

# IN RE DEMANDING SPEAKERS' CREDENTIALS

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-19-1

February 21, 2019

## *Executive Summary*

The Emory University Standing Committee for Open Expression exists to promote and protect the rights to open expression, dissent and protest among Emory Community members. As part of our responsibility to provide advice and counsel regarding the interpretation of Emory's Open Expression Policy, this Committee clarifies to what extent the University and University-affiliated bodies should demand the identification of speakers to determine whether they are Emory Community members.

The Open Expression Policy generally does not protect the rights of those who do not belong to the Emory Community. However, a policy of generally challenging speakers' identification poses several potential harms. Speakers whose identification is demanded will often turn out to be Emory Community members. Demands for identification may chill speech by making Emory Community members concerned about retaliation or harassment by the University. Speakers have an interest in speaking anonymously to avoid having to fear such retaliation. Moreover, a policy of demanding identification would be likely to be applied discriminatorily, either to speakers who do not "seem like" Emory Community members or to unpopular speech that has come to University officials' attention because of someone's complaint.

However, there are countervailing benefits to demanding identification, for instance the need to avoid likely or imminent violations of University policies (or to respond to actual violations), or the University's interest in preserving its scarce resources to primarily serve its own Community members.

Where a speaker does not pose a significant threat of violating University policies and does not significantly consume University resources, and if the speaker's expression would be protected by the Open Expression Policy if the speaker were an Emory Community member, presumptively University officials should leave the speaker alone.

## I. INTRODUCTION

Emory University’s Open Expression Policy<sup>1</sup> (“Policy”) “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.”<sup>2</sup> Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”<sup>3</sup> The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”<sup>4</sup>

The Committee for Open Expression serves as “a working group of [Emory University] community members—faculty, staff, and students—who seek to *promote* and *protect* the rights and responsibilities of community members related to issues and controversies involving speech, debate, open expression, protest, and other related matters.”<sup>5</sup>

The Committee’s responsibility is to “provide advice and counsel to Community members interpreting the Policy and the rights and responsibilities of individuals and groups under it.”<sup>6</sup> One way that it does so is by “investigat[ing] alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters.”<sup>7</sup> To that end, Emory Community members who believe their open expression rights have been infringed are encouraged to contact the Committee for Open Expression at [openexpression@emory.edu](mailto:openexpression@emory.edu).<sup>8</sup>

But the Committee may also proceed more generally, even in the absence of a complaint by a Community member, by “provid[ing] education . . . to the Community” about these issues and in any other way that is “necessary to effectuate [the] Policy”<sup>9</sup>—for instance, by clarifying the provisions of the policy and exploring how it may apply in particular recurring scenarios. It is this clarifying power that we are exercising in this opinion.

A recurring issue is how to treat persons present on campus who may or may not be Emory Community members. It is undisputed that the Policy generally protects only

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<sup>1</sup> The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in our recent opinions, *In re Emory Students for Justice in Palestine*, No. CFOE–16–1 (Feb. 10, 2016) [hereinafter *In re ESJP*], [http://senate.emory.edu/documents/past\\_documents/cfoe-palestine-16.02.10-revised2.pdf](http://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf), *In re Donald Trump Chalkings and Related Matters*, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter *In re Trump*], [http://senate.emory.edu/documents/past\\_documents/Open%20Expression%20Trump.pdf](http://senate.emory.edu/documents/past_documents/Open%20Expression%20Trump.pdf), *In re Definition of Community Member*, No. CFOE–16–3 (Nov. 21, 2016) [hereinafter *In re Community*], and *In re Emory Integrity Project Chalkboards and Other Limited Public Forums*, No. CFOE–17–1 (Sept. 26, 2017) [hereinafter *In re Limited Public Forums*]. The Policy was revised on April 12, 2017, so some quotes in previous opinions may refer to the previous version of the Policy.

<sup>2</sup> Policy 8.14.1.

<sup>3</sup> Policy 8.14.1.

<sup>4</sup> Policy 8.14.2.

<sup>5</sup> Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

<sup>6</sup> Policy 8.14.3.2.

<sup>7</sup> See, e.g., *In re ESJP*.

<sup>8</sup> Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

<sup>9</sup> Policy 8.14.3.2.

Emory Community members, but what if one is unsure of the status of particular speakers on campus? If an unknown speaker is engaged in expressive activity on campus—for instance, holding up a sign—should the University, as a rule, challenge that speaker and demand that they present identification, with a view toward asking them to leave if they are not an Emory Community member? Or should the University presumptively leave such people alone unless they commit some bad act (e.g., violate some law or University policy)?

In this opinion, we conclude that speakers have an interest in *not* having their credentials challenged by the University to determine whether they are Emory Community members. An unknown speaker will sometimes turn out to be an Emory Community member, and a policy of challenging the credentials of such speakers may lead to a number of undesirable outcomes: First, Emory Community members whose identification is challenged (and who might not carry their ID with them at all times) might feel chilled in their open expression rights under the policy. Second, such a policy might end up being enforced non-evenhandedly, against people who “don’t look like” Emory Community members. Third, such a policy might end up being enforced only when someone complains, which would target primarily controversial or unpopular speech.

