SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE, Plaintiffs-Appellants, vs. RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-1567-08T3 Civil Action On Appeal From the Final Order of the Superior Court of New Jersey Law Division: Middlesex County Entered on October 7, 2008 Docket No. in Court Below: MID-L-8465-06 SAT BELOW Travis L. Francis, A.J.S.C.

BRIEF OF *AMICI CURIAE* CLINICAL LEGAL EDUCATION ASSOCIATION, SOCIETY OF AMERICAN LAW TEACHERS & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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INTRODUCTION

The Clinical Legal Education Association ("CLEA"), the Society of American Law Teachers ("SALT"), and the American Association of University Professors ("AAUP"), *amici curiae* in this matter, submit this brief in support of the request of Defendants Rutgers, The State University, Rutgers Environmental Law Clinic, and Rutgers University Custodian of Records (collectively "Rutgers") that Judge Travis L. Francis' October 7, 2008 Order (Pa269) be affirmed. Judge Francis allowed CLEA to participate as an *amicus* in this case. (Pa219). SALT and AAUP are joining as *amici* in the appeal.

For the reasons stated herein, CLEA, SALT, and the AAUP contend that the petition of Plaintiffs/Appellants (Pa1) for access under the Open Public Records Act ("OPRA") or common law right of access to 18 separate categories of law clinic documents threatens the ability of law clinics in New Jersey and throughout the country to provide students with important training in lawyering skills and professional values and to provide clients with appropriate, ethical representation. Accordingly, this Court should affirm the trial court's denial of Plaintiffs'/Appellants' broad request for access to law clinic client files and other records reflecting the deliberations, communications, work product, pedagogical,

scholarly, academic research, or other actions of the Rutgers law clinic on client or course-related matters.

AMICI CURIAE **STATEMENTS OF INTEREST**

CLEA is a non-profit educational organization formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA has approximately 700 annual dues-paying members representing faculty at approximately 140 law schools in the United States, including members on the faculty of public law schools in New Jersey. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by representing clients under the supervision of law faculty. CLEA and its members are committed to legal education which trains law students to be competent, ethical practitioners and to promoting access to legal representation.

SALT is a non-profit educational organization formed in 1973 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to social concerns. SALT's members include law teachers, deans, law librarians, and legal education professionals from 170 law schools across the nation, including members from New Jersey's public law schools and many who teach in clinical legal education. Central components of SALT's mission include encouraging and enabling greater access to the legal profession, transforming law school curricula to meet the needs of a just

society, protecting academic freedom, and promoting legal services for underserved groups.

CLEA and SALT offer their views because the organizations and their members believe that clinical legal education is an important component of the overall education of our nation's future lawyers. Clinical legal education also is an important means of providing legal representation to clients who, because of lack of financial or other resources, the unpopularity of their views or the complexities of their cases, would otherwise not be represented. CLEA and SALT firmly believe that granting Plaintiffs' broad requests would adversely affect the ability of law clinics in New Jersey to provide a first-rate, ethical legal education to students and appropriate legal representation to clients, interfere with the availability of *pro bono* services provided by law clinics to needy citizens of New Jersey, and, through the precedential value of the decision of this Court, undermine legal education, access to justice, and attorney-client relations at law clinics in publicly-funded law schools in other parts of the United States. CLEA and SALT also believe that fundamental ethical obligations of lawyers are at issue in this matter, as well as important issues of access to legal representation and First Amendment rights of clinic clients.

The AAUP, founded in 1915, is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of faculty concerns. The AAUP is a non-profit organization of approximately 48,000 faculty, librarians, graduate students, and academic professionals. The AAUP has local campus chapters in approximately 40 states, including a chapter at Rutgers University in New Jersey. The AAUP's purpose is to advance academic freedom and shared university governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. A principal effort in moving these goals forward is the formation of national standards for the protection of academic freedom, frequently produced in collaboration with other organizations interested in higher education issues. Several of the AAUP's core standards and statements bear on this case.

In 1940, the AAUP published its seminal statement on the protection of academic freedom. The "Statement of Principles on Academic Freedom and Tenure," which was developed by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities, or AAC&U), is the country's fundamental, most widely-accepted description of the basic attributes of academic freedom and tenure. In that statement,

the AAUP and the AAC&U declared that "[a]cademic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning." In order to achieve this, teachers must be imbued with full freedom in research, publication and classroom discussion.

In Academic Freedom and Tenure: A Handbook of the American Association of University Professors, the AAUP elaborated on the centrality of academic freedom to a democratic society, positing that:

> The maintenance of freedom of speech, publication, religion, and assembly (each of which is a component of intellectual freedom) is the breath of life of a democratic society. The need is greatest in fields of higher learning, where the use of reason and the cultivation of the highest forms of human expression are the basic methods. To an increasing extent, society has come to rely upon colleges and universities as a principal means of acquiring new knowledge and new techniques, of conveying the fruits of the past and present learning to the community, and of transmitting these results to generations to come. Without freedom to explore, to criticize existing institutions, to exchange ideas, and to advocate solutions to human problems, faculty members and students cannot perform their work, cannot maintain their self-respect. Society suffers correspondingly. The liberty that is needed requires a freedom of thought and expression within colleges and universities, a freedom to carry the results of honest inquiry to the outside, and a freedom to influence human

affairs in the same manner as other informed and unprejudiced persons do.[1]

The AAUP believes that the ability of law school clinical programs to "advocate solutions to human problems" and to develop "new knowledge and new techniques" that can then be passed on to the legal community are at issue in this case.

