

**Court of Appeals  
of the  
State of New York**

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

*Petitioners-Appellants,*

– against –

FORDHAM UNIVERSITY,

*Respondent-Respondent.*

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**OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

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## **NATURE OF THE ACTION**

Respondent-Respondent Fordham University (“Fordham” or the “University”) respectfully submits this brief in opposition to Petitioners-Appellants Ahmad Awad (“Petitioner-Appellant Awad”), Sofia Dadap (“Petitioner-Appellant Dadap”), Sapphira Lurie (“Petitioner-Appellant Lurie”), and Julie Norris’s (“Petitioner-Appellant Norris”) (collectively, “Petitioners-Appellants”), Motion for Leave to Appeal dated January 20, 2021 (the “Motion”). Petitioners-Appellants seek leave to appeal a Decision and Order of the Appellate Division, First Department dated December 22, 2020 (the “Order”) which unanimously reversed an order of the Supreme Court of New York County (Bannon, J.), dated July 29, 2019, resulting in the dismissal of Petitioners-Appellants’ verified Petition (the “Petition”).

As the First Department noted and Despite Petitioners-Appellants’ attempts to make this matter seem more complicated than it is, this matter simply concerns Petitioners-Appellants’ challenge to Fordham’s decision to deny Petitioners-Appellants’ 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. Contrary to Petitioners-Appellants’ contentions, this proceeding is not a First Amendment free speech case nor is it a referendum on the Israeli-Palestinian conflict. The central issue before the Supreme Court and the Appellate Division was

whether Fordham followed its own published policy in making the decision to deny Petitioners-Appellants' application and whether that decision was made with a rational basis and in honest discretion.

Recognizing that the graduation of all the original Petitioners-Appellants would render the case moot, Petitioners-Appellants filed a motion to amend the Petition to add an additional petitioner, Veer Shetty ("Shetty"). The Supreme Court granted Petitioners-Appellants' motion to amend despite the fact that newly added petitioner Shetty was not even enrolled as a student at the time of Fordham's decision to deny SJP official club status. In that same decision, the Supreme Court then ultimately granted Petitioners-Appellants' Petition but in doing so, overlooked key facts in the Record and impermissibly inserted its own judgment for that of the University's.

After reviewing the Record and the Supreme Court's decision, the Appellate Division determined that Petitioners-Appellants' Petition should have been dismissed as moot because all of the Petitioners-Appellants had since graduated from Fordham and that the Supreme Court erred in granting Petitioners-Appellants' motion to amend their Petition to add the new petitioner, Shetty, due to Shetty's lack of standing. Further, recognizing the Supreme Court's error as to the merits of the Petition, the Appellate Division noted that Fordham's decision was in fact made in

an exercise of honest discretion and was not without sound basis in reason or taken without regard to the facts. Order at p. 2-3.

Simply put, Petitioners-Appellants have failed to raise an issue that is reviewable by this Court. Despite their strained attempts to argue otherwise, this matter does not present a novel legal question nor do Petitioners-Appellants claim that the Appellate Division misstated or misapplied the applicable law. At bottom, Petitioners-Appellants simply disagree with the Appellate Division's factual review and interpretation of the Record. Such issues are not reviewable as this Court's jurisdiction is "limited to the review of questions of law." N.Y. Const. art. VI, § 3(a). Thus, Petitioners-Appellants' Motion for Leave to Appeal should be denied in its entirety.

### **STATEMENT OF FACTS**

Fordham, through Keith Eldredge, the Dean of Students at Fordham's Lincoln Center campus ("Dean Eldredge"), denied Petitioners-Appellants' 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).<sup>1</sup>

### **Timeline of Events**

The opportunity for students to establish and maintain a student club at Fordham, a private institution, is a privilege, not a right. (R-78, 464). 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 students are not employed by the University. 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. Dorothy 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

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<sup>1</sup> References (“R”) denotes references to the Record on Appeal (the “Record”) that was filed before the Appellate Division, First Department.



Senate votes on the proposed club. Thereafter, if approved by the full USG senate, 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).

On October 21, 2015, in connection with the SJP application, 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 Awad, submitted a proposed constitution to establish a student SJP club at the Lincoln Center campus. (R-33, 256-260).

