

No. 10-2100, 10-2145

In the

**United States Court of Appeals
for the Sixth Circuit**

JULEA WARD,
Plaintiff-Appellant, Cross-Appellee

v.

ROY WILBANKS, *et al.*,
Defendants-Appellees, Cross-Appellants.

**On Appeal from the United States District Court
for the Eastern District of Michigan**

**BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW,
ON BEHALF OF PLAINTIFF-APPELLANT**

BENJAMIN D. DUPRÉ*
JOHN A. EIDSMOE
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, Alabama 36104
Telephone: (334) 262-1245
*Attorneys for Amicus Curiae
Foundation for Moral Law
Counsel of Record

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**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS**

10-2100

10-2145

JULEA WARD,
Plaintiff-Appellant,

v.

ROY WILBANKS, et al.,
Defendant-Appellant.

Pursuant to 6th Cir. R. 26.1, Foundation for Moral Law makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

December 28, 2010

s/Benjamin D. DuPré
Benjamin D. DuPré

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**STATEMENT OF IDENTITY AND INTERESTS
OF *AMICUS CURIAE***

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the views of the American people as a whole from the beginning of American history through the present, have held that homosexual conduct has always been and continues to be immoral and not protected by law. The Foundation also stands for freedom of expression of religious and moral beliefs and believes counselors should not be barred from entering the counseling profession simply because they believe as religious tenets that homosexual conduct is wrong and refuse to affirm that which they regard as immoral and destructive. This brief primarily focuses on whether the text of the

Constitution should be determinative in this case, and whether the Constitution protects Julea Ward's convictions about homosexual conduct and her manner of expressing those convictions.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29, Amicus has filed a motion for leave to file this brief because only Appellant has granted consent to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Since she enrolled in the Graduate Counseling Program at Eastern Michigan University (EMU), Julea Ward has convincingly demonstrated by her grade point average and her completion of work assignments that she is fully capable of completing the academic work for a master's degree in this program. However, she has been dismissed from the program because, as a matter of religious conviction, she refuses to alter or compromise her religious and moral beliefs by counseling a client in a manner that affirms or approves a homosexual lifestyle.

Forcing Julea Ward to either (1) say things in classroom and counseling situations that are diametrically opposite to her religious and moral convictions, or (2) give up her right to participate in a graduate counseling degree program at a state university and/or the right to work in her chosen profession (counseling) is an unconstitutional burden on free speech and free exercise of religion in violation of the First Amendment to the United States Constitution and Article II, §§ 3 and 4 of the Constitution of the State of Michigan.

Homosexual conduct is not protected by either the United States Constitution or the Constitution of the State of Michigan. It is prohibited by the Old and New Testaments and by most ancient societies, by the common law of England and America, and by the laws of nearly all states until the courts began striking those laws down on an erroneous reading of the U.S. Constitution. Under

these circumstances, a speech code requiring students and counselors to affirm the homosexual lifestyle on pain of dismissal from the program or the profession should not be allowed to trump basic rights of freedom of speech and free exercise of religion.

Eastern Michigan University's refusal to allow persons who hold moral objections to homosexual conduct to complete their graduate counseling program, and the American Counselors Association's (ACA's) refusal to allow such persons to enter the counseling profession, violates the rights of persons who want to leave the homosexual lifestyle, or parents who want their children to receive counseling from one who will not undermine the beliefs they have taught their children, to receive the services of a counselor of their choice.

However they might try to disguise it, the policies of EMU and the ACA are a blatant effort to silence speech and suppress beliefs contrary to the pro-homosexual agenda. Such policies have no place in the American constitutional system.

ARGUMENT

I. THE CONSTITUTIONALITY OF EASTERN MICHIGAN UNIVERSITY'S DISMISSAL OF JULEA WARD SHOULD BE JUDGED ACCORDING TO THE PLAIN MEANING OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS AS INTENDED BY THEIR FRAMERS.

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Sheldon v. Tucker*, 364 U.S. 479, 487 (1960).

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. *Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.* Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957). (emphasis added).

A. The Constitution is the “supreme Law of the Land.”

Our Constitution dictates that the Constitution and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All “judicial Officers” are “bound by Oath or Affirmation, to support *this Constitution*” and not a person, office, government body, or judicial opinion. *Id.* (emphasis added); *see also* 28 U.S.C. § 453 (oaths of justices and judges). This Constitution and the

solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a written constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private*

Correspondence of James Madison from 1813-1836, at 52 (J.C. McGuire ed., 1853).

