No. 11-2066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff-Appellee,

vs.

UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-APPELLEE CHICAGO TRIBUNE COMPANY

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-2066

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief.

Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Chicago Tribune Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

SNR Denton US LLP

(3) If the party or amicus is a corporation:

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

Chicago Tribune Company's parent is Tribune Company

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ James A. Klenk Date: 8/12/2011

Attorney's Printed Name: James A. Klenk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). ____ No √

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None

Attorney's Signature: /s/ Natalie J. Spears Date: 8/12/2011

Attorney's Printed Name: Natalie J. Spears

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None

Attorney's Signature: /s/ Gregory R. Naron Date: 8/12/2011

Attorney's Printed Name: Gregory R. Naron

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None

Attorney's Signature: /s/ Kristen C. Rodriguez Date: 8/12/2011

Attorney's Printed Name: Kristen C. Rodriguez

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JURISDICTION

The Jurisdictional Statement of Defendant-Appellant University of Illinois Board of Trustees (the "University") is complete and correct.

STATEMENT OF ISSUES

Was the district court correct in declaring that the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, does not prevent the University from disclosing, pursuant to a valid State freedom of information act request, public records relating to the principal participants in the University's Category I shadow admissions because:

(1) The request does not seek "education" records that would come within FERPA's ambit, but instead seeks information pertaining to misconduct and politically-motivated favoritism by public officials; or

(2) FERPA is a statute that sets conditions on the receipt of federal funding but does not "prohibit" the University from doing anything, and thus may not be used to withhold otherwise disclosable public records;

(3) Complying with the specific request in this case would not amount to a systematic "policy or practice" of FERPA violations that could be the basis for any federal sanction;

(4) If FERPA were interpreted to prevent release of the requested information, it would violate the First Amendment?

STATEMENT OF FACTS

The Chicago Tribune publishes the *Chicago Tribune* newspaper. (A.60, ¶ 1; A.94 ¶ 1.) In the spring of 2009, the Tribune published a series of articles relating to the University of Illinois' admissions process titled "Clout Goes to College." (A.61 ¶ 5; A.95 ¶ 5.) The University is an Illinois state authority funded by the public's tax dollars. (A.317.) The Trustees are political appointees, 110 ILCS 310/1, and the University's Chancellor holds a statutory position. 110 ILCS 90/1. The files and documents of the Trustees, the Chancellor and other university officials are state property and public records. State Records Act, 5 ILCS 160/1.5-160/3.

"Clout Goes to College" reported that the University maintained a list, known as "Category I," of certain applicants who were closely tied to clout-heavy patrons. (A.61 ¶ 6; A.95 ¶ 6.) Governor Quinn appointed an official "Admissions Review Commission" (the "Commission") to investigate this corruption of the University's admissions practices. (Brief of Appellant ("Univ. Br."), p. 12; A.2; A.153-199.) Chaired by Judge Abner Mikva, the Commission found not only that Category I existed, it constituted a separate, "shadow admissions process" that bypassed the "official admissions process," and "catered to applicants who were supported by public officials, University Trustees, donors, and other prominent individuals." (A.155.)

The Official Admissions Process

The Commission Report describes the "Official Admissions Process" followed by the Undergraduate Admissions Office ("UAO"). (Rept. at 13, A.167.) With more than 50,000 applications annually (A.368), the process is heavily formulaic:

> UAO staff calculate a Projected Grade Point Average ("PGPA") for an applicant by a formula that takes into account the applicant's standardized test score and class rank. For an applicant from high schools that do not rank students, UAO estimates a class rank. Approximately 30 percent of applicants to most colleges are automatically admitted to the University based purely on their PGPAs.

(Rept. at 13; A.167.)

Some colleges, like the Colleges of Business or Engineering, conduct a full review of all applicant files and have not adopted an "automatic admit" policy. (*Id.*) The reviews are conducted by admissions committees within UAO. (*Id.*) UAO admissions committees consider the following factors:

> In addition to class rank and GPA, these committees consider factors such as the applicant's essays, the rigor of the applicant's high school curriculum, and the applicant's socio-economic background and geographical region. (6/29/09 TR at 5:18 - 7:10). Other factors that are considered include legacy status, whether the applicant is a first generation college student, and any special talents of the applicant (i.e., music, sports). (6/19/09 TR at 11:24).

(*Id.*)

The UAO admissions committees assign numeric ratings (one to five) to each individual applicant whom they review. "Applicants rated 'one' are admitted, while applicants rates 'five' are denied." (*Id.*) Applicants in the middle are subject to a final review by the committees and the Deans of the undergraduate colleges. (*Id.*)

Category I - The Shadow Process

The Commission Report also found that there was "a shadow process – Category I – that operated by a different set of rules." (*Id.* at 14; A.168.) The Category I process was for applicants who were sponsored by "public officials, University Trustees, donors, and other prominent individuals (collectively 'sponsors'"). (*Id.* at 1; A.155.) The Category I shadow process was "[u]nknown to the public and even to most University employees." (*Id.*)

The University's Chancellor and Government Relations Office maintained the Category I process to grant public officials and other Sponsors special favors. University Chancellor Herman – not the Undergraduate Admissions Office – oversaw the Category I process and "was the ultimate decision-maker with respect to Category I applicants." (*Id.* at 15; A.169.) Decisions on Category I applicants sponsored by public officials were based on, among other things, "information about the legislators involved provided by [the University's] Government Relations [Office]." (*Id.*) The Commission concluded that "Governmental Relations sought to influence, and did influence,

admissions decisions, as a means of maintaining and developing relationships with public officials." (*Id.* at 21; A.175.) All the while, the Chancellor's Office and Government Relations Office were aware they were engaging in "political favoritism." *See* email cited *id.*, at 28 (A.182) (the Provost was worried "the political favoritism was a bit too obvious").

Chancellor Herman and Government Relations also instructed the College of Law ("COL") to admit clout-sponsored applicants. Equivalent to the Category I list for undergraduates, a Special Interest ("SI") list was maintained for "special admits" at the COL. "[W]ith no input from the COL Dean or admissions officials," Herman and Governmental Relations would direct COL "to admit certain applicants whom the College otherwise would have denied." (*Id.* at 26-27; A.180-181.) University emails describe the process as "corrupted." (*Id.*; A.180.)

Requests by Governors, State Legislators and other prominent Sponsors for preferential treatment – either directly or through University Trustees and other officials – are not letters of recommendation. (*Id.* at 32; A.186.) Dean Bruce Smith of the College of Law explained the distinction between Sponsor calls for special treatment and letters of recommendations in his testimony to the Commission:

> Since becoming Dean, Smith has not received calls from Trustees, the Chancellor's Office, the Provost, or anyone else regarding an applicant to COL. As Smith

> has unequivocally declared, under his watch, an inquiry will only be answered if it is made by the applicant him/herself. In addition, *Smith testified that the "proper mechanism for words of support are letters of recommendation," which is COL's "established policy.*"

(*Id.*; emphasis supplied.)

The Commission Report catalogs numerous examples of public official Sponsors intervening in the admissions process to sponsor applicants. (*Id.* at 15-19; A.169-173.) Trustees intervened for applicants sponsored by then Governor Blagojevich and other prominent public persons. (*Id.* at 20-24; A.174-178.) Children of large donor Sponsors were given special Category I treatment. (*Id.* at 19; A.173.) The Commission concluded that, "In scores of instances, the influence of prominent individuals – and the University's refusal or inability to resist that influence – operated to override the decisions of admissions professionals and resulted in the enrollment of students who did not meet the University's standards." (*Id.* at 1; A.155.)

The announced policy of the University is "that decisions involving students and employees be based on merit and be free from invidious discrimination in all forms." (*Id.* at 10; A.164.) The University's Ethics Handbook provides that it is "a conflict of interest and unethical for a state board employee or appointee to place his or her interests or those of a friend or business associate above, those of the state." (*Id.*) The University's Code of

Conduct requires Trustees and employees to "show even handedness by treating others with impartiality." (*Id.*) The Commission found that the University Chancellor, the University President, Individual Trustees, members of the Government Relations Office and others acted "in a manner inconsistent with University-sanctioned principles of ethical conduct and fair-dealing." (*Id.* at 5; A.159.)

The Tribune's FOIA Request

On December 10, 2009, Tribune submitted a request to the University pursuant to the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1, *et seq.* (the "Request"). The Request sought:

> the following public records with regard to each applicant in Category I (and/or equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in the such [*sic*] applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other university officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.

