No. _____

# In the Supreme Court of the United States

FACULTY, ALUMNI, AND STUDENTS OPPOSED TO RACIAL PREFERENCES, PETITIONER

*v.*

NEW YORK UNIVERSITY, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The New York University Law Review is engaging in illegal race and sex discrimination when selecting articles for publication, as it asks authors to identify their race, sexual orientation, and gender identity when submitting manuscripts, and admits on its website that it considers whether submissions are written by "authors from underrepresented backgrounds in the legal profession." The Law Review also discriminates in favor of racial minorities, women, homosexuals, and transgender individuals when selecting its members—a practice that violates the unambiguous text of Title VI and Title IX.

Petitioner Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) is a membership association that includes scholars and academics who submit articles to the NYU Law Review and intend to continue submitting their manuscripts in the future. FASORP has sued NYU to enjoin the discriminatory membership- and article-selection policies of its Law Review. FASORP also alleges that the NYU School of Law discriminates in its faculty hiring by conferring preferences on female and minority faculty candidates at the expense of white men. The court of appeals, however, held that FASORP had failed to allege standing, even though the complaint explains in detail how FASORP's members are suffering discriminatory treatment on account of these policies. The question presented is:

> Should the Court summarily reverse the court of appeals' holding that FASORP failed to allege standing in its amended complaint?

## PARTIES TO THE PROCEEDING

Petitioner Faculty, Alumni, And Students Opposed To Racial Preferences (FASORP) was the plaintiff-appellant in the court of appeals.

Respondent New York University was a defendant-appellee in the court of appeals.

A corporate disclosure statement is not required because FASORP is not a corporation. *See* Sup. Ct. R. 29.6.

## STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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# In the Supreme Court of the United States

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## PETITION FOR A WRIT OF CERTIORARI

Federal law prohibits universities that accept federal funds from discriminating on account of race or sex. *See* 42 U.S.C. § 2000d (Title VI); 20 U.S.C. § 1681 (Title IX). The New York University Law Review is violating these requirements in two separate and distinct ways. First, the Law Review is discriminating in favor of racial minorities, women, homosexuals, and transgender individuals when selecting its members—a practice that violates the clear and unequivocal text of Title VI and Title IX. The Law Review is also engaging in illegal race and sex discrimination when selecting articles for publication, as it asks authors to identify their race, sexual orientation, and gender identity when submitting manuscripts, and admits on its website that it considers whe-

ther these submissions have been written by "authors from underrepresented backgrounds in the legal profession."[1]

Petitioner Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) is a membership association that includes scholars and academics who submit articles to the NYU Law Review and intend to continue submitting their manuscripts to the Law Review in the future. FASORP has sued New York University to enjoin the discriminatory membership- and article-selection policies of its Law Review. App. 46a–47a, 54a–57a. FASORP also alleges that the New York University School of Law discriminates on account of race and sex in its faculty hiring, by discriminating in favor of female or minority faculty candidates and against white men. App. 47a, 57a.

In a transparent attempt to cert-proof the plaintiff's challenge to this patent violation of federal civil-rights law, the court of appeals held that the plaintiff's complaint had failed to allege the elements of Article III standing[2]—even though the complaint explains *in detail* how the members of FASORP are suffering discriminatory treatment on account of the Law Review's membership- and article-selection policies, as well as the Law

1. https://www.nyulawreview.org/about (last visited on January 24, 2022); *see also* First Amended Complaint, Exs. 4–6, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF Nos. 39-4 – 39-6) (screenshots of NYU Law Review's submission pages on Scholastica).

2. App. 10a–17a.

School's faculty-hiring practices. App. 48a–52. The court of appeals then used this failure-to-allege-standing holding as an excuse to avoid ruling on whether the university's race and sex preferences violate Title VI and Title IX. App. 10a–17a. The Court should summarily reverse the court of appeals and remand for it to consider whether the plaintiffs have pleaded a violation of federal civil-rights laws.

## OPINIONS BELOW

The opinion of the court of appeals is available at 11 F.4th 68, and it is reproduced at App. 1a–20a. The district court's opinion is available at 2020 WL 1529311, and it is reproduced at App. 21a–39a.

## JURISDICTION

The court of appeals entered its judgment on October 18, 2021. App. 41a. On November 15, 2021, Justice Sotomayor extended the time to file a petition for certiorari until January 24, 2022. FASORP timely filed this petition on January 24, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title VI of the Civil Rights Act of 1964 provides, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Title IX of the of the Education Amendments of 1972 provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681.

Rule 8(a) of the Federal Rules of Civil Procedure provides, in relevant part:

> A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

Fed. R. Civ. P. 8(a).

## STATEMENT

The New York University Law Review is an academic journal edited and operated by students at NYU Law School. These students select and edit the articles that the Law Review will publish, and they also select the students who serve as members and editors of the Law Review. Until recently, membership on a law review was an academic honor reserved to students who were selected on account of their law-school grades and performance on a writing competition. In recent years, howev-

er, the Law Review has been using race and sex preferences to select its members. The Law Review's current membership-selection policies are explained on its website.[3]

Each year, the Law Review selects 50 new members from the rising 2L class. *See* note 3, *supra*. The Law Review first extends membership offers to 15 students based solely on their performance on a writing competition. *Id.* After those 15 students are selected, another 15 are chosen solely on the basis of their first-year grades. *Id.* Then eight additional students are selected based on "a combination of their grades and writing competition scores." *Id.*

After these 38 students are selected on the basis of merit, the remaining 12 slots are set aside for selections made by the Law Review's "Diversity Committee." *Id.* To enable it to fill this "diversity" quota, the NYU Law Review instructs all applicants to submit a "personal statement" of no more than 500 words. *Id.* The Law Review explains:

> The information contained in these personal statements allows the *Law Review* to realize its commitment to staff diversity. The *Law Review* evaluates personal statements in light of various factors, including (but not limited to)

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3. *See* First Amended Complaint, Ex. 1, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-1) (copy of the Law Review's membership-selection policies at the time this lawsuit was filed).

> race, ethnicity, gender, sexual orientation, national origin, religion, socio-economic background, ideological viewpoint, disability, and age. With regard to these and other aspects of diversity, applicants should clearly identify and discuss any personal characteristics, background, unique experiences, or qualifications that the applicant would like to bring to the attention of the Selection Committee.

*Id.* The NYU Law Review also permits applicants to submit a résumé, which "can be used to share personal and professional information that cannot be easily communicated through a personal statement," and which "will be used by the *Law Review* to realize its commitment to staff diversity." *Id.* The Law Review instructs applicants to remove their "names and addresses" from their résumé before submitting it. *Id.*

The NYU Law Review also discriminates on account of race, sex, sexual orientation, and gender identity when selecting articles for publication. The Law Review requires authors seeking to publish with the journal to submit their manuscripts through a web-based submission service called Scholastica.[4] When authors submit a manuscript to the NYU Law Review through Scholasti-

4. *See* First Amended Complaint, Ex. 3, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-3) ("[W]e accept submission of unsolicited Articles via Scholastica. We no longer accept submissions by e-mail or by postal service.").

ca's website, they are invited to provide their "demographic information," including their race, sexual orientation, and gender identity.[5] In the "race" category, authors are invited to check one or more of the following boxes: "Black or African American," "Hispanic or Latino," "American Indian or Alaskan Native," "Asian," "Native Hawaiian or Other Pacific Islander," "White/Non-Hispanic," or "Other, please specify."[6] For "sexual orientation," authors are asked to choose between "Prefer not to answer," "Straight/Heterosexual," "Gay," "Lesbian," "Bisexual," or "Other."[7] And in the "gender identity" field, authors may respond with "Prefer not to answer," "Male," "Female," "Neither," "Both," or "Genderqueer."[8] The Law Review admits on its website that it seeks to publish articles "written by authors from underrepresented backgrounds in the legal profession."[9]

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5. *See* First Amended Complaint, Exs. 4–6, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF Nos. 39-4 – 39-6) (screenshots of NYU Law Review's submission pages on Scholastica).

6. *See* First Amended Complaint, Ex. 4, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-4).

7. *See* First Amended Complaint, Ex. 5, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-5).

8. *See* First Amended Complaint, Ex. 6, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-6).

9. https://www.nyulawreview.org/about (last visited on January 24, 2022); *see also* First Amended Complaint, Ex. 2, *Faculty, Alumni, and Students Opposed to Racial Preferences v. New*

(continued…)

On October 7, 2018, an organization called Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) sued New York University, the U.S. Secretary of Education, and the United States of America.[10] FASORP is an unincorporated nonprofit membership association, and its members include faculty, alumni, and students of law schools who oppose the use of race and sex preferences in faculty hiring, student admissions, law-review membership, and law-review article selection. After the defendants moved to dismiss, FASORP filed an amended complaint. App. 42a–61a. FASORP's amended complaint alleges that New York University is violating Title VI and Title IX by:

> (1) Discriminating on account of race and sex when selecting articles for publication in the New York University Law Review, by discriminating in favor of racial minorities, women, homosexuals, and transgender individuals, and by discriminating against white heterosexual men, App. 46a–47a, 54a–57a;
>
> (2) Discriminating on account of race and sex when hiring faculty at the New York University Law School, by discriminating in favor of

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*York University Law Review, et al.*, No. 1:18-cv-09184-ER (ECF No. 39-2).

10. The original complaint also named New York University School of Law and the New York University Law Review as defendants, but these are not distinct legal entities from New York University. So only New York University is a respondent to this petition.

> female or minority faculty candidates and against white men, App. 47a, 57a; and
>
> (3) Discriminating on account of race and sex when selecting the members and editors of the New York University Law Review, by discriminating in favor of racial minorities, women, homosexuals, and transgender individuals, and by discriminating against white heterosexual men, App. 45a–46a, 54a–57a.

FASORP brought these claims under the causes of action that this Court has recognized in Title VI and Title IX. App. 57a (¶ 62); *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (private litigants may sue to enforce Title VI, but only when challenging intentional racial discrimination and not policies that merely impose a disparate impact); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (private litigants may sue to enforce Title IX).

FASORP specifically alleged that its members were suffering injury in fact on account of these discriminatory policies and practices. With respect to the Law Review's article-selection policies, the amended complaint alleges that:

> The members of FASORP include faculty members or legal scholars who have submitted articles to the NYU Law Review in the past, and who intend to continue submitting their scholarship to the NYU Law Review in the future, and who will face discrimination on account of their race, sex, sexual orientation, or gender identity unless the NYU Law Review is

> enjoined from enforcing its discriminatory article-selection policies. These individuals were members of FASORP when the original complaint was filed.

App. 51a–52a (¶ 42). The amended complaint also explains how these members of FASORP have Article III standing to challenge the discriminatory article-selection policies:

> Faculty members of FASORP who submit articles to the NYU Law Review are being subjected to race and sex discrimination because the NYU Law Review gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male. This discriminatory treatment inflicts "injury in fact." *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The injury is caused by the NYU Law Review's discriminatory article-selection practices, and that injury will be redressed by an injunction that bars the NYU Law Review from considering the race, sex, sexual orientation, or gender identity of an author when selecting articles for publication.

App. 48a–49a (¶ 33). With respect to the Law School's faculty-hiring policies, the amended complaint alleges that:

> The members of FASORP include individuals who have sought and applied for entry-level or

> lateral teaching positions at New York University School of Law and intend to do so again in the future, or remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply, and who face or will face discrimination on account of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring. These individuals were members of FASORP when the original complaint was filed.

App. 45a (¶ 45). Finally, with respect to the membership-selection policies, the amended complaint alleges that:

> Members of FASORP who submit articles to the NYU Law Review suffer a separate and distinct "injury in fact" from the journal's membership-selection policies. Because the NYU Law Review has subordinated academic merit to diversity considerations when selecting its members and editors, the articles that FASORP members submit to the Law Review are judged by less capable students—and these are the students who will ultimately make the career-altering decision of whether a professor's article gets accepted for publication or rejected. This inflicts "injury in fact." This injury is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

App. 49a (¶ 34).