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.

On October 27, 2016, students interested in forming SJP, including Petitioner-Respondent Awad, Petitioner-Respondent Dadap, and Petitioner-Respondent 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). The USG president communicated this decision to Dean Eldredge shortly thereafter for his consideration and final determination. (R-199). On the same date and in accordance with the University Club Guidelines, Dean Eldredge wrote to the Petitioners-

Appellants 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-Appellants' 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-Appellants 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, including numerous Fordham constituencies and many of the Petitioners-Appellants, and extensive research online and elsewhere, Dean Eldredge denied SJP official club status at the Lincoln Center campus. (R-81). Although not

required to do so, Dean Eldredge summarized some of his concerns in correspondence with the proposed club representatives:

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).

### **Procedural History**

Petitioners-Appellants 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-Appellants 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-Appellants thereafter filed a motion to amend the Petition on February 8, 2019 seeking to add an additional petitioner, Veer Shetty. (R-505-506). Fordham opposed both motions. (R-496-499). On July 29, 2019, the Supreme Court issued an order: (i) granting Petitioners-Appellants' 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-Appellants' 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).

On January 27, 2020, Fordham perfected its appeal. (R-555). On December 22, 2020, the Appellate Division, First Department issued a Decision and Order unanimously reversing the Supreme Court's order dismissing Petitioners-Appellants' Petition in its entirety finding that: (1) Shetty lacked standing to challenge Fordham's decision; (2) the claims of the other Petitioners-Appellants had become moot due to their graduation; and (3) even if the Petition had been considered on the merits, the court would have concluded that because Fordham followed its approval procedure and acted "in the exercise of honest discretion," the

Petition should not have been granted. See Order p. 1-3. Petitioners-Appellants thereafter filed the instant Motion for Leave to Appeal.

### **STANDARD OF REVIEW**

An appellant may seek leave to appeal a final order of the Appellate Division by permission of the Court of Appeals. CPLR § 5602(a)(1)(i). In its motion seeking leave to appeal, an appellant must include a “concise statement of the questions presented for review and why the questions presented merit review” by the Court of Appeals. 22 NYCRR § 500.22(b)(4). Generally, the Court of Appeals will only grant motions for leave to appeal that include issues that are “novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division.” Id.

None of those prerequisites are present in this case. Here, Petitioners-Appellants have failed to present an issue that is reviewable by this Court. In sum, Petitioners-Appellants merely take issue with the Appellate Division’s interpretation and application of the facts in this matter. Moreover, and contrary to Petitioners-Appellants’ assertions, the issues presented here are not novel or of such public importance to warrant review by this Court. Finally, Petitioners-Appellants do not claim that the Appellate Division misstated the applicable law. As such, Petitioners-Appellants’ Motion for Leave to Appeal should be denied in its entirety.

## **ARGUMENT**

### **POINT I**

#### **THE APPELLATE DIVISION CORRECTLY HELD THAT PETITIONERS-APPELLANTS' MOTION TO AMEND THEIR PETITION SHOULD HAVE BEEN DENIED**

Petitioners-Appellants claim that the Appellate Division erred first, by holding that Petitioners-Appellants' motion to amend their Petition should have been denied because proposed petitioner Shetty did not have standing to challenge Dean Eldredge's decision and, second, because the remaining Petitioners-Appellants had all graduated, the Petition should have been dismissed as moot. Petitioners-Appellants opine that should this decision be allowed to stand, college and university students would somehow be prevented from ever challenging an institution's policies. In addition to providing no legal or factual basis for such a sweeping prognostication, Petitioners-Appellants necessarily overlook key aspects of the Appellate Division's decision and misinterpret well-established legal principles.

Petitioners-Appellants recognized that due to the graduations or imminent graduations of Petitioners-Appellants, the proceeding risked being dismissed on grounds of mootness. (R-510, 536-537). In an effort to avoid that result, Petitioners-Appellants enlisted a current Fordham student to act in their stead. The Appellate Division correctly held that this effort should have failed. As the Appellate Division correctly noted, Shetty had not been aggrieved in any way by Dean Eldredge's

decision, nor could he have, as he was not a student at the time it was made. As such, Shetty lacked standing and his claims were not ripe for review. Order at p. 2.

