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Via U.S. Mail & Electronic Mail

Ms. Loretta P. Martinez
General Counsel
Office of University Counsel
University of New Mexico
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Re: Unconstitutional Security Fees Charged to Students for Life

Dear Ms. Martinez,

As you know, the University of New Mexico has charged Students for Life at the University of New Mexico \$5,461.40 for security associated with a lecture Ms. Kristan Hawkins gave on campus on April 24, 2023. We write to insist that the University rescind this bill, as it represents an unconstitutional viewpoint-based fee.

As introduction, Alliance Defending Freedom is an alliance-building, nonprofit legal organization that advocates for the right of people to live out their faith and speak freely. Since 2011, we have represented parties in 15 victories at the Supreme Court.¹ In 2018, *Empirical SCOTUS* ranked us first among “the top performing firms” litigating First Amendment cases.² ADF’s Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of censorship. Since 2006, the Center has represented clients in over 400 litigation victories for First Amendment freedoms on public university campuses nationwide.³ But today, we write in the hopes that this matter can be resolved quickly and amicably.

FACTUAL BACKGROUND

As you know, Students for Life at the University of New Mexico invited Kristan Hawkins, President of Students for Life of America, to lecture on campus on April 24,

¹ See, e.g., *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (victories for S. Nazarene Univ. and Geneva Coll.); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

² Adam Feldman, *Supreme Court All-Stars 2013–2017*, EMPIRICAL SCOTUS (Sept. 13, 2018), <https://bit.ly/2pm2NXn> (last visited Sept. 29, 2023).

³ Alliance Defending Freedom, *Who We Are*, <https://bit.ly/3JbKFbb> (last visited Sept. 29, 2023).

2023, as part of a speaking tour entitled *Lies Pro-Choicers Believe*. In the weeks leading up to this event, the student group's officers met with Lt. Stump of the University police to discuss security arrangements. Initially, he estimated that security fees would total close to \$7,000, an estimate he based on the reactions to three recent events Turning Point USA hosted on campus and the fact that these events had made national news. But he repeatedly told the officers that the final charges could be much lower, depending on how events unfolded. He and other University officials also explained that Ms. Hawkins' lecture had the potential to be controversial, like the previous Turning Point USA events.

In March, Lt. Stump emailed a quote for security arrangements to Students for Life at the University of New Mexico's president, Victoria Trujillo, indicating that the \$8,140 estimate represented the maximum the group could be charged but that the final figure might be less. Once again, he emphasized how his security assessment was based on "previous TPUSA events as we spoke about." Ms. Trujillo accepted this tentative estimate because she had no choice if she wanted the event to proceed. The power dynamics—University police v. student group—flowed in one direction.

As it turned out, Ms. Hawkins' lecture generated no security issues. Unlike the prior events Lt. Stump relied on for his quotes, there were no threats regarding this event and no advertisements urging people to protest. When Ms. Hawkins spoke, there were no protestors and few (if any) security issues. Nevertheless, days later, the University sent the student group a bill for \$5,461.40 because the University chose to assign no less than thirty officers to this unprotested event.

LEGAL ANALYSIS

I. Neither Students for Life of America nor Students for Life at the University of New Mexico has waived any constitutional rights.

Before Ms. Hawkins set foot on campus, Students for Life of America objected on behalf of its local chapter to these security fees, writing Lt. Stump on April 6, 2023. You responded on April 20, 2023, claiming the student group had agreed to pay whatever fees were ultimately imposed, though the final figure was still uncertain.

In the days preceding Ms. Hawkins' lecture, the student group had no choice but to accept the University's security estimates. To do otherwise would jeopardize the months it had spent planning the event and risk having the University cancel the lecture. To treat acceptance of a tentative figure given this power imbalance as a knowing, fully-informed, and voluntary waiver of constitutional rights is ridiculous.

II. As ADF represents both Students for Life of America and Students for Life at the University of New Mexico, the only issue before us is the constitutionality of the University's security fees.

After Ms. Hawkins' lecture and after the group received the \$5,461.40 bill, Students for Life of America reiterated its position that these fees violated the Constitution, in a letter dated May 16, 2023. On June 1, 2023, you responded, insisting in part that the University billed a student organization, and thus, Students for Life of America had no grounds for objecting to fees not imposed on it.

Whatever the merits of this assertion may be, it is now moot. ADF represents both Students for Life of America and the student organization, both of which still object

to these unconstitutional, viewpoint-based security fees. The issue is the fees, not the identity of the messenger objecting to the fees.

III. The University's security fees violate the First Amendment.

As you are well aware, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”⁴ In fact, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”⁵ because “the core principles of the First Amendment ‘acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution’s educational mission.’”⁶

But here, the University has violated the First Amendment rights of Students for Life of America and Students for Life at the University of New Mexico by imposing security fees that (A) represent an exercise of unbridled discretion and (B) effectuate a heckler’s veto. Thus, these fees should be rescinded.

