No. 00-1073

In the

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT
NO. 1-011, ET AL.,
Petitioners,

v.

KRISTJA J. FALVO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE STUDENT PRESS LAW CENTER URGING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free press rights of student journalists. As the only national organization in the country devoted exclusively to this purpose, the SPLC has collected information on student media cases nationwide and has submitted amicus curiae briefs in numerous cases before state and federal courts.

Amici's interests in this case lie in its potentially sweeping implications for newsgathering and reporting. Federal laws designed to limit disclosure of information affect what the public can learn about its government and other institutions, particularly when they are enforced in such a way that will make state governments err on the side of nondisclosure in the face of civil rights suits. And more specifically, the Family Educational Rights

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

and Privacy Act itself is being interpreted in an inconsistent and somewhat haphazard manner that already is jeopardizing traditional reporting in the scholastic press.

STATEMENT OF FACTS

Amici defer to the parties for an explanation of the factual history and procedural posture of the case, other than to note that a critical jurisdictional issue — whether a remedy under 42 U.S.C. § 1983 is appropriate for what is essentially a records disclosure law — was decided by the court below without a full briefing by the parties. *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1210-11 (10th Cir. 2000).

SUMMARY OF THE ARGUMENT

This Court is being asked to more clearly define what constitute "education records" under the Family Educational Rights and Privacy Act. *Amici* take no position as to whether the school test papers at issue in the present case qualify as such records under FERPA. Rather, *amici* seek to have this Court clarify two other aspects of FERPA that implicate the present case.

First, *amici* ask this Court to recognize that, as a threshold jurisdictional matter, federal civil rights laws cannot be used to vindicate statutory privacy interests like those identified by FERPA, as opposed to actual constitutionally mandated privacy rights. Such application will have a devastating impact on public access to government-held information, as every congressional mention of privacy interests will lead to access denials out of fear

of nearly unlimited civil rights liability.

This court's § 1983 case law makes clear that information access laws like FERPA should not be enforceable through civil rights actions, because any "rights" created are not individually enforceable rights, but "systemwide" rights meant to allow Congress to enforce its interests through the spending power.

In addition, *amici* ask that as this Court attempts to more clearly define "education records" under FERPA, it should take the opportunity to make certain that access to information needed by student and professional journalists is not unnecessarily denied.

ARGUMENT

I. Privacy interests created by federal information disclosure rules are not a valid basis for a § 1983 claim, and the consequences of turning every disclosure regulation into a civil rights law would have drastic implications for the public's right to know how its government operates.

In this case, this Court is being asked to more clearly define what constitute "education records" under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (hereinafter "FERPA"). However, as a threshold matter, it must first decide whether release of such records is remediable under the federal civil rights statute, 42 U.S.C. § 1983.

The Tenth Circuit found that although the issue had not been addressed by the parties, § 1983 was an appropriate remedy for an alleged violation. *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1211 (10th Cir. 2000).

But such a finding cannot be accepted so readily, and requires careful consideration of the impact of such a decision.

Application of the civil rights remedy to statutes like FERPA goes one significant step beyond the typical § 1983 action by asking courts to enforce not a constitutionally mandated privacy right, but a privacy interest that is "created" simply by congressional action to limit disclosure of a certain class of government records.

Amici do not ask this Court to declare FERPA unconstitutional; we ask instead that the Court recognize that FERPA and other information disclosure regulations do not create a privacy right that can be vindicated by a § 1983 civil rights suit. And as will be discussed *infra* at section II, it is not the plain language of FERPA that makes the privacy interests so threatening to public access, but the broad, inconsistent and quite frankly dubious nature in which FERPA requirements have been interpreted by courts and school administrators that compels a closer look by this court.

A. Allowing § 1983 claims to vindicate information disclosure interests will dramatically affect public access to information, and will wipe out the careful balancing between access rights and privacy interests that is regularly conducted by legislatures.

FERPA is an information disclosure rule that specifies how schools must handle student records if they wish to receive federal funds. It does not specify any individual cause of action as a remedy, but instead allows federal officials to withhold funds from

schools that do not comply. *See* 20 U.S.C. § 1232g, subsections (a)(1)(A); (a)(2); (b)(1); (b)(2); and (e) (2001). Thus, litigants often seek access to federal courts under the federal civil rights law, 42 U.S.C. § 1983, when they feel their privacy interests in school records have been violated.

