IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONALD DE LA HAYE, *Plaintiff,* v. JOHN C. HITT, in his official capacity as President of the University of Central Florida; DANIEL D. WHITE, in his official capacity as Vice President and Director of Athletics of the University of Central Florida; A. DALE WHITTAKER, in his official capacity as Provost and Vice President for Academic Affairs of the University of Central Florida; MARIBETH EHASZ, in her official capacity as Vice President for Student Development and Enrollment Services of the University of Central Florida; and MARCOS MARCHENA, ROBERT A. GARVY, KEN BRADLEY, CLARENCE H. BROWN III, JOSEPH CONTE, NICK LARKINS, JOHN LORD, ALEX MARTINS, BEVERLY J. SEAY, WILLIAM SELF, JOHN SPROULS, DAVID WALSH, AND WILLIAM YEARGIN, in their official capacities as members of the Board of Trustees of the University of Central Florida, *Defendants.*	§	CIV. ACT. NO. 6:18-cv-135-ORL-22GJK JUDGE GREGORY J. KELLY

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

Introduction

The University of Central Florida ("UCF") put before its football kicker a choice: stop posting videos about college life and sports that are truthful, lawful, and frequently entertaining on your social media accounts or give up your athletic scholarship. Donald attempted to negotiate a resolution that avoided this all-or-nothing outcome because he did not want to give up his ability to speak, but UCF made no exemption. Ultimately, UCF withdrew Donald's athletic scholarship and removed him from the football team. But for this ultimatum, Donald would still be pursuing his college degree and playing on the football team. But without his scholarship, he was unable to pay for his tuition and took leave from UCF.

This lawsuit seeks to remedy UCF's free speech and due process violations in a straightforward fashion. First, it asks the Court to enjoin UCF from enforcing the rule it relied upon to terminate Donald's scholarship. Second, it asks the Court to declare that Donald is eligible to obtain an athletic scholarship even if he continues to make YouTube videos and Instagram posts. In plain terms, this Court should put a stop to UCF's unfounded censorship.

UCF gives five reasons why Donald's complaint should be dismissed (Doc. 43 pp. 2-3). First, UCF contends that this lawsuit violates the Eleventh Amendment because its resolution would purportedly require payment of some State funds. The second point is two sub-points: the NCAA makes the rules, not UCF, so UCF did not enforce an unconstitutional condition, and Donald signed a waiver so he voluntarily agreed to the condition. The last three points are that he is no longer a student so he cannot sue, he never had a property interest in his scholarship, and he cannot re-enroll in college this year so he is entitled to no relief whatsoever.

UCF misconstrues the facts and its analysis misses the mark. Its motion fails to show any absent link between plausible facts and elements to state a cause of action under the First Amendment or the Fourteenth Amendment's Due Process Clause. Accordingly, the Court

should deny UCF's motion to dismiss.

Statement of Facts

Donald De La Haye has been recording, editing, and posting short films and pictures to social media since he was twelve years old. Compl. (Doc. 1) at ¶ 13; Decl. of Donald De La Haye, attached hereto as Ex. A at ¶¶ 7-8. His posts range from popular culture to personal commentary on life as a college student. Compl. ¶¶ 13, 17; Ex. A ¶ 8.

In June 2015, before Donald enrolled at UCF, he created a YouTube account. Compl. ¶ 15. He posted videos about his life, current events, and sports. *Id*. at ¶ 17; Ex. A ¶ 8. As Donald's entertaining and insightful videos grew his YouTube page's popularity, YouTube allowed him to "monetize"—*i.e.*, receive compensation for—peoples' views of his video posts. Compl. ¶¶ 18, 31.

But Donald is more than just media savvy, he is also a gifted athlete and upstanding member of the community. *Id*. at ¶¶ 12, 22-25. Because of these traits, UCF offered him a scholarship to play football for the Knights. *Id*. at ¶ 10. He accepted the offer, matriculated in Fall 2015, and relied on his scholarship as the sole means to finance his education. *Id.* at ¶¶ 10-11.

During Donald's time at UCF, his following on YouTube continued to grow. *Id*. at ¶ 18. Eventually, UCF became aware of Donald's YouTube page and the fact that he earned a small amount of money from his videos. When UCF learned of De La Haye's YouTube page, the school informed Donald that it would rescind his scholarship if he referenced his status as a student-athlete or depicted his skills as a football player on his YouTube page if his page also contained monetized videos of any sort. *Id*. at ¶ 35. The UCF included in its definition of videos that referenced his status as a student athlete a video of De La Haye throwing a football on the beach with his girlfriend. Ex. A at ¶ 16.

As a compromise, De La Haye offered to demonetize his videos that referenced his status as a student-athlete or depicted his skills as a football player. Compl. ¶ 34. UCF rejected this offer, and in July 2017, it removed Donald from the Knights football team and

revoked his scholarship. *Id.* at ¶ 26, 35. UCF was the sole decision maker regarding De La Haye's place on the football team and his receipt of an athletics scholarship; the NCAA, a voluntary, nongovernmental organization, had no authority or control over UCF's actions. *Id*. at ¶¶ 28-29.