A. The University's security fees represent an exercise of unbridled discretion.

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁷ Nor may it engage in viewpoint discrimination, which is “an egregious form of content discrimination.”⁸ One way in which the government engages in viewpoint discrimination is by granting unbridled discretion to an administrator to choose when a burden on speech (such as a security fee) applies without being limited to an exclusive list of content- and viewpoint-neutral criteria.⁹ Over three decades ago, the Supreme Court held that “[t]he First Amendment prohibits the vesting of such unbridled discretion” to discriminate between viewpoints “in a government official.”¹⁰ It explained that “[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.”¹¹ Specifically relevant here, the “*decision [of] how much to charge for police protection . . . or even whether to charge at all*” cannot be left up to administrators.¹²

The University’s security fees run afoul of these principles. The University’s policies state that “the UNM Police Department will collaborate with the UNM Special Events Committee . . . and special event sponsor with regard to the number of police officers, security officers, or combination of other officers required.”¹³ To be sure, this

⁴ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁵ *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁶ *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

⁷ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

⁸ *Id.* at 829.

⁹ *Southworth v. Bd. of Regents of Univ. of Wis. Sys.*, 307 F.3d 566, 578 (7th Cir. 2002) (holding that the prohibition on unbridled discretion is an element of viewpoint neutrality).

¹⁰ *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

¹¹ *Id.* (quotation marks and citation omitted); see also *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009) (noting that unbridled discretion to impose security fees indicated possible content-based discrimination).

¹² *Forsyth Cnty.*, 505 U.S. at 133 (emphasis added).

¹³ Univ. of New Mexico, *Administrative Policies & Procedures Manual—Policy 2230: Police & Security Services* § 3, <https://bit.ly/3EBceJb> (last visited Sept. 29, 2023).

assessment is “based upon the factors” outlined earlier in the policy, but it is not limited to those factors. After all, Lt. Stump repeatedly referenced the prior events of other groups and the protests they generated—factors that are not listed in the policy—as the basis for his security assessments, which drove the resulting fees. Besides, the multiplicity of factors and the lack of direction as to how they are balanced means officials have unlimited discretion in whether to charge for security and how much to charge. Ultimately, the University’s Police Department and Special Events Committee considers whatever it wants, determines on its own whether security is needed, determines on its own how much security presence is needed, and sends the bill to the speaker. There are no meaningful—and certainly no objective or narrowly drawn—limits on these entities’ discretion. This is unconstitutional.

B. The University’s security fees—based entirely on projected reactions to speech—effectuate a heckler’s veto.

In addition, the Supreme Court long ago ruled that “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”¹⁴ As other courts have noted in similar contexts, speech that is “met by violence or threats or other unprivileged retaliatory conduct by persons offended by [it] cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker’s opponents’ mounting a riot”¹⁵ To drive home the point, the Supreme Court ruled that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation”¹⁶ and that policies “which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”¹⁷ Thus, “[p]articipants in an orderly demonstration in a public place are not chargeable with the danger . . . that their critics might react with disorder or violence.”¹⁸

Yet here, the University is insisting that a student group pay \$5,461.40 to exercise its free speech rights simply because University officials, exercising unbridled discretion concluded the group’s critics and opponents might misbehave. Some might consider Student for Life’s pro-life views controversial, but this is the reason for granting the speech more protection, not for charging it higher fees.¹⁹ After all, to exclude or burden speech because some deem it controversial is nothing more than viewpoint discrimination.²⁰ Charging security fees based on the content or viewpoint of the speech is exactly the type of “suppression” the First Amendment does not permit.²¹ Thus, these security fees are an unconstitutional heckler’s veto.

¹⁴ *Forsyth Cnty.*, 505 U.S. at 134–35.

¹⁵ *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 247 (6th Cir. 2015).

¹⁶ *Forsyth Cnty.*, 505 U.S. at 134.

¹⁷ *Id.* at 135.

¹⁸ *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966).

¹⁹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988) (“[I]f it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978))).

²⁰ *Child Evangelism Fellowship of N.J., Inc. v. Safford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) (“To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint.”).

²¹ *Cf. Forsyth Cnty.*, 505 U.S. at 133.


DEMAND

In light of these constitutional violations, we ask that the University immediately rescind the security fees it has charged to Students for Life at the University of New Mexico for Ms. Hawkins' April 2023 lecture. Meanwhile, we ask the University to take immediate steps to preserve any and all documents connected with, discussing, or relevant to the incidents described here (including, but not limited, to any records of security fees charged to other student groups in the last five years).

CONCLUSION

Our clients seek to resolve this matter quickly and amicably so that they can once again focus entirely on defending the sanctity of life and assisting those harmed by the scourge of abortion. But they also insist that the University respect their constitutional rights. We hope your clients share their desire and will quickly respect their rights by rescinding the security fees. We hope to hear from you by the close of business on October 25, 2023. Otherwise, we may be forced to advise our clients of other ways to vindicate their priceless constitutional rights.

Sincerely,



Travis C. Barham
Senior Counsel
ALLIANCE DEFENDING FREEDOM

Cc (via electronic mail):

- Mr. Zachary Kester, General Counsel, Students for Life of America, zkester@studentsforlife.org.
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