No. 11-2066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,
Plaintiff/Appellee,
v.
UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES,
Defendant/Appellant,

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 10 C 568
The Honorable Joan B. Gottschall, Judge Presiding

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF APPELLANT AND URGING REVERSAL

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July 20, 2011

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-2066

Short Caption: Chicago Tribune Company v. University of Illinois Bd. of Trustees

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i) Identify all its parent corporations, if any; and

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Attorney's Signature: s/ Marc Rotenberg Date: July 20, 2011

Attorney's Printed Name: Marc Rotenberg

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INTEREST OF AMICUS CURIAE[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C.[2] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. EPIC is both an advocate for personal privacy and a leading champion of open government.

EPIC has participated as *amicus curiae* in many cases before the U.S. Supreme Court and other courts concerning privacy issues, new technologies, and Constitutional interests. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011); *NASA v. Nelson*, 131 S. Ct. 746 (2011); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Quon v. City of Ontario*, 130 S. Ct. 2619 (2010); *Tolentino v. New York*, 926 N.E.2d 1212 (N.Y. 2010), *cert. granted*, 131 S. Ct. 595, (2010) and *cert. dismissed as improvidently granted*, 131 S. Ct. 1387 (U.S. 2011); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *IMS Health v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) *cert. denied*, 129 S. Ct. 2864 (2009); *National Cable and Telecommunications Association v. Federal Communications Commission*,

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[1] The parties consent to the filing of this *amicus curiae* brief. In accordance with Fed. R. App. P. Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC is grateful for the work of EPIC Clerks Sapna Mehta, Kathleen Scott, and Alex Stout, who contributed to the preparation of this brief.

555 F.3d 996 (D.C. Cir. 2009); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); *Commonwealth v. Connolly*, 913 N.E.2d 356 (Mass. 2009); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a longstanding interest in personal privacy, government transparency, and the proper application of freedom of information laws. EPIC routinely testifies in Congress on these topics,[3] edits and publishes the leading litigation manual on open government,[4] and maintains several popular web sites devoted to these topics.[5] The EPIC Advisory Board includes several leading experts on open government.[6] EPIC recently filed an *amicus* brief in *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011), urging the Supreme Court to overturn the Third Circuit Court of Appeals' extension of "personal privacy" protections under the federal Freedom of Information Act to corporations.

EPIC supports FERPA's strong privacy safeguards for education records. Congress enacted FERPA with the clear intent to protect students' privacy and prohibit disclosure of education records. The legislature's selection of a conditional funding provision as the Act's enforcement mechanism does not render the disclosure prohibition any less effective. In fact, the

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[3] *See, e.g.*, *Testimony of John Verdi, EPIC Senior Counsel, before House Committee on Oversight and Government Reform: Why Isn't the Department of Homeland Security Meeting the President's Standard on FOIA?*, March 31, 2011, available at: http://oversight.house.gov/images/stories/Testimony/Verdi_Testimony.pdf.

[4] *Litigation Under The Open Government Laws* (2010) (Harry A. Hammitt et al. eds., 2010).

[5] *E.g. EPIC FOIA Notes*, http://epic.org/foia_notes; *EPIC: Open Government*, http://epic.org/open_gov.

[6] Steven Aftergood, Federation of American Scientists, *Project on Government Secrecy*, http://www.fas.org/sgp; *David Banisar, Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (2006) available at: http://www.privacyinternational.org/foi/foisurvey2006.pdf; David Burnham, *Transactional Records Access Clearinghouse*, http://trac.syr.edu; Harry A. Hammitt, *Access Reports*, http://www.accessreports.com.

conditional funding clause is consistent with common legislative practice and FERPA's statutory scheme. As a practical matter, the conditional funding provision is an effective means of enforcing FERPA's prohibition against unauthorized disclosure of education records. Further, the District Court's holding that FERPA does not prohibit the disclosure of education records is squarely at odds with the intent of the Illinois legislature, which has enacted strong privacy safeguards for students' personal information and exempted students' records from disclosure under the Illinois open government law.

