

*To be Argued by:*  
JAMES G. RYAN  
*(Time Requested: 15 Minutes)*

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**New York Supreme Court**  
**Appellate Division – First Department**

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

*Petitioners-Respondents,*

– against –

FORDHAM UNIVERSITY,

*Respondent-Appellant.*

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**BRIEF FOR RESPONDENT-APPELLANT**

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## QUESTIONS PRESENTED

1. Despite demonstrating that Fordham University followed its official process, as set forth in the University Club Guidelines, did the court nevertheless err in finding that Fordham University failed to substantially comply with its internal policies and procedures in deciding to deny financial support, employee assistance and official recognition to a proposed student club, Students for Justice in Palestine (SJP)?

Respondent-Appellant respectfully submits that the answer to this question is “yes.”

2. Despite providing numerous rational reasons for Fordham University’s denial of Petitioners-Respondents’ application to form a student club on Fordham’s Lincoln Center campus, did the court nevertheless err in finding that the decision of Fordham University, a private university, to deny SJP official club status was arbitrary and capricious?

Respondent-Appellant respectfully submits that the answer to this question is “yes.”

3. Despite the expiration of the applicable statute of limitations and the lack of standing of proposed petitioner, Veer Shetty, did the court nevertheless err in granting Petitioners-Respondents’ motion to amend their petition?



Respondent-Appellant respectfully submits that the answer to this question is “yes.”

4. Did the court err by denying Fordham University its statutory right to file an answer pursuant to CPLR § 7804(f) after denying its motion to dismiss the petition?

Respondent-Appellant respectfully submits that the answer to this question is “yes.”

## NATURE OF THE ACTION

Respondent-Appellant Fordham University (“Fordham” or the “University”) respectfully submits this brief in 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, “Petitioners-Respondents”), to annul Fordham’s decision to deny Petitioners-Respondents’ request to form a student club, Students for Justice in Palestine (“SJP”), on Fordham’s Lincoln Center campus. (R-4-26).<sup>1</sup>

In deciding to grant the Petition, the court erroneously held that Fordham failed to abide by its published policy governing the approval and recognition of student clubs at Fordham. (R-18, 20-21). The court also erroneously held that Fordham failed to provide a rational basis in deciding not to recognize SJP as an official club at Fordham. (R-24). Simply stated, in reaching this decision, the court confused unofficial guidelines, specifically, a process that is set forth in an information packet that is prepared by students, with the University’s official club

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<sup>1</sup> References (“R”) denotes references to the Record on Appeal (the “Record”) that is being filed herewith.

approval process, which is set forth in the University Club Guidelines for establishing a student club. This resulted in the court's incorrect determination that students, rather than the University, had the final say as to what student clubs Fordham would permit, fund, and otherwise support. By doing so, the court necessarily overlooked and misinterpreted Fordham's actual published procedure for the approval and recognition of student clubs. The court also overlooked the extensive research and discussion that took place prior to Fordham making its determination as to Petitioners-Respondents' application and, in doing so, the court exceeded the permissible scope of judicial review of a private university's decision of whether to recognize a proposed student club.

The court also erred in granting Petitioners-Respondents' motion to amend their Petition to avoid the fact that this proceeding was moot since all of the Petitioners-Respondents graduated (or were about to graduate) and no relief could be awarded to them in the summer of 2019. The court permitted the amendment to add a current student (Veer Shetty) as a named petitioner despite the fact that the proposed petitioner lacked standing, his claims were not ripe for adjudication and his claims were barred by the applicable statute of limitations. Finally, given the court's decision to deny Fordham's motion to dismiss the Petition, as a matter of law, Fordham should have been given the opportunity to file an answer. The court nevertheless refused to permit Fordham to exercise that statutory right.

Accordingly, Fordham respectfully requests that this Court reverse the Supreme Court's Order and reinstate Fordham's decision to deny Petitioners-Respondents' application for club status. In the alternative, 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 Petitioners-Respondents' motion to amend the Petition and order that the Petition be dismissed as moot. Finally, at a minimum, Fordham should have been allowed the statutory opportunity to file an answer.

## **STATEMENT OF FACTS**

Fordham, through Keith Eldredge, the Dean of Students at Fordham's Lincoln Center campus ("Dean Eldredge"), denied Petitioners-Respondents' application to establish a Fordham-sanctioned and funded student club which was proposed to be a local chapter of the national organization, Students for Justice in Palestine. Dean Eldredge enumerated many reasons for that decision and had the express, written authority to veto applications by students to form clubs that would be funded, supported and officially sanctioned by Fordham, a private university. (R-65-68, 71-78).

### **University Club Guidelines**

Fordham's Office for Student Involvement is the central hub for all student club activities for undergraduate students at the Lincoln Center campus and Dr. Dorothy A. Wenzel is its Director ("Dr. Wenzel"). (R-178). The Office for Student Involvement provides guidance and support to student leaders looking to build, develop and maintain student clubs. Id.

The opportunity for students to establish and maintain a student club at Fordham is a privilege, not a right. (R-78, 464). Moreover, as a private, Jesuit and Catholic university, Fordham has a significant interest in the types and nature of the student organizations that it permits, funds and otherwise supports. (R-78, 186, 465). As such, Fordham has established a specific club approval process and specific

procedures, set forth in the “University Club Guidelines,” for students who wish to establish a Fordham-supported student club at the University’s Lincoln Center campus. (R-178, 197-202).

Specifically, prospective club leaders must fill out the appropriate paperwork, including a proposed constitution, and submit it to the Operations Committee of a student-run organization known as the United Student Government (“USG”). (R-201). The USG Operations Committee then reviews the proposed club’s constitution and provides recommended edits to the students proposing the club. *Id.* Thereafter, the Director for Student Involvement (here, Dr. Wenzel) reviews the proposed club’s constitution and makes additional recommendations, if necessary. *Id.* Then, when both the Director and the USG Operations Committee are satisfied, the full USG Senate votes on the proposed club. Thereafter, the proposed club’s application is submitted to the Dean of Students (here, Dean Eldredge), who has final veto power, for the last review. *Id.* The University Club Guidelines have controlled this process at all times and under these University Club Guidelines, the Dean has always had final veto power. *Id.* Dean Eldredge and Dr. Wenzel were both operating pursuant to Fordham’s official club registration and approval policy that is set forth in the University Club Guidelines and has been in existence since April 2015. (R-70, 178, 201).

### **Club Registration Packet and USG (Generally)**

At the beginning of the club registration and approval process, the prospective club leaders usually obtain a packet of materials prepared by fellow students who are members of USG in order to aid the prospective club leaders in the application process. (R-179). USG student members prepare the packet as a service to their fellow students to guide them through the club approval process. (Fordham does not prepare the packet.) USG, however, is not a department or office of the University. Id. The members are students who have been elected by their peers. They are not employees of the University. Id. Fordham is not, and was not, involved in the preparation of the information packet. Id.

In the case of the SJP application, USG students prepared and provided Petitioners-Respondents with the aforementioned information packet (the “Club Registration Packet”). Id. Unfortunately, in the case of Petitioners-Respondents and others, the Club Registration Packet that they received from USG in 2015 and 2016 was incorrect in that USG apparently inverted the last two (2) steps in the club approval process by indicating that USG, not the Dean of Students, had final club approval authority. (R-206). As noted, Fordham is not, and was not, involved in the preparation of the information packet. (R-178-180). However, since discovering this transposition error on October 28, 2016, USG amended the Club Registration Packet to contain the correct club approval process as set forth in the University Club

Guidelines, which has been in existence at all relevant times herein and clearly contain the Dean's ultimate veto power as the last step in the club approval process. (R-240).

