25-140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

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 University at Buffalo Director of Student Engagement,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of New York
Case No. 1:23-cv-00480

PRINCIPAL BRIEF OF APPELLANTS

CODY S. BARNETT
TYSON C. LANGHOFER
P. LOGAN SPENA
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cbarnett@ADFlegal.org
tlanghofer@ADFlegal.org
lspena@ADFlegal.org

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
tbarham@ADFlegal.org

Counsel for Appellants

DISCLOSURE STATEMENT

University at Buffalo Young Americans for Freedom, Justin Hill, and Amelia Slusarz have no parent corporation and no stockholders.

TABLE OF CONTENTS

Disclosure Statement i

Table of Authorities iv

Jurisdictional Statement 1

Statement of the Issues 2

Statement of the Case 3

Summary of Argument 11

Argument 14

I. The National Affiliation Ban violated Plaintiffs' First Amendment rights, and Plaintiffs have standing to seek redress for those violations. 14

A. Plaintiffs have standing to pursue nominal damages for the concrete harms they suffered under the National Affiliation Ban. 15

B. Defendants continue to impose the same burdens on Plaintiffs, so Plaintiffs' request for injunctive relief against the Ban is not moot. 21

II. The Legal Status Ban violates Plaintiffs' association and speech rights without sufficient justification. 26

A. The Legal Status Ban violates Plaintiffs' expressive-associational rights. 27

B. The Legal Status Ban compels Plaintiffs' speech. 34

C. The Legal Status Ban restricts speech in a limited public forum. 35

D. The Legal Status Ban cannot survive any level of constitutional scrutiny. 37

1. The Legal Status Ban fails strict scrutiny because Defendants have not identified a compelling interest to stifle Plaintiffs' expression or grappled with less restrictive alternatives. 40

2. The Legal Status Ban is neither viewpoint neutral nor reasonable. 41

III. The other factors weigh in favor of preliminarily enjoining the Legal Status Ban. 47

Conclusion 50

Certificate of Service 52

Certificate of Compliance 53

TABLE OF AUTHORITIES

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023) 26, 34

ACLU v. Ashcroft,
322 F.3d 240 (3d Cir. 2003) 49

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 15, 21

Allen v. Whitmer,
2021 WL 3140318 (6th Cir. July 26, 2021) 18

Alliance for Open Society International, Inc. v. United States Agency for International Development,
651 F.3d 218 (2d Cir. 2011) 17, 31

Amalgamated Transit Union Local 1015 v. Spokane Transit Authority,
929 F.3d 643 (9th Cir. 2019) 46

American Freedom Defense Initiative v. Metropolitan Transportation Authority,
815 F.3d 105 (2d Cir. 2016) 23

Amidon v. Student Association of State University of New York at Albany,
508 F.3d 94 (2d Cir. 2007) ..... passim

Board of Regents of University of Wisconsin System v. Southworth,
529 U.S. 217 (2000) 11, 44, 45

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 15, 26, 27

Carroll v. Blinken,
957 F.2d 991 (2d Cir. 1992) 11, 29, 34, 45

Cerame v. Slack,
123 F.4th 72 (2d Cir. 2024) 20

Christian Legal Society v. Martinez,
561 U.S. 661 (2010) 26, 38, 39, 40

Christian Legal Society v. Walker,
453 F.3d 853 (7th Cir. 2006) 18, 19

Cornelius v. NAACP Legal Defense & Education Fund, Inc.,
473 U.S. 788 (1985) 45, 47

Donoghue v. Bulldog Investors General Partnership,
696 F.3d 170 (2d Cir. 2012) 27

Dubuisson v. Stonebridge Life Insurance Company,
887 F.3d 567 (2d Cir. 2018) 14

Elrod v. Burns,
427 U.S. 347 (1976) 49

FBI v. Fikre,
601 U.S. 234 (2024) 12, 24, 25

Fellowship of Christian Athletes v. District of Columbia,
743 F. Supp. 3d 73 (D.D.C. 2024) 17, 34

Fellowship of Christian Athletes v. San Jose Unified School District Board of Education,
82 F.4th 664 (9th Cir. 2023) 19, 26, 39, 40

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) 42

Fulton v. City of Philadelphia,
593 U.S. 522 (2021) 40, 41

Goe v. Zucker,
43 F.4th 19 (2d Cir. 2022) 17

Granite State Outdoor Advertising, Inc. v. Town of Orange,
303 F.3d 450 (2d Cir. 2002) 21

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

Husain v. Springer,
494 F.3d 108 (2d Cir. 2007) 35

Janus v. American Federation of State, County, & Municipal Employees, Council 31,
585 U.S. 878 (2018) 34

Kane v. De Blasio,
19 F.4th 152 (2d Cir. 2021) 48, 49

Los Angeles County v. Davis,
440 U.S. 625 (1979) 15

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 20

Lyng v. International Union, United Automobile, Aerospace & Agricultural Workers of America, UAW,
485 U.S. 360 (1988) 30

Mhany Management, Inc. v. County of Nassau,
819 F.3d 581 (2d Cir. 2016) 21

Morrison v. Olson,
487 U.S. 654 (1988) 44

New Hope Family Services, Inc. v. Poole,
966 F.3d 145 (2d Cir. 2020) 48

New York Progress & Protection PAC v. Walsh,
733 F.3d 483 (2d Cir. 2013) 48, 49

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville,
508 U.S. 656 (1993) 24

Pi Lambda Phi Fraternity, Inc. v. University of Pittsburg,
229 F.3d 435 (3d Cir. 2000) 15

Port Washington Teachers' Association v. Board of Education of Port Washington Union Free School District,
478 F.3d 494 (2d Cir. 2007) 20

Radha Geismann, M.D., P.C. v. ZocDoc, Inc.,
850 F.3d 507 (2d Cir. 2017) 15

Reed v. Town of Gilbert,
576 U.S. 155 (2015) 38

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 15, 17

Rosenberger v. Rector & Visitors of University of Virginia,
515 U.S. 819 (1995) 27, 41, 47

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) ..... passim

Shurtleff v. City of Boston,
596 U.S. 243 (2022) 46, 47

Shuttlesworth v. City of Birmingham,
394 U.S. 147 (1969) 42

Slattery v. Hochul,
61 F.4th 278 (2d Cir. 2023) 16, 29, 33, 38

Southworth v. Board of Regents of University of Wisconsin System,
307 F.3d 566 (7th Cir. 2002) 42, 44

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 19

Srour v. New York City,
117 F.4th 72 (2d Cir. 2024) 21, 22

St. Mary Catholic Parish in Littleton v. Roy,
736 F. Supp. 3d 956 (D. Colo. 2024) 38

Tabbaa v. Chertoff,
509 F.3d 89 (2d Cir. 2007 16

TikTok, Inc. v. Garland,
145 S. Ct. 57 (2025) 40

Tyler v. City of Kingston,
74 F.4th 57 (2d Cir. 2023) 10, 35, 36

Uzuegbunam v. Preczewski,
592 U.S. 279 (2021) 14, 18

Vans, Inc. v. MSCHF Product Studio, Inc.,
88 F.4th 125 (2d Cir. 2023) 48

Verlo v. Martinez,
820 F.3d 1113 (10th Cir. 2016) 48

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 37

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 1

42 U.S.C. § 1988 1

Other Authorities

Mike Pence, *Former VP Mike Pence addresses conservative youth organization*, PBS NewsHour (July 26, 2022) 3, 16

Rules

Fed. R. App. P. 4 1

Federal Rule of Civil Procedure 12 14

JURISDICTIONAL STATEMENT

Under 42 U.S.C. §§ 1983 and 1988, the University at Buffalo Young Americans for Freedom and its officers Justin Hill, Jacob Cassidy,[1] and Amelia Slusarz (collectively, "Plaintiffs") sued in the United States District Court for the Western District of New York, alleging violations of the First and Fourteenth Amendments to the United States Constitution. The district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Plaintiffs moved for a preliminary injunction that would have stopped the University at Buffalo Student Association and other University officials from violating Plaintiffs' constitutional liberties. But the district court denied that motion and instead granted Defendants' motions to dismiss on December 15, 2024. Plaintiffs then filed a timely notice of appeal within 30 days on January 13, 2025. Fed. R. App. P. 4(a)(1)(A).

