No. 10-13925-J

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JENNIFER KEETON,
Plaintiff-Appellant,

v.

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

Appeal from the United States District Court for the Southern District of Georgia, Augusta Division, No. 1:10-cv-00099-JRH-WLB, Hon. J. Randall Hall, United States District Judge

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MOTION OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND THE NATIONAL ASSOCIATION OF SCHOLARS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1 and 11th Cir. R. 26.1-1, *amici* certify that the persons interested in this case are those listed in the first brief filed in this case (Brief of Appellant), plus the Foundation for Individual Rights in Education (FIRE) and the National Association of Scholars (NAS). FIRE and NAS are non-profit corporations that have no parent corporation or other corporation that owns 10% or more of their stock. They are also not publicly held. *Amici* are not aware of any other person or entity that has an interest in the outcome of this case or appeal.

Pursuant to Fed. R. App. 29(b) and 11th Cir. R. 29-1, the Foundation for Individual Rights in Education (FIRE) and the National Association of Scholars (NAS) respectfully move for leave to file a brief as *amici curiae* in support of plaintiff-appellant Jennifer Keeton. Keeton has consented to the filing of this brief. *Amici* have requested but have not received the consent of the defendants-appellees. This motion is timely because Appellant's Brief was filed on October 12, 2010. *See* Fed. R. App. 29(e).

The proposed brief has been submitted with this motion. In support of its motion, *amici* state:

1. FIRE is one of the leading public interest organizations seeking to protect student free speech at universities. It has over ten years of experience with past and present threats to student free speech, and with how administrators tend to craft speech codes in light of court decisions.

FIRE is committed to the protection of speech expressing all perspectives, religious and otherwise, and can thus provide a perspective that may be broader than that offered by the parties. It has indeed filed amicus briefs in a wide range of cases, defending a wide range of student speech. *See* http://thefire.org/index.php/article/12364.html (listing the cases). And it has defended free speech in many more cases that did not reach the stage where an amicus brief has been required;

again, those cases involved a wide range of student speech. *See* http://www.thefire.org/cases/all/ (providing links to documents on those cases).

2. NAS has over twenty years of experience with threats to free speech at universities. It likewise aims to protect student free speech, whether religious or otherwise.

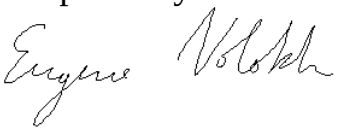
3. *Amici* believe that the defendants' actions imposed a substantial burden on Jennifer Keeton because of the viewpoint of her speech, and that such a viewpoint-based burden both violates Keeton's First Amendment rights and unacceptably chills the speech of other students. Moreover, this viewpoint-based burden cannot be justified using the precedents that rightly leave the university free to impose generally applicable curriculum requirements on all students, regardless of their viewpoints.

4. Unless the district court's decision is reversed, it threatens to become a road map for other public universities that want to restrict a wide range of speech (not at all limited to anti-homosexuality speech) by a wide range of students (not at all limited to counseling students). Naturally, this is of grave concern to the *amici* and to the students and faculty members that they represent.

For these reasons, FIRE and NAS respectfully request that the Court grant their motion for leave to file their brief as *amici curiae*.

Dated: October 19, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that, on October 19, 2010, I served one copy of the foregoing Motion of the Foundation for Individual Rights in Education and National Association of Scholars for Leave to File a Brief as *Amici Curiae* in Support of Plaintiff-Appellant on each of the following:

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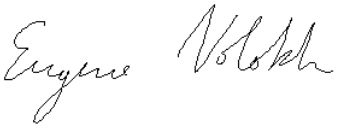

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BRIEF OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND THE NATIONAL ASSOCIATION OF SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF THE *AMICI CURIAE*

