New York Supreme Court

Appellate Division—First Department

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

Petitioners-Respondents,

Appellate Case No.: 2020-00843

– against –

FORDHAM UNIVERSITY,

Respondent-Appellant.

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

WILL CREELEY (N.Y. Bar No. 4629523)
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New York County Clerk's Index No. 153826/17

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE, and JULIE NORRIS, Petitioners-Respondents, -against- FORDHAM UNIVERSITY, Respondent-Appellant.	Docket No.: NY Cty. Index No. 153826/17 **NOTICE OF MOTION**

PLEASE TAKE NOTICE that upon the annexed affirmation of Jay M. Wolman and the papers annexed hereto, and upon all prior papers and proceedings had in this case, the undersigned will move this Court, at a term of the Appellate Division of the Supreme Court, First Judicial Department, at the courthouse located at 27 Madison Avenue, New York, New York 10010 on August 24, 2020 at 10:00 in the morning, or as soon thereafter as counsel may be heard, for an order pursuant to 22 NYCRR 1250.4(f) and Appellate Division First Department Rule 600.4:

1. Granting Foundation for Individual Rights in Education, the National Coalition Against Censorship, and PEN American Center, Inc., leave to file and serve their required number of copies of an amici curiae brief (the "Amici

Curiae Brief") in support of Petitioners-Respondents in the above-captioned action; and

2. For such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Appellate Division First Department Rule 600.4(b), six copies of the proposed brief is submitted with this Motion.

PLEASE TAKE FURTHER NOTICE that, pursuant to Practice Rule of the Appellate Division 1250.4(a)(8) (22 NYCRR 1250.4(a)(8)), oral argument on this Motion is neither required nor permitted.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering affidavit and any notice of cross-motion, with supporting papers, if any, must be served at least seven days before this Motion is to be heard; whereupon any reply or responding affidavits shall be served at least one day before the Motion is to be heard.

Dated: July 31, 2020

Jay M. Wolman
Jay M. Wolman
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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FIRST DEPARTMENT

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE, and JULIE NORRIS, Petitioners-Respondents, -against- FORDHAM UNIVERSITY, Respondent-Appellant.	Docket No.: NY Cty. Index No. 153826/17 **AFFIRMATION OF JAY M. WOLMAN IN SUPPORT OF MOTION OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, NATIONAL COALITION AGAINST CENSORSHIP, AND PEN AMERICAN CENTER, INC. TO APPEAR AS *AMICI CURIAE***

I, JAY M. WOLMAN, duly affirm and say:

1) I am an attorney at the law firm of Randazza Legal Group, PLLC, counsel for proposed *amici curiae,* Foundation for Individual Rights in Education ("FIRE"), National Coalition Against Censorship ("NCAC"), and PEN American Center, Inc. ("PEN America") in this appeal.

2) I am a member in good standing of the Bar of the State of New York.

3) I submit this affirmation in order to place before the Court this application of FIRE, NCAC, and PEN America to file an *amici curiae* brief in the above captioned appeal.

4) I submit this affirmation upon information and belief, based upon my familiarity with the work of FIRE, NCAC, and PEN America, review of the pleadings and papers in this matter, and discussion with my clients.

5) The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends fundamental rights at both public and private institutions through public commentary and advocacy, litigation on behalf of students and faculty members, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, No. 19-1842, 2020 U.S. App. LEXIS 20365, at *21 (3d Cir. June 30, 2020) (citing with approval FIRE's *amicus curiae* brief in holding that a high school cheerleader's online speech was protected by the First Amendment).

6) The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational,

professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked to protect the First Amendment rights of artists, authors, teachers, students, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of members of university communities, including the students who seek to form a chapter of Students for Justice in Palestine at Fordham University.

7) PEN American Center, Inc. ("PEN America" or "PEN") is a nonprofit organization that represents and advocates for the interests of writers, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its membership includes more than 7,400 journalists, novelists, poets, essayists, and other professionals including students and those in the academic and higher education communities. PEN America stands at the intersection of journalism, literature, and human rights to protect free expression and individual writers facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative and free expression. PEN champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. PEN America supports the First Amendment and free expression rights of students and others on America's college campuses to protect principles of open inquiry and debate.

8) The students FIRE, NCAC, and PEN America defend rely on the expressive rights enshrined in the institutional promises, commitments, and policies of private colleges and universities like Fordham. Because this appeal concerns Fordham's failure to follow its own policies and to fulfill its own promises of free speech, affirmation of the lower court's correct ruling is critically important to protecting the rights of students at private institutions of higher education throughout New York and nationwide.

9) FIRE, NCAC, and PEN America appear for the purpose of providing the Court their unique, experienced, and credible rights-oriented perspective, rather than to duplicate arguments made by the Parties.

10) On behalf of FIRE, NCAC, and PEN America, I respectfully request the Court to grant this motion to file the accompanying Brief as *amici curiae.*

WHEREFORE, it is respectfully requested that this Court issue an Order granting the motion of the Foundation for Individual Rights in Education, the National Coalition Against Censorship, and PEN America to appear as *amici curiae* with respect to this appeal.

Dated: July 31, 2020

Jay M. Wolman

JAY M. WOLMAN

EXHIBIT A

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

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

Index No. 153826/2017

Petitioners,

NOTICE OF APPEAL

-against-

FORDHAM UNIVERSITY,

Respondent,

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

PLEASE TAKE NOTICE, that respondent Fordham University appeals to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, from each and every part of the within Amended Decision, Order and Judgment of the Honorable Nancy M. Bannon, dated July 29, 2019 and entered in the office of the Clerk of the Supreme Court, New York County, on August 6, 2019.

Dated: August 30, 2019
Garden City, New York

CULLEN AND DYKMAN LLP

By:_____
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EXHIBIT B

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

In the Matter of,

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

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 Bannon

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the attached is a true copy of the Amended Decision, Order and Judgment in this matter that was entered in the office of the Clerk of the Supreme Court, New York County, on August 6, 2019.

Dated: August 6, 2019
New York, New York

Respectfully submitted,

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Counsel for Respondent

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON **PART** IAS MOTION 42EFM

Justice

----------X

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE, JULIE NORRIS

Plaintiff,

- v -

FORDHAM UNIVERSITY,

Defendant.

----------X

INDEX NO. 153826/2017

MOTION DATE 03/04/2018, 03/04/2018, 03/04/2018, 05/08/2019

MOTION SEQ. NO. 001 002 003 004

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 78
were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77
were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98
were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108
were read on this motion to/for AMEND CAPTION/PLEADINGS

The petition and motions are determined in accordance with the attached Amended Decision, Order and Judgment, which replaces the prior Decision, Order and Judgement, which contains an error.

