No. 04-3503
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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.	)	Appeal from the United States District Court for the District of North Dakota Civil Case No. A2-04-1

REPLY BRIEF FOR APPELLANT

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This is a civil rights suit in which plaintiff-appellant Martin Wishnatsky alleges that the director of a state law school's Clinical Education Program (CEP) unconstitutionally denied and continues to deny Wishnatsky equal access to the services of the CEP because of Wishnatsky's viewpoint, namely, his public criticism of the CEP and its director. The complaint alleges a textbook violation of the federal constitutional prohibition against viewpoint discrimination. See Brief for Appellant § II(A). Moreover, because this appeal arises at the pleadings stage, Wishnatsky's allegations must be taken as true. Id.

The district court improperly granted judgment on the pleadings. Hence, the judgment should be reversed and the case remanded for further proceedings.

The brief of defendant-appellee Laura Rovner is more telling for what it *fails* to say than for what it does say.

First, Rovner does *not* contest the constitutional principle that government may not deny services or benefits to private persons on the basis of the viewpoint of their speech. That principle is the lynchpin of Wishnatsky's claim, see Brief for Appellant § II(A), yet Rovner ignores it.

Second, Rovner does *not* make any serious attempt to defend the district court's improper importation of a "chill" element into the jurisprudence governing viewpoint

discrimination. See infra note 5. Yet this error was the sole basis for the district court's ultimate decision to leave the judgment against Wishnatsky in place. See Add.[1] at A-8 to A-9. See also Brief for Appellant § II(B) (explaining why the district court's ruling on this point was error); see also id. § II(C) (explaining why, even if a "chill" element applied, it would not support the judgment below).

Rather than address Wishnatsky's arguments, Rovner resorts to three primary defense tactics. First, Rovner insists on a narrow reading of Wishnatsky's Amended Complaint -- yet this is improper at the pleadings stage, and especially for a *pro se* complaint. (Wishnatsky proceeded *pro se* in the district court.) Second, Rovner asserts fact-based defenses -- yet this is also improper at the pleadings stage. Third, Rovner urges this Court to shoehorn the present case into the totally inapposite lines of government employment and contracting cases -- yet this is plainly legally incorrect; moreover, the "balancing" test Rovner urges would depend upon factual determinations not yet made, and hence cannot support judgment on the pleadings.

Thus, as demonstrated in the Brief for Appellant, the judgment must be reversed and the case remanded for further proceedings.

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[1] "Add." refers to the Addendum to the Brief for Appellant.

I. DEFENDANT ROVNER'S DEPARTURE FROM HER POSITION AS DIRECTOR OF THE CLINICAL EDUCATION PROGRAM FURTHER WEAKENS DEFENDANT'S ARGUMENTS.

As an initial matter, Wishnatsky wishes to address the implications of the revelation, by defendant, that "Professor Rovner has left employment with the Clinic." Brief of Appellee at 2 n.2. (This new fact is not in the record on appeal.)

Wishnatsky seeks both declaratory and injunctive relief against Rovner in both her official and individual capacities. Add. at A-13. Rovner's departure does not affect the *official* capacity suit, which automatically continues against Rovner's successor in office. Rule 25(d), Fed. R. Civ. P. As to the *individual* capacity suit, the claim for *injunctive* relief is now moot. (Rovner apparently is not even in North Dakota anymore. See www.law.du.edu/rovner/ (Rovner now a law professor in Denver).) The individual capacity suit for *declaratory* relief remains alive as to a *retrospective* declaration of the unconstitutionality of Rovner's actions, but is now moot as to a *forward-looking* declaration that Rovner must not discriminate on the basis of Wishnatsky's viewpoint.

Importantly, Rovner's departure undermines her factual defenses based on an alleged intractable animosity between Wishnatsky and herself. On remand, it will presumably be difficult, at best, for defendant to contend that Wishnatsky's criticisms of Rovner and her directorship necessarily foreclose an effective attorney-client

relationship under the new administration of the clinical education program (CEP).

In short, while this factual development does not directly affect the present appeal, it does starkly illustrate the fallacy of defendant's claim that, having once criticized the CEP and its director, Wishnatsky may justifiably be deemed henceforth and forevermore *persona non grata* at the CEP.

