



March 7, 2011

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**Re: Unconstitutional Student Application Funding Policies and Application to Young Americans for Freedom.**

Dear Dr. Stein and Mr. Graham:

The Alliance Defense Fund's Center for Academic Freedom represents the Young Americans for Freedom at Stony Brook University concerning the recent denial of student activity funding to YAF. ADF is a national legal alliance that defends individuals' First Amendment rights in the public square, and ADF's Center for Academic Freedom is particularly focused on defending those rights on university campuses. The First Amendment requires Stony Brook University and its Undergraduate Student Government to ensure that its allocation of student activity funding to student groups is done on a viewpoint neutral basis. The policies adopted for the allocation of student fees to student groups at Stony Brook fail to ensure viewpoint neutrality and were applied in a manner that discriminates against YAF on the basis of its views. By this letter we request that you approve YAF's budget request and immediately implement revised policies to ensure a viewpoint neutral allocation of student activity fees.

**Factual Background:**

Stony Brook University students must pay approximately \$95 per year in student activity fees, a charge additional to tuition and other required student fees. SBU permits a large part of these fees to be distributed to student groups by the Undergraduate Student Government. Last fall, the Stony Brook Undergraduate Student Government enacted a "New Club Funding Act" to address future funding for any groups not already recognized and funded by USG.

The New Club Funding Act provides that in order to be eligible for funding a club must first be recognized by the Undergraduate Student Government. and provide "a detailed, itemized anticipated budget for each event or request outlining how allocated funds would be used." It further requires new student groups seeking funding to submit signatures from 5% of Stony Brook University students – roughly 800 such students – supporting their funding. 10% of the submitted signatures are verified by calling the signatories to question whether they signed a

petition in favor of the group's funding. Signatories must provide their full legal name, NetID, and a telephone number. New groups are also limited to a request of \$1,750. A 2/3 vote of the Special Services Council of USG is required to recommend a funding request to the full Student Senate. With the exception of these eligibility requirements, the New Club Funding Act provides no list of the criteria that may or may not be considered by the Special Services Council or the Student Senate in evaluating requests for funding.

Last Spring YAF sought official recognition by the University's Student Activity Center, but was initially informed that it was too similar to the College Republicans. After YAF clarified its differences from the College Republicans, including the fact that YAF is non-partisan, it again applied and was approved for recognition by the Student Activity Center in the Spring of 2010. Throughout the fall of 2010, YAF asked the Undergraduate Student Government about funding, but funding for new groups was on hold as USG was revising its funding policies for new student groups. Soon after the New Club Funding Act was finally passed, YAF submitted a proposed budget and request for funding from the Undergraduate Student Government. YAF made revisions as requested by USG at the beginning of the spring semester. On February 7, YAF was informed that its constitution had been approved by the Chief Justice of the Supreme Court. But on February 17 the USG rejected YAF's application for funding, stating as follows:

After reviewing your club's mission statement, the Special Services Council has come to the conclusion that your club is very similar to the College Republicans. We are not permitted to recognize new clubs whose mission is similar or an extension of a club that is already recognized and funded by USG.

### **Legal Analysis**

#### **I. Stony Brook University and its Undergraduate Student Government Are Responsible for Ensuring the Viewpoint Neutral Allocation of Student Activity Fees.**

When a public university imposes a student activity fee and permits the allocation of these fees to student groups it creates a public forum, although a "metaphysical" one, for student speech. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). Inevitably, funds will be directed to student groups whose views some or many students disagree with. The Supreme Court has permitted public universities to allow this direction of students' fees to the propagation of views they disfavor only where protections are in place to ensure that the funds are distributed in a viewpoint neutral manner. *Southworth v. Board of Regents of University of Wisconsin System*, 529 U.S. 217, 233-34 (2000).

In *Southworth*, although the student government actually allocated the student fees to student groups, the Court also placed the obligation to ensure that viewpoint neutrality provisions were in place on the University that collected those fees and permitted the student government to allocate them. *Id.* at 233. The Court remanded the case to the lower court to determine whether

the University had done so, expressing doubt that its referendum process by which the student body could vote to determine whether a student group may or may not be funded, was viewpoint neutral. *Id.* at 221.

