Appeal Nos. 10-2100 & 10-2145

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULEA WARD,

Plaintiff-Appellant/Cross-Appellee,

v.

ROY WILBANKS, FLOYD CLACK, GARY D. HAWKINS, PHILIP A. INCARNATI, MOHAMED OKDIE, FRANCINE PARKER, THOMAS W. SIDLIK, JAMES F. STAPLETON, DR. SUSAN MARTIN, DR. VERNON POLITE, DR. IRENE AMETRANO, DR. PERRY FRANCIS, DR. GARY MARX, PAULA STANIFER, DR. YVONNE CALLAWAY and DR. SUZANNE DUGGER,

Defendants-Appellees/Cross-Appellants,

On Appeal from the United States District Court
for the Eastern District of Michigan
Civil Case No. 09-11237 (Honorable George Caram Steeh)

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-2100/10-2145 Case Name: Julea Ward v. Roy Wilbanks, et al.

Name of counsel: David A. French, Jeremy D. Tedesco, Steven M. Jentzen

Pursuant to 6th Cir. R. 26.1, Appellant Julea Ward
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 21, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeremy D. Tedesco
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Julea Ward respectfully requests oral argument. The case presents critical questions regarding the scope of student free speech on campus and the ability of individual schools and even academic departments to create and enforce codes of conduct which require students to express agreement with government-approved views of timeless and critical moral issues.

INTRODUCTION

Acting under wildly overbroad nondiscrimination polices (hereinafter, the Speech Code), officials at Eastern Michigan University (EMU) expelled Julea Ward in the final phase of her graduate counseling program—in spite of her 3.9 GPA, in spite of the fact that she had precisely followed her professors' instructions, and in spite of her compliance with clear ethics mandates regarding counseling referrals.

EMU officials expelled her for insufficient tolerance, for "condoning discrimination" and for "imposing [her] values" because she refused to promise to verbally affirm homosexual behavior in hypothetical future counseling sessions and because she had expressed moral disagreement with homosexual behavior in classroom discussions. EMU's disciplinary process featured state officials explicitly impugning Ms. Ward's religious beliefs, even going so far as to engage her in a self-described "theological bout" where they directly challenged her interpretations and understandings of scripture.

EMU calls this coercion their "curriculum" and uses that term as a pretext to justify imposing phenomenally broad speech codes. Until the decision of the court below, no court in the land—including this Court—had upheld speech codes of such breadth and vagueness on the merits. According to EMU's own testimony, the codes are so broad that they can prohibit even negative *thoughts* when

reviewing a client file. When the court below in essence created a curricular exception to decades of speech code jurisprudence, it created an exception which swallows the rule and gave motivated academic departments the legal means to fatally undermine the university as a marketplace of ideas.

JURISDICTIONAL STATEMENT

Appellant Julea Ward filed this suit under 42 U.S.C. §1983 for deprivations of her rights under the First and Fourteenth Amendments to the United States Constitution. The district court possessed subject matter jurisdiction over this suit under 28 U.S.C. §§1343(a)(3) and 1343(a)(4), and 28 U.S.C. §1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291, because this is an appeal from a final judgment under Fed. R. Civ. P. 54 that disposed of all parties' claims.

This appeal is from the district court's July 26, 2010 Order granting Defendants' motion for summary judgment, and denying Ms. Ward's motion for summary judgment, and its Judgment entered the same day. Ms. Ward filed a timely notice of appeal on August 23, 2010, in accordance with Fed. R. App. P. 4(a)(1)(A).

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment to Defendants *de novo*. *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). This Court "must afford all reasonable inferences, and construe the evidence in the light most favorable to" Ms. Ward. *Cox v.*

Kentucky Dep't of Transp., 53 F.3d 146, 150 (6th Cir. 1995). Further, if there is "evidence on which the jury could reasonably find for" Ms. Ward, summary judgment should be denied. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Finally, "[i]n First Amendment cases, appellate courts must 'make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Boger v. Wayne County*, 950 F.2d 316, 322 (6th Cir. 1991) (citation omitted).

STATEMENT OF ISSUES

1. Did the district court err in finding that EMU's disciplinary policies prohibiting the "[i]nability to tolerate different points of view," "imposing values that are inconsistent with counseling goals," and "condon[ing] . . . 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" are not facially unconstitutional despite their vast breadth and vagueness?

2. Did the district court err in finding that EMU's discriminatory treatment of Ms. Ward pursuant to the above overbroad and vague policies—including targeting her religious speech and views, prying into her religious beliefs, coercing her to express a message she morally opposes and punishing her for refusing to express it, and failing to extend an individualized exemption (referral) from its policies in a

case of religious hardship, even though the exemption is available to myriad others—did not violate her rights under the Free Speech and Free Exercise of Religion Clauses of the First Amendment to the United States Constitution?

3. Did the district court err in dismissing Defendants Wilbanks, Clack, Hawks, Incarnati, Okdie, Parker, Sidlik, Stapleton, and Martin, despite their policy-making and enforcement responsibilities for EMU policies?

STATEMENT OF THE CASE

I. Nature of the Case

EMU's counseling department demands that its students adhere to incredibly broad and vague disciplinary policies throughout their enrollment. These policies prohibit, among other things, the "[i]nability to tolerate different points of view," "condon[ing] . . . discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, [and] socioeconomic status," and "imposing values that are inconsistent with counseling goals."

The sheer scope of these policies is alarming. Applicable "at all times" to EMU counseling students (and not just in counseling sessions) EMU officials testified that the disciplinary policies prohibit students from "agree[ing]" with, "promot[ing]," or "believ[ing]" an idea that EMU deems "discriminatory." (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 55:25-56:12.) And EMU's

disciplinary policies can reach every conceivable view or belief a student may utter or hold. (*Id*., Ex. 3, Callaway Dep. 42:17-25 (policy prohibits discrimination on the basis of "the way we see things, the way we do things, what seems normal to us").)

These breathtakingly overbroad disciplinary policies empowered a Michigan State official to target and attack Ms. Ward's religious views in a self-styled "theological bout" at her formal review meeting. (RE #1, Compl., Ex. 3 at 49-51.) That official questioned Ms. Ward about whether "anyone [is] more righteous than another before God," extracted from Ms. Ward her view that "God says that we're all the same," and then attacked that view by questioning how she could square it with her religious conviction against affirming homosexual behavior. (*Id*. at 50.) And Ms. Ward is not unique. EMU used these same policies to impose discipline on a student who disagreed with her professor's view that calling Barack Obama "bright" was a racial slur (because, according to her professor, brightness equates with whiteness). (RE #17, Pl.'s Reply Mem. in Supp. of Mot. Prelim. Inj., Ex. 4.) With policies of such breadth, even petty political disagreements can lead to punishment.

Ms. Ward filed this civil rights action to challenge EMU's unconstitutional policies and actions both facially and as-applied.

II. Course of Proceedings and Disposition Below

Ms. Ward filed suit on April 2, 2009. After extensive discovery, cross-motions for summary judgment were filed on February 2, 2010. The lower court denied Plaintiff's summary judgment motion, and granted Defendants', in an Order dated July 26, 2010. In addition, on October 7, 2009, Defendants moved for dismissal, for lack of personal involvement in the disciplinary action against Ms. Ward, of her claims against the members of EMU's Board of Regents, EMU's President, and the Dean of EMU's College of Education. On February 1, 2010, the lower court granted the motion as to EMU's Regents and President, and denied it as to the Dean. Ms. Ward timely filed a notice of appeal on August 23, 2010.

STATEMENT OF FACTS

A. Background

Julea Ward enrolled in EMU's Graduate Counseling Program in May 2006, to obtain the necessary education to be a licensed counselor in Michigan. (RE #1, Compl. ¶ 2.) EMU dismissed her from the program in March 2009. (*Id.*, Ex. 5.) At the time of her dismissal, Ms. Ward was in the final phase of the program and had a greater than 3.9 GPA. (*Id.*, Compl. ¶¶ 2-3.)

Ms. Ward is a Christian who derives her fundamental beliefs and moral convictions from the Bible, including those pertaining to sexual morality. (*Id.*, Ex. 4 at 63.) Based on Biblical teachings, Ms. Ward believes that sexual relationships are proper only between a married man and woman. (*Id.*) Accordingly, she

believes all sexual conduct outside of marriage is immoral, including both heterosexual and homosexual conduct, and that it would violate her beliefs to affirm immoral sexual conduct. (*Id.*)

B. EMU's Disciplinary Policies

EMU's Counseling Student Handbook contains the "Departmental Student Disciplinary Policy" for students enrolled in the program. (RE #14, Defs.' Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 5 at 13.) According to the Handbook, "the University and the Department's Counseling Program" (*id.*) expect students to comply with numerous disciplinary policies, including the following:

- The "[i]nability to tolerate different points of view . . . ." (hereinafter the "Intolerance Policy") (*id.* at 14);
- "Counselors do not condone . . . 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" (hereinafter the "Condoning Discrimination Policy") (*id.* at 59); and
- "Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals" (hereinafter the "Imposing Values Policy") (*id.* at 47).

Students enrolled in EMU's counseling program must adhere to these policies "at all times" and not simply during counseling sessions. (RE #1, Compl., Ex. 7.) EMU relied on these policies in expelling Ms. Ward from its counseling program. (*Id.*, Ex. 2 at 18; *id.*, Ex. 5 at 67.)

EMU's Condoning Discrimination Policy regulates speech and belief, as a key EMU official testified that the policy forbids a student from "agree[ing]" with, "promot[ing]," or even "believ[ing]" a "discriminatory" belief or idea. (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 55:25-56:12.)

The Imposing Values Policy likewise reaches beyond the spoken word and into a student's mind, prohibiting "judgmental" thoughts as a student reviews a client file, speaks with a client on the phone, or looks at a client's photos:

> Q. Can you run afoul of [the imposing values] provision, only when you're in the counseling session with the client, one-on-one? . . .
> A. The counseling relationship begins from the moment the client makes a phone call to you, so imposing values or not imposing values begins from the moment the client calls. It begins, if you are assigned a client and you're reading their case notes, or reading their referral photos. We read those, not based on our values, but based on what is in the best interests of the client. *So, does it take place only in the context of when the person's in front of me? No, it can take place before I even see the client, by making judgments about them based upon what I might hear—if a client calls and has a thick accent, and my values are, "all immigrants should be sent back to where they came from*."

