

Motion Sequence #1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of,

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

Index No. 153826/2017

Petitioners,

-against-

Hon. Nancy M. Bannon

FORDHAM UNIVERSITY,

Respondent,

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

-----X

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITIONERS' VERIFIED PETITION**



100 Quentin Roosevelt Boulevard
Garden City, New York 11530
(516) 357-3700

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS..... 2

 University Club Guidelines..... 2

 Club Registration Packet and USG (Generally) 3

 Timeline of Events..... 4

STANDARD AND METHOD OF REVIEW 8

ARGUMENT..... 10

POINT I 10

 PETITIONERS’ CLAIMS UNDER THE FIRST AMENDMENT 10

 ARE MISPLACED SINCE FORDHAM IS A PRIVATE UNIVERSITY 10

POINT II..... 14

 NEW YORK LAW CONSTRAINS JUDICIAL REVIEW 14

 OF A UNIVERSITY’S ACADEMIC AND ADMINISTRATIVE DECISIONS 14

POINT III 18

 THE UNIVERSITY COMPLIED WITH ITS 18

 POLICIES AND PROCEDURES AND THE DECISION TO DENY 18

 SJP CLUB STATUS WAS NEITHER ARBITRARY NOR CAPRICIOUS 18

 1. The University Complied with its Club Approval Policy and Procedures (the Club Guidelines) 20

 2. The Discrepancy Between the Club Guidelines and the Club Registration Packet is a Harmless Error Created by Students, not the University 23

POINT IV 27

 THE UNIVERSITY’S DECISION WAS MADE IN GOOD FAITH 27

CONCLUSION 30

TABLE OF AUTHORITIES**Statutes**

CPLR § 3211(a)(1)	8
CPLR § 7804(f).....	8
CPLR 3211(a)(7)	8

Cases

<u>Al-Khadra v. Syracuse Univ.</u> , 291 A.D.2d 865, 866, 737 N.Y.S.2d 491 (4th Dept. 2002)	23
<u>Al-Khadra v. Syracuse Univ.</u> , 291 A.D.2d 865, 866, 737 N.Y.S.2d 491 (4th Dept. 2002).....	19
<u>American Civil Liberties Union of Virginia, Inc. v. Radford College</u> , 315 F.Supp. 893, 896 (W.D.V.A. 1970).....	16
<u>Bachellar v. Maryland</u> , 397 U.S. 564 (1970).....	12
<u>Bellis v. Albany Medical College of Union Univ.</u> , 136 A.D.2d 42, 525 N.Y.S.2d 932 (3d Dept. 1988).....	11
<u>Beta Sigma Rho, Inc. v. Moore</u> , 46 Misc.2d 1030, 1035, 261 N.Y.S.2d 658, 664 (Sup. Ct., Erie Cnty. 1965), <u>aff'd</u> 25 A.D.2d 719 (4th Dept. 1966).....	16, 28
<u>Bickerstaff v. Vassar College</u> , 354 F.Supp.2d 276, 283 (S.D.N.Y. 2004)	8
<u>Burton v. Wilmington Parking Authority</u> , 365 U.S. 715, 722 (1961)	11
<u>Buttny v. Smiley</u> , 281 F.Supp. 280, 285 (D.C.Colo. 1968).....	29
<u>Byerly v. Ithaca College</u> , 290 F.Supp.2d 301, 305 (N.D.N.Y. 2003).....	8
<u>Carr v. St. John's University, New York</u> , 17 A.D.2d 632, 634, 231 N.Y.S.2d 410, 414 (2d Dept. 1962), <u>aff'd</u> 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962).....	28
<u>Clemson University Vietnam Moratorium Committee v. Clemson University</u> , 306 F.Supp. 129 (D.S.C. 1969)	17
<u>Coleman v. Hackley School</u> , 251 A.D.2d 328, 329, 673 N.Y.S.2d 732, 732 (2d Dept. 1998)	28
<u>Commodari v. Long Island Univ.</u> , 89 F.Supp.2d 353 (E.D.N.Y. 2000), <u>aff'd</u> , 62 F. App'x 28 (2d Cir. 2003)	11
<u>Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.</u> , 11 Misc.3d 1060(A), 3, 816 N.Y.S.2d 694 (Sup. Ct., Madison Cnty. 2006)	28

Delta Kappa Epsilon Alumni Corp. v. Colgate University, 11 Misc.3d 1060(A), 816 N.Y.S.2d 694 (Sup. Ct., Madison Cnty. 2006) 16

Ebert v. Yeshiva Univ., 28 A.D.3d 315, 813 N.Y.S.2d 408 (1st Dept. 2006)..... 19

Ebert v. Yeshiva University, 28 A.D.3d 315, 315, 813 N.Y.S.2d 408, 409 (1st Dept. 2006)..... 23

Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) 16

Fernandez v. Columbia University, 16 A.D.3d 227, 228, 790 N.Y.S.2d 603, 603 (1st Dept. 2005) 23

Galiani v. Hofstra University, 118 A.D.2d 572, 499 N.Y.S.2d 182 (2d Dept. 1986)..... 28

Gerdes v. Reynolds, 281 N.Y. 180, 184, 22 N.E.2d 331 (1939) 9

Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dept. 1985), aff'd, 66 N.Y.2d 946, 498 N.Y.S.2d 779 (1985) 12, 15

Goldberg v. Regents of University of Cal., 248 Cal.App.2d 867 (Cal. Ct. of Appeals 1967)..... 29

Harris v. Trustees of Columbia Univ., 98 A.D.2d 58, 71, 470 N.Y.S.2d 368, 376 (1st Dept. 1983) 20

Healy v. James, 408 U.S. 169 (1972) 12

Hengjun Chao v. Mount Sinai Hosp., 476 Fed. Appx. 892, 895 (2d Cir. 2012) 9

Hyman v. Cornell University, 82 A.D.3d 1309, 918 N.Y.S.2d 226 (3d Dept. 2011)..... 13, 23

Jennings v. Teachers Coll., 29 Misc. 3d 1236(A), 920 N.Y.S.2d 241 (Sup. Ct., N.Y. Cnty. 2010) 9

Keles v. New York Univ., No. 91-cv-7457(SWK), 1994 WL 119525, at *6 (S.D.N.Y. 1994) ... 18

Keles v. Trustees of Columbia University in City of New York, 74 A.D.3d 435, 435-36, 903 N.Y.S.2d 18, 19 (1st Dept. 2010)..... 15

Klinge v. Ithaca Coll., 244 A.D.2d 611, 613, 663 N.Y.S.2d 735, 736-37 (3d Dept. 1997)..... 8

Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982) 11

Maas v. Cornell Univ., 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 718-19 (1999)..... 8, 10, 15, 16

Matter of Dopp v State Univ. of N.Y., 146 A.D.3d 1058, 1061, 44 N.Y.S.3d 608 (3d Dept. 2017) 18

Matter of Harris v. Trustees of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959, 479 N.Y.S.2d 216, [1984] 19

