

Motion Sequence #3

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

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.

Index No. 153826/2017

Hon. Nancy M. Bannon

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION
AND EXPEDITED DISCOVERY

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS	2
Fordham’s Rules and Policies on Freedom of Expression	3
Fordham’s Veto of USG’s approval of SJP	4
ARGUMENT	6
I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION.....	6
A. PETITIONERS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE.....	7
1. Fordham violated its own policies and procedures.....	9
2. The reasons given by Fordham for its decision lacked a rational factual basis.....	12
B. PETITIONERS WILL BE IRREPARABLY HARMED BEFORE A DECISION ON THE MERITS CAN BE RENDERED UNLESS THE COURT ISSUES A PRELIMINARY INJUNCTION.....	14
C. A WEIGHING OF THE EQUITIES FAVORS PETITIONERS’ POSITION.....	16
II. PETITIONERS HAVE A RIGHT TO LIMITED DISCOVERY IN CONNECTION WITH THEIR MOTION FOR PRELIMINARY RELIEF.....	17
CONCLUSION.....	18

TABLE OF AUTHORITIES**Cases**

<i>Bachellar v. Maryland</i> , 397 U.S. 564 (1970)	10
<i>Barbour v. Knecht</i> , 296 A.D.2d 218 (1st Dep't 2002).....	14
<i>Basile v. Albany Coll. of Pharm. of Union Univ.</i> , 279 A.D.2d 770 (3d Dep't 2001)	13
<i>Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley</i> , 454 U.S. 290 (1981)	9
<i>D.F. v. Gladys Carrion</i> , 43 Misc.3d 746 (Sup. Ct. N.Y. Cnty. 2014)	13
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	15, 16
<i>Gerber Prods. Co. v. New York State Dep't of Health</i> , 47 Misc.3d 249 (Sup. Ct. Albany Cnty. 2014).....	17
<i>Gray v. Canisius Coll. of Buffalo</i> , 76 A.D.2d 30 (4th Dep't 1980)	14
<i>Healy v. James</i> , 408 U.S. 169 (1972)	13
<i>Jamaica Chamber of Commerce v. Metro. Transp. Auth.</i> , 159 Misc.2d 601 (Sup. Ct. Queens Cnty. 1993).....	7
<i>Kallini v. N. Y. Inst. of Tech.</i> , 34 Misc.3d 1211(A) (Sup. Ct. N.Y. Cnty. 2012)	8
<i>Kickertz v. N. Y. Univ.</i> , 110 A.D.3d 268 (1st Dep't 2013).....	8
<i>Klein, Wagner & Morris v. Lawrence A. Klein, P.C.</i> , 186 A.D.2d 631 (2d Dep't 1992).....	14
<i>Lee v. New York City Dep't of Hous. Pres. & Dev.</i> , 162 Misc.2d 901 (Sup. Ct. N.Y. Cnty. 1994).....	7
<i>Levine v. Feldman</i> , 215 A.D.2d 182 (1st Dep't 1995).....	17
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017)	11
<i>Melvin v. Union Coll.</i> , 195 A.D.2d 447 (2d Dep't 1993)	6, 15
<i>Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.</i> , 70 A.D.2d 1021 (3d Dep't 1979).....	7
<i>Nespoli v. Doherty</i> , 17 Misc.3d 1117(A) (Sup. Ct. N.Y. Cnty. 2007).....	17
<i>Olsson v. Bd. of Higher Education</i> , 49 N.Y.2d 408 (1980)	14

Pell v. Bd. of Education, 34 N.Y.2d 222 (1974)..... 12, 13, 14

Riccelli Enters., Inc. v. State of New York Workers' Compensation Bd., 117 A.D.3d 1438 (4th Dep't 2014) 6, 7

Rizvi v. N. Y. Coll. of Osteopathic Medicine of N.Y. Inst. of Tech., 98 A.D.3d 1049 (2d Dep't 2012) 8, 9, 12

Rockwell v. Morris, 12 A.D.2d 272 (1st Dep't 1961)..... 13

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995)..... 10

Scherbyn v. Wayne-Finger Lakes Bd. of Co-opposition, Educ. Servs., 77 N.Y.2d 753 (1991).... 13

Starishevsky v. Hofstra Univ., 161 Misc.2d 137 (Sup. Ct. Suffolk Cnty. 1994) 14

Stewart v. Parker, 41 A.D.2d 785 (3d Dep't 1973)..... 7

Stop BHOD v. City of New York, 22 Misc.3d 1136(A) (Sup. Ct. Kings Cnty. 2009)..... 17

