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)

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Appellant Jennifer Keeton, hereby certifies that the following individuals and entities are known to have an interest in the outcome of this case:

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Cooper, Frederick E.

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellant Jennifer Keeton respectfully request oral argument for her appeal. Her case presents important First Amendment questions addressing whether State education officials may permissibly penalize a graduate university student for her religious speech and viewpoints and impose conscience-violating coercion of her speech as means of enforcing conformity to those educators' preferred perspectives. Because of the important constitutional liberties implicated in this appeal, and the nuanced nature of certain of the disputes it presents, counsel respectfully submits that oral argument would be of assistance to this Court.

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JURISDICTION

Appellant Jennifer Keeton filed this suit under 42 U.S.C. §1983 for deprivations of her rights secured by the First and Fourteenth Amendments to the United States Constitution. The district court possessed subject matter jurisdiction over this suit under 28 U.S.C. §§1343(a)(3) and 1343(a)(4), and 28 U.S.C. §1331. The jurisdiction of this Court rests on 28 U.S.C. §1292(a)(1).

This appeal is from the district court's denial of Miss Keeton's motion for preliminary injunction on August 20, 2010. Miss Keeton filed a notice of appeal on August 23, 2010, within the 30-day time period provided by Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Whether the district court erred in not preliminarily enjoining Augusta State University ("ASU") officials from expelling Miss Keeton from the ASU counseling program for her refusal to participate in a Remediation Plan that violates her First Amendment rights; and not preliminarily enjoining those officials from imposing the terms of that Remediation Plan on Miss Keeton as a condition of her participation in her Practicum course and other program requirements, and of her successful completion of the ASU counseling masters degree program.

STATEMENT OF THE CASE

This is a civil rights action brought by a Christian graduate student enrolled in the Counselor Education Program at Augusta State University. Miss Keeton filed suit on July 21, 2010, after her professors placed her on non-academic probation because she expressed her biblical views on sexual ethics, and threatened to expel her if she did not agree to alter her views and promise them that she will affirm the propriety of homosexual sex in her future clinical speech to clients.

Along with her Verified Complaint, Miss Keeton filed a motion for preliminary injunction. The district court held a hearing on that motion on August 11, 2010. On Friday, August 20, 2010, the district court issued an order and opinion denying the motion for injunction, in which the court asserted that the imposition to which Miss Keeton objects is a curricular requirement, therefore beyond the reach of the First Amendment. On Monday, August 23, 2010, Miss Keeton filed her notice of appeal from that denial. On Monday, September 13, 2010, Miss Keeton filed with this Court her Motion for Injunction Pending Appeal, which has since been fully briefed. That motion is pending.

STATEMENT OF FACTS

A. Introduction

Jennifer Keeton is a graduate student in the Augusta State University Counselor Education Program. (Dkt.1, Ver.Compl. ¶5.)[1] In the fall of 2009, she enrolled in the ASU program, seeking to obtain her master's degree in school counseling. (*Id.* ¶13.) Miss Keeton is a Christian, and is committed to the truth of the Bible, including its teaching on human nature, the purpose and meaning of life, and the ethical standards that govern human conduct. (*Id*. ¶14.)

At certain points during the past school year, Miss Keeton discussed her religiously-based views of gender and sexuality both inside and outside the classroom. She recited to professors her beliefs that sexual behavior is the result of personal choice for which individuals are accountable, not inevitable deterministic forces; that gender is fixed and binary (*i.e.*, male or female), not a social construct or personal choice subject to individual change; and that homosexuality is a "lifestyle," not a "state of being." (*Id.* ¶16.) She also shared her Christian faith privately with certain friends and colleagues, commended its virtues and benefits, and explained Christian viewpoints on matters related to sexual ethics.[2] (*Id.* ¶17.)

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[1] A verified complaint is treated as a sworn affidavit or declaration. *Sammons v. Taylor*, 967 F.2d 1533, 1545 n.5 (11th Cir. 1992).

[2] Consistent with her biblical convictions, Miss Keeton has never questioned the dignity or worth of individuals because of their moral views or sexual behavior, as neither undermines their valuable status as created in the image of God. (Dkt.1,

After being apprised of Miss Keeton's expressions of her biblical ethical convictions on sexuality and gender, Defendants informed her in writing that her speech is unethical according to American Counseling Association (ACA) and American School Counselor Association (ASCA) codes of ethics. (Dkt.1-3, Ver.Compl. Ex. B at 3.; Dkt.1, Ver.Compl. ¶31.) As a result, her professors placed her on non-academic probation. Under the terms of that probation, Defendants will expel Miss Keeton from the State university counseling program unless she commits to them that she will, in her future professional endeavors, tell clients wanting to hear it that homosexual sex is moral. (Dkt.53, Tr. of Prelim. Inj. Hr'g. ("Tr.") 92-94, Aug. 11, 2010; Dkt.1, Ver.Compl. ¶¶104, 108.)

B. Defendants' Remediation Plan Imposition

The ASU Counselor Education Program Student Handbook authorizes the imposition of a "Remediation Plan" on a student when that student's performance is "not satisfactory on interpersonal or professional criteria *unrelated to academic performance*."[3] (Dkt.1, Ver.Compl. ¶21 (emphasis added).)

In the Remediation Plan dated May 27, 2010 that Defendants imposed on Miss Keeton, they require her to attend workshops, read articles, participate in

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Ver.Compl. ¶18.)

[3] Defendants have included Miss Keeton's writing skills as a concern in the Remediation Plan. (Dkt.1, Ver.Compl. ¶28.) Miss Keeton is in compliance with this writing portion of the plan (*id.* ¶109), and it is not a component of the injunctive relief she seeks from this Court. (*But see id*. ¶37.)

social mixing with gay populations ("[o]ne such activity could be attending the Gay Pride Parade in Augusta"), and study the ALGBTIC (Association for Lesbian, Gay, Bisexual, Transgender Issues in Counseling) competencies for counseling gay and transgender clients. (Dkt.1-3, Ver.Compl. Ex. B at 5.) The faculty also require that Miss Keeton submit monthly two-page reflection papers that include summaries of "how her study has influenced her beliefs." (*Id*.) Based on those reflection papers and what she communicates during meetings with faculty members (a requirement of which is expounded below), Defendants would decide whether Miss Keeton has changed her mind adequately to avoid expulsion from the program. (Dkt.1, Ver.Compl. ¶¶ 34, 65-68, 71, 98, 104.)

C. Defendants' Justification for Imposing Probation on Miss Keeton

Defendants included in the Remediation Plan document the three provocations for their imposing on Miss Keeton its requirements and threats:

> [1] [Miss Keeton] has *voiced disagreement* in several class discussions and in written assignments with the gay and lesbian "lifestyle." [2] She stated in one paper that *she believes* GLBTQ "lifestyles" to be identity confusion. This was during her enrollment in the Diversity Sensitivity course and after the presentation on GLBTQ populations. [3] Faculty have also received unsolicited reports from another student that she has *relayed her interest* in conversion therapy for GLBTQ populations, and she has *tried to convince* other students to support and <u>believe</u> her views.

(Dkt.1-3, Ver.Compl. Ex. B at 3 (italicized emphasis added).)[4] Miss Keeton has

[4] Miss Keeton has never taken a position on conversion therapy, as such. (Dkt.1,

thus been targeted for non-academic remediation by her professors because she expressed—in class and (allegedly) in private conversations—a disfavored viewpoint on the content of the subjects being studied in her graduate program. Aggravating her offense was her (alleged) attempt to convince others of her viewpoint.

After identifying Miss Keeton's speech as the provocation for their imposition of the Remediation Plan, Defendants explained the alleged demerit of Miss Keeton's communications: "[T]hese statements and actions are in direct conflict with the codes of ethics to which counselors and counselors-in-training are required to adhere." (*Id*.) That is, Defendants consider Miss Keeton's views and her speech presenting them to be unethical. Her professors supported this rebuke by citing a provision in the ACA Code of Ethics (counselors "do not condone or engage in discrimination") and two sections in the ASCA ethical code containing aspirations for counselors. But they do not identify what specific portions of the cited material Miss Keeton is supposed to have violated, nor do they identify how her speech and views could constitute such a violation.[5] (*Id.* at 3-4.)

In the remediation document the faculty do, however, offer their own

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Ver.Compl. ¶40.)

