

Motion Sequence #2

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 OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	2
A. Fordham’s Rules and Policies on Freedom of Expression.....	3
B. Fordham’s Rules and Policies Concerning Club Recognition.....	4
C. Fordham’s Reasons for Denying SJP Club Recognition Reveal a Concern with the Political Views of SJP.....	7
STANDARD OF REVIEW.....	12
ARGUMENT.....	13
I. EDUCATIONAL INSTITUTIONS’ NON-ACADEMIC DETERMINATIONS ARE SUBJECT TO ARTICLE 78 JUDICIAL REVIEW.....	14
II. FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE.....	16
A. Fordham Violated Its Own Policies and Procedures.....	17
1. By Engaging in Viewpoint Discrimination, Fordham Violated its Policies Promising to Uphold Students’ Freedom of Expression.....	17
2. Fordham Did Not Adhere to its Procedures for Granting Student Clubs Official Status.....	21
B. Fordham’s Decision Was Arbitrary and Capricious Because it Lacked Foundation in Fact and Basis in Reason.....	22
1. One of the Central Bases for Fordham’s Decision – that the Proposed SJP Club Would Engage in the Same Conduct Attributed to Other Campus SJP Student Groups – Has No Foundation in Fact.....	23

2. Since Fordham Did Not Raise Purported “Safety and Security”
Concerns When it Rendered its Determination, it Cannot Rely on Such
Concerns Now 24

3. New York State Cases, As Well As Federal Cases Upon Which Fordham
Relies, Make Clear that a Decision Based on Mere Suspicion
or Fear of Future Wrongful Conduct or Disturbance is Irrational..... 25

III. FORDHAM ACTED IN BAD FAITH BY ENGAGING IN VIEWPOINT
DISCRIMINATION AND BY PUTTING FORTH NEW RULES TO BE
ABLE TO VETO SJP’S APPROVAL 28

CONCLUSION 29

TABLE OF AUTHORITIES**Cases**

<i>Ackerman v. 305 E. 40th Owners Corp.</i> , 189 A.D.2d 665 (1st Dep't 1993).....	29
<i>Ador Realty, LLC v. Div. of Hous. & Cmty. Renewal</i> , 25 A.D.3d 128 (2d Dep't 2005)	22, 23
<i>American Civil Liberties Union v. Radford College</i> , 315 F. Supp. 893 (W.D. Va. 1970)	27, 28
<i>Bachellar v. Maryland</i> , 397 U.S. 564 (1970)	19
<i>Barbour v. Knecht</i> , 296 A.D.2d 218 (1st Dep't 2002)	29
<i>Basile v. Albany College of Pharm.</i> , 279 A.D.2d 770 (3d Dep't 2001)	16, 25, 26
<i>Baskin v. Zoning Bd. of Appeals</i> , 48 A.D.2d 667 (2d Dep't 1975) (Shapiro, J., dissenting), <i>rev'd for reasons stated in dissenting opinion</i> , <i>Baskin v. Zoning Bd. of Appeals</i> , 40 N.Y.2d 942 (1976)	26, 27
<i>Beta Sigma Rho, Inc. v. Moore</i> , 46 Misc.2d 1030 (N.Y. Sup. Ct. 1965)	15
<i>Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.</i> , 102 S. Ct. 434 (1981)	3, 4
<i>Cohen v. Seward Park Hous. Corp.</i> , 7 Misc. 3d 1015(A) (N.Y. Sup. Ct. 2005)	29
<i>Courtroom Television Network LLC v. State of N.Y.</i> , 5 N.Y.3d 222 (2005)	19
<i>Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.</i> , 11 Misc.3d 1060(A) (N.Y. Sup. Ct. 2006).....	15
<i>Di Milia v. Bennett</i> , 149 A.D.2d 592 (2d Dep't 1989).....	27
<i>Esteban v. Central Missouri State College</i> , 415 F.2d 1077 (8th Cir. Mo. Aug. 28, 1969).....	28
<i>Festa v. N.Y. City Dep't of Consumer Affairs</i> , 820 N.Y.S.2d 452 (Sup. Ct. 2006).....	19
<i>Gertler v. Goodgold</i> , 107 A.D.2d 481 (1st Dep't 1985)	15
<i>Gray v. Canisius College of Buffalo</i> , 76 A.D.2d 30 (4th Dep't 1980)	28

<i>Harris v. Trustees of Columbia Univ.</i> , 98 A.D.2d 58 (1st Dep't 1983) (Kassal, J., dissenting), <i>rev'd for reasons stated in dissenting opinion</i> , <i>Harris v. Trs. of Columbia Univ.</i> , 62 N.Y.2d 956 (1984)	23
<i>Healy v. James</i> , 408 U.S. 169 (1972)	28
<i>Hyman v. Cornell University</i> , 82 A.D.3d 1309 (3d Dep't 2011)	23
<i>Jeffers v. American Univ. of Antigua</i> , 125 A.D.3d 440 (1st Dep't 2015)	17
<i>Keles v. Trustees of Columbia Univ.</i> , 74 A.D.3d 435 (2010)	14
<i>Leon v. Martinez</i> , 84 N.Y.2d 83 (1994)	12, 13
<i>Levine v. Feldman</i> , 215 A.D.2d 182 (1st Dep't 1995)	29
<i>Maas v. Cornell Univ.</i> , 94 N.Y.2d 87 (1999)	15
<i>Matter of Corona Realty Holdings, LLC v. Town of N. Hempstead</i> , 32 A.D.3d 393 (2d Dep't 2006)	22
<i>Matter of D.F. v. Gladys Carrion</i> , 43 Misc. 3d 746 (N.Y. Sup. Ct. 2014)	24
<i>Matter of Dopp v. State Univ. of N.Y.</i> , 146 A.D.3d 1058 (3d Dep't 2017)	15
<i>Matter of Hendessi v. New York Coll. of Osteopathic Medicine of NY Inst. of Tech.</i> , 36 Misc. 3d 1241(A) (N.Y. Sup. Ct. 2012)	14, 15
<i>Matter of Kallini v. New York Inst. of Tech.</i> , 34 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2012)	16
<i>Matter of Katz v. New York Univ.</i> , Misc. LEXIS 5480 (3d Dep't 2011)	17
<i>Matter of Kickertz v. New York Univ.</i> , 99 A.D.3d 502 (1st Dep't 2012), <i>vacated on other grounds</i> , <i>Matter of Kickertz v. New York Univ.</i> , 25 N.Y.3d 942 (2015)	16
<i>Matter of Powers v. St. John's Univ. Sch. of Law</i> , 110 A.D.3d 888 (2d Dep't 2013)	25, 26
<i>Matter of Rizvi v. New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.</i> , 98 A.D.3d 1049 (2d Dep't 2012)	16, 17, 23, 29
<i>Matter of Warner v. Elmira Coll.</i> , 59 A.D.3d 909 (3d Dep't 2009)	15, 16, 17, 23

