
New York Supreme Court

Appellate Division—First Department

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE and JULIE NORRIS,

Petitioners-Respondents,

– against –

FORDHAM UNIVERSITY,

Respondent-Appellant.

**AMICI CURIAE BRIEF ON BEHALF OF
FOUNDATION FOR INDIVIDUAL RIGHTS IN
EDUCATION, NATIONAL COALITION AGAINST
CENSORSHIP AND PEN AMERICAN CENTER, INC.
IN SUPPORT OF PETITIONERS-RESPONDENTS**

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Sarah McLaughlin, <i>After viewpoint-based denial, Williams Initiative for Israel finally receives recognition</i> , FIRE (May 16, 2019), https://www.thefire.org/after-viewpoint-based-denial-williams-initiative-for-israel-finally-receives-recognition ; Jackson Richman	17

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SUMMARY OF ARGUMENT

In 1972, the Supreme Court of the United States reversed Central Connecticut State College’s viewpoint-based denial of recognition to a prospective chapter of Students for a Democratic Society. Recognizing the importance of students joining together on campus in support of shared convictions, the Supreme Court declared that a state college “may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.” (Healy v. James, 408 U.S. 169, 187–88 [1972]). Now, nearly fifty years after that landmark ruling, Fordham University has followed in Central Connecticut State’s footsteps, denying official recognition to a prospective chapter of a student group — Students for Justice in Palestine — because it disapproved of the group’s viewpoint. As a private university, Fordham’s viewpoint discrimination did not violate the First Amendment. But it did violate the extensive and unambiguous guarantees of free expression Fordham makes to its students, enshrined in the university’s mission statement and throughout the university’s policies — and those guarantees are binding.

Despite the long-recognized importance of freedom of expression and association on campus, Fordham is far from the only private university that has betrayed its promises of free expression after students chose to voice dissenting, challenging, or simply inconvenient opinions. *Amicus* FIRE’s two decades of

experience defending student rights demonstrates that private institutions in New York and nationwide routinely ignore their own policies and promises to silence unwanted expression when it suits them. Too often, private colleges indulge in censorship with relative impunity, despite assuring students, parents, and accrediting agencies that they will honor expressive rights. The problem has worsened to such an extent that the U.S. Department of Education has proposed new rulemaking to ensure that private schools fulfill their commitments to freedom of expression and stop engaging in a cynical bait and switch.

In New York, however, students have a remedy: Article 78 actions, like the one successfully brought against Fordham by Plaintiffs-Appellees. In New York, Article 78 (C.P.L.R. §§ 7801, *et seq.*) ensures that private institutions like Fordham cannot abandon their own rules and promises when students choose to speak out or band together with their peers, and it prohibits exactly the kind of arbitrary and capricious decision-making on display in the dean of students' viewpoint discrimination in this matter. The lower court properly found that Article 78's high bar to judicial intervention into college administration was more than met here. To protect student expressive rights statewide by forcing schools like Fordham to follow their own rules and deliver on their own promises, this Court should affirm the lower court's correct analysis.

INTEREST OF *AMICI CURIAE*¹

The Foundation for Individual Rights in Education (“FIRE”) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation’s institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends fundamental rights at both public and private institutions through public commentary and advocacy, litigation on behalf of students and faculty members, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. (See, e.g., B.L. v. Mahanoy Area Sch. Dist., No. 19-1842, 2020 U.S. App. LEXIS 20365, at *21 [3d Cir. June 30, 2020] (citing with approval FIRE’s *amicus curiae* brief in holding that a high school cheerleader’s online speech was protected by the First Amendment)).

The National Coalition Against Censorship (“NCAC”) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of

¹ *Amici* FIRE, NCAC, and PEN America affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, its members, or counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

expression. (The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.) Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, teachers, students, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of members of university communities.

PEN American Center, Inc. (“PEN America” or “PEN”) is a nonprofit organization that represents and advocates for the interests of writers, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its membership includes more than 7,400 journalists, novelists, poets, essayists, and other professionals including students and those in the academic and higher education communities. PEN America stands at the intersection of journalism, literature, and human rights to protect free expression and individual writers facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative and free expression. PEN champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. PEN America supports the First Amendment and free expression rights of students and

others on America's college campuses to protect principles of open inquiry and debate.

