

IN RE DONALD TRUMP CHALKINGS AND RELATED MATTERS

Opinion of the Emory University Senate Standing Committee for Open Expression

No. CFOE-16-2

April 26, 2016

Executive Summary

The Emory University Standing Committee for Open Expression (“the Committee”) 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 to Community members interpreting Emory’s Open Expression Policy and the rights and responsibilities of individuals and groups under it, this Committee expresses its view on several incidents related to political expression that took place in March 2016: (1) pro-Donald Trump chalkings, (2) a “Mein Trumpf” poster, (3) the drawing of a Hitler mustache on a Trump poster, (4) the cutting up of two pro-Bernie Sanders posters, and (5) the placing of an Israeli flag over an anti-Israel sign.

The phrases “Trump 2016” and other pro-Donald Trump messages were found chalked on public spaces near the center of campus. The Open Expression Policy protects the content of these chalkings. Some instances of chalking may have violated one of the many chalking guidelines that possibly applied (e.g., by being on vertical surfaces), but the University has never taken disciplinary action against anyone accused of violating such guidelines, and it may not start doing so for reasons related to the content of the message. We believe that Emory has not pursued anyone in connection with this incident and does not plan to do so. This Committee recommends that the University develop a chalking policy that is reasonable, neutral as to content, clear as to when Emory staff may remove messages, uniform to the extent feasible, and easily accessible online to all members of the Emory Community.

A “Mein Trumpf” poster comparing Donald Trump to Hitler and the KKK is likewise protected content.

On at least four other occasions, posters or signs were defaced or hidden by unknown parties: a Hitler mustache was drawn on a Trump poster, a Bernie Sanders sign was cut up, another Bernie Sanders message was altered by the addition of extraneous text, and a sign critical of a pro-Israeli display was covered by an Israeli flag. The individuals involved in these incidents violated the Open Expression Policy.

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.” Under the Policy, the University “affirms the rights of members of the Community to assemble and demonstrate peaceably.”² The Policy “is paramount to other policies of the University that may conflict, except those grounded expressly in local, state, or national law.”³

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.”⁴

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.”⁵ One way that it does so is by “[i]nvestigating alleged infringements of the right of members of the Community concerning speech, debate, open expression, Protest, Dissent, and other related matters.”⁶ 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.⁷ 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.”⁸

Thus, this opinion discusses several instances of political speech, or suppression of political speech, from March 2016 that have been brought to our attention:

- pro-Donald Trump messages written on Emory’s campus in chalk;
- a “Mein Trumpf” flyer portraying Donald Trump as Hitler and a Klansman;
- the drawing of a Hitler mustache on a Trump poster;
- the destruction or alteration of pro-Bernie Sanders flyers; and
- the placing of an Israeli flag over an anti-Israeli sign.

¹ The Policy is available at <http://policies.emory.edu/8.14>. We have discussed the Policy in greater depth in our recent opinion, *In re Emory Students for Justice in Palestine*, No. CFOE–16–1 (Feb. 10, 2016) [hereinafter *In re ESJP*], <http://www.senate.emory.edu/documents/cfoe-palestine-16.02.10-revised2.pdf>.

² Policy 8.14.1.

³ Policy 8.14.2.

⁴ Policy 8.14.3. The members of the Committee are listed at the end of this opinion.

⁵ Policy 8.14.3.2.

⁶ See, e.g., *In re ESJP*.

⁷ Policy 8.14.4 describes generally the procedure for filing complaints to the Committee.

⁸ Policy 8.14.3.2.

