IN THE STUDENT SUPREME COURT
IN AND FOR THE FLORIDA STATE UNIVERSITY

TAYLOR NEY,

Petitioner,

v.

THE UNITE PARTY,

Respondents,
_____/

J. Kaney. Delivers the Opinion of the Court Joined by C.J. Donnelly, J. Engelbrecht, and J. Moorhead.

SYLLABUS

This case comes before the Court on two appeals from both plaintiff, Taylor Ney, and defendant, The Unite Party, from a decision by the Florida State University Elections Commission. Each side appealed separate portions of the same Elections Commission vote.

Defendant alleged that Chapter 701 of the Election Code in conjunction with the restrictions in section 714(1)(J) place unconstitutional burdens on speech. Next, Defendant argues that the social media posts do not violate the election code, there was never a call to action, and The Unite Party was not a registered political party at the time of the alleged violations. Plaintiff generally challenges all decisions of the Commission in which the Commission did not find violations by Defendants.

ISSUES

1. Whether sections in the FSU Election Code place unconstitutional burdens on speech under the First Amendment?

2. Whether The Unite Party violated sections of the Election Code pursuant to Plaintiff's original complaint before the Elections Commission?

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, Campaign Director for Independent candidates for Student Body President and Vice-President (John Walker and Randy Ornstein) brought allegations of fifty-two violations of the Election Code outline in Chapter 700 of the Florida State University Student Body Statutes (FSU SBS) against defendant, The Unite Party.

Mr. Ney alleged twenty-six violations of FSU SBS section 714(1)(A) and twenty-six violations of section 705(4).

The Elections Commission held that The Unite Party violated FSU SBS section 714(1)(A) five times and 705(4) eleven times, which resulted in the assessment of five Schedule 1 violations and eleven Schedule 2 violations pursuant to FSU SBS section 716(2) and 716(3). Both parties brought appeals from the same Elections Commission vote. Petitioners assert that the Commission Erred in not finding more violations against Respondents. Respondents contest that sections of the Election Code violate the First Amendment's right to freedom of speech and expression, and alternatively argue that there were no violations of the Elections Code.

ANALYSIS

The First Amendment of the United States Constitution provides as follows:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

U.S. Const. amend. I.

In order for the First Amendment to apply in this case it must be shown that both FSU and the FSU SGA are "state actors" and thus subject to constitutional control. Indeed, Florida State University is a public institution of higher learning which means it is a state actor for constitutional purposes. Similarly, student government associations are generally considered state actors since they act under the color of state law in their adoption of rules and regulations regarding SGA elections. *See generally Sellman v. Baruch College of City University of New York*, 482 F. Supp 475 (S.D.N.Y. 1979). Admittedly, student government associations enjoy "a measure of autonomy," however, the state and university exercise substantial control over it to "ascribe its acts to the state." *Sellman*, 482 F. Supp. at 478; *see also* J. Ben Shephard, *Forum Over Substance: Student Government Elections and First Amendment Problems*, 53 U. LOUISVILLE L. REV. 559 (2015). The Middle District of North Carolina provided the following analysis on the topic of student government as a state actor:

> The Student Government occupies and operates on premises owned by the University, and thus by the State; the Student Government is organized as and performs the functions of a governmental body; the Student Government derives its authority from the University; the Student Government receives direct and indirect financial assistance from the University.

Arrington v. Taylor, 380 F. Supp. 1348, 1359 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1974). This Court finds that both FSU and the FSU SGA are state actors that are subject to the constitutional restrictions of the First Amendment.

In *Tinker v. Des Moines Independent School District*, the Supreme Court noted that students and teachers "do not shed their constitutional rights at the schoolhouse gates. 393 U.S. 503, 506 (1969). The Court in *Healy v. James*, however, held that schools may enact regulations regarding the time, place, manner of speech so long as the regulations are reasonable in scope. 408 U.S. 169 (1972).

The United States Supreme Court's First Amendment jurisprudence in the realm of public schools can be broken down into three parts. First, the Court addressed the issue in 1969 in *Tinker*. The Court established the "*Tinker* standard" which requires the government to show that a student's speech or expression is either (a) substantial disruption of the school environment, or (b) an invasion of the rights of others. *Tinker*, 393 U.S. at 506. The Court stated that "[T]he prohibition of expression of one particular

opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible," and continued to note that "school officials do not possess absolute authority over their students." *Tinker*, 393 U.S. at 510.

Next, the Court addressed the issue of lewd and vulgar speech in the public-school setting. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). The Court established a balancing test: "the freedom to advocate unpopular and uncontroversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681.

Finally, the Court addressed the issue of student speech in school newspapers in *Hazelwood School District v. Kuhlmeier*. The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. 484 U.S. 260, 273 (1988).

