

Case No. 10-13925-JJ

**UNITED STATES COURT OF APPEALS
FOR THE
ELEVENTH CIRCUIT**

JENNIFER KEETON,

Appellant,

v.

MARY JANE ANDERSON-WILEY, *et al.*

Appellees.

On Appeal From the United States District Court for the
Southern District of Georgia, Docket No.: 1:10-cv-00099-JRH-WLB

**CORRECTED *AMICUS* BRIEF OF PARENTS AND FRIENDS OF
LESBIANS AND GAYS (“PFLAG”) AND GEORGIA SAFE SCHOOLS
COALITION (“GSSC”)
IN SUPPORT OF THE APPELLEE FOR AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE
DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *amici* certify that the persons interested in this case are those listed in the Brief of Appellee filed November 22, 2010, with the following additions: Parents and Friends of Lesbians and Gays (“PFLAG”) and Georgia Safe Schools Coalition (“GSSC”). PFLAG and GSSC are respectively a nonprofit corporation and a nonprofit association that have no parent company and are not publicly held.

STATEMENT OF THE ISSUE TO BE ADDRESSED BY *AMICI*

What effect do the professional obligations imposed on school counselors, and the potentially grave consequences for their violation, have on the analysis of the First Amendment claims asserted by Appellant?

**SUMMARY OF ARGUMENT AND STATEMENT OF INTEREST OF
*AMICI CURIAE***

As set forth more fully in the accompanying motion, *amici curiae* Parents and Friends of Lesbians and Gays (“PFLAG”) and Georgia Safe Schools Coalition (“GSSC”) are organizations that seek to provide young people with affirming and accepting environments in which to flourish. *Amici curiae* have dedicated their efforts to creating settings for youth in which those who are lesbian, gay, bisexual,

transgender, and those who are questioning their sexual orientation or gender identity (“LGBTQ”), are supported and provided accurate information in counseling situations. As a result of their collective academic and first-hand experiences, *amici* understand the crucial role of counselors in creating an environment where all young people, regardless of sexual orientation or gender identity and expression, feel safe and accepted at school and in the world. Those experiences also have helped them understand as well as the harmful role counselors can play in undermining LGBTQ students’ self-esteem, self-worth and overall mental health.

Amici agree with the District Court’s ruling that courts should not second-guess curricular requirements imposed by a university on a student that are reasonably related to legitimate pedagogical interests, where the school is not discriminating against or trying to censor the student or her viewpoint due to simple disagreement. *Keeton v. Anderson-Wiley*, No. 110-099, 2010 U.S. Dist. LEXIS 85959, at **26-27 (S.D. Ga., Aug. 20, 2010). Moreover, *amici* agree with the District Court’s determination that the pedagogical interests served by the actions of Augusta State University (“ASU”) involving Jennifer Keaton included the school’s concern over maintaining its accreditation and “producing counselors with an ability to counsel vast segments of the population.” *Id.* at **26-27.

Amici write to stress another interest that the District Court did not reach and that Ms. Keeton affirmatively disdains: a counselor’s need to meet professional obligations and thus prevent harm to lesbian, gay, bisexual, transgender, and questioning (“LGBTQ”) youth from having a trusted counselor express condemnation and a need to change, when those youth are in emotionally vulnerable moments. This interest is compelling whether viewed as a pedagogical interest in ensuring that a school’s counseling students understand their professional obligations including the primacy of promoting the patient’s welfare, or as a general governmental interest in protecting youth from psychological and physical harm caused by officials in authority. Abundant psychological research attests to the vulnerability of LGBTQ youth and the potentially devastating consequences of repudiation and rejection by those they trust.

ARGUMENT

I. LGBTQ YOUTH ARE AN EMOTIONALLY VULNERABLE POPULATION AT RISK OF GREAT PSYCHOLOGICAL AND PHYSICAL HARM FROM ANTI-LGBT ACTIONS OF OTHERS.

LGBT students, compared to any other minority group, are more likely to feel unsafe in school—interfering with their ability to thrive and succeed in school.¹ Chief among these problems is bullying, which involves repeated

¹ Pearson J., Muller C., & Wilkinson L., *Adolescent Same-sex Attraction and*

physical, psychological, social, or verbal attacks by an aggressor against a victim in an uneven power dynamic.² “Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”³

The effects of bullying on victims are numerous and include a decline in academic performance, a loss of self-esteem, absence from school, disruption of relationships with family members indifferent to or unaware of the plight, and in extreme cases, running away, or committing suicide.⁴ Because of feeling unsafe at school, LGBT students are eight times more likely to miss school than their

Academic Outcomes: The Role of School Attachment and Engagement, 54.4 Social Problems 523 (2007)