ARGUMENT

I. DESPITE THE IMPORTANCE OF EXPRESSIVE RIGHTS IN HIGHER EDUCATION, PRIVATE COLLEGES ROUTINELY VIOLATE THEIR OWN PROMISES OF FREEDOM OF EXPRESSION.

Courts have long recognized the importance of protecting student expressive and associational rights in higher education. While not bound by the First Amendment, private colleges and universities have traditionally matched their public counterparts' commitments to speech and associational rights over the past half-century, guaranteeing — as Fordham University does — freedom of expression to their students. Nevertheless, private colleges now routinely break their promises of free expression, teaching their students precisely the wrong lesson about their rights and the integrity of the institutions from which they seek their degrees.

A. Mirroring their Public Counterparts, Private Colleges and Universities Have Traditionally Promised Students Freedom of Expression.

“The essentiality of freedom in the community of American universities is almost self-evident.” (Sweezy v. New Hampshire, 354 U.S. 234, 250 [1957]). The danger posed by threats to freedom of expression is “especially real in the University setting,” because our colleges and universities house the “tradition of thought and experiment that is at the center of our intellectual and philosophic

tradition.” (Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 [1995]). Given the vital importance of freedom of speech, academic freedom, and freedom of association on campus, courts have long recognized our “national commitment to the safeguarding of these freedoms.” (Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 [1978]).

The twin freedoms of expression and association do not lose their salience on private campuses, and private institutions have long recognized the essential role of freedom of expression in higher education and “the notion that universities should be centers of discussion of contested issues.” (Matter of Awad v. Fordham University, 2019 NY Slip Op 51418(U), *6 [N.Y. Sup. Ct., July 29, 2019]). While private colleges and universities are not legally bound by the First Amendment, the vast majority of private institutions — including Respondent-Appellant² — guarantee their students and faculty members freedom of expression in official policies.³ They do so to further their educational mission, to attract students and

² See, e.g., *Demonstration Policy*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 17, 2020) (“Each member of the University has a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society.”).

³ See, e.g., *The Rules of University Conduct*, Columbia University, https://www.essential-policies.columbia.edu/files_facets/imce_shared/TheRulesOfUniversityConduct.pdf (last visited July 17, 2020) (“The Rules of University Conduct . . . are intended to ensure that all members of our community may engage in our cherished traditions of free expression and open debate. . . . To be true to these principles, the University cannot and will not rule any subject or form of expression out of order on the ground that it is objectionable, offensive, immoral, or untrue.”);

faculty to the institution and foster a robust climate of debate and discussion, to meet the public’s conception of our colleges and universities as true marketplaces of ideas, and to keep pace with their public peer institutions.⁴

In 1967, the same year the Supreme Court observed that “[t]he Nation’s future depends upon leaders trained through wide exposure to [a] robust exchange of ideas,”⁵ a committee commissioned by the University of Chicago and chaired by prominent First Amendment scholar Harry Kalven, Jr., issued an influential report emphasizing the importance of freedom of expression at private institutions in similar terms: “A university, if it is to be true to its faith in intellectual inquiry,

Speech and Expression Policy, Georgetown University, <https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression> (last visited July 17, 2020) (“As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammelled verbal and nonverbal expression of ideas. It is Georgetown University’s policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.”). *See also FIRE’s Spotlight Database*, Foundation for Individual Rights in Education, <https://www.thefire.org/resources/spotlight> (last visited July 28, 2020) (cataloguing university speech policies, including private universities’ commitments to freedom of expression).

⁴ *See, e.g.,* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 171 (2010) (“Although public and private universities differ in administrations, it is unlikely that student and faculty’s reasonable expectations of free speech at a public college differ from their reasonable expectations of a private liberal arts or research college promising free speech and holding itself up as a purveyor of critical education.”). *See also* John Inazu, *The Purpose (and Limits) of the University*, 18 UTAH L. REV. 943, 949 (2018) (“The First Amendment expressly governs public universities and informs the culture and norms of many private universities.”).

