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

BRIEF FOR APPELLANT

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SUMMARY OF THE CASE

May a state agent categorically deny a government service or benefit to a person because of disagreement with that person's publicly expressed viewpoint on matters of public concern? The answer is plainly, "No."

This appeal comes from an order granting judgment on the pleadings. Hence, this Court must assume the truth of plaintiff's allegations: that the director of a state law school's clinical education program (CEP) denied and continues to deny plaintiff Martin Wishnatsky the services of the CEP because of Wishnatsky's public criticism of that CEP and its director. The federal district court granted judgment on the pleadings against Wishnatsky and declined to alter or amend the judgment.

The notion that a government agency can blacklist a person from legal services for unconstitutional reasons is so plainly incorrect as to warrant summary reversal. Whether defendant's purported alternative grounds for refusing Wishnatsky are true, or are instead mere pretexts for discrimination, is a question of fact that cannot be resolved at the pleadings stage. Thus, the judgment must be reversed and the matter remanded for further proceedings.

Whereas the law is well-settled, appellant does not believe oral argument is necessary. If the Court desires argument, 15 minutes per side should suffice.

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JURISDICTIONAL STATEMENT

District court jurisdiction: Plaintiff-appellant Martin Wishnatsky filed suit under 42 U.S.C. § 1983 asserting violation of his federal constitutional rights to free speech and equal protection. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343.

Court of appeals jurisdiction: This is an appeal from a final judgment. The court of appeals has jurisdiction under 28 U.S.C. § 1291.

Timeliness of appeal: The district court's order granting judgment on the pleadings, as well as the separate final judgment, were entered on July 29, 2004. On August 12, 2004, plaintiff-appellant filed a timely motion to alter or amend the judgment under Rule 59(e), Fed. R. Civ. P. See Rules 59(b), 6(a), Fed. R. Civ. P. On September 3, 2004, the district court denied that motion. The order denying the Rule 59(e) motion was entered on September 7, 2004. Plaintiff-appellant filed a timely notice of appeal on October 4, 2004. See Rules 4(a)(1)(A), 4(a)(4)(A)(iv), Fed. R. App. P.

Finality: This is an appeal from a final judgment (as well as from the orders granting judgment on the pleadings and denying plaintiff's motion to alter or amend the judgment).

STATEMENT OF ISSUES

1. Whether the district court erred by granting judgment on the pleadings? Syverson v. FirePond, Inc., 383 F.3d 745 (8th Cir. 2004); Faibisch v. University of Minnesota, 304 F.3d 797 (8th Cir. 2002).

2. Whether the district court erred by denying plaintiff's motion to alter or amend the judgment? Centric Jones Co. v. City of Kearney, 324 F.3d 646 (8th Cir. 2003); Computrol, Inc. v. Newtrend, L.P., 203 F.3d 1064 (8th Cir. 2000).

3. Whether it violates the First and Fourteenth Amendments for the government to treat a person categorically as *persona non grata*, regarding the provision of legal services, because that person publicly criticized the government on a matter of public concern? U.S. Const. amends. I, XIV; Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); National Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Naucke v. City of Park Hills, 284 F.3d 923 (8th Cir. 2002).

STATEMENT OF CASE

Nature of Case

This is a civil rights suit under 42 U.S.C. § 1983 asserting that defendant Laura Rovner, a state actor, unconstitutionally denied and continues to deny plaintiff Martin Wishnatsky equal access to government services or benefits because of Rovner's disagreement with Wishnatsky's publicly expressed viewpoint on a matter of public concern.

Course of proceedings

Wishnatsky filed a complaint, and then an amended complaint, in federal district court in North Dakota, seeking declaratory and injunctive relief against Laura Rovner, director of the Clinical Education Program (CEP) of the University of North Dakota School of Law. Wishnatsky alleged that defendant Rovner's ongoing "refusal of legal representation to Plaintiff *on the basis of [Wishnatsky's] criticism* of the [CEP] and its director violates the Free Speech and Equal Protection Clauses of the [U.S.] Constitution," Am'd Cplt. at 2, ¶ 7 (emphasis added). Addendum (Add.) A-14.