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

[1] On June 20, 2024, Cassidy voluntarily dismissed his claims to join the United States Navy.

STATEMENT OF THE ISSUES

1. To have standing to pursue nominal damages, Plaintiffs must plead a concrete and particularized injury. Plaintiffs have alleged that their automatic derecognition resulted in them being unable to reserve table space, reserve classroom space for weekly meetings, and reserve meeting space for guest speakers, making it more difficult for Plaintiffs to express their message. Do Plaintiffs have standing?
2. When a defendant voluntarily ceases activity that caused harm, it bears the formidable burden to show that it is absolutely certain it will not return to its old ways. Here, Defendants rescinded the National Affiliation Ban because they could achieve the same unconstitutional result through the Legal Status Ban. Are Plaintiffs' claims for injunctive relief against the National Affiliation Ban still live?
3. The Legal Status Ban forces all recognized student organizations to become members of the Student Association and prevents them from having a separate legal identity; makes every student organization's message the voice only of the Association; gives the Association unbridled discretion to determine which groups get recognized, what contracts these groups can execute, and which groups can affiliate with off-campus entities; and burdens Plaintiffs' expressive association and compels their speech. Are Plaintiffs entitled to a preliminary injunction?

STATEMENT OF THE CASE

Since its inception in the 1960s, Young America's Foundation "has provided a forum for American … college students to come together to cultivate and grow their shared ideas and commitment to individual freedom, limited government, a strong national defense, free enterprise, and traditional values." JA146. Its chapters—known as Young Americans for Freedom or YAF—"provide an environment for" students "to learn about United States history, the United States Constitution," and the values that the Foundation strives to exemplify. JA144. This broad network of college chapters enjoys a national reputation as "the premier [conservative] organization inspiring freedom-loving young people across the country."[2]

One such chapter was founded on the campus of State University of New York at Buffalo ("UB") in 2017. JA144. That chapter ("YAF-Buffalo") has grown substantially and, in the last two years alone, has boasted "over 100 members" and held "weekly meetings" and lectures. JA144. These meetings and lectures featured discussions about "political, religious, social, cultural, and moral issues and ideas." JA144. Since its recognition in 2017, YAF-Buffalo has existed without controversy on

[2] Mike Pence, *Former VP Mike Pence addresses conservative youth organization*, PBS NewsHour, at 1:10–1:15 (July 26, 2022), https://perma.cc/29JU-A9PV.

UB's campus, meeting weekly to discuss current political, social, and economic issues and to plan events. JA144, 147.

That changed in March 2023 when YAF-Buffalo "hosted cultural commentator Michael Knowles, who lectured on campus about cultural responses to gender ideology." JA150. His "lecture garnered much attention," including some protests on campus. JA150. In response, UB's Student Association enacted a policy—the National Affiliation Ban—that targeted YAF-Buffalo and retaliated against it for hosting the Knowles lecture. JA151.

Drawing the Student Association's ire at UB has serious consequences. At UB, student groups can achieve official recognition only through a "University Recognizing Agent." JA149. And although UB departments and other entities serve as University Recognizing Agents, the Student Association is the primary agent. JA149. After all, only groups recognized by the Student Association are "eligible to access the mandatory student activity fees distributed to student organizations." JA149. Student Association's recognition also gives student groups access to "the University's Interactive Student Organization web service," the "[a]bility to reserve/rent space on campus for events and meetings," "[a]ccess to vendor and lobby tables in the Student Union," the "[p]rivilege to conduct fundraising activities on campus," "[e]ligibility to participate in all membership recruitment opportunities offered … as well as other campus resources and involvement activities," and more. JA148.

The Student Association's retaliatory actions deprived YAF-Buffalo of these benefits. A mere two weeks after the Knowles lecture, the Student Association adopted a policy that prohibited certain recognized student groups from being a "chapter of or otherwise part of any outside organization." JA151; JA191. Any group subject to this affiliation ban that did not comply by May 31, 2023, would be "automatic[ally] derecogni[zed]." JA152; JA196. When introducing the measure, the Student Association's president announced, "We all know why we're doing this." JA151. Indeed, at least four other student groups that addressed similar content as YAF-Buffalo but from a different viewpoint were exempted from the Ban and allowed "to affiliate with a national organization if they so wished." JA153.

YAF-Buffalo's affiliation with Young America's Foundation is vital to the group's identity and the messages it wants to convey. YAF-Buffalo's members "desire to associate together under the name of Young Americans for Freedom to advance their shared views" and "remain a chartered student chapter of that national organization." JA153. After all, that name comes with significant recognition amongst students who hold views in common with YAF-Buffalo. So YAF-Buffalo did not disaffiliate from the national organization and, under the Ban's terms, was "automatically derecognized" on June 1, 2023. Over the next month, YAF-Buffalo "could not reserve table space in the Student Union, could not reserve classroom space for its weekly meetings, and could not

reserve meeting space for guest speakers." JA153. So YAF-Buffalo and three of its members—Justin Hill, Jacob Cassidy, and Amelia Slusarz (collectively with YAF-Buffalo, "Plaintiffs")—filed suit in federal court, "challenging the unbridled discretion that UB Defendants grant the Student Association and the Student Association's abuse of that discretion to discriminate against and derecognize [YAF-Buffalo] through the National Affiliation Ban." JA154.

Within a month, the Student Association rescinded the National Affiliation Ban, stating that it was "hereby repealed and deemed never to have taken effect." JA154; JA202. That did little to remedy YAF-Buffalo's harm; for a month, the group had been "derecognized" and thus could not "receive any of the benefits afforded to recognized student organizations," was not "eligible to receive the budget it was allocated from the mandatory student activity fee," and "could not effectively communicate its messages on campus." JA152.

Worse, in the same breath that it rescinded the National Affiliation Ban, the Student Association adopted a new policy in its stead. This policy required any officer of a recognized group to sign an "Acknowledgement of Club Responsibilities" form before "taking any act as an SA club officer—including … the use of SA club funds, facilities, or other resources." JA155; JA202. By signing this form, officers "certify" that they will comply with all Student Association policies—including the Legal Status Ban.

That sweeping Legal Status Ban prohibits any recognized club from existing as a "separate legal entity from [the Student Association]," having "any accounts or financial activities outside of [the Student Association]," signing contracts without the Student Association's approval, or commencing any litigation. JA155.

This "reinvigorated enforcement" of the Legal Status Ban accomplishes the same viewpoint-discriminating objectives as the National Affiliation Ban. JA155. For instance, to exist as a Young America's Foundation chapter, YAF-Buffalo "must agree to abide by the chapter requirements of" the Foundation. JA159. And to host speakers on campus, YAF-Buffalo must normally contract "with the speaker and sometimes other vendors." JA159. Yet the Legal Status Ban simultaneously prohibits YAF-Buffalo from entering into any contracts without Student Association approval and vests in the Student Association unbridled discretion in exercising the approval process. This includes granting the Student Association unbridled discretion over whether YAF-Buffalo can affiliate with the Foundation. JA156.

YAF-Buffalo knows how the Student Association will exercise its discretion. When YAF-Buffalo invited Knowles to speak, the Student Association—despite saying the approval "process generally takes [two or three] weeks—took "almost two months" to approve the event, only doing so "three days before the event was scheduled," even though the Student Association itself prepared every word in the contract. JA161–

63. That created "substantial logistical difficulties and burdens" on Plaintiffs, just because they wanted to host a speaker with whom the Student Association disagreed. JA163.

Plaintiffs "cannot sign the form certifying that they are complying with the Legal Status Ban," in part because they are pursuing this lawsuit. JA158. For many months, Plaintiffs repeatedly tried to negotiate with the Student Association by adding "language … that would allow them to sign it without certifying as true something that was false." JA159; JA424–508. The Student Association rejected all proposed compromises.

As a result, in September 2023, YAF-Buffalo's officers were prevented from accessing any funds in the group's account. JA159. Without those funds, YAF-Buffalo encountered serious difficulties operating as an expressive organization. It could not purchase new American flags for its annual "9/11 Never Forget" project. JA164. Nor could it purchase Israeli flags in honor of the victims of the October 7, 2023 attack. JA401. YAF-Buffalo's recruitment efforts were seriously hampered, as the group could not access funds to prepare presentations or print leaflets and flyers. JA402. So, too, has YAF-Buffalo's social activities been curtailed; it was unable to host a fall or spring banquet, put on debate, film, or game nights, or even print banners to enhance tabling events. JA400–02.

