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No. 10-2100/10-2145

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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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JULEA WARD,

Plaintiff-Appellant/Cross-Appellee,

v.

ROY WILBANKS, ET. AL.,

Defendants-Appellees/Cross-Appellants.

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Appeal from the United States District Court  
District of Michigan, Eastern Division  
Honorable George Caram Steeh

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PROPOSED BRIEF OF *AMICUS CURIAE* OF  
ATTORNEY GENERAL BILL SCHUETTE  
IN SUPPORT OF PLAINTIFF-APPELLANT  
ASKING THIS COURT TO REVERSE

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**STATEMENT OF INTEREST OF  
*AMICUS CURIAE* STATE OF MICHIGAN**

The Michigan Constitution provides for the protection of religious worship, and also shields Michigan citizens from religious discrimination by guaranteeing that “[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.” Mich. Const. Art 1, § 4. These protections apply to the public institutions of the State, including its fifteen public universities.

The claim here was filed by Julea Ward, a Michigan resident, who claimed that Eastern Michigan University violated her constitutional rights under the First and Fourteenth Amendments. The claim was not brought under the Michigan Constitution, but these principles undergird Michigan law and implicate the role of the Attorney General, who is the chief legal officer for the State. Consistent with this role, the Attorney General is authorized by Michigan law, Mich. Comp. Law § 14.28, to safeguard the interests of the people of the State when, in his judgment, this is necessary.

In the Attorney General’s view, there is a genuine issue of material fact regarding whether Eastern Michigan University (EMU) discriminated against Julea Ward and dismissed her from its program based on her religious beliefs.

The Amicus Curiae Brief of the State of Michigan prepared by the Attorney General is being filed pursuant to Fed. R. App. P. 29(a).

## INTRODUCTION

This appeal involves alleged religious discrimination against a graduate student for her disfavored religious beliefs. It arises out of EMU's decision to dismiss plaintiff Julea Ward from her degree program when she asked—as EMU policy allowed—to be excused from counseling a prospective client rather than be required to approve his conduct of engaging in sexual activity outside of marriage.

In the faculty interrogation of Ms. Ward that ultimately resulted in her dismissal, an EMU professor specifically asked Ward if she was “more righteous than another before God?” and queried why an individual engaged in sexual conduct outside a marriage relationship “shouldn't ... be accorded the same respect and honor that God would give them.” The obvious implication was that Ward was being dismissed for her religious views. Although Ward raises several issues in her briefing, the Attorney General will address only one: whether EMU violated Ward's constitutional right to be free of religious discrimination when it determined that she violated the American Counseling Association's Code of Ethics and Standards of Practice (“ACA Code of Ethics”). There is a substantial fact question regarding whether EMU's actions against Ward were based on a fair and nondiscriminatory application of the ACA Code of Ethics, or were instead based on Ward's disfavored religious beliefs.

The ACA Code of Ethics and the EMU counseling program's textbooks expressly contemplate that a counselor may refer a client to another counselor. Moreover, the textbooks clearly provide, and a fair reading of the Code allows, that these referrals may be based on a counselor's personal beliefs. In fact, there is no dispute that the EMU program has previously allowed students to invoke the referral policy for personal reasons. But Julea Ward was disciplined and ultimately dismissed when she invoked the policy based on her Christian belief that sexual activity that occurs outside of a marriage is wrong, and that she cannot in good conscience counsel a client to engage in that activity.

There is a striking difference between EMU's written standards and EMU's application of those rules to Julea Ward. Indeed, the evidence suggests that Ward was punished and ultimately dismissed from the program solely for her attempt to exercise disfavored religious beliefs, not for a violation of the Code. Moreover, the stark contrast between EMU's policy and conduct raises at least an inference that EMU invoked the standards as a pretext for religious discrimination. In other words, the factual record gives rise to a reasonable inference that EMU "weeded out" Ward solely because of her religious views to ensure that only candidates with the "right" beliefs are admitted to the counseling profession. If true, the effect is to deprive a Michigan citizen of a degree from a Michigan public university solely because her religious views do not coincide with those of the establishment. Such

conduct is unconstitutional and warrants reversal and remand for further proceedings.

