



July 16, 2021

President Frederick W. Clark Jr., Esq.
Bridgewater State University
131 Summer Street, Room 200
Bridgewater, Massachusetts 02325

Sent via U.S. Mail and Electronic Mail (fclark@bridgew.edu)

Dear President Clark:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE writes today out of concern for the risk to free speech and academic freedom at Bridgewater State University ("BSU") posed by certain recommendations of the Special Presidential Task Force on Racial Justice ("Task Force"). We appreciate that the creation of the Task Force represents a well-intentioned effort to promote an inclusive and enriching academic environment for students and faculty of all identities and backgrounds. However, several of the recommendations, along with proposed changes to the faculty collective bargaining agreement, raise concerns that research and teaching will be subject to ideological constraints that imperil faculty members' First Amendment rights.

Accordingly, we call on your administration to reject or modify these proposals and affirm BSU's commitment to the expressive rights and academic freedom of its faculty and students.

I. Task Force Recommends Changes to the Institutional Review Board

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

Last year, in the wake of the murder of George Floyd, you announced the formation of the Task Force "to examine the elements of policy, practice, and culture that are impeding racial equity at BSU, and to identify remedies and recommendations for corrective action."¹ One of the Task Force's six subcommittees, the Curricula and Co-Curricula subcommittee, addressed a "set of significant issues raised surrounding research processes and the critically

¹ *Presidential Task Force on Racial Justice*, BRIDGEWATER STATE UNIV., <https://www.bridgew.edu/racial-justice/task-force> (last visited June 21, 2021).

important role of the Institutional Review Board (IRB).”² Concerns about the IRB and research practices arose amid a controversy surrounding a recent IRB-approved survey offered to participants in a psychology research subject pool.

A. Screenshot of IRB-Approved Research Survey Causes Controversy

In September 2020, BSU psychology professor Dr. Elizabeth Spievak applied to the IRB for renewed approval of an active research study, “People, Places, and Things: A Survey about Beliefs and Attitudes.”³ Designed by Spievak and undergraduate researchers in the Department of Psychology, the study surveyed BSU students and members of the larger community to explore how metaphorical rhetoric used to frame an issue affects people’s thoughts, feelings, perceptions, and decision-making.

Spievak’s IRB application explained that her team revised one of the question prompts to make it more relevant to contemporary issues, replacing “metaphors of terrorism with corresponding metaphorical frames and questions about the COVID 19 spread and Black Lives Matter Protests.”⁴ Spievak attached the revised survey to the application, which the IRB approved on September 23, 2020.⁵

One part of the revised survey randomly assigned participants a short hypothetical vignette that described either COVID-19 or BLM as either an “open wound that is deteriorating your local community” or a “wild beast preying on your local community.”⁶ The survey then asked participants to allocate funds from a fictitious town budget to address the issue.⁷ Spievak and her team of student researchers hypothesized that participants would respond differently based on the metaphorical framing and their pre-existing beliefs.⁸ They collected data from

² BRIDGEWATER STATE UNIV., SPECIAL PRESIDENTIAL TASK FORCE ON RACIAL JUSTICE FINAL REPORT 15 (May 2021), <https://bit.ly/2S5idS4> [“TASK FORCE FINAL REPORT”]. The IRB “has the ultimate responsibility to determine risk with regard to human subject research and to approve or not approve such research performed under the sponsorship of the University or its auxiliaries.” BRIDGEWATER STATE UNIV., POLICY OF USE OF HUMAN SUBJECTS IN RESEARCH § 1.3 (on file with author).

³ ELIZABETH R. SPIEVAK., BRIDGEWATER STATE UNIVERSITY INSTITUTIONAL REVIEW BOARD STUDY RENEWAL/PERIODIC REVIEW FORM (Sept. 2020) (on file with author). Spievak is herself a member of the IRB but did not participate in its review of her application.

⁴ *Id.*

⁵ Letter from Dr. Michael Young, Senior Assoc. Provost and Chief Data Officer, BSU, to Spievak (Sept. 23, 2020) (on file with author).

⁶ *Id.* The terrorism vignettes in the previous version of the study alternatively described terrorism as “destroying the city,” “a wild beast preying on the city,” or “a virus infecting the city.” Anastasia A. Fitian & Elizabeth R. Spievak, *Mind the Metaphor: Message Framing, Attitudes, and Terrorism Response Recommendations* (May 2020), Poster presented at the Ass’n for Psych. Sci. Annual Convention, Chicago, IL.

