COMMONWEALTH OF MASSACHUSETTS

Appeals Court

SUFFOLK, SS. NO. 2015-P-0905

HARVARD CLIMATE JUSTICE COALITION, ALICE M. CHERRY, BENJAMIN A. FRANTA, SIDNI M. FREDERICK, JOSEPH E. HAMILTON, OLIVIA M. KIVEL, TALIA K. ROTHSTEIN, KELSEY C. SKAGGS AND FUTURE GENERATIONS,
Plaintiffs-Appellants,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE ("HARVARD CORPORATION"), HARVARD MANAGEMENT COMPANY, INC., AND ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT
OF THE SUFFOLK SUPERIOR COURT

BRIEF OF DEFENDANT-APPELLEE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General

Brett J. Blank (BBO No. 686635)
Assistant Attorney General
Non-Profit Organizations/Public Charities Division
100 Cambridge Street
Boston, Massachusetts 02108
617-963-2346
brett.blank@state.ma.us

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QUESTIONS PRESENTED

1. May students of a university organized as a public charity overcome the Attorney General's exclusive standing to bring an action alleging that the university's fiduciaries breached their duties to that university, simply by claiming that they have suffered an injury as a result of the fiduciaries' decisions?

2. Do such students have standing to demand court-ordered divestiture of the university's endowment from fossil fuel companies simply because those students receive some benefit from that university's charitable activity?

STATEMENT OF THE CASE

1. Nature of the Case.

Plaintiffs-Appellants Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, Kelsey C. Skaggs (collectively, the "Students"), appeal a judgment of the Suffolk County Superior Court (Wilson, J.),[1] ruling that, *inter*

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[1] The Appendix will be cited as "App. [page number];" Students' Brief will be cited as "St. Br. at [page number];" the Brief of the Animal Legal Defense Fund as *Amicus Curiae* will be cited as "ALDF Br. at [page

(footnote continued...)

alia, they lack standing to litigate a claim that Defendants-Appellees President and Fellows of Harvard College ("Harvard Corporation") and Harvard Management Corporation, Inc. ("Harvard Management") have mismanaged Harvard University's endowment.[2]

2. Prior Proceedings.

On November 19, 2014, the Students (who are Harvard students) filed their complaint alleging that, *inter alia*, Harvard Corporation and Harvard Management have breached their fiduciary duties to Harvard by investing a portion of its endowment in fossil fuel companies. App. 5-6 at ¶¶ 1, 3-9. As relief, Students primarily seek an injunction ordering Harvard Corporation and Harvard Management to divest Harvard's endowment from fossil fuel companies. App. 15 at ¶ 74. Because Harvard is a public charity, Students named the Attorney General as a necessary party

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(…footnote continued)
number];" and the Brief of Amicus Dr. James E. Hansen will be cited as "Hansen Br. at [page number]."

[2] The Attorney General is not a party to Count II of Students' complaint - alleging, on behalf of "Future Generations," a claim of "Intentional Investment in Abnormally Dangerous Activities" - and thus the Attorney General takes no position with respect to Students' appeal of the dismissal of that count. App. 14-15 at ¶¶ 63-73.

pursuant to G.L. c. 12, § 8G. App. 7 at ¶ 13.

On December 10, 2014, the Attorney General moved to dismiss the Complaint pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6), asserting that she has the exclusive standing to litigate this claim. App. 29. Harvard Corporation and Harvard Management filed similar motions to dismiss. *Id.*

On March 17, 2015, the Superior Court issued its Memorandum of Decision and Order on Defendants' Motions to Dismiss (the "Decision"), which, *inter alia*, granted the Attorney General's motion to dismiss. App. 42. This appeal followed.

3. Statement of Facts.

The Complaint alleges that the burning of fossil fuels has contributed to climate change (and associated "deleterious geopolitical, economic, and social consequences") and that Harvard has a duty "to respond to climate change." App. 7-9 at ¶¶ 16-28, 31. From this premise, Students allege that Harvard Corporation's and Harvard Management's investment of a portion of Harvard's endowment in "publicly traded fossil fuel companies" has helped cause "environmental and social harms," and thus is inconsistent with Harvard's charitable mission and amounts to

mismanagement of Harvard's endowment. App. 9-11 at ¶¶ 32-47.