[5] The State of Georgia has not adopted either the ACA or ASCA ethical codes as standards governing counselors in the State. *Compare* Ga. Comp. R. & Regs. 135-7 *with* Dkt.1-7, Ver.Compl. Ex. F; *see also* http://www.counseling.org/Files/FD.ashx?guid=1bf2d9ae-6c26-412b-b123-147991e59350 (last visited October 11, 2010).

contrary points of view as reproof of Miss Keeton. They put forth that studies show that "sexual orientation is not a lifestyle or choice, but a state of being"; that conversion therapy is ineffective and may be harmful; and that the American Psychological Association published that homosexuality is a mental disorder only until 1973. (*Id*. at 4 (emphasis original).)

In a written Addendum to the Remediation Plan (Dkt.1-4, Ver.Compl. Ex. C), the professors reaffirmed the Remediation Plan's explanation that Miss Keeton's speech is the reason for her probation. (*Id*. at 1.) In that Addendum, Defendants supplemented their justification for the probation by quoting from emails that Miss Keeton had sent them since the Remediation Plan had been imposed. They specifically isolated as culpable two of Miss Keeton's explanations of what she believes:

> In the June 14 email you said "My Christian moral views are not just about me. I think the Bible's teaching is true for all people, and it shows the right way to live." In the June 16 email, you indicated "I believe the Bible's teachings applies to all people on who they are and how they should act . . . from that I see that some behaviors are not moral or positive."[6]

(*Id*.) The professors then explain:

[6] Miss Keeton testified that she told Defendants that her beliefs do not entail that she would impose them on unwilling clients. (Dkt.1, Ver.Compl. ¶¶73, 80, 91, 92, 99; Dkt. 35-6, Defs.' Prelim. Inj. Resp. Memo. Ex. F at 3 ("I understand these are my personal beliefs, and I cannot impose them"). She explained, however, that she will not affirmatively validate immoral conduct (Dkt.1, Ver.Compl. ¶¶99-100), which is a qualitatively different sort of requirement.

> These statements indicate that *you think* certain people should act in accordance with your moral values, and/or that *your beliefs* are in some way to [sic] superior to those of others. *The belief* that you possess a special knowledge about the way that other people should live their lives, and that others need to adopt a similar set of values contradicts the core principles of the American Counseling Association and American School Counselor Association Codes of Ethics, which define the roles and responsibilities of professional counselors.

(*Id*. (emphasis added).)

Beyond their written formulations, Defendants also rebuked Miss Keeton's viewpoints during the course of three meetings with her in which they discussed the terms of the remediation program. The faculty members told Miss Keeton that she needs to alter her beliefs (Dkt.1, Ver.Compl. ¶¶51, 65, 67, 89), and that she should not think she can maintain her current beliefs and successfully complete the remediation program. (*Id*. ¶66.) Dr. Schenck told Miss Keeton that she could not be either a teacher or a counselor with her views. (*Id*. ¶48.) And Dr. Schenck explained to Miss Keeton that the alteration of belief that the faculty were seeking was that she would (1) no longer believe that her views should be shared by other people, and (2) that she would come to believe that persons of homosexual orientation need not change and are fine just the way they are. (*Id.* ¶71).

Thereafter, Miss Keeton in an email message to her professors objected to the remediation requirement that she alter her beliefs. (*Id*. ¶76.) Dr. Schenck responded to Miss Keeton with an email message of her own:

> Jennifer, you misinterpreted what I was saying. I do not expect you to change your *personal* beliefs and values. What is the issue is *if you believe* your personal beliefs and values should be the same beliefs and values for all people. This is the unethical part—applying your own personal beliefs and values on other people and not *truly accepting* that others can have different beliefs and values that are equally valid as your own.

(*Id*. ¶78 (emphasis added).)[7] Thus did Dr. Schenck identify both the belief that Miss Keeton is forbidden to maintain (*i.e.*, that "your personal beliefs and values should be the same beliefs and values for all people") and the belief that she is required to maintain (*i.e.*, "truly accepting that others can have different beliefs and values that are equally valid as your own").

D. Compelled Speech Requirement of Remediation Plan

Not only have Defendants targeted Miss Keeton for probationary status because of her expressed points of view and are requiring her to alter those disfavored views, Defendants have specifically explained that she will be expelled if she does not pledge to them that she will tell future clients that homosexual sex is proper. (Dkt.1, Ver.Compl. ¶104.) Dr. Anderson-Wiley told Miss Keeton that she should not even pursue the Remediation Plan if she expects she will remain unwilling to commit to validating the sexual behavior of homosexual clients in hypothetical future contexts. (*Id.* ¶105.) At the preliminary injunction hearing, Dr.

[7] This explains why the faculty's offer to allow Miss Keeton to keep her "personal" values (Dkt.1-4, Ver.Compl. Ex. C at 1) is of little comfort. Miss Keeton's values extend beyond her own person. (*See* Dkt.1, Ver.Compl.¶108.)

Anderson-Wiley testified that Miss Keeton will not be able to complete the Remediation Plan successfully unless she commits to her professors now that she will tell future clients wishing to hear so that homosexual sex is right and proper, and that if Miss Keeton does not register her willingness to do that, Defendants will dismiss her from the ASU counseling program. (Dkt.53, Tr.92-94.)

Notwithstanding Miss Keeton's emails and affidavit testimony objecting to Defendants' censure of her beliefs and requiring their alteration, the Remediation Plan's written rebuke of Miss Keeton's expressed viewpoints as unethical under the ACA and ASCA standards, the Addendum letter's reiteration that Miss Keeton's beliefs contradict professional ethical standards, Dr. Schenck's own email message identifying Miss Keeton's beliefs as unethical and in need of the changes she there specified, and the faculty's requirement that Miss Keeton pledge to speak favorably of conduct she deems immoral or be expelled, Dr. Schenck at the preliminary injunction hearing nonetheless testified that she was not targeting Miss Keeton's views or requiring their alteration. (Dkt. 53, Tr.106, 109-10.) Dr. Anderson-Wiley testified that she never communicated to Miss Keeton that her beliefs were unethical and that she did not intend that Miss Keeton change them. (Dkt.53, Tr.78-79.)[8]

[8] The noncontributing nature of those self-interested assertions is explained *infra*, pp. 39-44 and 47-49.

E. Miss Keeton's Pending Expulsion from the ASU Counseling Program

Miss Keeton's professors have left her with no option that allows her both to maintain the integrity of her convictions and to successfully complete the Remediation Plan. (Dkt.1, Ver.Compl. ¶110.) If she avoids the Remediation Plan altogether (as Dr. Anderson-Wiley proposed, in view of the strength of her convictions (*id.* ¶105)), she will be expelled. (*Id.* ¶110; Dkt.1-3, Ver.Compl.. Ex. B at 5; Dkt.1-4, Ver.Compl. Ex. C at 2.) If she participates in the Remediation Plan but does not alter her views and pledge to affirm homosexual behavior, she will be expelled. (Dkt.1, Ver.Compl. ¶110.) Accordingly, Miss Keeton's final statement to her professors was that she would take the course Dr. Anderson-Wiley suggested: "I am not going to agree to a remediation plan that I already know I won't be able to successfully complete." (*Id*. ¶108.)

Defendants recently de-enrolled Miss Keeton from her Practicum course, and reiterated that her dismissal from the counseling program looms. (Aff. of Jennifer Keeton, appended to Appellant's Mot. for Inj. Pending Appeal (Aug. 23, 2010).)

F. District Court Opinion

The district court issued its decision and memorandum opinion on August 20, 2010. (Dkt.48, Mem.Op.) The court denied Miss Keeton's motion for preliminary injunction for the reason that the ASU faculty's conduct of which she complains is legitimate academic instruction. That determination was presented in

an opinion layered with cooperating factual and legal errors.

A striking aspect of the district judge's opinion is that nothing like the foregoing factual presentation is to be found in it. The court conspicuously evades those facts upon which Miss Keeton presents her causes of action. The court's case narrative creates the impression that Defendants were assisting Miss Keeton with her failure to conform to curricular responsibilities, and Miss Keeton refused their assistance by avoiding the academic tasks they prescribed. The court then proposes that the law requires a lenient and deferential disposition toward Defendants' "academic" intervention—which is how the court classifies, without exception, all of their conduct.

