



November 1, 2021

Emory University School of Law Student Bar Association  
c/o President Jaydn Taylor  
Emory University School of Law  
1301 Clifton Road Northeast  
Atlanta, Georgia 30322

*Sent via Electronic Mail (jdtayl5@emory.edu)*

Dear President Taylor and Members of the Student Bar Association:

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 appreciates that Emory University is one of the few institutions in the country whose policies earn a "green light" rating from FIRE.<sup>1</sup> We are concerned, however, about the threat to expressive rights posed by the viewpoint-based denial of recognition of the Emory Free Speech Forum student group by the Emory University School of Law Student Bar Association (SBA). The SBA's decision to reject a student group over opposition to the group's views violates the university's laudable commitment to upholding free speech rights.

**I. The SBA Votes to Deny the Emory Free Speech Forum a Temporary Charter Over Opposition to Its Ideology**

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. However, if the facts here are substantially accurate, the SBA must grant a charter to the Emory Free Speech Forum.

The Emory Free Speech Forum (EFSF) is a non-partisan student group "devoted to fostering critical discourse and open dialogue surrounding important issues in law and society."<sup>2</sup> On October 20, the group applied for a temporary charter from the SBA, which would allow the

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<sup>1</sup> Press Release, FIRE, Emory University earns FIRE's highest rating for free speech (Dec. 5, 2017), <https://www.thefire.org/emory-university-earns-fires-highest-rating-for-free-speech>.

<sup>2</sup> The Emory Free Speech Forum, Presentation to the Emory University School of Law Student Bar Association (Oct. 20, 2021) (on file with author).

EFSF to seek university funding and use university resources for up to two full semesters.<sup>3</sup> The group has satisfied all the procedural criteria for recognition.

Upon presentment to the SBA, several SBA members criticized the EFSF's mission, purpose, and ideology.<sup>4</sup> Several SBA members objected to the proposed speakers the group sought to host, its decision to forgo moderators for its discussion-based events, and its perceived similarity to the Federalist Society and the American Constitution Society.<sup>5</sup>

Soon after the meeting, the SBA rejected the EFSF's charter application, informing the group that "[t]he purpose and goals of your organization overlap considerably with the purpose and goals of several other existing organizations on campus."<sup>6</sup> The SBA also "fail[ed] to see a need for this particular club to be chartered and subsequently funded by SBA," assertedly based on—ironically—the "well-established promotion of free speech values across Emory school" created by its "Respect for Open Expression Policy" and "Open Expression Initiatives."<sup>7</sup>

The SBA also cited the "nature of this group," specifically citing "concern[] with the lack of mechanisms in place to ensure respectful discourse and engagement."<sup>8</sup> It added: "Without safeguards in place, such as a moderator or mediator," the SBA believes, the EFSF's discussions "will likely give rise to a precarious environment – one where the conversation might very easily devolve."<sup>9</sup> The SBA asserted that "it is disingenuous to suggest that certain topics of discussion you considered, such as race and gender, can be pondered and debated in a relaxed atmosphere when these issues directly affect and harm your peers' lives in demonstrable and quantitative ways."<sup>10</sup> The SBA thus told the EFSF that the SBA "is hesitant to issue a charter when there are no apparent safeguards in place to prevent potential and real harm that could result from these discussions while under the umbrella of SBA-chartered organizations."<sup>11</sup>

## **II. The SBA's Viewpoint-based Rejection of the EFSF Violates Students' Expressive Rights**

Denying recognition to a student organization because of its ideology impermissibly burdens students' right to organize and express themselves. As the organization tasked with recognizing student groups on behalf of Emory Law,<sup>12</sup> the SBA's determinations must be consistent with the school's promises of free expression. The SBA's decision to deny a charter

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<sup>3</sup> Emory Law, *Bylaws for Chartering Student Organizations* (last visited Oct. 27, 2021), <https://law.emory.edu/student-life/student-bar-association/sba-charter.html>.

<sup>4</sup> SBA Meeting Minutes (Oct. 27, 2021) (on file with author).

<sup>5</sup> *Id.*

<sup>6</sup> Letter from the SBA to the EFSF (Oct. 27, 2021) (enclosed).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Bylaws for Chartering Student Organizations*, *supra* note 3 ("The Student Bar Association has the authority under the Student Government Association Constitution and the Student Bar Association Constitution to provide a charter to student organizations comprised primarily of law school students.").

to EFSF over opposition to its mission, ideology, and proposed expressive events thus violates students' free speech rights.

