STATE OF NEW YORK
SUPREME COURT : COUNTY OF JEFFERSON

In the Matter of the Petition of	:	RJI #22-18-0762 Index #2018-1865
JOHN DOE "1", JOHN DOE "2", JOHN DOE "3", JOHN DOE "4", JOHN DOE "5", JOHN DOE "6", JOHN DOE "7", JOHN DOE "8", JOHN DOE "9", and JOHN DOE "10",	:	
Petitioners,	:	
-vs-	:	
SYRACUSE UNIVERSITY,	:	
Respondent.	:	Motion and Decision

Dulles State Office Building
317 Washington Street
Watertown, New York 13601
August 22, 2018

B E F O R E:

HON. JAMES P. McCLUSKY,

Supreme Court Justice

A P P E A R A N C E S:

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Carrie

THE COURT: We're here on John Doe Number 1 through 10 versus Syracuse University. First of all, it's scheduled for 10:00 o'clock, it's a

the papers. Miss Felter, I'll give you first chance -- anything to add to your written

were going forward, we recognized that in a motion to dismiss, which surely would be filed, that that claim would be subject to dismissal based on the availability

The second thing I think that isn't explicitly laid out in our papers, and I know the Court has read the papers, is that, you know, the idea that these students are not -- that they haven't asserted a privacy interest that would entitle them to proceed anonymously, is -- is particularly troubling to me because of the fact that it's the University and its student newspaper, The Daily Orange, which created the situation, the hysteria, the publicity, the media attention on this particular situation, and they did that in an effort to distance themselves from what they obviously knew was a social stigma associated with these

of that skit, and it's the University and its daily newspaper that made the situation as public and as controversial as it is. So they created --

THE COURT: Just -- I'm sure we're going to hear from Mr. Powers when he gets the chance to speak, but the newspaper is an independent organization; correct?

MS. FELTER: We don't know. They claim that it's an independent organization; but, frankly, that would be the subject of discovery as to what the financial support arrangements are. It's a student-run organization. You know, just because it's run by students doesn't necessarily means it's independent of the University.

So I mean, you know, I -- it can't be lost on anyone, including the Court, that, you know, the world that we live in now, you know, these kind of allegations of being virulent, violent, racist, antisemite, engaging in acts of sexual harassment, misconduct -- those kinds of allegations bring out the pitch fork

favor.

So I think, as I said, it's just ironic that the University, which created the circumstances under which this hysteria exists, now claims that these students are not entitled to a privacy while it's determined by this Court whether they should have been prosecuted in the first instance for this conduct that has nothing to do with the Code of Conduct violations that were charged and prosecuted.

So I'll reserve my right, perhaps, to respond additionally.

THE COURT: Mr. Powers?

MR. POWERS: Thank you, your Honor. A lot was said in the papers, and I apologize for the length of them. There were -- there was a lot of ground to cover and we didn't want to leave

that aren't in the federal action; correct?

MR. POWERS: That's correct, your Honor.

THE COURT: At best, even if I buy the Syracuse University argument that we don't have jurisdiction because there's another matter pending, we could still leave those three people pending.

MR. POWERS: Well, perhaps we should discuss that argument, your Honor, because the group of clients that this law firm has represented has been much larger than the clients that they chose to put forward in the federal action.

They chose those clients so that they would have diversity and they would have a federal forum for what Ms. Felter admits her state law claims. They chose the forum, they chose to leave certain of their clients off that caption. Now they come in front of you, having already litigated many of the issues that are in this petition, seeking to relitigate those petitions selecting a different subset of their clients.

THE COURT: Well, if they had a separate lawsuit, brought by a separate attorney, with three students who are New York State residents, they bring the Article 78, we could still have two different decisions, then, if you're arguing they're the same -- it would be the same decision. I could decide differently than Judge Scullin.

