NO. 142PA18 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; and THE DURHAM HERALD COMPANY,	)	
Plaintiffs	)	
v.	)	From Wake County
	)	No. COA17-871
CAROL L. FOLT, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill,	)	
Defendants	)	

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BRIEF OF *AMICI CURIAE* STUDENT PRESS LAW CENTER AND THE BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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BRIEF OF *AMICI CURIAE* STUDENT PRESS LAW CENTER AND THE BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PLAINTIFFS

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ISSUE PRESENTED

Whether the Court of Appeals panel was correct in concluding, as a matter of law, that the applicable provisions of the Family Educational Rights and Privacy Act ("FERPA") neither conflict with nor preempt the North Carolina Public Records Act, requiring Defendants to disclose the records requested by Plaintiffs.

IDENTITY AND INTERESTS OF AMICI

The Student Press Law Center is a nonprofit legal-assistance organization headquartered in Washington, D.C., that supports substantive, civic-minded journalism in schools and colleges nationwide. Since its founding in 1974, the SPLC has been the nation's only dedicated source of legal assistance serving student journalists and journalism educators. As such, its legal staff regularly assists in resolving disputes about access to records and student privacy, and its attorneys have authored many authoritative articles addressing misconceptions about the breadth of FERPA confidentiality.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 42 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly articles about open-government laws, responds to media inquiries about public-records statutes, and educates citizens about their access rights. The Center is filing this brief in an exercise of the academic freedom of its faculty and not as a representative of, or on behalf of, the University.

INTRODUCTION AND SUMMARY

This is a case about the public's ability to oversee how powerful government agencies discharge their duty to keep the public safe. Congress fashioned a specific exemption to the Family Educational Rights and Privacy Act ("FERPA") in 20 U.S.C. 1232g(b)(6)(B) with the express purpose of making sure that federal student privacy law did not obstruct the public's access to essential safety information about dangerous campus misconduct. The University is attempting in this case to distort this unmistakably clear congressional pronouncement, a distortion that the Court of Appeals readily saw through.

FERPA is, contrary to the sky-is-falling rhetoric to which institutions are prone, an exceedingly narrow statute carrying zero practical risk of penalties. It is not a "reputation management" statute, and it cannot be refashioned into (in the words of one North Carolina judge) an "invisible cloak" that envelops every aspect of citizens' interaction with government agencies, the result that the trial court's mistaken interpretation invited. *See News & Observer Publ'g Co. v. Baddour*, No. 10 CVS 1941 (N.C. Super. Ct. Memorandum Ruling, April 19, 2011).

ARGUMENT

I. FERPA is frequently manipulated for illicit concealment purposes.

Any claim of FERPA confidentiality by a university seeking to avoid disclosure of potentially embarrassing records must be met with skepticism, as educational institutions have been caught regularly abusing FERPA for illicit concealment purposes. *See* Mary Margaret Penrose, *Tickets, Tattoos and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 Cardozo L. Rev. 155 (April 2012) (detailing instances where UNC Chapel Hill and other colleges have been found by courts to have mischaracterized public records, such as athletes' parking tickets, as confidential education records). The universe of records that educational institutions have refused to produce on FERPA grounds goes vastly beyond what Congress envisioned as "education records," including such plainly non-confidential, non-educational items as videos and minutes of government meetings. *See, e.g., Bracco v. Machen*, No. 01-2009-CA-4444 (Fla. Cir. Ct. Jan. 10. 2011) (videos of Student Senate meetings ordered released); Bill Bush, *Privacy law shields school-district tallies of gun incidents*, The Columbus Dispatch, Dec. 10, 2013 (Ohio Department of Education withholds even de-identified data on gun incidents in schools, purportedly in reliance on FERPA); Tony

Casey, *ETSU won't share football concussion numbers as NCAA faces class action lawsuit*, Johnson City Press, Feb. 5, 2017 (college claims FERPA forbids releasing statistics about athlete concussions). Educational institutions so often mischaracterize public records as confidential under FERPA that their categorization should be entitled to no deference.