The court in its opinion never mentioned that the faculty had contemporaneously put in writing—more than once—the reasons for their singular imposition on Miss Keeton. But it was not just Defendants' explicitly viewpoint-based explanation for placing Miss Keeton on probation on which the court was silent, but also their repeated accompanying castigation of her points of view (Dkt.1, Ver.Compl. ¶¶29-33, 38, 48, 49, 65, 66, 71, 78, 85, 89; Dkt.1-3, Ver.Compl. Ex. B at 3-4; Dkt.1-4, Ver.Compl. Ex. C at 1), the details of their coercive requirement that Miss Keeton must comply with to avoid expulsion, and their suggestion that she not even initiate the Remediation Plan in light of her ethical commitments. Because of these omissions from its factual presentation, the

court's report of Miss Keeton's refusal to participate in the remediation program was barren of explanatory context—a circumstance that the court took advantage of to offer judgments like the following:

> Plaintiff's refusal to participate in the Plan, which requires her to read counseling literature geared towards counseling GLBTQ persons and attend workshops geared towards that same end, demonstrates Plaintiff's unwillingness to complete curricular assignments.

(Dkt.48, Mem.Op. at 20.)

This is manifestly incorrect. Miss Keeton never told her professors that her objection was to the mundane tasks associated with the Plan. (Dkt.1, Ver.Compl. ¶¶67, 68.) Her rejection of the Plan has ever and only been to its oppressive requirement that she "alter her views" and sincerely pledge that she will affirm that homosexual sex is moral. (*Id.* ¶¶76, 80, 98, 103, 108.) And it was Dr. Anderson-Wiley who advised that Miss Keeton not even initiate the remediation process if she knew she would not ultimately change her mind and commit to speaking favorably of the moral status of homosexual sex. (*Id.* ¶105.) But because the district court avoided recounting the specific requirements for successful completion of the Remediation Plan that Miss Keeton challenges and made no reference to Miss Keeton's written communications to the faculty in which she set forth her reasons for refusing to participate (*id.* ¶¶ 86, 80, 108), the court was not hindered in denominating Miss Keeton's refusal as an "unwillingness to complete curricular assignments."

The court's "curricular" characterization is likewise derivative of its silence on all facts inconsonant with its theory of case resolution. The requirements of the Plan are not curricular. They are exclusively extra-curricular; only applicable to Miss Keeton, associated with no class, and subject to no grading. And according to the standards that authorize their implementation, Remediation Plans may not be employed except to address non-academic concerns. (*Id.* ¶ 21; Dkt.1-2, Ver.Compl. Ex. A at 27.) Moreover, the faculty's aim to coercively extract from Miss Keeton a promise to convey an ideological message in the future is hardly "academic." Yet the court, unconstrained by the record evidence, continues to assert that "Plaintiff's refusal to complete the Remediation Plan and her unwillingness to adhere to the ACA Code of Ethics constitute a refusal to complete curriculum requirements." (Dkt.48, Mem.Op. at 27.)

The court's additional and gratuitous charge that Miss Keeton is unwilling to adhere to ACA ethical standards is not only untrue (Dkt.1, Ver.Compl. ¶¶42, 50, 67, 76, 80, 92, 99, 108; Dkt. 35-6, Defs.' Prelim. Inj. Resp. Ex. F at 3-4), the court never attempted to show how Miss Keeton's points of view, or her refusal to pledge to affirmatively convey moral validation for immoral conduct in hypothetical future settings, could constitute a violation of the ACA Code. Nor did the court explain why, even if Miss Keeton's beliefs and her resistance to coerced speech by State officials were "unethical" according to the current standards of a

private organization (that do not govern even licensed counselors in the State), that would be relevant to whether the First Amendment forbids State officials to compel a person to alter her views and promise to say what she now disbelieves.

The court elsewhere states that the ASU counseling program has a legitimate pedagogical interest in maintaining its accreditation with Council for Accreditation of Counseling and Related Educational Programs (CACREP), implying that this accreditation interest validates the faculty's treatment of Miss Keeton. (Dkt.48, Mem.Op. at 22-23.) Yet no evidence was introduced to support that notion (*see* Dkt.53, Tr.24-25), and in any event nothing in CACREP standards remotely suggests the propriety—let alone the necessity—of afflicting a student with the penalties and burdens Defendants have imposed on Miss Keeton. And the court below never sought to establish that predicate to its insinuation. Its inclusion is thus wholly arbitrary.[9]

The court's awkward refitting of the faculty's actions as benign curricular

[9] In service of its narrative, the court recites testimony from affidavits submitted by two classmates of Miss Keeton (Dkt.48, Mem.Op. at 9-11) containing allegations simply not relevant to the case—a point that counsel made to the court below at the injunction hearing (Dkt.53, Tr. 18-20). For instance, the first student affiant never testified that he had ever communicated to the defendant professors his allegations about Miss Keeton's out-of-classroom speech presented in his affidavit (which Miss Keeton contests). And the defendant professors themselves never testified—in their affidavits, or in court—that this student had shared these allegations with them, or that such allegations had served as a reason for their imposing the probationary requirements on Miss Keeton. Yet the district court gave prominent place to his accusations in its narrative.

acts and its characterization of Miss Keeton's resistance as akin to refusing to turn in homework, is driven by the court's pre-determination to employ a portion of the Supreme Court's ruling in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (which allows—in circumscribed contexts—for educators to regulate student speech in service of "legitimate pedagogical concerns") to resolve this case. But *Hazelwood*'s rule has no application here, and the court below at no point explored the context of that case or explained how its rule could possibly pertain to Defendants' actions.[10] The court, by its errant handling of the case narrative and its employ of an inapposite legal standard to dispose of Miss Keeton's claims, converted Miss Keeton's case into something other than what it is.

SUMMARY OF ARGUMENT

A fundamental aim of the First Amendment is to protect from government interference citizens' determination of the beliefs meriting their adherence and expression. "Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). And the "marketplace of ideas" that is the State university is an environment of heightened First Amendment attention. For the university's valuable civic function

[10] *Hazelwood's* inapposite character is discussed *infra*, at §I.(B.) at 27-32.

to be realized and preserved, judicial vindication of First Amendment freedoms there must be assiduously maintained.

It necessarily follows, then, that courts may not turn a blind eye to State action that violates the prized liberties of thought and speech on campus. The Supreme Court recently reiterated that courts "owe no deference to universities" when considering whether they have exceeded constitutional limits, and it is judicial abdication to avoid vindicating fundamental liberties. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S.Ct. 2971, 2988 (2010). The court below erred badly both in its nonintervention in Defendants' egregious mistreatment of Miss Keeton and in the justifications it offered for that abstention.

The district court further and rather dramatically erred in applying as its comprehensive standard of measure for all of Defendants' conduct the rule from a case that has no application to Miss Keeton's claims. The district court enlisted *Hazelwood*, 484 U.S. 260, to provide the catch-phrase it employed when repeatedly proposing, *sans* explanation, that all of Defendants' challenged conduct (*i.e.*, coercing Miss Keeton's speech and conscience and retaliating against her for her expressed views) is legitimate pedagogy and thus beyond reproof. But not only were the court's proffered legal conclusions arbitrary, so also was its appeal to *Hazelwood* as the purported benchmark for analysis. For *Hazelwood*'s rule only

governs speech presented in a school-sponsored expressive activity in which the message presented is reasonably attributable to the school itself. And even then, *Hazelwood* authorizes regulation of student speech in a way that Defendants here never engaged.

It is basic that government viewpoint discrimination is one of the most egregious forms of First Amendment violation. In such instances the government penalizes and prohibits not just speech itself, but the perspective and ideology of the speaker, and does so as a means of manipulating public thought and discourse to serve the preferences of the authorities. ASU's imposition of penalties and coerced speech requirements on Miss Keeton was declared by Defendants to have been provoked by her expression of her biblical perspective on sexual ethics. Their censure and burdening of Miss Keeton because of her expressed perspective constitutes forbidden viewpoint discrimination. Though the district court proposed that Defendants were merely enforcing professional ethical requirements, that nexus was never demonstrated, and in any event is of no aid to their defense, for their conduct is no less oppressive and illegal because they appeal to yet another constitutional nullity. Invoking the ACA Code does not immunize the State from constitutional strictures.

ASU officials also violated Miss Keeton's right against compelled speech in requiring that she profess an ideological position she opposes, else be dismissed

from the counseling program. It is long-settled that State coercion applied to compel a person to affirmatively communicate a message of the government's preference that the individual disfavors is unconstitutional. And it is an undisputed fact in this case that ASU faculty are requiring Miss Keeton on pain of expulsion to pledge that she will convey to future clients moral approval for homosexual sex, though she emphatically disagrees with that viewpoint. That offensive State imposition could not fall more squarely within the constitutional prohibition on compelled speech. Defendants' peculiar conception that there is no affront in such coerced expression because its victim may simply speak without actually believing what she says, is both perverse and alien to First Amendment canons.

