

No. DAR-30948
APPEALS COURT CASE NO. 2026-P-0649

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BENJAMIN EDELMAN,

Plaintiff-Appellant/Cross-Appellee,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE,

Defendant-Appellee/Cross-Appellant.

On Appeal from Judgment of the

Superior Court for Suffolk County No. 2384CV00395-BLS1

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLEE'S
APPLICATION FOR DIRECT APPELLATE REVIEW

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CORPORATE DISCLOSURE

The Foundation for Individual Rights and Expression ("FIRE") states that it is a non-profit, tax-exempt organization incorporated in the Commonwealth of Pennsylvania. FIRE has no parent corporation, and no publicly held company has 10% or greater ownership in FIRE.

RULE 17(C)(5) STATEMENT

No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person or entity, other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund the preparation or submission of the brief. Neither *amicus curiae* nor its counsel has represented a party to the present appeal in another proceeding involving similar issues. Neither *amicus curiae* nor its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF INTEREST

The Foundation for Individual Rights and Expression (“FIRE”) is a nonpartisan nonprofit that defends free speech nationwide. For more than twenty-five years, FIRE has advocated for faculty members punished by private colleges for expression protected by institutional speech policies. FIRE believes that if our nation’s universities are to effectively prepare students for success in our democracy, the law must remain clearly on the side of academic freedom and free speech on campus. We respectfully submit this brief in furtherance of that mission.

FIRE has a significant interest in this proceeding because the Superior Court’s decision, if allowed to stand, will compromise professors’ expressive rights. Private colleges and universities are not bound by the First Amendment’s guarantee of free speech and are generally free to define their own missions and determine the expressive protections they will extend to faculty. Yet the vast majority of the nation’s private institutions, including Harvard University, maintain policies guaranteeing faculty the freedom to teach, write, speak, and research,¹ precisely because these protections are vital to the academic enterprise. The Supreme Court of the United States put it in the starkest terms: “Teachers and students must always

¹ FIRE’s Spotlight Database, <https://www.thefire.org/research-learn/fires-spotlight-database> (last visited Aug. 6, 2026) (cataloguing institutional policies protecting academic freedom and freedom of expression at private colleges and universities, including Harvard).

remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”²

Having made such commitments, private colleges must be bound by them. Faculty members, who fulfill the college’s mission to pursue truth and disseminate knowledge through robust debate, research, and pedagogy, rely on these promises, reasonably trusting that private institutions will honor their commitments. They inform professors’ decisions to join an institution, remain there, pursue groundbreaking scholarship, speak publicly within their expertise, and participate candidly in academic governance. Harvard, for example, promises new faculty an opportunity to earn tenure to attract top-tier scholars and educators, in exchange for the job security and academic freedom guaranteed by such policies.³

Yet *amicus* FIRE’s experience demonstrates that private colleges regularly punish faculty members for public commentary, classroom expression, and criticism of institutional practices despite policies purporting to protect academic freedom and free expression.⁴ When taken to court for violating their own policies, colleges

² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

³ *Report of the FAS Tenure-Track Review Committee (TTRC)* 1 (2021), https://facultyresources.fas.harvard.edu/sites/g/files/omnuum1751/files/facultyresources/files/final_ttrc_report_cg_letter.pdf (describing the granting of tenure as “a way to ensure scholars have the freedom to pursue their scholarly interests” and “to protect the academic freedom of the individual.”).

⁴ See Scholars Under Fire Database, FIRE, <https://www.thefire.org/research-learn/scholars-under-fire> (last visited Aug. 5, 2026) (detailing over 600 attempts to

frequently turn to the litigation tactic of attempting to defeat breach-of-contract claims by denying their written commitments have any force. That is precisely what Harvard has done here by claiming not to be bound by the clear, written tenure procedures of its business school.

When private colleges fail to uphold their commitments or refuse to be bound by them, courts are the necessary last resort for faculty to vindicate their rights. Allowing Harvard to ignore its policies and “speak out of both sides of its mouth” will only encourage other colleges to do the same, to the detriment of the robust debate at the core of academia.⁵ FIRE submits this brief to explain why the Supreme Judicial Court should ensure that prompt and meaningful judicial enforcement of private colleges’ free-speech commitments and related tenure policies are essential to preserving the open exchange of ideas that serves as the engine of American higher education.

punish professors and researchers for their protected expressive activity at private colleges since 2000).

⁵ This detrimental effect is demonstrated by a recent FIRE faculty survey showing 35% of faculty say they recently toned down their writing for fear of controversy, 14% of faculty suffered discipline or threats of discipline for either their teaching, research, academic talks, or other off-campus speech, and 27% of faculty feel unable to speak freely for fear of how students, administrators, or other faculty would respond. Honeycutt, N., *Silence in the Classroom: The 2024 FIRE Faculty Survey Report*, FIRE, <https://www.thefire.org/research-learn/silence-classroom-2024-fire-faculty-survey-report>.