On remand the United States Court of Appeals for the Seventh Circuit determined that the University's policies failed to provide the necessary protections for viewpoint neutrality in several key respects and thus violated the First Amendment. As that Court explained, "The same [First Amendment] principles which apply to governmental regulations of parks, sidewalks and streets through permit and licensing schemes also apply to the University's forum of money established by its mandatory fee system." *Southworth v. Board of Regents of the University of Wisconsin*, 307 F.3d 566, 580 (7<sup>th</sup> Cir., 2002) ("*Southworth II*"). Hence, the "requirement of viewpoint neutrality includes as a corollary a prohibition on unbridled discretion." *Southworth II*, at 579-80. Where the student government's authority to allocate fees among groups is not limited by "narrow, objective and definite standards," its authority is not appropriately bridled and courts or other reviewing authorities cannot ascertain whether viewpoint discrimination "infected the [student government's] decision. *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94, 103 (2d. Cir. 2007) (internal citations omitted).

In *Amidon*, the United States Court of Appeals for the Second Circuit – which has jurisdiction over all of New York State, held that the school's system for allocating student activity fees to student groups violated the First Amendment. SUNY-Albany's student government allocated student fees either through a budgeting process through the student senate or via an advisory student referendum. In order to proceed via referendum, student groups needed to either obtain the signatures of 15% of the student body or a two-thirds vote of the student senate. *Id.* at 96. But the signature threshold and the referendum process itself were deemed "advisory" in nature because the final decision was still up to the student senate. The student government listed some narrow and objective standards for allocating student fees, but did not make this list exhaustive. *Id.* at 103.

The Second Circuit held that the advisory referendum process failed to ensure viewpoint neutrality because it "creates a substantial risk that funding will be discriminatorily skewed in favor of [student groups] with majoritarian views" in violation of the principles of *Rosenberger* and *Southworth*. *Id.* at 102. The Court likewise held that the student government's consideration of whether a group would "expend funds for the enrichment of campus life," and "complement the educational mission" of the school were so "vague and pliable" that they afforded the student senate unbridled discretion to discriminate against groups on the basis of their views in allocating student fees. *Id.* at 104. The failure to make the list of these criteria exclusive further failed to bridle senators' authority by permitting them to quietly interject their own discriminatory factors into the process. *Id.*

## **II. The Policies of Stony Brook University and the University Student Government and Their Application to Young Americans for Freedom Violate The First Amendment.**

First, neither the New Club Funding Act nor any other policy of the student government provides a finite list of the criteria that may be used by student government in allocating funds to student groups. In *Amidon*, the student government did at least provide such a list but left open the possibility of the application of additional unspecified criteria. The Second Circuit held that “because the criteria are nonexclusive, there is a disconcerting risk that the SA could camouflage its discriminate[ion] ... through post-hoc reliance on unspecified criteria.” *Id.* at 103. Stony Brook’s complete lack of any criteria for funding makes its unconstitutionality even more clear.

Additionally, Stony Brook’s prerequisite that student groups seeking funding “[c]annot duplicate the services of established clubs and organizations already serving a specific student body” fails the requirement of viewpoint neutrality. This criterion is not an objective standard, but explicitly requires the examination of a group’s stated views and the comparison of those views to those of other groups. Whether two groups’ views and mission are sufficiently distinct or are “very similar” to another group, as it was phrased in the email to Stony Brook YAF on February 17, is necessarily subjective and provides ample opportunity for viewpoint discrimination. This criterion fails the requirement of “narrow, objective, and definite standard” to determine whether to recognize prospective student organizations. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). *See also Amidon*, 508 F.3d at 103; *Southworth II*, at 580.

