COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 14-3620H

HARVARD CLIMATE JUSTICE COALITION, ET AL.,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
HARVARD MANAGEMENT COMPANY, INC.,
and MARTHA M. COAKLEY

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.'S MOTION TO DISMISS

We hereby oppose Defendants President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss (the "Motion"). Because each count in our complaint states a viable claim for relief, the Motion should be denied.

I. Introduction

Defendants ground their arguments for dismissal in a misapprehension of our claims and the law underlying them. Massachusetts courts have not addressed whether students possess the special interest requisite to challenge the management of university assets in exceptional circumstances. This case, however, presents such circumstances, and we have narrowly tailored our assertion of standing to them. As such, a grant of standing would neither contravene this state's public policy nor open the door to excessive litigation. Moreover, since any determination of our ability to meet standing requirements and the extent of Defendants' charitable duties requires a fact-based inquiry, it is unsuitable for resolution via a motion to dismiss.

Defendants similarly mistake the nature of our novel tort claim, which we bring on behalf of Future Generations. Because it alleges an independent tort and does not implicate Defendants' fiduciary duties, this claim requires no showing of special interest. Defendants' contentions that

they owe Future Generations no duty of reasonable care and that our claim's novelty necessitates summary dismissal are incompatible with this state's prior case law, the nature of tort law generally, and the overwhelming injustice that our claim would, if recognized, begin to redress.

Our interest in this case is far from hypothetical. To achieve marginally better financial return for a university endowment that is already the world's largest, Defendants knowingly contribute to a problem that threatens our well-being as students and that of Future Generations. Not only is the case suitable for judicial resolution, but even the most elementary adherence to principles of fairness and justice demands it. Defendants cannot abrogate their duties—and put the health of the planet and its inhabitants at risk—by appealing to fiduciary discretion. For these reasons, and as detailed below, our case should be allowed to proceed.

II. Facts

Our request for relief is consistent with Defendants' charitable obligations, their past conduct, and the demands of justice. The catastrophe of climate change is now of such a scale and intensity that underwriting it not only harms the public interest but also violates the Harvard Corporation's duty to promote the "advancement and education of youth." Cplt. at Ex. H.

Harvard President Drew Faust has stated that "climate change poses a serious threat to our future—and increasingly to our present." *Id.* at Ex. J. But Defendants' efforts to address that threat fall far short of what is required. In particular, research and scholarship on climate change, while important for guiding action to confront it, Defs. Mem. at 3-4, cannot substitute for such action. Likewise, campus sustainability measures, *id.* at 4, have a minimal impact on the continued extraction of fossil fuels—an impact outweighed by Defendants' investment in them. Finally, the appointment of a Vice President for Sustainable Investing, *id.*, does not commit

Defendants to any changes in their investment behavior. In short, these steps, though laudable, do nothing to address the harms caused by Harvard's investments in fossil fuels.

The Corporation has several times chosen to divest from morally repugnant sectors, thereby recognizing the political and moral implications of its investments. *See* Cplt. at Ex. N. Recently, the Harvard Corporation's decisions to sign the United Nations Principles for Responsible Investment and to join the Carbon Disclosure Project, Defs. Mem. at 4, acknowledge the connection between its investments and its duty to address climate change. Taken together, Defendants' current attention to their investments' climate impacts and their past divestment decisions suggest that they recognize a duty to withdraw investments that endanger social welfare and the interests enumerated in the Charter of the Harvard Corporation ("Charter"). Cplt. at Ex. H. This duty, once recognized, is not obviated by the personal judgment or preferences of Defendants' trustees. Therefore, further factual inquiry is needed to ascertain its full extent.

III. Standard for Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief may be granted under Mass. R. Civ. P. 12(b)(6) permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires that the complaint set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . . " *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at

557. The Court, must, however, accept as true the allegations of the complaint and draw every reasonable inference in favor of the plaintiff. *Curtis v. Herb Chambers I–95, Inc.*, 458 Mass. 674, 676 (2011). The court takes into consideration the allegations in the complaint "although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint, also may be taken into account." *Schaer v. Brandeis University*, 432 Mass. 474, 477 (2000). As a general matter, courts are not to "resolve undecided points of substantive law" via a motion to dismiss. *M. Aschheim Co. v. Turkanis*, 17 Mass. App. Ct. 968, 968 (1983).

