



# COMMONWEALTH of VIRGINIA

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October 29, 2008

The Honorable Timothy D. Hugo  
Member, House of Delegates  
P.O. Box 893  
Centreville, Virginia 20122

The Honorable Robert G. Marshall  
Member, House of Delegates  
P.O. Box 421  
Manassas, Virginia 20108

Dear Delegates Hugo and Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You inquire about student organization-sponsored activities that occur at Virginia's public colleges and universities. First, you inquire concerning the authority of a public college or university ("college") to limit forums for student expression. Second, you ask about the authority of a college regarding the use of "student activity monies." Finally, you inquire concerning the authority of a college to regulate the appearance of student organization-sponsored performances on campus, particularly performances that may be considered "sexually explicit or pervasively vulgar."

## Response

It is my opinion that the board of visitors of a college has the authority to establish a policy applying standards of conduct and reasonable rules and regulations to student organizations. If a college allows student organizations to have access to its facilities, it may deny access to a student group only for viewpoint-neutral reasons. Likewise, in both the collection and dissemination of student activity fees, it is my opinion that a college must be viewpoint neutral. Finally, it is my opinion that a board of visitors may adopt viewpoint-neutral policies regulating student organization-sponsored performances on campus, providing funding for such performances, and limiting use of the institution's facilities to performances that comply with the adopted policies.

## Applicable Law and Discussion

It is well established in Virginia that a college, through its board of visitors, "has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably

necessary to effectuate the powers expressly granted.”<sup>1</sup> This authority does not supersede statutes regarding specific topics.<sup>2</sup>

The Supreme Court of the United States and several federal circuit court opinions have examined appropriate treatment of student organizations in the higher education context.<sup>3</sup> These cases provide the constitutional parameters within which boards of visitors may regulate student organizations, programs, and access to facilities and funding.

### I. Obligations of Educational Institutions

A preliminary review of the relationship between colleges and student organizations is useful. A college is not obligated to create a forum for student expression. Rather than delegating performance selection decisions to student groups, it may decide that performances or events it sponsors must meet certain qualitative standards.<sup>4</sup> If a college decides that it, rather than student groups, will select which events occur on campus, it may still seek student input without creating a public forum.<sup>5</sup> The program’s

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<sup>1</sup>Goodreau v. Rector & Visitors, 116 F.Supp.2d 694, 703 (W.D. Va. 2000) (quoting Batcheller v. Commonwealth, 176 Va. 109, 123, 10 S.E.2d 529, 535 (1940)).

<sup>2</sup>See e.g., VA. CODE ANN § 23-114 (2006) (providing that Board of Visitors of Virginia Tech “shall at all times be under the control of the General Assembly”); see also § 23-122 (2006) (providing that Board of Visitors of Virginia Tech “may make such regulations as they deem expedient, *not contrary to law*”) (emphasis added).

<sup>3</sup>See Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (*Southworth I*); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972); Christian Legal Soc’y v. Walker, 453 F.3d 853 (7th Cir. 2006); ACLU v. Mote, 423 F.3d 438 (4th Cir. 2005); Southworth v. Bd. of Regents, 307 F.3d 566 (7th Cir. 2002) (*Southworth II*); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976).

<sup>4</sup>See *Rosenberger*, 515 U.S. at 833 (“[w]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”); see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (holding that government sponsored arts funding decisions may consider decency as legitimate funding factor); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that federally subsidized family planning grants may constitutionally prohibit grantees from engaging in abortion counseling).

<sup>5</sup>The act of a college in retaining decision-making responsibility for events will not automatically mean it can assert that it has not created a limited public forum for private speech. In *Legal Services Corporation v. Velaquez*, 531 U.S. 533 (2001), the United States Supreme Court noted that “it does not follow ... that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Id.* at 542 (alterations in original) (quoting *Rosenberger*, 515 U.S. at 834). The Fourth Circuit has said that in distinguishing between government speech and private speech it has: “borrowed a four-factor test from other circuits that examines: ‘(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.’” *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004) (citation omitted). Thus, to meet this four-factor test and to show that it has not created a forum for public speech, a college must either: (1) have a purpose statement indicating that it will be the sponsor of the programs and events on campus, for instance, to facilitate learning, cultural insight, and recreational pursuits for students; or (2) indicate that it is not sponsoring such programs and events to encourage views from private speakers. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 206-07 (2003).

funding and selection criteria should inform students clearly that input by student organizations does not create a limited public forum and that decision-making authority for any college-sponsored event rests with the college.