(A.17; A.61 ¶ 8; A.95-96 ¶ 8.)

The Tribune thus asked for the names of the Category I Sponsors, who the Sponsors spoke with at the University, the identity of the University officials

who handled the Sponsor's request, the identity of the parents who, through the Sponsors, requested preferential treatment for their children and whether the Sponsor's request changed the status of the application. With the exception of the parents' names and addresses, the Request before the Court does not request a single item mentioned in the University's laundry list at page 9 of its brief, to-wit: applications, essays, transcripts, etc. (A.17, 22-23.) If disclosure of the Sponsor-related information, implicates any of this information, the University, as it has in the past, could redact it.[1]

The University denied the Request *in toto*, asserting that the requested information is exempt from disclosure under Section 7(1)(a) of FOIA because it was protected under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. (A.19-20; A.62 ¶ 10; A.96 ¶ 10.) The University asserted that "the information you seek was obtained by the University as part of the application process and thus is part of the education records" protected by FERPA. (A.20.)

[1] The University redacted information produced to the Commission. (Rept. at 9; A.163.) "The Commission did not challenge the University's FERPA analysis, nor did the Commission undertake its own analysis, because the redactions did not hinder the Commission in achieving the principal purposes for which it was established." (*Id.*)

The Family Educational Rights and Privacy Act

Review and Correction Rights. Subsection (a) of FERPA first provides that federal funds should not be made available to educational institutions which have a policy of denying parents of students "the right to inspect and review the education records of their children." 20 U.S.C. 1232g(a)(1)(A) and (B). FERPA further provides that institutions receiving federal funds must provide parents an "opportunity for a hearing" to:

> challenge the content of such student's education records, in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C. § 1232g(a)(2).

Subsection (a) of then FERPA defines "education records" as follows:

> (A) For 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).

Release of Education Records. Subsection (b) of FERPA provides that federal funds should not be made available to educational institutions which have "a policy or practice of permitting 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)(1).

Once a student attains the age of 18, the rights to review and correct and to consent to release previously held by the parents become the rights of the student and only the student. 20 U.S.C. § 1232g(d).

The Complaint & Decision

The Tribune filed suit seeking a declaratory judgment that the University's interpretation of FERPA was incorrect. (A.11-26.) Tribune's complaint asserted that Tribune's request for Sponsor documents was not a request for education records under FERPA and further that FERPA did not shield the University from the Tribune's request. (A.14, A.68.) On cross motions for summary judgment, the District Court ruled in the Tribune's favor, ruling on only one of the grounds the Tribune advanced – that FERPA was not a federal statute that prohibited the University from disclosing education records. (A.7.)[2]

[2] As the University observes, "[a]though the district court did not reach any of the Tribune's other arguments, this Court may consider 'any basis' for summary judgment 'supported in the record.'" (Univ. Br., p. 33, quoting

SUMMARY OF ARGUMENT

When University Trustee Lawrence Eppley tells Chancellor Herman that Governor Blagojevich wants a student admitted to the University and the Chancellor overrides the Admissions Department and orders the sponsored student to be admitted in place of a more qualified applicant, that is a matter of profound public interest and concern. (Rept. at 20, 27; A.174, A.181.) Not a single actor in this scheme has a right of privacy to shield his actions from public scrutiny. FERPA grants neither the sponsored students nor their parents individual, enforceable privacy rights. *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The University cannot use FERPA to hide from the public the misconduct of high University officials, and the favor-seeking of the Sponsors for whom they acted, for multiple reasons:

First, the information Tribune requested does not fall within the meaning of FERPA "education records." The University has consistently pretended that the Category I information is simply "part of the application process" and thus is "part of the education records." (A.20.) Of course, the requested information does *not* involve the typical and traditional college "application process"; the separate "Category I" process *bypassed* that legitimate process.

Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 723 (7th Cir. 2011)).

To be a FERPA education record, a record must be "maintained" as part of the permanent record, relate to education, be "directly related to a student" and record "private facts." The Sponsor documents Tribune Request does not meet these requirements.

That FERPA could be used to cloak records reflecting a corrupt "shadow admissions process" in secrecy is a proposition no authority could sustain. FERPA is not a secrecy statute that protects information that might be embarrassing *to the State*. That was never Congress's purpose. Were FERPA interpreted in the overreaching fashion the University advocates, it would offend the First Amendment.

Second, FERPA does not specifically prohibit the University from disclosing any information. "FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions." *Gonzaga Univ.*, 536 U.S. at 290. By its terms, FERPA "*speak[s] only to the Secretary of Education*, directing that '[n]o funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.' 20 U.S.C. § 1232g(b)(1)." *Id.* at 287 (emphasis added). Those terms do not empower the Department of Education to compel the University's compliance with the nondisclosure provisions; the Secretary of the Department of Education may not sue for specific

performance of its "contract" with the University. The Secretary's sole remedy for non-compliance is to withhold federal funds. 20 U.S.C. § 1232g(f).

Third, even if FERPA was not simply a federal funding condition and instead, as the University contends, independently "prohibits" the University from disclosing certain student education records, all the statute "prohibits" is a systematic "policy or practice" of disclosing such material, "not individual instances of disclosure." *Gonzaga Univ.*, 536 U.S. at 287-88. As a matter of law, responding to Tribune's discrete, singular Request for documents could not be deemed such a "policy or practice."

The University's parade of horribles – that the privacy of students and parents will be forever compromised and the University will lose its federal funding – is unfounded. "Private information" and "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of privacy" is exempt from disclosure under the Illinois Freedom of Information Act, 5 ILCS 140/7(1)(b) and (1)(c). And, as the University concedes, the Department of Education has never withdrawn an institution's funding for violating FERPA.

The University and its *Amici* are in a frenzied state, imagining that the District Court's decision portends the end of student privacy and federal funds for higher education. This near hysteria is unhinged from the language of FERPA, reality and Illinois law. To return to the dispute that brought the

parties to Court, we focus first below on the threshold issue of whether the Sponsor information the Tribune seeks is a FERPA "education record."

ARGUMENT

I. THE SPONSOR DOCUMENTS TRIBUNE SEEKS ARE NOT FERPA EDUCATION RECORDS.

A. FERPA Education Records Are Maintained by the University's Custodian, Related to Education, Directly Related To A Student, and Certain Private Facts.

Category I Sponsors' and University officials' identities and clout outcomes are not FERPA "education records" because: 1) they are not institutional records "maintained," i.e., "retained in a permanent file as a matter of course;" 2) they have nothing to do with "education;" 3) they are not private facts and 4) they are not "directly related to a student." According to the University, any University document that is "connected and associated with individual students . . . [satisfies] FERPA's definition of 'education records.'" (Univ. Br., p. 38.) The Supreme Court rejected such an expansive construction of "education records" in *Owasso Independent School District No. 1-011 v. Falvo*, 534 U.S. 426 (2002) ("*Falvo*"), and *Falvo* and its reasoning establish that the Category I documents at issue in this case are not FERPA "education records."

1. Sponsor documents are not "maintained."

Falvo held that peer-graded assignments were not education records under FERPA, though they "directly related to a student." 534 U.S. at 431.

Even though the Court assumed a teacher's grade book "is an education record," the Court held that peer grades are not education records under FERPA because they are not "maintained within the meaning of § 1232g(a)(4)(A)." 53 U.S. at 433. The Court adopted the position of the school district and the United States that FERPA "covers only institutional records – namely, those materials retained in a permanent file as a matter of course." *Id.* at 431 ("FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar."). The Court looked to "statutory indicators" and "other sections of the statute to support our interpretation." *Id.* at 432-34.

Looking first at the statutory indicator "maintained" in this case, the Sponsor documents the Tribune seeks are, like the documents in *Falvo*, not permanent institutional records kept by a single custodian "as a matter of course." As the Commission Report recounts, "while the University had a formal undergraduate admissions process, there was also a shadow process – Category I – that operated by a different set of rules." (Rept. at 14; A.168.)

> While applicants who lacked [the] clout [of Category I applicants] sought admission through the University's official admissions process, Category I applicants were given separate and often preferential treatment by University leadership. And while the official process took into account the applicant's characteristics (e.g., academic achievement, special talents, personal circumstances), the Category I

> process tended to focus on the "power and money" of the applicant's sponsor.

(*Id.* at 1; A.155.)

