



FIRE

Foundation for Individual
Rights and Expression

May 22, 2023

Nathan Hazen
Student Government Association
James Madison University
170 Bluestone Drive, Room 331
Harrisonburg, Virginia 22807

Sent via U.S. Mail and Electronic Mail (hazennl@dukes.jmu.edu)

Dear President Hazen:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by James Madison University Student Government Association's Senate Resolution implying it will unconstitutionally condition event funding on views expected to be expressed at the event. FIRE reminds the SGA of its legal obligation to uphold First Amendment principles by distributing funds in a viewpoint-neutral manner.

In January, the JMU chapter of Young Americans for Freedom (YAF) requested contingency funding to host commentator Liz Wheeler at an April 26 event, the topic of which YAF had yet to announce.² JMU student organizations that have "a Constitution and are in good standing with the Office of Student Activities and Involvement" and have "exhausted all forms of fundraising" may request contingency funding.³ At that month's SGA meeting, the SGA Senate approved YAF's funding request.⁴ On April 17, YAF announced the topic of the event and titled

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² Eleanor Shaw & Michael Russo, *SGA members say YAF didn't follow financial procedure or Liz Wheeler event, feel misled by topic*, THE BREEZE (Apr. 26, 2023), https://www.breezejmu.org/news/sga-members-say-yaf-didn-t-follow-financial-procedure-for-liz-wheeler-event-feel-misled/article_03ea31e4-e3d8-11ed-bce0-bf9ef71c412e.html. The recitation of facts here reflects our understanding of the facts. We appreciate that you may have additional information to offer and invite you to share it with us.

³ *SGA Funding*, JAMES MADISON UNIV. available at <https://www.jmu.edu/sga/funding/index.shtml#undefined> [<https://perma.cc/525N-4JAU>]. Contingency funding is used to cover events and supplies on a per-event basis. FIRE notes the SGA's concern that YAF may not have followed the correct procedure to submit its contingency funding request. This procedural irregularity is distinct from the SGA Senate's resolution on the topic of the YAF event and its promise to scrutinize funding moving forward.

⁴ Shaw & Russo, *supra* note 2.

it “The Ideology of Transgenderism.”⁵ On April 26, the SGA passed Senate Resolution 2 which reads, in part:

We did not approve, nor were we aware of this topic. We reserve the right to deny funding for any reason if a majority of senators are opposed. In this case, the funding request from YAF was voted on and approved on January 31st, and the money has already been put into a contract, so we are unable to rescind funding. . . . Moving forward as an organization, we will strive to increase scrutiny of all funding requests we receive.⁶

This statement strongly implies the SGA would have denied YAF’s request for contingency funds had the SGA known the topic of the event at the time of the request. The statement additionally commits that SGA will “scrutinize” future funding requests based on event topic and viewpoint. However, the SGA is constitutionally barred from doing so.

It has long been settled law that decisions and actions of a public university such as JMU,⁷ and its student government—including funding of student organizations⁸—must comply with the First Amendment, which forbids the SGA from imposing content- or viewpoint-based restrictions on the distribution of student activity fee funds to student groups.⁹ JMU’s authority to impose mandatory student fees carries with it a burden to ensure it distributes the funds distributed to student groups in a viewpoint-neutral manner.¹⁰

⁵ Ashlyn Campbell, *Community members debate controversial Liz Wheeler lecture set at JMU next week*, THE BREEZE (Apr. 20, 2023), https://www.breezejmu.org/news/community-members-debate-controversial-liz-wheeler-lecture-set-at-jmu-next-week/article_f1fdc3de-df0d-11ed-a679-23e62c46291b.html.

⁶ *A Resolution to release an immediate statement regarding JMU’s Chapter of Young Americans for Freedom’s event with Liz Wheeler*, JAMES MADISON UNIV. STUDENT GOV’T ASS’N SENATE (passed Apr. 26, 2023), <https://bloximages.newyork1.vip.townnews.com/breezejmu.org/content/tncms/assets/v3/editorial/b/d6/bd63a6b2-e3da-11ed-8d8d-835a540868c8/64488e55e1db6.pdf.pdf>. [<https://perma.cc/J8W9-7E4Q>].

⁷ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

⁸ *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Koala v. Khosla*, 931 F.3d 887, 894 n.1 (9th Cir. 2019) (assuming action by student government regarding student newspaper funding was state action because it was an “exercise of authorities concerning student affairs by delegations” of power from the university).

⁹ *Ala. Student Party v. Student Gov’t Ass’n of Univ. of Ala.*, 867 F.2d 1344, 1349 (11th Cir. 1989) (finding the University of Alabama student government is a state actor when analyzing a First Amendment challenge to student government campaign finance regulations); *Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 365–66 (8th Cir. 1988) (holding state university student government was a state actor for purposes of allocating funding to student groups); *Denton v. Thrasher*, No. 4:20-cv-425-AW-MAF, at *9 (N.D. Fla. Oct. 8, 2020) (holding that the student government is a state actor bound by the First Amendment).

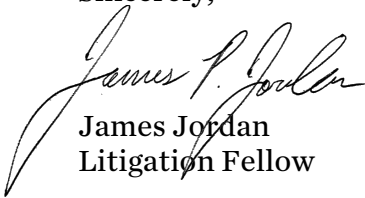
¹⁰ *Southworth*, 529 U.S. at 233 (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”). *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (“For the

For example, in reversing the University of Virginia’s refusal to fund a student newspaper because of the views it promoted, the Supreme Court affirmed that “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.”¹¹ The Court further explained that “the government may not regulate speech based on its substantive content or the message it conveys” or “favor one speaker over another,” and that public universities must maintain the “requirement of viewpoint neutrality” in distributing funds collected via their student activity fees.¹² As the Court similarly explained in a case at the University of Wisconsin, “viewpoint neutrality” must be “the operational principle” for any constitutional system of student activity fee allocation at public universities.¹³

SGA’s apparent plan to engage in viewpoint discrimination when distributing student event fees would violate the First Amendment if brought to fruition. While JMU, the SGA, and individual student leaders may certainly advocate for their own viewpoints on contested political issues, they may not use viewpoint-discriminatory criteria to censor some student speech while funding only those groups with popular views.

We request a substantive response to this letter no later than the close of business on June 5, 2023, confirming that the SGA will not consider a student group’s viewpoint or event’s content when distributing student activity fee funds.

Sincerely,



James Jordan
Litigation Fellow

Cc: Jonathan R. Alger, President
Brielle Lacroix, Student Government Executive Assistant
John F. Knight, University Counsel

University, by regulation, to base disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

¹¹ *Rosenberger*, 515 U.S. at 836.

¹² *Id.* at 819, 828–29.

¹³ *Southworth*, 529 U.S. at 233–34.