



July 3, 2014

President Robert W. Kustra
Boise State University
Office of the President
1910 University Drive
Boise, Idaho 83725

Sent via U.S. Mail and Facsimile (208-426-3779)

Dear President Kustra:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by Boise State University's recent charge of \$465 to the student group Young Americans for Liberty (YAL) for security-related expenses at a recent on-campus event. Forcing YAL to shoulder the costs of security—because of Boise State's subjective judgment that the viewpoints expressed at the event necessitate it—violates YAL's First Amendment rights and puts freedom of expression at Boise State at risk. We are additionally concerned by Boise State policies that mandate this unconstitutional practice. Boise State must immediately rescind the security fees it has charged YAL and revise its policies in accordance with the First Amendment rights of its students.

The following is our understanding of the facts. Please inform us if you believe we are in error.

On May 16, YAL hosted an event at Boise State's Special Events Center (SPEC) featuring a keynote address by Dick Heller, the successful plaintiff in the Supreme Court case *District of Columbia v. Heller*, 554 U.S. 570 (2008), concerning the right to private firearm possession. The event was co-sponsored by non-campus organizations Idaho Open Carry and the Republican Liberty Caucus of Idaho. YAL posted a flyer advertising the event on its Facebook page, as well as on the events-planning website Eventbrite.com.

On May 15, at 2:00 p.m., YAL president Nick Ferronato met with Student Union Associate Director Elise Alford-Claffey and Student Involvement and Leadership Center Associate Director Charlie Varland to discuss final arrangements for the planned event. At this meeting, Alford-Claffey raised concerns that some attendees at the event may openly carry firearms in violation of Boise State policy. That evening, at 7:49 p.m., Alford-Claffey emailed Ferronato and YAL Vice President Sherlyn Rose an invoice charging YAL \$465 to have two private security officials and three uniformed police officers present at the event, for three hours each. (Other facilities-related charges brought the total owed by YAL to \$521.50.) The email stated, in part:

- *Security is a required component of your event. Costs must be covered by Young Americans for Liberty as the sponsoring student organization. Boise State’s policy bans weapons across campus. Per Conference Services Event Policies and Guidelines and university recommendation, Campus Security will enforce that policy with the cooperation of the Boise Police Department. If a member of the public violates policy, one of the options the university has is to “exclude” that person from campus. If they return, or refuse to leave, they can be arrested for trespassing, a misdemeanor in Idaho law. Security will deploy 5 officers at logical ingress routes into the SPEC.*
- *If your student organization does not agree to cover the costs for necessary security, Boise State will effectively cancel your reservation. [...]*

Boise State policy allows such demands on student groups like YAL. Concerning “Event Security,” Boise State’s Student Union Event Policies and Guidelines state:

- **University Conference Services may require uniformed security officers and/or law enforcement officers to be present at your event.** For example, officers may be required if your organization plans to serve alcohol or plans to hold an event outside of normal business hours. You may also request the presence of security and/or law enforcement officers.
- Such arrangements for security and/or law enforcement officers will be made by University Conference Services. Those arrangements may include allowing your group to provide its own security. **If University Conference Services has to hire additional officers, the cost will be passed on to the sponsoring organization as part of the event cost.** If Conference Services does not have to hire additional officers, there will be no cost to be passed on. Conference Services may not have to hire additional officers if current staff is sufficient.
- If additional officers are required because of the size of your group, your group will not be charged unless you requested the security. The University may take crowd control measures as necessary to maintain the safety of the campus and to allow the normal use of campus by others.

- If officers are required to respond because a University policy or a law is violated, the violating party will be charged for any extraordinary costs.

[Emphases added.]

Left with no other choice if it wished to proceed, YAL hosted the event as planned on May 16 and paid the full amount Boise State charged the group for security. The *Idaho Statesman* later reported that none of the roughly 30 attendees openly carried firearms.¹ Responding to an inquiry by *IdahoReporter.com* (published by the nonprofit Idaho Freedom Foundation), Kathleen Tuck, Assistant Director of Boise State’s Office of University Communications and Marketing, stated:

We do charge campus groups for security when it is deemed a necessary component of an event, based on threat assessments. ... In this case, there was concern that a community member had been encouraging folks to open carry.²

Tuck may have been referring to nonstudent Matthew Townsend III, who wrote a message on YAL’s Facebook page regarding a previous occasion in which he “carried a handgun openly on my hip inside the Student Union Building” and claimed he would “be doing this again soon, hopefully with undercover videographers.” YAL, however, at no time suggested that open carry was allowed at its event—in fact, YAL made clear that open carry was prohibited. Responding on its Facebook page to the inquiry, “Is this an open carry event?” on May 10, YAL replied, “This event will take place on [the] Boise State Campus, and the University’s no firearm policy will apply.” Idaho Open Carry, one of the event’s co-sponsors, likewise posted a message on its Facebook page on May 15 reading, “NO OPEN CARRY AT BOISE STATE FRIDAY NIGHT.”