Additionally, the AAUP's 1967 "Joint Statement on Rights and Freedoms of Students" is implicated by this case. In the 1967 Joint Statement, the AAUP recognized that the "[f]reedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community." These ideals are in jeopardy now just as they were in 1989, when the AAUP filed an amicus brief with the New Jersey Supreme Court in the case of In re Executive Committee on Ethical Standards.[2] That earlier case, which also involved the Rutgers clinical law program, has been cited in the Superior Court decision from which this case has been appealed.

Recognizing that the national AAUP frequently submits *amicus* briefs in federal and state courts where its standards are implicated and where important legal issues in higher

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[1] Academic Freedom and Tenure: A Handbook of the American Association of University Professors, pp. 47-48 (L. Joughin ed. 1969).

[2] In re Executive Committee on Ethical Standards, 116 N.J. 216 (1989).

education are at stake, and that the AAUP previously filed an *amicus* brief in a precedent-setting decision guiding this case, it is appropriate for the AAUP to participate now. The AAUP believes this case raises serious concerns about the academic freedom of public universities and their clinical legal educators, scholars, and students.

The *amici* accept the facts and procedural history set forth in Plaintiffs'/Appellants' brief.

ARGUMENT

I. REQUIRING PRODUCTION OF THE DISPUTED RECORDS WILL HARM LEGAL EDUCATION

Clinical legal education creates law offices within law schools where law faculty supervise students in actual client representation so that the students may learn how to become competent, ethical lawyers. Requiring production of the requested records will harm the students' education because permitting records requests aimed at client representation will burden law clinics and divert them from their educational and client representation missions. It also will make law practice in law school clinics different from law practice in law firms, corporate law departments, and other legal offices. Record requests would become adversarial tools aimed at clinical law offices and thus will undermine the authentic practice of law within those clinical offices and impinge on the academic freedom of the programs.

A. Law School Clinics Are a Fundamental Component of Legal Education

Clinical education is now a fundamental component of American legal education and is an important part of the professional training of today's lawyers. The origins of clinical legal education date back to the early part of the twentieth century when several law schools began using real

cases to teach law students.[3] In 1933, Jerome Frank proposed that each law school develop a legal clinic, staffed by full-time "teacher-clinicians."[4] In the ensuing decades, leaders of the bench, bar, and academia recognized that our nation's law schools were insufficiently preparing lawyers for practice and called for greater attention to lawyering tasks other than legal reasoning and writing.

Clinical programs became established at most American law schools during the 1960s. Through the Council on Legal Education for Professional Responsibility, the Ford Foundation provided seed money for clinical programs at law schools across the country.[5] Former Chief Justice Warren Burger was a prime proponent of clinical legal education. In 1973, he complained that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."[6] He called for expanded law school

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[3] See, e.g., John S. Bradway, The Beginning of the Legal Clinic of the University of Southern California, 2 S. Cal. L. Rev. 252 (1929); John S. Bradway, Some Distinctive Features of a Legal Aid Clinic Course, 1 U. Chi. L. Rev. 469 (1934).

[4] Jerome Frank, Why Not A Clinical-Lawyer School, 81 U. Pa. L. Rev. 907, 917 (1933); see also Karl N. Llewellyn, On What Is Wrong With So-Called Legal Education, 35 Colum. L. Rev. 652 (1935).

[5] See George S. Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162, 172-80 (1974).

[6] Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227, 234 (1973).

skills programs and noted specifically that "[t]he law school . . . is where the groundwork must be laid."[7]

Chief Justice Burger's campaign led to further calls for change. A committee formed within the Second Circuit found "a lack of competency in trial advocacy in the Federal Courts," and recommended that law schools teach trial skills.[8] A committee from the United States Judicial Conference made similar recommendations.[9] An American Bar Association ("ABA") task force on lawyer competency also recommended that law schools offer instruction in litigation skills.[10] Amplifying the support of clinical programs by both the bench and bar, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]his [student intern] practice has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation."[11]

In 1992, a different task force addressed the problem of lawyer competency and expanded the recommendations of bench and

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[7] Id. at 233.
[8] See Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164, 167-68 (1975).
[9] See Final Report of the Committee to Consider Standards For Admission To Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215 (1979).
[10] Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 3-4 (1979).
[11] Jordan v. United States, 691 F.2d 514, 522-23 (D.C. Cir. 1982).

bar. The ABA's Task Force on Law Schools and the Profession recommended that legal education necessarily include instruction in lawyering skills and professional values. The Task Force also promulgated The MacCrate Report, a statement of skills and values necessary for lawyers to assume "ultimate responsibility for a client."[12] These lawyering skills can be generally categorized as: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and litigation alternatives; organization and management of legal work; and recognizing and resolving ethical dilemmas.[13] The professional values are, generally, providing competent representation, seeking to promote justice, fairness and morality, seeking to improve the profession, and commitment to self-development.[14] According to the Task Force, law schools must play an important role in developing these skills and values.[15]

As a result of these recommendations and reports, professional skills programs are now firmly established in American law schools. Each law school accredited by the ABA is obligated to "require that each student receive substantial

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[12] Legal Education and Professional Development - An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 125 (1992) (hereafter MacCrate Report).
[13] Id. at 138-40.
[14] Id. at 140-41.
[15] Id. at 331-32.

instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession."[16] Moreover, the ABA specifically acknowledged the value of law school clinics by amending Accreditation Standard 302 in 1996. In order to achieve and maintain ABA accreditation, a law school now must offer "substantial opportunities" for "live-client or other real-life practice experiences."[17] The profession thus recognizes that law school clinics in which faculty teach students through the vehicle of actual cases are necessary to the professional education of law students. As the New Jersey Supreme Court so aptly put it: "Clinical training is one of the most significant developments in legal education."[18]

Recently, a renewed commitment to clinical legal education was proffered by two leading reports. The first was "Best Practices in Legal Education," which among its conclusions determined that students who learn in the context of a law clinic "seem to believe that more is expected of them, and treat associated intellectual tasks with a greater seriousness of

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[16] ABA Standards and Rules of Procedure for Approval of Law Schools (2007) (Std. 302(a)(4)).
[17] Id. (Std. 302(b)(1)).
[18] In re Executive Commission on Ethical Standards, 116 N.J. 216, 217 (1989).

purpose and a higher level of engagement."[19] The second was a Carnegie Foundation for the Advancement of Teaching report, "Educating Lawyers: Preparation for the Profession of Law," which identified three "apprenticeships of professional education" to which law schools should be attending: the intellectual or cognitive apprenticeship, the apprenticeship to the forms of expert practice shared by competent practitioners (taught in law clinics), and the ethical-social apprenticeship (also advanced in clinics).[20]

Law school clinics are unique vehicles for teaching law students the professional skills and values that they must master.[21] Clinical programs strongly reinforce the non-clinical curriculum in developing student's legal analysis and research skills. More importantly, they provide law teachers an unequalled format for teaching students problem-solving, factual investigation, counseling, litigation, and negotiation.[22] Good lawyering skills instruction must "1) develop[ ] students' understanding of lawyering tasks, 2) provid[e] opportunities to . . . engage in actual skills performance in role, and 3) develop [students'] capacity to reflect upon professional

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[19] Roy Stuckey, et al., Best Practices for Legal Education 40 (2007).
[20] William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law (2007).
[21] See MacCrate Report, supra note 12, at 234.
[22] Id.

conduct through the use of critique."[23] Professional educators consider each of these aspects of skills instruction in structuring law school clinics.

Additionally, in order to become competent and responsible attorneys, law students must be taught to recognize and resolve ethical dilemmas.[24] Live-client clinics have been widely recognized to have exceptional value in teaching professional responsibility and ethical skills.[25] To impart these skills, clinical professors themselves must be able to identify, analyze, and decide the correct course when confronted with ethical issues and must be able to place students in the role of a practicing attorney confronting comparable ethical dilemmas.[26] Clinical professors are ethical role models and clinics should be structured as "ethical law firms."[27]

B. Requiring Production Will Undermine Clinical Legal Education

To be most effective, law clinics seek to put law students into the role of lawyer so that the clinic student can learn to

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[23] Id., at 243.
[24] See Maureen E. Laflin, Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report, 33 Gonz. L. Rev. 1, 4 (1997).
[25] See, e.g., Joan L. O'Sullivan et al., Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice, 3 Clinical L. Rev. 109 (1996).
[26] Laflin, supra note 24, at 18.
[27] Eleanor W. Myers, "Simple Truths" About Moral Education, 45 Am. U.L. Rev. 823 (1996); Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35 (2003).

"think and act like a lawyer" and be confronted with the same practical and ethical situations that confront practicing lawyers in comparable situations. To that end and to the extent consistent with their unique educational objectives, most law school clinics seek to operate similar to and reflect the practices of a typical law office. In turn, law school clinics, like other law offices, are bound by the professional responsibility and other court rules guiding licensed attorneys and their offices.

The Plaintiffs' May 11, 2006 public records request for 18 categories of documents (Pa9) seeks to distort the operations of the Rutgers Environmental Law Clinic ("Clinic") and deny it the ability to operate like other law offices and even like other higher education courses in the state. The OPRA requests for Clinic client billing and time records on cases (Requests 2-3, Pa11), disbursements and payments on cases (Requests 4-6, Pa11)), minutes of meetings at which client matters were discussed (Request 7, Pa11), documents submitted by clients and experts to the Clinic (Requests 8-11, Pa11-12), documents received from a similarly aligned party and its law firm for use in representing clients (Requests 12-13, Pa12), and documents between the Clinic and government agencies or officials for use in representing clients (Requests 14-18, Pa12) are plainly objectionable. The requests seek to compromise the core of the

attorney-client relationship, disrupt the day-to-day internal operations of a clinical law office and its educational functions, and impinge on the academic freedom of the clinic.

The effect, as well as likely intent, of Plaintiffs' broad request is to intrude into sensitive Clinic and client matters and to divert the Clinic's attention, time, and resources away from its cases and clients. Another effect is to restrict the time that Clinic staff can devote to training students to be effective lawyers and to signal to the Clinic attorneys and students that they should back off from their ethical, zealous representation of Clinic clients.

The request in this case is particularly troubling because it came after courts twice dismissed lawsuits brought by the Plaintiffs over matters involving the Clinic[28] and denied Plaintiffs' efforts to pry into the activities of the Clinic and its clients.[29] Unable to obtain information about the inner workings of the Clinic or the Clinic's relations with its clients through appropriate, court-supervised discovery methods, the Plaintiffs' broad OPRA request now seeks to burden and intimidate Rutgers with wasteful, invasive demands.