The District Court's decision needlessly places at risk the privacy of the nearly twenty million college students enrolled in schools across the United States. The state's open government law serves a vital purpose, but even the state statute explicitly recognizes exceptions to the general principle of open access to public records. Where Congress enacts legislation to specifically prohibit access to student records, the line is crossed, the privacy of student records must be respected.

ARGUMENT

I. FERPA Protects the Privacy of Student Records

A. Congress Passed FERPA Out of Growing Concern for Students' Privacy

On August 21, 1974, President Ford signed into law the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Pub. L. No. 93–380 § 513, codified at 20 U.S.C. § 1232g (2011). New York Senator James Buckley, FERPA's author, stated that the statute's purpose is two-fold: to give parents and students access to students' records and to protect individual privacy. 120 Cong. Rec. 39,862 (1974). FERPA prohibits the nonconsensual release of students' "educational records," including the "personally identifiable information contained therein." 20 U.S.C. § 1232g(b)(1). FERPA "firmly establishes the principle that parent or student consent for disclosure of all education records is the rule, rather than the exception." *Privacy Protection Study Commission, Personal Privacy in an Information Society*, 425 (1977).

Senator Buckley stated that FERPA was Congress' "opportunity to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities." 120 Cong. Rec. 14,580 (1974). Further, Senator Buckley noted that the law would "provide parents with access to their children's school records, to prevent the abuse and improper disclosure of such records and data, and to restore the rights of privacy to both students and their parents." 120 Cong. Rec. 13,952 (1974).

Around the date of FERPA's enactment in 1974, Congress was vigorously creating and protecting other statutory privacy rights. The Fair Credit Report Act was passed in 1970, 15 U.S.C. § 1681, the Privacy Act in 1974, 5 U.S.C. § 552a, and the Foreign Intelligence Surveillance Act in 1978, 50 U.S.C. § 1801. Likewise, Supreme Court jurisprudence clarified the Constitutional right to privacy in 1968 in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)

(holding that "specific guarantees" within the Bill of Rights "create zones of privacy"), and again in 1973 in *Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution"). The executive branch was also expanding privacy protections, with the creation of a Domestic Council Committee on the Right of Privacy focused on the right of citizens to inspect and correct government data and the creation of means to safeguard personal information against improper alteration or disclosure. Office of the White House Press Secretary, *Fact Sheet: The President's Address on the American Right of Privacy*, Washington, DC, Feb. 23, 1974,[7] A 1973 report to the Secretary of Health, Education, and Welfare found that "any use" of the administrative files of schools "for any but the original intention carries a clear danger of exploitation of truly private personal information." *Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Dept. of Health, Education & Welfare* 72 (1973). On August 12, 1974, President Gerald Ford told a joint session of Congress, "there will be hot pursuit of tough laws to prevent illegal invasion of privacy in both government and private activities." President Gerald Ford, *Address to a Joint Session of Congress*, Aug. 12, 1974.[8]

FERPA, commonly known as the "Buckley Amendment" was offered as an amendment on the Senate floor. The Act was not considered or approved by any Congressional committees or subcommittees. No committee reports were drafted concerning the Amendment. Less than one month after the Amendment's passage, Senator Buckley, along with Senator Clairborne Pell, issued a joint statement explaining the lawmakers' intent in passing FERPA. The Senators stated that FERPA is intended:

> To assure parents of students, and students themselves if they are over the age of 18 or attending an institution or post-secondary education, access to their

[7] *Available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4364.
[8] *Available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4694#axzz1SenKzoWT.

> education records and to protect such individuals' rights to privacy by limiting the transferability (and disclosure) of their records without their consent. The Secretary of Health, Education, and Welfare is charged with enforcement of the provisions of the Act, and failure to comply with its provisions can lead to withdrawal of Office of Education assistance to the educational agency or institution.

