To be Argued by:
Alan Levine
*(Time Requested: 15 minutes)*

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**NEW YORK SUPREME COURT**
**APPELLATE DIVISION – FIRST DEPARTMENT**

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FORDHAM UNIVERSITY,

Respondent-Appellant,

v.

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

Petitioners-Respondents.

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# BRIEF FOR PETITIONERS-RESPONDENTS

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## COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1) Did Fordham fail to follow its own policies in denying Students for Justice in Palestine ("SJP") club status where the factors Fordham based its decision on—that it would be polarizing and advocated political goals against a specific country—did not abide by Fordham's Mission Statement and other rules?

The Supreme Court held in the affirmative.

2) Was Fordham's decision to deny club status to SJP based on the reported conduct of other clubs at other schools irrational, since the evidence that all SJPs are autonomous and operate independently was unrebutted?

The Supreme Court held in the affirmative.

3) Should Petitioners-Respondents have been permitted to add another Petitioner who was injured by the same occurrence—Fordham's binding decision to deny SJP club status—where there was notice and no prejudice to Fordham?

The Supreme Court held in the affirmative.

4) Could the merits of the Article 78 Petition be decided where there was no factual dispute and no prejudice to Fordham?

The Supreme Court held in the affirmative.

## COUNTERSTATEMENT OF THE NATURE OF THE ACTION

Petitioners-Respondents applied to form a club, Students for Justice in Palestine ("SJP"), at Fordham University in order to inform members of the Fordham community about Palestinians and the violations of their rights. The United Student Government ("USG") approved the application, but the Fordham administration overruled that decision and denied SJP official club recognition. Supreme Court considered the reasons advanced by Respondent-Appellant Fordham University ("Appellant" or "Fordham") for its action and found that Fordham's "disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel." R-24.

Supreme Court found that Fordham ignored the commitment embodied in its Mission Statement and other rules to guarantee freedom of inquiry, and instead introduced new criteria, "polarization," and criticism of "a specific country" for determining club applications. The court also found that the reasons given for denial of the SJP application lacked any "rational basis." Those conclusions are amply supported by the Record below. Fordham argues that the court relied on the wrong club approval process in reaching its decision, however the question of which approval process applied is irrelevant, as Justice Bannon acknowledged that Dean Eldredge had the right to veto new clubs—but noted that such discretion is "neither unlimited nor unfettered." R-21.

The court's opinion repeatedly calls attention to the obvious, that, throughout the application process, Fordham was preoccupied with SJP's political message and that the rejection of its application was the consequence of Fordham's disapproval of that message. Accordingly, this Court should uphold Supreme Court's finding that Fordham acted arbitrarily and capriciously in violation of Article 78.

## COUNTERSTATEMENT OF FACTS

In Fall 2015, students at Fordham applied to start a club called Students for Justice in Palestine ("SJP"), whose purpose was to "build support in the Fordham community" for "justice, human rights, liberation and self-determination" for Palestinians. R-538, ¶¶ 17-18; R-52; R-423. Over the course of a year, Fordham administrators questioned the students about their political beliefs (*see, e.g.*, R-539, ¶ 23; R-542, ¶ 31; R-59, ¶ 9) and the proposed group's affiliation with an organization called National Students for Justice in Palestine ("NSJP"). R-538-40, ¶¶ 20-21, 24; R-545, ¶ 46. The students assured the University that SJP at Fordham would be autonomous and would function independently of NSJP and other SJPs, providing written evidence to that effect from NSJP, and amending the group's constitution to make that explicit. R-539, ¶ 21; R-545, ¶ 46; R-405-07, ¶¶ 10-17; R-279; R-285; R-423; R-429.

Dean of Students Keith Eldredge and Director of the Office of Student Leadership and Community Development ("OSLCD") Dorothy Wenzel met and

corresponded with the students to request information and suggest constitution revisions.[1] R-402-04, ¶¶ 2-7; 405-07, ¶¶ 10-18; R-182-86, ¶¶ 22-23, 28, 31-33. Fordham's brief fails to mention the substance of these meetings, which demonstrated Fordham's preoccupation with SJP's political views. At the October 5, 2016 meeting with students (mentioned at Appellant's Br. 12), Wenzel and Eldredge asked about SJP's potential support for boycott, divestments, and sanctions, and expressed concerns that SJP would "stir up controversy." R-10; *see also* R-404-05; R-416. At a meeting on December 12, 2016 (that Fordham fails to mention), Wenzel and Eldredge met with students and questioned them on their political views relating to Israel. R-13-14; *see also* R-59; R-542, ¶ 31.

After SJP's constitution was reviewed by Eldredge and Wenzel and modified in accordance with their requests, the application went on to the USG Senate, which approved SJP as a student club in November 2016. R-541, ¶ 29; *see also* R-12 (Eldredge and Wenzel "approved SJP's constitution, and forwarded the relevant packet to the USG"). On December 22, 2016, Fordham, through Eldredge, took the unprecedented step of vetoing USG's approval. R-542-43, ¶ 33. There is no

[1] Although Fordham mentions one meeting the students had with Eldredge (Appellant's Br. 12, citing R-183-85), it fails to mention Eldredge's role in reviewing SJP's constitution before the USG approved SJP. Appellant's Br. 10. Under the Club Registration Process, the Dean of Students and the OSLCD Director approve the club's constitution before the USG Senate approves a club (R-206), while under the Club Guidelines, the Dean of Students has the right to veto a new club. R-201.

evidence in the Record that USG's approval of a club has ever been vetoed previously.

