No. 99-30895

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, et al.,

Appellants,

v.

THE SUPREME COURT OF THE STATE OF LOUISIANA,

Appellee.

BRIEF FOR *AMICI CURIAE*, THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND THE CLINICAL LEGAL EDUCATION ASSOCIATION, IN SUPPORT OF APPELLANTS AND SEEKING REVERSAL

Appeal from the United States District Court
for the Eastern District of Louisiana
No. Civ. A. 99-1205

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CERTIFICATE OF INTERESTED PERSONS

Case Number: 99-30895

Title: *Southern Christian Leadership Conference, et al. v. The Supreme Court of the State of Louisiana*

The undersigned counsel certifies that none of the following listed persons nor their counsel or representatives have any financial interest in the outcome of this case:

1. The Association of American Law Schools, as *amicus curiae*;

2. The American Association of University Professors, as *amicus curiae*; and

3. The Clinical Legal Education Association, as *amicus curiae*.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

By_____

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INTEREST OF *AMICI CURIAE*

Amici curiae are three educational associations with vital interests in this case. Each is deeply concerned about the threat to academic freedom posed by the Louisiana Supreme Court's modification to Rule XX.

The Association of American Law Schools (AALS) is a non-profit educational organization that has as its purpose "the improvement of the legal profession through legal education."[1] The AALS was formed in 1900, as an organization of law schools that agreed to meet its membership standards. Of the 182 ABA-approved law schools in this country, 162 have met its standards of membership and have become members of the AALS. The AALS serves the legal community as a learned society of law teachers, and it is legal education's principal representative to the federal government and to other higher education organizations and learned societies.

The American Association of University Professors (AAUP), founded in 1915, is an organization of approximately 44,000 faculty members and research scholars in all academic disciplines, including law. Among the organization's central functions is the development of policy standards to defend academic freedom in higher education. AAUP's academic freedom policies are widely respected as models in American

[1] Article 3, Articles of Incorporation of the Association of American Law Schools, Inc.

colleges and universities, and have been cited by this nation's highest court. *See, e.g.*, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971). The Association's policies provide that higher education extends beyond the traditional classroom into settings such as clinics, and that these educational programs are protected by academic freedom. *See, e.g.*, AAUP, *The Work of Faculty: Expectations, Priorities, and Rewards*, AAUP POLICY DOCUMENTS AND REPORTS 129, 130 (1995) (recognizing that teaching occurs "in settings other than within the traditional classroom (as in studios, small-group tutorials, field work, or *clinics*)") (emphasis added) ("*The Work of Faculty*"); *The University of Mississippi*, 56 AAUP BULLETIN 75-86 (Spring 1970) (discussing academic freedom and clinical law faculty).

The Clinical Legal Education Association (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 currently has over 1,060 dues-paying members representing more than 140 law schools from six continents. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by doing. CLEA and its members are committed to training law students to be competent, ethical practitioners.

The AALS and CLEA offer their views to this Court because they believe that clinical legal education is an important component of the overall education of our

nation's future lawyers. These *Amici* firmly believe that the outcome of this appeal will affect the ability of law schools in Louisiana to provide a first-rate legal education, and may affect legal education in other parts of the United States as well. The AAUP has joined this Brief because of its particular concern for academic freedom. All three *Amici* join in urging this Court to reverse the decision below.

ARGUMENT

I. CLINICAL WORK IS AN INTEGRAL PART OF A QUALITY LEGAL EDUCATION

Over the past thirty years, clinical legal education has become an established part of American legal education. In law school clinics, students learn by doing. The students' hands-on work for real clients in real cases is essential to the learning process. In law school clinics, students take on primary responsibility for cases and actually appear before courts and administrative agencies, under close faculty supervision. This work is integral to modern law schools' educational mission. The district court was wrong to suggest that the Defendant's amendments to Rule XX are harmless because law faculty can take cases on their own. *See Southern Christian Leadership Conference, Louisiana Chapter v. Supreme Court of the State of Louisiana,* 61 F.Supp.2d 499, 507 (E.D. La. 1999) ("*SCLC*"). Law schools do not fund clinics so that law faculty can engage in litigation. Rather, law schools fund clinics because training students with real cases is an effective method to teach the theory and the practice of law, as well as the values of the profession.

