COURT OF APPEALS
STATE OF NEW YORK

AHMAD AWAD, et al.

Petitioners-Appellants,

-against-

FORDHAM UNIVERSITY,

Respondent-Respondent,

New York County
Index No. 153826/17

Appellate Division
Case No. 2020-00843

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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Dated: January 20, 2021
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTRODUCTION

At a moment when university students across the nation are speaking out for racial equality and human rights, Fordham University has decided to deny recognition to a Students for Justice in Palestine (SJP) club, a club that advocates for the rights of the Palestinian people. Supreme Court Justice Bannon correctly found that decision to be irrational and inconsistent with Fordham's rules and policies protecting free expression. While the Appellate Division's summary reversal of Justice Bannon's well-reasoned decision is wrong on the facts and on the law, of greater concern is the prospect of its impact on college students seeking judicial relief when they face political discrimination. By denying a student who is subject to a politically-motivated college decision the opportunity to challenge the decision merely because he was not a student at the time it was made, and by refusing to critically engage with the facts demonstrating both the college's political motivation and the violation of its free speech guarantees, the Appellate Division decision, if allowed to stand, will effectively reverse the decisions of this Court that ensure the availability of Article 78 as a means to challenge arbitrary decision-making by college administrators.

Central to this Court's 40-year history of applying Article 78 to the decisions of college administrators has been the insistence that courts determine that those decisions did not lack a "rational basis" and were not "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 NY2d 222, 231 [1974].) To do so means that courts may not simply accept the word of the college, as the Appellate Division did here, that its decisions were made "'in the exercise of its honest discretion.'" (NY St Cts Elec Filing [NYSCEF] Doc. No. 27, order, *Awad v. Fordham Univ.*, — NYS3d —, 2020 WL 7502479, *2, 2020 NY Slip Op. 07695, *3 [1st Dept 2020] (quoting *Matter of Powers v. St. John's Univ. Sch. of Law*, 25 NY3d 210, 216 [2015]).) Instead, as the decisions of this Court exemplify, courts are obliged to examine the facts underlying claims of arbitrary academic decisions to ensure that the decisions were rational and based on the evidence. Justice Bannon's lengthy analysis of the facts fulfilled that responsibility. The Appellate Division's one-sentence discussion of the facts flatly ignored it.

If allowed to stand, the decision of the Appellate Division establishes a precedent that effectively immunizes the decisions of college administrators from judicial review. First, it dismissed the case as moot because the original Petitioners, who applied to start SJP in 2015, had all graduated; it did so despite this Court's precedent permitting review of significant, recurring issues that would otherwise evade review. Although Justice Bannon permitted the addition of Petitioner Veer Shetty, a current Fordham student who desired to join SJP at Fordham, the Appellate Division held that he lacked standing and his claim was not ripe because he had not

been a student at the time of Fordham's rejection of the SJP application. His remedy, the court held, without citing any relevant authority, was to submit a new application, a plainly futile exercise given that Fordham had already decided not to permit such a club and would certainly do so again.

Second, the Appellate Division's decision implies that whatever reasons are offered by college administrators for their decisions will be accepted by the courts as an exercise of "honest discretion," no matter the evidence demonstrating the implausibility of those reasons. This case illustrates the injustice of such a practice. The Appellate Division simply assumed that the post-litigation reason given by Fordham for its decision—namely, the allegations that students in *other* SJP clubs on *other* campuses had engaged in disruptive behavior—was actually the basis for its decision and assumed that Fordham's reliance on those allegations was not "without sound basis in reason" and not "taken without regard to the facts." But those allegations, whether or not Fordham relied on them, provide absolutely no basis for Fordham's decision. Given the significant public importance of protecting political speech at our colleges from arbitrary decision-making by administrators, as well as the conflicts between the Appellate Division decision and this Court's jurisprudence, leave to appeal should be granted.

