No. 10-13925-J

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER KEETON,
Appellant,

v.

MARY JANE ANDERSON-WILEY, *et al.,*
Appellees.

Appeal from the United States District Court for the Southern District of Georgia
Civil Case No. 1:10-cv-00099 (Honorable J. Randal Hall)

REPLY BRIEF OF APPELLANT

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I. Introduction

The ASU counseling faculty has required of Miss Keeton that she promise to them that she will convey moral approval for homosexual sex to future clients. If she does not so commit, she will be expelled from the counseling school. This requirement impelled Miss Keeton to withdraw from the remedial program in which it was issued, for she knew she could not successfully complete it on such conscience-violating terms. These are undisputed facts.

It is this point—*i.e.*, *the crux of Miss Keeton's case*—that Defendants and their supporting *amici* steadfastly avoid. They thereby discount their submissions entirely. If, as they propose, Miss Keeton's preliminary injunction request is indeed legally unfounded, it is fair to ask why *not one party* opposing her before this Court has included an acknowledgment of this principal basis for the relief she seeks, or argued that it is lawful for State functionaries to coerce from a student a pledge to communicate as her own a contested message on sexual morality. Defendants' and *amici*'s unwavering refusal to report the facts of the case and the content of Miss Keeton's claims serves as a veritable concession of the validity of her claim for relief.

Attending to the parties' evasion of Miss Keeton's claims is their systematic misrepresentation of her case. It is straw men, not her claims, to which they direct

their refutation. On their alternate telling, Miss Keeton was placed on probation not for the reasons the faculty wrote in the Remediation Plan document, but because she repudiated professional standards taught at ASU; she has refused to complete the remedial probation because she did not want to read assigned literature; and she insists that she has a constitutional right to avoid curricular standards. That manufactured scenario has no relation to the case before this Court.

This case presents a rare instance of blatant, express, and coercive re-education that should be intolerable across the political spectrum. A business school could not require its students to "affirm" capitalism or disavow socialism as a condition of receipt of an education. A geology department could not require its students to affirm—or deny—the reality of global warming to avoid expulsion. A law school could not require its students to affirm—or deny—the interpretive or moral legitimacy of the Supreme Court's substantive due process jurisprudence, nor require students to promise to defend—or oppose—the death penalty in their future professional efforts. A medical school could not require its students to affirm—or deny—female circumcision or sex-change operations. A political science department could not require its students to affirm any particular school of political thought or civic policy proposal. Nor could any of these educators require students to give a running account of the status of their beliefs, and make "correct"

beliefs and a promise of ideological cooperation (instead of academic performance) the condition of continuing receipt of a State education.

The ASU faculty's conduct in this case is a renunciation of individual conscience and academic freedom, and is intolerable under the First Amendment.

II. Material Facts

Defendants imposed on Miss Keeton a remediation program with its expulsion threat because she expressed a disfavored viewpoint about homosexuality in and out of the classroom—not because Miss Keeton has failed to demonstrate an understanding of professional restraint. Defendants put in writing that the reason they imposed their probationary requirements is (1) Miss Keeton had expressed her disagreement with the homosexual "lifestyle"; (2) she had written her view that she believes GLBTQ lifestyles are "identity confusion"; (3) she is reported to have spoken favorably of conversion therapy during a private conversation; and (4) she sought to persuade colleagues to support and believe her views. (Dkt.1-3 at 3.)

The faculty reiterated in their Addendum letter that the Remediation Plan document accurately presented the reasons for the probation: Miss Keeton's statements in and out of class. (Dkt.1-4 at 1 ("All of these incidents were described in the Remediation Plan.").) Further, the faculty in the Addendum letter supplemented the justification for her probation by expressing their disfavor for

Miss Keeton's beliefs which she had recently recounted in emails to them. (*Id.*) Those beliefs neither imply nor were stated by Miss Keeton as requiring a violation of ASU's instructed professional standards in a clinical context. (*See* Dkt.1 ¶¶92, 99.)

Nor was that purported risk what drove the faculty to place Miss Keeton on probation. In Miss Keeton's written class assignment that the faculty seized upon for her statement of belief that GLBTQ conduct is "identity confusion," Miss Keeton had also explained: "*I understand these are my personal beliefs, and I cannot impose them*." (Dkt.35-6 at 3 (emphasis added).) But rather than applaud (or indeed, give any attention at all to) her statements revealing her understanding of the restraints on professional conduct taught to her, the faculty isolated for rebuke her disclosure of her views on GLBTQ conduct and identified this as a justification for subjecting her to their remediation. The faculty's focus has always been Miss Keeton's views and beliefs, not her "inability to resist imposing her moral viewpoint on counselees" (as the district court erringly proposed (Dkt.48 at 20)). *See* Dkt.1 ¶92 ("Miss Keeton explained that she can maintain a professional demeanor when counseling, and her beliefs do not entail that she must impose values on unwilling clients"); *id*. ¶99 ("Miss Keeton stated to the faculty members that she believes that she will be able to avoid imposing her beliefs on a client, while also maintaining her convictions that certain behaviors are improper").