Likewise, there is no legal requirement that compels colleges to recognize student organizations. However, as a practical matter, colleges generally consider student extracurricular activities and organizations to be an integral part of the collegiate experience. Once a college recognizes student organizations, its board and administration must operate under numerous constitutional constraints.

## II. Student Organizations

### A. Recognition

The United States Supreme Court in *Healy*<sup>6</sup> held that student organizations have an associational right to be recognized by their college, unless there is a legitimate justification for nonrecognition.<sup>7</sup> A college “may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”<sup>8</sup> Further, the *Healy* Court held that denying recognition to any organization meeting the institution’s reasonable viewpoint-neutral requirements for recognition equates to prior restraint under the First Amendment<sup>9</sup> because the organization would be prevented from engaging in the various associational activities of other groups.<sup>10</sup> In identifying what would provide a college with a legitimate justification for denying recognition, the Supreme Court noted:

The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy “directed to inciting or producing imminent lawless action and ... likely to incite or produce such action.” In the context of the “special characteristics of the school environment,” the power of the government to prohibit “lawless action” is not limited to acts of a criminal nature. Also prohibitable are actions which “materially and substantially disrupt the work and discipline of the school.” Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.<sup>[11]</sup>

In speaking to reasonable requirements a college may impose upon the student organizations that it recognizes, the Court noted

“that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and

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<sup>6</sup>408 U.S. 169.

<sup>7</sup>*Id.* at 187-88; *see also Matthews*, 544 F.2d at 164-65 (rejecting University’s concerns that recognizing homosexual organization would promote illegality and give impression that University sanctioned organization; such concerns were insufficient reasons to overcome group’s associational rights).

<sup>8</sup>*Id.*

<sup>9</sup>U.S. CONST. amend. I.

<sup>10</sup>*Healy*, 408 U.S. at 184.

<sup>11</sup>*Id.* at 188-89 (citations and footnote omitted).

its property; that it may expect that its students adhere to generally accepted standards of conduct.”<sup>12]</sup>

The *Healy* Court indicated that the “Student Bill of Rights” struck the right balance between advocacy and impermissible conduct.<sup>13</sup> Student organizations were free to discuss any question that interested them, but they could not keep others from speaking or being heard, invade the privacy of others, damage the property of others, “disrupt the regular and essential operation of the college,” or interfere with others’ rights.<sup>14</sup> However, the record did not show that the denial of recognition for the student group, Students for a Democratic Society, was based upon a legitimate concern that the group would be disruptive; and thus, the reason for nonrecognition “constituted little more than the sort of ‘undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.’”<sup>15</sup> Finally, the Court said that a college could require student organizations to adhere to reasonable regulations regarding time, place, and the manner in which to conduct their activities, and to affirm that they will adhere to reasonable campus rules as a condition of gaining recognition.<sup>16</sup>

Therefore, boards of visitors would have the authority, subject to recognized constitutional parameters, to establish policies applying standards of conduct and reasonable rules and regulations to student organizations. Adopting such a policy provides guidance to student organizations and safeguards the college against allegations that it denied recognition on constitutionally suspect grounds. The policy could indicate that the college reserves the right to refuse to recognize any organization whose purpose is to incite violence, materially and substantially disrupt the institution’s mission, or whose activities likely will interfere with the educational rights of other students.

