COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK

LAW SCHOOL

December 21, 2010

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Supreme Court of New Jersey
P.O. Box 970
25 West Market Street
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: Sussex Commons Assoc., et al. v. Rutgers, the State University, et al.
Docket No. 067232

Dear Mr. Neary:

Enclosed for filing is an original and 10 copies of the Brief of Amici Curiae, Clinical Legal Education Association, Society of American Law Teachers, and American Association of University Professors, and an original Certificate of Service. Each of these parties filed as amici below.

Please stamp "filed" on the extra copies and return them to us in the enclosed self-addressed stamped envelope.

Sincerely,

Professor Edward Lloyd
Evan M. Frankel Clinical Professor of Environmental Law
Director of Clinical Education

cc: See attached Certificate of Service

CERTIFICATE OF SERVICE

I certify that, except where indicated otherwise, two copies of the accompanying Brief of Amici Curiae, Clinical Legal Education Association, Society of American Law Teachers, and American Association of University Professors have been served by Federal Express on:

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I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

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DATED: December 21, 2010

SUPREME COURT OF NEW JERSEY
Docket No. 067232

SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE, Plaintiffs-Respondents, vs. RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS, Defendants-Petitioners.	Civil Action ON PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE NEW JERSEY SUPERIOR COURT APPELLATE DIVISION Appellate Division: Docket No. A-1567-08T3 Hon. Jose L. Fuentes Hon. William P. Gilroy Hon. Marie P. Simonelli Law Division: Docket No. L-8465-06 Hon. T.L. Francis

BRIEF OF AMICI CURIAE CLINICAL LEGAL EDUCATION ASSOCIATION, SOCIETY OF AMERICAN LAW TEACHERS & AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF PETITION FOR CERTIFICATION

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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 Petition for Certification of Defendants-Petitioners Rutgers, The State University, Rutgers Environmental Law Clinic, and Rutgers University Custodian of Records (collectively "Rutgers").[1]

CLEA, SALT, and the AAUP contend that the Petition for Certification should be granted as the appeal presents a question of general public importance and the interest of justice requires this Court's intervention. The Appellate Division's opinion allowing access under New Jersey's Open Public Records Act ("OPRA") to law clinic documents threatens the ability of law clinics in New Jersey to provide students with important training in lawyering skills, interferes with the ability of law clinics to provide clients with appropriate, ethical representation, and chills access by underrepresented groups to much needed pro bono legal representation.

AMICI CURIAE STATEMENTS OF INTEREST

CLEA is a non-profit organization formed in 1992 to improve the quality of legal education. CLEA is the nation's largest

[1] The Law Division granted CLEA leave to appear as an amicus, and the Appellate Division granted amici status to SALT and the AAUP.

association of law teachers, with over 900 dues-paying members representing faculty at over 180 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.

SALT is a non-profit organization formed in 1973 whose members include law teachers, deans, and law librarians 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.

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 academic professionals with local campus chapters in approximately 40 states, including a chapter at Rutgers. 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. The AAUP filed an amicus brief in In re Executive Committee on Ethical Standards, 116 N.J. 216 (1989).

Amici accept the facts, procedural history, and statement of matters involved in Rutgers' Petition for Certification.

ARGUMENT

I. REQUIRING COMPLIANCE WITH OPRA 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 compliance with OPRA will harm the students' education by burdening clinics and diverting them from their educational and client representation missions. It also will make law practice in 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 the academic freedom of the programs.

Clinical education is a fundamental component of American legal education and an important part of the professional training of today's lawyers. To achieve and maintain ABA accreditation, a law school now must offer "substantial opportunities" for "live-client or other real-life practice

experiences."[2] The profession thus recognizes that clinics are necessary to the professional education of law students. As this court so aptly put it: "Clinical training is one of the most significant developments in legal education."[3]

Law clinics are unique vehicles for teaching students professional skills and values. Clinics provide law teachers an unparalled format for teaching students problem-solving, factual investigation, counseling, litigation, and negotiation. Good skills instruction must develop a student's understanding of lawyering tasks, provide opportunities for the student to engage in skills performance in role, and then help a student develop the capacity to reflect upon professional conduct by effective critique. Professional educators consider each of these aspects of skills instruction in structuring law school clinics.

To be most effective, a clinic puts the student into the role of lawyer so that the student can learn to "think and act like a lawyer" and face the same practical and ethical situations that practicing lawyers confront in comparable situations. To that end and to the extent consistent with their unique educational objectives, most clinics seek to operate similar to and reflect the practices of a typical law office.

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[2] ABA, Standards and Rules of Procedure for Approval of Law Schools Std. 302(b)(1)(2010).

[3] In re Executive Commission on Ethical Standards, 116 N.J. 216, 217 (1989).

In turn, clinics, like other law offices, are bound by the professional responsibility and other court rules guiding licensed attorneys and their offices.

