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Amici respectfully submit this brief for the purpose of expanding upon the reasons that the materials at issue in this case are “education records” within the meaning of the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, and that this Court accordingly should deny mandamus relief.

I. STATEMENT OF THE IDENTITY AND INTEREST OF AMICI

Amici are national organizations dedicated to the interests of improving higher education. They support respondent The Ohio State University in this action because, if this Court were to limit FERPA in the way urged by relator ESPN, Inc. (“ESPN”), the ruling would substantially diminish established privacy rights in education records and have a profound adverse impact on administration and operation of the nation’s public educational institutions, to the detriment of their educational missions.

Founded in 1918, the American Council on Education (“ACE”) is a national nonprofit organization that represents more than 1800 presidents and chancellors of accredited degree-granting institutions in the United States. ACE is dedicated to the improvement of higher education, and recognizes that widespread access to a postsecondary education is a cornerstone of a democratic society. As the major coordinating body for the nation’s higher education institutions, ACE seeks to provide leadership and a unifying voice on key higher education issues. Accordingly, ACE defends its member institutions in their efforts to meet the nation’s goal of expanding access to higher education and increasing educational attainment.

The American Association of Collegiate Registrars and Admissions Officers (“AACRAO”), founded in 1910, is a nonprofit association of more than 2,600 institutions of higher education and more than 10,000 enrollment officials. AACRAO represents campus professionals in admissions, enrollment management, academic records and registration.

Because they work with sensitive information contained in educational records, members of AACRAO are directly responsible for protecting the privacy of applicants, students and former students.

The American Association of Community Colleges (“AACC”), a nonprofit association, is the primary national voice and advocacy organization for the nation’s community colleges, representing nearly 1,200 two-year, associate degree-granting institutions and more than twelve million students -- almost half of all U.S. undergraduates.

The Association of American Universities (“AAU”) is a nonprofit association of leading research universities devoted to maintaining a strong system of academic research and education. It consists of fifty-nine U.S. universities and two Canadian universities, divided almost evenly between public and private institutions. Founded in 1900, AAU focuses on national and institutional issues that are important to research-intensive universities, including funding for research, research and education policy, and graduate and undergraduate education.

The Association of Public and Land-Grant Universities (“APLU”), founded in 1887, is a nonprofit association of public research universities, land-grant institutions and state public university systems. APLU member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all federally-funded academic research, totaling more than \$34 billion annually. As the nation’s oldest higher education association, APLU is dedicated to advancing learning, discovery and engagement. The association provides a forum for the discussion and development of policies and programs affecting higher education and the public interest.

NASPA-Student Affairs Administrators in Higher Education (“NASPA”) is the leading voice for student affairs administration, policy and practice, and affirms the commitment of the

student affairs profession to educating the whole student and integrating student life and learning. With more than 12,000 members at 1,400 campuses, and representing 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship and the spirit of inquiry.

II. ARGUMENT

The Ohio State University has properly and necessarily protected confidential student information in compliance with the mandatory provisions of FERPA, for the reasons set forth in the merits brief of the Ohio Attorney General. The purpose of this amicus brief is to provide a supplemental explanation of the statutory definition of “education records” and the pertinent case law -- the only reasonable conclusion of which is that the records at issue are included within the scope of FERPA and thus barred from release under federal law and the Ohio Public Records Law.

Proposition of Law: The Family Educational Rights and Privacy Act Compels Educational Institutions to Preserve the Confidentiality of “Education Records” That “Contain Information Directly Related to a Student” in Response to Requests under the Ohio Public Records Law.

This Court should enforce FERPA as written, including the congressional definition of the term “education records,” and reject the ESPN request to transform that statute into a vehicle for selective disclosure of information directly related to students.

A. The Ohio State University Has Conscientiously Observed the Requirements of FERPA and the Ohio Public Records Law.

There is no dispute that, like nearly every other university and college in the United States, Ohio State receives substantial federal funds. *See* Affidavit of Diane L. Stemper at ¶¶ 4-8; Affidavit of Thomas F. Ewing at ¶¶ 4-6. In 2010, Education Department funding for all post-

secondary educational programs and new students loans totaled over \$140 billion.¹ Because amici's member institutions accept such federal education funds, they are obligated to comply with FERPA privacy requirements that prohibit the release of "education records."

FERPA specifically prohibits educational institutions that receive federal funds under programs administered by the U.S. Department of Education from releasing "education records" or any "personally identifiable information" contained in such records. *See* 20 U.S.C. § 1232g(b)(1). The Ohio Public Records Law in turn provides an exemption from its disclosure requirements for "[r]ecords the release of which is prohibited by state or federal law." Ohio Rev. Code § 149.43(A)(1)(v); *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 2011-Ohio-6009.

When Ohio State received successive ESPN requests under the Ohio Public Records Law for various documents, many of which contain personally identifiable information about students, the university undertook a granular review of the requested materials to assure compliance with FERPA. Counsel for Ohio State and ESPN also engaged in a lengthy oral and written dialogue designed to clarify the ESPN requests and identify the responsive documents.

Compelled by FERPA and the Ohio Public Records Law exemption, Ohio State ultimately released redacted copies of certain requested documents, from which it removed any personally identifiable information of the students, and has withheld from production certain

¹ *See* U.S. Dep't. of Educ., "Funds for State Formula-Allocated and Selected Student Aid Programs," available at <http://www2.ed.gov/about/overview/budget/statetables/12stbystate.pdf> (follow the "Grand Total" hyperlink) (last visited November 17, 2011). This Court can take judicial notice of public records available on the Internet. *See State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8 (favorably citing cases in which courts have taken judicial notice of public records available on the Internet). Furthermore, this Court is free to take judicial notice of adjudicative facts that are either "(1) generally known within the territorial jurisdiction of the [court] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid. R. 201. The rules of evidence do not limit the Court in taking judicial notice of "legislative facts."

other documents that are incapable of sufficient redactions to protect personally identifiable information. *See* Affidavit of Jim Lynch at ¶ 9 and Exhibit 2. By its scrupulous attention to the protection of student education records, and its solicitude for student privacy, Ohio State has observed in an exemplary way the standards set by Congress as a matter of national policy in FERPA as well as its own obligations under the Ohio Public Records Law.

B. Congress Has Chosen a Broad Generic Definition of the Term “Education Records” as a Matter of National Policy.

Congress enacted FERPA in order to establish strong federal protection of student “education records.” The term “education records” is defined by FERPA and informed by federal regulations and agency guidance. Congress ultimately specified in FERPA that “education records” means “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). Congress required that “[n]o 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 educational records (or personally identifiable information contained therein other than directory information . . .).” 20 U.S.C. § 1232g(b)(1).

The broad generic definition of “education records,” which is the law of the land today, replaced the itemized classification included in the original version of FERPA. In its first incarnation, FERPA contained a varietal definition of protected records. The list included “identifying data, academic work completed, level of achievement (grades, [SAT] scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.” Education

Amendments of 1974, Pub. L. No. 93-380, § 513(a), 88 Stat. 484, 571-572 (1974). It is to this sort of now-obsolete definition that ESPN urges the Court to return.

Because this detailed list quickly became a source of great confusion within the higher education community, Congress repealed it and adopted the Buckley Amendment less than four months after FERPA first took effect. Buckley/Pell Amendment, Pub. L. No. 93-568, § 2(a), 88 Stat. 1858 (1974). With the Buckley/Pell Amendment, sponsored by Senators James L. Buckley and Claiborne D. Pell, who had been the primary authors of FERPA, Congress shifted to the current broad definition of “education records” as “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.” *Id.*

Congress subjected the broad new definition to a list of specific exceptions. *See* 20 U.S.C. §§ 1232g(a)(4)-(5), § 1232g(b)(5)-(7). The exceptions include records kept by a university’s law enforcement unit; records relating exclusively to certain employment; a student’s health treatment records; “directory information” including a student-athlete’s academic major, height and weight; and the name and final result of a disciplinary proceeding involving violent crime. 20 U.S.C. §§ 1232g(a)(4)(B)(ii)-(iv), 20 U.S.C. §§ 1232g(a)(5)(A)-(B), 1232g(b)(6)(B).