SUMMARY OF ARGUMENT

It is well-settled that the Attorney General has the exclusive duty to see to the due application of charitable funds, and that private plaintiffs may assert a charitable mismanagement claim only if they "assert interests in such organizations which are distinct from those of the general public." *Weaver v. Wood*, 425 Mass. 270, 276 (1997). A private plaintiff seeking to assert such a mismanagement claim must show that his or her "claim has arisen from a personal right that directly affects the individual member, such as where the member has a right to vote in connection with some aspect of the charity's affairs . . . and is prohibited from doing so." *Id. See* pages 8-14.

The two interests asserted by these Students fall short of meeting this high bar. First, Students allege that they have standing to litigate this mismanagement claim because the investment of a portion of Harvard's endowment in fossil fuel companies has caused them harm. But Students' alleged injury fails to demonstrate that their claim has

arisen from a "personal right" in the administration and management of Harvard's endowment, as *Weaver* requires. As a result, this alleged injury fails to establish that Students have standing to litigate this claim. *See* pages 15-19.

Second, Students allege that they have standing to litigate this mismanagement action because, as Harvard students, they receive the benefits of Harvard's charitable activity. But this argument rests on a fundamental misapprehension of charities law, which establishes that a charity's beneficiaries consist of the indefinite class of persons that such charity is intended to serve, including those that do not directly benefit from its activities. *See Brady v. Ceaty*, 349 Mass. 180, 182-83 (1965). Thus, Students' relationship to Harvard's endowment is no different than any other member of the indefinite class served by Harvard - all are its beneficiaries. And the Supreme Judicial Court's precedent makes clear that the Attorney General is the exclusive representative of that indefinite class of beneficiaries. *See, e.g., Weaver,* 425 Mass. at 275. Thus, Students' status as Harvard students, and their receipt of associated benefits, is insufficient to

confer standing. Indeed, a review of the principles underlying the Attorney General's exclusive standing establish that it was designed to preempt private mismanagement claims exactly like those asserted by Students here. *See* pages 19-32.

As a result, this Court should affirm the Superior Court's Decision.

ARGUMENT

I. Standard of Review and Governing Legal Principles.

An appellate court engages in *de novo* review of a dismissal pursuant to Mass. R. Civ. P. 12(b)(1) or 12(b)(6). *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011). In evaluating a motion to dismiss, the court assumes the truth of the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them. *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322 (1998). The court then asks whether the complaint, so construed, "possess[es] enough heft to 'sho[w] that the pleader is entitled to relief.'" *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2006)). In making this determination, the court "look[s] beyond

the conclusory allegations in the complaint and focus[es] on whether the factual allegations plausibly suggest an entitlement to relief." *Curtis*, 458 Mass. at 676.

To have standing, the plaintiff bears the burden of proving "that the challenged action has caused the [plaintiff] injury." *Brantley v. Hampden Div. of Probate and Family Court Dept.*, 457 Mass. 172, 181 (2010) (quoting *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981)); *see also id.* ("a plaintiff must demonstrate standing separately for each form of relief sought"). "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Enos v. Sec'y of Envtl. Affairs*, 432 Mass. 132, 135 (2000) (internal quotation omitted). "Alleged injury that is 'speculative, remote, and indirect' will not suffice to confer standing"; rather, the alleged injury "must be a direct consequence of the complained of action." *Brantley*, 457 Mass. at 181 (quoting *Ginther*, 427 Mass. at 323).

II. Students Lack Standing to Challenge the Management of Harvard's Endowment.

A. The Attorney General Has the Exclusive Standing to See to the Due Application of Charitable Funds.

Pursuant to G.L. c. 12, § 8, the Attorney General has the duty to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." And for more than 100 years, the Supreme Judicial Court has recognized that the Attorney General's duty to prevent the misuse or mismanagement of charitable funds is exclusive:

> We consistently have held that only the Attorney General can bring an action alleging the misuse of charitable assets. A century ago we noted: "The law has provided a suitable officer to represent those entitled to the beneficial interests in a public charity. It has not left it to individuals to assume this duty, or even to the court to select a person for its performance. Nor can it be doubted that such a duty can be more satisfactorily performed by one acting under official responsibility than by individuals, however honorable their character and motives may be."