II. PRO-DONALD TRUMP CHALKING

A. The University's Policy of Neutrality as Between Different Types of Content

On Monday, March 21, 2016, numerous pro-Donald Trump messages were found chalked around the Emory campus.⁹ Most read “Trump,” “Trump 2016,” “Vote Trump,” “Vote Trump 2016,” or some variants of the above; other messages were “Accept the Inevitable: Trump 2016”¹⁰ and “Build the Wall.”¹¹

The permissibility of the chalking is primarily governed by section 8.14.5.8 of the Open Expression Policy on “Nonpersonal Protests such as flyers, signs, displays, etc.” Most importantly, that section enshrines a rule that the University must be neutral as to the content of the speech:

No nonpersonal Protests should be denied because of the content of the flyer, sign, or display within the limits of the law. Additionally, a member of the Community who defaces the open expression of others will be held in violation of this policy.¹²

In light of the Policy's statement that nonpersonal protests may not be denied (before the fact) because of content, it is apparent that nonpersonal protests likewise may not be punished (after the fact) because of content.¹³ The content of the chalkings is thus fully protected under the Policy. (This makes sense since, as we have written before, Emory's Open Expression Policy incorporates at least the same substantive standards that the First Amendment imposes on public universities,¹⁴ so that the Emory Community has at least the same rights as the communities of the University of Georgia or Georgia State University.)

⁹ Here, as in the rest of this opinion, our report of the facts as we understand them should not be interpreted as factual findings for purposes of any possible future disciplinary hearings or for any other purpose. In the event that we are mistaken about any of the facts, our conclusions here should be interpreted as being statements about how the Policy would apply if our view of the facts were correct.

¹⁰ Sam Budnyk, Emory Students Express Discontent with Administrative Response to Trump Chalkings, Emory Wheel, Mar. 22, 2016, <http://emorywheel.com/emory-students-express-discontent-with-administrative-response-to-trump-chalkings/>.

¹¹ Amanda Obando Polio, Emory Student: It's Not About Chalk. It's About the Message Trump Sends to People of Color, Grade Point, Mar. 25, 2016, <https://www.washingtonpost.com/news/grade-point/wp/2016/03/25/emory-student-its-not-about-chalk-its-about-the-message-trump-sends-to-people-of-color/>. Some pictures of the chalking can be found at Susan Svrluga, Someone Wrote ‘Trump 2016’ on Emory's Campus in Chalk. Some Students Said They No Longer Feel Safe, Grade Point, Mar. 24, 2016, <https://www.washingtonpost.com/news/grade-point/wp/2016/03/24/someone-wrote-trump-2016-on-emorys-campus-in-chalk-some-students-said-they-no-longer-feel-safe/>; Jim Galloway, Chalk One up for Donald Trump at Emory University, Atl. J.-Const., Mar. 22, 2016, <http://politics.blog.ajc.com/2016/03/22/chalk-one-up-to-donald-trump-at-emory-university/>.

¹² Policy 8.14.5.8.

¹³ See also In re ESJP, Part IV.B.3, at 9.

¹⁴ Id., Part I.B–C, at 2–4.

Some parties had expressed a concern that the chalked messages “were meant to intimidate rather than merely to advocate for a particular candidate, having appeared outside of a Georgia election or campus campaign activity.”¹⁵ But Emory Community members’ open expression rights do not depend on whether an election in Georgia is imminent or whether a political campaign has been active on campus; and there is no reason to presume an intent to intimidate when political messages appear outside of those contexts.

In any event, a statement like “Trump 2016” is core political expression. If *any* expression is protected under the Policy, clearly this includes expressions of support for or opposition to candidates or their policies. This is true whether the statement is made honestly, ironically (e.g., “Billionaires for Bush”), or with any other subjective intent. Therefore, whether the chalkings were made to intimidate or “merely to advocate for a particular candidate” is not relevant to whether they are protected expression under the Policy.

B. Applicability of Claims of Pain and Fear

Some students reported that the chalkings caused them pain.¹⁶ It is true that, while the Policy protects Community members’ open expression rights, the University also:

affirms the right of others to pursue their normal activities and to be protected from physical, mental, or emotional injury or property damage.¹⁷

But, as we held in the context of a display accusing Israel of being an apartheid state, the content of “nonpersonal Protests” (such as displays or chalking) is expressly protected under the Policy¹⁸ and therefore cannot give rise to mental or emotional injury prohibited under the policy.¹⁹ Even outside of the context of nonpersonal protests, expressions of opinion on subjects of social or political interest cannot constitute “mental or emotional injury” prohibited under the Policy.