But allowing § 1983 claims for perceived violations of statutes like FERPA, as well as all future regulations enacted by Congress that address privacy interests but create no private cause of action, will have staggering implications. States will have no choice but to completely bar access to entire categories of information once Congress acts in a particular area, for fear of massive civil rights liability for alleged violations. The debates over balancing the public interests in disclosure of information with the private interest in secrecy of personal information will simply end under the shadow of a disclosure "death penalty" in the name of civil rights.

This balancing between access and privacy interests is appropriately left to the legislatures. State legislatures continually wrestle with privacy issues and how those issues come into conflict with governmental disclosure of information and the people's right to know how their government acts.

There are a multitude of laws enacted by Congress to govern the dissemination policy of government records. These laws were drafted by Congress in light of the strong countervailing interests in access and privacy. Congress balanced these interests in the manner it felt was most appropriate. Allowing § 1983 suits to be brought on these statutes disrupts the tenuous balance struck by Congress between access and privacy.

These laws are government information dissemination laws,

not civil rights laws, and should not be made such through a misapplication of § 1983.

B. An ambiguous privacy *interest* gleaned from a federal statute, as opposed to a recognized constitutionally mandated privacy right, cannot justify a § 1983 claim when it does not explicitly create a privacy *right*.

Not all mentions of privacy interests in federal regulations give rise to privacy "rights" that can be vindicated by § 1983 actions. Examining the history of § 1983 and what the civil rights law is meant to cover will show that the privacy interests recognized by FERPA and other information release statutes do not warrant federal civil rights actions, because the interests they acknowledge do not rise to the level of individually enforceable privacy "rights."

1. Section 1983's history shows that, in the realm of privacy rights, only interests rising to the level of constitutionally recognized privacy rights are covered.

Section 1983 is used to vindicate rights under the constitution and other federal laws. Almost exclusively, when the right being vindicated is a privacy right concerning disclosure of information, courts have only upheld § 1983 claims over constitutionally recognized privacy rights, not privacy interests purportedly created under a federal statute. FERPA is the only exception.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,

> subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

Congress enacted the Civil Rights Act of 1871 to stop lynchings and other violent acts against African-Americans. The Civil Rights Act of 1871, known at the time as the Ku Klux Klan Act, was passed after the Reconstruction-era amendments because Congress realized that the Thirteenth, Fourteenth, and Fifteenth Amendments "alone would not secure equality for blacks or stop the atrocities committed against them." John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW, 644 (5th ed. 1995).

The act was "designed to civilly and criminally punish those who acted to deprive others of their civil rights." *Id.*

In 1874, Congress added the phrase "and laws" to Section 1 of the Civil Rights Act. *Id.* The Civil Rights Act of 1871 and the Civil Rights Acts of 1866 and 1870 "remained dormant for many years but were resurrected in the 1960s." Harold S. Lewis, Jr., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW, 1-2 (1997) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968)).

42 U.S.C. § 1983, the codification of section one of the original Civil Rights Act of 1871, emerged as the civil penalty provision that "provides the cause of action and general basis for federal courts to protect individual rights." CONSTITUTIONAL

LAW at 644.

It was only as recently as 1980 that this Court recognized § 1983 as a vehicle to remedy claims other than civil rights or equal protection claims. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). The *Thiboutot* court, over a vigorous dissent from Justice Powell, held that the plain meaning of "and laws" indicated that the § 1983 remedy should include violations of federal statutory law as well as federal constitutional law. *Id.* at 4-8. The Court "indirectly limited the scope of *Thiboutot* by emphasizing that a statute must create 'enforceable rights' before a court will imply a private cause of action, and that mere 'precatory' language in a statute is insufficient to establish a federal cause of action." Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, U. KAN. L. REV. 321, 331 (2001) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 15-27, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)).

While courts have recognized privacy interests sufficient for a remedy under § 1983, those privacy interests generally involve direct violations of the Fourth Amendment. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (discussion of immunity for officers in entry into home; Fourth Amendment violation case under § 1983); *Valdez v. McPheters*, 172 F.3d 1220 (10th Cir. 1999) (expectation of privacy in residence is protected under Fourth Amendment and thus remediable under § 1983); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) *cert. denied*, 113 S.Ct. 2996 (1993) (forcing officer to undergo urinalysis test absent cause was violation of Fourth Amendment and remediable under § 1983).