A. Law Schools Are Required To Provide Legal Skills Instruction, Including Training In A Clinical Or Other Practice Setting

In the first half of this century, several law schools began experimenting with teaching students with real cases.[2] Over time, there came a broad recognition that law schools should do more to prepare students for the practice of law rather than solely focus on the skill of legal analysis exemplified by the casebook method. In the 1960s, the Ford Foundation provided seed money for clinical legal education programs across the country, and clinics began to flourish. *See* George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172-80 (1974). Law schools also developed clinical courses in response to calls from leaders of the bench and bar, such as former Chief Justice Warren Burger, who urged "[the] modern law school [to] fulfill[] its basic duty to provide society with people oriented and problem oriented counselors and advocates to meet the broad social needs of our changing world." Warren Burger, *The Future of Legal Education*, STUDENT L.J., Jan. 1970, at 19 (italics omitted).

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[2] *See, e.g.*, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California,* 2 S.C. L. REV. 252 (1929) (describing a general practice clinic); John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934) (discussing clinical legal education and the clinical program at Duke University); *see also* Jerome Frank, *Why Not A Clinical-Lawyer School*, 81 U. PA. L. REV. 907 (1933); Karl N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

Recognizing the importance of clinical legal education in the law school curriculum, the American Bar Association (ABA) promulgated a Model Student Practice Rule to facilitate the growth of clinical courses in American law schools. *See* ABA MODEL RULE ON STUDENT PRACTICE (1969), *reprinted in* BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993-95 (Fannie J. Klein ed., 1978). "Real-client" clinics for academic credit are well established at nearly all of our nation's law schools. *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT -- AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 239 (1992) ("MACCRATE REPORT"). The most recent data collected by the Committee on In-House Clinics of the AALS Section on Clinical Education indicates that there are real-client clinics at 183 law schools in the United States.[3]

The ABA formally recognizes that experiential learning is an essential part of a legal education and that clinics are effective settings in which to teach the skills and values central to the practice of law. ABA accreditation standards now provide that each law school "*shall* . . . offer instruction in professional skills." ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS (1996) (Standard 302(a)(iv)) (emphasis added). Further, the ABA accreditation standard for the core curriculum states that each law school "*shall* offer live-client or other real-life practice experience." *Id.* (Standard 302(d)) (emphasis added). These actions by the ABA acknowledge that "the most significant development in legal education in the post-World War II era has been the growth of the skills training curriculum" and the development of clinical education in American law schools. MACCRATE REPORT, at 6; *see also Determination of Executive*

[3] A more complete listing of law school clinics in the United States is available at: http://www2.wcl.american.edu/clinic.

Commission of Ethical Standards Re: Appearance of Rutgers Attorneys, 561 A.2d 542, 543 (N.J. 1989) ("*Rutgers*") ("Clinical training is one of the most significant developments in legal education").

B. Law School Clinics Serve A Unique and Necessary Educational Role

Law school clinics are unique vehicles for law schools to teach law students essential professional skills. *See* MACCRATE REPORT, at 234. Clinical programs strongly reinforce the entire law school curriculum in developing students' legal analysis and research skills. *Id.* Clinical programs also afford students paramount opportunities to engage in problem solving, factual investigation, counseling, and negotiation. *Id.* Prior to the development of clinical programs, these skills had been "considered as incapable of being taught other than through the direct practice experience" of a newly-licensed lawyer. *Id.*

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 conduct through the use of critique." *Id.* at 243. Professional educators focus upon these aspects of skills instruction in structuring law school clinics. That is why the MACCRATE REPORT recommends that "[l]aw schools should assign primary responsibility for instruction in professional skills to permanent full-time faculty who can devote the time and expertise to teaching and developing new methods of teaching

skills to law students." *Id.* at 333-34 (Recommendation C.24); *see also* Eric S. Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 486-87 (1990) (professional educators must direct law school clinics because of the critical analysis required to integrate knowledge and practice).

