BENJAMIN W. BULL, AZ Bar No. 009940 (*Of Counsel*)
JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 Fax
jtedesco@telladf.org

DAVID A. FRENCH, TN Bar No. 16692, KY Bar No. 86986
ALLIANCE DEFENSE FUND
12 Public Square
Columbia, TN 38401
(931) 490-0591; (931) 490-7989 Fax
dfrench@telladf.org

JEFFREY A. SHAFER, IL Bar No. 6230713
ALLIANCE DEFENSE FUND
801 G Street N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690; (202) 347-3622 Fax
jshafer@telladf.org

STEVEN M. JENTZEN, MI Bar No. P29391
ATTORNEY AT LAW
106 S. Washington
Ypsilanti, MI 48197
(734) 482-5466; (734) 482-2440 Fax
smj@jentzenlaw.com
Local Counsel

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Julea Ward, Plaintiff, vs. **Roy Wilbanks**, *et al.*, Defendants.	Case No. 2:09-cv-11237-GCS-PJK Judge George Caram Steeh **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Comes now Plaintiff, Julea Ward, by and through counsel, and, pursuant to Local Rule 7.1 and Federal Rule of Civil Procedure 56, hereby respectfully moves this Court for summary judgment on all causes of action in her Verified Complaint. There are no genuine issues of material fact, and Plaintiff is entitled to judgment as a matter of law on these causes of action.

In terms of relief, Plaintiff requests that the Court grant an injunction prohibiting Defendants, their officers, agents, employees, and all other persons acting in active concert with them, from enforcing their 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," due to their facial overbreadth, vagueness, and content and viewpoint-based discrimination. Plaintiff also requests that a declaratory judgment be entered declaring these policies facially unconstitutional.

Further, Plaintiff respectfully requests that this Court grant an injunction prohibiting Defendants, their officers, agents, employees, and all other persons acting in active concert with them, from enforcing their policies prohibiting the "[i]nability to tolerate different points of view," "imposing values that are inconsistent with counseling goals," "discrimination based on . . . sexual orientation," and "[u]nethical, threatening or unprofessional conduct," against Mrs. Ward to punish and retaliate against her based on her religious beliefs and expression regarding homosexual behavior, and ordering Defendants to immediately reinstate Mrs. Ward into EMU's School Counseling Program, and to expunge all evidence of their unlawful discipline and

dismissal from her educational records. Plaintiff also requests that a declaratory judgment be entered declaring these policies unconstitutional as applied to Mrs. Ward.

In support of her motion, Mrs. Ward relies on this Motion, the Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed contemporaneously herewith, and the Exhibits attached to this Motion. Pursuant to ECF Rule R18(a), Plaintiff has only attached exhibits that have not previously been filed with the Court. Plaintiff does, however, list the previously filed exhibits that she relies on in a separate section of the Index of Exhibits.

In the memorandum of law in support of this motion, Plaintiff cites the exhibits attached to this motion in the format ("Ex. __ at __"). Plaintiff cites all previously filed documents in the format (Doc. # _, [Name of Document], Ex. __ at __).

Further, several of the exhibits attached to this motion are covered by the protective order governing this case, and thus are filed under seal. To the extent the memorandum of law reflects the content of these confidential exhibits, those sections have been redacted from the publicly viewable version. Plaintiff is contemporaneously filing an unredacted version of the memorandum under seal as well, as the final exhibit to her summary judgment motion.

Pursuant to Local Rule 7.1(a), Plaintiff certifies that a good faith attempt was made to obtain concurrence from the Defendants in the relief sought. Defendants' counsel did not concur in the requested relief.

Respectfully submitted this the 2nd day of February, 2010.

By: s/Jeremy D. Tedesco

BENJAMIN W. BULL, AZ Bar No. 009940 (*Of Counsel*)
JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 Fax
jtedesco@telladf.org

DAVID A. FRENCH, TN Bar No. 16692, KY Bar No. 86986
ALLIANCE DEFENSE FUND
12 Public Square
Columbia, TN 38401
(931) 490-0591; (931) 490-7989 Fax
dfrench@telladf.org

STEVEN M. JENTZEN, MI Bar No. P29391
ATTORNEY AT LAW
106 S. Washington
Ypsilanti, MI 48197
(734) 482-5466; (734) 482-2440 Fax
smj@jentzenlaw.com
Local Counsel

Attorneys for Plaintiff

JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444–0020; (480) 444–0028 Fax
jtedesco@telladf.org

DAVID A. FRENCH, TN Bar No. 16692, KY Bar No. 86986
ALLIANCE DEFENSE FUND
12 Public Square
Columbia, TN 38401
(931) 490–0591; (931) 490–7989 Fax
dfrench@telladf.org

JEFFREY A. SHAFER, IL Bar No. 6230713
ALLIANCE DEFENSE FUND
801 G Street N.W., Suite 509
Washington, D.C. 20001
(202) 393–8690; (202) 347–3622 Fax
jshafer@telladf.org

STEVEN M. JENTZEN, MI Bar No. P29391
ATTORNEY AT LAW
106 S. Washington
Ypsilanti, MI 48197
(734) 482–5466; (734) 482–2440 Fax
smj@jentzenlaw.com
Local Counsel

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Julea Ward, Plaintiff, vs. **Roy Wilbanks**, *et al*., Defendants.	Case No. 2:09-cv-11237-GCS-PJK Judge George Caram Steeh **PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES vi

CONTROLLING AUTHORITIES viii

I. Introduction and Summary of Material Facts 1

II. Standard of Review 6

III. Argument 7

A. Defendants' Disciplinary Policies Are Facially Unconstitutional Because They Are Overbroad and Vague. 7

1. Defendants' policies are facially overbroad. 8

2. Defendants' policies are facially vague. 12

B. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights Under the Free Exercise Clause. 13

1. Defendants' impermissibly punished Mrs. Ward for her religious beliefs. 13

2. Defendants' policies are not neutral or generally applicable. 15

C. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's First Amendment Right To Be Free Of Compelled Speech. 22

D. Defendants' Application Of Their Disciplinary Policies Violates Mrs. Ward's Right To Be Free From Retaliation Based On Her Protected Expression. 25

1. Mrs. Ward engaged in protected expression. 25

2. Defendants took adverse action against Mrs. Ward. 26

3. Defendants were motivated by Mrs. Ward's protected expression. 26

E. Defendants Applied Their Disciplinary Policies Against Mrs. Ward In A Viewpoint Discriminatory And Unreasonable Manner. 27

F. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights under the Establishment Clause. 28

G. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights under the Equal Protection Clause. 29

IV. CONCLUSION 30

TABLE OF AUTHORITIES

***Cases*:**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)....6

Arnett v. Myers,
281 F.3d 552 (6th Cir. 2002) 26

Bair v. Shippensburg University,
280 F. Supp. 2d 357 (M.D. Pa. 2003)....7

Baird v. State Bar of Arizona,
401 U.S. 1 (1971)....5

Braunfeld v. Brown,
366 U.S. 599 (1961)....14

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 8, 10

Cantwell v. Connecticut,
310 U.S. 296 (1940)....13, 14

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995)....26

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 15, 21, 22

City of Chicago v. Morales,
527 U.S. 41 (1999)....12

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985)....29, 30

*Cohen v. San Bernardino Valley Coll*ege,
92 F.3d 968 (9th Cir. 1996)....7

College Republicans at San Francisco State University v. Reed,
523 F. Supp. 2d 1005 (N.D. Cal. 2007)....7

County of Allegheny v. ACLU,
492 U.S. 573 (1989)....................28

Dambrot v. Central Michigan University,
839 F. Supp. 477 (E.D. Mich. 1993)....................13