Sylmark Holdings Ltd. v. Silicone Zone Intl. Ltd., 5 Misc.3d 285 (Sup. Ct. N.Y. Cnty. 2004).... 17

Tedeschi v. Wagner Coll., 49 N.Y.2d 652 (1980)..... 1, 8

Tucker v. Toia, 54 A.D.2d 322 (4th Dep't 1976)..... 16

Ulster Home Care Inc. v. Vacco, 255 A.D.2d 73 (3d Dep't 1999)..... 15, 16

Vanech v. City of New York, Index No. 118694/98, 2000 N.Y. Misc. LEXIS 438 (Sup. Ct. N.Y. Cnty. 2000)..... 13

Warner v. Elmira Coll., 59 A.D.3d 909 (3d Dep't 2009)..... 8, 12

Statutes

Article 78 of N.Y. C.P.L.R. *passim*

N.Y. C.P.L.R. 408..... 17

N.Y. C.P.L.R. 6301..... 6, 7

N.Y. C.P.L.R. 7805..... 7

Treatises

DAVID L. FERSTENDIG & OSCAR G. CHASE, WEINSTEIN KORN & MILLER CPLR MANUAL § 6301.05 (3d ed. 2017) 14

PRELIMINARY STATEMENT

Petitioners Sofia Dadap and Julie Norris are Fordham University students who care deeply about human rights and are interested in starting a Students for Justice in Palestine (“SJP”) club at Fordham’s Lincoln Center campus before they graduate. Ms. Dadap is a senior scheduled to graduate in May 2018. Ms. Norris is scheduled to graduate in May 2019.

For more than a year, students at Fordham engaged in a process seeking to obtain official recognition of a club called SJP. Their goal was to build support on campus for justice and human rights for Palestinians. In November 2016, the United Student Government (“USG”) Senate approved SJP as a club at Fordham. Soon thereafter, Dean of Students Keith Eldredge overruled the USG’s decision and denied SJP official club status, an unprecedented action.

It is clear from the reasons proffered by Dean Eldredge that he was motivated by the belief that SJP’s advocacy for Palestinian rights and its criticism of Israel would be disagreeable to some members of the Fordham community. As a result of Fordham’s decision, Petitioners have been unable to engage in the kinds of activities available to club members.

In its decision denying SJP official recognition, Fordham failed to follow its own rules and policies that bar it from restricting students’ expressive activities based on the positions being advocated. In addition, Fordham’s decision relied on factors for which there was no evidentiary basis. New York courts routinely review the non-academic decisions of educational institutions, as those determinations are “closely akin to the day-to-day work of the judiciary,” *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 658 (1980). Because Fordham’s refusal to recognize SJP violated its own rules and was arbitrary and capricious, judicial intervention under Article 78 of the N.Y. C.P.L.R. is appropriate.

A preliminary injunction is necessary to remedy the harm caused by Fordham’s unlawful

action. Fordham's policies acknowledge that participation in student clubs is a fundamental aspect of campus life. Petitioners Awad and Lurie were already denied this opportunity, which they will never be able to retrieve. Every day that SJP continues to be denied recognition, Petitioners Dadap and Norris are being deprived of one of the important experiences to which they are entitled as Fordham students.

If 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. This Court should, therefore, issue a preliminary injunction reinstating the decision of the USG.

STATEMENT OF FACTS

The process to seek official recognition for SJP began in November 2015. Verified Petition [hereinafter "Pet."], Dkt. No. 1, at ¶ 2. As stated in its proposed constitution, the mission of SJP at Fordham is "to build support in the Fordham community among people of all ethnic and religious backgrounds for the promotion of justice, human rights, liberation, and self-determination for the indigenous Palestinian people." Pet. at ¶ 17. As an official club, students with SJP would be able to invite guest speakers to campus, receive Fordham funding for events and programs, distribute literature, post materials, promote club activities, solicit members at Fordham's Club Day and other club fairs throughout the year, and book rooms for meetings. Pet. at ¶¶ 58-59; Affidavit of Sofia Dadap in Support of Petitioners' Motion for a Preliminary Injunction and Expedited Discovery, [hereinafter "Dadap Aff."], filed herewith, at ¶¶ 6-8.

Without official club status, SJP may not do any of these activities. Pet. at ¶¶ 58-59; Dadap Aff. at ¶¶ 6-8.

