SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004959-00T5

RUTGERS 1000 ALUMNI COUNCIL, An unincorporated organization, Plaintiff-Respondent	:	Civil Action
v.	:	On appeal from the Superior Court of New Jersey Chancery Division
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, and WILLIAM W. OWENS, in his official capacity as Director of Marketing and Communications Services of Rutgers Magazine, Defendants	:	Middlesex County Docket No: C-101-99
	:	Sat Below: Hon. Joseph C. Messina

BRIEF OF RESPONDENT RUTGERS 1000 ALUMNI COUNCIL

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INTRODUCTION

This is a First Amendment free speech case. It challenges Rutgers, the State University of New Jersey, to permit a group of concerned alumni to express their views in a public forum. Their longstanding dedication to Rutgers and their efforts to change prevailing policies led the trial court to characterize these alumni as "the loyal opposition." The trial court correctly held that the State University violated the Constitution when, without justification, it silenced the loyal opposition by denying plaintiff access to a designated public forum and engaged in viewpoint discrimination.

Plaintiff, the Rutgers 1000 Alumni Council ("Alumni Council"), is a group of Rutgers University alumni who believe that the State University of New Jersey has made a strategic decision to emphasize its revenue sports program to the detriment of academic scholarship. Reasonable minds may disagree about the extent to which sports should be emphasized at a state university. Many people believe that a state school should recognize and reward athletic ability, while others believe that college students are best served by emphasizing classroom skills.

The best forum to engage in a debate about how the State University can best serve college students in the State of New Jersey is at Rutgers University. Rutgers University is, at least in theory, dedicated to the exchange of ideas, and should be the ideal place to discuss extracurricular programs that are currently in place at the University.

Plaintiff, a group of concerned alumni, sought to express its views in the advertising section of a magazine for Rutgers alumni, inviting other alumni to become engaged in a debate of proven interest to the Rutgers community, a debate touching upon

the State University's fundamental mission to serve college students in New Jersey. The Alumni Council's views departed from the present orthodoxy of the Rutgers University administration, however, which thwarted its efforts to reach out to alumni through *Rutgers Magazine*.

This case presents no implications whatever for the private press. Private magazines have the right under the First Amendment to reject ads for any reason. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). But Rutgers, the State University of New Jersey, is a state actor, and *Rutgers Magazine* is an instrumentality of the state, not a private entity. Accordingly, Rutgers University cannot claim First Amendment protection but is subject, through the Fourteenth Amendment, to the First Amendment's prohibition against abridging free speech in the advertising sections it established in *Rutgers Magazine*. Db30.

PROCEDURAL HISTORY

Plaintiff adopts the procedural history set forth in the opening brief of defendants-appellants Rutgers, the State University of New Jersey and William W. Owens, Jr. ("Rutgers University"), with two exceptions.

First, contrary to Rutgers University's representation, the trial court held that the relevant forum was the advertising section of *Rutgers Magazine*. Conclusion of Law number 13 states that "the relevant forum at issue in this case is the advertising space in R*utgers Magazine*." Da48. Findings of fact number 55 and 56 explicitly state that the three other sections of the *Magazine* (the "class notes" section, the "letters to the editor," and the editorial pages) were <u>not</u> part of the relevant forum. Da45. The trial court's remark that the entire magazine had been dedicated to promoting Rutgers University's revenue sports program was not essential to the determination of the case. As dictum, it was no part of the court's ruling as memorialized in its Order of April 3, 2001.

Second, of course, Respondent asserts that, contrary to Rutgers University's characterization, the trial court's ruling was correct.

STATEMENT OF FACTS

A. The Plaintiff

Rutgers 1000 is short for "1000 Men & Women of Rutgers," a group of students, alumni, and faculty opposed to the growing professionalization of sports at Rutgers University. The name comes from the group's stated goal: to get 1000 signatures on a petition to the Board of Governors. Da65.

The Rutgers 1000 Alumni Council neither includes nor speaks for the Rutgers 1000 faculty alliance or the Rutgers 1000 student alliance. Alone, its members number about 200. One of its campaigns is to persuade Rutgers to leave the Big East Conference, which focuses on "revenue" sports, i.e., football and basketball, and sends teams to NCAA championships.

The Alumni Council is not affiliated with the Rutgers Alumni Association or the Rutgers University Foundation. It is a group of like-minded alumni with no formal organizational or reporting structure. It was formed in 1998, and is generally led by Richard S. Seclow. N.J.S.A. 2A:64-1 provides that an unincorporated entity with seven or more members has standing to sue and be sued in New Jersey.

Since this litigation began in 1999, additional Rutgers University alumni have joined the Rutgers 1000 Alumni Council. 2T 136:1-20.

B. The Defendants

Rutgers Magazine is an official publication "for alumni and friends of New Jersey's State University." Da66. It sells commercial advertisements to almost anyone who will buy them. Advertisers need not be alumni, or even members of the Rutgers University community. 2T 29:1-3. The *Magazine* will dedicate the back and inside

covers, plus up to 16 pages of the *Magazine*, to advertising. Da66. The *Magazine* has never run short of ad space. Da66.

Rutgers University does not endorse messages that appear in the ad space in *Rutgers Magazine*. 2T 29:4-6. All advertisements in *Rutgers Magazine* are paid for, whether they come from other departments within Rutgers University or advertisers that are unrelated to Rutgers University. 2T 31:10-32:6. Advertisements are treated as external revenue sources for the *Magazine.* Da175, 2T 31:7-32:6.

The Fall 1998 issue featured a full page ad for the Big East Conference basketball championship. Da92-93. The Big East Conference paid $4855 for the ad. Da66. In 1998, a separate advertising section, called "The Marketplace" featured classified ads for vacation rentals, travel tours, books and employment. Da86.

"Advocacy" ads appear in *Rutgers Magazine* as well. The *Magazine* regularly publishes full-page advertisements in an effort to encourage alumni to lobby legislators on behalf of Rutgers. See, e.g., Da75, 77. Labeled a "salute to alumni legislators," these advertisements explicitly invite alumni to "contact legislators to discuss issues of importance to the University." The ads also invite alumni to contact the Alumni Office to "learn how you can help."

As an official publication of the State University, *Rutgers Magazine* enjoys tax-exempt status. Advertising revenue amounted to $13,000 of its total $400,000 budget in 1998; the remainder came from Rutgers University. Da66.

Defendant William W. Owens is the Director of Marketing and Communications Services at Rutgers University. He has complete discretionary authority to examine the

content of all proposed advertising for *Rutgers Magazine*, and to reject ads that he deems inappropriate. 2T 61:1-3.

C. Rutgers 1000 Alumni Council's Two Proposed Ads

In May 1998, the Alumni Council submitted for publication a one-column display advertisement, urging Rutgers University to withdraw from "professionalized" college athletics and resume competition at a "genuinely collegiate level." Da161. Defendant William W. Owens, the editorial director of the *Magazine*, rejected the ad, stating that *Rutgers Magazine* did not sell space for "*advocacy advertising* of any sort." Da164 (emphasis added).

On behalf of the Alumni Council, its spokesman, Richard S. Seclow, wrote back to Mr. Owens, asking for a statement of the *Magazine*'s standards for accepting ads. Da165. Mr. Owens responded by letter dated July 27, 1998, with the following statement:

> *Rutgers Magazine* is intended to promote Rutgers and its programs, and to engender loyalty and enthusiasm for the institution among the University community, friends of the University, and alumni. Through its advertisements, the magazine offers goods and services that might benefit and be of interest to that audience so long as the nature of the goods and services is not inconsistent with the magazine's limited purposes.

Da166. Defendants had never before reduced this policy to writing. Da202.

Mr. Owens further stated that the *Magazine* had never published any kind of "*advocacy advertisement* supporting one side or another in a matter of public controversy." Da166 (emphasis added). Mr. Owens stated that the Alumni Council's ad fell within that proscription and was inconsistent with *Rutgers Magazine*'s mission to "promote Rutgers and its programs, and to engender loyalty and enthusiasm for the institution among the University community, friends of the University and alumni." Da166.

Mr. Owens identified the "matter of public controversy" in the Rutgers 1000 Alumni Council ad to be Rutgers University's participation in the Big East Conference. 2T 53:19-24.

In October and November 1998, the Alumni Council tried again, this time asking for a classified ad in the "Marketplace." The classified ad simply stated "Rutgers 1000 Invites Inquiries." Da169. William Owens returned the check for $255 with a brief letter saying "the magazine is unable to accept the advertisement you submitted." Da171.

Mr. Owens rejected the Rutgers 100 classified ad not because of what it said, but because of the identity of the group that submitted the ad. 2T 54:21-55:20.

D. Rutgers University's Alleged "Policy"

In correspondence to Mr. Seclow, in defendants' answers to interrogatories, and in defendants' briefs on cross-motions for summary judgment, the alleged policy of *Rutgers Magazine* was articulated as a policy against "advocacy advertising." See, e.g., Da164, 166, 201, 202. Sometime between filing briefs on the cross-motions for summary judgment in December 2000, and trial on February 21, 2001, defendants changed their characterization of the alleged policy to one of "issue neutrality." At the time of trial, the policy no longer proscribed advocacy advertising but instead barred "issue-oriented" advertising. 2T 44:15-19.

Neither the alleged policy against advocacy advertising nor the policy of issue neutrality can be discerned from the contract and copy regulations (also known as the "rate card" or "reg. card") the *Magazine* sends to prospective advertisers, or from any other source. Da172-173; 2T 58:8-60:25; 92:1-10. Instead, Rutgers University's policies were developed after the fact, on an ad hoc basis. Mr. Owens testified: "We really don't

write down policies and guidelines other than on the reg. card." "These policies we developed in our heads from dealing with the issues over and over again every day. We just know what the policies are from the constant exposure." 2T 92:1-10. The policy against “advocacy advertising” was not reduced to writing until after Mr. Owens rejected the Alumni Council’s ad, Da202, and the policy against “issue-oriented advertising” was not articulated until after the trial commenced.

