IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

LEADERSHIP INSTITUTE et al., Plaintiffs, v. STOKES et al., Defendants.	)))))))))	Case No. 1:24-cv-187-DHU-JMR

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

A preliminary injunction is needed to stop UNM's[1] unconstitutional suppression of protected speech. "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American [universities]." *Healy v. James*, 408 U.S. 169, 180 (1972). UNM has abdicated its responsibility to protect free speech by charging exorbitant fees to speakers on its campus when it fears violence may be directed against them based on the viewpoint they express. These fees suppress and irreparably chill Plaintiffs' speech. UNM rightly offers no reason to permit it to continue this unconstitutional course of conduct as there are no good reasons to do so. This Court should enjoin UNM to preserve this critical freedom—speech—that is "the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

UNM is mistaken that Plaintiffs ask this Court to apply a modified test for a preliminary injunction. Instead, Plaintiffs ground their request for a preliminary injunction in well-established constitutional principles surrounding issuance of a preliminary injunction in a First Amendment

[1] Defendants collectively refer to themselves as "UNM." (Doc. 15, Defs.' Resp. at 2.) Plaintiffs adopt this convention.

challenge. UNM itself admits that the test for a preliminary injunction is condensed in a First Amendment challenge. (Doc. 15 at 6–7 (acknowledging that the likelihood of success and irreparable harm factors are "linked")); (*id.* at 10 (noting third and fourth factors "merge" when the government is the opposing party).)

UNM's other arguments also fail. It wrongly asserts that Leadership Institute (LI) lacks standing while doing little to deny that Turning Point USA at UNM (TP-UNM) does. That means Plaintiffs satisfy Article III standing under the one-plaintiff rule. UNM also misunderstands the status quo in the preliminary injunction context. Plaintiffs seek only to maintain the last peaceable uncontested status—the status quo—which comes before the enactment of the contested policy.

UNM scarcely addresses the most important preliminary injunction factor: likelihood of success. UNM forfeits any argument that its policy does not impose a heckler's veto and any argument that a heckler's veto is ever constitutional. It does not dispute that UNM police told TP-UNM's student leaders that they would have to pay more for security because of the potential reaction to Ms. Gaines' speech. UNM makes a conclusory statement that its policy is narrowly tailored, but it ignores that viewpoint-based restrictions—like UNM's heckler's veto—are not subject to a balancing test at all. Nor can it argue that its policy is necessary when, as shown below, a school can hold events without charging speakers more money when it fears a mob's reaction.

The likelihood-of-success factor is dispositive. Right now, Plaintiffs are threatened by enforcement of the security fees. Even if UNM has not (yet) taken enforcement action, it has not disclaimed that it may. And that uncertainty dampens Plaintiffs' ability to speak; free speech is so precious that even momentary lapses of First Amendment freedoms cause irreparable injury. There is no public interest in enforcing an unconstitutional policy and thus there is no harm caused by

enjoining enforcement of it. That is why courts typically issue injunctions on First Amendment grounds once they find a likelihood of success. This Court should grant the motion.

ANALYSIS

The parties agree on the four-factor test for preliminary injunctions. That said, UNM misconstrues Plaintiffs as arguing for the use of a "modified" test. They do not. Plaintiffs merely explain how the factors are interrelated and that a likelihood of success on a First Amendment claim influences the other factors in Plaintiffs' favor. As the Tenth Circuit has explained, "the seminal importance of the interests at stake" in a First Amendment challenge often make the first factor "determinative." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016).

I. Plaintiffs do not invoke a modified test and their requested injunction is not disfavored.

UNM misunderstands both the standard for a preliminary injunction and Plaintiffs' motion. Plaintiffs do not ask to modify the test that both parties agree upon. Further, a preliminary injunction would neither alter the status quo nor afford Plaintiffs all the relief requested.