⁷ *Id.*

⁸ The results showed that participants who held conservative beliefs were more likely to endorse law enforcement expenditures, as opposed to other options like expanding economic assistance programs, when presented with the more inflammatory “wild beast” metaphor. Noah Wasserman et al., *The Bigger Picture: Metaphorical Framing and Attitudes Towards Black Lives Matter and the COVID-19 Pandemic* (May 2021), Poster presented at the Ass’n for Psych. Sci. Annual Convention, Chicago, IL.

over 400 participants, including 260 students.⁹

One participant took a screenshot of the “wild beast” version of the BLM vignette without the surrounding context, and on February 28, 2021, a student posted the screenshot on Twitter.¹⁰ The student then tweeted the names of the student researchers involved in the survey, stating “these are the students at Bridgewater State that think that BLM is a ‘wild beast preying on local communities.’”¹¹

On March 1, you and Provost Karim Ismaili informed the BSU community that, after receiving “a number of student complaints,” the university was “reviewing the use of a survey developed as part of a class research project that was seeking to gain a deeper understanding of issues of racial discrimination and bias.”¹² Your message noted the ongoing work of the Task Force and said “[t]his matter raises numerous questions that the university continues to explore on a daily basis, including how we advance the academic and research enterprise in a manner that is sensitive to the profound pain caused by racial injustice.”¹³

On March 10, you and Provost Ismaili sent a follow-up email to the BSU community noting steps the university had taken to review the survey.¹⁴ Your message stated the “review has already identified actions that will prevent such a situation from occurring again,” including as an “example” that “the Office of the Provost will work with the IRB to infuse racial justice and equity more deliberately in its work.”¹⁵ You and Ismaili asked the Task Force to advise you on additional approaches to the issue.

B. Task Force Releases Final Report

The Task Force’s final report was released on May 17, 2021. Through the Curricula and Co-Curricula subcommittee, the Task Force found that “the campus saw the effects of a racist vignette in a research study, revealing the need for changes to research practices and the IRB structure.”¹⁶ The report identified “several significant problems, ethical and legal,” including that Spievak and the student researchers “inappropriately adapted a vignette in the research literature that doesn’t contain racialized content, to make it about members of Black Lives Matter.”¹⁷ The Task Force found that “there was no opportunity for participants to know they

⁹ *Id.*

¹⁰ jenner (@jhiggles), TWITTER (Feb 28, 2021, 10:06 PM), <https://twitter.com/jhiggles/status/1366223230319607808>.

¹¹ jenner (@jhiggles), TWITTER (Mar. 1, 2021, 12:09 AM), <https://twitter.com/jhiggles/status/1366254247235506178>.

¹² Email from Frederick W. Clark Jr., Esq., President, BSU, and Karim Ismaili, Ph.D., Provost and Vice President for Academic Affairs, BSU, to BSU community (Mar. 1, 2021, 3:50 PM) (on file with author).

¹³ *Id.*

¹⁴ Email from Clark and Ismaili to BSU community (Mar. 10, 2021, 10:30 AM) (on file with author).

¹⁵ *Id.*

¹⁶ TASK FORCE FINAL REPORT at Exh. A, 11.

¹⁷ *Id.* at Exh. A, 38.

would encounter a vignette that could trigger racial trauma and therefore no opportunity for participants to leave the survey before encountering it.”

The Task Force further identified “a lack of explicit anti-racist evaluative tools in the IRB process” and found that “[t]he need to make changes to research practices goes to the heart of decolonizing the University and examining the foundations of inequitable power relationships that historically have shaped the processes of knowledge creation to support and sustain power imbalances.”¹⁸ The report states that “[t]he question of how to ‘do no harm’ is central to anthropological research” and that “[i]n the specific context of the [Task Force], doing no harm relates directly to racial equity.”¹⁹ The report also notes that the guidelines for “doing no harm” do not “account for the potential for harm in the wider community beyond the research participants.”²⁰ To that end, the Task Force makes the following recommendations:²¹

Commit as an institution to do no harm in research; offer peer-to-peer training in the psychological harm of racial and other forms of trauma. Revise the question on the IRB application about potential harm to ask explicitly about the potential for post-traumatic (including racialized trauma explicitly) harm triggered by research questions. Require Principal Investigators to explain how they will mitigate the harm on the most vulnerable populations of the researched community.