Weaver, 425 Mass. at 275 (quoting *Burbank v. Burbank*, 152 Mass. 254, 256 (1890)); *see also Ames v. Attorney Gen.*, 332 Mass. 246, 250 (1955) ("The duty of taking

action to protect public charitable trusts[3] and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interests."); *Dillaway v. Burton*, 256 Mass. 568, 573 (1926) ("It is well settled that it is the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings. It is his duty to see that the public interests are protected and to proceed in the prosecution or to decline so to proceed as those interests may require.").

Here, Students allege that Harvard Corporation and Harvard Management have mismanaged Harvard's endowment by investing a portion of those charitable funds in "fossil fuel companies." As a result, this

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[3] Massachusetts courts apply this principle consistently in cases involving both charitable corporations and charitable trusts. For example, in *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163 (1981), the plaintiffs asserted that the directors of a charitable corporation had mismanaged that corporation. *Id.* at 167. In holding that the Attorney General had the exclusive standing to litigate that claim, the court relied upon *Ames*, a case involving allegations of mismanagement of a charitable trust. *See Lopez*, 384 Mass. at 167 (citing *Ames* court's explanation of Attorney General's exclusive standing); *Ames*, 332 Mass. at 248 (applying exclusive standing doctrine to allegations that trustees had breached terms of a charitable trust).

action implicates the Attorney General's exclusive standing. Thus, unless Students can establish the applicability of the narrow, "special standing" exception to this doctrine, this Court must affirm the trial court's dismissal of this action. For the reasons that follow, these Students cannot do so.

B. The Superior Court Properly Concluded that Students May Not Invoke the "Special Standing" Doctrine.

Students seek to invoke a limited exception to the Attorney General's exclusive standing known as the "special standing" doctrine. Specifically, Students claim that they have "special standing" for two reasons.

First, Students allege that they have special standing to challenge the investment of Harvard's endowment because of "the effect that Harvard's fossil fuel investments have on us." St. Br. at 18-19; *see also* ALDF Br. at 18-23 (arguing that Students have standing to litigate this mismanagement claim because the manner in which Harvard Corporation and Harvard Management invested Harvard's endowment has caused Students "personal harm"). Specifically, Students allege that these harms - including a purported chilling effect on academic freedom and deterioration

in Harvard's physical campus because of sea level rise – are not shared by the general public. St. Br. at 18-19; Hansen Br. at 5 (arguing that Students "retain a special interest in the physical integrity of the campus such that they retain standing to challenge Harvard's fossil fuel investments").

Second, Students allege that their status as Harvard students is sufficient to confer special standing to challenge the investment of Harvard's endowment. St. Br. at 16-17. Specifically, Students allege that, as Harvard students, they enjoy benefits from Harvard's charitable activity that are not shared by the general public. *Id.* For the reasons that follow, both of these claims fail.

1. The Special Standing Doctrine Applies Only in Certain, Limited Instances.

As the Superior Court observed, the Supreme Judicial Court has "created a small chink in the armor of Attorney General exclusivity, through which private citizens can also assert claims that a public charity is mismanaging its assets." App. 29. The Supreme Judicial Court, however, has recognized such "special standing" only when private citizens "assert[] interests in such organizations which are distinct

from those of the general public." *Weaver*, 425 Mass. at 276 (citations and internal quotation marks omitted). Special standing exists only where "the claim has arisen from a personal right that directly affects the individual member, such as where the member has a right to vote in connection with some aspect of the charity's affairs . . . and is prohibited from doing so." *Weaver*, 425 Mass. at 276.

In determining whether a plaintiff has special standing, Massachusetts courts typically examine whether that plaintiff has been accorded such "personal rights" in the administration of the public charity by either the operation of law, the public charity's articles of organization or by-laws, or a will or trust gifting property to that public charity. Most typically, a plaintiff has been accorded such "personal rights" if he or she (a) is a fiduciary of the charity,[4] (b) possesses a reversionary interest under the terms of a will or trust giving that plaintiff a right to the charity's property in the

[4] *See In re Boston Reg. Med. Ctr., Inc.*, 328 F. Supp. 2d 130, 145-47 (D. Mass. 2004) (applying Massachusetts law and holding that trustees of a public charity may sue other trustees for breach of fiduciary duty).

event that the charity engages in certain conduct,[5] or (c) seeks to enforce a specific right that he or she has been accorded by that charity's articles of organization or by-laws (most typically the right to vote on a particular matter).[6] This narrow exception has never been extended to "a potential beneficiary of the charity, such as a member of a church, or some other non-trustee, such as a donor, seeking to enforce the trust's charitable purposes or bylaws," each of whom lacks standing to litigate a mismanagement claim. *See In re Boston Reg. Med. Ctr., Inc.*, 328 F. Supp. 2d

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[5] *See Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007) (holding that plaintiffs had special standing to litigate a claim that actions of public charity had triggered their equitable reversionary interest in conditionally gifted property).