120 Cong. Rec. 39,858-66 (1974) (joint remarks of Senator Buckley and Senator Pell). The Joint Statement also expressed the legislators' intent that, with the adoption of the Act, "parents and students may properly begin to exercise their rights under the law, and the protection of their privacy may be assured." *Id*. at 39863. The enactment was in response to "the growing evidence of the abuse of student records across the nation." 121 Cong. Rec. S7974 (daily ed. May 13, 1975) (remarks of Senator Buckley). The Congressional Record included a finding that:

> Access to pupil records by non-school personnel and representatives of outside agencies is, for the most part, handled on an ad hoc basis. Formal policies governing access by law-enforcement officials, the courts, potential employers, colleges, researchers and others do not exist in most school systems.

Id.

Senator Buckley's statements emphasize that students have substantial privacy and confidentiality interests in their school records, SenatorRep.No.93-1026, 93rd Cong., 2nd Sess. 186-88, and that "there [is] clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations." 121 Cong. Rec. S7975 (daily ed. May 13, 1975). Lawmakers recognized that privacy violations are no less of a violation if the records are obtained pursuant to judicial approval, unless, before such approval is given, the party seeking the disclosure demonstrates a genuine need for the information that outweighs the privacy interest of the students. SenatorRep.No.93-1026, 93rd Cong., 2nd Sess. 187.

Senator Buckley emphasized the "larger problem of the violation of privacy and other rights of children and their parents that increasingly pervades our schools." 120 Cong. Rec. at 13,951-52. FERPA's purpose was to "affirm the privacy and rights of children and their parents," ensure parental access to student information, and extend the "'personal shield for every American' against all invasions of privacy" to students. *Id*.

The FERPA amendments came about because of rising public concern about the misuse of automated record systems in universities. A 1973 government report on computerization notes that "a number of schools and colleges have been forced to abandon automated registration and scheduling by determined student campaigns to fold, spindle and mutilate." *Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Dept. of Health, Education & Welfare, Records, Computers, and the Rights of Citizens* 28 (1973). As Vance Packard explained in the best-selling *The Naked Society*:

> A perplexing problem has arisen in thousands of schools, particularly colleges, as to the kinds of information a teacher can properly give out to prospective employer about ex-students or graduating seniors. The problem has become acute at the college level because both corporate and government investigators, including FBI agents, have tended to become ever more probing in their questioning. . . .
>
> What is a teacher's responsibility in dealing with such investigators? Unfortunately, the schools have offered the teachers virtually no guidance.

Vance Packard, *The Naked Society* 108 (1964).

As Alan Westin explained in the seminal *Privacy and Freedom*:

> Government and private studies of the reasons for student's success in school require personal questions directed at the student throughout his school career and, often, interview with his parents and friends. The result of such highly psychological and sociological approaches to public policy is a demand for more personal information from schoolchildren, employees, employers, organizations, and so forth. Some are sought in the name of research or purely statistical data, some for general enforcement of socio-economic policy, but all extract more detailed personal information citizens than ever before in our history.

Alan F. Westin, *Privacy and Freedom* 161 (1967).

Westin further noted that the individual's "complete educational record from pre-school nursery to post-graduate courses could be in the educational master file, including the results of all intelligence, aptitude and personality tests taken during his lifetime." *Id.* at 165.

Aryeh Neier's *Dossier: The Secret Files They Keep on You*, provides further background on the events that gave rise to the passage of FERPA. *See generally* Aryeh Neier, *Dossier: The Secret Files They Keep on You* (1975). Neier observed that "[s]chools have been compiling dossiers since the early part of the nineteenth century, but only in the last half century have records begun to include information beyond grades and attendance." *Id.* at 18. A report from the Russell Sage Foundation found that a majority of schools in New York City responding to a survey sent to school superintendents acknowledged that they allowed "prospective employers, juvenile courts (without subpoena), local police, the health department, the CIA, and the FBI access to the records. *Id.* "Only a small minority would allow access to such information to children or their parents." *Id.* Similarly, the Privacy Protection Study Commission found many reports of "sensitive disclosures" of student information by post-secondary institutions, highlighting access by commercial interests, government auditors, and "law enforcement and intelligence agencies." *Privacy Protection Study Commission, Personal Privacy in an Information Society* 409 (1977).

