UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN'S AND 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; and C. RUSSELL H. SHEARER,

Plaintiffs,

VERSUS

THE SUPREME COURT OF THE STATE OF LOUISIANA,

Defendant.

C.A. 99-1205
Section L, Mag. 4

Hon. Eldon E. Fallon

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The motion to dismiss should be denied. Unable and unwilling to address the serious claims raised in the Complaint, Defendant, the Supreme Court of Louisiana, instead completely mischaracterizes those claims. Plaintiffs do not argue, as Defendant would have this Court believe, that civil litigants have a constitutional right to counsel, that individuals have a constitutional right to engage in the unauthorized practice of law, or that Defendant lacks broad authority to regulate the practice of law in Louisiana. Rather, the Complaint alleges that Defendant has exercised its authority to regulate the practice of law in a manner that violates the United States and Louisiana Constitutions. Defendant's power to regulate the legal profession is not unlimited: Defendant must act in accordance with the dictates of state and federal law.[1]

The Complaint raises factual allegations that go to the heart of the ability of citizens to participate in the democratic processes of Louisiana government, and these allegations must be deemed true for purposes of Defendant's motion. To dismiss Plaintiffs' claims at this early stage of the litigation, without opportunity for full factual and legal development, would be profoundly inappropriate. Defendant's "sleight of hand" legal arguments cannot avoid the crux of Plaintiffs' charge: that Defendant adopted the March 22, 1999 Amendments to the Rules of the Supreme Court of Louisiana ("Rule XX Amendments") in order to silence the Tulane Environmental Law Clinic ("TELC") and "satisfy [business and governmental interests in the State] who are discomforted by [TELC's] successful legal advocacy." *Resolution of the Supreme Court of*

[1]*See* La. Const. Art. V, § 5(a) ("The supreme court . . . may establish procedural and administrative rules not in conflict with law . . . .").

Louisiana March 22, 1999 (Johnson, J., dissenting from adoption of Rule XX Amendments) (hereinafter "Resolution"). This charge must be heard.

FACTUAL BACKGROUND

As alleged in the Complaint, Defendant promulgated the Rule XX Amendments in response to intense pressure by business interests and the executive branch of Louisiana government. TELC, and other law clinics in Louisiana, have a long history of providing highly competent legal services to those who would otherwise be unable to retain counsel. *See* Compl. ¶ 22. This advocacy often brings TELC into conflict with powerful interests in the State. For example, beginning in 1996, TELC engaged in successful advocacy on behalf of citizen groups opposing the location of a massive chemical production facility in Convent, Louisiana, a small, predominantly African-American, lower-income community located in the heart of the so-called "Cancer Alley." *See id.* ¶¶ 23-47. TELC's involvement in the Shintech case provoked several business associations representing entities adverse to TELC and its clients, including The Chamber/New Orleans and the River Region ("The Chamber"), the New Orleans Business Council, the Louisiana Association of Business and Industry ("LABI"), and The Chamber/ Southwest Louisiana, to petition the Louisiana Supreme Court, demanding that Defendant investigate the activities of TELC. *See id.* ¶¶ 6, 31, 33, 37-39, 40. Charging that "faculty and students' legal views are in direct conflict with business positions," *id.* ¶ 31, LABI proposed an amendment to Rule XX that would stifle TELC's "obstructionist practices," *see id.* ¶¶ 37-38. Governor Murphy J. ("Mike") Foster and his agents played an integral role in this mobilization, advising business leaders to withhold financial support from TELC and repeatedly engaging in public criticism of TELC. *See id.* ¶¶ 29, 32, 35-36.

Responding to these demands and to political pressure exerted by Governor Foster, Defendant initiated an investigation into TELC. *See id.* ¶¶ 34, 41-44. Defendant commenced its official investigation in September 1997, *see id.* ¶ 41; however, it in fact began an unofficial investigation of TELC as early as July when Kim Sport, Deputy Judicial Administrator for the Louisiana Supreme Court, contacted Governor Foster's office seeking information regarding TELC. *See id.* ¶ 34. Notably, Ms. Sport also held an official position as Chair of The Chamber's West Bank Council. *See id.* Although Defendant purported to conduct a general investigation of law school clinics in the state, the target of its inquiry was plainly TELC. For example, Defendant specifically referred to complaints regarding TELC in its notice to the law schools, and its investigators conducted extensive interviews with TELC students and staff, while conferring only with the clinic directors at Tulane's other clinics. *See id.* ¶¶ 41, 43.

Defendant has never publicly disclosed the results of its investigation. *See id* ¶ 45. Although this investigation revealed no evidence of ethical or legal violations by TELC or any other clinic, and no evidence that any clinic ever represented clients otherwise able to afford legal representation, *see id.* ¶¶ 45-47, Defendant nonetheless promulgated Amendments to Rule XX on June 17, 1998, modeled closely after LABI's proposal. *See id.* ¶¶ 39, 47. Kim Sport continues to serve as Defendant's spokesperson on the Rule XX Amendments, and maintained her affiliation with The Chamber, serving as its Regional Council Leader for Community Development as recently as January 29, 1999. *See id.* ¶ 50.

The final Rule XX Amendments (amended twice since their initial promulgation, most recently on March 22, 1999, and effective in their current form as of April 15, 1999) have profoundly curtailed TELC's ability to represent clients in new matters, and have significantly

restricted the practices of other law clinics throughout the state of Louisiana. The Rule XX Amendments limit clinic representation to individuals and organizations that meet specified income requirements, Sections 3, 4, 5; impose a certification requirement on organizations seeking clinic representation, Section 5; and prohibit student practitioners from representing clients with whom "any clinical program supervising lawyer, staff-person, or student practitioner initiated . . . contact . . . for the purpose of representing the contacted person or organization," Section 10. Compl. ¶ 8. Defendant's student practice rule has prevented TELC and other clinics from representing community organizations in new matters, thus depriving those organizations of access to much needed legal counsel in a variety of pressing matters. *See id.* ¶¶ 9, 54-89.

ARGUMENT

I. STANDARD OF REVIEW APPLICABLE TO A MOTION TO DISMISS

Defendant has mischaracterized the applicable standard of review. When analyzing a motion to dismiss for failure to state a claim, the Court must view all of the allegations in the Complaint in the light most favorable to Plaintiff and accept them as true. *See OBO Transp. Servs., Inc. v. Hired Trucks, Inc.*, No. Civ. A. 96-3898, 1998 WL 61026, at *1 (E.D. La. Feb. 11, 1998) (Fallon, J.); *Francis v. Health Care Capital, Inc.*, No. Civ. A. 94-3870, 1996 WL 559988, at *1 (E.D. La. Oct. 1, 1996) (Fallon, J.). Such a motion must be denied "unless it appears beyond doubt that there is no set of facts under which the allegations could constitute a claim for relief." *Smith v. Winter*, 782 F.2d 508, 511-12 (5th Cir. 1986). 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 viewpoint discrimination." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992).

II. DEFENDANT HAS COMPLETELY MISCHARACTERIZED THE CLAIMS STATED IN PLAINTIFFS' COMPLAINT, AND FAILED TO ADDRESS THE SUBSTANCE OF THE DISPUTE

Defendant's motion completely mischaracterizes the Complaint. Defendant spends the bulk of its memorandum proving the unexceptionable propositions that (a) non-lawyers have no constitutional right to represent others in a court of law, *see* D. Mem. at 2-8, 17-18; (b) courts have the authority to regulate both lawyers and clinical law student practice, *see id.* at 8-17, and (c) there is no constitutional right to have legal counsel in civil matters, *see id.* at 22-23. Of course, Plaintiffs accept all three propositions. But nothing in Defendant's memorandum requires dismissal of the Complaint.

As set forth in Section III, *infra*, Plaintiffs allege that the Rule XX Amendments violate various provisions of the United States and Louisiana Constitutions. Rather than address those allegations, Defendant's blanket response seems to be that in regulating the practice of law, it is subject to no First Amendment constraints. Thus, Defendant asserts:

> Plaintiffs . . . alleg[e] that their First Amendment rights are being violated by the Louisiana Supreme Court's change in rules; *those allegations are simply another way of saying that the ability to represent others in court is somehow amenable to First Amendment protection*. That claim is without merit . . . .

D. Mem. at 17 (emphasis added). This assertion is nothing short of stunning. It is very well established that "the ability to represent others in court is . . . amenable to First Amendment protection." *Id.*; *see, e.g.*, *In re Primus*, 436 U.S. 412, 432 (1978); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *In re Stolar*, 401 U.S. 23, 30 (1971); *Baird v. State*

Bar, 401 U.S. 1 (1971) (plurality opinion); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5 (1964).[2]

Obviously, this does not mean that anyone, regardless of training or certification, can advertise himself as a lawyer, stroll into court, and represent clients before the bar. *See* D. Mem. at 18. Nor does it mean even that any law graduate has the right to be admitted to the bar. To the contrary, state courts generally have authority to regulate the legal profession and to admit and expel lawyers based on their qualifications. But while Defendant may exclude a particular applicant from the practice of law in the State of Louisiana, it does not have unlimited power to place restrictions on that person's practice of law once the court concludes that he or she is qualified to practice. Defendant could not, for example, certify a lawyer to practice law, but only on the condition that the lawyer limit his or practice to certain claims (for example, to exclude claims of race discrimination), certain clients (for example, to represent the poor), or certain viewpoints. Nor could Defendant impose onerous reporting requirements on lawyers; for example, the court could not require the lawyer to report the identity and income of everyone who seeks the lawyer's counsel. In each of these contexts, the First Amendment stands in the way.

