To be Argued by:
AARON MEYER
(*Time Requested: 15 Minutes*)

Supreme Court of the State of New York
Appellate Division – First Department

Case No.: 2020-00843

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

Petitioners-Respondents,

- against -

FORDHAM UNIVERSITY,

Respondent-Appellant.

BRIEF FOR *AMICUS CURIAE* STANDWITHUS

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INTEREST OF AMICUS CURIAE

This amicus brief in support of Respondent-Appellant is submitted on behalf of StandWithUs, an international, non-profit Israel education organization founded in 2001. Its staff and volunteers believe that education is the road to peace and are committed to stand up for Israel and the Jewish people when publicly attacked or misrepresented. StandWithUs is dedicated to educating people of all ages about Israel and combating the extremism and antisemitism that often distort Israel-related issues. While providing positive education to millions, StandWithUs also vigorously challenges discriminatory boycotts and other campaigns of hate, including through the use and application of Title VI of the Civil Rights Act of 1964.

This brief addresses the legally flawed decision by the lower court to improperly substitute its judgment for that of Fordham University administrators, who adhered to the university's guidelines and declined to recognize a university chapter of Students for Justice in Palestine ("SJP"). While the substantive basis for the university's decision should have been, and must properly remain, outside the scope of judicial review, StandWithUs must note that there was more than ample basis for Fordham reasonably to decline recognition due to the documented antisemitic nature of the conduct of the student organization involved, both nationally and locally, and the federally-imposed obligation of the university administration to act in a manner that prevents a hostile campus environment for its students.

By declining to expose its campus to what Fordham correctly termed a polarizing

entity whose primary purpose ran antithetical to Fordham's goal of open dialogue, the university also averted potential federal legal ramifications. Finally, the lower court also erred in refusing to permit Respondent-Appellant from interposing an answer after it incorrectly denied Fordham's motion to dismiss, since the lower court's otherwise improper factual analysis failed to address what would have been material questions of fact relating to SJP and its polarizing conduct that could not be determined properly on the motion to dismiss.

I. THE DECISION TO DENY RECOGNITION TO STUDENTS FOR JUSTICE IN PALESTINE ("SJP") WAS NOT ARBITRARY AND CAPRICIOUS

This Court has stated that, "[h]aving accepted a State charter and being subject to the broad policy-making jurisdiction of the Regents of the University of the State of New York, a single corporate entity of which they are deemed a part … private colleges and universities are accountable in a C.P.L.R. article 78 proceeding, with its well-defined standards of judicial review, for the proper discharge of their self-imposed as well as statutory obligations." Gertler v. Goodgold, 107 A.D.2d 481, 486, (1st Dept. 1985), *affd.* 66 N.Y.2d 946 (1985).

While universities and colleges are subject to such judicial review, the role of a court in evaluating a decision by a private university with regard to internal matters is drastically limited. *See* Keles v. Hultin, 144 A.D.3d 987 (2d Dept. 2016). Furthermore, courts have a restricted role in the review of decisions made by private universities concerning issues pertinent to campus life and activities. *See* Aryeh v. St John's University et al, 154 A.D.3d 747 (2d Dept. 2017) (holding that, "[a] determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules…" Id at 747). *See also* C.P.L.R. § 7803(3).

Courts may not substitute their own judgment for the judgment of college administrators. *See* Fruewald v. Hofstra University, 82 A.D.3d 1233 (2d Dept. 2011); *see also* Lipsky v. New York Institute of Tech, 69 A.D.3d 725 (2d Dept. 2010) (holding that, "in reviewing such a determination, a court ... must not substitute its judgment for that of

the university…". Id at 725-726).

The standard then for judicial review of a private university's decision regarding campus activities is to determine whether the university acted in an arbitrary and capricious manner. *See* Lai v. St John's University, 155 A.D.3d 627 (2d Dept. 2017). The university is obligated to follow its own rules in a fair, impartial and rational manner. *See, e.g*., Jacobs v. Columbia University, 2005 NY Slip Op 30606 (Sup Ct. New York Co 2005, Richter, J.). As the Appellate Division, Second Department has explained, "[W]hen a university acts within its jurisdiction, not arbitrarily, but in the exercise of an honest discretion based upon facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion." Carr v. St John's University, 17 A.D.2d 632, 634 (2d Dept. 1962).

