

# IN RE MOCK EVICTION NOTICES

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-19-3

April 15, 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 discusses a recent incident, in which members of Emory Students for Justice in Palestine posted mock eviction notices on residents' doors in Emory residence halls to call attention to issues of forced evictions of Palestinians by the Israeli government. (It has not been found that Jewish students were targeted by such posting.)

Posting flyers on residents' doors is prohibited by Residence Life's reasonable and neutral policies. Therefore, the flyers that were posted on residents' doors were properly removed. Some residents with limited English skills might have been legitimately confused about whether the flyer was an actual eviction notice; a possible future rule against flyers that cause substantial confusion, if narrowly crafted, could be consistent with the Open Expression Policy. Aside from this issue, the rest of the flyer is fully protected political speech under the Open Expression Policy, and Residence Life staff acted properly in approving the flyers for posting according to the posting guidelines.

Any disciplinary sanctions for the misposting must be in line with other disciplinary sanctions for similar violations, and should not be any larger than they would otherwise be based on the message involved.

## I. INTRODUCTION

### *A. The Open Expression Policy and the Committee for Open Expression*

Emory University’s Respect for 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.

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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 several recent opinions, which are available at <https://senate.emory.edu/about/committees/open-expression.html>. 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> Id.

<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.

*B. Emory Students for Justice in Palestine's Mock Eviction Notices*

On Tuesday, April 2, 2019, as part of "Israel Apartheid Week,"<sup>10</sup> members of Emory Students for Justice in Palestine (ESJP), a recognized Emory student organization, posted flyers on the doors of students in various residence halls on the main campus and Clairmont campus.<sup>11</sup>

The flyer begins:

**EVICTIION NOTICE**

**We regret to inform you that your suite is scheduled for demolition in three days.**

*If you do not vacate the premise by midnight on April 5th 2019 we reserve the right to destroy all remaining belongings. We cannot be held responsible for property or persons remaining inside the premises. Charges for demolition will be applied to your student accounts.*

The rest of the flyer relates to Israeli-Palestinian issues. It discusses forced evictions of "Palestinian families living under Israeli occupation," arguing that such evictions are "arbitrary, racist, humiliating," violate international law, and are part of an ethnic cleansing and "Judaization" campaign on the part of the Israeli government.

The flyer ends with a disclaimer:

**THIS IS NOT A REAL EVICTION NOTICE.**

**This is intended to draw attention to the reality that Palestinians confront on a regular basis.**

The opening words "EVICTIION NOTICE" are in very large type. By contrast, while the text "THIS IS NOT A REAL EVICTION NOTICE" at the bottom has some prominence (it is in bold capital letters and begins a short paragraph preceded by substantial white space), it is in much smaller type, roughly comparable in size to the rest of the text.

A full image of the flyer is reproduced in Exhibit A.

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<sup>10</sup> See Richard Chess & Nicole Sadek, Students Outraged over Mock Eviction Notices, Emory Wheel, Apr. 5, 2019.

<sup>11</sup> The flyers were also posted on doors at the Emory Point apartments, which are not managed by Emory University. In this opinion we only address posting in the Emory residence halls. See *id.* ("The flyers were posted throughout residence halls, Clairmont Campus and Emory Point."); Dave Schechter, Emory University Caught in Israel-Palestinian Flap, Atl. Jewish Times, Apr. 5, 2019; Update About the Posting of Flyers at Emory University, Emory News Ctr., Apr. 12, 2019.

All copies of the flyer posted in the residence halls (like all other flyers posted in the residence halls at the time<sup>12</sup>) bore the stamp of approval of the Office of Residence Life.

It has not been found that ESJP was targeting Jewish residents (though some claims to that effect were made in the immediate aftermath of the event), and this opinion is written under the assumption that no such targeting occurred.<sup>13</sup>

We conclude that the flyers that were improperly posted (for instance, on residents' doors) were properly removed. Moreover, some residents (for instance, students with limited English skills) might have been legitimately confused about whether the flyer was an actual eviction notice; a possible future rule against flyers that can cause substantial confusion, if narrowly crafted, could be consistent with the Open Expression Policy.

However, the rest of the flyer is fully protected speech under the Open Expression Policy. Any disciplinary sanctions for the misposting must be in line with other disciplinary sanctions for similar violations, and should not be any stricter than they would otherwise be based on the message involved.

