ASSU CONSTITUTIONAL COUNCIL

STANFORD COLLEGE REPUBLICANS *v.* UNDERGRADUATE SENATE

Argued January 18, 2022—Decided January 25, 2022

BEFORE: SHERWIN LAI, *Chair*, VIKTOR KRAPIVIN, LODEWIJK GELAUFF, and AVI GUPTA, *Councillors*[*]

PER CURIAM.[**]

The Stanford College Republicans requested funding from the ASSU Undergraduate Senate for a speaker event featuring former Vice President Mike Pence. The Senate denied the request on December 7th, 2021, on a vote of 5 in favor, 0 against, and 8 abstained. The Stanford College Republicans then petitioned this Council, alleging that the denial of funding, among other things, violated its members' free speech rights and contravened procedural requirements set by the ASSU Constitution. We must decide whether the Senate's actions constituted proper approval or disapproval of funds and—if necessary—the remedy to which the Stanford College Republicans are entitled.

I

On November 4th, 2021, Stephen Sills submitted a Standard Grant request[1] for a "winter quarter" lecture event on behalf of the Stanford College Republicans. Several days later, the Appropriations Committee of the Undergraduate Senate approved that request, prompting the full

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[*] COUNCILLOR JANKELOW took no part in the consideration or decision of this case.

[**] COUNCILLOR GELAUFF does not join Part II-C-2 of this opinion.

[1] "Standard Grants shall be allocated routinely by the relevant Association legislative body, and shall be the primary means of funding VSO expenses." ASSU Const. art. V, § 8(A)(1).

Undergraduate Senate to begin consideration of the grant request. Nearly one month after the initial request was submitted, Appropriations Committee Chair Jaden Morgan notified Mr. Sills that the Stanford College Republicans' grant request had been rejected by the Undergraduate Senate. In an email, Sen. Morgan conveyed the news that the Petitioner's grant request had "failed to meet the 8-vote majority required for approval" and that the Senate's denial of funding was due to "event size, security logistics, and public health." The initial vote taken on the Petitioner's grant application did not occur during a regularly scheduled Senate meeting, no public notice of the vote was issued, and the Senate did not give notice of any special meeting held to vote on the issue. Instead, the Senate took the vote in a private Slack channel.

Without prompting from the Petitioner, the Undergraduate Senate held a virtual Zoom meeting on December 7th, 2021 (the "December meeting"), where the Senate "revoted" on several financial grant applications, including the one submitted by Mr. Sills. Those "revotes" were held due to the Senate's concern over the constitutionality of the original votes taken in the private Slack channel. The Senate issued notice of the December meeting 20 hours prior to the meeting in a public Slack channel; notice for this meeting was not issued in any other forum.

During the December meeting, the Undergraduate Senate quickly approved funding for 11 different grant applications before proceeding to consider the Petitioner's application. The Senate resolved to impose a number of public health-related conditions on the Petitioner's event, including:

> (8 Senators yes)Mask Condition:Masks must be worn by everyone at the eventStanford College Republicans must provide masks for those who do not have one.(11 senators

> yes)Health Check Conditions (Revised):Stanford Students:Passed health check on day of the eventNon-Stanford Affiliates:Proof of vaccinationIf not vaccinated b/c medical or religious reasons, they must show a negative covid-19 test taken within 72 hours the event(10 senators yes)Limiting the Number of Stanford Affiliates:Pre-registration form for all attendeesPre-registration forms must include a statement for participants affirming that they are residents of Santa Clara CountyAttendeesOnly 1000 people maximum can attend the eventThe maximum number of people that can attend the event may lower pending the severity of the Omnicron VariantOnly 10% of event attendees can be non-Stanford affiliatesNon-Stanford affiliates allowed to attend this event must be Santa Clara residents[2]

No additional COVID-19 restrictions were imposed for any other event under consideration by the Undergraduate Senate during the December meeting.[3]

After voting affirmatively to impose the preceding public health-related conditions on the Petitioner's event, the Senate proceeded to vote on the main motion to grant funding. Five votes were cast in the affirmative, zero votes in the negative, and eight Senators abstained. The presiding officer of the Undergraduate Senate then announced the result of the vote: "five approved, eight abstentions, zero denies, SCR's funding does not pass." No Senator objected to that announcement by the presiding officer. A Senator then offered a motion to adjourn, which was agreed to by voice vote.

The Petitioner filed suit before this Council on January 3, 2022, alleging that the Senate's denial of funding violated

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[2] The operative language of the conditions is provided here to the greatest extent possible from the Undergraduate Senate December meeting Zoom chat. All errors in spacing, formatting, and spelling are in original.

[3] If their event is held, the Petitioner agrees to comply with all COVID-19 restrictions imposed by the University and by the Senate.

its members' free speech rights, that the Senate failed to provide adequate notice of the meeting, that the Senate's quorum rule is unconstitutional, and that the full Senate's vote was inconsequential because the Appropriations Committee had granted the funding in the first instance. We accepted the case on January 11, 2022, and heard arguments on January 18, 2022. The case is now ripe for decision.