Defendant Rovner, after answering the amended complaint, moved for judgment on the pleadings. She conceded that "the court should construe the complaint in the light most favorable to the plaintiff, the allegations in the complaint being taken as true." Brief in Support of Motion for Judgment on the Pleadings (D.N.D. Apr. 29, 2004) at 2. She further conceded that "government may not deny a valuable governmental benefit to a person on a basis that infringes on the person's

constitutionally protected freedom of speech, even if the individual has no right to the benefit." Id. (citing Supreme Court case). Moreover, Rovner conceded that Wishnatsky had alleged that it was his "public" speech concerning "a public issue" that prompted Rovner to refuse his request for legal services. Id. at 9. Nevertheless, Rovner contended she was entitled to judgment on the pleadings.[1]

Disposition Below

The district court granted defendant Rovner's motion for judgment on the pleadings. Order Granting Judgment on the Pleadings (D.N.D. July 29, 2004) ("Order on Pleadings"). Add. A-1. While purporting to accept Wishnatsky's allegations as true, Order on Pleadings at 2 (Add. A-2), the court below in fact accepted defendant Rovner's factual allegations as true. The court noted that Rovner had claimed the CEP was too busy to take Wishnatsky's case at the time, id. at 3 (Add. A-3), and that Rovner claimed to perceive an inability to form a productive attorney-client relationship with Wishnatsky because of Wishnatsky's public criticisms, id. at 5 (Add. A-5). The court did not credit Wishnatsky's allegation that, Rovner's purported

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[1]Rovner's brief also argued that she was entitled to summary judgment. Id. at 14-30. Rovner subsequently withdrew this contention. See Notice of Voluntary Withdrawal of Motion for Summary Judgment (Notice) (D.N.D. May 10, 2004). Rovner acknowledged that this withdrawal precluded the district court from considering her supporting affidavits. Notice at 1.

excuses to the contrary notwithstanding, Rovner had *in fact* rejected Wishnatsky's request because of disagreement with his publicly expressed viewpoint on matters of public concern.[2]

The district court entered final judgment the same day. Add. A-6.

Wishnatsky moved for post-judgment relief. See Motion to Alter or Amend Judgment (D.N.D. Aug. 12, 2004) (Motion to Alter). Wishnatsky pointed out that, by crediting Rovner's asserted justifications rather than Wishnatsky's allegation of viewpoint discrimination, the district court erroneously "has given the party seeking dismissal the benefit of every favorable inference, thus favoring the party it is required to disfavor." Motion to Alter at 9.

The district court denied Wishnatsky's motion. Memorandum Opinion and Order Denying Plaintiff's Motion to Alter or Amend the Judgment (D.N.D. Sept. 3, 2004) ("Mem. Op.") (Add. A-7). Acknowledging Wishnatsky's objection that the court had improperly "resolved disputed facts" at the pleadings stage, id. at 1 (Add.

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[2]The details of Wishnatsky's criticism may technically be outside the proper scope of the matters that may be considered at the pleadings stage. As noted earlier, however, it is undisputed that the criticism was public and related to a matter of public concern. Moreover, at least outside the context of public employees, the First Amendment protects even private speech that is *not* a matter of public concern. Eichenlaub v. Township of Indiana, 385 F.3d 274, 282-85 (3d Cir. 2004).

A-7); see also id. at 2 (Add. A-8), the court proceeded, in contrast to its earlier opinion, by

> assuming that Plaintiff engaged in constitutionally protected activity -- he exercised his First Amendment right to publicly criticize the Clinic -- and that Plaintiff suffered adverse actions as a result -- he was then denied legal representation by the Clinic . . . .

Id. at 2 (Add. A-8). Nevertheless, the district court denied relief. The court ruled that the government's refusal of legal services, even as a reaction to Wishnatsky's speech, was as a matter of law an insufficient injury to state a valid claim, because such a refusal was not likely to "chill a person of ordinary firmness from continuing to speak out." Id. at 3 (Add. A-9); see also id. at 2 (Add. A-8).

STATEMENT OF FACTS

Procedural posture

This appeal arises from an order granting judgment on the pleadings. Hence, the facts plaintiff alleged must be taken as true.

