UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 04-3503

MARTIN WISHNATSKY,
Plaintiff-Appellant,

v.

LAURA ROVNER, Director,
Clinical Education Program,
University of North Dakota School of Law,
in her individual and official capacity,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF *AMICI CURIAE* CLINICAL LEGAL EDUCATION ASSOCIATION, THE SOCIETY OF AMERICAN LAW TEACHERS, & THE GEORGETOWN UNIVERSITY LAW CENTER CLINICAL PROGRAM IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Clinical Legal Education Association is an independent private non-profit Pennsylvania corporation, and is not owned in whole or in part by any other individual or corporation. The Society of American Law Teachers is an unincorporated learned society. The Georgetown University Law Center Clinical Program is part of Georgetown University, which is a private non-profit federally chartered corporation that is not owned in whole or part by any other individual or corporation.

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INTEREST OF THE *AMICI CURIAE*

Three amici submit this brief in support of Appellee and urge this Court to affirm the judgment below: the Clinical Legal Education Association (CLEA); the Society of American Law Teachers (SALT); and the Georgetown University Law Center Clinical Program.

CLEA is a non-profit educational organization, which was formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA currently has over 600 dues-paying members representing more than 160 law schools in the United States, including members in the State of North Dakota, and additional members from law schools in other countries. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by representing actual clients. CLEA and its members are committed to training law students to be competent, ethical practitioners.

SALT was founded in 1973 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to social concerns. SALT is now the largest membership organization of law professors in the United States, with over 850 members at more than 150 schools. SALT is committed to fostering public service in law practice, promoting social justice and advancing human rights. Encouraging and enabling greater access to the legal

profession, transforming law school curricula to meet the needs of a just society, protecting academic freedom, and promoting legal services for underserved groups have always been central components of that mission. Many SALT members are educators who teach clinical legal skills. Others who are not clinicians teach at schools that have clinical programs, and they are familiar with and supportive of such programs.

Georgetown University Law Center has one of the largest and most highly regarded in-house clinical programs in the nation. At least 17 full-time faculty, 26 graduate fellows, and several adjunct faculty supervise and teach the approximately 300 J.D. students who enroll in over a dozen clinical courses each year. The mission of the Georgetown Clinical Program is to educate students in the practical art of lawyering while providing the highest quality legal representation to under-represented individuals and organizations. Students in the clinics represent a wide range of clients: refugees seeking political asylum; adult and juvenile criminal defendants; victims of domestic violence; housing and community development groups; individuals threatened with eviction; children seeking access to adequate special and regular education; groups or individuals seeking to remedy civil rights violations or protect the environment; and organizations seeking legislative and regulatory reform on a variety of issues in the United States and abroad.

CLEA, SALT and the Georgetown Clinical Program offer their views to this Court because they believe that the ability of law schools to provide high quality clinical programs is threatened by the legal action taken by Mr. Wishnatsky. If this type of lawsuit is viable, professors directing clinical programs will need to factor into their academic decisions the substantial risk of becoming entangled in § 1983 litigation and/or Bar disciplinary proceedings instituted by an individual or group that takes issue with the curricular decision of a faculty member. These concerns are powerful and might lead a professor to chart a safer course, albeit one with less pedagogical value for the students, simply to avoid these risks. Amici believe that the fundamental ethical obligations of lawyers and the First Amendment academic freedom rights of faculty members running clinical programs are dispositive considerations in this case that compel dismissal as a matter of law.

CONSENT OF PARTIES TO FILING OF BRIEF OF *AMICI CURIAE*

Amici have obtained the consent of the Appellee, Laura Rovner, by and through her attorney, Douglas A. Bahr, on December 30, 2004, and the consent of the Appellant, Martin Wishnatsky, by and through his attorney, Walter Weber, on December 22, 2004, to file this brief of *amici curiae*.