The asserted policy does not reflect reality. *Rutgers Magazine* has accepted advocacy advertising. Twice in 1998, the *Magazine* published a full-page ad entitled "Salute to Alumni Legislators." Da75, 77. The ad explicitly invites alumni to "contact legislators to discuss issues of importance to the University." The ad also invites alumni to contact the Alumni Office to "learn how you can help." Since it encourages readers to advocate on behalf of Rutgers University in the state legislature, the "Salute" must be considered an advocacy ad. Mr. Owens testified he did not know whether the purchaser of the ad was an “issue-oriented” group, and made no inquiries to find out. 2T 68:1-71:5.

It is not possible to determine beforehand whether a prospective advertisement will be accepted or rejected for publication in *Rutgers Magazine*. There is no procedure in place to identify whether a prospective advertiser is an "advocacy" or "issue-oriented" group. The determining factor for acceptance in 1998 was the reputation of the prospective advertiser. If William Owens knew that the advertiser took a position on a matter of public controversy, he testified that he would not accept its proposed ads. 2T 51:7-23. However, if Mr. Owens were not familiar with the prospective advertiser, he may or may not inquire into the advertiser's identity as an "issue-oriented" group. 2T 68:11-22. Nevertheless, after he identified Rutgers University's participation in the Big

East Conference as "a matter of public controversy," 2T 53:19-24, *Rutgers Magazine* accepted and published an ad for the Big East Basketball. Da92-93.

Rutgers Magazine has mentioned the Rutgers 1000 Alumni Council in three sections other than advertising: the "alumni notes" section, the letters to the editor, and an article about the Director of Athletics, Robert Mulcahy. No harm came to *Rutgers Magazine* or Rutgers University as a result. 2T 83:5-19; 84:16-22.

E. Alternative Means of Communication

Unable to reach alumni through an ad in the *Magazine*, Mr. Seclow submitted a request to mail an appeal to the alumni. On the assumption that Rutgers University would not disclose the personal addresses of its alumni, he suggested that the Alumni Council could perhaps submit the material to be mailed and pay all handling and postage expenses. Da167. The Assistant Vice President for Alumni Relations, Richard Lloyd, turned down the request, stating that the alumni mailing lists "are available only to school and college alumni associations and alumni groups that have officially affiliated with one of these organizations." Da168.

To the contrary, however, the Office of Alumni Relations does occasionally send mailings to alumni on behalf of organizations, even if the organizations are not related to Rutgers University. For example, an accounting firm prepared a letter to be sent to recent graduates, and the Alumni Office mailed it out to accounting majors of the last five years. 2T 206:12-208:4.[1]

[1] Defendants omitted the Richard Lloyd deposition testimony in evidence from their appendix, although it had been included in the trial binder. Counsel read the relevant testimony into the trial transcript at the citations given in the text.

Rutgers University thus thwarted plaintiff's every effort to reach like-minded Rutgers alumni.

F. The Trial Court's Comments

On March 13, 2001, the trial court ruled in favor of the Rutgers 1000 Alumni Council, and adopted its proposed findings of fact and conclusions of law. The court also made a statement from the bench to be communicated "to the parties and also to an Appellate tribunal." 3T 67:4-5.

The first legal determination before the court was one of "forum analysis," a branch of First Amendment free speech law related to but analytically separate from the law of "viewpoint discrimination." In its written order, the trial court found that the editorial pages, letters to the editor, and alumni notes sections of *Rutgers Magazine* were not part of the relevant forum. Da45. Instead, it held that "the relevant forum at issue in this case is the advertising space in *Rutgers Magazine*." Da48.

From the bench, the court said "I think you can get a greater understanding for what is happening here if one doesn't limit the forum to just the advertising section of the magazine but looks at the magazine as a whole." 3T 67:9-12. Referring to the Summer 1998 issue, the trial court noted that the cover story on the revenue sports program "was indeed an article to promote and/or justify Rutgers' participation in big time sports." 3T 67:24-25. Again referring to that particular Summer 1998 issue, "the State utilized the magazine to bring up the subject matter in question. And when the State did that it designated the magazine as a place or channel of communication for a dialogue with regard to the subject of big time sports." 3T 68:4-8.

The trial court accepted the *Magazine*'s asserted policy "to promote Rutgers and to engender loyalty and enthusiasm for the State University:"

> But what the plaintiff was trying to do was consistent with that policy. The plaintiff has a different viewpoint as to what is in the best interest of Rutgers. The plaintiff is no less loyal than other individuals that have a different viewpoint.
>
> So one cannot reasonably say that the plaintiff was not a loyal alumnus or the plaintiff's group was not a loyal alumnus and attempt to differentiate on those grounds.
>
> This, of course, is the longstanding concept of the loyal opposition. And the loyal opposition has or should have an opportunity to be heard and to keep the dialogue going.

3T 69:2-15.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE SUBJECT TO STRICTER APPELLATE SCRUTINY THAN THE CLEARLY ERRONEOUS STANDARD

Rutgers University argues that because the trial court adopted plaintiff's proposed findings of fact, its findings must be subjected to a stricter standard of review than the clearly erroneous standard. This is simply not the law. The Supreme Court fully answered this issue, stating "… our previous discussions of the subject suggest that even where the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985).

This Court must defer to the trial court's findings of fact so long as they are supported by substantial credible evidence. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Legal conclusions are always subject to the appellate tribunal's independent review. Manalapan Realty v. Township Committee, 140 N.J. 366, 378 (1995).

Rutgers University's brief cites cases involving a constitutional dimension that sometimes attaches to state law, such as defamation. See, e.g., Bose Corp. v. Consumers Union, 466 U.S. 485, 510 (1984) ("actual malice" standard applies to product disparagement). This case, in contrast, presents a purely constitutional issue, rather than a question of state law. Defendants' brief accordingly lends no legal support to their request for what amounts to a new summary judgment motion before a new tribunal. Indeed, their request for strict appellate scrutiny disguises the strict constitutional scrutiny that actually attaches to Rutgers University as a state actor: the State University has failed

to articulate a compelling governmental interest to justify its suppression of the Alumni Council's free speech rights.

The case on which defendants rely most heavily is bad law in the Tenth Circuit. Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464 (10th Cir. 1980), has been superseded by Bessemer City, supra, and Dowell v. Board of Education of Oklahoma City Public Schools, 8 F.3d 1501, 1509 (10th Cir. 1993), which held that the district court's verbatim adoption of proposed findings of fact "does not mean that we afford the district court's findings any less deference."

The trial court's findings of fact are amply supported in the record, and cannot be disturbed unless they are clearly erroneous. To substantiate their argument that the record does not support the trial court's findings, defendants must do more than assert generally that the findings are unsupported by the evidence. Rutgers University must identify the specific findings it challenges and demonstrate that each finding is either unsupported by evidence or, because the trial court unreasonably discounted contrary evidence, unsupported by the record in its entirety. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Defendants have failed to demonstrate that the trial court's findings were clearly erroneous. They are not entitled to a do-over.

II. THE TRIAL COURT CORRECTLY HELD THAT THE RELEVANT PUBLIC FORUM WAS ADVERTISING SPACE IN *RUTGERS MAGAZINE*

The parties agree, and the trial court concluded, that the relevant forum in this case is the advertising section of *Rutgers Magazine*. Specifically, the trial court ruled, in conclusion of law number 13, that "the relevant forum at issue in this case is the advertising space in *Rutgers Magazine*." Da48. It found, as a matter of fact, that the editorial pages of the *Magazine*, the letters to the editor, and the "class notes" section were not part of the relevant forum. See findings of fact 55 and 56, Da45. These findings and conclusions, incorporated in the Order of April 3, 2001, directly contradict defendants' argument that the trial court "unambiguously" held that the "entire magazine" constituted the relevant forum.[2]

The trial court took care to explain its reasons for considering the Summer 1998 issue as a whole. Regardless of whether the magazine were a public or non-public forum, the court held that Rutgers University engaged in viewpoint discrimination, suppressing the disfavored view of the "loyal opposition." As to viewing the magazine as a whole, the trial court said:

> [W]ith regard to the determination of the intention of the State actor in opening the forum to be a limited or designated public forum one must consider the nature of the property and how compatible the property is

[2] Rutgers University makes much of the trial court's observation that *Rutgers Magazine* dedicated a cover story, and indeed most of its Summer 1998 issue to its revenue sports program. Yet despite its insistence that this Court review the record as a whole, Rutgers University omitted to include original full-color copies of the magazine, which were important exhibits at the trial. The Rutgers 1000 Alumni Council respectfully refers this Court to the original exhibit J-3, which can be found in the trial binder. Plaintiff has transmitted the trial binder, which is part of the record, with its opposition briefs. The Alumni Council regrets it cannot provide five copies of the Summer 1998 issue of *Rutgers Magazine* to this Court, and respectfully suggests that Rutgers University should do so.

> with the expressive activity. Also, one must consider the context. And that gets back to my initial comment that the totality of the circumstances is important.

3T 70:10-17.

Considering the Summer 1998 issue of *Rutgers Magazine* in its entirety, and Rutgers University's decision to suppress the Alumni Council's ad in that particular issue, the trial court determined that "the action of the State actor was, in this case, an attempt to suppress an opposing view. And whether the magazine is deemed to be a nonpublic forum or a limited public forum I think that the attempt to suppress an opposing view is prohibited." 3T 72:22-73:1.

