No. 01-679

In the
Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,
v.
JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE STUDENT PRESS LAW CENTER, SOCIETY OF PROFESSIONAL JOURNALISTS, AND SECURITY ON CAMPUS, INC., IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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

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

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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

Security On Campus, Inc., is the only national non-profit organization devoted exclusively to the prevention of college and university campus violence and other crimes. Since SOC's founding in 1987 by Connie and Howard Clery, whose daughter Jeanne was raped and murdered on campus, SOC has sought to make campuses safer by ensuring that students are made aware of crimes and other dangers to their safety on campus. SOC's efforts have been the impetus for numerous state and federal laws that disclose greater campus crime information to members of the public, including current and prospective students. SOC is based in King of Prussia, Pennsylvania.

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

SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act ("FERPA") imposes a requirement on educational institutions: if they wish to receive federal funds, they cannot have a "policy or practice" of releasing certain student records. This requirement does not create a "right" sufficient to serve as the basis of a civil rights suit under 42 U.S.C. § 1983, but rather recognizes a "systemwide" interest by Congress in records disclosure issues.

Privacy rights that can be vindicated under § 1983 must rise to the level of *constitutional* privacy violations — illegal

intrusion into homes by state agents, for example. A law enacted by Congress with the goal of requiring secrecy in certain records does not create a constitutional right, and the statutory interest recognized fails to meet this court's standards to justify a civil rights suit.

The judgment of the Washington Supreme Court finding that FERPA "rights" can be vindicated under § 1983 should be overturned, to avoid the consequences of allowing federal statutes like FERPA from wiping out years of work by state legislatures to balance privacy interests against the public need for information about its government and institutions.

ARGUMENT

I. The privacy interest addressed in FERPA does not rise to the level of a "right" that can be vindicated by a § 1983 claim.

The Civil Rights Act of 1871 included a provision, currently codified at 42 U.S.C. § 1983, that allows for private suits against state actors[2] who deprive individuals of "any rights, privileges or immunities secured by the Constitution and laws." The impact of this provision has grown exponen-

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[2]In the evolution of § 1983 suits, courts have required a state actor to infringe on a specific right under the color of law. Here, the "actor" is a private university. The question was raised below whether a private university would qualify as a state actor for purposes of FERPA. However, in granting the petition for certiorari, the Supreme Court did not take this question. Regardless of whether a private university would be presumed a state actor for purposes of FERPA, FERPA was not intended to create the kind of right that § 1983 was intended to protect.

tially over the last 130 years, allowing it to evolve from a barely used remedy for violations of constitutional rights by state officials, to the method of vindicating a range of specific statutory violations in federal courts. As applicability of § 1983 expanded to cover statutory violations, this Court developed standards for determining when a statute created an individual right that could be enforced through a civil rights lawsuit.

The most troublesome set of cases surely are those that revolve around violations of perceived "rights" of privacy. Privacy is a term that still defies easy definition.

While a final definition of this term is beyond the scope of this case, this Court is now being asked to define at what point a privacy interest becomes a "right" under § 1983. *Amici* propose that the answer is clear: Only those privacy interests that have been recognized as *constitutional* privacy rights properly justify § 1983 suits. This distinction is consistent with the history and purpose of § 1983, with its derivation from the Fourteenth Amendment, and with the public policy interests that would be jeopardized by an overly broad definition that would allow any privacy interest to reach the level of a protected "right."

Another factor that should inform the examination of privacy rights concerns exactly what type of information disclosure is at stake. In many cases, privacy advocates argue that information that has already been given to the government — and thus been removed from the truly private realm — should be kept secret by the government. This argument has merit for highly personal information that is required to be disclosed to a governmental body. But when the cloak of secrecy also covers the very information that governments use to make decisions, or that the public needs to inform its own

oversight of government or institutions, secrecy in the name of "privacy" becomes a dangerous tool that harms the public interest.

