Nos. 10-2100/2145

In the United States Court of Appeals
for the Sixth Circuit

Julea Ward

Plaintiff-Appellant,

v.

Roy Wilbanks et al.,

Defendants-Appellees.

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

Brief of *Amicus Curiae* Americans United for Separation of Church and State in Support of Appellees

---

Ayesha N. Khan
Gregory M. Lipper
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005
(202) 466-3234 (phone)
(202) 466-2587 (fax)
khan@au.org | lipper@au.org

February 11, 2011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-2100/2145 Case Name: Ward v. Wilbanks

Name of counsel: Gregory M. Lipper

Pursuant to 6th Cir. R. 26.1, Americans United for Separation of Church and State
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 February 11, 2011 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/ Gregory M. Lipper

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.

Table of Contents

Table of Authorities

Cases

Other Authorities

Interest of *Amicus Curiae*

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C.[1] Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state cases, including many cases before this Court.

As part of its commitment to ensuring that the state remains neutral on questions of religion, Americans United supports governmental

---

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part; and that no party, party's counsel, or person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

attempts to prevent private citizens from converting public activities and programs into forums for private religious speech. Be it the classroom or the courtroom, Americans United has worked to ensure that government programs are not hijacked for private religious gain. *See, e.g.*, *ACLU of Ohio Found., Inc. v. Deweese*, __ F.3d __, 2011 WL 309657 (6th Cir. Feb. 2, 2011); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008).

In this case, Plaintiff seeks to employ her religious statements and beliefs to trump the curriculum of a public university's counseling program, and to force that university to adopt an approach to counseling that would harm patients and contradict well-established professional norms. Although Plaintiff is entitled to believe that counselors ought to bring their religious message to sessions with patients, a public university is entitled to train all of its students to focus on clients' emotional needs—not counselors' personal views.

Preliminary Statement

Plaintiff's religious beliefs do not entitle her to undo a university's counseling curriculum and upend the professional relationship between

counselor and client. A student in a graduate counseling program offered by Eastern Michigan University ("the University"), Plaintiff is unwilling to counsel "within [her] clients' value systems." Ward Opening Br. at 45–46. She equates the mere counseling of a gay or lesbian patient about a romantic relationship with the dissemination of an "ideologically–driven, 'gay affirmative' message." *Id.*

During her required counseling practicum, Plaintiff refused to counsel any gay or lesbian client about any issue that required her "to affirm or validate homosexual relationships" or to "provide affirmative counsel regarding any extra-marital sexual relationship (whether heterosexual or homosexual)." *Id.* at 49 n.7. As a result, Plaintiff would have needed to refer, to another counselor, any patient seeking counseling that might relate to a non-marital or homosexual romantic relationship—no small population, especially among clients of a university clinic. She would have insisted on making a referral even if the need had arisen weeks or months into the patient's treatment, and even if the mid-course interruption would have impeded the patient's treatment.

Because Plaintiff sought to refer many if not most of her potential clinical patients, the University reasonably concluded that she could not satisfy a key curricular requirement. A university would not be required to graduate a Jehovah's Witness whose religious views prevented him from providing his clinical patients with necessary blood transfusions—even if he aced his written anatomy exam. Likewise, the University was entitled to expel Plaintiff because her religious views prevented her from counseling clinical patients who wanted to discuss non-marital sex—no matter how sophisticated her work in the classroom.

The First Amendment does not prohibit the University from requiring Plaintiff to counsel certain types of patients or to "affirm" their choices. For the University, tolerance is not a social ideal; it's the standard of care: effective counselors must "avoid imposing values that are inconsistent with counseling goals." ACA Code of Ethics R. A.4.b (2005). Just as a criminal defense attorney must defend clients who he thinks are guilty, Plaintiff must follow professional norms when counseling clients whose sexual practices she disapproves of.

