Motion Sequence #3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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In the Matter of,

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

Petitioners,

-against-

FORDHAM UNIVERSITY,

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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Index No. 153826/2017

Hon. Nancy M. Bannon

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

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PRELIMINARY STATEMENT

Respondent Fordham University ("Fordham" or the "University") respectfully submits this memorandum of law and the affirmation of James G. Ryan, dated December 15, 2017 (the "Ryan Affirmation"), in opposition to the motion of petitioner Sofia Dadap ("Petitioner Dadap") and petitioner Julie Norris ("Petitioner Norris") (collectively, "Petitioners"), for an order: (1) preliminarily enjoining the University from interfering with a decision of a student organization known as the United Student Government ("USG") to permit a student club to be formed on campus; (2) directing the University to produce copies of documents relating to its decision to deny University club status to a group of students interested in forming a club named Students for Justice in Palestine ("SJP"); and (3) directing the University to make available for deposition Keith Eldredge, the Dean of Students at Fordham's Lincoln Center campus ("Dean Eldredge"), and Jeffrey Gray, Senior Vice President for Student Affairs at Fordham ("SVP Gray").

As the Court is aware, on April 26, 2017, Petitioners, students interested in forming a student club known as SJP, filed the verified petition (the "Petition") pursuant to CPLR Article 78 seeking to review the University's decision to deny financial support, employee assistance and official recognition to a proposed student club (SJP) on Fordham's Lincoln Center campus.[1] On June 5, 2017, the University moved to dismiss the Petition pursuant to CPLR § 7804(f), for failure to state a cause of action pursuant CPLR § 3211(a)(7) and a defense founded upon documentary evidence pursuant to CPLR § 3211(a)(1).[2] The University's motion to dismiss (the "Motion to Dismiss") was fully submitted on July 17, 2017 and oral argument was originally

[1] A copy of the Petition is attached to the Ryan Affirmation as Exhibit "A".
[2] A copy of the eCourts Docket (last visited December 14, 2017) is attached to the Ryan Affirmation as Exhibit "B".

scheduled for March 14, 2018. By Interim Order dated October 26, 2017, oral argument was rescheduled for January 3, 2018.[3]

Nothing has changed since the Motion to Dismiss was fully submitted in July 2017 so as to warrant injunctive relief. Similarly, as to the very foundation of Petitioners' instant motion, nothing has changed since this Court scheduled and indeed, rescheduled oral argument (to an earlier date) for January 2018. As set forth in the affidavits attached to the Petition, Petitioner Dadap and Petitioner Norris were scheduled to graduate in 2018 and 2019, respectively, when the Petition was filed with the Court on April 26, 2017.[4] This is not new information.

Nevertheless, in November 2017, as a result of Petitioners' apparent impatience with this Court's calendar, Petitioners filed the instant motion for a preliminary injunction via order to show cause (the "Order to Show Cause") in an attempt to persuade this Court that there is some semblance of urgency in this case. Not surprisingly, Petitioners' Order to Show Cause and accompanying memorandum of law in support (hereinafter referred to as "Petitioners' Brief") contains the same arguments and requests the very same relief (i.e. the ultimate relief) as requested by Petitioners in the April 26, 2017 Petition. Notably, Petitioners did not move for injunctive relief when the Petition was filed.

As detailed below, Petitioners' motion is without merit and a preliminary injunction is not warranted. First, Petitioners do not, nor can they, demonstrate that they will suffer irreparable harm absent injunctive relief. At bottom, the health, safety, employment and/or livelihood of Petitioners (or anyone else) is not at issue in this case. The Court must remember that this case concerns a proposed student club and the privilege afforded pursuant to applicable university

[3] A copy of the Interim Order is attached to the Ryan Affirmation as Exhibit "C".
[4] See Affidavit of Sofia Dadap, sworn to on April 19, 2017, at ¶ 1 ("I am a junior at Fordham University."); see also Affidavit of Julie Norris, sworn to on April 19, 2017 at ¶ 1 ("I am a sophomore at Fordham University majoring in urban studies and minoring in computer sciences.")

guidelines to organize and form a Fordham-sanctioned and financed club. The ability to form such a club is a privilege not a right. Moreover, while Petitioners were denied official club status by the University, they were not precluded from promoting awareness and discussion of the Israeli-Palestinian conflict and/or the complex issues arising therefrom. In fact, as set forth below and in the University's Motion to Dismiss, the University encouraged, and continues to encourage, continued conversation about this important topic.

Second, it would be wholly inequitable to permit Petitioners to preclude the University from enforcing policies it deems attendant to its duty of supervision and control of the institution at large. In this regard, almost one year after the University decided to deny official club recognition to SJP, Petitioners, by seeking the ultimate relief herein, are actually seeking to alter the status quo and are asking this Court to direct the University to ignore its procedures. Notwithstanding the many procedural and factual errors contained in this request, Petitioners continue to ignore the legal reality that judicial scrutiny of college and university determinations involving students is extremely limited, with universities afforded a high level of deference. Where a university substantially follows its procedures and reaches a rational decision, its action will not be deemed arbitrary and capricious and will not be disturbed by a court of law. See Hyman v. Cornell Univ., 82 A.D.3d 1309, 1310-11, 918 N.Y.S.2d 226 (3d Dept. 2011) (citing Warner v. Elmira Coll., 59 A.D.3d 909, 909, 873 N.Y.S.2d 381 (3d Dept. 2009), and affirming dismissal of petition); see also Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Institute, 260 A.D.2d. 992, 993, 689 N.Y.S.2d 292 (3d Dept. 1999); Al-Khadra v. Syracuse Univ., 291 A.D.2d 865, 866, 737 N.Y.S.2d 491 (4th Dept. 2002) (quoting Rensselaer Soc. of Engineers, 260 A.D.2d at 993-94)).

Lastly, as more fully set forth below, Petitioners' request for expedited discovery must be denied because Petitioners have failed to meet the statutory mandate and high bar required to be granted this extraordinary relief in an Article 78 proceeding.

