguez's speech does not constitute a matter of public concern

Even if the court does decide that Dr. Rodriguez spoke as a private citizen, the First Amendment does not protect his speech for it does not constitute a matter of public concern. Whether speech addresses a matter of public concern depends on the content, context and form of the speech in question as revealed by the entire record. *Connick*, 461 U.S. at 147-48. In making this determination, the court cannot "cherry pick" publicly impactful speech out of a statement while ignoring the context and manner in which the employee made the speech. *Munroe*, 805 F.3d at 469 (referencing *Miller v. Clinton County*, 544 F.3d 542, 550 (3d Cir. 2008)). In deciding if the speech is a matter of public concern, courts must take into consideration an employee's motivation and whether it is pertinent that the expression take place. *Id.* at 467. Not all professor speech engages in a matter of public concern; if the speech is a private grievance, the First Amendment does not protect the speaker from his employer's discipline. *Demers v. Austin*, 746 F.3d 402, 416 (9th Cir. 2014); *see also Connick*, 461 U.S. at 148. Accordingly, speech relating only to mundane employment grievances fails to implicate a matter of public concern because managing to "brush" on matter of public concern will not convert a private grievance into protected speech. *Munroe*, 805 F.3d at 467-68. Moreover, even if

the courts hold that this speech is a matter of public concern, they must still balance it with JMU's interest in promoting the efficient services. *Id*. at 472; *see infra* Part II.

The blog post in question evidences a grievance between Dr. Rodriguez and his colleagues at JMU. Dr. Rodriguez chose to address his colleagues as "pill pushers" and references the work they do as "myopic" in its focus: in other words, lacking intellectual insight. R. at 8. The letter from the faculty demanding his dismissal further evidences ill-will between the parties and the large number of professionals at JMU who question Dr. Rodriguez's medical competence. R. at 11; *see Connick*, 461 U.S. at 148.

Dr. Rodriguez did not intend this speech as something the whole world needed to hear; he intended his speech as a diary post or something of the like. This case parallels one where a public-school teacher spoke about her students in blog posts and they went viral; her speech too was unprotected. *See Munroe*, 805 F.3d at 467-68. Like *Munroe*, Dr. Rodriguez's speech did not inform the public about any alleged wrongful conduct at JMU; the title of the post, "Just Some Personal Private Ranting" shows he did not seek to implicate larger discussion which parallels Munroe's "Things That Bothered Me Today" post. *Munroe*, 805 F.3d at 469; R. at 8. The First Amendment should not protect Dr. Rodriguez's post just like the First Amendment did not protect Munroe's speech when her blog post was not something she meant to disseminate to the masses. R. at 8; *see Munroe*, 805 F.3d at 467-68. The government system has no interest in the fact that Dr. Rodriguez has a negative opinion of his colleagues and it is apparent that he did not mean for his speech to be a "Public Informative Rant" but he meant for it to be a "Personal Private Rant." R. at 8.

Labelling Dr. Rodriguez's speech as a matter of public importance simply because it had 50,000 views and many people protested it, would be giving importance to any employee speech

even if the speaker intended merely for "Some Private, Personal Ranting." *See Munroe*, 805 F.3d at 469. Thus, granting protection to speech that merely touches on a matter of public concern invites ex-employees to bombard the court system wishing to justify their bad decisions as protected speech; claims from citizens that their speech is a matter of public concern because of a certain number of "retweets" or "re-blogs" on social media would become a common occurrence. Consequently, the court system as we know it could lose its regulation over speech considered protected or unprotected by the lower courts. Even if this Court deems Dr. Rodriguez's speech as a matter of public concern, JMU did not violate his First Amendment rights. Dr. Rodriguez's interest in speaking on a matter of public concern does not outweigh JMU's interest in promoting the efficient services it must provide to the public. *See infra* Part II.

Dr. Rodriguez's speech does not trigger any First Amendment protections. He made his speech pursuant to his official duties as the chairman of JMU's taskforce on improving public access to medical care. This Court has only ever granted an academic exception for institutions and not professors as individuals; giving one to Dr. Rodriguez would not be a prudent decision for the Court. *See Urofsky*, 216 F.3d at 412. Even if the court concluded that Dr. Rodriguez did not speak pursuant to his official duties, the First Amendment would not afford his speech any protections because his speech was merely an attempt to air a private grievance and not a matter of public concern. *See Demers*, 746 F.3d at 416; *see also Connick*, 461 U.S. at 148.

