No. 10-13925-AA

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER KEETON,
Plaintiff-Appellant,

v.

MARY JANE ANDERSON-WILEY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia,
Augusta Division, No. 1:10-cv-00099-JRH-WLB,
Hon. J. Randall Hall, United States District Judge

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amici* certify that persons interested in this case are those listed in the briefs filed in this case and also the American Civil Liberties Union ("ACLU") and the ACLU of Georgia. The ACLU and the ACLU of Georgia are non-profit corporations, have no parent corporations, and are not publicly held.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Georgia is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before the federal courts on numerous occasions, both as direct counsel and as amicus curiae. In this case, Appellant, Jennifer Keeton, claims that her First Amendment rights have been infringed by Augusta State University's requirement that she agree to abide by standards of ethical professional conduct when counseling gay and lesbian clients. As organizations that have long been dedicated to preserving First Amendment rights and opposing discrimination, the ACLU and the ACLU of Georgia have a strong interest in the proper resolution of this controversy. We submit this brief in support of Appellees for the reasons stated below.

STATEMENT OF THE ISSUES

The issue presented on appeal is whether the First Amendment entitles plaintiff to a preliminary injunction allowing her to counsel clients in the clinical portion of Augusta State University's counseling program in a manner that the district court found would be at odds with the standards of ethical professional

[1] All parties have consented to the filing of this brief.

conduct incorporated in the University's generally applicable counseling curriculum.

SUMMARY OF THE FACTS

The Augusta State University ("the University") graduate program in counseling incorporates the American Counseling Association ("ACA") Code of Ethics as part of its counseling curriculum. The University faculty teach that the Code of Ethics requires a counselor to respect the dignity of all clients from diverse backgrounds and to avoid imposing the counselor's own values on the client. (Dkt.1-7, Compl. Ex. F at 5-6).[2] The ACA's Code of Ethics specifically requires counseling instructors to create remediation plans when concerned about a student's professional competency and to dismiss the student from the program if those concerns are not addressed. (Dkt.1-7, Compl. Ex. F at p. 15, § F.5.b). Consistent with these standards, the University regularly creates individualized remediation plans to address a wide range of professional deficiencies. (Dkt.48, Dist. Ct. Op. at 4, 11-12, 20). The University teaches that, under the ACA ethical

[2] Specifically, Section A.4 of the Code of Ethics provides: "Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants." (Dkt.1-7, Compl. Ex. F at pp. 5-6, § A.4.b). The Code of Ethics further prohibits counselors from engaging in "discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law." (Dkt.1-7, Compl. Ex. F at p. 11 § C.5).

standards, it would be impermissible for a counselor to impose the counselor's own views on a client whose belief system differs from the counselor's. (Defs.' Br. at 26-27.)

Plaintiff-Appellant Jennifer Keeton ("plaintiff") is a graduate student in the University's counselor education master's degree program. (Dkt.1, Compl. ¶ 5). Following graduation, she plans to work as a counselor for students in grades K-12. In May 2010, before plaintiff started the clinical practicum phase of the counseling program, the University informed her she must complete a remediation program to address her competence in counseling gay and lesbian clients in accordance with the ACA's Code of Ethics. (Dkt.1, Compl. ¶¶ 23-25). Among other things, the remediation plan required plaintiff to attend additional workshops concerning minority populations, read additional materials concerning the counseling of gay and lesbian clients, and submit "reflection papers" concerning her additional studies. (Dkt.1-3, Compl. Ex. B at 6).[3]

The University informed plaintiff that it placed her on remediation for three reasons: (1) plaintiff "voiced disagreement in several class discussions and in written assignments with the gay and lesbian 'lifestyle,'" (2) plaintiff "stated in one paper that she believes GLBTQ 'lifestyles' to be identity confusion," and (3)

[3] The procedure for creating remediation plans is codified in the counseling program's student handbook. *See* (Dkt.48, Dist. Ct. Op. at 4 n.3).