IV. We Have Standing to Challenge Defendants' Investments in Fossil Fuels

Defendants' argument in favor of dismissal rests primarily upon the claim that we lack standing to challenge their investments in fossil fuels. However, Massachusetts courts allow plaintiffs with a special interest in the management of a charity to bring actions challenging breaches of duty in charitable administration. *See, e.g., Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007). The Complaint describes with great particularity our special interest in Defendants' investments in fossil fuels and their resulting harms. Cplt. ¶¶ 49-62. Contrary to Defendants' contention, our claim for standing is sufficiently limited to avoid disrupting the Commonwealth's charity enforcement scheme. Indeed, this action seeks to vindicate the interests and enforce the charitable duties that Massachusetts' special interest doctrine was created to protect. Accordingly, Defendants' Motion should be denied and our action should be allowed to proceed.

A. Massachusetts Law Allows Plaintiffs With a Special Interest in the Management of a Charity to Sue for Breaches of Charitable Duty

Authority to enforce the due application of charitable funds in Massachusetts normally rests with the Attorney General. M.G.L. c. 12, § 8. Under prior common law, this authority was exclusive. *Burbank v. Burbank*, 152 Mass. 254, 256 (1890). However, in accordance with the

modern trend, Massachusetts courts have created and progressively expanded a special-interest exception to the general rule. *See, e.g.*, *Lopez v. Medford Cmty. Ctr., Inc.*, 384 Mass. 163, 167 (1981); *Maffei*, 449 Mass. at 245; Restatement (Third) of Trusts § 94 (2012) ("[a] suit for the enforcement of a charitable trust may be maintained . . . by another person who has a special interest in the enforcement of the trust"). In determining whether a plaintiff has standing to litigate based on a special interest, the crucial question is whether that interest is distinct from one shared by the general public. *Lopez*, 384 Mass. at 167.

The Supreme Judicial Court has provided some guidance as to the difference between excluded, generally shared public interests and nonexcluded private interests. The Court has found an insufficiently private interest when a plaintiff's control over a charitable trust is temporally limited, *Dillaway v. Burton*, 256 Mass. 568, 573 (1926) (cotrustee could not bring action against other cotrustees for mismanagement where special interest would be extinguished after trust paid out) or lacks real force, *Ames v. Attorney General*, 332 Mass. 246, 252 (1955) (members of arboretum visiting committee "with no rights or powers" lacked standing to compel Attorney General enforcement action). Similarly, special interest claims based on anticipated benefits fail when the benefits are identical to those anticipated by the general public. *Burbank*, 152 Mass. 254 at 256 (heirs and next of kin had no interest in trust distinct from that of other residents standing to benefit from bequest to town).

On the other hand, the Court has granted standing where, as in this case, the plaintiffs are in a special relationship with the charity and suffer harms arising from that relationship. For example, the Court has found a special relationship where supervision is mandated by the trust document. *Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Acad. in Andover*, 253 Mass. 256, 301-2 (1925) (visitors responsible for school's religious

mission had standing to challenge trustees' plan for closer affiliation with another school). The Court has also found a special relationship when the plaintiff is entitled to the entire benefit of the trust. *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 225 (1954) (college had standing to challenge administration of trust fund to which it was entitled on occurrence of contingency). Finally, special interest claims based on membership rights may succeed when there is an allegation of bad faith. *Jessie v. Boynton*, 372 Mass. 293, 303-4 (1977) (employee members of hospital had standing to challenge procedure of vote on disenfranchisement).

