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ACLJ
American Center for Law & Justice

June 7, 2005

VIA EMAIL AND FIRST CLASS MAIL

Hon. Patricia Spencer, President
Victor Valley Community College
18422 Bear Valley Road
Victorville, CA 92392-5849

re: *Bethany Hauf's rights to academic freedom, freedom of speech and freedom of religion*

Dear President Spencer:

Bethany Hauf has retained the American Center for Law and Justice (ACLJ) to pursue legal claims arising from Victory Valley Community College and adjunct instructor Michael Shefchik's adversely scoring her work in English 101 because of instructor Shefchik's personal distaste for references to God in Mrs. Hauf's written work product.

By way of introduction, the ACLJ is a not-for-profit public interest law firm and educational group. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. We render assistance to a significant number of students in situations similar to the one Mrs. Hauf now faces.

The legal principles relevant to this particular situation have been set forth in numerous Supreme Court decisions. As you will see in the pages that follow, *Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 506 (1969), *Widmar v. Vincent*, 454 U.S. 265 (1981), *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), and many other federal court decisions attest to the fact that religious expression in the public arena is consistent with the First Amendment, including when the expression takes place on public school grounds. As then-President

Clinton stated, "[t]he First Amendment does not -- I will say again -- does not convert our schools into religion-free zones." *President's Remarks at James Madison High School in Vienna, Virginia*, 31 Weekly Comp. Pres. Doc. 1220, 1224 (July 12, 1995).

In the following pages, the facts of this matter are set forth and analyzed under the relevant law. After reviewing the following, please take the necessary steps required to ensure that your faculty and staff do not violate Bethany Hauf's and other students' federal constitutional rights and California statutory rights in the future.

I. STATEMENT OF RELEVANT FACTS

Bethany Hauf attends Victor Valley Community College. Michael Shefchik, her instructor for English 101, assigned a number of writing projects, including the one of present concern for a research paper.

On April 12, 2005, Mrs. Hauf contacted Mr. Shefchik via email inquiring about a topic choice she was considering, either for a persuasive writing assignment or for the research project assignment. She identified the topic as "Religion and Its Place within the Government." She stated that she was learning, from the groundwork already done, that the topic was sufficiently grounded in research materials that it could justifiably serve as her research project. And, she asked a few technical questions about writing in response to the various assignments.

Mr. Shefchik received the email and replied to it.

In his reply, he made clear that he understood the particular topic of interest to Mrs. Hauf and her possible use of it for her research project. At least twice in the email, when it would have been proper to indicate that her topic choice was out of line with the assignment, Mr. Shefchik actually indicated that the proposed topic was within the bounds of the assignment. He said, "Certainly you could write a persuasive paper or a research paper on the topic . . . ." Later in the email he stated, "Should you decide to go with this topic," and "Whatever you decide, these subjects, like most others, need objective treatment . . . ." The email from Mr. Shefchik did include this notable guidance: "I have one limiting factor – no mention of big "G" gods, i.e., one, true god argumentation."

Given that the subject was one with a richly diverse background of research material, was of interest to her, and was passed upon by the instructor, Mrs. Hauf

proceeded with her research and writing to complete the assignment. In compliance with course requirements, she submitted a draft of the her research project and attended a conference May 28, 2005, with Mr. Shefchik on her research project.

The conference did not "go well." Mr. Shefchik told her that, at best, because she had written off topic about God, she would be graded 69 out of a possible 100 points. Mr. Shefchik told Mrs. Hauf, among the reasons for his limitation was that references to "God" could be offensive. He also indicated to her that there was an appeal process if she was unhappy with his actions, and he invited her to undertake that process. Within three or four minutes of the start of what was supposed to be an approximately 20 minute conference, Mrs. Hauf found the conference concluded and without having received any of the sort of pedagogical supervision and guidance appropriate to such a conference.

Because Mr. Shefchik had identified Assistant Professor Judy Solis as the person to whom any appeal from his decision should be taken, Mrs. Hauf immediately walked over to Professor Solis' office. She explained the circumstances to Professor Solis. Professor Solis then invited Mr. Shefchik to join her and Mrs. Hauf in her office. A further brief discussion ensued, but no aid or assistance correcting Mr. Shefchik's conduct was forthcoming. At the conclusion of that meeting, Mrs. Hauf and Mr. Shefchik returned to his office for a further brief meeting.