STATEMENT OF FACTS

For the Court's convenience, the University briefly summarizes the relevant facts set forth in the University's Motion to Dismiss and the accompanying moving affidavits of Dr. Dorothy A. Wenzel, the Director of the Office for Student Involvement at the Lincoln Center campus of Fordham University, sworn to on June 5, 2017 (the "Wenzel Affidavit") and Keith Eldredge, the Dean of Students at Fordham's Lincoln Center campus, sworn to on June 5, 2017 (the "Eldredge Affidavit"). For the court's ease of reference, a copy of the Wenzel Affidavit (without exhibits) is attached to the Ryan Affirmation as Exhibit "D" and a copy of the Eldredge Affidavit (without exhibits) is attached as Exhibit "E" to the Ryan Affirmation.[5]

Again, this matter simply concerns the denial by Fordham, through Dean Eldredge, of Petitioners' application to have a Fordham-sanctioned student club.

Fordham's Office for Student Involvement is the central hub for all student club activities for undergraduate students at the Lincoln Center campus and Dr. Dorothy A. Wenzel is its Director ("Dr. Wenzel"). See Wenzel Affidavit at ¶ 6. The Office for Student Involvement provides guidance and support to student leaders looking to build, develop and maintain their clubs. Id.

[5] For a complete review of the facts of this case, and to avoid wholly unnecessary repetition, the University refers the Court to the fully submitted Motion to Dismiss and all of the affidavits and exhibits attached thereto. In addition to the moving affidavits, a copy of the Wenzel Affidavit in Further Support of the University's Motion to Dismiss, sworn to on July 17, 2017, ("Wenzel Reply Affidavit") is attached as Exhibit "F" to the Ryan Affirmation and a copy of the Eldredge Affidavit in Further Support of the University's Motion to Dismiss, sworn to on July 17, 2017 ("Eldredge Reply Affidavit") is attached as Exhibit "G" to the Ryan Affirmation.

When students enrolled at the University's Lincoln Center campus want to form a club, the University's Club Guidelines control. See Wenzel Affidavit at ¶ 7. The Club Guidelines, a true and correct copy of which is attached to the Wenzel Affidavit as Exhibit "A" at pg. 5, instruct students who wish to form a club on the Lincoln Center campus as to the specific process to be followed.[6] They also contain the club approval process that Fordham has had in place since April 2015 on the Lincoln Center campus. See Wenzel Affidavit at ¶ 8.

Specifically, prospective club leaders must fill out the appropriate paperwork and submit same to the Operations Committee of a student organization known as the United Student Government ("USG"). See Exhibit "A" at pg. 5 to the Wenzel Affidavit. The USG Operations Committee reviews the proposed club's constitution and provides recommended edits to the students proposing the club. Id. Thereafter, the Director for Student Involvement (Dr. Wenzel) reviews the proposed club's constitution and makes additional recommendations if necessary. Id. Then, when both the Director and the USG Operations Committee are satisfied, the full USG Senate votes on the proposed club. Thereafter, the proposed club's application is submitted to the Dean of Students (Dean Eldredge) for the final determination. Id. Thus, it is the Dean, not the USG, who has the final approval authority.

On November 17, 2016, the USG Senate voted to approve SJP as a club at the University's Lincoln Center campus. See Exhibit "O" at pg. 2 to the Wenzel Affidavit.

On the same date, Dean Eldredge wrote to the Petitioners and other students saying that he was informed of USG's decision to approve the SJP club and that he now would review SJP's application for club status in accordance with the Club Guidelines. See Exhibit "P" at pg. 1 to the Wenzel Affidavit. As more fully set forth in the University's Motion to Dismiss, Dean Eldredge's assessment and research into this proposed local chapter of SJP took many hours over

[6] Unless otherwise noted, all references to Exhibit "A" represent Exhibit "A" at pg. 5.

several weeks. In coming to his decision, Dean Eldredge took time to discuss the matter with representatives from all concerned parties as well as multiple professors familiar with the issues at hand. See Eldredge Affidavit, at ¶¶ 15-19. In addition to these discussions, Dean Eldredge conducted his own independent research. Id., at ¶ 20 and Exhibit "J" attached thereto.

On December 22, 2016, after reviewing the application and other materials, Dean Eldredge denied SJP official club status at the Lincoln Center campus. See Exhibit "A" at pg. 1 to the Eldredge Affidavit. In correspondence with the proposed club representatives, Dean Eldredge explained some of his concerns 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.
>
> 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.
>
> **In a statement announcing their vote to approve the club, United Student Government at Lincoln Center acknowledged the need for open, academic discussion and the promotion of intellectual rigor on campus; however, I disagree that the proposal to form a club affiliated with the national Students for Justice in Palestine organization is the best way to provide this. I welcome continued conversation about alternative ways to promote awareness of this important conflict and the issues that surround it from multiple perspectives.**

Id. (emphasis added).

As noted above, Petitioners commenced the instant Article 78 proceeding on April 26, 2017. See Exhibit "A" to the Ryan Affirmation. The University's Motion to Dismiss was fully submitted on July 17, 2017. See Exhibit "B" to the Ryan Affirmation. Oral argument is

scheduled for January 3, 2018. See Exhibit "C" to the Ryan Affirmation. On November 2, 2017, Petitioners filed a motion by order to show cause seeking a preliminary injunction and expedited discovery. The University now files its opposition to Petitioners' Order to Show Cause.

ARGUMENT

POINT I

PETITIONERS ARE SEEKING THE ULTIMATE RELIEF

In the Petition, filed on April 26, 2017, Petitioners seek judgment pursuant to CPLR § 7806, as follows:

> (1) Directing Respondent Fordham University to permit Petitioners to form a club named Students for Justice in Palestine (SJP);
> (2) Directing Respondent Fordham University to afford the club SJP official recognition with the same rights and privileges enjoyed by all other clubs at Fordham;
> (3) Declaring that Fordham violated its policies and procedures in overruling USG's approval of SJP; and
> (4) Granting such other relief as the Court deems just and proper.