The view espoused by the Second Department in Carr is in accord with that of the Practicing Law Institute, which similarly explained in its seminal 1963 book on the then-newly enacted C.P.L.R., "if conflicting evidence presents a fair question of face upon which the discretion of the official was exercised, it is error for the reviewing Court to substitute its judgment for that of the official." CPLR Forms and Guidance for Lawyers, Leon Liner, Ed., Practicing Law Institute, New York, NY 1963, comment on section 7803, at p. 1255.

According to Fordham's published university procedures, the final determination as to the appropriateness of any new student club resides with the Dean of Students. In the case at bar, the Dean of Students reviewed SJP's application and properly

determined that the stated purposes and activities of SJP are inconsistent with Fordham's own mission statement and purposes. (See Point 2 for a discussion of the role taken by other SJP chapters throughout the United States.) The Dean of Students opined as follows:

> "After consultation with numerous faculty, staff and students, and my own deliberation, I have decided to deny the request to form a club known as Students for Justice in Palestine at Fordham University. While students are encouraged to promote diverse political points of view, and we encourage conversation and debate on all topics, 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. To permit SJP to form a chapter at Fordham would be inconsistent with university goals." Lower Court decision, at page 8.

Here, the Dean of Students specifically articulated the scope and nature of his review of SJP before making his final determination. He conferred with multiple campus stakeholders, including faculty, staff and students, and looked over SJP's own stated goals and purposes. His actions were not arbitrary, capricious or in bad faith. In Cabonargi v. City University of New York, 102 A.D.3d 467 (1st Dept. 2013), this Court reversed a determination by the lower court which had granted a student's petition to overrule an academic decision by the university. This Court found that the university's decision to dismiss the petitioner was "rational, and was made in good faith and in accordance with its own rules." Id. *See also, e.g.*, West Village Assocs. v. New York State Div. Of Housing and Community Renewal, 377 A.D.2d 111 (1st Dept. 2000), in which this Court held that even in the case of a public agency, a rational decision "must

be upheld even though the court, if viewing the case in the first instance, might have reached a different conclusion." Id at 112.

In the case at bar, Fordham's decision to deny SJP recognition as a student club was based upon the Dean of Students' own meetings with SJP, his review of the SJP application and his consultations with faculty and staff. There was nothing arbitrary or capricious about this determination. *See* Pell v. Board of Education of Union Free School Dist. No 1 et al, 34 N.Y.2d 222 (1974) (holding that "arbitrary action is without sound basis in reason and is generally taken without regard to the facts"). Id at 231. It is crystal clear from the record that the Dean of Students' determination to deny recognition to SJP was based upon a thorough review of facts and was neither irrational nor capricious.

There is no split among the judicial Departments of this state on this point. Much to the contrary, the Appellate Division, Third Department has expressly denied relief to petitioners who attempt to obtain what amounts to judicial reversal of private university decisions. In Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Institute, 260 A.D.2d 992 (3d Dept. 1999), the Court stated that such "contentions are, in the main, misplaced within the appropriate context of our review." Id at 993.

The Third Department further noted that "the relationship between a private university and its students and student organizations is essentially a private one" such that even in cases of university discipline, the "full panoply of due process guarantees" does not apply. Id at 994, *quoting* Matter of Mu Ch. of Delta Kappa Epsilon v. Colgate

Univ., 176 A.D.2d 11, 13 (3d Dept. 1992).

This Court has recently restated the precise standard utilized by the Second and Third Departments, namely that, "[a]bsent State involvement, the only issue for our review is whether respondents substantially complied with their own rules." Bondalapati v. Columbia University, 170 A.D.3d 489, 490 (1st Dept. 2019), *citing* Mu Ch., *supra*, and Cavanagh v. Cathedral Preparatory Seminary, *infra*.

The lower court should have refrained from engaging in any interpretation of Fordham's guidelines, and compounded its error when it misinterpreted Fordham's university rules and improperly concluded that the Dean of Students did not have the discretion to deny SJP's request to form a chapter once SJP had proceeded through other university procedures, despite Section 8(h) of the university's student guidelines, which expressly provides that the Dean of Students retains the right to veto formation of any new club.

Accordingly, the lower court demonstrably and improperly substituted its own judgment for the judgment of Fordham University as articulated by the Dean of Students. The Dean of Students specifically determined that SJP's own stated mission was contrary to the mission which guides Fordham University. In deciding that there was no such contradiction, the Supreme Court articulated its own determination that SJP's mission was consistent with Fordham's own mission. This is clearly outside the role of the courts in adjudicating such university disputes. *See* Rensselaer, *supra*.