## ARGUMENT

**I. This Court should reverse and remand because there is a genuine issue of material fact about whether Julea Ward was dismissed from the EMU program based on her religious beliefs, rather than on a neutral application of the ACA Code of Ethics.**

At the outset, the Attorney General notes that plaintiff disputes whether the standards the Supreme Court articulated in *Hazelwood School District v.*

*Kuhlmeier* are applicable here.<sup>1</sup> For purposes of argument only, however, the Attorney General will assume *Hazelwood* applies. Even under the *Hazelwood* rubric, Julea Ward has proffered sufficient evidence of religious discrimination to warrant a remand for further proceedings.

The law provides that an action may lie for religious discrimination—even in the university setting for decisions regarding curriculum matters—where there is an unfair or discriminatory application of the rules. A fair reading of the ACA Code of Ethics and the textbooks on which EMU relies reveals an EMU policy allowing counseling students to refer a patient to another counselor when, as here, a counselor had a significant moral disagreement about advice that the program expected the counselor to provide. Even though other students had been allowed to invoke the referral policy, EMU concluded that Ward’s referral decision violated the ACA Code of Ethics. The disparity between EMU’s written policy and its application to Julea Ward gives rise to the reasonable inference that Ward

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<sup>1</sup> *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

was dismissed because of her religious beliefs. The ACA Code of Ethics does not provide that moral opposition to sexual activity that occurs outside of marriage constitutes grounds for dismissing a student.

**A. There is a valid constitutional claim of religious discrimination where a university applies a curriculum requirement as a pretext to punish a disfavored religious belief.**

The Supreme Court held in *Regents of the University of Michigan v. Ewing* that university faculties enjoy “the widest range” of discretion in making decisions about the academic performance of students.<sup>2</sup> Thus, in order to establish a possible constitutional violation, there must be “a substantial departure from accepted academic norms,” demonstrating that the faculty members did not “exercise professional judgment.”<sup>3</sup> This Court has likewise recognized the “wide latitude” provided to college and graduate schools in establishing a curriculum consistent with that university’s mission.<sup>4</sup>

One of the seminal cases evaluating First Amendment claims in a public school setting is *Hazelwood School District v. Kuhlmeier*.<sup>5</sup> The Supreme Court determined in that case that there was no First Amendment violation by a public

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<sup>2</sup> *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

<sup>3</sup> *Ewing*, 474 U.S. at 225.

<sup>4</sup> *Kissinger v. Board of Trustees of Ohio State University*, 5 F.3d 177, 180-181 (6th Cir. 1988).

<sup>5</sup> *Hazelwood*, 484 U.S. at 260.

secondary school for suppressing two pages of a school newspaper because its content was not appropriate for publication.<sup>6</sup>

Relying on *Hazelwood*, this Court in *Settle v. Dickson County School Board* examined a constitutional challenge brought by a secondary-school student who was instructed that she could not write a paper on the “Life of Jesus Christ” for her ninth-grade drama class.<sup>7</sup> This Court cited *Hazelwood* and noted that student speech in a school-sponsored event was subject to the editorial control of the school as long as the restriction related to “legitimate pedagogical concerns.”<sup>8</sup> Significantly, this Court noted that it would be an entirely different matter if the asserted restriction was only a “pretext” for discrimination:

So long as the teacher limits speech or grades speech in the classroom in the name of learning *and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion*, the federal courts should not interfere.<sup>9</sup>

The Tenth Circuit recently applied this commonsense reasoning in evaluating a similar constitutional challenge to the one here.

In *Axson-Flynn v. Johnson*, the Tenth Circuit reviewed a claim from a student at the University of Utah in the acting program.<sup>10</sup> She contended that the University violated her constitutional right of free speech and free exercise as a

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<sup>6</sup> *Hazelwood*, 484 U.S. at 270-271.