Standard of Review

To prevail over a motion to dismiss, a plaintiff need only present sufficient, facially plausible facts to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 566 U.S. at 678. The court accepts a plaintiff's factual allegations as true, *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1534 (11th Cir. 1994), and construes the complaint liberally in the plaintiff's favor, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The action may not be dismissed unless "it appears beyond doubt," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated on other grounds by Twombly*, 550 U.S. 544, that a plaintiff can offer no set of facts supporting the relief requested, *Scheuer, supra; Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993).

Argument

UCF's actions are content- and viewpoint-based restrictions on Donald's speech. UCF restricted his speech because he discussed, disseminated, and published his ideas on popular culture, athleticism, and sports on the same YouTube page where he earned modest revenue—a restriction that does not exist, and would never be tolerated, if applied to any other student in America who receives a scholarship for psychology, English, or engineering, or any other major.

De La Haye has standing to sue, the Eleventh Amendment does not bar his claims, and UCF enforced an unconstitutional condition and ultimately deprived him of his free speech and due process rights.

I. DE LA HAYE HAS STANDING TO CHALLENGE UCF POLICIES THAT DIRECTLY CAUSED HIM HARM AND THAT UCF ALONE CAN REMEDY.

UCF contends that a student, who was promised a scholarship to complete his education, lacks standing to sue after UCF unilaterally revoked his scholarship for unconstitutional reasons. Contrary to UCF's contention, there is nothing "hypothetical" about what occurred here: De La Haye was kicked off the football team. His scholarship was rescinded. He was ordered to vacate student housing with three days' notice. Ex. A, ¶¶ 17, 19; Roster Removal/Transfer Request Form, attached hereto as Ex. B. And all of this happened because he exercised his free speech rights by communicating on social media.

Standing under Article III has three elements: "(1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is … concrete and particularized …; (2) … the injury has to be fairly traceable to the challenged action of the defendant, … and (3) it must be likely … that the injury will be redressed by a favorable decision." *Florida Family Policy Council v. Freeman,* 561 F.3d 1246, 1253 (11th Cir. 2009) (internal citations omitted). This case easily satisfies all three elements.

First, De La Haye suffered an injury in fact when UCF unilaterally rescinded his scholarship because he refused to forfeit his First Amendment rights. It is, of course, axiomatic that free speech rights under the First Amendment are a legally-protected interest. *Association of Data Processing Serv. Orgs.,, Inc. v. Camp,* 397 U.S. 150, 153 (1970) ("The question of standing … concerns … whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or *constitutional guarantee* in question.") (emphasis added); *see also Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). It is also plain that De La Haye had a legally protected property interest in his scholarship award. Defs.' MTD, Ex. B-1; *see Brands v. Sheldon Cmty. Sch*., 671 F. Supp. 627, 631 (N.D. Iowa 1987) ("Once awarded, a college scholarship may give rise to a property interest in its continuation."). De La Haye's

right to free speech and his interest in a scholarship award that was unconstitutionally revoked is a legally protected interest that is concrete and particularized.

Yet, UCF claims that De La Haye lacks standing because he is no longer a student at UCF. Mot. at 16. This is nonsensical. De La Haye did not leave UCF voluntarily; he was deprived of his scholarship and therefore forced out of school by Defendants because he would not surrender his First Amendment rights. The Supreme Court has long recognized that former students have standing to seek relief against schools that expel or otherwise punish them in ways that violate their First Amendment rights. *See Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973) (Action by expelled graduate student for declaratory and injunctive relief where Court held that university violated former student's First Amendment rights and reinstated the student to the school's graduate program.); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

UCF also contends that there is "no allegation that Plaintiff will seek and receive readmission to UCF." Mot. at 17. On the contrary, in his request for relief, De La Haye seeks reinstatement of "his scholarship *eligibility* and *all consequences* flowing therefrom." Compl. at 12 (emphasis added). One obvious consequence of reinstating De La Haye's scholarship is that De La Haye would seek and be readmitted to UCF. The only reason De La Haye left UCF is because he "relied on that scholarship as the sole means to finance his education." Compl. ¶ 11. De La Haye clearly alleges this was an involuntary decision. De La Haye seeks to have his scholarship eligibility reinstated as the necessary predicate to his readmission to UCF. Finally, in responding to UCF's 12(b)(1) Motion, at a 17, De La Haye has specifically asserted that if his scholarship eligibility is restored, he will "immediately seek readmission to UCF." Ex. A ¶ 22.

Second, UCF contends that De La Haye lacks standing because UCF "has no authority to confer an athletics scholarship" on him. Mot. at 19. As discussed below, that is simply not true. UCF, in its own records, admitted that UCF "*has a choice* to allow the SA [student athlete] to keep his aid for the 2017-18 year." Yet, "Athletics *chose to cancel the*

aid because [De La Haye] rendered himself ineligible by not following NCAA rules." Emails attached hereto as Ex. D at DLH 00488.