See Exhibit "A" to the Ryan Affirmation.

On November 2, 2017, Petitioners requested that the Court issue an order "preliminarily enjoining Respondent from interfering with the decision of Fordham's United Student Government approving Petitioners' application for official recognition of a club named Students for Justice in Palestine." See Order to Show Cause, at pg. 1. Petitioners believe that "[a] preliminary injunction is necessary to remedy the harm caused by Fordham's unlawful action." See Petitioners' Brief, at pgs. 1-2. Petitioners seek a preliminary injunction to ignore Dean Eldredge's final decision and to have USG's decision reinstated. See id., at pg. 2.

Reinstatement of USG's decision would involve affirmative conduct on the part of Fordham to reverse Dean Eldredge's decision and to abide by the decision of the student members of USG. This amounts to a mandatory injunction. "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the

plaintiff would receive the ultimate relief sought, pendente lite." St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc., 308 A.D.2d 347, 349, 765 N.Y.S.2d 573, 574 (1st Dept. 2003) (citing Rosa Hair Stylists, Inc. v. Jaber Food Corp., 218 A.D.2d 793, 794, 631 N.Y.S.2d 167, 168-169 (2d Dept. 1995)). Petitioners "should not seek a preliminary injunction as a means of obtaining 'the ultimate relief in their action.'" Pena v. Doar, 37 Misc. 3d 1201(A), 960 N.Y.S.2d 51 (Sup. Ct. N.Y. Cty. 2012) (citing Putter v. City of New York, 27 A.D.3d 250, 253, 811 N.Y.S.2d 29, 31 (1st Dept. 2006)). Ultimate relief sought by Petitioners is the establishment of SJP as an official, University recognized club. See Exhibit "A" to the Ryan Affirmation, at pg. 19. Reinstatement of USG's decision is equivalent to permitting the establishment of SJP. Therefore, Petitioners are actually seeking to obtain the ultimate relief under the guise of a request for a preliminary injunction. As Petitioners acknowledge in paragraph 47 of the Petition, SJP has not been established as an officially recognized club on campus. See Exhibit "A" to the Ryan Affirmation, at pg. 12. As such, a mandatory injunction that effectively now causes SJP to become an officially recognized club alters the status quo. Such a request that seeks to change the status quo and obtain the ultimate relief sought in the Petition is impermissible without a showing of "extraordinary circumstances[.]" St. Paul Fire and Marine Ins. Co., 308 A.D.2d at 349, 765 N.Y.S.2d at 574 (citing Rosa Hair Stylists, Inc., 218 A.D.2d at 794, 631 N.Y.S.2d at 168-9).

POINT II

PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

"It is well settled that a Preliminary Injunction is a drastic remedy which will not be granted absent a showing by the movant of a clear right of entitlement thereto, which is established pursuant to the law and upon the undisputed facts as adduced in the record." United

Capital Source, LLC v. Benisvy, 48 Misc.3d 1203(A), 18 N.Y.S.3d 582 (Sup. Ct. Nassau Cty. 2015) (citing Abinanti v. Pascale, 41 A.D.3d 395, 837 N.Y.S.2d 740 (2d Dept. 2007)); see also Emerging Vision, Inc. v. Main Place Optical, Inc., 10 Misc.3d 1071(A), 814 N.Y.S.2d 560 (Sup. Ct. Nassau Cty. 2006), on reconsideration, 11 Misc.3d 1057(A), 815 N.Y.S.2d 494 (Sup. Ct. Nassau Cty. 2006) (citing JDOC Constr., LLC v. Balabanow, 306 A.D.2d 318, 319, 760 N.Y.S.2d 678 (2d Dept. 2003)). This high threshold is a product of the strong judicial belief that preliminary injunctions are "extraordinary remed[ies]" that should be issued cautiously." OTG Mgmt., LLC v. Konstantinidis, 40 Misc.3d 617, 619-20, 967 N.Y.S.2d 823, 824-25 (Sup. Ct. N.Y. Cty. 2013); see, e.g., Reed, Roberts Assocs., Inc. v. Strauman, 40 N.Y.2d 303, 307-08, 386 N.Y.S.2d 677 (1976); Oak Orchard Community Health Ctr. v. Blasco, 8 Misc.3d 927, 930, 800 N.Y.S.2d 277 (Sup. Ct. Monroe Cty. 2005) ("[i]t is also a general rule that a preliminary injunction is a drastic remedy and should be issued cautiously") (citing Uniformed Firefighters Assn. of Greater N.Y. v. City of New York, 79 N.Y.2d 236, 581 N.Y.S.2d 734 (1992)).

A preliminary injunction can be granted only when the movant demonstrates: (1) "a likelihood of success on the merits;" (2) "danger of irreparable harm unless the injunction is granted;" and (3) "a balance of the equities in his or her favor." Neos v. Lacey, 291 A.D.2d 434, 435, 737 N.Y.S.2d 394 (2d Dept. 2002); OTG Mgmt., LLC v. Konstantinidis, 40 Misc.3d 617, 619, 967 N.Y.S.2d 823,824-25 (Sup. Ct. N.Y. Cty. 2013). The failure to satisfy any one prong of this analysis requires as a matter of law that the preliminary junction sought be denied.

1. **Petitioners Fail to Show Irreparable Harm**

"The ***single most important*** prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted [Plaintiffs are] likely to suffer irreparable harm before a decision on the merits can be rendered." Estee Lauder Companies Inc. v. Batra, 430 F.Supp.2d

158, 174 (S.D.N.Y. 2006) (quoting Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985)) (emphasis added). To meet this threshold, "Plaintiffs must … demonstrate that such an injury is more than just a mere possibility and, in fact, is likely and imminent absent injunctive relief." Spinal Dimensions, Inc. v. Chepenuk, 16 Misc.3d 1121(A), 12, 847 N.Y.S.2d 905 (Sup. Ct. Albany Cty. 2007) (citing Golden v. Steam Heat, 216 A.D.2d 440, 628 N.Y.S.2d 375 (2d Dept. 1995)). The movant "must show an injury that is neither remote nor speculative, but actual and imminent." Estee Lauder Companies Inc., 430 F.Supp.2d at 174 (citing Earthweb, Inc. v. Schlack, Case No. 99-cv-9302, 2000 WL 1093320, at *2 (2d Cir. May 18, 2000)) (internal quotations omitted).