7/29/2019
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE: [X] CASE DISPOSED [ ] GRANTED [ ] DENIED [ ] NON-FINAL DISPOSITION [ ] GRANTED IN PART [ ] OTHER

153826/2017 AWAD, AHMAD vs. FORDHAM UNIVERSITY
Motion No. 001 002 003 004

Page 1 of 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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In the Matter of

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

Petitioners,

v

FORDHAM UNIVERSITY,

Respondent.

----------X

Index No. 153826/17

DECISION, ORDER & JUDGMENT

MOT SEQ 001, 002 003, 004

NANCY M. BANNON, J.:

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, Ahmad Awad, Sofia Dadap, Sapphira Lurie, and Julie Norris ("the petitioners"), seek to review a determination of the respondent, Fordham University ("Fordham" or "the University"), dated December 22, 2016, denying their request to organize a club known as Students for Justice in Palestine at Fordham University ("SJP"), and to have the club recognized as a "registered organization" that is sanctioned by the University (SEQ 001). Fordham moves pursuant to CPLR 7804(f) and 3211(a)(1) and (7) to dismiss the petition (SEQ 002). The petitioners move to preliminarily enjoin Fordham from interfering with an earlier determination of Fordham's United Student Government ("USG")

Executive Board and Senate, dated November 16, 2016, approving the organization for recognition (SEQ 003). By separate motion, the petitioners move pursuant to CPLR 3025(b) to amend the petition to add Veer Shetty as an additional petitioner(SEQ 004).

The petitioners' motion to amend the petition is granted. The respondent's cross motion to dismiss the petition is denied, the petition is granted, the respondent's determination is annulled, and the petitioner's motion for a preliminary injunction is denied as academic.

II. BACKGROUND

On November 19, 2015, several undergraduate students at Fordham University, including the petitioner Ahmad Awad, applied for recognition of SJP as student club at Fordham's Lincoln Center campus. In accordance with Fordham's published rules, the students submitted all of the required paperwork, including a proposed constitution, which recited that the group's mission was "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." It also stated that "SJP is organized around the principles of the call by Palestinian civil society for Boycott, Divestment and Sanctions of Israel."

Fordham's published rules include Section 2(a) of the

Fordham University Lincoln Center Campus United Student Government Operations Committee Club Guidelines ("the Guidelines"), which provides that a club's purpose, as set forth in the club's constitution, must state "how th[e] Club will benefit the Fordham community." Section 2(e) requires a "[s]tatement that the Club will not restrict membership based upon national origin, race, religion, creed, gender, sexual orientation, age, or physical handicap." Section 8(h) of the Guidelines provides that the Dean of Students has a right to veto any new club, but the Guidelines do not articulate or enumerate any grounds on which the Dean may exercise such a veto. Moreover, the Guidelines themselves are unclear as to whether that veto must be exercised prior to a vote by the USG Executive Board and Senate.

However, Section I of the 2016-2017 Fordham University Lincoln Center Campus United Student Government Operations Committee Club Registration Process provides, in relevant part, that:

> "The Operations Committee will work with you in editing your constitution. After all revisions to the constitution have been made in accordance with constitutional guidelines, the packet will be submitted to the Director of the Office for Student Involvement and then to the Dean of Students.
>
> "Once a club's constitution is approved by the Director of the Office for Student Involvement and the Dean of Students, the packet is to be forwarded to the USG Senate for their recommendations and final approval.

> "Upon approval by above-mentioned parties, the club is considered a registered organization of F[ordham] C[ollege] L[incoln] C[enter] and G[abelli] S[chool of] B[usiness]."

On April 5, 2016, Awad wrote to Dr. Dorothy Wenzel, Director of the Office of Student Leadership and Community Development and New Student Orientation, seeking a response to the application from Fordham's administration. On April 26, 2016, Wenzel and a student, who was then the Vice President of Operations for USG, told Awad and another student that some minor, standard modifications needed to be made to the constitution, and that SJP should be set to be approved in autumn 2016.

Over the next several months, email correspondence was exchanged between Awad, the outgoing and incoming USG Vice-Presidents, and Wenzel concerning, among other things, whether the Fordham chapter of SJP was obligated to obtain any approvals from the national SJP organization before it could begin operations.

On October 5, 2016, Awad and other students met with Wenzel, Dean of Students Keith Eldredge, and the new Vice President of Operations for USG. At the meeting, Wenzel and Eldredge expressed concern that SJP's presence on campus and its potential support for boycott, divestment, and sanctions would "stir up controversy," and referenced a controversy that occurred when Professor Norman Finkelstein, whose scholarship supports

Palestinian rights, spoke at Fordham in 2009. Wenzel and Eldredge again asked about any requirements that the national SJP organization might impose upon the Fordham chapter, and also asked if the students would consider not using the name "Students for Justice in Palestine." The students responded that they had chosen the name Students for Justice in Palestine to connect the group to the broader movement for justice in Palestine, and that they wished to retain the name.

Wenzel added that she spoke to several Jewish faculty members about SJP in the previous academic year, and requested their opinion on whether the administration should permit SJP to be established at Fordham. Over the course of the next few weeks, Awad and other students interested in organizing SJP responded to requests for further edits to the club constitution and questions about the national organization from Eldredge, Wenzel, and USG members.

On October 27, 2016, Awad, Lurie, Dadap, and other students, along with their proposed faculty advisor Glenn Hendler, met with the USG Operations Committee. At the meeting, the USG Vice President of Operations asked if Governor Cuomo's executive order that purports to punish entities that engage in boycott, divestment, and sanctions activities aimed at Israel, or the New York City Council resolution condemning such boycott, divestment, and sanctions activities, prevented the formation of SJP at

Fordham, since SJP's constitution mentions support for such activities. The students explained to the USG's Vice President that boycotts are protected speech activity, and that such legislation could not legally prohibit their advocacy of boycott, divestment, and sanctions. The USG's Vice President told the petitioners that she would make sure that the USG held a vote on whether to approve SJP in the upcoming weeks. She also said that she would inform the Jewish Student Organization (JSO) about the upcoming vote on the recognition of SJP, as Wenzel had instructed her to let that organization provide its opinion on the question of the approval of SJP. In response, Awad and other supporters of SJO told Wenzel that it was inappropriate for another student organization to have a say in the establishment of SJP.

Prior to November 17, 2016, the Director of the Office for Student Involvement and the Dean of Students approved SJP's constitution, and forwarded the relevant packet to the USG, thus clearing the way for the USG to vote on a resolution for final approval.

On November 17, 2016, the USG Executive Board and Senate voted to approve SJP as a club at the Fordham University Lincoln Center Campus. The USG wrote to the newly formed SJP that diverse viewpoints and critical inquiry are consonant with the University's stated mission. In its determination, the USG wrote as follows:

> "United Student Government invited representatives from both Students for Justice in Palestine and the Jewish Student Organization to hear their perspectives and ask questions to both groups.
>
> "After careful deliberation, United Student Government has faith that this chapter of Students for Justice in Palestine at Fordham and its members will positively contribute to the Fordham community in such a way that is sensitive to all students on campus. United Student Government is dedicated to the safety of all students and has faith that Students for Justice in Palestine can function on campus respectfully. This chapter of Students for Justice in Palestine at Fordham fulfills a need for open discussion and demonstrates that Fordham is a place that exemplifies diversity of thought. Their presence will help to create a space for academic discussion and promote intellectual rigor on campus. We do not believe that the presence of Students for Justice in Palestine will take away from efforts to promote a safe environment on our campus.
>
> "As with all United Student Government decisions, we welcome all students to voice their concerns and participate in the open dialogue which USG promotes."