"The First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings." *Hazelwood*, 484 U.S. at 266 (quoting *Bethel*, 478 U.S. 682). The Election Code in this case, however, is not confined to expressive activity solely on the FSU Campus: the code governs all SGA campaign activity, regardless of whether it's on or off campus. Thus, campaign materials cannot be distributed on the sidewalks or streets of Tallahassee, nor in local parks – areas that are squarely considered public fora – until a week prior to the election. Section 714.1(E)(1) of the Florida State University Student Body Statutes (FSU SBS) provides that "[c]ampaign materials posted on private property must still be in compliance with all applicable provisions of this code, including the time in which campaigning is allowed." The FSU SBS defines campaign materials as:

> "any material, including but not limited to social media, electronic communication, videos, posters, placards, signs, signboards, leaflets, folders, handbills, fliers, banners, t-shirts, buttons, paint, University owned walls that may be painted on, handwritten announcements or circulars of any size and consistency that publicize a political party or candidate for an elected office of the student body, and calling the action to vote."

Florida State University Student Body Statutes section 701.1(E).

Since the code controls expressive activity in these public fora, they are subject to the constitutional standard applicable to such for a strict scrutiny and the "compelling state interest" test. A university's interest in furthering its educational mission, if reasonable in scope, may be a "compelling state interest." *See Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981). The sweeping and expansive ranges of the elections code, however, prevents any conclusion that the code is "reasonable in scope."

Moreover, FSU makes its campus generally available for student debate and intellectual discourse, limiting one particular topic of discussion: political speech relating to Student Government elections. The Supreme

Court's decision in *Widmar* dictates that the validity of such an action by the university be assessed under the strict scrutiny and "compelling state interest" test. Applied to the present case, there is no assertion furthered which portrays an "educational mission" that compels the implementation of the broad election code adopted by FSU's Student Government Association.

Furthermore, there is no showing by the University that campaigning earlier than a week prior to an election causes a "substantial disruption" under *Tinker*. The facts of this case do not fall within the *Fraser* analysis since the speech at issue is not said to be vulgar or offensive. Most recently, the Supreme Court held that schools may restrict speech that "a reasonable observer would interpret as advocating illegal drug use," which is plainly not the case here. *Morse v. Frederick*, 551 U.S. 393, 422 (2007). The Court in *Widmar* recognized a "university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277. While the facts of this case are distinguishable, the Supreme Court's analysis/test from *Hazelwood* would apply. Under *Hazelwood* schools may place limitations on speech that are "reasonably related to pedagogical concerns." *Hazelwood*, 484 U.S. at 273.

This Court fully understands the great deference afforded to public schools in their ability to curtail certain avenues of speech in order to further their educational mission. This case, however, presents a situation where the speech does not contravene any educational mission, and rather, furthers general ideas behind typical "educational missions." The speech in this case arises from the desire to become involved in student government, and ideally, to give back and improve upon the student body as a whole. There are limitations upon the campaigning, which are permissible, that ensure that a disruption is not created for fellow students. In this case, posting on social media will not inhibit the ability to learn and attend school for other students. Further, there has been no showing of any specific "pedagogical" concern which supports limiting student campaign speech.

This Court finds that the aforementioned portions of the election code are unconstitutional as an infringement on the right of free speech of FSU's students. Florida State University has not attempted to justify an educational purpose for the regulations.

Assuming arguendo that the First Amendment rights of potential SGA candidates at FSU were not violated, this Court holds in the alternative that the Elections Commission erred in sanctioning the Unite Party.

This Court relies upon textualism, a school of statutory interpretation which rests on the premise that Congress speaks authoritatively only through enacted legislation. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994). The late Justice Scalia noted that the meaning of terms should be determined on the basis of which meaning "most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989).

In the present case, Chapter 700 explicitly states that the Election Code is "in force three (3) weeks prior to an election." The textual approach dictates that the words in effect at

the time of enactment govern, not the intent or purpose behind the statute. Does it seem fair or logical for an election code to solely apply three weeks prior to an election? Of course not. It is not this Court's job, however, to determine what the FSU Student Senate *may* have intended through their creation of particular legislation.

Pursuant to this Court's interpretation of Chapter 700 there were no Election Code violations by Unite Party as the events in question occurred outside of the three-week period in which the Code applied.

CONCLUSION

The ruling on the constitutionality of the Election Code is expressly limited to the portions of the Code which impermissibly restrict students' freedom of speech and expression under the First Amendment. First, this Court finds 714(E)(1) to be unconstitutional in light of this Court's analysis. Second, this Court finds 701(A), (B), and (E) to be unconstitutional under the First Amendment as impermissibly restrict freedom of speech and expression.

