THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNIVERSITY AT BUFFALO YOUNG AMERICANS FOR FREEDOM; **JUSTIN HILL**; **JACOB CASSIDY**; and **AMELIA SLUSARZ**,

Plaintiffs,

v.

UNIVERSITY AT BUFFALO STUDENT ASSOCIATION, INC.; **BRIAN HAMLUCK** in his official capacity as the University at Buffalo Vice President for Student Life; **TOMÁS AGUIRRE** in his official capacity as the University at Buffalo Interim Dean of Students; and **PHYLLIS FLORO** in her Official Capacity as the University at Buffalo Director of Student Engagement,

Defendants.

CASE NO.: 1:23-cv-00480

THE HONORABLE LAWRENCE J. VILARDO

Jury Trial Demanded

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

TREATISES

OTHER AUTHORITIES

INTRODUCTION

Ever since March 2023, Defendants have sought to silence Young Americans for Freedom and its members. First, they sought to do so by automatically derecognizing the group when it refused to bow to their demand that it cut ties with its off-campus allies, a tailored demand that ignored a half century of Supreme Court precedent. *See Healy v. James*, 408 U.S. 169, 181 (1972).

Next, through their Legal Status Ban, Defendants condition recognition—a status vital to student groups because of the attendant benefits—on Young Americans for Freedom's officers signing a form agreeing that their group can no longer exist but must merge into Student Association. The group would also have to give up (or give Student Association complete control over) its right to control the messages it communicates, to associate only with those who share its goals, to enter contracts, to hold funds, to conduct financial transactions, to affiliate with off-campus allies, to retain its own property, and even to defend its freedoms in court. In short, to get the full benefits of Student Association recognition, Young Americans for Freedom must give up its existence, its distinct identity, and its freedoms.

These policies have real consequences for Young Americans for Freedom. For the entire school year, Defendants have prevented the group from accessing the over $6,300 in student-fee funding in its account. So far, it appears the group has not been denied other benefits of Student Association recognition, but this bar on using its funds has hamstrung its ability to express its ideas on campus this school year.

Young Americans for Freedom has sought to reach an agreement with Defendants that would allow it to access its account. Those efforts have failed, and Defendants continue to deny the group this benefit of recognition. This discrimination has forced the group to forego, cancel, or curtail numerous opportunities to advance its views on campus. These opportunities to speak, once lost, are lost forever. Thus, Young Americans for Freedom must now seek injunctive relief.

STATEMENT OF FACTS[1]

I. Young Americans for Freedom adds to the diversity on campus.

Almost seven years ago, Young Americans for Freedom first became a registered student group at the University. 2d. Am. V. Compl. ("Compl."), Doc. 37, ¶ 24. It retained its recognition from Student Association until just before this lawsuit. *Id.* ¶¶ 71, 86. It teaches students about United States history, the Constitution, individual freedom, a strong national defense, free enterprise, and traditional American values through the wide variety of expressive events it conducts on campus. *Id.* ¶ 25. As a group, it posts flyers and signs, hosts tables with information, invites speakers to campus, and engages with students about a host of political, religious, cultural, and moral issues. *Id.* ¶¶ 26–27. Due to these efforts, the broader network of Young Americans for Freedom chapters enjoys a national reputation as "the premier primary [conservative] organization inspiring young people across the country."[2]

At the University, Young Americans for Freedom meets weekly to discuss current political, social, and economic issues and to plan events. *Id.* ¶¶ 23–27, 54. Its higher-profile events include hosting lectures from LtCol. (Ret.) Allen West (on whether America is systemically racist) and Michael Knowles (on cultural responses to gender ideology). *Id.* ¶¶ 50–51, 72–73. Smaller events include its annual "9/11 Never Forget Project," collecting school supply donations for the needy, and setting up information tables on campus. *Id.* ¶¶ 52–53.

II. Student groups must have official recognition to function on campus.

To promote its views and share its values on campus, Young Americans for Freedom must retain recognized status. *Id.* ¶¶ 58–60, 128–37. Without it, the group cannot use a wide variety of campus resources. *Id.* ¶¶ 58–60. Without recognition

---

[1] All pinpoint citations to filed documents refer to the internal page numbering or bates-stamp number (if such exist), not the ECF page number.

[2] Mike Pence, *Former VP Pence at Young America's Foundation*, CSPAN (July 26, 2022, 1:02–1:03 PM), https://bit.ly/49VGLiT.

from Student Association, the group cannot access funding from the mandatory student activity fee. *Id.* ¶ 64. And this is the benefit that Defendants are denying Young Americans for Freedom and that restricts its speech.[3] Without access to the funds in its account, it cannot pay for the items necessary to communicate its views and has had to cancel or curtail many outreach efforts. Hill Decl. ¶¶ 12–27. As a result, Defendants have hamstrung its ability to compete in the marketplace of ideas, denying it access to funding available to all other groups Student Association recognizes.

III. Defendants' Legal Status Ban denies Young Americans for Freedom the benefits of recognition unless it surrenders its freedoms.

In March 2023, Young Americans for Freedom's status in the eyes of Defendants suddenly changed. That month, the group hosted Mr. Knowles, whose lecture on cultural responses to gender ideology attracted some attention and protests. *Id.* ¶¶ 73–74. Two weeks later, Student Association adopted a resolution that derecognized some (but not all) groups affiliated with a national organization (*i.e.*, Defendants' National Affiliation Ban). *Id.* ¶¶ 75–76, 79. Everyone involved knew that Mr. Knowles' lecture triggered this move, as Student Association's president announced to the senate: "We all know why we're doing this." *Id.* ¶ 77. The ban applied to Young Americans for Freedom, but not to at least four other student groups that addressed similar topics. *Id.* ¶¶ 93–96. Student Association then announced that if any groups subject to the ban did not terminate their national affiliations by May 31, they would be "automatically derecogni[zed]." *Id.* ¶¶ 81–82. Young Americans for Freedom did not disaffiliate and was thus derecognized on June 1. *Id.* ¶¶ 85–86.