### A. *Emory Law guarantees its students expressive rights*

Emory Law makes affirmative, robust commitments to its students' freedom of expression. As a private institution, the law school is not required to make these commitments by virtue of the First Amendment. However, Emory Law has a legal and moral duty to adhere to the promises it makes.<sup>13</sup>

Emory Law incorporates Emory University's "Respect for Open Expression Policy."<sup>14</sup> That policy affirms "an environment where the open expression of ideas and open, vigorous debate and speech are valued, promoted, and encouraged," including "these freedoms of thought, inquiry, speech, and assembly."<sup>15</sup> The policy explicitly notes that the university "respects the Constitutional rights of free speech and assembly."<sup>16</sup> While the policy recognizes that "[c]ivility and mutual respect are important values," and calls upon Emory's constituents to consider these values, it makes clear that these values "do not limit the rights protected by this Policy."<sup>17</sup>

Further, the Emory Law Student Handbook recognizes "that the educational process of our institution requires diverse forms of open expression – including freedom of thought, inquiry, speech, activism, and assembly," and "affirms the rights of members of the community to assemble, demonstrate peaceably, respectfully express views on controversial social and political issues and engage in any other activities that are protected by the University Respect for Open Expression Policy."<sup>18</sup>

This policy notably applies to students, and student groups specifically, providing that: "The University shall not deny recognition to an organization *because of disagreement with its mission or the viewpoints that it represents*."<sup>19</sup> Likewise, the policy states that "[e]xpression that communicates a viewpoint, regardless of form, is protected as long as it does not violate the guidelines of this Policy. This includes protest, dissent, and any other communicative activity, whether or not it occurs in the context of a Meeting or Event."<sup>20</sup>

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<sup>13</sup> Courts have construed the promises private universities make in provisions of student handbooks and official policies, including those of Emory University, as legally binding contracts. *See, e.g., Jansen v. Emory Univ.*, 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978); *Kuritzky v. Emory Univ.*, 669 S.E.2d 179 (Ga. Ct. App. 2008); *Morehouse Coll., Inc. v. McGaha*, 627 S.E.2d 39 (Ga. Ct. App. 2005).

<sup>14</sup> Emory Law, *Student Handbook*, at 69 (2020-21), [https://law.emory.edu/\\_includes/documents/sections/student-life/emory-law-student-handbook-2021-2022.pdf](https://law.emory.edu/_includes/documents/sections/student-life/emory-law-student-handbook-2021-2022.pdf); Emory University, *Policy 8.14, Respect for Open Expression Policy* (rev. Sept. 21, 2018), <https://tinyurl.com/67e4ps85>.

<sup>15</sup> *Respect for Open Expression Policy*, *supra* note 14, at 2.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Student Handbook*, *supra* note 14, at 69.

<sup>19</sup> *Respect for Open Expression Policy*, *supra* note 14, at 6 (emphasis added).

<sup>20</sup> *Id.*

Any student or student group reading Emory Law’s policies would reasonably believe that the university is committed to providing expressive rights consistent with the First Amendment.

***B. Student government viewpoint-based denials of recognition to student organizations violate students’ expressive rights***

While, again, Emory Law is not bound by the First Amendment, court decisions interpreting and applying its guarantee of freedom of expression provide guidance as to what Emory Law’s institutional promises of that freedom entail. Under First Amendment standards, the SBA’s refusal to grant a charter to the EFSF violates students’ expressive rights.

The freedom of speech embraced by the First Amendment carries “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”—a right “crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”<sup>21</sup> This is the right that fosters students’ ability to organize around causes, views, or simply a desire to communicate, in order to influence their institutions, communities, and country.

Denying recognition to a student organization impairs students’ ability to engage in their right of expressive association.<sup>22</sup> At Emory, recognition carries additional consequences: A temporary charter affords groups a self-generated account by the SBA Business Manager, the ability to reserve university space, and the right to request a perpetual charter, which allows the group to request either a budget or supplemental funding from the SBA.<sup>23</sup> Denying EFSF a temporary charter frustrates the ability of a group of students to utilize these resources, burdening their ability to function as a viable campus group. As the Supreme Court of the United States has recognized, there is “no doubt” that “denial of official recognition, without justification, to college organizations burdens or abridges” the associational right “implicit in the freedoms of speech [and] assembly”—which Emory Law promises to its students.<sup>24</sup>

