FIRE
Foundation for Individual Rights in Education

May 4, 2018

Adriana Wilding
University of Rhode Island Student Senate
Memorial Union, Room 201
50 Lower College Road
Kingston, Rhode Island 02881

Sent via U.S. Mail and Electronic Mail (president@rhodysenate.org)

Dear President Wilding:

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.

We are writing today to bring to your attention to several University of Rhode Island (URI) Student Senate policies that impermissibly interfere with the expressive rights of political and religious student organizations. These policies were brought to our attention by a coalition of URI student organizations, including URI's chapter of BridgeUSA (Bridge URI), ACLU URI, URI Students for Sensible Drug Policy (SSDP URI), the URI College Democrats, and the URI College Republicans.

The following is our understanding of the facts. Please inform us if you believe we are in error.

I. Background

A. The Senate's policies

The Senate is "the official representative voice of the on & off campus undergraduate student body of the University of Rhode Island."[1] The Senate has "the power to grant status as a recognized organization and to administer and expend the Student Activities Tax."[2] In addition to being empowered to recognize student organizations at URI, the Senate has the power to "lay, collect, administer, and allocate taxes upon the undergraduate students of

[1] *About Us URI Student Senate*, UNIV. OF R.I., https://web.uri.edu/studentsenate/about-us (last visited Apr. 30, 2018).
[2] UNIV. OF R.I., BYLAWS, Art. II § D, https://web.uri.edu/studentsenate/files/Bylaws-4-16-18-w-table-of-contents.pdf (last visited Apr. 30, 2018).

the university."[3] While the Senate is entitled to administer the Student Activities Tax, it may not modify the amount of the tax without the consent of the Rhode Island Board of Governors for Higher Education.[4]

Pursuant to the Bylaws, recognized organizations are granted either funded or unfunded status.[5] The Senate will fund those organizations that "serve the University of Rhode Island Undergraduate Student community in a unique and/or valuable way."[6] However, organizations that have "a mission that is religious in nature, or jeopardize[s] Senate's nonprofit status 501(c)(3)" are not eligible for funding and are granted unfunded status.[7]

The Senate's Finance Handbook further states: "No Student Activity Tax money may go towards campaigning or supporting a particular political candidate."[8] The Senate justifies this prohibition by citing a concern that funding campaigning or the support of a candidate would "endanger [the Senate's] status as a nontaxable nonprofit organization."[9]

B. The Senate's history of funding organizations

The Senate interprets the provisions in the Bylaws and Finance Handbook strictly, at times, but inconsistently. For example, it funds some but not other religious organizations. It refuses to fund any organization that it considers political, not just organizations that support particular candidates or parties. None of the distinctions the Senate draws stand up to legal scrutiny.

The Senate's treatment of religious organizations is beset with arbitrary decision-making and viewpoint discrimination. For example, at the start of 2016, the Muslim Student Association (MSA) was considered a religious organization. Senate minutes reflect the following exchange:

> McIsaac: Why is Hillel funded?
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> King: they consider themselves cultural this year and not religious any longer
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> [. . .]
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> Anderson: Muslim Student Association?

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[3] *Id.* at Art. IX § B(1).
[4] *Id.* at Art. IX § B(1).
[5] *Id.* at Art. IX § A(4)(a)–(b).
[6] *Id.* at Art. IX § A(4)(b).
[7] *Id.* at Art. IX § A(4)(a). *Accord Id.* at Art. IX § B(3).
[8] UNIV. OF R.I., STUDENT SENATE FINANCE HANDBOOK 11, (2017), https://web.uri.edu/studentsenate/files/Final-Finance-Handbook.pdf (last visited Apr 30, 2018).
[9] *Id.* at 12.

> King: **reads mission statement.* They identify themselves as religious.[10]

MSA then changed its mission statement so that it would be classified as a cultural organization, making it eligible for funding.[11] As a result, MSA was granted $3,575 in funding for the 2017–2018 academic year.[12] $1,500 of this amount was dedicated to an Eid banquet featuring a chaplain as a speaker.[13] In other words, the Senate appears to have funded an ostensibly religious activity. Every other identifiably religious organization was unfunded this academic year and will remain unfunded next academic year.[14]

Decisions regarding political organizations are equally arbitrary. For example, SSDP URI lost its funding in 2016 on the ground that it is a political organization with ties to a national organization:

> This year, we are recommending that they are unfunded due to their political agenda and ties to their national organization. They have some great programs. We said that if they disassociated with their National Organization we could fund them, but the group has been adamant in not doing so. Legally, we simply cannot fund them.[15]

At a recent Senate meeting, senators debated whether the ACLU URI could be funded. Some senators expressed the view that ACLU URI was a political group and supports political parties or candidates. Although Sam Foer, president of ACLU URI, stated during the meeting that the organization would not support a political party or candidate, members of the Senate continued to debate whether the ACLU URI was disqualified from receiving funding because of the group's ties to the national ACLU and the potential for some funding to be used for lobbying or protests. As a result of the controversy and confusion, the funding decision was tabled. While ACLU URI was subsequently recognized as a funded organization, the incident highlights that even the Senate is confused about the meaning of its own Bylaws.

