COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. FAR-24794

APPEALS COURT NO. 2015-P-0905

HARVARD CLIMATE JUSTICE COALITION & others,
Plaintiffs-Appellants,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE
& others,
Defendants-Appellees

OPPOSITION OF DEFENDANTS/APPELLEES PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY INC. TO PLAINTIFF/APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

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INTRODUCTION

In November 2014, seven Harvard students brought suit against President and Fellows of Harvard College and Harvard Management Company, Inc. ("Harvard"), demanding that the Superior Court order Harvard to invest its endowment at their direction, rather than at the direction of Harvard's fiduciaries. In particular, Plaintiffs demanded that the Court order Harvard to divest from fossil fuel companies, as they were unsatisfied with the comprehensive steps Harvard had chosen to undertake to address climate change in ways consistent with its education and research mission – which include supporting research and scholarship by faculty and students on the scientific, legal, economic, political, and public health aspects of climate change, while at the same time reducing energy consumption and greenhouse gas emissions, and participating in other external initiatives.[1]

On Harvard's motion, and the motion of the Attorney General, also named as a defendant, the Superior

[1] Harvard's approach was described in an April 7, 2014 statement by Harvard President Drew Faust, which Plaintiffs appended to their Complaint as Exhibit J.

Court dismissed the suit. After this Court rejected Plaintiffs' application for Direct Appellate Review, the Appeals Court affirmed the Superior Court's order. Now, only one of the seven students, Plaintiff/Appellant Benjamin A. Franta, seeks further appellate review.[2] The Court should reject Plaintiff's application as his claims remain wholly without any legal merit.

STATEMENT OF REASONS WHY THE APPLICATION SHOULD NOT BE GRANTED.

A. The Courts Below Correctly Dismissed Count I of Plaintiff's Complaint Because Plaintiff Does Not Have a Special Interest in Harvard's Management of Charitable Assets and Has No Standing to Challenge Harvard's Investments.

Count I of the Complaint contended that Harvard had mismanaged charitable assets by investing in fossil fuels. Applying longstanding precedent, the Superior Court dismissed that claim, and the Appeals Court affirmed that decision, ruling that under G.L. c. 12 §8, the Attorney General has exclusive standing to

[2] An unincorporated student organization was also named as an original Plaintiff. After oral argument, three Plaintiffs withdrew from the appeal. *Harvard Climate Justice Coalition v. President and Fellows of Harvard Coll.*, 2016 Mass. App. LEXIS 141 (Oct. 6, 2016)(Plaintiff's Appendix ("Pl.'s App.") Ex. A), and only one seeks further appellate review.

oversee a charitable organization's management of its assets.[3] *See, e.g.*, *Weaver v. Wood*, 425 Mass. 270, 276 (1997) (the Attorney General has the "exclusive and discretionary role as a protector of the public interest in the efficient and lawful operation of charitable corporations.").

In the courts below, Plaintiffs essentially argued that their status as students constituted a personal "special interest" sufficient to give them standing. But, as the Superior Court held: "Supreme Judicial Court precedent on this point could hardly be clearer" and "Plaintiffs' status as Harvard students . . . does not endow them with personal rights specific to them that would give them standing." Pl.'s App. Ex. B at 7, 10. Indeed, following this Court's clear precedent, both the Superior Court and Appeals Court held that the personal interests required to challenge a charitable organization's management of its assets are dramatically different than the Plaintiff's interests

[3] Pursuant to Mass. R. App. P. 27.1, Harvard does not set forth a Statement of Prior Proceedings. While Plaintiff's Statement of Facts describes the allegations in somewhat different terms than the Complaint, it similarly fails to describe a claim upon which relief could be granted as a matter of law.

here. In *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007), for example, plaintiffs had a reversionary interest in property donated to the Archdiocese and for that reason, the Court granted them standing to challenge its management of the donated assets. Similarly, in *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 165-67 (1981), the plaintiffs, who had individual voting rights under the bylaws of a charitable institution, were permitted standing to challenge the denial of those rights. *Id*.

This Court's cases consistently teach that *only* "personal, specific [interests] exist[ing] apart from any broader community interest," are sufficient to confer standing. *Maffei*, 449 Mass. at 245. By contrast, participants in a charitable organization who do *not* possess reversionary property interests or individual rights under the organization's bylaws — interests Plaintiff has not claimed and never could claim — have no standing to challenge the organization's management of its assets. *See Weaver v. Wood*, 425 Mass. at 271-74 (members of the First Church of Christ, Scientist, a charitable organization, lacked standing to sue the church's directors for allegedly failing to comply with the church's governing docu-

ments and their fiduciary duties); *see also Ames v. Attorney General*, 332 Mass. 246, 247-51 (1955) (plaintiffs lacked standing to challenge Harvard's decision to move the Arnold Arboretum's library and herbarium to Cambridge, even though they had been donors of the Arnold Arboretum and advisors on its management).

