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

Dear Ms. Webb:

We are writing to you regarding the Bowling Green State University bias reporting system. We are concerned that the policy infringes on students' First Amendment rights because it allows officials to discriminate against the content and viewpoint of speech. The policy 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<sup>®</sup>. 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 Bowling Green State University that bias reporting systems stifle free expression and violate longstanding precedent.

### **Factual Background**

On its website, the University maintains a webpage called "BGSU Bias Reporting System."<sup>1</sup> The webpage states:

We continue to engage the campus community by sharing our experiences, listening to others, and debating ideas in civil, constructive ways. However, there are times when the actions and behaviors of our campus community impact others negatively and we must respond to these incidents with resources, support, and actions. While Bowling Green State University welcomes open expression and

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<sup>1</sup> <https://www.bgsu.edu/student-affairs/bias-reporting-system.html#:~:text=Bowling%20Green%20State%20University%20strives,%2C%20openness%2C%20compassion%20and%20inclusion.&text=Bias%20incidents%20include%2C%20but%20are,others%20based%20on%20their%20identity>.

debate, bias incidents directly impact the ability to know, trust, support, and learn from one another and will not be tolerated.<sup>2</sup>

The University defines a bias incident as “language and/or actions that demonstrate bias against persons because of, but not limited to, their actual or perceived race, color, religion, ethnic or national origin, gender, genetic information, age, disability, sexual orientation, gender identity, gender expression, or status as a military veteran.”<sup>3</sup> The University does not appear to define “bias” as used in the definition of “bias incident,” but it adds, “Bias incidents include, but are not limited to, name-calling, stereotyping, belittling, or excluding others based on their identity.”<sup>4</sup> Anyone can anonymously report a perceived bias incident to the Dean of Students.<sup>5</sup> According to the form, bias can be expressed through “digital communication,” “intimidation,” “social media applications,” “verbal encounter,” “written or printed encounter,” and “other” means.<sup>6</sup>

On the webpage, the University provides a list of past bias incidents, including a report of insensitive comments made during a card game in a residence hall and a report that a textbook “contains outdated medical views regarding intersex and transgender individuals.”<sup>7</sup>

### 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.”<sup>8</sup> Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.<sup>9</sup> 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. Bowling Green State 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[.]”<sup>10</sup> 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.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> [https://cm.maxient.com/reportingform.php?BowlingGreenStateUniv&layout\\_id=27](https://cm.maxient.com/reportingform.php?BowlingGreenStateUniv&layout_id=27).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>9</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>10</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Although the Constitution does not protect obscenity,<sup>11</sup> inciting others to imminent lawless action,<sup>12</sup> true threats of physical violence,<sup>13</sup> and defamation,<sup>14</sup> it *does* protect hate speech and offensive speech.<sup>15</sup> 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.”<sup>16</sup>

As the University admits on its Freedom of Speech webpage, “Offensive speech (in person, written or via social media) that communicates hatred, bigotry, and other abhorrent ideas is still protected speech under the First Amendment.”<sup>17</sup> But the bias reporting system runs headfirst into protected speech when it defines a bias incident as “*language* and/or actions that demonstrate bias” including “name-calling, stereotyping, [and] belittling” as forms of bias,<sup>18</sup> and it specifically encourages students to report bias that is expressed in person, written, or through social media.<sup>19</sup> Although colleges have a duty to prevent unlawful discrimination and harassment, this definition goes too far by banning students from speech that “impact[s] others negatively.”<sup>20</sup> In this way, students are forced to hazard guesses about whether a joke is stereotypical or could “negatively impact” 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. Students at the University have already been reported for comments during a game in the privacy of their dormitory<sup>21</sup>; the risk of being reported for speech on controversial topics in public areas is far greater. 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.

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<sup>11</sup> 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).

<sup>12</sup> *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

<sup>13</sup> 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).

<sup>14</sup> Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

<sup>15</sup> *Papish*, 410 U.S. at 670; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–81 (1992).

<sup>16</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

<sup>17</sup> <https://www.bgsu.edu/dean-of-students/free-speech/faq.html>.

<sup>18</sup> <https://www.bgsu.edu/student-affairs/bias-reporting-system.html#:~:text=Bowling%20Green%20State%20University%20strives,%2C%20openness%2C%20compassion%20and%20inclusion.&text=Bias%20incidents%20include%2C%20but%20are,others%20based%20on%20their%20identity> (emphasis added).

<sup>19</sup> [https://cm.maxient.com/reportingform.php?BowlingGreenStateUniv&layout\\_id=27](https://cm.maxient.com/reportingform.php?BowlingGreenStateUniv&layout_id=27)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

II. Bowling Green State 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.”<sup>22</sup> Any action taken by university authorities that has a chilling effect on student speech is unconstitutional.<sup>23</sup> 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.<sup>24</sup>

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 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.<sup>25</sup> 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 harassment 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.

Bowling Green State 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. One thing is clear: bias incidents “will not be tolerated.”<sup>26</sup> 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. Moreover, the University's records show that reports of bias are handled by different departments on campus, but it is unclear how that authority is distributed. It is also unclear how much authority each department has to act on a bias incident; many of the past reports indicate that a department was notified “for follow-up,” without any more information.<sup>27</sup> Due to the anonymity of the reporting form, a lack

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<sup>22</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

<sup>23</sup> *Id.*

<sup>24</sup> *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

<sup>25</sup> *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).

<sup>26</sup> <https://www.bgsu.edu/student-affairs/bias-reporting-system.html#:~:text=Bowling%20Green%20State%20University%20strives,%2C%20openness%2C%20compassion%20and%20inclusion.&text=Bias%20incidents%20include%2C%20but%20are,others%20based%20on%20their%20identity.>

<sup>27</sup> *Id.*

of guidelines for following up on reports, and a clear intent to ban expression that “impact[s] others negatively,” the bias reporting system imposes an unconstitutional chilling effect on speech.

### III. Bowling Green State University’s bias reporting system and related policies open the door to content and viewpoint discrimination.

The bias reporting system at Bowling Green State University also grants university officials power 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.<sup>28</sup> Viewpoint-based restrictions are never constitutional.<sup>29</sup> When a university bans discussion of certain topics, the restriction is considered content-based.<sup>30</sup> Content-based restrictions are presumptively unconstitutional.<sup>31</sup>

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. Although the Dean may then choose to delegate responsibility for following up on reports, that choice lies with him alone. He has the authority to first and foremost assess whether *he* considers something to be biased before determining whether to launch an investigation or otherwise follow up on reports. There are no guidelines in place to curb that discretion. 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.”<sup>32</sup> 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.

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 “language” from its definition for bias and clarify that speech is protected and cannot be subject to any investigation or punishment. The University must link to its Freedom of Speech webpage on its bias reporting system webpage and in its bias reporting form. It must clarify that *any* constitutionally protected speech, including hate speech and offensive speech, cannot and will not be investigated or punished. And it must explain that any meeting requests with the Dean of

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<sup>28</sup> *Rosenberger*, 515 U.S. at 820.

<sup>29</sup> *Id.*

<sup>30</sup> *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).

<sup>31</sup> *See, e.g., Papish*, 410 U.S. at 670.

<sup>32</sup> *Healy*, 408 U.S. at 180.

Bowling Green State University

October 3, 2022

Page 6 of 6

Students or any other department of campus 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. Bowling Green State University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O’Leary

Cece O’Leary

Director of 1A Project

Southeastern Legal Foundation

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