As support for the UCF's contention that it purportedly "lacks authority" to award a scholarship, UCF again cites to NCAA Rules, Mot. at 19-20, but those rules have no bearing on the constitutional question of whether UCF may deny a scholarship benefit simply because UCF disapproves of the content of a student's off-campus speech. *See Crue v. Aiken*, 370 F.3d 668, 679 (7th Cir. 2004) ("[T]he fact that the NCAA might or might not like the speech cannot ultimately control a First Amendment issue like this.").

UCF also contends that because the 2017-18, school year is nearly completed, De La Haye can no longer seek injunctive and declaratory relief that his First Amendment rights were and continue to be violated. Mot. at 20-21. But the passage of *this* school year is immaterial since a new school year is always just around the corner. *See Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) ("[R]espondent's lack of a contractual or tenure 'right' to re-employment for the 1969—1970 academic year is immaterial to his free speech claim."). De La Haye seeks restoration of his scholarship to continue the education that was promised to him by UCF, and that he would have completed but-for UCF's unconstitutional actions. A favorable decision by this Court, "reinstating his scholarship eligibility and all consequences flowing therefrom" Compl. at 12, would redress De La Haye's injuries by allowing him to return to school for the 2018-19 academic year.

Finally, irrespective of his claim for injunctive relief, De La Haye also seeks a declaratory judgment. *See* Compl. at 11. His claim for declaratory relief would survive even in the absence of an injunction. *See Mayweathers v. Swarthout*, No. 2:09-cv-3284 LKK KJN P., 2011 WL 2746067 at *10 (E.D. Cal. July 14, 2011), No. 2:09-CV-3284-LKK-KJN-P., 2011 WL 3813049 (E.D. Cal. Aug. 26, 2011) (Finding that although Plaintiff's RLUIPA claim for *injunctive relief* was moot, "plaintiff's request for *declaratory relief* is not moot and, on this basis, plaintiff's RLUIPA claim should proceed."); *see also Levin v. Harleston*, 966 F.2d 85, 90 (2nd Cir. 1992) (Ordering declaratory relief even in the absence of injunctive

relief in university professor's § 1983 free speech action).

De La Haye's entire life was upended because UCF promised him an education and then unilaterally broke its promise because he exercised his First Amendment rights. "The relevant question is not whether the plaintiff has a legal right to be free from certain conduct or is legally entitled to the relief sought, but whether the plaintiff has sufficiently alleged a personal stake in the outcome." *Allen v. School Bd. for Santa Rosa Cnty., Fla*., 782 F. Supp. 2d 1304, 1314 (N.D. Fla. 2011), *on reconsideration*, No. 3:10CV142/MCR/CJK, 2011 WL 13112091 (N.D. Fla. May 12, 2011). De La Haye has standing to seek declaratory and injunctive relief.

II. THE ELEVENTH AMENDMENT DOES NOT BAR DE LA HAYE'S ACTION, WHICH SEEKS PROSPECTIVE INJUNCTIVE RELIEF FOR CONSTITUTIONAL INJURY CAUSED BY UCF, PLAINLY FALLING WITHIN THE *EX PARTE YOUNG* EXCEPTION TO SOVEREIGN IMMUNITY.

De La Haye's lawsuit alleges that state actors in their official capacity engaged in constitutional rights violations, it seeks prospective injunctive relief, and therefore falls plainly within the exception to sovereign immunity under *Ex Parte Young*, 209 U.S. 123 (1908).

The Eleventh Circuit holds, "Under the doctrine enunciated in *Ex parte Young*, 209 U.S. 123, however, a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment." *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011) (citation modified, additional citations omitted). Prospective relief aims to directly bring an end to a present violation of federal law by dictating an official's future conduct, *Papasan v. Allain*, 478 U.S. 265, 278 (1986), while retrospective relief (which cannot avail itself of the *Ex parte Young* exception), compensates the plaintiff for a past violation of his legal rights, usually resulting in some type of monetary award. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). In determining whether the *Ex parte Young* exception applies, "a court need only conduct a straightforward inquiry into whether

the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quotations and citation omitted). "[A] prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies [the court's] 'straightforward inquiry.'" *Id*. at 645. "[W]here prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 (1997).

