

Court of Appeals
of the
State of New York

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

Petitioners-Respondents,

— against —

FORDHAM UNIVERSITY,

Respondent-Appellant.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

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Docket No.:
NY Cty. Index No.
153826/17

First Dept. Appellate Case
No.: 2020-00843

NOTICE OF MOTION

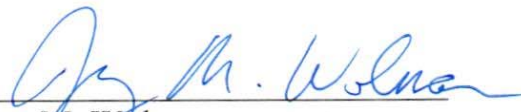
PLEASE TAKE NOTICE that upon the annexed affirmation of Jay M. Wolman and the papers annexed hereto, and upon all prior papers and proceedings had in this case, the undersigned will move this Court, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207 on March 1, 2021 at 9:30 in the morning, or as soon thereafter as counsel may be heard, for an order pursuant to Rules of Practice of the Court of Appeals Rule 500.23(a)(3):

1. Granting Foundation for Individual Rights in Education leave to file and serve their required number of copies of an amicus curiae brief (the “Amicus Brief”) in support of the Motion for Leave to Appeal of Petitioners-Respondents; and
2. For such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rules of Practice of the Court of Appeals Rule 500.23(a)(3), the original and one copy of Movant's papers, accompanied by an original amicus brief is filed in addition to submission in digital format.

PLEASE TAKE FURTHER NOTICE that, pursuant to Court of Appeals Rule 500.21(c), opposition papers, if any, must be filed on or before the return date of this motion.

Dated: February 16, 2021



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Rule 500.1(f) Corporate Disclosure Statement

Pursuant to Rules of Practice of the Court of Appeals Rule 500.1(f), Movant Foundation for Individual Rights in Education hereby discloses it is not a publicly-held corporation and that it has no parents, subsidiaries, or affiliates, publicly-traded or otherwise.

COURT OF APPEALS
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AFFIRMATION OF
JAY M. WOLMAN IN
SUPPORT OF
MOTION OF
FOUNDATION FOR
INDIVIDUAL RIGHTS
IN EDUCATION TO
APPEAR AS AMICUS
CURIAE

I, JAY M. WOLMAN, duly affirm and say:

1) I am an attorney at the law firm of Randazza Legal Group, PLLC, counsel for proposed *amicus curiae*, Foundation for Individual Rights in Education (“FIRE”) in this appeal.

2) I am a member in good standing of the Bar of the State of New York.

3) I submit this affirmation in order to place before the Court this application of FIRE to file an *amicus curiae* brief in the above captioned proceeding in support of the motion for leave to appeal filed by Petitioners-Respondents.

4) I submit this affirmation upon information and belief, based upon my familiarity with the work of FIRE, review of the pleadings and papers in this matter and conversations with my client.

5) The Foundation for Individual Rights in Education, Inc. (“FIRE”) is a nonpartisan, 501(c)(3) nonprofit organization dedicated to promoting and protecting civil liberties at our nation’s institutions of higher education. For 20 years, FIRE has worked to protect students’ expressive rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights and due process protections on campus.

6) In 2017 alone, FIRE received over 800 requests for help from students and faculty.

7) That year, FIRE’s Individual Rights Defense Program won 31 direct advocacy victories on behalf of individuals and assisted hundreds of others behind the scenes.

8) At least 42 schools or universities have adopted a version of “The Chicago Statement on Principles of Free Expression” in favor of free speech and academic freedom since FIRE first began to promote it.

9) FIRE operates a “Green Light” list, working with schools to revise all of their restrictive policies, freeing hundreds of thousands of students from speech codes.

10) Through public awareness efforts, legislative work, and litigation, FIRE led the fight against the controversial 2011 so-called “Dear Colleague” letter that instituted a number of policies jeopardizing campus due process rights.

11) Since 2013, FIRE has won at least 11 litigation victories affecting nearly 280,000 students.

12) Over 90% of FIRE’s activities are funded by grants and donations, with 63% of that in 2017-18 from individual donors and 37% from foundation grants.

13) FIRE has provided assistance to state and federal courts as *amicus curiae* in numerous cases involving free speech principles likely to impact large segments of the public. A list of cases in which FIRE has submitted briefs as *amicus curiae* can be found online at <https://www.thefire.org/category/amicus-briefs/>

14) The proposed brief would be of assistance to the Court given FIRE’s experience in cases involving free speech principles. While the parties are competent, they are focused on issues beyond the free speech principles at stake and FIRE’s brief will remedy the deficiencies in theirs, identifying law and arguments that might otherwise escape the Court’s consideration. Movant was permitted to file an amicus brief in this matter before the Appellate Division, First Department.