At the undergraduate level, the "shadow process" was run by the Chancellor's Office and Government Relations, not the Undergraduate Admissions Office. (*Id.* at 14-15; A.168-169.) Twice yearly, the Chancellor, the Associate Chancellor and the Government Relations Office met, and Chancellor Herman decided who to admit. (*Id.*; A.168.) The files of the Chancellor's Office, the Government Relations Office, and Trustees are not the official "admissions database" the University maintained. (*See id.* at 21; A.175.) Whatever rogue files the Chancellor's Office, Government Relations, the Trustees and others may have kept, they were not the records solicited by the University and kept "as a matter of course" in the Official Admissions Process described by the Commission. *Falvo*, 534 U.S. at 431.

As in *Falvo*, "[o]ther sections of the statute support our interpretation." *Id.* at 434. Section 1232g(b)(4)(A) of FERPA requires educational institutions to "maintain a record, kept with the education records of each student," that lists those who have requested access to a student's education records and their reasons for doing so – reasons which must be "legitimate." 20 U.S.C. § 1232g(b)(4)(A). The record of access is then only available to the school official

responsible for custody of the records and his or her assistant. *See Falvo*, 534 U.S. at 434.[3]

The Chancellor's Office, the Government Relations Office, Trustees and other University Sponsors are not the University custodian responsible for an applicant's, and then student's, institutional files. These state actors have no "direct responsibilities for admissions." (Rept. at 12; A.166.) Indeed, the University's own Academic Policies and Regulations do *not* identify the Chancellor, the President, the Trustees, or Government Relations officials as record custodians. (Student Code, § 3-605(b) at A.275.)

Further, it would be passing strange to think that the Chancellor and other actors listed above separately recorded who sought and obtained access to the Category I information and their "legitimate interest" in that information, as § 1232g(b)(4)(A) requires of true "educational records." Indeed, as the Commission found, the Chancellor, University President,

---

[3] "Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system." 20 U.S.C. § 1232g(b)(4)(A).

Deans and Trustees who participated in the Category I shadow process "disregarded University-sanctioned principles of ethical conduct and fair dealing" and there can now be no argument that what they were doing was "legitimate." To paraphrase *Falvo*, "It is fanciful to say they maintain[ed] the [Category I] papers in the same way the registrar maintains a student's folder in a permanent file." *Falvo,* 534 U.S. at 433.

Finally, to put a point on this argument, if this Court accepts the invitation of the University's Education Association *Amici* to take judicial notice of public university websites,[4] the Court should examine the University of Illinois' Freshman Application Procedures at http://admissions.illinois.edu/apply/tips-freshman.html. The Procedures tell undergraduate applicants:

> **Unsolicited Information**. Please do not send unsolicited information such as letters of recommendation. That documentation will NOT be added to your file. (Emphasis in original).

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[4] Brief of *Amici* Supporting the Board of Trustees of the University of Illinois, filed by the American Council of Education, *et al.*, p. 11, n.2, citing *Denius v. Dunlap*, 330 F.3d 919 (7th Cir. 2003) and *Laborers' Pension Fund v. Blackmore Sewer Construction, Inc.*, 298 F.3d 600 (7th Cir. 2002).

Further, after the district court's ruling, the University filed a Motion to Stay supported by 147 pages of new material. (A.217-357.) If this Court considers the University website and other materials in the University's Motion to Stay, it is only fair that the Court considers the Freshman Application Procedures on the website quoted above.

The University receives more than 56,250 applications each year. (A.368.) Admissions would grind to a halt if unsolicited "recommendations" of any sort were part of the official process. If "unsolicited information" is forbidden and expressly excluded from an applicant's file, the University has no basis to say that any Category I information is "maintained" as an education record as required by FERPA and *Falvo*.[5]

2. Sponsor documents are not about "education."

Even if "maintained" is deemed to be simply found in a filing cabinet somewhere in the University system – and not, as the Supreme Court holds, retained in the student's permanent file as a matter of course, 534 U.S. at 431– the record must at a minimum be about the student's *education* to be an education record. As numerous courts have held, "in order to constitute 'education records' under FERPA, the content of the records have some tie to some aspect of the educational process . . . ." *Bd. of Educ. v. Colonial Educ.*

[5] Of course, the University could not insulate the illegitimate Category I documents from public access simply by putting them in a student's "file" in any case. *See, e.g., Reppert v. Southern Illinois Univ.*, 375 Ill. App. 3d 502, 507 (4th Dist. 2007) ("[T]he mere fact that personnel files are *per se* exempt from disclosure . . . does not mean that the individual [employment] contracts [of certain University employees] are also *per se* exempt simply because they are kept in those files.") (citing *CBS, Inc. v. Partee,* 198 Ill. App. 3d 936, 942 (1st Dist. 1990) ("To hold that all information contained in a personnel file is exempt from public disclosure simply because it is in a personnel file would permit a subversion of the broad purposes of the [FOIA].").

Ass'n., 1996 WL 104231, at 6; *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) ("The function of the statute is to protect *educationally* related information."). Calls from the Governor's Office, Speaker Mike Madigan, State Senators and Representatives and Sponsors for special treatment are *not* records, files or documents reflective of an applicant's educational performance, skills or traits.

The University's suggestion that Category I Sponsor requests are the equivalent of "confidential letters and statement of recommendation" (Univ. Br., pp. 46-48) is refuted by the Commission testimony of Dean Smith of the College of Law. Dean Smith drew a sharp distinction between "letters of recommendation" and "calls from Trustees, the Chancellor's Office, the Provost and others seeking special consideration." (Rept. at 32; A.186.) "Smith testified that the 'proper mechanism for words of support are letters of recommendation,"[6] not these pleas for special treatment. (*Id.*)

Even though Sponsor requests "may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects; i.e., records relating to individual

[6] Unlike the undergraduate college, the College of Law requests letters of recommendation, which must be on personal knowledge by an expert in the field and address the applicant's "personal qualities, such as: intellectual curiosity, enthusiasm and commitment." http://law.illinois.edu/prospective-students/apply-jd.

student academic performance, financial aid or scholastic probation which are kept in individual student files." *Bauer v. Kincaid*, 759 F. Supp. at 591.

The University argues that "Congress made no content-based judgments with regard to its 'education records' definition," and asserts that, if records "directly relate to a student and are kept by that student's university," they are, without more, deemed FERPA "education records." (Univ. Br., p. 39.) The University relies on *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) to support its position, and dismissively asserts that every other case that has disagreed with that court's all-encompassing interpretation – and there are many – is simply "erroneous." (Univ. Br., pp. 40-44.)

The notion that all records that could identify a student are "education records" – regardless of the content or circumstances, and regardless of FERPA's purpose – is inconsistent with this Court's decision in *Disability Rights Wisconsin, Inc. v. State of Wisconsin Department of Public Instruction*, 463 F.3d 719 (7th Cir. 2006), which took a more nuanced and sensible approach. The Court there held that even though disclosure of student-specific information – including disciplinary records – "ordinarily might implicate FERPA," disclosure in that case would *not* violate FERPA, because the students' privacy interests were "outweighed" by other important interests. *Id.* at 730.

The salient point of *Disability Rights*, which the University disregards, is that the privacy interests protected by FERPA are not absolute, and certainly cannot be read to give University administrators unfettered discretion to withhold documents because they might be embarrassing to the State institution.[7] In this regard, *Disability Rights'* holding is consistent with the Supreme Court's decision in *Falvo, supra,* which likewise rejected a sweeping and nonsensically formalistic application of FERPA. 534 U.S. at 434-35. "There is no more likely way to misapprehend the meaning of language – be it in a constitution, a statute, a will or a contract – than to read the words literally, forgetting the object which the document as a whole is meant to secure." *Cent. Hanover Bank & Trust Co. v. Comm'r*, 159 F.2d 167, 169 (2d Cir. 1947) (L. Hand, J.).

Thus, while the University characterizes *Miami Univ.* as the "leading authority" (Univ. Br., p. 38), the fact is that many other courts, consistent with *Falvo*, have held that FERPA does not "encompass every document that relates to a student in any way and is kept by the school in any fashion." *BRV, Inc. v. Superior Court*, 49 Cal. Rptr. 3d 519 (Cal. Ct. App. 2006)

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[7] The University attempts to avoid the reasoning of *Disability Rights Wisconsin* by claiming it involved "a narrow set of circumstances and a narrow solution" (Univ. Br., pp. 43-44); Tribune's request is equally narrow. Contrary to the University's hyperbole, Tribune does not seek a "broad carve-out . . . to obtain access to private student records" (*id.*, p. 44) – it seeks a *specific* category of documents in which no legitimate privacy interests exist.