Moreover, when Plaintiff counseled the University's clients, under the auspices of a University professor's license, she acted as the University's employee. It is well settled that government control of speech "that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

Although Plaintiff asserts that the University "teaches that referrals based on value conflicts are permissible" for practicing professionals, Ward Opening Br. 12, the record reflects only one instance in which the patient of a University *student* was referred. For a limited period of time, "a student who had recently suffered the loss of a significant person in their life was not assigned clients who were coming in to deal with grief issues." R. 139 (Dist. Ct. Order) at 30. This brief, temporary, class-neutral accommodation of a grieving student is a far cry from the blanket, permanent, class-based exception that Plaintiff demands, in which she would "*always* refer *all* clients who seek counseling for sexual relationship issues she believes to be against the teachings of the Bible." *Id.* (emphasis in original).

Plaintiff also argues that the First Amendment prohibits the University from requiring her to provide "gay-affirmative therapy" while prohibiting her from providing "reparative therapy"—which tries to turn gay and lesbian patients straight. *See* Ward Opening Br. at 52–53, 56–57. The University may, however, require methods that help patients and prohibit ones that are harmful. Whereas "affirmative therapy" is good counseling practice, reparative therapy harms patients: the latter practice has been repudiated by virtually every professional association to consider it and is linked to attempted suicide.

Like doctors, lawyers, and other professionals, counselors simply may not say whatever they want when serving their clients. A criminal defense lawyer, no matter how devout, may not advise a client to deny medical care to her child. *Cf. Walker v. Superior Court*, 763 P.2d 852, 869–71 (Cal. 1988) (rejecting Free Exercise challenge to manslaughter conviction of parent who treated child's meningitis using only prayer). An anesthesiologist, no matter how pious, may not sedate a patient using LSD. *Cf. United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C. 1968) (rejecting Free

Exercise challenge to drug conviction of defendant who believed that "psychedelic substances, such as LSD, are the true Host"). The First Amendment does not prevent states from promoting a client's needs over his provider's religious agenda; a public-university counseling program may train its students to practice accordingly.

To shift the focus from her conduct to her conscience, Plaintiff invokes a so-called "theological bout." Specifically, she claims that discussion of her religious beliefs at her appeal hearing creates a factual dispute about whether the University targeted her religious beliefs (as opposed to conduct that happened to flow from those beliefs). *See* Ward Opening Br. at 38–40. But University officials began Plaintiff's hearing seeking to discuss only her "stated unwillingness to intentionally and competently provide counseling services concerning relationship issues to clients who identify as gay." R. 1-5 (Hearing Tr.) at 2:2–3. Plaintiff's religion became an issue only when she made it one: she attempted to justify her conduct on the ground that, "I will not and cannot affirm any behavior that goes against what the Bible says as a Christian." *Id.* at 27:21–22.

Once Plaintiff claimed that her religion precluded her from fulfilling certain curricular requirements, University officials were entitled to investigate the extent to which Plaintiff intended to flout the curriculum. And each time that University officials attempted to question her about conduct, she answered by invoking her faith. *See, e.g.*, *id.* at 23:11–13 ("AMETRANO: So, would you be able to help [clients] explore the option of going with their sexual orientation and being gay? Would you be able to help them with that side of it? WARD: Because of my religious beliefs, I would not be able to affirm . . .") (ellipses in original). Were the Court to rule against the University because *Plaintiff* pushed the discussion towards dogma, students would use their religious beliefs as both a sword, to justify their refusal to comply with curricular requirements, and a shield, to prevent universities from assessing the scope of their noncompliance.

As even Plaintiff's *amici* acknowledge, "a counseling situation involves a real client." Foundation of Moral Law Br. at 22. The University was entitled to train its students to provide professional care to all of those clients, not just those who make choices that its students embrace.

Argument

I. The University's Application of Professional Standards to Plaintiff's Clinical Counseling Did Not Violate the Free Speech Clause.