II. DEFENDANT ROVNER ERRS BY URGING A SUPER-STRICT, NARROW READING OF WISHNATSKY'S PRO SE COMPLAINT.

Rovner tries to deflect the merits of Wishnatsky's viewpoint discrimination claim by resorting to nitpicking over the Amended Complaint. To the contrary, however, at the pleadings stage complaints must be construed liberally in favor of the party resisting dismissal. Holden Farms, Inc. v. Hog Slat, Inc., 347 F.3d 1055, 1059 (8th Cir. 2003). This is especially true where the pleading party proceeds *pro se*, as was the case here. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (*pro se* complaints held to "less stringent standards than formal pleadings drafted by lawyers"); Atkinson v. Bohn, 91 F.3d 1127, 1129 (8th Cir. 1996) (per curiam) (court must "liberally construe" a *pro se* complaint).

The Amended Complaint alleges Rovner declined Wishnatsky's request for legal services "on the basis of criticism of the Clinical Education Program and its director," Am'd Cplt. ¶ 7 (Add. at A-14). Rovner objects that this allegation appears

in the "Cause of Action" section instead of the "Factual Background" section. Brief of Appellee at 11 n.8. Such insistence upon calling technical footfaults is improper in general at the pleadings stage, and entirely incompatible with the indulgence offered to *pro se* complainants.

In any event, the Amended Complaint makes the same allegation elsewhere. In response to Wishnatsky's request for legal representation, Rovner allegedly "declined the request," invoking "ethical concerns" predicated upon "persistent and antagonistic actions" by Wishnatsky. These "antagonistic actions" in turn amounted to no more than "one phone conversation" and "public letters and commentary." Am'd Cplt. ¶¶ 5-6. The plain import of these allegations is that Rovner discriminated against Wishnatsky because of what he said. (And, as the letters and articles Rovner relies upon[2] demonstrate, what Wishnatsky said consisted of a sharp public critique

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[2]Rovner argues that the district court could rely upon certain matters of public record in ruling upon the pleadings. Brief of Appellee at 12-14. Rovner does *not* contend that consideration of such materials converted the ruling below into a summary judgment. Indeed, Rovner specifically withdrew her motion for summary judgment. See Brief for Appellant at 4 n.1.

None of the materials, viewed as factual backdrop at the pleadings stage, is incompatible with Wishnatsky's claim of viewpoint discrimination. To the contrary, they amply illustrate the public, constitutionally protected nature of Wishnatsky's comments as well as Rovner's public disagreement with Wishnatsky's point of view. See, e.g., Clinic Add. 1-2. Hence, this Court need not address the propriety of their consideration by the district court (or by this Court).

of certain conduct by Rovner on a matter of public concern.)[3]

Rovner protests that a "pretext" allegation appears nowhere in the complaint. Brief of Appellee at 4, 11. But the complaint directly alleges discrimination based on Wishnatsky's public commentary. By necessary implication, any other excuses offered by Rovner are pretexts.

III. DEFENDANT ROVNER'S RELIANCE UPON FACT-BASED DEFENSES IS IMPROPER AT THE PLEADINGS STAGE.

Rovner insists that she did not refuse Wishnatsky's request for government services because of his *viewpoint* but rather because the CEP was too busy and because "ethical concerns" precluded representation of Wishnatsky. Brief of Appellee § II(C). These are fact-based arguments; hence, neither defense can suffice at this stage of the proceedings.

"I'm too busy," of course, is one of the oldest excuses in the book. Wishnatsky alleged that he was refused because of his publicly voiced viewpoint, which is unconstitutional. Whether Rovner can establish that the CEP genuinely was "too busy" must await factual development. In any event, even if the CEP *at the time* was

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[3]Contrary to Rovner's mistaken claim, Brief of Appellee at 7 n.7, Wishnatsky does not assert that Rovner has conceded that she blackballed Wishnatsky because of his public speech. Indeed, that is the primary disputed factual issue in the case. Rather, Wishnatsky noted that she conceded that the speech in question *concerned a public issue*. Brief for Appellant at 4.

truly "too busy" (i.e., lacked the resources to assume additional work), this would not justify the *categorical, permanent* rejection of Wishnatsky.

Rovner's purported "ethical concerns," meanwhile, are (or at least, at the pleadings stage must be assumed to be) no more than a repackaging of discrimination against Wishnatsky's publicly expressed viewpoint. Rovner's syllogism is as follows:

a. Wishnatsky publicly criticized Rovner and the CEP.

b. This offended and upset Rovner.

c. Therefore, Rovner (and any successor director) was ethically barred, now and henceforth, from representing Wishnatsky.