MR. POWERS: My response to that, your Honor, is what they should have done, and the argument's been made, if we add these three Plaintiffs, also our clients, to the first filed action, that that will defeat diversity jurisdiction; and in that case, we'll get remanded to state court. That's the argument. There's nothing preventing them from doing that.

Now, when they do that, that action goes to state court with its entire procedural history. Everything that Judge Scullin has done and decided, or Judge Peebles as the case may be, goes with it. You avoid all the problems that we're facing right now with the same issue potentially being decided by the same -- by different courts at the same time, and that's an issue that we try to void.

THE COURT: You can't force somebody to go to Smith Sovik if they don't want to go with Smith Sovik.

MR. POWERS: What I'm suggesting, your Honor, is that this was a conscious choice they made at the outset. They chose federal court. They could have had all their clients together in one action, they could have brought it in state court. They must have viewed -- and I would suggest they do view -- that any ruling in that federal court case was going to benefit their clients who are not part of the lawsuit.

Indeed, all of their claims aren't based on a

specific conduct by individuals, they're based on conduct against the group. They treat them all uniformly and we see it in this action.

You don't have individual affidavits from each of the clients, each of the Petitioners stating what their irreparable harm is. They're treating the entire body as a group, and so they must have believed -- and I would submit they do believe -- that all their clients are going to benefit or would have benefited from the rulings that they got from Judge Scullin, that's why they chose strategically, tactically to do what they did.

Now, conceivably, Judge, I think

Petitioners to the federal court action and then

pending that --

MS. FELTER: There are 10 --

THE COURT: -- to resolve the issues?

MS. FELTER: There are 10, and there's one who's waiting in the wings, so there's

You know what the conduct is here. And I've heard this -- these individuals referred to as kids. They're not kids, these are young men that have engaged in this conduct that, hopefully, you have viewed.

I don't think -- in order for you to find that a TRO is appropriate, you have to think it's likely, looking down the road, that I'm going to let them off the hook, that they're not going to be subject to any punishment. These adult men, for this conduct which was not in a private room, they weren't

Students have the right not to be discriminated against by any agent or organization of Syracuse University for reasons of age, creed, ethnic or national origin, gender, pregnancy, disability, marital status, age --

THE COURT: And this fraternity, who did they discriminate against?

MR. POWERS: They discriminated against individuals with disabilities, they discriminated --

THE COURT: Did they discriminate?

MR. POWERS: -- African Americans, they discriminated against --

THE COURT: What I understand, they said some inappropriate things, but is that discrimination? Did they prevent somebody from doing something?

MR. POWERS: The way that I would analogize this, your Honor, is as follows: These are adults, they were at an organization sanctioned event, and they are having -- they are putting on skits for an audience of 30 to 40 other members of the organization that have objectively racist, homophobic,

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standard.

THE COURT: So if they show All in the Family in the fraternity, a TV show, would that not be allowed?

MR. POWERS: If they show --

THE COURT: The TV show, All in the Family. If they ran an afternoon where they showed six hours of All in the Family, which is certainly racist, sexist, et cetera, et cetera, by today's standards -- maybe not when it was showed -- but it's -- and has the N-word in

being punished for not violating the rules of the school, isn't that shock -- you know, shocks the conscience?

MR. POWERS: Judge, with all due respect, in a public event, at a student organization, where discriminatory things are said, it's well within the discretion of the University to find that that's discriminatory towards the bodies that are being -- the groups that are being slurred.

To -- to

state.

So what Petitioner is asking you to do is, they're asking you to second-guess the interpretation of these Disciplinary Code provisions for the University, to get involved and really be a second level of appeal, to provide a de novo review whether or not you think this conduct violates the harassment provisions. There's harassment provisions in the Code, there's harassment provisions in the fraternity and sorority policy. That's not the role of the Court with all due respect.

The question is, does this punishment shock your conscience, or are you likely to find down the road -- because we're here on a TRO -- are you going to find down the road that this one-year suspension is shocking given what these students engaged in. I would suggest we're not even close to that.

