

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT**

**STUDENTS FOR ONLINE VOTING, et.al.,
Petitioners,**

Case No. 1D08-1358

vs.

Lower Court Case No. 2008-CA-833-W

**Student Government of the Student Body etc. et. al.,
Respondents.**

**APPELLANTS/PETITIONERS' RESPONSE TO UNIVERSITY OF
FLORIDA 'S MOTION TO DISMISS**

The motion to dismiss filed by the University of Florida must be dismissed as devoid of legal merit and is grounded in numerous sham statements and factual inaccuracies.

First, the University of Florida (UF) took final agency action when the Vice President for Student Affairs denied Appellants/Petitioners' (hereinafter Petitioners) petition for relief. As is fully established in Petitioners' Initial Brief, pp. 5-8, the Vice President was authorized by law and the rules of UF to take final agency action on the matter. Because UF's final action constituted a decision to deny relief that Petitioners' were entitled to under UF's governing rules, which

include the constitution of UF student government, on the ground that the Online Vote petition violated the United States Constitution, UF undertook the judicial function of adjudicating the federal constitutionality of Petitioners' petition to amend the student government constitution. Because this is a decision that only an Article V, Florida Constitution court possesses in Florida, UF's action constitutes an unconstitutional usurpation of judicial power that it does not and cannot constitutionally possess.

Because no Florida administrative agency possesses jurisdiction to render constitutional decisions, Petitioners immediately sought relief by filing a writ for peremptory relief in the Circuit Court of the Eight Judicial Circuit of Florida to stop the usurpation. The circuit court ultimately dismissed the petition for writ on the ground that the matter was best reviewed in this Court. The circuit court explicitly stated that it would have transferred the petition to this Court's original jurisdiction but for the fact that Petitioners, as a precaution, had already filed a petition for peremptory writ in the original jurisdiction of this Court, which upon motion this Court stayed pending the decision of the circuit court. After the circuit court dismissed the case, this Court *sua sponte* transformed the petition into an

appeal. Hence, the merits of the plea for prerogative relief is now before the Court as if it were an appeal from the denial of relief in the circuit court. The matter is now fully briefed and ready for a decision on the merits.

UF has provided no coherent basis for its contention that there has been no final agency action, but the tenor of its motion suggests that the issue at hand is of inconsequential legal import. To curry that impression, UF has sought throughout its motion to belittle student government, and indirectly Petitioners, by referring to student government as “mock” government that is organized as a laboratory for learning by UF. UF also refers to student government statutes as “mock” laws and the student government judicial body as a “mock” court. Under the Florida Constitution and laws these are fanciful statements that perhaps describe the pre-World War II functions of student government but not those today. As the source of its fancy, UF refers to *Alabama Student Party v. Student Govt Ass’n of Univ. of Alabama*, 867 F.2d 1344 (11th Cir. 1098). UF entirely ignores that *Alabama* pertained entirely to the law of Alabama (as it was in 1989) and not the current law of Florida. UF also entirely ignores that *Alabama* involved a first amendment claim (thus, being the reason for federal jurisdiction) and not a claim involving the

constitutional structure of government and the courts *in Florida*.

UF suggests that the University of Florida student government was created by UF as an educational program. This is entirely false. UF student government is a part of the constitutional structure of governance of the State of Florida. To govern the state university system of Florida, Article IX §7 Florida Constitution¹

¹Article IX § 7. State University System

a. Purposes. In order to achieve excellence through teaching students, advancing research and providing public service for the benefit of Florida's citizens, their communities and economies, the people hereby establish a system of governance for the state university system of Florida.

b. State University System. There shall be a single state university system comprised of all public universities. A board of trustees shall administer each public university and a board of governors shall govern the state university system.

c. Local Boards of Trustees. Each local constituent university shall be administered by a board of trustees consisting of thirteen members dedicated to the purposes of the state university system.The appointed members shall be confirmed by the senate and serve staggered terms of five years as provided by law. The chair of the faculty senate, or the equivalent, and the president of the student body of the university shall also be members.