Shortly after Plaintiffs filed suit and sought injunctive relief, Student Association rescinded the National Affiliation Ban. *Id.* ¶¶ 99–101. It claimed the automatic derecognition was "deemed never to have taken effect," but not even Student

[3] So far, it appears Defendants have allowed Young Americans for Freedom to enjoy other benefits of recognition from Student Association, but that may be because the group has not tried to use resources exclusive to Student Association. Hill Decl. ¶ 14.

Association can revise history or undo past events. *Id.* ¶¶ 101–03. So really, it just chose to re-recognize Young Americans for Freedom. *Id.* ¶ 104.

At the same time, though, Student Association adopted a "different requirement." *Id.* ¶ 105. Under it, before "taking any act as an SA club officer—including … the use of SA club funds, facilities, or other resources—a student officer of an SA club must sign the … 'Acknowledgment of Club Officer Responsibilities'" form. *Id.* ¶ 106. By signing this form, officers "certify" that they will comply with Defendants' policies, including the Legal Status Ban. *Id.* ¶ 107. Thus, they certify their club will not:

- Be a "separate legal entity from [Student Association]";
- "[H]ave any accounts or financial activities outside of [Student Association]";
- "[S]ign contracts"; or
- "[C]ommence litigation."

Id. ¶¶ 107–09. It also means that Student Association gets to determine—based on any factors it wishes to consider—whether the club can continue to affiliate with a national organization. *Id.* ¶¶ 110–13. It means that they agree that their club cannot raise or hold funds, *id.* ¶¶ 143–47; cannot conduct financial transactions without first getting Student Association's blessing, *id.* ¶¶ 149–59; cannot own property, *id.* ¶¶ 173–76. And it means that they agree to merge their club into Student Association (and all the other groups also merged with Student Association, even though Plaintiffs vigorously disagree with many of these groups). *Id.* ¶¶ 181–92. The mandated form ends by requiring each officer to affirm: "I shall be responsible for my violation of this agreement." Compl. Ex. 5, Doc. 37-5, at 7.

So rather than derecognizing Young Americans for Freedom, Student Association seeks to absorb the club into itself and require its approval before the club can carry out even the most basic functions. And it is serious about this. In September 2023, Young Americans for Freedom's officers discovered that they could not access any of the funds in the group's account. Compl., Doc. 37, ¶¶ 135–37; Hill Decl. ¶ 8. Why? They had not signed the form that would end their group's existence and

surrender its freedoms. Compl., Doc. 37, ¶¶ 135–37; Hill Decl. ¶ 9. As a result, this entire school year, Defendants have prevented the group from using any of the $6,315.21 in its account to conduct its expressive activities, and at the end of this semester, those funds will revert to Student Association. *Id.* ¶¶ 10–13.

Being locked out of its account and prohibited from owning property has hampered Young Americans for Freedom's speech. The group wanted to buy new flags for its annual "9/11 Never Forget" project and to upgrade the display by purchasing larger flags. Compl., Doc. 37, ¶¶ 177–78. But purchasing these flags costs at least $300, a sum the group would not spend unless it could be sure it would retain the flags. *Id.* ¶¶ 179–80. Besides, without access to its account, it has no money to spend. Hill Decl. ¶ 17. Similarly, the group wanted to buy Israeli flags to support the victims of Hamas' October 7, 2023 attacks, but it cannot access its account. *Id.* ¶ 18. Plus, if it had access to its account, the group would have expressed its views on campus by spray painting the bull; hosting a fall and spring banquet; holding debate, film, and game nights; and by creating banners and signage to enhance its tabling events. Compl., Doc. 37, ¶ 137; Hill Decl., ¶¶ 16, 19–23, 25–26. It has also been forced to curb its recruitment and networking efforts and its efforts to share its views via presentations, leaflets, and flyers. *Id.* ¶¶ 24–25. These opportunities to share its views in the last six months are gone forever—all because Defendants unconstitutionally insist Young Americans for Freedom and its members surrender their freedoms.

IV. Defendants refuse to grant Young Americans for Freedom the benefits of recognition during this litigation unless it surrenders its freedoms.

As soon as Young Americans for Freedom's officers discovered they could not access the club's funds, they tried to work with Student Association to resolve the situation without surrendering their freedoms. But all of these attempts have failed.

First, Young Americans for Freedom's officers signed the required form but just added language saying that federal and state law supersede University and

Student Association policies, that they were not waiving their claims, and that they would follow all constitutional and legal policies. Compl., Doc. 37, ¶¶ 131–32; Hill Decl. ¶ 6; Hill Decl. Ex. 1 at 1–4. All these statements are true, and none of them undermine Defendants' legitimate interests, as the Constitution is the supreme law of the land and any laws or policies that contradict it are null and void. U.S. CONST., art. VI ¶ 2. But Defendants refused to accept these forms, saying no alterations were permitted. Compl., Doc. 37, ¶ 133; Hill Decl. ¶ 7; Hill Decl. Ex. 2 at 1.