[6] *See Jessie v. Boynton*, 372 Mass. 293 (1977) (holding that members of a charitable corporation had standing to allege that the corporation's officers, in violation of their fiduciary duties, had induced the members to vote in favor of a by-law amendment eliminating their voting rights); *Trustees of Andover Theological Seminary v. Visitors of Theological Institution in Phillips Academy in Andover*, 253 Mass. 256 (1925) (holding that board of visitors of seminary had standing to challenge plan by trustees to affiliate closely with divinity school, because board of visitors had been created at the founding of the seminary and given a "wide sweep of powers," including the power "to see to it that there was no deviation in the management of that institution from the declared purposes of the founders").

at 146 & n.5 (applying Massachusetts law, collecting cases, and holding that the Attorney General has the exclusive standing "to enforce the rights of the beneficiaries of charitable trusts").

Students neither serve as fiduciaries of Harvard nor possess a reversionary interest encumbering a portion of its endowment. Further, they do not contend that Harvard's charter explicitly provides them the right to challenge the investment of Harvard's endowment.

Instead, as explained above, Students claim that they have "special standing" to challenge the investment of Harvard's endowment because (1) Harvard's fossil fuel investments harm them and (2) they are Harvard students who benefit from Harvard's charitable activities. Neither of these assertions, however, demonstrates that Students have been accorded a personal right in the management of Harvard's endowment which is distinct from that of the general public.

2. The Alleged Harms Caused by Harvard's Investment in Fossil Fuel Companies Do Not Establish that Students Have a Personal, Enforceable Interest in the Management of Harvard's Endowment.

As explained above, the threshold inquiry in the special standing analysis is the existence of a personal right in the administration of the charity that is not shared by the general public. Contrary to Students' brief,[7] and for the reasons that follow, this right is not determined by reference to an alleged injury. The Supreme Judicial Court's precedent on this point is clearly to the contrary.

In *Estate of Moulton v. Puopolo*, 467 Mass. 478 (2014), the estate of a deceased employee of a charitable corporation brought a wrongful death action against the directors of that charity alleging that, *inter alia*, those directors breached their fiduciary duties by adopting certain policies and procedures that allegedly led to the employee's death. *Id.* at

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[7] *See* St. Br. at 18 (arguing that "[t]he second and more important basis for our special interest standing is the effect that Harvard's fossil fuel investments have on us" and that "[s]uch harms are not shared by the general public"); *id.* at 22 ("We allege . . . a distinct interest in Harvard's fossil fuel investments, based on the language of the Charter and the personal effects of fossil fuel investments on our education. . . .").

479-81. The Supreme Judicial Court concluded that the complaint failed to state a claim for breach of fiduciary duty because (1) the directors did not owe the employee a fiduciary duty and (2) the Attorney General had the exclusive standing to enforce the fiduciary duties that the directors owed to the charitable corporation, its clients, and the public. *Id.* at 491-94 ("Even had the complaint contained allegations of harm to [the charitable corporation] itself, to any particular . . . client [of that charitable corporation, or to the general public from the director defendants' adoption of the workplace policies, the plaintiff does not have standing to bring an action to protect the public interest in the efficient and lawful operation of a charitable corporation, or to correct any abuse or error in the administration of that corporation.").

Estate of Moulton teaches that injury alone - even if traceable to the decisions of the fiduciaries of a public charity - does not confer standing to litigate a claim that those fiduciaries breached their duties to their institution, its clients, or the

public.[8] Instead, as *Weaver* makes clear, a plaintiff must first demonstrate that he or she has been accorded a personal right in the administration of that charity.

But the existence of such a personal right, by itself, is insufficient to confer special standing. Instead, a plaintiff seeking shelter in the special standing doctrine must also demonstrate that the challenged action caused an injury to that personal right. For example, in *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163 (1981), the plaintiffs sought to exercise their right to vote in a charitable corporation's annual election, as explicitly allowed by the corporation's constitution and by-laws. *Id.* at 168. The court held that the plaintiffs had standing to litigate their claim that, because the corporation's directors refused to allow them to vote, they were unlawfully denied membership in the corporation. *Id.* That same group of plaintiffs, however, also sought to litigate a claim that the directors had mismanaged the corporation. *Id.* at 165.