"[f]aculty have also received unsolicited reports from another student that [plaintiff] has relayed her interest in conversion therapy for GLBTQ populations, and she has tried to convince other students to support and believe her views." (Dkt.1-3, Compl. Ex. B at 4). During an evidentiary hearing, Professor Anderson-Wiley, one of plaintiff's professors, elaborated on the unsolicited report she received from another student about the plaintiff:

> I had a student come to me with -- who expressed concerns that Jenn may not be able to ethically counsel clients and keep her views separate from the client's views. . . . She stated that she thought that Jenn might have problems counseling this population and that [Jenn] had expressed that she would want to convert students from being homosexual to heterosexual and that she had tried to convince people to support her views.

(Dkt.53, Tr. at 61:3-22).[4] The University concluded that plaintiff's statements about her desire to "convert" students from homosexual to heterosexual directly conflicted with the ACA Code of Ethics, as they involve imposing the counselor's own values on the client. (Dkt.1-3, Compl. Ex. B at 4).[5]

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[4] The district court found, based on the testimony provided at the evidentiary hearing, that the University's references to plaintiff's "views" referred not to plaintiff's abstract opinions about homosexuality, but to her specific plans to tell gay and lesbian clients that being gay is immoral and to seek to change their sexual orientation. (Dkt.48, Dist. Ct. Op. at 23-24); (Dkt.53, Tr. at 61:3-22).

[5] The faculty also noted that clinical studies show that so-called "conversion therapy" -- which seeks to change a person's sexual orientation -- "may harm clients rather than help them" and therefore also conflicts with the Code of Ethics requirement that counselors not take actions that harm the client. *See* (Dkt.1-3, Compl. Ex. B at 5).

Plaintiff subsequently attended meetings with University faculty to discuss the remediation plan. During one of those meetings, plaintiff told her professors that she would tell a gay client that "it's not okay for him to be gay." (Dkt.53, Tr. at 109:12-13). Based on all the record evidence and testimony at the hearing, the district court found that plaintiff demonstrated "an inability to resist imposing her moral viewpoint on counselees." *See* (Dkt.48, Dist. Ct. Op. at 20, 22); *id.* at 24 (discussing plaintiff's apparent belief that "Plaintiff's moral view is preferable to a homosexual counselee's moral view, and that therefore Plaintiff ought to tell the counselees as much in a counseling setting" (emphases omitted)).

On June 22, 2010, after several remediation meetings with plaintiff, the faculty agreed to allow plaintiff to enroll in the clinical practicum while she completed the remediation plan. The faculty did so based on plaintiff's assurances that "through the remediation plan she may further learn to separate personal values and beliefs from those of the client so that she may attend to any need of future clients in an ethical manner." (Dkt.1-5, Compl. Ex. D at 3).

Four days later, however, plaintiff sent the University faculty an e-mail withdrawing from the counseling program. In her e-mail, plaintiff made clear that she had decided to withdraw from the program because she refused to agree that she would abide by the University's standards of ethical conduct if she encountered a gay or lesbian client:

> I know there is often a difference between personal beliefs and how a counseling situation should be handled. But in order to finish the counseling program you are requiring me to alter my objective beliefs and also to commit now that if I ever may have a client who wants me to affirm their decision to have an abortion or engage in gay, lesbian, or transgender behavior, I will do that. I can't alter my biblical beliefs, and I will not affirm the morality of those behaviors in a counseling situation.
>
> I don't want any more meetings. My final answer is that I am not going to agree to a remediation plan that I already know I won't be able to successfully complete.

(Dkt.1, Compl. ¶ 108).

On July 21, 2010, plaintiff filed a complaint against certain University faculty and administrators in their individual and official capacities alleging that the remediation plan constituted unconstitutional viewpoint discrimination, religious discrimination, retaliation against protected speech, and compelled speech. Plaintiff also sought a preliminary injunction allowing her to participate in the clinical practicum without agreeing to refrain from telling gay and lesbian clients that being gay is morally wrong. (Dkt.3). After holding an evidentiary hearing, the district court denied plaintiff's motion for preliminary injunction in an opinion dated August 20, 2010. (Dkt.48). This appeal followed.

SUMMARY OF THE ARGUMENT

This is an appeal from the denial of a preliminary injunction. That procedural posture necessarily shapes the issues before the Court. Plaintiff argues that the University violated her First Amendment rights when it required her to

participate in a remediation program based, she claims, on the University's disagreement with her religious and political views about homosexuality. If plaintiff is ultimately able to prove that claim at trial, she may be entitled to damages. That is not, however, the issue currently before the Court.