Next, the parties' counsel met to discuss the two problems Young Americans for Freedom's officers had with signing the mandated form: (1) their signatures could be used to suggest that they waived their claims in this case; and (2) their signatures confirmed that they were complying with all policies, something that is not true. Compl., Doc. 37, ¶¶ 128–31; Barham Decl. ¶¶ 5–8. After all, they are suing Student Association, something the Legal Status Ban explicitly forbids and renders impossible. Compl., Doc. 37, ¶¶ 107–09, 126–34 (If Young Americans for Freedom were absorbed into Student Association, this would mean Student Association is suing itself.) These officers cannot sign a document affirming a false statement, especially given the penalties to which this would expose both Young Americans for Freedom and themselves. *Id.* ¶¶ 134; Compl. Ex. 5, Doc. 37-5, at 7 ("I shall be responsible for my violation of this agreement.").

Student Association then proposed a stipulation, claiming the form dealt only with prospective conduct. Barham Decl. ¶ 10; Barham Decl. Ex. 4 at 6–7. Young Americans for Freedom explained that the distinction between prospective and current conduct is dubious at best and proposed an alternative in which the officers agreed to abide by all policies except those challenged now or in the future. Barham Decl. ¶ 11; Barham Decl. Ex. 5 at 1, 7–8. Student Association objected to this proposal without suggesting an alternative. Barham Decl. ¶ 13; Barham Decl. Ex. 7 at 8–9.

So Young Americans for Freedom narrowed the proposed stipulation, saying it

would abide by all policies except those challenged here. Barham Decl. ¶ 14; Barham Decl. Ex. 8 at 1, 8–13. Student Association still rejected this, reiterating its prior position. Barham Decl. ¶ 16; Barham Decl. Ex. 10 at 10–11. It insists that the group surrender its right to exist along with its constitutional rights (and those of its members) to regain access to its funds. So after six months of trying to resolve this issue amicably, Young Americans for Freedom and its officers must seek judicial relief.

ARGUMENT

This Court should grant Young Americans for Freedom and its officers this preliminary injunction as they can "demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, (3) public interest weighing in favor of granting [it]," *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (quoting *Friends of E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016)), and (4) "that the balance of equities tips in [their] favor," *Winters v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. By denying Young Americans for Freedom the benefits of recognition, Defendants are inflicting irreparable injury on it and its members.

Especially "in the First Amendment context," "the likelihood of success on the merits is the dominant, if not the dispositive, factor" of the preliminary injunction analysis. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (same). After all, "violations of First Amendment rights are presumed irreparable." *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2020). The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Bery v. City of N.Y.*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction."). The same is true for other constitutional violations (*e.g.*, unconstitutional conditions). 11A WRIGHT & MILLER, FED. PRAC. & PROC.

CIV. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech …, most courts hold that no further showing of irreparable injury is necessary."); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (same). Thus, "'the *alleged* violation of a constitutional right … triggers a finding of irreparable harm.'" *Jones v. Wolf*, 467 F. Supp. 3d 74, 93 (W.D.N.Y. 2020) (Vilardo, J.) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)).

This legal principle applies here. By being frozen out of its account, Young Americans for Freedom has been unable to improve and expand its "9/11 Never Forget Project," hold a similar event in support of Israel after the October 7 attack, host two banquets, conduct debates, show films, host game nights, or create new banners and signage for its tabling events. *See supra* Facts III. Plus, it has had to curb its recruitment and networking efforts and efforts to share its views via presentations, leaflets, and flyers. *See supra* Facts III. It will never have the chance to share its views during the past six months again, and this is an interest that the First Amendment protects. *Walsh*, 733 F.3d at 486 ("The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable." (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009)).

Plus, if Young Americans for Freedom were compelled to merge with Student Association to get the benefits of recognition, nothing done later will rectify the fact that it lost the ability to function as a distinct entity during that time. Compl., Doc. 37, ¶¶ 121–27. Nor during that time would there be a way for it to distance itself from the views and expression of other student groups with which Plaintiffs disagree. *Id.* ¶¶ 181–92. Thus, the group and its officers have shown an irreparable injury.

II. Young Americans for Freedom and its officers are likely to succeed on the merits of their claims against Defendants' Legal Status Ban.

Given Young Americans for Freedom's constitutional claims, "the likelihood of

success on the merits is the dominant, if not the dispositive, factor" for this motion. *Walsh*, 733 F.3d at 488. To merit this injunction, all it and its officers must do is show they will likely succeed on one of their claims. But they do so for all of them.

A. Defendants' Legal Status Ban violates Young Americans for Freedom's expressive association rights.

For over 50 years, the Supreme Court has affirmed that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs" and that "denial of official recognition, without justification, to college organizations burdens or abridges that associational right." *Healy*, 408 U.S. at 181. This right of expressive association is fundamental to other freedoms that the First Amendment protects. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort towards those ends were not also guaranteed."). "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect." *Rumsfeld v. Found. for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 68 (2006). "[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right *to associate with others* in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (emphasis added, cleaned up) (quoting *Roberts*, 468 U.S. at 622). This right includes the right not to associate with those who undermine the group's objectives. *Id.* at 648 ("Thus freedom of association ... plainly presupposes a freedom not to associate."). It "is crucial in [1] preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," [2] "preserving political and cultural diversity," and [3] "shielding dissident expression from suppression by the majority." *Id.* (cleaned up).