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[28] Certification of Julia LeMense Huff, ¶¶ 32, 39 (Pa67).
[29] Id. at ¶¶ 52-53, 57 (Pa67) (referencing the January 6, 2006 decision of Judge James A. Farber in Sussex Commons Outlets, LLC. vs. Chelsea Property Group (N.J. Super. Ct. SSX-L-554-03)

The request also threatens the academic freedom of clinical faculty. This threat is particularly stark when viewed against the backdrop of the United States Supreme Court's recognition of the tenets of academic freedom. The Court has particularly highlighted two beneficial aspects of academic freedom - the role academic freedom plays in the development of new ideas and the role of academic freedom in educating our future leaders.[30] Legal clinics have become the law schools' research laboratories for the development of new ideas. Through litigation of actual cases, clinical instructors train their students in developing new legal theories and expanding existing legal doctrine. Professional educators must have the academic freedom to consider all aspects of skills instruction in developing and structuring law school clinics.

Amici curiae believe that the Clinic and American clinical legal education will be severely compromised if disgruntled opponents in law clinic cases can use state public records

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[30] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)("No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is this true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate."); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)("The classroom is peculiarly the marketplace of ideas. The nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas.").

requests as a means to interfere with the normal educational and legal representation operations of law school clinics. Time and resources spent by the Clinic responding to improper public records requests are time and resources that cannot be focused where most needed and where most beneficial to legal education, the legal profession, and the public: on producing competent lawyers.

In addition, allowing public records requests into the internal workings and client files of law clinics will have a chilling effect on the types of cases and clients that law school clinics agree to handle. The repeated efforts by law clinic opponents to interfere in the ability of law school clinics to provide legal assistance have been well documented.[31] The ABA has noted the problem and warned that "attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools."[32]

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[31] See Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 Fordham L. Rev. 1971, 1975-92 (2003) (chronicling outside interference in law clinic cases, including repeated efforts to limit the operations of law clinics at Rutgers).

[32] Memorandum D8383-25 from James P. White, Consultant on Legal Education, ABA, to Deans of ABA Approved Law Schools (Feb. 21, 1983), reprinted in Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on

These efforts by clinic opponents, including real estate developers, to restrict the normal lawyering activities of law school clinics have been particularly pronounced against environmental law clinics, like the Rutgers Clinic.[33] Indeed, it has become all too common for opponents of environmental advocates to file lawsuits or wage other attacks that seek to limit the ability of lawyers to provide these citizens with legal representation and that threaten the willingness of citizens to speak out on matters of environmental concern. This phenomenon has been referred to as "SLAPP" suits -- "Strategic Lawsuits Against Public Participation."[34] "[I]n a typical Strategic Lawsuit Against Public Participation ("SLAPP suit"), citizens protesting corporate policies or actions get sued by a corporation for defamation or tortious interference with business. An activist who testifies against a real estate developer at a zoning-board hearing . . . may find herself hit with a SLAPP suit."[35] Superior Court Judge James A. Farber, in a lawsuit related to Plaintiffs' underlying proposal to develop

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Outside Interference and Academic Freedom, 11 J.C. & U.L. 179, 197-98 (1984).

[33] See Robert R. Kuehn, Shooting the Messenger: The Ethics of Attacks on Environmental Representation, 26 Harvard Envtl. L. Rev. 417, 424-32 (2002).

[34] George W. Pring & Penelope Canan, SLAPPs: Getting Sued for Speaking Out 83-104 (1996) (discussing SLAPP strategy of going after environmental activists and their attorneys).

[35] David Luban, Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers, 91 Cal. L. Rev. 209, 219 (2003).

the Ross' Corner shopping center, has already noted that efforts to pursue legal action against Clinic clients for engaging in the protected activity of petitioning their government would chill the citizens' rights.[36]

These varied efforts of clinic opponents also chill law clinic activities more generally, signaling to clinic faculty the need to fear the consequences of taking on certain cases or representing certain clients. Clinic professors have repeatedly expressed concerns about the interference that may result from representing unpopular clients or challenging the actions of certain well-funded or well-connected opponents.[37] One lawyer observed that attacks on publicly-funded law offices demonstrate, as here, "the vulnerability of publicly funded legal services programs to political interference -- increasing in proportion to the effectiveness of the lawyers' work."[38]

Therefore, if this Court allows the form of interference in law clinic operations sought by Plaintiffs it will scare clinics away from certain cases or needy clients, thereby driving law

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[36] Transcript of Proceedings at 54-55, Sussex Commons Outlets, LLC. v. Chelsea Property Group (N.J. Super. Ct. Law Div. Sussex County, Jan. 6, 2006) (Pa82) (attached as Exhibit 1 to Certification of Julia LeMense Huff (Pa67)).

[37] See, e.g., David E. Rovella, Law Students Urged to Take Death Cases, Nat'l L.J., Dec. 7, 1998, at A9; Beverly T. Watkins, Limits Urged on the Litigation that Law Schools May Undertake in Clinics, Chron. of Higher Educ., Jan. 26, 1983, at 8.