ARGUMENT

Mr. Wishnatsky asserts that this appeal is controlled by the "simple proposition" that "a government agent" may not deny a "service or benefit" to a person "because of the publicly expressed viewpoint of that person." Br. of Appellant at 9. This is an incorrect statement of the issue before the Court. Mr. Wishnatsky is not seeking representation from a government legal services organization; he is seeking to have a clinical education program accept him as a client and include his proposed research topic for a potential lawsuit[1] in its academic curriculum. Because the distinction between a legal services organization and a clinical education program is fatal to his claim based on the facts alleged in this case, Mr. Wishnatsky attempts to divorce Professor Rovner's decision not to undertake representation in his proposed potential lawsuit from the academic context in which the decision was made. The issue he raises in this appeal, however, cannot be considered outside the academic context in which it arises. Because the Civil Rights Project ("Clinic") operates as part of the law school and has as its primary mission the education of its students, Professor

[1] Mr. Wishnatsky requested the Clinic's assistance in researching the religious roots of the goddess of justice statue on top of the Grand Forks County courthouse for a potential lawsuit. See Add. A-10 (". . . I do not possess the expertise properly to research the pagan religious origins of the Themis statue. . . . I request the assistance of the Clinical Education Program in developing a lawsuit . . . .").

Rovner's decision whether to have the Clinic and its students represent Mr. Wishnatsky in his proposed case is intrinsically linked to the essential academic freedom to define an educational curriculum. Her decision was not simply a decision to decline representation, but a decision that undertaking representation would not best serve the educational mission of the Clinic. Once viewed in their proper context, Mr. Wishnatsky's First Amendment and Equal Protection arguments fail as a matter of law.

I. THE POWER TO DECIDE WHAT AND HOW TO TEACH STUDENTS, INCLUDING THE RIGHT TO DETERMINE WHICH CASES AND CLIENTS ARE BEST FOR A CLINICAL CURRICULUM, IS PROTECTED BY THE PRINCIPLE OF ACADEMIC FREEDOM.

The essence of Mr. Wishnatsky's lawsuit is that he disagrees with the decisions Professor Rovner has made in setting the curriculum for the clinical education program. As is clear from his published comments, properly recognized and considered by the District Court, Add. at A-2, Mr. Wishnatsky is opposed to the Clinic's decision to represent the plaintiffs challenging the Ten Commandments display at City Hall. As evidenced by this lawsuit, he also disagrees with Professor Rovner's choice not to undertake representation in his proposed lawsuit challenging the statue of the goddess Themis displayed at the local courthouse. Because his views on the proper curriculum for the Clinic were

not accepted, he calls this "viewpoint discrimination." Br. of Appellant at 8. However, while Mr. Wishnatsky is completely within his rights to disagree with the policies set by the Clinic in determining the best way to educate the students enrolled in that clinical course, he does not have any legal action based on the Clinic's decision to set its curriculum according to the clinical faculty's view rather than his own. This is not viewpoint discrimination; it is a manifestation of the venerated principle of academic freedom, which "'long has been viewed as a special concern of the First Amendment.'" Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)). See Bd. of Regents v. Southworth, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Because clinical programs seek to be responsive to community concerns and welcome critical feedback regarding cases and curriculum, Amici respect and appreciate Mr. Wishnatsky's exercise of his free speech rights and expression of his views as to the propriety of the Clinic's caseload. However, Amici respectfully submit that a clinical director should not be subject to a lawsuit like Mr. Wishnatsky's when she makes curricular choices according to her view, rather than the critic's view, of what is best for the advancement of law students' professional education.

A. Mr. Wishnatsky May Not Force Professor Rovner To Adopt His View Of The Best Clinical Curriculum Simply Because He Has Publicly Criticized Her Curricular Choices.

The authority and autonomy to set an educational curriculum and determine the methods by which a curriculum will be taught are at the heart of academic freedom. Justice Frankfurter listed these rights among "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring) (quotation marks and citation omitted). In a clinical course, the freedom to determine "what may be taught" and "how it shall be taught" must fundamentally include the authority to select those cases and clients an educator deems most conducive to law students' professional education.