d. Statewide Board of Governors. The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be fully responsible for the management of the whole university system.The governor shall appoint to the board fourteen citizens dedicated to the purposes of the state university system. The appointed members shall be confirmed by the senate and serve staggered terms of seven years as provided by law. The commissioner of education, the chair of the advisory council of faculty senates, or the equivalent, and the president of the Florida student association, or the equivalent, shall also be members of the board.

creates a constitutional governing system governed by a board of governors and local governing system governed by a board of trustees. As a part of this constitutional governing structure, the “president of the student body”² of each university shall be a member of the board of trustees. Furthermore, the “president of the Florida student association” shall be a member of the board of governors of the statewide system.³ Thus, student government in a Florida state university, such as UF, has constitutional status *as a part of the government of Florida* and is not a mere educational laboratory subject to the whim of the university.

The legislature has enacted statutes to implement this constitutional structure. One statute makes plain that “University boards of trustees are part of the executive branch of government.”⁴ Hence, the UF’s student government

²Article IX §7c. Florida Constitution.

³Article IX §7d. Florida Constitution.

⁴§1001.71(3) Fla. Stat. University boards of trustees; membership

(1) Pursuant to s. 7(c), Art. IX of the State Constitution, each local constituent university shall be administered by a university board of trustees comprised of 13 members as follows: 6 citizen members appointed by the Governor subject to confirmation by the Senate; 5 citizen members appointed by the Board of Governors subject to confirmation by the Senate; the chair of the faculty senate or the equivalent; and the president of the student body of the university.

(2) Members of the boards of trustees shall receive no compensation but may be reimbursed for travel and per diem expenses as provided in s. 112.061.

president is an official of the executive branch of Florida government. Similarly, the president of the Florida university student government who is seated as a member of the board of governors of the state university system is a “public officer” of the State of Florida.⁵ Hence, one of the governmental functions of UF student government - undergirded by constitutional mandate - is to choose high executive officials of state government. Furthermore, the legislature itself created UF student government in a statute that states: “A student government shall be organized on the main campus of each state university. Each student government is a part of the university at which it is established.”⁶ Thus, UF’s suggestion that UF created the UF student government is legally false. What the legislature has created, UF cannot abolish.

(3) University boards of trustees are a part of the executive branch of state government.

⁵§1001.795 Fla. Stat.

(2) Members of the boards of trustees shall receive no compensation but may be reimbursed for travel and per diem expenses as provided in s. 112.061.

(3) University boards of trustees are a part of the executive branch of state government.

⁶§1004.26(1) Fla. Stat. Note: the statute also permits local boards of trustees to create student governments on branch campuses. UF student government is not a branch campus government but is created by law.

Every statute pertaining to student government concerns itself only with governmental functions, not some “educational laboratory.” Furthermore, every UF document, including 6C1-4.002 FAC⁷, the student government constitution,

⁷ 6C1-4.002. Student Affairs: Student Government Constitution.

(1) Student Government shall be the representative of all students and is encouraged to function on campus with the recognition that ultimate authority for university affairs rests with the Board of Trustees and the Administration of the University.

(2) Every student of the University is a member of the Student Body, and is entitled to vote in accordance with the Constitution of the Student Body of the University. The Student Body Constitution has been promulgated by the students and accepted by the University as expressing the will of the students. Rights, privileges, duties and responsibilities applicable to members of the Student Body and method of government are spelled out in the Constitution. The Constitution is subject to amendment from time to time in accordance with procedures established in the instrument. The current Constitution is available to members of the student body upon request.

(3) The governing organization of the Student Body of the University of Florida is known as the Student Government of the University of Florida. Student Government is recognized as the representative of the Student Body.

(4) Student Government may propose to the president written recommendations covering the allocation of that portion of the University fees designated by law as student activity and service fees;

(5) Student Government may propose to the president written recommendations for student membership on university committees as may be designated for student representation.

(6) Student Government must submit to the president, for approval, all laws passed by the Student Senate and all proposed changes in the Student Body Constitution and By-Laws.