⁵ (*Keyishian v. Board of Regents*, 385 U.S. 589, 603 [1967]) (striking down New York state law requiring removal of faculty for “treasonable or seditious acts or utterances” on First Amendment grounds).

must embrace, be hospitable to, and encourage the widest diversity of views within its own community.”⁶

Likewise, in 1974 — two years after the *Healy* Court made clear that the First Amendment protects student expressive and associational rights on public campuses — a Yale University committee issued its own widely-cited report on freedom of expression. Chaired by eminent historian C. Vann Woodward, the report echoed *Healy*’s holding and emphasized the essentiality of freedom of expression within the private university: “To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views. . . . Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.”⁷ Indeed, Yale’s Woodward Report explicitly cited the First Amendment as informing its reasoning and inspiring its conclusion: “We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at

⁶ Report on the University’s Role in Political and Social Action, Kalven Committee, University of Chicago, Office of the Provost (Nov. 1967), <https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action>.

⁷ C. Vann Woodward, *et al.*, Report of the Committee on Freedom of Expression at Yale, Yale University, 1974, <https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>.

the time. . . . [E]ven when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression.”⁸

The vast majority of private colleges and universities promise their students freedom of expression not only to meet the public’s expectation that, as the United States Congress put it, “an institution of higher education should facilitate the free and open exchange of ideas,”⁹ but also because their accrediting agencies share this expectation and require them to fulfill it as a condition of accreditation.

Respondent-Appellant Fordham, for example, is accredited by the Middle States Commission on Higher Education, which requires that an accredited university “possess and demonstrate . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression” and maintain “a climate that fosters respect among students, faculty, staff, and administration from a range of

⁸ *Id.* In 2014, a University of Chicago committee chaired by First Amendment scholar Geoffrey Stone issued a new report on free expression, concluding that “the University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.” Geoffrey Stone, *et al.*, Report of the Committee on Freedom of Expression, University of Chicago, 2014, <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>. The report’s text, or a close variation, has now been adopted by more than 70 institutions or faculty bodies. *Chicago Statement: University and Faculty Body Support*, Foundation for Individual Rights in Education (July 14, 2020), <https://www.thefire.org/chicago-statement-university-and-faculty-body-support>.

⁹ Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(C) (2006).

diverse backgrounds, ideas, and perspectives.”¹⁰ Other accrediting agencies require similar commitments to expressive rights. The Higher Learning Commission requires its accredited institutions to be “committed to freedom of expression and the pursuit of truth,”¹¹ for example, and the New England Commission of Higher Education requires its accredited institutions to be “committed to the free pursuit and dissemination of knowledge.”¹² Accrediting agencies’ insistence on a baseline level of expressive rights demonstrates that freedom of expression on campus is a fundamental expectation of the private university.

B. Private Colleges and Universities Like Fordham Violate Their Promises of Freedom of Expression.

Private institutions like Fordham promise their students expressive rights because of normative expectations and our nation’s longstanding recognition of the integral role of free expression in higher education. They understand that students expect to be able to speak their minds and join their voices together on campus, and they seek to meet this expectation in policy. However, when faced with

¹⁰ *Standards for Accreditation and Requirements of Affiliation*, Middle States Comm’n on Higher Educ., 2015, <https://www.msche.org/standards>.

¹¹ *Criteria for Accreditation*, Higher Learning Comm’n, June 2014, <https://www.hlcommission.org/Policies/criteria-through-august-31-2020.html>.

