ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE

4 May 2018

Via U.S. Mail & Electronic Mail at tfoster@coloradomesa.edu
Dr. Tim Foster
Office of the President
Colorado Mesa University
1100 North Avenue
Grand Junction, Colorado 81501

Via U.S. Mail & Electronic Mail at kurban@coloradomesa.edu
Ms. Karen Urban
Co-BSN Program Director
Colorado Mesa University
1100 North Avenue
Grand Junction, Colorado 81501

Re: Unconstitutional Restriction of Religious Remarks at Colorado Mesa University's Pinning Ceremony for Nursing Graduates

Dear President Foster and Ms. Urban:

We recently learned that Colorado Mesa University ("CMU") officials have censored the remarks Miss Karissa Erickson plans to give to her fellow nursing graduates at their pinning ceremony, prohibiting her from mentioning Jesus or reading a short Bible verse. As these officials misunderstand what the First Amendment means, we write to inform you that they are on the verge of engaging in viewpoint discrimination and violating the Establishment Clause. Thus, we insist that you allow Miss Erickson to deliver her desired remarks without further interference.

By way of introduction, Alliance Defending Freedom is an alliance-building, nonprofit legal organization that advocates for the right of people to live out their faith freely. The ADF Center for Academic Freedom is dedicated to ensuring that religious students, faculty, and staff at public universities enjoy rights to speak, associate, and learn on campus on an equal basis as those of other perspectives so that everyone can freely participate in the marketplace of ideas.

FACTUAL BACKGROUND

This year's nursing class selected two of its members to speak at the upcoming pinning ceremony, one of whom is Miss Erickson. CMU officials gave her no guidelines as to what she could say. The only limitation presented was that the two speakers combined had to conclude their remarks in ten minutes.

In the days following, Miss Erickson prepared her remarks. After thanking the audience, she recalls some humorous experiences from nursing school. Then she shares a story about withstanding adversity that ends with: "God always has a purpose." She closes by saying: "I find comfort in Jesus's words, and I pass them on to you. John 16:33. 'These things I have spoken to you, that in Me you may have peace. In the world you have tribulation, but take courage, I have overcome the world.'"

When they reviewed her draft on April 18th, Dr. Graham, Ms. Seago, and Ms. Noga told her they would "look into whether it was okay or not to mention religion," noting that CMU disapproves of mentioning any specific religion. Two days later, Dr. Graham instructed her by e-mail to "take out the last section where you start [sic] that you find comfort in Jesus' words and cite a [B]ible verse." She explained: "Speeches should be free of any one religious slant." Later she remarked: "We just have to be professional and careful in a public ceremony as some people don't

appreciate those references."

On May 2nd, when Miss Erickson asked whether these remarks violated a CMU policy, Dr. Graham and Ms. Seago referred her to Ms. Urban. Ms. Urban explained that several years earlier, students took offense when the Gideons, a private Christian ministry, distributed Bibles on campus. Due to the ensuing negative publicity it received, CMU no longer allows Bible verses or remarks about any specific religion because someone might be offended. But she made it clear that Miss Erickson had to remove references to Jesus and the Bible verse from her speech, or "there will be repercussions. This program will not tolerate it." According to her, CMU is just "tired of dealing with this and has no more energy to spend towards it."

LEGAL ANALYSIS

It appears that the officials involved in this matter fundamentally misunderstand what the First Amendment allows and what it requires of them. Of course, even if CMU is "tired" or lacks "energy," it must respect the fundamental constitutional rights of its students, including Miss Erickson.

I. The First Amendment does not require the University to purge religious remarks from its pinning ceremony.

The University's legal concerns about the prayers appear to rest on the so-called "separation of church and state." In reality, "[t]his extra-constitutional construct has grown tiresome," especially since the First Amendment does not demand it.[1] The oft-repeated phrase does not appear *anywhere* in the Constitution. The First Amendment merely states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] Nor does this "misleading metaphor"[3] appear anywhere in the debates of the Constitutional Convention, of the state conventions that ratified the Constitution, of the First Congress that drafted the First Amendment, or of the state legislatures that ratified the First Amendment.[4] The Establishment Clause merely "requires the state to be a neutral in its relations with . . . religious believers and non-believers; it does not require the state to be their adversary."[5] Hence, it does not exclude religious speech from full protection under the First Amendment or require college administrators to purge it from all public ceremonies.

Accordingly, both federal appellate courts that have considered graduation prayers at colleges and universities ruled that those prayers comply with the First Amendment.[6] If the Establishment Clause allows clergy-led graduation prayers, certainly it allows a graduate to reference her faith in her remarks.

In 1995, a professor and three students sued Indiana University officials, claiming that the clergy-led invocation and benediction at the graduation ceremony—a long-standing tradition[7]—violated the Establishment Clause.[8] As the Seventh Circuit highlighted, these prayers differed dramatically from those at high school

---

1 *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005).

2 U.S. CONST. amend. 1.

3 *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

4 *See id.* at 91–114 (Rehnquist, J., dissenting) (tracing debates surrounding the formation and ratification of the First Amendment); *see also* DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 13, 19–20, 43–48 (2000).