(applying California analogue to FERPA). *Accord*, *Bd. of Trustees, Cut Bank Pub. Schs. v. Cut Bank Pioneer Press*, 160 P.3d 482, 487 (Mont. 2007); *Kirwan v. The Diamondback,* 721 A.2d 196, 204 (Md. 1998); *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997); *Red & Black Publ'g Co., Inc. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *Bd. of Educ. v. Colonial Educ. Ass'n*, 1996 WL 104231, at *6; *Bauer v. Kincaid*, 759 F. Supp. at 591.

3. Sponsor documents are not "private facts."

Any definition of education records in FERPA must be informed by the statute's purpose and the statutory context where the term "education records" is found. The definition of education records is found in Section (a) of the Act. 20 U.S.C. § 1232g(a)(4). Section (a) is the section that grants parents access rights to a student's records, (§ 1232g(a)(1)), and the right

> to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading or *otherwise in violation of the privacy rights of students*, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C. § 1232g(a)(2) (emphasis added). In granting this right, Congress plainly sought to limit the definition of education records to private data. As

Senator Buckley put it, "We are talking about invasion of personal, private data." 120 Cong. Rec. 14584 (1974).

When Terry McLennand of the University's Government Relations Office returns from a legislative session in Springfield and tells the Provost that Sen. DeLeo, Sen. Schoenberg, Rep. Lang and University President White want a "wait listed" applicant admitted and the applicant is admitted (Rept. at 15; A.169), no one would contend that McLennand, President White and the listed elected officials had a right of privacy in their actions. *Cassidy v. American Broadcasting Co.*, 60 Ill. App. 3d 831, 838 (1st Dist. 1978) (there is "no right of privacy" in information "concerning discharge of public duties"); Restatement (Second) of Torts § 652D, cmt. e. They were doing the public's business, and doing it in a way that the Commission found to be in disregard of the University's own ethics and standards.

The parents who induced the University officials to violate the University's norms for their own advantage have no privacy interest either. As this Court has recognized, "the First Amendment greatly circumscribes the right *even of a private figure*" to prevent "the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) (emphasis added). "People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust

them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private." Restatement (Second) of Torts § 652D, cmt. f.

Haynes applies *a fortiori* here because the parents knew what they were doing when they went to the politicians to open the back door to the University. The Commission Report has several illustrations of how the process worked:

- After calls from Speaker Madigan and others Government Relations head McLennand noted, "We need these four cases," and the legislators would rather ask [constituents] for patience then deliver bad news." (Rept. at 16; A.170.)
- "This came through [redacted] and the [redacted] kid's parents are one of the owners of [redacted] – Big money!" (*Id.* at 20; A.174.)
- "Given his father's donors status I may be asking you to admit him. We are about to launch a big capital campaign, and we cannot be alienating big donors by rejecting their kids." (*Id.* at 19; A.173.)
- "I'm … growing increasingly concerned that Terry [McLennand] is sharing too much information with legislators and the families of kids we are tracking. In this case there is simply no way Cullerton would have known [certain student information] without Terry telling him." (*Id.* at 22; A.176.)

Parents who went to Senator Cullerton and others to use political connections to obtain benefits from the state can have no reasonable expectation of privacy. *See, e.g., In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 373 (9th

Cir. 2002) (private individual has "no privacy interest in allegations . . . bearing on the way he does business with public bodies").

The case of former Rep. Molaro underscores the point. Rep. Molaro granted tuition waiver General Assembly scholarships to 4 members of Phillip Bruno's family totaling $94,000. Bruno was a Molaro campaign worker and contributor. After the Tribune reported the tuition waivers and that Bruno's children may not have satisfied the residency requirements for the scholarships,[8] the U.S. Attorney commenced a grand jury investigation that is on-going.[9] Phillip Bruno and his children have no right of privacy in these public facts. Restatement (Second) of Torts § 652D, cmt. f ("These persons are regarded as properly subject to public interest . . .). Rep. Molaro's case illustrates why the Tribune's Request for the names and addresses of the parents of Category I applicants is so important. The parents' identity enables the Tribune to connect the dots and explore a Sponsor's motivation to grant preferential treatment in violation of the University's practices and allows the public to evaluate a Sponsor's performance of his public duties.

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[8] Stacy St. Clair and Jodi S. Cohen, *Ex-Lawmaker Waives Tuition for Supporter's Family*, Chi. Trib., Jun. 2, 2010 at Sec. 1 at 1.

[9] Stacy St. Clair and Jodi S. Cohen, *Former State Rep. Robert Molaro Faces Criminal Investigation*, Chi. Trib., Aug. 9, 2011 at Sec. 1 at 4.

4. Sponsor documents are "not directly related to a student."

The Tribune seeks the identities of clouted Sponsors who sought special treatment, and the University administrators who granted it, contrary to their official charge. (Trib. 12/24/09 Letter at 1-2; A.245-246.) The focus of the Tribune's request is on the Sponsors and University administrators, not applicants. (*Id.*) Where records relate to alleged improprieties by administrators and politicians, involving applicants only incidentally, the records reflecting those improprieties are not "directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201 (Fla. Dist. Ct. App. 1st Dist. 2009).

The University asserts that *NCAA* is different because the allegations of university misconduct were not "directly relating to a student" within FERPA's terms. (Univ. Br., p. 42.) That does not distinguish *NCAA* – it merely restates the issue, and confirms why the case applies. The *reason* the *NCAA* court found the requested records were not "directly relat[ed] to a student" was because they "pertain[ed] to allegations of misconduct by the University Athletic Department, and only tangentially relate[d] to the students who benefited from that misconduct." *NCAA,* at 1211. The same is true here: the Category I records are principally about official misconduct,

and only tangentially about the individual students on whose behalf political clout was exerted.[10]

Nor can the University distinguish *Kirwan v. The Diamondback,* 721 A.2d 196 (Md. 1998), which held students' parking tickets were not FERPA "education records." The University argues that "[u]nlike parking tickets, the Request seeks documents and information going to the very heart of one's 'status as a student,' as they involve the process by which an applicant became an admitted student" (Univ. Br., p. 43); that again misses the critical point. The Category I "process" was *not* the official process by which students were admitted. It was a separate, illegitimate "shadow process" reserved for clouted applicants. Documents reflecting that unofficial deal making cannot be secreted under FERPA, simply because it might identify the student's parents. "Prohibiting disclosure of any document containing a student's name

[10] *Accord BRV, Inc. v. Superior Court*, 49 Cal. Rptr. 3d at 526-27 (report analyzing allegations of misconduct by school district superintendent, while "identif[ying] students by name and detail[ing] acts taken by them and against them," was "not directly related" to the private educational interests of the student); *Wallace v. Cranbrook Educ. Cmty.*, No. 05-73446, 2006 WL 2796135, at *4 (E.D. Mich. Sept. 27, 2006) ("[T]he current case involves disciplinary action against an employee."); *Hampton Bays Union Free Sch. Dist. v. Public Empl. Rel. Bd.*, 878 N.Y.S.2d 485, 488 (App. Div. 3d Dept. 2009) ("[R]ecords pertaining to allegations of teacher misconduct cannot be equated with *student* disciplinary records . . . .") (emphasis added).

would allow universities to operate in secret, which would be contrary to one of the policies behind" FERPA. *Kirwan,* 721 A.2d at 204.

B. The University's Interpretation Flouts The Statute's Intent.

In determining whether records are covered by FERPA, "it is important to keep in mind what Congress intended to accomplish" in that statute. *Kirwan,* 721 A.2d at 204. That is true when applying *any* statute. *See Sanders v. Jackson*, 209 F.3d 998, 1002 (7th Cir. 2000) ("[A] statute must be interpreted in accordance with its object and policy.").

Here, FERPA's legislative history reveals that "in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy." *Kirwan*, 721 A.2d at 204. "Following Watergate, lawmakers were increasingly concerned that secret governmental documents could be erroneously relied upon to the detriment of individuals, most of whom had no idea that data was being kept and no method of correcting inaccurate information"; "Senator Buckley explained that individual privacy and a citizen's right to know what information the government had collected were the motivating forces behind" the Buckley Amendment. Mary Margaret Penrose, *In The Name Of Watergate: Returning FERPA To Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75, 77, 82 (2011) (citing 120 Cong. Rec. 14580 (1974)). In particular,

> Congress was concerned about students being required to participate in medical research and experimental educational programs without parental notification or permission. 120 Cong. Rec. 13951 (1974). It wanted to "take the lid off secrecy in our schools." 120 Cong. Rec. 13952 (1974). At the same time, Congress was greatly concerned with the systematic violation of students' privacy. 120 Cong. Rec. 13951 (1974). ... Specifically mentioned by the sponsor of the legislation was the access that the FBI, CIA, juvenile courts, health department officials, and local police departments had to education records. ... The types of information or education records that were mentioned on the floor of Congress 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 classroom questionnaires on personal life, attitudes toward home, family and friends. *See* 120 Cong. Rec. at 13951-13954, 14584-14585.