Subsequent to the USG's vote of approval, Dean of Student Eldredge then wrote to Awad, Dadap, Lurie and other students, stating that he was informed of the decision to approve the SJP club and that he "now need[ed] to review the request before it is finalized." On the last day of the fall semester's classes in 2016, Eldredge requested a meeting with the students who were attempting to organize SJP. The meeting was conducted on December 12, 2016, with Eldredge, Wenzel, Lurie, and another student in attendance. Eldredge and Wenzel asked the students their views on boycott, divestment, and sanctions against Israel, whether the use of such activities meant the dissolution of

Israel, why students might use the term "apartheid" to describe Israel, and whether the student organizers would work with national advocacy groups Jewish Voice for Peace, J Street, and Seeds of Peace. At the meeting, Lurie and the other student explained that boycott, divestment, and sanctions are non-violent tactics meant to pressure the Israeli government to respect Palestinian rights, and they offered several examples of discriminatory laws and practices in Israel that they believed fit within the legal definition of apartheid. The two students also replied that they would like to work with Jewish Voice for Peace.

On December 22, 2016, Eldredge issued the following determination:

> "After consultation with numerous faculty, staff and students and my own deliberation, I have decided to deny the request to form a club known as Students for Justice in Palestine at Fordham University. While students are encouraged to promote diverse political points of view, and we encourage conversation and debate on all topics, I cannot support an organization whose sole purpose is advocating political goals of a specific group, and against a specific country, when these goals clearly conflict with and run contrary to the mission and values of the University.
>
> "There is perhaps no more complex topic than the Israeli-Palestinian conflict, and it is a topic that often leads to polarization rather than dialogue. The purpose of the organization as stated in the proposed club constitution points toward that polarization. Specifically, the call for Boycott, Divestment and Sanctions of Israel presents a barrier to open dialogue and mutual learning and understanding."

The petitioners thereafter commenced this CPLR article 78 proceeding, seeking to annul that determination, and compel the respondent to recognize SJP as a sanctioned club in accordance with the USG's vote of approval.

The respondent moves to dismiss the petition on the grounds that documentary evidence provides a complete defense to the proceeding, and that the petition fails to state a cause of action.

By separate motion, the petitioners move pursuant to CPLR 3025(b) to amend the petition to add Veer Shetty as an additional petitioner.

III. DISCUSSION

A. MOTION TO AMEND THE PETITION

The petitioners move pursuant to CPLR 3025(b) to amend the petition to add as an additional petitioner, Veer Shetty, a undergraduate student enrolled at the respondent University. The petitioners do not seek to add any additional claims. The respondent opposes the motion. The motion is granted for the reasons set forth the petitioners' motion papers.

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b);

JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). The court finds the respondent's arguments in opposition, *i.e.* that the proposed additional petitioner lacks standing and that the claim is untimely, to be unpersuasive, and it has wholly failed to establish any prejudice or surprise resulting from the proposed amendment.

B. MOTION TO DISMISS THE PETITION

"Courts have a restricted role in reviewing determinations of colleges and universities. A determination will not be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, [or] it fails to abide by its own rules." Matter of Powers v St. John's Univ. Sch. of Law, 25 NY3d 210, 216 (2015) (internal quotation marks and citation omitted). Thus, a judicial challenge to a university's alleged failure to comply with its own internal regulations properly lies pursuant to CPLR article 78, and review is appropriate under the "arbitrary and capricious" standard of CPLR 7803(3). See id.; Maas v Cornell Univ., 94 NY2d 87 (1999); Matter of Harris v Trustees of Columbia Univ., 62 NY2d 956 (1984), revg for reasons stated in dissenting op of Kassal, J., 98 AD2d 58, 67-73 (1st Dept. 1983).

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference." Matter of Eastern Oaks Dev., LLC v Town of Clinton, 76 AD3d 676, 678 (2nd Dept. 2010); see Leon v Martinez, 84 NY2d 83 (1994); Matter of Gilbert v Planning Bd. of Town of Irondequoit, 148 AD3d 1587 (4th Dept. 2017); Matter of Schlemme v Planning Bd. of City of Poughkeepsie, 118 AD3d 893 (2nd Dept. 2014); Matter of Ferran v City of Albany, 116 AD3d 1194 (3rd Dept. 2014); Matter of Marlow v Tully, 79 AD2d 546 (1st Dept. 1980). "In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition . . . where, as here, 'no answer or return has been filed." Matter of Scott v Commissioner of Correctional Servs., 194 AD2d 1042, 1043 (3rd Dept. 1993); see Matter of Ball v City of Syracuse, 60 AD3d 1312 (4th Dept. 2009). "Whether a plaintiff [or petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19 (2005). As long as the petition alleges specific facts "giving rise to a fair inference" that the determination was arbitrary and capricious (Matter of Vyas v City of New York, 133 AD3d 505, 505 [1st Dept. 2015]), dismissal for failure to state a cause of action is not warranted.

The petition here more than satisfies that standard, as it clearly alleges that Fordham procedurally violated its own rules concerning the recognition of student clubs by permitting a dean to overrule a vote of the USG, and imposed a newly identified factor in considering whether approval is warranted or not, namely whether a group may add to the "polarization" of persons with differing opinions on contested topics of the day.

"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." Leon v Martinez, 84 NY2d 83, 88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 (2014). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable." Dixon v 105 W. 75th St., LLC, 148 AD3d 623, 629 (1st Dept. 2017), citing Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). The documentary evidence here, consisting of the administrative record itself, does not conclusively establish that the challenged decision was not arbitrary and capricious.

Generally, the denial of a motion to dismiss the petition in a CPLR article 78 proceeding is followed by the service and filing of an answer and administrative record, or return. See Matter of Kickertz v New York Univ., 25 NY3d 942 (2015). However, where "it is clear that no dispute as to the facts exists and no prejudice will result" a court, upon a respondent's motion to

dismiss, may decide the petition on the merits. Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County, 63 NY2d 100, 102 (1984); see Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs, 148 AD3d 1137 (2nd Dept. 2017); Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., 115 AD3d 427 (1st Dept. 2014); Matter of Kuzma v City of Buffalo, 45 AD3d 1308 (4th Dept. 2007).

Under the circumstances presented here, service of an answer is not necessary, as the facts have been fully presented in the parties' papers, and no factual dispute remains. See Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. Of Nassau County, supra; Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y., supra; Matter of Camacho v Kelly, 57 AD3d 297 (1st Dept. 2008).