5 *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (noting that religious speech is not a "First Amendment orphan").

6 *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied* 523 U.S. 1024 (1998).

7 *Tanford*, 104 F.3d at 985 (noting that these prayers dated back to 1840).

8 *Id.* at 983–85.

graduations, where the audience largely consisted of children.[9] In a university context, "there was no coercion—real or otherwise—to participate [in the prayers]."[10] Students freely chose whether to participate in the graduation and could come and go throughout the ceremony. Also, "the mature stadium attendees were voluntarily present and free to ignore the cleric's remarks."[11] The Seventh Circuit went on to observe that the prayers—which are "widespread throughout the nation"—were "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[12] They "serve[d] legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs."[13] Thus, the Seventh Circuit concluded that "the First Amendment was not intended to prohibit [state universities] from sanctioning ceremonial invocations of God. Such . . . action simply does not amount to an establishment of religion."[14]

Similarly, in 1991, an engineering professor sued Tennessee State University officials, claiming that the clergy-led invocations and benedictions at university functions, including graduations, violated the First Amendment.[15] Like the Seventh Circuit, the Sixth Circuit ruled that these prayers have a "secular purpose" by "serv[ing] to dignify or to memorialize a public occasion."[16] Of course, prayer is unquestionably religious, but "[t]he people of the United States did not adopt the Bill of Rights to strip the public square of every last shred of public piety."[17] Also like the Seventh Circuit, the Sixth Circuit focused on the fact that the university graduation audience consists of adults, which minimizes any potentially coercive effect: "It would not be reasonable to suppose that an audience of college-educated adults could be influenced unduly by prayers of the sort in question here."[18] Indeed, "[t]here was absolutely no risk that [the professor]—or any other unwilling adult listener—would be indoctrinated by exposure to the prayers."[19] Of course, someone "may f[ind] the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional."[20]

As two federal courts of appeals have upheld clergy-led prayers at university commencement exercises, the Establishment Clause simply does not require CMU to purge its ceremonies of all things religious, particularly the remarks of students. We encourage you to celebrate—rather than squelch—the religious heritage of your students at this pivotal moment in their professional lives.

II. By banning remarks about a specific religion, University officials engage in viewpoint discrimination.

CMU officials made it abundantly clear that the religious nature of Miss Erickson's remarks was problematic, creating the risk of "repercussions" if she refused to remove this content. In the process, they ignored a fundamental First Amendment principle: this speech represents Miss Erickson's expression as a private citizen. There is a "crucial difference between *government* speech endorsing religion, which the

---

9 *Id.* at 985.

10 *Id.*

11 *Id.* at 985–86 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 ("University students . . . are less impressionable than younger students. . . .")).

12 *Id.* at 986 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

13 *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

14 *Id.* (quoting *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring)).

15 *Chaudhuri*, 130 F.3d at 233–35.

16 *Id.* at 236.

17 *Id.*

18 *Id.* at 237; *see also id.* at 238–39 (distinguishing university prayers from those in *Lee v. Weisman*, 505 U.S. 577 (1992), because of the maturity of the audience).

19 *Id.* at 239.

20 *Id.* (quoting *Lee*, 505 U.S. at 597)

Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[21]

It is also well-established that university officials cannot silence speech simply because it expresses a particular viewpoint, including a religious one.[22] The Supreme Court has held on at least three separate occasions that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[23] Both it and other courts have repeatedly condemned efforts to exclude or restrict religious expression as viewpoint or content discrimination, both at universities[24] and elsewhere.[25]

CMU will allow Miss Erickson to deliver graduation remarks from any perspective whatsoever. But once she gave a religious perspective, the censors sprang to action. They allow her to quote the story about adversity but object when she quotes Jesus. This is textbook viewpoint discrimination, a "blatant" First Amendment violation.[26]

III. By restricting speech simply because it might offend, University officials violate the First Amendment.

According to CMU officials, the University is censoring Miss Erickson's references to Jesus and the Bible because they might offend another student or attendee. But this reasoning flatly ignores decades of First Amendment jurisprudence. For the First Amendment exists precisely to protect controversial speech.

After all, the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[27] One of the functions of free speech is "to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[28] When people confront expression they find offensive, the First Amendment solution is simple: they can avert their eyes.[29] But government cannot cleanse public discourse until it is "palatable to the most squeamish among us."[30]

This bedrock principle applies with full force to universities for "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[31] "The Supreme Court has held time and again,

---

21 *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original); *accord Pinette*, 515 U.S. at 760 ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed . . . a free-speech clause without religion would be *Hamlet* without the prince.").

22 *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 831 (1995).

23 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (referring to *Rosenberger*, 515 U.S. 819, and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)).

24 *See, e.g., Rosenberger*, 515 U.S. at 831–32 (excluding religious newspaper from the student fee forum constitutes viewpoint discrimination); *Widmar*, 454 U.S. at 269–70 (excluding religious student group seeking to worship from a university building constitutes content discrimination); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 778–79 (7th Cir. 2010) (excluding events involving prayer, worship, and proselytizing from a student fee forum constitutes viewpoint or content discrimination).