15) The students FIRE defends rely on the protections of free speech and due process enshrined in the institutional promises, commitments, and policies of private colleges and universities like Fordham University (“Fordham”). The issue in this appeal involves Fordham’s breach of its promise of free speech and denial of due process, an issue critically important to students throughout New York and nationwide.

16) FIRE appears for the purpose of providing the Court with its unique and credible rights-oriented perspective, rather than to duplicate arguments made by counsel for the Parties.

17) On behalf of FIRE, I respectfully request the Court to grant FIRE’s motion to file the accompanying Brief as *amicus curiae*.

WHEREFORE, it is respectfully requested that this Court issue an Order granting Foundation for Individual Rights in Education’s motion to appear as *amicus curiae* with respect to the motion for leave to appeal.

Dated: February 16, 2021


JAY M. WOLMAN

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
EXPRESS NEXT DAY AIR**

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

On February 16, 2021

deponent served the within: **Motion for Leave to File an Amicus Brief**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 16, 2021



MARIA MAISONET
Notary Public State of New York
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Proposed Brief

Court of Appeals
of the
State of New York

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Petitioners-Respondents,

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FORDHAM UNIVERSITY,

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**AMICUS CURIAE BRIEF ON BEHALF OF FOUNDATION
FOR INDIVIDUAL RIGHTS IN EDUCATION
IN SUPPORT OF PETITIONERS-RESPONDENTS**

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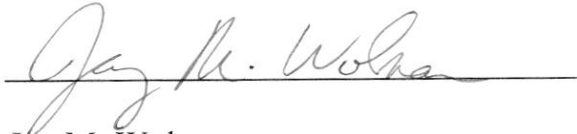
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Dated: February 16th, 2021

Respectfully submitted,

A handwritten signature in cursive script, reading "Jay M. Wolman", is written over a solid horizontal line.

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SUMMARY OF THE ARGUMENT

Fordham University makes laudable and binding commitments to free speech in its mission statement and policies. The language of these policies evokes a vision of students engaged in a lively and open exchange of ideas on a campus where no student is denied a right or privilege for the mere expression of a political viewpoint. But that is exactly what happened when Fordham violated its own promises to deny recognition to a prospective student group—Students for Justice in Palestine (“SJP”)—solely due to the group’s viewpoint. In New York, Article 78 exists to prevent private institutions like Fordham from making decisions based on arbitrary factors untethered from their own written rules and policies. Accordingly, Fordham’s viewpoint-discriminatory rejection of SJP must be annulled as arbitrary and capricious.

Fordham’s adherence to its own extensive and unequivocal promises of free expression is not optional. When a university like Fordham breaks its promises of free expression, it not only violates the law, but also harms students who reasonably relied on the university’s representations in deciding to matriculate. This case is not about interfering with Fordham’s right as an educational institution to create and enforce academic standards. Rather, it is about holding Fordham accountable for abandoning its voluntary, binding commitments in a way that frustrates students’ expectations and is antithetical to the role of a university as a venue for open inquiry.

Fordham is not an outlier. *Amicus* FIRE’s two decades of experience defending student rights demonstrates that private institutions in New York and nationwide routinely censor speech with relative impunity, despite assuring students, parents, and even accrediting agencies that they will honor expressive rights. In the time since the students applied to form SJP, at least eleven other private colleges and universities in New York have been accused of violating their promises of free expression to students or faculty. Students are being denied the benefit of the bargain with their institutions. This case presents the Court with a critical opportunity to protect student rights by giving them a meaningful remedy under Article 78 when private universities engage in a classic bait and switch, promising students free speech but delivering censorship.

The Appellate Division incorrectly determined that this matter is moot because the students who challenged Fordham’s decision have graduated. *Matter of Awad v. Fordham Univ. (Awad II)*, No. 2020-00943, 2020 N.Y. App. Div. LEXIS 7922, at *1–2 (1st Dep’t Dec. 22, 2020). The Appellate Division argues that because future students may challenge any similar denial of recognition, “this is not a matter likely to evade judicial review.” *Id.* It has been more than five years since the club application was denied, longer than the typical four-year undergraduate program. The Appellate Division failed to provide any reason why future students won’t also graduate before their legal claims are resolved. This type of fact pattern will both

repeat itself and evade judicial review, satisfying a well-established exception to the mootness doctrine.