The Foundation for Individual Rights in Education (FIRE) is a national secular, non-partisan, 501(c)(3) non-profit educational and civil liberties organization working to defend and promote individual rights, especially the freedom of speech, at our nation's colleges and universities. During its more than ten years of existence, FIRE has advocated on behalf of students expressing a vast range of political views, including both supporters of gay rights, see, *e.g.*, FIRE, *Hampton University: Gay and Lesbian Student Group Denied Recognition Without Explanation*, Sept. 1, 2006–Feb. 22, 2007, http://www.thefire.org/case/736.html, and opponents of homosexuality, see, *e.g.*, Beth McMurtrie, *Tufts U. Restores Status of Christian Student Group Accused of Anti-Gay Bias*, CHRON. OF HIGHER ED., May 26, 2000, http://www.thefire.org/article/4163.html. Its goal in all such cases is not just to protect any particular point of view or ideology, but to protect student expression generally.

The National Association of Scholars is an organization of professors, graduate students, and others dedicated to the promotion of traditional higher education. It focuses on principles of freedom of thought and conscience, rigorous intellectual inquiry, and the need for coherent curricula, grounded in the western tradition of disciplined research. It is also devoted to the defense of traditional academ-

ic freedom and the open, civil and free expression of ideas on college campuses, including those which may be unpopular, controversial or provocative.

STATEMENT OF THE ISSUES

Whether the district court erred in not preliminarily enjoining Augusta State University officials from (1) expelling Jennifer Keeton from the counseling program for her refusing to participate in a Remediation Plan that was imposed on her based on her expression of anti-homosexuality views, and (2) imposing that Plan as a condition of Keeton's further participation in the university degree program.

SUMMARY OF ARGUMENT

The First Amendment presumptively bars the government from imposing special burdens on a person based on the content or the viewpoint of that person's speech. This covers not just punishments for speech and traditional taxes on speech, but also time-consuming obligations selectively imposed only on those who express disfavored views. And this principle fully applies to university students.

Nor can such viewpoint-based burdens be justified on the grounds that a university may set its curriculum. A government-run university has broad authority to impose various curricular requirements on all its students, much as the government has broad authority to impose taxes and other burdens. But such authority to

create general rules for all students or taxpayers does not include the authority to selectively retaliate against those who have expressed a particular view.

Such viewpoint-based burdens likewise cannot be justified on the grounds that the student's expression of the viewpoint supposedly predicts future incompetence or unprofessionalism on the student's part. Any such rationale would justify restricting a vast range of student speech, and would thus dramatically undermine academic freedom at American public universities. And such a rationale would show the Remediation Plan in this case to be unconstitutional for much the same reason that prior restraints are generally unconstitutional: It does not simply punish unprotected speech or conduct (here, negligent counseling), but also restricts fully protected speech (here, student debate inside and outside of class).

ARGUMENT

I. The First Amendment Presumptively Forbids Imposing Special Obligations on University Students Who Express Particular Viewpoints

Jennifer Keeton, a university student, holds certain views on a controversial topic. She expressed her views in class, and outside class to other students. She tried to persuade the other students of her views. She did not violate any rules of classroom behavior. She could not have violated any constitutionally permissible rules of professional practice, since she had not yet gone through the practicum requirement—contrary to the opinion below, she did not "impos[e] her oral view-

point on counselees," Dkt. 48, Order at 22, because she had no counselees.

Keeton was therefore doing precisely what First Amendment law contemplates university students will do: participating in debate, questioning orthodoxy, and contributing to the diversity of ideas on university campuses. For that, though, she received two rewards.

First, Keeton was slapped with a viewpoint-based tax, though payable in time rather than money: an obligation to spend many hours doing tasks that were not required of classmates who had not expressed the same views, and then to report "how her study has influenced her beliefs." *Id.* at 6–7. Such a burden—attending three workshops, reading ten peer-reviewed articles, attending an unspecified number of activities such as the Gay Pride Parade, and writing a two-page paper each month, *id.*—is no small thing for a busy university student.