Young Americans for Freedom will likely succeed on its association claims as it can show that (1) it "engaged in expressive association," and (2) Defendants' Legal Status Ban "significantly affect[s] [its] ability to advocate its viewpoints" and even to exist and function as a group on campus. *Slattery v. Hochul*, 61 F.4th 278, 286–87 (2d Cir. 2023) (citing *Dale*, 530 U.S. 640; *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2020)). Indeed, as this ban "imposes 'severe burdens on associational rights,'" strict scrutiny applies, and the ban flunks it. *Id.* (quoting *Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 191 (2d Cir. 2017)).

1. Young Americans for Freedom and its members engage in expressive association.

To satisfy the first prong of this analysis, a group simply "must engage in some form of expression, whether it be public or private." *Dale*, 530 U.S. at 648. And "[i]t seems indisputable that an association that seeks to transmit … a system of values engages in expressive activity." *Id.* at 650. It is hard to dispute that Young Americans for Freedom meets this standard. After all, the "standard is not demanding," *Green v. Miss U.S.A., LLC*, 52 F.4th 773, 803 (9th Cir. 2022) (Van Dyke, J., concurring), as the "Supreme Court has cast a fairly wide net in its definition of what comprises expressive activity." *Pi Lambda Phi*, 229 F.3d at 443.

Young Americans for Freedom's members have banded together to advance a shared set of values: appreciation of U.S. history, the Constitution, individual freedom, strong national defense, free enterprise, and traditional American values. Compl., Doc. 37, ¶ 25. They advance these values using various forms of expression, including posting flyers and signs, hosting informational tables, inviting speakers to campus, and engaging fellow students. *Id.* ¶ 26. Sometimes, they use high-profile events, *id.* ¶¶ 51, 73; other times, they use flag displays or service projects, *id.* ¶¶ 52–53. But it's all expression. And their relationship with Young America's Foundation is critical to their goals and to ensuring that their group remains "the organization it

was formed to be and that its members want it to be." *Id.* ¶¶ 83–85, 90–91. Thus, they want to continue this affiliation to keep advancing their shared views. *Id.* ¶¶ 121, 183, 192. This more than suffices to show they engage in expressive association.

2. Defendants' Legal Status Ban severely burdens Young Americans for Freedom's associational rights.

Next, Defendants' Legal Status Ban "significantly affect[s] [Young Americans for Freedom's] ability to advocate its viewpoints" and even to function. *Slattery*, 61 F.4th at 286. It prohibits student groups from having any separate legal existence from Student Association. Compl., Doc. 37, ¶¶ 107, 109, 121–27. Thus, it merges Young Americans for Freedom into Student Association, which also encompasses every other student group, including those Plaintiffs would never join or support but from whom they could not then dissociate. *Id.* ¶¶ 181–92. It bans groups from having "any accounts or financial activities outside of SA," thus prohibiting groups from holding cash or raising funds, activities essential to continuing the group's expression. *Id.* ¶¶ 107, 109, 138–47. It bans them from signing contracts, a provision Student Association used to impede their events. *Id.* ¶¶ 107, 109, 148–72. It prevents them from owning property as a club. *Id.* ¶¶ 174–80. If they want to affiliate with an off-campus organization, they must first get Student Association's permission, which it can grant or deny for any reason. *Id.* ¶¶ 110–13. This ban even prohibits them from defending their own rights in court. *Id.* ¶¶ 109, 126–27. Thus, for this entire school year, it has blocked Young Americans for Freedom from accessing its club funds, which has impeded its ability to conduct expressive activities. *Id.* ¶¶ 128–37; *see supra* Facts III.

These burdens easily qualify as "severe," *Slattery*, 61 F.4th at 286, "direct and substantial," and "significant," *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (quoting *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996)). The government unconstitutionally burdens the right of association when it "seek[s] to impose penalties or withhold benefits from individuals because of their membership in

a disfavored group," *Roberts*, 468 U.S. at 622 (citing *Healy*, 408 U.S. at 180–84); *Tabbaa*, 508 F.3d at 101 (same, citing same), or when it "forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623; *Slattery*, 61 F.4th at 287.

Defendants do both. They automatically derecognized Young Americans for Freedom for maintaining its national affiliation, Compl., Doc. 37, ¶¶ 71–86; adopted the Legal Status Ban to achieve the same goal, *id.* ¶¶ 105–08; and still restrict the group's ability to affiliate, *id.* ¶¶ 110–13. The Legal Status Ban compels all groups to merge into Student Association (and thus with each other), preventing this group and its members from not associating with those who hold opposing views. *Id.* ¶¶ 181–92; *Roberts*, 468 U.S. at 623 ("Freedom of association … plainly presupposes a freedom not to associate."). Add the other burdens (*e.g.*, inability to own property, raise funds, sign contracts), and the overall burden is "severe." *Slattery*, 61 F.4th at 288–89.

3. Defendants' Legal Status Ban flunks strict scrutiny.

Because Defendants have severely burdened Young Americans for Freedom's associational rights, strict scrutiny applies. *Id.* at 287, 289–90. So they must prove that their Legal Status Ban "furthers a compelling interest" and is "narrowly tailored to achieve [it]," *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015), meaning there must be "no less restrictive means of achieving that end," *Slattery*, 61 F.4th at 289.