Federal regulations adopted pursuant to FERPA define the term “personally identifiable information” -- which educational institutions release at peril of losing their federal funding -- as including, but not limited to: “(a) The student’s name; (b) The name of the student’s parent or other family members; (c) The address of the student or student’s family; (d) A personal identifier, such as the student’s social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s

maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” 34 C.F.R. 99.3.

Importantly for this case, FERPA directly identifies the only information about student-athletes that is subject to release. Under the statutory exception for “directory information,” FERPA allows disclosure of “the student’s . . . participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees, honors and awards received[.]” 20 U.S.C. § 1232g(a)(5)(A); *see also* 34 C.F.R. §§ 99.31(a)(11) and 99.3. Hence it is consistent with the FERPA mandate for universities and colleges to include such student information in athletic programs and news releases.

FERPA’s system of protecting broadly-defined “education records,” with specifically-identified exceptions, has set the nationwide standard for nearly forty years. In enacting FERPA, Congress explained that its purpose “is two-fold – to assure parents of students, and students themselves if they are over the age of eighteen . . . access to their education records and to *protect such individuals’ rights to privacy* by limiting the transferability of their records without consent.” Joint Statement, 120 Cong. Rec. 39,858, 39,862 (1974) (emphasis added). Congress further explained that, under the statute, “parents and students may properly begin to exercise their right under the law, and *the protection of their privacy may be assured.*” *Id.* at 39,863 (emphasis added). Congress required that educational institutions inform parents of students or students “of the rights accorded them by [FERPA].” *See* 20 U.S.C. § 1232g(e). Parents and

students thus have a well-founded expectation of privacy when they disclose personal information to schools.

1. Literal Reading of the “Education Records” Definition Is Necessary to Respect the Choice That Congress Has Made.

Mindful of the inherent tension between protection of student privacy and promotion of public disclosure, courts have adjusted over the years to application of the broad generic standard of “education records” that Congress chose to adopt as the “supreme Law of the Land” to which “the Judges in every State shall be bound.” U.S. Const. art. VI. In the context of public records laws, reason and experience have shown that observance of the literal reading of the “education records” definition is the only proper way to respect the choice that Congress has made. This Court accordingly should reject the *ad hoc* approach that ESPN advocates.

The United States Court of Appeals for the Sixth Circuit has recognized that “FERPA broadly defines ‘education records,’” and has noted in particular that “Congress made no content-based judgments with regard to its ‘education records’ definition.” *United States v. Miami Univ.* (6th Cir. 2002), 294 F.3d 797, 812 (“*Miami University*”). The court conducted a plain language analysis of the broad, two-pronged definition of “education records” and determined that disciplinary records must be considered “education records” under FERPA. *Id.*

Other courts have conducted similar analyses and reached the same conclusion. *See MacKenzie v. Ochsner Clinic Found.* (2003 E.D. La.), C.A. No. 02-3217 Section “R” (3), 2003 U.S. Dist. LEXIS 15385, at *11 (“The plain meaning of the statutory language reveals that Congress intended for the definition of [“education records”] to be broad in scope”) (quoting *Belanger v. Nashua, N.H., Sch. Dist.* (D.N.H. 1994), 856 F. Supp. 40, 48); *Connoisseur Comm’n of Flint, L.P. v. Univ. of Mich.* (Mich. Ct. App. 1998), 230 Mich. App. 732, 736, 584 N.W.2d 647 (holding that a student-athlete automobile information sheet is an education record

because it contains information directly related to the student-athlete and is maintained by the university); *An Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.* (Ind. Ct. App. 2003), 787 N.E.2d 893, 907-08 (applying *Miami University* opinion's broad interpretation of "education records" to find that investigation into a coach's behavior that contained information directly related to students was an education record).

In an earlier opinion, of course, this Court rendered a less content-neutral interpretation of the meaning of "education records." The facts presented in *State ex rel. Miami Student v. Miami Univ.* (1997), 79 Ohio St. 3d 168, 680 N.E.2d 168 ("*Miami Student*"), persuaded the Court to hold that disciplinary records were not "education records" because they were "nonacademic". *Id.* at 171-172 (citing *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia* (1993), 262 Ga. 848, 427 S.E.2d 257). The facts of the *Miami Student* case, however, are different from the facts before the Court in this case. At issue in *Miami Student* were redacted disciplinary records sought in order to "effectively track crimes and student misconduct on campus." 79 Ohio St. 3d at 172. The Court was concerned that the safety of students could be compromised if information about campus crime statistics were not available to parents and students. *Id.* Here, the safety of the campus community is not at stake, and the public has literally been inundated with news about the underlying events.

Furthermore, in the intervening years since this Court decided the *Miami Student* case, the United States Court of Appeals for the Sixth Circuit has joined this Court in the dialogue about the relationship between FERPA and the Ohio Public Records Law. In *Miami University*, 294 F.3d at 810-813, as set forth above, the Sixth Circuit reached a different conclusion than this Court, based in part upon a literal reading of the "education records" definition and the statutory exceptions. This Court has acknowledged that it considers a federal court's interpretation of

federal law as persuasive authority. *See State v. Burnett*, 93 Ohio St. 3d 419, 424, 2001-Ohio-1581, 755 N.E.2d 857.

Certainly, the reasoning of the Sixth Circuit is at least as worthy of consideration as the reasoning of any other court in the ongoing judicial discussion of the nexus between FERPA and state open records laws. *See Busch v. Graphic Color Corp.* (Ill. 1996), 169 Ill. 2d 325, 335, 662 N.E.2d 397 (“decisions of the Federal courts interpreting a Federal act such as the FHSA are controlling upon Illinois courts, in order that the act be given uniform application”); *Red Maple Properties v. Zoning Comm’n* (Conn. 1992), 222 Conn. 730, 739 n. 7, 610 A.2d 1238 (“decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. . . . [i]t would be a bizarre result if this court [adopted one analysis] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [a different analysis].”) (quoting *Tedesco v. Stamford* (Conn. 1991), 24 Conn. App. 377, 385, 588 A.2d 656).

Just as the Congress itself revisited the definition of “education records” early in the history of FERPA, to any extent that this Court perceives on the facts of this case any divergence between its opinion in *Miami Student* and the later analysis of the Sixth Circuit in *Miami University* and (as addressed below) the regulatory guidance of the U.S. Department of Education, this case provides an ideal opportunity for an informed redefinition of the relationship between FERPA and the Ohio Public Records Law.

2. Ohio State Has Struck the Proper Balance between FERPA and the Ohio Public Records Law by Producing Records in Redacted Form.

Nor has Ohio State been insensitive to its obligations under the Ohio Public Records Law. On the contrary, it appears that the university has thus far produced in redacted form all of the requested records that it could produce without compromising the privacy protections that

FERPA affords to its students or the attorney-client privilege that Ohio law provides to communications with its counsel. See Affidavit of Jim Lynch at ¶¶ 4-12; Affidavit of Sandra J. Anderson at ¶¶ 2-6; Affidavit of Douglas Archie at ¶¶ 3-6. Amici understand that the university is adhering to this same standard in its ongoing response to the request for certain NCAA investigation documents. Neither FERPA nor the Ohio Public Records Law requires anything more of the university. Neither the students nor the clientele at Ohio State should expect anything less from their respective administrators and counsel.

The painstaking efforts of Ohio State are exactly consistent with the way in which courts, in the cases cited by ESPN, have reconciled the public right to information with the private right of confidentiality. Significantly for the present case, this Court in *Miami Student* required the redaction of information directly related to students. With the Court's approval, information including the student's name, Social Security number, student identification number and "[t]he exact date and time of the alleged incident . . . since this constitutes other information that may lead to the identity of the student" was redacted from the materials that Miami University produced. 79 Ohio St. 3d at 172; see *Miami University*, 274 F.3d at 811 ("With these court-imposed redactions, the [*Miami Student* opinion] appears to comport with the FERPA's requirements."). Here, Ohio State has redacted essentially the same information, and produced substantially the same residual portions of the responsive records as this Court ordered Miami University to produce in the *Miami Student* litigation.