After returning home that same day, Mrs. Hauf posted her draft to the online blackboard (as all student work was to be posted there for review and comment by other students). In addition, in the Discussion Board section of the online blackboard, Mrs. Hauf posted a message regarding her paper, and the concerns expressed about it by Mr. Shefchik, as well as her own concern for the thoughts of the other students in the class regarding her work. Her posted message was in compliance with an oral instruction given by Mr. Shefchik during the brief conference. He told Mrs. Hauf that she should confirm with her classmates that he had given specific instructions about the research project.

The very next day Mr. Shefchik caused Mrs. Hauf's paper to removed from its electronic posting. As a consequence, she was denied the benefit of other students' evaluation and thoughts on her work, as well as having been denied the opportunity to confirm with those students, in accord with Mr. Shefchik's instructions, whether her paper was "off topic."

Mr. Shefchik describes himself as an Atheist. He has recounted his tales of

being a "Dead Head" (a camp follower of the rock group "Grateful Dead"), and of illegal drug use experiences from his youth. He has even offered to make "bootleg" music CDs of another rock group, "Phish." While his life experiences, drug usage choices, and willingness to offer to make bootleg copies of copyrighted materials are troubling, it is the strange intersection of his professed personal belief in atheism with the decision to down-grade Mrs. Hauf's work because of its references to a big "G" God that must provoke appropriate administrative intervention by you and your faculty.[1]

II. STATEMENT OF RELEVANT LAW

As a prefatory matter, the nature of Bethany's product, her research paper, must be understood. Mr. Shefchik's actions appear to be driven by a view that Mrs. Hauf wrote "off topic" when, as the facts above show, he knew and approved of the topic she wrote on, although he urged her to take an advocacy position that was not able to be supported by the historical research. So, when Mr. Shefchik downgraded Bethany's draft and gave her extremely short shrift at her draft conference, he embodied his viewpoint disagreement by asserting that the topic was out of bounds.

Before VVCC commits itself to the defense of the precarious position into which Mr. Shifchik is drawing it, the College should bear in mind with just whiat bias and motivation Mr. Shifchik must be operating to have come to the present impasse. Bethany's paper discusses some of the evidences supporting a hypothesis that, while the Constitution prohibits an established church, religion was essential to the founding of the Nation and to its governance thereafter. Her paper was not one written "about God" *per se*. Nor was her paper inherently and necessarily religious. And, in keeping with the requirements of the assignment, it was assiduously supported with citations to authority and written objectively.

Consequently, even if, in a country in which academic and constitutional freedoms are so highly prized, it could be constitutional to impose a topical ban on papers about big "G" gods, it was sophomoric error to read Mrs. Hauf's research paper as falling within the prohibited zone.

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1. Mr. Shefchik's instruction presented other instances in which he and Mrs. Hauf came into ideological conflict, over and beyond his prohibition on mentioning the big "G" god in her research paper. Mr. Shefchik also told his students not to identify themselves or others as "Americans" in their writings, despite well-established nomenclatures for doing so. In addition, he has made disparaging digs and remarks about people of faith and about the Government of the United States.

A. BETHANY HAUF'S SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT

It is a fundamental proposition of constitutional law that a government body may not suppress or exclude the speech of private parties for the sole reason that the speech is religious or contains a religious perspective. *Widmar v. Vincent,* 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993). To deny this fundamental principle would be to eviscerate the essential guarantees of free speech and religious freedom under the First Amendment.

It is well settled that religious speech is protected by the First Amendment and may not be singled out for disparate treatment. *Widmar,* 454 U.S. at 269 (citing *Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981); *Neimotko v. Maryland,* 340 U.S. 268 (1951); *Saia v. New York,* 334 U.S. 558 (1948)); *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Westside Community Sch. v. Mergens,* 496 U.S. 226 (1990). This principle was reaffirmed by the United States Supreme Court, which stated:

> 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 . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760. Thus, a student's constitutional free speech rights to express religious views are fully protected by the First and Fourteenth Amendments to the United States Constitution. President Clinton recognized these rights in his Presidential Guidelines on Student Expression in the Public Schools. He specifically states that the Bible is a permissible school subject and that "[s]tudents may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions." *Presidential Memorandum to the Secretary of Education*, 1998 Revised Guidelines. Thus, Mrs. Hauf may discuss religion and God, even express when appropriate her religious beliefs and views, through projects such as the research project given by Michael Shefchik.