Factual claims

Plaintiff Martin Wishnatsky is an adult resident of Fargo, North Dakota. Amended Complaint (Cplt.) ¶ 1 (Add. A-13). Defendant Laura Rovner is the Director of the Clinical Education Program (CEP) of the University of North Dakota School of Law. Id. ¶ 2 (Add. A-13).

In a letter to Rovner, Wishnatsky made a written request for CEP representation in a lawsuit. Id. ¶ 4 (Add. A-14). See Add. A-10 (text of letter). Rovner responded with a letter denying Wishnatsky's request and citing Wishnatsky's alleged "persistent and antagonistic actions" toward CEP and the faculty involved. Cplt. ¶ 5 (Add. A-14). See Add. A-12 (text of letter). Wishnatsky's only "actions" regarding CEP and the faculty were Wishnatsky's public criticism and commentary. Cplt. ¶¶ 6-7 (Add. A-14). Rovner refused Wishnatsky's request because of his public criticism of CEP and its director. Id. ¶ 7 (Add. A-14).

SUMMARY OF ARGUMENT

The district court erred by granting judgment on the pleadings in favor of defendant and then declining to alter or amend the judgment.

At the pleadings stage, courts must take as true a plaintiff's factual assertions. Here, plaintiff Martin Wishnatsky alleges that defendant Laura Rovner, the director of a state law school's clinical education program (CEP), denied and continues to deny Wishnatsky legal services from the CEP because of Wishnatsky's viewpoint -- i.e., his public criticism of the CEP on a different matter. Wishnatsky seeks declaratory and injunctive relief against that viewpoint discrimination.

Defendant Rovner disputes Wishnatsky's factual assertion of viewpoint discrimination, but that factual disagreement cannot be resolved at the pleadings stage.

Hence, the district court, which improperly credited Rovner's version of the disputed facts, erred by granting judgment on the pleadings.

In disposing of Wishnatsky's motion to alter or amend the judgment, the district court subsequently -- and properly -- assumed Wishnatsky's allegations to be true. Nevertheless, the district court erred once more by holding that, even if Rovner denied government services to Wishnatsky because of his publicly expressed viewpoint, the denial of free legal services did not cause a sufficient "chill" on free speech to give rise to a federal claim.

The unconstitutionality, under the federal guarantees of free speech and equal protection, of invidious viewpoint-based denials of government services or benefits, does not depend upon an *additional* showing of "chill" to the person discriminated against. The district court erroneously borrowed this "chill" element from an inapposite line of "retaliation" cases, cases in which the government did not discriminatorily *deny services or benefits*. Moreover, even if this "chill" element were to be imposed in the present case, Wishnatsky's complaint easily satisfies the standard. If, as this Court has held, the discriminatory imposition of $35.00 in parking tickets creates a sufficient injury, then *a fortiori* the discriminatory denial of thousands of dollars worth of legal services is sufficient injury.

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

ARGUMENT

When a government agent denies a service or benefit to a person because of disagreement with the publicly expressed viewpoint of that person, the government agent violates the federal constitutional guarantees of free speech and equal protection. That simple proposition controls this appeal.

The district court committed two consecutive errors of law.

In its initial order granting judgment on the pleadings, the court below improperly resolved disputed questions of material fact. The court credited defendant's asserted excuses for refusing legal services to plaintiff, rather than crediting plaintiff's contrary claim that those excuses were merely pretextual cover for government discrimination against plaintiff because of his publicly expressed viewpoint.

In its subsequent order declining to alter or amend the judgment, the district court properly assumed that, as plaintiff alleged, defendant had in fact denied legal services to plaintiff because of plaintiff's publicly expressed viewpoint. However, the court below then committed a new error of law by holding that governmental viewpoint-based discrimination is only unconstitutional if it "chills" the target of the

discrimination, and that a denial of legal services is insufficient injury as a matter of law.

Certainly a governmental provider of legal services need not accept every would-be client or every case that walks in the door. But the government may not categorically refuse services to a person just because that person dared publicly to criticize the governmental provider.

The judgment below must be reversed, and the matter remanded for further proceedings.

I. THE DISTRICT COURT'S INITIAL ORDER GRANTING JUDGMENT ON THE PLEADINGS IMPROPERLY RESOLVED DISPUTED QUESTIONS OF FACT.

This Court reviews *de novo* orders granting judgment on the pleadings. Syverson v. FirePond, Inc., 383 F.3d 745, 749 (8th Cir. 2004).