II. The public has an overriding interest in access to these records.

Colleges are notorious for manipulating statistics to downplay the severity of sexual assault on their campuses. *See* Collin Binkley *et al.*, *Reports on college crime are deceptively inaccurate*, The Columbus Dispatch, Sept. 30, 2014 (analyzing colleges' federally reported data to show that, on an annual basis, half of all major colleges claim to have experienced no violent crime of any kind, and nearly 20 percent claim not to have experienced a single sexual assault over the past 12 years,), *available at* http://www.dispatch.com/article/20140930/NEWS/309309904. Once journalists from the *Dispatch* obtained the same type of records that are being withheld here, they documented that the college disciplinary system imposes inexplicably disparate penalties – at times, as insultingly light as an essay and a $75 fine – for conduct that would result in years in prison if committed anywhere else. *Id.* It is no wonder that UNC would prefer to keep its disciplinary records a secret.

Sexual assault is a concern of such national urgency that then-Vice President Biden was put in charge of a White House initiative to address distressing levels of sexual violence on college campuses. *See* Aamer Madhani & Rachel Axon, *Biden: Colleges must step up to prevent sexual assault*, USA Today, April 29, 2014. More than 200 colleges are under active Title IX investigation, often for the very same conduct that the Plaintiff news organizations are seeking to investigate here. Nick Anderson, *At first, 55 schools faced sexual violence investigations. Now*

the list has quadrupled, The Washington Post, Jan. 18, 2017 (reporting that Department of Education has 304 investigations underway related to sexual violence at 223 colleges and universities). The public urgently needs access to university documents to independently verify whether higher-education institutions are doing their jobs.

III. Records of this kind have, harmlessly, been released elsewhere.

If it violated FERPA for educational institutions to release public records reflecting the outcome of sexual assault cases, we would know it by now, because records of this kind have been released many times without incident. For example, reporters obtained public records of the outcomes of sexual assault disciplinary cases from two dozen public institutions across the country – at times, with the names of the perpetrators included – and published their findings, without DOE sanctions against any of the institutions. *Campus Insecurity: Inside the investigation*, The Columbus Dispatch, Nov. 24, 2014, *available at* http://www.dispatch.com/article/20141124/NEWS/311249711; *see also* Patricia Boh *et al.*, *Sweeping rape under the rug*, The (SMU) Daily Campus, May 1, 2012 (student reporters used public records to examine 100 cases of sexual assault reported to Southern Methodist University and discovered that only one resulted in criminal penalties), *available at* https://www.smudailycampus.com/news/sweeping-rape-under-the-rug.

In 2010, Maryland's Attorney General directed the University of Maryland to comply with requests to produce a decade's worth of public records documenting disciplinary cases involving cases of sexual assault, stating:

> If the University finds that its rules or policies were violated in a matter involving a forcible sexual offense, incest, or statutory rape, the final results of the disciplinary proceeding – including the identity of the accused student – may be disclosed without violating FERPA. Accordingly, the student's identity would be available in response to a [public records] request.

Md. Attorney General issues FERPA Opinion, SPJ D.C. Pro Blog (June 7, 2010), *available at* http://spjdc.org/2010/06/md-attorney-general-issues-ferpa-opinion/). *See also* Alexandra Moe, *AG Rules Universities Must Reveal Punishments in Sex Assault Cases*, Capitol News Service, April 1, 2010, *available at* http://cnsmaryland.org/cns/wire/2010-editions/04-April-editions/100401-Thursday/SexualAssault_CNS-UMCP.html.

Following that interpretation, records of a decade's worth of sexual-assault disciplinary cases, including the names of those disciplined, were released to Capitol News Service, which broadcast a series of stories based on the records without incident (and in fact won a 2011 Society of Professional Journalists' award for its coverage). *See* Danielle Lama, *Students win fight for sexual-assault records*, SPJ D.C. Pro Blog (April 29, 2011) (reporting reporters' findings of a "huge disconnect between the amount of sexual assaults that occur and the number of people who are held accountable"), *available at* http://spjdc.org/2011/04/students-win-fight-for-sexual-assault-records/. Those records revealed that only four people had been disciplined for sexual assault at Maryland over the preceding 10 years.

