

Court of Appeals
of the
State of New York

JOHN DOE “3”, JOHN DOE “7”, JOHN DOE “8”, et al.,

Petitioners-Appellants,

– against –

SYRACUSE UNIVERSITY,

Respondent-Respondent.

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

Jay M. Wolman
RANDAZZA LEGAL GROUP
43-10 Crescent Street, Suite 1217
Long Island City, NY 11101
Tel. (702) 420-2001
jmw@randazza.com

Zach Greenberg
FOUNDATION FOR
INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
zach.greenberg@thefire.org
(215) 717-3473

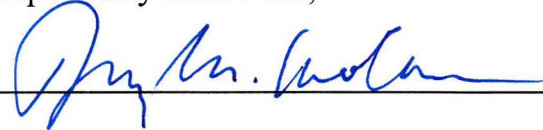
Attorneys for Amicus Curiae Foundation for Individual Rights in Education

Rule 500.1(f) Corporate Disclosure Statement

Pursuant to Rules of Practice of the Court of Appeals Rule 500.1(f), 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.

Dated: April 13, 2021

Respectfully submitted,



Jay M. Wolman
RANDAZZA LEGAL GROUP
43-10 Crescent Street, Suite 1217
Long Island City, NY 11101
Tel. (702) 420-2001
jmw@randazza.com

Zach Greenberg
FOUNDATION FOR
INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
zach.greenberg@thefire.org
(215) 717-3473

*Attorneys for Amicus Curiae
Foundation for Individual Rights in
Education*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Syracuse’s Punishment of Appellants Violates Syracuse’s Institutional Commitment to Protect Students’ Free Speech.....	4
A. Syracuse has made numerous clear promises to protect its students’ free speech rights.....	5
B. The trial and intermediate appeal courts failed to hold Syracuse accountable for violating its free speech promises.	7
II. FIRE’s Experience Demonstrates That Students Struggle to Hold Private Universities Accountable for Broken Promises of Free Speech.	10
A. Syracuse has continually violated its free speech promises with impunity.	11
B. Private universities nationwide regularly break their promises of free speech.	12
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>Albert v. Carovano</i> , 824 F.2d 1333 (2d Cir. 1987).....	17
<i>Albert v. Carovano</i> , 839 F.2d 871 (2d Cir. 1987).....	17
<i>Albert v. Carovano</i> , 851 F.2d 561 (2d Cir. 1988).....	17
<i>Bilicki v. Syracuse Univ.</i> , 2019 NY Slip Op. 52178(U), (N.Y. Sup. Ct., Onondaga County, 2019)	7
<i>Doe I v. Syracuse Univ.</i> , 188 A.D.3d 1570 (4th Dep’t 2020)	7, 8, 9
<i>Doe v. Syracuse Univ.</i> , 341 F. Supp. 3d 125 (N.D.N.Y. 2018).....	12
<i>Doe v. Syracuse Univ.</i> , 440 F. Supp. 3d 158 (N.D.N.Y. 2020).....	12
<i>Doe v. Syracuse Univ.</i> , No. 2018-1865, Slip Op. (N.Y. Sup. Ct., Jefferson County, Jan. 8, 2019).....	4, 7, 9
<i>Doe v. Syracuse Univ.</i> , No. 5:18-CV-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019).....	12
<i>Fraternity of Alpha Chi Rho, Inc. v. Syracuse Univ.</i> , 2021 NY Slip Op. 50195(U), (N.Y. Sup. Ct., Onondaga County, Mar. 10, 2021).....	12
<i>Gonzales v. McEuen</i> , 435 F. Supp. 460 (C.D. Cal. 1977)	17
<i>Hyman v. Cornell Univ.</i> , 82 A.D.3d 1309 (3d Dep’t 2011)	9
<i>Matter of Awad v. Fordham Univ.</i> , 189 A.D.3d 605 (1st Dep’t 2020)	15

Matter of Awad v. Fordham Univ., 2019 N.Y. Misc. LEXIS 4720 (N.Y. Sup. Ct.,
New York County, July 29, 2019).....15

Noakes v. Syracuse Univ., 369 F. Supp. 3d 397 (N.D.N.Y. 2019).....12

Tedeschi v. Wagner Coll., 49 N.Y.2d 652 (1980)8, 9

Other Authorities

U.S. Const., Amend. I..... *passim*

Adam Goldstein, *Analysis: Department of Education investigates Fordham over
broken speech promises in Austin Tong case*, FIRE, Aug. 25, 202013