The impermissible viewpoint discrimination is inextricably intertwined with this supposed ethical defense. Viewpoint discrimination cannot be "laundered" this way. Consider an analogous hypothetical:

a. Jesse Jackson publicly criticizes a CEP and its director for alleged racism.

b. The CEP director is offended and upset at the charges.

c. Therefore, the CEP director (and any successor director) is ethically barred, now and henceforth, from representing Jackson.

The flaws in this syllogism are manifest. Public criticism does not *as a matter of law*

create *permanent, irreconcilable* conflicts. (For example, Sen. John Kerry selected Sen. John Edwards as his running mate despite their bitter primary squabbles.) Nor does a citizen's daring to voice criticism of government officials justify the subsequent denial of government services -- unless those services are to be reserved for those persons who either agree with government or keep their mouths shut.

IV. DEFENDANT ROVNER'S ATTEMPT TO RECATEGORIZE THIS CASE IS UNPERSUASIVE.

A. Unconstitutional Conditions

Rovner would pigeonhole this case under the "unconstitutional conditions" doctrine. Brief of Appellee § II. There is no need for recourse to this more general doctrine, however, as the unconstitutionality of government viewpoint discrimination is already well established as a specific constitutional norm. See Brief for Appellant § II(A). Moreover, even if this case were forced into the "unconstitutional conditions" box, Wishnatsky would still state a claim. See, e.g., Speiser v. Randall, 357 U.S. 513 (1958) (discriminatory denial of benefits for engaging in certain disfavored speech is a restriction on that speech). Here, according to Wishnatsky's allegations, Rovner has denied Wishnatsky the benefit of free legal services (or, more precisely, access to a program offering free legal services[4]) because of his exercise

[4]Wishnatsky claims no more -- and no less -- than the right to equal (continued...)

of his right to free speech. If conditioning access to government services upon forfeiture of one's right to criticize the government is not an unconstitutional condition, it is hard to imagine what would be.

B. Government Contracting

Perhaps recognizing that the "unconstitutional conditions" doctrine also does not legitimize the viewpoint-based denial of government services or benefits, Rovner attempts to force this case into the more particular category of government contracting. Brief of Appellee at 15-17. This strained analogy cannot support the weight of Rovner's argument.

1. Flawed analogy

Rovner points to the primary educational purpose of the CEP as supposedly justifying the analogy to government contracts. Brief of Appellee at 14, 17-18, 28. But it is unclear why a primary educational purpose should be relevant to the analysis. As Rovner herself concedes, a secondary purpose of the CEP is to provide quality legal services to individuals who lack the resources or whose cases are controversial.

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[4](...continued)
consideration with those who have *not* publicly criticized Rovner or the CEP. Contra Brief of Appellee § II(C)(3). That the CEP is free to impose additional, legitimate conditions upon the delivery of its services (e.g., the educational value of the proposed case) does not sanitize the imposition of an illegitimate criterion, such as a viewpoint-based exclusion. It is therefore irrelevant that Wishnatsky does not have an "absolute right" to receive the benefit or services.

Id. at 5. Furthermore, that a government service is educational is no reason to tolerate viewpoint discrimination. Public schools cannot refuse admission to otherwise qualified students because of their parents' politics. State law schools may not turn away otherwise qualified would-be law students because of those students' views on public issues. Nor may a state deny financial aid to students who have the temerity to criticize the state (even if they criticize the aid program itself, for example, by asserting that the assistance is excessive).

In any event, Rovner's analogy is wholly unpersuasive. In contracting cases, the government retains a private person to carry out some government program. By contrast, in the attorney-client situation, the private person retains the government to carry out the private person's program of action. The situations are exactly the reverse.

Rovner argues that the beneficiary of free state legal services is somehow a partner with the government in joint pursuit of a government objective (here, education) and thus analogous to a private entity contracting to work with the government on some project. Brief of Appellee at 17. But this argument proves too much. By parity of reasoning, the student group in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995), and the church in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), were joint partners with

government in an educational mission. Indeed, the recipients of any government services or benefits could similarly be deemed "partners" in the fulfillment of some government program. Such reasoning does nothing to explain why the free legal services at issue here should be treated like government contracts rather than government services.

2. Irrelevance of Pre-Existing Relationships

Given the inappositeness of the government contracting cases, Rovner's proposed importation of a "pre-existing relationship" element from those cases, Brief of Appellee § II(A), is meritless. Moreover, if Rovner's novel argument were correct, the plaintiffs in Rosenberger and Lamb's Chapel would have had to have proven a "pre-existing relationship" to state a claim. The Supreme Court required no such thing.

