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J. Rex Tolliver
Vice President for Student Affairs and Academic Support
University of South Carolina
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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Mr. Tolliver:

We are writing to you regarding the University of South Carolina's bias reporting system and related policies. We are concerned that the policies infringe on students' First Amendment rights because they allow officials to discriminate against the content and viewpoint of speech. The policies also unconstitutionally chill freedom of expression because they allow anyone on campus to report students for perceived bias incidents. As such, we demand that the University revise these unconstitutional policies.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic[®]. Through our 1A Project, we educate the public about students' First Amendment rights on college campuses and take legal action on behalf of students whose rights are violated. This letter seeks to inform the University of South Carolina that bias reporting systems stifle free expression and violate longstanding precedent.

Factual Background

On its website, the University of South Carolina Office of Diversity, Equity, and Inclusion maintains a webpage called "Report an Incident."¹ The webpage states:

While our ultimate goal is a unified and inclusive campus environment, incidents of bias and hate do occur. They might involve students, faculty, staff, administrators and other community members.

You can report incidents of bias or hate to the Office of Civil Rights and Title IX by submitting a Bias and Hate Incident Form.²

The University does not appear to define bias on this webpage. Although it directs users to the Office of Civil Rights and Title IX website for more information, that website also fails to define

¹ https://sc.edu/about/offices_and_divisions/diversity_equity_and_inclusion/report_an_incident/index.php.

² *Id.*

bias.³ Likewise, the Bias and Hate Incident Form directs users to the Office of Civil Rights & Title IX reporting form for harassment, discrimination, and retaliation.⁴ Thus, the University appears to treat so-called bias and hate incidents identically to incidents of discrimination and harassment.

Anyone can submit a report anonymously. According to the reporting form, the University will contact the complainant “to discuss supportive measures and appropriate institutional response, including informal and formal resolution processes.”⁵ Complainants can report incidents involving race, ethnicity, sexual orientation, and gender identity. They are also required to describe the impact the behavior had on them and the remedy they are seeking.

Analysis

It is well-settled that a college campus is the “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.”⁶ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁷ The bias reporting system and related policies undermine this bedrock principle and raise serious First Amendment concerns because the policies (1) are unconstitutionally vague and overbroad; (2) impose a chilling effect on speech; and (3) give university officials unbridled discretion to assess the viewpoint and content of speech to determine if it is biased.

I. The University of South Carolina’s bias reporting system and related policies are unconstitutionally vague and overbroad.

A policy violates the Constitution when it is so broad that it infringes on constitutionally protected speech. Similarly, a law or policy is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning[.]”⁸ Vague and overbroad policies are especially dangerous when students must hazard guesses as to what conduct or speech is punishable; students cannot be expected to comply with a vague school policy when they have no way of knowing exactly what is required or prohibited.

Although the Constitution does not protect obscenity,⁹ inciting others to imminent lawless action,¹⁰ true threats of physical violence,¹¹ and defamation,¹² it *does* protect hate speech and

³ https://sc.edu/about/offices_and_divisions/civil_rights_title_ix/reporting/index.php.

⁴ https://cm.maxient.com/reportingform.php?UnivofSouthCarolina&layout_id=60.

⁵ *Id.*

⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁷ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁸ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

⁹ Obscene material is lewd, sexual, and serves no artistic, educational, scientific or literary value to the public. *Paris Adult Theater v. Slaton* (1973). Indecent speech does *not* amount to obscenity. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

¹⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹¹ True threats are words or conduct that intentionally put others in fear for their physical safety. This is *not* the same as hate speech. *Koeppele v. Romano*, 252 F. Supp. 3d 1310 (M.D. Fla. 2017), *aff’d sub nom. Doe v. Valencia Coll.*, No. 17-12562, 2018 WL 4354223 (11th Cir. Sept. 13, 2018).

¹² Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

offensive speech.¹³ A school cannot single out speech it finds offensive, *even if* the entire student body is offended. That is because “[g]iving offense is a viewpoint.”¹⁴

Although colleges have a duty to prevent unlawful discrimination and harassment, the University of South Carolina goes too far by using “bias” and “hate” interchangeably with “harassment” and “discrimination.” The University fails to define what it means by so-called bias and hate incidents or whether such incidents are subject to the same investigation and resolution process as incidents of discrimination and harassment. In this way, students are forced to hazard guesses about whether their speech could be punished. Hate speech is protected precisely because it is so difficult to define; what offends one individual might not offend another. For this reason, the standard for discrimination and harassment is a high one, and it only extends to conduct, not speech.¹⁵

Conservative and libertarian students are especially cautious about expressing their views on college campuses these days, including views about marriage and family life, abortion, immigration, gun control, gender identity, race, and the environment. Given the lack of guidelines when it comes to defining or reporting bias and hate, those students could be reported for any speech that offends their peers or causes their peers harm, such as handing out flyers describing abortion or hosting a debate about transgender issues. Although speech on these topics may offend some students, that does not mean a university can shield students from it by giving them a mechanism through which to report it. The University’s bias reporting system is therefore vague, overbroad, and unconstitutional.