Petitioners allege that they will suffer irreparable harm because, "[i]f this action proceeds in its ordinary course, even if Fordham's Motion to Dismiss is denied, a favorable decision by this Court on the merits of the Petition will surely not benefit Petitioner Dadap, who is a senior, and may not benefit Petitioner Norris, who is a junior. In any event, the longer the delay in vindicating their rights, the longer that both Petitioners will continue to suffer irreparable harm." See Petitioners' Brief, at pg. 2. Petitioners further contend in conclusory fashion that "[w]ithout prompt relief from this Court, Petitioners Dadap and Norris will be denied a college experience [participation in a club] which both they and Fordham acknowledge to be an important one." Id., at pg. 15.

These reasons unequivocally do not rise to the level of detriment required to meet the threshold to prove irreparable injury. As noted, the ability to organize and form a University sanctioned and financed club is a privilege, not a contractual right. Here, Petitioners were not afforded a privilege and are simply unhappy with Dean Eldredge's decision. Students, however, do not have an unqualified or unfettered right to have their proposed clubs or organizations

recognized by the University and Petitioners provide no supporting facts or law to the contrary. Moreover, as seen in the very detailed papers submitted by the University in support of its Motion to Dismiss, Petitioners have other alternatives to have a pro-Palestinian club without the SJP moniker. Instead, they insist on being affiliated with SJP, a decision that was not supported by the University. Specifically, they wanted to have the University devote its financial and employee resources to a club of Petitioners' choosing without the requisite constraints associated with that privilege. The denial of this privilege is not irreparable harm as, without more, such bare allegations fail to show that any injury "is actual and imminent." Estee Lauder, 430 F.Supp.2d at 174.

Petitioners rely on Melvin v. Union College, 195 A.D.2d 447, 600 N.Y.S.2d 141 (2d Dept. 1993) to support the assertion that "the denial of that [college] experience cannot be adequately remedied with compensation and Petitioners will continue to suffer harm pending the final determination of the litigation." See Petitioners' Brief, at pg. 15. In Melvin, a student was suspended for two semesters due to a finding of academic dishonesty. Melvin, 195 A.D.2d at 447. The student sought a preliminary injunction enjoining the college from enforcing the suspension pending the outcome of the lawsuit. Id. The issuance of a preliminary injunction in Melvin served to *preserve* the status quo (i.e., the student continued attending classes). Id. at 448. As noted above, in this case, Petitioners are seeking the preliminary injunction to *alter* the status quo, to actually create a University-sanctioned and financed club, SJP, where none currently exists, and before this Court decides this matter on the merits. Such a request that seeks to change the status quo and obtain the ultimate relief that Petitioners seek is impermissible without a showing of "extraordinary circumstances[.]" St. Paul Fire and Marine Ins. Co., 308 A.D.2d at 349, 765 N.Y.S.2d at 574 (citing Rosa Hair Stylists, Inc., 218 A.D.2d at 794, 631 N.Y.S.2d at

168-9). Further, Petitioners make no effort to demonstrate that they are any worse off than Petitioners Ahmad Awad and Sapphira Lurie, both of whom graduated from the University in May 2017 and both of whom are silent as to this motion. See Wenzel Affidavit, at ¶ 3.

Finally, it also bears repeating that, although Petitioners were denied official club status in the form and with the affiliation they sought and now continue to seek, the University encourages Petitioners to continue to debate and discuss this very complex and divisive issue. A proposed University sanctioned club is one of many different ways to pursue conversation about the Israeli-Palestinian conflict. While an SJP affiliated club is Petitioners preferred vehicle to facilitate the conversation, it is certainly not the only method by which one can invoke dialogue and discussion on the topic. Today, Petitioners are encouraged to continue to have the debate and discourse that the Israeli-Palestinian issues mandate. Their ability to do so is not impacted in any manner by Dean Eldredge's decision. Petitioners simply cannot do so with the financial and other support of the University under the moniker of their choosing.

a. Petitioners' Constitutional Claims are Misplaced Since Fordham is a Private University

Petitioners cite Elrod v. Burns, 427 U.S. 347, 373 (1976), for the proposition that "[w]hen an alleged deprivation of a constitutional right is involved, such as the right to free speech, courts generally hold that no further showing of irreparable injury is necessary." See Petitioners' Brief, at pg. 15.[7] Here, Fordham is a private institution and, thus, constitutional challenges to its actions are misplaced.

[7] In Elrod, plaintiffs were non-civil service employees of Cook County, Illinois, a governmental employer. Their complaint alleged that they were discharged or threatened with discharge solely because they were not affiliated with or sponsored by the Democratic Party. They sought declaratory, injunctive, and other relief for violations of, inter alia, the First and Fourteenth Amendments. Finding that the parties failed to make an adequate showing of irreparable injury, the district court denied their motion for a preliminary injunction and ultimately dismissed their complaint for failure to state a claim upon which relief could be granted. The appellate court reversed and remanded with instructions to enter appropriate preliminary injunctive relief. The U.S. Supreme Court affirmed, holding that

