

IN RE EMORY INTEGRITY PROJECT CHALKBOARDS AND OTHER LIMITED PUBLIC FORUMS

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-17-1

September 26, 2017

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 may control the content of user-generated content in "limited public forums" that they have created. A limited public forum is a forum for public participation, created for a defined purpose and limited to particular participants or subject matters.

The University does not need to create limited public forums; it may always choose to express itself directly. The University may speak for itself through its employees and other agents, from the President on down. Or the University may solicit views, choose which to publish, and then publish them in a context that makes clear that they were chosen to support the University's view. Or it may select speakers to assist it in delivering its own message. Clearly, the University has broad discretion in deciding how to convey its own message.

However, *if the University chooses to create a limited public forum*, it must make clear what restrictions it is imposing on the forum in terms of who is allowed to participate and what subject matter is allowed. The requirements that the Open Expression Policy imposes on the University are not onerous: the restrictions on the forum, which must be clearly expressed, must merely be reasonable and viewpoint-neutral. The University may then choose to erase comments, as long as they fall outside this defined purpose, taking care to do so even-handedly and keep within the purposes that it has defined beforehand.

I. INTRODUCTION

Emory University’s Open Expression Policy¹ (“Policy”) “reaffirms Emory’s unwavering commitment to a community that inspires and supports courageous inquiry through open expression, dissent, and protest.”² Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”³ The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”⁴

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.”⁵

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.”⁶ 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.”⁷ 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.⁸ 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.”⁹

In this opinion, we clarify to what extent the University and University-affiliated bodies may control the content of user-generated content in “limited public forums” that they have created. A limited public forum is a forum for public participation, created for a defined purpose and limited to particular participants or subject matters.

The University does not need to create limited public forums; it may always choose to express itself directly. The University may speak for itself through its employees and other agents, from the President on down. Or the University may solicit views, choose which to

¹ 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, *In re Donald Trump Chalkings and Related Matters*, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter *In re Trump*], [http:// 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*]. The Policy was revised on April 12, 2017, so some quotes in previous opinions may refer to the previous version of the Policy.

² Policy 8.14.1.

³ Policy 8.14.1.

⁴ Policy 8.14.2.

⁵ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁶ Policy 8.14.3.2.

⁷ See, e.g., *In re ESJP*.

⁸ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

⁹ Policy 8.14.3.2.

publish, and then publish them in a context that makes clear that they were chosen to support the University’s view. Or it may select speakers to assist it in delivering its own message. Clearly, the University has broad discretion in deciding how to convey its own message.

However, *if the University chooses to create a limited public forum*, it must make clear what restrictions it is imposing on the forum in terms of who is allowed to participate and what subject matter is allowed. The requirements that the Open Expression Policy imposes on the University are not onerous: the restrictions on the forum, which must be clearly expressed, must merely be reasonable and viewpoint-neutral. The University may then choose to erase comments, as long as they fall outside this defined purpose, taking care to do so even-handedly and keep within the purposes that it has defined beforehand.

II. THE UNIVERSITY AND SPECIAL FORUMS INVITING COMMUNITY INPUT

The Emory Integrity Project (EIP), “a joint project of Emory’s Center for Ethics and its Division of Campus Life,” is “a comprehensive effort to promote and develop a culture of ethics and integrity throughout Emory’s undergraduate experience.”¹⁰

One of EIP’s Fall 2016 projects involved setting up “chalkboards strategically located within buildings and common spaces across campus.” The chalkboards presented “a series of rotating prompts—such as ‘Leading with integrity looks like . . .’—that invite[d] community feedback.”¹¹ Other prompts included “An obstacle to respectful dialogue @ Emory is . . .”,¹² “The campus culture of Emory is . . .”, “Making a positive impact on the world is . . .”, “Given recent national events this will be a place for open expression and solidarity . . .”, and “Refusing to stand during the national anthem as a form of protest is . . .” There were nine prompts in all.

Some of the comments on the boards actually addressed the prompts and were “serious and engaging”; other comments instead made nonresponsive references to Harambe and Donald Trump.¹³ The experience with the chalkboards raised questions about the extent to which it is permissible, under the Open Expression Policy, for EIP to erase some of these comments.

