



FIRE

Foundation for Individual
Rights and Expression

December 7, 2022

New England Commission of Higher Education
301 Edgewater Place, Suite 210
Wakefield, Massachusetts 01880

Re: Emerson College

Sent via NECHE Complaint Form

To the New England Commission of Higher Education:

As a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience,¹ the Foundation for Individual Rights and Expression (FIRE) respectfully submits this letter as a complaint, and as supplemental support for any other complaints by students and faculty, regarding the above-referenced institution. Enclosed, please find all correspondence between FIRE and the institution relevant to our complaint, together with copies of the relevant institutional policies and/or procedures.

Emerson College, an institution accredited by the Commission, is not in compliance with Standard of Accreditation 9.3 (Integrity, Transparency, and Public Disclosure), which requires that the institution “is committed to the free pursuit and dissemination of knowledge,” and “assures faculty and students the freedom to teach and study, to examine all pertinent data, to question assumptions, and to be guided by the evidence of scholarly research.”²

For the past 14 months, Emerson administrators have repeatedly chilled student expression on campus by singling out a student organization, Turning Point USA (TPUSA), and its members, in violation of Emerson’s clear promises of free expression, which include a

¹ We invite you to learn more about our mission and activities at thefire.org.

² Integrity, “Standards for Accreditation,” *Standard Nine: Integrity, Transparency, and Public Disclosure*, NEW ENGLAND COMM’N OF HIGHER EDUC., https://www.neche.org/resources/standards-for-accreditation#standard_nine [<https://perma.cc/46WN-HCDV>].

statement that the First Amendment “is of high importance,”³ and the assurance that students have the “right to participate in the open exchange of ideas and freedom of expression.”⁴

In September 2021, TPUSA—which at the time was a recognized Emerson student organization—distributed stickers in open areas of campus with the phrase “China Kinda Sus” in criticism of the Chinese government. Some recipients of the stickers felt that the stickers were targeting Chinese and Asian people and reported the group to Emerson College. Interim President William P. Gilligan condemned the stickers for expressing “anti-Asian bigotry” in an email to the whole Emerson community and announced that Emerson would suspend and investigate the group.⁵ Despite stating the investigation had not uncovered evidence that the group intended to target any subjects other than the Chinese government, the administration still placed a formal warning on the group’s record.⁶ This had an immediate chilling effect on TPUSA’s speech on campus, as after this sanction and denunciation, the group was unable to obtain a faculty advisor, which Emerson then used as grounds to derecognize the group.

When a student member of TPUSA attempted to put up flyers to respond to criticism of the organization presented in an opinion piece in the campus newspaper, Emerson administrators refused to approve them. FIRE advocated for both the rights of the student to put up his posters, and the rights of publications to publish opinion pieces highly critical of other student groups, or to decline to do so.

Emerson’s discriminatory treatment of TPUSA has continued late into this year. In October, an administrator denied TPUSA’s event proposal to screen a CBS News documentary about free speech on campus, which includes an interview with a former student who left Emerson after the “China Kinda Sus” controversy.⁷ The administrator said he denied the event because its advertising materials—which were critical of Emerson—contained “false information” and “misinterpretation of fact.” Last month, administrators also prohibited the group from posting flyers advertising a screening of the conservative pundit Matt Walsh’s documentary, “What Is a Woman?” about gender and transgender issues because the group used emojis of pregnant men and women in the flyers, which would provoke “negative responses,” according to the same administrators.

FIRE’s enclosed correspondence to Emerson—sent over the span of more than a year and seeking resolution of these violations of NECHE Standard 9.3—has proven unfruitful. Yet in

³ *Statement on Freedom of Expression*, EMERSON COLL., <https://emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> [<https://perma.cc/X6S2-MR3M>].

⁴ *Rights and Responsibilities for Students/Student Organizations*, EMERSON COLL., <https://emerson.edu/departments/community-standards/code-community-standards/rights-responsibilities-studentsstudent> [<https://perma.cc/6CMM-2AJE>].

⁵ Email from William P. Gilligan, Interim Pres., Emerson Coll., to Emerson student email listserv (Sept. 30, 2021, 11:39 a.m.), *available at* <https://www.thefire.org/research-learn/email-emerson-interim-president-william-gilligan-student-body-september-30-2021>.

⁶ 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), *available at* <https://www.thefire.org/research-learn/emerson-college-tpusa-disciplinary-letter-november-3-2021>.

⁷ CBS News, *Are the Kids All Right?* YOUTUBE (May 12, 2022), https://www.youtube.com/watch?v=ccJmV4oz_ck.

