

IN RE CONTROVERSIAL DISPLAYS IN UNIVERSITY SPACES

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE–22–1

February 1, 2022

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 what happens when Emory Community members are given permission to put up displays in certain common areas, and this permission is revoked once the University unit that manages that common area becomes aware of a controversial aspect of the display’s message.

When the University makes a space generally available for reservation by members of the Emory community (such as registered student organizations), and if the organization reserves the space according to the usual rules and puts up a display promoting its viewpoint, the University may not discriminate against the organization’s speech based on disagreement with the viewpoint of the speech. When the University speaks in its own voice, it may affirm views that it favors. By contrast, when the University allows the speech of others in certain spaces, this rule of non-discrimination is required by the University’s commitment to viewpoint-neutrality; allowing the speech does not constitute endorsement of the speakers’ views.

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, by “provid[ing] education . . . to the Community” about these issues, as “necessary to effectuate [the] Policy”⁹—for instance, by clarifying the provisions of the policy and exploring how it may apply in particular recurring scenarios.

It occasionally happens that Emory Community members are given permission to put up displays in certain common areas, and that this permission is then revoked (either before

¹ The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in various recent documents, *In re Emory Students for Justice in Palestine*, No. CFOE–16–1 (Feb. 10, 2016) [hereinafter *In re ESJP*]; *In re Donald Trump Chalkings and Related Matters*, No. CFOE–16–2 (Apr. 26, 2016) [hereinafter *In re Trump*]; *In re Definition of Community Member*, No. CFOE–16–3 (Nov. 21, 2016) [hereinafter *In re Community*]; *In re Emory Integrity Project Chalkboards and Other Limited Public Forums*, No. CFOE–17–1 (Sept. 26, 2017) [hereinafter *In re Limited Public Forums*]; *In re Demanding Speakers’ Credentials*, No. CFOE–19–1 (Feb. 21, 2019); *In re Displays Naming Specific People*, No. CFOE–19–2 (Feb. 22, 2019); and *In re Mock Eviction Notices*, No. CFOE–19–3 (Apr. 15, 2019). These documents are available at <https://senate.emory.edu/about/committees/open-expression.html>. The Policy was revised on September 21, 2018, so some quotes in previous documents may refer to the previous version of the Policy.

² Policy 8.14.1.

³ *Id.*

⁴ Policy 8.14.2.

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

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.

or after those displays are put up) once the University unit that manages that common area becomes aware of a controversial aspect of the display's message.

This has occasionally occurred around Christmas, when student organizations have reserved University spaces and put up controversial displays of Nativity scenes, using the Nativity story as an allegory for immigration, refugees, or the Israeli-Palestinian conflict. This phenomenon is broader than just Nativity scenes, but the general pattern is similar. Perhaps the University became aware of the controversial aspect after it had already given permission for the display, or perhaps some aspect of the message did not become controversial until after permission had been given. Either way, once the controversial content has become known, the University has sought to revoke the permission that it had previously granted.

We conclude that, when the University makes a space generally available for reservation by members of the Emory community (such as registered student organizations¹⁰), and if the organization reserves the space according to the usual rules and puts up a display promoting its viewpoint, the University may not discriminate against the organization's speech based on disagreement with the viewpoint of the speech. When the University speaks in its own voice, it may affirm views that it favors. By contrast, when the University allows the speech of others in certain spaces, this rule of non-discrimination is required by the University's commitment to viewpoint-neutrality; allowing the speech does not constitute endorsement of the speakers' views.

II. EMORY COMMUNITY MEMBERS MAY SPEAK, BUT SO MAY EMORY ITSELF

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 Open Expression Policy affirms that "Emory University respects the Constitutional rights of free speech and assembly." We have often recognized that the Policy voluntarily incorporates at least the same substantive standards that the First Amendment imposes on public universities. As a result, members of the Emory Community—a category that includes faculty, students, staff, and others—have at least the same free speech rights as their counterparts at 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.¹¹

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;

¹⁰ The "Emory Community" whose rights are protected by the Policy includes students, staff, faculty, and some others. See generally Policy 8.14.2; *In re Community*. Thus, whenever this document refers to student organizations by way of example, the same would be true if the organizations were composed of faculty or staff members.

¹¹ *In re Limited Public Forums*, Part III.A, at 4–5 (quoting Policy 8.14.5) (some internal quotation marks omitted) (internal brackets removed).

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.”¹² The same is true of judicial interpretations of the First Amendment in analogous contexts outside of universities.

Thus, we recently discussed the appropriate treatment of so-called “limited public forums,”¹³ or forums “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”¹⁴ “Traditional” or “ordinary” public forums, like campus sidewalks, are presumptively open to the entire public for purposes that are not limited ahead of time—Community members there can talk to each other about whatever they like. Limited public forums include certain University spaces that the University has chosen to open up for use by student organizations.¹⁵

When limited public forums are at issue, the University may restrict access to certain groups or to discussion of certain topics, provided those restrictions are reasonable and viewpoint neutral. Neutrality as between different viewpoints is one of the foremost requirements that the First Amendment imposes on public universities and that the Open Expression Policy endorses at Emory. The University is not required to establish any limited public forum: it could take down its public bulletin boards or prohibit non-class use of classrooms. But once the University has chosen to establish a limited public forum, it must respect the boundaries it has set, and viewpoint discrimination is forbidden.¹⁶

At the same time, the University may also speak for itself. The University president has the same Open Expression rights as any other member of the Emory Community, and so do other University decisionmakers. Thus, the University may support undocumented students or transgender students or a particular vision of sustainability or gender equity, or may speak out against supremacist ideology, 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.¹⁷

As we have previously pointed out, University speech can take the form of direct statements by University officials. But the University may also “solicit a wide variety of views, then choose which views to print”—as in the case of selected student testimonials about particular University programs. It can also “select private speakers . . . for a [University] program to assist it in advancing a particular message.”¹⁸ This activity is fully consistent with the Open Expression Policy, since it can be characterized as the

¹² In re ESJP, Part I.B, at 3.

