



June 3, 2019

President Robert Barchi
Rutgers, The State University of New Jersey
Winants Hall
7 College Avenue, 2nd Floor
New Brunswick, New Jersey 08901

Sent via U.S. Mail and Electronic Mail (president@rutgers.edu)

Dear President Barchi:

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 the recent referendum defunding Rutgers' student newspaper, *The Daily Targum*. While we understand how the referendum came into existence and that it was motivated by a desire to ensure the independence and vitality of the *Targum*, it is nevertheless an unconstitutional, viewpoint-discriminatory method of allocating student funding. Even if the *Targum* had received funding through the referendum, that process would still be unconstitutional on its face.

Accordingly, we call on Rutgers to both restore funding to the *Targum* immediately through whatever lawful mechanism it can and to discontinue the practice of holding a funding referendum for this or any other student organization.

I. RUTGERS' REFERENDUM PROCESS ON FUNDING *THE DAILY TARGUM*

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

A. *The Daily Targum's* referendum process.

The Daily Targum has been the student newspaper of Rutgers since 1869. In 1980, it became an independent student-run organization.¹ Since that time, it has been funded through a student referendum process, most recently amended in 2010.²

Since 2017, the Rutgers Conservative Union (RCU) has promoted a “#DefundTheTargum” campaign.³ A September 2017 Facebook post by the RCU links to a *Targum* opinion piece calling for dress code changes to foster inclusivity with commentary including: “Stuff like this is why RCU will be hosting a tabling event in front of Brower on 9/13 from 12-4 to #DefundTheTargum[.]”⁴ In explaining the hashtag to conservative media outlet *Campus Reform*, the then-president of RCU explained that he believed the paper “has a political bias to the left” and that he would like to see a “politically balanced newspaper instead.”⁵ RCU’s criticism of the *Targum* followed a March 2017 article documenting a flyer posted by an RCU member that had been adapted from a flyer created by a white supremacist organization,⁶ which RCU said was “Fake News,”⁷ and a letter to the editor that same month criticizing RCU’s views.⁸

In May 2019, the referendum Oversight Committee held a vote on the *Targum*’s funding. Although the majority of votes supported funding the *Targum*, vote participation did not meet the required 25% threshold in any of the colleges or campuses.⁹ As a result, the *Targum*’s student activity funding was zeroed out.

¹ Brendan Brightman, *The Daily Targum fails to pass referendum for 1st time since 1981*, DAILY TARGUM, May 21, 2019, <http://www.dailytargum.com/article/2019/05/the-daily-targum-fails-to-pass-referendum-for-1st-time-since-1981>.

² § 10.3.3: *Student Services & Other Student-Related Policies and Programs, Policy on Special Student Organization Funding*, RUTGERS (rev. June 16, 2010), <https://policies.rutgers.edu/sites/default/files/10.3.3-current.pdf> (hereinafter Rutgers policy §10.3.3).

³ Toni Airaksinen, *Students campaign to defund ‘biased’ school newspaper*, CAMPUS REFORM (Sept. 19, 2017), https://www.campusreform.org/?ID=9802&&fb_comment_id=1677815588958407_1684274474979185.

⁴ Rutgers Conservative Union, FACEBOOK (Sept. 12, 2017), <https://tinyurl.com/y2xpjj9v> (archived on May 23, 2019 at <https://tinyurl.com/y34y7jkj>).

⁵ See Airaksinen, *supra* note 3.

⁶ Kira Herzog & Chloe Dopico, *Rutgers Conservative Union flyer mimics one created by white supremacy group*, DAILY TARGUM (Mar. 1, 2017), <http://www.dailytargum.com/article/2017/03/rutgers-conservative-union-flyer-mimics-one-created-by-national-white-supremacy-group>.

⁷ Rutgers Conservative Union, FACEBOOK (Mar. 1, 2017), <https://www.facebook.com/RUConservatives/posts/825213600988533>.