In an email Miss Keeton wrote to the faculty declining to participate in the Remediation Plan, she affirmed her commitment to ethical counseling (which she said was not in conflict with her views) but despaired that she would fail remediation because her beliefs on sexual morality as expressed in her reflection papers will not conform to faculty requirements. (Dkt.1 ¶76.)

The impacted "beliefs" on which Miss Keeton was required to report in monthly reflection papers (Dkt.1-3 at 5) were obviously her ethical conceptions that the faculty had critiqued earlier in the Remediation Plan document. It was Miss Keeton's communication of her religion-founded beliefs on sexual ethics which the faculty reported as the justification for their imposing remediation in the first place, and which they condemned as problematic and in need of alteration. That these beliefs would subsequently be monitored as part of the probationary supervision is little surprise. Indeed, Miss Keeton exchanged communications with the faculty premised on this understanding of her responsibility:

> I really want to stay in the program, but I don't want to have to attend all the events about what I think is not moral behavior, and then *write reflections on them that don't meet your standards because I haven't changed my views or beliefs, as stated in these papers* or at our meetings.

(Dkt.1 ¶76 (emphasis added).) Her understanding of this requirement was validated by Dr. Schenck, who responded in writing to Miss Keeton's message by explaining the *kind* of belief-alteration Miss Keeton was required to exhibit: "truly

accept that others' beliefs are equally valid as your own." (Dkt. 1 ¶78.) Schenck did not deny that Miss Keeton was obliged to present such assessments to the faculty. This understanding of the "beliefs" Miss Keeton must include in her reflection papers was likewise presumed in the remediation meetings between the parties. (*See* Dkt.1 ¶¶98, 103.)

Miss Keeton wrote to the faculty after the third remediation plan meeting that she understands the professional standards calling for client autonomy and for the division of personal beliefs from the proper handling of the counseling relationship. *See* Dkt.1 ¶108 ("I understand the need to reflect clients' goals and to allow them to work toward their own solutions, and I know I can do that. I know there is often a difference between personal beliefs and how a counseling situation should be handled."). But she objected to the requirement imposed on her by the faculty that she affirmatively convey moral approval for conduct she deems immoral. (*Id.*) ("[I]n order to finish the counseling program you are requiring me to alter my objective beliefs[1] and also to commit now that if I ever may have a client who wants me to affirm their decision to have an abortion or engage in gay, lesbian, or transgender behavior, I will do that. I can't alter my biblical beliefs, and I will not affirm the morality of those behaviors in a counseling situation."). Miss Keeton's objection is not and never has been to professional standards or to

[1] *See* Dkt.1 ¶80.

withholding value judgments from clients. She instead resists the faculty's heavy-handed imposition on her conscience which requires, *inter alia*, that she convey a contested value position to clients.

Defendants have penalized and burdened Miss Keeton because of her "opinion or perspective," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), and are requiring that she "foster . . . an idea [she] find[s] morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The evidence supports Miss Keeton's constitutional claims for equitable relief.

III. Evaluation of Defendants' Response

A. Defendants fail to address the material facts and divert attention instead to extraneous considerations.

Defendants in their statement of facts diligently avoid the foregoing facts of consequence, emphasize matters of no apparent bearing, and recite pages worth of professional standards without offering any explanation for how that litany justifies the actions that Defendants took against Miss Keeton—actions which Defendants refuse to discuss.[2]

[2] The presentation of the American School Counselor Association (ASCA) *et al. amici* similarly hovers at a level of generality that constitutes avoidance, as they also recite a litany of professional standards asserting these to have application to the dispute on appeal but never demonstrating how they do. For instance, they argue that the "ASU Faculty's conduct is consistent with their ethical obligations as counselor educators"—but never identify what that "conduct" is or why it is so classified, so as to make their statement anything beyond mere assertion. (ASCA Br. at 16.) Similarly, their contention that the decision in this case will "have a

None of the CACREP or ACA standards that Defendants recite require the faculty's viewpoint-discriminatory reprisal against Miss Keeton for her utterances, their coercive extraction of her promise to declare a preferred ideological position, or their scrutiny of her beliefs. Moreover, even if these organizational standards did call forth those responses, Defendants have not shown how those actions would be less unconstitutional as a result.[3]

State officials' authority to set and enforce professional ethics rules is limited by the First Amendment,[4] and the Supreme Court has invalidated state

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significant impact on *amici*" (*id.* at 3) is never explained, for they never so much as identify what is at stake in Miss Keeton's petition.