II

Before we discuss the actions of the Undergraduate Senate in this case, we must first resolve several preliminary questions. The Petitioner alleges that the only approval needed for this event was the approval of the Appropriations Committee. We are unpersuaded. We next consider the constitutionality of the original private Slack vote taken by the Undergraduate Senate. And finally, we evaluate whether the Undergraduate Senate complied with the ASSU Constitution's notice requirements for the December meeting.

A

The Appropriations Committee is the funding committee of the Undergraduate Senate. In accordance with the Undergraduate Senate Bylaws, the members of the committee "may review funding applications." Undergraduate Senate Bylaws app. II, § 1(A)(1). "[A]ll allocations of funds shall be made by a majority vote of the members of the Appropriations Committee." *Id.* The Petitioner argues that this language delegates the Undergraduate Senate's entire authority to approve Standard Grants to the Appropriations Committee. To determine whether the Stanford College Republicans' event was approved under this provision, we must assess whether such authority was delegated to the Committee in the first place, and if so, whether such delegation was constitutional.

The ASSU Constitution imposes restrictions on the allocation and disbursement of Standard Grants by the Undergraduate Senate:

> The relevant Association legislative body may, by majority vote, approve each Standard Grant. Grants that are not approved shall not be disbursed. ASSU Const. art. V, § 8(B)(3).[4]

We parse this text in the way it would have been understood when adopted. Fortunately, that analysis does not require significant inquiry. Article V of the Constitution was amended in its entirety during the Spring 2019 quarter. At that time, the Undergraduate Senate Bylaws did not contain any language purporting to permit the unilateral allocation of funds by the Appropriations Committee. By contrast, the sole authority by which funds could be allocated by the Undergraduate Senate was specified in Article III, § 1(A)(1) of the Undergraduate Senate Bylaws, a provision that survives the Spring 2019 amendments:

> Unless otherwise specified in the Constitution, the Association By-Laws, or these By-Laws, all allocations of funds shall be made by majority vote of the members of the US.

This clause provides for the approval of Standard Grants by the relevant Association legislative body and *prohibits* the disbursement of funds without approval of that legislative body. That prohibition comports with other provisions of the ASSU Constitution, including its Freedom of

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[4] The Petitioner contends that the word "may," as used here, "makes the approval of Standard Grants optional to begin with," so "it does not follow that this provision requires the Undergraduate Senate to approve Standard Grants" for the grants to be disbursed. Petitioner's Complaint 23-24. That reading of § 8(B)(3) is entirely atextual. It is beyond question that while voting to grant funding is optional, *the need* for the Senate to vote to grant funding *for the funds to be disbursed* is not.

Information guarantees, which ensure the student body has the ability to observe the work of its elected representatives and make "their views known." ASSU Const. art. I, § (7)(3).

The ASSU Constitution also allows the various populations of the Association to "establish rules ensuring that funds derived from fees levied upon those populations are expended and accounted for properly." ASSU Const. art. II, § 5. The requirement that all funds be approved by the relevant legislative body is precisely one such rule. (Of course, the relevant legislative body may impose additional rules in the grant approval process, provided that those rules are consistent with the Constitution.)

Further, one of the Constitution's disbursement clauses imposes a mandate on funding decisions: "The relevant Association legislative body, and its funding committee, shall oversee most decisions related to their populations' Fee portion." ASSU Const. art. V, § 6(D)(2). How could the Senate possibly oversee funding decisions if the Appropriations Committee could approve funding without even notifying the Senate that it had done so? Another disbursement clause provides: "The relevant Association legislative body shall attempt to allocate exactly the amount of allocable funds derived from the fee each quarter." ASSU Const. art. V, § 6(D)(4). It should be clear by this point that the Petitioner's argument has fallen apart. The Constitution allows the Association populations to establish rules ensuring proper expenditure of funds, and those populations proceeded to do so in Article V of the Constitution. Those established rules require the Undergraduate Senate to do its best to allocate the total amount of allocable funds each quarter. If the Appropriations Committee and the full Senate began approving allocations in parallel, funds could be expended improperly, and the Association could quickly fall into debt. These considerations lead us to conclude that the approval

of the Standard Grant by the Appropriations Committee was a necessary—but insufficient—step in the Standard Grant approval process, for the Undergraduate Senate could not have constitutionally delegated its fund approval authority to the Appropriations Committee.

B

After the Appropriations Committee approved the Standard Grant, the matter was referred to the full Undergraduate Senate for consideration. Although the record is scarce on this issue, it is stipulated that the Senate decided to reject the grant in a vote taken in a private channel on the ASSU Slack. No public notice or agenda of a meeting was given, *see* ASSU Const. art. I, § 7(5), members of the Association were not given a meaningful opportunity to make their views known, *see* ASSU Const. art. I, § 7(3), and the vote was not "open for observation to all members of the Association," ASSU Const. art. I, § 7(2). Nor did the Senate comply with rules surrounding closed meetings. ASSU Const. art. I, § 7(7)-(9).