Fordham's Rules and Policies on Freedom of Expression

Fordham's free expression commitment begins with its Mission Statement, which "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 of and reverence for cultures and ways of life other than their own." Pet. at ¶ 48. The University also promises that "[e]ach member of the University has a right to freely express his or her positions and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society."¹ Fordham assures it will not infringe on the rights of students "to express [their] positions" and engage in "other legitimate activities."² Elsewhere, Fordham reaffirms its commitment to "freedom of expression and the open exchange of ideas. The expression of controversial ideas and differing views is a vital part of University discourse."³ Finally, in its consideration of requests to approve student demonstrations, Fordham says that a "request to use space at Fordham for a protest or a demonstration has never been turned down based on the viewpoint or content of the protesters/demonstration."⁴

¹ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited Nov. 1, 2017). Fordham President, Father McShane, has also expressed his understanding of these principles, stating "you know that I am tireless...in advocating for the University's mission, in urging our students...to be men and women for others...I hope our graduates leave the campus bothered. Bothered by injustice. Bothered by poverty. Bothered by suffering." Affidavit of Glenn Hendler, Dkt. No. 67, at ¶ 19.

² *Demonstration Policy*, *supra* note 1.

³ *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimespolicy (last visited Nov. 1, 2017).

⁴ *Demonstrations FAQ*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6564/demonstrations_faq (last visited Nov. 1, 2017).

Taken together, these rules express the University's unequivocal commitment to bedrock principles of free speech. Clubs, as a vehicle for collective student expression, represent a fundamental exercise of those principles. For Petitioners, an SJP club would be their means of collectively advocating for Palestinian human rights. Pet. at ¶¶ 11-14. Denying the right to form such a club not only robs Petitioners of the opportunity to educate themselves and others about an issue they care deeply about, but also sends a chilling message to the campus community that advocacy for this particular cause is not sanctioned by the administration, making pariahs of the Petitioners and their supporters, and warning others that viewpoints that the administration disfavors are off limits. *Dadap Aff.* at ¶¶ 9-10.

Fordham's Veto of USG's approval of SJP

At the beginning of the 2016 academic year, the students who were interested in forming SJP asked about the status of their application. After some back-and-forth discussions with Dorothy Wenzel, Director of the Office of Student Leadership and Community Development, USG members and Eldredge, the students revised SJP's constitution to state its independence and autonomy from National Students for Justice in Palestine (NSJP), and provided Fordham written confirmation from NSJP that it does not require specific language in SJP groups' constitutions. Second Affidavit of Ahmad Awad [hereinafter "Sec. Awad Aff."], Dkt. No. 58, at ¶¶ 10-17. *See also* Pet. at ¶¶ 20, 45; Affidavit of Dorothy Wenzel [hereinafter "Wenzel Aff."], Exhibit [hereinafter "Ex."] I, Dkt. No. 35, at p. 2; Ex. J, Dkt. No. 36, at p. 1; Ex. K, Dkt. No. 37, at p. 2. Moreover, the NSJP website also clearly states, "we do not dictate to SJP chapters: **all individual SJPs are autonomous student orgs** on their respective campuses." Pet. at ¶ 45. (Emphasis in original.)

Thereafter, SJP's constitution was sent to the USG Senate. On November 17, 2016, the USG Executive Board and Senate voted to approve SJP as a club. Pet. at ¶ 28. Eldredge subsequently wrote Petitioners stating that he was informed of the decision to approve the SJP club and that he "now need[s] to review the request before it is finalized." Pet. at ¶ 29. According to the Affidavit he submitted in support of Fordham's Motion to Dismiss, Eldredge consulted with students and faculty members, some of whom provided materials or expressed views that were highly critical of the positions advocated by SJPs and of the activities conducted by some SJPs on other college campuses. *See* Affidavit of Keith Eldredge [hereinafter "Eldredge Aff."], Dkt. No. 15, at ¶ 18.

On December 22, 2016, Eldredge emailed Petitioners stating that he was overruling USG's approval of SJP. Pet. at ¶ 32. He wrote that he could not support "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;" that the topic of the "Israeli-Palestinian conflict . . . often leads to polarization" and the topic and purpose of SJP "points toward that polarization." Eldredge Aff., Ex. A at p. 1. He subsequently told the students that his decision was final and non-appealable. Pet. at ¶ 39.

On January 20, 2017, Jeffrey Gray, Fordham's Vice President for Student Affairs, in response to a letter from counsel for Petitioners, added another justification, stating that the denial of SJP's club status "was based on the fact that chapters of this organization have engaged in behavior on other college campuses that would violate this University's student code of conduct." Pet. at ¶ 41.

In the Affidavit Eldredge submitted in support of Fordham's Motion to Dismiss, he said that his "overarching concern was with the conduct exhibited by other chapters of SJP and its

polarizing effect on the Lincoln Center campus, which obviously can lead to issues of safety and security.” Eldredge Aff at ¶ 23.