De La Haye requests an injunction and declaration requiring UCF to discontinue its finding that he is ineligible for his scholarship because he exercised his free expression rights under the First Amendment, as well as a declaration that UCF's actions were an impermissible regulation of speech. The reinstatement of his scholarship *eligibility* is merely a necessary consequence of that cessation. In other words, the Complaint seeks injunctive and declaratory relief relating to UCF's eligibility determination rather than any sort of equitable restitution of funds wrongly withheld *in the past.*

The Eleventh Amendment, moreover, does not preclude injunctive relief against a state official even where compliance with the injunction will cost the state money in the future. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 n.27 (1982) ("a prospective decree that has an 'ancillary effect' on the state treasury 'is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.'") (quoting *Edelman*, 415 U.S. at 668); *see also Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (Eleventh Amendment no bar to court order that state defendants pay costs attributable to education components in school desegregation plan, as *Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"). The examples of injunctive relief, which required the systematic overhaul of prisons and schools and sometimes enormous budget outlays, are testament to this unquestioned aspect of our legal system. *See, e.g., Hoffer v.*

Jones, No. 4:17cv214-MW/CAS, 2017 WL 5586878 at *10 (N.D. Fla. Nov. 17, 2017).

Thus, even if De La Haye's claims against officials of UCF require payment of state funds, they are valid under *Ex parte Young* because they seek reinstatement of De La Haye's scholarship eligibility in the future. This is tantamount to the expenditure of funds resulting from the reinstatement of employees wrongfully terminated from public employment, which obviously and uncontroversially involves the state paying salary and benefits to a reinstated employee. As the Eleventh Circuit found in *Lane v. Central Ala. Cmty. Coll.*:

> Lane seeks equitable relief in the form of reinstatement of his employment. We have determined previously that requests for reinstatement constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment. … **That Lane's reinstatement would require the State to pay Lane's salary does not trigger Eleventh Amendment protection**. The Supreme Court has recognized that compliance with the terms of prospective injunctive relief will often necessitate the expenditure of state funds. … And [s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young.* 772 F.3d 1349, 1351 (11th Cir. 2014) (emphasis added) (internal quotation marks omitted) (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

Like *Lane*, the reinstatement of the scholarship eligibility is not properly characterized as a demand for damages to compensate for a past injury, but as an equitable remedy that UCF allow De La Haye to receive scholarship funds—solely in the future—by requiring UCF to find him eligible on an ongoing basis. The mere fact that De La Haye may receive scholarship funds from the State of Florida as a result of his eligibility reinstatement does not preclude this remedy. *See also Hollywood Mobile Estates Ltd. v. Cypress*, 415 Fed. Appx. 207, 209, 211 (11th Cir. 2011) (finding that a request for restoring plaintiff to possession of leased premises owned by a tribal sovereign did not exceed the limits of *Ex parte Young*).

UCF relies heavily on *Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208 (11th Cir. 2000). But the Eleventh Circuit in that case relied on the fact that the objectionable injunctive relief required "the payment of state

funds to redress *prior* inadequate reimbursements." *Id*. at 1220 (emphasis in original). De La Haye, on the other hand, is not seeking any damages or equitable restitution for scholarship money owed in the *past*, or any expenses he incurred because UCF revoked his scholarship eligibility; he only seeks an order that his eligibility be reinstated on an ongoing basis, for future years of eligibility.

UCF contends that the relief sought in this action exceeds that permitted by *Ex parte Young* because it seeks to remedy a discrete past injury; namely, the revocation of De La Haye's scholarship. (MTD at 8-9). But the fact that an injunction also remedies a past harm does not "render[] an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially undermined because the need for prospective relief often arises out of a past injury." *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir. 1990), cert. denied, 498 U.S. 813 (1990) (holding that reinstatement is prospective even though it contemplated "chang[ing] the result of an action … already taken") (internal citations omitted); *Buchwald v. University of N.M. Sch. of Med*., 159 F.3d 487, 495 n.5 (10th Cir. 1998) ("The existence of a past harm does not convert a prospective injunction into retrospective relief barred under the Eleventh Amendment.").

Other courts have also upheld claims for reinstatement to educational institutions, including for the denial of scholarships, under *Ex parte Young.* For example, in *Derezic v. Ohio Dep't of Educ.*, No. 2:14-CV-51, 2014 WL 4206580 (S.D. Ohio Aug. 25, 2014), the court found that the plaintiffs stated a viable claim against state officials for reinstatement of revoked school vouchers, because reinstatement claims "are prospective in nature and appropriate subjects for *Ex parte Young* actions." *Id*. at *8 (internal quotation marks and citation omitted); *see also Carten v. Kent State Univ*., 282 F.3d 391, 395–97 (6th Cir. 2002) (dismissed university student could bring a suit under *Ex parte Young* for reinstatement after he was expelled in violation of the ADA, because "claims for reinstatement state a violation that continues during the period the plaintiff is excluded from the benefits to which he is entitled.").