**1. The Appellate Division Correctly Held that Proposed Petitioner Shetty Lacks Standing in this Matter.**

Petitioners-Appellants' motion to amend sought solely to add proposed petitioner Shetty as a petitioner in this action. When Petitioners-Appellants 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. As the Appellate Division correctly noted, 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). The alleged injury must be one that is personal to the petitioner, meaning that it is "distinct from that of the general public." Transactive Corp. v. New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 587 (1998).

The Appellate Division correctly held that Shetty, who began his matriculation in 2018, had not been injured by Fordham's decision to deny SJP official club status in 2016. Order at p. 2. As the Appellate Division noted in its decision, Shetty admitted that he was not enrolled in the University at the time of its



decision regarding SJP. Id. ; see also (R-507). The Appellate Division also noted that Shetty (or any other student currently enrolled at Fordham) could file his own application for club recognition at any time. Order at p. 2. Shetty admittedly chose not to do so.

Petitioners-Appellants also argue that Shetty nevertheless should have been permitted to challenge Fordham’s decision regarding Petitioners-Appellants’ club application because he was “impacted by the policy.” Motion at p. 11. Petitioners-Appellants, however, misconstrue the facts in this regard. Fordham’s decision did not create a “policy” under which the University would deny all applications for clubs seeking to advocate for the interests of Palestine. Dean Eldredge’s decision, as with all student club applications at Fordham, was solely limited to the specific club application of the original Petitioners-Appellants. As such, proposed petitioner Shetty could not have suffered an injury in fact from Dean Eldredge’s decision since he was not part of the application process, nor was he even enrolled as a student at Fordham at the time of the decision. Again, Shetty, was and still is, free to submit his own club application. As such, the Appellate Division was correct in holding that Shetty lacked standing.

## **2. The Appellate Division Correctly Held that Proposed Petitioner Shetty’s Claims Are Not Ripe for Adjudication.**

In addition to lacking standing, the Appellate Division also correctly held that proposed petitioner Shetty’s claims are not ripe for adjudication. Order at p. 2.

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.” Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519 (1986); see also In re City of New York, 6 N.Y.3d 540, 547 (2006).

In its Order, the Appellate Division properly held that Fordham has not made any decision related to Shetty that could be considered “final and binding.” Order at p. 2. As stated above, Shetty has not made an application to the University to start his own club. As such, it is impossible for Shetty to argue that the University made a final decision, or 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 a specific application submitted by the former students, well before Shetty was even a student at the University. (R-507). As explained above, there is no dispute that Shetty was not in any way involved in Petitioners-Appellants’ particular club application process to the University. As a result, it cannot be argued that the University’s 2016 decision regarding Petitioners-Appellants’ application was “final and binding” on Shetty. As the Appellate Division indicated, he can prepare and file a new club application at any time.

### **3. The Appellate Division Correctly Held that the Petition Should Have Been Dismissed as Moot.**

The Appellate Division also held that “[g]iven that the original petitioners have all graduated, their claims have become moot, inasmuch the relief they sought is no longer available to them.” Order at p. 2. The Appellate Division further held that because “students currently enrolled in the respondent university’s undergraduate program may file an application for recognition of a similar club at any time, this is not a matter likely to evade judicial review.” Id.

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)). 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).

Petitioners-Appellants do not dispute that all of the original Petitioners-Appellants have since graduated and, therefore, the courts can no longer redress their alleged injuries. In arguing that the Appellate Division should not have held that

their claims should have been dismissed as moot, Petitioners-Appellants assert that their claims satisfied the narrow exception to mootness because their claims are otherwise “effectively nonreviewable” due to their brief existence; i.e. the standard four (4) year matriculation period for a college student. Motion at p. 13. This Court has previously held that it “can elect to retain jurisdiction despite mootness if recurring novel or substantial issues are sufficiently evanescent to evade review otherwise.” Matter of Citineighbors Coal. of Historic Carnegie Hill v. New York City Landmarks Pres. Comm’n, 2 N.Y.3d 727, 729 (2004). Despite Petitioners-Appellants’ contention, their claims are not novel nor likely to evade review. In fact, their claims were reviewed by the Appellate Division which found that but for the lack of standing, it also would have denied the Petition on the merits. Order p. 2-3.

