2000 WL 33991317 (C.A.5)

For Opinion See 252 F.3d 781

United States Court of Appeals,

Fifth Circuit.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; St. James Citizens for Jobs & the Environment; Calcasieu League for Environmental Action Now; Holy Cross Neighborhood Association; Fishermen & Concerned Citizens' Association of Plaquemines Parish; St. Thomas Residents Council; Louisiana Environmental Action Network; Louisiana Association of Community Organizations for Reform Now; North Baton Rouge Environmental Association; Louisiana Communities United; Robert Kuehn; Christopher Gobert; Elizabeth E. Teel; Jane Johnson; William P. Quigley; Tulane Environmental Law Society; Tulane University Graduate and Professional Student Association; Inga Haagenson Causey; Carolyn Delizia; Dana Hanaman, Plaintiffs - Appellants,

v.

SUPREME COURT OF THE STATE OF LOUISIANA, Defendant - Appellee.

No. 99-30895.

March 14, 2000.

On appeal from the United States District Court for the Eastern District of Louisiana No. Civ. A. 99-1205

Reply Brief of Appellants

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heightened scrutiny in light of the lack of any justification for the rule, the rule's evident overbreadth, and the ready availability of less restrictive alternatives.

Unable to deny that plaintiffs have adequately pleaded the essential elements of both viewpoint discrimination and unconstitutional conditions claims, LSC endeavors instead to divert the Court's attention by mischaracterizing plaintiffs' allegations, misrepresenting the applicable legal framework, and raising various non sequiturs. LSC devotes much of its brief to repeating again and again that there is no constitutional right of the poor to counsel in civil cases, and that states are not obligated to authorize law students to practice law through law school clinical programs. But no matter how many times LSC says it, this case is *not* about a right to counsel or students' right to practice law. LSC has no responses to the key doctrinal points, which clearly require remand.

***4** *Argument*

I.

Plaintiffs' Viewpoint Discrimination Claim Requires Remand

LSC's brief fails to confront plaintiffs' central claim in this lawsuit: that LSC adopted the amended Rule XX at the urging of powerful government and business interests in Louisiana in retaliation for the role that plaintiff community groups and TELC played in raising environmental concerns about the proposed Shintech plant and other development projects, and to prevent TELC from representing such groups in the future. Plaintiffs' opening brief explicitly set forth this claim, *see* Appeal Brief of Plaintiffs-Appellants (Pl. Br.) at 26-34. But it is only in a footnote late in its brief that LSC acknowledges that "the plaintiffs' 'viewpoint discrimination' argument hinges on the alleged nexus between the TELC's representation of a few groups in the Shintech matter and the recent changes to Rule XX ...." Appeal Brief of Defendant-Appellee LSC (LSC Br.) at 53 n.91; *see also* LSC Br. at 5 ¶ 2, 6 ¶ 9.

That footnote is the only place where the word Shintech appears in LSC's brief. However, LSC nowhere denies that a charge that government officials took adverse action against citizens in retaliation for their speech and advocacy activities states a claim of governmental viewpoint discrimination in violation of

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***6** Although LSC makes express reference to viewpoint discrimination in the heading to Section 5 of its brief, LSC's brief contains no real discussion of the claim, and instead resorts to mischaracterizing plaintiffs' allegations, misrepresenting the applicable legal framework, and raising various non sequiturs.

A. The Speech and Advocacy Activities That Triggered the Viewpoint-Discriminatory Backlash Are Protected Under the First Amendment

There can be no serious question that the speech and advocacy activities that plaintiffs charge elicited the viewpoint-discriminatory and retaliatory backlash were "conduct ... protected by the First Amendment," *Brady*, 113 F.3d at 1423, thus making out the first element of a viewpoint discrimination claim. Because LSC's brief contains so little focused discussion of the viewpoint discrimination claim, it is difficult to tell whether LSC questions this point. *See* LSC Br. at 29 (discussing "'speech' of lay persons who attempt to act as attorneys for others" in relation to viewpoint discrimination). If LSC means to suggest that activities that sparked the viewpoint-discriminatory backlash were not protected under the First Amendment -- perhaps because some of them involved advocacy by law students in court -- that suggestion is unsupportable.