However, other less direct privacy violations may be remediable under § 1983. In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court concluded that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600, 97 S.Ct. at 876-77 (footnotes omitted). In *Whalen*, the Court held that, when balanced against the state's interests, an individual's privacy right was not violated by the creation of a New York state database of patients and their prescribed drugs. The Supreme Court again addressed an individual's privacy interest in avoiding disclosure of personal matters in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59, 97 S.Ct. 2777, 2795-96, 53 L.Ed.2d 867 (1977).

However, neither *Whalen* nor *Nixon* defined what matters were actually so personal or intimate as to be sufficient for a constitutional privacy claim under § 1983. In fact, the court in *Whalen* cited a University of Chicago article that says, "The concept of a constitutional right of privacy still remains largely undefined." *Whalen*, 429 U.S. at 600 fn. 24. Twenty five years after that statement was made, it is still true. Moreover, in neither *Whalen* nor *Nixon* did the plaintiffs prevail on their privacy claims.

Case law subsequent to *Whalen* has honed the definition of constitutionally protected "personal" information under § 1983 to include the following: "personal and humiliating" details of a rape, *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998); a video recording of sexual activity, *James v. City of Douglas*, 941 F.2d 1539

(11th Cir. 1991); sexual history information, *Eastwood v. Department of Corrections*, 846 F.2d 627 (10th Cir. 1998); personal financial information, *DePlantier v. U.S.*, 606 F.2d 654, 669-71 (5th Cir. 1979), reh. denied, 608 F.2d 1373 (5th Cir. 1979); transsexual status, *Powell v. Schriver*, 175 F.3d 107 (2d. Cir. 1999); HIV-positive status, *Doe v. City of New York*, 15 F.3d 264 (2d. Cir. 1994); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994); medical history, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 795-98 (7th Cir. 1987); and personal diary excerpts, *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995).

The Court here has the opportunity to clearly establish what was left unclear in *Whalen* and *Nixon*: what information is so "personal" that its disclosure invokes a privacy right violation sufficient for a § 1983 claim. Such a violation should only be found when the privacy invasion is so highly personal or intimate," *Falvo*, 233 F.3d at 1209, that it reaches the level of an infringement of constitutionally protected privacy rights, not simply when a Congressional funding requirement was not met by a state official.

With the exception of privacy interests under FERPA, discussed *infra* at section I.B.3., only those "disclosure of information" privacy cases representing interests of a personal, intimate and confidential nature that were much more substantial than the vague right involved in the case at bar are permitted under § 1983. Even so, all of the above "disclosure of information" privacy claims under § 1983 were based on privacy rights under the Constitution, not privacy interests purportedly recognized under a federal statute, as is the case here under

FERPA.

2. Federal statutes enforceable under § 1983 must specifically create individual, not merely "systemwide," rights.

There are two exceptions to the rule that § 1983 provides a cause of action for violations of federal statutes, not just federal constitutional rights: "(1) the statute does not create enforceable rights, privileges or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990) (*quoting Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987)).

The § 1983 analysis was further modified in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992).

In *Suter*, the Court considered whether private individuals had the right to enforce by a § 1983 claim a provision of the Adoption Assistance and Child Welfare Act of 1980. The Act established a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services. To receive funding, a State was required to create a plan that ensured that "reasonable efforts" would be made to eliminate the need for removal of the child from his home before the State resorted to foster care. The plan was also supposed to make "reasonable efforts" for the child to return to his home. *Id.* at 351.

The Seventh Circuit ruled that the "reasonable efforts" clause

could be enforced under § 1983, but the Supreme Court held the Act did not create an enforceable right on behalf of the plaintiffs. The Court made the center of inquiry whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family."

The statute at issue in *Suter* was mandatory in its terms: A state was required to have a plan which, among others, "provides that in each case, reasonable efforts would be made" in order to obtain federal reimbursement. Unlike the statute in *Wilder*, neither the Adoption Act nor its regulations provided any measure in determining "reasonableness." *Suter*, 503 U.S. at 360.

The Court also noted that States could not be expected to know of any requirement "other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 361. The regulations were not specific as to what was required of the States, except obtaining approval of a plan. *Id.* at 362.

The Supreme Court most recently considered whether an enforceable right under § 1983 was created by a federal statute in *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). In *Blessing*, the Court held that individuals could not enforce certain Social Security Act provisions through a §1983 suit because the Act created only "systemwide" policies and not individual rights.