To this end, and as noted in the University's Motion to Dismiss, the First Amendment and New York State Constitution protect individual freedoms from governmental interference, such as what occurred in Elrod; they do not protect individual freedoms from interference by a private organization such as the University. See SHAD All. v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985); People v. Raab, 163 Misc.2d 382, 386, 621 N.Y.S.2d 440, 443 (Dist. Ct. Nassau Cty. 1994). "Neither private universities nor their employees are 'state actors' for the purpose of constitutional claims, including claims alleging violation of the right to free speech." Mitchell v. New York Univ., 129 A.D.3d 542, 544, 12 N.Y.S.3d 30, 33 (1st Dept. 2015) (citing Powe v. Miles, 407 F.2d 73, 79-81 (2d Cir. 1968)), leave to appeal denied, 26 N.Y.3d 908, 18 N.Y.S.3d 599 (2015); see also Commodari v. Long Island Univ., 89 F.Supp.2d 353, 385 (E.D.N.Y. 2000), aff'd, 62 F. App'x 28 (2d Cir. 2003) (same). As the court found in Beilis v. Albany Medical College of Union University, 136 A.D.2d 42, 44, 525 N.Y.S.2d 932 (3d Dept. 1988), "[w]hile students at public universities are entitled to due process, students at private universities cannot invoke such rights unless they meet the threshold requirement of showing that the State somehow involved itself in what would otherwise be deemed private activity." (internal citations omitted); see also Stone v. Cornell Univ., 126 A.D.2d 816, 818, 510 N.Y.S.2d 313 (3d Dept. 1987) (asserting "[a] threshold requirement to invoking the State's constitutional due process provision is a showing that the State has in some fashion involved itself in what, in another setting, would otherwise be deemed private activity", and finding that although defendant, a private university, received financial assistance from the State, that alone does not constitute a sufficient degree of state involvement to allow an intrusion into the university's disciplinary policies) (internal quotations omitted).

"the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod, 427 U.S. at 373 (internal citations omitted).

Consequently, Petitioners' constitutional challenge fails because, unlike in Elrod, Fordham is a private university and not a state actor and First Amendment protections do not generally extend to private institutions such as Fordham.[8]

b. Petitioners Cite Certain Fordham Policies That Are Facially Irrelevant

In a last ditch effort to create an irreparable injury where none exists, Petitioners contend that "Fordham's commitment to students' rights to free expression is comparable to the First Amendment's, and the violation of that commitment inflicts injury that is no less serious. In short, Petitioners have suffered the same irreparable harm as that which warranted preliminary relief in *Elrod* and *Ulster Home Care*." See Petitioners' Brief, at pg. 16.

Apparently, recognizing that they do not have the same broader constitutional freedoms that students at public institutions may enjoy, Petitioners attempt to meld together various distinct and inapplicable policies of Fordham concerning the Demonstration Policy, the Bias Related Incidents and/or Hate Crime Policy, as well as Fordham's Mission Statement in an effort to create some type of omnibus "freedom of expression" policy. See Petitioners' Brief, at pgs. 9-10. This argument fails for many reasons.

First, Petitioners cannot cherry pick bits and pieces of different institutional policies and unilaterally deem the resulting amalgamation to be "rules" of the institution. While the University encourages expression of thought and dialogue, there is no "free speech policy" or "freedom of expression policy" at Fordham despite Petitioners' attempt to cobble one together.

[8] Petitioners' citation to Ulster Home Care Inc. v. Vacco, 255 A.D.2d 73, 75 (3d Dept. 1999) is similarly misplaced. See Petitioners' Brief, at pgs. 15-16. In Ulster, the operator of a licensed home care agency sought declaratory and injunctive relief to prevent enforcement of a public charge regulation by the New York Attorney General on the ground that it was unconstitutionally vague and ambiguous. Notably, the operator was faced with the threat of criminal prosecution and the constitutionality of the public charge was implicated. Contrastingly, the instant matter involves students interested in forming a University sanctioned club. There is no threat of criminal prosecution and constitutional rights are not implicated, as Fordham is a private institution.

Second, there is no demonstration, protest or public gathering at issue in this matter and none has been alleged. As such, Petitioners citation to Fordham's Demonstration Policy (see Petitioners' Brief, at pgs. 3, 9-10) is wholly irrelevant and designed solely to mislead the Court. Similarly, Petitioners did not file a bias claim nor do they allege that they did so. Thus, Petitioners' citations to Fordham's Bias-Related Incidents and/or Hate Crimes Policy (see Petitioners' Brief, at pgs. 3, 9) is also misplaced.

Finally, Fordham's Mission Statement "guarantees the freedom of inquiry required by rigorous thinking and the quest for truth....seeks to foster in all its students life-long habits of careful observation, critical thinking, creativity, moral reflection and articulate expression... (and) seeks to develop in its students an understanding and reverence for the cultures and ways of life other than their own." See Petitioners' Brief, at pg. 3. Nowhere in the Mission Statement does Fordham create a right for students to have any student club of their choosing, which would receive funding, meeting space and the supervision of a faculty member or administrator that officially recognized student clubs at Fordham enjoy. Establishing a club is not merely "allowing" a student to express a viewpoint—it also involves oversight by University staffing and the use of University financing and property, all of which Petitioners acknowledge. See Petitioners' Brief, at pg. 2. The University chose not to grant Petitioners this privilege under the terms Petitioners demanded. Nonetheless, Petitioners are still free to promote their views, associate with and enjoy the company of like-minded individuals and otherwise support the views of SJP. They simply do not have the right to have Fordham provide the financial, physical, or employee resources to do so and Fordham's Mission Statement does not state otherwise.

In sum, despite Petitioners' attempt to make this matter appear more complicated than it is, this remains a simple case. The only University policy implicated in this case and before this

Court is the University Club Guidelines, which contains the official club approval registration process at Fordham. See Wenzel Affidavit at ¶¶ 7-8. As described below and in the University's Motion to Dismiss, the University complied with that policy and, as such, the Petition should be dismissed in its entirety.

2. Petitioners Cannot Show a Likelihood of Success on the Merits

"With respect to the first requirement (i.e. likelihood of success), it has been stated that a party is not entitled to a preliminary injunction, unless the right is plain from the facts." Merrill Lynch Realty Assoc., Inc. v. Burr, 140 A.D.2d 589, 592, 528 N.Y.S.2d 857 (2d Dept. 1988).