C. MERITS OF THE PETITION

A determination is arbitrary and capricious where is not rationally based, or has no support in the record. See Matter of Gorelik v New York City Dept. of Bldgs., 128 AD3d 624 (1st Dept. 2015). A determination may also be annulled as arbitrary and capricious where the decision maker considers inappropriate factors in coming to his or her decision. See Matter of Rossakis v New York State Bd. of Parole, 146 AD3d 22 (1st Dept. 2016);

Matter of Kaufman v Incorporated Vil. of Kings Point, 52 AD3d 604 (2nd Dept. 2008). In addition, a determination of a university, acting in its administrative capacity, may be set aside where the university does not abide by its own rules. See Matter of Powers v St. John's Univ. Sch. of Law, supra.

A court's review of administrative determinations is limited to the record made before the decision maker. See Matter of Featherstone v Franco, 95 NY2d 550 (2000); Matter of Levine v New York State Liquor Auth., 23 NY2d 863 (1969); Matter of Pascazi v New York State Bd. of Law Examiners, 151 AD3d 1324 (3rd Dept. 2017). A court reviewing an administrative determination "must judge the propriety of that determination solely upon the grounds invoked" by the decision maker, "and the court is powerless to affirm the [determination] through reasoning it deems more appropriate." Matter of Stern, Simms & Stern v Joy, 48 AD2d 788, 788 (1st Dept. 1975); see Matter of Weill v New York City Dept. of Education, 61 AD3d 407 (1st Dept. 2009). "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." Matter of Scherbyn v Wayne-Finger Lakes Bd. of Cooperative Educ. Servs., 77 NY2d 753, 758 (1991); see Securities & Exch. Comm. v Chenery Corp., 332 US 194 (1947); Matter of Blum v D'Angelo, 15 AD2d 909 (1st Dept. 1962).

Here, Fordham did not abide by its own published rules

governing the approval and recognition of student clubs, inasmuch as it seemingly imposed an additional tier of review, by a dean, of an approval already rendered by the USG. This deviation from usual practice is particularly notable here, since the USG was only empowered to vote for approval of a club in the first instance where prior approval has already been granted by the Director of the Office for Student Involvement and the Dean of Students. Indeed, the Dean's abrupt change from preliminary approval to rejection was made without a rational explanation or any change in circumstances. In the context of administrative determinations, "[a] change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief" (Sierra Club v United States Army Corps of Engrs., 772 F2d 1043, 1046 [2nd Cir. 1985]), and such an unexplained change necessarily requires the conclusion that the ultimate determination was arbitrary. See id.

Moreover, the ground for overruling the USG, as articulated by Dean Eldredge, was the potential "polarization" of the Fordham community were SJP to be formally recognized. Although the Dean, in determining whether to veto any new club, has discretion to evaluate whether the club will promote Fordham's mission, this discretion is neither unlimited nor unfettered. The issue of whether a club's political message may be polarizing is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham,

and appears to have been arbitrarily considered by Dean Eldredge after input from others who are critical of SJP's political beliefs. Importantly, consideration of whether a group's message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues.

> "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v Board of Regents 385 US 589, 603 (1967).

Contrary to Fordham's contention, its status as a private university does not mandate dismissal of the petition. Although Fordham is not a public university, and thus not expressly subject to First Amendment limitations on its right to restrict opinions that might be controversial or unpopular (see e.g. Mitchell v New York Univ., 129 AD3d 542 (1st Dept. 2015); Matter of Panarella v Birenbaum, 37 AD2d 987 [2nd Dept. 1971], affd 32 NY2d 108 [1973]), Fordham's own rules, regulations, and guidelines do not empower the Dean of Students to restrict the university's recognition of a student club based on its potential for raising issues or taking political positions that might be controversial or unpopular with a segment of the university community. Indeed, Fordham's 2005 mission statement, in relevant part, provides that:

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

> "Fordham affirms the value of a core curriculum rooted in the liberal arts and sciences. The University seeks to foster in all its students life-long habits of careful observation, critical thinking, creativity, moral reflection and articulate expression.
> "In order to prepare citizens for an increasingly multicultural and multinational society, Fordham seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own."

In other words, the consideration and discussion of differing views is actually part of Fordham's mission, regardless of whether that consideration and discussion might discomfit some and polarize others.

In his determination, Dean Eldredge does not provide a rational basis for concluding that SJP might encourage violence, disruption of the university, suppression of speech, or any sort of discrimination against any member of the Fordham community based on religion, race, sex, or ethnicity. His only articulated concern was that SJP singled out one particular country for criticism and boycott. Again, this is not an established ground for denying recognition to a student club. To the extent that Dean Eldredge claims authority to reject any club that criticizes a particular country, that same rule could be applied to students protesting or criticizing China's occupation and annexation of Tibet, Russia's occupation of the Crimea, or Iraq's one-time occupation of Kuwait.

Since there is nothing in the record of Dean Eldredge's determination supporting his authority to reject an application

of a student club because it criticized the policies of only one nation, the determination must be annulled as arbitrary and capricious. Even if he had such authority, there is nothing in the record of his determination requiring Fordham to apply such a rule consistently. Therefore, it must be concluded that his disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel, rather than some other nation, in spite of the fact that SJP advocates only legal, nonviolent tactics aimed at changing Israel's policies. This also renders his determination arbitrary and capricious, since the defense of a particular nation is not a factor countenanced by Fordham's rules, regulations, and guidelines for the approval of student clubs.

At present, there is no need to remand for further administrative action, since the administrative record is sufficiently developed for judicial consideration of whether SJP followed all applicable rules, regulations, and guidelines in applying for approval, and whether Fordham arbitrarily and capriciously failed to abide thereby, and arbitrarily considered inappropriate factors in reaching its ultimate determination. See Matter of Pantelidis v New York City Bd. of Stds. & Appeals, 43 AD3d 314 (1st Dept. 2007).

D. MOTION FOR A PRELIMINARY INJUNCTION

Since the court is granting the petition and annulling

Fordham's determination, the petitioners' motion to preliminarily enjoin Fordham from interfering with the USG's approval has been rendered academic.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the petitioners' motion to amend the petition to add Veer Shetty as a petitioner (SEQ 004) is granted and the amended petitioner in the form annexed to the moving papers shall be deemed served upon the respondent upon service of this order with notice of entry, and it is further,

ORDERED that the respondent's motion to dismiss the petition (SEQ 002) is denied; and it is further,

ORDERED and ADJUDGED that the amended petition (SEQ 001) is granted, the determination of Dean Keith Eldredge dated December 22, 2016, disapproving the application of Students For Justice in Palestine at Fordham University to be recognized as a student club is annulled, and Fordham University is directed to recognize Students For Justice in Palestine at Fordham University as a university-sanctioned club in accordance with the approval of the United Student Government Executive Board and Senate dated November 17, 2016; and it is further,

ORDERED that the petitioners' motion to preliminarily enjoin the respondent from interfering with the approval of the United Student Government Executive Board and Senate dated November 17,

2016, pending hearing of the petition herein (SEQ 003), is denied as academic.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 29, 2019

ENTER: _____
J.S.C.