(*Id*. at 66:17-67:9 (emphasis added).)

EMU's Condoning Discrimination Policy also prohibits "treat[ing] [a person] differently," "viewing [a person] somehow negatively" (*id*., Ex. 2, Ametrano Dep. 60:4-11), and "remaining silent" in the face of discrimination (*id*., Ex. 3, Callaway Dep. 42:2-7). In other words, the policy prohibits discrimination

based on "the way we see things, the way we do things, what seems normal to us." (*Id*., Ex. 3, Callaway Dep. 42:17-25.)

EMU officials also testified that terms in the Condoning Discrimination Policy are "vague" (*id*., Ex. 2, Ametrano Dep. 53:12-18 ("spirituality is much more vague" than "religion"); it is difficult to define the policy's terms (*id*., Ex. 4, Dugger Dep. 52:15-53:17 ("not prepared" to provide definition of "culture" discrimination); *id*., Ex. 4, Dugger Dep. 51:12-13 ("I might need to use a dictionary" to define "condone.")); the terms in the policy are ambiguous (*id*., Ex. 2, Ametrano Dep. 53:8 ("[R]eligion is religion"); *id*., Ex. 2, Ametrano Dep. 55:13-15 ("[Sexual orientation] is the orientation of who I would have sex with if I did, so that's what sexual orientation is")); and the policy's terms are subject to varying definitions (*compare id*., Ex. 4, Dugger Dep. 56:20-57:18 ("marital status/partnership" prohibits discrimination based on whether a person is single, divorced, married, separated, or involved in "a same sex union of some kind") *with id*., Ex. 5, Francis Dep. 59:24-61:3 ("marital status/partnership" broadly expanded to include polygamous and polyamorous relationships).)

C. EMU's Enforcement Of Its Disciplinary Policies Against Ms. Ward.[1]

EMU commenced disciplinary action against Ms. Ward while she was enrolled in the Practicum class, in which students counsel clients of EMU's counseling clinic. (RE #1, Compl. ¶¶ 5-6.) During Practicum, EMU assigned Ms. Ward a potential client who "was seeking counseling regarding a homosexual relationship." (*Id*. ¶ 70; RE #16, Answer ¶ 70.) Based on the potential values conflict with a client who may be seeking a "gay affirmative" message, Ms. Ward asked Defendant Callaway, her Practicum supervisor, whether she should refer the potential client immediately or meet with him and then refer in the event a "values conflict" arose. (RE #9, Pl.'s Mot. Prelim. Inj., Ex. 3 at 8 ¶¶ 29-32; RE #82, Defs.' Mot. Summ. J., Ex. 4, Dugger Dep. 101:2-14; *id*., Ex. 1, Ward Dep. 211:23-212:8.) Defendant Callaway told Ms. Ward to refer the potential client, and Ms. Ward followed her instructions, referring the client without meeting him or speaking with him. (RE #9, Mot. Prelim. Inj., Ex. 3 at 8 ¶ 34.)

This referral decision was consistent with the ACA Code of Ethics and the instruction Ms. Ward had received to that point. The ACA Code of Ethics states that counselors can make referrals at any time, even before a counseling relationship begins:

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[1] As discussed *infra*, § I.A., undisputed facts show that EMU has enforced its policies against other students based on their protected expression and beliefs.

> [A.11.b.] Inability to Assist Clients. If 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.

(RE #14, Defs.' Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 5 at 50.)

EMU concedes that it teaches that referrals based on value conflicts are permissible. (RE #139, Summ. J. Order at 32.) In fact, EMU teaches that referrals based on conflicts over sexual values and practices are commonplace, despite the ACA's prohibition on sexual orientation discrimination, which covers how a person "practice[s] or perceive[s] [their] sexuality—either as heterosexual, homosexual, or neither." (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 59:2-7.) A required text from one of Ms. Ward's required courses (COUN 502) states the following:

> Although helping professionals have personal values about sexual practices, the study found that when practitioners' beliefs conflict with those of clients, they appear to be able to avoid imposing their personal values on clients. However, 40% had to refer a client because of a value conflict. This research supports previous conclusions that the practice of therapy is not value free, particularly where sexual values are concerned.

(RE #79, Pl.'s Mot. Summ. J., Ex. 1 at 21-22.)

This book also advised students to follow the American Psychology Association Guidelines for Psychotherapy with Lesbian, Gay, & Bisexual Clients, which states that "[p]sychologists are encouraged to recognize how their attitudes

and knowledge about lesbian, gay, and bisexual issues may be relevant to assessment and treatment and seek consultation *or make appropriate referrals* when indicated." (*Id*. at 12 (emphasis added).) The guidelines later state that if a psychologist's "contravening personal beliefs" prevent her from providing the requested services, that an "appropriate referral[]" can be made. (*Id*., Ex. 5 at 54.)

The COUN 502 text also states the following regarding value-based referrals:

> If you find yourself struggling with an ethical dilemma over value differences, we encourage you to seek consultation. Supervision is often a useful way to explore value clashes with clients. After exploring the issues in supervision, if you find that you are still not able to work effectively with a client, the ethical course of action might be to refer the client to another professional. . . .
>
> If you find it necessary to make a referral because of value conflicts, we are convinced that *how* the referral is discussed with the client is crucial. Make it clear that it is *your* problem as the helper, not the client's.

(*Id*., Ex. 1 at 9-10.) Ms. Ward turned in a paper in COUN 502 reflecting the teaching that referrals based on value conflicts are permissible (*id*., Ex. 8 at 88 ("If I ever do believe my personal worldview or moral standards are being compromised I will take full responsibility for the problem, respectfully communicate that to the client and refer him/her to another professional")), and received a perfect score (*id*. at 89).

A required text in another of Ms. Ward's required courses (COUN 580)

states the following regarding value-based referrals:

> [V]alues that reflect our ideas about morality, ethics, lifestyle, 'the good life,' roles, interpersonal living, and so forth have a greater chance of entering the helping process. . . . There may be times when a referral is necessary because of an unresolved and interfering value conflict with a client.

(*Id*., Ex. 2 at 32.) The same book later states:

> If you have a *major* reservation about pursuing selected goals, a referral might be more helpful to the client. . . .
>
> Referral may be appropriate in any of the following cases: if the client wants to pursue a goal that is incompatible with your value system; if you are unable to be objective about the client's concern . . . .

(*Id*. at 34.) As in COUN 502, Ms. Ward once again turned in a paper during COUN 580 that stated that there were some aspects of her religious beliefs that could result in values conflicts with clients, and that "[i]n situations w[h]ere the value differences between a counselor and client are not amenable 'standard practice' requires that the counselor refer his/her client to someone capable of meeting their needs." (*Id*., Ex. 7 at 80.) Ms. Ward received a perfect score on this paper. (*Id*. at 81.)

EMU also admits that referrals (value-based or otherwise) are permissible in many other situations where its nondiscrimination policy applies. For example, EMU's nondiscrimination policy prohibits discrimination based on "religion" and "spirituality." Yet EMU teaches students that value clashes related to "religion and spiritual values" may necessitate a referral. (RE #79, Pl.'s Mot. Summ. J., Ex. 1 at

17-20; s*ee also* RE #14, Defs.' Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 21 (noting that a counselor may refer when he lacks "understanding of a client's religious or spiritual expression").) EMU also prohibits "socioeconomic status" discrimination, which bans discrimination based on "how much money a person makes or how much money they come from. . . . Whether they're rich or poor, middle class, wealthy." (RE #82, Defs.' Mot. Summ. J., Ex. 4, Dugger Dep. 58:7-11.) Yet a counselor may turn a client away due to his inability to pay. (*Id*. at 59:1-15.)

At Ms. Ward's next supervision meeting after making the referral her supervisor directed her to make, Defendant Callaway surprised Ms. Ward by informing her that she would not be assigned any more clients and that the first level of disciplinary action—an informal review meeting—would be scheduled. (RE #1, Compl. ¶ 78; RE #16, Answer ¶ 78.) Ms. Ward had no previous indication that she had violated any EMU policy and had indeed followed Defendant Callaway's instructions—and all previous instruction regarding referrals—to the letter.

During the supervision meeting, EMU officials told Ms. Ward she could remain in the program if she submitted to a "remediation" plan. (RE #1, Compl. ¶ 82; RE #16, Answer ¶ 82.) Defendant Dugger also stressed to Ms. Ward "three times" that the remediation plan had nothing to do with her lacking competence.

(RE #80, Pl.' Mot. Summ. J., Ex. 19 at 177 ("[Ms. Ward] clarified incorrectly three times her perception that I described her as incompetent. Each time, I corrected her and clearly said that this is not what I was communicating").) Nor was the remediation plan focused on the referral. Rather, the remediation plan was aimed at changing Ms. Ward's "belief system":

> The development of a remediation plan of course would . . . be contingent on Ms. Ward's recognition that *she needed to make some changes. And . . . she . . . expressed just the opposite. [She] . . . communicated an attempt to maintain this belief system and those behaviors*.

(RE #1, Compl., Ex. 3 at 29 (emphasis added).) Unwilling to be "remediated," Ms. Ward took the only viable option EMU gave her: a formal review meeting where a committee of three EMU officials and one student would decide if she could remain in the program. (*Id*., Compl. ¶¶ 89, 90.)

Throughout the disciplinary process, EMU told Ms. Ward that she was being disciplined based on her religious views regarding homosexual behavior and because of her in-class speech about her beliefs. In the letter summarizing Ms. Ward's alleged violations of EMU's disciplinary policies discussed at the informal review meeting, EMU stated that Ms. Ward had "communicated bias against clients who identify as lesbian, gay or bisexual." (RE #80, Pl.'s Mot. Summ. J., Ex. 14 at 108.)