Additionally, the trial court's comments regarding *Rutgers Magazine* having raised the issue of big time athletics in the Summer 1998 issue demonstrate that Rutgers University engaged in viewpoint discrimination. Defendants' actions show they were not disturbed by controversial speech; rather, Rutgers University was only concerned with controversial speech it could not completely control. Defendants' own discussion of the issue puts the lie to their claim that they acted in a content-neutral manner to shield readers from controversy. See City of Cincinnati v. Discovery Networks Inc., 507 U.S. 410, 425 (1993) (noting that City undermined its asserted interest in esthetics when it exempted newspaper racks from its ban on racks containing commercial handbills); Bolger v. Youngs Drug Products, 463 U.S. 60, 73 (1983) (holding that a ban on mailing advertisements for contraceptives aimed at preventing "offensive" speech was unconstitutional where it "provided only the most limited incremental support for the interest asserted"). Thus, any claim that Rutgers University was merely shielding readers from controversial subjects by refusing the Alumni Counsel's ads is undermined by

Rutgers University's own discussion of the topic which was aimed directly at readers in the Summer 1998 issue.

Accordingly, the trial court's references to the magazine as a whole informed its ruling that Rutgers University engaged in viewpoint discrimination. It was not an essential part of that ruling; the court could have found viewpoint discrimination against the "loyal opposition" even without considering the Summer 1998 issue in its entirety.

In dicta, the trial court made comments, recounted in part in defendants' brief, noting that the State University used the Summer 1998 issue of *Rutgers Magazine* to discuss its "big time" sports program. These dicta were neither necessary nor sufficient for the trial court's final holding, and are completely absent from the Order from which Rutgers University appeals. Where a court's language is "not legally significant or necessary," it constitutes dictum. State v. Ravotto, __ N.J. __, 2001 N.J. Lexis 930 at *24 (July 26, 2001).

The trial court's references to the entire magazine must be viewed in relation to the court's comments about "the loyal opposition." 3T 69:12-15. Its dicta are consistent with its findings of fact or conclusions of law. They certainly do not amount to reversible error.

III. HAVING OPENED ITS ADVERTISING SPACE TO THE PUBLIC, AND HAVING ALLOWED AD SPACE FOR THE PROMOTION OF REVENUE SPORTS, *RUTGERS MAGAZINE* VIOLATED THE FIRST AMENDMENT WHEN IT SUPPRESSED PLAINTIFFS' ADVERTISEMENTS

Rutgers University cannot justify its decision to reject ads from the loyal opposition while simultaneously accepting advocacy ads and ads that promote the big-time sports program. Its suppression of the Alumni Council's message in a designated public forum violates the First Amendment.

The United States Supreme Court has consistently applied a "forum" analysis to determine whether a given rule or regulation violates the First Amendment. In *traditional* public forums (parks, streets and sidewalks), content-based restrictions on speech are constitutional only if they serve a *compelling* governmental interest in the least restrictive way." Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In *designated* public forums, content-based restrictions on speech remain subject to strict scrutiny, and even content neutral regulations must be narrowly tailored to advance a *significant* governmental interest. United States v. Kokinda, 497 U.S. 720, 726-27 (1990). In *nonpublic* forums, regulations on speech must be "*reasonable* and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

A. Discerning the Nature of the Forum

The nature of a forum is determined neither by the intent of the state actor, nor by consent, nor by the access sought by a prospective speaker. It is a conclusion of law to be drawn by a court of competent jurisdiction, based upon the factors set out in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985). The factors are the state

actor's past policies and practices, the attributes of the forum, and evidence of the government's intent.

Rutgers University incorrectly but repeatedly argues that the question before this Court is whether defendants intended to create a public forum in the advertising pages of *Rutgers Magazine*. Db28, 40, 41, 45, 46. This is an incorrect, or, at best, incomplete statement of the law. Intent is but one factor to be considered in the analysis:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.... Accordingly, the Court has looked to the *policy and practice* of the government to ascertain whether it *intended* to designate a place not traditionally open to assembly and debate as a public forum.... The Court has also examined the *nature of the property* and its *compatibility with* expressive activity to discern the government's intent.

Cornelius, 473 U.S. at 802.

This Court, like the trial court, must accordingly, in order to discern the legal nature of the forum, look to (1) the *Magazine*'s policies and practices, (2) the nature of the property, and (3) its compatibility with expressive activity. The trial court, with appropriate citations to the record, concluded that *Rutgers Magazine* had a policy of selling ads to the public, in practice did sell advocacy ads, and provided ad space that was compatible with expressive activity concerning the revenue sports program at Rutgers. Da38, 48, 49.

Governmental entities like Rutgers University do not have jurisdiction to determine the constitutional rights of prospective speakers. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60, 73 (1803). If a state actor could determine the nature of a forum as traditional, designated, or non-public, there would be

nothing left for the courts to determine. Gregoire v. Centennial School Dist., 907 F.2d 1366, 1374 (3d Cir. 1990) ("[t]o allow [] the government's statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of First Amendment rights would be determined by the government rather than by the constitution."). In cases like this, the judiciary is called upon to determine the nature of the forum and the level of scrutiny to be applied, without deferring to the governmental entity that is alleged to have designated the forum. Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 251 (3d Cir. 1998), cert. denied, 525 U.S. 1068 (1999). See also Air Line Pilots Ass'n, Int'l v. Dept. of Aviation, 45 F.3d 1144, 1153-54 (7th Cir. 1995) (government's stated policy is not dispositive with respect to the government's intent in a given forum); Stewart v. Dist of Columbia Armory Bd., 863 F.2d 1013, 1016-1017 (D.C. Cir. 1998) (intent should be inferred from Cornelius factors).

The question, therefore, is not whether defendants intended to create a designated public forum, but whether, in light of their policies and practices and the nature of the advertising space, the ad space constitutes a public forum as a matter of law.

The fact is that defendants opened the advertising pages of *Rutgers Magazine* to the public at large. The *Magazine* does publish advocacy ads such as the "Salute to Alumni Legislators." Moreover, after identifying the revenue sports program as a controversial issue, and after rejecting the Alumni Council ads, the *Magazine* published the two-page ad for the Big East basketball tournament. Clearly, based on the evidence, and for the reasons set forth in its Order of April 3, 2001, the trial court rendered the proper determination.

B. Ad Space is a Designated Public Forum

The factors set forth in Cornelius, supra, 473 U.S. at 802, show that *Rutgers Magazine* created a designated public forum in its advertising space. A designated public forum exists where, as here, the state actor intentionally opens to the public a forum that it might otherwise reserve for its own use. For example, in Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court found that state university meeting places constitute designated public forums. Widmar concerned the University of Missouri at Kansas City, which had made its facilities generally available for the activities of registered student groups but later prohibited religious groups from using the facilities for worship. The Court held that the state university's exclusionary policy violated the Constitution. Through its policy of selling ads to advertisers both inside and outside the Rutgers community, Rutgers University has likewise created a forum generally open for advertisers wishing to reach the Rutgers community, especially alumni.

Similarly on point is the Third Circuit's opinion in Christ's Bride Ministries v. SEPTA, supra,148 F.3d 242. Christ's Bride Ministries ("CBM") purchased ad space for posters stating that "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." SEPTA operates buses, subways and regional rail lines, and is an "agency and instrumentality" of the Commonwealth of Pennsylvania. After receiving complaints about the posters, SEPTA removed them. Reviewing SEPTA's policies and practices with respect to selling ad space, the court concluded that (a) the advertising space was a public forum; (b) SEPTA's action in removing the posters could not survive strict scrutiny; and (c) even if the ad space were not a public forum, SEPTA nevertheless violated the constitution.

SEPTA's policies and practices were much like *Rutgers Magazine*'s. SEPTA used its advertising space to generate revenue, and it discouraged tobacco and alcohol-related advertising. Id. at 250. It reserved for itself the right to reject ads for any reason, and claimed the right to remove any advertising material it deemed objectionable for any reason. In practice, however, SEPTA accepted a broad range of ads for display, including religious messages and ads for safe sex, family planning, adoption, and related topics, including two ads related to abortion. The court concluded that SEPTA created a designated public forum that was suitable for the message CBM wanted to express. Id. at 256.

Even if the ad space were not a limited public forum, the Third Circuit held that SEPTA's conduct violated the First Amendment, because it was not reasonably related to the purposes of the forum. Id. at 257. CBM paid the commercial rate for the ad space, just like any other advertiser, and submitted an ad on abortion and women's health, topics that were already the subject of other permitted advertisements. Thus, the court found that the subject of the speech and the manner in which it was presented were compatible with the purposes of the forum. Id. at 256.

Here, *Rutgers Magazine* had no written policy, regulations or guidelines until after it rejected the Alumni Council ads. Advocacy ads and athletic promotions previously appeared in advertising space. See, e.g., Da73 (apparel promoting sports teams and the Big East Conference), Da75, 77 (urging alumni to lobby their legislators in Trenton on behalf of Rutgers University); Da95 (recreation memberships), Da92-93 (Big East basketball championship). When the Alumni Council attempted to place two paid ads, one urging Rutgers to withdraw from professionalized college athletics, and the other merely inviting inquiry, the *Magazine* rejected both as "advocacy." The previously

unwritten policy against “advocacy advertising” was formulated after the fact to exclude the Alumni Council’s disfavored point of view.

Most significantly, a full-page ad for the Big East Conference appears in the Fall 1998 issue. Da92-93. The ad, which sold for $4855, Da66 (joint stipulation 15), promoted the Big East basketball tournament - not Rutgers University. The Alumni Council's ads concerned a topic that was already the subject of other permitted advertisements, and the manner in which they were presented were fully compatible with the purposes of the ad space. See Christ's Bride Ministries, 148 F.3d at 256. See also Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001)(college yearbook is a limited public forum).

