UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND GREENBELT DIVISION

University of Maryland Students for Justice in Palestine, Plaintiff, v. **Board of Regents** et al. Defendants.	**Case No. 8:24-cv-02683-PJM** **Hon. Peter J. Messitte** **PLAINTIFF'S BRIEF IN REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Under Local Rule 105 and the Court's September 19, 2024 order (ECF 12), Plaintiff submits this brief replying to Defendant's response (ECF 27) to Plaintiff's motion for a preliminary injunction (ECF 8).

INTRODUCTION

The University of Maryland, College Park (UMCP) summarily cancelled all expressive events from taking place on a day of historical significance, and in a statement issuing this decree, bluntly laid out its unlawful reasons why: because there was significant opposition and because it believed the day should be one of reflection and dialogue. Despite stating that there were "no immediate or active threats" *to even prompt* a security assessment, Defendants now put forth an eleventh-hour argument that racist, anti-Black and anti-Palestinian statements by individuals wishing to stop Plaintiff from speaking caused the university to stop everyone from speaking on October 7th, except themselves. This is a textbook heckler's veto and has no basis in law. *Forsyth Cnty. v. Nationalist Movemen*t, 505 U.S. 123, 134-35 (1992).

The Supreme Court has made it clear that the Government may not ban speech "simply because it might offend a hostile mob." *Id*. If it could, the pro-Israel individual who wrote UMCP threatening to host a Klan rally on campus in protest of Plaintiff's vigil would be able to get every student event calling for an end to violence against disenfranchised groups banned by threatening nooses, sheets and symbolic hangings – or wishing harm upon the president's children, or hyperbolically suggesting they would bring a gun to campus in self-defense.

Summarily labelling hostile emails "violence" is not a First Amendment work around granting the University complete license to ban all expressive events. Defs.' Mot. to Dismiss, ECF No. 27 at 13. Even if racist speech by pro-Israel individuals who oppose Plaintiff's message did rise to the level of a threat – which it does not – the University must use the least restrictive means possible to serve its compelling interest, which it has failed to do. This is not Defendant's first rodeo with controversy. For decades, the University has hosted events from numerous controversial speakers – one of whom incited a literal mob at another public university – while taking security precautions such as metal detectors and checking IDs. Instead of cancelling one extremely controversial speaker upon demands to do so, UMD's then-president put out a statement calling on the university to "consider different perspectives" and noted that "restrictions on freedom of speech are unconstitutional."[1]

When it came to University of Maryland Students for Justice in Palestine (UMD-SJP)'s vigil, Defendants did none of this. In repeated meetings with Plaintiff, Defendants told the students that many people opposed their message and were calling for censorship. Defendants also questioned Plaintiff with respect to that message. At no time was Plaintiff told that pro-Israel

[1] Wallace D. Loh, *Letter to the University of Maryland Community*, Univ. of Md. (Nov. 10, 2016), available at https://web.archive.org/web/20170130044451/https://www.president.umd.edu/true-our-values.

counter protesters who opposed its message might be a threat to their event or their members. As it has done with other student groups in the past, Defendants did not discuss with Plaintiff what security measures or alterations to the event's plan may be necessary to allow it to proceed safely.

The Government would have the court ignore President Pines' and other UMD administrators' own words and instead believe that it was racist language from three hostile individuals to one university that led to a statewide ban covering a dozen institutions and hundreds of thousands of students. They would also have the court believe that rescheduling UMD-SJP's event to a day other than the one they have chosen to mark does nothing to alter Plaintiff's expression, yet also somehow alleviates all of the threats by individuals who do not wish to see the event happen.

Defendants' last-minute attempt to concoct a compelling interest does not pass the sniff test and even if it did, they utterly failed to select the least restrictive means of achieving it.

ARGUMENT

I. The Government ignores the controlling case—*Rock for Life v. Hrabowski*—that this Court must follow in dealing with Defendants' new concerns about violence

The Fourth Circuit has already determined what a university is to do if it has concerns that a student-organized event will lead to violence. Rather than "acquiesce to a heckler's veto" and cancel the event, Defendants must "provid[e] a security presence…[which is] a less restrictive means of ensuring student safety." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 553 (4th Cir. 2010); *See id.* at 558 n. 3 (King, J., concurring in part) (summarizing the majority opinion that "an educational institution in this Circuit is now required by the First Amendment to address the additional safety concerns by providing a security presence…or watching the event closely to determine whether security is truly necessary"). Though *Rock for Life* controls, the Government does not even mention the case.

Rock for Life instructs federal courts to prevent Defendants from allowing people who do not agree with UMD-SJP to "importun[e] [the] government to curtail 'offensive' speech at peril of suffering disruptions of public order." *Id.* In doing so, the Fourth Circuit built on a long line of cases that have entrenched the principle that a "listener's reaction to speech" is not a lawful basis to burden that speech. *See Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob"); *Healy v. James*, 408 U.S. 169, 191 (1972) ("undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus").