The Supreme Court has also held that denial of group recognition based on ideology expression, or fear of disruption violates the First Amendment. In *Healy v. James*, for example, the Court held that the president of a public college violated the First Amendment when he refused to grant recognition to a chapter of Students for a Democratic Society (SDS).<sup>25</sup> Following a “climate of unrest” on college campuses, replete with “widespread civil disobedience . . . accompanied by the seizure of buildings, vandalism, and arson,” causing some “colleges [to] shut down altogether,” students sought to form a new chapter of SDS at the college.<sup>26</sup> The college president refused to grant the group recognition, citing its philosophy and suspected ties to the national SDS organization, which had “published aims . . . which include disruption and violence.”<sup>27</sup> The Court held that once the proposed group had completed all the procedural requirements for recognition, the First Amendment

<sup>21</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>22</sup> See *Healy v. James*, 408 U.S. 169, 181 (1972) (“There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges” their First Amendment rights).

<sup>23</sup> *Bylaws for Chartering Student Organizations*, *supra* note 3.

<sup>24</sup> *Healy*, 408 U.S. at 181.

<sup>25</sup> *Id.* at 187–88.

<sup>26</sup> *Id.* at 171–72.

<sup>27</sup> *Id.* at 174 n. 4.

placed a “heavy burden” on the college to demonstrate a viewpoint-neutral justification for denial.<sup>28</sup>

In keeping with Emory’s commitment to free speech, the SBA must employ only content- and viewpoint-neutral criteria in the recognition and funding of student organizations.<sup>29</sup> Failing to do so is viewpoint discrimination, “an egregious form” of censorship.<sup>30</sup> Authorities “must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>31</sup> As a result, courts low and high have repeatedly and consistently held that universities must grant expressive student organizations recognition on a content- and viewpoint-neutral basis.<sup>32</sup>

Although there is no dispute that the EFSF has met every requirement for recognition, members of the SBA have raised objections related to the group’s ideology, mission, and proposed expressive events, citing the alleged harms of granting a charter to a group that seeks to foster “critical discourse and open dialogue” on controversial topics. Opposition to an organization’s expressive purpose cannot serve as a basis to override the free speech rights of the EFSF, for the reasons stated above. An SBA vote to grant recognition is not an endorsement of the group, but instead an acknowledgement that the group has met the stated criteria of recognition. Accordingly, the SBA’s rejection of the group based on its mission and ideology is viewpoint discrimination—“censorship in its purest form”<sup>33</sup>—and a direct violation of university policy prohibiting the denial of recognition to a student organization “because of disagreement with its mission or the viewpoints that it represents.”<sup>34</sup>

The prohibition against viewpoint discrimination is what has protected groups across the political spectrum when they hold dissenting or unpopular views. For example, it protected chapters of LGBTQ organizations in Arkansas and New Hampshire in the 1970s and ’80s when student senates and university trustees, urged by state lawmakers, refused to “support a homosexual group” or their expression, which was, at the time, considered “shocking and offensive.”<sup>35</sup> Federal appellate courts held these denials violated the First Amendment, with

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<sup>28</sup> *Id.* at 184.

<sup>29</sup> *See Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”); *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”); *Widmar v. Vincent*, 454 U.S. 263, 277 (holding that after university had “created a forum generally open to student groups,” the “content-based exclusion of religious speech . . . violates the fundamental principle that a state regulation of speech should be content-neutral”).

<sup>30</sup> *Rosenberger*, 515 U.S. at 829.

<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g., Southworth*, 529 U.S. at 233. While, again, Emory Law is not a public university bound by the First Amendment, its commitment to freedom of expression—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 guarantees of freedom of speech and association entail.

<sup>33</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

<sup>34</sup> *Respect for Open Expression Policy*, *supra* note 14, at 6.

<sup>35</sup> *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 661–62 (1st Cir. 1974); *Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 362–363 (8th Cir. 1988).

one court explaining that recognition cannot be curtailed on the basis that some find the group's views "abhorrent or offensive."<sup>36</sup> FIRE has also come to the defense of organizations who faced loss of recognition or funding due to their protected speech, including groups on the left and right,<sup>37</sup> pro-choice and pro-life organizations,<sup>38</sup> animal rights and hunting clubs,<sup>39</sup> and pro-Israel and pro-Palestinian groups.<sup>40</sup> If student governments or university administrators could deny recognition or funding because of a group's views, the rights of *all* of these groups would be lost.

