

IN THE
SUPREME COURT OF THE UNITED STATES



BYRON RANDALL FISHER,

Petitioner

- v. -

RICHMOND, THE AMERICAN INTERNATIONAL
UNIVERSITY IN LONDON, INC.,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Was the Second Circuit Court of Appeals correct in affirming the District Court's dismissal of the Complaint (sounding in breach of contract) on summary judgment on the ground that Petitioner had waived appeal rights with respect to those issues by failing to address in the Court of Appeals the basis for the summary judgment entered in the Court below?

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**COUNTERSTATEMENT OF THE
CASE IN OPPOSITION TO THE
PETITION FOR CERTIFICATION**

The Second Circuit Court of Appeals affirmed the detailed and well-reasoned summary opinion of the United States District Court for the Southern District of New York and correctly determined that Petitioner had waived appellate review of his breach of contract claims that were pleaded in the District Court but not pursued by him on appeal.

To put it bluntly, Petitioner is a smart aleck who comes to this Court with unclean hands. He has attempted to portray himself as a war hero and an officer with great personal integrity, when as the undisputed facts show, his character is somewhat less angelic when it was ascertained, that, he, in fact, attended and then failed out of West Point on academic grounds. (App. p.2a-4a) but failed to mention that small detail in his subsequent application to Richmond, Respondent's university facility in London, to pursue a graduate degree (*Id.* at 64). His application for admission to Richmond was accepted by Respondent under false pretenses. Resume fraud in its purest form.

Petitioner is attempting to obtain certiorari because he wants this Court (as he did in the Courts below) to interfere with a university's academic process and confer a masters' degree on him. even though he, in fact, did not satisfy the University's Academic standards for such a degree.

FACTS

Petitioner matriculated at Respondent's London-based University seeking a graduate degree in international relations in Fall 2010. (App. 46a). One of the requirements that Petitioner had to satisfy to receive a Master's degree in International Relations was to complete all course work with the grade-point average of a B, and a written a Masters' thesis that was graded as a "B" or better (App. 19a).

Petitioner began writing his thesis in August 2011. His master's thesis advisor, Dr. James Boys, offered Petitioner the opportunity to have the advisor read a draft of the thesis and make comments before the work was submitted to the personnel who would be grading his submission. (App. 47a). A few weeks before his Master's thesis was due, his academic advisor, read the draft of it and advised Petitioner that his handiwork would merit no more than a C because of its deep flaws

and superficial analysis. (App. 20a). He advised Petitioner that unless certain aspects of the thesis were modified he was not going to be getting a Master's degree from the University. (App. 20a).

Petitioner chose not to further revise the draft. (App. 31a). To no one's surprise, Petitioner's Masters' thesis submission was given a grade "C-" by the reviewers. (App. 24a). His submission was also reviewed by the International Relations Department personnel in November 2017. (App. 33a and 48a). The reviewers confirmed that Petitioner's thesis warranted a grade of "C". (App. 33a). Notwithstanding Petitioner's poor academic performance when, he was informed of his failures, he was given the opportunity to submit a revised thesis in 12 months. (App. 34a and 38a). Petitioner declined that opportunity. (App 38a).

On February 3, 2014 the Registrar of the University, issued a letter to Petitioner congratulating him on having fulfilled the requirements required by the University Catalog, which was erroneous because it stated that Petitioner had earned the Master's degree when in fact, as Petitioner knew, that was not the case. The transcript was corrected and a copy sent to Petitioner. (App. 35a-42a and 49a).

Petitioner sought to take advantage of this clerical mistake by attempting to demonstrate that University personnel were acting in bad faith and should be stuck with the erroneous higher grade that was given to Petitioner. (App. 49a). Petitioner appealed the University's position (that the passing grade on Petitioner's transcript was an error) to the State of Delaware Department of Education (where Richmond was incorporated) which reviewed the matter and determined that it was not going to interfere with how academic institutions handled internal academic matters. (Pet. App. B, p.11). Petitioner also applied to a unit of the Veterans Administration seeking an order compelling Richmond to accept the erroneous grade given to him (App. 49a). That approach failed also (App. 34a). The VA reported to Respondent that Fisher did not want to work with Richmond. (App. 49a). In connection with that complaint, Richmond was asked to send its file generated in connection with the Petitioner's matter. (Pet. App. B, pp. 11&12, fn.4). Richmond and its counsel submitted to the other institutions a copy of the corrected transcript showing that he did not earn the requisite academic credit. (App. 37a-38a).