The burden of proving that the university's decision to deny recognition to SJP

was 'arbitrary and capricious', or even properly reviewable by the court, rested with SJP as petitioner. As it is clear that the university's denial decision was not arbitrary and capricious, SJP failed to meet its burden of proof. *See, e.g.* Lomastro v. New York Institute of Technology et al, 2019 NY Slip Op 30493(U) (Sup. Ct. New York Cty. 2019, Perry J.).

With apologies for repetition, even if any petitioner "was not afforded due process, a private school student is not entitled to the full panoply of due process rights unless a threshold showing of State involvement is made." Cavanagh v. Cathedral Preparatory Seminary, 284 A.D.2d 360 (2d Dept. 2001), *citing* Rensselaer, *supra*.

Indeed, it is difficult to find applicable precedent wherein a private university's determination whether to recognize any student organization was successfully challenged in court, given that unlike student disciplinary matters, there is no putative penalty that could theoretically shock the conscience.

Accordingly, the Court of Appeals' admonition that "[c]ourts have a 'restricted role' in reviewing determinations of colleges and universities" (Powers v. St. Johns University School of Law, 25 N.Y.3d 210, 216 (2015), *citing* Maas v. Cornell Univ., 94 N.Y.2d 87, 92, (1999)), should be construed most strongly in support of private universities when, as here, there is no disciplinary or related action that could theoretically implicate scrutiny pursuant to a breach of contract theory.

Somewhat parenthetically, as an alternative to the incorrect 'due process' analysis, the lower court's quasi-First Amendment reasoning was also entirely misplaced, since

the private university's discretion to recognize clubs cannot otherwise "lose its private character merely because the public is generally invited to use it for designated purposes." Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972). *See also, e.g.*, Cent. Hardware Co. v. NLRB, 407 U.S. 539 (1972).

Petitioners-Respondents failed to make any threshold showing of purported State involvement, and therefore any theoretical 'due process' or quasi-free speech considerations applied by the lower court in minimizing the Dean of Students' clear and unambiguous discretion to veto club recognition was entirely without support or justification in the record or appellate case law, federal or state.

The lower court improperly granted the relief requested in the petition.

II. FORDHAM'S RATIONAL DECISION TO REJECT STUDENTS FOR JUSTICE IN PALESTINE ("SJP") RATIONALLY AVERTED POTENTIAL FEDERAL RAMIFICATIONS PURSUANT TO 42 U.S.C. § 2000(d)

For the reasons identified by Respondent-Appellant in its brief, and further amplified above, *amicus curiae* again stresses that the lower court's decision was incorrect as a matter of law and cannot be sustained by ready application of applicable precedent. However, it may be beneficial to highlight the consequences that factored into Fordham's largely unreviewable discretionary action in declining to recognize a student chapter on its campus.

As explained by student advocates to the Fordham Dean of Students, there was a substantial possibility that SJP's proposed Fordham chapter would encourage antisemitic activities, as defined by federal law, on campus and interfere with other students' ability

and rights to participate in campus activities, such as the then-recent incident at Vassar College, wherein its SJP chapter "published a Nazi propaganda poster by Norwegian artist Harald Damsleth captioned "Liberators" in which a many limbed monster decorated with the US flag, holding a money bag grasped by a long-nosed banker, and wearing a Star of David as a loin cloth, stomps on houses of the innocent" to its Tumblr account. Amanda Borschel-Dan, "Vassar's SJP sort of apologizes for anti-Israel, Nazi cartoon," *The Times of Israel*, May 16, 2014, available online at https://www.timesofisrael.com/vassars-sjp-sort-of-apologizes-for-anti-israel-nazi-cartoon/, last accessed February 29, 2020.

Fordham's decision to deny recognition of an SJP chapter on campus was consistent with the scope and intent of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d).

Title VI of the 1964 Civil Rights Act, 42 U.S.C., § 2000(d) *et seq.* prohibits discrimination on the bases of race, color and national origin in programs and activities receiving federal financial assistance. The United States Department of Education's Office of Civil Rights ("OCR") has explained that schools "may violate [Title VI] and the Department's implementing regulations when peer harassment based on race, color, [or] national origin . . . is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees." *See* U.S. Department of Education, Office for Civil Rights, Office of the Assistant Secretary, "Dear Colleague Letter," Oct. 26, 2010, page 1, available at

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html, last accessed February 28, 2020.