Eldredge's email explaining his veto decision said that he could not support "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;" and that the topic of the "Israeli-Palestinian conflict . . . often leads to polarization" and the topic and purpose of SJP "points toward that polarization." R-81. That Fordham has officially recognized other potentially polarizing clubs such as the Rainbow Alliance and the Feminist Alliance (R-307) and invited polarizing speakers to campus such as Karl Rove and Newt Gingrich (R-66) confirms that it was SJP's political message supporting Palestinian rights that troubled Eldredge.[2]

Vice-President for Student Affairs Jeffrey Gray, responding to concerns from Petitioners-Respondents' counsel, gave a different reason, claiming the decision "was based on the fact that chapters of this organization have engaged in behavior on other college campuses that would violate this University's student code of conduct." R-544, ¶ 42. In his Affidavit submitted in this case, Eldredge mentioned "safety and security" concerns for the first time, which he claimed could result from

[2] Supreme Court concluded that Eldredge's "disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel, rather than some other nation," and that his determination was "arbitrary and capricious" since a club's position with regard to "a particular nation is not a factor countenanced by Fordham's rules, regulations, and guidelines for the approval of student clubs." R-24.

"the conduct exhibited by other chapters of SJP and its polarizing effect on the Lincoln Center campus." R-76, ¶ 23. Yet Eldredge's Affidavit also declared that the students could have had 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, ¶ 25. Eldredge thereby acknowledged that it was indeed the name, SJP, and the political message it conveyed, that concerned him.

Fordham makes much of the "several weeks" that Eldredge spent reviewing materials and speaking to individuals concerning "SJP as an organization" (Appellant's Br. 13), implying that it was relevant to the club that Petitioners-Respondents sought to form. In fact, this was information concerning activities of *other* clubs at *other* campuses. As the Record makes abundantly clear, all student groups bearing the name SJP operate independently. The Record contains absolutely no evidence to the contrary. *See, e.g.*, R-285; R-405-07, ¶¶ 10-17; R-418; R-423; R-429; R-433-34, ¶¶ 7-9, 13; R-535, ¶ 6; R-545, ¶ 46. Given that Eldredge already knew from the students that SJP at Fordham would operate independently, his several weeks of review of irrelevant material further confirms that his central concern was with SJP's "political goals." R-14; R-81.

Although Fordham chides the court for ignoring this "extensive research" (Appellant's Br. 4), the court properly focused on SJP at Fordham, not the activities

of other SJPs at other schools, and properly concluded that Fordham had utterly failed to 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." R-23.[3] Contrary to the charge of violence and disruption, the court held that SJP advocates only "legal, nonviolent tactics aimed at changing Israel's policies." R-24. As Justice Bannon found, "the consideration and discussion of differing views is actually part of Fordham's mission, regardless of whether that consideration and discussion might discomfit some and polarize others." R-23.

Fordham's free expression commitment begins with its Mission Statement, which "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 of and reverence for cultures and ways of life other than their own." R-546, ¶ 49. The University also promises that "[e]ach member of the University has a right to freely

[3] Amicus Curiae briefs filed by StandWithUs and the Institute for the Study of Global Antisemitism and Policy (ISGAP) raise arguments not made by Fordham and rely on materials similar to those consulted by Fordham, in addition to "facts" outside the record. StandWithUs Amicus Br. 10-14; ISGAP Amicus Br. 15-17. They speculate that SJP at Fordham would engage in discriminatory behavior that might cause Fordham to violate Title VI of the Civil Rights Act or President Trump's related 2019 Executive Order. StandWithUs Amicus Br. 11-15; ISGAP Amicus Br. 2-3, 22. These allegations have zero support in the record, and flatly contradict Justice Bannon's finding quoted in the text. R-23.

express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society."[4] Fordham assures it will not infringe on the rights of students "to express [their] positions" and engage in "other legitimate activities."[5] Elsewhere, Fordham reaffirms its commitment to "freedom of expression and the open exchange of ideas. The expression of controversial ideas and differing views is a vital part of University discourse."[6] Finally, in its consideration of requests to approve student demonstrations, Fordham says that a "request to use space at Fordham for a protest or a demonstration has never been turned down based on the viewpoint or content of the protesters/demonstration."[7] As the court below found, consideration of whether a club's political message may be polarizing is not a relevant factor anywhere in Fordham's rules, and is contrary to the notion that universities are centers of discussion of contested issues. R-21-22. Moreover, as Justice Bannon observed,

[4] *Demonstration Policy*, Fordham Univ., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 22, 2020). Fordham President Father McShane has also expressed his understanding of these principles, stating "you know that I am tireless . . . in advocating for the University's mission, in urging our students . . . to be men and women for others . . . I hope our graduates leave the campus bothered. Bothered by injustice. Bothered by poverty. Bothered by suffering." R-442, ¶ 19.

[5] *Demonstration Policy*, *supra* note 4.

[6] *Bias-Related Incidents and/or Hate Crimes*, Fordham Univ., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimespolicy (last visited July 22, 2020); R-546, ¶ 50.

[7] *Demonstrations FAQ*, Fordham Univ., https://www.fordham.edu/info/21684/university_regulations/6564/demonstrations_faq (last visited July 22, 2020).

after noting Eldredge's continuing reference to SJP's views about Israel, "it must be concluded that his disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel, rather than some other nation." R-24.