PROCEDURAL HISTORY

Petitioner filed this lawsuit on January 27, 2017 alleging that Richmond breached its contract with him in connection with the process of determining whether petitioner had earned a Master's degree. (Pet. App. B and App. 49a). One of the remedies sought was an injunction restraining Richmond from changing the transcript (App. 49a).¹

After discovery concluded, Richmond moved for summary judgment pursuant to Fed R. Civ. P. 56 on the basis of their being no breach of contract by Richmond (Pet. App. B, p.4). In response, Petitioner did not address the breach of contract issues, rather, he raised the issue of whether or not a default judgment should have been entered against Richmond for altering his transcript in connection with Fisher's complaint to the State of Delaware, the Veterans Administration and the District Court. (Pet. App. A, p.5). The so-called altered transcript was the corrected transcript that reflected the less than adequate performance of Petitioner in his

¹ Petitioner cites to 18 U.S.C. §1001 which makes it a crime to use fictitious or materially false documents in a judicial, legislative or executive proceeding. That statute also states that it does **not** apply to a party its counsel in a judicial proceeding. The statute is wholly inapplicable here.

effort to earn a degree in International Relations (App. 37a).

REASONS FOR DENYING CERTIORARI

Petitioner does not articulate pursuant to Supreme Court Rule 10, any reason why this Court should grant certiorari. There is no circuit split identified by him. In the District Court, Petitioner's claim was framed as a breach of contract action. In the Court of Appeals, the appeal was framed as a violation of 28 USC §1001.² The Court of Appeals, applying well-settled law in the Circuits, affirmed the dismissal of Petitioner's appeal. There is no conflict among the circuit complaints on the question of the consequences of failing to present an issue to a lower court.

JURISDICTIONAL STATEMENT

Respondent does not dispute this Court's jurisdiction over this Petition exists but denies that the case satisfies the standard set forth in the Supreme Court Rule 10. Petitioner filed his petition for a writ of certiorari on June 21, 2019.

² Petitioner failed to disclose in his Petition the fact that he authorized the disclosure of the transcript (App. 43a).

ARGUMENT**THE SECOND CIRCUIT'S OPINION IS NOT IN CONFLICT WITH CASES FROM OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE OF A PRO SE LITIGANT NOT PRESERVING APPELLATE RIGHTS.**

It is well settled law amongst the circuits that where a litigant fails to raise an argument raised in the District Court, the argument is waived for purposes of appeal absent extraordinary circumstances. This rule applies to *pro se* litigants also. *Moates v. Barkley*, 147 F.3d 207, 209 (2d. Cir. 1998); *Smith v. Fischer*, 803 F.3d 124, 126 n.1 2 Cir. 2015) (per curium); *Baker v. Dorfman*, 239 F.3d 415, 420 (2nd Cir. 2000); *Singleton v. Wulff*, 428 U.S. 106 (1976).

In this case, Petitioner pleaded breach of contract claims in the District Court. However, in the Second Circuit, Petitioner did not present those issues thereby losing the right to argue any errors made by the District Court on the breach of contract claim absent extraordinary circumstances. Instead, the Petitioner argued in the Second Circuit that he was mistreated as a veteran and that Respondent and its counsel were in violation of 18 U.S.C. §1001 by furnishing to Delaware, the VA and the District court copies of the corrected transcript. In this regard, Petitioner offered no excuse

what so ever to the Second Circuit as to why he failed to seek appellate review of the District Court's rulings with respect to the breach of contract claims rulings. The Petition does not provide a basis for reviewing the Court of Appeals' opinion. That Opinion is consistent with decisions from other circuits. The Petition should be denied.

CONCLUSION

The Petitioner's Writ of Certiorari should be denied.

August 2, 2019 Respectfully submitted,

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