STATEMENT OF FACTS

In the Fall of 2015 – more than five years ago – students at Fordham University applied to start a club called Students for Justice in Palestine ("SJP"), whose purpose was to build support in the Fordham community for justice and human rights for Palestinians. (R-538, ¶¶ 17-18; R-52, ¶ 3; R-423). Over the course of a year, Fordham administrators, led by Dean of Students Keith Eldredge, questioned the students about their political beliefs (*see, e.g.*, R-539, ¶ 23; R-542, ¶ 31; R-59, ¶ 9) and the proposed group's relationship to 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 SJPs on other campuses, even 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.) In response to concerns raised by Eldredge that SJP's presence would stir up controversy, and regarding alleged incidents involving SJPs at other schools,[1] the students assured

[1] Such allegations against SJP groups - which must be seen in the context of concerted efforts to undermine student advocacy for Palestinian rights - are often inflammatory, inaccurate, and determined to be unsubstantiated after lengthy university investigations. (R-397-99, ¶¶ 6-10.) Today there are approximately 200 student groups advocating for Palestinian freedom and equality on campuses all over the country. (R-434.)

Fordham that they were not going to do anything that violated university policy. (R-404, ¶ 8.)

The application was then considered by the United Student Government, which approved SJP as a student club in November 2016, finding that SJP at Fordham "fulfills a need for open discussion and demonstrates that Fordham is a place that exemplifies diversity of thought." (R-541, ¶ 29.) On December 22, 2016, Eldredge took the unprecedented step of vetoing USG's approval. (R-542-43, ¶ 33.) In this final determination, Eldredge identified two bases for his decision to veto USG approval of SJP: first, he could not approve of a club "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, second, the topic of the "Israeli-Palestinian conflict . . . often leads to polarization" and the topic and purpose of SJP "points toward that polarization." (R-81.)

The rejection of the SJP application because of its political views was a flagrant violation of Fordham's free speech rules, Mission Statement and other policies. (R-546, ¶ 49.) As Supreme Court Justice Bannon noted, "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 commitment to encouraging the "discussion of differing views" begins with its Mission Statement, which "guarantees the freedom of inquiry

required by rigorous thinking and the quest for truth." (R-546, ¶ 49.) The University also promises that "[e]ach member of the University has 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." (R-546, ¶ 50.) 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." (R-546, ¶ 50.)

In a belated effort to obscure its political motivation, Fordham submitted an affidavit from Eldredge after the commencement of this litigation claiming that he had "safety and security" concerns that could result from SJP groups on other campuses.[2] (R-76, ¶ 23.) But the students wishing to start SJP had already assured Eldredge during the application process that their group would be independent and would abide by university policy. (R-404-05.) Fordham provided no basis to doubt the evidence and those pledges – and indeed listed other reasons for rejecting the club, reasons which Justice Bannon found to be without rational basis.

Justice Bannon was not fooled, concluding that Fordham had utterly failed to provide "a rational basis for concluding that SJP might encourage violence,

[2] In his affidavit, Eldredge essentially acknowledged that it was indeed the name, SJP, and the political message it conveyed, that concerned him, when he 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.)

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.) Contrary to the charge of disruption, the court found that SJP advocates only "legal, nonviolent tactics aimed at changing Israel's policies." (R-24.) Justice Bannon added: "[I]t must be 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." (R-24.)

The truth of Justice Bannon's observation that Fordham SJP's intention was to engage in legal, nonviolent activities is borne out by the activities in which the club has engaged in the year since Justice Bannon ordered Fordham to afford SJP official recognition. During that time, SJP has advanced its mission of educating students about Palestinian rights by hosting inclusive events with guest speakers, sponsoring a poetry night, visiting the Palestine Museum, and supporting the Black Lives Matter movement. (NYSCEF Doc. No. 24, brief of amicus curiae Professors at Fordham University in *Awad v. Fordham Univ.*, available at 2020 WL 7353840, *6.) Fordham has not alleged that SJP, Shetty or any club member has violated any college rule during its time on campus.

Petitioners Awad, Lurie, Dadap, and Norris have all graduated from Fordham. (R-177, ¶ 3; R-510, ¶ 5.) Petitioner Veer Shetty started as a student at Fordham University in January 2018, after Eldredge's decision. (R-507, ¶ 1.) Because of his

commitment to advocacy of Palestinian rights, Shetty wanted to participate in SJP on campus. (R-508, ¶¶ 3-4.) Since Fordham had already decided that no SJP would be permitted, he sought to be added as a Petitioner in this litigation so that he could challenge that decision.