II. JMU did not violate Dr. Rodriguez's free speech rights by terminating him when Dr. Rodriguez's speech affected JMU's performance to the public.

Determining whether a public employer has improperly discharged an employee for engaging in protected speech requires a careful balancing of the interests of the employee in speaking on a matter of public concern and the interest of the government employer in promoting efficient public services. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In employing the

balancing test, the court uses a "sliding scale": the importance of the speech in question is directly proportional to the amount of disruption an employer must tolerate. *Munroe*, 805 F.3d at 472. This Court has noted the wide discretion and control that government employers must exercise over their staff. *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)). In deciding whether the government has properly used its discretion, the court will not consider the employee's speech on its face; the manner, and place of the employee's speech are relevant, as well as the context in which the dispute emerged. *Rankin*, 483 U.S. at 388. Factors to consider when balancing the interests of the parties include whether the statement in question hampers harmony among associates, has an adverse impact on cohesive relationships for which confidence and loyalty are necessary, disrupts the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Id*. at 388 (quoting *Pickering*, 391 U.S. at 570-573). Dr. Rodriguez's speech does not constitute a matter of public concern. In any case, JMU's interest in efficiently promoting its services outweighs Dr. Rodriguez's minimal First Amendment protection. JMU's interests in efficiently and effectively providing its services to the public outweigh Dr. Rodriguez's interests in making his blog speech. JMU has an institutional academic freedom to choose for itself who may teach. Additionally, JMU has an interest in maintaining its reputation and integrity. Lastly, JMU has a strong interest in maintaining the efficient and regular operation of the medical school and Dr. Rodriguez's speech disrupted this.

A. JMU has an institutional academic freedom to choose who may teach for it

When JMU dismissed Dr. Rodriguez for disseminating speech that disagreed with JMU's mission, JMU simply exercised a freedom that this Court has granted to academic institutions in the past. Justice Frankfurter highlighted the dependence of a free society on autonomous universities and enumerated for the public "four indispensable freedoms of a university" which

include the freedom of an academic institution to determine for itself based on academic grounds who may teach. *Sweezy*, 354 U.S. at 262-63 (Frankfurter, J., concurring). Further, the AAUP's 1940 Statement limits academic freedom in that public speech made by professors must always be accurate and display respect for opinions of others. *See* AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, https://www.aaup.org/file/1940%20Statement.pdf.

JMU was exercising a freedom that this Court has granted to colleges when it dismissed Dr. Rodriguez. *See Sweezy*, 354 U.S. at 262-63. Dr. Rodriguez's speech caused an uproar at JMU; a donor for JMU threatened to withdraw its support for the campus and students held protests which led to a class cancellation. R. at 10. Further, JMU dismissed Dr. Rodriguez soon after the faculty at JMU sent a letter stating that Dr. Rodriguez's speech was "outdated, outrageous, and irresponsible." R. at 11. Considering the content of the record as true, Dr. Rodriguez's speech being outdated and outrageous shows that he did not attempt to do what the AAUP explicitly asks of professors. *See* AAUP statement, *supra*. Additionally, Dr. Rodriguez's blog speech shows a lack of respect for opinions of others as shown by his use of the word "pill-pushers" in describing his colleagues. R. at 8. Dr. Rodriguez's speech was inaccurate, and irresponsible as it led to the death of a patient. R. at 10. This Court should not hold this blog speech as academic in nature because Dr. Rodriguez shows no factual basis for his claims on the post and disrespects opinions of others in contravention with the AAUP statement. R. at 8. Dr. Rodriguez's speech deserves no academic exception by law or informally because he did not follow the AAUP's instructions, nor is there an exception made by the courts for professors as individuals in the first place. *See Sweezy*, 354 U.S. at 262-63. JMU merely practiced a discretion granted by this Court in deciding who it deems fit to teach and to Dr. Rodriguez's dismay, he no longer made the cut.

B. JMU has an interest in maintaining its reputation and integrity

JMU's interest in protecting its status among other medical schools in the nation outweighs Dr. Rodriguez's interest in making his blog speech. In the past, this Court has denied First Amendment protections to employees whose actions bring a public employer into disrepute. *See San Diego,* 543 U.S. at 81 (holding that where police officer's actions brought employer into disrepute, First Amendment did not protect police officer from termination). Moreover, the fact that an employee works in a "public contact role" amplifies a government employer's interest in circumventing disruption. *Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1218 (D. Or. 2013).