Such is the case here. Under FERPA, schools have been hesitant to release important campus crime information for fear of a complete loss of federal funds. Congress amended FERPA to address that problem, Higher Education Amendments of 1992, PL 102-325, §1155, 106 Stat 448 (1992), but the specter of massive civil rights litigation for violations over incidents such as discussing a future teacher's moral fitness, as in this case, or for having a student call out a grade in class, as in a case heard this term by this court and decided earlier this week, *Owasso Independent School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001), will again lead to a clampdown on release of important public information. Section 1983, a law enacted as a sword of justice to remedy heinous crimes such as lynchings and home-burnings in the post-Civil War era, should not be fashioned into a bludgeon to deny the general public access to important information.

This court's standards make clear that while § 1983 applies to violations of laws, not just constitutional rights, those laws must nonetheless clearly create individual rights before they can serve as the basis for a civil rights claim. An examination of the development of that principle makes clear that the privacy interest addressed in FERPA does not create such rights. FERPA requires educational institutions to adopt a systemwide policy that protects privacy if they wish to receive federal education funds, but this Court has held that such a policy is quite distinct from an enforceable individual right.

A. Applying § 1983 to FERPA is inconsistent with the history and tradition of 1983 claims.

1. The origins of § 1983

42 U.S.C. § 1983 was originally introduced as § 1 of the Ku Klux Klan Act of 1871. *District of Columbia v. Carter*, 409 U.S. 418, 423-426 (1973) (citing the Act of April 20, 1871, §1, 17 Stat. 13). This legislation, which later became known as the Civil Rights Act of 1871, was one part of a series of civil rights laws created to address the growing terrorism of the Ku Klux Klan and prevent violent acts such as lynchings of African-Americans. Initially, § 1 of the Act "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Id*. at 426. After the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress enacted a series of civil rights statutes to assist in the enforcement of the new amendments because the amendments "alone would not secure equality for blacks or stop the atrocities committed against them." John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW, 644 (5th ed. 1995). *See also* Michele W. Homsey, *Employment Discrimination in The Public Sector: The Implied Repeal of Section 1983 by Title VII*, 15 LAB.LAW 509 (2000). The Civil Rights Act was intended to enforce rights created by the Fourteenth Amendment. *See Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

In 1874, Congress expanded the statute to apply to rights under the Constitution "and laws," when Congress consolidated the laws of the United States into a single volume under a new subject-matter arrangement. *See* 2 Cong.Rec. 827 (Jan. 21, 1874).

Section 1983 currently states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983 (2001).

For nearly 70 years after its inception, § 1983 claims were rarely raised. *See Maine v. Thiboutot*, 448 U.S. 1, 27 (Justice Powell's dissent) ("One writer found only 21 cases decided under §1983 in the first 50 years of its history.").

The Supreme Court made one of its first modern interpretations of § 1983 in *Hague v. CIO*, 307 U.S. 496 (1939), holding that § 1983 may be used to enforce the right to assemble and distribute literature as a privilege and immunity of a citizen, as protected by the Fourteenth Amendment. *Hague* at 515 (1939). Like *Hague*, the cases that began raising §1983 claims during the 1960s were brought for violations of Fourteenth Amendment rights. *See generally* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 745-47. Section 1983 began to evolve from an effort to force states to enforce their own rights into an effort "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by

the Fourteenth Amendment might be denied by the state agencies." *Carter*, 409 U.S. at 428 – 429.

The statute gained popularity during the civil rights movement of the 1960s and 1970s after the *Monroe v. Pape* decision, which allowed § 1983 to remedy a constitutional injury inflicted by an officer. *See Weinberg* at 746. These cases again stressed constitutional due process and equal protection violations as guaranteed by the Fourteenth Amendment. *Id.* ("The decade immediately following *Monroe* was marked by increasing absorption of the Bill of Rights into the fourteenth amendment.").

2. Expansion to cover statutory rights

But the biggest step in the modern evolution of § 1983 came in 1980, when this Court first allowed it as a remedy for more than just civil rights or equal protection claims. *Maine v. Thiboutot*, 448 U.S. at 4. In *Thiboutot*, a father sued under § 1983 over the welfare benefits he was entitled to under the federal Social Security Act. The *Thiboutot* Court held that the plain meaning of § 1983's reference to rights under the Constitution "and laws" meant that violations of federal statutory laws, such as the federal Social Security Act, could be remedied through a § 1983 suit. Id. at 4-8.

The Court has clarified that under the *Thiboutot* standard, § 1983 suits were not available for all violations of federal law, but only for violations of *rights*. *See Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981).

