IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 04-3503

MARTIN WISHNATSKY,
Plaintiff-Appellant,

vs.

LAURA ROVNER,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil Case No. A2-04-01
The Honorable Judge Ralph R. Erickson

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE

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INTEREST OF *AMICUS*

The Association of American Law Schools (AALS) was founded in 1900, with the purpose of "the improvement of the legal profession through legal education." It is the law teachers' learned society and legal education's principal representative to the federal government and other national higher education and learned society organizations. One hundred sixty-six of the nation's law schools have qualified for, and are, members of the AALS. Important issues concerning clinical legal education and academic freedom are presented in the questions involving the Appellee, Laura Rovner, Director, Clinical Legal Education Program, University of North Dakota School of Law.

For reasons stated below, AALS believes that it is critical to the quality of legal education at the University of North Dakota that its law clinics retain full decision-making authority, within the guidelines established by the law school, over selection of cases in which students will be representing clients under the supervision of the law school faculty. Accordingly, AALS is writing this brief in support of the Appellee and supporting affirmance of the district court decision.

CONSENT OF PARTIES TO FILING OF *AMICUS* BRIEF

The AALS obtained the consent of the Appellee, Laura Rovner, by and through her attorney, Douglas A. Bahr, on December 20, 2004, and the consent of the Appellant, Martin Wishnatsky (Wishnatsky), by and through his attorney, Walter Weber, on December 22, 2004, to file this *amicus* brief.

ARGUMENT

This case involves issues of academic freedom both for the Appellee, Laura Rovner, a law professor, and for the University of North Dakota School of Law (referred to collectively as "the Clinic.") The Clinic has a First Amendment academic freedom right to make educational decisions, such as determining how best to use its limited resources in selecting cases, and to decide whether particular cases provide appropriate educational and ethical experiences for law students. The district court properly acknowledged that the Clinic is an educational program, not a government legal aid office, and representation by the Clinic is not a governmental benefit.

Wishnatsky's suit seeks to deny the Clinic's academic freedom right to set and follow its own educational policies. Instead, Wishnatsky seeks to establish the principle that any person who publicly disagrees with the educational policies of the Clinic has an absolute right to compel legal representation by the Clinic regardless of existing educational goals, resource limitations, or ethical considerations. Rather than the Clinic exercising its academic freedom right to set its own educational policies and curriculum, Wishnatsky seeks to dictate educational policy to the Clinic and thereby deny its right of academic freedom.

I. ACADEMIC FREEDOM IS A LONG ESTABLISHED PRINCIPLE.

The AALS has adopted the principles of academic freedom promulgated by the

American Association of University Professors (AAUP) and subscribes to statements made by the AAUP in *amicus* briefs submitted by it in other litigation. For that reason, portions of arguments I and II in this brief are taken verbatim from the AAUP *amicus* brief in FAIR v. Rumsfeld, No. 03-4433 (3rd Cir. 2003).

One of the AAUP's principal tasks is the formulation of national standards, often in conjunction with other higher education organizations, for the protection of academic freedom and other important aspects of the university life. The 1940 Statement of Principles on Academic Freedom and Tenure ("1940 Statement") was developed by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), and has been endorsed by over 180 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents & Reports 3 (2001 ed.) (hereafter "AAUP Policy Documents"). The 1940 Statement is the country's fundamental, most widely accepted description of the basic attributes of academic freedom and tenure, and has been cited by the Supreme Court. See, e.g. Board of Regents v. Roth, 408 U.S. 564, 579 n.17 (1972); Tilton v. Richardson, 403 U.S. 672, 681-82 (1971).