## II. FREE SPEECH PROTECTION AT EMORY

This incident is governed by the same principles that we have applied before—most notably when we explained that an “Israel is an Apartheid [sic] State” wall (also put up by ESJP) was protected under Emory’s Open Expression Policy,<sup>14</sup> and later when we explained that the “Trump 2016”/“Build the Wall” chalkings were likewise protected speech under the Policy.<sup>15</sup>

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<sup>12</sup> See Update About the Posting, supra note 11 (noting that the practice “has been discontinued” because of confusion over whether Emory endorses the speech).

<sup>13</sup> See Schechter, supra note 11 (“In reviewing this incident, we found no evidence that individual students or a particular group were targeted,” the university said in a statement issued April 3.”); Emory-Israel Public Affairs Committee - EIPAC, Facebook post, Apr. 3, 2019, 10:54 PM, <https://www.facebook.com/EIPAC1/posts/2117628334984318> (“We have no explicit evidence that [ESJP] singled out Jewish or pro-Israel individuals when they illegally solicited by placing flyers around the private apartment complex.”); mass e-mail from Rabbi Russ Shulkes, Hillels of Georgia, Apr. 4, 2019, re: “Israeli Apartheid Week and more” (“Originally it was reported that the eviction notices were specifically put on doors with a *Mezuzah* at Emory point, skipping the doors of non-Jews. . . . But that has been debunked.”); Shiri Moshe, Anti-Zionist Students Target Emory University Dorms with Mock Eviction Notices Blasting Israel, *Algemeiner*, Apr. 3, 2019 (“Both Emory University and Emory Hillel said they found no evidence that Jewish students were targeted by the flyers, with Emory Hillel director Dave Cohn telling *The Algemeiner* on Wednesday that he was ‘not prepared to reach a definitive conclusion’ on the matter.”); Jacob Busch, Fake Eviction Flyers Polarized Already Divided Campus Dialogue, *Emory Wheel*, Apr. 5, 2019 (calling the distribution of the flyers “random” and “seemingly random”); e-mail from Emory President Claire E. Sterk to the Emory Community, Apr. 12, 2019, re: “A message from Emory’s president” (“Jewish students were not singled out . . .”); Update About the Posting, supra note 11.

<sup>14</sup> In re Emory Students for Justice in Palestine (Feb. 10, 2016) [hereinafter In re ESJP], [https://senate.emory.edu/documents/past\\_documents/cfoe-palestine-16.02.10-revised2.pdf](https://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf).

<sup>15</sup> In re Donald Trump Chalkings and Related Matters, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter In re Trump], [https://senate.emory.edu/documents/past\\_documents/Open%20Expression%20Trump.pdf](https://senate.emory.edu/documents/past_documents/Open%20Expression%20Trump.pdf).

In past opinions, we have explained the relationship between the Open Expression Policy and the First Amendment of the U.S. Constitution:

Emory University is a private institution; therefore, the First Amendment of the U.S. Constitution does not bind the University of its own force. However, the University has chosen to adopt the Open Expression Policy, which affirms that “Emory University respects the Constitutional rights of free speech and assembly.” We have recognized on several occasions that the Policy incorporates at least the same substantive standards that the First Amendment imposes on public universities. As a result, the Emory Community—a category that includes faculty, students, staff, and others—has at least the same rights as the communities of the University of Georgia or Georgia State University. Indeed, in some ways, the Policy provides broader support for open expression than the First Amendment compels at public universities: in particular, the Policy commits the University to take affirmative steps to encourage protest and dissent.<sup>16</sup>

“[T]he authority to interpret the Policy rests with the Committee,” we have written; nonetheless, “judicial interpretations of the First Amendment in the context of cases supporting the rights of individuals at *public* universities are persuasive authority as to the Policy’s meaning.”<sup>17</sup> The same is true of judicial interpretations of the First Amendment in analogous contexts outside of universities.

### III. VIOLATIONS OF POSTING POLICIES

In posting these flyers, members of ESJP violated reasonable and neutral posting guidelines, and those flyers that were improperly posted were permissibly removed for that reason.