Another IRB-related recommendation is for the university to “[o]ffer racial justice training to members of the IRB that leads to an audit of procedures and decision-making.”²²

Separately, the Task Force recommends that BSU “[u]tilize BSU and other institutions’ examples of antiracist, decolonial, and abolitionist pedagogies as the expectation of all full- and part-time faculty of BSU.”²³ The Task Force implores the university to “[e]ncourage and reward, in contract-renewal and tenure and promotion reviews, implementation of those pedagogies,” and to make anti-racism and racial justice “a priority in tenure, promotion, and post-tenure review.”²⁴

These latter recommendations are consonant with proposed revisions to the collective bargaining agreement (CBA) that governs all faculty at BSU and other state colleges and universities and is currently being renegotiated.²⁵ The Massachusetts Board of Higher

¹⁸ *Id.* at Exh. A, 39.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at Exh. A, 47.

²² TASK FORCE FINAL REPORT at Exh. A, 47.

²³ *Id.* at 22.

²⁴ *Id.* at 22, Exh. A, 26.

²⁵ See AGREEMENT BETWEEN THE BOARD OF HIGHER EDUCATION AND THE MASSACHUSETTS TEACHERS ASSOCIATION/NEA MASSACHUSETTS STATE COLLEGE ASSOCIATION (July 1, 2017 to June 30, 2020) [“CBA”] (on file with author). The CBA was extended by one year with certain revisions related to COVID-19 that are not relevant here. Memorandum of Agreement for a Collective Bargaining Agreement for the Period July 1, 2020

Education, which represents BSU and other state colleges and universities, proposes to “[m]odify [faculty] evaluation criteria to include commitment to equity, inclusion and social justice within pedagogy, scholarship and service.”²⁶ The faculty union’s “Racial Justice Proposal” would likewise include “inclusive and equity-centered teaching practices” in the criteria for the evaluation of all faculty.”²⁷

II. The Task Force’s Recommendations Threaten Free Speech and Academic Freedom

Many of the Task Force’s recommendations substantially threaten faculty members’ rights to free expression and academic freedom. The proposed reforms would inevitably result in suppression of legitimate research and may unconstitutionally deny faculty access to tenure, promotion, and employment opportunities on the basis of ideological viewpoint.

A. The First Amendment and BSU’s Collective Bargaining Agreement with Faculty Protect Academic Freedom

It has long been settled law that the First Amendment is binding on public universities like BSU.²⁸ Academic freedom is of “special concern to the First Amendment”²⁹ and it “extends as readily to the scholar in the laboratory as to the teacher in the classroom.”³⁰ Indeed, “free speech is of critical importance [at universities] because it is the lifeblood of academic freedom[.]”³¹ As the Supreme Court of the United States cogently explained in rejecting efforts to root out “subversive persons” from universities:³²

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always

Through June 30, 2021 Between the Board Of Higher Education and the Massachusetts State College Association/MTA/NEA (on file with author).

²⁶ BHE BARGAINING PROPOSALS (May 12, 2021), <https://mscaunion.org/wp-content/uploads/2021/05/BHE-Bargaining-Proposals-Introduction-May-12.pdf>.

²⁷ MSCA BARGAINING PROPOSALS, 2021–2024 SUCCESSOR NEGOTIATIONS (Apr. 29, 2021), https://mscaunion.org/wp-content/uploads/2021/05/Racial-Justice-Proposals_April-29-2021.pdf.

²⁸ *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

²⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

³⁰ *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982).

³¹ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

³² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Likewise, BSU, by way of the CBA, agrees to “endorse the principles and standards of academic freedom and academic responsibility as generally and traditionally accepted in institutions of higher education.”³³ Academic freedom is defined as “the right of scholars in institutions of higher education freely to study, discuss, investigate, teach, exhibit, perform and publish.”³⁴ The CBA continues: “The scholar is entitled to full freedom in research and in the exhibition, performance and publication of the results of his/her research, and to full freedom in the classroom in discussing his/her subject, most specifically in the selection of his/her course materials and in the selection of texts.”³⁵

Thus, BSU has both constitutional and contractual obligations to respect its faculty members’ academic freedom.

B. BSU Cannot Restrict Research Because It Offends Others or Conflicts with Certain Ideological Beliefs

FIRE has little doubt the IRB has an important role in preventing or mitigating the risk of serious harm to human research subjects.³⁶ But the purpose of the IRB is not to preclude or require modification of research activities that present *any* risk of harm,³⁷ and it certainly cannot be used as a tool to repress research activities merely because they risk causing offense or are perceived as inconsistent with certain political or ideological beliefs. The Task

³³ CBA art. V, § A. Negotiations for a new CBA are ongoing, but the current proposals do not indicate that there will be any substantial changes to the provisions concerning academic freedom.

