FIRE
Foundation for Individual Rights and Expression

November 9, 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 Mr. Hazen:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by a provision of the James Madison University Student Government Association's Fall Election Policy that imposes unconstitutional prior review on student speech and permits viewpoint discrimination in the campaign material approval process. FIRE thus calls on the SGA to meet its First Amendment obligations by rescinding this policy.

The SGA's Fall Election Policy requires that "[a]ll campaign content posted to social media or otherwise must be approved by the commission before posting."[2] Failing to abide by this rule can result in sanctions, including suspension of campaign rights.[3] The policy provides no guidelines to ensure the Elections Commission approves and rejects campaign materials in a viewpoint-neutral way and instead grants it unlimited authority to reject campaign materials for any reason, including for the views expressed.

It has long been settled law that the decisions and actions of a public university and, by extension, its student government, must comply with the First Amendment.[4] The SGA's

[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 mission and activities at thefire.org.

[2] *JMU Fall Elections Policy*, Campaigning, Campaign Regulations, JAMES MADISON UNIV. STUDENT GOV'T ASS'N 5 (on file with author). Note that this letter reflects our understanding of the pertinent facts, though we appreciate you may have additional information and, if so, invite you to share it with us.

[3] *JMU Fall Elections Policy*, Campaigning, Elections Violations, Process, Sanctioning, JAMES MADISON UNIV. STUDENT GOV'T ASS'N 6 (on file with author).

[4] *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 student government action on student newspaper funding was state action as an "exercise of authorities concerning student affairs by delegations" of power from the university); *Ala. Student Party v. Student Gov't Ass'n of Univ. of Ala.*, 867 F.2d 1344, 1349 (11th Cir. 1989) (finding student government to be a state actor in analyzing 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) (state university student government was state actor in allocating funding to student

policy imposes unconstitutional prior review on student expression because it bars students from publishing campaign materials without the Elections Commission's approval.[5] Such prior review is often the first step towards the imposition of a prior restraint, which the Supreme Court has described as the "most serious and least tolerable" infringement on free speech.[6]

The policy also allows for unconstitutional viewpoint discrimination. When public university officials delegate student organization funding decisions to student governments, student governments, acting as a proxy of the university, must make those decisions in a viewpoint-neutral manner.[7] Yet the prior review requirement here gives SGA limitless authority to bar content on the basis of the views expressed, including speech some SGA members may find personally offensive, even where that speech is protected by the First Amendment.[8] In addition to being unlawful, this practice harms SGA candidates and the broader JMU student body by potentially suppressing candidate speech that current Elections Commissions members dislike or wish to censor for any reason.

FIRE calls on the SGA to uphold students' expressive rights by embracing the freest possible exchange of ideas in the campaign process. While this approach may result in the dissemination of viewpoints SGA may deem offensive or even wrongheaded, it is JMU's students—who democratically elect SGA representatives—who must be free to make that decision themselves. We request a response to this letter no later than November 27, 2023, confirming the SGA will commit to complying with the First Amendment by eliminating this unconstitutional election policy provision.

Sincerely,

Leslie Corbly

Leslie Corbly
Program Officer, Campus Rights Advocacy

Cc: Jonathan R. Alger

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groups); *see also Denton v. Thrasher*, No. 4:20-cv-425-AW-MAF, at 9* (N. D. Fla. Oct. 8, 2020) (Florida State University student government is a state actor).

[5] Prior review of expression by a state actor violates the First Amendment. *See Lovell v. Griffin,* 303 U.S. 444, 451 (1983) (striking down an ordinance requiring city manager's approval of literature before distribution).

[6] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

[7] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). ("For the University . . . to cast 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.").

[8] The Supreme Court has consistently and clearly held that government entities may not restrict student expression because it is viewed by some as offensive or hateful. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (upholding student newspaper's use of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon...depicting policemen raping the Statute of Liberty and the Goddess of Justice").