Kirwan, 721 A.2d at 204 (emphasis added).

The University asserts that the Joint Statement regarding the December 1974 amendments to the statute is somehow more illuminating of legislative intent. (Univ. Br., p. 45.) The amendments defined "the material subject to challenge [by parents and students] . . . generically as 'education records,' eliminating the long list of illustrative examples contained in existing law" (120 Cong. Rec. 39862). Congress nowhere suggested that those "illustrative examples" ceased to be illustrative of the type of records with which the statute was concerned. "It appears that Senator Buckley's aim was to protect

academic and academically-related records, not tangential records that might be located within the school building" and that "the initial definition was not wholly abandoned and should be referenced and evaluated" in clarifying "the scope of FERPA's protection . . . ." Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 86-87.

The clear focus of the amendment to the "education records" definition was student and parent access to their files. It was "intended . . . to open the bases on which [schools'] decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct – or at least enter an explanatory statement – inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution." 120 Cong. Rec. 39862. In this context, it is a *non sequitur* to talk about giving parents and students the opportunity to view, challenge and correct any "inappropriate information" in University files, when the "inappropriate information" at issue pertains to the under-the-table deal-making initiated by the students and parents themselves in the Category I process.

One thing is clear: notwithstanding its lofty rhetoric about protecting student privacy, the University is using FERPA here to shield documents potentially embarrassing *to Government*. That was never Congress' purpose.

Kirwan, 721 A.2d at 204. *See also* Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 96 (using FERPA "to protect the school, not the student" is an "inversion [that] was never intended by Senator Buckley and is contrary to the spirit of FERPA"). As Senator Buckley himself recently re-emphasized, FERPA

> was meant to protect "education records," or those records that have some academically related function. . . . Upon learning that schools were shielding themselves by refusing to disclose non-academic information, Senator Buckley stated, "[t]hat's not what we intended . . . . Institutions are putting their own meaning into the law."

Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 105 (quoting Riepenhoff & Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, Columbus Dispatch, May 31, 2009, at 1A).[11]

In short, the University's interpretation "produces results that are odd in light of the conduct regulated by the statute. . . . We cannot believe that Congress intended such implausible results, and therefore, even if [its] reading is the most straightforward, it is not necessarily the correct one." *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 537 (7th Cir. 2003); *see*

[11] "Senator Buckley was joined in his concern about misuse of FERPA by Paul Gammill, who had recently taken over the federal education department responsible for monitoring FERPA. Echoing the senator's concerns, Gammill stated that '[i]t sounds like some institutions are using this act to hide things.'" Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 97 (quoting Riepenhoff & Jones). Mr. Gammill is the author of the DOE letter that the University solicited. (A.108-109.)

also Milner v. Department of Navy, 131 S.Ct. 1259, 1269-70 (2011) (Government's "plain text" interpretation of federal FOIA exemption for "personnel" records would "strip the word 'personnel' of any real meaning"; "this odd reading would produce a sweeping exemption, posing the risk that FOIA would become less a disclosure than 'a withholding statute'"); *Zbaraz v. Madigan*, 572 F.3d 370, 387 (7th Cir. 2009) ("An interpretation that flies in the face of a statute's purpose . . . leads to an absurd result.").

C. The DOE Letter Is Entitled To No Deference, And Does Not Support The University.

The University invokes a letter that its lawyers solicited from the DOE – in connection with its response to the state Admission Review Commission's document request, *not* the Tribune's Request. (A.108.) The DOE letter has no bearing here. The Commission's document request – to which the DOE's letter was addressed – was broader than Tribune's. Moreover, the lawyers' letter soliciting the DOE opinion highlights all the sensitive education information that "arguably" could be linked to a specific student, i.e., GPA, test scores, etc. (A.105.) Again, Tribune's Request does not ask for any of that.

Further, agency "[o]pinion letters are not entitled to *Chevron* deference, or even the deference we accord an agency's interpretation of its own ambiguous regulation," but are only "'entitled to respect' . . . to the extent that [they] have the 'power to persuade.'" *CenTra, Inc. v. Cent. States, Se. & Sw. Areas*

Pension Fund, 578 F.3d 592, 601 (7th Cir. 2009) (citations omitted). The DOE letter has no analysis and is persuasive of nothing. (A.108-09.)

First, the University's lawyers did not focus the DOE's attention on whether documents relating to Category I applicants that did *not* come from the students could be considered "information provided in connection with the application process" – or, more to the point, whether documents reflecting the trading of political favors can legitimately be considered part of an educational institution's "application process." As shown above, such an interpretation would be untenable. In short, Category I records are *neither* legitimate "application records" *nor* "education records" within the meaning of FERPA. *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000) ("[W]e find unpersuasive the agency's interpretation . . . .").

Second, the DOE's suggestion that all so-called "application records" retroactively become FERPA-protected once the applicant "becomes a student in attendance" – but the statute's privacy protections are nullified in the event the applicant does *not* attend the institution – makes no sense. Rather than drawing that arbitrary distinction, it is far more reasonable to interpret application materials as being beyond FERPA's scope. After all, at the time an applicant applies to a school, he or she by definition "has not been in attendance" there (20 U.S.C. 1232g(a)(6)) – and that is true whether or not the applicant is subsequently admitted. *Cf. Lieber v. Bd. of Trustees of S. Ill.*

Univ., 176 Ill. 2d 401, 410 (1997) (information about "people who had been accepted as freshmen, but who had not yet enrolled" were not included in FOIA exemption for "personal information maintained with respect to students," noting by analogy that FERPA definition of "'student' 'does not include a person who has not been in attendance' at an educational agency or institution").

D. Concealing Sponsor Records Violates The First Amendment.

Both the Supreme Court in *Falvo* and this Court in *Disability Rights Wiscosnin* looked to balance other interests in defining what is and is not treated as an education record under FERPA. In *Falvo*, the Supreme Court relied on principles of federalism to buttress its sensible result. In *Disability Rights Wisconsin*, this Court weighed the statutory goals of federal disability legislation. In this case, the Court should look to the First Amendment, because the public has the right to know what its elected officials and the University's employees did in doling out the favors of admission – a rogue process the University's own emails admit was rank "political favoritism." (Rept. at 28; A.182.)

Chancellor Herman's Category I documents and the "special admit" records of Government Relations and the other participants in the Category I scheme are state property, presumptively available for public inspection. State Records Act, 5 ILCS 160/1.5 ("Pursuant to the fundamental philosophy

of the American constitutional forum of government . . . those records, with very few exemptions, [are] to be available for the use, benefit, and information of the citizens . . . ."). State universities fall expressly under the State Records Act, and the Category I documents were created and used in the performance of official duties. 5 ILCS 160/2, 160/3. Thus, by statute, Illinois has codified the First Amendment interest.

Wholly apart from the State Records Act (and the Illinois FOIA), records of how public benefits are dispensed are open to the public. *See, e.g., Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 905 (D.C. Cir. 1996) (explaining that "as a matter of federal common law," public has had a right of access to those "government document[s] created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived," which "would encompass, for example, a report or record of government expenditures") (citing *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374 (1st Dist. 1962) (common law right of access applied to "financial records of expenditures and receipts" of Board of Education)).

And here, the records at issue reflect official misconduct, the exposure of which is at the very heart of the First Amendment's protections. *In re the Application of CBS, Inc.*, 540 F. Supp. 769, 771-72 (N.D. Ill. 1982) ("The public interest in access . . . is particularly strong where, as in the present

case, the materials sought are related to the corruption of a public agency."); *Stilp v. Contino*, 629 F. Supp. 2d 449, 464 (M.D. Pa. 2009) ("Open discussion and scrutiny of public corruption has traditionally received expansive protection under the First Amendment.") (citing *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1035 (1991)).