The Court has also specified that obligations created by federal laws under the spending power must be imposed on states unambiguously. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, a patient

brought suit against a Pennsylvania hospital for providing a less than "minimally adequate habilitation," as required by the Developmentally Disabled Assistance and Bill of Rights Act. *Pennhurst*, 451 U.S. at 5-8. The question was whether Congress intended a "bill of rights" provision of the act to create enforceable rights and obligations through § 1983. The *Pennhurst* Court held that a statute must create enforceable rights before a court will imply a private cause of action; it must go beyond mere precatory language suggesting that Congress preferred that states provide certain types of treatment. *Id*.

"The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. The *Pennhurst* Court found that even though the Act listed a variety of conditions for the receipt of federal funds, the Act was voluntary like other federal-state grant programs, and the states were given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding. *Id.* In cases such as *Pennhurst* where the language of the Act was ambiguous, the Court found that Congress merely intended the legislation to serve as "a nudge in the preferred directions." *Pennhurst*, 451 U.S. at 19. "When Congress intended to impose conditions on the grant of federal funds…it proved capable of doing so in clear terms." *Id.* at 23. *See also Id.* at 17-18 ("In cases where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.").

The *Pennhurst* Court found that Congress must express clearly its intent to impose conditions on the grant of federal

funds so that the states can knowingly decide whether or not to accept those funds before it will assume that a "right" has been created. *Id.* at 24. The Court found that the Act did not provide the express and clear language that illustrated a Congressional intent to impose mandatory conditions on the grant of federal funds.

3. *Differentiating systemwide obligations from individual rights*

In the decade after the *Pennhurst* decision, this Court on several occasions held that federal statutes can create private remedies if the obligations are unambiguous. But without language that specifically provides for a private remedy or that provides guidance to states in how to comply, the statute merely creates a generalized duty on the states to comply.

In *Suter v. Artist M.*, 503 U.S. 347 (1992), the question raised was whether Congress, in enacting the Adoption Assistance and Child Welfare Act ("Adoption Act"), unambiguously created a federally enforceable right to force states to make "reasonable efforts" to prevent children from being removed from their homes. The Supreme Court found that it did not because the language imposed "only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." The Court also found that "Congress did not intend to create a private remedy for enforcement of the 'reasonable efforts' clause" because it did not create a federally enforceable right.

The *Suter* Court found that:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing

> acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Suter, 503 U.S. at 356.

The Court distinguished those cases where the provisions of federal funding statutes were specific enough to imply a federally enforceable right. The Court found that in a case like *Wright v Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987), where federal housing legislation imposed a ceiling on the rates charged to low-income housing tenants and specifically defined in regulations how a reasonable rate for utilities in rent would be measured, the tenants had an enforceable right to sue. *Suter* at 357. Likewise, the Court found that in a case where the federal Medicaid legislation required the states to adopt reasonable rates for Medicaid facilities and then details the factors to be considered in determining the methods for calculating those rates, the obligation could be enforced by the Medicaid providers through a § 1983 suit. *Suter* at 359 (citing *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 519 (1990)).

In contrast, the statute in *Suter*, which required the State to make "reasonable efforts" to maintain an abused or neglected child in his home, or return the child to his home from foster care, did not provide statutory guidance as to how the "reasonable efforts" are to be measured. Id. at 360. "How the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.*

The *Suter* Court also found that while the statutory

provisions in the Adoption Act might not have provided a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under §1983 (which they did not reach due to their finding that the Adoption Act did not create a federally enforceable right), it showed that the absence of a remedy to individual plaintiffs under §1983 did not make the "reasonable efforts" clause moot since language of other sections of the Act showed that Congress knew how to impose precise requirements on the states when it intended to. *Suter* at 360-361.