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: “In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.”

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

The U.S. Supreme Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, 2788 (2008):

[W]e are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Heller*, 128 S. Ct. at 2821.

The court should therefore protect those rights that are clearly enshrined in the Constitution, rather than those interests that emanate from the imaginations of later courts.

II. EMU’S DISMISSAL OF JULEA WARD FROM ITS COUNSELING PROGRAM IS AN INFRINGEMENT UPON HER FREE SPEECH AND FREE EXERCISE OF RELIGION RIGHTS UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE II §§ 3-4 OF THE MICHIGAN CONSTITUTION.

EMU has argued, and the trial court has ruled, that EMU’s policies and actions in this case involve Ward’s behavior, not her speech or religious beliefs. Amicus contends that speech, religious belief, and behavior cannot be neatly compartmentalized. Beliefs, if they are sincerely held, naturally lead to words and actions consistent therewith. As the Supreme Court said in *Cantwell v. Connecticut*, 310 U.S. 296 at 303-04 (1940):

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

The *Cantwell* Court recognized that religious actions do not have the same absolute protection that is accorded to religious beliefs, but religious actions are nevertheless protected. The government can infringe the free exercise of religion only “for the protection of society,” and even then, “the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”

Likewise, Article II, §§ 3 and 4 of the Michigan Constitution provides:

4. Every person shall be at liberty to worship God according to the dictates of his own conscience....

5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

No one has expressed any doubt that Julea Ward’s convictions about homosexuality are religious and sincere. Just as clearly, the words she would say in counseling a client about homosexuality constitute speech. When speech is motivated by religious conviction, it involves a “hybrid right” the violation of which requires strict scrutiny; *Employment Division v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997). EMU must demonstrate that its interest in restricting Julea Ward’s religiously-motivated speech is compelling and cannot be achieved by less restrictive means such as allowing her to refer such cases to another counselor. As homosexuals constitute, by the highest estimate,

only 10% of the American adult population and by other estimates not more than 2%,¹ permitting Ms. Ward to refer such cases would impose no significant burden upon anyone, as does the testimony of Dr. Irene Ametrano that in her twenty-nine years of teaching no other student has ever refused to counsel a client.

Very clearly, EMU's policies do restrict Ward's freedom of expression. Even requiring her to refer a homosexual client rather than counseling the client in accordance with her beliefs, is a restriction on free speech, because she is not permitted to share her beliefs with that client even though she and the client may both believe the client would benefit from such expression.

And in fact, EMU goes beyond that. Not only is she prohibited from saying what she believes; she is required to say what she does not believe, in fact, what she regards as abhorrent. By helping clients clarify their beliefs and apply their values to solving their own problems, a counselor sends a message to the client that homosexual behavior is acceptable. This is not what Ms. Ward believes. EMU is therefore forcing Ward and other students similarly situated to either (1) change their beliefs, or (2) lie about their beliefs. Either is a First Amendment violation. As the Supreme Court recognized in the compulsory flag salute and pledge case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), forcing a

¹ Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (W.W. Saunders & Co. 1948) 639, 650-51; Dr. Judith A. Reisman and Edward W. Eichel, *Kinsey, Sex and Fraud: The Indoctrination of a People* (Lochimar/Huntington House 1990) 17, 20, 23, 39-40, 62-73, 181.

school child to say something he/she does not believe (saluting the flag and saying the Pledge of Allegiance) is as much a free speech violation as prohibiting a person from saying something he/she does believe. Dr. Suzanne Duggar's testimony that the program has graduated many strongly religious and Christian students proves nothing whatsoever except that either those other students' religious convictions were different from Ward's or they chose not to act on their convictions. Whether Julea Ward's convictions are in the majority, in the minority, or hers alone makes no difference whatsoever as to whether the First Amendment protects them. In fact, if she is a small minority her beliefs are easier to accommodate.

EMU has failed to demonstrate any interest that would justify infringing Julea Ward's constitutional right to liberty of conscience, freedom of speech, and free exercise of religion.

III. THE POLICIES OF EASTERN MICHIGAN UNIVERSITY AND THE AMERICAN COUNSELING ASSOCIATION SHOULD NOT TAKE PRECEDENCE OVER THE FREE SPEECH AND FREE EXERCISE OF RELIGION RIGHTS OF JULEA WARD.