This is within the discretion of the University. This one-year suspension, this two-year suspension -- those are within the published punishments in the guidelines for violation of these types of provisions. These are within the discretion of the University.

The student in Keefe, the nursing student who just -- he posted a rant on Facebook -- he also used the I-was-just-joking defense. He got expelled. The 8th Circuit not only found that that wasn't a violation of the

first amendment, they found it wasn't arbitrary and capricious. That's the same standard applied here.

So, your Honor, just backing up, I -- I think there are real problems with respect to two courts deciding the same issue, issues at the same time now. I think Counsel's correct that, which she mentioned in her reply papers, that 3211(a)4 gives you the discretion to fashion an appropriate remedy under the circumstances.

And I do think that there are, perhaps, other work-arounds for you, but that's a very real problem which I would respectfully suggest needs to be addressed. That you should not be deciding things that Judge Scullin has either already decided or things that are already pending in front of him, and that it's not fair to the University to have to defend the same issues in different courts, which we are doing right now, arguing the same things that I've already argued to Judge Scullin.

The other thing that I would bring to your attention, your Honor, and I -- and I don't know if -- if it's going to change your view, and I would like to supplement the record, but we learned -- we've learned yesterday that four of the Petitioners are currently enrolled in other colleges and universities.

And this goes to tt to

We have cited the law that says an interruption in schooling of a semester -- which is what we're talking about on Article 78 -- that's not irreparable harm. It's not unusual for students to take more than four years to finish their schooling. I've got one of them who is living in my house right now. That's not irreparable harm.

If they're unsuccessful in either the federal court litigation or this

case, I would suggest it's very different than this case, but you've also got other cases that say --

THE COURT: The Melvin case, though, is the irreparable harm statute, says it is irreparable harm. There's two other factors they have to meet to -- which would be the likelihood of success and the balance of the equities. They found that was this irreparable harm for factor number two.

MR. POWERS: I can't -- I can't argue with you there, the court did find it in its discretion, but I'm just saying there's case law going the other way.

THE COURT: But not Fourth Department, Court of Appeals.

MR. POWERS: Melvin's not Fourth Department.

THE COURT: The Second Department. And if there's no Fourth Department case, I have to follow the other Department's position.

MR. POWERS: Well, we don't know what proof the Plaintiff submitted regarding the irreparable harm. You have no such proof in front of you.

THE COURT: I think you may raise a valid point there on that issue, and that's separate and looking at the fact that you're going to be out -- possibly out a semester in the abstract. You raise a point, we don't have individual statements from the students.

MR. POWERS: All right. So on this issue of the federal court not being able to hear the Article 78 provision and Counsel said that it's ironic because we

So it's not -- it's not ironic and it's not a certainty that I would challenge the jurisdiction of the Court to hear the Article 78. In fact, that would have been fairly stupid on my part because it would have ensured a second action. I never would have done that to my client. I would have never put my client in the position it's in now having to litigate two different cases at the same time.

It also took me about 5

law claims, that arise out of the same set of events get tried in one case. That's the purpose of 1367.

Now, these cases, and sometimes very emphatic language say, you know, we're going to decline jurisdiction over the Article 78, those are better heard in state court. Most of those are cases against the government or a regulatory agency, state agency involving the application of state law. This is not such a case. The federal court is just as well equipped to interpret the student handbook as you are, your Honor.

The other significance is -- and I'll cite you back the Melvin case -- Melvin v. Union College, the Court held, including the Second Circuit -- or Second Department, that a breach of contract claim arising out of student discipline is functionally equivalent to an Article 78 claim. And how do we know that? We know that because the trial court converted the breach of contract claim to an Article 78 claim, and Second Department affirmed.

Breach of contract claim arising out of student discipline is already in the federal action. That's a functional equivalent of this claim that's now being brought in front of you. The standard for breach of contract in the federal -- federal court for this type of claim, is did the University substantially comply with its own procedures and was the result arbitrary or not. As you can see, it's the

same standard -- same standard under Article 78, so there's good reason why the case law say these are basically the same claim.