Defendants also violated Miss Keeton's right to the free exercise of religion. The faculty targeted her religious views themselves for censure and other penalty and required Miss Keeton to continue disclosing those beliefs for faculty scrutiny as an element of the remediation process. Such scrutiny is required so that Defendants may ensure her views are altered or subordinated to their partisan vision of professional right-think. These afflictions are not required by a neutral law of general applicability but were tailored exclusively to Miss Keeton in response to her expression of belief. And the nature of these encroachments is the sort subject to absolute constitutional forbiddance.

The legal prohibition on State retaliation against persons' exercise of

constitutional rights is well-settled. That ASU retaliated against Miss Keeton for her exercise of First Amendment rights is readily identifiable on the record evidence. Defendants took adverse action against her which would deter a person of ordinary firmness from continued exercise of First Amendment rights, and she has indeed had her speech chilled by Defendants' retaliation.

This Court should provide Miss Keeton the First Amendment protections to which she is entitled under well-established Supreme Court precedent by reversing the district court's denial of her request for preliminary relief.

ARGUMENT

Miss Keeton is entitled to a preliminary injunction because: "(1) [she] has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to [her] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006).

I. Miss Keeton has a substantial likelihood of prevailing on the merits.

Defendants' non-academic, coercive assault on Miss Keeton's speech, views, and integrity of conscience implicates the gamut of core First Amendment prohibitions.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "raise[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

Turner Broad. Sys. , 512 U.S. at 641 (internal citations omitted).

Defendants' actions are particularly egregious for they occur at a public university, which is the "marketplace of ideas," *Healy v. James*, 408 U.S. 169, 180 (1972). Given the need for "vigilant protection of constitutional freedoms" in this context, *id.* (*quoting Shelton v. Tucker*, 364 U.S. 479, 487 (1960)), "universities are not enclaves immune from the sweep of the First Amendment." *Id.*[11] So, for example, "the dangers of viewpoint discrimination are *heightened* in the university setting. 'For the University, by regulation, 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, its college and university campuses.'" *Gay Lesbian Bisexual Alliance* (*GLBA*) *v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*,

[11] *See also Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) ("[T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

515 U.S. 819, 836 (1995); *see also McCauley v. Univ. of V.I.*, --- F.3d ---, 2010 WL 3239471, *7-11 (3d Cir. 2010) (extended discussion of First Amendment application in university setting).

The lower court's refusal to apply First Amendment strictures to Defendants' non-academic remediation imposition on Miss Keeton, instead deferring to their "educational" discretion, was clear error. Defendants do not criticize her academic performance, nor do they object to her performance in a clinical setting. And the burden Defendants impose on Miss Keeton is not part of her program studies. Instead, Defendants reacted to her expression of views they disfavor, and through a non-curricular device (only authorized for addressing concerns unrelated to academic performance (Dkt.1, Ver.Compl. ¶21)) targeted her for expulsion (unless she converts) because of those views.

State university officials may teach students and evaluate their academic performance in response to such instruction. It is not, however, the province of such State officials to scrutinize the souls of students and penalize their viewpoints; or to divine their future speech-crimes and punish them; or to coerce from students a pledge to affirm pet doctrines.

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Supreme Court demonstrated the contrast between a legitimate educational function and the prohibited compulsion and penalizing of speech (there, a required pledge of

allegiance to the American flag):

> Here . . . we are dealing with [non-academic] compulsion of students to declare a belief. They are not merely made [academically] acquainted with the flag salute so that they may be informed as to what it is or even what it means.

Id. at 631. The ASU Defendants are engaged in conscience-invading compulsion, not academic instruction. The First Amendment forbids judicial deference to such government conduct.

A. The First Amendment disallows a court to withhold constitutional scrutiny from Defendants' treatment of Miss Keeton, and the district court erred in deferring to Defendants' caprice.

The Constitution neither requires nor permits judicial deference to the ASU defendants in this case, and the district court erred by so proceeding. The Supreme Court stated in *Christian Legal Society Chapter of the Univ. of Ca. v. Martinez* that:

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

130 S.Ct. at 2988 (Emphasis added.)

The Supreme Court's counsel has never been, nor reasonably could be, that courts should shirk responsibility to apply constitutional standards to state officials who are employed as educators. To the contrary, the Court has repeatedly announced the particular importance of applying First Amendment standards in the

educational environment because of the worrisome implications of ideological oppression in such contexts. *See supra* at 21-22 (setting forth case law expounding obligation of full application of First Amendment standards in university context).

Accordingly, the Court admonishes deference only when the question at issue involves the wisdom or reasonableness of educational policy, not whether a policy or action constitutes compelled speech or viewpoint discrimination. Thus, in *Martinez*, the Supreme Court enlisted deference to educational policy decisions when assessing the "reasonableness" of the policy it was evaluating, *id.* at 2988-89, not in order to evade determining whether the challenged policy constituted viewpoint discrimination in the first place. *See id.* at 2993-94. That latter question is one to which deference cannot be applied. *Rosenberger*, 515 U.S. at 828-29; *see also San Antonio Indep. Sch. Dist. v. Rodridguez*, 411 U.S. 1, 40 (1973) (noting "the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights," unlike those merely involving contestable education policy).

The Supreme Court addressed the scope and limit of deference in the conceptually parallel context of legislative enactments, helpfully explaining the following:

> A reviewing court may not easily set aside such a considered congressional judgment. At the same time, "*[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake*. . . . Were it otherwise, the scope of freedom of

> speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified."

FCC v. League of Women Voters of Cal., 468 U.S. 364, 387 (1984) (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)) (emphasis added). That observation applies equally to the university context. Federal courts owe universities no greater deference than they give to a parallel branch of government. When acts of State academic officials depart from the confined realm of tutelage and intrude on the First Amendment rights of students, there exists no purpose or legal authorization for extending immunity to them for such trespasses.

In justifying its deferential approach, the court below relied upon, among others, the Supreme Court's case of *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). (Dkt.48, Mem.Op. at 14-15, 21.) But as this Court observed in *Knight v. Alabama*, 14 F.3d 1534, 1552-53 (11th Cir. 1994), *Ewing*

> speaks of academic autonomy being a "concern" of the First Amendment and of deference being appropriate when conducting substantive due process review of certain professional academic decisions. . . . It does not hold that the First Amendment absolutely precludes relief in circumstances where it is determined that *remedying a constitutional violation* requires regulating or overriding an educational policy decision made by a public university.

(Emphasis added.) Thus even when educational policy would be negated by a judicial remedy, this is no bar to vindicating constitutional standards. And it could be no other way, since educators are not vested with a veto over the Constitution.

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

Barnette, 319 U.S. at 637. As the Supreme Court observed later in *Barnette*:

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. *** We *cannot*, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court *when liberty is infringed*.

Id. at 639-40 (emphasis added).

The district court's suggestion that the case excerpts it compiles (Dkt.48, Mem.Op. at 14-15) authorize its refusal to subject defendants' actions to First Amendment scrutiny is plainly erroneous, as seen even from the context-rent quotations themselves that the court offers. Miss Keeton did not ask the district court to substitute its "notions of sound educational policy for those of the school authorities" (*id.* at 14 (quoting *Martinez*, 130 S. Ct. at 2988)); she asked the court to reprove and enjoin their non-curricular targeting of her for penalties because of the viewpoints she expressed. Miss Keeton has not objected to "editorial control over the style and content of [her] speech in school-sponsored expressive activities" (*id.* (quoting *Hazelwood*, 484 U.S. at 273)); she seeks to have Defendants enjoined from expelling her because she refuses to presently commit to them that she will speak a conscience-violating message in her future private professional endeavors. Miss

Keeton does not challenge the notion that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges" (*id.* (citing *Hazelwood*, 484 U.S. at 273)); that proposition has nothing to do with the judicial relief she seeks, and anyway does not nullify the operation of constitutional strictures at a public university. Miss Keeton did not ask the court to "review the substance of a genuinely academic decision" (*id.* at 15 (quoting *Ewing*, 474 U.S. at 225)), for a coerced fidelity-pledge to convey ideological speech does not fit that category. Nor does she contest the right of a university to "control conduct" of students (*id.* (citing *Healy*, 408 U.S. at 180)—such as violence by campus chapters of Students for a Democratic Society or interferences with students' access to an education, *see Healy*, 408 U.S. at 187, 189-91. And she certainly was not asking the district court judge to act as an "ersatz dean" (*id.* (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1074-75 (11th Cir. 1991)), but rather to function as a judge applying settled First Amendment law.