<sup>7</sup> *Settle v. Dickson County School Board*, 53 F.3d 152, 154 (6th Cir. 1995).

<sup>8</sup> *Settle*, 53 F. 3d at 155.

<sup>9</sup> *Settle*, 53 F. 3d at 155 (emphasis added).

<sup>10</sup> *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1280 (10th Cir. 2004).

Mormon by threatening to expel her from the program when she refused to say certain vulgar words or take God's name in vain during classroom acting exercises.<sup>11</sup> The federal district court had dismissed the claim on a motion for summary judgment.<sup>12</sup>

The Tenth Circuit relied on the standard from *Ewing* that the federal courts should not “second-guess the pedagogical wisdom or efficacy of an educator’s goal,” but nevertheless stated that the federal courts had a duty to “investigate whether the educational goal or pedagogical concern was pretextual.”<sup>13</sup> The Tenth Circuit ultimately reversed the district court and remanded for further proceedings, concluding that “there is a genuine issue of material fact as to whether [the University faculty’s] justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination.”<sup>14</sup>

**B. The curriculum requirements of EMU allowed for referrals for a values conflict, but EMU did not allow a referral here for Ward’s Biblically-based beliefs, giving rise to a genuine issue of material fact whether she was dismissed based on religious discrimination.**

EMU’s application of the ACA Code of Ethics and the rules from the textbooks here suggests strongly that EMU applied these rules in a different fashion to Julea Ward solely because of her conservative religious beliefs.

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<sup>11</sup> *Axson-Flynn*, 356 F.3d at 1280.

<sup>12</sup> *Axson-Flynn*, 356 F.3d at 1282-1283.

<sup>13</sup> *Axson-Flynn*, 356 F.3d at 1293.

<sup>14</sup> *Axson-Flynn*, 356 F.3d at 1293.

Accordingly, there is a genuine issue of material fact as to whether EMU's justification for dismissing Ward was a pretext for religious discrimination.

**1. The ACA Code of Ethics and the texts that EMU used in its curriculum provided for referrals for values conflict.**

The controlling standards used by EMU for its Graduate Counseling Program is the ACA Code of Ethics. On its face, the Code appears to allow for referrals for the circumstance in which a counselor would have an "inability" to assist a client:

A.11 Termination and Referral

- b. Inability to Assist Clients. *If counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships.* Counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives. If clients decline the suggested referrals, counselors should discontinue the relationship.

\* \* \*

- d. Appropriate Transfer of Services. When counselors transfer or refer clients to other practitioners, they ensure that appropriate clinical and administrative processes are completed and open communication is maintained with both clients and practitioners. [R 14, Defendants' Response to Motion for Preliminary Injunction filed on May 15, 2009, Exhibit 5, ACA Code of Ethics, p. 50 (emphasis added).]<sup>15</sup>

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<sup>15</sup> The Amicus here references the page numbers that appear from the text cited, rather than from the R page numbering or the page numbering from the motion.

There is no indication in the ACA Code of Ethics that this “inability” would be limited to circumstances in which the counselor was not professionally competent to provide assistance, as opposed to one in which there was a moral conflict for the counselor.

In fact, the paragraph within the section governing “Termination and Referral” lists three circumstances in which “termination” would be appropriate: (1) “when it is reasonably clear that the client [] no longer needs assistance”; (2) “is not likely to benefit”; or (3) “is being harmed by continued counseling.” (R 14, ACA Code of Ethics, p. 50.) The ACA Code of Ethics states that the primary responsibility of a counselor is to “respect the dignity and to promote the welfare of clients” and directs the counselor to avoid “imposing values that are inconsistent with counseling goals.” (R 14, ACA Code of Ethics, pp. 45, 47.) But there are no specific limitations identified in the Code for referrals. In other words, there is no indication in the ACA Code of Ethics that referrals based on moral or religious considerations that the client’s decisions are not consistent with the counselor’s independent understanding of the client’s interest or welfare are prohibited. Examining the ACA Code of Ethics in isolation, the most reasonable inference is that the “inability” identified in A.11 would encompass any proper basis on which to seek a referral.