<i>Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.</i> , 18 N.Y.3d 329 (2011).....	23
<i>Mu Chapter of Delta Kappa Epsilon v. Colgate University</i> , 176 A.D.2d 11 (3d Dep't 1992).....	23
<i>Norton v. Discipline Committee of East Tennessee State University</i> , 419 F.2d 195 (6th Cir. Nov. 28, 1969).....	28
<i>Olsson v. Board of Higher Education</i> , 49 N.Y.2d 408 (1980).....	14, 15, 29
<i>Pell v. Board of Education</i> , 34 N.Y.2d 222 (1974).....	22, 23
<i>Radin v. Albert Einstein College of Med. of Yeshiva Univ.</i> , 2005 U.S. Dist. LEXIS 9772, 2005 WL 1214281 (S.D.N.Y. May 20, 2005).....	15
<i>Ray v. Ray</i> , 108 A.D.3d 449 (1st Dep't 2013).....	12
<i>Rensselaer Soc'y of Eng'rs v. Rensselaer Polytechnic Insts.</i> , 260 A.D.2d 992 (3d Dep't 1999).....	23
<i>Richter v Yeshiva Univ.</i> , Misc. LEXIS 2030 (N.Y. Sup. Ct. 2017).....	15
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	28
<i>Rockwell v. Morris</i> , 12 A.D.2d 272 (1st Dep't 1961).....	26, 27
<i>Rosenberger v. Rector & Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995).....	19
<i>Scherbyn v. Wayne-Finger Lakes Bd. of Co-opposition, Educational Services</i> , 77 N.Y.2d 753 (1991).....	25
<i>Starishevsky v. Hofstra Univ.</i> , 161 Misc. 2d 137 (N.Y. Sup. Ct. 1994).....	14, 16, 29
<i>Susan M. v. New York Law School</i> , 76 N.Y.2d 241 (1990).....	15
<i>Tedeschi v. Wagner College</i> , 49 N.Y.2d 652 (1980).....	2, 14, 16, 21
<i>Vanech v. City of New York</i> , Misc. LEXIS 438 (N.Y. Sup. Ct. 2000).....	25
Statutes	
CPLR § 3211(a)(1).....	12, 13
CPLR § 7803(3).....	13

Report

PALESTINE LEGAL & CTR. FOR CONSTITUTIONAL RIGHTS, THE
PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER
ATTACK IN THE U.S. (2015), *available at* <https://palestinelegal.org/the-palestine-exception> 9

Websites

Bias-Related Incidents and/or Hate Crimes, FORDHAM UNIV., *available at*
<https://www.fordham.edu/info/21684/universityregulations/6566/bias-relatedincidentsandorhatecrimes>..... 18

Demonstration Policy, FORDHAM UNIV., *available at*
<https://www.fordham.edu/info/21684/universityregulations/3709/demonstrationpolicy> 17, 18

Mission Statement, FORDHAM UNIV., *available at*
<https://www.fordham.edu/info/20057/about/2997/mission>..... 17

Student Leadership and Community Development, FORDHAM UNIV.,
available at <http://216.230.117.32/section3/section55/index.html> 18

PRELIMINARY STATEMENT

Petitioners have brought this Article 78 proceeding to challenge Fordham University's decision to overrule approval of their application to form an officially recognized club called Students for Justice in Palestine ("SJP"). Fordham's decision followed a process lasting more than a year, during which prospective SJP members repeatedly met with Fordham officials and United Student Government ("USG") representatives, responded to multiple requests for information, and made requested changes to their constitution. Petition [hereinafter "Pet."] at ¶¶ 19-24. After the USG Senate approved SJP, Dean of Students Keith Eldredge overruled the approval and denied SJP official club status, in an unprecedented move that contravened the Club Registration Process. *See, e.g.*, Pet. at ¶¶ 76-77; Affidavit of Glenn Hendler, filed herewith [hereinafter "Hendler Aff."] at ¶ 9.

Fordham barred SJP because of its 1) particular "political goals;" 2) potential for "polarization;" 3) advocacy of boycott, divestment, and sanctions (BDS); and 4) purported affiliation with National Students for Justice in Palestine. Pet. at ¶ 32; Affidavit of Keith Eldredge [hereinafter "Eldredge Aff."] at ¶ 7. In other words, Fordham barred SJP because its views and its expression of those views might be offensive to some. Since making its decision, Fordham's principal justification has become a purported safety concern about having a group named SJP at Fordham because of media reports of misconduct by *other* SJPs on *other* campuses, while acknowledging that it is indifferent to whether those reports are truthful or accurate. Eldredge Aff. at ¶ 24. From those reports, Fordham infers—in the face of unrefuted evidence that SJP groups operate entirely independently of one another—that the proposed SJP at Fordham would engage in similar activity. In barring SJP, Fordham violated its policies on free expression as well as its own procedures for approving student clubs.

Fordham argues that this case presents only "the very narrow issue of whether the

University complied with its internal policies and procedures.” Memorandum of Law in Support of Respondent’s Motion to Dismiss Petitioners’ Verified Petition [hereinafter “Resp. Mem.”] at p. 1. Although Fordham undoubtedly did violate its policies and procedures, settled law also obliges the Court to consider that Fordham’s decision to deny SJP club recognition was wholly unsupported—and even contradicted—by the evidentiary record, and, therefore, was arbitrary and capricious.

Fordham urges this Court to “refrain from substituting its decision for the judgment of trained professionals in higher education.” Resp. Mem. at p. 2. But New York courts routinely review the non-academic decisions of educational institutions precisely because such decisions do *not* involve the highly specialized professional judgment that academic determinations often require. Thus, the public policy considerations that warrant judicial deference are simply not applicable to Fordham’s decision regarding SJP; to the contrary, the issues at stake in this case are part and parcel of “the day-to-day work of the judiciary,” *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 658 (1980). Indeed, Fordham’s arbitrary and capricious refusal to recognize SJP in bad faith requires judicial intervention under Article 78. Fordham’s Motion to Dismiss must be denied.

STATEMENT OF FACTS

In November 2015, a group of students at the Lincoln Center campus of Fordham University sought official recognition of an organization called Students for Justice in Palestine (“SJP”). Pet. at ¶ 2. As stated in its proposed constitution, SJP at Fordham’s mission 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. Without official club status, SJP cannot distribute literature, post materials, invite guest speakers to campus, or receive Fordham funding for events and

programs; nor can it promote its activities or solicit members at Fordham's Club Day, or even book a room for meetings. Pet. at ¶¶ 58-59.

Fordham's Rules and Policies on Freedom of Expression

Fordham "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, quoting Fordham's Mission Statement. Fordham guarantees 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, for its part, 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

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. As the United States Supreme Court said in *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 102 S. Ct. 434, 436 (1981),

¹ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 7, 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." Hendler Aff. at ¶ 19.

² *Id.*

³ *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 7, 2017).

“the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” For Petitioners, an SJP club would be their means of collectively advocating for Palestinian human rights. Pet. at ¶¶ 11-14.

Fordham’s Rules and Policies Concerning Club Recognition

Fordham’s 2016-2017 Lincoln Center USG Operations Committee Club Registration Process provides that a group wishing to form a student club must submit their registration packet to the USG Operations Committee, which “will work with you in editing your constitution.” Pet. at ¶27. The packet is then submitted to the Director of the Office of Student Leadership and Community Development (OSLCD) and the Dean of Students, and “Once the club’s constitution is approved by [them], the packet will be given to the USG Senate for their recommendations and final approval.” *Id.*; Affidavit of Dorothy Wenzel [hereinafter “Wenzel Aff.”] at ¶8; Wenzel Aff., Ex. B at p. 3, Ex. C at p. 3.

This Club Registration Process was formally provided to the SJP students twice, on October 21, 2015 and on October 5, 2016. Resp. Mem. at pp. 4, 6; Second Affidavit of Ahmad Awad, filed herewith [hereinafter Sec. Awad Aff.] at ¶4.⁴ The students submitted the required Club Registration packet and a draft constitution on November 19, 2015. Wenzel Aff., Ex. F. Petitioner Awad met with Wenzel and a USG member on April 26, and was asked to make some minor modifications to the constitution and to find out what if anything National Students for Justice in Palestine (NSJP) required of them. Sec. Awad Aff. at ¶ 7.