Contrary to Petitioners' claim, Fordham's decision to deny SJP official club status is not subject to "close judicial scrutiny." See Petitioners' Brief, at pg. 7. "It is well established that judicial review of an educational institution's determination involving nonacademic matters is limited to whether the institution substantially adhered to its own published rules and guidelines and was not arbitrary and capricious." Quercia v. New York Univ., 41 A.D.3d 295, 296, 838 N.Y.S.2d 538 (1st Dept. 2007) (internal citations omitted); see also VanHouten v. Mount St. Mary Coll., 137 A.D.3d 1293, 1295, 28 N.Y.S.3d 433 (2d Dept. 2016). Judicial review of an academic institution's determination is limited to whether it: (i) "substantially adhered to its own published rules and guidelines"; and (ii) whether the determinations are based on "a rational interpretation of the relevant evidence" such that they are neither arbitrary nor capricious. Katz v. New York Univ., 95 A.D.3d 547, 547, 943 N.Y.S.2d 518 (1st Dept. 2012) (internal citations omitted); Shah v. Union College, 97 A.D.3d 949, 951, 948 N.Y.S.2d 456, 457 (3d Dept. 2012) (internal citations omitted).

As more fully set forth in the University's Motion to Dismiss, it is beyond debate that the University complied with its policies and procedures, acted in the exercise of honest discretion

and was neither arbitrary nor capricious in rendering its decision to deny SJP official club status. In short, on November 17, 2016, in accordance with the approval process set forth in the University's Club Guidelines, the USG Senate voted and approved SJP as a club at Fordham. See Exhibit "O" at pg. 2 to the Wenzel Affidavit. The USG VP of Operations communicated this decision, via email, to Dean Eldredge shortly thereafter. Id., at pg. 1. On that same date, Dean Eldredge wrote to the Petitioners and other interested students stating that he was informed of USG's decision to approve the SJP club and that he now needed to review the request in accordance with the Club Guidelines. See Exhibit "P" at pg. 1 to the Wenzel Affidavit.

As the last link in the club approval process, and after many hours of research, discussion and deliberation on the potential effect that the existence of a SJP chapter could have on the Fordham Lincoln Center campus, Dean Eldredge denied the students' request to form a SJP club at the Lincoln Center campus on December 22, 2016. See Eldredge Affidavit at ¶ 21 and Exhibit "A" at pg. 1 to the Eldredge Affidavit.

It is well settled that once it has been demonstrated that the University followed its established policies and practices, the only remaining inquiry for the Court is whether the decision to deny SJP club status was "based upon the exercise of honest discretion after a full review of the operative facts." Galiani v. Hofstra Univ., 118 A.D.2d 572, 499 N.Y.S.2d 182 (2d Dept. 1986) (decision to suspend student, based upon the exercise of honest discretion after a full review of the operative facts, was neither arbitrary nor capricious so as to warrant judicial intervention); Carr v. St. John's University, New York, 17 A.D.2d 632, 634, 231 N.Y.S.2d 410, 414 (2d Dept. 1962), aff'd 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962) ("When a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest

discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion").

As more fully set forth in the University's Motion to Dismiss, Dean Eldredge's thorough examination of the issue, through his engagement in a lengthy review and consideration of comments from all sides of the issue, supports the rational basis of his decision. Dean Eldredge's assessment and research into this proposed local chapter of SJP took many hours over several weeks. See Eldredge Affidavit, at ¶¶ 15-19. In addition to these discussions, Dean Eldredge conducted his own independent research. Id., at ¶ 20 and Exhibit "J" to the Eldredge Affidavit. Petitioners' position and the position of their supporters, in addition to the contrasting viewpoints of other members of the Fordham community, were equally vetted. On December 22, 2016 in a lengthy email describing his position and based on the totality of the discussions with Petitioners, their supporters, those opposed to the application and the voluminous materials that he reviewed after receiving some from interested parties or after obtaining some on his own, Dean Eldredge denied Petitioners' application due to polarization issues, including the safety and security of the Fordham community.[9] The mere fact that Dean Eldredge did not support the creation of a Fordham sanctioned SJP chapter simply does not equate to a supposition that the decision is irrational.[10]

In sum, although Petitioners are displeased with the University's decision to deny official club recognition to SJP, governing law dictates that because the University substantially followed its policy, this Court should not second-guess the club approval and deliberation process that took place at the University or substitute its judgment for that of University officials.

[9] See Eldredge Reply Affidavit at ¶ 17.
[10] To the extent Petitioner cites to Healy v. James, 408 U.S. 169 (1972) (see Petitioners' Brief at pg. 13), again, this citation is misplaced, as the dispute involved "a denial by a **state college** of official recognition to a group of students ... " Fordham is not a state college, but rather, a private institution.

There is simply no basis for the Court to disturb the University's decision, and the Petition should be dismissed. See e.g. Hyman v. Cornell Univ., 82 A.D.3d 1309, 1310, 918 N.Y.S.2d 226, 228 (3d Dept. 2011) (upholding university's disciplinary decision where there was "no indication that respondent deviated from its procedures, and its determination is amply supported by the evidence"); Ebert v. Yeshiva Univ., 28 A.D.3d 315, 315, 813 N.Y.S.2d 408, 409 (1st Dept. 2006) (affirming university's expulsion decision where university proceeded in accordance with and substantially observed its disciplinary policies and procedures); Zartoshti v. Columbia Univ., 79 A.D.3d 470, 471, 911 N.Y.S.2d 623, 623 (1st Dept. 2010) (upholding two-year suspension where private university substantially complied with its own guidelines and "petitioner demonstrated no prejudice resulting from the deviation from literal compliance" with handbook procedures); Fernandez v. Columbia Univ., 16 A.D.3d 227, 228, 790 N.Y.S.2d 603, 603 (1st Dept. 2005) (upholding disciplinary sanction where private university "substantially abided" by its own governing rules and regulations); Al–Khadra v. Syracuse Univ., 291 A.D.2d 865, 866, 737 N.Y.S.2d 491, 492 (4th Dept. 2002) (respondent substantially adhered to the procedures outlined in its Judicial System Handbook).