Adam Goldstein, *Update: St. John’s limits academic freedom of history
department in ongoing effort to punish professor for asking question*, FIRE,
Oct. 12, 2020.....13

Adam Steinbaugh, *Presidential Candidates Debate On College Campuses, But
Can The Students?*, FIRE, Sept. 24, 201614

Alex Morey, *Judge: Syracuse had ‘no rational basis’ for suspending frat over
alleged harassment by non-student; calls university’s actions ‘troubling’*, FIRE,
Mar. 11, 202112

Alex Morey, *Lawsuit: St. Bonaventure discriminated against long-time dean for
Wiccan beliefs*, FIRE, June 6, 201913

BARD COLL., *Student Handbook (2020-21)*.....5

Catherine Sevckenko, <i>Cornell’s Decorating Rules: You Can Put Up Anything You Want As Long As It’s a Snowflake</i> , FIRE, Dec. 16, 2015.....	13
COLGATE COLL., <i>Code of Student Rights and Responsibilities</i> (2020-21)	5
COLUMBIA UNIV., <i>Rules of University Conduct</i> , (revised Sept. 29, 2019)	5
FIRE <i>New York college summons student to a meeting for holding unloaded guns in off-campus Facebook video</i> , Oct. 10, 2018	16
FIRE, <i>Case Archives</i> (updated Mar. 18, 2021).....	16
FIRE, <i>Leader Statement Database</i> (last updated Nov. 25, 2019)	6
FIRE, <i>Spotlight Database</i> (last updated Mar. 18, 2019)	5
FIRE, <i>Spotlight Database, Rensselaer Polytechnic Institute, Cases</i> (last updated Mar. 18, 2019).....	15
FORDHAM UNIV., <i>Demonstration Policy</i>	14
FORDHAM UNIV., <i>Mission Statement</i>	14
Katlyn Patton, <i>New York college summons student to meeting on eve of graduation to investigate alleged possession of forbidden flyers</i> , FIRE, Dec. 11, 2019	13
Katlyn Patton, <i>NYU ignores academic freedom, investigates Mark Crispin Miller’s course content, blog post</i> , FIRE, Nov. 30, 2020	13
Middle States Comm’n on Higher Educ., <i>Standards for Accreditation and Requirements of Affiliation 5</i> (13th ed. 2015)	6

President Bush Signs College Cost Reduction and Access Act, THE WHITE HOUSE,
 Sept. 27, 200710

*President Donald J. Trump is Improving Transparency and Promoting Free
 Speech in Higher Education*, THE WHITE HOUSE, Mar. 21, 201910

Press Release, *10 Worst Colleges for Free Speech: 2021*, FIRE, Feb. 17, 202111

Press Release, *The 10 worst colleges for free speech: 2019*, FIRE, Feb. 12, 2019 15

*Press Release: Academic freedom at The New School? Not if you quote an iconic
 black writer.*, FIRE, Aug. 7, 201913

Remarks by the President on Education, THE WHITE HOUSE, Oct. 17, 2016.....10

RENSSELAER POLYTECHNIC INSTITUTE, *Rensselaer Handbook of Student Rights &
 Responsibilities 4* (revised Aug. 29, 2019).....15

Ryne Weiss, *University of Rochester may subject single gender organizations to
 arbitrary waiver process*, FIRE, April 11, 201813

Samantha Harris, *In Suspending Wrestling Team for Private Messages, Columbia
 Goes Too Far*, FIRE, Nov. 16, 201613

Sarah McLaughlin, *When U.S. universities clash with China’s ‘sensitive content’,
 FIRE*, Sept. 13, 2018.....14

SYRACUSE UNIV., *Anti-Harassment Policy* (revised Dec. 13, 2016).....6

SYRACUSE UNIV., *Campus Disruption Policy* (revised Aug. 20, 2010)5

SYRACUSE UNIV., *Free Speech*.....5

SYRACUSE UNIV., S.I. Newhouse School of Public Communications, *About*7

SYRACUSE UNIV., *Student Handbook 5* (2019).....6

The Biden Plan for Education Beyond High School, BIDEN FOR PRESIDENT10

Zach Greenberg, *Syracuse University finally concedes that its free speech promises are worthless*, FIRE, March 29, 2019.....14

INTEREST OF AMICUS CURIAE

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. For more than 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.