In any event, in their Petition, Petitioners-Appellants sought to challenge Fordham’s decision to deny SJP official club status on the basis that, in making its decision, Fordham failed to follow its applicable policies and its decision lacked a rational basis. (R-28-50). Such challenges to non-academic decisions made by colleges and universities are not likely to evade review and are, in fact, regularly brought before New York courts. See i.e., Matter of Powers v. St. John’s Univ. Sch. of Law, 25 N.Y.3d 210 (2015); Maas v. Cornell Univ., 94 N.Y.2d 87 (1999); Matter of Aryeh v. St. John’s Univ., 154 A.D.3d 747 (2d Dep’t 2017). Further, Petitioners-Appellants’ claims are not novel as the applicable legal standards have been well

established for decades. See Matter of Olsson v. Bd. of Higher Educ. of City of N.Y., 49 N.Y.2d 408, 413 (1980) (holding that courts should “exercise[] the utmost restraint in applying traditional legal rules to disputes within the academic community.”); Matter of Powers v. St. John’s Univ. Sch. of Law, 25 N.Y.3d 210, 216 (2015) (holding that 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.”); see also Matter of Harris v. Tr. of Columbia Univ. in City of N.Y., 62 N.Y.2d 956, 959 (1984). As such, Petitioners-Appellants’ claims do not satisfy the exception to mootness.

This Court’s decision in Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 717-719 (1980), relied on by Petitioners-Appellants in their Motion, is instructive. In that matter, the Appellate Division dismissed petitioners’ Article 78 petition on mootness grounds. This Court held that petitioners’ claims did not satisfy the narrow exception to mootness holding that the Court could not entertain the appeal as the applicable legal principles had already been well-established by prior decisions. This Court did so despite also noting that the issues presented in the petition were often capable of evading judicial review. Id. This Court further stated that the facts of the petition did not present a sufficient reason to depart from “normal jurisprudential principle which calls for judicial restraint when the particular controversy has become moot.” Id. at

716. The same is true here where Petitioners-Appellants' claims involve a simple challenge to a university's very specific, factually based, non-academic decision and the resolution of that challenge invokes legal principles that have been well-established for decades.

Finally, as explained in detail below, this proceeding is not a free speech case despite Petitioners-Appellants' continued attempts to claim otherwise. In their Motion, Petitioners-Appellants cite to a number of cases, all involving public institutions, that note the importance of protecting students' free speech rights on public college and university campuses in their attempt to argue the exception to mootness should apply. See Motion at p. 13. While this issue is certainly important, it is not present in this matter. In reality, this matter simply concerns a private university's right to choose to which student clubs it will fund, provide faculty supervision, office space and other forms of university support. At no point did Fordham state that Petitioners-Appellants were prevented from expressing their views regarding the Israeli-Palestinian conflict on campus. In fact, in his email informing Petitioners-Appellants of his decision to deny SJP club status at Fordham, Dean Eldredge specifically welcomed and encouraged Petitioners-Appellants to have "continued conversation" and to "promote awareness of this important conflict and the issues that surround it from multiple perspectives." (R-81). As explained throughout this proceeding, there is nothing in Fordham's policies or procedures that

entitle its students to start a club with the name and association of their choosing. Thus, Petitioners-Appellants have not presented an issue of such importance that it meets the narrow exception to the mootness doctrine which in turn would merit review by this Court.

## POINT II

### **THE APPELLATE DIVISION CORRECTLY NOTED THAT FORDHAM'S DECISION TO DENY SJP OFFICIAL CLUB STATUS WAS RATIONALLY BASED**

It cannot be overlooked that the Appellate Division also found that had it considered the merits of the Petition, it would have also reversed on that basis because it would have concluded that the Petition should have been dismissed on its merits. In addressing this adverse ruling, Petitioners-Appellants conclude that the Appellate Division erred by holding that: (1) Fordham followed its applicable club approval procedure; (2) that its decision to deny SJP official club status was made in an “exercise of honest discretion”; (3) and was not “without a sound basis in reason or taken without regard to the facts.” Order at p. 2-3 (internal citations omitted). To be clear, Petitioners-Appellants do not claim that the Appellate Division misstated the law or applied the wrong legal standard. Rather, Petitioners-Appellants simply disagree with the Appellate Division’s interpretation of the facts in this matter. Such findings of fact are generally not reviewed by this Court. 22 NYCRR § 500.22(b)(4); N.Y. Const. art. VI, § 3(a).

