



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.

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5/1/2022

Date