The Court listed three requirements for whether a federal statute gives rise to a "right" under § 1983: (1) "Congress must have intended that the provision in question benefit the plaintiff,"

(2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) "the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id.* at 340-41 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989); *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed. 2d 455 (1990) ; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed. 2d 694 (1981)).

The inquiry, the Court directed, must be toward each individual claim. "Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights." *Blessing*, 520 U.S. at 342. The Court criticized the Ninth Circuit for not engaging in a "methodical inquiry" as to whether the statute created individual, not systemwide, rights. Substantial compliance was all that was required of the state agencies under the statute at issue in *Blessing*, which could be met even with non-compliance of up to 25 percent. Even non-compliance beyond such a mark only triggered penalty provisions that increase audits and reduce the state's grant. "As such it does not give rise to individual rights." *Id.* at 344. Even the statute's requirement that each State have "sufficient staff" to fulfill specified functions did not give rise to federal rights because "the link between increased staffing and the services provided to any particular individual is far too tenuous to support the notion that Congress meant to give each and every [citizen] who is eligible [under the statute] the right to have the

[State office] staffed at a sufficient level." *Id.* at 345. However, the *Blessing* Court left open the possibility that some provisions of the Act might give rise to individual rights and remanded to determine exactly what rights plaintiffs were asserting.

Suter and *Blessing*, therefore, clarify that §1983 does not provide an individual enforcement mechanism unless Congress clearly imposed mandatory obligations on a State and those obligations are "unambiguous." Furthermore, participating institutions must be able to exercise their options "knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981); *see also Suter*, 503 U.S. at 362. Finally, the statute must do more than mandate systemwide performance of a program; it must create individualized rights. *Blessing*, 520 U.S. at 344-46.

3. FERPA interests are not remediable under §1983 because FERPA creates "systemwide" rights, not individual rights and remedies.

Following the above analysis, it is clear that FERPA is not the type of statute that creates individual rights and remedies. Instead, its enforcement provisions must be considered *Blessing*-style "systemwide" rights, meant to be enforced through the congressional spending power.

FERPA was introduced as an amendment to a school funding bill on the Senate floor. S. 1539, 93rd Cong., 2d. Sess. (1974). Sen. James L. Buckley introduced the amendment after reading an article in *Parade* magazine about an increase in data kept on students in school records that parents were not allowed to see,

while government officials and select others were. 120 CONG. REC. S13951-54 (daily ed. May 9, 1974) (statement of Sen. Buckley); *see also* Diane Divoky, "How Secret School Records Can Hurt Your Child," *Parade* (March 31, 1974). Buckley introduced the amendment, which was never considered by a Senate committee, as a "Freedom of Information Act for children and parents" in order to give parents an opportunity to inspect these files in order to know what information schools were keeping on their child, and to limit access to those files by others. 120 CONG. REC. at S13952.

Discussion on the amendment was limited to the fact that schools were making efforts to change the behavioral patterns and social values of children without their parents consent and were keeping secret records of assessments of students that parents were unable to view. 120 CONG. REC. S14579-94 (daily ed. May 14, 1974). It appears from the Congressional records that the amendment was passed by a voice vote later that day without any discussion of rights or remedies that would be granted to parents through the amendment. *Id*. at S14594.

Perhaps the lack of this type of discussion was due to the fact that the act was strictly a funding-related measure, with revocation of federal funds as the only enforcement mechanism. The text of the amendment clearly defines it as a funding statute: Each provision begins, "No funds shall be made available under any applicable program to any educational agency or institution . . ." *See* 20 U.S.C. § 1232g, subsections (a)(1)(A); (a)(2); (b)(1); (b)(2); and (e) (2001). Additionally, Sen. Sam Ervin Jr., a co-sponsor of the bill, said, "The penalties for noncompliance with this act would be a loss of Federal Funds." 120 CONG. REC. at S14584. Nowhere in the text of the statute is there any mention

of any other remedy or grant any individual right of action for the release of records.

With respect to records disclosure specifically, FERPA requires that "[n]o funds shall be made available . . . to any educational agency or institution which has a *policy or practice* of permitting the release of education records," absent certain exceptions. 20 U.S.C. § 1232g(b)(1) (emphasis added). Although this requirement is mandatory, the requirement is not that an institution may not release individual records; the requirement is only that the institution may not have a "policy or practice" of the release of records. Thus the statute is meant to remedy wholesale, systemwide abuses, not individual releases. Thus, under a *Blessing*-type analysis, the claim that a privacy right is created under FERPA would fail because *Blessing* states that § 1983 is meant to remedy the violation of individual, not systemwide rights.