The Court then summarized the standards for when a "right" is created, and distinguished such rights from more general "systemwide" performance policies, in *Blessing v. Freestone*, 520 U.S. 329 (1997). Examining a claim based on the denial of services under a child support services law, the *Blessing* Court provided a three-prong test for deciding whether enforceable rights are created. *Id.* at 340. First, Congress must have intended that the provision in question benefit the plaintiff. *Id.* at 341. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. *Id.* at 342. Third, the statute must unambiguously impose a binding obligation on the states. *Id.*

But just as importantly, the Court in *Blessing* made clear that many funding conditions imposed by Congress are meant to establish systemwide policies, not individual rights. Noting that plaintiffs must identify with particularity the rights they claimed, and that courts must examine these "manageable analytic bites," rather than the statute in general, the Court found that:

> The Court of Appeals did not engage in such a methodical inquiry. As best we can tell, the Court of

> Appeals seemed to think that respondents had a right to require the Director of Arizona's child support agency to bring the State's program into substantial compliance with Title IV-D. But the requirement that a State operate its child support program in "substantial compliance" with Title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied. . . . In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights.

Blessing at 343-4.

This distinction between individual rights and systemwide performance requirements is essential to understanding why FERPA and other information nondisclosure rules do not create individual rights that can be the impetus for § 1983 claims.

4. How FERPA fits within the § 1983 framework.

The provisions in FERPA are not specific enough to imply a federally enforceable right. At best, FERPA creates a "systemwide" right, which this Court has held is an insufficient basis for a § 1983 claim.

FERPA is an information disclosure rule that specifies

how schools must handle student records if they wish to receive federal funds. It provides:

> No funds shall be made available under any applicable program to any educational agency or institution which has a *policy or practice* of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following [exceptions].

20 U.S.C. § 1232g(b)(1)(emphasis added).

Created pursuant to the spending power of Congress, FERPA merely demonstrates granted incentives by Congress to regulate the states' conduct. The specific language in FERPA gives the Secretary discretion to determine whether an educational institution has engaged in a "policy or practice" of disclosing personally identifiable information held in education records. The Act provides that the Secretary may withhold federal funding if the educational institution fails to satisfy the requirements of the Act.

Like the "reasonable efforts" language in *Suter*, the "policy or practice" language in FERPA does not provide enough guidance to create more than a generalized duty of compliance by the educational institutions. Furthermore, the language specifically provides the Secretary with discretion to determine when an educational institution has failed to comply with FERPA. When the Secretary finds noncompliance, the federal funding must be withheld.

FERPA clearly addresses a "systemwide" policy interest, rather than an individual right.

First, FERPA was not intended to protect against single isolated instances of disclosure. In the case before the court, the student argued that the individual release of his education records among Gonzaga University personnel and to the Office of the Superintendent of Public Instruction violated a right under FERPA. But FERPA does not prohibit individual disclosure of education records. Instead it creates a potential funding penalty for institutions that have a "policy or practice" of releasing records covered by the statute without consent. "[FERPA] addresses the conditions under which an institution becomes ineligible for funds. It does not prohibit a request for or release of student records." *Tombrello v. USX Corp.*, 763 F.Supp. at 545. Nor does it provide any individuals with a remedy to enforce the statute. The purpose behind FERPA was to provide students with access to their education records and to limit the transferability of their education records to third parties without their advance knowledge and consent. When the Secretary of Education determines that a university has engaged in a policy or practice of non-compliance, the only recourse is the discretion of the Secretary of Education to determine what educational institutions have not complied and then to withhold funds. From the language of FERPA alone, educational institutions may not engage in a policy or practice of education record disclosure in order to obtain federal funding, but FERPA does not specifically regulate single isolated instances of disclosure. Thus, FERPA was not intended to create individual rights, but to encourage a systemwide policy of nondisclosure. Without an individual right, the test fails.

Second, unlike some other federal funding statutes Congress created, FERPA's provisions are too vague and amorphous to enforce. In *Wright*, the statute specifically defined how a "reasonable amount of utilities" would be

determined. In *Wilder*, the statute also defined the computable and measurable rates that states were required to reimburse to Medicaid providers. FERPA's provisions are more like the statutes in *Suter* and *Blessing*, which refer to a particular plan that states were to adopt. In *Suter*, the statute required the participating states to make "reasonable efforts" to avoid removing children from their homes and to return children to their homes, *Suter*, 503 U.S. at 351, but gave discretion to the states on how to carry out those efforts. *See Id.* In *Blessing*, the statute required the participating states to certify that they were operating in "substantial compliance" with the Act. The Court found in *Blessing* that the "substantial compliance" language didn't create individual entitlement to the services outlined in the Act, but rather provided a "yardstick for the Secretary to measure the systemwide performance." *Blessing*, 520 U.S. at 343. Likewise, FERPA speaks in terms of a "policy or practice" of nondisclosure, but leaves the discretion to the educational institutions to carry out the "policy or practice." Nothing in the regulations define what a policy or practice would entail.