The reasons offered by Eldredge and Gray are plainly pretextual. Fordham has never barred speech, speakers, or clubs because they may lead to “polarization,” as evidenced by its invitations to Karl Rove and Newt Gingrich to speak on the campus (Eldredge Aff. at ¶ 6), and by its official recognition of potentially “polarizing” clubs such as the Feminist Alliance and the Rainbow Alliance (Wenzel Aff., Ex. R, Dkt. No. 44, at p. 2). As for the allegedly disruptive behavior of some SJPs on other campuses, Fordham knew from Petitioners and the revised SJP constitution that the proposed club would be entirely independent of both the NSJP and other campus SJPs. Fordham had absolutely no information to the contrary.

Fordham’s rejection of USG’s approval of club status for SJP was motivated by hostility to the views it advocates. Fordham’s decision lacked any rational basis in fact, violated its own rules, and was arbitrary and capricious. Because SJP has not been officially recognized, Petitioners and other students interested in establishing SJP at Fordham have been unable—and will continue to be unable—to engage in a variety of activities that recognized clubs can engage in. See Dadap Aff. at ¶ 6.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

Courts are authorized to issue a preliminary injunction in an Article 78 proceeding in the same manner as authorized under N.Y. C.P.L.R. 6301. See *Melvin v. Union Coll.*, 195 A.D.2d 447, 448 (2d Dep’t 1993) (granting a temporary injunction forbidding a college from suspending a student during the pendency of an Article 78 proceeding); see also *Riccelli Enters., Inc. v. State*

of *New York Workers' Compensation Bd.*, 117 A.D.3d 1438, 1439 (4th Dep't 2014) (deciding that although petitioners moved for a stay pursuant to N.Y. C.P.L.R. 7805, the Supreme Court properly granted their request for relief as a request for preliminary injunction); *see also Stewart v. Parker*, 41 A.D.2d 785, 786 (3d Dep't 1973) (a party can request a preliminary injunction under N.Y. C.P.L.R. 6301 or a stay under N.Y. C.P.L.R. 7805 during an Article 78 proceeding).

The standard for the issuance of a preliminary injunction under N.Y. C.P.L.R. 6301 and N.Y. C.P.L.R. 7805 are identical: "In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that a balancing of the equities demonstrates that the moving party is entitled to injunctive relief." *Lee v. New York City Dep't of Hous. Pres. & Dev.*, 162 Misc.2d 901, 909 (Sup. Ct. N.Y. Cnty. 1994). *See also Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 (3d Dep't 1979); *Jamaica Chamber of Commerce v. Metro. Transp. Auth.*, 159 Misc.2d 601, 603 (Sup. Ct. Queens Cnty. 1993).

A. PETITIONERS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE.

Fordham's decision to deny SJP official club status—in violation of its own policies and with disregard for the evidentiary record—is subject to close judicial scrutiny. Fordham's decision to overrule approval of SJP was a non-academic determination, unrelated to issues of academic performance.⁵ Courts in Article 78 proceedings review a university's non-academic

⁵ As Dean of Students, Eldredge oversees Student Life, a part of the Division of Student Affairs and is "responsible for many of the activities that are not directly related to [students'] academic courses," including overseeing disciplinary hearings. *See Welcome from Dean Eldredge*, FORDHAM UNIV., https://www.fordham.edu/info/25099/welcome_from_the_deans/10007/welcome_from_dean_eldredge (last visited Oct. 25, 2017); *Student Conduct System*, FORDHAM UNIV.,

determinations “closely” to ensure that the university has followed “its own rules,” in addition to reviewing “whether the institution has acted in good faith or its action was arbitrary or irrational.” *Tedeschi*, 49 N.Y.2d at 658 (annulling university’s non-academic decision because it did not conform to its own rules and guidelines). “To suggest . . . that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words.” *Id.* at 662. *See also Rizvi v. N.Y. Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 A.D.3d 1049, 1052 (2d Dep’t 2012) (“When, as here, action taken against a student is predicated upon grounds unrelated to academic achievement, the operative standard requires that the educational institution proceed in accordance with its own rules and guidelines.”); *Kallini v. N.Y. Inst. of Tech.*, 34 Misc.3d 1211(A), 1211 (A) (Sup. Ct. N.Y. Cnty. 2012) (“If the university has not substantially complied with its own guidelines and policies or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious.”).