### **B. Access to Facilities**

The United States Supreme Court has recognized the general principle that “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”<sup>17</sup>

The Supreme Court decision in *Widmar* sets forth the law regarding student organization’s access to facilities.<sup>18</sup> In *Widmar*, a university prevented a religious student organization from using its facilities for worship services contrary to its policy to encourage the activities of student organizations.<sup>19</sup> “[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>20</sup> The Court continued:

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<sup>12</sup> *Id.* at 192 (quoting *Esteban v. Cent. Miss. State Coll.*, 415 F.2d 1077, 1089 (8th Cir. 1969)).

<sup>13</sup> *Id.* at 189.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 191 (alteration in original) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

<sup>16</sup> *Id.* at 192-93.

<sup>17</sup> *Rosenberger*, 515 U.S. at 829.

<sup>18</sup> *See Widmar*, 454 U.S. 263.

<sup>19</sup> *Id.* at 265.

<sup>20</sup> *Id.* at 267 n.5.

At the same time, however, our cases have recognized that First Amendment rights must be analyzed “in light of the special characteristics of the school environment.”... A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.<sup>[21]</sup>

Further, relying on *Healy*, the Court noted that the “denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes’ must be subjected to the level of scrutiny appropriate to any form of prior restraint.”<sup>22</sup>

The university’s defense and justification for denial of access was its belief that permitting a religious group to use the space for worship would violate the Establishment Clause.<sup>23</sup> The *Widmar* Court used the *Lemon* test<sup>24</sup> to determine whether the government violated the Establishment Clause<sup>25</sup> and determined that although an open forum may advance a religious purpose, it does not foster government entanglement with religion.<sup>26</sup> Further, because the forum was open to all groups, not just religious ones, the Court was not concerned that the primary effect of allowing such use by a religious student organization would be an impermissible advancement of religion.<sup>27</sup> Accordingly, the university was not able to show a compelling state interest to limit access of its facilities, and the Court held in favor of the student religious organization.<sup>28</sup>

Thus, when a college generally allows recognized student organizations access to its facilities, it may not deny access to any student group unless it has a viewpoint-neutral reason for doing so. Absent a showing that the particular group was not contemplated to be within the class of speakers or topics for whom the forum was created, the college likely would need a compelling state interest to impose a narrowly tailored restriction.

### III. Student Activity Fees

The United States Supreme Court has said that an institution’s creation of student activity funding “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”<sup>29</sup> Thus, if a college accepts student activity fees from its students to disburse to student organizations, thereby creating a forum, it follows that it must distribute the money in a viewpoint-neutral manner.

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<sup>21</sup> *Id.* at 268 n.5 (citation omitted).

<sup>22</sup> *Id.* at 268 n.5 (quoting *Healy*, 408 U.S. 181, 184) (alteration in original).

<sup>23</sup> *Id.* at 270-71.

<sup>24</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>25</sup> *Widmar*, 454 U.S. at 271. After *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court essentially requires that entanglements between government and religion be excessive to find an Establishment Clause violation; thus, the entanglement prong has been folded into the primary effects prong. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002) (O’Connor, J., concurring).

<sup>26</sup> *Widmar*, 454 U.S. at 272-74.

<sup>27</sup> *Id.* at 273.

<sup>28</sup> *Id.* at 277.

<sup>29</sup> *Rosenberger*, 515 U.S. at 830.

To illustrate, University of Virginia students who published *Wide Awake*, a Christian student newspaper, sued the University for denying the group a printing subsidy because of the newspaper's religious views.<sup>30</sup> The University already subsidized a variety of other student publications and journalistic activities according to its purpose of supporting "a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'"<sup>31</sup> The University denied funding to *Wide Awake* due to concern that providing such funding would violate the Establishment Clause.<sup>32</sup> The Court held that the University would not violate the Establishment Clause by funding this group and that failure to fund the group, while simultaneously funding other publishing groups, was viewpoint discrimination.<sup>33</sup> Echoing its facilities access jurisprudence, the Court noted:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.<sup>[34]</sup>