Although Plaintiff hopes to make this case about a speech code, *see* Ward Opening Br. at 20–37, she was never disciplined for anything she said or did inside the classroom or for anything she said or did outside the practicum. She was admitted into the University graduate program even after disclosing that she "strictly adheres to orthodox Christian beliefs." R. 139 (Dist. Ct. Order) at 2. And she received A's in all of her classes, even though she was not shy about expressing her religious views. *See id.*

Plaintiff was disciplined only after she refused to fulfill a curricular counseling requirement that was essential to the University's training program. Yet although Plaintiff is religious and her counseling depends on the spoken word, Plaintiff's counseling is not religious speech.

First, Plaintiff had no Free Speech right to opt out of counseling a broad swath of patients because of her religious views. By requiring Plaintiff to counsel patients with different values, the University did not

violate First Amendment prohibitions against compelled speech and viewpoint discrimination. A counselor's treatment of a patient is no more expressive activity than a motion drafted by a law student in a legal clinic; in each case, a professional school must ensure that the student is learning to properly serve her clients. Plaintiff's First Amendment arguments are especially weak because she spoke for the University—not herself—when she treated the University's clients under the license of a University professor.

Second, even if Plaintiff's counseling methods could be considered expressive activity, they still would amount to no more than curricular speech, which itself is subject to reasonable regulations consistent with the University's educational goals. The University is entitled to train students to counsel a broad range of patients on a broad range of issues, and Plaintiff has no right to second guess this reasonable pedagogical choice. Similarly, the University could require Plaintiff—like all counseling students—to engage in practices that helped her clients, by affirming their choices and worth, and to avoid practices that would harm her patients,

such as using discredited methods like reparative therapy.

A. Plaintiff's Counseling of University Patients Is Not Expressive Activity Subject to First Amendment Constraints.

The First Amendment does not authorize Plaintiff to opt out of treating any University patient whose views or conduct she disapproves of. Plaintiff incorrectly asserts that requiring her to counsel gay patients, or patients who engage in sexual activity outside of marriage, is akin to forcing her to salute the American flag or adorn her license plate with the government's message. *See, e.g.*, Ward Opening Br. at 57; American Center for Law & Justice Br. at 5–6; Foundation of Moral Law Br. at 11; Justice and Freedom Fund Br. at 29. She also suggests that to require her to provide "gay-affirmative therapy" but to prohibit her from providing "reparative therapy" would amount to unconstitutional viewpoint discrimination. *See* Ward Opening Br. at 57.

This Court has made clear, however, that professional service to clients—even service rendered exclusively through the use of words—is not expressive activity. In rejecting an attorney's argument that the First Amendment protected his speech when representing his clients, the Court

held that "an attorney retains no personal First Amendment rights when representing his client in [courtroom] proceedings." *Mezibov v. Allen*, 411 F.3d 712, 721 (6th Cir. 2005). An attorney could not claim compelled speech although he "is ethically bound to make reasonable arguments on behalf of his client, even if the attorney disagrees with them." *Id.* at 719. And he could not cry viewpoint discrimination although he "is bound . . . to make arguments only to the benefit of his client, regardless of what the attorney himself might like to say." *Id.* Ultimately, "in filing motions and advocating for his client in court, [an attorney is] not engaged in free expression; he [is] simply doing his job." *Id.* at 720.

If the state may regulate the manner in which professionals serve their clients, a state university may—indeed, must—ensure that clinical students serve their clients according to the same standards. Further, the need for careful training of would-be counselors is just as great as the need for careful training of would-be lawyers. Plaintiff may agree with her *amicus* that counseling is "one of the softest of the 'soft' sciences," Foundation of Moral Law Br. at 19, but the University reasonably holds the

modern view that counselors should use rigorous methods supported by evidence. *See, e.g.*, Paul L. West & Judith Warchal, *The Role of Evidence-Based Therapy Programs in the Determination of Treatment Effectiveness*, in Gregory G. Walz et al., *Compelling Counseling Interventions* 291 (2009).