Second, Keeton was informed that she might be dismissed from the counseling program, presumably if the university concludes her supplemental obligation has not "influenced her beliefs," *id.* at 7, in the right way. Both of these burdens were imposed on Keeton precisely because she supposedly (1) "voiced disagreement in several class discussions and in written assignments with the gay and lesbian 'lifestyle,'" (2) "stated in one paper that she believes GLBTQ 'lifestyles' to be identity confusion," (3) "relayed [to another student] her interest in conversion

therapy for GLBTQ populations," and (4) "tried to convince other students to support and believe her views," Dkt. 1-3, Ver. Compl. Exh. B at 3 (emphasis in original) ("Reason(s) for Remediation").

The First Amendment forbids such government retaliation based on a person's exercise of First Amendment rights. To prove retaliation, "private citizens" (as opposed to government employees) "must establish that the retaliatory acts would deter a person of ordinary firmness from exercising his or her First Amendment rights." *Bennett v. Hendrix*, 423 F.3d 1247, 1252 (11th Cir. 2005). Students of ordinary firmness would certainly be deterred from expressing their dissenting viewpoints if the cost of such expression is many hours of extra university-imposed burdens, coupled with the risk of expulsion from the program.

Besides violating Keeton's own First Amendment rights, the university's retaliation also sent a powerful message to other students: If you express views like Keeton's, prepare to suffer the same consequences—prepare to incur many hours of extra obligations, and to put yourself at risk of expulsion. Just as campus speech codes that impose discipline for constitutionally protected speech unacceptably

"inhibit [students] in expressing [their] opinions," "in class" and outside,[1] so ASU's actions here likewise inhibited student expression.

In this respect, the university's actions are much like those of the State of Florida in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831 (1974). There, Florida law required newspapers that published criticisms of candidates to also publish the candidate's reply. *Id.* at 244, 94 S. Ct. at 2833. Tornillo defended the law on the grounds that the law "'ha[d] not prevented the *Miami Herald* from saying anything it wished,'" *id.* at 256, 94 S. Ct. at 2839 (quoting Tornillo's brief), but the Court disagreed. The law, the Court held, "exacts a penalty on the basis of the content of a newspaper," a penalty that included the "cost in . . . time" as well as in materials and space. *Id.* at 256–57, 94 S. Ct. at 2839. The Court continued:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida sta-

[1] *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 n.18 (3d Cir. 2008); *see also Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182, 1183 (6th Cir. 1995) (striking down a speech code because it "'chill[ed]' the exercise of free speech and expression," and "present[ed] a 'realistic danger' the University could compromise the protection afforded by the First Amendment"); *McCauley v. Univ. of V.I.*, No. 09-3735, 2010 WL 3239471, *16, 2010 U.S. App. LEXIS 17196, *48 (3d Cir. Aug. 18, 2010) (striking down a speech code because of "the blanket chilling of all protected speech" stemming from the "risk[]" that a student who speaks may "receiv[e] punishment").

> tute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."

Id. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S. Ct. 710, 725 (1964)).[2]

Precisely the same is true here: The university's action "exacts a penalty on the basis of the content" of student speech, a penalty that includes the cost in time (likely more time than was usually required by the right-of-reply law in *Miami Herald*) as well as risk. Moreover, "[f]aced with the penalties that would accrue" to any student who made statements that could arguably be treated by the university

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[2] The Supreme Court went on to also say that, "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors," *id.* at 258, a rationale that is not applicable to this case. But the Court's objection to "penalt[ies] on the basis of . . . content" and the Court's concern about "intrusion into the function of editors" were each independently adequate justifications for the Court's decision. *See also Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 13, 106 S. Ct. 903, 910 (1986) (plurality) (characterizing *Miami Herald* as involving a "content-based penalty" on speech); *id.* at 11 n.7, 106 S. Ct. at 909 n.7 (stressing that "[t]he Court's opinion in *Tornillo* emphasizes that the right-of-reply statute impermissibly deterred protected speech," and that interference with editorial decisions was an "*independent* ground for invalidating the statute" (emphasis added)); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035, 2044 (1980) (characterizing *Miami Herald* as striking down a law that "exact[ed] a penalty on the basis of the content of a newspaper").

as requiring "remediation," students "might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the [University policy], [student commentary on controversial issue] would be blunted or reduced." "Government-enforced ['remediation' policies] inescapably 'dampen[] the vigor and limit[] the variety of [student] debate."