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[8] Students do not allege that Harvard Corporation and Harvard Management breached any fiduciary duty that they may owe to Students as individuals.

The court concluded that those plaintiffs could not do so, recognizing that the Attorney General had the exclusive standing to prosecute that claim. *Id.* at 167, 169.

Lopez establishes that a plaintiff's claimed injury acts as a limiting, not a broadening, principle in the special standing analysis. Even if a plaintiff has a "personal right" in the administration of a public charity, that plaintiff will have standing only to bring an action alleging the deprivation of, or injury to, that right. In other words, a plaintiff with standing to litigate one species of fiduciary duty claim does not thereby have standing to litigate every conceivable fiduciary duty claim. *See, e.g., Lopez*, 384 Mass. at 165-69.

In sum, to have special standing to maintain this action, Students must demonstrate the existence of a personal right or interest in the management of Harvard's endowment ***and*** that such personal right has been injured by the manner in which Harvard's endowment has been managed.[9] The "effect that

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[9] While Students contend that they do not seek to challenge Harvard's investment of its endowment broadly, but instead seek to challenge only its

(footnote continued...)

Harvard's fossil fuel investments have on [Students]" (St. Br. at 18), or "conduct imperiling the character and existence of [Harvard]" (St. Br. at 24), does not establish the existence of a personal right.

Consequently, Students may maintain this action only if their status as Harvard students vests them with personal rights with respect to the management of Harvard's endowment. For the reasons that follow, their status as Harvard students provides no such rights.

3. The Superior Court Properly Concluded that Students' Status as Harvard Students Did Not Confer Special Standing to Challenge the Investment of Harvard's Endowment.

As the Superior Court recognized, the Supreme Judicial Court has rejected the applicability of the special-standing doctrine to plaintiffs similarly

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investment in fossil fuels (St. Br. at 20-21), this puts the cart before the horse. To have standing to litigate a claim that Harvard Corporation and Harvard Management's investment of a portion of Harvard's endowment in fossil fuel companies is in breach of their fiduciary duties, *Lopez* requires Students to demonstrate that they have a personal right or interest with respect to the management of Harvard's endowment generally. In the absence of such a personal right or interest, Students' mismanagement claim is no different than that of the members in *Lopez*.

situated to the Students in this case. App. 31. For example, in *Weaver*, two members of the First Church of Christ, Scientist, in Boston (the "Church") - a public charity - brought an action in which they sought to challenge a determination by the Church's directors and its publishing arm (the "Publishing Society") to authorize major investment in television ventures, alleging that such a decision was in disregard of the Church's governing documents and amounted to a breach of fiduciary duty. *Weaver*, 425 Mass. at 271, 274. Framing the question presented as whether the two members - who were "life-long members" of the Church, but had never served as fiduciaries of the Church or the Publishing Society - had standing to litigate this claim, the Supreme Judicial Court answered in the negative. *Id.* at 274-78. Critically, the court held that, "[w]hile the plaintiffs' relationship with the Mother Church is indeed different from a member of the public who is not a member of the Church, we have never held that membership in a public charity, alone, is sufficient to give standing to pursue claims that a charitable organization has been mismanaged or that its officials have acted *ultra vires*." *Id.* at 277.

Similarly, as explained above, the *Lopez* court concluded that plaintiffs - would-be members of a charitable corporation - had standing to litigate a claim that the corporation's directors unlawfully denied those plaintiffs membership in the corporation. 384 Mass. at 168. But those same plaintiffs, the court concluded, "had no standing to prosecute … claims of corporate mismanagement." *Id.* at 165-69.

Students' claims here are even weaker than those rejected in *Weaver* and *Lopez*. In both *Weaver* and *Lopez*, the plaintiffs were members (or would-be members) of a public charity. Under a membership charity's articles of organization or by-laws, the members are accorded specific rights (usually the right to vote on particular matters). *See* G.L. c. 180, § 3 (providing that non-profit corporation may have one or more classes of members, and that the rights of such members must be set forth in the articles of organization or by-laws). Those rights notwithstanding, the Supreme Judicial Court expressly concluded in both *Weaver* and *Lopez* that members lack standing to litigate a claim of mismanagement. Here, while Students repeatedly argue that Harvard's charter supports their special standing claim, they point to

nothing in that document according them, as students, any enforceable, personal rights, let alone personal rights with respect to the management of Harvard's endowment.

