



June 30, 2014

President Robert W. Kustra
Boise State University
Office of the President
1910 University Drive, Suite 210
Boise, ID 83725-1000

Jeremiah Shinn
Boise State University
Assistant Vice President for Student Life
1910 University Drive
Boise, ID 83725-133

Sent via U.S. Mail and Facsimile

Dear President Kustra and Assistant Vice President Shinn,

I am the Director of the Idaho Freedom Foundation's Center for Defense of Liberty, and I am writing to you as legal counsel for Young Americans for Liberty at Boise State University ("YAL"). The Center for Defense of Liberty is a public interest litigation organization dedicated to the protection of the rights and liberties of Idahoans, including their rights to free speech, due process, equality under the law, and academic freedom.

The Center for Defense of Liberty is seriously concerned by the lack of respect for the First Amendment that Boise State University ("BSU") demonstrated in connection with the May 16, 2014 speech that was delivered by Dick Heller and was sponsored by YAL (the "Heller Event"). Despite the Heller Event having been planned for over six weeks, YAL was not informed until approximately 24 hours before the event that BSU had decided that additional security would be required at the event, and that YAL would have to pay an additional \$465.00 for such security. This charge increased the facilities cost for the Heller Event by approximately 820% over the previously-quoted total. Furthermore, the web page containing the details of the Heller Event was removed from the BSU website prior to the event, and the event was also removed from the "This Week at Boise State" section of the BSU website.

Thus, not only did BSU unconstitutionally place a price tag on Mr. Heller's speech by assessing various "security" charges based on the content of Mr. Heller's expression and the expected reaction from the attendees, but it also appears that BSU depressed attendance at the Heller Event by removing information about the event from its website.

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

YAL is an officially recognized chapter of the national group Young Americans for Liberty, and is also an officially recognized BSU student group sponsored by a faculty adviser. In describing itself, YAL states that, "Young Americans for Liberty is an organization of students whose mission is, 'to train, educate, and mobilize youth activists committed to "winning on principle". Our goal is to cast the leaders of tomorrow and reclaim the policies, candidates, and direction of our government.' We are a group of passionate people who want nothing more than the liberty and freedom we are entitled to as human beings."

Toward the end of March of 2014, the Republican Liberty Caucus of Idaho ("RLC") had decided to reach out to Mr. Heller about giving a speech regarding his landmark Second Amendment case that was decided by the Supreme Court of the United States. The speech was to be an opportunity for Mr. Heller to speak about his case, his experience at the Supreme Court, the Second Amendment, and the contours of the right to bear arms. Mr. Heller agreed to include BSU as one of the stops on his national speaking tour, and YAL elected to be a co-sponsor of the event, along with Idaho Open Carry and RLC. On March 31, 2014, YAL contacted BSU about reserving the Special Events Center (the "SPEC") within the Student Union Building ("SUB") for the event. At the time that the SPEC was reserved, more than six weeks prior to the date of the Heller Event, YAL was not provided any indication that there would be any additional security costs associated with the event or that the event could be canceled by BSU if YAL did not accede to security costs imposed on the day before the event.

In accordance with BSU policies, YAL Vice President, Sherlyn Rose ("Ms. Rose"), had also submitted a "Promotion Request" in connection with flyers that YAL intended to distribute regarding the Heller Event. In response, on May 13, 2014, at approximately 11:53 AM, Ms. Rose received an email message (the "Baty Email") from Ashlie Baty, Coordinator of the Student Involvement & Leadership Center at BSU ("Ms. Baty"). The Baty Email "asked" that the flyers use "Boise State University instead of "BSU," and indicated that they should read "Free Admission for Boise State University Students" instead of "BSU Free Admission," because BSU was not a sponsor of the event. The Baty Email also noted that the flyer may want to add the date and location of the event. Ms. Baty's email further noted that YAL would need to submit a "Co-Sponsorship Agreement" in conjunction with other groups that were helping to put on the event, and declared that, "the press release should not be distributed until this Agreement is on file with our office." Finally, the Baty Email indicated that YAL would need to submit an Expense Request via BSU's OrgSync program in order to process the payments, and also indicated that if other groups were paying for any of the costs then that information would have to be indicated in the Co-Sponsorship Agreement.