At the beginning of the 2016 academic year, the students asked about the status of their SJP application and responded to Wenzel’s question regarding NSJP, clarifying that NSJP

⁴ Everyone involved in the process understood that USG granted final approval; it was understood by Petitioners (Pet. at ¶ 60; Sec. Awad Aff. at ¶¶ 4, 18), by the USG Vice President of Operations (Wenzel Aff., Ex L., Oct. 27 email to Wenzel, stating “This is a huge decision that rests on the shoulders of a USG Senate”), and even by Wenzel herself. On October 27, 2016, Wenzel emailed students stating that, “United Student Government oversees the club registration process. The process is all student driven and student decided.” Wenzel Aff, Ex. S.

requires nothing of SJP groups. Wenzel Aff., Ex. I; Sec. Awad Aff. at ¶ 11. On October 5, Petitioners met with Wenzel, Eldredge and a USG member and discussed their concerns. Sec. Awad Aff. at ¶ 8. On October 14th, the students submitted a revised constitution responding to administrators' concerns about their relationship with NSJP. That same day, Eldredge wrote Petitioner Awad and other students asking for additional edits to the constitution to further explain SJP's position on boycott, divestment and sanctions (BDS) for Palestinian rights, and SJP's relationship to NSJP.⁵ On October 17th, SJP then submitted further revisions to its constitution stating its independence and autonomy from NSJP. Sec. Awad Aff. at ¶ 16; Wenzel Aff., Ex. K. On October 26th and 28th, students provided Fordham written confirmation from NSJP that it is an "ad-hoc conference planning body and support network for student groups active on Palestine" and that it does not require specific language in SJP groups' constitutions.⁶ Sec. Awad Aff. at ¶ 17.

On October 27, USG VP of Operations Wolf informed Petitioners that once a final edit was made to SJP's constitution, it would be sent to the USG Senate for a vote, and that "Dr. Wenzel gave [her] permission to make such a move so long as we made the final edit to the constitution." Wenzel Aff., Ex. M at p. 1. It appeared as though all outstanding questions about SJP's constitution had been resolved in advance of the USG Senate's vote, in accordance with the Club Registration Process rules. Sec. Awad Aff. at ¶ 18.

⁵ Eldredge then stated, "Please submit the revised constitution to Kayla [Wolf]. As I think you know, the USG Operations committee makes an initial decision and their approvals are then forwarded for my review." Sec. Awad Aff., Ex. A at p. 1. This reflected the Club Registration Process: after the USG Operations Committee has reviewed the constitution and revisions have been made in accordance with the constitutional guidelines, then Wenzel and Eldredge review and approve the constitution, and then the club application packet goes to the USG Senate for final approval. Sec. Awad Aff. at ¶ 6; Wenzel Aff., Ex. B at p. 3; Wenzel Aff., Ex. C at p. 3; Pet. at ¶ 27.

⁶ NSJP is an informal network of local student-led organizations that determine their own missions, visions, and goals. Affidavit of Irène Lucia Delaney, filed herewith, at ¶¶ 5, 7. NSJP does not dictate the structure, programming or any aspect of local organizations, and imposes no financial or other obligations on them. *Id.* at ¶¶ 7-9.

The very next day, Wenzel “discovered” that the Club Registration Process was incorrect, and that the “Club Guidelines,” an excerpt of which was emailed a few days later by the USG President (Wenzel Aff., Ex. E at p. 1), provided that the “Dean of Students has a right to veto any new club.” *Id.* at p. 5. The Club Guidelines that Fordham submitted with its Motion to Dismiss are undated and were never provided in full to Petitioners prior to being filed with Respondent’s motion. Second Affidavit of Sapphira Lurie, filed herewith, at ¶¶ 5-6 [hereinafter Sec. Lurie Aff.]. No documentary evidence has been provided that these Club Guidelines previously existed, or had ever been applied or distributed to anyone. Indeed, there is no evidence that Eldredge had ever before reviewed a student club’s application after the USG Senate’s approval, or that he ever vetoed the USG Senate’s approval of a student club.⁷ Hendler Aff. at ¶ 9; Sec. Lurie Aff. at ¶ 8.

Fordham’s own evidence supports Petitioners’ allegation that the rules were changed, or, at the least, first applied, near the end of SJP’s club approval process, in a manner that would conveniently ensure the university’s ability to override the USG’s decision. There is ample evidence that all of the actors involved in the process were following the steps outlined in the Club Registration process, that they were unaware of the new rules that Wenzel “discovered,” and that they understood that USG was tasked with granting final approval.

Respondents minimize the difference between the two sets of rules, arguing that two of the steps were merely “inverted.” Wenzel Aff. at ¶ 41; Eldredge Aff. at ¶ 11. Although the timing of the Dean’s role is inverted, the new rules give the Dean a power he did not previously possess. While the Club Registration Process gives the Dean of Students the authority to

⁷ Fordham claims that the Club Registration Process was not official, as USG is not a department or office of the University (Resp. Mem. at p. 3, citing Wenzel Aff. at ¶10), but the Guidelines document Fordham has now provided is also labeled a USG document, with no indication that it is more or less “official” than the Club Registration Process provided to all students starting a club. *See* Wenzel Aff., Ex. A at p. 1.

approve the club's constitution – and only the constitution – at a stage prior to USG Senate “final approval,” the Club Guidelines grant the Dean a non-appealable veto power of the USG's approval of the club as a whole.⁸

Fordham's Reasons for Denying SJP Club Recognition Reveal a Concern with the Political Views of SJP

Fordham has stated its reasons for denying SJP official club status on three occasions: (1) In Eldredge's initial email announcing his decision; (2) in a subsequent letter from a Fordham vice-president; and (3) in Eldredge's and Wenzel's Affidavits in support of the motion before the court. Given the absence of a factual basis for any of those reasons, the underlying concern with SJP's political advocacy is unmistakable.

In his December 22, 2016, email overruling the USG Senate's approval, Eldredge wrote the students 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 stated purpose of SJP “points toward that polarization;” and that the call for BDS “presents a barrier to open dialogue.” 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 two new justifications, 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. (Emphasis added.) He also said that when Fordham had “asked [students]

⁸ Fordham argues that the change in the club approval rules was “harmless error.” Resp. Mem. at p. 23. However, if, as Petitioners contend, the introduction of the Club Guidelines into the approval process was contrived by the administration as a means to veto a club whose views were considered too controversial, then the consequence, the Dean's veto of SJP approval, was far from harmless.

to change the name of the proposed club and to distance themselves from the national organization, our students declined to do so.” *Id.*

While Eldredge’s email rejecting the students’ SJP application was about the ideas and values advocated by SJP, his Affidavit in support of Fordham’s Motion to Dismiss says that “my 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. Although he says that the behavior of other SJP chapters gave him “the reasonable belief that similar problematic behavior may occur on Fordham’s campus” (*id.* at ¶ 22), there is not a word in his Affidavit explaining why he thought that belief to be reasonable in the face of the students’ multiple revisions to their club constitution as requested by him and Wenzel (*see, e.g.*, Sec. Awad Aff. at ¶¶ 14, 16), and their repeated assurances that their club would be autonomous, that its activities would be determined by the Fordham students alone (*id.* at ¶¶ 11-13), that their intention was to “politely educate the Fordham community on Israel and Palestine” (*id.* at ¶ 9), and that they “were not going to do anything against university policy.” *Id.* at ¶ 8. They also pledged in their constitution that they would abide by the University’s rules and Code of Conduct. Wenzel Aff., Ex. K at p. 6. In fact, Eldredge’s Affidavit does not mention the students’ assurances at all.