Finally, since FERPA does not unambiguously prohibit the release of an individual's education records, but merely prohibits a "policy or practice" of disclosure and then provides little guidance to the states as to what that "policy or practice" might entail, it fails the last prong of the *Blessing* test that requires an unambiguous binding obligation on the states.

Even presuming, for the sake of argument, that what the student alleges is true and Gonzaga University did release the personally identifiable information in the student's education records to the student's detriment, this action only constitutes one individual instance of disclosure and does not indicate a

"policy or practice" of disclosure, as FERPA's provisions unambiguously require. Thus, it fails the final requirement that the statute unambiguously imposes a binding obligation on the states because the entitlement the student raises in his claim is not the same requirement imposed on the educational institutions. The language of the statute unambiguously states that the educational institutions are prohibited from adopting a "policy or practice" of disclosure, rather than an individual release of records.

As in *Blessing*, FERPA was not intended to ensure that "the needs of any particular person have been satisfied," but merely required participating schools to have a systemwide plan in place. *Blessing*, 520 U.S. at 343.

B. This case provides the court with the opportunity to determine what level of privacy "interest" identified by Congress rises to the level of a justification for a 1983 civil rights claim.

While the line of cases above are useful in a determination of what statutory mandates create "rights," it is not at all clear that they are helpful in the specific area of privacy rights. In fact, privacy claims allowed under § 1983 have generally been based on *constitutional*, not statutory, rights, usually under the Fourth Amendment. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (discussion of immunity for officers in entry into home; Fourth Amendment violation case under § 1983); *Valdez v. McPheters*, 172 F.3d 1220 (10th Cir. 1999) (expectation of privacy in residence is protected under Fourth Amendment and thus remediable under § 1983); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) *cert. denied,* 113 S.Ct.

2996 (1993) (forcing officer to undergo urinalysis test absent cause was violation of Fourth Amendment and remediable under § 1983).

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

It is worth noting that Congress's power to create a privacy "right" under its spending power is still suspect. Conditional spending measures carry with them the penalty of revocation of funding for noncompliance; the power to create a "right" comes not from the Spending Clause of the Constitution, but from § 5 of the Fourteenth Amendment, which gives Congress the power to make laws to enforce the due process and equal protection provisions of § 1 of that amendment. In *Pennhurst*, the Court noted that it was unnecessary to address the question of whether a right is "appropriate" under Congress' Fourteenth Amendment powers only because the Court had found that there was no right created in the Developmentally Disabled Assistance and Bill of Rights Act. 451 U.S. at 16 (fn. 12). And as the *Pennhurst* Court noted, "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S. at 16.

The privacy "rights" allegedly created by FERPA are not

justified by the Fourteenth Amendment. Outside of the sphere of Fourth Amendment privacy cases, the personal privacy issues that traditionally have warranted constitutional protection — usually related to marriage, procreation, contraception, and child rearing — concern protection against certain types of government intrusions into personal and private matters, but do not create a "general constitutional 'right of privacy.'" *Whalen v. Roe*, 429 U.S. 589, 608 (1977) (Justice Stewart's concurrence). Furthermore, privacy rights against government intrusion are distinct from the interests in non-disclosure promoted in cases like the present one. This distinction is magnified when there is a legitimate state interest in releasing some information that might be considered private, such as the campus crime information discussed *infra* at 26-27.

In addition, educational institutions have a legitimate interest in some disclosures of information, whether that means in informing the university community of crime and safety concerns, or in maintaining the integrity of its moral character certification processes, as in the present case. The purpose behind school certification of an applicant is that the school is in the best position to verify an applicant's moral conduct. A school must be permitted to deny an applicant's affidavit, which involves disclosing information about the student. Otherwise, the entire purpose of the school's certification processes is defeated. The certification process by the school would be pointless since all applications would be automatically granted regardless of a student's true character.