⁸ Ryan Pugliese, *LETTER: Rutgers Conservative Union is ruining name of conservatism at U.*, DAILY TARGUM, Mar. 27, 2017, <http://www.dailytargum.com/article/2017/03/rutgers-conservative-union-is-ruining-name-of-conservatism-at-u>; see also Rutgers Conservative Union, FACEBOOK (Mar. 27, 2017), <https://bit.ly/2HHU4ZC> (responding to Pugliese letter).

⁹ See Brightman, *supra* note 1.

On May 14, the RCU posted again on Facebook, writing that they did not run the campaign to “destroy the paper,” but to “give more freedom” to students: “If you don’t use a service, and don’t like what’s being offered, there is no reason to pay for it.”¹⁰

B. The referendum process as written.

The referendum process is described in Rutgers Policy §10.3.3, titled Policy on Special Student Organization (SSO) Funding.¹¹ The purpose of the referendum mechanism, as stated in the policy, is to “cooperatively determine the willingness of Rutgers students to fund a petitioning student organization.”¹² To be eligible, groups seeking SSO status must be “[e]ducationally valuable student-sponsored organizations (e.g., nonpartisan student organizations, campus newspapers, or groups providing forums for expression of diverse views)[.]”¹³ “Educationally valuable” is not further defined.

Under the policy, an organization must submit a “concept plan” to a reviewing committee appointed by the Student Government; the committee makes a fee recommendation to the University President, who must then approve the plan and fee.¹⁴ No discretionary limitations are placed on the decisions of either the committee or the president, other than that the purpose of the committee review is to determine whether “the educational value of the organization justifies the proposed investment[.]”¹⁵

If the proposed referendum is approved by both the committee and the President, a referendum is held in each “college, campus, or division” on whether the SSO should receive funds. At least 25% of the students in each subsection must vote in favor for the organization to receive funding from that subsection of the campus.¹⁶ The referendum process is then repeated every three years.¹⁷

II. THE FIRST AMENDMENT FORBIDS DISTRIBUTING STUDENT FEES BY REFERENDA

¹⁰ Rutgers Conservative Union, FACEBOOK (May 14, 2019), <https://tinyurl.com/y65lczxb> (archived on May 23, 2019 at <https://tinyurl.com/y55wbyul>).

¹¹ Rutgers policy § 10.3.3, *supra* note 2.

¹² *Id.* § 10.3.3(I).

¹³ *Id.* § 10.3.3(II).

¹⁴ *Id.* § 10.3.3(II)(a).

¹⁵ *Id.* § 10.3.3(IV)(B)(2).

¹⁶ *Id.* § 10.3.3(II)(b).

¹⁷ *Id.* § 10.3.3(II)(c) & (g).

- A. At a public institution, any mechanism of distributing student funding must be viewpoint-neutral.

The First Amendment applies with full force to public universities such as Rutgers. *See, e.g., 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.”).

Rutgers’ authority to impose mandatory student fees on its students—whether it does so through a student government or otherwise—carries with it the burden to ensure that any distribution of fees to student groups is done in a viewpoint-neutral manner. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (“*Southworth*”) (“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 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.”).

- B. A referendum cannot be used to determine the eligibility or amount of funding a group receives because there is no way to ensure the viewpoint-neutrality of a popular vote.

In the years since Rutgers moved the *Targum* to a referendum-based funding mechanism, the Supreme Court of the United States and multiple federal courts of appeal have ruled that such mechanisms are inherently viewpoint-based and thus violate the First Amendment rights of students.

In *Southworth*, the University of Wisconsin’s mandatory student fee system was challenged by students who argued that requiring them to pay fees that would fund groups with ideologies they opposed was a violation of their First Amendment rights. *Southworth*, 529 U.S. at 221. The Supreme Court upheld the general system of requiring student funds to be paid to a pool, and then having the pool allocated by someone (*i.e.*, a student government) acting on behalf of the university. While the Court acknowledged that the complaining students had a legitimate interest in how their funds would be expended, the Court found that “the viewpoint neutrality requirement of the University program is in general sufficient to protect the rights of the objecting students.” *Id.* at 230.