The Review Commission has established beyond peradventure that misconduct has occurred here. (A.152-99.) Chancellor Herman, President White and six Trustees have resigned. (A.368.) There is no legitimate public interest in the University and those who benefited from the misconduct in shielding their acts from public scrutiny. There is a First Amendment right of access, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); the view there is no right of access has never commanded a majority of the Supreme Court. *Id.* at 583 (Stevens, J. concurring) (discussing *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)). Accordingly, if "education records" in FERPA were construed to include the Category I Sponsor information at issue here, it would violate the First Amendment. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1233-34 (D.D.C. 1991) (application of FERPA violated First Amendment); *Bauer v. Kincaid*, 759 F. Supp. at 593-94 (if FERPA protected records, First Amendment would be violated).

II. THE DISTRICT COURT CORRECTLY FOUND THAT FERPA'S FUNDING CONDITIONS DO NOT "PROHIBIT" DISCLOSURE PURSUANT TO STATE FREEDOM OF INFORMATION LAWS.

A. FERPA Is A Funding Statute, Not A Statute That "Prohibits" Disclosure, And It Does Not Impose Duties Independently Enforceable Against The Funding Recipients.

FERPA does not prohibit the University from disclosing the education records of a student without a student's consent. Both the express terms of FERPA and the Supreme Court's opinion in *Gonzaga University v. Doe*, 536 U.S. 273 (2002) support this proposition, and this Court, like the District Court below, should reject the University's position that FERPA is a federal law that "specifically prohibits" the disclosure of the information the Tribune requested. 5 ILCS 140/3(a)(7).

FERPA provides that:

> No funds should be made available under any applicable program to any educational agency or institution which has *a policy or practice of releasing, or providing access to*, any personally identifiable information in education records other than directory records . . . unless [there is written consent from the student].

20 USC § 1232g(b) (emphasis supplied). The funding condition is that there not be "a policy or practice." This is not a provision that specifically prohibits the disclosure of particular information.

FERPA's enforcement provisions further support the construction that the funding condition does not prohibit disclosure. Institutions receiving funds

can continue to receive federal funding so long as they "comply substantially" with the Act. 20 U.S.C. § 1234c(a). That means that some degree of non-compliance is accepted. If there can be non-compliance without the termination of federal funding, FERPA cannot be said to specifically prohibit the disclosure of a student's education records without the student's consent.

Gonzaga University held that FERPA did not grant individuals federal rights enforceable under Section 1983. The Supreme Court's decision was based on the following reasoning, which underscores that FERPA does not affirmatively prohibit the University from disclosing education records to third parties:

- "FERPA's non-disclosure provisions . . . speak *only* in terms of institutional policy and practice, not individual instances of disclosure."
- The non-disclosure provisions have only "an 'aggregate' focus" on the institution and do not give rise to individual federal rights.
- Funding cannot be terminated so long as the institution complies substantially with the Act. 20 U.S.C. § 1234c(a).
- Any "reference to individual consent is in the context of describing the type of 'policy or practice' that triggers a funding prohibition."

536 U.S. at 288-89.

Congress knows how to expressly prohibit conduct in legislation enacted pursuant to the Spending Clause. For example, in the cases the University cites (Univ. Br., pp. 22-23), Civil Rights Acts created specific non-

discrimination rights and duties, enforceable by both the government and the private parties that are affected by the proscribed conduct. *See, e.g., Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 180 (2005) ("Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.'") (quoting *Cannon* v. *Univ. of Chicago,* 441 U.S. 677, 704 (1979)). Unlike FERPA, these Acts employ direct terminology: "No person . . . shall . . . be subjected to discrimination." *Gonzaga*, 536 U.S. at 287. That Congress did not speak in such clear and unambiguous terms in FERPA further confirms that Congress did not intend FERPA's funding conditions to be the prohibitions on disclosure the University contends.[12]

The University nevertheless asserts that "the sizable majority of courts" hold that FERPA "forbids disclosure of education records," and that only "a handful of cases have suggested that FERPA is just a funding condition and

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[12] *United States v. Miami University* does not call for a different result; the court there relied on the same inapposite case law involving federal civil rights statutes. *See* 294 F.3d at 808-809. Like the University, the *Miami University* court erred in failing to recognize that in contrast to those statutes, "FERPA's provisions speak only to the Secretary of Education," *Gonzaga*, 536 U.S. at 287, and do not directly impose requirements on the funding recipients that may be independently enforced. *Gonzaga* – decided seven days before the Sixth Circuit's *Miami University* decision – is mentioned only twice in *Miami University* and then only in footnotes. 294 F.3d at n.11, n.20.

not an explicit prohibition on the release of FERPA-protected records." (Univ. Br., pp. 25-26.) The University is incorrect. The preponderance of authority addressing this precise issue correctly holds, consistent with the Supreme Court's ruling in *Gonzaga*, that "[b]y its terms, FERPA does not prohibit the disclosure of any education records. Instead, FERPA operates to deprive an educational institution of its eligibility for federal funding if its policies or practices run afoul of the rights of access and privacy protected by the law." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1210 (Fla. Dist. Ct. App. 1st Dist. 2009). "[A] federal law which does not prohibit disclosure, but only provides for the loss of funds if the information is disclosed, does not supersede the state FOIA." *Troutt Bros., Inc. v. Emison*, 841 S.W.2d 604, 607 (Ark. 1992) (citing *Student Bar Ass'n v. Byrd*, 239 S.E. 2d 415, 418 (N.C. 1977) ("The Buckley Amendment does not forbid . . . disclosure of information concerning a student"; it "simply cuts off Federal funds, otherwise available to an educational institution which has a policy or practice of permitting the release of such information")).[13]

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[13] *Accord U.S. v. Haffner*, No. 09-CR-337, 2010 WL 5296920, at *15 (M.D. Fla. Aug. 31, 2010) ("FERPA addresses the conditions under which a school may become ineligible for federal funding if it fails to follow certain standards for release of some types of student information"; it "does not prohibit a request for, or the release of, student records.") (citing *Tombrello v. USX Corp.,* 763 F. Supp. 541, 545 (N.D. Ala. 1991)); *Bauer v. Kincaid,* 759 F. Supp. 575, 589 (W.D. Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the

All the University is left with are cases in which it says the courts have "described" FERPA's requirements "as a prohibition on the disclosure or dissemination of covered education records." (Univ. Br., p. 28.) It says this Court's decision in *Shockley v. Svoboda*, 342 F.3d 736 (7th Cir. 2003) is such a case, but in reality, the Court there accurately clarified that "FERPA

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disclosure of educational records"); *Red & Black Publ'g Co. v. Bd. of Regents,* 427 S.E.2d 257, 261 (Ga. 1993) ("[T]he Buckley Amendment does not prohibit disclosure of records. Rather, . . . the Buckley Amendment provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records."); *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 57 (Fla. Dist. Ct. App. 5th Dist. 2004) ("*FERPA does not prohibit the* disclosure of any educational records. FERPA only operates to deprive an educational agency or institution of its eligibility for applicable federal funding based on their policies and practices regarding public access to educational records . . . .") (italics in original); *Adams v. Rizzo*, No. 04-8469, 2006 WL 3298303, at *16 (N.Y. Sup. Ct. Nov. 13, 2006) ("[FERPA] does not prohibit the disclosure of covered information – it simply states that the federal government will not make funds available to responsible entities that fail to comply with the statute's privacy provisions."); *Eastern Conn. State Univ. v. Freedom of Info. Comm'n*, 17 Conn. L. Rptr. 588, No. CV960556097, 1996 WL 580966, at*3 (Conn. Super. Ct. Sept. 30, 1996) ("[FERPA requirements are] merely a precondition for federal funds. . . . [F]ederal law in the form a [*sic*] funding preconditions, provides no defense to the FOIC ordered disclosures.") (citing *Maher v. Freedom of Info. Comm'n,* 192 Conn. 310 (1984) (Medicaid privacy provisions did not exempt public records from disclosure under State FOIA; "[n]othing in the federal regulatory scheme per se prevents a state legislature from enacting binding legislation, as part of its Freedom of Information Act, or elsewhere, that is inconsistent with Medicaid safeguards")). *DTH Publ'g Corp. v. Univ. of North Carolina*, 496 S.E.2d 8 (N.C. App. 1998), on which the University relies, also actually held that "FERPA does not *require* UNC to do anything, but instead operates by withholding funds," but nevertheless held that FERPA made "student education records 'privileged or confidential'" within the terms of the State open meetings law. *Id.* at 12.

prohibits the federal funding of schools that have 'a policy or practice of permitting the release of education records . . . .'" *Id.* at 741 (quoting 20 U.S.C. § 1232g(b)(1)) (emphasis added). In any event, neither *Shockley* nor the other cases the University string-cites at footnote 3 ever reached the issue at bench – i.e., whether FERPA is, by its terms, simply a funding condition and does not "prohibit" disclosure for purposes of a State freedom of information request exemption. In *Svoboda*, the Court did not reach that issue because plaintiff had no private right of action; the other cases likewise refer to FERPA in passing as a "prohibition," while ruling on grounds that did not require them to analyze what that means.[14] Cases are not authority for issues not presented to the court for decision. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

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[14] *E.g., Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 5-6 (D.D.C. 2008) ("Because Plaintiffs' subpoena sought to discover directory information and was issued pursuant to a Court order, FERPA does not prohibit disclosure of the information sought by Plaintiffs' subpoena"); *Interscope Records v. Does 1-14*, 558 F. Supp. 2d 1176 (D. Kan. 2008) (same); *Jennings v. Univ. of North Carolina*, 340 F. Supp. 2d 679 (M.D.N.C. 2004) (FERPA did not support plaintiff's motion to seal affidavits and depositions in suit against university); *Storck v. Suffolk County Dep't of Social Servs.*, 122 F. Supp. 2d 392 (E.D.N.Y. 2000) (private FERPA action dismissed; claims not directed against educational institution).