Instead, he refers to a variety of published materials and media reports including those provided to him by the Jewish Student Organization (JSO) and various faculty members to describe disruptive activities of SJP organizations on campuses around the country. Eldredge Aff. at ¶¶ 17, 18, 20; Eldredge Aff., Ex. J. Although Eldredge’s “decision . . . was based on” this information (*id.* at ¶ 22), he cannot comment on the “accuracy” or “truth” of anything he read. *Id.* at ¶ 24. Despite his startling admission that the information upon which he decided to deny

students the opportunity to form a club might not be reliable, Eldredge did not consult readily available sources that would have refuted them and painted an entirely different picture of SJP campus activities. As Ben Lorber, campus coordinator for Jewish Voice for Peace (JVP) states, “The documents submitted by Fordham...are drawn literally from the pages of outside organizations and news outlets that avowedly and uncritically defend Israeli government policies.” Affidavit of Ben Lorber, filed herewith, at ¶ 9 [hereinafter Lorber Aff.]. These sources do not “provide a reliable, objective picture of SJP campus activism.” *Id.*

Other sources, including on Fordham’s campus, were also available. There were, for example, other Fordham “faculty members who are supportive of Israeli policy who were eager to engage in debates that could have been sponsored or co-sponsored by an SJP club.” Hendler Aff. at ¶ 13. Had he not largely confined himself to opinions that were openly hostile to BDS, he might have learned that advocates for BDS have “opened up space for more speech, more learning, and more critical interrogation of the issues on campus,” and have “help[ed] create a culture of civic engagement on campuses.” Lorber Aff. at ¶¶ 4, 5. He might also have learned that there is a concerted and well-funded campaign to undermine student advocacy for Palestinian rights, and SJPs in particular, and that allegations against them are often inflammatory, inaccurate, and determined to be unsubstantiated after lengthy university investigations. *Id.* at ¶¶ 6-10.⁹

At bottom, Eldredge’s concern about “safety and security” – a concern he says was based on one-sided materials whose “truth” and “accuracy” he could not vouch for, and which contradicted information he had been given by the SJP students and their proposed faculty advisor – reflects a post-litigation strategy that masks Eldredge’s and Gray’s hostility, and the

⁹ See also PALESTINE LEGAL & CTR. FOR CONSTITUTIONAL RIGHTS, THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE U.S. (2015), available at <https://palestinelegal.org/the-palestine-exception>.

hostility of others on Fordham's campus, to the positions for which SJP wanted to advocate. Their assertion that those positions would negatively impact Fordham are no less frivolous than their assertion that SJP activities will threaten Fordham's safety and security. Indeed, Eldredge himself attributes these "safety" concerns to the name SJP itself, not to any potential conduct, and declares that he would agree to a group "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 says that SJP's "political goals conflict" with or are "contrary to the mission and values of the University." But SJP's mission "to build support in the Fordham community...for the promotion of justice, human rights, liberation, and self-determination for the indigenous Palestinian people" (Pet. at ¶ 17; Wenzel Aff., Ex. K at p. 2), is entirely consistent with Fordham's commitment to "the promotion of justice" and "the protection of human rights." Pet. at ¶ 48.¹⁰ Eldredge also says that the topic of Israel and Palestine "often leads to polarization," and that SJP's purpose, and specifically its support for BDS, "presents a barrier to open dialogue and mutual learning and understanding." Eldredge Aff. at ¶ 6. Professor Hendler responds in his Affidavit, "As an academic institution, Fordham University does not – and should not – shy away from difficult topics, even if some consider them to be 'polarizing.' ...As a university, Fordham must welcome diverse perspectives and viewpoints, including unpopular and polarizing ones. The students seeking to form an SJP club made clear in their mission statement that they were committed to education, debate, and discussion. To justify censorship

¹⁰ That SJP's goals and Fordham's values are not in conflict is apparent to SJP's proposed faculty advisor, Professor Glenn Hendler, who "believed that, as a Jesuit university committed to human rights, Fordham would welcome an organization devoted to advocacy for and education about a people living under occupation. ...I understood SJP's mission of education and advocacy as consistent with both my own values and those of Fordham University." Hendler Aff. at ¶ 5. A group of Catholic clergy and academics similarly objected to Fordham's denial of SJP recognition, stating that "such denial by a Catholic university seems inconsistent with the mission and values of Jesus and Catholic social teaching." Hendler Aff., Ex. A at p. 1.

because certain ideas are polarizing is antithetical to the very foundation of any academic institution.” Hendler Aff. at ¶ 11.

Eldredge claims that his decision was “not a content-based” one (Eldredge Aff. at ¶ 6), that he “welcome[s] continued conversation, from multiple perspectives, about alternative ways to promote awareness of the Israel/Palestine conflict” (*Id.* at ¶ 7), and that he “offered and would agree to approve a club that has a mission devoted to promoting justice, peace and equality for all Palestinians, including the creation of a Palestinian state.” *Id.* at ¶ 25. But, in addition to the fact that Petitioners never understood that their club would not be approved with the name SJP (Sec. Awad Aff. at ¶19), Eldredge makes clear that his decision had to do with the particular views of SJP. The fact that Fordham raised concerns about “polarization” when such figures as Karl Rove and Newt Gingrich were invited to the campus (Eldredge Aff at ¶ 6), and when it afforded official recognition to potentially “polarizing” clubs such as the Feminist Alliance and the Rainbow Alliance (Wenzel Aff., Ex. R at p. 2), supports Hendler’s belief that “when it comes to issues involving Palestinian rights, it appears that Fordham operates with a different set of rules.” Hendler Aff. at ¶ 17. Eldredge claims he could not “assure...a fair and equitable discourse” (Eldredge Aff. at ¶ 24) on Israel and Palestine with the approval of SJP (as if educational institutions could ever make such assurances), but his denial of the group effectively rejected a set of views, and as a result, “impoverished political discussion on all sides of these important issues.” Hendler Aff at ¶ 13.

There is reason for similar skepticism about Eldredge’s professed concern that SJP’s advocacy of BDS “presents a barrier to open dialogue and mutual learning and understanding.” Eldredge Aff. at ¶ 6. In fact, there have been numerous campus BDS campaigns, and they have often generated widespread conversations among students about their universities’ roles in

perpetuating injustice. Lorber Aff. at ¶¶ 4-5 . Information about those campaigns, and the dialogue and learning they have generated, was easily available to Eldredge.

Fordham's concerns that SJP's political goals, its advocacy of BDS, and its name itself would have a negative impact on the Fordham community are wholly without a factual basis. Similarly, the concern about safety and disruption also lacked a factual basis. Eldredge's decision was clearly a consequence of his ignoring evidence presented to him by the students that contradicted his concerns, and his refusal to avail himself of readily available evidence that would have given him a fuller picture of SJP and its activities. By doing so, Eldredge was able to justify a decision – namely, that the views espoused by SJP were too “polarizing” to allow on the Fordham campus – that flies in the face of Fordham's stated values of free expression. Because Eldredge's refusal to afford recognition to SJP was based not on a rational review of available evidence, but on hostility to SJP's views, his decision was both arbitrary and capricious and in bad faith.

STANDARD OF REVIEW

It is well established that on a motion to dismiss pursuant to CPLR 3211, “the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Ray v. Ray*, 108 A.D.3d 449, 451 (1st Dep't 2013).

Fordham argues that dismissal is warranted because the Petition contains “factual allegations that are contradicted by documentary evidence, or legal conclusions that are unsupportable in the face of undisputed facts.” Resp. Mem. at p. 9. However, Fordham cites no allegation that falls into either category, and, in fact, there is none. As the Court of Appeals stated in *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994), “Under CPLR 3211(a)(1), a dismissal is

warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Insofar as the documents submitted by Fordham challenge any of the Petition’s allegations, Petitioners have submitted affidavits in response that the court may “freely consider.” *Id.* Indeed, as explained below, it is Fordham’s—not Petitioners’—claims that are “contradicted by documentary evidence.”

ARGUMENT

Since Fordham’s decision to deny club recognition to SJP is unrelated to academic matters, it is not entitled to the judicial deference that New York courts typically afford academic determinations in an Article 78 proceeding. Accordingly, Fordham’s decision should be annulled as “arbitrary and capricious,” CPLR § 7803(3), see section I, *infra*, because the University violated its own policies and procedures and because the decision wholly lacked a rational basis in fact. The decision should also be set aside because it was made in “bad faith.” Section III, *infra*.