So far, Defendants have claimed an interest in protecting the student fee, promoting fiscal integrity, and ensuring that student groups comply with their policies. Student Ass'n Mot. to Dismiss Br., Doc. 41-8, at 18–19, 22–23; Univ. Defs.' Mot. to Dismiss Br., Doc. 40-1, at 12. But these interests are not compelling. After all, their actions are not protecting the student fee for Young Americans for Freedom and its members but banning them from accessing their student-fee funding. *See supra* Facts III. Nor have Defendants shown that the group's expression implicates these interests. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021). Nor can they show that the *only* way to achieve these ends is to restrict or prohibit student groups from (1)

affiliating with off-campus entities, (2) existing as independent groups, (3) raising and holding funds, (4) entering contracts, (5) conducting financial transactions, (6) owning property, and (7) defending their civil rights. If there really is a problem with policy compliance, Defendants can employ a host of other, less restrictive alternatives, including mandating attendance at seminars that detail what the policies require or enforcing penalties when student groups violate the fiscal policies. Plus, Defendants do "'not have an interest"—let alone a compelling one—"in the enforcement of an unconstitutional [policy].'" *Walsh*, 733 F.3d at 488 (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (cleaned up)); *Agudath Israel*, 983 F.3d at 637 ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.").

Because Young Americans for Freedom engages in expressive association and Defendants impose severe burdens they cannot justify, Plaintiffs will likely succeed on their expressive association claim. The preliminary injunction should be granted.

B. Defendants' Legal Status Ban compels Young Americans for Freedom's speech.

As the Supreme Court just reaffirmed, the government "may not compel a person to speak its own preferred messages," "speak its message when he would prefer to remain silent," or "include other ideas with his own speech that he would prefer not to include." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). This principle extends to expressive associations. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892 (2018) ("The right to eschew association for expressive purposes is likewise protected." (quotation omitted)). When government "violates that cardinal constitutional command" by forcing people "to mouth support for views they find objectionable," it coerces them "into betraying their convictions," which is "always demeaning" to "free and independent individuals." *Id.* at 892–93. Young Americans for Freedom will likely succeed on its compelled speech claim because it has

identified "(1) speech; (2) to which [it] objects; that is (3) compelled by some governmental action." *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015).

Young Americans for Freedom identified five student groups that Student Association recognizes who advance messages with which it and its members "frequently disagree." Compl., Doc. 37, ¶¶ 184–87. More recent evidence underscores this. Students for Justice in Palestine is unlikely to appreciate Young Americans for Freedom's desire to hold a pro-Israel demonstration. Hill Decl. ¶ 18. Nor will the Lesbian/Gay and Bisexual Transgender Alliance like the group's planned "De-Transitioners Day of Visibility" to highlight those victimized by body-altering gender-transition efforts. *Id.* ¶ 26. Conversely, Young Americans for Freedom fundamentally disagrees with many views these five organizations exist to advance and thus would not voluntarily join any of them or support their events. Compl., Doc. 37 ¶¶ 185, 187.

But Defendants' Legal Status Ban "merges all student organizations into one." *Id.* ¶ 182. Under that ban, none of these groups can have any existence separate from Student Association. *Id.* ¶¶ 107, 109, 181. All of them are absorbed into Student Association and combined with each other. *Id.* ¶¶ 188–89. If Young Americans for Freedom were thus absorbed, any time it would speak, the entity doing the talking would be Student Association—the only group that exists. That would represent the speech of all absorbed groups. Likewise, whenever any of these five groups speaks, Student Association is doing the talking, and this would represent Young Americans for Freedom's speech and that of its members. The group and its members want nothing to do with this strange arrangement as it compels them to participate in expression to which they object. *Id.* ¶¶ 190–92. After all, the whole reason they came together was to advance only the views they share. *Id.* ¶ 183.

When government compels speech, at least strict scrutiny applies. *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977). *But see 303 Creative*, 600 U.S. at 587–92 (finding a compelled-speech violation without even applying strict scrutiny). And

Defendants' Legal Status Ban cannot survive this. *See supra* Argument II.A.3. Thus, Young Americans for Freedom and its members will likely succeed on this claim.

C. Defendants' Legal Status Ban illegally restricts speech in Student Association's speech- and association-facilitating forum.

Young Americans for Freedom will likely succeed in showing that Defendants' Legal Status Ban unconstitutionally restricts speech in the Student Association's forum for student groups. While this is a limited public forum, once Defendants created it, their "ability … to interfere with the speech made through such an outlet is generally strictly curtailed." *Husain v. Springer*, 494 F.3d 108, 121 (2d Cir. 2007) (quotation omitted). Defendants are "'free to impose a blanket exclusion on certain types of speech, but once [they] allow[ ] expressive activities of a certain genre, [they] may not selectively deny access for other activities of that genre.'" *Tyler v. City of Kingston*, 74 F.4th 57, 61–62 (2d Cir. 2023) (quoting *Hotel Emps. & Rest. Emps. Union, Local 100 of N.Y. v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 545–46 (2d Cir. 2002)) (cleaned up). Defendants do so in a way that flunks any level of scrutiny.

1. Defendants' Legal Status Ban must (but cannot) pass strict scrutiny as Young Americans for Freedom's expression falls within the forum's purposes.

The Second Circuit has long held that when speech "falls within the designated category for which the forum has been opened," any restrictions must survive "strict scrutiny." *Id.* (quoting *Hotel Emps.*, 311 F.3d at 545) (cleaned up); *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 143 n.4 (2d Cir. 2004) (same). Young Americans for Freedom's speech and association falls within the bounds of Student Association's forum, as that entity has recognized the group since 2017, Compl., Doc. 37, ¶¶ 49, 71, except between its automatic derecognition and later re-recognition of the group, *id.* ¶¶ 75–104. During those six or so years, Young Americans for Freedom has held regular meetings and events on campus as a recognized student organization. *Id.* ¶¶ 25–26, 50–54, 72–74. Strict scrutiny thus applies here, and Defendants' Legal Status Ban

cannot survive it. *See supra* Argument II.A.3. So Young Americans for Freedom and its members will likely succeed on their free speech claim.