¹² *Standards for Accreditation*, New England Comm’n of Higher Educ., July 1, 2016, https://www.neche.org/resources/standards-for-accreditation/#standard_six.

pressure to censor, too many private colleges nevertheless violate those principles, and *amicus* FIRE’s case archive is replete with examples.¹³

For example, Rensselaer Polytechnic Institute’s policies provide that its students are “citizen[s] of the nation at large, and [RPI] shall not impede or obstruct students in the exercise of their fundamental rights as citizens,” that students are “free to examine and discuss all questions of interest to them and to express opinions publicly and privately,” and “free to support causes by orderly means, including peaceful assembly, which do not disrupt the normal operation of” RPI.¹⁴

In 2016, some students, aggrieved that RPI’s administration was wresting control over a student-operated union on campus, began a “Save the Union” campaign critical of RPI’s senior administrators. Over the next three years, those administrators abandoned the Institute’s robust promises of freedom of expression, ignoring written policies, citing nonexistent policies, and writing new speech-restrictive policies in order to suppress their critics. When students supporting the movement repeatedly requested permission to hold peaceful demonstrations, the

¹³ *All Cases*, Foundation for Individual Rights in Education, <https://www.thefire.org/cases/?limit=all> (last visited July 28, 2020).

¹⁴ Rensselaer Polytechnic Inst., Rensselaer Handbook of Student Rights and Responsibilities 6 (rev. Aug. 29, 2019), <https://info.rpi.edu/sites/default/files/Handbook-of-Student-Rights-and-Responsibilities-Rev-August-29-2019.pdf>.

requests were denied.¹⁵ When they did so anyway, they were met with fences and police officers, hired from the city's ranks, who videotaped them and turned the surveillance footage over to administrators, who promptly used it to identify their critics.¹⁶

When students erected "Save the Union" signs in accordance with RPI's posting policies, RPI's administration repeatedly tore them down. In one of several examples caught on tape, security officers tore down signs criticizing the administration because it was "Accepted Students Day," when many prospective students and their parents were expected on campus.¹⁷ When students pointed out to the officers that the policy allowed the posters, an officer responded: "Today's a different story."¹⁸

Not only were students barred from posting flyers, they were prohibited from handing them out. Students who did so were charged under a policy barring

¹⁵ Press Release, Rensselaer Polytechnic Institute president (literally) fences out free speech, FIRE, Oct. 12, 2017, <https://www.thefire.org/rensselaer-polytechnic-institute-president-literally-fences-out-free-speech>.

¹⁶ Adam Steinbaugh, *Troy Police Department videotaped student demonstrators at Rensselaer Polytechnic Institute, a private institution*, FIRE (Mar. 27, 2018), <https://www.thefire.org/troy-police-department-videotaped-student-demonstrators-at-rensselaer-polytechnic-institute-a-private-institution>.

¹⁷ Adam Steinbaugh, *Rensselaer Polytechnic Institute's commitment to freedom of expression remains doubtful*, FIRE (Nov. 8, 2017), <https://www.thefire.org/rensselaer-polytechnic-institutes-commitment-to-freedom-of-expression-remains-doubtful>.

¹⁸ Save The Union, *RPI Public Safety Student Rights Oppression 1*, Apr. 9, 2016, https://soundcloud.com/save_the_union/rpi-public-safety-student-rights-oppression-1.

commercial solicitation and told they needed an administrator’s permission to distribute written materials. Others were ordered to cease distributing flyers on sidewalks by security officers citing “eminent domain.” After the New York Civil Liberties Union and FIRE pointed out that RPI’s policies didn’t require permission to hand out flyers, and that such a policy — if it existed — would be contrary to basic principles of freedom of expression,¹⁹ RPI’s administrators created a new policy requiring exactly that.²⁰ Today, no student at RPI is permitted to hand out any written material without express permission from an RPI administrator, and may only do so if they are affiliated with a recognized student organization. The “Save the Union” campaign is not recognized. Nonetheless, RPI continues to advertise its promise of freedom of expression to its students and the public.

A student at another private New York institution, Long Island University, found himself similarly at the whims of an institution that ignored its promised freedom of expression. During his summer vacation, Anand Venigalla posted a series of photographs of himself at a gun show, shooting an antique, powder-based

¹⁹ “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse [one] must first inform [authorities] of her desire to speak to her neighbors and then obtain a permit to do so.” (*Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 [2002]).