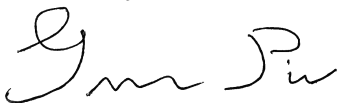
Emerson's search for a new president, the college stated that "free expression" of diverse ideas is a "non-negotiable" value for the institution.⁸ But, as both Emerson's policies and NECHE standards demand, any commitment to free expression requires protecting speech that may be unpopular or controversial

Accrediting agencies, including the Commission, are often the last line of defense for students' and faculty members' expressive freedoms at institutions of higher education. Students' limited time at a college or university impacts their ability to push for long term changes at their institution. Even in rare instances when a legal remedy is available to these students, the typical student lacks the time and resources to institute costly, protracted litigation. FIRE feels strongly that NECHE is the appropriate body to hold Emerson to account.

The Commission's Standard 9.3 is one of the strongest protections for student and faculty expression at private institutions in the United States. For accreditation to mean something, institutions must take these requirements seriously and clear departures from these standards must be enforced. Emerson's refusal to bring its conduct in line with Standard 9.3 despite repeated efforts at resolution merits the Commission's attention in the same way that other accrediting bodies have taken action against institutions for departing from a commitment to freedom of expression.⁹

If FIRE may be of assistance in providing further information or clarification, please do not hesitate to contact me. I may be reached via email at graham.piro@thefire.org and phone at (215) 717-3473.

Sincerely,



Graham Piro
Program Officer, Campus Rights Advocacy

Encl.

⁸ *Presidential Search Update: Prospectus*, EMERSON COLL. (July 22, 2022), https://emerson.edu/sites/default/files/pdf/Presidential_Search/Emerson_College_President_07212022.pdf [<https://perma.cc/J3FX-UR8P>].

⁹ For example, the Middle States Commission on Higher Education cited Mount St. Mary's University administrators' intolerance for criticism, in apparent breach of Standard II, as a basis to open an inquiry into a recently reaccredited institution. Susan Svrluga, *Mount St. Mary's University president resigns*, WASH. POST (Feb. 29, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/02/29/mount-st-marys-future-direction-on-the-table-as-leaders-meet-today>. The Higher Learning Commission also placed Missouri's Southwest Baptist University on probation for not being in compliance with three of the "Core Components" required for accreditation, including a requirement that "the institution is committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning." https://www.hlcommission.org/download/_BoardActionLetters/HLC%20Action%20Letter%20-%20Southwest%20Baptist%20University%2011.8.21.pdf.

Rights & Responsibilities for Students/Student Organizations

Community Standards

The College's mission is to educate students to assume positions of leadership in communication and the arts and to advance scholarship and creative work that brings innovation, depth, and diversity to these disciplines. Our mission can only be met when we have an environment that contributes to scholarship and our creative work.

As part of a community of artists and innovators we will work together to establish an environment built on trust and mutual respect. With this in mind it is an expectation that all Students know and honor the following Rights and Responsibilities.

Rights

All students at Emerson College have certain rights. These rights include:

- A.** The right to participate in the open exchange of ideas and freedom of expression. Understanding this right does not exempt you from the consequences of your actions.
- B.** The right to be secure from unreasonable or unauthorized search or seizure.
- C.** The right to reasonable privacy, including the privacy of personal information.
- D.** The right to a fair Student Conduct Process.
- E.** The right to bring forward a complaint if one has a good faith reason to believe that it is more likely than not that the rights or responsibilities derived from this statement have been violated.

Responsibilities

Student members of the Emerson College community as individuals and in groups have certain responsibilities. These include:

- A.** The responsibility to respect and equally treat all members of the College community in a civil manner.
- B.** The responsibility to know and follow College policies as well as federal, state and local laws and comply with them as required.
- C.** The responsibility to respect the confidentiality of personal information about members of the Emerson College community and to preserve the right of privacy.
- D.** The responsibility to recognize that student and student organization/club behavior reflects upon the individuals involved and upon the College community.

Statement on Freedom of Expression

Community Standards

As an institution dedicated to Communication and the Arts, the first amendment of the US Constitution is of high importance. Different members of the College Community will at times have different opinions or perspectives on a particular topic. Such differences in thought and perspective are a natural part of life and an important part of the educational and learning experience. It is not the role of the College to shield individuals from ideas and opinions that are different from their own; that they may find disagreeable or even offensive. The College values and supports a climate of mutual respect, however these concepts should not be a reason to stop a discussion of ideas.

The College encourages students to present ideas, express their individuality and be open to thoughts that differ from their own. While the free expression of ideas is vital to daily life and learning. It is important to note that the College may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, or that is otherwise directly incompatible with the functioning of the College. Expression that may violate the Policy Against Discrimination, Harassment & Sexual Violence is also prohibited. Students that fail to meet these expectations can be referred to Community Standards or to the Office of Equal Opportunity, as applicable.

In addition, the College may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of academic and community life. Please review the College's [Policy on Demonstrations \(/policies/demonstrations\)](/policies/demonstrations) for more information.

Civil discourse is the engagement in constructive dialogue or discussion that is intended to promote understanding of an idea or ideal, which is an essential function of freedom of speech. One moves away from civil discourse when they use language that can be characterized as hurtful or meant to cause harm, that contains direct insults, includes threats, defames an individual, and/or the rises to the level of discrimination or harassment. It also important to keep in mind that censorship is defined as the suppression of words, images, or ideas that are considered offensive by a particular person or group.