Though the chalkboard project is over, similar issues arise in other contexts.

For instance, Emory Law School has established and maintains several Facebook groups. “Emory Law Class of 2020” is an example of a “closed group,” where membership is

¹⁰ Elaine Justice, Emory Integrity Project Launched with \$2.6 Million Grant from Templeton Foundation, Emory News Ctr., Jan. 11, 2016, http://news.emory.edu/stories/2016/01/upress_emory_integrity/campus.html.

¹¹ Kimber Williams, Emory Integrity Project Invites Community Conversation, Emory Report, Sept. 1, 2016, http://news.emory.edu/stories/2016/08/er_emory_integrity_project/campus.html.

¹² See EIP’s Instagram post at <https://www.instagram.com/p/BJ2tj8LDWbz/?taken-by=emoryintegrity>.

¹³ Maggie Halickman, We Need to Talk About Safe Spaces, Emory Wheel, Sept. 22, 2016, <http://emorywheel.com/we-need-to-talk-about-safe-spaces/>; see also Emory Integrity Project Brings YouTube Comment Section to Life, Emory Spoke, Sept. 19, 2016 (a satirical commentary on the chalkboards in Emory’s humor magazine). References to Harambe, a gorilla killed at the Cincinnati Zoo in May 2016, have become common in popular culture and Internet memes.

limited to those who have been admitted by a group administrator—typically a student falling into the relevant category, plus a handful of staff members.¹⁴ Once a member has been admitted, they have the ability to post on any subject, though most posts are on innocuous subjects—roommate requests and the like.

In addition to these Facebook *groups*, Emory Law School has also established and maintains several Facebook *pages*, for instance “Emory University School of Law,”¹⁵ “Emory Law School Career Center,”¹⁶ and “Center for the Study of Law and Religion.”¹⁷ Only certain authorized individuals (typically staff members) may post on these pages, but anyone with a Facebook account may post comments (and, on some pages, reviews).

Similar Facebook groups¹⁸ and pages¹⁹ exist throughout the University.

These groups and pages present certain similar issues to the EIP chalkboards: they are all forums established by the University or University-affiliated bodies that in some way invite input from select groups within the Community, or from the Community at large. To what extent may those in charge of these forums control what is posted on these forums and control or delete content created or posted by Community members?

III. OPEN EXPRESSION IN LIMITED PUBLIC FORUMS

A. Limited Public Forums and the First Amendment

As we have explained in past opinions, Emory University is a private institution; therefore, the First Amendment of the U.S. Constitution does not bind the University of its own force.²⁰ 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.”²¹ We have recognized on several occasions that the Policy “incorporates at least the same substantive standards that the First Amendment imposes on public universities.”²² As a result, the Emory Community—a category that includes faculty, students, staff, and others²³—has at least the same rights as the communities of the

¹⁴ <https://www.facebook.com/groups/385761548441191/>.

¹⁵ <https://www.facebook.com/emorylaw/>.

¹⁶ <https://www.facebook.com/Emory-Law-School-Career-Center-233454750064864/>.

¹⁷ <https://www.facebook.com/Center-for-the-Study-of-Law-and-Religion-447801610174/>.

¹⁸ See, e.g., the following Facebook groups: Emory Class of 2021 (Official Group), <https://www.facebook.com/groups/emorycollege2021/>; Oxford College of Emory University Class of 2016, <https://www.facebook.com/groups/220545784717744/>.

¹⁹ See, e.g., the following Facebook pages: Emory Continuing Education, <https://www.facebook.com/EmoryContEd/>; Emory Alumni Association, <https://www.facebook.com/EmoryAlumniAssociation/>.

²⁰ See *In re ESJP*, Part I.B, at 2; *In re Trump*, Part I.A, at 3; *In re Community*, Part II, at 2–3.

²¹ Policy 8.14.5; see also *id.* (“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.”).

²² *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.

²³ See generally *In re Community*; see also Ajay Nair, Student Affairs Professionals: Open Expression and Beyond, NASPA: Student Affairs Administrators in Education, July 17, 2017, <https://www.naspa.org/about/blog/student-affairs-professionals-open-expression-and-beyond> (“[A]cademic freedom and open

University of Georgia or Georgia State University.”²⁴ Indeed, “[i]n 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.”²⁵

The Policy’s endorsement of First Amendment rights is helpful in interpreting the Policy’s terms. “[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.”²⁶ The same is true of judicial interpretations of the First Amendment in analogous contexts outside of universities.