For all the reasons stated in the sections above, Petitioner cannot succeed on the merits. Consequently, the motion for a preliminary injunction must be denied. See Allawi v. State Univ. of New York at Stony Brook, Index No. 15830/2002, 2002 WL 31748836, at *2 (Sup. Ct. Suffolk Cty. Nov. 15, 2002) (denying preliminary injunction motion in Article 78 proceeding where petitioner submitted no evidence which would establish that respondents' determination to terminate his residence at the university was arbitrary or capricious).

3. The Balancing of the Equities Plainly Tips in Favor of Fordham

Finally, Petitioners have not, nor can they, show that the equities lie in their favor "since the record affords no reason to believe that an injury [they are] likely to sustain will be more burdensome to [them] than the harm likely to be caused to [the University] through the imposition of an injunction." Credit Index, L.L.C. v. RiskWise Int'l L.L.C., 282 A.D.2d 246, 247, 722 N.Y.S.2d 862 (1st Dept. 2001). Fordham will sustain greater harm than Petitioners should a preliminary injunction be issued. Petitioners have suffered no injury, and are free to debate and discuss the Israeli-Palestinian conflict using methods other than a University sanctioned student club. A preliminary injunction against Fordham, however, would undermine the University's ability to fulfill its duty of supervision and control of the institution at large and impede its discretion on how best to operate the institution. In Fordham's case, Dean Eldredge, a senior, experienced professional, who has held his current position for over eleven (11) years and has been part of Fordham's administration for over twenty (20) years, determined that a local chapter of SJP, sanctioned by the University, was inappropriate for Fordham's Lincoln Center campus due to his concerns regarding the resulting polarizing effects and any commensurate safety and security issues. Here, given the potential hardship and prejudice to Fordham were the injunction to be granted, relative to the plainly speculative and potential harm Petitioners might suffer absent the injunction, the balance of equities weighs in favor of denying Petitioners' motion. Fordham's right to regulate and restrict clubs is overarching and trumps Petitioners' privilege. For all the aforementioned reasons, Petitioners' motion for a preliminary injunction must be denied.

POINT III

PETITIONERS ARE NOT ENTITLED TO DISCOVERY

In an Article 78 proceeding, "a petitioner is not entitled to discovery as of right" and, "[b]ecause discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted **only** where it is demonstrated that there is a need for such relief." Gerber Products Co. v. New York State Dept. of Health, 47 Misc.3d 249, 253, 3 N.Y.S.3d 267 (Sup. Ct. Albany Cty. 2014) (quoting Matter of Town of Pleasant Val. V. New York State Bd. of Real Prop. Servs., 253 A.D.2d 8, 15, 685 N.Y.S.2d 74 (2d Dept. 1999)) (emphasis added); see also Matter of Nespoli v. Doherty, 17 Misc.3d 1117(A), 851 N.Y.S.2d 64 (Sup. Ct. N.Y. Cty. 2007) (same); CPLR § 408. Thus, while the Supreme Court has broad discretion in granting or denying disclosure, courts have permitted discovery in Article 78 proceedings **only** in very limited circumstances. See Stapleton Studios, LLC v. City of New York, 7 A.D.3d 273, 274-75, 776 N.Y.S.2d 46 (1st Dept. 2004).

For a party to be entitled to discovery in an Article 78 proceeding, the party must show that: (1) the proposed discovery is material in nature, necessary to the prosecution or defense of the proceeding; (2) the request is carefully tailored to obtain the necessary information; and (3) such discovery does not create undue delay. See Suit-Kote Corp. v. Rivera, 137 A.D.3d 1361, 1365, 26 N.Y.S.3d 642 (3d Dept. 2016); Nespoli, 17 Misc.3d 1117(A), 2007 WL 3084870, at *2 (same). Failure to meet this burden must result in the denial of leave for discovery. See Bramble v. New York City Dept. of Educ., 125 A.D.3d 856, 857-58, 4 N.Y.S.3d 238 (2d Dept. 2015) (finding leave for disclosure inappropriate where petitioner teacher failed to demonstrate requested discovery from New York City Department of Education was necessary and would not unduly delay proceeding for leave to serve a late notice of claim arising from extensive personal

injuries sustained when shielding a student from assault by group of other students); Stapleton Studios, LLC, 7 A.D.3d at 274-75. Moreover, leave for discovery should **not** be granted where the pleadings establish that the moving party is not entitled to the relief sought. Id. at 275.

In the present action, Petitioners seek (i) the disclosure of all documents relating to Fordham's decision to deny club status to SJP, and (ii) the depositions of both Dean Eldredge and SVP Gray. See Petitioners' Brief, at p. 18. Petitioners argue that such disclosure is sufficiently limited and narrowly tailored so as to only focus on the factual dispute concerning Fordham's motivation in denying SJP club status. To justify their alleged "need" for this disclosure, Petitioners simply claim that New York law "grants the opportunity to pursue limited discovery when the motivation underlying a challenged decision is at issue." See Levine Aff., at ¶ 8. This, however, is a misapprehension of the law.

As an initial matter, as previously stated, leave for discovery should **not** be granted where the pleadings establish that the moving party is not entitled to the relief sought. See e.g., Stapleton Studios, LLC, 7 A.D.3d at 275. As discussed in great detail in Fordham's Motion to Dismiss and in Section II, supra, it is clear that Petitioners cannot succeed on the merits of their claim and, therefore, are not entitled to the relief they seek. Consequently, their motion for leave for disclosure must be denied. Kellenberg Memorial High School v. Section VIII of New York State Public High School Athletic Assoc., Inc., 255 A.D.2d 320, 320, 679 N.Y.S.2d 660 (2d Dept. 1998), appeal dismissed 93 N.Y.2d 847, 688 N.Y.S.2d 493, leave to appeal denied 93 N.Y.2d 816, 697 N.Y.S.2d 564, certiorari denied 528 U.S. 1155 (nonpublic high schools not entitled to conduct discovery with respect to petition for judicial review of administrative denial of their request for membership in particular section of state public high school athletic

association, as proceeding was summary in nature and schools contended that matter was ripe for summary disposition).