It is axiomatic that a case cannot be resolved on the pleadings when there is a dispute as to the material facts. Faibisch v. University of Minn., 304 F.3d 797, 803 (8th Cir. 2002) (judgment on pleadings appropriate "where no material issue of fact remains to be resolved"). The district court therefore erred when it indulged *defendant's* factual claims in granting judgment on the pleadings against *plaintiff*.

Plaintiff Wishnatsky asserts that defendant Rovner, director of a state law school legal services clinic, refused Wishnatsky's request for legal services because

of Wishnatsky's public criticism of Rovner and of her Clinical Education Program. Rovner claims, in contrast, that she and the CEP were just too busy to take Wishnatsky's case, and that she had ethical qualms because Wishnatsky's public criticisms would supposedly preclude an effective attorney-client relationship. Wishnatsky counters that those excuses are mere pretextual cover for refusing Wishnatsky because of his speech.

Resolution of this hotly contested factual dispute plainly must abide the outcome of discovery and either trial or summary judgment motions. At the pleadings stage, however, Wishnatsky's version of the facts must be taken as true. Syverson, 383 F.3d at 749; Faibisch, 304 F.3d at 803.

The district court, in granting judgment on the pleadings for defendant Rovner, accepted her asserted excuses at face value and ignored Wishnatsky's allegation of viewpoint discrimination. Order Granting Judgment on the Pleadings at 3-5 (D.N.D. July 29, 2004) (Add. A-3-5). This was plainly an improper inversion of the correct factual assumptions. The court below should have indulged *plaintiff's* allegations, not *defendant's*.

Hence, judgment on the pleadings must be reversed unless, *even taking plaintiff's allegations as true*, defendant would be entitled to judgment as a matter of law. That was the district court's second ruling, on the motion to alter or amend the

judgment. As demonstrated in the following argument section, here, too, the district court went astray.

II. THE DISTRICT COURT'S SUBSEQUENT ORDER ERRONEOUSLY REJECTED PLAINTIFF'S CLAIM OF UNCONSTITUTIONAL DISCRIMINATION.

This Court reviews orders denying Rule 59 motions to alter or amend the judgment for abuse of discretion. Centric Jones Co. v. City of Kearney, 324 F.3d 646, 649 (8th Cir. 2003). "A district court by definition abuses its discretion when it makes an error of law." Computrol, Inc. v. Newtrend, L.P., 203 F.3d 1064, 1070 (8th Cir. 2000). Hence, Rule 59(e) rulings are effectively reviewed *de novo* as to the pertinent law. Id.

Plaintiff Wishnatsky pointed out, in a motion to alter or amend the judgment, that the district court had improperly resolved disputed fact questions in favor of the *movant* (defendant) for judgment on the pleadings, rather than the party *opposing* the motion (plaintiff). In response, the district court correctly assumed that defendant Rovner had refused legal services to Wishnatsky because of Wishnatsky's public criticism of Rovner and her Clinical Education Program. Mem. Op. at 2 (D.N.D. Sept. 3, 2004) (Add. A-8). Nevertheless, the court below ruled that Wishnatsky's claim failed as a matter of law for failure to allege sufficient "injury" or "chill." Id. at 2-3 (Add. A-8-9). As demonstrated herein, that ruling was erroneous as well.

Wishnatsky alleges that, because of his publicly expressed viewpoint, Rovner has denied and continues to deny any consideration of Wishnatsky for the services of the state law school's legal clinic. Wishnatsky is, in effect, *persona non grata* because of his stated views on matters of public concern.[3] That is a textbook constitutional violation.

A. Government May Not Deny Its Services or Benefits Because of the Recipient's Viewpoint.

A governmental provider of legal services obviously need not take every client or case that walks in the door. There are many perfectly valid grounds for declining representation, e.g., the applicant does not meet the pertinent financial qualifications; the proposed case is meritless; the government agency is so overburdened or underfunded that it cannot take on new cases at the time; the proposed case falls outside the scope of the government agency's mandate; etc. On the other hand, there are grounds for a government agency to refuse legal services that would plainly be illegitimate, indeed unconstitutional, such as: the applicant's race or ethnicity; the

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[3]Had Wishnatsky taken a *supportive* position toward the clinical education program and its director, rather than a *critical* position, there is no reason to believe he would still be deemed a categorically unacceptable client. Obviously, the problem, for Rovner, was Wishnatsky's *point of view*.

applicant's sex; the applicant's political affiliation; the applicant's religious beliefs; the applicant's expressed position on a matter of public concern; etc.

