

February 13, 2017

URGENT

VIA EMAIL

James Thelen
Chief of Staff and General Counsel
University of Maine System
46 University Drive, Augusta, ME 04330
james.thelen@maine.edu

Re: Unconstitutional Assessment of Security Fees for the Young Americans for Freedom Event on February 16, 2017

Dear Mr. Thelen:

Young Americans for Freedom, chapter affiliate of Young America's Foundation ("YAF") and a registered student organization at University of Southern Maine ("University"), contacted Alliance Defending Freedom about a violation of its constitutional rights when the University assessed security fees for an expressive event scheduled for this Thursday, February 16, 2017. We ask that you immediately rescind the decision to assess the fees.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith and beliefs.¹ We are dedicated to ensuring that students may exercise their rights to speak, associate, and learn on an equal basis with all other students regardless of their viewpoints. We have contacted the University at least three times in the past regarding certain unconstitutional speech codes and offering assistance in conforming your policies to the First Amendment's requirements. We are now contacting you on behalf of our client, YAF.²

¹ Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including four victories before the highest court in the last six years. *See e.g. 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, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona 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).

² *E.g.* Letter from Travis Barham to Selma Botman, May 30, 2012 (on file with author); Letter from Travis Barham to Selma Botman, July 3, 2012 (on file with author); Letter from Jordan Lorence to Theodora Kalikow, Dec. 20, 2013) (on file with author).

FACTUAL BACKGROUND

YAF is hosting an event featuring a talk by sitting Maine House Representative Larry Lockman this Thursday, February 16, 2017. Representative Lockman's speech is entitled "Alien Invasion: Fixing the Immigration Crisis," and will discuss issues of national public interest relating to immigration policy and enforcement.

On February 7, 2017, at the request of Jason Saucier, Director of Campus Life, YAF President Benjamin Bussiere met with Mr. Saucier and David McKenzie, Dean of Students, to discuss the event. During this meeting Messrs. Saucier and McKenzie indicated that due to expected controversy regarding Representative Lockman's views, YAF would be required to pay for at least two security officers to be present during the event to ensure the safety of the attendees and speaker. Mr. Bussiere expressed his belief that this requirement was likely unconstitutional, but the administrators insisted that YAF must pay. Mr. Bussiere appealed to University Vice President, Nancy Griffin who confirmed that YAF would be required to pay for additional security in order to hold the event and that they would not be allowed to hold the event without paying for security. USM President Cummings told the Portland Press Herald that he would require YAF to pay for extra security at the event because "It could become a highly charged situation, and that is why we believe having extra security on hand will be essential."³

Mr. Bussiere contacted the University office of Public Safety on Thursday, February 9, and was informed that YAF would be required to pay for three security officers in the amount of approximately \$450. This charge significantly burdens YAF's ability to speak and present its viewpoints on campus.

Under the University's "Use of Facilities & Grounds Policy," "the Director of Public Safety, or designee" is given complete and unbridled discretion to "require and charge for public safety or other police personnel presence if in the opinion of the Director of Public Safety, or designee, it is necessary to preserve order, provide safety, oversee crowd control, and/or manage traffic and parking due to this event or a combination of events occurring at the same time."⁴ The policy contains no exhaustive list of viewpoint and content neutral guidelines to protect against viewpoint discrimination or a de facto heckler's veto.

ANALYSIS

As you are well aware, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."⁵ In fact, "the vigilant protection of constitutional freedoms is

³ Dennis Hoey, *Student Group Asks USM to Disinvite Conservative Speaker*, *Portland Press Herald*, Feb. 8, 2017, <http://www.pressherald.com/2017/02/08/student-group-asks-usm-to-cancel-appearance-by-controversial-legislator/>.

⁴ USM Use of Facilities & Grounds Policy, at 5, *available at* https://usm.maine.edu/sites/default/files/human-resources/usm_facility_use_policy_2014.pdf.