In this case, First Amendment caselaw is especially useful, because it gives a name (and a framework for analysis) to forums like the EIP chalkboards or University-created Facebook groups and pages: “limited public forums,” or forums “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”²⁷ The term “limited public forum” was coined by contrast with “traditional” or “ordinary” public forums, like sidewalks and parks, which are presumptively open to the entire public for purposes that are not limited ahead of time. In the University context, obvious examples of ordinary public forums are, for instance, common areas like campus sidewalks or the Quad, where Community members can talk to each other about whatever they like.

Limited public forums, as discussed above, may include physical spaces like chalkboards or the use of University spaces by student organizations,²⁸ but they may also include virtual spaces like pages on social media, or even more “metaphysical” forums like a Student Activities Fund created “to support a broad range of extracurricular student activities.”²⁹

expression must extend to all community members, including staff and especially student affairs professionals . . .”).

²⁴ 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.

²⁵ In re ESJP, Part I.C, at 3–4; see also In re Community, Part II, at 3.

²⁶ In re ESJP, Part I.B, at 3.

²⁷ Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 71 n.7 (1983).

²⁸ See, e.g., Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 390–97 (1993). The Open Expression Policy already recognizes the demands of open expression as to the use of spaces by student organizations. See Policy 8.14.5.3 (“It is the policy of the University to protect voluntary assembly and to make its facilities available for assembly. . . . Such standards must be reasonable and not require excessive limitations when not warranted, and it is the responsibility of administrators of space on campus to ensure policies and procedures promote open expression. Reservations shall not be denied to any member of the Community based on content of the Meeting, Event, or Dissent unless such content would otherwise violate the responsibilities set forth in 8.14.5.5 of this Policy.”).

²⁹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824, 830 (1995). The Open Expression Policy already recognizes the demands of open expression as to student organization recognition and funding. See Policy 8.14.5.3 (“The University shall not deny recognition to an organization because of disagreement with its mission or the viewpoints that it represents. However, the University may properly take into account, when allocating scarce resources to groups, whether one group’s mission is duplicative of another’s.”).

It is clear from courts' discussion of limited public forums that the government—and thus the University in the context of the Open Expression Policy—has broad discretion as to whether and how to allow public expression in such forum, precisely because these *limited* public forums are set up for *limited* purposes. As we make clear below, the restrictions on expression in limited public forums must merely be reasonable and viewpoint-neutral.

B. The University May Simply Speak for Itself

In the first place, the government is not required to set up a limited public forum at all: it may simply speak for itself. And the same is true of the University, under the Policy. The government, and government officials, may speak out and argue in favor of their own views of sound policy (that is, after all, why we elect politicians).³⁰ Similarly, the “Emory University Community”—the set of people who have rights and responsibilities under the Open Expression Policy—includes all University students, faculty, staff, trustees, and Board members,³¹ and therefore includes anybody at Emory with any decisionmaking authority. President Sterk has the same right to chalk a message as any undergraduate student,³² and similarly, the decisionmakers of the University may issue statements and spend University funds and resources to convey a particular message.

The University, through its employees and other agents, and acting through any of its subdivisions, may thus affirm its support for undocumented students³³ or transgender students³⁴ or a particular vision of sustainability³⁵ or gender equity,³⁶ or may speak out against “[s]upremacist ideology,”³⁷ without providing equal support to the contrary position, though of course it may not ordinarily prevent Community members from expressing contrary (even offensive) positions on these matters.³⁸

³⁰ See *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (“The exception is necessary to allow the government to stake out positions and pursue policies.”).

³¹ Policy 8.14.2(2).

³² See *In re Trump*, Part II.D, at 9 & n.47 (noting that then-President James Wagner himself chalked the text “Emory Stands for Free Expression!” on a sidewalk).

³³ Ajay Nair & Stuart Zola, Emory Affirms Support for Undocumented Students, Emory News Center, http://news.emory.edu/stories/2016/11/upress_letter_response/index.html (Jan. 18, 2017).

