



November 10, 2021

Dr. William P. Gilligan
Interim President & Professor Emeritus
Emerson College
180 Tremont Street, 14th Floor
Boston, Massachusetts 02116

URGENT

Sent via Electronic Mail (william_gilligan@emerson.edu)

Dear Interim President Gilligan:

FIRE is disappointed that Emerson College failed to respond to our letter of October 5, 2021, concerning its suspension and institution of misconduct charges against a student organization for distributing stickers that—as Emerson now recognizes—were intended to criticize China’s government. Our concerns have only grown in light of the finding of responsibility by Emerson’s Conduct Board, which the group is appealing.

The Conduct Board found the Emerson chapter of Turning Point USA (TPUSA) responsible for violating the school’s Bias Related Behavior policy.¹ Despite finding that the group “did not intend to target anyone other than China’s government,”² Emerson issued a “Formal Warning”—a formal sanction under Emerson’s policies.³ That warning letter additionally stipulates that “[a]dditional behavior that violates Emerson’s Community Standards”—that is, engaging in the same or similar speech—“will likely result in additional disciplinary action.”⁴

The Conduct Board found, in particular, that:

[B]y disseminating the Stickers[, TPUSA] engaged in discriminatory conduct on the basis of national origin, that had

¹ Letter from Julie Rothhaar-Sanders, Director of Community Standards, to Sammi Neves and Kjersten Lynum as Emerson College-Turning Point USA Leadership (Nov. 3, 2021) (on file with author). The group was found not responsible for violating Emerson’s Invasion of Privacy policy.

² *Id.*

³ EMERSON COLL., *Basis for Findings & Sanctions*, <https://www.emerson.edu/departments/community-standards/student-conduct-process/basis-findings-sanctions> (last visited Nov. 9, 2021).

⁴ *Id.*

the effect of “unreasonably interfering with” the Complainant’s enrollment and/or had the effect of creating a hostile, intimidating or offensive working, living or learning environment. Although the Board found that the members of the Emerson chapter did not intend to target anyone other than China’s government, handing out the sticker nonetheless had a discriminatory effect given the pervasive environment of anti-Asian discrimination that has developed over the past several years particularly in the wake of the COVID pandemic.⁵

Deeming the distribution of a sticker critical of a foreign government to be “discriminatory conduct on the basis of national origin” on these grounds is inconsistent with Emerson’s erstwhile commitments to its students’ freedom of expression. At core, Emerson concludes that its campus is subject to “pervasive” anti-Asian discrimination and that the burden of redressing this discrimination falls on the shoulder of a student group Emerson *concedes* did not (and did not intend to) engage in discriminatory conduct. The result is that Emerson students—and presumably faculty—cannot criticize China’s government.

That is an astounding result at an institution of higher education. Campus speech on domestic or international political affairs will inevitably involve criticism of foreign governments. That criticism will inevitably be upsetting to those who support or identify with those states. Emerson’s decision to sanction TPUSA for its criticism of the Chinese government is a violation of the university’s commitments to free expression.

The precedent that Emerson has established here will not be limited to critics of China. For example, there has been an increase in anti-Semitic incidents in recent years, with visible situations of threats and violence occurring after clashes in the Israeli-Palestinian conflict this past May.⁶ Emerson’s interpretation of its obligations and policy would lead to sanctions against a Palestinian student advocacy group for distributing flyers critical of the Israeli government or promoting boycotts against it.⁷

Colleges and universities pride themselves on being environments that draw from a great diversity of students from rich and varied backgrounds. That speech critical of foreign governments causes unintentional—and unavoidable—offense to others is not a basis to retreat from these principles. Whether speech is protected is “a legal, not moral, analysis.”⁸ The Supreme Court has repeatedly, consistently, and clearly held that expression may not be

⁵ *Id.*

⁶ Ruth Graham and Liam Stack, *U.S. Faces Outbreak of Anti-Semitic Threats and Violence*, N.Y. TIMES, May 26, 2021, <https://www.nytimes.com/2021/05/26/us/anti-semitism-attacks-violence.html>.