***7** Plaintiffs charge that the "'substantial' or 'motivating' factor behind the defendant's [adverse] action," *Brady*, 113 F.3d at 1423, was the speech and associational activities of plaintiff community groups, law professors, and law students in participating in public debates and legal proceedings raising environmental questions and objections to various proposals, including most notably the Shintech project. *See* Pl. Br. at 8-13; Compl. at ¶¶ 23-27. The parties involved in these First Amendment activities were thus not just law students representing clients pursuant to Rule XX, but also licensed lawyers, lay individuals and organizations. And the speech activities that triggered the viewpoint discriminatory backlash took place in diverse settings, including public hearings, community meetings, agency administrative proceedings, court proceedings, and the media. *See* Pl. Br. at 8-13; Compl. at ¶ ¶ 26-27. It was all of these activities that led the Chamber, the Business Council, and the Louisiana Association of Business & Industry to file complaints with LSC charging TELC with taking positions "in direct conflict with business positions" and that were "anti-business" and asking LSC "to investigate th[ose] positions" and to impose restrictions on the clinics. *See* Pl. Br. at 10-13; Compl. at ¶¶ 30-31, 33, 37-38.

Few would question that these expressions of opinion by citizens on matters of public, social, and political concern that occurred outside of court proceedings ***8** are among the most highly protected forms of speech under the First Amendment. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("commenting on matters of public concern [is a] classic form[] of speech that lie[s] at the heart of the First Amendment"). The Supreme Court has also long recognized that advancement of positions on matters of public concern through litigation can be "a means for achieving the lawful objective of equality of treatment by all government, federal, state and local, for the members of [particular] communit[ies] in this country" and "is thus a form of political expression." *NAACP v. Button*, 371 U.S. 415, 429 (1963). *Accord In re Primus*, 436 U.S. 412, 428 (1978); *see also Button*, 371 U.S. at 430 (litigation is a means "to petition [the government] for redress of grievances").

Thus, it is irrelevant to plaintiffs' viewpoint discrimination claim whether law students have a First Amendment right to engage in the practice of law. For even assuming that they do not, the First Amendment protects plaintiffs from being subject to retaliation and discrimination by the government for viewpoints expressed in the course of public advocacy.

***9** B. Viewpoint Discrimination Is Actionable Even Where the Government's Adverse Action Is the Denial of a Benefit to Which the Plaintiff Has No "Right"

Regarding the second element of a viewpoint discrimination claim -- that the defendant has taken adverse action against the plaintiff for which the "'substantial' or 'motivating' factor" was the plaintiff's protected speech, *see Brady*, 113 F.3d at

1423 -- there can also be little doubt that the new restrictions imposed by the Rule XX amendments satisfy this element, provided that plaintiffs have sufficiently alleged LSC's retaliatory motivation. Although, again, it is sometimes hard to tell from LSC's brief precisely what its position is on this issue, LSC appears to argue that, because law students have no First Amendment (or other) right to practice law, the changes in Rule XX restricting student practice cannot count as an "adverse action" for purposes of a viewpoint discrimination claim. *See* LSC Br. at 33-34.

If this is LSC's point, it is wholly unsupportable. For the Supreme Court's extensive body of viewpoint-discrimination jurisprudence chiefly involves retaliatory denial of benefits to which the recipient had absolutely no right. Thus, for example, in employment-related cases, the jobs at issue are generally at-will employment. *See, e.g., Mount Healthy v. Doyle,* 429 U.S. 274, 283-84 (1977) (non-tenured teacher who "could have been discharged for no reason whatever" ***10** protected against viewpoint-based firing); *Board of County Comm'rs, Wabaunsee County v. Umbehr,* 518 U.S. 668, 679 (1996) ("the prohibition of unconstitutional conditions on speech applies 'regardless of the public employee's contractual or other claim to a job"') (quoting *Perry,* 408 U.S. at 597). And the cases concerning viewpoint-based denial of other benefits similarly involve benefits that the governmental body involved is under no duty to create or confer. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.,* 473 U.S. 788, 812-13 (1985) (involving charge of viewpoint-based denial of opportunity to participate in federal government workplace charity drive); *Speiser v. Randall,* 357 U.S. 513 (1958) (charge of viewpoint-based denial of state-created homeowners property tax exemption). Almost by definition, if plaintiffs in these cases possessed stronger rights-based entitlements to their positions or benefits, they would have sued on that basis rather than under the First Amendment.