Taken together, Fordham's rules express the University's unequivocal commitment to bedrock principles of free speech. Clubs, as a vehicle for collective student expression, represent a fundamental exercise of those principles. For Petitioners-Respondents, an SJP club is their means of collectively advocating for Palestinian rights and liberation. R-536-37, ¶¶ 11-15. Without approval to be a club, SJP could not invite speakers to campus, receive Fordham funding for events and programs, distribute literature, post materials, promote club activities, book rooms for meetings, or solicit members at Fordham's Club Day and other club fairs throughout the year. R-548-49, ¶¶ 59-60; R-491-93, ¶¶6-8. Denying the right to form such a club not only robs Petitioners-Respondents of the opportunity to educate themselves and others about a human rights issue they care deeply about, but also sends a chilling message to the campus community that advocacy for this particular cause is not sanctioned by the administration, making pariahs of Petitioners-Respondents and their supporters, and warning others that viewpoints that the administration disfavors are off limits. R-493-94, ¶¶ 9-10.

Petitioners-Respondents Awad, Lurie, Dadap, and Norris have all graduated from Fordham, without the opportunity to participate in an official SJP club. R-177,

¶ 3; R-510, ¶ 5. Petitioner-Respondent Veer Shetty started as a student at Fordham University in January 2018, and is expected to graduate in 2021. R-507, ¶ 1. While at Fordham, he wanted to get involved in supporting Palestinian rights, and came across information about how students at Fordham were trying to start an official club called Students for Justice in Palestine, a club that he wanted to be part of. R-508, ¶¶ 3-4. Until Supreme Court's decision, Mr. Shetty was unable to do so because Respondent-Appellant Fordham had refused to recognize SJP.

## ARGUMENT

The Court should affirm New York County Supreme Court's conclusion that Fordham University's denial of club status to SJP was arbitrary and capricious, since the reasons Fordham gave for its decision were inconsistent with its own rules and policies, and were irrational, as they relied on the reported conduct of student groups on other college campuses.

### I. THE COURT PROPERLY RULED THAT FORDHAM FAILED TO FOLLOW ITS OWN POLICIES IN DENYING THE STUDENTS' CLUB APPLICATION.

It is settled New York law that a court may set aside a university's decision if it did not "substantially adhere[] to its own published rules and guidelines," or if the determination was not "based on a rational interpretation of the relevant evidence." *Kickertz v. New York Univ.*, 110 A.D.3d 268, 272, 971 N.Y.S.2d 271, 276 (1st Dep't 2013) (citation omitted). A determination may also be set aside as arbitrary and

capricious if the decisionmaker considers inappropriate factors to arrive at the decision. *Matter of Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 29, 41 N.Y.S.3d 490, 495 (1st Dep't 2016).

Appellant argues that the lower court, in reviewing Fordham's determination, incorrectly "substitute[d] its own judgment" and "exceeded its limited role." Appellant's Br. 18, 32. But *Gertler v. Goodgold* (Appellant's Br. 17) makes clear that "the judgment of professional educators is subject to judicial scrutiny to the extent that appropriate inquiry may be made to determine whether they abided by their own rules, and whether they have acted in good faith or their action was arbitrary or irrational." 107 A.D. 2d 481, 486, 487 N.Y.S.2d 565, 570 (1st Dep't 1985), *aff'd*, 66 N.Y.2d 946, 489 N.E.2d 748, 498 N.Y.S.2d 779 (1985).

Although New York courts are reluctant to apply close judicial scrutiny to university decisions regarding academic matters, determinations unrelated to academic performance are "quite closely akin to the day-to-day work of the judiciary" and, therefore, courts scrutinize such determinations more closely. *Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 658, 404 N.E.2d 1302, 1304, 427 N.Y.S.2d 760, 763 (1980); *see also Matter of Susan M. v. New York Law School*, 76 N.Y.2d 241, 245, 556 N.E.2d 1104, 1106-07, 557 N.Y.S.2d 297, 299-300 (1990) (distinguishing judicial review of an institution's academic determination from judicial review of non-academic determinations).

Dean Eldredge's decision, expressed in his December 22, 2016 email, to deny SJP club status was a non-academic decision. It was, therefore, appropriate for Justice Bannon to determine whether the grounds upon which Eldredge relied in making that decision—that the proposed club "advocat[ed] political goals of a specific group, and against a specific country," and that the club posed a risk of "polarization"—were consistent with Fordham's rules and policies. Appellant's Br. 14. Justice Bannon found that they were not.[8] R-20-24.

Justice Bannon held that to deny club recognition on either of the factors enumerated by Eldredge would be flatly inconsistent with Fordham's Mission Statement, which "guarantees the freedom of inquiry."[9] This guarantee is laid out in Fordham's rules: one assures students "a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society;"[10] another states that it values "expression of

[8] Justice Bannon also found that Fordham "seemingly imposed an additional tier of review, by a dean, of an approval already rendered by the USG." R-21. Fordham argues that the court relied on the wrong club approval process in reaching this decision and that Eldredge had the right to veto the SJP club under the applicable rules. Appellant's Br. 22. But the question of which approval process applied or was being followed is irrelevant, as Justice Bannon acknowledged that Eldredge had the discretion to evaluate whether a new club promotes Fordham's mission in determining whether to veto it, but noted that such discretion is "neither unlimited nor unfettered." R-21. The court found that the reasons Eldredge gave for his veto were contrary to Fordham's rules, and that Fordham's decision was irrational, as discussed *infra*, Section II.

[9] *Mission Statement*, Fordham Univ., https://www.fordham.edu/info/20057/about/2997/mission_statement (last visited July 22, 2020); R-546, ¶ 49. Fordham's Mission Statement also includes a commitment "to research and education that assist in the alleviation of poverty, the promotion of justice, the protection of human rights and respect for the environment." *Mission Statement, id.*; R-543, ¶ 35.