Dambrot v. Central Michigan University,
55 F.3d 117 (6th Cir. 1995)....................6, 7, 12

DeJohn v. Temple University,
537 F.3d 301 (3d Cir. 2008)....................7

Doe v. University of Michigan,
721 F. Supp. 852 (E.D. Mich. 1989)....................6, 7, 8, 9, 13

Employment Division Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990)....................13, 14, 15, 26

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995)....................22, 25

Keyishian v. Board of Regents of University of New York,
385 U.S. 589 (1967)....................7, 8

Kincaid v. Gibson,
236 F.3d 342 (6th Cir. 2001)....................27

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993)....................27

Larson v. Valente,
456 U.S. 228 (1982)....................28

Lynch v. Donnelly,
465 U.S. 668 (1984)....................28

McDaniel v. Paty,
435 U.S. 618 (1978)....................14, 29

NAACP v. Button,
371 U.S. 415 (1963)....................8, 26

Plyler v. Doe,
457 U.S. 202 (1982)....................30

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992)....................7

Rosenberger v. Rector & Visitors of University of Virginia,
515 U.S. 819 (1995)....................27, 29

Saxe v. State College Area School District,
240 F.3d 200 (3d Cir. 2001)....................7

Sherbert v. Verner,
374 U.S. 398 (1963)....................14

Thaddeus-X v. Blatter,
175 F.3d 378 (6th Cir. 1999) 25, 26

UWM Post, Inc. v. Board of Regents of University of Wisconsin System,
774 F. Supp. 1163 (E.D. Wis. 1991) 7

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943)....................5, 6, 25

Widmar v. Vincent,
454 U.S. 263 (1981)....................27

Wooley v. Maynard,
430 U.S. 705 (1977)....................22, 24, 25, 26

***Statutes and Rules*:**

Fed. R. Civ. P. 56(c) 6

U.S. Const. amend. I 13

STATEMENT OF THE ISSUES

Pursuant to Local Rule 7.1(c)(2), Plaintiff hereby provides this concise statement of the issues presented by Plaintiff's Motion for Summary Judgment:

1. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants' 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 facially overbroad, vague, and content and viewpoint discriminatory.
2. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants' dismissal of Mrs. Ward was based on Defendants' targeting, denigration, and cross-examination of her religious beliefs regarding homosexual behavior, and where Defendants' dismissal occurred pursuant to policies that are not neutral or generally applicable.
3. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants conditioned Mrs. Ward's ability to obtain a degree on her willingness to change, abandon, or express a message contrary to, her fundamental religious beliefs.
4. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants retaliated against Mrs. Ward by initiating disciplinary proceedings against her and dismissing her from the counseling program, solely based

on her protected religious expression regarding homosexual behavior.

5. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants discriminated against Mrs. Ward's protected religious expression regarding homosexual behavior in a viewpoint discriminatory and unreasonable manner.
6. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants targeted, attacked, and cross-examined Mrs. Ward's religious beliefs in a manner that lacked neutrality toward religion and manifested hostility toward Mrs. Ward's particular religious beliefs.
7. Whether Plaintiff should be granted summary judgment where the undisputed facts show that Defendants treated Mrs. Ward differently than similarly situated students in a manner that abridged her fundamental rights to free speech and free exercise of religion.

CONTROLLING AUTHORITIES

Pursuant to Local Rule 7.1(c)(2), Plaintiff hereby provides a list of the controlling or most appropriate authority for the relief sought:

Baird v. State Bar of Arizona, 401 U.S. 1 (1971)

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Dambrot v. Central Michigan University, 55 F.3d 117 (6th Cir. 1995)

Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)

Larson v. Valente, 456 U.S. 228 (1982)

Lynch v. Donnelly, 465 U.S. 668 (1984)

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995)

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

Wooley v. Maynard, 430 U.S. 705 (1977)

I. Introduction and Summary of Material Facts[1]

Defendants—Eastern Michigan University (EMU) officials—have made it clear to Plaintiff Julea Ward why they dismissed her from EMU's counseling program: their disdain for her religious beliefs regarding homosexual behavior. They cannot seriously dispute this. Indeed, they charged Mrs. Ward with violating an EMU policy that prohibits the "[i]nability to tolerate different points of view" (Compl. Ex. 2 at 18), highlighting that this case is about a clash of views regarding homosexual behavior, and that her unpopular view resulted in her dismissal.

This clash of views, and Defendants' disdain for Mrs. Ward's views, was on full display at the formal review meeting that culminated in Mrs. Ward's dismissal. (Compl. Ex. 3.) At that meeting, Defendants questioned, denigrated, and challenged Mrs. Ward's religious beliefs. Indeed, Defendant Francis engaged Mrs. Ward in a self-styled "theological bout" where he cross-examined her religious beliefs regarding the issue that is at the core of this case:

> 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

[1] The undisputed facts included in this Summary, and throughout this brief, are highly relevant to this Court's determination of the Defendants' qualified immunity motion. Pursuant to her Fed. R. Civ. P. 56(f) motion filed in relation to the summary judgment portion of Defendants' qualified immunity motion (Doc. # 52), Plaintiff respectfully requests that the Court consider the discovery materials attached to this motion, and the undisputed facts gleaned from them, if it decides to rule on Defendants' request for summary judgment based on qualified immunity, as they bear directly on the issues raised in that motion.

> 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.

(*Id*. Ex. 3 at 49–51).

In addition to this "theological bout," Defendants also, among other things:

- reiterated that "professional counseling was not the place where [Mrs. Ward's] attitudes would be condoned," (*id*. Ex. 3 at 24);
- stated that Mrs. Ward's Christian faith would "jeopardize [a] client's sense of safety and comfort," (*id*. Ex. 3 at 27–28);
- questioned whether she believed that "homosexuality [was] a choice"(*id*. Ex. 3 at 39);
- inquired whether Mrs. Ward viewed her "brand of Christianity as superior" to that of other Christians who may not agree with her, like Defendant Francis (*id*. Ex. 3 at 49).

Two days after the formal review meeting, Defendants notified Mrs. Ward by letter that the review committee had unanimously dismissed her from the program. (*Id*. Ex. 5.) The letter identified her religious values as the source of the controversy, explaining that she was dismissed for refusing to change her "stance" despite being notified of the "conflict between [her] values that motivate [her] behavior and those behaviors expected by the profession." (*Id*. (emphasis added).)[2]

Even before Defendants' Star Chamber-like treatment of Mrs. Ward at the formal review,

[2] The first draft of the dismissal letter was more explicit, as it expressly referenced Mrs. Ward's "personal values and religious beliefs" and stated that she refused to change her "stance" despite being notified of the "conflict between [her] values and those of the profession." (Ex. 20 at 184.)

they had targeted Mrs. Ward's religious beliefs. At the informal review conference (the first step in EMU's disciplinary process), Defendants offered her a "remediation plan" aimed at helping her see "the error of her ways." (Compl. ¶¶ 83–84.) During this conference, Defendant Dugger told Mrs. Ward three separate times that the remediation plan had nothing to do with her lacking competence. (Ex. 19 at 177 ("[Mrs. 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").) Rather, as Defendant Dugger stated at the formal review, the remediation plan was aimed at changing her 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.