A non-academic university determination must “substantially adhere to its own published rules and guidelines” *and* be based on “a rational interpretation of the relevant evidence.” *Kickertz v. N.Y. Univ.*, 110 A.D.3d 268, 272 (1st Dep’t 2013); *see also Warner v. Elmira Coll.*, 59 A.D.3d 909, 910 (3d Dep’t 2009). Fordham did neither. It failed to substantially comply with its policies that allow students to freely express their positions—including by forming clubs—even when those ideas are controversial. Fordham’s stated justifications for the decision—“polarization” and “safety and security” concerns resulting from the alleged conduct of *other* independent SJPs on *other* campuses—are wholly without basis in fact and contradicted by the evidence.

https://www.fordham.edu/info/21684/university_regulations/3808/student_conduct_system (last visited Oct. 25, 2017).

1. Fordham violated its own policies and procedures.

Denying official recognition to SJP because of its political views violated Fordham's obligation to "proceed in accordance with its own rules and guidelines." *Rizvi*, 98 A.D.3d at 1052. Fordham's policies guaranteeing free expression, as reflected in the University Mission Statement, Demonstration Policy, and Bias-Related Incidents and/or Hate Crimes policy, together establish Fordham's unequivocal commitment to permitting the expression of viewpoints and ideas without regard to content.

As stated above, Fordham values and guarantees "freedom of expression and the open exchange of ideas" and "freedom of inquiry," as well as ensures the right of students to "freely express" dissenting positions. *See supra* pp. 3-4. Fordham also clarifies that "demonstrations are sanctioned forms of freedom of speech,"⁶ pledging that the "expression of controversial ideas and differing views is a vital part of University discourse."⁷ Fordham has committed itself, through a variety of written policies, to protect a diverse range of expression, even when Fordham disagrees with the views expressed.

Fordham's commitment to support a "wide variety of clubs and organizations" to stimulate students' "intellectual and personal growth" reflects these same free expression principles.⁸ Student clubs are a primary vehicle for students to express their views, both individually and collectively. *See, e.g., Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."). While Petitioners would not claim the right to have a club if Fordham barred all

⁶ *Demonstration Policy*, *supra* note 1.

⁷ *Bias-Related Incidents and/or Hate Crimes*, *supra* note 3.

⁸ *Student Leadership and Community Development*, FORDHAM UNIV., <http://216.230.117.32/section3/section55/index.html> (last visited Nov. 2, 2017).

clubs, having decided to allow clubs and to adopt policies that encourage the expression of controversial points of view, Fordham is prohibited—by those very policies—from rejecting a club out of distaste for the positions that the club advocates.

Fordham, no less than other colleges, purports to abide by fundamental principles of freedom of expression, which reject the notion that certain ideas will not be tolerated because some may find them offensive or controversial. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (speech cannot be regulated due to “the specific motivating ideology or the opinion or perspective of the speaker”). *See also Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (“[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.”).

The principles these cases express are echoed by Fordham’s Mission Statement and its policies governing student speech. And even though not bound by the First Amendment, Fordham’s consciousness of its rules is reflected in its statement that it will not deny approval of a demonstration “based on the viewpoint or content of the protesters/demonstration. . . .”⁹ Though Fordham’s campus is private property, this is quite similar to the way municipalities coordinate with those planning protests in public spaces. Fordham’s commitment to viewpoint neutrality notwithstanding, Eldredge and Gray’s explanations of Fordham’s decision to veto SJP’s approval reveal clear hostility to the positions advocated by SJP:

a. Eldredge’s letter states that SJP would “advocat[e] political goals . . . [that] clearly conflict with and run contrary to the mission and values of the University.” Eldredge Aff.,

⁹ *Demonstrations FAQ*, FORDHAM UNIV, https://www.fordham.edu/info/21684/university_regulations/6564/demonstrations_faq (last visited Nov. 1, 2017).

Ex. A at p. 1. But Fordham's values, as expressed in its Mission Statement, include a commitment to education that assists in "the promotion of justice" and "the protection of human rights." Pet. at ¶ 17. Those values are self-evidently consistent with SJP's advocacy of justice and human rights for the Palestinian people. *Id.*

b. Eldredge justifies denying recognition to SJP because the topic and purpose of SJP would lead to polarization rather than dialogue. Eldredge Aff., Ex. A at p. 1. But given that Fordham previously extended speaking invitations to such polarizing figures as Karl Rove and Newt Gingrich and recognized such potentially polarizing clubs as the Feminist Alliance and the Rainbow Alliance, its purported concern with the issues raised by SJP was more about the substance of those issues than their impact on the campus. Moreover, concerns about polarizing ideas are merely a euphemism for controversial views, which Fordham has pledged to permit.¹⁰

c. Fordham's purported concern about the allegedly disruptive activities of SJP groups on other campuses, expressed by Eldredge and Vice President Gray, is patently frivolous, given the evidence that SJP was completely independent and autonomous, including the assurance given by Petitioners and by NSJP, as well as the explicit statement in SJP's proposed constitution. *See supra* at p. 4. Fordham has no evidence upon which to question that fact.

