



July 26, 2017

Garrey Carruthers  
New Mexico State University  
Office of the President  
MSC 3Z  
P.O. Box 30001  
Las Cruces, New Mexico 88003-8001

*Sent via U.S. Mail and Electronic Mail (president@nmsu.edu)*

Dear President Carruthers:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses.

FIRE is concerned about the threat to freedom of speech at New Mexico State University (NMSU) presented by NMSU's policy governing security fees for student events. The unconstitutional policy, which invites arbitrary enforcement based on the whims of administrators, has recently been applied to require a student organization to pay for two police officers to provide security for a keynote address by conservative writer and speaker David Horowitz. NMSU's policy affixes an unacceptable and unconstitutional price tag to campus expression. NMSU must revise its policy and rescind the fee imposed against the students inviting Horowitz to speak on campus.

## **I. FACTS**

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

In March 2017, NMSU registered student organization Students for Academic Freedom (SAF) began planning an event featuring a keynote address by Horowitz, which was scheduled to take place on May 3, 2017. SAF Vice President Brannick Harris submitted an Activity Registration Form to the Campus Activities office, and after NMSU College of Education Student Program Coordinator Leslie Perez approved the event, SAF secured a room reservation for the event.

Less than a week before the event, on April 28, Amanda Bowen of the NMSU Police

Department sent an email to Director of Campus Activities Bruce Vandevender, outlining security needs for the event:

Hi Bruce,

Based upon the event details, conversations with Dr. Horowitz [sic] security team, and planned counter-protests NMSU PD is going to require 2 police officers for the Students for Academic Freedom event.

When speaking to Mr. Pat Frisco with the security detail I made clear that they should not be carrying firearms or providing security services.

Shall we use your index for the charges associated with personnel?

Shortly thereafter, Vandevender forwarded Bowen's email to SAF President Wake Gardner, informing him that SAF would be responsible for covering the cost of security needs. Later that day, Gardner replied to Vandevender:

Bruce,

What is the charge for the police? We'd like to know if other political events on campus like the 5 Hijabs speaker/video or the event held by the Solutionaries had to have security. We'd like to ensure that we're not being singled out for an event that is not standard practice. Thank you,

Wake

Approximately 120 people attended SAF's event, including some critics of Horowitz, who publicly debated him both during the question-and-answer segment of the event and after it concluded.<sup>1</sup> There were no reports of any significant disruption during the event.

On May 17, two weeks after the event, Campus Activities Administrative Assistant Rose Carbajal emailed Gardner and Harris to inform them that SAF would need to reimburse Campus Activities for the \$320.13 it paid for the police officers who provided security at the event. As of the date of this letter, SAF has not reimbursed Campus Activities for the security costs.

## II. ANALYSIS

It is well-settled law that the First Amendment applies with full force on public university campuses. *See, e.g., 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.”); *Papish v. Board of*

---

<sup>1</sup> Diana Alba Soular, *Conservative speaker claims NMSU lacks political diversity*, LAS CRUCES SUN-NEWS (May 4, 2017), <http://www.lcsun-news.com/story/news/politics/2017/05/04/conservative-speaker-claims-nmsu-lacks-political-diversity-david-horowitz/101286214/>.

*Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *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 and quotation marks omitted). NMSU is legally bound to respect the First Amendment rights of its students and recognized student organizations like SAF.

#### **A. Forcing SAF to pay for security violates the organization’s First Amendment rights**

By requiring that SAF, less than a week before the event, agree to pay \$300 for additional security, NMSU unacceptably affixed a price tag to the group’s expressive activities. By conditioning the financial burden imposed on a student group on the anticipated reaction to the viewpoints expressed at an event, NMSU impermissibly allows for the exercise of a “heckler’s veto” by anyone wishing to impede or silence a student group engaging in controversial or unpopular expression.

The Supreme Court has explicitly forbidden the imposition of additional security fees based on the controversial nature of a speaker: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992). In *Forsyth*, the Supreme Court struck down an ordinance permitting the local government to set varying fees for events, including public demonstrations, based on how much police protection the event would require. *Id.* at 134, 137. The Court held that the imposition of fees related to public speech must be based upon content-neutral criteria, and made clear that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Id.* at 134.

That NMSU considered the reaction to Horowitz’s speech when determining whether, and how much, security would be required is not in question. Indeed, in her email detailing the security requirements of the NMSU Police Department, Amanda Bowen explicitly stated that the determination was based in part on “planned counter-protests.” Assessing fees based on such a consideration is precisely what the First Amendment forbids.

Moreover, NMSU’s rationale for the security requirement is at odds with comments later given by the NMSU Police Departments itself. When asked by the press about any “disruptions or threats surrounding the event,” NMSU Police Chief Stephen Lopez reportedly responded: “There was absolutely nothing of concern.”<sup>2</sup>

---

<sup>2</sup> *Id.*

NMSU has provided a dangerous blueprint to those who would suppress groups whose viewpoints they dislike. Any student or community member may now declare their intent to protest forcefully in the hope that NMSU will 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 NMSU's legal and moral obligation to uphold its students' First Amendment rights.

Finally, it is notable that aside from Chief Lopez's comment that there was "nothing of concern," reports of the event indicate that Horowitz's speech and the audience's reaction to it generally exemplified the free exchange of ideas that NMSU ought to foster.