Clinics are essential to the education of the next generation of lawyers. While lawyers can learn skills in law school clinics or in their law practice, only "real-client" clinical instruction in law school emphasizes the "conceptual underpinnings of these skills." MACCRATE REPORT, at 234. Clinics teach students how to reflect on the practice of law, how to integrate the doctrines learned in traditional classes into practice, how to formulate hypotheses and test them in the real world, how to approach each decision creatively and analytically, and how to identify and resolve issues of professional responsibility. *See* Anthony Amsterdam, *Clinical Legal Education -- A 21st Century Perspective,* 34 J. LEGAL EDUC. 612 (1984). Students who experience these methods in law school learn how to learn from their experiences in practice throughout the rest of their legal careers.

Furthermore, the intensive supervision in clinical courses "distinguishes clinical training from the unstructured practice experience students encounter after graduation." Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ ST. L.J. 277, 280 (footnote omitted). Law school clinical faculty are best equipped to

assess law students and supply appropriate feedback because law faculty provide more intensive guidance than is generally available in any other setting. In 1980, a joint committee of the AALS and the ABA issued guidelines for law school clinics and recommended that student-faculty ratios and student caseloads be strictly limited. Under these guidelines, clinical law faculty supply close supervision; they must assist students with case preparation, review their work, accompany them to court and observe and evaluate the students' performances. CLINICAL LEGAL EDUCATION: REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) (Guideline VII). This close and direct faculty supervision, and the resulting "co-counsel" relationship, is essential to creating an effective adult-learning environment. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 347 (1982). It also distinguishes "real-client" clinical training from the practice experience encountered by students in "externships," where students are supervised by practicing lawyers, and "simulation" courses, where there is neither a real client nor a shared co-counsel relationship with a law faculty supervisor. *Id.* at 346-49.

Finally, law school clinics provide unique educational opportunities for students to integrate professional skills and values into an actual practice setting. *Id.* at 347-48. Among the fundamental values of the profession is "acting in conformance with considerations of justice, fairness, and morality" on behalf of a client, and helping ensure that adequate legal services are provided to those who cannot pay for them. MACCRATE REPORT, at 213. By helping students fulfill the profession's responsibility towards those who cannot afford counsel, and by working to further the cause of

justice, "real-client" clinics teach students the best values of the profession.

C. The District Court Misperceived the Role of Law School Clinics

The district court mischaracterized the role of faculty and students in clinical programs, and thus erred in concluding that the amendments to Rule XX would not severely affect law clinics in Louisiana. The district court mistakenly held that the amendments to Rule XX do not operate directly on the law schools or faculty because they merely "control[] what law students are permitted to do outside the classroom . . . ." *SCLC*, 61 F.Supp.2d at 509. Yet, in clinical courses, the "classroom" is (1) the clinic office, where students meet with clients and learn the tasks of lawyering; (2) the courtroom, where students appear on behalf of clients under faculty supervision; and (3) the seminar room, where case theories and lawyering skills are studied and discussed. In all of these settings, faculty are teaching and students are learning. More to the point, in all of these places, faculty and students are engaging in work that is integral to the educational mission of the law school.

Further, the district court failed to appreciate the role of clinical faculty when it held that the solicitation ban in Rule XX does not "prohibit the professor-plaintiffs from representing or soliciting whomever they wish, or from employing students in any nonrepresentative capacity they desire, just as any licensed attorney would rely on a student law clerk or paralegal." *Id.* at 510. The relationship between faculty and

students in a law school clinic fundamentally differs from the employment relationship between an attorney and a law clerk or paralegal. Clinical faculty do not "employ" law students to do the faculty's work; rather, faculty teach students in a setting that the ABA and others recognize is a core component of a law school's educational mission. Because clinics exist in law schools so that students can learn with real cases, faculty cannot represent clients unless the students are able to participate in the cases.

II. RULE XX INFRINGES ON THE ACADEMIC FREEDOM OF FACULTY IN LOUISIANA

The 1999 amendments to Rule XX violate the academic freedom of law professors in Louisiana. Faculty have the right to determine what may be taught and how it may be taught, whether in a law school clinic or a traditional classroom. The State may only infringe these First Amendment freedoms by a rule that is narrowly tailored to further a compelling state interest. In modifying Rule XX, the Defendant neither advanced a compelling justification nor narrowly tailored its amendments.

A. The First Amendment Protects What May be Taught and How It May be Taught

The classic formulation of the doctrine of academic freedom is set forth in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Supreme Court overturned the contempt citation of a college professor who refused to answer questions about his lectures. Justice Frankfurter wrote:

> 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. (354 U.S. at 263 (emphasis supplied) (citation omitted)).