Matter of Mitchell v New York Med. Coll., 208 A.D.2d 929, 930, 617 N.Y.S.2d 894 (2d Dept. 1994)..... 28

Matter of Olsson v. Bd. of Higher Ed. of City of N.Y., 49 N.Y.2d 408, 413, 426 N.Y.S.2d 248, 250 (1980) 14, 15, 18

Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 234, 356 N.Y.S.2d 833, [1974] 19

Matter of Susan M. v. New York Law School, 76 N.Y.2d 241, 246, 557 N.Y.S.2d 297 (1990). 18

Melvin v. Union Coll., 195 A.D.2d 447, 447-78, 600 N.Y.S.2d 447 (2d Dept. 1993) 9

Mitchell v. New York Univ., 129 A.D.3d 542, 544, 12 N.Y.S.3d 30, 33 (1st Dept. 2015) 11

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 11

Mu Chapter of Delta Kappa Epsilon, by Swett v. Colgate University, 176 A.D.2d 11, 578 N.Y.S.2d 713 (3d Dept. 1992) 19

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)..... 11

Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195 (6th Cir. 1969)..... 16

People v. Raab, 163 Misc.2d 382, 621 N.Y.S.2d 440 (Dist. Ct., Nassau Cnty. 1994) 10, 11

Powe v. Miles, 407 F.2d 73, 80-81 (2d Cir. 1968) 11

Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216, 10 N.Y.S.3d 156 (2015)..... 19

Quercia v. New York Univ., 41 A.D.3d 295, 296, 838 N.Y.S.2d 538, 540 (1st Dept. 2007) 19

Radin v. Albert Einstein Coll. of Med. of Yeshiva Univ., No. 04-cv-704(RPP), 2005 WL 1214281, at *10 (S.D.N.Y. May 20, 2005) 16

Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Institute, 260 A.D.2d. 992, 993, 689 N.Y.S.2d 292 (3d Dept. 1999) 19

Romeo v. Seton Hall University, 378 N.J. Super. 384, 875 A.D. 2d 1043 (2005)..... 14

Rosenberger v. Rector & Visitors of the University of Virginia., 515 U.S. 819 (1995) 12

Sempra Energy Trading Corp. v. BP Prods., 52 A.D.3d 350, 860 N.Y.S.2d 71 (1st Dept. 2008) 10

SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985) 10

Sherman v. Yolo County Chief Probation Officer, No. CIV S-06-0931, 2006 WL 2975610, at * 2
(E.D. Cal. Oct. 17, 2006)..... 29

Silverman v. New York Univ. Sch. of Law, 193 A.D.2d 411, 597 N.Y.S.2d 314 (1st Dept. 1993)
..... 9

Snyder v. Voris, Martini & Moore, LLC, 52 A.D.3d 811, 812, 860 N.Y.S.2d 622 (2d Dept. 2008)
..... 9

Stone v. Cornell Univ., 126 A.D.2d 816, 510 N.Y.S.2d 313 (3d Dept. 1987) 11

Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 658, 427 N.Y.S.2d 760 (1980) 18

Tedeschi v. Wagner College, 49 N.Y.2d 652, 658, 427 N.Y.S.2d 760 (1980)..... 15

Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495, 495, 815 N.Y.S.2d 547 (1st Dept. 2006) 9

Zartoshti v. Columbia University, 79 A.D.3d 470, 471, 911 N.Y.S.2d 623, 623 (1st Dept. 2010)
..... 23

Motion Sequence #1**PRELIMINARY STATEMENT**

Respondent Fordham University (“Fordham” or the “University”) respectfully submits this Memorandum of Law, the accompanying affidavit of Keith Eldredge, sworn to on June 5, 2017 (the “Eldredge Affidavit”), the accompanying affidavit of Dr. Dorothy A. Wenzel, sworn to on June 5, 2017 (the “Wenzel Affidavit”), and the affirmation of James G. Ryan, dated June 5, 2017 (the “Ryan Affirmation”), in support of its motion to dismiss the verified petition (the “Petition”) of Ahmad Awad (“Petitioner Awad”), Sofia Dadap (“Petitioner Dadap”), Sapphira Lurie (“Petitioner Lurie”), and Julie Norris (“Petitioner Norris”) (collectively, “Petitioners”), students interested in forming a student club, Students for Justice in Palestine (“SJP”), on Fordham’s Lincoln Center campus. Despite Petitioners’ attempt to make this matter appear more complicated than it is, this remains a simple case. It concerns the very narrow issue of whether the University complied with its internal policies and procedures in connection with its decision to deny financial support, employee assistance and official recognition to a proposed student club. As demonstrated by the documentary evidence submitted herewith, 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 at the University.

The University now moves 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).

Petitioners also present a flurry of irrelevant First Amendment arguments that are generally associated with public institutions. As the Court is aware, First Amendment protections

do not generally extend to a private institution such as Fordham in this context and, for that reason, the first cause of action must fail.

Finally, for sound policy reasons, New York courts in this context have repeatedly declined to intervene in matters involving straightforward educational decisions, because those decisions require highly specialized professional judgment. Therefore, for the reasons set forth herein, it is respectfully submitted that this Court, consistent with well-established precedent, should similarly refrain from substituting its decision for the judgment of trained professionals in higher education.

Consequently and as more fully set forth herein, Petitioners' claims fail on both procedural and substantive grounds and should be dismissed in their entirety.

STATEMENT OF FACTS

For the Court's convenience, the University briefly summarizes the relevant facts and timeline set forth in the Wenzel and Eldredge Affidavits.

This matter concerns the denial by Fordham, through Keith Eldredge, the Dean of Students at Fordham's Lincoln Center campus ("Dean Eldredge"), of Petitioners' application to have a Fordham-sanctioned student club which would be a local chapter of a national organization known as Students for Justice in Palestine.

University Club Guidelines

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.

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, the relevant 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.¹ The Club Guidelines 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 it 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 (here 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.

Club Registration Packet and USG (Generally)

At the beginning of the club registration process, the prospective club leaders usually obtain a packet of materials prepared by fellow students who are members of USG. See Wenzel Affidavit at ¶ 10. USG members prepare the packet as a service to their fellow students to guide them through the club approval process. (Fordham does not prepare the packet.) USG, however, is not a department or office of the University. Id. The members are students who have been elected by their peers and they are not employees of the University. In this case, USG prepared

¹ Unless otherwise noted, all references to Exhibit "A" represent Exhibit "A" at pg. 5.

and provided Petitioners with the aforementioned information packet (the “Club Registration Packet”). See Wenzel Affidavit at ¶ 11.

Timeline of Events

On October 21, 2015, the USG Vice President of Operations for the 2015-2016 academic year, Amanda Ritchie (“Ms. Ritchie”) emailed Gunar Olsen (“Mr. Olsen”) a Club Registration Packet, including an application, as he was interested in forming a local chapter of SJP on Fordham’s Lincoln Center campus as an official Fordham student club. See Exhibit “B” at pgs. 1-14 to the Wenzel Affidavit.