The Government, however, does exactly what *Rock for Life* says it cannot do. Defendants marshal evidence that some people do not like UMD-SJP and that these people will engage in racist counterprotests or have wished harm upon Defendant Pines' family. *See* Dkt. 27-1, 27-2. But rather than advance their cause, these emails from the public prove that there is a "hostile mob" that the Government cannot lawfully acquiesce to. *See Bible Believers v. Wayne County Michigan*, 805 F.3d 228, 245-248 (6th Cir. 2015) ("A review of Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto.")

Those emails from the public falsely claim that UMD-SJP's intent, in organizing an interfaith vigil with Jewish Voice for Peace, is "to celebrate the murder of JEWS," Dkt. 27-2 at 10, in addition to other racist and Islamophobic smears. These baseless smears only show that UMD-SJP's advocacy has had "profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). This friction is an anticipated outcome of our free speech jurisprudence.

Rather than a lawful justification for censorship, "invit[ing] dispute" between UMD-SJP and others about the meaning of October 7th is a "function of free speech under our system of government." *Id.* And by "induc[ing] a condition of unrest, creat[ing] dissatisfaction with conditions as they are, [and] even stir[ring] people to anger," this student group is exercising its free speech rights in a manner that "best serve[s] [the Free Speech clause's] high purpose" *Id. See United States v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 818 (2000) ("The Constitution exists precisely so that opinions and judgments…can be formed, tested, and expressed).

Providing additional security is something that Defendants have done before and can do again. As recently as May 2024, more than a dozen organizations sponsored an event called "Israel Fest" on McKeldin Mall and Students for Justice in Palestine held a rally critical of the event, also on McKeldin Mall. "University event staff checked IDs, searched bags and scanned attendees with metal detectors at gated entrances for each event", as reported by the University of Maryland student newspaper.[2] The Government has failed to explain why it did not consider doing the same on October 7th, if it genuinely had public safety concerns.

The University of Maryland, College Park (UMCP) has successfully ensured the safety of speakers and protesters even during highly controversial events. In 1987, UMCP hosted Black Power leader Kwame Ture (formerly known as Stokely Carmichael), which drew significant protests.[3] In November 2002, members of the Westboro Baptist Church, a radical hate group, came to UMCP to protest a college production of The Laramie Project, a play about the homophobic

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[2] "UMD increases security at annual Israel Fest and boycott", The Diamondback, https://dbknews.com/2024/05/09/annual-israel-fest-protest-boycott-increased-security/.

[3] "Controversial Speeches and Rhetoric at UMD", University of Maryland University Libraries, https://exhibitions.lib.umd.edu/learning-with-archives/controversial-speeches-and-rhetoric-at-umd.

murder of Matthew Shepard.[4] The play was allowed to continue as planned. What Defendants have done before, they can do again.

II. Defendants do not even attempt to justify the statewide breadth of its ban, dooming the Government's "Day of Dialogue" to strict scrutiny failure

Strict scrutiny is daunting. In order to survive it, the Government must "prove that no less restrictive alternative would serve its purpose." *Central Radio Co. Inc. v. City of Norfolk, Va*., 811 F.3d 625, 633 (4th Cir. 2016). Here, the extreme breadth of Defendants' expressive conduct ban dooms the Government. That is because, rather than cancel UMD-SJP's interfaith vigil directly, Defendants did so via a statewide ban that applies to hundreds of thousands of students.

All of the evidence that Defendants muster regards only College Park and only UMD-SJP's event. Defendants offer nothing to support its ban on any of the other 11 institutions. The Government "bears the burden of proving the constitutionality of its actions." *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999). That means that it is up to Defendants to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield v. Fane*, 507 U.S. 761, 762, (1993).

By providing no evidence of any kind regarding security concerns throughout the USM system, Defendants do not even try to meet their burden. *See Edenfield v. Fane*, 507 U.S. 761, 762, (1993) (explaining that the "breadth" of a rule can make "an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective").

III. UMD-SJP meets the other, non-likelihood-of-success *Winters* elements.

A. The balance of equites favors allowing UMD-SJP to do its interfaith vigil

[4] "Despite hateful rhetoric, the McKeldin demonstrators were allowed to stay. Here's why.", The Diamondback, https://dbknews.com/2019/09/19/umd-key-of-david-protest-mckeldin-rhetoric/.

This element is "lawyers' jargon for choosing between conflicting public interests." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 609-610 (1952) (Frankfurter, J., concurring). Here, UMD-SJP's interest in commemorate of the escalation of an ongoing massacre against Palestinians is pure political speech entitled to the utmost protection. The Government's interest, on the other hand, began as an interest in "promot[ing] reflection" and evolved into a purported interest in safety.