Now, Counsel has cited to you some case law that have -- where cases have said,

court. I represented to the Court that the Article 78 claim was going to be added because they told me it was going to be added. So all this is pointing us in one direction, that this is -- that the filing of this action is not the result of some circumstances that were unknown to them at the time they originally brought the federal court action. They knew in April that they were going to challenge the result when they chose the federal forum. They didn't have to choose federal court. They chose it.

So now they don't like where things are going in federal court, so they bring another action -- relitigation. This is a 3211(a)4 situation, Judge. And with all due respect, it's a problem.

Now, Judge Scullin doesn't know about this yet. We haven't advised him, and at the Plaintiffs have not advised him yet. But we've got matters pending that are identical to matters that are pending in front of you. I mean, we've got a -- we're on the road to inconsistent -- potential inconsistent decisions in different courts. It's going to be a real mess.

Your Honor, I have kind of gone on --

THE COURT: That's all right.

students at the end of the semester. As a result of us making that application to the Court, we withdrew it because we reached an agreement with the University that, in the fact that the University would ensure that these students had alternative arrangements to get through the last part of the semester.

So there was no need to go forward with that request before the Court because we reached an agreement that the University would respect the fact that the kids were trying to finish out the semester.

The second claim for injunctive relief that we

because of the pendency of the disciplinary action; then, when they tried to get unmarked transcripts, because of the fact that the thing was on appeal, the University chose to prematurely mark their transcripts and release them. And I think that they did that because they didn't want to be accused of preventing them from transferring but, you know, our position was that the status quo in the case was established before they were disciplined and before the hold was in place and that the Court should allow to the students to get unmarked transcripts.

We lost that argument on the issue of what was the statuses quo, but it had nothing to do with the substance of what the University has done. In fact, Judge Scullin specifically declined to listen to any arguments on the merits of the case.

So they have now made a motion to dismiss the state court -- of the state law claim, the breach of contract action and the defamation claims, but that is an entirely different analysis than what's before the Court.

In that motion and those claims, we are seeking punitive and compensatory damages for the impact of the breaches of contract on the students. These damages are not incidental to the claim for relief, they're separate and apart. That they're going to affect them long-term for the rest of their lives. That they've been defamed, that

they've been put -- associated on the internet for the rest of their lives with, you know, charges that never should have been brought in the first place.

So it's a completely separate analysis as to whether the breach of contract resulted in actual -- and defamation resulted in damages to these students. Then what is this Court being asked to do, which is to determine whether

otherwise, because you have roasts on Comedy Central, you have all kinds of things that are insanely offensive, and that is the point. And that was the point of this performance.

He brought up the fact -- Mr. Powers brought up the fact that the policy of the University against organizations covers this, but the fact of the matter is that that policy applies to organizations, not individuals. The fraternity and sorority policy that he refers to was already implemented to kick the entire organization off-campus permanently forevermore, never to return.

So they -- as soon as this happened, they took the opportunity to say to Theta Tau: You're out of here and don't ever come back. They implemented that policy to punish the organization. There's nothing in that policy that applies to individuals, and that's the point.

These -- while the -- the organization itself might be charged with engaging in conduct that's offensive, you know, or violates the fraternity's policies in terms of what's acceptable conduct, these individual students had to be found guilty of some specific provision of the Code of Conduct in order to be punished, and that just simply didn't happen.

As your Honor pointed out, the harassment provision requires that these -- that the speech target a specific

individual and not constitute free speech. And the University's own policy adopts and protects the first amendment standard regarding free speech, as long as it doesn't constitute fighting words, then it's protected free speech.