C. *Rutgers Magazine's* "Policy" is Neither Content-Neutral Nor Narrowly Tailored

Rutgers University's policy against “issue-oriented” ads is purely content-based, and thus presumptively unconstitutional. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). The government cannot deny public access to a designated public forum or regulate access on the basis of the content of the proposed speech. Perry, 460 U.S. at 45. At most, it may impose content-neutral time, place, and manner restrictions that are necessary to serve a compelling interest and that are narrowly drawn to achieve that end. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Widmar, supra, 454 U.S. at 270.

In any event, the alleged policy against “issue-oriented” speech cannot be content-neutral. The editor would have to scrutinize each ad to categorize both the text and the

identity of the advertiser, as William Owens did with the Rutgers 1000 Alumni Council. Since the ad space is a designated public forum, content-based restrictions on speech remain subject to strict scrutiny, and even content neutral regulations (which defendants have not established) must be narrowly tailored to advance a significant governmental interest (which defendants have not identified). Kokinda, 497 U.S. at 726-727.

D. Rutgers University Asserts No Sufficient Governmental Interest

Rutgers University has not articulated any legitimate governmental interest to support its efforts to suppress the Alumni Council's speech, hence its "policy" fails every level of constitutional scrutiny. The *Magazine*'s mission "to promote Rutgers and its programs, and to engender loyalty and enthusiasm for the institution" applies to the editorial content of the *Magazine*, not its advertising space. The ads sold to the Arbor Glen Retirement Community, Da89, and Hitcharama Recreational Vehicles, Da90, are unrelated to "engendering loyalty and enthusiasm" for Rutgers, and the Daily Targum newspaper, Da99, is often quite critical of the University.

Rutgers Magazine does not endorse the ads in its pages. 2T 29:1-3. Readers will not assume that Rutgers University endorses ads any more than letters to the editor. Nor do the ads necessarily endorse Rutgers. Ironically, the independent *Daily Targum* newspaper, which is often critical of the University (and advertises in *Rutgers Magazine*), probably engenders loyalty by airing controversies rather than trying to manipulate alumni sentiment.

Defendants' asserted interest in promoting loyalty is nothing more than a restatement of their desire to review prospective ads and reject the ads of which they disapprove. Their policy fails every level of scrutiny under the federal constitution,

regardless of the forum analysis applied. The *Magazine*'s promotional purpose cannot be characterized as a "compelling" or "significant" government interest. See Cornelius, 473 U.S. at 800. See also Texas v. Johnson, 491 U.S. 397 (1989); Kokinda, 497 U.S. at 726-27 (in a designated public forum, content-based restrictions on speech remain subject to strict scrutiny, and even content neutral regulations must be narrowly tailored to advance a "significant" governmental interest).

Nor would the Alumni Council ads have interfered with space limitations, since the *Magazine* permits up to 16 pages of advertising, plus the back and inside covers, which defendants admit has never sold out. Da66 (joint stipulation 13). There is no compelling state interest in preventing the Alumni Council from expressing its views in *Rutgers Magazine*.

Even under the least exacting level of scrutiny, defendants' policy cannot be characterized as "reasonable" when the only reason they give is a restatement of their desire to restrict expression because of its content or the identity of the speaker. See Perry, supra, 460 U.S. at 46; see also Christ's Bride, 148 F.3d at 257.

Defendants' citations to Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998); and Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989), do not help Rutgers. The governmental interests asserted in those cases were more substantial than Rutgers Magazine's ephemeral promotional purpose, and the governmental entities in those cases behaved consistently when applying their policies and practices to prospective speakers.

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), pre-dates the forum analysis set forth in Perry,[3] and in any event concerned limited advertising card space in city buses as opposed to advertising space in print that is, for practical purposes, unlimited. The Court upheld the right of a municipality to restrict advertising space in city buses to "innocuous and less controversial commercial and service oriented advertising," but only because the city had consistently rejected political ads, and because of concern for the "captive audience" on the bus. Id. at 304. There is no such captive audience in this context, and Rutgers University has not been consistent.

Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), again concerned advertising space on city buses. The city asserted four governmental interests in support of its refusal to sell ad space to an anti-abortion organization: 1) maintaining a position of neutrality on political and religious issues; 2) a fear that buses and passengers could be subject to violence if advertising were not restricted; 3) preventing a reduction in income earned from selling ad space becaue commercial advertisers would be dissuaded from sharing the forum with political and religious messages; and 4) fear of violating the Establishment Clause. Id. at 979. The court held that these interests

[3] Several decisions have held that state-supported school newspapers and public transport companies may not exclude controversial editorial advertisements in favor of commercial advertisements: Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wisc. 1969), aff'd 441 F.2d 1257 (7th Cir. 1971); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash.2d 63, 455 P.2d 350 (1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51, 434 P.2d 982 (1967). The Supreme Court has never overruled or criticized these cases, see CBS v. DNC, 412 U.S. 94, 129 n.23 (1973)(citing cases), though it has observed that they provide little guidance in resolving the question of access to the *broadcast* media. Id. at 130. Like Lehman v. Shaker Heights, supra, these cases predate the Court's 1983 decision in Perry, 460 U.S. 37, which introduced the public forum analysis that applies here.

supported the reasonableness of the city's consistent practice of turning away non-commercial ads.

Here, in contrast, Rutgers University has not maintained a position of neutrality; it has published ads that specifically support the revenue sports program and encourage alumni to take political action on behalf of the university. Rutgers University certainly cannot assert any health or safety concern, or any potentially conflicting constitutional issue like the Establishment Clause, and it has not asserted any concern that it might lose other prospective advertisers. The only governmental interest Rutgers University proffers is its desire to influence the minds of alumni, and the means it has chosen toward that end impermissibly invest the magazine's editorial director with absolute discretion.

In Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371 (5th Cir. 1989), a lawyer sued a bar journal for publishing disciplinary proceedings. The court held that the bar journal, as a state actor, was subject to First Amendment constraints that do not apply to the private press. Id. at 382. The governmental interest it served was to encourage members of the bar to adhere to the state's disciplinary rules. Accordingly, it published the results of disciplinary proceedings, and had never given individual attorneys a right of reply. The court found that the bar journal's decision was reasonable in light of the purpose of the forum, which was rationally related to the bar's ethical standards. Id. at 383.

The promotional purpose Rutgers asserts in this case is not tied to any state interest as substantial as the governance of attorneys as officers of the court, nor is it tied to any statute, rule or formal regulation. To the contrary, the promotional purpose is merely a restatement of Rutgers's content-based and purely discretionary method of

vetting ad copy. Moreover, unlike this case, Estiverne involved no commercial advertising; it concerned editorial content, which is not the relevant forum at issue here.

E. Rutgers Cannot Carry Its Burden

Without a legitimate state interest to support its suppression of speech, Rutgers cannot carry its burden of demonstrating a reasonable fit between its policy and its actual conduct. "[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 480 (1989).

Rutgers University admits it is a state actor. Db30. It opened its advertising space in *Rutgers Magazine* to the public, allowed ad space for the promotion of big-time sports in the Big East ad, and published advocacy advertising in the "Salute to Alumni Legislators." The record amply reveals that defendants violated the Constitution by rejecting plaintiff's proposed ads based on their content and plaintiff's identity as a disfavored organization. 2T 101:11-24; 2T 54:21-55:20.

Rutgers University relies on Perry, supra, 460 U.S. 37 (1983), for the proposition that it is entitled to silence disfavored groups based on their identity. Db58. But the facts of this case are virtually the opposite of the facts in Perry. The forum in Perry was teacher mailboxes, a highly restricted forum to which very few people had access. Here, in contrast, almost anybody gets to advertise in *Rutgers Magazine*. A very special group in Perry had status to engage in collective bargaining with the teachers union, and therefore had access to the non-public forum in that case. Here, Rutgers University is trying to do the opposite, labeling a group of disfavored alumni for the purpose of denying access to a forum where other advertisers are permitted to speak.

Rutgers concedes that only its advertising space is relevant to the public forum analysis in this case. Unaccountably, Rutgers University maintains that the editorial section of the *Magazine* invites controversy, directly contradicting the purported mission of engendering loyalty, support, and enthusiasm. Db13. Moreover, Rutgers asserts that the editorial pages, letters, and alumni notes, went so far as to publish information provided by Richard S. Seclow. Db13. This assertion cannot be reconciled with Rutgers's claim that to allow the very same views to be published in the advertising section would somehow be inconsistent with the *Magazine*'s mission to engender loyalty, support, and enthusiasm.

The difference between the ad section and the other three sections of the *Magazine* is the degree of control Rutgers University can exert over speech. In the editorial pages, Rutgers University can control the message that is conveyed about the Alumni Council. By editing the letters from alumni, Rutgers University can limit the writers' ability to speak for themselves. In all three sections, Rutgers University can omit information about how interested alumni can affiliate themselves with the Rutgers 1000 Alumni Council.

The floodgates did not open; no harm came to Rutgers University as a result of mentioning the Alumni Council and its message in other sections of the *Magazine*. 2T 83:5-19, 84:16-22. There is no evidence that harm would inure from letting the Alumni Council speak for itself in advertising. Accordingly, defendants' decision to suppress the ads was unreasonable.

Rutgers University attempts to contrast the "Salute to Alumni Legislators" ad against the Alumni Council's. Db51. The "Salute" pertains to "state legislation affecting

Rutgers and higher education," whereas the Alumni Council's proposed ads pertain to "a concrete matter of internal University policy." Ibid. However, the distinction is not reasonable. Both the revenue sports program and the legislative appropriation to the State University affect every single Rutgers student in New Jersey, affecting the resources allocated to library and sports facilities, faculty and coaching salaries, and the University's standing among its peers.