Attempting to distinguish these precedents, LSC suggests that *Brady, Perry v. Sindermann,* 408 U.S. 593 (1972), and the myriad other public employee viewpoint discrimination cases hinge on the existence of an underlying "right" to or "reasonable expectation" of continued employment. LSC Br. at 34, 42. This contention is without basis. Tellingly, LSC cites nothing from these opinions supporting this novel proposition and cases such as *Mount Healthy* and *Umbehr* ***11** could not be clearer that the First Amendment limits government's power to punish public employees for their speech regardless of what other entitlement they might have to the position.

In a similar vein, LSC attempts to distinguish *Speiser* on the ground that "The tax exemption was open to all, and there was a special burden placed upon those who refused to [swear a loyalty oath in order to receive the benefit]." LSC Br. at 34. But the homeowners tax exemption in *Speiser* was one that the state was under no obligation to create and could abolish or redefine for any reason (or no reason at all). Nonetheless, the Court held that denying it to certain citizens based on their viewpoints violated the First Amendment. *Speiser,* 357 U.S. at 518.

Finally, in view of the obvious similarities between this case and *Cornelius,* LSC attempts to distinguish that precedent, but cannot. In appreciating the relevance of *Cornelius* to this case, it is important to understand that in *Cornelius* the Supreme Court considered two separate forms of a First Amendment speech discrimination claim and that it is the second of the two on which plaintiffs rely.

The Court first considered whether the federal government's stated policy of excluding non-profit "advocacy" groups from participation in the Combined Federal Campaign, the federal workplace charity drive at issue in that case, ***12** violated the First Amendment. The Court concluded that the policy did not facially violate the First Amendment, finding that the charity drive qualified as a "non-public forum" and that barring participation by advocacy groups was a permissible content-based (not viewpoint-based) restriction since it applied to all advocacy groups, regardless of their political orientation. 473 U.S. at 802-12.

After reaching that conclusion, however, the Court went on to discuss a second form of viewpoint discrimination claim: the possibility that the facially general bar on advocacy groups was in reality adopted for the purpose of excluding certain prominent civil rights and environmental groups disfavored by the government. The Court held that the First Amendment forbids such "exclusion that is in fact based on the desire to suppress a particular point of view," *Cornelius*, 473 U.S. at 812, and remanded the case for fact-finding on that claim. *Id.* at 813.

Cornelius is a troubling precedent for LSC since it makes clear that, as in this case, adoption of a generally applicable and facially neutral rule violates the First Amendment where it can be shown to have been motivated by a desire to suppress or retaliate against persons espousing a disfavored viewpoint. LSC attempts to blunt the force of *Cornelius* by contending that "viewpoint discrimination requires ... a limitation of a forum equally open to others similarly ***13** situated, [and] also that the speaker be a member of the class for whose benefit the forum was created." LSC Br. at 30 (citing *Cornelius*, 473 U.S. at 806). But *Cornelius* did not ultimately rest on these criteria. Rather, the Court made clear that even exclusion from a non-public forum constitutes actionable viewpoint discrimination, and will require remand where the government's action is improperly motivated. *See Cornelius*, 473 U.S. at 812-13; *accord International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992).

LSC's arguments misunderstand the fundamental premise of the Supreme Court's viewpoint discrimination jurisprudence. The point of these cases is that actions that government ordinarily has the power to take and that adversely affect particular persons or groups violate the First Amendment where these exercises of power are motivated by opposition to, and retaliation for, disfavored views. While LSC enjoys broad latitude to modify the student practice rule in a variety of ways -- or to refuse to authorize student practice at all -- like all government actors, it cannot do so where its action is "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 813. *But see* Slip Op. at 26 ("[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary.").