ARGUMENT

I. Fordham’s Viewpoint-Discriminatory Rejection of Students for Justice in Palestine was Arbitrary and Capricious.

Judicial intervention is necessary to annul Fordham’s viewpoint-discriminatory refusal to recognize SJP. Fordham’s refused to recognize SJP as a student club explicitly because of its political views and speculation that the club would “polarize” the campus community. In so doing, Fordham disregarded its promises of free expression and its own rules. By abandoning its commitments to free expression and relying on factors absent from any of its rules, policies, or guidelines, Fordham engaged in exactly the type of arbitrary and capricious decision-making that Article 78 is intended to prevent.

A. Fordham’s refusal to recognize Students for Justice in Palestine was explicitly based on the proposed club’s political views.

After receiving the application to form Students for Justice in Palestine (“SJP”) on November 19, 2015, Fordham administrators repeatedly probed the students’ views on issues related to the Israeli-Palestinian conflict. *Matter of Awad v. Fordham Univ.* (“*Awad I*”), No. 153826/17, 2019 N.Y. Misc. LEXIS 4720, at *4–10 (N.Y. Sup. Ct. July 29, 2019), *rev’d*, 189 A.D.3d 605 (1st Dep’t 2020). Those discussions, which lasted more than a year, culminated in Fordham’s decision to

deny recognition of SJP—a decision expressly premised on disapproval of SJP’s political views.

Dorothy Wenzel, Director of the Office of Student Leadership and Community Development and New Student Orientation, initially told the students in April 2016 that, with some “minor, standard modifications” to the SJP constitution, the club should be set for approval. *Awad I* at *4. However, in multiple meetings over the next several months, Director Wenzel and Dean of Students Keith Eldredge interrogated the students about their political beliefs, including their views on the Boycott, Divestment, and Sanctions movement (“BDS movement”) against Israel, whether Israel is an apartheid state, and the students’ potential relationship with the National Students for Justice in Palestine organization. *Id.* at *4–10. Dean Eldredge and Director Wenzel raised concerns that SJP’s presence on campus and potential support for the BDS movement would cause controversy. Director Wenzel also solicited opinions from Jewish faculty members and Fordham’s Jewish Student Organization as to whether the club should be approved. The students described the BDS movement as using nonviolent tactics to pressure Israel to respect Palestinian rights. They also assured the administration that their SJP club would be independent from its national counterpart.

In November 2016, Director Wenzel approved the SJP constitution, reflecting the administration’s apparent understanding that the students’ application complied

with university rules and guidelines. Fordham’s student government then voted to approve SJP as a student club. The student government found that SJP would “positively contribute to the Fordham community in such a way that is sensitive to all students on campus” and that the group “fulfills a need for open discussion and demonstrates that Fordham is a place that exemplifies diversity of thought.” *Id.* at *7–8. But after months of investigating the students’ political views, Dean Eldredge decided to take the matter into his own hands.

In December 2016, Dean Eldredge vetoed the student government’s approval of SJP, explicitly citing his disapproval of the group’s political message and its potential reception on campus: “I cannot support an organization whose sole purpose is advocating political goals of a specific group, and against a specific country, when these goals clearly conflict with and run contrary to the mission and values of the University.” *Id.* at *9–10. Noting that the Israeli-Palestinian conflict is “a topic that often leads to polarization rather than dialogue,” Dean Eldredge concluded that the purpose of SJP “points toward that polarization” and its support for the BDS movement “presents a barrier to open dialogue and mutual learning and understanding.” *Id.* As the trial court observed, nothing in Dean Eldredge’s statement suggested that he had any reasonable basis for predicting that SJP “might encourage violence, disruption of the university, suppression of speech, or any sort

of discrimination against any member of the Fordham community based on religion, race, sex, or ethnicity.” *Id.* at *18.

As Dean Eldredge’s own words make clear, his decision to overturn the student government’s recognition of SJP was motivated by the group’s political beliefs. That rationale, however, finds no basis in any of Fordham’s rules or policies. To the contrary, it flies in the face of the strong endorsements of free expression found throughout Fordham’s governing documents.

B. Fordham failed to abide by its own policies.

Fordham bills itself as an institution that values freedom of expression and its rules and policies repeatedly and explicitly recognize the rights of its students to speak their minds and associate with others who share their beliefs. Thus, Fordham’s refusal to recognize a student group based on their political views or their potential to cause “polarization” was arbitrary and capricious.

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 Dep’t 1985). A court may annul an administrative decision in an Article 78 proceeding as arbitrary and capricious when it finds the decision was based on consideration of inappropriate factors. *See Cameron v. Church*, 286 A.D.2d 328 (2nd Dep’t 2001) (county acted arbitrarily and

capriciously when it denied an employee’s promotion request based on consideration of improper factors). As the trial court recognized, although Fordham’s administration “has discretion to evaluate whether the club will promote Fordham’s mission, this discretion is neither unlimited nor unfettered.” *Awad I* at *15–16.