Within approximately ten minutes of receiving the Baty Email, Ms. Rose contacted YAL President, Nick Ferronato ("Mr. Ferronato"), about the need to complete the Co-Sponsorship Agreement and the Expense Requests. Within a few minutes of that email, Ms. Baty sent another message to ask whether or not any of the co-sponsors intended to raise funds at the event. Ms. Rose responded within a few minutes that no fundraising was to be involved. At approximately 12:07 PM, Ms. Rose received an email directly from OrgSync with the subject line "Your form submission Promotion Approvals has been denied by Ashlie Baty." (the "Denial Email"). The body of the Denial Email read:

Form Submission Denied

Your form submission Promotion Approvals has been denied by Ashlie Baty in Boise State University

We're so sorry, but this poster has been denied for the following reason(s): [List Reason(s)]

The email also contained a link to the denial on OrgSync. With YAL's flyers having been rejected, and with the date of the event only a few days away, YAL elected to forego the distribution of the flyer and focus on finalizing other aspects of the Heller Event.

On May 15, 2014, Elise Alford-Claffey, Associate Director of the SUB, contacted Mr. Ferronato to discuss safety measures for the event. At that meeting, conducted at 2:00 on May 15, 2014, just 28 hours prior to the beginning of the Heller Event, Ms. Alford-Claffey and Charlie Varland (Associate Director of The Student Involvement & Leadership Center) indicated that additional security would be required for the event, and that YAL would be responsible for the costs of the additional security. Following that meeting, Ms. Alford-Claffey sent an email message to Mr. Ferronato and to Ms. Rose to "follow-up from our 2:00 meeting today so we can best support your decision to continue or cancel your reservation." The email also requested that YAL confirm whether or not it would be keeping the facility reservation based on the following conditions:

- *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.* We would be happy to begin discussion of rescheduling this event or work with you to schedule a new event with the support of an Event Coordinator.

- *If your student organization agrees to cover the costs for necessary security, we are ready to support your event needs and your reservation will stand.* We have made all requested adjustments to your reservation including addition of skirted tables and chairs to the Special Events Center Lobby, access to the SPEC Green Room, bottled water for your speaker, and removal of the Farnsworth Room from your reservation. This decision was made in light of the simultaneous Riverside Hotel reception for Mr. Heller. Guests attending your event will have parking access in the Lincoln Garage as part of your request through Transportation & Parking.¹

The email from Ms. Alford-Claffey that imposed the “conditions” upon the Heller Event also referenced the “Event Security” section of BSU’s “Event Policies and Guidelines, which states the following:

Event Security

- 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.²

With little to no time to alter the location of an event that had been planned for many weeks, YAL acceded to BSU’s demands, and confirmed that they would proceed with the event.

On the day of the Heller Event, Ms. Rose was notified via the YAL Facebook page that the web page for the Heller Event that had previously been listed on the BSU website was no longer working, and that the Heller Event was also no longer listed on the events page of the BSU website. Nobody at YAL had been notified that these changes would be made, and no explanation was given as to who authorized such changes or why changes were made that would make it harder for people to learn about the event and to attend it. The official “Young

¹ Email from Elise Alford-Claffey, dated 5/15/2014, 7:49 PM (emphasis in original).

² <http://conferenceservices.boisestate.edu/event-policies-and-guidelines/> (Event Security section)

Americans for Liberty at Boise State University” Facebook account noted that, “At the moment, they are working on putting it back up. The person I talked to was surprised that it was taken down. That’s where we are at the moment. The event is of course still on.” Another Facebook commenter indicated that, “I just spoke with Heather in the BSU Communications Department. She said she will look into it.” To the best of YAL’s knowledge, the event page was never put back up,³ the events calendar was never updated to add the Heller Event back onto it,⁴ and as of this date those items are no longer available on the BSU website.

On the day of the event, attendees reported an overwhelming police presence. One attendee stated that, upon his arrival, he thought that some kind of security incident had occurred, and that the impression conveyed to the general public was that some kind of dangerous event was transpiring. The hallway from the SPEC to the rest of the SUB was also blocked, forcing attendees to enter the Heller Event from an outside door, and preventing them from moving freely from the SPEC to the SUB.

Following the Heller Event, on May 16, 2014, Idaho Statesman reporter Kristin Rodine wrote an article that indicated that BSU security and Boise police were in attendance at the event to prevent people from attempting to open carry guns to the Heller Event. Ms. Rodine also noted that approximately thirty people attended the event and that none of them attempted to open carry. Some attendees reported slightly higher attendance numbers, but the attendance was well below the attendance at other similar events that Mr. Heller had attended, including another one in Idaho, and well below what was expected for the Heller Event.