¹³ In re Limited Public Forums.

¹⁴ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 71 n.7 (1983).

¹⁵ In re Limited Public Forums, Part III.A, at 5.

¹⁶ *Id.*, Part III.C, at 7–8.

¹⁷ *Id.*, Part III.B, at 6.

¹⁸ *Id.* at 7 (internal quotation marks and footnote omitted) (internal brackets removed).

University's own speech, which does not have to be neutral as between different viewpoints.¹⁹

There are thus two main categories of speech: the university's own speech, which the university may freely control, and speech by other members of the Emory Community, which the university generally *may not control* based on viewpoint. It is therefore important to be clear, in any given case, which type of speech is at issue.

III. DISTINGUISHING BETWEEN UNIVERSITY AND NON-UNIVERSITY SPEECH

When University officials make statements in their capacity as University officials—whether on a common sidewalk, in a campus-wide e-mail, or in University promotional materials—it is usually obvious to all that the speech is University speech.²⁰ For instance, the University regularly hangs banners on campus streetlights with University-approved messages. These banners have, in the past, advertised Carlos Museum exhibits, noted Emory's 175th anniversary, and promoted environmental sustainability. Nobody thinks that these streetlights are generally available for student organizations. Because those banners are clearly University speech, the University is free to remove a banner or change its text if it finds something objectionable about the message, and this does not implicate the Open Expression Policy.

At the other extreme, certain venues are immediately recognizable as limited public forums, where the speech is not that of the University. When one sees flyers for events posted on a kiosk, everyone understands that the speech is that of the individual Emory Community members who have posted the flyers. Because it is a limited public forum, the University may impose certain reasonable restrictions on what sorts of flyers may be posted or how long they may stay up, but it may not bar a flyer because of disagreement with its content. Similarly, when a student organization like Young Democrats of Emory or Christian Legal Society reserves a classroom for a meeting, it is immediately apparent that the speech is that of those organizations, not that of the University.

But in some cases, it may be trickier to figure out whether particular expression is University speech or non-University speech.

The case of selected student testimonials (praising a particular program, major, department, or school) is a good example. Suppose the University decides to remove a particular student's testimonial because it (belatedly) decides that the content of the testimonial is objectionable. (Or perhaps the particular student has become embroiled in

¹⁹ *Id.*

²⁰ Even in a traditional public forum, the University is free to engage in its own speech. Cf. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (“[A]lthough a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”).

controversy, and the University would rather not have the student's name prominently displayed among the testimonials.)

May the University do this? If the selection of the testimonials is clearly the University's expressive act (for instance, if the testimonials are part of a University-curated web site or the University's promotional materials), it is clear that University speech is at issue. But if the testimonials were written on a bulletin board where students were invited to give their views of a program, then the student testimonials are the students' own speech, and the University may not remove them due to controversial content.²¹

The line between University speech and non-University speech is contextual—but most of the time, the categorization is clear. Suppose that a University space is regularly made available for reservation by recognized student organizations, and that these organizations regularly put up displays related to the organizations' mission. Then suppose that such a student organization does in fact reserve that space under the usual reservation rules and proceeds to put up its displays. (In December, it would not be surprising to see a Nativity scene, and—as mentioned in the Introduction—the organization's interpretation of the Nativity scene might involve parallels with refugees, immigrants, or Palestinians. Or, at any time of the year, an organization might put up a display endorsing some controversial position on domestic policy, international relations, or anything else.) That space is a limited public forum, and the speech there is the organization's speech, not the University's. The University may not censor the speech, or revoke the organization's permission to put up its display, based on disagreement with the organization's message.

IV. CONCLUSION

When the University makes a space generally available for reservation by the Emory Community (which includes faculty, staff, and students), the presumption is that this space is a limited public forum. This means that the restrictions on speech within that forum should be reasonable, and the University may not discriminate within that forum based on the viewpoint of the speech.

There is a peril associated with limited public forums. The University is not required to make limited public forums available—it may decrease or eliminate the availability of kiosks, classrooms for student organization use, public space for reservation by student organizations, and the like. Similarly, it may convert a limited public forum into a space for University speech by exercising tight control over the content of speech that it allows. What if the University responds to particularly controversial speech by shutting down a forum entirely?

This peril exists, but it is unavoidable because we cannot control what spaces the University makes available for speech by the Emory Community. We trust, however, that

²¹ This was the case of the Emory Integrity Project chalkboards discussed in *In re Limited Public Forums*.

the University will be guided by the spirit of Open Expression. This means that the University should not respond to controversial speech in a particular forum by shutting down the forum or fundamentally changing its character. Moreover, though the University is of course allowed to change the number and location of available public spaces, it should always take care to provide ample opportunity for speech by members of the Emory Community.

Composition of the Committee for Open Expression:

Leah Bader, student, Emory College
Grace Berner, graduate student, School of Law
Garrett Canterbury, student, Emory College
Nicole Gerardo, faculty, Emory College & Laney Graduate School
Kate Hawks, graduate student, Laney Graduate School
Briana John, student, Emory College
Erica Lee, faculty, School of Medicine
Nadia Lelutiu, staff, School of Medicine
Ashley Mastin, staff, Rollins School of Public Health
Ilya Nemenman, faculty, Emory College & Laney Graduate School
Rhonda Patrick, staff, James Weldon Johnson Institute
Lydia Smith, Campus Life
Alexander “Sasha” Volokh, faculty, School of Law (chair)
Jane Wang, Constitutional Council (ex officio, non-voting)