No. 10-2100

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULEA WARD,
Plaintiff-Appellant,

v.

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

On appeal from the United States District Court
for the Eastern District of Michigan
No. 09-11237—The Honorable George Caram Steeh

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Appellant

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, *Amicus Curiae* The Becket Fund for Religious Liberty makes the following disclosures:

1. The Becket Fund for Religious Liberty does not have a parent corporation, nor is it the subsidiary or affiliate of a publicly owned corporation, nor does it issue stock.

2. The Becket Fund for Religious Liberty does not have a financial interest in the outcome of this case.

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INTEREST OF *AMICUS*

Amicus The Becket Fund for Religious Liberty is a non-profit, non-partisan law firm that advocates for the free public expression of all religious traditions, both in the United States and around the world. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others.

The Becket Fund is frequently involved as counsel for religious plaintiffs or as an *amicus curiae* in appeals involving the application of the Free Exercise Clause and related civil rights statutes protecting free exercise. *See*, *e.g.*, *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) (beard accommodation for Muslim police officers; argued appeal as counsel for *amici*); *Merced* v. *Kasson*, 577 F. 3d 578 (5th Cir. 2009) (Santeria goat sacrifice; counsel for successful plaintiff); *Stormans* v. *Selecky*, 586 F.3d 1109 (9th Cir. 2009) (healthcare conscience exemptions; counsel for plaintiffs successfully seeking panel rehearing).

Amicus is concerned that the lower court's ruling in this case, if upheld, will greatly reduce protections for conscience within the Sixth Circuit. In particular, the district court's decision would allow government entities to systematically disfavor exemptions for religious reasons while allowing exemptions for secular reasons, even values-based secular reasons. Under the facts of this case, such a wide-ranging ruling is not just wrong, it is entirely unnecessary. Since referrals for non-

religious reasons are already available to some students, it makes little sense not to extend the same referral accommodations to students acting out of religious motivations. Indeed, refusing to allow students to refer clients for religious reasons could have the effect of excluding entire classes of people from the counseling profession solely because of their religious beliefs and practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Free Exercise claim in this appeal might be more difficult were the University enforcing a rule it applied to everyone equally and neutrally. But it isn't. Instead, the University has created a system riddled with exceptions that University officials can use to approve activities they happen to agree with and punish those they dislike. Under the Free Exercise Clause, such a system triggers strict scrutiny in two independent ways:

First, the University's expulsion of Ward violates the Free Exercise Clause because the decision to expel Ward was made within a system of "individualized assessments" and the expulsion substantially burdened her religious exercise. The Supreme Court has recognized that systems of individualized assessments are structurally prone to abuse and thus automatically trigger strict scrutiny.

Second, the University separately triggered strict scrutiny by expelling Ward pursuant to a disciplinary policy that is neither neutral nor generally applicable. Since the University allows referrals for some reasons, including values-based rea-

sons, it must extend the same option to students like Ward who seek to make referrals for religious reasons.

The University's decision to expel Ward cannot withstand strict scrutiny for two reasons. First, its stated interests in promoting non-discrimination and retaining accreditation are not *compelling* governmental interests because the University pursues them only selectively. That selectivity cuts against any claim that enforcement of the policy is necessary in Ward's particular case.

Second, expelling Ward was far from the least restrictive means of furthering the University's claimed interests in preventing discrimination and maintaining accreditation. One obvious less restrictive alternative would have been to allow Ward to refer the small number of clients whom she could not counsel in good conscience. Such a referral option—already extended to other students for non-religious reasons—would have permitted Ward to stay in the program while allowing the University to further its interests.

The sad truth of this case is that University officials picked a fight they didn't have to. The ostensible conflict between Ward's conscience and the University's interests—to the extent it really exists—did not have to result in her expulsion. Because it did, the University has violated the Free Exercise Clause.

ARGUMENT

I. The University's expulsion of Ward violates the Free Exercise Clause.

Different types of laws get different levels of scrutiny under the Free Exercise Clause. When a law is "neutral and generally applicable," it typically gets rational basis review. *Employment Division* v. *Smith*, 494 U.S. 872 (1990). But if a law is not neutral or generally applicable, or if it involves a system of "individualized assessments" of the reasons for the regulated conduct, it is subject to strict scrutiny. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 531 (1993).

Here, the University's disciplinary policy triggers strict scrutiny for two independent reasons: (1) It involves a system of individualized assessments, *see* Part A *infra*, and (2) It is not neutral or generally applicable, *see* Part B *infra*. Having triggered strict scrutiny, the University's expulsion of Ward fails to meet that demanding test. *See* Part C *infra*. It therefore violates the Free Exercise Clause.