The students FIRE defends rely on the protections of free speech enshrined in the institutional promises, commitments, and policies of private colleges and universities like Syracuse University (Syracuse). If allowed to stand, the trial and intermediate appellate courts' rulings will allow Syracuse and other private schools to betray their promises of expressive rights to students without consequence.

SUMMARY OF ARGUMENT

Private universities like Syracuse University frequently make robust promises of free speech to attract the most talented faculty and students to teach and learn at their institutions. Too often, however, these same universities—which make laudable and binding commitments to free speech in their mission statement and policies—disregard those promises when honoring them proves unpopular or inconvenient. Whether to avoid controversy or negative publicity, or simply to quash criticism of the institution and its practices, private universities often promise freedom of expression, but practice censorship.

This litigation against Syracuse encapsulates this deceptive behavior. The language of Syracuse’s many policies promising free speech evokes a vision of students engaged in a lively and open exchange of ideas on a campus where no student is disciplined for private, satirical expression among friends. But that is exactly what happened when Syracuse dismantled the Theta Tau engineering fraternity over a satirical skit voluntarily conducted and viewed by its members in a private setting. Rather than adhere to its explicit—and numerous—written policies promising students a full array of expressive rights, the university permanently banned the group and effectively expelled several of its members, including Petitioners-Appellants (“Appellants”).

Syracuse’s adherence to its own extensive and unequivocal promises of free expression is not optional. When a university like Syracuse breaks its promises of

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

The case before this Court does not exist in a vacuum. It comes to this Court against a background of students in New York and nationwide struggling to hold private universities accountable for flouting their policies regarding students' rights. If allowed to stand, the decision below will further embolden institutions to continue to ignore their own policies and promises to students when convenient. With this broader context in mind, *amicus* FIRE asks that this Court reverse.

ARGUMENT

The trial and the intermediate appellate courts incorrectly determined that Syracuse's policies, public statements, and promises do not afford students rights consistent with the First Amendment, and thus the university was within its discretion to punish Appellants for expression that would be protected under First Amendment standards. Since the vast majority of private universities in New York make similar free speech promises, failing to hold Syracuse accountable for breaking

its promises threatens to eviscerate the protection of guaranteed expressive rights at other private institutions of higher education in New York.

Amicus FIRE’s two decades of experience defending student rights demonstrates that private universities—and especially Syracuse—routinely punish students for expression protected by institutional promises to afford students free speech rights consistent with the First Amendment. In the time since Syracuse disbanded Theta Tau and suspended its members, numerous other private colleges and universities in New York have likewise violated their own promises of free expression to students or faculty. Students are being denied the benefit of expressive rights at their institutions. This case presents the Court with a critical opportunity to protect student rights by affording a meaningful remedy when private universities engage in a classic bait-and-switch, promising students free speech but delivering censorship.

I. Syracuse’s Punishment of Appellants Violates Syracuse’s Institutional Commitment to Protect Students’ Free Speech.

Syracuse betrayed its promise to uphold students’ free speech rights when it punished Appellants for performing a private, satirical comedy sketch wholly protected by Syracuse’s policies guaranteeing students’ expressive rights. Importantly, the Supreme Court of New York, Jefferson County concluded that “the [Appellants’] words are protected free speech” *Doe v. Syracuse Univ.*, No. 2018-1865, slip op. at 6 (N.Y. Sup. Ct., Jefferson County, Jan. 8, 2019). Based upon

Syracuse’s public commitment to free speech, Appellants could not reasonably have expected to be punished for their private, protected satire.

A. *Syracuse has made numerous clear promises to protect its students’ free speech rights.*

For decades, New York private universities have promised incoming students free speech rights consistent with the protections under the First Amendment, often phrasing their commitment to free speech in their mission statements as core values of the institution.¹ Syracuse is no exception, proclaiming to be “committed to academic freedom and freedom of expression,”² and “to the principle that freedom of discussion is essential to the search for truth,” and stating that it consequently “welcomes and encourages the expression of dissent.”³

