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New York Supreme Court
Appellate Division—Fourth Department

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JOHN DOE "3", JOHN DOE "7", JOHN DOE "8", et al.

Petitioners/Appellants,

– against –

SYRACUSE UNIVERSITY

Respondent.

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

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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 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 and due process enshrined in the institutional promises, commitments, and policies of private colleges and universities like Syracuse University ("Syracuse"). If allowed to stand, the lower court's ruling will allow these schools to continue to erode civil liberties on campus without consequence.

ARGUMENT

I. Introduction

Private universities 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 disregard those promises when honoring them proves 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.

The lower court found that Syracuse's punishment of Appellants for their expression under the general harassment provision of its student conduct code was inappropriate because the university's policy plainly exempts speech protected under First Amendment standards. *Doe v. Syracuse Univ.*, Sup Ct, Jefferson County, Jan. 8, 2019, index No. 2018-1865, slip op at 5-6). But, despite finding Appellants' expression was protected under First Amendment standards, the lower court also held that Syracuse's punishment of Appellants under two other policies — a provision of the conduct code prohibiting "mental harm" and the university's discriminatory harassment policy — was rational. The court therefore upheld the sanctions in their entirety. *Id* at 6-7. The court also found that Syracuse substantially complied with its disciplinary procedures in imposing the sanctions. *Id*. at 3-5.

By leaving the students' punishment intact, the lower court failed to take into account Syracuse's explicit written promises to protect student expression consistent with First Amendment standards — a commitment Syracuse proudly advertises to its students, yet has flagrantly ignored in this case. Further, the lower court's ratification of the deficient process used by Syracuse ignores the numerous procedural irregularities and outright violations of Syracuse's own rules.

The lower court's decision is cast against a background of students nationwide struggling to hold private universities accountable for flouting their policies regarding students' rights. If allowed to stand, that decision will only embolden Syracuse and other institutions to continue to ignore their own policies when convenient. *Amicus* FIRE asks that this Court review Appellants' allegations with this broader context in mind and reverse the lower court's ruling.

II. FIRE's Experience Demonstrates that Students Struggle to Hold Private Universities Accountable for Broken Free Speech Promises.

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

Private universities promise incoming students free speech rights consistent with the protections under the First Amendment. (*see, e.g.* American Univ., *Guidelines for Freedom of Expression and Dissent* [updated Jan. 2016], available at https://www.american.edu/policies/upload/freedom-of-expression-508sig.pdf [last accessed Nov. 13, 2019] ("The University fosters and protects freedom of expression

and dissent for all members of the University community. The only limits on free expression are those dictated by law, limits necessary to protect the safety and rights of others, and limits to ensure the normal functioning of the University."); Carnegie Mellon Univ., *Freedom of Expression* [updated Feb. 2, 2007], available at https://www.cmu.edu/policies/administrative-and-governance/freedom-of-expression.html [last accessed Nov. 13, 2019]("Carnegie Mellon University values the freedoms of speech, thought, expression and assembly – in themselves and as part of our core educational and intellectual mission. . . . The only limits on these freedoms are those dictated by law and those necessary to protect the rights of other members of the University community and to ensure the normal functioning of the University."); Northeastern Univ., *Code of Student Conduct, General Expectations* [rev. Mar. 2018], available at http://www.northeastern.edu/osccr/wp-content/uploads/2019/06/Code-of-Student-Conduct-2019-2020.pdf [last accessed Nov. 13, 2019]("As citizens and as members of an academic community, students enjoy the same basic privileges and are bound by the same responsibilities as all citizens.")).

However, around the country, private universities routinely punish students for speech protected by institutional promises of free expression. Despite this, few are ever held accountable for this deceptive practice. 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 few representative instances:

Fordham University "guarantees the freedom of inquiry required by rigorous thinking and the quest for truth." (Fordham Univ., *Mission Statement* [2019], available at https://www.fordham.edu/info/20057/about/2997/mission_statement [last accessed Nov. 13, 2019]). And, it 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." (Fordham Univ., *Demonstration Policy* [2019], available at https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy [last accessed Nov. 13, 2019]). Yet, for years, Fordham refused to recognize a campus chapter of the student organization Students for Justice in Palestine ("SJP") out of concern that the group's views would lead to "polarization" of the campus community. Fordham's SJP chapter remained unrecognized until the Supreme Court, County of New York, ordered Fordham to recognize the organization, citing in part Fordham's institutional promises of free speech. (*see Matter of Awad v. Fordham Univ*., 64 Misc. 3d 1234[A], 2019 NY Slip Op 51418(U), ¶ 7 [Sup Ct, NY 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.")).