25 *See, e.g., Good News Club*, 533 U.S. 98; *Lamb's Chapel*, 508 U.S. 384; *see also CEF of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526–30 (3d Cir. 2004) (excluding religious materials from a school flyer forum constitutes viewpoint discrimination); *CEF of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 373 F.3d 589, 593–94 (4th Cir. 2004) (same).

26 *Rosenberger*, 515 U.S. at 829.

27 *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing cases upholding this principle); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.).

28 *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

29 *See Cohen v. California*, 403 U.S. 15, 21–22 (1971).

30 *Id.* at 25.

31 *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973).

both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[32] Indeed, the Sixth Circuit echoed this principle while upholding graduation prayers.[33]

IV. By banning remarks about a specific religion, University officials violate the Establishment Clause.

Not only did CMU officials object to the religious nature of Miss Erickson's remarks, but they also made it clear that CMU "will not tolerate" references to any specific religion or "one religious slant." So Miss Erickson can refer to God (as she does), but not Jesus. Both objections violate the Establishment Clause.

The Establishment Clause "forbids hostility toward any [religion]."[34] CMU officials have demonstrated plenty of this when they announced the need to check whether Miss Erickson could mention Scripture, when they created this ban in reaction to negative publicity, when they said CMU will not "tolerate" Miss Erickson's remarks and threatened "repercussions," and when they said CMU is "tired" of dealing with citizens exercising their religious freedoms. Anytime officials "scan and interpret student publications" for religious content (as they did here), they risk "fostering a pervasive bias or hostility to religion" in violation of the Establishment Clause.[35]

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[36] But CMU officials will allow some religious perspectives—those sufficiently generalized and sterilized so as to be palatable to officials. Hence, Miss Erickson can mention God, but not Jesus. But CMU "may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy."[37]

DEMAND

In his *Farewell Address*, George Washington observed: "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity."[38] In this situation, federal courts agree. Nothing in the Constitution prohibits clergy-led prayers at university graduations, let alone a few religious remarks from one of the graduates.

In addition, we urge you to respect Miss Erickson's constitutional rights. As you know, "state colleges and universities are not enclaves immune from the sweep of the First Amendment,"[39] and "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."[40] That is, we insist that you withdraw your demand that Miss Erickson purge her remarks of religious

---

[32] *Saxe*, 240 F.3d at 215 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Johnson*, 491 U.S. at 414; *Street v. New York*, 394 U.S. 576, 592 (1969); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

[33] *Chaudhuri*, 130 F.3d at 239 ("[Some] may have found the prayers offensive, but that reaction, in and of itself, does not make them unconstitutional.").

[34] *See, e.g.*, *Lynch*, 465 U.S. at 673 (noting that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

[35] *Rosenberger*, 515 U.S. at 845–46.

[36] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[37] *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014).

[38] PETER LILLBACK, GEORGE WASHINGTON'S SACRED FIRE 917–18 (2006); George Washington, *Address of George Washington, President of the United States . . . Preparatory to his Declination* 22–23 (Baltimore, George & Henry S. Keatinge, 1796), *quoted in* BARTON, *supra* note 4, at 117.

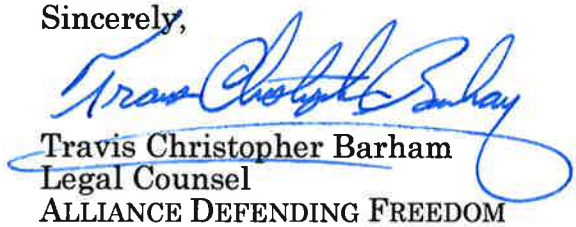
[39] *Healy v. James*, 408 U.S. 169, 180 (1972).

[40] *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

content and assure us that you will do nothing to restrict how she discusses her faith.

As the May 11th pinning ceremony is quickly approaching, we respectfully insist that you inform our office in writing by the **close of business on May 8, 2018** whether you will be willing to take these steps. If you refuse, we will have no option but to advise our client on other avenues for vindicating her fundamental constitutional rights. Meanwhile, please place a litigation hold on all e-mail accounts, document collections, social media accounts, and all other sources of information (including electronically stored information) that reference in any way Miss Erickson, the nursing program's pinning ceremonies, or CMU's policies and practices regarding religious references at its events.

Sincerely,



Travis Christopher Barham
Legal Counsel
ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Daniel Lowenberg, FLEMING & LOWENBERG, MOUNTAIN LAW GROUP LLC, at dlowenberg@moutainlawgroup.com
- Dr. John Marshall, Vice President for Student Services, at marshall@coloradomesa.edu
- Dr. Lucy Graham, MSN Program Coordinator, at lgraham@coloradomesa.edu
- Ms. Heather Seago, Instructor of Nursing, at hsego@coloradomesa.edu
- Ms. Jodi Noga, Assistant Professor of Nursing, at jnoga@coloradomesa.edu