As the OCR's implementing regulations for Title VI expressly provide, Title VI recipients are prohibited from actions that, *inter alia*:

> (i) Deny an individual any service, financial aid, or other benefit provided under the program;
> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
> (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; or
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program…." 34 C.F.R. § 100.3(b)

By definition then, Title VI prohibits harassment of students based upon national origin. Harassment includes incidents which interfere with students' rights to participate in services and accept opportunities on campus. Throughout the country, SJP chapters have participated in repeated campaigns to harass and intimidate Jewish students and Fordham's dean expressly noted this practice:

> "There is perhaps no more complex topic than the Israeli-Palestinian conflict, and it is a topic that often leads to polarization rather than dialogue. The purpose of the organization *as stated in the proposed club constitution* points toward that polarization. Specifically, the call for Boycott, Divestment and Sanctions of Israel presents a barrier to open dialogue and mutual learning and understanding." Lower Court Order at 4 (emphasis added).

Indeed, terming SJP's constitution as merely 'pointing towards' polarization may have been a generous assessment, given other SJP chapters' penchant for calling for

intifada, which has been synonymous with violent terrorist attacks throughout Israel, and reasonably led to similar fears of violence when shouted here, as students at City College of New York encountered in 2018. *See, e.g.,* Oshra Bitton, "When Students for 'Justice' Promote Violence," The Algemeiner, May 14 2018, available online at https://www.algemeiner.com/2018/05/24/when-students-for-justice-promote-violence/, last accessed February 29, 2020.

On December 11, 2019, the President issued an Executive Order recognizing the International Holocaust Remembrance Alliance ("IHRA")'s definition of antisemitism. "It shall be the policy of the executive branch to enforce Title VI against discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI." "Executive Order on Combating Anti-Semitism," December 11, 2019, available online at https://www.whitehouse.gov/presidential-actions/executive-order-combating-anti-semitism/, last accessed February 28, 2020.

The IHRA definition of antisemitism includes the following: "denying the Jewish people their right to self-determination by claiming that the existence of the State of Israel is a racist endeavor", *Id.*, and builds upon the U.S. State Department's adoption of the IHRA's working definition since 2010. *See* U.S. Department of State Office of International Freedom, "Defining Anti-Semitism," May 26, 2016, available online at https://www.state.gov/defining-anti-semitism/, last accessed February 28, 2020.

Refusing to treat Jewish students as equals, seeking to strip away the right of Jews to self-determination and demonizing the State of Israel are all implicated by the

IHRA definition adopted by Executive Order. IHRA further defines antisemitism as hatred of Jews and the "rhetorical and physical manifestation of antisemitism directed towards Jewish people or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities." Id.

Much of SJP's conduct nationally satisfies the IHRA definition of antisemitism. SJP regularly demonizes the State of Israel and denies Jews the right to self-determination, including through substantially disruptive conduct targeting Jewish and pro-Israel students. Clearly, permitting a student organization on campus which by its very constitution indicates an intention to interfere with the civil rights of Jewish students raises potential implications under Title VI. *See, e.g.*, Anthony Berteaux, "In the safe spaces on campus, no Jews allowed," *The Washington Post*, September 15, 2016, available online at https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/15/in-the-safe-spaces-on-campus-no-jews-allowed/, last accessed February 29, 2020.

It is worth noting that the national Students for Justice in Palestine organization condemned the Executive Order, and signatories to the tendentious and hyperbolic condemnation include "Fordham University Students for Justice in Palestine". *See* National Students for Justice in Palestine, "SJP Condemns Trump's Executive Order," undated, available online at https://www.nationalsjp.org/sjpunitedstatement.html, last accessed February 28, 2020.

Similarly, while the national SJP organization proudly boasts of what it describes

as "US Campus Victories in the Boycott, Divestment & Sanctions Movement", (undated, available online at https://www.nationalsjp.org/bds-victories.html), the BDS movement was deemed sufficiently egregious and damaging that on June 5, 2016, New York State Governor Andrew Cuomo issued an "Executive Order Directing State Agencies and Authorities to Divest Public Funds Supporting BDS Campaign Against Israel," Governor Andrew Cuomo, June 5, 2016, available online at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf, last accessed February 28, 2020

Thus, the Dean of Students' decision to deny SJP recognition as a student organization at Fordham represented a genuine desire to avoid potential conflicts on Fordham's campus, averted potential federal consequences pursuant to Title VI, especially in light of the IHRA definition of antisemitism utilized by the Department of Education to assess potential violations of Title VI, and was in keeping with New York State's own stated goals in condemning the same BDS scheme, the furtherance of which forms a central component of SJP's stated mission and goals.

