



Request For Interpretation ASUW Bylaws § 5.02 (1) (C)

Opinion of the Judicial Council joined and delivered by Justices Swaney, Compton, Wangen, Cruz, Thompson, and the Chief Justice. Justice Helvey Concurrs.

Background

On January 19, 2024, Senators Gabriel Saint and Joseph Rzeszut submitted a Request For Interpretation (RFI) to the ASUW Judicial Council (JC) regarding ASUW By-Laws, Art. 5 § 5.02(1)(C). In that request, the Senators asked, “Is there an unconstitutional restriction of freedom of expression in § 5.02(1)(C)?” The context given in the RFI first points out that the University of Wyoming (UW) is bound by elements of Federal law, that employees of UW are likewise subject to further requirements of UW policy following Federal law, and that this policy contains restrictions on discrimination. The argument presented by the Senators then asserted that the restrictions under § 5.02(1)(C) are vague and broader than those given by Federal law. They further argued that this addition to Federal prohibitions does not comply with Federal law, and that this extension violates Amendment I of the U.S. Constitution. With those arguments, Senator Saint and Senator Rzeszut requested that the JC issue a recommendation to the ASUW Senate, advising a revision of ASUW By-Laws, Art. 5 § 5.02(1)(C).

Noting similarities to matters brought before the JC in the past, we believe it helpful to review a short history of events leading up to this RFI. In September 2023, Senator Saint submitted a RFI arguing that § 5.02(1)(C) had the effect of creating an unconstitutional restriction of free expression through its vague use of terms like “discriminate,” and that it contradicted with § 5.02(1)(D). This RFI further asked the JC to strike the following from § 5.02(1)(C), “I will not tolerate language.” The opinion of the JC determined that § 5.02(1)(C) did not facially violate the U.S. Constitution in the areas considered under the RFI, and that § 5.02(1)(C) and § 5.02(1)(D) were not contradictory. The JC further refused to remove verbiage from the By-Laws as requested by Senator Saint.

Following the Interpretation to his first RFI, Senator Saint appealed to the Dean of Students, Ryan O'Neil. In that appeal, Senator Saint presented other reasoning and arguments than what was first presented in the original RFI. However, in his rush to appeal the JC decision, he failed to follow ASUW procedure for providing notice and failed to follow ASUW By-Laws, Art. 3 § 3.01(3)(a) which prevents appeals on matters of interpretations.

Despite these oversights, Dean O'Neil decided to consult the Office of General Counsel and replied to the Senator's query with the opinion of the General Counsel, stating that § 5.02(1)(C) is more restrictive than Federal law allows. The writing of the General Counsel asserted that § 5.02(1)(C) posed due process concerns because it allowed for sanctions on behavior before a final determination was rendered by the Equal Opportunity Report & Response (EORR) Office. Their opinion also included a concern that there is a possibility for restrictions under § 5.02(1)(C) on behavior that discredits others.

Finally, the opinion expressed concern that the broad scope of § 5.02(1)(C) may come into conflict with the commitment to open-minded discourse contained in § 5.02(1)(D). It is not the



purpose of the JC to scrutinize and respond to the reasoning given by Dean O’Neal through the General Counsel in this setting, however, the points raised therein have been analyzed and considered by this Council.

Ordinarily, a matter brought to the JC for another review, after having been previously decided on the exact same elements and concerning the same concepts, may be dismissed based on the principles of *res judicata*. However, the JC accepts this RFI and the four new issues it raises. First, can ASUW regulate its own affairs? Second, what is the meaning or definition of discrimination? Third, what is the meaning or definition of discrediting? Finally, does the inclusion of the word “may” create an ambiguous term for ASUW members?

The JC will discuss and provide interpretation for ASUW members to take into consideration and under advisement. We would remind the Senators that this Interpretation by the JC is final and unappealable.¹ If any other questions or concerns arise after this opinion, the Senators are free to submit additional RFI’s.

Discussion

Issue 1: Can ASUW regulate its affairs?

Implicit in this RFI is the question of whether the ASUW working documents should be interpreted as allowing ASUW to regulate its own affairs, including the ability to place limits on individual members’ speech. We answer this question in the affirmative.