(Compl. Ex. 3 at 29 (emphasis added).) And Defendants advised Mrs. Ward that they initiated these proceedings in part based on "concern[s]" with "statements" she made in and out of class throughout her enrollment in EMU's program, statements expressing her religious beliefs regarding homosexual behavior. (Ex. 14 at 108; Compl. Ex. 2 at 19.)[3]

Authorizing Defendants' astonishing mistreatment of Mrs. Ward are the impossibly vague and overbroad policies she allegedly violated. Their dismissal letter claims Mrs. Ward violated two policies: "'Counselors . . . avoid imposing values that are inconsistent with counseling goals,' . . . and 'Counselors do not condone or engage in discrimination based on age, culture . . . sexual orien-

3 [redacted]

tation . . . .'" (Compl. Ex. 5.)[4] Defendants admit that their "imposing values" policy[5] forbids not just forcing values on a client (Ex. 23 at 231, Callaway Dep. 51:6–21), but also "judgmental" thoughts as a counselor 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."

(Ex. 25 at 262–63, Francis Dep. 66:17–67:9 (emphasis added).)

Defendants also admit that their nondiscrimination policy[6]—which prohibits both engaging in and "condon[ing]" discrimination—applies to both "treat[ing] [a person] differently" and "view-

---

[4] Mrs. Ward also challenges two other EMU policies Defendants enforced against her. She challenges a policy that prohibits the "[i]nability to tolerate different points of view" facially and as-applied. (Compl. Ex. 2 at 18.) She also challenges a policy prohibiting "[u]nethical, threatening, or unprofessional conduct" as-applied. (*Id.*) Defendants' Counseling Handbook describes each of these policies (including the ACA Code of Ethics) as "University policies and rules" under a section titled "Departmental Student Disciplinary Policy." (Doc. # 14, Defs.' MPI Resp. Ex. 5 at 13.)

[5] Defendants' claim that Mrs. Ward violated this policy makes no sense. Imposing connotes force or coercion, yet here Mrs. Ward never met with the potential client. (Doc. # 9, Pl.'s MPI Ex. 3 ¶¶ 46–48; (Ex. 23 at 219-20, Callaway Dep. 31:16–32:4 (at EMU's counseling clinic, the counselor-client relationship begins "[a]t the first meeting").) Defendants' application of this policy to Mrs. Ward, standing alone, demonstrates its vagueness and overbreadth.

[6] Mrs. Ward's reassignment of the potential Practicum client (at Defendant Callaway's direction) who was seeking counsel on a homosexual relationship was not discriminatory. First, as Mrs. Ward told Defendants repeatedly, she would counsel a homosexual client on any issue that does not require her to affirm or validate homosexual relationships or behavior. (Compl. Ex. 3 at 31; Ex. 4 at 63; Ex. 6 at 69.) Second, Mrs. Ward's religious beliefs apply equally to heterosexual and homosexual relationships, meaning she would not provide affirmative counsel regarding any extra-marital sexual relationship (whether heterosexual or homosexual). (Compl. Ex. 3 at 47–48.) Third, as discussed *infra* Part III.B.2, Defendants expressly teach that values-based referrals are permissible, including ones involving gay, lesbian, and bisexual issues.

ing [a person] somehow negatively." (Ex. 26 at 289, Ametrano Dep. 60:4–11.) The prohibition on "condoning" discrimination plainly implicates the spoken word (Ex. 25 at 278, Francis Dep. 103:22–25 (condone means to "promote and/or support behaviors or ways of providing counseling that are discriminatory against a class of people, or a different type of people")), and even covers "remaining silent" in the face of discrimination (Ex. 23 at 225, Callaway Dep. 42:2–7). Further, EMU's nondiscrimination policy reaches every topic and belief, controversial or not. Indeed, not only does it prohibit every conceivable form of "discrimination," but its prohibition of discrimination based on "culture" applies to "the way we see things, the way we do things, what seems normal to us." (*Id.* 42:17–25.) Unbelievably, under EMU's policy a student could conceivably be punished for "condoning" discrimination not just for agreeing with the "discriminatory"—yet protected—statements of another, but also *for remaining silent when such statements are made*.

Defendants' policies, and their actions taken pursuant to them, violate core First Amendment freedoms. The Supreme Court has long held that the state cannot impose belief-based litmus tests on its citizens, including litmus tests that prevent citizens from entering their chosen profession. As the Supreme Court said in overturning the State Bar of Arizona's decision to exclude a prospective member based on her unpopular communist beliefs,

> 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). And in 1943, the Supreme Court applied this fundamental constitutional principle in the academic setting by striking down a state law that required students to salute the flag and recite the Pledge of Allegiance to stay in

school. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court memorably declared that if there is any "fixed star" in the "constitutional constellation," it is that no government official may "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." *Id.* at 642. This decision controls this case and condemns Defendants' unconstitutional actions against Mrs. Ward.

This Court and the Sixth Circuit have repeatedly struck down as vague and overbroad policies similar to (yet narrower than) Defendants' policies that authorized their unconstitutional acts.[7] The facts highlighted above demonstrate that Defendants' policies are mind-bogglingly more vague and overbroad than the policies stricken in these cases, as they reach not just what you say, but what you believe. One need look no further than Defendants' interrogation/cross-examination of Mrs. Ward's religious beliefs at the formal review meeting to witness the boundless scope of their policies.

II. Standard of Review

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A genuine issue of material fact exists if there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in the moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Here, the undisputed facts highlighted in this brief demonstrate that Mrs. Ward is entitled to judgment as a matter of law.

[7] *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) (striking down overbroad 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"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182–85 (6th Cir. 1995) (striking down as facially overbroad and vague university's "discriminatory harassment" policy prohibiting "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").

III. Argument

A. Defendants' Disciplinary Policies Are Facially Unconstitutional Because They Are Overbroad and Vague.[8]

As discussed before,[9] university speech codes—an all too common tool used by public universities over the past 25 years to silence unpopular or compel favored speech—have **never** been upheld by the federal courts. *See DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (permanently enjoining overbroad sexual harassment policy); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (finding college sexual harassment policy vague); *Dambrot*, 55 F.3d 1177 (enjoining overbroad and vague "discriminatory harassment" policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (striking down university system speech code); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of overbroad "racism and cultural diversity" policy); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (policy prohibiting discriminatory epithets was overbroad and vague); *Doe*, 721 F. Supp. at 863 (enjoining overbroad and vague discrimination and harassment speech code); *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). Such codes are routinely struck down facially because their overbreadth and vagueness imperil protected expression in a setting where the exercise of First Amendment freedoms is essential both individually, and nationally. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967)

---

[8] In addition, Defendants' policies are facially unconstitutional because they regulate the content and viewpoint of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992); *Dambrot*, 55 F.3d at 1184–85. Plaintiff briefed this fatal constitutional flaw in her Motion for Judgment on the Pleadings (Doc. # 53, Pl.'s MJP Mem. 16–18), so she does not reiterate it here.

[9] (Doc. # 9, Pl.'s MPI Mem. 14–18; Doc. # 51, Pl.'s QI Resp. 10–12; Doc. # 53, Pl.'s MJP Mem. 3–16.)

("The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."). The EMU policies at issue here contain classic speech code language and are breathtakingly overbroad and vague.

1. Defendants' policies are facially overbroad.

Under elementary principles of law, statutes 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 those 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 is overbroad if it "sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." *Doe*, 721 F. Supp. at 864 (citing *Broadrick*, 413 U.S. at 612).

Discovery has proven the unbelievable scope of Defendants' policies. Again, the "imposing values" policy reaches not just forcing values on a client, but also "judgmental" thoughts in your head before meeting a client. (Ex. 25 at 262–63, Francis Dep. 66:17–67:9.) And Defendants' nondiscrimination policy—which prohibits both engaging in and "condon[ing]" discrimination—reaches "viewing [a person] negatively" (Ex. 26 at 289, Ametrano Dep. 60:4–11), "remaining silent" in the face of discrimination (Ex. 23 at 225, Callaway Dep. 42:2–7), and agreeing with or believing something "discriminatory":

> Q. . . . [T]he [nondiscrimination] provision states that counselors cannot condone any of these forms of discrimination. What does condone mean, within the context of this provision?
> A. To agree and/or promote.
> Q. Can you give me an example of improper condoning of discrimination?
> A. That I would believe that persons involved in an interracial marriage to be improper, immoral, and contrary to the human condition.
> Q. So if you believe that, that's an improper condoning of discrimination under

this policy?
A. Yes.