Finally, the University quotes *Board of Education of Oak Park v. Kelly E.,* 207 F.3d 931 (7th Cir. 2000) for the proposition that "'States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant.'" (Univ. Br., p. 23.) The Court made that statement in the course of holding that a "string attached to money under the [Individuals with Disabilities Education Act] is submitting to suit in federal court" and waiving Eleventh Amendment immunity. *Kelly E.*, 207 F.3d at 935 (citing 20 U.S.C. § 1403(a)). FERPA attaches no such "string."

Moreover, in the case *Kelly E.* cites for the quoted proposition, *South Dakota v. Dole,* 483 U.S. 203 (1987), Congress used its spending power to encourage States to "enact higher minimum drinking ages than they would otherwise choose." *But*, the Court emphasized, "the enactment of such laws *remains the prerogative of the States not merely in theory but in fact*." *Id.* at 211-12 (emphasis added). Precisely the same is true of the "carrot and stick" statutory scheme embodied in FERPA. *See Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985); *Adams v. Rizzo*, No. 04-8469, 2006 WL 3298303, at *16 (N.Y. Sup. Ct. Nov. 13, 2006) ("FERPA does not provide a general statutory ban on publication of the covered information, instead relying on the power of the purse to induce the desired behavior.") (citing *Frazier v. Fairhaven Sch. Comm.,* 276 F.3d 52, 68 (1st Cir. 2002)).

B. The University' Does Not Have A Contract With The DOE That "Prohibits" Disclosure.

The University contends that FERPA is "in the nature of a contract" with the Department of Education. (Univ. Br., p. 22.) But there can be no doubt that if there is a "contract," all it does is condition the receipt of federal funds on the agreement not to have a "policy or practice of releasing" records without consent. *Gonzaga* acknowledges there may be "individual instances of disclosure" without the loss of federal funds. 536 U.S. at 588. And *Gonzaga* holds that reference to "individual consent" in FERPA is "in the context of describing the type of 'policy or practice.'" *Id.* The contract, if there is one, is not a prohibition on disclosure.

But even if FERPA created a more expansive contract, it does not amount to a "specific[] prohibit[ion]" of federal law, for purposes of exemption under Illinois FOIA, 5 ILCS 140/7(1)(a). Unlike the positive law embodied in statutes applicable to the entire community, a contracting "promisor has in effect an option to perform or pay damages rather than a duty to perform." *Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank, N.A.*, 546 F.3d 839, 846 (7th Cir. 2008). And contrary to what the University argues, FERPA's non-disclosure rules are not properly enforced by the DOE through "the exercise of a court's equitable powers." (Univ. Br., p. 23, citing *Miami Univ.*, 294 F.3d at 809). On its face, FERPA does not provide for such policing of the

University's "contractual" obligations; the DOE's exclusive recourse under the statute is to withhold funds for noncompliance – and only if it has determined "compliance cannot be secured by voluntary means." 20 U.S.C. § 1232g(f). *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d at 68-69 (the "sole enumerated remedy for unremediated violations" of FERPA is "the withholding of federal funds").

Indeed, *Miami University* itself acknowledges that § 1232g(f) "may not sufficiently empower the DOE to enforce the FERPA through the courts." 294 F.3d at 807. The court instead suggests that 20 U.S.C. § 1234c(a)(4) might confer that power; it provides: "Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds, the Secretary may . . . (4) take any other action *authorized by law with respect to the recipient*." (Emphasis added.) But again, the *Miami University* court fails to recognize that the only DOE "action" that is "authorized by law" in FERPA is to withhold the recipient's funds. *E.g.*, 20 U.S.C. §§ 1232g(b)(1), (b)(2), (e), (f). *Congress conferred no other "power*" in the statute, and the *Miami University* court's bootstrapping cannot be sustained. "If Congress does not expressly grant or necessarily imply a particular power for an agency, then that power does not exist." *Miami Univ.*, 294 F.3d at 807.

So too, the purported "contractual" standard under FERPA is so vague and imprecise as to be singularly unsuitable for specific performance. *TAS Distrib. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 637 (7th Cir. 2007) (specific performance "appropriate only when the terms of the contract are sufficiently specific to allow the precise drafting of such an order"; denying specific performance of "all reasonable efforts" contract term). "FERPA's nondisclosure provisions . . . speak only in terms of institutional policy and practice, not individual instances of disclosure," and recipient institutions are not "liable" for funding termination "so long as they 'comply substantially' with the Act's requirements." *Gonzaga Univ.*, 536 U.S. at 288 (citing 20 U.S.C. 1234c(a)).

C. There Is No Basis For The University's Dire Warnings About The Consequences of Granting The Requested Declaratory Relief.

The University's concern that disclosing the Category I documents would result in a FERPA violation, much less the loss of federal funding, is unfounded. As the DOE itself emphasizes, in the letter the University solicited, the loss of funding penalty is an "extreme" "last resort" measure when the Secretary determines that compliance "cannot be achieved by voluntary means." (A.109.) *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d at 68-69 ("[B]efore stopping the flow of federal funding to an educational institution, FERPA requires the Secretary to find not only that the

institution has failed to comply with the statutory protocol but also that compliance cannot be secured by voluntary means.").

The University concedes that the "DOE has never previously had to revoke federal funding based on FERPA violations, and the University does not believes [*sic*] that the DOE would precipitously commence" such action. (A.230 n.5.) In fact, "[s]ince FERPA's passage in 1974, no school has ever lost federal funding due to improper disclosure of 'education records.' Most likely, this is because losing federal funding requires a policy or practice of improper disclosures. Isolated instances carry no sanction . . . ." Penrose, *supra*, 14 N.Y.U. J. Legis. & Pub. Pol'y at 105 n.149; *see also* Brief of *Amicus Curiae* EPIC, pp. 13, 15-16 (pointing out that no institution has ever lost funding because of FERPA violations).

The University's suggestion that the district court's ruling spells the end of privacy protection for student records is equally overwrought. (Univ. Br., pp. 31-32.) It asserts that the January 2010 amendments to Illinois FOIA mean that only "private information" such as Social Security and driver's license numbers will be exempt from disclosure. That is incorrect. All the amendment did was to remove what the courts had deemed a *per se* privacy exemption for "files and personal information maintained with respect to . . . students" (fmr. 5 ILCS 140/7(1)(b)(1)); the statute now exempts "personal information contained within public records, the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy," which is defined as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c) (eff. Jan. 1, 2010).

The balancing of privacy interests with the public's interests in disclosure that is now codified in Illinois FOIA has long been a hallmark of the common law of privacy.[15] The University's overreaching interpretation of FERPA's scope goes well beyond any legitimate privacy concerns, and is emblematic of the statute's misuse by university administrators;

> One of the most egregious defects of the Buckley Amendment is its propensity to allow colleges and universities the wherewithal to manipulate the law, thereby protecting the institution while giving the appearance of protecting student privacy. As one administrator has observed, "[w]hat seems apparent . . . is that some college and university officials have grown accustomed to using the act – indeed, abusing it – as a defensive shield against disclosure of information that the public has a right to know and to which the Buckley Amendment has never had any relevance."

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[15] *See, e.g.,* Restatement (Second) of Torts, § 652D, cmt. d ("When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy. . . . [and this is] a rule not just of the common law of torts, but of the Federal Constitution as well."); *Leopold v. Levin*, 45 Ill. 2d 434, 444 (1970); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *Florida Star v. B.J.F.* 491 U.S. 524, 535 (1989).