A. Scope of Legislative Power and Right to Self-Regulation

The ASUW Student Government has the exclusive authority to conduct the business of the Associated Students of the University of Wyoming through the Executive, Legislative, and Judicial branches.² The ASUW Senate, vested with the legislative powers of the ASUW, has many powers including the power to “enact legislation in the form of bills or resolutions,”³ and “assume whatever responsibilities it deems necessary to fulfill its obligations to the students.”⁴ The ASUW, in pursuit of “promo[ting] the interests and well-being of all students,”⁵ has deemed it necessary to enact the Article 5 Code of Ethics.

The ASUW is not alone in setting standards for members’ conduct. In further consideration of this issue, the JC surveyed codes of conduct for other universities’ student governments. This research revealed that other bodies have used their powers of self-regulation to limit individual members’ speech. At the University of Iowa, Undergraduate Student Government (USG) members have limits on their speech to maintain a respectful student government environment and uphold a positive environment that is without hate or discrimination. Specifically, USG senators must “speak to ... fellow USG representative[s] and constituents in a respectful manner, despite personal disputes

¹ ASUW By-Laws. Art. 3 § 3.01(3)(A)(a)

² ASUW Const. Art. II

³ ASUW By-Laws § 2.02(1)(B)

⁴ By-Laws § 2.02 (C)

⁵ By-Laws § 5.01 (1)



or differing opinions.”⁶

The USG places more stringent limitations on its executive office holders by prohibiting “attacking/negatively singling-out specific students and/or student organizations” and “creating an unwelcoming environment for any student, group, identity, etc. through microaggressions, discrimination, harassment, or other harmful action.”⁷

Another example of a university student government limiting the speech of its members is Liberty University. Members of the Liberty University Student Government Association (SGA) serve as “a privilege and a responsibility” and are “held to a higher standard of conduct.” University Student Government Association (SGA).⁸ This code further expresses that student government members are expected to “refrain from abusive conduct, personal charges or verbal attacks upon the character or motives of fellow SGA members as well as the University administrators, faculty, staff and the student body.”⁹

Student governments like ASUW must regulate their affairs to facilitate the professional and respectful environment required to focus on pressing issues that will serve its founding purpose and serve the student body it strives to represent. For these reasons, we hold that the legislative body of the ASUW has the right to self-regulation and the right to limit the speech of its elected members. The ASUW holds its power internally and can regulate itself without outside interference.

B. The U.S. Constitution allows public employers to impose restrictions on free expression

The Judicial Council (JC) has previously interpreted ASUW By-Laws § 5.02 (1)(C), (D) as being a constitutional restriction on free speech.¹⁰

As noted in the Oct. 2023 decision, the U.S. Supreme Court has routinely applied a two-prong test in determining whether a speech restriction imposed by a public employer violates the First Amendment.¹¹ The first inquiry examines whether an employee speaks as a citizen on a matter of public concern. If the answer is no, there are no First Amendment protections available.¹² If the answer is yes, the second prong inquires whether the government has an “adequate justification” for treating employees differently.¹³ This expresses how a public employer is allowed to restrict the speech of its employees.

⁶ *USG Senator Code of Conduct, University of Iowa,*

<https://usg.uiowa.edu/resources/governing-documents/usg-senator-code-conduct> (last visited Feb. 7, 2024).

⁷ *USG Executive Code of Conduct, University of Iowa,*

<https://usg.uiowa.edu/resources/governing-documents/usg-executive-code-conduct> (last visited Feb. 7, 2024)

⁸ *Code of Ethics, LibertyUniversity,*

https://www.liberty.edu/students/sga/wpcontent/uploads/sites/93/2019/10/lusga_code_of_ethics.pdf (last visited Feb. 7, 2024)

⁹ *Id.*

¹⁰

<https://www.uwyo.edu/asuw/about-us/judicial-branch/JCDecisions/jc-decisions-2023-2024/request-for-interpretation-a-suw-by-laws-10-4-2023.pdf>

¹¹ *See Garcetti v. Ceballos*, 547 U.S. 410 (2006)

¹² *Id.* at 418

¹³ *Id.*



This would apply to average University of Wyoming employees, but ASUW members operate between two spaces in terms of their employment status. If they are employees, the *Garcetti* test would apply. If they are not employees, ASUW members would still be able to regulate their speech as representatives of the University. This is the case because ASUW members chose to hold their representative position, as opposed to being a regular employee. The choice to hold an appointed ASUW position is a privilege, not a right.

