FIRE
Foundation for Individual Rights in Education

May 17, 2021

Jonathan Holloway
Office of the President
Rutgers, The State University of New Jersey
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Sent via U.S Mail and Electronic Mail (*president@rutgers.edu*)

Dear President Holloway:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by a recent amendment to the constitution of the Student Bar Association (SBA) of Rutgers Law School, Camden Campus, requiring student groups to hold events addressing "topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency" in order to request more than $250 in student activity fee funding. This condition on the distribution of student activity fees violates Rutgers' First Amendment obligation to distribute such funds in a viewpoint-neutral manner and must be rescinded.

I. The Camden Campus SBA Requires Student Groups to Host Ideological Events to Request Greater Funding

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

The Student Bar Association is the representative student government body at Rutgers Law School.[1] It is also the umbrella organization for all law student groups and is responsible for

[1] Rutgers Law School, *Student Bar Association (SBA)* (last accessed Apr. 22, 2021), http://catalogs.rutgers.edu/generated/nwk-law_0406/pg5647.html; Rutgers Law School (Camden) Student Bar Ass'n, *Constitution* (rev. Nov. 20, 2021) (on file with author) ("SBA Constitution").

allocating the student activity fee funds collected by Rutgers to student organizations within the law school.[2]

On November 20, 2020, the Camden Campus SBA voted to amend its constitution by adding a section titled "Student Organizations Fostering Diversity and Inclusion." That section provides that if an organization "requests or receives $250 or more in total allocations," they are required to "plan at least one (1) event that addresses their chosen topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency."[3]

II. The First Amendment Bars Rutgers From Requiring Students Groups to Host Ideological Events to Request Greater Levels of Student Activity Fee Funding

Rutgers may not condition student organizations' funding on their willingness to host events that address or promote a specific ideology, as the First Amendment requires that public universities distribute student activity fee funds in a viewpoint-neutral manner.

A. The First Amendment Requires the Viewpoint-Neutral Distribution of Student Activity Fees at Rutgers.

It has long been settled law that the First Amendment is binding on public universities like Rutgers.[4] Accordingly, the decisions and actions of a public university and its student government—including the recognition and funding of student organizations—must be consistent with the First Amendment.[5]

Rutgers' authority to impose mandatory student fees—whether it does so through a student government or otherwise—carries with it the burden to ensure that any distribution of these funds to student groups is done in a viewpoint-neutral manner.[6]

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[2] *Student Bar Association (SBA)*; *supra* note 1; *SBA Constitution*, *supra* note 1.

[3] SBA Constitution, *supra* note 1.

[4] *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (internal citation omitted).

[5] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000); *Koala v. Khosla*, 931 F.3d 887, 894 n.1 (9th Cir. 2019) (assuming action by student government regarding student newspaper funding was state action because it was an "exercise of authorities concerning student affairs by delegations" of power from the university); *Ala. Student Party v. Student Gov't Ass'n of Univ. of Ala.*, 867 F.2d 1344, 1349 (11th Cir. 1989) (finding that the University of Alabama student government is a state actor when analyzing First Amendment challenge to student government campaign finance regulations*); Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 365-66 (8th Cir. 1988) (holding that state university student government was a state actor for purposes of allocating funding to student groups); *Denton v. Thrasher*, No. 4:20-cv-425-AW-MAF, at 9* (N. D. Fla. Oct. 8, 2020) (holding that the Florida State University student government is a state actor bound by the First Amendment).

[6] *Southworth*, 529 U.S. at 233 ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others."); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to

In *Rosenberger*, the United States Supreme Court established that a public university may not impose content- or viewpoint-based restrictions on the distribution of student activity fee funds to its student groups.[7] In reversing a university's refusal to fund a student newspaper because it "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality," the Court affirmed that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression."[8] The Court further explained that "the government may not regulate speech based on its substantive content or the message it conveys" or "favor one speaker over another," and that public universities must maintain the "requirement of viewpoint neutrality" in distributing funds collected via their student activity fees.[9]

Likewise, in *Southworth*, the Court acknowledged that a university bound by the First Amendment may "charge its students an activity fee used to fund a program to facilitate extracurricular student speech," but only if that "program is viewpoint neutral."[10] The Court explained how "viewpoint neutrality" must serve as "the operational principle" for any constitutional system of student activity fee allocation at public universities.[11]

The Rutgers SBA, the vehicle through which student groups within the law school request and receive funding from student activity fees, has conditioned funding requests exceeding $250 on groups "plan[ning] at least one (1) event that addresses their chosen topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency." Like the ban on funding a student group because it "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality" struck down in *Rosenberger*, the SBA's policy similarly uses ideological criteria to limit funding for student groups. As explained in *Rosenberger* and *Southworth,* this viewpoint-discriminatory condition is antithetical to the First Amendment's requirement of viewpoint neutrality when public universities distribute student activity fees to their student groups.

The First Amendment deficiencies of this requirement are not alleviated by the SBA's allowance that groups may choose their own "topics" for discussion through this lens. The viewpoint-discriminatory nature arises from the "lens" itself because the requirement cannot be satisfied by events *critical* of the perspective offered by, for example, Critical Race Theory. Moreover, there are no objective criteria against which student organizations—or, more importantly, the SBA—can evaluate a discussion in order to determine whether it sufficiently adopts the "lens" of "diversity and inclusion, or cultural competency." The SBA may not condition student group funding on such a requirement.

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cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

[7] 515 U.S. at 828–29.

[8] *Id.*

[9] *Id. at* 819, 828–29.

[10] 529 U.S. at 218.

[11] *Id.* at 233–34.

B. The SBA's Requirement Violates the First Amendment Prohibition Against Compelled Speech.

The SBA's mandate puts student organizations in the unenviable position of deciding either to falsely affirm their belief in an ideological proposition with which they disagree or on which they simply prefer to remain silent, or to forgo accessing university resources. This amounts to compelled speech in violation of the First Amendment.

As the Supreme Court has noted, the "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[12] Expressive rights are therefore violated when an institution compels a student "to declare a belief [and] . . . to utter what is not in his mind."[13] Doing so "would strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[14] The Court has explained that:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[15]

Student groups like the Federalist Society, which may seek to host only events featuring topics outside the lens chosen by the SBA, are forced to choose between their institutional beliefs and university funding. The imposition of this choice amounts to compelled speech. It requires groups to declare certain political beliefs—beliefs that may run afoul of their institutional mission—in order to access greater university funding for their activities. While the SBA can exhort groups to host such events, it may not shut off funds to those who refuse to do so.

III. Rutgers Must Rescind Its Requirement That Student Groups Plan Ideological Events to Request Greater SBA Funding

The SBA can doubtlessly encourage students to hold such discussions, and there is no constitutional bar that would prevent it from planning its own events concerning "topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency." Indeed, the First Amendment protects their right to do so. However, conditioning funding on hosting events that promote a particular ideology violates Rutgers' legal obligations as a public institution bound by the First Amendment.

FIRE calls on Rutgers to rescind this unconstitutional condition on student group funding and commit to distributing its student activity fee in a viewpoint-neutral matter.

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[12] *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

[13] *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 634 (1943).

[14] *Id.* at 637.

[15] *Id.* at 642.

We request receipt of a response to this letter no later than the close of business on May 28, 2021.

Sincerely,

Zachary Greenberg
Senior Program Officer, Individual Rights Defense Program

Cc: Kimberly Mutcherson, Rutgers Law School, Co-Dean and Professor of Law
John J. Hoffman, Senior Vice President and General Counsel