In *Baker v. Mitchell-Waters*, 160 Ohio App.3d 250, 2005-Ohio-1572, 826 N.E.2d 894, ¶¶ 14, 31, the Second District Court of Appeals likewise found no FERPA impediment to production of certain Mental Retardation and Developmental Disabilities program records, but

noted that “[t]he trial court ordered that the identity of all students, including their medical-related information, be redacted from these documents.”

In *NCAA v. Associated Press* (Fla. Dist. Ct. App. 2009), 18 So. 3d 1201, the Florida Court of Appeals ordered production of the transcript of an NCAA infractions hearing and the NCAA response to the appeal of Florida State University. But the court pointedly noted that “the names of all students were redacted from the transcript and response” and that “[t]he transcript and response . . . do not reveal the identity of the students.” 18 So. 3d at 1211. “We emphasize,” said the court, “that our decision is limited to the disclosure of the redacted versions of the transcript and response.” *Id.*

Notably, the records requested in this case arise from student activity *per se*, rendering inapplicable the decision in *Ellis v. Cleveland Mun. Sch. Dist.* (S.D. Ohio 2004), 309 F. Supp. 2d 1019, that a student’s witness statement on a teacher’s behavior is not an “education record.” In this case, by contrast, the redacted information pertains directly to the actions of student-athletes.

The limited holding in *The News and Observer Publ’g Co. v. Baddour* (N.C. Sup. Ct., May 12, 2011), Case No. 10 CVS 1941, does not require more of Ohio State. The North Carolina Superior Court held open the question of whether the Public Records Law required the university to disclose all documents and records of any investigation into any misconduct of the coaches, players and tutors -- the documents most closely akin to the records that ESPN has requested here. *Id.* at 2, 5. The court ordered production of eleven parking tickets received by students, reasoning that the fact that “the ultimate sanction *might* include academic or disciplinary ramifications does not convert the entire UNC-CH parking system into a disciplinary arm of the University,” and hence the parking tickets were not “education records.” *Id.* at 4-5 (emphasis in original). Even that limited holding is far from dispositive here, however, because

such records implicitly would be protected if the parking system were a disciplinary arm of the university. (As set forth below, athletics are an integral part of the higher education process.)

Nor is this the all-or-nothing sort of situation that confronted the Maryland Court of Appeals in *Kirwan v. The Diamondback* (Md. 1998), 352 Md. 74, 721 A.2d 196. There, the University of Maryland, College Park, invoked FERPA as a basis for withholding from production the entirety of certain campus parking violation files that involved members of the men's basketball team. The court believed that the university's response was more zealous than necessary. FERPA, said the court, "was not intended to preclude the release of any record simply because the record contained the name of the student." *Id.* at 91. Faced with the choice between no production and full production, the court chose the latter, explaining that "[p]rohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind the Family Educational Rights and Privacy Act." *Id.*

The present case does not require a choice between the lesser of two alternatives. By contrast, the best of both worlds comes before the Court in this proceeding. Ohio State has served the purposes of both FERPA and the Ohio Public Records Law by its careful production in redacted form of all responsive records that it could produce without disclosing the identity of its students or the confidences entrusted to its attorneys. The Court should encourage -- not punish -- that sort of meticulous observance of the conflicting demands of competing statutes.

3. The Court Should Observe the Canons of Statutory Construction by Heeding the Literal Text of the "Education Records" Definition.

ESPN's position that the term "education records" relates only to grades or classes fails under basic tenets of statutory construction. As noted in the *Miami University* case, the plain language of the "education records" definition admits of no content-based judgments. 294 F.3d

at 812. There accordingly is no license to read a content-based judgment into the statute. *Lamie v. United States Tr.* (2004), 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (“when the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.”) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.* (2000), 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1). Nor do extra-mural comments of a former lawmaker, even the eminent Senator Buckley, thirty-five years after the initial adoption of FERPA inject any ambiguity into the plain statutory language that has remained the law of the land ever since its rapid amendment. Indeed, the language of the statute, including the “education records” definition, speaks for itself.

Notably, under ESPN’s topical interpretation of “education records,” the statute would not need any of the exceptions that the Congress carefully enacted. For example, if information about a student-athlete were not generally protected as an “education record,” there would have been no reason for Congress to provide an exception that allows a school to publish a student-athlete’s height and weight. *See* 20 U.S.C. § 1232g(a)(5)(A)-(B). If FERPA were to mean what ESPN claims -- that so-called “non-academic” information does not fall within the ambit of the statute -- then it would not have been necessary for the Congress to include the “directory information” exception for information as to a student-athlete’s academic major, height and weight; the exception for information kept by university law enforcement operations; the exception for certain employment information; the protocol for handling of student health treatment records; and the exception for the name and final result of a disciplinary proceeding involving violent crime. *See* 20 U.S.C. §§ 1232g(a)(4)(B)(ii)-(iv); 1232g(a)(5)(A)-(B), 1232g(b)(6)(B). *See also Miami University*, 294 F.3d at 813 (“If Congress believed that student

disciplinary records were not education records under the FERPA, then these sections would be superfluous”).

Fidelity to the canons of statutory construction thus requires rejection of the ESPN position. *See Duncan v. Walker* (2001), 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (quoting *Market Co. v. Hoffman* (1879), 101 U.S. 112, 115, 25 L. Ed. 782) (holding that courts should construe statutes so that “no clause, sentence or word shall be superfluous, void, or insignificant”); *Williams v. Taylor* (2000), 529 U.S. 362, 404, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (“the cardinal principle of statutory construction” is to give meaning to every word and clause of a statute).

4. The FERPA Regulatory Enforcement Agency Subscribes to the Literal Reading of the “Education Records” Definition.

Furthermore, Congress intended that federal law inform its broad definition of “education records.” The Family Policy Compliance Office (“FPCO”) of the U.S. Department of Education publishes advisory letters to help courts, schools, parents and students interpret FERPA. The FPCO has stated that records that “relate to the school’s responsibility to self-report violations to the NCAA” and contain “specific information such as the name of the student and his high school” are “education records” within the scope of FERPA. *See* Letter to L. Lee Tyner, Jr., Associate University Attorney at the University of Mississippi (Feb. 12, 2002). (Appendix at 3) An example of such a record would be an NCAA-requested investigative report that contained student information ranging from “grades and course work to the details of misconduct and rules violations.” *See* Letter to Terry Roach, Executive Assistant to the President for Legal Affairs at the University of Maryland (Aug. 19, 1996). (Appendix at 5)

In fact, according to the FPCO, “education records” encompasses any record sent to the NCAA that contains enough information about a student that “a reasonable person in the

community can identify the subject of the report.” See Letter to Doris Dixon, NCAA (Mar. 12, 1999). (Appendix at 10) Combined with the Sixth Circuit’s opinion in *Miami University*, the FPCO guidance makes it clear that Ohio State properly and necessarily has protected confidential education records in its response to ESPN.

5. Fairness and Sound Administration of FERPA Require Maintenance of a Uniform Standard for “Education Records.”

The statutory standard for “education records” is objective and easy to apply. There is a reason for that virtue. Families, students, colleges and universities need a uniform standard in order to avoid the chaos, confusion and endless litigation that would result from the hair-splitting document-by-document review inherent in the approach that ESPN urges the Court to embrace.

To provide for uniformity in the administration of FERPA, the Secretary of Education established the above-mentioned Family Policy Compliance Office within the Department of Education for “investigating, processing, reviewing, and adjudicating violations of [the Act].” *Gonzaga Univ. v. Doe* (2002), 536 U.S. 273, 279, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (quoting 20 U.S.C. § 1232g(g)). Congress has provided that “[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices” of the Department of Education. 536 U.S. at 290 (citing 20 U.S.C. § 1232g(g)). “This centralized review provision was added just four months after FERPA’s enactment due to ‘concern that regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.’” *Id.* (quoting Joint Statement, 120 Cong. Rec. 39,858, 39,863 (1974)). Consistent with that approach, application of the plain language definition of “education records” as written by Congress and interpreted by the Sixth Circuit and the FPCO will not only minimize litigation and provide assurances to

students that their private information will not be disclosed against their will, but also will maximize the uniform operation of the law.