***C. The SBA may not justify rejecting the EFSF over its similarity of purpose with other university entities***

Not only was the SBA's failure to recognize the EFSF over its ideology and/or planned expressive activities improper, but the SBA also may not rest its decision on the similarity of the EFSF's mission to that of other campus groups or university policies and initiatives.

It strains credulity to assert that the EFSF substantially overlaps with any existing campus group. The two Emory Law student groups mentioned by the SBA when discussing the EFSF, the Federalist Society and the American Constitution Society, have vastly different purposes from the EFSF's nonpartisan, neutral, and narrow mission of "fostering critical discourse and open dialogue surrounding important issues in law and society."<sup>41</sup> The Emory Law Federalist Society chapter's mission reflects its "conservative and libertarian" objectives, and provides that its "core principles are (1) that the state exists to preserve freedom, (2) that the separation of governmental powers is central to our Constitution, and (3) that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."<sup>42</sup> The American Constitution Society chapter's mission is similarly political, seeking to "foster[] a new generation of progressive leadership in the law."<sup>43</sup> That the EFSF might draw threads from both of these perspectives, as *part* of its pursuit of respectful discourse and engagement of topics that the EFSF selects, does not mean that the EFSF "substantially

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<sup>36</sup> *Bonner*, 509 F.2d at 662.

<sup>37</sup> Press Release, FIRE, One day after FIRE files lawsuit, med school approves student's long-denied club application (Aug. 19, 2021), <https://bit.ly/3DKg7ZT>; Sarah McLaughlin, *We're Not Buying Hagerstown Community College's Excuses for Denying Student Group's Recognition*, FIRE (Sept. 17, 2015), <https://bit.ly/3pegTdo>.

<sup>38</sup> Mary Zoeller, *Georgetown fails to live up to free speech promises by not recognizing pro-choice student group*, FIRE (Mar. 29, 2018), <https://bit.ly/3ve0cQk>; Katlyn Patton, *University of Northern Iowa administration must correct its student government's refusal to recognize 'hate group' Students for Life*, FIRE (Oct. 16, 2020), <https://bit.ly/3ARjCMo>.

<sup>39</sup> Press Release, FIRE, Public university rejects animal rights club, citing 'emotional risk' to students (Dec. 10, 2019), <https://bit.ly/3p7bdIG>; Press Release, FIRE, BULLSEYE: University of Pennsylvania's Hunting, Archery, and Shooting Club finally approved after FIRE's intervention (Apr. 29, 2021), <https://bit.ly/2YTLm5n>.

<sup>40</sup> Press Release, FIRE, Pro-Israel group denied recognition by Williams College student government, administration's response falls short (May 15, 2019), <https://bit.ly/3DES26C>; Press Release, FIRE, FIRE, NCAC Call on Fordham to Recognize Students for Justice in Palestine (Jan. 25, 2017), <https://bit.ly/3aHuuBL>.

<sup>41</sup> The Emory Free Speech Forum, *supra* note 2.

<sup>42</sup> Emory Law, *Student Organizations* (last visited Oct. 27, 2021), <https://law.emory.edu/student-life/student-organizations/student-organizations.html>.

<sup>43</sup> *Id.*

overlaps” by necessity (or at all) with the subject matter(s) encompassed by the groups the SBA cited.

Nor does the EFSF duplicate the work of the Practice Societies mentioned by the SBA, which instead focus on “plan[ning] networking and professional development events focused around specific practice areas” and “bridg[ing] the academic realm and the real world of practice.”<sup>44</sup> The SBA fails to explain how a group devoted to discussion overlaps with university professional development initiatives.

Additionally, the SBA avers that the EFSF’s “free speech values” are already “well-established” and “continuously promoted” by Emory’s Respect for Open Expression Policy and Open Expression Initiatives,<sup>45</sup> yet fails to elaborate on how a *student group*’s goal of fostering open debate by actively hosting speakers and discussion-based events is redundant of *university policy* protecting expressive rights.<sup>46</sup> Sharing the same values as university initiatives is far from a legitimate reason to withhold allocation of scarce institutional resources, and cannot justify denying recognition to a student group.