A. The University's disciplinary policy is subject to strict scrutiny because it involves a system of "individualized assessments."

The University's disciplinary policy triggers strict scrutiny under the Free Exercise Clause by imposing a substantial burden on Ward's religious exercise pursuant to a system of individualized exemptions.

1. Strict scrutiny applies when the government substantially burdens religious exercise pursuant to a system of "individualized assessments."

In 1963, the Supreme Court held in *Sherbert* v. *Verner* that the Free Exercise Clause mandated strict scrutiny ***whenever*** the government imposed a "substantial burden" on religious exercise, even when the burden was incidental. 374 U.S. 398 (1963) (decision to deny unemployment benefits to Seventh-day Adventist who was terminated after refusing to work on the Sabbath impermissibly burdened religious exercise and could not satisfy strict scrutiny). For almost thirty years, the Court applied this standard throughout its Free Exercise cases, ruling in favor of Free Exercise claimants when the government decision to substantially burden religious exercise did not satisfy strict scrutiny. *See, e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Bd.*, 450 U.S. 707 (1982); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), however, the Supreme Court narrowed the range of cases where strict scrutiny applied under the Free Exercise Clause. *Smith* held that laws burdening religious exercise are not subject to strict scrutiny when they are "neutral" with respect to religion and "of general applicability." *Id.* at 879. Applying this rule, the Court held that an across-the-board criminal prohibition against ingesting peyote could be applied to burden the religious exercise of Native Americans who used the drug for sacramental purposes, with no recourse to the strict scrutiny test articulated in *Sherbert*.

But *Smith* ***did not overrule*** *Sherbert* or the line of cases it spawned. Instead, the Court ***distinguished*** *Sherbert* and its progeny as situations in which the government was applying a law that allowed it to make an "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. *Sherbert*, for example, involved an unemployment compensation provision that denied benefits if the worker refused work "without good cause." *Id.* This "good cause" inquiry, the *Smith* Court stated, "created a mechanism for individualized exemptions," that rested on the discretion of government officials. *Id.* (quotation omitted). Thus, in contrast to "across-the-board prohibitions" like the drug laws, the unemployment compensation laws varied in their application upon the discretion of government officials. *See id.* at 884-85. Accordingly, the *Smith* Court explained, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884.

Three years later, in *Lukumi,* the Court reaffirmed and applied the "individualized assessment" doctrine. The Court concluded that a local ordinance prohibiting "unnecessary" animal killing constituted "a system of 'individualized governmental assessment of the reasons for the relevant conduct,'" because it "require[d] an evaluation of the particular justification for the killing." *Id.* at 537 (quoting *Smith*, 494 U.S. at 884). The *Lukumi* Court held that such laws must "undergo the most

rigorous of scrutiny" before the burdening of religious practice could be justified.[1] Accordingly, the Supreme Court has made clear that even after it narrowed Free Exercise protections in *Smith*, strict scrutiny still applies when the government substantially burdens religious exercise through a system of individualized assessments.

Since *Smith* and *Lukumi*, the Courts of Appeals have consistently recognized and treated "individualized assessments" (or "exemptions") claims as exceptions to the general rule announced in *Smith*. *See, e.g.*, *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (systems of "individualized exemptions" are those that "make case-by-case determinations," and not those "contain[ing] express exceptions for objectively defined categories of persons"); *American Friends Serv. Comm. Corp.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991) ("'where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.'") (quoting *Smith*, 494 U.S. at 884); *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (Alito, J.) ("*FOP*") (recognizing *Lukumi's* application of the "individualized assessments" doctrine); *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 210 (3d Cir. 2004) (Alito, J.) (applying "individualized assessments" doc-

[1] *Id.* In both *Smith* and *Lukumi*, the Court used the terms "individualized assessment" and "individualized exemption" interchangeably. *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884.

trine). *See also Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) (recognizing that *Sherbert*'s individualized assessment doctrine continues to apply post-*Smith*, and that the codification of this doctrine in Section 2(a) of the Religious Land Use and Institutionalized Persons Act ("RLUIPA) was therefore an "uncontroversial use" of Congressional power).

In sum, even after *Smith,* incidental, substantial burdens on religious exercise still trigger strict scrutiny under the Free Exercise Clause if they are imposed pursuant to a system of individualized assessments.

2. The University's disciplinary policy substantially burdens Ward's religious exercise pursuant to a system of "individualized assessments."