In the letter advising Ms. Ward of the alleged violations of EMU's disciplinary policies to be discussed at her formal review meeting, EMU targeted Ms. Ward's "statements and responses to feedback about working with individual clients who identify as gay, lesbian, bisexual or transgendered delivered in COUN 571–Cross Cultural Counseling (Fall 2007 semester); individual supervision meetings (1/20/09 and 1/27/09); and the informal review meeting (2/3/09)." (RE #1, Compl., Ex. 2 at 19.) These "statements and responses to feedback" constituted Ms. Ward's "religious beliefs that homosexual behavior is immoral and that a person can change their homosexual behavior." (*Id*., Compl. ¶ 49; RE #16, Answer ¶ 49.) There was no allegation that Ms. Ward had ever behaved inappropriately in an actual counseling session.

At the formal review meeting, Defendant Francis explicitly addressed Ms. Ward's religious beliefs, engaging her in the following, self-styled "theological bout":

> Francis: [I]s anyone more righteous than another before God?
> Ward: Is anyone more righteous than another before God?
> Francis: Yeah.
> Ward: God says that we're all the same.
> Francis: Yeah.
> Ward: That's what God says.
> Francis: OK, so, if that's your direction . . . how does that then fit with your belief that . . . and I understand that you're not, because the word you keep using is affirming, you're not, which comes across as I'm not going to condone that behavior, I'm not going to affirm it, so I'm not going to go that way.
> Ward: OK.

> Francis: If that's true, then aren't you on equal footing with [persons engaging in homosexual behavior]? With, with everyone?
> Ward: Absolutely, Dr. Francis.
> Francis: OK. Then doesn't that mean that you're all in the same boat and shouldn't [persons engaging in homosexual behavior] be accorded the same respect and honor that God would give them?
> Ward: Well, what I want to say is, again, I'm not making a distinguishable difference with the person . . . . I'm addressing the behavior.
> Francis: Okay, so it's love the saint condemn the sinner, or condemn the sin—I'm sorry.
> Ward: If that's the wording you want to use.
> Francis: What wording would you use?
> Ward: What I've just said. I'm not opposed to any person . . . . I believe that we are all, um, God loves us all, is what I believe.

(RE #1, Compl., Ex. 3 at 49-51.) This "theological bout" occurred immediately after Defendant Dugger inquired whether Ms. Ward "would see [her] brand of Christianity as superior" to that of other Christians, like Defendant Francis. (*Id*. at 49.)

EMU officials also inquired about Ms. Ward's beliefs regarding the nature of homosexuality (*id*. at 39 ("do you think that homosexuality is a choice?"); stated that Ms. Ward could not include that she is a Christian in her informed consent document because clients would "feel that they're going to be judged more" and have their "sense of safety and comfort" jeopardized (*id*. at 27-28); and stated that "professional counseling was not the place where [Ms. Ward's] attitudes would be condoned" (*id*. at 24). After the formal review meeting, EMU sent Ms. Ward a letter advising her that she had been dismissed from the program, and telling her

that the "*values that motivate* [her] behavior" are contrary to the profession. (*Id*., Ex. 5 (emphasis added).)

SUMMARY OF ARGUMENT

EMU has adopted overbroad and vague disciplinary policies that endanger First Amendment freedoms in a setting where the Supreme Court has repeatedly held such freedoms warrant vigilant protection. EMU's policies are breathtaking in their scope and vagueness, as they regulate not just what a student says, but also what she thinks and believes. Pursuant to the boundless power granted by these policies, EMU officials punished Ms. Ward and other students based on their protected expression.

Further, EMU enforced its unconstitutional policies against Ms. Ward in a viewpoint discriminatory and unreasonable manner. EMU targeted Ms. Ward's religious views and beliefs throughout her disciplinary process, including a "theological bout" in which an EMU professor targeted and pried into the religious assumptions underlying her views regarding sexual morality. This is clear-cut viewpoint discrimination. EMU acted unreasonably when it punished Ms. Ward for making a referral that her supervising professor told her to make, and which was entirely consistent with EMU's teachings about value-based referrals.

EMU violated Ms. Ward's right to the free exercise of religion. EMU imposed special disabilities (i.e., discipline culminating in dismissal) based on Ms.

Ward's religious views. Further, EMU burdened Ms. Ward's religious beliefs and practices pursuant to policies that lack neutrality and general applicability. EMU concedes that referrals are permissible professional practice for a wide variety of reasons—including referrals based on values conflicts—yet EMU refused to extend this exemption to Ms. Ward in a case of religious hardship.

EMU also violated Ms. Ward's right to be free from compelled speech. EMU punished Ms. Ward for her refusal to speak EMU's ideologically-driven, "gay affirmative" message. This is a clear violation of the compelled speech doctrine.

Finally, EMU's Regents and President are proper Defendants to this lawsuit. Ms. Ward challenges unlawful actions authorized by unconstitutional EMU policies. As EMU's policymakers, its Regents and President are liable should Ms. Ward prevail.

ARGUMENT

I. EMU'S DISCIPLINARY POLICIES ARE FACIALLY OVERBROAD AND VAGUE.

It is an unhappy fact that over the past 25 years public universities all too often have adopted overbroad and vague policies that chill protected speech, and have used such policies to penalize unpopular expression. Indeed, according to annual surveys from the nonpartisan Foundation for Individual Rights in Education, up to 70 percent of American colleges and universities have adopted at

least one policy that prohibits protected expression. *See Spotlight on Speech Codes Reports*, http://www.thefire.org/code/speechcodereport/.

Until the lower court's decision in this case, such policies have never been upheld on the merits. This Circuit was the first to strike down an overly-expansive nondiscrimination policy, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (enjoining an overbroad and vague "discriminatory harassment" policy), but many, many federal courts have followed suit. *See, e.g., McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (striking policies that prohibited unauthorized or offensive signs and "conduct which causes emotional distress"); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (permanently enjoining overbroad sexual harassment policy which prohibited conduct that had the "purpose" of creating an "offensive environment"); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (finding college sexual harassment policy vague); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (striking down university system speech code and civility policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad "racism and cultural diversity" policy which banned, among other things, "acts of intolerance" and required that students adopt the university's commitment to social justice in their "attitudes and actions."). *See*

also Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001) (Alito, J.) (striking down overbroad anti-harassment regulations in public high school).

In fact, even before this Court's *Dambrot* decision, the Eastern District of Michigan had itself weighed in on speech codes, striking down the University of Michigan's expansive harassment policy. *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

University speech codes are routinely struck down because their overbreadth and vagueness imperil protected expression in a context—public university campuses—where there is *heightened* concern for the protection of First Amendment freedoms. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

The facts of this case prove the limitless scope and extraordinary vagueness of EMU's policies. They also paint a disturbing picture of how such policies empower public university officials to punish students whose expression and views challenge university orthodoxy. Indeed, they enabled EMU not just to punish Ms. Ward for her protected religious expression, but also to scrutinize what was in her mind, and to punish her for what it found there. EMU's policies are uniquely unconstitutional in that they not only regulate speech, but also authorize "inva[sion of] the sphere of intellect and spirit which it is the purpose of the First Amendment

to our Constitution to reserve from all official control." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It was clear error for the district court to uphold policies that authorized such broad ranging regulation of core First Amendment freedoms.

A. EMU's Policies Are Breathtakingly Overbroad.

Laws regulating First Amendment activities must be narrowly drawn to address only the precise evil at hand. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). This is because First Amendment freedoms are "delicate and vulnerable" and "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Therefore, a law regulating speech will be struck down as overbroad if it "'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Deja Vu of Nashville v. Metro. Gov't of Nashville*, 274 F.3d 377, 387 (6th Cir. 2001) (citation omitted). The critical question is whether EMU's policies "present[] a 'realistic danger' the University could compromise the protection afforded by the First Amendment." *Dambrot*, 55 F.3d at 1183.

Here, the record answers this question with an emphatic *yes*. All three policies—the Intolerance Policy, the Condoning Discrimination Policy, and the Imposing Values Policy—cover vast amounts of protected expression and conduct. First, the Intolerance Policy—which prohibits the "inability to tolerate different points of view"—aims exclusively at speech. It deals with "points of view" and

authorizes the punishment of students who are "intolerant" of differing viewpoints. Speech (most of it protected) appears to be the policy's sole target. The court below failed to even address the constitutionality of this policy, despite the fact that the university applied it to Ms. Ward and used it to justify its decision to expel her from the program.

EMU's Condoning Discrimination Policy is likewise overbroad. This policy directly regulates a student's speech *and* beliefs, as it prohibits "agree[ing]" with, "promot[ing]," or "believ[ing]" an idea EMU deems "discriminatory." (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 55:25-56:12.) Further, there is no safe harbor for any belief or idea under this policy, since it forbids discrimination based on "culture," "language preference," "socioeconomic status," "sexual orientation," "spirituality," "marital status/partnership," and more. And if this were not broad enough, EMU interprets its policy to prohibit discrimination based on "the way we see things, the way we do things, what seems normal to us." (*Id.*, Ex. 3, Callaway Dep. 42:17–25). In other words, the policy encompasses every facet of a student's interaction with the world.

The record also proves that EMU's Imposing Values Policy authorizes regulation of speech *and* belief. It does so by prohibiting judgmental thoughts about a client even outside of a counseling session. (*Id.*, Ex. 5, Francis Dep. 66:17-67:9 ("[D]oes [imposing values] take place only . . . when the person's in front of

me? No, it can take place before I even see the client, *by making judgments about them based upon what I might hear—if a client calls and has a thick accent, and my values are, "all immigrants should be sent back to where they came from*") (emphasis added).)

EMU's policies are far more overbroad than university policies struck down by this Court, and other federal courts. In *Dambrot*, this Court found overbroad a university's "discriminatory harassment" policy, which prohibited "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment" based on "racial or ethnic affiliation." 55 F.3d at 1182-85. This Court found this language to be plainly overbroad:

> It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy's language presents a "realistic danger" the University could compromise the protection afforded by the First Amendment.

Id. at 1183.

Similarly, in *Saxe*, 240 F.3d at 217, the Third Circuit struck down as overbroad a public school anti-harassment policy that prohibited "negative" or "derogatory" speech about issues such as "racial customs," "religious traditions," "sexual orientation," and "values," because these prohibitions implicated "'core' political and religious speech." And in *Doe*, 721 F. Supp. at 856, the court struck

down as overbroad a policy that prohibited "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." The court found that "the state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited." *Id*. at 864.