Plaintiffs' inability to access YAF-Buffalo's account did not alleviate them from having to pay the mandatory student-activity fee. They have been functionally subsidizing *other* organizations' messages—including messages with which Plaintiffs disagree—without being able to access any funds to help them express their own messages.

Since the Student Association would not compromise, YAF-Buffalo sought relief in federal court to protect its constitutional rights. After the Student Association rescinded its National Affiliation Ban, Plaintiffs twice amended their complaint and moved for a preliminary injunction against the Legal Status Ban. They continued to seek relief against the National Affiliation Ban, both for the harms it caused and because the Student Association used other policies, like the Legal Status Ban, to achieve the same result as the National Affiliation Ban.

On December 15, 2024, the district court granted Defendants' motions to dismiss and denied Plaintiffs' motion for a preliminary injunction. As to the National Affiliation Ban, the court concluded that Plaintiffs' claims for injunctive relief were moot due to the Student Association's rescission of the Ban, even though that Ban had already caused harm; the court held that Plaintiffs lacked standing to pursue nominal damages for those harms. To the district court, these harms were not "a completed violation of a constitutional right," so Plaintiffs did not "allege that they were in fact prevented from engaging in any such [expressive] activities or even that they would have attempted to engage in

those activities but for the chilling effect of the National Affiliation Ban." JA589.

As for the Legal Status Ban, the district court first merged Plaintiffs' expressive-association and compelled-speech claims into one forum analysis, considering these claims to have "arise[n] in exactly the same context." JA606. Under that forum analysis, the court concluded that lesser constitutional scrutiny applied—even though the Legal Status Ban regulates expression "within the boundaries of [the] … recognized student organization forum." JA614. To the court, the Legal Status Ban merely "restrict[s] the form or manner of speech," not its substance. JA617 (quoting *Tyler v. City of Kingston*, 74 F.4th 57, 63 (2d Cir. 2023)).

Applying lesser scrutiny, the district court upheld the Legal Status Ban as reasonable and viewpoint-neutral. Although Plaintiffs pled allegations showing the unbridled discretion the Student Association retained under the Legal Status Ban, somehow the district court concluded that Plaintiffs' complaint was "devoid of any [such] allegation." JA621. Further, the district court thought that the Legal Status Ban was "common sense" and, without detailed analysis, concluded that it reasonably protected Defendants' interest in safeguarding limited student resources against the very students who supplied those resources. JA624.

Plaintiffs timely filed a notice of appeal.

SUMMARY OF ARGUMENT

Expressive associations help college students collectively "engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000). These groups offer students not only "a varied extracurricular life," but they also give them a "hands-on civics training" that prepares them to enter the larger American dialogue. *Carroll v. Blinken*, 957 F.2d 991, 1002 (2d Cir. 1992).

Yet many universities have enacted policies that suppress expressive voices with which they disagree. The State University of New York at Buffalo is one such school. In direct response to YAF-Buffalo's expression, UB's Student Association enacted a policy—the National Affiliation Ban—that premised YAF-Buffalo's official recognition on its willingness to forego association with the national organization, Young America's Foundation. To do so would fundamentally alter the nature of both YAF-Buffalo's association and the message it wants to convey, so it defied the National Affiliation Ban and was consequentially "automatically derecognized." And UB's policies give the Student Association blanket authorization to impose these policies on student groups.

YAF-Buffalo suffered real harms as a result. It could not "receive any of the benefits afforded to recognized student organizations," was not "eligible to receive the budget it was allocated from the mandatory

student activity fee," and "could not effectively communicate its messages on campus." JA152. Consequently, Plaintiffs have standing to pursue nominal damages to remedy those harms, and the district court erred in concluding otherwise.

And given that the Student Association *de facto* re-enacted the National Affiliation Ban through "reinvigorated enforcement" of the Legal Status Ban—done immediately after Plaintiffs challenged the former in court—Defendants have not met their "formidable burden" to prove that there's no "reasonable expectation" that they will "return to [their] old ways." *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (cleaned up). Plaintiffs' request for injunctive relief against the National Affiliation Ban remains live.

Like the National Affiliation Ban, the Legal Status Ban also imposes unconstitutional conditions on YAF-Buffalo. It, too, premises YAF-Buffalo's access to student funds on the group's willingness to surrender its associational rights to the Student Association's unfettered discretion. More, the Legal Status Ban obliterates any distinction between student organizations on UB's campus, effectively merging student organizations into one conglomerate under the Student Association's umbrella. Such a joinder forces Plaintiffs to associate with groups that have sharply different views than YAF-Buffalo and effectively melds every message into a singular, discordant voice. By compelling

such association and subsequent speech, the Legal Status Ban violates the First Amendment.

No matter what scrutiny applies, the Legal Status Ban flunks it. At best, the Ban restricts expression in a limited public forum and so must be both reasonable and viewpoint neutral. But the unbridled discretion vested in the Student Association to decide what groups can and cannot associate with outside organizations—without any objective criteria constraining that decision—makes the Ban viewpoint discriminatory. And there's nothing reasonable about imposing measures that unduly restrict expression—and potentially expand the Student Association's liability—in a forum designed to facilitate student speech.

If the Ban cannot satisfy this lower level of scrutiny, it certainly cannot pass strict scrutiny—a more appropriate analysis, given the Ban's effect on expressive-association and free-speech rights. The Ban serves no compelling interest as applied to Plaintiffs' speech. And for the interests that Defendants do cite, they could achieve them in various other ways without restricting expression.

Every day that the Legal Status Ban remains in effect, YAF-Buffalo cannot engage on UB's campus as an expressive association on the same footing as other student groups. The equities weigh in Plaintiffs' favor. This Court should reverse the district court and remand with instructions to enter Plaintiffs' requested injunction.

ARGUMENT

I. The National Affiliation Ban violated Plaintiffs' First Amendment rights, and Plaintiffs have standing to seek redress for those violations.

The National Affiliation Ban significantly burdened YAF-Buffalo's expressive-associational rights. As a result, YAF-Buffalo suffered concrete harm, both in derecognition itself and in the ensuing consequences. These consequences affected YAF-Buffalo's ability to associate and advocate the messages it wanted to convey. Because Plaintiffs suffered "a completed violation of a legal right," they are entitled to nominal damages. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021).

The district court erred by mischaracterizing the many harms Plaintiffs endured as a mere policy dispute. This Court reviews "*de novo* the district court's decision to dismiss plaintiffs' complaint for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1), construing the complaint in plaintiffs' favor and accepting as true all material factual allegations contained therein." *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567, 573 (2d Cir. 2018) (cleaned up).

Even though the Student Association rescinded the Ban, it lives on in the form of "reinvigorated" enforcement of other policies. JA155. Defendants have not and cannot meet their "heavy" burden to show that it is "absolutely clear that [Plaintiffs] no longer [have] any need of the judicial protection that [they] sought," so the district court was wrong to dismiss Plaintiffs' claims for injunctive relief as moot. *L.A.*

Cnty. v. Davis, 440 U.S. 625, 631 (1979) (cleaned up); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam). When a district court dismisses for lack of jurisdiction, including for mootness, this Court reviews "the district court's factual findings for clear error and its legal conclusions *de novo*." *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507, 511 (2d Cir. 2017) (cleaned up).

A. Plaintiffs have standing to pursue nominal damages for the concrete harms they suffered under the National Affiliation Ban.

The First Amendment protects the right "to associate" with others to promote diverse "political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984). To qualify for this protection, a group must, among other things, associate together to engage in expressive activity. And the "Supreme Court has cast a fairly wide net in its definition of what comprises expressive activity." *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburg*, 229 F.3d 435, 443 (3d Cir. 2000).

YAF-Buffalo easily satisfies the definition. Its members have banded together to "transmit … a system of values," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000)—namely, an appreciation of American history, the Constitution, individual liberties, a strong national defense, free enterprise, and other traditional American values. To advance these shared values, YAF-Buffalo engages in various forms of

expression, including leafletting, hosting informational tables, inviting speakers to campus, and directly engaging fellow students. It also contracts with national YAF so that it can exist as a YAF chapter and, among other things, benefit from YAF's overall reputation as "the premier [conservative] organization inspiring freedom-loving young people across the country." Mike Pence, *supra* note 2.

