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September 29, 2023

Garnett S. Stokes
President
University of New Mexico
presidentstokes@unm.edu

Re: Upcoming Riley Gaines Event: Security Fees

Dear President Stokes:

We are writing to you regarding an upcoming event on your campus featuring speaker Riley Gaines. We are concerned that the University of New Mexico (UNM) may charge security fees that are excessive and unreasonable in light of the First Amendment.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic[®]. Through our 1A Project, we educate the public about students' First Amendment rights on college campuses and take legal action when the rights of students and visiting speakers are violated. This letter seeks to inform UNM that excessive security fees may violate the First Amendment, especially when they are based on the nature of the event and anticipated reactions to a speaker.

Factual Background

University Policy 2230, called "Police and Security Services," provides a list of factors UNM will consider to determine whether an on-campus event requires security.¹ The factors include the estimated number of attendees, the venue's size and location, access points such as entrances and exits, and the timing of the event.

We understand that Turning Point USA (TPUSA) is hosting an event featuring speaker Riley Gaines, a former college athlete who speaks publicly about women's sports and transgenderism in athletics. We also understand that UNM plans to charge TPUSA over \$7,000 in security fees for the event.

This does not appear to be the first time UNM has assessed such high fees to a student chapter, nor is it the first time UNM has received a warning about doing so. In 2017, UNM received a legal demand letter after it attempted to charge students \$3,400 to host a speaker.² And just last semester, UNM received a similar warning when it quoted over \$8,000 in security fees for a speaking event.³ In both of those instances, like here, the events were hosted by conservative

¹ <https://policy.unm.edu/university-policies/2000/2230.html>.

² www.thefire.org/research-learn/fire-letter-university-new-mexico-january-24-2017.

³ www.thefire.org/cases/university-new-mexico-university-imposes-high-security-fee-pro-life-student-event.

student groups, and the fees appeared to be based on the anticipated reaction to the visiting speakers.

Analysis

It is well-settled that a college campus is the “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.”⁴ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁵ But when colleges expect student chapters to pay security fees that cost thousands of dollars, and require students to commit to those fees before their events can even happen, they pave the way for viewpoint discrimination and deter students from hosting speaking events in the future. This raises serious First Amendment concerns.

I. Excessive security fees point to unconstitutional viewpoint discrimination.

Engaging in “politically controversial” speech “is the essence of First Amendment expression. . . . No form of speech is entitled to greater constitutional protection[.]”⁶ To that end, when a university promotes or discourages an event on campus based on how controversial it deems the event or speaker, it engages in unconstitutional viewpoint discrimination.⁷ “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”⁸

The Supreme Court has consistently held that there is a risk of censorship when the government conducts an “appraisal of facts, the exercise of judgment, and the formation of an opinion” before allowing an individual to engage in speech.⁹ When it comes to security or permit fees, the Court has held that the government must provide “narrowly drawn, reasonable and definite standards” rather than leaving “[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all” to the administrator reviewing the event request.¹⁰

UNM rescinded a particularly egregious policy a few years ago which allowed the university to assess security fees based on its subjective assessment of how “controversial” an event would be.¹¹ While it made the policy more neutral on its face, SLF is still concerned that the policy leaves ample room for a campus official to act in discriminatory ways.

For example, in just the three instances described above, the security fees imposed on conservative student groups fluctuated from \$3,000 to \$8,000. This is similar to *Forsyth County v. Nationalist Movement*, where a county administrator charged different permit fees to different

⁴ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁵ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁶ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995).

⁷ *Id.*

⁸ *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992).

⁹ *Id.* at 131.

¹⁰ *Id.* at 133.

¹¹ www.thefire.org/news/victory-university-new-mexico-suspends-speech-code-waives-speech-tax-milo-yiannopoulos-speech.

groups for different events without explaining the changes in fees.¹² The Supreme Court held that the fluctuating fees showed that the county official had unbridled discretion to assess fees on a case-by-case basis.¹³ This was unconstitutional because it opened the door to viewpoint discrimination.

UNM's listed criteria do nothing to clarify these major fluctuations. The fluctuations suggest that UNM is not actually imposing a specific, narrowly drawn fee for certain spaces every time. Instead, the university appears to give unbridled discretion to a single official to determine how many security officers will be needed per event. That single official thus has the authority to base his decision to impose security fees on his personal views and to make judgment calls about the reaction a speaker may cause with her expression. In this way, the list of criteria does not appear to be narrowly drawn, reasonable, and definite as required by *Forsyth County*.