### **Timeline of Events**

In connection with the SJP application, on October 21, 2015, the USG Vice President of Operations for the 2015-2016 academic year, Amanda Ritchie emailed Gunar Olsen a Club Registration Packet, including an application, as he was interested in forming a local chapter of SJP on Fordham's Lincoln Center campus as an official Fordham student club. (R-204-217).

On November 19, 2015, four undergraduate Fordham students, including Petitioner-Respondent Ahmad Awad, submitted a proposed constitution to establish a student SJP club at the Lincoln Center campus. (R-33, 256-260).

Although SJP submitted the materials to USG in November 2015, due to an internal delay at USG, USG did not provide Dr. Wenzel with a copy of SJP's application and proposed constitution until shortly before the University's spring break in March 2016. (R-181-182, 262-273). The University was not involved in this delay. (R-181-182). On April 5, 2016, Petitioner-Respondent Awad, as the proposed president for the SJP chapter, wrote to Dr. Wenzel seeking a status update as to his request to establish the SJP chapter. (R-275-276). In Petitioner-Respondent Awad's email he says: "But we've been quite disappointed that we haven't heard back from



anyone from USG, especially because it's been several months since we submitted everything on November 20." (R-275). Dr. Wenzel immediately responded to Petitioner-Respondent Awad via email on April 6, 2016 indicating to him that she had not received a copy of SJP's proposed club constitution until shortly before the University's spring break in March 2016 and that, pursuant to the club approval process, she desired to schedule a meeting with the interested students and USG. (R-275-276).

At this juncture, and as specifically set forth in the University Club Guidelines, a robust, interactive dialogue occurred among the prospective club leaders, the USG Operations Committee and Dr. Wenzel as the Director for Student Involvement. (R-182). The purpose of this dialogue was: (1) to review the proposed club's constitution; (2) discuss the proposed club's function, overall mission, future purpose, and potential effect on the campus community; (3) eliminate any redundancies with other clubs; and (4) suggest appropriate modifications to the proposed constitution, if necessary. Id.

In that regard, on April 26, 2016, Dr. Wenzel, along with USG Vice President of Operations for the 2015-2016 academic year, Ms. Ritchie, met with Petitioner-Respondent Awad and Christina Napolitano, a proposed member of SJP. (R-182). The parties discussed the national SJP organization and how the proposed campus club would be affiliated with the national organization, if at all. Id. The approval

process then went into a natural hiatus due to the end of the academic year and summer recess. Id.

On September 7, 2016, Mr. Olsen, on behalf of Petitioner-Respondent Awad and other students emailed Kayla Wolf, the new USG Vice President of Operations for the 2016-2017 academic year, requesting an update on the proposed club's status. (R-183). Ms. Wolf, on behalf of USG, immediately responded to the students to acknowledge the email. (R-278-279).

On September 20, 2016, Dr. Wenzel emailed Petitioner-Respondent Awad confirming that Ms. Wolf would be the proposed club's contact person at USG for the 2016-2017 academic year. (R-281-282). She also asked for written confirmation that the national SJP organization did not require anything from the proposed local chapter. (R-183). Dr. Wenzel asked to meet again to discuss issues about proposed programming and the group's constitution. Id.

As Petitioners-Respondents recognized, “[o]ver the next couple of weeks, Petitioner[-Respondent] Awad and other students interested in starting SJP responded to follow-up email inquiries from administrators on routine matters and requested to meet with USG and Fordham administrators.” (R-35). As more fully set forth below and in the Wenzel Affidavit, this interactive process is not unusual at Fordham. (R-183).

On October 5, 2016, students interested in forming SJP (Petitioner-Respondent Awad, as well as other interested students) met with Dean Eldredge, Ms. Wolf, and Dr. Wenzel. (R-183-185). Also, on October 5, 2016, Ms. Wolf of USG emailed Mr. Olsen a new Club Registration Packet and a fast track constitution to further the application process and help with any edits. Id.

On October 17, 2016, SJP submitted an updated constitution. (R-284-289).

On October 27, 2016, students interested in forming SJP, including Petitioner-Respondent Awad, Petitioner-Respondent Sofia Dadap, and Petitioner-Respondent Sapphira Lurie met with the proposed club's faculty advisor, Glenn Handler, and the USG Operations Committee. (R-186). This meeting was scheduled, in part, as a result of the USG Operations Committee's review of SJP's proposed constitution. Specifically, the student run USG Operations Committee had questions about the local chapter's relationship to the national organization and wished to speak with the interested members in person. (R-186). The University was not involved in this meeting.

The USG Operations Committee then (as the next step in the approval process) reviewed SJP's proposed constitution and submitted it to the USG Senate for approval. (R-188).

On November 17, 2016, the USG Senate voted to approve SJP as a student club at the Fordham University's Lincoln Center campus. (R-200). Ms. Wolf

communicated this decision to Dean Eldredge shortly thereafter. (R-199). On the same date and in accordance with the University Club Guidelines, Dean Eldredge wrote to the Petitioners-Respondents and other students saying that he was informed of USG's decision to approve the SJP club and that he now would review SJP's application for club status in accordance with those University Club Guidelines. (R-302).

Dean Eldredge's deliberation regarding the SJP affiliate lasted several weeks, during which he spent numerous hours: (1) thoroughly reviewing Petitioners-Respondents' student club application; (2) thoroughly reviewing materials submitted by other interested individuals; (3) researching SJP as an organization; and (4) engaging in discussions with: (a) Petitioners-Respondents and other students attempting to establish SJP; (b) members of the Fordham community, including students interested in the matter; (c) administrators at other institutions with SJP affiliated chapters; (d) Fordham faculty with relevant insight and/or expertise; and (e) other professionals and experts with knowledge and expertise on SJP as relating to the Israeli-Palestinian conflict. (R-72-78, 88-175).

On December 22, 2016, after a lengthy review of the application and associated information as well as materials submitted by others, independent and extensive research into the organization at issue, interviews of various people with knowledge of SJP, numerous Fordham constituencies and others including many of

the Petitioners-Respondents, and extensive research online and elsewhere, Dean Eldredge denied SJP official club status at the Lincoln Center campus. (R-81). In correspondence with the proposed club representatives, Dean Eldredge provided some of his concerns:

After consultation with numerous faculty, staff and students and my own deliberation, I have decided to deny the request to form a club known as Students for Justice in Palestine at Fordham University. While students are encouraged to promote diverse political points of view, and we encourage conversation and debate on all topics, I cannot support an organization whose sole purpose is advocating political goals of a specific group, and against a specific country, when these goals clearly conflict with and run contrary to the mission and values of the University.

There is perhaps no more complex topic than the Israeli-Palestinian conflict, and it is a topic that often leads to polarization rather than dialogue. The purpose of the organization as stated in the proposed club constitution points toward that polarization. Specifically, the call for Boycott, Divestment and Sanctions of Israel presents a barrier to open dialogue and mutual learning and understanding.

In a statement announcing their vote to approve the club, United Student Government at Lincoln Center acknowledged the need for open, academic discussion and the promotion of intellectual rigor on campus; however, I disagree that the proposal to form a club affiliated with the national Students for Justice in Palestine organization is the best way to provide this. I welcome continued conversation about alternative ways to promote awareness of this important conflict and the issues that surround it from multiple perspectives.