²⁰ Adam Steinbaugh, *Rensselaer Polytechnic Institute enforced a non-existent policy to suppress student critics, then wrote the policy*, FIRE (Sept. 24, 2019), <https://www.thefire.org/rensselaer-polytechnic-institute-enforced-a-non-existent-policy-to-suppress-student-critics-then-wrote-the-policy>.

rifle and holding several other firearms.²¹ Venigalla's photos were not accompanied by any threats or reference to the university, noting merely that he was at "a Cabela's at Pennsylvania." Although he was on summer break and his online speech had nothing to do with his university, he was summoned by an administrator to a meeting with student conduct officials. Venigalla was interrogated about his photos and about an academic paper he had written that discussed whether political violence — like the Boston Tea Party — could be morally justified against state actors.

Remarkably, a similar controversy is currently taking place at Fordham itself. In June, as protests in Hong Kong captured the public's attention, Austin Tong, a Chinese immigrant and undergraduate student, posted a photograph of himself holding a lawfully-acquired firearm. His post appears to have been a response to the Chinese government's oppression of Hong Kong protesters, including the hashtag used by Chinese dissidents to reference the Tiananmen Square massacre ("#198964") and the historic American refrain "Don't tread on me." Other students, angered by another of Tong's posts that criticized Black Lives Matter demonstrators, characterized Tong's post as a threat. Fordham — ignoring

²¹ Letter from Sarah McLaughlin, Senior Program Officer, FIRE, to Kimberly R. Cline, President, Long Island University, Aug. 31, 2018, <https://www.thefire.org/fire-letter-to-long-island-university-post-august-31-2018>.

both its promises of freedom of expression and the trial court’s recent reminder of their importance — found Tong responsible for “threats,” and is now demanding he write a letter of apology, requiring him to take courses online instead of in the classroom, and barring him from continuing to serve in the student government.²² These penalties will have a severe chilling effect on student expression. They also expose Fordham’s belief that the photograph was a threat as insincere; presumably, if Fordham administrators actually thought Tong’s speech presented a real threat, they would have contacted law enforcement instead of asking him to write a letter of apology, continue online classes, and bar him from student government. Tong has filed suit against Fordham.²³

Administrators are not the only source of limits on student expression. In 2019, a mirror-image version of the Fordham censorship now before this Court occurred at Williams College in Massachusetts. There, a *pro*-Israel student organization was denied recognition by the student government. While the full rationale for the rejection was not made public — the student government’s minute-keeper said the debate included “clearly anti-Semitic things I didn’t type

²² Letter from Lindsie Rank, Program Officer, FIRE, to Father Joseph M. McShane, S.J., President, Fordham University, July 17, 2020, <https://www.thefire.org/fire-letter-to-fordham-university-july-17-2020>.

²³ Priscilla DeGregory & Doree Lewak, *Fordham student says school wrongfully penalized him for social media posts*, N.Y. POST (July 23, 2020), <https://nypost.com/2020/07/23/fordham-student-wrongfully-penalized-for-social-media-posts-suit>; *see also Tong v. Fordham Univ.*, (index no. pending) (Sup. Ct., N.Y. Cty., filed July 23, 2020).

down” and did not want to repeat²⁴ — much of the criticism of the proposed group focused on the group’s support of Israel.²⁵ Williams administrators ultimately granted recognition to the group through an alternative process, restoring the institution’s commitment to freedom of expression and quickly resolving an investigation initiated by the United States Department of Education.²⁶

Sadly, Plaintiffs-Appellees’ experience at Fordham is not unique. While students at public institutions may fall back on avenues for redress afforded to them under the First Amendment, students at private institutions lack those enforcement mechanisms, emboldening private institutions to betray their promises. Censorship of student expression at private institutions ostensibly committed to freedom of speech has proven to be such a persistent and pernicious problem that the federal Department of Education announced proposed regulations

²⁴ Minutes of the Williams College Council, Apr. 30, 2019, http://ephblog.com/wp-content/uploads/2019/05/4_30_19-Minutes.docx.