[3] Beyond the limited legal import of private organizations' vague and aspirational ethical codes (*see infra* notes 5-7), Defendants' appeal to ambiguous professional provisions as their authorization for penalizing and coercing Miss Keeton's speech implicates a separate line of constitutional condemnation: unbridled discretion in speech regulation is prohibited and implicated by imprecise speech governance regulations. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 767-68 (1988).

[4] *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) (noting that ethics rules infringed "upon protected freedoms of expression" and concluding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222-23 (1967) (noting that the state's power to regulate the legal profession does not *per se* justify regulations that impair First Amendment freedoms); *In re R.M.J.*, 455 U.S. 929, 203 (1982) (subjecting ethical rules governing advertisements to First Amendment scrutiny); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637-38 (1985) (scrutinizing attorney disciplinary rules under First Amendment commercial speech doctrine); *In re Primus*, 436 U.S. 412, 422, 432-33 (1978) (noting the state's right to regulate the legal profession, but requiring its disciplinary actions to "withstand the exacting scrutiny applicable to limitations on core First Amendments rights"); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 766-70 (1976)

enforcement of ethical requirements from a broad array of professions.[5] Hence, Defendants' invocation of a private organization's "code of ethics" neither answers Miss Keeton's claims[6] nor insulates the faculty from constitutional scrutiny.[7]

Defendants applaud themselves for filing several affidavits and documents and putting three witnesses on the stand at the preliminary injunction hearing, implying that such procedural exercises prove their substantive position to be superior to Miss Keeton's. (Resp.Br.19.) That does not follow. Much of their boasted evidence is noncontributing to the case (see, *e.g.*, App.Br. at 15 & n.9, 37 n.18), and Miss Keeton herself used several other components of their

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(assessing the state's interests in setting pharmacists' ethical standards, but ruling that the First Amendment trumped).

[5] *See generally Va. State Bd. of Pharm.*, 425 U.S. 748 (striking down prohibition on advertising drug prices as unprofessional conduct on First Amendment grounds); *Button*, 371 U.S. 415 (striking ethical rules regarding solicitation, etc. for violating First Amendment); *In re Primus*, 436 U.S. 412 (same); *United Mine Workers*, 389 U.S. 217 (holding that unauthorized practice of law rules violate the First Amendment); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (striking ban on advertising prices for attorney services); *In re R.M.J.*, 455 U.S. 191 (striking ethical restrictions on attorney advertisements); *Zauderer*, 471 U.S. 626 (reversing discipline of attorney for violating ethical standards regarding advertisements); *Baird v. State Bar of Ariz.*, 410 U.S. 1 (1971) (striking professional character and fitness questions because they conflicted with the First Amendment).

[6] *Bates*, 433 U.S. at 371 (noting that the challenged ethics rules stemmed from the shared attitudes and values of the profession, but concluding that "habit and tradition are not in themselves an adequate answer to a constitutional challenge").

[7] *See*, *e.g.*, *Button*, 371 U.S. at 439 (noting that ethics rules infringed "upon protected freedoms of expression" and concluding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").

documentary and oral testimony to support her claims.[8] Moreover, in generally denigrating Miss Keeton's Verified Complaint, Defendants fail to disclose that they concede the truth of a significant portion of its content, including that which recounts what Defendants themselves committed to writing and what Miss Keeton put in writing and submitted to them. Additionally, while Defendants had every opportunity in affidavits and oral court testimony to deny additional components of Miss Keeton's testimony, they did not do so, leaving significant portions thereof undisputed.

B. Defendants ascribe authority to the district court's conclusions that they do not possess.

Defendants report several of the district court's "findings" which opine on why the Remediation Plan was imposed and whether the evidence vindicates Miss Keeton's constitutional claims or legitimate state interests for the faculty's conduct. (Resp.Br.13-14.) Defendants do not justify these conclusions or connect them to evidence in the record, but present them as meritorious simply because the

[8] The facts on which Miss Keeton relies are drawn from documents drafted by Defendants (*e.g.*, the Remediation Plan (Dkt.1-3), the Addendum (Dkt.1-4), Dr. Schenck's written message (Dkt.1 ¶78)), documents submitted by Defendants to the district court (*e.g.*, Dkt.35-6), policies of ASU (*e.g.*, Dkt.1 ¶21), and oral testimony by the lead defendant Dr. Anderson-Wiley. In addition, undisputed portions of Miss Keeton's own affidavit testimony which is notably harmonious with Defendants' own testimonial offerings and written statements also supports her claim. (*Compare, e.g.*, Dkt.1 ¶105 *with* Dkt.54, Tr. 92-94.)

court announced them.[9] The lower court's assertions, however, do not constrain this Court, for reasons beyond their lack of warrant.[10] As a procedural matter, when a claim of constitutional infringement is presented to an appellate court "there is a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995).

