Nos. 10-2100 & 10-2145

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULEA WARD,
Plaintiff-Appellant,

v.

ROY WILBANKS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan,
No. 09:11237 (GCS),
Hon. George Caram Steeh, United States District Judge

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

Rose A. Saxe
ACLU Foundation
125 Broad Street, 18th Floor,
New York, NY 10004
212-549-2500
rsaxe@aclu.org

Michael J. Steinberg
ACLU Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
313-578-6814
msteinberg@aclumich.org

Daniel Mach
ACLU Foundation
915 15th St., NW
Washington, DC 20005
202-675-2330
dmach@dcaclu.org

Attorneys for Amici Curiae

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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 Michigan 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, Julea Ward, claims that her First Amendment rights have been infringed by the requirements of Eastern Michigan University's graduate counseling program that she agree to abide by standards of ethical professional conduct when counseling gay and lesbian clients during her clinical practicum. As organizations that have long been dedicated to preserving First Amendment rights and opposing discrimination, the ACLU and the ACLU of Michigan have a strong interest in the proper resolution of this controversy. We submit this brief in support of Eastern Michigan University for the reasons stated below.[2]

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

[2] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money towards the preparation or filing of this brief.

STATEMENT OF THE ISSUES

The issue presented on appeal is whether the First Amendment entitles plaintiff to refuse to counsel gay and lesbian clients on any issues relating to relationships during her school-sponsored clinical practicum, notwithstanding the standards of ethical professional conduct barring discrimination based on sexual orientation and barring counselors from imposing their values on clients, which are incorporated into the University's counseling curriculum.

SUMMARY OF THE FACTS

The Eastern Michigan University ("the University") graduate program in counseling incorporates the American Counseling Association ("ACA") Code of Ethics as part of its counseling curriculum. The ACA Code of Ethics, in relevant part, forbids counselors from "condon[ing] or engag[ing] 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," ACA Code of Ethics at C.5.[3] It further provides that a counselor's primary duty "is to respect the dignity

[3] While plaintiff asserts that the prohibition on "condoning" discrimination bars students from even *holding* discriminatory beliefs, the undisputed evidence shows that the University does not interpret this requirement to prohibit student counselors from having discriminatory beliefs. *See infra*, p. 19.

and to promote the welfare of clients," *id.*, at A.1.a, and requires all counselors to be "aware of their own values, attitudes, beliefs and behaviors and avoid imposing values that are inconsistent with counseling goals," *id.* at A.4.b. To ensure accreditation by the Council for Accreditation of Counseling and Related Education Programs (CACREP), the University requires students enrolled in the graduate counseling program to abide by the Code of Ethics.

Plaintiff-Appellant Julea Ward ("plaintiff") enrolled in the University's counselor master's degree program in 2006, seeking a degree that would allow her to become a high school counselor. In January 2009, plaintiff began the clinical practicum phase of the counseling program, during which she works with actual clients under the supervision of University faculty. During the practicum, plaintiff was scheduled to see a gay client for counseling for depression. After reviewing the file and learning that the client previously had sought assistance regarding a same-sex relationship, plaintiff asked her faculty supervisor whether she should refer the client immediately to another student, or establish rapport with the client and then refer if the client wanted to discuss his relationship, because she was unwilling to work with a gay or lesbian client on issues relating to their relationships. Her supervisor told her to have the client meet with another student, and scheduled a meeting to discuss the issue with plaintiff.

At that meeting, plaintiff was informed that refusing to work with clients based on the clients' sexual orientation was inconsistent with the ACA Code of Ethics. After plaintiff maintained that she should be allowed to refer clients to other counselors-in-training in these situations, her supervisor scheduled an informal review, during which time plaintiff was again told that such conduct was inconsistent with the University's requirement that students follow the ACA Code of Ethics during the practicum. Plaintiff refused to change her position, insisting that she would not engage in any conduct that was inconsistent with her religious beliefs, and that helping gay or lesbian clients improve their relationships contravened her religious beliefs that such relationships were sinful. Accordingly, after the informal review concluded that plaintiff was out of compliance with the University's requirements, plaintiff sought a formal review.