Id. (Emphasis added).

Petitioners-Respondents filed this Article 78 proceeding on April 26, 2017. (R-28-50). Fordham filed a motion to dismiss the Petition on June 5, 2017. (R-62-

388). On November 2, 2017, Petitioners-Respondents filed a motion brought by order to show cause seeking a preliminary injunction enjoining Fordham from interfering with USG's decision to approve SJP and also sought expedited discovery. (R-482-485). Petitioners-Respondents filed a motion to amend the Petition on February 8, 2019 seeking to add an additional petitioner. (R-505-506). Fordham opposed both motions. (R-496-499). On July 29, 2019, the Supreme Court issued an Order: (i) granting Petitioners-Respondents' motion to amend the Petition; (ii) denying Fordham's motion to dismiss the Petition; (iii) granting the Petition (without permitting Fordham to file an answer) and directing Fordham to recognize SJP as an official University club; and (iv) denying Petitioners-Respondents' motion for a preliminary injunction as academic. (R-7-26). After receipt of a Notice of Entry, Fordham served and filed a Notice of Appeal on August 30, 2019. (R-2-3).

## **ARGUMENT**

### **POINT I**

#### **FORDHAM FOLLOWED ITS PUBLISHED POLICY IN DENYING SJP OFFICIAL CLUB STATUS**

New York courts have consistently held that courts have a “‘restricted role’ in reviewing determinations of colleges and universities.” Matter of Powers v. St. John’s Univ. Sch. of Law, 25 N.Y.3d 210, 216 (2015) (citing Maas v. Cornell Univ., 94 N.Y.2d 87, 92 (1999)). According to the New York Court of Appeals, a college or university’s 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.” Id. (citing Matter of Harris v. Tr. of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959 (1988); Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 234 (1974)).

The Court of Appeals has also determined that “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, 94 N.Y.2d at 92. 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). Further, 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). “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.” Id. at 485; see also Maas v. Cornell Univ., 94 N.Y.2d 87, 91 (1999).

In this case, the court initially recognized that the procedures outlined in the University Club Guidelines granted Dean Eldredge, as the Dean of Students, the final authority to exercise a veto regarding a club’s recognition or approval. (R-9, 21). The court erred, however, in holding that Fordham failed to comply with its own rules when Dean Eldredge exercised that authority. (R-18, 20-21). Further, despite evidence of a lengthy review and inquiry by Dean Eldredge into SJP and the experience other colleges and universities have had with SJP chapters, and his commensurate concerns regarding the safety and security of the Fordham community, the court simply disagreed with Dean Eldredge’s determination to deny SJP official club status and found that such determination was arbitrary and capricious. (R-23-24). In doing so, the court ignored the numerous steps and detailed actions that Dean Eldredge undertook in his deliberations.



In arriving at its determination, the court necessarily exceeded its limited role of reviewing Fordham's determination and in so doing, substituted its opinion for that of Dean Eldredge, a senior, experienced professional, who has held his current position as Dean of Students for over 11 years and has been part of Fordham's Administration for over 20 years. (R-65).

“In academic communities greater freedoms may prevail than in society at large and the subtle fixing of these limits should, to a great degree, be left to the educational institution itself.” Jones v. Vassar Coll., 59 Misc.2d 296, 299 (Sup. Ct. Dutchess Cnty. 1969) (“The judiciary must exercise restraint in questioning the wisdom of specific rules or the manner of their application, since such matters are ordinarily in the prerogative of school administrators rather than the courts.”). A court's scrutiny of a college or university's determination regarding a matter involving its students, or student organizations, is restricted to finding whether the college or university complied with its rules and guidelines. See Rensselaer Soc. of Engineers v. Rensselaer Polytechnic Inst., 260 A.D.2d 992, 993 (3d Dep't 1999).

“The university's decision ‘must be annulled only where there has been a lack of substantial compliance, or where the determination lacks a rational basis... [p]erfect adherence to every procedural requirement is not necessary to demonstrate substantial compliance.’” Doe v. Cornell Univ., 59 Misc.3d 915, 926 (Sup. Ct. Tompkins Cnty. 2017), aff'd, 163 A.D.3d 1243 (3d Dep't 2018) (citing Doe v.

Skidmore Coll., 152 A.D.3d 932, 935 (3d Dep't 2017)). In Doe v. Cornell University, the court dismissed a student's petition to annul the university's determination that the student was responsible of sexual misconduct, finding that although the university had not perfectly adhered to every requirement of its rules and regulations, substantial compliance was all that was required to avoid annulment of the determination. Id. at 926-34; see also Ebert v. Yeshiva Univ., 28 A.D.3d 315, 315 (1st Dep't 2006) (finding that the university substantially complied with its own rules even though student was not given the opportunity to confront his accusers at a disciplinary hearing).

Here, the court went beyond its limited scope of review when it held that Fordham failed to comply with its governing rules and procedures. (R-17-18, 20-21). In arriving at this determination, the court relied on the wrong policy (specifically, that which is set forth in the USG student-created Club Registration Packet) to reach its decision. The court then compounded that error when it concluded that Dean Eldredge had previously approved the SJP affiliate club status before the USG vote took place. The court's finding in this regard was, simply put, factually wrong. (R-9, 12, 21).

### **1. Fordham Fully Complied With its Governing Club Guidelines.**

According to the Club Registration Process outlined in Section 8(h) of the University Club Guidelines, Dean Eldredge, as the Dean of Students, has the

authority to veto any new student club. (R-201). The official University Club

Guidelines outline the actual procedures as follows:

**SECTION 8. Club Registration Process**

- a. All prospective Club leaders must submit a New Club Meeting Request form online to the USG Operations mailbox in order to begin the registration process.
- b. The USG Vice President of Operations, or a delegate, shall then meet with prospective Club leaders to discuss in detail their goals for the prospective Club and give them a Club Registration Packet.
- c. The prospective Club leaders must fill out the Club Registration Packet in its entirety and submit it to the USG Operations committee for review.
- d. The Constitution will be edited by the Operations Committee and returned to the prospective Club leaders for review.
- e. The edited Constitution will then be submitted again to the Operations Committee and after passing review will be given to the Director for Student Involvement for review.
- f. The Director for Student Involvement may approve or deny the Constitution.
- g. Approval means the Constitution goes to the USG Senate for review. If the Senate passes it, the Club becomes a new club on probation.
  - i. Denial means the prospective Club leaders must edit the constitution again and repeat the process for review by the Director for Student Involvement.
- h. Dean of Students has a right to veto any new club.
- i. Following USG Senate approval, the Club will go on 14 weeks probation during which they may only submit two budget appeals to SABC per month.
- j. At the end of the 14 weeks probation, the President or representative designee of the Club shall meet with the USG Vice President of Operations for an end of probation review, where the Club could be designated

active, or go defunct based on the guidelines set forth in Section 1.

- i. Probation could be extended, pending a case by case review.

(R-201) (emphasis added).