² Xin Ma, Len Stewin, and Deveda Mah, *Bullying in School: Nature, Effects, and Remedies*, 16.3 Research Papers in Education 247 (2001)

³ Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dept. of Ed., *Dear Colleague Letter Harassment and Bullying* (Oct. 26, 2010). In this letter issued last month, the Department of Education’s Office of Civil Rights explained to school administrators nationwide that federal law may cover many incidents of school bullying, including actions against LGBTQ students who are gender-nonconforming. (“it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.”) <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf>

⁴ *Id.*

heterosexual counterparts.⁵ Not only do LGBT students' grades suffer, but also the percentage of LGBT students who do not plan to pursue a post-secondary education is almost twice that of the national students generally.⁶ The most devastating result of anti-LGBT bullying and harassment in schools is LGBT teenager suicide. The suicide rate for LGBT students continues to be three to four times higher than for their heterosexual counterparts.⁷ A recent survey of transgender and gender-nonconforming individuals revealed a much higher attempted suicide rate than the general population (41% vs. 1.6%), but the differential is still greater for those transgender and gender non-conforming people who suffered bullying, harassment, and violence in school (51%).⁸

⁵ Stuart Biegel & Sheila James Kuehl, *Williams Institute Report, Safe at School: Addressing the School Environment and LGBT Safety through Policy and Legislation* (September 2010), http://www.law.ucla.edu/williamsinstitute/pdf/Biegel_LGBT.pdf Of the LGBT students surveyed, 32.7% missed a day of school because of feeling unsafe compared with only 4.5% of a national sample of secondary school students. *See generally Nuxoll v. India Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th Cir. 2008) (citing suggestive evidence "that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations.").

⁶ *Id.*

⁷ *Id.*

⁸ Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, with Jody L. Herman, Jack Harrison, and Mara Keisling, *National Transgender Discrimination Survey Report on Health and Health Care* (NCTE/NGTLF, Washington D.C. October 2010). Of the respondents, 88% identify as either male-to-female transgender (MTF), also referred to as transgender women, or female-to-male transgender (FTM), also

Although difficult to calibrate, the bullying problem is widespread. While 1 in 5 elementary school and 1 in 10 middle school students in the United States report being bullied, bullying is grossly underreported.⁹ Since the majority of bullying incidents occur at school, school staff have a vital role to play in reducing bullying at school, in the form of more rigorous discipline, intensive supervision, counseling for students, and effective training for teachers.¹⁰

II. SCHOOL COUNSELORS CAN PROFOUNDLY AFFECT AN LGBTQ YOUTH'S MENTAL HEALTH.

There are many factors that lead to the reality of a school counselor's "integral" role in "creating an environment where all students, regardless of sexual orientation or gender identity/ expression, feel safe and accepted at school."¹¹ In

referred to as transgender men. 12% of the sample identify as gender queer or as gender non-conforming

⁹ Stephen L. Brown, David A. Birch, Vijaya Kancherla, *Bullying Perspectives: Experiences, Attitudes, and Recommendations of 9 to 13 Year Olds Attending Health Education Centers in the United States*, 75.10 J. of Sch. Health 384 (2005); Xin Ma, Len Stewin, and Deveda Mah, *Bullying in School: Nature, Effects, and Remedies*, 16.3 Research Papers in Education 247 (2001) (citing victims' experience of inadequate support from adults and adults' lack of knowledge regarding proper responses).

¹⁰ *Id.*

¹¹ Georgia Safe Schools Coalition, *LGBTQQ Youth 101: A Comprehensive Manual for School Counselor* (2009) at 6, <http://webcache.googleusercontent.com/search?q=cache:qvcyZ5d7dHYJ:www.georgiasafeschoolscoalition.org/+Georgia+Safe+Schools+Coalition,+LGBTQQ+Youth+101:+A+Comprehensive+Manual+for+School+Counselor&cd=2&hl=en&ct=clnk&gl=us>

her chosen field of school counseling, Ms. Keeton would be at the intersection of the “[t]hree venues for providing services to youth [that] can make vital differences in the lives of LGBT youth—schools, mental health and social services, and health care services – by increasing safety and inclusion.”¹² While various school administrators and teachers have obligations to know of and protect against threats to student safety, school counselors stand out due to: training to recognize warning signs and to appreciate negative consequences from inaction; ethical obligations to act to prevent harm to at-risk students; and access to information from students trusting in their acting in accordance with professional standards.¹³

LGBT students face a range of issues in the school environment and often seek help from school professionals and, in particular, school counselors.¹⁴ The

¹² Suicide Prevention Resource Center, *Suicide risk and prevention for lesbian, gay, bisexual, and transgender youth* (2008)
http://www.sprc.org/library/SPRC_LGBT_Youth.pdf

¹³ See *Georgia Safe Schools Manual, Supra.* at 10, citing Ethical standards for school counselors (2004) and Position statement: gay, lesbian, bisexual, transgendered and questioning youth (2005) (citations omitted); see also Thomas J. Hernandez and Susan R. Seem, *A Safe School Climate: A Systemic Approach and the School Counselor*, 7.4 Professional School Counseling 256 (2004).

