



Student Judiciary

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COLLEGIANS FOR A CONSTRUCTIVE TOMORROW (CFACT), Petitioners

v.

Barabara KIERNOZIAK, Kevin OTTEN, Drew DORSHORST, Emily MCWILLIAMS, in their official capacities as Representatives and Officers of the Student Council and Student Services Finance Committee.

JUDGMENT ON APPEAL

Cite As: 2005 ASM SJ 1

♦
Nathaniel Romano
Chief Justice

♦
Grant Collins
Vice-Chief Justice

♦
Timothy Leonard
Chair, Student Elections
Commission

♦
Nicholas Fox
Associate Justice

♦
Yin-Chin Wang
Associate Justice

On Certified Appeal from a Panel Judgment

Before the Court En Banc: Romano, CJ, Collins, VCJ, Leonard, Fox, Wang, S.JJ.

CHIEF JUSTICE ROMANO announced the Judgment and Delivered the Opinion of the Court, which VICE-CHIEF JUSTICE COLLINS joined in full, JUSTICES LEONARD and WANG joined as to Parts I and II and JUSTICE FOX joined as to parts I and III-B.

JUSTICE FOX delivered an Opinion dissenting as to Part II.

JUSTICE WANG, with whom JUSTICE LEONARD joins, delivered an Opinion dissenting as to Part III.

NATHANIEL ROMANO, Chief Justice. The Student Judiciary certified two questions in the case of *Collegians for a Constructive Tomorrow (CFACT) v. Barbara Kiernoziak, et. al.*, 2004 ASM SJ 16, for appellate review by the full Court. See, *Certification for Appeal*, 2005 SJ Ord. 2. We consider (1) whether the panel below erred in requiring that all participants in a funding decision, including non-voting *ex-officio* members, are bound to observe viewpoint neutrality, and (2) whether the panel erred in holding that a distinction exists between actions taken by individuals in the funding process, and the collective action taken by a collective group. *Id.* We answer both questions in turn.

I

This case stems from a budget cut made to Petitioner CFACT's budget by the Student Council at the end of the fall 2004 term. We incorporate the facts as found in the panel opinion below, and reprint only what is necessary to understand the case. See, *CFACT v. Kiernoziak, supra*, at 1 *cf.* Rule 19, *Student Judiciary Rules of Procedure (SJR) (2004)* (limiting the use of new evidence in appellate hearings).

At its meeting on December 1, 2004, the Council was presented with the GSSF budgets for the 2005-2006 semester. *Student Council Agenda for December 1, 2004* at Item XI.D.1 (available at <http://www.asm.wisc.edu/council/meetings/agendas04-05/120104.pdf>). The budgets had previously been adopted by the Student Services Finance Committee (SSFC) and were recommended for approval by the Council. See, *ASM By-laws* §2.03(A) (2004).

While considering the budgets, Respondent Finance Chair Barbara Kiernoziak, moved the Council to cut \$10,000 from CFACT's budget, specifically cutting speaker honoraria. She stressed two themes. First, that CFACT did not have any plans to bring speakers to campus as of that date. Second, she argued that many other groups brought speakers of similar views and ideas to the campus. Her motion was seconded by Respondent Rep. Drew Dorshorst. Respondent SSFC Vice-Chair Kevin Otten also spoke in favor of the motion. However, both Rep. Dorshorst and Vice-Chair Otten spoke in favor of the motion on the grounds that no other group

received more than \$5,000 in speaker honoraria and that it was inequitable for one group to receive a significantly higher share. The motion passed. Eventually, after debate on other matters, the budgets were adopted as amended, including the cut to CFACT's honoraria budget.

CFACT then filed a timely petition with the Court on the grounds that viewpoint neutrality (VPN) was violated and requesting that the Council's decision be reversed, and that Kiernoziak, Otten, Dorshorst, and Council Chair Emily McWilliams¹ all be stripped of their offices within ASM. The trial panel dismissed the complaints regarding Respondents Otten, Dorshorst, and McWilliams. With regard to Chair Kiernoziak, the panel found her statements to have been slightly misleading to the Council, and inappropriately considering the viewpoints of both CFACT's speakers while impermissibly comparing them to speakers of other groups on campus. The panel found her remarks to have constituted a non-malicious violation of VPN.

Having unanimously found a non-malicious VPN violation, the panel split on remedy. The majority determined that her statements were not enough evidence to show the Council as a whole acted in a manner contrary to VPN and so, while referring her individual behavior to Council for such measures as it deemed proper, *see, By-laws* §2.01(C)(III), the majority also affirmed the decision of the Council.

At the request of several justices, the Court certified the case for appeal. *See, Rule 18, SJRP; Certification of Appeal, supra.* We now answer the two questions raised by that certification.

II

The first question certified for appeal asks if the panel erred in considering Chair Kiernoziak and other *ex-officio* members to be bound by the dictates of VPN the same as voting, full members of the Council.

II-A.