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).

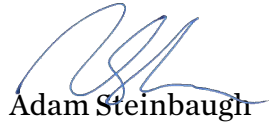
²⁹ *Id.* at 716.

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



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>.



January 28, 2022

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

URGENT

Sent via Electronic Mail (william_gilligan@emerson.edu)

Dear President Gilligan:

FIRE¹ is concerned that Emerson College is moving to revoke recognition of a student chapter of TPUSA because the organization, despite substantial efforts, is unable to obtain a full-time faculty advisor, almost certainly because the group's political viewpoint, or the efforts by Emerson's administration to sanction the organization, have dissuaded faculty members—even those who agree with the group—from advising it.

Because of this, the derecognition is inherently a result of viewpoint-based opposition to the group's views. Enforcement of the requirement, when the college could easily meet its institutional interests by furnishing the group with a staff or administrative advisor, is contrary to Emerson's promises of free expression. Accordingly, FIRE calls on Emerson to waive the requirement or provide an advisor to TPUSA.

I. Emerson's TPUSA Chapter Will Lose Recognition if it Does Not Obtain the Support of a Faculty Member

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.

Last fall, TPUSA was embroiled in a controversy concerning the distribution of the "China Kinda Sus" stickers, which Emerson College subsequently conceded were intended to criticize China's government, not its people. In the wake of that incident, Emerson's

¹ As you may recall from previous correspondence, 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.

administration publicly condemned TPUSA for “anti-Asian bigotry and hate” amidst “a rise in anti-Asian sentiment[.]”²

On January 18, 2022, the Program Coordinator for Student Engagement and Leadership emailed the leadership of TPUSA informing the group it would be derecognized by the college if they did not find a faculty advisor.³ Loss of recognition means the organization will be “frozen until a new advisor is found,” resulting in it losing “access to funds or ability to reserve space,”⁴ as well as being “unable to use Emerson’s brand and likeness[.]”⁵ A follow-up email laid out the restrictions the group faces:

[A]ll social media platforms, graphics, and organization email accounts will need to be updated so that they do not contain Emerson’s brand or likeness, meaning that the use of Emerson’s name cannot be in any graphics, org email accounts, social media account names, or EmConnect titles associated with the org. Independent student organizations are also not eligible to do Instagram takeovers on the official Emerson instagram account because of these policies.⁶

TPUSA had drawn interest from part-time or affiliated faculty, but was informed by the Emerson staff member that faculty advisors must now be “a full-time faculty or staff member,” and that Emerson could not approve TPUSA’s recognition because it had not obtained that support.⁷ The staff member explained that this was to avoid difficulty in maintaining an advisor, as “there is no guarantee that affiliated faculty will be coming back semester to semester.”⁸

TPUSA has reached out to more than 50 professors, but has not been able to locate a faculty member willing to risk the social, political, or career consequences that might attend affiliation with a controversial organization.

II. TPUSA’s Derecognition is Based on Viewpoint Issues That Render Its Derecognition a Violation of Emerson’s Promises of Free Expression

Emerson’s promises of free expression prohibit the college from requiring that student organizations, as a condition of obtaining formal recognition and its attendant rights, obtain the endorsement of its faculty or staff. TPUSA’s inability to find a full-time faculty advisor is a product of opposition to the group’s views—opposition no doubt accentuated by Emerson’s

² EMERSON TODAY, RECENT EVENT ON THE BOSTON CAMPUS, <https://today.emerson.edu/2021/09/30/recent-event-on-the-boston-campus> (Sept. 30, 2021).

³ Email from Jenna Coviello, Program Coordinator for Student Engagement and Leadership, to Sammi Neves, President, Emerson College-Turning Point USA (Jan. 18, 2022, 12:43 p.m.) (on file with author).

⁴ EMERSON COLL., STUDENT ENGAGEMENT AND LEADERSHIP, <https://www.emerson.edu/departments/student-affairs/undergraduate-student-handbook/student-engagement-leadership#studentorg> (last visited Jan. 26, 2022).

⁵ Coviello, *supra* note 3.

⁶ Email from Coviello to Neves (Jan. 25, 2022, 3:46 p.m.) (on file with author).

⁷ *Id.*, see also EMERSON COLL., CREATING A NEW STUDENT ORGANIZATION, <https://www.emerson.edu/departments/seal/student-organizations> (last visited Jan. 26, 2022).

⁸ *Id.*

own public statements condemning the group. Yet this significant burden on the group is easily remedied, and the college’s institutional interests addressed, by providing the group with a staff advisor, permitting an affiliated faculty member to fill the role, or waiving the requirement entirely.