¹ See, e.g., BARD COLL., *Student Handbook* (2020-21), <https://www.bard.edu/dosa/handbook/index.php?aid=1252&sid=718> (last visited April 9, 2021) (“Bard College strongly affirms the right of free speech for each member of the Bard community.”); COLGATE COLL., *Code of Student Rights and Responsibilities* (2020-21), <https://www.colgate.edu/current-students/colgate-university-student-handbook/student-rights-and-0> (last visited April 9, 2021) (“In order to create the best possible climate for learning, the University recognizes the importance of providing personnel and facilities of high quality and of maintaining the rights of free inquiry, expression, and assembly.”); COLUMBIA UNIV., *Rules of University Conduct*, (revised Sept. 29, 2019), <https://universitypolicies.columbia.edu/content/rules-university-conduct> (“Because of the University’s function as an incubator of ideas and viewpoints, the principle of free expression must be jealously guarded.”). The institutional commitments to free speech made by other private universities in New York can be found at FIRE’s Spotlight Database. FIRE, *Spotlight Database* (last updated Mar. 18, 2019), https://www.thefire.org/resources/spotlight/?x=&speech_code=&y=NY&institution_type=Private&speech_code_advanced=&y_advanced=NY#search-results.

² SYRACUSE UNIV., *Free Speech*, <https://policies.syr.edu/policies/free-speech> (last visited April 9, 2021).

³ SYRACUSE UNIV., *Campus Disruption Policy* (revised Aug. 20, 2010), <https://policies.syr.edu/policies/free-speech/campus-disruption-policy>.

Syracuse’s commitment to protecting free speech is referenced in two of the policies that it enforced against Appellants. Specifically, the harassment provision of Syracuse’s student conduct code prohibits only conduct “beyond the bounds of protected free speech,”⁴ and Syracuse’s discriminatory harassment policy provides as follows:

Syracuse University is committed to maintaining an environment that fosters tolerance, sensitivity, understanding and respect while protecting the free speech rights of the members of its community. . . . The University is also committed to protecting academic freedom and the freedom of speech by members of its community. This policy is not intended, and may not be applied, to abridge the free speech or other civil rights of any individual or group on campus. However, harassing speech or conduct that effectively prevents equal access to University programs or otherwise violates federal or state law, or University policy, is prohibited.⁵

These promises are bolstered by the public statements of Syracuse Chancellor Kent Syverud on the importance of free speech,⁶ the attestations the university makes to its academic accreditation agency,⁷ as well as by the text of the First

⁴ SYRACUSE UNIV., *Student Handbook* 5 (2019). The policy has since been revised but can be found in the trial court’s opinion. *Doe*, slip op. at 6.

⁵ SYRACUSE UNIV., *Anti-Harassment Policy* (revised Dec. 13, 2016), <https://policies.syr.edu/policies/free-speech/anti-harassment-policy> (emphasis added).

⁶ FIRE, *Leader Statement Database* (last updated Nov. 25, 2019), https://www.thefire.org/research/leader-statement-database/#leader-statement-database/?view_36_search=syracuse&view_36_page=1.

⁷ Syracuse is accredited by the Middle States Commission on Higher Education, which requires the university to “possess[] and demonstrate[] . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression” as a matter of institutional “Ethics and Integrity.” Middle States Comm’n on Higher Educ., *Standards for Accreditation and Requirements of Affiliation* 5 (13th ed. 2015), <http://msche.org/publications/RevisedStandardsFINAL.pdf>.

Amendment emblazoned on the exterior walls of Syracuse’s nationally-renowned S.I. Newhouse School of Public Communications.⁸ Any student reading Syracuse’s policies, listening to the statements of its chancellor, or seeing the First Amendment prominently displayed on a campus building would reasonably expect to possess the same expressive rights as students at New York’s public colleges and universities.

B. The trial and intermediate appeal courts failed to hold Syracuse accountable for violating its free speech promises.

The trial court, despite finding Appellants’ expression was protected under First Amendment standards, upheld Syracuse’s punishment of the students, finding that the sanctions were rational. *Doe*, slip op. at 6–7. And a majority of the Appellate Division, Fourth Judicial Department refused to construe Syracuse’s numerous, public, and clear promises to uphold its students’ free speech as anything other than illusory, unenforceable puffery, finding that these policies do “not expressly or impliedly adopt a First Amendment standard.” *Doe I v. Syracuse Univ.*, 188 A.D.3d 1570, at *1575 (4th Dep’t 2020) (quoting *Bilicki v Syracuse Univ.*, 2019 NY Slip Op 52178(U), at *6 (N.Y. Sup. Ct., Onondaga County, 2019)). The court instead relied on a single university provision conditioning students’ “right to express themselves freely on any subject” on not “violat[ing] the Code of Student Conduct.” *Id.* According to the intermediate appellate court, this condition allows the university to ignore its numerous policies promising students free speech rights, its guarantees