At no time during the process while the student club status and recognition of the SJP affiliate were pending did Fordham, through its Dean of Students or otherwise, fail to follow these exact procedures. As the Director for Student Involvement, Dr. Dorothy Wenzel, outlined in her June 5, 2017 Affidavit, Fordham follows these procedures in the same order as they are listed in the official University Club Guidelines. (R-178-179, 201). Dr. Wenzel declared this process as follows:

These Club Guidelines also contain the club approval process that Fordham has in place and has been following since April 2015 on the Lincoln Center campus. Specifically, prospective club leaders must fill out the appropriate paperwork and submit it to a committee of the United Student Government ("USG") known as the USG Operations Committee. The USG Operations Committee reviews the proposed club's constitution and provides recommended edits to the students requesting the club. Thereafter, I, as the Director for Student Involvement, review the proposed club's constitution and make additional recommendations if necessary. Then, when both I and the Operations Committee are satisfied, the full USG Senate votes on the proposed club. Thereafter, the proposed club's application is submitted to the Dean of Students (Dean Eldredge) for the final determination. . . . Contrary to [Respondents'] allegation and as indisputably set forth in the University's Club Guidelines, USG is not the sole entity authorized to approve student groups. [] I, along with USG, generally work with groups of interested students to formulate a constitution, develop

a defined mission, explore and avoid overlap with an existing club and partner/join existing clubs if the missions or purposes of both groups are somewhat aligned. In accordance with the Club Guidelines, the proposed application is then approved or denied by the USG Senate. Finally, the proposed application is then approved or denied by the Dean of Students in accordance with the Club Guidelines. Review by the Dean is the final step in the club application process.

Id. (Emphasis added).

Importantly, the court initially correctly recognized that the University Club Guidelines granted Dean Eldredge the authority to veto any new club. (R-9) (“Section 8(h) of the Guidelines provide[] that the Dean of Students has a right to veto any new club.”). However, the court then applied the inaccurate process set forth in the USG student prepared Club Registration Packet (which incorrectly inverted the last two steps in the club approval process) and held that Fordham violated its own rules by permitting the Dean to overrule a vote of USG. (R-18). The court was mistaken. The University Club Guidelines, which set forth the University’s official club approval process, specifically delineate both the scope of the Dean’s power and when that power is to be exercised. (R-201-202).

It is thus clear from the Record, that Dean Eldredge, as the Dean of Students and final arbiter in the determination, had the authority to veto the SJP affiliate as a student club at Fordham’s Lincoln Center campus. (R-9, 21, 178-179, 201). Dean Eldredge, in fact, exercised this authority after a lengthy and deliberate review of the

club's application. (R-81, 201). In making this determination, as seen above and in the Record, the Dean considered several factors, conducted his own research, and had discussions with numerous individuals interested in the matter, as well as with professionals well versed in the Israeli-Palestinian conflict that gave rise to the national SJP organization. (R-72-76). Just as USG and Dr. Wenzel can choose to approve or deny a proposed club's constitution under the governing University Club Guidelines, Dean Eldredge, as the last link in the process, can veto club status to any new club under those same governing University Club Guidelines. (R-201).

## **2. The Court Incorrectly Applied the Process Set Forth in the USG Created Club Registration Packet to Reach its Decision.**

It is beyond debate that both the court and Petitioners-Respondents mistakenly cite to USG's Club Registration Packet, specifically, Section I of the 2016-2017 Fordham University Lincoln Center Campus USG Operations Committee Club Registration Process as the governing club approval procedures. (R-9-10, 36, 221). However, as explained in Fordham's motion to dismiss, the Petition as well as the affidavits of Dean Eldredge and Dr. Wenzel, and their attached exhibits, the procedures outlined in the USG Club Registration Packet simply are not the governing guidelines for club registration and approval at Fordham. (R-70, 178-179). The student-prepared USG Club Registration Packet outlined incorrect procedures because USG inverted the last two (2) steps in the club approval process by erroneously indicating that USG, not the Dean of Students, had final approval

authority. Id. Simply put, the court did not appreciate the import of this very impactful transposition error.

The court also did not appreciate that the student-created error, however, ultimately had no effect on SJP's application. To be clear, this discrepancy resulted in no harm to Petitioners-Respondents because the official University Club Guidelines have been consistent throughout this process and always indicated the proper club approval process. Petitioners-Respondents became aware early in the SJP application process that the Club Registration Packet erroneously provided by USG did not contain the University's governing procedures. (R-70-71, 180). They learned this well before any required determinations under the official University Club Guidelines were made. Id.

Specifically, the formal club approval process for SJP had not yet begun in that neither USG nor the Dean had voted on Petitioners-Respondents' application at the time that the discrepancy between the students' Club Registration Packet prepared by USG and the University Club Guidelines was discovered on October 28, 2016 (R-70-71, 180). Additionally, Petitioners-Respondents were immediately informed of the correct club approval process set forth in the University Club Guidelines nearly a month prior to any deliberations by USG on their application and well before the final decision of the Dean of Students was made in December 2016. In fact, USG recognized and independently took steps to rectify its error when

the then USG President Leighton Magoon, specifically notified Petitioners-Respondents of this discrepancy between the University Club Guidelines and the USG Operations Committee Club Registration Packet that was originally given to Petitioners-Respondents. (R-188, 253-254). In his email to Petitioners-Respondents, dated October 31, 2016, the USG President corrected USG's error by providing the actual University Club Guidelines, including Dean Eldredge's authority to veto any new club, to properly reflect the club approval process. (R-253-254).

Therefore, Petitioners-Respondents and the other students interested in joining SJP were on notice that the actual approval sequence, as set forth in the official University Club Guidelines, necessarily involved a further review by the Dean of Students, which had not occurred at the time of the USG vote in November 2016. (R-253-254). As a result, Petitioners-Respondents become aware of and were on actual notice of Dean Eldredge's authority to veto any new student club before any USG deliberations regarding the SJP club application took place. (R-180, 253-254). Additionally, Dean Eldredge emailed Petitioners-Respondents on the same day that the USG vote approving the club occurred to remind Petitioners-Respondents that he still had to conduct the final review of the request. (R-71, 86) ("I was informed that the United Student Government voted to approve the Students for Justice in Palestine club earlier today. As you know, I now need to review the request before it is finalized.") (R-86).



Nevertheless, still citing to the erroneous USG Club Registration Packet, the court found that Fordham did not abide by its own published rules and “deviat[ed] from usual practice” because it “imposed an additional tier of review, by a dean.” (R-20-21). As seen above, the court was simply wrong. Review by the Dean of Students is not only not a “deviation from practice”, it expressly is the practice as set forth in by the University Club Guidelines. (R-20-21, 201).

In sum, the University Club Guidelines, which is the only relevant official policy and procedure for the University with regard to student club approval, set forth the proper approval process at all relevant times herein. Governing law dictates that because the University carefully and completely followed its policy, the court should not second-guess the club approval and deliberation process that took place at the University or substitute its judgment for that of University officials. There simply was no basis for the court to disturb the University’s decision, and the Petition should have been dismissed. See, e.g., Hyman v. Cornell Univ., 82 A.D.3d 1309, 1310 (3d Dep’t 2011) (upholding university’s disciplinary decision where there was “no indication that respondent deviated from its procedures, and its determination is amply supported by the evidence”); Ebert v. Yeshiva Univ., 28 A.D.3d 315, 315 (1st Dep’t 2006) (affirming university’s expulsion decision where university proceeded in accordance with and substantially observed its disciplinary policies and procedures); Zartoshti v. Columbia Univ., 79 A.D.3d 470, 471 (1st Dep’t 2010)

(upholding two-year suspension where private university substantially complied with its own guidelines and petitioner demonstrated no prejudice resulting from the deviation from literal compliance with handbook procedures); Fernandez v. Columbia Univ., 16 A.D.3d 227, 228 (1st Dep’t 2005) (upholding disciplinary sanction where private university “substantially abided” by its own governing rules and regulations); Al-Khadra v. Syracuse Univ., 291 A.D.2d 865, 866 (4th Dep’t 2002) (respondent substantially adhered to the procedures outlined in its Judicial System Handbook).

