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Young Americans for Freedom at University of Florida v. The University of Florida Board of Trustees: The Student Government Viewpoint Neutrality Crisis

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Young Americans for Freedom at University of Florida v. The University of Florida Board of Trustees: The Student Government Viewpoint Neutrality Crisis

By: William K. Baird, Staff Editor, Vol. 111

In 2018, the Young Americans for Freedom (hereinafter "YAF") at the University of Florida and two of its members sued the University of Florida's trustees and other administrators under 41 U.S.C. § 2983.[1] YAF alleged—among other things—a deprivation of its First Amendment rights under caselaw requiring viewpoint neutrality.[2] The allegation centered around the University of Florida Student Government's allocation process.[3] The process gave student groups the opportunity to request funding from a \$1 million pool, which was part of the over \$20 million Student Government budget obtained through mandatory student fees.[4]

YAF was denied funding for two speakers—an NRA spokesman and a conservative commentator—under the university's two-tiered funding system that barred student groups in the lower tier from requesting speaker's fees.[5] Applications to the upper tier were subject to approval by the Student Government which, YAF claimed, operated with unbridled discretion and vague guidelines.[6] The parties settled out of court in the summer of 2019 when the University of Florida agreed to change the Student Government's funding policy and paid \$66,000 to the YAF University of Florida Chapter.[7]

This case brought viewpoint neutrality back to the forefront of universities' bureaucratic consciousness. There remains a careful balance to be struck between the First Amendment rights of students and the soundness of elected student representatives doling out mandatory fees to their peers.

The Beginning: Rosenberg and Southworth

To hone the perfect balance, one must consider the seminal cases applying viewpoint neutrality to university funding—both majority opinions authored by Justice Kennedy. In *Rosenberg*, the Supreme Court heard arguments on comparable facts: an elected student organization, controlling the pool of money funded by mandatory fees, denied funding to a student group.[8] The Court held that the fund controlled by the Student Council constituted a metaphysical forum and that universities, as instrumentalities of the state, may not regulate speech based on its substantive content or the message it conveys by subjecting the viewpoint to disfavored treatment.[9] *Southworth* solidified the utilization of mandatory fees to fund student organizations and activities, so long as the process for awarding funding was viewpoint neutral and did not discriminate based on the message of the recipient.[10]

The Balance

Student governments are essential players on college campuses. They offer opportunities for student leadership, development, and lifelong civic engagement by bridging the gap between students and administrators. An effective student government funds events to highlight the rich fabric of the student body. Elected student representatives are far more effective in this capacity than unelected administrators, which is why student fee money has been allocated for this very use across college campuses.

The balance between the students' first amendment rights and the undeniable benefit of having elected students manage allocations can be achieved by utilizing a first come first served single-tier system.[11] This system would follow guidelines through a rubric and would provide additional safeguards through an appeals and non-compliance process.

Suggested Solution

Single-tiered grant systems hold student organizations at an arm's length to ensure non-preferential treatment and avoid the dissatisfaction of organizations holding unrepresented viewpoints.[12] Two-tiered grant systems, where one tier is treated more favorably than the other, introduce exclusionary criteria.[13]

Each limiting factor to funding is an opportunity for a violation of viewpoint neutrality. A natural bias exists to grant organizations with large memberships top-tier status. This natural bias conflicts with *Southworth*, which finds that the popularity of speech cannot be utilized as a determining factor.[14] Reasonable limits should be imposed to ensure that a first come first serve system does not find itself without funding in the first weeks of the fiscal year.

Rubric Approval

Consideration by a student government body via a rubric can alleviate concerns of unbridled discretion prohibited by *Southworth* on remand to the Seventh Circuit.[15] Utilizing a rubric created in conjunction with the University Office of Legal Counsel ensures that student government officials with limited legal training can adhere to viewpoint neutrality. Rubrics can be customized to fit grants like travel, recruitment, or conferences.

Appeals

An appeals system is vital to student government funding systems and should include an initial review by students, independent secondary consideration by the student government (the student government's judicial branch), and a final review by a designee of the university's administration.[16] The standard of review for the appellate body should be de novo. It is imperative that university administration, which will be most vulnerable to suit for violating viewpoint neutrality, be included in this appeals process. Autonomy of a student government is precious but must be tempered by reality.