Moreover, the application of this policy to YAF is both erroneous and illustrates the threat of viewpoint discrimination inherent in this policy. YAF does not “duplicate the mission of College Republicans.” YAF, unlike College Republicans, is a non-partisan organization. Indeed, its current membership includes Democrats, Republicans and likely others as well. The purpose of College Republicans is to promote Republican candidates for office. YAF advocates not for candidates themselves, and certainly not for candidates of any one party, but instead seeks to advance the conservative ideas in the Sharon Statement. But a simple review of the currently funded student organizations shows a number of Christian and other religious organizations, ethnic groups, literary and journalistic groups, and others that appear to be quite similar to others that are also funded. Even if this subjective policy could be applied in an evenhanded and viewpoint neutral manner it is not being so applied at Stony Brook.

The requirement that student groups gather the support by petition of 5% of students willing to publicly identify as supporting their funding also fails the requirement of viewpoint neutrality. In *Amidon* the Second Circuit held that even an *advisory* referendum posed too great a risk of interjecting majoritarian views into the allocation of funds to student groups. *Amidon*, at 102. Stony Brook requires student groups to not just submit to an advisory referendum but to actively attain roughly 800 signatures of students willing to publicly identify themselves to others as supporting a group’s application for funding. This binding prerequisite for funding discriminates against less popular or more controversial views in violation of the First Amendment. Such a requirement effectively makes the popularity of a student group’s message

(and hence the ease with which it can obtain the signatures or its ultimate ability to gather them at all) an important factor in the allocation process. Student government “cannot use the popularity of the speech as a factor in determining funding,” *Southworth II*, 307 F.3d at 595, because the First Amendment requires “that minority views are treated with the same respect as are majority views.” *Southworth*, 529 U.S. at 235. Even more than the advisory referendum in *Amidon*, the petition requirement here “creates a substantial risk that funding will be discriminatorily skewed in favor of [student groups] with majoritarian views. Favoritism of majority views is not an acceptable principle for allocating resources in a limited public forum.” *Amidon*, at 102.

Finally, the New Club Funding Act applies only to and imposes new hurdles on new student groups, making it more difficult for them to obtain funding than already funded groups and limiting the amount of funds they may request. This has the effect of cementing the position of the established groups and ideas and burdening newer groups – even to the point of completely excluding those whose views are in any way similar to a group already recognized and funded by USG. As the United States Court of Appeals for the Seventh Circuit has held, the “consideration of the length of time an organization has been in existence and the amount of funding an organization has received in the past discriminates against less traditional viewpoints.” *Southworth II*, 307 F.3d at 594. Granting a favored position to established groups and placing additional burdens on newer groups with newer ideas and strategies for advancing those ideas fails the requirement of viewpoint neutrality mandated by the Supreme Court and the Second Circuit.

The deadline for applications for student fees are April 1. Moreover, Young Americans for Freedom desires to express its ideas on campus, inviting speakers and adding to the marketplace of ideas at Stony Brook University, but the denial of funding has seriously impeded these efforts. And the rights of all Stony Brook University students, including but not limited to YAF’s members, are violated whenever they are required to pay student fees that are allocated in a manner that permits viewpoint discrimination. As a result, we ask that you (1) immediately grant YAF’s budget request and provide it the requested funding; (2) eliminate the petition requirement; (3) implement objective and finite standards to govern the discretion of the student government officials who are responsible for allocating student funds and ensure that they do so in a viewpoint neutral manner; and (4) apply the same standards to all groups, both new and old.

It is our sincere hope that the Undergraduate Student Government, with the encouragement and guidance from the SBU administration responsible for ensuring that the student fees it collects and assigns for distribution to the USG, will take this opportunity to ensure that its funding system protects the rights of the students who pay these fees as well as the groups that seek funding from them. Because of the coming deadline for applying for student fees and the present impairment of the expression of Young Americans for Freedom due to its denial of funding, I ask that you please respond by Friday, March 18 so that we may assess whether legal action will be necessary to protect the rights of our clients and other students at Stony Brook University.

Dr. Jerrold Stein, et al.

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Sincerely,

/s/ M. Casey Mattox

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Senior Legal Counsel

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