



Via Email

January 26, 2017

Jeffrey L. Gray
Vice President for Student Affairs
Fordham University

Re: Ban on Students for Justice in Palestine at Fordham University

Dear Vice President Gray,

We write in response to your January 20, 2017, letter concerning Fordham University's decision to deny Students for Justice in Palestine (SJP) associational status. Your letter misconstrues the facts, misunderstands the law, and ignores Fordham's contractual obligations to respect students' freedom of expression, as promised in various University policies.

1. Fordham's SJP Ban Violates Free Speech and Associational Principles

In your letter, you state that the decision to deny SJP club status "was based on the fact that chapters of this organization have engaged in behavior on other college campuses that would violate this University's student code of conduct." You also stated that you "asked [students] to change the name of the proposed club and to distance themselves from the national organization, our students declined to do so." Your letter reflects a deep misunderstanding of freedom of association and speech principles to which Fordham promises to adhere.

Fordham's mission statement "guarantees the freedom of inquiry required by rigorous thinking and the quest for truth."¹ The university's demonstration policy recognizes the value of dissent and promises to uphold freedom of expression, noting that, "[e]ach member of the University has a **right to freely express his or her positions** and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society."² According to its own policies, Fordham may not infringe on the rights of students "to **express their positions**" and engage in "other legitimate activities."³ This is because Fordham "values

¹ Fordham University, "Mission Statement," n.d., https://www.fordham.edu/info/20057/about/2997/mission_statement (emphasis added).

² Fordham University, "Demonstration Policy," n.d., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (emphasis added).

³ Fordham University, "Demonstration Policy," n.d., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy.

freedom of expression and the **open exchange of ideas**. The expression of controversial ideas and differing views is a vital part of University discourse.”⁴

Fordham holds 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, “from your engagement with the community and the people in it.”⁵ The opportunity for, and the importance of student clubs are emphasized throughout Fordham’s website, which states that: “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.”⁶ Moreover, various rights of expression guaranteed by the University are contingent on the expression coming from a registered student organization or club, including distribution of literature,⁷ posting of materials,⁸ and inviting guest speakers to campus.⁹ Students who seek club status for SJP are also denied these and other basic rights to express themselves at Fordham.

In *Healy v. James*, the Supreme Court held that the denial of student group status based on the actions of a national group violates associational rights under the First Amendment.¹⁰ The facts in *Healy v. James* find apt analogue to this one. During a time of great political unrest in the 1960s, students at Central Connecticut State College applied to start a Students for a Democratic Society (SDS) chapter on campus. Though the students expressly stated that their group was not under the dictates of a national organization, the college president rejected a committee’s recommendation to approve the group, stating that the group would be a “disruptive influence,” “contrary to the orderly process of change” on campus and doubted the group’s independence from the national organization.¹¹

In finding that the president’s decision violated the associational rights of students, the Supreme Court noted that the college bore a “heavy burden” of proof as to whether its action was appropriate – a burden which was not met by simply alleging that *some* SDS chapters had engaged in disruptive campus activity in other places.¹²

⁴ Fordham University, “Bias-Related Incidents and/or Hate Crimes,” n.d., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes.

⁵ Fordham University, “Student Life,” n.d., https://www.fordham.edu/info/20015/student_life.

⁶ Fordham University, “Student Leadership and Community Development,” n.d., <http://216.230.117.32/section3/section55/index.html>.

⁷ Fordham University, “Distribution of Literature,” n.d., https://www.fordham.edu/info/24226/a_z_listing/3710/distribution_of_literature.

⁸ Fordham University, “Publicity and Posting,” n.d., https://www.fordham.edu/info/24226/a_z_listing/3733/publicity_and_posting.

⁹ Fordham University, “Speakers Policy,” n.d., https://www.fordham.edu/info/24226/a_z_listing/3740/speakers_policy.

¹⁰ *Healy v. James*, 408, U.S. 169 (1972).

¹¹ *Id.* at 173, 179.