See also Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978) (quoting Frankfurter's concurrence); *Rutgers*, 561 A.2d at 546-47 (quoting *Sweezy* and *Bakke*). The Supreme Court and this Court have underscored the indispensable need for academic freedom in a democratic society. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.") Further, this Court has held:

> Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth. (*Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir., 1983), *aff'd*, 482 U.S. 578 (1987)).

Academic freedom is protected by the First Amendment. In *Bakke*, the Supreme

Court recognized that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment." 438 U.S. at 312. The Supreme Court referred to the selection of a student body as part and parcel of "[t]he freedom of a university to make its own judgments as to education . . . ." *Id*. at 312. The Supreme Court went on to apply this "constitutional," "paramount," and "compelling" interest in academic freedom to the graduate setting. *Id*. at 313-14.

As described in more detail in subpart D of this argument, *infra*, the amendments to Rule XX infringe the academic freedom of faculty in Louisiana by restricting how and what they may teach without a compelling justification or narrowly-tailored rule. This Circuit and other courts have not hesitated to protect these rights in the absence of evidence of disruption to the educational process or some other compelling justification. In *Kingsville Independent School District v. Cooper*, 611 F.2d 1109 (5th Cir. 1980), for example, this Court recognized a right to decide "how to teach" when it protected an instructor's use of role-playing to teach African-American history. *See id.* at 1113-14; *see also Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969) (recognizing the rights of teachers to assign materials that include vulgar terms); *Parducci v. Rutland*, 316 F.Supp. 352, 356 (M.D. Ala. 1970) (protecting the assignment of controversial books for reading outside of the classroom).

Similarly, this Court must protect Plaintiff faculty's rights to assign cases and teach their clinical courses without government intrusion unless and until the Defendant demonstrates a compelling state interest for intruding into the educational process at Louisiana's law schools. The Defendant Court has not asserted any such interest. The Defendant Court identified Rule XX "as one means of providing assistance to clients unable to pay for [competent legal] services and to encourage law schools to provide clinical instruction in trial work of varying kinds." R. XX, §1. But these laudable goals do not provide a compelling state interest for restricting the academic freedom of clinical law professors to determine which cases provide valuable educational opportunities for students. *See* Section II D.2 *infra* (describing the wide range of clinical programs).

B. The Principles of Academic Freedom Apply Wherever Teachers Teach and Students Learn, Including in Law School Clinics

The district court dismissed the Plaintiffs' academic freedom claims, finding that "when the government impedes the faculty from accomplishing this objective [clinical teaching] in the manner they deem most appropriate," the government is not infringing "the faculty's constitutional right to teach freely." *SCLC*, 61 F.Supp.2d at 510. In reaching this conclusion, the court found that teaching and scholarly activities outside of the classroom are entitled to lesser protections than those inside the classroom. *See*

id. at 509. Yet existing authority establishes that the locus of teaching and learning does not bear on whether faculty and students enjoy academic freedom. Thus, the principles of academic freedom apply as equally 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."); *Rutgers*, 561 A.2d at 546-47 (construing state conflict-of-interest statute as not barring law faculty from appearing outside the traditional classroom before state agencies based, in part, on "the fundamental importance of academic freedom"). The courts' rulings in *Dow* and *Rutgers* are fully consistent with the AAUP's policies, which state: "Teaching . . . includes laboratory instruction, academic advising, training graduate students in seminars and individualized research, and various other forms of educational contact in addition to instructing undergraduates in the classroom," and that teaching occurs in a variety of settings, including "clinics." *The Work of Faculty,* at 130.

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).

There is no authority for the district court's determination that the principles of academic freedom are restricted to the traditional classroom, or receive lesser protection outside of the classroom. The principles of academic freedom apply where teachers teach and students learn, including in a law school clinic.

C. Academic Freedom May Not Be Abridged Without a Compelling State Interest and a Narrowly-Drawn Rule

When its regulations touch on academic freedom, the State must act with

care. In *Sweezy,* Justice Frankfurter, joined by Justice Harlan, wrote:

> Political power must abstain from intrusion into [academic] freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are *exigent and obviously compelling*. (*Id.* at 262 (emphasis added)).