Rutgers University's citation to Lebron v. Nat'l Railroad Passenger Corp., 69 F.3d 650 (2d Cir. 1995), is unavailing. In Lebron, the Second Circuit held that it was reasonable for Amtrak to "decline to enter the political arena" when it sold advertising space in New York City's Penn Station. Id. at 658. The ad space at issue was a particular billboard inside the station, and the proposed advertisement displayed a Coors beer can menacing a Nicaraguan village. The proposed ad criticized the Coors family for supporting right-wing causes worldwide. Id. at 653. Amtrak had never accepted an advertisement aimed at any political arena.

The distinction between Lebron and this case is that Rutgers has already entered the political arena. The Salute to Alumni Legislators urges alumni to contact Rutgers University for instruction on the positions to take with state legislators. Indeed, the Salute does exactly what the Rutgers 1000 Alumni Council's classified ad would have done - it invites inquiry. The Big East ad takes sides in favor of the revenue sports program at the State University. *Rutgers Magazine* published it, knowing full well that the subject provoked hot debate. Thus Rutgers University, unlike Amtrak, cannot claim that it has been consistently neutral.

The political arena in this case is very narrow. The revenue sports program at Rutgers is related to the state university's commitment to academic standing, its recognition of athletic talent, and its caliber as a state university. To publish the Rutgers 1000 Alumni Council's ads would therefore not necessarily require *Rutgers Magazine* to publish ads with no comparable nexus to the university.

The issue in this case is much narrower than Rutgers suggests. To accept the Alumni Council's ads would not force *Rutgers Magazine* to accept ads from Holocaust deniers, Operation Rescue, the NRA, or even politicians running for office. The Alumni Council ads concern the debate about what is best for Rutgers University, on a subject that is already an important issue at the University and of proven interest to alumni. They address a political issue, but only to the extent they stimulate discussion about how a state university can best serve its constituency.

To print the Alumni Council ads would actually support the purpose of the *Magazine*, stimulating readers to grapple with Rutgers University's mission in the state, and encouraging loyalty by respecting the readers' intelligence. Rutgers University's defenses are inconsistent with the tradition and practices of a university environment dedicated to academic freedom and free speech.

Even if the advertising space in *Rutgers Magazine* were not a public forum, defendants' decision not to accept the ads from the Rutgers 1000 Alumni Council violated the First Amendment. Rutgers University cannot use its policy against "issue-oriented" ads as a pretext for excluding disfavored speakers or unpopular views. To label something "issue-oriented" is to retreat into an exaggerated level of generality; to ban it is a form of viewpoint discrimination. See Air Line Pilots, supra, 45 F.3d at 1159 (airport

cannot refuse advertising in display cases on the basis that another advertiser found it objectionable).

Defendants' proffered "policy" is neither facially legitimate nor sufficient to justify suppressing the message of the Alumni Council. Rutgers University violated the First Amendment because its stated purpose in reality concealed a bias against the viewpoint advanced by the Rutgers 1000 Alumni Council. "The existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination." Cornelius, 473 U.S. at 811.

IV. REGARDLESS OF THE NATURE OF THE FORUM, RUTGERS UNIVERSITY'S SUPPRESSION OF THE RUTGERS 1000 ALUMNI COUNCIL ADS CONSTITUTES VIEWPOINT DISCRIMINATION

The record reveals that Rutgers University rejected plaintiff's ads because it wished to suppress the Alumni Council's disfavored views. Viewpoint discrimination is a form of content discrimination in which "the government targets not subject matter, but particular views taken by speakers on a subject." Rosenberger v. University of Virginia, 515 U.S. 819, 829 (1995). In Rosenberger, a state university declined to pay for the printing costs of a student organization that had a Christian religious orientation. The Supreme Court held that the university had selected for disfavored treatment a specific editorial (i.e., religious) viewpoint. Marching through the black letter law set forth in its precedents, the Court stated the axiom that "the government may not regulate speech based on its substantive content or the message it conveys," id. at 828, and concluded that "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination." Id. at 831. Elsewhere, using

more colorful metaphors, the Court has said that viewpoint discrimination permits "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992).

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. … 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.

Rosenberger, 515 U.S. at 835-36.

Very recently, the Supreme Court reaffirmed these principles. Good News Club v. Milford Central School, 121 S.Ct. 2093, 130 L.Ed.2d 151, 2001 U.S. Lexis 4312 (June 11, 2001), citing Rosenburger, supra, and Lamb's Chapel v. Center Moriches Union Free School Dist, 508 U.S. 384 (1993). In short, even when the state is acting to preserve the limits of a forum it has created, it must use neutral standards instead of selectively suppressing particular points of view. See Rosenberger, 515 U.S. at 829 ("the State must respect the lawful boundaries it has itself set"). See also Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001) (state university officials used viewpoint discrimination to suppress college yearbook).

The record reveals five facts that establish a clear case of viewpoint discrimination, regardless of the nature of the forum in the advertising pages of *Rutgers Magazine*. First, the Alumni Council's display ad was the first advertisement ever to be submitted to *Rutgers Magazine* and rejected under defendants' alleged policy. *Rutgers*

Magazine has never received ads from Holocaust deniers, the NRA, Operation Rescue, or any other prospective advertiser whom it has rejected. 2T 65:15-22. Second, the alleged policy was not written anywhere until defendants rejected the Rutgers 1000 Alumni Council's ads. The policy against "advocacy" ads was not articulated as such until William Owens sent his rejection letter of June 24, 1998, Da165, Da202, and "issue-oriented" ads were not identified until the time of trial. 2T 44:15-22.

Third, Rutgers University rejected the Alumni Council's classified ad not because of what it said, but because William Owens considered the Alumni Council to be an "issue-oriented" group. 2T 54:21-55:20. The text of the classified ad merely invited inquiry, Da169; the identity of the messenger got the ad killed. As Mr. Owens testified, the classified ad was rejected not on the basis of its content, but because of the identity of the group that submitted it. 2T55:9-20.

Fourth, *Rutgers Magazine* in fact does accept advocacy advertising. The best example is the "Salute to Alumni Legislators," which urges alumni to contact Rutgers University to find out how to approach legislators in Trenton to discuss issues that are of importance to the University. Da75, 77. The ads in *Rutgers Magazine* are not limited to goods and services, as the Big East ad and the Salute to Alumni Legislators amply illustrate. Da75, 92.

Fifth, and finally, after the Alumni Council ads were rejected, and after participation in the Big East Conference was identified as a matter of public controversy, 2T 53:19-24, *Rutgers Magazine* accepted and published an ad from the Big East Conference, urging alumni to support Rutgers's participation in the basketball

tournament. Da92-93. The evidence is abundantly clear that the Alumni Council is disfavored because of its point of view.

To reject the classified ad because it came from the Rutgers 1000 Alumni Council was manifestly improper. "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law … abridging the freedom of speech.'" FCC v. League of Women Voters, 468 U.S. 364, 383-384 (1984).

Defendants' tortured attempts to characterize the classified ad as "issue-oriented" are specious. Even in Cornelius, where the Supreme Court ultimately held that the forum was nonpublic, the Court remanded the matter for a hearing to determine whether the federal government was excluding certain groups because it tacitly disapproved of their views. Cornelius, 473 U.S. at 811.

Rutgers University may not use viewpoint discrimination to decide who may use its facilities and on what terms, even if they are not public forums. "Where the proffered justification for restricting access to a nonpublic forum is facially legitimate, the government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers." U.F.C.W. Local 1099 v. Southwest Ohio Regional Transit Auth., 163 F.3d 341, 356 (6th Cir. 1998). See also Cornelius, 473 U.S. at 806, 811; Mosley, 408 U.S. at 95-96; Chicago Acorn v. Metropolitan Pier & Expo. Auth., 150 F.3d 695, 704 (7th Cir. 1998) ("government may not discriminate on political grounds in the terms of access to the nonpublic forums that it owns").

Rutgers University argues that it did not practice viewpoint discrimination when, after identifying the revenue sports program as a matter of controversy, 2T 53:19-24, it permitted the Big East Conference to advertise but suppressed the Alumni Council. Defendants assert that the Big East ad was unrelated to the University's participation in the conference, but merely sold tickets. Db21, 52. The ad itself defies defendants' argument. Da92-93. The record shows that Rutgers University will entertain all points of view on its revenue sports program, so long as they cleave to the *status quo*, win the approval of the current administration, and conform absolutely to current doctrine. This is the apotheosis of prior restraint. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 763 (1988) (danger of censorship is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official).

V. INVESTING A STATE ACTOR WITH ABSOLUTE DISCRETION TO USE SHIFTING CRITERIA TO SUPPRESS SPEECH CONSTITUTES PRIOR RESTRAINT

Whatever the nature of the advertising space as a forum, whether public or not, Rutgers University's "policy" lacks objective standards. It permits arbitrary decision-making by the Director of Marketing and Communications Services, creating a prior restraint. A restriction is a prior restraint if it "prevents the expression of a message." Hamilton Amusement Center v. Verniero, 156 N.J. 254, 284 (1998), cert. denied, 527 U.S. 1021. Restrictions on protected expression that vest unbridled discretion in government officials are impermissible, because they result in unreviewable prior restraints on First Amendment rights. Lakewood, 486 U.S. at 757. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint,

intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." Id. at 757. Here, of course, Rutgers University actually did abuse its discretion when it refused to run the Rutgers 1000 Alumni Council ads.

