To be Argued by:
JAMES G. RYAN
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New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2020-00843

AHMAD AWAD, SOFIA DADAP, SAPPHIRA LURIE, JULIE NORRIS and VEER SHETTY,

Petitioners-Respondents,

– against –

FORDHAM UNIVERSITY,

Respondent-Appellant.

REPLY BRIEF FOR RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

Respondent-Appellant Fordham University ("Fordham" or the "University"), a private university, respectfully submits this brief in further support of its appeal from the Order of the Supreme Court of New York County (Bannon, J.), dated July 29, 2019 and entered August 6, 2019 (the "Order"), granting the verified Petition (the "Petition") of Petitioners-Respondents Ahmad Awad ("Petitioner-Respondent Awad"), Sofia Dadap ("Petitioner-Respondent Dadap"), Sapphira Lurie ("Petitioner-Respondent Lurie"), and Julie Norris ("Petitioner-Respondent Norris") (collectively, "Respondents"), to annul Fordham's decision to deny Respondents' request to form a student club, Students for Justice in Palestine ("SJP"), at Fordham's expense and with Fordham's support on its Lincoln Center campus. (R-4-26).[1]

Contrary to the central theme of Respondents' opposition brief ("Opposition Brief" or "Brief"), this proceeding is not a First Amendment free speech case. It is not a referendum on the Israeli-Palestinian conflict. At bottom, it is simply a matter of a private university's right to choose which student clubs it will fund, provide faculty supervision, office space and other forms of university support. Here, after extensive documented deliberation and review, Fordham, through its Dean of

[1] References ("R") denotes references to the Record on Appeal (the "Record") which was filed with Fordham's Appellate Brief on January 27, 2020.

Students, Keith Eldredge, chose to deny Respondents' application to form a local chapter of SJP at Fordham. The University exercised its prerogative after abiding by its guidelines related to student club approval (the "University Club Guidelines") and after a fulsome assessment of the facts and issues attendant to the application. While some may have arrived at a different decision, the Record confirms that Fordham followed its own published policy in making the decision and that the decision to deny the application to form a local chapter of SJP at Fordham was rational. Consequently, the Record necessarily confirms that the Supreme Court erroneously held that Fordham failed to abide by its own published policy governing the approval and recognition of student clubs at Fordham. (R-18, 20-21). Finally, despite voluminous documentation and sworn statements to the contrary, the Supreme Court erred when it reversed the applicable burden of proof and held that Fordham failed to provide a rational basis in deciding not to recognize, fund, and otherwise fully support SJP as an official student club at Fordham. (R-24). And perhaps, most egregiously, in ruling on the motion to dismiss, the Supreme Court failed to "look to the 'whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated.'" Mtr. Of 96 Wythe Acquisition LLC v. Jiha, 51 Misc. 3d 750, 752 (2d Dep't 2016) (quoting Matter of Purdy v. Kreisberg, 47 N.Y.2d 354, 358 (1979)).

ARGUMENT

It is well settled in New York that courts have a "restricted role" in reviewing determinations of colleges and universities. Aryeh v. St. John's University, 154 A.D.3d 747, 63 N.Y.S.3d 393 (2d Dep't 2017). "This public policy is grounded in the view that in matters wholly internal these institutions are peculiarly capable of making the decisions which are appropriate and necessary to their continued existence." Gertler v. Goodgold, 107 A.D.2d 481, 485, 487 N.Y.S.2d 565, 569 (1st Dep't 1985) (internal citations omitted). Courts are reluctant to become involved in matters involving educational institutions, reflecting "the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment [that] these institutions are, for the most part, better suited to make." Keles v. Trustees of Columbia University in City of New York, 74 A.D.3d 435, 435-36, 903 N.Y.S.2d 18, 19 (1st Dep't 2010) (citing Maas, 94 N.Y.2d at 91, 699 N.Y.S.2d at 718)); see also Matter of Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 413 (1980).

In their Brief, Respondents misstate and misconstrue the standard by which courts are to review the non-academic decisions of colleges and universities. Respondents cite to Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 658, 404 N.E.2d 1302 (1980) and assert that the Court of Appeals held that "determinations unrelated to academic performance are 'quite closely akin to the day-to-day work of the

judiciary' and, therefore, courts scrutinize such determinations more closely." Brief at p. 11. However, Respondents entirely ignore the fact that in making that statement, the Court of Appeals was specifically referencing determinations related to a disciplinary "suspension or expulsion." Tedeschi, 49 N.Y.2d at 658. Specifically, Tedeschi dealt with a college's decision to expel a student after a series of classroom disruptions and insubordinate conduct. Id. Such a fact pattern is somewhat akin to a tort or criminal law matter courts regularly encounter. Conversely, a determination as to whether a private university must fund, provide support, and grant official status to a student club that will necessarily operate under, and for better or worse, impact the University's campus, is surely not a determination that is "closely akin to the day-to-day work of the judiciary."