(Ex. 25 at 253–54, Francis Dep. 55:25–56:12.) Further, since this policy prohibits discrimination based on "the way we see things, the way we do things, what seems normal to us" (Ex. 23 at 225, Callaway Dep. 42:17–25), its scope is boundless. Throwing more gas on the overbreadth fire, Defendants adopted (and applied to Mrs. Ward) a policy prohibiting the "[i]nability to tolerate different points of view." (Compl. Ex. 2 at 18; Doc. # 14, Defs.' MPI Resp. Ex. 5 at 14.) What is "intolerance" of a different view? Verbally disagreeing with it? The very fact that Defendants could apply this policy in such a manner (and did so as to Mrs. Ward) proves its overbreadth.

The overbreadth of Defendants' policies can also be seen in how they interpret and enforce them. For example, in *Doe*, 721 F. Supp. at 865–66, this Court enjoined a policy that prohibited "discriminatory harassment" based on sex and sexual orientation when a university investigated a student because he "openly stated his belief that homosexuality was a disease" and that he had "been counseling several of his gay patients" to change their sexual orientation.[10] Although the university acquitted the student of the harassment charges, the simple fact that it investigated such clearly protected conduct proved the policy's impermissible sweep. *Id.*

Here, Defendants have enforced the policies at issue against students, including Mrs. Ward, based on their protected expression in and out of class. In addition to the unabashed denigration and cross-examination of Mrs. Ward's religious beliefs at the formal review meeting (*see supra* Part I), Defendants also expressly told Mrs. Ward she was being punished in part because of her expressions of her religious beliefs regarding homosexual behavior in and out of class. (Compl.

[10] Of course, Mrs. Ward never stated that homosexuality is a disease, nor did she counsel, or intend to counsel, clients to change their homosexual orientation. (Doc. # 9, Pl.'s MPI Ex. 3 ¶ 48.)

Ex. 2 at 19 (identifying "your 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" as "of concern").)[11] And again, Defendants raised as "concerns" discussions in COUN 571 regarding Mrs. Ward's religious beliefs regarding homosexual behavior that led Dr. Callaway to talk to her about "homophobia" and to warn her that she should "carefully consider whether the EMU counseling program was a good fit for [her]." (Ex. 14 at 108.)[12]

As in *Doe*, Defendants' application of its policies to Mrs. Ward would not be possible absent their inherent overbreadth, as they dismissed her for following her convictions and not meeting with a potential client who was seeking counsel regarding a homosexual relationship. (Compl. ¶ 72; Ans. ¶ 71; Compl. Ex. 5.) So, Mrs. Ward *did not even speak to the potential client*, yet EMU concluded that she violated its policies against "condon[ing] . . . discrimination" and "imposing values." (Compl. Ex. 5.) If the university in *Doe* violated the First Amendment by simply *investigating* a graduate student who *actually counseled* clients to change their sexual orientation, then EMU certainly did so when it *dismissed* Mrs. Ward for providing no counsel at all.

[11] Defendants cannot dispute that the "concerning" statements they cite constituted Mrs. Ward's religious views regarding homosexual behavior. (Compl. ¶ 49; Ans. ¶ 49; Ex. 28 at 304-05, Ward Dep. 104:10–105:1 (in individual supervision "we had a whole conversation about my Christian views and her telling me that they were incompatible with the profession").)

[12] This evidence amply refutes Defendants' repeated claims that Mrs. Ward freely expressed her religious views on homosexual behavior in class without punishment. That claim is obviously untrue when Defendants identified her religious expression on the issue in and out of class as one of the reasons she was being disciplined. Indeed, as Mrs. Ward testified: "I certainly did not continue to express my opinion once, you know, we would have a conversation and I would see that this was not going anywhere, and [the] professor seemed really disagreeable and kind of shut down my point of view, no, I didn't continue. I was silent." (Ex. 28 at 308, Ward Dep. 122:1–9.) This kind of chill on free speech is the quintessential First Amendment injury inflicted by facially unconstitutional speech codes. *See Broadrick*, 413 U.S. at 630 (recognizing that "overbreadth review is a necessary means of preventing a 'chilling effect' on protected expression").

Defendants have similarly punished other students for in-class expression that differed from EMU's point of view. For instance, they punished Melissa Henderson for a difference of opinion with Dr. Callaway regarding race. (Doc. # 17, Pl.'s MPI Reply Ex. 4.) Ms. Henderson's expression of these contrary views led to an informal review conference and a subsequent remediation plan which contained an express limit on Ms. Henderson's speech:

> I suggested that your quick objections in class might reflect reliance on assimilation and that, when ideas presented do not fit in your current cognitive schema, you may reject them outright rather than explore whether you need to accommodate the new ideas by changing your cognitive schemas. Dr. Callaway suggested that you take a week to reflect upon ideas that initially seem incorrect before you assertively challenge them in class. To assist this process, Dr. Callaway suggested that you may benefit from using the strategies for disconfirming unconscious racism that are presented in the Ridley text used for the COUN 571 class.

(*Id.* at 35 (emphasis added).) Unsurprisingly, after being subjected to discipline and the above Orwellian limit on her speech, Ms. Henderson self-censored her speech. (*Id.* at 32 ¶¶ 37–38.) Given the text of Defendants' policies, testimony regarding what they mean, and Defendants' past enforcement of them, there can be no doubt that they are facially overbroad.

2. Defendants' policies are facially vague.

The vagueness doctrine prohibits laws that fail to provide fair warning of prohibited conduct and that authorize and encourage arbitrary and discriminatory enforcement by lacking enforcement guidelines. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Defendants' policies are void for vagueness 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. Mrs. Ward already detailed how Defendants' policies should be stricken under various Supreme Court and Sixth Circuit vagueness decisions in her motion for judgment on the pleadings. (Doc. # 53, Pl.'s MJP Mem. 11–16.)

In addition, discovery has confirmed the vagueness of Defendants' policies. Defendants self-diagnosed the constitutional problem by describing some of the policies' terms as "vague" (Ex. 26 at 284, Ametrano Dep. 53:12–18 ("spirituality is much more vague" than "religion"), and by expressing difficulty at defining the policies' terms (*id.* 53:5–11 ("[R]eligion is religion. I have never stopped to think about what the definition of religion means in the context of this policy"); Ex. 22 at 196-97, Dugger Dep. 52:15–53:17 ("not prepared" to provide definition of "culture" discrimination); (Ex. 22 at 201–02, Dugger Dep. 57:23–58:6 ("I'm not sure" what "language preference discrimination" is)). Defendants' highly divergent definitions of the same terms likewise illustrate the vagueness of their policies. For example, Defendant Dugger stated that the term "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." (Ex. 22 at 200–01, Dugger Dep. 56:20–57:18.) Defendant Francis agreed but broadly expanded the term to cover

polygamous and polyamorous relationships. (Ex. 25 at 257–59, Francis Dep. 59:24–61:3.) Hence, the terms of Defendants' policies defy clear definition, leaving students guessing as to whether their protected expression "would later be found to be sanctionable." *Doe*, 721 F. Supp. at 867.