Not only is the University responsible for teaching Plaintiff how to counsel clients, but Plaintiff's clinical clients are in fact the University's clients. Plaintiff's practicum took place at a public-university clinic, where she practiced under the license of a public-university professor. R. 14-9 (Practicum Manual) at 138. When counseling patients, then, Plaintiff was a public university's employee, and the First Amendment permits the government to control "speech that owes its existence to a public employee's professional responsibilities"—even where the employee's "duties sometimes require[her] to speak or write." *Garcetti*, 547 U.S. at 421–22.

Indeed, this Court recently rejected a teacher's claim that she had a free speech right to determine which books she did and did not assign to her students. The teacher had no First Amendment protections in this

setting, because "the government, just like a private employer, retains control over what the employer has commissioned or created: the employee's job." *Evans-Marshall v. Bd. of Ed.*, 624 F.3d 332, 340 (6th Cir. 2010) (quotations omitted). Among other things, the Court dismissed the possibility that a teacher could "respond to a principal's insistence that she discuss certain materials by claiming that it improperly compels speech." *Id.* at 341 (emphasis omitted). Rather, "[w]hen a teacher teaches, the school system does not regulate that speech as much as it hires that speech." *Id.* (emphasis, alteration, and quotations omitted).

The University does not cede this control merely because Plaintiff is an unpaid student intern, rather than a salaried professional. In *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007), the Eleventh Circuit held that a state university could prohibit a social-work student from making religious statements during a counseling session that he conducted through his required practicum. *See id.* at 1294. The student's statements were government speech, and "the termination of [the student] from the practicum because of what he said during the private counseling

session [did] not violate the Free Speech Clause." *Id.*

Other courts have reached the same result where graduate students have sought to inject religion into their university-sponsored internships. In *Hennessy v. City of Melrose*, 194 F.3d 237 (1st Cir. 1999), the First Circuit held that a state university could terminate a teaching student after he shared his personal religious views with students in his practicum. Like the student in *Hennessy*, Plaintiff's participation in the University's practicum "closely resembles an employer-employee relationship" because she is there to "master the rudiments of a profession." *Id.* at 245.

B. Even if Plaintiff's Counseling Methods Are Expressive Activity, the University May Regulate them In a Manner Consistent With its Legitimate Pedagogical Goals.

The University would have the right to regulate Plaintiff's counseling even under the more restrictive rules governing regulation of curricular speech. In school-sponsored activities, educators may regulate student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). This latitude necessarily includes the right to require students to say

certain things, even things that the student may find offensive or contrary to their religion.

Thus, in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit rejected the argument that merely "forcing [a college drama student], as part of an acting-class exercise, to say words she finds offensive constitutes compelled speech in violation of the First Amendment." *Id.* at 1290. So long as the educational concern is not pretextual, requiring a drama student "to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees." *Id.* at 1291–92. The dicta cited by Plaintiff from *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989), does not support her position that a school may never require a student to say anything. *See* Ward Opening Br. at 44. Instead, *Poling* involved the speech of a student-government candidate, who necessarily expressed his own views, rather than a student providing services in a client-centered clinic. *See* 872 F.2d at 763.

Whether or not professional counselors are allowed to refer their patients at will, the University is more than entitled to expose its students to a variety of patients with a variety of problems so that its graduates possess a variety of skills. This approach is not radical: an aspiring criminal lawyer must pass Contracts and Torts; a would-be dermatologist must learn pediatrics and psychiatry. *See, e.g.*, *Head v. Bd. of Trustees of the California State Univ.*, No. C 05-05328 WHA, 2006 WL 2355209, at *7 (N.D. Cal. Aug. 14, 2006) (university has "legitimate pedagogical purpose" in "requiring certain speech from students to improve their understanding of other races and cultures so that they could better teach students in those groups"), *aff'd* 315 Fed. Appx. 7 (9th Cir. 2008).

