No. 99-30895

IN THE UNITED STATES COURT OF APPEALS
FOR THE 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.

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

BRIEF OF APPELLANTS

DAVID S. UDELL
E. JOSHUA ROSENKRANZ
PAUL K. SONN
PHILIP G. GALLAGHER
BURT NEUBORNE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 5th
Floor
New York, New York 10013
Tel: (212) 998-6720
Fax: (212) 995-4550

MARY E. HOWELL (#7030)
HOWELL & SNEAD
316 South Dorgenois Street
New Orleans, Louisiana 70119
Tel: (504) 822-4455
Fax: (504) 822-4458

MARJORIE R. ESMAN (#18198)
701 South Peters Street, Suite 100
New Orleans, Louisiana 70130
Tel: (504) 524-5328
Fax: (504) 523-1071

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties:

Counsel believe that no party has a financial interest in the outcome of this litigation.

B. Attorneys for Plaintiffs-Appellants:

David S. Udell
E. Joshua Rosenkranz
Paul K. Sonn
Philip G. Gallagher
Burt Neuborne
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas, 5th Floor
New York, New York 10013

Mary E. Howell
Howell & Snead
316 South Dorgenois Street
New Orleans, Louisiana 70119

Marjorie R. Esman
701 South Peters Street, Suite 100
New Orleans, Louisiana 70130

C. Attorneys for Defendant-Appellee:

Michael H. Rubin
McGlinchey Stafford
9th Floor, One American Place
Baton Rouge, Louisiana 70825

Christina B. Peck
Roedel, Parsons, Koch, Frost, Balhoff & McCollister
8440 Jefferson Highway, Suite 301
Baton Rouge, Louisiana 70809

David S. Udell

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument and respectfully suggest that, in view of the complex constitutional issues raised by this case, granting argument would assist this Court in its decisional process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

OTHER

STATEMENT OF JURISDICTION

The district court properly had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This appeal is from the July 29, 1999 final judgment of the United States District Court for the Eastern District of Louisiana. Plaintiffs timely filed their Notice of Appeal on August 17, 1999, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the complaint's allegations that the Louisiana Supreme Court (LSC) effectively repealed authorization for student lawyers and law school clinics to represent group clients and did so with the intent to suppress speech on politically controversial topics, state a claim of viewpoint discrimination under the First Amendment?

2. Whether the complaint's allegations that the LSC, by conditioning the authorization of student law practice on a requirement that student lawyers and law professors forgo representing group clients, thereby burdening First Amendment associational rights in a way that is not narrowly tailored to an important state interest, state a claim of unconstitutional conditions under the First Amendment?

3. Whether the complaint's allegations that the LSC repealed authorization for student lawyers and law school clinics to engage in pro bono legal outreach — consisting of reaching out to disadvantaged groups and individuals to educate them about their rights and make known the availability of pro bono legal services — and did so with the intent to suppress speech on politically controversial topics, state a claim of viewpoint discrimination under the First Amendment?

4. Whether the complaint's allegations that the LSC, by conditioning the authorization of student law practice on a requirement that student lawyers and law professors forgo pro bono legal outreach, thereby burdening First Amendment speech and associational rights in a way that is not narrowly tailored to an important state interest, state a claim of unconstitutional conditions under the First Amendment?

5. Whether the complaint's allegations that the LSC, by effectively prohibiting law students from representing group clients or from engaging in pro bono legal outreach, thereby preventing students from being trained in the important skills involved with representing such clients, state a claim of unconstitutional infringement of academic freedom under the First Amendment?

STATEMENT OF THE CASE

A. Statement of Facts

This appeal presents a case of retaliation against community organizations in Louisiana and their law student attorneys for successful advocacy on matters that have displeased political and business interests in the state. Law school clinical programs have in recent years played a vital role in helping meet the basic legal needs of community groups and individuals in Louisiana who cannot afford legal counsel. Over the course of the 1990s, however, influential business and political forces became increasingly incensed that representation provided by law school clinical programs was empowering community groups and local residents to challenge activities that threatened their well-being.

In 1996 and 1997 in particular, the Tulane Environmental Law Clinic (TELC), representing a community group and local residents in St. James Parish, Louisiana — one of the most polluted counties in the United States, ranking third in the state and seventeenth nationwide in toxic emissions — successfully opposed a proposal by the Shintech Corporation to construct a chemical plant in their community. The planned facility would have released an additional 1.5 million tons of pollution each year into the surrounding air, including more than 100,000 pounds of Vinyl Chloride (a class A human carcinogen), ethylene dichloride and

other toxins. The Governor and the business community reacted to the Shintech case with public anger and announced their intent to prevent law students from providing such assistance in the future. They petitioned the Louisiana Supreme Court (LSC) to impose restrictions on TELC (and the state's other law school clinics) on the grounds that it had purportedly "act[ed] freely to discredit industry in Louisiana" and had "negatively impacted the state." Compl. ¶ 39.

Regrettably, the state Supreme Court acquiesced to this campaign of retaliation and amended the state's law student legal practice rule, Rule XX of the Rules of the Supreme Court of Louisiana, so as effectively to bar law school clinics from representing community groups and prohibit them from engaging in legal outreach to potential clients. The revised rule imposes unprecedented restrictions on both the types of clients that law school clinics may represent and the outreach and communication techniques they may use. As was its design, the new rule has made it effectively impossible for law school clinics in Louisiana to continue to represent community groups — a devastating blow in a state where student lawyers and clinical professors are among the only sources of representation for disadvantaged communities and individuals.

1. The Legal Needs of Community Groups in Louisiana

Community groups play a critical role in helping residents of politically and economically powerless communities in Louisiana in their struggle for basic human dignity. As is the case for many communities, it is through neighborhood organizations and institutions that disadvantaged Louisianans band together to address the problems facing their communities. From tenants in New Orleans' housing complexes, to residents of the unincorporated regions lining the industrialized banks of the Mississippi, citizens join together collectively in neighborhood associations, civil rights organizations, or religious institutions in an effort to build better lives for their families and neighbors. While community groups work to address a wide range of issues, in recent years many Louisianans have focused on the environmental and health threats to the well-being of their communities. Illustrative are the circumstances of the community group plaintiffs in this case, whose members and neighborhoods have each been confronted by real environmental and health threats and need legal representation. *See* Compl. ¶¶ 13, 82-88. Yet none of these groups can afford to retain the counsel necessary to raise in legal fora concerns about these potential threats to their communities.

2. The Vital Role of Law School Clinics in Representing Community Groups

Nationwide, lawyers willing to represent clients who cannot afford to pay them are in short supply and Louisiana is no exception. In the face of this acute shortage, law school clinical programs in Louisiana have come to play a vital role as one of the only sources of legal counsel for groups seeking to address serious problems facing disadvantaged communities. TELC in particular has grown to play a central role giving legal voice to the powerless.

In this process, clinics at the Louisiana law schools that offer such programs have come to employ a variety of methods to make their services available to needy clients. Although not used with great frequency, targeted legal education and outreach to past and potential clients at times have played an important role in the work of the clinics. Like many lay people, members of disadvantaged communities frequently do not appreciate what their legal rights are and so often do not realize, when faced by a particular harm, that they may have legal recourse. Because of this reality, and such persons' lack of familiarity with the few legal organizations willing to take non-paying cases, it is sometimes necessary for providers of pro bono legal assistance, such as the law school clinics in Louisiana, to reach out and inform community residents and groups of their rights, letting

them know about the possible availability of pro bono legal assistance to help them. Compl. ¶¶ 95, 101, 107.

3. The Shintech Case and the Tulane Environmental Law Clinic

The far-reaching changes in Louisiana's law student legal practice rule at issue in this case were the direct result of the successful representation by TELC of plaintiff St. James Citizens for Jobs and the Environment (St. James Citizens). St. James Parish lies in Louisiana's "Cancer Alley," the corridor stretching from Baton Rouge to New Orleans that is home to over one hundred industrial facilities that discharge toxic chemicals into the air and water. Compl. ¶ 24. In 1996, a multiracial group of over one hundred mostly low-income and working-class residents of St. James Parish joined together to form St. James Citizens, an unincorporated organization dedicated to raising community environmental and health concerns in this county known as one of the most heavily polluted in the United States. Compl. ¶ 13.