During the formal review hearing on March 10, 2009, plaintiff stated that she would not counsel gay or lesbian clients on same-sex relationships, or any other behavior that "goes against what the Bible says." (Dkt. 1-5, at 27.) Because plaintiff couched her explanations of what she would and would not do with reference to her beliefs (*id.*, at 10-14, 27-28), the faculty inquired as to the nature of her beliefs, including engaging in a "theological bout" to try to understand what plaintiff's objections were (*id.*, at 28).

On March 12, 2009, plaintiff was informed that the review panel had unanimously determined that she should be dismissed from the counseling program because, "by your behavior, you have violated the ACA Code of Ethics. Additionally, by your own testimony, you declared that you are unwilling to change this behavior. Your stance is firm despite information provided directly to you throughout your program and discussions you acknowledge having with faculty regarding the conflict between your values that motivate your behavior and those behaviors expected by the profession." (Dkt. 1-7.)

On April 2, 2009, plaintiff filed a complaint against certain University faculty and administrators in their individual and official capacities seeking damages and injunctive relief, alleging that her expulsion from the University constituted unconstitutional viewpoint discrimination, religious discrimination, and compelled speech. Following cross-motions for summary judgment, the district court denied plaintiff's motion and granted defendants' motion in an opinion dated July 26, 2010. (Dkt. 139.) This appeal followed.

SUMMARY OF THE ARGUMENT

Plaintiff argues that the University violated her First Amendment rights by dismissing her from the graduate counseling program because she refuses to work

with gay and lesbian clients on any issues relating to their relationships during her clinical practicum, based on her religious views about homosexuality.

Such refusal violates the American Counseling Association (ACA) Code of Ethics, which prohibits discrimination based upon sexual orientation, among other protected classifications.[4] The University has incorporated that ethical code into its counseling curriculum. In the absence of any evidence from which a reasonable fact-finder could conclude that plaintiff's *beliefs* about homosexuality, rather than what *actions* she said she would take as a counselor during her clinical practicum, led to her dismissal from the program, the district court properly entered summary judgment for the University.

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

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[4] Plaintiff denies that refusing to work with gay and lesbian clients on relationship issues is sexual orientation discrimination because she claims she would work with gay clients on other issues. Appellant's Br. at 49, n.7. As discussed below, that argument both lacks merit as a matter of logic, and fundamentally misconceives of the nature of counseling.

all official student clubs be open equally to all students, including a club that regarded same-sex intimacy as a sin, as plaintiff does in this case.

Finally, plaintiff seeks to characterize the University's application of the ACA Code of Ethics as a "speech code," asserting that the University "require[s] students to express agreement with government-approved views of timeless and critical moral issues." Appellant's Br. at vii. Here the undisputed facts show that the University does not apply its policies beyond counseling interactions, or to require conformity of belief – either of which would indeed raise constitutional questions. It is not impermissible, however, for a university to require student counselors, when engaged in the business of counseling, to comport with anti-discrimination principles. Provided these requirements are applied in an even handed manner, a university can prevent student counselors-in-training from refusing to see clients because, to give another example, the clients are involved in an interracial marriage, even though some people may have strong religious and moral views about the propriety of those relationships. Accordingly, plaintiff's 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 and the Ethical Code Governing the Profession that the Student is Being Trained to Enter.

Plaintiff seeks to be 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. Requiring plaintiff to comply with these standards of professional conduct does not constitute viewpoint discrimination or unconstitutional compelled speech. Plaintiff argues that she has been targeted for her beliefs, and claims that her conduct was in fact consistent with the ACA Code of Ethics. Appellant's Br. at 11. As the undisputed evidence shows, however, plaintiff was dismissed from the program because she refused to comply with the ACA Code of Ethics, as interpreted by both the University and the ACA itself (Dkt. 82-9), and therefore summary judgment was properly granted for the University.[5]

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[5] 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 v. Li*, 308 F.3d 939, 964 (9th Cir. 2002) (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

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

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.

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 violated the religious and associational rights of CLS and its members by prohibiting the group from excluding "unrepentant" gay and lesbian students. CLS further argued that the "all comers" policy was a form of unconstitutional viewpoint discrimination 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). The Supreme Court rejected that argument, explaining that the group had "confus[ed] its *own*

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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 resolve which standard applies here because under any standard, a public university need not allow students to act contrary to the school's curriculum and the professional code of ethics during their clinical work.