***14** C. Even If Some Forms of Viewpoint-Inspired Retaliation Are Too Insignificant to Be Actionable, The Harms Alleged Here Far Exceed That Threshold

Although never actually confronting plaintiffs' viewpoint discrimination claim, LSC invents bases for distinguishing many of the authorities cited in plaintiffs' brief. Contending that *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999), supports their position, rather than plaintiffs', LSC notes that, in that case, viewpoint-inspired government retaliation in the form of "criticism, investigations, and accusations" of a public employee was deemed too trivial an injury to state a claim under the First Amendment. 174 F.3d at 500; LSC Br. at 42-43. But even if there were some support for a "de minimis exception" to the prohibition against government viewpoint discrimination, the very substantial harms imposed here rise far above that level. Governmental officials and business interests in Louisiana began by "critici[zing], investigati[ng], and accus[ing]" the community groups, law professors, and law students who voiced complaints about the proposed Shintech plant and other environmental matters, but their actions did not stop there. Rather, LSC reacted to these interests by enacting a formal rule change substantially restricting future law clinic activities. The effect of the amendments has been to deny most such community groups access to law clinic counsel in the future, and to limit law clinic legal outreach to such groups. *See* Pl. Br. at 14-15, ***15** 50-52. Just as denial of participation in a government program, *see, e.g., Cornelius*, 473 U.S. at 812-13; *East Timor Action Network, Inc. v. City of New York*, 71 F. Supp. 2d 334 (S.D.N.Y. 1999), or denial of a municipal contract, *see, e.g., Umbehr*, 518 U.S. 668, is a sufficiently significant harm to support a First Amendment viewpoint discrimination claim, so must be the restriction of the law student practice rules at issue in this case.[FN1]

FN1. Moreover, the case law shows that "even minor forms of retaliation can support a First Amendment claim." *Smith v. Fruin*, 28 F.3d 646, 649 n.3 (7th Cir. 1994). *See, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 & n.8 (1990); *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) (revocation of permission for tow-truck operator to use police radio frequencies "in retaliation for the exercise of his First Amendment right of free speech" triggers strict scrutiny).

D. Rule XX's Facial Neutrality Does Not Defeat Plaintiffs' Claim

LSC similarly errs in suggesting that Rule XX's facial neutrality -- the fact that Rule XX does not state "the Court sees fit to limit environmental advocacy on behalf of community groups" -- insulates it from First Amendment viewpoint discrimination challenge. *See* LSC Br. at 29. But that is not the law. Even facially neutral government actions must comply with the First Amendment's prohibition against actual viewpoint discrimination. This is illustrated by *Cornelius*. *See* discussion *supra* Part I.A.

***16** Because plaintiffs have amply pleaded the elements of a First Amendment viewpoint discrimination claim, and because such cases hinge on questions of fact and motivation that are inappropriate for disposition on summary judgment, *see Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184, 190 n.32 (5th Cir. 1995); Pl. Br. at 46-47 -- let alone a motion to dismiss -- the district court's dismissal was error, which should be reversed and the claim remanded.

II.

Plaintiffs' Unconstitutional Conditions Claim Requires Remand

LSC employs a similar strategy of avoidance regarding plaintiffs' First Amendment unconstitutional conditions claim. Refusing to acknowledge even the existence of the Supreme Court's unconstitutional conditions doctrine, LSC makes only glancing reference to the term "unconstitutional conditions" even though, after the viewpoint discrimination claim, this claim was the other major cause of action discussed in plaintiffs' brief. Instead, LSC repeats again and again the undoubtedly true, but for this case legally irrelevant, propositions that the poor have no right to government-financed counsel in civil cases, and that there is no right of law students to practice law. *See, e.g.*, LSC Br. at 17, 25.