The Russell Sage report led to the creation of "a special committee of school officials and representatives of civic organizations to review the problem of records and to recommend new policies." Neier, *supra*, at 19. New York City, New Mexico, and others adopted policies that gave students and parents the right to inspect educational records and prohibited access by others. *Id*.

B. Admissions Records are an "Education Record" Under FERPA

FERPA protects admissions records under the "education records" provision. 20 U.S.C. § 1232g(a)(4)(A). When FERPA was first signed into law in August 1974, it set forth a list of the types of records that were protected from disclosure. 120 Cong. Rec. 13,952 (1974). This list did not explicitly include admissions records. *Id*. In December 1974, Congress amended FERPA, replacing the list with a broader standard that protects all records that "contain information directly related to a student; and 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). This definition encompasses the "detailed record on the applicant"—including academic, financial, and medical information, as well as faculty and staff notes and evaluations—that universities generate during the admissions process. *Privacy Protection Study Commission, Personal Privacy in an Information Society* 406–07 (1977). More broadly, all student records created and kept by schools for their later use are within the bounds of FERPA's protections. *See Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002) (reading Congress' use of the word "maintains" as applying FERPA's privacy protections to records that "will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled").

FERPA plainly contemplates that admissions records fall within the "education records" category in the way that it treats confidential letters and statements of recommendation associated with the admissions promise. The Act prohibits most disclosures of education records. 20 U.S.C. § 1232g(b). The Act also requires that schools provide students and parents with access to their education records. 20 U.S.C. § 1232g(a)(1)(A) – (B); *see also* 120 Cong. Rec. 39,862 (1974) (Senator Buckley stating that FERPA is intended to provide students and parents

with the means to "know, review, and challenge all information—with certain limited exceptions—that an institution keeps on [students], particularly when the institution may make important decisions affecting [the students'] future, or may transmit such personal information to parties outside the institution"). However, the Act exempts certain admissions records from the access obligation. 20 U.S.C. § 1232g(a)(1)(C)(ii) (stating that the Act "shall not operate to make available to students in institutions of postsecondary education . . . confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended"); 20 U.S.C. § 1232g(a)(1)(C)(iii)(I) (stating that, for letters submitted after January 1, 1975, schools may not release letters to students who have waived their right to access them).

The Joint Statement, which constitutes the legislative history for FERPA, explains that Sections 1232g(a)(1)(C)(ii) and 1232g(a)(1)(C)(iii)(I) were intended to alleviate the concerns of schools that required letters of recommendation as a part of their admissions process and promised recommenders that "such letters will not be available to the student, to his parents, or to third parties not associated with the purpose of the recommendation." 120 Cong. Rec. at 39,863. This exception, which removes certain elements of a student's admissions record from the "education records" category, demonstrates that the other portions of an admissions record are classified as "education records" and subject to FERPA requirements. *See In re Globe Bldg. Materials, Inc.*, 463 F.3d 631, 635 (7th Cir. 2006) (applying the concept of *expressio unius est exlusio alterius*, that "to express or include the one thing implies the exclusion of the other").

As the Department of Education, the agency tasked with enforcing FERPA, explained:

> The 1974 amendments limited the right to inspect and review records so that postsecondary students do not have access to 1) financial records of their parents, and 2)

> confidential letters of recommendation placed in records before January 1, 1975, or if the student has voluntarily waived access to these letters, *provided that the waiver cannot be required as a precondition of admission,* employment, or receipt of awards. In order to ensure that a rejected applicant was not given the right to challenge letters of recommendation or the institution's admission decision, "student" was defined as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution."

Dept. of Educ., *Legislative History of Major FERPA Provisions* at 3 (June 2002) (emphasis added).[9]

Admissions records fall within the definition of "education records" protected by Congress. Congress intended to prevent the release of admissions records to outside parties.