²⁵ Letter from Sarah McLaughlin, Senior Program Officer, FIRE, to Maud S. Mandel, President, Williams College, May 15, 2019, <https://www.thefire.org/fire-letter-to-williams-college-may-2019> (noting student government members criticizing the proposed group, arguing that “there are ways of supporting Israeli statehood that don’t support the occupation or human rights abuses against Palestinians” and “almost everyone will agree that massive abuses are happening, and I think that you need sort of a special consideration and debate when it comes to voting for [proposed groups] that affiliate themselves with a state involved in such a conflict.”).

²⁶ Sarah McLaughlin, *After viewpoint-based denial, Williams Initiative for Israel finally receives recognition*, FIRE (May 16, 2019), <https://www.thefire.org/after-viewpoint-based-denial-williams-initiative-for-israel-finally-receives-recognition>; Jackson Richman, *Williams College reaches resolution with Department of Ed after nixing pro-Israel group*, JEWISH NEWS SYNDICATE (July 12, 2019), <https://www.jns.org/williams-college-reaches-resolution-with-department-of-ed-after-nixing-pro-israel-group>.

this past January to “require private institutions to comply with their stated institutional policies on freedom of speech” as a condition of the receipt of federal grants.²⁷

Private institutions like Fordham should not be permitted to promise free expression in policy only to censor in practice. In New York, they cannot. As the lower court correctly held, Article 78 is the legal means by which private universities like Fordham may properly be held accountable.

II. THE LOWER COURT WAS RIGHT: FORDHAM BROKE ITS PROMISES TO ITS STUDENTS.

A. Fordham Promises its Students Freedom of Expression.

Upon enrolling at Fordham University, students like Plaintiffs-Appellees expect that their university will respect their expressive and associational rights. This expectation is entirely reasonable: Fordham bills itself as an institution that values freedom of expression, and Fordham’s policies repeatedly and explicitly

²⁷ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190 (U.S. Dep’t of Educ., proposed Jan. 17, 2020). *See also* Robert Shibley, *New Department of Education First Amendment grant regulations have real promise, but require caution*, FIRE (Jan. 17, 2020), <https://www.thefire.org/new-department-of-education-first-amendment-grant-regulations-have-real-promise-but-require-caution>.

recognize the rights of its students to speak their minds and band together with others who share their beliefs.

Fordham’s mission statement “guarantees the freedom of inquiry required by rigorous thinking and the quest for truth.”²⁸ Describing Fordham as “a place where ideas and opinions are formulated and exchanged,” the institution’s Demonstration Policy proclaims that “[e]ach member of the University has a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society.”²⁹ Because “the University values freedom of expression and the open exchange of ideas” and the “expression of controversial ideas and differing views is a vital part of University discourse,” the university’s policy prohibiting “Bias-Related Incidents and/or Hate Crimes” carefully notes that simply because “the expression of an idea or point of view may be offensive or inflammatory to others” does not mean it will be subject to punishment.³⁰ Indeed, rather than barring students from expressing dissenting, minority, or even the allegedly “divisive” viewpoints of Plaintiff-Appellees,

²⁸ *Mission Statement*, Fordham University, https://www.fordham.edu/info/20057/about/2997/mission_statement (last visited July 17, 2020).

²⁹ *Demonstration Policy*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 17, 2020).

³⁰ *Bias-Related Incidents and/or Hate Crimes*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 17, 2020).

Fordham’s rules expressly *prohibit* such views from being silenced. The University Code of Conduct outlaws “[e]ngaging in, or inciting others to engage in, conduct which . . . prevents or limits the free expression of ideas by others[.]”³¹

Fordham’s policies are clear. The university has unambiguously promised its students freedom of expression. The lower court was correct to intervene to prevent Fordham from breaking that promise.