The University's application of the disciplinary policy to Ward falls easily within the doctrine of "individualized assessments." Specifically, the University's policy gives it broad latitude to decide, on a case-by-case basis, which reasons are legitimate bases for referrals and which are not. Although the District Court held that there is "no system of 'particularized exemptions,'" it at the same time acknowledged that "EMU has allowed referral of clients on a limited basis." Op. at 30. This is self-contradictory.

For example, referrals are permissible if "a student who had recently suffered the loss of a significant person in their life was . . . assigned clients who were 'coming in to deal with grief issues.'" *Id*. Additionally, a referral is permissible "if

the parents of a homosexual child seek counseling and set the counseling goal as helping their child not engage in homosexual relationships or behavior because of their religion." *Id*. Finally, the university policy explicitly provides that referrals are permissible in cases involving clients "seeking end-of-life counseling." *Id*. at 31. All of these referrals are permitted on a case-by-case basis after the University considers the reasons for the relevant conduct.

Despite acknowledging these exemptions to the policy, and despite the University's concession that the assigned text in one of Ward's counseling classes provides that "referrals based on value conflicts are permissible," the court still held that the policy did not allow for individualized assessments, citing *Kissinger* v. *Board of Trustees of Ohio State University*, 5 F.3d 177 (6th Cir. 1993) as its only support. *Id*. at 32. In *Kissinger*, a graduate student alleged that her free exercise rights were violated when the university refused to permit her to complete a veterinary graduate program without operating on healthy animals. Op. at 29. The graduate student requested that Ohio State create a new curriculum to fit her beliefs, despite no indication that any student had graduated from the veterinary program without taking part in the objectionable operations. *Kissinger*, 5 F.3d at 178-80.

This Court held that there was no system of individualized exemptions, holding that although exceptions had been made for students seeking to further their coursework, none had ever been made for students seeking to graduate from the

program: "[b]ecause Kissinger's purpose is to graduate from veterinary school, not merely to pursue further coursework there, the record contains no indication that Ohio State maintained a system of particularized exemptions for students who do not successfully complete Operative Practices and Techniques." *Id.* at 181.

This case is easily distinguished, as the other exceptions to the University's disciplinary policy were granted to students seeking to graduate from the program just as Ward is. Moreover, the exceptions permitted by the University are precisely the type that several Circuits have held constitute "individualized exemptions"—they are subjective and "designed to make case-by-case determinations." *Axson-Flynn*, 356 F.3d at 1298.

Axson-Flynn is instructive because its facts are very similar to those here. In *Axson-Flynn* the plaintiff was enrolled in the University of Utah Actor Training Program. *Id.* at 1280. She claimed it would violate her religious beliefs to comply with the Program's script adherence requirement by saying certain curse words or "take God's name in vain." *Id.* Relying on the fact that the University had given exemptions to another student, the Tenth Circuit reversed and remanded the district court's summary judgment against her, holding that a "pattern of ad hoc discretionary decisions amounting to a 'system'" would support an individualized assessments claim. *Id.* at 1299.

The situation here is if anything more problematic. The University could not even determine whether Ward violated its policy until it conducted a thorough hearing probing the particular nature of her beliefs. And expert witnesses still conflict over whether her actions did, in fact, violate that policy. Such a case-by-case inquiry into an open-ended ethics standard is the quintessential "individualized assessment." *See id.* at 1297 (noting the role of particularity and subjectivity, and whether the government "'consider[s] . . . the particular circumstances' involved in the particular case") (quoting *Smith,* 494 U.S. at 884).

Similarly, in *Thornburgh*, 951 F.2d at 961, the court held that a system of particularized exemptions is involved where procedures exist for individuals to apply for an exemption so that the government may assess the reasons for the conduct. In the present case, referrals are permissible but not mandated for students who are grieving and are assigned grieving clients. Op. at 30. Referrals are also permissible but not mandated for those students who are assigned to clients seeking reparative therapy or end-of-life counseling. *Id.* at 30-31. That the student can apply, or ask, for these referrals (or choose not to) lends to these exemptions precisely the sort of subjectivity that makes them "individualized exemptions" for purposes of the Free Exercise Clause. *Thornburgh*, 951 F.2d at 961. *See also Blackhawk*, 381 F.3d at 210 (finding system of individualized assessments where individuals could apply for waivers on the basis of written but "open-ended" requirements).