### **3. The Court Improperly Applied Fordham’s Mission Statement.**

In its Order, the court also improperly cited to Fordham’s 2005 Mission Statement to support its conclusion that Dean Eldredge did not have the power to veto a new student club. (R-22-23). Fordham’s Mission Statement “guarantees the freedom of inquiry required by rigorous thinking and the quest for truth....seeks to foster in all its students life-long habits of careful observation, critical thinking, creativity, moral reflection and articulate expression... (and) seeks to develop in its students an understanding and reverence for the cultures and ways of life other than their own.” Id.

Nowhere in the Mission Statement does Fordham create a right for students to have any student club of their choosing, which would receive the funding, meeting space and the supervision of a faculty member or administrator that officially

recognized student clubs at Fordham enjoy. Denial of Petitioners-Respondents' application, which occurred only after a full and robust discussion with them, their supporters, those opposed and those who took no position, and after carefully reviewing any and all materials that Dean Eldredge obtained or that were provided to him, in no way impacted the spirit or the express terms of the University's Mission Statement. Petitioners-Respondents remain free to promote their views, associate with and enjoy the company of like-minded individuals and otherwise support the views of SJP. As set forth in the December 2016 decision, as well as his June 5, 2017 Affidavit, Dean Eldredge acknowledges and supports continued conversation about "alternative ways to promote awareness of this important [Israeli-Palestinian] conflict and the issues that surround it from multiple perspectives." (R-67). He simply disagreed that the proposal to form an SJP student club was the best way to provide for this discussion because of the potential for disruption on campus. Id. "However, to be absolutely clear, I welcomed, and continue 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. Petitioners-Respondents also

were presented with the option of having a club to explore these views, but without any affiliation with SJP, but did not accept that option. Thus, the fact remains that Petitioners-Respondents' ability to discuss these issues is not impacted in any manner by Dean Eldredge's decision. They simply cannot do so under the banner of affiliation that they insist on utilizing.

Moreover, Fordham's Mission Statement is not mentioned in the official University Club Guidelines. Fordham's Mission Statement is simply not a factor, nor part of the procedure, in determining whether a proposed student club will be officially recognized at Fordham. By effectively incorporating Fordham's Mission Statement as part of the University Club Guidelines, the court deviated from Fordham's official University Club Guidelines and implemented a new level of review.<sup>2</sup>

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<sup>2</sup> The court did in this same discussion, however, properly note that Fordham is not a public university it is therefore not subject to the First Amendment. (R-22). As such, Petitioners-Respondents' First Amendment rights are not at issue on this appeal.

#### **4. Dean Eldredge Did Not Approve the Proposed SJP Club Before the USG Vote.**

The court also erred in concluding that Dean Eldredge previously had approved the SJP affiliate as a student club before the USG vote on the resolution took place and that USG was to subsequently vote on the request. (R-12, 21) (“Prior to November 17, 2016, the Director of the Office for Student Involvement and the Dean of Students approved SJP’s constitution, and forwarded the relevant packet to USG, thus clearing the way for USG to vote on a resolution for final approval.”) (R-12). Again, this is simply incorrect. The Record is wholly devoid of any evidence that Dean Eldredge had, at any time prior to the USG vote, approved, or made any determination regarding the SJP affiliate or its constitution.

The Record further shows that Fordham fully and completely followed all other procedures outlined in the University Club Guidelines. USG and Dr. Wenzel engaged in an interactive process by meeting with Petitioners-Respondents to discuss in detail the proposed club’s goals, helping Petitioners-Respondents and other interested potential members in editing SJP’s constitution, and submitting the constitution to a USG vote. (R-181-189). In fact, despite USG’s request to do so, Dean Eldredge specifically did not take any action prior to the USG Senate vote. (R-187). According to Dr. Wenzel, the USG Executive Board asked Dean Eldredge to make a final decision on SJP’s status prior to the USG Senate vote because “due to the controversy generated by the [SJP] application among the students at the Lincoln

Center campus, the USG members did not want to take a full vote.” Id. In other words, they wanted to avoid making the decision. After discussing with Dean Eldredge, Dr. Wenzel “reiterated to the students how important it was to comply with the University’s club approval policy and procedure, that is, the Club Guidelines.” Id.

In view of these facts, it is evident that the court erred in finding that Fordham failed to comply with its policies and procedures.

## POINT II

### **FORDHAM’S DECISION TO DENY SJP OFFICIAL CLUB STATUS WAS RATIONALLY BASED**

As noted, the Court of Appeals has long held that in the context of an educational institution’s determinations that are unrelated to academic achievement, the standard of review is “whether the institution has acted in good faith or its action was arbitrary or irrational.” Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 658 (1980); Quercia v. N.Y. Univ., 41 A.D.3d 295, 296 (1st Dep’t 2007) (where this Court held that it is well established that judicial review of a college or university’s non-academic determination is restricted to whether the determination was arbitrary and capricious). “Administrative 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).

New York courts have held that a college or university’s determination should not be disturbed if it “was based upon the exercise of honest discretion after a full review of the operative facts” and thus, “it was neither arbitrary nor capricious so as to warrant judicial intervention.” Matter of Galiani v. Hofstra Univ., 118 A.D.2d 572 (2d Dep’t 1986). “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); see also Ibe v. Pratt Inst., 151 A.D.3d 725, 726 (2d Dep’t 2017).

For example, in Beta Sigma Rho v. Moore, the court found that the Board of Trustees did not act arbitrarily or capriciously in adopting a resolution banning all sororities and fraternities from its universities because it had a reasonable basis for the adoption of the resolution after the court reviewed all the steps which led to the enactment of the resolution. Beta Sigma Rho v. Moore, 46 Misc.2d 1030, 1033 (Sup. Ct. Erie Cnty. 1965) (these steps included a survey and study that were conducted

for over a year before the adoption of the resolution and which were subsequently submitted to the Board of Trustees for review before making a determination). The court further noted that “it [was] not for the court to substitute its judgment for that of the Trustees on a matter of educational policy.” Id. at 1035.

Colleges and universities must make determinations that are consistent with the responsibility of ensuring the safety and welfare of its students and campuses, and such determinations are not arbitrary or capricious. See Harte v. Adelphi Univ., 63 Misc.2d 228, 230 (Sup. Ct. Nassau Cnty. 1970) (finding that the patterns of unrest and occasional violence in colleges and universities at that point in time were sufficient to uphold the university president’s determination to take “precautionary measures” and cancel classes); see, e.g., Schwarzmuller 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).

Further, colleges and universities have a duty, as well as the authority, to maintain supervision and control over their institutions. Schuyler v. State Univ. of N.Y. at Albany, 31 A.D.2d 273, 275 (3d Dep’t 1969); Spatol v. Barton, 69 Misc.2d 35, 39 (Sup. Ct. Monroe Cnty. 1972). Therefore, universities may determine to adopt resolutions, as they deem necessary, which include the outlawing of extracurricular clubs and student organizations. See, e.g., Beta Sigma Rho v. Moore, 46 Misc.2d at



1035; Delta Kappa Epsilon Alumni Corp. v. Colgate Univ., 11 Misc.3d 1060(A), (Sup. Ct. Madison Cnty. 2006); see also Widmar v. Vincent, 454 U.S. 263, 278 (1981) (Stevens, J., concurring) (“Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities” and thus, “it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity.”)