The catalyst for the formation of St. James Citizens was a proposal by a major international firm, Shintech, to add yet another potentially hazardous, polluting facility to the Parish by constructing a polyvinyl chloride and ethylene dichloride production plant in the small community of Convent — a low-income African-American town where 95% of the total reported toxic emissions for the

Parish are already concentrated. Compl. ¶ 24. Proposed for a site already ringed by eleven major industrial facilities and located in close proximity to schools and hundreds of individual residences, the facility would have released 1.5 tons of pollutants each year into the environment, including more than 100,000 pounds of vinyl chloride (a Class A human carcinogen), ethylene dichloride, and other toxins. *Id.*

Convinced of the need to speak up about the Shintech plant, St. James Citizens sought legal assistance from numerous national and local public interest legal organizations including the Sierra Club Legal Defense Fund, the Natural Resources Defense Council, and the NAACP Legal Defense Fund, Inc., but none was able to help. Compl. ¶¶ 23, 25. Without resources to afford private legal counsel, St. James Citizens then requested assistance from TELC. Compl. ¶ 25.

TELC is a program in clinical legal education established by Tulane University School of Law for the dual purposes of offering its students the opportunity to learn legal advocacy skills while at the same time providing high-quality pro bono legal services to communities and individuals faced with environmental and health concerns who otherwise would be unable to obtain legal representation. When appearing before state courts and agencies, TELC operates pursuant to Louisiana Supreme Court Rule XX, which authorizes the practice of

law by law school clinical programs. Compl. ¶ 20. The LSC first adopted this rule, entitled "Limited Participation of Law Students in Trial Work," in 1971 in order to help make available legal services "to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds." Compl. ¶ 20. In 1988, at the request of the Tulane and Loyola University Law School deans, the LSC modified Rule XX to make explicit that law students acting through clinics could also represent "community organizations." Compl. ¶ 21.

TELC agreed to represent St. James Citizens in raising community concerns about the proposed Shintech plant, Compl. ¶ 25, and did so in a variety of fora, including at public hearings before the Louisiana Department of Environmental Quality (LDEQ) and in state court. Compl. ¶ 26. TELC also filed objections to the proposed plant with the United States Environmental Protection Agency (EPA), leading EPA to instruct LDEQ to address the concerns raised by TELC on behalf of St. James Citizens. Compl. ¶ 28. In the end, faced with these community concerns and uncertainty about the ultimate resolution of the environmental complaints, Shintech decided to site its plant elsewhere.

4. The Backlash Against Law School Clinics

TELC's representation of St. James Citizens provoked a barrage of criticism from powerful political and business figures in Louisiana. These forces launched a concerted campaign to prevent TELC and other law school clinics from continuing to represent disadvantaged communities in Louisiana seeking to raise environmental and health concerns. Compl. ¶ 28. Immediately after learning that the EPA had instructed the LDEQ to investigate TELC's complaints in the Shintech matter, Louisiana Governor Murphy J. "Mike" Foster called the President of Tulane University to complain about TELC. Compl. ¶ 28. Then, at a May 1997 meeting of the New Orleans Business Council, Governor Foster urged the gathered business leaders to withhold their support for Tulane University until it reined in TELC, Compl. ¶ 29, and later went on to suggest that the Louisiana legislature should consider stripping Tulane of its tax exempt status in retaliation for TELC's activities.

Following the Governor's lead, other high state officials joined the attack on TELC. The Secretary of the Louisiana Department of Economic Development, Kevin Reilly, in August 1997, sent a letter to the President of Tulane University accusing its clinic of acting irresponsibly and urged that "Tulane request [the LSC] to review the activities of TELC to determine if the Clinic has overstepped the

charter the Court originally gave it." Compl. ¶ 35. Using his public office to wage a campaign of political pressure and criticism against TELC for its representation of community groups, Secretary Reilly vilified TELC and its community group clients as "environmental fascists" who used "brown-shirt tactics." Compl. ¶ 36.

When these attempts to pressure Tulane directly failed, the political and business interests then turned their attention to the LSC, initiating a heavy-handed campaign to urge the Court to prevent TELC and other clinics from continuing to help community groups voice environmental and health concerns — particularly regarding development plans favored by the Governor and industry groups. At Governor Foster's urging, Louisiana's business leaders began to pressure the LSC to restrict TELC's activities. Compl. ¶¶ 29-31, 33, 37, 40. For example, in September 1997, the Louisiana Association of Business and Industry wrote the LSC, accusing TELC and its clients of damaging Louisiana business. Compl. ¶¶ 37-38. The various business lobbies urged the LSC to amend Rule XX to limit student law practice, and specifically demanded that law school clinics be restricted from representing community groups and from in legal outreach — the very restrictions the LSC went on to enact, precipitating this lawsuit. Compl. ¶¶ 39, 47, 49. Not shy about making known that the source of their displeasure with TELC and its clients was the viewpoints they were voicing, major industry trade

associations wrote the LSC charging that TELC's actions hurt Louisiana business and urging the Court to investigate the positions advocated by the TELC and restrict its activities. Compl. ¶¶ 31, 33.

Emblematic of the extensive influence of these industry lobbies within the LSC was the LSC Deputy Judicial Administrator Kim Sport. In an example of conflicted interests, Ms. Sport served as the LSC's public liaison and was one of its initial investigators of the complaint concerning TELC and its clients, yet all the while served as an officer with the New Orleans Chamber of Commerce, one of the major trade associations lobbying the LSC to limit the activities of TELC and the other law school clinics. Compl. ¶ 34.

Responding to this mounting political pressure, in the fall of 1997, the LSC launched an official investigation into the activities of TELC and Louisiana's other law school clinics, but focused the investigation on TELC. Compl. ¶¶ 41, 43. By way of comparison, the LSC's librarian surveyed law school clinic practice in other states and found that TELC's model of representing nonprofit community groups raising issues of concern to disadvantaged residents was consistent with the practice at law school clinics nationwide. Compl. ¶ 44.

The LSC has never made public the results of its investigation into the activities of the law school clinics nor the final report. However, two justices of

the court, including the Chief Justice, have disclosed that it revealed neither evidence of unethical or inappropriate conduct by student-practitioners at TELC or any other law school clinic, nor any suggestion that the clinics had represented clients capable of affording private legal counsel or otherwise violated the student practice rules then in effect. Compl. ¶¶ 45, 46.

5. The Louisiana Supreme Court's Amendment of Rule XX to Effectively Prevent Representation of Community Groups by Law School Clinics and Bar Legal Outreach to Potential Clients.

The LSC acquiesced to this campaign to retaliate against TELC and prevent it and other clinics from representing community groups that might raise their voices in opposition to proposals favored by the Governor and business interests. Despite the results of its own investigation, the LSC substantially amended Rule XX to limit sharply the activities of TELC and the other clinics.

The LSC announced the Rule XX amendments in their current form on March 22, 1999. In relevant part, they provide:

> Section 4: Standard for Determining Eligibility for Representation. Law School clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Heath and Human Services. These guidelines need not be applied when the client is court-appointed or court-referred and the appointing or referring court has reviewed the economic condition of the client and has determined that the client is indigent.

> Section 5: Representation of Indigent Community Organizations. Any indigent community organization that wishes to obtain representation pursuant to this rule must certify in writing to the inability to pay for legal services. The written certification shall be subject to inspection by the Supreme Court of Louisiana.
>
> Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any indigent community organization provided at least 51% of the organization's members are eligible for legal assistance pursuant to Section 4 of this rule. The indigent community organization shall also provide information to clinic staff which shows that the organization lacks, and has no practical means of obtaining, funds to retain private counsel.
>
> Section 10: Lawyer staffpersons of law school clinical programs and certified student practitioners shall adhere to the rules prohibiting solicitation of cases or clients. In addition, no student practitioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or other indigent community organization for the purpose of representing the contacted person or organization.

LA. SUP. CT. R. XX (1999); Compl. ¶ 49.

The Rule XX amendments have had their intended effect of preventing community groups in Louisiana from obtaining law school clinic assistance — historically one of the few sources of legal aid to community groups in Louisiana unable to pay for lawyers. Compl. ¶ 56. Sections 4 and 5 compel members of a community group seeking assistance of a clinic to disclose their personal finances. But many low-income members, like people of any income level, are reluctant to

disclose information about their finances, particularly where it might get into the hands of powerful litigation adversaries who could use it to harass or embarrass them. Compl. ¶¶ 57-58. Additionally, these documentation requirements impose severe burdens on community groups that typically lack the administrative resources to gather and update on a regular basis information on their members' incomes sufficient to document their eligibility for representation. Compl. ¶¶ 64-65.

B. Course of Proceedings and Disposition in the Court Below

Faced with these intolerable and unprecedented restrictions, plaintiffs filed this lawsuit on April 16, 1999. Compl. ¶ 4. Plaintiffs complained of several different constitutional violations, including the following: (1) that by limiting the authorization for law school clinics to represent, and engage in legal education and outreach to, community groups because of political and business interests' desire to silence and retaliate against those groups and their law school clinic counsel, the LSC engaged in viewpoint discrimination in violation of the First Amendment; (2) that by conditioning authorization for student law practice on the requirement that both students and law professors comply with rules severely burdening the First Amendment associational rights of them and of their potential clients, the LSC

imposed unconstitutional conditions on those rights; and (3) that by effectively forbidding law school clinic professors and students from representing community group clients, the LSC has prevented students from being trained in the important skills that these relationships involve, impermissibly infringing the First Amendment sphere of academic freedom enjoyed by universities.