While the Court noted the risk when a public university provides direct payments to sectarian organizations, it held that the Establishment Clause did not prohibit the University from funding *Wide Awake* when its neutral student activity fee program included nonsectarian recipients and money did not directly flow to the religious group's coffers.<sup>35</sup> The Court specifically found that: (1) the religious organization was independent of the state;<sup>36</sup> (2) the incidental benefit to religion would come from a program of secular services for secular purposes;<sup>37</sup> (3) funding would be based on religion-neutral criteria;<sup>38</sup> (4) any benefit to religion would be indirect, not the result of public funds flowing directly to sectarian coffers;<sup>39</sup> (5) people would not perceive the aid to be a government endorsement of a religious message or of a religion;<sup>40</sup> and (6) the University would avoid entanglement with religion by funding all qualified student organizations, because it would obviate the need to monitor or supervise the messages in the publications printed by the student organization.<sup>41</sup> Moreover, the University may have violated the constitutional principle of government neutrality by, in effect, sending a message of hostility toward religion.<sup>42</sup>

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<sup>30</sup> *Id.* at 827

<sup>31</sup> *Id.* at 824 (citation omitted).

<sup>32</sup> *Id.* at 827-28.

<sup>33</sup> *Id.* at 844-46.

<sup>34</sup> *Id.* at 829-30.

<sup>35</sup> *Id.* at 842-43.

<sup>36</sup> *Id.* at 841, 850 (O'Connor, J., concurring).

<sup>37</sup> *Id.* at 843.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 842-43.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 843.

<sup>42</sup> *Id.* at 846 (O'Connor, J., concurring); *see also* *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (noting that Constitution prohibits government hostility to religion).

The *Rosenberger* Court determined that the University had engaged in viewpoint discrimination and violated the free speech rights of the student journalists who authored *Wide Awake*.<sup>43</sup> Thus, whenever an institution collects student activity fees and distributes those fees to student groups, it must be careful not to treat or fund differently any group because of the group's ideas or views.

In *Southworth I*, the United States Supreme Court addressed whether it was permissible for the University of Wisconsin to collect student activity fees and distribute them to various student organizations when individual students voiced objections to funding certain of those organizations.<sup>44</sup> The Court determined the University could collect such fees, provided the proceeds were distributed in a viewpoint-neutral manner.<sup>45</sup> The Court found that the collection of activity fees is permissible where supporting student organizations are an extension of an institution's educational mission:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.<sup>[46]</sup>

Thus, a college is not compelled to impose and collect student activity fees. Indeed, colleges first must make a determination that their mission *is* served by such collection and distribution before they are entitled to impose a mandatory fee upon their students.<sup>47</sup> In *Southworth I*, the Court found that the University was entitled to impose such fees because a core element of its mission is to "facilitate a wide range of speech."<sup>48</sup>

In *Southworth I*, the Supreme Court took a dim view of a policy allowing a student body to vote to approve or disapprove an organization's continued funding through referenda,<sup>49</sup> since allocation decisions must be viewpoint neutral. In *Southworth II*, the Seventh Circuit specifically examined several criteria to determine whether the University's method of distributing funds was viewpoint neutral.<sup>50</sup> First, the Seventh Circuit determined that the United States Supreme Court's "prohibition against unbridled

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<sup>43</sup>*Rosenberger*, 515 U.S. at 837.

<sup>44</sup>*Southworth I*, 529 U.S. 217.

<sup>45</sup>*Id.* at 233.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 231. The *Southworth I* outcome differs from the Supreme Court's decisions in union and bar association cases. See *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In such instances, the Court held that objecting members who disagreed with speech or political activities may not be forced to subsidize such activities over and above the cost of their actual membership. *Id.* In *Southworth I*, the Court held that allowing students to "opt-out" of funding organizations they are opposed to subsidizing is a permissible way of handling objectors, but it is not constitutionally required. *Southworth I*, 529 U.S. at 232 (noting also that such restriction would be disruptive, costly, and ineffective). The Court said the best way for an institution to ensure the protection of students' free speech rights was by operating a viewpoint-neutral program. *Id.* at 233. Such a program must not fund one particular viewpoint, as in the union and bar association cases, but a wide variety of viewpoints.