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[2]Professor Sullivan's observation that "[l]awyers, as professionals, are subject to speech restrictions that would not ordinarily apply to lay persons," D. Mem. at 17 (quoting Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 Fordham L. Rev. 569, 569 (1998)), does not help Defendants. Professor Sullivan does not say that lawyers are subject to *any* speech restriction that Defendants might suggest. *See id.* ("[I]n light of their frequent role as representatives of underdogs and challengers to the state and the status quo, lawyers may be perceived to be entitled to extraordinary speech protections.").

By emphasizing that non-lawyers have no right to practice law and that state courts have an interest in regulating law school clinics, Defendant could, perhaps, be understood to claim that law students have no First Amendment rights to challenge Defendant's rules, even if admitted lawyers do. But that proposition is not correct either. Certainly, no law student has any "right" to practice law. As a general matter, Defendant may limit student practice in ways that are relevant to their limited training. Defendant may even prohibit student practice entirely, so long as unconstitutional purposes did not motivate its decision.[3] What Defendant cannot do, and what Plaintiffs allege Defendant has done here, is target student practice for restriction based on hostility to the viewpoints of the students, their clients, and their professors. And, Defendant cannot impose unconstitutional conditions on the exercise of First Amendment rights by allowing law students to represent clients only if they, their clients, and their professors refrain from exercising First Amendment rights. *See generally* Section III, *infra*.

The United States Supreme Court has held that a state may not indirectly interfere with constitutional rights by imposing "unconstitutional conditions" on their exercise. The First Amendment protects "not only against heavy handed frontal attack, but also from . . . more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *accord Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963). Thus, a regulation may not "impose penalties or withhold benefits" from individuals who choose to exercise First Amendment freedoms. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "[I]f a government could deny a benefit to a person because of his constitutionally

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[3] *See Schware v. Board of Bar Exam'rs*, 353 U.S. 232, 239 (1957) (state qualifications for legal practice must be related to "the applicant's fitness or capacity to practice law").

protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). By invoking the unconstitutional conditions doctrine, the Court has frequently prevented governments from "produc[ing] a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).[4] Here, as described in greater detail in Section III, *infra*, Defendant has tried to use law student practice as a tool to discourage the exercise of fundamental First Amendment rights. Defendant's irrelevant arguments about the unauthorized practice of law should not cloud this Court's analysis.

III. DEFENDANT'S MOTION TO DISMISS MUST BE DENIED BECAUSE THE COMPLAINT ADEQUATELY ALLEGES THAT THE ENFORCEMENT OF THE RULE XX AMENDMENTS IS UNCONSTITUTIONAL

Plaintiffs have adequately alleged that the Rule XX Amendments are unconstitutional.

A. The Complaint Adequately Alleges That Defendant Discriminated Against Plaintiffs On The Basis Of Viewpoint

Had Defendant promulgated the Rule XX Amendments declaring its intention to shut down Louisiana's environmental clinics because it abhorred the cases they were bringing, or the

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[4] *See, e.g.*, *Board of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *Rutan v. Republican Party*, 497 U.S. 62 (1990); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987). Furthermore, because law student clinical practice does not involve government subsidies, Defendant cannot justify its imposition of unconstitutional conditions on the basis of *Regan v. Taxation with Representation*, 461 U.S. 540, 545, 549 (1983). In *Regan*, the Court upheld Congress' decision not to grant 501(c)(3) status to organizations that engage in substantial lobbying activities because tax exempt status is a subsidy, and the state's "decision not to subsidize the exercise of a fundamental right does not infringe the right." "In this case, however, unlike the situation faced by the charitable organization in [*Regan*], . . . [the speaker] is barred from using even wholly private funds to finance" speech. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *see Regan*, 461 U.S. at 545-46 & n.7 (distinguishing unconstitutional conditions on constitutional rights, which are prohibited, from failure to subsidize constitutional rights, which is generally

clients they were serving, there would be no doubt that the Rule XX Amendments would constitute unconstitutional viewpoint discrimination. A Preamble, for example, bemoaning "the detrimental effects of the successful environmental justice claims on our business community," or "the highly unpopular causes championed by the law clinics," would present an open-and-shut case of First Amendment travesty. The Complaint alleges that Defendant has accomplished the same effect with the same motive. Defendant simply did not publicly broadcast it. Plaintiffs have alleged sufficient facts that, if proven true, will support a finding of viewpoint discrimination, and dismissal of this claim would therefore be inappropriate.

As the United States Supreme Court has repeatedly affirmed, governments may not discriminate against a speaker on the basis of his or her viewpoint. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).[5]

In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc*., 473 U.S. 788, 811 (1985), the Court held that a federal government fund-raising drive could exclude participation by advocacy organizations such as the Legal Defense Fund so long as the exclusion is not "in reality a facade for viewpoint based discrimination." *Id.* The Court remanded the case to determine whether the government's explanation for the exclusion was "in fact based on the desire to suppress a

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permitted).

[5]*See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

particular point of view." *Id.* at 812. *See Hobbs*, 968 F.2d at 481 (dismissal improper where complaint alleges viewpoint discrimination because adjudication of factual issues required).[6]

Here, the Complaint alleges that Defendant imposed the Rule XX restrictions at the request of government officials and business interests in Louisiana who disagreed with the viewpoints expressed by Plaintiffs, and regularly opposed Plaintiffs in court and before regulatory bodies, *see* Compl. ¶¶ 3, 5, 28-45; that the restrictive Rule XX Amendments are modeled after suggested revisions proposed by an industry group hostile to Plaintiffs, *see id.* ¶ 39; that Kim Sport, an employee of Defendant who was involved in its investigation of the law school clinics, held positions with one of the business interests that lobbied Defendant, *see id.* ¶¶ 34, 41, 50; that Defendant amended Rule XX after preparing an internal investigative report indicating there was no basis for such restrictions, *see id.* ¶¶ 41-47; that Defendant's procedures were highly irregular and deprived Plaintiffs of a fair opportunity for comment, *see id.* ¶ 45; and that Defendant has refused ever since to disclose its investigative report to Plaintiffs and the general public, *see id.* at 45. Plaintiffs are not alone in alleging viewpoint discrimination. Justice Johnson, who was uniquely situated to describe the Court's motivation, insisted that her colleagues had adopted the rule out of motive to discriminate against a particular viewpoint:

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[6]Even insofar as Defendant's actions might be viewed as legislative in nature, *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968), this Court must nonetheless inquire into Defendant's motive. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (court may determine improper legislative intent through "'circumstantial evidence'" or "'more direct evidence of legislative purpose'") (citing *Miller v. Johnson*, 515 U.S. 900, 915 (1995)); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (court may assess whether legislature's "predominate" intent was illicit); *Wallace v. Jaffree*, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring in the judgment); *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936); *Goldberg v. Whitman*, 743 F. Supp. 943 (D. Conn. 1990) (describing standards for assessing illicit legislative motive).

> [W]e should not curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy.
>
> Even though the complaints from business interests were directed specifically at Tulane Environmental Law Clinic, we decided to do a survey of law clinics at Tulane, Loyola, and Southern University law schools. An exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule.

Resolution (Johnson, J., dissenting); *see* Compl. ¶ 45. These allegations are more than sufficient to preclude dismissal of Plaintiffs' viewpoint discrimination claim.

The discriminatory intent underlying the Rule XX Amendments is also visible on their face, in that they selectively prohibit law school clinics from offering to represent "individuals and community organizations," while permitting law school clinics to offer to represent government agencies. Rule XX, §§ 3, 10. If, on its face, a governmental action targets ideas or information that government seeks to suppress, that action will be found unconstitutional.[7] More specifically, Section 10 prohibits law students from representing "an indigent person or other indigent community organization" if the person or organization was notified by law school clinic staff about the availability of clinic representation, but permits students to represent "the state [or] any political subdivision thereof" in the same situation. *See* Rule XX, § 3.[8]

By singling out for penalty the speech of indigent individuals and organizations that challenge decisions of government, while permitting law clinic representation of the government,

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[7] *See, e.g., Texas v. Johnson*, 491 U.S. at 397; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[8] Section 3 states: "an eligible law student may appear . . . on behalf of the state, any political subdivision thereof, or any indigent person or indigent community organization."

the Rule XX Amendments violate the First Amendment. In *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771-72 (2d Cir. 1999), the Second Circuit overturned a similar ban on advocacy by lawyers in federally funded Legal Services Corporation programs that represent the indigent. The court made clear that the unidirectional nature of the ban -- it barred challenges to welfare laws, but allowed defense of welfare laws -- evidenced its viewpoint discriminatory nature. *See id*. at 769-70; *see also Texas v. Johnson*, 491 U.S. at 413-18.

The purported interests that Defendant has alternatively expressed to defend the Rule XX Amendments further manifest its discriminatory intent. *See Texas v. Johnson*, 491 U.S. at 410. Defendant explained that Section 5 was necessary to ensure legal representation for those who cannot afford to retain private counsel. Yet not only is there no evidence that this was a legitimate concern, but Section 5 actually makes representation of the poor more difficult. *See* Section III.E.2, *infra*. Similarly, Section 10 cannot be justified with reference to Defendant's asserted interest in regulating legal ethics. *See* Section III.C, *infra*. These facts further establish that the Rule XX Amendments operate as a mere facade for viewpoint discrimination. *See* Compl. ¶¶ 3, 53. Defendant's illicit motive becomes even clearer when the asserted motivations for Sections 5 and 10 are compared. Section 10 directly impedes the representation of poor individuals and organizations by denying law student representation to "solicited" poor clients -- in direct contrast to the avowed purpose behind Section 5. Defendant's asserted interests cannot hide its true purpose: discrimination on the basis of viewpoint. For all these reasons, Plaintiffs have adequately alleged that the Rule XX Amendments constitute viewpoint discrimination in violation of the First Amendment.