ARGUMENT

Private colleges frequently emphasize their commitments to free speech when recruiting faculty and describing their institutional values. In a 2024 statement on “Open Inquiry and Academic Freedom,” for example, Harvard President Alan Garber hailed the “the University’s unwavering commitment to academic freedom and the free exchange of ideas,” declaring the institution’s success to be “dependent on free, open, and constructive discourse among the University’s many members.”⁶ President Garber’s statements are reflected in university policies promising faculty “[f]reedom of inquiry and expression” and “the protections of academic freedom,” as well the opportunity to earn the additional safeguards afforded by tenure.⁷ These policies are designed precisely to protect faculty from their institutions wrongfully withholding university benefits for in retaliation for protected expression, as Professor Edelman demonstrated Harvard has done by denying him tenure based on his extramural speech.⁸

⁶ Alan M. Garber & John F. Manning, *Open Inquiry and Academic Freedom*, Harv. Univ. President (Apr. 4, 2024), <https://www.harvard.edu/president/news/2024/open-inquiry-and-academic-freedom>.

⁷ *Statement on Outside Activities of Holders of Academic Appointments*, Harv. Off. of the Provost (June 7, 2000), <https://provost.harvard.edu/statement-outside-activities-holders-academic-appointments>; *supra* note 3, *Report of the FAS Tenure-Track Review Committee*.

⁸ *Edelman v. President & Fellows of Harvard College*, No. 2384CV00395-BLS1, at 3–4 (Mass. Super. Ct. Mar. 18, 2024) (describing how the tenure committee

But FIRE’s experience shows private universities too often change their tune when a faculty member asks a court to enforce those commitments. Policies presented to faculty, accreditors, and the public as meaningful protections are labeled merely aspirational when the courts call them to account.⁹ Guarantees are suddenly claimed to be subject to exceptions broad enough to swallow the rule.¹⁰ Ironclad promises intended to protect controversial speech suddenly become unenforceable when relied on to do just that.¹¹ This trend will only continue with Harvard and across the nation if courts follow the Superior Court in allowing private colleges to skirt accountability by telling courts their published commitments to

considered Professor Edelman’s public “dispute with a Brookline restaurant,” “activities outside HBS,” and “work in an airline class-action lawsuit” in making its decision).

⁹ *Wilson v. Clark Atlanta Univ.*, 339 Ga. App. 814, 794 S.E.2d 422 (2016) (rejecting university’s claim that its tenure protections for faculty preventing summary dismissal in the faculty handbook were merely aspirational); *see Bason v. Am. Univ.*, 414 A.2d 522, 524 (D.C. 1980) (rejecting university’s assertion that its faculty manual governing tenure proceedings was “merely an advisory direction to administrators and deans, creating no contractual right for the faculty member” after it failed to follow those procedures when evaluating a professor for tenure).

¹⁰ *Morgan v. American Univ.*, 534 A.2d 323, 329 (D.C. 1987) (accepting university’s argument that faculty termination policies were ambiguous in allowing university to terminate faculty without following specified procedures).

¹¹ *Lopez Prater v. Trustees of the Hamline Univ. of Minn.*, 693 F. Supp. 3d 1009, 1021–22 (D. Minn. 2023) (accepting university’s contention that federal law preempted its academic freedom guarantees in case involving a professor displaying historical depictions of the Prophet Muhammad during an online art history class).

tenure, academic freedom, and free speech are actually worthless while loudly proclaiming the opposite to anyone without a Westlaw subscription.

Too often, courts permit private colleges to execute this bait-and-switch. For example, Yale University promises faculty “the fullest degree of intellectual freedom,” yet successfully argued to the United States Court of Appeals for the Second Circuit that the robust academic freedom policies in its Faculty Handbook were “generalized support for” this right rather than enforceable contractual promises, defeating Dr. Bandy Lee’s claims that she was improperly fired for social media commentary about President Donald Trump. *Lee v. Yale Univ.*, No. 22–2634, 2023 WL 4072948, at *2 (2d Cir. June 20, 2023). The Mayo Clinic College of Medicine and Science likewise sought to avoid enforcement of its own faculty protections once Dr. Michael Joyner sued to overturn punishment for not “stick[ing] to prescribed messaging” and for speaking to the media without approval. The court accepted Mayo’s argument that its “Freedom of Expression and Academic Freedom Policy”—which specifically guarantees “freedom of expression, which includes the right to discuss and present scholarly opinions and conclusions without fear of retribution or retaliation if those opinions and conclusions conflict with those of the faculty or institution”—did not create binding contractual obligations. *Joyner v. Mayo Clinic*, No. 55–CV–23–7708, slip op. at 25 (Minn. Dist. Ct. July 1, 2024)

(policy “does not contain language with enough specificity to be an offer of a unilateral contract.”).