Rensselaer Polytechnic Institute ("RPI") in Troy, New York, assures each student that he or she "is a citizen of the nation at large, and [that] the Institute shall not impede or obstruct students in the exercise of their fundamental rights as citizens." (Rensselaer Polytechnic Institute, *Rensselaer Handbook of Student Rights & Responsibilities* 4 [rev. Aug. 29, 2019], available at https://info.rpi.edu/sites/default/files/Handbook-of-Student-Rights-and-Responsibilities-Rev-August-29-2019.pdf [last accessed Nov. 13, 2019]). 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 bogus disciplinary actions against students who spoke to the media at demonstrations against the administration. Most 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." (FIRE, *The 10 worst colleges for free speech: 2019* [Feb. 12, 2019], available at https://www.thefire.org/10-worst-colleges-for-free-speech-2019 [last accessed Nov. 13, 2019]).

Albion College in Michigan punished a student for emailing a joke about "white privilege" to his fellow College Republicans in 2018, despite a policy

explicitly stating that "Albion College recognizes an individual's rights to freedom of thought, inquiry, and expression specifically as they extend to the electronic information environment." (Letter from Sarah McLaughlin, Senior Program Officer, FIRE, to Mauri Ditzler, President, Albion College [Nov. 16, 2017], available at https://www.thefire.org/fire-letter-to-albion-college-november-16-2017 [last accessed Nov. 13, 2019]).

Even core political speech, which the Supreme Court of the United States has ruled should garner the highest levels of protection, is not safe. In the run-up to the 2017 presidential election, Georgetown University's law school prohibited a group of students supporting Senator Bernie Sanders' campaign from engaging in political speech in support of their chosen candidate, even though Georgetown promises that "all members of the Georgetown University academic community, which comprises students, faculty and administrators, enjoy the right to freedom of speech and expression." (Letter from Marieke Tuthill Beck-Coon, Senior Program Officer, FIRE, to William M. Treanor, Dean, Georgetown University Law Center [Feb. 1, 2016], available at https://www.thefire.org/letter-to-georgetown-university-law-center [last accessed Nov. 13, 2019]).

These instances represent only a tiny fraction of the instances of censorship by private institutions FIRE has documented over the last two decades. (*see* FIRE, *Case Archives* [updated Nov. 6, 2019], available at

https://www.thefire.org/category/cases/ [last accessed Nov. 13, 2019]). Every single one of these private universities explicitly promises students the right to free speech, yet when the time comes to stand by their promises, they fall woefully short.

This appeal represents an effort to hold Syracuse to its promises of free speech, promises Appellants and others relied upon in choosing to matriculate at Syracuse. The lower court's 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 aren't worth the paper they're 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. Here, Syracuse should be required to uphold its alleged commitment to free expression.

B. Syracuse's punishment of Appellants violates Syracuse's institutional commitment to protect student free speech.

As set forth above, private universities make promises to incoming students that they will enjoy free speech rights consistent with the protections under the First Amendment. Syracuse is no exception, proclaiming to be "committed to the principle that freedom of discussion is essential to the search for truth." (Syracuse Univ., *Campus Disruption Policy* [rev. Aug. 20, 2010], available at https://policies.syr.edu/policies/free-speech/campus-disruption-policy [last accessed Nov. 13, 2019]).

Syracuse's commitment to protecting free speech is referenced in two of the policies that the school enforced against Appellants. Specifically, the harassment provision of Syracuse's student conduct code prohibits only conduct "beyond the bounds of protected free speech." (Syracuse Univ., *Syracuse University Student Handbook* 3 [2019], available at https://www.syracuse.edu/wp-content/uploads/student-handbook.pdf [last accessed Nov. 13, 2019]). And, Syracuse's discriminatory harassment policy provides:

> 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.