II. The University of South Carolina’s bias reporting system and related policies impose an unconstitutional chilling effect on student speech.

Speech is chilled when a speaker objectively fears that speaking will result in discipline and as a result censors her speech altogether. The Supreme Court repeatedly writes that the danger of chilling speech “is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”¹⁶ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.¹⁷ And even when a member of a university does not have the actual authority to impose discipline, the mere appearance of authority is enough to objectively chill and censor speech.¹⁸

As we’ve seen these past few years, cancel culture is a pandemic itself that plagues social media. One need only say something that could be perceived in a remotely offensive way, and he is shouted down, unfollowed on social media, threatened, and even fired from work or expelled from school. Unfortunately, nowhere is cancel culture more visible than on college campuses. With reporting forms at students’ fingertips, students wishing to prevent a controversial speaker from visiting campus or to stop a student organization from garnering interest in their cause can

¹³ *Papish*, 410 U.S. at 670; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

¹⁴ *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

¹⁵ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

¹⁶ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

¹⁷ *Id.*

¹⁸ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

simply report members of that organization for engaging in a bias incident. Speech activities are shut down at the press of a button.

Recent cases make clear that bias reporting systems and bias response teams impose an unconstitutional chilling effect on speech.¹⁹ They force students to consider whether their speech could offend their peers, which could mean anything these days. Rather than risk being reported for expressing their true views, and facing lengthy investigations that could result in punishment, students choose to remain silent.

The University of South Carolina is no exception. Not only are its policies vague and overbroad, but there is also a lack of clarity about what happens after a student is reported. In fact, the form leaves it in the complainant's hands to demand a specific remedy. This certainly undermines due process and fails to give students any sufficient guidelines for conduct that rises to the level of discrimination or harassment. Nowhere does the University explain that protected speech will not be subjected to lengthy investigations or punishment. Given the lack of guidelines that force students to guess whether their words will subject them to consequences, the bias reporting system imposes an unconstitutional chilling effect on speech.

III. The University of South Carolina's bias reporting system and related policies open the door to content and viewpoint discrimination.

The bias reporting system also opens the door for university officials to engage in unconstitutional viewpoint and content-based discrimination. When a university promotes or discourages speech based on "the speaker's specific motivating ideology, opinion, or perspective," it has engaged in viewpoint discrimination.²⁰ Viewpoint-based restrictions are never constitutional.²¹ When a university bans discussion of certain topics, the restriction is considered content-based.²² Content-based restrictions are presumptively unconstitutional.²³

The University's reporting system gives officials unbridled discretion to discriminate against content and viewpoint.²⁴ In failing to provide guidelines for assessing reports of hate and bias, the University leaves it to individual administrators to decide for themselves whether they think a bias incident occurred. The words "bias" and "hate" are entirely undefined in University policies; thus, the reporting system gives officials broad discretion to make up their own definitions and assess whether they personally consider something to be biased. Such subjectivity is unconstitutional because it allows officials to insert their own views while discriminating against others.

¹⁹ *Id.*; *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 765 (6th Cir. 2019); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1122-24 (11th Cir. 2022).

²⁰ *Rosenberger*, 515 U.S. at 820.

²¹ *Id.*

²² *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Boos v. Barry*, 485 U.S. 312, 319 (1988).

²³ *See, e.g., Papish*, 410 U.S. at 670.

²⁴ *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”²⁵ It is the duty of college officials to protect and defend the voices of every student on campus. But through this unconstitutional reporting system, it is unclear which speech can be considered biased and what action the University will take when it receives reports of bias. The bias reporting system and related policies create a chilling effect on all students, particularly those wishing to share conservative views, and it allows university officials to assess both the viewpoint and content of speech.

Bias reporting forms are particularly dangerous because they are used to silence students whose views do not conform to the masses. SLF urges the University to clarify that speech cannot be investigated or punished through reporting forms, no matter how offensive students perceive the speech to be. The University must explain on its website that “hate” and “bias” are not the same as unlawful discrimination and harassment. To prevent unnecessary confusion and to avoid chilling speech, the University must remove all references to a “Bias and Hate Incident Form” online. In its discrimination and harassment reporting form, the University must clarify that only certain forms of *conduct* are subject to the University’s investigation and resolution process; speech is entirely protected from such invasive and burdensome processes. Finally, the University must explain that any meeting requests with campus administrators that stem from a report of biased speech are purely voluntary.

Open discourse is critical to both a functioning democracy and a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, race, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a “marketplace of ideas” that differ from their own. The college experience can have a significant impact on the leaders of tomorrow. The University of South Carolina must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O’Leary
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²⁵ *Healy*, 408 U.S. at 180.