Fordham’s refusal to grant SJP club status violated University policy and protocol in two respects: first, in denying SJP official recognition because of the group’s support of Palestinian rights and BDS as a means of securing those rights, Fordham engaged in viewpoint discrimination and thus violated the core principle of its policies concerning student free expression, section II.A.1, *infra*; and second, Fordham introduced new rules concerning club recognition at an advanced stage of its consideration of SJP’s application, granting Dean Eldredge a power he had never wielded before: the power to overrule the student government’s final decision to officially recognize SJP as a student group. Section II.A.2., *infra*.

Fordham’s decision to deny SJP club recognition was also arbitrary and capricious because it was unsupported—indeed, contradicted by—the evidentiary record. First, Fordham

justifies its decision on the basis of the conduct of *other* SJP groups at *other* universities, despite evidence establishing that each SJP group operates entirely independently. Second, the University cites unsupported “safety and security” concerns associated with granting SJP club status; however, since the University did not raise those concerns upon rendering its decision, they cannot now be considered a rational basis for the decision. Third, under New York law, the mere suspicion or fear of future disruptive conduct cannot suffice as a justification for denying SJP official club status.

The University’s decision was also made in bad faith. Fordham denied SJP club status “not upon the record but in an apparent reaction to what [the University] believed was acceptable in the eyes of the community, and then sought to justify the result without regard to...the facts elicited.” *Starishevsky v. Hofstra Univ.*, 161 Misc. 2d 137, 148-49 (N.Y. Sup. Ct. 1994). In addition, the apparent change in the rules or application of the rules governing official recognition of student clubs points to a lack of good faith on the part of the University.

I. EDUCATIONAL INSTITUTIONS’ NON-ACADEMIC DETERMINATIONS ARE SUBJECT TO ARTICLE 78 JUDICIAL REVIEW.

Although New York courts have been reluctant to review university or college decisions regarding academic matters since such determinations “generally rest upon the subjective judgment of professional educators,” determinations unrelated to academic performance are “quite closely akin to the day-to-day work of the judiciary” and, therefore, routinely subject to judicial scrutiny. *Tedeschi* at 658. By relying on cases in which courts have declined to review purely academic decisions,¹¹ Fordham blurs the distinction that courts have drawn between the

¹¹ In cases Fordham cites, courts have expressed reluctance to interfere with universities’ core academic decisions, such as decisions to withhold diplomas or expel students on academic grounds that require assessments of students’ academic performance. *See, e.g., Olsson v. Board of Higher Education*, 49 N.Y.2d 408 (1980); *Keles v. Trustees of Columbia Univ.*, 74 A.D.3d 435 (2010); *Matter of Hendessi v. New York Coll. of Osteopathic Medicine of NY Inst.*

levels of deference owed to academic versus non-academic university decisions. Other cases cited by Fordham are equally inapposite.¹²

Courts have explained the rationale behind their approaches to the two lines of cases. Determinations regarding the issuance of academic credentials must “be left to the sound judgment of professional educators who monitor the progress of their students on a regular basis.” *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 413 (1980). Non-academic determinations, on the other hand, do not require this “special expertise.” *Susan M. v. New York Law School*, 76 N.Y.2d 241, 245 (1990) (“Unlike disciplinary actions taken against a student, institutional assessments of a student’s academic performance...necessarily involve academic determinations requiring the special expertise of educators”). Determining whether Fordham followed its own policies and procedures in denying SJP club status, and whether its decision was rational, does not require specialized judgment. *Richter v Yeshiva Univ.*, Misc. LEXIS 2030, *8 (N.Y. Sup. Ct. 2017) (citation omitted) (“The question of whether a school has followed its own rules does not involve any highly specialized, academic judgment, and is determined by the court”).

Accordingly, New York courts routinely intervene to annul non-academic university decisions deemed to be made arbitrarily, capriciously, or in bad faith. *See, e.g., Matter of Warner v. Elmira Coll.*, 59 A.D.3d 909, 911 (3d Dep’t 2009) (annulling the college’s

of Tech., 36 Misc. 3d 1241(A) (N.Y. Sup. Ct. 2012); *Matter of Dopp v. State Univ. of N.Y.*, 146 A.D.3d 1058 (3d Dep’t 2017); *Matter of Susan M. v. New York Law School*, 76 N.Y.2d 241 (1990).

¹² The courts in *Gertler v. Goodgold*, 107 A.D.2d 481 (1st Dep’t 1985), *Radin v. Albert Einstein College of Med. of Yeshiva Univ.*, 2005 U.S. Dist. LEXIS 9772, 2005 WL 1214281 (S.D.N.Y. May 20, 2005), and *Maas v. Cornell Univ.*, 94 N.Y.2d 87 (1999) all found that plaintiffs did not have judicially cognizable breach of contract claims, emphasizing that “a CPLR Article 78 proceeding is the route for judicial review of such matters, not a plenary action.” *Maas* at 92. The university decisions in *Delta Kappa Epsilon Alumni Corp. v. Colgate Univ.*, 11 Misc.3d 1060(A) (N.Y. Sup. Ct. 2006), and *Beta Sigma Rho, Inc. v. Moore*, 46 Misc.2d 1030 (N.Y. Sup. Ct. 1965), were not upheld pursuant to Fordham’s broad and incorrect assertion of “authority to adopt resolutions and enforce policies as it deems necessary to its duty of supervision and control of the institution at large,” Resp. Memo at 16; rather, those decisions were upheld because they were deemed entirely well-founded and rational given the circumstances.

determination that petitioner possessed cocaine because the decision was based on ambiguous evidence); *Basile v. Albany College of Pharm.*, 279 A.D.2d 770, 771-72 (3d Dep't 2001) (annulling the college's determinations that petitioners cheated on examinations because the college relied on either "sheer speculation" or evidence that was "based upon false assumptions"); *Starishevsky* at 148 (annulling the university's decision to terminate petitioner because it was made "not upon the record but in an apparent reaction to what [the university] believed was acceptable in the eyes of the community," "in direct contravention to the grievance procedure," and in bad faith); *Matter of Kickertz v. New York Univ.*, 99 A.D.3d 502, 510 (1st Dep't 2012), *vacated on other grounds*, *Matter of Kickertz v. New York Univ.*, 25 N.Y.3d 942 (2015) (annulling the university's decision to expel petitioner because "petitioner was not afforded substantial justice" in violation of the university's "own published guidelines and policies"); *Matter of Rizvi v. New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 A.D.3d 1049, 1053 (2d Dep't 2012) (annulling the college's decision to expel petitioner because the college "did not abide by its own rules and guidelines[,]...as it imposed an additional restriction on the petitioner not articulated in the...student handbook"); *Matter of Kallini v. New York Inst. of Tech.*, 34 Misc. 3d 1211(A), 1211A (N.Y. Sup. Ct. 2012) (annulling the university's decision to suspend petitioner because the university violated its disciplinary policies and procedures); *Tedeschi* at 660 (same). Fordham's non-academic determination denying SJP official club status—in violation of its own policies and with disregard for the evidentiary record—is subject to full judicial scrutiny.

II. FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE.

In order to be upheld by a court, a non-academic university determination must both substantially comply with the university's own policies and be founded in "a rational interpretation of the relevant evidence." *Matter of Katz v. New York Univ.*, Misc. LEXIS 5480, *13 (3d Dep't 2011). *See also, Warner* at 910. Respondent cites no authority that calls into question this legal standard.