The National Affiliation Ban "significantly affected [YAF-Buffalo's] ability to advocate its viewpoints." *Slattery v. Hochul*, 61 F.4th 278, 287 (2d Cir. 2023) (cleaned up). YAF-Buffalo's relationship with national Young America's Foundation is critical to ensure that YAF-Buffalo can transmit its shared values and remain "the organization it was formed to be and that its members want to be." JA152. Without the national affiliation, "group membership" in YAF-Buffalo is "less attractive." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 69 (2006).

Yet the National Affiliation Ban sought to prevent YAF-Buffalo from associating with the Foundation. In forcing YAF-Buffalo to surrender that affiliation, the National Affiliation Ban imposed not just a "direct and substantial" burden on YAF-Buffalo's expressive association but a "significant[ ]" one. *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (cleaned up); *Slattery*, 61 F.4th at 287.

Even putting Plaintiffs to the choice violated the Constitution. The National Affiliation Ban forced Plaintiffs either to exercise their

constitutional rights and "associate with others," *Roberts*, 468 U.S. at 622, or to access the forum Defendants opened for student groups. Defendants did not allow them to enjoy both, even though the First Amendment protects both. The government cannot condition the exercise of one constitutional right on the surrender of another. *Cf. Goe v. Zucker*, 43 F.4th 19, 34 n.16 (2d Cir. 2022); *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech." (cleaned up)).

These unconstitutional abridgments harmed Plaintiffs directly. Plaintiffs refused to comply with the Ban and, as a result, spent a month as a derecognized student group. The Supreme Court has long recognized that "denial of official recognition, without justification, to college organizations burdens or abridges" "the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972). After all, "official recognition guarantees students the ability to meet safely, recruit, and join their classmates on equal footing in the school's civil society." *Fellowship of Christian Athletes v. Dist. of Columbia*, 743 F. Supp. 3d 73, 84 (D.D.C. 2024). That's why courts "presume[ ]" an injury when a university denies "official recognition to a student organization"—even when that organization was able to "still hold meetings on campus and … communicate with students by [unofficial] means." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th

Cir. 2006). Derecognition here, in and of itself, imposed "a completed violation of a legal right." *Uzuegbunam*, 592 U.S. at 292.

The harm inherent in derecognition distinguishes this case from the unpublished decision in *Allen v. Whitmer*, No. 21-1019, 2021 WL 3140318 (6th Cir. July 26, 2021). In *Allen*, plaintiffs challenged a travel restriction imposed during the pandemic but lifted before the lawsuit. Yet the plaintiffs failed to allege that they "took *any* … action" that would have resulted in enforcement against them, thus leading the court to dismiss for lack of "actual, measurable harm." *Id.* at *3. By contrast, the National Affiliation Ban "*automatically* derecognized" YAF-Buffalo. That's not just a "real threat" of enforcement; it is *enforcement itself*. The Supreme Court recognized long ago that the "denial of official recognition" is itself an actual harm. *Healy*, 408 U.S. at 181.

Defendants' automatic derecognition worked other concrete harms, too. During YAF-Buffalo's month as a derecognized student group, Plaintiffs "could not reserve table space in the Student Union, could not reserve classroom space for its weekly meetings, and could not reserve meeting space for guest speakers." JA153. Nor could YAF-Buffalo "receive the budget it was allocated from the mandatory student activity fee." JA152. These harms meant that YAF-Buffalo "could not effectively communicate its messages on campus." JA152. "Such impediments cannot be viewed as insubstantial." *Healy*, 408 U.S. at 182. They

are all "concrete and particularized." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up).

The district court erroneously concluded that Plaintiffs did not suffer a completed constitutional injury. The court suggested that Plaintiffs' complaint stemmed from the "mere *existence* of an allegedly unconstitutional law or policy." JA589 (emphasis added). That ignores the law and the facts. Again, the Supreme Court and at least two circuits have acknowledged that a student group's derecognition constitutes a cognizable constitutional injury. *Healy*, 408 U.S. at 181; *Walker*, 453 F.3d at 867; *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (en banc).

And YAF-Buffalo suffered more than just derecognition. When it was automatically derecognized, it "could not reserve table space in the Student Union, could not reserve classroom space for its weekly meetings, and could not reserve meeting space for guest speakers." JA153. Those prohibitions "hamper[ed its] ability to recruit students, constituting an enduring harm that … irreparably risk[ed] the club's continued existence on campus." *Fellowship of Christian Athletes*, 82 F.4th at 695. It certainly made "group membership less attractive." *Rumsfeld*, 547 U.S. at 69. The district court read these allegations as merely subjunctive, not concrete consequences of derecognition. That didn't just fail to "draw inferences from the complaint in the light most favorable to the plaintiffs," *Port Wash. Teachers' Ass'n v. Bd. of Educ. of Port Wash.*

Union Free Sch. Dist., 478 F.3d 494, 498 (2d Cir. 2007)—it imposed a specificity requirement inappropriate at this stage in the litigation, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (cleaned up)); *accord Cerame v. Slack*, 123 F.4th 72, 81–82 (2d Cir. 2024).

More, the district court's logic ignores the chilling effect that automatic derecognition had on Plaintiffs. At the least, Plaintiffs' complaint alleged a desire to engage in expressive activities that they could not do in the month they were derecognized. That Plaintiffs did not "allege that they were in fact prevented from engaging in any such activities," JA589, is beside the point. The actual chill on their speech is enough to confer standing. *Cerame*, 123 F.4th at 80.

Plaintiffs suffered real, concrete harms from derecognition. The district court was wrong to conclude that Plaintiffs lack standing to pursue nominal damages to remedy these. This Court should reverse the district court's ruling on standing.

B. Defendants continue to impose the same burdens on Plaintiffs, so Plaintiffs' request for injunctive relief against the Ban is not moot.

The burden to show that a controversy has become moot "logically falls on a defendant." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016). That burden "is a heavy one." *Davis*, 440 U.S. at 631 (cleaned up). At the least, Defendants must make it "absolutely clear that the litigant no longer [has] any need of the judicial protection that it sought." *Adarand Constructors*, 528 U.S. at 224. They can do so either by showing that "interim … events have completely and irrevocably eradicated the effects of the alleged violation," or that "there is no reasonable expectation that the alleged violation will recur." *Granite State Outdoor Advert., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002) (per curiam). Defendants here demonstrated the opposite.

Effects. Start with the "easy question"—whether the rescission has "eradicated" the effects from the National Affiliation Ban "automatically derecognizing" YAF-Buffalo. *Srour v. New York City*, 117 F.4th 72, 82 (2d Cir. 2024). It has not. Though the Student Association attempted to retroactively declare the Ban's effects to have never taken place, that doesn't change reality: YAF-Buffalo spent a month as a derecognized student group, bereft of the benefits that come with official recognition. Then, in the same breath that Student Association rescinded the National Affiliation Ban, it breathed new life into the Legal Status Ban, effectively achieving the same result.

At the end of the day, YAF-Buffalo won't sever ties with Young America's Foundation, and for that reason, Defendants deny YAF-Buffalo access to the benefits that come with being an officially recognized group. JA159; JA399 (noting that Plaintiffs could not access funds during the 2023–24 school year). Although YAF-Buffalo is now technically recognized, its officers won't agree to abide by the Legal Status Ban, which *still* prevents them from accessing benefits that recognition was supposed to give them. *Id.* And Student Association could at any time derecognize YAF-Buffalo for violating the Legal Status Ban—including for pursuing this very lawsuit without the Student Association's blessing.

Contrast the ongoing effects of the National Affiliation Ban with the facts in *Srour*. There, the plaintiff applied for and was denied a permit to possess rifles and shotguns in his home. Amidst litigation, the government changed its permitting regulations. The plaintiff filed new requests for permits, which the government granted. Because he "obtained a permit to possess rifles and shotguns … his situation [was] sufficiently altered so as to present a substantially different controversy from the one that existed when [his] suit was filed." *Srour*, 117 F.4th at 82 (cleaned up). In contrast here, Plaintiffs face the same choice they did under the National Affiliation Ban: affiliate with Young America's Foundation and lose benefits or receive the same benefits as other recognized student groups. Since this controversy started, Defendants'

policies have not let them do both. The effects of the National Affiliation Ban persist, keeping Plaintiffs' controversy against it live.