¹⁴ Diane E. Elze, *Gay, Lesbian, and Bisexual Youths' Perceptions of their High School Environments and Comfort in School*, 25.4 Children & Schools 225 (2003) (study showing that 57% of LGBT students surveyed sought help from a school professional—42% from a school counselor); Janet Fontaine, *Evidencing A Need: School Counselor's Experiences With Gay and Lesbian Students*, Professional School Counseling, Vol. 1.3 (1998) (more than 51% of high school counselors who responded reported that they had experience working with at least one student who

help sought by LGBT students from school professionals has not been limited to the school context; rather, LGBT students seek help and counseling for family-related issues, as well as depression and low self-esteem.¹⁵ They often turn to counselors due to lack of other alternatives: “[T]he experience of gay, lesbian, and bisexual teenagers is often one of isolation, fear of stigmatization, and lack of peer or familial support.”¹⁶ According to the American Academy of Pediatrics’ Committee on Adolescence “[i]t is critical that schools find a way to create safe and supportive environments for students who are or wonder about being non-heterosexual.”¹⁷

was confused about sexual identity issues—42% had worked directly with at least one self-identified gay or lesbian student. Twenty-one percent of elementary school counselors reported that they knew of students in their schools who were either identifying as gay or lesbian and/or questioning their sexual identity).

¹⁵ Janet Fontaine, *Evidencing A Need: School Counselor’s Experiences With Gay and Lesbian Students*, 1.3 Professional School Counseling 8 (1998).

¹⁶ Just the Facts Coalition, *Just the facts about sexual orientation and youth: A primer for principals, educators, and school personnel*, Washington, DC: American Psychological Association (2008) Retrieved from www.apa.org/pi/lgbcc/publications/justthefacts.html. (hereinafter (“Just the Facts”).

¹⁷ Barbara Frankowski and the Committee on Adolescence, *Sexual Orientation and Adolescents*, 133 Pediatrics 1827 (2004).

III. LGBTQ YOUTH ARE AT PARTICULAR RISK OF SEVERE PSYCHOLOGICAL AND PHYSICAL HARM FROM REJECTION BY THOSE THEY TRUST.

Experience has proven that counselors who perform professionally, by exhibiting an open, non-judgmental approach, attain significant success in therapeutic outcomes, while the inverse is also true.

A. A Counselor Exhibiting Empathy Is Likely To Achieve Successful Therapeutic Results.

Decades of study have led psychotherapists to conclude that the leading indicator of positive therapeutic outcome is the development of a strong therapeutic alliance—the working relationship formed between the therapist and the patient that includes their expectations and attitudes about one another.¹⁸ The therapeutic alliance concept has gained overwhelming recognition in psychotherapy and has been adopted as an integral component in virtually all models of the counseling process.¹⁹

¹⁸ Adam O. Horvath & Lester Luborsky, *The Role of the Therapeutic Alliance in Psychotherapy*, 61.4 *Journal of Consulting and Clinical Psychology* 561 (1993). The therapeutic alliance can be characterized in two ways: a working alliance by which the therapist and patient share responsibility for establishing treatment goals, and an alliance by which the patient sees the therapist as a supportive, non-judgmental figure who can relate back to the patient a sense of understanding or appreciation of the patient's experiences.

¹⁹ *Id.* The importance of empathy is similar whether the patient is a youth or an adult. See also Stephen R. Shirk & Marc Karver, *Prediction of Treatment Outcome From Relationship Variables in Child and Adolescent Therapy: A Meta-Analytic Review*, 71.3 *Journal of Consulting and Clinical Psychology* 452 (2003); Steven J. Ackerman & Mark J. Hilsenroth, *A Review of Therapist Characteristics*

The attribute of a counselor that best predicts a strong therapeutic alliance is empathy,²⁰ *i.e.*, a counselor's ability to sense the patient's private world and be able to communicate back to the patient an understanding of what is clearly known to the patient, as well as voice meaning into the patient's experience of which he or she is unaware.²¹ Empathy not only strengthens the therapeutic alliance, but also provides counselors with perspective that leads to informed treatment strategies and interventions.²² Empathic listening has proven effective in crisis situations involving risk of harm to self and/or others.²³ Positive therapeutic outcomes attain where the patient perceives empathy by counselors and thus becomes more likely to engage in the treatment process and comply with counselor recommendations.²⁴

and Techniques Negatively Impacting the Therapeutic Alliance, 38.2
Psychotherapy 171 (2001) (survey showing 90% of counselors surveyed asserted that the therapeutic alliance is extremely important in leading to a positive therapeutic outcome with youth patients).