Flyer posting is governed by the Open Expression Policy’s provision on “Nonpersonal Expression,” which states, in part:

For purposes of nonpersonal expression such as flyers, chalking, signs, and displays, persons expressing themselves should follow all applicable flyer posting policies and banner reservation rules; however, these requirements should not be unreasonable in terms of access, time frame, requirements, or costs to the group.<sup>18</sup>

It is apparent that many of the flyers were posted in violation of “applicable flyer posting policies.” The Residence Life Posting Policy clearly states that flyers may not be posted on

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<sup>16</sup> In re Emory Integrity Project Chalkboards and Other Limited Public Forums, No. CFOE–17–1 (Sept. 26, 2017), Part III.A, at 4–5 (quoting Policy 8.14.5) (some internal quotation marks omitted) (internal brackets removed) [hereinafter In re Limited Public Forums], [https://senate.emory.edu/documents/past\\_documents/cfoe-palestine-16.02.10-revised2.pdf](https://senate.emory.edu/documents/past_documents/cfoe-palestine-16.02.10-revised2.pdf).

<sup>17</sup> In re ESJP, Part I.B, at 3.

<sup>18</sup> Policy 8.14.5.8.

doors.<sup>19</sup> Another version of the posting policies, which is reproduced in Exhibit B, states: “NOT ALLOWED: Posting flyers on room doors without approval from residents.”

This prohibition is not unreasonable: dorm residents’ interest in controlling the expressive content of their own doors is clearly substantial. Not only is posting on doors without the residents’ approval prohibited, but the guidelines also state that “[a] resident’s room assignment (including the bedroom, bathroom, and doors to those rooms) is deemed as the private space of the resident(s) living there.”<sup>20</sup> Posting on residents’ doors without their consent is thus a violation of personal privacy. The flyers that were posted in violation of the posting guidelines were thus properly removed by University officials (or by the room residents themselves).<sup>21</sup>

#### IV. POSSIBLE CONFUSION REGARDING EVICTION

Residents who found this notice on their door may have been concerned, at first, about whether they were being actually evicted. But this concern would have quickly dissipated as they read further down—even before the disclaimer at the bottom that this was not a real eviction notice, it was evident that the flyer was about Israel-Palestine issues.<sup>22</sup>

However, not everyone can read English easily and is sophisticated about political flyers. (As we discuss below, the Residence Life stamp of approval should not be interpreted as endorsement of the particular message,<sup>23</sup> but it is possible that such a stamp might have inadvertently contributed to some residents’ confusion.<sup>24</sup>) In particular, students with limited English skills also live in the residence halls, and some of them may have been actually concerned before the situation was explained to them.

The posting guidelines do not specifically provide for denying permission for flyers whose content may be confusing, so the Residence Life staff who approved and stamped the flyer as appropriate for posting in the designated posting areas were correct to approve the

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<sup>19</sup> See Emory Univ., Offs. of Res. Life & Hous. Ops., Campus Life, Housing Policy 1.10, <https://housing.emory.edu/policies/rules/index.html>; see also Emory University Posting Guidelines and Practices, <http://policies.emory.edu/uploads/Emory%20Posting%20Guidelines%20and%20Practices2016.pdf> (“Flyer posting is impermissible on . . . doors . . .”).

<sup>20</sup> See Exhibit B.

<sup>21</sup> In the case of the vandalized Israel Apartheid wall, we stated: “Even if speech falls within one of the Policy’s exceptions, that does not automatically make it reasonable for a third party, rather than Emory University itself, to take action against that speech.” In re ESJP, Part III.B.2, at 6. See also In re ESJP, Part III.B, at 7 n.28 (“[E]ven if speech falls within an exception to the Policy, third parties’ unilateral action against that speech can still qualify as an ‘undue hardship’ to the speaker.”); id., Part IV.A, at 8 n.37 (“[E]ven if expression is unprotected by the Policy, third parties may not have the same right to suppress the speech as do University officials.”). But, because the door of a resident’s own dorm room is defined as the resident’s private space and posting on that door without the resident’s consent is prohibited, it is reasonable for the affected resident to take the flyer down, even if unrelated people may not do so.

<sup>22</sup> Compare Busch, *supra* note 13 (calling the flyers “clearly fake”), with Schechter, *supra* note 11 (calling the flyers “official-looking”).

<sup>23</sup> See text accompanying *infra* notes 46–50.

<sup>24</sup> See Sterk e-mail, *supra* note 13 (flyers “incorrectly gave the impression that Emory endorsed the message on the flyers”).

flyer.<sup>25</sup> Still (for the future), the Open Expression Policy does provide some limited scope for considering content to a small extent.