A. *Emerson Makes Promises of Free Expression to Its Students.*

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 then 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

Having made these commitments, Emerson is obligated to keep them, as both a moral duty and legal obligation.¹¹

B. *TPUSA is Threatened with Loss of its Status as a Recognized Student Organization Because of its Viewpoint.*

TPUSA’s student leadership has attempted in good faith to find another faculty advisor, and has drawn interest from part-time or affiliated faculty, but it has been unsuccessful in attracting an advisor among full-time faculty, and now faces derecognition. To be sure, faculty members, engaging in their own rights to freedom of association, have a cognizable associative right to decline to form a relationship with TPUSA because of disagreement with the group’s views.¹² But if TPUSA is derecognized, its status as a registered student organization in good standing would improperly change as a direct result of community members’ opposition to its viewpoint.

Practically speaking, Emerson is *itself* adopting the faculty members’ viewpoint-based objections in derecognizing TPUSA due to an inability to secure a full-time faculty advisor. While an individual professor retains the right to associate or disassociate on the basis of viewpoint with whomever he or she pleases, Emerson has made clear promises of protecting

⁹ EMERSON COLL., RIGHTS & RESPONSIBILITIES FOR STUDENTS/STUDENT ORGANIZATIONS <https://www.emerson.edu/departments/community-standards/code-community-standards/rights-responsibilities-studentsstudent> (last visited Jan. 26, 2022).

¹⁰ EMERSON COLL., STATEMENT ON FREEDOM OF EXPRESSION, <https://www.emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> (last visited Jan. 26, 2022). 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.

¹¹ *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 college is based on contract, the terms of which are contained in the student handbook and other college materials).

¹² *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”).

its students' free expression and cannot deny TPUSA access to college resources because of faculty member prerogatives based on TPUSA's viewpoint.

A rule requiring that student organizations engage a faculty advisor is content- and viewpoint-neutral on its face, and would not normally prompt questions of free expression. But in this circumstance, given TPUSA's political viewpoint and the heightened controversy surrounding the group, the application of the policy creates a clear burden flowing from opposition to the group's viewpoint.¹³

This disadvantage is further evidenced by TPUSA's continued efforts to find a new advisor. TPUSA has diligently searched for another advisor, contacting at least 50 faculty members. In light of the number of prospective advisors contacted, it is difficult to reach a conclusion other than that faculty members are hesitant to associate with a controversial organization they may disagree with politically—especially given the administration's public comments of disdain for the group.

Emerson's public statements and investigation into TPUSA have also likely contributed to a reluctance on the part of any interested faculty in getting involved with the group. After all, if *unintentionally* violating college policy is enough for a student group to get sanctioned, why would a faculty member *voluntarily* risk the college taking action against them? By investigating the group and finding the group responsible for "anti-Asian bigotry and hate" (even as it recognized that it had no such intent), and issuing a "Formal Warning" to the group, Emerson's administration has now forced the group to operate under constant threat of further discipline—discipline that would be exacerbated by the existence of the "Formal Warning" on the group's record. Further discipline would likely imperil the group's status, and would push any hesitant faculty member away from working with the group.

C. Derecognition of Student Groups for Viewpoint-Based Reasons Violates Emerson's Promises of Free Expression.

In keeping with its commitments of free expression, Emerson must employ only content- and viewpoint-neutral criteria when determining whether a recognized student organization has met its obligations.

Emerson has a responsibility to ensure that student organizations espousing controversial, dissenting, or simply unpopular viewpoints are not denied official recognition and its attendant benefits because of an inability to find a faculty advisor. TPUSA has indicated that at least one visiting professor expressed interest in serving as an advisor for the group.¹⁴ As the group has undertaken a good-faith effort to find an advisor, Emerson should allow the student group to elect to have a part-time or affiliated faculty member as an advisor, and in doing so, accept the fact that they may have to replace their advisor more regularly than groups that can secure full-time faculty advisors. Doing so would keep the responsibility of finding an advisor with the student group, and would uphold the status quo. Such a provision

¹³ *McCullen v. Coakley*, 573 U.S. 464, 485 n. 4 (2014) (discussing that an otherwise-neutral law may be unconstitutional as applied if its use discriminates between speakers of different viewpoints).

¹⁴ If the visiting faculty who have expressed interest end up not representing the group, then the college should still commit to providing the group a staff advisor.

would also address the concern that Emerson has effectively created a *fait accompli* by which TPUSA is forced to find a full-time advisor to maintain its recognition, but interested advisors are disincentivized from assisting the group by Emerson's own public statements.


Alternatively, if a student organization is able to demonstrate an inability to secure a faculty member's participation as an advisor, despite a good-faith effort to do so, Emerson must assign a college staff member to serve in that capacity. This approach would respect the associative rights of Emerson faculty members and advance the college's interest in facilitating communication with student organizations, while eliminating a viewpoint-based penalty on controversial or outspoken student organizations.

III. Conclusion

FIRE is concerned that TPUSA's political viewpoint combined with Emerson's public statements have likely had a significant chilling effect on faculty desire to become involved with TPUSA. Therefore, we call on Emerson to act to maintain TPUSA's status as a recognized student organization.