⁷ See, for example, recent pressure on the University of North Carolina to penalize a student instructor because of her views on Israel. Peter Reitzes, *UNC Violates Government Agreement by Promoting Antisemitism in Classroom*, ALGEMEINER, Aug. 23, 2021, <https://www.algemeiner.com/2021/08/23/unc-violates-government-agreement-by-promoting-antisemitism-in-classroom>.

⁸ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019). The meaning of Emerson’s commitment to free speech—and how a reasonable student would interpret that promise—is informed by the decades of jurisprudence defining the scope of what the First Amendment’s guarantee of freedom of speech entails.

restricted on the basis that others find it to be offensive, and this principle applies with particular strength to universities, dedicated to open debate and discussion.

As FIRE wrote in our previous letter:

Although private institutions like Emerson are not bound by the First Amendment, Emerson has adopted policies guaranteeing students “certain rights,” including the “right to freedom of speech, . . . freedom of political belief and affiliation,” and “freedom of peaceful assembly.”⁹ Emerson reinforces these commitments with a statement on students’ expressive rights, laudably highlighting the “high importance” of the First Amendment and urging that this “right to freedom of speech” is “not only a right but a community responsibility.”¹⁰

Emerson can doubtlessly penalize discriminatory conduct or speech amounting to discriminatory harassment. As Emerson concedes, the stickers were not intended to be discriminatory. Even if they were, their offensive nature is not sufficient to amount to hostile environment harassment under the law, and Emerson’s obligations to remedy harassment do not require—or authorize—it to censor particular instances of otherwise protected expression. As FIRE previously noted in its October 5 letter, the Office of Civil Rights (OCR) of the United States Department of Education has established that discriminatory harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”¹¹

Whatever steps Emerson must take to remedy its “pervasive” anti-Asian discrimination, those steps cannot justify censorship of speech critical of foreign states. Accordingly, we call on you to lift the disciplinary sanctions in this matter. FIRE will ensure that punishing this protected speech will have continued effects on Emerson’s reputation as a college that purports to protect open inquiry and expression. We appreciate receipt of your written response to this letter before the close of business on Friday, November 12, 2021.

Sincerely,



Graham Piro

Program Officer, Individual Rights Defense Program

Encl.

⁹ EMERSON COLL., RIGHTS & RESPONSIBILITIES FOR STUDENTS/STUDENT ORGANIZATIONS, <https://www.emerson.edu/departments/community-standards/code-community-standards/rights-responsibilities-studentsstudent> (last visited Nov. 9, 2021).

¹⁰ EMERSON COLL., STATEMENT ON FREEDOM OF EXPRESSION, <https://www.emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> (last visited Nov. 9, 2021).

¹¹ U.S. DEP’T OF EDUC., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.



October 5, 2021

Dr. William P. Gilligan
Interim President & Professor Emeritus
Emerson College
180 Tremont Street, 14th Floor
Boston, Massachusetts 02116

URGENT

Sent via Electronic Mail (william_gilligan@emerson.edu)

Dear Interim President Gilligan:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by Emerson College's suspension, investigation, and initiation of misconduct charges against a student organization and its members due to its distribution of stickers critical of the government of the People's Republic of China. Criticism of governments is core political expression protected by principles of free expression that Emerson pledges to uphold.

I. Emerson College Charges TPUSA Over Distribution of "China Kinda Sus" Sticker

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

On September 29, 2021, members of Turning Point USA at Emerson College ("TPUSA"), a recognized student organization, set up a table in an outdoor area to engage with other students and solicit new members. The table included written materials for those interested.