(Syracuse Univ., *Anti-Harassment Policy* [Dec. 13, 2016], available at https://policies.syr.edu/policies/free-speech/anti-harassment-policy [last accessed Nov. 13, 2019](emphasis added)). These promises are bolstered by the public statements of Syracuse Chancellor Kent Syverud on the importance of free speech. (*see* FIRE, *Leader Statement Database* [last updated Oct. 29, 2019], available at https://www.thefire.org/research/leader-statement-database/#leader-statement-database/?view_36_search=syracuse&view_36_page=1 [last accessed Nov. 13, 2019]). And, they are bolstered by the text of the First Amendment emblazoned on

the exterior walls of Syracuse's nationally-renowned S.I. Newhouse School of Public Communications:

(Syracuse Univ., S.I. Newhouse School of Public Communications, *About* [2019], available at https://newhouse.syr.edu/sites/default/files/newhouse_3_with_1st_amendment_1.jpg [last accessed Nov. 13, 2019]). Any student reading Syracuse's policies, listening to the statements of its president, 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.

Syracuse betrayed its promise to uphold students' free speech rights when it punished the Appellants for performing a private, satirical comedy sketch, which would be wholly protected by the First Amendment at a public college. Importantly, the lower court concluded that "the [Appellants'] words are protected free speech." (*Doe v. Syracuse Univ*, Sup Ct, Jefferson County, Jan. 8, 2019, index No. 2018-1865, slip op at 6). The Court may set aside a school's determination when "a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness." (*Matter of Powers v. St. John's Univ. Sch. of Law*, 25 NY3d 210, 216 [2015] (collecting cases, internal citations omitted)). Syracuse acted arbitrarily, in the absence of honest discretion, and it failed to abide its own rules. Based upon Syracuse's public commitment to free speech, Appellants could not reasonably have expected to be punished for their private, protected satire. And the penalty imposed on Appellants shocks the sense of fairness, especially where the lower court disallowed purported violations on which the penalty was grounded.

III. The Lower Court Erred in Dismissing Appellants' Complaints of Procedural Unfairness.

Around the country, university tribunals are handing down life-altering disciplinary decisions without affording accused students even the most basic elements of a fair process. Historically, courts have been largely deferential to the results of internal university proceedings. But this deference — rooted in a respect

for universities' unique expertise in addressing academic misconduct — must be and is being reconsidered in light of the wide range of serious nonacademic misconduct now routinely addressed by university judiciaries.

An increasing number of courts are now concluding that schools may not brand students for life as harassers, stalkers, or even rapists, without first providing them a meaningful opportunity to defend themselves in a fundamentally fair proceeding. FIRE urges this court to reach the same conclusion.

Denials of due process and fair procedure are common on campus. This is particularly true in the context of campus sexual misconduct adjudications, where an April 2011 mandate from the Department of Education radically shifted the way colleges and universities adjudicate claims of sexual harassment and assault on campus, requiring, among other questionable directives, a lower standard of proof for a guilty finding. (*see* Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., to Colleague [Apr. 4, 2011], available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [last accessed Nov. 13, 2019]). At the same time, the Department of Education also dramatically ramped up its investigation of schools for alleged Title IX violations. (*see id.*) With their institutional futures on the line, many schools all but abandoned basic procedural protections for accused students in an effort to avoid investigation and the potential loss of federal funding.

This shift led to a flood of litigation. Since April 2011, more than 500 accused students have filed lawsuits in state and federal court challenging the procedures by which their cases were adjudicated by campus tribunals. (*see* Samantha Harris & KC Johnson, *Lawsuits by Students Accused of Sexual Misconduct, 4/4/2011 through 10/16/2019* [updated 2019], available at, https://docs.google.com/spreadsheets/d/e/2PACX-1vQNJ5mtRNzFHhValDrCcSBkafZEDuvF5z9qmYneXCi0UD2NUaffHsd5g4zlmnIhP3MINYpURNfVwSZK/pubhtml [last accessed, Nov. 13, 2019]). As these cases work their way through the courts, the traditional deference that courts have afforded to university disciplinary decisions has eroded substantially. (*see, e.g.*, *Montague v. Yale Univ.*, US Dist Ct, Conn, No. 3:16-cv-00885, Mar. 29, 2019, slip op at 20) ("When an expulsion is 'not grounded in academic, but disciplinary reasons . . . the court need not confer . . . the type of deference that is appropriate within the context of an academic, rather than a contractual dispute, which falls squarely within the court's competency.'") (internal citations omitted); *see also Doe v. Geo. Wash. Univ.*, 366 F Supp 3d 1, 7 n.8 [D.D.C. Dec. 20, 2018] ("[The university] cites no persuasive case law indicating that a university is entitled to similar deference on non-academic matters.")).