³⁴ *Id.*

³⁵ *Id.*

³⁶ The development of modern ethical principles governing research involving human subjects is rooted in a shameful history of horrific abuses, most notably Nazi experiments on unwilling prisoners and the Tuskegee syphilis study, which “used disadvantaged, rural black men to study the untreated course of a disease” and deprived them of “demonstrably effective treatment in order not to interrupt the project, long after such treatment became generally available.” DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, THE BELMONT REPORT (1979), https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf.

³⁷ Federal regulations and BSU’s current policy sensibly permit expedited review of research activities that “present no more than minimal risk to human subjects” and fall into a specified category, including research that uses survey or interview methodologies. 45 C.F.R. § 46.110; POLICY OF USE OF HUMAN SUBJECTS IN RESEARCH, *supra* note 2, at §§ 2.1(B), 5.1(A). Research subject to expedited review may not be disapproved, and the IRB may waive the requirement of obtaining signed consent forms from subjects for research that “involves no procedures for which written consent is normally required outside of the research context” and presents no more than minimal risk, i.e., “the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.” POLICY OF USE OF HUMAN SUBJECTS IN RESEARCH, *supra* note 2, at §§ 4.0(C), 5.1(b), 18.6.

Force report raises grave concerns that future research applications will be subject to this untenable standard, stifling academic freedom.

Under the First Amendment, expression may not be limited on the basis that it is offensive to others. Hence, the government cannot ban the burning of the American flag,³⁸ prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft,”³⁹ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,⁴⁰ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.⁴¹ This is because authorities “cannot make principled distinctions” between speech that is and is not sufficiently innocuous to warrant protection.⁴²

This principle applies with particular strength to public universities, where faculty and students engage in research and scholarship in pursuit of advanced knowledge and understanding. Such research may involve speech or ideas that offend some, many, or even most. But “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”⁴³ As the Supreme Court recently reaffirmed, “public school students, like all other Americans”—including faculty—“have the right to express ‘unpopular’ ideas on public issues, even when those ideas are expressed in language that some find ‘inappropriate’ or ‘hurtful.’”⁴⁴

The Task Force’s recommendations run afoul of these principles and BSU’s promises of academic freedom. The reaction to Spievak’s research survey—which motivated these recommendations—portends how the proposed changes to IRB review, if implemented, would be used to suppress legitimate research. The Task Force claims the survey inappropriately included a “racist vignette.” As an initial matter, the vignette’s purpose was to evaluate how particular language affects the decisions made by readers, building on a literature that explores how “metaphors have profound influences on how we conceptualize and act with respect to important societal issues.”⁴⁵ Ironically, the outrage over the survey came from social media users who did not participate in the study and who saw the vignette presented out of context as if it represented the personal views of the researchers. The approval of

³⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

³⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁴⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

⁴¹ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

⁴² *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁴³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁴⁴ *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. ____, 2021 WL 2557069, at *8 (2021) (Alito, J., concurring) (construing majority opinion). *Mahanoy Area School District* involved First Amendment rights in high schools, not colleges or universities, where public institutions have even less leeway to regulate expression. *See id.* at *7 n.2.

⁴⁵ Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, 6(2) PLOS ONE e16782 (2011).

research cannot depend on whether a third party might disapprove of or misrepresent it, causing public anger.⁴⁶

Even setting aside the misrepresentation, that a research project might offend subjects or others does not justify its restriction under the banner of preventing “harm.” The proposal that research “do no harm” is admirable as an aspiration, and IRBs undoubtedly serve important roles in evaluating proposed research to ensure that it does not purposefully or inadvertently cause concrete, measurable harm. However, conceptualizing “harm” to encompass offense—however great—to the content of a question posed to a voluntary participant will place considerable constraints on research, including in ways that may not presently be anticipated. It would, for example, neuter the ability of researchers to ask questions to purposely gauge what participants find offensive, to ask participants to evaluate potentially offensive material, or to investigate participants’ biases or attitudes on sensitive issues.⁴⁷ Given that BSU’s IRB policy already accounts for “psychological risk” — which “refers to the impact of research that interrupts the normal activity of human subjects resulting in immediate and/or long-term stress that would not otherwise be experienced by the individual”⁴⁸—the expansion of the conception of “harm” represents a substantial erosion of faculty members’ freedom of inquiry.