A. Fordham violated its own policies and procedures.

1. *By engaging in viewpoint discrimination, Fordham violated its policies promising to uphold students' freedom of expression.*

Denying official recognition to SJP violated Fordham's enforceable obligation to "proceed in accordance with its own rules and guidelines." *Rizvi* at 1052. Fordham failed to abide by its policies pledging to uphold students' freedom of expression, as reflected in the University Mission Statement, Demonstration Policy, and Bias-Related Incidents and/or Hate Crimes policy.¹³ According to the Mission Statement, Fordham "guarantees the freedom of inquiry required by rigorous thinking and the quest for truth," and "is committed to research and education that assist in" the "promotion of justice" and "the protection of human rights."¹⁴ The University's "Policy on Dissent"—found within the policy regarding student demonstrations—states 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."¹⁵ The policy recognizes "the rights of the members of the University

¹³ Although Respondent cites an inapplicable New Jersey case for the proposition that "a contractual relationship cannot be based on isolated provisions in a student handbook," it is well-settled under New York law that "[P]romises set forth in a school's bulletins, circulars, and handbooks...can establish the existence of an implied contract." *Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 441-42 (1st Dep't 2015) (quotation omitted). Regardless, the existence of a contract between Fordham and its students is irrelevant to its Article 78 obligations, which require substantial compliance with written University policies and procedures.

¹⁴ *Mission Statement*, FORDHAM UNIV. (Apr. 28, 2005), available at <https://www.fordham.edu/info/20057/about/2997/mission>.

¹⁵ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited June 23, 2017).

community” to “freedom to express positions” and “freedom to engage in other legitimate activities.”¹⁶ Finally, Fordham’s policy on bias-related incidents and hate crimes emphasizes that the University “values freedom of expression and the open exchange of ideas. The expression of controversial ideas and differing views is a vital part of University discourse.”¹⁷

Respondent’s out-of-hand dismissal of the applicability of the Demonstration Policy and Bias-Related Incidents and/or Hate Crimes policy—as though the unequivocal commitments to free expression contained therein do not apply generally—defies logic. Notably, Fordham does not deny that its policies uphold free expression, including of controversial ideas. To the contrary, Fordham has incorporated its clear commitment to students’ rights to free expression into several parts of its student handbook. Indeed, the reason Fordham has a “Policy on Dissent” is *precisely because* of the University’s commitment to free speech; the “Policy on Dissent” is a manifestation of that commitment. The fact that Fordham’s pledge to uphold students’ rights to free expression is reflected in several policies rather than a single “free speech” policy does not undermine that pledge, but rather strengthens it. Fordham’s encouragement of student clubs reflects the same free expression principles—a commitment to an atmosphere in which all ideas compete for acceptance: “By registering and supporting a wide variety of clubs and organizations . . . the University reinforces its commitment to stimulate the intellectual and personal growth of its students.”¹⁸

Although Fordham argues at length that the U.S. and New York State Constitutions do not apply to its conduct since it is a private institution, Resp. Memo, Point I, petitioners did not

¹⁶ *Id.*

¹⁷ *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited June 23, 2017).

¹⁸ Fordham University, “Student Leadership and Community Development,” n.d., <http://216.230.117.32/section3/section55/index.html>.

bring claims under the federal or state constitutions. Rather, Petitioners allege that Fordham violated *its own* enforceable policies to “guarantee...freedom of inquiry,” uphold students’ “freedom to express positions,” and promote “the open exchange of ideas.” These policies use the language of the basic constitutional principle of free speech, and as such, they are naturally interpreted and understood by reference to that constitutional principle. Since Fordham’s rules are not self-defining, this Court can properly look to discussions of First Amendment principles to help give meaning to Fordham’s rules.¹⁹

Petitioners do not argue that they have a right “to have any club of their choosing,” as Fordham claims. Resp. Mem. at p. 14. Rather, Petitioners allege that Fordham failed to substantially comply with its policy to uphold free expression by denying SJP official status *out of hostility to SJP’s political message*. 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 dislike for the positions that the club advocates. *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 viewpoint discrimination that drove Fordham’s decision need not be inferred; it is plainly apparent from Eldredge’s own statements and justifications. His hostility to SJP’s

¹⁹ Analogously, New York courts, in shaping the meaning of New York’s constitutional provision protecting free expression, NY CLS Const. Art I, § 8, have often looked to federal cases that interpret the First Amendment. *See, e.g., Festa v. N.Y. City Dep’t of Consumer Affairs*, 820 N.Y.S.2d 452, 457-461 (Sup. Ct. 2006), *aff’d as modified*, 37 A.D.3d 343, 830 N.Y.S.2d 133 (2007); *Courtroom Television Network LLC v. State of N.Y.*, 5 N.Y.3d 222, 229-233 (2005).

political views is perhaps best captured by his claim that SJP would “advocat[e] political goals...[that] clearly conflict with and run contrary to the mission and values of the University.” But Fordham’s commitment to freedom of expression and to “research and education that assist in the protection of human rights” would be meaningless if it excluded efforts to raise awareness about the “political goals” of people whose rights are violated by “a specific country.” Such an exclusion would have barred advocating against South Africa’s apartheid regime. Regardless, the University’s commitment to open inquiry even with regard to controversial ideas means that it cannot silence views it does not like. In characterizing the call for BDS as “polarizing” and as “a barrier to open dialogue and mutual learning and understanding,” Eldredge similarly betrayed his hostility to the positions advocated by SJP. The fear of “polarization” had not previously surfaced at Fordham, *see supra*, pp. 6-11, and abundant evidence was available to him that advocacy of BDS had promoted valuable dialogue on campuses across the country. *Id.*²⁰

And finally there is Gray’s charge—repeated by Eldredge—that the students had refused to use a name other than SJP. Eldredge Aff., at pp. 14-15; Sec. Awad Aff. at ¶ 19. Gray does not say why that would disqualify the club from recognition. But a reasonable inference is that the name SJP, and the program that it advocated, had elicited strong criticism from some of the people Eldredge had consulted. Eldredge knew from them, as he knew from Petitioners, that the name carried political significance. As Petitioner Awad observes, the name SJP was chosen to connect to the broader movement for justice in Palestine and the name itself conveys a political

²⁰ There is further evidence of Eldredge’s hostility to SJP’s views in his Affidavit, in which he notes that the JSO also provided him with a “letter from Hillary Clinton expressing her alarm over the Boycott, Divestment, and Sanction movement to isolate the State of Israel.” Eldredge at ¶ 17; Ex. D at pp.12-13. That Eldredge chooses to recite that fact in an affidavit that purports to explain why he denied SJP club status is evidence of his continuing concern about what SJP advocates, namely BDS, and not how it will behave. Eldredge evidenced that concern during the approval process and in his Affidavit. *See, e.g.*, Pet. at ¶¶ 22, 30, 32; Eldredge Aff. at ¶ 18.

message that was significant for the students. Sec. Awad Aff. at ¶ 9. Knowing the political message conveyed by the name, SJP, Eldredge declares that a club with another name would have been approved. Eldredge Aff. at pp. 14-15. Which is simply another way of saying that Fordham was concerned with SJP's political views or how those views were expressed, not its potential behavior.

2. *Fordham did not adhere to its procedures for granting student clubs official status.*

Fordham also violated its rules for recognizing student groups. “As a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual...when a university has adopted a rule or guideline establishing the procedure to be followed...that procedure must be substantially observed.” *Tedeschi* at 660. In this instance, Petitioners relied on the club approval procedures that were published, repeatedly disseminated, and appear to have been followed by all involved in the process. *See, supra*, at pp. 4-6. Petitioners meticulously followed the mandated steps, responded to repeated inquiries of administrators, and made adjustments to their constitution to resolve concerns prior to the USG Senate vote. A year passed before the sudden alteration of the rules, with the insertion of a previously nonexistent, never employed and non-appealable veto power on the part of the Dean. “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.” *Tedeschi* at 662. Contrary to Respondents' claim that “the formal club approval process for SJP had not yet begun” when the change was introduced (Eldredge Aff. at ¶ 13), Petitioners—in what they believed was part of the approval process—had spent months discussing their constitution and mission with administrators who were tasked with approving it. *See, infra*, pp. 4-6; Sec. Awad Aff. at ¶¶ 6-19.