The lower court here cavalierly dismissed Appellants' procedural concerns, noting only that "Respondent is not held to the standards of due process generally

expected by society and guaranteed by our constitution when dealing with public institutions." (*Doe v. Syracuse Univ*, Sup Ct, Jefferson County, Jan. 8, 2019, index No. 2018-1865, slip op at 4-5). While it is true that private universities are not constitutionally obligated to provide their students with due process, judicial decisions about fundamental fairness at private universities are often informed by due process principles.

For example, in granting a student's motion for a preliminary injunction setting aside his expulsion based on claims of procedural unfairness, one court stated, "[c]learly, courts are not prohibited from protecting against procedural irregularities in school disciplinary proceedings that amount to due process violations." (*Doe v. Rhodes College*, US Dist Ct, WD Tenn, No. 2:19-cv-02336, June 14, 2019, slip op at 12). And when private universities fail to follow their own policies, ignore promises of basic fairness, and jeopardize students' futures without a fair process, courts have increasingly been willing to intervene to assure just outcomes.

In another example, a judge allowed a student's breach of contract claims to proceed against Brandeis University on the grounds that Brandeis had failed to provide the student with "basic fairness" in adjudicating a claim of sexual misconduct brought by the student's ex-boyfriend. (*see Doe v. Brandeis Univ.*, 177

F Supp 3d 561, 573 [D. Mass. 2016]). In *Brandeis Univ.*, Judge Dennis Saylor explained:

> Brandeis appears to have substantially impaired, if not eliminated, an accused student's right to a fair and impartial process. And it is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. ... If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.

Id. While the case before this court does not involve sexual misconduct, universities face similar pressure to address discriminatory harassment on the basis of protected class status, the victims of which, as Judge Saylor wrote about victims of sexual harassment, "have not always achieved justice in the past." *Id*. And an expulsion for discriminatory harassment is similarly damaging to a student's reputation and his/her future educational and career prospects.

Beyond the broad importance of basic fairness, several of the procedural issues that Appellants raise in this case have been specifically identified by courts as concerns in cases involving private universities. For example, Appellants allege that the University Conduct Board's impartiality may have been compromised because Syracuse Office of Student Rights and Responsibilities Associate Director Eric Nestor, "who was administering the process on the University's behalf," improperly consulted with the hearing board and stayed in the hearing room during breaks. (Plaintiffs' Verified Petition at 19.) The U.S. Court of Appeals for the First Circuit

considered a similar issue and held that "it is reasonable for a student to expect that a school's basic fairness guarantee excludes outside influences in the Board's deliberations." (*Doe v. Boston Univ.*, 892 F3d 67, 87 [1st Cir. 2018]).

Appellants also complain that "[t]he Board repeatedly rephrased or refused to ask questions posed by Appellants to Respondent's complaining witness." (Plaintiffs' Verified Petition at 20). In *Rhodes College*, the court held that a student had cast doubt on the outcome of his disciplinary proceeding because he had not had the opportunity to cross-examine his accuser. (*see Doe v. Rhodes College*, *supra* at 9). Noting that "[w]hen a disciplinary decision relies on any testimonial evidence in a case where credibility is in dispute and material to the outcome, due process requires an assessment of credibility through cross-examination," the court held that this procedural flaw cast "some articulable doubt on the accuracy and reliability of the disciplinary proceeding's outcome." (*Id.*)

It is true that "[a] student subject to disciplinary action at a private educational institution is not entitled to the full panoply of due process rights," and "[s]uch an institution need only ensure that its published rules are substantially observed" (*Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015] (internal quotation marks and citation omitted)). But, it does not appear from the record that Syracuse sufficiently published to the students the rules under which the proceeding would occur and did not abide the ones it did publish. FIRE urges this Court to overturn the

lower court's decision, which wholly disregarded the procedural rights of Appellants.

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. Syracuse University has imposed such consequences, without due process, on a group of students who did nothing more than perform a private, satirical comedy sketch that is protected by the university's promises of free speech. If allowed to stand, the lower court's decision will embolden not only Syracuse but countless other private institutions around the country to ignore their promises of free speech and fair procedure that students and faculty rely on whenever it is in their institutional interest to do so.

Accordingly, *amicus curiae* FIRE urges this Court to protect students' free speech and due process rights by reversing the lower court's decision.

Dated: November 14, 2019

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