B. The Complaint Adequately Alleges That The Rule XX Amendments Violate The Equal Protection Clause

Plaintiffs have adequately alleged that Defendant has violated the Equal Protection Clause of the Fourteenth Amendment, which "mandate[s] that all persons similarly situated must be treated alike." *Rolf v. San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) (holding that district court erred in dismissing Equal Protection claim that State had retaliated against plaintiffs for engaging in protected speech). Under the Clause, government regulations infringing on fundamental rights are subject to strict judicial scrutiny; they must be narrowly tailored to serve a compelling governmental interest. *See Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (holding that Illinois statute prohibiting picketing of residences but allowing picketing of places of employment violated Equal Protection Clause); *Mosley*, 408 U.S. at 95-96, 101 (ordinance censoring particular viewpoints violates equal protection because "[t]here is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard") (internal citation and quotation marks omitted); *Rolf*, 77 F.3d at 828. Because Plaintiffs here have alleged facts establishing that Defendant engaged in viewpoint discrimination by enacting the Rule XX Amendments, *see* Section III.A., *supra*, Plaintiffs have also stated a claim for denial of equal protection of the laws under the Fourteenth Amendment. *See Rolf*, 77 F.3d at 828. Accordingly, it would be error to dismiss "the equal protection claim at this stage of the litigation." *Id.* [9]

Further, the Rule XX Amendments are not narrowly tailored to any compelling state interest that would justify the burdens they impose on fundamental First Amendment rights. *See Rolf*, 77 F.3d at 828. A regulation fails strict scrutiny if it is overinclusive or underinclusive. *See*

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[9] *See also Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *Trister v. University of Mississippi*, 420 F.2d 499, 504 (5th Cir. 1969); *Texas State Troopers Ass'n. v. Morales*, 10 F.

Mosley, 408 U.S. at 101-02; *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1165-66 (6th Cir. 1993). In *Mosley*, the Court held that a statute prohibiting all non-labor school picketing but permitting peaceful labor picketing was not narrowly tailored to the city's interest in preventing school disruption. *See* 408 U.S. at 102; *see also Carey*, 447 U.S. at 465 ("The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility . . . ."); *Lubavitch*, 997 F.2d at 1165-66.

Here, likewise, Defendant cannot demonstrate the Rule XX Amendments are narrowly tailored to serve any compelling government purpose. As discussed below, the Amendments are not closely tailored to any of the justifications that have been offered by Defendant. *See* Section III.C., III.E.2., and III.G., *infra*. Accordingly, Plaintiffs have successfully stated a claim for violation of the Equal Protection Clause.

C. The Complaint Adequately Alleges That Section 10 Of The Rule XX Amendments Unconstitutionally Infringes Rights of Free Speech, Free Association, And To Petition Government For Redress of Grievances

Section 10 of the Rule XX Amendments unconstitutionally burdens Plaintiffs' fundamental right to engage in group legal action to advance the public interest, in violation of the First Amendment. Under Section 10, a law student practitioner may not represent a potential client if any law clinic staff person initiated contact with the potential client, whether in person, by mail, or in any other manner, for the purposes of representing that client. This rule places a severe burden on poor and working class communities in Louisiana and the law school clinics on

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Supp. 2d 628, 635-36 (N.D. Tex. 1998).

whom they rely for legal information and representation. Defendants have tried to justify that burden by asserting that "client solicitation" by law school clinics threatens legal ethics.[10] Nothing could be further from the truth. Time and again, the Supreme Court has rejected this argument, emphasizing that the ethical risks associated with commercial client solicitation are simply not present when public interest lawyers offer their services *pro bono* in an effort to advance their beliefs and those of their clients through the courts. Such activity is not a threat to legal ethics; indeed, it is the most noble activity in which a lawyer can engage.

Plaintiffs have a fundamental right to work together to advance the public interest through legal action. "[T]he basic right to group legal action" is central to the First Amendment. *United Transp.*, 401 U.S. at 585. In particular, the ability of dissident voices such as the client-plaintiffs to protect their rights will be undermined if access to the courts is infringed. "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances," *NAACP v. Button*, 371 U.S. 415, 430 (1963). For this reason, "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," *id.*, and regulations burdening this right are subject "to the closest judicial scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *See Primus*, 436 U.S. at 432 (law burdening solicitation of clients by

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[10]In its commentary to Rule XX, the Court sought to explain Section 10 as follows:
> [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 representation.

public interest lawyers must be "closely drawn" to a "subordinating interest that is compelling") (internal quotation marks omitted).[11]

Courts have repeatedly affirmed that a state may not, under the guise of preventing solicitation by lawyers, prevent public interest counsel from offering legal representation to those seeking to advance the public interest. As Justice Souter has explained:

> Organizations, their members and their staff lawyers may assert a protected first amendment right of associating for non-commercial purposes to advocate the enforcement of legal and constitutional rights . . . . When such advocacy may reasonably include the provision of legal advice or . . . litigation, the organization may itself provide legal representation . . . despite State regulations restricting legal practice and the solicitation of clients, provided that the organization and its lawyers do not engage in the specific evils that the general State regulations are intended to prevent.

In re New Hampshire Disabilities Rights Center, Inc., 541 A.2d 208, 213 (N.H. 1988) (Souter, J.).

In *Button*, 371 U.S. at 430, the United States Supreme Court considered the constitutionality of a Virginia statute barring client solicitation as applied to the NAACP. NAACP staff lawyers would recruit litigants for school desegregation litigation at community meetings and finance the litigation. *See id.* at 421-22. The NAACP paid its staff attorneys less than that "ordinarily received for equivalent private professional work" and prohibited its

[11]The right to collective legal action stems from the First Amendment guarantee of freedom of association. "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). Laws affecting the freedom of association "operate in an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam); *see*, *e.g.*, *Morse v. Republican Party*, 517 U.S. 186, 228 (1996); *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986); *Roberts*, 468 U.S. at 622; *Primus*, 436 U.S. at 424; *Button*, 371 U.S. at 430; *Bates*, 361 U.S. at 522-23; *Familias Unidas v. Briscoe*, 619 F.2d 391, 398 (5th Cir. 1980); *Ealy v. Littlejohn*, 569 F.2d 219, 226 (5th Cir. 1978).

attorneys from accepting additional compensation from litigants or other sources. *See id.* at 420-21.

The Court held that the Virginia statute infringed the First Amendment rights of community members and public interest lawyers to engage in "vigorous advocacy" through legal action. *Id.* at 429. For the NAACP, "litigation . . . is a means for achieving the lawful objectives of equality of treatment . . . . It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." *Id.* The Court rejected Virginia's asserted "interest in regulating [legal ethics]." *Id.* at 439:

> Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.

Id. at 443-44. Thus, the interest in regulating legal ethics could not "justify the broad prohibitions which [Virginia] has imposed." *Id.* at 444.

In *Trainmen*, 377 U.S. at 2, 5, the United States Supreme Court dissolved a state court injunction restraining a union from referring members to union-approved lawyers in worker's compensation matters, deeming such referrals illegal client solicitation. The Court concluded that the injunction infringed the union members' First Amendment right "to assist and advise each other" because the union had no pecuniary motives. *Id.* at 6. Again, the Court rejected any interest in regulating legal ethics:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits . . . to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and

> carefully counseled adversaries, and for them to associate together to . . . enforce rights granted them . . . cannot be condemned as a threat to legal ethics.

Id. at 7 (internal citation omitted); *id.* at 6 ("Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice.").

In *United Transportation*, 401 U.S. at 585, the Court upheld a similar plan against a state court injunction in light of the "fundamental right" to engage in "collective activity . . . to obtain meaningful access to the courts." In *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 219-22 (1967), the Court affirmed a plan whereby a union employed a salaried attorney to represent members in worker's compensation matters. The Court determined that "substantial[] impair[ment] [of] associational rights [were] not needed to protect the State's interest in high standards of legal ethics. . . . [T]here has come to light . . . not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession" from the union's activities." *Id.* at 225.

In *Primus*, 436 U.S. at 431, the Court once again held that the solicitation of prospective litigants by nonprofit organizations seeking to advance the public interest is protected speech. An ACLU cooperating attorney had been reprimanded by the South Carolina Supreme Court for offering *pro bono* representation to women who had been sterilized by the county government as a condition of receiving public assistance. *See id.* at 415-21. The United States Supreme Court held that South Carolina's actions could not "withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.'" *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam)). As to the claim that "legal ethics" were somehow threatened by the ACLU's activities, the Court explained that such concerns were simply irrelevant in this context:

"This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance . . . [in order] to express personal political beliefs . . . ." *Id.* at 422.

By preventing law student-plaintiffs, otherwise licensed to practice by Rule XX, from representing "solicited" client-organizations in public interest litigation, Section 10 directly interferes with Plaintiffs' exercise of First Amendment rights as described in *Button* and its progeny. Plaintiffs have alleged that the law student-plaintiffs, law professor-plaintiffs, and client-plaintiffs are engaged in difficult, often controversial, litigation to advance the public interest. Compl. ¶¶ 3, 5-6, 15, 25-27. No clinic staff person has a financial stake in any litigations brought by the clinic. *Id.* ¶ 52. *Button* and *Primus* are directly violated here.[12]

Furthermore, Section 10 places unconstitutional conditions on Plaintiffs' First Amendment right "to assist and advise each other." *Trainmen*, 377 U.S. at 6. *See* Section II, *supra*. Section 10 provides that if any member of the law clinic staff recruits a client, then no law student can represent that client (although a law professor may represent the client), thus limiting the ability of the law clinic to provide effective representation to individuals and community organizations seeking to advance their rights. In contrast, if a client finds the clinic on her own, then both law students and law professors can represent the client. Thus, Section 10 imposes on all Plaintiffs a penalty for engaging in protected First Amendment activity.