For the reasons set forth in detail in Fordham's Appellate Brief ("Appellate Brief") and below, the Supreme Court erred in finding that Fordham failed to substantially comply with its policies and procedures. The Supreme Court also erred in finding that Fordham's determination to deny SJP club status was arbitrary and capricious. In doing so, the Supreme Court necessarily and improperly substituted its own analysis and opinion in place of Fordham's and went far beyond its "restricted role" in reviewing Fordham's decision. Therefore, the Order must be reversed.

POINT I

FORDHAM FOLLOWED ITS PUBLISHED POLICY IN DENYING SJP OFFICIAL CLUB STATUS

As stated in Fordham's Appellate Brief, a college or university's administrative determination must not be disturbed unless the school "acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules . . . or imposes a penalty so excessive that it shocks one's sense of fairness." Matter of Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216 (2015) (citing Matter of Harris v. Tr. of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959 (1988). Further, "case law reflects the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters." Maas v. Cornell Univ., 94 N.Y.2d 87, 92 (1999). Thus, courts should "exercise[] the utmost restraint in applying traditional legal rules to disputes within the academic community." Matter of Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 413 (1980). Finally, because "administrative decisions of educational institutions involve the exercise of subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny." Gertler v. Goodgold, 107 A.D.2d 481, 485 (1st Dep't 1985) (citing Matter of Olsson, 49 N.Y.2d at 413).

1. The Supreme Court and Respondents Misinterpreted Fordham's Policies.

The Supreme Court and Respondents both misconstrued and misinterpreted Fordham's policies related to free expression and its University Club Guidelines. In their Brief, Respondents argue that the Supreme Court correctly held that Fordham's decision to deny SJP official club status in part because of "polarization" was impermissible because Fordham's policies related to freedom of inquiry effectively amount to an ironclad right to form any student club regardless of its potential adverse effects on the campus community. Brief at p. 14. As stated in Fordham's Appellate Brief, Fordham's Mission Statement does not create an unfettered right for students to have any club they choose. This is an important distinction that both the Supreme Court and Respondents overlooked.

Fordham's Mission Statement and its other policies that give students the right to express their ideas (e.g. "freedom of inquiry") are not without limitation. As a private university, Fordham generally can limit that right as it deems necessary to comport with its Mission Statement. This exercise of educational and administrative discretion is certainly necessary when reviewing student club applications since the official University recognition of student clubs also attaches the imprimatur that approved clubs are effectively ambassadors for Fordham to the outside world. Fordham also retains the right to limit club activities for the pragmatic reason that, once granted recognition by the University, official clubs at Fordham receive

funding, meeting space, and faculty supervision. (R-181). Consequently, because of a potential club's impact to the University's campus community, finances, space requirements, and faculty time commitments as mentors to a club, the club approval process at Fordham specifically grants the University the final say in which clubs it will choose to support. (R-68-69).

This is not to say that if club status is not granted, the affected students are silenced from expressing their views. Nothing could be further from the truth. Here, at no point did Fordham state that Respondents were prevented from expressing their views regarding the Israeli-Palestinian conflict on campus. In fact, in his email informing Respondents of his decision to deny SJP club status at Fordham, Dean Eldredge specifically welcomed and encouraged Respondents to have "continued conversation" and to "promote awareness of this important conflict and the issues that surround it from multiple perspectives." (R-81). Respondents and the Supreme Court entirely ignored this reality, and instead, conflated Fordham's Mission Statement and various other policies, which at most protect student from adverse disciplinary action for expressing their views, with the University Club Guidelines, which is the only policy that governs the process used to approve a proposed student club at Fordham.

2. Fordham Followed the University Club Guidelines.

In their Brief, Respondents admit that the Supreme Court correctly determined that Dean Eldredge had the ultimate discretion to evaluate whether a new club should be granted official club status. See Brief at p. 12, n. 8. That finding should have ended the Supreme Court's inquiry. Both the Supreme Court and Respondents, however, then erred by asserting that Dean Eldredge's express right to veto any new club is somehow limited by the free expression provisions contained in Fordham's Mission Statement. (R-22-23).