(7) Student Government must submit to the president, for approval all allocations and expenditures from the Student Government portion of the activity and service fee monies.

and the Constitution of the University of Florida, *concerns itself only with governmental functions* as they affect choosing the student member of the UF board of trustees, spending the revenue obtained from student fees, the role of students in the general governance of UF as an institution, student disciplinary matters, and many others that vitally affect the *personal* interests of students apart from their education. In fact, by statute,⁸ before student activity and service fees may be raised, the raise “must be recommended” by a committee at least half of whose members must be appointed by the student body president and cannot be implemented until the UF president has consulted with the student body president and approved by the board of trustees of which the student body president is a member. Hence, student government has a vital role in what it cost students to attend UF and how that money is spent. That is governance of the greatest importance.

Hence, student government at UF and all other Florida state universities is not a mere educational program that exists at the pleasure of the university. Instead, it is a *true government* - with constitutional status and legislative creation.

(8) Upon approval of the president, the Student Government may establish and maintain educational research centers for child development.

⁸§1009.24(10)(a) Fla. Stat.

When UF students elect a student body president, they elect a high official of the executive department of state government. When UF undertakes to restrict Petitioners in their lawful quest pursuant to provisions of law to reform the electoral processes for choosing student body presidents, UF interferes with lawful legal and constitutional rights and inflicts serious injury to Petitioners and the system of constitutional governance in the State of Florida.

Despite the fact that it denied Petitioners' petition to place the Online Vote amendment upon the 2008 spring election for vote, UF argues that its indication of willingness to form a committee to look into Petitioners' concerns means that UF has not taken final agency action. On this logic, any state agency could deny relief required by law on any claim and concomitantly avoid taking final action on the matter (and thereby insulate itself from judicial review) by simply proposing that a committee look into the matter. This, of course, is absurd. The student government election in which Petitioners were lawfully entitled to a place on the ballot has long come and gone. In short, UF took final agency action when it denied Petitioners the relief they were lawfully entitled to: i.e., placing the Online Vote amendment on the ballot for spring 2008.

This conclusion is supported not only by the absurdity of UF’s argument but is also mandated by law. Under §1004.26 Fla. Stat.⁹ UF student government is *created by act of the legislature* and is required by the same act to adopt “internal operating procedures governing ... the operation and administration of student government” §1004.26(3) Fla. Stat. Pursuant to that mandate, UF student government has proposed and the UF student body has adopted the Constitution of

⁹§1004.26. University student governments

(1) A student government is created on the main campus of each state university. In addition, each university board of trustees may establish a student government on any branch campus or center. Each student government is a part of the university at which it is established.

(2) Each student government shall be organized and maintained by students and shall be composed of at least a student body president, a student legislative body, and a student judiciary. The student body president and the student legislative body shall be elected by the student body; however, interim vacancies and the student judiciary may be filled in a manner other than election as prescribed by the internal procedures of the student government.

(3) Each student government shall adopt internal procedures governing:

(a) The operation and administration of the student government.

(b) The execution of all other duties as prescribed to the student government by law.

(4)(a) The qualifications, elections, and returns, the appointments, and the suspension, removal, and discipline of officers of the student government shall be determined by the student government as prescribed by its internal procedures.

(b) Any elected or appointed officer of the student government may be removed from office by the majority vote of students participating in a referendum held under this paragraph. (Remainder omitted).

the Student Body of the University of Florida, which contains a provision¹⁰ for amendment by initiative and referendum. Finally, the UF Board of Trustees has adopted an administrative regulation¹¹ that requires *inter alia*:

(2) *Every student* of the University is a member of the Student Body, and *is entitled to vote in accordance with the Constitution of the Student Body of the University*. The Student Body Constitution has been promulgated by the students and *accepted by the University* as expressing the will of the students. *Rights, privileges, duties and responsibilities applicable to members of the Student Body and method of government are spelled out in*

¹⁰Constitution of the Student Body of the University of Florida:

**ARTICLE VIII
AMENDMENTS**

Section 1. Proposal by the student senate. (Omitted).

Section 2. Proposal by initiative.—Students may propose amendments to the constitution upon a submission of a petition to the student honor court chancellor joined by ten percent of the electorate not later than twenty-eight days before the ratification election. Each amendment proposed shall embrace only one subject and matter directly connected to that subject.

Section 3. Proposal by revision commission.— (OMITTED)

Section 4. Requirement for ratification.—A three-fifths approval vote of those voting in the spring general election is necessary to ratify all constitutional amendments.