Finally, the university's actions sent another message as well: If you challenge the views that the administration seeks to inculcate, prepare to have even your private conversations with your classmates reported to the authorities, see Dkt. 48, Order at 4, scrutinized for evidence of wrong thinking, and used as the basis for university retaliation. This creates the very sort of "atmosphere of suspicion and distrust" that the Supreme Court condemned in *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 77 S. Ct. 1203, 1212 (1957).

II. The District Court Erred in Equating the University's Retaliation Against Keeton with Generally Applicable University Curricular Decisions

The District Court dismissed Keeton's claim that the university had unconstitutionally retaliated against her speech:

> 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. Defendants' reasons for imposing the Remediation Plan appear to be, on the evidence presented, academically legitimate, rather than a mere pretext to retaliate against her for expressing her beliefs. Plaintiff points to no instance in which she

> was asked to change her personally held religious beliefs. To the contrary, the record reveals that Plaintiff was asked only to complete the Plan in order to fulfill academic requirements "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273.

The District Court committed a factual error and a legal error. First, the Remediation Plan expressly said that "[e]ach month [Keeton must] submit a two-page reflection to her advisor that summarizes," among other things, "how her study has influenced her beliefs," and that "[b]ased on these written reflections and two scheduled meetings . . ., faculty will decide the appropriateness of [Keeton's] continuation in the counseling program." Dkt. 1-3, Ver. Compl. Exh. B at 5. Keeton was thus indeed being asked to change her beliefs.

But, second and more important, the District Court assumed that a university was free to selectively impose curriculum requirements on those students who have expressed certain views. That is not correct. A university does have great latitude in deciding what all of its students in a particular program or course must learn. But it does not have such latitude in imposing special curricular burdens on students who express certain views, whether anti-homosexuality, anti-war, pro-gun-rights, anti-religious, or whatever else.

This distinction between government power to impose general burdens, and the lack of government power to selectively burden those people who express certain viewpoints, is familiar in First Amendment law. The government, for instance,

has great latitude in imposing taxes, including taxes on the media. *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991). But it does not have such latitude in imposing special taxes on magazines with a certain content, even in the absence of any viewpoint discrimination and "even where . . . there is no evidence of an improper censorial motive." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 228, 107 S. Ct. 1722, 1727 (1987).

Similarly, the government may limit contributions to political candidates, but it may not stringently limit those candidates who spend a good deal of their own money to speak, and at the same time impose less restrictive limits on those candidates' rivals. *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008). Imposing such discriminatory limits based on candidates' constitutionally protected self-funded speech may deter such speech, and thus may constitute "a special and potentially significant burden" which acts as an unconstitutional "drag on First Amendment rights." *Id.* at 2771–72. And the government may stop subsidizing public television stations generally, but it may not take away subsidies from those stations that choose to editorialize using their own funds. *FCC v. League of Women Voters*, 468 U.S. 364, 399–401, 104 S. Ct. 3106, 3127–28 (1984).

The same principles fully apply to universities. The government has great latitude in choosing whether or not to fund various student activities. But it does not

have such latitude in denying funding to student newspapers based on their religious viewpoints, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), or denying funding to student groups based on their pro-gay-rights viewpoints, *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997). Likewise, the state's latitude in designing generally applicable university curricula does not justify imposing special curricula on those students who express certain viewpoints.

Rosenberger and *Gay Lesbian Bisexual Alliance* offer a helpful perspective on this case. In *Rosenberger*, the Court held that a university could not refuse funding to student newspapers based on the religious viewpoints that the newspapers expressed. But say that, instead of denying funding, the University of Virginia had provided that any science students who express a religious viewpoint in a student newspaper—and only those students—must (1) take extra lessons on rationalistic scientific thinking, (2) read extra articles on the subject, (3) submit "reflection[s]" on "how [their] study has influenced [their] beliefs," and (4) face expulsion based on the university's evaluation of those "reflections."