B. BETHANY HAUF DID NOT ABANDON HER CONSTITUTIONAL RIGHTS AS A CONDITION OF MATRICULATION AT VICTOR VALLEY COMMUNITY COLLEGE

Students do not forfeit their First Amendment rights to free speech by attending school: "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506 (1968). Accordingly, students are free to write about secular topics from a religious viewpoint, write about religious topics, and may even, where appropriate contextually express their religious views while at school. This freedom includes utilizing historical references to "God" for support of a research thesis and in defense of that thesis orally and in writing. An instructor's decision to downgrade a student's work because of such factual, objectively verifiable historical content, based on its religious essence, cannot be sustained.

Mr. Shefchik, acting as an employee of the Community College, lacks authority to censor student expression unless the speech creates a material and substantial disruption to the school's ability to fulfill its educational goals. The United States Supreme Court has held such censorship to be unconstitutional where there has been "no finding and no showing that engaging [in the activity] would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966)). This standard of "material and substantial disruption" cannot be met merely by the prognosticating about possible disruptions resulting from supposed offenses taken to the use of the word "God." As the Supreme Court stated, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. In *Tinker*, the Supreme Court held that students are protected by the Constitution in the school environment, and that prohibitions of pure speech can be supported only when they are necessary to protect "the work of the schools or the rights of other students." 393 U.S. at 509.

When a student chooses to complete an assignment on issues dealing with religion and/or God, or related topics, school officials such as Mr. Shefchik are barred by the Constitution from censoring the student's beliefs just because they come from a religious perspective. Censorship of student speech based on its content and/or viewpoint represents a careless and broad denial of constitutional rights based on a grossly erroneous view of the law regarding students' rights:

> Yet, in our system, state-operated schools may not be enclaves for totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect

> their obligations to the state. **In our systems, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expressions of those sentiments that are officially approved.**

Tinker, 393 U.S. at 511 (emphasis added).

This fundamental constitutional principle is applicable both inside and outside the classroom. As the *Tinker* Court noted, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions. . . ." 393 U.S. at 512-13. Moreover, attempting to enforce a policy that excludes religious speech forces school officials

> to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content . . . That eventuality raises the specter of governmental censorship, to ensure **that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech . . . is to imperil the very sources of free speech and expression.**

Rosenberger, 515 U.S. at 844-45 (emphasis added).

We completely acknowledge that school officials have "important, delicate and highly discretionary functions" to perform. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943). However, these functions must be performed "within the limits of the Bill of Rights." *Id.* "The vigilant protection of constitutional freedoms is nowhere more vital than in a community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1967). By forbidding or severely restricting a student's ability to express his private beliefs because they contain religious principles, a school exercises "authoritative selection" violative of the well-established principle that the "classroom is peculiarly the marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Furthermore, the decision to selectively exclude material with religious content or viewpoint violates the First and Fourteenth Amendments.

C. DOWNGRADING BETHANY HAUF'S WORK BASED ON PERCEIVED VIEWPOINT AND CONTENT VIOLATES HER FIRST AMENDMENT RIGHTS

The fundamental principal remains that government actors cannot target

religious speech for exclusive restrictions. As the Supreme Court held in *Lamb's Chapel*, "[t]he principle that has emerged from our cases is that **the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others**." 508 U.S. at 394 (emphasis added).

The First Amendment precludes any governmental effort to single out and censor – or otherwise burden – the speech of private parties solely because that speech is religious. A unanimous United States Supreme Court in *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), explained this principle in light of free exercise concerns:

> The principle that government, in pursuit of legitimate interest, cannot, in a selective manner, impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence.

Id. at 543.

These principles were reaffirmed in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. at 819 (1995), where the Court found unconstitutional a university policy which denied a religious newspaper access to university funds because of its religious perspective:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . . In the realm of private speech or expression, government regulation may not favor one speaker over another. **Discrimination against speech because of its message is presumed to be unconstitutional**. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

515 U.S. at 828-829 (citations omitted) (emphasis added). *See also Good News/Good Sports Club v. School Dist. of the City of Ladue,* 28 F.3d 1501, 1506-1507 (8th Cir. 1994) (where the Eighth Circuit observed that the *Lamb's Chapel* Court "refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of

seemingly secular subject matter").

In Bethany's situation, Mr. Shefchik may grade her work appropriately, that is, by the application of standards that do not violate constitutional rights. He may not, however, award punitive grades to her work because her research assignment mentions a big "G" God or discusses the role of religion in the Government of the nation. Such actions violate her free speech rights.