C. When Congress intends to create an enforceable privacy interest, it explicitly does so.

Congress has in the past successfully created privacy

statutes where it wanted to protect the unwarranted invasion of privacy of individuals. The Privacy Act was created in 1974 in order to regulate the collection, maintenance, use, and dissemination of personal information by federal government agencies. 5 U.S.C. § 552a(b) (2002). Congress provided that private entities, state and local government agencies, and individuals, unless sued in their official capacity as government officials, are not subject to the Act. However, it did create one exception. It made federal, state, and local governments liable under the Privacy Act for disclosure of an individual's Social Security number. *See* Privacy Act of 1974, PL 93-579, §7, 88 Stat 1896 (1974). In those instances, a person may file suit against a state or local agency for violation of privacy.

Similarly, the Drivers Privacy Protection Act was created in 1994 in order to restrict the release and use of certain personal information in state motor vehicle records.18 U.S.C. § 2721 (2002). It specifies exactly what criminal and civil penalties can be levied against officials who violate the act, 18 U.S.C. § 2724 (2002), as well giving individuals the right to sue for violations. Id.

Another example is the Fair Credit Reporting Act, which was created in 1970 to "insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. §1681 (2002). The Act provides the circumstances in which information may be disclosed by reporting agencies. Violations of the provisions of the FRCA will result in fines under Title 18, imprisonment for not more than 2 years, or both. 18 U.S.C. §1681r (2002).

In each of these privacy statutes, Congress granted power to individuals to sue state and local agencies that have

violated the provisions in the statute. It also required state agencies to comply with the provisions. In some statutes, Congress provides intricately detailed civil remedies for failure to comply with the statute's provisions, such as it did in the Privacy Act. *See* 5 U.S.C. §552a(g)(1) (2002). For example, under the Privacy Act, refusal or failure to comply with the provisions gives power to the individual to bring a civil action against the agency, and even statutorily provides jurisdiction of the civil suits to the district courts of the United States, as well as judicial guidance for judgments. 5 U.S.C. §552a(g). In other statutes, Congress merely provides that violations will result in fines or imprisonment, or both. *See* 18 U.S.C. § 2724. *See also* 18 U.S.C. § 1681r.

Congress is capable of writing provisions in statutes to provide individuals the power to enforce a particular statute against an agency for invasions of privacy. Had Congress intended FERPA to similarly provide individuals with a enforceable right to sue for noncompliance, it would have directly provided so in the statute.

II. Allowing § 1983 claims under a federal statute like FERPA will undermine state action to protect citizens' interests and lead to greater government secrecy by undermining state open records laws.

A. Allowing remedies beyond government revocation of funds will have sweeping consequences.

Educational institutions voluntarily elect to accept funding and thus submit to the requirements of FERPA. Congress did not force schools to comply with FERPA, but rather provided an incentive — federal funding — to comply. The plain

language of the statute, as well as the regulations, support this interpretation. *See* 20 U.S.C. §1232g(b)(1). *See also, e.g.,* 34 C.F.R. § 99.67 ("If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution *has complied voluntarily* with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.") (emphasis added).

Allowing § 1983 suits to enforce FERPA encourages administrative agencies and courts to create additional remedies other than the one Congress provided — revocation of funds for noncompliance. The Sixth Circuit is currently considering just such a case, where a federal District Court allowed the U.S. Department of Education, invoking FERPA, to obtain an injunction forbidding a state university from releasing campus court records involving criminal behavior by students. *U.S. v. Miami University*, No. 00-3518 (6th Cir. filed April 27, 2000). In effect, this gave the federal government injunctive power, similar to a 1983 case, in order to directly subvert a state open records law requirement. *U.S. v. Miami University*, 91 F.Supp.2d 1132 (2000).