This would of course have been at least as clearly unconstitutional as the program actually involved in *Rosenberger*. "Discrimination against speech because of its message is presumed to be unconstitutional." 515 U.S. at 828, 115 S. Ct. at

2516. "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 828–29, 115 S. Ct. at 2516 (citations omitted). And if financial burdens based on a person's expression of viewpoints are unconstitutional, burdens consisting of time-consuming extra obligations and risk of expulsion would be unconstitutional as well, as Part I discusses.

If in our hypothetical the University of Virginia had simply imposed a blanket requirement that *all* students (or all students in certain departments) take classes on rationalistic scientific thinking, or be evaluated based on their ability to answer exam questions in those classes, that would have been permissible. We agree with the district court that a university has power to set curriculum generally. But the hypothetical illustrates that the university may not impose additional curricular obligations on certain students in reaction to those students' speech.

Likewise, in *Gay Lesbian Bisexual Alliance*, this Court held that even modest burdens—denial of on-campus banking privileges and of event funding—were unconstitutional when they were targeted towards groups that "encourage . . . persons" to violate state laws against oral or anal sex, or "foster[] or promote[] a life-

style or actions prohibited by" such laws.[3] Such burdens, this Court said, constituted impermissible viewpoint discrimination.

Say, though, that instead of those burdens, the university had imposed a special burden only on those students who express viewpoints that encourage, foster, or promote oral or anal sex. Those and only those students would have to take special seminars on the wrongfulness of such behavior, write papers explaining how the seminars "influenced [their] beliefs," and risk expulsion if those papers were seen as unsatisfactory. This sort of tax paid in time, effort, and risk would be as unconstitutional as the denial of funding or on-campus banking privileges.

Again, a general requirement that all students take a course on sexual morality would be a constitutional exercise of the university's power to set curriculum (though it might be unwise or counterproductive). But a special requirement imposed only on those who dared to express certain viewpoints could not be saved by the university's power over the curriculum—just as a denial of funding or banking privileges to such speakers could not be saved by the university's broad power over its money and other property.

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[3] The case was decided before *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), so Alabama's criminal laws were seen as constitutional at the time, under *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986).

III. There Is No First Amendment Exception for Student Viewpoints That the University Believes to Be Predictors of Future Poor Performance

So a public university generally may not impose special burdens on students who express certain viewpoints. But some of the District Court's reasoning seems to rest on the assumption that there should be an exception when the viewpoints seem to predict future misbehavior by the student.

Thus, for instance, the District Court reasoned that "the record suggests . . . that the Plan was imposed because Plaintiff exhibits an inability to *counsel* in a professionally ethical manner—that is, an inability to resist imposing her moral viewpoints on counselees." Dkt. 48, Order at 19–20; *see also id.* at 22. Of course, Keeton did not actually exhibit any inability in a counseling setting, because her class work to date did not obligate her to counsel people. But perhaps the Court was suggesting that Keeton's viewpoints foreshadow a future inability to counsel people improperly. *See id.* at 23–24 (reasoning that the Remediation Plan was imposed because of the faculty's concern that Keeton's "beliefs affect [Keeton's] ability to counsel in an ethical manner in accordance with the program's curriculum").

Yet under the First Amendment, public universities cannot be allowed to single out certain viewpoints as supposedly dangerous, and impose targeted burdens on people who express those viewpoints. If "disenchantment with [a stu-

dent]'s performance . . . is no justification for denial of constitutional rights," *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667, 668 n.3, 93 S. Ct. 1197, 1198 n.3 (1973), fear that a student's viewpoints predict future bad performance is no justification for such denial, either. This is so for two reasons.

A. The University's Arguments, If Accepted, Would Justify the Restriction of a Vast Range of Speech

First, whatever the government's rationale for retaliating against students who express certain views, the effect is the same: Discussion of controversial topics, and challenges to conventional wisdom, will be deterred. And this will happen not just to anti-gay speech in counseling programs, but to a broad range of speech.