The standard of review for preliminary injunction decisions "changes in First Amendment free speech cases." *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Instead of reviewing factual findings for clear error, this Court reviews "the core constitutional fact[s]" *de novo*. *Id.* "In cases involving [F]irst [A]mendment claims, an appellate court must make an independent examination of the whole record and is not bound by the clearly erroneous standard of review." *Id.* at 1203 (internal quotation marks omitted). This is because "'the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and [this Court] must thus decide for [itself] whether a given course of conduct falls on the near or far side of the line of constitutional protection.'" *Id.* at 1205 (quoting *Hurley*, 515 U.S. at 567).

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[9] Defendants suppose: "Absent clear error in those factual findings, the legal analysis of her claims should be based on the actual findings of the district court." (Resp.Br.16.)

[10] As to that absence of warrant, *see* App.Br. at 11-16, 23-27, 32-33, 35-36, 44, 49-50, 52-53.

> [T]he conclusion of law as to a Federal right and [the] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. In such cases, the Supreme Court has instructed us to make an independent examination of the whole record, and has recognized our ultimate power ... to conduct an independent review of constitutional claims when necessary.

Flanigan's Enters. v. Fulton County, 596 F.3d 1265, 1275 (11th Cir. 2010) (internal quotation marks omitted).

C. Defendants mistakenly commend the district court's exercise of deference.

Defendants aim to limit the significance of the district court's deferring to the faculty's impositions by asserting that "[t]he only deference the district court showed to the university faculty was in the university's choice of 'pedagogical approaches,' *i.e.*, the steps of the Remediation Plan." (Resp.Br.33.) That, however, is not a mitigating observation, for the Remediation Plan is the exclusive target of Miss Keeton's motion for injunction. The Plan was imposed in punitive response to her expressed points of view, and its terms uniquely require of her extensive commitments not required of any other student, including the disclosure of her beliefs as a litmus for dismissal and a coerced promise to convey moral approval for conduct she believes immoral. These terms do not merit judicial deference. *See* App.Br. at 23-26.

Defendants further propose the district court's employ of deference is laudable for "judges lack the on-the-ground expertise and experience of school

administrators." (Resp.Br.34 (quoting *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2988 (2010)).) But that consideration has no application when the question is whether students' viewpoints may be penalized and their speech coerced. *Id*. Provincial academic expertise is not a prerequisite to (or even a qualification for) what is a quintessentially legal issue: the accurate adjudication of the constitutional status of viewpoint-directed speech penalties and compulsion of ideological speech from conscientious objectors. Nor have Defendants explained how it would be.[11]

Defendants urge from *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) that faculties enjoy discretion in evaluating the "academic performance of students." (Resp.Br.34.) Miss Keeton does not contest this. But the ASU remediation process is not authorized for use in addressing her academic performance (Dkt.1 ¶21); that is the task of the teachers who issue her grades.

[11] Defendants throughout their brief cite the Supreme Court's recent decision in *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971 (2010) as refuting Miss Keeton's First Amendment claims, though ignoring the manifold distinctions between that case and hers. For example, *Martinez* involved the question of access standards for a limited public forum for student organizations, not whether State officials may impose singular and retaliatory penalties against a student for her private utterances. The *Martinez* decision evaluated a neutral "all-comers" access policy, not an arbitrary penalty responsive to one student's disfavored viewpoints. The Court in *Martinez* relied on its classification of the rule at issue as implicating a subsidy ("dangling the carrot of subsidy, not wielding the stick of prohibition," *id*. at 2986), while ASU carries only a stick.

D. Defendants err in affirming *Hazelwood*'s application to this case.

Defendants offer no clear defense of the district court's use of *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) to evaluate Miss Keeton's motion. Instead, they insinuate the relevance of that case by suggesting that ASU's design of its own curriculum is school-sponsored speech (Resp.Br.24)—which of course it is. But that does not mean *Miss Keeton's* speech can be penalized as it has been[12] or that she may legitimately be coerced to affirm a contested moral proposition.