In sum, the Court's inquiry into whether a private plaintiff possesses interests that are "distinct from those of the general public," *Lopez*, 384 Mass. at 167, is fact based and depends crucially on the specific nature of the relationship between plaintiffs and the defendant charitable organization. The Court's rulings look to such factors as the plaintiff's control over charitable assets; rights bestowed by the charity's governing document; the distinction between the plaintiff's and the public's benefits; and distinct harms suffered as a result of mismanagement. The Court also considers whether granting standing would undermine the purposes motivating the default rule of exclusive Attorney General enforcement authority, namely the competence of the public representative and the danger of vexatious litigation *Dillaway*, 256 Mass. at 575.

B. We Have a Special Interest in Defendants' Investments in Fossil Fuels

As demonstrated by the Complaint, our interest in certain of Defendants' investment decisions supports standing to challenge their fossil fuel investments in particular. This special interest is limited to those investments that "directly affect 'the advancement and education of youth' and the maintenance of the university's physical campus." Cplt. at ¶ 49 (quoting the Charter, *id.* at Ex. H). The interest is grounded in the language of the Charter, *id.*, the special benefits that we enjoy from these decisions as students and a student association, *id.* at ¶¶ 49-51,

and the particular harms we do and will suffer as a result of the Corporation's contribution to climate change, *id.* at ¶¶ 52-63. Furthermore, our standing claim is narrowly tailored to the the particular harms we do and will suffer as a result of the Corporation's contribution to climate change, which the Complaint describes in detail. *Id.* at ¶¶ 16-28, 52-63.

i. Our standing claim is limited

President Faust has stated that Harvard has "a special obligation and accountability to the future, to the long view needed to anticipate and alter the trajectory and impact of climate change," and that this obligation encompasses Defendants' investment decisions. *Id.* at Ex. J. Indeed, Massachusetts law governing nonprofit management requires investors to consider each "asset's special relationship or special value, if any, to the charitable purposes of the institution." M.G.L. c. 180A, § 2(e)(2)(viii). Continued investment in fossil fuels in the face of scientific certainty about their extreme harms not only fails to comport with the charitable purposes enumerated in the Charter but also threatens Harvard's campus and our well-being as students and a student association. Contrary to the Defendants' dismissal of such claims as "legal conclusions cast in the form of factual allegations," Defs. Mem. at 10, these harms are sufficiently developed to survive a motion to dismiss. As detailed in the Complaint, they include interference with the Harvard Climate Justice Coalition's mission to secure a safe transition to a healthier energy future and damage to Individual Plaintiffs' future enjoyment of the campus and current well-being as students. ¶¶ 52-62.

As in *Lopez*, where the plaintiffs' special interest standing rested upon an injury (denial of membership rights), 384 Mass. at 167-68, so in the instant case the scope of our special interest is defined by the harms caused by the particular investments identified in the Complaint. ¶ 32. The Charter and subsequent affirmation by President Faust recognize special duties toward

students, the long-term health of the university, and future generations. *Id.* at ¶¶ 41-52. The unique harms we suffer as a result of Defendants' investment practices in fossil fuel companies confer a right to enforce these duties[1]—a right that is distinct from any enjoyed by members of the general public, who neither by Charter grant nor by university affiliation enjoy a special interest in the well-being of Harvard.[2] As such, we seek the Court's recognition of a special interest held by only a limited number of potential litigants.[3]

ii. Defendants' "slippery slope" argument is unavailing

Defendants warn that conferring standing on us will invite student actions challenging "the content of the curriculum, the kind of housing offered, or the dates of the academic year." Defs. Mem. at 7. This "slippery slope" argument is unfounded.

As current students and a Harvard-exclusive student association, Cplt. ¶¶ 1, 3-9, our positions with regard to the Harvard Corporation are well defined, and we currently and actually enjoy the benefits of Harvard's charitable activity. The Complaint clearly describes the issue-specific grounds of our standing claim as tied to the exceptional harms of climate change. ¶¶ 49-62. Both our fixed relationship and this issue specificity negate any danger of unpredictability in

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[1] As a general rule, standing in Massachusetts courts depends upon a showing of injury. *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981) ("To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury"); *see also* Mass.R.Civ.P. 17(a). While weighing the limiting rules of Massachusetts special interest standing law, the Court should be cognizant of the fact that the outcome of this litigation affects us in a way distinct from that of the public. Cplt. ¶¶ 52-62. This differentiated interest should at the least allow us to survive a motion to dismiss.