To begin with, the counseling program's rationale could apply not just to speech that disapproves of homosexuality, but also to speech that strongly disapproves of certain religious beliefs. Say a counseling student argues to his classmates that Scientology is a fraud, that Catholicism or conservative Islam oppresses women, that all religions but Catholicism or conservative Islam are against God's will, that organized religion is a "snare and a racket," *Cox v. New Hampshire*, 312 U.S. 569, 572, 61 S. Ct. 762, 764 (1941) (reporting on the constitutionally protected views of Jehovah's Witnesses), that all religion is "the opium of the people," KARL MARX, EARLY WRITINGS 244 (1992) (originally published 1844), or that all religion is just "delusion," RICHARD DAWKINS, THE GOD DELUSION (2006)—and

that, because of this, members of some or all religions are immoral, deceptive, or foolish. That, an administrator could say, might be a predictor of future inability to empathetically and professionally counsel believers in organized religion. Believers in many religions, or in no religion at all, are thus in jeopardy from the district court's decision (at least so long as they are bold enough to express those beliefs to classmates).

Or say that a counseling student harshly condemns Israel, and argues that all Israeli citizens are morally culpable for Israel's treatment of the Palestinians. That, an administrator could say, might be a predictor of future inability to empathetically and professionally counsel immigrants from Israel. Either the anti-religious or the anti-Israeli views might thus be interpreted as predictors of the possibility that the student will in the future "condone or engage in discrimination based on . . . culture, . . . ethnicity, . . . [or] religion/spirituality." AMERICAN COUNSELING ASS'N, ACA CODE OF ETHICS 10, § C.5 (2005), available at http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx.

And of course other professions have professional obligations and expectations as well. Say a business or economics student expresses support for Marxism. That, an administrator could argue, might be a predictor of future incompetence—or even of a future breach of a duty of loyalty to his corporation's stockholders—

especially if (to borrow the District Court's description of ASU's views about sexual orientation conversion therapy) "the faculty . . . concluded that research in [economics] peer-reviewed journals reveals that [Marxist prescriptions are] ineffective in [improving economic conditions]," Dkt. 48, Order at 4.

On the other hand, say a social work student expresses conservative political or economic views. That, an administrator could argue, is a predictor of insufficient future empathy for the downtrodden, and insufficient commitment to "social justice." *See* FIRE, *FIRE Warns Department of Health and Human Services Against Supporting Political Litmus Tests on Campus*, Oct. 25, 2006, http://www.thefire.org/article/7429.html (discussing accreditation standards that appear to require commitment to "social justice," and discussing an incident in which a university "threatened an education master's student with dismissal for expressing his opinion that white privilege and male privilege do not exist"); FIRE, *Victory for Freedom of Conscience in Education Schools: NCATE to Drop 'Social Justice' Recommendation for Teacher Certification*, June 6, 2006, http://www.thefire.org/article/7083.html (describing the withdrawal of similar accreditation standards by an education school accreditation organization).

Likewise, say a business school student expresses anti-gay or anti-evangelical-Christian views in class. That, an administrator could say, might be a

predictor of the student's illegally discriminating against his future gay or evangelical Christian employees, or illegally harassing his future gay or evangelical Christian coworkers. *But see Doe v. Univ. of Mich.*, 721 F. Supp. 852, 865 (E.D. Mich. 1989) (concluding that an incident in which administrators pressured a student who expressed such views "to attend an educational 'gay rap' session, write a letter of apology to the [student newspaper], and apologize to his class" helped show that the university policy under which the incident was handled was unconstitutionally overbroad under the First Amendment). And the list could go on, to include a wide range of other opinions.[4]