But the safety concerns are insubstantial. The Government attaches vulgar, racist emails to its opposition but none of them contain any real threats. The closest an email gets is a message from "a very upset parent of a Jewish student" who made "some comments about being locked and loaded." Dkt. 27-2 at 14. But that email also states that the parent did not say anything "that rises to the level of an actual threat," according to UMD's own Deputy General Counsel. *Id.*

Similarly, Defendants rightfully object to an email suggesting that a person is planning a "Klan Rally" and that he already has "1715 people signed up." *Id* at 11. But another party's wrongful actions do not justify censorship of others. *Meinecke v. City of Seattle*, 99 F.4th 514, 524-25 (9th Cir. 2024) ("If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."). And it appears that Defendants have made no effort to determine whether this "Klan Rally" is actually being planned or is just a racist thing someone said, even though UMPD has "an Information Analysis Unit dedicated to monitoring open source information." Dkt. 27-2 at 6. The same threatening email cited by Defendants as rationale for cancelling UMD-SJP's October 7th event also calls on the administration to cancel another UMD-SJP event planned for August 27th. However, that event went forward without incident.

Given the flimsiness of Defendants' safety concerns, the value of Plaintiffs' speech tips the balance in the student group's favor.

B. Cancelling UMD-SJP's event is irreparable, because the first anniversary of October 7, 2023 happens only once.

The difference between an irreparable harm and regular harm is whether a court can "restore the status quo ante in an acceptable form." *International Brotherhood of Teamsters v. Airgas, Inc.,* 239 F. Supp. 3d 906, 913 (D. Md. 2017). If a court can do so, then there is no irreparable harm. So long as "corrective relief will be available at a later date," then this factor cannot be met. *Doe v. Pittsylvania County, VA*, 842 F. Supp. 927, 932 (W.D. Va 2012).

The Government, however, seeks to prevent UMD-SJP from expressing what it believes should be the meaning of October 7th. Defendants do so on the day—October 7th—that everyone acknowledges has special significance and, in fact, is singular this year. There will never be another first anniversary of October 7, 2023, and by excluding their voice from the date, the Government's views—enshrined in its 'Day of Dialogue—are more likely to prevail than UMD-SJP's.

C. The public interest favors UMD-SJP

UMD-SJP is an exceptional group of students. As the Chief of Police explained, Defendants have experienced constant "security challenges on the University campus since the events in Israel and Gaza on October 7, 2023." Dkt. 27-2 at 4. But it has been the "strong and productive working relationships" with student groups, including with UMD-SJP, that has allowed UMD to avoid "the violence, conflict, or widespread disruptions to campus life" experienced elsewhere. *Id.* Indeed, UMD has "a positive relationship with SJP," one that allows the Chief of Police to acknowledge that it does "not anticipate that [UMD-SJP] intended to engage in violent or disruptive behavior on October 7." Dkt. 27-2 at 5.

That prediction is based on an extensive track record UMD-SJP has built. UMD-SJP has "sought and received permission to use campus space for organizational activities over seventy times" in the last year. Dkt. 27-1 at 5. The Chief of Police reports that all of these events took place "without significant disruption or conflict despite the heightened emotions on campus during this time." Dkt. 27-2 at 3-4.

And those seventy events have had a substantial public impact. UMD-SJP and other likeminded students are national leaders among those who call for an end to Israel's genocide in Gaza. UMD-SJP sets a tone that others, even beyond the campus, follow. Their voice is important every day, but it will carry special weight on October 7th when likeminded people will look to UMD-SJP to help them process the day.

Plaintiff's perfect track record for hosting safe events must count for something. The public interest is best served by allowing these passionate students to speak out on a matter of conscience on October 7th, just as they have more than seventy times in the last year without incident.

IV. The Court should set Plaintiff's Injunction Bond at $0.

Rule 65 of the Federal Rules of Civil Procedure states: "(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Under this rule, District courts "…have wide discretion in determining whether to require security" at all. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009). While courts may set the bond amount as they see fit or waive the bond requirement altogether, "the district court must expressly address the issue of security before allowing any waiver." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013).

The purpose of this rule is to cover "the potential incidental and consequential costs …the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999). However, in the case of a preliminary injunction on a constitutional issue, "defendants face little to no harm by being prohibited from enforcing a [policy] that is likely to be found unconstitutional" and courts have accordingly waived the bond requirement. *Planned Parenthood S. Atl. v. Stein*, 680 F. Supp. 3d 595, 600 (M.D.N.C. 2023). Absent "proof showing a likelihood of harm", courts may exercise their discretion to determine a bond is unnecessary to secure a preliminary injunction." *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

In the instant case, there is no risk of harm to defendants and the bond requirement should be waived. Defendants have not requested that the Court require a bond, and their assertion of possible future harm related to UMD-SJP's interfaith vigil is too speculative to count. If the Court finds that the Plaintiff has proven the likelihood of their success on the merits of their constitutional claim, such that a preliminary injunction will issue, then *res ipsa* defendants will not face harm from their inability to enforce an unconstitutional policy.

Finally, plaintiff University of Maryland Students for Justice in Palestine is a small student organization with an extremely limited budget. Any bond that the court would impose would pose a significant financial hardship on them and effectively prevent them from speaking. This court has held that where "a bond would impose significant financial hardship…, Respondents have not disputed that claim, and the financial impact to Respondents of an improperly imposed injunction

is limited and would not create any significant hardship, the Court will waive the security requirement." *Coreas v. Bounds*, 458 F. Supp. 3d 352, 362 (D. Md. 2020).

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Respectfully submitted,

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