[38] Jerome B. Falk, Jr. & Stuart R. Pollak, Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services, 24 Hastings L.J. 599, 600 (1972-73).

clinics, and most particularly clinical educators, to make case intake or other decisions for non-pedagogical reasons and preventing clinics from using the best means to train students in professional skills and values. This is counter to basic notions of appropriate instructional decision making.[39]

Of equal importance, forcing production of documents in this case also will create a clinic law office that must operate in a way that grossly differs from other law offices. It would make clinic lawyers constantly concerned -- beyond the requirements in evidentiary and ethics rules that guide the judgments of other lawyers -- that what the clinic receives from its clients or develops on their behalf, and the research, planning and strategizing behind those documents, may have to be revealed to the public or clinic opponents. Clinical legal education operates best and clinic students learn best when the actions of clinic attorneys, students, and clients are guided by the same legal principles that govern other law offices in the state, not by invasive, burdensome actions of clinic opponents

[39] See the AAUP's 1966 "Joint Statement on Government of Colleges and Universities" (a joint initiative with the American Council on Education and the Association of Governing Boards of Universities and Colleges), which observed that "[w]hen an educational goal has been established, it becomes the responsibility primarily of the faculty to determine the appropriate curriculum and procedures of student instruction." AAUP Policy Documents & Reports 135-40 (10th ed. 2006).

that distort a law clinic's operations and harm its educational objectives.

II. REQUIRING PRODUCTION WOULD BE CONTRARY TO THE PRIVILEGES PROVIDED OTHER CLIENTS AND TO OPRA'S EXEMPTION FOR HIGHER EDUCATION MATERIALS AND WOULD INTERFERE WITH CLINIC ATTORNEY-CLIENT RELATIONS AND ACCESS TO LEGAL REPRESENTATION

Plaintiffs' broad-reaching request for documents, if granted, would make the Clinic's records and internal operations open to Clinic opponents in a way that the documents and operations of other law offices representing private clients and records of other higher education activities are not. If this Court were to permit such requests, it will make it impossible for Clinic attorneys and students to provide the same assurances of confidentiality that are available to clients of private law firms. Such a ruling also would interfere with the relationship between clinic attorneys and their clients and restrict access by needy New Jersey residents to the free legal assistance of law clinics. Instead, the Court should ensure that the same rules of privilege and confidentiality that govern the attorney-client relations of other lawyers in the state who represent private citizens also govern law clinic relationships by denying Plaintiffs' request for Clinic records. The Court also should enforce the legislature's efforts to protect the academic freedom of universities by treating the pedagogical, scholarly,

and research records associated with university operations such as law clinics as privileged and confidential.

As in other states, information arising from the relationship between clients and attorneys is protected in New Jersey from disclosure by the attorney-client and work product privileges. The United States Supreme Court has explained that the common law attorney-client privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[40] The privilege exists "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[41] New Jersey courts have repeatedly recognized the "sanctity of confidentiality" accorded to the attorney-client relationship[42] and that proper preparation of a client's case demands that the attorney be able to assemble and sift through relevant information and plan legal strategies without interference from opponents.[43]

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[40] Upjohn Co. v. Unites States, 449 U.S. 383, 389 (1981).
[41] Id. at 390.
[42] Reardon v. Marlayne, Inc., 83 N.J. 460 (1980).
[43] In re Grand Jury Subpoenas Duces Tecum, 241 N.J. Super. 18, 27 (1989) (quoting United States v. Nobles, 422 U.S. 225, 237 (1975)).

The attorney work product privilege also is firmly established in common law to protect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.[44] As the Supreme Court explained, "it is essential that a lawyer work with a certain degree of privacy" and if an attorney's private thoughts and work product were forced to be disclosed "[t]he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[45] New Jersey courts also have long recognized the work product privilege.[46]

Given the existence of these basic privileges and protections for the materials at issue here, *amici* strongly urge this court to find that an analysis of the requested Clinic documents is unnecessary. Indeed, such a case-by-case assessment would expose the Clinic's records to the sort of searching inquiry that would be totally inappropriate for a private legal clinic or any other legal office. In the event the court does look beyond these privileges to the language of the statute, however, OPRA articulates several important exemptions that shield all the materials in question from disclosure.

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[44] Hickman v. Taylor, 329 U.S. 495 (1947).
[45] Id. at 510-11.
[46] See, e.g., Halbach v. Boyman, 377 N.J. Super. 202, 207 (2005).

First, the definition of "government record" in OPRA specifically excludes "any record within the attorney-client privilege."[47] Regarding attorney work product, the court in Gannett New Jersey Partners v. County of Middlesex held that if a document is protected from discovery by rules of court, then it is also protected against disclosure under OPRA.[48] The court explained that OPRA provides in section 47:1A-9(b) that its provisions "shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . court rule. Consequently, if a document is protected work product under Rule 4:10-2(c) [the attorney work product rule], it also is protected from disclosure under OPRA."[49] Hence, OPRA protects against disclosure of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party."[50] In addition, the discovery of facts and opinions held by experts is protected by Rules of Court 4:10-2(d) and, in turn, is similarly exempt from disclosure under section 47:1A-9(b) of OPRA.[51]

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[47] N.J.S.A. 47:1A-1.1.
[48] Gannett New Jersey Partners v. County of Middlesex, 379 N.J. Super. 205, 216 (2005).
[49] Id. at 216.
[50] N.J. Rules of Court 4:10-2(c).
[51] N.J. Rules of Court 4:10-2(d).