The ASM Constitution declares that the Student Council shall be made up of 33 Representatives. *ASM Const.* Art. VII §1 (2004). The By-laws expand on this to state that, in addition, several officers and appointees of the Council, including the Finance Chair, have the right, *ex-officio*², to be present, to speak, and to take certain procedural actions during Council meetings. *By-laws* §3.01(B). These persons are not "Representatives" and do not exercise the fundamental power of the Council to make legislative decisions. *Const.* Art. VII §6(a). Under the *ex-officio* rules, the Finance Chair has the right to speak and make procedural motions on all financial matters, including the GSSF budget process. *By-laws* §3.01(B). This puts the Finance Chair, and the other *ex-officio* members, in the unique situation of not being members of the Council, but of having special privileges not available to ASM members at large. We recognize, as a matter of ASM law, that this is wholly consistent with the ASM Constitution.

The dissent would have us believe that in so recognizing we are abandoning our commitment to the hierarchy of laws. *Post at 7-8* (Fox, J. dissenting). Nothing is further from the truth; indeed, we reaffirm our commitment to the noble idea that the ASM Constitution is the ultimate guide for this Court. *See, Evans v. Rouhlac*, 2004 ASM SJ 10, *appeal denied*, 2004 SJ Ord. 15; *Schober v. Evans*, 2004 ASM SJ 14. Only the 33 elected representatives are "Representatives" on the Council; this does not alter the fact that the Council may chose to include others in its

¹ Apparently, the only rationale forwarded for Chair McWilliams' inclusion was that, as presiding officer, she bore some responsibility to ensure VPN-compliance. No evidence, and scant discussion was made of her role in this case at all.

² An *ex-officio* member is, generally, a member who holds the position by virtue of another office she holds. Unlike the elected members of the Council, an *ex-officio* member has no personal right in the membership; if she ceases in the office granting the *ex-officio* status, she ceases to be an *ex-officio* member.

deliberations. See, *Const. Art. VII §6(a); By-laws §3.01(B)*. Recognizing this fact in no way affects the constitutional balance.

There is a distinct difference between the “Representatives” on the Council and the members *ex-officio*. Cf. *Const. Art. VII §6(a) and Bylaws §3.01(B)*. In fact, it is a bit of a misnomer to discuss the latter as “members.” The formalistic view would be merely to say that these persons are those whom the Council has granted the privilege to participate in the decision-making process to a certain degree. Here, it is participation by debate and certain procedural acts. *Id.* This in no way offends the Constitution, for the *ex-officio* members are not, in that manner, exercising a purely legislative power that is reserved for the elected “Representatives.”³

The Council, like all corporate bodies, has the inherent right to include whomever it wishes in its deliberations. This can be from the simplest act of inclusion, such as the Open Forum rules, to the creation of *ex-officio* officers with the full panoply of privileges, save the right to actually vote on the final question. Indeed, it is worth noting that this Court has itself authorized non-Justices have the right to speak in certain circumstances. Rule 25, *SJRP*. Further, in numerous committees and commission, the Council has been very broad in this manner, naming any member of ASM who attends a meeting to be a member of the committee. See, *By-laws §§ 1.09(B)* (naming all members of ASM as non-voting members of the Coordinating Council), *3.03(G)(IV)* (the Council may give any member of ASM debating privileges at any meeting), *3.07(C) et seq.* (allowing any member of ASM “without limitation” to become members of the Diversity, Campus Relations, and Academic Affairs Committees). The mere fact that the Council chooses to allow non-Representatives to debate and make certain procedural motions in no way conflicts with the demands that only the 33 elected representatives take part in the actual votes of the legislative process. As we note below, there is a distinction between the process by which a decision is made, and the ultimate decision that is made. See, *Multi-Cultural Student Coalition v. Otten – Order Denying Motion to Dismiss*, 2004 SJ Ord. 8.

II-B

The Council is charged with hearing and approving the GSSF budgets recommended by the SSFC. *By-laws §2.03(A)*. While Council can approve the budgets by simple majority vote, amendments of the budget require two-thirds (2/3) vote to carry. *By-laws §2.03(A)(II)*. Their discretion in this matter is limited by the dictates of the ASM Constitution.

The ASM Constitution mandates absolute ideological non-discrimination by the governing organs of the ASM, including the Council. *Const. Art. IV §1*. The *By-laws* declare that this non-discrimination shall be carried out in the funding process by mandating that all funding actions be taken in a manner that is viewpoint neutral. *By-laws §2.01(A)(I)*. According to the *By-laws*, a decision conforms with VPN when it is made (1) in a manner consistent with due process and (2) without taking the views of the organization to be funded into account. *By-laws §2.01(B)(II)*. This is consistent with the requirements of the First Amendment as applied in the public university setting. See, *Bd. of Regents of the Univ. of Wis. v. Southworth, et. al.*, 529 U.S. 217 (2000).

The ultimate resolution of who is bound by the dictates of VPN ultimately rests on the determination of who is “making” a decision that must be viewpoint neutral. CFACT contends that any persons who participates in any manner must be bound by these rules. Respondents, to the contrary, urge us to limit the rules solely to those who vote on the final decision. We reject both views.

³ As we note below, this does not wholly insulate them from the requirements of the *By-laws* with regard to viewpoint neutrality. See section II-B.

The view advocated by CFACT is far too broad, and would encompass far too many neutral parties to be effective. As many noted during oral arguments, this theory leads to the possibility that Open Forum rules, and other strong policies preferring free discussion among all members of ASM, not just officers and appointees, would be stifled. Further, it would seem to prohibit even members of a group seeking GSSF funding from advocating for their organization. In the long run, the result would be that every member of the ASM would suddenly find him- or herself limited in when and where expression of views regarding various campus groups could be discussed. We will not countenance such a chilling effect on the free speech rights of ASM members at large.