Accepting Mr. Wishnatsky's theory that he may compel the Clinic to add his case to its curriculum simply by exercising his First Amendment right to disagree with the Clinic's Director and her academic decisions would revoke these essential freedoms and grant the power to set academic policy—even as to the most fundamental decisions as to what materials and activities to use to educate students—to anyone who has publicly criticized an academic institution or professor. The First Amendment, however, does not support such a right, and it certainly does not give license to a critic to force a public academic institution to

take into account his views on the proper way to structure a clinical curriculum simply because he has made public statements in opposition to the clinical program and its faculty. The exercise of free speech does not entitle the speaker to a "trump card" that defeats all other constitutionally protected rights and interests. See Wayte v. United States, 470 U.S. 598, 614 (1985) (rejecting the petitioner's view that he was the victim of selective prosecution for draft evasion because he had exercised his First Amendment rights by informing the authorities that he had refused to register for the draft out of protest, because "such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law"); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) (noting that a "candidate ought not to be able, by engaging in [constitutionally protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision").

B. The Fact That Professor Rovner's Curricular Decision Was Made Within The Context Of Clinical Education Does Not Remove The Protections Of Academic Freedom.

Mr. Wishnatsky baldly asserts that the Clinic is a legal services provider and administrator of a government benefit and ignores the academic context in which

this case arises. Clinical programs undoubtedly provide important pro bono legal services to the community. However, the fact that the curriculum of this publicly-funded clinic requires undertaking representation in a relatively small number of cases and may involve clients beyond the academic institution does not remove the Clinic's curricular decisionmaking from the academic context and convert such curricular decisionmaking into administration of a government legal services benefit. However much Mr. Wishnatsky focuses on the Clinic's work on behalf of its clients, he cannot avoid the fact that the Clinic operates as an academic course, within a law school, with the primary goal of educating law students.

In a clinical course, essential academic freedom as to "what may be taught" and "how it shall be taught," Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring), fundamentally includes the freedom to select the cases and clients best-suited to advancing law students' professional education. Immersing students into the legal issues of an actual client must be done after careful consideration and requires sensitive academic judgment as to which cases will present the optimal mix of legal issues that will best further the students' educational goals. The clients of a clinic become part of the educational process, and, just as an academic institution is given substantial freedom to choose which educators to hire as professors and what subjects to teach, id., so too must clinical legal programs be given freedom to

decide which clients and which cases will give the students the best educational experience.

Additionally, the ability of a clinical program to provide representation to only a limited number of clients clearly distinguishes it from a government benefit like legal services. Obviously, a clinic will be able to provide representation in only a very small number of cases. Such extreme scarcity of resources precludes Mr. Wishnatsky's argument that he has an absolute right to representation by the Clinic. See Nabke v. U.S. Dep't of Hous. & Urban Dev., 520 F. Supp. 5, 8 (W.D. Mich. 1981) (finding, in the legal aid context, that "it does not follow that there is a federal right to such assistance where the priority allocation of inadequate resources is so plainly a part of the statutory scheme").[2]

Although Mr. Wishnatsky attempts to exploit the Clinic's use of real cases to teach students in support of his argument that the Clinic is the provider of a government benefit, clinical programs are undeniably educational, first and foremost. Clinical programs were created in order to enhance the education of

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[2] In Nabke, the District Court also noted that, given the scarcity of resources, it would undercut the purpose of providing for legal services to the poor to subject legal aid providers to lawsuits challenging their decisions as to the allocation of resources. Nabke, 520 F. Supp. at 8. "The necessity of defending lawsuits and paying judgments would rechannel those funds and services away from this intended purpose." Id. Thus, even if this Court were to consider the Clinic akin to a legal services organization, Nabke suggests that Mr. Wishnatsky's present lawsuit would not be viable.

students by using actual cases, in order to better prepare them for legal practice.[3] For example, in 1992, the American Bar Association's (ABA's) Task Force on Law Schools and the Profession recommended that legal education necessarily include instruction in lawyering skills and professional values. That recommendation, embodied in the MacCrate Report, includes a statement of skills and values necessary for lawyers to assume "ultimate responsibility for a client."[4] These skills can be categorized as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and litigation alternatives, organization and management of legal work, and recognizing and resolving ethical dilemmas.[5] The professional values are, generally: providing competent representation; seeking to promote justice, fairness, and morality; seeking to improve the profession; and commitment to self-development.[6] According to the Task Force, law schools must play an important

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[3] See, e.g., John S. Bradway, Some Distinctive Features of a Legal Aid Clinic Course, 1 U. Chi. L. Rev. 469 (1934) (discussing clinical legal education and clinical program at Duke University); John S. Bradway, The Beginning of the Legal Clinic of the University of Southern California, 2 S. Cal. L. Rev. 252 (1929) (describing general practice clinic).