At this stage of the proceedings, the only question before the Court is whether plaintiff is entitled to reinstatement in a counseling program despite what the district court found was her stated unwillingness to comply with the ACA Code of Ethics, which has been incorporated into the University's counseling curriculum. The answer to that question is no, absent any evidence in the record that the University's insistence that all students comply with the ethical code of the profession they are seeking to join is selectively applied.

There is nothing surprising or illegitimate about a graduate school's desire to train its professional students in accordance with the ethical rules of the profession they are about to enter. The fact that plaintiff objects to those rules on ideological grounds does not convert the University's neutral enforcement of those rules into prohibited viewpoint discrimination. Less than a year ago, the Supreme Court rejected a similar argument in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), when it upheld a policy at the Hastings College of the Law requiring that all official student clubs be open equally to all students, including a club that regarded homosexuality as sin, as plaintiff does in this case.

In determining the propriety of preliminary injunctive relief, it is immaterial when the University learned that plaintiff would not divorce her personal views on homosexuality from her ethical obligations as a counselor. Whether plaintiff's attitude was apparent before she was directed to participate in a remediation program or after is therefore beside the point on this appeal. The First Amendment does not require the University to reinstate a student who cannot satisfy its curricular requirements because she refuses to abide by its ethical rules, even if the University obtains that knowledge through "after-acquired evidence."

Finally, plaintiff has objected to aspects of the remediation plan that the University has imposed as a condition of her continuation at the school, which allegedly required her to repudiate her personal beliefs and affirm the morality of homosexuality. It would be unconstitutional for the University to restrict Ms. Keeton's speech outside the context of a counseling session, or require Ms. Keeton to repudiate her personal beliefs or attend a gay pride parade. But at the preliminary injunction hearing, the University officials disputed that interpretation of the remediation plan, and the district court credited their testimony. As construed and limited by the University officials' testimony and the district court's factual findings, plaintiff's wholesale challenge to the University's actions in this case is without merit.

ARGUMENT

I. The First Amendment Does Not Bar a Public University From Requiring Students to Counsel Clients in a Manner Consistent With the University's Counseling Curriculum.

Plaintiff seeks a preliminary injunction ordering her reinstated in the University counseling program despite her unwillingness to comply with the ACA Code of Ethics, which has been incorporated into the University's counseling curriculum. The district court found that, given plaintiff's stated refusal to agree to counsel students in the clinical practicum in a manner consistent with those professional standards, she was not entitled to this relief. The district court was correct. Requiring plaintiff to comply with these standards of professional conduct does not constitute viewpoint discrimination or unconstitutional compelled speech.

A. Requiring Students to Conform Their Counseling Behavior to the ACA Code of Ethics During the Clinical Practicum Is Not Viewpoint Discrimination.

A public university may not selectively impose burdens on students with certain viewpoints or compel students to alter their personal beliefs. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943). For example, it would be unconstitutional for the University to prohibit students with religious viewpoints from imposing their personal values on clients but to allow students with non-religious viewpoints to impose their values. *See Rosenberger*, 515 U.S. at 830-31.

But nothing in the First Amendment entitles a student to work with actual clients through the University's clinical practicum, while she refuses to counsel those clients in accordance with the University's generally applicable curricular standards. Indeed, the Supreme Court's recent decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), ("*CLS*"), forecloses plaintiff's argument that the University's actions in this case are constitutionally impermissible because they conflict with her deeply held moral beliefs.

Plaintiff contends that the University's mandate that she comply with its teaching that counselors may not impose their values on clients during her clinical course work places an unequal burden on students like her who believe in absolute moral truths. According to plaintiff, "there is an inevitable belief incompatibility between her normative biblical ethic and the morally relativistic stance" reflected in the University's interpretation of the ACA's Code of Ethics. (Pl. Br. at 47-48). However, plaintiff enrolled in an educational program specifically designed to train graduate students how to be counselors in accordance with this code of ethics, and part of the University's educational mission involves training students in a clinical setting to apply those counseling practices. Requiring plaintiff to follow the same ethical standards as any other student does not constitute viewpoint discrimination.