In any event, whatever merit the "pre-existing relationship" element may have in the government contracting context, it makes no sense to impose such an element in the context of viewpoint-based denials of government services. The existence of a pre-existing relationship has no logical relevance to the invidiousness of discriminatorily denying welfare benefits, or the use of a facility, or financial aid, or (as here) eligibility for free legal services because the would-be recipient is, say, a Democrat, or a gun control opponent, or (as here) a public critic of the government

agency's position in a separate matter.

3. Inappositeness of "Valuable Governmental Benefit" Test

Rovner argues that she did not deny any "valuable government benefit" to Wishnatsky. Brief of Appellee at 19.[5] Even if this element applied, it would be satisfied here, where the benefit Rovner disqualified Wishnatsky from receiving was thousands of dollars of legal services. But more fundamentally, as noted in Wishnatsky's opening brief, the viewpoint-based denial of equal access to government services or benefits is unconstitutional without any need to make an additional showing that the service or benefit met some amorphous standard of "significance." Brief for Appellant § II(A), (B). Is a hunting license sufficiently important that its viewpoint-based denial counts as the denial of a "valuable government benefit"? What about access to High Occupancy Vehicle (HOV) lanes on a highway? Use of pay-at-the-bank options for county real estate taxes? There is no need to engage in such subjective weighing, because the viewpoint-based denial of such services or benefits (or conveniences) by itself offends the Constitution.

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[5]Curiously, this is as close as Rovner comes to defending the district court's ultimate ruling that Wishnatsky failed to allege sufficient "chill." Rover reinterprets this as a holding that there was no "valuable government benefit." Id. However labeled, this holding is erroneous. Brief for Appellant § II(B), (C).

C. Government Employees

Rovner invokes cases addressing the government's ability to discharge or discipline its own employees. Brief of Appellee § II(D). But Wishnatsky neither was nor wished to be an employee of the CEP. Rather, he was an applicant for its services, just like any member of the public requesting government services or benefits. Hence, no balancing test borrowed from the government employment cases applies here. Furthermore, any balancing of the CEP's interests would first require factual determinations, and thus such balancing cannot support judgment at the pleadings stage. The availability of the requisite CEP resources, Brief of Appellee § II(D)(1), the relative academic value of Wishnatsky's proposed case, id. § II(D)(2), and the prospect of an effective working relationship between Rovner (or the new director)[6] and Wishnatsky despite past differences, id. § II(D)(3), are all heavily fact-sensitive matters. Hence, no such "balancing" can support judgment on the pleadings here.[7]

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[6]Rovner's departure, as noted supra § I, calls into question the continuing relevance of Rovner's concern, Brief of Appellee at 27, that Wishnatsky's personal criticisms of Rovner might impair any future attorney-client relationship.

[7]Rovner asserts a "known conflict" between Wishnatsky and the CEP's "current clients." Brief of Appellee at 34. But Wishnatsky's *verbal disagreement* with or *disapproval* of some other client or case is not an ethical problem -- there is no rule that all of a firm's clients must be in ideological harmony.

V. ROVNER'S PLEA FOR DEFERENTIAL STANDARDS FOR PROFESSIONAL AND ACADEMIC JUDGMENTS IS PREMATURE.

Rovner devotes the last part of her brief, Brief of Appellee § III(B), to a request that this Court adopt a deferential standard for the review of decisions of "professional judgment" and "academic decisions." This request for an essentially advisory opinion is premature and thus should not be addressed at this time. See also infra § VI(A).

Wishnatsky alleges that Rovner denied and continues to deny him eligibility for CEP legal services *because of his viewpoint.* All he asks is that *such* discrimination be declared unconstitutional and enjoined. Wishnatsky does *not* question the legitimacy of genuine academic decisions about which matters to handle, or genuine professional judgments about which clients to take. Thus, Rovner's preemptive concern with scrutiny of such decisions is premature. All this Court need decide now is whether state law school legal clinics have an *absolute* right to refuse applicants on the basis of their viewpoints. Not even Rovner makes such a claim. Hence, since the facts have yet to be developed, judgment on the pleadings must be reversed.[8]

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[8]For the first time, Rovner argues that Wishnatsky's request for legal services was "insincere." Brief of Appellee at 39. But Rovner did not purport to deny Wishnatsky's request on this basis. Add. at A-12. In any event, this is yet another (continued...)

