No. 11–2066

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District of Illinois.
No. 1:10-cv-00568 – Joan B. Gottschall, Judge

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The United States respectfully submits this *amicus* brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

This case concerns the relationship between the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and the Illinois Freedom of Information Act ("Illinois FOIA"), which exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal ... law." 5 Ill. Comp. Stat. 140/7(1)(a). The University of Illinois denied a records request made by the Chicago Tribune on the ground that the disclosures are prohibited by FERPA. The Tribune filed this lawsuit against the University, seeking a declaratory judgment that FERPA does not prohibit disclosure of the requested records. The district court held that FERPA does not prohibit state officials from taking action but merely sets conditions on the receipt of federal funds.[1]

As discussed in the Argument, the district court's analysis reflects a misunderstanding of Spending Clause doctrine. Although no state is required to participate in a federal spending program, a state that chooses

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[1] The district court did decide whether the requested records are protected by FERPA. The United States has not reviewed the records and thus takes no position on that issue.

to participate must comply with the conditions on receipt of federal funds. The University receives funds under federal education programs, and it is therefore prohibited from making disclosures of education records that are inconsistent with FERPA. Indeed, when a university believes that it cannot comply with FERPA due to a potential conflict with state law, it is required to notify the Department of Education. *See* 34 C.F.R. § 99.61. Accordingly, if the Court reaches the merits, its should reject the reasoning of the district court.[2]

STATEMENT

The University of Illinois is a state university that receives funds under federal education programs. This suit arises out of a request that the Chicago Tribune filed with the University pursuant to the Illinois FOIA. The request sought records regarding a category of students who may have received preferential treatment in the admissions process as a result of their relationship to certain influential individuals.

The University denied the request on the ground that disclosure was prohibited by FERPA, and the information thus protected under the

[2] We note, however, that there is a threshold question of subject matter jurisdiction. *See* pp.10-11, *infra*.

Illinois FOIA, which exempts "[i]nformation specifically prohibited from disclosure by federal ... law." 5 Ill. Comp. Stat. 140/7(1)(a).

The Tribune filed this suit in district court, seeking a declaratory judgment that FERPA does not prohibit disclosure of the records. The district court entered summary judgment for the Tribune, holding that disclosures that violate FERPA's grant conditions are not "prohibited" by federal law. The court reasoned that "[t]he ordinary meaning of 'prohibit' is 'to forbid by authority' or 'to prevent from doing something.'" A.5 (quoting Webster's Ninth New Collegiate Dictionary 940 (1985)). The court declared that "FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action." *Ibid.* "Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations." *Ibid.* (citing *Gonzaga University v. Doe*, 536 U.S. 273, 278-79 (2002)). The court concluded that "Illinois could choose to reject federal education money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything." A.6.

ARGUMENT

The district court's analysis rests on a misunderstanding of Spending Clause doctrine. Although no state is required to participate in a federal spending program, a state that chooses to participate must comply with the conditions on receipt of federal funds. The University of Illinois receives funds under federal education programs. Accordingly, federal law prohibits the University from making disclosures of education records that are inconsistent with FERPA.

1. It is well established that Congress may "fix the terms on which it shall disburse federal money to the States." *New York v. United States*, 505 U.S. 144, 158 (1992) (citation omitted). "Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga University v. Doe*, 536 U.S. 273, 278 (2002). Although participation in a federal spending program is voluntary, "schools and educational agencies receiving federal financial assistance must comply with" FERPA's conditions. *Owasso Independent School*

District v. Falvo, 534 U.S. 426, 428 (2002); *see also* 34 C.F.R. §§ 99.1(a), 99.3.

Applying this principle, the Sixth Circuit in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), issued a permanent injunction that barred a university from releasing education records that the Chronicle of Higher Education had sought pursuant to the Ohio Public Records Act. The Sixth Circuit explained that, "'under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. One condition specified in the Act is that sensitive information about students *may not be released* without [the student's] consent.'" *Id.* at 809 (quoting *Owasso*, 534 U.S. at 428) (emphasis in *Miami University*).

The district court in this case noted that *Miami University* was a suit brought by the United States to compel a university to comply with FERPA. *See* A.6. The obligation to comply with FERPA is not, however, contingent on the institution of an enforcement action by the United States. Such an action merely enforces an obligation created by the university's acceptance of federal education funds. As the Sixth Circuit

explained, "[o]nce the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." *Miami University*, 294 F.3d at 809.