The “mental[] or emotional injury” proviso in the Policy is significant. For instance, Georgia law—like the law of every other state—recognizes the tort of “intentional infliction of emotional distress.”²⁰ Georgia also recognizes the tort of “negligent infliction of emotional distress.”²¹ These are also sometimes called intentional or

¹⁵ Emory President James Wagner Responds to Campus Chalkings, Emory Report, Mar. 22, 2016 [hereinafter Wagner letter], http://news.emory.edu/stories/2016/03/er_take_note_chalkings/campus.html (also referring to “perceived intimidation”).

¹⁶ Namrata Susan Verghese, Administration Responds to Student Protests, Emory Wheel, Mar. 23, 2016, <http://emorywheel.com/22416-2/>; Budnyk, supra note 10; Wagner letter, supra note 15.

¹⁷ Policy 8.14.1; see also id. 8.14.5.5(f).

¹⁸ Policy 8.14.5.8.

¹⁹ In re ESJP, Part IV.B.3, at 9.

²⁰ See, e.g., *Yarbray v. S. Bell Telephone & Telegraph Co.*, 409 S.E.2d 835, 837–38 (Ga. 1991).

²¹ See, e.g., *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000).

negligent infliction of “emotional harm”²² or of “emotional injury,”²³ so the notion that emotional harm is a legally cognizable injury is certainly well-established, both in Georgia and in other states. Conduct that falls within these torts would, at the very least, violate University policy and fall outside “the spirit of Open Expression at Emory,”²⁴ and would also directly violate the Open Expression Policy.²⁵ However, to extend the concept of mental or emotional injury to encompass the expression of social or political opinions would undermine the Policy and its commitment to the University’s neutrality as to content.

Some students also reported feelings of fear resulting from the chalkings.²⁶ Certainly, if the content of the chalkings threatened violence, force, or injury to persons or property, they would violate the Open Expression Policy as well as other policies,²⁷ including state criminal law.²⁸ Such acts would also reasonably evoke feelings of fear—though the acts are prohibited without reference to whether anyone subjectively feels fear; and likewise, a subjective feeling of fear is insufficient, by itself, to bring an act within a prohibition in the Policy. The knowledge that someone supports Donald Trump and is willing to express his feelings in chalk is not a threat, and is not a reasonable cause for fear in this context.

C. Applicability of Bias and Harassment Policies

Nor is this an instance of “harassment” under the Open Expression Policy or “discriminatory harassment” under the Equal Opportunity and Discriminatory Harassment Policy (EODHP).²⁹ In the case of a display calling Israel an apartheid state, we already held that no “harassment” was present, because harassment is limited to one-on-one communications—whereas nonpersonal protests like displays (or chalking) are inherently “directed at the world at large.”³⁰ We also held that “[e]xpression on

²² See, e.g., *Al Who Enterprises, Inc. v. Capitol Indemnity Corp.*, 457 S.E.2d 696, 697 (Ga. App. 1995) (“intentional infliction of emotional harm”); *Powers v. Latimer*, 450 S.E.2d 295, 299 (Ga. App. 1994) (“negligent infliction of emotional harm”); Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 46–48 (“Intentional (or Reckless) Infliction of Emotional Harm” and “Negligent Infliction of Emotional Harm”).

²³ See, e.g., *Canberg v. City of Toccoa*, 535 S.E.2d 854, 856 (Ga. App. 2000).

²⁴ Policy 8.14.5.5(a) (conduct that “violate[s] . . . state . . . law”), (f) (conduct that “cause[s] injury to persons”).

²⁵ Policy 8.14.5.4(a) (conduct that “[u]nreasonably infringe[s] on the rights of other Community members”), (c) (conduct that “[c]reate[s] undue hardship”).

²⁶ Verghese, *supra* note 16; Budnyk, *supra* note 10.