If the policies in *Dambrot*, *Saxe*, and *Doe* transgressed the overbreadth doctrine, EMU's policies certainly do. Indeed, the policies' language and EMU officials' testimony about their scope demonstrate that they sweep broadly into the realm of core protected speech, and are much broader as they even regulate what students think and believe.

Doe, the reasoning of which this Court affirmed in *Dambrot*, 55 F.3d at 1183, explains that a policy's overbreadth can also be shown through evidence of its application to protected expression. For example, in *Doe* the university enforced its policy prohibiting "discriminatory harassment" based on sex and sexual orientation against a student who "openly stated [in class] his belief that homosexuality was a disease" and who had "been counseling several of his gay patients" to change their sexual orientation. 721 F. Supp. at 865. Although the university acquitted the student of the charges, its application of the policy to

"comments made in a classroom setting" proved the policy's impermissible sweep. *Id*. at 861.

Here, in addition to testifying that its disciplinary policies apply to what a student says and thinks, there is also ample evidence that EMU enforces its disciplinary policies against protected expression. EMU advised Ms. Ward that she violated its disciplinary policies by "communicat[ing] bias against clients who identify as lesbian, gay or bisexual" (RE #80, Pl.'s Mot. Summ. J., Ex. 14 at 108), and by expressing her religious views regarding sexual morality in and out of class (RE #1, Compl., Ex. 2 at 19). EMU then targeted Ms. Ward's religious beliefs through its self-styled "theological bout," and myriad other ways.

In addition, EMU punished another counseling student for her protected, in-class expression. This student expressed her views regarding race during a class discussion about then candidate Barack Obama. (RE #17, Pl.'s Reply Mem. in Supp. of Mot. Prelim. Inj., Ex. 4.) This student's expression of her views, which differed from the views of her professor (for example, the student did not believe that it was racist to call Barack Obama "bright"), led to an informal review conference and a subsequent remediation plan which expressly limited her speech, (*id*. at 35 ("take a week to reflect upon ideas that initially seem incorrect before you assertively challenge them in class"), and targeted her mind, (*id*. (advising student she needed to "accommodate new ideas by changing [her] cognitive

schemas").) Unsurprisingly, this student self-censored her speech after EMU disciplined her. (*Id*. at 32 ¶¶ 37-38.)[2]

The evidence demonstrating the overbreadth of EMU's disciplinary policies is overwhelming, and the district court erred in not enjoining them on this ground.

B. EMU's Disciplinary Policies Are Unconstitutionally Vague.

In addition to being overbroad, EMU's disciplinary policies are also impermissibly vague. EMU's policies are vague because they "den[y] fair notice [to students] of the standard of conduct to which [they are] held accountable," and they constitute an "unrestricted delegation of power" that "leaves the definition of [their] terms" to EMU officials, thereby "invit[ing] arbitrary, discriminatory and overzealous enforcement." *Dambrot*, 55 F.3d at 1183-84.

Consider EMU's testimony about the ambiguity of its Condoning Discrimination Policy. When asked what "religion/spirituality" means, EMU officials testified that "religion is religion[,] I have never stopped to think about what the definition of religion means in the context of this policy," (RE #82, Defs.' Mot. Summ. J. Ex. 2, Ametrano Dep. 53:5-11), and that "spirituality is much more

[2] Documentary evidence and testimony regarding another relevant disciplinary matter was filed under seal in the court below, pursuant to a stipulated protective order. Having been advised by the case manager that including quotes from, or reflecting the content of, these confidential materials would require this brief to be blocked from public access in its entirety, Plaintiff has chosen not to do so. This Court can, however, access the relevant testimony and documentary evidence in the record. (RE #72, Pl.'s Mot. for Leave, Ex. 1; *id*., Ex. 2 at 7, Ametrano Dep. 5:14–6:6.)

vague" than "religion," (*id*. at 53:12-18). When asked to define "sexual orientation," one EMU official gave the mind-numbing definition that it is "the orientation of who I would have sex with if I did, so that's what sexual orientation is." (*Id*. at 55:13-15.) Another official testified that she was "not sure" what "language preference discrimination" is. (*Id*., Ex. 4, Dugger Dep. 57:23-58:6.) Another official, when asked how to distinguish marital status and marital partnership discrimination, testified: "I don't know." (*Id*., Ex. 3, Callaway Dep. 46:8-10.)

Given EMU's difficulty in defining the categories of prohibited discrimination in its policy, how is a student to know whether her speech or conduct "condones" discrimination based on any of those categories?

Further, the ambiguity of EMU's policy invites enforcement based "on the viewpoint of those in charge of the . . . policy," another tell-tale sign of vagueness. *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 484 (E.D. Mich. 1993). Defendant Francis' "theological bout" is a perfect example. His "bout" with Ms. Ward immediately followed Defendant Dugger asking her whether she "would see [her] brand of Christianity as superior" to other Christians, like Defendant Francis. (RE #1, Compl. Ex. 3 at 48.)

EMU's enforcement of its Imposing Values Policy against Ms. Ward highlights its vagueness. In addition to its impossibly vague proscription on a student's "judgmental" thoughts outside of a face-to-face meeting with a client, *see*

supra, this policy also forbids forcing one's values on a client. (RE #82, Defs.' Mot. Summ. J., Ex. 3, Callaway Dep. 51:6–11 ("imposing values" means "saying . . . I've figured out the best way to be, and I'm going to show you the best way to be").) EMU dismissed Ms. Ward because she allegedly violated this policy, yet it is undisputed that she *never met or spoke with* the potential client assigned to her. (RE #9, Pl.'s Mot. Prelim. Inj., Ex. 3, Ward Aff. ¶¶ 46–48.) How can one "impose values" on a client without even communicating with him?

In addition, Ms. Ward denied she would force the potential Practicum client to accept her values regarding homosexual behavior. (*Id*. at ¶ 48 ("I never would have 'imposed my values' . . . . My intent throughout this process was to respect EMU's direction that I not advise clients that they change or abstain from their homosexual behavior"); RE #82, Defs.' Mot. Summ. J., Ex. 1, Ward Dep. 147:12–15 (stating that she would comply with the ACA ethics opinion regarding reparative therapy).) And EMU taught Ms. Ward that referring a client due to a values conflict regarding sexual practices does not constitute "imposing values," based on a study discussed in a required text:

> Although helping professionals have personal values about sexual practices, the study found that when practitioners' beliefs conflict with those of clients, *they appear to be able to avoid imposing their personal values on clients*. *However, 40% had to refer a client because of a value conflict*.

(RE #79, Pl.'s Mot. Summ. J., Ex. 1 at 21-22 (emphasis added).)

Despite Ms. Ward never meeting or speaking to the potential client, having no intention of imposing her religious values on that client or any future client, and EMU's teaching that referring due to a sexual values conflict does not constitute "imposing values," they charged her with violating the Imposing Values Policy.

Finally, consider EMU's Intolerance Policy, which raises more questions than it answers. What constitutes the "inability to tolerate?" Whose "points of view" must be tolerated? Does one point of view have to be tolerated more than another? Or are all views entitled to equal "tolerance"? If you strongly disagree with someone's viewpoint, are you guilty of being "intolerant" of their view under this policy?

The Supreme Court, this Circuit, and other federal courts have struck down similarly vague policies. In *Keyishian v. Board of Regents of University of New York*, university professors challenged the constitutionality of New York regulations that allowed the state to forbid employment to "subversive" persons. 385 U.S. 589, 591-92 (1967). Specifically, the state could disqualify persons for "advocat[ing], advis[ing], teach[ing], or embrac[ing] the . . . doctrine" of "forceful overthrow" of the government. *Id.* at 599-601. The Court found these terms to be vague because they could prohibit the "mere advocacy of abstract doctrine" and the "mere expression of belief." *Id.* at 600-01.

In *Dambrot*, the Sixth Circuit found the terms "negative and offensive" in CMU's discriminatory harassment policy vague because "one must make a subjective reference" to determine what conduct will be sanctioned. 55 F.3d at 1184. And, the *Doe* court held that UM's harassment policy was vague because the words "victimize" and "stigmatize" were "general and elude[d] precise definition." *Doe*, 721 F. Supp. at 867. EMU's policies suffer from these same defects, and they should be enjoined.

C. The District Court Committed Numerous Errors In Upholding EMU's Overbroad And Vague Disciplinary Policies.

Despite the substantial undisputed evidence proving the vast overbreadth and vagueness of EMU's disciplinary policies, the lower court upheld them. In so doing, the lower court became the first federal court to uphold such policies against constitutional attack on the merits. *See supra* at 21-22 (listing cases striking down policies similar to EMU's). The court upheld the policy not because its language had ever passed constitutional muster in any court, but because the policy applied only to the counseling department and because he characterized it as primarily curricular. Both of these conclusions create dangerous exceptions to conventional free speech doctrine and have the potential to dramatically limit student speech on American campuses.

1. The number of students an overbroad and vague disciplinary policy applies to is constitutionally irrelevant.

The lower court found that the disciplinary policies challenged here "only appl[y] to students in the counseling program," and not to "all students at the University." (RE #139, Summ. J. Order at 17.) The Court found this was "significant" because it showed that EMU's policies were "already more narrow than those involved in *DeJohn*, *Doe*, and *Dambrot*." (*Id*.)

This is plain error. There is no case that supports the court's proposition that a university can cure the overbreadth and vagueness of a policy by reducing the number of students to whom it applies, or applying the policy to one department and not another. Such reasoning confuses the reach of the policies with their scope. EMU's policy is actually broader in scope than the policies in *DeJohn*, *Doe*, and *Dambrot*, regulating expression and thoughts "at all times" even if it reaches only counseling students.

Such an approach makes a mockery of the "vigilant protection" owed First Amendment rights on public university campuses. *See Shelton*, *supra*. Indeed, public universities are often divided into different colleges/departments/divisions, which typically have their own codes of conduct for students enrolled in their programs. The lower courts' approach would immediately immunize these policies from constitutional scrutiny because they apply to less than the whole student body. The court below stands alone in this legal principle. One could

scour every word of every college speech code decision without finding any support for the contention that the outcome would be different had the policy applied only to a specific academic department rather than the entire campus.