The only other provision that addresses referrals in the ACA Code of Ethics is in the “End-of-Life Care for Terminally Ill Clients,” A.9, which expressly provides for a conscience clause for counselors who do not wish to “explore end-of-life options” with their clients:

- b. Counselor Competence, Choice, and Referral. Recognizing the personal, moral, and competence issues related to end-of-life decisions, counselors may choose to work or not work with terminally ill clients who wish to explore their end-of-life options. Counselors provide appropriate referral information to ensure that clients receive the necessary help. [R 14, ACA Code of Ethics, p. 49.]

There is nothing in this provision that suggests it is the exclusive basis on which to seek a referral for personal or moral convictions, which would encompass religious convictions.

In fact, the EMU curriculum textbooks from Ward’s class work make clear that referrals based on a counselor’s beliefs are permissible and a part of the standard of care for counseling professionals. The primary example of this point is taken from *Becoming a Helper*, 5th Edition, edited by Marianne Schneider Corey and Gerald Corey (2007), in which the textbook evaluates at length the relationship between the counselor’s beliefs and the client’s beliefs. The textbook expressly contemplates referrals in its section addressed “Values Conflicts With Clients”:

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.* [R 79, Plaintiff’s Motion for Summary Judgment, filed February 2, 2010, Exhibit 1, *Becoming a Helper*, pp. 223-224 (emphasis added).]<sup>16</sup>

The textbook continues that such a referral should be a “last resort,” but only states this in the form of a recommendation, indicating that “[w]e *hope* that you would not be too quick to refer” a client. *Id.* at 224 (emphasis added).<sup>17</sup> Another textbook that Ward encountered in her class work likewise indicated the appropriateness of referral where there is a conflict with the beliefs of the counselor:

*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, if you are unfamiliar with or unable to use a treatment requested by the client, if you would be exceeding your level of competence in working with the client, or if more than one person is involved, and because of your emotions or biases, you favor one person instead of another.* [R 79, Plaintiff’s motion filed February 2, 2010, Exhibit 2, *Interviewing and Change Strategies for Helpers*, 5th ed., Cormier and Nurius (2003), p. 266 (emphasis added).]

Ward produced a report from Dr. Warren Throckmorton, which evaluated the EMU textbooks and the ACA Code of Ethics for referrals and determined that a referral to another counselor based on a conflict in beliefs was an appropriate use

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<sup>16</sup> See also *id.* at 223 (“We hope that there would be very few instances where you would have to tell clients that you could not work with them because you do not agree with their value system.”).

<sup>17</sup> The Corey textbook also provides that a counselor should not “keep their values separate from their professional relationships,” because the assumption that “counseling is value-neutral is no longer tenable.” *Id.* at 222, 223.

of the referral process. (R 80, Plaintiff’s Motion filed on February 2, 2010, Exhibit 29, Dr. Throckmorton’s expert report, pp. 2-9.) That conclusion is consistent with professional practice; the Corey textbook, for example, indicates that “40%” of professionals [have] had to make a referral based on a value conflict. (R 79, Plaintiffs’ Motion for Summary Judgment, Exhibit 1, *Becoming a Helper*, pp. 235-236.)<sup>18</sup>

Dr. David Kaplan, the ACA’s Chief Professional Officer, provided the certified opinion that the Code affirmatively excluded referrals based on the counselor’s personal beliefs with the exception of end-of-life counseling.<sup>19</sup> But Kaplan’s report offered no textual support for that conclusion, and he does not even address the express provision for values-based referrals in the textbook *Becoming A Helper*, which was published in 2007. This omission is significant given that Kaplan was directly addressing the plaintiff’s expert, Dr.