PROCEDURAL HISTORY

This Article 78 proceeding was commenced on April 26, 2017. (R-28.) On August 6, 2019, Justice Bannon granted Shetty's motion to be added as a Petitioner to the action, and granted the Petition, annulling Dean Eldredge's decision and directing that Fordham recognize SJP as an official club. (R-25.) Justice Bannon's Decision, Order and Judgment is attached to the Affirmation of Radhika Sainath as Exhibit A. Fordham then appealed and, in a decision dated December 22, 2020, the Appellate Division, First Department, held that the case was moot since all the Petitioners except Shetty had graduated, that Shetty had no standing to challenge Eldredge's decision since he was not a student at the time it was rendered, and that Shetty's claim was not ripe since he had not himself submitted an application for an SJP club. (NYSCEF Doc. No. 27, order at 2.) The court went on to find that Eldredge's decision was based on his concern for the actions of other SJPs on other campuses, and the decision had a rational basis. The Appellate Division decision is Exhibit B to the Sainath Affirmation. Pursuant to CPLR § 5513 (b), this Motion for Leave to Appeal is timely filed within 30 days of service of the Notice of Entry of

the Appellate Division's order, which was e-filed in the Supreme Court and e-served on December 22, 2020. The Notice of Entry is Exhibit C to the Sainath Affirmation.

STATEMENT OF JURISDICTION

This appeal is sought pursuant to CPLR § 5602 (a) (1) (i), as the Appellate Division's December 22, 2020 order sought to be appealed from was a final determination of this action.

QUESTIONS PRESENTED FOR REVIEW

1) Should a student who sought to be added to a legal challenge to a college's politically-motivated decision brought by students who have now graduated be able to challenge that policy that directly impacts him even if it was adopted before he was in college?

The Appellate Division found that he should not.

2) Did a college act irrationally, when, despite its free speech guarantees, it denied recognition to a club based on alleged actions taken by clubs of the same name at other campuses, even with uncontroverted evidence of the club's independence from other groups?

The Appellate Division found that it did not, without addressing the college's free speech guarantees or the evidence at hand.

ARGUMENT

I. BY DENYING PETITIONER SHETTY THE RIGHT TO CHALLENGE FORDHAM'S DECISION, THE APPELLATE DIVISION EFFECTIVELY BARRED COLLEGE STUDENTS FROM CHALLENGING THEIR COLLEGES' UNLAWFUL POLICIES.

In the winter of 2019, after three of the original Petitioners had graduated, and as the last remaining Petitioner was nearing graduation, Petitioners moved for permission to add Veer Shetty as a Petitioner in the action so that he too could challenge Fordham's decision. Shetty, then a sophomore at Fordham, alleged that he wanted to be a member of an SJP club but that Eldredge's decision would not permit it.

In her decision on the merits of the action, Justice Bannon granted Shetty's motion. In its reversal of that decision, the Appellate Division ruled that Shetty's claim was not ripe and that he did not have standing to challenge Eldredge's determination. Since the other Petitioners had graduated, the court ruled that the action was moot. The court's ruling on standing, ripeness, and mootness defies settled law. If allowed to stand, given the limited time that students are in college, the Appellate Division decision will effectively immunize unlawful college policies from judicial review.

A. Because Dean Eldredge's Decision Denying Recognition of SJP Prevented Petitioner Shetty From Joining an SJP Club, He Has Standing to Challenge that Decision.

Dean Eldredge's decision to deny recognition of SJP impacted Shetty no less than it did the other Petitioners. He suffered the same injury that they did and thus satisfied the basic requirement of standing. Standing "requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation." (*Matter of Ass'n for a Better Long Island, Inc. v. New York State Dept. of Envtl. Conservation,* 23 NY3d 1, 6 [2014]). This Court has "been reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." (*Id*.) The fact that Shetty was not impacted by the policy at the time it was adopted is wholly irrelevant. It goes without saying that litigants can challenge the legality of policies and practices even though they were not subjected to them at the time they were first adopted. The only relevant inquiry regarding standing was whether the litigant was impacted by the policy. This is an elemental aspect of standing doctrine.