Whether UNM's criteria is sufficiently narrow may also depend on how UNM treats other speakers and events. If UNM were to host a slam poetry event in the same location, at the same time of day, and with the same number of attendees as the Riley Gaines event, would it use the same number of security guards? If not, there would be strong evidence that UNM is not using neutral, narrowly drawn, and definite criteria to assess security fees, but instead bases its decisions on *who* is speaking, *what* they are saying, and *how* it anticipates a crowd to react to the speaker. The fact that UNM consistently charges excessively high fees to conservative student groups hosting conservative speakers seems to underscore this disparate treatment. Under *Forsyth County* and settled precedent, such viewpoint discrimination is plainly unconstitutional.

II. Excessive security fees deter students from engaging in open inquiry on campus and create a heckler's veto.

Speech is chilled when a speaker objectively fears that speaking will result in discipline and as a result censors her speech altogether. The Supreme Court repeatedly writes that the danger of chilling speech "is especially real in 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."¹⁴ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.¹⁵

As recent years have shown, hecklers plague events that are meant to encourage thoughtful debate and open inquiry.¹⁶ Hecklers shout down, harass, and even assault speakers, including Riley Gaines.¹⁷ Universities cannot cave to hecklers by standing aside while they drown out speakers.¹⁸

¹² *Forsyth County*, 505 U.S. at 132.

¹³ *Id.* at 132-33.

¹⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

¹⁵ *Id.*

¹⁶ See, e.g., The College Fix, *Campus Cancel Culture Database*, www.thecollegefix.com/ccdb/ (listing hundreds of examples of speaking events being protested, heckled, and canceled altogether).

¹⁷ Kyle Morris, *Riley Gaines 'ambushed and physically hit' after Saving Women's Sports speech at San Francisco State*, Fox 10 Phoenix (April 8, 2023), www.fox10phoenix.com/news/riley-gaines-ambushed-and-physically-hit-after-saving-womens-sports-speech-at-san-francisco-state.

¹⁸ See *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1166, n.2 (10th Cir. 2021) ("A 'heckler's veto' is '[t]he government's restriction or curtailment of a speaker's right to freedom of speech when necessary to prevent possibly violent reactions from listeners."); *Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989) ("The

But rather than deterring and punishing *hecklers* who attempt to cancel speaking engagements, universities instead punish the targeted *victims*—student groups and their guests—by foisting the heavy burden of security fees on them to cover the cost of stopping the mob. As a result, the students who are trying to take full advantage of all that college has to offer are faulted for doing so.

Security fees can thus have a strong—and unconstitutional—chilling effect on student speech. Whether in the form of a quote prior to an event or a bill following an event, the threat of security fees can be so daunting that students may hesitate to host or plan speaking engagements altogether. Every time their speech is chilled in this way, the hecklers win. This is a troubling and unconstitutional reality on many campuses, and SLF fears the same is occurring at UNM.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”¹⁹ It is the duty of college officials to protect and defend the rights of every student on campus. SLF acknowledges and appreciates campus security’s daily sacrifices to protect students. But it is well-settled that hecklers are not entitled to those same protections. Expecting student groups or speakers to pay unreasonable or excessive fees in anticipation of how hecklers will react turns the Constitution on its head. It is instead the government’s responsibility to deter and prevent heckling at its own cost.

SLF urges UNM to reduce excessive and unreasonable security fees related to the Riley Gaines event. It also encourages UNM to make its criteria for assessing future events more definite and narrowly defined, not subject to change based on who is hosting an event, who is speaking, or any expected reactions from the crowd.

Open discourse is critical to both a functioning democracy and a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, background, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a “marketplace of ideas” that differ from their own. The college experience can have a significant impact on the leaders of tomorrow, and for this reason, universities must provide students with equal access to ideas without discriminating based on viewpoint. UNM must do its part to ensure this freedom for all students.

Yours in Freedom,

s/ Cece O’Leary
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Supreme Court has squarely rejected what it refers to as the ‘heckler’s veto’ as a justification for curtailing ‘offensive’ speech in order to prevent public disorder.”).

¹⁹ *Healy*, 408 U.S. at 180.