B. Fordham Failed to Abide by Its Own Rules.

In New York, “the judgment of professional educators is subject to judicial scrutiny . . . to determine whether they abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational.” (Gertler v. Goodgold, 107 A.D.2d 481, 486 [1st Dept. 1985]). The lower court correctly found that Fordham violated its own rules by both “imposing an additional tier of review” from the dean upon Students for Justice in Palestine’s application for recognition and by citing “the potential ‘polarization’ of the Fordham community were SJP to be formally recognized” as grounds for overruling the student government’s recognition of the group. (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Neither the dean’s additional review nor his viewpoint-based reversal of SJP’s

³¹ *University Code of Conduct, Chapter 3: Violations*, Fordham University, https://www.fordham.edu/info/20987/article_6_university_code_of_conduct/2173/chapter_3_violations (last visited July 17, 2020).

recognition were authorized by Fordham's policies, and Fordham's plain failure "to abide by its own rules" warrants judicial intervention. (Matter of Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216 [2015]) (citing Matter of Harris v. Trustees of Columbia Univ., 62 N.Y.2d 956, 959 [1984])).

Importantly, the lower court correctly determined that the dean's viewpoint-based discrimination against SJP was arbitrary and capricious. A court may annul an administrative decision in an Article 78 proceeding as arbitrary and capricious when it finds "the decision maker consider[ed] inappropriate factors in coming to his or her decision." (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Reliance "upon inappropriate factors" renders a determination "irrational and an abuse of discretion" under Article 78. (Stone Landing Corp. v. Bd. of Appeals, 5 A.D.3d 496, 497 [2d Dep't 2004]) (first citing Matter of Cohen v. Bd. of Appeals, 100 N.Y.2d 395, 402 [2003]; and then citing Matter of Pleasant Valley Home Constr., Ltd. v. Van Wagner, 41 N.Y.2d 1028, 1029 [1977])). As students like Plaintiffs-Appellees would reasonably expect, given Fordham's extensive representations about the expressive rights they possess, "[t]he issue of whether a club's political message may be polarizing is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham[.]" (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Fordham's policies do not permit the denial of a student group's application for recognition based on an

administrator’s subjective speculation about how its views might be received by other students. To the contrary, as the lower court emphasized, “the consideration and discussion of differing views is actually part of Fordham’s mission, regardless of whether that consideration and discussion might discomfit some and polarize others.” (Id. at *7). Because students rely on Fordham to follow its own rules and make good on its own promises, the lower court was correct to conclude that the dean’s viewpoint-based discrimination “must be annulled as arbitrary and capricious.” (Id.)

In its brief, Respondent-Appellant places a great deal of emphasis on the lower court’s examination of two sets of rules circulating at Fordham for club approval: the “governing club guidelines,” which it asserts are the real rules, and the “USG registration packet,” which it asserts are a student-authored misstatement of the rules. Respondent-Appellant’s Brief at 23–24. Ultimately, neither version of the rules saves the dean’s viewpoint discrimination from being annulled as arbitrary under Article 78, as neither version authorizes the dean to assert “polarization” as a basis for disqualification. But to the extent there are multiple versions of the rules, it is Fordham’s obligation to promulgate the correct ones, including through the student government, which acts as its agent for purposes of recognizing student organizations. Article 78’s goal of ensuring fundamental fairness in the asymmetrical student/institution relationship cannot be achieved if

students are expected to not only obtain a policy from a decision-maker, but then audit it for administrative consistency.

Respondent-Appellant also asserts that the dean's determination should not be disturbed because it had a "rational basis" and was based on the exercise of his "honest discretion." Respondent-Appellant's Brief at 35. Here, Respondent-Appellant conflates rational thinking with rational application of written rules. Whether the dean's determination was *rational in the abstract* is unrelated to whether that basis is *enumerated in the governing policy*.

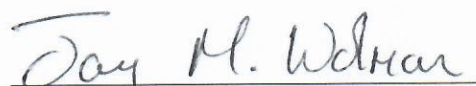
As the lower court correctly noted, a club's potential for polarization "is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham, and appears to have been arbitrarily considered by Dean Eldredge" (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). As such, the dean's reliance on an extrinsic, unenumerated, and ultimately subjective determination as a basis for denying Petitioners-Respondents' rights "must be annulled as arbitrary and capricious." (Id. at *7).

CONCLUSION

To protect both Petitioners-Respondents and their peers at Fordham and other private New York institutions of higher education, this Court should affirm

that Article 78 does not allow private colleges and universities to promise freedom of expression in policy but deliver viewpoint discrimination in practice.

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)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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