Viewpoint discrimination and retaliation, compelled speech, and free exercise violations are not aspects of "education" to which courts may defer.

B. The district court plainly erred by dislocating a portion of the rule in *Hazelwood* to impose on Miss Keeton's claims.

Because Defendants are not regulating Miss Keeton's speech in a school-sponsored expressive activity in which her speech carries the imprimatur of the school itself, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) has no

bearing on her case. The district court never justified its recitation of isolated phrases drawn from the rule in *Hazelwood* as means to dispense with Miss Keeton's First Amendment claims. The court did not set forth the facts, analysis, or components of the ruling of *Hazelwood* that govern its applicability, and thus avoided confronting anything that would reveal the patently inapposite character of that case. The only remotely germane observation the district court offered about *Hazelwood* was that this Court in *Bishop,* 926 F.2d 1066, had "adopt[ed] the Hazelwood standard at the university level." (Dkt.48, Mem.Op. at 15.) The extent of the district court's legal evaluation, then, seems to be that Miss Keeton complains of treatment by university officials, so *Hazelwood* governs her case. That hardly follows.

In *Hazelwood*, the Supreme Court introduced the refinement in the First Amendment standards governing student expression that secondary-school officials may regulate student speech in a way "reasonably related to legitimate pedagogical concerns" when that speech is presented in the context of school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. *Hazelwood,* 484 U.S. at 271. The Supreme Court on no less than four occasions in *Hazelwood* recited as exemplary instances of school-sponsored student speech that which is (1) published by the school in its

newspaper, and (2) presented in theatrical productions produced by the school. *Id.* at 271-73. These imprimatur-bearing, official speech organs exemplify contexts in which the school not merely "tolerates," but instead "affirmatively . . . promote[s]," *id*. at 270-71, speech that is "disseminated under [the school's] auspices," *id*. at 272, and expressive activities to which the school "lend[s] its name and resources." *Id*. at 272-73.

Speech presented in an official school organ like the institutional newspaper or school-produced dramatic production is categorically unique (a proposition implicit in the repeated appeal to such examples in *Hazelwood*), for such official communicative vehicles reflect the school's own speech. *See Rosenberger*, 515 U.S. at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles. *See e.g.*, . . . *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272, 108 S.Ct. 562").

The Supreme Court in *Morse v. Frederick*, 551 U.S. 393, 405 (2007), reaffirmed that a critical evaluation in determining the application of *Hazelwood* is the focus on reasonable perception of school imprimatur. In *Morse* the Court quickly dismissed the relevance of *Hazelwood* to the facts of that case with the observation that "no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id*.; *see also id.* at 423 (Alito, J., concurring) ("*Hazelwood*

… allows a school to regulate what is in essence the school's own speech").

Though forcing *Hazelwood* onto every one of Miss Keeton's claims, the district court never paused to consider the contexts to which that case rule is limited. The district court did cite this Court's decision in *Bishop*, 926 F.2d 1066, as reason for its application of *Hazelwood* to this case, but it merely offered parenthetically that *Bishop* "adopt[ed] the Hazelwood standard at the university level." (Dkt.48, Mem.Op. at 15.) This Court in *Bishop*, however, did not even rule that *Hazelwood* governed university student speech. It instead presented *Hazelwood*'s analysis as a "polestar," 926 F.2d at 1074, informing its own design of a rule addressing a university's regulation of an *employee professor's* religious speech presented during classroom instruction (about which the university had both coercion and Establishment Clause concerns, *id.* at 1069).

This Court explained in *Bishop* that "the State has interests as an employer in regulating speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id*. at 1072; *see also id*. at 1074 ("[W]e consider the University's position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons.") Elsewhere this Court stated that "[w]hile a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and

deliberately representative of the school." *Id*. at 1073. "[T]he school has an interest . . . in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur[.]'" *Id.* at 1073 (quoting *Hazelwood*, 484 U.S. at 271). And in *GLBA* this Court explained:

> *Bishop* is inapposite [to a student speech claim] because it involved a professor as the speaker. It is well-established that the government may determine 'what is and is not expressed when it is the speaker or when it enlists private entities to convey its own message.' *Rosenberger,* 515 U.S. at [833].

GLBA, 110 F.3d at 1549. *Bishop*, then, not only presents no authorization for extending *Hazelwood* to instances of graduate university student speech challenges, it emphasizes the very point that makes *Hazelwood* irrelevant to this case: it applies only when the institution's own message and imprimatur are at issue.[12]

Nothing in Miss Keeton's case locates it anywhere in the vicinity of *Hazelwood*. Miss Keeton did not speak in a school-sponsored expressive activity that ASU officials regulated. Instead those officials have penalized her because of the viewpoint she expressed in private communications that cannot rationally be viewed as carrying university imprimatur, and have required that she privately pledge to them her willingness to convey an ideological message she disbelieves

[12] In view of *Bishop*'s facts and analysis, it was mistaken for the district court to appeal to the dictum offering that "federal judges should not be ersatz deans or educators," (Dkt.48, Mem.Op. at 15, 21 (quoting *Bishop*, 926 F.2d at 1075)), as authorizing its refusal to apply constitutional standards to Miss Keeton's travail.

when in circumstances that she may never encounter. The district court's application of *Hazelwood* to Miss Keeton's case is mistaken on so many levels, it is little wonder the court forwent any explanation of its use.[13]

But the district court's mishandling extended beyond asserting *Hazelwood*'s governance. The court's repeated intonation of a phrase isolated from a portion of the rule of that case ("reasonably related to legitimate pedagogical concerns"), which the court used as its preferred characterization of all of the defendants' oppressive conduct about which Miss Keeton complains (but which the court relabeled as benign academic policy), was mere assertion. (*See, e.g.,* Dkt.48, Mem.Op. at 22 ("incorporation of the ACA Ethical Code into the ASU counseling program's curriculum, and requiring students to adhere to the Code as a curricular requirement, appears at this time to be 'reasonably related to a legitimate

[13] The foregoing demonstrates that *Hazelwood* on its own terms cannot apply to Miss Keeton's circumstance, even if it is assumed that case could in proper circumstances address university student speech. But it merits consideration that the mere fact that this case arises in the context of the speech of a graduate university student also undermines *Hazelwood's* relevance. The differences between public elementary and high schools and public universities are vast, whether in terms of their pedagogical missions, their *in loco parentis* role (which universities lack), their need to maintain comprehensive control over students, the age of their students, and the extent to which their students remain subject to school regulations. *McCauley*, 2010 WL 3239471, at *6-11. Thus, "the teachings of . . . *Hazelwood* . . . and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied." *Id.* at *11.

pedagogical concerns"); *id.* at 24 ("[t]o the extent that Defendants compel Plaintiff to speak at all by requiring that she 'affirm' GLBTQ conduct in a counseling setting, they demand nothing more than Plaintiff's adherence to the ACA Code of Ethics, which . . . appears to be . . . 'reasonably related to legitimate pedagogical concerns'"); *id.* at 27-28 ("Plaintiff was asked only to complete the Plan in order to fulfill academic requirements 'reasonably related to legitimate pedagogical concerns'"). The court never offered any analysis prior to offering such judgments, and never revealed the standards it employed to identify the legal "legitimacy," let alone "pedagogical" character, of Defendants' reinterpreted conduct.[14] The court simply asserted the conclusion *ipse dixit*, repeatedly.

C. Defendants are violating Miss Keeton's right to be free from viewpoint discrimination.

Defendants have set forth in writing that they targeted Miss Keeton for the rebuke, probationary status, and unique reformatory requirements expounded above because of her speech communicating a disfavored ethical viewpoint.

"One of the most egregious types of First Amendment violations is viewpoint-based discrimination." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004); *accord Rosenberger*, 515 U.S. at 829. Viewpoint

[14] Moreover, the court also never once attempted to demonstrate that the ACA Code disallows Miss Keeton's speech and views or requires any of what the faculty have imposed on Miss Keeton, or explain how Defendants' conduct would be any less oppressive and unconstitutional for possessing that private affiliation.

discrimination occurs when "the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829. Thus, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* These principles apply regardless of the speech or forum because "[g]overnment actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place." *Holloman*, 370 F.3d at 1280.