2. EMU's disciplinary policies cannot be saved by recasting them as "curriculum."

The lower court correctly found that EMU has "incorporated" the ACA Code of Ethics "into [its] disciplinary policy." (RE #139, Summ. J. Order at 17.) (*See also id*. at 6 ("the Student Handbook requires students to conduct themselves in a manner that is consistent with University policies, including the ACA Code of Ethics").)[3] The court even quotes portions of *Dambrot*, *Doe*, and *DeJohn*, which condemn EMU's policies (*id*. at 15-17), and many of the key facts proving the overbreadth and vagueness of EMU's policies (*id*. at 18 (noting that EMU's policies prohibit "judgmental thoughts, viewing a person negatively, remaining silent in the face of discrimination, and agreeing with something 'discriminatory'")).

But instead of proceeding to strike down EMU's policies, the court abruptly switches gears, and begins referring to EMU's policies as curriculum. (*Id*. at 19.)

[3] The court erred, however, in suggesting that the ACA Code only "applies to students . . . during their academic counseling activities." (*Id*. at 12.) To the contrary, as Defendant Polite told Ms. Ward in upholding her dismissal, students are "expected to conduct themselves in a responsible and professional manner at all times," and specifically noted that students "must adhere to the code of ethics of the American Counseling Association." (RE #1, Compl., Ex. 7.)

The lower court then absolves EMU of any liability for the vast overbreadth and vagueness of its disciplinary policies, and for its discriminatory enforcement of those policies against Ms. Ward and others. These policies and actions, according to the lower court, are curriculum matters to which the Court owes EMU near absolute (if not absolute) deference. (*Id.*)

Yet courts must not defer to universities when fundamental rights are at issue. As the Supreme Court recently said in *Christian Legal Society Chapter of the University of California v. Martinez*:

> This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and *we owe no deference to universities when we consider that question*. *Cf. Pell v. Procunier*, 417 U.S. 817, 827 . . . (1974) ("Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties.").

130 S. Ct. 2971, 2988 (2010) (emphasis added).

The lower court "fail[ed] to appreciate the distinction between policy determinations and application of state policy." *United Food and Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 357 (6th Cir. 1998). While courts owe deference to a state entity's policy determinations, "[t]he courts must remain free to engage in an independent determination of whether the government's rules and its application of its rules" violate fundamental constitutional rights. *Id.*

> Under our constitutional scheme, any deference to a state agency's expertise "must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification."

Id. (citation omitted).

Applying these principles here, deference is owed to EMU's decision to teach about the ACA Code of Ethics as part of its educational program. Critically, Ms. Ward does not challenge this decision at all.[4] This deference, however, does not extend to whether EMU's "rules and its application of its rules" violate First Amendment rights. *Id*. The lower court abdicated its role to "engage in an independent determination" of this question by repeatedly relying on its finding that EMU had "a rational basis" for incorporating the ACA Code of Ethics into its counseling program. (RE # 139, Summ. J. Order at 21, 26.)

There is an immense difference between teaching *about* a private organization's code of ethics (the ACA is a private organization) and granting a state actor the immense advantage of rational basis review when it adopts and applies that private organization's ethics code even to situations (such as in-class

[4] The lower court overstates Ms. Ward's claims, stating that she "objects that the [ACA Code of Ethics] was *enforced* against students in the program." (RE #139, Summ. J. Order at 13.) This is incorrect. Ms. Ward's challenge focuses narrowly on three EMU disciplinary policies, which EMU incorporated from the ACA Code, that are facially unconstitutional under settled legal precedent. Her lawsuit has nothing whatsoever to do with a broad-based challenge to EMU's enforcement of the ACA Code against students, or with EMU's decision to incorporate that Code into its program.

discussion) the code was never drafted to address. Once again, until the decision of the court below, there was simply no authority for the proposition that conduct codes are subjected to rational basis review simply because a university calls them "curricular."

II. EMU'S ENFORCEMENT OF ITS UNCONSTITUTIONAL POLICIES AGAINST MS. WARD WAS BOTH VIEWPOINT DISCRIMINATORY AND UNREASONABLE.

Even if EMU's policies were otherwise constitutional, under the Free Speech Clause, the government's enforcement of regulations against speakers must be viewpoint neutral and reasonable, regardless of a forum's classification. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). EMU contravened both requirements here.

A. EMU Has Engaged In Unlawful Viewpoint Discrimination.

Viewpoint discrimination occurs when "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Thus, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

Contemporaneous recordings and documents of the events underlying this litigation prove that EMU targeted Ms. Ward because of her expression and

religious views regarding homosexual behavior. Leading up to Ms. Ward's formal review meeting, EMU officials:

- Told her that her religious views were homophobic and that, on account of these views, EMU was likely not a "good fit" for her (RE #80, Pl.'s Mot. Summ. J., Ex. 14 at 108);

- Told her that her religious views "communicated bias" against homosexuals (*id.*); and

- Targeted her "statements and responses to feedback" in class, which comprised her religious views regarding homosexual behavior, as a reason for her discipline (RE #1, Compl. Ex. 2 at 19).

EMU even conceded in lower court briefing that Ms. Ward was punished in part because she "offered her *continuing view* that she should be able to offer [reparative therapy]" and that she "*strongly disagrees* with the ACA's position on reparative therapy." (RE #82, Defs.' Mot. Summ. J. Mem. 3, 11 (emphasis added).)[5]

Then, at the formal review meeting, EMU officials:

- Questioned whether Ms. Ward "would see [her] brand of Christianity as superior" to that of other Christians, (RE #1, Compl., Ex. 3 at 49);

[5] It is vital to understand that Ms. Ward was expressing disagreement with the morality of homosexual behavior, not expressing opinions about the origin of homosexual desire, nor indicating in any way that she would refuse to counsel homosexual individuals—merely that she would not morally affirm homosexual relationships and behavior because it violated her religious beliefs to do so. Again, EMU taught that referrals are permissible when such value-based conflicts with clients arise.

- Stated that clients would "feel that they're going to be judged more" and would have their "sense of safety and comfort" jeopardized if Ms. Ward put in her informed consent that she was a Christian (*id*. at 27-28);

- Questioned whether Ms. Ward believes that "homosexuality is a choice?" (*id*. at 39);

- Stated that "professional counseling was not the place where [Ms. Ward's] attitudes would be condoned" (*id*. at 24); and

- Explained that the remediation plan offered to Ms. Ward was aimed at her "mak[ing] some changes" to her "belief system" (*id*. at 29).

EMU's targeting of Ms. Ward's religious views then came to its climactic finish: Defendant Francis' self-described "theological bout" (*id*. at 49-51), in which he attacked Ms. Ward's religious views regarding homosexual behavior. EMU's violation of the prohibition on viewpoint discrimination could not be plainer.

Stunningly, the lower court dismissed the substantial and undisputed evidence demonstrating EMU's targeting of Ms. Ward's religious views as mere "indelicate" inquiries. (RE #139, Summ. J. Order at 28.) But the Supreme Court has held that prying by state officials into an individual's personal beliefs to determine her fitness to enter a profession (which is precisely what EMU did to Ms. Ward) violates the First Amendment:

> The First Amendment[] . . . prohibits a State from excluding a person from a profession or punishing him solely because . . . he holds certain beliefs. Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these

> protected areas, as Arizona has engaged in here, discourage citizens from exercising rights protected by the Constitution.

Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (citations omitted). The evidence shows that EMU dismissed Ms. Ward because she "holds certain beliefs," and that EMU made *unlawful* (not *indelicate*) "inquiries about [her] beliefs."

EMU officials later denied these statements indicated that they were targeting Ms. Ward for her expression and beliefs, but the striking contrast between their contemporaneous explanations and their post-litigation justifications creates a classic factual dispute.

In fact, the lower court had previously held that the same evidence highlighted above *precluded* awarding EMU officials summary judgment on all of Ms. Ward's claims based on qualified immunity. (RE #109, Qual. Imm. Order at 25; RE #125, Order Granting Defs.' Mot. for Recon. at 2 ("Ward has sufficiently plead and come forward with evidence from which a reasonable jury might conclude that the EMU defendants' act of dismissing Ward violated First and Fourteenth Amendment rights so clearly established that a reasonable official in their position would have clearly understood that they were under an affirmative duty to refrain from such conduct").)

Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) is instructive. The court granted the university broad curricular discretion when a drama student did not want to utter swear words in a script but still reversed summary judgment on

free speech, free exercise, and compelled speech claims. University officials told the student that she should "speak with other 'good Mormon girls' and that she could 'still be a good Mormon' and say these words." *Id*. at 1293. If those comments merit a jury trial, then EMU's full-blown "theological bout" (along with their many other written statements) should send this case to the trier of fact.

It is inexplicable how the exact same evidence was sufficient to defeat EMU's qualified immunity motion but was insufficient to defeat its motion for summary judgment on the merits. This is especially true considering that the qualified immunity standard is far more difficult for a plaintiff to overcome. The lower court clearly erred by granting EMU summary judgment.

B. EMU's Treatment Of Ms. Ward Is Unreasonable.

It is patently unreasonable to punish Ms. Ward for making a value-based referral after teaching her that: value-based referrals are permissible (RE #139, Summ. J. Order at 32 (EMU "concede[s] that . . . referrals based on value conflicts are permissible and sometimes in the client's best interest")); a study found that where counselors' and clients' "personal values about sexual practices" conflict, "40% [of counselors] had to refer a client because of a value conflict" (RE #79, Pl.'s Mot. Summ. J., Ex. 1 at 21-22); a referral under such circumstances allows the counselor to "avoid imposing their personal values on clients" (*id*.); and the

high occurrence of such referrals "supports previous conclusions that the practice of therapy is not value free, particularly where sexual values are concerned" (*id*.).

Indeed, prior to the initiation of disciplinary proceedings, there is not a shred of evidence in the record that values-based referral was impermissible. The very referral at issue here was *mandated* by Defendant Callaway. Ms. Ward did what she was taught to do. She did what she was told to do. And she was expelled.