Descriptions of the speech portray an event at which both supporters and critics of Horowitz were able to engage in robust—if at times heated—debate.<sup>3</sup> That the event was successful in fostering lively discussion without significant disruption is a credit to NMSU students, and underscores that heavy-handed security requirements are unnecessary. Demonstrating to students the importance of robust dialogue and debate in practice is far more productive and appropriate than imposing unconstitutional security costs—and largely obviates the need for them in the first instance.

#### **B. NMSU's "Activity Registration Form Regulations" policy is unconstitutional**

The unconstitutional imposition of security fees on SAF was made possible by the fact that NMSU's policy grants administrators broad discretion to impose security fees as they see fit. NMSU's policy fails to specify 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 Activity Registration Form Regulations<sup>4</sup> (the Regulations) governing all student organization events provide, in relevant part:

Organizations/departments sponsoring events requiring crowd control will be responsible for the cost of necessary security when it is determined by the University police or appropriate administrators that such security is required.

This policy abridges the First Amendment, and NMSU cannot utilize it to impose a tax on controversial events, including Horowitz's appearance.

The Supreme Court has held that providing administrators with such unfettered discretion violates the First Amendment. *See Forsyth County*, 505 U.S. at 123. The *Forsyth* Court noted that "[a] government regulation that allows arbitrary application is inherently inconsistent

---

<sup>3</sup> *Id.*

<sup>4</sup> *Activity Registration Form Regulations*, NEW MEXICO STATE UNIV., <https://policy.unm.edu/university-policies/2000/2230.html> (last visited July 26, 2017).  
<https://campusactivities.nmsu.edu/activity-registration-form-regulations/>

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.**” *Id.* 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 observed 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).

The Court’s concerns regarding unchecked discretion have been borne out in this case. The Regulations provide no objective criteria for assessing security needs, and as a result, SAF has been billed for security based expressly on the anticipated opposition to David Horowitz’s speech. Such a result is constitutionally impermissible.

### C. Policy Revisions

FIRE is aware that over the past year, several controversial events featuring different speakers at campuses across the country have resulted in high profile incidents involving property damage and violence. Those incidents, however unfortunate, are not sufficient justification to burden expressive rights and maintain unconstitutional policies that allow administrators to do so. As Chief Justice John Roberts has observed, “As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

The University of New Mexico’s (UNM’s) experience in this regard proves instructive. As you may be aware, in January 2017, UNM advised two student organizations, approximately two weeks before their event featuring speaker Milo Yiannopoulos, that they would have to pay \$3,400 to cover the cost of event security in accordance with a policy permitting such fees based on the “controversial nature of speakers or subjects.” Following a letter from FIRE and public outrage, UNM reversed its decision to charge the students for security, and UNM Acting President Chaouki Abdallah immediately suspended the portion of UNM’s policies used to assess the security costs.<sup>5</sup>

On May 10, 2017, UNM promulgated a revised policy<sup>6</sup> for security services. That policy provides, in relevant part:

---

<sup>5</sup> *VICTORY: University of New Mexico Suspends Speech Code, Waives Speech Tax for Milo Yiannopoulos Speech*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jan. 26, 2017), <https://www.thefire.org/victory-university-of-new-mexico-suspends-speech-code-waives-speech-tax-for-milo-yiannopoulos-speech>.

<sup>6</sup> *Policy 2230: Police and Security Services*, UNIV. OF N.M. (May 10, 2017), <https://policy.unm.edu/university-policies/2000/2230.html>.

For the purposes of this policy, a “special event” is any non-routine event held in a University building or on University property. Special events may require security; the University will evaluate the following factors to determine required security services for a special event:

- an accurate estimate of the number of attendees at the event
- the venue’s size and location
- the number of entrances and exits, within the venue, and access to restrooms and other facilities near the venue
- whether the event will be open to the public
- whether there will be a ticketing process and what type
- length of time scheduled for the event
- whether the event will occur during daylight or evening hours
- whether a fee will be charged for entry, goods, or services
- whether alcohol will be served at the event

A schedule of charges based on the factors above will be updated regularly and posted on the UNM Police Department website. The basic cost of security according to this schedule will be charged to all groups; additional security services may be requested by the special event sponsor for an additional cost.

UNM’s revised policy comports with constitutional standards by not only setting forth a definite and content-neutral list of criteria with which security needs will be assessed, but also by maintaining a publicly-available schedule of costs utilizing those criteria in order to provide transparency and ensure that events are not treated disparately based on hostility to them.

FIRE urges NMSU to follow UNM’s commendable example and adopt a similar policy. We would be pleased to work collaboratively with NMSU, free of charge, in order to craft a policy that accounts for the university’s needs while protecting NMSU community members’ First Amendment rights.

### **III. Conclusion**

In charging Students for Academic Freedom for the presence of two police officers at their event based on planned protests, New Mexico State University has violated its students’ First Amendment rights. Fortunately, the appropriate resolution is readily accomplishable. To comply with the First Amendment, NMSU must rescind the demand that SAF pay for the cost of security at their event and implement a content-neutral policy outlining objective criteria upon which it will base future decisions about security needs. FIRE urges you to do so, and stands ready to assist in any way possible.

Thank you for your attention to our concerns. We request a response to this letter by August 9, 2017.

Sincerely,



Ari Z. Cohn  
Director, Individual Rights Defense Program

cc:

Lizbeth G. Ellis, Chief Legal Affairs Officer  
Stephen Lopez, New Mexico State University Police Chief  
Bruce Vandevender, Director of Campus Activities