Nor is there any doubt that the denial of an individualized exemption in this particular case produces "religious hardship"—*i.e.*, a substantial burden on Ward's religious exercise. *Lukumi*, 508 U.S. 520. The district court held that Ward's free exercise rights were not violated because, according to the court, the University "never demonstrated a purpose to change her religious beliefs . . . Defendants acknowledged that plaintiff's beliefs motivated her behaviors, but always made the distinction between the two, and in no way attacked her beliefs." Op. at 28. Whether the University asked Ward to change her *beliefs* is irrelevant to the burden inquiry. It is undisputed that University officials penalized Ward's religious *exercise*—that is, Ward was expelled because she was unwilling to act in a manner contrary to her beliefs. Forcing Ward to choose between following her conscience and continuing her studies is a substantial burden on her religious exercise by any measure. *See*, *e.g.*, *Sherbert*, 374 U.S. at 404 (substantial burden where plaintiff was forced "to choose between following the precepts of her religion and forfeiting benefits"); *A.A.* ex rel. *Betenbaugh* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248, 266 (5th Cir. 2010) (substantial burden where plaintiff was forced "to choose between attending Needville public schools and following his religious beliefs"). Strict scrutiny is therefore required.

B. The University's disciplinary policy is subject to strict scrutiny because it is not neutral or generally applicable.

The University's expulsion of Ward pursuant to the disciplinary policy separately violates the Free Exercise Clause, triggering strict scrutiny. The policy is not neutral and generally applicable for two main reasons: (1) The policy is not generally applicable because it allows referrals for non-religious reasons, and not for religious reasons; and (2) The policy, as applied to Ward, is not neutral under *Lukumi* because it targets certain religious beliefs for disfavor.

1. The University's disciplinary policy is not neutral and generally applicable under *Lukumi* because it allows value-based referrals for non-religious reasons but not for religious reasons.

A law burdening religious practice must be of general applicability, and cannot "in a selective manner impose burdens only on conduct motivated by religious belief[.]" *Lukumi*, 508 U.S. at 542-43. The Free Exercise Clause precludes the state from intentional discrimination, but also "protects religious observers against unequal treatment," *Id.* at 543. That is, the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 580 U.S. at 543. Under *Lukumi* and subsequent caselaw, the requirement of "general applicability" means three things: (a) The government may not impose a policy that is substantially underinclusive for its stated ends; (b) The government cannot allow exemptions from a policy for secular conduct but deny similar exemptions for religious conduct; and (c) The government cannot impose a policy that gives the gov-

ernment discretion to make individualized exemptions. Any one of these three features renders a law not "generally applicable." Here, the University's policy is characterized by all three.

a. The University's policy is not "generally applicable" because it is substantially underinclusive for its stated ends.

First, the University's policy is not "generally applicable" under *Lukumi* because it is substantially underinclusive in pursuing its ends. *See Lukumi*, 580 U.S. at 543. In *Lukumi*, the government enacted ordinances prohibiting animal sacrifices necessary to the Santeria religion. The Supreme Court rejected the government's claim that the ordinances were necessary to protect public health and prevent animal cruelty, noting that the ordinances failed "to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 543-44. Commenting on the disparity, the Court noted: "The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The [government] does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity." *Id.* at 544. Similarly, an ordinance prohibiting slaughter of animals outside areas zoned for slaughterhouses was underinclusive because the ordinance exempted commercial operations that slaughtered "small numbers" of hogs and cattle. *Id.* at 545. Put simply, the government had imposed a prohibition on Santeria worshippers that it was not prepared to impose

more generally. *Id.* Accordingly, the ordinances were not "generally applicable" and were subject to strict scrutiny. *Id.* at 527-28, 543-44.

Here, the University has established a substantially underinclusive policy with respect to its core curriculum by approving, providing for, and granting referrals to accommodate student hardship. The University allows referrals, and counseling ethics generally allow for referrals. Op. at 30-33. One student was allowed to refer *all* clients with grief issues, demonstrating that the University could refer an entire class of clients to accommodate a particular student's emotional burdens. Op. at 30. Ward's request is far narrower: she needs to refer only those clients whose conduct she cannot affirm without violating her conscience. Op. at 4. By openly granting referrals, the University has demonstrated that it is willing to permit referrals for some students. The University's refusal to grant Ward referrals shows that the policy is not "generally applicable" under *Lukumi*. *See* 508 U.S. at 545.

b. The University's policy is not "generally applicable" because it allows exemptions for secular but not religious reasons.