The Supreme Court did, however, remand part of the case for further consideration of the University of Wisconsin's system of permitting some organizations to seek funding through a referendum process. The Court wrote:

While the record is not well developed on the point, it appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. **To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires.** The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.

Id. at 236 (emphasis added). After the case was remanded to the district court, the University of Wisconsin entirely discontinued the use of referenda, as “the United States Supreme Court noted its inherent problems on appeal.” *Fry v. Bd. of Regents*, 132 F. Supp. 744, 746 (W.D. Wisc. 2000). Instead, a new system permitted a student government committee to vote on requests. The district court explained that this was still an inherently flawed system:

The present system for allocating fees cannot be distinguished from the student referendum. Both the referendum and the student government operate on the principle of majoritarian rule. As the Supreme Court stated in *Southworth*, and re-iterated in *Santa Fe Independent School District v. Doe*, “access to a public forum cannot depend upon majoritarian consent. . . . Instead of a decision by 40,000 students the present system places a vote in the hands of committee members who represent those 40,000 students. **Direct democratic referenda and representative legislatures both produce majority determinations that necessarily sacrifice viewpoint neutrality.** Such determinations are not sufficient to safeguard diverse student speech.

Id. at 750 (citations omitted) (emphasis added). On appeal from this decision, the U.S. Court of Appeals for the Seventh Circuit further underscored the unconstitutional nature of a referendum process by pointing out that even the University's amended system continued to be tainted by its prior reliance on the referendum process: “[B]y basing current funding on past funding, the elimination of the referendum did little to rectify the constitutional defect of the referendum. . . . In other words, viewpoint discrimination from past years has been institutionalized into the current system.” *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 594 (7th Cir. 2001)

(“*Southworth III*”). Additionally, the University’s prior process had banned funding for “activities which [were] politically partisan or religious in nature,” which the court noted was unconstitutional. *Id.* at 594.

The Seventh Circuit is not the only federal court of appeals to reject as unconstitutional a referendum schema for allocating student fees. In *Amidon v. Student Association of the State University of New York at Albany*, 508 F.3d 94 (2d Cir. 2007), SUNY Albany used a non-binding referendum to assist the student government in the allocation of mandatory student fees. When challenged, SUNY argued that the referendum was constitutional because it was used to gauge student interest, and thus, would influence the amount of funding a student organization received, but not the decision whether to fund. *Id.* at 100.

The U.S. Court of Appeals for the Second Circuit rejected this argument, noting that “[a] university’s viewpoint-discriminatory decision respecting how much funding to allocate to an RSO raises the same concerns as a viewpoint-discriminatory decision respecting whether to fund an RSO at all.” *Id.* at 101. “The referendum at issue here, which asks simply whether an RSO should receive a certain amount of funding, plainly crosses the line and fails to provide the protection of viewpoint neutrality the constitution requires.” *Id.* at 105.

Taken together, the *Southworth* cases and *Amidon* establish that a referendum mechanism for funding may be impossible to reconcile with *Rosenberger*’s requirement of viewpoint-neutrality.¹⁸ The Supreme Court and Seventh Circuit found the mandatory referendum in *Southworth* to offer functionally unbridled discretion to make viewpoint-discriminatory allocations. The Second Circuit found that SUNY Albany’s advisory referenda in *Amidon* did not serve a compelling purpose, as the student government was “free to disregard them[.]” *Id.* at 106. In either case, the referendum system was unconstitutional.

C. The practice of relying on a referendum to determine student organization funding must be entirely abandoned, as it cannot be reconciled with *Southworth*.

Policy §10.3.3(I) explains that its purpose is to “cooperatively determine the willingness of Rutgers students to fund a petitioning student organization.” This subjects funding decisions

¹⁸ The Supreme Court has maintained this requirement outside the context of student fees. *See, e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

to the will of the majority. But as the Supreme Court explained in *Southworth*, “[t]o the extent the referendum substitutes majority determinations for viewpoint neutrality, it would undermine the constitutional protection the program requires. . . the whole theory of viewpoint neutrality is that minority views are treated with the same respect as majority views.” 529 U.S. at 217.

