

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' REPLY MEMORANDUM OF LAW**  
**IN FURTHER 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 .....	1
ARGUMENT.....	3
I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION. ....	3
A. Petitioners Seek Relief to Prevent Continuing Harm, Which Should Be Granted Regardless of Whether It Is the Ultimate Relief. ....	3
B. Petitioners Will Suffer Irreparable Harm. ....	5
C. Petitioners are Likely to Succeed on the Merits.....	6
D. The Harm to Petitioners in Being Denied the Ability to Engage in Club Activities as SJP Greatly Outweighs Any Harm to Fordham in Lifting its Veto of a Club It Has Agreed to Permit Under a Different Name. ....	8
II. PETITIONERS ARE ENTITLED TO LIMITED DISCOVERY .....	9
CONCLUSION.....	10

TABLE OF AUTHORITIES

**Cases**

*Bachman v. Harrington*, 184 N.Y. 458 (1906)..... 3, 4

*Gerber Prods. Co. v. New York State Dep’t of Health*, 47 Misc.3d 249 (Sup. Ct. Albany County 2014) ..... 10

*Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440 (1st Dep’t 2015)..... 7

*Melvin v. Union Coll.*, 195 A.D.2d 447 (2d Dep’t 1993) ..... 5

*Mindel v. Educ. Testing Serv.*, 147 Misc.2d 968 (Sup. Ct. N.Y. County 1990) ..... 4, 5

*Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 66 AD.3d 255 (1st Dep’t 2009)..... 4

*St. Paul Fire & Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347 (1st Dep’t 2003) .... 3

*Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652 (1980)..... 9

## **PRELIMINARY STATEMENT**

This action charges Fordham University with overruling a student government decision to approve a student club solely because of its political message. Assuming the charge is accurate—and the limited discovery proposed by Petitioners will certainly help confirm its accuracy—Fordham has deprived the Petitioners of the University’s most fundamental obligation, namely, to guarantee them the freedom to advocate for causes in which they believe without being censored by college officials. Without preliminary injunctive relief, Petitioners will continue to suffer irreparable harm.

## **STATEMENT OF FACTS**

In November 2015, students at Fordham applied to start a club called Students for Justice in Palestine (SJP), whose purpose would be to build support in the Fordham community for justice and human rights for Palestinians. Verified Petition [hereinafter “Pet.”], Dkt. No. 1, at ¶¶ 16-17. For a year, Fordham administrators dragged out the process, questioning the students about their political beliefs (*see, e.g.*, Pet. at ¶¶ 22, 30; Affidavit of Sapphira Lurie [hereinafter “Lurie Aff.”], Dkt. No. 5, at ¶ 9) and the proposed group’s affiliation with National Students for Justice in Palestine (NSJP). Pet. at ¶¶ 19-20, 23, 45. The students assured the University that SJP at Fordham would be autonomous and would function independently of NSJP and other SJPs, providing written evidence to that effect from NSJP, and amending the group’s constitution to make that explicit. Pet. at ¶¶ 20, 45; Second Affidavit of Ahmad Awad [hereinafter “Sec. Awad Aff.”], Dkt. No. 58, at ¶¶ 10-17.

SJP’s application then went to the United Student Government (USG), which approved SJP as a student club in November 2016. Pet. at ¶ 28. On December 22, 2016, Fordham took the unprecedented step of vetoing USG’s approval. Pet. at ¶ 32. Dean of Students Eldredge said

he vetoed the club because the topic of the “Israeli-Palestinian conflict . . . often leads to polarization” and the topic and purpose of SJP “points toward that polarization.” Affidavit of Keith Eldredge [hereinafter “Eldredge Aff.”], Exhibit [hereinafter “Ex.”] A, Dkt. No. 16, at p. 1. That Fordham has officially recognized other potentially polarizing clubs and invited polarizing speakers to campus confirms Petitioners’ allegation that it was SJP’s politics that troubled Eldredge. Affidavit of Dorothy Wenzel [hereinafter “Wenzel Aff.”], Ex. R, Dkt. No. 44, at p. 2.