2. Defendants' Legal Status Ban flunks even the most lenient standards for a limited public forum.

Defendants' Legal Status Ban cannot even survive the more lenient scrutiny applied in limited public fora, which requires that it be both viewpoint-neutral and reasonable. Flunking either test is fatal, and this ban flunks both.

a. Defendants' Legal Status Ban is not viewpoint-neutral.

Defendants' Legal Status Ban must at least be viewpoint-neutral. *Tyler*, 74 F.4th at 61. As Student Association's forum is the only one that distributes student-fee funding, Compl., Doc. 37, ¶ 64, this viewpoint-neutrality mandate applies all the more. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233–34 (2000) (permitting public universities to compel students to pay student activity fees only if they ensure "viewpoint neutrality in the allocation of funding support").

The Supreme Court "consistently condemn[s]" speech regulations that "vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). Given vague or non-existent criteria, officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Speech restrictions must contain "narrow, objective, and definite standards to guide" officials, *Shuttlesworth*, 394 U.S. at 150–51, and cannot involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). These principles apply with full force to student-fee fora, like Student Association's. *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 103 (2d Cir. 2007).

Defendants' Legal Status Ban gives unbridled discretion in at least six ways.

Student Association has unlimited discretion:

1. *To let a student group affiliate with an off-campus entity*, for none of the factors in its contracts policy provide any guidance—let alone a comprehensive list of objective criteria—for deciding whether a specific club can affiliate with an outside organization, Compl., Doc. 37 ¶¶ 110–13, 264;
2. *To recognize a student group*, as no policy provides a comprehensive list of objective criteria student groups must meet to be recognized, *id.* ¶¶ 114–15, and no policy requires Student Association to recognize any club that meets all criteria for recognition, *id.* ¶¶ 262–63;
3. *To let a group conduct a fundraiser*, *id.* ¶¶ 143–47, 265;
4. *To allow a group to conduct a financial transaction*, as the factors in its contracts policy provide no guidance as to whether to approve or deny a proposed financial transaction, *id.* ¶¶ 153–59, 173;
5. *To permit a group to retain its own property*, as all property it purchases with student fees remains a "property of … Student Association … on discretionary loan to for use of the club" and Student Association can reclaim that property if it determines—in its unbridled discretion—that the group is not using it "in a proper and justifiable manner," *id.* ¶¶ 175–80; and
6. *To let a group enter into a contract*, *id.* ¶¶ 148–52, 155–73, 265–66.

The reason Student Association has this unbridled discretion is that the University Defendants gave it to them. It is University Defendants who operate the student organization forum, *id.* ¶¶ 55–56. It is University Defendants who implement and enforce the UB Recognition Policy, *id.* ¶¶ 44, 57, which requires groups recognized by Student Association to "abide by [its] Rules and Regulations." *Id.* ¶ 66. And it is University Defendants who could change these policies. *Id.* ¶ 45. Without them, "Student Association would not have the authority to adopt and implement the National Affiliation Ban … or … the Legal Status Ban." *Id.* ¶ 46.

To be sure, some Student Association policies outline factors to consider when making decisions. But "written criteria alone do not ensure that an official's discretion is adequately bridled." *Amidon*, 508 F.3d at 104 (quoting *Beal v. Stern*, 184 F.3d 117, 126 n.6 (2d Cir. 1999)). This is especially true when, as here, those factors are "nonexclusive." *Id.* So Student Association can consider any other factors it wants and can deny requests that meet all the written criteria. This creates "a disconcerting risk that [it] could camouflage its discriminatory [decisions] through post-hoc reliance

on unspecified criteria." *Id.* Plus, some factors (*e.g.*, "All terms of each contract must be reasonable under the circumstances," Compl. Ex. 8, Doc. 37-8, at 1) "are too vague and pliable to effectively provide the constitutional protection of viewpoint neutrality required by *Southworth*." *Amidon*, 508 F.3d at 104. So whether Student Association is deciding whether to approve a contract, a financial transaction, or an affiliation request, the factors in this policy are "incapable of providing guidance." *Id.*

Add to this the Legal Status Ban's track record, and the viewpoint discrimination becomes all the more vivid. After all, Student Association started by passing the National Affiliation Ban in direct response to Young Americans for Freedom's expression (*i.e.*, Mr. Knowles' lecture) and gerrymandered it to apply to this group but not other similar ones. Compl., Doc. 37, ¶¶ 71–80, 93–98. It then automatically derecognized Young Americans for Freedom. *Id.* ¶¶ 81–92. Once facing legal accountability for instituting a policy that violates over fifty years of Supreme Court precedent, *see Healy*, 408 U.S. 169, it replaced this policy "with a different requirement" (*i.e.*, the Legal Status Ban) that "accomplished the same objective as the National Affiliation Ban." *Id.* ¶¶ 105–08. So the discrimination in the first policy taints the second, though attempts to drive certain views out of the marketplace of ideas are "clearly impermissible" in a forum "open to unrestricted speech." *Husain*, 494 F.3d at 127.

In short, Defendants' Legal Status Ban confers multiple levels of unbridled discretion—discretion given by the University Defendants and used by Student Association to target disfavored views and groups. Once again, strict scrutiny applies, and Defendants' policies flunk it. *See supra* Argument II.A.3. So Young Americans for Freedom and its members will likely succeed on their free speech claim.

b. Defendants' Legal Status Ban is not reasonable in Student Association's speech- and association-facilitating forum.