d. Eldredge acknowledges that he would agree to a club "without a name that attracts the level of animosity and safety concerns that other campuses with SJP chapters throughout the country have experienced." Eldredge Aff. at ¶ 25. Eldredge understood from Petitioner Awad that the students chose the name SJP "to connect to the broader student movement for justice in Palestine and . . . the name itself conveys a political message that was significant" for the students. Second Affidavit of Ahmad Awad [hereinafter "Sec. Awad Aff."],

¹⁰ As the United States Supreme Court has recently affirmed, denying a benefit based on offense to others is viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744, 1749 (2017).

Dkt. No. 58, at ¶ 9. Petitioner Dadap, too, has emphasized the importance of the name SJP to signal “being a part of the growing student movement for justice in Palestine.” Dadap Aff. at ¶ 4. Eldredge’s willingness to accept a club with a name that conveyed a different political message than SJP, while allowing the club to engage in the same activities, is clear evidence that it was the club’s message and not “safety and security” concerns that troubled him.

Fordham’s policies concerning student speech commit the college to tolerate varied political messages regardless of their viewpoint. In denying club recognition to SJP because of the views that it advocates, Fordham violated its rules and acted arbitrarily and capriciously.

2. The reasons given by Fordham for its decision lacked a rational factual basis.

In addition to ascertaining whether educational institutions have adhered to their own policies and procedures, courts also examine whether university decisions are founded in fact and supported by the evidentiary record. *See Pell v. Board of Education*, 34 N.Y.2d 222 (1974). If they are found to be lacking in “rational basis” or are “taken without regard to the facts,” they will be voided. *Id.* at 231. *See also Warner*, 59 A.D.3d at 910 (“While respondent adhered to its written rules, its determination was arbitrary and capricious because the determination was not rationally based upon, and was contradicted by, the evidence.”); *Rizvi*, 98 A.D.3d at 1053-54 (university “acted irrationally and, hence, arbitrarily and capriciously” because “there is no basis in this record supporting [the university]’s determination to treat the petitioner differently” than other students).

Fordham has said that an additional reason for denying SJP official status is that allegedly disruptive behavior of independent SJPs on other campuses raises the possibility that similar

behavior may occur on Fordham's campus.¹¹ Eldredge Aff. at ¶ 22. This justification not only lacks "foundation in fact" and "sound basis in reason," *Pell*, 34 N.Y.2d at 231; it *believes* facts and reason, and its purported basis was flatly contradicted by the uncontroverted evidence that SJP would be independent and autonomous. On numerous occasions, Petitioners declared to Fordham administrators, and included in their constitution, that SJP at Fordham was completely independent from NSJP and SJPs on other campuses. *See supra* at p. 4. Fordham had absolutely no evidence to the contrary. *See D.F. v. Gladys Carrion*, 43 Misc.3d 746, 754 (Sup. Ct. N.Y. Cnty. 2014) (concluding that decision is arbitrary and capricious in part because it "rests on the premise that has no foundation in the record"). Furthermore, Eldredge acknowledges that the accuracy or truth of the media reports on which he relied regarding other SJP groups' purported conduct was irrelevant to his decision. Eldredge Aff. at ¶ 24.¹² And the mere fact that there are other organizations with the same name does not mean that they will engage in the same conduct. *See Healy v. James*, 408 U.S. 169, 186 (1972) (college president's decision to deny official recognition to a student group because it would be "disruptive" violated students' associational rights because "guilt by association alone" was "an impermissible basis" for the decision). Fordham's reliance on the activities that were alleged to have occurred on other

¹¹ Because Fordham did not raise safety and security concerns when it made its decision, it cannot rely on such concerns now. The "reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination. If those grounds are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper, alternative ground in the Article 78 proceeding." *Vanech v. City of New York*, Index No. 118694/98, 2000 N.Y. Misc. LEXIS 438 (Sup. Ct. N.Y. Cnty. 2000), at *11-12, citing *Scherbyn v. Wayne-Finger Lakes Bd. of Co-opposition, Educ. Servs.*, 77 N.Y.2d 753 (1991).