Vice President for Student Affairs Jeffrey Gray, responding to concerns from Petitioners’ counsel, gave a different reason, claiming the decision “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 subsequently submitted in support of Fordham’s Motion to Dismiss, he mentioned “safety and security” concerns for the first time, which he claimed could result from “the conduct exhibited by other chapters of SJP.” Eldredge Aff., Dkt. No. 15, at ¶ 23. Given the uncontradicted evidence that SJPs operate completely independently, Eldredge’s concerns are wholly without a basis in fact.

Petitioner Sofia Dadap is graduating this May, and Petitioner Julie Norris will graduate in May 2019. Pet. at ¶¶ 13-14. Both are passionately committed to educating the Fordham community about the denial of Palestinian rights. Affidavit of Sofia Dadap in Support of Petitioners’ Motion for a Preliminary Injunction and Expedited Discovery [hereinafter “Dadap Aff.”], Dkt. No. 83, at ¶ 3. Fordham’s veto of SJP’s approval prevents Petitioners from doing that in the effective manner that only club participation permits at Fordham. *See* Pet. at ¶¶ 58-59. In addition, it deprives them of the club experience, which is a meaningful part of student life and the college experience. Fordham acknowledges the significance of clubs, holding itself out

as a place where students can “get[] involved in things like clubs (we’ve got more than 160)” and promises that much growth will occur outside the classroom.<sup>1</sup>

Petitioners will suffer irreparable harm as long as Fordham’s veto of SJP’s approval due to its political message is allowed to stand.

## ARGUMENT

### **I. PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION.**

#### **A. Petitioners Seek Relief to Prevent Continuing Harm, Which Should Be Granted Regardless of Whether It Is the Ultimate Relief.**

Respondent argues that a preliminary injunction must be denied because Petitioners are seeking the ultimate relief. Respondents’ Memorandum of Law in Opposition to Petitioners’ Motion for a Preliminary Injunction and Expedited Discovery [hereinafter “Resp. Opp.”], Dkt. No. 94, at pp. 7-8. While it is true that Petitioners seek an order reinstating the decision of the USG that approved club status for SJP, one of the ultimate requests for relief sought in this action, that fact alone will not bar preliminary relief. New York courts have consistently held that, if the preliminary relief is necessary, as here, to prevent continuing harm to the plaintiff, then the similarity between the preliminary and final relief is beside the point—even more so where the relief granted is reversible.

The principle is explained in *Bachman v. Harrington*, 184 N.Y. 458 (1906), which is cited in one of the cases upon which Respondent relies, *St. Paul Fire & Marine Insurance Co. v. York Claims Service, Inc.*, 308 A.D.2d 347 (1st Dep’t 2003). Addressing the defendant’s argument that the plaintiff’s application for a preliminary injunction sought the same relief as a final injunction, the court said that “in the case of a threatened violation of a contract continuous in its character, such as a contract to furnish water or light during a term, the defendant might be

---

<sup>1</sup> *Student Life*, FORDHAM UNIV., [https://www.fordham.edu/info/20015/student\\_life](https://www.fordham.edu/info/20015/student_life) (last visited Dec. 21, 2017).

restrained from failing to supply water or light during the pendency of the litigation . . . where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted.” *Bachman* at 464.

In other words, it is not the similarity between preliminary and final relief that is determinative; it is whether the preliminary relief is necessary to prevent continuing harm to the plaintiff and whether the relief granted is temporary. For that reason, the *Bachman* court approved that part of the trial court order that restored the plaintiff to membership in the Rochester Musicians’ Protective Association *pendente lite*, even though that was the ultimate relief sought.

The principle announced in *Bachman* has been the consistent rule in New York courts. *See, e.g., Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 66 AD.3d 255, 259 (1st Dep’t 2009) (ordering landlord to allow tenant café to install new vent needed to continue operating where delay might destroy the business or cause it to lose its liquor license); *Mindel v. Educ. Testing Serv.*, 147 Misc.2d 968, 972-73 (Sup. Ct. N.Y. County 1990) (requiring testing company to administer makeup exam to student suing over testing irregularities where delay might prevent student from applying to college early decision programs). In both of these cases, as in the present case, courts mandated action that was the ultimate relief sought.

Moreover, where the relief mandated by the preliminary injunction “can readily be undone,” the balance of equities tips in favor of granting relief. *Second on Second Café* at 273-74 (“[I]t is significant that the record establishes that the changes effected pursuant to the mandatory preliminary injunction can readily be undone, if [defendant] desires, upon the expiration of the lease or in the event (unlikely, we think) that [defendant] prevails in this action.”).