¹² *Id.* at 186-87. (“Not only did petitioners proclaim their complete independence from this organization, but they also indicated that they shared only some of the beliefs its leaders have expressed. On this record it is clear that the relationship was not an adequate ground for the denial of recognition.”)

[G]uilt by association alone, without establishing that an individual's association poses the threat feared . . . is an impermissible basis upon which to deny First Amendment rights . . . The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.¹³

Noting that the First Amendment protects the “right of individuals to associate to further their personal beliefs,” the Court found that “[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.”¹⁴

As in *Healy*, and noted in our January 17th letter, students interested in starting SJP at Fordham repeatedly declared their complete independence from National Students for Justice in Palestine (NSJP), and SJP chapters on other campuses. Students explained that their group would not be beholden to the national body, nor would any of their actions have to be approved by NSJP. The students confirmed with NSJP that NSJP is a separate, student-run organization which organizes annual conferences but otherwise is independent of campus SJP organizations, and submitted this information to Fordham. NSJP’s website also clearly states “we do not dictate to SJP chapters: **all individual SJPs are autonomous student orgs** on their respective campuses.”¹⁵

Denying SJP club status at Fordham based on actions of the national group or other chapters violates the free speech and associational principles to which Fordham promises to adhere. Regardless of whether private universities are bound by the First Amendment, Fordham is presumably committed to the rights to free speech and association which it guarantees. Moreover, it appears that Fordham’s banning of SJP on the basis of allegations of activities of other chapters is a standard that only applies to SJP. In recent times, student groups across the country have protested – and often disrupted – talks by neo-Nazis, ethno-nationalists and right-wing hate groups. Yet it appears that only SJP is being censored for the actions (or in this case, allegations), of independent groups which bear the same name.

2. NSJP, a separate, independent organization, has not engaged in “disruptive” activity

Besides Supreme Court precedent that First Amendment rights cannot be denied based on association alone, and the fact that SJP is autonomous from NSJP and other SJPs, it is not clear what “disruptive” activity NSJP – or any other SJP chapter – has engaged in that would violate Fordham’s code of conduct. Your letter makes only vague and unsupported allegations that “SJP’s actions at other campuses have actually attempted to restrict speech” – citing no examples of where such “actions” occurred, what they were or who Fordham believes committed them.

Your letter separately mentions “the national organization.” NSJP organizes national conferences where students around the country supporting Palestinian rights gather to discuss

¹³ *Id.* at 186 (internal quotations and citations removed).

¹⁴ *Id.* at 181.

¹⁵ National Students for Justice in Palestine, “About Us,” n.d., <http://www.nationalsjp.org/about.html> (emphasis in original).

issues relating to Israel/Palestine. It is unclear how organizing national conferences on one of the most important foreign policy discussions of the day violates Fordham's code of conduct.

On separate occasions, Fordham students interested in starting an SJP were questioned on the 2014 activities of New York University Students for Justice in Palestine (NYU-SJP), when the student president of an Israel advocacy group falsely accused NYU-SJP of targeting Jewish dorms with flyers highlighting Israel's policies of demolishing Palestinian homes. These false statements were repudiated by NYU officials, and no disciplinary action was taken against SJP or any student affiliated with SJP or involved in distributing the flyers.¹⁶

It is true that Israel advocacy organizations, some of whom have applauded your decision to ban SJP at Fordham, have brought numerous unsubstantiated and meritless complaints against SJPs, and other groups supporting Palestinian rights, at other schools. Most recently, in New York City, an independent fact-finding investigation conducted by a formal federal judge and prosecutor found that SJP had engaged in no misconduct after the Zionist Organization of America demanded the City University of New York (CUNY) ban SJP from all campuses.¹⁷ In a detailed report, the investigation stressed that: "Political speech is often provocative and challenging, but that is why it is vital to university life. If college students are not exposed to views with which they may disagree, their college has short-changed them."¹⁸

For more information about widespread attempts to suppress Palestinian rights advocacy in the United States, especially on college campuses, please see our attached Report, *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, which details numerous examples of baseless complaints and false and inflammatory accusations against Palestinian rights advocates. Fordham students interested in starting an SJP should not be banned for the actions of (much less allegations against) unaffiliated SJP chapters – any more than the College Republicans should be banned for the actions of President Donald Trump.