Moreover, this lack of "explicit standards" to guide "those who apply" Defendants' policies, *id.* at 867—invites the arbitrary, discriminatory enforcement against disfavored expression that the vagueness doctrine prohibits. In fact, it is EMU who has engaged in actionable religious discrimination in violation of its own policies. Defendant Dugger asked Mrs. Ward whether she viewed her form of Christianity as "superior" to one of the enforcement official's (Francis) Christian beliefs. (Compl. Ex. 3 at 48–49.) Then, on the heels of that audacious question, Defendant Francis cross-examined Mrs. Ward about her religious beliefs in a self-styled "theological bout." (*Id.* at 49–51.) A more striking example of vague policies being impermissibly enforced based "on the viewpoint of those in charge of the . . . policy," *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 484 (E.D. Mich. 1993), is difficult to imagine. EMU's wildly vague policies should be enjoined.

B. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights Under the Free Exercise Clause.

The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . ." U.S. CONST. amend. I (emphasis added). It protects both the freedom to believe and the freedom to act on one's religious beliefs. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940). The undisputed facts demonstrate that Defendants have violated Plaintiff's free exercise rights in both ways.

1. Defendants' impermissibly punished Mrs. Ward for her religious beliefs.

"The free exercise of religion means, first and foremost, the right to *believe and profess* whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'go-

vernmental regulation of religious *beliefs* as such.'" *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (citing *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)) (first emphasis added). As this protection is "***absolute***," *Cantwell*, 310 U.S. at 303–04,[13] the State may ***never*** "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities" or "compel affirmation of a repugnant belief."[14] *Sherbert*, 374 U.S. at 402.

The undisputed facts demonstrate that Defendants discriminated against Mrs. Ward because she holds, in EMU's view, abhorrent religious views. Defendants expressly told Mrs. Ward that it was the "values that motivate your behavior" (*i.e.*, her religious values) that resulted in her dismissal. (Compl. Ex. 5.) And Defendants consistently targeted, denigrated, and challenged her beliefs during her enrollment in the program and the disciplinary process:

- When she expressed her views in class, Defendants labeled her a "homophobe" (Compl. ¶ 59; Ex. 14 at 108) and told her that she ought to consider whether EMU is a "good fit" for her (Ex. 14 at 108);

- When she expressed her views in supervision sessions, Defendant Callaway told her that her religious views "were incompatible with the profession" (Ex. 28 at 304-05, Ward Dep. 104:10–105:1);

- When she expressed her views at the informal review conference, Defendants told her that she needed to accept "remediation" to see "the error of her ways" (Compl. ¶ 83), and explained at the formal review meeting that the purpose of "remediation" was for Mrs. Ward to "change[]" her "belief system" (*id*. Ex. 3 at 29); and

- When she expressed her religious views at the formal review, Defendants reiterated that her "attitudes would not be condoned" in professional counseling (*id*. Ex. 3 at 24), questioned whether she believed homosexuality was a choice (*id*. Ex. 3 at 39), stated that her

---

[13] *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." (citations omitted)); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute." (citations omitted)); *Sherbert*, 374 U.S. at 402–03 ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.").

[14] This aspect of the free exercise claim is discussed under the compelled speech section of this brief. (*See infra* Part III.C.)

> beliefs would jeopardize client safety and comfort (*id*. Ex. 3 at 27–28), inquired whether she viewed herself as "superior" to other Christians (*id*. Ex. 3 at 49), and engaged her in a "theological bout" regarding her religious beliefs (*id*. Ex. 3 at 49–51.)

These undisputed facts prove a violation of Mrs. Ward's free exercise rights. Official action "targeting religious beliefs as such is never permissible." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Defendants here have done the impermissible: they have ousted a student from their counseling program because of the nature of her religious beliefs.

2. Defendants' policies are not neutral or generally applicable.

Under the Free Exercise Clause, a law burdening religious practices that lacks neutrality or general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531–32. A law can be shown to 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. Defendants' own words condemn them here, as they expressly told Mrs. Ward that they 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." (Compl. Ex. 5 (emphasis added).) Moreover, they attacked and challenged Mrs. Ward's religious beliefs at the formal review meeting.

A lack of neutrality and general applicability can also be proven by showing that a law grants an exemption that undermines its purpose, *Lukumi*, 508 U.S. at 543, or that it has "in place a system of individual exemptions" that it "refuses to extend . . . to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. In this case, the same facts prove both types of claims. Defendants concede that referrals based on value conflicts are permissible.

(Doc. # 14, Defs.' MPI Resp. 11 ("Students enrolled in the Program . . . are also taught that . . . they should rarely refer a client to another counselor due to a value conflict"); (Ex. 23 at 222, Callaway Dep. 39:6–17 (admitting that value-based "referrals happen").) Defendants had to concede this, considering that in required classes and from required texts EMU teaches its students that value-based referrals are permissible and sometimes in the client's best interest.

For example, in COUN 580,[15] the assigned text states:

> [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."

(Ex. 2 at 032.) The same book later states that "value judgments by both the helper and the client may be inevitable during" the goal setting process, and that "[i]f the client selects goals that severely conflict with the helper's values or exceed the helper's level of competence, the helper may decide to refer the client . . . ." (*Id.* at 035.) And again, the same book 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 034.)[16] Notably, Mrs. Ward turned in a paper during COUN 580 that stated, relying on

---

[15] The syllabus for COUN 580—Counselor Development: Counselor Process states that the course goals and objectives are, *inter alia*, to "[t]rain prospective counselors in the integration of basic counseling skills," and "[i]ntroduce prospective counselors to ethical standards and professional responsibilities." (Ex. 9 at 90.) Defendants cite COUN 580 as an example of EMU's curriculum that Mrs. Ward is allegedly violating. (Doc. # 14, Defs.' MPI Resp. 10.) This claim is inexplicable considering that the required text for this course expressly teaches that values-based referrals are an accepted aspect of professional practice. In fact, it teaches that two of the referrals Mrs. Ward stated she would likely make based on a religious values conflict—a client seeking an abortion and a client seeking affirmation of a homosexual relationship or behavior—are permissible. (Ex. 2 at 032 (abortion); *id.* at 033 (homosexuality).)

the required text, that there were some aspects of her religious beliefs that could result in values conflicts with clients that may result in referral. (Ex. 7 at 079 ("In situations were [sic] 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").) Mrs. Ward received a perfect score on this paper. (*Id*. at 081.)[17]

Importantly, Defendants admit that referrals (value-based or not) are permissible in situations where their nondiscrimination policy applies. How could this not be true when the term "culture" prohibits discrimination based on "the way [a client] see[s] things, the way [a client] do[es] things, what seems normal to [a client]"? (Ex. 23 at 225, Callaway Dep. 42:24–25.)

---

[16] Also, the manual for the Practicum class Mrs. Ward enrolled in states that students are "expected to adhere to the ethics of our professional association(s)," and lists, among others, the ethics code of the American Mental Health Counselors Association, (Doc. # 14, Defs.' MPI Resp. Ex. 7 at 20), a division of the ACA (*id.* Ex. 14). Regarding referrals, that code states:

> 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. <u>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.</u>

(Doc. # 17, Pl.'s MPI Reply Ex. 3 at 12 (emphasis added).)

[17] In another class, COUN 502—Helping Relationships: Basic Concepts and Services,[17] the required text again approves 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.

(Ex. 1 at 009–10.) As in COUN 580, Mrs. Ward again turned in a paper in COUN 502 reflecting the teaching that referrals based on values conflicts are permissible (Ex. 8 at 088 ("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 089.)

Plainly, any referral implicates the limitless scope of "culture" discrimination.

More specifically, Defendants testified that the term "sexual orientation" prohibits discrimination based on how a person "practice[s] or perceive[s] [their] sexuality—either as heterosexual, homosexual, or neither." (Ex. 25 at 257, Francis Dep. 59:2–7.) Yet, EMU teaches that a counselor's and client's values regarding "premarital sex, casual sex, extramarital sex, open marriages, sexual orientation, and sex in adolescence and late adulthood" may necessitate a referral. (Ex. 1 at 021.) Citing a study from 2003, the COUN 502 text states:

> 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.