This decision, in any event, belongs to the University. Even in the more peripheral context of extracurricular activities, the Supreme Court has recognized the right of public graduate schools to implement policies that promote "conflict-resolution skills, toleration, and readiness to find common ground." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (citations and quotations omitted). A professional school's academic

objectives "may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts," and they are harder to fulfill "if students wall themselves off from opposing points of view." *Id.* at 2999–3000 (Kennedy, J., concurring). The University's interest is even keener here, where it seeks to regulate a clinical program at the heart of its curriculum.

Plaintiff's conduct, moreover, directly implicates the University's pedagogical interest. Plaintiff claims that her need to make future referrals is "hypothetical," Ward Opening Br. at 1, and her *amici* describe her requested exemption as "modest," Becket Br. at 22. But the conduct that triggers Plaintiff's desire to refer—sexual activity outside of marriage—is practiced by an overwhelming number of potential patients in a university-based clinic. *See* Centers for Disease Control and Prevention, *Sexual and Reproductive Health of Persons Aged 10-24 Years – United States, 2002-2007* 21 (2009), *available at* http://www.cdc.gov/mmwr/pdf/ss/ss5806.pdf ("CDC Report") (nearly 4 in 5 Americans have had sex by age 21). The scope of Plaintiff's refusal to counsel is especially significant given that she is

training to counsel *high-school* students: few of them are married; many are sexually active (and most of those who aren't want to be); even more engage in sexual activity short of actual intercourse.[2]

The University also needed to ensure that Plaintiff learned how to counsel gay and lesbian students, because school counselors face a number of counseling issues related to homosexuality. *See* Diane E. Elze, *Gay, Lesbian, and Bisexual Youths' Perceptions of their High School Environments and Comfort in School*, 25 Children & Schools 225, 232 (2003) (57% of gay/lesbian students sought help from a school professional and 42% sought help directly from a school counselor). Suicide is the leading cause of death among gay and lesbian adolescents, whose rate of suicide doubles or

---

[2] *See* CDC Report, *supra*, at 21 (by age 18, more than half of Americans have had sex); Paula Goodwin et al., *Who Marries When? Age At First Marriage in the United States*, NCHS Data Brief (June 2009), *available at* http://www.cdc.gov/nchs/data/databriefs/db19.pdf (by age 18, only 6% of women and 2% of men are married); Gary J. Gates & Freya L. Sonenstein, *Heterosexual Genital Activity Among Adolescent Males*, 32 Family Planning Perspectives 295, 296 (2000) (discussing rates of oral sex and other sexual activity by males 17–19 who had not had sexual intercourse).

triples that of heterosexual adolescents. *See* Rita M. Marinoble, *Homosexuality: A Blind Spot in the School Mirror*, 1 Prof'l Counseling 4 (1994). And counselors who instead reject or judge such patients can harm them profoundly; GLBT students rejected by trusted authority figures are more likely to attempt suicide. *See* Jaime M. Grant et al., *National Transgender Discrimination Survey Report on Health and Health Care* 16 (2010), *available at* http://transequality.org/PDFs/NTDSReportonHealth_final.pdf.

There is no basis for Plaintiff's assertion that "*Hazelwood* should not apply to universities." Ward Opening Br. at 42. Other courts recognize that "the *Hazelwood* framework is applicable in a university setting." *Axson-Flynn*, 356 F.3d at 1289. Plaintiff claims that this Court's decision in *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), suggests otherwise, but *Kincaid* limited its skepticism of *Hazelwood* to "the context of university *extracurricular* activities." *Axson-Flynn*, 356 F.3d at 1287 n. 6 (emphasis in original) (citing *Kincaid*, 236 F.3d at 346 n.5). In this case, conversely, the curricular nexus could not be tighter: Plaintiff challenges regulation of her conduct in a University-sponsored clinic as part of the University's

professional training program.