Further, in *Keyishian,* 385 U.S. at 604-05 (1967) (citation omitted), the Supreme Court stated: "'First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity' . . . . The danger of . . . chilling . . . the exercise of vital First Amendment rights must be guarded against by sensitive tools . . . ."

In this case, the district court summarily rejected the Plaintiffs' academic freedom claims because it could perceive no boundaries to those claims at all:

> Taken to its logical conclusion, the right the faculty implores this Court to recognize is one that bestows upon professors unfettered discretion to instruct students, not only in the classroom but also in the "real-world" context, in whatever manner they choose so long as the professors feel it is the most pedagogically beneficial. Under this theory, a professor supervising a criminal law clinic might determine that the best educational experience for students would be to first learn how it feels to be a criminal and to spend time incarcerated. (*See SCLC,* 61 F.Supp.2d at 510).

The district court's hypothetical of encouraging criminal behavior is a red herring. Academic freedom is not unbounded: "it carries with it duties correlative with

rights." AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS & REPORTS 3 (1995). These duties include, for example, complying with the law as well as professional standards of the discipline and ethical standards of the profession. *See, e.g.*, William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, THE CONCEPT OF ACADEMIC FREEDOM 59, 78 (E.L. Pincoffs, ed., 1972); AAUP, *Statement of Professional Ethics*, AAUP POLICY DOCUMENTS & REPORTS 105 (1995) (e.g., professors should not plagarize or discriminate against students). Academic freedom may be restricted, but only by a narrowly-tailored rule designed to further a compelling state interest, such as the prevention of violations of professional standards.

D. Rule XX Is Not a Narrowly-Drawn Rule That Furthers a Compelling State Interest

The Plaintiffs allege that Rule XX impermissibly interferes with their academic freedom because they must reject new individual and group clients, even though these potential clients cannot obtain other counsel and their cases provide excellent educational opportunities. The State may impose restrictions on First Amendment freedoms when it has a compelling interest, but may do so "only with narrow specificity." *Keyishian*, 385 U.S. at 605, quoting *NAACP v. Button*, 371 U.S. 415, 433

(1963). No such compelling state interest has been established in this case. *See* Section II. A *supra*.

Even if the State had compelling interests in restricting the academic freedom of faculty to particular cases as specified in Rule XX, the income eligibility requirements and the solicitation ban are not narrowly drawn to further these interests; indeed, they may not further these interests at all. Accordingly, the State has not met the rigorous standard necessary to restrict the "essential freedom" guaranteed to clinical educators by the First Amendment to determine their pedagogical methods. *Sweezy*, 354 U.S. at 263.

1. Rule XX's income eligibility restrictions impermissibly interfere with the academic freedom of law faculty

Assuming that encouraging clinics to assist clients unable to pay for legal services is a legitimate governmental interest, the income eligibility requirements of Rule XX are not narrowly drawn to achieve it.

The Rule provides that clinics may represent only those individuals or family units "whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services." R. XX, §4. An income ceiling alone is too blunt a measure to further the State's purpose—at least not without, at the same time, foreclosing faculty from teaching with complex cases that

have great pedagogical value and, thus, violating "the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment." *Aguillard*, 765 F.2d at 1257.

No scheme conditioning eligibility for representation solely on income level is narrowly tailored to the State's expressed interest of providing legal services for those who cannot afford counsel. Rule XX fails to account for the complexity of a case, which is a substantial factor in determining the ability to secure counsel. A person whose yearly earnings are above 200% of the federal poverty level may be able to pay for a lawyer to draft a will, but may be unable to retain counsel to bring a complex environmental or employment discrimination lawsuit. Likewise, a person fired from employment in September, but who needs a lawyer in November, may have earned over the annual income amount, yet be unable to afford counsel. Thus, §4 is not narrowly tailored to suit the State's interest because it excludes from representation a broad segment of the population who would otherwise qualify as "clients unable to pay for [competent legal] services." R. XX, §1. To the extent that it forces faculty to reject potential cases with significant pedagogical value, even when the clients cannot afford counsel, Rule XX unduly burdens the right of faculty to select cases and clients based on academic grounds free from state interference that is neither "exigent" nor "obviously compelling." *Sweezy*, 354 U.S. at 262.