[2] The dependence of our standing claim upon the specific harms caused by fossil fuel investments belies Defendants' allegation that we seek to advance "broader claims" unrelated to our special interest. *See* Defs. Mem. at 10 n. 4. As required by *Lopez*, 384 Mass. at 165, we seek relief only for injuries affecting our interest in the long-term health of the university campus and our current university experience. These injuries arise only from Defendants' investments in fossil fuels, and we seek relief only on that front.

[3] While we refrain to speculate whether any investments other than those in fossil fuels could rise to the level of certain and pervasive harm described in the Complaint, the exceptional risks posed by climate change readily provide a limiting principle.

the class of potential litigants. Furthermore, we are not seeking monetary relief, obviating the risk that similar actions could drain the coffers of charitable organizations. Finally, Defendants' assertion that we seek to force the Court to compel them to "substitute [our] personal views about how [we] would like the institution to operate," Defs. Mem. at 11, is unconvincing. As in any enforcement action, we ask the Court only to enforce pre-existing duties, not to fashion new ones. Such an action no more "entangl[es] courts in the myriad internal decisions inherent in running a charitable organization," *id.* at 2, than any other claim of charitable mismanagement.

C. Defendants' Memorandum Mischaracterizes Our Standing Claim

Defendants' Memorandum fails to note the gravamen of our standing claim, namely the exceptional harms caused by investment in fossil fuels, and mischaracterizes our interest as one based on "[s]tudent status alone." *Id.* at 8. Defendants also allege that because other members of the general public might be affected by their fossil fuel investments, special interest standing must fail. *Id.* at 10. These arguments are legally deficient. The fact that other members of the general public might be affected in some way by defendant misconduct does not preclude us from basing our standing claims on a special and greater degree of harm.[4] Nor are our harms any less real or particularized simply because Defendants' behavior causes damage on a global scale. Harvard is an influential actor whose behavior affects many people, but this fact does not insulate its leadership from litigation based on individualized harms.

Defendants also allege that student suits challenging university management "without more" are necessarily precluded. *Id.* at 10. Not only is this focus on student standing misplaced, but Defendants' analysis of the relevant authority is incomplete. In *Trustees of Dartmouth*

[4] The same analysis applies to Defendants' argument, *id.* at 9 n. 3, that our injury claims are mooted by our ability to associate as the Harvard Climate Justice Coalition and by Defendants' piecemeal efforts to confront climate change. Just because we have managed *some* critical engagement with global warming despite Defendants' activities does not mean that their activities cause *no* injury whatsoever.

College v. Woodward, the Supreme Court, in considering plaintiff trustees' challenge to a legislative alteration of their charter, noted that "students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice." 17 U.S. 518, 641 (1819). This observation was made in the absence of any claim of injury by the students. *Id.* at 641. Defendants also appeal to out-of-state authority to substantiate their claim that students are precluded from challenging any aspect of university management, citing *Miller v. Alderhold*, 228 Ga. 65, 69 (1971) and *Russell v. Yale University*, 54. Conn. App. 573, 579 (1999). But these cases stand only for the claim that student status alone is insufficient to confer standing to challenge university management, making them irrelevant here.[5] Defendants lastly turn to the Supreme Judicial Court's decision in *Harvard Law School Coalition for Civil Rights v. President & Fellows of Harvard College*, 413 Mass. 66, 71 (1992). But that case was decided exclusively on a claim of breach of implied contract under Massachusetts' anti-discrimination statutes; the Court made no mention whatsoever of special interest standing or charitable enforcement. *Id.* The dangers of granting general student standing are simply not present here because we are challenging only management decisions that harm us for the rest of our lives, and especially in our capacity as Harvard graduates.