As the Seventh Circuit recognized on remand, “by voting—here via referendum—the students appear to make funding decisions based on the speech of various student groups; their votes for funding will advance certain viewpoints, while their votes against funding will suppress others.” *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, Nos. 97-3510 & 97-3548, 2000 U.S. App. LEXIS 15470, *8–9 (7th Cir. June 23, 2000). Rutgers cannot fulfill the obligation to use a viewpoint-neutral method of allocation through a tainted process—even one that is purportedly non-binding, as was the “advisory” vote in *Amidon*. See *Amidon*, 508 F.3d at 101.

Rutgers’ referendum process is facially unconstitutional, as it provides no protection against viewpoint discrimination. It is noteworthy that the *Targum*’s most recent referendum reveals precisely the type of viewpoint-discriminatory voting that the Supreme Court feared would take place. The RCU’s #DefundTheTargum campaign was explicitly, unapologetically, and irredeemably viewpoint-based.¹⁹ As the referendum is facially unconstitutional, this point is academic, but it illustrates plainly why referenda are necessarily viewpoint-based, and thus provides a textbook example of why such a process cannot be reconciled with the First Amendment.

D. Rutgers’ referendum policy is unconstitutional under *Southworth* and *Rosenberger* for three additional reasons.

Policy §10.3.3 is an unconstitutional, viewpoint-discriminatory funding mechanism in at least three additional distinct ways. As the purpose of the policy is to hold a referendum that is itself unconstitutional, we assume the policy as a whole will not be used going forward. We highlight these issues only to ensure you are aware of their shortcomings as you consider how to replace the referendum process.

1. *The exclusion of partisan organizations from those eligible for SSO funding.*
Policy §10.3.3 lists “nonpartisan student organizations, campus newspapers, or groups providing forums for expression of diverse views” as examples of groups

¹⁹ See *supra* notes 4–10 and accompanying text. It is important to understand, however, that the #DefundTheTargum campaign was the protected free expression of the RCU. RCU has the constitutional right to express a viewpoint; Rutgers has the constitutional obligation to insulate funding decisions from being influenced by such expressions.

that are “educationally valuable student-sponsored organizations,” and thus, eligible for funding. The exclusion of explicitly partisan groups from funding eligibility is functionally no different than the rule the Supreme Court struck down in *Rosenberger*, which “required public officials to scan and interpret student publications to discern their underlying philosophic assumptions[.]” *Rosenberger*, 515 U.S. at 845. A viewpoint-neutral funding system cannot discriminate against partisan student groups.

2. *The nearly unfettered discretion granted to the student government committee.* Under the policy, a committee of the University Senate is charged with determining whether the “educational value of the organization justifies the proposed investment in resources[.]”²⁰ There is no definition of “educational value”; instead, the policy requires that the proposed SSO’s submitted plan “[p]rovide sufficient evidence of the educational value of the student organization’s activities and an explanation of how special funding furthers the educational mission of the University.”²¹

While an inquiry into educational value can be a component of a viewpoint-neutral limiting standard,²² it does not, standing alone, provide adequate guidance, particularly when the group tasked with interpreting it includes no professional educators.²³

3. *The unfettered discretion granted to the University President.* While the “educational value” inquiry performed by the University Senate committee is an insufficient limitation on discretion, it has the virtue of being a limitation of some kind. The University President, on the other hand, has no apparent limitations on his or her discretion on the face of the policy. Policy

²⁰ Rutgers policy §10.3.3(IV)(B)(2), *supra* note 2.

²¹ *Id.* § 10.3.3(IV)(B)(1)(b).

²² See generally *Southworth III*, 307 F.3d at 590–91 (finding that the requirement that student groups provide an “identifiable educational service” is not facially unconstitutional when part of a multipart, 11-point inquiry into grant eligibility).