The university moved to dismiss the amended complaint for failing to allege Article III standing and, in the alternative, for failing to allege a claim on which relief may be granted. The district court granted the motion to dismiss but allowed FASORP leave to amend. App. 21a–39a.[11] FASORP opted to stand on its amended complaint, and the district court entered a final judgment.

On appeal, the Second Circuit held that the complaint failed to allege Article III standing, and it declined to resolve whether the complaint had alleged violations of Title VI and Title IX. App. 10a–17a. The court of appeals acknowledged its duty to "accept as true all material allegations of the complaint" and "construe the complaint in favor of the complaining party." App. 3a (citation and internal quotation marks omitted). And it acknowledged that FASORP's complaint alleged the existence of members who have submitted and intend to submit scholarship to the Law Review, and have sought and intend to seek faculty appointments at the Law School.[12] Yet the

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11. The district court also granted the federal defendants' motion to dismiss, App. 37a–38a, but FASORP did not contest the dismissal of the federal defendants on appeal, and it is no longer pursuing claims or seeking relief against the federal defendants.

12. App. 13a (acknowledging that FASORP alleged that its membership includes "'faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future'" and "'individuals who have sought and applied for entry-level or lateral teaching positions at the Law School and intend to do so again the future, or remain potential candidates.'").

court of appeals held that FASORP's complaint failed to provide sufficient factual details—even though detailed factual allegations are *not* required to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations" (citation and internal quotation marks omitted)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

With respect to FASORP's membership, the court of appeals held that the complaint should have been "more specific" in describing their intentions to submit articles and seek faculty appointments:

> When did FASORP's members submit articles or apply for jobs at NYU? Have those members drafted articles they intend to submit? If so, when do they plan to submit? Instead, FASORP effectively asks us to accept a "self-description of the activities of its members" and to conclude that "there is a statistical probability that some of those members are threatened with concrete injury." Such allegations are plainly insufficient to show that FASORP's members have suffered the requisite harm here.

App. 14a (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009)). And with respect to injury-in-fact, the court of appeals held that FASORP "fails to demonstrate" a "certainly impending" injury or a "substantial risk" of harm. App. 14a (quoting *Susan B. An-*

*thony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted)). The court of appeals wrote:

> The primary defect in all these theories is that there is uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged. Without any "description of concrete plans" to apply for employment, submit an article, or of having submitted an article, that will or has been accepted for publication, FASORP's allegations exhibit the kind of "some day intentions" that cannot "support a finding of [] actual or imminent injury."

App. 15a (quoting *Summers*, 555 U.S. at 496). Judge Menashi filed a concurrence, in which he faulted FASORP's complaint for failing to "'identify members who have suffered the requisite harm.'" App. 18a (quoting *Summers*, 555 U.S. at 499); *see also id.* ("FASORP has not identified a member who has, or will, submit articles to the Law Review or seek teaching positions at the law school.").

## REASONS FOR GRANTING THE PETITION

The federal rules of civil procedure establish a regime of notice pleading. Not code pleading, where complaints must recite and establish each element of a cause of action.[13] Not fact pleading, where complaints must an-

13. *See Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) ("[I]t is unnecessary to set out a legal theory for the plaintiff's claim for relief." (citation and internal quotation marks omitted)); (continued…)

ticipate and describe the factual details that they expect to uncover in discovery.[14] Notice pleading. Even after *Twombly* and *Iqbal*, this Court has made clear that a complaint needs only to plausibly *allege*—and not "demonstrate"—the existence of jurisdiction,[15] and that the allegations of a complaint *must* be accepted as true when deciding a motion to dismiss. *See, e.g.*, *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1927 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.").

When FASORP's complaint alleges that its members "*intend to continue submitting* their scholarship to the NYU Law Review in the future,"[16] and that its members "*will face discrimination* on account of their race, sex, sexual orientation, or gender identity"[17] absent judicial relief, the court of appeals is *compelled* to accept the truth of those allegations at the motion-to-dismiss stage. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864 (2017) (a complaint's allegations are "assumed" to be true on a motion

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*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) ("[A]n employment discrimination plaintiff need not plead a prima facie case of discrimination").

14. *See Iqbal*, 556 U.S. at 678 ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations" (citation and internal quotation marks omitted)).

15. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 749 (2021) ("[A] plaintiff must plausibly allege all jurisdictional elements."); *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 536–37 (2021) (plurality opinion of Gorsuch, J.).

16. App. 51a (¶ 42).

17. App. 51a (¶ 42).

to dismiss). It cannot deny the truth of these allegations by complaining that FASORP failed to supply detailed information about who would submit the articles, or when and how those articles would be submitted—details that are assuredly not required under the regime set forth in Rule 8(a)(1). *See Iqbal*, 556 U.S. at 678 ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations" (citation and internal quotation marks omitted)); *Twombly*, 550 U.S. at 555 ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

This Court has summarily reversed courts of appeals for holding federal complaints to a heightened-pleading standard. *See Johnson v. City of Shelby*, 574 U.S. 10 (2014); *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). It should do so here as well. Summary reversal is especially warranted in this case, where a court of appeals has concocted a heightened-pleading requirement to shield a university from accusations of unlawful race and sex discrimination—accusations that, if proven, would establish a patent violation of federal civil-rights statutes. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (federal civil-rights laws protect whites from racial discrimination on the same terms as racial minorities); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) ("What did 'discriminate' mean in 1964? As it turns out, it meant then roughly what it

means today: 'To make a difference in treatment or favor (of one as compared with others).'"

## I. THE COURT SHOULD SUMMARILY REVERSE THE COURT OF APPEALS' HOLDING THAT FASORP FAILED TO ALLEGE STANDING WITH RESPECT TO THE LAW REVIEW'S ARTICLE-SELECTION POLICIES AND THE LAW SCHOOL'S FACULTY-HIRING POLICIES

The amended complaint specifically alleges that FASORP's members include scholars and academics who submit articles to the NYU Law Review and intend to continue submitting their manuscripts in the future:

> The members of FASORP include faculty members or legal scholars who have submitted articles to the NYU Law Review in the past, and who intend to continue submitting their scholarship to the NYU Law Review in the future, and who will face discrimination on account of their race, sex, sexual orientation, or gender identity unless the NYU Law Review is enjoined from enforcing its discriminatory article-selection policies. These individuals were members of FASORP when the original complaint was filed.

App. 51a–52a (¶ 42). The amended complaint goes on to explain how these members of FASORP are suffering "injury in fact" on account of the Law Review's discriminatory article-selection policies, which is traceable to the defendants and will be redressed by the judicial relief that FASORP is seeking:

> Faculty members of FASORP who submit articles to the NYU Law Review are being subjected to race and sex discrimination because the NYU Law Review gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male. This discriminatory treatment inflicts "injury in fact." *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The injury is caused by the NYU Law Review's discriminatory article-selection practices, and that injury will be redressed by an injunction that bars the NYU Law Review from considering the race, sex, sexual orientation, or gender identity of an author when selecting articles for publication.

App. 48a–49a (¶ 33).

The amended complaint also explains how FASORP's membership includes individuals who have sought and applied for entry-level or lateral teaching positions at New York University School of Law and will do so again in the future:

> The members of FASORP include individuals who have sought and applied for entry-level or lateral teaching positions at New York University School of Law and intend to do so again in the future, or remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply, and who face or will face discrimination on ac-

> count of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring. These individuals were members of FASORP when the original complaint was filed.

App. 52a (¶ 45). The individuals described in these paragraphs are suffering Article III injury because they will encounter discriminatory treatment on account of their race or sex. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 559 (1993).

Yet the court of appeals somehow held that this *failed to allege* Article III standing—even though the complaint specifically describes the affected members of FASORP and specifically explains how each component of the Article III standing inquiry is satisfied. The court of appeals' holding is untenable and warrants summary reversal.

### A. The Court Of Appeals Erred By Requiring FASORP To Plead Facts Describing When Its Members Will Submit Articles Or Apply For Jobs

The court of appeals held that FASORP's allegations were insufficiently "specific" because they failed to say when its members had previously submitted articles or applied for jobs at NYU, or when its members intend to submit their future articles or whether those articles had already been drafted:

> It is possible to be more specific—even if "naming names" and submitting individual affidavits is not required. For example: When did

> FASORP's members submit articles or apply for jobs at NYU? Have those members drafted articles they intend to submit? If so, when do they plan to submit? Instead, FASORP effectively asks us to accept a "self-description of the activities of its members" and to conclude that "there is a statistical probability that some of those members are threatened with concrete injury." Such allegations are plainly insufficient to show that FASORP's members have suffered the requisite harm here.

App. 13a–14a (quoting *Summers*, 555 U.S. at 497). This level of detail is not required at the motion-to-dismiss stage. *See Iqbal*, 556 U.S. at 678 ("[T]he pleading standard Rule 8 announces does not require detailed factual allegations" (citation and internal quotation marks omitted)); *Twombly*, 550 U.S. at 555 ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations"). The complaint alleges that FASORP has members "who have submitted articles to the NYU Law Review in the past, and who intend to continue submitting their scholarship to the NYU Law Review in the future"[18]—and the court of appeals *must* accept the truth of that allegation regardless of whether the complaint provides details on when the articles will be drafted or submitted. In like manner, the complaint says that FASORP has members "who have sought and applied for entry-level or lateral teaching positions at

18. App. 51a (¶ 42).

New York University School of Law and intend to do so again in the future, or remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply." App. 52a (¶ 45). The truth of that allegation *must* be accepted regardless of whether the complaint provides details on when FASORP's members applied for jobs at NYU.

The court of appeals was also flatly wrong in saying that FASORP had alleged nothing more than "a statistical probability that some of [its] members are threatened with concrete injury." App. 14a (quoting *Summers*, 555 U.S. at 497 (internal quotation marks omitted)). The complaint says that FASORP's members "*will face discrimination* on account of their race, sex, sexual orientation, or gender identity unless the NYU Law Review is enjoined from enforcing its discriminatory article-selection policies." App. 51a–52a (¶ 42) (emphasis added). And it says that FASORP's members "*will face discrimination* on account of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring." App. 52a (¶ 45) (emphasis added). These are allegations of *certain* harm—not a "statistical probability" of harm—and the court of appeals was obligated to accept the truth of these assertions.

Finally, the court of appeals erred by claiming that it need not accept a "'self-description of the activities of [FASORP's] members'" at the motion-to-dismiss stage. App. 14a (quoting *Summers*, 555 U.S. at 497). The court must accept the truth of *all* factual allegations when deciding a motion to dismiss—including any "self-

description of the activities" of an organization's members. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 359 n.1 (2019) ("Because this case comes to us from a decision granting a motion to dismiss, we assume the truth of the facts alleged in Rotkiske's operative complaint."). The court of appeals quoted language from *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009), but *Summers* was not a motion-to-dismiss case; it reversed a *final judgment* on the ground that the plaintiffs had failed to *prove* associational standing through affidavits. *See id.* at 494–97. *Summers* has nothing to say about the requirements for *pleading* associational standing at the motion-to-dismiss stage—and it does not overrule the requirement that courts accept the truth of *all* factual allegations (including any "self-description" of the activities of an organization's members) when deciding a motion to dismiss.

### B. The Court Of Appeals Erred By Holding That FASORP Had Failed To Allege A "Certainly Impending" Injury Or A "Substantial Risk" Of Future Harm

The court of appeals also held that FASORP had failed to allege a "certainly impeding" injury or a "substantial risk" of future harm. App. 14a (quoting *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted)). This holding is likewise unsupportable and warrants summary reversal.