The trial court correctly found that Fordham violated its own rules by both (1) “impos[ing] an additional tier of review” by the Dean when the student government already had approved the application and (2) citing “the potential ‘polarization’ of the Fordham community were SJP to be formally recognized” as grounds for overruling the student government’s approval of the group. *Id.* Neither Dean Eldredge’s additional review nor his viewpoint-based reversal of SJP’s 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).

Importantly, the trial court correctly determined that Dean Eldredge’s viewpoint-based discrimination against SJP was arbitrary and capricious. In denying the group’s application for recognition, Dean Eldredge disregarded Fordham’s own promises of free inquiry and improperly considered factors absent from its own rules and guidelines.

Fordham promised students the right to engage in dissenting advocacy in its official, public policies. Fordham’s Demonstration Policy guarantees 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.*”¹ Limitations to this promise are expressly included, such as prohibitions on demonstrations that interfere with the rights of others.²

Other guarantees help strengthen and interpret this promise. The trial court pointed to Fordham’s Mission Statement, the document outlining Fordham’s most essential purposes, which states “Fordham . . . guarantees the freedom of inquiry required by rigorous thinking and the quest for truth.” *Awad I* at *17. Fordham’s Speakers Policy states that “[a]ny duly-registered student club or organization may invite a speaker” for the “enjoyment of *the freedom to express points of view on the widest range of public and private concerns.*”³ The policy also includes express limitations on these freedoms, such as a prohibition on any event that “would endanger” the University community.⁴ Fordham’s Distribution of Literature policy guarantees that student organizations and individual students are “*free to distribute*” literature.⁵ But again, Fordham includes express limitations on this right, such as a

¹ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (emphasis added).

² *Id.*

³ *Speakers Policy*, FORDHAM UNIV., https://www.fordham.edu/info/24226/a_z_listing/3740/speakers_policy (emphasis added).

⁴ *Id.*

⁵ *Distribution of Literature*, FORDHAM UNIV., https://www.fordham.edu/info/24226/a_z_listing/3710/distribution_of_literature (emphasis added).

prohibition on distributing literature that would “justif[y] complaint on the grounds of obscenity or libel.”⁶

The policy at issue should be interpreted in the light of the promises included in these other documents and so cannot be interpreted to allow for rejection of an organization based on a secret “polarizing” test. As the trial court observed, “Although the Dean, in determining whether to veto any new club, has discretion to evaluate whether the club will promote Fordham’s mission, this discretion is neither unlimited nor unfettered. The 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.” *Awad I* at *15–16.

More so, interpreting the policy at issue to have a secret limitation on “polarizing” student organizations would make the promise in the Demonstrations Policy meaningless or ineffectual, against foundational principles of congruent interpretation that seek to give life to all promises made. *See, e.g., Del Glob. Techs. Corp. v. Park*, 03 CIV. 8867 (PGG), 2008 U.S. Dist. LEXIS 101757, at *8 (S.D. N.Y. Dec. 15, 2008) (internal citations omitted); *accord Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244–45 (2014). *See also, Doe v. Colgate Univ.*, 457 F. Supp. 3d 164, 174 (N.D. N.Y. 2020), *reconsideration denied*, 5:17-CV-1298 (FJS/ATB), 2020 WL 3432827 (N.D. N.Y. June 23, 2020) (“In New York, the relationship

⁶ *Id.*

between a university and its students is contractual in nature. The contract's terms are supplied by 'the bulletins, circulars and regulations made available to the student.'") (internal citations omitted); *accord Carr v. St. John's Univ.*, 17 A.D.2d 632, 633 (2nd Dep't 1962), *aff'd*, 12 N.Y.2d 802 (1962).

As the students 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" *Awad I* at *16. Fordham's policies do not permit the denial of a student group's application for recognition based on an administrator's disapproval of its views or subjective speculation about how those views might be received by other students. To the contrary, as the trial 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 *17–18.

In reversing the trial court's decision, the Appellate Division dismissed the case as moot and noted that, even if it had reached the merits, it would have concluded that Fordham had "acted 'in the exercise of its honest discretion'" when it rejected SJP's application for recognition. *Awad II* at *2 (citation omitted). The Appellate Division reasoned:

Respondent's conclusion that the proposed club, which would have been affiliated with a national organization reported to have engaged in disruptive and coercive actions on other campuses, would work against, rather than enhance respondent's commitment [to] open dialogue and mutual learning and understanding, was not "without sound basis in reason" or "taken without regard to the facts."