⁸ SYRACUSE UNIV., S.I. Newhouse School of Public Communications, *About*, <https://newhouse.syr.edu/about> (last visited April 9, 2021).

to its accreditor, and its chancellor's pronouncements extolling the value of free speech, allowing Syracuse to continue violating students' rights with impunity.⁹ *Doe I*, 188 A.D.3d at *1575–76.

The dissent rightfully criticized “the staggering breadth” and “indefiniteness” of Syracuse’s ban on mentally harming others, finding that “it effectively serves as a systemic instrument for the suppression of any viewpoint that falls outside the zone of permissible opinion decreed by the most strident and self-righteous of the campus community.” *Id.* at *1578 (NeMoyer, J., dissenting). The dissent correctly characterized Syracuse’s determination as “a vague and standardless diktat” and “the very embodiment of arbitrary and capricious administrative decision-making that should be annulled” *Id.*

Both the trial court and intermediate appellate court majority failed to faithfully apply the standard for judicial review of nonacademic university disciplinary proceedings. They incorrectly found that Syracuse’s actions must be upheld so long as they are not arbitrary or irrational, the standard New York State courts apply when private universities enforce academic standards. *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 655 (1980) (noting that judicial review for “matters involving academic standards . . . is whether the institution has acted in good faith

⁹ *Supra* notes 3–9 and accompanying discussion.

or its action was arbitrary or irrational.”).¹⁰ This Court in *Tedeschi* explicitly rejected the notion that “[s]uspension or expulsion for causes unrelated to academic achievement” should be deferentially reviewed to only determine “whether the institution has acted in good faith or its action was arbitrary or irrational,” because such disciplinary determinations are not “matters involving academic standards [that] generally rest upon the subjective judgment of professional educators.” 49 N.Y.2d at 658. Rather, *Tedeschi* requires judges to instead “look[] more closely at the actions of educational institutions in such matters” in order to ensure that their promises are “substantially observed” and not “reduce[d] . . . to a meaningless mouthing of words.” *Id.* at 658, 660, 662.

FIRE urges the Court to hold Syracuse to its promises of free speech, promises Appellants and others relied upon in choosing to matriculate at Syracuse. The trial and intermediate appellate courts’ ratification of Syracuse’s censorship of its students—despite finding the speech protected under First Amendment standards—sends the message that private university free speech promises are not worth the paper they are written on. It leaves students’ rights at the whims of university administrators, who frequently choose to disregard the right to free expression when it interferes with the reputational interests of their institutions.

¹⁰ *Doe*, slip op. at 7 (upholding Syracuse’s determination in part because it was “rational”); *Doe I*, 188 A.D.3d, at 1576 (upholding Syracuse’s determination because it was “neither unreasonable nor irrational” (quoting *Hyman v Cornell Univ.*, 82 AD3d 1309, 1310 (3d Dep’t 2011))).

II. FIRE’s Experience Demonstrates That Students Struggle to Hold Private Universities Accountable for Broken Promises of Free Speech.

The severe punishment Syracuse inflicted upon the Theta Tau over protected expression is far from the only abuse of student rights committed by the university, and it will not be the last so long as such abuse remains unaddressed. Syracuse and other private institutions of higher education in New York frequently violate the free speech rights of their students without consequence. This continuing failure to uphold students’ expressive freedoms enables greater rights abuses, as students are often unable to hold their universities accountable for breaking free speech promises.

Ensuring private universities like Syracuse uphold their contractual promises to students is not only legally required, it is sound policy. Successive presidential administrations have demonstrated the bipartisan recognition of the significance of a college education for success in contemporary society,¹¹ 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.

¹¹ 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, <https://joebiden.com/beyondhs> (last visited April 9, 2021).

For example, a student may choose to attend Syracuse or another private university in New York based on the combination of their guarantees to protect the full array of students' First Amendment rights,¹² their academic programs, and their many vibrant student organizations, so that they may gain crucial academic and professional experience in their chosen field while in college. When that university fails to fulfill its promises, as Syracuse has done here, 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. Students and society as a whole should not incur this cost because of a university's failure to fulfill its promises.