[4] Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 125 (1992) (hereinafter "MacCrate Report").

[5] Id. at 138-40.

[6] Id. at 140-41.

role in developing these professional skills and values.[7] Instruction in lawyering skills is required for law school accreditation by the ABA.[8] Clinical professors therefore must give careful consideration to which cases will provide the best opportunities for inculcating these skills and values.[9] Cases must be screened according to student availability, level of difficulty and complexity, educational value, student and faculty interest and expertise, and time constraints.[10] When selecting cases and clients for the Clinic, Professor Rovner was creating the curriculum for her course, which is an "essential freedom" protected by the principle of academic freedom. Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring). As one scholar has pointed out:

> [s]election of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment that only the law school faculty is capable of making, these decisions should be protected by academic freedom.

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[7] Id. at 331-32 (Recommendations C.12, C.13, C.15, C.16, C.17 and C.19).
[8] ABA, Standards for Approval of Law Schools (1996) (Standard 302(a)(iv)).
[9] Cf. Paul D. Reingold, Why Hard Cases Make Good (Clinical) Law, 2 Clinical L. Rev. 545 (1996) (arguing that short, routine cases do not provide the same learning opportunities as complex cases).
[10] Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the *MacCrate Report*, 33 Gonz. L. Rev. 1, 9-10 (1998).

Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom, 11 J.C. & U.L. 179, 190 (1984). For present purposes, the choices made by clinical professors are no different from the educational choices made by non-clinical professors, and "the crucial educational function served by law school clinical programs protects clinic decisions concerning *case selection* and *choice of [clients]* from [government] interference as an academic freedom interest." Id. at 193 (emphasis added).

C. The District Court Properly Dismissed Mr. Wishnatsky's Lawsuit Because He Has No Right To Have The Court Adjudicate Whether His View Or Professor Rovner's View Of The Best Clinical Curriculum Should Prevail.

By seeking to have the District Court's decision reversed so that he may engage further in the inquiry into how the Clinic's curricular decisions are made, Mr. Wishnatsky seeks to insert himself into a process in which he has no right to be a part. As the Supreme Court has said, "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Minn. State Bd. For Comty. Colls. v. Knight, 465 U.S. 271, 285 (1984). Mr. Wishnatsky may continue to express his opposition to school policy and curricular decisions, but he has no right to force clinical faculty to take into account his opinions on the Clinic's curriculum or accept his

proposed potential lawsuit for their clinical course. See id. at 283 ("The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."). The District Court properly dismissed his claims as matter of law.

Mr. Wishnatsky's attempt to have the Court arbitrate whether his view or Professor Rovner's view of the best clinical curriculum should prevail is inappropriate:

> If a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," Bishop v. Wood, 426 U.S. 341, 349 [] (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. [78], 89-90 [(1978)].

Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985). Accordingly, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). The consequences for a clinical director if such an intrusion is allowed would be significant. The Supreme Court has noted that interpreting the First Amendment to force public institutions to consider the opinions of dissenters in

every decision would effectively thwart the work of such institutions. Minn. State Bd. For Comty. Colls., 465 U.S. at 285. The Supreme Court also has noted that, because of "the vital role in a democracy that is played by those who guide and train our youth[,] [t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." Sweezy, 354 U.S. at 250, quoted in Keyishian, 385 U.S. at 603. Even forcing Professor Rovner to go through the process of discovery in this case would be detrimental to her First Amendment right to academic freedom. See Sweezy, 354 U.S. at 261 (noting "the grave harm resulting from governmental intrusion into the intellectual life of a university," and protecting a professor from having to discuss the contents of his lecture) (Frankfurter, J., concurring).