The most that Students can point to is the fact that, as students, they receive some benefit from Harvard's charitable activity. St. Br. at 14, 16-17, 18-19, 24-25. But this does not provide them with standing to challenge the investment of Harvard's endowment. The "beneficiaries" of a charity are comprised of the indefinite class of persons that the charity is intended to serve. *See Brady v. Ceaty*, 349 Mass. 180, 182-83 (1965) (class of beneficiaries of a public charity "is made up of recipients and nonrecipients alike"). Thus, Students' relationship to Harvard and its endowment is no different than any member of the indefinite class served by Harvard, presumably the "youth" referenced by its charter. All members of that indefinite class - even those that are not Harvard students - are Harvard's "beneficiaries." *See* GEORGE GLEASON BOGERT, ET AL., THE LAW OF TRUSTS AND TRUSTEES § 411 (3d Ed. 2005) ("In ultimate analysis it is the public at large which benefits, and not merely the individuals directly assisted. Thus, there is some

reason for vesting in a single authority the discretion and power to enforce such trusts, rather than in leaving the matter to the numerous, changing, and uncertain members of the group to be aided.")

With this understanding in mind, Students' argument fails. The Supreme Judicial Court repeatedly has held that a plaintiff's status as a beneficiary of a public charity is insufficient to confer standing to litigate a mismanagement claim; instead, the Attorney General is the exclusive representative of all of the charity's beneficiaries. *See Weaver,* 425 Mass at 275 (Attorney General is the exclusive representative of those entitled to the beneficial interests in a public charity); *Burbank v. Burbank*, 152 Mass. 254, 256 (1890) ("The law has provided a suitable officer to represent those entitled to the beneficial interests in a public charity."); *see also In re Boston Reg. Med. Ctr., Inc.*, 328 F. Supp. 2d at 147 ("The Attorney General's standing to enforce the rights of the beneficiaries of charitable trusts is, as the Supreme Judicial Court has often said, exclusive."). Thus, Students' status as beneficiaries of Harvard's charitable activity does not give rise to special standing to litigate this mismanagement claim.

As this analysis demonstrates, Supreme Judicial Court precedent forecloses Students' claim of "special standing," and thus there is no need for this Court to examine case law from other jurisdictions. But even if this Court was inclined to look at foreign case law, the great weight of authority establishes that students lack standing to assert a mismanagement claim. *See Russell v. Yale Univ.*, 737 A.2d 941, 943-44, 946 (Conn. App. Ct. 1999) (holding that students lacked standing to allege that Yale Corporation's reorganization of Yale Divinity School amounted to "abuse of discretion as trustee of a public charitable trust" because "absent special injury to a student or his or her fundamental rights, students do not have standing to challenge the manner in which the administration manages an institution of higher education," citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 641 (1819)); *Miller v. Alderhold*, 228 Ga. 65, 69 (1971) ("One attending a private college has no vested financial interest in the institution. As a student he has no standing in court to challenge the act of the trustees or others in the operation and management of the college."); AUSTIN WAKEMAN SCOTT, ET AL., SCOTT AND ASCHER ON TRUSTS

§ 37.3.10 (5th Ed.) ("The mere fact that person may in the trustee's discretion become a recipient of some sort of benefit under the trust ordinarily does not entitle the person to maintain a suit to enforce the trust. Nor is a person entitled to enforce a trust merely because that person is a member of, or a current or former student at, a charitable institution that benefits from the trust, or that serves as its trustee.").

The one case cited by Students to the contrary is *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977). But, as Students note, the Alabama legislature superseded that decision by statute in 1984. *See Cook v. Lloyd Noland Fdn.*, 825 So.2d 83, 86-87 (Ala. 2001) (noting that while the court in *Jones* held that the beneficiaries of a charitable trust may maintain a suit to enforce that trust, the Alabama legislature "superseded that right" in 1984). As a result, Students have not identified a single jurisdiction that permits students, by virtue of their status as students, to bring an action alleging the mismanagement of the private universities that they attend. In sum, Massachusetts case law, and that of its sister states,

establishes that Students lack standing to litigate this mismanagement claim.