***17** Although plaintiffs' complaint identifies multiple portions of the Rule XX amendments that impose unconstitutional conditions on protected rights, perhaps the most egregious is the provision that pressures clinical law professors to forgo their First Amendment rights to engage in legal outreach to disadvantaged Louisianans.

LSC does not deny that law clinic professors, as licensed attorneys engaged in not-for-profit, public interest representation, have an unassailable First Amendment right recognized in cases such as *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), to engage in legal outreach and to represent any persons who, as a consequence, decide that they wish to pursue legal action. *See* Pl. Br. at 48-50. Under Rule XX, when law professors exercise this right, then law students are barred from assisting them in a representative capacity on such cases. Far from trivial, this condition effectively forces clinical law professors to cease engaging in legal outreach, since the purpose of their clinics is to enable students to gain experience representing clients. *See* Rule XX § 1; Pl. Br. at 51-52. This restriction follows the classic model of an unconstitutional condition: rather than directly prohibiting persons from exercising a constitutionally protected right, the

government instead pressures them indirectly to refrain from exercising it by threatening them with loss of a privilege or benefit ***18** should they continue to do so. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 716 (1996) (rather than requiring citizens to support mayor's reelection campaign, municipality pressured them to give up their right to political choice by denying privilege of municipal contracts to those who did not support the campaign); Pl. Br. at 27-30.

Although LSC's brief does not directly address the unconstitutional conditions claim, it includes arguments that appear aimed at undercutting the claim. None, however, stand up under careful examination.

A. The Fact That Rule XX Is Not Framed as a Direct Bar on Legal Outreach by Clinical Law Professors Does Not Insulate It From Unconstitutional Conditions Review

LSC's sole response to plaintiffs' claim about the burden placed on law professors is that Rule XX imposes no legally relevant burdens on law professors' rights since it does not directly bar them from engaging in legal outreach. *See* LSC Br. at 27. But unconstitutional conditions cases are almost never about direct bars. Instead they involve indirect attempts to pressure parties into giving up rights by conditioning access to privileges. Thus, in *FCC v. League of Women Voters,* 468 U.S. 364 (1984), the government did not ban all public television stations from engaging in all editorializing. Rather, it pressured them to refrain ***19** from such speech by denying them federal subsidies if they did. Similarly, in *City of Northlake,* the municipality did not require its citizens to support its mayor's reelection campaign, but instead pressured them to give up their right to political choice by denying municipal contracts to those who failed to contribute to the campaign. 518 U.S. at 716. The fact that Rule XX's burden on law professors' right to legal outreach is indirect thus neither distinguishes it from other unconstitutional conditions cases nor prevents it from triggering heightened constitutional scrutiny.

B. Rule XX's Burden on First Amendment Rights Triggers Heightened Constitutional Scrutiny, Not Rational Basis Review

The district court concluded that the challenged Rule XX restrictions are subject only to rational basis review. *See* Slip Op. at 24-25. But under the Supreme Court's unconstitutional conditions case law, such burdens on First Amendment rights are permissible only if they are narrowly tailored to furthering an important government interest. *See Rutan v. Republican Party of Ill.,* 497 U.S. 62, 74 (1990) (holding that the government may penalize the exercise of a First Amendment right only if the government's practice is "narrowly tailored to further vital government interests"); *League of Women Voters,* 468 U.S. at 398-99 ***20** (rejecting restriction that was "not narrowly tailored to address any of the Government's suggested goals."). Indeed, although LSC contends (wrongly) that any challenge to the Rule XX indigence standards are subject only to rational basis review, LSC Br. at 37, it never even tries to argue that the unprecedented law professor outreach provision merits such relaxed review.

C. Remand Is Required to Determine Whether Rule XX's Burden on Law Professors' Right to Engage in Legal Outreach is Narrowly Tailored to an Important Government Interest

LSC has offered absolutely no justification for why clinical law professors should be the only attorneys providing pro bono legal services in Louisiana who must endure government pressure to refrain from exercising their constitutionally guaranteed right to engage in legal outreach to potential clients. But consideration of whether LSC could justify burdening law professors' right to engage in legal outreach by showing the condition to be narrowly tailored to an important government

interest is premature at this point. The questions of adequate justification and narrow tailoring are mixed questions of law and fact, *see* *International Soc'y for Krishna Consciousness v. City of Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989), that require development of a record and are inappropriate for resolution on this motion to dismiss.