II. FERPA Prohibits the Disclosure of Student Records

A. Conditional Funding as the Means to Enforce FERPA's Prohibition Against Disclosure by Universities is Consistent with FERPA's Statutory Purpose

FERPA prohibits "the release of education records . . . or personally identifiable information contained therein . . . of students without the written consent of their parents . . .". 20 U.S.C. § 1232g(b). Congress chose to enforce this prohibition through a "conditional funding" provision – FERPA states that "no funds shall be made available under any applicable program to any educational agency or institution" that fails to comply with FERPA's disclosure prohibition. *Id*. In enacting FERPA, Congress conditioned "the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278–79 (2002).

It is not uncommon for Congress to utilize conditional funding provisions to enforce statutory prohibitions. *E.g.*, 23 U.S.C. § 158 (2011) (conditioning disbursement of national highway funds on states' adoption of a minimum drinking age of twenty-one); 20 U.S.C. § 1681 (2011) (prohibiting educational programs that receive federal financial assistance from

[9] *Available at* http://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html.

discriminating on the basis of sex); 20 U.S.C. § 1400, 1407 (2011) (setting requirements for special education and disabilities services offered by states and agencies that accept federal funding under the statute); 10 U.S.C. § 983 (2011) (barring funding to universities that fail to provide access to military recruiters). The Supreme Court has observed that "objectives not thought to be within [Congress'] Article I 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Congress' choice to enforce FERPA's disclosure prohibition through a conditional funding provision is consistent with common legislative practice.

Congress has stated: "in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States." 20 U.S.C. § 3401(4) (2011). FERPA primarily regulates the actions of institutional actors, not individuals. 20 U.S.C. § 1232g(f)–(g) (instructing the Secretary of Education to create a centralized review function and enforce FERPA); *Gonzaga*, 536 U.S. at 287 (noting that FERPA provisions "speak only" to the Secretary of Education); *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 379 (7th Cir. 2010) (discussing Congress' FERPA enforcement mechanisms and noting that the Act directs the Secretary of Education to ensure educational institutions' compliance with the statute). After FERPA's enactment, the Secretary of Education implemented regulations governing educational institutions that receive funds "under any program administered by the Secretary." 34 C.F.R. § 99.1 (2011). These regulations apply to any institution that provides educational services or instruction, as well as institutions that are authorized to "direct and control" public educational entities. *Id*. The regulations do not apply to individuals. *Id*.

Congress' choice to enforce FERPA's disclosure prohibition through a conditional funding provision is consistent with the Act's statutory scheme because FERPA regulates institutions, not individuals. And the regulated institutions rely, to a substantial extent, on federal funds. In fact, FERPA-regulated entities depend on federal funding to such an extent that it would be nearly impossible for an entity to forgo such funds.

B. FERPA Operates as a Prohibition; No Public University Could Reasonably Forswear Federal Funding for the Opportunity to Disregard Its FERPA Obligations

Public universities are dependent on federal funding, and it is neither practical nor feasible for the institutions to operate without this support. Decreases in other funding sources have further constrained universities. *See* Letter from Peter McPherson, President, Association of Public & Land-Grant Universities, to A.P.L.U. Council of Presidents, Council on Academic Affairs, Council on Research Programs and Graduate Education and Council on Government Affairs (Nov. 2010) at 16–17 (discussing options for the future viability of public research universities and noting that the "general consensus" is that "additional federal support is critically needed" in order to "forestall permanent damage").[10] Many institutions view federal financial support as critical to their success. *Id*. The Association of Public and Land-Grant Universities noted that the partnership between the federal government and universities is "critical to future U.S. economic and technological competitiveness." *Id.* at 21. FERPA-covered institutions work with the Department of Education's Family Policy Compliance Office to change their policies in order to comply with FERPA, and as such, no institution has lost its federal funding. *See* Clifford A. Ramirez*, FERPA Clear & Simple: The College Professional's*

[10] *Available at* http://www.aplu.org/document.doc?id=2856.

Guide to Compliance (2009); *FERPA and Campus Safety*, NACUA Notes (National Association of College and University Attorneys), June 19, 2009, at 7.[11]

Universities cannot exercise a real choice in deciding to forgo federal funding for the freedom to ignore FERPA's mandates. Public universities are dependent on federal funds. Federal funding includes aid through federal government programs across a wide range of academic and athletic programs. Federal funding includes direct funding to states that is then distributed to universities, as well as funding to individual students that makes enrollment possible.