The 1940 Statement makes clear the importance of academic freedom in furthering the common good and reminds those in academia that our profession and our institutions are judged by our actions as well as our utterances. It recognizes both the importance of individual academic freedom for the faculty in research, scholarship

and teaching, and the importance of the faculty's role in constructing an appropriate educational environment as both "citizens, members of a learned profession, and officers of an educational institution." 1940 Statement at 4. The AAUP's statement On the Relationship of Faculty Governance to Academic Freedom elaborates on these issues, noting both that "sound governance practice and the exercise of academic freedom are closely connected, arguably inextricably linked," and that "the faculty should have primary authority over decisions about such matters [as] . . . the maintenance of a suitable environment of learning." AAUP, On the Relationship of Faculty Governance to Academic Freedom, AAUP Policy Documents 224, 225, 227.

The choice of cases by the Clinic represents an exercise of academic judgment, and is, therefore, a decision protected by both AALS policy and the First Amendment right to academic freedom. Wishnatsky seeks to infringe upon the academic freedom of the Clinic by dictating how and what the faculty must teach. Courts have consistently upheld the rights of faculty to decide how to teach and what materials to assign to students, even when those educational decisions are controversial. See, e.g., Kingsville Independent School District v. Cooper, 611 F.2d 1109, 1113-14 (5th Cir. 1980) (recognizing a the right of "how to teach" by protecting an instructor's use of role playing to teach African-American history); Keefe v. Geanakos, 418 F.2d 359, 362 (1st Cir. 1969) (recognizing the right of teachers to assign materials that include vulgar terms); Parducci v. Rutland, 316 F.Supp. 352, 356 (M.D. Ala. 1970) (protecting the assignment of controversial books for reading outside of the classroom). In the present case, where the educational decision not to provide representation to

Wishnatsky was based on resource limitations and ethical considerations, the Clinic's right to select appropriate cases similarly should be upheld.

II. THE SUPREME COURT RECOGNIZES THAT ACADEMIC FREEDOM IS PROTECTED BY THE FIRST AMENDMENT.

The Supreme Court has long treated academic freedom as a matter of constitutional importance. See Board of Regents v. Southworth, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring) (citing cases). From the Court's first explicit recognition of the distinctive right to academic freedom in Sweezy v. New Hampshire, 354 U.S. 234 (1957), to its opinion last year in Grutter v. Bollinger, 539 U.S. 306 (2003), the Supreme Court has consistently acknowledged that institutions of higher learning "occupy a special niche in our constitutional tradition." Id. at 330. Because of "the vital role in a democracy that is played by those who guide and train our youth," Sweezy, 354 U.S. at 250, academic freedom is "a special concern of the First Amendment[.]" Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

The constitutional right of academic freedom has evolved in a series of Supreme Court cases stretching back almost fifty years. The Supreme Court's first cases on academic freedom dealt with the First Amendment rights of individual university scholars. The Court has continued to recognize that right, expanding it to include the right of an institution and its faculty to make decisions about the educational environment and structure of the university.

In Sweezy v. New Hampshire, the Court ruled that Sweezy, a lecturer at the University of New Hampshire, could not be held in contempt for refusing to answer questions regarding alleged "subversive activities," including questions about his lectures at the University. 354 U.S. at 254-55. The Court explained:

> We believe that there unquestionably was an invasion of petitioner's liberties in the areas of *academic freedom* and political expression—areas in which government should be extremely reticent to tread. *The essentiality of freedom in the community of American universities is almost self-evident.* No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250 (emphasis added).

In his concurring opinion in Sweezy, Justice Frankfurter further described the principle of academic freedom, focusing on the right of the university to be free from government control. "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." Sweezy, 354 U.S. at 261 (Frankfurter, J., concurring). Justice Frankfurter recognized that a "free society" depends on "free universities," meaning "the exclusion of governmental intervention in the intellectual life of a university." Id. at 262.

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach,

protected right of professors to display photographs of themselves in military dress for scholarly purposes); Dube v. State Univ., 900 F.2d 587, 597-98 (2d Cir. 1990) (stating academic freedom permitted professor to discuss controversial topics in the classroom).