[10] *Demonstration Policy*, *supra* note 4.

controversial ideas and differing views;"[11] and another, in the context of demonstrations, that it will not discriminate based on "viewpoint or content."[12]

Fordham claims that the court's reliance on the Mission Statement's guarantee was inappropriate, arguing that it "is simply not a factor, nor part of the procedure, in determining whether a proposed student club will be officially recognized." Appellant's Br. 29. Fordham's position comes down to this: despite promises to prospective students that Fordham will be a place where they will be able to express "controversial ideas and differing views," and to "work for their acceptance," the University will still exercise the power to deny students the right to form clubs that seek to promote controversial ideas and differing views.

This Department has firmly rejected Fordham's assertion of such power: "[P]romises set forth in a school's bulletins, circulars, and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract." *Jeffers v. American Univ. of Antigua*, 125 A.D.3d 440, 441–42, 3 N.Y.S.3d 335, 337 (1st Dep't 2015) (citations omitted). A university is simply not permitted to ignore those promises. *See, e.g.*, *Tedeschi*, 49 N.Y.2d at 662, 404 N.E.2d at 1307, 427 N.Y.S.2d at 766 ("To suggest . . . that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what

[11] *Bias-Related Incidents and/or Hate Crimes*, *supra* note 6.
[12] *Demonstrations FAQ*, *supra* note 7.

they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words."). Throughout its rules and policies, Fordham guarantees that it will be a place where dissent and the expression of controversial ideas are protected. As Justice Bannon rightly notes, to deny recognition of a club because "a group's message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues." R-22. As such, a university may not ban a student club that seeks to advocate for those views, even if their "consideration and discussion might discomfit some and polarize others." R-23. Fordham's "polarization" concern was that SJP might express viewpoints that give rise to potentially uncomfortable disagreement.[13] But such debate is protected by Fordham's policies, which guarantee freedom of inquiry and a right to freely express positions, and embrace the expression of controversial ideas and differing views as a vital part of University discourse. *See infra,* pp. 7-9.

Rather than adhering to its promises to protect the expression of controversial ideas, Fordham instead rejected SJP because the group might be polarizing. This concern about polarization, the court held, was a "newly identified factor" (R-18)

[13] For example, Fordham argues that the students' *application* was "causing [] polarization" before it was even approved, as evidenced by the fact that the USG had heard "[s]trong feelings both for and against the club" from the Fordham community. Appellant's Br. 43. But those strong feelings notwithstanding, the USG approved the application, finding that SJP would "positively contribute to the Fordham community in such a way that is sensitive to all students on campus" and that it "fulfills a need for open discussion and demonstrates that Fordham is a place that exemplifies diversity of thought." R-13.

and was "not enumerated or identified . . . in any governing or operating rules, regulations, or guidelines issued by Fordham . . . ." R-21. In other words, Fordham's decision did not conform with its rules, but arbitrarily considered inappropriate factors.

As for Dean Eldredge's concern that "SJP singled out one particular country for criticism and boycott," the court below found that this, too, "is not an established ground for denying recognition to a student club." R-23. Indeed, to take seriously Dean Eldredge's complaint that SJP had singled out a country for criticism would imply, as Justice Bannon observed, that Fordham students would not be permitted to "protest[] or criticiz[e] China's occupation and annexation of Tibet, Russia's occupation of the Crimea, or Iraq's one-time occupation of Kuwait." R-23. In fact, such a policy, if evenly applied, would prohibit students from forming a club that criticized the policies of the United States. It was obvious to Justice Bannon that Fordham had no such policy, leading her to "conclude[] . . . that [Dean Eldredge's] disapproval of SJP was made in large part because the subject of SJP's criticism is the State of Israel, rather than some other nation." R-24. Given the requirement that universities "abide[] by their own rules," *Gertler*, 107 A.D.2d at 486, 487 N.Y.S.2d at 570, Dean Eldredge was not entitled to make up new criteria for evaluating Petitioners-Respondents' club application.

## II. FORDHAM'S DECISION TO DENY SJP CLUB STATUS WAS IRRATIONAL BECAUSE IT RELIED ON FACTS THAT WERE CONTRADICTED BY UNREBUTTED EVIDENCE.

Justice Bannon's decision requiring approval of SJP's application must be upheld even if Fordham did not violate its own policies guaranteeing freedom of expression. There was no evidence to support Fordham's alleged "safety and security" concerns (R-77), particularly since Dean Eldredge's inference that the conduct of other student groups on other campuses was predictive of the conduct in which Fordham's SJP would engage was flatly contradicted by the evidence. R-23-24. Therefore, Fordham's decision was not based on "a rational interpretation of the relevant evidence." *Matter of Katz v. New York Univ.*, 95 A.D.3d 547, 547, 943 N.Y.S.2d 518, 518 (1st Dep't 2012). Fordham's determination must be annulled for this reason alone.

In order to be upheld by a court, a non-academic university determination must not only substantially comply with the university's own policies, but it must be supported "by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination.'" *Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal*, 25 A.D.3d 128, 139-140, 802 N.Y.S.2d 190, 199 (2d Dep't 2005) (citation omitted). The decision of a university administrator will be annulled when it lacks "rational basis" and is "taken without regard to the facts." *Matter of Pell v. Board of Educ. of Union Free School*

*Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974).