The Appellate Division followed a long line of directives from this Court concerning the deference to be given to an educational institution's decision in these types of matters. This Court 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). 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." 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)).

Here, the Appellate Division correctly noted that Fordham's determination, through Dean Eldredge, was neither arbitrary nor capricious because it was grounded upon a rational basis. Petitioners-Appellants essentially claim that this Court should grant them leave to appeal because they prefer the Supreme Court's interpretation of the Record to that of the Appellate Division. Such fact-based inquiries, however, do not provide a basis on which to grant an application for leave to appeal. N.Y. Const. art. VI, § 3(a).

**1. The Appellate Division Correctly Found that Fordham Acted in the Exercise of Honest Discretion.**

Petitioners-Appellants claim that the Appellate Division erred by holding that Fordham's decision to deny SJP official club status was made in the exercise of



honest discretion because, in Petitioners-Appellants' subjective opinion, Fordham's concern about the actions of SJP chapters on other campuses was not rationally related to Petitioners-Appellants' club application. Petitioners-Appellants argue that Fordham lacked a rational basis for its decision despite noting that Fordham engaged in a year-long, interactive application process with Petitioners-Appellants which included a collaborative dialogue with Dean Eldredge. Motion at p. 18. Specifically, Petitioners-Appellants claim that Dean Eldredge's concerns regarding the actions of the national SJP organization and SJP chapters on other campuses was not a rational basis on which to base his decision to deny Petitioners-Appellant proposed club application because Petitioner-Appellant Awad promised that Petitioners-Appellants' SJP chapter would be autonomous from the national SJP organization and its other chapters. Id.

Petitioners-Appellants' assertion that there was nothing in the Record to support Dean Eldredge's concerns regarding Petitioners-Appellants' connection to the national SJP organization and other SJP chapters is hollow. The Record is replete with evidence that Petitioners-Appellants insisted throughout the club approval process and this litigation, including in their instant Motion, that their only desire is to have an official club at Fordham under the name "Students for Justice in Palestine." Motion at p. 10; (R-256-260, 284-289). Moreover, in their proposed constitution, Petitioners-Appellants stated that they would adopt the various "Points

of Unity” as set forth by the national SJP organization. (R-285). Because of Petitioners-Appellants’ 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, it is clear that because Petitioners-Appellants insisted on using the name SJP, 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 conduct of other SJP chapters on those campuses in making his decision.

Dean Eldredge’s research and deliberation in this regard was particularly extensive. During his review of Petitioners-Appellants’ application, Dean Eldredge met and spoke with other people on campus interested in the matter who had both objective and subjective views on the matter. As part of this process, Dean Eldredge agreed to meet with Fordham students, at their request, and listened to their concerns regarding the proposed SJP-affiliated club. (R-72, 88-90). These students 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>2</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 emphasized that he agreed to meet with these students 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 additional correspondence, representing both sides of the issue, reviewed submissions from interested persons and conducted his own independent research on the matter. (R-75, 116-175). Petitioners-Appellants would have preferred that the Appellate Division simply ignore Dean Eldredge’s extensive research and deliberation on this issue and instead assert that Dean Eldredge should have relied on their self-serving assertion that their proposed SJP chapter would not be affiliated with the national SJP organization or other chapters despite a mountain of evidence to the contrary.

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<sup>2</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.

Petitioners-Appellants' reliance on Healy v. James, 408 U.S. 169 (1972) is misplaced. There, the Supreme Court held that a public college, 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 its procedural and substantive body of law, and moreover, involved a state college which the Court specifically noted was a "state-supported institution of higher learning." Because, as Petitioners-Appellants concede, that matter involved a state college, the Court was required to examine the students' claims under the First Amendment, an entirely different standard that does not apply to Fordham, a private university, in this instance. 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, Petitioners-Appellants 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). Thus, Dean Eldredge's consideration of the actions of the national SJP organization and SJP chapters on other campuses was clearly rational.