The Eastern District of Pennsylvania applied this approach in finding that a "right" sufficient for a § 1983 claim was not conferred upon a law school graduate under FERPA in *Gundlach v. Reinstein*, 924 F. Supp. 684, 692-93 (E.D. Pa. 1996). The court held that because the statute was intended to address "systematic, not individual, violations" of students' privacy, there was no "unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA." *Id.* at 692.

Likewise, the Court of Appeals of Washington agreed that the privacy "rights" under FERPA would fail under § 1983. *Doe v. Gonzaga University*, 99 Wash. App. 338, 992 P.2d 545 (Wash. App. 2000), *rev'd* 24 P.3d 390 (Wash. 2001). The

Court of Appeals commented that the issue of whether such rights existed under FERPA was "more akin to *Suter* and *Blessing* than to *Wilder* and *Wright*." The court noted that FERPA only requires that a systemwide plan be put in place; "the law is not intended to ensure that 'the needs of any particular person have been satisfied.'" *Doe v. Gonzaga University*, 992 P.2d at 556 (*quoting Blessing*, 520 U.S. at 343).

Although the Washington Supreme Court, in reversing the appellate court, purported to follow the three-prong test from *Blessing*, it did not analyze whether individual rather than systemwide rights were created by FERPA. The decision suffers from an oversimplification of the third *Blessing* prong; the court held that because institutions with programs receiving funding were bound to obtain student consent before releasing records, the prong was met. This analysis fails to distinguish between individual rights and systemwide failures leading to a termination of funding – the very heart of the *Blessing* decision. *Gonzaga*, 24 P.3d at 401. Instead, in cursory fashion, the court held that federal appellate decisions that have allowed a § 1983 right under FERPA were "well-reasoned" and "more persuasive" than an analysis under *Wright*, *Wilder*, *Suter* and *Blessing*. *Id.*

The Washington Supreme Court in *Gonzaga*, like the federal appellate decisions it relies on, including the decision by the Tenth Circuit in the case at bar, employs a quote from the FERPA drafters to show that individuals were meant to be protected by the Act: "The purpose of the Act is two-fold – to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." *Gonzaga*, 24 P.3d at 400; *Falvo*, 233 F.3d at 1211 (*quoting* Joint Statement in Explanation

of the Buckley/Pell Amendment, 120 CONG. REC. 39862 (Dec. 13, 1974)).

However, this statement only demonstrates that like all spending power statutes, Congress intended some group to benefit from its legislation. In fact, FERPA is designed directly to establish systemwide programs, not protect individuals. Using the above quote to stand for the proposition that in this case Congress intended for individuals to be protected is to implicitly suggest that in other spending power legislation – such as the legislation at issue in *Blessing* and *Suter* – Congress had no such intent, otherwise a statement plucked from the Congressional record stating that the Adoption Assistance and Child Welfare Act of 1980 was meant to protect foster and adoptive children would have sufficed to meet this element in *Suter*, for example.

Moreover, the two appellate decisions cited by the Tenth Circuit in the instant case for the proposition that a violation of FERPA may be the basis for a civil rights lawsuit under § 1983, *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990) and *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d. Cir. 1986), were decided prior to *Blessing* and *Suter* and thus do not benefit from the Court's explication of the difference between individual and systemwide rights. *Falvo*, 233 F.3d at 1210.

C. When it has intended to create privacy rights in a statute, Congress has specifically created remedies.

Congress has shown that when it wants to recognize a privacy right, it creates remedies for violations of that right.

For instance, the Privacy Act of 1974, 5 U.S.C. § 552a (2000), was, like FERPA, enacted to allow individuals to access records about themselves from federal agency files and to seek amendment of erroneous information. Like FERPA, it is also a record-keeping statute. It mandates certain management and storage procedures for information about individuals so that they can see what routine uses will be made of information about them that is located in federal agency files. But the Privacy Act spells out remedies for agency mismanagement of records on individuals, including damage awards. 5 U.S.C. § 552a(g).