Id. at *3 (citations omitted).

The Appellate Division's decision is not grounded in the record. SJP's alleged affiliation with "a national organization reported to have engaged in disruptive and coercive actions on other campuses," *id.*, was *not* a reason Dean Eldredge gave in his decision overturning the student government's approval of SJP. Instead, Dean Eldredge explicitly disapproved of SJP's purpose of "advocating political goals of a specific group, and against a specific country," which, in his assessment, "points toward . . . polarization." *Awad I* at *9–10.

Now that the students are seeking judicial relief, Fordham advances other reasons for its nonrecognition of SJP. *See, e.g.*, Reply Brief for Respondent-Appellant at 15–17, *Awad II* (No. 2020-00843). But disapproval of SJP's political views and their potential reception on campus were the *only* reasons Dean Eldredge gave when he made his decision. *See Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982) ("A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or

improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis.”).

Dean Eldredge’s arbitrary consideration of SJP’s potential to cause “polarization” has no basis in any rules or guidelines issued by Fordham. Judicial sanction of Eldredge’s reasoning would give Fordham, and other private universities that promise their students a climate of free expression, license to deny recognition of any student group that advocates a political goal opposed by other students. Fordham cannot embrace the values of free expression and viewpoint diversity in its rules and policies and then, when presented with a student club’s request for recognition, suddenly decide that one side of a debate is out of bounds. Such arbitrary and capricious decision-making frustrates students’ reasonable expectations. Because students rely on Fordham to follow its own rules and make good on its own promises, the university’s viewpoint-based discrimination and reliance on an extrinsic, unenumerated, and ultimately subjective determination as a basis for denying the students’ rights must be annulled as arbitrary and capricious.

C. The Appellate Division applied a definition of “honest discretion” that would permit actions that are arbitrary within the meaning of Article 78.

The Appellate Division wrote that, if it had reached the merits, it would have ruled against the students, because “Respondent followed its approval procedure and

acted ‘in the exercise of its honest discretion[.]’” *Awad II* at *3 (quoting *Matter of Powers*, 10 N.Y.3d at 216). The Appellate Division’s statement cannot be reconciled with the facts established below.

As Fordham admitted in its brief to the Appellate Division, it promulgated two different “approval procedures”: the “USG Club Registration Packet,” which Fordham asserts is a misstatement of its rules, and the “University Club Guidelines,” which it asserts are the real rules. Brief for Respondent-Appellant at 23–24, *Awad II* (No. 2020-00843). The former is what was given to students in November 2015 and does not provide for the Dean to review a group’s recognition after student government approval; the latter is what Fordham invoked for the first time in December 2016 to justify Dean Eldridge’s review and subsequent denial. The two sets are mutually exclusive. Fordham could not, and did not, follow both.

The Appellate Division is correct insofar as, at all times, Fordham was following one of its (at least) two sets of mutually exclusive rules. But, as the trial court found, the switch between the two operating practices is suspect, “and such an unexplained change necessarily requires the conclusion that the ultimate determination was arbitrary.” *Awad I* at *15 (citation omitted). If Article 78 is meant to prohibit arbitrary decision-making, that must include arbitrarily deciding when to invoke secret, alternate versions of rules.

The Appellate Division concluded that Fordham’s viewpoint-based denial was made “in the exercise of its honest discretion.” *Awad II* at *3 (quoting *Matter of Powers*, 25 N.Y.3d at 216). But in *Powers*, a student failed to comply with an explicit, written requirement to disclose “all of the relevant facts” of his criminal convictions. 25 N.Y.3d at 214. This Court found that St. John’s acted in its honest discretion because the student was “on notice, based on the electronic certification that he submitted with his application, that the failure to provide truthful answers” could result in adverse consequences. *Id.* at 217. That notice did not exist here. As the trial court in the present case 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” *Awad I* at *16.

To provide a level of fundamental fairness in the asymmetrical student/college relationship, Article 78 must prohibit colleges like Fordham from unilaterally imposing new hurdles that bar students from receiving the benefits promised when they paid their tuition.

II. This Court Should Ensure That Private Colleges Keep Their Promises to Students.

Fordham promises students that the university will respect freedom of expression. Fordham failed to uphold this promise. This failure harms the students who rely on honest representations to determine institutional fit. This Court should

not allow Fordham to abandon the free expression essential to its role as an academic institution but then receive deference based on that role. Instead, this Court should ensure that Article 78 provides a meaningful remedy to students and faculty that are subject to private colleges' bait-and-switch practices. Finally, this Court should resolve standing in the students' favor under the well-established exception to mootness for cases that evade review.