(*Id.* at 021–22.)[18] Indeed, Defendants' teaching that the precise value-based referral that occurred here (and at Dr. Callaway's direction) is permissible[19] further demonstrates that Mrs.

[18] Note also how this passage states that counselors "avoid imposing their personal values" even though they referred a client based on a values conflict. In Mrs. Ward's situation, EMU has taken the illogical position that a referral based on values is improper imposing of one's values. As usual, EMU's required texts from required classes contradict their litigation-inspired explanation of their unconstitutional actions.

[19] EMU's curriculum and documents state this on more than one occasion. For instance, several EMU required texts advise students to follow the American Psychology Association (APA) Guidelines for Psychotherapy with Lesbian, Gay, & Bisexual Clients. (Ex. 1 at 012; Ex. 2 at 033; Ex. 3 at 040; Doc. # 14, Defs.' MPI Resp. Ex. 16 at 4.) Guideline 2 of this document states: "Psychologists 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." (Ex. 5 at 047; *see also* Ex. 1 at 012 (quoting Guideline 2); Ex. 2 at 033 (same).) These guidelines state later that if a psychologist's "contravening personal beliefs" prevent him from providing the requested services, that an "appropriate referral[]" can be made. (Ex. 5 at 054.) Further, the 2006 ACA ethics opinion, which EMU relied on in dismissing Mrs. Ward (Compl. Ex. 3 at 58-59), states: "There also was agreement among the Committee members that any counselors stating that they can offer conversion therapy must also offer referrals to gay, lesbian, and bisexual-affirmative counselors and should discuss thoroughly the right of clients to seek these professionals' counsel." (Doc. # 14, Defs.' MPI Resp. Ex. 16 at 5; Ex. 25 at 270,

Ward's religious views, and not her behavior, resulted in her dismissal from the program.[20]

Defendants' nondiscrimination policy also prohibits discrimination based on "religion" and "spirituality." Yet EMU teaches students that value clashes related to "religion and spiritual values" may necessitate a referral. (Ex. 1 at 017–20; Doc. # 14, Defs.' MPI Resp. Ex. 21 (noting that a counselor may refer when he lacks "understanding of a client's religious or spiritual expression").) Their policies also specifically allow for referrals based on a counselor's "personal [and] moral" values when working with terminally ill patients who are exploring their end of life options (Doc. # 14, Defs.' MPI. Resp. Ex. 5 at 49, § A.9.b), an exploration which obviously involves deeply held religious and spiritual values.

Defendant Francis also testified that a referral could be made if the parents of a lesbian child came for counseling and told the counselor that they were deeply religious people who believed homosexual behavior is immoral and set the counseling goal as helping their daughter not engage in homosexual relationships or behavior. (Ex. 25 at 273–75, Francis Dep. 91:2–93:9.) Despite the clients—the parents (not the daughter)—setting a goal based on their religious beliefs, Defendant Francis stated that referring the client is permissible because the clients' religious goal involves a third party's homosexual practices. (*Id.*) There is, essentially,

---

Francis Dep. 85:1–6 ("The person that is providing the conversion therapy needs to be able to also provide referrals . . . to people who are gay, lesbian, bisexually-affirmative counselors").) The opinion does not state that counselors providing conversion therapy must also provide gay affirmative therapy, but rather must <u>refer</u> the client to counselors who provide such therapy. If such referrals are taboo, as Defendants claim, this opinion obviously would not sanction them.

discrimination against orthodox religious beliefs regarding homosexual behavior built into Defendants' code and practices. Not only can a client who wants reparative therapy because of their "particular religious belief[s]" be denied services (*Id.* 266-67, 72:24–73:4), but parents of a child who is not a client can be denied services if they are seeking help based on their religious beliefs that homosexual behavior is immoral.[21]

Defendants testified that the term "socioeconomic status" prohibits discrimination based on "how much money a person makes or how much money they come from. . . . Whether they are rich or poor, middle class, wealthy." (Ex. 22 at 202, Dugger Dep. 58:7–11.) Yet Defendants testified that turning a client away due to their inability to pay would be permissible:

> Well, counseling is a profession by which we attempt to make a living. And so, it's reasonable to charge some fee for services. Our code of ethics does encourage us to do some pro bono work, and certainly not to abandon clients. It calls for us to assist the client in finding affordable services for them. But it does not require us to give our services away to anybody who wants our services, regardless of ability to pay.

(*Id.* at 203, 59:1–15.) Apparently, the "value" of making money trumps a client's interest in not being denied services, or being referred somewhere else, due to their socioeconomic status.[22]

This is not a case involving a neutral and generally applicable law. Rather, Defendants teach that there are numerous circumstances when a client can be referred, based on an irrecon-

---

[21] This is textbook viewpoint discrimination as well. Defendants' policy grants exemptions to counselors not wanting to partake in "gay-negative" counseling, but denies the same privilege to counselors—like Mrs. Ward—who do not want to partake in gay-affirmative counseling.

[22] The list goes on and on. Defendants testified that "language preference" prohibits discrimination on the basis of "the language one speaks." (Ex. 26 at 287, Ametrano Dep. 58:18–22.) Yet if a counselor does not speak a client's language, a referral is permissible. (*Id.* at 288, 59:5–25.) They testified that "gender identity" prohibits discrimination based on, *inter alia*, a client's perceived gender role. (Ex. 23 at 227–28, Callaway Dep. 44:11–45:1.) Yet EMU teaches its students that one issue where a value-based referral may be indicated is where values clash concerning "gender-role identity." (Ex. 1 at 015 (stating such conflicts may arise regarding "appropriate family roles and responsibilities, child-rearing practices, multiple roles, and nontraditional careers for women and men").)

cilable values conflict or for other reasons. This is, in fact, how EMU operates its clinic. Defendant Francis testified that because EMU's clinic has "beginning level clinicians," he "screen[s] out those clients who are presenting with issues that are beyond the skill level of the clinicians" and "make[s] a referral to someone outside [EMU's clinic]." (Ex. 25 at 246, Francis Dep. 42:4–23.) In addition, any client who wants to continue their counseling services into a new semester will be reassigned to a different counselor because the counselor they were seeing is finished with Practicum. (Ex. 25 at 242–44, Francis Dep. 38:19–40:13.) Defendants also accommodated a student who had "just suffered the loss of a significant person in their life" by not assigning the student a client who "was coming in to deal with grief issues." (*Id.* at 249–50, 45:20–46:7.)

That referral is an acceptable practice is reflected in provision A.11.b of the very disciplinary code Defendants charged Mrs. Ward with violating:

> 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.

(Doc. # 14, Defs.' MPI Resp. Ex. 5 at 50.)[23] By refusing to extend this individualized exemption to Mrs. Ward in a case of religious hardship, even though it is available to myriad others, EMU is violating 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

[23] Further, Defendants' code also requires counselor educators to "respect the diversity of [their] trainees" (Defs.' MPI Resp. Ex. 5 at 47, A.4.b), and to provide "accommodations that enhance and support diverse student well-being and academic performance" (*id.* at 71, F.11.b). Through dismissing Mrs. Ward due to her religious beliefs, Defendants neither respected her diversity nor provided her an accommodation, as their own code requires them to do.

Exercise Clause). This violation is made even more egregious by the fact that Defendants grant exemptions to counselors not wanting to partake in therapy that assists clients in abstaining from or changing their homosexual desires/behaviors, while denying the same exemption to counselors like Mrs. Ward who do not want to partake in gay-affirmative therapy.

C. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's First Amendment Right To Be Free Of 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). Thus, it is black letter law that governments cannot "compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). But this is precisely what Defendants did to Mrs. Ward.

Defendants require their counseling students to affirm and validate homosexual relationships and behavior. (Compl. ¶¶ 4, 46–48; Doc. # 9, Pl.'s MPI Ex. 3 ¶¶ 3–10.) At the formal review meeting (and in earlier classes), Defendants misrepresented a 2006 ACA ethics opinion and told Mrs. Ward that it is "unethical" for counselors to refer a client for (or provide) "reparative therapy." (Compl. Ex. 3 at 58.)[24] "Reparative therapy," according to Defendants and the ACA ethics opinion, involves attempts to change a person's homosexual orientation, desires, and/or behaviors to heterosexual. (Ex. 22 at 206–07, Dugger Dep. 73:24–74:24 (reparative therapy includes "counseling someone to change their behavior from homosexual to heterosexual"); Doc. # 14, Defs.' MPI Resp. Ex. 16 at 2 (reparative therapy involves client requests to change "their sexual behaviors, orientation or identity").) While reparative therapy is prohibited, the ACA ethics opinion states that counselors

[24] The ACA actually permits reparative therapy referrals with appropriate warnings. (Doc. # 14, Defs.' MPI Resp. Ex. 16 at 3.) This highlights how EMU is forcing compliance with its own rigid views, not the ACA's.

should use "gay affirmative" treatments when counseling gay, lesbian, and bisexual clients. (Doc. # 14, Defs.' MPI Resp. Ex. 16 at 4.)

According to Defendants, "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.

(Ex. 22 at 208, Dugger Dep. 75:9–17.)[25] The ACA ethics opinion cites the Association for Lesbian, Gay, Bisexual, and Transgender Issues in Counseling's (ALGBTIC) Competencies for Counseling Gay, Lesbian, Bisexual and Transgender Clients as a source regarding gay affirmative treatments. (Doc. # 14, Defs.' MPI Resp. Ex. 16 at 4.) This document states that 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," and that they must "use nonstigmatizing and affirming mental health . . . resources." (Ex. 6 at 076–77.) With Defendants wrongfully prohibiting reparative therapy, and with the only alternative being "gay affirmative" therapy, it is plain that EMU requires its students to take an affirming and validating position regarding homosexual behavior and relationships.

---

[25] This definition comports with Mrs. Ward's testimony that she was taught in COUN 571 that she had to affirm or support "[t]he homosexual lifestyle, acceptance of that lifestyle as being normal, right, worth fighting for." (Ex. 28 at 301, Ward Dep. 65:7–10.) Indeed, the text for that class advises students that "[h]eterosexist bias in therapy needs to be acknowledged and changed," that they should help homosexual clients "establish a new affirming identity," and that they should be prepared to refer homosexual clients to churches that are "open to a gay congregation." (Ex. 3 at 039, 041.) Another book on the reading reference list in the COUN 571 syllabus, entitled *Counseling Gay Men and Lesbians, A Practice Primer*, states that when counseling gay and lesbian couples "[r]outine exploration of the couple's sex life may have to be initiated by the counselor," and that a counselor should "celebrate relationships," "make positive comments about milestones in gay relationships," and "[c]ongratulat[e] a couple who has recently moved in together or mak[e] positive comments about their work in counseling . . . ." (Ex. 4 at 045, 046.)

Mrs. Ward is a Christian who derives her religious beliefs from the Bible. (Compl. ¶ 3, Ex. 4 at 63.) She believes that God has ordained sexual relationships between married men and women (not persons of the same sex) and that homosexual conduct is immoral behavior. (Compl. ¶¶ 3–5, Ex. 3 at 31, Ex. 4 at 63.) Thus, she cannot counsel a client seeking assistance with a homosexual relationship because EMU's requirement that she affirm and validate the homosexual relationship and behavior would violate her beliefs and require her to express a view that contravenes her convictions. (Compl. ¶¶ 3–5, 18, Ex. 3 at 32, Ex. 4 at 64.) Thus, when EMU assigned Mrs. Ward a potential client desiring counsel on a homosexual relationship, she exercised her First Amendment right not "to foster . . . an idea she found morally objectionable," *Wooley*, 430 U.S. at 715, by having the person reassigned at Defendant Callaway's direction and consistent with EMU's class teachings.[26]

Instead of respecting Mrs. Ward's First Amendment rights—and following its own curriculum on referrals—EMU initiated disciplinary proceedings against Mrs. Ward because she would not violate her religious beliefs and speak an affirming message on homosexual behavior. Defendants compounded their compelled speech violation at the informal review conference, by offering Mrs. Ward a "remediation plan" that was aimed at helping Mrs. Ward see the "error of her ways" and "chang[ing]" her "belief system." (Compl. Ex. 3 at 29.) Defendants further exacerbated their constitutional violation by dismissing Mrs. Ward from the program when she would not agree to change, abandon, or speak a message contrary to her religious views after

[26] Mrs. Ward did not unilaterally reassign the potential client. Rather, after identifying the values conflict, Mrs. Ward asked Defendant Callaway if she should meet with the potential client and refer if necessary, or just reassign immediately. (Doc. # 9, Pl.'s MPI Ex. 3 at 8 ¶¶ 29–32; Ex. 22 at 211, Dugger Dep. 101:8–14; Ex. 28 at 311–12, Ward Dep. 211:23–212:8.) Consistent with EMU's curriculum which allows referrals where there are values conflicts, Defendant Callaway directed her to have the potential client reassigned to another counselor. (Doc. # 9, Pl.'s MPI Ex. 3 at 8 ¶ 34.)

interrogation and denigration of those views at the formal review meeting. (*See supra* Part I.)

A more egregious violation of the compelled speech doctrine is difficult to conceive. Although unconstitutional, car owners being forced to convey the State's "Live Free Or Die" message on their license plate despite being morally opposed to it, *Wooley*, 430 U.S. at 715, and parade organizers being compelled to include a gay and lesbian contingent whose message they did not agree with, *Hurley*, 515 U.S. at 579, are a far cry from what EMU has done to Mrs. Ward. Here, EMU compelled her to speak a message with which she disagreed, and when she exercised her First Amendment right not to, they denigrated, cross-examined, and tried to change, her religious beliefs. When she did not relent under this coercion, they dismissed her from the program. What the Supreme Court said in 1943 bears repeating: "If there is any fixed star in our constitutional constellation, it is 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. Defendants have transgressed this fundamental First Amendment principle through their discriminatory mistreatment of Mrs. Ward.

D. Defendants' Application Of Their Disciplinary Policies Violates Mrs. Ward's Right To Be Free From Retaliation Based On Her Protected Expression.

To establish a First Amendment retaliation claim, Mrs. Ward must demonstrate that: (i) she engaged in protected conduct; (ii) an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and (iii) the adverse action was motivated at least in part by her protected conduct. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). Here, the undisputed facts easily prove each element.

1. Mrs. Ward engaged in protected expression.

Mrs. Ward unquestionably engaged in expression the First Amendment protects. She ex-

pressed her religious beliefs and views regarding homosexual behavior in various settings—in class, in conversations with professors, at the informal and formal review hearings, and in letters to Defendants. (Compl. ¶¶ 49, 58, 76, 80, Ex. 3 at 31, Exs. 4, 6.) Her religious expression receives 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."). The First Amendment also protects her referral of the potential client assigned to her because she was choosing not to be "the courier for [a] message" she finds unacceptable. *Wooley*, 430 U.S. at 717. Similarly, it protects her refusal to submit to "remediation" that would require her to change her religious beliefs. *Smith*, 494 U.S. at 877 (noting the right to believe whatever religious doctrine one chooses).