Thus, we conclude, if someone is engaged in activity that would be protected by the Open Expression Policy if they were Emory Community members, the University should, as a rule, not challenge their credentials. This suggests a simple rule:

1. If this speaker were known to be an Emory Community member, would there be any reason to prevent them from speaking?
2. If not, then it is generally not worthwhile to check whether the speaker is an Emory Community member.
3. However, there are circumstances when challenging their credentials could be appropriate: for example, if the activity implicates the University’s interest in preserving its resources, avoiding congestion, or avoiding actual or threatened violations of law or of University policies.

Nothing in this opinion is meant to permit behavior that is otherwise prohibited. For example, Emory has policies regulating solicitation and distribution of literature<sup>10</sup> (for instance, raising money or handing out flyers on behalf of Greenpeace). This opinion has no bearing on whether or not such policies are valid; and, assuming such policies are valid, this opinion does not authorize any contrary behavior. If, under certain circumstances, literature distribution would violate some Emory policy, then University officials may check those literature distributors’ credentials to see whether that policy is being violated and determine what action to take.

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<sup>10</sup> E.g., Policy 4.67.

Nor is anything in this opinion meant to prohibit behavior that would otherwise be permitted. For instance, if an organization is trying to have a large rally on Asbury Circle or a speaker in an auditorium, the University is entitled to make sure the event is in fact sponsored by Emory Community members (because of, e.g., the interest in avoiding congestion or preserving University resources). However, once credentials have been checked and the event turns out to be really sponsored by Emory Community members, the event should presumably (as long as no other policies are violated) go on as usual.

## II. THE RIGHTS OF COMMUNITY MEMBERS

As we have explained in past opinions, Emory University is a private institution and is therefore not bound by the First Amendment of the U.S. Constitution.<sup>11</sup> However, “the Policy incorporates at least the same substantive standards that the First Amendment imposes on public universities, so that the Emory Community has at least the same rights as the communities of the University of Georgia or Georgia State University.”<sup>12</sup> Indeed, “[i]n some ways, the Policy provides broader support for open expression than the First Amendment compels at public universities.”<sup>13</sup>

However, the rights guaranteed by the Policy are generally limited to a group of people denoted the “Emory University Community.” The Policy strictly distinguishes between Community members, who have rights under the Policy, and other people, who generally do not.<sup>14</sup> For instance, with some exceptions, “[r]eservations [for Events and Meetings] shall not be denied to any member of the Community based on content of the Meeting, Event, or Dissent.”<sup>15</sup> This guarantee of neutrality with respect to content is not extended to non-Community members.

The Policy defines the term to include students, faculty, staff, trustees, alumni, invited guests, and business patrons.<sup>16</sup> A member of the outside community who has no prior relationship with Emory may become an Emory Community member for certain purposes and at certain times—for instance, by attending a talk or concert that is open to the public, seeing an Emory doctor, or eating at an Emory Dining café.<sup>17</sup> However, members of the outside community do not become Emory Community members merely by walking onto campus. Thus, if a non-Emory protester, or march composed of non-Emory Community members, enters Emory property, the University’s response should be informed by its

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<sup>11</sup> See *In re ESJP*, Part I.B, at 2; *In re Community*, Part II, at 2.

<sup>12</sup> *In re Trump*, Part II.A, at 3 (footnote omitted); see also *In re ESJP*, Part I.B, at 2–3; *In re Community*, Part II, at 2–3; Policy 8.14.5 (“Emory University respects the Constitutional rights of free speech and assembly. As such, the only responsibilities outlined in this section that limit the free exercise thereof have been done in a way to ensure maximum open expression and narrowly tailoring exceptions to specific safety or community concerns.”).

<sup>13</sup> *In re ESJP*, Part I.C, at 3–4.

<sup>14</sup> *In re Community*, Part II, at 3.

<sup>15</sup> Policy 8.14.5.3.

<sup>16</sup> Policy 8.14.2. These terms—particularly the “invited guest” and “business patron” categories—are discussed at greater length in *In re Community*.

<sup>17</sup> See *In re Community*, Part III.C, at 7–8.

view of prudence, respect, and public relations, but it is clear that the Policy does not require the University to treat them as though they were Emory Community members.

### III. THE POTENTIAL HARMS OF ASKING FOR IDENTIFICATION

The distinction between Emory Community members and non-Community members is dictated by the Policy. However, it is in practice often difficult or impossible to distinguish between Community and non-Community members without asking—that is, without challenging their credentials and perhaps demanding identification.

Once the Policy has been violated, it is clear that demanding identification can be appropriate—for instance, disciplinary procedures are different depending on whether the violator is an undergraduate student, graduate or professional student, faculty member, staff member, trustee, or contracted worker.<sup>18</sup> Thus, the Policy provides that, “[w]hen the [Division of Campus Life] declares that an individual or a group has violated the Guidelines, they may request to examine their University or other identification. The hosts of invited guests may also be asked to provide their University identification.”<sup>19</sup> (Even then, though, authorization to demand identification is limited to the Division of Campus Life.)