A. Students rely on promises by private colleges to guarantee a fit with the institution, providing both student and societal benefits.

Ensuring private universities like Fordham uphold their contractual promises to students is not only legally required, it is sound policy. Successive presidential administrations have demonstrated the bipartisan emphasis on the significance of a college education for success in contemporary society⁷ and not all colleges and majors provide the same fit with a student's goals. Therefore, the way a university presents itself to prospective students through its specific guarantees will be crucial to a student's decision to attend that specific institution.

⁷ See, e.g., *President Bush Signs College Cost Reduction and Access Act*, THE WHITE HOUSE (Sept. 27, 2007), <https://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070927-3.html>; *Remarks by the President on Education*, THE WHITE HOUSE (Oct. 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/17/remarks-president-education>; *President Donald J. Trump is Improving Transparency and Promoting Free Speech in Higher Education*, THE WHITE HOUSE (Mar. 21, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-is-improving-transparency-and-promoting-free-speech-in-higher-education>; *The Biden Plan for Education Beyond High School*, BIDEN FOR PRESIDENT (Oct. 8, 2019), <https://joebiden.com/beyondhs>.

For example, a student may choose to attend Fordham based on the combination of its freedom of expression guarantees and its location in New York, the home of the United Nations and many prominent international organizations, so that they may gain crucial, professional experience in political advocacy while in college. If that university fails to fulfill its promises, it denies the student the benefit of their bargain and deprives society of the benefits of an individual's talent harmonizing with their educational and professional opportunities. This cost should not be suffered by the student and society because of a university's own misrepresentations.

B. Courts should not defer to universities when they abandon their unique role, as the trial court observed.

In New York, the contractual relationship between a university and its students is both extended and constrained by the unique role that academic institutions serve. For example, courts have extended this relationship to include “reciprocal obligations that are implicit in the relationship itself,” *Downey v. Schneider*, 23 A.D.3d 514, 516 (2nd Dep’t 2005), and constrained it by their “reluctance to intervene in controversies involving academic standards,” because universities have the unique capacity to create and enforce sound academic judgments that would be “seriously undermined” by too much government interference, *Olsson v. Bd. of Higher Ed.*, 49 N.Y.2d 408, 413 (1980).

Here, Fordham’s role as an academic institution cuts against judicial deference towards its refusal to uphold the association rights covered by its promises. The trial court observed, “consideration of whether a group’s message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues.” *Awad I* at *16. Instead, the trial court emphasized that free inquiry and the open contest of views are essential purposes of the university: “The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.” *Id.* (quoting *Keyishian v. Bd. of Regents* 385 US 589, 603 (1967)).

A single administrator refusing—on standardless, viewpoint-discriminatory grounds—to fulfill Fordham’s promise in its *Demonstration Policy*⁸ to allow students “to freely express their positions and to work for their acceptance,” even when those positions “dissent from existing situations in the University,” is precisely the “kind of authoritative selection” universities exist to guard against. *Id.* Deference based on institutional role does not apply when an institution abandons that role.

⁸ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy.

C. Article 78 must provide a meaningful remedy to students and faculty subjected to the bait-and-switch practices of private colleges that promise free speech but deliver censorship.

In abandoning its own promises, Fordham unfortunately keeps company with many private universities. In FIRE's latest review, more than 90 percent of private colleges maintain policies that would be unconstitutional under the First Amendment.⁹ Private New York universities are no exception.

Among the colleges in this state that have been accused of violating their free expression promises to students or faculty since SJP first applied for club status are New York University,¹⁰ Columbia,¹¹ Syracuse,¹² Long Island University,¹³

⁹ *Spotlight on Speech Codes 2021*, FIRE, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2021>.

¹⁰ Katlyn Patton, *NYU ignores academic freedom, investigates Mark Crispin Miller's course content*, *blog post*, FIRE, Nov. 30, 2020, <https://www.thefire.org/nyu-ignores-academic-freedom-investigates-mark-crispin-millers-course-content-blog-post>.

¹¹ Samantha Harris, *In Suspending Wrestling Team for Private Messages, Columbia Goes Too Far*, FIRE, Nov. 16, 2016, <https://www.thefire.org/in-suspending-wrestling-team-for-private-messages-columbia-goes-too-far>.

¹² Zach Greenberg, *Syracuse University finally concedes that its free speech promises are worthless*, FIRE, March 29, 2019, <https://www.thefire.org/syracuse-university-finally-concedes-that-its-free-speech-promises-are-worthless/>.