ELECTIONS

Section 1. Qualifications to vote.—The Student Body, as defined by Article II Section 1, shall comprise the electorate. Each member of the electorate shall be entitled to vote in Student Body elections.

Section 3. Spring general election.—The first day of the spring general election shall be the last Tuesday in February and the second day shall be the succeeding calendar day.

¹¹6C1-4.002. Student Affairs: Student Government Constitution. See n. 7, *supra*.

the Constitution. The Constitution is subject to amendment from time to time in accordance with procedures established in the instrument. 6C1-4.002(2)FAC. (Italics added.)¹² The Florida Supreme Court “has recognized that rules and regulations of an administrative agency, made under power conferred by statute, have the *force and effect of the statute.*” *Florida Livestock Board v. W.G. Gladden*, 76 So.2d 291, 293 (Fla. 1954). This makes the amending procedures of the Constitution of the Student Body of the University of Florida binding law of the State of Florida.

These documents unequivocally establish that the Constitution of the Student Body of the University of Florida is a part of the law of the State of Florida, that it applies to UF in this case, and that it provides the means of amendment by initiative and referendum. This procedure is similar to the procedure the citizens of Florida have reserved for themselves to amend the Florida Constitution. Article XI §11(3) Florida Constitution.

The facts of the case, as fully developed in Petitioners’ initial brief, establish that Petitioners satisfied all the requirements of law to have the Online Vote amendment placed on the spring 2008 student government election for a vote. The facts also establish that UF denied that right. Even UF would agree that it must

follow the statutory law of the State of Florida that applies to it, as does §1004.26 Fla. Stat. *Crossings At Fleming Island Community Development Dist. v. Echeverri*, 991 So.2d 793 (Fla. 2008) (With limited exceptions that have no application here, an agency cannot challenge the constitutionality of the statutes it administers). More than that, however, a Florida administrative agency, such as UF, is bound by law to follow its own rules and regulations. *Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So.2d 306, 308 (Fla. 1st DCA 1997). In this case, UF was bound to apply the Constitution of the Student Body of the University of Florida and student body statutes, *as written and as adopted by UF*, which meant that UF was bound to place the Online Vote amendment on the ballot. That denial constituted final agency action.

More particularly, the injury UF has inflicted upon Petitioners is the most serious a governmental actor can inflict- the right of access to ballot. The Florida Supreme Court has acknowledged, “The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished.” *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1236 (Fla.2000), vacated on other grounds, *Bush v. Palm Beach County*

¹² Petitioners have supplied the supporting student government statutes in

Canvassing Bd., 531 U.S. 70, 121 S.Ct. 471 (2000). By enactment of the Florida legislature,¹³ the UF student body president and the UF student body *legislative members must be elected by the UF students*. By enactment of the Florida legislature, each state university student body is required to adopt internal regulations to regulate these elections.¹⁴ By the law referred to in the preceding paragraphs, UF denied Petitioners their right to propose amendments to the Student Body Constitution for a vote and concomitantly denied them and all UF students the right to vote on it. UF did this by usurping the powers of an Article V court. This is injury of the highest degree and demands judicial relief.

For all these reasons, UF's motion must be dismissed.

their initial brief.

¹³§1004.26 (2)Fla. Stat. “(2) Each student government shall be organized and maintained by students and shall be composed of at least a student body president, a student legislative body, and a student judiciary. *The student body president and the student legislative body shall be elected by the student body;.....*” (Italics added.)

¹⁴ §1004.26(3) Fla. Stat.

“(3) Each student government shall adopt internal procedures governing:

(a) The operation and administration of the student government.

(b) The execution of all other duties as prescribed to the student government by law.

(4)(a) The qualifications, elections, and returns, the appointments, and the suspension, removal, and discipline of officers of the student government shall be determined by the student government as prescribed by its internal procedures.”

Certificate of Service

I certify that a copy of notice and attachment has been provided by United States Mail to Amy Haas, Office of Vice President and General Counsel, University of Florida, P. O. Box 113125, Gainesville, Fl. 32611, and John A. DeVault, 101 E. Adams Street, Jacksonville, Fl. 322021 on this 8th day of April 2009.

Respectfully submitted,

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