A practice of voting in such a manner could not have possibly been constitutional. Any vote taken over an electronic medium without adequate public notice is void. Any vote taken over an electronic medium without the ability for members of the Association to make their views known is void.[5] Thus, the original vote on funding the Stanford College Republicans' event submitted by Mr. Sills taken by the Undergraduate Senate in a *private* Slack channel is null and void.[6]

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[5] The legislative bodies may of course act to cure these defects by ratifying any constitutionally deficient votes at constitutionally compliant meetings.

[6] We reserve the question of whether a constitutionally valid vote could be taken in a public Slack channel for another day.

C

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The Petitioner alleges that the December meeting failed to comply with notice requirements specified in three places: Undergraduate Senate Bylaws app. II, § 1(A)(3) (requiring "any motion to overrule a decision of the Appropriations Committee [to be given] at least 72 hours prior notice to the Appropriations Committee"); Undergraduate Senate Bylaws app. III, § 1 (requiring "72 hours public notice" for online meetings); and ASSU Const. art. I, § 7(5) (requiring "[i]nformation regarding the location, time and agenda for all . . . meetings [to] be made available in a public place" and "in electronic form" "at least 24 hours before the meeting is to be held"). We need not decide whether either of the 72-hour public notice requirements of the Undergraduate Senate Bylaws is violated here because the Senate violated the Constitution's 24-hour notice requirement in any event, as we explain below.

The plain text of the ASSU Constitution mandates significant transparency and notice requirements for any valid meeting of a legislative body. The Freedom of Information clauses in Article I of the ASSU Constitution unambiguously require the legislative bodies to provide at least 24 hours of notice before any meeting:

> Information regarding the location, time and agenda for all such meetings must be made available in a public place. This information must also be made available in electronic form. This information must be made available at least 24 hours before the meeting is to be held. ASSU Const. art. I, § 7(5).

Which meetings are covered by this constitutional provision? Section 7(2) specifies that "[a]ll meetings of Association legislative bodies, and all meetings . . . in which one or

more Association legislators is acting in an official representative capacity" are covered by the 24-hour notice requirement. There can be no ambiguity: If notice or information regarding an upcoming meeting of a legislative body is not given at least 24 hours in advance, that meeting is invalid.

Timely notice aside, the ASSU Constitution also requires that notice be provided in a "public place." ASSU Const. art. I, § 7(5). That provision instructs that any member of the Association must be able to find out about a legislative body's meeting. A notice is provided in a public place if any interested member of the ASSU would likely find the notice after making a reasonable effort to locate it.[7]

Prior to December 7, 2021, notice of Undergraduate Senate meetings was provided only on the `#assu-general` Slack channel. Afterwards, the Senate relocated its notice announcements to the `#ugs-public` channel, yet no steps were taken to publicize this channel such that interested members of the ASSU would be able to find it. This pattern of belated, hidden, and nomadic notice announcements prevents stakeholders from providing input in meetings where contentious topics like the one at issue in this case are discussed. These inconsistencies—no, consistent inadequacies—pose serious concerns about whether the Undergraduate Senate's meetings satisfied the provisions of Article I, § 7 of the Constitution.

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[7] The wisdom of such a requirement is easy to illustrate in reference to *Douglass Adams's Hitchhiker's Guide to the Galaxy*. In this book, Mr. Dent's house is about to be demolished after a "public" display of demolition plans for a period of nine months. (Perhaps we should even laud the city officials for such a detailed and early notice!) The plans were "on display in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying Beware of the Leopard." No reasonable person would be able to locate and become informed of such plans because they were not on display in a public place.

The record shows that notice was given fewer than 20 hours in advance of the December 7, 2021, meeting, short of the 24 hours required by ASSU Const. art. I, § 7(5). Nor was the notice provided in a location that an interested student could reasonably access. That the Slack channel can technically be joined by any Stanford student is insufficient to satisfy the meaning of "public."[8] A student would have had to inquire about the location of the notice, discover the existence of the ASSU Slack workspace (which is not clearly advertised on the ASSU website), join the workspace, then join the `#ugs-public` channel. That far exceeds the effort an interested member of the Association should be reasonably expected to exert to locate the notice.

For these reasons, the December 7, 2021, meeting failed to satisfy the notice requirements of Article I, § 7 of the Constitution and is null and void.

2

The deficiencies in providing notice render the Undergraduate Senate's December 7, 2021, meeting unconstitutional. Generally, acts stemming from the unconstitutional act—the actions and votes taken at that meeting in this case—are invalid as well. However, "[a]cts stemming from the unconstitutional act may . . . be deemed valid if they were performed in good faith." ASSU Const. art. IV, § 2(C)(8).