New York State Ass'n of Nurse Anesthetists v. Novello (2 NY3d 207, 212 [2004]), the only standing case cited by the Appellate Division, is not to the contrary. There, the plaintiffs' claim of injury was rejected because it was based on "speculation," (*id.* at 213) and "hypothesized harm." (*Id.* at 215.) There is nothing either speculative or hypothetical about the injury that Shetty suffered. That injury

afforded him standing. There is simply no case upon which the Appellate Division's holding to the contrary could rely.

B. Shetty's Claims Are Ripe for Adjudication, as Fordham's Decision Was Final and Binding.

In holding that Shetty's claim was not ripe, the Appellate Division found that, because he did not apply to start an SJP club, Fordham's decision to prohibit SJP was not "final and binding" upon him. (NYSCEF Doc. No. 27, order at 2.) But Fordham's decision obviously did bind Shetty because it denied him the right to join an SJP club at Fordham. In order for an action to be ripe for review, there must be "a definitive position on the issue that inflicts an actual, concrete injury." *(Matter of Gordon v. Rush*, 100 NY2d 236, 242 [2003] (quotations omitted).) There is no dispute that Fordham's position that it would not recognize SJP was definitive. And as discussed above, Fordham's decision caused Shetty a concrete injury of not being able to join SJP. *See, supra*, at 11. The fact that Fordham's "definitive position on the issue"—to preclude an SJP on its campus"—was made before Shetty was a student there does not render Shetty's claim unripe; he has been injured by the decision all the same.[3]

[3] The Appellate Division asserts that Shetty could submit his own application to Fordham. But he was not obliged to do so, since, as argued in text, his claim that Eldredge's decision was unlawful was ripe by virtue of the injury he suffered from that decision. It was ripe, additionally, because a new SJP application would be futile, since Fordham has made clear that it would not permit an SJP club. "[W]hen it is plain a that 'resort to an administrative remedy would be futile' . . . an article 78 proceeding should be held ripe." (*Walton v. New York State Dept. of Correctional Servs*., 8 NY3d 186, 196 [2007] (citation omitted).)

C. Even If Shetty Had Not Sought to Be Added as a Party, the Action Satisfies the Exception to Mootness.

Although the original Petitioners have all graduated, this Court has repeatedly recognized an exception to the mootness rule that "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 NY2d 707, 714 [1980].) The Court has "invoked the exception to mootness to consider substantial and novel issues that are likely to be repeated and will typically evade review." (*Matter of Gonzalez v. Annucci*, 32 NY3d 461, 470-71 [2018] (applying exception to mootness to sex offender's challenge to his placement upon release).) The circumstances of this case – presenting an issue of great importance, that is likely to recur, and effectively nonreviewable because of its brief existence – are precisely those for which the rule was designed.

The importance of the underlying issue is self-evident. Courts have consistently acknowledged the urgency of protecting free speech rights at our nation's universities. (*See, e.g., Sweezy v. New Hampshire*, 354 US 234, 250 [1957] ("The essentiality of freedom in the community of American universities is almost self-evident"); *Regents of Univ. of Cal. v. Bakke*, 438 US 265, 313 [1978] ("it is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples") (internal quotations omitted). *See also* NYSCEF Doc. No. 20, brief of

amicus curiae Foundation for Individual Rights in Education, National Coalition Against Censorship, and PEN American Center (FIRE, et al.) in *Awad v. Fordham Univ.*, at 6-7.)

The significance of free speech guarantees, not only in public colleges, to which the First Amendment applies, but also in private colleges, is evident in Fordham's explicit acknowledgment in its Mission Statement and elsewhere (*see supra* at 4-5), as well as in the policies of the vast majority of private colleges. (*See* NYSCEF Doc. No. 20, brief of amicus curiae FIRE, et al. at 7-8.) The import is heightened here, given that the students seek to speak out and organize on an issue of public concern, Israel and Palestine. Students have long been at the forefront of engaging with the most pressing human rights issues of the time, from protesting Jim Crow laws, the Vietnam War, and South African Apartheid in years past, to advocating for racial equality and seeking justice in Palestine today. New York students' right to non-arbitrary, rational fact-based determinations by their schools, and students' ability to hold schools to account for promises made to them – especially regarding their free expression – raise significant and important questions that this Court should address.