Defendants note that Miss Keeton denies *Hazelwood*'s relevance because her penalized speech does not carry school imprimatur, yet assert that "Keeton fails to explain how her behavior as a student counselor in a practicum class, and other clinical classes required for her degree, could possibly *not* carry the *imprimatur* of the ASU counselor education program." (Resp.Br.24-25.) Miss Keeton has never been in a practicum or clinical environment. The speech for which she was penalized did not arise in a clinical setting, and the faculty's remedial examination of her beliefs and their coercion of a speech pledge from her are likewise dissociated from a clinical setting.[13] The district court's employ of *Hazelwood* was

[12] "[N]othing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment." *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 213 (3d Cir. 2000) (Alito, J., dissenting from decision en banc). That it likewise does not apply to a student's private conversations out of class should go without saying.

[13] Further, it is not self-evident (as Defendants seem to think) that Miss Keeton's future speech counseling students at Augusta Christian School (Dkt.47 at 1) carries

without justification.

E. Defendants mischaracterize the facts and Miss Keeton's claims.

Defendants' classify all they have done to Miss Keeton as within the praiseworthy category of ensuring "ethical" counseling. Through employ of such equivocal phrasing they celebrate the propriety of their conduct without ever stating specifically what it was. Thus, for example, they describe the Remediation Plan as an "academic matter … designed to assist" Miss Keeton "in correcting deficiencies in [her] professional development" (Resp.Br.35), while nowhere reporting the specific "Reason(s) for Remediation" that are presented in the plan document itself. Nor do they acknowledge their requirement that Miss Keeton promise to them that she will convey an ideological message she disbelieves to avoid dismissal from the program, or that Miss Keeton's reasons for withdrawing from remediation were communicated in writing to the faculty, or what those written terms recite. Instead Defendants allege her "unwillingness to adhere to the ACA Code of Ethics" (Resp.Br.41) and her "refus[al] to participate in the curriculum" (Resp.Br.35).

Such evasions are tactically associated with Defendants' redesign of Miss Keeton's legal claims. Defendants repeatedly propose Miss Keeton argues something other than what she does, and then decry the argument that she does not

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the imprimatur of ASU simply because she is receiving practicum credit for her employ there.

make. For instance:

> Keeton argues that the university is engaged in viewpoint discrimination and unconstitutionally compelling certain speech when they require that she 'affirm' that she will follow her profession's ethical standards.

(*Id*. at 31.) This is not her First Amendment claim. *See* App.Br. at 33-45. Miss Keeton consistently has expressed her willingness and interest in complying with professional responsibilities (*see supra* at 4, 6), and Defendants have never shown that what they have imposed on Miss Keeton is required by relevant ethical standards.

Defendants repudiate the argument affirming a "right to insist that no one paid by public funds express a view with which he disagreed" (Resp.Br.23 (quoting *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1131 (2009))—but no one in this case has offered that argument. Defendants further argue that "Keeton may disagree with the counselor education curriculum, but that disagreement does not bestow her [sic] with a First Amendment right to alter the university's program." (*Id*.) True enough, though it is unclear why they say so; it is not Miss Keeton's claim. Defendants similarly urge: "The ASU faculty are not guilty of suppressing Keeton's views merely because they teach a different view." (Resp.Br.24 n.13.) Miss Keeton has never asserted otherwise.

Defendants purport to describe her complaint: "Keeton[] object[s] to the faculty's position that a counselor's job is to help the counselee find what is moral

for themselves [sic] and not via the counselor's biases[.]" (Resp.Br.25.) Yet her written statements to the faculty speak otherwise (*see* Dkt.1 ¶108 ("I understand the need to reflect clients' goals and to allow them to work toward their own solutions, and I know I can do that. I know there is often a difference between personal beliefs and how a counseling situation should be handled"); Dkt.35-6 ("I understand these are my personal beliefs, and I cannot impose them")), and Defendants fail to cite where she has presented the argument they impute to her. Or where she has presented this argument: "What Keeton wants is for the court to change ASU's viewpoint neutral curriculum." (Resp.Br.34.) Or this one: "Here, Keeton seeks exemption from ASU's neutral policy, i.e., that *all* students follow the counseling curriculum." (Resp.Br.38.) Or this one: "Keeton objects on religious grounds ... to reading counseling literature on how to counsel a gay client[.]" As to the latter, Defendants avoid reporting that Miss Keeton wrote that "I still find it vital to study this [GLBTQ] population because it is part of our society today." (Dkt.35-6 at 4.)[14]