4. Sound Policy Compels the Affirmance of the Superior Court's Decision.

Faced with a body of case law that defeats their claim, Students devote a significant portion of their brief to a discussion of public policy. Specifically, Students assert that (1) Harvard's status as a non-member entity is somehow improper, as it permits it to "evade legal challenge," (St. Br. at 17-18, 27); and (2) allowing Students to maintain this action is consistent with, and furthers, the principles underlying the exclusive standing doctrine (St. Br. at 23-25, 27-29). Both arguments fail.

a. Harvard's Status as a Non-Member Entity Is Not Improper, and Does Not "Permit[] it to Evade Legal Challenge."

There is no merit to Students' claim that Harvard's status as a nonmember entity permits it to "evade legal challenge." Specifically, Students argue that because Harvard Corporation is not a membership corporation,[10] its students "lack any membership rights

[10] Pursuant to G.L. c. 180, § 3, a non-profit corporation, such as Harvard Corporation, may, but is not required to, have one or more classes of members. In the event that the incorporators elect to create

(footnote continued...)

whose violation could provide a basis for legal claims." St. Br. at 17-18. From this premise, Students claim that "analogies to membership interest standards" would permit Harvard to escape legal review by "simultaneously withholding membership status and benefitting from membership standards for special interest." *Id.*; *see also id.* at 27 (arguing that "the Supreme Judicial Court has been protective of the rights of non-profit corporation members by granting special interest standing to enforce them" and that "[t]his judicial remedy is in addition to the regular avenues of influence members enjoy over charity directors").

As *Weaver* and *Lopez* make clear, however, membership in a public charity alone is insufficient to confer standing to litigate a mismanagement claim. Thus, even if Harvard did not "withhold[] membership

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one or more classes of members, the rights of such members must be set forth in the corporation's articles of organization or by-laws. *Id.* The Legislature has made clear, however, that a non-profit corporation is not required to have members; in the case of a non-membership, non-profit corporation, "any action or vote required or permitted by this chapter to be taken by members of the corporation shall be taken by action or vote of the same percentage of the directors of the corporation." *Id.*

status" from Students, such status would not vest Students with standing to litigate this mismanagement claim. As a result, Harvard's status as a nonmember charity does not permit it to "evade legal challenge."

Students' claim appears to be premised on a misunderstanding of the Supreme Judicial Court's decision in *Jessie v. Boynton*, 372 Mass. 293 (1977), which Students cite repeatedly in their brief. In that case, the court concluded that members of a charitable corporation had standing to litigate a claim that the corporation's officers, in violation of their fiduciary duties, had induced the members to vote in favor of a by-law amendment eliminating their voting rights. *Id.* at 302-05. The court reasoned that while a member of a charitable corporation has no property interest in his or her right to vote, the plaintiffs nevertheless "became members of the [charitable corporation] voluntarily by the payment of dues. Each had a vote concerning the operation of the [corporation] to the extent the by-laws provided. That right to vote should not be taken away except in accordance with lawful procedures and practices." *Id.* at 305.

Jessie is consistent with *Lopez* and *Weaver*, and stands for the unremarkable proposition that, where a public charity accords its members a particular right, those members have standing to maintain a cause of action to vindicate that specific right. *Jessie* does not stand for the much broader proposition that all members of a public charity have standing to litigate any conceivable breach of fiduciary duty claim (such as a mismanagement claim). Although the Supreme Judicial Court did not have any occasion to address that argument in *Jessie*, the court squarely rejected it in *Lopez* and *Weaver*.

Here, Students have not explained how they have been accorded a specific right with respect to the management of Harvard's endowment such that they may maintain a cause of action to vindicate that right. In the absence of such a special right, Students' mismanagement claim must be dismissed, as in *Lopez* and *Weaver*.

b. The Superior Court's Conclusion that Students Lack Standing is Consistent with the Policies Underlying the Attorney General's Exclusive Standing.