A university’s power of supervision and control over its institution, including its students and student organizations, can be lost when the student organizations involve ties that are not local in nature and are responsible to, and governed by, a non-university authority. See Beta Sigma Rho, 46 Misc.2d at 1033 (citing the report the Board of Trustees used to make its determination). Where a student social club is local to the university, the university can easily control the student club’s “formal policies and informal practices through observations, consultation and regulation, for policies are there made locally. But where such a group is only a segment of a national organization, it loses the power to make its own policies and, instead, must be bound by those determined by the national.” Id. at 1034 (citing the report). The court in Beta Sigma Rho, found that the Board of Trustees’ determination to ban all social clubs from its university was well grounded on the use of this report. Id. at 1035.

Here, Fordham’s determination, through Dean Eldredge, was neither arbitrary nor capricious because it was grounded upon a rational basis. In overturning that decision, the court improperly substituted its own opinion for that of Dean Eldredge, Fordham’s Dean of Students. (R-23-24, 72-78). In doing so, the court exceeded its scope of review and misinterpreted key facts that were crucial to the Dean’s determination.

**1. The Court Mistakenly Ignored Dean Eldredge’s Full Review of the Operative Facts and Exercise of Honest Discretion.**

In holding that Dean Eldredge’s determination was arbitrary and capricious, the court ignored the numerous steps that Dean Eldredge took during his lengthy and deliberate review of the proposed club’s application, which are reflected in the Record. (R-23-24, 72-78). The court’s analysis and determination also conflict with cases involving very similar issues. See, e.g., Beta Sigma Rho v. Moore, supra.; Delta Kappa Epsilon Alumni Corp. v. Colgate Univ., supra.

Since Dean Eldredge’s determination was supported by a rational basis, it should have been upheld. Bondalapati v. Columbia Univ., 170 A.D.3d 489, 490 (1st Dep’t 2019). It is beyond dispute that Dean Eldredge conducted a thorough and careful determination which “was based upon the exercise of his honest discretion after a full review of the operative facts.” Matter of Galiani v. Hofstra Univ., 118 A.D.2d 572 (2d Dep’t 1986) (R-72-78). As noted in more detail above, Dean Eldredge’s deliberation regarding the SJP affiliate lasted several weeks, during

which he spent numerous hours: (1) thoroughly reviewing Petitioners-Respondents' student club application; (2) thoroughly reviewing materials submitted by other interested individuals with diverse viewpoints; (3) researching SJP as an organization; and (4) engaging in full and robust discussions with: (a) Petitioners-Respondents and other students attempting to establish the proposed SJP club at Fordham; (b) members of the Fordham community, including students interested in the matter, those opposed and those who took no position; (c) administrators at other institutions with SJP-affiliated chapters; (d) professors; and (e) other professionals and experts with knowledge and expertise on SJP and its interaction with the Israeli-Palestinian conflict and the BDS movement. (R-72-78, 88-175). Dean Eldredge thoroughly vetted Petitioners-Respondents' application, their position and the position of their supporters. In that same spirit, the contrasting viewpoints of other members of the Fordham community were equally vetted and this process of engagement, exploration and investigation took many hours over several weeks. Id.

In fact, as noted, immediately after the USG vote in November, Dean Eldredge contacted the students interested in establishing an SJP-affiliated club and requested to meet with them before he made a final decision on the request. (R-75, 114). Dean Eldredge and Dr. Wenzel met with those students on December 12, 2016 and discussed the status of Dean Eldredge's review. (R-75). The students requested

an answer as to the status of their club application before the end of the semester, which Dean Eldredge agreed to provide. Id.

In the course of his deliberations, Dean Eldredge contacted Rev. Robert Grimes, S.J., Associate Professor and Dean of Fordham College at Lincoln Center, about speaking with individuals on all sides of the issue to get further insight. (R-73, 105) (“I want to hear all sides of the argument – preferably from folks who will be somewhat measured and objective as they advocate for their position.”) Fr. Grimes suggested that Dean Eldredge speak to Kathryn Kueny, Professor of Theology, Magda Teter, Chair in Judaic Studies and Professor of History, and John Entelis, Professor of Political Science and Middle East Studies. (R-73-74, 105). Dean Eldredge spoke to all three of those individuals and discussed their concerns, knowledge and thoughts on the issue, and the individuals suggested others with whom he could speak regarding the matter. (R-74-75, 107-109, 111-112).

Dean Eldredge also met and spoke with other persons interested in the matter who had both objective and subjective views on the matter. These individuals included Glenn Handler, Chair of the English Department and the proposed SJP faculty advisor, Jason Morris, Ph.D., an Associate Professor of Biology and Faculty Advisor for Fordham University Hillel, Fr. Patrick Ryan, Laurence J. McGinley Professor of Religion and Society, and the Jewish Student Organization (“JSO”). (R-72-75).

Dean Eldredge agreed to meet with students from JSO, at their request, and listened to their concerns regarding the proposed SJP-affiliated club. (R-72, 88-90). JSO provided Dean Eldredge with various materials including “eviction notices” that were allegedly placed under the doors of Jewish students at New York University by members of that institution’s SJP-affiliated chapter, a sampling of specific SJP attempts to seriously disrupt campus events at institutions across the country,<sup>3</sup> and a letter from Secretary of State Hillary Clinton expressing her alarm over the Boycott, Divestment, and Sanction movement to isolate the State of Israel. (R-91-100). Importantly, however, in his Affidavit, Dean Eldredge clarified that he agreed to meet with JSO, only “to have them involved in looking at how the dialogue related to the Palestinian issues could be as inclusive as possible and to determine what effect, if any, allowing an SJP chapter could have on campus” and “not to give them a role in the approval or denial of the club.” (R-73). Throughout this time, Dean Eldredge also received correspondence, reviewed submissions from interested persons and conducted his own independent research on the matter. (R-75, 116-175).

The court, however, not only failed to acknowledge these many steps, it inexplicably found that Dean Eldredge came to his decision only “after input from

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<sup>3</sup> Included were events that allegedly occurred at Georgetown University, University of California Irvine, Stanford University, Boston University, University of New Mexico, San Francisco State University, Manhattanville College, University of California Davis, Florida International University, University of South Florida, University of Tennessee, University of Chicago, Northwestern University, Brown University, University of Texas, Austin, Johns Hopkins University, University of California Santa Cruz, Goucher College, and University of Minnesota.

others who are critical of SJP’s political beliefs.” (R-21-22). The mere fact that, after engaging in a comprehensive and exhaustive review of their application and the input from all concerned, Dean Eldredge did not agree with Petitioners-Respondents or others who supported the creation of a Fordham-sanctioned SJP chapter simply does not equate to a conclusion or supposition that the decision is irrational. (R-24, 72-78). It is clear from the Record that Dean Eldredge received input from individuals with a variety of views, both for and against SJP, as well as those with objective views on the matter and thus, that his decision was clearly rational.