HON. NANCY M. BANNON

EXHIBIT C

New York Supreme Court

Appellate Division—First Department

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

Petitioners-Respondents,

– against –

FORDHAM UNIVERSITY,

Respondent-Appellant.

AMICI CURIAE BRIEF ON BEHALF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, NATIONAL COALITION AGAINST CENSORSHIP AND PEN AMERICAN CENTER, INC. IN SUPPORT OF PETITIONERS-RESPONDENTS

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SUMMARY OF ARGUMENT

In 1972, the Supreme Court of the United States reversed Central Connecticut State College's viewpoint-based denial of recognition to a prospective chapter of Students for a Democratic Society. Recognizing the importance of students joining together on campus in support of shared convictions, the Supreme Court declared that a state college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." (Healy v. James, 408 U.S. 169, 187–88 [1972]). Now, nearly fifty years after that landmark ruling, Fordham University has followed in Central Connecticut State's footsteps, denying official recognition to a prospective chapter of a student group — Students for Justice in Palestine — because it disapproved of the group's viewpoint. As a private university, Fordham's viewpoint discrimination did not violate the First Amendment. But it did violate the extensive and unambiguous guarantees of free expression Fordham makes to its students, enshrined in the university's mission statement and throughout the university's policies — and those guarantees are binding.

Despite the long-recognized importance of freedom of expression and association on campus, Fordham is far from the only private university that has betrayed its promises of free expression after students chose to voice dissenting, challenging, or simply inconvenient opinions. *Amicus* FIRE's two decades of

experience defending student rights demonstrates that private institutions in New York and nationwide routinely ignore their own policies and promises to silence unwanted expression when it suits them. Too often, private colleges indulge in censorship with relative impunity, despite assuring students, parents, and accrediting agencies that they will honor expressive rights. The problem has worsened to such an extent that the U.S. Department of Education has proposed new rulemaking to ensure that private schools fulfill their commitments to freedom of expression and stop engaging in a cynical bait and switch.

In New York, however, students have a remedy: Article 78 actions, like the one successfully brought against Fordham by Plaintiffs-Appellees. In New York, Article 78 (C.P.L.R. §§ 7801, *et seq.*) ensures that private institutions like Fordham cannot abandon their own rules and promises when students choose to speak out or band together with their peers, and it prohibits exactly the kind of arbitrary and capricious decision-making on display in the dean of students' viewpoint discrimination in this matter. The lower court properly found that Article 78's high bar to judicial intervention into college administration was more than met here. To protect student expressive rights statewide by forcing schools like Fordham to follow their own rules and deliver on their own promises, this Court should affirm the lower court's correct analysis.

INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends fundamental rights at both public and private institutions through public commentary and advocacy, litigation on behalf of students and faculty members, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. (See, e.g., B.L. v. Mahanoy Area Sch. Dist., No. 19-1842, 2020 U.S. App. LEXIS 20365, at *21 [3d Cir. June 30, 2020] (citing with approval FIRE's *amicus curiae* brief in holding that a high school cheerleader's online speech was protected by the First Amendment)).

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of

[1] *Amici* FIRE, NCAC, and PEN America affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, its members, or counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

expression. (The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.) Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, teachers, students, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of members of university communities.

PEN American Center, Inc. ("PEN America" or "PEN") is a nonprofit organization that represents and advocates for the interests of writers, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its membership includes more than 7,400 journalists, novelists, poets, essayists, and other professionals including students and those in the academic and higher education communities. PEN America stands at the intersection of journalism, literature, and human rights to protect free expression and individual writers facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative and free expression. PEN champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. PEN America supports the First Amendment and free expression rights of students and

others on America's college campuses to protect principles of open inquiry and debate.

ARGUMENT

I. DESPITE THE IMPORTANCE OF EXPRESSIVE RIGHTS IN HIGHER EDUCATION, PRIVATE COLLEGES ROUTINELY VIOLATE THEIR OWN PROMISES OF FREEDOM OF EXPRESSION.

Courts have long recognized the importance of protecting student expressive and associational rights in higher education. While not bound by the First Amendment, private colleges and universities have traditionally matched their public counterparts' commitments to speech and associational rights over the past half-century, guaranteeing — as Fordham University does — freedom of expression to their students. Nevertheless, private colleges now routinely break their promises of free expression, teaching their students precisely the wrong lesson about their rights and the integrity of the institutions from which they seek their degrees.

A. Mirroring their Public Counterparts, Private Colleges and Universities Have Traditionally Promised Students Freedom of Expression.

"The essentiality of freedom in the community of American universities is almost self-evident." (Sweezy v. New Hampshire, 354 U.S. 234, 250 [1957]). The danger posed by threats to freedom of expression is "especially real in the University setting," because our colleges and universities house the "tradition of thought and experiment that is at the center of our intellectual and philosophic

tradition." (Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835 [1995]). Given the vital importance of freedom of speech, academic freedom, and freedom of association on campus, courts have long recognized our "national commitment to the safeguarding of these freedoms." (Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 [1978]).

The twin freedoms of expression and association do not lose their salience on private campuses, and private institutions have long recognized the essential role of freedom of expression in higher education and "the notion that universities should be centers of discussion of contested issues." (Matter of Awad v. Fordham University, 2019 NY Slip Op 51418(U), *6 [N.Y. Sup. Ct., July 29, 2019]). While private colleges and universities are not legally bound by the First Amendment, the vast majority of private institutions — including Respondent-Appellant[2] — guarantee their students and faculty members freedom of expression in official policies.[3] They do so to further their educational mission, to attract students and

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[2] *See, e.g.*, *Demonstration Policy*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 17, 2020) ("Each member of the University has a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society.").

[3] *See, e.g.*, *The Rules of University Conduct*, Columbia University, https://www.essential-policies.columbia.edu/files_facets/imce_shared/TheRulesOfUniversityConduct.pdf (last visited July 17, 2020) ("The Rules of University Conduct . . . are intended to ensure that all members of our community may engage in our cherished traditions of free expression and open debate. . . . To be true to these principles, the University cannot and will not rule any subject or form of expression out of order on the ground that it is objectionable, offensive, immoral, or untrue.");

faculty to the institution and foster a robust climate of debate and discussion, to meet the public's conception of our colleges and universities as true marketplaces of ideas, and to keep pace with their public peer institutions.[4]

In 1967, the same year the Supreme Court observed that "[t]he Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas,"[5] a committee commissioned by the University of Chicago and chaired by prominent First Amendment scholar Harry Kalven, Jr., issued an influential report emphasizing the importance of freedom of expression at private institutions in similar terms: "A university, if it is to be true to its faith in intellectual inquiry,

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Speech and Expression Policy, Georgetown University, https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression (last visited July 17, 2020) ("As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammeled verbal and nonverbal expression of ideas. It is Georgetown University's policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn."). *See also FIRE's Spotlight Database*, Foundation for Individual Rights in Education, https://www.thefire.org/resources/spotlight (last visited July 28, 2020) (cataloguing university speech policies, including private universities' commitments to freedom of expression).