Defendant Rovner presumably would concede these general propositions. At no time has she asserted an absolute right to refuse any applicant for any reason whatsoever.

Case law, moreover, amply confirms the specific proposition that government may not penalize a private party for espousing or expressing a particular viewpoint. This fundamental proposition applies not just to direct restrictions on speech, e.g., Boos v. Barry, 485 U.S. 312 (1988) (restriction on demonstrations critical of embassy occupants), but also to the denial of access to facilities, programs, or benefits, e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (restriction on reimbursements for student publications); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (restriction on use of school facilities); Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (restriction on range of allowable legal arguments in government-funded litigation). Indeed, even in the context of highly discretionary programs like awards for artistic excellence, viewpoint discrimination is strictly forbidden. See National Endowment for the Arts v. Finley, 524 U.S. 569, 583 (1998) (NEA grants program) ("directed viewpoint discrimination . . . would prompt this Court to invalidate a statute on its face"). See also Cornelius

v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985) (Combined Federal Campaign solicitations in federal workplaces) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

Nor can there be any doubt as to the constitutionally protected status of Wishnatsky's public commentary. "Criticism of public officials lies at the very core of speech protected by the First Amendment." Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964)) (internal quotation marks and additional citation omitted).

Therefore, Wishnatsky has plainly stated a valid claim of viewpoint-discriminatory denial of access to government services or benefits. Such a claim is actionable under the federal constitutional right to free speech, as demonstrated by cases like Rosenberger, Lamb's Chapel, and Velazquez. Moreover, the Equal Protection Clause of the Fourteenth Amendment also forbids viewpoint-based discrimination. See Police Dep't v. Mosley, 408 U.S. 92, 94-99 (1972); Carey v. Brown, 447 U.S. 455, 461-63 (1980); RAV v. City of St. Paul, 505 U.S. 377, 384 n.4 (1992). This remains true even if defendant is targeting only Wishnatsky for discrimination. Even a "class of one" has the constitutional right to freedom from invidious discrimination. Village of Willowbrook v. Olech, 528 U.S. 562 (2000)

(per curiam). See also Clark v. Jeter, 486 U.S. 456, 461 (1988) (discrimination based upon the exercise of fundamental rights triggers "the most exacting scrutiny").[4]

B. The District Court Erred by Importing an Inapposite "Chill" Element.

The district court declined to apply this line of authority. Instead, the district court characterized this case as a "retaliation" case, Mem. Op. at 2 (D.N.D. Sept. 3, 2004) (Add. A-8), and held that Wishnatsky's complaint failed to allege sufficient injury to "chill" an ordinary person, id. at 2-3 (Add. A-8-9). Tellingly, defendant Rovner never made this argument below. The lower court apparently seized upon this theory *sua sponte*.

The district court's reasoning is doubly flawed. First, "chill" is not an independent element of equal access viewpoint discrimination cases. And second, even if it were, the denial of potentially very costly legal services is more than sufficient injury to meet any "chill" element.

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[4]The district court ruled that Wishnatsky failed to state a claim. Accordingly, the court below never reached the question whether the viewpoint discrimination at issue might survive strict scrutiny under the Free Speech and Equal Protection Clauses. Defendant Rovner remains free to make this argument on remand. In the present appeal from judgment on the pleadings, this factually dependent argument is not before the Court.

The cases establishing the well-settled rule against governmental viewpoint discrimination in access to governmental services or benefits simply do not impose an additional requirement that the discrimination be "likely to chill a person of ordinary firmness from . . . continuing to speak out," Mem. Op. at 2-3. See, e.g., Lamb's Chapel; Rosenberger; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). Cases in this Circuit likewise do not impose or even hint at an additional "chill" element where government denies services or benefits on the basis of the private speaker's viewpoint. E.g., Wigg v. Sioux Falls School Dist., 382 F.3d 807 (8th Cir. 2004) (viewpoint-based denial of teacher's participation in after-school program); Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004) (viewpoint-based exclusion from Adopt-A-Highway program); Lewis v. Wilson, 253 F.3d 1077 (8th Cir. 2001) (potentially viewpoint-based denial of participation in vanity license plate program), cert. denied, 535 U.S. 986 (2002).