²³ Rutgers in particular should be familiar with the shortcomings of a reliance upon “educational value” as a threshold test for receipt of student funding. In *Galda v. Rutgers*, 772 F.2d 1060, 1068 (3d Cir. 1985), the University had determined that the nonprofit Public Interest Research Group (PIRG) provided “educational value” to students and thus permitted it to receive student funding. The U.S. Court of Appeals for the Third Circuit found paying student fees to an off-campus nonprofit over the objections of ideologically opposed students violated their First Amendment rights. *Id.* at 1060. Any educational value PIRG provided was “incidental to, and inherent in, the ideological activities.” *Id.* at 1068. While PIRG was an off-campus, non-student nonprofit (and it is presumably due to *Galda* that Rutgers policy § 10.3.3 limits itself to student organizations), it remains a valuable cautionary tale about the limits of an “educational value” inquiry untethered to a more comprehensive set of cabining principles.

§10.3.3(II)(A) states that the student government committee, if it approves, “will recommend the organization’s concept plan to the University President.” The next provision, §10.3.3(II)(B), begins, “[i]f the concept plan is approved by the President as indicated in Paragraph A above,” the referendum procedure begins. At no point in the document is any limiting principle whatsoever placed on the President’s discretion to approve or deny a group’s request.

E. REMEDIES

Despite the glaring constitutional defects with Policy §10.3.3, FIRE appreciates and understands that we review the policy today with the benefit of decades of precedent that were not available to the original drafters in 1971. Rutgers adopted a policy that represented the state of the law at the time it was adopted and presumably has had no occasion to revisit it, and there was likely little reason to reconsider Policy §10.3.3 under *Southworth* until an organization was harmed. That harm has now been visited upon the *Targum*, and it is incumbent upon Rutgers to rectify the damage caused by an archaic policy by taking steps to reconcile its policy with its legal obligations, as well as making whole the current student groups harmed by the policy.

Broadly speaking, Rutgers faces two problems going forward: the immediate harm done to the *Targum* and the general harm caused by maintaining an unconstitutional policy. To triage the situation, Rutgers must take the following steps:

1. **Discontinue use of Policy §10.3.3 and inform the student body it is doing so.**
2. **Restore immediate funding to *The Daily Targum* through whatever lawful means the University determines is expedient.** In the short term, precisely where the funding comes from is less significant than that the harm caused by the referendum is ameliorated. The *Targum* editors may be exploring their legal rights as we speak; it would be far simpler for all involved for Rutgers to step up and reallocate money to restore the funding lost due to the unlawful referendum.
3. **Replace Policy §10.3.3 with a constitutionally valid allocation method.** To that end, FIRE has a staff of attorneys who work cooperatively with institutions on questions like these. While the circumstances of this letter do not afford us the latitude to lay out the full spectrum of the lawful options to replace the referendum system, it is worth noting that there are still student newspapers at

the schools involved in *Southworth* and *Amidon*.²⁴ The key will be to select a process that ensures the viewpoint neutrality that a referendum renders impossible.

III. CONCLUSION

For the reasons above, we urge Rutgers to restore funding to *The Daily Targum*, discontinue the use of the referendum process, and replace that process with a lawful, viewpoint-neutral method of allocating funding to student publications. We also reiterate our offer to assist Rutgers in transitioning to a new, constitutionally-sound funding mechanism.

We request receipt of a response to this letter by the close of business on June 17, 2019.

Sincerely,



Adam Goldstein
Program Officer, Individual Rights Defense Program
Foundation for Individual Rights in Education

cc:

Rebecca Bright, Editor-in-Chief, *The Daily Targum*
Priyanka Bansal, Managing Editor, *The Daily Targum*
Jhanvi Virani, President, Rutgers University Student Assembly

²⁴ Those newspapers are *The Badger Herald* and *Albany Student Press* at the University of Wisconsin and SUNY Albany, respectively.