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 (her beliefs that same-sex intimacy is sinful and that counseling a gay client to help improve his relationship is promoting sin), with viewpoint discrimination by the government. To plaintiff, any inquiry or demand that she conform her behavior to the ACA Code of Ethics is itself a demand that she act inconsistently with her beliefs, which she asserts would require her to *change* her beliefs. (*See, e.g.*, Dkt. 80-13, at 65-66). But the fact that plaintiff holds these beliefs does not prevent a public university from requiring her to comport with the ACA's professional standards, including the prohibition on discrimination based on sexual orientation, during the clinical practicum. *See CLS*, 130 S. Ct. 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.

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). A public university may not selectively impose burdens on students with certain viewpoints or compel students to alter their personal beliefs. *See 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 allow students with non-religious viewpoints to refuse to work with clients, but to prohibit students with religious viewpoints from doing the same. *See Rosenberger*, 515 U.S. at 830-31.

Amici are unaware, however, of any evidence in this record that other students who sought to engage in conduct that violates the ACA Code during the practicum were allowed to do so and not subject to academic discipline. Likewise, *amici* are unaware of a factual dispute on this record that supports plaintiff's allegations that the actions taken against her were motivated by her beliefs as opposed to her express refusal to conform her *behavior* to the anti-discrimination

rule embodied in the professional code of ethics that the university had incorporated as part of its curriculum. This would be a very different case if there were such evidence in the record. *See 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.").

Plaintiff concedes that the University may require her to comply with the ACA Code of Ethics (Dkt. 82-3, at 229-30), but contends that her conduct was consistent with those requirements because she would agree to refer the client elsewhere, *see* Appellant's Br. at 11. According to plaintiff, this suggests that the University's decision was in fact motivated by opposition to her religious beliefs. But the University faculty unanimously explained that such refusals to work with gay and lesbian clients are contrary to the ACA Code of Ethics and the University's standards for the clinical practicum. And the ACA explained in an expert report submitted in this case by Dr. David Kaplan, its chief professional officer, that "refusing to counsel someone on issues related to sexual orientation is a clear and major violation of the 2005 ACA Code of Ethics just as it would be if a practicum student refused to counsel an assigned African-American client who

wanted help with a multiracial relationship on the basis that the counselor's values do not allow her to accept mixed race relationships." (Dkt. 82-9, at 5.)[6]

Plaintiff next makes a half-hearted effort to argue that because she was willing to talk with gay and lesbian clients about issues unrelated to their relationships, the faculty's determination that she engaged in sexual orientation discrimination is pretextual. Appellant's Br. at 49, n.7.[7] As the Supreme Court made clear in *CLS*, however, 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

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[6] Plaintiff points to several sentences from her coursebooks that she argues support her interpretation of the ACA Code of Ethics to permit clients to refuse to see patients whose values they do not share. Appellant's Br. at 12-14. But as previously noted, the ACA itself has stated that her conduct does indeed violate its code of ethics, and plaintiff concedes that she will defer to the ACA's interpretation of its code. Moreover, to the extent that plaintiff had a genuine misunderstanding of the ACA and University's requirements based on her readings of those texts, that misunderstanding was corrected by her faculty and advisor during the initial meeting with her practicum supervisor, her informal review, and the formal review. Plaintiff continued to maintain that she would not change her behavior.

[7] During her deposition, plaintiff also stated that if she were a high school counselor, she would not work with a gay student seeking help coming to terms with his sexual orientation, and would instead suggest that he find another counselor to talk with, even if she were the only counselor in the school. (Dkt. 82-3, at 202.)

omitted). Just as it would be race discrimination for a counselor to refuse to work with an African-American client on relationship counseling because she is dating a white man, so too is it sexual orientation discrimination to refuse to work with gay and lesbian clients on issues involving their relationships.[8]

Further, as the faculty explained, because of the nature of counseling and human psychology, a discussion of relationships may be (or may become) a part of