Marywood University also argued that it need not follow every step of the faculty handbook’s progressive disciplinary procedures in terminating a tenured professor for speech critical of the university and its president. *Fagal v. Marywood Univ.*, 916 F.3d 204 (3d Cir. 2019). Judge Bibas’s dissent identifies the recurring problem presented by private universities that encourage faculty to rely on detailed disciplinary procedures and tenure protections yet later seek to reinterpret or minimize those commitments when challenged in court. *Id.* (Bibas, J., dissenting). In a case where the college “admits that, in firing Fagal, it did not follow all of its own procedures,” the dissent explains that “[t]he employment contract is the backbone of a tenured professor’s job,” and professors “trust universities to honor their tenure, as promised by contract.” *Id.* Rather than allow private colleges to get away with their confessed failure “to follow the policy to the letter,” in the way Marywood did with Professor Fagal and that Harvard is now seeking to do with Professor Edelman, the value of academic freedom depends on courts’ insistence that these institutions keep their word. *Id.* (internal quotations and citations omitted).

Yet not every court has enabled such fecklessness. At FIRE’s urging,¹² the Wisconsin Supreme Court properly held that Marquette University could not escape judicial review of its academic-freedom policies when challenged by Professor John McAdams, who was suspended for a blog post criticizing a graduate instructor. *McAdams v. Marquette University*, 2018 WI 88, 914 N.W.2d 708 (Wis. 2018). Marquette asked the court to defer to its erroneous interpretation that its policies allowed discipline for clearly protected speech, which the court rejected because Marquette’s “internal dispute resolution process is not a substitute for Dr. McAdams’ right to sue in our courts.” *Id.* at 713. The court correctly determined Dr. McAdams’ blog post was “a contractually-disqualified basis for discipline” because Marquette’s punishment violated its promise to afford faculty “the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action.” *Id.* at 737. By holding Marquette to its word, the Wisconsin Supreme Court properly protected academic freedom and freedom of inquiry on campus.

There are countless other examples of colleges seeking to evade judicial enforcement of their faculty policies through express disclaimers, excessive

¹² Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v. Marquette Univ.*, No. 2017AP1240 (Wis. filed Nov. 29, 2017).

deference, and minor exceptions that swallow the rule.¹³ Many colleges make a charade of their commitments by claiming their faculty handbooks and free-speech policies are not legally binding (while feeling free, of course, to strictly apply those policies when it suits the institution's needs), lest they be sued and required to honor the rights they promise.¹⁴ Unless courts hold colleges to their academic-freedom promises, private colleges will continue to engage in this form of systematic deception of both faculty and the public, receiving the institutional benefits of promising faculty rights while retaining unilateral authority to ignore them when honoring their promises just gets too uncomfortable.

“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”¹⁵ Surely, contending with related questions is of “such public

¹³ *E.g.*, *Wortis v. Tufts*, 493 Mass. 648 (2024) (rejecting Tufts's argument that its tenure policies guaranteeing “economic security” and “academic freedom” created only aspirational commitments in professors' breach-of-contract claims regarding salary and status reductions); *McConnell v. Howard Univ.*, 818 F.2d 58, 66 (D.C. Cir. 1987) (rejecting judicial deference to a university's interpretation of its tenure and dismissal procedures because doing so would render the faculty handbook “a virtual nullity”).

¹⁴ For example, Cornell University's Faculty Handbook boasts one of the strongest academic freedom statements in the country, yet states that it “is not intended to create a contract between the university and its employees.” *Faculty Handbook*, Cornell Univ. Off. of the Dean of Faculty, <https://www.deanoffaculty.cornell.edu/policies-procedures/faculty-handbook/> (last visited Aug. 5, 2026).

¹⁵ *Sweezy*, 354 U.S. at 250.

interest that justice requires a final determination by the full Supreme Judicial Court.”¹⁶ If the dire outcome about which the Supreme Court warned is to be avoided, especially in a time where public confidence in higher education continues its decade-long drop among all groups,¹⁷ this Court must grant appellate review to hold Harvard to its commitments to protect expression on its campus, and send a strong signal to colleges across the country that, having given their word to faculty members, the law expects them to keep it.

Dated: August 10, 2026

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¹⁶ Mass. R. A. P. 11(a).

¹⁷ Jeffrey M. Jones, *Confidence in U.S. Higher Education Slips Back Slightly*, Gallup (July 13, 2026), <https://news.gallup.com/poll/712322/confidence-higher-education-slips-back-slightly.aspx>.

CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of amicus briefs, including Rules 17 and 20.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R.A.P. 20(a)(2)(D), the brief contains 2203 words.
2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, in 14-point Times New Roman font. The undersigned has relied on the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I, Robert Shibley, hereby certify, under the penalties of perjury, that on August 10, 2026, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, and I served two copies on counsel either by first-class mail, pursuant to Mass. R. A. P. 13(c) and 19(d)(1), or by electronic mail, pursuant to Mass. R. A. P. 13(c).

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