³⁴ Stuart M. Zola & Lynell Cadray, Statement on Recent Federal Guidelines Related to Transgender Restrooms/Title IX, http://news.emory.edu/stories/2017/02/upress_transgender_statement/ (Feb. 25, 2017).

³⁵ Emory Sustainability Vision and Strategic Plan, http://sustainability.emory.edu/uploads/articles/2016/05/2016050607512849/VisionReport_5-5-16.pdf (May 5, 2016).

³⁶ Ctr. for Women at Emory, Mission and Values Statement, <http://www.womenscenter.emory.edu/aboutTheCenter/missionAndVisionStatement.html>.

³⁷ E-mail from Emory President Claire E. Sterk to the Emory community, Aug. 14, 2017 (“Supremacist ideology does not, and will not, have a seat at Emory University’s table.”).

³⁸ Compare Nair, *supra* note 23 (“[R]egulating some ideas and not others is a slippery slope. . . . [I]deas—especially provocative ones—must flourish. Speech that we do not agree with must be intellectually challenged so that other provocative ideas cannot be dismissed because of regulations. We hope that, in a society that truly values civility and respect, hate speech will suffer the social opprobrium that it deserves.”), with *id.* (arguing that the university should, instead of regulating speech, “counter the ill-effects of [hate speech against marginalized groups] by *supporting* students most affected” (emphasis added)).

The government, and the University, may also solicit a wide variety of views, then choose which views to print. This is likewise government (or University) speech, provided it is clear from the context that the message is that of the government (or University), which has purposely selected particular views that it favors.³⁹ For instance, Emory Law School's International Humanitarian Law Clinic posts videos of student testimonials on its website,⁴⁰ and Laney Graduate School likewise posts the text of student testimonials about its Population Biology, Ecology, and Evolution Graduate Program.⁴¹ These sites do not give equal time to negative testimonials, nor do they print all testimonials indiscriminately. Everybody understands that the sites, including the decision of which testimonials to include, are the University's own speech, and that the content is selected to support the University's chosen message.

Like government under the First Amendment, the University may also, consistent with the Policy, select "private speakers . . . for a government program to assist [it] in advancing a particular message."⁴² Thus, the University's Support & Opportunities for Latin@s (SOL) program affirms particular values to the exclusion of others, and chooses student leaders (SOL Managers, SOL Coordinators, and an SOL SQUAD of student volunteers) to help it implement its vision.⁴³ Most obviously, because the University is an abstract entity, the primary way it speaks is by hiring employees and paying them with University funds to speak on its behalf. None of this activity offends the Open Expression Policy, since it can be characterized as the University's own speech, which is not required to be neutral as between different viewpoints.

C. Reasonable and Viewpoint-Neutral Restrictions in Limited Public Forums

If—instead of, or in addition to, speaking for itself—the government (or the University) does decide to establish a limited public forum where Community input is invited, it "may restrict access to 'certain groups' or to 'discussion of certain topics,'" provided those restrictions are "reasonable and viewpoint neutral."⁴⁴ Neutrality as between different viewpoints is one of the foremost requirements that the First Amendment imposes on

³⁹ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–73 (2009).

⁴⁰ Emory Law School, Int'l Humanitarian Law Clinic, <http://law.emory.edu/academics/clinics/international-humanitarian-law-clinic.html>.

⁴¹ Emory Univ., Laney Grad. Sch., Population Biology, Ecology, & Evolution Grad. Prog., Student Testimonials, http://biomed.emory.edu/PROGRAM_SITES/PBEE/about-us/testimonials.html.

⁴² *Matal v. Tam*, 137 S. Ct. 1744, 1768 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

⁴³ Emory Univ., Campus Life, Off. of Multicult. Progs. & Servs., SOL Leadership, <http://www.emory.edu/MULTICULTURAL/me/sol/staff.html>.