D. BETHANY HAUF'S PRIVATE SPEECH DOES NOT IMPLICATE VICTOR VALLEY COMMUNITY COLLEGE IN A VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Schools and school authorities often wrongly believe that allowing students to express religious views at school would be a violation of "the separation of Church and State" (Establishment Clause). This very argument has been reviewed and **rejected** by the United States Supreme Court. In *Board of Educ. of the Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), the Supreme Court stated, as a general proposition, that the activities of students in a public school do not present any Establishment Clause problem:

> Petitioners' principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), and objective observer in the position of a secondary school student will perceive official school support for such religious meetings. . . . **We disagree.**

496 U.S. at 249-250 (emphasis added).

Of course, *Mergens* merely reflects the Establishment Clause's intended limitation – not on the rights of individual students – but on the power of governments (including State supported colleges). As Justice O'Connor stated, "there is a crucial difference between **government** speech endorsing religion, which the Establishment Clause forbids, and **private** speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250.

As the Supreme Court stated in *Mergens,* a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused

to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248. *Accord Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1382 n.14 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 253 (1990); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist.*, 941 F.2d 45, 48 (lst Cir. 1991).

The Establishment Clause of the First Amendment "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." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Everson,* 330 U.S. at 18. This principle of neutrality was once again affirmed in *Hedges v. Wauconda Community Sch. Dist.,* 9 F.3d 1295, 1299 (7th Cir. 1993),[2] where the court struck down a complete ban on the censorship of religious material:

> School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is, however, what schools are for.

9 F.3d at 1299. The court went on to criticize the School's decision to err on the side of censorship rather than free speech:

> Yet Wauconda proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson Wauconda proposes to teach its students! Far better to teach them about the first amendment, about the difference between public and private action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to become partial. The school's proper response is to educate the audience rather than squelch the speaker.

Id.

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2. In *Hedges*, the Court of Appeals found that a school policy which prohibited the distribution of all material with religious content violated the First Amendment. Although the Court allowed time and place restrictions on the distribution, it found that a student's right to free speech in the schools should be protected. *Hedges*, 9 F.2d at 1299.

Students who act on their own behalf and engage in speech activities as a result of personal belief or interest, are fully protected by the First Amendment. Consequently, there is no basis for restricting student expression in written assignments or classroom discussions on otherwise permissible subjects, merely because such writings or discussions are offered from a religious perspective.

III. DEMAND

It is imperative that this situation be corrected immediately to avoid possible litigation in federal court.

To accomplish that correction, Michael Shefchik must: (1) reverse his actions that violate Mrs. Hauf's constitutional and statutory rights and (2) discontinue those actions and related practices. As a matter of fact, Mr. Shefchik specifically stated that Mrs. Hauf could score no higher than 69 points out of a possible 100 points on her draft because of her topic choice. This viewpoint biased action raises serious questions about whether Mr. Shefchik can now or hereafter act in a manner free from bias in his re-grading/re-scoring of Mrs. Hauf's work.

In particular, Mrs. Hauf demands that her grades for course work on the research project be recalculated by Mr. Shefchik free from the prejudicial impact of his unconstitutional viewpoint discrimination and free from retributory impact for having sought legal counsel and aid in seeking redress of this matter. To insure that her grades do not reflect his biases, the re-grading/re-scoring, at a minimum should be reviewed by a superior in the English Department.

In addition, because of the offenses he inflicted, Mr. Shefchik should make amends to Mrs. Hauf by apologizing for his discriminatory treatment of Mrs. Hauf's views. Obviously, if Mr. Shefchik acted without animus, then the other explanation, ignorance of constitutional limits, suggests that he should receive some kind of training to sensitize him to the constitutional dimensions of his employment in a public educational institution, including his duty to respect constitutional freedoms of expression.

These steps, at a minimum, would demonstrate that academic inquiry and intellectual liberty are valued prizes for students too, and not only professors and instructors at VVCC.

These actions must take place immediately: the violation of an individual's constitutional rights, even for a moment, results in irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). In light of the serious nature of the legal rights at

issue and the fact that the scoring of Mrs. Hauf's oral presentation of the research assignment is due as soon as Monday, June 7, 2005, we request that you take immediate action to intervene with Mr. Shefchik, and that you advise us of VVCC's position on these matters immediately. If you wish to further discuss this issue, please feel free to contact James M. Henderson, a Senior Counsel with the ACLJ, at (202) 641-9163.

Sincerely,

AMERICAN CENTER FOR LAW AND JUSTICE

Jay Alan Sekulow
Chief Counsel

cc: Bethany Hauf
Michael Shefchik