2. Defendants took adverse action against Mrs. Ward.

Defendants permanently *dismissed* Mrs. Ward from the counseling program based on her religious views regarding homosexual behavior, and on her unwillingness to change, abandon, or express a message contrary to those views. If the mere threat of disciplinary proceedings would deter a person of ordinary firmness from exercising his or her First Amendment rights, *Button*, 371 U.S. at 433 ("threat of sanctions" impermissibly chills First Amendment expression), then undoubtedly Defendants' action of dismissing Mrs. Ward "would chill or silence a 'person of ordinary firmness' from future First Amendment activities." *Thaddeus X*, 175 F.3d at 397.

3. Defendants were motivated by Mrs. Ward's protected expression.

Mrs. Ward need only show that Defendants' adverse actions were "motivated, at least in part, by [her] protected conduct" in order to prove a causal connection. *Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002). EMU's documents and the formal review transcript condemn them here, as they indisputably show that their *sole* motivation for taking adverse action against Mrs.

Ward was her protected expression. Indeed, Defendants' dismissal letter stresses that they dismissed Mrs. Ward based on the "values that motivate your behavior." (Compl. Ex. 5 (emphasis added).) The formal review meeting confirms this, where Defendants denigrated, challenged, and cross-examined Mrs. Ward's beliefs, and at the informal review conference, where they offered a remediation plan aimed at helping her see the "error of her ways" and "chang[ing]" her "belief system." (*See supra* Part I.) Given these facts, there can be no dispute that Defendants' actions were motivated by one thing: Mrs. Ward's protected religious expression.

E. Defendants Applied Their Disciplinary Policies Against Mrs. Ward In A Viewpoint Discriminatory And Unreasonable Manner.

Viewpoint discrimination occurs when "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). So "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.*

Again, Mrs. Ward's private religious speech regarding homosexual behavior is unquestionably protected expression. (*See supra* Part III.D.1.) And no forum analysis need be conducted here since viewpoint discriminatory and unreasonable speech restrictions are unlawful in any forum. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993); *accord Kincaid v. Gibson*, 236 F.3d 342, 356 (6th Cir. 2001).[27]

There is no question here that EMU dismissed Mrs. Ward based on her religious views regarding homosexual behavior. Indeed, Defendants' charging of Mrs. Ward with a violation of the

[27] "[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum" and that "[t]he college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) (citations omitted). These holdings militate strongly against the finding of a nonpublic forum here. But even in a nonpublic forum, EMU's viewpoint discrimination violates the First Amendment.

EMU policy that prohibits the "[i]nability to tolerate different points of view" highlights that it was the clash between Mrs. Ward's and EMU's views regarding homosexual behavior that resulted in her dismissal. And again, Defendants were not shy about stressing this clash at the formal review meeting, the informal review conference, and the few times Mrs. Ward expressed her views in class. (*See supra* Part I.) Defendants' disdain for Mrs. Ward's religious views saturates the record.

Defendants' actions are also patently unreasonable. Is it reasonable to tell a student that she must undergo a "remediation plan" aimed at "chang[ing]" her "belief system" to stay in an academic program? Is it reasonable, when the student declines to have her religious views "remediated," to engage her in a "theological bout" regarding her religious beliefs? Is it reasonable, after cross-examining the student's religious beliefs and asking her whether she thinks she is "superior" to other Christians, to deny her a degree based on the "values that motivate [her] behavior"? There is nothing reasonable about Defendants' discriminatory actions, and they are therefore unconstitutional.

F. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights under the Establishment Clause.

The undeniable purpose of the Establishment Clause is to ensure government neutrality toward religion, particularly among denominations. *County of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989). Indeed, its "clearest command . . . is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244 (1982). As a corollary, the Establishment Clause requires "accommodation . . . of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Thus, "no person can be punished for entertaining or professing religious beliefs." *Allegheny*, 492 U.S. at 591. Defendants' actions clearly violate these clearest commands of the Establishment Clause.

Again, EMU targeted Mrs. Ward's beliefs and attacked the religious motivation behind them.

(*See supra* Part I.) Defendants instructed her to hide her Christian identity from clients because it would jeopardize their safety and comfort. (Compl. ¶ 94; Ex. 3 at 27–28.) They pressured her to undergo "remediation" to help her see the "error of her ways" by "chang[ing]" her "belief system." (Compl.¶¶ 82–86; *id*. Ex. 3 at 29.) When she refused, they used the formal review meeting to ask if her "brand of Christianity [w]as superior" and to scrutinize her religious beliefs in a "theological bout." (*Id*. Ex. 3 at 48–51.) They even flatly refused her simple request to accommodate her religious views by allowing her to refer those rare clients seeking affirmation of a homosexual relationship. (*Id*. Ex. 3 at 34–35.) Finally, they dismissed her from the program because of the "values that motivate [her] behavior," which are clearly religious in nature. (*Id*. Ex. 5.)

Defendants clearly conditioned Mrs. Ward's ability to get a degree on her willingness to change, abandon, or speak a message contrary to, her fundamental religious beliefs. The Establishment clause forbids such hostility toward religion. *See McDaniel*, 435 U.S. at 636 (Brennan, J., concurring) ("[F]orc[ing] or influenc[ing] a minister or priest to abandon his ministry as the price of public office" "manifests patent hostility toward, not neutrality respecting, religion."). Indeed, Defendants' cross-examination of Mrs. Ward's religious beliefs crossed a clear constitutional line. *Rosenberger*, 515 U.S. at 845–46 ("[R]equir[ing] public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief . . . [is] a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."). The Establishment Clause condemns Defendants' actions here.

G. Defendants' Application of Their Disciplinary Policies Violates Mrs. Ward's Rights under the Equal Protection Clause.

"The Equal Protection Clause of the Fourteenth Amendment commands that . . . all persons

similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Equal protection analysis requires that if a classification targets a suspect class or impacts a fundamental right, it will be strictly scrutinized and upheld only if it is precisely tailored to further a compelling government interest. *Plyler v. Doe*, 457 U.S. 202, 217–18 (1982).

The facts outlined above also demonstrate a violation of Mrs. Ward's equal protection rights. The record makes clear that Defendants' actions targeted Mrs. Ward's fundamental rights to free speech and free exercise of religion. Moreover, Mrs. Ward has shown that Defendants are treating her differently than similarly situated students. Defendants concede that referrals based on values conflicts, or other factors, are permissible, even where their nondiscrimination policy is applicable. Yet they are denying Mrs. Ward the ability to refer where she has a values conflict with a client. This is true even though EMU taught Mrs. Ward in required classes and from required texts that value-based referrals, including the one she made, are permissible.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant her motion for summary judgment.

Respectfully submitted this the 2nd day of February, 2010.

By: s/Jeremy D. Tedesco

JEREMY D. TEDESCO, AZ Bar No. 023497
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444–0020; (480) 444–0028 Fax
jtedesco@telladf.org

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 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:

Jerome R. Watson (P27082)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendants
150 W. Jefferson, Suite 2500
Detroit, Michigan 48226
(313) 963–6420
watson@millercanfield.com

Mark T. Boonstra (P36046)
Leigh R. Greden (P61859)
Miller, Canfield, Paddock and Stone, P.L.C.
Attorneys for Defendants
101 N. Main Street, 7th Floor
Ann Arbor, Michigan 48104
(734) 663–2445
boonstra@millercanfield.com
greden@millercanfield.com

Attorneys for Defendants

I also certify that I served a copy of the confidential exhibits and the proposed order via email to the counsel listed above.

s/Jeremy D. Tedesco
JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444–0020; (480) 444–0028 Fax
jtedesco@telladf.org