Three additional exemptions in OPRA protect Clinic records from disclosure. The definition of government record specifically does not include "inter-agency or intra-agency advisory, consultative, or deliberative material."[52] Thus, OPRA protects Clinic deliberative privilege documents containing opinions, recommendations, or advice about clinic policies or decisions.[53]

OPRA also excludes from the definition of government record all "pedagogical, scholarly and/or academic research records and/or the specific details of any research project" under the auspices of any public institution of higher education.[54] This higher education exemption seeks to protect the academic freedom of universities and avoid outside interference in the teaching and research activities of public institutions of higher education. Law clinic records, like those associated with other university courses and research activities, therefore are "deemed to be privileged and confidential."[55]

Finally, materials protected from disclosure by New Jersey rules of professional conduct are not available to Plaintiffs. As noted, OPRA does not abrogate or erode any exemption from public access or privilege or grant of confidentiality

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[52] N.J.S.A. 47:1A-1.1.
[53] See Gannett New Jersey Partners, 379 N.J. Super. at 219-220.
[54] N.J.S.A. 47:1A-1.1.
[55] Id.

established or recognized by court rules.[56] New Jersey Rule of Professional Conduct 1.6(a), a rule issued by the Supreme Court of New Jersey, provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." The confidentiality protection of RPC 1.6(a) "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[57] This rule of confidentiality

> contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.[58]

Therefore, under the authority of Gannett New Jersey Partners and section 47:1A-9 of OPRA, if a Clinic document is deemed confidential under RPC 1.6(a), it also is protected from disclosure under OPRA.

This series of exemptions demonstrates New Jersey's intent that Clinic records be afforded the same degree of confidentiality and protection provided to the records of other law offices in the state. Such protections are particularly

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[56] N.J.S.A. 47:1A-9(a) & (b).
[57] N.J. RPC 1.6 cmt. 1.
[58] ABA Model Rules of Professional Conduct, R. 1.6 cmt. 2.

vital here since the Clinic's clients are private citizens, not the government agencies or officials that might be represented by the attorney general or other attorneys employed by the state.

In this respect, the Clinic's clients are most similar to the private clients represented by the Office of the Public Defender. The law is clear that "[t]he files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender."[59] This OPRA exemption underscores the recognized principle that it is the client, not the attorney, who controls the waiver of a privilege[60] and that a client should not be punished for being represented by a lawyer paid with public funds. As the Supreme Court explained in another context, a public defender does not act under color of state law as he "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. . . . It is the constitutional obligation of the State to respect the professional independence of the public defender whom it engages."[61] As they too are represented by lawyers paid by the state to represent private

[59] N.J.S.A. 47:1A-5(k).
[60] See Restatement of the Law Governing Lawyers § 78 cmt. b.
[61] Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

clients, Clinic clients should be provided the same level of protection afforded to clients of state public defenders. Consequently, Clinic files also should be deemed confidential and not open to inspection by the public.[62]

A decision of this Court that fails to respect the confidentiality of files maintained by the Clinic would mean that law clinic clients will not be able to communicate freely and frankly with their attorneys, unlike private clients represented by other attorneys. Similarly, sensitive or embarrassing information that Clinic attorneys may develop or obtain that private attorneys can, and indeed under professional responsibility rules must, protect from disclosure could be

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[62] The relationship of the clinical faculty to their state employer is parallel to that of public defenders to their state employers. As the Court said about the public defender in Polk County, "an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government." 454 U.S. at 319 n.8 (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)). Similarly, faculty members at public universities can be effective only if their academic functions, including teaching and course development, are governed not by the state but by faculty exercising their professional responsibilities. As the AAUP has observed, "[t]he faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research… and those aspects of student life which relate to the educational process." Statement on Government of Colleges and Universities, AAUP Policy Documents & Reports 135-40 (10th ed. 2006). When faculty members have authority over academic matters and academic freedom is carefully protected on campus, "institutions of higher education will be best served and will in turn best serve society at large." Statement on Relationship of Faculty Governance to Academic Freedom, AAUP Policy Documents & Reports 141-44 (10th ed. 2006).

revealed to the public. Beyond the Rutgers Environmental Law Clinic, other law clinics in New Jersey offer free legal representation in the areas of criminal defense, domestic violence, juvenile justice, immigration and human rights, tax, and special education, among others. Given the vulnerabilities of the clients represented by the state's law clinics, it is hard to imagine how these clinics could effectively or ethically operate without the same long-recognized protections afforded private clients in other practice settings.

Because ethics rules require lawyers to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,[63] if the Plaintiffs' requests were granted, Clinic attorneys would have to disclose the inability to protect this information to all prospective clients. Many clinic clients, fearful of the consequences of such disclosure, would forgo representation. In some situations, law clinic attorneys might have to decline representation for fear that eventual disclosure would compromise a client's case or even safety. Joint defense agreements or other working arrangements between law clinics and private firms, which are often beneficial to clinic clients and

[63] N.J. RPC 1.4(b). All lawyers, including those who provide legal services without charge to the client, have "a duty to this Court to observe all appropriate standards of professional conduct and responsibility." In re Education Law Center, Inc., 86 N.J. 124, 133-134 (1981).

useful learning experiences for clinic students, would be hard to enter into since communications with or documents received from those outside firms might now become available to the public.