<sup>49</sup>*Id.* at 235.

<sup>50</sup>*Southworth II*, 307 F.3d at 566.

discretion is a component of the viewpoint-neutrality requirement.”<sup>51</sup> Nevertheless, it found that the weight such University gave to the length of time that a particular organization had existed on campus and the amount of funding it had received in previous years was problematic, because current decisions would depend in part on viewpoint-discriminatory decisions made in the past and because providing less funding to a new group would potentially discriminate against less traditional viewpoints.<sup>52</sup> Further, the Court noted that the University could not use the popularity of an organization’s views as the sole factor to determine funding.<sup>53</sup> However,

[t]hat does not mean that the University can never consider the number of students involved because some variable expenses will legitimately depend on this factor, such as the amount of money needed for refreshments or programs distributed to attendees. Or, ... the number of students interested in an event may necessitate the renting of a larger space, and in this circumstance it is legitimate to consider the size of the attending audience.... [S]uch criteria are not facially invalid, but improper consideration of the popularity of the speech may justify an as-applied challenge.<sup>[54]</sup>

Therefore, as a general rule, if a college implements an allocation process with objective criteria where decision makers do not possess unbridled discretion to consider a group’s “popularity,” it is less likely to engage in viewpoint discrimination allocation.

#### **IV. Student Organization-Sponsored Performances**

Although there is little case law dealing with student organization sponsored-performances, the cases from other contexts are uniform in requiring – at a minimum – viewpoint neutrality. Under the Fourth Circuit’s reasoning, the reasonableness of the exclusion from a forum will be judged by strict scrutiny rather than a viewpoint-discrimination standard if the group or speaker is deemed an insider and part of the class of speakers for whom the institution’s forum was created.<sup>55</sup> Therefore, if a college only allows access to a forum of student organizations generally, and a student organization is denied access, then that denial will be scrutinized strictly in light of the forum’s purpose.<sup>56</sup> Conversely, a college’s denial of access to a member of the general public only would be reviewed to ensure it was viewpoint

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<sup>51</sup> *Id.* at 579.

<sup>52</sup> *Id.* at 593-94.

<sup>53</sup> *Id.* at 594-95.

<sup>54</sup> *Id.* at 595.

<sup>55</sup> *See Mote*, 423 F.3d at 444.

<sup>56</sup> *Id.* To further complicate matters, the distinction between viewpoint and content discrimination, while theoretically understandable, is difficult to apply. *Rosenberger*, 515 U.S. at 831-32. “[I]t must be acknowledged, the distinction is not a precise one.” *Id.* at 831. Content-based decisions by necessity will require an institution to consider the purpose of its forum as well as those granted access to the forum. For example, the *Rosenberger* Court mentioned, as a contrast to the University of Virginia’s denial of funding for religious activities, that the University prohibited the funding of lobbying activities while not discriminating against the political views of the groups. *Id.* at 825. Prohibiting lobbying, therefore, most likely is a content-based restriction and not viewpoint discriminatory. If an institution carefully crafts a well-defined purpose statement, by clearly identifying who the intended insiders to the forum are, and by considering any prohibitions in light of the speakers and topics already allowed access to the forum, the institution may be able to make content-based distinctions regarding which speech and activities are within the forum’s purpose.

neutral since a member of the general public is not within the class of speakers for whom the forum was created.<sup>57</sup>

Provided an institution's restrictions are related reasonably to the purpose of the forum, the institution may establish other funding requirements that are unrelated to a student organization's views or topics. *Healy* and other Supreme Court cases addressing student organizations mention time, place, and manner restrictions or reasonable regulations.<sup>58</sup> For instance, in *Southworth I* a university employed various restrictions for group funding that appeared to withstand constitutional scrutiny although the specific criteria were not challenged. The criteria for the restrictions required a student group to register with the university and "organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus."<sup>59</sup> The university agreed to reimburse the various groups for certain expenses, such as printing, postage, office supplies, and the like; however, gifts, donations, contributions, and the cost of legal services would not be covered.<sup>60</sup> In *Southworth II*, the Seventh Circuit determined that a university's specific procedures and its appeals process guarded against unbridled discretion and helped ensure viewpoint neutrality.<sup>61</sup> However, the university was cautioned not to allow the size of a group to become a proxy for treating minority views differently.<sup>62</sup>