By contrast, adoption of the ESPN position would create unfair distinctions among our nation's college students. One untoward distinction would be a discrimination between athletes and non-athletes. Non-athlete students would be able to pursue their extracurricular interests with the benefit of the privacy that FERPA provides. It is difficult to imagine, for example, that the type of information that ESPN says is fair game in this case would ever be released about non-athlete students involved in a university-sponsored political club. Yet a student-athlete in the limelight at a public university would be required to pursue her or his related interests without the assumption of such confidentiality.

No less odious or unfortunate would be the distinction between students at public and private colleges and universities. Student-athletes at private colleges would not have to worry about public revelation of family financial crises or personal issues, for example. But a student-athlete at a public school would have reason for constant apprehension that an embarrassing fact that he or she disclosed in confidence to his or her coach might come to light through a public records search. The Court should not make student-athletes effectively waive their right to privacy in order to enroll in a public college or university. Students who attend this nation's venerable public institutions ought not to be penalized with a significant loss of privacy from which their counterparts at private institutions are immune.

And public-school student-athletes also would be open to scrutiny from competitors if the ESPN redefinition of "education records" were to prevail. If information about student-athletes that does not directly relate to grades or classes is not protected, can a competitor request a coach's notes about how a student-athlete practiced in the week before the big game? If an

overly aggressive parent finds out that a rival coach mishandled an embarrassing incident involving a child's main competitor, could the parent request the documentation of the incident and release it during the week of the upcoming match? Could a back-up quarterback request investigation records regarding inappropriate comments made by the starting quarterback in the locker room, hoping to gain the starting position? These scenarios, while redolent of poor sportsmanship, would not be beyond the realm of possibility if this Court were to indulge the ESPN approach to FERPA.

Yet another casualty of disregard for the uniformity sought by Congress would be the state-by-state variations of FERPA rights that could emerge. Even states with identically worded public record laws could ultimately reach different conclusions if our nation's federalism were deemed to invite interstate differences in observance of federal obligations. In turn, these state-by-state idiosyncrasies could lead to a great deal of uncertainty, with public institutions obtaining clear guidance only after they have been sued in connection with a state FOIA request. In addition, disparate judgments from state courts could affect the relative security of student and faculty privacy in public universities across the country.

Sound administration of FERPA likewise would suffer from adoption of ESPN's proposed interpretation of "education records." Lawful response to a public records request would compel public institutions to define which aspects of their operations are academically-related on a case-by-case basis. This analysis would inevitably lead to questions such as: Are student-housing records "academically related"? Is a student's participation in school-funded clubs an "academic" matter? Is a student's disability accommodation request within the scope of the academic mission of the college or university? Are documents from the ROTC program "academic" in nature? Each request would require the public institution to make its own

determination, and then this Court would likely have to review each decision in an original action in mandamus.

Further complicating the difficulty of the situation, Ohio State could be forced to produce records with information directly related to a student under the ESPN interpretation of the “education records” definition, but the Department of Education could go to the federal courthouse and seek to enjoin Ohio State from producing those same documents under the literal reading of the statute. The uncertainty and litigation that would result from adoption of the ESPN interpretation of “education records” would harm institutions and their students. If ESPN wishes to operate under the definition of “education record” that it proposes, the proper forum in which it should seek the necessary modification is Congress, not the courts.

C. Because Inter-Collegiate Athletics Are an Integral Part of Higher Education, There Would Be No Exception for Records of Student-Athletes Even If the Standard Were Not So Broad.

The records at issue in this case would fall within the scope of FERPA even if FERPA were limited only to “academic” records. A student-athlete’s participation in athletics is a fundamental cornerstone of the student-athlete’s education. Because inter-collegiate athletics are an integral part of the educational experience at American colleges and universities, athletic records relating to student-athletes are directly related to students.

ESPN unfairly casts the underlying events at issue in this case as a matter of “non-academic” improprieties related only “tangentially” to students, and attempts to portray student athletes as peculiar sorts of scholars. *See* ESPN Merits Brief at 16-17. As a basic principle, that sort of characterization completely mistakes the close relationship between academics and inter-collegiate athletics for a student-athlete.

The Court ought not to indulge the inappropriate stereotype on which ESPN stakes its case. It is difficult enough for student-athletes to deal with the athletic stigma that they

frequently face among their classroom peers and, occasionally, their professors. *See, e.g.*, Herbert D. Simons, Corey Bosworth, Scott Fujita, & Mark Jensen, “The Athlete Stigma in Higher Education,” 41 *C. Student J.* (Jun. 2007) at 251; Josephine R. Potuto & James O’Hanlon, “National Study of Student-Athletes Regarding Their Experiences as College Students,” 41 *C. Student J.* (Dec. 2007) at 18.² To allow release of these records on the basis that they are “non-academic” -- even if FERPA allowed such a distinction -- would be to treat student-athletes disrespectfully and gratuitously to disparage the educational benefits that ensue from their participation in inter-collegiate athletics.

1. Athletics Play a Vital Role in the Education of a Student-Athlete.

Amici’s member institutions view their mission as providing a well-rounded education that leads to future success in life. *See, e.g.*, Kent State University, Mission Statement (“educate [students] to think critically and to expand their intellectual horizons while attaining the knowledge and skills necessary for responsible citizenship and productive careers”);³ Denison University, Course Catalogue 2011-2012 (guiding principle of mission statement is to “develop interdisciplinary integration of the many forms of knowledge”).⁴ Athletics are intended to be an important component of that educational mission. *See* Ohio State University, NCAA Athletics Certification Site (listing the “[e]ducation and enrichment of the student-athlete” as its first value and commitment, “providing each student-athlete with quality educational opportunities and programs to help him/her grow as a total person.”);⁵ University of Texas Athletics, The University of Texas Mission Statement (“The Athletics Departments at The University of Texas at Austin are committed to The University’s mission of achieving excellence in education,

² Available at www.ncaapublications.com/p-4086-national-study-of-student-athletes-regarding-their-experiences-as-college-students.aspx.

³ Available at <http://www.kent.edu/president/mission-statement.cfm>.

⁴ Available at <http://www.denison.edu/academics/catalog/missionstatement.html>.

⁵ Available at <http://www.osu.edu/ncaa/>.

research, and public service. . . . No goal of ours exceeds the mandate to educate and graduate the student-athlete.”);⁶ Cecil College, Vision and Mission Statements (“The primary goal for the intercollegiate athletics at Cecil College is to support the vision and mission of the College by providing students with opportunities that will lead to their academic success and personal development, as well as fostering self-fulfillment through athletics.”).⁷

The NCAA Constitution likewise is replete with references to the academic purpose of inter-collegiate athletics:

Article 1.3.1 explains that the basic purpose of NCAA “is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”

Article 2.2.1 states that “[i]t is the responsibility of each member institution to establish and maintain an environment in which a student-athlete’s activities are conducted as an integral part of the student-athlete’s educational experience.”

Article 2.5 specifies that “[i]ntercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body.”

Article 2.9 stipulates that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived.”

Article 2.12 states that “[e]ligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student-athletes.”

Article 2.14 provides that “[t]he time required of student-athletes for participation in intercollegiate athletics shall be regulated to minimize interference with their opportunities for acquiring a quality education in a manner consistent with that afforded the general student body.”

Article 2.15 requires that “[t]he conditions under which postseason competition occurs shall be controlled to assure that the benefits inherent in such competition flow fairly to all participants, to prevent unjustified intrusion on the time student-athletes devote to their academic programs, and to protect student-athletes from exploitation by professional and commercial enterprises.”

⁶ Available at <http://www.texasports.com/school-bio/mission-statement.html>.

⁷ Available at <http://www.cecil.edu/athletics/athletic-information/athletic-vision.asp>.