Law clinics across New Jersey and the rest of the country provide millions of hours each year of unpaid student legal work to clients without the financial resources to hire a private attorney.[64] The plain result of a decision in this case requiring disclosure is that many clinic clients will no longer be assisted by a law clinic. This is particularly problematic because for many needy New Jersey citizens, law clinics are the last, and in many situations the only, lawyer in town that can or will take their case.[65]

Having to navigate a peculiar set of rules on privilege and confidentiality also means that clinic students in New Jersey

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[64] Luban, supra note 35, at 236.

[65] The unavailability of legal representation for the lower-income clients typically served by law school clinics has been well documented:

> Although one in seven Americans lives in poverty, only one percent of attorneys are dedicated to serving the legal needs of the poor. "[T]here is about one lawyer for every 240 non-poor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid."

Robert R. Kuehn, Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation, 2006 Utah L. Rev. 1039, 1041 (quoting Luban, supra note 35, at 211). "According to most estimates, about four-fifths of the civil legal needs of low income individuals . . . remain unmet." Deborah L. Rhode, Access to Justice: Connecting Principles to Practice, 17 Geo. J. Legal Ethics 369, 371 (2004).

would have to be taught rules that diverge from the norms followed by other lawyers. Rather than reinforcing and applying what students learn in law school evidence and professional responsibility classes, clinic students would need to be taught to disregard typical notions of privilege and confidentiality. This is contrary to the efforts of clinics to get the student to think and act like a typical practicing lawyer. It also gives clinic students a skewed notion of privilege and confidentiality rules that would not apply once the student passed the bar and worked in a private law office.

Therefore, the result of failing to subject law clinic records to the same privileges and rules of confidentiality that govern other law offices representing private clients is to interfere with the relationship between clinic clients and their attorneys. As the Restatement of the Law Governing Lawyers observed in explaining the importance of the duty of confidentiality: "A client's approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client."[66] Granting the Plaintiffs' request means that clients will not be able to trust Clinic lawyers to be able to protect their interests, driving some clients away from law clinics and leaving them without legal representation. This result is untenable. Clearly, the

[66] Restatement of the Law Governing Lawyers § 58 cmt. b.

Rutgers Clinic and its clients should enjoy the same protections from disclosure that are available to private law firms and their clients.

III. REQUIRING PRODUCTION WILL INFRINGE ON FIRST AMENDMENT RIGHTS OF CLINIC CLIENTS

By chilling public participation in government disputes and interfering with modes of expression and association between clients and their attorneys, Plaintiffs' request to open up the internal files of the Clinic infringes on the First Amendment rights of Clinic clients. As a result, to the extent that this Court believes that any provision in OPRA or the common law may provide a right of access to Clinic records, it is clear that the Plaintiffs must first demonstrate a compelling interest in the records that would override the clients' First Amendment interests. This Plaintiffs cannot do.

The Supreme Court has recognized that the right of citizens to be heard in agency or court proceedings would be, in many cases, of little use if it did not involve the ability to be represented by an attorney: "Even the intelligent and educated layman has small and sometimes no skill in the science of law."[67] As one commentator observed, "access to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is not equality before the law. The

[67] Powell v. Alabama, 287 U.S. 32, 45 (1932).

lawyer becomes the critical medium by which access to that legal system and concomitant opportunity to secure justice is achieved."[68]

It is particularly important that citizens advocating for public interests be heard. As the New Jersey Supreme Court noted in the Mount Laurel case: "The practice of public interest law is a much needed catalyst in our legal system. It helps to create a balance of economic and social interests and to assure that all interests have a fair chance to be heard with the help of an attorney."[69]

Given the complexity of environmental disputes, litigation has been particularly crucial to advance environmental interests. Litigation and access to legal representation may be the only means by which conflicts between ordinary environmental advocates and powerful financial interests can be resolved. "Litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[70] As one experienced environmental lawyer observed about the environmental movement: "[I]n no other political and social

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[68] Robert A. Katzmann, Themes in Context, in The Law Firm and the Public Good 1, 6 (Robert A. Katzmann ed., 1995).

[69] Township of Mount Laurel v. Dep't of Public Advocate, 83 N.J. 522, 535 (1980).

[70] NAACP v. Button, 371 U.S. 415, 430 (1963). As the Court explained in another case, "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." In re Primus, 436 U.S. 412, 431 (1978).

movement has litigation played such an important and dominant role."[71]

Yet access to legal representation to advance public, rather than private, interests is hard to find -- fewer than .001% of lawyers are public interest lawyers.[72] Citizens advancing issues of public concern often are left without an attorney or must turn to the limited free legal assistance provided by law school clinics.

For these reasons, the Supreme Court has been especially vigilant in protecting the First Amendment right of citizens involved in public disputes to be free from intrusive inquiries into their operations and restrictions on their access to and association with legal representatives. For example, the Court in NAACP v. Alabama refused to compel production of records of the NAACP, finding that compelled production would adversely affect the ability of the group and its members to pursue their collective advocacy efforts by inducing members to withdraw from the group and dissuading others from getting involved because of

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[71] David Sive, The Litigation Process in the Development of Environmental Law, 13 Pace Envtl. L. Rev. 1, 3 (1995).