On June 12, 2014, Dustin Hurst, a reporter for IdahoReporter.com, wrote an article regarding the Heller Event and the additional security fees. In that article, BSU communications staffer Kathleen Tuck was quoted as saying that, “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.” YAL believes that this is in response to a single member of the local community that hinted in a Facebook comment that he might open carry at the Heller Event. YAL further notes that someone responded to the official Facebook announcement regarding the event to ask if it was an open carry event, and the official “Young Americans for Liberty at Boise State University” Facebook account replied that, “This event will take place on Boise State Campus, and the University’s no firearm policy will apply.” (emphasis added). Because BSU did not approve YAL’s flyers, and because the event information was removed from BSU’s website, this was one of the few means by which people were able to learn about the event, and YAL’s position on the subject was made very clear. Idaho Open Carry, a co-sponsor of the Heller Event also posted on its official Facebook page on May 15, 2014, notifying its members, “NO OPEN CARRY AT BOISE STATE FRIDAY NIGHT,” and instructing them to not open carry at the Heller Event so that BSU would not follow through on its threat to charge YAL for additional security at the event.

³ <http://news.boisestate.edu/update/2014/05/09/dick-heller-discuss-second-amendment-may-16/>

⁴ <http://news.boisestate.edu/update/2014/05/15/week-boise-state-35/>

Free speech is a fundamental liberty that must be vigorously protected, particularly on a college campus, where the free exchange of ideas is absolutely essential to the intellectual growth of the students and the development of critical thinking skills. Indeed, BSU acknowledges that, “The Student Union and Special Events Center serves as a forum for many divergent views and opinions both within the University community and beyond. These views and opinions do not necessarily represent the views of the Student Union or Boise State University, but merely *reflect the institution’s commitment to intellectual growth and academic freedom and to an open debate and discussion of ideas.*”⁵

Penalizing a speaker (or the organization sponsoring the speaker) simply because of the expected reaction from those attending the event has a chilling effect on speech on campus, and has been deemed by the Supreme Court of the United States to be a violation of the First Amendment.

The Supreme Court has repeatedly declared that public universities are bound by the First Amendment and by its protection of the free speech rights of those visiting and attending such universities. For example, in *Healy v. James*, 408 U.S. 169 (1972), the Court declared that

[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.

Healy, 408 U.S. at 180.

BSU’s statements to the Idaho Statesman and to IdahoReporter.com claim that the security measures are a response to the “threat” that one community member was encouraging people to open carry, and not in response to the content of Mr. Heller’s speech. It is not clear, however, precisely what kind of threat BSU expected would be presented by a person open carrying *in support of* Mr. Heller and his speech, and it is equally unclear why more than a dozen officers and security personnel would be required in order to deal with such a person. Furthermore, this explanation also fails to address why it is that all information about the Heller Event was removed from BSU’s website prior to the event. Quite frankly, when considered in light of BSU’s vocal opposition to the expansion of Second Amendment (and Article I, Section 11 of the Idaho Constitution) rights via the “Campus Carry Bill” (S1254), the treatment of YAL in connection with the Heller Event gives the appearance of bad faith on the part of BSU.

Even assuming, *arguendo*, that BSU was operating at all times in good faith, and was genuinely concerned about safety, that does not permit the University to put a price tag on Mr. Heller’s speech itself. BSU and its staff explicitly threatened to cancel the event unless the demand for security fees was acceded to by YAL. That is, BSU sought to directly burden the

⁵ <http://conferenceservices.boisestate.edu/event-policies-and-guidelines/demonstrations-and-literature/>

speaker himself (and the sponsoring organization) in response to the content of the speech and the reaction that it was assumed to engender in certain attendees – a reaction that was completely out of the speaker’s control and that had been explicitly rejected by YAL on an official communication regarding the event.

The Supreme Court addressed this very issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 - 135 (1992). In *Forsyth*, the Court considered the constitutionality of a Forsyth County, Georgia, ordinance that allowed the local government to set varying fees for events based upon how much police protection the event would need. The Court struck down the ordinance on First Amendment grounds, stating 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.” The Court found that in order to make such a determination, county administrators would have to “examine the content of the message that is conveyed.” Therefore, the Court declared that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. . . . **Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” (emphasis added; citation omitted).

Indeed, the situation here is even more extreme than that considered in *Forsyth*. In this case, there was no angry mob, or even the threat of such a mob. The “threat” upon which BSU claims to have been acting was that it disapproved of the manner in which certain *supporters* of the speaker *may* choose to demonstrate their support for the speaker. Setting aside the issue of whether or not BSU is legally entitled to prevent open carry on campus, what it clearly cannot do is to burden a speaker simply because of the assumed or anticipated reaction to the speaker’s message.