University policy also fails the "generally applicable" test because it allows exemptions for secular reasons, but not religious reasons. *FOP*, 170 F.3d at 365. In *FOP*, a police department regulation required officers to shave their beards, with limited medical exemptions. *Id.* at 360. Because the department allowed exemptions from the policy for non-religious medical reasons, the court held, it was required to allow exemptions for religious reasons. *Id.* at 364. The department's wil-

lingness to consider beards medically but not religiously necessary "devalue[d] religious reasons . . . by judging them to be of lesser import than nonreligious reasons. Thus religious practice [was] being singled out for discriminatory treatment." *Id.* at 364-65 (*quoting Lukumi*, 508 U.S. at 537-38).

Likewise, the University has singled out religious practice for discriminatory treatment, permitting client referrals for secular reasons (including emotional hardship). Op. at 30. The University's refusal to accommodate Ward's religious beliefs in any way imposes a double standard, and under *Lukumi* and *FOP*, such a standard is not "generally applicable." The district court attempted to explain away the differing treatment of Ward and the other student by describing prior exemptions as "limited basis" or "limited accommodation" exemptions. *Id*. But that supposed distinction is both factually wrong (because Ward's requested accommodation is also "limited" to specific cases) and, more importantly, legally irrelevant. In *FOP*, the department's medical exemption was typically applied to a *temporary* condition (*pseudo folliculitis barbae*), but the court nevertheless held that the plaintiffs' religious convictions justified a *permanent* exemption. 170 F.3d at 360. In short, the University has no business telling Ward how long it will deign to tolerate her religious convictions. The Free Exercise Clause demands not just toleration, but respect for Ward's conscience.

The District Court erroneously relies on *Kissinger* to show general applicability. But unlike the plaintiff in *Kissinger*, who sought an entirely new curriculum, Ward has excelled in the curriculum, wants to take part in the counseling Practicum, and only asks to be allowed to refer clients in a manner that other students have already been allowed to refer clients for secular reasons. Op. at 2-4. Indeed, there is no evidence that any counseling client has or would suffer any harm by allowing Ward to refer clients to other counselors who have no conscientious objections (just as no client has suffered any harm by allowing other students to refer clients with grief issues). *Id*. at 1-10.

Also unlike this case, the *Kissinger* record contained no evidence that Ohio State had ever attacked the student's religious beliefs. 5 F.3d at 179. Ward, on the other hand, was subjected to a "theological bout"—a kind of religious inquisition expressing obvious and overt hostility to her particular brand of religious beliefs. Op. at 4-5. In short, *Kissinger* denied the student's right to a complete reworking of a program from which no student seeking to graduate from the program had ever been exempted, whereas Ward asks only for referrals in a small subset of assignments, within a program that openly grants exemptions for non-religious reasons. The University's policy singles out religious practice for unequal treatment and, under *Lukumi* and *FOP*, is not generally applicable.

c. The University's policy gives it discretion to make "individualized exemptions."

As shown in Section I.A, the University's policy also gives it discretion to make "individualized exemptions" from its general requirements. Individualized exemptions are problematic not just because they trigger a substantial burden analysis under *Sherbert* v. *Verner*. They also implicate the neutrality and general applicability standards by creating "the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209, *citing Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; *FOP*, 170 F.3d at 364-65. They thus warrant strict scrutiny.

In *Blackhawk*, for example, the statute at issue permitted a state officer to waive a permit fee where the waiver was "consistent with sound game or wildlife management activities or the intent of the Game and Wildlife Code." 381 F.3d at 205 (brackets omitted). That statute, the Third Circuit held, was "sufficiently open-ended to bring the regulation within the individualized exemption rule." *Id.* at 210. The court rejected the government's argument that religious exemptions were inconsistent with its general policy against keeping live animals in captivity, holding that the policy's failure to "categorically disfavor" such captivity, and indeed, its allowance of captivity in certain circumstances, created a "regime of individualized, discretionary exemptions that trigger strict scrutiny." *Id.* at 210.

Here, likewise, the University has ample room to create "individualized, discretionary exemptions" by allowing referrals on an ad hoc basis tailored to the specific student's circumstances. *See* Op. at 30. Indeed, that is just what it has done for students facing grief issues and end-of-life counseling situations. Because the policy gives the University the power to make individualized determinations of this sort, the policy is at particular risk of being applied in a discriminatory manner against Ward, and therefore triggers strict scrutiny. *See id.*

2. The University's disciplinary policy, as interpreted and applied by the University, is not neutral under *Lukumi* because it targets certain religious beliefs for disfavor.