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[4] These examples cannot be effectively distinguished from this case by arguing that Keeton had reportedly said "that she would, [if asked by a counselee about the morality of homosexual conduct], explain to the counselee that, consistent with [Keeton's] personal views, the conduct is not moral," Dkt. 48, Order at 12. The university's Remediation Plan makes clear that the "Reason(s) for Remediation" did not consist of Keeton's having made specific statements about her planned future assertions in counseling sessions. Rather, those reasons (setting aside some unspecified alleged weaknesses in Keeton's writing skills) were that Keeton supposedly (1) "voiced disagreement in several class discussions and in written assignments with the gay and lesbian 'lifestyle,'" (2) "stated in one paper that she believes GLBTQ 'lifestyles' to be identity confusion," (3) "relayed [to another student] her interest in conversion therapy for GLBTQ populations," and (4) "tried to convince other students to support and <u>believe</u> her views." Dkt. 1-3, Ver. Compl. Exh. B at 3 (emphasis in original). Whether the Remediation Plan was constitutionally imposed must be judged based on the speech that actually led the university to impose the Plan. *See, e.g.*, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 812–13, 105 S. Ct. 3439, 3454 (1985) (concluding that

In all these cases, the administration could plausibly argue that it is concerned about possible future professional incompetence and unprofessionalism on the student's part. A faculty member who heard a student express such views, for instance, might reasonably call the student aside and informally urge the student to broaden his horizons, perhaps recommending some extra readings.

But the First Amendment does not allow the university to impose special academic burdens on students who express such views, because such burdens would powerfully deter student speech (as described in Part I). If the burdens were allowed, students would quickly learn that the only safe path is not to say anything that runs contrary to the administration's views about what attitudes professionals—managers, scientists, counselors, economists, lawyers, and more—should hold. After all, any such statements might lead the administration to worry that the student will eventually misbehave, and might lead to the imposition of burdensome "remediation plans."

As FIRE has learned during its ten years in existence, and as NAS has

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the First Amendment would be violated when even a facially constitutional explanation for an executive branch action is actually a pretext for retaliation based on the target's viewpoint); *Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1565 n.18 (11th Cir. 1995) (likewise); *Williams v. City of Valdosta*, 689 F.2d 964, 969, 975 (11th Cir. 1982) (likewise).

learned during its more than twenty years, many public university administrators have a substantial appetite for restricting student speech. So far, that administrator desire has been rightly checked by a solid line of court decisions.[5] But if courts build a doctrine under which university-disfavored speech could be subjected to burdensome "remediation plans," many university administrators will come to embrace it, and use it as a basis for a new generation of speech codes.

After all, as we discuss above, a wide range of speech could be seen by university administrators as a supposed predictor of future unprofessional or incompetent behavior. All the administrators would need to do is set forth some theory under which the speech supposedly demonstrates improper reasoning, ignorance, or a lack of civility—characteristics that might be seen as predicting future professional

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[5] *McCauley v. Univ. of V.I.*, No. 09-3735, 2010 WL 3239471, 2010 U.S. App. LEXIS 17196 (3d Cir. Aug. 18, 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Smith v. Tarrant County Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995).

misconduct. Indeed, it is a common human reaction to see other people's views that we find repugnant as predictors of possible future bad behavior by those people. And such a reaction could, if the district court's analysis is adopted, justify burdening the speaker with substantial extra obligations, and the risk of expulsion. *Cf.* FIRE, *Michigan State Ends Controversial Thought Reform Program*, May 3, 2007, http://www.thefire.org/article/8011.html (describing a university program in which students who engaged in certain speech were required to attend a special Student Accountability in Community Seminar); Michigan State Univ., *Student Accountability in Community Seminar: Faculty and Staff Guide*, http://www.thefire.org/article/7586.html (noting that some of the speech that could lead to required seminar attendance included "making sexist, homophobic, or racist remarks at a meeting" of a student organization, or "[f]ailing to understand how [organization] members' actions affects others").

It would then be the rare student who would brave the burden and the risk and express her views—not just views disapproving of homosexuality, but the wide range of views we discuss above. And the chilling effect would be felt in class, outside class (as in this very case), in student newspapers, in questions following public speeches, and elsewhere. "[T]he First Amendment to our Constitu-

tion was designed to avoid these ends by avoiding these beginnings." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641, 63 S. Ct. 1178, 1187 (1943).