Rutgers University invested one individual, William Owens, with discretion to give or withhold access to the *Magazine*'s advertising section. The difficulty with this approach is that it explicitly grants a governmental official discretionary authority to examine the content of proposed speech. Far from providing-content neutral guidelines or time, place and manner restrictions, it forces the government official to investigate prospective speakers and analyze the content of their speech. It will inevitably be necessary for the state actor to weigh and consider the content of each ad, and determine whether, in his opinion, a proposed advertisement will "promote Rutgers and its programs," "engender loyalty and enthusiasm," "benefit and be of interest to the audience," and be "not inconsistent with the magazine's limited purposes."

In a long and celebrated line of cases, the Supreme Court has stricken policies that vested officials with unfettered discretion to regulate speech. See Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (invalidating ordinance that required marchers to obtain permission from a city commission); Cox v. Louisiana, 379 U.S. 536 (1951) (striking standardless breach-of-the-peace statute); Kunz v. New York, 340 U.S. 290 (1951) (invalidating ordinance that prohibited public worship without a permit from the city police commissioner). The Supreme Court has often and uniformly held that such policies impose censorship because "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based

upon the content of the speech or viewpoint of the speaker." Lakewood, 486 U.S. at 763-764.

As the Supreme Court explained, this principle is closely related to the standards for regulating expressive activity. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). "The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." Id. at 131 (internal citations omitted).

Leaving the decision open to discretion is no answer; the government official who gives permission based on content alone must censor based on content alone. "The essence of this forbidden censorship is content control. Any restriction on expressive activity would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Police Dep't v. Mosley, 408 U.S. at 96 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The power to deny the use of a forum in advance of actual expression must be subject to "narrow, objective, and definite standards to guide the licensing authority." Shuttlesworth, supra, 394 U.S. at 150-51.

Rutgers University's argument that prior restraint applies only in public forums is baseless. Db62. The proscription against prior restraint is not limited to parks, streets and sidewalks; it clearly applies to governmental efforts to restrict private speech in the print

media. See, e.g., New York Times v. United States, 403 U.S. 713 (1971) (Pentagon papers).

The history of prior restraint jurisprudence is recited in the case where the United States Supreme Court recognized the First Amendment as fundamental within the purpose of the Due Process Clause of the Fourteenth Amendment. Grosjean v American Press Co., 297 U.S. 233 (1935). "History discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government." See also Lakewood, 486 U.S. at 757 (history of prior restraint).

The two major First Amendment risks associated with unbridled discretion are self-censorship and the difficulty of detecting censorship because of *post hoc* rationalizations and shifting criteria. Lakewood, 486 U.S. at 759. These risks are not confined to public forums, but may exist wherever state actors attempt to control expression. Here, defendants' criteria shifted from "advocacy advertising" to "issue-oriented" group identity, rendering the criteria so vague as to be meaningless.

Such an open-ended and malleable policy permits a censor to permit or suppress ads based on the government's approval or disapproval of the speaker's message, and makes it impossible to tell beforehand whether prospective speech will be permitted or not. Rutgers University's "policy" expands to fit whatever is to be suppressed. When the Alumni Council first submitted its display ad, the rationale for rejecting it was "advocacy advertising." Da164. Later, in order to reject the classified ad, which said almost nothing, the policy expanded to bar ads from issue-oriented groups. The editor of *Rutgers*

Magazine, Lori Chambers, was herself not sure whether the "policy" would permit the ads from the Alumni Council; she had to ask her boss, Mr. Owens. Db17, Da67, 2T 44:1-12. Even Mr. Owens could not interpret the policy. He did not know whether the "Salute to Alumni Legislators" was purchased by an issue-oriented group. 2T 68:11-15. Nor did he try to find out. No. 2T 68:16-22. At deposition, Mr. Owens testified that ads were limited to goods and services, and was not sure whether he would permit an ad that featured t-shirts and baseball caps bearing the Rutgers 1000 logo. Db10, Da201, 2T 80:17-81:16. At trial, by contrast, he rejected the proposal out of hand. 2T 76:16-77:4. It is not possible to determine beforehand whether a prospective advertisement will be accepted or rejected for publication in *Rutgers Magazine.*

Defendants argue that the trial court's decision is "far more likely to chill or deter future expressive speech than to foster or encourage it." Db45. In essence, the argument is "we must censor them so we will not have to censor ourselves." This Court need not rule based on abstractions that might occur in the future rather than those that have already occurred. If *Rutgers Magazine* dedicates a cover story to minority scholarships, gay rights on campus, abortion services or controversial departmental research, Db43, it will be entitled to editorialize about the merits of the issue in its editorial pages. If *Rutgers Magazine* then sells an ad for thousands of dollars pertaining to one view of the cover story, while suppressing a contrary view, it may again face the questions presented here. But the question before this Court is whether Rutgers University violated plaintiff's free speech rights in 1998. This Court may "decline to discuss political speech in a hypothetical case that is not before it." State v. Schad, 160 N.J. 156, 177 (1999), quoting

Hamilton, 156 N.J. at 266. See also Pentagon Papers, 403 U.S. at 725 (First Amendment tolerates no surmise or conjecture) (Brennan, J., concurring).

Ordinarily, state actors maintain impartiality by permitting many contrasting points of view. The time-honored formulation for curing offensive speech is to permit more speech. Strangely, defendants asserts they must "discriminate even-handedly against everybody" by restricting speech. Db12. The alleged mission to maintain impartiality contradicts the *Magazine*'s other alleged mission to engender loyalty, support, and enthusiasm. It also defies logic, unless it is taken as nothing more than a restatement of defendants' desire to retain the strategy of placing absolute discretion in the *Magazine*'s editorial director. Rutgers has not set forth "narrow, objective and definite standards" as required by the First Amendment. Shuttlesworth, 394 U.S. at 151.

Ironically, Rutgers University seems to place no faith in its graduates to read and evaluate advertising material with a critical eye. Instead of welcoming ads from alumni, especially those that might pertain to the role of the University in the State of New Jersey, Rutgers cloaks itself with paternalistic authority, not permitting its readers to speak or disagree with each other. The University community deserves better.

VI. DEFENDANTS VIOLATED THE FIRST AMENDMENT RIGHT OF ALL RUTGERS ALUMNI TO RECEIVE INFORMATION ABOUT THEIR ALMA MATER

Rutgers Magazine is an official source of information for Rutgers alumni, many of whom care about the University's academic standing as well as its athletic prowess. To deprive a group of concerned alumni from the very forum Rutgers created for the specific purpose of disseminating information about the University violates the First Amendment rights of alumni who would affiliate with the Alumni Council if they could.

Justice Brennan's concurring opinion in Lamont v. Postmaster General, 381 U.S. 301 (1965), now constitutes the hallmark of the right to receive information: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them…. It would be a barren marketplace of ideas that had only sellers and no buyers." Id. at 308 (cited with approval in Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1252 (3d Cir. 1992) (First Amendment right to receive information in public libraries)).

The constitutional right to receive information was first articulated by the United States Supreme Court in Martin v. City of Struthers, 319 U.S. 141 (1943), a case in which a Jehovah's Witness was convicted and fined for distributing advertisements even though she "proceeded in a conventional and orderly fashion." Id. at 142. The Court observed that the framers "knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature … and *necessarily protects the right to receive it*." Id. at 143 (emphasis added).

In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court, in a plurality opinion, again placed its imprimatur on the constitutional right to receive information. It struck down a variety of statutes that prohibited doctors from providing information about birth control:

> The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read … and freedom of inquiry, freedom of thought, and freedom to teach - indeed the freedom of the entire university community.

Id. at 482 (internal citations omitted).

In Stanley v. Georgia, 394 U.S. 557 (1969), the Court explained that the "right to receive information and ideas, regardless of their social worth … is fundamental to our free society." Id. at 564.

The Supreme Court subsequently recognized the right to receive information in several other decisions. See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) ("First Amendment … afford[s] the public access to discussion, debate, and the dissemination of information and ideas"); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (First Amendment encompasses "right to receive information and ideas"); Board of Ed. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (First Amendment protects the right to receive information and ideas). These Supreme Court cases make it clear that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompass the affirmative right of public access to information and ideas.

Rutgers University alone has the resources to provide information about its policies and programs, and it alone has the resources to disseminate messages among

concerned alumni. It has established a forum in *Rutgers Magazine* that purports to be for alumni, touching not only the right of alumni to speak through advertising, but also the right of alumni to receive pertinent information about their alma mater.

> It is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them…. More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.

Pico, 457 U.S. at 867 (plurality opinion) (emphasis in original).

According to Rutgers University, the *Magazine* will accept commercial advertising, but will reject ads from disfavored alumni regarding University policies. This approach offends the equal protection component of the First Amendment, by treating some advertisements differently from others. Mosley, 408 U.S. at 95. "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities." Id. at 96.

The trial court correctly ruled that defendants unconstitutionally impaired the right of other alumni to receive information about an ongoing program at Rutgers University, and the right of certain alumni to affiliate themselves with the Rutgers 1000 Alumni Council.

VII. THE ADVERTISING SECTION OF *RUTGERS MAGAZINE* IS NOT GOVERNMENTAL SPEECH AND IS THEREFORE SUBJECT TO CONSTITUTIONAL CONSTRAINTS

A number of prospective *amici curiae*[4] raise a new issue that cannot be reconciled with defendants' arguments on this appeal. The new issue is whether this case involves "government speech rather than government regulation of private speech." Brief in support of motion for leave to appear, at 3. Instead of arguing in support of Rutgers University's position, or accepting the case before the Court as presented by the parties, State v. Nance, 148 N.J. 376, 385 (1997), *amici* offer wholly different grounds for reversing the trial court.