UCF also repeatedly argues that prospective injunctive (and declaratory) relief is precluded because De La Haye is not presently enrolled at UCF. (MTD at 7, 8, 10). But this is a red herring. The only reason that De La Haye is not attending UCF is because UCF unconstitutionally revoked his ability to pay his tuition by conditioning his access to a benefit on the content of his speech. Of course, UCF requires students to pay money, from whatever source, before being able to partake of its services. De La Haye will reenroll at UCF once he is eligible for scholarship. Exhibit A, ¶ 22. For UCF to now act as a bemused bystander in circumstances that UCF itself created is a remarkable example of what many courts have characterized as "chutzpah." *Cf. Williams v. State*, 190 S.E.2d 785, 785 n. 1 (Ga. App. 1972) (noting that "[t]he classic definition of 'chutzpah' is that quality enshrined in a man, who having killed his mother and father, throws himself upon the mercy of the court because he is an orphan."); *see also Yates v. City of New York*, No. 04 Civ. 9928(SHS), 2006 WL 2239430 *1 (S.D.N.Y. Aug. 4, 2006).

Moreover, courts have repeatedly permitted plaintiffs not presently attending educational institutions to seek prospective relief against officials of those institutions. *See, e.g., Carten*, 282 F.3d at 393 (plaintiff graduate student dismissed for poor performance permitted to seek prospective injunctive relief for failure to accommodate learning disability); *Flint v. Dennison*, 488 F.3d 816, 823-24 (9th Cir. 2007) (rejecting argument that student's graduation from university "render[ed] his cause of action seeking declaratory and injunctive relief against defendants moot."); *Shepard v. Irving*, 77 Fed. Appx. 615, 617, 620 (4th Cir. 2003) (rejecting argument that plaintiff, who had already graduated from university, could not seek relief under *Ex parte Young* for failing grade and plagiarism conviction, because they would constitute "continuing injury to the plaintiff"). Moreover, injuries to former students can persist because of the actions of university officials. *See Flint*, 488 F.3d at 824 (describing how university actions "may jeopardize the student's future employment or college career"); *Shepard*, 77 Fed. Appx. at 617 ("The plaintiff had a job lined up contingent upon her graduation. Because of the 'F,' the plaintiff did not graduate on time,

and she lost the job she had lined up.").

The ongoing injury in this case is plain: the continued denial of his scholarship eligibility prevents De La Haye from pursuing a college education that UCF promised him. As a result, prospective injunctive relief and a declaratory judgement that UCF acted unconstitutionally in this case are appropriate. UCF's arguments against the claim for declaratory relief, (MTD at 9-11), being wholly parasitic on its critique of De La Haye's claim for injunctive relief, similarly collapse.

III. UCF'S ACTIONS ARE CONTENT- AND VIEWPOINT-BASED REGULATIONS OF DE LA HAYE'S SPEECH, AND DE LA HAYE DID NOT WAIVE HIS FIRST AMENDMENT PROTECTIONS BY PLAYING FOOTBALL OR ACCEPTING A COLLEGE SCHOLARSHIP.

Like nearly every college student in America, and most students at UCF, De La Haye communicated with friends and followers on his social media platforms about his life as a student. His speech is both truthful and about lawful activity. UCF's decision to prohibit that speech because Mr. De La Haye does what all social media users do—use his own name and image—is a plain content-based regulation that cannot survive strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227–29 (2015) (any speech restriction triggered by the content of the communication is a content-based restriction subject to strict scrutiny).

At the same time, the government cannot take adverse action against a person because the government disapproves of his speech or deny a government benefit—such as a college scholarship—on that basis. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist*., 570 U. S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right") (internal quotation marks and citation omitted); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–549 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832–834 (1995); *Perry*, 408 U.S. at 597-98. UCF's decision to remove De La Haye from the football team and rescind his scholarship—aid on which he solely relied to attend college—in response to his constitutionally protected speech did exactly this.

A. UCF's actions are content-based restrictions on De La Haye's speech which exceed the scope of NCAA's rules.

Irrespective of the NCAA's rules or their application by UCF to De La Haye in this case, De La Haye has alleged content-based discrimination that is subject to strict scrutiny.[1] UCF's actions against De La Haye are content-based because they discriminate against the topics discussed and messages expressed on his social media platforms. A policy is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. As the Supreme Court has repeatedly held, "[T]he First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). Content-based restrictions on speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226.

De La Haye alleges that UCF discriminated against him *because of* what he said—namely, because he spoke about being a college football player. Compl. ¶ 45. In its Motion to Dismiss, UCF asserts that De La Haye's claims are based on "the NCAA's amateurism requirements," Mot. at 3, and that De La Haye "does not allege that the NCAA or UCF misapplied the NCAA Rules, but instead sues Defendants for enforcing them." Mot. at 13. But that is incorrect. While it is true that, as a government entity, UCF cannot enforce an unconstitutional rule of a private organization, *see, e.g., Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001), UCF's actions in this case actually go beyond what NCAA rules require and directly regulate the content of De La Haye's speech *irrespective* of those NCAA rules.

After UCF gave De La Haye the Hobson's choice between taking his videos off the

[1] UCF's *application* of the NCAA rules against De La Haye, and others, are also viewpoint-based, and thus presumptively unconstitutional, because they apply to only one set of speakers— student athletes and no others. *See Rosenberger.*, 515 U.S. at 829 (public universities cannot deny funds to student newspaper that expresses Christian viewpoints).