Indeed, in the 45-year history of FERPA, "no institution has ever lost funding as a result of FERPA violations." Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 Geo. L.J. 493, 498 (2013). Surely the first such penalty will not be issued because a university complied with valid open records request as directed by trial and appellate courts.

IV. FERPA neither preempts state open-records statutes nor requires an individualized discretionary assessment of each request.

Because FERPA says nothing about preempting state law, preemption can be found only if Congress has comprehensively occupied the field, or if state law imposes obligations

irreconcilable with federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Neither is true here.

It is beyond dispute that federal law does not occupy the entire field of student privacy or the management of student records, because states – including North Carolina – in fact legislate on that subject regularly. *See, e.g.*, N.C.G.S. § 115C-402(e) (specifying the contents of students' "official records" and providing that "[t]he official record of each student is not a public record"); N.C.G.S. § 115C-174.13(b) (providing that "written material containing the identifiable scores of individual students on any test" is a confidential education record exempt from the open records act); N.C.G.S. § 8-53.4 (making information acquired in rendering school counseling services inadmissible on student privacy grounds). Indeed, the FERPA statute itself explicitly contemplates that states will legislate in the field, by deferring to exemptions created by states that allow "state and local officials or authorities" to have access to otherwise-confidential education records as provided by state statute. 20 U.S.C. § 1232g(b)(1)(E). It is thus entirely within the authority of states to require the production of records that Congress has explicitly chosen not to make confidential.

The areas in which courts have found federal field preemption to exist are areas of traditional federal expertise and responsibility. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012) (immigration). Education and the maintenance of state records are two areas of law over which states have primary expertise and responsibility, subjects historically committed to the discretion of state and local government. To find that Congress has preempted state authority in these areas of unique state expertise and discretion would represent a drastic recalibration of federalism. *See FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990) (noting the Court's "presumption that Congress does not intend to pre-empt areas of traditional state regulation").

Nor can the University's refusal to honor Appellant's request for public records be legitimized on the grounds of conflict preemption. As with field preemption, the ultimate question in conflict preemption comes down to federal intent, and a court is not permitted to find implied conflict preemption where an agency, at the time it enacted a rule, "was not concerned about" preventing the outcome produced by the state law. *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 324 (2011). The Department of Education explicitly stated in its 2008 FERPA rulemaking that it was unconcerned with the operations of state open-records law. *See* U.S. Dept. of Educ., Family Educational Rights and Privacy, 73 Fed. Reg. 74805, 74831, 74831 (Dec. 9, 2008). The absence of an intent to preempt could not be clearer.

The DOE has expressly provided by regulation that educational institutions may escape FERPA liability simply by giving notice to the Department that they believe themselves to be compelled by state law to make a release of education records. *See* 34 C.F.R. § 99.61 ("If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law."). If this provision is to mean anything, it must mean that a school or college can avoid FERPA sanctions by giving notice that a conflicting legal obligation – here, the open records statute --

compels disclosure.

The trial court's only basis for finding a conflict between federal and state law was the notion that federal law requires an individualized discretionary assessment of each production of records, a requirement that appears nowhere in FERPA or its implementing regulations (and that the Court of Appeals properly rejected). The statute has just one penalty provision: Disqualification from federal funding for an institution that maintains a policy and practice of

releasing confidential education records without a lawful justification. 20 U.S.C. § 1232g(b)(1). The statute penalizes only disclosure, not a failure to individually analyze each record before deciding whether to disclose. Plainly, as the Court of Appeals correctly found, there is no "individualized discretion requirement" in federal law with which the state's open-records statute conflicts. UNC can be in complete compliance with federal law (which permits disclosure) and state law (which requires it), without conflict.