However, the argument put forth by Respondents is far too narrow. Limiting VPN rules solely to those officers and appointees who chose to vote on an issue inevitably opens up a significant loophole. A GSSF funded group that advocates for an unpopular viewpoint, or against a popular one, might find itself the victim of the very sort of behavior that VPN is bound to protect it from. However, if the violators simply abstained from the final vote, they would find themselves removed from any sort of sanction. Whether they had the franchise or not, they could simply opt not to exercise it, and engage in proscribed behavior with total immunity. Surely, this is not consistent with our constitutional mandate to protect members of ASM, including GSSF funded groups, from political viewpoint discrimination.

We believe then, that, as a matter of law, the dictates of VPN fall on any person who participates procedurally in the process of VPN, whether they ultimately vote or not. It must be recognized that the rules of VPN apply to any “decision” made that allocates funds. *By-laws* §2.01(B). A “decision” is not limited by its terms to the final vote; rather, when considering the actions of a legislative body, a decision begins the moment the motion under consideration is made, and continues until the question is finally resolved, whether by a vote, another motion that tables the question, or some other procedural device.

Decisions are processes, they do not simply appear fully determined. In no case is a decision simply pop into existence without any stimulus. A question, an idea, an issue must first be breached. In the case of the Council, decisions begin with the introduction of a motion or resolution bringing forward a question. *See, Robert’s Rules of Order, Newly Revised* s.1.

We believe that this recognizes that decisions are not simply votes, that, in collegial bodies, they are the result of a series of actions taken by those with the right to take those actions⁴. Each person having the right to take action must also bear a parallel responsibility to take those actions in a manner consistent with his or her oath of office. This stems from the fact that procedural actions are part and parcel of any decision made by the Council. No decision is made without at least two distinct procedural acts – moving the question and calling the question. In between those two acts, numerous other procedural acts can have a significant impact on the ultimate decision – amending the question, tabling the question, committing it to a committee or sub-committee, merging the question with others, et. Each of these procedural acts has an impact on the ultimate decision. Just as the ultimate decision must be viewpoint neutral, so too must the parts of the decision be viewpoint neutral; viewpoint neutrality cannot emerge from a Frankenstein monster of biased and discriminatory sub-acts.

⁴ JUSTICE FOX in dissent has commented that Chair Kiernoziak and other *ex-officio* members only have their rights and authorities by the leave of the Council. *See, post at 7-8* (Fox, J. dissenting); *cf. Patzner v. Student Council*, 2002 ASM SJ 4). This is true. However, it does not change the analysis. Though Council can restrict or remove Chair Kiernoziak and other *ex-officio* members from enjoying the procedural rights they currently enjoy, as long as Council grants them the right to act procedurally, they must act in conformity with the dictates of the Constitution and By-laws. The Council has no authority to create a special category of officers or appointees immune from the general law; that is not consistent with the Constitution’s guarantees of due process and non-discrimination. *See section II-A, ante at 2-3.*

II-C

Applying these principles, we conclude that the panel below was correct in its determination that Chair Kiernoziak was properly named in this case. Clearly, she acted procedurally in a manner that mean the VPN rules applied to her. She made the actual motion bringing the issue to the Council floor. Her act was the *sine qua non* for the decision. As such, it clearly meets the standard we have enunciated.

We note, however, that the issue is unclear with regard to persons such as Respondent Vice-Chair Otten, who spoke but had no procedural rights. Vice-Chair Otten could not have acted procedurally had he tried; his only right is that to speak, unless he is acting in the stead of the SSFC Chair, which he clearly was not. See, *By-laws* §3.03(G)(I). However, because his case was dismissed at the original trial, and not specifically noted in our certification order, we do not decide the issue of whether *ex-officio* members without procedural rights are bound as are those who do exercise procedural rights.

Accordingly, for the reasons stated above, we answer the first certified question in the negative. The panel below did not err, and properly concluded that Chair Kiernoziak was within its jurisdiction to hear VPN complaints against her.

III

The next certified question asks whether the panel properly concluded that, despite Chair Kiernoziak's non-malicious violation of VPN, the judgment of the Council should not be disturbed. The panel concluded, over the dissent of one justice, that the actions of one member do not necessarily mean that the entire decision is to be voided.

III-A

As a preliminary matter, we note that the By-laws specifically distinguish between "officers, appointees, and bodies" in stating who is bound by the dictates of VPN. *By-laws* §2.01(C)(I). We have long held that statutory language shall never be rendered moot or redundant. *Schober v. Evans*, 2004 ASM SJ 14. We give each and every word the effect of its plain meaning. *Reidl v. Student Election Commission*, 1998 ASM SJ 4.

In this case, the By-laws specifically target "officers, appointees, and bodies" as distinct and separate institutions. The plain meaning of this statute requires then, that each group be judged as a distinct entity, each one capable of violating the rules of VPN. If we were to simply group all of these under the heading of what ASM branch they worked with, we would eliminate the need for binding officers and appointees as separate entities. Instead, we would establish that the ASM bodies were the only ones bound by VPN, with officers and appointees serving only as parts of bodies.