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, February 4, 2022, confirming that Emerson will allow TPUSA to remain a recognized student organization with a temporary faculty advisor as the group looks for a full-time advisor.

Sincerely,



Graham Piro

Program Officer, Individual Rights Defense Program

Cc: Jenna Coviello, Program Coordinator for Student Engagement and Leadership
Erik Muurisep, Assistant Vice President for Campus Life
Jim Hoppe, VP and Dean of Campus Life



February 15, 2022

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

Sent via Electronic Mail (william_gilligan@emerson.edu)

Dear President Gilligan:

FIRE is gravely concerned to learn that Emerson College revoked recognition of its student chapter of TPUSA for the chapter's purported inability to secure a suitable staff or faculty advisor, despite clear indications the group made dozens of good-faith efforts to do so. Not surprisingly, TPUSA's difficulty in obtaining approval of faculty or staff members follows the Emerson administration's public condemnation of TPUSA by Emerson's administration for asserted "anti-Asian bigotry and hate" and a "Formal Warning" sounding in same—despite Emerson's acknowledgement that the group criticized the Chinese government, not its people. This revocation directly contravenes Emerson's policies that honor the "high importance" of the First Amendment and claim to guarantee students the rights to "freedom of speech," "freedom of political belief and affiliation," and "freedom of peaceful assembly."¹

Loss of recognition carries meaningful consequences. It means that TPUSA is "frozen until a new advisor is found," has no "access to funds or [the] ability to reserve space,"² and is disallowed from using "Emerson's brand and likeness[.]"³ Additionally, TPUSA is not eligible for any Emerson Recognition and Achievement awards because Emerson has forced it to operate as an independent organization.⁴

¹ EMERSON COLL., STATEMENT ON FREEDOM OF EXPRESSION, <https://www.emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> (last visited Feb. 8, 2022).

² EMERSON COLL., STUDENT ENGAGEMENT & LEADERSHIP, <https://www.emerson.edu/departments/student-affairs/undergraduate-student-handbook/student-engagement-leadership#studentorg> (last visited Jan. 26, 2022).

³ Email from Jenna Coviello, Program Coordinator for Student Engagement and Leadership, to Sammi Neves, President, Emerson College-TPUSA (Jan. 18, 2022, 12:43 p.m.) (on file with author).

⁴ Email from Coviello to Neves (Feb. 9, 2022, 1:45 p.m.) (on file with author).

Requiring student organizations to gain the approval of a university employee or faculty member operates as a *de facto* limitation on student organizations' viewpoints, particularly when the administration has placed its finger on the scales by sending the message—to its faculty and employees—that it disapproves of the group's expression.

In this case, that censorship is a conscious choice: Emerson could, today, assign a staff member to serve as an advisor. Or it could grant the organization a variance to allow it to have a part-time or affiliated faculty member as an advisor, which might expand the pool of potential advisors. Given Emerson's continuing refusal to offer the slightest defense of its students' expressive rights, we will not hold our breath.

Emerson's treatment of TPUSA is deeply shameful for an institution of higher education that claims to uphold free expression. Your administration's own statements about the group have chilled faculty and staff who may otherwise have been interested in advising the organization, even if they do not support its views. This callous indifference to the rights of TPUSA's members renders Emerson's promises of freedom of expression fleeting at best, leaving a stain on a school whose motto pledges to honor "Expression Necessary to Evolution."

Be advised that FIRE will continue to call public attention to Emerson's abandonment of these duties to its students by all means possible. We invite you to convince us that we have no reason to do so.

Sincerely,

A handwritten signature in cursive script, appearing to read "Graham Piro".

Graham Piro

Program Officer, Individual Rights Defense Program

Cc: Jenna Coviello, Program Coordinator for Student Engagement and Leadership
Erik Muurisepp, Assistant Vice President for Campus Life
Jim Hoppe, VP and Dean of Campus Life



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

Sent via Electronic Mail (william_gilligan@emerson.edu)

Dear President Gilligan:

FIRE¹ is deeply concerned about the state of free expression at Emerson College after the college has yet again failed to uphold its purported commitment to free expression by blocking a student from putting up posters on the grounds that they are insufficiently civil or respectful. While the poster in question is critical of another student and may be offensive to some, it falls within the bounds of the expressive freedoms Emerson promises its students. We call on Emerson to allow the student to display his poster, and once again urge the college to affirm its commitment to student expressive rights.

I. Emerson Administrator Denies Student Request to Put up Flyer

The following reflects our understanding of the pertinent facts, though we appreciate you may have additional information and invite you to share it with us, toward which end we enclose an executed privacy waiver authorizing you to do so.