In his Application for Further Appellate Review, Plaintiff asserts that his "special interest" is rooted in his "knowledge, derived from his professional work, of the harm caused to him and future generations" and his reliance on the "free exchange of scientific knowledge regarding climate change," which he alleges "is undermined by activities supported by said investments." Pl.'s Application at 11-12. Plaintiff's argument fails on its face, as his concerns are manifestly indistinguishable from those of virtually all other Harvard students, employees and alumni, all of whom presumably share an interest in the free exchange of ideas, including ideas about climate change. By his own description, it is clear that Plaintiff's interests in no way rise to the kind of special interest this Court has recognized as sufficient to confer standing.

In sum, the dismissal of Plaintiff's claims below was a simple, straightforward application of longstanding precedent. Neither the public interest nor the interests of justice require further review by this Court.

B. The Courts Below Correctly Dismissed Count II of the Complaint Because Plaintiff Cannot Represent "Future Generations" and There Is No Sound Basis for This Court to Recognize a New Tort—"Intentional Investment in Abnormally Dangerous Activities."

In Count II of the Complaint, Plaintiffs attempted to bring suit *not* on their own behalf but, instead, on behalf of "all Future Generations," meaning "individuals not yet born or too young to assert their rights," and asked the Court to recognize, for the first time, a tort of Plaintiffs' own invention: "Intentional Investment in Abnormally Dangerous Activities." The Superior Court also dismissed this claim and, again, the Appeals Court affirmed. Likewise, this Court should reject Plaintiff's Application for Further Appellate Review.

First, Plaintiff argues for the first time in his Application that he seeks to vindicate his own rights, not just the rights of "Future Generations," when asking this Court to recognize his new tort. But "claims

[that] were not raised in the trial court . . . are not entitled to consideration on appeal," *Cacicio v. Sec'y of Pub. Safety*, 422 Mass. 764, 769 n. 9 (1996), and that aspect of Plaintiff's claim therefore should be rejected summarily.

Second, both the Superior Court and the Appeals Court correctly concluded that Plaintiff had no legal authority to bring a claim based on the interests of "Future Generations." Plaintiff provides no reason why he — rather than any other current or former Harvard student or employee, or any other member of the public, or even any other of the six Plaintiffs in this case who chose not to seek further appellate review — should be permitted to assert rights on behalf of "individuals not yet born or too young to assert their rights." Plaintiff has not obtained the permission of anyone, including any court, to speak on behalf of those persons, *compare* G.L. c. 215,§ 56A (granting authority to appoint a guardian ad litem to represent a child's basic welfare rights), and the Superior Court was wise not to grant Plaintiff "a roving commission to litigate on behalf of Future Generations." See Pl.'s App. Ex. B at 16.

Finally, both the Superior Court and Appeals Court sensibly concluded that it would be inappropriate to recognize the new tort Plaintiff has attempted to advance. "Courts are hesitant…to create a new… cause of action, only doing so when there is no other way to vindicate such public policy." *Bergeson v. Franchi*, 783 F. Supp. 713, 717 (D. Mass. 1992)(quoting *Melley v. Gillette Corp.*, 19 Mass. App. Ct. 511, 512 (1985), aff'd, 397 Mass. 1004 (1986))(internal quotations omitted). In *Remy v. MacDonald*, 440 Mass. 675, 675 (2004), for example, this Court rejected a request to recognize a new tort, a cause of action by a child "against her mother for personal injuries incurred before birth because of the mother's negligence," concluding, among other things, that the proposed new tort would inject courts into areas in which they lacked the expertise to make sound decisions.

Here, as the Superior Court found below, the Plaintiff's claim has no limiting principle. While Plaintiff asserts that investments in fossil fuels promote abnormally dangerous activities, others could claim instead that investments in companies that manufacture unhealthy food, make weapons, or do business in countries whose policies particular plaintiffs may

believe violate human rights, constitute abnormally dangerous activities.[4] In short, the Plaintiff's novel tort claim arises from what he believes is the mismanagement of a charitable organization, and it was invented precisely to side-step existing Massachusetts law, which already addresses the governance of charities. In proposing this new tort, Plaintiff is attempting to avoid the application of established Massachusetts law, which, as described above, holds uniformly that, absent narrowly defined special interests not present in this case, it is the sole province of the Attorney General to oversee a charitable organization's management.

CONCLUSION

Plaintiff's application raises no substantial issue affecting the public interest or interests of justice and thus should be denied.

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[4] In considering a proposed new tort, this Court also canvasses other jurisdictions. *See, e.g. Remy,* 440 Mass. at 679 (declining to recognize new tort); *Payton v. Abbott Labs*, 386 Mass. 540, 555 (1982) (same). Here – not surprisingly – no other jurisdiction has considered, much less recognized, the novel tort Plaintiff proposes, and this Court should similarly decline to do so.

PRESIDENT AND FELLOWS OF
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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016 I filed the attached document through the Electronic Filing Service Provider Odyssey File & Serve for electronic service. I hereby certify that on November 7, 2016 copies to non-registered users were sent by conventional mailing in accordance with the rules:

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