The Complaint alleges that the income eligibility restrictions in Rule XX have

prevented faculty from "utilizing non-state funds to provide representation to clients whose cases afford the best teaching and learning opportunities." Complaint, ¶92; *see also* Complaint, ¶106 (clinic formerly represented people who could not afford counsel, even if they do not fall into the government categories, "because it offers a pedagogical opportunity for clinical teaching and advances the public interest.") This profound intrusion on the freedom of law faculty to determine the manner in which they teach may be justified only by an "exigent and obviously compelling" reason. *Sweezy*, 354 U.S. at 262. The State has failed to make any such showing.

2. Rule XX's restrictions on representing organizations impermissibly interfere with the academic freedom of law faculty

Section 5 of Rule XX provides that to qualify for clinic representation, an organization must show that 51% of its members meet the income threshold. The Plaintiffs allege that this provision interferes with academic freedom by unduly limiting the faculty's ability to instruct in subject areas and with cases that contain the most appropriate teaching opportunities. Complaint, ¶¶92, 97-99, 103-104. Plaintiff Johnson has described how §5 has prevented her from expanding her clinic's work into the area of housing law, specifically because she is unable to represent new community organizations. Complaint, ¶¶98-100. Indeed, the Plaintiffs allege that barring group representation was precisely what the drafters of Rule XX had in mind. Complaint, ¶¶51-54. Taking these allegations as true, Rule XX's restrictions on what clinical faculty may teach violate the First Amendment.

Section 5 establishes enormous barriers to group representation. The demands of financial disclosure pose a tremendous burden on grass-roots organizations with little or no permanent staff, insignificant budgets, and minimal administrative capacity to maintain a financial database on dues-paying members. Furthermore, where no dues or membership requirements exist, such organizations may not even keep a roster of involved participants. Complaint, ¶¶64-67. Moreover, members may be unwilling to divulge sensitive personal financial information that could open them to retaliation by powerful opponents. *See NAACP v. Alabama*, 357 U.S. 449 (1958) (holding unconstitutional Alabama's demand that the NAACP reveal the names and addresses of its members). This is of particular concern among those living in economically-depressed communities (the natural clientele of law school clinics), or in areas where a brutal reaction to social change can be expected based on past experience. Complaint, ¶¶57-58.

Rule XX's income provisions are also vague. Section 5 fails to define "membership" in an indigent community organization. This is particularly problematic when a local organization is affiliated with a national association or is a non-membership organization. Even if an organization could define its membership for the purpose of §5 compliance, it remains unclear whether only local chapter "members" would be subjected to financial scrutiny, or whether national "members" would be

counted as well.[4] A plain reading of the text provides no guidance, and clinical faculty will be reluctant to rely on assumptions where there is a threat that a client may have to be abandoned down the road. Further, §5 requires "indigent community organizations" to certify in writing that they cannot afford private counsel, but does not describe the grounds on which this certification must be based. The certification is "subject to inspection" by the Louisiana Supreme Court, but neither the criteria nor parameters of such inspection are given. While §5 requires organizations to provide "information" to the clinic showing that the organization cannot obtain counsel, the Rule does not state the "information" required.

In *Button*, the Court warned that First Amendment freedoms are so easily chilled that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U.S. at 433. This warning is especially pertinent here: the Plaintiffs allege that they are reluctant to represent new organizational clients for fear of provoking retaliatory sanctions motions and misconduct charges, despite their good faith efforts to comply with the Rule. Complaint, ¶¶71, 72, 92, 94, 108, 109.

[4] This point was raised by Louisiana Supreme Court Justice Victory in his concurrence and partial dissent on passage of the Rule XX amendments.

By preventing law faculty from teaching with cases involving groups, Rule XX interferes with the ability of Louisiana law schools to deliver the same quality education as law schools elsewhere. Some of the most educationally enriching work performed by law school clinics across the country has involved the representation of groups; clinical work on behalf of these clients is an established part of legal education. Law students have represented groups with regard to funding legal services for the poor,[5] defending political canvassing,[6] access to courts *in forma pauperis*,[7] challenging radio broadcast licensing determinations,[8] fighting sex discrimination in employment,[9] enforcing zoning regulations,[10] litigating the complex interplay between Indian tribal

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[5] *Petition of New Hampshire Bar Association and New Hampshire Bar Foundation*, 453 A.2d 1258 (N.H. 1982), Family & Housing Law Clinic, Franklin Pierce Law Center.