We cannot uphold a stemming act found to be unconstitutional as one of "good faith" simply because the consequences of nullifying that action would be inconvenient. We

[8] Latest university data from Autumn Quarter 2020 reveals that 18,623 students, 6,366 of which are undergraduates, are enrolled at the University and are thus members of the Association. *See Enrollment Statistics, 2020-21*, Registrar's Office, Stanford University (Oct. 26, 2020). A mere 50 of those members have joined the `#ugs-public` Slack channel.

instead must perform a careful, reasoned balancing inquiry of several factors, including (1) whether the determination that the antecedent act was unconstitutional is a close, ambiguous, or subjective one, or whether that determination was clear or unambiguous; (2) the effect the stemming act has on parties directly affected by that act; (3) the effect the stemming act has on the public interest of the members of the Association at large; and (4) other factual patterns or contextual information regarding the circumstances surrounding the unconstitutional action.

We now apply these factors to this situation. The first factor—whether it was a close call to find that the antecedent act is unconstitutional—weighs against the granting of a good faith exception. It is not a close call that a notice provided 20 hours in advance of the meeting falls short of the 24-hour notice requirement. The Senate contends that the unusual circumstance of the meeting being scheduled during finals week warrants an altered reading of the 24-hour notice requirement. But the Constitution provides for no such exception. Numbers no longer have meaning if 24 becomes 20 simply because a meeting occurs during finals week. Because the determination that the notice requirement was not satisfied is neither ambiguous nor subjective, the first factor weighs against the granting of a good faith exception.

The second factor—the effect the stemming act has on parties directly affected by that act—however, weighs in favor of upholding the stemming acts for good faith. If we were to nullify the stemming acts here, the Petitioner's remaining claims would be foreclosed, for all actions taken at the December meeting (including the vote on Petitioner's funding request) would be vacated. That would wrongly punish

the Petitioner for the Senate's constitutional violation[9] and perversely incentivize the lack of notice to dodge controversial business. Additionally, vacating all actions taken at the Senate's December 7 meeting would severely disrupt the reliance interests of the other student organizations whose funding requests were unanimously approved at that meeting. In light of the effect actions taken at the meeting have on the Petitioner as well as other parties directly affected, we find the second factor to weigh in favor of granting a good faith exception.

The third factor—the effect the stemming act has on the public interest of the members of the Association at large—also weighs in favor of upholding the stemming acts for good faith. To be certain, the lack of proper notice deprives members of the Association the opportunity to meaningfully engage with the government that serves them and thus adversely affects the public interest of the Association. But as explained above, holding all stemming acts at the December meeting as void—which entails the logistical chaos of vacating funding that had been granted unanimously and possibly already disbursed—would cause significant disruption and uncertainty to the members of the Association. Even members of unaffected student organizations would be unable to rely upon the finality of the funding decisions taken by the legislative bodies. So we find that this factor, on balance, too weighs in favor of granting a good faith exception.

With respect to the final factor, it is worth considering that the Senate's meeting was taken in light of "concerns over the constitutionality of a slack [*sic*] vote". Stipulation #6. The Senate's December 7 meeting could be construed as

[9] We note that the same may not apply to a party who is directly affected by an unconstitutional stemming act but does not bring forth its case to the Council in a timely manner.

a good faith effort to cure the unconstitutionality of its earlier private Slack channel vote. That weighs in favor of a good faith exception.[10]

These factors, taken together, provide support for our conclusion to uphold the stemming acts as performed in good faith. Notwithstanding that conclusion, we take pains to remind the legislative bodies that constitutionally mandated procedures cannot be ignored simply because they may be inconvenient. If members of the legislative bodies wish to dispense with procedures because they find them burdensome, they have all the tools to do so: amendment of the Constitution and Bylaws. It should not be expected that business conducted at unconstitutionally convened meetings will be upheld in the future. Our forbearance here should not be construed as an invitation for the Senate to continue neglecting constitutional transparency requirements that are designed to maintain engagement and accountability in our democratic system of student government.

III

There is no dispute that the Senate's December 7, 2021, vote on funding the Stanford College Republicans' event submitted by Mr. Sills with the public health-related conditions was 5 in favor, 0 against, and 8 abstaining. *See* Stipulation #6; Oral Argument at 5:23. The question is whether

[10] In general, the purpose of this factor is to consider potentially idiosyncratic characteristics of a particular set of stemming acts. As a matter of policy, we encourage all branches of the Association to comply with the Constitution. A public meeting with a defective notice—while still undoubtedly unconstitutional—is preferable to a private meeting or vote without any notice.

that vote passed, the declaration of the presiding officer to the contrary notwithstanding.[11]

As a general matter, the Council does not automatically substitute its understanding of the Undergraduate Senate Bylaws and procedures for that of the legislative body. We will defer to the legislative bodies' interpretations of their Bylaws and procedures as long as they do not require an *unreasonable* (or plainly unconstitutional) interpretation of the Constitution or Bylaws. In other words, we do not require the legislative body's interpretation to match our own as long as it falls within a "zone of reasonableness." But if the Constitution or Bylaws unambiguously and clearly foreclose the legislative body's interpretation of procedures, we must give full effect to the meaning of the governing documents.[12]

"Appropriations" "always requir[e] a recorded vote of a simple majority of" the Undergraduate Senate.

