AMERICAN CENTER
for LAW & JUSTICE

DISTRICT OF COLUMBIA [redacted]

TENNESSSEE [redacted]

VIRGINIA [redacted]

June 5, 2023

VIA E-MAIL & FED-EX

Mr. Drazen Elez
Administrator of Vocational Rehabilitation
3016 W. Charleston Blvd, Suite #200
Las Vegas, NV 89102
702-486-0506
d-elez@detr.nv.gov

Re: Nevada's Vocational Rehabilitation unconstitutional application of Signature line policy

Dear Mr. Elez,

The American Center for Law & Justice (ACLJ)[1] represents Ms. [redacted] (hereinafter "Ms. [redacted]"), an employee at the State of Nevada Vocational Rehabilitation (hereinafter "NVR"), in regard to NVR's discriminatory application of its "policy" governing employees' signature lines. In the absence of a formal policy addressing employee signature lines, NVR has failed to establish clear guidelines that are consistent with protecting the constitutional rights of our client. This failure to adopt a governing policy raises concerns about the arbitrary, capricious and discriminatory treatment experienced by Ms. [redacted]. The purpose of this letter is to place you on notice that NVR's inconsistent application of its policy to silence Ms. [redacted] religious speech and expression violates the First Amendment. A summary of the facts and law are set forth below.

Summary of Facts

[1] By way of introduction, the ACLJ is an organization dedicated to the defense of religious and constitutional freedoms. The ACLJ engages legal, legislative and cultural issues through advocacy, education and litigation that includes representation before the Supreme Court of the United States and international tribunals around the globe.

Ms. [redacted], along with her coworkers, made the decision to modify their email signature lines to include a small Christian fish symbol after their names. Some NVR employees include "She/Her" and "he/him" pronouns in their signature lines to demonstrate solidarity with the LGBTQ+ community. Additionally, other coworkers have symbols such as stars beside their names on their signature lines. Following the inclusion of the Christian fish symbol in her signature line on emails, Ms [redacted] was informed that she had offended someone and was instructed to remove the fish from her signature line.

Ms. [redacted] expressed her concerns regarding the lack of a specific policy regarding signature lines and highlighted her offense by the LGBTQ+ support language utilized by her coworkers. Despite her protest and request for the institution of a uniform signature line policy to ensure fairness and non-discrimination, Ms. [redacted] was still instructed to remove the fish symbol from her signature line.

Fearing potential negative repercussions, Ms. [redacted] subsequently approached the Human Resources department to seek a resolution and address the discriminatory treatment she has endured. Ms. [redacted] was singled out and told to remove the fish from her signature line because it was found offensive by someone. As far as Ms. [redacted] is aware, this same instruction was never provided to any other employee who has chosen a personalized signature line (including some that could easily classify as culturally or politically divisive).

While NVR does not currently have an explicit policy addressing employee signature lines, NVR has not previously communicated any guidelines or restrictions regarding the content allowed in employees' signatures. Moreover, NVR has not applied any such policy, if it exists, consistently and fairly to all employees. Moreover, at this time, it appears NVR has not applied any such policy, if it exists, evenhandedly and in a neutral manner to all of its employees.

As of today, numerous other employees continue to display "he/him" or "she/her" indicating solidarity with the LGBTQ+ community but Ms. [redacted] who decided to display a small Christian fish symbol after her signature, was told to remove it.

Despite the absence of an explicit policy regarding NVR employee signature lines, the arbitrary discrimination regarding what content is permitted and what is not raises constitutional concerns. The unequal treatment experienced by Ms. [redacted] based on the inclusion of a Christian fish symbol, while other employees are allowed to include LGBTQ+ support language, violates the principles of fairness and equal protection under the law enshrined in the Constitution. Therefore, even in the absence of a specific policy, the inconsistent application of standards and the resulting discriminatory treatment are constitutionally problematic.

The purpose of this letter is to explain that the First Amendment to the United States Constitution protects Ms. [redacted] from the very censorship and unequal treatment NVR has engaged in here and to request your assurances that NVR will apply any policy regarding signature lines in a manner that comports with the First Amendment.

Statement of Law

As the Supreme Court recently reiterated, "the Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy v. Bremerton Sch. Dist.,* Case No. 21-418, slip op. at 1 (June 27, 2022). "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expression. *Id*. at 11 (citing *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 841 (1995)). "That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id*.

The Free Exercise Clause protects the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Id.* at 12 (citing *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). It protects against "official expressions of hostility" to religion, or application of principles or laws that are not "neutral" or "generally applicable" absent a compelling state interest that is narrowly tailored in pursuit of that interest. *Id*. at 13. Under well-established precedent, a violation of the Free Exercise Clause occurs where a government entity burdens sincere religious speech or "practice pursuant to a policy that is not 'neutral or 'generally applicable.'" *Id*. at 12 (citing *Smith*, 494 U.S. at 879-881). As the Supreme Court in *Kennedy* recently affirmed,

> A government policy will not qualify as neutral if it is "specifically directed at . . . religious practice." A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.