C. The District Court Erred By Applying *Hazelwood* To Ms. Ward's Free Speech Claims.

The lower court dispensed with Ms. Ward's free speech claims by relying on the "pedagogical interests" test from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The *Hazelwood* Court held that a public high school did not violate the First Amendment when it "exercis[ed] editorial control over the style and content of student speech in [a] school-sponsored" newspaper because their actions were "reasonably related to legitimate pedagogical concerns." *Id*. at 271-73. Invoking *Hazelwood*, the lower court found: "Having demonstrated that its Policy is reasonably related to legitimate pedagogical concerns, the University did not violate plaintiff's First Amendment free speech rights." (RE #139, Summ. J. Order at 27.) *Hazelwood* has no application to this case for at least two reasons.

First, *Hazelwood* should not apply to universities. The Supreme Court expressly reserved this question, 484 U.S. at 273 n.7, and this Court refused to apply *Hazelwood* in the university context on virtually identical issues. *Kincaid*,

236 F.3d at 346 n.5 (speech challenge to university's editorial control over university-sponsored yearbook). Further, the Third Circuit recently noted the vast differences between public elementary and high schools and public universities, *McCauley*, 618 F.3d at 242-47, and concluded that

> the teachings of . . . *Hazelwood* . . . and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.

Id. at 247.

Second, *Hazelwood* only applies to speech that members of the public might reasonably perceive bears the imprimatur of the school. *Hazelwood*, 484 U.S. at 271. This is a highly circumscribed form of speech, involving only that speech which "could reasonably be viewed as speech of the school itself." *McCauley*, 618 F.3d at 249. *See also Rosenberger*, 515 U.S. at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. *See e.g.*, . . . *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272, 108 S.Ct. 562").

The speech involved here cannot reasonably be viewed as EMU's own speech. EMU targeted Ms. Ward's religious speech and beliefs in and out of class, and at the informal and formal review meetings. This is not *Hazelwood* speech,

but rather private speech entitled to full First Amendment protection. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech . . . is . . . fully protected under the Free Speech Clause").

Importantly, even under *Hazelwood*, speech restrictions must still be viewpoint neutral and reasonable. 484 U.S. at 267 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) as standard for *Hazelwood* claims, which requires reasonableness and viewpoint neutrality). *See also Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, 797 (E.D. Mich. 2003) ("A school's restrictions on speech reasonably related to legitimate pedagogical concerns must still be viewpoint-neutral"). As shown above, many facts in the record demonstrate the viewpoint discriminatory and unreasonable nature of EMU's enforcement of its disciplinary policies against Ms. Ward.

Further, this Court has held that compelled speech violates *Hazelwood*. In *Poling v. Murphy*, 872 F.2d 757, 763 (6th Cir. 1989), this Court applied *Hazelwood* to a student's speech at a high school assembly, finding that the school properly punished the student for using rude and discourteous language. Critically, however, the court stressed that "school officials made no attempt to compel [the plaintiff] to say anything he did not want to say." *Id.* Relying on *Barnette*, the court stated that such compulsion would have violated the plaintiff's First Amendment rights. *Id.* As discussed *infra*, § IV, EMU violated Ms. Ward's right

to be free from compelled speech. Accordingly, EMU's viewpoint discriminatory, unreasonable, and coercive treatment of Ms. Ward violates the First Amendment, even under *Hazelwood*.

D. The District Court Erred In Finding That Ms. Ward Violated A Curricular Requirement.

The lower court also rejected Ms. Ward's free speech claims by latching onto a line of irrelevant cases spawned by *Hazelwood* which stand for the proposition that a student does not have a constitutional right to refuse to complete an academic requirement. (RE #139, Summ. J. Order at 24-26.) The Court then found that Ms. Ward's "refusal to attempt learning to counsel all clients within their own value systems is a failure to complete an academic requirement of the program," and that EMU thus justifiably expelled her. (*Id*. at 26.) There are myriad errors with this finding.

First, the "academic requirement of the program" at issue is compliance with a grotesquely unconstitutional speech code. As noted *supra*, EMU expelled Ms. Ward for violating *specific provisions* of the student code of conduct, provisions which no federal court (before this case) had ever upheld. The lower court's entire analysis rests on the foundation of its erroneous finding that the policies at issue are constitutional merely because they are "curricular."

Second, setting aside the constitutionality of EMU's policies, the requirement that counselors be able to counsel all clients within the clients' value

systems *is found nowhere in EMU's curriculum or the ACA Code of Ethics*. As noted *supra* in the Statement of Facts, the ACA Code expressly allows referrals before a counseling relationship begins. EMU also "concedes that . . . referrals based on value conflicts are permissible and sometimes in the client's best interest." (RE # 139, Summ. J. Order at 32.) And the Statement of Facts also recites numerous instances where EMU taught that referrals based on value conflicts are permissible. In referring her potential Practicum client (again, at the direction of her supervising professor), Ms. Ward was following, not violating, a curricular teaching. The lower court thus plainly erred in finding that Ms. Ward was "interfer[ing] with [EMU's] curriculum by demanding that she be allowed to set her own standards for counseling clients." (*Id*. at 25.)[6]

EMU's alleged "requirement" also leads to absurd results. It means that: an African-American counselor must help a client who wants his family to be more accepting of his membership in a white supremacist group; a pro-life counselor must help a client be comfortable with her decision to abort a baby; a feminist counselor must help a wife accept her husband's desire that she be a homemaker; and a counselor who believes in monogamous marriage must help a client who wants to

[6] The lower court also erred in finding that Ms. Ward "unequivocally demonstrated her unwillingness to make any effort at working within the client's value systems when they are not in accordance with hers." (RE #139, Summ. J. Order at 33.) To the contrary, when Dr. Francis asked Ms. Ward if she could work with clients who had "totally opposite [religious] views from you," Ms. Ward responded that it "would not be a problem." (RE #1, Compl., Ex. 3 at 42.)

conceal his adulterous affairs from his wife, or who wants help convincing his wife to accept an open marriage. Indeed, the list of morally offensive values a counselor must be willing to counsel based upon is limited only by the imagination. EMU's "requirement" is an impossible standard that denies the reality that everyone (yes, even licensed counselors) has a moral objection to something. There would likely be few if any counselors left if EMU's litigation-inspired defense were actually the rule governing the profession.

III. EMU VIOLATED MS. WARD'S FREE EXERCISE RIGHTS.

EMU violated Ms. Ward's free exercise rights in two ways. EMU penalized and punished Ms. Ward because of her religious views, and imposed burdens on her religious beliefs and practices pursuant to policies that are neither neutral nor generally applicable.

A. EMU Punished Ms. Ward Because Of Her Religious Views.

The Supreme Court has held that the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Accordingly, the government may neither "impose special disabilities on the basis of religious views," *id.*, nor "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities," *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

The facts showing that EMU imposed a special disability (i.e., discipline culminating in expulsion) on the basis of Ms. Ward's religious views are discussed in § II.A, *supra*, and will not be rehashed here. These facts show that EMU targeted Ms. Ward's religious views throughout the disciplinary process. Defendant Francis' "theological bout," standing alone, proves EMU's impermissible targeting of Ms. Ward's beliefs.

Further, Ms. Ward need not prove EMU's purpose was to change her religious beliefs to prevail on her free exercise claim, just that EMU penalized or punished her because of her views. *See Smith*, *supra*. Nonetheless, the evidence shows that EMU's purpose was to change Ms. Ward's beliefs, which exacerbates the free exercise violation. Defendant Dugger stated that Ms. Ward's remediation plan was conditioned on her "recognition that she needed to make some changes," and that the remediation plan was scrapped because Ms. Ward "expressed just the opposite" and "*communicated an attempt to maintain this belief system* and those behaviors." (RE #1, Compl. Ex. 3 at 29 (emphasis added).)

Further, EMU conceded in lower court briefing that the remediation plan was aimed at changing Ms. Ward's beliefs: "[the] remediation plan was contingent on Plaintiff recognizing that *she needed to change* her behavior and *her belief* that she should be allowed to discriminate based on sexual orientation." (RE #97,

Defs.' Opp. to Pl.'s Mot. Summ. J. at 6 (emphasis added).)[7] EMU's "transparently disingenuous and offensive . . . attempt[s] to torture the facts *ex post facto*," *Hansen*, 293 F. Supp. 2d at 802, by admitting that Ms. Ward must change her beliefs, *but then changing what her beliefs are to fit its theory of the case*, should be ignored. EMU's spin does not change the fact that the beliefs at issue here are Ms. Ward's religious views that extramarital sexual conduct is immoral (RE #1, Compl. Ex. 3 at 31), and that it was EMU's purpose to change those beliefs and the behavior that flows from them.

Critically, the Supreme Court has held that the First Amendment condemns efforts, like EMU's here, to use nondiscrimination policies to coerce "bias-free" speech and acts. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). The Supreme Court found it to be a "decidedly fatal

[7] The lower court wrongly accepted EMU's spin that Ms. Ward insisted on an "undifferentiated referral of an *entire class* of clients," i.e., clients who identify as homosexual. (RE # 139, Summ. J. Order at 33.) But the undisputed facts are to the contrary. Ms. Ward repeatedly stressed she would counsel a homosexual client on any issue that did not require her to affirm or validate homosexual relationships or behavior. (RE #1, Compl. Ex. 3 at 31; Ex. 4 at 63; Ex. 6 at 69.) In addition, Ms. Ward's religious beliefs apply equally to heterosexual and homosexual relationships, meaning she could not provide affirmative counsel regarding any extra-marital sexual relationship (whether heterosexual or homosexual). (*Id.*, Ex. 3 at 47-48.) Further, Ms. Ward's supervisor-directed referral was entirely consistent with EMU's teaching that referrals commonly happen where counselors and clients have clashes over sexual values/practices. (RE #79, Pl.'s Mot. Summ. J., Ex. 1 at 21-22 (study found that where "practitioners' beliefs conflict with those of clients" regarding sexual values/practices, "40% had to refer a client because of a value conflict").)

objective" to forbid acts of discrimination against certain classes for the purpose of "produc[ing] a society free of the corresponding biases" and "speakers free of the [corresponding] biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction." *Id*. at 578-79.