⁴⁴ *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 383 (4th Cir. 2006); *Davison v. Plowman*, 2017 WL 1164480, at *4 (E.D. Va. Mar. 28, 2017). See also Nair, *supra* note 23 ("If we truly embrace open expression, we must be prepared to embrace ideas that challenge our sensibilities. Open expression must apply to those with whom we disagree as well as those with whom we agree. It must apply to conservatives who, incidentally, report feeling marginalized on many campuses, as well as to progressives/liberals and everyone else across the political spectrum.")

government⁴⁵ and that the Open Expression Policy imposes on the University.⁴⁶ Then, once the government (or the University) has established the limited public forum, it “must respect the lawful boundaries it has itself set,”⁴⁷ and “‘viewpoint discrimination’ is forbidden.”⁴⁸

Thus, for instance, an Emory Integrity Project chalkboard may announce that it is soliciting opinions on refusing to stand during the national anthem. Then, those in charge of the chalkboard may erase unrelated or nonresponsive comments, such as statements about Harambe or other opinions that do not relate to the national anthem, and may even curate the content in other (viewpoint-neutral) ways, such as by erasing comments after a certain time, erasing comments that are duplicative to allow more space on the chalkboard for other comments, or erasing comments that fall below a (viewpoint-neutral) level of quality.

The restrictions on the University are not onerous: the prompt must be viewpoint neutral, and the University must respect the limitation contained within the prompt—i.e., it may not selectively erase comments that take a view that the University does not favor.

IV. CONCLUSION

The University may express itself directly in many different ways. It may speak through its employees or other agents. It may solicit private views, such as testimonials, and print the ones that it likes in a way that makes it clear that the choice of what to print is the University’s. It may select private speakers for its own programs. It has broad discretion in choosing what messages (if any) to convey and how to convey these messages.

But if the University chooses to create a “limited public forum,” where community input is invited but participation is limited to select groups or particular subject matters, it must make clear what participation and subject-matter restrictions it is imposing on the forum. The requirements that the Open Expression Policy imposes on the University are not onerous: the restrictions on the forum, which must be clearly expressed, must merely be reasonable and viewpoint-neutral. The University may then choose to erase comments,

⁴⁵ See, e.g., *Matal*, 137 S. Ct. at 1763 (opinion of Alito, J.) (“We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’” (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))); *id.* at 1765 (Kennedy, J., concurring in part and concurring in the judgment) (viewpoint discrimination is “a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny”).

⁴⁶ See, e.g., Policy 8.14.5.2 (“Expression that communicates a viewpoint, regardless of form, is protected as long as it does not violate the guidelines of this Policy.”); *id.* 8.14.5.3 (“Reservations shall not be denied to any member of the Community based on content of the Meeting, Event, or Dissent unless such content would otherwise violate the responsibilities set forth in 8.14.5.5 of this Policy.”); *id.* (“The University shall not deny recognition to an organization because of disagreement with its mission or the viewpoints that it represents.”); *id.* 8.14.5.6 (“For planned events, . . . no reservation shall be denied because of the content of expression.”); *id.* 8.14.5.7 (“No group or organization should be denied use of a space on campus because of the content of the Meeting, Event, or Protest, unless such content would otherwise violate the responsibilities set forth in 8.14.5.5 of this Policy.”); *id.* 8.14.5.8 (“No nonpersonal expression should be denied because of the content of the flyer, sign, or display within the limits of the law.”).

⁴⁷ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

⁴⁸ *Id.* at 829–31; *Matal*, 137 S. Ct. at 1763 (opinion of Alito, J.) (citing *Rosenberger*, 515 U.S. at 819).

as long as they fall outside this defined purpose, taking care to do so even-handedly and keep within the purposes that it has defined beforehand.

Composition of the Committee for Open Expression:

Ross Abbott, Constitutional Council (ex officio, non-voting)
Morgan Ackley, student, Emory College
Nidia Bañuelos, faculty, Libraries & Information Technology
Christy Bradley, Campus Life
Jennifer Kostyrna, staff, Business Practice Improvement
Maria Lameiras, staff, Communications & Public Affairs
Erica Lee, faculty, School of Medicine
Samuel Maidman, student, School of Medicine
Ashley Mastin, staff, Rollins School of Public Health
Zachary Needell, graduate student, School of Law
Ilya Nemenman, faculty, Emory College & Laney Graduate School
Kyla Smith, student, Emory College
Alexander “Sasha” Volokh, faculty, School of Law (chair)
Edward Wang, student, Emory College