²⁰ Steven J. Ackerman & Mark J. Hilsenroth, *A Review of Therapist Characteristics and Techniques Positively Impacting the Therapeutic Alliance*, 23 *Clinical Psychology Review* 1 (2003).

²¹ Candi P. Feller and R. Rocco Cottone, *The Importance of Empathy in the Therapeutic Alliance*, 42 *J. of Humanistic Counseling, Ed., and Development* 53-61 (Spring 2003)

²² Arthur J. Clark, *Empathy: An Integral Model in the Counseling Process*, 88 *Journal of Counseling & Development* 348-356 (Summer 2010).

²³ W. Hankammer, B. Snyder, C. Hankammer, *Empathy as the Primary Means in Suicide Assessment*, 21.1 *Journal of Professional Counselor* 5-19 (Fall 2006).

²⁴ *Id.* Clark; Sheila Redfern and Christine Dancey, *Empathy: Its Effect on How*

Counselors must vigilantly work toward conveying a respectful, flexible, accepting, and responsive attitude toward their patients if the counseling process is to result in a positive therapeutic outcome.²⁵

B. A Judgmental Counselor Can Cause Great Psychological and Physical Harm to LGBTQ Youth.

A counselor who cannot keep her personal values out of the interaction has great potential to harm her client. *Ward v. Wilbanks*, No. 09-cv-c11237, 2010 US Dist Lexis 74831 (E.D. Mich. July 26, 2010), at *44. The American School Health Association (“ASHA”) specifically cautions its members to understand “their own personal feelings and attitudes concerning sexuality topics so personal life experiences do not intrude inappropriately into the educational experience.”²⁶ Instead, the expectation of school health professionals is that “sexuality education be medically accurate and based on current medical, psychological, pedagogical, and social research.”²⁷

Counselors are Perceived, 21.3 *British Journal of Guidance & Counseling* 300-309 (Sept. 1993).

²⁵ Steven J. Ackerman & Mark J. Hilsenroth, *A Review of Therapist Characteristics and Techniques Negatively Impacting the Therapeutic Alliance*, 38.2 *Psychotherapy* 171 (2001).

²⁶ ASHA Resolutions, *Quality Comprehensive Sexuality Education* (available at <http://www.ashaweb.org/pdfs/resolutions/Qualcompsexed.pdf>)

²⁷ *Id.*

There are devastating consequences to LGBTQ youth from rejection by trusted individuals. Notably, the already high rates of suicide among transgender and gender non-conforming people who suffered bullying, harassment, and violence in school (51%) balloons to even high levels when teachers were the reported perpetrators: 59% for those harassed or bullied by teachers, 76% among those who were physically assaulted by teachers and 69% among those who were sexually assaulted by teachers.²⁸

Two overriding principles of the counseling profession – avoiding harm to the patient and not imposing a counselor’s views on the patient – have led every major professional mental health organization to inveigh against conversion therapy for LGBTQ patients.²⁹ While the language of resolutions and position statements differ, they all share two basic premises why conversion therapy is problematic. As a matter of experience, there is no basis to conclude conversion therapy is successful, and it indeed can be harmful (*see, e.g.*, 1993 American Academy of Pediatrics Policy Statement on Homosexuality and Adolescence

²⁸ Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, with Jody L. Herman, Jack Harrison, and Mara Keisling, *National Transgender Discrimination Survey Report on Health and Health Care* (NCTE/NGLTF Washington, D.C. October 2010) at 16.

²⁹ Just the Facts, at 5-9 (citing positions of American Psychiatric Association, American Psychological Association, American Counseling Association, American Academy of Pediatrics, American School Counselor Association, and National Association of Social Workers).