The facts of this case are precisely the type of circumstances requiring a preliminary mandatory injunction. Like the student in *Mindel* seeking admission to prestigious colleges, Petitioners will miss out on time-sensitive opportunities in the absence of a preliminary injunction.<sup>2</sup> See Pet. at ¶¶ 58-59; Dadap Aff. at ¶¶ 6-8. If Fordham lifts its veto of SJP's approval during the pendency of the litigation, it would be free to reinstate its ban if it prevails in this action.

**B. Petitioners Will Suffer Irreparable Harm.**

Fordham provides absolutely no support for its astounding assertion that Petitioners' ability to "pursue conversation about the Israeli-Palestinian conflict . . . is not impacted in any manner by Dean Eldredge's decision." Resp. Opp. at p. 12. First, Fordham says that Petitioners have not suffered harm because an official club is "a privilege, not a contractual right." Resp. Opp. at p. 10. At Fordham, students are entitled, pursuant to Fordham's policies, to form officially sanctioned clubs.<sup>3</sup> Although club recognition comes with "oversight by University staffing and the use of University financing and property," Resp. Opp. at p. 15, the implication that Fordham has unreviewable discretion to deny club status because its resources are involved is frivolous. Were it otherwise, the parties would not be arguing about whether or not Fordham followed its policies.

Fordham also argues that Petitioners have not suffered harm because they are being offered adequate alternatives, such as having a club without the "SJP moniker." Resp. Opp. at p.

---

<sup>2</sup> Similarly, Fordham's attempt to distinguish *Melvin v. Union College*, 195 A.D.2d 447 (2d Dep't 1993) is misplaced. Resp. Opp. at p. 11. In *Melvin*, the court granted a preliminary injunction forcing the University to reenroll a student it had already suspended for academic dishonesty because the student would otherwise suffer irreparable injury. Fordham claims the preliminary injunction in that case preserved the status quo, but then the status quo was the status of enrollment *prior* to the University's challenged action of suspension. Here, then, the status quo is USG's approval of SJP, prior to Fordham's veto of that approval.

<sup>3</sup> See, e.g., Fordham University, *Student Leadership and Community Dev.*, UNDERGRADUATE BULLETIN 2014-2016 (July 2015), available at <http://216.230.117.32/section3/section55/index.html> ("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.").



11. But Petitioners want a Students for Justice in Palestine club because of its important political significance. *See* Petitioners' Memorandum in Support of Their Motion for a Preliminary Injunction and Expedited Discovery [hereinafter "Pets. Prel. Inj. Memo."], Dkt. No. 81, at pp. 11-12. Offering Petitioners a club with a less "political" name but with an identical mission simply confirms what Petitioners have alleged throughout this litigation, namely that Eldredge's action was motivated by his hostility to SJP's political views.

For the same reason, Fordham's offer to the Petitioners "to continue to debate and discuss," the issue of Palestinian rights does not mitigate the harm suffered by the denial of club recognition. *Resp. Opp.* at p. 12. Petitioners not only want to debate and discuss Palestinian rights, they also wish to educate the campus community about the denial of those rights and to encourage those students to join the international human rights community in seeking justice for Palestinians. *Dadap Aff.* at ¶ 8; *Affidavit of Julie Norris* [hereinafter "Norris Aff."], Dkt. No. 6, at ¶ 4. Official club status is an essential vehicle for achieving those goals, since it brings with it the right to distribute and post materials, have speakers, book rooms, solicit members, and obtain school funding. *Pet.* at ¶¶ 58-59. What Petitioners seek to do as a club is precisely why Fordham has clubs. 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.<sup>4</sup>

### C. Petitioners are Likely to Succeed on the Merits.

Petitioners argue that Eldredge's denial of official club status to SJP warrants judicial action for two reasons. *Pets. Prel. Inj. Memo.* at pp. 9-12. First, Petitioners assert that Eldredge's