***21** III.

LSC's Other Arguments Are Misplaced

LSC devotes the majority of its brief to repeating a litany of arguments that ultimately have little bearing on this case. While most do not warrant a response, plaintiffs will briefly address a few.

A. The Standards of the Federal Legal Services Corporation Are Not Relevant to This Case

LSC attempts to divert attention from the troubling facts concerning the retaliatory issuance of the Rule XX amendments by suggesting that a ruling remanding this case for proper consideration of plaintiffs' claims would somehow imply that the rules of the federal Legal Services Corporation are unconstitutional. But this suggestion cannot be right. Plaintiffs' core claim here is that in enacting the Rule XX amendments, LSC acted in retaliation for the unpopular speech of plaintiffs in Shintech and other environmental matters. This claim hinges on unique events that occurred in Louisiana and sheds no light on whether the entirely separate history of the enactment of the rules of the federal Legal Services Corporation would support a claim of unconstitutional viewpoint discrimination.

***22** Moreover, the constitutional problems with Rule XX arise in a legal context that is fundamentally different from that in which the rules of the Legal Services Corporation operate. Law school clinics in Louisiana operate entirely with non-governmental funds whereas the federal Legal Services Corporation is the major funder of the programs to which its rules apply. While government entities enjoy significant discretion in determining the types of services to authorize with their own funds, *see* *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991), they enjoy far less latitude to limit the privately funded operations of government fund recipients. *See* *League of Women Voters*, 468 U.S. at 400-01. Moreover, notwithstanding LSC's basic authority to regulate the qualifications of those who practice law, LSC has insufficient interest to justify pressuring an entirely non-government funded entity, such as a law school clinical program, to prohibit indisputably qualified practitioners from reaching out to potential clients, or from deciding which clients to serve.[FN2] Thus, despite the fact that Louisiana's Rule XX and the federal Legal Services Corporation rules both incorporate income eligibility

FN2. Indeed, the federal Legal Services Corporation rules concerning group clients are expressly inapplicable to representation that is financed with non-federal funds. Thus, under those rules, grantees may use non-federal funds to represent any group regardless of the incomes of its members. *See* 45 C.F.R. §§ 1611.3(e), 1611.5(c) (2000).

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FN3. ?? serve indigent clients, only one other state imposes strict dollar eligibility thresholds; every other state permits clinic staff to assess indigence on a case by case basis. This distinction is critical, as clinic staff are not required to demand disclosure of sensitive and embarrassing personal financial information of prospective clients

-- something which chills even the eligible from enforcing their rights. Also community organizations are not required to maintain systems to track members' incomes. Nor under such states' flexible standards can litigation adversaries as easily justify pursuing harassing discovery of clients' sensitive and embarrassing personal financial information under the pretense of exploring their eligibility for law clinic representation.

***24** C. Plaintiffs Have Standing

LSC's suggestion that plaintiffs in this case have not suffered the injury-infact required for standing under Article III of the Constitution is unfounded. Article III's requirements for standing are familiar:
a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 704 (2000). That each of the categories of plaintiffs in this case has suffered a concrete injury-in-fact that is traceable to the Rule XX amendments and would be redressed by their invalidation is self-evident. First, the community organization plaintiffs have all alleged that while law clinics, particularly TELC, had represented them in the past, the new Rule XX amendments effectively prevent ***25** them from qualifying for law clinic representation, denying them the legal counsel they need to confront specific, pressing environmental and other problems. *See* Compl. at ¶¶ 76-89.