EMU is pursuing precisely this fatal objective. On its face, EMU's nondiscrimination policy points to this objective by forbidding "condoning" discrimination, which prohibits "agree[ing]" with, "promot[ing]," or "believ[ing]" an idea EMU deems "discriminatory." (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 55:25-56:12.). And EMU admits that it enforced this policy against Ms. Ward to change her "belief system and those behaviors." (RE #1, Compl., Ex. 3 at 29.) EMU is thus transgressing the one "fixed star in our constitutional constellation": that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

B. EMU's Policies Are Neither Neutral Nor Generally Applicable.

Under the Free Exercise Clause, a law burdening religious beliefs and practices that lacks neutrality or general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

531-32 (1993). A law can lack neutrality and general applicability in many ways. *Id*.

First, "if the object of a law is to infringe upon or restrict practices because of their *religious motivation*, the law is not neutral." *Id*. at 533 (emphasis added). EMU's disciplinary policies' lack of neutrality is proven by its dismissal letter to Ms. Ward, which states that EMU dismissed her because she was unwilling to change her "stance" despite being told repeatedly of the "conflict between your *values that motivate* your behavior and those behaviors expected by the profession." (RE #1, Compl., Ex. 5 (emphasis added).) The penultimate draft of this letter expressly referenced Ms. Ward's "personal values and religious beliefs" and stated that there was a "conflict between [her] values and those of the profession." (RE #80, Pl.'s Mot. Summ. J., Ex. 20 at 184.) There is nothing neutral about such blatant targeting of a person's religious motivation for her acts.

A law also lacks neutrality and general applicability if it grants an exemption that undermines its purpose, *Lukumi*, 508 U.S. at 543, or if it has "in place a system of individual exemptions" that is not "extend[ed] . . . to cases of 'religious hardship' without compelling reason," *Smith*, 494 U.S. at 884. Thus, in *Lukumi*, 508 U.S. at 537, the city violated the Free Exercise Clause by refusing to extend an exemption for "necessary killings" from a ban on animal killing to a Santeria church that practiced animal sacrifice, and in *Blackhawk v. Pennsylvania*, 381 F.3d

202, 209-10 (3d Cir. 2004), the state violated the Free Exercise Clause by refusing to extend a "'hardship' or 'extraordinary circumstances'" exemption from a fee requirement for the keeping of wild animals to a Native American Indian who kept wild animals for religious reasons.

EMU's teachings and the ACA Code of Ethics provisions regarding referrals, *see* Statement of Facts, *supra*, prove that EMU's disciplinary policies violate the Free Exercise Clause in the same manner. Rather than repeating each of these important facts, several key facts are highlighted here.

First, EMU "concede[s] that . . . referrals based on value conflicts are permissible and sometimes in the client's best interest." (RE #139, Summ. J. Order at 32.)

Second, despite EMU's prohibition on "sexual orientation" discrimination, value based referrals where conflicts arise over sexual values/practices are permissible and, in fact, widespread. (RE #79, Pl.'s Mot. Summ. J., Ex. 1 at 21-22 (study found that 40% of counselors had to refer clients because of a value conflict regarding "personal values about sexual practices," which "supports previous conclusions that the practice of therapy is not value free, particularly where sexual values are concerned").)

Third, counselors who morally object to "gay unaffirmative" therapy may refer parents who seek counseling on how to help their daughter not engage in

homosexual relationships or behavior (RE #82, Defs.' Mot. Summ. J., Ex. 5, Francis Dep. 91:2-93:9), yet counselors who morally object to "gay affirmative" therapy (like Ms. Ward) must provide such therapy to clients who seek it and are forbidden to refer the client to another professional.

Fourth, the manual for the very class in which Ms. Ward made her referral, pursuant to Defendant Callaway's direction, informs students that they are expected to adhere to, among others, the ethical code of the American Mental Health Counselors Association. (RE #14, Defs.' Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 7 at 20). This Code expressly endorses value-based referrals:

> Mental health counselors will actively attempt to understand the diverse cultural backgrounds of the clients with whom they work. This includes learning how the counselor's own cultural/ethical/racial/religious identity impacts his or her own values and beliefs about the counseling process. *When there is a conflict between the client's goals, identity and/or values and those of the mental health counselor, a referral to an appropriate colleague must be arranged.*

(Re #17, Pl.'s Reply Mem. in Supp. of Mot. Prelim. Inj., Ex. 3 at 12 (emphasis added).)

Given the undisputed fact that referral is permissible, even where EMU's expansive Condoning Discrimination Policy applies, it is clear that EMU's policies lack neutrality and general applicability.[8] The referral exemption involved here is

[8] The lower court also erred by relying on EMU's expert's (David Kaplan) opinion that Ms. Ward's value-based referral violated the ACA Code of Ethics (RE #139,

no different than the exemptions involved in *Lukumi* and *Blackhawk* and, as in those cases, EMU's refusal to extend it to Ms. Ward in a case of religious hardship, even though it is available to myriad others, violates her free exercise rights. *See Lukumi*, 530 U.S. at 537 (treating "religious reasons" for a requested exemption "to be of lesser import than nonreligious reasons" violates the Free Exercise Clause).

The lower court erred in relying on *Kissinger v. Board of Trustees of Ohio State University College of Veterinary Medicine,* 5 F.3d 177 (6th Cir. 1993) to reject Ms. Ward's free exercise claims. (RE #139, Summ. J. Order at 29.) Indeed, all the facts necessary to prove a free exercise violation that were missing in *Kissinger* are present here. EMU directly and repeatedly targeted Ms. Ward's religious views, *Kissinger*, 5 F.3d at 179 (noting the lack of any evidence that Ohio State "attack[ed] or exclude[d] any individual on the basis of his or her religious beliefs"), and, given the undisputed facts regarding referrals highlighted above, this case hardly involves a policy that is "generally applicable to all," *id*. at 180.

Summ. J. Order at 31), while completely ignoring the undisputed facts showing that the opposite is true, and ignoring Ms. Ward's highly qualified expert who offered the opposite opinion (RE #80, Pl.'s Mot. Summ. J., Ex. 29). The court compounded its error by also ignoring Dr. Kaplan's June 30, 2009 blog post, which seriously undermines his expert report. In this post, Dr. Kaplan concedes that professional counselors make value based referrals "at the drop of a hat," claims that they do so because they are taught at graduate schools that such referrals are permissible (as students are at EMU), and states that such referrals are a personal "pet peeve[]" of his. (RE #99, Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 1 at 4.)

IV. EMU VIOLATED MS. WARD'S RIGHT TO BE FREE FROM COMPELLED SPEECH.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). It is "the fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The government transgresses this principle when it "compel[s] affirmance of a belief with which the speaker disagrees," *id.*, or "requires the utterance of a particular message favored by the Government," *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 641 (1994). Here, EMU clearly violated Ms. Ward's right to be free from compelled speech.

EMU requires its counseling students to affirm homosexual relationships and behavior. (RE #1, Compl. ¶¶ 4, 46-48; RE #9, Pl.'s Mot. Prelim. Inj., Ex. 3 ¶¶ 3-10.) EMU holds the view that a 2006 ACA ethics opinion bans "reparative therapy" (RE #1, Compl., Ex. 3 at 58-59), which involves client requests to change "their sexual behaviors, orientation or identity" (RE #14, Defs.' Opp. to Pl.'s Mot. for Prelim. Inj., Ex. 16 at 2).[9] As a counterpoint to reparative therapy, EMU

[9] The opinion actually allows reparative therapy, so long as the counselor gives the client certain warnings prior to starting treatment, showing that EMU is mistaken in its understandings of the very ACA documents it so coercively enforces.

requires students to provide "gay affirmative" treatments to gay, lesbian, and bisexual clients. (*Id.*, Ex. 16 at 4.)

> According to EMU, "gay affirmative" therapy
>
> > refers to the notion that being gay is not bad. It's not something that you should feel ashamed of or in any way less good than heterosexual identity. And so, it would be a treatment that basically saw homosexuality and heterosexuality as equally valuable but different and not put one as better than the other.

(RE #82, Defs.' Mot. Summ. J., Ex. 4, Dugger Dep. 75:9–17.) "Gay affirmative" treatment requires counselors to "affirm that sexual minority persons have the potential to integrate their GLB orientations and transgendered identities into fully functioning and emotionally healthy lives." (RE #79, Pl.'s Mot. Summ. J., Ex. 6 at 76.) EMU also taught Ms. Ward that she had to affirm or support "[t]he homosexual lifestyle, acceptance of that lifestyle as being normal, right, worth fighting for" (RE #82, Defs.' Mot. Summ. J., Ex. 1, Ward Dep. 65:7-10), and that "[h]eterosexist bias in therapy needs to be acknowledged and changed" (RE #79, Pl.'s Mot. Summ. J., Ex. 3 at 39). EMU officials also testified that it is "gay unaffirmative" (and thus impermissible) for a counselor to help a client "reconcile their sexual orientation and religious beliefs by helping the client adopt their religious views that homosexual behavior or relationships are immoral and . . . ceasing to engage in homosexual behavior or ceasing a homosexual relationship." (RE #82, Defs.' Mot. Summ. J., Ex. 4, Dugger Dep. 76:19-77:12.)

By prohibiting any attempt to help clients who seek to change or refrain from homosexual desires, conduct, or relationships (even when the client seeks such help), and by only allowing "gay affirmative" therapy, EMU plainly requires its students to affirm homosexual behavior and relationships. The lower court's finding that EMU does not require students to "*endorse* or *advocate* homosexuality" (RE #139, Summ. J. Order at 33) cannot be squared with the overwhelming contrary evidence, which the lower court does not even address.