In this brief the Foundation does not urge that *Lawrence v. Texas*, 539 U.S. 558 (2003), be overturned, because the court can reach the correct result without overturning *Lawrence*. Rather, we argue that because homosexual conduct has been disfavored and/or prohibited in much of the world throughout history, including at least until very recently in the United States, an alleged state interest in

affirming homosexuals should not be considered so compelling as to justify an infringement upon a student and future counselor's freedom of speech and free exercise of religion.

A. Homosexual Conduct was, until recently, strongly disapproved in most cultures and in Anglo-American law.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).² Among the Romans, homosexual conduct did exist, but homosexual acts were a capital offense under the Theodosian Code (IX.7.6) and under the Justinian Code (IX:9.31).

The English common law contained similar provisions. Sir William Blackstone, of whose *Commentaries on the Laws of England* (1763) Justice James Iredall said in 1799 that “[F]or near 30 years [it] has been the manual of almost every student of law in the United States,”³ after discussing the offense of rape, wrote concerning homosexual conduct:

² Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

³ U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor*, April 11, 1799 (Philadelphia) 3; *Documentary History of the Supreme Court of the*

IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum* " ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei.*" ["Where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future be guilty of it, may undergo the most severe punishments."] Which leads me to add a word concerning its punishment.

THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment....⁴

United States, 1789-1800, at 347 (Maeva Marcus, ed., Columbus University Press 1990).

⁴ Sir William Blackstone, *Commentaries on the Laws of England* Book IV Ch. 4.

Blackstone's condemnation of homosexual acts is echoed by numerous scholars of that age and before, among them Sir Edward Coke and Thomas Aquinas.⁵ That this condemnation was carried over into American law is attested by Perkins and Boyce, who state in their hornbook *Criminal Law*, "Homosexual conduct" was made a felony by an English statute so early that it was a common-law offense in this Country, and statutes expressly making it a felony were widely adopted."⁶

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. Also, numerous states, either by statute or by case law, prohibited homosexual parents from adopting or having custody of a child.

Even in the counseling and mental health professions, the favor shown to homosexuals is comparatively recent. The American Psychological Association's *Diagnostic and Statistical Manual* classified homosexuality as a mental disorder until 1973. The American Counseling Association (ACA) performed a massive overhaul of its Code of Ethics as recently as 2005. In fact, only sixteen states and the District of Columbia have adopted the ACA Code of Ethics, and Michigan is

⁵ *Ex parte H.H.*, 830 So. 2d 21, 33-34 (2002) (Moore, C.J., concurring specially).

⁶ Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 465 (3d ed. 1982).

not one of those sixteen states.⁷ Although EMU has incorporated the ACA Code of Ethics into its counseling program, the fact that Michigan has not adopted the Code undermines EMU's claim that its interest in rigidly following the Code is compelling.

Therefore, EMU's claimed interest in ensuring that counselors affirm the homosexual lifestyle should not be elevated above the clear free speech and freedom of religion rights guaranteed by the United States and Michigan Constitutions.

B. The EMU policy is prejudicial toward those who want to change their sexual orientation or want their child counseled from a standpoint of traditional moral values.

Plaintiff argued at trial that if a counselor may refer a client who wants to change homosexual desires or behaviors, he or she should be able to refer a client who does not want to change such desires. Amicus further argues that parents have a right to raise their children according to their religious and moral values, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57 (2000); and that the parents of a child who may be unsure of his/her sexual orientation have a right to send that child to a counselor who shares those values

⁷ American Counseling Association, <http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx> accessed 22 December 2010).

and who will not lead the child to conclude that homosexual conduct is moral and legitimate. Furthermore, a homosexual may desire to change his/her orientation for a variety of reasons: a religious conversion, a change in moral values, finding homosexual relationships to be unfulfilling, a desire to have children coupled with a belief that children should be raised by two opposite-sex parents. That person has a need and a right to be counseled by a professional who shares his/her values and goals and will help him/her make that change. The trial court addressed this argument by citing Dr. Perry C. Francis's testimony that reparative therapy (helping a client change his/her sexual orientation) is not the standard of care of the profession and therefore is not part of EMU's curriculum.