On October 7, 2021, Emerson's student newspaper, *The Berkeley Beacon*, published an opinion written by Justin Chen titled "Turning Point U.S.A, should there be a voice for them on campus?" It discussed the recent on-campus controversy involving TPUSA's distribution of stickers displaying the phrase, "China Kinda Sus," and criticized TPUSA's national chapter for assertedly disseminating "conspiracy theories" about the spread of COVID-19 and the 2020 election, and for making "racist remarks against minority groups."²

In response to Chen's opinion piece, Sam Neves, an Emerson undergraduate and president of TPUSA's campus chapter, submitted to Emerson's administration a poster he wanted to display on campus. The poster prominently displayed the phrase "Justin Chen is a Liar," with

¹ As you may recall from previous correspondence, Foundation for Individual Rights in Education (FIRE) is a nonpartisan nonprofit dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

² Justin Chen, *Turning Point U.S.A, should there be a voice for them on campus?*, BERKELEY BEACON (Oct. 7, 2021), <https://berkeleybeacon.com/turning-point-u-s-a-should-there-be-a-voice-for-them-on-campus/>.

a picture of Chen, and leveled a series of accusations against Chen: “He claimed an Asian woman was ‘racist against her own race’ because she criticized the Chinese government,” “He falsely attributed claims to people who never said it,” “He maliciously conflated criticism to a corrupt organization with attacks to an entire race of people,” and “He stabbed his friends in the back just to get 5 minutes of attention.”



Additionally, the poster displayed a screenshot of an email conversation between then-editor-in-chief of *The Berkeley Beacon*, Charles McKenna, and Neves in which McKenna told Neves that the article “is an opinion piece and we stand by the author and the content wholeheartedly,” adding there would be no changes to the article.

On April 14, Neves met with Erik Muurisepp, the Assistant Vice President of Campus Life, to discuss the posters. In that meeting, Muurisepp cited two Emerson policies in denying permission to display the posters: “The responsibility to treat all members of the College community in a civil and respectful manner,” and “The responsibility to act as a good citizen.”³ Muurisepp also told Neves that he should submit his own article to the Berkeley Beacon to respond to Chen’s claims.

II. Emerson’s Promises of Free Expression Protect Neves’s Right to Put up the Flyer

As FIRE has repeatedly made clear in prior correspondence, although private institutions like Emerson are not bound by the First Amendment, Emerson has adopted policies guaranteeing

³ EMERSON COLL., RIGHTS & RESPONSIBILITIES FOR STUDENTS/STUDENT ORGANIZATIONS <https://www.emerson.edu/departments/community-standards/code-community-standards/rights-responsibilities-studentsstudent> (last visited Apr. 19, 2022) [<https://perma.cc/63HE-KYRC>].

students “certain rights,” including the “right to freedom of speech.”⁴ 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.”⁵

Having made these commitments, Emerson is obligated to keep them, as both a moral duty and a legal obligation.⁶ Given Emerson’s commitment to protect students’ expressive rights and its clear endorsement of the importance of the First Amendment as a “community responsibility,” students would reasonably expect to be able to express any viewpoint—even those considered offensive, disrespectful, or uncivil to others—without encountering institutional censorship.

A. Freedom of Expression Protects Subjectively Offensive Expression.

Freedom of expression “does not end at the spoken or written word.”⁷ Conduct that falls within a traditionally protected genre—such as displaying posters—is expressive conduct, even if it does not convey a “narrow, succinctly articulable message.”⁸ Because freedom of expression protects “not only the content but also the dissemination of written material,” it extends to the posting of written material.⁹

Other students may find Neves’s posters as offensive, uncivil, or disrespectful as Neves found Chen’s editorial. But whether speech is protected by the First Amendment is “a legal, not moral, analysis,”¹⁰ and the Supreme Court has repeatedly, consistently, and clearly held expression may not be restricted on grounds that others find it offensive or uncivil.

B. The Policies Cited by Emerson are Vague and Violate Students’ Right to Engage in Protected Expression.

The two policies Emerson cites to reject Neves’s request violate the expressive freedoms that Emerson promises its students. While many institutions, including Emerson, aspire to be places of civil discourse, formal enforcement of policies requiring students to “treat all members of the College community in a civil and respectful manner,” or to act “as a good

⁴ *Id.*

⁵ EMERSON COLL., STATEMENT ON FREEDOM OF EXPRESSION, <https://www.emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> (last visited Apr. 19, 2022) [<https://perma.cc/X6S2-MR3M>]. 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.

⁶ *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 college is based on contract, the terms of which are contained in the student handbook and other college materials).

⁷ *Texas v. Johnson*, 491 U.S. 397 at 404 (1989).

⁸ *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995).

⁹ *Dulaney v. Mun. Court for S.F. Judicial Dist.*, 11 Cal. 3d 77, 83 (1974) (holding that the posting of written notices on utility poles implicated the First Amendment).

¹⁰ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

citizen,”¹¹ create considerable risks to expressive freedom as they rely on subjective evaluations about what speech is sufficiently civil or inoffensive.