Most recently, in Grutter v. Bollinger, the Court reviewed the University of Michigan Law School's admissions policy — a policy drafted by a faculty committee and intended to enhance the diversity of the law school's student body, see Grutter, 539 U.S. at 319-320 — against a challenge that the policy unlawfully discriminated on the basis of race. In accordance with its conviction that there is "a constitutional dimension, grounded in the First Amendment, of educational autonomy," the Court explained that "[t]he Law School's *educational judgment* that such diversity is essential to its educational mission is one to which we defer." 539 U.S. at 328 (emphasis added). In upholding the Law School's admissions policy, the Court invoked its "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." Id. Once again, the Court noted that academic freedom implicates core First Amendment values. "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Id.

At the root of the Supreme Court's deference to academic judgment "is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First

> what may be taught, how it shall be taught, and who may be admitted to study.'

Id. at 263.

In Keyishian v. Board of Regents, the Court again relied upon academic freedom in holding unconstitutional New York state loyalty oath requirements for university professors. 385 U.S. at 602-03. The Court noted the importance of "safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." Id. at 603. In the Court's view, the importance of academic freedom made "[t]hat freedom . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" Id. at 603 (quoting Shelton v. Tucker, 365 U.S. 479, 487 (1960)).

Relying on Sweezy and Keyishian, the federal courts have applied this individual right of academic freedom to speak and to teach free from unreasonable government interference in numerous subsequent decisions. See, e.g., Hardy v. Jefferson Community College, 260 F.3d 671, 682-83 (6th Cir. 2001), cert. denied, 535 U.S. 970 (2002) (holding that professor's right to academic freedom protected his use of offensive language in the classroom); Bonnell v. Lorenzo, 241 F. 3d. 800, 823-24 (6th Cir. 2001), cert. denied, 534 U.S. 951 (2001) (weighing professor's right to academic freedom against student's right to learn "in a hostile-free environment"); Burnham v. Ianni, 119 F.3d 668, 680 n.19 (8th Cir. 1997) (finding academic freedom

amendment.''' Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 (1985). (quoting Keyishian, 385 U.S. at 603). The Court's reluctance to interfere in academic decision-making arises out of the conviction that the danger of limiting First Amendment rights is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 835 (1995).

Similarly, this Court must protect the Clinic's academic freedom to select educationally sound and ethically appropriate cases, and to determine how to allocate its resources, without being second-guessed by individuals who seek representation. Wishnatsky does not have an absolute right to representation by the Clinic, and he should not be able to bootstrap a claim to such a right by merely alleging viewpoint discrimination. The Clinic is an educational program and not a government legal aid office. Representation by the Clinic does not constitute a governmental benefit. The district court considered the complaint in a light most favorable to Wishnatsky, and it found that as a matter of law the Clinic was entitled to judgment. This Court should affirm the lower court's decision.

III. LAW CLINICS ARE AN ESTABLISHED PART OF LEGAL EDUCATION.

The provision by law schools of legal education through which (1) law students may gain practical experience and academic credit under the supervision of faculty and staff attorneys and (2) clients may at minimum cost retain enthusiastic legal

representation is an important development in legal education. Law clinics constitute a significant method of ensuring that our law schools not only train students to "think like a lawyer" but also provide them with the opportunity to develop the "on-the-spot" judgment and pragmatic skills that will be equally important as scholarly analytic skills in satisfying the responsibility of law schools to produce competent lawyers. See generally Meltsner & Shrag, Report from a CLEPR Colony, 76 Columbia L. Rev.581, 584-87 (1976); E.S. Milstein, The Future of Clinical Legal Education, 6 District Law. 12 (May-June 1982).

Former Chief Justice Warren Burger on occasion criticized the nation's law schools for their failure to provide practice experience to their students and pointed to this failure as one cause of incompetence among legal practitioners. See Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973). Several arms of the American Bar Association have concurred with the Chief Justice's position that practical training in lawyering skills is vitally important to effective legal education. See, e.g., American Bar Association Task Force on Professional Competence, Interim Report 9-10 (1982); American Bar Association Section of Legal Education and Admission to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 3-4 (1979).