A. Syracuse has continually violated its free speech promises with impunity.

This Court need look no further than Syracuse to see the detrimental results of failing to hold a private university accountable for the promises it makes to its students. Since 2005, the university has lured students to its campus with laudable promises to protect their rights, and yet punished them for, among other protected expressive activities: running a satirical TV station; writing an anonymous, sarcastic blog about life in law school; complaining on Facebook about a racially-charged comment made in their presence by a community leader;¹³ and hosting non-student guests who allegedly used derogatory language—the last incident finally earning the

¹² See *supra* notes 2–9 and accompanying discussion.

¹³ Press Release, *10 Worst Colleges for Free Speech: 2021*, FIRE, Feb. 17, 2021, <https://www.thefire.org/10-worst-colleges-for-free-speech-2021> (describing how Syracuse has violated the free speech rights of its student since 2005).

university a rebuke from the Supreme Court of New York, Onondaga County for sanctioning a group of students who, in the court’s words, “did nothing wrong.”¹⁴

Appellants’ lawsuit is only one of many lawsuits against Syracuse for breaking its promises to students who, like Appellants, reasonably believed the university’s promises that it would protect their rights.¹⁵ These lawsuits, combined with the many rights abuses at Syracuse publicized by FIRE, illustrate the university’s two-faced attitude when it comes to upholding the promises it makes to its students.

B. Private universities nationwide regularly break their promises of free speech.

FIRE’s two decades of experience defending student rights demonstrates that private institutions in New York and nationwide routinely censor speech with

¹⁴ *Fraternity of Alpha Chi Rho, Inc. v Syracuse Univ.*, 2021 NY Slip Op 50195(U), at *4 (N.Y. Sup. Ct., Onondaga County, Mar. 10, 2021); see also Alex Morey, *Judge: Syracuse had ‘no rational basis’ for suspending frat over alleged harassment by non-student; calls university’s actions ‘troubling’*, FIRE, Mar. 11, 2021,

<https://www.thefire.org/judge-syracuse-had-no-rational-basis-for-suspending-frat-over-alleged-harassment-by-non-student-calls-universitys-actions-troubling> (describing decision).

¹⁵ E.g., *Fraternity of Alpha Chi Rho, Inc.*, 2021 NY Slip Op 50195(U), at *4 (finding that Syracuse had “no rational basis” for suspending student group over alleged derogatory language used by non-student, and that the punishment violated university policies promising free speech and due process rights); *Doe v. Syracuse Univ.*, 440 F. Supp. 3d 158 (N.D.N.Y. 2020) (denying in part Syracuse’s motion to dismiss expelled student’s breach of contract claims for violating policies promising due process rights); *Doe v. Syracuse Univ.*, No. 5:18-CV-377, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019) (denying in part Syracuse’s motion to dismiss student’s breach of contract claims for violating policies promising students due process rights, including access to evidence and evidentiary standards); *Noakes v. Syracuse Univ.*, 369 F. Supp. 3d 397 (N.D.N.Y. 2019) (denying Syracuse’s motion to dismiss student’s Title IX claims over a flawed and discriminatory university disciplinary process); *Doe v. Syracuse Univ.*, 341 F. Supp. 3d 125 (N.D.N.Y. 2018) (denying Syracuse’s motion to dismiss student’s Title IX claims over a biased university disciplinary process).

relative impunity, despite assuring students, parents, and even accrediting agencies that they will honor expressive rights.

Among the universities in New York that violated such free speech promises to students or faculty since 2015 are New York University,¹⁶ Columbia University,¹⁷ Fordham University,¹⁸ Long Island University,¹⁹ Cornell University,²⁰ the University of Rochester,²¹ St. John's University,²² The New School,²³ St. Bonaventure University,²⁴

¹⁶ 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>.

¹⁷ 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>.

¹⁸ Adam Goldstein, *Analysis: Department of Education investigates Fordham over broken speech promises in Austin Tong case*, FIRE, Aug. 25, 2020, <https://www.thefire.org/analysis-department-of-education-investigates-fordham-over-broken-speech-promises-in-austin-tong-case>.

¹⁹ 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>.

²⁰ Catherine Sevckenko, *Cornell's Decorating Rules: You Can Put Up Anything You Want As Long As It's a Snowflake*, FIRE, Dec. 16, 2015, <https://www.thefire.org/cornells-decorating-rules-you-can-put-up-anything-you-want-as-long-as-its-a-snowflake>.