Dr. Rodriguez making statements on the internet advancing a holistic approach to medicine and advising chiropractic treatment for epilepsy brought JMU stance in the medical community into disrepute. R. at 8; *see San Diego,* 543 U.S. at 81. JMU is known worldwide for the strength of its medical school; it is the nation's second oldest medical school and the oldest institution of higher learning in the state of Gonzalez. R. at 4. Local media outlets focused on Dr. Rodriguez's affiliation with JMU after the wrongful death trial ensued. R. at 3. Dr. Rodriguez worked as chairman of JMU's taskforce on improving public access to medical care which is inherently a public contact role. R. at 6. Dr. Rodriguez's public contact role had the power to affect the public's opinion of JMU and JMU had a heightened interest in circumventing the disruption that Dr. Rodriguez's speech instigated for JMU. *See Shepherd*, 986 F. Supp. 2d at 1218. JMU's interest in circumventing disruption that Dr. Rodriguez's statements caused weighs more than Dr. Rodriguez's interest in making his blog statements: Dr. Rodriguez's speech had the potential to negatively affect JMU's stance within the medical community and JMU acted accordingly when it dismissed Dr. Rodriguez after his speech caused negative attention from the public.

C. JMU has a strong interest in maintaining the efficient and regular operation of the medical school and Dr. Rodriguez's speech disrupted this interest.

Dr. Rodriguez's interest in making his blog speech fails to outweigh JMU's interest in maintaining effective and efficient services that it must provide to the public; Dr. Rodriguez's blog speech did indeed hamper harmony among associates and interfere with JMU's regular operation of its campus. Courts weigh opinions from people whose cooperation is necessary for the functioning of a government institution in deciding if statements hamper harmony within institutions. *Munroe*, 805 F.3d at 475. In general, the First Amendment does not allow outsiders – people who attempt to "heckle" educators into silence for making unpopular speech – to dictate whether the constitution protects an employee's rights; however, the law does not deem people whose cooperation is necessary for the functioning of a government institution as "outsiders." *Id.* Additionally, when weighing whether a statement carries the intent of a speaker to affect harmony among co-workers, courts consider statements that carry the apparent potential for undermining office relations. *Connick*, 461 U.S. at 152.

Dr. Rodriguez's blog speech impacted the opinions of JMU's faculty, student body and at least one of its donors. R. at 10-11. JMU's faculty sent a letter calling for Dr. Rodriguez's dismissal and the students organized a "sit-in" that resulted in a class cancellation. R. at 3, 10. JMU's students, faculty and donors are not outsiders to this dispute; their cooperation is necessary for JMU to operate efficiently and it is necessary to consider these facts in our balance. See *Munroe*, 805 F.3d at 476. (factoring into decision the fact that parents and students protested the retention of a public-school teacher who wrote negative blog posts about her students; the First Amendment did not protect the teacher's speech). Further, Dr. Rodriguez used the word "pill pushers" to describe his colleagues in his blog post and implied that they are short-sighted in their practice of medicine. R. at 8. Dr. Rodriguez's use of pejorative language towards his

colleagues directly caused disruption of harmony between his associates within JMU and himself. The faculty's letter addressed to the Dean of Students shows that they did not react positively to his blog speech and believed Dr. Rodriguez to be unfit to practice medicine or teach for JMU. R. at 10-11. Dr. Rodriguez's blog speech proved to have affected harmony among associates within JMU. *Id*. JMU took its students, faculty and donors into consideration in making its decision to terminate Dr. Rodriguez, as should this Court in making the decision that Dr. Rodriguez's interest in making the statements did not outweigh JMU's interest in efficiently serving the community.

Because Dr. Rodriguez's speech affected JMU's ability to efficiently perform the services it provides to the public, JMU did not violate his free speech rights when it terminated his employment. JMU merely exercised rights that this court has previously granted to government institutions when it discharged Dr. Rodriguez for interfering with JMU's performance. In making this blog speech, Dr. Rodriguez brought JMU into disrepute and JMU deciding to terminate him was not a violation of Dr. Rodriguez's First Amendment rights. JMU's faculty and students protested Dr. Rodriguez's blog speech; JMU appropriately weighed their opinions in making its decision to terminate Dr. Rodriguez. JMU's interests in providing efficient services heavily outweighs Dr. Rodriguez's interest in making his speech; Therefore, Dr. Rodriguez's speech, even if considered a matter of public concern, fails to establish grounds for First Amendment protection.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's order, and remand for entry of judgment in JMU's favor.

Respectfully submitted.

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that 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 the 8th day of March 2019 to:

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