



29 September 2014

Via U.S. Mail & Electronic Mail
at jalandry05@mail.cfcc.edu

Mr. Jack Landry
Drama Instructor
Cape Fear Community College
411 North Front Street
Wilmington, North Carolina 28401

Re: Viewpoint Discrimination Against Religious Student Expression

Dear Mr. Landry:

Mr. Justin Kaleb Graves recently contacted Alliance Defending Freedom after you refused to allow his production—which the drama club had unanimously voted to sponsor—to proceed due to its religious message. In so doing, it appears that you violated his right to free speech by engaging in viewpoint discrimination.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. We are dedicated to ensuring that religious students and faculty enjoy rights to speak, associate, and learn on an equal basis as students and faculty of different faiths or no faith at all. While we often litigate to defend these freedoms,¹ today we write to urge you to respect your students' right to free speech by allowing Mr. Graves' production—with its religious content—to proceed.

FACTUAL BACKGROUND

During the past summer, Mr. Graves—a dual enrollment student at Cape Fear Community College (CFCC)—developed a production featuring illusions and sleights of hand that also includes religious themes. This fall, he approached the drama club to obtain its sponsorship for performing the production on campus. The club unanimously voted to sponsor it, even though Mr. Graves noted that he would not minimize or eliminate its overtly Christian components.

Mr. Graves then approached you as the club's advisor, but you refused to allow the production to proceed. In two conversations, you stated that because CFCC is a publicly funded institution, the drama club could not support an overtly Christian show. So you instructed him to minimize—or “dumb down”—the religious content until it was not “obvious.” You explained (1) that this content could anger taxpayers, prompting lawsuits; (2) that you did not want anyone to feel “offended” (al-

¹ See, e.g., *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

though you apparently had no such concerns when the drama club sponsored productions that included rape and incest this year); and (3) that this production would violate the First Amendment if it included religious content.

LEGAL ANALYSIS

I. The Supreme Court has repeatedly ruled that excluding speech due to its religious content is unconstitutional viewpoint discrimination.

Since at least 1981, the Supreme Court has clearly indicated that public universities cannot single out religious speech for special, detrimental treatment. At the time, some students wanted to use university buildings for a meeting consisting of “prayer, hymns, Bible commentary, and discussion of religious views and experiences,”² but the university prohibited its buildings from being used for “religious worship or religious teaching.”³ The Supreme Court ruled that not only are “religious worship and discussion . . . forms of speech and association protected by the First Amendment,”⁴ but the university had to satisfy strict scrutiny to justify rejecting the students’ request,⁵ which it could not do.⁶

In 1995, the Supreme Court reiterated that public universities cannot target religious groups for different treatment. The University of Virginia refused to let *Wide Awake*—a student publication dedicated to providing a Christian perspective on the issues of the day and to evangelizing students to become Christians—receive student activity fees because it was a “religious activity.”⁷ But the Court ruled for the students, noting that it was “axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁸ Indeed, when “the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”⁹ Once again, excluding groups simply due to their religious activities constituted viewpoint discrimination.¹⁰ Excluding all religious groups only exacerbated the constitutional problem by silencing multiple voices and skewing debate in multiple ways.¹¹

The Supreme Court has also applied these same principles to the elementary and high school context,¹² making it clear that “speech discussing otherwise per-

² *Widmar v. Vincent*, 454 U.S. 263, 265 n.2 (1981).

³ *Id.* at 265.

⁴ *Id.* at 269; see also *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . [A] free-speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.”).

⁵ *Widmar*, 454 U.S. at 269–70.

⁶ *Id.* at 276–77.

⁷ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 823–27 (1995).

⁸ *Id.* at 828 (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

⁹ *Id.* at 829 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

¹⁰ *Id.* at 831.

¹¹ *Id.* at 831–32.

¹² See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107–12 (2001).

missible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint.”¹³

It appears that you ignored these fundamental First Amendment principles. When CFCC allowed the drama club to sponsor programs of its choice, it created a forum for student speech. You refused to allow one program to proceed simply due to its Christian themes and content. This represents the same sort of content and viewpoint discrimination the Supreme Court has so regularly condemned.