The Drivers Privacy Protection Act, 18 U.S.C. § 2721 *et seq*. (2000), also provides for remedies, and like FERPA directly addresses others' disclosure policies. The DPPA was enacted by the federal government to mandate that states pass laws requiring that certain "personal" information in state driver records not be routinely disclosed by the state agencies which collected it, but instead be available only to several categories of recipients who are described in the legislation. 18 U.S.C. § 2721(a). It also provides for criminal fines and civil damages against persons who knowingly violate its provisions. 18 U.S.C. §§ 2723(a), 2724.

II. The wide-spread confusion surrounding the definition of "education records" covered by FERPA should be clarified to avoid serious misapplication of the law.

The ambiguous meaning of "education records" in FERPA and the dearth of legislative history about the meaning of this phrase, combined with inconsistent application of the law by courts and the Department of Education has lead to increased confusion by school administrators as to what records are

covered by FERPA. Unfortunately, this often has the practical effect of closing access to records that clearly were not meant by Congress to be covered by FERPA. Additionally, closing access to all school records inhibits the ability of student and professional journalists to inform the public of the happenings of their school system.

A. Both schools and courts are confused as to what falls within the definition of "education records" and the Department of Education continues to add to the confusion.

The confusion over what sort of student records should be withheld under FERPA is evident in conflicting court decisions. For example, in *Louisiana v. Mart*, a Louisiana appellate court granted access to videotape of a fight on a school bus used in criminal prosecution to local television stations and newspapers because it found that FERPA did not cover these records. *Louisiana v. Mart*, 697 So.2d 1055, 1059-61 (La. Ct. App. 1997). However, a Florida appellate court denied a local television station access to a tape of a junior high school student who pulled a gun on a school bus during a fight under a state law similar to FERPA. *Tampa Television, Inc. v. School Board of Hillsborough County,* 659 So. 2d 331, 331-32 (Fla. App. 1995).

The Department of Education has added to the confusion surrounding the definition of "education records." For example, despite the rulings of several courts, all of which said that FERPA did not apply to campus crime records created by college and university police departments, the Department of Education continued to vigorously assert its position that such records were "education records." *See Bauer v. Kincaid*, 759 F. Supp. 575,

591 (W.D. Mo. 1991); *Jones v. Southern Arkansas University*, No. CIV-90-88 (Columbia County Cir. Ct. May 10, 1991). The Department retreated only after a federal court enjoined it from making further threats to cut off federal funding to schools that complied with public requests for campus police records. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1233-34 (D.D.C. 1991). In 1992, Congress amended FERPA to clarify campus crime reports were not included in the definition of "education records." Pub. L. No. 102-325, § 1155 (1992).

A similar disagreement continues on the issue of whether campus disciplinary records involving criminal acts committed by students can be kept secret as "education records" under FERPA. The Department maintains that they do[2] while state courts say they do not. *See Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257, 260-62 (Ga. 1993); *Doe v. Red & Black Publishing Co.*, 437 S.E.2d 474 (Ga. 1993); *Ohio ex rel. The Miami Student v. Miami University*, 680 N.E.2d 956, 970-72 (Ohio 1997), *cert. denied*, 118 S. Ct. 616 (1997).

In a case addressing the disclosure of information related to National Collegiate Athletic Association violations, the Maryland high court held that information about unpaid parking tickets of student athletes and coaches must be open to the public under the

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[2] The Department — relying on FERPA — has recently taken the unprecedented step of suing two Ohio public universities to prevent them from releasing student disciplinary records involving criminal activity requested by the Chronicle of Higher Education that the Ohio Supreme Court has ruled are public under state law. *United States v. Miami University*, 91 F.Supp.2d 1132 (S.D. Ohio 2000), *appeal docketed*, No. 00-3518 (6th Cir. April 27, 2000).

state open records law. *Kirwan v. Diamondback*, 721 A.2d 196, 199-207 (1998). In doing so, the court rejected arguments by the university, supported by the Department of Education, which filed an *amicus* brief in the case, that the parking records of student athletes were exempt from disclosure under the state open records law in part because they were "education records" covered by FERPA. The Department of Education's inability to provide accurate guidance and the inconsistent court treatment of school records adds to the confusion among school personnel over what records are "education records" under FERPA.

B. The legislative history indicates that lawmakers were primarily concerned about protecting records created by educators about a student's academic life.