A primary “function of free speech . . . is to invite dispute,” and it “may indeed best serve its high purpose when it induces a condition of unrest” or “stirs people to anger,” as speech is “often provocative and challenging,” carrying profound unsettling effects.”¹² Freedom of expression necessarily protects “not only informed and responsible criticism” but also that spoken “without moderation.”¹³ The “wide latitude” afforded by freedom of expression “is not without its costs in terms of the risk to the maintenance of civility and an ordered society,” and those risks have often been borne “on the campus and elsewhere.”¹⁴

A broad rule mandating students treat each other in “a civil and respectful manner” and act “as a good citizen” imperils a broad range of protected expression. Words exchanged during lively debate often may later be isolated, stripped of their context, and recast as incivility. Further, as courts have recognized, civility codes “prohibit[] the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause.”¹⁵ Thus, while an anti-war protester could give a stemwinder of a speech about his opposition to the draft, freedom of expression protects his right to say, more directly, “Fuck the draft.” Accordingly, decades of free speech jurisprudence stand for the principle that authorities—like Emerson administrators—“cannot make principled distinctions” between what speech is civil or inoffensive enough to be permitted.¹⁶

III. Conclusion

To be sure, FIRE supports both the rights of Neves to put up his posters, and the rights of Chen and *The Berkeley Beacon* to publish opinion pieces highly critical of other student groups—and to decline to do so as well. Just as Chen has a right to stridently criticize TPUSA members, TPUSA members have the right to respond in kind. This exchange of criticism and “more speech”¹⁷ is exactly what is contemplated by a commitment to free expression—a commitment Emerson purports to make but continues to breach. The Supreme Court has repeatedly held that there is no exception for expression others view as hateful, writing that government does not have the authority “to license outside of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules.”¹⁸

Note too that Neves’s posters are responding to criticism broadly disseminated by the student newspaper. The student newspaper is under no obligation to print Neves’s response to this criticism, and so Neves is embracing an alternative for his rejoinder. This exchange of ideas is

¹¹ EMERSON, *supra* note 3.

¹² *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

¹³ *Bumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

¹⁴ *Healy v. James*, 408 U.S. 169, 194 (1972).

¹⁵ *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007).

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

¹⁷ *Whitney v. California*, 274 U.S. 357, 377 (1927).

¹⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

exactly what Emerson's free expression policies claim to embrace—but Emerson falls short by restricting Neves's ability to put up the posters.

We request a response to this letter no later than the close of business on May 24, 2022, confirming Emerson will allow Neves to put up his posters around campus. FIRE also asks Emerson once again to affirm students' expressive rights, including the right to timely participate in campus dialogue, without fearing institutional censorship or retaliation.

Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro

Program Officer, Individual Rights Defense Program

Cc: Jenna Coviello, Program Coordinator for Student Engagement and Leadership
Erik Muurisep, Assistant Vice President for Campus Life
Jim Hoppe, VP and Dean of Campus Life

Authorization and Waiver for Release of Personal Information

I, Sam Neves, born on ██████████, do hereby authorize Emerson College (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

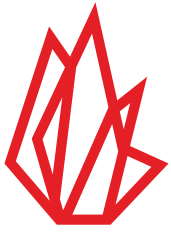
This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:
██████████
723D40398172403...
Student's Signature

5/1/2022

Date



FIRE

Foundation for Individual
Rights and Expression

November 18, 2022

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

URGENT

Sent via U.S. Mail and Electronic Mail (william_gilligan@emerson.edu)

Dear Interim President Gilligan:

FIRE¹ is concerned by Emerson's continued viewpoint-discriminatory treatment of the college's student chapter of Turning Point USA. Most recently, Emerson denied the group's event proposal for a film screening of a CBS News documentary about free speech on campus,² which includes an interview with KJ Lynam, a former Emerson student who left the school after the "China Kinda Sus" controversy.³ Denying this event violates Emerson's promises of free expression to its students.

Earlier today, Emerson administrators also prohibited TPUSA from posting flyers advertising a screening of Matt Walsh's documentary "What Is a Woman" because the emojis used in the posters, which depict pregnant men and women, would provoke "negative responses."⁴ While the event can still proceed, the group is unable to promote the event.

Given Emerson's lack of responsiveness to FIRE's past letters and public advocacy, please find enclosed a draft of the complaint we will be filing with the New England Commission of Higher Education concerning the state of free expression on Emerson's campus. As our complaint

¹ As you will recall from previous correspondence, the Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit dedicated to defending freedom of speech. You can learn more about our expanded mission and activities at thefire.org.

² CBS News, Are the Kids Are All Right?, YouTube (May 12, 2022) https://www.youtube.com/watch?v=ccJmV4oz_ck.

³ Ann Dailey Moreno, WCHSTV, *Emerson College punishes student club over stickers criticizing China's government* (Oct. 7, 2021) <https://wchstv.com/news/nation-world/emerson-college-punished-student-club-over-stickers-criticizing-chinas-government>.