American Freedom Defense Initiative v. Metropolitan Transportation Authority does not counsel otherwise. 815 F.3d 105 (2d Cir. 2016) (per curiam). The district court cited *AFDI* for the proposition that the National Affiliation Ban's effects have been eradicated by renewed enforcement of the Legal Status Ban, making Plaintiffs' harms "a consequence of the … new … policy, not a relic of its old one." *Id.* at 110. That's a misapplication of *AFDI*. There, the government "carried its heavy burden of persuasion" that the dispute was moot by changing course—(1) a "combination of … amendments" to its old unconstitutional policy, (2) "its failure to appeal the district court's award of nominal damages to [the plaintiff]" for prior applications of that policy, and (3) representations to the court at oral argument that it *would not* apply the policy to the plaintiff again. *Id*. This case is the exact opposite. Defendants still enforce the National Affiliation Ban's effects through the Legal Status Ban, and Plaintiffs continue to suffer consequences from that conduct.

Recurrence. After Plaintiffs sued over the National Affiliation Ban, the Student Association rescinded the Ban, only to reenact it through reinvigorated enforcement of the Legal Status Ban. The Legal Status Ban gives the Student Association unbridled discretion over any contracts YAF-Buffalo wants to enter into, with no objective criteria

governing how the Student Association will wield such discretion. See *infra* Argument II. Since YAF-Buffalo must contract with Young America's Foundation to affiliate with them, revitalized enforcement of the Legal Status Ban accomplishes the same objective as the National Affiliation Ban. To underscore this, the Student Association subjects any affiliation agreement to its contract policies, policies that grant it unbridled discretion. JA156. This policy "disadvantages [Plaintiffs] in the same fundamental way." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Thus, "[t]here is no mere risk that [Defendants] will repeat [their] allegedly wrongful conduct; [they have] already done so." *Id.* So Plaintiffs' request for injunctive relief against the National Affiliation Ban remains live.

YAF-Buffalo faces the same risk as the plaintiff in *FBI v. Fikre*, 601 U.S. at 234. There, the plaintiff was placed on the federal government's "No Fly List." After he sued, the government removed him from the list, with no "explanation accompan[ying] the decision." *Id.* at 239. The government argued mootness, but the Supreme Court disagreed. The government's "sparse declaration" that it would not put the plaintiff back on the list—coupled with the fact that "no statute or publicly promulgated regulation describe[d] the standards the government employs" when adding or removing people from the list— was insufficient to moot the controversy. *Id.* at 237, 242.

Neither can Defendants' "sparse declarations" moot the controversy here, especially when the Legal Status Ban gives the Student Association the same power to control affiliations. The Student Association still retains unbridled discretion to reject YAF-Buffalo's affiliation with national Young America's Foundation, achieving the same result as the National Affiliation Ban.

"The Constitution deals with substance, not strategies." *Id.* at 241 (cleaned up). "What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct." *Id.* at 244. Defendants may claim to have rescinded the National Affiliation Ban, but its spirit lives on through the Legal Status Ban. So, too, does Plaintiffs' case against the initial policy. This Court should not countenance the government's mid-litigation alteration of a policy to moot a challenge to that policy when officials enforce it through other means. That would give the government carte blanche to moot *any* civil rights claim while continuing to violate the same rights through alternate policies. That's a recipe for docket manipulation and violated rights. Defendants have not met the "formidable burden" of proving this case is moot, and this Court should reverse. *Id.* at 241 (cleaned up).

II. The Legal Status Ban violates Plaintiffs' association and speech rights without sufficient justification.

In the same way as the National Affiliation Ban, the Legal Status Ban infringes on Plaintiffs' First Amendment rights. By preventing student organizations from existing as separate entities and instead merging them into the Student Association, the Ban significantly burdens Plaintiffs' associational freedoms. *Dale*, 530 U.S. at 653. Concomitantly, as every student group now speaks through the Student Association, Plaintiffs are forced to utter messages with which they disagree. That, too, violates the First Amendment. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023).

The district court was wrong to merge these claims into one. Though the court relied on *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), subsequent decisions have confirmed the "narrowness of the Court's holding" in that case. *Fellowship of Christian Athletes*, 82 F.4th at 694. The differences between this case and *Martinez* highlight all the more why this Court should analyze Plaintiffs' expressive-associational and free-speech claims separately.

Regardless, this Court should subject the Legal Status Ban to strict scrutiny—a standard it cannot pass. Defendants have not cited a compelling interest that supports the Legal Status Ban, much less one that would support inhibiting Plaintiffs' expression. And the

generalized interests they invoked can be achieved through less restrictive means.

The Legal Status Ban can't even withstand lesser scrutiny. To do that, it must at least be both viewpoint-neutral and reasonable. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). It is neither. It vests the Student Association with unbridled discretion to determine, among other things, which student groups receive recognition and which can affiliate with outside groups. This unchecked discretion "essentially silence[s] views that the First Amendment is intended to protect." *Rumsfeld*, 547 U.S. at 68. That is not viewpoint neutral. And it further highlights how, in a forum all parties agree was created to facilitate student expression, the Ban is unreasonable. The district court wrongly dismissed Plaintiffs' claims, and this Court reviews that error with fresh eyes, "construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein." *Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012).

A. The Legal Status Ban violates Plaintiffs' expressive-associational rights.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy*, 408 U.S. at 181. Concomitant with the right to associate is the "freedom *not* to associate." *Dale*, 530 U.S. at 648 (emphasis added) (cleaned up). Yet the Legal Status Ban forces all recognized student groups, including

YAF-Buffalo, to exist as subsidiaries of the Student Association. No student group can exist on equal footing with other student groups separate of the Student Association—or, consequentially, of each other.

This merger of all student organizations forces YAF-Buffalo to associate with many student groups that do not share its views. For instance, Students for Justice in Palestine likely disagrees with YAF-Buffalo's desire to hold a demonstration supporting Israel. JA401. Nor will the Lesbian/Gay and Bisexual Transgender Alliance likely appreciate YAF-Buffalo's planned "De-Transitioners Day of Visibility" to highlight those victimized by body-altering gender-transition efforts. JA402. Conversely, YAF-Buffalo fundamentally disagrees with many views advocated by these organizations and thus would not voluntarily join any of them or support their events. JA165. Yet the Legal Status Ban "merges all student organizations into one" so that YAF-Buffalo has no choice but to associate with these groups. JA164.

The Legal Status Ban thus affects the messages YAF-Buffalo wants to convey through association while also undermining YAF-Buffalo's very ability *to* associate. Under the Ban, YAF-Buffalo cannot own property, raise and hold its own funds, access the funds owed it under the mandatory student activity fee, enter contracts (with outside speakers or otherwise), or even defend its rights in court. These prohibitions hamper YAF-Buffalo's ability to "remain a viable entity in a campus

community in which new students enter on a regular basis." *Healy*, 408 U.S. at 181–82.

The forced merger thus "significantly affect[s] [YAF-Buffalo's] ability to advocate its viewpoints." *Slattery*, 61 F.4th at 287. It is not, as the district court said, a matter of sharing a forum with disagreeable forces; the Legal Status Ban effectively imposes automatic membership and associations YAF-Buffalo does not want.

This Court has already held that a university cannot force students to automatically join one organization. In *Carroll v. Blinken*, the State University of New York at Albany charged a mandatory student activity fee; on paying that fee, students automatically became "members" of the New York Public Interest Research Group. 957 F.2d at 993–95. This Court held that such an "automatic membership policy" compromised students' ability "to associate or not with whom they please." *Id.* at 999. So too here. The Legal Status Ban forces every student organization to become a "member" of the Student Association. That forced membership burdens student organizations and their members, like Plaintiffs, who desire to remain independent in their associations.