National Collegiate Athletic Association, “2010-2011 NCAA Division I Manual,” Constitution (“NCAA Manual”).⁸

Even the Internal Revenue Service recognizes that “the athletic program of a university . . . is considered to be an integral part of its overall educational activities.” *See* Rev. Rul. 67-291, 1967-2 C.B. 184; *see also* Rev. Rul. 64-275, 1964-2 C.B. 142 (“in the area of judicial construction, the courts have consistently held that training in athletic and physical fitness is ‘educational’”). The Service has traditionally taken the position that income from paid admissions to college and university athletic events, regardless of the number of persons in attendance or the amount of paid admissions, is not taxable as income from unrelated trade or business because the events themselves are related to the educational purposes of the colleges and universities.

This position is consistent with language contained in the Committee Reports on the Revenue Act of 1950, in which the predecessor to section 513 of the Code was enacted: “Athletic activities of schools are substantially related to their educational functions. For example, a university would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students from other schools.” (H.R. Rep. No. 81-2319, at 109 (1950). Moreover, “income of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business, since its athletic activities are substantially related to its educational program.” S. Rep. No. 81-2375, at 107 (1950).

Indeed, athletics are intimately interwoven with academics in the life of a student-athlete before, during and after her or his collegiate experience. A student-athlete’s participation in high

⁸ Available at <http://www.ncaapublications.com/p-4180-2010-2011-ncaa-division-i-manual.aspx>.

school sports demonstrates to college admission departments that the student-athlete is involved, has time-management skills and leadership experience. Moreover, just as universities and colleges become acquainted with personal hardships and triumphs of applicants through application essays, *see, e.g.*, University of Oregon, Application (“[d]etails of any serious illness, diagnosed disability, personal difficulties, or family circumstances that have affected your education are encouraged”),⁹ coaches visit the homes of student-athletes to learn about their family situation and life experiences. Athletics become part of a student-athlete’s identity before the student-athlete steps foot on campus.

After a student-athlete enrolls, she or he earns the right to participate in collegiate sports by succeeding at academics. For incoming students, the NCAA imposes minimum high school GPA requirements, credit requirements and test scores. *See, e.g.*, NCAA Manual, Bylaws, at Art. 14.3. Undergraduates who participate in inter-collegiate athletics are required to make progress toward a degree, and maintain a minimum grade point average and full-time student status. *Id.* at Art. 14.1, 14.4.¹⁰ The various athletic conferences and educational institutions impose additional, and often stricter, academic requirements on student-athletes. *See* Big West Conference, 2011 Code Book (“Eligibility rules for Big West competition . . . shall be the current NCAA rules except where the Big West has more strict rules.”);¹¹ Franklin Pierce University, General Eligibility Requirements (“NCAA cum GPA requirements are more lenient

⁹ Available at <http://admissions.uoregon.edu/freshmen>.

¹⁰ In fact, the NCAA has recently made sweeping changes to make the academic requirements for student-athletes and universities even more strict. *See* Sports Network “NCAA’s sweeping reform is ‘Change You Can Believe In,’” *Fox News* (November 3, 2011), available at <http://www.foxnews.com/sports/2011/11/03/ncaas-sweeping-reform-is-change-can-believe-in/>.

¹¹ Available at www.bigwest.org/code_book/2011/Section_3-Eligibility6.21.11.pdf.

than Franklin Pierce University requirement [sic], but the stricter of the two must be followed.”).¹²

Coaches receive updates on the academic progress and class attendance of their student-athletes to help the student-athletes meet their educational requirements. *See* Saint Joseph’s University, Academic Services for Student Athletes (progress reports, midterm grades and other information “are shared with all head coaches, so they can further assist their student athletes in maintaining good academic progress”).¹³ Colleges and universities include academic achievement metrics in the contracts of many of their coaches to ensure that academics are playing the proper role in the education of student-athletes. *See* University of Wisconsin Office of Operations Review and Audit, “Academic Performance Standards in NCAA Division I and II UW Athletic Coaches’ Contracts and Performance Evaluations,” at 2-3, 8-9 (September 2006) (“Wisconsin Study”).¹⁴

Participation in the sport itself is an educational experience for the student-athlete. Many colleges and universities consider athletics a vital and important aspect of a liberal arts education and require all students to take a sports class to graduate. *See, e.g.*, Muskingum University, 2011 Course Catalogue at 43, 100 (requiring at least two classes from physical education 102 – 140 which enable students to participate in “a wide range of activities such as aerobic fitness, archery, badminton . . .”).¹⁵ Participation in inter-collegiate athletics teaches students valuable lessons about technique, proper nutrition for competition, ability to handle competitive pressure, leadership and public relations.

¹² Available at <http://athletics.franklinpierce.edu/information/compliance/compgeneral>.

¹³ Available at <http://www.sju.edu/studentlife/studentresources/sess/studentathletes/services.html>.

¹⁴ Available at www.wisconsin.edu/audit/coachcontracts.pdf.

¹⁵ Available at <http://www.muskingum.edu/registrar/documents/MuskingumUnivCatalog2011.pdf>.

In recognition of the integral role of athletics, academic credit for participation in varsity athletics is available at a number of colleges and universities. Students at Texas Tech University, for example, can earn up to one credit hour per year through participation in varsity sports that will count toward the school's Personal Fitness and Wellness Program.¹⁶ Iowa State University also grants academic credit to its varsity athletes.¹⁷ At the same time, smaller universities allow for similar programs for their varsity sports. Bluffton University in Ohio grants up to four credits to each student during his or her athletic career.¹⁸ From public Johnson State College¹⁹ in Vermont to private Baptist-affiliated Samford University²⁰ in Alabama, athletes at many schools are eligible to receive academic credit for efforts on and off the field.

Student-athletes also learn life-skills through their participation in sports. To help them achieve their full potential, athletic departments often perform behavioral analyses of their student-athletes, learning how they best learn, grow and react. *See* Respondent's Submission of Evidence -- Volume II, Responsive Records As Provided to ESPN, at 306 (describing Athletic Department behavioral analyses of players). Senior student-athletes learn leadership skills by mentoring younger teammates, interacting with different personalities, and taking leadership positions on the team. *See, e.g.,* Lehigh University, "Leadership Development" (describing ways

¹⁶ Texas Tech University, Department of Health, Exercise, and Sport Sciences, *available at* http://www.depts.ttu.edu/officialpublications/catalog/AS_HESS.php.

¹⁷ Iowa State University, Undergraduate Academic Advising Handbook, Fall 2011, at 12, *available at* www.ans.iastate.edu/dept/AdvisorHandbook.pdf.

¹⁸ Bluffton University, Co-curricular Program, *available at* <http://www.bluffton.edu/catalog/campuslife/cocurricular/>.

¹⁹ Johnson State College, Student Athlete Handbook, 2011-2012, at 5, *available at* athletics.jsc.edu/information/Student_Athlete_Handbook_2011-12.doc.

²⁰ Samford University, Student Handbook 2011-12, Bachelor Degree Requirements *available at* <http://www.samford.edu/assets/0/2147483985/2147484746/92ac16ec-ea38-408e-90f8-4916e7ecff9c.pdf>.

that student-athletes can gain leadership experience).²¹ Student-athletes, who live busy lives, learn valuable time management skills, often attending required study hall hours every week. *See Wisconsin Study*, at 9-11. Lessons in personal responsibility readily inure to student-athletes, who are accountable to their coaches and teams for actions that affect their athletic eligibility.

Nor do the educational benefits of athletic participation expire upon graduation. In 2006, a regional survey of CEOs and legislators found that 78.3% had participated in interschool sports, and nearly 80% indicated that their involvement in school sports had complemented their career development and academic pursuits. *See Tim Berrett, "High School Sport Involvement Among Alberta's Senior Executives" (2006)* (survey respondents cited learning teamwork, discipline, goal setting, leadership, independence and self confidence through sports).²² A student-athlete's participation in athletics can prepare her or him for careers in related fields, such as coaching, umpiring or sports officiating. *See Bureau of Labor Statistics, Occupational Handbook, 2010-2011 Edition "Athletes, Coaches, Umpires, and Related Workers"* ("these jobs require immense overall knowledge of the game, usually acquired through years of experience at lower levels").²³ Studies have found that high school student-athletes are more likely to earn their postsecondary degree, to gain employment and to receive higher wages as compared to non-athletes. *See National Center for Education Statistics, "What Is the Status of High School Athletes 8 Years after Their Senior Year?"* (September 2005).²⁴

Colleges and universities across the United States sponsor inter-collegiate athletics as an important way of enhancing undergraduate education. In this context, the records generated in

²¹ Available at http://www.lehighsports.com/student_athlete_services/leadership.aspx.