A church excluded from equal access to after-hours use of public school facilities, as in Lamb's Chapel, is certainly not required to prove that it felt pressured to alter its religious viewpoint in response. It strains credulity to think that a strongly evangelical entity, like the plaintiffs in Rosenberger or Good News Club, would be "chilled" into changing the viewpoint of their message just because of a denial of printing expenses (in Rosenberger) or the need to locate meetings off-campus instead

of on-campus (in Good News). And it is patently implausible to think that merely denying participation in an "Adopt-A-Highway" program, as in Robb, or denying the vanity plate of one's choice, as in Lewis, would "chill" a person of ordinary firmness from anything at all.

While government discrimination against private viewpoints necessarily exerts a chilling effect, Rosenberger, 515 U.S. at 835-36, proof of a "chill" is simply not an independent element of the constitutional violation. Indeed, if alleging "sufficient chill" were a requirement, government could immunize its violation of the First and Fourteenth Amendments by proving that the "chill" did not push the mercury down "too far" in the thermometer.

The district court's basic mistake was to lift the "chill" test from an inapposite line of "retaliation" cases and try to force that test upon the present circumstances. The line of cases the district court sought to superimpose addresses those situations where governmental officials react adversely to criticism, but their adverse reaction falls short of denying access to services or benefits. In such cases, courts have to distinguish between trivial retaliation -- e.g., grumpiness or verbal rebukes -- and actionable retaliation -- e.g., discharging an employee or making physical attacks. The cases the district court invoked trace precisely those distinctions. See Bloch v. Ribar,

156 F.3d 673 (6th Cir. 1998)[5] (sheriff's revelation, at press conference, of humiliating details of plaintiff's rape, was sufficient to support retaliation claim); Garcia v. City of Trenton, 348 F.3d 726 (8th Cir. 2003) (discriminatory issuance of four parking tickets totaling $35.00 was sufficient to support retaliation claim); Carroll v. Pfeffer, 262 F.3d 847 (8th Cir. 2001) (five incidents of mostly nonphysical harassment scattered over several years was insufficient to support retaliation claim), cert. denied, 536 U.S. 907 (2002). See also Naucke v. City of Park Hills, 284 F.3d 923 (8th Cir. 2002) (offensive comments by public officials were insufficient to support retaliation claim). Importantly, *none* of these cases involved the discriminatory *denial of benefits or services* because of the plaintiff's viewpoint.

C. Even if "Chill" Were a Necessary Element of the Claim, Which It is Not, that Element Would Be Satisfied Here.

Moreover, even if this ill-fitting retaliation line of cases were transposed to the present case, the elements of a claim would still be met. The "chill" element is "designed to weed out *trivial* matters," Garcia, 348 F.3d at 728 (emphasis added), not to hobble the First Amendment. As this Court explained,

> In applying this "test," we are mindful of the words of Judge Posner in Bart v. Telford, [677 F.2d 622,] 625 [(7th Cir. 1982)]:

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[5]The district court, Mem. Op. at 2 (D.N.D. Sept. 3, 2004) (Add. A-8), incorrectly cited this case as an Eighth Circuit decision.

> The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable.

Garcia, 348 F.3d at 729.

If $35.00 worth of parking tickets suffices to meet the "chill" test, as this Court held in Garcia, 348 F.3d at 729, then the denial of thousands of dollars worth of government legal services, as in this case, easily suffices.

Again, the district court was in error when it *sua sponte* imposed on this case the "chill" element from retaliation cases. But even under that inapposite test, Wishnatsky adequately alleges a constitutional violation.

CONCLUSION

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

Respectfully submitted,

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November 22, 2004

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 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 4,204 words.

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Walter M. Weber

November 22, 2004

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 25(d), Fed. R. App. P., that an original and nine copies of the 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 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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