[72] Debra S. Katz & Lynne Bernabei, Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power, 96 W. Va. L. Rev. 293, 300 (1993-94).

fear of exposure of their beliefs and activities and the consequences of such exposure.[73]

Similarly, in NAACP v. Button, the Supreme Court struck down on First Amendment grounds a state law that had the effect of infringing on the ability of lawyers to communicate openly with and assist persons who sought legal assistance to assert their rights.[74] The Court held that litigation in the public interest is not a technique of resolving private differences but a form of political expression and "may be the most effective form of political association."[75] The Court in In re Primus struck down yet another state law that interfered with the ability to make legal assistance available to persons advancing public interests, noting that "[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights."[76]

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[73] NAACP v. Alabama, 357 U.S. 449, 462-63 (1958). The case involved a claim that the activities of the NAACP were subject to a state law regulating foreign corporations doing business in Alabama. The state claimed that it was entitled to production of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all the NAACP's Alabama members and agents.

[74] NAACP v. Button, 371 U.S. 415 (1963). The case involved a challenge to a state law that prohibited communications (viewed as improper solicitation) between the NAACP and citizens about legal rights and the organization's free legal assistance programs.

[75] Id. at 429-31.

[76] In re Primus, 436 U.S. 412, 432 (1978). Similar to NAACP v. Button, the case addressed a state law prohibiting communications between the ACLU and citizens about their legal

In each case, the Supreme Court found that the ability of citizens to communicate and associate as a means of advancing pubic interests was protected by the First Amendment. Likewise, in each case the Court required that there be a demonstrated compelling interest in infringing on the relationship between citizens and the organization or their attorneys.[77] In addition, the Court held that the means employed in furtherance of that compelling interest must be drawn with narrow specificity to avoid unnecessary abridgement of expressive and associational freedoms.[78] As the Court stated in In re Primus, where political expression and association are at stake, a state's law "must regulate with significantly greater precision."[79]

In the instant case, the clients of the Clinic have joined to advance their shared interests as concerned citizens in a matter of public dispute -- the Ross' Corner development. They have sought to advance those interests, through the assistance of the Clinic, at public hearings and through litigation. The success of the citizens in advancing these public interests is dependent both on their ability to gain access to the legal representation of the Clinic and on their ability to associate,

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rights and the availability of free legal assistance from the ACLU.

[77] See, e.g., NAACP v. Alabama, 357 U.S. at 463; NAACP v. Button, 371 U.S. at 438-39; In re Primus, 436 U.S. at 432.

[78] NAACP v. Button, 371 U.S. at 437-38; In re Primus, 436 U.S. 412, 432-33.

[79] In re Primus, 436 U.S. at 437-38.

communicate, and share information with Clinic attorneys without fear of disclosure and possible reprisal.

In turn, Clinic lawyers, like the lawyers in the above Supreme Court cases, must be allowed to freely, without fear of disclosure, "acquaint persons with what they believe to be their legal rights and . . . (advise) them to assert their rights."[80] As in those cases, the activities of the Clinic's clients are modes of expression and communication protected by the First Amendment. As such, to withstand constitutional scrutiny, Plaintiffs must show a compelling reason why OPRA or the common law should be interpreted to infringe on the protected First Amendment interests of Clinic clients.

Plaintiffs have offered no justification, claiming an absolute right to the Clinic's internal records and persisting in this case even after its two lawsuits challenging Frankford Township's actions toward the development of Ross' Corner were dismissed with prejudice.[81] Judge James A. Farber previously found that efforts to sue the Clinic's clients over their participation in the Sussex Commons project at Ross' Corner seek to punish the clients for exercising their First Amendment right to petition the government for redress of their grievances and, if allowed, might suppress other people from exercising similar

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[80] NAACP v. Button, 371 U.S. at 435.
[81] See Certification of Julia LeMense Huff, ¶¶ 33, 39 (Pa67).

rights.[82] Given Judge Farber's concern about these "attempts at chilling the rights of the citizens in the area of Ross' corner to exercise their first amendment rights," the Plaintiffs must demonstrate a compelling showing that the public interest is served by turning public records access into a "weapon of oppression" that curtails citizen involvement and access to legal representation.[83]

The Supreme Court recently noted in Legal Services Corp. v. Velazquez that restrictions on First Amendment rights related to legal representation are even more problematic where the result may be that citizens are unlikely to find other legal counsel not encumbered by the restriction.[84] "There often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights . . . . It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[85]

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[82] Transcript of Proceedings at 54-55, Sussex Commons Outlets, LLC. v. Chelsea Property Group (N.J. Super. Ct. Law Div. Sussex County, Jan. 6, 2006) (Pa82) (attached as exhibit to Certification of Julia LeMense Huff (Pa67)).
[83] See NAACP v. Button, 371 U.S. at 436.
[84] Legal Services Corp. v. Velazquez, 531 U.S. 533, 546 (2001). Velazquez involved a challenge to legislation restricting Legal Services Corporation attorneys in advising their clients and presenting arguments and analyses to the courts.
[85] Id. at 546, 548 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

Here, because providing access to Clinic records will inhibit communications between Clinic attorneys and clients and drive many New Jersey citizens away from associating with law clinics and deny them legal representation, the Plaintiffs' justification for an interpretation or application of state law that intrudes into Clinic records must be even more compelling. The Plaintiffs' desire to further punish the Clinic and its clients for their interest in the Ross' Corner development proposal clearly is not a compelling interest for infringing on the First Amendment rights of those clients.

CONCLUSION

For the foregoing reasons, CLEA, SALT, and the AAUP request that the Court affirm the trial court's October 7, 2008 Order denying the Plaintiffs' Order to Show Cause for access under the Open Public Records Act or common law right of access to law clinic records.

Respectfully submitted,

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