II. The Supreme Court has repeatedly ruled that speech cannot be restricted merely because it might offend someone.

Several times, you remarked that Mr. Graves’ production might offend someone. While this is rather hypocritical, seeing as you had no such qualms about productions regarding rape and incest, it is important to recognize that the First Amendment exists to protect controversial speech,¹⁴ even if it is religious.¹⁵ 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.”¹⁶ When people confront expression they find offensive, the First Amendment provides a simple solution: they can avert their eyes (or in this case, leave the performance).¹⁷ But government cannot cleanse public discourse until it is “palatable to the most squeamish among us.”¹⁸

This bedrock principle applies with full force to college and 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.”¹⁹ In fact, the “Supreme Court has held time and again, 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.”²⁰

III. The Supreme Court has repeatedly ruled that the Establishment Clause does not require public universities to purge religious speech.

It also appears that you refused to allow Mr. Graves’ production to proceed due to concern that it would violate the Establishment Clause of the First Amendment. However, the Supreme Court has repeatedly declared—no less than seven times—that the government does not run afoul of the Establishment Clause when it treats

¹³ *Good News Club*, 533 U.S. at 111–12.

¹⁴ *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (“The First Amendment protects expression, be it of the popular variety or not.”).

¹⁵ *See 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.”).

¹⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing cases upholding this principle); *see also Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.).

¹⁷ *See Cohen v. California*, 403 U.S. 15, 21–22 (1971).

¹⁸ *Id.* at 25.

¹⁹ *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973).

²⁰ *Saxe*, 240 F.3d at 215.

religious and secular expression alike.²¹

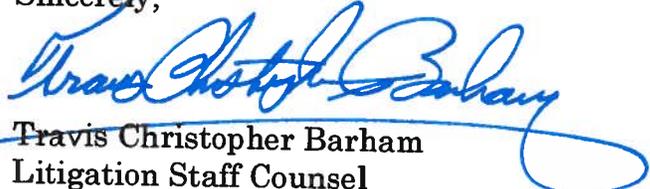
As long as CFCC “grants equal access to both secular and religious speech,” it does not “endorse or disapprove of religion.”²² In fact, it respects the constitutional principle of neutrality when “[it], following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”²³ Ironically, your practice of scanning potential productions to identify (and then exclude) the religious ones presents the real constitutional danger because it “risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.”²⁴

DEMAND

As you know, public universities are “not enclaves immune from the sweep of the First Amendment.”²⁵ Indeed, Supreme Court precedents “leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.”²⁶ In this context, as even Justice Brennan noted, “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”²⁷

Therefore, we insist that that you allow Mr. Graves’ production to proceed—without regard to its religious nature or content—on the same basis as all other productions the drama club votes to sponsor. By the close of business on **Friday, October 10, 2014**, please respond to me in writing to confirm whether you will do so. I look forward to your response and to resolving this matter amicably.

Sincerely,



Travis Christopher Barham
Litigation Staff Counsel
ALLIANCE DEFENDING FREEDOM

Cc:

- Dr. Ted D. Spring, Office of the President, Cape Fear Community College
- Ms. Deborah J. Dewart, Attorney at Law

²¹ See *Widmar*, 454 U.S. at 273–76; *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 253 (1990); *Lamb’s Chapel*, 508 U.S. at 395; *Rosenberger*, 515 U.S. at 842–43; *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000); *Good News Club*, 533 U.S. at 112–20; *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002); see also *Mitchell v. Helms*, 530 U.S. 793, 809–10, 825–36 (2000); *Pinette*, 515 U.S. at 764 (“And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.”).

²² *Mergens*, 496 U.S. at 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

²³ *Rosenberger*, 515 U.S. at 839.

²⁴ *Id.* at 845–46.

²⁵ *Healy v. James*, 408 U.S. 169, 180 (1972).

²⁶ *Id.*

²⁷ *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J. concurring in judgment).