This is not an idle concern, as evidenced by the avowed goal to prevent research like Spievak’s vignette. BSU, through its IRB, can no more withhold approval of a research survey because one of the questions presents a subjectively offensive point of view than it can punish a faculty member for presenting that same view in the classroom when it is pedagogically relevant.⁴⁹ In each situation, it is possible that someone, upon encountering the point of view, will experience offense or psychological discomfort. But that is not a permissible basis for limiting speech or academic freedom under the First Amendment or the CBA’s guarantee of “full freedom in research.” Were it otherwise, not only could the BLM vignette be suppressed,

⁴⁶ See *Mahanoy Area Sch. Dist.*, at *13 (discussing constitutional bar against the “heckler’s veto”).

⁴⁷ For example, Spievak explained the importance of her research team framing the survey’s questions in the way that they did: “[I]f we simply asked someone in a survey how racist they are, they are probably not going to answer affirmatively, as people tend not to describe themselves in such terms or even consciously believe they could be biased much of the time. If you frame an issue concerning race in a certain way, however, a person might reveal their biases. To that end, psychologists have devised tools and scales in order to obtain information about biases, as the study in question did.” FAQs ON BLMCOVID 3-21-21 (on file with author).

⁴⁸ POLICY OF USE OF HUMAN SUBJECTS IN RESEARCH, *supra* note 2, at § 18.8. Examples of stress-inducing situations include “undue coercion” and “exposure to noxious events.” *Id.* Any reforms must not weaken this standard to encompass any negative reactions to speech or ideas.

⁴⁹ See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001) (stating that, in the classroom context, a professor’s lectures, materials, or remarks, “however repugnant” to students or others, are “protected by the First Amendment” when they are “germane to the classroom subject matter”). “Not only much of the mental harm but also many of the moral, social, legal, and economic harms that IRBs aim to prevent are little more than the unavoidable costs of the freedom of speech or of the press, and to this extent, the government cannot penalize or prevent them. Such injury is ordinarily beyond government intervention even after the injury has occurred, and it can therefore hardly justify interference beforehand, when its occurrence is merely speculative.” Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 342 (2004). *Cf. supra* note 42 & accompanying text (citing *Mahanoy Area Sch. Dist.* at *8).

but so could all sorts of research content in psychology, social science, neuroscience, and other domains, including the previous vignette about terrorism.⁵⁰

Other language in the Task Force report strongly suggests that the ultimate goal is to reform IRB procedures not simply to mitigate risks of harm, but to restrict research on ideological grounds. For instance, the Task Force claims that the “need to make changes to research practices goes to the heart of decolonizing the University and examining the foundations of inequitable power relationships that historically have shaped the processes of knowledge creation to support and sustain power imbalances.” This statement contains politically and ideologically laden language and ideas that are subject to debate, and cannot be the basis for reviewing research activities without seriously infringing on academic freedom. The Task Force’s express ideological mission makes its recommendations—such as “racial justice training” for IRB members “that leads to an audit of procedures and decision-making”—highly dubious. How, for example, would the new procedures be used to evaluate a survey that seeks to examine views on affirmative action or diversity trainings? The process of approving research must remain viewpoint-neutral; it cannot be guided by the tenets of a particular ideology.

Because the new limitations—in particular the use of “harm”—lack precise, objective, viewpoint-neutral definitions, and in view of the Task Force’s findings and goals, there is reason to believe this vague standard will obstruct research merely because it is ideologically disfavored or might, like Spievak’s study, contain language that offends others, including those in the “wider community beyond the research participants.”

Even if a research proposal is not outright rejected, IRB-required changes to content deemed unacceptable can interfere with or defeat the purpose of the research,⁵¹ and informed-consent requirements expanded to include warnings about offensive language threaten to undermine freedom of inquiry. Not only have studies on trigger warnings suggested they are ineffective,⁵² but in the research context, such warnings may affect how participants respond and thereby skew results. Moreover, “[b]y requiring excessively somber warnings in informed consent forms—even those for social science research—IRBs can ensure low participation, and in this way can force a halt to research they find objectionable, without formally denying