Throckmorton’s report, who had relied on and quoted at length from the Corey

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<sup>18</sup> “Although helping professionals have personal values about sexual practices, the study found that when practitioners’ beliefs conflict with those of clients, they appear 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.* (emphasis added).

<sup>19</sup> “The ACA Ethics Revision Task Force, which promulgated the 2005 *ACA Code of Ethics*, was very much aware of the code’s prohibition on using personal values as a criterion for referral or termination.” [R 82, Defendants’ Motion for Summary Judgment, filed on February 2, 2010, Exhibit 7, Dr. Kaplan’s certified report, pp. 13-14 (emphasis added).]

text. (R 80, Motion filed on February 2, 2010, Exhibit 29, Dr. Throckmorton's expert report, p. 2.)

The district court's evaluation on this point cites this textbook, *Becoming a Helper*, and ultimately concludes that "[t]here are excerpts from the required texts supporting both sides regarding the referrals." See slip. op., pp. 32-33. But the district court did not cite any provision from the ACA Code of Ethics or any other textbook in support of the position that referrals are forbidden based on personal values. This is the central point here, since this was the supposed neutral basis on which EMU based its decision.

## **2. EMU punished Ward for invoking the referral clause.**

In the practicum, Ward explained that she sought Dr. Callaway's guidance when she saw that her prospective client was seeking counseling about that client's sexual activity outside of a marriage relationship:

In reading this person's file prior to my first appointment, I also noticed that the individual was a returning client and that the past counselor had affirmed this person's homosexual behavior, as the counseling department mandates counseling students do. Because I knew I could not provide the same counsel without . . . violating my religious beliefs, I called Dr. Callaway prior to my first appointment to ask if I should keep the initial appointment with the client and refer him or her if it became necessary or simply cancel the appointment. [R 1, Complaint filed on April 2, 2009, Exhibit 3, Formal review hearing, March 10, 2009, p. 12.]

Moreover, although Ward was willing to counsel a patient about considering alternatives to non-marital sexual activity, the EMU Department had excluded these options. *Id.* at 10, 23.

In response to Ward’s referral and the follow-up informal meeting, the Department sent Ward a letter indicating that it was convening a formal review hearing, which was “disciplinary in nature.” (R 1, Complaint, Exhibit 2, February 19, 2009 letter.) The letter identified two possible violations: (1) imposing personal values; and (2) discrimination against clients based on their sexual orientation. Among other provisions, the letter quoted from the two sections of the ACA Code of Ethics relevant for the hearing:

A.4 Avoiding Harm and Imposing Values

\* \* \*

- b. Personal Values. Counselors are aware of their own, values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants.

\* \* \*

C.5 Nondiscrimination

Counselors do not condone or engage in 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. Counselors do not discriminate against clients, students, employees, supervisees, or research

participants in a manner that has a negative impact on these persons. [R 14, ACA Code of Ethics, pp. 47, 59.]

At the formal hearing, Ward explained that she was able to provide counseling to homosexual clients, but had religious beliefs that would not allow her to affirm homosexual conduct or any other sexual activity that occurred outside of marriage. (R 1, Complaint, Formal review hearing, pp. 10-14.) The faculty conducting the hearing then explored whether Ward limited this objection to homosexual conduct, or applied it to all non-marital sexual activity, and Ward explained that it was the latter. *Id.* at 15-27.

At this point, Dr. Suzanne Dugger asked whether Ward saw her “brand of Christianity as superior to his [i.e., Dr. Perry Francis’s] because you are not just a Christian in name only.” *Id.* at 28. Dr. Francis is an ordained Lutheran minister, and Ward had just stated during the hearing that she was “not a Christian in name only” and could not affirm conduct that contradicted the teachings of the Bible. *Id.* at 27. This inquiry then led to a line of questions from Dr. Francis, prefaced as a “theological bout,” in which he inquired whether anyone was “more righteous than another before God?” and whether she was on an “equal footing with these people?” *Id.* at 29. The unmistakable subtext of this inquiry was that Ward’s understanding of Christianity was mistaken, because, based on the equality of all persons before God, “shouldn’t they be accorded the same respect and honor that God would give them?” *Id.* at 29. The clear implication was that such respect and

honor included offering counseling that would affirm a patient's homosexual conduct. Dr. Francis even asked "how does that then fit with your belief" and did not finish the query. *Id.* at 29.