Fordham says that its refusal to grant SJP status was rational because it had legitimate fears the club would engage in disruptive activities. The only evidence that Fordham cited to justify those fears was the reported conduct of *other* student groups on *other* campuses. R-75-78. In Section A, below, we discuss why that evidence utterly fails to support Fordham's determination. In Section B, below, we point out that, in any event, Fordham's alleged concerns for safety and security were not mentioned as reasons in Eldredge's decision, and, therefore, are not a proper basis for upholding its decision.

### A. Fordham's Decision Was Based on Impermissible Speculation that SJP at Fordham Would be Controlled or Influenced by NSJP, Which Was Directly Contradicted by Unrebutted Evidence.

Appellant argues that the court below ignored "all the research and interviews that [Dean Eldredge] conducted during his thorough and careful deliberation" that led him to the conclusion that "an SJP affiliate on Fordham's campus could cause [issues of violence, disruption of the university, suppression of speech, or discrimination]." Appellant's Br. 39. To the contrary, the court acknowledged this research in rendering its opinion (R-10-11, 21-22), but simply concluded that it did not "provide a rational basis" for Dean Eldredge's decision. R-23. The court was indisputably correct.

First, the "research" upon which Eldredge relied concerned alleged disruption caused by a handful of other SJP groups on other campuses.[14] However, the record is replete with unrebutted evidence that SJP at Fordham would be autonomous, and would act independently from National SJP and SJP groups at other universities. R-405, ¶ 10; R-432-44, ¶¶ 3–13; R-545, ¶ 46.

Fordham cites *Beta Sigma Rho v. Moore*, 46 Misc. 2d 1030, 261 N.Y.S.2d 658 (Sup. Ct. Erie County 1965), *aff'd*, 25 A.D.2d 719, 269 N.Y.S.2d 1012 (4th Dep't 1966) (Appellant's Br. 34) in an effort to establish a link between the SJP at Fordham and SJPs on other campuses. But in *Moore*, university officials banned national fraternities on campus after making a specific finding that "[i]n all instances it is apparent that the final control and decision of policies and practices of such fraternities and sororities is vested in the national organizations rather than in the local chapters," which are "governed by, and responsible to, non-university authority." *Id.* at 1033, 662. Fordham had no reason to believe that control of the SJP would lie anyplace but in the hands of its members at Fordham. Petitioner Awad explicitly represented that the SJP club would be entirely autonomous (R-405, ¶ 10), and Petitioners introduced abundant evidence in support of that representation. That

[14] It is worth noting that groups advocating for justice in Palestine are often wrongly maligned with erroneous allegations against them. R-399-400, ¶¶ 10–12. For example, one print-out included in Eldredge's "research" purporting to portray independent SJP groups and individual students at other campuses as disruptive was inaccurate, and was part of a trend led by Israel advocacy groups to malign activism for Palestinian rights by falsely accusing student groups of actions they did not take. *Id.*

evidence showed that all SJP student groups "run completely independently of and autonomously from NSJP," NSJP does not "dictate the structure, programming, *or any other aspect* of local organizations," and SJPs "are student-led and determine their own missions, visions, and goals." R-432-44, ¶¶ 3-10 (emphasis added).[15] Fordham introduced no evidence whatsoever to the contrary.

Fordham's assertion that Petitioners-Respondents want "a connection with the larger, national SJP organization" (Appellant's Br. 41), from which it infers control by NSJP, is not supported by the Record and misunderstands Petitioners-Respondents' desire to use the name Students for Justice in Palestine. That name has come to be associated with the broader student movement for justice in Palestine (R-405, ¶ 9; R-539-40, ¶ 24), and has political significance for Petitioners-Respondents. That is not inconsistent with their explicit representation that the SJP at Fordham would decide its own policies and activities.

Despite the evidence that SJP at Fordham would operate autonomously, Fordham speculates that the alleged conduct of a handful of *other* student groups at *other* campuses might predict the behavior of SJP at Fordham. But determinations based on "sheer speculation" and "suspicion alone will not suffice" to render a decision rational, particularly when there is evidence that contradicts the speculation.

[15] NSJP's main role is organizing an annual national conference, where any student organization supporting Palestinian rights around the country – *whether it is called SJP or not* – can choose to attend or not to attend. R-432-34, ¶¶ 5, 10, 13.

*Matter of Basile v. Albany Coll. of Pharm. of Union Univ.*, 279 A.D.2d 770, 771-72, 719 N.Y.S.2d 199, 201 (3d Dep't 2001) (it was irrational of the university to rely on suspicion of cheating to discipline students "when faced with proof that petitioners took these examinations in separate rooms and under the watchful eye of a proctor, who discerned no evidence of cheating."). *See also Healy v. James*, 408 U.S. 169, 186 (1972) (University improperly denied student club application based on affiliation with national organization, where national organization was "loosely organized, having various factions and promoting a number of diverse social and political views only some of which call for unlawful action," and where "petitioners proclaim their complete independence from this organization").

The cases that Fordham cites in which universities successfully assert security issues in defense of their challenged determinations all entailed university responses to instances in which there was specific evidence of safety concerns or disruption, not mere speculation. In *Harte v. Adelphi University*, the university canceled classes two days after protesting students had been shot at Kent State University in order to safeguard the safety of its students and faculty. 63 Misc. 2d 228, 229, 311 N.Y.S.2d 66, 67 (Sup. Ct. Nassau County 1970). The next day, students sought a mandatory injunction to fully reopen classes, and a few days later, the University resumed classes. *Id.* The court, noting "the prevailing atmosphere of unrest," found the university's decision, which was "directed by a primary concern for preservation of

life and property," was not capricious and illegal. *Id.* at 230, 68.