**2. The Court Erred in Concluding that Dean Eldredge Failed to Express a Rational Basis for His Determination.**

The court concluded that Dean Eldredge did “not provide a rational basis for concluding that SJP might encourage violence, disruption of the university, suppression of speech, or any sort of discrimination against any member of the Fordham community based on religion, race, sex, or ethnicity” and that Dean Eldredge’s “only articulated concern was that SJP singled out one particular country for criticism and boycott.” (R-23). This holding is unfounded, as Dean Eldredge expressed a rational basis for determining that an SJP affiliate on Fordham’s campus could cause any of these issues based on all the research and interviews that he conducted during his thorough and careful deliberation. Dean Eldredge based his decision on the reported conduct of other SJP-affiliated chapters on other campuses, which gave him a reasonable belief that similar problematic behavior might occur

on Fordham's campus. (R-76, 116-175). One of his main concerns was with the behavior exhibited by other SJP-affiliated chapters and "its polarizing effect on the Lincoln Center campus, which obviously can lead to issues of safety and security." (R-76). Further, Dean Eldredge, through his extensive research, uncovered a number of examples of such safety and security issues at other college campuses with SJP chapters. (R-76, 116-175).

Moreover, contrary to the court's conclusion, Dean Eldredge did in fact give various reasons for his determination to deny SJP club status, both at the time when he informed Petitioners-Respondents of his decision as well as during the process of the review. (R-21-23, 72-175). In his December 22, 2016 email informing Petitioners-Respondents of his decision, Dean Eldredge gave a synopsis of the reasoning behind his determination by explaining how he had consulted with numerous people and conducted his own research. (R-81). Dean Eldredge also noted that he disagreed with the view that "a club affiliated with the national Students for Justice in Palestine is the best way to provide [open, academic discussion and promotion of intellectual rigor on campus]." Id. Dean Eldredge further noted that he "welcome[d] continued conversation about alternative ways to promote awareness of this important conflict and the issues that surround it from multiple perspectives." Id. Dean Eldredge also indicated that he would have "agree[d] to approve a club that has a mission devoted to promoting justice, peace and equality for all Palestinians,

including the creation of a Palestinian state” but that the SJP-affiliated club would not be the way to reach this mission. (R-77-78).

Moreover, Petitioners-Respondents were fully aware of the deliberative process as it took place. At meetings with Petitioners-Respondents during the process of review, USG, Dean Eldredge and Dr. Wenzel asked if the students would consider not using the name “Students for Justice in Palestine” or “SJP” in order to avoid the issues that the SJP-affiliated brand has caused on other campuses. (R-77-78, 185, 294-295). Dean Eldredge indicated “that the students could effectively espouse similar views to SJP through a similarly themed club, but without a name that attracts the level of animosity and safety concerns that other campuses with SJP chapters throughout the country have experienced.” (R-77-78). However, Petitioners-Respondents refused to accept this offer noting that they wanted to connect their proposed club to the national SJP organization which conveys the “broader movement” against Israel and in support of justice in Palestine. (R-294-295, 405). These interactions, however, confirm that Petitioners-Respondents were aware of Dean Eldredge’s polarization, safety and security concerns throughout the review process.

Finally, the fact that Petitioners-Respondents refused to change their proposed name because they wanted a connection with the larger, national SJP organization strengthens the rational basis behind Dean Eldredge’s determination. Like the report



cited in Beta Sigma Rho v. Moore, supra., which concluded that “where a group is only a segment of a national organization,” it loses its individual power and is thus bound by the national, Dean Eldredge’s deliberations considered the issues brought up by the national SJP organization as a whole. Beta Sigma Rho, supra.

**3. The Court Erred in Finding that Dean Eldredge’s Concern Regarding Polarization on Campus Is Not an Enumerated Factor on Which to Base His Decision.**

Dean Eldredge rationally concluded that the formation of an SJP-affiliated club would cause campus polarization and possible negative impacts on student safety and the general security of the Fordham community. The court, however, held that Dean Eldredge’s reasoning was not “enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham.” (R-21). The court held that Fordham “imposed a newly identified factor in considering whether approval is warranted or not, namely whether a group may add to the ‘polarization’ of persons with differing opinions on contested topics of the day.” (R-18). This conclusion is unsupported and contrary to the Record. There simply are no specific factors enumerated or identified in the governing University Club Guidelines. The decisions by the Dean to approve or veto a club application is left to his discretion and expertise. In fact, it was the court that added a new level of review when it somehow “found” that Fordham had a specific set of factors in its procedures that it had to consider. Fordham does not. It would be difficult, if not

impossible, for Fordham, or any college or university, to identify any and all specific factors because each determination that a school makes should be based on a uniquely-identified situation. A college or university must be able to make a case-by-case determination in order to consider all the relevant facts and circumstances of each individual matter.

Further, Dean Eldredge's concern regarding polarization on Fordham's campus clearly was rational. Dean Eldredge was aware of the polarization that was occurring at other colleges and universities, as well as at Fordham because of the proposed SJP club. The SJP club proposal already was causing this polarization at Fordham, before USG even voted on whether to approve the club. (R-186-187, 291-292). In an email to Dr. Wenzel and Dean Eldredge from USG President Kayla Wolf, she explains that the entire USG Executive Board was "feeling extremely uncomfortable" with how the situation with SJP was unfolding and the position it was putting them in. (R-291). The USG President expanded, explaining that the USG Executive Board felt as if they were "having to play the mediator in a dispute between students." Id. She stated that members from both sides of the argument had communicated their "[s]trong feelings both for and against the club" and she did not "feel comfortable trying to communicate these decisions to the Senate." Id.

In light of the foregoing facts, it is evident that the court erred in concluding that Dean Eldredge's determination was arbitrary and capricious. In so holding, the

court necessarily exceeded its “restricted role” in reviewing Dean Eldredge’s determination and it substituted its interpretation of the facts for Fordham which is impossible under the circumstances.

### **POINT III**

#### **THE SUPREME COURT ERRED BY GRANTING PETITIONERS-RESPONDENTS’ MOTION TO AMEND THE PETITION**

Petitioners-Respondents recognized that due to the graduations or imminent graduations of Petitioners-Respondents, the proceeding risked being dismissed on grounds of mootness. (R-510, 536-537). In an effort to avoid that result, Petitioners-Respondents enlisted a current Fordham student to act in their stead. That effort, however, should have failed, but did not because in granting Petitioners-Respondents’ motion to amend, the court erred by entirely failing to consider many of Fordham’s arguments in opposition to Petitioners-Respondents’ motion, including that the proceeding was moot, that the proposed petitioner lacked standing, and that the proposed petitioner’s arguments were barred by the applicable statute of limitations. In fact, proposed petitioner Shetty had not been aggrieved in any way. In its Order granting the amendment, the court merely stated that Petitioners-Respondents’ motion to amend was granted “for the reasons set forth in petitioners’

motion papers.” (R-15). As such, the court’s decision to grant Petitioners-Respondents’ motion to amend should be reversed.

While a motion to amend a pleading is generally freely granted, “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). The First Department has stated that, in an effort to conserve judicial resources, “examination of the merit of the underlying proposed amendment is mandated. 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). The court also erred by failing to recognize that “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).

### **1. Proposed Petitioner Shetty Lacks Standing in this Matter.**

Petitioners-Respondents’ motion to amend sought solely to add proposed petitioner Shetty as a petitioner in this action. When he moved to amend the Petition, proposed petitioner Shetty was a sophomore at Fordham who claimed that he wanted to join the proposed SJP club but was unable to do so because of Fordham’s 2016 decision to deny that application by those former students. However, proposed petitioner Shetty did not have standing to be added as a petitioner in this action

because he suffered no injury. 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)).