(“[Therapy aimed at] changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”). As a matter of principle, conversion therapy is an improper initiative by a counselor, because sexual orientation is not a mental health problem, so the desire to change it must be based on a motivation not recognized as proper in the counseling context.³⁰

It is recognized that not only do mental health professionals lack a legitimate interest in changing one’s sexual orientation, so does the state: “Sexual orientation and sexual identity are immutable; they are so fundamental to one’s identity that a person should not be required to abandon them. . . . Sexual identity is inherent to one’s very identity as a person.” *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (citing Alfred Kinsey, et al., “Sexual Behavior in the Human Male,” in *Cases and Materials on Sexual Orientation and the Law* 1, 7 (William B. Rubenstein ed., 2d ed., 1997)). “Homosexuality is as deeply ingrained as

³⁰ Just the Facts at 7 (“Therefore, the American Psychiatric Association opposes any psychiatric treatment, such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her sexual homosexual orientation.”); *accord* American Medical Association House of Delegates, Resolution H-160.991 *Health Care Needs of the Homosexual Population* (1985), available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.shtml> (also opposing conversion therapy, citing the assumptions of a mental disorder and the need to change).

heterosexuality. . . . Exclusive homosexuality probably is so deeply ingrained that one should not attempt or expect to change it. Rather, it would probably make far more sense simply to recognize it as a basic component of a person's core identity." *Hernandez-Montiel*, 225 F.3d at 1093-94, quoting *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 34-35 (D.C. 1987) (quoting A. Bell, M. Weinberg & S. Hammersmith, *Sexual Preference - Its Development in Men and Women* 190, 211 (1981)); see also *Nuxoll v. India Prairie Sch. Dist. #204*, 523 F.3d 668, 671 (7th Cir. 2008) ("People are easily upset by comments about their race, sex, etc., including their sexual orientation, because for most people these are major components of their personal identity--none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being."). These holdings are confirmed by the Supreme Court's disapproval of "attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects" in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

IV. PROSPECTIVE HARM TO THE PSYCHOLOGICAL AND PHYSICAL HEALTH OF LGBTQ YOUTH SIGNIFICANTLY DISTINGUISHES ASU'S INTERESTS FROM THE STATE ACTORS IDENTIFIED BY APPELLANT.

The two most disconcerting pieces of evidence before the District Court were the affidavits of two classmates attesting to statements Ms. Keeton made

about conversion therapy and her unwillingness to counsel LGBTQ patients. One student testified to a discussion he had with Ms. Keeton outside of class where she expressed “her view that the gay population could be changed and that, *as school counselors*, we could help them.” *Keeton* at **12-13 (emphasis in affidavit as cited by the court). The other classmate relayed Ms. Keeton’s statements in class that she hoped to work in school settings with no LGBTQ youth, and that she would refer LGBTQ youth to other counselors. *Id.*³¹ As noted by the District Court and the *Ward* court, the American Counseling Association Code of Ethics proscribes conduct harmful to patients, imposition of the counselor’s views on patients, and discrimination on the basis of sexual orientation and gender identity. *Keeton*, at **24, 26, 29; *Ward* at *12, citing ACA Code of Ethics §§ A.1.a, A.4.b, C.5.³²

³¹ Amici also notes that, besides evincing discrimination, Ms. Keeton’s statement that she hoped to work in a school with no LGBTQ students is not feasible in practice. Estimates show that there are nearly three million LGBT students in the United States. Connif Callahan, *Schools That Have Not Worked With Gay and Lesbian Students Have Been Sanctioned By the Courts*, 121.12 *Education* 313-326 (2001). “In a high school setting, a counselor can expect to be presented with all sorts of issues, including homosexuality. Counseling is not an exact science; rather it is unpredictable and personal at its core. A client may seek counseling for depression, or issues with their parents, and end up discussing a homosexual relationship.” *Ward*, at **43-44.

³² Additionally, the following actions are “unprofessional conduct” in Georgia: practicing inhumane or discriminatory treatment toward any person or group of persons (Rules of The Georgia Composite Board of Professional Counselors, Social Workers and Marriage and Family Therapists 135-7-.02(2)(a)); undertaking

Ms. Keeton's disregard for her ethical obligations, and the potential resulting harm to prospective clients, renders her First Amendment analysis irrelevant.

"[O]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), quoting *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart J., concurring); *Shultz v. Wells*, No. 2:09cv646-WKW, 2010 U.S. Dist. LEXIS 26984 **31-32 n.7 (M.D. Ala. Mar. 3, 2010) ("The state's obligation and power to protect its citizens by regulation of the professional conduct of its health practitioners is well settled. Assuming -- although we are loathe to do so -- an incidental restriction of Dr. Shea's freedom of speech, the First Amendment is not an umbrella shielding the type of verbal conduct in which the doctor engaged. It does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions." [citations omitted]), quoting *Shea v. Bd. of Med. Exam'rs*, 81 Cal. App. 3d 564, 577 (Cal. Ct. App. 1978).

a course of treatment when the client, or the client's representative, does not understand and agree with the treatment goals (*Id.*; § 135-7-.01(2)(d)); knowingly withholding information about accepted and prevailing treatment alternatives that differ from those provided by the licensee (*Id.*; § 135-7-.01(2)(e)); when there are clear and established risks to the client, failing to provide the client with a description of any foreseeable negative consequences of the proposed treatment. (*Id.*; § 135-7-.01(2)(f)).