On July 27, 1999, the district court granted the LSC's motion to dismiss the Complaint for failure to state a claim. In that opinion, the lower court failed to a startling degree to confront the central legal issues raised. Although plaintiffs' briefing contained extensive analysis of the viewpoint discrimination claim, the district court virtually ignored the issue, belatedly discussing it only in its "Summary" section. Even then, the court failed to cite, let alone discuss or apply the leading Supreme Court authorities relied on by plaintiffs, such as *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), or any other of the Court's First Amendment viewpoint discrimination precedents. Instead, the court suggested that viewpoint-based retaliation against the law school clinics for espousing positions opposed by powerful business and political interests is not only constitutional, but it is to be expected from the LSC: "[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." Slip op. at 26.

The district court's treatment of plaintiffs' First Amendment unconstitutional conditions claims was equally troubling. Focusing on the unexceptional fact that the LSC enjoys substantial authority to regulate the practice of law, the district court suggested that the restrictions on legal outreach imposed by Rule XX as a condition of student law practice are subject only to the most relaxed judicial scrutiny. *See* Slip op. at 23; *see also id.* at 20.

The court appeared to ignore the fundamental premise of the Supreme Court's "unconstitutional conditions" case law — that even where the government enjoys the "greater" power to refrain from authorizing or funding an activity, the Constitution nonetheless prohibits the government from exercising the seemingly "lesser" power of imposing restrictions or conditions on the enjoyment of the government benefit when the exercise of such a "lesser" power is intended to suppress a particular viewpoint. Instead, the district court held that "Without a predicate right to representation in civil cases, the essential bridge to stating a claim that regulation of the clinics burdens the client-plaintiffs' constitutional rights collapses." Slip op. at 14.

Having granted the LSC's motion to dismiss, the district court on July 30, 1999 entered final judgment in favor of the LSC. Plaintiffs-Appellants timely filed their Notice of Appeal on August 17, 1999.

SUMMARY OF ARGUMENT

One sentence in the district court's opinion captures succinctly both the central fact of this case and the error of the court below: "[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." Slip op. at 26. The political pressure to which the district court referred was the pressure — by the Governor of Louisiana and powerful business interests — to silence a group of student lawyers and law professors because they were too effctive in representing community groups, and in reaching out to low-income communities to educate them about their rights and to offer them assistance to vindicate those rights in court. The political pressure resulted in the LSC's amendments to Rule XX, which severely restrict the activities of the offending law school clinics. This scenario — powerful interests pressuring elected officials to change rules to silence the disenfranchised and extinguish their disfavored positions — is the classic example of unconstitutional viewpoint discrimination.

Rule XX effectively shuts down the law clinics' ability to serve low-income communities by imposing two mutually reinforcing restrictions. First, the LSC promulgated ostensibly neutral financial eligibility criteria designed to disable any community group from qualifying for clinic representation. Second, the LSC

imposed a wide-ranging bar that prevents law school clinic students from representing any client, including a community group, who first learned of the clinic because of its outreach, whether that outreach was in the form of a public speech, face-to-face contact, a brochure, or a letter.

Both restrictions implicate longstanding First Amendment protections.

I.

Because Rule XX determines whom law school clinics may represent, and how clinics may reach out to individuals and communities, it implicates First Amendment associational rights that protect the ability of lawyer and client to join together to advance a client's interests. *See NAACP v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958); *In re Primus*, 436 U.S. 412, 438 n.32 (1978). Such an interference with First Amendment associational rights is flatly prohibited if, as here, it is an effort to suppress a disfavored viewpoint. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999) ("[T]he First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms.").

Thus, while law school clinics exist at the pleasure of the LSC, which possesses the "greater" power to eliminate them entirely, the "greater" power to abolish student practice does not encompass the "lesser" power to regulate it in a way that is manifestly designed to suppresses a disfavored viewpoint.

Moreover, the Rule's onerous restrictions on group representation burden core First Amendment associational freedoms, without the requisite justification or tailoring. Rule XX conditions representation of community groups on compliance with intrusive and chilling criteria that no group could meet. No community group could survive if it demanded that every member submit income statements and expose himself to the harassment and even retaliation of political antagonists. A generation ago, the Supreme Court rebuffed efforts to suppress community groups by forcing disclosure of membership lists. The LSC regulation is far worse, since it requires disclosure of sensitive financial information. Under Rule XX, community organizations representing impoverished communities can seek clinic representation only at the price of disclosure of the sensitive financial records of all members. To justify such a burden on associational rights, the government interests would have to be numerous and weighty. But at most the LSC has suggested only a single interest — the interest in ensuring that clinics preserve their resources for truly needy clients. But no one has ever suggested that any

Louisiana law school clinic has represented clients able to afford legal counsel. In any event, the interest in ensuring that law school clinics serve those in need can be served by any number of less burdensome mechanisms. The sad irony is that, in the name of preserving legal clinics for the neediest, Rule XX wipes out the clinics' ability to serve low-income communities.

II.

The Rule XX provision that prohibits law students from representing any potential client who was first contacted by law school clinic personnel violates the First Amendment in the same two ways. As with the restrictions on community group representation, the attempt to silence the clinics is motivated by a desire to suppress a disfavored viewpoint. In addition, Rule XX imposes a classic unconstitutional condition on law student practice. In return for the "privilege" of representing disadvantaged clients under the guidance of a faculty member, and in return for the "privilege" of supervising clinic students, both law students and law professors are required to surrender a crucial First Amendment right — the right to engage in speech directed at educating individuals and communities about their rights or offering them representation. The Supreme Court has repeatedly held that government may not put a citizen to such a Hobson's choice between participation

in a government program or surrender of a First Amendment right. *See Speiser v. Randall*, 357 U.S. 513, 518 (1958).

The most troubling procedural aspect of the case is the district court's decision to dismiss plaintiffs' allegations of viewpoint discrimination and unconstitutional conditions — both intensively fact-bound issues — without conducting a factual inquiry.

Finally, the threat posed by Rule XX to the integrity and academic freedom of universities underlies all of the claims in this case. Rule XX authorizes law schools to train their students in student practice clinics, but only if the privately funded law schools, contrary to their educational philosophy, agree to forbid law students from reaching out to those who need information about their legal rights, and to confine law students to representing only those obviously impoverished community groups that are willing to surrender their First Amendment rights to associational privacy. No legal academic would choose to convey such an un-American message to a law student.

STANDARD OF REVIEW

The court of appeals reviews *de novo* a district court judgment dismissing a complaint for failure to state a claim on which relief may be granted. In considering a motion to dismiss, the complaint must be liberally construed in favor of the plaintiff, and all the facts pleaded in the complaint must be taken as true. *Brown v. Nationsbank Corp.* 188 F.3d 579, 585-86 (5th Cir. 1999). A claim may not be dismissed unless it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998). "A plaintiff need not put all of the essential facts in the complaint. He may add them by affidavit or brief — even a brief on appeal." *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963-64 (7th Cir.1992). Moreover, a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (internal quotations omitted). Rule 12(b)(6) dismissal is particularly inappropriate "where, as here, the complaint alleges [a First Amendment claim of] viewpoint discrimination." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992).

ARGUMENT

I.

Plaintiffs Should Be Permitted to Prove that By Effectively Prohibiting Law School Clinics from Representing Community Groups, Rule XX Violates the First Amendment Rights of Disadvantaged Individuals and Groups, and of Law Professors and Students.

While Rule XX purports to focus law school clinic resources toward disadvantaged communities in need of legal assistance, its effect is precisely the opposite. Because low-income members of community groups in low-income neighborhoods are often reluctant, afraid, and/or ashamed to disclose sensitive personal information about their incomes, and because grass-roots groups in low-income communities lack the administrative resources to gather and update eligibility information for their members, the group client eligibility requirements effectively bar all community groups, even those composed entirely of low-income people, from eligibility for law school clinic representation. Such an overbroad result was no accident. Precisely this outcome was intended by the Governor of Louisiana, and the powerful business interests that led the effort to silence Louisiana's law school clinics and to restrict their ability to represent impoverished community groups. Compl. ¶ 3(a).

The burdensome group eligibility requirements imposed by Rule XX violate the First Amendment rights of disadvantaged individuals and groups, and of law school clinic professors and students in two separate but interrelated ways. First, they result from an act of illegal viewpoint discrimination since they were intended to suppress a disfavored viewpoint. Second, they severely burden the First Amendment associational rights of law school clinic professors, law students and members of disadvantaged community groups to associate with one another to raise issues of mutual concern, thus triggering traditional First Amendment strict scrutiny.