[6] *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986), Constitutional Litigation Clinic, Rutgers Law School.

[7] *California Men's Colony, Unit II Men's Advisory Council v. Rowland*, 939 F.2d 854 (9th Cir. 1991), *rev'd*, 506 U.S. 194 (1993), Post-Conviction Justice Project, University of Southern California.

[8] *National Black Media Coalition v. F.C.C.*, 822 F.2d 277 (2d Cir. 1987), Media Law Clinic, New York University School of Law.

[9] *Congregation Kol Ami v. Chicago Commission on Human Relations*, 649 N.E.2d 470 (Ill. App. Ct. 1995), Edwin F. Mandel Legal Aid Clinic, University of Chicago.

[10] *Lloyd A. Fry Roofing Co. v. Pollution Control Board*, 314 N.E.2d 350 (Ill.App.Ct. 1974), De Paul Law Clinic.

and federal law,[11] pursuing legal representation for Cuban refugees,[12] supporting municipal nuisance ordinances,[13] asserting the civil rights of the homeless,[14] representing victims in adult abuse cases,[15] and providing transactional assistance to community development organizations[16] and arts organizations.[17] Had any of these clinics been forced to comply with Rule XX, their law students would not have benefitted from exposure to such a variety of legal subject areas because their clients could not have qualified for legal assistance. The virtual elimination of group

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[11] *In Matter of Catholic Charities and Community Services of Denver*, 942 P.2d 1380 (Colo. 1997), Indian Law Clinic, University of Colorado School of Law.

[12] *Cuban American Bar Assoc., Inc. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), Allard K. Lowenstein International Human Rights Law Clinic, Yale Law School.

[13] *Inter Urban Bar Association of New Orleans v. City of New Orleans*, 652 So.2d 1038 (La.App.Ct. 1995), Tulane Environmental Law Clinic, Tulane Law School.

[14] *Streetwatch v. National Railroad Passenger Corp.*, 875 F.Supp. 1055 (S.D.N.Y. 1995), Jerome N. Frank Legal Services Organization, Yale Law School.

[15] Civil Justice Clinic, Washington University School of Law (described at http://ls.wustl.edu/Students/Courses/Aiken/Cjc/excases.html).

[16] Program in Legal Assistance for Urban Communities, University of Michigan Law School (described at http://www.umich.edu/clinical/index.htm); Jerome N. Frank Legal Services Organization, Yale Law School (described at http://www.yale.edu/lawweb/lawschool/clinfp.htm); Community Economic Development Clinic of American University, Washington College of Law (described at http://www.wcl.american.edu/clinical/community.html)

[17] Clinical Seminar in Law and the Arts, Columbia Law School (described at http://www.law.columbia.edu/clinics/arts.htm).

representation interferes with the ability of faculty to choose what subjects to teach based on their own best judgment as educators and legal professionals. *See Aguillard*, 765 F.2d at 1257.

Rule XX infringes the freedom to choose what to teach and is not narrowly tailored to further any compelling state interest. Section 5 serves neither the articulated interest of the State in providing legal counsel for those unable to afford it, nor the articulated interest of "encouraging . . .clinical instruction in trial work of varying kinds." Prior to Rule XX's amendment, Louisiana law school clinics employed their own client selection formulas that included factors such as the substantive weight of the legal issues, pedagogic appropriateness, and public interest value. An additional, but not determinative factor, is that prospective clients had to show that they could not obtain legal representation from the private bar. Complaint, ¶¶90, 91, 96, 100, 102, 103, 106. Thus, as part of their own efforts to teach students the values of the profession, law school clinics in Louisiana already devoted their resources to those who would otherwise have had no access to legal recourse, to those who would otherwise be defenseless, and to those seeking to enforce a public law or vindicate a public right.

As alleged in the Complaint, there was never any claim that a clinic had committed a single ethical violation, nor broken the student practice rule. Complaint, ¶¶45-46. The Defendant Court's own investigation uncovered no instance in which a

clinic had represented a client who could afford to hire a private attorney. Complaint, ¶¶44-47. Thus, clinics were able to maintain educational excellence and professional integrity while serving the legitimate interests of the State. For these reasons, §5 abridges the academic freedom of faculty to determine what to teach without the state articulating a compelling state interest for such an intrusion.