Plaintiff is also incorrect to suggest that regulations of curricular speech must be viewpoint neutral. *See* Ward Opening Br. at 44. The Circuits are split on this question, and this Court has not resolved it. *See Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (collecting cases). More importantly, a requirement of viewpoint neutrality would undermine the reasoning of *Hazelwood*, which recognized schools' need to restrain speech that is "biased or prejudiced," would "advocate drug or alcohol use," or would "associate the school with any position other than neutrality on matters of political controversy." 484 U.S. at 271–72.

At the very least, the University must be able to regulate viewpoint when necessary to Plaintiff's training as a counselor. Plaintiff would hardly claim that a public law school cannot compel participants in a criminal-defense clinic to assert their clients' innocence in court; or that the same school must permit defendants' student attorneys to echo arguments made by the prosecution. Nor would Plaintiff claim that a state medical school must permit student interns to call for their patients' death before surgery,

even though that school permits students to express hope that their patients survive. Given that effective counselors "avoid imposing values that are inconsistent with counseling goals," ACA Code of Ethics R. A.4.b (2005), the University is entitled to enforce the same type of regulations in its counseling clinic.

It would be especially harmful to the University's educational mission if, under a misplaced command of viewpoint neutrality, the University was forced to permit its student counselors to provide reparative therapy. Although she told the University that she did not seek a right to practice reparative therapy, Plaintiff now argues in her brief that the University violates the First Amendment 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." Ward Opening Br. at 57. Affirmative therapy is helpful to patients, however, while reparative therapy often harms them. Just as a medical school can prohibit its students from treating hospital patients with leeches and snake oil (even when the

patient seeks such treatment), the University can forbid students from using counseling methods that cause their patients harm.

Indeed, one recent study found not only that reparative therapy was ineffective, but that several patients who received reparative therapy have since attempted suicide, including many without a prior history of suicide attempts. *See, e.g.*, Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumer's Report*, 33 Prof'l Psych. Research & Practice 249, 254–55 (2002). According to the American Psychological Association, "attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation*, 41–42 (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. Unsurprisingly, reparative therapy has been repudiated by virtually every medical and professional organization whose mission even remotely

relates to counseling.[3]

Plaintiff, then, would prevent the University from running a credible graduate program and from protecting its clinical patients. Fortunately, her preferred approach is not the law. Especially when it comes to treating depressed youth, "the Constitution is not a 'suicide pact.'" *Doe v. Boland*, __ F.3d __, 2011 WL 148267, at *4 (6th Cir. Jan. 19, 2011).

II. The University's Application of Professional Standards to Plaintiff's Clinical Counseling Did Not Violate the Free Exercise Clause.

For similar reasons, the Free Exercise Clause does not prevent the University from requiring its students to counsel clinical patients in

---

[3] *See, e.g.*, *AMA Policy Regarding Sexual Orientation* ¶ H-160.991(1)(c), http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml (last visited Feb. 10, 2011); American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation*, (May 2000), http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx; Just the Facts Coalition, *Just the Facts About Sexual Orientation and Youth* 5 (2008), *available at* http://www.naswdc.org/pressroom/media/justthefacts.pdf (joint statement of multiple organizations).

accordance with professional standards. First, even if the proper counseling of patients conflicted with Plaintiff's religious beliefs, the Free Exercise Clause does not require the University to accommodate religious objections to neutral, generally-applicable laws, including the graduate counseling curriculum at issue here. Second, even if the University were shown to have a system of individualized exemptions, its refusal to grant Plaintiff's requested accommodation was justified by compelling interests in protecting clients and avoiding violations of the Establishment Clause.

A. Plaintiff Was Subject to a Neutral, Generally-Applicable Curriculum.

In requiring Plaintiff to adhere to professional counseling standards and to treat all comers to the University clinic, the University complied with well-settled Free Exercise rules. The Supreme Court has refused to hold "that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

Plaintiff does not dispute that the Free Exercise Clause permits the University to implement a general requirement that she complete a

practicum and that she counsel students according to specific methods. Nor could she. In *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177 (6th Cir. 1993), this Court upheld a state university's refusal to graduate a veterinary student who refused to operate on live, healthy animals. *See id.* at 181. Although the university's curricular requirement violated the plaintiff's religious beliefs, the Court held that it advanced the University's "purely pedagogical purpose" and thus did not target the plaintiff's religion. *Id.* at 179. The same reasoning applies here.