Dissenting from the adoption of Section 10, Justice Lemmon aptly expressed how Section 10 discriminates against Plaintiffs by penalizing indirectly what it could not prohibit directly:

12The law student-plaintiffs have the same right to associate with client-plaintiffs to advance the public interest that a fully licensed lawyer would have. *See* Section II, *supra*.

> This court . . . 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 (Lemmon, J., concurring in part and dissenting in part); *see also id.* (Traylor, J., concurring in part and dissenting in part) (joining opinion of Victory, J.).[13]

As in *Button* and its progeny, Defendant's purported interest in regulating legal ethics cannot justify the regulation here because the evils of client solicitation are simply not relevant in the context of public interest practice.[14] Neither the law school clinics, nor individual law students and professors, profit financially from their work. *See* Compl. ¶ 52. Civil rights cases in Louisiana, such as the environmental justice litigation in which TELC is engaged, "are neither very profitable nor very popular." *Button*, 371 U.S. at 443; *see* Compl. ¶¶ 28-50. The problem is not with competition among lawyers of the type which might lead to the abuse of clients, but "one of an apparent dearth of lawyers who are willing to undertake such litigation." *Button,* 371 U.S. at 443; *see* Compl. ¶¶ 13, 25, 76-81. And of course, Defendant's investigations did not reveal "a single case in which TELC or any other law school clinic . . . engaged in any sort of

13The harm caused by Section 10 is substantial. Law student practitioners provide the bulk of the legal representation offered by the law school clinics. A few law professors simply cannot do the work of several law student practitioners, and it is unreasonable to ask them to do so given the tremendous resources that private law firms often bring to the defense.

14The speciousness of Defendant's purported interest is revealed by the fact that Section 10 prohibits law student practitioners, but not other admitted lawyers, from representing so-called "solicited" clients. If solicitation is an ethical problem, it is a problem for admitted lawyers as well. Defendant is well aware that *Button* squarely precludes the type of regulation adopted here, *see* Louisiana Rule of Professional Conduct 7.2(a) (prohibiting solicitation where "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain"). *See* Section II, *supra*.

professional misconduct,", that might justify Section 10.[15] Compl. ¶ 7; *see id.* ¶ 45. Thus, Defendant had no basis to adopt Section 10 -- without evidence that the "solicitation" of clients by law school clinics threatens legal ethics, Louisiana's interest in regulating legal ethics cannot justify Section 10's interference with First Amendment rights. "Rights of political expression and association may not be abridged because of state interests . . . without substantial support in the record . . . ." *Primus*, 436 U.S. at 434 n. 27.[16]

Indeed, the United States Supreme Court has rejected restrictions as broad as Section 10 even when applied to lawyers motivated by financial gain. Section 10 denies law student representation to a client whenever any clinic staff-person "initiated in-person contact, or contact by mail, telephone *or other communications medium*" for the purposes of "soliciting" that client Rule XX, § 10 (emphasis added). Yet, even in the context of commercial speech, where the state's regulatory power is greatest and First Amendment rights are weakest, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980), the Supreme Court has never approved such a sweeping regulation. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), decided the same day as *Primus*, the Court approved a state rule prohibiting in-person solicitation for commercial gain in situations creating a risk of undue influence, on the grounds that a lawyer "may exert [undue] pressure," *Ohralik*, 436 U.S. at 457, when he "*personally*

15*See* Resolution (Johnson, J., dissenting) (indicating that Defendant's investigation revealed no ethical violations by law clinics).

16*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 v. James*, 408 U.S. 160, 190 (1972); *Mine Workers*, 389 U.S. at 223.

solicits an unsophisticated, injured, or distressed lay person," *id.* at 465 (emphasis added).[17] However, commercial solicitation that is not "in person" and does not bear the same risk of harm may not be prohibited. *See Bates v. State Bar*, 433 U.S. 350, 384 (1977) (striking down blanket rule prohibiting truthful, restrained attorney advertising through print and other media as improper infringement of commercial speech).[18] Defendant's rule thus has the perverse effect of granting greater First Amendment rights to lawyers in the private sector than to public interest lawyers championing unpopular views without hope of financial gain, even though the former's speech is entitled to "a limited measure of protection," *Ohralik*, 436 U.S. at 456, while the latter's speech "is at the core of the First Amendment's protective ambit," *Primus*, 436 U.S. at 424. Section 10 is unconstitutional on this basis alone.

D. The Complaint Adequately Alleges That The Rule XX Amendments Violate Plaintiffs' Academic Freedom

Plaintiffs have alleged that the Rule XX Amendments restrict the ability of the law professor-plaintiffs to utilize "non-state funds to provide representation to clients whose cases

17The *Ohralik* Court was careful to distinguish the kind of public interest advocacy that the law school clinics are engaged in, and limited the ban on in-person solicitation to commercial contexts. *See id.* at 458-59.

18*See also Peel v. Attorney Registration & Disciplinary Comm.*, 496 U.S. 91, 110 (1990) (plurality opinion) (holding lawyer could advertise certification as civil trial specialist despite rule barring such advertising); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-78 (1988) (striking rule prohibiting lawyers from soliciting commercial legal business by sending truthful letters to potential clients facing particular legal problems); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 639-41, 647, 652 (1985) (striking rule banning truthful commercial attorney advertisements that contain pictures and illustrations or information on specific legal problems); *In re R.M.J.*, 455 U.S. 191, 204-07 (1982) (striking strict rules regulating lawyer advertisement).

afford the best teaching and learning opportunities." Compl. ¶ 92. As such, Defendant's adoption of those rules violates the First Amendment, and its motion to dismiss must be denied.

"Academic freedom . . . [is] a special concern of the First Amendment." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978). "To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).[19] For this reason, courts have carefully scrutinized and rejected legislative efforts to interfere with the ability of teachers to educate in the manner they deem appropriate.[20] Courts, too, must defer to the educational decisions:

> When judges are asked to review . . . a genuinely academic decision . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate [the complete lack of] professional judgment . . . . Added to our concern for lack of standards . . . is a reluctance to trench on the prerogatives of educational institutions and our responsibility to safeguard their academic freedom.

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985).

The Tulane and Loyola law school clinics play critical roles in legal education. Clinics teach students how to reflect on the practice of law; to integrate theoretical doctrines into real-

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19*See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (striking statute requiring dismissal of teachers for advocacy of "subversive viewpoints"); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (discussing university's freedom "to determine for itself on academic grounds . . .what may be taught [and] how it shall be taught").

20*See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking Louisiana statute requiring schools to teach theory of creation if theory of evolution is taught); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding local school boards may not remove books from school library based on dislike of ideas contained in those books); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking statutes forbidding the teaching of evolution in public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking statute restricting education in languages other than English); *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (protecting use of "role playing" to teach African-American history); *Keefe v. Geanakos*, 418 F.2d 359, 360 (1st Cir. 1969) (protecting right to teach high school students with materials that include vulgar terms).

world practice; to approach decisions responsibly, creatively, and analytically; and to identify and resolve ethical dilemmas in lawyering, by giving students the responsibility of representing actual clients in real-world disputes. *See* Anthony Amsterdam, *Clinical Legal Education -- A 21st Century Perspective*, 34 J. Legal Educ. 612 (1984). The law professor-plaintiffs select cases based on a variety of factors, including their pedagogic value and the substantive interests of students and faculty. *See* Compl. ¶¶ 90-91, 96-97, 102-03.

Plaintiffs have adequately alleged that the Rule XX Amendments severely restrict the ability of the law professor-plaintiffs to provide an appropriate clinical legal education to the student-plaintiffs. *See id.* ¶¶ 92-108. The Rule XX Amendments diminish the value of the students' legal education. *See id.* ¶¶ 110-22. By alleging that Defendant has restricted the cases that the law professor-plaintiffs may teach based solely on Defendant's substantive opposition to Plaintiffs' viewpoints, Plaintiffs have alleged a violation of their First Amendment rights.

In its motion to dismiss, Defendant offers no justification for this state of affairs -- it does not claim that the rejected cases are inappropriate for their pedagogical purpose, beyond the competency of students to handle, or inconsistent in any way with generally accepted professional standards.[21] Defendant may regulate student clinical practice, but it may not engage in viewpoint discrimination by trampling on academic freedom in doing so.

21In determining whether a teacher may use particular materials or methods, the courts have considered whether the materials and methods are appropriate to (1) their pedagogical purpose, *see Kingsville*, 611 F.2d at 1113; (2) the educational level of the students, *see Parducci v. Rutland*, 316 F. Supp. 352, 355-56 (M.D. Ala. 1970); and (3) generally accepted professional standards, *see Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974).