The *Miami University* court recognized that, under the Supreme Court's then recent decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), a private party cannot sue to enforce FERPA's non-disclosure provisions in an action brought under 42 U.S.C. § 1983. *See Miami University*, 294 F.3d at 809 n.11 (citing *Gonzaga*). The Sixth Circuit did not suggest that a university's obligation to comply with FERPA arises only when the United States has filed suit to enforce that obligation.

2. By exempting "[i]nformation specifically prohibited from disclosure by federal ... law," the Illinois FOIA ensures that state officials will not be subject to conflicting obligations under federal and state law. Compliance with the FERPA's restrictions on disclosure is thus consistent with the terms of the state statute.

Even assuming, however, that a conflict existed between FERPA's non-disclosure provisions and the Illinois FOIA, the federal grant conditions would control. The Supreme Court has repeatedly held that

Spending Clause statutes preempt inconsistent state law. In *Townsend v. Swank*, 404 U.S. 282 (1971), for example, the plaintiffs alleged that certain conditions imposed by Illinois law on the receipt of federal benefits under the Aid to Families with Dependent Children program were inconsistent with the Social Security Act and therefore invalid. *See id.* at 283-85. The Supreme Court agreed, holding that the Illinois statute was "invalid under the Supremacy Clause." *Id.* at 285.

Similarly, in *Carleson v. Remillard*, 406 U.S. 598, 604 (1972), the Supreme Court held that a California regulation that conflicted with the Social Security Act was preempted. In *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982), the Court held that provisions of a New York welfare program that conflicted with federal regulations under the Social Security Act were invalid under the Supremacy Clause. And, in *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curiam), the Court explained that the Social Security Act "unambiguously rules out any attempt to attach Social Security benefits," while the Arkansas statute at issue in the case "just as unambiguously allows the State to attach those benefits." The Court held that "this amounts to a 'conflict' under the Supremacy Clause

– a conflict that the State cannot win." *Ibid.*; *see also Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) ("In a pre-emption case such as this, state law is displaced" as inconsistent with the Medicaid statute "to the extent that it actually conflicts with federal law.").

Because spending conditions that have been accepted by state governments are federal law, they bind third parties in the same manner as other federal legislation. *See Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417 (1973) (funds derived from Social Security disability benefits are immune from state debt-collection processes by reason of the Supremacy Clause, even though the funds are in private hands); *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 257-58 (1985) (state statute imposing restrictions on the way local governments may spend funds received from the federal government under the Payment in Lieu of Taxes Act was invalid under the Supremacy Clause); *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 359 (2000) (because railway crossing signs were "installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law

addressing the same subject, thereby pre-empting respondent's [tort] claim").

Accordingly, the courts of appeals have uniformly recognized that "federal Spending Clause legislation trumps conflicting state statutes or regulations." *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1041 (8th Cir. 2002); *see also Westside Mothers v. Haveman*, 289 F.3d 852, 859-60 (6th Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002); *Frazar v. Gilbert*, 300 F.3d 530, 550-51 (5th Cir. 2002), *reversed on other grounds*, 540 U.S. 431 (2004).

Although the Supreme Court has "used contract law as an analogy to describe the legal relationship between the federal government and participating states," it has made clear "'that it is using the term "contract" metaphorically, to illuminate certain aspects of the relationship formed between a State and the federal government.'" *Missouri Child Care Ass'n*, 294 F.3d at 1040-41 (quoting *Westside Mothers*, 289 F.3d at 858). "Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett v. Kentucky Dept.*

of Education, 470 U.S. 656, 669 (1985); *see also Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002). Through FERPA, Congress has limited the circumstances in which a university that accepts federal education funds may disclose education records. Accordingly, if the Court reaches the merits, it should reject the reasoning of the district court.

3. We note, however, that there is a threshold question of subject matter jurisdiction. Although the Tribune's complaint alleges that this suit arises under FERPA, *see* A.12 ¶ 4, it is the Illinois FOIA that provides the Tribune's cause of action. It does not appear that the Tribune's "right to relief under state law requires resolution of a substantial question of federal law." *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 164 (1997). Instead, the exemptions are framed as defenses. *See* 5 Ill. Comp. Stat. 140/11(f); *see also Northeast Illinois Regional Commuter R.R. Corp. v. Hoey Farina & Downes*, 212 F.3d 1010, 1014 (7th Cir. 2000) (the Declaratory Judgment Act does not permit a federal court to adjudicate "what amounts to a federal defense to a state-law cause of action") (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667

(1950), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16 (1983)).

CONCLUSION

If the Court reaches the merits, it should reject the reasoning of the district court.

Respectfully submitted.

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July 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2011, I caused the foregoing *amicus* brief to be filed and served through the ECF system.

s/Alisa B. Klein

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