For example, the Supreme Court improperly applied Fordham's Mission Statement in its Order to support its conclusion that Dean Eldredge did not have the power to veto a new student club. (R-22-23). In doing so, the Supreme Court failed to apply the principle it otherwise recognized that the right to free expression at a private institution is not governed by First Amendment principles. Id. Similarly, in their Brief, Respondents mischaracterize Fordham's position and assert that, despite Fordham's promise through its Mission Statement to be a place where students will be able to "express 'controversial ideas and differing views,'" the University denied this right to Respondents. Brief at p. 13. That is simply not the case. Again, both the Supreme Court and Respondents conflate the limited right of free expression granted by the Mission Statement with the privilege of having a student club funded and otherwise supported by Fordham. Regardless of whether SJP was granted official

club status, Respondents remained free to promote their views, meet with one another, and express ideas, including ideas about the Israeli-Palestinian conflict which may be considered controversial, without fear of penalty, such as suspension or expulsion. Dean Eldredge made this clear in both is December 2016 decision and his June 5, 2017 affidavit in which he stated that he supports continued conversations about "alternative ways to promote awareness of this important [Israeli-Palestinian] conflict and the issues that surround it from multiple perspectives." (R-67). Dean Eldredge further stated that he "welcomed, and continue[s] to welcome, continued conversation, from multiple perspectives, about alternative ways to promote awareness of the Israeli/Palestine conflict and the issues that surround it." Id. "Obviously, any alternative mechanism for dialogue to take place must be more aligned with campus wide safety policies; my obligation, as Dean of Students, is to maintain order on Fordham's campus and freedom of movement thereon for invited guests, students and members of the school staff." Id. Thus, it is clear that in recognition of Fordham's Mission Statement, at no point did Dean Eldredge do anything to prevent Respondents from exercising their right to express their ideas or views. Dean Eldredge simply denied Respondents' request to create an official SJP club on Fordham's campus, to be funded, supported, and implicitly endorsed by Fordham, which he had the right to do under Fordham's Official University Club Guidelines.

Respondents also rely on the Supreme Court's incorrect holding that Dean Eldredge imposed a "newly identified factor" in denying SJP official club status in part because the organization may be polarizing. However, as stated in Fordham's Appellate Brief, the Supreme Court's conclusion that there was a list of "factors" that somehow constrained the Dean's discretion is entirely unsupported by the Record. As stated above, the University Club Guidelines confirm in no uncertain terms that the "Dean of Students has a right to veto any new club." (R-201). (Emphasis added). Despite the Supreme Court's finding to the contrary, there are no specific factors enumerated or specified anywhere in the Record that limit, confine, or otherwise constrain the Dean's discretion as to whether or not he should approve a new student club. Given that each newly proposed club and the situation surrounding that club's application process is unique, the Dean is purposefully granted broad discretion under the University Club Guidelines to enable him or her to make a case-by-case final determination as to whether or not the University will grant club status—and therefore provide Fordham's name, funding and other resources—to a particular applicant.

Further, both the Supreme Court and Respondents argue that Dean Eldredge's use of the term "polarization" only refers to the possibility of others having a different viewpoint than SJP rather than the safety and security implications raised by Dean Eldredge. Brief at p. 14. The Supreme Court and Respondents notably omit

Dean Eldredge's references to "safety and security" concerns that were paramount in reaching his ultimate decision. (R-74-78). As noted in the Eldredge Affidavit, Dean Eldredge was very concerned about the safety and security issues surrounding other SJP chapters and the national organization. (R-76-78, 466). This concern was confirmed by his extensively documented research which showed that members of other SJP chapters were "allied" with terrorist organizations and "targeted" Jewish students. (R-157, 404).

Both the Supreme Court and Respondents also asserted that since a club that wants to espouse a goal of Boycott, Divestment, and Sanctions ("BDS") is not a specifically prohibited "factor," Dean Eldredge's concern over Respondents' stated mission was similarly improper. This assertion is also not supported by the Record. In their Brief, Respondents rely on the Supreme Court's statement that Dean Eldredge's concern regarding SJP's calls to boycott Israel was not a specific, delineated, and established ground for denying SJP official club status. Brief at p. 15. Once again, this is purely a red herring because there are no specific factors or grounds in the University Club Guidelines or elsewhere that the Dean must follow, rely on, or be bound by in deciding whether to grant a proposed club official status at Fordham. It would be impossible, despite what the Supreme Court and Respondents seem to suggest, to include every possible factor that could arise in reviewing a student club application in accordance with the University Club

Guidelines. And even if it were possible, which it is not, Respondents fail to identify any case law or rule to support the proposition that a private university must list specific factors that it must consider when deciding whether to approve and provide funding, resources, and its imprimatur to a proposed student club.

