IN UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Martin Wishnatsky, Plaintiff, v. Laura Rovner, Director; Clinical Education Program, University of North Dakota, School of Law, in her individual and official capacity, Defendant.	**Civil Case No. A2-04-1**

BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AS AMICI CURIAE IN SUPPORT OF DEFENDANT

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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 University of North Dakota Civil Rights Project. For reasons stated below, AALS believes that it is critical to the quality of legal education at the University of North Dakota that its legal 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 motion to dismiss the pending suit.

ARGUMENT

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 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 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

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. The AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents & Reports 3 (2001ed.) (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 a law school clinic represents an exercise of academic judgment on the part of the faculty of the law school concerned and is, therefore, a

decision protected by both AALS policy and the First Amendment right to academic freedom.

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 Term in Grutter v. Bollinger, 123 S. Ct. 2325 (2003), the Supreme Court has consistently acknowledged that institutions of higher learning "occupy a special niche in our constitutional tradition." Id. at 2339. 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, 354 U.S. 234 (1957), 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. 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, 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. 589 (1967). 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." Keyishian, 385 U.S. 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, numerous subsequent decisions of the federal courts have applied this individual right of academic freedom to speak and to teach free from unreasonable government interference. See, e.g., Hardy v. Jefferson Community College, 260 F.3d 671, 682-83 (6th Cir. 2001), cert. denied, 535 U.S. 970 (2002) (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 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) (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, 123 S. Ct. at 2334 — 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 Supreme 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." 123 S. Ct. at 2339 (emphasis added). In upholding the Law School's admissions policy, the Supreme 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 amendment.'" Ewing, 474 U.S. at 226. (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 and Visitors of Univ. of Virginia, 515 U.S. 819, 835 (1995).

III. CLINICS ARE AN ESTABLISHED PART OF LEGAL EDUCATION

The operation by law schools of legal clinics 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. Legal clinics constitute a significant method of insuring 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 Column, 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 Burger, C.J., 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.");

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 "real-client" clinics, demonstrate that clinical and classroom teaching are both integral to modern legal education. 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 where teachers teach and students learn, including in a law school clinic. In the instant case, plaintiff's efforts to force the University of North Dakota Civil Rights Project 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. As the above-referenced line of cases show, courts must continue to give deference to that professional judgment in order for the preservation of academic integrity

Dated this 28th day of April, 2004.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 28th day of April, 2004 a true and correct copy of the foregoing BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AS AMICI CURIAE IN SUPPORT OF DEFENDANT was mailed, by regular U.S. mail, postage prepaid, addressed to the following party and counsel at their last known address::

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