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Vice President for Student Affairs and Dean of Students
Clemson University
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Re: Unconstitutional First Amendment Policy on Campus: Anti-Harassment Policy

Dear Dr. Miller:

We are writing to you regarding Clemson University's anti-harassment policies and procedures. We are concerned that the policies infringe on students' First Amendment rights because they are unconstitutionally vague and overbroad, they allow officials to discriminate against the content and viewpoint of speech, and they chill freedom of expression. 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 Clemson University that vague anti-harassment policies and procedures stifle free expression and violate longstanding precedent.

Factual Background

The Clemson Student Handbook contains an anti-harassment and non-discrimination policy, which states:

[I]t is the policy of Clemson University that harassment/discrimination as defined in this policy, by employees, students or non-employees will not be tolerated. . . .

Clemson University will respond promptly to all complaints of harassment, discrimination, and retaliation. Immediate and appropriate corrective action will be taken when it is determined that harassment has occurred. . . .

Violation of this policy can result in any disciplinary action that the University deems appropriate up to and including termination from employment (employees),

dismissal from the University (students) or disassociation/removal from campus (visitors and other non-students).¹

The University defines “harassment” as “unwelcome verbal or physical conduct, based upon race, color, religion, sex, sexual orientation, gender, pregnancy, national origin, age, disability, status as a military veteran, genetic information or protected activity . . . that unreasonably interferes with the person’s work or educational performance or creates an intimidating or hostile work or educational environment.”² It lists “epithets, slurs, jokes or other verbal, graphic or physical conduct” as examples of harassment.³

The Clemson Division of Student Affairs also maintains a website called “Clemson Reporting Concerns,” where students can report policy violations to the Office of Community and Ethical Standards (OCES).⁴ The OCES is responsible for investigating and disciplining students for violating campus policies.⁵ Individuals can submit reports anonymously. The form provides several open-ended prompts, and it concludes by asking the complainant which administrator should receive a copy of the report.

On the OCES website, the University states, “If you are documented in an incident, it is not the end of the world.”⁶ It warns students who have been accused of a policy violation and may be subject to discipline, “During this time is not the time to argue your case, or be uncooperative with the staff member.”⁷ The University explains that it will contact the accused student for a meeting, and that during the meeting students should “take responsibility for [their] actions.”⁸ It concludes, “Demonstrating that you have learned something from the incident will make the whole process easier for you.”⁹

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.”¹⁰ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.¹¹ The anti-harassment policy and procedures 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 harassment.

¹ <https://www.clemson.edu/studentaffairs/community-resources/oces/student-handbook/access-discrimination/anti-harassment-policy.html>.

² *Id.*

³ *Id.*

⁴ <https://www.clemson.edu/studentaffairs/reports.html>.

⁵ <https://www.clemson.edu/studentaffairs/community-resources/index.html>.

⁶ <https://www.clemson.edu/studentaffairs/community-resources/oces/index.html>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹¹ *Healy v. James*, 408 U.S. 169, 180 (1972).

I. Clemson University’s anti-harassment policy is 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[.]”¹² 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,¹³ inciting others to imminent lawless action,¹⁴ true threats of physical violence,¹⁵ and defamation,¹⁶ it *does* protect hate speech and offensive speech.¹⁷ 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.”¹⁸

Although colleges have a duty to prevent unlawful discrimination and harassment, Clemson University goes too far. The standard for harassment has been settled for decades: it exists where conduct is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”¹⁹ In contrast, the University defines harassment as “unwelcome *verbal* or physical conduct . . . that unreasonably *interferes* with the person’s work or educational performance or creates an *intimidating* or hostile work or educational environment.”²⁰ First, terms like “interferes” and “intimidating” are not readily definable terms. They undermine the standard for harassment that ensures objectivity in the disciplinary process by filtering harassment through the complainant’s perspective to determine whether the complainant feels intimidated or whether the complainant’s environment has been interfered with. These terms are too vague for students to know how to comply with them, and they force students to guess at what might “interfere” with or “intimidate” their classmates, which naturally varies from person to person.