The complaint says that it is *certain*—not speculative—that members of FASORP will encounter race and sex discrimination at the hands of the Law Review and the Law School. App. 51a–52a (¶ 42) ("[M]embers of

FASORP . . . *will face discrimination* on account of their race, sex, sexual orientation, or gender identity unless the NYU Law Review is enjoined from enforcing its discriminatory article-selection policies." (emphasis added)); App. 52a (¶ 45) ("[M]embers of FASORP . . . *will face discrimination* on account of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring." (emphasis added)). These are allegations of certitude—and the certainty of these allegations must accepted at this stage of the litigation.

The complaint also says that members of FASORP "have submitted articles to the NYU Law Review in the past" and "intend to continue submitting their scholarship to the NYU Law Review in the future." App. 51a (¶ 42); *see also* App. 52a ("The members of FASORP include individuals who have sought and applied for entry-level or lateral teaching positions at New York University School of Law and intend to do so again in the future, or remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply."). That is not a "highly attenuated chain of possibilities," as the court of appeals held. App. 36a (quoting *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted)). Nor is there any "uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged." App. 15a. The complaint says that FASORP members *will* encounter discrimination from the Law Review's article-selection practices and the Law School's faculty-hiring process. App. 51a–52a (¶ 42)); App. 52a (¶ 45). There are

no contingencies alleged in the complaint. It is certain that members of FASORP will face discrimination from Law Review's article-selection practices and the Law School's faculty-hiring process, because the complaint says that they will—and those assertions are all that is needed to survive a motion to dismiss.

## II. THE COURT SHOULD SUMMARILY REVERSE THE COURT OF APPEALS' HOLDING THAT FASORP FAILED TO ALLEGE STANDING WITH RESPECT TO THE LAW REVIEW'S MEMBERSHIP-SELECTION POLICIES

FASORP's complaint alleges that its faculty members are suffering injury-in-fact from the Law Review's membership-selection policies because the use of race and sex preferences affects the composition of the students who select and edit the articles submitted by FASORP members, and it dilutes the academic qualifications of the students who make the career-altering decisions of whether a FASORP member's article gets accepted for publication in the NYU Law Review. App. 52 (¶ 43).

The court of appeals denied that this constitutes "injury in fact." App. 15a–16a. But the court of appeals was *required* to accept the truth of the plaintiff's assertion that the Law Review's membership-selection policies will harm FASORP's members by having their submissions evaluated by less capable students:

> Members of FASORP who submit articles to the NYU Law Review suffer a separate and distinct "injury in fact" from the journal's membership-selection policies. Because the

> NYU Law Review has subordinated academic merit to diversity considerations when selecting its members and editors, the articles that FASORP members submit to the Law Review are judged by less capable students—and these are the students who will ultimately make the career-altering decision of whether a professor's article gets accepted for publication or rejected. This inflicts "injury in fact."

App. 49a (¶ 34); *see also* App. 52a (¶ 43) ("[M]embers of FASORP . . . *will have* their submissions judged and evaluated by less capable students who made Law Review because of diversity criteria, and who leapfrogged students with better grades and writing-competition scores." (emphasis added)). If this allegation is true—and it *must* be assumed true when deciding a motion to dismiss—then FASORP's members are indisputably suffering injury from the Law Review's membership-selection policies. The court of appeals' refusal to accept this alleged injury warrants summary reversal. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) ("[A]n identifiable trifle is enough for standing" (citation and internal quotation marks omitted)).

* * *

The courts of appeals cannot impose heightened pleading requirements in lawsuits that challenge the legality of affirmative-action policies. And they cannot manipulate the rules of pleading to concoct procedural or jurisdictional obstacles to lawsuits that may require the judiciary to weigh in on politically contentious issues. *See*

Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964). FASORP's amended complaint easily satisfies the requirements of notice pleading, and the Court should summarily reverse the court of appeals' contrary holding.

## CONCLUSION

The Court should grant the petition for writ of certiorari and summarily reverse the court of appeals' ruling.

Respectfully submitted.

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January 24, 2022

# APPENDIX

# In the United States Court of Appeals for the Second Circuit

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AUGUST TERM 2020

No. 20-1508-cv

FACULTY ALUMNI AND STUDENTS OPPOSED TO RACIAL PREFERENCES,
*Plaintiff-Appellant*,

*v.*

NEW YORK UNIVERSITY, and MIGUEL CARDONA, in his official capacity as U.S. SECRETARY OF EDUCATION, UNITED STATES OF AMERICA,
*Defendants-Appellees*,[*]

NEW YORK UNIVERSITY LAW REVIEW, NEW YORK UNIVERSITY SCHOOL OF LAW,
*Defendants*.

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* Under Fed. R. App. P. 43(c)(2), Miguel Cardona is, in his official capacity as Secretary of Education, substituted for his predecessor Betsy DeVos. The Clerk of Court is directed to amend the caption of this matter accordingly.

On Appeal from the United States District Court
for the Southern District of New York

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ARGUED: MARCH 5, 2021
DECIDED: AUGUST 25, 2021

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Before LEVAL, CABRANES, AND MENASHI, *Circuit Judges*.

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This appeal presents one threshold question: whether Plaintiff-Appellant Faculty, Alumni, and Students Opposed to Racial Preferences ("FASORP"), a membership association, has standing to sue Defendant-Appellee New York University. We hold that FASORP does not because it has failed to demonstrate injuries to its members. Accordingly, we **AFFIRM** the judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, Judge).

Judge MENASHI concurs in a separate opinion.

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JONATHAN F. MITCHELL (Paul Niehaus, Kirsch & Niehaus, New York, NY, *on the brief*), Mitchell Law PLLC, Austin, TX, *for Plaintiff-Appellant*.

TAMAR LUSZTIG (Arun S. Subramanian, Jacob W. Buchdahl, Jillian S. Hewitt, *on the brief*), Susman Godfrey LLP, New York, NY, for *Defendant-Appellee*.

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JOSÉ A. CABRANES, *Circuit Judge*:

This appeal presents one threshold question: whether Plaintiff-Appellant Faculty, Alumni, and Students Opposed to Racial Preferences ("FASORP"), a membership association, has standing to sue Defendant-Appellee New York University ("NYU"). We hold that FASORP does not, because it has failed to demonstrate injuries to its members. Accordingly, we **AFFIRM** the judgment of the United States District Court for the Southern District of New York (Edgardo Ramos, *Judge*).

## I. BACKGROUND

Where, as here, a defendant moves to dismiss for lack of jurisdiction premised on the plaintiff's lack of constitutional standing, it is well settled that "we accept as true all material allegations of the complaint[] and . . . construe the complaint in favor of the complaining party."[1] We therefore accept as true the following allegations, drawn from FASORP's amended complaint, and construe them in FASORP's favor.

FASORP is an "unincorporated nonprofit membership association" whose members "include faculty, alumni, and students of law schools who oppose the use of race and sex preferences in faculty hiring, student ad-

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1. *Cortlandt Street Recovery Corp. v. Hellas Telecomms., S.a.r.l.*, 790 F.3d 411, 417 (2d Cir. 2015) (internal quotation marks and citation omitted).

missions, law review membership decisions, and law-review article selection."[2]

NYU is a private university located—as its name indicates—in New York, NY. The NYU Law Review (the "Law Review") is an academic publication edited and operated by students at the NYU School of Law ("the Law School").[3]

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2. Plaintiff's Br. at 6. FASORP is organized under the laws of Texas.

3. Scholars from other academic disciplines may be surprised to learn that legal academic journals are almost universally "under total student control" and have been since the founding of the first law review—the Harvard Law Review—in 1887 and the second law review—the Yale Law Journal—in 1891. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 118 & 127 n.34 (1983). This has at times given rise to considerable angst and merriment in the legal academy. *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936-37) ("The students who write for the law reviews are egged on by the comforting thought that they will be pretty sure to get jobs when they graduate in return . . . and the super-students who do the editorial or dirty work are egged on even harder by the knowledge they will get even better jobs."); C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit: A Law-and-Economics, Critical, Hermeneutical, Policy Approach and Lots of Other Stuff That Thousands of Readers Will Find Really Interesting and Therefore You Ought to Publish in Your Prestigious, Top-Ten, Totally Excellent Law Review*, 44 J. LEGAL EDUC. 1, 13 (March 1994) ("Law Professor's Editing Rule: Change back everything the law review editors have done. After all, you're the one being paid to write, not them. Do you trust what a law student has to say about writing?" (emphasis in original)).

   Terms such as "Law Review," defined for the purpose of this opinion, are substituted even into quoted material, where applicable, for consistency.

The Law School student editors of the Law Review, who select articles for publication, also select Law School students who will serve as future editors of the Law Review. The Law Review admissions process is competitive, with just fifty spots available on the Law Review each year.

Recently, the Law Review incorporated race and sex into its editor-selection process. Of the fifty available spots, fifteen students are selected based on their writing competition performance, fifteen students are selected based on their first-year grades, and eight students are selected based on a combination of the writing competition and their first-year grades. The remaining twelve spots are filled by the Law Review's Diversity Committee (the "Committee").

To decide which students will fill those twelve spots, the Law Review asks applicants to submit statements that describe personal characteristics, background, experiences, or qualifications that they would like to highlight for the Committee. The Committee then evaluates these personal statements, considering factors that include (but are not limited to) race, ethnicity, gender, sexual orientation, national origin, religion, socioeconomic background, ideological viewpoint, disability, and age. In addition to these personal statements, applicants are also instructed to submit an anonymized version of their resume that does not include their name or address. The Law Review uses these personal statements and anonymized resumes to favor applicants who are women, racial minorities, and members of the LGBTQ community.

Quite apart from the process to select its editors, the Law Review also includes race and sex considerations in

its article-selection process. The Law Review's website includes a statement that it is committed to "publishing scholarship written by authors from underrepresented backgrounds in the legal profession."[4] Authors that wish to submit their articles for consideration do so through a web-based submission service called Scholastica. The Law Review's Scholastica portal has been configured by the Law Review to invite (but not require) authors to provide certain demographic information when they submit articles for consideration, including race, sexual orientation, and gender identity.

On October 7, 2018, FASORP brought suit against NYU, the Law Review, the Law School (together, the "NYU Defendants"), and the United States of America and the Secretary of Education (the "Federal Defendants"), seeking declaratory and injunctive relief pursuant to Title VI of the Civil Rights Act of 1964[5] ("Title VI") and Title IX of the Education Amendments of 1972[6] ("Title IX").[7]

In January 2019, the District Court granted FASORP leave to file an amended complaint.

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4. Am. Complaint ¶ 25.
5. 42 U.S.C. § 2000d *et seq*.
6. 20 U.S.C. § 1681 *et seq*.
7. FASORP had previously filed a complaint with almost identical allegations against Harvard Law School and the Harvard Law Review. That complaint was dismissed by the United States District Court for the District of Massachusetts on August 8, 2019. *Faculty, Alumni, and Students Opposed to Racial Preferences v. Harvard Law Review Ass'n*, Civ. No. 18-12105-LTS, 2019 WL 3754023 (D. Mass. Aug. 8, 2019). FASORP did not appeal the District Court's decision.

FASORP filed its amended complaint (the "Amended Complaint") on February 28, 2019. In the Amended Complaint, FASORP pleads that its members have standing to challenge the Law Review's article-selection and editor-selection processes, as well as the Law School's faculty-hiring processes, all of which FASORP alleges violated Title VI and Title IX by impermissibly considering sex and race in its selection and hiring decisions.