Here, proposed petitioner Shetty had not suffered an injury in fact stemming from Fordham's decision to deny SJP official club status in 2016. Proposed petitioner Shetty admitted that he was not enrolled in the University at the time of its decision regarding SJP. (R-507) ("In January 2018, I commenced my studies at Fordham University. I am now in my second year and expect to receive my diploma in 2021."). Proposed petitioner Shetty necessarily also was not at all involved in SJP's 2015 application process to the University. Logically, he was not involved in drafting SJP's proposed constitution, he did not attend meetings with administrators to discuss the proposed club, nor was he in any way involved in the interactive process during SJP's application. He did not suffer any injury because he could now file his own application for club recognition at any time. As such, Petitioners-

Respondents' assertion that proposed petitioner Shetty's claims are the same as theirs is entirely without merit.

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

In addition to lacking standing, proposed petitioner Shetty's 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)).

In this instance, Fordham has not made any decision related to proposed petitioner Shetty, let alone one that could be considered "final and binding." As stated above, proposed petitioner Shetty has not made an application to the University to start his own club. As such, it is impossible for proposed petitioner Shetty to argue that the University made a final decision or in fact, any decision, that inflicted some kind of injury upon him and is therefore ripe for adjudication. The only University decision at issue in this matter was one made in 2016 regarding an application submitted by the former students, well before proposed petitioner Shetty

was even a student at the University. As explained above, proposed petitioner Shetty was not in any way involved in Petitioners-Respondents' particular club application process to the University. As a result, it cannot be argued that the University's 2016 decision regarding Petitioners-Respondents' application was "final and binding" on proposed petitioner Shetty. He can prepare and file a new club application at any time.

### **3. Proposed Petitioner Shetty's Claims Are Barred by The Four-Month Statute of Limitations Under CPLR § 217(1).**

In addition to not having standing to challenge the University's decision, any claims proposed petitioner Shetty may have regarding the University's decision are barred by the applicable statute of limitations. 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."

In this case, the University issued its decision regarding SJP on December 22, 2016, well over two years prior to the filing of Petitioners-Respondents' motion to amend the Petition to add proposed petitioner Shetty to this action. There is no doubt that Petitioners-Respondents are challenging the University's single, isolated

decision that occurred on December 22, 2016. As such, the statute of limitations began to run on that date and expired on April 22, 2017.

**4. The Motion to Amend Should Have Been Denied and the Petition Should Have Been Dismissed on Mootness Grounds.**

Because the Supreme Court should have denied Petitioners-Respondents' motion to amend the Petition, the Petition should have been dismissed as moot. As previously stated by Petitioners-Respondents throughout their various filings in this action, all Petitioners-Respondents, except for Petitioner-Respondent Norris, had graduated from Fordham prior to May 2019. (R-510, 536-537). Petitioners-Respondents, however, admitted when they moved to amend their Petition that Petitioner-Respondent Norris was "scheduled to graduate from Fordham University in May 2019, at the end of the 2018-2019 Academic Year. The other three Petitioners-Respondents have already graduated." (R-510 536-537).

The Petitioners-Respondents also candidly recognized that "Petitioners[-Respondents] are moving to amend the Petition to add Petitioner Veer Shetty to avoid the possibility that this action will be mooted by the graduation of the current Petitioners[-Respondents] before a final determination is rendered." As a result of Petitioners-Respondents' admissions, the Petition is moot.

As a general rule, "courts are precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances'" City of New York v. Maul, 14 N.Y.3d 499, 507 (2010) (quoting



Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 (1980)). A matter is to be considered moot where the relief sought by petitioners is no longer available to them. Tessler v. Bd. of Educ. of City of New York, 49 A.D.3d 428, 429 (1st Dep’t 2008). Further, courts are forbidden from ruling on matters “that do not actually determine the rights of the parties in a particular case” pending before it. Cohen v Engoron, No. 100298/2009, 2009 WL 3713138 (N.Y. Sup. Ct. 2009).

It is also well settled that “students’ declaratory and injunctive claims against the universities that they attend are mooted by the graduation of the students,” absent a claim of damages, as it becomes impossible for the courts to redress their alleged injury. Fox v. Bd. of Tr. of State Univ. of New York, 42 F.3d 135, 140 (2d Cir. 1994); See also Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993); Mincone v. Nassau Cty. Cmty. Coll., 923 F. Supp. 398, 403 (E.D.N.Y. 1996). As Petitioners admitted, because all of Petitioners-Respondents had graduated or were about to graduate from Fordham before the Supreme Court issued its Order, there was no action the Supreme Court could have taken to grant them the relief sought in their Petition. Therefore, the Petition should have been dismissed as moot.

#### **POINT IV**

#### **FORDHAM SHOULD BE PERMITTED TO FILE AN ANSWER TO THE PETITION**

The Supreme Court further erred by holding that Fordham should not be permitted to serve and file an answer because no factual issue remains. Under CPLR

§7804(f) the respondent to a petition “may raise an objection in point of law by setting in forth in his answer of 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.” The Court of Appeals has held that while in certain instances a court need not permit a respondent to submit an answer where “the facts are fully presented in the papers” such that it is “clear that no dispute exists as to the facts and no prejudice will result from the failure to require an answer,” a respondent must be permitted to answer where triable issues of fact exist, particularly in regard to whether a college or university substantially complied with its own policies and procedures in making a decision. Kickertz v. New York Univ., 25 N.Y.3d 942, 944 (2015).

As set forth in great detail herein, there is no question that, at a minimum, a triable issue of fact exists as to whether Fordham complied with its policies and procedures in denying SJP recognized club status. As stated above, the Supreme Court incorrectly applied Fordham’s club approval guidelines in analyzing whether the University followed its policies and procedures in making its decision. Further, at a minimum, there also are issues of fact as to whether Dean Eldredge’s decision was arbitrary and capricious. The Supreme Court almost entirely overlooked the extensive research and consideration that Dean Eldredge engaged in before making his decision to deny SJP official club status. These are clear factual issues that Fordham should be allowed to address more fully through an answer and hearing on

the merits. As such, the Supreme Court erred in not allowing Fordham to submit an answer to the Petition.


### CONCLUSION

For the foregoing reasons, it is respectfully requested that the Order of the court be reversed, the motion to dismiss the Petition should be granted and Fordham University's decision to deny Petitioners-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 Petitioners-Respondents' motion to amend the Petition and order that the Petition be dismissed as moot. Finally, at a minimum, Fordham should have been allowed the statutory opportunity to file an answer.

Dated: Garden City, New York  
January 27, 2020

Respectfully submitted,  
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**New York Supreme Court**  
**Appellate Division – First Department**

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

*Petitioners-Respondents,*

– against –

FORDHAM UNIVERSITY,

*Respondent-Appellant.*

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1. The index number of the case in the court below is 153826/17.
2. The full names of the original parties are as above. There have been no changes.
3. The proceeding was commenced in Supreme Court, New York County.
4. The proceeding was commenced on or about April 26, 2017, by the filing of a Notice of Petition and Verified Petition. The Motion to Dismiss the Petition was filed on or about June 5, 2017 in lieu of the Answer.
5. The nature and object of the proceeding is as follows: Article 78 Proceeding.
6. The appeal is from an Amended Decision, Order and Judgment of the Supreme Court of the State of New York, County of New York, the Honorable Nancy M. Bannon, entered on August 6, 2019.
7. This appeal is being perfected on a full reproduced record.