VI. THE AMICI ATTACK NONEXISTENT STRAW MEN AND ADDRESS ISSUES NOT PRESENTED HERE.

The two amicus briefs contribute little of relevance to this appeal. Instead, they pursue arguments not made and issues not presented here. Ironically, these same amici who profess deep concern over education appear to be teaching the lesson that the First Amendment should not apply to state law school faculty.

Tellingly, neither amicus brief disputes Wishnatsky's central argument that government may not deny services and benefits because it disfavors the would-be recipient's point of view on other matters. Nor does either amicus brief defend the rationale of the district court decision on appeal here.

A. There is No Academic or Curricular Decision at Issue Here.

Amici vigorously defend academic freedom and a clinical law professor's right to make curricular decisions. But those concerns are irrelevant to this case. Rovner did not purport to reject Wishnatsky's application on any case-specific grounds. Rather, her letter asserted that the CEP was too busy "to accept *any* new cases," Add. at A-12 (emphasis added), and that ethical concerns *personal to Wishnatsky* precluded *any* acceptance of matters from Wishnatsky, id. This is *not* the exercise of case evaluation and rejection of a request on its merits. Surely amici do not mean to

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[8](...continued)
fact-based argument; thus, it cannot support dismissal on the pleadings.

suggest that Rovner's stated reasons were mere pretext for an underlying academic judgment about the suitability of Wishnatsky's proposed case.[9]

B. There is No Forced Representation Here.

Amici suggest that Wishnatsky is trying to dictate what Rovner must do and to force her to take his case. This is a straw man of amici's own making. All Wishnatsky asks is that he not be categorically disqualified because of his publicly expressed criticism of a different matter. Wishnatsky's complaint does *not* seek an order barring Rovner's challenge to the Ten Commandments or an order requiring her to accept his case. The complaint *does* seek a declaration that barring Wishnatsky because of his criticism is unconstitutional and an injunction against such discrimination. Add. at A-15. That modest request fully comports with an attorney's freedom to select or refuse cases on *legitimate* grounds.[10]

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[9]Rovner and amici suggest that Wishnatsky's request might have been defective as seeking something short of full-blown litigation. Brief of Appellee at 28 n.15; CLEA Br. at 25. The short answer is that Rovner never made any such objection to Wishnatsky's application, and in fact Rovner and the CEP had represented clients challenging a Ten Commandments display in a setting (a city commission meeting) less formal than actual litigation. Wishnatsky requested assistance "on the same basis as that granted" in the Ten Commandments challenge. Add. at A-10. He sought no more than equal treatment.

[10]The CLEA amicus brief, while conceding that "Wishatsky's speech" is what "disqualified him from being one of the few people to be represented by the Clinic," CLEA Br. at 26, nevertheless suggests that clinical law faculty should be absolutely (continued...)

CONCLUSION

This Court should reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

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January 10, 2005

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[10](...continued)
immune from suits alleging invidious discrimination, id. at 3, 6 ("should not be subject to a lawsuit"), 15 (should not allow discovery), 21. But immunity -- even absolute immunity -- pertains to damages, not to injunctive relief. E.g., Pulliam v. Allen, 466 U.S. 522, 536-37 (1984) (judges not immune from injunctive relief). Wishnatsky seeks no damages here; rather, he seeks only equitable relief. Add. at A-15. Moreover, the Supreme Court has been "'quite sparing' in recognizing absolute immunity" based on an official's "special functions." Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993). "The official seeking absolute immunity bears the burden of showing that such immunity is justified," id. at 269. Rovner has not come close to meeting that burden. Providing legal services is simply not the sort of function entitled to the same protection as such exclusive government functions as judging or prosecuting cases.

CERTIFICATE OF COMPLIANCE

Undersigned counsel for plaintiff-appellant hereby certifies, pursuant to Rule 32(a)(7)(C), Fed. R. App. P., and 8th Cir. R. 28A(c), that the Reply Brief for Appellant was printed using WordPerfect version 10, 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 3,729 words.

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Walter M. Weber

January 10, 2005

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(d), Fed. R. App. P., that an original and nine copies of the Reply Brief for Appellant, plus a diskette version, were sent this day to the clerk of this Court by first-class mail, postage-prepaid, and that two copies of the Reply Brief for Appellant, plus a diskette version, were served this day, 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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