C.J. Donnelly concurring with whom Engelbrecht, Kaney, and Moorhead join.

This Court has seen these same issues year after year. Each time the Court finds the Election Code to be full of contradictions, poorly worded statutes, and unconstitutional clauses. With this in mind, I personally went to the other two branches of government and offered the services of law students to fix this sickly statute.

After my offer of free assistance from eager law students, a total of zero people came to me seeking assistance. The Election Code determines the manner in which students may campaign to become a part of SGA. This Code is one of the most important in the SGA statutes. If the Senate is not fixing the issues at the very core of Student Government, what are all these well-dressed people doing?
Fixing the Election Code may not be the most exciting or easy work, but how satisfied can we be with the composition of SGA while the Elections Code is defective? Is it not offensive as an American to be told that you cannot speak? Is it not foundational in our society that political speech is the epitome of all speech? And yet here we sit in the Student Government Association telling those who wish to join us in representing the Student Body that they are limited in their rights to speak.

In this case, there were some questions about what a call to action is. I will end this concurrence with an example:

Members of the Senate, please support changes in the Elections Code, please vote for these changes, please seek assistance in crafting new statutes.

J. Moorhead concurring with whom Engelbrecht and Kaney join.

I join completely with the Court, but write separately to address a reoccurring problem. Year in and year out, the Court is faced with this same question we resolve today. Consistently the Court has resolved this question in the same way, declaring portions (and once seemingly all, before a reversal) of Chapter 700 unconstitutional. Time, place, and manner restrictions on speech are permissive, and again the Court correctly finds the challenged provisions are not time, place, and manner restrictions. *See Healy*, *supra*. The reason is that the restrictions amount to content based restrictions as opposed to time, place, and manner restrictions. When a restriction is placed on

student speech, which is of certain content, the university must have a compelling and valid reason to do so. *See generally Widmar, supra* at 280 (STEVENS, J., concurring). Here there is no compelling pedagogical interest that exists in banning student political speech for the three weeks prior to an election.

It may very well be said, the pedagogical interest is to not bombard students with messages regarding Student Government politics. However, the First Amendment was designed to protect this exact speech against all intrusive governmental action, with extremely limited exceptions. Here, Florida State University, by and through its Student Government, at a base level, is saying it has a compelling interest in keeping political speech contained by limiting it, arbitrarily, to three weeks before an election. However, the way they do that is not a permissible time, place, and manner restriction. Section 701.1(E) specifically says "any material." If the word "any" does not amount to a content based restriction, I cannot say I know what would. Merriam-Webster defines "any" in multiple ways, but two are make my point undoubtedly clear. "Any" is defined as, "one or some indiscriminately of whatever kind," and alternatively, "one, some, or all indiscriminately of whatever quantity." The use of the word "any" undoubtedly makes the statute in question fail strict scrutiny, since the first question asked in the two-prong test will be: is the statute narrowly tailored? *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). In my eyes, it is impossible to have a statue be considered narrowly tailored when the statue uses the word "any" to indiscriminately ban, from the outset, all speech related to campus politics and campaigning.

It is incomprehensible how year after year SGA actors fail to recognize the most important line in our University Constitution, "[e]ach student shall be subject to the rules of the courts and the University but *these rules shall at no time and in no way abridge the student's rights as citizen under the United States Constitution* or the Constitution of the State of Florida." Fla. St. Univ. Const., Art. 1, § 6. (Emphasis added). Justice Kaney could not be more spot on, a student does not abandon his or her constitutional protections when they enroll at the university, and that is made unambiguously clear in our Student Body Constitution. *See generally Tinker*, *supra*.

As Justices we swore an oath to protect the Constitution of the United States, first and foremost. The sequence of that affirmation comes before the provisions for the constitutions of the State of Florida, and Florida State University Student Body for a reason. That reason is the supremacy clause, the "Constitution, and all the laws of the United States…shall be the supreme law of the land." U.S. Const. art. VI. Today we uphold our oath; we correctly declare those limited portions of Chapter 700 which were challenged unconstitutional.

I now turn to Chief Justice Donnelly's remarks on to Student Senate. He is dead on. It amazes me: the Student Senate is more concerned with making sure 125 tickets to Marvel's *Black Panther* movie are funded with the student body's Activity and Service fees than they are the freedom of speech, our most fundamental constitutional right. *See* sga.fsu.edu/bills/2.14.18.pdf. I reiterate the Chief Justice's question, what are you well dressed people doing? There are more noble ways to spend your time as legislators then funding a movie screening. Chapter 700 is an 800-pound gorilla, but you are too busy playing House of Cards to see it. I implore you now, fix the disaster that lies in that chapter. I know it must feel like a momentous

undertaking, but chip away slowly, and suddenly that huge block of marble will have become your David.