B. The Restrictions in This Case Are Analogous to Unconstitutional Prior Restraints

For the reasons given above, the university's actions are unconstitutional even if they are seen simply as a content-based penalty, rather than a prior restraint. But the Supreme Court's prior restraint jurisprudence is still relevant here.

Traditional prior restraints involve attempts to prevent constitutionally unprotected speech (such as obscenity) in a way that also burdens protected speech (such as nonobscene films). *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 316, 100 S. Ct. 1156, 1161 (1980). The university's action in this case likewise is an attempt to prevent constitutionally unprotected speech (supposedly negligent counseling in a future practicum) in a way that also burdens protected speech (student discussion in class and outside class).

As the Court held in *Vance*, the unconstitutionality of prior restraints reflects "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* at 316 n.13, 100 S. Ct. at 1161 n.13 (emphasis in original). The same applies to restraints such as the University's Remediation Plan: A free society's public universities may be able to discipline those students who actually im-

properly counsel clients, in violation of constitutionally valid practicum rules. But universities may not throttle all other students beforehand, by imposing special burdens on all expression—expression in class, in casual conversation, and elsewhere—of viewpoints that (in the administration's view) are supposedly predictors of future misbehavior.

Moreover, one reason that prior restraints issued before the speech is actually said are unconstitutional is that "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Id.* Likewise, what a student will actually say in a practicum or in practice cannot be known in advance. Professionals or even trainees who are actually counseling clients rightly tend to be more circumspect than students debating in class. Perhaps Keeton's counseling will ultimately be entirely in keeping with what the university suggests. But in any event the university may not burden all students' expression of their views about homosexuality, in class and out of class, because of a fear that some students will in the future unsoundly counsel a client during a practicum.

Indeed, students debating in class *should* be less circumspect than when counseling clients. The responsible professional dealing with a client ought to follow conventional wisdom, at least unless experience makes her confident that she

ought to depart from such wisdom. But the responsible student discussing subjects in class ought to be willing to challenge conventional wisdom. The Supreme Court's analysis in *Vance* is thus entirely apt here: Punishable speech (here, unprofessional or incompetent counseling of clients that violates constitutionally valid practicum rules) may be punished, but it may not be restrained before the fact through policies that deter constitutionally protected debate in the university.

And the university indeed has ample tools to promote student professionalism and competence: It can teach all students about professional obligations, and it can discipline those students who actually violate constitutionally valid practicum rules while participating in a practicum course. Those tools are of course not perfect, but they will likely be far more effective than forced re-education. Someone who has deeply held beliefs, yet is coerced to engage in a program specifically designed to change her beliefs, is unlikely to sincerely convert. "He that complies against his will, is of his own opinion still." SAMUEL BUTLER, HUDIBRAS 297 (1984) (originally published 1687). And whether or not these alternative tools are maximally effective, they are constitutionally permissible—and the university's content-based penalties for student speech are not.

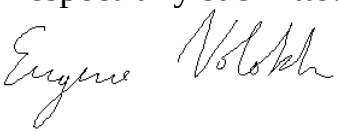
CONCLUSION

For these reasons, this Court should reverse the district court's denial of Jen-

nifer Keeton's motion for preliminary injunction, and either enter such an injunction or remand the case to the district court with instructions to enter the injunction.

Dated: October 19, 2010

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). The brief contains 5,722 words, not counting the corporate disclosure statement, table of contents, table of citations, and certificates.

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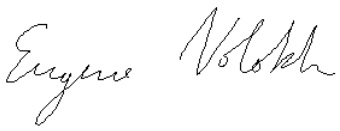

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I certify that, on October 19, 2010, I served one copy of the foregoing Brief of the Foundation for Individual Rights in Education and National Association of Scholars as *Amici Curiae* in Support of Plaintiff-Appellant on each of the following:

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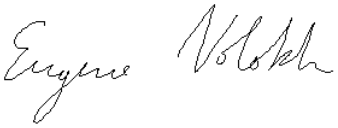

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