The -- it was satire. I mean, there's no person that was targeted, no person that was harmed, no person that claimed to be offended. The only people that were offended and got hysterical over this performances were people that watched the videos three weeks or four weeks after the fact, because they were publicized by The Daily Orange, and by that time every single person who watched the videos knew the story of what the videos contained, had all of the editorial commentary by both the University and The Daily Orange to set up what it was they were going to be watching, and then they clicked on the link and watched the videos.

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it to the University and The Daily Orange.

So every single person that watched

John Doe "1",

board members at the conduct board asked the students if that constituted evidence that somebody was offended. The fact that an unidentified person, while the whole room is laughing, yells out, "Too far." So that's the basis of their claim that somebody was harassed or harmed.

THE COURT: Any last words, Mr. Powers?

MR. POWERS: Yeah, I was wondering what's the satirical -- what was the satirical point of the gang rape of the individual in the wheelchair in -- I don't -- I don't mean to get cute with you, but think about the parent of the applicant -- the disabled applicant to the University who sees that nationally publicized video. What do they think about sending their child to Syracuse University?

This is -- this conduct is not conduct in the basement -- private conduct in the basement, this is conduct that has harmed the University. It is just not true to say that this -- that nobody objects or nobody was offended by this. Conduct to a person, the faculty, the alumni, the student body was outraged --

THE COURT: But the Code of Conduct -- my problem is that the Code of Conduct directs -- goes to the intent of the actor -- the intent of the one who's speaking or doing the actions. What you're talking about is based on people's response, and that could be -- how do you know what the person's response is going to be? It's subjective.

MR. POWERS: Well, I think you're focusing on Two, but I think Three is also important. Conduct, whether physical, verbal, electronic, oral, written, or video which threatens the mental health of any person or persons, including or not limited to -- and it gives some examples -- and the ones that I would point out are the examples of bullying and other destructive behavior.

This is destructive behavior. This is intimidating conduct. This is conduct that created a very real feeling of a threat from minority communities within the University. That they're at a place of higher education where their particular ethnicity, their particular race is being discussed this way at a University -- in a sanctioned event of a University organization.

It's up to the University to determine the interpretation of these provisions. These provisions, just like our penal law, just like all of our state law, you can't put every manifestation of a violation in words. These have to be interpreted. They're interpreted by the

University, and our law says that that interpretation is entitled to extreme significant discretion by this Court. You're only to second-guess if it's shocking to you what they found.

They found that this conduct which, if you or I engaged in it, we would surely be punished in some form or fashion. These are adult men, they're not -- they're no different. They're embarrassed by this, that's why they want to proceed anonymously. Has nothing to do with anything the University did.

They're not sexual assault victims, they are responsible for their own conduct. If they're embarrassed by it, it's because of what's on the internet. The Daily Orange is not a Syracuse University controlled organization, it's a newspaper. They publish what they believe is newsworthy. Syracuse has no control over that, and there's no evidence to the contrary, your Honor.

That's a -- so to the extent they're embarrassed by this -- I'm sorry, but they should be. They -- they have an opportunity to accept accountability, they have an opportunity to come back and make good. They're not being expelled, they're being suspended. That's

So this one particular guy has a girlfriend who he's so obsessed with, he talks about her incessantly, you know, that's all he does is mumble about his girlfriend. So the idea is to suggest that he's so brain dead and so controlled by his girlfriend that he can't function as a normal person. The wheelchair was a parody, it was satire to suggest the kid is so whipped and, you know, mentally screwed up by being controlled by his girlfriend that he can't think or respond to the fact even that he's being assaulted.

So, I mean, offensive? Absolutely. But has nothing to do with suggesting that, you know, these students or anybody at the University has a hostility towards people with actual disabilities. I mean, this is like a fantasy thing that they made up.

That was also, by the way, based on something that was publically available on YouTube. Some crazy shock comedian had done the same sort of thing and made the same kind of statement. That's what that skit was based on.

The other thing is, that he keeps saying that the result has to shock the conscience, arbitrary and capricious. The Hill case, which was most recently decided by the Fourth Department, specifically overturned an administrative disciplinary determination because the record was devoid of evidence, much less substantial evidence to

support the determination.