Among these were stickers depicting a character from an online multiplayer game, "Among Us," the object of which is to identify the imposter crewmate on a spaceship. The depicted character is red and superimposed with the emblem of the Communist Party of China, the hammer and sickle.¹ The sticker includes the words "China kinda sus," invoking a slang term

¹ CONSTITUTION OF THE COMMUNIST PARTY OF CHINA, Ch. XI, Art. 53 (rev. Oct. 24, 2017), *available at* http://www.xinhuanet.com//english/download/Constitution_of_the_Communist_Party_of_China.pdf.

“sus”—short for suspicious—used by “Among Us” players to identify suspected imposters. TPUSA chapters frequently distribute stickers on this theme, including a variation critical of domestic politics, which reads: “Big gov sus.” This is the version criticizing China:²



While tabling, students openly recorded conversations, which took place in a public area.

On September 30, 2021, you sent an email to the Emerson community announcing that the “Office of Community Standards and Student Conduct and the College will initiate an investigation,” as it had “come to [your] attention that several individuals were distributing stickers yesterday that included anti-Chinese messaging that is inconsistent with the College’s values[.]”³ That email was followed by a joint statement by a consortium of administrative departments, including Emerson’s Office of International Student Affairs, criticizing the stickers as “anti-China hate.”⁴

On October 1, 2021, Emerson’s Director of Community Standards sent a formal letter to TPUSA Emerson President Sammi Neves and Vice President Kjersten Lynum, notifying them of alleged violations of Emerson’s policies against “Bias Related Behavior” and “Invasion of Privacy.”⁵ The letter also imposed interim restrictions, prohibiting the chapter from “hosting programs, meetings and/or tabling,” violations of which “could result in additional sanctions, up to and including dismissal from the College.” The letter announced that “interviews will be conducted” and that a “meeting will be held with your organization’s leadership[.]” The letter warned that members of the organization are required to “keep what is discussed during our conversations confidential” and may “not talk about the statements you make during the interview, with anyone” except a “personal representative.”

² maddi complains about the weather (@angrylesbo420), TWITTER (Sept. 29, 2021, 4:05 PM), <https://twitter.com/angrylesbo420/status/1443305979706286081>.

³ E-mail from William P. Gilligan, Interim Pres., Emerson Coll., to Emerson student email listserv (Sept. 30, 2021, 11:39 AM) (on file with author).

⁴ E-mail from International Student Affairs, Emerson Coll. (Sept. 30, 2021, 12:42 PM) (on file with author).

⁵ Letter from Julie Rothhaar-Sanders, Dir. of Cmty. Standards, Emerson Coll., to Anuar Sammi (Oct. 1, 2021) (on file with author).

II. The “China Kinda Sus” Sticker is Protected by Freedom of Speech, Which Emerson Promises to its Students

Emerson’s initiation of an investigation and imposition of interim measures is a serious departure from the college’s policies guaranteeing students the right to freedom of expression, which includes the right to criticize foreign governments. Even if criticism of China were synonymous with criticism of its citizens or those of Chinese descent, the speech at issue here does not rise to the level of unprotected harassment.

A. Emerson Guarantees its Students the Right to Freedom of Speech

Although private institutions like Emerson are not bound by the First Amendment, Emerson has adopted policies guaranteeing students “certain rights,” including the “right to freedom of speech, . . . freedom of political belief and affiliation,” and “freedom of peaceful assembly.”⁶ Emerson reinforces these commitments with a statement on students’ expressive rights, laudably highlighting the “high importance” of the First Amendment and urging that this “right to freedom of speech” is “not only a right but a community responsibility.”⁷

Having made these commitments, Emerson is obligated to keep them, as both a moral duty and legal obligation.⁸

B. Criticism of Foreign Governments is Protected Speech, Even if it is Offensive to Others

The stickers distributed at Emerson and elsewhere are critical of China’s government. They follow a long tradition of student protests on American college campuses criticizing foreign nations, whether those opposing South Africa’s apartheid⁹ or, more recently, the government of Israel.¹⁰

⁶ EMERSON COLL., RIGHTS & RESPONSIBILITIES FOR STUDENTS/STUDENT ORGANIZATIONS, <https://www.emerson.edu/departments/community-standards/code-community-standards/rights-responsibilities-studentsstudent> (last visited Oct. 4, 2021).