Here, in referencing "polarization," Dean Eldredge specifically considered SJP's stated goal of "Boycott, Divestment, and Sanctions" of Israel and how this organizational purpose manifested itself with similar SJP clubs on other college campuses. (R-72-76). Through his research, Dean Eldredge found that SJP's promotion of "Boycott, Divestment, and Sanctions" was the cause of many of the safety and security issues associated with other SJP chapters. Id. Dean Eldredge also noted in his affidavit that political leaders and public officials have expressed alarm over the calls to isolate Israel. (R-72). Indeed, the New York City Council Resolution condemning BDS was discussed at the October 27, 2016 meeting regarding the SJP club application. (R-518). Respondents did not, and could not, establish that Dean Eldredge acted irrationally in concluding that a club whose main purpose is to call for the "Boycott, Divestment, and Sanctions . . . against a single country" would not lead to beneficial dialogue about these complex global issues at Fordham. (R-81). As such, it was these concerns that led Dean Eldredge to view SJP as "polariz[ing]" and deny SJP official club status.

Respondents also rely on the Supreme Court's speculative comments that the decision to deny SJP official club status means that Fordham students would not be permitted to form clubs that criticize other governments or countries. Brief at p. 15. There is simply no basis for that finding anywhere in the Record. In fact, Dean Eldredge offered Respondents the ability to form a club that took a similarly critical view of Israel's policies if Respondents agreed to name the club something other than "Students for Justice in Palestine." (R-77-78, 81). Moreover, both the Supreme Court and Respondents continued to ignore the fact that the official recognition and financial support of a student club by Fordham is a privilege, not a right. As such, Fordham designed its University Club Guidelines so that it could evaluate applications for new student clubs on a case-by-case basis. If, as the Supreme Court suggested, students wished to start a club related to "Russia's occupation of Crimea," the University would necessarily evaluate that club's application and the stated purpose and goals of the club on an individual basis and on its merits. The University's decision to deny SJP club status would have no bearing on any future decisions related to different proposed student clubs. In fact, to hold otherwise would compel Fordham to grant almost any applicant official club status. This would force Fordham to provide University support and funds to groups that, for example, are not in keeping with its religious tenets or groups that espouse views that most would agree should not be directly supported by any higher education institution.

POINT II

FORDHAM'S DECISION WAS RATIONAL AND NEITHER ARBITRARY NOR CAPRICIOUS

As previously noted, a college or university's "action is arbitrary when it is without a sound basis in reason and is taken without regard to the facts." Wander v. St. John's Univ., 147 A.D.3d 1009, 1010 (2d Dep't 2017) (citing Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 231 (1974)). "When a determination is supported by a rational basis, it must be sustained even if the reviewing court would have reached a different result." Doe v. Cornell Univ., 59 Misc.3d 915, 934 (Sup. Ct. Tompkins Cnty. 2017), aff'd, 163 A.D.3d 1243 (3d Dep't 2018) (internal citation omitted). Further, private schools "are afforded broad discretion in conducting their programs" and when a private school makes a determination "'based on facts within its knowledge that justify the exercise of discretion,' then a court may not review this decision and substitute its own judgment." Hutcheson v. Grace Lutheran Sch., 132 A.D.2d 599 (2d Dep't 1987) (internal citation omitted); see also Ibe v. Pratt Inst., 151 A.D.3d 725, 726 (2d Dep't 2017). Here, Respondents present a number of strained arguments and ignore the key reasons underlying Dean Eldredge's decision to deny SJP official club status.

1. Fordham's Reliance on Past Issues With Other SJP Chapters was not Irrational.

The main focus of Respondents' assertion that Fordham acted irrationally in denying SJP official club status is that Fordham's reliance on outside research regarding other SJP chapters and the national SJP organization was somehow impermissible. Brief at p. 17. In support of their position, Respondents contend that Fordham had no right to look behind the SJP curtain. In doing so, Respondents simply point to their claim that the Fordham SJP chapter "would be autonomous, and act independently from national SJP and SJP groups at other universities" and suggest that should have ended Fordham's inquiry. Id. at 18.