¹² Moreover, Fordham's purported fear of "problematic behavior" that "would violate the University's Code of Conduct" is "sheer speculation" that cannot constitute a rational basis for the University's determination. *Basile v. Albany Coll. of Pharm. of Union Univ.*, 279 A.D.2d 770, 772 (3d Dep't 2001) (college's determination was arbitrary and capricious because allegations "based on sheer speculation" cannot "rationally support the determinations"; *see also Rockwell v. Morris*, 12 A.D.2d 272, 276 (1st Dep't 1961) (denying a permit to deliver a speech violated the department's regulation because there was "no competent record upon which [to]... reach the conclusion, even if otherwise legally permissible, that [Petitioner's] proposed speech...was likely to create the disorders.")).

campuses as a basis for its decision regarding SJP lacked any “rational basis” and was “taken without regard to the facts.” *Pell*, 34 N.Y.2d at 231.¹³

Fordham’s inference that SJP would engage in disruptive behavior was based entirely on the alleged behavior of SJP clubs on other campuses. Not only did it do nothing to confirm the truth of the allegations concerning what occurred on other campuses, but, more importantly, it had no reason whatsoever to assume that SJP at Fordham would be influenced by the activities of other clubs on other campuses. Fordham’s decision was driven by hostility to SJP’s political message—the University’s own hostility as well as the hostility of others who influenced the outcome—rather than rationally based upon a reliable evidentiary record. In *Starishevsky v. Hofstra University*, the court annulled a determination when the private university made it “not upon the record but in an apparent reaction to what it believed was acceptable in the eyes of the community, and then sought to justify the result.” 161 Misc.2d 137, 148-49 (Sup. Ct. Suffolk Cnty. 1994). The Court should do the same here.

B. PETITIONERS WILL BE IRREPARABLY HARMED BEFORE A DECISION ON THE MERITS CAN BE RENDERED UNLESS THE COURT ISSUES A PRELIMINARY INJUNCTION.

Irreparable injury is defined as “that which cannot be repaired, restored, or compensated in money or where the compensation cannot be measured.” DAVID L. FERSTENDIG & OSCAR G. CHASE, WEINSTEIN KORN & MILLER CPLR MANUAL § 6301.05 (3d ed. 2017). The Court’s determination of irreparable injury should be based upon an assessment of the impact of non-intervention upon the party seeking relief, especially when that impact is greater than what an enjoined defendant would suffer. *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186

¹³ Courts will also nullify university determinations made in bad faith. *See, e.g., Gray v. Canisius Coll. of Buffalo*, 76 A.D.2d 30, 34 (4th Dep’t 1980). “An academic institution must act in good faith in its dealings with its students,” *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 414 (1980), and “[a] showing of unequal treatment is sufficient” to allege bad faith. *Barbour v. Knecht*, 296 A.D.2d 218, 224 (1st Dep’t 2002).

A.D.2d 631, 633 (2d Dep't 1992) (granting a preliminary injunction preventing the appellants from using the firm's name in an action to recover damages for breach of contract).

Petitioner Dadap is scheduled to graduate from Fordham at the end of this academic year (May 2018), Dadap Aff. at ¶ 2, and Petitioner Norris is scheduled to graduate the following year (May 2019). Affidavit of Julie Norris [hereinafter "Norris Aff."], Dkt. No. 6, at ¶ 1. Absent preliminary relief, Petitioners cannot get a "full measure of relief" because a decision on the merits will not benefit Petitioner Dadap, and may not benefit Petitioner Norris. Dadap Aff. at ¶ 2; Affirmation of Alan Levine, filed herewith, at ¶ 3. Petitioner Dadap describes the importance of belonging to a club that will allow them to educate Fordham students about the denial of Palestinian rights and to encourage those students to join the international human rights community in seeking justice for Palestinians. Dadap Aff. at ¶ 8; Norris Aff. at ¶ 4. Fordham's policies make clear that participation in official clubs is an integral part of the student experience. Without prompt relief from this Court, Petitioners Dadap and Norris will be denied a college experience which both they and Fordham acknowledge to be an important one. The denial of that experience cannot be adequately remedied with compensation and Petitioners will continue to suffer harm pending the final determination of the litigation. *Melvin*, 195 A.D.2d at 448. Fordham's denial of Petitioners' opportunity to enjoy this important college experience because of the cause they seek to advocate constitutes irreparable harm.

When 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. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Breaches of rights of equity are similarly viewed as constituting irreparable harm. *Ulster Home Care Inc. v. Vacco*, 255 A.D.2d

73, 75 (3d Dep't 1999) ("where, as in this instance, the granting of a preliminary injunction is necessary for the protection of rights cognizable in equity and there is a danger of irreversible injury...based on an invalid statute or administrative rule or order, such relief is available."). 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*.