A university that chose to forgo federal grants would still be subject to FERPA if it admitted a single student who received federal funding.[12] The Department of Education estimates that it provides "grant, loan, and work-study assistance" to more than fifteen million postsecondary students every year.[13] The Department makes more than $120B in new student loans annually.[14] The Department allocated over $38B for all postsecondary education program grants and work-study payments in 2010 and estimated an expenditure of more than $37B for 2011 and 2012. Dept. of Educ., *Funds for State Formula- Allocated and Selected Student Aid Programs*, 120 (July 11, 2011).[15] The actual and estimated amount of annual funding allocated by the Department to the State of Illinois for all postsecondary education programs has been over $1.6B for the past three years. *Id.* at 34 (noting that the subtotals do not reflect all of the funds

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[11] *Available at* http://www.case.org/Documents/PublicPolicy/FERPA_2009a.pdf.
[12] *See Government Funding Policy*, Gardner Webb Univ. http://supportgwu.com/content/government-funding-policy (last visited July 14, 2011).
[13] *The Federal Role in Education*, Dept. of Educ., http://www2.ed.gov/about/overview/fed/role.html (last modified Mar. 30, 2011).
[14] *Fiscal Year 2012 Budget Summary Section II.E Higher Education Programs*, Dept. of Educ.,http://www2.ed.gov/about/overview/budget/budget12/summary/edlite-section2e.html (last updated Feb. 14, 2011).
[15] *Available at* http://www2.ed.gov/about/overview/budget/statetables/12stbystate.pdf.

that a state receives from the Department of Education since institutions may also receive funds on a competitive basis).

Further, if any department or component of a university receives funding from the Department of Education, FERPA's disclosure prohibitions apply to the entire institution. 34 C.F.R. § 99.1(d). Thus, if a single department or university office chose to disclose student records, it would place at risk the entire institution's eligibility for federal funding.

The Department of Education views FERPA as a prohibition and enforces the statute's provisions as such. *The Family Educational Rights and Privacy Act: Guidance for Eligible Students*, Dept. of Educ. 1 (Feb. 2011) ("FERPA generally prohibits the improper disclosure of personally identifiable information derived from education records."); *see also United States v. Miami Univ.*, 294 F.3d 797, 804 (6th Cir. 2002) (indicating that the Department of Education instructed Miami University that the Act prohibits the university from releasing student records in response to a state public records act request).[16] The Department recognizes the effectiveness of FERPA's conditional funding provision as an enforcement mechanism. In response to a challenge to a FERPA provision related to law enforcement records, the Department of Education stated that when it investigates FERPA violations, most institutions voluntarily comply with Agency demands as a result of the "extraordinary leverage" provided by FERPA's conditional funding provision. *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1230 (D.D.C. 1991).

Congress' rationale for employing conditional federal funding as FERPA's enforcement mechanism and the evidence illustrating the practical effect of federal funding on institutions demonstrates that FERPA effectively prohibits disclosure of student records. Indeed, to date no

[16] *Available at* http://ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf.

public school in the almost forty year history of the Act has chosen to forswear federal funding so that it might disregard the obligations set out in FERPA.

C. FERPA Establishes a Mandatory Enforcement Scheme

FERPA sets out clear prohibitions and leaves no discretion to covered institutions. "Under FERPA, schools and educational agencies receiving federal financial assistance *must* comply with certain conditions." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002) (emphasis added). Congress "effectuated" FERPA's "explicit purpose" of protecting students' right to privacy by imposing the funding conditions on educational institutions. *Miami Univ.*, 294 F.3d at 817–18. "Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." *Id.* at 81; *see also Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 939 (9th Cir. 2009) (noting that FERPA and the Individuals with Disabilities Education Act "prohibit" institutions from disclosing records "without parental consent or court order"); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002) (referring to "FERPA's litany of specific prohibitions").