[14] *Amicus* ACLU adopts this mischaracterization method in an extreme. *See e.g.*, ACLU Br. at 1 (describing Miss Keeton's First Amendment claim as a challenge to the "requirement that she agree to abide by standards of ethical professional conduct"); *id.* at 9 (reporting her "unwillingness to comply with the ACA Code of Ethics"); *id.* at 10 (stating that she challenges "the University's mandate that she comply with its teaching that counselors may not impose their values on clients"); *id.* at 13 (suggesting her compelled speech claim challenges the requirement that she "counsel clients in accordance with the ACA Code of Ethics during her training"); *id.* at 14 (concocting that she has "specifically stat[ed] her intent to

F. Miss Keeton's First Amendment claims are well-stated.

Defendants' authoritarian impositions on Miss Keeton repudiate not only the autonomy of individual conscience but also the quintessence of the university as a marketplace of ideas. "For the University … to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life[.]" *Rosenberger*, 515 U.S. at 836. The ASU faculty's insistence that students be regimented into dutiful proponents of viewpoints of their preference instantiates the antithesis of First Amendment values.

While Defendants propose that "the facts show that Keeton has always been free to express her views, religious or otherwise, without censorship" (Resp.Br.22), the record demonstrates the contrary. The burdensome Remediation Plan was imposed on Miss Keeton because of the viewpoints she shared in and out of class, views which the faculty then rebuked and corrected. (Dkt.1-3 at 3-5.) The

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disregard the ethical standards of the profession during her training"); *id.* at 15 ("Ms. Keeton made clear that she would not" comply with the ACA Code); *id.* at 15 n.10 (inventing that "Plaintiff argues that there is no need for her to develop the ability to refrain from imposing her own views on clients"); *id.* at 16 ("the evidence to date showed that plaintiff would not comply with the ACA Code of Ethics and refrain from imposing her values as a counselor on her clients"); *id.* at 17 (arguing the First Amendment does not protect Keeton because she is "a student who will not abide by the rules of professional conduct"); *id.* at 17 n.12 ("plaintiff made clear her intentions to engage in conduct inconsistent with the ACA Code of Ethics"). Such a performance implies an acknowledgment of the validity of the case Miss Keeton actually brings.

Addendum letter chastised Miss Keeton's written statements of her religious outlook, and explained that these further justify the probationary imposition. (Dkt.1-4 at 1.) Dr. Schenck explained to Miss Keeton how her outlook on life is unethical and must be changed. (Dkt.1 ¶78.) Miss Keeton has not been "free to express her views ... without censorship."

Indeed, in a later and more forthcoming moment, Defendants refine their position by explaining that Miss Keeton's freedom to speak as she wishes does not entail immunity from faculty reprisal:

> Keeton may express any view she wants both in and out of the classroom, but the counselor educators charged with her instruction are not required to ignore her statements simply because she asserts them as religious beliefs.

(Resp.Br.41.) As Defendants go on to propose, reprisals by the faculty are justified because penalizing Miss Keeton for her statements (apparently including those reported from private conversations) is akin to grading her test answers. "Teachers can't teach and evaluate a student's progress except by considering what she says and writes.... First Amendment rights are not infringed when educators make judgments—based on what a student says and writes—that the student does not grasp the basics of the class." (Resp.Br.41 n.26.)

But whether a student "grasps the basics of a class" is reflected in the grade that a student is given by the class instructor. Miss Keeton has not been flunked from any class; she is graded highly. Indeed, as Defendants point out, she received

an "A" in her "Diversity Sensitivity in Counseling" class (Resp.Br.22), the class in which she expressed her forbidden viewpoint in a written assignment. (Dkt.35-6.) And the faculty in the Remediation Plan did not address (nor are they through such means authorized to address (Dkt.1 ¶21)) Miss Keeton's academic performance in any class. They instead targeted her for her expressed viewpoints.

1. Viewpoint discrimination claim

In ostensibly responding to Miss Keeton's viewpoint discrimination claim, Defendants assail a straw man: "That Keeton objects, on religious grounds, from [sic] reading peer journals and attending counseling workshops ... does not make the curriculum, or Remediation Plan, viewpoint discrimination." (Resp.Br.26.) Quite right. But that is not her claim. And Defendants continue to avoid her claim in proposing that "Keeton's argument is that by imposing neutrality, and failing to create an exemption for her, the curriculum discriminates on the basis of viewpoint." (Resp.Br.27.) Miss Keeton does not challenge the curriculum. She challenges the terms of probation the faculty impose on her alone, which they explained in writing was visited upon her because she expressed beliefs they disfavor.[15]

[15] Defendants' reliance on *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2004) and *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) is mistaken. (Resp.Br.27.) These cases involve, respectively, regulation of student speech that carries secondary-school imprimatur and issuance of a failing grade to a student who did not comply with the terms of a written assignment.