Specifically, FASORP pleads in its Amended Complaint that its members include "faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future."[8]

With respect to article-selection, FASORP alleges in its Amended Complaint that its "[f]aculty members . . . who submit articles to the Law Review are being subjected to race and sex discrimination because the Law Review gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male."[9] As a result, its members "will face discrimination on account of their race, sex, sexual orientation, or gender identity unless the Law Review is enjoined from enforcing its discriminatory article-selection policies."[10]

With respect to editor-selection, FASORP alleges that it has standing to challenge that process because "the articles that FASORP members submit to the Law Review are judged by less-capable students" because

8. Am. Complaint ¶ 42.
9. *Id.* at ¶ 33.
10. *Id.* at ¶ 42.

"the Law Review has subordinated academic merit to diversity considerations when selecting its members and editors."[11] That is, FASORP members will be injured by having "their submissions judged and evaluated by less capable students who made law review because of diversity criteria, and who leapfrogged students with better grades and writing-competition scores."[12] FASORP claims this matters because "these are the students who will ultimately make the career-altering decision of whether a professor's article gets accepted for publication or rejected."[13] And, even if a FASORP member's article is accepted, "[t]hose who have their articles accepted by the journal must submit to a student-run editing process, and the Law Review's use of sex and race preferences dilutes the quality of students who edit an author's piece."[14]

With respect to NYU's faculty-hiring practices, FASORP pleads that its members "include individuals who have sought and applied for entry-level or lateral teaching positions at the Law School and intend to do so again in the future," or who "remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply."[15] According to FASORP, "NYU Law School, along with nearly every other law school in the United States, discriminates on account of race and sex when hiring its faculty."[16] As a

11. *Id.* at ¶ 34.
12. *Id.* at ¶ 43.
13. *Id.* at ¶ 34.
14. *Id.* at ¶ 35.
15. *Id.* at ¶ 45.
16. *Id.* at ¶ 27.

result, FASORP claims that its members "face or will face discrimination on account of their race and sex unless NYU is enjoined from using race and sex preferences in faculty hiring."[17]

On March 21, 2019, the NYU Defendants filed a motion to dismiss FASORP's Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6),[18] alleging that FASORP did not have standing to bring its suit. The Federal Defendants followed suit on May 9, 2019, moving to dismiss FASORP's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). On March 31, 2020, the District Court granted both motions to dismiss without prejudice, finding that FASORP lacked standing and that FASORP had failed to state a claim under Titles VI and IX.[19] FASORP then opted to stand on its Amended Complaint and judgment entered on May 4, 2020.

FASORP timely appealed.[20]

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17. *Id.* at ¶ 45.

18. In their motion to dismiss, the NYU Defendants asserted that the Law School and the Law Review should be dismissed as named defendants in FASORP's suit pursuant to Fed R. Civ. P. 4(m), on the basis that they are not legal entities amenable to service of process. FASORP did not object.

19. Because we hold that FASORP has failed to establish Article III standing, we need not decide whether it also failed to state a claim for relief under Titles VI and IX.

20. In its opening brief, FASORP states that it "is not contesting the dismissal of the federal defendants, and it will no longer pursue claims or seek relief against the federal defendants in this litigation." Plaintiff's Br. at 9 n.2. Accordingly, the federal defendants did not file a brief in this appeal.

## II. DISCUSSION

We review a District Court's dismissal of a complaint for lack of standing *de novo*.[21]

FASORP, "as the party invoking federal jurisdiction, bears the burden of establishing" standing.[22] "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating'" each of the elements that make up the "'irreducible constitutional minimum' of standing."[23]

In determining whether a party has standing to sue, we ask whether it "has alleged . . . a personal stake in the outcome of the controversy, [so] as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[24] This limitation flows from Article III, Section 2 of the Constitution, which limits our jurisdiction to "Cases" and "Controversies."[25] Standing doctrine operates "to ensure that federal courts do not exceed their authority as it has been traditionally understood."[26]

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21. *Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 79-80 (2d Cir. 2005).
22. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016).
23. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).
24. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (internal quotation marks and citation omitted).
25. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citing U.S. CONST. art III, § 2).
26. *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020) (quoting *Spokeo*, 136 S. Ct. at 1547).

One species of standing doctrine is associational standing: When does an organization, such as FASORP, have a personal stake in the outcome of a litigation such that it is entitled to sue? Organizations may have standing to challenge actions that cause them direct injury.[27] 27 But an organization also has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[28]

To establish the first prong of this test, an organization must satisfy the familiar three elements of standing under Article III. That is, FASORP must show that one or more of its members has: (1) "suffered an injury-in-fact—an invasion of a legally protected interest which is

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27. *Warth*, 422 U.S. at 511 (An organization can "have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982) ("[O]rganizations are entitled to sue on their own behalf...."); *New York C.L. Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) ("Under this theory of 'organizational' standing, the organization is just another person—albeit a legal person—seeking to vindicate a right. To qualify, the organization itself must meet the same standing test that applies to individuals." (internal quotation marks and alterations omitted)).

28. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see, e.g.*, *Warth*, 422 U.S. 490, 511 (1975) (calling this approach "representational" standing); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (calling it "associational" standing); *see also New York C.L. Union*, 684 F.3d at 294 (describing the various terms referring to this approach).

(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[29]

*a. Identification of Members*

As an initial matter, in asking whether FASORP has standing to challenge the Law Review's article-selection and editor-selection processes and NYU's faculty-hiring process on behalf of its members, we are mindful that "[s]tanding . . . is not an ingenious academic exercise in the conceivable . . . but requires a factual showing of perceptible harm."[30] Accordingly, the Supreme Court "has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm."[31]

Still, FASORP argues that it is not required to "name names" of injured members in its standing allegations at the pleading stage.[32] But, even if FASORP is not

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29. *LaFleur v. Whitman*, 300 F.3d 256, 269 (2d Cir. 2002) (internal quotation marks omitted).

30. *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009) (internal quotation marks and alteration omitted).

31. *Id.*

32. Here, FASORP relies on *Bldg. & Const. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("An association bringing suit on behalf of its members must allege that one or more of its members has suffered a concrete and particularized injury, as the plaintiffs do. But the defendants cite to no authority—nor are we aware of any—that supports the proposition that an association must

(continued…)

required to "name names," standing pleadings "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."[33] And, as relevant here, FASORP "must allege facts that affirmatively and plausibly suggest that it has standing to sue."[34]

By way of identifying members who have suffered the requisite harm, FASORP only asserts that its membership includes "faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future" and "individuals who have sought and applied for entry-level or lateral teaching positions at the Law School and intend to do so again the future, or remain potential candidates . . . ."[35] FASORP argues that "[i]t's hard to get more specific than that."[36] We do not agree. It is possible to be more specific—even if "naming names" and submitting indi-

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'name names' in a complaint in order properly to allege injury in fact to its members." (internal citation omitted)).

33. *Lujan*, 504 U.S. at 561.

34. *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011).

35. Am. Complaint ¶ 42, 45. Although FASORP alleges that its members who are alumni or students will be injured, Am. Complaint ¶ 35-39, FASORP does not specifically allege that its members actually include any alumni of the Law Review or NYU students. Further, while FASORP contends that it has "never 'admitted' that it has no student or alumni members," FASORP concedes that "it is simply not asserting standing on their behalf in this particular lawsuit against NYU." Plaintiff's Reply Br. at 21 n.17 (emphasis in original).

36. Plaintiff's Br. at 13.

vidual affidavits is not required. For example: When did FASORP's members submit articles or apply for jobs at NYU? Have those members drafted articles they intend to submit? If so, when do they plan to submit? Instead, FASORP effectively asks us to accept a "self-description of the activities of its members" and to conclude that "there is a statistical probability that some of those members are threatened with concrete injury."[37] Such allegations are plainly insufficient to show that FASORP's members have suffered the requisite harm here.

*b. Injury-In-Fact*

Even if FASORP's pleadings were found to sufficiently "identify members who have suffered the requisite harm,"[38] FASORP fails to demonstrate that those members have experienced an "invasion of a legally protected interest"[39] that is "'certainly impending'" or that "there is a 'substantial risk' that the harm will occur."[40]

With respect to its challenges of faculty-selection and article-selection procedures, FASORP only alleges a "highly attenuated chain of possibilities"[41] in its Amended Complaint, starting with its allegations that its faculty or scholar members will be injured—i.e., discriminated against—because they "intend to continue submitting their scholarship" and "intend" to apply for jobs at the

37. *Summers*, 555 U.S. at 497.

38. *Summers*, 555 U.S. at 499.

39. *Lujan*, 504 U.S. at 560.

40. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Intern.*, 568 U.S. 398, 414 n.5).

41. *Id.*

Law School, or remain candidates for recruitment to the faculty at the Law School.[42]

With respect to FASORP's challenge to the Law Review's editor-selection process, FASORP notably does not claim to have any Law Review "alumni" or NYU "student" members. Nor does FASORP plead that any of its members have applied for, or were rejected from, the Law Review's editorial board. To overcome this deficit, FASORP instead argues that its faculty and scholar members have standing to challenge the Law Review's editor-selection process because the "use of race and sex preferences [in the editor-selection process] affects the composition of students who select and edit the articles submitted by FASORP members."[43]

The primary defect in all these theories is that there is uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged. Without any "description of concrete plans" to apply for employment, submit an article, or of having submitted an article, that will or has been accepted for publication, FASORP's allegations exhibit the kind of "some day intentions" that cannot "support a finding of [] actual or imminent injury."[44]

To avoid this problem specifically with regard to editor selection, FASORP argues that its faculty or scholar members are injured in the same way that a criminal defendant is injured when his "juror-selection process [is] tainted by unlawful racial discrimination"—that is,

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42. Am. Complaint ¶¶ 42, 45 (emphasis added).

43. Plaintiff's Br. at 27-28.

44. *Summers*, 555 U.S. at 496 (quotation marks and citation omitted).

FASORP members are injured by virtue of having their articles judged by student editors whose admissions process was tainted by unlawful discrimination.[45] FASORP relies on Powers v. Ohio[46]—in which the Supreme Court held that a criminal defendant can contest peremptory challenges exercised to exclude jurors based on race even if the defendant and the jurors share the same race—to support this argument. But this reliance is inapposite because *Powers* depended on special considerations relating to criminal justice that are inapplicable here. In *Powers*, the Court held that a criminal defendant is injured by a tainted process even if that tainted process could inure to his benefit because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process, [] places the fairness of a criminal proceeding in doubt," and "condones violations of the United States Constitution within the very institution entrusted with its enforcement."[47] That the state would reinforce unlawful racial discrimination by sanctioning it in juror selection is not a concern present in this case. Therefore, with respect to the editor-selection process FASORP's allegations still fall short of suggesting an injury that is certainly impending or substantially likely to occur so as to constitute an injury-in-fact.

* * *

In sum, we hold that FASORP's pleadings in the Amended Complaint do not suffice to show that its

45. Plaintiff's Br. at 28.

46. 499 U.S. 400 (1991).

47. *Id.* at 411-12 (internal citation omitted).

members have suffered an injury-in-fact.[48] FASORP has thus not demonstrated it has standing based on injuries to its members, as would be required to maintain this suit.

## III. CONCLUSION

For the foregoing reasons, we hold that the District Court properly dismissed FASORP's Amended Complaint.

We have previously observed that "where a complaint is dismissed for lack of Article III standing, the dismissal must be without prejudice rather than with prejudice."[49] After all, "[s]uch a dismissal is one for lack of subject matter jurisdiction, and without jurisdiction the district court lacks the power to adjudicate the merits of the case."[50]

Accordingly, we AFFIRM the District Court's judgment dismissing the Amended Complaint without prejudice.

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48. Because we conclude that FASORP has not sufficiently pleaded an injury-in-fact, we do not go on to examine the other elements of Article III standing: causation and redressability.

49. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54 (2d Cir. 2016).

50. *Id.* (internal quotation marks and citations omitted); *see also Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121 (2d Cir. 1999) ("[I]t is our view that Article III deprives federal courts of the power to dismiss a case with prejudice where federal subject matter jurisdiction does not exist.").