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[8] Such an example is not far-fetched. *Amici* note that there is a long history of religious opposition to interracial relationships in this country. *See Bob Jones Univ. v. United States*, 468 F. Supp. 890, 897 (D. S.C. 1978) ("The religious belief involved is plaintiff's conviction that the Bible forbids interracial dating and marriage and that God has cursed any acts in furtherance thereof."), *rev'd in part*, 461 U.S. 574 (1983) (holding that a religious school that excluded unmarried black students because of religious beliefs about interracial relationships was appropriately denied a federal tax benefit offered to charitable organizations). *Loving v. Virginia*, 388 U.S. 1, 3 (1967) ("'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'") (quoting trial court opinion); *State v. Gibson*, 36 Ind. 389 (Ind. 1871) (holding that segregation laws derive not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts'") (quoting *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 214 (Pa. 1867)). And still today, there are some who believe that such relationships are inappropriate. In late 2009, a Justice of the Peace in Louisiana refused to issue a marriage certificate to an interracial couple, claiming that he was not racist, but simply did not believe that blacks and whites should marry. *See* Mary Foster, *Interracial Couple Denied Marriage License in Tangipahoa Parish*, New Orleans Times-Picayune, Oct. 16, 2009, http://www.nola.com/crime/index.ssf/2009/10/interracial_couple_denied_marr.html.

counseling that is not ostensibly about relationships. *See, e.g.,* (Dkt. 69-5, at 77) (Dr. Calloway testified that "[w]e can't discriminate against giving services to clients, based on their sexual orientation, and we can't dissect people into parts."). For example, if a client seeks counseling for an eating disorder, it may not be until several sessions that the client reveals—or even realizes—that the eating disorder is connected to other issues including, potentially, his intimate relationships. Were counselors permitted to refer clients whenever the counseling session veered into an area where the counselor disagreed with the client's behavior or goals, clients would risk losing a counselor whom they had come to trust. Because this abandonment by a counselor after the counseling relationship has already developed can be very harmful to clients, the faculty stated that they could not let a student counselor see gay or lesbian clients at all under these terms. (Dkt. 69-8, at 101.)

Plaintiff's arguments, if accepted by this Court, could have far-reaching consequences. The ACA Code of Ethics recognizes the diversity of contemporary life, and is designed to ensure that counseling students learn to help clients through a range of issues that may present at some point during the counseling relationship. Under plaintiff's logic, counseling students who believe that the appropriate role of women is to serve their husbands and refrain from working outside the home could refuse to work with female clients who sought help with balancing work and

family life, and counseling students who object to interfaith relationships on religious grounds could refuse to assist clients struggling with family acceptance of such relationships. To allow students to pick and choose which issues they will work on with which kinds of clients in their counseling practicum would prevent students from developing important skills and undermine the ability of public universities to set their curriculum and train counselors in accord with the mandates of their future profession.

Finally, while plaintiff makes much of the fact that the faculty inquired as to her religious beliefs, no reasonable fact-finder could conclude from that inquiry that the faculty acted because of her beliefs, rather than her stated intent to continue to act contrary to the ACA Code of Ethics. Because plaintiff repeatedly told the faculty during the informal and formal reviews that she would not engage in any conduct that was inconsistent with her beliefs during the counseling practicum, the faculty were left with no alternative but to inquire as to what she believed, in order to ascertain what plaintiff would or wouldn't do during her counseling in the practicum. (Dkt. 1-5, at 10-14, 27-28.) Again, while it would be patently unconstitutional to expel a student simply because the faculty disapproves of her *beliefs*, a public university need not allow students to engage in discriminatory *conduct* against clients, even when such discrimination is motivated by a student's deeply held beliefs.

B. Requiring Students to Counsel Clients in a Manner Consistent with the University Curriculum Does Not Violate the First Amendment Prohibition on Compelled Speech.

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; *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005). Requiring plaintiff 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.

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. To that end, she asserts "a First Amendment right to refuse to foster ideas that contravene her fundamental beliefs." Appellant's Br. at 57. But 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.").

Plaintiff remains free to voice her disagreement with the standards of ethical professional conduct, and to voice her views about sexual orientation.[9] As discussed in Part II, *infra*, the University does not interpret the ACA Code of Ethics to require students to abandon their beliefs. Indeed, plaintiff admits that she was never told that she had to change her beliefs in order to remain in the program. (Dkt. 82-3, at 223.) But the First Amendment does not grant plaintiff the right to remain in a professional training program while specifically stating her intent to disregard the ethical standards of the profession during her training by discriminating against an entire class of potential clients. *Cf. Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177 (6th Cir. 1993) (holding that a public university is not required to change its curriculum to conform to students' religious objections).