Seeking to avoid this result, Plaintiff claims that the University's decision is subject to strict scrutiny because the decision was made pursuant to a system of "individualized exemptions." *Smith*, 494 U.S. at 884. While the ACA may permit practicing professionals to refer patients under certain circumstances, *see* Ward Opening Br. at 41–42, the University is entitled to require its students to counsel more broadly, so that its training program prepares would-be professionals for a range of situations. *See* Section I.B.

Indeed, one faculty member testified that she was unaware of any

student—over a span of nearly three decades—who had refused to treat particular clinical patients. *See* R. 82-4 (Ametrano Dep.) at 7:22–23, 45: 2–6. The record reflects only one instance in which a student was permitted to refer a client elsewhere: for a limited time, a student grieving over the loss of a loved one was not assigned clients who themselves needed counseling for grief. R. 139 (Dist. Ct. Order) at 30. This single, temporary, specific referral hardly establishes the system-wide exemption scheme on which Plaintiff's argument depends.

Likewise, the so-called "theological bout" at Plaintiff's formal hearing does not suggest that the University targeted her because of her religious beliefs. A law is religiously neutral unless it "target[s] religious beliefs" or "restrict[s] practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). There is a difference between targeting religious beliefs, on the one hand, and inquiring about the conduct-based consequences of one's religious beliefs, on the other. *See, e.g.*, *In re Marriage of Epperson*, 107 P.3d 1268, 1275 (Mont. 2005) (custody decision reflects that "the family regularly shunned people

for 'minor transgressions' such as reciting the rosary or saying grace at their dinner table in an unacceptable manner"); *Waites v. Waites* 567 S.W.2d 326, 333 (Mo. 1978) ("Inquiry into religious beliefs per se is impermissible; inquiry into matters of child development as impinged upon by religious convictions is permissible . . . .").

The University's inquiries reflect the latter. It was Plaintiff who injected religion into the discussion; when asked whether she would refrain from imposing her own views on her clients, Plaintiff refused and declared that she would not counsel on "any behavior that 'goes against what the Bible says.'" R. 139 (Dist. Ct. Order) at 4. University officials attempted to focus the conversation on Plaintiff's conduct, and Plaintiff circled back to religion. *See, e.g.*, R. 1-5 (Hearing Tr.) at 23:11–13 ("AMETRANO: So, would you be able to help them explore the option of going with their sexual orientation and being gay? Would you be able to help them with that side of it? WARD: Because if my religious beliefs, I would not be able to affirm . . ."") (ellipses in original); *id.* at 23:16–19 ("FRANCIS: So, I . . . I . . . I need to make sure about something here. So,

you're unwilling to do that? WARD: I am unable to do that because of my religious beliefs and my convictions, I cannot affirm homosexual behavior.").

In sum, Plaintiff invoked religion and only religion as the basis of her noncompliance. She went so far as to declare: "[W]ho's the [American Counseling Association] to tell me what to do. I answer to a higher power and I'm not selling out God." *Id.* at 3:4–5 (quotations omitted). In light of Plaintiff's pronouncements, the University was entitled to assess whether and to what extent her religious beliefs would interfere with her clinical work.

B. *Even if the University Had a System of Individualized Exemptions, the University's Refusal To Grant Plaintiff's Requested Exemption Was Justified by Compelling Interests.*

Even if the Court were to conclude that the University had a practice of granting individualized exemptions, rather than relying on a generally-applicable policy that required students to serve all who seek counsel, the expulsion of Plaintiff was justified by compelling government interests. A law or policy that is not neutral and generally applicable is permissible if it

furthers "a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. Here, the University had two such interests.