E. The Complaint Adequately Alleges That Section 5 Of The Rule XX Amendments Improperly Burdens Plaintiffs' First Amendment Rights

The United States Supreme Court has consistently held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transp.*, 401 U.S. at 585 (1971); *see* Section III.C., *supra*. Yet, if the Southern Christian Leadership Conference, Louisiana Chapter, or any of the client-plaintiffs in this action, seeks to exercise this right through law clinic representation, Section 5 of the Rule XX Amendments compels them to sacrifice other, equally cherished, First Amendment rights, in violation of the Constitution. *See* Section II (discussing unconstitutional conditions doctrine). Under Section 5, a community organization seeking representation must document that 51% of its members meet restrictive indigency guidelines established by Defendant, thus encouraging groups to expel members with larger incomes and burdening the organization's First Amendment right to define its own membership. This documentation is, in turn, subject to inspection by Defendant, thus burdening the First Amendment right of organizations espousing unpopular views to shield confidential membership information from disclosure. Because Section 5 burdens the exercise of First Amendment rights, it is subject to heightened scrutiny. And since it is not rationally related, much less narrowly tailored, to any compelling interest, it is unconstitutional.

1. Section 5 Impermissibly Conditions Law School Clinic Representation On The Compelled Disclosure Of Private Membership Information

Section 5 abridges associational freedoms by conditioning the availability of law school clinic representation on the compelled disclosure of private membership information by the client-plaintiffs. The United States Supreme Court has repeatedly held that compelled disclosure

of an organization's private membership information to the government may "abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs," therefore triggering strict scrutiny. *Patterson*, 357 U.S. at 460; *accord Gibson*, 372 U.S. at 544. Groups seeking to advance unpopular points of view are particularly sensitive to forced disclosure. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *Patterson*, 357 U.S. at 460. Thus, compelled disclosure of membership information "work[s] a significant interference" with the freedom of association whenever public identification of members would lead to reprisals, and the fear of reprisals from public disclosure would lead to decreased membership. *Bates*, 361 U.S. at 523-24.[22] In addition, the Fifth Circuit Court of Appeals has consistently guarded the freedom of association from forced disclosure requirements.[23]

In the present case, the Complaint alleges that Section 5 conditions law clinic representation on the compelled disclosure of private membership information, and that, due to the unpopular views espoused by Plaintiffs, such compelled disclosure will expose members to "threats, harassment or reprisal." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101 (1982). Thus, while community organizations are not required to disclose information,

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22*See Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important . . . in shielding dissident expression from suppression by the majority."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982); *Button*, 371 U.S. at 431; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101 (1982) ("The First Amendment prohibits a state from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment or reprisals."); *Buckley*, 424 U.S. at 71 (same).

23*See Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483,1499 (5th Cir. 1995); *Hastings v. North East Indep. Sch. Dist.*, 615 F.2d 628, 632 (5th Cir. 1980); *Familias Unidas*, 619 F.2d at 395, 399; *Ealy*, 569 F.2d at 226-28.

the clinic may not represent them unless they do so. Section 5 does not provide any mechanism for ensuring that, in documenting members' incomes, private information will be shielded from inspection by Defendant, or from the risk of disclosure to clinic opponents through the discovery process. "[M]embers of organizations are concerned that through such compelled disclosure, private information could become available to government agencies or others, rendering members vulnerable to . . . retaliation. The threat of disclosure has a chilling effect on members' willingness to join organizations and remain as members." Compl. ¶ 58; *see also id.* ¶¶ 57, 59, 71. Justice Johnson recognized Section 5's dangers:

> 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 (Johnson, J., dissenting).[24]

The Complaint further highlights the virulent opposition of governmental and commercial interests to the viewpoints espoused by Plaintiffs, and the willingness of those interests to retaliate against Plaintiffs for the exercise of First Amendment rights. *See*, *e.g.*,

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24It would be no answer to suggest that Defendant could alleviate the risk of compelled disclosure by allowing client-organizations to provide income documentation with the identifying information redacted. For one thing, the Rule XX Amendments do not require Defendant to allow organizations to provide redacted information. A court may not rely on "guarantee[s that are] of purely speculative value. . . . [W]e cannot assume that, in its subsequent enforcement, ambiguities [in the rule] will be resolved in favor of adequate protection of First Amendment rights." *Button*, 371 U.S. at 437-38. In addition, the Fifth Circuit has held that even the compelled disclosure of redacted private information burdens First Amendment freedoms. In striking a city ordinance that risked disclosure of private clubs' membership lists, the Fifth Circuit was unsatisfied with the argument that the clubs could provide the tax returns of members with the names redacted. "The power to mandate the disclosure of even redacted tax returns indicates how intrusive the [ordinance] probes into the private affairs of the Clubs and their members." *Louisiana Debating*, 42 F.3d at 1499 n.32.

Compl. ¶¶ 29-45. By threatening forced disclosure of private information, Section 5 severely burdens core First Amendment rights.

2. Section 5 Impermissibly Conditions Law School Clinic Representation On The Sacrifice Of The Right To Control Organizational Affairs

Section 5 abridges associational freedoms by interfering with the client-organizations' ability to define their membership. *See New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring). "[T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'" *Tashjian v. Republican Party*, 479 U.S. 208, 214-15 (1986) (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981)); *accord Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224-25 (1989). To trigger strict scrutiny, the challenged regulation need not dictate an association's membership; it need only "interfere with the [group's] internal organization." *Roberts*, 468 U.S. at 623.

The Complaint alleges that Section 5 interferes with the client-organizations' freedom to define their membership and with the freedom of members to associate with individuals of their own choosing. Most client-plaintiff organizations include poor, working-class, and middle-class members who seek to promote justice in their communities. To engage in effective advocacy, these groups need to promote broad-based coalitions across cultural and class lines. Yet, in order to seek law school clinic representation, client-plaintiffs must "separate into two subgroups -- those who are truly desperately poor, and all others." Compl. ¶ 61.[25] Section 5 therefore isolates

25Furthermore, those who meet very low indigency standards are not the only clients unable to pay for legal services. Low and moderate income persons, and organizations comprised of such persons, also have difficulty affording counsel, particularly in complex civil matters. *Cf.* Anita P. Arriola & Sydney M. Wolinsky, *Public Interest Practice in Practice: The Law and Reality*, 34

and stigmatizes the poorest Louisianans, and discourages their effective organization. *Id.* ¶¶ 61-62.[26]

The Supreme Court of New Hampshire, in an opinion by then New Hampshire Supreme Court Justice David Souter, held that a state could not require a non-profit organization devoted to advancing the interests of the disabled through litigation to limit its work to advising and representing poor clients because to do so "would limit the pursuit of a protected associational interest" as guaranteed by the First Amendment. *New Hampshire Disabilities*, 541 A.2d at 213. Following *Button*, *Trainmen*, and *Mine Workers*, the Court recognized the right of the non-profit association's "members to serve, and of its staff lawyers to represent, all economic classes of the disabled who will place their legal interests" in the association's hands. *New Hampshire Disabilities*, 541 A.2d at 214. Not even the State's "public interest in regulating the practice of law," *id.* at 215, a right that the motion to dismiss asserts is unassailable, was sufficiently compelling to justify the infringement on the freedom of association.

New Hampshire Disabilities is directly on point. Like the disability rights organization in that case, Plaintiffs here seek to exercise their "first amendment right of associating for non-commercial purposes to advocate the enforcement of legal and constitutional rights of those members, or of others within a definite class whom the organization[s] exist[] to serve." *Id.* at

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Hastings L.J. 1207, 1212-18 (1983).

26In addition, Section 5 directly discriminates against group organization: although an individual who satisfies Defendant's restrictive income guidelines is eligible for law clinic representation so long as she acts alone, a group that includes individuals satisfying those income guidelines is not eligible for law clinic representation unless those satisfying the income limits constitute 51% of the group. "To place . . . any limit on individuals willing to band together to advance their views . . . while placing none on individuals acting alone, is clearly a restraint on the right of association." *Rent Control*, 454 U.S. at 296.

213. Although all Plaintiffs here, like the organization in *New Hampshire Disabilities*, focus on the needs of poor and working class communities, they have the right to associate with other individuals or associations which share their agendas, regardless of whether those individuals satisfy income guidelines established by Defendant. Because Section 5 infringes Plaintiffs' right to associate with whomever they choose in order to advance the public interest, it burdens core First Amendment rights and triggers heightened scrutiny.

3. Section 5 Is Not Rationally Related, Much Less Narrowly Tailored, To Any Compelling State Interest

Defendant has not demonstrated that Section 5 is rationally related to any compelling governmental interest, much less narrowly tailored to such an interest. A regulation that "burdens [associational] rights" must be "narrowly tailored" to advance "a compelling state interest" that is unrelated to the suppression of ideas. *Eu.*, 489 U.S. at 222; *see also Mine Workers*, 389 U.S. at 222; *Primus*, 436 U.S. at 426. Defendant's does not identify a *single* compelling interest which would justify Section 5's interference with the freedom of association. Its failure even to articulate such an interest precludes dismissal.

The only purpose that members of the Supreme Court of Louisiana have ever articulated in amending Rule XX is a desire to ensure that the law school clinics provide legal representation only to those individuals and organizations unable to afford private counsel.[27] Plaintiffs agree that providing representation to the poor is a worthy goal. Indeed, the clinics at Tulane and

27 *See, e.g.*, Resolution (Calogero, C.J., concurring) ("[T]he purpose of the Student Practice rule is to train law students in trial work, and secondarily to furnish legal services to indigent persons."); *id.* (Lemmon, J., concurring in part and dissenting in part) (The Rule XX Amendments clarify "the purpose of law clinics to serve both indigent persons and organizations primarily composed of indigent persons."); *id.* (Victory, J., dissenting in part and concurring in part) (same); *id.* (Traylor, J., concurring in part and dissenting in part). Of course, as Plaintiffs allege,

Loyola law schools have not represented a single client that would have been able to afford counsel on their own. *See* Compl. ¶3(e); Resolution (Johnson, J., dissenting).