II. There Is No Evidence That the Ethical Standards at Issue Here Are Being Applied As an Impermissible Speech Code.

Finally, plaintiff argues that the University's application of its disciplinary policies must be enjoined as an impermissible speech code in violation of the First Amendment. Taking several deposition statements made by faculty members out of context, plaintiff asserts that the University applies the ACA Code of Ethics far beyond the counseling relationship, and to prohibit beliefs that are inconsistent

[9] Indeed, as the district court noted, it is undisputed that she did so in many classes, in which she received A grades. (Dkt. 139, at 2.)

with that Code. Appellant's Br. at 20-28.[10] If these allegations were in fact supported by the record evidence, those requirements would violate the Constitution. But without any such support, this claim lacks merit.

In context, the deposition transcripts upon which plaintiff relies to support her allegations of overbreadth and vagueness make clear that the University does not prohibit "condoning" discrimination in the abstract sense of believing that discrimination is acceptable. *Cf. id.* at 24. Instead, the faculty witnesses stated, "[i]f I were a supervisor and allowed my student to discriminate, I would be condoning it" (Dkt. 70-4, at 51 (deposition of Dr. Irene Ametrano)), and, "[t]hat does not mean that a counselor cannot believe what they want to believe. Counselors believe all sorts of things. We're a very varied profession within all the mental health professions. But to promote and/or actively practice behaviors that discriminate against a class of people is inappropriate, and violates these particular ethics codes," (Dkt. 80-10, at 103-04 (deposition of Dr. Perry Francis)).

Similarly, notwithstanding plaintiff's assertion that the policies apply outside the counseling relationship, there is simply no evidence that the University or faculty have ever applied them in such a manner. As noted above, plaintiff received "A" grades in classes in which she expressed her views that

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[10] As noted previously, plaintiff does not allege that she herself was ever told that she must change her beliefs in order to remain enrolled at the University. Nor have *amici* found any evidence of such statements in the record.

homosexuality is immoral and that counselors should be permitted to refer clients based on their religious beliefs. *See, e.g.*, (Dkt 69-4, at 72) (Dr. Ametrano testified that plaintiff expressed her opposition to homosexuality frequently in class, and received As in class, because the EMU faculty "do not grade students based on their beliefs. We have many students who share those beliefs. We don't grade them on those.").

As construed and limited by the faculty witnesses, the Code of Ethics and the University's application of that policy to plaintiff simply do not pose the constitutional concerns she raises.

CONCLUSION

For all these reasons, this Court should affirm the district court's grant of summary judgment to the University.

Dated: February 11, 2011

Respectfully submitted,

/s/ Michael J. Steinberg

Michael J. Steinberg
ACLU Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
313-578-6814
msteinberg@aclumich.org

Attorney for *amici curiae*

Rose A. Saxe
ACLU Foundation
125 Broad Street, 18th Floor,
New York, NY 10004
212-549-2500
rsaxe@aclu.org

Daniel Mach
ACLU Foundation
915 15th St., NW
Washington, DC 20005
202-675-2330
dmach@dcaclu.org

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 4,702 words according to the word processing system utilized by the American Civil Liberties Union Foundation.

/s/ Michael J. Steinberg
Michael J. Steinberg

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

This is to certify that I have this 11th day of February, 2011, served a true and correct copy of the foregoing brief upon the following attorneys of record by electronic delivery through this Court's electronic filing system, pursuant to 6 Cir. Rule 25(f):

Mark Boonstra
Miller, Canfield, Paddock, and Stone, P.L.C.
101 N. Main St., 7th Floor
Ann Arbor, MI 48104
Tel.: 734-668-7735
boonstra@millercanfield.com

David French
Alliance Defense Fund
12 Public Square
Columbia, TN 38401
Tel.: 931-490-0591
dfrench@telladf.org

/s/ Michael J. Steinberg
Michael J. Steinberg

Attorney for Amici Curiae