A. Rule XX's effective repeal of authorization to represent group clients violates the First Amendment rights of community groups and their law school clinic counsel because Rule XX was adopted to suppress their speech on controversial issues.

1. The First Amendment bars the government from taking away a benefit — even one the beneficiary has no constitutional right to receive — when the government is motivated by an intent to suppress disfavored viewpoints.

Where the government takes adverse action against its citizens — in this case, denying the opportunity for members of even low-income community groups to receive legal representation from law school clinics — out of animus for a view they have expressed, that response constitutes viewpoint discrimination, and is permissible under the First Amendment only if it meets the exacting demands of

heightened constitutional scrutiny. *See, e.g., Rosenberger,* 515 U.S.at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Colson*, 174 F.3d at 508 ("[T]he First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms."). So strong is this First Amendment prohibition against viewpoint-based retaliatory action by the government that even where the adverse action is the denial of a privilege that the government is under no obligation whatsoever to extend, that denial or withdrawal nonetheless triggers heightened scrutiny — and is presumptively unconstitutional — if it is based on the government's disagreement with the would-be recipient's views. "[T]o deny a [benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser*, 357 U.S.at 518. *See Healy v. James*, 408 U.S. 169, 185-86 (1972) ("[T]he Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization.").

In case after case, the Supreme Court and the lower federal courts have taught that government policies that deny benefits to persons or groups because they espouse disfavored viewpoints are subject to heightened First Amendment

scrutiny.[1] In guarding First Amendment freedoms, the Supreme Court has exercised particular vigilance in circumstances where, as here, the government has withdrawn or removed a previously granted resource. Underscoring that such changes may signal the intrusion of viewpoint discrimination into government decision-making, the Court has instructed: "If [government officials] intended by their removal decision to deny . . . access to ideas with which [the officials] disagreed, and if this intent was the decisive factor in [their] decision, then [the officials] have exercised their discretion in violation of the Constitution." *Board of Educ. Island Trees Union Free Sch. Dist. v Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (footnote omitted) (reviewing whether removal of books from

---

[1]*See, e.g., Speiser*, 357 U.S. at 526 (unconstitutional to deny privilege of tax exemption to persons affiliated with "subversive" organizations); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (unconstitutional to bar same from privilege of university teaching job); *Perry v. Sindermann*, 408 U.S. 593 (1972) (unconstitutional to deny renewal of professor's teaching contract because of criticism of university policy); *Healy*, 408 U.S. at 185-86 (unconstitutional for public university to deny privilege of official recognition to student activist group because of opposition to its philosophy); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984) (unconstitutional for public university to deny privilege of official recognition to gay student group because of opposition to homosexuality); *Housing Works, Inc. v. City of New York*, 1999 U.S. Dist. LEXIS 17600, at *60 (S.D.N.Y. Nov. 12, 1999) (unconstitutional to deny government contract because of criticism of government official); *Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184, 202 (E.D.N.Y. 1999) (unconstitutional to rescind government subsidy because of opposition to "perceived viewpoint" of art displayed by recipient museum).

school library was motivated by intent to suppress disfavored ideas). *See Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995) (same); *Brooklyn Inst. of Arts & Sciences,* 64 F. Supp. 2d at 201-02 (invalidating as illegal viewpoint discrimination attempted withdrawal of government subsidy to museum).

Even where the government policy that denies the benefit does not evidence viewpoint discrimination on its face, the First Amendment is nonetheless offended where the policy's adoption was "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812-13 (1985). In *Cornelius*, the Court reviewed the constitutionality of a government rule preventing legal and political advocacy groups from receiving contributions from federal employees through the Combined Federal Campaign. Certain legal and political advocacy groups challenged the rule, suggesting that, while framed in general terms, the rule was aimed at excluding particular civil rights and environmental advocacy groups with whose viewpoints the government disagreed. The government countered "that a decision to exclude all advocacy groups, regardless of political or philosophical orientation, is by definition viewpoint neutral." *Id.* at 811-12. Addressing this proffered justification, the Court explained that "While we accept the validity and

reasonableness of the justifications offered by petitioner for excluding advocacy groups from the [Combined Federal Campaign], those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." *Id.* at 812. Accordingly, the Court remanded the case for consideration of whether the government's proffered justification was, in fact, the true reason the restriction was enacted or, instead, "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view." *Id.* at 812-13.[2]

2. Plaintiffs have set forth in the complaint circumstantial evidence strongly suggesting that Rule XX was amended in order to suppress their disfavored viewpoints.

There is no real dispute in this case that the LSC enacted the Rule XX amendments in response to political pressure from those seeking to silence TELC and the other law school clinics. The district court all but acknowledged that this was true, first recounting the compelling circumstantial evidence set forth in the complaint, then acknowledging that "This may well raise an issue in need of closer

---

[2]This approach is not limited to viewpoint discrimination cases. The principle that improper governmental motivation — for example, racial, gender, or religious animus or favoritism — may render unconstitutional a restriction that would be permissible if adopted for any of a range of legitimate policy reasons is a consistent principle of contemporary constitutional doctrine. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (religious animus); *Hunter v. Underwood*, 471 U.S. 222 (1985) (racial animus); *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (gender bias).

examination," and finally observing that "Furthermore, in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." Slip op. at 26. But rather than recognizing these textbook elements of illegal viewpoint discrimination, the district court was led astray, somehow concluding that this politicization of the LSC's rule-making absolved defendant for its acquiescence to the efforts to retaliate against TELC and the other clinics. Instead, however, this acknowledgment underscores the overwhelming and troubling nature of the proof of viewpoint discrimination in this case — and the error of the district court's conclusion that the complaint fails to state a claim for relief.

Plaintiffs have alleged that the Rule XX amendments were adopted "to suppress a particular point of view," *Cornelius*, 473 U.S. at 812-13, by preventing community groups from obtaining law school clinic assistance to help them voice environmental and public health concerns. Compl. ¶¶ 3, 54-56. Under the standards for establishing First Amendment viewpoint discrimination and retaliation claims, a plaintiff need only show that "(1) [she engaged in] conduct [that] was protected by the First Amendment, and (2) that such conduct was a 'substantial' or 'motivating' factor behind the defendant's action." *Brady v.*

Houston Ind. Sch. Dist., 113 F.3d 1419, 1423 (5th Cir. 1997) (citing *Mount Healthy v. Doyle*, 429 U.S. 274, 283-87 (1977)).

This standard is met here. The activities by TELC and the community group clients it represented that led to the Rule XX amendments — voicing concerns at public hearings and filing complaints with governmental regulatory bodies — are classic examples of core First Amendment activities. And plaintiffs have alleged that the LSC enacted the new Rule XX restrictions to accommodate the desires of powerful business and political interests to silence TELC and its clients. Plaintiffs' claim thus suffices under the notice pleading standards of FED. R. CIV. P. 8 to state a claim for relief. *See General Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999) (under Rule 8(a) complaint may not be dismissed where it "set[s] forth sufficient information to outline the elements of the claim or permit inferences to be drawn that these elements exist").

While no more is required to avoid dismissal, plaintiffs, in fact, set forth in the complaint extensive circumstantial evidence supporting the inference that defendant enacted the Rule XX amendments out of viewpoint discriminatory and retaliatory motive. In approximately twelve pages of detailed allegations, plaintiffs recount the great difficulty the residents of Convent, Louisiana had in finding pro bono counsel willing to assist them in the politically controversial Shintech matter,

Compl. ¶ 25; how, after finally obtaining TELC representation, several of the plaintiff community groups were able to file complaints raising serious environmental and health questions about the proposed citing of the Shintech facility in the already heavily polluted, politically marginalized and predominantly African-American community of Convent, Louisiana, Compl. ¶¶ 26-27; how the concerns voiced by TELC and the community groups elicited swift and concerted retaliation by certain powerful business and political leaders in Louisiana, Compl. ¶¶ 26-27; how that retaliation culminated in a political campaign to pressure the LSC to restrict the activities of the law school clinics — a campaign in which business lobbyists expressly demanded that the LSC bar clinics from representing groups and from engaging in legal outreach, Compl. ¶¶ 28-40; and how the LSC acquiesced and adopted the restrictions demanded by the forces waging the retaliatory campaign to silence the clinics and their clients. Compl. ¶¶ 47-50.