It is clear that principles of academic freedom are equally as important to law school clinical courses as to Property, Torts, or Constitutional Law. Faculty and students have the same cognizable academic freedom rights whether the teaching and

learning take place in a classroom, in a laboratory, or in any other location where teachers are teaching, students are learning, and scholarly activities take place. See, e.g. Dow Chemical Company v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) ("[W]hatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom."); Determination of Executive Commission of Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, 546-47 (N.J. 1989) (hereafter "Rutgers") (construing state conflict-of-interest statute as not barring law faculty from appearing outside the traditional classroom before state agencies based, in part, on "the fundamental importance of academic freedom"). The courts' rulings in Dow and Rutgers are fully consistent with the AAUP's policies, which state: "Teaching . . . includes laboratory instruction, academic advising, training graduate students in seminars and individualized research, and various other forms of educational contact in addition to instructing undergraduates in the classroom," and that teaching occurs in a variety of settings, including "clinics." AAUP, The Work of Faculty: Expectations, Priorities, and Rewards, AAUP Policy Documents & Reports 129, 130 (1995).

In Sweezy, Justice Frankfurter in his concurrence noted "four essential freedoms" of a university, "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 354 U.S. at 263. The judgment of a clinical teacher concerning which cases to accept is the same judgment that any teacher uses when determining what to teach and how it shall be taught. The Court has acknowledged the importance of "autonomous

decisionmaking by the Academy." Regents of University of Michigan v. Ewing, 474 U.S. at 226 n.12 (1985). One of the most important academic decisions a clinical teacher makes is when deciding which cases to accept in order to maximize the learning potential for his or her students. Like any other academic decision, it is important to give it maximum deference and constitutional protection.

Further, the history of clinical legal education and the express language of the ABA's accreditation standards, which require law schools to afford students the opportunity to enroll in "live-client" clinics, demonstrate that clinical and classroom teaching are both integral to modern legal education. American Bar Association, Standards for Approval of Law Schools Standard 302(c)(1996) ("A law school shall offer in its J.D. program . . . live-client or other real-life practice experiences.") Indeed, the Supreme Court in Sweatt v. Painter, 339 U.S. 629 (1950), recognized the importance of practical experience in legal education:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Id. at 634.

The AALS supports the proposition that the principles of academic freedom apply wherever teachers teach and students learn, including in a law school clinic. In the instant case, Wishnatsky's efforts to force the Clinic to accept his case is in direct opposition to the principles of academic freedom. Law school clinical professors are

faculty members whose professional judgments must determine which cases best present the most valuable educational opportunities for their students within the bounds of applicable legal ethics rules. As the above-referenced line of cases shows, courts must continue to give deference to that professional judgment in order to preserve academic integrity.

CONCLUSION

In view of Wishnatsky's attempt to interfere with the academic freedom of the Clinic, and the lack of material facts to be resolved by the court, the *Amicus Curiae* AALS respectfully submits that the district court's ruling should be affirmed.

Dated this 29th day of December, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Case No. 04-3503

The undersigned certifies pursuant to Fed. R. App. P 32(a)(7) and 8th Cir. R. 28(A) that the text of Association of American Law Schools' *Amicus Curiae* Brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 3,176 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 Times New Roman Font Face in Font Size 14. This font contains Serifs. A 3½-inch computer diskette containing the full text of the brief in PDF format has been provided to the clerk. The diskette has been scanned for viruses and is virus-free.

Dated this 29th day of December, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2004, this Brief of *Amicus Curiae* in Support of Appellee was filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by depositing ten (10) copies on paper and one (1) on computer disk for delivery by OVERNIGHT FEDEX DELIVERY duly addressed to the Clerk. In addition, on this day counsel for Appellant and Appellee were served with this Brief of *Amicus Curiae* in Support of Appellee by depositing two (2) copies on paper and one (1) copy of the diskette (scanned for viruses and virus-free) containing the full text of same in PDF format, mailed first-class, postage prepaid, to:

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