For instance, if a group had approached Residence Life for approval of a flyer that obviously contained threats of violence, the staff would not have violated the Open Expression Policy if they had denied approval to the flyer on that basis—threats of violence (and violations of law more generally) are unprotected under the Policy.<sup>26</sup> Similarly, if the flyer looked so much like an official communication that any reasonable readers would have been concerned about eviction and would have had to spend time determining their status, those who posted the flyers would have been “interfer[ing] unreasonably with the activities or rights of other persons”—which is likewise unprotected under the Policy.<sup>27</sup> (Outright impersonation of the University or of another group is likewise either illegal or close to it, so this would also be unprotected.<sup>28</sup>)

Naturally, the Open Expression Policy sharply limits University officials’ discretion to consider the content of flyers: some disruption is an unavoidable result of a regime that robustly protects free speech. There may be some room in the future to provide for some limited scrutiny of the content of flyers, but such scrutiny must not go beyond checking whether the flyer falls within an unprotected category under the Policy.<sup>29</sup>

## V. THE CONTENT OF THE FLYER

Putting aside the issue of the flyers’ wrongly being posted on residents’ doors, and the issue of potential confusion as to whether the flyers were actual eviction notices, is there any further reason either for Residence Life to have withheld its approval, or for University authorities to now impose harsh penalties against ESJP or its members who posted the flyers?

We think that there is not.

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<sup>25</sup> See text accompanying *infra* note 44; Update About the Posting, *supra* note 11.

<sup>26</sup> Policy 8.14.5.5(a), (g).

<sup>27</sup> Policy 8.14.5.5(b). There is, of course, general language in the Undergraduate Code of Conduct that would seem to cover *intentional* impersonation of someone else—for instance the requirements of trustworthiness and honest character—but intentional impersonation does not seem to have been the posters’ intent here.

<sup>28</sup> If a flyer were extremely similar to an official University notice, it could—depending on the precise circumstances—constitute fraud, defamation, a violation of the “false light” tort, or similar (even if the similarity were unintentional), and approval could be denied on that ground. Policy 8.14.5.5(a). We interpret the violation-of-law exception flexibly: if a flyer could make a substantial number of people believe that it comes from someone else, such “impersonation” can be acceptable grounds for denying permission for the flyer, without the need for a precise analysis of whether the flyer would be illegal.

<sup>29</sup> See generally Policy 8.14.5.4–.5. The policy on “nonpersonal expression” does provide that “[n]onpersonal expression should be denied because of the content of the flyer . . . within the limits of the law.” Policy 8.14.5.8. This section does lay out a general rule of neutrality as to different types of content, which is a core value of the Open Expression Policy. But “within the limits of the law” is an important limitation to this rule of content neutrality. Moreover, the requirement of content-neutrality should be read in light of the general exceptions to the Open Expression Policy in sections 8.14.5.4–.5.

Some have opined that the content of the flyers was anti-Semitic,<sup>30</sup> stating, among other things, that “the nature and the language in the notices was threatening, potentially violating students’ fundamental sense of safety” and that “[t]he content is unambiguously hateful with clear anti-Semitic overtones.”<sup>31</sup>

We do not know whether the motives of those who wrote or distributed the flyers were anti-Semitic; clearly, different readers’ perceptions differ on this point. In any event, it is the objective content of the flyers that matters, not the speakers’ or distributors’ subjective motives.

The flyer described and condemned a practice of the Israeli government, characterizing it as an attempt to “ethnically cleanse the region of its Arab inhabitants and maintain an exclusively ‘Jewish’ character of the state”—a practice that, according to the flyer, “the Israeli government itself describes . . . as ‘Judaization.’” This is an expression of disagreement with the actions of a government (though admittedly, in Israeli-Palestinian relations, issues of politics, ethnicity, and religion are deeply intertwined). The question of housing, settlement, and eviction is an important issue in contemporary politics and international relations, falling squarely within the definition of “Dissent” or “Protest” under the Policy.<sup>32</sup>

It is true that some definitions of anti-Semitism encompass more than explicit expression of animus toward Jews. The U.S. State Department, for instance, has, for a number of years, used a “working definition” of anti-Semitism that includes “[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation.”<sup>33</sup> It is not clear that the flyer uses such double standards (who knows what the authors would think of forced evictions in other countries?); but in any event, we cannot police these sorts of factors.<sup>34</sup> The Open Expression Policy allows Community

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<sup>30</sup> See Schechter, *supra* note 11 (“I find it racist, anti-Semitic and absolutely offensive,” . . . Rabbi Russ Shulkes, executive director of Hillels of Georgia, told WSB-TV.”); *id.* (quoting Prof. Kenneth W. Stein referring to “the anti-Semitic contents of the flyer”); Shulkes, *supra* note 13 (“The eviction notice was anti-Zionist **and** anti-Semitic.”); *id.* (implying that the notice “cross[ed] the line into racism”).