We cannot adopt a meaning that essentially removes two entire categories from regulation that they have been specifically made part of. That is not consistent with our precedents, the common law of ASM. *Schober v. Evans, supra; Reidl v. Student Election Commission, supra; Richards v. Student Council*, 1997 ASM SJ 1. Thus, in recognizing officers and appointees as separate branches of the regulated, the statute clearly and unequivocally demands that they be judged independent of the work of the body of which they are but one part.

III-B

The overall principle to be gleaned from our caselaw is the same principle found in the By-laws. That is, a funding decision itself is void only if the actions taken by the decision-making body themselves are procedurally flawed or if it is clear that the majority has taken viewpoint into

account. See, *By-laws* § 2.01(C)(I). Where there is simply improper activities by an individual, the overall decision should not be disturbed. *Nichols v. Reyes*, 2002 ASM SJ 8.

Reviewing the common law of ASM on viewpoint neutrality, it is clear that committee decisions have only been vacated when either (1) there was a fundamental defect of process; or (2) when viewpoint neutral violations made by members were egregious and malicious. In *Legal Information Center v. Werner Appeal*, 2003 ASM SJ 18 (en banc), the Court reversed an eligibility hearing when the SSFC Chair was negligent in the performance of his duties. Likewise, in *State-Langdon Neighborhood Ass'n v. Smith*, 2002 ASM SJ 14 (en banc), the full Court found a violation at the eligibility stage where improper forms were used. Improper forms likewise provided the basis for viewpoint neutrality appeals in *Tenant Resource Center v. SSFC I*, 2004 ASM SJ 7, *appeal denied*, 2004 SJ Ord. 9; *ALPS v. Patzner*, 2002 ASM SJ 13; *DES v. Patzner*, 2002 ASM SJ 7; and *MEChA v. Patzner*, 2002 ASM SJ 6. In each of these instances, the overall decision of the SSFC or Council was reversed and new hearings were held.

However, these cases applied only when the overall action taken by the body in question was tainted. Individual violations do not automatically taint the outcome. Our recent caselaw has absolutely recognized that there is a sharp distinction between committee decisions, and individual actions. *MCSC v. Otten – Order Denying Dismissal*, *supra*. A very similar situation occurred in the case of *Nichols v. Reyes*, *supra*. In that case, the Court found that Rep. Reyes violated viewpoint neutrality by neglecting to properly fill out eligibility paperwork. *Id.* at 2. However, while finding her guilty of a non-malicious violation, the Court did not reverse the overall funding decision. *Id.*

III-C

Ultimately, both the statutory command, and the inexorable push of the common law are in conjunction – there is a distinction between when the actions of a committee – i.e. a “body” – are implicated, and when individual participants in the decision-making process act impermissibly. The rule to be gleaned, and applied in the case at bar, is that the decision of the body will only be reversed where there is clear and convincing evidence that the body itself violated the rules of VPN. *Nichols v. Reyes*, *supra*. Individual actors may take impermissible actions, but they are distinct actors from the body itself. *Id.*

Justice WANG, both below and now, wishes to state that any bad actions impermissibly taint the entire process. While we understand her concerns, and share them, we simply cannot find that idea in either caselaw or the By-laws. It is clear that officers, appointees, and bodies, must be recognized as distinct categories of individuals. We cannot simply merge them into one mass of “ASM Actors” and blur their activities; to do so would be to ignore the plain command of the statute and overrule what has been the uniform holding of this Court ever since the inception of VPN review.

This is the important principle that has been implicit in our cases, highlighted in the statutes, and that we now adopt today as the law of ASM. Viewpoint neutrality cases against individual members and the bodies that they serve on are distinct cases, and each will be judged on its own merits.

In the case at bar, CFACT simply cannot meet the burden to prove by clear and convincing evidence that the Council acted in a manner that was inconsistent with VPN. The evidence does show only that Respondent Kiernoziak took an improper motive into account. Indeed, Rep. Dorshort and Vice-Chair Otten, both also respondents in this matter, both offered an alternative rationale for cutting CFACT’s budget; they both suggested that the budget should be cut to

equalize honoraria across all groups. This equalization argument is perfectly acceptable. It is neutral, in that it does not take viewpoints into account.

We are required to afford all members of ASM, including representatives on the Student Council, the protections of due process under the law. *Const.* Art. IV, §2. One of the basic precepts of due process is that a person is presumed to be innocent. Because of this presumption, we must assume, unless CFACT can prove otherwise, that members of the Council acted properly. No evidence has been entered, though, to show that any impropriety spread to the rest of the Council. In fact, considering the permissible alternatives offered by Otten and Dorshorst, the exact opposite is true in the record; the Council clearly could act out of a permissible belief. When the legislature clearly has a rational and permissible motive to consider, it would be the height of judicial activism to simply conclude, without evidence, that the Council acted impermissibly and to imperiously overrule them. That we cannot, and will not, do.

III-D

Accordingly, for the reasons stated above, we answer the second certified question in the negative. The panel did not err in affirming the decision of the Student Council. There is no evidence presented that would sustain a judgment that the Council acted impermissibly and violated CFACT's rights to VPN in the budget process. The panel's original remedy will be affirmed.

