



December 3, 2018

Mr. Stephen Gilson  
Associate Legal Counsel  
University of Pittsburgh  
Email: SGILSON@pitt.edu

***Re: Unlawful Assessment of Security Fee for Ben Shapiro Lecture***

Dear Mr. Gilson:

We write on behalf of Young America's Foundation (YAF) and the University of Pittsburgh College Republicans ("College Republicans") who seek to host events and well-known speakers at the University of Pittsburgh (the "University"). The University violated YAF's and College Republicans' constitutional rights when the University assessed security fees for an expressive event held on November 14, 2018. We ask that you immediately rescind the assessment of the fees.

By way of introduction, Young America's Foundation (YAF) is the principal outreach organization of the Conservative movement, inspiring thousands of American youth by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF's chapter affiliates are found on hundreds of campuses nationwide and now bring this message to the grounds of the University of Pittsburgh which is a public university. College Republicans is a student organization duly registered with the Division of Student Affairs at the University. College Republicans advocates for conservative viewpoints and supports Republican candidates and issues at the University. ADF's Center for Academic Freedom, is a non-profit legal organization dedicated to ensuring freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of government censorship.<sup>1</sup>

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<sup>1</sup> Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including nine victories before the highest court in the last seven years. *See e.g. Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671, (Mem)–2672 (2018) (granting, vacating and remanding to Washington Supreme Court in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (striking down state law forcing pro-life pregnancy centers to advertise for abortion industry); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (upholding ADF's client's free-exercise rights); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (striking down state burdens on ADF's client's free-exercise rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (successful result for religious colleges' free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (striking down federal burdens on ADF's client's free-exercise rights); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town

## FACTS

College Republicans hosted *New York Times* bestselling author Ben Shapiro for a YAF-sponsored campus lecture on November 14, 2018 in Alumni Hall (the “Event”) at the University. Students followed the University’s policies and procedures for scheduling the Event, notifying the University of their plans several months in advance. Yet, just two days before the Event, the University unexpectedly informed YAF and College Republicans that the University decided that extra security would be required for the Event and that YAF and College Republicans would be required to pay for the security costs. The University explained that it chose to assess security costs based on the University’s security evaluation of the possibility of “controversy” and “protests.”

The University then threatened to cancel the Event if YAF and College Republicans refused to agree to pay \$5,546.52 in security fees. YAF and College Republicans were surprised at the cost, but YAF signed a promise to pay the fee in protest with the Event scheduled only one day away.

YAF previously signed a contract on October 18, 2018 (on behalf of Mr. Shapiro) as the performance “Artist” and YAF agreed to the specific terms of the contract. Under Section 1.J., the contract stated unequivocally that the “University will provide: Accommodations for livestream by YAF team, Pitt Police Security.” Any possible ambiguity in that provision was eradicated in Section 10 of the contract stating that the “*University will provide all house personnel necessary for the Event. This includes all ushers, ticket takers and security personnel deemed necessary by the University.*” (emphasis added). Nevertheless, the University forced YAF and College Republicans to choose between promising to pay the fee and having the Event canceled altogether.

Contrary to the contract that the University required YAF to sign, the “*hosting organization*” (not the University) is made responsible for contacting University Police to schedule security and to obtain cost information under its “Scheduling and Protest Guidelines.” Scheduling and Protest Guidelines § 2.b. Even after the determination by University Police, “all event security requirements will be subject to review by the Dean of Students or their designee” at which time the designee may “increase the security” based on their personal evaluation of the above factors. Scheduling and Protest Guidelines § 2.c. While the Guidelines contain some general criteria to guide University administrators in deciding whether to assess security fees on student groups, the criteria are not objective and the administrators are not limited by those criteria. Moreover, the Guidelines do not explain how the criteria are to be weighed or quantified. Instead, the University is free to assess security fees in its sole discretion. Pursuant to this unbridled discretion, the University assessed a security fee on YAF and College Republicans based upon the content and viewpoint of Shapiro’s speech and listeners’ potential reactions.

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represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state’s tuition tax credit program defended by a faith-based tuition organization represented by ADF).

## ANALYSIS

The University of Pittsburgh violated the First Amendment and breached its contract with Young America's Foundation when it imposed a viewpoint discriminatory security fee on the Ben Shapiro lecture just two days before the lecture was scheduled to take place.

### **I. The University Discriminated Against YAF and College Republicans Based on the Viewpoint of its Speech.**

“State colleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>2</sup> In fact, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,”<sup>3</sup> 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.’”<sup>4</sup> The University’s assessment of a security fee for College Republican’s Event is unconstitutional because administrators assessed the fee based on the viewpoint of College Republicans’ speech and based on the potential negative reactions of listeners.

#### **A. School policy codifies an unconstitutional heckler’s veto—empowering protestors to stifle student speech on the basis of viewpoint.**

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”<sup>5</sup> Nor may the government engage in viewpoint discrimination, which is “an egregious form of content discrimination.”<sup>6</sup>

In *Forsyth County v. Nationalist Movement*, the Supreme Court held that a county ordinance allowing a government official unbridled discretion to establish a fee for speaking based on the estimated costs of security was unconstitutional under the First Amendment.<sup>7</sup> According to the Court, “[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.”<sup>8</sup> Because the “decision [of] how much to charge for police protection . . . or even whether to charge at all” was “left to the whim of the administrator,” without any consideration of “objective factors” or any requirement for “explanation,” the ordinance was an unconstitutional prior restraint on speech.<sup>9</sup>

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<sup>2</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>3</sup> *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>4</sup> *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)).