<sup>31</sup> Jewish Fed. of Greater Atl., United Against Hate, <https://jewishatlanta.org/impact/community-security/united-against-hate/>.

<sup>32</sup> Policy 8.14.2. “Dissent” is defined as “the fundamental right of expression of counterpoint(s) through symbols, speech, expression, satire, flyers or leaflets, action, and other comparable forms of expression.” “Protest” is defined as “dissent with the goal of change, which may attract attention,” and the definition goes on to state that “Protest may also include more individually-based forms of Dissent such as posting flyers . . . .”

<sup>33</sup> U.S. Dep’t of State, Defining Anti-Semitism, <https://www.state.gov/s/rga/resources/267538.htm>.

<sup>34</sup> In any event, at least this aspect of the State Department’s definition of anti-Semitism is contestable. Many Americans hold the United States to a higher standard than other countries, but this is usually an expression of their pro-Americanism, not their anti-Americanism. See also Steven Levitsky & Glen Weil, We Are Lifelong Zionists. Here’s Why We’ve Chosen to Boycott Israel, *Wash. Post*, Oct. 23, 2015 (“Doesn’t boycotting Israel but not other rights-violating states constitute a double standard? It does. We love Israel, and we are deeply concerned for its survival. We do not feel equally invested in the fate of other states.”).



members to have their own varying views on what behavior is expected or demanded of different nations.

Rather than trying to discern intentions or detect double standards, we look to the specific provisions of the Open Expression Policy. Nothing in the content of the flyer itself violated the Open Expression Policy: it did not “violate any federal, state, local, or other applicable law”;<sup>35</sup> it did not “interfere unreasonably with the activities of rights of other persons”;<sup>36</sup> it did not “interfere unreasonably with the general operations of the University”;<sup>37</sup> it did not “cause . . . or threaten to cause . . . injury”;<sup>38</sup> it did not “use or threaten [or encourage others to use or threaten] violence or force”;<sup>39</sup> and it did not “cause harassment, as defined by state law.”<sup>40</sup>

Emory’s own Equal Opportunity and Discriminatory Harassment Policy (EODHP) is also limited by “the centrality of academic freedom and the University’s determination to protect the full and frank expression of ideas.”<sup>41</sup> (We have, in the past, rejected the idea that the concept of academic freedom is limited to “classroom activity, formal teaching, commentary by experts with doctorates, peer-reviewed publications, or academic research in a narrow sense.”<sup>42</sup>) Moreover, we have repeatedly said that “[e]xpressions on subjects of social and political interest” that are protected by the Open Expression Policy cannot be punished under the EODHP.<sup>43</sup>

Thus, the Residence Life staff who approved and stamped the flyer as appropriate for posting in the designated posting areas were correct to approve the flyer.<sup>44</sup>

The Residence Life Posting Policy limits posting privileges to “Emory University recognized and chartered student organizations” (such as ESJP), and the Residence Life and Housing approval stamp served to indicate that the flyer came from such an

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<sup>35</sup> Policy 8.14.5.5(a).

<sup>36</sup> Policy 8.14.5.5(b).

<sup>37</sup> Policy 8.14.5.5(c).

<sup>38</sup> Policy 8.14.5.5(f).

<sup>39</sup> Policy 8.14.5.5(g). A flyer that was *intentionally* meant to make residents believe their apartments would be destroyed could be thought to threaten violence or force. But it is exceedingly unlikely that the members of ESJP who posted the flyers intended to make anyone believe that their apartments would actually be destroyed: not only is there the disclaimer at the bottom, but the effectiveness of their political message depends on people realizing that the message is really about Palestine. See also *supra* note 27.

<sup>40</sup> Policy 8.14.5.5(h).

<sup>41</sup> Policy 1.3.2.

<sup>42</sup> *In re ESJP*, Part IV.B.4, at 10.