Meanwhile, the Senate continues to fund several organizations that have political agendas and ties to national organizations. For example, the Sexuality and Gender Alliance is a funded organization even though its mission statement calls for it to "spread acceptance and awareness."[16] The NAACP is a funded organization even though its mission statement calls for

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[10] UNIV. OF R.I., URI STUDENT SENATE MINUTES (Nov. 16, 2016), https://web.uri.edu/studentsenate/files/General-Student-Senate-Minutes-11.16.16.pdf (last visited Apr. 30, 2018).

[11] *SOARC 11-28-16*, UNIV. OF R.I., https://web.uri.edu/studentsenate/soarc-11-28-16 (last visited Apr. 30, 2018); UNIV. OF R.I., URI STUDENT SENATE AGENDA (Nov. 30, 2016) https://web.uri.edu/studentsenate/files/General-Student-Senate-Minutes-11.30.16.pdf (last visited Apr. 30, 2018).

[12], UNIV. OF R.I., 2017–18 STUDENT SENATE BUDGET (last visited May 4, 2018), https://web.uri.edu/studentsenate/files/2017-2018-Budget.pdf

[13] *7th Annual Eid Banquet*, UNIV. OF R.I, http://events.uri.edu/event/7th_annual_eid_banquet (last visited Apr. 30, 2018).

[14] *See, e.g.*, 2018–19 Student Senate Budget (on file with author).

[15] URI STUDENT SENATE AGENDA, *supra* note 12.

[16] *URI Student Organizations*, UNIV. OF R.I., https://studentorg.apps.uri.edu (last visited Apr. 24, 2018).

it to "advance the . . . political states of African Americans and other racial and ethnic minorities" and it is affiliated with a national organization.[17] Women's Republic was recognized as a funded organization even though it is designed to connect students to a "nationwide network," and it was observed hosting an event where students were permitted to petition in favor of statewide legislation.[18] These three organizations engage in the types of action and advocacy that could be perceived as political even though they receive funding. Ultimately, the Senate's rules lack sufficient clarity to be applied in any principled way.

II. Analysis

It has long been settled law that the First Amendment is fully binding on public institutions like URI. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *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).

While the Senate's desire to protect its status as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code (IRC) is understandable, its actions impermissibly infringe on the expressive and associational rights of URI's students because the Senate is using this concern to justify unconstitutional viewpoint discrimination. Furthermore, the limitation employed by the Senate does not serve an interest sufficiently compelling to excuse viewpoint discrimination, as the IRS has expressly disclaimed the possibility that the tax-exempt status of the university (or the Senate) may be threatened by political activity of this nature.[19]

A. The Senate is a state actor when administering access to student fees.

As a threshold matter, while the Senate is separately incorporated from URI, it functions as a

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[17] *See NAACP Mission Statement, URI Student Organizations*, UNIV. OF R.I., https://studentorg.apps.uri.edu (last visited Apr. 30, 2018); NAACP PROVIDENCE BRANCH, http://naacpprov.org (last visited Apr. 30, 2018).

[18] UNIV. OF R.I., URI STUDENT SENATE MINUTES (Sept. 27, 2017), https://web.uri.edu/studentsenate/files/Agenda-2017_09_27.pdf (last visited Apr. 30, 2018).

[19] *See, e.g.*, IRS Rev. Rul. 72-512 (nonprofit university does not endanger tax-exempt status by permitting students to receive credit for participating in political campaigns, provided students control political expression); *see also* IRS. Rev. Rul. 72-513 (nonprofit university does not endanger tax-exempt status by providing funding and facilities to student newspaper that supports political issues and candidates). The IRS' training material on determining what constitutes a violation incorporates these rulings. Judith E. Kindell and John Francis Reilly, ELECTION YEAR ISSUES 365 (IRS Exempt Organizations, 2nd ed. 2002), https://www.irs.gov/pub/irs-tege/eotopici02.pdf ("The actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization from a school official.").

state actor when it distributes mandatory student activity fees. A private party is considered a state actor when it

> assumes a traditional public function when performing the challenged conduct, or if the private party's conduct is coerced or significantly encouraged by the state, or if the private party and the state have become so intertwined that they were effectively joint participant[s] in the challenged conduct.