Internet or changing their content entirely—or be deprived of his scholarship, and thus his educational opportunities—De La Haye sought a waiver from UCF. As part of that request, he offered to "demonetize" any videos on his YouTube page that "referenced his status as a student-athlete or depicted his skills as a football player." Compl. ¶ 34. UCF denied this request. *Id.* at ¶ 35. In other words, UCF prohibited De La Haye from posting any videos to his social media page that referenced his status as an athlete or demonstrated his skill as an athlete—*whether or not he received compensation for them*. UCF even forbade De La Haye from posting a video of himself at the beach, tossing a football back and forth with his girlfriend. *Id.* at ¶ 36.

De La Haye was a student and a student-athlete. Prohibiting him from discussing that fact, or from posting videos on his own social media platforms in which he used his athletics skills, even if he did not receive compensation for those posts, is a content-based restriction of his speech. Such restrictions are therefore presumptively unconstitutional unless they are narrowly tailored to achieve a compelling government interest. *Reed*, 135 S. Ct. at 2227. UCF has made no attempt to show, in its Motion to Dismiss, how that restriction survives strict scrutiny. Of course, that is a merits question, not properly addressed at the motion to dismiss stage—*see, e.g.*, *Crafted Keg, LLC v. Secretary of the Fla. Dep't of Bus. & Prof'l Regulation*, No. 2:14-CV-14430, 2015 WL 11254293 at *2 (S.D. Fla. Jan. 15, 2015)—but it shows that the motion must be denied.

B. UCF cannot demand that De La Haye forfeit his First Amendment rights as a condition of receiving student aid.

Even assuming UCF did not exceed the scope of NCAA rules, UCF cannot *condition* the provision of an athletics scholarship on a college athlete, like De La Haye, giving up his constitutional right to free speech in purported compliance with those rules. That is an unconstitutional condition. "[U]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government where the benefit sought

has little or no relationship to [the right]." *Lebron v. Secretary, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1217 (11th Cir. 2013) (citation omitted); *see also Perry*, 408 U.S. at 597-98 ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

The unconstitutional conditions doctrine is predicated on the idea that "[w]hat the state may not do directly it may not do indirectly." *Lebron*, 710 F.3d at 1217 (citation omitted); *See also Adams v. James*, 784 F.2d 1077, 1080 (11th Cir. 1986) ("The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe."). If the government is prohibited from *directly* limiting the exercise of free speech rights, it cannot *indirectly* limit that same right by offering a benefit subject to the condition that a recipient waive the right. *Legal Servs. Corp.*, 531 U.S. at 540–49.

It seems plain that UCF cannot prohibit its students from posting videos to their social media pages, whether they receive compensation for the videos or not, absent some showing that the videos would disrupt the work or discipline of the school. *See, e.g., Boim v. Fulton Cnty. Sch. Dist.* 494 F.3d 978, 985 (11th Cir. 2007). In this case, Plaintiff has alleged that his videos were perfectly harmless—and they obviously were. De La Haye's videos were truthful speech about lawful activity that were neither inappropriate nor offensive. Compl. ¶ 17. They did not disrupt UCF activities, bring disfavor to its reputation, disrupt the learning environment, or interfere with either his academic life or the academic pursuits of any other student. *Id.* at ¶ 22–23. On the contrary, his social media postings cast student life at the university in a positive, energetic light—something that should be encouraged by an institution dedicated to the personal, academic, and professional development of students, rather than prohibited.

Because UCF could not regulate this speech directly, it cannot do so "indirectly by conditioning the receipt of this government benefit on the applicant's forced waiver" of his constitutional rights. *Lebron*, 710 F.3d at 1217. The nexus between University work or

discipline and the prohibition on speech is simply too attenuated—if any nexus exists at all. As a result, UCF's demand that De La Haye stop communicating on social media or risk losing his scholarship is an unconstitutional condition.

C. UCF cannot avoid liability for its own constitutional violations because it promulgates and enforces its own rules.

Even assuming the rules of a private intercollegiate organization override the First Amendment, as Defendants appear to assume, UCF cannot avoid liability for decisions that UCF, and UCF alone, made.

In its motion, UCF contends that, "Plaintiff's claim for reinstatement of his athletic scholarship depends on UCF's membership in the NCAA … ." Mot. at 15. That contention is the opposite of both De La Haye's allegations (Compl., ¶¶ 28, 32, 44, 46-47) and UCF's own records. Specifically, in an e-mail from Alicia Keaton, the Director of Student Financial Assistance at UCF, to Nicole Harvey, the Senior Associate Athletic Director for Compliance, Ms. Keaton asked whether De La Haye should be appealing the decision to withdraw his scholarship to the NCAA or to UCF. Ms. Harvey responded, "The awarding agency [UCF] *has a choice* to allow the SA [student athlete] to keep his aid", but that UCF's Athletics department "*chose to cancel the aid* because [De La Haye] rendered himself ineligible by not following NCAA rules." Ex. D at DLH 00488 (emphasis added). Thus, it is indisputable whose choice it was to rescind De La Haye's scholarship: it was UCF, not the NCAA. And there is no question who made that choice: it was UCF, not the NCAA. See *NCAA v. Tarkanian*, 488 U.S. 179, 194–95 (1988) ("[W]e [have] established that the State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action, [even though] [t]hose rules had been adopted *in toto* from the [private] American Bar Association ….") (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 n.12 (1977)).