<sup>43</sup> See *id.*; *In re Trump*, Part II.C, at 5–6; Policy 8.14.2 (“This Policy is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”).

<sup>44</sup> Obviously, the staff approved the flyers for posting in conformity with the posting guidelines. We presume that the staff did not know that the flyers would be posted in improper locations; the fault in the misposting lies with those who posted the flyers, not with those who approved the flyers for posting.

organization rather than from non-Emory organizations, which lack rights under the Open Expression Policy.<sup>45</sup>

Emory Community members should know that the Open Expression Policy protects a wide variety of expressive statements,<sup>46</sup> including some statements that some might find offensive.<sup>47</sup> Moreover, at the time of the incident, every flyer posted in the residence halls bore the Residence Life stamp of approval.<sup>48</sup> The stamp of approval should therefore not be taken as an endorsement of the content of the message;<sup>49</sup> on the contrary, in light of the rule of neutrality as to content, the stamp of approval should properly be taken as an act of *deliberate, nearly complete disregard* of the content of the message.<sup>50</sup> (Nonetheless, the University has discontinued this practice in order to avoid confusion in the future.<sup>51</sup>)

This policy of substantially disregarding the content of flyers and other speech is an intentional and beneficial feature of the Open Expression Policy. If we condoned punishing ESJP because of the content of the flyers, the next, inevitable step would be calls to punish some pro-Israel organization because of its speech. Pro-Israel activities are often disrupted, or scheduled talks canceled, on various university campuses due to protest.<sup>52</sup> When this happens, those who disrupt the pro-Israel activities seek to justify

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<sup>45</sup> See Update About the Posting, *supra* note 11. The Open Expression Policy generally limits rights and responsibilities under the Policy to members of the “Emory University Community.” See Policy 8.14.2. For a discussion of who is and not is a Community member, see generally *In re Definition of Community Member*, No. CFOE–16–3 (Nov. 21, 2016), <https://senate.emory.edu/documents/cfoe-community-16.11.21.pdf>.

Admittedly, the Residence Life Posting Policy denies posting privileges to Emory Community members who do not act through a recognized organization. But we do not need to reach the question of whether the Posting Policy should allow for broader posting privileges.

<sup>46</sup> See Policy 8.14.5.1 (“Each member of the Community is expected to know and follow this Policy.”).

<sup>47</sup> See *In re ESJP*, Part IV.B.3, at 9 (“If a Community member’s offense at or discomfort with certain expressive content were considered mental or emotional injury, open expression on any controversial topic would be subject to restriction, in direct contradiction to the purpose of the Policy.”); *In re Limited Public Forums*, Part III.B, at 6 (“The University . . . may [take a number of positions on controversial topics], though of course it may not ordinarily prevent Community members from expressing contrary (even offensive) positions on these matters.”).

<sup>48</sup> As we have noted above, the stamp of approval may have inadvertently made the flyers easier to confuse with genuine official notices. See text accompanying *supra* note 23.

<sup>49</sup> See Schechter, *supra* note 11 (quoting Prof. Kenneth W. Stein saying that “[a] university administrator stamped approval and by doing so sanctioned the content of the ‘eviction’ notice”); Shulkes, *supra* note 13 (“Emory’s stamp on the eviction notice makes it look like Emory condones the statements in the flyer.”); *id.* (demanding that “Emory cease from using their logos on content that they do not stand behind”).

<sup>50</sup> See Shulkes, *supra* note 13 (“Emory is dealing with this situation like someone illegally put up an innocuous flyer on people’s doors, as opposed to acknowledging that this eviction notice is much more heinous and a way to make Jewish students feel threatened, targeted and unsafe.”).

<sup>51</sup> See *supra* note 12.

<sup>52</sup> See, e.g., Andrew Pessin & Doron Ben-Atar, *The Silencing of Pro-Israel Students on Campus*, Tablet, Mar. 20, 2018; Scott Jaschik, *Who Gets Shouted Down on Campus?*, Inside Higher Ed, Feb. 26, 2018; Shiri Moshe, *British Jews ‘Appalled’ by King’s College London Protest Against Former Israeli Minister*, *Algemeiner*, Feb. 13, 2018; Shiri Moshe, *Princeton Hillel Cancels Speech by Top Israeli Diplomat, Drawing Criticism and an Apology*, *Algemeiner*, Nov. 7, 2017.

their actions with claims that Zionism is racism or “settler colonialism.”<sup>53</sup> The organizers of the pro-Israel activities, for their part, often view these acts as grounded in anti-Semitic motivations. But our Policy protects both sides in this debate. The content-neutrality that allows ESJP to sharply criticize Israeli government policy is the same content-neutrality that allows Emory’s pro-Israel organizations to sharply criticize the Palestinian Authority and Hamas.<sup>54</sup>

## VI. POTENTIAL SANCTIONS

Finally, there remains the question of what sanctions are appropriate against the group or members involved.