Second, the law clinic professors and law students have similarly alleged that the Rule XX amendments prevent them from continuing to engage in legal outreach to, and representation of, community organizations whose members have pressing legal needs -- many of whom the professors or students were able to represent in the past prior to the Rule XX amendments. As alleged in the complaint, this inability to represent such clients denies the students and faculty both the learning and teaching opportunities that such representation presents, and frustrates their desire to associate with and provide legal assistance to community organizations faced with compelling, often heart-wrenching threats to their well-being. *See* Compl. at ¶¶ 90, 95, 97, 101, 102, 104, 107, 116, 117, 119, 120, 122.

Finally, the two Tulane student organization plaintiffs enjoy associational standing because (1) their memberships include law students who, like the individual student plaintiffs, otherwise have standing to sue in their own right, Compl. at ¶¶ 110-12; (2) advocacy concerning the quality of learning of experiences available to law students at Tulane University is germane to the organizations' purposes, Compl. at ¶¶ 16(b), 110; and (3) this suit seeks ***26** generalized injunctive relief and so does not require participation of individual members in the lawsuit. *See Friends of the Earth,* 120 S. Ct. at 704 (citing *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

LSC's puzzling suggestion that these very real and coherent injuries do not suffice to establish Article III standing appears to be based on the mistaken assumption that, in order to enjoy standing, a plaintiff must suffer an injury to an underlying legally protected right or interest (separate from the violation being asserted). But that is simply not the law. Cases such as *Friends of the Earth* and *Cornelius* demonstrate that a concrete and particularized disadvantage caused by a challenged action constitutes injury-in-fact. Thus, in *Friends of the Earth,* a case challenging whether a factory's discharge of chemicals into a river violated the Clean Water Act, the Supreme Court recognized that private persons who previously had made recreational use of the river and enjoyed its aesthetic beauty had suffered injury-in-fact for Article III purposes where, because of the pollution, they could no longer do so. *See* 120 S. Ct. at 704.[FN4] Although these persons obviously had no ownership right or legally protected interest in the river, the ***27** Court nonetheless held that they were injured by the

challenged pollution's interference with their desire to continue making recreational and aesthetic use of that natural resource. *See id.* at 705.

> FN4. Technically, the plaintiff in *Friends of the Earth* was an environmental organization. However, in the course of evaluating whether the organization met the requirements for associational standing, the Court examined whether various of its non-plaintiff members would have had individual standing to sue in their own right. *See* 120 S. Ct. at 704-05.

Similarly, in *Cornelius,* there was no question that the advocacy groups denied the benefit of participating in the federal charity drive had suffered an "injury" supporting standing although they had no "right" to participate in the charity drive. Indeed, if direct injury to a legally protected interest were a requirement for standing, then plaintiffs would be barred from litigating any unconstitutional conditions or viewpoint discrimination case since such claims, by definition, involve denials of privileges or advantages in which the plaintiff normally could claim no right or legally protected interest. *See* discussion *supra* Part I.B.

But what all such cases -- including this case -- have in common is a concrete, tangible disadvantage that is caused by a government action that is alleged to violate the law. Thus, in cases such as *Cornelius* and *East Timor Acton Network,* the denial of participation in the government program (to which there otherwise was no right) was alleged to result from a violation of the First Amendment prohibition against governmental viewpoint discrimination. And in *Friends of the Earth,* the concrete recreational and aesthetic harms were alleged to ***28** have resulted from violations of the Clean Water Act. Here as well, plaintiffs charge that concrete, enumerated injuries resulted from the government's violation of the plaintiffs' First Amendment right not to suffer adverse government action and retaliation because of viewpoints they have expressed.

D. The Abstention Argument and Other Issues Raised in the Washington Legal Foundation *Amicus* Brief Have No Relevance to This Case

Finally, a non-party to this litigation, the Washington Legal Foundation (WLF), recently filed an *amicus* brief advancing a new and somewhat puzzling argument that LSC had evidently deemed not sufficiently serious to merit inclusion in its brief. While this Court ordinarily will not consider any argument that is not raised by the parties, *see Bell v. Wolfish,* 441 U.S. 520, 531 n. 13 (1979); *Corrosion Proof Fittings v. Environmental Protection Agency,* 947 F.2d 1201, 1208 (5th Cir. 1991) (disregarding arguments raised only in briefs of *amici*), plaintiffs will briefly note the defects in WLF's argument.