Part of the duties of an ASUW member is to “promote the general welfare of all students at the University, to represent the concerns of the student body, and to provide for and regulate such other matters.”¹⁴ Furthermore, “there is no right to membership on ASUW, it is a privilege.”¹⁵ By accepting a position within the ASUW, one voluntarily agrees to conform to certain rules and the University’s code of ethics. Allowing members of the ASUW to be discriminatory or allowing them to discredit others would contradict ASUW’s stated purpose. ASUW can allow a certain standard of behavior for its members, as there is a justification for the University of Wyoming to hold representatives of the ASUW to a higher standard than the general public.

Undoubtedly, self-regulation is a key part of ASUW’s responsibilities and should be considered essential. Next, we interpret the language of discrimination within ASUW By-laws and the Judicial Council’s offered definition.

As there is no live case asking the council to decide whether § 5.02 (1) (C) is unconstitutional, we will treat the question raised as a facial challenge. A facial challenge is a “claim that a statute is unconstitutional on its face — that is, that it always operates unconstitutionally.”¹⁶ If there was a case for the Council to decide, it would likely be an as-applied challenge, a “claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, [usually] because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party.”¹⁷

On Oct. 11th, 2023, the JC published an opinion regarding these statutes and has given statements as to the JC’s opinions on the matter. The JC rejected Sen. Saint’s request to strike the language from the By-laws and found that § 5.02 (1) (C) was constitutional.

This decision was further appealed by Sen. Saint to the Dean of Students, who further asked for advisement from the Office of General Counsel on whether the JC’s interpretation was correct.¹⁸ The General Counsel’s interpretation failed to include the JC’s findings in the opinion and further excludes the Judicial Council’s determination in the case.

¹⁴ ASUW Const. preamble

¹⁵ ASUW Const. Article IV

¹⁶ Challenge, Black’s Law Dictionary (11th ed. 2019)

¹⁷ *Id.*

¹⁸



Issue 2: § 5.02 (1) (C) Interpretation of “discrimination”

Senator Saint and Senator Rzeszut’s request also requests clarification as to the definition of “discrimination” and claims the ASUW By-Laws, specifically § 5.02 (1)(C), are “too vague” in terms of compliance with federal law. The University of Wyoming’s General Counsel previously provided comments on this topic, but we feel as though they failed to provide a clear definition of “discrimination.” Instead, reliance was placed on the Equal Opportunity, Harassment, and Nondiscrimination Standard Administrative Policy and Procedure (“UW Policy”). The policy reads:

Pursuant to University Regulations 4-2 (Discrimination and Harassment) and 4-3 (Title IX and Sexual Misconduct), UW does not discriminate against any employee, applicant for employment, student, or applicant for admission on the basis of: race, gender, religion, color, national origin, disability, age, protected veteran status, sexual orientation, gender identity, genetic information, creed, ancestry, political belief, or any other protected category under applicable local, state, or federal law.¹⁹

While this regulation forbids discrimination, it does not define what discrimination is. This lack of specificity leaves room for ambiguity in enforcement and it is thus a term that demands precision and clarity in its definition. Discrimination is defined by the Cambridge Dictionary “to treat a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their race, gender, sexuality, etc.”²⁰ We affirm our previous acceptance of this definition. This definition provides clarity to the current ASUW By-Laws and can be supplemented with General Counsel’s comments.

Issue 3: § 5.02 (1) (C) Interpretation of “discredit”

Senator Saint and Senator Rzeszut also raised concern with regards to the language of § 5.02 (1) (C) reading that no action or language can “discredit” anyone. They argue that discrediting another does not serve as grounds for restricting speech.

Discrediting, in the context of the present dispute, refers to actions that undermine the integrity, decorum, or professionalism of an entity or its members. The Cambridge Dictionary also specifically defines discredit as “to cause people to stop respecting someone or believing in an idea or person.”²¹

The power of ASUW to internally regulate its affairs is at the forefront of what makes the organization function properly and with procedural ease. Similarly, the power of the Judicial

¹⁹ UW Standard Administrative Policy and Procedure – *Equal Opportunity, Harassment, and Nondiscrimination*, page 16, https://www.uwyo.edu/regs-policies/_files/docs/policies/eo-harassment-nondiscrim-sap-approved_8-14-20.pdf (last accessed Feb. 10, 2024)

²⁰ *discriminate*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/discriminate> (last visited Feb. 6, 2024).

²¹ *discredit*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/discriminate>. (last visited Feb. 6, 2024).