MENASHI, *Circuit Judge*, concurring:

The court correctly notes that FASORP has failed to establish associational standing because associations asserting such standing must "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). FASORP has not identified a member who has, or will, submit articles to the Law Review or seek teaching positions at the law school. Accordingly, FASORP has failed to establish that it has standing as an association to bring suit on behalf of its unidentified members. *Accord ante* at 1214. That conclusion is enough to resolve this appeal. The court, however, proceeds to consider whether, if FASORP had adequately identified members, those hypothetical members would have been able to allege an injury in fact. *Ante* at 15. I do not understand this discussion to break new ground in our standing doctrine, and I write separately to clarify the applicable principles with respect to the alleged discrimination in article selection and faculty hiring.

A plaintiff association challenging an unlawfully discriminatory process needs to allege that its members are "able and ready" to participate in the process—in this case, by submitting articles or seeking teaching positions—"and that a discriminatory policy prevents [those members] from doing so on an equal basis." *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)); see also id. (holding that a plaintiff established standing by showing "that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate

admissions"); *Carney v. Adams*, 141 S. Ct. 493, 501 (2020) (reiterating that a plaintiff challenging an allegedly discriminatory process must show that he "was 'able and ready' to apply … in the reasonably foreseeable future").

A plaintiff who alleges harm from a discriminatory barrier to equal treatment "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Ne. Fla. Chapter*, 508 U.S. at 666; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). Rather, the "injury in fact" in such a case "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter*, 508 U.S. at 666; *Adarand*, 515 U.S. at 211 ("The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing.") (internal quotation marks and alteration omitted); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (identifying "an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race").[1]

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1. These cases involved constitutional claims in addition to claims under Title VI. *See Gratz*, 539 U.S. at 276 & n.23; *Bakke*, 438 U.S. at 284. That does not affect the standing analysis. "Title VI's protections are coextensive with the Equal Protection Clause of the Fourteenth Amendment." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 185 (1st Cir. 2020); *see also Bakke*, 438 U.S. at 287 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

FASORP therefore needed only to identify members who are "able and ready" to submit articles or to seek faculty positions, not members who have already done so. *Gratz*, 539 U.S. at 262. Because FASORP does not identify members, however, it necessarily cannot allege the sort of "concrete plans" necessary to "support a finding of . . . 'actual or imminent' injury," *Summers*, 555 U.S. at 496, and whether its hypothetical members are able and ready to act is necessarily a speculative question. Accordingly, I concur in the court's opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



FACULTY, ALUMNI, AND STUDENTS OPPOSED TO RACIAL PREFERENCES,

Plaintiff,

- against -

NEW YORK UNIVERSITY LAW REVIEW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK UNIVERSITY, UNITED STATES OF AMERICA, and BETSY DEVOS, *in her official capacity as U.S. Secretary of Education*,

Defendants.

**OPINION AND ORDER**

18 Civ. 9184 (ER)

Ramos, D.J.:

Faculty, Alumni, and Students Opposed to Racial Preferences ("FASORP"), brings this action for declaratory or injunctive relief pursuant to Title VI and Title IX, against New York University Law Review (the "Law Review"), New York University School of Law (the "Law School"), New York University ("NYU") (collectively the "NYU Defendants"), United States of America and Betsy DeVos (the "Federal Defendants," and with the NYU Defendants, "Defendants"). FASORP alleges that the NYU Defendants violated Title VI and Title IX by considering sex and race in the Law Review's selection of members and articles, and in NYU's faculty hiring. FASORP further alleges that the United States government, through the Department of Education and its Secretary, Betsy DeVos, enabled this discrimination by incorrectly interpreting Title VI and Title IX to issue regulations permitting consideration of race and sex and by continuing to provide federal funding to NYU. The NYU Defendants and the Federal Defendants move separately to dismiss this action. For reasons set forth below, their motions to dismiss are GRANTED.

## I. BACKGROUND[1]

### A. Factual Background

FASORP is an unincorporated nonprofit membership association organized under the laws of Texas. Am. Compl. ¶ 3. NYU is located in New York, New York. *Id.* ¶ 4. The Law Review is an academic journal edited and

1. The following facts, drawn from the first amended complaint filed by FASORP ("Am. Compl."), Doc. 39, are accepted as true for the purpose of the instant motion and construed in the light most favorable to FASORP.

operated by students at the Law School. *Id.* ¶ 6. The student editors of the Law Review select the articles that the Law Review will publish, as well as the students who will serve as future members and editors of the Law Review. *Id.* ¶ 9. Until recently, membership on the Law Review was reserved for students selected on the basis of their grades and performance on a writing competition. *Id.* ¶ 10.

In recent years, the Law Review has incorporated race and sex into its membership selection policies. *Id.* ¶¶ 12–13. Among the fifty spots available on the Law Review each year, fifteen students are selected solely based on their writing competition performance, another fifteen are chosen solely on the basis of their first-year grades, and eight students are selected based on a combination of both. *Id.* ¶ 13. The remaining twelve spots are set aside for selections made by the Law Review's Diversity Committee. *Id.* ¶ 14.

To fill these twelve spots, the Law Review requires all applicants to submit personal statements, which it evaluates in light of various factors including but not limited to race, ethnicity, gender, sexual orientation, national origin, religion, socio-economic background, ideological viewpoint, disability, and age. *Id.* ¶ 15. Applicants are instructed to clearly identify and discuss any personal characteristics, background, unique experiences, or qualifications that they would like the selection committee to aware of. *Id.* Applicants are also permitted to share personal and professional information in a separate resume, on which they are instructed to not put their names and addresses. *Id.* ¶ 16. The Law Review allegedly uses these personal statements and resumes to give preferential

treatment to applicants who are women, racial minorities, and members of the LGBTQ community. *Id.* ¶

The Law Review has similarly incorporated race and sex into its selection of articles for publication. *Id.* ¶ 17. In order to be published in the journal, authors are required to submit their manuscripts through a web-based submission service called Scholastica. *Id.* ¶ 19. Scholastica, at the Law Review's request, invites potential authors to provide their demographic information including their race, sexual orientation, and gender identity. *Id.* ¶ 20. For race, authors are invited to check a box for either "Black or African American," "Hispanic or Latino," "American Indian or Alaskan Native," "Asian," "Native Hawaiian or other Pacific Islander," "White/NonHispanic," or "Other, please specify." *Id.* ¶ 21. For sexual orientation, authors are invited to select either "prefer not to answer," "straight/heterosexual," "gay," "lesbian," "bisexual," or "other." *Id.* ¶ 22. For gender identity, authors may select either "prefer not to answer," "male," "female," "neither," "both" or "genderqueer." *Id.* ¶ 23.

The Law Review states on its website that it is committed to, "publishing scholarship written by authors from underrepresented backgrounds in the legal profession." *Id.* ¶ 25. NYU and the Law School allegedly permit these practices by the Law Review. *Id.* ¶ 26. The Law School also allegedly discriminates on the basis of race and sex in its faculty hiring by favoring female or minority faculty candidates over white males. *Id.* ¶ 27. The Department of Education has interpreted Title VI and Title IX, in 34 C.F.R. § 106.3(b) and § 100.3(b)(6)(ii) respectively, to permit universities to take affirmative action to "overcome the effects of conditions which resulted in limited participation therein by persons" of a

particular sex, race, color or national origin, in absence of "a finding of discrimination" on those bases or prior discrimination. *Id.* ¶¶ 27–28.

**B. Standing Pleadings**[2]

FASORP pleads that its members have standing to sue as individuals by alleging:

- Faculty members of FASORP who submit articles to the Law Review are being subjected to race and sex discrimination because the Law Review gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male. *Id.* ¶ 33.
- Members of FASORP who submit articles to the Law Review suffer a separate and distinct injury in fact from the journal's membership-selection policies. Because the Law Review has subordinated academic merit to diversity considerations when selecting its members and editors, the articles that FASORP members submit to the Law Review are judged by less capable students—and these are the students who will ultimately make the career-altering decision of whether a profes-

2. FASORP also alleges that its members who are alumni of the Law Review suffer from a "dilution" of, or diminished prestige of the "law-review credential," and that FASORP members who are current students at NYU will either be denied an equal opportunity to compete for membership, or have their law review membership be "tainted." *Id.* ¶¶ 35–39. However, FASORP does not allege that there are any actual FASORP member who are alumni of the Law Review or current students at NYU.

sor's article gets accepted for publication or rejected. *Id.* ¶ 34.

- Those who have their articles accepted by the journal must submit to a student-run editing process, and the Law Review's use of race and sex preferences dilutes the quality of the students who edit an author's piece. *Id.* ¶ 35.
- The members of FASORP include faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future, and who will face discrimination on account of their race, sex, sexual orientation, or gender identity unless the Law Review is enjoined from enforcing its discriminatory article-selection policies. *Id.* ¶ 42.
- The members of FASORP include faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future, and who will have their submissions judged and evaluated by less capable students who made law review because of diversity criteria, and who leapfrogged students with better grades and writing-competition scores. *Id.* ¶ 43.
- The members of FASORP include individuals who have sought and applied for entry-level or lateral teaching positions at the Law School and intend to do so again in the future, or remain potential candidates for visiting professorships and

lateral faculty appointments without any need to formally apply, and who face or will face discrimination on account of their race and sex unless NYU is enjoined from using race and sex preferences in its faculty hiring. *Id.* ¶ 45.

## II. PROCEDURAL HISTORY

FASORP commenced the action on October 7, 2018. Doc. 1. On December 28, 2018, the NYU Defendants filed a letter for a pre-motion conference for leave to file a motion to dismiss. Doc. 31. On January 3, 2019, the Court held a pre-motion conference at which it granted FASORP leave to file an amended complaint and the NYU Defendants leave to file a motion to dismiss the amended complaint. On February 28, 2019, FASORP filed the amended complaint. Doc. 39. On March 21, 2019, the NYU Defendants filed their motion to dismiss. Doc. 41. On May 9, 2019, the Federal Defendants filed a motion to dismiss. Doc. 52. Both sets of defendants move pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12 (b)(6) and allege that FASORP either lacks standing or fails to state a claim.

## III. LEGAL STANDARD

### A. Motion to Dismiss under Rule 12 (b)(1)

"Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subjection matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat's Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal citation and quotation marks omitted). "Be-

cause standing is challenged on the basis of the pleadings, [the Court] accept[s] as true all material allegations of the complaint, and must construe the complaint in favor of the [plaintiff]." *Connecticut v. Physicians Health Servs. Of Conn., Inc.*, 287 F.3d 110, 114 (2d Cir. 2002) (citation and internal quotation marks omitted). However, the burden remains on the plaintiff, as the party invoking federal jurisdiction, to establish its standing as the proper party to bring an action. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009) (citation omitted); *see also FW/PBS, Inc. v. City Of Dallas*, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record," and if the plaintiff fails to "clearly [] allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute," he does not have standing under Article III) (internal citations and quotation marks omitted).

**B. Motion to Dismiss under Rule 12 (b)(6)**

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). The Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *see also Iqbal*, 556 U.S. at 680.

**C. Associational Standing**

An association may assert standing to sue on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). It is well established that the first prong of the *Hunt* test is "grounded in Article III as an element of the constitutional case or controversy requirement" and that inclusion of at least one member with standing to individually bring the claim forwarded by the association is "an Article III necessity for the association's representative suit." *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 544–45 (1996).

To establish the first prong of the *Hunt* test, the association bears the burden to show: (1) one or more of its members have suffered an injury in fact, that is concrete, particularized, and actual and imminent as opposed to conjectural or hypothetical; (2) the injury is fairly trace-

able to the challenged action; and (3) it is likely that the injury will be redressed by a ruling in favor of the association. *See Bldg. & Constr. Trades Council & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) (internal citations and quotation marks omitted). A "particularized injury" is one that impacts the injured member in a "personal and individual way." *LaFleur v. Whitman*, 300 F.3d 256, 269 (2d Cir. 2002) (internal citation and quotation marks omitted).