3. There is no "civility" exception to free speech

Your letter mentions that political dialogue must take place within "norms of civility." The use of the vague and highly subjective concept of "civility" has been at the center of a number of campus controversies. For example, University of California, Berkeley Chancellor Nicholas B. Dirks faced criticism in September 2014 after issuing a statement pitting "civility" against "freedom of speech." Not only did faculty respond fiercely, but the Chancellor's

¹⁶ See, Palestine Legal, "Cases," Mar. 10, 2015, <http://palestinelegal.org/case-studies/2015/3/4/new-york-university>; PALESTINE LEGAL & THE CENTER FOR CONSTITUTIONAL RIGHTS, *THE PALESTINE EXCEPTION TO FREE SPEECH* 77 (2015) ("Palestine Exception") <http://palestinelegal.org/the-palestine-exception-appendix#nyu1>.

¹⁷ Press Release, Palestine Legal, *Independent Investigation Clears CUNY Students for Justice in Palestine* (Sept. 12, 2016), <http://palestinelegal.org/news/2016/9/12/press-release-independent-investigation-clears-cuny-students-for-justice-in-palestine?rq=CUNY>.

¹⁸ Judge Barbara Jones and Paul Shechtman, *REPORT TO CHANCELLOR MILLIKEN ON ALLEGATIONS OF ANTI-SEMITISM* (Sept. 6, 2016) <http://www2.cuny.edu/wp-content/uploads/sites/4/page-assets/news/newswire/assets/CUNYReport.pdf>.

statement was roundly rejected in the pages of the Wall Street Journal,¹⁹ the Los Angeles Times,²⁰ Inside Higher Education,²¹ Salon,²² the Chronicle of Higher Education,²³ and the Washington Post,²⁴ forcing him to backtrack in a subsequent clarification.²⁵

Courts are also hostile to the concept of “civility” at universities, regularly holding that punishment for “incivility” violates the First Amendment. For example, in 2006, San Francisco State University (SFSU) opened an investigation into whether a student organization—the College Republicans—violated the Student Code of Conduct by failing to be “civil” in its interactions with others on campus. The College Republicans sued SFSU in federal court for unconstitutionally chilling its speech through an investigation. The College Republicans prevailed; in his ruling, federal magistrate Judge Wayne D. Brazil made clear that requiring “civility” on campus at threat of investigation or sanction is unconstitutional:

[A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause.²⁶

¹⁹ Greg Lukianoff, *Free speech at Berkeley-so long as it's 'civil'*, WALL STREET JOURNAL, Sep. 8, 2014, <http://online.wsj.com/articles/greg-lukianoff-free-speech-at-berkeleyso-long-as-its-civil-1410218613>.

²⁰ Michael Hiltzik, *Free speech, civility, and how universities are mixing them up*, LOS ANGELES TIMES, Sep. 9, 2014, <http://www.latimes.com/business/hiltzik/la-fi-mh-free-speech-civility-20140909-column.html>.

²¹ Colleen Flaherty, *The problem with civility*, INSIDE HIGHER ED, Sep. 9, 2014, <https://www.insidehighered.com/news/2014/09/09/berkeley-chancellor-angers-faculty-members-remarks-civility-and-free-speech>.

²² David Palumbo-Liu, *Civility is for suckers: Campus hypocrisy and the 'polite behavior' lie*, SALON, Sep. 10, 2014, http://www.salon.com/2014/09/10/civility_is_for_suckers_campus_hypocrisy_and_the_polite_behavior_1ie/.

²³ Peter Schmidt, *Please for civility meet cynicism*, CHRONICLE OF HIGHER EDUCATION, Sep. 10, 2014, <http://chronicle.com/article/Pleas-for-Civility-Meet/148715/>.

²⁴ Eugene Volokh, *Free speech and civility at universities*, WASHINGTON POST, Sep. 9, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/09/free-speech-and-civility-at-universities/>.