²⁷ Policy 8.14.5.5(f)–(g) (threats of injury, violence, or force violate other policies as well as the spirit of the Open Expression Policy); see also *id.* 8.14.5.4(a) (unreasonable infringement on rights of other Community members violates the Open Expression Policy); *id.* 8.14.5.5(c) (creating undue hardship impeding Community members’ right to open expression violates the Open Expression Policy).

²⁸ See Ga. Code § 16-11-37 (terroristic threats).

²⁹ Policy 1.3.2.B, available at <http://policies.emory.edu/1.3>.

³⁰ *In re ESJP*, Part IV.B.4, at 10.

subjects of social and political interest cannot be ‘discriminatory harassment’³¹ within the meaning of the EODHP.

In light of this, it is apparent that the use of the bias incident reporting process would have been inappropriate here—despite claims that this incident calls for “refinements” to the “bias incident reporting and response process.”³²

Emory’s Bias Incident Reporting system defines a “bias incident” as “any intentional or unintentional act or behavior directed toward an individual or group based on any facet of the individual’s or group’s identities.”³³ The definition could stand to be refined, since, as currently written, it covers even *positive* statements (e.g., “Black is Beautiful” or “Gay is O.K.”) and clearly *permissible* statements (e.g., “Sorry, I prefer to date tall guys” or “Sorry, I prefer to date women”). Suppose, however, that we interpreted “bias” similarly to the statement in the EODHP that discriminatory harassment includes “conduct that denigrates or shows hostility or aversion toward an individual or group on the basis of” a list of characteristics.

Under such an interpretation, at most, the call to “Build the Wall” might be interpreted as a statement hostile to illegal immigrants or Latinos, since there is a plausible correlation between proponents of Donald Trump’s immigration policy and animus toward those groups. In particular, some students at Emory are beneficiaries of the Deferred Action for Childhood Arrival (DACA) policy, under which certain categories of illegal immigrants—chiefly those who entered the United States as children, have lived here continuously for a long time, and have completed high school or a GED or are enrolled in school—are exempt from deportation. Emory welcomes such students and, indeed, provides them the possibility of need-based financial aid that is lacking from the state and federal governments.³⁴ Such students would experience substantial disruption—certainly they could not continue their studies at Emory—if Trump’s “Build the Wall,” with an accompanying policy of mass deportations of illegal immigrants already here, were implemented. They might perceive a “Build the Wall” chalking as the chalker’s attack on their right to remain at Emory.

On whether such expression of opinion can constitute a bias incident, a useful precedent is the discussion in our previous decision of the “Israel is an Apartheid State” wall

³¹ Id.

³² Wagner letter, *supra* note 15.

³³ Campus Life, Bias Incident Reporting, http://www.emory.edu/CAMPUS_LIFE/initiatives/programs_and_resources/birt.html.

³⁴ See Emory Univ., Office of Undergraduate Admission, Undocumented & DACA Students, <http://apply.emory.edu/apply/undocumented.php> (“Emory University welcomes applications of undocumented students that have been granted DACA status by the federal government.”); Emory Univ., Office of Financial Aid, Deferred Action for Childhood Arrival (DACA) Students and Need-based Financial Aid, <http://www.studentaid.emory.edu/DACA/index.html>; Lydia O’Neal, Emory to Offer Financial Aid to Undocumented Immigrants, Emory Wheel, Apr. 2, 2015, <http://emorywheel.com/emory-to-offer-financial-aid-to-undocumented-students/>.

erected by Emory Students for Justice in Palestine (ESJP).³⁵ In that decision, we considered whether the messages on that wall could be said to “denigrate[] or show[] hostility or aversion toward” a group, for instance Jews or Israelis. We strongly denied that ESJP’s display could be so characterized: it showed “aversion to a country on the basis of its policies, not to people.”