As an initial matter, FIRE reminds Boise State that the First Amendment is fully binding on public universities. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

¹ Kristin Rodine, *Concerns about open-carry presence at BSU gun rights talk don’t materialize*, *Idaho Statesman*, May 16, 2014, <http://www.idahostatesman.com/2014/05/16/3188277/boise-state-will-check-for-weapons.html>.

² Dustin Hurst, *Student liberty group says Boise State treated it unfairly with extra security fee*, *IDAHOREPORTER.COM*, June 12, 2014, <http://idahoreporter.com/student-liberty-group-says-boise-state-treated-unfairly-extra-security-fee/>.

Boise State's requirement that YAL pay for the costs of security for its event—security that Boise State itself deemed necessary—violates YAL's First Amendment rights. By conditioning the financial burden imposed on a student group upon an individual's subjective reaction to a group or event's viewpoint, Boise State allows for the exercise of a "heckler's veto" by anyone wishing to cause difficulties for a student group engaging in controversial or unpopular expression.

In forcing YAL to pay \$465 in security fees as a condition of holding its event, Boise State has unconstitutionally affixed a price tag to the group's expression. The Supreme Court addressed precisely this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992), when it struck down an ordinance in Forsyth County, Georgia, that permitted the local government to set varying fees for events based upon how much police protection the event would need. Declaring the ordinance a violation of the First Amendment, the Court wrote that "[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." *Id.* at 134.

Indeed, Boise State has provided a dangerous blueprint to those who would suppress the viewpoints of groups whose views they dislike in just the manner *Forsyth* sought to prohibit. With the precedent Boise State has set here, any student or community member could announce plans to open carry at a group's campus event, and encourage others to do so, in the hope that Boise State would respond by financially burdening the group to the point that it can no longer afford to exercise its right to free speech. This kind of heckler's veto is a perverse and unacceptable outcome entirely at odds with Boise State's obligation to protect its students' First Amendment rights.

FIRE understands Boise State's concern that some attending YAL's event may disobey the university's policies against firearms on campus, and we recognize that Boise State felt the need to prevent such a possibility. Boise State cannot, however, force student groups to shoulder the cost of security simply due to the possibility that some attendees may choose not to comply with Boise State's policies by engaging in conduct over which YAL has no control and had, in fact, actively discouraged. Boise State's policies and practices regarding security for events do not supersede students' and student organizations' First Amendment rights.

Making Boise State's event security policies still more problematic is the nearly unchecked discretion they provide to Boise State administrators to impose fees for security as they see fit. Boise State fails to specify exactly how its administrators determine whether and how many security officers are required for an event. The lack of clear, viewpoint-neutral guidelines allows for an unacceptable degree of administrative discretion and arbitrary, viewpoint-based determinations.

The *Forsyth* Court noted 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.” *Forsyth*, 505 U.S. at 130 (emphasis added) (internal quotation marks omitted). Indeed, in *Forsyth*, “the administrator **based the fee on his own judgment of what would be reasonable.”** *Id.* at 132 (emphasis added). The Court found that the county’s implementation of the ordinance did not rely on “narrowly drawn, reasonable and definite standards guiding the hand of the Forsyth County administrator,” and thus ruled that “[n]othing in the law or its application prevents the official from **encouraging some views and discouraging others through the arbitrary application of fees.”** *Id.* at 133 (emphasis added) (internal citations and quotation marks omitted). Boise State’s guidelines are similarly flawed, and the principles set forth in *Forsyth* are no less applicable on a public university campus. *See Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010) (relying on *Forsyth* in holding that the trial court erred in not granting an injunction preventing enforcement of Southeastern Louisiana University’s security fee policy).

There may be certain instances in which student groups partially or fully cover the costs of security—if the group demands security beyond what the university deems necessary, for example. However, any administrative imposition of security fees upon a student group must be guided by narrowly-drawn, viewpoint- and content-neutral, reasonable, definite, and published standards in order to comply with Boise State’s obligations under the First Amendment.

FIRE asks that Boise State University immediately refund the unconstitutional security fee of \$465 it forced YAL to pay in order to hold its event on campus. We further call on Boise State to use only narrowly-drawn, viewpoint- and content-neutral, reasonable, definite, and published criteria when assessing security costs for student groups’ campus events. While we are prepared to use all necessary resources to see this case through to a just conclusion, we hope to soon commend Boise State for affirming its First Amendment commitments and promptly righting the errors committed here.

We request a response to this letter by July 24, 2014.

Sincerely,



Ari Z. Cohn

Program Officer, Legal and Public Advocacy

cc:

Elise Alford-Claffey, Associate Director, Student Union

Charlie Varland, Associate Director, Student Involvement and Leadership Center

Ashlie Baty, Coordinator, Student Involvement and Leadership Center

Kathleen Tuck, Assistant Director, Office of University Communications and Marketing