C. A WEIGHING OF THE EQUITIES FAVORS PETITIONERS' POSITION.

In order for a preliminary injunction to issue it must be shown that the irreparable injury to be sustained by the petitioner is more burdensome than the harm caused to respondent through imposition of the injunction. *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976) ("In view of the conceded irreparable harm facing plaintiffs as contrasted with the damage the state would face by postponing implementation of the statute until this case can be heard on its merits, Special Term properly exercised its discretion by granting plaintiffs' motion for a preliminary injunction.").

Petitioners are unable to establish SJP at Fordham and engage in all the activities that Fordham requires club status to participate in. *See* Dadap Aff. at ¶ 6. Fordham's decision to overrule USG's approval of SJP has stigmatized advocacy for Palestinian rights at Fordham, so that even those students who were previously interested are now reticent to speak out publicly for Palestinian rights, and has stigmatized Petitioners in a way that could negatively impact their employment opportunities. *Id.* at ¶¶ 9-10. The burden on Fordham in lifting its veto of the USG's approval of SJP and recognizing a club it has said it would recognize by another name

will be essentially non-existent compared to the irreparable harm that Petitioners will suffer if a preliminary injunction is not issued.

II. PETITIONERS HAVE A RIGHT TO LIMITED DISCOVERY IN CONNECTION WITH THEIR MOTION FOR PRELIMINARY RELIEF.

It is well settled that limited discovery is available pursuant to N.Y. C.P.L.R. 408 in an Article 78 proceeding upon an appropriate showing of need. *See, e.g., Nespoli v. Doherty*, 17 Misc.3d 1117(A), 1117A (Sup. Ct. N.Y. Cnty. 2007) (granting limited discovery in an Article 78 proceeding to aid petitioner in furnishing information to the court that respondents' actions are without basis in fact.). Thus, discovery will be granted when a petitioner questions, and the respondent denies, an improper motive for the challenged action. *See, e.g., Gerber Prods. Co. v. New York State Dep't of Health*, 47 Misc.3d 249, 254 (Sup. Ct. Albany Cnty. 2014) (discovery granted when respondent contested petitioner's assertion that the agency's action had been taken in order to favor a competitor, as it was "clearly relevant for the purposes of determining whether respondents' actions were rational"); *see also Levine v. Feldman*, 215 A.D.2d 182, 182 (1st Dep't 1995) (discovery required to "prove that defendants' claim of economic necessity is a pretext for a termination that was actually motivated by age discrimination"). It is equally well settled that limited discovery is available upon a proper showing of need when an Article 78 petitioner seeks a preliminary injunction. *Stop BHOD v. City of New York*, 22 Misc.3d 1136(A) (Sup. Ct. Kings Cnty. 2009), citing *Sylmark Holdings Ltd. v. Silicone Zone Intl. Ltd.*, 5 Misc.3d 285 (Sup. Ct. N.Y. Cnty. 2004).

Petitioners allege that Fordham denied official club recognition to SJP because of hostility to the viewpoint advocated by SJP. Fordham asserts that its decision was based on concerns that SJP would be polarizing and generate safety and security concerns. Petitioners

believe Fordham's justifications are pretextual, groundless, and based on pure speculation. The discovery that Petitioners seek is limited and pertains only to the factual dispute concerning the motivation for Fordham's decision:

- Petitioners request all documents relating to Fordham's decision to deny club recognition to SJP.
- Petitioners seek to depose Dean of Students Keith Eldredge, who accepts responsibility for the decision concerning SJP.
- Petitioners seek to depose Vice President for Student Affairs Jeffrey Gray, who wrote a letter to the Petitioners explaining Eldredge's decision.

The limited discovery sought by Petitioners is narrowly focused on the factual dispute concerning motivation. It will not delay the resolution of this matter and, importantly, it will provide the Court with a full factual record on which to base its decision on the motion. Limited discovery under these circumstances is consistent with the uniform holdings of New York courts.

CONCLUSION

This Court should grant Petitioners' request for limited discovery and for a preliminary injunction enjoining Fordham 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.

Dated: November 2, 2017
New York, New York

Respectfully submitted,



Maria C. LaHood (N.Y. Bar No. 4301511)
Center for Constitutional Rights
666 Broadway, 7th Floor

New York, NY 10012
Tel: (212) 614-6464 / Fax: (212) 614-6499
mlahood@ccrjustice.org

Cooperating Counsel:
Alan Levine (N.Y. Bar No. 1373554)

Radhika Sainath (N.Y. Bar No. 5252127)
Rahul Saksena (N.Y. Bar No. 4819751)
Palestine Legal

Counsel for Petitioners