Orders

Therefore, for the reasons herein stated, the Court does declare that

1. IT IS ORDERED that the first certified question be answered in the negative and the certificate is dismissed.
2. IT IS FURTHER ORDERED that the second certified question be answered in the negative and the certificate is dismissed.
3. IT IS FURHTER ORDERED that all judgments of the panel below will be and are AFFIRMED without modification.
4. IT IS FINALLY ORDERED that the remedies imposed by the panel below will be and are AFFIRMED and shall be put into effect immediately.

Accordingly, the Judgment of the Panel below is

AFFIRMED.

NICHOLAS J. FOX, *Student Justice* (concurring at to parts I and III-B and dissenting as to Part II). I dissent from my colleagues today in regards to Chair Kiernoziak's relationship to the Student Council because I strongly feel that the Court *en banc* negligently overlooked the concrete provisions in the *ASM Constitution* and *Bylaws*. Instead of entrenching its opinion in the sound provisions of our governing law, the Court has took it upon itself to reinvent and redefine clear law; if the Court had wanted a clearer and more inclusive definition of "member," it should have deferred to the Student Council to enact such a definition. For the reasons forthcoming, I argue that the Court has set dangerous precedent and imposed undue restraints on persons who are not at present considered part of a decision-making body.

I

The ASM Bylaws clearly state that “All officers, appointees or bodies shall make grant allocation decisions in a viewpoint neutral fashion” (2.01(C)(I)), which is further expounded in 2.01(B)(II), “Viewpoint neutral fashion: A decision is made in a viewpoint neutral fashion where the decision is made: 1) In accordance with any procedural requirements for making the decision; and 2) Without considering the viewpoint being expressed by the recipient of the funds.” In the case at bar, it is essential to note that the Student Council was the body making the grant allocation decision, and therefore that body as a whole—including all of its members—must remain viewpoint neutral.

This Court has emphasized the idea of Viewpoint Neutrality (VPN) in making a grant allocation decision. The Court correctly argued in *Appeal of UW Infoshop v. Patzner et al.* (2002 ASM SJ 11) that “Viewpoint Neutrality is a process” (at 3), and in *Nichols v. Reyes* (2002 ASM SJ 8) the Court affirmed that “Determining eligibility [or funding] is a process that encompasses an organization’s presentation and request of eligibility [or funding], the question and answer session that follows, the debate by the SSFC [or other bodies making a grant allocation decision], [...], the final vote, and any other steps the SSFC [or other bodies making a grant allocation decision] may endure in coming to their decision” (at 1). Indeed, both Petitioner and Respondent agree that VPN is not determined solely by the vote, but that budgetary or eligibility decisions are an on-going process of debate, motions, amendments, etc., all of which culminates in a vote. The vote is merely a capstone to the process; it is part of the process, but it is not wholly the process in and of itself.

II

This Court has relied heavily on the principle of the hierarchy of laws (see *United States v. Lopez*, 514 U.S. 549; *Schober v. Evans*, 2004 ASM SJ 14; *MCSC v. Greenbaum*, 2004 ASM SJ 9), meaning that the *ASM Constitution* will precede the *ASM Bylaws* and any rules or laws of the ASM. The *ASM Constitution* declares, “The Student Council (“SC”) shall consist of 33 Representatives. Of these, all except the Freshmen Representatives shall be ASM members elected at the Spring elections” (Art. VII, Sec. 1). The word “Representatives” in the *ASM Constitution* has a very simple and concrete meaning: whoever is a Representative in the constitutional sense has been elected by the student body at large⁵, and said Representative has all of the rights and privileges—including the right to vote—as a constitutional member of the Student Council. The Student Council, as defined by the *ASM Constitution*, consists of 33 Representatives who have been elected by the student body and who, by virtue of their elected office, have the power to vote.

The Court has previously addressed the issue of the Finance Committee Chair in relation to the Student Council (see *Patzner v. Student Council*, 2002 ASM SJ 4). However, I feel the panel in this case erroneously interpreted the *ASM Constitution*. The Court observed in *Patzner v. Student Council* that the Finance Committee Chair is a representative of the Student Council by virtue of his or her office, in that the Chair is under the jurisdiction of the Student Council and is accountable to it (at 2). The panel in *Patzner*, though, recognizes and then immediately neglects to apply the fact that the Student Council, as it is constitutionally defined, consists of 33 Representatives who are *elected* in the Spring Elections. In this sense, “Representatives” is directly correlated with the fact that they are elected, and consequently that they have voting power. Instead, the panel in *Patzner*, much like the Court *en banc* today, took it upon itself to expand the constitutional definition of “Representative” to include not only those elected Student

⁵ Members of the ASM, however, can become Representatives of the Student Council in the constitutional sense pursuant to the appointment procedures outlined in the *ASM Bylaws*, Section 3.01(C).

Council Representatives, but also to include “[any] appointed person who represents his or her own respective branch of the ASM” (at 2). The Court failed in *Patzner* to limit the constitutional understanding of the word “Representative” in relation to the Student Council as solely an elected, and therefore voting, member. Instead, by judicial fiat, the Court erroneously expanded the constitutional definition to include more than those elected Representatives.