The distinction is crucial: the Israeli government is not the same as the Israeli people (and not all Israelis support the policies of any given government related to Palestinians) and is not the same as Jews. Agreement with the policies of the Israeli government related to Palestinians is not a protected characteristic under the EODHP, nor is it a “facet” of one’s “identit[y]” within the meaning of the bias reporting system. And most importantly, even though some statements against Israeli policy may be motivated by the speaker’s subjective animus either toward Jews or Israelis, there is no logically necessary reason for this to be so; one can oppose current Israeli policy on grounds unrelated to bias against any group, and thus we cannot call the statement “Israel is an Apartheid State” a bias incident without knowing the speaker’s subjective intent.

“Build the Wall” presents a similar situation. It is true that most illegal immigrants coming across the Mexican border are Latino. But the vast majority of Latinos in the United States (over 80%) are not illegal immigrants. Nor is the fact of having crossed the border illegally a protected characteristic under the EODHP or a facet of one’s identity within the meaning of bias reporting. Admittedly, DACA students did not enter the country as adults and likely were not personally responsible for violating the country’s immigration laws. We do not seek to minimize the harm that they would suffer if the DACA program were reversed and they were deported, and we acknowledge that Emory, which has made the decision to welcome them as students, would likewise suffer. However, even if support for Trump’s immigration policy is correlated to animus toward Latinos, or toward DACA students more specifically, there is no logically necessary reason for this to be so; one can oppose immigration on grounds unrelated to bias against any group, and thus we cannot call the statement “Build the Wall” a bias incident without knowing the speaker’s subjective intent.

Finally, expression on subjects of social and political interest—in this case, a viewpoint on the contested issue of U.S. immigration policy—cannot be a bias incident. Were it otherwise, a wide range of traditional social and political expression would be classified as bias, from “Keep Your Rosaries out of my Ovaries” to “Don’t Trust Anyone Over 30.” Emory University does not discourage the expression of any social or political viewpoint.

³⁵ In re ESJP, Part IV.B.4, at 10.

D. Applicability of Chalking Guidelines

The Policy does leave room for reasonable chalking guidelines. The same section of the Policy that enshrines the University’s neutrality as to different forms of content also states:

For purposes of expression through nonpersonal Protests 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.³⁶

The Policy thus incorporates any chalking guidelines³⁷ that are reasonable and that treat different types of content neutrally. Another section of the Policy casts doubt on space reservation requirements: in the context of protests, “[n]ot having a reservation is not sufficient reason for terminating any Protest unless the impromptu Protest unreasonably interferes with prior scheduled Meetings, Events, or essential operations of the University.”³⁸ The Policy recognizes chalking as a species of “Protest,”³⁹ and therefore there is only a narrow scope for reservation requirements in the context of chalking.⁴⁰

Currently, there is no University-wide chalking policy; different areas of the University have different rules. For instance, the Dobbs University Center (DUC) allows chalking only “on horizontal, ground surfaces, that are exposed to weather and foot traffic.”⁴¹ Other areas, like the Medical School, are more restrictive. We express no opinion here on whether any given area’s chalking guidelines are unreasonable, but the Policy clearly allows the University at least some leeway in reasonably regulating chalking.

It is possible that some instances of the Trump chalking—particularly the chalking that was on vertical surfaces⁴²—may have violated some areas’ guidelines. But, without further details on the precise placement of the chalk, there seems to be little basis to conclude that the chalking *generally* violated University policy.⁴³ Therefore, aside from

³⁶ Policy 8.14.5.8.

³⁷ The Policy strictly refers only to “flyer posting policies and banner reservation rules,” but we interpret this expression to implicitly refer to chalking guidelines as well.

³⁸ Policy 8.14.5.6.

³⁹ Policy 8.14.5.8.

⁴⁰ The Policy also does not allow for protests (“unless a special exemption is granted”) in particular areas such as private offices, museums, classrooms, or hospitals, and did not impede the flow of traffic. Policy 8.14.5.6. But there is no claim that the chalkings at issue here were in one of those locations.