The Attorney General's exclusive standing is premised on a "recognition by the Legislature not only

of his [or her] fitness as a representative of the public in cases of this kind, but of the necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public." *Dillaway*, 256 Mass. at 575; *see also Ames*, 332 Mass. at 253 (noting that one of the reasons for the Attorney General's exclusive standing is to ensure that public charities are not "exposed to attack from all sides"); *In re Boston Reg. Med. Ctr.*, 328 F. Supp. 2d at 147 ("By preventing members of the public who may benefit from a charity from suing based on their asserted beneficial interest in the charitable trust, recognizing the Attorney General as the sole representative of the beneficiaries of a charity shields charities and their directors from multifarious litigation."); AUSTIN WAKEMAN SCOTT, ET AL., SCOTT AND ASCHER ON TRUSTS § 37.3.10 (5th Ed.), § 37.3.10 (5th Ed.) ("[T]he reason [for the attorney general's exclusive standing] is easy to see. If everyone were entitled, as a matter of right, to seek to enforce charitable trusts, charitable trusts would be subject to repetitious and harassing, and perhaps often

baseless, litigation.").

This principle applies with considerable force in the university context. If student status, standing alone, were sufficient to confer "special standing," then nothing would prevent other students from claiming the mismanagement of the private universities that they attend. *See Hardman v. Feinstein*, 195 Cal. App. 3d 157, 162 (1987) (noting that Attorney General's exclusive standing is premised on a "need to protect the trustee [of a charitable trust] from vexatious litigation, possibly based on an inadequate investigation, by a large, changing, and uncertain class of the public").

Perhaps aware of the lack of any previously recognized limiting principle that would distinguish Students from another group of students seeking to litigate a mismanagement claim, Students suggest one. Specifically, Students claim that special standing for students should be recognized only when student-plaintiffs allege "conduct imperiling the character and existence of their institution." St. Br. at 24. Students, however, have cited no cases recognizing this as a relevant factor in the special standing analysis. As explained above, the special standing

analysis focuses on the plaintiff's "personal rights," not the alleged harm. And for good reason. Other groups may believe, just as strongly and sincerely as Students, that other actions by Harvard "imperil[its] character and existence." Under Students' theory, this Court would be required to recognize the standing of all other such groups to litigate a mismanagement claim premised on such alleged harm. Thus, Students' suggested limiting principle is actually nothing of the sort.

In sum, Students offer no sound reason to depart from the settled rule that, absent "special standing" (which Students cannot establish here), only the Attorney General may sue to enforce the proper use and management of the assets of public charities.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Superior Court dismissing Count I of Students' complaint.

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Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

Brett Blank (BBO No. 686635)
Assistant Attorney General
Non-Profit Organizations/
Public Charities Division
100 Cambridge Street
Boston, MA 02108
617-963-2346
brett.blank@state.ma.us

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

Brett J. Blank

ADDENDUM

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 8 Due application of charity funds enforced

Section 8. The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 8G Attorney general as a party; service

Section 8G. The attorney general shall be made a party to all judicial proceedings in which he may be interested in the performance of his duties under the provisions of sections eight to eight M, inclusive, and service upon or notice to the director in any such proceeding shall be deemed sufficient service upon or notice to the attorney general.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 180 CORPORATIONS FOR CHARITABLE AND CERTAIN OTHER PURPOSES

Section 3 Incorporators; manner of incorporation; classes of members; personal liability of officers and directors to corporation

Section 3. One or more persons, of the age of eighteen years or more in the case of natural persons, may act as incorporators to form a corporation for any of the purposes mentioned in section four. The corporation shall be formed in the manner prescribed in and subject to section thirty of chapter sixty-nine, section two B of chapter one hundred and fifty-five and sections eleven, twelve and thirteen of chapter one hundred and fifty-six B, except that the corporation shall have no capital stock, the articles of organization shall omit references to stock and stockholders, the articles of organization shall specify the purposes for which the corporation is formed and the corporation may not assume a name that is misleading as to its corporate purposes.

A corporation may have one or more classes of members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment, the duration of membership and the qualification and rights, including voting rights, of the members of each class shall be set forth in the articles of organization or the by-laws. If a corporation does not have members, any action or vote required or permitted by this chapter to be taken by members of the corporation shall be taken by action or vote of the same percentage of the directors of the corporation.

The articles of organization, in addition, may state a provision eliminating or limiting the personal liability of officers and directors to the corporation or its members for monetary damages for breach of fiduciary duty as an officer or director notwithstanding any provision of law imposing such liability; provided, however, that such provision shall not eliminate or limit the liability of an officer or director (i) for any breach of the officer's or director's duty of loyalty to the corporation or its members, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) for any transaction from which the officer or director derived an improper personal benefit. No provision adopted pursuant to the provisions of this paragraph shall eliminate or limit the liability of an officer or director for any act or omission occurring prior to the date upon which such provision becomes effective.