On November 19, 2015, four undergraduate Fordham students, including Petitioner Awad, submitted a proposed constitution to start a student SJP club at the Lincoln Center campus. See Petition at ¶ 16, which is attached as Exhibit “A” at pgs. 1-34 to the Ryan Affirmation. A copy of this constitution is attached to the Wenzel Affidavit as Exhibit “F” at pgs.1-5.

Although SJP submitted the materials to USG in November 2015, due to an internal delay at USG, USG did not provide Dr. Wenzel with a copy of SJP’s application and proposed constitution until shortly before the University’s spring break in March 2016. See Wenzel Affidavit at ¶ 19. See Exhibit “G” at pgs. 1-12 to the Wenzel Affidavit. On April 5, 2016, Petitioner Awad, as the proposed president for the SJP chapter, wrote to Dr. Wenzel as the Director of Student Involvement seeking a status update as to his request to start the proposed club. See Exhibit “H” at pgs. 1-2 to the Wenzel Affidavit. In Petitioner Awad’s email he says: “But we’ve been quite disappointed that we haven’t heard back from anyone from USG, especially because it’s been several months since we submitted everything on November 20.” Id. Dr. Wenzel immediately responded to Petitioner Awad via email on April 6, 2016 indicating to

him that she had not received a copy of SJP's proposed club constitution until shortly before the University's spring break in March 2016 and that, pursuant to the club approval process, she desired to schedule a meeting with the interested students and USG. Id.

At this juncture, and as specifically set forth in the Club Guidelines, a robust, interactive dialogue occurred among the prospective club leaders, the USG Operations Committee and Dr. Wenzel as the Director for Student Involvement. See Wenzel Affidavit at ¶ 22. The purpose of this dialogue is: (1) to review the proposed club's constitution; (2) discuss the proposed club's function, overall mission, future purpose, and potential effect on the campus community; (3) eliminate any redundancies with other clubs; and (4) suggest appropriate modifications to the proposed constitution, if necessary. Id.

On April 26, 2016, Dr. Wenzel, along with USG Vice President of Operations for the 2015-2016 academic year, Ms. Ritchie, met with Petitioner Awad, the proposed club president, and Christina Napolitano ("Ms. Napolitano"), a proposed member of SJP. See Wenzel Affidavit at ¶ 23. The parties discussed the national SJP organization and how the proposed campus club would be affiliated with the national organization, if at all. Id. The approval process then went into hiatus due to the end of the academic year and summer recess. Id.

On September 7, 2016, Mr. Olsen, on behalf of Petitioner Awad, as well as for Hend Elmadboly and Asad Hussain Jung, emailed Kayla Wolf, the new USG Vice President of Operations for the 2016-2017 academic year ("Ms. Wolf"), asking for an update on the proposed club's status. See Wenzel Affidavit at ¶ 24. Ms. Wolf, on behalf of USG, immediately responded to the students to acknowledge the email. See Exhibit "I" at pgs. 1-2 to the Wenzel Affidavit.

On September 20, 2016, Dr. Wenzel emailed Petitioner Awad confirming that Ms. Wolf would be the proposed club's contact person at USG for the 2016-2017 academic year. See Exhibit "J" at pgs. 1-2 to the Wenzel Affidavit. She also asked for written confirmation that the national SJP organization did not require anything from the proposed local chapter. See Wenzel Affidavit at ¶ 26. Dr. Wenzel asked to meet again to discuss issues about the group's proposed programming and the group's constitution. Id.

As Petitioners recognize, "[o]ver the next couple of weeks, Petitioner Awad and other students interested in starting SJP responded to follow-up email inquiries from administrators on routine matters and requested to meet with USG and Fordham administrators." See Petition at ¶ 21, which is attached as Exhibit "A" at pgs. 1-34 to the Ryan Affirmation. As more fully set forth below and in the Wenzel Affidavit, this interactive process is not unusual at Fordham. See Wenzel Affidavit at ¶ 27.

On October 5, 2016, students interested in forming SJP (Petitioner Awad, as well as interested students Alexa McMenamin, Areeg Abdelhamid ("Ms. Abdelhamid"), and Mr. Olsen) met with Dean Eldredge, Ms. Wolf and Dr. Wenzel. See Wenzel Affidavit at ¶ 28. Also on October 5, 2016, Ms. Wolf of USG emailed Mr. Olsen a new Club Registration Packet and a fast track constitution to further the application process and help with edits. See Exhibit "C" at pgs. 1-19 to the Wenzel Affidavit.

On October 17, 2016, SJP submitted an updated constitution. See Exhibit "K" at pgs. 1-6 to the Wenzel Affidavit.

On October 27, 2016, students interested in forming SJP (Mr. Olsen, Ms. Abdelhamid, Ms. Napolitano, Petitioner Awad, Petitioner Dadap, and Petitioner Lurie) met with the proposed club's faculty advisor, Glenn Hendler, and the USG Operations Committee. See Wenzel

Affidavit at ¶ 33. This meeting was scheduled, in part, as a result of the USG Operations Committee's review of SJP's proposed constitution. Specifically, the USG Operations Committee had questions about the local chapter's relationship to the national organization and wished to speak with the interested members in person. See Wenzel Affidavit at ¶ 33.

The USG Operations Committee then (as the next step in the approval process) reviewed SJP's proposed constitution and submitted it to the USG Senate for approval. See Wenzel Affidavit at ¶ 42.

On November 17, 2016, the USG Senate voted to approve SJP as a club at the Fordham University's Lincoln Center campus. See Exhibit "O" at pg. 2 to the Wenzel Affidavit. Ms. Wolf communicated this decision to Dean Eldredge shortly thereafter. Id. at pg. 1. 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.

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 provided 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).

Petitioners filed this Article 78 proceeding on April 26, 2017. See Exhibit “A” at pgs. 1-34 to the Ryan Affirmation.² The University now moves to dismiss the Petition pursuant to CPLR § 7804(f), for failure to state a cause of action pursuant to CPLR 3211(a)(7) and a defense founded upon documentary evidence pursuant to CPLR § 3211(a)(1).

STANDARD AND METHOD OF REVIEW -

“[C]laims based upon the rights or procedures found in college manuals, bylaws and handbooks may only be reviewed by way of a special proceeding under Article 78 of New York's CPLR in New York State Supreme Court.” Bickerstaff v. Vassar College, 354 F.Supp.2d 276, 283 (S.D.N.Y. 2004), aff'd, 160 Fed. Appx. 61 (2d Cir. 2005) (summary order); see Byerly v. Ithaca College, 290 F.Supp.2d 301, 305 (N.D.N.Y. 2003) (asserting review of controversies involving colleges and universities give way to an Article 78 proceeding, not a plenary action) (citing Maas v. Cornell Univ., 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 718-19 (1999)); see also Klinge v. Ithaca Coll., 244 A.D.2d 611, 613, 663 N.Y.S.2d 735, 736–37 (3d Dept. 1997) (college followed termination procedures provided in handbook, and thus, if tenured professor was dissatisfied with results of procedure, his sole remedy was to commence Article 78 proceeding);

² A copy of a stipulation extending the University's time to respond to it to June 5, 2017 is attached to the Ryan Affirmation as Exhibit “B” at pgs. 1-2.