The University's policy has also been enforced in a selective manner, undermining the claim that the policy is neutral. Even under a facially neutral law, official action that targets religious conduct violates the Free Exercise Clause, and the real, operational effects of its enforcement are "strong evidence" of its true objective. *Lukumi*, 508 U.S. at 534-35; *Blackhawk*, 381 F.3d at 209 (Alito, J.) (citing *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 167-72 (3d Cir. 2002)). To determine the law's effect under *Lukumi*, the court should examine three facts: (a) Whether the burden of the policy, in practical terms, falls on religious objectors but almost no others; (b) Whether the policy proscribes more religious conduct than necessary; and (c) Whether the University interprets its policy in a way that favors secular conduct. *Lukumi*, 508 U.S. at 535-40. The court should look beyond the text of the University policy and analyze its practical effects. As the Supreme

Court observed in *Lukumi*: "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. The object of the University's policy, as demonstrated by its practical effects on students like Ward, is to target certain religious beliefs for disfavor.

a. The burden of the University's policy falls disproportionately on religious objectors in general, and Ward in particular.

The burden of the University's policy falls disproportionately on religious objectors like Ward. Like the ordinances at issue in *Lukumi*, which "exclude[d] almost all killings of animals except for religious sacrifice," 508 U.S. at 535-36, the University's disciplinary policy conflicts directly with Ward's religious convictions. Beyond Ward, the policy will likely fall mostly upon religious students who cannot in good conscience affirm homosexual conduct in counseling. At the same time, the University has exempted certain students from normal Practicum requirements by referring clients whose needs conflicted with students' non-religious needs. Op. at 30-31 (grieving students can refer grieving clients; similarly, students who disagree with a client's end-of-life decision or who were assigned parent-clients seeking reparative therapy for their homosexual child, could refer the clients to other counselors). Consequently, students whose religious beliefs forbid them from affirming homosexual conduct are the only students who must choose between their convictions and their education.

If there were any doubt about whether this disparate treatment is accidental, the University's conduct at Ward's disciplinary hearing confirms that it was not. The clear message of the "theological bout" at the University's formal hearing—implicit and explicit— was that Ward's religious convictions were viewed by University officials with disfavor. *See* Op. at 4-5, 27-28. Such direct and unequivocal hostility to a particular religious practice eviscerates the University's claim of neutrality and requires strict scrutiny.

b. The policy proscribes more religious conduct than necessary.

The policy also proscribes more conduct than necessary because it resulted in Ward's expulsion, not only preventing her from counseling in the Practicum program, but essentially excluding her from the profession entirely—solely because her religious beliefs and conduct. Op. at 3-4, 30. The University made no effort to allow her to complete the program while continuing to abide by her religious convictions. In *Lukumi*, the Supreme Court found "significant evidence" of targeting because the ordinances "proscribe[d] more religious conduct than [was] necessary to achieve their stated ends." *Lukumi*, 508 U.S. at 538. These "gratuitous restrictions" made reasonable the inference that the ordinances sought not to effectuate the governmental interests, but to suppress religious conduct. *Id.* Here, too, the University's policy reaches far beyond its alleged goal of educating students about counseling ethics, and instead has a devastatingly punitive effect on Ward. Instead

of attempting to find a narrow compromise to accommodate Ward's religious beliefs, the University expelled her from the program and shattered her hope of entering the counseling profession. Op. at 5-6.

As stated above, unlike the plaintiff in *Kissinger,* the case cited as controlling by the District Court, Ward accepted the core requirements of the curriculum and needed only a modest accommodation—not a separate curriculum, as in *Kissinger*. Op. at 4, 30-33. In the present case, the University was willing to refer clients for students whose own grief precluded counseling of *all* students having grief issues, so a limited accommodation would not have threatened the Practicum. *Id.* Yet the University reached far beyond establishing and maintaining its core curriculum. Instead of providing Ward with limited referrals on an as-needed basis, the University ejected her from the program. That step was completely unnecessary to its curricular goals and under *Lukumi* triggers strict scrutiny.

c. The University interprets its policy to favor secular conduct.

The University has interpreted its policy to prohibit referrals where Ward's religious beliefs forbid her counseling certain cases, while allowing referrals for secular reasons, a preference for secular conduct that triggers strict scrutiny under *Lukumi*. *See* 508 U.S. at 537. On its face, the ACA Code of Ethics allows referrals when a counselor determines that she is unable to be of professional assistance to the client. ACA Code of Ethics A.11.b. The University has ***expanded*** the ACA's

categories of permissible reasons for referrals, permitting referrals to accommodate a counselor's emotional or other non-religious needs. Op. at 30. By interpreting the policy to permit referrals for secular reasons, but not for Ward's religious reasons, the University has favored secular values over religious values, secular reasons over religious reasons, and secular conduct over religious conduct. Such an unbalanced interpretation renders the policy non-neutral, and thus subject to strict scrutiny.