²⁵ Ken White, *Follow-up: U.C. Berkeley Chancellor Nicholas Dirks Gets Free Speech Right This Time*, POPEHAT, Sep. 12, 2014, <http://www.popehat.com/2014/09/12/follow-up-u-c-berkeley-chancellor-nicholas-dirks-gets-free-speech-right-this-time/>.

²⁶ See, e.g., *College Republicans at San Francisco State University v. Reed*, 523 F.Supp.2d 1005, 1019 (N.D. Cal. 2007).

Claims of civility have also been rejected in the context of speech on behalf of Palestinian rights. In 2014, Professor Steven Salaita was terminated from a tenured position at the University of Illinois at Urbana-Champaign, which claimed that his personal tweets criticizing the Israeli government's assault on Gaza were "uncivil." The Center for Constitutional Rights represented Professor Salaita in his case against the university, and the federal court refused to dismiss the case, finding that the university's attempt to distinguish between the "incivility" of the tweets "and the views those tweets presented [was] unavailing."²⁷ The court further found that the "tweets' contents were certainly a matter of public concern, and the topic of Israeli-Palestinian relations often brings passionate emotions to the surface."²⁸

The label of incivility has historically been used against unpopular groups, and often those seeking social justice, such as peaceful civil rights protesters in the 1960s. It is precisely when debate is passionate, however, that university administrators must steward an open campus forum and be cognizant of "the dependence of a free society on free universities," as the U.S. Supreme Court has said.²⁹ When core beliefs are contested and debated, university leaders must guarantee the conditions necessary for free debate on campus, and must assure that expression on matters of public concern is not only tolerated, but invited. Debate, disagreement, and free expression, including protests, demonstrations, and other expressive activities organized by student groups, embody the highest values of a free university and a democratic society. Attempts to prevent or punish speech because it may be considered "uncivil" violates Fordham's guarantees of free expression, contravenes academic freedom, and stifles debate.

4. Fordham's banning of SJP raises concerns under Title VI of the Civil Rights Act

Your letter did not address our concern that Fordham discriminated under Title VI of the Civil Rights Act by denying Ahmad Awad, a Palestinian-American who has since graduated, the opportunity to share his culture, history and story of his family's homeland on an equal basis as other students at Fordham. As Ahmad recently explained: "I was devastated to discover that Fordham would prohibit SJP — and, even worse, do so not because of any bad behavior, but simply because of what it represents on paper."³⁰

What SJP "represents on paper" is the idea that Palestinians like Ahmad deserve justice and to be afforded the same rights as everyone else. As a university committed to providing a diverse educational environment free from discrimination, we expect that Fordham will live up to its contractual guarantee of free expression and its obligations under Title VI by immediately permitting and facilitating the formation of SJP. We also reiterate our requests that Fordham apologize to the students involved, expressly recommit to guarantees of free speech and association on campus, and ensure equal treatment regardless of protected class.

²⁷ *Salaita v. Kennedy*, 118 F. Supp. 3d 1068, 1082 (N.D. Ill. 2015), citing *Cohen v. California*, 403 U.S. 15, 26 (1971) (finding "Fuck the Draft" jacket protected by the First Amendment).

²⁸ *Salaita*, 118 F. Supp. 3d at 1083.

²⁹ *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957).

³⁰ Ahmad Awad, Op-Ed., *Fordham Flunks Free Speech Test*, N.Y DAILY NEWS, Jan. 23, 2017, <http://www.nydailynews.com/opinion/fordham-flunks-free-speech-test-article-1.2951921>.

5. Conclusion

We hope that Fordham will treat freedom of speech not as a burden or a legal limitation, but rather, as a foundational value that enables searching scholarship and democratic governance. We would be happy to schedule a meeting with you to discuss these matters at your earliest convenience, along with students interested in starting an SJP. We look forward to your prompt response.

Sincerely,



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Deputy Legal Director
Center for Constitutional Rights



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Encl.

cc: Rev. Joseph M. McShane, S.J.