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[11] There are serious questions as to whether the vote was taken in a manner consistent with several requirements specified in the Constitution and Bylaws. *See*, *e.g.*, ASSU Const. art. II, § 12 (requiring "[a]ll votes of Association legislative bodies" to be taken "by open ballot"); Undergraduate Senate Bylaws. art. I, § 4(B)(5) (requiring "vote[s]" on "[a]ppropriations" decisions to be "recorded"); Undergraduate Senate Bylaws art. II, § 2(F)(2) (requiring the Secretary to "include all recorded votes in the US meeting minutes and [to] detail all the ayes, nays, abstentions, and absences"). Because the record is not developed on these issues, we do not decide today whether the vote violated any of those provisions. We reiterate our reminder above to "the legislative bodies that constitutionally mandated procedures cannot be ignored simply because they may be inconvenient."

[12] It is well-settled that claims alleging violations of the Bylaws or other governing documents of the Association fall squarely within our jurisdiction. Because "the ASSU Constitution states the manner in which changes to legislative body By-Laws should be made," "a violation of the By-Laws implicitly violates the ASSU Constitution." *Case 7: Runoff Election* (ASSU Const. Council 1999). Thus, the Council has "jurisdiction to consider" a case "only directly involv[ing] violations of legislative body By-Laws." *Id.*

Undergraduate Senate Bylaws art. I, § 4(B)(5)(4). By definition, a simple majority means "a majority of those members present *and voting*." Undergraduate Senate Bylaws art. I, § 4(C)(1) (emphasis added). Since abstentions are not votes, only votes in favor and votes against count toward the denominator used to determine the requisite affirmative votes needed for passage. And not without good reason. Requiring an absolute affirmative majority of members present to pass a measure would deprive Senators the ability to maintain a position of neutrality, as an abstention—a refusal to vote—would be construed as a vote against.

The Undergraduate Senate's presiding officer's declaration that the 5-0 vote did not pass contravenes the Constitution and Undergraduate Senate Bylaws and must be set aside. While 13 members were present, only 5 were present *and voting*. A majority thereof—the requisite threshold for passage—is 3. The number of votes in favor, 5, unambiguously cleared that threshold. It would do a disservice to Senators who abstained to maintain a truly neutral position if the presiding officer were allowed to treat abstentions as if they were "no" votes.

The vote also satisfied the Undergraduate Senate's quorum requirement. The Constitution's definition of the "Undergraduate Senate Quorum" refers to the number of members present, not the number of those voting: "A majority of the regular members of the Undergraduate Senate shall constitute quorum to conduct business." ASSU Const. art. II, § 3(C)(1). The Undergraduate Senate Bylaws, however, single out voting and elevate the quorum requirement for that action only: "1/2 of all members (eight) voting shall constitute quorum for votes." Undergraduate Senate Bylaws art. I, § 4(B)(4)(2). To the extent that § 4(B)(4)(2) applies here, it is unconstitutional (and unenforceable) because it contravenes the Constitution's definition of the

quorum. *See Finley v. Undergraduate Senate* (ASSU Const. Council 2014) (prohibiting the Senate bylaws from modifying forms of voting in ways that defy the Constitution). It is unconstitutional for the Senate Bylaws to impose a higher quorum requirement for voting (as opposed to any other type of "business") because such an imposition hampers the constitutional right of a quorum of Senators *present* to conduct *any* form of business, including votes. A quorum to conduct business necessarily entails a quorum to take votes, for no business or debate can be conducted without a pending motion, and no motion serves any utility without an opportunity to vote on it.[13]

The Respondent contends that "if the petitioner believes . . . that the vote was afoul to the Constitution, then they cannot assert that the contents of the vote violated the Constitution and thus cannot ask the Council to nullify the vote AND allocate funding. The petitioners can only ask the vote be nullified and a revote occur." Response 5. That argument presupposes that the Senate voted to deny the funding in the first place. It did not. The Undergraduate Senate Bylaws dictate that the Senate passes funding when a majority of its members present and voting vote in favor of it, not when the presiding officer declares it so. We thus do not "nullify the vote"; we nullify the Senate's presiding officer's incorrect declaration that the vote did not pass. In other words, the Council does not force the Senate to allocate

[13] In fact, imposing a higher quorum than constitutionally mandated would flout Article II, § 3(B)(2) of the Constitution, which prohibits any "member of the Undergraduate Senate in attendance at a meeting of the Undergraduate Senate" from "disenfranchise[ment]" "for any reason." Because a meeting by definition requires a *constitutional* quorum—no more, no less—enforcing § 4(B)(4)(2) would effectively deprive the five members who voted in the affirmative from having their votes counted.

funding; it simply clarifies the Senate's own action to grant funding.