What's more, Ms. Harvey went on to explain that if UCF were to choose to let De La Haye keep his scholarship, the amount of that scholarship would "count against" the football team's financial aid limit (a cap on student aid set by the NCAA). Ex. D at DLH 00488.

That, she wrote, would "cause a recruiting and competitive disadvantage for UCF." *Id.* In other words, the UCF alone chose to punish De La Haye for exercising his First Amendment rights, and it did so based on its own *financial* considerations—so that it would not suffer what it considered a competitive disadvantage in its football program. Thus, UCF's contention that De La Haye "[r]ender[ed] … himself … ineligible" is false. Mot. at 13. UCF's own records make it clear that *UCF* rendered De La Haye ineligible, and *UCF* made the decision to rescind his scholarship.

UCF's reliance on *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320 (11th Cir. 2008), is also misplaced. Mot. at 14. In fact, *Johnston* supports De La Haye's position. Setting aside the obvious fact that a private organization cannot dictate to a state university what its constitutional obligations are,[2] the relationship between the Sports Authority and the NFL is diametrically different from the relationship between UCF and the NCAA. Membership organizations (*i.e.*, universities) control the NCAA and its rules, not the other way around.

Although the NCAA is a private organization, it is composed of colleges and universities like UCF. And those colleges and universities develop the NCAA's rules. "The rules governing NCAA sports are developed through a member-led governance system. Using this system, NCAA members introduce and vote on proposed legislation. The national office provides administrative help, continuity, research and legal expertise." *See* http://www.ncaa.org/about/frequently-asked-questions-about-ncaa. As UCF makes clear in its own submission, universities are directly responsible for and directly involved in the process of creating NCAA rules, amending NCAA rules, and enforcing NCAA rules. *See* MTD, Exhibit C.

Specifically, NCAA rule-making starts with schools and athletic conferences.[3] The

[2] The government may not negotiate a contract whereby it agrees to do what it has no constitutional authority to do. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2100–01 (2014).

[3] *See, e.g.*, NCAA Rule 5.2.1 ("Constitution. The *membership* may adopt legislation to be included in the constitution of the Association, which sets forth basic purposes, fundamental policies and general principles that generally serve as the basis on which the legislation of the

universities likewise propose amendments to NCAA rules.[4] Indeed, there is an entire section of the NCAA Constitution titled "Institutional Control." NCAA Rule, art. 6. The general principle set out there is plain and unambiguous as to who *controls* and has *responsibility for* intercollegiate athletics. NCAA Rule 6.01.1 ("The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member."). What's more, Defendant Hitt, as President of UCF, is specifically identified as the party with the "ultimate responsibility and final authority for the conduct of the intercollegiate athletics program …" NCAA Rule 6.1.1.

This is the opposite of the situation in *Johnston*. In *Johnson*, the court upheld a pat-down policy at NFL football games at a stadium operated by the Tampa Sports Authority because the court found that the Sports Authority "had no role in formulating or mandating the pat-down policy." 530 F.3d. at 1329. But in this case, UCF plays a *major* role in both formulating and mandating NCAA rules and policies. Unlike *Johnston*, a third-party organization did not unilaterally impose the unconstitutional condition on De La Haye—UCF itself did. What's more, as expressly admitted by UCF, UCF alone made the decision to revoke De La Haye's scholarship, unless he surrendered his constitutional rights—and it did so based on its own financial self-interest. As a result, "the entity imposing the condition was the government itself." *Id.* And, unlike in *Johnston*, De La Haye was "forced by the government to choose between assertion of his constitutional rights and obtaining a benefit to which he was entitled." *Id. Johnston* shows that UCF is responsible for violating Donald's First Amendment rights, not the other way around.

Association shall be derived and which includes information relevant to the purposes of the Association" (emphasis added); NCAA Rule 5.2.2 "Operating Bylaws. Each *division* may adopt legislation to be included in the operating bylaws of the Association, which provide rules and regulations not inconsistent with the provisions of the constitution … " (emphasis added)).

[4] *See* NCAA Rule 5.3.2.1.6.1 ("Membership Review. All Division I members may provide comments related to proposed amendments …").

IV. DE LA HAYE HAS PROPERLY ALLEGED A VIOLATION OF HIS SUBSTANTIVE DUE PROCESS RIGHTS BECAUSE UCF ARBITRARILY AND CAPRICIOUSLY RESCINDED HIS SCHOLARSHIP FOR REASONS UNRELEATED TO HIS ATHLETIC OR ACADEMIC PERFORMANCE.