Defendants' Legal Status Ban must also be "reasonable in light of the purposes served by the forum." *Cornelius v. NAACP Leg. Def. & Educ. Fund, Inc.*, 473 U.S. 788,

806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("limiting [the] forum to activities compatible with the intended purpose of the property"). But this ban fails to clear even this hurdle.

The University "recognizes that organized student groups are a valuable part of the student educational environment" and that they can make "positive contributions to the primary educational mission of the University." Compl. Ex. 1, Doc. 37-1, at 1. New York regulations highlight how student organization fora exist to promote "programs of cultural and educational enrichment," "student publications and other media," "student organizations … for the purposes and activities … that are of an educational, cultural, recreational[,] or social nature." 8 N.Y.C.R.R. § 302.14(c)(3). Student Association even admits its forum "ensures that the opportunities for intellectual and social development through extracurricular activities are available to all students." Student Ass'n Mot. to Dismiss Br., Doc. 41-8, at 18. Everyone agrees that the "University set up a forum for student organizations to engage in expression." Compl., Doc. 37, ¶ 55. The forum's goal is to facilitate student speech and association.

This forum mirrors the *Southworth* forum, one where the university chose to ensure "students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Southworth*, 529 U.S. at 233. It "is distinguished not by discernable limits but by its vast, unexplored bounds." *Id.* at 232. Its purpose is "facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 229; *Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir. 1992) (describing student-fee funding for a group as serving as a "hands-on civics exercise" and "stimulat[ing] uninhibited and vigorous discussion on matters of campus and public concern").[4]

Defendants' Legal Status Ban does nothing to accomplish these speech-

[4] *Carroll* is "not controlling" in part as it predated *Southworth*, but this does not impact its descriptions of the student-fee forum's purpose. *Amidon*, 508 F.3d at 100.

facilitating goals. Absorbing all student groups into the Student Association does nothing to facilitate student speech. Compl., Doc. 37, ¶¶ 105–09, 121–27, 181–82. Rather, merging disagreeing groups into one forces all to lose their distinctive voices. *Id.* ¶¶ 183–92. Similarly, requiring student groups to get Student Association's permission to affiliate with like-minded groups, to sign contracts, to conduct fundraisers, or to hold funds simply impedes these groups from speaking, as it ladens all normal group functions with layers of bureaucracy. *Id.* ¶¶ 109, 138–80. This micromanagement prevents groups from organizing "educational, cultural, recreational[,] or social" events. 8 N.Y.C.R.R. § 302.14(c)(3). And prohibiting student groups from taking legal action to defend their civil rights is a shameless effort to avoid accountability and evade constitutional requirements, Compl., Doc. 37, ¶¶ 109, 128–37, one that is almost as brazen as the University Defendants' giving Student Association a blank check to impose these requirements in the first place, *id.* ¶¶ 44–46, 65–70.

Defendants seem to think Student Association can declare all speech within its forum to be its own—government speech. After all, if all groups must merge into Student Association and have no separate existence, then the only group in the forum is Student Association, and all speech in the forum belongs to it. *Id.* ¶ 190. But "the government-speech doctrine does not extend to private-party speech that is merely subsidized or otherwise facilitated by the government." *Shurtleff v. City of Bos.*, 596 U.S. 243, 271 (2022) (Alito, J., concurring in judgment). "When the government's role is limited to applying a standard of assessment to determine a speaker's eligibility for a benefit, the government is regulating private speech, and ordinary First Amendment principles apply." *Id.* (Alito, J., concurring in judgment). This describes perfectly Student Association's role in recognizing student groups.

The Supreme Court has carefully drawn this distinction in its student organization cases. Even after receiving student-fee funding, student groups "are not the University's agents, are not subject to its control, and are not its responsibility."

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834–35 (1995). Indeed, student fee funds do not even belong to a university. *Id.* at 841; *id.* at 851–52 (O'Connor, J., concurring). They do "not raise the issue of the government's right … to use its own funds to advance a particular message." *Southworth*, 529 U.S. at 229. Thus, *Southworth* explicitly distinguished the student fee forum at issue from a situation in which "the government itself is the speaker." *Id.* Defendants cannot sidestep this principle that undergirds the entire notion of a speech forum by declaring all groups recognized by Student Association to be its wholly-owned subsidiaries.

Given that Student Association's forum is to serve as a "hands-on civics exercise," *Carroll*, 957 F.2d at 1000, consider how Defendants' Legal Status Ban would apply in society at large. Suppose a city adopted an ordinance that said it would grant business licenses only if a business agreed (1) not to have any separate legal existence from the city government (and thus to merge with all other businesses in the city, including its competitors), (2) to let the city control all decisions about contracts and financial transactions, (3) to let the city take any of its property whenever the city decided the business was not using it "in a proper and justifiable manner," (4) to let the city decide whether the business could ever affiliate with another business outside the city, and (5) never to sue the city. This ordinance would fall as unconstitutional in no time, and it would fall even faster if applied to expressive associations. The same should happen here because Supreme Court "precedents … leave no room for the view that … First Amendment protections should apply with less force on college campuses than in the community at large." *Healy*, 408 U.S. at 180.

Because Defendants' Legal Status Ban has nothing to do with facilitating student speech and expression, it is not reasonable given the purposes of Student Association's forum. Thus, Young Americans for Freedom and its members are likely to succeed on their free speech claim.