<http://lpcaga.org/index.php?customernumber=60573668318&pr=Ethics>

Ms. Keeton, while appearing to concede Georgia's interest in regulating unprofessional counselor conduct at the hearing below, argues that Augusta State can do nothing in response to affirmative statements of an intention to *engage* in such unprofessional conduct.³³ In *Gentile*, the Supreme Court emphatically rejected an approach constraining the state from acting preemptively to avoid injustice resulting from pretrial publicity. 501 U.S. at 1072 (“we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”), quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). Even assuming the state's greater latitude to control the speech of attorneys and litigants, the principle of acting prospectively to avoid harm applies with even greater force where no process is available to reverse the harm.³⁴

³³ Transcript of Hearing, Dkt. 53, Tr.20:22-21:6 (“What Ms. Keeton may have told another student about what she may do in the future isn't grounds for an official to throw her out of the educational program. Future conduct is unknown. And when it takes place, there are bodies with jurisdiction that can evaluate it at that time. But the state actors at this university are positively forbidden to extract oaths of fidelity to moral relativision [sic] or a fashionable view of homosexuality at this point in time. It's beyond the ken of a professor.”).

³⁴ To the extent that Ms. Keeton backs away from the concession at the hearing that the state properly could take action against Ms. Keeton for unprofessional conduct in the counseling setting, she relies improperly on *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which held that Boston could not force a parade to display a message of inclusion with which it

ASU could justify remedial action based on the synergistic concerns of ensuring compliance with ethical standards and avoiding harm to future patients. *Ward* at *44 (providing its students the skills “to deal with situations in a non-harmful, ethically appropriate manner is the legitimate pedagogical . . . concern of the University.”). Indeed, because of the potentially tragic consequences, the need to prevent unprofessional counseling of LGBTQ youth is supported by the state’s strong interest in promoting the welfare of youth. The Supreme Court repeatedly

disagreed. Indeed, the clues to *Hurley*’s inapplicability are in the very passages Ms. Keeton cites to the court. The concern for what Ms. Keeton would say in a private counseling setting is to prevent harm to the only listener, the patient, not “to produce speakers free of . . . biases,” and not undertaken “for no better reason than promoting an approved message or discouraging a disfavored one.” See Brf. at 45, quoting *Hurley*, 515 U.S. at 579. The concern expressed by ASU is not with what Keeton might say publicly or even in mandating a particular message in the counseling setting. Instead, ASU tried to encourage her to respond in a way that would minimize harm to the patient. The state’s lack of interest in compelling any particular message is apparent: if, instead of the particular hypothetical posed by Dr. Schenck in which the patient asks if same-sex relations are moral, the patient asked a different question about his prospective professional or personal life as a gay adult, Ms. Keeton could respond with objective information that would dispel the patient’s concerns and not articulate a personal moral approval.

Another key distinction from *Hurley* is the critical role of the counselor, and his or her professional obligations, as explained in Sections I-III, *supra*. *Hurley* distinguished cases where the Court had compelled access by noting that the excluded parade contingent had many alternative modes of communication to reach its audience. 515 U.S. at 575-80. But a parade route is far different than a school counselor’s office with an LGBTQ student in crisis. ASU has pedagogical reasons for being concerned about its graduates’ professional performance generally; this interest is heightened when a school counselor may be the only source of unbiased information about mental health.

has held that the government has a deeply compelling interest in promoting the physical and psychological well being of minors:

It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, supra, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity.

New York v. Ferber, 458 U.S. 747, 756-757 (1982); accord *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) ("the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"), quoting *Prince*, 321 U.S. at 165; see also *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The Court also has held that the state has an interest in preventing suicide happening not only generally, but especially as a result of victimization and marginalization. *Washington v. Glucksberg*, 521 U.S. 702, 730, 732 (1997) ("all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups" for which the government has an interest in protecting them "from prejudice, negative and inaccurate stereotypes, and 'societal indifference'" that might lead to suicide); see also *Cruzan v. Dir.*,

Mo. Dep't of Health, 497 U.S. 261, 280 (1990) (“Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest.”).