However, there remains the question of what posture the University should adopt when actions by unknown speakers do not violate the Policy. What if an unknown speaker engages in conduct which, if an Emory Community member were doing it, would be protected behavior?

To understand whether challenging a speakers’ credentials is consistent with the values of the Policy, it is necessary to consider the potential harms that such challenges can cause.

First, there is an interest in speaking anonymously. On a campus like Emory’s with about 15,000 students (to say nothing of staff and faculty, who also have rights under the Open Expression Policy), not everyone knows each other.<sup>20</sup> People expressing unpopular opinions may fear retaliation and harassment by the University to some extent, and requiring that they show their identification on demand may “discourage[] participation . . . by forcing name identification without sufficient cause.”<sup>21</sup>

Moreover, in practice, a policy of challenging speakers’ credentials is likely to be applied in a discriminatory way. We do not doubt the good faith of University officials, but activity protected by the Open Expression Policy happens all the time—every time Community

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<sup>18</sup> Policy 8.14.7.4.

<sup>19</sup> Policy 8.14.7.2. The Policy uses “Guidelines” here as a synonym for “Policy.”

<sup>20</sup> Not everyone carries a university ID at all times—nor do all categories of Emory Community members even require an ID.

<sup>21</sup> *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 198–200 (1999); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002).

members speak to each other, hold meetings, hand out flyers, wear pins or clothes with messages on them, or otherwise engage in expressive activity. It is clear that identification can only be demanded in a tiny percentage of such cases. Perhaps an authority figure will ask for speakers' identification based on their hunch or intuition as to who "seems like" a student or other Emory Community member. Or an authority figure will respond to a complaint, which means that the burden of providing identification will be disproportionately borne by speakers who have come to someone's attention because their expressive activity is unusual or disliked. That itself is a form of content-based discrimination that should be minimized.

#### IV. THE POTENTIAL BENEFITS OF ASKING FOR IDENTIFICATION

To be sure, the University does have some valid interests in determining who is and who is not an Emory Community member.

One important interest is to avoid violations of University policies (including the Open Expression Policy itself). As noted above, once a violation has occurred, someone from the Division of Campus Life may demand to see the violator's identification. But it is not always necessary to wait until an actual violation has occurred. A rally that realistically threatens violence to persons or property plausibly implicates this value even if it does already fall under the interest in avoiding congestion described above. The University's leeway in checking identification before a violation has occurred depends on standard, commonsensical factors, such as the likelihood or imminence of a violation, and the severity of a violation if it occurs.

Another important interest is to preserve scarce University resources and ensure that these resources are available for use by the Emory Community.<sup>22</sup> When areas need to be reserved ahead of time, the limitation to Emory Community members tends to take care of itself. But most expressive activity requires no advance permission. Certain areas are popular with speakers, signature gatherers, or literature distributors because of the volume of traffic—for instance, Cox Hall Bridge, Asbury Circle, or common areas in the Emory Student Center. But it is that very volume of traffic that raises the possibility that the area will become unduly congested.

Thus, University officials are not required to maintain deliberate ignorance about the identity of speakers on campus. If they happen to know, based on previous encounters, that someone is not an Emory Community member, they may act on that information. If a speaker initiates contact with a University official—perhaps to ask for information or logistical help—the official may inquire whether the speaker is an Emory Community member; the time of University employees, after all, is another type of scarce resource

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<sup>22</sup> See Policy 8.14.5.3 (“[T]he University may properly take into account, when allocating scarce resources to groups, whether one group’s mission is duplicative of another’s.”).

that the University may validly seek to preserve for primarily serving Emory Community members.

The strength of the University's interest dictates the measures that it may take to check identification: a lone signature gatherer who does not impede the flow of foot traffic, does not bother University officials, and does not violate University policies generally does not implicate the interests in preventing congestion of University resources or avoiding policy violations. The opposite is likely to be true in the case of a large, noisy rally or march. A merely hypothetical concern that a public area might become congested is not enough; rather, the congestion concern becomes relevant when Community members who wish to use these areas, either for speech or for foot traffic, cannot do so effectively.

## V. CONCLUSION

In short, when faced with an unknown person engaged in expressive activity, it is useful to ask: If this person were known to be an Emory Community member, would their activity be protected under the Open Expression Policy? If not—if the person is violating some policy—then the Division of Campus Life may ask who they are and take steps accordingly. But if the activity would be protected in the case of an Emory Community member, it is generally not worthwhile to check the unknown speaker's identification. Doing so may chill Emory Community members' expression, and it is likely to be applied in a non-evenhanded way. Allowing peaceful and unobtrusive speakers to engage in expressive activity without challenge is consistent with the values behind the Open Expression Policy.

That said, there are valid University interests that can justify challenging speakers' identification. These include the University's interest in preserving its resources, avoiding congestion, or avoiding actual or threatened violations of law or of University policies.

### *Composition of the Committee for Open Expression:*

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Owen Mattocks, Constitutional Council (ex officio, non-voting)  
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