²² Available at http://www.asaa.ca/new/documents/ASAACEOMLAsudyfinalreportNov2006_000.pdf.

²³ Available at <http://www.bls.gov/oco/ocos251.htm>.

²⁴ Available at nces.ed.gov/pubs2005/2005303.pdf.

the course of a student's athletic participation are inextricably intertwined with the inherently educational character of that experience.

2. Student-Athlete Records Are Directly Related to Students.

Given the interwoven relationship between college athletics and academics, ESPN is wrong in claiming that athletic records maintained by Ohio State that contain information about student-athletes are only "tangentially" related to students. Amici are concerned that, if the personal information about student-athletes at stake in this case were subject to production, others could then argue for access to information such as:

- Behavior analysis of student-athletes;
- Coaching staff thoughts on a student-athlete's educational and personal development;
- A student-athlete's relationship with his or her parents and family;
- Financial circumstances of student-athletes and their families;
- A student-athlete's eligibility for financial aid;
- A student-athlete's parent/guardian's information and signatures; and
- The results of a student drug test.

See, e.g., Respondent's Submission of Evidence -- Volume II Responsive Records As Provided to ESPN at 178-181, 302-306, 495, 932, 947-949.

If a student-athlete and an athletic department cannot vigorously and honestly discuss situations involving a student-athlete without creating a basis for documentation in a potential public record, the education of the student-athlete will suffer. A student-athlete understandably would refrain from candor with his or her coaches and tutors about personal problems that may be distractions from classes and practice, because the right public records request might expose such circumstances to the general public. Instead of confiding to a coach about concerns for a

teammate's eating or drinking habits or time management problems, a student-athlete may conclude that it would be safer to spare himself or herself from such public exposure and simply remain silent. If a student-athlete runs into personal problems that affect her or his own athletic eligibility, withdrawal from sports may be preferable to the profoundly personal process of obtaining an NCAA waiver based upon documentation that could be subject to unlimited public distribution. *See* 2010-2011 NCAA Manual, Bylaws, at Article 14.2.1.5 (a student-athlete can receive a waiver from the five-year rule upon providing documentation of family injury, illness or extreme financial difficulty such as a layoff, bankruptcy or death in the family).

The Court ought not to overlook such potential consequences of the definition that ESPN seeks to engraft upon the FERPA standard for classification of "education records." Even if the standard for "education records" were not so broad, there would be no exception for records of student-athletes, because inter-collegiate activities are an integral part of higher education at American colleges and universities. Indeed, conformance to the literal text of the "education records" definition not only honors the letter of the law and the intent of Congress, but also avoids the dysfunctional results that transition to the ESPN standard would impose upon student-athletes.

D. Under FERPA, Records Are Maintained When They Are Preserved and Retained.

Nor does ESPN plausibly argue that Ohio State does not "maintain" the records in question. Ohio State maintained the records directly related to the student-athletes in this case when it preserved and retained them in a database and collected them together for the purposes of determining students' NCAA eligibility. The Supreme Court of the United States, in the case cited by ESPN, *Owasso Indep. Sch. Dist. v. Falvo* (2002), 534 U.S. 426, 122, S. Ct. 934, 151 L. Ed. 2d 896, limited its holding to the "narrow point" that grades on a student's paper are not

education records before they are collected and recorded by a teacher. 534 U.S. at 436. That holding does not apply to this case, as Ohio State had possession of the records at issue.

The Court in *Owasso* did theorize that the word “maintain” is one that “suggests” that FERPA might pertain only to a record to “be kept in a filing cabinet. . . or on a permanent secure database,” but did not develop that thought or include it in its holding. *Id.* at 434. As Justice Scalia’s concurrence pointed out, the majority’s suggestion would render as inoperative the FERPA exception to education records for “records of instruction . . . personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” *Id.* at 436-437 (Scalia, J. concurring) (quoting 20 U.S.C. 1232g(a)(4)(B)(i)). In sum, Justice Scalia explained that the majority’s theory was “unnecessary for the decision of this case, seemingly contrary to §1232g(a)(4)(B)(i), and . . . incurably confusing.” *Id.* Therefore, the language in *Owasso* cited by ESPN is not applicable here. *See also An Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.* (Ind. Ct. App. 2003), 787 N.E.2d 893, 906 (“*Falvo* should not be read to mean that all records not maintained by a registrar or central custodian cannot be education records.”).

In any event, Ohio State has maintained the records in secure databases and files that are scheduled to be retained for at least seven years. *See* Affidavit of James Null at ¶ 2 (Ohio State’s Department of Athletics “used the Mimosa Nearpoint System (‘Mimosa’) to retain copies of all e-mails and attachments thereto sent to or by any person in The Department . . . in order to retain copies of records that could become relevant to students’ NCAA eligibility and related matters”); Affidavit of Douglas Archie at ¶¶ 3-4 (Ohio State collected documents requested by the NCAA and the documents were copied into secure electronic files to which only authorized personnel had access and which were schedule to be retained for seven years).

Furthermore, the e-mails and other documents requested by ESPN were retained for the very purpose of monitoring the eligibility of student-athletes and responding to NCAA investigations. *See* Affidavit of James Null at ¶ 2 (Mimosa system used “in order to retain copies of records that could become relevant to students’ NCAA eligibility and related matters”); Affidavit of Douglas Archie at ¶¶ 2-3 (documents collected and copied into secure electronic files to respond to “the investigation of several student athletes”). This is unlike the facts presented in *Phoenix Newspapers v. Pima Cmty. Coll.* (Az. Sup. Ct. May 17, 2011), Case No. C20111954. In *Phoenix Newspapers*, the records were located in e-mail inboxes and were on a central database only as a necessary component of providing e-mail, and the court held that this fact did not comport with the idea expressed in *Owasso* of a record kept in a central location or database. *Id.* at 3. Here, the e-mails were retained and collected for the very purpose of monitoring the eligibility of student-athletes and responding to NCAA, and were therefore “maintained” under FERPA.

E. Respect for the Privacy of “Education Records” Is Mandatory When an Educational Institution Accepts Federal Education Funding.

Finally, Amici respectfully take vigorous exception to the impractical argument that FERPA does not operate to compel American colleges and universities to protect the privacy of “education records.” Congress has prohibited schools that accept federal funding from disclosing “education records” and the “personally identifiable information” contained within them.²⁵ 20 U.S.C. § 1232g(b)(1); *see Miami University*, 294 F.3d at 809 (“Under FERPA, schools and educational agencies receiving federal financial assistance *must* comply with certain

²⁵ This Court likewise requires litigants to respect the privacy of personal identifying information as a condition for litigating in this forum. *See* S. Ct. Prac. R. 8.6 (“To protect legitimate personal privacy interests, social security numbers and other personal identifying information shall be redacted from documents before the documents are filed with the Supreme Court in accordance with the Rules of Superintendence.”).

conditions”) (quoting *Owasso*, 534 U.S. 426). As the court noted in *Miami University*, “Congress acknowledged students’ and parents’ privacy interests as a whole and empowered the DOE to protect those interests when a University systematically ignores its obligations under the FERPA.” 294 F.3d at 818 n.20. The practical reliance of American colleges and universities on federal funding makes the “choice” suggested by ESPN illusory. Even in *Miami Student*, this Court did not indulge such analysis.

Flawed by its unrealistic basis, the attempt to characterize FERPA as elective also is overbroad. The contention that FERPA is not prohibitory boils down to the proposition that no contract is binding if one is not absolutely required to enter into it in the first place. Adoption of such a rule plainly would lead to results as unsettling in college and university administration as they would be in contract law. In Ohio, everything at a public university (*e.g.*, student grades, student admission application essays, parental tax returns) would be subject to public disclosure if FERPA compliance truly were a matter of choice. Under ESPN’s position, a document request to each of Ohio’s public universities would effectively pose a dilemma between compliance with the request and utilization of billions of dollars of support from the Department of Education for the benefit of the public. At an Ohio institution of higher education committed to the protection of student privacy under such circumstances, one individual could wipe out substantial federal funding in a single afternoon by demanding production of otherwise private student information.