Plaintiffs have thus not only alleged that the Rule XX amendments were motivated by a "bias against the viewpoint advanced by the excluded speakers," *Cornelius*, 473 U.S. at 812, in violation of the First Amendment, but have set forth in extensive detail circumstantial evidence strongly supporting that inference. *See* Slip op. at 25 (acknowledging "the close temporal relationship between the business community's expressions of outrage and the subsequent changes to Rule

XX"). Such "well-documented circumstantial evidence of a retaliatory motive" is sufficient to establish liability on the merits, *see Housing Works, Inc. v. City of New York*, 1999 U.S. Dist. LEXIS 17600, at *60 (S.D.N.Y. Nov. 12, 1999), and radically exceeds the degree of pleading specificity required to survive a motion to dismiss.

B. Rule XX unconstitutionally conditions law student legal practice on a requirement that law school clinics abandon community groups as clients — and does so in a fashion that is not narrowly tailored to achieving any important government interest.

The district court's failure to perceive the basic elements of a viewpoint discrimination claim is paralleled in its failure to recognize that the Rule XX restrictions on student lawyers representing community groups present a classic example of an unconstitutional condition. The court below neither cited nor discussed any of the Supreme Court's guiding case law in this area, and consequently failed to apply the correct legal framework in assessing the claim. Properly analyzed, this count states a claim for relief, since the restrictions on student lawyers representing group clients burden the First Amendment rights of the professors, students, and clients to associate to raise community legal concerns, yet they are not narrowly tailored to an important government interest.

1. Community groups and their members have a fundamental First Amendment right to associate with one another and with law school clinic professors and students to raise community concerns and assert legal rights.

The Supreme Court has long recognized that the fundamental political freedoms guaranteed by the First Amendment include the "the right 'to engage in association for the advancement of beliefs and ideas.'" *NAACP v. Button*, 371 U.S. 415, 430 (1963) (quoting *Patterson*, 357 U.S. at 460). Among the "form[s] of political expression" embraced under this right is legal advocacy, including litigation, *id.* at 429, particularly where the lawyers involved "engage[] in [the] associational activity for the advancement of ideas and beliefs [rather than their] own commercial interests." *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

This same associational freedom also protects groups and their members from compelled disclosure of private membership information. In cases such as *Patterson*, *Bates v. City of Little Rock*, 361 U.S. 516 (1960), and *Brown v. Socialist Workers*, 459 U.S. 87 (1982), the Supreme Court has repeatedly warned that forced disclosure of a group's membership information may "abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs," *Patterson*, 357 U.S. at 460, since public identification of members, particularly where a group is embroiled in a public controversy, may expose

members to "threats, harassment or reprisals," *Brown*, 459 U.S. at 101, thereby chilling membership. *See Bates*, 361 U.S. at 523-24. *See* Compl. ¶ 58; *see also id.* ¶¶ 57, 59, 71.[3]

Indeed, as this case law makes clear, these associational freedoms were first recognized in the context of the NAACP's historic campaign against racial segregation, *see* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965), under circumstances bearing more than a passing resemblance to the facts of this case. As in *Button* where the State of Virginia attempted to impede client groups and individuals from associating with civil rights lawyers, the Rule XX restrictions in this case are an attempt by powerful interests to change the lawyering "ground rules" in order to deny a legal voice to community groups whose concerns have, with law clinic assistance, received public attention for the first time.

---

[3]As LSC Justice Bernette Johnson observed in her dissent from the Rule XX amendments, "Compelled disclosure of membership in an organization engaged in the advocacy of an unpopular cause would expose members to the possibility of economic reprisals, loss of employment, threats of physical coercion, and other manifestations of public hostility." Resolution of the LSC Adopting Amendments to LA. SUP. CT. R. XX (Mar. 22, 1999) (Johnson, J., dissenting).

2. Rule XX burdens fundamental First Amendment associational rights by conditioning law clinic representation on compliance with chilling and burdensome eligibility requirements — requirements that no group can be expected to meet.

It is thus clear that Louisiana could not directly impose rules limiting lawyers to representing certain categories of clients, or mandating disclosure of sensitive membership information by groups seeking to associate with lawyers to raise community concerns. The district court reasoned, however, that since the LSC could permissibly bar law student legal practice altogether, it must enjoy plenary power to condition or restrict the privilege of law student practice in any way it chooses. But this suggestion ignores the Supreme Court's long-standing teaching that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996). *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("If a government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). Under this doctrine of "unconstitutional conditions," the Court has repeatedly warned that the government may not, through conditions on government grants or privileges,

indirectly "produce a result which [it] could not command directly." *Speiser*, 357 U.S. at 526.

In Rule XX, the LSC has dictated that in order for law students to be free to work as lawyers on behalf of any community group client, the group must both restrict its membership to predominantly low-income individuals (thereby discouraging low-income and working class citizens from joining together to address community concerns), and its members must agree to forgo their right to maintain the confidentiality of membership and financial information. Equally, the law school clinic professors — who, as lawyers, otherwise enjoy an unassailable First Amendment right to represent any client of their choosing — must limit themselves to representing only majority low-income groups where the members are willing to disclose documentation about their incomes, in order for their students to be eligible to serve as lawyers on the cases.

The compelled disclosure of community group members' finances, because of members' natural reluctance to share such information, and the fact that it would likely be disclosed to litigation adversaries who might use it to embarrass or harass them, chills residents' willingness to join community groups, and groups' willingness to avail themselves of law school clinic assistance to raise community concerns. Moreover, groups composed largely, or even entirely, of low-income

persons lack the administrative resources to gather and update on a regular basis information on their members' incomes sufficient to document their eligibility for representation under the group client eligibility rule. Compl. ¶¶ 64-69. The entirely foreseeable (and, indeed, intended) result has been that, since the LSC's promulgation of the new Rule XX, the law school clinics in Louisiana have been unable to represent a single community group client. *See* Compl. ¶ 58; *see also id.* ¶¶ 57, 59, 71.

Equally, the group client eligibility rule burdens the First Amendment associational rights of law professors to provide assistance to such clients. On its face, Rule XX burdens the right of law school clinic professors to represent group clients, since it limits the resources available for such cases by barring students from participating as lawyers in the cases of clients who cannot (or are afraid to) document their eligibility. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) (rule barring party engaged in First Amendment-protected activity from enlisting particular type of assistance constitutes a burden on the right, triggering heightened scrutiny). Moreover, in practice, the burden on law school clinic professors' right to assist such clients is even more profound, for the rule has the consequence (sought by TELC's industry and government opponents) of effectively preventing not just students, but the clinics and clinical professors as well from representing

groups. Although the district court and the LSC argue that, in theory, a law school clinical professor and clinic could still handle cases on behalf of community group clients by having students forgo appearing as lawyers on such matters, that is not, in fact, a real option. Because law school clinics are established for the training and education of law students, clinics simply cannot take on cases in which students are barred from participating because to do so would not serve the goals of clinical education. The purpose of clinical legal education is to permit law students — under the supervision of law school clinic professors — to become student attorneys and to serve real clients in a representative capacity, thereby learning important lawyering skills, while at the same time providing badly needed legal services to those unable to procure counsel.

3. Rule XX's group client eligibility requirements violate the First Amendment because they are not narrowly tailored to an important government interest.

Particularly in areas as laden with First Amendment import as this, the Supreme Court has made clear that burdens on freedom of speech and association — whether imposed as conditions on a privilege or otherwise — are subject to heightened constitutional scrutiny, and so must be narrowly tailored to serving an important government interest. For instance, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court examined a congressional ban against editorializing

by public television stations that received government subsidies. Although the stations had no right to receive such funds, the Supreme Court found that leveraging the funding to compel recipient stations to give up their right to engage in editorial speech nevertheless violated the First Amendment. *Id.* at 402. In reaching this conclusion, the Court subjected the restriction to heightened constitutional scrutiny, finding that it was "not narrowly tailored to address any of the Government's suggested goals." *Id.* at 398-99. *See also 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").

In a case very similar to this, the Supreme Court reviewed the constitutionality of rules governing the exercise of another species of First Amendment-imbued privilege that states may — but need not — grant: the opportunity to enact laws by means of a citizen ballot initiative. *See Meyer*, 486 U.S. 414. States are under no obligation to provide for law-making by ballot initiative. Colorado, however, like many states, has chosen to do so and had specified rules governing the initiative process, including one barring the use of paid petition circulators to gather the voter signatures needed to qualify a proposed initiative for the ballot. While Coloradans, of course, still enjoyed their

fundamental First Amendment right to circulate petitions on any subject of their choosing and to hire assistants to help with that process, the law barred the use of paid petition circulators to qualify a proposed initiative for the ballot.

Reviewing the constitutionality of this ban, the Supreme Court rejected out of hand the state's "conten[tion] that because the power of the initiative is a state-created right, [the state] is free to impose limitations on the exercise of that right." *Meyer*, 486 U.S. at 424.[4] Although suggesting that in areas enjoying lesser First Amendment protection, such as commercial speech, the greater power to ban an activity may sometimes encompass the lesser power to condition exercise of the privilege on the grantee's agreeing to refrain from certain protected speech, *see id.* at 424-25 (discussing *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986)),[5] the Court held that where the speech involved enjoys

---

[4]The district court in this case relied on precisely this sort of mistaken "greater-power-includes-the-lesser-power" logic— reasoning squarely rejected by the Supreme Court in *Meyer* and many other cases — in holding that the LSC has plenary authority to impose any manner of restriction on law school clinic practice. *See* slip Op. at 19.