²¹ 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>.

²² Adam Goldstein, *Update: St. John's limits academic freedom of history department in ongoing effort to punish professor for asking question*, FIRE, Oct. 12, 2020, <https://www.thefire.org/update-st-johns-limits-academic-freedom-of-history-department-in-ongoing-effort-to-punish-professor-for-asking-question>.

²³ *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>.

²⁴ 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>.

Hofstra University,²⁵ Alfred University,²⁶ and Syracuse itself.²⁷ Every single one of these private universities promise students and faculty free speech rights consistent with First Amendment, yet when the time came to stand by their promises, they fell woefully short.

Examples from FIRE’s 20-year history are far too numerous to lay out in this brief, but we urge the Court to consider these representative instances:

Fordham University “guarantees the freedom of inquiry required by rigorous thinking and the quest for truth,”²⁸ and promises each member of the community “a right to freely express his or her positions and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society.”²⁹ Yet for years Fordham refused to recognize a campus chapter of the student organization Students for Justice in Palestine out of concern that the group’s views would lead to “polarization” of the campus community. The Supreme Court, County of New York’s decision ordering Fordham to recognize the group’s free speech rights was overturned by the Appellate Division, First Department, and the group

²⁵ 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>.

²⁶ 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>.

²⁷ 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>.

²⁸ FORDHAM UNIV., *Mission Statement*, https://www.fordham.edu/info/20057/about/2997/mission_statement (last visited April 9, 2021).

²⁹ FORDHAM UNIV., *Demonstration Policy*, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited April 9, 2021).

has now appealed to this Court to hold Fordham accountable for violating its commitment to free speech.³⁰

Rensselaer Polytechnic Institute (RPI) assures each student that “the Institute shall not impede or obstruct students in the exercise of their fundamental rights as citizens.”³¹ Yet, despite this promise, RPI has gone to great lengths over the past several years to prevent students from holding demonstrations critical of the administration. Administrators erected a fence across the campus to keep students out of sight of a black-tie fundraiser, hired local police to videotape students, and instituted pretextual disciplinary actions against students who spoke to the media at demonstrations against the administration.³² More recently, students passing out buttons and flyers critical of RPI’s administration were told by campus security officers to “vacate” the sidewalk, over which the university was inexplicably claiming “eminent domain.”³³

³⁰ *Matter of Awad v. Fordham Univ.*, 2019 N.Y. Misc. LEXIS 4720, *17–18 (N.Y. Sup. Ct., New York County, July 29, 2019) (“[T]he 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.”), *overruled by* 189 A.D.3d 605, 606 (1st Dep’t 2020) (finding that Fordham’s refusal to recognize the group despite promising free speech to its students was “in the exercise of its honest discretion” and “not without sound basis in reason.”) (citations and quotations omitted).

³¹ RENSSELAER POLYTECHNIC INSTITUTE, *Rensselaer Handbook of Student Rights & Responsibilities* 4 (revised Aug. 29, 2019), <https://info.rpi.edu/sites/default/files/Handbook-of-Student-Rights-and-Responsibilities-Rev-August-29-2019.pdf>.

³² Press Release, *The 10 worst colleges for free speech: 2019*, FIRE, Feb. 12, 2019, <https://www.thefire.org/10-worst-colleges-for-free-speech-2019>; FIRE, *Spotlight Database, Rensselaer Polytechnic Institute, Cases* (last updated Mar. 18, 2019), <https://www.thefire.org/schools/rensselaer-polytechnic-institute> (describing instances of censorship at RPI).

³³ *Id.*

Likewise, in 2018, Long Island University Post summoned a student to a disciplinary meeting for his nonthreatening political social media posts and academic writings regarding recreational firearms events,³⁴ and investigated another student in 2019 for allegedly possessing and distributing flyers critical of the school.³⁵ These actions contradict the university’s promise to uphold students’ rights “to free speech and peaceful assembly” and proclamations that “intellectual inquiry and critical thought” and “artistic and creative expression” are among the university’s “core values.”³⁶

These situations represent only a tiny fraction of the instances of censorship by private institutions FIRE has documented over the last two decades.³⁷ FIRE’s case archives demonstrate that the consequences of broken free speech promises are suffered by students of various backgrounds across the nation, but not by the educational institutions they attend.³⁸

Misconduct that is rewarded will be repeated. Failing to hold universities accountable for violating their clear commitment to students’ rights will result in greater rights abuses, more lawsuits seeking redress, and an erosion of civil liberties on campus—to the detriment of students and the educational institutions they attend.