---

<sup>4</sup> Fordham argues, as it did in its Motion to Dismiss, that Petitioners have no constitutional claim because Fordham is a private college. *Resp. Opp.* at pp. 12-14. Petitioners cite First Amendment cases not because they bind Fordham, but rather to provide a full understanding of Fordham's robust commitment to free expression. Petitioners' Memorandum of Law in Opposition to Respondent's Motion to Dismiss [hereinafter "Pets. Opp. Mot. to Dismiss"], Dkt. No. 72, at pp. 18-19; *Pets. Prel. Inj. Memo.* at p. 10. Fordham's commitment is expressed in a variety of places in its policies, and the denial of the right to organize a club because of its political views is the essence of irreparable harm. That is the case whether the denial is at the hands of the government in violation of the First Amendment or a private college in violation of its commitment to diverse student expression.

decision reflected hostility to the views that SJP advocated, thus violating Fordham's policies regarding free expression. In denying that its decision violated any University policies, Fordham has not explicitly argued that prohibiting student clubs because of their political views would comply with its mission or policies. Instead, Fordham claims that although it "encourages" free expression, it is not bound by its various commitments to uphold freedom of expression in this case because it does not have a single policy entitled "Freedom of Expression Policy." Resp. Opp. at p. 14. Yet in its Mission Statement and throughout its policies, Fordham expresses its commitment to free expression through its "guarantee[]" of "freedom of inquiry,"<sup>5</sup> its assurance that students can "freely express" dissenting positions,<sup>6</sup> its commitment to permit the "expression of controversial ideas,"<sup>7</sup> and its pledge not to discriminate based on "viewpoint or content."<sup>8</sup> See, e.g., *Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 441-42 (1st Dep't 2015) ("[P]romises set forth in a school's bulletins, circulars, and handbooks... can establish the existence of an implied contract.") (quotation omitted).

Second, Petitioners have argued that Eldredge's concern that the proposed SJP club posed a threat to safety and security utterly lacked a rational basis in evidence. Pets. Prel. Inj. Memo. at pp. 12-14. In response, Fordham says only that Eldredge read many documents and

---

<sup>5</sup> *Mission Statement*, FORDHAM UNIV. (Apr. 28, 2005), available at <http://www.fordham.edu/info/20057/about/2997/mission-statement>.

<sup>6</sup> *Demonstration Policy*, FORDHAM UNIV., <https://www.fordham.edu/info/21684/university-regulations/3709/demonstration-policy> (last visited Dec. 19, 2017).

<sup>7</sup> *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., <https://www.fordham.edu/info/21684/university-regulations/6566/bias-related-incidents-and-or-hate-crimes-policy> (last visited Dec. 19, 2017).

<sup>8</sup> *Demonstrations FAQ*, FORDHAM UNIV., <https://www.fordham.edu/info/21684/university-regulations/6564/demonstrations-faq> (last visited Dec. 21, 2017). Fordham suggests that Petitioners' citation to Fordham's Demonstration Policy is designed to mislead the Court. Resp. Opp. at p. 15. Petitioners have consistently and explicitly identified the specific sources of Fordham's policies ensuring freedom of expression. See, e.g., Pet. at ¶ 49; Pets. Opp. Mot. to Dismiss at pp. 3, 17, 18; Pets. Prel. Inj. Memo. at pp. 3, 9, 10. Petitioners cite the Demonstration Policy, which is contained in University Regulations, as just one of Fordham's several policies, including its Mission Statement, through which it exhibits its commitment to free expression and disavowal of viewpoint discrimination.

consulted many people. Resp. Opp. at p. 18. But Fordham does not say a word about anything Eldredge learned from those documents and people that gave him a reasonable basis for his concern about safety and security. True, he did learn about the alleged behavior of other SJPs on other campuses. Eldredge Aff. at ¶¶ 22-23. But the purported behavior of SJPs at other campuses (even if accurate) offered no rational basis for that concern, given that Petitioners and NSJP had assured Fordham that SJP would be autonomous, and as the students enshrined in SJP's amended constitution. Pet. at ¶¶ 20, 45; Sec. Awad Aff., at ¶¶ 10-17. Eldredge learned nothing from the people and documents he consulted to give him any basis for believing to the contrary.<sup>9</sup>

**D. The Harm to Petitioners in Being Denied the Ability to Engage in Club Activities as SJP Greatly Outweighs Any Harm to Fordham in Lifting its Veto of a Club It Has Agreed to Permit Under a Different Name.**