<sup>5</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

<sup>6</sup> *Id.* at 829.

<sup>7</sup> *Forsyth Cnty.*, 505 U.S. at 130.

<sup>8</sup> *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).

<sup>9</sup> *Forsyth Cnty.*, 505 U.S. at 133.

Here, the University’s security fees policies and practices are fraught with unbridled discretion. The University’s Event Scheduling and Protest Guidelines for SORC-Registered Organizations provides University officials sole discretion to determine whether an event requires security. Although the University considers some objective factors—anticipated audience size, location of the event, access level to the event (open to the University community, ticketed, invitation only)—when assessing a security fee, school policy also requires school administrators to consider several subjective criteria too. According to school policy “health and safety concerns, other events taking place on campus, prior security concerns at speaker’s past presentations, and any recommendations by the University Police” also factor into a security fee assessment. Regrettably, nothing prevents the University from considering additional factors. Scheduling and Protest Guidelines § 2.a.

Similar to the guidelines struck down by the Court in Forsyth County, here, the University’s Guidelines vest administrators with unbridled discretion to charge student groups security fees for their events. The Guidelines do not provide administrators with any meaningful guidance when deciding whether to assess security fees or any justification for charging the fees to registered student organizations like College Republicans.

Further, University Guidelines allow for the assessment of fees based on the potential negative reactions of listeners. Per University Guidelines, school administrators must consider “prior security concerns at speaker’s past presentations” and “other events taking place on campus.” Both of these factors are content-based because both require university officials to factor safety concerns created by protestors at the University of Pittsburgh and at other universities. “Listeners’ reaction to speech is not a content-neutral basis for regulation.”<sup>10</sup> As a result, Pitt’s own policy codifies an unconstitutional heckler’s veto that stifles minority viewpoints.

### **B. Applying university Guidelines, school administrators illegally discriminated against conservative students.**

The Supreme Court made clear, “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”<sup>11</sup> Imposing security fees based on the beliefs offered by YAF, College Republicans and their speaker—Ben Shapiro—is viewpoint discrimination.<sup>12</sup>

In his email dated November 13<sup>th</sup>, Lieutenant James Kenna of the University of Pittsburgh Police Department confirmed to College Republicans that the content of Mr. Shapiro’s speech contributed to the high security fee. He attested that of the “different variables” that he considered when calculating the security fee, “some sort of controversy” was a factor. He also stated in his email that he considered “things like protests.” Speech is considered controversial based on its contents. Similarly, protests are inseparably linked to the content of speech. Protestors do not protest speech they agree with; they protest when they disagree with a speech’s content.

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<sup>10</sup> *Forsyth Cnty.*, 505 U.S. at 134; see also *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (“[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.”).

<sup>11</sup> *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992).

<sup>12</sup> *Rosenberger*, 515 U.S. at 828-29.

University administrators charged YAF and College Republicans more than \$5,500 in security fees because administrators subjectively decided that Ben Shapiro's views are controversial and capable of causing a reaction within the student body. That is why days before the Shapiro lecture, the University prominently displayed, on its website, a banner titled "Ways to respond when you disagree with a speaker." Among other suggestions, the banner encouraged students to "hold a *peaceful* counter-demonstration." (*emphasis added.*)

The University unconstitutionally burdened students' speech when it required YAF (on behalf of College Republicans) to pay over \$5,500 in security fees. As such, this unconstitutional fee should be rescinded in full.

## **II. The University breached its contract with Young America's Foundation when it charged YAF and College Republicans for security.**

A month before Shapiro's lecture, the University presented to YAF and College Republicans a contract purporting to reflect the terms of the agreement for the lecture. No ambiguity existed in the contract regarding who would provide security for the Event. YAF signed the contract weeks before the lecture and College Republicans relied on the fact that this agreement would allow Shapiro to speak as requested. In multiple sections of the contract, the University accepted full responsibility to provide security and cover any associated costs for the Shapiro lecture. Although YAF and College Republicans were later made aware that the University sought to write in additional terms not found in the contract, the specific additional terms (regarding payment for security) were not reduced to writing and instead forced upon YAF and College Republicans just two days before the lecture. Therefore, in addition to violating the Constitution, the University actions violate the terms of the contract.

### **DEMAND**

In light of these clear constitutional violations and attempt to abrogate the terms of an unambiguous contract, we ask that you (1) immediately rescind the demand for security fees assessed to YAF for the previously held Event, particularly given the fact that YAF is under no binding legal obligation to pay for security under the terms of its contract; (2) revise the Guidelines to require the assessment of security fees only when specified objective criteria are satisfied and forbid the assessment of fees based upon the content or viewpoint of an event or based upon listeners' reactions. We also ask that you take all steps necessary to preserve any documents connected with, discussing, or relevant to the incidents described herein.

Sincerely,

*Jonathan M. Larcomb*

Jonathan M. Larcomb  
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Center for Academic Freedom

cc: Mark Trammell, Esq., Young America's Foundation  
Christian Romano, University of Pittsburgh College Republicans