Finally, Petitioners-Appellants' argument that Dean Eldredge's concerns about the actions of the national SJP organization and other chapters should not have been considered because he did not specifically mention these concerns in detail in his brief December 22, 2016 email to Petitioners-Appellant's informing them of his decision is without merit. Petitioners-Appellants cite to two cases in which this Court noted that review of an administrative decision involving a governmental agency is limited to the grounds invoked by the agency. Motion p. 17-18. This Court has previously held that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency." Matter of Featherstone v. Franco, 95 N.Y.2d 550, 554, 742 N.E.2d 607, 610 (2000) (internal citation omitted); see also Rizzo v. New York State Div. of Hous. & Cmty. Renewal, 6 N.Y.3d 104, 110 (2005) (noting that the principle that "judicial review of an administrative determination is limited to the grounds invoked by the agency" is "merely another way of saying that an appellate court is bound by the record.") (internal citations omitted). Here, Dean Eldredge was under no obligation to issue a written decision of any kind as none is required by the University Club Guidelines. The email he provided to Petitioners-Appellants in December 2016 informing them of his decision was merely done as a courtesy. Moreover, despite not specifically mentioning his concern regarding the actions of the national SJP organization and its various chapters, there is ample evidence in the Record that shows Dean Eldredge specifically researched,

considered and took these issues into account when making his decision to deny Petitioners-Appellants' club application. (R-88-100, 125, 144, 331). Thus, the Appellate Division properly held that Dean Eldredge's concerns about Petitioners-Appellants' association with the national SJP organization and with the disruptive actions of other chapters provided a rational basis for Dean Eldredge's decision.

## **2. The Appellate Division Correctly Disregarded Petitioners-Appellants' Free Speech Arguments.**

As noted, despite Petitioners-Appellants' continued attempts to describe this matter as one involving their free speech rights, this matter is not a free speech case, nor is it a referendum on the Israeli-Palestinian conflict. Again, this matter simply involves Fordham's unquestionable right as a private university to decide to which student clubs it will grant official university status. Petitioners-Appellants make a series of conclusory and unsupported allegations that Fordham's decision to deny their proposed club application was somehow due to their political views. Motion p. 20-21. Petitioners-Appellants continue to misconstrue the free speech guarantees provided by Fordham in its Mission Statement. Fordham's Mission Statement and its other policies protect students' right to express their ideas on Fordham's campus. These guarantees are not, however, without limitation. As a private university, Fordham generally can limit that right as it deems necessary to comport with its Mission Statement. Fordham 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).

As stated in detail above, and as the Appellate Division noted, Dean Eldredge arrived at the rational decision to deny Petitioners-Appellants' club application, in part, because of concerns he had about the proposed club's potential disruptions to Fordham's campus. Contrary to Petitioners-Appellants' claims, there is absolutely no evidence in the Record that Dean Eldredge made this decision because of the proposed club's political message. Rather, Dean Eldredge's decision was based upon legitimate concerns he had related to the proposed club's effect on campus safety and whether the proposed club would actually harm other students' ability to engage in discourse on its campus. It bears repeating that Dean Eldredge's decision in no way prevented Petitioners-Appellants from expressing their views and speaking freely about Palestine on its campus. Dean Eldredge's decision was simply related to whether the University would sanction and support Petitioners-Appellants' proposed club by granting them official club status.

Petitioners-Appellants' acknowledgement that Dean Eldredge informed them that they could have a similar club that expresses the same themes and ideas so long

as they used a name other than “Students for Justice in Palestine” only further supports the fact that Dean Eldredge’s decision was not motivated by Petitioners-Appellants’ political views, but rather their connection to the national SJP organization which has been proven to spawn multiple disruptive chapters. Motion at p. 21. As such, it is clear that Dean Eldredge’s decision was rationally based and had nothing to do with Petitioners-Appellants’ political views.

**CONCLUSION**

For the foregoing reasons, it is respectfully requested that Petitioners-Appellants’ Motion for Leave to Appeal be denied in its entirety.

Dated: Garden City, New York  
January 29, 2021

Respectfully submitted,  
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