Matthew R. Salzwedel & Jon Ericson, Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics, 2003 Wis. L. Rev. 1053, 1097 (2003).

III. FERPA'S SANCTIONS APPLY ONLY WHERE SCHOOLS HAVE A "SYSTEMATIC" "POLICY AND PRACTICE" OF INDISCRIMINATE DISCLOSURE – NOT THIS CASE.

The district court's grounds for decision – that FERPA "does not forbid Illinois officials from taking any action," much less "prohibit" the University from complying with state FOIA law (A.5) – is well-founded in law, as shown above. *In addition* to those grounds, there is a narrower basis for sustaining the judgment, which Tribune argued below – namely, that compliance with Tribune's Request in this instance would not amount to a "policy or practice" of disseminating private student information. 20 U.S.C. § 1232g(b)(1).

"FERPA's nondisclosure provisions . . . speak only in terms of institutional policy and practice, not individual instances of disclosure." *Gonzaga Univ.*, 536 U.S. at 288. That "policy or practice" must be of a "systematic" nature. *See, e.g.*, *Daniel S. v. Bd. of Educ. of York Cmty. High Sch.*, 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001); *Smith v. Duquesne Univ.*, 612 F. Supp. at 80 ("FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records."). Responding to the Tribune's FOIA Request for Category I documents does not a "policy or practice" make. Certainly,

there is no danger that "public disclosure of [the Category I] materials could soon become a commonplace occurrence," let alone a "systematic" policy of any kind. (Univ. Br., p. 33, quoting *Unincorp. Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2003)). In fact, in "September, 2009, a new [University] Board of Trustees enacted reforms to ensure that the improper practices could *not* occur again." (A.36.)

The University argues that "[b]y holding categorically that FERPA never provides a basis to withhold education records" in response to FOIA request, "the district court has effectively imposed upon the University a 'policy or practice' of disclosing FERPA-protected records . . . ." (Univ. Br., p. 33.) That confuses the district court's holding (FERPA "prohibits" nothing) with the narrower proposition which the court did not reach: that even if FERPA *is* potentially a basis for withholding education records, it could *only* be so where the University was engaged in a systematic "policy or practice" of disclosures. Here, disclosure of the discrete Category I documents could not be the basis for the necessary "policy or practice" finding.

IV. THE "PREEMPTION" AND JURISDICTIONAL SUGGESTIONS OF *AMICUS CURIAE* DEPARTMENT OF JUSTICE ARE NOT WELL-FOUNDED.

A. There Is No Federal Preemption.

The DOJ's preemption argument, which the University did not assert, and should be deemed waived, is without merit. It is erroneously premised on the assumption that there is a "conflict" between Illinois FOIA and FERPA in which case the federal law's requirements would prevail over the state's under the Supremacy Clause. (Brief of *Amicus* Curiae DOJ, p. 6, *passim.*) That straw man falls, however, because, as the district court correctly found, *there is no "conflict"* – FERPA does not "prohibit" the University from doing anything, including complying with a valid public records act request, and if it did so "prohibit" the University, then the request would be exempt under Illinois FOIA. Likewise, since the Tribune's Request calls for no "education records" within the meaning of FERPA, there can be *no conflict* between the statutes. In contrast, the cases the DOJ cites presented a direct conflict between federal statutes expressly providing eligibility for federal entitlement programs, and state statutes that purported to exclude certain otherwise covered individuals from those federal benefits. *E.g.*, *Townsend v. Swank*, 404 U.S. 282, 286 (1971) ("[A] state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the

Social Security Act and is therefore invalid under the Supremacy Clause."). Those cases have no application here.

B. There Is Subject Matter Jurisdiction.

The University did not question the Court's federal question jurisdiction, because there is no basis to do so. As the University pointed out in its Jurisdictional Statement, the "interpretation of a federal law, FERPA, lies at the heart of the dispute, and the Tribune's Complaint properly pleads and presents a pure federal question with respect to the parties' opposing constructions of FERPA." (Univ. Br., p. 1.) A case "arises under" federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 9 (1983). This is the rule in declaratory judgment actions as well. *E.g.*, *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 619-20 (7th Cir. 1995).

The DOJ cites *Northeast Illinois Regional Commuter Railroad Corp. v. Hoey Farina & Downes*, 212 F.3d 1010 (7th Cir. 2000), which quotes *dicta* from *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952) for the proposition that a putative defendant in a prospective state law action cannot use the Declaratory Judgment Act to preemptively establish a defense to the would-be state court action. (In *Wycoff*, there was no "concrete

controversy." 344 U.S. at 245-46.) *Wycoff*'s *dicta* does not foreclose jurisdiction.

First, *Illinois v. General Electric Co.,* 683 F.2d 206 (7th Cir. 1982) rejected precisely the proposition DOJ suggests. There, declaratory judgment plaintiffs claimed that if the state court in pending litigation accepted the declaratory judgment defendant's proposed construction of state law, that law would violate its constitutional rights. *Even though* plaintiffs' argument was a "defense" in that state action, the Court rejected an uncritical application of the "dictum in the *Wycoff* case": if that dictum is "understood to require federal claimants always to litigate their claims as defenses in state court if they can," then "it must be wrong, and though lower federal courts have followed it from time to time, the Supreme Court has not." 683 F.2d at 211; *accord Braniff Int'l v. Florida Pub. Serv. Comm'n,* 576 F.2d 1100 (5th Cir. 1978); *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1305-06 (9th Cir. 1975). It cannot be the case that this controversy – unquestionably requiring the construction of a federal statute – is *per se* barred from federal court, because it is also the basis of a state court "defense."

Second, in contrast to *Wycoff*, the "character of the threatened action" in state court by the declaratory defendant (the University), is *federal* in nature. That is to say, the University could have brought its own action, independent of any "defense" to Tribune's suit, seeking a declaration of its federal law

duties under FERPA[16], and the district court would have had jurisdiction to determine those federal questions. The Court recently made precisely this point in *Samuel C. Johnson 1988 Trust v. Bayfield County, Wis.*, ___ F.3d ___, Nos. 09-2876, 09-2879, 2011 WL 2417020 (7th Cir., June 17, 2011). There, the declaratory defendant (the County) "could just as well have brought the quiet-title action as the plaintiffs, and in that event the claim would have arisen under federal law"; hence, the case was "within the rule that 'in declaratory judgment cases, the well-pleaded complaint rule dictates that jurisdiction is determined by whether federal question jurisdiction would exist over the presumed suit by the declaratory judgment defendant.'" *Id.* at *1 (citing *GNB Battery*, 65 F.3d at 619).

Put differently, the University's obligations under FERPA present a live federal controversy, "irrespective of the fact that a state FOIA statute is also involved." (Univ. Br., p. 2, quoting *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 254 n.19 (7th Cir. 1981) (citing *Rath Packing Co. v. Becker*, 530 F.2d 1295, 1305-06 (9th Cir. 1975) (federal question jurisdiction lies where action "implicates federal rights," regardless of the fact that the federal statute may also afford a defense to a state law action)).

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[16] Disclosure duties under FERPA have been the subject of other federal declaratory relief actions by schools. *See, e.g., Unified Sch. Dist. No. 259, Sedgwick Cty., Kan. v. Disability Rights Center of Kan.*, 491 F.3d 1143 (10th Cir. 2007); *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987).

Finally, the DOJ incorrectly asserts that "it is the Illinois FOIA that provides the Tribune's cause of action." (Brief of *Amicus Curiae* DOJ, p. 10.) Tribune's complaint does not plead a cause of action or seek relief under Illinois FOIA. It seeks a declaration of the proper interpretation of the federal FERPA statute. Even if the claim has its origin in a state law dispute, "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

CONCLUSION

Plaintiff-Appellee Chicago Tribune Company respectfully requests that the Court affirm the district court's grant of declaratory relief.

Dated: August 12, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing BRIEF OF PLAINTIFF-APPELLEE CHICAGO TRIBUNE COMPANY, complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). The brief, including headings, footnotes and quotations, contains 13,198 words, as calculated by the word processing program employed to generate such brief.

/s/ James A. Klenk

CERTIFICATE OF SERVICE

James A. Klenk, an attorney, certifies that he caused three copies of the foregoing **BRIEF OF PLAINTIFF-APPELLEE CHICAGO TRIBUNE COMPANY** to be served upon the parties listed below via the CM/ECF system and via U.S. Mail, proper postage prepaid, on this 12th day of August, 2011:

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