In July 1997, the Ohio Supreme Court ruled that student disciplinary records relating to criminal behavior[3] maintained by a public college were not "education records" under FERPA, and therefore were subject to the Ohio state open records law. *See State ex rel. The Miami Student v. Miami University*, 79 Ohio St.3d 168, 680 N.E.2d 956 (1997). When a subsequent request was made to the universities to release the campus crime records, the Department of Education

[3]This did not pertain to academic misconduct, such as cheating or plagiarism or other non-criminal offenses.

intervened and sought an injunction, a power it had never before exercised in a FERPA case,[4] to prevent the schools from releasing the information. *See Miami University*, 91 F.Supp. 2d 1132, 1136. The federal district court disregarded the state supreme court's decision on the open records question and prohibited the disclosures under FERPA. *Id.*

But as discussed *supra* at 15, FERPA does not prohibit the disclosure of records. FERPA should not be viewed as a weapon used by the federal government to eviscerate state public records laws.

B. Making public policy decisions by balancing privacy and access interests has traditionally been and is appropriately left to state legislatures.

Every year, states modify their access laws in an effort to fine-tune the balance between the competing interests of public access to information and the interest in personal privacy when individuals are identified in records. The balancing is by no means perfect, and the balance that reconciles those competing interests is often elusive. Yet legislatures will react to problems that arise, often enacting

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[4]The regulations regarding FERPA limit the Secretary to the following remedies, when determined that a school has failed to comply:

1) Withhold further payments under any applicable program;

2) Issue a complaint to compel compliance through a cease-and-desist order; or

3) Terminate eligibility to receive funding under any applicable program.

34 C.F.R. § 99.67

openness reforms when confronted with corruption that flourished in secrecy, and enacting secrecy measures when individuals feel that purely personal information about them is being disclosed to others. Openness advocates are kept busy fighting for the public's right to know how its government operates and what information it has gathered to guide its decisions.

Although this method of legislating does not lead to a perfect balance, it is far more appropriate in a democratic system than a scheme where state actors refuse to release information out of fear of civil rights litigation because of the sweeping nature of a conditional spending provision. Allowing § 1983 claims for perceived violations of statutes like FERPA, whose provisions are unclear to begin with,[5] as well as all future regulations enacted by Congress that address privacy interests but create no private cause of action, will have staggering implications. States will have no choice but to completely bar access to entire categories of information once Congress acts in a particular area, for fear of massive civil rights liability for alleged violations. The debates over balancing the public interests in disclosure of information

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[5]See, for example, the discussion of *amici* The Reporters Committee for Freedom of the Press and The Student Press Law Center, in the other FERPA case heard by this Court this term, *Owasso Indep. School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001), pointing out to the court that the requirements of FERPA have been significantly misinterpreted by various states, school districts and universities, to the detriment of the public. Brief *Amicus Curiae* of The Reporters Committee for Freedom of the Press and The Student Press Law Center at 19-28, *Owasso Indep. School District v. Falvo*, 534 U.S. ___ (2002), *reversing* 233 F.3d 1203 (10th Cir. 2001).

with the private interest in secrecy of personal information will simply end under the shadow of a disclosure "death penalty" in the name of civil rights.

This balancing between access and privacy interests is appropriately left to the state legislatures. Allowing § 1983 claims not only negates the role of those legislatures, it also ignores the balancing of interests already performed by Congress in enacting federal laws. There are a multitude of laws enacted by Congress to govern the dissemination policy of government records. Congress balanced these interests in the manner it felt was most appropriate. Allowing § 1983 suits to be brought on these statutes disrupts the tenuous balance struck by Congress between access and privacy.

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

C. Eliminating this balancing of interests would have a drastic effect on public access to campus crime information.

The harms discussed generally above are real and would have an immediate effect. Specifically, allowing this claim would negate attempts to satisfy the public interest in receiving information on campus crime.

In the year 2000, there were 395 murders, 3,982 forcible sex offenses, 12,894 robberies, 18,761 aggravated assaults, 68,486 burglaries, and 2,008 instances of arson, among other serious crimes reported on college and university campuses across the United States, according to the U.S. Dept. of Education. *See* OFFICE OF POSTSECONDARY EDUCATION,

DEP'T OF EDUCATION, *Campus Crime Statistics Online*, http://www.ed.gov/offices/OPE/PPI/security.html (last seen on February 6, 2002). Nearly 80 percent of campus crime is student-on-student crimes, and 95 percent of all campus crimes are drug or alcohol related. *See* Student Right-To-Know and Campus Security Act, PL 101-542, §202(2), 104 Stat 2381 (1990).