[5]The Supreme Court has subsequently eliminated this exception and held that even conditions on commercial speech trigger heightened scrutiny. Disavowing *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), the Court ruled that in the commercial speech context as well, the greater power to ban a particular "vice" activity does not encompass the lesser power to restrict speech as a condition of exercising that privilege. *See 44 Liquormart*, 517 U.S. at 509-11; *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325,

greater First Amendment status (such as political speech), such conditions on the exercise of a privilege trigger heightened scrutiny. *Id.* at 425. The Court similarly rejected the notion that the ban did not raise First Amendment concerns because proponents remained free to place a measure on the ballot using volunteers. *Id.* at 424. The Court stressed that merely because Colorado "leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." *Id.*

At the outset — and putting to one side the fact that the group client eligibility rules in practice prevent even low-income community groups from receiving law school clinic assistance — there is serious reason to doubt that even the LSC's purported purpose of reserving law clinic representation exclusively for low-income groups and individuals qualifies as a valid government interest. Where states have attempted to wield their authority to regulate the practice of law to restrict providers of pro bono legal services to serving only categories of clients deemed sufficiently needy or worthy by the state, courts have found that those conditions impermissibly burden the First Amendment associational rights of pro bono legal services providers and their would-be clients. *See In re N.H. Disabilities Law Ctr., Inc.*, 130 N.H. 328, 339, 541 A.2d 208, 215 (1988) (Souter,

---

327 n.* (4th Cir. 1996).

J.) (state may not condition authorization of not-for-profit corporation to practice law — an exception to the general bar against practice of law by corporations — on requirement that it restrict itself to serving only low-income clients). As Justice Souter explained writing for the New Hampshire Supreme Court, "[the] members and employees [of a non-profit public interest law organization] have an associational right under the first amendment to engage in advocacy on behalf of [their target client community] . . . whether or not the clients are poor . . . ." 130 N.H. at 339, 541 A.2d at 215 (citing and discussing *Button* and related cases). *Accord Application of Thom for Approval of Incorporation of Lambda Legal Defense & Educ. Fund, Inc.*, 347 N.Y.S.2d 571, 574, 301 N.E.2d 542, 544-45 (1973) (opinion of Burke, J., concurring) (application of public interest legal organization for non-profit corporate charter cannot be denied on grounds that organization does not limit its services to indigents).

But even if it were legitimate for Louisiana to reserve the lawyering services of law school clinics for low-income individuals and groups, the Rule XX group client eligibility restrictions, particularly as they are being enforced by the LSC, are not narrowly tailored to that end, and so impermissibly burden vital First Amendment associational rights. Among the facts that plaintiffs would establish at trial strongly suggesting that the group client eligibility rules are not narrowly

tailored are the reality that (1) Rule XX contains no safeguards against litigation opponents harassing and intimidating law school clinic clients by conducting discovery concerning their finances and, in fact, Louisiana courts (including the LSC) have tolerated these tactics in a case brought by a law school clinic (on behalf of a low-income individual) since the enactment of Rule XX; and (2) under the new Rule XX, not a single community group has been able to demonstrate its eligibility for law school clinic representation.

A range of alternative rules readily present themselves which would direct law school clinic resources to low-income communities but without the self-defeating and chilling consequences of Rule XX. For example, community groups with budgets or resources below a specified threshold might enjoy a rebuttable presumption of eligibility. Or groups based in communities that generally lack resources could be presumed to qualify for clinic representation, absent contrary evidence. And a rule barring eligibility questions from being raised in the context of ongoing litigation is absolutely critical as a safeguard to ensure that any such inquiries are made in good faith, and not used as a harassing litigation tactic that deters otherwise eligible low-income groups from accepting law school clinic assistance.

C. The complaint's dual allegations that repeal of law school clinic representation of groups constitutes viewpoint discrimination and imposes an unconstitutional condition require factual inquiry and preclude dismissal.

Dismissal of plaintiffs' claims concerning group client eligibility was additionally erroneous because such First Amendment claims of viewpoint discrimination and retaliation, and unconstitutional conditions, are intensely fact-bound, and so are inappropriate for resolution on a motion to dismiss. On their viewpoint discrimination count, issues of actual motivation in First Amendment litigation are questions of fact requiring resolution by the trial court on an appropriate record. *See Campbell*, 64 F.3d at 191 ("[W]e leave to the fact-finder the weighty task of determining, after a full development of the factual record, the actual motivation behind the [government's actions]"). Indeed, as this Court has repeatedly stressed, even summary judgment — let alone dismissal for failure to state a claim — is virtually always inappropriate in First Amendment cases that hinge motivation. "[I]n First Amendment cases, . . . 'summary judgment is ill-suited for credibility determinations' and '[i]t is likewise an inadequate procedure for sorting out nebulous questions of motivation.'" *Campbell*, 64 F.3d at 190 n.32 (quoting and characterizing *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987)). *See also id.* (quoting and characterizing *Porter v. Califano*, 592 F.2d 770 (5th Cir.

1979)); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992). The same holds for the LSC's potential defense under *Mount Healthy v. Doyle*, 429 U.S. 274 (1977): Whether the LSC would have adopted Rule XX even absent the industry and political interests' complaints about TELC's activities is a factual question similarly unamenable to resolution on a motion to dismiss. Equally, plaintiffs' unconstitutional conditions claim presents the question of whether the group client rules are narrowly tailored — a mixed question of law and fact, *see International Soc. for Krishna Consciousness v. City of Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989), that is inappropriate for resolution on a Rule 12(b)(6) motion.

Because plaintiffs' claims hinge on factual questions, and because plaintiffs' allegations of viewpoint discriminatory motive and absence of narrow tailoring are sufficiently pled and must be accepted as true on this motion to dismiss, the district court's ruling granting dismissal was error and must be reversed.

II.

Plaintiffs Should Be Permitted to Prove That by Prohibiting Students from Representing Any Client Who Was Initially Contacted by Law School Clinic Professors or Students, Rule XX Violates the First Amendment Rights of Students and Law Professors, and of Disadvantaged Individuals and Groups, to Communicate and Associate with One Another.

Like the group client rules, the legal outreach restrictions were all but forced on the LSC by the Governor and business critics of the law school clinics, Compl. ¶¶ 3, 28-40, 47, and are constitutionally infirm in the same ways. Both are the product of unlawful viewpoint discrimination and retaliation by the government, and both impose unconstitutional conditions on the privilege of law student legal practice.

A. Rule XX unconstitutionally conditions law student legal practice on a requirement that law school clinic professors and students forgo their First Amendment right to reach out to disadvantaged individuals and communities by informing them of their rights and the opportunity for law school clinic representation.

1. Law school clinic professors and students have a First Amendment right to engage in community education and legal outreach.

The Supreme Court has long taught that legal outreach, consisting of public education about legal rights accompanied by offers of pro bono legal assistance, can at times play an important role in helping the disadvantaged assert their rights. Because of lack of sophistication about what their rights may be, and lack of

familiarity with the few legal organizations (often located at great distances) that are willing to take non-paying cases, legal education and outreach by public interest lawyers, including offers of possible pro bono legal assistance, are often the only realistic way for the disadvantaged to learn about and enforce their rights. *See Bates*, 433 U.S. at 377 n.32 ("Underlying [*Button* and its progeny] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.").

Beginning with *Button* and continuing in a series of cases including *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) , *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971), and *Primus*, the Supreme Court has held time and again that public interest lawyers who are driven not by pecuniary interest but by a desire to educate the disadvantaged and assist them in vindicating their rights enjoy an absolute right that "come[s] within the [First Amendment] right 'to engage in association for the advancement of beliefs and ideas,'" *Primus*, 436 U.S. at 424 (*quoting Button*, 371 U.S. at 430), to extend offers of pro bono legal assistance, whether through speeches, letters, leaflets, or direct in-person communication. *See In re Disability Law Ctr. of N.H.*, 130 N.H. 328, 336, 541 A.2d 208, 213 (1988) (Souter, J.) (summarizing "the salient features of the *Button*

line of cases"). Moreover, this right extends not just to lawyers but also non-lawyers who engage in pro bono legal outreach as agents of lawyers. *See Button*, 371 U.S. at 435 (invalidating anti-solicitation law that applied to pro bono "lawyers and nonlawyers alike").