In *CLS*, the Supreme Court rejected a challenge to the Hastings College of the Law's generally applicable policy that all student organizations must accept all

students in the law school as members and potential leaders of the organization. The Christian Legal Society sued the school, arguing that the "all comers" policy constituted impermissible discrimination against religious groups that wanted to exclude "unrepentant" gay and lesbian students. The student organization argued that the policy created an unconstitutional disparate impact because "it systematically and predictably burden[ed] most heavily those groups whose viewpoints are out of favor with the campus mainstream." *Id.* at 2994 (internal quotation marks omitted). But the Supreme Court rejected that argument, explaining that the group had "confus[ed] its *own* viewpoint-based objections to... nondiscrimination laws (which it is entitled to have and to voice) with viewpoint *discrimination*." *Id.* (internal quotation marks omitted).

Like the student organization in *CLS*, plaintiff confuses her own viewpoint-based objections to the University's standards of professional competence with viewpoint discrimination by the government. Plaintiff's desire to tell clients that it is immoral to be gay or lesbian and that gay people should try to change their sexual orientation may be motivated by her sincerely held beliefs. But that does not mean that the University acted impermissibly by taking steps to prevent her from engaging in such conduct during the University's clinical practicum where it is inconsistent with generally applicable professional ethical standards. *See id.* at 2994; *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994)

("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."). All graduate students participating in the clinical practicum must counsel clients in accordance with the University's counseling curriculum. Requiring plaintiff to agree to comply with these generally applicable standards as a condition of proceeding to the practicum does not amount to discrimination against her particular viewpoint.[6]

If, on the other hand, there were evidence that only students with plaintiff's religious or political views were held to this code of conduct, such evidence would indeed support a claim of viewpoint-based penalty. *Cf. CLS*, 130 S. Ct. at 2995 (remanding for lower court to address claim that facially neutral policy was selectively applied on the basis of viewpoint).[7] As the district court noted, plaintiff

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[6] The University's rules of ethical professional conduct and its remediation procedures are not designed to suppress ideas or viewpoints and apply regardless of the particular viewpoint the counselor seeks to advance. Thus, the ethical rules would prevent a counselor from imposing personal views on a gay client as well as on a client who sees homosexual conduct as a sin. In addition, plaintiff indicated that she intended to engage in conversion therapy. (Dkt.53, Tr. at 61:3-22). That raised an independent concern because the practice of conversion therapy has been demonstrated to be ineffective and harmful to clients, and is therefore not authorized as a counseling practice. *See* (Dkt.1-3, Compl. Ex. B at 5).

[7] *See also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) ("[W]e may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive."); *Brown v. Li*, 308 F.3d 939, 958 (9th Cir. 2002) (Reinhardt, J., dissenting) ("The university's extreme actions in response to Brown's speech -- speech that was highly critical of university and other public officials -- raises a genuine question of material fact as to whether the university punished him because of the viewpoint he sought to

will have an opportunity to present any such evidence on remand after discovery is completed. *See* (Dkt.48, Dist. Ct. Op. at 21-22). But there is no evidence currently in the record to support such a claim.

B. Requiring Ms. Keeton to Counsel Clients in a Manner Consistent with the University Curriculum Does Not Compel Speech or Require Ms. Keeton to Pledge Allegiance to Any State Orthodoxy.

Under the First Amendment, a public educational institution may not force a student to profess beliefs with which the student does not agree or pledge allegiance to any official dogma. *See Barnette*, 319 U.S. at 634 (1943); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005). Requiring Ms. Keeton to counsel clients in accordance with the ACA Code of Ethics during her training, however, does not amount to compelled speech or an impermissible requirement that she abandon her beliefs.[8]

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express or whether . . . it simply desired to further a legitimate pedagogical concern.").