Plaintiffs-Respondents' public records request seeks to distort the operations of the Rutgers Environmental Law Clinic ("RELC") and deny it the ability to operate like other law offices. These intrusive requests 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 undermine the academic freedom of the clinic.

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

This OPRA request is particularly troubling because it came after a court denied Plaintiffs-Respondents' previous attempts to pry into the activities of the RELC and its clients (Pa. 116-17). Unable to obtain information about the inner workings of the RELC through appropriate, court-supervised discovery

methods, the Plaintiffs-Respondents' OPRA request now seeks to burden and intimidate Rutgers with wasteful, invasive demands.

The request also threatens the academic freedom of clinical faculty. This threat is particularly stark when viewed against the backdrop of the U.S. Supreme Court's recognition of the tenets of academic freedom. The Court has 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.[4] 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.

Rutgers and American legal education will be severely compromised if disgruntled opponents can use state public records requests as a means to interfere with the normal educational and legal representation operations of clinics. Time and resources spent responding to improper public records requests are time and resources that cannot be focused where

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[4] See, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

most needed and 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 clinics will have a chilling effect on the types of cases and clients they agree to handle. The repeated efforts by clinic opponents to interfere in the ability of clinics to provide legal assistance have been well documented.[5] The ABA has noted the problem and warned:

> Improper 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 and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility.[6]

Efforts to restrict the lawyering activities of clinics have been particularly pronounced against environmental law clinics.[7] 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

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[5] 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 clinic cases, including repeated efforts to limit clinics at Rutgers).
[6] ABA, Standards and Rules of Procedure for Approval of Law Schools 146 (2010-11) (reprinting ABA Statements).
[7] See Robert R. Kuehn, Shooting the Messenger: The Ethics of Attacks on Environmental Representation, 26 Harvard Envtl. L. Rev. 417, 424-32 (2002).

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."

These varied efforts also chill 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.[8] 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."[9]

If this Court allows the form of interference in clinic operations sought here it will scare clinics away from certain cases or needy clients, thereby driving 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 by representing the neediest of New Jersey's residents.

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[8] See, e.g., David E. Rovella, Law Students Urged to Take Death Cases, Nat'l L.J., Dec. 7, 1998, at A9.

[9] 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).

Compelling compliance with OPRA also will force clinic law offices to operate in a manner that grossly differs from other law offices. It would require clinic lawyers to be 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 opponents.

Having to navigate a set of rules on confidentiality unique to law school clinics also means that clinic students in New Jersey would be taught rules that diverge from those which apply to all other lawyers. Rather than reinforcing and applying what students learn in evidence and professional responsibility classes, clinic students would be taught to disregard typical notions of privilege and confidentiality that would apply to clients in every other law practice setting. This is contrary to students learning to think and act like practicing lawyers. It also would fail to train students in confidentiality rules and norms, as the special OPRA rules are not the norms that would apply once the students passed the bar and worked in a private law office.

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

II. REQUIRING COMPLIANCE WITH OPRA WILL INTERFERE WITH ATTORNEY-CLIENT RELATIONS AND ACCESS TO REPRESENTATION

Plaintiffs-Respondents' broad-reaching request for documents, if allowed, would intrude on the traditional protections of the attorney-client relationship that are a hallmark of the U.S. legal system. If this Court were to permit these requests, it will make it impossible for clinic attorneys and students to provide the same assurances of confidentiality that are available to clients of other 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.

Notably, the Court could deny Plaintiffs-Respondents' request simply by holding that materials protected from disclosure by New Jersey rules of professional conduct are not available under OPRA. OPRA provides in section 47:1A-9 that the act shall not abrogate or erode any privilege or grant of confidentiality or any exemption from public access made, established, or recognized by court rules. In Gannett New Jersey Partners v. County of Middlesex, 379 N.J. Super. 205, 216 (App. Div. 2005), the court held that under this provision, if a

document is protected from discovery by rules of court, then it is also protected against disclosure under OPRA.

New Jersey Rule of Professional Conduct 1.6(a), issued by the New Jersey Supreme Court, provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." Rule 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."[10]

Therefore, under the authority of Gannett New Jersey Partners and section 47:1A-9 of OPRA, if a law clinic document is deemed confidential under RPC 1.6(a), it also is protected from disclosure under OPRA. Plaintiffs-Respondents readily admit they seek documents relating to a particular case, information that clearly falls within RPC 1.6(a) and therefore should be exempt from any disclosure under OPRA.

In many respects, clinic clients are most similar to the 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

[10] N.J. RPC 1.6 cmt. 1.

Public Defender."[11] This OPRA exemption underscores the recognized principle that it is the client, not the attorney, who controls the waiver of confidentiality and privilege and that a client should not be punished for being represented by a lawyer paid with public funds. As the U.S. 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."[12] As they too are represented by lawyers paid by the state to represent private clients, law 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 under OPRA.[13]

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[11] N.J.S.A. 47:1A-5(k).

[12] Polk County v. Dodson, 454 U.S. 312, 321-22 (1981).