If YAL is the only group to which such a standard has been applied, then this is clearly a case of discrimination against its speaker and his message. There is little doubt that there have been speeches at the SUB with thirty attendees that did not warrant such a heavy security presence. As we have seen in *Forsyth*, however, even if such a policy has been applied to other speakers at other events, such a non-content-neutral policy cannot and will not survive a First Amendment challenge.

Setting aside the legal precedent, however, simple respect for the principle of free speech necessitates that BSU revise its policy with regard to “security fees.” If one Facebook comment about open carry by one person is enough to warrant the imposition of \$465 in security fees upon the organization sponsoring an event, then BSU would be establishing a blueprint for making unpopular speech too expensive to express on campus. Any group could simply issue a public declaration of their intent to stage a massive open carry protest at any event of which they disapprove, and the security fees would likely prove so cost prohibitive that all but the most well-funded groups would be silenced by the University’s own policy. It would be a formal declaration that BSU is granting a “heckler’s veto” to any and all groups willing to implement such an approach, and free speech on campus would be dealt a major blow.

We are also concerned that BSU’s policies constitute a prior restraint on the speech rights of student groups. As indicated above, YAL’s officers had submitted a proposed flyer for

approval by BSU, and Ms. Baty rejected the flyer. Although the Baty Email couched the revisions of the flyer as suggestions that she “asked” them to change, the denial of the request indicates that these were more than just suggestions. Indeed, BSU’s formal policies encourage such results. BSU’s Student Union Event Policies and Guidelines, under the heading of “Signs, Banners & Decorations” indicates that, “A University Conference Services Event Coordinator must approve signs, banners, and decorations prior to the event.”⁶ Furthermore, pursuant to BSU’s Open Spaces Use Policy, “The Vice President for Student Affairs is authorized to require a Sponsoring Organization/Individual to utilize reasonable methods to allow the public a choice about viewing or receiving certain material that the Vice President deems may not be suitable for a general audience or that are inconsistent with the University’s legitimate interest in maintaining a public area that is freely accessible to all members of the public.”⁷

One of the fundamental principles of free speech is that a speaker should not have to ask permission from a government official before they engage in protected speech. This principle of prior restraint was expressed by the Supreme Court in *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147 (1969), where it affirmed that, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” (Citations omitted). Furthermore, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575 (1971), the Supreme Court noted that, “This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.” *Id.* at 419 (citations omitted). The *Keefe* court further declared that, “Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity. . . . Respondent [who was seeking the restraint] thus carries a heavy burden of showing justification for the imposition of such a restraint.” *Id.* (citations omitted); (see also, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963) “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

Failure to protect free speech on campus not only damages the groups and ideas that are silenced, but also deprives all students of the opportunity to have their ideas and beliefs challenged and to learn how to respond to such challenges through open and peaceful discourse. Silencing speech devalues the education being provided to BSU’s students, reduces the value of the University to the community at large, and undermines the educational mission of the University.

For these reasons, YAL respectfully requests that the \$465 in “security fees” be refunded to the YAL organization account and that BSU revise its policies on security fees and promotional material pre-approvals to comply with *Forsyth*, *Shuttlesworth* and the full body of First Amendment law. We request a response to this letter by the close of business on July 14, 2014. We sincerely hope that this matter can be resolved quickly and amicably. We are also, however, fully willing to employ all resources at our disposal to achieve a just conclusion in this matter, and we therefore hope to receive a response from you shortly.

⁶ <http://sub.boisestate.edu/event-policies-and-guidelines/>

⁷ <http://policy.boisestate.edu/governance-legal/open-spaces-use/>

Please feel free to call me if you have any questions about this letter or if you would like to discuss the matter further. My office number is (208) 258-2280, ext. 213.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Geoffrey D. Talmon', written in a cursive style.

Geoffrey D. Talmon
Director, Center for Defense of Liberty

cc via electronic mail:

Nick Ferronato, President, Young Americans for Liberty at Boise State University

Sherlyn Rose, Vice President, Young Americans for Liberty at Boise State University

Ashlie Baty, Coordinator, Student Involvement & Leadership Center at Boise State University

Elise Alford-Claffey, Associate Director, Student Union Building at Boise State University

Charlie Varland, Associate Director, Student Involvement & Leadership Center at Boise State University