⁷ EMERSON COLL., STATEMENT ON FREEDOM OF EXPRESSION, <https://www.emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> (last visited Oct. 4, 2021). The meaning of Emerson’s commitment to free speech—and how a reasonable student would interpret that promise—is informed by the decades of jurisprudence defining the scope of what the First Amendment’s guarantee of freedom of speech entails. That is emphatically so when Emerson itself references the First Amendment in articulating its commitment.

⁸ *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 169 (D. Mass. 2017) (under Massachusetts law, the relationship between a student and a university is based on contract, the terms of which are contained in the student handbook and other college materials).

⁹ *See, e.g., Students against Apartheid Coalition v. O’Neil*, 660 F.Supp. 333, 335 (W.D. Va. 1987) (students erected “shanties” on the lawn of the University of Virginia to criticize South Africa).

¹⁰ *See, e.g., Zach Greenberg, OCR’s use of overly broad anti-Semitism definition threatens student and faculty speech*, FIRE (Sept. 14, 2018), <https://www.thefire.org/ocrs-use-of-overly-broad-anti-semitism-definition-threatens-student-and-faculty-speech> (describing efforts to restrict speech critical of Israel’s government on the basis that such criticism is anti-Semitic).

Freedom of expression entails the right to criticize not only our own government, but those of foreign nations, even when that criticism is offensive to the “dignity” of those states or threatens to upend “vital national interest[s.]”¹¹

In *Boos v. Barry*, the Supreme Court of the United States struck down a prohibition on displays within 500 feet of an embassy if the display would bring the embassy’s government “into public odium.”¹² The regulation, intended to “shield diplomats from speech that offends their dignity,” was supported by weighty interests: protecting the dignity of foreign embassies had “a long history and noble purpose,” served the “Nation’s important interest in international relations” by supporting cordial discourse, and was required by international law.¹³

Despite these interests, the regulation violated the First Amendment:

[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment. . . . A “dignity” standard, like the “outrageousness” standard that we rejected in [*Hustler Magazine, Inc. v. Falwell*], is so inherently subjective that it would be inconsistent with “our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.”¹⁴

That others find speech deeply offensive is not a permissible basis to curtail it. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. This core principle is why the authorities cannot outlaw burning the American flag,¹⁵ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁶ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,¹⁷ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.¹⁸

This principle applies with particular strength to universities and colleges dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping

¹¹ *Boos v. Barry*, 485 U.S. 312, 323 (1988).

¹² *Id.* at 317.

¹³ *Id.* at 320, 323.

¹⁴ *Id.* at 322 (cleaned up, and quoting, in part, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (the “outrageous” and insulting nature of a parody advertisement did not remove its protection under the First Amendment, as “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness,” and speech may not be punished merely because it “may have an adverse emotional impact on the audience”)).

¹⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁶ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁷ *Hustler Magazine, Inc.*, 485 U.S. at 50.

¹⁸ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

the Statue of Liberty and the Goddess of Justice.”¹⁹ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. So, too, were “offensive and sophomoric” skits depicting derogatory stereotypes,²⁰ and student organizations that the public viewed as “shocking and offensive.”²¹ Yet, “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”²²

C. *The “China” Stickers Are Criticism of China’s Government and Do Not Amount to Unprotected Harassment*

While Emerson has important obligations to respond to and remedy hostile educational environments under Title VII, those obligations are not implicated here.