Jarvis v. Vill. Gun Shop, Inc., 805 F.3d 1, 8 (1st Cir. 2015) (internal quotation marks and citations omitted). The Senate derives its funding from mandatory fees collected from students and distributes those fees to student organizations under authority delegated to it by URI. There can be no reasonable dispute that the Senate has taken on a traditional public function, that its behavior is significantly encouraged by the state, and that it is completely intertwined with URI when it performs these functions. Indeed, the Supreme Court of the United States implicitly held as much in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) (assuming that student government was a state actor in distributing mandatory student activity fees); *see also Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (implicitly holding that student government is subject to Equal Protection Clause). The Senate is thus bound by the First Amendment when it distributes funding to student organizations in the same way that URI would be had it not delegated this authority.

B. The Senate cannot engage in viewpoint discrimination or retain unbridled discretion.

As long as student organizations are funded by the student activity tax, it must be without regard to their viewpoint. *See 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 Virginia*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to 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"). The decision to recognize and fund student organizations must be reasonable and viewpoint-neutral. *Rosenberger*, 515 U.S. at 829.

The "requirement of viewpoint neutrality includes as a corollary a prohibition on unbridled discretion." *Southworth v. Bd. of Regents*, 307 F.3d 566, 579–80 (7th Cir. 2002); *accord Amidon v. Student Ass'n*, 508 F.3d 94, 102 (2d Cir. 2007) ("The Court prohibits unbridled discretion because it allows officials to suppress viewpoints in surreptitious ways that are difficult to detect"); *Forsyth v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (concluding that unbridled discretion allows for officials to engage in viewpoint discrimination). Thus, the Supreme Court has consistently struck down laws and ordinances that "subject[] the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969). "Standards provide the guideposts that check the licensor and allow courts

quickly and easily to determine whether the licensor is discriminating against disfavored speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). Accordingly, in *Amidon*, the United States Court of Appeals for the Second Circuit applied the standards arising from the Supreme Court's prior restraint jurisprudence to strike down a student funding referendum process that lacked definite standards. *See* 508 F. 3d at 106.

The Senate's Bylaws and financial policies lack "narrow, objective, and definite standards" to guide decision-making. The policies are applied to authorize the funding of self-identified "cultural" organizations but not "religious" ones. But nothing in the policies defines these terms. Without clear and objective standards, there is a risk that determinations will be based not on legitimate criteria, but on senators' agreement or disagreement with a group's views, message, or expressive activities.

The Senate's refusal to fund political groups is equally lacking in discernible criteria. The Bylaws and Financial Handbook only disallow funding of activities that support political candidates or parties, but the Senate has declined to fund Bridge URI and SSDP URI, even though neither organization supports political candidates or parties. The Senate denies funding to some groups on the ground that the groups engage in political advocacy, but funds other groups that are unabashedly politically engaged. The senators are further confused about whether engagement in protests and lobbying leads to ineligibility. And the Senate funds some groups with ties to national organizations, but denies funding to other organizations on the basis of such ties—a denial that cannot be squared with *Healy*, 408 U.S. at 186 (noting that it impermissible to rely on disapproval of a national group's philosophy when recognizing student organizations).[20] Both Women's Republic and the NAACP are funded organizations although they are both connected to national organizations, while SSDP URI has been denied funding because of its national ties. This disparate treatment is arbitrary at best, and viewpoint-discriminatory at worst.

C. The Senate must fund religious organizations.

Even if the Senate were to adopt clear and explicit criteria for funding eligibility, it cannot deny funding to religious student organizations. In *Rosenberger*, 515 U.S. at 837, the Supreme Court held that the University of Virginia engaged in viewpoint discrimination when it refused to provide student activity fee funding to a religious student newspaper. Justice Anthony Kennedy explained: "For the University, by regulation, to 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." *Id.* at 836. Nor would the Senate run afoul of the Establishment Clause by providing student activity fees on a content and viewpoint-neutral basis to religious student organizations. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017);

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[20] While the Bylaws prohibit funding an organization "if it is affiliated with and receives funds from an organization external to the Student Senate," Bylaws, Art. IX, §(B)(5)(4), this was not cited as a reason for denying SSDP funding in November 2016.