These and other cases have recognized a bright-line distinction between pro bono legal outreach and "in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons." *Primus*, 436 U.S. at 422. Unlike pro bono legal outreach, the latter enjoys only the lesser First Amendment protection accorded commercial speech, and so may permissibly be subjected to untailored "prophylactic [restrictions] whose objective is the prevention of harm before it occurs." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978). *But see Bates*, 433 U.S. 350 (even under lesser commercial speech standards, prohibition against commercial solicitation by mail violates First Amendment).

2. Rule XX burdens law professors' and students' First Amendment right to reach out to communities in need by prohibiting any student from ever working on a case that can be traced back to legal outreach.

Rule XX provides that "no student practitioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising

lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or indigent community organization for the purpose of representing the contacted person or organization." LA. SUP. CT. R. XX § 10 (1999). It thus conditions the authorization of law students to participate as lawyers (as opposed to as non-lawyer legal clerks) on law clinic cases on the requirement that not just the students, but the clinical law professors and other clinic staff as well, refrain from exercising their constitutionally protected right to pro bono legal outreach.

As discussed in detail above, any rule that requires law professors to refrain from exercising a First Amendment right in order for law students to work as lawyers on a case, burdens that right and triggers heightened scrutiny. *See supra* page 39; *Meyer*, 486 U.S. at 424 (rule barring party engaged in First Amendment-protected activity from enlisting particular type of assistance constitutes a burden on the right, triggering heightened scrutiny). But as also explained, in the context of a law school clinical program, the burden is greater still. Because the purpose of clinical legal education is to teach students lawyering skills by working in an actual representative capacity, professors simply cannot agree to accept cases on which their students are barred from participating as lawyers. *See supra* pages 39-40. Thus, as the Complaint alleges, Compl. ¶¶ 95, 101, 107, and as the court must

therefore accept as true on this motion, section 10 has the effect of forcing law professors too to forgo legal outreach. Contrary to the district court's suggestion, and as plaintiffs will prove at trial, clinical faculty thus *cannot* continue to litigate cases that result from legal outreach with "students . . . participat[ing] in [such] solicited cases in other fashions." Slip op. at 24.

3. The burden imposed by Rule XX on law professors' and students' First Amendment rights is not justified by any important government interest.

As noted previously, under the Supreme Court's unconstitutional conditions case law, the government may condition the availability of a government-granted privilege on a party's refraining from exercising an important First Amendment right only if the restriction survives heightened constitutional scrutiny — *i.e.*, if it is narrowly tailored to meeting an important government interest. *See supra* Part I.C.3 (discussing, *inter alia*, *FCC v. League of Women Voters* and *Meyer v. Grant*). In dismissing plaintiffs' challenge to the legal outreach restrictions, the district court erroneously applied a form of relaxed scrutiny; scarcely considered Rule XX's unprecedented burden on of the right of law school clinic professors to engage in legal outreach; and improperly speculated about the likely impact of the legal outreach restriction in a fashion inappropriate on a motion to dismiss where

the complaint alleged that the provision has forced law school clinics and professors to forgo legal outreach to clients, *see* Compl. ¶¶ 95, 101, 107.

On this appeal it is clear that, under the heightened scrutiny that properly applies to Rule XX's burdening of law school clinic professors' and students' rights to pro bono legal outreach, plaintiffs' complaint states a claim for relief and, indeed, it is inconceivable that, at trial, defendant could prove the existence of a narrowly tailored important justification of the sort that *Meyer* and *League of Women Voters* demand. Although this appeal arises on a motion to dismiss and the district court thus has had no opportunity to receive or examine purported justifications for the restrictions, the district court relied on the explanation set forth in the LSC's commentary to the amendments. That commentary provides:

> [I]n furtherance of the Court's policy against solicitation of legal clients generally, the ethical prohibitions against attorney solicitation, and the Court's view that law students should not be encouraged to engage in the solicitation of cases, Section 10, as amended, prohibits a student practitioner from representing a client who has been the subject of targeted solicitation by any law clinic representative.

La. Sup. Ct. R. XX § 10 cmt. (1999). Citing this commentary, and ignoring the all-important First Amendment distinction between pro bono legal outreach and commercial solicitation, *see* slip op. at 23, the district court suggested that some form of relaxed scrutiny applied to the legal outreach claim, reasoning that

"Section 10 does not implicate the students' constitutional freedoms due to [the LSC's] inherent power to regulate student practice, and even if it did, the Court believes that Section 10 strikes the proper balance between the government and individual interests at stake. It is rationally related to a legitimate state interest." *Id.*

But under the heightened scrutiny mandated by *Meyer* and *League of Women Voters* — and, indeed, even under mere rational basis scrutiny, were that the applicable standard (which it is not) — the justification suggested in the Rule XX commentary is inadequate. The commentary ignores the paramount distinction between pro bono legal outreach and commercial solicitation. There is no valid "policy" or "ethical prohibition" against legal outreach to potential pro bono clients by either attorneys or non-attorney agents; under *Button* and *Primus* any such restrictions conflict with the First Amendment and are unenforceable. Indeed, even if the law school clinics were engaged in commercial solicitation (which they are not), the Rule XX restrictions would still be unjustified because they pressure clinical law professors to forgo even written outreach and outreach to former clients, both of which Louisiana law and the First Amendment safeguard even for commercial lawyers. *See* LA. SUP. CT. R. 7.2(a), (b) (1999); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988).

Even more importantly, neither the Rule XX commentary nor the district court opinion even *attempt* to justify the Rule's completely unprecedented requirement that law school clinic faculty must also refrain from pro bono legal outreach in order for their students to be free to work on cases in a representative capacity. Even if the LSC were to advance a coherent, appropriate reason for barring law students from exercising the First Amendment right to pro bono outreach enjoyed by all lawyers, the LSC would still be obligated to offer a separate justification for why law school clinics should be barred from representing clients in cases where *law school clinic professors* have exercised this core First Amendment right. The LSC has not and cannot.

The district court opinion addresses this critical question in just two sentences where it asserts — wrongly and ignoring the allegations of the Complaint, *see* Compl. ¶¶ 95, 101, 107— that the Rule simply does not burden law professors in their ability to continue engaging in legal outreach. *See* slip op. at 19; *but see* discussion *supra* Part II.A.2. The lower court offered no explanation or justification for the restriction on clinic faculty, and none is suggested in the complaint or any other relevant document — to say nothing of any justification narrowly tailored to a substantial governmental interest as required by *Meyer* and *League of Women Voters.* Even on remand, LSC would have a heavy burden to

demonstrate a justification for why law school clinic faculty should be the only lawyers in Louisiana effectively prevented from exercising the First Amendment right of pro bono legal outreach and, indeed, why they should be denied the right enjoyed even by commercial attorneys to engage in written solicitation and in the solicitation of former clients. Indeed, even LSC Justice Harry Lemmon — a jurist who has not hesitated to voice his personal disagreement with some of the U.S. Supreme Court's decisions concerning non-commercial legal outreach — dissented from the adoption of the Rule XX solicitation restrictions, writing:

> This court under decisions of the United States Supreme Court (some of which I do not agree with) could not prohibit lawyers admitted to practice from certain types of solicitation, and this includes lawyers who are employed by law clinics. Since we could not prohibit . . . solicitation directly, I question whether we should prohibit these types of solicitation indirectly by imposing penalties on the lawyers admitted to practice in the form of a prohibition against their use of student lawyers to represent the validly solicited clients.

Resolution of the LSC Adopting Amendments to LA. SUP. CT. R. XX (Mar. 22, 1999) (Lemmon, J., concurring in part and dissenting in part).

Finally, even if one could discern an important government interest justifying the outreach restriction (and, as explained below, *see infra* Part II.C, any such interest would have to be supported by actual record evidence), the Rule XX restriction would not meet the requirements of narrow tailoring. The Supreme

Court has instructed that, in light of the First Amendment values inhering in pro bono legal outreach to clients, state regulation of such practices must be "narrowly drawn . . . to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Primus*, 436 U.S. at 438. Such careful tailoring is particularly important given that "considerations of undue commercialization of the legal profession are of marginal force where . . . a nonprofit organization offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid." *Id.* at 437. Rule XX's blanket restriction on legal outreach is not narrowly drawn to address any actual abuse — indeed, the LSC's own investigation revealed no abusive outreach by law school clinics — and, in any event, the question of narrow tailoring can only be resolved after factual inquiry on an appropriate record. *See infra.*

B. Rule XX's repeal of authorization to engage in legal outreach violates the First Amendment rights of community groups, individuals, and their law school clinic counsel, because Rule XX was adopted to suppress their speech on politically controversial topics.