The development of the expressive-association doctrine since *Carroll* reinforces this conclusion: forcing students into one group that then picks and chooses what subgroups are recognized "amounts to special treatment that skews the university's otherwise neutral support of a variety of viewpoints." *Id.* at 1003. Student organizations aren't mere

"outsiders who come onto campus for [a] limited purpose"—they are expressive groups with discordant views that *must* obtain the Student Association's approval to get recognized and thereby function on campus. *Rumsfeld*, 547 U.S. at 69. "This distinction is critical." *Id.*

Yet the district court resisted this conclusion because it thought the Legal Status Ban does not "directly regulate association." JA633. According to the district court, student organizations can forego joining the Student Association—if they also forego recognition and access to the mandatory student fee (and other benefits) that comes with it. That's no choice at all. The Constitution protects *both* Plaintiffs' ability to expressively associate *and* to access the student activity fee. That protection encompasses "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Workers of Am., UAW*, 485 U.S. 360, 367 n.5 (1988) (cleaned up).

Unsurprisingly, the Supreme Court and this Court have repeatedly rejected such logic. For instance, in *Rumsfeld*, the Supreme Court held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *Rumsfeld*, 547 U.S. at 59 (cleaned up). And in *Alliance for Open Society International*, this Court similarly concluded that "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's

constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." 651 F.3d at 231. If the government cannot condition access to discretionary benefits in a way that burdens First Amendment rights, neither can the government condition access to a forum in such a way. To do so burdens First Amendment rights directly, not incidentally.

No "adequate alternative channel[ ]" exists to save the Legal Status Ban, either. *Id.* at 233. In some narrow circumstances, government "may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* (cleaned up). To the district court, YAF-Buffalo had an alternative: forego recognition and espouse its message as an unrecognized organization. But that ignores all the harms YAF-Buffalo suffered in the month it was derecognized, like subsidizing other organizations' speech through the mandatory student-activity fund without being able to access money to support its own expression. This compelled speech means that the Legal Status Ban really "provid[es] an outlet to do nothing at all," and that is not an "adequate alternative." *Id.* at 239. Plaintiffs cannot be forced to forgo their associational rights to obtain benefits that the Student Association otherwise makes available to student organizations.

The district court also rejected Plaintiffs' characterization of the Legal Status Ban because, it said, Plaintiffs did not allege that the Ban

forces these groups to "share meetings, events, or even a budget." JA631. That overlooks the forest for the trees. As the district court noted, the Ban states that *all* "club[s are] a group of [m]embers of [Student Association]." JA631. That means YAF-Buffalo and *every other student group* must associate—together—under the Student Association's banner. That compulsion comingles messages even if meetings and events are not shared.

The district court's analogy proves this point. The court compared the Student Association to the United States and student organizations to the separate states: while "each state is a part of the United States," no one, the district court concluded, "would claim that Vermont has merged with Texas." JA631. But *everyone* would conclude that both Vermonters and Texans are *Americans*. And being American means there is an associational link between Texas and Vermont (and, in turn, with the federal government). So too here: the Legal Status Ban makes YAF-Buffalo and every other student organization "members" of the Student Association. That associates every student organization with the Student Association and with each other. That forced association burdens YAF-Buffalo's expression.

Worse, the Legal Status Ban goes well beyond the analogy's limits and *doesn't* prove the point for which the district court employed it. While Vermont and Texas may both be states within the federal system, they still maintain separate legal identities. They each have their own

legal codes, court systems, legislatures, and executives. These identities are precisely what prevents someone from claiming "that Vermont has merged with Texas." JA631. But under the Legal Status Ban, student groups have no such legal independence. They can't do something as basic as enter a contract without the Student Association's approval. And given the unfettered discretion the Student Association possesses, if even one other student group objects to YAF-Buffalo contracting with a speaker, the Association can and will prohibit the speaker and thus the event and YAF-Buffalo's association with that speaker.

Finally, the district court focused only on the Legal Status Ban's effect on YAF-Buffalo's message and ignored the effects on its very ability to associate. *See Rumsfeld*, 547 U.S. at 69–70 (noting that "the freedom of expressive association protects more than just a group's membership decisions"). Nowhere did the district court analyze how the Ban's prohibitions on owning property, raising and holding funds, independently accessing the mandatory student activity funds, entering into contracts, or commencing litigation "impose[ ] severe burdens on associational rights." *Slattery*, 61 F.4th at 287 (cleaned up).

For instance, every YAF-Buffalo member must pay the mandatory student activity fee. Yet the Legal Status Ban prevents YAF-Buffalo from accessing that fee, functionally turning its members' payments into subsidies for other organizations—even those with whom they disagree. As pled, these impediments affect YAF-Buffalo's ability to

"recruit" and connect with like-minded students. *Fellowship of Christian Athletes*, 743 F. Supp. 3d at 84; *see* JA152. They also make membership in YAF-Buffalo "less attractive," especially the prohibition on YAF-Buffalo's ability to contract freely with Young America's Foundation. *Rumsfeld*, 547 U.S. at 69.

The district court's conclusions assume that forced association has "only one *modus operandi*." *Carroll*, 957 F.2d at 998. That is wrong. Reversing the district court's contrary conclusion would reinforce this Court's correct holding in *Carroll* and align this circuit with the subsequent development of the expressive association doctrine.

B. The Legal Status Ban compels Plaintiffs' speech.

Governments "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*, 600 U.S. at 586. 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." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892–93 (2018).

The Legal Status Ban compels Plaintiffs to express those groups' messages. Again, the Ban merges all student groups into the Student

Association. Whenever one student group speaks, all groups speak together. As noted, YAF-Buffalo has serious disagreement with many views advocated by other student groups. Yet the Legal Status Ban, by merging all these groups into the Student Association, compels YAF-Buffalo effectively to voice those very messages.

The district court resisted this conclusion largely because it did not think that anyone would attribute the student organizations' speech to each other. That misses the point. Because the student organizations cannot exist independently of the Student Association, whenever one organization speaks, it speaks as a "member" of the Student Association. Attribution is built into the Student Association's corporate form.

C. The Legal Status Ban restricts speech in a limited public forum.

Courts sometimes analyze "speech restrictions on publicly owned property according to a forum-based approach." *Tyler*, 74 F.4th at 61. That includes public universities' restrictions on expressive student groups and their allocation of mandatory student activity fees. *Husain v. Springer*, 494 F.3d 108, 121 (2d Cir. 2007); *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 100–01 (2d Cir. 2007). The parties agree (and precedent confirms) that Defendants' recognition process for student organizations creates a limited public forum.

While the government can "impose a blanket exclusion on certain types of speech" in a limited public forum, "once it allows expressive

activities of a certain genre, it may not selectively deny access for other activities of that genre." *Tyler*, 74 F.4th at 61 (cleaned up). When the government restricts speech "that falls within the designated category for which the forum has been opened," "[s]trict scrutiny" applies. *Id.* at 62 (cleaned up).

That's precisely what the Legal Status Ban does. Both YAF-Buffalo's expressive association and its speech "fall[ ] within the designated category for which" Defendants opened the forum. *Id.* As the district court concluded, the University created the forum to facilitate student expression. Yet the Legal Status Ban necessarily impedes that very purpose. Student groups cannot exist as their own legal entity. Nor can they freely contract with speakers without obtaining the Student Association's approval. As the district court held, the "Student Association can thwart, and has in fact burdened, activities through" its contract approval process. JA579 n.7. These regulations necessarily restrict speech "for which the forum has been opened." JA614 (cleaned up).

The district court reasoned that the Legal Status Ban merely restricted the "form or manner of speech in a limited public forum." JA617 (cleaned up). That's wrong. Regulations that restrict the "form or manner of speech" function like content-neutral laws; they regulate the "time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But the Legal Status Ban alters the very substance and viewpoint of both Plaintiffs' association and its speech.

The Ban subjects Plaintiffs' outside affiliations to the Student Association's unbridled discretion while simultaneously forcing Plaintiffs to associate with groups who have messages Plaintiffs generally oppose, all under the Student Association's banner. And in that merger, Plaintiffs' message becomes mixed together with other messages that at best Plaintiffs do not want to convey or at worst dilute Plaintiffs' own message. So the Legal Status Ban does not restrict Plaintiffs' speech at the periphery—it strikes at its very heart. It is not a regulation on the "form or manner of speech" in the forum.