In a letter dated March 12, 2009, Ward was informed that she had been dismissed from the School Counseling Program for violation of the ACA Code of Ethics for attempting to impose values based on sexual orientation. (R 1, Complaint, Exhibit 5, March 12, 2009 letter.)

**3. There is a genuine issue of fact about whether EMU was really "weeding" out Ward for her conservative religious views.**

Given the clear provision for referrals for value conflicts in the textbooks of the EMU Counseling program and the expressed provision for referrals within the ACA Code of Ethics, there is a genuine issue of material fact about whether EMU's actions were motivated by Ward's disfavored religious views. This is particularly ironic, because Ward sought the referral because she was honoring the standards from the ACA Code of Ethics but did not want to contradict her Christian beliefs regarding sexual conduct outside of marriage. In other words, there is a strong inference that EMU dismissed Ward because of her religious beliefs.

The district court determined that EMU reasonably concluded that Ward had violated the non-discrimination clause of the ACA Code of Ethics here because

Ward had sought an “undifferentiated referral of an *entire class* of clients” referring to the class of clients with a homosexual orientation. Slip. op., p. 33 (emphasis in original). But this is not what happened.

Ward stated that she would counsel clients who were engaged in homosexual conduct as long as the subject of the counseling did not require her to affirm homosexual conduct. (R 1, Complaint, Formal review hearing, p. 10.) Moreover, she indicated that she would have provided counseling advice regarding alternatives to this conduct, but that the program foreclosed this opportunity because “reparative therapy” was not medically supported. *Id.* at 23. Ward did not refuse to provide counseling to any specific group, but rather indicated that she would not affirm sexual conduct outside of marriage.<sup>20</sup> *Id.* at 27.

The district court’s response to the point that this would create a crisis of conscience for Ward is indifferent to her deeply-held religious beliefs:

It is true that EMU’s curriculum does require plaintiff to make an effort to counsel homosexual clients, but, contrary to plaintiff’s assertion, this requirement is not a requirement to *endorse* or *advocate* homosexuality, hence infringing her free exercise rights. Plaintiff was not required to change her views or religious beliefs; **she was required to set them aside** in the counselor-client relationship[.] Slip. op., p. 33 (italicized emphasis in original; bolded emphasis added).]

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<sup>20</sup> Under the Michigan Constitution and Michigan statutory law, marriage is defined as the union of one man and one woman. Mich. Const. Art. 1, § 25; Mich. Comp. Law 501.1 *et. seq.*

The difference between “setting aside” one’s religious beliefs as compared with endorsing conduct that one opposes is an illusory one. Such an analysis provides a very truncated role for conscience.

The fact that EMU approved other referrals and did not subject the specific graduate student to a disciplinary proceeding, see slip. op., p. 30,<sup>21</sup> supports the claim that the real basis for EMU’s decision here was a disagreement with Ward’s religious beliefs. The exchange with Dr. Francis during the formal hearing about Ward’s understanding of Christianity supports this conclusion. As in *Axson-Flynn*, the line of questions suggests strongly that the EMU faculty believed that Ward had a mistaken understanding of Christianity. The basis for the Tenth Circuit decision in *Axson-Flynn* in remanding for further proceedings was the fact that the faculty there suggested that Mormonism did not prevent the student from using the vulgar or blasphemous language:

Additionally, the program’s insistence that Axson-Flynn speak with other “good Mormon girls” and that she could “still be a good Mormon” and say these words certainly raises concern that hostility to her faith rather than a pedagogical interest in her growth as an actress was at stake in Defendants’ behavior in this case.<sup>22</sup>

The same is true here.