In an action for injunctive or declaratory relief, a plaintiff's allegations of past injury are insufficient to establish standing, instead, the plaintiff must show a likelihood of future harm, which is "a real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also McCormick ex rel. McCormick v. Sch. Dist. Of Mamaroneck*, 370 F.3d 275, 284 (2d Cir. 2004). The Supreme Court has stressed that the threatened injury must be "certainly impending," or there is a "substantial risk" that the harm will occur, and that "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013) (internal quotation marks and citations omitted). The "injury in fact" standing inquiry is particularly rigorous in an action like this, where the plaintiff seeks to compel an executive agency to follow certain laws. *Robinson v. Sessions*, 721 Fed. App'x 20, 23 (2d Cir. 2018) (internal citations omitted).

## IV. DISCUSSION

Defendants assert that FASORP lacks Article III associational standing in the instant action because the amended complaint fails to specifically identify at least one injured FASORP member with standing to sue individually. Defendants further contend that FASORP has

not alleged a concrete and particularized injury, or a real and immediate threat of repeated injury. In response, FASORP contends that it needs not identify its injured members by name. It furthers contends that it has adequately alleged both a concrete and particularized injury and future injury.

**A. Associational Standing**

Preliminarily, both the NYU Defendants and the Federal Defendants point to *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009), and *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016), for the proposition that an association must identify at least one member with standing to sue with specific allegations, if not by name. In response, FASORP cites *Bldg. & Constr. Trades Council* for the proposition that an association need not provide names to allege standing at the pleading stage and avers that *Summers* was not decided at the pleading stage. *Bldg. & Constr. Trades Council*, 448 F.3d at 145 (finding no authority for the proposition that an association must name names in a complaint to properly allege standing at the pleading stage) (internal quotation marks omitted). The Supreme Court clarified in Summers, which was decided three years after *Bldg. & Constr. Trades Council*, that a plaintiff organization must at minimum, allege specifically that one or more identified member has suffered or would suffer harm. 555 U.S. at 498.

Additionally, courts within this Circuit and the First Circuit have relied on *Summers* in support of their standing inquiries at the motion to dismiss stage. *See Art & Antique Dealers League of America, Inc. v. Seggos*, 18 Civ. 2504(LGS), 2019 WL 416330, at *2–3 (S.D.N.Y. Feb 1, 2019) (citing *Summers* to require a plaintiff associa-

tion to make specific allegations establishing at least one injured member at the pleading stage); *see also Draper*, 827 F.3d at 3 (citing *Summers* in requiring the plaintiff association to identify at minimum one injured member specifically at the pleading stage); *see also Residents & Families United to Save Our Adult Homes v. Zucker*, No. 16CV1683NGGRER, 2018 WL 1175152, at *6 (E.D.N.Y. Mar. 6, 2018), *appeal withdrawn*, No. 18-1078, 2018 WL 3454963 (2d Cir. July 9, 2018) (interpreting *Summers* at the pleading stage to require that "a plaintiff must name the members of an organization who were injured").

Here, the Court need not decide whether *Summers* mandates that a plaintiff association must use the actual name of one of its injured members at the pleading stage, because it is clear that a plaintiff association must at minimum, identify one injured member with specific allegations, which FASORP fails to do. *Seggos*, 2019 WL 416330, at *2. An association's "self-description of the activities of its members" will not do. *Id.* (quoting *Summers*). FASORP's general descriptions of its own faculty members who have submitted articles to the Law Review in the past, are the type of pleadings that were explicitly rejected in *Summers*. This alone requires dismissal on the basis that FASORP inadequately pleads associational standing.

In addition, as explained in further detail below, FASORP's allegations also fall short of pleading either a concrete and particularized injury, or a real and immediate threat of repetition of that injury.

**B. Injury in Fact**

Defendants contend, and this Court agrees, that FASORP's allegations regarding the Law Review's

membership and articles selection processes, and faculty hiring by NYU fail to show a concrete and particularized injury.

First, the NYU Defendants contend that FASORP's faculty members have suffered no injury in fact from the Law Review's membership and articles selection process because there is no legally protected interest in having one's academic work evaluated by the most "capable" students. NYU Defendants' Mem. in Supp. of Mot. to Dismiss ("NYU's Mem."), Doc. 42 at 9.[3] Additionally, the Federal Defendants contend that FASORP has not alleged an injury in fact because it does not allege any member whose article was actually rejected by the Law Review, or whose application for a faculty position at NYU was actually denied. The Federal Defendants' Mem. in Supp. of Mot. to Dismiss ("Fed's Mem."), Doc. 53 at 20–21.

In response, FASORP makes two arguments. First, FASORP analogizes the alleged injury here to that alleged in *Powers v. Ohio*, 499 U.S. 400 (1991), where the Supreme Court held that a criminal defendant could contest raced-based exclusions of jurors through preemptory challenges, whether or not the defendant and the excluded jurors share the same race. Pl.'s Opp. Mem. at 8–10. Extrapolating from *Powers*, FASORP avers that its faculty members have a legally protected interest to have their articles judged by a law review whose membership-selection process complies with Title VI and Title IX, just like a criminal defendant's legally protected

3. The NYU Defendants also argue that FASORP's notion that minority and female students are inferior members of the Law Review is offensive and unsupported.

interest in having the charges against him evaluated by a jury chosen without raced-based exclusions. Id. Second, FASORP argues, primarily relying on *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, Fla.*, 508 U.S. 656 (1993), that the injury here flows not from the rejection of an article submission or a faculty position application, but from being subject to discriminatory treatment. Pl.'s Resp. in Opp. to Mot. to Dismiss ("Pl.'s Resp."), Doc. 55 at 1–3.

FASORP's arguments miss the mark. First, unlike a criminal defendant's constitutional right to a fair trial and hence a fairly selected jury, there is no legal right to have one's article reviewed or published by a student-run academic law journal. FASORP has cited no legal authority for such a proposition, and the Court is aware of none. Reliance on *Jacksonville* does not cure this defect, because FASORP has not alleged a "government erected barrier." *See Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994) (interpreting *Jacksonville* to require allegation of a government-erected barrier to establish standing). Indeed, all the allegedly discriminatory policies here are implemented either by NYU, the Law School or the Law Review, none of which are governmental entities.[4] Therefore, FASORP has not alleged an injury in fact, that is "an invasion of a legally protected interest" that is concrete and particularized. *Jacksonville*, 508 U.S. at 663.

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4. Regarding FASORP's faculty hiring claim, nowhere in the amended complaint does FASORP allege any fact about the hiring practice of the Law School. Instead, FASORP asserts in one conclusory sentence that "NYU Law School, along with nearly every law school in the United States, discriminates on account of race and sex when hiring its faculty. . . ." Am. Compl. ¶ 27.

**C. Likelihood of Future Harm**

FASORP's allegations regarding the Law Review's membership and article selection process are similarly inadequate in pleading a real and immediate threat of repetition of that injury.[5] As recounted above, FASORP alleges that its faculty members "intend to continue to submit articles" or intend to apply in the future, or remain potential candidates for faculty positions at NYU. The Supreme Court has made clear in *Clapper* that a plaintiff must show "concrete facts" showing a substantial risk of harm and cannot rely on speculation about "the unfettered choices made by independent actors not before the court." 568 U.S. at 414 n.5.

Even taking every reasonable inference in FASORP's favor, the amended complaint shows that FASORP's alleged threatened injury—being subject to discriminatory treatment—would only take place if: (1) a faculty member of FASORP authors a legal article at some point in the future; (2) that member submits that article to the Law Review; (3) the Law Review members are indeed composed of students that had chosen to identify their race and gender as noteworthy characteristics in their personal statements or resumes, and had received preferential treatments as a result thereof; (4) those students are "less capable" than students selected

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5. As aforementioned, the amended complaint only contains a conclusory statement by FASORP concerning its faculty hiring claim. FASORP cannot rely solely on conclusory allegations of injury for its faculty hiring claim, even at the pleading stage. *Baur v. Veneman*, 352 F.3d 625, 636–37 (2d Cir. 2003) ("a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing").

only on the basis of grades and other diversity factors; (5) the faculty member of FASORP volunteers his race and gender information, which the Law Review then uses to either give less weight to or reject his article; and (5) if those articles are accepted for publication, the Law Review would staff those "less capable" students as editors on those articles. Such a "highly attenuated chain of possibilities" cannot support standing, as a plaintiff cannot "manufacture standing merely by inflicting harm on [its] fear of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 410, 415. Failure to adequately plead this element alone dooms FASORP's action for declaratory and injunctive relief.

**D. Failure to State a Claim**

In any event, even if the Court were to accept FASORP's standing allegations as sufficient, the amended complaint would still be dismissed for failure to state a claim.[6] To that end, Judge Sorokin's reasoning in finding that FASORP fails to state a claim in *Faculty, Alumni, & Students Opposed to Racial Preferences v. Harvard Law Review Assoc.*, No. 18 Civ. 12105, 2019 WL 3754023, at *8–9 (D. Mass. Aug. 8, 2019), is persuasive.

Standing deficiencies aside, FASORP fails to state a claim against NYU because: (1) FASORP does not allege, as a threshold requirement for its faculty hiring claim, that the federal funds received by NYU are pri-

6. The NYU Defendants contend in their motion to dismiss that the Law School and the Law Review be dismissed as named defendants in this action pursuant to Fed. R. Civ. P. 4(m), on the basis that they are not legal entities amenable to service of process. Pl.'s Opp. Mem. at 24 n. 15. FASORP does not object. *Id.*

marily intended to provide employment; (2) FASORP fails to proffer any factual allegation describing the Law Review's article-selection process other than alleging that the Law Review receives background information of the authors and asserting in a conclusory way that the process is discriminatory, which is fatal to its article selection claim; (3) FASORP's factual allegations regarding the membership selection claim acknowledge that student applicants have discretion to highlight, if at all, personal characteristics including ideological viewpoint, socio-economic background and many other factors aside from race, sex and sexual orientation; and (4) that the amended complaint is devoid of factual allegations about the membership selection process by the Law Review, thereby unable to transform the facially holistic process into a functional equivalent of an unlawful quota or set-aside program. *Harvard Law Review*, 2019 WL 3754023, at *8–10.

In addition, the Federal Defendants contend in their motion to dismiss, and FASORP concedes in its response, that FASORP does not have a cause of action to sue the Federal Defendants pursuant to the Administrative Procedures Act, Title VI and Title IX. *See* Fed's Mem. at 6–15; *see also* Pl.'s Resp. at 13–14. However, FASORP urges this Court to address its potential claim under *Ex parte Young* against Betsy DeVos as the Secretary of the Department of Education, which it raises for the first time in its opposition brief to the Federal Defendants' motion to dismiss. *Ex parte Young*, 209 U.S. 123 (1908); Pl.'s Resp. at 8. Indeed, nowhere in the amended complaint does FASORP even allude to the possibility of an *Ex parte Young* claim, whereas the amended complaint specifically identifies Title VI, Title

IX and the Administrative Procedures Act as the legal bases for FASORP's claims against the Federal Defendants. It is well established in this district that a plaintiff cannot amend his pleadings in his opposition briefs. *O'Brien v. Nat'l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("[I]t is axiomatic that the [amended] complaint cannot be amended by the briefs in opposition to a motion to dismiss."). Therefore, FASORP has failed to state a claim either against the NYU Defendants, or against the Federal Defendants.