Hengjun Chao v. Mount Sinai Hosp., 476 Fed. Appx. 892, 895 (2d Cir. 2012) (under New York law, former professor's claims against medical school based on rights or procedures found in college manuals, bylaws, and handbooks could only be reviewed by way of Article 78 proceeding). Article 78 review is the appropriate procedure to seek review of whether an academic institution abided by its own rules. See Melvin v. Union Coll., 195 A.D.2d 447, 447-78, 600 N.Y.S.2d 447 (2d Dept. 1993) (wherein a student challenged whether a university abided by the rules set forth in its student handbook); Jennings v. Teachers Coll., 29 Misc. 3d 1236(A), 920 N.Y.S.2d 241 (Sup. Ct., N.Y. Cnty. 2010) (citing Silverman v. New York Univ. Sch. of Law, 193 A.D.2d 411, 597 N.Y.S.2d 314 (1st Dept. 1993) (for the proposition that that student's breach of contract claim based on alleged violations of student handbook was only judicially addressable via an Article 78 proceeding)).

CPLR § 3211(a)(7) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that...the pleading fails to state a cause of action.” While it is commonly understood that a court shall accept the facts alleged in a complaint as true for purposes of a motion to dismiss pursuant to CPLR § 3211, it has long been held that “a pleading which, fairly construed, fails to allege any *facts* which constitute a wrong but only general conclusions, is entirely insufficient and may be dismissed on that ground.” Gerdes v. Reynolds, 281 N.Y. 180, 184, 22 N.E.2d 331 (1939) (emphasis in original).

Moreover, this Court is “not required to accept factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts.” Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495, 495, 815 N.Y.S.2d 547 (1st Dept. 2006); see, e.g., Snyder v. Voris, Martini & Moore, LLC, 52 A.D.3d 811, 812, 860 N.Y.S.2d 622 (2d Dept. 2008) (affirming an order dismissing a complaint where “documentary evidence . . .

resolved all factual issues in [defendant's] favor as a matter of law”); Sempra Energy Trading Corp. v. BP Prods., 52 A.D.3d 350, 860 N.Y.S.2d 71 (1st Dept. 2008) (dismissing claim where it was refuted by documentary evidence). This is true even in the context of a motion to dismiss. Normally courts accord plaintiffs every favorable inference for the purpose of determining motions to dismiss. See, e.g., Maas, 94 N.Y.2d at 91, 699 N.Y.S.2d at 718. Neither allegations consisting of bare legal conclusions nor factual claims flatly contradicted by documentary evidence, however, are entitled to “that arguendo advantage.” Id.

As will be discussed in detail below, the documentary evidence establishes that the University fully complied with the University’s policies and procedures for club approval and that Petitioners’ unsupported claims are both procedurally infirm and substantially without merit.

ARGUMENT

POINT I

PETITIONERS’ CLAIMS UNDER THE FIRST AMENDMENT ARE MISPLACED SINCE FORDHAM IS A PRIVATE UNIVERSITY

Petitioners seek to adjudicate their first cause of action – “Fordham violated its own policies and rules protecting free speech and the expression of controversial ideas” – within the purview of an administrative/Article 78 review. See Petition at ¶ 62, which is attached as Exhibit “A” at pgs. 1-34 to the Ryan Affirmation.

The First Amendment and New York State Constitution protect individual freedoms from government interference; they do not protect individual freedoms from interference from a private organization. See SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99 (1985); People v. Raab, 163 Misc.2d 382, 621 N.Y.S.2d 440 (Dist. Ct., Nassau Cnty. 1994). “As a general matter the protections of the Fourteenth Amendment do not extend to ‘private conduct

abridging individual rights.” National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).

Infringement on individual freedoms can be found against a private organization, but only when “the government has participated in the private conduct to such an extent that the conduct can be deemed to be fairly attributable to the state.” Raab, 163 Misc.2d at 386, 621 N.Y.S.2d at 443 (internal quotations omitted); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982) (focusing on “whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision” to discern whether a private organization infringed on an individual freedom) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)).

“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, 80-81 (2d Cir. 1968) (holding that “the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.”)); see also Commodari v. Long Island Univ., 89 F.Supp.2d 353 (E.D.N.Y. 2000), aff'd, 62 F. App'x 28 (2d Cir. 2003) (same). As the court found in Bellis v. Albany Medical College of Union Univ., 136 A.D.2d 42, 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, 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).

Consequently, Petitioners’ claim fails for two reasons: first, Fordham is a private university and not a state actor; and second, because the Petition does not allege a single fact, or set forth any detail as to how a state actor participated in the decision making process such that SJP’s club status denial is conduct attributable to the state.

The cases that Petitioners cite are easily distinguishable. In Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995), the dispute involved “[t]he University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the first and Fourteenth Amendments.” Id. at 822. (Emphasis added). In Healy v. James, 408 U.S. 169 (1972), again, the dispute involved “a denial by a state college of official recognition to a group of students...” Id. at 170. Bachellar v. Maryland, 397 U.S. 564 (1970), is a freedom of expression case against the State of Maryland that overturned demonstrators’ convictions for violations of Maryland law for endangering the public peace and refusal to obey a policeman’s command.

In fact the two cases involving private institutions cited by Petitioners in support of this claim actually support Fordham’s position herein. For example, in Gertler v. Goodgold, 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dept. 1985), aff’d, 66 N.Y.2d 946, 498 N.Y.S.2d 779 (1985), the court reversed the supreme court’s denial of New York University’s motion to dismiss the complaint on the grounds that public policy compels restraint concerning academic

and administrative decisions of educational institutions (such as Fordham's herein) which removes such determinations from judicial scrutiny. *Id.* In the second case cited by Petitioners, Hyman v. Cornell University, 82 A.D.3d 1309, 918 N.Y.S.2d 226 (3d Dept. 2011), the court affirmed the dismissal of petitioner's Article 78 proceeding against Cornell University ("Cornell") which had found that petitioner had violated Cornell's Code of Conduct. Relevant to the discussion herein, the court also noted that: "It is well settled that in reviewing a university's disciplinary determinations, 'court[s] must determine whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings.'" *Id.* at 1310 (internal quotations omitted). As will be seen in the cases cited in the discussion below, the same rationale applies to Fordham's decision herein.

Moreover, Petitioners' attempt to cobble together various distinct and inapplicable policies of Fordham concerning Demonstrations on Campus, the Bias Related Incidents and Hate Crime Policy as well as Fordham's Mission Statement (see Petition at ¶¶ 48-49, 73), to create a First Amendment claim against a private university when, as seen at length above and not to be repeated herein, one is not legally cognizable, necessarily fails.

Petitioners do not allege and did not seek to demonstrate on campus. As such, the University's Demonstration Policy is clearly inapplicable. Similarly, Petitioners did not file a bias claim nor do they allege that they did. As such, that policy is not impacted herein. Finally, Petitioners cite portions of Fordham's Mission Statement as being applicable herein. Fordham's Mission Statement reads in pertinent part:

Fordham strives for excellence in research and teaching, and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth.