However, this interest, even if it were honestly held, cannot justify the extraordinary burden Section 5 imposes on Plaintiffs' ability to use wholly non-state funds to form broad coalitions to advance the public interest. Defendant cannot force upon law school clinics the sole responsibility for providing legal representation to the indigent. Defendant could dedicate its own resources toward representation of the indigent, or employ strategies to enlist pro bono or other private resources. But instead, it has placed the full burden of representing the indigent on Plaintiffs. Section 5 thus violates Plaintiffs' rights to use their own funds, in the manner they consider most appropriate, to exercise their First Amendment rights. *See League of Women Voters*, 468 U.S. at 399-40.

Even assuming that providing legal services to the poor is a compelling interest that could justify these burdens, Section 5 is not narrowly tailored to advance that interest. A state seeking to justify a restriction on First Amendment rights must show that it is trying to prevent an actual, and not merely a speculative, harm. *See Primus*, 436 U.S. at 434 n.27; *supra* 16 and accompanying text. Thus, in *Button*, 371 U.S. at 441-43, Virginia sought to justify its rule prohibiting client solicitation by the NAACP in part on the basis that because the NAACP financed the litigation and paid the attorneys' salaries, it would exert undue influence on the attorneys and interfere with the attorney-client relationship. The Court rejected this justification because Virginia had failed to demonstrate that there was "a serious danger . . . of professionally reprehensible conflicts of interest." *Id.* at 443. Without such a showing, Virginia could not

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this asserted justification is simply a pretense for viewpoint discrimination *See* Compl. ¶¶ 3, 52.

prove that the regulation was actually needed to advance its interest.

Here, Defendant's motion to dismiss must fail because, according to Plaintiffs' allegations, the law school clinics have only represented organizations that are unable to afford counsel. *See* Compl. ¶ 3. Defendant therefore had no reason to adopt to Section 5. The investigations of the Supreme Court of Louisiana confirm this fact. *See id.* ¶ 7 ("[The investigation did not uncover a single case in which . . . any . . . law school clinic provided legal services to any group or individual that was able to afford private counsel . . . ."); *see also id.* ¶¶ 41-47; Resolution (Johnson, J., dissenting).

In his opinion issued with the Amendments, Justice Lemmon writes that the "law clinics unilaterally, without consulting this court, extended their operations beyond the service of indigent persons and organizations comprised primarily of indigent persons." *See* Resolution (Lemmon, J., concurring in part and dissenting in part). But Plaintiffs allege that Chief Justice Pascal Calogero has admitted that Defendant "had not identified a single client represented by the law school clinics that was capable of affording private counsel." Compl. ¶ 46. Therefore, Defendant had no reason to act as it did. Because there is no "substantial basis," *Healy*, 408 U.S. at 190, for concluding that Section 5's burdens on Plaintiffs' associational rights are necessary to serve any state interest, or to remedy anything other than "speculative" harms, *Mine Workers*, 389 U.S. at 223, Section 5 cannot survive strict scrutiny.

Finally, even if Defendant had some basis to require that only indigent community organizations be represented by law school clinics, Section 5 is irrational. Instead of ensuring that organizations which are unable to afford counsel have access to the clinic, the Rule XX Amendments "have drastically curtailed access to state courts for individuals and community

organizations who lack the resources to retain private counsel . . . ." Compl. ¶ 3(b). The Amendments "fail to take into account whether organizations, as opposed to their members, can afford private counsel. They also fail to consider the extensive costs of complex litigation as well as whether potential law school clinic clients have financial obligations that make it impossible for them to afford private counsel." *Id.* ¶ 3(c); *see also id.* ¶ 68. The administrative difficulty of certifying compliance with Section 5 on an ongoing basis makes it impossible for any organization, especially organizations comprised primarily of indigent persons, to qualify for law school clinic representation. *See id.* ¶¶ 64-67. Client-plaintiffs lack access to other qualified counsel. *See id.* ¶¶ 78-80. Chief Justice Calogero has admitted that he is "unaware of any community organization able to qualify for law clinic assistance" under the Rule XX Amendments. *Id.* ¶ 54.

F. The Complaint Adequately Alleges That The Rule XX Amendments Are Vague And Overbroad

Plaintiffs have adequately alleged that the Rule XX Amendments are vague and overbroad in violation of the First Amendment because they fail to give Plaintiffs fair notice of which actions are permitted and which are proscribed, and therefore have chilling effects of protected speech. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). "If [a] law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (footnote omitted). Vague laws "inhibit the exercise of [First Amendment] freedoms," *Grayned*, 408 U.S. at 109, because speakers may "avoid the risk of loss of employment, and perhaps profession, only by restricting

their conduct to that which is unquestionably safe," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).[28] In this regard, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433.

1. Section 5 Is Vague And Overbroad

The Complaint properly alleges that Section 5 provides insufficient guidance to Plaintiffs on how to comply with its requirements. Compl. ¶ 136. First, Section 5 fails to explain "what proof of income must be submitted to certify eligibility." *Id.* ¶¶ 69, 136. As Justice Johnson explains in her dissent, Section 5 "does not make clear the type of scrutiny which will be allowed to satisfy or challenge the" rule. Resolution (Johnson, J., dissenting). For example, the rule provides no guarantee that a client's sworn statement or a tax return would suffice to comply with Section 5. Further, Section 5 does not specify how frequently client-plaintiffs must verify their members' incomes. *See* Compl. ¶ 69. And because Section 5 lacks a scienter requirement, a good faith error by a law professor or student exposes the advocate to the threat of sanctions. *See id.*; *see also Hoffman Estates*, 455 U.S. at 499 ("[A] scienter requirement may mitigate a law's vagueness . . . ."). The threat of sanctions is real and immediate, as evidenced by calls from the environmental defense bar to police the activities of law school clinics. *Id.* ¶72. As a result, law professor-plaintiffs and student-plaintiffs are discouraged from providing legal assistance even to persons whose incomes, if ascertainable, would satisfy Section 5. *Id.* ¶¶ 69, 72.

Second, Section 5 is vague in that its requirements are nonsensical when applied to

28*See also* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the 'Chilling Effect,'* 58 B.U. L. Rev. 685, 693 (1978) (A law has a chilling effect "when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by

client-plaintiffs LEAN and LCU, whose members include "nonprofit corporations, unincorporated membership organizations, as well as individual members." Compl. ¶ 70. There is no such thing as "[f]ederal poverty guidelines" for nonprofit corporations and unincorporated membership organizations. *Id*. Thus, even though the members of such client-plaintiff organizations cannot afford counsel, they are unable to establish compliance with Section 5 because of the vagueness inherent in the Rule as applied to their circumstances. *See id.*

2. Section 10 Is Vague And Overbroad

Section 10 not only violates *Button* and its progeny, *see* Section III.C., *supra*, but also unconstitutionally infringes fundamental First Amendment freedoms by exerting a chilling effect on Plaintiffs' constitutional right to associate and to inform each other about their legal rights. Section 10 therefore discourages speech which Defendant concedes is constitutionally protected -- the right of any citizen to inform any other about their legal rights under the law.[29]

The Supreme Court has "not required that all of those subject to overbroad regulations risk prosecution to test their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). In *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), the Court struck a North Carolina regulation requiring, *inter alia*, professional fund-raisers to prove the reasonableness of fees that exceeded a certain percentage of revenue. Rejecting the state's argument that the Court need not concern itself with the chilling effect of the regulation because the "standards for determining reasonable fundraising fees [would] be judicially defined over the years," *id.* at 793, the Court reasoned:

> Speakers . . . cannot be made to wait for years before being able to speak with a measure of security. In the interim, fundraisers will be faced with the knowledge that every

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governmental regulation not specifically directed at that protected activity.").

29*See Commentary to Section 10 Amendment* ("[T]his . . . prohibition . . . does not in any way restrict or prohibit law school clinical activities which are intended to provide education or information to Louisiana citizens.").

> campaign incurring [high] fees will subject them to potential litigation over the "reasonableness" of the fee . . . . [T]he fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.

Id. at 793-94.

As a practical matter, it is impossible for speakers to distinguish, *ex ante*, between the allegedly improper activity of "solicitation" and the protected activity of community legal education. The impossibility of distinguishing between these activities chills Plaintiffs from exercising their fundamental right to educate others about the law and pursue legal action. Clarification of the line between the permitted and proscribed conduct by the courts, if possible at all, will take "years," *Riley*, 487 U.S. at 793, and will come only with the attendant costs of fact-finding and other proceedings, as well as with the risks of erroneous fact-finding, sanctions, charges of misconduct, possible disbarment, and impediments to future federal and state bar admissions -- even if Plaintiffs have engaged in protected speech. *See* Compl. ¶¶ 71-72, 118, 121.[30] Thus, even if *Button* did not protect the public interest solicitation at issue here -- which it does -- Section 10 should be struck down because of the chilling effects it exerts on fundamental First Amendment speech. Dismissal of the Complaint is therefore improper.

G. The Complaint Adequately Alleges That The Rule XX Amendments Violate The Donor-Plaintiff's Right To Freedom Of Expression

30*See also* La. R.S. 37:213; La. Sup. Ct. Rule XIX, §§ 5(C)(6), 10.