Some have called for “serious consequences” because of the content of the flyers.<sup>55</sup> It follows from our previous discussion that, to the extent that any sanctions rely on the content of the flyers (aside from the issue of posting in private spaces and potential confusion), such sanctions would be inconsistent with the Open Expression Policy. ESJP’s statements about Israeli government policy are protected speech. Moreover, any sanctions against the students or ESJP based on this incident may not take into account their other Israel Apartheid Week activities, which are exercises of their Open Expression rights.<sup>56</sup> (In fact, if someone (other than the affected residents themselves, or University staff enforcing posting guidelines<sup>57</sup>) tore down a flyer on someone’s door, that person would be in violation of the Open Expression Policy.<sup>58</sup>)

To the extent that sanctions rely on the violation of posting guidelines (specifically, posting on doors), those sanctions must be consistent with historical sanctions for similar occurrences—ignoring the content of the protected speech. To the extent there was some genuine confusion as to whether the notices were actual eviction notices, the University

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<sup>53</sup> See, e.g., Jaschik, *supra* note 52.

<sup>54</sup> Not that “pro-Israel” organizations or individuals (or pro-Palestinian organizations or individuals, for that matter) are a unified bloc: pro-Israel organizations and individuals obviously differ in their attitudes toward the current Israeli government, West Bank settlements, and many other policy issues. See, e.g., Jonathan Kopp, *Amid Protests, Careful Language Needed*, Emory Wheel, Apr. 5, 2019; Naomi Keusch Baker, *A Pro-Peace, Pro-Israel and Pro-Palestine Voice Exists*, Emory Wheel, Apr. 6, 2019.

<sup>55</sup> Jewish Fed. of Greater Atl., *supra* note 31; Shulkes, *supra* note 13.

<sup>56</sup> See Shulkes, *supra* note 13 (“[W]e at Hillel would like to see . . . [t]he Emory SJP chapter punished. They should not just receive a slap on the wrist for putting up a flyer in the wrong place. They purposefully flouted their responsibilities of an Emory club in good standing. And instead of acting contrite after illegally posting the eviction notices, they continued with Israeli Apartheid Week as if nothing took place. In fact, they staged a die-in (where students lie on the ground and pretend their dead to mimic the experiences of a terrorized people) in front of Cox Bridge, the place where Hillel and other pro-Israel clubs tabled in order to help heal the Emory community.”).

<sup>57</sup> See Chess & Sadek, *supra* note 10 (“[S]taff removed the flyers from students’ doors because distributors violated Campus Life’s policy against posting flyers on doors.”).

<sup>58</sup> See Policy 8.14.5.8 (“Additionally, a member of the Community who defaces the open expression of others will be held in violation of this policy.”); *In re Trump*, Part II.D, at 9 (“[T]he chalking is fully protected speech under Emory’s Open Expression Policy. (Indeed, the Policy makes clear that any Emory Community member, whether student or employee, who ‘defaces’ such chalking would be the one violating the Policy. . . .)”).

may validly take such effects into account. As we wrote in our opinion about the Trump chalkings: “[T]he University has historically been permissive as to chalking on vertical surfaces, and to our knowledge, has never taken disciplinary action against anyone for chalking on vertical surfaces. Even if the chalking did violate the chalking guidelines, selectively enforcing those guidelines on non-content-neutral or non-viewpoint-neutral grounds violates the Open Expression Policy.”<sup>59</sup>

As far as we know, the University has not been in the practice of imposing heavy sanctions for violating posting guidelines. It is therefore unlikely that heavy sanctions would be appropriate in this instance.

## VII. CONCLUSION

We conclude that the ESJP flyers were properly removed from residence hall doors, since they were posted there improperly.

Residence Life staff acted properly in approving these flyers for posting according to Emory’s posting guidelines. Generally, University officials should not scrutinize the content of flyers before approving them for posting. The content of the flyers at issue here is protected under the Open Expression Policy. To be consistent with the Open Expression Policy, any future policy of scrutinizing the content of flyers must be strictly limited to the exceptions provided for in the Policy itself, for instance true threats, impersonation of the University or another group, or the like.