WLF raises the novel suggestion that principles of federalism evident in the Supreme Court's "*Younger*" abstention doctrine, *see Younger v. Harris,* 401 U.S. 37 (1971), preclude federal court jurisdiction over this matter. But as is apparent to anyone remotely familiar with them, *Younger* and related abstention doctrines ***29** do not and cannot apply here, as there is no ongoing state court or administrative proceeding relating to this matter.

Article III and federal statute vest the "federal courts [with] a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716 (1996). Only sparingly has the Supreme Court recognized the narrowest of exceptions to this fundamental obligation. And the Court has "been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment" as is the case here. *City of Houston v. Hill,* 482 U.S. 451, 467-68 (1987).

Under the *Younger* abstention doctrine invoked by WLF, a federal court may decline to exercise its jurisdiction only where three conditions are met: (1) there is an ongoing state court proceeding; (2) the proceedings implicate important state interests; and (3) there will be an opportunity in the state court proceedings to raise any constitutional claim. *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); *Wrightman v. Texas Supreme Ct.*, 84 F.3d 188, 189 (5th Cir. 1996). Here the first of these conditions cannot be satisfied since no parallel state court or administrative proceeding is either pending or anticipated. *See* ***30***Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (*Younger* abstention is clearly erroneous where there is no allegation of a pending state court proceeding).

Amicus WLF also relies on *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), for the proposition that LSC is not a proper defendant in this matter as it is protected by legislative immunity. As *Consumers Union* itself makes clear, however, a state supreme court that not only promulgates rules governing attorney conduct, but also enforces those rules, is not shielded from federal court review of the constitutionality of its actions. *See id.* at 736 ("[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities.").

Like the Supreme Court of Virginia, LSC both sets the rules that regulate attorney conduct and enforces them. *See Succession of Wallace*, 574 So. 2d 348, 350 (La. 1991) (holding that LSC has exclusive authority to admit, discipline, suspend, and disbar attorneys).[FN5] Thus, the federal courts may in this case properly ***31** enjoin LSC from continuing to enforce the unconstitutional Rule XX, in the same way that federal courts routinely enjoin state supreme courts from enforcing other unconstitutional provisions of state bar rules. *See Rapp v. Committee on Professional Ethics & Conduct*, 504 F. Supp. 1092, 1099-1 101 (D. Iowa 1980); *Rapp v. Disciplinary Bd. of Haw. Supreme Ct.*, 916 F. Supp. 1525 (D. Haw. 1996). Because LSC not only amended Rule XX, but will also now enforce it against plaintiffs and other attorneys in Louisiana, prospective relief is an available remedy against LSC. *Cf. Pulliam v. Allen, 466* U.S. 522, 541-42 (1984) (holding that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity").

> FN5. Under the Louisiana Constitution, LSC has original jurisdiction over all disciplinary proceedings against attorneys and has the authority to establish procedural and administrative rules. *See* La. Const. Art. 5, § 5 (A) - (B). LSC has exercised this authority to create an Attorney Discipline Board, with members appointed by LSC, which initially hears all cases of attorney misconduct. *See* LSC Rule XIX, § 2. Appeals from decisions of the Attorney Disciplinary Board imposing sanctions on attorneys proceed directly to LSC. *See id.* § 11. LSC has also created the position of Disciplinary Counsel, whose appointment LSC must approve, to initiate and carry out the prosecution of all matters of attorney misconduct. *See* LSC Rule XIX, § 4.

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; St. James Citizens for Jobs & the Environment; Calcasieu League for Environmental Action Now; Holy Cross Neighborhood Association; Fishermen & Concerned Citizens' Association of Plaquemines Parish; St. Thomas Residents Council; Louisiana Environmental Action Network; Louisiana Association of Community Organizations for Reform Now; North Baton Rouge Environmental Association; Louisiana Communities
2000 WL 33991317 (C.A.5) (Appellate Brief)

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