Federal district courts have also held that FERPA's conditional funding provision prohibits institutions from disclosing information. In analyzing the applicability of a § 1983 claim under FERPA—an issue that was subsequently resolved by the Supreme Court in *Gonzaga*—a New Hampshire district court held that FERPA is not "merely a congressional preference" but instead a requirement that imposes a "mandatory obligation" on educational institutions. *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 46 (D.N.H. 1994) (allowing the plaintiff to proceed with a § 1983 claim under FERPA). A Washington district court opined that "[t]he basic protection of FERPA is that a school that accepts federal education funds is prohibited from releasing student education records without student consent." *E.W v. Moody*,

No. 06-5253, 2007 WL 445962, at *2 (W.D. Wash. 2007). Thus, the enforcement mechanism established by Congress for FERPA compels universities to protect student information.

III. The State of Illinois Recognizes the Importance of Student Privacy

The present case involves the interaction of Illinois' state open government law and FERPA, a federal statute. Appellant is not subject to Illinois' educational privacy law, the Illinois School Student Records Act ("ISSRA"). 105 Ill. Comp. Stat. 10/2(b) (2010) (ISSRA governs only "elementary or secondary educational agenc[ies] or institution[s]," not universities). However, the Illinois legislature provided strong privacy protections for students' education records in ISSRA. 105 Ill. Comp. Stat. 10/6, 10/9 (prohibiting disclosure of student records and conferring a private right of action on students). These protections make clear the Illinois legislature's intent to safeguard student records, even in the face of open government requests. Moreover, the Illinois Freedom of Information Act ("FOIA") protects student privacy by exempting student records from compelled disclosure. 5 Ill. Comp. Stat. 140/7(1)(a)–(c), (1)(j), (1)(z).

The Illinois School Student Records Act, enacted in 1976, is a comprehensive privacy statute that is modeled after FERPA and protects the privacy of student records. *See Garlick v. Oak Park & River Forest High Sch. Dist. #200*, 905 N.E.2d 930, 939 (Ill. App. Ct. 2009) (noting that ISSRA is modeled after FERPA); Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. Va. L. Rev. 361, 380 (2005) (referring to ISSRA as "comprehensive"). ISSRA explicitly prohibits the disclosure of student records. 105 Ill. Comp. Stat. 10/6(a). It mandates that "[n]o school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated." *Id.* ISSRA sets forth several exceptions to this general prohibition, including disclosure for research in accordance

with FERPA. *Id.* §§ 10/6(a)(1)–(a)(12). The Illinois Supreme Court has held that ISSRA "prohibits the disclosure of a school student record whereby a student may be individually identified." *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 538 N.E.2d 557, 560 (Ill. 1989). ISSRA confers a private right of action on students; it creates a right to both injunctive relief and damages for a violation of the mandate. 105 Ill. Comp. Stat. 10/9; *John K. v. Bd. of Educ. for Sch. Dist. #65*, 504 N.E.2d 797, 802 (Ill. App. Ct. 1987).

The Illinois Freedom of Information Act, enacted in 1984 and amended in 2010, protects student privacy through its exemptions. 5 Ill. Comp. Stat. 140 (2010). The Illinois FOIA mandates that "[e]ach public body shall make available to any person for inspection or copying all public records." *Id*. § 140/3. The Illinois FOIA includes several exemptions, all listed in Section 7 of the statute. *Id*. § 140/7. At least three exemptions protect student records: exemption 7(1)(a), exemption 7(1)(j), and exemption 7(1)(z). *Id.* Exemption 7(1)(a) states that "information specifically prohibited from disclosure by federal or State laws or rules and regulations implementing federal or State law" is exempt from inspection and copying. *Id.* § 140/7(1)(a). Exemption 7(1)(a) includes ISSRA, which had been effective law for eight years prior to the enactment of the Illinois FOIA, and FERPA, which had been effective law for ten years prior to the Illinois FOIA. *Id.* § 140/7(1)(a). Exemption 7(1)(j) protects information pertaining to education matters, including "information concerning a school or university's adjudication of student disciplinary cases, but only to the extent that disclosure would unavoidably reveal the identity of the student." *Id.* § 140/7(j). Exemption 7(1)(z) further protects information about students, specifically "information about students exempted from disclosure under . . . the School Code, and information about undergraduate students enrolled at

an institution of higher education exempted from disclosure under . . . the Illinois Credit Card Marketing Act of 2009." *Id.* § 140/7(z).