So in addition to the fact that they violated -- that we are alleging that they violated the procedural rights of the students not to be charged in the first place with these Code of Conduct violations, and the fact that they were charged is an arbitrary and capricious violation of the procedures, we are alleging, and we have support -- there's case law to support it, most recently from the Fourth Department -- that if the -- the result itself is not supported by substantial evidence, then it can be overturned.

And that's exactly what the situation is here. There's -- by no stretch of the imagination could you contend that these students were guilty of committing harassment against any person or group based on what's written in the Code of Conduct.

And finally, the last thing I meant to talk about when I was standing before, the issue of whether there's any evidence to suggest that there's irreparable harm. It's my understanding, based on communications with the students, that there were two students who had gone through the disciplinary process, filed appeals, and then ultimately decided, for financial reasons, that they were not going to pursue this litigation, that their money and time would be better spent trying to transfer to other schools. So the

two, that I know of, who were able to transfer to another institution -- a private institution, are not parties in this case.

There's a third one. The third one that I mentioned woul

which you're referring to, that was the common experience of the students. When they're trying to apply to other schools, there were two -- I don't know, frankly, what the circumstances were under how they managed -- they had family connections or something to Rutgers -- were able to transfer there, but the vast majority of students who were in a situation where they were trying to transfer are getting responses like the one that's attached there.

Well, you can't come here until you get reinstated at SU or you spend a year at another institution. So a lot of these students are electing to wait out the -- the period of suspension at SU, some are going to work, some are going to go to community college, but that's not the same thing as being denied the opportunity to continue their education at Syracuse University where they originally matriculated.

And if the Court is concerned about that issue and is going to entertain further submissions from Mr. Powers on this issue, then we could certainly submit additional -- to tie up that end piece in terms of not only have they been suspended and prevented from coming back to the University, which a court has already held in this state is irreparable harm, they are either going to a different institution or not able to

THE COURT: The Court's considered all the papers submitted to this date, which includes the verified petition, the memorandum of law, affirmation of Attorney Felter

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spoken in [illegible] setting. They allege the University officials [illegible] investigating the incident confis

another university or college, so based on that the Court will deny that part of the preliminary injunction.

Court is also asked to allow the students to proceed as John Does. Customarily, and -- there is presumption in openness of judicial proceedings, but both the federal and the state legislature has ruled that school

inclination would be to try to consolidate the state law claims with this action here as additional causes of action, separate and apart from the administrative review.

THE COURT: I won't make either party decide today. I understand they have to talk to other people, clients, and everything.

MS. FELTER: But I mean, assuming that that's what we do, you know, we would have to -- we would make the arrangements with the Court and then we'd like to get back before your Honor as soon as possible to address the factual issue that you raised regarding the irreparable harm, if necessary, again, and any other issues on the merits to resolve this.

MR. POWERS: I think, your Honor, correct me if I'm wrong, I think what you were referring to was a return date for the actual Article 78 itself?

THE COURT: Correct.

MR. POWERS: For decision and hearing on the merits?

THE COURT: Right; if one is needed.

MR. POWERS: Yeah. And so --

MS. FELTER: The record is really big -- the administrative record, which we don't have at this point. I know it's quite extensive, so we have to get the record, we have to breach to make arguments based on that.

THE COURT: If we schedule a telephone conference for September 19th, will that --

MS. FELTER: Yeah, that's fine.

MR. POWERS: We'll set the date on that day, your Honor, for the --

THE COURT: Right. We can see where we're at, hopefully the record is completed by then so we can proceed. How's 9:00 o'clock on the 19th?

MS. FELTER: That a telephone --

THE COURT: It would be a telephone conference. We'll do it as a call-in conference, Court will send out directions on how to call in.

MR. POWERS: That works for me, your Honor.

THE COURT: Mr.

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I, CARRIE L. SORENSEN,