Plaintiffs have adequately claimed that the Rule XX Amendments impermissibly restrict the First Amendment rights of the donor-plaintiff. Individuals have a core First Amendment right to contribute money to the recipients of their choice in order to advance their views. *See Riley*, 487 U.S. at 788-89.[31] Moreover, law clinics, as private institutions sustained with private funds, including those funds contributed by the donor-plaintiff, have a First Amendment right to spend those funds free from government interference. *See League of Women Voters*, 468 U.S. at 401. The government may not restrict or coercively discourage speech simply because it involves the expenditure of money. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (plurality opinion); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 482-83 (1985); *Buckley*, 424 U.S. at 19.[32]

Defendant's blanket arguments regarding the judicial power to regulate lawyers do not justify dismissal of the donor-plaintiff's claims. Defendant may not regulate legal practice in a manner that impermissibly burdens the donor-plaintiff's right to make charitable contributions that support the independence of the academy and advance the rule of law. *See* Compl. ¶¶ 18, 123-25.

31*See also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 963-69 (1984); *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37 (1980); *Buckley*, 424 U.S. at 14-19.

32Unlike the campaign contribution limits upheld in *Buckley*, the limits on the donor-plaintiff impose more than a "marginal restriction" upon his free expression. 424 U.S. at 20. Donating to the clinic is the most effective means available for the donor-plaintiff to express his support for TELC's clinical program. Furthermore, in *Buckley*, the Court upheld the contribution limits because it "involves little direct restraint on his political communication." *Id.* at 21. In contrast, the Rule XX Amendments directly restrain political communication because the law clinics are prohibited from using the donor-plaintiff's funds in the manner he intends. Indeed, the right of an individual to "advoca[te] . . . a politically controversial viewpoint," as the donor-plaintiff seeks to do here through his contributions, "is the essence of First Amendment expression. . . . No form of speech is entitled to greater constitutional protection . . . ." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

In adopting and defending the Rule XX Amendments, Defendant has suggested that its purpose was to ensure that law student clinical practice be reserved for those who are unable to afford private counsel. *See* Section III.E.2., *supra*. The donor-plaintiff shares this concern. *See* Compl. ¶¶ 18, 123. However, Defendant is not empowered to substitute its judgment for the donor-plaintiff as to how this goal may best be advanced. In *Riley*, 487 U.S. at 790, North Carolina sought to restrict what it thought were certain unreasonable fundraising practices in an effort to protect charities and donors. However, the United States Supreme Court held that this "paternalistic premise" could not justify the restriction on core First Amendment speech. *Id.* "[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Id.* at 791; *see also Tashjian*, 479 U.S. at 224 (government may not interfere with expression because it deems "a particular expression as unwise or irrational") (internal quotations omitted).

In sum, Plaintiffs have alleged that the donor-plaintiff seeks to advance his views by contributing funds to the law school clinics, that the Rule XX Amendments restrict the law school clinics' ability to fully advance those views, and that the donor-plaintiff's First Amendment rights are impermissibly violated as a result. These allegations are more than sufficient to survive Defendant's motion to dismiss.

H. The Complaint Adequately Alleges That The Rule XX Amendments Violate Plaintiffs' Due Process Rights

Defendant also errs in contending that the adoption of the Rule XX Amendments did not violate Plaintiffs' due process rights. Plaintiffs have substantial liberty and property interests that the Rule XX Amendments severely harm. The arbitrary and illegitimate manner in which the Amendments were promulgated, as well as the lack of any rational basis for the Amendments, denied Plaintiffs both procedural and substantive due process.

1. The Adoption Of The Rule XX Amendments Violated Plaintiffs' Procedural Due Process Rights

Sections 3, 5, and 22 of the Louisiana Constitution give the client-plaintiffs rights to freedom from invasions of privacy, to petition the government, and of access to the courts. Section 7 assures Plaintiffs' rights to free speech and free association. *See* La. Const. Art. I, §§ 3, 5, 7, 22.[33] While not every state law creates a liberty interest such that its violation implicates the Due Process Clause, these provisions in the Louisiana Constitution are mandatory and explicit, and establish freedoms that are of fundamental importance in a democratic society. As such, they suffice to create liberty interests that trigger the protections of the Due Process Clause.[34]

Moreover, Plaintiffs have property interests that are affected by the Rule XX Amendments. Plaintiffs have "a legitimate claim of entitlement," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), not to be prohibited from appearing in court or denied their choice of counsel for reasons that violate their rights under the U.S. and Louisiana Constitutions. Notably, the United States Supreme Court has held "the practice of law is not a matter of the State's

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33*See Louisiana Republican Party v. Foster*, 96-0314 (La. 5/21/96), 674 So. 2d 225, 229 n.2 ("The freedom of association protected by the First and Fourteenth Amendments is also guaranteed by Article I, Sections 7 and 9 of the Louisiana Constitution"); *Dixon v. Shuford*, 28, 138 (La. App. 2 Cir. 4/3/96), 671 So. 2d 1213, 1215 (La. Ct. App. 1996) (rights to petition government supports right of self-representation in court); *State v. Moses*, 94-0489 (La. App. 4 Cir. 5/16/95), 655 So. 2d 779, 784-85 (La. Ct. App. 1995) (emphasizing special protection for anonymity and privacy contained in the Louisiana Constitution).

34*See, e.g., Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) (1983); *Sandin v. Connor*, 515 U.S. 472, 483-84 (1995) ("[S]tates may . . . create liberty interests which are protected by the Due Process Clause."); *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986) ("it may be necessary to look to state law to determine" whether person has an interest protected by Due Process Clause); *Stern v. Tarrant County Hosp. Dist..*, 778 F.2d 1052, 1058 (5th Cir. 1985) (en banc).

grace," and found a denial of due process where the factual record did not support a refusal to grant admission to the bar on the basis of an applicant's moral character. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 n.5 (1957).

Defendant's promulgation of the Rule XX Amendments failed to satisfy procedural due process, given the importance of the liberty and property interests at stake.[35] Plaintiffs were not allowed to examine and respond to the report on the clinic investigations. *See* Compl. ¶ 45. In addition, evidentiary support for Defendant's claimed interests in amending Rule XX is completely lacking. *See* Sections III.C, III.G., *supra*.[36]

Perhaps most importantly, Plaintiffs were denied an impartial decision-maker, as is required by the Due Process Clause. *See Concrete Pipe & Prods., Inc., v. Construction Laborers Pension Trust*, 508 U.S. 602, 617-18 (1993). A decision-maker must not have "a personal interest, financial or otherwise" if due process is to be satisfied. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). Here, a senior officer of Defendant who performed a pivotal role in investigating the law clinics and adoption of the Rule XX Amendments served at the same time as an officer of The Chamber, one of the business groups most critical of TELC's activities and a strong advocate of the Rule XX Amendments. *See* Compl. ¶¶ 31, 34, 41, 50. Such a flagrant

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35*See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

36 This case is therefore notably different from *Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985), *see* D. Mem. at 19-20, where the Seventh Circuit rejected a due process challenge to a rule adopted by a federal district court because "the record reveals that the procedure followed in adopting the rules adequately identified the problem, researched various solutions, [and] solicited public comment on both the problem and possible solutions." *Brown*, 774 F.2d at 785.

conflict of interest violates due process.[37]

2. The Adoption Of The Rule XX Amendments Violated Plaintiffs' Substantive Due Process Rights.

In addition, as discussed above, the Rule XX Amendments violate Plaintiffs' fundamental rights under the First Amendment, rights that "are protected against state intrusion by the Due Process Clause." *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988); *see also Paul v. Davis*, 424 U.S. 693, 710 n.5 (1976). Where such fundamental rights are at stake, the government cannot simply rest, as Defendant does here, *see* Section II, on invocations of the importance and legitimacy of its interest. Instead, Defendant must demonstrate that there is "a tight fit," *Brennan*, 834 F.2d at 1256, between the Rule XX Amendments and its interest in regulating the practice of law. Defendant cannot do thus, given the lack of any factual basis supporting Defendant's decision to dramatically revise the student practice rule. Indeed, the lack of support for the Rule XX Amendments demonstrates that adoption of the Amendments also violated the most basic protection offered by substantive due process -- the right to be "secure against . . . arbitrary action of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

37Defendant's reliance on *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493 (5th Cir. 1986), to establish that its promulgation of the rule is legislative, and therefore not subject to due process analysis, is incorrect. D. Mem. at 19. If action is based on generalizations regarding policy, it is legislative; but if it is based on "specific facts" or singles out particular individuals for different treatment, it is administrative. *Hughes v. Tarrant County*, 948 F.2d 918, 921 (5th Cir. 1991); *see Bogan v. Scott-Harris*, 523 U.S. 44, __, 118 S. Ct. 966, 973 (1998); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915). Here, Defendant's actions were clearly directed at TELC, its clients, and its donors. They were not actions of broad applicability for which the democratic process is thought an adequate remedy. *See Bi-Metallic*, 239 U.S. at 445. But even if this Court deems Defendant's actions quasi-legislative, and therefore not subject to due process protection, Defendant's profoundly unfair process in adopting the Amendments remains relevant to Plaintiffs' viewpoint discrimination claim.

IV. PLAINTIFFS' STATE LAW CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT

Contrary to Defendant's claim, the Eleventh Amendment does not prohibit this Court from exercising jurisdiction over Plaintiffs' claims premised on a violation of state law. In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Supreme Court held that a Pennsylvania statute could not support a district court's grant of broad injunctive relief that restructured operations of a state mental hospital, stating that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Id.* at 117.