The use of the term "may" in the federal FERPA regulation, 34 C.F.R. § 99.31(a) – which provides that an educational institution "may disclose personally identifiable information from an education record" under certain conditions – does not really mean "take your pick, it's up to you," as the University argues. This is made clear by the other situations that follow the phrase "may," some of which undeniably are legally compulsory. For instance, the regulation says that educational institutions "may disclose" if the purpose of the disclosure is "to comply with a judicial order or lawfully issued subpoena." 34 C.F.R. § 99.31(a)(9)(i). Obviously, this provision does not mean "you may choose not to disclose" so that a university could claim to have federal dispensation to treat a court order as optional. What "may disclose" means in the context of FERPA is simply that disclosure will not result in any federal penalty.

V. Congress clearly intended its FERPA revisions to afford the public access to information about disciplinary cases involving serious crimes.

Although the FERPA statute is clear on its face in entitling the Plaintiff/Appellee to the requested records so that the Court need not resort to any interpretive aids, it is worth noting that the legislative history of Section 1232g(b)(6)(B) amply supports the Court of Appeals' commonsense interpretation.

The FERPA exemption for outcomes of serious disciplinary cases was introduced as a floor amendment by Rep. Mark Foley, R-Fla., who explained that FERPA was never meant to obscure violent misconduct:

> [T]he Department of Education has wrongly concluded that FERPA prevents universities from releasing to the public the results of campus disciplinary actions or proceedings. Under this interpretation of FERPA, student criminal activities like aggravated assault and rape are protected along with legitimately protected grade and financial aid information. This interpretation is wrong. Escalating violence on college campuses across the Nation require that Congress clarify the intent of FERPA. I fully believe, Mr. Chairman, that every student has the right to privacy. But when a university finds through its own disciplinary proceedings that a student has committed an act of violence, such as sexual assault, the university community has a right to know about it.

144 Cong. Rec. H2868 (1998).

Rep. Bob Goodling, R-Pa., followed Rep. Foley by stating:

> Information related to crimes of violence should not be protected from disclosure if we truly want our college campuses to be safe environments for all students. If students do not know about violent offenders in their college community, how will they know how to protect themselves? … We should not be protecting these acts of violence simply because they occur on our Nation's college campuses.

144 Cong. Rec. H2869 (1998).

Rep. Gerald Solomon, R-N.Y., echoed his colleagues' remarks:

> By hiding this information, students are put at risk because they do not know when a violent crime has been committed by a student or if that student remains even on campus. We need to give parents and students the information that accurately measures the dangers that are present on many college campuses today.

Id.

Rep. John Duncan, R-Tenn., concluded the discussion of the Foley amendment, stating that it was based on a bill he had introduced with the intent of overriding the Department of Education's overly broad interpretation of FERPA, enabling colleges to conceal dangerous

wrongdoing. Duncan stated his understanding that the Foley language "would amend the federal academic privacy laws to exclude criminal actions," and explained:

> I think that most people would think that matters like grades and financial aid records should be private matters between a student and his or her parents and their college or university. These records should not be released to the public. However, I think it is wrong that some students and colleges use these privacy laws to hide criminal acts.

144 Cong. Rec. H2870 (1998). The amendment was adopted on a voice vote and became today's Section 1232g(b)(6)(B). Not one person stated during the floor discussion that the amendment was intended or understood to make disclosure optional at a college's discretion.

VI. Transparency promotes greater reporting of sexual misconduct on campus.

UNC's contention that the Court should disregard the plain wording and intent of the statute to fashion an outcome-driven workaround to promote reporting of sex crimes on campus simply belies history and experience. There is absolutely no evidence that publicizing cases of sexual misconduct drives down reporting, and compelling evidence that it does the opposite.