One may object, claiming that the Senate did not wish to grant the funding and mistakenly saw abstentions as a sufficient means to attain that object. We see no reason to entertain that argument. While we offer some deference to legislators' *procedures* as long as they are constitutional and reasonable, we cannot defer to legislators' subjective *understandings* of the Constitution and the Undergraduate Senate Bylaws (whether correct or incorrect). After all, it is the duty of all the branches of our student government to understand the governing documents of the Association.

To reiterate, the question here is not whether the Senate's presiding officer could have *reasonably known* about the Constitution and the Bylaws, but whether the presiding officer's action required an un*reasonable interpretation of the Constitution*. It did. If Senators wished to register their objections to the funding, they could have done so by voting "no." They did not.

IV

We conclude by considering the remedy available to the Petitioner. The Constitution empowers this Council to "adjudicate all cases where the constitutionality of an act . . . is called into question," ASSU Const. art. IV, § 2(A), and declare unconstitutional acts "null and void," ASSU Const. art. IV, § 2(C)(8). Our analysis above requires us to rule that the Undergraduate Senate's presiding officer's declaration that the Standard Grant did not pass was null and void.[14] As of the announcement of this opinion, the Standard Grant

[14] We thus need not and do not resolve Petitioner's free speech and viewpoint discrimination claims at this juncture.

is deemed to have been enacted with the public health-related conditions adopted by the Senate.[15]

It is so ordered.

[15] As with any other approved legislation, the Senate may reconsider the enactment of the Grant (provided that such reconsideration is constitutional and procedurally valid). *See* Undergraduate Senate Bylaws art. III, § 1(A)(3). Our decision today should not be read to preclude this action, but in response to any such rescission, the Petitioner may return to the Council to pursue any further claims if they so desire. As the Petitioner acted in a timely manner to file their Standard Grant request, any action by the Senate must be timely as well. Any reconsideration by the Senate shall take place within one week of the announcement of this opinion, *cf.* Undergraduate Senate Bylaws art. III, § (1)(A)(3) (dictating that an override "may only take place at *the first US meeting* after the minutes of the meeting at which the initial allocation occurred are made publicly available" (emphasis added)), and the Grant shall be disbursed should such reconsideration not occur.

ASSU CONSTITUTIONAL COUNCIL

STANFORD COLLEGE REPUBLICANS *v.* UNDERGRADUATE SENATE

Argued January 18, 2022—Decided January 25, 2022

COUNCIL CHAIR LAI, with whom COUNCILLOR GUPTA joins, concurring.

The Council correctly holds that the Senate did approve the Petitioner's funding request on a 5-0 vote, and its presiding officer's declaration to the contrary was unconstitutional. It thus had no occasion to "resolve Petitioner's free speech and viewpoint discrimination claims at this juncture." *Ante* at 17, n. 14. That approach is consistent with the "well-established principle governing the prudent exercise of [a] [c]ourt's jurisdiction that normally [a] [c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)) (internal quotation marks omitted).

I write separately, however, to put forth some pertinent principles for considering the complex intersection between student government funding and the freedom of speech, two issues at the forefront of this case. I also propose a framework that I hope will be helpful in resolving free speech and viewpoint discrimination claims in the future. It has become apparent to me that parties who appear before the Council are in need of clearer guidance to articulate or defend against claims on those issues.

I

Mirroring the First Amendment of the U.S Constitution, the ASSU Constitution guarantees that "[t]he Association

shall enact no legislation . . . abridging the freedom of speech." ASSU Const. art. I, § 3(2). At the same time, the ASSU Constitution incorporates a "Budgetary and Financial Policy" in which

> The members of the various Association populations shall . . . have the ultimate authority to establish rules ensuring that funds derived from fees levied upon those populations are expended and accounted for properly. As the representative bodies for the students, the legislative bodies of the Association shall exercise these powers in the names of the members of their respective constituencies. ASSU Const. art. II, § 5.[1]

The relationship between the funding of Voluntary Student Organizations on campus and the freedom of speech is nuanced and resists brightline characterizations. On one hand, they enjoy a symbiotic coexistence when elected student representatives exercise their power of the purse "in the University setting," acting "against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995). On the other hand, the two come into conflict when the denial of funding to a VSO can have the effect of inhibiting speech.

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[1] A complication we will have to wrestle with is that the ASSU allows "all members . . . the right to a full refund of any and all fees paid to the Association." ASSU Const. art. I § 3(1). Whether the non-compulsory, opt-out nature of the student fee that funds ASSU disbursements affects the applicability of *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995), and *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000), to the ASSU is a question we eventually must confront.