Pennhurst, at most, bars a federal court from exercising jurisdiction over claims that solely assert a violation of state law. As a result, *Pennhurst* does not affect a federal court's jurisdiction to determine whether state officials have violated state law when such a determination is a necessary antecedent to resolving the merits of a federal law claim. *See, e.g.*, *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 965-66 (5th Cir. 1993).[38] *Pennhurst* simply does not apply where a violation of state law forms the basis for a federal law claim, because Plaintiff is seeking enforcement of federal law, not state law, and any relief ordered will be based on federal law. *See Chrissy F. v. Mississippi Dep't of Public Welfare*, 925 F.2d 844, 851 (5th Cir. 1991); *Brown v. Georgia Dept. of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989).

As discussed in Section III.H., *supra*, Plaintiffs contend that Article I, Sections 2, 3, 5, 7, 9 and 22 of the Louisiana Constitution, combined with their experience and practices under the

38*See Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 556-57 (5th Cir. 1988).

preexisting Rule XX and their rights under the U.S. Constitution, give them liberty and property interests that are subject to the protections of the Due Process Clause. Such due process claims are plainly not precluded by the Eleventh Amendment. *See, e.g., Chrissy F.*, 925 F.2d at 851 (assuming jurisdiction over a due process challenge premised on state law). Indeed, as state law constitutes the major source of liberty and property interests that trigger the procedural protections of the Due Process Clause, reading *Pennhurst* to bar Plaintiffs' claims "would eviscerate the due process clause." *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 561 (5th Cir. 1988) (Wisdom, J., dissenting on other grounds).

In addition, the Fifth Circuit has read *Pennhurst* narrowly to bar suit "not . . . where the state official's actions are alleged to be unauthorized by state law but where state law imposes an affirmative duty upon the official, and it is that duty that provides the basis for the injunctive relief sought." *Word of Faith*, 966 F.2d at 966 n.5.[39] Unlike *Pennhurst*, the state constitutional provisions on which Plaintiffs rely do not impose affirmative obligations on the state but instead contain mandatory prohibitions on government action; moreover, the relief Plaintiffs seek would impose no affirmative duties on Defendant. Under *Word of Faith*, the Eleventh Amendment does not preclude this Court from exercising jurisdiction over Plaintiffs' claim that the Rule XX Amendments are unauthorized under state law and, worse, violate fundamental protections afforded by the Louisiana Constitution.

V. ALL PLAINTIFFS HAVE STANDING

39*See also Cuesnongle v. Ramos*, 835 F.2d 1486, 1498 n.9 (1st Cir. 1987) (considering, but not resolving view of *Pennhurst* as "extend[ing] only . . . far-reaching, 'affirmative' relief that requires state officials to conform to a detailed regulatory system as prescribed by state law"); Erwin Chemerinsky, Federal Jurisdiction § 7.5 at 405 (1994).

Plaintiffs satisfy the constitutional requirements for standing, described by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (internal quotations omitted), as consisting of the three basic elements: "injury in fact," "causation," and "redressibility."[40] To establish standing at this stage "general factual allegations of injury resulting from Defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561; *see also Meadowbriar Home for Children, Inc. v. G.B. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) (same).

A. The Client-Plaintiffs Have Standing

Defendant's sole argument to justify dismissal of the claims of the ten client-plaintiff organizations [41] based on lack of standing is that the client-plaintiffs "rely on the premise that there is a right to representation in civil suits." D. Mem. at 27. Defendant asserts that there is "no such right," and that the client-plaintiffs therefore "cannot establish" an "injury in fact" -- invasion of a "*legally-protected* interest." *Id.* Defendant has not alleged that the client-plaintiffs fail to satisfy the causation and redressibility elements of Article III standing, nor any other

40More specifically, Plaintiffs must show "an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan*, 504 U.S. at 559, the injury in fact must be "fairly trace[able] to the challenged action of Defendant," *id.*, and "it must also be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision," *id.* at 560-61 (internal quotations omitted).

41Defendant incorrectly suggests that client-plaintiffs divide into two sets that either "have been or would like to be" clients of the Tulane Law Clinic. D. Mem. at 22 & nn. 49, 50. The Complaint describes one set of client-plaintiffs who "are represented and/or have been represented by TELC" and a separate set of client-plaintiffs who "are represented and/or have been represented by [the Loyola Law Clinic]." Compl. ¶ 55; *see id.* ¶ 13.

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requirements for standing. *See e.g.*, *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Even assuming that Plaintiffs had alleged that there is a right to counsel in civil suits (which they have not, *see* Section II, *supra*), it would be error to find lack of standing based on the merits of that claim. Standing "focuses on the party seeking to get his complaint before a federal court *and not on the issues he wishes to have adjudicated*." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added). "[T]he question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* at 99-100.[42]

Indeed, the client-plaintiffs have suffered an "injury in fact." The Complaint alleges that they have experienced concrete, particularized, actual and imminent harms caused by the Rule XX Amendments. For example, in violating the client-plaintiffs' rights under the federal and state constitutions, the Rule XX Amendments: (a) interfere with their capacity to advance their interests, protect their rights, and participate in the regulatory and judicial processes, Compl. ¶ 56; (b) inhibit individuals from joining the client-plaintiff organizations, *id.* ¶¶ 57-59; (c) deny the client-plaintiff organizations access to the courts, *id.* ¶ 60; and (d) deprive the client-plaintiffs of legal assistance on urgent matters that pose an immediate threat to their members' safety and well being, *id.* ¶¶ 81-88.

In particular, the client-plaintiffs have standing to claim on behalf of themselves and

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42*See Cook v. Reno*, 74 F.3d 97, 99 (1996), *aff'd after remand*, 132 F.3d 1455 (5th Cir. 1997) ("[T]he ultimate merits of the suit are not a consideration when deciding standing."); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 85 (5th Cir. 1986) (same).

others not before the Court that the Rule XX Amendments are vague and overbroad in violation of the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Courts apply liberal standing requirements to afford First Amendment rights "breathing space" in which to operate. *Id.* at 612. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.*[43] The client-plaintiffs have standing to proceed on their own behalf and on behalf of members and potential members of the client-plaintiff organizations whose First Amendment rights are threatened by the Rule XX Amendments.

B. <u>The Student-Plaintiffs Have Standing</u>

Defendant's sole ground for challenging the standing of the student plaintiffs is that "students have no constitutional right to represent others in court." As discussed above, Defendant's standing challenge confuses the issue of standing with the issue of the merits. The student-plaintiffs allege concrete, particularized, actual, and imminent injuries in fact. For example, the Rule XX Amendments deprive law students of "critical aspect[s] of clinical legal training," Compl. ¶ 117, and interfere with the quality of their legal training and the value of their degrees, *id.* ¶¶ 116-17, 119-20, 122. The Rule XX Amendments also place student-plaintiffs at risk of retaliation for engaging in First Amendment activity. *Id.* at ¶¶ 72, 118, 121.

C. <u>The Donor-Plaintiff Has Standing</u>

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43 *See, e.g., Alexander v. United States*, 509 U.S. 544, 555 (1993); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-801 (1984); *Patterson*, 357 U.S. at 458-59.

Defendant argues that the donor-plaintiff's stated intention of making future contributions to TELC reveals that the donor-plaintiff has suffered no injury in fact. D. Mem. at 28. But the donor-plaintiff has suffered an injury in fact, in that he alleges the Rule XX Amendments restrict the efficacy of his donations: the law clinic can no longer engage in the full extent of activities the donor plaintiff seeks to advance with his funding. Compl. ¶¶ 9, 124-25.

Defendant also argues that the donor-plaintiff lacks standing insofar as he complains of the impact of the Rule XX Amendments on the "*independent* pedagogic *judgment*" of TELC faculty. D. Mem. at 29, n. 65 (emphasis in original). Defendant suggests that if the TELC faculty were truly independent, the donor-plaintiff could not rely on TELC to advance his views. *Id.* However, it is TELC's very independence that the donor-plaintiff seeks to advance through his donations. Compl. ¶ 124. Since the Rule XX Amendments reduce the independence of the TELC faculty, *see id.* ¶ 9, they interfere with the donor-plaintiff's efforts to advance this view. This injury is particularized, concrete, and actual, and confers standing.[44]

D. <u>The Law Professor-Plaintiffs Have Standing</u>

Defendant's erroneously assert that the law professor-plaintiffs do not allege a concrete and particularized injury in fact. D. Mem. at 30. The Complaint expressly alleges, for example, that the Rule XX Amendments are "preventing [the law professor plaintiffs] from utilizing non-state funds to provide representation to clients whose cases afford the best teaching and learning opportunities," Compl. ¶ 92, and that the fear of retaliation chills their speech, *id.* ¶ 94. In light of these allegations, Defendant's bold assertion that "nothing in Rule XX impacts [the law

44Defendant argues that the donor-plaintiff cannot establish standing based on "Rule XX's purported impact on the rights of others." D. Mem. at 29 & n. 66. However, the donor-plaintiff

professors'] actions in or outside of the classroom," D. Mem. at 30, overlooks the crux of the law professors' claims.

E. The Student Associations Have Standing

. Defendant does not challenge the standing of Tulane Environmental Law Society and the Graduate and Professional Students Association, other than to assert broadly that neither the organizations nor their members possess First Amendment Rights. However, both Plaintiffs have standing to sue on behalf of their members. *See Hunt*, 432 U.S. at 343; *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

asserts standing on his own behalf, not on behalf of others.

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss the Complaint.

Respectfully Submitted,

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

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

DAVID S. UDELL (Trial Attorney)
RICHARD R. BUERY, JR.*
GILLIAN METZGER
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

On the memorandum
Sheri Danz (law student intern)

Attorneys for Plaintiffs

*motion pro hac vice admission to be filed

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