¹³ Katlyn Patton, *New York college summons student to meeting on eve of graduation to investigate alleged possession of forbidden flyers*, FIRE, Dec. 11, 2019, <https://www.thefire.org/new-york-college-summons-student-to-meeting-on-eve-of-graduation-to-investigate-alleged-possession-of-forbidden-flyers>.

Cornell,¹⁴ the University of Rochester,¹⁵ St. John's,¹⁶ The New School,¹⁷ St. Bonaventure,¹⁸ Hofstra,¹⁹ Alfred,²⁰ and Fordham itself.²¹

Additionally, there is no other instance reflected in the record when Fordham has vetoed a student organization's recognition, making the chilling effect of this viewpoint suppression all the clearer, and so all the more effective. Brief for Petitioners-Respondents at 4–5, *Awad II* (No. 2020-00843). The national organization behind Students for Justice in Palestine states that there are more than

¹⁴ Catherine Sevchenko, *Cornell's Decorating Rules: You Can Put Up Anything You Want As Long As It's a Snowflake*, FIRE, December 16, 2015, <https://www.thefire.org/cornells-decorating-rules-you-can-put-up-anything-you-want-as-long-as-its-a-snowflake>.

¹⁵ Ryne Weiss, *University of Rochester may subject single gender organizations to arbitrary waiver process*, FIRE, April 11, 2018, <https://www.thefire.org/university-of-rochester-may-subject-single-gender-organizations-to-arbitrary-waiver-process>.

¹⁶ Adam Goldstein, *Update: St. John's limits academic freedom of history department in ongoing effort to punish professor for asking question*, FIRE, October 12, 2020, <https://www.thefire.org/update-st-johns-limits-academic-freedom-of-history-department-in-ongoing-effort-to-punish-professor-for-asking-question>.

¹⁷ *Press Release: Academic freedom at The New School? Not if you quote an iconic black writer.*, FIRE, Aug. 7, 2019, <https://www.thefire.org/academic-freedom-at-the-new-school-not-if-you-quote-an-iconic-black-writer>.

¹⁸ Alex Morey, *Lawsuit: St. Bonaventure discriminated against long-time dean for Wiccan beliefs*, FIRE, June 6, 2019, <https://www.thefire.org/lawsuit-st-bonaventure-discriminated-against-long-time-dean-for-wiccan-beliefs>.

¹⁹ Adam Steinbaugh, *Presidential Candidates Debate On College Campuses, But Can The Students?*, FIRE, Sept. 24, 2016, <https://www.thefire.org/presidential-candidates-debate-on-college-campuses-but-can-the-students>.

²⁰ Sarah McLaughlin, *When U.S. universities clash with China's 'sensitive content'*, FIRE, Sept. 13, 2018, <https://www.thefire.org/when-u-s-universities-clash-with-chinas-sensitive-content>.

²¹ Adam Goldstein, *Analysis: Department of Education investigates Fordham over broken speech promises in Austin Tong case*, FIRE, August 25, 2020, <https://www.thefire.org/analysis-department-of-education-investigates-fordham-over-broken-speech-promises-in-austin-tong-case>.

two hundred other chapters at universities.²² Indeed, many private New York universities that promise freedom of expression recognize chapters of Students for Justice in Palestine, including Columbia University,²³ Cornell University,²⁴ New York University,²⁵ the University of Rochester,²⁶ and Vassar College.²⁷ Here, Fordham is an outlier.

Although private universities are under no obligation to promise freedom of expression, each of these institutions maintains policies that purport to do just that. Article 78 should be interpreted to hold them to those obligations “simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual” *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 660 (1980).

If the Appellate Division’s dismissal of this case is left undisturbed, it would mean that no private college can be held to its promises unless it violates them in

²² NATIONAL STUDENTS FOR JUSTICE IN PALESTINE, <https://www.nationalsjp.org/> (“National Students for Justice in Palestine (National SJP) is a collective of organizers that supports over 200 Palestine solidarity organizations on college campuses across occupied Turtle Island (U.S. and Canada).”) (last accessed Feb. 8, 2021).

²³ *Student Groups, Students for Justice in Palestine*, COLUMBIA UNIV. <https://www.cc-seas.columbia.edu/student-group/students-justice-palestine> (last accessed Feb. 8, 2021).

²⁴ Search for “Students for Justice in Palestine” in *Groups*, CORNELL UNIV., https://cornell.campusgroups.com/club_signup?group_type=&search=students+for+justice+in+palestine&category_tags=&order=name_asc (last accessed Feb. 8, 2021).