⁴¹ Dobbs Univ. Ctr., Publicize Your Event, http://duc.emory.edu/meeting_services/reservations/publicize_event.html. The DUC’s policy also requires that sidewalk areas near the DUC be reserved (for a maximum of 48 hours) through the University’s online space reservation system, 25Live; but, as noted above, the Open Expression Policy casts doubt on reservation requirements.

⁴² The photographs in the sources listed in note 11 show chalking on both horizontal and vertical surfaces.

⁴³ Some statements by the University seemed to suggest that the chalking did in fact violate University policy. Logue, *supra* note 46; Ajay Nair, *Emory’s Trump Chalkings in Context*, Inside Higher Ed, Mar. 28,

whatever chalking may have violated some reasonable placement guidelines that are neutral as between different types of content, the 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. It would, therefore, be helpful to have policies, whether University-wide or not, that provide content-neutral guidelines for when University staff may remove chalking.⁴⁴)

Moreover, the 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.

Notably, the University has clarified—despite early suggestions to the contrary⁴⁵—that “no follow-up action is planned related to the incident.”⁴⁶ Several days after the original chalkings, President Wagner himself chalked the text “Emory Stands for Free Expression!” next to a student organization’s chalk pictures of the presidential candidates.⁴⁷

III. “MEIN TRUMPF” POSTER

Posters were found in various locations on campus, portraying Donald Trump in the guise of Hitler and a Klansman. The poster—which originated with the Revolutionary Communist Party, USA—reads: “Brought to you by a vicious and thoroughly rotten system / Mein Trumpf / A Thoroughly American Fascist Pig!”⁴⁸ In the picture, Trump is portrayed with a Hitler mustache, and wearing a Klansman’s hood, a Nazi military uniform, and a leather jacket with an American flag pin.

A Community member filed a bias incident report based on discomfort with the Hitler imagery. However, to suggest that Trump is similar to Hitler (or to a Klansman), and to

2016, <https://www.insidehighered.com/views/2016/03/28/context-controversy-over-trump-chalkings-emory-university-essay>.

⁴⁴ See also the discussion of what it means to “deface[]” a display in Part IV below.

⁴⁵ Budnyk, *supra* note 10 (reporting statements by President James Wagner that the University would “review footage ‘up by the hospital [from] security cameras’ to identify those who made the chalkings,” and that “if they’re students, they would go through the conduct violation process”).

⁴⁶ Josh Logue, Chalk It up to Trump, *Inside Higher Ed*, Mar. 25, 2016, <https://www.insidehighered.com/news/2016/03/25/debate-grows-over-pro-trump-chalkings-emory>.

⁴⁷ See George Franco, New Chalk Drawings at Emory University, *Fox 5 Atlanta News*, Mar. 25, 2016, <http://www.fox5atlanta.com/news/113622182-story>; Alex Morey, Emory President Chalks Pro-Speech Message After Trump Controversy as Students, Alumni Urge More Action, *Found. for Indiv. Rights in Educ.*, Mar. 30, 2016, <https://www.thefire.org/emory-president-chalks-pro-speech-message-after-trump-controversy-as-students-alumni-urge-more-action-video/>.

⁴⁸ See <http://revcom.us/static/meme/429MeinTrumpfMEME-en.jpg>.

express this in pictures, is fully protected under the Open Expression Policy.⁴⁹ Nor does this poster express bias toward anyone—and certainly not to any victims of Hitler or the Ku Klux Klan, since the poster is implicitly critical of Hitler and the Klan. At most, the poster is critical of fascists, but political philosophy certainly cannot be grounds for a bias report; and perhaps the poster is also critical of the United States, to the extent that it might be read to suggest that fascism is “thoroughly American.” But, as noted above, being critical of the United States does not imply opposition to any group of people; and in any event, expression on subjects of social and political interest cannot be a bias incident. Therefore, the use of the bias incident reporting system in this case was improper.