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<sup>21</sup> The district court noted Ward’s point that “certain students were given exemptions from counseling a particular client in circumstances not involving religion” and also stated that “EMU has allowed referral of clients on a limited basis.” Slip. op., p. 30.

<sup>22</sup> *Axson-Flynn*, 356 F.3d at 1293.

The faculty at the formal hearing suggested that, like Dr. Francis, Julea Ward should be able to provide this kind of counseling. Dr. Francis was trying to educate Ward about his view of the true nature of Christianity to show her that her belief that she could not counsel was based on her proud belief in her superiority to others, not a commitment to any Christian moral code. Dr. Francis told Ward that if she properly understood Christianity, *like him*, she would be able to affirm homosexual activity in good conscience as a Christian.

The question arises whether EMU would have reached the same result if the student had sought a referral based on a conflict of beliefs that related to a class of conduct that was not socially disfavored in the university community, such as opposition to a religious belief that the marital role of a woman in marriage is to be subservient to her husband, or opposition to the cultural practice of female circumcision. Each of these classes of conduct relates to “religion” or “culture” within the non-discrimination clauses of the ACA Code of Ethics, but any fair observer may surmise that a graduate counseling student at EMU who refused to endorse these disfavored views would not have found themselves isolated and then dismissed from the program.

At the formal hearing, Dr. Gary Marx unintentionally identified the real motivation for Ward's dismissal from the program:

MARX: *So I guess what I am trying to figure is how someone with such strong religious beliefs would enter a profession that would cause you to go against those beliefs . . .*

WARD: Well ...

MARX: By . . . by its stated code of ethics.

WARD: I . . .

MARX: That's what I don't understand . . .

WARD: I think . . .

MARX: *Why would you put yourself in that position?*

[R 1, Complaint, Formal review hearing, p. 31 (emphasis added).]

The underlying message is that Biblical Christians, or anyone with strong conservative moral beliefs, should not be in a counseling program or seek to become counselors. The line of questions was telling because, earlier in the hearing, Ward had stated that she was subject to religious discrimination at EMU for her beliefs, *id.* at 20, that her "religious beliefs were incompatible with the counseling department," *id.* at 11, and that Dr. Callaway indicated that EMU would "weed out those [who were] not on the same page." *Id.* at 11.

Thus, there is a genuine issue of material fact regarding the claim that the EMU counseling program, as applied to Ward, sought to screen out religiously

conservative degree candidates. The ACA Code of Ethics, the textbooks, and the curriculum itself do not require this result, but there is a legitimate claim here that the application of these rules by the EMU faculty to Ward was a pretext for religious discrimination.<sup>23</sup> As in *Axson-Flynn*, the proper remedy here would be to remand for further proceedings. This Court should reverse and remand.

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<sup>23</sup> The fact that the social scientists such as counselors and psychologists are not reflective of the political views of the general population was recently examined in an article of the *New York Times*. “Social Scientist Sees Bias Within,” *Science*, p. 1, February 7, 2011, (“[Dr. Jonathan Haidt] polled his audience at the San Antonio Convention Center, starting by asking how many considered themselves politically liberal. A sea of hands appeared, and Dr. Haidt estimated that liberals made up 80 percent of the 1,000 psychologists in the ballroom. When he asked for centrists and libertarians, he spotted fewer than three dozen hands. And then, when he asked for conservatives, he counted a grand total of three.”). See <http://www.nytimes.com/2011/02/08/science/08tier.html?scp=1&sq=social%20scientists&st=cse> (last accessed on March 11, 2011).

## CONCLUSION

The Attorney General respectfully asks this Court to reverse the district court's grant of summary judgment for defendants and to remand for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 5,087 words.
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## **PROOF OF SERVICE**

I certify that on March 11, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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