Respondents further contend that there is no support for Fordham's belief that Respondents sought to maintain a connection with SJP's national organization and other chapters. Id. at 19. However, at the same time, Respondents insisted throughout the club approval process and this litigation that their only desire is to have an official club at Fordham under the name "Students for Justice in Palestine." Brief at p. 19, 25. Because of Respondents' insistence on using the name, it was impossible for Dean Eldredge to ignore the record of disruption and intimidation associated with the national SJP organization and its other chapters and the possibility that those issues would also arise on Fordham's campus. Thus, because Respondents insisted on using the name, it was entirely rational for Dean Eldredge to conduct research on other chapters on other college campuses with the same name

and affiliated with the same umbrella organization and to consider SJP conduct on those campuses in making his decision.

In fact, Respondents recognize and admit that the name "Students for Justice in Palestine" has "come to be associated with the broader student movement for justice in Palestine." Brief at p. 19. It does not take a quantum leap of logic to also recognize that this association is surely due in large part to the national SJP organization and its other chapters. Thus, if only as a matter of common sense, it was entirely proper for Dean Eldredge to research and consider the communications and actions of the national SJP organization and other chapters.

While Respondents claim that their SJP chapter "would decide its own policies and activities," the platform that they put forth in their application for club approval was almost identical to that of the national SJP organization. (R-432-433). In their proposed constitution, Respondents state that their group would be "organized around the principles of the call by Palestinian civil society for Boycott, Divestment and Sanctions of Israel" and would adopt the various "Points of Unity" as set forth by the national SJP organization. (R-285). Indeed, the national SJP, submitted an affidavit in this matter stating that local chapters must adopt the Points of Unity's call for BDS. (R-432). Thus, Respondents' claim that they are wholly independent from SJP's national organization and other chapters, by all accounts, rings untrue.

Respondents also assert that Fordham's concerns about issues that have occurred with other SJP chapters is unrelated to Respondents' proposed club and amounts to improper speculation. Essentially, Respondents contend that Fordham should have ignored the evidence documenting the serious safety and security issues involving other SJP chapters, and that, in effect, it should have waited until an issue related to safety or security actually happened on Fordham's campus before it took action. Brief at p. 16-17. Turning a blind eye, however, to the noxious behavior of SJP chapters as Respondents suggest, would arguably be an abdication of Fordham's primary responsibility to ensure the safety of members of its campus community. At the very least, one cannot credibly claim that Dean Eldredge acted irrationally by considering those acts. See Regents of Univ. of California v. Superior Court, 4 Cal. 5th 607, 624, 413 P.3d 656, 667 (2018) (holding that higher education institutions have a duty to "to use reasonable measures to protect students from foreseeable injury"); see also Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 453, 96 N.E.3d 128, 142 (2018) (holding that colleges and universities' duty to protect students from harm even extends to protecting students from committing self-harm); VanHouten v. Mount St. Mary Coll., 137 A.D.3d 1293, 1294, 28 N.Y.S.3d 433, 435 (2d Dep't 2016) (upholding college's decision to expel student due to disruptive classroom behavior).

To support their position, Respondents cite to Matter of Basile v. Albany Coll. of Pharm. of Union Univ., 279 A.D.2d 770, 771-72, 719 N.Y.S.2d 199, 201 (3d Dep't 2001). In that case, due to a dearth of evidence in the record to support the decision, the Third Department overturned a university's decision to expel two students and give a third a failing grade for allegedly cheating. See id. Specifically, the Third Department found the university improperly relied on hearsay evidence and speculation that implicated the students as cheaters. See id. Here, there was nothing speculative regarding Fordham's concerns about safety and security. Dean Eldredge based these concerns on numerous documented safety and security issues regarding SJP chapters around the country with which Respondents insisted upon identifying themselves. (R-74-78). Furthermore, as explained above, there is a material difference between the due process rights implicated when imposing penalties, such as suspension or expulsion, and conferring club status and all its attendant privileges which no student or student group is entitled to as a matter of right.

Similarly, Respondents' reliance on Healy v. James, 408 U.S. 169 (1972) is also misplaced. There, the Supreme Court held that a university improperly denied a student club application based on an affiliation with a national organization where the national organization was "loosely organized" and had "diverse political and social views." Id. First, this case is inapplicable here as that matter was not brought

under Article 78 and moreover, involved a state college which the Court specifically noted was a "state-supported institution of higher learning." Because that matter involved a state college, the Court examined the students' claims under the First Amendment, an entirely different standard that does not apply to Fordham, a private university. Id. at 180. Further, the college in Healy conceded that the national organization at issue was "loosely organized" and had various factions with different social and political views. Id. at 186. Here, Respondents have adopted the same goals and principles of the national SJP organization. As Dean Eldredge's research showed, the national SJP organization and its various chapters are all mandated to adopt the same view that promotes the "Boycott, Divestment, and Sanctions" of Israel. (R-125, 144, 331).