The district court's contrary analysis was just another way of proclaiming the Legal Status Ban "reasonable" and "viewpoint neutral." *See* Argument II.D.2 (arguing otherwise). It elides the reality that the Legal Status Ban fundamentally alters the substance and viewpoint of Plaintiffs' message and association. For that reason, the Ban must—but cannot—survive strict scrutiny.

D. The Legal Status Ban cannot survive any level of constitutional scrutiny.

Because the Legal Status Ban severely burdens YAF-Buffalo's associational rights and compels its speech, Defendants must at minimum prove that it "furthers a compelling interest" and is "narrowly tailored to achieve that interest," *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (cleaned up), meaning there isn't a "less restrictive means of achieving that end," *Slattery*, 61 F.4th at 289 (cleaned up).

The district court erroneously merged Plaintiffs' expressive association claim with its other free-speech claims and analyzed them together under a forum analysis. "While similar and both grounded in the First Amendment—and some consider compelled speech a corollate to the right to expressive association—their analyses are slightly different." *St. Mary Cath. Parish in Littleton v. Roy*, 736 F. Supp. 3d 956, 1011 (D. Colo. 2024). Rather than analyze these claims together, the district court should have taken each on its own terms.

Nothing in *Martinez* compels otherwise. *Martinez* involved a student organization's objection to a policy that prevented student organizations from selecting members and officers based on certain characteristics. 561 U.S. at 670. The Supreme Court merged the student organization's expressive-associational and compelled-speech claims against that policy because "[w]ho speaks on [that group's] behalf … colors what concept is conveyed." *Id.* at 680 (cleaned up).

But here, the Legal Status Ban does more than just alter who can speak for Plaintiffs; it separately forces Plaintiffs to associate with organizations that Plaintiffs prefer not to associate. *Rumsfeld*, 547 U.S. at 69–70 (noting that "the freedom of expressive association protects more than just a group's membership decisions"). Moreover, the Ban imposes a host of hardships that make it difficult for Plaintiffs even to associate together in the first place. These are separate First Amendment injuries that deserve their own reckoning. Unlike in *Martinez*, they do not "arise

in exactly the same context," so it's wrong to reduce the scrutiny applied to the lowest common denominator. 561 U.S. at 681.

The Court in *Martinez* also worried that treating the claims separately would "invalidate a defining characteristic of limited public forums"—the government's ability to prevent certain groups from accessing them. *Martinez*, 561 U.S. at 681. But nothing about Plaintiffs' challenge undermines that governmental interest here. After all, YAF-Buffalo existed in Defendants' forum for years. JA147, 150. Instead, Plaintiffs' challenge revolves around its ability to exist as an organization separate and distinct from the Student Association. Given the different challenge, *Martinez*'s rationale has no force here.

More, *Martinez* involved an "*exceptionless* policy" far different than the "discretion the [Student Association]" wields in this case. *Fellowship of Christian Athletes*, 82 F.4th at 686. That discretion affects Plaintiffs' association in ways different than its speech. Plaintiffs' expressive association is no mere "auxiliary to speech's starring role" here. *Martinez*, 561 U.S. at 681.

The district court thought that *Martinez* merges expressive-associational and free-speech claims whenever they occur in "a university's student organization forum." JA612. That overreads *Martinez*'s "narrow[ ]" holding. *Fellowship of Christian Athletes*, 82 F.4th at 694; *see also Martinez*, 561 U.S. at 668, 675–78; *id.* at 698 (Stevens, J., concurring) (observing the "narrow issue presented by the record"). "*Martinez*

simply held that a truly categorical all-comers policy … may comply with the First Amendment as a neutral law of general applicability." *Fellowship of Christian Athletes*, 82 F.4th at 694.

In the end, the district court's merger "obscure[d] … the ultimate constitutional questions" here. *See TikTok, Inc. v. Garland*, 145 S. Ct. 57, 74 (2025) (per curiam) (Gorsuch, J., concurring in the judgment). Whatever scrutiny applies, the Legal Status Ban cannot withstand it.

1. The Legal Status Ban fails strict scrutiny because Defendants have not identified a compelling interest to stifle Plaintiffs' expression or grappled with less restrictive alternatives.

The Legal Status Ban cannot withstand strict scrutiny. To start, the Ban does not further a compelling interest. Defendants have argued that the policy protects the mandatory student fee, promotes fiscal integrity, and ensures student groups' compliance with University policies. That states the interests "at a high level of generality, but the First Amendment demands a more precise analysis." *Fulton v. City of Phila.*, 593 U.S. 522, 541 (2021). Defendants need more than "broadly formulated interests"—they must demonstrate that the Legal Status Ban advances *those* very interests as applied against *Plaintiffs*. *Id.* (cleaned up). Nowhere have Defendants demonstrated how YAF-Buffalo's speech and expressive association threaten these interests.

Nor have Defendants demonstrated that the Legal Status Ban is the only way to achieve these interests. If Defendants want to promote

fiscal integrity and ensure compliance with University policies, they could simply host informational sessions with student group officers and punish violations that occur. Defendants have not demonstrated any reason why they must prophylactically merge every group into the Student Association and prohibit a student organization's separate existence to achieve these goals. As this Court held, "economic scarcity cannot justify viewpoint discrimination." *Amidon*, 508 F.3d at 105.

Even taking Defendants' stated interests, the Legal Status Ban undermines them. Without legal separation, the Student Association is on the hook for the individual acts of each student organization. That imperils rather than safeguards student resources.

2. The Legal Status Ban is neither viewpoint neutral nor reasonable.

The Legal Status Ban cannot even withstand lesser constitutional scrutiny. At the very least, the Ban must be both viewpoint-neutral and reasonable. *Rosenberger*, 515 U.S. at 829. It is neither.

Viewpoint neutrality. The "First Amendment prohibits the vesting of … unbridled discretion in a government official." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992). This prohibition "is an element of viewpoint neutrality." *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 578 (7th Cir. 2002).

The Legal Status Ban violates this prohibition. It vests the Student Association with unlimited discretion over numerous aspects of

student organizations' speech. To start, the Student Association determines which student groups are officially recognized—and thus have access to campus resources, including the mandatory student-activity fee. The Student Association also decides which contracts student groups can enter—including contracts to associate with outside organizations. No policy sets out "narrow, objective, and definite standards" to guide the Student Association's decisions in any of these determinations. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). Yet the Supreme Court has "consistently condemned" speech regulations that "vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper recognition of public places." *Id.* at 153 (cleaned up).

That the Student Association has *some* policies outlining the recognition process does not fix the First Amendment problem. "[W]ritten criteria alone do not ensure that an official's discretion is adequately bridled." *Amidon*, 508 F.3d at 104 (cleaned up). That's especially true when those criteria are "nonexclusive." *Id.* Nothing prevents the Student Association from denying recognition to a group that ostensibly satisfies *every* written policy. That the Student Association can freely deny recognition despite a group's satisfaction of its written policies creates "a disconcerting risk that the [Student Association] could camouflage its discriminatory [decisions] through post-hoc reliance on unspecified criteria." *Id.*

More, some of the written policies "are too vague and pliable to effectively provide the constitutional protection of viewpoint neutrality." *Id.* For instance, the Student Association has the authority to reject a contract that a student group wants to enter if the Student Association finds the "terms" of that contract "[un]reasonable under the circumstances." JA239. And the Legal Status Ban premises a student group's recognition on its willingness to surrender its contractual rights to the Student Association's authority—without any guidance as to what the Student Association will consider "reasonable" terms. As the district court explained, the Student Association has used this discretion to "thwart" student expression. JA579 n.7. Such a vague standard vests the Student Association with too much discretion to pass constitutional muster.

After all, the Student Association has already demonstrated viewpoint hostility in this very case. After Plaintiffs hosted Michael Knowles on campus, the Student Association adopted the National Affiliation Ban in retaliation for the views expressed in Knowles's lecture. As the Student Association president quipped, "We all know why we're doing this." The Student Association disagreed with Plaintiffs' speech and sought to punish YAF-Buffalo's ability to associate freely as a result. And when YAF-Buffalo challenged the National Affiliation Ban in court, the Student Association rescinded it, only to smuggle in the same outcome under the Legal Status Ban.