In fact, the ACA Code of Ethics does not address reparative therapy. In 1998 the ACA Ethics Committee addressed reparative therapy, expressed skepticism about its effectiveness, and suggested that counselors either not refer clients to reparative therapists or, if they do, fully inform clients of the unproven nature and potential risks of such therapy.⁸ And in May 2006 the Ethics Committee issued an opinion that conversion/reparative therapy does fall under Standard C.6.e and that counselors using this approach must tell clients that conversion/reparative therapy is developing or unproven.⁹ Furthermore, the May 2006 opinion is far from settling the issue. In February 2008 the President of the

⁸ American Counseling Association, "ACA in the News," 22 May 2006 _____

⁹ American Counseling Association, "ACA in the News" 1 August 2006 _____

50,000-member American Association of Christian Counselors (AACC) wrote to his own membership and to the ACA,

Our analysis of the opinion is that it stands in direct opposition to those counselors who work with clients who choose not to affirm homosexuality in their lives. Furthermore, the opinion not only challenges the religious diversity of people, but also undermines a client's right to self-determination and the freedom of choice when it comes to a therapeutic environment.¹⁰

Also, Dr. Warren Throckmorton addressed a letter of complaint to the ACA, signed by over 400 counselors, cited the following ACA Policy:

Policy 301.7

Policy and Role on Non-Consensus Social Issues of Conscience

Having respect for the individual's values and integrity in no way restricts us as individuals from finding legitimate avenues to express and support our views to others, who decide and make policy around these issues. To this end, it will be ACA Governing Council policy to encourage its members to find and use every legitimate means to examine, discuss, and share their views on such matters within the Association. We also endorse the member's right to support social, political, religious, and professional actions groups whose values and positions on such issues are congruent with their own. Through such affiliations, every member has an opportunity to participate in shaping of government policies which guide public action.

To truly celebrate our diversity, we must be united in our respect for the differences in our membership. To this end, the role of the Association in such matters is to support the rights of members to hold contrary points of views, to provide forums for developing

¹⁰ Dr. Tim Clinton, "Letter to the American Counseling Association" 13 February 2008, American Association of Christian Counselors, <http://www.aacc.net/2008/02/13/letter-to-the-american-counseling-association/> (accessed 22 December 2010).

understanding and consensus building, and to maintain equal status and respect for all members and groups within the organization. Following this philosophy, the Governing Council considers it inappropriate for this body to officially take sides on issues which transcend professional identity and membership affiliation, and which substantially divide our membership, at least until such time that there can be a visible consensus produced among the membership.

Approved: 7/15/90¹¹

Dr. Throckmorton then cited the ACA Ethics Committee resolution cited above and argued that this resolution violates the ACA's own policies on respecting alternative views of therapy. American Counseling Association President, Brian Canfield spoke for the ACA in a letter to Throckmorton on March 19, 2008. Dr. Canfield promised that the ACA Ethics Committee would review Throckmorton's complaints, saying,

...to what extent a counselor may ethically engage in providing counseling services to a client who expresses conflict and dissonance over their sexual attraction/orientation with their personal, cultural or religious beliefs and values is, in my opinion, a very legitimate question which needs to be clarified.¹²

This demonstrates what is already common knowledge -- that the question of proper counseling about sexual orientation is far from a settled issue or a rock-hard science. As quoted before from *Sweezy*, "No field of education is so thoroughly

¹¹ Dr. Warren Throckmorton, <http://wthrockmorton.com/2008/02/15/i-think-aca-violated-its-policies-so-i-complained/> (accessed 22 December 2010).

¹² Dr. Brian Canfield, Letter to Throckmorton 19 March 2008; http://en.wikipedia.org/wiki/Warren_Throckmorton#cite_note-22 (accessed 22 December 2010),

comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.” Counseling is one of the softest of the “soft” sciences, and few if any issues in the counseling field are as fluid and rapidly-changing as that of sexual orientation. Many decisions in this field are made on the basis of biases (pro and con), emotions, gut reactions, and, in all too many instances, political pressure. To take a recently-enacted resolution of the ACA that is itself the subject of controversy within the ACA, and make that resolution the final, settled orthodoxy of a state university’s counseling program, must fail under the First Amendment when weighed against the free speech and free exercise rights of Julea Ward.

Also, the ACA states that

...There are treatments endorsed by the Association for Gay, Lesbian, and Bisexual Issues in Counseling (see <http://www.aglbic.org/resources/competencies.html>), a division of the American Counseling Association and the American Psychological Association (see <http://www.apa.org/pi/lgbc/guidelines.html>) that have been successful in helping clients with their sexual orientation. These treatments are gay affirmative and help a client reconcile his/her same-sex attractions with religious beliefs.¹³

When a client experiences conflict between religious beliefs and homosexuality, the ACA would prefer that counselors try to change the client’s religious beliefs

¹³ American Counseling Association, , “ACA in the News,” 22 May 2006, <http://www.counseling.org/PressRoom/NewsReleases.aspx> (accessed 23 December 2010).

into beliefs that are compatible with and accepting of homosexuality, rather than changing the client's sexual orientation so that it is compatible with his/her religious beliefs. This further demonstrates that the ACA places a higher value upon acceptance of homosexuality than upon freedom of conscience and free exercise of religion.