This Council encountered such a conflict in *Stanford Anscombe Society v. Graduate Student Council* (2014). In that case, the Graduate Student Council rescinded funding for a conference that the Stanford Anscombe Society intended to hold. We held that because "GSC funding for events is not speech," the Graduate Student Council's action did not violate the Free Speech Clause of the ASSU Constitution. We reasoned that

> If legislative funding was speech and student groups have a right to speech, then student groups would have a right to funding. There is simply not enough money for the GSC to distribute, if every group argued that they had a right to speech, and thus deserved funding. Given the limits of the available funds, the GSC is given the constitutional authority to decide what events it funds. The GSC did not pass legislation to prevent the event from taking place, nor did it pass legislation to prevent certain controversial speakers to attend the conference. An argument can be made (and was) that the event or certain speakers were unable to attend because the funding was revoked, but once again, this Council does not believe student groups have a right to funding.

While I am not in a position to say whether *Anscombe* was correctly decided without further briefing on both sides of the issue, I am skeptical that the "categorical" distinction it drew between funding and speech can be reconciled with the Supreme Court's "resolution of conflicts between generally applicable [interests] and . . . First Amendment rights . . . like speech," which "has been much more nuanced." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring). Indeed, the Supreme Court has recognized that a "restriction on the amount of money" that can be spent "necessarily reduces the quantity

of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).[2] There are also serious questions about whether the rigid approach *Anscombe* developed can survive the 2019 Amendments to the ASSU Constitution, which appended a binding interpretation of their Letter of Acceptance that "[t]he criteria [considered before Grants are allocated] must be applied *consistently* for all student organizations." ASSU Const. art. V, § 6(C)(2), n. 18 (emphasis added). This constitutional requirement of consistency necessarily circumscribes legislative bodies' discretion to treat similar funding requests differently.

How, then, are we to properly evaluate allegations that the refusal to fund a student organization or its event violated that organization's free speech rights? We must, of course, be mindful that "the assessment of support of student life is complex and necessarily subjective to a great degree" and that "the value of direct student control in the funding process lies in the collective subjective opinions of the representatives." Brief Amicus Curiae of Timothy Vrakas 4. But we must also keep in mind that the Free Speech Clause of the ASSU Constitution prohibits the Association from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at

[2] Although the Council held in *Anscombe* that the GSC's rescission of funding did not prevent the conference from taking place, University policies—such as the rule requiring 50 percent of the cost of an event requiring security or extraordinary resources to come from on-campus funding source—along with other circumstances may render a legislative body a "gatekeeper" without whose support an event cannot take place. *See Events Requiring Security or Extraordinary Resources*, OFFICE OF SPECIAL EVENTS & PROTOCOL, STANFORD UNIVERSITY.

829 (1995), even when the student body finds the expression "upsetting," "offensive," "disagreeable," "misguided, or even hurtful," *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citations and internal quotation marks omitted). And although the ASSU may not be able to approve every single request for funds as a practical and logistical matter, it "cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835.

II

I am not confident that *Anscombe*'s formalistic characterization of funding is sufficient to balance the competing interests at issue in cases where a party alleges that the denial of funding violated its free speech rights under the ASSU Constitution. I instead propose a burden-shifting framework, inspired by that established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973), that is more attentive to the specific facts of each case.

First, the petitioner bears the initial burden of establishing a prima facie case of viewpoint discrimination. They must (a) demonstrate a reasonable effort but inability to secure funding for an event containing protected speech from alternative sources—either because of university rules and guidelines or because of the nature of the event they wish to hold, or both—thus rendering the ASSU a "gatekeeper" of speech; and (b) show a pattern of facts that give rise to an inference of viewpoint discrimination—*e.g.*, statements of legislators taken as a whole,[3] deviation from standard procedures in consideration of the request for funding, funding

[3] It is very important to distinguish between the views of individual representatives from the views of a legislative body as a whole. The former may shed light on, but does not necessarily reflect, the latter—which must remain the subject of the inquiry.

granted to comparable organizations and events, etc. If the petitioner is unable to do so, that is the end of the matter.

But once the petitioner establishes a prima facie case of viewpoint discrimination, the burden shifts to the respondent to provide a legitimate, neutral, and nondiscriminatory justification for the rejection of funding. Possible justifications that could satisfy this burden could include concerns over campus safety, public health, security logistics, etc., but they must be articulated in a concrete and particularized—rather than merely speculative and conclusory—way. If the respondent is unable to do so, the petitioner's viewpoint discrimination claim prevails.

If, however, the respondent is able to identify one or more neutral and nondiscriminatory justifications for the denial of funding, the burden once again shifts back to the petitioner to show that those justifications were pretextual. The petitioner would need to show, for example, "a clear pattern, unexplainable on grounds other than [the viewpoint of the petitioner], [that] emerges from the effect of the [denial of funding] even when [it] appears neutral on its face." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Sources for proof of pretext could include "[t]he historical background of the [respondent's] decision," "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "[t]he legislative or administrative history," and substantially comparable requests for funding that were granted even though those requests could be just as objectionable on the basis of the justification that the respondent has proffered. *Id.* at 266-68. Whether that showing of pretext is adequately persuasive will then become dispositive of the merits of the viewpoint discrimination claim.