De La Haye has alleged a violation of his substantive due process rights because UCF arbitrarily rescinded his scholarship for speaking about his life on social media, rather than for any reason related to the work or discipline of the school. Compl., ¶¶ 17, 22-23; Ex. A, ¶¶ 11-13.

UCF contends that De La Haye "lacks a protected interest in his scholarship," claiming that the Eleventh Circuit "has denied constitutional protection to rights similar to the one Plaintiff asserts." Mot. at 22. Yet the Eleventh Circuit has expressly recognized continued enrollment in a state school as a property interest protected by the Fourteenth Amendment. "[N]o tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment." *Barnes v. Zaccari*, 669 F.3d 1295, 1305 (11th Cir. 2012). The Supreme Court has similarly "assume[d] the existence of a constitutionally protectable property right" in continued enrollment in a state university. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985). This protected right is "derive[d] from [the] implied contract right to continued enrollment free from arbitrary dismissal." *Id.* Thus, a public university cannot deny a student the ability to continue an education if that denial is arbitrary and capricious.

In this case, UCF's actions prevented De La Haye from continuing his enrollment and course of study at UCF for reasons entirely unrelated to academic work or discipline. *See Boim*, 494 F.3d. at 985. Throughout the process that led to the rescission of De La Haye's scholarship, UCF never alleged, and certainly never proved, that De La Hayes's social media videos were disruptive to UCF or student life. In fact, *coaches actively encouraged De La Haye to make the videos, and coaches and other athletics staff participated in them*. Compl. ¶¶ 20-21; Ex. A ¶¶ 12-13.

The arbitrary nature of UCF's actions is further evidenced by De La Haye's compliance with the express terms of his agreement with UCF. In UCF's "Student-Athlete Code of Conduct," the section pertaining to "On-Line Postings & Responsibilities" prohibits students from "having pictures or statements that could be deemed inappropriate," including "[v]isible/identifiable alcohol and other drugs …; explicit photographs; vulgar/obscene language; comments that ridicule; [et cetera]." Defs' MTD, Ex. B-3, Page ID 168. None of De La Haye's posts had any of this material. De La Haye complied with the criminal activity prohibitions, *id.* at 169, the academic policies and procedures, *id.* at 170, the academic dishonesty policy, *id.* at 171, and the class attendance policy, *id.* at 171, of his athletics agreement. He also complied with the agreement's positive command to "be a positive role model[] within the academic, athletics and overall community." *Id.* at 169.[5] De La Haye's YouTube videos were part of his positive contributions to both UCF and the broader community. Compl., ¶ 18. Yet, his scholarship was rescinded and he was removed from student housing because he posted videos to YouTube that UCF did not like. That is arbitrary, capricious, and was properly pled as a substantive due process violation.

Request for Oral Argument

Pursuant to Local Rule 3.01(j), De La Haye believes the Court will be aided by and respectfully requests oral argument. Plaintiff estimates the required time for argument is 30 minutes for each side.

Conclusion

Based on the foregoing, Plaintiff respectfully requests that Defendant UCF's Motion to Dismiss be DENIED.

[5] Ironically, while prohibiting De La Haye from using his own name and likeness on social media platforms, UCF mandated that De La Haye "authorize the University … to use your name, picture, or likeness … including to promote NCAA and conference championships, or other events, activities, or programs." *Id.* at 172.

Respectfully Submitted,

/s/ Brian Hoops
BRIAN HOOPS
ROETZEL & ANDRESS, LPA
2320 First St., Suite 1000
Ft. Myers, FL 33901
(239) 338-4252
(239) 337-0970 (fax)
bhoops@ralaw.com

/s/ Matthew R. Miller
JONATHAN RICHES (*pro hac vice)*
MATTHEW R. MILLER (*pro hac vice*
Trial Counsel
Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
(602) 256-7045 (fax)

litigation@goldwaterinstitute.org

/s/ Robert Henneke
ROBERT HENNEKE (*pro hac vice)*
Texas Bar No. 24046058
RYAN D. WALTERS (*pro hac vice)*
Texas Bar No. 24105085
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, TX 78701
(512) 472-2700
(512) 472-2728 (fax)
rhenneke@texaspolicy.com
rwalters@texaspolicy.com

Attorneys for Plaintiff
Donald De La Haye

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2018, I electronically filed and served this document with the Clerk of the Court and on the parties listed below by using the CM/ECF system.

Richard E. Mitchell, Esq.
Andy Bardos, Esq.
GRAYROBINSON, P.A.
301 E. Pine St., Ste. 1400
Orlando, FL 32801
Rick.mitchell@gray-robinson.com
Andy.bardos@gray-robinson.com
Maryann.Hamby@gray-robinson.com

Counsel for Defendants

Respectfully submitted,

/s/ *Jonathan Riches*
Jonathan Riches