Finally, among the more than 60 organizations recognized by the SBA, there are already several overlapping organizations, such as the multiple groups dedicated to trial practice, LGBT issues, and international students.<sup>47</sup> This suggests that the SBA’s similarity-of-purpose rationale is a pretextual justification for the SBA’s viewpoint-based rejection of the EFSF.<sup>48</sup>

### III. Conclusion

The great many student groups recognized by the SBA are a testament to the diversity of its student body. While SBA members may not agree with the viewpoints or expressive activities of all of these groups, the existence of these organizations is made possible by decades of capable SBA leadership recognizing the value of fostering a diverse and vibrant collection of student clubs.

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<sup>44</sup> Emory Law School, *Practice Societies* (last visited Oct. 27, 2021), <https://law.emory.edu/center-for-professional-and-career-development/students/practice-societies.html>.

<sup>45</sup> Letter from the SBA to the EFSF, *supra* note 6.

<sup>46</sup> See Emory University, *Division of Campus Life, Respect for Open Expression* (last visited Oct. 27, 2021) <https://campuslife.emory.edu/about/initiatives/open-expression/index.html>. For example, the Open Expression Observers Program allows students to request individuals to observe controversial events they host in order to ensure there is no substantial disruption, but does itself host such discussion-based events, as EFSF seeks to do. Emory University, *Open Expression Observers Program* (last visited Oct. 27, 2021), <https://campuslife.emory.edu/about/initiatives/open-expression/observers.html>.

<sup>47</sup> *Student Organizations*, *supra* note 42. For example, the SBA has recognized the Asian Pacific American Law Student Association, the Chinese American Law Students Association, the South Asian Law Student Association, the International Law Society, the Emory International Law Review, Association of International Law Students, the Emory International Arbitration Society, and the International Refugee Assistance Project.

<sup>48</sup> Additionally, Emory requires the SBA to consider “whether one group’s mission is duplicative of another’s” only “when allocating scarce resources to groups.” *Respect for Open Expression Policy*, *supra* note 14, at 6. Even assuming that the EFSF is similar to other groups, granting the *right* to request access to university resources and a budget, with no guarantee of success, is not *allocating* those resources, rendering this justification inapposite.

FIRE urges the SBA to uphold Emory Law's commitment to expressive rights—and continue to support viewpoint diversity among its fellow students—by granting a temporary charter to the EFSF by the time of the SBA's next meeting on November 3, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read "Zach", with a long, sweeping flourish extending to the right.

Zachary Greenberg  
Senior Program Officer, Individual Rights Defense Program

Cc: Gregory L. Fenves, Emory University President  
Stephen D. Sencer, Senior Vice President and General Counsel  
Mary Anne Bobinski, Dean and Asa Griggs Candler Professor of Law

Encl.



Dear Emory Free Speech Forum:

Thank you for your time and presentation to the SBA Board. We will be unable to extend you a temporary charter at this time as the charter approval did not reach a majority vote.

The purpose and goals of your organization overlap considerably with the purpose and goals of several other existing organizations on campus, and we encourage you to collaborate with them to host the discussions you brought up in your presentation. If the discussions you envision for your group cover a wide array of topics, we suggest you reach out to the several [Emory Law Practice Societies](#).

Emory's [Respect for Open Expression Policy](#) has continuously promoted the free speech values you mentioned in your presentation, and the university provides [Open Expression Initiatives](#) campus-wide. Because of this well-established promotion of free speech values across Emory school, we fail to see a need for this particular club to be chartered and subsequently funded by SBA.

Finally, due to the nature of this group we are concerned with the lack of mechanisms in place to ensure respectful discourse and engagement. Without safeguards in place, such as a moderator or mediator, these discussions will likely give rise to a precarious environment – one where the conversation might very easily devolve. In particular, it is disingenuous to suggest that certain topics of discussion you considered, such as race and gender, can be pondered and debated in a relaxed atmosphere when these issues directly affect and harm your peers' lives in demonstrable and quantitative ways. As brought up during our meeting, there is nothing to prevent you from having these conversations in the casual manner you envision. The SBA is hesitant to issue a charter when there are no apparent safeguards in place to prevent potential and real harm that could result from these discussions while under the umbrella of SBA-chartered organizations.

We recognize the importance of promoting free speech, and we believe that Emory already fosters open dialogue in many active ways. We encourage you to reach out and collaborate with existing student organizations that share a great interest in free speech. While we are unsure how your organization's mission will be furthered meaningfully with a charter from SBA, we encourage you to continue to meet to discuss.

Respectfully,  
The SBA Board