First, the University had a compelling interest in ensuring that Plaintiff did not harm her patients by placing her religious beliefs above their therapeutic needs. Plaintiff and her *amici* attempt to downplay the University's interest by describing her desired exemption as issue-based, not client-based. People and their problems, however, do not fit into neat boxes: "A client may seek counseling for depression, or issues with their parents, and end up discussing a homosexual relationship." R. 139 (Dist. Ct. Order) at 26.

Moreover, if Plaintiff did not learn that a client needed guidance on non-marital sexual issues until well into the counseling relationship, she would need to refer the client in the midst of therapy. Mid-counseling referrals are bad for clients, especially when they arise from the counselor's disapproval of the patient's choices. *See, e.g.*, Sharon E. Cheston, *Making Effective Referrals* 42–58 (1991) (counselor's decision to terminate

relationship may cause client to experience feelings of rejection, betrayal, fear, anxiety, and depression); *id.* at 89 ("In many instances, the client has just begun to open up wounds and address concerns that he may have long ignored. In this raw state, referral is not desirable."). As discussed above in Section I.B, GLBT students are especially vulnerable to emotional harm if they interpret their counselor's decision to refer as rejection. *See* Grant, *supra*, at 16.

The Fifth Circuit identified these concerns in rejecting a similar claim brought by a counselor under Title VII of the Civil Rights Act. *See Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001). The plaintiff, who refused to counsel on topics (including homosexual relationships) that conflicted with her religious beliefs, sought an accommodation that would "excuse her from counseling on all subjects of concern at all times." *Id.* at 500. The court observed that not only would other counselors have "to assume a disproportionate workload," but also that "substituting counselors would have a potential negative impact on those being counseled." *Id.* at 501 & n.15.

The Supreme Court has recognized that "[s]tates have a compelling interest in the practice of professions within their boundaries . . . and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). This interest is especially compelling where, as here, the conduct relates to the health and safety of patients. *See, e.g.*, *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (university's "interest in the health and well-being of its students" is "compelling" and justifies a university health insurance program).

Second, the University had a compelling interest in avoiding the Establishment Clause concerns that would accompany the blanket opt-out that Plaintiff desires. *See, e.g.*, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) (government had compelling interest in "compliance with the Establishment Clause"). Although the government may accommodate religion in some cases, the Establishment Clause provides that "an accommodation must be measured so that it does not

override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). For instance, in the context of prisons, the Establishment Clause may prohibit accommodations that are "excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution." *Id.* at 726.

The sweeping accommodation sought by Plaintiff would inevitably impose excessive burdens on the University's counseling clinic and its patients. As discussed above, referrals, especially mid-course referrals, can harm patients, especially gay and lesbian patients, and it is not always possible to identify values conflicts at the outset. Moreover, because her values conflict with any patient actually (or potentially) engaged in sexual activity outside of marriage, the scope of Plaintiff's desired exemption is immense.

Plaintiff admits that the number and type of values conflicts "is limited only by the imagination." Ward Opening Br. at 47. While Plaintiff is free to enroll in a university willing to uproot its clinic without limit, the University may train its students to put their personal views aside.

Conclusion

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Gregory M. Lipper

Ayesha N. Khan
Gregory M. Lipper
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street, NW
Suite 850, East Tower
Washington, DC 20005
(202) 466-3234 (phone)
(202) 466-2587 (fax)
khan@au.org | lipper@au.org

February 11, 2011

Certificate of Compliance

I certify that this brief was prepared in Microsoft Word, Book Antiqua, 14 point font. According to the word count function, and in accordance with the computation rules set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 6,013 words.

/s/ Gregory M. Lipper

Gregory M. Lipper

Certificate of Service

I certify that on February 11, 2011, a copy of this brief was served on all parties through the Court's electronic filing system.

/s/ Gregory M. Lipper

Gregory M. Lipper