The Court should be wary of any reliance on the District Court decision in *Chicago Tribune Co. v. Univ. of Illinois Bd. of Trustees* (N.D. Ill. 2011), 781 F. Supp. 2d 672, on which ESPN extensively bases its argument, and not only for these reasons. On September 30, 2011, at oral argument on appeal from that decision, the Seventh Circuit issued an order from the bench

that the parties “file simultaneous supplemental memoranda . . . addressing whether this suit is within the subject matter jurisdiction of the federal courts.”²⁶

III. CONCLUSION

The Court in this case should “sing Ohio’s praise” in recognition of the exemplary way in which the university has heeded its obligations under both FERPA and the Ohio Public Records Law.²⁷ For the reasons set forth above, amici respectfully urge the Court to affirm that Ohio State properly and necessarily has honored the privacy rights of its students under FERPA, and to deny a writ of mandamus.

²⁶ General Docket, Seventh Circuit Court of Appeals, Docket #11-2066, *available at* <https://ecf.ca7.uscourts.gov/cmecf/servlet/TransportRoom>.

²⁷ “Carmen Ohio,” *available at* http://www.sgsosu.net/osu/songs/carmen_ohio.html.

Dated: November 30, 2011

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

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CERTIFICATE OF SERVICE

I served a copy of this brief upon the counsel listed below by first-class U.S. mail on

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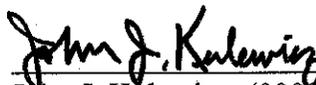
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APPENDIX

FPCO Letter to L. Lee Tyner, Jr., Associate University Attorney at the
University of Mississippi (Feb. 12, 2002)Appendix pp. 1-3

FPCO Letter to Terry Roach, Executive Assistant to the President for
Legal Affairs at the University of Maryland (Aug. 19, 1996).....Appendix pp. 4-8

FPCO Letter to Doris Dixon, NCAA (Mar. 12, 1999)Appendix pp. 9-10



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

FFR 12 2002

Mr. L. Lee Tyner, Jr.
Associate University Attorney
The University of Mississippi
209 Lyceum
P.O. Box 1848
University, Mississippi 38677-1848

Dear Mr. Tyner:

This is in response to your January 25, 2002, letter to this Office in which you request our opinion concerning an application of the Family Educational Rights and Privacy Act (FERPA). Specifically, you "request an opinion . . . regarding whether certain documents are" education records under FERPA. You enclosed a copy of a letter from the University of Mississippi (University) to the Southeastern Conference (SEC) and a redacted self-report to the National Collegiate Athletic Association (NCAA) as examples of the documents you wish us to review. In your letter, you explain that you previously released similar documents after removing "the names of current or former students and any other personally identifiable information" in response to a request for the documents from *The Clarion-Ledger*, a daily newspaper in Mississippi. You state you are requesting guidance on whether you may, under FERPA, disclose the example and similar documents in personally identifiable form in response to a request from *The Clarion-Ledger* for an unredacted version of the documents. This Office administers FERPA, which addresses issues that pertain to education records.

FERPA is a Federal law that gives parents the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. When a student reaches 18 years of age or

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attends a postsecondary institution, he or she becomes an "eligible student" and all rights under FERPA transfer from the parent to the student. FERPA defines "education records" as "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)(i) and (ii). In using the term "education records," the Department refers to materials that are preserved or retained by an educational agency or institution, or someone acting for such agency or institution, as an institutional or official record of the student. In other words, the term does not include student work that is created, used, or kept in the classroom and does not become part of the student's institutional record.¹

FERPA generally prohibits the disclosure of personally identifiable information derived from education records without the prior written consent of the eligible student, except in certain specified circumstances. Based on the information you have provided this Office, none of the exceptions to the prior written consent provision in § 99.31 applies to *The Clarion-Ledger's* request for unredacted documents. 34 CFR §§ 99.30 and 99.31.

Please note that section 99.3 of the regulations defines "personally identifiable information" as information that includes but is not limited to:

- (a) the student's name;
- (b) the name of the student's parent or other family member;
- (c) the address of the student or the student's family;
- (d) a personal identifier, such as the student's social security number or student number;
- (e) a list of personal characteristics that would make the student's identity easily traceable; or
- (f) other information that would make the student's identity easily traceable.

(Emphasis added.)

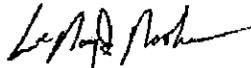
¹ This interpretation of "education records" is the position of the United States as set out in more detail in an amicus curiae brief supporting petitioners in Owasso Independent School District No. I-011 v. Falvo No. 00-1073 (S. Ct.). The Supreme Court may rule on the scope of the term "education records" in the above-captioned matter. The Department will review the Court's ruling in this case, and may issue additional guidance or regulations to further clarify the scope of the term "education records."

Based on our review of the letter and sample report you submitted, this Office has determined that the documents at issue are education records. We have determined that the documents, in unredacted form, are education records because they are directly related to the student -- they contain specific information such as the name of the student and his high school -- and because the documents are maintained by the University, and are institutional in nature (they relate to the school's responsibility to self-report violations to the NCAA)².

FERPA does not specifically define "easily traceable," and situations regarding disclosures of information that could be considered easily traceable must be analyzed on an individual basis. For example, a university is in the best position to determine whether a redacted version of an education record would be easily traceable if disclosed by the institution. In making this determination, an institution should take into consideration a number of factors. First, the school should consider whether the party seeking access to the records has prior knowledge of the students listed in the education record. In examining the prior knowledge of a potential recipient, the standard the school official should apply is whether the individual can trace the identity of the student without significant amounts of additional searching for information. Thus, our focus has been on whether the school official reasonably could have concluded, at the time of the disclosure, that the disclosure would not make the student's identity easy to trace. If an institution determines that an education record remains easily traceable to a student even after it has been redacted, the institution would be prohibited from disclosing the record without the prior written consent of the student.

I trust that the above is responsive to your inquiry.

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office

² In an unreported decision, the Chancery Court of the 1st Judicial district of Hinds County rules on this issue in 1996. Gannett River States Publishing Corporation v. Mississippi State University, Case G95-1795 (July 5, 1996). The court held that the records at issue in that case -- correspondence from the NCAA to the university -- were subject to disclosure under the judicial order exception in FERPA. In order to apply the exception, the court had to have concluded that the records were "education records" under FERPA. To the extent the holding contradicts the notion that correspondence to or from the NCAA is an education record, the Department disagrees with the ruling.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

AUG 19 1996

Mr. Terry Roach
Executive Assistant to the President
for Legal Affairs
University of Maryland
2101 Main Administration Building
College Park, Maryland 20742

Dear Mr. Roach:

This is in response to your recent telephone inquiries and subsequent letter of May 29, 1996, regarding the Family Educational Rights and Privacy Act (FERPA) and its application to educational records that are redisclosed by a third party.

In your letter, you explained that the University of Maryland (University), as well as other postsecondary institutions, are required by the National Collegiate Athletic Association (NCAA) to submit investigative reports in connection with an individual student athlete's eligibility to participate in intercollegiate athletics. You stated that the information which the NCAA requires its member institutions to prepare and disclose on its student athletes ranges from grades and course work to the details of misconduct and rules violations.

You also noted that intercollegiate athletics is the object of much media attention and that information contained in reports submitted by universities to the NCAA is frequently requested by the media. You explained that recently, on a number of occasions, sports writers have contacted the NCAA seeking details about particular players. In response to such requests the NCAA has released "sensitive and identifiable information to the embarrassment of student-athletes." Additionally, you provided articles from the *Washington Times* in which Mr. Jack Kitchen, NCAA attorney, is quoted as stating that FERPA does not apply to the NCAA because the NCAA does not receive Federal funds.