In *Lawrence v. Texas*, 539 U.S. 558, 574 (2003), Justice Kennedy wrote, quoting from *Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992):

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The Foundation does not agree that the Constitution includes a "right to define one's own concept of existence."¹⁴ But if it does, does that right not belong

¹⁴ The term "liberty" as it is used in the Preamble to the U.S. Constitution and in the Fifth and Fourteenth Amendments was understood by the Framers as Blackstone understood liberty. Blackstone understood liberty in terms of moral right and wrong:

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, with out any restraint or control, unless by

equally to those who hold traditional values, to the person with homosexual inclinations who wants to define himself as an heterosexual, to the religious person who wants help in dealing with urges that he considers sinful, and to a counseling student such as Julea Ward who wants to define her existence as that of a counselor who helps her clients live according to their traditional values? “Equal protection of the law” requires an affirmative answer to that question.

No state interest has been demonstrated that would justify infringing upon Julea Ward’s rights under the United States and Michigan Constitutions.

C. Julea Ward’s freedom of speech and free exercise of religion rights are entitled to greater protection than that afforded by the trial court.

The trial court cited *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a case involving a high school journalism class, and suggests that freedom of expression issues on university campuses are to be treated the same way. But as the Supreme Court recognized in *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971),

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial

the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will.

Blackstone, *op. cit.* I:121. Note that Blackstone said man’s liberty is restrained by “the law of nature,” and that he called homosexual conduct “the infamous crime against nature.” Fn. 4.

elementary and secondary schools. ... There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it.¹⁵

Nor is this the same as an artificial situation in which a student is directed in class to argue a contrary point of view, as in a debate class. In that situation, the student, the professor, and the rest of the class all know that the student is defending that position as a class requirement, not because that is what the student really believes. But a counseling situation involves a real client who believes the student counselor is expressing his/her real beliefs.

The Supreme Court, and the nation's traditions as well, have historically recognized that freedom of expression is entitled to the highest protection in our universities:

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Sheldon v. Tucker*, 364 U.S. 479, 487 (1960).

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train

¹⁵ As authority for the proposition that college students are less impressionable than high school students, the Court cited Donald Giannella, “Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle,” 81 Harv.L.Rev. 513, 574, 583 (1968).

our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. *Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes.* Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957). (emphasis added).

A decision to uphold EMU’s dismissal of Julea Ward will have a chilling effect upon freedom of expression, because students will then know that if they express any reservations about homosexuality, they do so at peril to their careers. Furthermore, as the Supreme Court said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943),

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

No area of study, no field of inquiry, should be off limits in the academic community. Nothing is so well-settled that students and faculty should not be free to challenge it – including the idea that counselors must affirm and support the homosexual lifestyle. The counseling field is large enough and broad enough that it should have a place for a future counselor like Julea Ward. In fact, countless people would want her services and would benefit from them.

CONCLUSION

Therefore, the court should not allow EMU to enforce a policy that deprives Julea Ward and others similarly situated from training in a counseling program that should be open to all qualified persons, regardless of how they exercise their constitutional rights to freedom of speech, free exercise of religion, and liberty of conscience.

For the foregoing reasons, *Amicus* respectfully urges that the district court's decision below be reversed.

Dated this 28rd day of December, 2010.

s/ Benjamin D. DuPré
Benjamin D. DuPré*
John A. Eidsmoe
Foundation for Moral Law
One Dexter Avenue
Montgomery, Alabama 36104
Phone: (334) 262-1245
Fax: (334) 262-1708
bdupre@morallaw.org
Counsel for *amicus curiae*
Foundation for Moral Law
**Counsel of Record*

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s/ Benjamin D. DuPré

Benjamin D. DuPré

Counsel for *amicus curiae* Foundation for Moral Law

Dated this 28th day of December, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of December, 2010, a copy of the foregoing motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. The parties may access this filing through the Court's system.

s/ Benjamin D. DuPré
Benjamin D. DuPré