[8] The district court analyzed the university's restriction of plaintiff's curricular speech under *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). While the Supreme Court has not decided what standard of scrutiny governs a University's restriction of student speech in curricular matters, *see Bd. of Regents v. Southworth*, 529 U.S. 217, 238-39 (2000) (Souter, J., concurring in judgment), other courts and commentators have proposed more speech-protective standards, *see Brown*, 308 F.3d at 964 (Reinhardt, J., dissenting) (suggesting "time, place, and manner" or intermediate scrutiny as possible alternative standards); Tom Saunders, Case Comment, *The Limits on University Control of Graduate Student Speech*, 112 Yale. L. J. 1295 (2003) (suggesting that courts use a *Pickering*-style balancing test weighing the pedagogical interest of the University against the free speech interest of the student). This Court need not definitely resolve the appropriate standard of

Plaintiff argues that following the University's standards of ethical professional conduct during the counseling sessions in the clinical practicum would unconstitutionally force her to "affirm" homosexuality or other client behaviors with which she may disagree. But surely that argument proves too much. *Cf. Brown*, 308 F.3d at 953 (Graber, J.) ("[A] college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question.")

As discussed below, the district court found that counseling practicum clients in accordance with the University's counseling curriculum does not require plaintiff to abandon her personal beliefs about same-sex intimacy or about what the role of a counselor should be. *See* Part III, *infra*. Plaintiff remains free to voice her disagreement with the standards of ethical professional conduct and to argue that they should recognize "objective right and wrong on matters of human sexual conduct and gender" instead of "moral relativism." (Pl. Br. at 47). She does not have a First Amendment right to remain in a professional training program while specifically stating her intent to disregard the ethical standards of the profession during her training.

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scrutiny on this appeal because, under any standard of review, plaintiff has not demonstrated a sufficient likelihood of success on the merits to warrant the extraordinary relief of a preliminary injunction.

As the University has clarified, the remediation plan and ACA Code of Ethics are designed to ensure that plaintiff "respect the dignity" of clients (including gay men and lesbians), and to understand that the counseling relationship is not a forum to express her own views, but rather to help clients find their own answers according to their own moral compass. (Defs.' Br. at 28-29). Where the University's counseling program has adopted the ACA Code of Ethics and is designed to train counselors to be able to practice in secular school settings, the University can require her to demonstrate an ability to comply with those standards. In this case, Ms. Keeton made clear that she would not.[9] It is for that reason -- not her personal views -- that the district court found she was subjected to remediation.[10] (Dkt.48, Dist. Ct. Op. at 22).

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[9] Plaintiff's statement to her faculty that if asked, she would tell a gay person that being gay is wrong is a refusal to respect the dignity of gay and lesbian clients. As the Supreme Court made clear in *CLS*, condemnation of same-sex intimacy is, in fact, a condemnation of gay people. *CLS*, 130 S. Ct. at 2990 ("CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' Our decisions have declined to distinguish between status and conduct in this context.") (citations omitted).

[10] Plaintiff argues that there is no need for her to develop the ability to refrain from imposing her own views on clients because she may ultimately decide to practice as a Christian counselor, a separate area of practice not subject to the same ethical rules. (Dkt.1-4, Compl. Ex. C at 3). But just as a law school can require that all students pass a course in criminal law even if some students intend to practice only civil litigation once they graduate, the University is entitled to teach all of its counseling students in accordance with its established curriculum, regardless of

II. Plaintiff's Challenges to the Manner in Which the Remediation Plan Was Imposed Do Not Entitle Her to a Preliminary Injunction.

The procedural posture of this appeal is a challenge to the denial of a preliminary injunction where the relief requested by plaintiff was reinstatement in the counseling program and the ability to proceed to the clinical practicum where she would counsel student clients. The district court's denial of the motion was not erroneous, as the evidence to date showed that plaintiff would not comply with the ACA Code of Ethics and refrain from imposing her values as a counselor on her clients.

Plaintiff's *amici* challenge the University's actions, arguing that, at the time the University placed plaintiff on remediation, it did not have sufficient evidence that she actually intended to impose her moral beliefs on clients during the counseling sessions. *See* (FIRE Br. at 18 n.4).[11] But whether plaintiff's position was apparent before she was directed to participate in a remediation program or after is beside the point on this appeal. *Cf. CLS*, 130 S. Ct. at 2982 n.6 (examining

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whether some students ultimately decide to practice in a different field after graduating.