Nor are any of the other cases cited by Appellant (Appellant's Br. 33–34) remotely apposite. Each of those cases involve disciplinary actions taken against individual students who had engaged in specific disruptive or threatening conduct. *See Matter of Schwarzmueller v. State Univ. of N.Y. at Potsdam*, 105 A.D.3d 1117, 962 N.Y.S.2d 752 (3d Dep't 2013) (upholding university's decision to suspend and remove from campus an individual who had been accused of violating the university code of conduct when he alarmed another student by allegedly flicking a knife in the dormitory hallway); *Matter of Schuyler v. State Univ. of N.Y. at Albany*, 31 A.D.2d 273, 274, 297 N.Y.S.2d 368, 370 (3d Dep't 1969) (challenge to university's ability to hold disciplinary proceeding against an individual who had allegedly engaged in an abusive and harassing demonstration at the university); *Spatol v. Barton*, 69 Misc. 2d 35, 37, 328 N.Y.S.2d 934, 936-37 (Sup. Ct. Monroe County 1972) (challenge to university's actions by a student who had certain university privileges suspended when he was charged with 10 different counts of disruptive behavior).

Here, Petitioners-Respondents proposed a student club to advocate for Palestinian rights and justice, and "to engage in community education about various aspects of the decades-long oppression of Palestinians." R-423. Based on the evidence in the Record, the court correctly concluded that Fordham SJP advocates only "legal, nonviolent tactics aimed at changing Israel's policies" (R-24), and that

Dean Eldredge's conclusion that SJP would raise concerns around safety had no rational basis. R-23. There is simply nothing in the Record to support Fordham's concerns about acts of disruption or misconduct by SJP at Fordham, much less concerns regarding safety or security.

### B. Fordham's Concerns About Safety and Security Are Impermissible Post-Hoc Rationalizations for the Challenged Determination.

A court cannot uphold an administrator's determination based on any reasons not raised by the administrator at the time that the decision was rendered; any "alternative ground for [the determination] belatedly raised by the respondents . . . may not serve to sustain [the determination]." *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 759, 573 N.E.2d 562, 567, 570 N.Y.S.2d 474, 479 (1991); *accord Matter of Stern, Simms & Stern v. Joy*, 48 A.D.2d 788, 788, 369 N.Y.S.2d 152, 154 (1st Dep't 1975). The issue of safety and security was not raised by Dean Eldredge when he denied SJP's application. Dean Eldredge first raised the issue in the course of this litigation when he stated in an affidavit that polarization "obviously can lead to issues of safety and security." R-76, ¶ 23.[16] Since

[16] The only mention of potential disruptive conduct prior to the litigation was by Vice-President Gray, in response to a letter sent by counsel for Petitioners-Respondents to Fordham. Gray wrote that Dean Eldredge's decision "was based on the fact that chapters of this organization have engaged in behavior on other college campuses that would violate this University's student code of conduct." R-544, ¶ 42. However, Gray himself was not the decision-maker, and his report of the basis for Eldredge's decision is contradicted by the plain words of Eldredge's email to Petitioners.

the issue was not articulated by Eldredge when he denied SJP's application, Fordham may not rely on it now.

## III. THE COURT PROPERLY GRANTED PETITIONERS-RESPONDENTS' MOTION TO AMEND THE PETITION.

Petitioners-Respondents moved for permission to file an Amended Petition on February 8, 2019 to add Veer Shetty, a student at Fordham, as a Petitioner. Over Fordham's objections, Justice Bannon granted the motion. Relying on two decisions of this Court, *JPMorgan Chase Bank, N.A. v. Low Cost Bearings NY Inc.*, 107 A.D.3d 643, 969 N.Y.S.2d 19 (1st Dep't 2013) and *Forty Cent. Park S., Inc. v. Anza,* 130 A.D.3d 491, 14 N.Y.S.3d 11 (1st Dep't 2015), she ruled that the grounds for the objections were "unpersuasive." R-16.

The New York Court of Appeals has held that "[a]pplications to amend pleadings are within the sound discretion of the court." *Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 411, 23 N.E.3d 1008, 1013, 998 N.Y.S.2d 740, 745 (2014). This Court has consistently upheld that principle. *Y.A. v. Conair Corp.*, 154 A.D.3d 611, 612, 62 N.Y.S.3d 116, 118 (1st Dep't 2017) ("Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit."). *See also Fellner v. Morimoto,* 52 A.D.3d 352, 353, 862 N.Y.S.2d 349, 350 (1st Dep't 2008); *Lanpont v. Savvas Cab Corp.*, 244 A.D.2d 208, 209-10, 664 N.Y.S.2d 285, 286-87

(1st Dep't 1997). Fordham has now raised the same objections to the motion that it argued to Justice Bannon. They remain unpersuasive.

### A. Petitioner Shetty Has Standing to Be a Petitioner Because Fordham's Decision to Deny an SJP Club Caused Him Injury.

Fordham argues that Shetty does not have standing to be a Petitioner in this action because he was not a Fordham student at the time of Eldredge's decision to deny SJP's club application in December 2016, and, therefore, he was not injured by that decision. Appellant's Br. 45-46. But Shetty was a Fordham student who wanted to be a member of SJP who was unable to do so because of Eldredge's decision. That is the injury in fact that gave Shetty the right to challenge that decision. This concrete injury was redressed by the court's order directing Fordham to recognize SJP: Petitioner Shetty is currently a member of SJP and is able to engage in student club activities.