Fordham affirms the value of a core curriculum rooted in the liberal arts and sciences. The University seeks to foster in all its students life-long habits of

careful observation, critical thinking, creativity, moral reflection and articulate expression.

In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own.

Mission Statement, FORDHAM UNIV. (Apr. 28, 2005), available at https://www.fordham.edu/info/20057/about/2997/mission_statement.

Nowhere in that statement does Fordham create a right for students to have any 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. See e.g. *Romeo v. Seton Hall University*, 378 N.J. Super. 384, 875 A.D. 2d 1043 (2005) (a contractual relationship cannot be based on isolated provisions in a student handbook). In other words, Petitioners are 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.

Based on the foregoing, it is clear that Fordham, as a private institution, in no way impacted Petitioners' First Amendment rights or otherwise violated its internal policies and thus the first cause of action should be dismissed.

POINT II

NEW YORK LAW CONSTRAINS JUDICIAL REVIEW OF A UNIVERSITY'S ACADEMIC AND ADMINISTRATIVE DECISIONS

Based on sound considerations of public policy, New York courts do not typically intervene in controversies involving an educational institution's academic and administrative determinations. Matter of Olsson v. Bd. of Higher Ed. of City of N.Y., 49 N.Y.2d 408, 413, 426 N.Y.S.2d 248, 250 (1980). "This public policy is grounded in the view that in matters wholly

internal these institutions are peculiarly capable of making the decisions which are appropriate and necessary to their continued existence.” Gertler v. Goodgold, 107 A.D.2d 481, 485, 487 N.Y.S.2d 565, 569 (1st Dept. 1985) (internal citations omitted). Because matters involving academic standards generally rest upon the subjective judgment of professional educators, the issues reviewed in such cases are based on whether the institution has acted in good faith or its action was arbitrary or irrational. Tedeschi v. Wagner College, 49 N.Y.2d 652, 658, 427 N.Y.S.2d 760 (1980).

In general, “[c]ourts retain a restricted role in dealing with and reviewing controversies involving colleges and universities.” Matter of Hendessi v New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech., 36 Misc. 3d 1241(A), 3, 960 N.Y.S.2d 50 (Sup. Ct., N.Y. Cnty. 2012) (quoting Maas v. Cornell Univ., 94 N.Y.2d 87, 92, 699 N.Y.S.2d 716, 719 (1999)). Courts are reluctant to become involved in matters involving educational institutions, reflecting “the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment [that] these institutions are, for the most part, better suited to make.” Keles v. Trustees of Columbia University in City of New York, 74 A.D.3d 435, 435-36, 903 N.Y.S.2d 18, 19 (1st Dept. 2010) (citing Maas, 94 N.Y.2d at 91, 699 N.Y.S.2d at 718)); see also Matter of Olsson, 49 N.Y.2d at 413 (cautioning that courts should “exercise the utmost restraint in applying traditional legal rules to disputes within the academic community”).

Courts consistently acknowledge the principle that, “since the academic and administrative decisions of educational institutions involve the exercise of subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny.” Gertler, 107 A.D.2d at 486 (citing Matter of Olsson, 49 N.Y.2d 408, 426 N.Y.S.2d 248); see also Radin v. Albert Einstein Coll. of Med. of Yeshiva Univ., No. 04-cv-

704(RPP), 2005 WL 1214281, at *10 (S.D.N.Y. May 20, 2005) (reiterating that courts have a “restricted role” in reviewing academic and administrative decisions at private universities). Courts generally will not substitute their own views for those of officials of an educational institution. See, e.g., Maas, 94 N.Y.2d at 92, 699 N.Y.S.2d at 719.

Moreover, it is well settled that a college or university has the authority to adopt resolutions and enforce policies as it deems necessary to its duty of supervision and control of the institution at large. Delta Kappa Epsilon Alumni Corp. v. Colgate University, 11 Misc.3d 1060(A), 816 N.Y.S.2d 694 (Sup. Ct., Madison Cnty. 2006) (citing Beta Sigma Rho, Inc. v. Moore, 46 Misc.2d 1030, 1035, 261 N.Y.S.2d 658, 664 (Sup. Ct., Erie Cnty. 1965), aff'd 25 A.D.2d 719 (4th Dept. 1966) (“the Board of Trustees may adopt such resolutions, including the outlawing of national fraternities and social organizations, as it deems necessary, to its duty of supervision and control of its educational institutions”)). Additionally, “[s]tudent organizations do not have an unqualified right to be recognized by a college administration.” American Civil Liberties Union of Virginia, Inc. v. Radford College, 315 F.Supp. 893, 896 (W.D.V.A. 1970) (where a campus organization’s conduct would be unduly disruptive of the orderly functioning of the institution, the college has a reasonable basis not to recognize the organization on campus). “College officials properly have wide discretion in operating the school and in determining what actions are most compatible with its educational objectives.” Id. (citing Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195 (6th Cir. 1969) (finding university’s suspension of students for their distribution of literature intended to cause disruption and disturbance on campus proper because a university has the right to ensure an orderly environment compatible with its educational objectives); Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) (“It is obvious that where there is actual or

potentially disruptive conduct, or disorder or disturbance by the petitioners, or interference with the work of the school or of the rights of other students, or threats or acts of violence on the school premises, or substantial disorder, then reasonable action by school authorities is constitutionally permitted”); Clemson University Vietnam Moratorium Committee v. Clemson University, 306 F.Supp. 129 (D.S.C. 1969).

In Fordham’s case, Dean Eldredge, a senior, experienced professional, who has held his current position for over 11 years and has been part of Fordham’s Administration for over 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. Consequently, based on his independent research of the organization at issue (SJP), a thorough review of the Petitioners’ application and materials submitted by others, and discourse with administrators at other institutions with SJP chapters, numerous Fordham constituencies including many of the Petitioners, and other interested students, he denied the application. See Eldredge Affidavit at ¶¶ 3 to 7 and Eldredge Affidavit at ¶¶ 14 to 28; see also Exhibit M at pgs. 1-60 of Eldredge Affidavit. As seen in his affidavit, Dean Eldredge evaluated the potential polarizing effects of the proposed SJP chapter on campus and determined that it was not in the best interest of the overall campus community for such an organization to exist in the proposed form on the Lincoln Center campus. Id. This decision involved many hours of research, discussion and deliberation. Id.

As such, in accordance with well-established precedent, the reasoned and rational decision by Dean Eldredge to deny SJP official club recognition at the Lincoln Center campus is entitled to deference and should not be disturbed by this Court as a matter of public policy.

POINT III

**THE UNIVERSITY COMPLIED WITH ITS
POLICIES AND PROCEDURES AND THE DECISION TO DENY
SJP CLUB STATUS WAS NEITHER ARBITRARY NOR CAPRICIOUS**

The University recognizes that this Court must assure itself that Fordham followed its applicable policies and procedures in reviewing Petitioners' application to form an SJP chapter at the Lincoln Center campus. The University also recognizes that its determination cannot be arbitrary or capricious. As seen in Point II above and as seen in the very detailed affidavits of Dean Eldridge and Dr. Wenzel submitted herewith, the University has met both of these tests. Therefore, this Court should not disturb that decision.