Appellant’s exhaustive reliance on *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) is misplaced, because the government was interested only in imposing orthodoxy, not in preventing harm to others.³⁵ *See Id.* at 633-34 (noting that refusal to engage in compulsory flag salute posed no danger to others); *id.* at 644 (Justices Black and Douglas, concurring) (characterizing compulsory pledge as a “test oath,” that disobedience thereto causes no harm). This fundamental distinction was set forth in *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert denied*, 404 U.S. 985 (1971), which explained that courts frequently “have held that the state’s interest outweighs any First Amendment rights” where there is a “clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by

³⁵ Tellingly, Ms. Keeton’s counsel revealed a deliberate inattention to any proffered state interest in arguing below that *Barnette* “suggest[s] that a compelling state-interest evaluation is not even necessary when state defendants are engaged in viewpoint discrimination.” *Id.* Transcript, 9:21-23. Even were the *Barnette* framework applicable to a state’s concern that competent counseling be provided to a patient (which *amici* strenuously dispute), *Barnette* does not hold that state interests can be irrelevant, only that the motivation in that case – enforced orthodoxy for its own sake – is not even a legitimate state interest. *Barnette*, 319 U.S. at 640 (“National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.”).

permitting the individual to assert what he claimed to be his ‘free exercise’ rights.” *Id.*, citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of the child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child).

Here, ASU became aware of troubling statements by Ms. Keeton evincing a refusal to abide by the ACA Code of Ethics in dealing with prospective LGBTQ patients. ASU instituted a remediation program that did not “punish” Ms. Keeton but merely assigned readings of peer-reviewed articles regarding appropriate counseling methods for LGBTQ patients, a logical and measured response to an aspiring professional’s stated intention to employ a counseling method universally questioned by the preeminent organizations in the field.

By way of example, a law school could react justifiably to a student’s professed intent to reveal criminal clients’ confidences to the prosecution, whether the student’s proffered justification was a religious belief against concealing the truth, a general hatred of criminals, some other motivation or none at all. To this end, much of the discussion in the amicus brief of the Foundation for Individual Rights in Education and the National Association of Scholars is inapplicable to

assessing the validity of the position of ASU at the time Ms. Keeton terminated the remediation process. Although FIRE and NAS ostensibly support Appellant, there is a fundamental tension in their arguments. FIRE and NAS are concerned about a school's chilling robust discussion in the classroom by imposing additional requirements on speakers they disfavor, a concern shared by the undersigned *amici* as a matter of general principle, but not of concern given the record in this case.³⁶ At the same time, FIRE and NAS agree with the undersigned *amici* that the expansive speech rights the counseling student enjoys in the classroom is circumscribed in the counseling setting.³⁷

³⁶ FIRE and NAS argue the irrelevance of Ms. Keeton's answer to a hypothetical Dr. Schenck proposed during a meeting after the Remediation Plan was issued, because the remediation plan's validity can "be judged only by the speech that actually led the university to impose the Plan." See Brf. at 18 n.4. The cited cases hold that a government's legitimate rationale for limiting First Amendment rights must be the actual motivation and not a pretext for viewpoint discrimination.

The record in this case, when viewed as a whole, does not suggest that ASU's proffered justifications are pretext for assigning additional tasks that would chill views such as Ms. Keeton's, especially in light of ASU's frequent statements to Ms. Keeton supporting her right to maintain her beliefs, and Ms. Keeton's adamant position that she is concerned only with maintaining her views, not with the "mundane tasks associated with the Plan." Brf. at 13.

³⁷ FIRE/NAS Amicus Brief. at 23-24 ("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.").

V. GENERAL EQUITABLE PRINCIPLES SUPPORT AFFIRMANCE.

Overarching this case is the fundamental principle of counseling – that the needs of the client are superior to the needs of the counselor.³⁸ *Amici* submit that this principle has even greater resonance in light of the patient group that Ms. Keeton intended to serve.

While this argument may seem to attribute selfishness to Ms. Keeton, it instead reflects that she underwent the process a prospective counselor should do – reviewing one’s experience, beliefs, biases, and principles – to determine whether and how those can be put aside to engage in professional counseling. In this respect, the amicus brief of FIRE and NAS is an admirable paean to the need to preserve robust, provocative debate in higher education generally that has particular resonance in the context of one pursuing a counseling degree. Counselors are required to examine their own values and biases and how those may affect the counselor-patient relationship. In this respect, many of the aspects of the pretermitted remediation process appeared constructive, as the faculty stressed that their concern lay only in Ms. Keeton’s actions towards patients, not in

³⁸ Both the American Counseling Association (“ACA”) Code of Ethics and the ethical rules applicable in Georgia stress first and foremost that a counselor’s “professional responsibility is to the client.” *Rules of the Georgia Composite Board of Counselors, Social Workers and Marriage and Family Therapists*, 135-7-.01 Responsibility to Clients; American Counseling Association, *Code of Ethics* § A.1.a Primary Responsibility (“The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients.”).

her personal beliefs, and Ms. Keeton assured faculty that her beliefs did not require her to try affirmatively to impose her beliefs on patients (as opposed to responding to questions posed by the patient about morality).