Council to practice judicial restraint when faced with pressing issues is of great significance. We are therefore always cautious not to overstep the legislative framework established by ASUW. Because of this, we refuse to strike or change the language of § 5.02 (1) (C) in any way. The power to amend and repeal By-Laws is a power rightfully reserved for the legislative body of ASUW and one we will not interfere with.

There are also several legitimate reasons for preventing discrediting among representatives of ASUW as well, like upholding a standard of professionalism and promoting a respectful environment for discussion and debate. We also recognize that limitations on discrediting are not only reasonable but essential for the proper functioning of our student governance. However, we acknowledge the potential for ambiguity surrounding the term “discredit,” and we suggest that the legislature amend the By-Laws to clarify this ambiguity.

One such amendment that could clarify the ambiguity surrounding the term “discredit” would be to incorporate language from the Statement of the University of Wyoming’s Principles developed in the spring of 2023 into the ASUW By-Laws. Such language states that, “free expression has legal limitations, including expression that is obscene or defamatory; constitutes a genuine threat or discriminatory harassment; incites imminent violence or other lawless action; unjustifiably invades privacy; interferes with the free expression rights of others; or otherwise stands in violation of the law.”

In addition to amending the By-Laws to clarify the term “discredit” specifically, it may also be beneficial to adopt standards for the personal conduct of members of ASUW like those of other universities. One university that has adopted extensive and far more extensive restrictions on student speech is the University of Iowa. As previously mentioned, Iowa’s Undergraduate Student Government’s Executive Code of Conduct restricts its members' speech to maintain a respectful student government environment and uphold a positive environment that is without hate or discrimination. We believe that the implementation of language like this into a general code of conduct could help foster a respectful environment where debate and discussion are welcome and encouraged. The implementation of such a code, of course, is at the discretion of the ASUW senate.

We believe the implementation of these recommendations would uphold the right to free expression for all members of ASUW while also providing clear guidelines for acceptable behavior for its members.

Issue 4: § 5.02 (1) (C) Interpretation of “may”

Lastly, Senator Saint and Senator Rzeszut also brought attention to the provision in § 5.02 (1) (C) which states that “language or actions that ‘may’ discriminate against another individual(s) is not tolerated,” claiming that it “restricts and dissuades members of ASUW their right to free expression.” They also argue that this provision lacks the necessary precision to align with the requirements of the First Amendment.

The term “may” within the bylaws is acknowledged as ambiguous. We agree with the argument put forth by Senator Saint and Senator Rzeszut that removing “may” would enhance clarity in the



legislative framework. However, we refuse to strike the language and, instead, we recommend that the legislature take the necessary procedural steps to remove the word “may” from the provision in § 5.02 (1) (C), thus removing the ambiguity surrounding the term. As previously mentioned, we are hesitant to take any steps that would conflict with the principle of judicial restraint when faced with issues like this.

We distinguish between a facial challenge and an as-applied challenge, emphasizing that any challenge should be context-specific and aligned with the facts at hand. In the context of the present dispute, a facial challenge to the provision in § 5.02 (1) (C) would involve questioning its constitutionality based solely on its language, without considering how it is applied in practice. Conversely, an as-applied challenge would examine whether the provision violates the First Amendment rights of specific individuals or groups in their situation.

It is essential to recognize that while a facial challenge may reveal potential constitutional issues with the language of the provision, an as-applied challenge provides a more nuanced understanding of its impact on individual rights. Therefore, any challenge brought before the Judicial Council should be carefully tailored to the specific circumstances at hand, ensuring that constitutional principles are upheld while also considering the practical implications of the law in question.

Conclusion

In summary, the judicial opinion addresses several key points regarding the interpretation and application of § 5.02 (1) (C) of the ASUW By-Laws:

“Discrimination” interpretation: The lack of specificity in defining discrimination within the By-Laws was highlighted, emphasizing the need for clarity and precision. By adopting a clear definition from the Cambridge Dictionary, the By-Laws can better align with First Amendment rights while maintaining compliance with federal law.

“Discredit” interpretation: Concerns were raised about the broad prohibition against “discrediting” individuals or groups within the By-Laws. While acknowledging the importance of maintaining professionalism and reputation, it was suggested that alternative language be considered to provide clearer guidelines for acceptable behavior while upholding the right to free expression.

“May” interpretation: The term “may” within the By-Laws was deemed ambiguous, with suggestions made to enhance clarity by removing it. However, rather than us striking the language outright, it is recommended that the legislature amends the By-Laws to address this ambiguity.