⁴ Email from Jennifer Nival, Director of Student Engagement and Leadership, to Sam Neves (Nov. 18, 2022, 11:49 AM) (on file with author).

explains, Emerson’s repeated refusal to ameliorate its treatment of TPUSA is in contravention of its accreditation, to which Emerson is bound.⁵

On October 23, Sam Neves submitted a request through EmConnect to host a screening of the “CBS Reports” series documentary, “Are the Kids All Right?: Free Speech.”⁶ TPUSA’s event description read:⁷

Are The Kids All Right?: Free Speech is a CBS documentary starring former Emerson student KJ Lynum, a Chinese student raised in Singapore.

KJ dropped out of Emerson because of the bullying and harassment she suffered on campus after Emerson President William Gilligan, OISA director Andrea Popa, ISA director Tamia Jordan, race-baiter Samantha Ivery, and SEAL incited students to bully her by telling the entire student body that she was an “anti-Asian bigot,” accusing her of distributing “xenophobic weapons,” encouraging students to report her, and calling for her punishment.

Erik Muurisepp, Associate Vice President of Campus Life, told Neves that after reviewing the submission, he would not approve the event. He pointed to alleged “false information” and what he “would categorize as misinterpretation of fact [sic] information and previous communications,” along with “accusatory statements made towards individuals (staff) at the College.”⁸

In a follow-up email, Neves offered to remove the phrase “race-baiter” and the accusation that Emerson “incited students to bully [Lynum],”⁹ but Muurisepp responded that the “language and accusations” in the description “are not completely factual,” that he “read them as inciteful,”¹⁰ and the event would therefore still not be approved.

As a threshold matter, the event description does not meet the legal definition of incitement, which applies only to speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”¹¹ TPUSA’s event description, while heavily critical of Emerson administrators, does not even begin to approach this high bar.

⁵ Integrity, “Standards for Accreditation,” Standard Nine: Integrity, Transparency, and Public Disclosure, NEW ENGLAND COMM’N OF HIGHER EDUC., https://www.neche.org/resources/standards-for-accreditation#standard_nine [<https://perma.cc/46WN-HCDV>].

⁶ CBS News, *supra* note 2.

⁷ Sammi Neves Event Request for Turning Point USA (Oct. 23, 2022, 7:42 PM) (on file with author).

⁸ Email from Erik Muurisepp, Associate Vice President of Campus Life, to Sam Neves (Oct. 26, 1:10 p.m.) (on file with author).

⁹ Email from Neves to Muurisepp (Oct. 26, 1:27 PM) (on file with author).

¹⁰ Email from Muurisepp to Neves (Oct. 27, 2:40 PM) (on file with author).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Expansive interpretations of these exceptions would chill political expression. The Supreme Court—interpreting First Amendment language coextensive with the expressive freedoms Emerson promises its students—has urged that “extreme care” be taken to ensure that an exacting incitement standard be met, lest “highly charged political rhetoric lying at the core” of freedom of expression unreasonably be interpreted as unprotected “true threats” or “incitement.”¹²

Emerson’s strong free speech promises also protect students’ right to share ideas or opinions that offend some on campus. Emerson’s policies state in no uncertain terms that it “is not the role of the College to shield individuals from ideas and opinions that are different from their own; that they may find disagreeable or even offensive.”¹³ Denying approval for the event because of offense taken at “accusatory statements” violates these clear principles. A sole administrator serving as gatekeeper for what speech is allowed on campus is also improper. The Supreme Court has held “government officials”—the analog here being university administrators—“cannot make principled distinctions” between what speech is sufficiently offensive or inoffensive.¹⁴

That is because the principle of freedom of speech does not exist only to protect non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive—including student dissent from the university’s own stances. As the Supreme Court explained:¹⁵

[Speech] may indeed best serve its high purpose when it induces a condition of unrest ... or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Finally, denying TPUSA’s event based on the subjective view that there are “misinterpretations of fact” in the description violates principles of free expression. A primary “function of free speech ... is to invite dispute,”¹⁶ and any conception of freedom of expression must necessarily protect “not only informed and responsible criticisms” but also “the freedom to speak foolishly and without moderation.”¹⁷ If Emerson objects to TPUSA’s characterization of its actions, Emerson may use its own expressive rights to correct the record. But as a college clearly committed to free expression, it may not use institutional punishment to silence critics.

¹² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

¹³ *Statement on Free Expression*, EMERSON COLL., <https://emerson.edu/departments/community-standards/code-community-standards/statement-freedom-expression> [<https://perma.cc/X6S2-MR3M>].

¹⁴ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁵ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

¹⁶ *Id.*

¹⁷ *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

As mentioned above, given Emerson's lack of responsiveness to FIRE in the past, we plan on filing the enclosed accreditation complaint shortly, barring a substantive response to our concerns from Emerson by Monday, November 28.

Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro
Program Officer, Campus Rights Advocacy

Cc: Kenneth Danton, Associate General Counsel
Erik Muurisep, Associate Vice President of Campus Life

Encl.