Over the course of that year, Fordham administrators' questions about SJP's political positions, and their insistence on consulting faculty and students about the SJP application, it became clear that Petitioners were receiving extra scrutiny because some people disliked their views. *See, e.g.,* Sec. Awad Aff., ¶¶ 3, 4. Thus, the last minute change in procedure—when all evidence suggests that everyone involved was following the original procedure and no evidence indicates that the change was ever previously disseminated or followed (*supra*, pp. 4-6)—is highly suspect. *See, e.g., Matter of Corona Realty Holdings, LLC v. Town of N. Hempstead*, 32 A.D.3d 393, 395 (2d Dep't 2006) (“An agency’s failure to provide a valid and rational explanation for its departure from its prior precedent ‘mandates a reversal, even though there may be substantial evidence in the record to otherwise support the determination’”).

B. Fordham’s decision was arbitrary and capricious because it lacked foundation in fact and basis in reason.

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. Even if Fordham substantially complied with its own rules, which it did not, the University’s decision should be annulled because the stated justifications for the decision—“polarization” and newly-invoked “safety and security” concerns resulting from the conduct of *other* SJPs on *other* campuses—are wholly without basis in fact and even contradicted by the evidence.

New York courts have repeatedly held that the decision of a college administrator will be annulled when it lacks “rational basis” and is “taken without regard to the facts.” *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). Rationality is defined “as being ‘[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination.’” *Ador Realty, LLC v. Div. of Hous. & Cmty. Renewal*, 25 A.D.3d

128, 139-140 (2d Dep't 2005) (quoting *Pell* at 231) (alterations in original). Fordham's decision to deny SJP official status not only lacked "foundation in fact" and "sound basis in reason," *Pell* at 231; the decision *belied* facts and reason, and its purported basis was flatly contradicted by the evidence. *See Warner* 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* 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); *Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 18 N.Y.3d 329, 334 (2011) (quotation omitted) ("An unsupported determination...must...be set aside as without rational basis and wholly arbitrary"). The cases cited by Respondent—in all of which the challenged determinations were deemed well-supported by the evidentiary record—are not to the contrary.²¹

1. *One of the central bases for Fordham's decision – a supposed controlling relationship between the proposed SJP club and other SJP groups across the country – has no foundation in fact.*

Fordham's ultimate stated justification for denying SJP official status hinges on the reported behavior of SJPs on other campuses and the possibility that similar behavior may occur on Fordham's campus. Eldredge Aff. at ¶ 22., Eldredge states 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." *Id.* at ¶ 23.

²¹ *Hyman v. Cornell University*, 82 A.D.3d 1309, 1310-11 (3d Dep't 2011) (university did not act arbitrarily and capriciously because "its determination is amply supported by the evidence," "Petitioner's numerous procedural challenges...are unsupported by the record," and "the documentary evidence...provided clear and convincing evidence...to support [the university's] determination"); *Rensselaer Soc'y of Eng'rs v. Rensselaer Polytechnic Insts.*, 260 A.D.2d 992, 994 (3d Dep't 1999) (university did not act arbitrarily and capriciously in part because "more than adequate evidence supports" its determination); *Mu Chapter of Delta Kappa Epsilon v. Colgate University*, 176 A.D.2d 11, 14 (3d Dep't 1992) (same); *Harris v. Trustees of Columbia Univ.*, 98 A.D.2d 58, 72 (1st Dep't 1983) (Kassal, J., dissenting), *rev'd for reasons stated in dissenting opinion, Harris v. Trs. of Columbia Univ.*, 62 N.Y.2d 956 (1984) ("[t]he record supports the action taken by respondents in the face of what appears to be a blatant, fraudulent misrepresentation" by petitioner).

Although Eldredge’s “overarching concern” hinges on a supposed controlling relationship between NSJP or other campus SJPs and SJP at Fordham, which is directly contradicted by all the evidence with which the University was presented during the application process. 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, e.g.*, Pet. at ¶¶ 20, 45; Wenzel Aff. Ex. I at p. 2; Ex. J at p. 1, Ex. K at p. 2; Sec. Awad Aff. at ¶¶ 10-17. The NSJP website even states, “we do not dictate to SJP chapters: **all individual SJPs are autonomous student orgs** on their respective campuses.” Pet. at p. 45. Respondent offers no evidence whatsoever that might suggest otherwise.²² Fordham’s determination was arbitrary and capricious because it rested on a central premise—the existence of a certain organizational structure—that was simply wrong. *See Matter of D.F. v. Gladys Carrion*, 43 Misc. 3d 746, 754 (N.Y. Sup. Ct. 2014) (concluding that decision is arbitrary and capricious in part because it “rests on the premise that has no foundation in the record”). The University had every reason, moreover, to know as much.

2. Since Fordham did not raise purported “safety and security” concerns when it rendered its determination, it cannot rely on such concerns now.

Contrary to the repeated assurances of Petitioners, Eldredge concluded that the selectively curated, reported conduct of SJPs at a handful of other universities—whether true or not—“could have a polarizing effect on the Lincoln Center campus, which obviously can lead to issues of safety and security.” Eldredge Aff. at ¶ 23. Eldredge only raised this concern in this litigation; he did not raise it in his decision denying SJP approval. Eldredge Aff., Ex. A at p 1.

²² It is also irrational to deny SJP official club status based on such concerns given Fordham’s apparent willingness to grant approval if the proposed club changes its name. Eldredge Aff. at ¶ 25. A group that is not named SJP could engage in the same conduct with the same effect—the name does not determine the group’s activities. In fact, student groups need not be named SJP to be a part of the NSJP network, and not all campus SJPs are part of that network. Delaney Aff. at ¶ 13.

While it is true that, in responding to a letter from Petitioners' counsel, Gray said that the disapproval of SJP's application "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, his letter was *after* Eldredge's email decision. That decision, Eldredge told the students, was "final" and "not appealable." Pet. at ¶ 39. Gray's words, therefore, cannot serve as a justification for Eldredge's decision. Even less so given that they were uttered in response to threat of legal action.

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*, Misc. LEXIS 438, *11-12 (N.Y. Sup. Ct. 2000), citing *Scherbyn v. Wayne-Finger Lakes Bd. of Co-opposition, Educational Services*, 77 N.Y.2d 753 (1991).

3. *New York State cases, as well as federal cases upon which Fordham relies, make clear that a decision based on mere suspicion or fear of future wrongful conduct or disturbance is irrational.*

New York courts have found that "suspicion alone will not suffice" to render a decision rational in Article 78 proceedings. *Basile* at 771 (finding that the statistical compilation on which the university relied merely "g[a]ve rise to a suspicion of cheating" because "an affidavit from an expert statistician, un rebutted by the College, establishes that the statistical case...is based upon false assumptions and therefore does not provide a rational basis to conclude that petitioners cheated"); *see also, Matter of Powers v. St. John's Univ. Sch. of Law*, 110 A.D.3d 888, 900 (2d Dep't 2013) ("There is nothing in the record to indicate that St. John's Law

School categorically denies admission to any student who has ever been accused of distributing controlled substances. Such a policy would, in all likelihood, be arbitrary and capricious since it would be based solely on accusation rather than fact” (emphasis in original)).