[4] *See, e.g.*, Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 171 (2010) ("Although public and private universities differ in administrations, it is unlikely that student and faculty's reasonable expectations of free speech at a public college differ from their reasonable expectations of a private liberal arts or research college promising free speech and holding itself up as a purveyor of critical education."). *See also* John Inazu, *The Purpose (and Limits) of the University*, 18 UTAH L. REV. 943, 949 (2018) ("The First Amendment expressly governs public universities and informs the culture and norms of many private universities.").

[5] (Keyishian v. Board of Regents, 385 U.S. 589, 603 [1967]) (striking down New York state law requiring removal of faculty for "treasonable or seditious acts or utterances" on First Amendment grounds).

must embrace, be hospitable to, and encourage the widest diversity of views within its own community."[6]

Likewise, in 1974 — two years after the *Healy* Court made clear that the First Amendment protects student expressive and associational rights on public campuses — a Yale University committee issued its own widely-cited report on freedom of expression. Chaired by eminent historian C. Vann Woodward, the report echoed *Healy*'s holding and emphasized the essentiality of freedom of expression within the private university: "To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views. . . . Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed."[7] Indeed, Yale's Woodward Report explicitly cited the First Amendment as informing its reasoning and inspiring its conclusion: "We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at

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[6] Report on the University's Role in Political and Social Action, Kalven Committee, University of Chicago, Office of the Provost (Nov. 1967), https://provost.uchicago.edu/reports/report-universitys-role-political-and-social-action.

[7] C. Vann Woodward, *et al.*, Report of the Committee on Freedom of Expression at Yale, Yale University, 1974, https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale.

the time. . . . [E]ven when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression."[8]

The vast majority of private colleges and universities promise their students freedom of expression not only to meet the public's expectation that, as the United States Congress put it, "an institution of higher education should facilitate the free and open exchange of ideas,"[9] but also because their accrediting agencies share this expectation and require them to fulfill it as a condition of accreditation.

Respondent-Appellant Fordham, for example, is accredited by the Middle States Commission on Higher Education, which requires that an accredited university "possess and demonstrate . . . a commitment to academic freedom, intellectual freedom, [and] freedom of expression" and maintain "a climate that fosters respect among students, faculty, staff, and administration from a range of

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[8] *Id*. In 2014, a University of Chicago committee chaired by First Amendment scholar Geoffrey Stone issued a new report on free expression, concluding that "the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed." Geoffrey Stone, *et al*., Report of the Committee on Freedom of Expression, University of Chicago, 2014, https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf. The report's text, or a close variation, has now been adopted by more than 70 institutions or faculty bodies. *Chicago Statement: University and Faculty Body Support*, Foundation for Individual Rights in Education (July 14, 2020), https://www.thefire.org/chicago-statement-university-and-faculty-body-support.

[9] Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(C) (2006).

diverse backgrounds, ideas, and perspectives."[10] Other accrediting agencies require similar commitments to expressive rights. The Higher Learning Commission requires its accredited institutions to be "committed to freedom of expression and the pursuit of truth,"[11] for example, and the New England Commission of Higher Education requires its accredited institutions to be "committed to the free pursuit and dissemination of knowledge."[12] Accrediting agencies' insistence on a baseline level of expressive rights demonstrates that freedom of expression on campus is a fundamental expectation of the private university.

B. Private Colleges and Universities Like Fordham Violate Their Promises of Freedom of Expression.

Private institutions like Fordham promise their students expressive rights because of normative expectations and our nation's longstanding recognition of the integral role of free expression in higher education. They understand that students expect to be able to speak their minds and join their voices together on campus, and they seek to meet this expectation in policy. However, when faced with

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[10] *Standards for Accreditation and Requirements of Affiliation*, Middle States Comm'n on Higher Educ., 2015, https://www.msche.org/standards.
[11] *Criteria for Accreditation*, Higher Learning Comm'n, June 2014, https://www.hlcommission.org/Policies/criteria-through-august-31-2020.html.
[12] *Standards for Accreditation*, New England Comm'n of Higher Educ., July 1, 2016, https://www.neche.org/resources/standards-for-accreditation/#standard_six.

pressure to censor, too many private colleges nevertheless violate those principles, and *amicus* FIRE's case archive is replete with examples.[13]

For example, Rensselaer Polytechnic Institute's policies provide that its students are "citizen[s] of the nation at large, and [RPI] shall not impede or obstruct students in the exercise of their fundamental rights as citizens," that students are "free to examine and discuss all questions of interest to them and to express opinions publicly and privately," and "free to support causes by orderly means, including peaceful assembly, which do not disrupt the normal operation of" RPI.[14]

In 2016, some students, aggrieved that RPI's administration was wresting control over a student-operated union on campus, began a "Save the Union" campaign critical of RPI's senior administrators. Over the next three years, those administrators abandoned the Institute's robust promises of freedom of expression, ignoring written policies, citing nonexistent policies, and writing new speech-restrictive policies in order to suppress their critics. When students supporting the movement repeatedly requested permission to hold peaceful demonstrations, the

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[13] *All Cases*, Foundation for Individual Rights in Education, https://www.thefire.org/cases/?limit=all (last visited July 28, 2020).
[14] Rensselaer Polytechnic Inst., Rensselaer Handbook of Student Rights and Responsibilities 6 (rev. Aug. 29, 2019), https://info.rpi.edu/sites/default/files/Handbook-of-Student-Rights-and-Responsibilities-Rev-August-29-2019.pdf.

requests were denied.[15] When they did so anyway, they were met with fences and police officers, hired from the city's ranks, who videotaped them and turned the surveillance footage over to administrators, who promptly used it to identify their critics.[16]

When students erected "Save the Union" signs in accordance with RPI's posting policies, RPI's administration repeatedly tore them down. In one of several examples caught on tape, security officers tore down signs criticizing the administration because it was "Accepted Students Day," when many prospective students and their parents were expected on campus.[17] When students pointed out to the officers that the policy allowed the posters, an officer responded: "Today's a different story."[18]

Not only were students barred from posting flyers, they were prohibited from handing them out. Students who did so were charged under a policy barring

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[15] Press Release, Rensselaer Polytechnic Institute president (literally) fences out free speech, FIRE, Oct. 12, 2017, https://www.thefire.org/rensselaer-polytechnic-institute-president-literally-fences-out-free-speech.