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

Ross Abbott, graduate student, School of Law  
Christy Bradley, Campus Life  
Nicole Gerardo, faculty, Emory College & Laney Graduate School  
Erica Lee, faculty, School of Medicine  
Nadia Lelutiu, staff, School of Medicine  
Samuel Maidman, graduate student, School of Medicine  
Ashley Mastin, staff, Rollins School of Public Health  
Owen Mattocks, Constitutional Council (ex officio, non-voting)  
Ilya Nemenman, faculty, Emory College & Laney Graduate School  
Zachary Raetzman, student, Goizueta Business School  
Alexander “Sasha” Volokh, faculty, School of Law (chair)

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<sup>59</sup> In re Trump, Part II.D, at 9.

Exhibit A: The mock eviction flyer

# EVICITION NOTICE

**We regret to inform you that your suite is scheduled for demolition in three days.**

*If you do not vacate the premise by midnight on April 5th 2019 we reserve the right to destroy all remaining belongings. We cannot be held responsible for property or persons remaining inside the premises. Charges for demolition will be applied to your student accounts.*

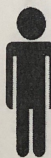
Eviction notices are routinely given to Palestinian families living under Israeli occupation for no other reason than their ethnicity. Forced evictions are arbitrary, racist, humiliating, and in violation of Article 53 of the Fourth Geneva Convention.

Palestinian homes are destroyed as part of the state of Israel's ongoing attempts to ethnically cleanse the region of its Arab inhabitants and maintain an exclusively "Jewish" character of the state. By destroying Palestinian homes, the state makes room for illegal Israeli settlements. The Israeli government itself describes this process as "Judaization."



27,000 Palestinian homes have been destroyed since 1967.

160,000 Palestinians have been left homeless as a result of these policies.

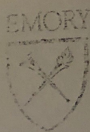


**THIS IS NOT A REAL EVICTION NOTICE.**

**This is intended to draw attention to the reality that Palestinians confront on a regular basis.**

*Source: The Israeli Committee Against House Demolitions*

[www.icahd.org](http://www.icahd.org)



Office of Residence  
&  
Housing Approval

by: *[Signature]*

*More Info*

*FB: @emoryuniversity*

## Exhibit B: Residence Life posting policies

EMORY UNIVERSITY  
CAMPUS LIFE

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# RESIDENCE LIFE POSTING POLICY



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THE GUIDELINES TO ABIDE BY WHEN POSTING IN RESIDENCE HALLS

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### EMORY UNIVERSITY'S POSTING GUIDELINES

Anyone wishing to post items in one of Emory's Residence Halls, must first abide by Emory University's Posting Guidelines and Practices, which falls under the university's Open Expression Policy. If you or someone you know has a concern regarding content of a poster please feel free to reach out to your Complex Director to discuss your concerns and the Open Expression policy and/or feel free to utilize the Bias Incident Reporting Form (if applicable).

### APPROVAL PROCESS

Only Emory University recognized and chartered student organizations and departments can post in residence halls. Posters and flyers must first receive the Res. Life and Housing approval stamp (from the office in Raoul or Clairmont) prior to posting/distribution.



### WHAT IS & IS NOT ALLOWED

- ALLOWED: Posting approved flyers only in designated spaces and/or posting boards within the residence hall
- NOT ALLOWED: Posting flyers on painted surfaces, doors, glass surfaces, elevators or on signs (e.g. exit signs, building signs)
- NOT ALLOWED: Clear tape, duct tape, and masking tape. You may only use painter's tape.
- NOT ALLOWED: Posting flyers on room doors without approval from residents
- NOT ALLOWED: Mass distribution of flyers (i.e. placing flyers under doors of rooms)
- NOT ALLOWED: Posting on RA/SA bulletin boards without prior permission
- ALLOWED: Banners are allowed only if the residential programming space has been reserved.



### DEFINITION OF PRIVATE SPACE

A resident's room assignment (including the bedroom, bathroom, and doors to those rooms) is deemed as the private space of the resident(s) living there. It is encouraged that residents living together come up with their own rules for their assigned private space to discuss their expectations of one another.

### FRIENDLY REMINDER

Please remember to take down your poster once the event is over.