## V. AMENDMENT

The NYU Defendants urge this court to dismiss the instant action with prejudice on the basis that FASORP has been on notice of the defects in its pleadings since the January 3, 2019 pre-motion conference. However, the Second Circuit, in *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC*, 797 F.3d 160 (2d Cir. 2015), reaffirmed the "liberal spirit" of amendment under Federal Rule of Civil Procedure 15 and counseled strongly against the dismissal of claims with prejudice prior to "the benefit of a ruling" that highlights "the precise defects" of those claims. Id. at 190–91 (quoting *Williams v. Citigroup Inc.*, 659 F.3d 208, 212– 13 (2d Cir. 2011) (per curiam)). Here, while FASORP has previously been given leave to amend the original complaint, this is the Court's first opportunity to highlight the precise defects of its pleadings, and it is not yet apparent that any further opportunity to amend would be futile. Therefore, the instant action is dismissed without prejudice and FASORP is permitted, if it wishes, to file a second amended complaint.

## VI. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are GRANTED without prejudice. If FASORP wishes to file a second amended complaint, it must do so by April 21, 2020. The Clerk of the Court is respectfully directed to terminate the motions, Docs. 41 and 52.

It is SO ORDERED.

Dated: March 31, 2020
New York, New York

/s/ Edgardo Ramos
Edgardo Ramos, U.S.D.J.

**MANDATE**

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25 th day of August, two thousand twenty-one.

Before: Pierre N. Leval,
José A. Cabranes,
Steven J. Menashi,
*Circuit Judges.*

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Faculty, Alumni, and Students Opposed to Racial Preferences,

Plaintiff-Appellant,

v.

New York University, Miguel Cardona, in his official capacity as U.S. Secretary of Education, United States of America,

Defendant - Appellees,

New York University Law

**JUDGMENT**

Docket No. 20-1508

Review, New York University
School of Law,

Defendants.

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The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that District Court's judgment dismissing the Amended Complaint without prejudice is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

**MANDATE ISSUED ON 10/18/2021**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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| **Faculty, Alumni, and Students Opposed to Racial Preferences**,<br><br>Plaintiff,<br><br>v.<br><br>**New York University Law Review**; **New York University School of Law**; **New York University**; **Betsy DeVos**, in her official capacity as U.S. Secretary of Education; **United States of America**,<br><br>Defendants. | Case No. 1:18-cv-9184-ER |

**FIRST AMENDED COMPLAINT**

Federal law prohibits universities that accept federal funds from discriminating on account of race or sex. *See* 42 U.S.C. § 2000d (Title VI); 20 U.S.C. § 1681 (Title IX). The New York University Law Review is flouting these requirements by using race and sex preferences to select its members—a practice that violates the clear and unequivocal text of Title VI and Title IX. The New York University Law Review is also engaging in illegal race and sex discrimination when selecting articles for publi-

cation, as it asks authors to identify their race, sexual orientation, and gender identity when submitting manuscripts, and admits on its website that it considers whether these submissions have been written by "authors from underrepresented backgrounds in the legal profession." *See* Exhibit 2. The plaintiff brings suit to enjoin these discriminatory practices, and to ensure that all components of New York University comply with their obligations under federal anti-discrimination law.

**JURISDICTION AND VENUE**

1. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

2. Venue is proper because a substantial part of the events giving rise to the claims occurred in this judicial district. *See* 28 U.S.C. § 1391(b)(2).

**PARTIES**

3. Plaintiff Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP) is an unincorporated nonprofit membership association organized under the laws of Texas. Its website is at http://www.fasorp.org.

4. Defendant New York University (NYU) is located in New York, New York 10003. It can be served at its Office of the General Counsel, located at Bobst Library, 70 Washington Square South, 11th floor, New York, New York 10012.

5. Defendant New York University School of Law is located at 40 Washington Square S, New York, New York 10012.

6. Defendant New York University Law Review (NYU Law Review) is a student-edited journal at New York University School of Law.

7. Defendant Betsy DeVos is the U.S. Secretary of Education. Her office is located at 400 Maryland Avenue, SW, Washington, D.C. 20202. She is sued in her official capacity.

8. Defendant United States of America is the federal government of the United States of America.

**STATEMENT OF FACTS**

9. The NYU Law Review is an academic journal edited and operated by students at NYU Law School. The students select and edit the articles that the Law Review will publish, and they also select the students who serve as members and editors of the Law Review.

10. Until recently, membership on a law review was an academic honor reserved to students who were selected on account of their law-school grades and performance on a writing competition.

11. In recent years, however, the NYU Law Review has been using race and sex preferences to select its members.

12. The NYU Law Review explains its membership-selection policies on its website. *See* http://www.nyulawreview.org/about/membership-selection (last visited on January 22, 2022) (attached as Exhibit 1).

13. The NYU Law Review selects 50 new members each year from the rising 2L class. *Id.* The Law Review first extends membership offers to 15 students based solely on their performance on a writing competition. *Id.* After those 15 students are selected, another 15 are chosen solely on the basis of their first-year grades. *Id.* Then eight additional students are selected based on "a combination of their grades and writing competition scores." *Id.*

14. After these 38 students are selected on the basis of merit, the remaining 12 slots are set aside for selections made by the Law Review's "Diversity Committee." *Id.*

15. To enable it to fill this "diversity" quota, the NYU Law Review instructs all applicants to submit a "personal statement" of no more than 500 words. *Id.* The Law Review explains:

> The information contained in these personal statements allows the *Law Review* to realize its commitment to staff diversity. The *Law Review* evaluates personal statements in light of various factors, including (but not limited to) race, ethnicity, gender, sexual orientation, national origin, religion, socio-economic background, ideological viewpoint, disability, and age. With regard to these and other aspects of diversity, applicants should clearly identify and discuss any personal characteristics, background, unique experiences, or qualifications that the applicant would like to bring to the attention of the Selection Committee.

*Id.*

16. The NYU Law Review also permits applicants to submit a résumé, which "can be used to share personal and professional information that cannot be easily communicated through a personal statement," and which "will be used by the *Law Review* to realize its commitment to staff diversity." *Id.* The Law Review instructs applicants to remove their "names and addresses" from their résumé before submitting it. *Id.*

17. The NYU Law Review uses these "personal statements" and résumés to give preferential treatment to women, racial minorities, homosexuals, and transgendered people when selecting its members.

18. The NYU Law Review also discriminates on account of race, sex, sexual orientation, and gender identity when selecting articles for publication.

19. The NYU Law Review requires authors seeking to publish with the journal to submit their manuscripts through a web-based submission service called Scholastica. *See* http://www.nyulawreview.org/submissions (last visited on January 22, 2022) ("During our review periods, we accept submission of unsolicited Articles via Scholastica. We no longer accept submissions by e-mail or by postal service.") (attached as Exhibit 3).

20. When authors submit a manuscript to the NYU Law Review through Scholastica's website, they are invited to provide their "demographic information," including their race, sexual orientation, and gender identity. Scholastica solicits this information only because the NYU Law Review asks for it. *See* Exhibit 4.

21. In the "race" category, authors are invited to check one or more of the following boxes: "Black or African American," "Hispanic or Latino," "American Indian or Alaskan Native," "Asian," "Native Hawaiian or Other Pacific Islander," "White/Non-Hispanic," or "Other, please specify." *See* Exhibit 4.

22. For "sexual orientation," authors are asked to choose between "Prefer not to answer," "Straight/Heterosexual," "Gay," "Lesbian," "Bisexual," or "Other." *See* Exhibit 5.

23. And in the "gender identity" field, authors may respond with "Prefer not to answer," "Male," "Female," "Neither," "Both," or "Genderqueer." *See* Exhibit 6.

24. The NYU Law Review solicits this "demographic information" for the purpose of enabling its article-selection committee to discriminate among authors on account of their race, sex, sexual orientation, and gender identity.

25. The NYU Law Review admits on its website that it seeks to publish articles "written by authors from underrepresented backgrounds in the legal profession." *See* http://www.nyulawreview.org/about (last visited on January 22, 2022) (attached as Exhibit 2) ("[T]he Law Review has been committed to . . . publishing scholarship written by authors from underrepresented backgrounds in the legal profession.").

26. New York University and New York University School of Law have been allowing the NYU Law Review to discriminate on account of race, sex, sexual orientation, and gender identity when selecting its members, editors, and articles.

27. New York University School of Law, along with nearly every law school in the United States, discriminates on account of race and sex when hiring its faculty, by discriminating in favor of female or minority faculty candidates and against white men.

28. The Department of Education interprets Title IX to permit universities to discriminate in favor of women and against men whenever women are underrepresented relative to their numbers in the general population—regardless of whether the alleged underrepresentation of women was caused by previous sex discrimination. *See, e.g.*, 34 C.F.R. § 106.3(b) ("In the absence of a find-

ing of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.").

29. The Department of Education interprets Title VI to permit universities to discriminate in favor of racial minorities and against whites whenever a minority is underrepresented relative to its numbers in the general population—regardless of whether the alleged underrepresentation was caused by previous racial discrimination. *See, e.g.*, 34 C.F.R. § 100.3(b)(6)(ii) ("Even in the absence of . . . prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.").

**STANDING—NYU LAW REVIEW**

30. FASORP has associational standing to challenge the defendants' use of race and sex preferences.

31. To establish associational standing, an entity must show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

32. Members of FASORP would have standing to challenge the defendants' violations of Title VI and Title IX if they sued as individuals.

33. Faculty members of FASORP who submit articles to the NYU Law Review are being subjected to race

and sex discrimination because the NYU Law Review gives preference to articles written by women and racial minorities at the expense of articles written by FASORP members who are white or male. This discriminatory treatment inflicts "injury in fact." *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The injury is caused by the NYU Law Review's discriminatory article-selection practices, and that injury will be redressed by an injunction that bars the NYU Law Review from considering the race, sex, sexual orientation, or gender identity of an author when selecting articles for publication.

34. Members of FASORP who submit articles to the NYU Law Review suffer a separate and distinct "injury in fact" from the journal's membership-selection policies. Because the NYU Law Review has subordinated academic merit to diversity considerations when selecting its members and editors, the articles that FASORP members submit to the Law Review are judged by less capable students—and these are the students who will ultimately make the career-altering decision of whether a professor's article gets accepted for publication or rejected. This inflicts "injury in fact." This injury is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

35. There is yet another "injury in fact" inflicted on FASORP members who submit articles to the NYU Law Review: Those who have their articles accepted by the journal must submit to a student-run editing process, and the Law Review's use of race and sex preferences dilutes the quality of the students who edit an author's

piece. This "injury in fact" is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

36. Members of FASORP who are alumni of the NYU Law Review suffer "injury in fact" from the use of race and sex preferences that diminish the prestige of the law-review credential. *See, e.g.*, Richard A. Posner, *Overcoming Law* 77 (1995) ("The *Harvard Law Review*, with its epicycles of affirmative action, is on the way to becoming a laughingstock."). Law-review membership is supposed to be an academic honor—and it was always regarded as such until journals started using race and sex preferences to select their members. Now law-review membership at NYU is part of a politicized spoils system and no longer acts as a signaling device for academic ability or achievement. This "injury in fact" is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

37. Members of FASORP who are female or minority alumni of the NYU Law Review suffer an additional "injury in fact" because their law-review membership is now viewed with suspicion—and it is difficult or impossible for them to prove that they earned their law-review membership through academic merit rather than the largesse of the "Diversity Committee." This "injury in fact" is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

38. Members of FASORP who are current students at NYU will be denied an equal opportunity to compete for membership on the Law Review on account of their race, sex, sexual orientation, or gender identity. *See Ne. Fla. Chapter*, 508 U.S. at 666. This "injury in fact" is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

39. Members of FASORP who are female or minority students at NYU—and who would have earned their way on to Law Review without help from the Diversity Committee—will suffer "injury in fact" because their law-review membership will be tainted by the journal's affirmative-action policies. This injury is caused by the NYU Law Review's use of race and sex preferences, and it will be redressed by an injunction that bars the NYU Law Review from considering race or sex when selecting its members and editors.