[16] Adam Steinbaugh, *Troy Police Department videotaped student demonstrators at Rensselaer Polytechnic Institute, a private institution*, FIRE (Mar. 27, 2018), https://www.thefire.org/troy-police-department-videotaped-student-demonstrators-at-rensselaer-polytechnic-institute-a-private-institution.

[17] Adam Steinbaugh, *Rensselaer Polytechnic Institute's commitment to freedom of expression remains doubtful*, FIRE (Nov. 8, 2017), https://www.thefire.org/rensselaer-polytechnic-institutes-commitment-to-freedom-of-expression-remains-doubtful.

[18] Save The Union, *RPI Public Safety Student Rights Oppression 1*, Apr. 9, 2016, https://soundcloud.com/save_the_union/rpi-public-safety-student-rights-oppression-1.

commercial solicitation and told they needed an administrator's permission to distribute written materials. Others were ordered to cease distributing flyers on sidewalks by security officers citing "eminent domain." After the New York Civil Liberties Union and FIRE pointed out that RPI's policies didn't require permission to hand out flyers, and that such a policy — if it existed — would be contrary to basic principles of freedom of expression,[19] RPI's administrators created a new policy requiring exactly that.[20] Today, no student at RPI is permitted to hand out any written material without express permission from an RPI administrator, and may only do so if they are affiliated with a recognized student organization. The "Save the Union" campaign is not recognized. Nonetheless, RPI continues to advertise its promise of freedom of expression to its students and the public.

A student at another private New York institution, Long Island University, found himself similarly at the whims of an institution that ignored its promised freedom of expression. During his summer vacation, Anand Venigalla posted a series of photographs of himself at a gun show, shooting an antique, powder-based

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[19] "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse [one] must first inform [authorities] of her desire to speak to her neighbors and then obtain a permit to do so." (Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–66 [2002]).

[20] Adam Steinbaugh, *Rensselaer Polytechnic Institute enforced a non-existent policy to suppress student critics, then wrote the policy*, FIRE (Sept. 24, 2019), https://www.thefire.org/rensselaer-polytechnic-institute-enforced-a-non-existent-policy-to-suppress-student-critics-then-wrote-the-policy.

rifle and holding several other firearms.[21] Venigalla's photos were not accompanied by any threats or reference to the university, noting merely that he was at "a Cabela's at Pennsylvania." Although he was on summer break and his online speech had nothing to do with his university, he was summoned by an administrator to a meeting with student conduct officials. Venigalla was interrogated about his photos and about an academic paper he had written that discussed whether political violence — like the Boston Tea Party — could be morally justified against state actors.

Remarkably, a similar controversy is currently taking place at Fordham itself. In June, as protests in Hong Kong captured the public's attention, Austin Tong, a Chinese immigrant and undergraduate student, posted a photograph of himself holding a lawfully-acquired firearm. His post appears to have been a response to the Chinese government's oppression of Hong Kong protesters, including the hashtag used by Chinese dissidents to reference the Tiananmen Square massacre ("#198964") and the historic American refrain "Don't tread on me." Other students, angered by another of Tong's posts that criticized Black Lives Matter demonstrators, characterized Tong's post as a threat. Fordham — ignoring

[21] Letter from Sarah McLaughlin, Senior Program Officer, FIRE, to Kimberly R. Cline, President, Long Island University, Aug. 31, 2018, https://www.thefire.org/fire-letter-to-long-island-university-post-august-31-2018.

both its promises of freedom of expression and the trial court's recent reminder of their importance — found Tong responsible for "threats," and is now demanding he write a letter of apology, requiring him to take courses online instead of in the classroom, and barring him from continuing to serve in the student government.[22] These penalties will have a severe chilling effect on student expression. They also expose Fordham's belief that the photograph was a threat as insincere; presumably, if Fordham administrators actually thought Tong's speech presented a real threat, they would have contacted law enforcement instead of asking him to write a letter of apology, continue online classes, and bar him from student government. Tong has filed suit against Fordham.[23]

Administrators are not the only source of limits on student expression. In 2019, a mirror-image version of the Fordham censorship now before this Court occurred at Williams College in Massachusetts. There, a *pro*-Israel student organization was denied recognition by the student government. While the full rationale for the rejection was not made public — the student government's minute-keeper said the debate included "clearly anti-Semitic things I didn't type

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[22] Letter from Lindsie Rank, Program Officer, FIRE, to Father Joseph M. McShane, S.J., President, Fordham University, July 17, 2020, https://www.thefire.org/fire-letter-to-fordham-university-july-17-2020.

[23] Priscilla DeGregory & Doree Lewak, *Fordham student says school wrongfully penalized him for social media posts*, N.Y. POST (July 23, 2020), https://nypost.com/2020/07/23/fordham-student-wrongfully-penalized-for-social-media-posts-suit; *see also Tong v. Fordham Univ.*, (index no. pending) (Sup. Ct., N.Y. Cty., filed July 23, 2020).

down" and did not want to repeat[24] — much of the criticism of the proposed group focused on the group's support of Israel.[25] Williams administrators ultimately granted recognition to the group through an alternative process, restoring the institution's commitment to freedom of expression and quickly resolving an investigation initiated by the United States Department of Education.[26]

Sadly, Plaintiffs-Appellees' experience at Fordham is not unique. While students at public institutions may fall back on avenues for redress afforded to them under the First Amendment, students at private institutions lack those enforcement mechanisms, emboldening private institutions to betray their promises. Censorship of student expression at private institutions ostensibly committed to freedom of speech has proven to be such a persistent and pernicious problem that the federal Department of Education announced proposed regulations

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[24] Minutes of the Williams College Council, Apr. 30, 2019, http://ephblog.com/wp-content/uploads/2019/05/4_30_19-Minutes.docx.

[25] Letter from Sarah McLaughlin, Senior Program Officer, FIRE, to Maud S. Mandel, President, Williams College, May 15, 2019, https://www.thefire.org/fire-letter-to-williams-college-may-2019 (noting student government members criticizing the proposed group, arguing that "there are ways of supporting Israeli statehood that don't support the occupation or human rights abuses against Palestinians" and "almost everyone will agree that massive abuses are happening, and I think that you need sort of a special consideration and debate when it comes to voting for [proposed groups] that affiliate themselves with a state involved in such a conflict.").

[26] Sarah McLaughlin, *After viewpoint-based denial, Williams Initiative for Israel finally receives recognition*, FIRE (May 16, 2019), https://www.thefire.org/after-viewpoint-based-denial-williams-initiative-for-israel-finally-receives-recognition; Jackson Richman; *Williams College reaches resolution with Department of Ed after nixing pro-Israel group*, JEWISH NEWS SYNDICATE (July 12, 2019), https://www.jns.org/williams-college-reaches-resolution-with-department-of-ed-after-nixing-pro-israel-group.

this past January to "require private institutions to comply with their stated institutional policies on freedom of speech" as a condition of the receipt of federal grants.[27]

Private institutions like Fordham should not be permitted to promise free expression in policy only to censor in practice. In New York, they cannot. As the lower court correctly held, Article 78 is the legal means by which private universities like Fordham may properly be held accountable.