A. Plaintiffs do not request a modified test.

Courts routinely recognize that the "likelihood of success" factor in a First Amendment case largely controls the other three factors. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding likelihood of success on a First Amendment challenge "unquestionably constitutes irreparable injury"); *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805–07 (10th Cir. 2019) (explaining how a showing of a likely constitutional violation means other factors are met). The Tenth Circuit, like all federal courts, recognizes that a movant who demonstrates a likelihood of success on the merits of a First Amendment challenge often satisfies the other factors as well. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) ("[I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor." (quotation omitted)), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

This is not an invocation of the modified test that the Supreme Court held improper in *Winter v. NRDC, Inc.*, 555 U.S. 7, 21 (2008). There, the Supreme Court rejected the notion that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm," rather than a likelihood of irreparable harm. *Id.* Plaintiffs do not argue that the strong likelihood of prevailing on the merits entitles them to make a weaker showing on other factors. Rather, it is *because* they have a strong likelihood of success on the merits that the other factors weigh in their favor. *See Free the Nipple-Fort Collins*, 916 F.3d at 805–07; (Doc. 5, Pls.' Mot. at 9 ("If a speaker can show that a First Amendment violation likely occurred, the other factors should weigh in the speaker's favor . . . .")); (*id.* at 18 ("Thus, once a First Amendment violation is established, the other preliminary injunction factors typically follow.")); (*cf.* Doc. 15 at 6–7 ("Tenth Circuit decisions have linked the 'irreparable injury' inquiry to the 'likelihood of success' inquiry . . . .")); (*id.* at 10 ("The harm to the opposing party and the public interest generally merge when the Government is the opposing party, as in the present case.").)

B. The requested preliminary injunction is not disfavored.

Plaintiffs' requested preliminary injunction is not disfavored because it neither alters the status quo nor requests full relief. In any event, Plaintiffs would succeed under either standard.

In the preliminary injunction context, the status quo is "the last peaceable uncontested status existing between the parties before the dispute developed." *Free the Nipple-Fort Collins*, 916 F.3d at 798 n.3 (quotation omitted). This is "the status existing *before* [the government] enacted the challenged . . . ordinance . . . ." *Id.* (emphasis added). In this scenario, the only "peaceable uncontested status" is one *without* the viewpoint-discriminatory security fee policy in effect; Plaintiffs brought this case to contest that policy.

Plaintiffs' requested preliminary injunction also does not afford them all the relief requested.[2] "[A] preliminary injunction falls into the all-the-relief category *only* if its effect, once complied with, cannot be undone." *Id.* (quotation omitted and emphasis added). "[H]ere, we probably *can* put the toothpaste back in the tube—if the plaintiffs lose on the merits after a trial," then UNM may fully enforce its security fee policy. *Id.* Further, Plaintiffs make a sufficiently strong showing on the first and third factors to exceed the threshold for disfavored injunctions, mooting the question. *See Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016) (declining to decide whether the injunction was disfavored where movant made strong showing on first and third factors). UNM barely contests that Plaintiffs are likely to prevail. That strong showing on likelihood of success tilts the balance-of-harms inquiry in Plaintiffs' favor.

C. Both Plaintiffs have standing, and, in the alternative, the one-plaintiff rule controls.

Both TP-UNM and LI have standing, and, in the alternative, the one-plaintiff rule would permit the case to move forward. LI has standing both because: (1) it would like to send speakers to UNM's campus in the future, but the high security fees restrict its ability to do so; and (2) if UNM successfully collects the security fees from TP-UNM, LI will owe the amount collected. (*See* Doc. 5-7, Clark Decl. ¶¶ 19–20.) Even so, the Court need not reach this argument. Under the one-plaintiff rule, "[i]f at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). UNM's conclusory contention that TP-UNM lacks standing simply recites case law requiring specific facts showing harm upon which to base standing. (*See* Doc. 15 at 5–6.) The Complaint, the Gonzales Declaration, and UNM's admissions provide specific facts in spades. UNM provides no reason to doubt TP-UNM's standing. *See Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1161 (10th Cir. 2012) (noting that inadequately briefed arguments are not

[2] If indeed the motion for preliminary injunction substantially determines the outcome, then this Court may consolidate it with a hearing on the merits. *See* Fed. R. Civ. P. 65(a)(2).

considered); *CGC Holding Co., LLC v. Hutchens*, 974 F.3d 1201, 1210 (10th Cir. 2020) ("[Defendants'] failure to address or argue the issue seals [its] fate." (quotation omitted)).