These concerns are reflected in the Supreme Court's admonition that courts cannot intervene in the daily academic decisions of educational institutions unless those decisions "directly and sharply implicate basic constitutional values." Epperson, 393 U.S. at 104. In this case, Mr. Wishnatsky has not come close to stating a claim that Professor Rovner's decision as to the best clinical curriculum "directly and sharply" implicates his First Amendment free speech right to express his viewpoint. Mr. Wishnatsky was not prevented from seeking to have his case included in the Clinic's curriculum, nor was he prevented from expressing his dissatisfaction when the Clinic's faculty made the academic judgment to decline

his case. But the right to *express* his view as to which cases the Clinic should or should not take does not entail that his view be *adopted*. As a matter of law, Mr. Wishnatsky does not have a claim for viewpoint discrimination based on the facts he has alleged, and the District Court properly dismissed his claim.

II. MR. WISHNATSKY HAS NO RIGHT TO FORCE PROFESSOR ROVNER TO VIOLATE ETHICAL RULES IN DEROGATION OF THE CLINIC'S MISSION TO EDUCATE ITS STUDENTS IN PROFESSIONAL RESPONSIBILITY.

Mr. Wishnatsky does not dispute—nor could he—that he has criticized Professor Rovner personally and attacked the Clinic as an institution. His brief to this Court does not address whether this antagonism may have created a hostile relationship between himself and Professor Rovner such that an attorney-client relationship would be precluded under Rule 1.7 of the North Dakota Rules of Professional Conduct. Mr. Wishnatsky apparently proposes that when such a hostile relationship results from the protected expression of a viewpoint, it cannot be considered a reason for declining representation.[11] Wholly apart from the academic freedom concerns that are implicated here, it would still be a dubious proposition that a potential client may force an attorney to violate the rules of

[11] Mr. Wishnatsky's brief does not address the discrepancy between his theory of the First Amendment—that public criticism of an attorney cannot give rise to a conflict of interest precluding representation—and the duty to avoid undertaking conflicted representation found in North Dakota Rule of Professional Conduct 1.7.

professional conduct when the conflict precluding representation arises from the exercise of free speech. The fact that Mr. Wishnatsky asserts this already dubious argument in the context of a clinical education program makes its success impossible.

As the Brief of Appellee notes, the Clinic could not represent Mr. Wishnatsky for ethical reasons as a matter of law, even without considering the academic context in which his claims arise. Br. of Appellee at 31-35. North Dakota Rule of Professional Conduct 1.7 provides, in part:

> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
>
> (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

A conflict precluding representation under Rule 1.7 may be personal, destroying the necessary feelings of trust and loyalty to a client, and may arise prior to undertaking the representation: "Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." N.D. Rules of Prof'l Conduct R. 1.7 cmt. As the Brief of Appellee points out, Mr. Wishnatsky's public and harsh criticisms of Professor Rovner and the Clinic would erode the mutual trust and confidence necessary for an effective

attorney-client relationship such that any reasonable lawyer would be compelled to decline representation in such a case. Br. of Appellee at 32-35.

A clinical professor at a public law school, like any ethical and reasonable attorney, must comply with the rules of professional conduct and a lawyer's determination that he or she has a conflict of interest is entitled to deference. Because this ethical conflict arises in the academic context, Professor Rovner's decision that the conflict precluded representation of Mr. Wishnatsky by the Clinic deserves even greater deference. When dealing "with the complex of strands in the web of freedoms which make up free speech," Speiser v. Randall, 357 U.S. 513, 520 (1958), the Supreme Court has directed that courts look to the particular circumstances in which the alleged suppression of speech occurs. Id.

The ethical concerns caused by Mr. Wishnatsky's public antagonism toward Professor Rovner and the Clinic carry additional weight in the clinical context because they affect not only Professor Rovner's responsible conduct as an attorney, but also her ability to educate her students properly. The University of North Dakota Clinic Manual states: "The Clinic operates as a law office in which each student is expected to assume the professional duties and responsibilities of a practicing attorney under the direct supervision of Clinic faculty. Students are expected to know and observe the requirements of the Rules of Professional Conduct in their clinic practice. . . . All Clinic members are expected to review and

scrupulously follow the requirements of the Rules of Professional Conduct." Ex. 1 at 1, 5. By seeking to require Professor Rovner to represent him, Mr. Wishnatsky is intruding upon her ability not only to set the curriculum for the Clinic, but also to provide an ethical model of professional responsibility for her students. See generally Peter A. Joy, The Law School Clinic As A Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35 (2003) (explaining that clinical law professors are also legal ethics and professional responsibility teachers).