First, the speech is not based on race, ethnicity, or national origin. The stickers do not invoke or traffic in stereotypes associated with people of Chinese descent or origin. Instead, the stickers are speech critical of China’s *government*. The stickers utilize the familiar emblem of the sole governing party of the country, superimposed over a video game character bearing the same red color of China’s flag. The sticker’s text (“China kinda sus”) refers to the name of the country, not its people. Criticism of a foreign government is not inherently criticism of the people it purports to represent, even if people who hail from, descend from, or support that particular nation find that criticism personally offensive.

Second, even assuming the stickers’ message was capable of being construed as speech based on race, ethnicity, or national origin, it does not rise to the level of peer-on-peer harassment as properly defined under the law.

Speech that others find offensive is not alone sufficient to constitute harassment. In the context of enforcing prohibitions against racially discriminatory harassment, the Office for Civil Rights (OCR) of the United States Department of Education has made clear that its regulations “are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and, therefore, discriminatory harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”²³

Instead, speech is unprotected as harassment only where it amounts to conduct “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”²⁴ Distributing a sticker which others are free to take or leave, and which makes no reference to a protected class, falls short of this standard.

¹⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²⁰ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

²¹ *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

²² *Papish*, 410 U.S. at 670.

²³ U.S. DEP’T OF EDUC., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

²⁴ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

D. Recordings in Public Areas Are Not an Invasion of Privacy

The basis for Emerson’s investigation into an alleged invasion of privacy is not clear from the notice received by the students. Members of the organization believe that the charge is likely predicated on their act of recording video and audio while tabling in the Boylston Place alley.

If so, the open recording of video and audio in a public area does not violate Emerson policy, which prohibits recordings only “in an environment that is considered private or where there is a reasonable expectation of privacy.”²⁵ There is no reasonable expectation of privacy in public areas, where no one person “has the right to exclude others from using the area,”²⁶ and there is no basis to believe that the heavily-trafficked street is in any way “considered private.” Consent is not a factor, and cannot be withdrawn, where there is no reasonable expectation of privacy.

E. Emerson Cannot Restrain Students from Discussing Meetings with Administrators

Emerson’s directive that students “keep what is discussed during our conversations confidential” is a prior restraint on speech, “the most serious and the least tolerable infringement on” freedom of expression.²⁷ The risk prior restraints present to freedom of expression is so great that the “chief purpose” in adopting the First Amendment was to prevent their use.²⁸ They are valid only in the most demanding of circumstances.²⁹

Requiring students to submit to conversations with administrators that they can never divulge places them in an inequitable position: While administrators condemn them publicly, students cannot say what they are told in private. In the absence of exceedingly compelling circumstances—and none are identified in Emerson’s letter—freedom of expression protects the right to disclose to others what is disclosed to you by the authorities.³⁰

III. Conclusion

Emerson makes laudable commitments to its students’ freedom of expression. Yet, in response to criticism of a foreign government, Emerson has abandoned these laudable commitments, imposing interim restrictions—which are reserved for an “imminent” threat to the “physical, social, or emotional well-being”³¹ of others—and initiating an investigation.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, October 8, 2021, confirming that Emerson has closed its

²⁵ *Potential Violations to the Code of Community Standards*, EMERSON COLL., <https://www.emerson.edu/departments/community-standards/code-community-standards/potential-violations-code-community> (last visited Oct. 5, 2021).

²⁶ *United States v. Sparks*, 750 F. Supp. 2d 384, 390 (D. Mass. 2010).

²⁷ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

²⁸ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

²⁹ *Id.* at 716.

³⁰ *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

³¹ *Interim Administrative Measures*, EMERSON COLL., <https://www.emerson.edu/departments/community-standards/student-conduct-process/interim-administrative-measures> (last visited Oct. 5, 2021).

investigation and will not pursue disciplinary sanctions in this matter. We further call on Emerson to publicly recommit to freedom of expression in order to mitigate the chilling effect cast by the college's response to protected expression.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Julie Rothhaar-Sanders, Director of Community Standards
Erik Muurisepp, Assistant Vice President for Campus Life
Jason Meier, Director Student Engagement and Leadership