Given the frequency of free speech controversies on college campuses, there is a considerable likelihood that the issue presented here, the suppression of controversial speech, will recur. And it will in fact recur at Fordham – it is indeed

an ongoing, actual controversy. Shetty and other current Fordham students have been participating in an SJP club at Fordham since Justice Bannon's decision and want to continue doing so and Fordham continues to assert its authority to not recognize SJP. (*See Matter of McCormick v. Axelrod*, 59 NY2d 568, 571 [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").)

The problem of nonreviewability is illustrated by the facts of this case. Students typically graduate in four years. This dispute has already run – from the time of club application to the time of this Motion – more than five years. (*See, e.g.*, *City of New York v. Maul*, 14 NY3d 499, 507 [2010] (finding that claims of inadequate foster care services "are likely to recur and may evade review given the temporary duration of foster care, the aging out of potential plaintiffs and the fact that some placements tend to be transitory.").)

The Appellate Division, citing only one irrelevant decision of its own,[4] dismissively rejected the applicability of the mootness exception by saying a student

[4] In *Matter of Tessler v. Board of Education of the City of New York* (49 AD3d 428, 429 [1st Dep't 2008]), a student complained about noise while taking an exam. Petitioner's request to retake the test at a later date was found moot since that date had already passed, and the question of whether the mootness exception rule should apply was not even considered. The Appellate Division also cited a federal case, *Fox v. Board of Trustees of State Univ. of New York*, which is inapplicable since the federal exception to mootness applies only if "there was a reasonable expectation that the

could apply "for recognition of a similar club at any time." (NYSCEF Doc. No. 27, order at 2.) The court expressed no concern for the obvious futility of such an application—Fordham would clearly deny it—nor of the near certainty that it, too, would evade judicial review by virtue of the student's graduation. Mr. Shetty is expected to graduate in 2021. (R-507.) The issue presented here is important, will certainly recur, even at Fordham, and will almost surely continue to evade review. The mootness exception warrants review on the merits by this Court.

II. IN UPHOLDING FORDHAM'S DECISION, THE APPELLATE DIVISION IMPROPERLY RELIED ON FACTS THAT DID NOT FORM A RATIONAL BASIS FOR THAT DECISION.

The mandate of CPLR § 7803 (3), that a court determine whether an action under review was "arbitrary and capricious or an abuse of discretion," imposes a fact-intensive obligation upon a reviewing Court. Supreme Court Justice Bannon honored that obligation with a careful 20-page analysis of the factual basis for the determination under review. While acknowledging its obligation to determine whether Fordham's determination had a "rational basis," the Appellate Division's reversal of Justice Bannon, with its one-sentence discussion of the facts, represents a complete abdication of that obligation. That it comes in a case in which a college

same complaining party would be subjected to the same action again." (42 F3d 135, 142-43 [2d Cir 1994], *cert. denied* 515 US 1169 [1995] (internal quotations omitted) (emphasis in original).) By contrast, New York courts must consider "a likelihood of repetition, either between the parties *or among other members of the public*." (*Matter of Hearst Corp. v. Clyne*, 50 NY2d 707, 714-15 [1980] (emphasis added).)

has engaged in blatant viewpoint discrimination as a means of suppressing student speech is particularly egregious.

The Appellate Division's cursory discussion of the facts in this case reads in its entirety as follows:

> Respondent's conclusion that the proposed club, which would have been affiliated with a national organization reported to have engaged in disruptive and coercive actions on other campuses, would work against, rather than enhance, respondent's commitment [sic] open dialogue and mutual learning and understanding, was not "without sound basis in reason" or "taken without regard to the facts."

(NYSCEF Doc. No. 27, order at 3 (internal quotations omitted).) Implausibly, the single basis upon which the court relied for its holding that Fordham's determination was rational – that the proposed club would be "affiliated with a national organization reported to have engaged in disruptive and coercive actions on other campuses" – was not even a ground that Fordham asserted in its determination.

That decision was contained in an email that Dean Eldredge sent to the students on December 22, 2016, which makes no mention whatever of the actions of a national group or any other group at other campuses. On that ground alone, the Appellate Division decision may not stand, given the settled law that an "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 NY2d 753, 759 [1991]. *See also Matter of Madeiros v. New York State Educ. Dept.*, 30 NY3d 67, 74 [2017] ("Judicial review of an

administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.") (internal quotations omitted).)