Professor Rovner, as a clinical professor charged with educating her students in lawyering skills and values, must select clients who will meet the objectives of the clinical curriculum. In order to achieve the educational objectives of the clinic, the client should be someone with whom the students will be able to form an appropriate lawyer-client relationship, providing a meaningful opportunity to interact and communicate. Clinical students learn necessary counseling,[12] problem solving,[13] fact gathering and negotiating[14] skills through interactions with clients. All of these elements require the active participation of the client. If a hostile or

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[12] MacCrate Report, at 39. See also Amy Gutmann, Can Virtue Be Taught to Lawyers?, 45 Stan. L. Rev. 1759, 1771-72 (1993) (arguing that reaching mutual understanding of clients' informed preferences is an ethical virtue taught in clinics).

[13] MacCrate Report, at 20.

[14] Alex J. Hurder, Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration, 44 Buffalo L. Rev. 71 (1996) (advocating for process of negotiation in forming collaborative lawyer-client relationship through case study of clinical client).

distrustful client were selected, the educational goals of the clinic might be undermined.

While any attorney, clinical professor or not, would be precluded from forming a professionally-responsible relationship with a potential client after the sort of public antagonism Mr. Wishnatsky directed at Professor Rovner and the Clinic, see Br. of Appellee at 33-35, ethical concerns regarding the attorney-client relationship take on additional meaning in the context of clinical education because the client becomes part of the student's legal education and is a vehicle through which the clinical professor carries out her educational mission. Professor Rovner was wholly within her rights to determine that Mr. Wishnatsky's antagonism would preclude an effective attorney-client relationship based on trust and respect. "Scholarship cannot flourish in an atmosphere of suspicion and distrust." Sweezy, 354 U.S. at 250. Professor Rovner has a right and a duty to her students to create an atmosphere where both she and the students "remain free to inquire, to study and to evaluate, to gain new maturity and understanding." Id.; Keyishian, 385 U.S. at 603. In this context, a clinical professor has an obligation to avoid representation that is ethically questionable. To accept Mr. Wishnatsky's argument and force Professor Rovner to breach her ethical duties and educational responsibilities would violate academic freedoms long-recognized by the Supreme Court.

The Supreme Court has recognized that academic freedom is an area "in which government should be extremely reticent to tread." Sweezy, 354 U.S. at 250. Mr. Wishnatsky's theory of this case asks the Court not only to sweep away this reticence, but also to place Professor Rovner in an impossible position: either she must violate her own ethical duties as an attorney, breach her duty as an educator charged with inculcating professional responsibility, and subject her students and clients to an acrimonious conflict, or she must face a lawsuit based on viewpoint discrimination. However, the First Amendment does not create such an intolerable dilemma. When a citizen exercises his right to criticize an attorney and at the same time disqualifies that attorney from representing him, he cannot claim unconstitutional viewpoint discrimination. The right to free speech does not always guarantee that the exercise of such right shall be "cost free." Lefkowitz v. Cunningham, 431 U.S. 801, 810 n.1 (1977) (Stevens, J., dissenting). See also Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (rejecting the view that the First Amendment right to freedom of speech is an "absolute"). Mr. Wishnatsky chose to exercise his right to criticize Professor Rovner and the Clinic but at the same time disqualified the Clinic from representing him. Accordingly, the motion to dismiss was properly granted because, as a matter of law, Professor Rovner properly declined representation of Mr. Wishnatsky based on her ethical duties as a lawyer and clinical educator.

III. THE SUPREME COURT PRESUMES THAT A UNIVERSITY ACTS IN GOOD FAITH IN ITS DECISIONMAKING AND MR. WISHNATSKY HAS NOT ALLEGED ANY FACTS SHOWING TO THE CONTRARY.