Like the car owners in *Wooley*, 430 U.S. at 715, who morally objected to displaying the State's "Live Free Or Die" message on their license plates, and the parade organizers in *Hurley*, 515 U.S. at 579, who refused to include a gay and lesbian contingent whose message they did not agree with, Ms. Ward has a First Amendment right to refuse to foster ideas that contravene her fundamental beliefs. And here, Ms. Ward's sincere religious beliefs prevent her from being the courier for EMU's "gay affirmative" message. (RE #1, Compl., Ex. 4 at 63 ("It would be a violation of my religious beliefs to be required to affirm or validate homosexual conduct").) Yet when Ms. Ward refused to foster this message, EMU's assault on her religious beliefs escalated and she was ultimately dismissed because she would not agree to change, abandon, or speak a message contrary to her religious views as a condition to obtaining a degree. The district court clearly erred in granting EMU summary judgment on Ms. Ward's compelled speech claim.

V. THE LOWER COURT ERRED IN DISMISSING MS. WARD'S OFFICIAL CAPACITY CLAIMS AGAINST EMU'S REGENTS AND PRESIDENT.[10]

The lower court dismissed Ms. Ward's official capacity claims against EMU's Regents and President "due to lack of a substantial role in plaintiff Julea Ward's dismissal" from EMU's counseling program. (RE #75, Mot. to Dismiss Order at 1.) But to prevail on her official capacity claims against these Defendants, Ms. Ward need not show their personal involvement in the dismissal decision, and it was error for the lower court to require her to do so.

As this Court has held, "an official capacity suit does not require a showing of supervisory liability. Since an official capacity suit is . . . a suit against a governmental entity, the allegedly unconstitutional action need only be based on a policy or custom of that entity for liability to attach." *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989). EMU's Regents and President exercise policy-making authority on behalf of EMU. M.C.L.A. Const. art. 8, § 6 (EMU Regents "shall have general supervision of the institution" and EMU President "shall be the principal executive officer of the institution"). They are, therefore, proper Defendants in Ms. Ward's action challenging the unlawful enforcement of EMU policies.

[10] Ms. Ward does not challenge the lower court's dismissal of her individual capacity claims against EMU's Regents and President.

CONCLUSION

A university cannot escape decades of free speech jurisprudence merely by relabeling extraordinarily broad and vague speech codes as "curriculum." EMU did not teach Ms. Ward *about* its concepts of "tolerance," "condoning discrimination," or "imposing values," but instead punished her for her speech and for her values.

Once the court below upheld these speech codes, the entire opinion that followed was the fruit of this poisonous tree and granted the university unbridled discretion to target a religious student for expulsion in spite of her 3.9 GPA and unquestioned record of classroom excellence. State officials cannot be permitted to engage students in "theological bouts" during disciplinary meetings, and EMU cannot tell Ms. Ward what she must say or believe about sexual conduct or any other morally contentious issue.

The judgment of the district court should be reversed.

Respectfully submitted this the 21st day of December, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing document is proportionally spaced, has a typeface of 14 points or more, and contains 13,978 words as calculated by Microsoft Word.

Dated: December 21, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(b), below is a designation of relevant district court documents:

RECORD ENTRY #	DESCRIPTION
1	Verified Complaint for Injunctive and Declaratory Relief and Damages
	Exhibit 2 - February 19, 2009 Letter from Dugger to Ward Informing Ward of the Date Set for the Formal Review Hearing
	Exhibit 3 - Transcript of the March 10, 2009 formal review hearing
	Exhibit 4 - February 9, 2009 email and letter from Ward to Dugger requesting a formal review hearing
	Exhibit 5 - March 12, 2009 letter from Ametrano to Ward dismissing Ward from the School Counseling Program
	Exhibit 6 - March 20, 2009 letter from Ward to Polite appealing her dismissal from the School Counseling Program
	Exhibit 7 - March 26, 2009 letter from Polite to Ward denying Ward's appeal
9	Plaintiff's Motion for Preliminary Injunction, Exhibit 3 - Affidavit of Julea Ward in Support of Plaintiff's Motion for Preliminary Injunction
14	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 5 - Eastern Michigan University Student Counseling Handbook
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 6 - Description, COUN 686, Counseling Practicum I

RECORD ENTRY #	DESCRIPTION
14	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 7 - Practicum Manual, EMU Department of Leadership and Counseling
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 12 - 2001 CACREP Standards
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 14 - ACA Divisions
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 16 - May 22, 2006, ACA Ethics Committee Position Statement, "Ethical Issues Related to Conversion or Reparative Therapy"
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 21 - Association for Spiritual Ethical and Religious Values in Counseling (ASERVC), Spiritual Competencies
	Defendants' Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 23 - Michigan Administrative Rules, Counseling
16	Defendants' Answer and Affirmative Defenses
17	Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction, Exhibit 1 - Affidavit of Julea Ward in Support of Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction
	Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction, Exhibit 3 - American Mental Health Counselors Association Code of Ethics
	Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction, Exhibit 4 – Affidavit of Melissa Henderson in Support of Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction

RECORD ENTRY #	DESCRIPTION
72	Plaintiff's Motion for Leave to Contact and/or Subpoena Student Referenced at Confidential Exhibits EMU 140/483, Exhibit 1 - Discovery Material Classified as Confidential by Defendants [FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER]
	Plaintiff's Motion for Leave to Contact and/or Subpoena Student Referenced at Confidential Exhibits EMU 140/483, Exhibit 2 – Discovery Material Classified as Confidential by Defendants [FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER]
75	Order Granting in Part Defendants Wilbanks', Clack's, Hawks', Incarnati's, Okdie's, Parker's, Sedlik's, Stapleton's, Martin's, and Polite's Motion to Dismiss or in the Alternative for Summary Judgment (# 23) and Denying Plaintiff's Rule 56(f) Motion for Relief from Defendants' Motion for Summary Judgment (# 38)
79	Plaintiff's Motion for Summary Judgment, Exhibit 1 - Excerpts from Marianne Schneider Corey & Gerald Corey, Becoming a Helper (2007), Chapter 8, Knowing Your Values 218-243
	Plaintiff's Motion for Summary Judgment, Exhibit 2 - Excerpts from Chapters 2 and 10 of Sherry Cormier & Paula S. Nurius, Interviewing and Change Strategies for Helpers: Fundamental Skills and Cognitive Behavioral Interventions 22-23; 266; 297 (2003)
	Plaintiff's Motion for Summary Judgment, Exhibit 3 - Excerpts from Sue and Sue, Counseling the Culturally Diverse (2008), Chapter 23, Counseling Sexual Minorities 447; 453-454
	Plaintiff's Motion for Summary Judgment, Exhibit 4 – Excerpts from Logan, Counseling Gay Men and Lesbians 99; 103 (2002)

RECORD ENTRY #	DESCRIPTION
79	Plaintiff's Motion for Summary Judgment, Exhibit 5 - American Psychological Association Guidelines for Psychotherapy with Lesbian, Gay, & Bisexual Clients
	Plaintiff's Motion for Summary Judgment, Exhibit 6 - ALGBTIC Competencies for Counseling Gay, Lesbian, Bisexual and Transgendered (LGBT) Clients
	Plaintiff's Motion for Summary Judgment, Exhibit 7 - Extended Entry # 1, Julea Ward's class paper from COUN 502
	Plaintiff's Motion for Summary Judgment, Exhibit 8 - Personal and Professional Development Paper, Julea Ward's class paper from COUN 580
	Plaintiff's Motion for Summary Judgment, Exhibit 9 - Course Syllabus, COUN 580 – Counselor Development: Counseling Process, Summer 2007
	Plaintiff's Motion for Summary Judgment, Exhibit 10 - Course Syllabus, COUN 502 Helping Relationships: Basic Concepts and Services, Summer 2006
	Plaintiff's Motion for Summary Judgment, Exhibit 11 - Julea's Academic Transcript from EMU
80	Plaintiff's Motion for Summary Judgment, Exhibit 13 - 02/03/09 Email from Francis to Thayer regarding Julea Ward's suspension from Practicum (EMU 00004)
	Plaintiff's Motion for Summary Judgment, Exhibit 14 - 02/02/09 Letter from Dugger to Ward regarding summary of informal review conference (EMU 00042-44)
	Plaintiff's Motion for Summary Judgment, Exhibit 15 - 01/29/09 Letter from Dugger to Ward regarding informal review conference (EMU 00045)
	Plaintiff's Motion for Summary Judgment, Exhibit 19 - 02/04/09 Email communications between Callaway, Dugger, and Tracy re: informal review conference (EMU 228-233)

RECORD ENTRY #	DESCRIPTION
80	Plaintiff's Motion for Summary Judgment, Exhibit 20 - 03/11/09 Emails regarding revisions to first draft of dismissal letter (EMU 255-265)
	Plaintiff's Motion for Summary Judgment, Exhibit 29 - Throckmorton Expert Report
81	Plaintiff's Motion for Summary Judgment, Exhibit 18 - Other EMU student disciplinary matters (EMU 103-139; 141-143; 474-475) [FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER]
82	Defendants' Motion for Summary Judgment, Exhibit 1 - Julea Ward Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 2 - Dr. Irene Ametrano Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 3 - Dr. Yvonne Callaway Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 4 - Dr. Suzanne Dugger Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 5 - Dr. Perry Francis Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 6 - Dr. Vernon Polite Deposition Transcript
	Defendants' Motion for Summary Judgment, Exhibit 7 - Expert Report of Dr. David Kaplan
99	Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit 1 - Declaration of Jeffrey A. Shafer in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment
109	Order Denying Defendants' Motion to Dismiss or for Summary Judgment on all Claims for Damages Due to Qualified Immunity and the Eleventh Amendment (# 28) and Denying as Moot Plaintiff's Rule 56(F) Motion (# 52)

RECORD ENTRY #	DESCRIPTION
125	Order Denying Defendants' Motion for Reconsideration and Granting Motion for Clarification [# 119]
139	Opinion and Order Denying Plaintiff's Motion for Summary Judgment [Doc. # 79] and Granting Defendants' Motion for Summary Judgment [Doc # 82]
140	Judgment
143	Plaintiff's Notice of Appeal
148	Notice of Cross-Appeal by Defendants/Appellees Dr. Vernon Polite, Dr. Irene Ametrano, Dr. Perry Francis, Dr. Gary Marx, Paula Stanifer, Dr. Yvonne Callaway, and Dr. Suzanne Dugger