The original version of the Illinois FOIA, which was in force until 2010, specifically protected "files and personal information maintained with respect to . . . students or other individuals receiving . . . educational . . . services directly or indirectly from federal agencies or public bodies." *AFL-CIO v. Niles Twp. High Sch., Dist. 219*, 678 N.E.2d 9, 12 (Ill. App. Ct. 1997) (quoting the pre-amendment statute and holding that names, addresses and phone numbers of students and parents were exempt from disclosure under the pre-amendment FOIA exemption 7(1)(b)(i)). In 2010, the statute was amended, expanding exemption 7(1)(b)'s privacy protections to include all "private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." 5 Ill. Comp. Stat. 140/7(1)(b).

The statutory schemes of both ISSRA and the Illinois FOIA reveal that the State of Illinois intended to protect from disclosure students' personally identifiable information. The plain language of both statutes demonstrates the legislature's clear intent to provide meaningful safeguards for students' educational records. Courts have interpreted ISSRA's language and legislative history to demonstrate that Illinois lawmakers intended the statute to provide particularly strong privacy safeguards. *See Garlick*, 905 N.E.2d at 939 (reasoning that because the Illinois legislature chose to change FERPA's language, inserting the phrase "copy" instead of FERPA's "review," the state law was intended to expand a parent's right of access to student information).

In enacting the Illinois FOIA, lawmakers imposed broad disclosure obligations on government entities, but protected students' privacy. *See Bowie*, 538 N.E.2d at 559 ("There is a presumption that public records are open and accessible. The flow of information, however, is

not left unchanneled. Among other concerns, the court must be vigilant against invasions of privacy. . . .") (citations omitted). The purpose of the Illinois FOIA is to open governmental records to the light of public scrutiny. *Id.* The Illinois FOIA stands for the principle that "the people of [Illinois] have a right to full disclosure of information relating to the decisions, policies . . . and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." 5 Ill. Comp. Stat. 140/1. At the same time, the Illinois FOIA states that the "[a]ct is not intended to cause an unwarranted invasion of personal privacy." *Id.* §140/1. *But see Lieber v. Bd. of Trs. of S. Ill. Univ.*, 680 N.E.2d 374, 380 (Ill. 1997) (noting that this declaration of purpose "is simply a declaration of policy or preamble," and "[a]s such, it is not part of the Act itself and has no substantive legal force"). The Illinois FOIA also acknowledges that there are "additional restrictions on disclosure of information" in other statutes. 5 Ill. Comp. Stat. 140/1.

The Illinois legislature did not intend for the Illinois FOIA to compel the disclosure of private student information. The legislative intent of the Illinois FOIA and the ISSRA reveal that lawmakers sought to protect from disclosure information of the sort sought by the Chicago Tribune Company in this case.

CONCLUSION

Amicus Curiae respectfully requests this Court to grant Appellant's motion to reverse the decision of the lower court.

Respectfully submitted,

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July 20, 2011

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 5,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Cir. Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Times New Roman style.

Dated: July 20, 2011

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ANTI-VIRUS CERTIFICATION

In the above-captioned matter, I, John Verdi, certify that I used Symantec Endpoint Protection Version 11.0.6005.562 to scan for viruses the PDF version of the foregoing Brief of *Amicus Curiae* that was submitted in this case by electronic case filing. No viruses were detected.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2011, the foregoing Brief of *Amicus Curiae* was electronically filed with the Clerk of the Court, and thereby electronically served upon counsel for the parties *via* electronic delivery. 2 paper copies was shipped to each party in this case by U.S. Mail, postage prepaid, on July 20, 2011. 15 paper copies were shipped to the Clerk by U.S. Mail, postage prepaid, on July 20, 2011.

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