C. The University's disciplinary policy does not withstand strict scrutiny.

Because the University's policy is not neutral or generally applicable and involves a system of individualized exemptions, the University must satisfy strict scrutiny. To do so, it has the burden of proving as an affirmative defense that its policy (1) furthers "a compelling governmental interest" and (2) is "narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. Under this test, a "Government's mere invocation" of broadly defined interests "cannot carry the day." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006) (applying the same test under RFRA). Rather, the government must demonstrate both that an interest of the highest order is endangered ***in this particular case***, and that it has employed the least restrictive means necessary to further that interest. *Id.* at 430-32. This is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 509 (1997).

Here, the University asserts two allegedly compelling interests in support of its policy: (1) the desire to prevent discrimination; and (2) "the desire to offer an accredited program." Op. at 26. Although both of these interests are legitimate, they fall short of satisfying strict scrutiny on the facts of this case.

1. The University's stated interest in preventing discrimination is not compelling under *Lukumi* because the University selectively pursues it.

As long as the University allows for referrals in some instances, it cannot claim a compelling interest in prohibiting Ward from referring clients based on her religious beliefs. Ward was singled out for dismissal because of her convictions while the University's policy allows for other instances of discrimination based on a counselor's beliefs and values. The University branded Ward's religious reasons for referring of a client as impermissible discrimination and dismissed her from the program. However, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 580 U.S. at 546. Here, the ACA Code targets religious conduct by allowing some referrals but failing to accommodate diverse religious beliefs about sexuality.

As explained above, the University allows some referrals. *See* Sections I.A and I.B, *supra*. The Supreme Court has explained that "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital inter-

est unprohibited." *Lukumi*, 580 U.S. at 546-47 (internal citations omitted). The University leaves referrals unprohibited in a number of settings.

For example, the ACA Code explicitly states that "[i]f counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships. Counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives." Compl. Ex. 1-16 (ACA Code A.11.b). In at least one instance, the University actually did allow a student to refer clients due to non-religious values. Op. at 30. Further, the ACA Code prohibits discrimination on the basis of both sexual orientation and religion. The University will not allow Ward to refer clients, but it has indicated that it would allow referral in the case of a religious parent seeking to keep a child from entering into a homosexual relationship. *Id.* at 30-31. If Ward's actions are prohibited as discriminatory but a similar referral because of conflicting religious beliefs are not, the University puts its interest in non-discrimination in doubt. The University has the burden of showing that its interest in preventing discrimination is compelling, but unless it has a uniform policy against referrals as discrimination, it has not met that burden. The University dismissed Ward not because she wanted to refer clients—it has not prohibited referrals outright—but because of the constitutionally protected religious *reason* behind her decision.

More to the question of whether Ward's request for a referral constitutes impermissible discrimination according to the ACA Code of Ethics, there is no *direct* conflict between the Code and Ward's referral request. As demonstrated by the fact that referrals are permissible and have in fact been permitted in the past, the conflict in the present case arises principally from the Defendants' *interpretation* of the Code. This interpretation is faulty. Ward's request does not constitute systematic discrimination, as she is willing and able to counsel homosexual clients on all matters except those involving sexuality. And an accommodation of Ward's exercise of her religious beliefs is not the same as discrimination.

Even if there were a direct conflict between the Code and Ward's referral request, this is not enough to constitute a compelling government interest. Merely following a rule is not a compelling interest in itself, as those rules could have just as easily been different; to be compelling, there must be some separate interest at stake. Moreover, as noted above, whether following the ACA Code of Ethics rises to the level of "compelling government interest" depends on how that interest relates to Ward's particular case. The Supreme Court in *O Centro*, when defining the requirements of strict scrutiny under the federal Religious Freedom Restoration Act (RFRA), held that a "categorical approach" was improper. 546 U.S. at 420. Instead, the compelling interest test must be "satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of

religion is being substantially burdened." *Id*. at 421. As it applies to the present case, this means that the university cannot claim that its interest in abiding by the ACA Code of Ethics is compelling; it must prove that the application of the Code is necessary in Ward's case specifically.

As discussed above, such an enforcement of the Code was not necessary, as referrals for non-religious reasons have been permitted in the past, and Ward's religiously-motivated referral request could have just as easily been allowed.

2. Expelling Ward was not the least restrictive means of furthering the University's stated interest in preventing discrimination.

