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Jared Tippets
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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Dr. Tippets:

We are writing to you regarding the Southern Utah University bias reporting system. We are concerned that the reporting system infringes on students' First Amendment rights because it allows officials to discriminate against the content and viewpoint of speech. The system also unconstitutionally chills freedom of expression because it allows anyone on campus to report students for perceived bias incidents. As such, we demand that the University revise this unconstitutional policy.

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 Southern Utah University that bias reporting systems stifle free expression and violate longstanding precedent.

Factual Background

On its website, the University maintains a webpage called "How Do I Report an Issue[.]" where students are encouraged to report bias incidents.¹ According to the University, "Bias or hate incidents consist of speech, conduct, or some other form of expression or action that is motivated wholly or in part by prejudice or bias,"² and "its effect is to discriminate, demean, embarrass, assign stereotype, harass, or exclude individuals[.]"³

¹ <https://www.suu.edu/safety/report.html>.

² *Id.*

³ *Id.*

The University maintains a reporting system where individuals can report perceived bias incidents.⁴ All reports of students engaging in bias are directed to the Dean of Students.⁵ Anyone who witnesses a bias incident may report it anonymously through the system.

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 undermines this bedrock principle and raises serious First Amendment concerns because it (1) is unconstitutionally vague and overbroad; (2) imposes a chilling effect on speech; and (3) gives university officials unbridled discretion to assess the viewpoint and content of speech to determine if it is biased.

I. Southern Utah University’s bias reporting system 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[.]”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 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

⁴ https://secure.ethicspoint.com/domain/en/report_company.asp?clientid=48435&override=yes&agreement=no.

⁵ <https://www.suu.edu/safety/report.html>.

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 *Brandenberg 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. *Koeppe 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).

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).

As the University admits on its Free Speech webpage, “it is not the role of SUU to suppress ideas and opinions some individuals find unwelcome, disagreeable, or even deeply offensive.”¹⁵ But through its bias reporting system, the University contradicts that commitment when it defines a bias incident as “*speech*, conduct, or some other form of *expression* or action that is motivated wholly or in part by prejudice or bias,” including anything that “embarrass[es]” or “stereotype[s]” an individual.¹⁶ Although colleges have a duty to prevent unlawful discrimination and harassment, this definition goes too far by banning students from speech that others may find offensive. In this way, students are forced to hazard guesses about whether a joke is stereotypical or could “embarrass” an individual, 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 University’s vague definition of bias, 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. Through its reporting system, the University forces students to guess whether their speech could be perceived as biased and reported to authorities. The University’s definition of bias is therefore vague, overbroad, and unconstitutional.

II. Southern Utah University’s bias reporting system imposes 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.”¹⁷ Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.¹⁸ 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.¹⁹

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

¹⁵ <https://www.suu.edu/free-speech/#:~:text=Free%20Speech%20at%20SUU&text=Diversity%20and%20inclusion%20require%20a,official%20policy%20on%20Free%20Speech>.

¹⁶ <https://www.suu.edu/safety/report.html> (emphasis added).

¹⁷ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

¹⁸ *Id.*

¹⁹ *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 response teams and bias reporting systems impose an unconstitutional chilling effect on speech.²⁰ They force students to consider whether their speech could offend their peers, which could mean anything these days. On top of that, anonymous reporting forms, like this one, allow students to falsely report each other for bias incidents without any accountability for the accuser. Rather than risk being reported for expressing their true views, and facing lengthy investigations that could result in punishment, students choose to remain silent.

Southern Utah University's bias reporting system 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. Reports of bias go directly to the Dean of Students, who has significant authority to act on campus. Communication from the Dean of Students regarding a bias incident will naturally take on a weighty tone. Nowhere does the University explain that protected speech will not be subjected to lengthy investigations or punishment. The anonymity of the reporting form, together with a lack of guidelines for following up on reports, impose an unconstitutional chilling effect on speech.

These concerns are not without merit. Just last year, a Southern Utah University professor was reported for not using a student's preferred pronouns.²¹ After a lengthy investigation, the University found that he engaged in so-called discrimination and harassment. It ordered him to take a course and warned that if he did not use students' preferred pronouns, he could lose pay and even his job.²² Conservative and libertarian students will no doubt fear that they are next.

III. Southern Utah University's bias reporting system opens the door to content and viewpoint discrimination.

The bias reporting system also allows 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.²³ Viewpoint-based restrictions are never constitutional.²⁴ When a university bans discussion of certain topics, the restriction is considered content-based.²⁵ Content-based restrictions are presumptively unconstitutional.²⁶

The University's bias reporting system gives the Dean of Students unbridled discretion to discriminate against content and viewpoint. Every report of bias goes first to the Office of the Dean. In failing to provide guidelines for assessing reports of hate and bias, the University leaves

²⁰ *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).

²¹ <https://www.sltrib.com/news/2022/08/31/professor-sues-suu-argues/>.

²² *Id.*

²³ *Rosenberger*, 515 U.S. at 820.

²⁴ *Id.*

²⁵ *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).

²⁶ *See, e.g., Papish*, 410 U.S. at 670.

it to the Dean of Students to decide for herself whether she thinks a bias incident occurred. And because the policy specifically allows the Dean to assess speech and expression as forms of bias, there is nothing in place to prevent her from infringing on protected speech. The bias reporting system thus gives the Dean of Students unbridled authority to engage in unconstitutional viewpoint and content discrimination.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”²⁷ 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 remove the bias reporting system altogether from campus, as it chills expression rather than invites it. But at a minimum, the University must remove vague language like “demean,” “embarrass,” and “stereotype” from its definition of bias. It must clarify that speech cannot be investigated or punished through reporting forms, no matter how offensive students perceive the speech to be, and it should link to the university’s Free Speech webpage in the same location where students can report bias incidents. 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. Southern Utah University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O’Leary
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²⁷ *Healy*, 408 U.S. at 180.