### B. Petitioner Shetty's Claim is Ripe for Adjudication.

Fordham argues that Petitioner-Respondent Shetty's claims are not ripe for review because Eldredge's 2016 decision was not "final and binding" on him. Appellant's Br. 47-48. But that decision did bind Shetty because it prevented him from joining an SJP club at Fordham. Although he "could now file his own application for club recognition at any time" (Appellant's Br. 46), such an application to form an SJP club would be futile since Fordham continues to make clear that it will not accept such a club, except by Court order. "[W]hen it is plain

that 'resort to an administrative remedy would be futile' . . . an article 78 proceeding should be held ripe." *Walton v. New York State Dep't of Correctional Servs.*, 8 N.Y.3d 186, 196, 863 N.E.2d 1001, 1007, 831 N.Y.S.2d 749, 755 (2007) (citation omitted). If Fordham means to suggest that Petitioner Shetty could apply for recognition for some other club, this argument misses the point. Petitioner Shetty is not interested in starting another student club with another name; he wants to continue being a member of a club called Students for Justice in Palestine (SJP). R-508, ¶ 4. The name SJP is important to Petitioners-Respondents to connect with the broader movement for justice in Palestine, and the name itself conveys a political message that is significant for the students. R-539, ¶ 24; R-405, ¶ 9.

### C. Petitioner Shetty's claims are not time-barred because they relate back to the filing of the original petition.

Fordham argues that Shetty's claims are time-barred because he challenged Eldredge's December 2016 decision outside of the Article 78 four-month statute of limitations. CPLR § 217(1). But CPLR § 203(f) says that when a new claim is asserted, it relates back to the original claim if it is "based on the same transaction or occurrence," and if the parties are "so closely related that the original petitioner's claim would have given the respondent notice of the [new claim] so that the imposition of the additional claim would not prejudice the respondent." *Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 547, 961 N.Y.S.2d 157, 158 (1st Dep't 2013) (citation omitted). "[T]he salient inquiry is not whether defendant had

notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences . . . to be proved pursuant to the amended pleading.'" *Id*. at 548, 159.

Here, the original four Petitioners moved to add Petitioner Shetty, who brought identical claims to theirs. Petitioner Shetty's claims arose out of the same exact transactions or occurrences as the claims of the original Petitioners—Fordham's decision to deny SJP club status. Petitioner Shetty is a current student at Fordham University who was injured in the same way as all other Petitioners were by Fordham's decision to deny SJP club status. It is therefore unquestionable that Fordham was on notice of these transactions and occurrences, and Fordham does not even attempt to argue that it is prejudiced by the addition of Petitioner Shetty, nor could it. *See Giambrone*, 104 A.D.3d at 548, 961 N.Y.S.2d at 159 (finding no prejudice to defendant where "from the outset of [its] involvement in the litigation, [defendant] [had] sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation").

### D. Even if Petitioner Shetty Had Not Been Added to This Case, the Exception to Mootness Applies to the Original Petitioners.

Although Fordham never argued mootness below, this is exactly the type of case that satisfies the exception to mootness with regard to the original Petitioners,

even if Petitioner Shetty had not been properly added to this case, which he was. This exception "permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable." *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980). The mootness exception applies where there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." *Id.* at 714-15, 878, 402.

First, this legal issue will inevitably recur since there are current students at Fordham University (including Petitioner Shetty) who wish to continue participating in SJP at Fordham. *See, e.g.*, *Matter of McCormick v Axelrod*, 59 N.Y.2d 568, 571, 453 N.E.2d 506, 507, 466 N.Y.S.2d 277, 278 (1983) (although all named plaintiffs' claims had been mooted, court found the "exceptions to the mootness doctrine manifestly applicable" since "when a predictably similar situation arises, the need for prompt remedial action would likely deprive this court of an opportunity for meaningful review").

Second, Fordham's actions are likely to continuously evade review. If Petitioner Shetty is required to submit another application now, only to be inevitably denied for the same reason as the original Petitioners, his case almost certainly would

not be decided before he graduates in 2021. The full duration of an undergraduate education passed between when the original Petitioners-Respondents first submitted their application to form SJP in November 2015, and when the court decided their case in August 2019. Any future petitioners will face similar challenges given the temporary duration of a university education. *See City of New York v. Maul*, 14 N.Y.3d 499, 507, 929 N.E.2d 366, 371, 903 N.Y.S.2d 304, 309 (2010) (challenge to New York State and City agencies' failure to fulfill duties with respect to certain children in the foster care system was likely to evade review "given the temporary duration of foster care" and "the aging out of potential plaintiffs.").

Finally, the legal issue presented is significant. Fordham's rejection of a student club in violation of its own rules and for irrational and arbitrary reasons has significance for Fordham students as it directly affects their ability to experience university life, and it concerns whether the University is fulfilling its responsibilities to its students. *See, e.g.*, *McCormick*, 59 N.Y.2d at 571, 466 N.Y.S.2d at 278, 453 N.E.2d at 507 (appealed issue is significant because it concerns the interpretation of a statute that affects the health and safety of numerous nursing home patients); *Maul*, 14 N.Y.3d at 507, 929 N.E.2d at 371, 903 N.Y.S.2d at 309 (holding that the issue is significant because it concerns whether New York City and State agencies were fulfilling their statutory responsibilities to disabled children).