During an academic year, nearly one out of every 36 college women will be a victim of an attempted or completed rape. *See* BONNIE S. FISHER, et al., U.S. DEP'T OF JUSTICE, *The Sexual Victimization of College Women* (2000). In an average five-year college career, the totals of victimized women reach nearly 20 to 25 percent of college women. Id. The perpetrators are most likely classmates. Id. About 36 percent of the completed rapes and 44 percent of the attempted rapes were committed by other students. Id. Most of these rapes are never reported to the authorities. Id.

Crimes on campuses is a grave problem. The education system cannot run smoothly with constant threats to the safety and welfare of the students. The Ohio Supreme Court in the *State ex rel. Miami Student v. Miami University* case, *supra* at 22, acknowledged the increase of campus crime and stressed that access to campus crime information helps students and parents make intelligent decisions concerning which university to attend. 680 N.E. 2d 956 (Ohio 1997).

However, the fear of FERPA claims has encouraged colleges and universities to withhold campus crime information from the public, even when that information would have been public if it had been gathered by local police departments and even in some cases where it is otherwise mandated to be public information by either state or federal law. *See* TOM DICKSON, *Buckley Amendment, Censorship Still Prob-*

lems for College Newspapers, COLLEGE MEDIA REVIEW, 8-13 (1997). *See also* U.S. DEP'T OF EDUCATION, "Dear Colleague" Letter Gen-96-11.

Allowing § 1983 suits to enforce federal privacy interests will have a chilling effect on the willingness of government agencies to release public information for fear of civil rights litigation. Subjecting educational institutions to § 1983 actions by students to enforce FERPA rights would only make them more reluctant to disclose campus crime information than they already are, which would only further deny students and their parents the opportunity to make informed decisions about which campuses are safe and how to avoid criminal victimization on and around their campuses. In a study conducted last year, more than half of 3500 students who were surveyed said that they were more likely to report crimes if the crime reports were accessible to the public. *See* S.M. JANOSIK & D.D. GEHRING, *The Impact of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act on Student Behavior*, 4 (2001).

Ohio's highest court recognized the potential harms on university students, prospective students, and their parents when the public is kept in the dark about criminal incidents on campus:

> Unfortunately at present, crimes and other student misconduct are escalating at campuses across the nation. For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend. Likewise, for students already enrolled in a university, their safety is of utmost importance. Without full public access to disciplinary

proceeding records, that safety may be compromised.

State ex rel. The Miami Student v. Miami University, 79 Ohio St. 3d at 172.

General statistics do not give students and their parents enough details to make an informed decision on what school to attend or, if already enrolled, what areas of campus to avoid. Most students get their campus crime information through news reports. In a survey taken among college students, about 60 percent of more than 3500 students surveyed said they read reports, newsletters, and flyers compiled at their institutions related to crime and safety, mostly through the student newspaper. *See* JANOSIK at 4, 18. These students were most likely to be women than men, and some of them had already been victims of campus crime. *See Id.* Many of them also added that they would be willing to change their behavior in how they protected themselves from harm and how they moved around on campus after what they had read about crimes and safety on campus. *Id.*

Congress itself realized the importance of releasing campus crime information. In 1998, it amended FERPA and allowed for disclosures of campus crime information. *See* 20 U.S.C. §1232g(b)(6)(B). But if § 1983 claims are permitted as a means of enforcing federal statutes like FERPA, states will almost certainly have no choice but to completely bar access to entire categories of information once Congress acts in a particular area for fear of massive civil rights litigation liability.

Permitting these types of claims will allow federal courts, as the court did in *U.S. v. Miami University*, to continue to ignore the balance the state legislatures have created in weighing the public's interest in information against individ-

ual privacy interests. The courts should not ignore the government's interest in strong open government laws. Permitting courts to create these remedies when Congress did not unambiguously through FERPA risks the elimination of a valuable oversight of government by its citizens, making it harder for the public to keep those institutions accountable for their actions.

CONCLUSION

Amici respectfully urge that this court overturn the Washington Supreme Courts' determination that a § 1983 remedy is proper under FERPA. Recognizing such a broad privacy right springing from a statute meant only to create a systemwide program will have damaging consequences for the public's ability to hold its public institutions accountable.

Respectfully submitted,

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