Indeed, whether students have standing to challenge the management of university assets in exceptional circumstances causing harm to the students is a question of first impression in Massachusetts. Defendants' argument that students may not bring a special interest action simply because they are students is unavailing; our special interest in Defendants' fossil fuel

[5] Furthermore, at least one court has granted special interest standing based on student status alone. *See Jones v. Grant*, 344 So.2d 1210, 1212 (Ala. 1977) ("[w]e find that the interest of the students . . . as beneficiaries in the financing of the educational institution with which they are associated is a sufficient special interest to entitle them to bring suit"), *superseded by* Ala. Code § 10A-3-2.44 (1984) (generally adjusting the state's enforcement scheme without reference to student status). This decision belies Defendants' assertion that there is a categorical common law rule against special interest standing based on student status.

investments is linked to our status as students but is not reducible to it. Therefore, Defendants fail to show why our standing claim is precluded under Massachusetts law.

D. Conferring Standing to Challenge Harvard's Investments in Fossil Fuels is Consistent with Massachusetts' Charitable Enforcement Scheme

Massachusetts statutory law empowers the Attorney General to enforce the duties of the directors of charitable organizations, M.G.L. c. 12, § 8, including the duty to consider each "asset's special relationship or special value, if any, to the charitable purposes of the institution." M.G.L. c. 180A, § 2(e)(2)(viii). As explained in *supra* Part IV.A, the Attorney General's enforcement authority is supplemented by the authority of plaintiffs with special interest standing to enforce charitable duties. This latter enforcement mechanism maintains the distinction between public interests in charities, enforced by the Attorney General, and private interests, enforced by individuals and associations. *See, e.g., Weaver v. Wood*, 425 Mass. 270, 276 (1997) (denying standing to church members based on membership alone). Special interest standing supports important policy goals of Massachusetts' charitable enforcement scheme, namely enhanced enforcement and ensuring that reasonable donor expectations are met. *See, e.g., id.* at 275 ("[T]he Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor's wishes . . . such a duty can be more satisfactorily performed by one acting under official responsibility") (citation omitted).

Liability for climate change harms presents public officials and courts with an array of administrative and doctrinal difficulties. Given the rapidly closing window to confront climate change and to hold duty-bound parties liable for failing to do so, Cplt. ¶¶ 23-27, the courts cannot expect the Attorney General to fashion and provide the sole means of relief for climate change harms in the charitable context. As explained in *supra* Part IV.A, Massachusetts common law looks to the specific nature of plaintiffs' interests and harms to decide whether special

interest standing is warranted rather than applying a rigid set of categorical requirements. In this case, allowing our claim to go forward will supplement rather than displace the Attorney General's enforcement authority and will provide a means to ensure that donors' expectations regarding the "advancement and education of youth," *id.* at Ex. H, are protected.

Even if the Court finds that granting special interest standing in this case would require an expansion of recognized special interests, such an expansion would be consistent with the "tendency of the courts to relax the rule requiring the charity to be represented by the Attorney General." Ronald Chester et al., Bogert's Trusts and Trustees § 414 (3d ed. 2014); *see also* Mary Grace Blasko et. al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 82 (1993) (noting a "growing tendency" to grant special interest standing across jurisdictions).[6] This growth in special interest standing seeks to accommodate private claims that are not justiciable under the formalist scheme of exclusive Attorney General enforcement. The inadequacy of such a scheme is especially pronounced with respect to the harms caused by climate change, where common law rules of exclusive enforcement are likely to foreclose meritorious claims.

Finally, Supreme Court precedent supports our standing claim. In *U.S. v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), the Court granted standing to an unincorporated association of law students alleging injuries stemming from adjusted freight recycling rates. 412 U.S. 669 (1973). Although causation was "far more attenuated" than in previous environmental cases, the Court ruled that the students could pursue their claims because they had alleged "specific and perceptible harm[s] that distinguished them from other citizens" and that were provable at trial. *Id.* at 686-89. This logic is particularly applicable in the context

[6] For example, courts in other states have granted standing to residents challenging the relocation of an area hospital, *City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514 (Ch. Div. 1967), to employees seeking to enjoin an employer nonprofit from dissolving its corporate existence, *Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458 (1985), and to potential beneficiaries of an elderly home challenging its relocation, *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990).