That the Legal Status Ban "was a part of the Student Association's by-laws before the events that led to this lawsuit" does not make it "viewpoint neutral." JA620. The Student Association did not start enforcing the Legal Status Ban until after the Knowles lecture—in direct retaliation to YAF-Buffalo's expression. Though "unbridled discretion" often "allows officials to suppress viewpoints in surreptitious ways that are difficult to detect,"[3] *Amidon*, 508 F.3d at 103, here the "wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

This demonstrated hostility shows the viewpoint bias inherent in the unbridled discretion that the Legal Status Ban gives the Student Association. It is inconsistent with the First Amendment's promise to students that "minority views [will be] treated with the same respect as are majority views." *Southworth*, 529 U.S. at 235.

Reasonableness. Nor is the Legal Status Ban "reasonable in light of the purpose[s] served by the forum." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Everyone agrees that the University created the forum "for student organizations to engage in expression." JA147; *accord* JA624–25 ("The parties agree the purpose of

[3] Because laws that give unbridled discretion mask "covert viewpoint discrimination," many courts—including this one—have entertained facial challenges against them. *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 99, 104 (2d Cir. 2007); *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 580 (7th Cir. 2002).

the forum is to facilitate students' extracurricular development, including their intellectual and social development as well as their expression." (cleaned up)). The forum recognizes the "positive contributions to the primary educational mission of the University" that "student groups" make. JA186.

In this way, the University's forum mirrors countless other limited public fora in student-speech cases. It ensures "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. And it "facilitat[es] the free and open exchange of ideas by, and among, [the University's] students." *Id.* at 229; *Carroll*, 957 F.2d at 1000 (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").

Yet the Legal Status Ban stands athwart these goals. Rather than facilitate speech, merging every student group into the Student Association causes these groups to lose their distinctive voices. So does having the Student Association micromanage groups' ability to affiliate with like-minded organizations and conduct fundraisers. Or to even contract with speakers to come on campus and further facilitate dialogue. *See* JA579 n.7 (acknowledging that the Student Association has used the Legal Status Ban to "thwart" student expression). Further, the Legal

Status Ban compounds these injuries by preventing student groups from taking any legal action to vindicate constitutional rights that the the Student Association violates.

The unbridled discretion vested in the Student Association testifies to the Ban's lack of viewpoint neutrality and also to its unreasonableness. Without definitive criteria guiding the Association's choices, nothing "prevent[s] arbitrary or discriminatory enforcement"—as YAF-Buffalo's own experience demonstrates. *Amalgamated Transit Union Loc. 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 651 (9th Cir. 2019).

Defendants cannot avoid the Legal Status Ban's unreasonableness by declaring that all speech within the forum is the University's own. "[T]he government-speech doctrine does not extend to private-party speech that is merely … facilitated by the government." *Shurtleff v. City of Bos.*, 596 U.S. 243, 271 (2022) (Alito, J., concurring in the 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.*; *accord Rosenberger*, 515 U.S. at 834–35 (student groups "are not the University's agents, are not subject to its control, and are not its responsibility").

Nor can "resource management" save the Legal Status Ban. The district court thought the Ban was a reasonable way to safeguard "limited resources" by "centralizing both the management of the student

activity fund and the associated legal obligations." JA625. That misunderstands the analysis. To rescue the Legal Status Ban, Defendants must show not that it reasonably serves goals generally but rather that it is reasonable "in light of the purpose[s] served by the forum." *Cornelius*, 473 U.S. at 806. Again, as the district court recognized, everyone agrees the forum's purpose is to facilitate students' expression. Defendants have yet to explain how the Ban accomplishes this mission.

And however efficacious the Ban is as to resource management—which is questionable, given the liability risks that a merger imposes on student resources—that says nothing about the unbridled discretion it gives the Student Association in recognizing student groups and managing what outside organizations they affiliate with. These powers do nothing to ensure fiscal integrity or promote legal compliance.

III. The other factors weigh in favor of preliminarily enjoining the Legal Status Ban.

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 180 (2d Cir. 2020). A district court's decision crosses the line if it "rests on an error of law." *Id.* Any "allegations of error … that involve questions of law are reviewed without deference." *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, 88 F.4th 125, 135 (2d Cir. 2023) (per curiam) (cleaned up).

To obtain a preliminary injunction, Plaintiffs needed to show "(1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Kane v. De Blasio*, 19 F.4th 152, 163 (2d Cir. 2021) (per curiam). "[T]he dominant, if not the dispositive, factor in deciding whether to grant a preliminary injunction" is Plaintiffs' ability to "demonstrate likely success on the merits." *New Hope*, 966 F.3d at 181 (cleaned up). "In the First Amendment context, the likelihood of success on the merits will often be the determinative factor because of the seminal importance of the interests at stake." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (cleaned up); *accord N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

Those important interests are at stake in this case. Without a preliminary injunction, the Legal Status Ban prevents YAF-Buffalo from enjoying its status as a recognized organization on equal footing with other student organizations. As pled, YAF-Buffalo has been unable to access funds even after the Student Association rescinded the National Affiliation Ban. And this has directly impeded YAF-Buffalo's ability to associate together and engage in expression. "[T]he loss of [these] First Amendment freedoms … unquestionably constitutes irreparable injury." *Kane*, 19 F.4th at 171 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).

A preliminary injunction also favors the public interest by preserving First Amendment freedoms. As this Court has held, "securing First Amendment rights is in the public interest." *Walsh*, 733 F.3d at 488. Conversely, governments lack "an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (cleaned up).

Plaintiffs have demonstrated a strong likelihood to succeed on the merits of their claims. Without a preliminary injunction, they cannot associate together and engage in the speech that they desire—much less on equal footing with other student organizations. The public interest weighs heavily in favor of allowing YAF-Buffalo to exist as a student organization, with access to all the benefits thereof, and engage in the expression and association that it wants. This Court should remand with instructions to enter Plaintiffs' requested injunction.

CONCLUSION

Ever since Plaintiffs expressed a viewpoint with which the Student Association disagreed, Defendants have sought to punish them. They first tried to do so through the National Affiliation Ban. That Ban automatically derecognized YAF-Buffalo, and no amount of legerdemain from the Student Association can change the real harms YAF-Buffalo suffered as a result. Plaintiffs have standing to recover nominal damages from those harms. And because Defendants have sought to enforce the National Affiliation Ban through other means, its voluntary rescission does not moot Plaintiffs' request for injunctive relief.

That other means has primarily been the Legal Status Ban. That Ban severely burdens Plaintiffs' expressive-association and free-speech rights by merging them, along with every other student organization on campus, into the Student Association. Even viewing the Ban through a forum analysis, it imposes restrictions on speech at the very heart of the forum's purpose. The district court should have subjected the Ban to strict scrutiny.

The Ban can't pass that standard. Defendants have advanced no compelling interest in restricting Plaintiffs' association and speech. The interests that they have put forward are not compelling and can be accomplished without violating the First Amendment.

Even under a lower level of scrutiny, the Legal Status Ban cannot pass muster. At the very least, the Ban must be viewpoint-neutral and

reasonable. But the unbridled discretion it vests in the Student Association—allowing them to select which groups are recognized and which recognized groups may make contracts, without any criteria guiding those decisions—is the very definition of viewpoint discrimination. And the Association's history of wielding that discretion to punish viewpoints with which it disagrees highlights the Ban's unreasonableness.

Given this, Plaintiffs have demonstrated a likelihood of success on the merits. The other equitable factors also tip in their favor. This Court should reverse the decision below and remand with instructions to enter Plaintiffs' requested injunction.

Respectfully submitted,

Dated: March 11, 2025

By: */s/ Cody S. Barnett*

CODY S. BARNETT
TYSON C. LANGHOFER
P. LOGAN SPENA
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cbarnett@ADFlegal.org
tlanghofer@ADFlegal.org
lspena@ADFlegal.org

JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

TRAVIS C. BARHAM
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
tbarham@ADFlegal.org

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2025 I electronically filed the foregoing Principal Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the ACMS system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Cody S. Barnett
Cody S. Barnett
Attorney for Appellants

March 11, 2025

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 28.1.1(b) because, excluding the portions exempted by Fed. R. App. R. 32(f), this brief contains 11,115 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Cody S. Barnett
Cody S. Barnett
Attorney for Appellants

Dated: March 11, 2025