⁵⁰ For other examples of such research, see Megan Oaten et al., *Moral Violations and the Experience of Disgust and Anger*, 12 FRONTIERS BEHAV. NEUROSCIENCE 179 (2018) (using vignettes containing offensive statements in experiment investigating whether reactions of physical disgust and moral disgust involve activation of common brain regions); Michael Thai et al., *Friends With Moral Credentials: Minority Friendships Reduce Attributions of Racism for Majority Group Members Who Make Conceivably Racist Statements*, 7 SOC. PSYCH. AND PERSONALITY SCI. 272 (2016) (presenting study participants with Facebook profile of white person who posted anti-Asian statement to look at whether participants’ attributions of racism depended on whether the white target was depicted with Asian friends or claimed they had Asian friends); Emma de Araujo et al., *Dominant Jerks: People infer dominance from the utterance of challenging and offensive statements* (Aug. 18, 2020) (unpublished preprint), available at <https://psyarxiv.com/egw3v> (using vignettes containing offensive statements to test the hypothesis that speakers make such statements for the purpose of displaying their dominance).

⁵¹ See, e.g., *supra* text accompanying note 45.

⁵² See, e.g., Peter Bonilla, *New study suggests ineffectiveness, and possible harms, of trigger warnings in college setting*, FIRE (May 1, 2020), <https://www.thefire.org/new-study-suggests-ineffectiveness-and-possible-harms-of-trigger-warnings-in-college-setting>.

approval.”⁵³ Importantly, research subjects are not without recourse—as BSU policy already recognizes, participation as a research subject is entirely voluntary, and subjects are “free to withdraw at any time without jeopardy.”⁵⁴

Importing ideological beliefs into the IRB’s work and guidelines will jeopardize the academic freedom of faculty whose ideas and scholarly interests deviate—or are perceived to deviate—from those beliefs. A research-licensing program “infused” with a specific political or ideological perspective, or that seeks to erect barriers to research involving potentially offensive language or ideas, is simply incompatible with academic freedom. Modifying the review process in this manner will have a chilling effect on research, and consequently, the “advancement of truth,”⁵⁵ as faculty and students retreat from inquiry insufficiently aligned with prevailing orthodoxies.

C. Faculty Evaluations Cannot Discriminate Against Faculty on the Basis of Ideological Viewpoint

FIRE is also concerned by the Task Force’s proposal that BSU prioritize “anti-racism” and “racial justice” in tenure and promotion reviews and make the use of “antiracist, decolonial, and abolitionist pedagogies” the “expectation” of *all* faculty, and by similar proposals to modify the faculty evaluation criteria in the CBA.

The meaning of the term “expectation” here is unclear, and we caution BSU that the First Amendment does not tolerate any policy that would make these criteria a *requirement* for all faculty. BSU cannot condition renewal, promotion, or tenure on a faculty member’s affirmation of highly politicized notions of anti-racism or social justice. Likewise, BSU cannot *require* faculty to adopt “pedagogies” based on disputed ideological concepts without violating their right to academic freedom. To further illustrate our concern by analogy, we trust that BSU would readily recognize the problem with mandating that faculty demonstrate their commitment to “patriotism” in their teaching, scholarship, or other activities. Faculty members with nonconforming personal or professional beliefs and commitments must not face negative consequences for following the dictates of their own consciences.

The First Amendment permits BSU to shape and express *its own* aspirational values as an institution and to make non-coercive efforts to support diversity and inclusion, however the university may define those concepts within the bounds of the law. BSU may also, of course, ensure that its educational environment is free from unlawful discriminatory conduct. What the university may not do, however, is abridge the freedom of faculty to pursue their scholarly interests, or to teach, and to express—or decline to express—any viewpoint or idea.

III. Conclusion

We urge BSU to think carefully about the potential consequences of these proposed changes to IRB and faculty evaluation policies. BSU must adhere to its obligations under the First Amendment and its promises to faculty of full academic freedom. Accordingly, we call on your

⁵³ Hamburger, *supra* note 47 at 302.

⁵⁴ POLICY OF USE OF HUMAN SUBJECTS IN RESEARCH, *supra* note 2, at § 1.2.

⁵⁵ CBA art. V, § A. (“Freedom in research is fundamental to the advancement of truth.”).

administration to reject the above-mentioned proposals or to adopt modified versions that comply with the First Amendment and BSU's promises of academic freedom, and to affirm the expressive rights of all BSU faculty and students.

We appreciate your time and attention to our concerns. We respectfully request receipt of a response to this letter by the close of business on July 30, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Terr', written in a cursive style.

Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records

Cc: Michael J. Murray, Esq., Director of Employee and Labor Relations, Massachusetts
Department of Higher Education
Christopher J. O'Donnell, President, Massachusetts State College Association
Maria Hegbloom, Chair, Massachusetts State College Association Day Bargaining
Committee