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 vagueness and overbreadth of Clemson’s anti-harassment policy, those students could be reported for any speech that offends or “intimidates” their peers, such as handing out flyers describing abortion or hosting

¹² *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

¹³ 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).

¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁵ True threats are words or conduct that intentionally put others in fear for their physical safety. This is *not* the same as hate speech. *Koepfel 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).

¹⁶ Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

¹⁷ *Papish*, 410 U.S. at 670; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

¹⁸ *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

¹⁹ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

²⁰ https://www.clemson.edu/studentaffairs/community-resources/oces/student-handbook/access-discrimination/anti-harassment-policy.html#non-criminal_internal_complaint_process.

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. Clemson's anti-harassment policy is therefore vague, overbroad, and unconstitutional.

II. Clemson University's anti-harassment policy and related procedures 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."²¹ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.²² 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.²³

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

Vague and overbroad anti-harassment policies force students to consider whether their speech could offend their peers, which could mean anything these days. On top of that, anonymous reporting forms allow students to falsely report each other for harassment without any accountability for the accuser. Rather than risk being reported for expressing their true views, undergoing lengthy investigations, and facing punishment, students choose to remain silent.

Clemson University is no exception. If a student is falsely reported to the OCES, or is reported for speech that is protected by the Constitution, the University affords her no rights. Instead, it warns accused students not to be "uncooperative" and to demonstrate learning something to "make the whole process easier[.]"²⁴ Rather than acknowledge that being reported to disciplinary authorities can be intimidating and can impose a chilling effect on speech, the University shrugs its shoulders and says "it is not the end of the world."²⁵

III. Clemson University's anti-harassment policy and related procedures open the door to content and viewpoint discrimination.

The anti-harassment policy also opens the door for university officials to engage in unconstitutional viewpoint and content-based discrimination. When a university promotes or

²¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

²² *Id.*

²³ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

²⁴ <https://www.clemson.edu/studentaffairs/community-resources/oces/index.html>.

²⁵ *Id.*

discourages speech based on “the speaker’s specific motivating ideology, opinion, or perspective,” it has engaged in viewpoint discrimination.²⁶ Viewpoint-based restrictions are never constitutional.²⁷ When a university bans discussion of certain topics, the restriction is considered content-based.²⁸ Content-based restrictions are presumptively unconstitutional.²⁹

The University’s anti-harassment policy gives officials unbridled discretion to discriminate against content and viewpoint.³⁰ Because its definition for harassment is vague, the policy lacks guidelines for administrators to follow when assessing reports of harassment. Thus, individual administrators can decide for themselves whether *they* think harassment has occurred, which includes whether *they* think a joke is funny or offensive. Even more egregiously, the University boldly suggests that the investigative process will go “easier” for students who show that they learned something, meaning students must change and conform their views to avoid punishment. This is plainly unconstitutional.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”³¹ It is the duty of college officials to protect and defend the voices of every student on campus. But through this unconstitutional anti-harassment policy and related procedures, it is unclear when speech rises to the level of harassment. The policy creates 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.

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 adjust its definition of harassment to remove all vagueness—including words like “interferes” and “intimidate”—as well as all references to protected speech—including the words like “verbal” and “jokes.” The University must clarify that offensive speech and hate speech are protected by the Constitution and will not be investigated or punished throughout its anti-harassment policies, reporting form, and related procedures. Finally, the University must remove any language that suggests students must conform their views to avoid punishment, including the demand that students demonstrate that they have “learned something from the incident” to make “the whole process easier[.]”

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

²⁶ *Rosenberger*, 515 U.S. at 820.

²⁷ *Id.*

²⁸ *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).

²⁹ *See, e.g., Papish*, 410 U.S. at 670.

³⁰ *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

³¹ *Healy*, 408 U.S. at 180.

Clemson University

October 3, 2022

Page 6 of 6

experience can have a significant impact on the leaders of tomorrow. Clemson University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O'Leary

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Director of 1A Project

Southeastern Legal Foundation

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