Miss Keeton's testimony reveals her professors' targeting of her viewpoint for rebuke and unique penalties. (Dkt.1, Ver.Compl. ¶¶29-33, 38, 39, 48, 49, 51, 65, 66, 71, 78, 84, 85, 89, 97.) The faculty's own written explanations declare that Miss Keeton's expressed views were the reason for their imposition of the Remediation Plan. (*Id.* ¶¶29-30, 84.) The initial Plan itself chastises Miss Keeton for her views on homosexuality and counters with alternative views. (Dkt.1-3, Ver.Compl.. Ex. B at 3-4; *see also* Dkt.53, Tr.45 ("THE COURT: Well, I think it's clear they disagree with her views. I think you can read that in the remediation plan. It seems to me it's very clear they disagree with her views."). The faculty's Addendum letter likewise reiterates the original document's explanation for why they have acted against Miss Keeton (Dkt.1-4, Ver.Compl. Ex. C at 1 ("faculty interactions with you during classes, papers written by you for classes, and behaviors toward and comments to

fellow students in your classes. All of these incidents were described in the Remediation Plan"), and it supplements that explanation with a rebuke of her biblical beliefs, which she had described as applying to others beyond herself.[15] Dr. Schenck likewise explained in writing which of Miss Keeton's beliefs are permissible and which condemned, and the form of remediated thinking she needs to adopt. (Dkt.1, Ver.Compl. ¶78.) The probationary plan initiated for these reasons involved not only the reproof in writing of her points of view, and correspondingly required she report on how her tasks were "influenc[ing] her beliefs," but it required that she either pledge to her professors that she will convey a viewpoint contrary to her own, or be expelled.[16]

Yet the district court avoided mention of the foregoing and professed an inability to identify in the record any evidence of viewpoint discrimination other than two statements (not discussed in the facts of this brief) that Miss Keeton attributed to Dr. Anderson-Wiley, which the latter denied. (Dkt.48, Mem.Op. at 22 n.11) ("Christians see [the GLBTQ] population as sinners[,]" and that Miss Keeton

[15] Notably, in the context of her expression of these normative ethical standards, she also communicated her conviction that these do not interfere with her conformity to professional expectations. (Dkt.1, Ver.Compl. ¶76 ("I don't think these views get in the way of ethical counseling"); *id.* ¶80 ("I think I can do that in a professional and ethical way without having to alter my beliefs"); *see also* Dkt 35-6 at 3 ("I understand these are my personal beliefs, and I cannot impose them"). Defendants nonetheless isolate for reproof Miss Keeton's beliefs themselves.

[16] "The threat of dismissal for failure to provide [partisan] support unquestionably inhibits protected belief . . ., and dismissal for failure to provide support only penalizes its exercise." *Elrod v. Burns*, 427 U.S. 347, 359 (1976).

must choose between fidelity to the Bible or to the ACA Code of Ethics). The court then offered that "incorporation of the ACA Ethical Code into the ASU counseling program's curriculum, and requiring students to adhere to the Code as a curricular requirement"—as if that were an accurate summary of the facts upon which Miss Keeton's brings her claims—"appears at this time to be 'reasonably related to legitimate pedagogical concerns,' *Hazelwood*, 484 U.S. at 273." (Dkt.48, Mem.Op. at 22.)

The question presented by this case is not whether ASU faculty may teach its signature conception of professional ethics standards. The problem is, indeed, that Defendants are not content with mere "teaching." And the court's refusal to interact with the specific actions Defendants took against Miss Keeton, resorting instead to vague generalization ("requiring students to adhere to the Code as a curricular requirement") sidesteps the question presented by the case. It also carries the unwarranted assumption that "Code adherence" vetoes the First Amendment.[17]

The Remediation Plan and all of its constituent components and Defendants' associated censures and coercive actions against Miss Keeton constitute

[17] Dr. Anderson-Wiley's testimony demonstrated both the capriciousness and viewpoint-discriminatory character of the faculty's conception of professional ethics. *Compare* Dkt.53, Tr.75-76 (when a Christian client questions whether his traditional convictions on the immorality of homosexuality are correct, the counselor must not answer him) *with* Dkt. 53, Tr.92-94 (counselor is *required* to tell client that homosexual behavior is proper conduct when the client wants that affirmation).

punishment, punishment specifically because of the views she communicated in papers, private conversations, and class discussions. Even mere "[v]erbal censure is a form of punishment." *Holloman*, 370 F.3d at 1268. *A fortiori* would the more severe collection of sanctions on Miss Keeton constitute punishment for her speech.[18]

Defendants penalized Miss Keeton—by their own explanation—in response to her speech communicating a viewpoint they oppose. Miss Keeton has demonstrated a substantial likelihood of prevailing on her viewpoint discrimination claim.

D. Defendants' conduct violates Miss Keeton's right to be free from compelled speech.

Defendants' compelled speech intrusion into Miss Keeton's freedom of mind is doubly oppressive. They seek to extract from her not only a *current* pledge or

[18] Accordingly, Defendants' testimony at the injunction hearing that "a remediation plan"—abstracted from particular content and from its employ in a particular case—is not a disciplinary measure (*see* Dkt.48, Mem.Op. at 4-5 n.3; Dkt.53, Tr.52), is both empty and misdirected. The relevant question in this litigation is whether the specific actions that State officials took and are taking against Miss Keeton constitute a penalty under the law. That legal determination is not capable of being stipulated by a witness, and certainly is not settled by testimony about what is not at issue in the case, *viz*., the nondescript abstraction of a "remediation plan." The discrete, concrete actions Defendants took against Miss Keeton are the focus of inquiry. "When by its very nature [an] imposition is a penalty, it must be so regarded." *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922). "No mere exercise of the art of lexicography can alter the essential nature of an act or a thing." *United States v. La Franca*, 282 U.S. 568, 572 (1931); and if the ASU imposition "be clearly a penalty it cannot be converted into [something else] by the simple expedient of calling it such." *Id*.

commitment that she will validate conduct that she believes immoral, but that pledge is intended to bind her to communicate that conscience-violating message in the *future*—without knowing whether future opportunities to do so will even exist, let alone be permissible in the employment context she may find herself. In such way do Defendants envision the reach of their manipulation. Not respecting the sanctity of her conscience, neither do they conceive separations of space, time, and affiliation to be constraints on their control over Miss Keeton's speech.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). It is "the fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The government transgresses this principle when it "compel[s] affirmance of a belief with which the speaker disagrees," *id.* at 573, or "requires the utterance of a particular message favored by the Government," *Turner Broad. Sys.*, 512 U.S. at 641. But this is precisely what Defendants—by their own admission—are doing to Miss Keeton.

Yet Defendants oddly downplay the significance of this violation of Miss Keeton's conscience by explaining that she does not actually need to believe what she says; she just needs to say it. Dr. Anderson-Wiley and the Assistant Attorney

General had the following exchange at the preliminary injunction hearing.

> Q Dr. Anderson-Wiley, when you just responded to plaintiff's counsel's example of having to affirm for the client that [homosexual] behavior, is that the same thing as Ms. Keeton believing that that behavior is okay?
>
> A No.
>
> Q In order to affirm something for a client, does that mean you have to change your own beliefs about that behavior?
>
> A No.
>
> Q Are you free to continue to believe whatever you want about that behavior?
>
> A Yes.

(Dkt.53, Tr.94.)

This is surely incredible. And its premise is utterly foreign to First Amendment law: that compelled speech is acceptable and does not implicate the speaker's beliefs because the compelled speaker can simply be *insincere*. The court below recognized this is a requirement that the speaker *lie.* (Dkt.53, Tr.114.) Counsel for Defendants hastened to validate the court's understanding, and celebrated its propriety: "[I]s it a requirement that the counselor lie? Absolutely." (Dkt.53, Tr.122.)

Supreme Court precedents consider compelled speech as particularly egregious because of the violence it does to the individual mind. The Court (like the rest of us) recognizes that speech communicates one's internal convictions on

the matter spoken to the hearer. That hearer, in the counseling context, critically includes the counselee. Indeed, that hearer's expectation of sincerity in a counselor's expression is precisely why Defendants insist that Miss Keeton pledge that she will validate all of her clients' conduct: because that speech by the counselor communicates to the counselee a message of invigorating affirmation—a message that would not convey unless the counselee views the message from the counselor as sincere. The obligation that ASU imposes is two-fold, then. The counselor must not only promise to speak against her conscience, but also actively deceive the counselee about her views on matters of ultimate consequence to the counselee.

In *Wooley*, the Supreme Court evaluated a State's requirement that a citizen display on his vehicle license plate an ideological message that contradicted his religious convictions, and the State's penalizing of the plaintiff for his refusal to so speak. "We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message[.]" *Wooley*, 430 U.S. at 713. The Court's answer was an emphatic *no*.