²⁵ *Law Students for Justice in Palestine*, NEW YORK UNIV. SCHOOL OF LAW, <https://www.law.nyu.edu/studentorganizations/justiceinpalestine> (last accessed Feb. 8, 2021).

²⁶ Search for “Palestine” in *Groups*, UNIV. OF ROCHESTER, https://ccc.rochester.edu/club_signup?group_type=&search=palestine&category_tags=&order=name_asc (last accessed Feb. 8, 2021).

²⁷ *Certified Organizations*, VASSAR COLLEGE, <https://pages.vassar.edu/vsa/student-organizations/certified-organizations> (last accessed Feb. 8, 2021).

such a way as to deny the ability to graduate. The concept of fundamental fairness demands more than that.

D. The Appellate Division’s ruling assumes that student rights violations will not evade review because they are likely to repeat, which turns the mootness doctrine on its head.

The Appellate Division ruled that the original petitioners’ claims are moot because they have already graduated. *Awad II* at *2. Yet the Appellate Division reasoned “this is not a matter likely to evade judicial review” because “students currently enrolled in the respondent university’s undergraduate program may file an application for recognition of a similar club at any time.” *Id.* The exception to the mootness doctrine that the Appellate Division addressed requires finding “a likelihood of repetition” and “a phenomenon typically evading review.” *Hearst Corp v. Clyne*, 50 N.Y.2d 707, 714–15 (1980) (setting forth the test for the mootness exception). The Appellate Division erred in finding that this exception is inapplicable.

The Appellate Division’s ruling seems to take the position that a fact pattern capable of repetition is inherently not evading review. If that were true, there would be no exception to the mootness doctrine for cases that are, in fact, evading review. A college education typically lasts four years; it has taken over five years to reach this point. While the Appellate Division is correct that the problem of mootness results in colleges who break their promises to students receiving a free pass, and

that this problem is capable of repetition, it has miscalculated the remarkably high probability that future cases will also evade review.

In this case, the students completed their club application process (which itself took months) on November 19, 2015; Dean Eldridge rejected their application on December 22, 2016. *Awad I* at *9–10. The Appellate Division issued its ruling on December 22, 2020, *four years to the day* after Fordham violated its students’ rights, and over five years after the students first submitted the club application. As of the date this brief is submitted, it has been five years, two months, and 30 days since the application was submitted, and the legal arguments in this case are not yet resolved.

Fordham has a four-year graduation rate of 78%.²⁸ While the Appellate Division has correctly ascertained that one of Fordham’s nearly 17,000 undergraduates could “file an application for recognition of a similar club at any time,” it miscalculated that the future case is “not ... likely to evade judicial review.” *Awad II*, at * 2.

FIRE knows all too well this problem is not only capable of repetition, but is actually repeating itself, in courtrooms nationwide. In many courts, nominal damages are the tool used to avoid mootness; Article 78 petitions cannot include

²⁸ Best Colleges: Fordham University, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-colleges/fordham-university-2722> (last visited Feb. 7, 2021) (four-year rate).

nominal damages claims. Here, the capable of repetition but evading review standard must be properly invoked to permit a ruling on the merits.

To the best of *amicus* FIRE’s research, this Court has never considered an Article 78 case involving a university’s suppression of a college student’s free speech rights. Article 78 has been the law of this state since 1937; in that time, New York has produced millions of college graduates, and this Court has heard thousands of Article 78 appeals. Statistically speaking, this pattern of conduct is not just evading review, it is a “fugitive from the law of averages.”²⁹

CONCLUSION

This Court has an opportunity to resolve a case that addresses the consistently broken promises of private universities. These broken promises are of national and statewide significance. Their resolution consistently evades review and is likely to repeat. Fordham violated its contractual promise to respect dissenting advocacy, denying students the benefit of their bargain and its essential purposes as a university. By doing so, Fordham acted arbitrarily and capriciously under Article 78. Its students deserve a meaningful remedy to the university’s misrepresentations of and departure from its promises to serve as an institution of open inquiry and free expression.

²⁹ *Cf.* BILL MAULDIN, UP FRONT 39 (W.W. Norton & Company 2000) (1945).

Dated: February 16th, 2021

Respectfully submitted,

A handwritten signature in blue ink, reading "Jay M. Wolman", is written over a horizontal line.

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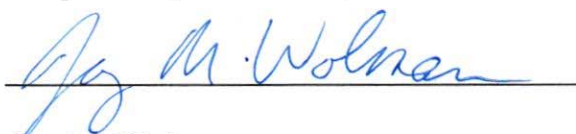
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