In the context of this matter, judicial review is limited to whether an institution's academic determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute. See Matter of Dopp v State Univ. of N.Y., 146 A.D.3d 1058, 1061, 44 N.Y.S.3d 608 (3d Dept. 2017); Matter of Susan M. v. New York Law School, 76 N.Y.2d 241, 246, 557 N.Y.S.2d 297 (1990). "To determine whether a university has acted in bad faith, arbitrarily or capriciously, its actions must be judged against its own stated policies and regulations." Keles v. New York Univ., No. 91-cv-7457(SWK), 1994 WL 119525, at *6 (S.D.N.Y. 1994) (granting summary judgment in favor of university and dismissing the complaint) (citing Matter of Olsson v. Board of Higher Educ. of City of N.Y., 49 N.Y.2d 408, 416, 426 N.Y.S.2d 248, 252-53 (1980)).

In cases, such as here, that are unrelated to academic achievement, the New York Court of Appeals clearly defined the standard of review as: "whether the institution has acted in good faith or its action was arbitrary or irrational." Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 658, 427 N.Y.S.2d 760 (1980). "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, 540 (1st Dept. 2007) (internal citations omitted). “Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious.” Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Institute, 260 A.D.2d 992, 993, 689 N.Y.S.2d 292 (3d Dept. 1999); see also 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); Ebert v. Yeshiva Univ., 28 A.D.3d 315, 813 N.Y.S.2d 408 (1st Dept. 2006) (citing Al-Khadra, 291 A.D.2d 865). The Court's inquiry is limited to whether the university substantially complied with its own guidelines or procedures. See Mu Chapter of Delta Kappa Epsilon, by Swett v. Colgate University, 176 A.D.2d 11, 578 N.Y.S.2d 713 (3d Dept. 1992).

As set forth by the Court of Appeals in Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216, 10 N.Y.S.3d 156 (2015), “[a] determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules (Matter of Harris v. Trustees of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959, 479 N.Y.S.2d 216, [1984], rev'g for reasons stated in dissenting op. of Kassal, J., 98 A.D.2d 58, 67-73, 470 N.Y.S.2d 368 [1983]) or imposes a penalty so excessive that it shocks one's sense of fairness (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 234, 356 N.Y.S.2d 833, [1974]).” In the absence of an affirmative showing that a university did not act in accordance

with its own policies or procedures, there can be no finding that the decision at issue was arbitrary or capricious, or otherwise improper. “To rule otherwise, would...amount to unjustifiable interference with academic affairs.” Harris v. Trustees of Columbia Univ., 98 A.D.2d 58, 71, 470 N.Y.S.2d 368, 376 (1st Dept. 1983) (reversing dismissal of petition by Special Term and reinstating and granting petition) (Kassal, J., dissenting), rev'd for reasons stated in dissenting opinion, 62 N.Y.2d 956, 479 N.Y.S.2d 216 (1984) (dismissing petition).

Thus, under either standard of judicial review, in order to prevail in this Article 78 proceeding, Petitioners must demonstrate that with respect to the actions taken against them, the University did not substantially observe its own procedures or act in good faith. As demonstrated herein, Petitioners have not met and cannot meet their burden as a matter of law.

1. The University Complied with its Club Approval Policy and Procedures (the Club Guidelines)

Without alleging how, Petitioners merely conclude that Fordham failed “...to follow its own policies and procedures and customary practices for the approval of student clubs” and therefore, acted arbitrarily and capriciously. See Petition at ¶ 76, which is attached as Exhibit “A” at pgs. 1-34 to the Ryan Affirmation. Cursory allegations aside, this is simply not the case. The documents attached to the Eldredge and Wenzel Affidavits show on their face that the University complied with each and every step of the applicable club approval process. Accordingly, pursuant to CPLR § 3211(a)(1), the University has a complete defense based on documentary evidence.

As more specifically set forth in the Wenzel Affidavit, 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 instruct students who wish to form a

club on the Lincoln Center campus as to the specific process to be followed. See Wenzel Affidavit at ¶ 7 and Exhibit “A” at pg. 5 thereto.

Specifically, as set forth in Section 8 of the University’s Club Guidelines, the club registration process at Fordham is as follows:

SECTION 8. Club Registration Process

- a. All prospective Club leaders must submit a New Club Meeting Request form online to the USG Operations mailbox in order to begin the registration process.
- b. The USG Vice President of Operations, or a delegate, shall then meet with prospective Club leaders to discuss in detail their goals for the prospective Club and give them a Club Registration Packet.
- c. The prospective Club leaders must fill out the Club Registration Packet in its entirety and submit it to the USG Operations committee for review.
- d. The Constitution will be edited by the Operations Committee and returned to the prospective Club leaders for review.
- e. The edited Constitution will then be submitted again to the Operations Committee and after passing review will be given to the Director for Student Involvement for review.
- f. The Director for Student Involvement may approve or deny the Constitution.
- g. Approval means the Constitution goes to the USG Senate for review. If the Senate passes it, the Club becomes a new club on probation.
 - i. Denial means the prospective Club leaders must edit the constitution again, and repeat the process for review by the Director for Student Involvement.
- h. Dean of Students has a right to veto any new club.**
- i. Following USG Senate approval the Club will go on 14 weeks probation during which they may only submit two budget appeals to SABC per month.
- j. At the end of the 14 weeks probation, the President or representative designee of the Club shall meet with the USG Vice President of Operations for an end of probation review, where the Club could be designated active, or go defunct based on the guidelines set forth in Section 1.

See Exhibit “A” at pg. 5 to the Wenzel Affidavit. (Emphasis added).

Despite this clear delineation of both the approval process and hierarchy, Petitioners appear to allege that the University did not follow its policies and procedures for denying club status because, *inter alia*, the policy does not give the Dean of Students veto authority over the USG Senate’s approval. See Petition at ¶ 77, which is attached as Exhibit “A” at pgs. 1-34 to the Ryan Affirmation. As seen above in the Club Guidelines set forth above, Petitioners are simply incorrect. The Club Guidelines, which set forth the University’s official club approval process,

specifically delineate both the scope of the Dean's power and when that power is to be exercised. See Exhibit "A" at pg. 5 to the Wenzel Affidavit. As specifically set forth in Section 8 of the Club Guidelines, after the USG Senate reviews the Club application and approves same, the **"Dean of Students has a right to veto any new club."** (Emphasis added). As the Court can see at subsection "h" of the Club Guidelines, the Dean of Students is the final arbiter in the approval process and his veto authority over any new club. See Exhibit "A" to the Wenzel Affidavit at pg. 5, Section 8, subparts (f),(g) and (h).