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary

components of the broader concept of "individual freedom of mind."

Id. at 714 (emphasis added). The Court thereby explained the indelible connection under First Amendment law between beliefs and speech. State compulsion requiring a person to communicate certain *speech* is a violation of the victim's freedom of *mind*. That is because the communication of messages is an acknowledged means of externalizing the beliefs of the one so speaking. State coercion of a spoken message is the coercion of an announcement of belief, and thus violates the integrity of the person so subject.

Defendant professors testified that (notwithstanding glaring indicators to the contrary) they were not actually concerned with Miss Keeton's beliefs; they were only compelling her to speak a particular message. Miss Keeton must merely pledge she will communicate a certain ideological message that contradicts her beliefs, or she will be expelled. (Dkt.53, Tr.92-94.) But that is no big deal, imply Defendants, because Miss Keeton does not have to actually believe the message they are requiring her to propagate.[19]

The Supreme Court in *Barnette* also explained the inherent and legally significant connection between speech and belief. There the Court invalidated a state law mandating that all public school students pledge allegiance to the

[19] The faculty do, however, require that Miss Keeton be sincere about her pledge to say what they require. She can be insincere about the message itself, but not about her promise to say it. (*See* Dkt.53, Tr.79.) Lying is what counselors do to counselees, not what counselors-in-training do to their professors.

American flag. The Court emphasized that "the compulsory flag salute and pledge requires *affirmation of a belief* and an attitude of mind," *Barnette*, 319 U.S. at 633 (emphasis added), thereby refuting the ASU professors' conception which blithely divides what one "affirms" from what one "believes." The Assistant Attorney General asked Dr. Anderson-Wiley:

> Q: In the counseling profession, does the word "believe" or "belief," does that mean the same thing as affirm? Is [Miss Keeton's] affirming something the same thing as her believing it, having one of her own beliefs?
>
> A: No, no.

(Dkt.53, Tr.95.) The First Amendment knows nothing of this. "[A] pledge of allegiance to [an averse position], *however ostensible*, only serves to compromise the individual's true beliefs." *Elrod*, 427 U.S. at 355 (emphasis added).

Notably, the Supreme Court in *Barnette* did not assign any legal significance to the possibility that the State coercers did not want to change students' beliefs about flag and country, but only to assure outwardly compliant speech, notwithstanding its invisible insincerity.

> It is not clear whether the [flag salute] regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony[,] or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.

Barnette, 319 U.S. at 633. In either case, the State's coercive measures demanding communication of a message disbelieved by the pupil is unconstitutional. "To

sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. The Supreme Court would not embrace such an internally conflicted position; "no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *Id*. at 642.

In *Hurley,* the Supreme Court reinforced this understanding of the critical importance of the connection between one's speech and sincere personal endorsement when it distinguished *Turner Broadcasting*.[20] It explained that in *Turner Broadcasting* it validated must-carry programming obligations on cable operators "because '[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.'" *Hurley*, 515 U.S. at 576 (quoting *Turner Broad. Sys.*, 512 U.S. at 655.) In contrast with that, "there is no customary practice whereby private [parade] sponsors disavow 'any identity of viewpoint' between themselves and the selected participants." *Id.* It goes without saying that when one speaks from his

[20] In *Hurley*, the Supreme Court invalidated the State's enforcement against a private parade organizer of a nondiscrimination law that forbade discrimination based on, *inter alia*, "sexual orientation." The parade organizer desired to exclude from his parade's messages one communicating favorably of homosexuality; the Court vindicated his First Amendment right to do so.

own mouth he is presumed to endorse the moral pronouncements thereby communicated.

"[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Id*. at 575. Both in coercing Miss Keeton to serve as a mouthpiece for a message she disbelieves, and in penalizing her refusal to do so, Defendants are violating her right to be free of compelled speech. *See id*.; *Holloman*, 370 F.3d at 1268.

Yet the court below directed no analysis to the gravamen of Miss Keeton's compelled speech claim. Instead, the court casually dismissed the application of the case law on which she rests her claim, without interacting with any of it. (Dkt.48, Mem.Op. at 23.) The court then opined on an issue not relevant to her claim, *viz.*, the faculty's attitude toward Miss Keeton's beliefs. (*Id.* at 23-24.) Thereafter the court, for the first and only time in its opinion, and only cryptically and merely in passing, mentioned the real claim that Miss Keeton brings (being required to speak a message she disbelieves), only to announce—again, without any supporting analysis offered—that this constitutes "legitimate pedagog[y]" under *Hazelwood*. (*Id*. at 24.) The entirety of that latter "discussion" was contained within a single sentence. In such fashion did the court dispense with Miss Keeton's claim.

Yet the Supreme Court leaves no doubt about the unambiguous First

Amendment bar against precisely what Defendants are doing to Miss Keeton. "Requiring access to a speaker's message . . . [as] a means to produce speakers free of . . . biases *** is a decidedly fatal objective." *Hurley,* 515 U.S. at 579.

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups, or indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. . . . While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however, enlightened either purpose may strike the government.

Id. The district court committed clear error in denying Miss Keeton's request for a preliminary injunction, as she has shown a substantial likelihood of success on her compelled speech claim.

E. Defendants are violating Miss Keeton's right to the free exercise of religion and autonomy of belief.

Because "[t]he free exercise of religion means, first and foremost, the right to *believe and profess* whatever religious doctrine one desires[,] . . . . the First Amendment obviously excludes all 'governmental 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 v. Connecticut,* 310 U.S. 296, 303-04 (1940),[21] the State may

[21] *Accord McDaniel v. Paty,* 435 U.S. 618, 626 (1978) ("The Free Exercise Clause

never "compel affirmation of a repugnant belief" or "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402. This categorical protection is not limited to religious beliefs alone as the "First Amendment gives freedom of mind the same security as freedom of conscience." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Indeed, "[o]ur political system and cultural life rest upon this ideal": that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. In short, the "First Amendment[] . . . creates a preserve where the views of the individual are made inviolate." *Baird*, 401 U.S. at 6.[22]

As the Supreme Court said in overturning the State Bar of Arizona's decision to exclude a prospective member based on her evasion of its interrogation of her political 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 . . . discourage citizens from exercising rights protected by the

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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))

[22] *See also Barnette*, 319 U.S. at 642 (prohibiting government from "invad[ing] the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

Constitution.

Baird, 401 U.S. at 6 (citations omitted).

Though Defendants have repeatedly targeted Miss Keeton's expressions of belief for condemnation and penalty (*see supra* at pp. 5-10), after being sued, Defendants testified that they are not concerned with her beliefs after all (Dkt.53, Tr.72, 106), only that she affirm GLBTQ conduct (Dkt.53, Tr.92-94). But it is self-evidently false that ASU's requirement of a Christian student with traditional biblical ethical convictions that she speak favorably of transgender and homosexual behavior is not an attack on her beliefs and a requirement that she change them.

Defendants apprehend fully that for Miss Keeton to profess allegiance to moral relativism in her future professional endeavors will require a change in her beliefs. This is not only evidenced by their explicit requirement that she alter her views (*see* Dkt.1, Ver.Compl. ¶¶51, 65-67, 71, 89), but by the equally clear (if implicit) message conveyed by the narrative of Defendants' treatment of Miss Keeton, *to wit*: when Miss Keeton voiced her beliefs in objective right and wrong on matters of human sexual conduct and gender, Defendants targeted her for remediation.

That acknowledged provocation for their imposition of remedial requirements on Miss Keeton demonstrates that Defendants identify that there is an

inevitable belief incompatibility between her normative biblical ethic and the morally relativistic stance they are compelling her to adopt in her future professional speech. For example, Dr. Anderson-Wiley revealingly testified that Miss Keeton's recitation of her biblical convictions in her email messages "heightened our concern that she may not be able to effectively separate her values and that she might impose her values on her clients." (Dkt.53, Tr.72.)[23] If "separation" (*i.e.*, insincerity) is the requirement for counseling propriety, why would *any* particular belief (which will be "separated," after all) be suspect? Because some beliefs constrain their adherents from participating in duplicity and affirmations of immorality. Miss Keeton maintains such beliefs. Her professors discovered this. So they imposed remediation. The Remediation Plan's written requirement that Miss Keeton report on how the remedial projects "influenced her beliefs" was not inadvertent or incidental, but central to the probationary effort.