While Respondents rely on their statements that their SJP chapter would only advocate legal, nonviolent tactics to support their views, they did not and could not establish it was irrational for Dean Eldredge to find this claim unpersuasive given that the materials which he reviewed confirmed that various SJP chapters have utilized illegal and violent tactics in the past. (R-74, 76-78). While no one could foretell the future as to how an SJP chapter would operate on Fordham's campus, Dean Eldredge's review of how other SJP chapters have operated on other college and university campuses was certainly appropriate and well-reasoned, and his decision to exercise caution, especially after the Respondents refused to form a

similar club using a different moniker, was eminently rational. In fact, to ignore this evidence would have been utterly irresponsible by Dean Eldredge and Fordham.

Finally, while the Supreme Court may have disagreed with Dean Eldredge's interpretation of the evidence before him, it was not permitted to insert its own opinion in place of his. A college or university decision can only be overturned if it "shocks one's sense of fairness." Matter of Powers v. St. John's Univ. Sch. of Law, 25 N.Y.3d 210, 216 (2015) (citing Matter of Harris v. Tr. of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959 (1988). Because Dean Eldredge's decision was based on a thorough review of all the facts before him—and, more fundamentally, because no student possesses the right to compel the University to provide funding and its imprimatur to any club he or she so chooses—Dean Eldredge's decision should not have been disturbed.

2. Fordham's Concerns Regarding Safety and Security Provide Permissible Support for its Decision.

Respondents also make a strained attempt to argue that Fordham's concerns about safety and security cannot be the basis for the decision because it was not explicitly mentioned by Dean Eldredge in his brief email informing Respondents of his decision. Brief at p. 22. First, Dean Eldredge was under no obligation to issue a written decision of any kind as none is required by the University Club Guidelines. Additionally, and contrary to Respondents' assertions, as with any college or university, the safety and security of Fordham's students is the University's

paramount responsibility. See Schwarzmueller v. State Univ. of N.Y. at Potsdam, 105 A.D.3d 1117, 1118-1119 (3d Dep't 2013) (upholding the university's determination, even though the university failed to follow all required procedures, because the university needed to preserve campus safety). As seen in his affidavit, there is no dispute that Dean Eldredge thoroughly researched and considered the possible safety and security implications of having an SJP chapter on Fordham's campus. (R-74-78).

The simple fact that Dean Eldredge did not specifically mention the terms "safety and security" in his courtesy email to Respondents is of no moment. He was not required to provide any reasons. Moreover, it is clear from Dean Eldredge's actions and his affidavit that safety and security issues were considered throughout his review of Respondents' application. (R-74-78). There is nothing in the University Club Guidelines that required Dean Eldredge, or any other Fordham official, to provide Respondents with any detail, let alone every detail that went into a decision of whether to accept or deny a student club application. Dean Eldredge's brief email was provided as a courtesy to Respondents and done so in an effort to encourage them to find alternative ways to express their views on campus. (R-81). As such, Respondents claim that Fordham's concerns regarding safety and security were somehow a "post-hoc" rationalization for its decision is simply incorrect.

POINT III

THE SUPREME COURT SHOULD HAVE DENIED RESPONDENTS' MOTION TO AMEND THE PETITION

The Supreme Court also erred in granting Respondents' motion to amend their Petition to add an additional Petitioner, Veer Shetty ("Shetty"), because the proposed petitioner lacked standing, his claims were barred by the applicable statute of limitations, and the proceeding was moot due to the graduation of the last original Petitioner. The Supreme Court entirely failed to consider any of these arguments in opposition to Respondents' motion and instead, merely stated that Respondents' motion to amend was granted "for the reasons set forth in petitioners' motion papers." (R-15).

While Respondents argue that applications to amend the pleadings are within the discretion of the Supreme Court, they ignore the fact that "where the proposed amendment is palpably insufficient or patently devoid of merit, leave to amend should be denied." Darby Grp. Companies, Inc. v. Wulforst Acquisition, LLC, 130 A.D.3d 866, 867 (2d Dep't 2015); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017). "Where no cause of action has been stated to begin with, leave to amend will be denied." Spitzer v. Schussel, 48 A.D.3d 233, 233 (1st Dep't 2008). Further, "the party seeking the amendment has the burden of establishing the merit of the proposal." Manhattan Real Estate Equities Grp. LLC v. Pine Equity NY, Inc., 27 A.D.3d 323 (1st Dep't 2006). Instead of recognizing this principle, the Supreme

Court simply granted Respondents' application without discussion or apparently examining whether Respondents had met their burden or taking into account any of Fordham's well-reasoned arguments in opposition.