D. Defendants' Legal Status Ban imposes unconstitutional conditions.

Under the unconstitutional-conditions doctrine, even if a person is not entitled to a benefit, the government "may not deny [it] to [him] on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). It applies to student groups. *Healy*, 408 U.S. at 183 ("Freedom[s] … are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."). And it "prevents the state from granting and withholding benefits as a stick to coerce recipients of those benefits to engage in certain behavior where, if the state regulated that behavior directly, that regulation would be a constitutional violation." *Goe v. Zucker*, 43 F.4th 19, 34 n.16 (2d Cir. 2022). Yet that's what Defendants are doing.

Defendants' Legal Status Ban conditions Young Americans for Freedom's recognition, Compl., Doc. 37, ¶¶ 107, 109, and access to its funds, *id.* ¶¶ 128–37, on its members waiving (or subjecting to unbridled discretion) their rights to:

1. Affiliate with Young America's Foundation; *id.* ¶¶ 71–86, 110–13, 289–95;
2. Exist as an independent organization; *id.* ¶¶ 107, 109, 121–27, 293;
3. Raise and hold funds; *id.* ¶¶ 107, 109, 143–47, 265;
4. Enter into contracts; *id.* ¶¶ 107, 109, 148–52, 155–73, 265–66, 294–95;
5. Conduct financial transactions; *id.* ¶¶ 107, 109, 153–59, 173, 265;
6. Own the group's own property; *id.* ¶¶ 177–80; and
7. Defend their civil rights; *id.* ¶¶ 107, 109, 124–30.

Each of these represents an unconstitutional condition on recognition and its benefits.

All Defendants rely on the fact that Young Americans for Freedom could seek recognition from other entities. Student Ass'n Mot. to Dismiss Br., Doc. 41-8, at 20; Univ. Mot. to Dismiss Br., Doc. 40-1, at 7–8, 12–13; Univ. Defs.' Mot. to Dismiss Reply, Doc. 44, at 6–7. Of course, any government official could make this argument to justify denying any benefit, any resource, or access to any forum. And it contradicts well-settled law. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the

plea that it may be exercised in some other place.").

Plus, none of those other entities offers student-fee funding. Compl., Doc. 37, ¶ 64. So this just confirms that they are conditioning recognition on Young Americans for Freedom waiving its right to seek student fee funding. So the group and its members will likely succeed on their unconstitutional conditions claim.

* * *

To show likelihood of success on the merits, Young Americans for Freedom and its members need to show they are likely to succeed on only one claim. But they have done so on all. Thus, this "dominant, if not the dispositive, factor" favors granting the injunction against Defendants' Legal Status Ban. *Walsh*, 733 F.3d at 488.

III. The other preliminary injunction factors weigh in Young Americans for Freedom's favor.

When "the government is the opposing party, the final two factors in the [preliminary injunction] analysis—the balance of the equities and the public interest—merge." *Jones*, 467 F. Supp. 3d at 93–94 (Vilardo, J.); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009). Given Young Americans for Freedom's likely success on its constitutional claims, these factors also favor the group. *A.H. by and through Hester v. French*, 985 F.3d 165, 184 (2d Cir. 2021) (finding "little difficulty concluding that the remaining factors favor a preliminary injunction"). After all, "securing First Amendment rights is in the public interest," and Defendants do "'not have an interest in the enforcement of an unconstitutional [policy].'" *Walsh*, 733 F.3d at 488 (quoting *Ashcroft*, 322 F.3d at 247 (cleaned up)); *Agudath Israel*, 983 F.3d at 637 ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal."). And Defendants face no harm as an injunction would just prohibit them from denying Young Americans for Freedom the benefits of recognition, thus preserving the status quo of the last six, almost seven, years. But Young Americans for Freedom and its members suffer harm every day the group

is denied the benefits of recognition, losing forever chances to share their views on campus this year. Only a preliminary injunction can restore the status quo and preserve the group's rights as this case unfolds. One should be granted here.

CONCLUSION

Because Defendants' Legal Status Ban violates Young Americans for Freedom's constitutional rights, inflicts irreparable harm, and has cost the group many opportunities to speak this school year, Young Americans for Freedom and its members respectfully ask this Court to issue a preliminary injunction that restores the status quo by prohibiting Defendants from enforcing this policy to derecognize them or deny them the benefits of recognition.

Respectfully submitted this 22nd day of March, 2024.

/s/ Travis C. Barham

DENIS A. KITCHEN
DENIS A. KITCHEN, P.C.
8899 Main Street
Williamsville, New York 14221
Telephone: (716) 631–5661
denis@kitchenlaw.com

TYSON C. LANGHOFER*
Virginia Bar No. 95204
JONATHAN CALEB DALTON*
Virginia Bar No. 83790
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
Telephone: (571) 707–4655
Facsimile: (571) 707–4656
tlanghofer@ADFlegal.org
cdalton@ADFlegal.org

TRAVIS C. BARHAM*
Georgia Bar No. 753251
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road N.E., Ste. D-1100
Lawrenceville, Georgia 30043
Telephone: (770) 339–0774
Facsimile: (770) 339–6744
tbarham@ADFlegal.org

* Admitted *pro hac vice*.

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I electronically filed the foregoing using the CM/ECF system, which automatically sends an electronic notification with this filing to all attorneys of record.

Respectfully submitted this 22nd day of March, 2024.

/s/ Travis C. Barham

TRAVIS C. BARHAM*
Georgia Bar No. 753251
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road N.E., Ste. D-1100
Lawrenceville, Georgia 30043
Telephone: (770) 339–0774
Facsimile: (770) 339–6744
tbarham@ADFlegal.org

* Admitted *pro hac vice.*

Attorney for Plaintiffs