Similarly in this case, the Court has expanded the constitutional definition of a member. The Court in the case at bar argues that the *Bylaws* merely expand or modify the definition of “member” of Student Council (*supra*). The Court errs here because the *Bylaws* specifically apply non-membership to the Finance Committee Chair. Under 3.03(G)(II), a section entitled “Rights of **non-members**” (emphasis added), the *Bylaws* state, “The chairs of the Finance Committee and SSFC shall have the right to introduce budget related legislation or other proposed allocations of student fees within the jurisdiction of the Finance Committee and SSFC.” Not only is Chair Kiernoziak not constitutionally part of the Student Council, but she is clearly defined as a non-member in the *ASM Bylaws*. The Court has failed to reconcile its notion of membership with the obvious provision that the Finance Committee Chair is not considered a member. If this Court should wish that the definition of some word be altered to incorporate or restrain certain meanings, then it needs to do so through the legislative branch of the Student Council. We interpret the law as it exists, not as we would like it to be; we determine if the law is constitutional, not if it is sound and wise. If a member of the Student Council is defined by the *ASM Constitution* and *Bylaws* in a very specific and narrow way, this Court is not at liberty to reinvent that law, especially in light of provisions which reinforce that narrow reading. The Student Council cannot exist without those 33 elected Representatives, but it can exist without any *ex officio* members. The law is clear, the law is specific, and we must interpret it in that way.

The Court emphasizes in *III-A (supra)* that, “We give each and every word the effect of its plain meaning.” How can the majority reconcile this statement of plain meaning with the provisions in the *ASM Constitution* and *Bylaws*? Can the plain meaning of the section “non-members” be any clearer? Can the *ASM Constitution* be any clearer that the Student Council consists of 33 elected Representatives? Yes, the *Bylaws* can be used to expand and clarify certain provisions of the *Constitution*, but those clarifications cannot violate the *Constitution* itself. For example, in *Schober v. Evans* (2004 ASM SJ 14), the Court acknowledged that as long as it retains jurisdiction over Registered Student Organizations, its constitutional mandate (“The Student Judiciary shall have jurisdiction over the discipline of Registered Student Organizations,” Art. X, Sec. 3(d)) would be fulfilled, even if it did not have original jurisdiction. However, in the case at bar, the plain meaning of the *Constitution* demands that the Student Council be narrowly defined. The majority attempts to circumvent the plain meaning of the text by adding more members to the Student Council than are constitutionally provided for. The *Constitution* does not read “33 elected Representatives, and any other members those Representatives choose to include.” Membership is exclusive, and the plain meaning of the text defines it as so. The *Bylaws* cannot expand and alter a narrowly-defined provision; they can only expand and detail larger, overarching provisions which are not already concrete (such as a general provision of Viewpoint Neutrality and what it means to be viewpoint neutral). Today the Court expands that definition in direct conflict with the *Constitution*.

Yet the majority argues in the case at bar that because Chair Kiernoziak can act procedurally, she therefore must be considered a member of the Student Council. There are two reasons why I feel this assumption is misguided (aside from those I have already mentioned). Firstly, members of the ASM can sit at the table with the Student Council as it conducts its business, provided that the Student Council has allowed this behavior pursuant to the *ASM Bylaws*. However, the only reason the Finance Chair, the Chief Justice of this Court, and other non-voting *ex officio* members can sit with the Student Council is because Student Council has suffered them to sit there. Indeed, the Student Council can amend the *ASM Bylaws* to forbid any

other officer, appointee, or member of ASM to sit at the table with the constitutionally-defined Student Council, or act procedurally in any matter before the Student Council. The fact that the Student Council can strip any person—except for those elected Representatives—of his or her “right” to be present at a Student Council meeting necessarily implies that all officers, appointees, and members of ASM are not part of the Student Council unless they were elected pursuant to the *ASM Constitution* or appointed to the Student Council by the Student Council pursuant to the *ASM Bylaws*.

Secondly, Chair Kiernoziak’s rights to act procedurally and speak at debate are limited. Pursuant to Section 3.01(B)(I) of the *ASM Bylaws*, “Any committee chairs and the Chief Justice of the Student Judiciary and Chair of the SSFC who are not Student Council Representatives [including Chair Kiernoziak in the case at bar] shall be an ex-officio member of the Student Council with all rights, powers and privileges except the right to vote, act procedurally on matters *outside the jurisdiction of their committees* or be an appointee of the Student Council” (emphasis added). It is clear that not only is Chair Kiernoziak’s position explicitly differentiated from an elected and voting Representative of the Student Council, but that her position as *ex officio* allows her to act procedurally *only* on matters relevant to her committee’s jurisdiction. The majority in the case at bar argues that because Chair Kiernoziak can act procedurally, then she was part of the decision-making process. What the Court fails to recognize is that *ex officio* power is limited to the specific areas of interest of those *ex officio* officers. Does this mean that when matters regarding finance appear before the Student Council, Chair Kiernoziak is a member of the Student Council? And when there is business before the Student Council which is germane to another aspect of student governance, does Chair Kiernoziak magically lose that membership status because the *Bylaws* forbid her to act procedurally in those matters? Chair Kiernoziak must either be a full member or not a member at all: she cannot be one sometimes and at other times not. Should the majority argue that she is a member at all times, the majority goes against every constitutional and bylaw provision I have mentioned already, and at each count, the majority has failed to reconcile its position with the concrete provisions of governance.