Therefore, on November 17, 2016, in accordance with the approval process set forth in the University's Club Guidelines, the USG Senate voted and its vote was to approve SJP as a club at Fordham. See Exhibit "O" at pg. 2 to the Wenzel Affidavit. Ms. Wolf, the USG VP of Operations for the 2016-2017 academic year, communicated this decision, via email, to Dean Eldredge shortly thereafter. Id. at pg. 1. On the 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.

In sum, although Petitioners are unhappy with the University's decision to deny official club recognition to SJP, governing law dictates that because it is indisputable that the University followed its policy, this Court should not second-guess the club approval and deliberation

process that took place at the University, nor can it substitute its judgment for that of University officials. Here, the documentary evidence demonstrates that Fordham carefully and completely followed its internal policies and procedures for student club approvals, and as such, there is no basis for the Court to disturb the University's decision and the Petition should be dismissed. See e.g. Hyman v. Cornell University, 82 A.D.3d 1309, 1310, 918 N.Y.S.2d 226, 228 (3d Dept. 2011) (no indication that respondent deviated from its procedures, and its determination is amply supported by the evidence); Ebert v. Yeshiva University, 28 A.D.3d 315, 315, 813 N.Y.S.2d 408, 409 (1st Dept. 2006) (upholding expulsion from private university where determination had been made pursuant to “informal processes and limitations” set forth in disciplinary rules); Zartoshti v. Columbia University, 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 University, 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 (4th Dept. 2002) (respondent substantially adhered to the procedures outlined in its Judicial System Handbook).

2. The Discrepancy Between the Club Guidelines and the Club Registration Packet is a Harmless Error Created by Students, not the University

Curiously, the Petition wholly fails to mention the very existence of the University's Club Guidelines but rather appears to rely upon a clerical error contained in the student created materials known as USG's Club Registration Packet. Simply put, Petitioners do not appreciate, or deliberately ignore, the fact that the University did not create those materials nor is it

responsible for any confusion suffered by Petitioners as a result of transcription errors contained therein.

As noted herein, at the beginning of the club approval process, prospective club leaders usually obtain a packet of materials prepared by fellow students who are members of USG. See Wenzel Affidavit at ¶ 10. USG members prepare the packet as a service to their fellow students to guide them through the club approval process. Id. USG, however, is not a department or office of the University. Id. The members are students who have been elected by their peers and they are not employees of the University. Id.

In this case, USG prepared and provided Petitioners with the aforementioned Club Registration Packet. See Wenzel Affidavit at ¶ 11. Unfortunately, in the case of Petitioners and others, the student-created Club Registration Packet that they received from USG in fall 2015 and fall 2016 was incorrect in that USG inverted the last two (2) steps in the club approval process by indicating that USG, not the Dean of Students, had final approval authority. Copies of the relevant Club Registration Packets for 2015 and 2016 are annexed to the Wenzel Affidavit as Exhibit “B” at pg. 3 and Exhibit “C” at pg. 3, respectively. In other words, the process set forth in the Club Registration Packet (as opposed to the University’s Club Guidelines) showed that the progression for club approval was Director of Involvement, Dean of Students, then USG; and that USG had the final word as to whether a club was approved by the University at the Lincoln Center campus. Id.³ That was clearly wrong. See Wenzel Affidavit at ¶ 12.

Nevertheless, and of critical importance, despite this clerical error by USG in creating the Club Registration Packet, there was no harm to Petitioners because, when the discrepancy

³ As would be expected, since discovering this discrepancy in October 2016, USG amended the Club Registration Packet and it now contains the correct club approval process set forth in the Club Guidelines (which clearly sets forth the Dean’s ultimate veto power). See Exhibit “D” at pgs. 1-13 to the Wenzel Affidavit.

between the Club Registration Packet and the Club Guidelines was discovered on October 28, 2016, the formal approval process had not yet begun in that neither USG nor the Dean had voted on the SJP application. See Wenzel Affidavit at ¶ 14 and Eldredge Affidavit at ¶ 13. In fact, Petitioners were immediately informed of the correct club approval process set forth in the University's Club Guidelines nearly a month in advance of any deliberations by USG on their application and well before the final decision of the Dean of Students was made in December, 2016. Id.

Specifically, the USG President emailed the proposed members of the SJP, including Petitioner Awad, to take responsibility for the admitted clerical error and to clarify the club approval process. That email reads in full:

From: **USGLC Fordham** <usglc@fordham.edu>
Date: Monday, October 31, 2016
Subject: Club Registration Process Clarification
To: Ahmad Awad <aawad1@fordham.edu>, Areeg Abdelhamid <aabdelhamid1@fordham.edu>, Christina Napolitano <cnapolitano2@fordham.edu>, Alexa McMenamin <amcmenamin4@fordham.edu>, Sapphira Lurie <slurie@fordham.edu>, Sofia Dadap <sdadap@fordham.edu>, Glenn Hendler <ghendler@fordham.edu>, Hend Elmadboly <helmadboly@fordham.edu>, Gunar Olsen <golsen3@fordham.edu>
Cc: Fordham USGOpsLC <usgopslc@fordham.edu>, Dorothy Wenzel <dwenzel@fordham.edu>

Good morning members of Students for Justice in Palestine,

To those of you who I have not yet met, my name is Leighton Magoon and I am the President of United Student Government. I first want to thank you for your patience and understanding during the club registration process. I am e-mailing you all this morning to provide context and transparency regarding the process United Student Government has been going through for the past academic year. Because I was President of USG during the 2015-2016 academic year when your new club request was initially made; I believed it was my responsibility to reach out.

At the end of the 2014-2015 academic year, USG approved formal Club Guidelines for the Operations committee. These guidelines are what the committee follows during the process of helping new clubs register and assisting current clubs. Additionally, there is a Club Registration Packet that all new clubs receive detailing the process of becoming

a new club. The packet details the proper steps to take including drafting a Constitution, meeting with the Operations committee, etc. Last week, the USG E-Board, Dr. Dorothy Wenzel and members of the Office for Student Involvement realized that the club registration process listed in the ClubRegistration Packet was, unfortunately, written incorrectly. The formal Club Guidelines should have been copied exactly to the Club Registration Packet but for some reason that did not happen (for transparency: the document listing the club registration process was updated during the previous academic year). During the making of said registration document, both myself and the members of the Office for Student Involvement assumed that the two documents would be exactly the same, unfortunately that was not the case and we are realizing the error in our assumptions.

The process we in USG have been going through has been reflective of the section below from our official USG Club Guidelines:

"Club Registration Process

- a. All prospective Club leaders must submit a New Club Meeting Request form online to the USG Operations mailbox in order to begin the registration process.
- b. The USG Vice President of Operations, or a delegate, shall then meet with prospective Club leaders to discuss in detail their goals for the prospective Club and give them a Club Registration Packet.
- c. The prospective Club leaders must fill out the Club Registration Packet in its entirety and submit it to the USG Operations committee for review.
- d. The Constitution will be edited by the Operations Committee and returned to the prospective Club leaders for review.
- e. The edited Constitution will then be submitted again to the Operations Committee and after passing review will be given to the Director of OSLCD for review.
- f. The Director of OSLCD may approve or deny the Constitution.
- g. Approval means the Constitution goes to the USG Senate for review. If the Senate passes it, the Club becomes a new club on probation.
 - i. Denial means the prospective Club leaders must edit the constitution again, and repeat the process for review by the Director of OSLCD.
- h. Dean of Students has a right to veto any new club.**
 - i. Following USG Senate approval the Club will go on 14 weeks probation during which they may only submit two budget appeals to SABC per month.
- j. At the end of the 14 weeks probation, the President or representative designee of the Club shall meet with the USG Vice President of Operations for an end of probation review, where the Club could be designated active, or go defunct based on the guidelines set forth in Section 1.