Amicus curiae will not further belabor this Court with the litany of federal and state actions involving SJP's course of conduct, including but not limited to pending federal actions brought against the organization and/or its pretextually 'independent' student chapters, unless so requested, as the narrow legal question presented obviates the need for inquiry into the objective bases for Fordham's decision. Still, insofar as the public policies of the United States and the State of New York are tangentially related to

the improperly reviewed basis for Fordham's decision, *amicus curiae* submits that this Court should be aware that Fordham's decision was entirely in keeping with public policy on both state and federal levels, and was demonstrably rational.

III. THE UNIVERSITY WAS IMPROPERLY DENIED THE RIGHT TO ANSWER THE PETITION

Amicus curiae is mindful that 22 N.Y.C.R.R. § 1250.4(f) mandates that party arguments not be duplicated, and will only passingly amplify Respondent-Appellant's position in this regard. That substantive error has been fully identified, but it was compounded by another error, namely that the lower court improperly and irrationally found there to be no question of fact sufficient to permit Fordham to interpose an answer once its motion was otherwise improperly denied.

Fordham made a pre-answer motion to dismiss SJP's petition. The standard of review for a motion to dismiss in the context of an Article 78 proceeding is to accept all of the factual allegations in the petition as true and rule upon the applicable law. As noted above, the lower court improperly determined that the Dean of Students did not have the right to veto recognition of a potential club once all of the other principals involved had approved that club, thereby overstepping its role in applying the applicable arbitrary and capricious standard.

In Ifran v. Vullo, 168 A.D.3d 733 (2d Dept. 2019), the lower court accepted the facts as true in the underlying petition and then denied the respondent the opportunity to answer the petition. The Appellate Division, Second Department reversed the lower

court, holding that "the court should not have decided the ultimate merits of the petition seeking relief under C.P.L.R. article 78 as the fund administrator had not yet filed an answer or the administrative record". Id at 734.

Even if the error on the part of the lower court would have been to dismiss the petition on an erroneous basis, the proper course would have been to remand for interposition of an answer. In Center for Discovery, Inc. v. NYC Dept. of Education, 162 A.D.3d 83 (1st Dept. 2018), this Court held that "[s]ince the motion court erred in granting the cross motion to dismiss the proceeding on the ground of exhaustion of remedies, we are obliged to remand the matter to the Supreme Court to permit respondent to file an answer pursuant to CPLR 7804(f)". Id at 87.

In Legacy at Fairways, LLC v. McAdoo, 67 A.D.3d 1460 (4th Dept. 2009), the lower court denied a pre-answer motion to dismiss a petition and thereafter permitted the respondent to answer the petition. The respondents therein appealed that denial, and the Fourth Department therefore reversed, because "the allegations in the petition herein demonstrate the existence of a bona fide justiciable controversy …. there are triable issues of fact ... and thus the court's factual determinations with respect to the merits of those issues before respondents answered the petition were premature." Id at 1462.

Again, the lower court should have denied the petition based on the clear and unambiguous university guideline that gave the dean of students the right to veto club recognition without engaging in any analysis regarding other theoretical procedural steps taken.

When the lower court improperly failed to deny the petition, and instead engaged in factual analysis that continued to presume the truth of Petitioners-Respondents' allegations, that reversible error was compounded by preventing Fordham from exercising its right to answer the petition.

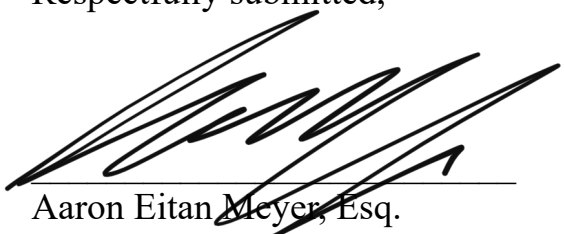
Therefore, while this issue should not be reached given the larger error of law set forth in point I, *supra*, the lower court therefore compounded its error by denying Fordham the right to answer the petition.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to reverse the lower court's clear error of law and dismiss the petition in accordance with settled case law. When, as here, a private university's interpretation of its guidelines is supported by said guidelines, and the complained-of action is limited to the entirely discretionary act of whether to recognize a student organization, the power of a court to substitute its own judgment must be at its lowest ebb. While proper consideration of the legal error is dispositive in reversing the lower court, *amicus curiae* has demonstrated that it was Respondent-Appellant alone whose actions were also in accordance with federal and state public policy, and it would have otherwise been error to overturn its decision. If Fordham's decision were otherwise properly subject to factual scrutiny, then it was further error of the lower court to refuse to permit Fordham from answering the petition and providing complete factual substantiation for its otherwise rational and unreviewable decision.

Dated: Hauppauge, New York
September 25, 2020

Respectfully submitted,



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