Additionally instructive for her claim (as noted above) is the immediate context of her written statement relating her viewpoint that GLBTQ conduct is "identity confusion" in which she presents the critical information that she does not intend to communicate such messages in the counseling room. (Dkt.35-6 at 3.) It is thus highly probative of her viewpoint discrimination claim that the faculty isolated her expressed viewpoint *which she identifies she would never announce to a client* as a reason for her remediation. This refutes Defendants' new proposal that their concerns were (notwithstanding the "Reason(s)" presented in the Remediation Plan document—which do not appear in their brief) with her purported failure to understand that professional standards call for withholding opinions from counselees.[16]

Defendants anachronistically offer that Miss Keeton's alleged (and contested)[17] statement to Dr. Schenck in the third remediation plan meeting justifies the imposition on Miss Keeton of the Remediation Plan. (Resp.Br.30-31.) But the faculty's reasons for imposing remediation were set forth in writing at the

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Neither applies to Miss Keeton's case.

[16] Even the errant district court opinion in *Ward v. Willbanks*, 2010 WL 3026428, at *11 (E.D. Mich. 2010) acknowledges the ACA Code's admonition to avoid imposing values "is not a prohibition on a counselor making statements about their values and beliefs in a setting other than with a client."

[17] As set forth above, Miss Keeton's position has never been that she is unable or unwilling to withhold her moral judgments from clients, but rather that she will not affirmatively state to clients that immoral conduct is moral. (Dkt.1 ¶¶92, 99, 100, 108; Dkt.35-6 at 3.)

time of its imposition (and never foresworn since), and had nothing to do with the statement Miss Keeton allegedly uttered later about her future professional intentions. Furthermore, even if this contested allegation on Miss Keeton's future intentions were accepted (notwithstanding its dissonance with her written and spoken commitments on that issue), that could not immunize Defendants from injunctive restraint for their probationary requirements obliging Miss Keeton to reveal the content of her beliefs for faculty evaluation and to pledge to affirm a proposition she disbelieves. Defendants' contemporaneous explication of such terms drove Miss Keeton to withdraw from remediation upon recognizing her foreordained failure under those standards. *See* Dkt.1 ¶¶105, 110.

2. Retaliation claim

Against Miss Keeton's retaliation claim, Defendants argue they have merely engaged garden-variety academic intervention:

> A student that fails a math test can be given extra work to try to bring them up to speed. The additional work does not make the requirement that the student learn the math curriculum retaliatory. All students have to learn the curriculum, some just pick it up faster than others.

(Resp.Br.26-27 n.18.) Indeed. But Miss Keeton received an "A" in the class in which she communicated a viewpoint that landed her on probation. And a hearsay reports of the content of her private conversation outside of class is not a source from which curricular knowledge and class grades are determined. Further, the faculty's requirement that Miss Keeton to avoid expulsion promise to convey

moral approval for homosexual sex is not an academic undertaking; it is ideological arm-twisting. Defendants' retaliation was not concerned with academic performance, but with stifling dissent. "[D]irect retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

3. Compelled speech claim

Defendants precisely invert Miss Keeton's compelled speech claim when offering that "Keeton is opposed to the fact that her role as a school counselor does not include an opportunity to judge her clients' moral compass." (Resp.Br.29.) To the contrary, she opposes the faculty's requirement that she promise to affirmatively repudiate her own moral compass as the condition for avoiding dismissal from the counseling program. The faculty has targeted Miss Keeton's moral convictions from the outset by penalizing her with probation because she communicated a Christian moral position on sexuality, by requiring her to reveal monthly the current content of her beliefs for faculty evaluation to resolve whether to dismiss her from the program, and by the requirement that she commit to speak an ideological message hostile to her convictions. This case does arise because the faculty instructed Miss Keeton to *refrain* from offering moral evaluations to clients, but because they are *compelling her* to communicate a certain moral

assessment—one that the faculty approve—as a condition of receipt of an education.