Fordham cites several federal cases to support its proposition that students' claims are mooted when they graduate (Appellant's Br. 50), but the federal exception to mootness is far more constrained and applies only where the "same complaining party" whose claim has been rendered moot "would be subjected to the same action again." *Fox v. Bd. of Trs. of the State Univ. of N.Y.*, 42 F.3d 135, 142-43 (2d Cir. 1994) (citation omitted); *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (same); *Mincone v. Nassau Cnty. Cmty. Coll.*, 923 F. Supp. 398, 403 (E.D.N.Y. 1996) (same). In contrast, New York courts must consider the likelihood of repetition for "other members of the public." *Hearst Corp.*, 50 N.Y.2d at 715, 409 N.E.2d at 878, 431 N.Y.S.2d at 402.[17]

## IV. RESPONDENT FAILS TO DEMONSTRATE ANY FACTUAL DISPUTES OR TO SHOW HOW ANY PREJUDICE WOULD RESULT FROM THE ABSENCE OF AN ANSWER.

Justice Bannon ruled that service of an Answer was not necessary since the facts had been fully developed in the parties' papers and no factual disputes remained. R-19; R-23-24. Only dispositive questions of law remained, and those were correctly decided by the court.

[17] *Matter of Tessler v. Board of Education of the City of New York*, 49 A.D.3d 428, 854 N.Y.S.2d 66 (1st Dep't 2008), relied on by Fordham (Appellant's Br. 50), actually supports Petitioners' position that this case should be decided even if the original Petitioners cannot benefit from the relief requested. *Tessler* decided whether the New York City Board of Education's decision not to permit petitioner to retake a high school admissions exam was arbitrary and capricious, even though the relief sought by petitioner (to retake the exam at a later date) was moot because that exam had already been administered. 49 A.D.3d at 429, 854 N.Y.S.2d at 67.

Under CPLR § 7804(f), where the "facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer," a court may grant the relief requested in the petition without permitting an answer to be filed. *Matter of Nassau BOCES Cent. Council of Teachers v. Board of Coop. Educ. Servs. of Nassau County*, 63 N.Y.2d 100, 102, 469 N.E.2d 511, 511, 480 N.Y.S.2d 190, 190 (1984). *See also Matter of Bayswater Health Related Facility v. New York State Dep't of Health*, 57 A.D.2d 996, 997, 394 N.Y.S.2d 314, 316 (3rd Dep't 1977) (when "there only remain questions of law, the resolution of which are dispositive, then the matter can be concluded without providing an opportunity for answer"). The lower court properly concluded this matter by granting Petitioners-Respondents the relief requested based on facts that were fully presented in the papers. *See, e.g.*, *Matter of Arash Real Estate & Mgt. Co. v. New York City Dep't of Consumer Affairs*, 148 A.D.3d 1137, 1138, 52 N.Y.S.3d 102, 105 (2d Dep't 2017) (upon respondent's motion to dismiss, court decided petition on the merits as no factual development was necessary to determine that respondent's "interpretation of the Administrative Code provision which the petitioner was charged with violating was unreasonable"); *Matter of Applewhite v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 A.D.3d 427, 428, 981 N.Y.S.2d 513, 514 (1st Dep't 2014) (facts had been fully presented so an answer was not warranted to show that Board of Education's

determination to sustain teacher's unsatisfactory performance rating was not rationally based and that Board had violated its own rules of procedure). Fordham misplaces reliance on *Matter of Kickertz v. New York University* (Appellant's Br. 51), in which the Court of Appeals found that an answer should have been permitted because there was a disputed issue of fact as to whether the university had "substantially complied with its established disciplinary procedures." 25 N.Y.3d 942, 944, 29 N.E.3d 893, 895, 6 N.Y.S.3d 546, 548 (2015). Here, there is no such factual dispute. "CPLR 7804(f) should not be construed to give respondent two bites at the apple by permitting the submission of duplicative pleadings on the merits." *Matter of Crooms v. Corriero*, 206 A.D.2d 275, 277, 614 N.Y.S.2d 511, 512 (1st Dep't 1994).

Fordham points to only one factual issue to which an Answer would be directed, namely, whether Fordham's club approval guidelines were properly applied with respect to Eldredge's authority to veto approval of a student club. Appellant's Br. 51. But Justice Bannon acknowledged Dean Eldredge had the authority to veto SJP, but noted that such discretion was not unfettered, and found that the reasons for his veto were arbitrary and inconsistent with Fordham's rules. *See* discussion, *supra*, Section I. Fordham offers no indication of what facts might be advanced concerning its disagreement with Justice Bannon's conclusion.

More to the point, even if an Answer would provide additional facts to the record related to the club approval rules, this would leave undisturbed Justice Bannon's legal conclusions: first, that Fordham had deviated from its own rules and policies in other respects, and, second, Eldredge's decision, even if authorized, was not rationally based on the evidence before him. *See* discussion, *supra*, Sections I and II. Each of these legal conclusions provided independent grounds for the court's order. In short, Fordham was not prejudiced by refusal to permit an Answer since the outcome of the case would have been the same.

Although Fordham also argues that the court "almost entirely overlooked the extensive research and consideration that Dean Eldredge engaged in before making his decision" (Appellant's Br. 51), it does not argue that these facts were not fully presented, or that there is any factual dispute. The lower court simply did not find those facts, which Fordham acknowledges were in the Record, significant to its decision. R-23-24. *See* discussion, *supra*, Section II.A. Spending time gathering irrelevant information cannot render an irrational decision rational.

## CONCLUSION

For the foregoing reasons, Supreme Court's decision should be affirmed.

Dated: July 24, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically served the foregoing Brief for Petitioners-Respondents on counsel for Respondent-Appellant via email:

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