Justice Helvey Concurring:

I join my esteemed colleagues in the judgment rendered in this case. However, I write separately to express reservations regarding the depth of interpretation undertaken in our deliberations. While I acknowledge the value of meticulous analysis, I am concerned that our extensive discussion may introduce unnecessary complexity and potential misinterpretation of our decision by future Judicial Councils.

This case could have readily been resolved through the application of *res judicata*, given its similarity to prior matters adjudicated by this Council. The principles of *res judicata* serve to promote judicial efficiency and finality, ensuring consistency in our jurisprudence. Therefore, I believe a more restrained approach to interpretation would have sufficed in this instance.

Moreover, I share the view that Senator Saint's conduct in pursuing this matter raises questions about procedural regularity and adherence to ASUW By-Laws. His disregard for established procedures, as evidenced by his failure to accurately specify the sections for interpretation in his initial Request For Interpretation (RFI), and his subsequent appeal to the Dean of Students without due process, are troubling.

While it is our duty to interpret the By-Laws crafted by the Legislature, it is not within our purview to alter or remove language as requested by Senator Saint. The role of this Council is to interpret, not to legislate. If Senator Saint seeks amendments to the By-Laws, he should pursue proper channels within the legislative process rather than attempting to circumvent them through appeals to this Council.

Furthermore, I caution against the weaponization of the Judicial Council for partisan or personal motives. ASUW exists to serve the student body and uphold the principles of education and democracy. It is incumbent upon all members, including Senators and Executives, to act in the best interests of the university community and to refrain from actions that undermine the integrity of our institution.

In conclusion, while I support the outcome reached in this case, I advocate for a more circumspect approach to interpretation in future matters. We must strive to uphold the rule of law and maintain the integrity of our judicial process within the framework established by ASUW By-Laws.



Addendum A

Request for Interpretation by Senators Saint and Rzeszut

Earlier in the school year Senator Saint submitted an Request For Interpretation (RFI) to the Judicial Council (JC) regarding unconstitutional infringement upon freedom of expression that is entitled to all members of Associated Students of the University of Wyoming (ASUW) in § 5.02 (1) (C) of the ASUW Bylaws. The JC rejected Senator Saint's RFI. Senator Saint appealed the JC's decision to the Dean of Students. Due Senator Saint's fair lack of understanding and oversight, he inadvertently failed to follow the necessary steps in the bylaws required in the process for appeal. Out of good faith towards the JC and for the sake of unity, Senator Saint and Senator Rzeszut submit this new RFI. The language they use is from the University of Wyoming's General Counsel.

In § 5.02 (1) (C) of the ASUW Bylaws states that "I will not tolerate language or actions that may discriminate against or discredit any individual student, group of students, or student organization(s)." The University of Wyoming is an institution that accepts funding from the federal government which means that discrimination is defined by the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Title II of the Americans with Disabilities Act. The University of Wyoming is entitled to make sure that these laws are enforced. Everything enforced by the University must be compliant and consistent to interpretations of the 1st Amendment to the U.S. Constitution.

Members of ASUW are employees of the University making them subject to federal law and University policy that enforces said laws.

University policy states, "Pursuant to University Regulations 4-2 (Discrimination and Harassment) and 4-3 (Title IX and Sexual Misconduct), UW does not discriminate against any employee, applicant for employment, student, or applicant for admission on the basis of: race, gender, religion, color, national origin, disability, age, protected veteran status, sexual orientation, gender identity, genetic information, creed, ancestry, political belief, or any other protected category under applicable local, state, or federal law.

ASUW's Bylaws are too vague and are not narrowly tailored enough for them to be in compliance with federal law, and risks infringing on the 1st Amendment rights of ASUW members. There is no process afforded to members of ASUW who so happen to violate such a subjective part of the bylaws.

§ 5.02 (1) (C) states that language or actions that "may" discriminate against another individual(s) is not tolerated. This is not narrowly tailored to comply with 1st Amendment law. § 5.02 (1) (C) also states that no action or language can "discredit"

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anyone, which is no reason to restrict someone's speech. The language in § 5.02 (1) (C) restricts and dissuades members of ASUW their right to free expression.

Senator Saint and Senator Rzeszut would ask the JC to advise the Senate to revise this portion of the bylaws to reflect University policy and federal law.