Counsel for Defendants attempts to distance her clients from her statements to the court at the preliminary injunction hearing. (Resp.Br.29 n.20 (quoting Dkt.54, Tr.122 ("Is a counselor required to lie? Absolutely.")).) But this effort is futile. Her statement announcing that a counselor is required to lie was not mistaken; it is a pithy summary of the message Dr. Anderson-Wiley communicated in her oral testimony: students must affirm the truth of certain propositions even if they believe them to be false. (Dkt.54, Tr. 94-95.) This, indeed, is the very point that counsel made in the immediately preceding footnote in the brief (Resp.Br.28 & n.19): just because a counselor "affirms" something does not mean such counselor believes it. Yet affirm it she must. As Defendants put it, "What is required of Keeton, and all counseling students, is that she 'affirm ... what the client believes is right for him or her.'" (*Id.* at 29.) So Miss Keeton must now pledge to her professors that if a future client pursues homosexual sex or abortion or a contra-biological gender identification, she will convey moral approval for such conduct. (*See* Dkt.1 ¶108.) If she does not promise to do that, she will be expelled. (Dkt.54, Tr. 92-94; Dkt.1 ¶104.)

> If "the government [were] freely able to compel ... speakers to propound political messages with which they disagree, ... protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."

Hurley, 515 U.S. at 575-76 (brackets and ellipses in original) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1996) (plurality opinion). The faculty's coercive remediation plan should be enjoined.

4. Free Exercise claim

Miss Keeton challenges the terms of the remediation program tailored specifically to her, containing requirements imposed on no other student. Defendants, however, posture their defense to her free exercise claim as if Miss Keeton mounts an attack on the school's curriculum. They urge that the "threshold questions" in her challenge are "(1) is the law neutral, and (2) is the law of general applicability?" (Resp.Br.35 (citing *First Assembly of God v. Collier Cnty.*, 20 F.3d 419, 423 (11th Cir. 1994).) The faculty's targeted and singular probationary imposition on Miss Keeton is precisely the sort of conduct excluded from the analysis they suggest. *See Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); App.Br. 45-46, 49. Additionally, Defendants fail to appreciate that a belief-targeting penalty by State officials is *never* legitimate under the Free Exercise Clause, even if generally applicable. *Smith*, 494 U.S. at 877. The State's penalizing of a person's views is categorically prohibited under the First Amendment. Government conduct "cannot interfere with mere religious beliefs and opinions," *id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

Defendants argue that it is not Miss Keeton's beliefs, but her "*behavior*, i.e., refusing to participate in the curriculum, that jeopardizes her standing in the counseling program." (Resp.Br.36.) This is backward, for it treats her *response* to Defendants' punitive conduct as if it were the *provocation* for that conduct. What Miss Keeton is "refusing" is a punitive Remediation Plan that is itself the constitutional offense, for it was imposed because of faculty hostility to her speech and viewpoints, makes her beliefs one of the contingencies determining her continuance in the program, and requires her to promise to convey an ideological message hostile to her beliefs.

Defendants write that while Miss Keeton interprets the need to change her views as the need to change her "*religious* views," the faculty intends only that she must "change her views about what is required to be a competent counselor." (Resp.Br.40 n.25.) But on Defendants' terms, those are equivalent requirements. For the views Miss Keeton must adopt to be a "competent counselor" include that which conceives of homosexuality not as a lifestyle but a "state of being," that GLBTQ conduct is not "identity confusion," that repentance of homosexual behavior is unhealthy, that seeking to convince colleagues of the merits of her views is culpable conduct (Dkt.1-3 at 3-5), and that conveying moral approval for homosexual relations is obligatory. (Dkt.1 ¶104; Dkt.54, Tr. 92-94.)

Additionally, Defendants do not explain why it would be constitutionally

acceptable for them to compel change in Miss Keeton's views on *any* issue. Professors instruct on subject matter and require students to demonstrate apprehension of it. Students' personal convictions on the ethical merit of such instruction are beyond the purview of State educators.

CONCLUSION

In denying Miss Keeton's preliminary injunction request, the lower court "applie[d] an incorrect legal standard" in granting unwarranted deference to the faculty's decisions and in viewing the case through the lens of the inapposite *Hazelwood* decision; it "relie[d] on clearly erroneous factfinding" in disregarding (though not denying) the undisputed record evidence (though *de novo* review is called for in any event); and it "reache[d] a conclusion that is clearly unreasonable or incorrect" by validating the faculty's uniquely sweeping and intrusive violation of Miss Keeton's rights. *See Schiavo ex. rel Schindler v. Schiavo*, 403 F.3d 1223, 1226 (2005).

Jennifer Keeton respectfully reiterates her request to this Court that it reverse the district court's denial of her motion for preliminary injunction and either enter the requested relief or remand the case to the district court with instructions to enter preliminary relief in the her favor.

Dated: December 9, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and it complies with the typeface requirements of Fed. R. App. P. 32(a)(5), because it has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

Dated: December 9, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served by U.S. Mail on the parties and counsel of record as follows:

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