Despite the courts' and schools' misapplication of the FERPA definition of "education records,"[3] the limited legislative history does provide some examples of "education records" intended to be covered by FERPA. Those examples include student IQ scores, medical records, grades, anecdotal comments about students by teachers, personality rating profiles, reports on interviews with parents, psychological reports, reports on teacher-pupil or counselor-pupil contacts and government-financed

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[3] "For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which - (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g (a)(4)(A).

classroom questionnaires on personal life, attitudes toward home, family and friends. 120 CONG. REC. S13951, S13953 (daily ed. May 9, 1974); 120 CONG. REC. S14584, S14585 (daily ed. May 14, 1974). These examples demonstrate that in enacting FERPA lawmakers were concerned about protecting information created by educators and other school officials about a student's academic life – not shielding from public view virtually every action taken by an individual student when he or she was within a school's geographic border.

C. Whatever interpretation this Court follows, it should be careful to note that material created by student journalists in the course of their work does not fall within FERPA's definition of "education records."

Unfortunately, the threat of a loss of federal funds (let alone the risk of a § 1983 action) combined with the general confusion surrounding the law have created an enormous incentive for schools to interpret, or misinterpret, FERPA broadly. Rather than risk the consequences or take the time to carefully sort out the law's requirements many schools simply take the easy way out by routinely denying access to information that would otherwise be publicly available. *See* Randolph, "Students Say Colleges Use Law to Hide Bad News," THE WASHINGTON POST, Nov. 30, 1989, at A22, col. 1. The Tenth Circuit's holding in this case will likely contribute to this knee-jerk reaction.

Across the country, schools have implemented policies based on a misguided interpretation of "education records" in an effort to comply with FERPA. One of the more troublesome provisions

to surface in a number of school policies in recent years has been the extension of FERPA's "education records" definition to include material produced by student journalists for inclusion in their student newspapers, yearbooks or other student-edited media. For example, the Student Press Law Center has received a growing number of calls from students and teachers reporting that school administrators have adopted or threatened to adopt policies that would prohibit students from publishing student photos or names in their student newspapers and yearbooks unless parental consent is obtained. *See e.g., Quill & Scroll*, February/March 2001, at 15.

Administrators at such schools contend that student-edited media produced using school facilities or resources are automatically transformed into "education records" that must be controlled and regulated like any other official school record. These administrators choose to ignore the obvious differences between student transcripts, test scores or psychological reports kept in teachers' desks or the school office and a news story about the winners of a school band competition written by a student reporter and published in the student newspaper. Under such a rationale, school officials — including college and university officials also subject to FERPA — would be forced to ban student photographers from taking and publishing photos from the latest football game in the student newspaper or graduation ceremony highlights in the student yearbook absent the prior written consent of the newsmakers or their parents. Unfortunately, the lack of clear guidance provided by FERPA itself — not to mention the confusion and "wriggle room" created by various court decisions and Department of Education interpretations — has been the inspiration for such bizarre results.

Such policies place an incredible and unconstitutional burden on the student media. Having to consult a list of "approved" students prior to reporting a news story is not only cumbersome, but essentially guts the integrity of the editorial process, where stories are published because they are fair, accurate and newsworthy, not because the subject has or has not consented to the use of his name or photo. To find otherwise would likely result in the elimination of student media programs at schools across the country because of the unworkable burden of obtaining consent from every parent or student in the school.

In the only case to directly address the issue of FERPA's application to student-edited media, a federal district court in New York rejected a school principal's claim that FERPA required him to confiscate copies of the school paper because it contained "confidential information about students." *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979). The court agreed that the paper contained information that would otherwise fall within the scope of FERPA if revealed by school officials, but refused to extend FERPA to the student media, stating:

> "[T]he prohibitions of [FERPA] cannot be deemed to extend to information which is derived form a source independent of school records…. Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records."

Id.

While it is entirely appropriate that a school district or a university create a policy regarding the disclosure of student information by school officials, it is wrong to conclude that a student reporter — who is neither a school official nor an agent of

the school — is subject to the same limitations in disclosing to his readers truthful information that he lawfully obtained during the newsgathering process. *Smith v. Daily Mail*, 443 U.S. 97, 102, 99 S.Ct. 2667, 2670, 61 L.Ed.2d 399 (1979) (finding that the government may not restrict the press from reporting independently gathered information where such information is newsworthy and accurate).