In sum, you ask the Department's Family Policy Compliance Office (FPCO) to confirm that these investigative reports, sometimes referred to as "letters of inquiry," are "education records" under FERPA. Second, you inquire whether the NCAA can publicly

redisclose an investigative report submitted to the NCAA by a university without the student's written consent. You also ask whether, if the NCAA publicly discloses information from such reports, FERPA provides any sanctions against the NCAA or the institution.

As you are aware, FERPA protects a student's privacy interest in his or her "education records." The term "education records" is defined as:

[T]hose 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). See also 34 CFR § 99.3 "Education records." Accordingly, a letter of inquiry or a report regarding a student athlete in attendance at a university is an education record under FERPA because the letter is directly related to the student (mentions the student-athlete's name) and is maintained by the school.

Addressing your second question, FERPA provides that education records, or personally identifiable information from such records, may be disclosed by institutions of postsecondary education to third parties only after obtaining prior written consent of the student. 20 U.S.C. § 1232g(b) (1) and (b) (2) (A). See also 34 CFR § 99.30.¹

Thus, universities may disclose information from the education records of student athletes who sign a copy of the NCAA's Student Athlete Statement (a copy of which you provided). Part II of the form is entitled "Buckley Amendment Consent" which reads:

By signing this part of the form, you certify that you agree to disclose your education records.

¹ FERPA does provide a number of exceptions to the general rule requiring written consent prior to disclosure of personally identifiable information. See 34 CFR § 99.31.

You understand that this entire form and the results of any NCAA drug test you may take are part of your education records. These records are protected by the Family Educational Rights and Privacy Act of 1974, and they may not be disclosed without your consent.

You give your consent to disclose only to those authorized representatives of this institution, its athletics conference (if any) and the NCAA, the following documents:

* * *

- o Any other papers or information obtained by this institution pertaining to your NCAA eligibility.

You agree to disclose these records only to determine your eligibility for intercollegiate athletics, your eligibility for athletically related financial aid, for purposes of inclusion in summary institutional information reported to the NCAA (and which may be publicly released by it),² for NCAA longitudinal research studies and for activities related to NCAA compliance reviews.

Even when a student has consented to the initial release of his "education records by the institution," FERPA limits the redisclosure of information from education records by third parties that receive such information. Therefore, information from an education record that the NCAA receives from an institution cannot be redisclosed without the student's prior written consent. The statute states:

...[P]ersonal information shall only be transferred to a third party on the condition that such party will not permit

² We note that the NCAA form 95-3a section, "Buckley Amendment Consent," provides that "summary institutional information" may be rereleased by the NCAA. The NCAA's redisclosure of "summary institutional information" is consistent with FERPA because this information refers to statistical compilations, not personally identifiable information from a student's education record.

any other party to have access to such information without the written consent ... of the student.

20 USC § 1232g(b)(4)(B). See also 34 CFR § 99.33(a)(1).

Regarding your question about the sanctions that would occur should an improper redisclosure of information from education records occur, the statute states:

If a third party outside the educational agency or institution permits access to information in violation of paragraph (2) (A), or fails to destroy information in violation of paragraph (1) (F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

20 U.S.C. § 1232g(b)(4)(B).

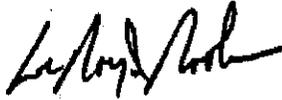
The statute directs the Secretary to obtain voluntary compliance from educational institutions and agencies. 20 USC § 1232g(f). Among the enforcement options available to the Department if a third party improperly redisclosed information from a student's education record that it received from a particular institution, the Department could prohibit the institution from making further disclosures to that third party for a period of at least five years³.

³ According to the legislative history from the Improving America's Schools Act (IASA), Congress targeted third parties who receive information from education records from schools without the consent of the student or parent. In particular, the Senate sponsor of the IASA amendments, Senator Grassley, stated that third parties have violated the redisclosure provisions for over 20 years. He hoped that his new provision strengthening the penalty for third party redisclosure by requiring that schools not be allowed to disclose information for up to five years would force "organizations to live up to the responsibilities placed in the law since 1974." 140 Cong Rec. S10290 (daily ed. August 2, 1994) (statement of Sen. Grassley).

Finally, we note that FERPA places the initial responsibility on the institution for notifying a third party receiving education records about the restrictions on redisclosure. 20 USC § 1232g(b)(4)(B); 34 CFR § 99.33(a)(1). When disclosing information from education records under § 99.30 to a third party such as the NCAA, an educational institution should inform the receiving party that the information may not be further disclosed. This could be accomplished, for example, by informing the third party that "this document contains personally identifiable information from a student's educational record. It is protected by the Family Educational Rights and Privacy Act (20 USC § 1232g) and may not be rereleased without the consent of the student" or some alternative phrasing to that effect.

I trust that this is responsive to your inquiry. Should you have further questions, please contact this Office again.

Sincerely,



LeRoy S. Rucker
Director
Family Policy Compliance Office



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF MANAGEMENT

MAR 12 1999

Ms. Doris Dixon
National Collegiate Athletic Association
One Dupont Circle, NW
Suite 400
Washington, D.C. 20036

Dear Ms. Dixon:

This letter is written in follow-up to our meeting of January 13, 1999, in which you and other participants expressed concern on behalf of the National Collegiate Athletic Association (NCAA) regarding the limitations that the Family Educational Rights and Privacy Act (FERPA) places on certain disclosures of education records. Also, this responds to a February 4, 1999, letter from Mr. John Morris relative to our meeting. In particular, the NCAA is concerned about the "easily traceable" aspect of FERPA as it applies to the release of NCAA investigative reports, waivers, and denial decisions.

While we are considering the scope of "easily traceable" information within the definition of "personally identifiable information," we wanted to provide to you, in writing, our suggestion that a prospective student-athlete provide to the NCAA prior written consent to disclose education records. Specifically, we suggest that if the NCAA added the following language to its Student Athlete Statement, it would permit the NCAA to release the investigative reports and respond to any subsequent questions regarding those reports in compliance with FERPA:

I allow the NCAA to disclose personally identifiable information from my education records to any third party, including but not limited to the media, for the purpose of reporting or verifying compliance/accuracies with regard to the NCAA Constitution and Bylaws, to investigate alleged violations of the Constitution and Bylaws, and/or to issue student infraction reports.

Additionally, we suggest that if the NCAA added the following language to its Student Athlete Statement, it would permit the NCAA to release waiver and denial decisions and respond to any subsequent questions regarding those waivers or decisions:

I allow the NCAA to disclose personally identifiable information from my education records to any third party, including but not limited to the media, for the purpose of reporting or verifying compliance/accuracies with regard to a waiver or denial decision.

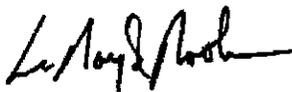
As we have previously informed you, FERPA requires that specific written consent be provided prior to disclosure of education records. The consent must be signed and dated. In addition, the written consent must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made. 34 CFR § 99.30. The above statements meet the prior written consent requirement for the purpose of FERPA.

Also, even if a student-athlete were to sign the above consent, the NCAA would be under no obligation to change its policy of disclosing information from education records in nonpersonally identifiable form. Rather, the NCAA could continue its disclosure in the same manner but the signed consent would alleviate any FERPA implications where a student's identity might be easily traceable.

Although we have typically advised schools that an easily traceable analysis must be made, at least in part, by the school on a case-by-case basis, we have concluded that if a reasonable person in the community can identify the subject of the report based on the information provided, then that release will violate FERPA. While we recognize that this conclusion may cause some difficulty for current NCAA reporting procedures, we believe that the legislative history and purpose of FERPA require the balance be struck in favor of the protection of privacy of a student-athlete's identity. We also have concluded that the caselaw in a non-privacy context (Freedom of Information Act) supports this decision as well. Whitehouse v. United States Dep't of Labor, 997 F. Supp. 172 (D. Mass. 1998).

We enjoyed meeting with you and would be interested in having the NCAA's thoughts regarding such a modification of your consent agreement. Please do not hesitate to contact this Office if you have any questions.

Sincerely,



LeRoy S. Rooker
Director
Family Policy Compliance Office