Regardless, however, Petitioners' request for disclosure must be denied because Petitioners have failed to demonstrate that Dean Eldredge's motivation was anything other than the many reasons he stated in his sworn affidavit. Petitioners cannot be permitted to engage in a fishing expedition but rather must demonstrate the requisite need for the documents and/or depositions requested. They offer no facts in this regard. Petitioners, however, cite to two cases to support their assertion that "discovery will be granted when a petitioner questions, and the respondent denies, an improper motive for the challenged action." See Petitioners' Brief, at pg. 17. These cases are easily distinguishable.

In Gerber Prods. Co. v. New York State Dep't of Health, 47 Misc.3d 249, 3 N.Y.S.3d 267 (Sup. Ct. Albany Cty. 2014), the petitioner sought leave for discovery pursuant to CPLR § 408 to uncover the factual basis for respondents' challenged decisions. More specifically, the petitioner contended that discovery was necessary because the respondents failed to indicate what specific data was relied upon in rendering the determination at issue. Id. Respondents opposed the motion, arguing that the petitioner failed to demonstrate a need for the discovery since an affidavit submitted by respondents explained the basis for respondents' determination and provided the relevant documentation as attachments thereto. Id. at 252-53. The court found that while this affidavit provided some of the basis for the determination, it failed to explain the cost criteria respondents applied to the submissions it received from petitioner. Id. at 253. Consequently, because (1) the affidavit failed to contain any criterion against which the price differential at issue could be compared, and (2) the information and data sought by petitioner would address this deficiency in the record, the court found that discovery was warranted. Id. at

253-54. Similarly, in Nespoli v. Doherty, 17 Misc.3d 1117(A), 2007 WL 3084870 (Sup. Ct. N.Y. Cty. 2007), the court granted the petitioner's motion for leave for discovery where the respondent only offered limited statistical support for his position, making it evident to the court that petitioners needed access to the data sought in order to support their claims.

Same is not the case here; the documents reviewed and materials and conversations considered in Fordham's rendering of its decision have been fully explained by the decision maker, Dean Eldredge. Thus, there is no need to question Dean Eldredge—his motivations and reasons have been laid bare via his affidavit and exhibits cited therein and in the University's Motion to Dismiss. Moreover, looking to Petitioners' request to depose SVP Gray, SVP Gray was not involved in the decision-making process at issue; he only became involved after Dean Eldredge denied SJP club status on December 22, 2016, when the Center for Constitutional Rights sent Fordham a letter stating their objection to Dean Eldredge's decision. SVP Gray responded to this letter and engaged in email correspondence with that organization. As Petitioners were recipients of this correspondence and discussed them in the Petition, it is clear that the extent of SVP Gray's involvement is known to Petitioners and Petitioners themselves are already in possession of all relevant documents illustrating SVP Gray's involvement herein. See Petition, at ¶¶ 40-46. Therefore, because SVP Gray was not involved in the decision-making process, (1) there is no need to depose him to support Petitioners' improper motivation claim and (2) deposing him would create undue delay in the proceeding.

Both Dean Eldredge and Dr. Wenzel filed lengthy and exhaustive affidavits in support of Fordham's Motion to Dismiss. These affidavits each outlined in great detail each and every step each individual took in their respective decision-making processes and attached as exhibits all

relevant documents respectively considered in the rendering of the ultimate decision. Specifically, attached to Dr. Wenzel's affidavit are:

(1) Petitioners' proposed club constitution (Exhibit "F");

(2) Copies of SJP's application and proposed constitution (Exhibit "G");

(3) Relevant emails (Exhibits "H" – "N" and "P", "Q", "S", "T");

(4) SJP's updated constitution (Exhibit "K");

(5) Materials submitted by JSO (Exhibits "U" and "V"); and

(6) Articles reviewed by Dr. Wenzel (Exhibit "W").

Attached to Dean Eldredge's affidavit are:

(1) Emails with and materials submitted by JSO (Exhibits "D" and "E");

(2) Correspondence with various individuals with whom Dean Eldredge discussed the matter (Exhibits "F" – "I"); and

(3) Submissions from interested persons and independent research (Exhibit "J").

Petitioners fail to specify what, if anything, was excluded from these affidavits so as to justify a need for disclosure. This is in stark contrast to Gerber and Nespoli where leave for disclosure was only granted because petitioners were able to demonstrate that the documents provided by respondents were insufficient and lacking in some manner. Nespoli, 17 Misc.3d 1117(A), 2007 WL 3084870, at *2-3 (Sup. Ct. N.Y. Cty. 2007); Gerber Prods. Co., 47 Misc.3d at 253-54.

As Petitioners have failed to (1) narrowly tailor their request so as to identify documents or information not already provided and (2) show a need for additional disclosure, as their claim can be fully and adequately analyzed by the detailed accounts and documents contained in both Dr. Wenzel's and Dean Eldredge's affidavits, respectively, along with materials that they already possess illustrating SVP Gray's limited involvement, their motion for leave for discovery must

be denied. See Bramble v. New York City Dept. of Educ., 125 A.D.3d 856, 857, 4 N.Y.S.3d 238 (2d Dept. 20215); Hanlon v. New York State Police, 133 A.D.3d 1265, 1266, 19 N.Y.S.3d 386 (4th Dept. 2015).

CONCLUSION

For the foregoing reasons, Respondent Fordham University respectfully requests that the Court deny Petitioners' motion for a preliminary injunction and expedited discovery in its entirety.

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Garden City, New York

Respectfully submitted,

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