[11] Plaintiff's *amici* assert that the University's stated reasons for remediation "did not consist of Keeton's having made specific statements about her planned future assertions in counseling sessions." (FIRE Br. at 18 n.4). But the testimony provided at the evidentiary hearing shows that one of the reasons plaintiff was placed on remediation was her specific plans to tell gay and lesbian clients that being gay is immoral and to seek to change their sexual orientation. (Dkt.53, Tr. at 61:3-22). Such conduct would be inconsistent with the ACA Code of Ethics.

validity of school's current policy, not its initial reason for excluding student group, because student group "seeks only declaratory and injunctive -- that is, prospective -- relief"). As plaintiff has made clear she will not comply with the ACA Code of Ethics, her only possible relief is retrospective.

The district court found that after the remediation plan was imposed, plaintiff stated to her faculty that she would tell a gay or lesbian client that being gay is immoral, in violation of the University's standards of ethical professional conduct. (Dkt.48, Dist. Ct. Op. at 12); *see also* (Dkt.1, Compl. ¶ 100). The First Amendment does not require the University to reinstate a student who will not abide by the rules of professional conduct taught by the University, even if the University obtains that knowledge through "after-acquired evidence." *Cf. McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) (discussing after-acquired evidence in the context of employment-discrimination claims).[12]

[12] For the same reasons, this case does not implicate the serious concerns raised by plaintiff and her *amici* that universities should not be allowed to prohibit the mere expression of an unpopular viewpoint in an attempt to predict future unethical conduct. *See* (Pl. Br. at 22) (accusing University of attempting to "divine . . . future speech-crimes"); (FIRE Br. at 14-18). Because plaintiff made clear her intentions to engage in conduct inconsistent with the ACA's Code of Ethics, there was no need for the University to rely on protected activity to "predict" or "divine" that she would engage in impermissible conduct in the practicum.

III. As Interpreted and Limited by the University Professors and the District Court, the Substance of the Remediation Plan Is Constitutional.

Finally, plaintiff has objected to aspects of the remediation plan that allegedly require her to repudiate her personal beliefs and affirm the morality of homosexuality. Plaintiff argues that the remediation plan unconstitutionally requires her to attend a gay pride parade and submit "reflection papers" discussing how her additional studies about gay and lesbian populations have "influenced [her] beliefs." (Dkt.1-3, Compl. Ex. B at 6). If her interpretation of those provisions were correct, those requirements would violate the Constitution.

The University, however, disputed that interpretation. Faculty testified that the remediation plan suggested a pride parade as one option for plaintiff to increase her interaction with gay populations but did not impose a mandatory requirement that she do so. (Dkt.53, Tr. at 66:23 - 67:5). In addition, faculty testified the reflection papers did not require plaintiff to discuss her personal "beliefs," but only plaintiff's understanding of her ethical obligations under the ACA Code of Ethics when counseling gay and lesbian clients in the clinical practicum. *See* (Dkt.53, Tr. at 67:22 - 68:1).[13] Based on the evidence in the record, the district court credited

[13] *See also, e.g.*, (Dkt. 35-1, Anderson-Wiley Decl. ¶ 22) ("Neither Ms. Keeton's remediation plan nor the ASU counseling program generally, require that Ms. Keeton alter any of her personal religious beliefs, including any belief she may hold regarding the manner in which all individuals should behave, in order to successfully complete the counseling program."); (Dkt. 35-2, Schenck Decl. ¶ 22)

the faculty's interpretation of the remediation plan over plaintiff's. (Dkt.48, Dist. Ct. Op. at 22).

As construed and limited by the faculty witnesses and the district court, the remediation plan does not pose the constitutional concerns raised by plaintiff. The remediation plan does not require plaintiff to alter her beliefs about homosexuality or to participate in a gay pride parade or any other form of expressive association.

CONCLUSION

For all these reasons, this Court should affirm the district court's denial of plaintiff's motion for preliminary injunction and remand the case for discovery to continue.

(same); (Dkt. 35-3, Deaner Decl. ¶ 22) (same); *see also* (Dkt.1-4, Compl. Ex. C at 3); (Dkt. 35-8, Laakso Decl. at 3-4).

Dated: November 29, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,854 words according to the word processing system utilized by the American Civil Liberties Union Foundation.

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