Amici urge the Court to clarify that information gathered by student journalists for use in a school-sponsored student newspaper, yearbook, magazine, Web site or other information medium, does not satisfy the second part of the "education records" definition. For even though copies of the publications may be maintained by the "educational agency or institution," student journalists are not acting on its behalf. 20 U.S.C. 1232g(a)(4)(A)(ii).

Such an interpretation would be consistent with numerous lower court decisions finding that independent acts or editorial decisions by student journalists do not constitute "state action." For example, in *Yeo v. Lexington*, the First Circuit held that student editors' decisions refusing to run an advertisement did not constitute a "state action." *Yeo v. Lexington*, 131 F.3d 241 (1st Cir. 1997). The court held that, "If the actions by the students are themselves state action or may be attributed to the school officials and provide the basis for state action, the inevitable legal consequence will be some level of judicial scrutiny of the students' editorial judgments. The inevitable practical consequence will be greater official control of the students' editorial judgments. Both consequences implicate the students' First Amendment interests, which are far from negligible." *Id.* at 250 (*citing Hazelwood Sch. District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98

L.Ed.2d 592 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252, 94 S.Ct. 2831, 2837, 41 L.Ed.2d 730 (1974)). *See also Leeds v. Meltz*, 85 F.3d 51, 54-55 (2d Cir. 1996) (finding no state action where school officials and students were sued over the decision by student editors of a newspaper in a state-supported law school to reject an ad); *Sinn v. The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (holding that there was no state action in a student editor's refusal to print an ad where the student paper "maintains its editorial freedom from the state."); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (finding a student newspaper's refusal to print an ad resulted in no state action where the students elected the editor and university officials did not control or supervise editorial judgment about what to publish).

Finally, it should be noted that FERPA has been on the books for over 25 years. During that time student journalists across the country have produced millions of newspapers, yearbooks, literary magazines and Web sites. These student media have routinely and naturally included news and information about other students and the school community. Indeed, the American student press has a long and proud history, dating back to the early days of this nation,[4] of providing news and information of special interest to our young citizens — and of introducing them to the important and vital role played by a free and independent press.

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[4] In fact, the first high school newspaper, *The Students Gazette*, was published on June 11, 1777, at the William Penn Charter School in Philadelphia. Stephen Weislogel, "The Student Gazette and its Successors," The School Press Review, Journal of the Columbia Scholastic Press Association, May, 1977.

The interpretation now being given to FERPA by some school officials threatens the student media's continued viability. We urge the Court to point out that material created by student journalists in the course of their work should clearly be recognized as not falling within FERPA's definition of "education records."

D. Whatever interpretation this Court follows, it should be careful to note that release of school records to investigative journalists serves a valuable oversight function.

Release of school records to journalists is a necessary component of informing the public of the effectiveness of their local schools. Thousands of stories a year could not be written without access to schools and school records. For example, in a five part series of stories two *Akron Beacon Journal* reporters wrote about how public records helped them to find out who was influencing the state's law makers to increase aid to private schools through voucher and charter school programs while public schools continued to lose funds. *See* Dennis J. Willard and Doug Oplinger, *Whose Choice?*, AKRON BEACON JOURNAL, Dec. 12-15, 1999. In another report, a *St. Petersburg Times* reporter was able to get records through public records requests that showed a discrepancy between the actual average standardized test scores of Florida's children and the numbers publicly disseminated by the State Department of Education. The reporter discovered that the state was excluding the testing results of special education students, making the state's children appear smarter. *See* Diane Rado, *Testing Policy Raises Questions*, ST. PETERSBURG TIMES, May 23, 1999, at 1B.

Because of the strong need to inform the public about school issues, it is important that journalists continue to have access to these records. This Court should be careful to narrowly interpret FERPA so as not to restrict access to records that have information vital to the public's knowledge.

CONCLUSION

Amici respectfully urge that this court overturn the Tenth Circuit's determination that a § 1983 remedy is proper under FERPA, or in the alternative, define "education records" narrowly, so that enforcement of FERPA does not interfere with the First Amendment interests of the scholastic and professional news media.

This Court must carefully consider the implications of allowing § 1983 claims on a records disclosure law like FERPA, and determine whether Congress creates a new privacy right comparable to a constitutionally mandated privacy right every time it acknowledges privacy interests.*Amici* assert that answering this question in the affirmative would have drastic, sweeping consequences for the public's interest in knowing how its government works.

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