Defendants cannot testify away the reality that they have discriminatorily targeted Miss Keeton for penalty and repentance because of her beliefs. The Supreme Court associated compelled speech requirements and penalties triggered by the expression of religious views with State regulation of religious beliefs:

[23] Defendants conceive of "imposing values" not as a coercive invasion (akin to what they are doing to Miss Keeton), but as encompassing a counselor's failure to tell a client his conduct is righteous.

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.

Sherbert, 374 U.S. at 402 (internal citations omitted). Defendants have imposed disadvantage, censoring pressure, and affirmation compulsion on Miss Keeton in violation of her free exercise rights.

Due to the district court's unswerving characterization of the case as a dispute over curriculum and not a challenge to the tailored discriminatory penalties directed uniquely against Miss Keeton because of her speech and views, the court discussed her free exercise claim in a way that misses the point expounded above. The court recited as exculpating Defendants that "[t]he Supreme Court has recently reaffirmed . . . 'that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct.' *Martinez*, 130 S.Ct. at 2995 n.27 (citing *Smith*, 494 U.S. at 878-82)." (Dkt.48, Mem.Op. at 26.)

But on that standard Defendants stand condemned. First, their viewpoint-based probation imposition and coerced speech requirement are not "valid regulations," for reasons discussed above. Second, these singular impositions on Miss Keeton are obviously not "of general application"; she is their lone victim, and Defendants tailor-made these for her as part of a specialized, individualized

remediation program. Third, Defendants' remediation requirements do not merely "incidentally burden [her] religious conduct"; burdening her religious conduct is their central aim. The remediation burdens were triggered by her expression of religious beliefs, they require her to report on the status of those beliefs, and they require that she pledge to affirmatively convey a message contrary to those beliefs.

Miss Keeton has demonstrated a substantial likelihood of prevailing on her Free Exercise claim.

F. Defendants are retaliating against Miss Keeton because she exercised her First Amendment rights.

"It is 'settled law' that the government may not retaliate against citizens for the exercise of First Amendment rights[.]" *Bennett v. Hendrix*, 423 F.3d 1247, 1256 (11th Cir. 2005). To show retaliation, Miss Keeton "must establish first, that [her] speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Id.* at 1250 (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005); *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)).[24]

[24] *Bennett's* formulation of the third factor (which was not at issue in that case) is somewhat unclear. But the Court's reference and reliance on *Constantine* and *Keenan* as authority appears to clarify the Court's intention. *See Constantine*, 411 F.3d at 499 ("(3) there was a causal relationship between her protected activity and the defendants' conduct"); *Keenan*, 290 F.3d at 258 ("(3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of

First of all, Miss Keeton's expressions of belief for which she was subject to retaliation were presented in venues calling for such expression—class discussion and reflection papers (*see* Dkt.1, Ver.Compl. ¶¶ 113, 114), private conversations, and private correspondence with faculty—and are pristine instances of protected speech. Miss Keeton also easily clears the low threshold for "adverse action" as Defendants' actions inarguably constituted more than a "*de minimis* inconvenience to her exercise of First Amendment rights." *Bennett*, 423 F.3d at 1252 (quoting *Constantine*, 411 F.3d at 500); *see also id.* at 1254 ("[T]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable" (citation omitted)). A "verbal censure" from a teacher chills a student's First Amendment rights. *Holloman*, 370 F.3d at 1268-69. After all, the mere "threat of sanctions may deter the[] exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Defendants' actions against Miss Keeton are clearly "adverse actions" because they "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Bennett*, 423 F.3d at 1254. The faculty "verbal[ly] censur[ed]" Miss Keeton by condemning her views and beliefs in writing and in

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constitutionally protected conduct").

multiple remediation meetings. *See Holloman*, 370 F.3d at 1268-69. They characterized her as "prejudiced" among other negative things; opined that her views were unethical, unprofessional, and rendered her unfit for counseling or teaching; and further warned that her views could be harmful or potentially lethal. (Dkt.1, Ver.Compl. ¶¶43-52, 65, 100-01.) They exacerbated these censures with their imposition on her of unique and extensive reformatory obligations and their continuing threat to dismiss her from the counseling program unless she pledges to convey a message contrary to the one that led Defendants to retaliate against her. Moreover, their censures have *actually chilled* Miss Keeton from speaking in a recent class. (*Id.* ¶¶111-12.) Undoubtedly, Defendants actions would deter a person of ordinary firmness from exercising First Amendment rights.

Finally, Defendants' adverse actions were indeed substantially motivated by Miss Keeton's protected speech, as seen by their repeated references to Miss Keeton's expressed beliefs and views on sexual morality as the reason for the remediation and threatened dismissal and their requirement that she give voice to an ideological message contrary to the one she had expressed. (*See supra* at 5-10.)

In declining Miss Keeton's retaliation claim, the district court again asserted, rather than demonstrated, its conclusions. The court gave no attention to any of the undisputed evidence containing the faculty's reasons for imposing probation on Miss Keeton. Instead the court announced that the Defendants' reasons "appear to

be, on the evidence presented, academically legitimate[.]" (Dkt.48, Mem.Op. at 27.) What that "evidence" might be, why the court considers the faculty's reasons "academically legitimate," and what legal standard was employed by the court to reach that conclusion, or even why "academic legitimacy" is determinative of a retaliation claim, were never disclosed by the court. The court nonetheless announced Defendants' actions to be legitimate academic requirements sanctified by *Hazelwood.* (*Id.* at 27-28.)[25]

Miss Keeton has shown a substantial likelihood of prevailing on her retaliation claim, and the district court ruled otherwise without offering any viable reason.

II. Miss Keeton has suffered and continues to suffer irreparable harm.

This Court "presumes irreparable harm to a plaintiff when certain core rights are violated." *Touchston v. McDermott*, 234 F.3d 1133, 1159 n.4 (11th Cir. 2004).

[25] The court also urges that "Plaintiff points to no instance in which she was asked to change her personally-held religious beliefs." (Dkt.48, Mem.Op. at 27.) This is either obviously false (as Miss Keeton points to several such instances (*see* Dkt.1, Ver.Compl. ¶¶51, 65-67, 71, 89)), or intends an alteration of the meaning of "personally-held religious beliefs" from that used in common parlance to the innovative definition Dr. Schenck announced (*i.e.*, those ethical views that have nothing to do with anyone other than the holder). (*See* Dkt.1, Ver.Compl. ¶ 78.) But in that latter case the court's observation about the absence of required change in *that* kind of belief is without value, for it is no virtue that Defendants' belief-alteration-requirement reaches "only" the greater part of Miss Keeton's ethical views, instead of all of them. And in any event, a retaliation cause of action does not have as an element that the State require the plaintiff to alter her beliefs. So the court's assertion here, beyond mistaken, is also misplaced.

"[T]he loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) (quoting *Elrod*, 427 U.S. at 373). "One reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Id*. at 1189. Miss Keeton has been disciplined, has been driven to self-censor (Dkt.1, Ver.Compl. ¶112), and suffers from a conscience-violating and speech-coercing condition of participating in a State education program.

Because Miss Keeton has shown a past and continuing violation of her First Amendment rights, "irreparable harm is presumed and no further showing of injury need be made."[26] *Touchston*, 234 F.3d at 1158-59 (Birch, J., dissenting) (citing demonstrative cases).

III. The requested injunction will not harm Defendants.

The current and continuing injury to Miss Keeton clearly outweighs any speculative negative consequence that Defendants would endure as a result of an injunction protecting Miss Keeton's First Amendment rights. The ongoing loss of Miss Keeton's First Amendment freedoms constitutes a "serious and substantial

[26] Thus Miss Keeton's loss of time and delayed entrance into her professional life entailed by the threatened expulsion need not be elaborated here.

injury," and Defendants simply have no legitimate interest in continuing their unconstitutional conduct. *KH Outdoor,* 458 F.3d at 1272. This is especially true here, where an injunction will simply maintain the status quo by keeping Miss Keeton enrolled in the counseling program and remove the uniquely discriminatory and oppressive remediation terms from imposing on her thoughts and speech as she proceeds with her studies.

IV. The public interest is served by issuance of the requested injunction.

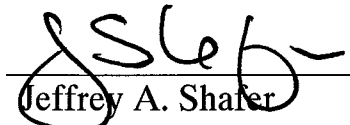
"[I]t is always in the public interest to protect First Amendment liberties." *Id.* (quoting *Joelner v. Vill. of Wash. Park,* 378 F.3d 613, 620 (7th Cir. 2004)). The requested injunction would accomplish that beneficial end.

CONCLUSION

Jennifer Keeton respectfully requests that this Court 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: October 12, 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 13,603 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: October 12, 2010.

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