The inadequacy of the justifications suggested in the Rule XX commentary and posited by the district court stems in addition from the fact that they do not reflect the real reason the LSC adopted the rule. Rather, as alleged in the

Complaint, and as the court must thus accept as true on this motion, the Rule XX amendments (including the legal outreach provision) were adopted by the LSC at the express urging of the Governor and business interests in Louisiana, *see* Compl. ¶¶ 3, 39, for the purpose of preventing law school clinics — particularly TELC — from representing individuals and community group clients in environmental cases and other matters opposed by these parties. Compl. ¶¶ 28-50.

The pedagogical "justifications" for the legal outreach restrictions set forth in the Rule XX commentary and posited by the district court thus ring hollow for the fundamental reason that they are post-hoc rationalizations, invented to dress up what was really an act of power politics. And in this respect too this case closely parallels *Button*, where new restrictions on legal outreach were similarly imposed under circumstances clearly suggesting they were meant to discourage litigation by a politically disfavored faction. *See Button*, 371 U.S. at 423 (Virginia legislature enacted rule change in 1956, shortly after NAACP began to make gains in legal struggle against segregation).

The fact that the changes in Rule XX were motivated by an intent to suppress the unpopular views of the community group clients that TELC had represented not only shows how the restrictions serve no valid state interest, but also establishes a separate and independent constitutional violation: that they were

adopted to punish and suppress speech based on its viewpoint in violation of the First Amendment. *See* discussion *supra* Part I.B.

C. The complaint's dual allegations that the restriction on legal outreach by law school clinics constitutes viewpoint discrimination and imposes an unconstitutional condition require factual inquiry and preclude dismissal.

As with plaintiffs' claims challenging the Rule XX group client restrictions, the district court's disposition of claims concerning the legal outreach restrictions on a motion to dismiss was additionally erroneous because those claims hinge on questions of fact, and mixed questions of law and fact, that require development of a factual record before their merits can be adjudged. As discussed above, First Amendment viewpoint discrimination claims are intensely fact-based, turning as they do on questions of motivation. Rarely are they suited for summary judgment — to say nothing of dismissal for failure to state a claim. *See supra* Part I.C.

As for the unconstitutional conditions claim, in cases such as *Button* and *Primus* where courts have reviewed the constitutionality of laws burdening the right to non-commercial legal outreach or other speech, courts have required that efforts to justify such restrictions must be supported by "substantial support in the record," *Primus*, 436 U.S. at 434 n.27, showing "substantive evils flowing from [the solicitation]" sought to be prohibited. *Button*, 371 U.S. at 344. *See Tinker v.*

Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome" First Amendment rights.); *Healy*, 408 U.S. at 190; *Mine Workers*, 389 U.S. at 223. Indeed, even restrictions on commercial solicitation of clients — which, as a form of commercial speech, enjoy far less protection — must be supported by actual record evidence demonstrating the weightiness of the governmental interest ostensibly served. *See Edenfield v. Fane*, 507 U.S. 761, 770-73 (1993); *id.* at 770 ("This burden is not satisfied by mere speculation or conjecture.").

And dismissal was especially inappropriate since members of the LSC have already disclosed that the Court's investigation of the law school clinics did not reveal "a single case in which TELC or any other law school clinic . . . engaged in any sort of professional misconduct" that might justify the Section 10 solicitation restrictions. Compl. ¶¶ 7, 45.

III.

The Politically Motivated Modifications to Rule XX Impermissibly Infringe the First Amendment Academic Freedom of Law School Faculty and Students.

The Rule XX restrictions at issue in this litigation are subject to heightened constitutional scrutiny for the additional reason that they trench seriously on legal educators' First Amendment academic freedom to determine appropriate teaching methods and curricular content, and law students' corresponding right to engage in such learning. By effectively forbidding law school clinic faculty and students from representing community group clients or clients with whom they have engaged in pro bono legal outreach, Rule XX prevents students from being trained in the important skills involved in representing such parties. More pernicious still, the amended Rule seeks to promote an ideological message in the law school classroom. As mandated by the state's highest court, law schools must now train their students not to provide legal assistance to persons who need information about their legal rights, and not to provide legal assistance to a low-income person unless that person will either proceed alone or in an isolated group formed only of others just as poor.

While the LSC enjoys responsibility for determining fitness to practice law, that authority does not include the power to dictate law school class content and

teaching methods. Rather, it is a fundamental principle of our constitutional order that the First Amendment confers a guarantee of academic freedom which vests universities with the right to determine the subjects and methods of teaching, free from such government interference. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Charged with guarding this liberty, the federal courts have consistently invalidated on First Amendment grounds government efforts to proscribe teaching on particular subjects, *see, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Epperson v. Arkansas*, 393 U.S. 97 (1968), or the use of particular teaching materials or pedagogies, *see Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980); *Sterzing v. Fort Bend Ind. Sch. Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974).

The genesis of the Rule XX amendments in demands and threats made by the Governor and business interests opposed to the activities of TELC further illuminates the exquisite vulnerability of the law schools to political pressure, and the need to recognize and preserve academic freedom here. TELC and Tulane University initially endured these assaults from the Governor, who directly called the President of Tulane to complain about TELC; actively urged business leaders to withhold support for the university until TELC could be brought under control; and publically castigated TELC, declaring it run by "vigilantes." Compl. ¶¶ 28,

29, 32. The business complainants to the LSC likewise demanded changes in Rule XX on the ground that basic legal advocacy taught to law school clinic students was "bad for business." Plaintiffs seek the opportunity to demonstrate that these and many other similar charges prompted issuance of the modified Rule, interfering with legal education and causing additional harm to the low-income community groups and other clients that law students may no longer learn to assist.

The district court rejected these concerns out of hand, reasoning that, under such a view of academic freedom, "a professor supervising a criminal law school clinic might determine that the best educational experience for students would be to first learn how it feels to be a criminal." Slip op. at 19. But recognizing the existence of First Amendment academic freedom concerns in the clinical legal education context implies no such absurd result. While government may infringe First Amendment freedoms only where its action is narrowly tailored to serving an important government interest, prevention of crime is among the strongest possible justifications, and a "criminal clinic" as imagined by the lower court would earn and expect little constitutional protection. But the clinical legal education at TELC that Rule XX halted posed no such risks, and was widely acclaimed for its success in teaching important skills and the rule of law to young

lawyers. The Complaint's allegations that Rule XX's barring Louisiana law school clinics from continuing to teach these important skills burdens important First Amendment rights thus states a claim for relief.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully suggest that the order of the district court dismissing plaintiffs' First Amendment claims should be REVERSED and the case REMANDED for adjudication of the claims after development of an appropriate record.

Respectfully submitted,

DAVID S. UDELL
E. JOSHUA ROSENKRANZ
PAUL K. SONN
PHILIP G. GALLAGHER
BURT NEUBORNE
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 5th Floor
New York, New York 10013
Tel: (212) 998-6720
Fax: (212) 995-4550

MARY E. HOWELL (#7030)
HOWELL & SNEAD
316 South Dorgenois Street
New Orleans, Louisiana 70119
Tel: (504) 822-4455
Fax: (504) 822-4458

MARJORIE R. ESMAN (#18198)
701 South Peters Street, Suite 100
New Orleans, Louisiana 70130
Tel: (504) 524-5328
Fax: (504) 523-1071

CERTIFICATE OF SERVICE

I, Paul K. Sonn, attorney for Plaintiffs-Appellants, certify that on January 7, 2000, I filed this Brief of Appellants with the Clerk for the United States Court of Appeals for the Fifth Circuit by depositing seven copies on paper and one on computer disk for delivery by United States Mail duly addressed to the Clerk. Additionally, on this day I served opposing counsel with this Brief of Appellants by depositing two envelopes for delivery by United States Mail, addressed to each of the individuals listed below and containing copies of the brief in paper and computer disk forms.

Christina Berthelot Peck
Roedel, Parsons, Koch, Frost,
Balhoff & McCollister
8440 Jefferson Highway, Suite 301
Baton Rouge, LA 70809
Tel. (225) 929-7033
Fax. (225) 928-4925

Michael H. Rubin
McGlinchey, Stafford & Lang
One American Place, 9th Floor
Baton Rouge, LA 70825
Tel. (225) 383-9000
Fax. (225) 343-3076

PAUL K. SONN
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 5th Floor
New York, New York 10013
Tel. (212) 998-6720

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2. and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7):

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH Cir. R. 32.2, THE BRIEF CONTAINS (select one):

A. 13,748 words, OR

B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

A. in proportionally spaced typeface using:

Software Name and Version: WordPerfect 8.0

in (Typeface Name and Font Size): Times New Roman 14 point,

OR

B. in monospaced (nonproportionally spaced) typeface using:

Typeface name and number of characters per inch:

_____

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed R. App. P. 32(A)(7), may result in the court's striking the brief and imposing sanctions against the person signing the brief.

_____

DAVID S. UDELL