40. The interests that FASORP seeks to protect in the litigation are germane to the organization's purpose. As its name suggests, FASORP seeks to restore meritocracy at American universities by eliminating the use of race and sex preferences.

41. Neither the claims asserted by FASORP nor the relief requested in this litigation requires the participation of individual FASORP members.

42. The members of FASORP include faculty members or legal scholars who have submitted articles to the NYU Law Review in the past, and who intend to continue submitting their scholarship to the NYU Law Review in the future, and who will face discrimination on account of their race, sex, sexual orientation, or gender identity

unless the NYU Law Review is enjoined from enforcing its discriminatory article-selection policies. These individuals were members of FASORP when the original complaint was filed.

43. The members of FASORP include faculty members or legal scholars who have submitted articles to the NYU Law Review in the past, and who intend to continue submitting their scholarship to the NYU Law Review in the future, and who will have their submissions judged and evaluated by less capable students who made Law Review because of diversity criteria, and who leapfrogged students with better grades and writing-competition scores. These individuals were members of FASORP when the original complaint was filed.

**STANDING—FACULTY HIRING**

44. FASORP has associational standing to challenge New York University School of Law's use of race and sex preferences in faculty hiring.

45. The members of FASORP include individuals who have sought and applied for entry-level or lateral teaching positions at New York University School of Law and intend to do so again in the future, or remain potential candidates for visiting professorships and lateral faculty appointments without any need to formally apply, and who face or will face discrimination on account of their race and sex unless New York University is enjoined from using race and sex preferences in its faculty hiring. These individuals were members of FASORP when the original complaint was filed.

**STANDING TO SUE THE FEDERAL DEFENDANTS**

46. The Department of Education is enabling the NYU Law Review, New York University School of Law,

and New York University—along with other law reviews and universities in the United States—to engage in race and sex discrimination by interpreting Title VI and Title IX to allow for "affirmative action" whenever women or minorities are underrepresented relative to their numbers in the general population. *See* 34 C.F.R. § 100.3(b)(6)(ii) ("Even in the absence of . . . prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."); 34 C.F.R. § 106.3(b) ("In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.").

47. If the Department of Education interpreted and enforced Title VI and Title IX as written, it would prohibit *all* forms of race and sex discrimination at universities that receive federal funds, and the threat of losing federal funding would induce the NYU Law Review, New York University School of Law, and New York University—and every other law review and university in the country—to adopt color-blind and sex-neutral policies with respect to law-review membership selection, article selection, and faculty hiring, just as the threat of losing federal money induced law schools to reluctantly accept military recruiters on campus. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).

48. Members of FASORP are suffering injury in fact not only from the discriminatory policies adopted by the NYU Law Review, New York University School of Law,

and New York University, but from many other law reviews and law schools that have discriminated against FASORP members on account of their race and sex—and that will continue to discriminate against FASORP members unless 34 C.F.R. § 100.3(b)(6)(ii) and 34 C.F.R. § 106.3(b) are held unlawful and set aside. All of these injuries are caused by the Department of Education's failure to interpret and enforce Title VI and Title IX as written, and its continued willingness to look the other way whenever universities discriminate in favor of women and racial minorities. These injuries will be redressed by a judgment that holds unlawful and sets aside 34 C.F.R. § 100.3(b)(6)(ii) and 34 C.F.R. § 106.3(b), and that orders the Secretary of Education to withhold federal funds from universities that permit their law reviews and faculty appointments committees to engage in any form of discrimination on account of race and sex.

**COUNT 1—NYU'S VIOLATIONS OF TITLE VI AND TITLE IX**

49. New York University and its components are violating Title VI and Title IX in numerous respects.

50. The NYU Law Review is violating Title VI and Title IX by using race and sex preferences when selecting its members, editors, and articles.

51. The NYU Law Review is violating the Second Circuit's interpretation of federal anti-discrimination law by conferring preferences upon homosexuals and transgendered people when selecting its members, editors, and articles. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

52. New York University and New York University School of Law are violating Title VI and Title IX by al-

lowing the NYU Law Review to use race and sex preferences when selecting its members, editors, and articles.

53. The NYU Law Review is a "program or activity" that "receives Federal financial assistance" within the meaning of Title VI and Title IX. The NYU Law Review is also a "program or activity" of New York University School of Law and New York University, which "receiv[e] Federal financial assistance" within the meaning of Title VI and Title IX.

54. The NYU Law Review is subject to the anti-discrimination requirements of Title VI and Title IX because, among other reasons: The student members of the NYU Law Review receive federal financial assistance to pay their law-school tuition; enrollment at New York University School of Law is a prerequisite for membership on the journal; the NYU Law Review depends on New York University School of Law and New York University to disclose the first-year grades that the Law Review uses to select its members; the NYU Law Review is subject to rules and regulations that New York University School of Law and New York University chooses to establish for the Law Review; the faculty at New York University School of Law assist and advise the NYU Law Review; the NYU Law Review occupies space on the campus of New York University; and the NYU Law Review draws upon the resources of New York University School of Law and New York University.

55. Individual members of FASORP have been or will be subjected to discrimination by the NYU Law Review's use of race and sex preferences in its selection of members, editors, and articles; by New York University School of Law and New York University's willingness to

allow the NYU Law Review to discriminate in this fashion; and by New York University School of Law's use of race and sex preferences in its faculty hiring. *See* paragraphs 42–43, 45. All of these constitute "programs or activities" that receive federal financial assistance.

56. The holdings of *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), purport to permit racial preferences only in the context of public-university admissions; they are inapplicable to faculty-hiring decisions and the selection of members and articles by a student-edited journal. They are also inapplicable to private universities.

57. In all events, the NYU Law Review's fixed, numerical set-aside of 12 slots reserved for "diversity" candidates is a constitutionally forbidden quota that fails even if one were to assume that *Grutter* and *Fisher* govern the NYU Law Review's membership-selection process. *See Grutter*, 539 U.S. at 328 ("[A] race-conscious admissions program cannot use a quota system").

58. The NYU Law Review has failed to adequately consider race- and sex-neutral alternatives to achieve diversity, as required by *Grutter* and *Fisher*. *See Grutter*, 539 U.S. 306, 339 (2003) ("Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."); *Fisher*, 136 S. Ct. at 2208 ("A university . . . bears the burden of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense." (citation and internal quotation marks omitted)).

59. The NYU Law Review's race and sex preferences are not limited in time, as required by *Grutter*. *See*

*Grutter*, 539 U.S. at 342 ("[R]ace-conscious admissions policies must be limited in time"); *id.* at 351 (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.").

60. New York University School of Law is violating Title VI and Title IX by discriminating in favor of female or minority faculty candidates and against white men.

61. The plaintiff therefore seeks declaratory and injunctive relief that prohibits New York University and its components, including the New York University School of Law and the NYU Law Review, from discriminating on account of race and sex in any manner outside the narrow context of student admissions, and only to the extent its use of race and sex preferences in student admissions satisfy the requirements of *Grutter* and *Fisher*.

62. The plaintiff seeks this relief under Title VI, Title IX, and any other law that might supply a cause of action for the requested relief.

**COUNT 2—CHALLENGE TO 34 C.F.R. § 100.3(b)(6)(ii) AND 34 C.F.R. § 106.3(b)**

63. 34 C.F.R. § 100.3(b)(6)(ii) and 34 C.F.R. § 106.3(b), which purport to allow federal funding recipients to discriminate in favor of women and minorities whenever those groups are underrepresented relative to their numbers in the general population, violate the clear and unambiguous text of Title VI and Title IX, and they cannot be sustained under any regime of agency deference. *See Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 781–82 (2018) (*Chevron* deference cannot sustain agency interpretations that contradict unambiguous statutory language).

64. 34 C.F.R. § 100.3(b)(6)(ii) and 34 C.F.R. § 106.3(b) extend far beyond the holdings of *Grutter* and *Fisher* by purporting to allow affirmative action whenever a group is underrepresented relative to its numbers in the general population, without limiting this allowance to student admissions, without requiring considerations of race-neutral alternatives, and without requiring time limits on the use of race and sex preferences.

65. The Court should therefore hold unlawful and set aside these agency rules under 5 U.S.C. § 706(2).

66. The plaintiff seeks this relief under Title VI, Title IX, the Administrative Procedure Act, and any other law that might supply a cause of action for the requested relief.

**COUNT 3—CHALLENGE TO NYU'S CONTINUED RECEIPT OF FEDERAL FUNDS**

67. Secretary DeVos and the Department of Education are violating Title VI and Title IX by allowing New York University to receive federal funding while the university, New York University School of Law, and NYU Law Review are discriminating on account of race and sex.

68. The Court should therefore instruct the Secretary of Education to enforce Title VI and IX by terminating federal funding to all components of New York University until the NYU Law Review repudiates the use of race and sex preferences when selecting its members, editors, and articles, and until New York University School of Law repudiates the use of race and sex preferences in faculty hiring. *See* 5 U.S.C. § 706(1) (authorizing courts to "compel agency action unlawfully withheld").

69. The plaintiff seeks this relief under Title VI, Title IX, the Administrative Procedure Act, and any other law that might supply a cause of action for the requested relief.

**DEMAND FOR RELIEF**

70. The plaintiff respectfully requests that the court:

a. declare that the NYU Law Review's membership-selection and article-selection policies violate Title VI and Title IX;
b. permanently enjoin the NYU Law Review from considering race, sex, sexual orientation, or gender identity when selecting its members, editors, or articles;
c. permanently enjoin the NYU Law Review from soliciting "demographic information" about an author's race, sex, sexual orientation or gender identity when considering manuscripts for publication;
d. order the NYU Law Review to establish a new membership-selection policy that is based entirely on academic merit and that explicitly disavows any consideration of race, sex, sexual orientation, or gender identity or expression, and to submit that revised membership-selection policy to this Court and to the Secretary of Education for their review and approval within 30 days of this Court's judgment;
e. permanently enjoin the NYU Law Review from selecting any new members or editors without first securing preclearance from this Court and from the Secretary of Education, each of whom must certify that the Law Re-

view's selection of those new members and editors was based on academic merit and was not in any way affected or influenced by race, sex, sexual orientation, or gender identity;

f. order the NYU Law Review to establish a new article-selection policy that explicitly forbids any consideration of an author's race, sex, sexual orientation, or gender identity or expression, and to establish a new article-selection process that conceals the author's name, sex, race, sexual orientation, gender identity or expression, and all other information that could be used to identify the author before the article is selected for publication, and order the NYU Law Review to submit its new article-selection process to this Court and to the Secretary of Education for their review and approval within 30 days of this Court's judgment;

g. permanently enjoin New York University School of Law from considering race, sex, sexual orientation, or gender identity in faculty hiring;

h. permanently enjoin New York University and its components from discriminating on account of race and sex in any manner outside the narrow context of student admissions, and only to the extent its use of race and sex preferences in student admissions satisfy the requirements of *Grutter* and *Fisher*.

i. order the Secretary of Education to terminate federal funding to all components of New York University until the NYU Law Review repu-

diates the use of race and sex preferences when selecting members, editors, and articles, and until New York University School of Law repudiates the use of race and sex preferences in faculty hiring;

j. hold unlawful and set aside 34 C.F.R. § 100.3(b)(6)(ii), 34 C.F.R. § 106.3(b), and any other agency rule, order, action, or guidance document that purports to allow universities to use race or sex preferences in faculty hiring, or that purports to allow law reviews to use race or sex preferences when selecting members or articles;

k. award costs and attorneys' fees;

l. grant all other relief that the Court deems just, proper, or equitable.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: January 22, 2022

* admitted *pro hac vice*

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