Finally, in regards to membership, the *Bylaws* at 3.03(F) state, “The rules contained in the current edition of *Robert’s Rules of Order Newly Revised* shall govern the Student Council in all cases to which they are applicable and in which they are not inconsistent with these *Bylaws* and any special rules of order the Student Council may adopt.” Despite the fact that the *ASM Constitution* defines the Student Council as 33 elected Representatives, and despite the fact that the Finance Committee Chair is defined as a “non-member” pursuant to the *Bylaws*, the definition of a member according to *Robert’s Rules of Order Newly Revised 10th Edition* is “A member of an assembly, in the parliamentary sense, [has] the right to *make motions*, to speak in *debate* on them, and to *vote*” (3, original emphasis). Chair Kiernoziak certainly cannot vote, which immediately disqualifies her from this definition.

The majority, for all of the grand ideas of fairness and procedural correctness, fails to find any relevant *Bylaw* or constitutional provision which actually requires *ex officio* persons to act according to VPN. The majority argues that all persons who can act procedurally (apparently without consideration that such acts are limited in scope) “must act in conformity with the dictates of the Constitution and By-laws” (Footnote 2, *supra*). And yet the majority’s logic to fulfill this statement waivers. In II-B *supra*, the majority argues that “The ultimate resolution of who is bound by the dictates of VPN ultimately rests on the determination of who is ‘making’ a decision that must be viewpoint neutral.” But Chair Kiernoziak is not making the decision because she does not have the power to vote. A decision, regardless of the intricate processes involved, cannot be made unless there is a vote. The majority asserts that VPN applies to those who make a decision—in essence, the elected and voting members of Student Council—and yet attempts to apply that logic to someone who cannot ultimately vote and who cannot ultimately make a decision.

But then the majority goes on to change the definition they just laid forth. The majority changes its VPN application from those making the decision to the decision itself, “It must be recognized that the rules of VPN apply to any ‘decision’ made that allocates funds” (*supra*, II-B). So now we have gone from “making a decision,” which I have already argued requires a vote, to the “decision” itself and the processes involved in that decision. I feel that the majority’s confusion between “participating” and “making” a grant allocation decision is crucial. Participation can include any member of ASM, regardless of whether he or she holds office. The floor can be yielded to any student on campus over the course of debate. *Ex officio* persons can speak at debate and make motions. However, “making” a decision not only entails debate and motions, it also entails a vote. The majority makes draconian statements when it suggests that a voting member could make non-VPN comments and then escape punishment by refusing to vote on the matter. ASM bodies and their voting members are held to the VPN standard; a voting member who makes non-VPN comments, regardless of whether or not a final vote is cast, violates that standard.

What is most interesting about the majority’s logic is that they argue, “Just as the ultimate decision must be viewpoint neutral, so too must the parts of the decision be viewpoint neutral” (*supra*, II-B). Here the majority argues that the parts of the process, including the final decision, must be VPN, and the parts include not only motions and debate, but those actors who engage in them. But then why does the majority insist that even though the comments made by Chair Kiernoziak were non-VPN—a part of the decision which purportedly must be VPN—the decision was not tainted? If the parts and the ultimate decision are to be VPN, in essence the whole process, then the majority contradicts itself by refusing to follow its own logic.

The standard of VPN is only applied to officers, appointees, and bodies making eligibility and funding decisions. If Student Council wants all persons—voting members and *ex officio* alike—to be bound by VPN, then it needs to pass legislation accordingly. The Court assumes that VPN binds everyone, and yet in this context, it does not. The only requirement *ex officio* members are bound by is the attendance policy (*Bylaws* 3.01(B)(III)). The Court has found no affirmative rule which binds non-members to policies to which voting members are bound. They have merely taken existing rule for those voting members of bodies and have expanded it to non-members.

III

I can understand the Petitioner and majority’s concern that too much immunity might be given to some members of the student government, and that such immunity could serve as a basis for undue corrupt influence. Petitioner argues that according to *Fry v. Board of Regents of the University of Wisconsin System* (Seventh Circuit Court of Appeals, No. 01-1912)(2002), the integrity of the funding process used on campus is that there are enough checks in the system to prevent unbridled discretion of officers. However, Petitioners overlook the application of the reasoning in the judgment of the Appeals Court. Indeed, the issue raised in *Fry* was whether or not the student government has unbridled discretion when distributing segregated fees. The Appeals Court ruled that because of the numerous checks within the student government system, the student government itself does not have unbridled discretion (although it does have some discretion which is unavoidable). What Petitioner overlooks in the case at bar is that every example which the Appeals Court uses in comparison to the current segregated fee system involves the unbridled discretion of the *decision-maker* (the issue of non-decision-makers is never addressed in the judgment). As I have stated in this dissent already, Chair Kiernoziak is not making any decision: that responsibility is laid upon the Student Council’s elected and voting Representatives.

IV

In effect, Chair Kiernoziak is not a member of the Student Council for several reasons: 1) the *ASM Constitution* limits the Student Council to 33 elected Representatives; 2) the *ASM Bylaws* specify further that the Finance Committee Chair is a non-member; and 3) *Robert's Rules of Order* clarify that a member in the parliamentary sense has the right to vote. The majority has failed on all three counts to reconcile its opinion with these provisions. When making grant allocation decisions, it is up to the voting members of the body to discriminate against non-VPN comments and facts. In the case at bar, the elected Representatives—the voting Representatives—are charged with upholding viewpoint neutrality. While other members of ASM may *participate* in the process, the Student Council is ultimately charged with *making* the funding decision.