Probation could be extended, pending a case by case review." (Emphasis added)

As you can see, the content of the paragraph remains outdated as the guidelines were originally released in the Spring 2015 Semester and in the Fall of 2015. Sections "a." through "h." detail the process that USG has been going through during the registration process for SJP as well as the other clubs that registered so far this year. I apologize on behalf of USG for the confusion during the process we have undergone during this

process, I can guarantee that there was no malicious intent for the differences in the forms, simply a lapse in editing by both Student Involvement and the previous USG Executive Board. We will be working on editing these respective forms as soon as we can to ensure they match and there is no future confusion from new clubs during their registration process.

I hope this provides some clarification in regards to the club registration process USG has been following the past couple of months. Thank you for your time and I know you are in good hands with the Vice President for Operations, Kayla Wolf, and the members of the Operations Committee.

Best regards,
Leighton

See Exhibit "E" at pgs. 1-2 to the Wenzel Affidavit.

In sum, the University's Club Guidelines, which is the official policy of and procedure for the University with regard to student club approval, was consistent at all relevant times herein and at all times set forth the proper approval process. Conversely, the student created Club Registration Packet which contained an erroneous transcription of the policy is not binding on the University. Moreover and most importantly, at no time did USG or the Dean of Students take any action under the erroneous procedure set forth in the student created Club Registration Packet. Rather, the voting took place in full accord with the University's Club Guidelines. As such, Petitioners' application was in no way impacted or affected by the students' transcription error contained in the USG Club Registration Packet.

Consequently, the Petition, to the extent it alleges procedural irregularities, is without merit and must be dismissed.

POINT IV

THE UNIVERSITY'S DECISION WAS MADE IN GOOD FAITH

Therefore, in this matter, once it has been demonstrated that the University followed its established policies and practices in the club approval process, the only remaining inquiry for the Court is whether the decision was made in good faith. The University's decision does not

warrant judicial intervention, and must not be disturbed, so long as it was “based upon the exercise of honest discretion after a full review of the operative facts.” Matter of Mitchell v New York Med. Coll., 208 A.D.2d 929, 930, 617 N.Y.S.2d 894 (2d Dept. 1994); see also Coleman v. Hackley School, 251 A.D.2d 328, 329, 673 N.Y.S.2d 732, 732 (2d Dept. 1998) (decision to expel 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); Galiani v. Hofstra University, 118 A.D.2d 572, 499 N.Y.S.2d 182 (2d Dept. 1986); 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”).

Moreover, administrators of a college or university possess an inherent authority to maintain order on their campus and freedom of movement thereon for invited guests, students and members of the school staff. This obligation and inherent power is well documented. For example, in Beta Sigma Rho, Inc. v. Moore, 46 Misc.2d 1030, 1035, 261 N.Y.S.2d 658 (Sup. Ct., Erie Cnty. 1965), the court, found that a school’s “Board of Trustees may adopt such resolutions, including the outlawing of national fraternities and social organizations, as it deems necessary, to its duty of supervision and control of its educational institutions.” Forty-one years later, the Supreme Court in Delta Kappa Epsilon Alumni Corp. v. Colgate Univ., 11 Misc.3d 1060(A), 3, 816 N.Y.S.2d 694 (Sup. Ct., Madison Cnty. 2006), reconfirmed Deta Sigma by holding “[a] college’s Board of Trustees has the authority to adopt resolutions and implement policies as it deems necessary to supervise and control its institution.” Moreover, “[u]niversity authorities

have an inherent general power to maintain order on campus and to exclude those detrimental to its well being.” Sherman v. Yolo County Chief Probation Officer, No. CIV S-06-0931, 2006 WL 2975610, at * 2 (E.D. Cal. Oct. 17, 2006) (citing Buttny v. Smiley, 281 F.Supp. 280, 285 (D.C.Colo. 1968) (holding that suspension from university for student hazing not a violation of First Amendment right of freedom of speech or right to assemble or of Fourteenth Amendment rights) (citing Goldberg v. Regents of University of Cal., 248 Cal.App.2d 867 (Cal. Ct. of Appeals 1967))).

As detailed in the accompanying affidavits of Dean Eldredge and Dr. Wenzel, the decision to deny SJP official club status was made only after fully investigating the facts and circumstances and was indisputably based on the “exercise of honest discretion” after a full review of the operative facts. The University gave SJP an opportunity to submit all relevant information and documents deemed relevant to their club approval status. See Wenzel Affidavit at ¶¶ 15 to 45; Eldredge Affidavit at ¶¶ 3 to 7; Eldredge Affidavit at ¶¶ 14 to 28; see also Exhibit “J” at pgs. 1-60 to the Eldredge Affidavit and Exhibit “W” at pgs. 1-58 to the Wenzel Affidavit. Dean Eldredge and Dr. Wenzel also heard from other interested constituencies within the Fordham community and reviewed information from them. Id. Dean Eldredge and Dr. Wenzel also spoke with administrators at other institutions and conducted independent research regarding SJP. Id. After reviewing all of the information available concerning the application, the University determined that it could not approve a SJP chapter on the Lincoln Center campus.

As such, because the University’s decision to deny SJP club status was based on the exercise of honest discretion after a full review of the operative facts, Petitioners’ application should be dismissed.

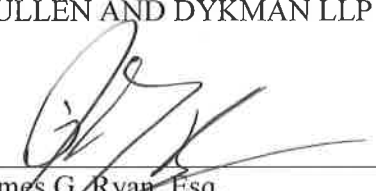
CONCLUSION

The University has demonstrated, as a matter of law, that Petitioners Ahmad Awad, Sofia Dadap, Sapphira Lurie, and Julie Norris have not set forth a cognizable cause of action under New York law. The Petition should be dismissed in its entirety pursuant to CPLR § 3211(a)(7) and CPLR § 3211(a)(1), together with such other relief as this Court deems just and proper. In the event the Court denies the motion in whole or in part, the University should be permitted to answer the petition pursuant to CPLR § 7804(f).

Dated: June 5, 2017
Garden City, New York

Respectfully submitted,

CULLEN AND DYKMAN LLP



James G. Ryan, Esq.
Attorneys for Respondent
100 Quentin Roosevelt Blvd
Garden City, New York 11530
Phone: (516) 357 - 3750
Fax: (516) 357 - 3792

Of Counsel:
James G. Ryan, Esq.
Hayley B. Dryer, Esq.