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

nowhere more vital than in the community of American schools,”⁶ 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.’”⁷ The University’s assessment of a security fee for YAF’s February 16 event is unconstitutional because it is assessed pursuant to a policy that grants administrators unbridled discretion to disfavor speakers due to their viewpoint or due to the perceived controversial nature of their viewpoints.

I. The University Is Discriminating Against YAF Based on the Viewpoint of its Speech and Because it Grants Unbridled Discretion to Administrators to Burden Speech Through Security Fees.

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁸ Nor may the government engage in viewpoint discrimination, which is “an egregious form of content discrimination.”⁹

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 by an exclusive list of content and viewpoint neutral criteria. The Supreme Court held in *Forsyth Cty., Ga. v. Nationalist Movement* that “[t]he First Amendment prohibits the vesting of such unbridled discretion” to discriminate between viewpoints “in a government official.”¹⁰ 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.”¹¹ 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.¹²

The Court applied this principle to security fees holding that, “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”¹³ As in *Forsyth*, the University’s policy here “contains more than the possibility

⁶ *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁷ *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)).

⁸ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

⁹ *Id.* at 829.

¹⁰ *Forsyth Cty., Ga. 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.

¹³ *Id.* at 134-35.

of censorship through uncontrolled discretion. . . . [The policy] often requires that the fee be based on the content of the speech.”¹⁴ There, the Court struck down a policy that permitted administrators to assess a security fee to cover “the cost of necessary and reasonable protection of persons participating in or observing” the event.¹⁵ The Court held that such a policy, by necessity, requires the administrator to “examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response.”¹⁶ This reasoning applies to the University’s policy here as well since, “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.”¹⁷

Here, the University grants unbridled discretion to the Director of Public Safety to charge student groups whatever the Director deems “necessary to preserve order, provide safety, [and] oversee crowd control.”¹⁸ The Department of Public Safety has indicated it will charge YAF approximately \$450 for security related to this event, and University officials, including the University President have indicated that YAF must pay for additional security due to the “controversial” nature of speaker.¹⁹ Thus, the University is discriminating based on the viewpoint and content of YAF’s speech. Indeed, this policy is facially indistinguishable from the one struck down in *Forsyth*. Any fees charged under this policy are unconstitutional and constitute de facto viewpoint discrimination prohibited by the First Amendment.²⁰

In sum, not only does the lack of specific criteria for the security fee policy and procedures permit administrators to charge fees based on the content and viewpoint being expressed, but it also allows the assessment of fees based on the potential negative reactions of listeners, both issues that led the Supreme Court to declare unconstitutional the permit policy in *Forsyth County*.

¹⁴ *Id.* at 133-34.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ USM Use of Facilities & Grounds Policy, at 5, available at https://usm.maine.edu/sites/default/files/human-resources/usm_facility_use_policy_2014.pdf.

¹⁹ See e.g. Dennis Hoey, *Student Group Asks USM to Disinvite Conservative Speaker*, Portland Press Herald, Feb. 8, 2017, <http://www.pressherald.com/2017/02/08/student-group-asks-usm-to-cancel-appearance-by-controversial-legislator/>.

²⁰ See *Forsyth Cty.*, 505 U.S. at 133; see also *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006) (“[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.”); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (“[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement.”); *Kaahumanu v. Hawaii*, 682 F.3d 789, 806-07 (9th Cir. 2012) (If even “the potential for the exercise of such power exists,” and even absent any indication of viewpoint discrimination, “this discretionary power is inconsistent with the First Amendment.”).

“Listeners’ reaction to speech is not a content-neutral basis for regulation.”²¹ The University’s policy violates the First Amendment rights of YAF and all students on campus.

DEMAND

In light of these clear constitutional violations, we ask that you immediately rescind the security fees assessed to YAF for the February 16 event. We also ask that you take all steps necessary to preserve any documents connected with, discussing, or relevant to the incidents described herein.

Since YAF’s event is scheduled for this Thursday at 7 p.m., please respond in writing by Noon on Wednesday, February 15.

Very truly yours,

/s/ J. Caleb Dalton
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²¹ *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.”).