[13] The relationship of the clinical faculty to their state employer is parallel to that of public defenders. As the U.S. Supreme Court said about the public defender, "an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government." Polk County, 454 U.S. at 319 n.8. Similarly, faculty members at public universities can be effective only if their academic functions are governed not by the state but by faculty exercising their professional responsibilities. As the AAUP observed: "The faculty has primary responsibility for such

Failing to respect the confidentiality of files maintained by clinics would mean that clinic clients will not be able to communicate freely with their attorneys, unlike clients represented by other attorneys. Similarly, sensitive or embarrassing information obtained by clinic attorneys that other attorneys can, and indeed under professional responsibility rules must, protect from disclosure would be revealed to the public. Beyond the RELC, other 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 clinics, it is hard to imagine how the clinics could effectively or ethically operate without the same long-recognized protections afforded clients in other practice settings.

Ethics rules (such as N.J. RPC 1.4(b)) require a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. If OPRA is applied to law clinics, clinic

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fundamental areas as curriculum, subject matter and methods of instruction." AAUP, 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." AAUP, Statement on Relationship of Faculty Governance to Academic Freedom, Id. at 141-44.

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 and thereby sacrifice potential legal rights that would be available to them if they could afford to hire private attorneys. In some situations, 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 clinics and firms, which are often beneficial to clinic clients and 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 annually provide over two million hours of unpaid student legal work to clients without the financial resources to hire an attorney.[14] The unavoidable result of subjecting the state's public law clinics to rules that differ from those that govern other law offices is that many in need will no longer be assisted by a clinic.

Shutting off this assistance is particularly problematic because for many needy New Jersey citizens, clinics are the only

[14] Center for the Study of Applied Legal Education, Report on the 2007-2008 Survey 19, available at http://csale.org.

lawyer in town that can or will take their case. If there is to be equal justice under law, clinics at public law schools and their clients should enjoy the same protections from disclosure that are available to law firms and their clients.

III. REQUIRING COMPLIANCE WITH OPRA 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-Respondents' request to open up the internal files of law clinics infringes on the First Amendment rights of clinic clients. As a result, Plaintiffs-Respondents must demonstrate a compelling interest in the records that would override the clients' First Amendment interests. This Plaintiffs-Respondents cannot do.

The U.S. 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."[15] It is particularly important that citizens advocating for public interests be heard. As this 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

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

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."[16]

Given the complexity of environmental disputes, 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. 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.[17] 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 U.S. 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

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

[17] 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).

withdraw from the group and dissuading others from getting involved because of fear of exposure of their beliefs and activities and the consequences of such exposure.[18] Similarly, in NAACP v. Button and In re Primus the Court struck down state laws 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.[19]

In each case, 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 their attorneys.[20] 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.[21]

In the instant case, the clients of the RELC have joined to advance their shared interests as concerned citizens in a matter of public dispute. They have sought to advance those interests, through the assistance of the RELC, at public hearings and

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[18] NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).
[19] NAACP v. Button, 371 U.S. 415 (1963); In re Primus, 436 U.S. 412, 432 (1978).
[20] 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.
[21] NAACP v. Button, 371 U.S. at 437-38; In re Primus, 436 U.S. 412, 432-33, 437-38.

through litigation. Their success in advancing these public interests is dependent both on their ability to gain access to the legal representation of the RELC and on their ability to associate, communicate, and share information with RELC attorneys without fear of disclosure and possible reprisal.

In turn, RELC lawyers, like the lawyers in the above 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."[22] As in those cases, the activities of the RELC clients are modes of expression and communication protected by the First Amendment. As such, to withstand constitutional scrutiny, Plaintiffs-Respondents must show a compelling reason why OPRA should be interpreted to infringe on the protected interests of RELC clients.

Plaintiffs-Respondents have offered no justification, claiming an absolute right to the RELC's internal records and persisting even after the conclusion of the underlying case. Given the obvious concern here about attempts at chilling the rights of the citizens to exercise their First Amendment rights, the Plaintiffs-Respondents must demonstrate a compelling showing that the public interest is served by turning public records

[22] NAACP v. Button, 371 U.S. at 435.

access into a "weapon of oppression" that curtails citizen involvement and access to legal representation.[23]

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: "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."[24]

Here, because providing access will inhibit communications between clinic attorneys and clients, driving many New Jersey citizens away from associating with law clinics and denying them legal representation, the justification for an interpretation of OPRA that intrudes into clinic records must be even more compelling. The Plaintiffs-Respondents have not and cannot show a compelling interest that justifies infringing on the First Amendment rights of those clients.

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[23] See NAACP v. Button, 371 U.S. at 436.
[24] 531 U.S. 533, 546, 548 (2001).

CONCLUSION

For the foregoing reasons, CLEA, SALT, and the AAUP request that the Court grant Rutgers' Petition for Certification, reverse the Appellate Division's decision, and affirm the Law Division's conclusion that OPRA does not provide a right of access to law clinic documents.

Respectfully submitted,

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Date: December 21, 2010