IV. DEFACING AND SUPPRESSION OF POSTERS AND DISPLAYS

There were also four incidents in which unknown persons vandalized various posters and displays:

- Someone drew a Hitler mustache on a Donald Trump poster.
- Someone cut up a Bernie Sanders poster.
- Someone drew thought bubbles and added text to another Bernie Sanders poster.
- Finally, in response to a Hillel display supportive of Israel at some reserved tables in the DUC Commons, someone else reserved a nearby table and placed a sign on it reading “#Propaganda”. Another person covered that sign with an Israeli flag.

All of these cases involved someone—perhaps an Emory Community member—defacing or suppressing the open expression of others. These cases are essentially indistinguishable from the vandalism of the wall put up by Emory Students for Justice in Palestine, which we discussed in our previous opinion.⁵⁰ Any posting of flyers or placement of signs is governed by the policy on nonpersonal protests, which adopts a policy of content-neutrality for flyers, signs, and displays, and which provides that “a member of the Community who defaces the open expression of others will be held in violation of this policy.”⁵¹ (The term “defac[ing]” need not be limited to intentional physical destruction, and is broad enough to encompass any act intended to hide a display or alter it to change its meaning.)

If flyers are in an area where anyone may post and where older flyers are constantly being posted over by newer flyers, the mere fact of covering up an older flyer, without more, does not violate the Policy—just as it does not violate the Policy for people to gradually wear away a chalked message merely by walking over it. There is no

⁴⁹ Recall, though, that the policy on displays incorporates reasonable flyer posting policies, see Policy 8.14.5.8 and *supra* Part II.D. Thus, a flyer posted in an inappropriate place, such as a departmental bulletin board where posting is restricted to official departmental flyers, may be removed by appropriate staff, provided that such a policy is enforced consistently and not selectively on non-content-neutral or non-viewpoint-neutral grounds.

⁵⁰ In re ESJP.

⁵¹ Policy 8.14.5.8.

“defac[ing]” within the meaning of the Policy unless there is an intent to suppress or alter the expression of the specific display.⁵² However, these four cases are clear instances where displays were intentionally altered or suppressed because of their message. If the vandals were Emory Community members, their actions violated several sections of the Open Expression Policy and should be treated seriously.

V. CONCLUSIONS AND RECOMMENDATIONS

In the end, no action was taken against anyone involved with the Donald Trump chalking or the “Mein Trumpf” poster. (The responsible parties have not been identified, but it is our understanding that no action would be taken against them even if they were.) Because this accords with the results of our own analysis, we have nothing further to recommend on the subject of potential sanctions. Our only recommendation related to the Trump incident is that the University develop a chalking policy that is reasonable, neutral as to content, clear as to when Emory staff may remove messages, uniform to the extent feasible, and easy to find online.

As to the incidents described in Part IV—the defacing of three posters and the covering up of a display with a flag—we recommend that these incidents be treated as violations of the Open Expression Policy in the event that the responsible parties are ever identified.

As we have stated previously, we also recommend that the relevant authorities should encourage individuals who feel that their open expression rights have been violated to contact the Committee. Also, the Emory community should become more familiar with the Open Expression policy through university-wide education events. We therefore recommend that the University make funding available for such events.⁵³

Composition of the Committee for Open Expression:

Max Blachman, graduate student, Goizueta Business School
Christy Bradley, Campus Life
Connor Crum, Constitutional Council (ex officio, non-voting)
Joshua Davila, student, Emory College
Sara Edwards, graduate student, Laney Graduate School
Dawn Francis-Chewning, staff, Libraries & Information Technology
Veronique King, staff, School of Medicine
Scott Kugle, faculty, Emory College
Maria Lameiras, staff, Communications & Public Affairs
Erica Lee, faculty, School of Medicine (chair)

⁵² But see the discussion of reasonable flyer posting policies, Policy 8.14.5.8, supra Part II.D, and supra note 49.

⁵³ See *In re ESJP*, Part V, at 12.

Christina Marcus, graduate student, Candler School of Theology
Lydia O'Neal, student, Emory College
Holloway Sparks, faculty, Emory College
Alexander "Sasha" Volokh, faculty, School of Law