II. The preliminary injunction factors favor Plaintiffs.

A. UNM has forfeited any argument that Plaintiffs are unlikely to succeed.

UNM bears the burden of demonstrating that the security fee policy is constitutional. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("As the Government bears the burden of proof on the ultimate question of [the law's] constitutionality, [Plaintiffs] *must* be deemed likely to prevail" unless the government can show that it survives scrutiny (emphasis added)). First, strict scrutiny does not even apply to claims of viewpoint discrimination. *See, e.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). And even if it did, UNM does little more than advance conclusory arguments. (*See* Doc. 15 at 12 (arguing that "UNM's policies are narrowly tailored to meet UNM's compelling interests . . . [in] protect[ing] the safety and welfare rights of its students because public safety is a compelling state interest" without explanation)); *see also Keyes-Zachary*, 695 F.3d at 1161 ("We will consider and discuss only those . . . contentions that have been adequately briefed for our review.").

Plaintiffs need only advance a prima facie case, which they have done. They presented: (1) evidence of a high fee charged to them based on an unclear application of a policy that vests substantial discretion in UNM officials;[3] (2) statements from UNM officials indicating that they treat TP-UNM differently based on the reaction they anticipate from members of the audience;[4]

[3] (*See* Doc. 5-1, Gonzales Decl. ¶ 31 (quoting Lieutenant Stump as saying that the security fees are not based on "a criteria . . . it's all based on individual assessments")); (*see also* Doc. 14, Answer ¶ 49 (declining to deny accuracy of statements attributed to Lieutenant Stump)); (Doc. 5-1 ¶ 44 (describing how UNM invoiced TP-UNM for $5,384.75)); (Doc. 14 ¶ 64 (admitting final invoice of $5,384.75 was sent to TP-UNM).)

[4] (*See* Doc. 5-1 ¶ 31 (describing meeting with Lieutenant Stump where TP-UNM was informed

(3) statements from UNM officials indicating that they treat TP-UNM differently based on the content of TP-UNM's events;[5] and (4) evidence that student organizations were targeted by the security fee policy based on their viewpoints.[6] This is more than enough to make a prima facie case. And it is factually and legally uncontested by UNM.

Indeed, UNM admits the facts that make its actions a heckler's veto. UNM explicitly states that it *has* increased security fees charged to TP-UNM because of past audience reactions and its fear of future audience reactions. (Doc. 15 at 8 (describing a violent audience reaction to a prior TP-UNM event and explaining that "[t]hat experience informed UNMPD and TP-UNM of the heightened security risk of events sponsored by TP-UNM on campus," resulting in UNM charging TP-UNM more in security fees)); *see also supra* n.4. That is the heckler's veto. The government may not punish speakers because of unintended reactions to their speech. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."). Plaintiffs' brief explained in detail what the heckler's veto is, how it operates, and why it is always unconstitutional, citing precedent from the Tenth Circuit and the Supreme Court. (*See* Doc. 5 at 13 & n.2 (collecting cases).) UNM fails to address that heckler's vetoes are unconstitutional, which is central to Plaintiffs' likelihood of success and is dispositive given UNM's concession that it is

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that the fees were based on the crowd's reaction to a past TP-UNM event)); (*see also* Doc. 14 ¶¶ 49, 51–52 (declining to deny accuracy of statements attributed to Lieutenant Stump).)

[5] (*See* Doc. 5-1 ¶ 32 (quoting Lieutenant Stump explaining that he would probably have assigned zero officers to a nearly identical screening of the Barbie movie)); (Doc. 14 ¶ 50 (declining to deny accuracy of statements attributed to Lieutenant Stump).)

[6] (*See* Doc. 5-1 ¶¶ 54–59 (describing how the Drag Queen Bingo event appeared to have no security but Students for Life America was billed a substantial amount)); (*see also* Doc. 14 ¶ 69 (denying as without knowledge or information a statement that UNM billed Students for Life America a large amount of money for security fees).)

granting a veto to violent crowds. UNM's failure to address the law means Plaintiffs have a strong likelihood of success on the merits. *See Meyer v. Bd. of Cnty. Comm'rs*, 482 F.3d 1232, 1242 (10th Cir. 2007) ("[I]t is not clear what assertion defendants are making, and we are not charged with making the parties' arguments for them.").