## V. Mission Statement and Board Policy

Viewpoint neutrality in the funding process is the key to ensuring that an institution treats groups in accordance with the Constitution. Likewise, any disparate treatment between groups would have to be legitimate and reasonable in light of the purpose of the forum created. Consequently, it is important that boards of visitors adopt written policies or mission statements regarding student organizations. This especially is important because the reasonableness of a college's restrictions will be judged by the forum's purpose.<sup>63</sup> Lack of clarity may lead to an inability to prove reasonableness.

Applying these guidelines, a board of visitors should adopt a policy specifically addressing the ability to regulate the appearance of student organization-sponsored performances on campus. Such a policy may provide that the mission of performances is to foster: (1) students' growth and excellence in intellectual and scholastic pursuits; (2) students' cocurricular endeavors; (3) students' governance; and (4) the cultural arts. Additionally, the policy may be crafted to provide that performances must promote social improvement and service through literature, speakers, debates, plays, performances, exhibits, events, and endeavors that likely will enable students to become more informed and effective citizens. To that end, a board of visitors could limit funding of student organizations and their programs and use of the college's facilities to those that further the adopted mission statement. Additional limitations also could

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<sup>57</sup> See *Mote*, 423 F.3d at 444.

<sup>58</sup> See, e.g., *Southworth I*, 529 U.S. at 234; *Widmar*, 454 U.S. at 276-77.

<sup>59</sup> *Southworth I*, 529 U.S. at 223.

<sup>60</sup> *Id.* at 225.

<sup>61</sup> *Southworth II*, 307 F.3d at 595.

<sup>62</sup> *Id.* at 594-95.

<sup>63</sup> See *Cornelius*, 473 U.S. at 806. "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius*, 473 U.S. at 806). For example, the Seventh Circuit said it was unable to evaluate the reasonableness of a university's policy in light of the purposes that the forum served because the purposes were unclear and the Court was unwilling to speculate what officials might have intended. *Walker*, 453 F.3d at 866-67.

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be articulated. For example, a board could prohibit use of the college's facilities or any public monies, including student activity fees, to sponsor plays, motion pictures, exhibits, displays, performances, or other events, the content of which, taken as a whole, is sexually explicit, pervasively vulgar, or which incites or promotes imminent lawlessness.<sup>64</sup> Finally, a board could reserve final determinations regarding application of its policy to the president of the college.

### **Conclusion**

Accordingly, it is my opinion that the board of visitors of a college has the authority to establish a policy applying standards of conduct and reasonable rules and regulations to student organizations. If a college allows student organizations to have access to its facilities, it may deny access to a student group only for viewpoint-neutral reasons. Likewise, in both the collection and dissemination of student activity fees, it is my opinion that a college must be viewpoint neutral. Finally, it is my opinion that a board of visitors may adopt viewpoint-neutral policies regulating student organization-sponsored performances on campus, providing funding for such performances, and limiting use of the institution's facilities to performances that comply with the adopted policies.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

6:310; 6:114; 6:29; 6:42; 1:941/08-019

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<sup>64</sup>For instance, assume the mission of a student organization finance allocation process is to foster student growth and excellence in intellectual and scholastic pursuits, co-curricular endeavors, governance, and the cultural arts. Under those circumstances, a board of visitors could adopt a policy stating that funding through the student organization finance allocation process shall be provided, and the facilities of the college shall be used, only in furtherance of the mission statement. Further, the policy could provide that college facilities or public monies, including student activity fees, will not be used to sponsor performances or events, the content of which, taken as a whole, is sexually explicit, pervasively vulgar, or which incites or promotes imminent lawlessness, and that final determinations regarding application of the policy is reserved to the president of the college.