Finally, I have argued that the Court in its opinion has scrounged and searched for provisions in which to entrench their argument: they have found none. They apply definitions beyond their constitutional and bylaw meaning; they Lochnerize their own version of rules and laws which do not exist; they bind members of the ASM to requirements that are specifically geared towards a certain group. If the Court wants “members” to be defined in a broader sense to incorporate *ex officio* members, if the Court wants VPN to apply to everyone participating in an eligibility or funding process (not merely making a decision), it needs to provoke the Student Council to pass such legislation. The Student Council is entrusted with legislative power. The Court is entrusted to interpret the law as it exists. We do not decide whether a law is good or bad; we decide if it is permissible. We do not expand limited definitions to include people external to those definitions; the power of legislative definition is left to the Student Council

For the aforementioned reasons, I respectfully dissent to the First Certified Question of Appeal.

V

I concur with the majority in regards to the remedy, but do so according to the logic set forth in *III-B (supra)*. Before I engage in the remedy question, however, I would like to address the paradox that might occur to some: how can I dissent from the First Certified Question and affirm the Second Certified Question? Many would argue the Second is contingent upon the First. I disagree. It is perfectly acceptable to treat both questions as distinct entities, especially since they were certified as such. I may dissent from my colleagues in regards to Chair Kiernoziak's relationship with the Student Council. But as is evident in my argument in that dissent, the burden of decision-making and consequently of remaining VPN is entrusted to the Student Council in the case at bar. If the Student Council took non-VPN information into consideration—regardless of its source—then the decision of the Student Council is tainted. The two Questions are separate entities, and I treat them accordingly.

In regards to the remedy, Petitioner CFACT does have the burden to prove that the Student Council's decision as a whole was tainted. They correctly argue that the Court cannot affirm that the decision was not tainted, but this merely serves to shift the burden from them. If CFACT cannot prove with clear and convincing evidence that the Student Council's decision was tainted, this Court is in no way bound to prove that it was not tainted.

Finally, the minority on this Question raises an interesting and yet unfeasible solution to the problem. The minority suggests that even if one impermissible statement is given during an eligibility or funding decision, the entire process is null and void. This suggestion is far too draconian for practicality. Chair Kiernoziak's comments were non-VPN, and yet they were also non-malicious. In essence, they were comments that were made in the casual course of

conversation, without premeditation or harmful intent; “The statement,” it could be argued, “just slipped out,” but this does not mean that the entire process should be voided. To make such an assumption would place an undue burden upon the committees making financial decisions. In *Appeal of UW Infoshop v. Patzner et al.* (2002 ASM SJ 11)(en banc)(appeal of 2002 ASM SJ 10, reversed), the Court stressed that the openness of debate is vital to the thoroughness of the funding process (at 3). The minority’s judgment would severely impair debate, because anytime a member made a non-VPN comment (malicious or non-), the entire process would be voided. The Judiciary does not want to inhibit debate on funding decisions, but we want to make sure that debate is in conformity to the rules established.

Therefore, I concur with the majority pursuant to *III-B* in regards to the Second Certified Question of Appeal.

YIN-CHIN WANG, Student Justice with whom TIMOTHY LEONARD, Student Justice joins (concurring as to parts I and II and dissenting as to part III). I feel obliged to repeat the theme in my separate opinion, *CFACT v. Kiernoziak et al*, 2004 ASM SJ 16, *dissenting*. The majority is ignoring the logical fact that an action collectively by a body consisted inevitably of that by any individual within the body. An overall body is the expansion of an individual. Any individual who stands in the position to be of influence and impact, who gives his or her advice in the deliberation of a resolution, and whose recommendation is so exclusive and authoritative to the body in question, shall be considered, at least, a “quasi” member of this body.

I cannot overemphasize the danger hidden in majority conclusion, which I have had the opportunity to address in the trial decision. The majority conclusion, I believe in a future, close and remote, will be construed to the extent of forgiving speeches and actions that are launched in a viewpoint neutrality unfriendly manner. It is repetitive to stress my concerns over the leniency the majority grants to impermissibility that is accompanied by permissibility. It also worries me whether the application of innocence presumption by the majority is legitimate in the case before us, a non-criminal proceeding. The burden of proof imposed by the majority on the plaintiff is either nowhere to be found in the *ASM Constitution and Bylaws*.

It is argued by the majority that the budget decision in question does not satisfy *ASM Bylaw* standard to be fundamentally defective in process, and therefore can not be declared void and null. I strongly disagree. Chair Kiernoziak made false and incomplete statement that CFACT had not had any plan for events nor a list of speakers. Such untrue disclosure of information would taint the decision by overall body, since the body did rely on Chair Kienozia’s first hand, exclusive knowledge on finance and budget matters. Should we not consider a decision fundamentally defective if it is made based on poor information disclosure and at the same time the manner of that disclosure has been outright held violative of viewpoint neutrality?

It is correct for the majority to argue that “individual violations do not automatically taint the outcome,” if the cited *Nichols v. Reyes*, 2002 ASM SJ 8 has not been carefully examined. However *Nichols* is distinguishable from this case. The seriousness of the alleged individual violations differs: while in *Nichols* the wrongdoing by the accused had not had the opportunity to contaminate the body.

Accordingly I find the budget decision is question to be null and void.

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Attest: /s/ NVR