Fordham makes no claim—nor could it—that SJP at Fordham engaged (or had any plan to engage) in any destructive or violent activities. Indeed, Fordham’s purported fear of “problematic behavior” that “would violate the University’s Code of Conduct” (and therefore, purported “safety and security” concerns)—a fear based on the alleged conduct of *other*, independent SJPs at *other* campuses—is “sheer speculation” that cannot constitute a rational basis for the University’s determination. *Basile* at 772 (college’s determination was arbitrary and capricious because allegations “are either hearsay anonymous notes or based on sheer speculation, neither of which will rationally support the determinations of the Committee”). In another Article 78 free speech case, a New York court found that denying a “rabid racist” a permit to deliver a speech violated the department’s own 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.” *Rockwell v. Morris*, 12 A.D.2d 272, 276 (1st Dep’t 1961). Specifically, the court found that newspaper clippings and the petitioner’s *own* leaflets containing “the characteristic emissions of certain extremist...groups...often responsible for disorder in sensitive places in the Nation” did not indicate that public disorder was likely to result from the speech. *Id.* at 275. Here, Fordham relied on even less compelling evidence: unverified reports of the alleged conduct of *other*, independent organizations on other campuses.

Thus, Fordham’s decision to deny SJP club status was effectively “anticipatory punishment for future wrongdoing,” and as such, cannot be deemed rational and permitted to

stand. *Baskin v. Zoning Bd. of Appeals*, 48 A.D.2d 667, 668 (2d Dep't 1975) (Shapiro, J., dissenting), *rev'd for reasons stated in dissenting opinion, Baskin v. Zoning Bd. of Appeals*, 40 N.Y.2d 942 (1976) (upholding decision to grant a building permit, notwithstanding the potential for violation of a zoning ordinance, because "the existence of a mere opportunity for future evasion or violation of law does not raise a presumption that such violation in fact actually presently exists (citation omitted)" and petitioner "should not receive the aid of the court to fend off the mere evanescent possibility of future violation"); *see also, Di Milia v. Bennett*, 149 A.D.2d 592, 593 (2d Dep't 1989) (to deny a building permit on the basis of "possible future illegal use" of the buildings is arbitrary and capricious). Were SJP to violate the University's Code of Conduct in the future, the University could initiate appropriate disciplinary proceedings; the University may not, however, deny SJP recognition on the basis of a speculation or hunch that the group will engage in "problematic behavior" in the future. *See Rockwell* at 283 ("The right of free expression is not to be entrusted to administrative previous restraint for contemplated violation of law, but such expression is not immune from punishment after the fact for what has been said, by judicial process."); *Baskin* at 668 ("There will be time enough...to take action to end a violation...when and if it occurs" (emphasis in original)).

Although Fordham relies on cases in which universities have asserted disruption to defend a challenged decision (MTD at 16-17), these cases actually support Petitioners' claims. The court in *American Civil Liberties Union v. Radford College* (MTD at 16) found that a student organization had a right to be recognized, even where, unlike here, non-recognition did "not preclude [the] organization from engaging in meaningful activity." 315 F. Supp. 893, 897

(W.D. Va. 1970).²³ Petitioners do not argue that they have “an unqualified right to be recognized by a college administration,” Resp. Mem. at p. 16, quoting *Radford*. Rather, they assert that Fordham cannot ban them from expressing their views via an official club simply because those views are deemed “controversial or...undesirable,” *id.* at 896, which is precisely what the court in *Radford* found. The court made clear that fear of potential disruption was irrelevant to the analysis at this stage, stating, “If their conduct as a campus organization is unduly disruptive of the orderly functioning of the institution, this court will be the first to reconsider its decision.” *Id.* at 899. Fordham’s other disruption cases only further underscore the lack of a factual basis for its irrational decision.²⁴

III. FORDHAM ACTED IN BAD FAITH BY ENGAGING IN VIEWPOINT DISCRIMINATION AND BY PUTTING FORTH NEW RULES TO BE ABLE TO VETO SJP’S APPROVAL.

Courts have made clear that when an educational institution renders a determination like the one at hand—“not in the exercise of [the institution’s] sound and honest discretion but rather in bad faith or in a manner which is arbitrary and capricious”—such a determination “could never receive the sanction of a court in which even the semblance of justice was attempted to be administered.” *Gray v. Canisius College of Buffalo*, 76 A.D.2d 30, 34 (4th Dep’t 1980)

²³ Here, Petitioners are precluded from engaging in almost all meaningful activity as members of SJP—they cannot distribute literature, post materials, invite guest speakers to campus, receive Fordham funding, book rooms for meetings, or formally solicit members. Pet. at ¶¶ 58-59.

²⁴ In *Norton v. Discipline Committee of East Tennessee State University*, MTD at 16, the court found that a university had authority to discipline students for distributing “false and inflammatory” pamphlets that were “an open exhortation to the students to engage in disorderly and destructive activities.” 419 F.2d 195, 198 (6th Cir. Nov. 28, 1969). As noted in *Esteban v. Central Missouri State College*, MTD at 16-17, “[t]here must, however, be more than mere fear and apprehension of possible disturbance.” 415 F.2d 1077, 1087 (8th Cir. Mo. Aug. 28, 1969) (the conduct at issue, including “aggressive action, disorder and disturbance, and acts of violence,” was not protected by the First Amendment). Indeed, the Supreme Court in *Healy v. James*, 408 U.S. 169, 186 (1972) found that a college president’s decision to deny official recognition to a student group on grounds that the group would be a “disruptive influence” violated the associational rights of students because “guilt by association alone, without establishing that an individual’s association poses the threat feared” was “an impermissible basis” for the decision). Given that a right to associate is recognized “for the purpose of engaging in...speech, assembly, [and] petition” activities, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984), the constraints imposed by Fordham on Petitioners’ ability to associate violated the University’s free expression policies.

(quotation omitted). “An academic institution must act in good faith in its dealings with its students,” *Olsson* at 414. “A showing of unequal treatment is sufficient” to allege bad faith. *Barbour v. Knecht*, 296 A.D.2d 218, 224 (1st Dep’t 2002).

Notwithstanding Fordham’s claims to the contrary, Resp. Mem. at pp. 27-29, the University breached its obligation to act in good faith by engaging in viewpoint discrimination and procedural machinations to deny SJP status, rather than exercising “an honest discretion based on facts within its knowledge.” *Rizvi* at 1054 (“[The University] did not act in good faith in its dealings with the petitioner, who was attempting to comply with the terms prescribed by the institution.”). Fordham’s decision was made in bad faith because it 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 the evidence. See *Starishevsky* at 148-49 (“When the University made its determination, 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 without regard to...the facts elicited...it acted in bad faith.”). Fordham also acted in bad faith by putting forth new rules at an advanced stage of the process, in a manner that conveniently facilitated Eldredge’s denial of SJP’s club status. See *supra*, at pp. 4-6.²⁵

CONCLUSION

Fordham’s motion to dismiss the Petition must be denied.

Respectfully submitted,

²⁵ Where pretext, unequal treatment, or bad faith is alleged, dismissal of pleadings before discovery is inappropriate. See, e.g., *Ackerman v. 305 E. 40th Owners Corp.*, 189 AD2d 665, 667, 592 N.Y.S.2d 365 (1st Dept 1993) (pre-discovery dismissal of pleadings “is inappropriate where those pleadings suggest that the directors did not act in good faith”); *Cohen v. Seward Park Hous. Corp.*, 7 Misc. 3d 1015(A), 1015A (N.Y. Sup. Ct. Apr. 18, 2005) (“it is simply too early at this juncture to evaluate whether this defense constitutes a neutral reason for its actions and, if so, whether the reason is pretextual in nature”); *Levine v. Feldman*, 215 A.D.2d 182, 182 (N.Y. App. Div. 1st Dep’t May 9, 1995) (summary judgment was premature before discovery because “plaintiff cannot prove that defendants’ claim of economic necessity is a pretext for a termination that was actually motivated by age discrimination”).



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