If it adopts the arguments advanced by *amici*, this Court must refuse to apply forum analysis to the advertising section of *Rutgers Magazine*. The prospective *amici* rely on precedents unrelated to the facts, citing to broadcast media and high school cases where totally different governmental interests drove the courts' decisions.

A. The Relevant Forum, Ad Space, Does Not Constitute Governmental Speech

The trial court's decision below does not impair governmental speech; to the contrary its focus is on the government's efforts to impair private speech. The editorial pages of *Rutgers Magazine* do constitute governmental speech, as do the class notes and letters, which are edited for content and viewpoint. Advertising space, in contrast, is routinely sold to private speakers unrelated to the university. The ads themselves are not

[4] Plaintiff does not oppose the appearance *amicus curiae* of American Council on Education, American Association of Community Colleges, American Association of State Colleges and Universities, Council for Advancement and Support of Education, and National Association of State Universities and Land-Grant Colleges, despite the fact that Rutgers University may well be among their members.

government speech, and Rutgers University does not endorse them. Finding 14 (Da38, citing 2T29:4-6).

In addition to ruling that the relevant forum was advertising space, the trial court made two important findings of fact that pertain to this issue. With appropriate citations to the record, the trial court found that "all advertisements in *Rutgers Magazine* are paid for, whether they come from other departments within Rutgers University or advertisers that are unrelated to Rutgers University." Finding 17 (Da38, citing 2T 31:10-32:6). It similarly found that "advertisements in *Rutgers Magazine* are neither government speech nor governmentally-subsidized speech, because they are paid for and treated as external revenue sources for the *Magazine*. The cash flow is from the advertiser to the state, not vice versa." Finding 18 (Da39, citing Da175-179, 2T 31:7-32:6).

These facts erode *amici*'s claim that the advertising space of *Rutgers Magazine* is governmental speech that should not be subject to constitutional constraints. Ab8. The First Amendment does not permit the state to suppress speech merely because the relevant forum is in a magazine. This is clear from Rosenberger, supra, where a state university declined to pay for the printing costs of a student organization that had a religious orientation. There, as here, the publication was not governmental speech. *Cf.* Legal Services Corp. v. Velazquez, 121 S.Ct. 1043, 1051 (2001) (holding that when government "designs a program to facilitate private speech, and not to promote a government message," and "seeks to use an existing medium of expression and to control it … in ways which distorts its usual functioning," it violates the constitution).

The context of state funded public broadcasting is not "closely analogous." Ab17. The broadcast media operate under statutorily mandated discretion, 47 U.S.C. § 309(a),

and bear no resemblance to a printed magazine published by the state. The broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969). See also FCC v. League of Women Voters, 468 U.S. 364 (1984) (dynamics of the broadcasting industry).

Forum analysis simply does not apply to the broadcast media, with the narrow exception of political candidates' debates. "Public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine." Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998); Knights of the Ku Klux Klan v. Curators of the University of Missouri, 203 F.3d 1085, 1093 (8th Cir. 2000); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982).

Advertising space in *Rutgers Magazine* bears no resemblance to television or radio. Far from being a scarce resource comparable to broadcast frequencies or air time, ad space in the *Magazine* has never run short. Da66 (joint stipulation 13). Viewpoint discrimination is intolerable, even when resources are scarce. It is "incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the rights to exercise viewpoint discrimination that is otherwise impermissible." Rosenberger, 515 U.S. at 835, discussing Lamb's Chapel.

In Forbes, the Supreme Court recognized that a public television station, as a protected speaker, enjoys broad First Amendment-based editorial discretion in structuring a candidate debate, including the right to exclude candidates with insufficient public

support. The Court warned, however, that since a televised debate on public television is a form of government speech subsidy, access may not constitutionally be allocated on the basis of a candidate's viewpoint. 523 U.S. at 675-76.

B. Advertising Does Not Convey a Governmental Message

This is a case about private speech. *Rutgers Magazine* need not sell ads at all; it chooses to do so to generate revenue. Ad space is designed to facilitate private speech so that the Arbor Glen Retirement Home, Hitcharama, and other advertisers can promote themselves. The ads do not speak for Rutgers University. The cash flow is not from the government to the speaker, but from advertisers to the State University. The Rutgers 1000 Alumni Council did not ask for a subsidy; it asked to pay the going rate for the purpose of purchasing advertising space in a forum that is open to the rest of the public.

Accordingly, this is not a case in which the government uses a private entity to convey a governmental message. Ab18. Rust v. Sullivan, 500 U.S. 173 (1991), does not immunize Rutgers Magazine from First Amendment attack. In Rust, Congress established a federally funded family planning program that explicitly excluded abortion as an acceptable form of family planning and, according to the government, forbade doctors employed by the program from discussing abortion with their patients. The Supreme Court upheld the restriction by a vote of 5-4, reasoning that the true First Amendment speaker was the government, using paid doctors to disseminate a narrowly defined substantive message about the government's preferred forms of family planning. Id. at 194.

Here, there is no selective funding issue; cash is flowing in the opposite direction. Rutgers University accepted $4855 from the Big East Conference and printed its ad in

Rutgers Magazine in the very issue for which it rejected plaintiff's ads. In Rust the government was giving away money, whereas here plaintiff is trying to give money to the State University in exchange for publishing its ad. Plaintiff does not question the central legal premise of Rust: that the government may speak in support of its programs free from the usual constraints of viewpoint neutrality. But Rust cannot possibly apply to defendants' self-interested, viewpoint discriminatory restrictions on the speech of others.

In its recent subsidized speech cases, the Supreme Court has repeatedly emphasized that the result in Rust hinged on the identity of the speaker. See Rosenberger, 515 U.S. at 833 ("[In Rust], the government did not create a program to encourage private speakers, but instead used private speakers to transmit specific information pertaining to its own program"); National Endowment for the Arts v. Finley, 524 U.S. 569, 612 (1998) ("Drawing on the notion of government-as-speaker, we held in Rust [] that the Government was entitled to appropriate funds for the promotion of particular choices among alternatives offered by health and social service providers"); Board of Regents v. Southworth, 529 U.S. 217, 235 (2000) ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different"). Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), is inapposite; the Alumni Council merely asks to be treated like every other advertiser.

Here, the speaker is the Rutgers 1000 Alumni Council. Applying Rust, as adopted in both Rosenberger and Southworth, this case presents not a government speaker charged with disseminating a particular government message as part of a narrowly focused substantive government program, but with a government decision to suppress

private speech that challenges the government's policies. See also Citizens to Protect Public Funds v. Board of Educ., 13 N.J. 172, 175 (1953) (Brennan, J.) (government may not fund only one side of debate).

To illustrate the distinction between the university speaking for itself and the university spending money to facilitate the speech of others, the Supreme Court explained in Rosenberger that "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." Id. at 833. If there were a programmatic message of the kind recognized in Rust, Rutgers University would have said so. Instead it claimed to be issue-neutral. Rutgers University has never claimed that *Rutgers Magazine*'s advertising section served an educational purpose.

The fact that the State University publishes a magazine does not give it license to violate the First Amendment.

> The government is surely under a constitutional obligation not to use its power of expression, any more than any other power, to abridge freedom of expression. Moreover, there is no real paradox involved in involving the First Amendment to restrict government expression. The purpose of the First Amendment is to protect private expression, and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.

T. Emerson, The System of Freedom of Expression 700 (Vintage Ed. 1971), quoted in Edward H. Ziegler, Government Speech and the Constitution: The Limits of Official Partisanship, 21 B.C. L. Rev. 578, 606 (1980). See also Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2d §20.11 (1992).

C. *Amici* Assert No Legitimate Governmental Interest

Amici rely on a line of totally inapposite high school cases to justify suppressing the message of the Rutgers 1000 Alumni Council. Hazelwood Sch. Dist.v. Kuhlmeier, 484 U.S. 260 (1988), pertained to a high school newspaper that was published as a regular classroom activity. As part of the educational curriculum, the paper merited editorial control by the teachers. *Rutgers Magazine*, in contrast, touches no pedagogical interests. Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991), concerned a ninth-grade teacher's comments about children engaged in sexual conduct. Plaintiff does not dispute the legitimate governmental interest in exposing children to material that is appropriate for their level of maturity; the concern is absent here. Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992), held that a high school could not suppress buttons containing the word "scab," worn by students in connection with a teachers' strike, because the buttons did not disrupt the curriculum.

It is inappropriate for *amici* to rely on these cases for the proposition that ads in *Rutgers Magazine* somehow bear the State University's imprimatur. Ab7. Defendants do not endorse messages in the ads that appear in *Rutgers Magazine*, 2T 29:1-3. Unlike children, Rutgers alumni have the critical skills to recognize ads for what they are: private speech.

D. Rutgers Magazine is Not Entitled to First Amendment Protection

Amici claim that *Rutgers Magazine* is part of the "press" that enjoys constitutional protection. Ab16. To the contrary, *Rutgers Magazine* is an official publication of the State University. There is no authority to hold that it is part of the "press" mentioned in the First Amendment.

Whether a given college publication merits constitutional protection depends on the degree of independence exercised by the college publication. See Kincaid v. Gibson, 236 F.2d 342 (6th Cir. 2001) (state university yearbook is limited public forum); Freedman v. N.J. State Police, 135 N.J. Super. 297 (Law Div. 1975) (*Daily Princetonian* newspaper qualifies as the "press," with New Jersey constitutional protection). The distinction to be drawn here is the difference between *Rutgers Magazine* and the *Rutgers Daily Targum*. The *Targum* is a student publication. It is not an official publication of Rutgers University; it operates under editorial policies of its own. 2T 66:4-10. The *Targum* accordingly constitutes part of the private press, and merits First Amendment protection. *Rutgers Magazine*, in contrast, is not independent. It is an instrumentality of the state.