The University is far from meeting its burden of showing that it has chosen the least restrictive means of meeting its goals of non-discrimination. Under strict scrutiny, "if a less restrictive alternative would serve the Government's purpose, the [government] *must* use that alternative." *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (emphasis added).

Here, the University has not shown that it has chosen the least restrictive option for the pursuit of its interest, compelling or not. Ward was offered two choices: (1) a "remediation" program, which by its nature would have required Ward to compromise her beliefs, and (2) a hearing at which Ward explained her beliefs and which ultimately resulted in her dismissal. Op. at 4. The University ignored an option described by the ACA Code that is less restrictive than dismissing Ward or requiring her to affirm homosexual relationships. Referral is an option that allows

counselors to refrain from "harming" clients. Compl. Ex. 1-16 (ACA Code A.11.b).

Referral is less restrictive than the University's actions in this case because it accommodates Ward's religious beliefs and allows her to stay in the program. It achieves the University's goals of non-discrimination by assigning clients to counselors who will be able to help them with their problems without allowing clients to come into contact with discrimination—perceived or real. The University has shown no evidence of harm in the one case in which Ward did refer a client, nor has it shown that her dismissal was necessary to avoid future harm. *See* Op. at 3. It has not, therefore, met its burden of showing that it has chosen the least restrictive means of furthering its interests.

3. Expelling Ward was not the least restrictive means of furthering the University's stated interest in maintaining its accreditation.

Nor is Ward's expulsion justified by the University's alleged interest in maintaining accreditation. According to the district court, the University "has a compelling interest to design and maintain a counseling program meeting the CACREP accreditation standard." Op. 48. Expelling Ward, the district court reasoned, was a narrowly tailored means of furthering that interest because it neither "targets plaintiff's religion, nor . . . substantially regulates aspects of students' personal lives outside of their professional conduct." *Id.* This conclusion fails for two reasons.

First, there is a material factual dispute over whether expelling Ward violated professional nondiscrimination standards, and thus over whether expelling her actually furthered the University's interest in maintaining its accreditation. Plaintiff adduced substantial evidence that value-based referrals like hers are standard practice in professional counseling. Textbooks assigned by the University taught that value-based referrals may be the most appropriate means of assisting a client, and that up to 40 percent of counselors had engaged in that practice. Op. 9-10; Ward Br. 12. While the University offered evidence to the contrary, a reasonable trier of fact could find that her requested referrals complied with professional norms. If so, expelling Ward did nothing to further the University's interest in maintaining its accreditation.

Second, even assuming Ward's referral violated professional standards, the University has not shown that accommodating Ward would lead to the loss of accreditation. At most, the University has adduced evidence that (1) "[i]n order to maintain its accreditation . . . , the students must have 'curricular experiences and demonstrated knowledge' in the ACA and ASCA Ethics Codes," and (2) Ward's referral arguably violated these codes. Op. 2, 48. But it simply does not follow that accommodating Ward in this particular case would result in a loss of accreditation. The University offered no evidence that any other school lost accreditation by accommodating value-based referrals. Nor has it explained how accommodating

Ward would result in a loss of accreditation. Absent such evidence, the University cannot show that expelling Ward was the least restrictive means available.

Indeed, the University's position is indistinguishable from that of the federal government in *O Centro*. There, a religious plaintiff sought an exemption from certain federal drug laws, which prohibited the plaintiff from consuming a sacramental (but hallucinogenic) tea. But the government argued that the ban was essential to maintaining the government's compliance with an international treaty. As the government put it, banning the tea furthered "a compelling interest in meeting its international obligations by complying with the [treaty]." *O Centro*, 546 U.S. at 437.

Applying strict scrutiny under RFRA, the Supreme Court unanimously rejected this argument. According to the Court, although the government submitted evidence on "the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs," it failed to submit any evidence "addressing the international consequences of granting an exemption for the [sacramental tea]." *Id*. at 438. The invocation of such "general interests, standing alone," was not enough to satisfy strict scrutiny. *Id*.

The same is true here. Although the University has offered evidence on "the general importance" of maintaining accreditation, it has offered no evidence ad-

dressing the "consequences of granting an exemption for [Ward]." *Id.* Its alleged interest therefore fails strict scrutiny. *See also Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 616-617 (7th Cir. 2007) (Posner, J.) (Local government could not exclude a church on the ground that the exclusion was justified by state law).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's ruling with respect to Ward's Free Exercise claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). The brief contains 6,989 words, not counting the cover, corporate disclosure statement, table of contents, table of authorities, signature block, and certificates.

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