Rather than address its use of the heckler's veto, UNM asserts in conclusory fashion that its policy meets the Supreme Court's instruction in *Forsyth County* by containing "narrowly drawn, reasonable and definite standards." 505 U.S. at 133 (1992). But this defies the evidence. TP-UNM's event was originally invoiced at over $10,000 for security, but that price was negotiated down to a little over $5,000. (*See* Doc. 14 ¶ 46 (declining to deny authenticity of invoice for over $10,000, (*see* Doc. 5-2, Gonzales Decl. Ex. 1))); (*id.* ¶ 64 (admitting Lieutenant Stump sent final invoice of $5,384.75 to TP-UNM).) A policy with "narrowly drawn, reasonable and definite standards" would not permit a variance in price of nearly 50% through negotiations. Nor would a policy containing a "complete list of factors" that are "all objective" allow Lieutenant Stump, the relevant enforcement official, to make "individual assessments" on a "case-by-case basis." (Doc. 14 at 13 (first and second quotes)), (Doc. 5-1 ¶ 31 (third and fourth quotes).) Likewise, such a policy would not permit Lieutenant Stump to factor into the analysis whether the event is a screening of the Barbie movie or a speaker coming to campus to discuss an important social issue.[7] (*See* Doc. 5-1 ¶ 32.) More dubious still is that the policy permits Lieutenant Stump to consider how crowds have reacted to TP-UNM's events. (*Id.* ¶ 31.) This is the sort of vague policy that impermissibly vests enforcement officials with unbridled discretion.

[7] UNM's decision to charge the New Mexico Athletic Association's basketball tournament $32,000 is irrelevant. (*See* Doc. 15-1, Stump Decl. ¶ 12.) Basketball is not protected First Amendment speech. The decision to charge more for an event that lasted longer and drew many more people is not based on the content or viewpoint of speech.

Plaintiffs want a fair opportunity to speak their minds on UNM's campus. UNM has denied them that by discriminating against them based on the content and viewpoint of their speech.

B. Plaintiffs face uncontroverted irreparable harm to their First Amendment rights.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. A plaintiff who demonstrates a likelihood of success on a First Amendment claim is thus entitled to a presumption of irreparable harm. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1266 (10th Cir. 2005); (*see also* Doc. 15 at 6–7 (citing *Schrier* for the same proposition but arguing that Plaintiffs have not shown a likelihood of success).) UNM never addresses that a First Amendment injury is per se irreparable.

Rather than deny that it has demanded security fees from Plaintiffs or disclaim a future intent to collect them, UNM just says that it has not *yet* used legal action to collect the security fees. (Doc. 15 at 7.) But that is not enough to remedy the harm to Plaintiffs' rights. *Cf. 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021) (noting importance of failure to disclaim future enforcement), *rev'd on other grounds*, 600 U.S. 570 (2023); *see also Hill v. Williams*. No. 16-cv-2627, 2016 U.S. Dist. LEXIS 155460, at *27 (D. Colo. Nov. 4, 2016) (holding irreparable harm prong was satisfied for a preliminary injunction where government officials disclaimed present enforcement but maintained that they could constitutionally enforce the law against plaintiffs).

UNM's statement shows that it still believes it could constitutionally collect the fees from TP-UNM and punish Plaintiffs. Plaintiffs here face a substantial threat of injury, as UNM has not even disclaimed enforcement. (*See* Doc. 15 at 7, 9.) It is undisputed that UNM sent TP-UNM an invoice for $5,384.75 on October 5, 2023. (Doc. 14 ¶ 64 (admitting that fact).) And it is undisputed that UNM maintains a policy permitting it to punish Plaintiffs for refusing to pay. (Doc. 1, Compl. ¶ 39); (Doc. 14 ¶ 39 (declining to deny accuracy of quoted language from policy).) UNM even plans to continue to charge these fees for future events unless the Court stops it.