The First Amendment operates as a restraint on government. *Amici* are misguided to suggest that an official publication of the state is entitled to freedom of the press. The arguments of Rutgers University and its *amici* run contrary to the fundamental principle of vigorous and open debate. Any argument based on academic freedom should support the principle of enhancing speech rather than suppressing it.

VIII. RUTGERS UNIVERSITY CANNOT SUPPORT ITS ASSERTED INTEREST IN SUPPRESSING PLAINTIFF'S ADS, AND HAS THEREFORE VIOLATED THE STATE CONSTITUTIONAL FREE SPEECH GUARANTEE

This action raises the question of whether it is constitutionally permissible for the State University of New Jersey to restrict the free exchange of differing viewpoints when the tradition and practices of a university environment are purportedly dedicated to academic freedom and free speech. Having opened its advertising space to the public, and as a state actor, Rutgers University bears a greater obligation to permit free speech than any obligation borne by private property owners.

When the government restricts speech in a public forum, the New Jersey Supreme Court has applied the standard set forth in First Amendment free speech cases discussed in Section III of this brief. See Green Party of New Jersey v. Hartz Mountain Industries, 164 N.J. 127, 146 (2000). The New Jersey Supreme Court adopted the federal forum analysis in Horizon Health Center v. Felicissimo, 135 N.J. 126 (1994). "We rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." Hamilton Amusement Center, supra, 156 N.J. at 264; see also State v. Schad, 160 N.J. 156, 176 (1999).

Under the state standard, therefore, when the government circumscribes speech, its regulations must further a substantial government interest that has no relation to the content of the proposed expression, Mosley, supra, 408 U.S. at 98-99, and the regulations must be narrowly tailored, presenting standards capable of objective application in order to avoid giving overbroad discretion to the officials charged with their implementation. Niemotko v. Maryland, 340 U.S. 268 (1951).

Article I, paragraphs 6 and 18 of the New Jersey Constitution provide:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.
>
> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.

The New Jersey Constitutional standard was first articulated in State v. Schmid, 84 N.J. 535 (1980), where the Court held that Princeton University could not restrict the free speech rights of a pamphleteer on campus. The test to be applied to ascertain the parameters of the rights of speech "(1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property." Id. at 563. Later, applying the New Jersey Constitution to the question of free speech at suburban shopping malls, the Court applied the three-part Schmid test along with a more general balancing of expressional rights and private property rights. New Jersey Coalition Against the War v. J.M.B. Realty, 138 N.J. 326, 356 cert. denied, 516 U.S. 812 (1995).

Rutgers University can assert governmental interests against plaintiff's free speech claims, but it cannot be more restrictive than a private property owner. Although the defendants have based their severe restraints on plaintiff's free speech rights on an asserted policy of refusing to accept issue-oriented advertising, that purported policy is unsubstantiated and discriminatorily applied to suppress viewpoints that are inconsistent with the orthodoxy of the current Rutgers University administration.

i. Normal Use. Advertising space in *Rutgers Magazine* is normally used to (a) generate revenue for the *Magazine*; (b) promote sports at Rutgers; (c) recruit alumni to lobby legislators in Trenton on behalf of Rutgers; (d) call attention to goods and services that would be of interest to alumni. Da73, 75, 77, 88, 89, 90, 92, 93, 99. Advertisements for sports, advocacy and matters wholly unrelated to Rutgers University are part of the normal use of *Rutgers Magazine*'s ad space.

Plaintiff's efforts to pay money to Rutgers in exchange for running an advertisement of interest to alumni are fully consistent with the "normal use" of the ad space.

ii. The Invitation to Use the Property. The second factor to be considered is "the extent and nature of the public's invitation to use that property." Schmid, 84 N.J. at 563. It is generally to be "considered together' with the first part of the test, see Coalition, 138 N.J. at 357. Whether analyzed separately or together, it is clear that *Rutgers Magazine* invites almost everyone to purchase ad space. *Rutgers Magazine* will sell ads to almost any member of the public, whether they are members of the Rutgers University community or not. Da172-173.[5]

The nature and extent of the invitation to the public are not determined by the defendants' subjective purposes, and are not limited to whether defendants extended an explicit invitation to plaintiff to speak. "The issue is whether defendants' actual conduct, the multitude of uses they permitted and encouraged, included expressive uses, amounted to an implied invitation and, if so, the nature and extent of that invitation." Coalition, 138 N.J. at 356.

[5] Alcohol, tobacco and insurance ads are rejected lest *Rutgers Magazine* lose its third-class non-profit postage rate.

The invitation to purchase ads in *Rutgers Magazine* extends to all prospective advertisers, whether or not they are members of the Rutgers community, so long as the ads are "of interest" to alumni. This invitation must accordingly extend to the Rutgers 1000 Alumni Council, whose activities surely qualify as being "of interest."

iii. The Purpose of the Expressive Activity. The third factor requires the Court to consider the purpose of the expressive activity undertaken in a given setting in relation to both the private and public use of that setting. The Alumni Council's advocacy concerns the expenditure of tax dollars on higher education and raises fundamental questions about the mission of the State University. This group of alumni has become increasingly concerned that Rutgers University's commitment to academic and intellectual standards is being jeopardized by an overemphasis on professionalized sports at the University. The debate about revenue sports goes to the core of the public university's role in the State of New Jersey.

This kind of political speech occupies a preferred position in New Jersey's system of constitutionally-protected interests. "Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" State v. Miller, 83 N.J. 402, 412 (1980).

The members of the Alumni Council are full-fledged members of the Rutgers alumni community, who have a right to make their dissenting views known to their neighbors on an issue already open for discussion, especially in a forum - ad space - that is made available to all and sundry.

iv. Burden. The burden is on defendants to justify their decision to suppress the Alumni Council's ads. "Where expressive activity is permitted and therefore compatible

with those uses, … the burden should fall on those who claim it is not." Coalition, 138 N.J. at 361.

v. Objective Criteria. Defendants must articulate objective rather than subjective reasons for rejecting the Alumni Council's ads. In Green Party, supra, the Court explained that the interests asserted by a private property owner for the purpose of foreclosing speech had to be objective rather than subjective. 164 N.J. at 158. Rutgers University must likewise show that it faced an objective downside risk to publishing the Alumni Council's ads.

William Owens's absolute discretion fails the state constitutional standard. As the New Jersey Supreme Court explained in Schmid, "Regulations thus devoid of reasonable standards to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise non-injurious and reasonable exercise of such freedoms." 84 N.J. at 567.

The standard that applies to a private property owner must *a fortiori* apply to Rutgers University as a state actor. In light of the various factors to be considered under the New Jersey State Constitution, plaintiff's right to express its views must prevail.

B. Alternative Means of Communication

Another factor the Court must consider is whether there exist convenient and feasible alternative means to engage in substantially the same expressional activity. See William G. Mulligan Foundation v. Brooks, 312 N.J. Super. 353, 359 (App. Div. 1998). Rutgers University cut off plaintiff's alternative means of contacting alumni when it declined to give plaintiff access to alumni mailing lists, even with protections in place for

preserving alumni privacy. Plaintiff has no adequate meaningful substitute for communication with Rutgers alumni other than *Rutgers Magazine* or alumni mailing lists. See Guttenberg Taxpayers & Renters Ass'n v. Galaxy Towers Condominium, 297 N.J. Super. 404, 410 (Ch. Div. 1996), aff'd, 297 N.J. Super. 309 (App. Div. 1996), certif. denied, 149 N.J. 141 (1997).

Rutgers Magazine is the most practical and economically feasible channel of communication capable of reaching the Rutgers alumni community. *Cf.* Knox County Local v. Nat'l Rural Letter Carriers' Ass'n, 720 F.2d 936 (6th Cir. 1984) (union magazine alone reaches scores of thousands of members of the union community and must therefore publish local's paid advertisement).

Since the ad space is the relevant forum, it does not help defendants to point to the media attention Rutgers 1000 has received elsewhere. The Rutgers 1000 website is no substitute for the kind of affirmative outreach Rutgers University uses with direct mailings of its *Magazine* and other literature to alumni. And although many stories may have appeared in the news media in 1998, they do not give the Rutgers 1000 Alumni Council a chance at the kind of sustained campaign the University mounts with its mailing lists, which, unlike scattershot news stories, can be guaranteed to reach a large and reliable fraction of Rutgers alumni.

The interest of free speech is "the most substantial in our constitutional scheme. Green Party, 164 N.J. at 145 (citing Coalition, 138 N.J. at 363). This being so, the State University cannot use its *Magazine* for advocacy of one set of views while freezing out a competing view. To favor only one side of a public debate violates the state constitution.

IX. PLAINTIFF IS ENTITLED TO FEES AND COSTS ON APPEAL

New Jersey Court Rule 4:42-9(a)(8) allows fee awards "in all cases where counsel fees are permitted by statute." Here, the relevant statute, 42 U.S.C. § 1988, provides that the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. The federal constitutional claims upon which plaintiff prevailed were brought pursuant to 42 U.S.C. § 1983, thereby authorizing an award of fees and costs pursuant to 42 U.S.C. § 1988.

This Court may refer the issue of attorney fees for appellate services to the trial court for disposition, or allow fees on motion filed within 10 days after the determination of the appeal. R. 2:11-24.

Rutgers University did not oppose plaintiff's motion before the trial court for fees and costs. Plaintiff respectfully submits that it is similarly entitled to fees and costs for this appeal.

CONCLUSION

For all the reasons set forth above, this Court should affirm the trial court's order in every respect.

_____
Grayson Barber
GRAYSON BARBER, L.L.C.

Edward Barocas
J.C. Salyer
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION

Dated: September 27, 2001