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Jeremiah Shinn  
Vice President for Student Affairs  
Louisiana State University  
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Re: Unconstitutional First Amendment Policy on Campus: Bias Reporting System

Dear Dr. Shinn:

We are writing to you regarding the Louisiana State University 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<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 Louisiana State University that bias reporting systems and bias response teams stifle free expression and violate longstanding precedent.

### **Factual Background**

On its website, Louisiana State University maintains a webpage called "LSU Cares."<sup>1</sup> The webpage states that the University offers an online system where students can report various incidents, including "concerns surrounding acts of bias or discrimination."<sup>2</sup> The University defines "bias" as "conduct that discriminates, stereotypes, marginalizes, excludes, harasses or harms anyone in our community based on their identity[.]"<sup>3</sup> The University urges students to "take a proactive stance" by reporting instances of perceived bias.<sup>4</sup> Anyone can file a report anonymously, and they can accuse peers of bias based on gender, race, sexual orientation, gender identity, and even socioeconomic status, among other categories.<sup>5</sup> And according to a brochure on the

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<sup>1</sup> <https://www.lsu.edu/saa/lsu-cares/index.php>.

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

<sup>3</sup> [https://cm.maxient.com/reportingform.php?LouisianaStateUniv&layout\\_id=6](https://cm.maxient.com/reportingform.php?LouisianaStateUniv&layout_id=6).

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

<sup>5</sup> *Id.*

University’s website, students should report concerns about “gender/identity bias” and “hate speech/behavior.”<sup>6</sup>

Reports of bias are reviewed by campus staff to determine a response.<sup>7</sup> According to the website, staff take a “CARE” approach: Communicate, Assess, Refer, Educate.<sup>8</sup> It is unclear how the CARE process actually works, such as how investigations are conducted and whether and when a report of bias is referred to other departments on campus. Members of the “Care Team” include members of the offices of the Dean of Students, Student Advocacy & Accountability, Academic Affairs, Residence Life, and campus police.<sup>9</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>10</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>11</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. Louisiana 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>12</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.

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

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<sup>6</sup> <https://www.lsu.edu/saa/docs/lsucaresbrochurelowres.pdf>.

<sup>7</sup> <https://www.lsu.edu/saa/l-su-cares/index.php>.

<sup>8</sup> *Id.*

<sup>9</sup> <https://www.lsu.edu/saa/students/advocacy/Lsucareteam.php>.

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

<sup>11</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

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

<sup>13</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>14</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>15</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. *Koeppl 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>16</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).

offensive speech.<sup>17</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>18</sup>

As the University admits in its Freedom of Speech policy, “It is not the proper role of the University to shield individuals from speech protected by the First Amendment . . . including without limitation ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”<sup>19</sup> But the bias reporting system runs headfirst into protected speech when it defines a bias incident as “hate speech/behavior”<sup>20</sup> that “discriminates, stereotypes, marginalizes, excludes, harasses or harms anyone in our community based on their identity[.]”<sup>21</sup> Although colleges have a duty to prevent unlawful discrimination and harassment, this definition goes too far by banning students from speech that “harms” or “marginalizes” others. In this way, students are forced to hazard guesses about whether a joke is stereotypical or could “harm” 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. Louisiana 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

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

<sup>18</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

<sup>19</sup> [https://www.lsu.edu/administration/policies/pmfiles/pm\\_79.pdf](https://www.lsu.edu/administration/policies/pmfiles/pm_79.pdf).

<sup>20</sup> <https://www.lsu.edu/saa/docs/lsucarebrochurelowres.pdf>.

<sup>21</sup> [https://cm.maxient.com/reportingform.php?LouisianaStateUniv&layout\\_id=6](https://cm.maxient.com/reportingform.php?LouisianaStateUniv&layout_id=6).

<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).

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.

Louisiana 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. Reports of bias go to members of the Care Team, which include the Dean of Students and other officials with significant authority to act on campus. Communication from such officials 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. 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. Louisiana State University's bias reporting system and related policies open the door to content and viewpoint discrimination.

The bias reporting system at Louisiana 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>26</sup> Viewpoint-based restrictions are never constitutional.<sup>27</sup> When a university bans discussion of certain topics, the restriction is considered content-based.<sup>28</sup> Content-based restrictions are presumptively unconstitutional.<sup>29</sup>

The University's bias reporting system gives members of the Care Team unbridled discretion to discriminate against content and viewpoint. In failing to provide guidelines for assessing reports of hate and bias, the University leaves it to those administrators to decide for themselves whether they think a bias incident occurred. That decision ultimately turns on whether those officials think a student's expression harmed or could have harmed another student. Such

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<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> *Rosenberger*, 515 U.S. at 820.

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

<sup>28</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>29</sup> *See, e.g., Papish*, 410 U.S. at 670.

subjectivity is unconstitutional because it allows officials to insert their own views while discriminating against others.

### **Demand**

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>30</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 vague language like “harms,” “stereotypes,” and “marginalizes” 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 policy on its LSU Cares 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—including jokes and stereotypes. It must explain that any requests to meet with the Care Team, the Dean of Students, or any other administrator in connection with 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. Louisiana State 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  
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<sup>30</sup> *Healy*, 408 U.S. at 180.