Mr. Wishnatsky bases his appeal on an argument that he was subjected to viewpoint discrimination in violation of his Equal Protection and First Amendment rights when the Clinic denied him representation "because of disagreement with [his] publicly expressed viewpoint." Br. of Appellant at 9. Even if Mr. Wishnatsky's claim of viewpoint discrimination were otherwise cognizable, in order to survive a motion to dismiss on those grounds, Mr. Wishnatsky must overcome the presumption of regularity afforded to academic decisions. He must provide something more than a mere conclusory allegation that he was treated unequally, which he has not done.

Because the courts are ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions," Regents of the Univ. of Mich., 474 U.S. at 226, there is only a "narrow avenue for judicial review" of academic decisions. Id. at 227. In this narrow judicial review of academic decisions, there is a presumption of regularity. The Supreme Court has held that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" Grutter, 539 U.S. at 329 (quoting Bakke, 438 U.S. at 318-19). Mr. Wishnatsky has not made a showing

to the contrary as to either the Clinic's decision that it did not have the resources to take his case or that it was prohibited from representing him due to an ethical conflict.

The interaction between a presumption of good faith and the showing necessary to be entitled to discovery in a legal action is illustrated by selective prosecution cases. The broad discretion given to the government in its decision of whom to prosecute "rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. at 607; see United States v. Armstrong, 517 U.S. 456, 465 (1996). Concerns as to judicial review in the criminal prosecution context arise from the fact that it is difficult for courts to review a prosecutor's decision as to the relative strengths of different cases and how a particular case might fit into the overall enforcement plan, as well as from the practical consequences of judicial examination, which would undermine prosecutorial effectiveness by delaying prosecutions and chilling law enforcement "by subjecting the prosecutor's motives and decisionmaking to outside inquiry." Id. (quoting Wayte, 470 U.S. at 607).

In the context of a clinical professor choosing which cases to include in the clinical curriculum, similar concerns arise. Like the government's decision of whom to prosecute, academic decisions, particularly the daily decisions as to what and how to teach, are ill-suited to judicial review. Regents of the Univ. of Mich.,

474 U.S. at 226; Bd. of Curators, 435 U.S. at 89-90. Requiring academics to submit to constant justification of their curricular choices would be as destructive to their effectiveness as "subjecting the prosecutor's motives and decisionmaking to outside inquiry," Wayte, 470 U.S. at 607, is harmful to prosecutors. See Sweezy, 354 U.S. at 250, 261. And just as there is a "presumption of regularity" for prosecutors, which protects their broad discretion to enforce the laws, Armstrong, 517 U.S. at 464, so too is there a presumption of "good faith" for academic institutions, Grutter, 539 U.S. at 329 (quoting Bakke, 438 U.S. at 318). Accordingly, as in the selective prosecution context, the Court should apply a rigorous standard for suits seeking to proceed to discovery in an action which seeks to disturb academic freedom. Cf. Armstrong, 517 U.S. at 468 (finding that, because of the diversion of resources and potential chilling effects when the government must respond to discovery in aid of a selective prosecution claim, a rigorous standard will apply to requests for discovery). Applying this rigorous standard to this case, it is clear that Mr. Wishnatsky has failed to state a claim of viewpoint discrimination and the District Court appropriately dismissed his lawsuit on the pleadings.

In an attempt to overcome his failure to allege any facts showing that Professor Rovner did not act in good faith, Mr. Wishnatsky asserts that his case was improperly dismissed because there is a factual dispute over his assertion of

viewpoint discrimination. See Br. of Appellant at 8, 11. However, what Mr. Wishnatsky frames as contested facts are merely different characterizations of the undisputed facts. Simply because the parties disagree about the legal conclusion drawn from a set of facts does not convert a legal dispute into a factual one. He has alleged no facts showing that the Clinic has not acted in good faith and according to its duties as an educational institution. As previously discussed, Professor Rovner's decisions regarding Mr. Wishnatsky's proposed case were highly reasonable curricular decisions and compelled by ethics rules.