3. Rule XX's anti-solicitation provision impermissibly interferes with the academic freedom and free speech of law faculty

Rule XX, §10, prohibits law students from representing clients with whom the clinic has initiated contact for the purpose of representation, although the Louisiana Rules of Professional Conduct permit solicitation when monetary gain is not a significant motive.[18] Because clinics are not established to enable faculty to litigate cases on their own, this restriction means that students cannot appear—and clinics cannot take cases—where there has been outreach to educate people about their rights. This impermissibly restricts the teaching activities of clinial students and faculty.

Starting with *Button*, and followed by a series of cases culminating with *In re Primus*, 436 U.S. 412 (1978), the Supreme Court has consistently held that lawyers

[18] LA St. Bar Art. 16 R.P.C. Rule 7.2(a) prohibits solicitation of professional employment "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

not primarily motivated by pecuniary gain have an absolute right to educate and assist clients in vindicating their legal rights. In *Primus*, the Court ruled that it will not "tolerate[] the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id*. at 434. Even the regulation of lawyer speech for commercial gain has to be pursuant to rules "narrowly drawn . . . to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Id.* at 438. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 477 (1978), which was decided the same day as *Primus*, the Court upheld a prohibition on the client solicitation for pecuniary gain. While the justices were willing to accept prophylactic regulation of client solicitation where a commercial transaction was involved, where political expression and association are at issue, "a State must regulate with significantly greater precision." *Primus*, 436 U.S. at 437-38. There must be "protection for 'advocating lawful means of vindicating legal rights.'" *Id.* at 432 (citation omitted).

In the case at bar, not only has the State failed to regulate with "precision," but §10 infringes the freedom of faculty to teach students how to perform legal outreach. Complaint, ¶¶73-75, 95, 101, 107. The anti-solicitation provision has a profound impact on the ability of law students to conduct public advocacy and education, and may well have a stifling affect even on non-litigation representation by law students. As an initial matter, clinics have to determine what kind of information dissemination

would constitute "solicitation" under §10. How the concept of client solicitation applies to the act of raising public awareness of legal rights and remedies—a key feature of a clinical education—is not explained in the Rule. The vagueness of §10 on this point permits opponents to construe communication that generally informs community members about the law and publicizes the availability of free legal assistance as solicitation, although it may not be directed at any specific individual or organization. Thus, the anti-solicitation provision oversteps the bounds of a "reasonable restriction with respect to the time, place, and manner of solicitation." *Primus*, 436 U.S. at 438-39.

Further, the educational mission of law school clinics will be undermined by the artificial distinctions imposed by Rule XX, which will result in the fragmentation of course content. As the two Louisiana Supreme Court justices who dissented on this issue pointed out, the anti-solicitation provision cannot be reconciled with the principles governing solicitation by licensed attorneys; the Rule irrationally severs the connection between knowledge of legal rights and the ability to act upon that knowledge. Yet "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." *Id* at 431. Section 10 presents clinics with the Hobson's Choice of training their students to contribute to justice only through informing the citizenry, or by providing legal representation–and one may not be meaningful without the other.

Section 10 violates the academic freedom of law faculty by preventing them from using clinical methods to teach students how to educate the public about their legal rights. Section 10 does not appear to further any expressed, let alone any compelling, State interest. Nor is it narrowly tailored to avoid infringing the First Amendment rights of law faculty. *Amici Curiae* respectfully suggest that §10 may not be upheld.

CONCLUSION

In view of Amended Rule XX's profound interference with the academic freedom of law faculty, and the lack of a compelling state interest for such restrictive amendments, *Amici* respectfully submit that the district court's ruling be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Peter A. Joy, attorney for *Amici Curiae*, certify that on January 14, 2000, I filed this Brief of *Amici Curiae* with the Clerk for the United States Court of Appeals for the Fifth Circuit by depositing seven copies on paper and one on computer disk for delivery by OVERNIGHT DELIVERY duly addressed to the Clerk. Additionally, on this day I served counsel for Appellants and Appellee with this Brief of Amici Curiae by depositing two envelopes for delivery by OVERNIGHT DELIVERY, addressed to each of the individuals listed below and containing copies of the brief in paper and computer disk forms.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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