The modern awareness movement about campus sexual assault traces its origins to an opinion column by a student at the University of Massachusetts-Amherst in 2012. In the column, Angie Epifano detailed a nightmarish experience in which her university miscategorized her report of sexual assault as indication of mental illness requiring institutionalization. *See* Rosemary Kelly and Shaina Mishkin, *Angie Epifano Profile: How One Former Amherst Student Sparked A Movement Against Sexual Assault,* The Huffington Post, June 2, 2013, *available at* https://www.huffingtonpost.com/2013/06/02/angie-epifano-profile_n_3353941.html. Soon afterward, protests began taking place at campuses everywhere and survivors of sexual abuse began similarly stepping forward and identifying themselves, resulting in a wave of new investigations, lawsuits, and reports of previously unreported sexual violence. *See* Amanda

Marcotte, *Campus Sexual Assault Reports Are Up. Don't Panic*, Slate, May 6, 2015 (reporting that reports of campus sexual assault "skyrocketed" from 3,264 in 2009 to 6,016 in 2013, the year following publication of the Epifano column), *available at* https://slate.com/human-interest/2015/05/campus-sexual-assault-reports-are-up-but-it-s-for-a-good-reason-more-victims-are-coming-forward.html; Jonah Newman and Libby Sander, *Promise Unfulfilled? The Chronicle of Higher Education*, April 30, 2014 (documenting spike in Title IX complaints filed with DOE's Office of Civil Rights in the year following the Epifano column, from fewer than 8,000 complaints to nearly 10,000).

Time and again, student victims have said that they reported sexual misconduct only because they learned through the media that an investigation was ongoing toward which their evidence might help. For instance, the disclosure of sexual abuse of female gymnasts provoked more victims to volunteer their testimony, leading to the conviction of former team doctor Larry Nassar and housecleaning at USA Gymnastics. One victim, only 11 at the time of her assault, testified that she reported being molested by Nassar only after reading in *The Indianapolis Star* of a teammate's similar experience, which caused her to realize that what Nassar did to her was improper. Emily Lawler, *Teen testifies ex-MSU Dr. Larry Nassar offered massage for heel injury, penetrated her*, MLive.com, May 26, 2017, *available at* https://www.mlive.com/news/index.ssf/2017/05/teen_says_ex-msu_dr_larry_nass.html.

Recently, a Washington woman reported a sexual battery by a member of the Washington State University athletic staff, because she read about sexual advances by the same employee against other students: "When other girls came forward, it changed the game. … When I saw that it was a pattern, that's when I decided, 'I'm not going to stay quiet.' If it doesn't stop now … other girls will be in danger." Thomas Clouse, *WSU places Jason Gesser on leave after former*

nanny files formal complaint alleging sexual misconduct, The Spokesman-Review, Sept. 18, 2018. *See also* Rebecca Everett, *Man accused of 4th student rape at Stockton University*, NJ.com, July 17, 2018 (quoting college student who said that reading about a lawsuit alleging sexual assault at a fraternity house "gave her the courage and comfort to come forward" and file her own lawsuit against the same accused perpetrator), *available at* https://www.nj.com/atlantic/index.ssf/2018/07/second_student_accuses_man_of_rape_at_illegal_frat.html; Joe Johnson, *Additional charge pending against man who allegedly raped UGA student*, OnlineAthens.com, April 26, 2018 (reporting on additional sexual assault charges against a man facing trial for raping a University of Georgia student, after a second victim "came forward after reading a news account about the other student being raped"), *available at* https://www.onlineathens.com/news/20180426/additional-charge-pending-against-man-who-allegedly-raped-uga-student.

Two facts are indisputable: Media attention to sexual assault on college campuses has dramatically increased since 2012, and the number of people coming forward to report sexual assaults has greatly increased over that same period. There is no empirical basis for the University's assertion that the FERPA exemption must be disregarded so as to cause more rapes to be reported.

To emphasize, nothing prevents the University from redacting identifiable information about student victims and witnesses, including factual details that unmistakably would identity a victim to a person who is not already aware. But that is far different from the university's position that it may categorically refuse to release all records of sexual misconduct cases, which the Court of Appeals properly rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Court of Appeals and order production of the records sought by Plaintiffs.

Respectfully submitted, this the 29th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Amicus Curiae certifies that the foregoing brief, which is prepared using Times New Roman 12-point font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendices) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing BRIEF AMICUS CURIAE by depositing copies, contained in a first-class postage paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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