First, Professor Rovner's letter to Mr. Wishnatsky cited a lack of resources as a reason for declining his proposed project. It is highly reasonable for Professor Rovner to decline to devote the Clinic's scarce resources to a research project that not only falls outside the Clinic's stated mission to engage students in litigation, not merely legal research, but also would likely lead to the conclusion that Mr. Wishnatsky's proposed lawsuit is frivolous. Moreover, Mr. Wishnatsky's proposed potential lawsuit is at best duplicative of, and more likely in conflict with, the existing Clinic case challenging the public display of the Ten Commandments. Second, Professor Rovner declined Mr. Wishnatsky's proposed project because ethics rules prohibited her from undertaking representation in a case where she could not create the requisite attorney-client relationship based on trust and confidence.

Mr. Wishnatsky's speech, as relevant in this case, is not "pure speech" because it caused a conflict of interest precluding an attorney-client relationship between the Clinic and Mr. Wishnatsky. Cf. Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 508 (1969) (noting that speech akin to "pure speech" does not "intrude[] upon the work of the schools or the rights of other students"). Instead, Mr. Wishnatsky's speech essentially disqualified him from being one of the few people to be represented by the Clinic. Now he seeks to force the Clinic's faculty to disregard their stated mission as educators (and, in particular, as educators charged with inculcating professional responsibility), violate the North Dakota Rules of Professional Conduct, and cede control of the Clinic's curriculum. There is no issue of pretext. Professor Rovner was only making the good faith decision that the Clinic's academic resources, as well as the clear mandate of the Rules of Professional Conduct, prevented the Clinic from taking his case.

Not only has Mr. Wishnatsky failed to show that Professor Rovner's decision was not made in good faith, he has also failed to make any specific allegations or meet any threshold showing that he is being treated unequally, as he claims. See Br. of Appellant at 16. He does not allege that Professor Rovner has felt free to disregard the Rules of Professional Conduct in cases in which conflicts arose for other reasons. He has not alleged that Professor Rovner cites the Clinic's lack of resources only in cases in which an applicant has been publicly antagonistic

to her. He has failed to come even close to making "a credible showing of different treatment of similarly situated persons." Armstrong, 517 U.S. at 470. Under the properly deferential standard applied where there is a presumption of regularity, Mr. Wishnatsky has not shown "clear evidence" that Professor Rovner has treated him differently from similarly situated persons. See id. at 464 (noting that the "presumption of regularity" supports the government's decisions "and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'") (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)). He clearly has failed to state an equal protection claim upon which relief may be granted.

Professor Rovner is a clinical educator who was acting in the best interests of her students and in accordance with rules of professional conduct when she declined Mr. Wishnatsky's request for representation. There are no alleged facts in dispute. Mr. Wishnatsky, however, takes Professor Rovner's reasons for declining representation and alleges that they are "pretextual cover," Br. of Appellant at 11, without any allegations that other similarly situated persons were treated differently. However, the word "pretext" is not a shibboleth granting those who invoke it the power to disrupt the important work of a clinical education program. This Court should require something more in order to disturb the principle of academic freedom and subject a professor to discovery and prolonged litigation.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel for *amici curiae* hereby certifies, pursuant to Rule 32(a)(7)(C), Fed. R. App. P., and 8th Cir. R. 28A(c), that the Brief of *Amici Curiae* was printed using MSWord, 2003, Times New Roman proportional typeface in 14-point type size, and that the brief complies with the type-volume limitations of Rule 32(a)(7), Fed. R. App. P. Exclusive of material not counted under Rule 32(a)(7)(B)(iii), the brief contains 6,543 words.

A 3 ½-inch computer diskette containing the full text of the brief in PDF format has been provided to the Clerk of the Court. The diskette has been scanned for viruses and is virus-free.

Dated this 30th day of December, 2004.

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Elizabeth B. Wydra

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(d), Fed. R. App. P., that two copies of the Brief of *Amici Curiae*, plus a diskette version in PDF format, were served on December 30, 2004 by first-class mail, postage prepaid, upon counsel for all other parties to this case, as listed below. I hereby certify that the diskettes have been scanned for viruses and are virus-free.

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