³⁴ FIRE *New York college summons student to a meeting for holding unloaded guns in off-campus Facebook video*, Oct. 10, 2018, <https://www.thefire.org/new-york-college-summons-student-to-a-meeting-for-holding-unloaded-guns-in-off-campus-facebook-video>.

³⁵ *See supra* note 20.

³⁶ *See supra* notes 35-36 and accompanying discussion.

³⁷ *See FIRE, Case Archives* (updated Mar. 18, 2021), <https://www.thefire.org/category/cases>.

³⁸ *Id.*

CONCLUSION

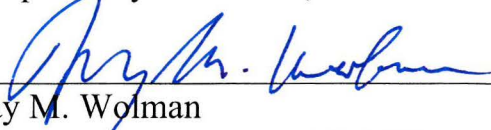
Universities have a tremendous amount of power over the students they enroll. Suspension or expulsion from college, particularly for an offense that carries a significant social stigma, can have permanent and life-altering consequences for a student.³⁹ Syracuse has imposed such consequences on a group of students who did nothing more than perform a private, satirical comedy sketch that is clearly protected by the university's promises of free speech. If allowed to stand, the trial and intermediate appellate court's decision will embolden not only Syracuse but countless other private educational institutions around the state to ignore the promises of free speech that students rely on whenever it is in the schools' institutional interest to do so.

Accordingly, *amicus curiae* FIRE urges this Court to rectify Syracuse's refusal to honor its promise to uphold its students' free speech rights. The decisions of the trial and intermediate appellate courts should be reversed.

Dated: April 13, 2021

³⁹ *E.g. Albert v. Carovano*, 824 F.2d 1333, 1339 (2d Cir. 1987) (finding that there is a stigma attached to suspension for disciplinary reasons), *modified on reh'g*, 839 F.2d 871 (2d Cir. 1987), *on reh'g en banc*, 851 F.2d 561 (2d Cir. 1988); *Gonzales v. McEuen*, 435 F. Supp. 460, 471 (C.D. Cal. 1977) ("There is no question that a high school student who is punished by expulsion might well suffer more injury than one convicted of a criminal offense.").

Respectfully Submitted,



Jay M. Wolman

RANDAZZA LEGAL GROUP
43-10 Crescent Street, Suite 1217
Long Island City, NY 11101
Tel. (702) 420-2001
jmw@randazza.com

Counsel of Record

Zach Greenberg
Foundation for Individual Rights in
Education
510 Walnut Street, Suite 1250
Philadelphia, PA 19106
Tel. (215) 717-3473
Fax. (215) 717-3440

**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2018.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface : Times New Roman

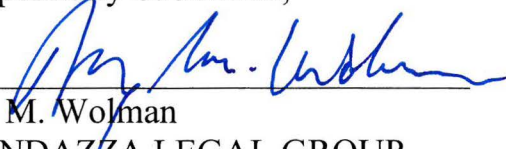
Point size: 14

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 4,216 words.

Dated: April 13, 2021

Respectfully Submitted,



Jay M. Wolman
RANDAZZA LEGAL GROUP
43-10 Crescent Street, Suite 1217
Long Island City, NY 11101
Tel. (702) 420-2001
jmw@randazza.com

Counsel of Record

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 April 13, 2021

deponent served the within: Amicus Curiae Brief on Behalf of Foundation for Individual Rights in Education in Support of Petitioners-Appellants

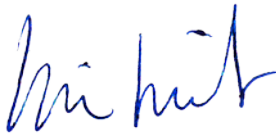
upon:

Danielle C. Wild, Esq.
Attorney for Petitioners-Appellants
Kaman, Berlove, Marafioti, Jacobstein & Goldman, LLP
135 Corporate Woods, Suite 300
Rochester, NY 14623
(585) 325-7440
dcwild@kamanesq.com

John G. Powers, Esq.
Attorneys for Respondent-Respondent
Hancock Estabrook, LLP
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202
(315) 565.4547
jpowers@hancocklaw.com

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 April 13, 2021



MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021



Job# 303795