Should future petitioners successfully demonstrate viewpoint discrimination under this framework, the Council

will have to determine an appropriate remedy. Although appropriate measures will necessarily vary with circumstances, it may be insufficient to merely remand the case to the same legislative body for a revote. The particularly pernicious and durable impact of viewpoint discrimination on free speech warrants more than such a confined remedy. And repeated instances of viewpoint discrimination cannot be adequately remedied by repeated remands, which would shirk from the Council's responsibility to declare unconstitutional acts "null and void." ASSU Const. art. IV, § 2(C)(8).

* * *

I do not conclusively resolve today whether the Petitioner in this case prevails on its free speech and viewpoint discrimination claims, for the Council properly holds that the Respondent enacted the Petitioner's request for funding in any event. While the record contains troubling evidence of patterns that could give rise to an inference of a prima facie case of viewpoint discrimination, one also cannot deny the Senate's legitimate interest in protecting public health in the midst of a pandemic. When competing interests such as these inevitably arise again in the future, it is my hope that the Council will perform a careful and nuanced examination of the relevant facts of the case in a disciplined and structured manner.

ASSU CONSTITUTIONAL COUNCIL

STANFORD COLLEGE REPUBLICANS *v.* UNDERGRADUATE SENATE

Argued January 18, 2022—Decided January 25, 2022

COUNCILLOR GELAUFF, concurring in part and dissenting in part.

While I join the majority in the unconstitutionality of the meeting, I respectfully dissent on the matter whether the stemming acts of the unconstitutional meeting should be declared in good faith and valid and therefore do not join Part II-C-2 of the Council's opinion.

The factors proposed by the majority are helpful factors to consider for upholding stemming acts. However, in my view they fail to adequately address the constitutional requirement to uphold stemming acts at face value: whether these stemming acts were performed *in good faith*. ASSU Const. art. IV, § 2(C)(8). My primary test here is whether the actor likely knew that the antecedent act was unconstitutional, whether the antecedent likely served to accomplish the stemming act, and whether the actor had taken all reasonable measures to avoid or alleviate the unconstitutionality.

In this case there are two categories of stemming acts to consider. First, there are the decisions taken in this meeting (all funding allocations of quick and standard grants) and second there are the actual disbursements by the Financial Manager based on the approval decisions.

For the disbursements of the funds by the Financial Manager (insofar they happened) based on allocation decisions taken in unconstitutionally convened meetings, it should not be the responsibility of the Financial Manager alone to interpret whether the Undergraduate Senate is

following its procedures correctly. When a decision is made by a legislative body to allocate funds, a Financial Manager acting in good faith could be expected to disburse them unless other provisions prevent them from doing so. Any such disbursements could therefore be considered a valid act. These disbursements also seem to easily meet the test of the majority, and we therefore reach the same conclusion.

It is less trivial to interpret the good faith of the Undergraduate Senate in its decisions. There seems to be indeed a pattern of inconsistent and insufficient notices, secret Slack votes were commonplace and questions around the status of recorded votes could be raised. In fact, the entire December meeting seems to be absent from the official ("rolling") minutes of the Undergraduate Senate. Although it is suspect that the UGS changed their announcement venue from `#assu-general` to `#ugs-public` and just before this meeting took place, this pattern makes it unlikely that there was a direct conspiracy, but rather a lack of willingness to follow burdensome rules. The lack of proper public notice however, makes it impossible for stakeholders such as the Petitioner to provide input in the meetings.

However, the Undergraduate Senate knowingly violated the Constitution in holding their meeting the way it did and was even reminded of the fact during the meeting by a Stanford Daily reporter. The reporter stated after asking whether the petitioners were made aware of the meeting (not so): "The agenda was made public at 12:21 this morning, which is not 24 hours. . . . I just want to make sure that this is procedurally correct according to the Constitution." There were several ways that the Senate could have alleviated the lack of transparency and opportunity for ASSU members to give input on the matter, including but not limited to giving notice to the applicant(s), and it chose not to.

The Undergraduate Senate knew that the decision would be contentious (from the secret Slack vote), knew that they violated the Constitution when voting, and the antecedent act arguably furthered the cause of abstaining senators to interpret the result of the vote in a constitutionally dubious manner. The antecedent act deprived members of the ASSU such as the applicants, of a constitutionally mandated opportunity to make their views known on this contentious decision and interpretation. The decision to not award funding to the petitioner can therefore not be considered a *stemming act in good faith* and should remain null and void.

The practice of announcing meetings in a both unconstitutional and inconsistent manner is setting the Undergraduate Senate up for challenges to the constitutionality of their decisions whenever some stakeholder considers such decisions undesirable.