Id. at 14 (citations omitted).

In this case, NVR's policy is neither neutral nor generally applicable because it seeks to restrict only Ms. [redacted] signature line, at least in part, because of its religious character, and it does so based on the contention that such speech/exercise is deemed "offensive" to others. Meanwhile, other employees' signature lines containing speech – some of which could also easily be deemed offensive to others – are left unchallenged. NVR's policy has "not [been] applied in an evenhanded, across-the-board-way." *Id*. at 14 (finding the same with regards to the school district's policy prohibiting a coach from praying by himself on the field after games because his activity was religious, all the while permitting other members of the coaching staff to engage in unregulated, non- religious speech and activities.)

NVR's actions against Ms. [redacted] are also suspect under the Free Speech Clause. "Employees [can]not be forced to relinquish their First Amendment rights simply because they

ha[ve] received the benefit of public employment." *Tucker v. Cal. Dep't of Educ*., 97 F.3d 1204, 1210 (9th Cir. 1996) (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968)). In keeping with this principle, if and when the government restricts speech or religious exercise, it bears the burden of justifying its actions and its interest must outweigh those of the employee. *Id*. (citing *Johnson v. Multnomah County,* 48 F.3d 420, 422 (9th Cir.), *cert. denied,* 115 S. Ct. 2610 (1995)).

Where a public employee speaks as a private citizen on a matter of public concern – as opposed to pursuant to his official duties – First Amendment protections may apply. *Id*. at 15. This inquiry is not necessarily dependent on whether the speech takes place "within the office environment." *Kennedy,* Case No. 21-418, slip op. at 18 (citing *Garcetti*, 547 U.S. at 421). Not everything a public employee "say[s] in the workplace is government speech subject to government control." *Id*. at 19 (citing *Garcetti*, 547 U.S. at 424). Courts define public concern speech broadly to include "almost any matter other than speech that relates to internal power struggles within the workplace." *Tucker*, 97 F.2d at 1210 (citing *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989) ("Speech that can fairly be considered as relating to any matter of political, social or other concern in the community is constitutionally protected."); *National Treasury Employees Union v. United States*, 990 F.3d 1271 (D.C. Cir. 1993), *aff'd in relevant part, rev'd in part on other grounds*, 513 U.S. 454 (1995) (noting the contrast between public concern and non-public concern is between issues of external interest as opposed to ones of internal office management); *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir. 1983) ("Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances") (citations omitted). "The Supreme Court has also made it clear that an employee need not address the public at large, for his speech to be deemed to be on a matter of public concern." *Tucker*, 97 F.2d at 1211 (citing *Rankin v. McPherson,* 483 U.S. 378, 384- 87(1987) (employee statement to co-worker concerning President Reagan was speech on a matter of public concern).

In *Tucker*, the court held that religious advocacy in private discussions between co-workers at a state agency was speech involving a matter of public concern and the state's asserted interests in restricting the speech were unjustified. *Id*. at 1214; *see also id.* at 1215 (also holding that a ban on employees' posting of religious materials outside of employees' cubicles or offices while permitting posts on a host of non-religious subjects – controversial and non-controversial alike – was also unconstitutional). Similarly, in *Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 617 (W.D. Ky. 2003), the court found that a librarian's public display of her personal religious beliefs while at work (the wearing of a cross necklace) was private speech on a matter of public concern and the government's implementation of a dress code prohibiting the wearing of religious, political or offensive ornamentation or clothes to prevent her from wearing the cross necklace was unconstitutional.

Here, and just like in the cases cited above, Ms. [redacted] signature line – and those selected by other employees – is most likely private speech on a matter of public concern and NVR will not be able to justify its suppression of Ms. [redacted] speech or expression on the grounds that it is offensive to others or that such speech might violate the Establishment Clause. As courts have held time and time again, "there is a critical 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." *Hale v. Marques*,

2020 U.S. Dist. LEXIS 57282, at *22 (D. Colo. Feb. 3, 2020) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (italics and internal quotation marks omitted). Notably, the Establishment Clause limits the power of government; it does not restrict the rights of individuals acting on their own behalf. The Establishment Clause does not include anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" *Good News Club v. Milford Central School*, 533 U. S. 98, 119 (2001) (emphasis deleted). *See also Kennedy*, Case No. 21-418, slip op. at 32 (noting the government was seriously mistaken in suggesting it had a duty to ferret out and suppress religious speech and observance by one of its employees while allowing comparable secular speech).

Conclusion

In light of the violation of our client's constitutional rights, **we demand your assurances on or before June 20, 2023**, that NVR will cease the selective application of any policy it maintains regarding signature lines in a manner that singles out and silences only Ms. [redacted] speech and expression because it is religious and/or unpopular with supervisors or other colleagues. We also request your assurances that Ms. [redacted] will not experience further retaliation as a result of her exercise of her constitutional rights. Should you wish to discuss this matter further or have any questions in this regard, please feel free to contact me directly at [redacted].

Sincerely,

Christina A. Compagnone

AMERICAN CENTER FOR LAW AND JUSTICE