II. THE LOWER COURT WAS RIGHT: FORDHAM BROKE ITS PROMISES TO ITS STUDENTS.

A. Fordham Promises its Students Freedom of Expression.

Upon enrolling at Fordham University, students like Plaintiffs-Appellees expect that their university will respect their expressive and associational rights. This expectation is entirely reasonable: Fordham bills itself as an institution that values freedom of expression, and Fordham's policies repeatedly and explicitly

[27] Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190 (U.S. Dep't of Educ., proposed Jan. 17, 2020). *See also* Robert Shibley, *New Department of Education First Amendment grant regulations have real promise, but require caution*, FIRE (Jan. 17, 2020), https://www.thefire.org/new-department-of-education-first-amendment-grant-regulations-have-real-promise-but-require-caution.

recognize the rights of its students to speak their minds and band together with others who share their beliefs.

Fordham's mission statement "guarantees the freedom of inquiry required by rigorous thinking and the quest for truth."[28] Describing Fordham as "a place where ideas and opinions are formulated and exchanged," the institution's Demonstration Policy proclaims that "[e]ach member of the University has a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society."[29] Because "the University values freedom of expression and the open exchange of ideas" and the "expression of controversial ideas and differing views is a vital part of University discourse," the university's policy prohibiting "Bias-Related Incidents and/or Hate Crimes" carefully notes that simply because "the expression of an idea or point of view may be offensive or inflammatory to others" does not mean it will be subject to punishment.[30] Indeed, rather than barring students from expressing dissenting, minority, or even the allegedly "divisive" viewpoints of Plaintiff-Appellees,

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[28] *Mission Statement*, Fordham University, https://www.fordham.edu/info/20057/about/2997/mission_statement (last visited July 17, 2020).
[29] *Demonstration Policy*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 17, 2020).
[30] *Bias-Related Incidents and/or Hate Crimes*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 17, 2020).

Fordham's rules expressly *prohibit* such views from being silenced. The University Code of Conduct outlaws "[e]ngaging in, or inciting others to engage in, conduct which . . . prevents or limits the free expression of ideas by others[.]"[31]

Fordham's policies are clear. The university has unambiguously promised its students freedom of expression. The lower court was correct to intervene to prevent Fordham from breaking that promise.

B. Fordham Failed to Abide by Its Own Rules.

In New York, "the judgment of professional educators is subject to judicial scrutiny . . . to determine whether they abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational." (Gertler v. Goodgold, 107 A.D.2d 481, 486 [1st Dept. 1985]). The lower court correctly found that Fordham violated its own rules by both "imposing an additional tier of review" from the dean upon Students for Justice in Palestine's application for recognition and by citing "the potential 'polarization' of the Fordham community were SJP to be formally recognized" as grounds for overruling the student government's recognition of the group. (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Neither the dean's additional review nor his viewpoint-based reversal of SJP's

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[31] *University Code of Conduct, Chapter 3: Violations*, Fordham University, https://www.fordham.edu/info/20987/article_6_university_code_of_conduct/2173/chapter_3_violations (last visited July 17, 2020).

recognition were authorized by Fordham's policies, and Fordham's plain failure "to abide by its own rules" warrants judicial intervention. (Matter of Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216 [2015]) (citing Matter of Harris v. Trustees of Columbia Univ., 62 N.Y.2d 956, 959 [1984])).

Importantly, the lower court correctly determined that the dean's viewpoint-based discrimination against SJP was arbitrary and capricious. A court may annul an administrative decision in an Article 78 proceeding as arbitrary and capricious when it finds "the decision maker consider[ed] inappropriate factors in coming to his or her decision." (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Reliance "upon inappropriate factors" renders a determination "irrational and an abuse of discretion" under Article 78. (Stone Landing Corp. v. Bd. of Appeals, 5 A.D.3d 496, 497 [2d Dep't 2004]) (first citing Matter of Cohen v. Bd. of Appeals, 100 N.Y.2d 395, 402 [2003]; and then citing Matter of Pleasant Valley Home Constr., Ltd. v. Van Wagner, 41 N.Y.2d 1028, 1029 [1977])). As students like Plaintiffs-Appellees would reasonably expect, given Fordham's extensive representations about the expressive rights they possess, "[t]he issue of whether a club's political message may be polarizing is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham[.]" (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). Fordham's policies do not permit the denial of a student group's application for recognition based on an

administrator's subjective speculation about how its views might be received by other students. To the contrary, as the lower court emphasized, "the consideration and discussion of differing views is actually part of Fordham's mission, regardless of whether that consideration and discussion might discomfit some and polarize others." (Id. at *7). Because students rely on Fordham to follow its own rules and make good on its own promises, the lower court was correct to conclude that the dean's viewpoint-based discrimination "must be annulled as arbitrary and capricious." (Id.)

In its brief, Respondent-Appellant places a great deal of emphasis on the lower court's examination of two sets of rules circulating at Fordham for club approval: the "governing club guidelines," which it asserts are the real rules, and the "USG registration packet," which it asserts are a student-authored misstatement of the rules. Respondent-Appellant's Brief at 23–24. Ultimately, neither version of the rules saves the dean's viewpoint discrimination from being annulled as arbitrary under Article 78, as neither version authorizes the dean to assert "polarization" as a basis for disqualification. But to the extent there are multiple versions of the rules, it is Fordham's obligation to promulgate the correct ones, including through the student government, which acts as its agent for purposes of recognizing student organizations. Article 78's goal of ensuring fundamental fairness in the asymmetrical student/institution relationship cannot be achieved if

students are expected to not only obtain a policy from a decision-maker, but then audit it for administrative consistency.

Respondent-Appellant also asserts that the dean's determination should not be disturbed because it had a "rational basis" and was based on the exercise of his "honest discretion." Respondent-Appellant's Brief at 35. Here, Respondent-Appellant conflates rational thinking with rational application of written rules. Whether the dean's determination was *rational in the abstract* is unrelated to whether that basis is *enumerated in the governing policy*.

As the lower court correctly noted, a club's potential for polarization "is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham, and appears to have been arbitrarily considered by Dean Eldredge . . . ." (Matter of Awad, 2019 NY Slip Op 51418(U) at *6). As such, the dean's reliance on an extrinsic, unenumerated, and ultimately subjective determination as a basis for denying Petitioners-Respondents' rights "must be annulled as arbitrary and capricious." (Id. at *7).

CONCLUSION

To protect both Petitioners-Respondents and their peers at Fordham and other private New York institutions of higher education, this Court should affirm

that Article 78 does not allow private colleges and universities to promise freedom of expression in policy but deliver viewpoint discrimination in practice.

Dated: July 31, 2020

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) ss.:
COUNTY OF NEW YORK)

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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