Rosenberger, 515 U.S. at 840. The Senate thus has no compelling interest in denying funding to religious organizations; it is in fact required to do so to the same extent that it funds non-religious organizations.

D. Funding political organizations would not jeopardize the Senate's 501(c)(3) status.

The Senate has declined to fund political organizations based on a misunderstanding over the requirement that nonprofit institutions refrain from participating or intervening in a political campaign. *See* 26 C.F.R. 1.501(c)(3)-1(c)(3)(ii)–(iii). That provision applies to the tax-exempt institution itself, not to students or individuals that speak on their own behalf (with or without university funding). This point is explained in a FIRE publication called a *Policy Statement on Political Activity on Campus*, last updated for the 2016 election cycle:

> Despite the seeming severity of the restrictions on political activity imposed by the requirements of Section 501(c)(3), however, it is extremely important to note that these prohibitions apply to the institution itself and those reasonably perceived to be speaking on its behalf, not to individual students, faculty, or staff engaged in clearly individual, unaffiliated activity. In 2002 continuing education materials, the IRS made clear that "[i]n order to constitute participation or intervention in a political campaign . . . the political activity must be that of the college or university and not the individual activity of its faculty, staff or students." Judith E. Kindell and John Francis Reilly, "Election Year Issues," Exempt Organizations Continuing Professional Education Technical Instruction Program for Fiscal Year 2002, 377–78 (2002) (Election Year Issues 2002).
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> [. . .]
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> With respect to students specifically, the IRS has noted that "[t]he actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization from a school official." Election Year Issues 2002 at 365. Consistent with this principle, agency administrative rulings have highlighted several educational contexts in which the partisan political activity of students—even where supported by institutional resources such as funding and staff assistance—does not amount to institutional conduct where there is no evidence of control or influence over students' activities or message. See Rev. Rul. 72-512, 1972-2 C.B. 246 (university did not violate 501(c)(3) where political science class required students to work on a campaign of each student's choosing); Rev. Rul. 72-513, 1972-2 C.B. 246 (university did not violate 501(c)(3) by providing funds and other resources to student-run newspaper that published op-ed favoring candidate).

[. . .]

> To be clear: As long as partisan political activity on campus by students and student groups is neither privileged nor hindered by the institution, and as long as partisan political speech by students and faculty does not overcome the strong presumption that they do not speak for the institution, then the tax-exempt status of universities and colleges will not be affected.

The Supreme Court similarly recognized the distinction between the institutional speech of a university and the private speech of recognized student groups funded by a mandatory student activity fee in *Southworth*, 529 U.S. 217 (2000). There, the Court noted that when speech is "financed by tuition dollars," with "the University and its officials . . . responsible for its content," then it "might be evaluated on the premise that the government itself is the speaker," but expressive activity may not be evaluated this way when it comes from student groups funded by a student activity fee intended for "the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." *Id.* at 229; *see also Rosenberger*, 515 U.S. at 841 (where university adhered to viewpoint neutrality in administering student fee program, student newspaper funded by fee did not speak on behalf of university).

Indeed, numerous other universities fund religious and political student groups without losing their tax-exempt status. For example, Muhlenberg College takes the position:

> Partisan activities by recognized student organizations in no way jeopardize the College's tax-exempt status, as long as those activities are not construed to express the position of Muhlenberg College, and do not appropriate College resources or public facilities for either the purpose of partisan fundraising or as donations to partisan organizations or individual candidates for public office.[21]

In sum, URI's restriction on funding student political student organizations generally finds no basis in IRS rules.

III. Conclusion

The Senate has an obligation to distribute the Student Activities Tax in a constitutional manner. As explained above, the Senate's funding policies violate the First Amendment rights of the URI students who are members of political and religious organizations. Its current policies allow for almost unlimited discretion in the funding of student organizations, thereby inviting and resulting in viewpoint discrimination. And nothing in the IRS rules mandates this result. For all of these reasons, the Senate could face legal liability if it refuses to modify its

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[21] MUHLENBERG COLL. POL'Y ON PARTISAN POL. ACTIVITY 5 (2017), *available at* https://www.muhlenberg.edu/media/contentassets/pdf/about/deanst/studentguide/partisanpolicy.pdf (last visited Apr. 30, 2018).

policies and practices. If URI would find it helpful, FIRE is prepared to work with the Senate to draft constitutionally sound policies to govern its funding decisions.

We respectfully request a response to this letter by May 18, 2018.

Sincerely,

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