1. Proposed Petitioner Shetty Lacks Standing.

To have standing to challenge an administrative decision in an Article 78 action, the petitioner must demonstrate that he has suffered an injury in fact. New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004); Roberts v. Health & Hosps. Corp., 87 A.D.3d 311, 318 (1st Dep't 2011). The alleged injury must be one that is personal to the petitioner, meaning that it is "distinct from that of the general public." Roberts, 87 A.D.3d at 318 (quoting Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 587 (1998)).

It is impossible for Shetty to have suffered an injury from Fordham's 2016 decision because he was not enrolled in the University at the time Respondents submitted their application or when Dean Eldredge made his decision to deny SJP official club status. In fact, Shetty admits in his affidavit that "[i]n January 2018, I commenced my studies at Fordham University." (R-507). As such, he was not at all involved in Respondents' application process, the drafting of SJP's proposed constitution, or any other part of the interactive process during SJP's application.

Additionally, Respondents' claim that Shetty had the right to challenge Dean Eldredge's decision because he wanted to join SJP but was unable to because of

Dean Eldredge's 2016 decision is without merit. Shetty was free to file his own application for club recognition at any time after he enrolled at Fordham in 2018. Shetty could have submitted an application that addressed Dean Eldredge's concerns with the original SJP application. In fact, Shetty does not claim that he ever tried to file any application for club recognition at Fordham. Further, Shetty, like Respondents, was free to express his views regarding Palestine and Israel on Fordham's campus regardless of Dean Eldredge's decision. As such, Respondents' claims that Shetty somehow suffered an injury are entirely without merit.

2. Proposed Petitioner Shetty's Claims Are Not Ripe for Adjudication.

In addition to lacking standing, Dean Eldredge's decision was not final and binding on Shetty and, as such, his claims are not ripe for adjudication. Generally, to challenge a decision under Article 78, the action at issue "must be 'final and binding upon the petitioner.'" Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d 92, 98 (2016) (quoting Walton v. New York State Dep't of Corr. Servs., 8 N.Y.3d 186, 194 (2007)). An action is considered final where "the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." Adirondack Council, Inc. v. Adirondack Park Agency, 92 A.D.3d 188, 190 (3d Dep't 2012) (quoting Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519 (1986)).

As stated above, Shetty was and is free to file his own application for club recognition at any time. Respondents' only argument in this regard is to reiterate

their assertion that Shetty only wants to be a member of a student club called "Students for Justice in Palestine." Brief at p. 25. As explained in detail above, there is nothing in Fordham's policies or procedures that grants Respondents or Shetty the right to start a student club with the name and association of their choosing. Again, official recognition of a student club by Fordham is a privilege not a right. Should Shetty desire to start an official club at Fordham related to advocating for the interests of Palestine, he is free to file his own application that addresses the safety and security concerns outlined by Dean Eldredge. As Fordham has made no decision related to Shetty, his claims are not ripe for adjudication.

3. Proposed Petitioner Shetty's Claims Are Time Barred.

Actions brought to challenge the decision of a college or university under Article 78 are subject to a four-month statute of limitations as set forth in CPLR § 217(1). Benson v. Trustees of Columbia Univ., 215 A.D.2d 255 (1st Dep't 1995); Silverman v. New York Univ. School of Law, 193 A.D.2d 411 (1st Dep't 1993). According to CPLR § 217(1), the statute of limitations begins to run immediately "after the determination to be reviewed becomes final and binding upon the petitioner."

Fordham issued its decision regarding SJP on December 22, 2016, well over two years prior to the filing of Respondents' motion to amend the Petition to add

proposed petitioner Shetty to this action. As such, Shetty's claims are clearly beyond the four-month statute of limitations set forth in Article 78.

In an attempt to overcome this reality, Respondents argue that Shetty's claims relate back to theirs for statute of limitations purposes. Brief at p. 25-26. The relation back doctrine allows a plaintiff or petitioner to "correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired." Giambrone v. Kings Harbor Multicare Ctr., 104 A.D.3d 546, 548, 961 N.Y.S.2d 157, 159 (2013) (internal citation omitted). While the nature of a party's mistake is irrelevant, adding a new party under the relation back doctrine is not permitted where there was no mistake. Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC, No. 652884/2013, 2015 WL 6437570, at *4 (N.Y. Sup. Ct. 2015). A new party plaintiff or petitioner can relate his or her claims back to the original complaint or petition for statute of limitations purposes "only if both claims arise out of the same transaction or occurrence and the new plaintiff and original plaintiff are so closely related or united in interest that the original claim would have given the defendant notice." Fazio Masonry, Inc. v. Barry, Bette & Led Duke, Inc., 23 A.D.3d 748, 749, 803 N.Y.S.2d 729, 730 (3d Dep't 2005); Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC, No. 652884/2013, 2015 WL 6437570, at *5 (N.Y. Sup. Ct. 2015).