Ms. Keeton abandoned the remediation process upon learning that the “Schenck hypothetical” should be resolved by the response that a student presenting in an emotional crisis seeking affirmance of his or her identity should receive that affirmance. It is possible that a further exploration of the hypothetical situation could have yielded a different result. It could be that Ms. Keeton was unaware of the grave real-life consequences of a patient’s hearing that it would be unacceptable for them to live their life as they saw themselves. It could be that the faculty and Ms. Keeton could have explored ethical ways acceptable to Ms. Keeton to reduce the likelihood of the Schenck hypothetical materializing -- for example, how Ms. Keeton could build her rapport with patients by explaining a counselor’s role so that it was agreed upon and understood that she would help them clarify and realize their goals and values, rather than prescribe what they should be.

Or it could be that Ms. Keeton wisely terminated the remediation process based on what she knew were irreconcilable conflicts between the course of conduct prescribed by her faith and by the applicable ethical rules. Parts of the record reflect that Ms. Keeton’s views are so entrenched that the ASU faculty’s arguments about prospective grave harm did not prompt the reaction one might

expect from one embarking on a career in counseling. See Verified Complaint at ¶¶101-02 (“Dr. Schenck and Dr. Deaner[’s explanation] to Miss Keeton that it was a life and death matter to not affirm a client’s sexual decisions, and that failing to do so has led and could lead to suicides by clients who are not affirmed in their sexual preferences” caused her to “[f]eel[] entirely manipulated and intimidated by her professors’ presentation.”); See also Appellant’s Brf. at 53 (citing as support for the First Amendment Claim the contention that the faculty “warned that her views could be harmful or potentially lethal.”); *id.* at 44 (analogizing ASU’s interest in her professional responses to a troubled patient to her being “coerc[ed] to serve as a mouthpiece”).

Notably, the Verified Complaint acknowledges a counselor’s obligation under the ACA Code of Ethics to promote “the welfare of clients” and to minimize “harm” to the patient, but asserts that the Code does not set a standard for how “the welfare of clients” and “harm” are to be assessed and defined. ¶¶ 128-29. To the extent that Ms. Keeton’s beliefs compelled her to define those terms to include either factors not cognizable in the professional counseling setting (*i.e.*, Ms. Keeton’s belief as to consequences after death from certain conduct) or assumptions with no basis in fact (*i.e.*, that gay men and lesbians “are lonely, unhappy individuals who never achieve acceptance or satisfaction”)³⁹, she may

³⁹ See Just the Facts, at 12 (“Many patients who have undergone reparative therapy

have made a wise decision for herself. *See generally* *Bodett v. Coxcom, Inc.*, 366 F.3d 736, 746 (9th Cir. 2004) (employee terminated for violating policy against making antigay statements to employees stated upon termination that “sometimes there is a higher calling than a company policy.”); *Bruff v. N. Miss. Health Servs.*, 244 F.3d 495, 500 (5th Cir. 2001) (noting that, in contrast to the typical religious accommodation request, the plaintiff counselor who refused to counsel in their nonmarital relationships “determined that she would not perform some aspects of the position itself.”).

Ms. Keeton is free to pursue a career in keeping with her values, including the option suggested by some ASU faculty of a Christian counseling or pastoral counseling program. Verif. Compl. at ¶ 51; *see also* *Bruff*, 244 F.3d at 498 (employer offering options of “performing pastoral or Christian counseling”). Whether Ms. Keeton’s preemptive termination of the remediation process prematurely thwarted a constructive process or wisely prevented wasted time and energy, it should be viewed as her career choice reflecting her value system, not the basis of a federal civil rights suit.

relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction.”) quoting American Psychiatric Association, *Position Statement on Psychiatric Treatment and Sexual Orientation* (1998), <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199820.aspx>

CONCLUSION

The District Court's decision should be affirmed for the reasons stated in that court's opinion and for the reasons stated herein.

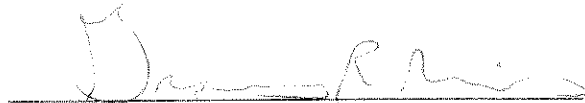
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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

The undersigned hereby certifies that the brief complies with Fed. R. App. P. 32(a)(7)(B) as having only 4,954 words, or less than one-half the 14,000 words that the rules allow for a brief of the appellee.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November, 2010, a true and correct copy of the foregoing MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE Lambda LEGAL DEFENSE AND EDUCATION FUND, INC. was served by United States Mail, postage prepaid, upon the following:

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