Fordham argues that Petitioners have suffered no harm, saying that the right to discuss and debate, which it has offered Petitioners, is the same as forming a club. If that were the case, it is hard to imagine why Fordham—or any university—has clubs at all. We have described, above, the very real impact that denial of club recognition will have on Petitioners' ability to educate about, and advocate on behalf of, Palestinian rights. As against the concrete harm suffered by Petitioners in the absence of preliminary relief, Fordham cites no concrete harm to itself. Instead, it speculates vaguely that an injunction “would undermine the University's ability to fulfill its duty of supervision and control of the institution at large and impede its discretion on how best to operate the institution.” Resp. Opp. at p. 20. If, by that, Fordham means to say that it has an unfettered right to operate the college as it pleases, and courts should not intervene, the short answer is that that is not the state of the law. If Fordham makes decisions that violate its

---

<sup>9</sup> Eldredge's decision also lacked a factual basis because he admits not caring whether other SJPs had actually engaged in misconduct. Eldredge Aff. at ¶ 24. And Eldredge's assertion that he would agree to the same club without the name SJP undermines the validity of his purported “safety and security” concerns. *Id.* at ¶ 25.

own policies or lack a rational basis in the evidence, courts have an obligation to intervene. *See, e.g., Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 657-658 (1980) (courts review whether a university has followed “its own rules” or “its action was arbitrary or irrational”).

The significant harm to Petitioners of continuing to be denied an SJP club, and facing the possibility of never having the opportunity to form such a club before they graduate, greatly outweighs any potential burden on Fordham, which, according to its position in this litigation, is merely the difference between having an approved club named SJP, or one with another name engaged in identical activities.

## **II. PETITIONERS ARE ENTITLED TO LIMITED DISCOVERY**

Fordham argues that the reason for denying club status was concern with safety and security. Memorandum of Law in Support of Respondents’ Motion to Dismiss Petitioners’ Verified Petition [hereinafter “Resp. Mot. to Dismiss],” Dkt. No. 53, at p. 17; Eldredge Aff at ¶ 23. Petitioners state that there is no rational basis for that concern, and that it masks the real reason for its action, namely, hostility to the viewpoint being advocated by SJP. Pets. Opp. Mot. to Dismiss at pp. 24-25. That is exactly the kind of factual dispute that the limited discovery sought by Petitioners can help resolve.

Fordham asserts that discovery should not be granted because decision-maker Keith Eldredge “fully explained” his decision in affidavits and exhibits. Resp. Opp. at p. 24. However, Petitioners have offered evidence that Eldredge’s explanation is not credible and are entitled to inquire further. In several instances, Eldredge’s Affidavit says that conversations he had and resources that he received, including from individuals supportive of SJP, influenced his decision. *See* Eldredge Aff. at ¶¶ 18.e, 18.g, 18.h, 18.i. Petitioners are entitled to documents reflecting those conversations as well as copies of the resources Eldredge received. The discovery sought is

limited. Given that Eldredge's assertion of a "safety and security" concern is a central defense to the Petition, and given that the concern was not raised prior to this litigation, *see* Pets. Opp. Mot. to Dismiss at pp. 24-25, such limited discovery is particularly appropriate.

Fordham also claims, without any evidentiary support, that Vice President for Student Affairs Jeffrey Gray—who wrote to Petitioners' counsel explaining the decision—was not involved in the decision-making process. Resp. Opp. at p. 24. The fact that Gray expanded on Fordham's reasons for its decision makes clear that he has relevant information as to the rationale, regardless of his involvement in the decision.

Petitioners' carefully tailored request for documents relating to Fordham's decision to deny club recognition and for depositions of the decision-maker and his superior who elaborated upon his reasons should be granted. *See Gerber Prods. Co. v. New York State Dep't of Health*, 47 Misc.3d 249, 253 (Sup. Ct. Albany County 2014) (disclosure is required "of any facts bearing on the controversy which will assist preparation for trial").

### CONCLUSION

This Court should grant Petitioners' request for a preliminary injunction enjoining Fordham from interfering with the decision of Fordham's USG to approve Petitioners' application for a Students for Justice in Palestine club, and for limited discovery.

Dated: December 22, 2017  
New York, New York

Respectfully submitted,



Maria C. LaHood (N.Y. Bar No. 4301511)  
Center for Constitutional Rights  
666 Broadway, 7<sup>th</sup> 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)  
Palestine Legal

*Counsel for Petitioners*