There is no question that Respondents did not make a mistake in failing to include Shetty in their original Petition nor could they have. Shetty was not a student at the time of the University's decision in 2016 nor at the outset of this litigation. As such, it would have been impossible to include Shetty in the original Petition.

Further, Shetty's claims do not arise out of the same transaction or occurrence as Respondents' nor can Shetty be said to be united in interest with Respondents' claims such that the University would have had notice of them. Respondents' claims arise out of an application they submitted to the University in 2015 and the University's decision regarding same in 2016, before Shetty was enrolled at the University. Shetty cannot have claims that arise out of an application and decision that was made over a year before he was a student at Fordham. Of even greater importance, Fordham obviously could not have possibly been on notice that Shetty would attempt to assert claims related to Respondents' original application and the University's 2016 decision, as Shetty was not enrolled as a student then or at the time this action was commenced in 2017.

Thus, Shetty's claims do not relate back to Respondents' claims for statute of limitations purposes.

4. Respondents' Petition Should Have Been Dismissed as Moot.

Because the Supreme Court should have denied Respondents' motion to amend the Petition, the Petition should have been dismissed as moot. All

Respondents, except for Respondent Norris, had graduated from Fordham prior to May 2019. (R-510, 536-537). Respondents even admit that when they moved to amend their Petition, Respondent Norris was "scheduled to graduate from Fordham University in May 2019, at the end of the 2018-2019 Academic Year. The other three Respondents [had] already graduated." (R-510, 536-537).

Respondents' arguments as to why their Petition should not have been dismissed as moot are unpersuasive. As stated above, Fordham's decision did not prevent Respondents from expressing their views on campus or from submitting an application to create a different club. Fordham's decision was limited to Respondents' attempt to create a club that Fordham determined would be disruptive and potentially have an adverse impact on the safety and security of its campus.

Finally, if, for example, Shetty or any other student wishes to file an application for official recognition of a similar club and receives a decision that does not permit the club, that decision based on its particular facts and circumstances is capable of being reviewed at that time on that record.

POINT IV

FORDHAM SHOULD BE PERMITTED TO FILE AN ANSWER TO THE PETITION

There is no doubt that the Supreme Court erred by not permitting Fordham to file an answer. CPLR § 7804(f) mandates that the respondent to a petition "may raise an objection in point of law by setting forth in his answer or by a motion to dismiss

the petition." CPLR §7804(f) further states that "[i]f the motion is denied, the court shall permit the respondent to answer." (Emphasis added).

There is no question that, at a minimum, a triable issue of fact exists as to whether Fordham complied with its policies and procedures and whether Dean Eldredge's decision to deny SJP official club status had a rational basis. Not only did the Supreme Court apply the incorrect club approval guidelines in analyzing whether Fordham followed its policies and procedures, but the Supreme Court also overlooked the extensive research and consideration that Dean Eldredge engaged in before making his decision. In doing so, the Supreme Court erred by entirely replacing Dean Eldredge's reasoned analysis with its own. The Supreme Court then compounded the error when it refused to allow Fordham the opportunity to address these issues more fully through an answer and a hearing on the merits. This would have allowed Fordham to explain the Supreme Court's misinterpretation of Fordham's University Club Guidelines as well as provide Fordham with a further opportunity to explain the bases for Dean Eldredge's decision. See Kickertz v. New York Univ., 25 N.Y.3d 942, 944 (2015).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Order of the Supreme Court be reversed, the motion to dismiss the Petition be granted, and Fordham University's decision to deny Respondents' request to form a student club,

Students for Justice in Palestine, on Fordham's Lincoln Center campus, be reinstated. Alternatively, should this Court determine that Fordham's motion to dismiss the Petition was properly denied, then this Court should reverse that portion of the Order that granted Respondents' motion to amend the Petition so as to add Shetty as a party. It should then order that the Petition be dismissed as moot. Finally, at a minimum, the Order should be reversed insofar as Fordham should have been allowed the statutory opportunity to file an answer.

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Respectfully submitted,
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