Noncompliance

A less elaborate process must exist for the student official that neglectfully or intentionally fails to comply with policy drafted for viewpoint-neutral compliance to ensure that student officials do not become a liability. Complaints filed by any interested party might be heard by the body responsible for assigning committees (if the review of funding requests is delegated to a committee) or, alternatively, by the student government's judicial branch. A standard of preponderance of the evidence or clear and convincing evidence should be utilized depending on the punishment imposed. Such punishments could be as minor as reassignment to a committee that does not handle funding or as harsh as removal from the student official's position.

In today's heated political climate universities' student organization funding systems will be placed under intense viewpoint neutrality scrutiny. As universities' tapestry of student experience gets more colorful hopefully student governments will still serve as students' funding partners.

[1] Trial Pleadings for the Plaintiff, *Young Ams. for Freedom at the Univ. of Fla. v. Univ. of Fla. Bd. of Trs.*, No. 1:18CV00250, 2018 WL 9415091, (2018).

[2] Trial Pleadings for the Plaintiff, *supra* note 1, ¶¶ 24, 40, 179.

[3] See Trial Pleadings for the Plaintiff, *supra* note 1 ¶¶ 5, 189, 198.

[4] See Trial Pleadings for the Plaintiff, *supra* note 1 ¶ 5; see Emily Dunson, Student Government Budget and Appropriations Chairwoman, Student Senate Law 2018-110: Amended Fiscal Year 2018-2019 Activity and Service Fee Budget, 1 (2018), <https://sg.ufl.edu/wp-content/uploads/2019/12/2018-1047-Amended-Fiscal-Year-2018-2019-Activity-and-Service-Fee-Budget.pdf>.

[5] Trial Pleadings for the Plaintiff, *supra* note 1, ¶¶ 15-19.

[6] Trial Pleadings for the Plaintiff, *supra* note 1, ¶¶ 4, 6.

[7] See Jacob Ogles, *UF Settles with Young Americans for Freedom Over Free Speech Dispute*, Florida Politics, August 1, 2019, <https://floridapolitics.com/archives/302327-uf-settles-with-young-americans-for-freedom-over-free-speech-dispute/>.

[8] See *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 825-28 (1995).

[9] See *id.* at 822; *Id.* at 830-31; and *Id.* at 829 (citing *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

[10] See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000).

[11] See generally William Baird, Appropriations and Revenue Chairman, Senate Legislation 70.2022: An Act Relating to SGA Funding, 1 (2022) (on file with University of Kentucky Student Government Association Senate Office) (enacting changes to the codes of the University of Kentucky’s Student Government Association funding process); William Baird & Amelia Pace, Omnibus Viewpoint Neutrality Funding Governing Code Changes, 15-27 (2022) (on file with University of Kentucky Student Government Association Senate Office) (proposing changes to the codes of the University of Kentucky’s Student Government Association funding process).

[12] Compare *id.* (The University of Kentucky Student Government Association proposed and passed a single tier system with a cap on funding per organization. Rather than favor specific organizations with special status it offers specialty grants—within the funding cap—to promote its priorities, i.e. community service, recruitment of new members.), with Trial Pleadings for the Plaintiff, *supra* note 1 ¶¶ 94-96, 99, 103, 162, 200-01, 203 (The University of Florida Student Government utilized a two tiered system which gave preferential treatment to hand selected organizations and led to the dissatisfaction of YAF).

[13] See Trial Pleadings for the Plaintiff, *supra* note 1 ¶¶ 94-96, 99, 103, 162, 200-01, 203.

[14] See *Southworth*, 529 U.S. at 235.

[15] See *Southworth v. Univ. of Wis. Sys.*, 307 F.3d 566, 579-80 (7th Cir. 2002).

[16] Cf Trial Pleadings for the Plaintiff, *supra* note 1 ¶¶ 89, 93, 156 (YAF argued that the lack of an appeals system was one indicator of unbridled discretion.).

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