The reversible error that the Appellate Division commits, however, is not confined to a narrow administrative principle, but also lies in its utter failure to fairly engage with the record in this case. That was its minimum obligation under Article 78. Had it done so, it would have found, as did Justice Bannon, first, that the single fact upon which it relied, the actions of other SJPs on other campuses, could not have provided a rational basis for Fordham's decision, and, second, that it was the political views that SJP represented that were at the heart of Fordham' decision.

A. The actions of SJPs on other campuses had no rational relationship to the Fordham SJP.

In the year-long application process, Dean Eldredge questioned the students regarding SJP's relationship to NSJP and allegations of misconduct by SJP clubs at other colleges. Petitioner Awad explicitly represented that the Fordham SJP club would be entirely autonomous (R-405, ¶ 10), and would function independently of National SJP and SJPs at other schools, provided written evidence to that effect from NSJP, and even amended 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.) In addition, Petitioner Awad assured Eldredge that SJP would abide by all university policy. (R-404.) There was simply nothing in the record to warrant the assumption that the

Petitioners were any more likely to engage in misconduct than students applying for any other club.

Nevertheless, Fordham made the argument to Justice Bannon that such alleged misconduct justified Eldredge's decision. After reviewing the allegations, she 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.) Contrary to new claims of safety and security concerns, the court held that SJP advocates only "legal, nonviolent tactics aimed at changing Israel's policies." (R-24.)

Justice Bannon's analysis closely parallels the United States Supreme Court's decision in *Healy v. James* (408 US 169 [1972]). There, too, a college had rejected a student application to form a club that was loosely affiliated with student groups on other campuses that were alleged to have engaged in disruptive conduct. The national organization, the Court observed, 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 "petitioners proclaim their complete independence from this organization" (*Id.* at 186.) The Court concluded: "On this record it is clear that the relationship was not an adequate ground for the denial of recognition. (*Id.* at 187.)

Because the college was public, the Court's decision rested on First Amendment grounds. While the Petitioners here do not have free speech rights under the Constitution, they have free speech rights under Fordham's Mission Statement and its various speech-related rules. The question here is precisely the one at issue in *Healy v. James*, whether those rights may be lost merely because of an affiliation with other clubs on other campuses that are alleged to engage in misconduct. The short answer here, as in *Healy*, is that they may not.[5]

B. Fordham's Decision Reflected Its Disagreement With SJP's Position on Israel/Palestine. As Such, the Decision Violated Fordham's Free Speech Guarantees.

To examine the record in this case is to be struck with the irresistible conclusion that it was not the actions of SJP clubs at other campuses that really concerned Dean Eldredge. Given what he knew to be SJP's harsh critique of Israel's treatment of Palestinians, he simply did not want Fordham to have a club called SJP at Fordham.

Eldredge's obsession with SJP's political views about Palestine and Israel is apparent throughout the Record. From his criticism that SJP was "polarizing," and

[5] Fordham's assertion in the court below that Petitioners wanted "a connection with the larger, national SJP organization" (Respondent-Appellant's brief in *Awad v. Fordham Univ.*) from which it inferred control by NSJP, was not supported by the Record and misunderstood Petitioners' 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. That is not inconsistent with their explicit representation that SJP at Fordham would decide its own policies and activities.

improperly focused on "a specific country"—criticisms that Justice Bannon found at odds with Fordham's free speech guarantees—to his inquiries to the students about their views on the boycott of Israel and on Jewish Voice for Peace, to his inquiry about SJP activities on other campuses, the Record clearly shows that the University's actions from the beginning of Petitioners-Appellants' application process were not rationally based. It is a conclusion that is re-enforced by Eldredge's statement 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.) In other words, the same students, presenting the same purported threat of disruption, could have an official club, as long as it was not called SJP. Viewing all of this, it was obvious to Justice Bannon "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.)

The Appellate Division mentioned none of these facts in its Opinion. In fact, it ignored Justice Bannon's analysis entirely. This Court should not permit judicial sanction of such blatant viewpoint discrimination that defies the university's applicable policies, and is therefore arbitrary and capricious, in violation of Article 78.

CONCLUSION

For the foregoing reasons, Petitioners-Appellants respectfully request that their motion for leave to appeal be granted.

Dated: January 20, 2021
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Respectfully submitted,

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