UNM agrees that TP-UNM has declined to schedule events for the next semester. (Doc. 15 at 7.) But UNM makes the mystifying argument that this is evidence that TP-UNM is not being irreparably harmed, (*id.*), when in fact it is evidence of chill. As Jonathan Gonzales stated in his declaration, TP-UNM has scheduled no events for the next semester because of the fees. (Doc. 5-1 ¶¶ 49–51.) This is a textbook example of chilled speech. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972); *Forsyth Cnty.*, 505 U.S. at 134–35. UNM effectively concedes that it has injured TP-UNM. And that injury is ongoing, which is why this Court should enjoin UNM.

That prior TP-UNM leadership submitted to an unconstitutional regime and paid the fees does not cure the present constitutional defect. *See Elrod*, 427 U.S. at 373 (noting prior acquiescence by prospective class members to unconstitutional demands before stating that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Plaintiffs filed suit challenging the fees charged for the Gaines event and events moving forward. The only question for the Court is whether these fees and these policies, under these circumstances, are constitutional.

Finally, UNM attempts to argue that Plaintiffs are not irreparably harmed because TP-UNM could sue for compensatory damages. (Doc. 15 at 9–10.) UNM's own Answer shows why this argument fails. UNM asserts sovereign immunity as an affirmative defense. (Doc. 14 at 16.) Thus, Plaintiffs cannot get a legal remedy—only an equitable one. *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urb. Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009). Because Plaintiffs cannot (and thus do not) seek compensatory damages, they will be irreparably harmed if forced to pay the invoice—something UNM could attempt to do at any time absent a preliminary injunction.[8]

[8] Plaintiffs agree with UNM only that they cannot seek compensatory damages owing to sovereign immunity. *But see Hutto v. Finney*, 437 U.S. 678, 693–94 (1978) ("When it passed

C. The balance of harms weighs in Plaintiffs' favor as does the public interest.

The parties agree that the final two factors merge when the government is the opposing party. (Doc. 15 at 10 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).) These factors are easily resolved: "when a law is likely unconstitutional, the interests of those the government represents, such as voters[,] do not outweigh a plaintiff's interest in having its constitutional rights protected." *Hobby Lobby*, 723 F.3d at 1145 (alterations and quotations in original omitted). After all, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*; *see also, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

UNM argues that the requested injunction would force it to cancel all events that need security. (Doc. 15 at 11.) But that would be a self-inflicted harm. A university can hold events—and charge fees for security—using policies that do not possess the many constitutional defects outlined here. *See, e.g.*, Univ. of Cal., Berkeley, Major Events Hosted by Non-Departmental Users (2019), https://perma.cc/3XKX-H753 (providing detailed and specific guidelines for when security fees will be charged and specifically avoiding charging additional fees based on anticipated audience reaction); Univ. of Cal., Berkeley, UCPD Fee Schedule (2020), https://perma.cc/BAU9-U9XS (providing narrowly-drawn, definite, and reasonable standards for security fees by breaking them down by type of event, venue capacity, and whether money is handled at the event). A well-crafted injunction can address UNM's speculative fears about what would happen if it must cease catering to hecklers.

Finally, UNM fails to address the litany of Tenth Circuit cases that say that it is *always* in the public interest to protect constitutional rights even as it makes the ipse dixit argument that

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42 U.S.C. § 1988, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities.").

public safety and welfare considerations tilt the public interest factor in its favor. (Doc. 15 at 11); *see, e.g.*, *Free the Nipple-Fort Collins*, 916 F.3d at 807; *Verlo*, 820 F.3d at 1127 (10th Cir. 2016); *Citizens United v. Gessler*, 773 F.3d 200, 218 (10th Cir. 2014); *Hobby Lobby*, 723 F.3d at 1145; *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

CONCLUSION

For these reasons, Plaintiffs request a preliminary injunction halting the enforcement of the security fee policy and the collection of payment for security fees related to the Gaines event.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned served this document today by filing it using the Court's CM/ECF system, which automatically notifies the parties and counsel of record.

April 22, 2024.

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