

ORIGINAL

IN THE SUPREME COURT OF OHIO

State, ex rel. ESPN INC.,	:	Case No.: 2011-1177
	:	
Petitioner,	:	
	:	Original Action in Mandamus
vs.	:	
	:	
THE OHIO STATE UNIVERSITY,	:	
	:	
Respondent.	:	

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**BRIEF OF AMICI CURIAE OHIO LEGAL RIGHTS SERVICE;  
OHIO SCHOOL BOARDS ASSOCIATION;  
COMMUNITY LEGAL AID SERVICES; AND  
NORTHEAST OHIO LEGAL SERVICES  
NOT EXPRESSLY SUPPORTING THE POSITION OF ANY PARTY**

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## STATEMENT OF INTEREST

Today, Ohio Legal Rights Service, Ohio School Boards Association, Community Legal Aid Services, and Northeast Ohio Legal Services are grateful for the opportunity to appear jointly as amici curiae to assist the Court in finding a solution to the vexing problems posed by this litigation. Amicus curiae the Ohio Legal Rights Service (“LRS”) is an independent state agency chartered at R.C. 5123.60 to protect and advocate for the rights of people with disabilities. The LRS Commission provides governance and oversight to the service. LRS has been designated by the Governor of Ohio as the protection and advocacy system (“P&A”) under federal law for people with disabilities in Ohio. See Section 10541 et seq., Title 42, U.S.Code. LRS remains independent from executive agencies and the Ohio Office of the Attorney General. The mission of LRS is to protect and advocate, in partnership with people with disabilities, for their human, civil, and legal rights. As the P&A for Ohio, LRS has extensive experience representing children with disabilities in special education cases before administrative bodies and in federal court. LRS recognizes that this case has implications for every Ohio child with a disability and their parents, and therefore joins in this brief with other Ohio-based civil justice groups and members of the education community.

Amicus curiae Ohio School Boards Association (“OSBA”) is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards in all of the city, local, exempted village, joint vocational school districts and educational service center governing boards throughout the State of Ohio are members of the OSBA, whose activities include extensive informational support, advocacy and consulting

activities such as board development and training, legal information, labor relations representation, and policy service and analysis.

Amicus curiae Community Legal Aid Services, Inc. ("CLAS") is the primary provider of free legal representation to low-income and elderly residents of central northeast Ohio. Formed in 2000 from the merger of county legal aid organizations throughout its service area, CLAS serves Columbiana, Mahoning, Medina, Portage, Stark, Summit, Trumbull and Wayne Counties, with combined total population of 1,930,463 persons, or seventeen percent (17%) of the State's population. The mission of CLAS is to secure justice for and protect the rights of the poor and to promote measures for their assistance. Toward this end, CLAS provides its clients a full complement of civil legal services such as protective orders, housing assistance, benefits and health advocacy. CLAS provides 47% of its services for the benefit of families with children, including juveniles and young adults. CLAS provides services in the area of education law, including school enrollment, discipline and IEP negotiation. Among CLAS' program priorities are legal measures that promote the safety, security and wellness of its clients. Protecting the confidentiality of student information is of vital importance to CLAS and its clients, most of whom cannot afford litigation to assert or defend their privacy rights.

Amicus curiae Northeast Ohio Legal Services ("NOLS") is a publicly funded, non-profit corporation that provides free legal services in civil matters to low-income individuals living in a eight county region of central northeast Ohio, consisting of Columbiana, Mahoning, Medina, Portage, Stark, Summit, Trumbull and Wayne Counties. The region has a total population of some 2.5 million and an eligible poverty population of approximately 275,000. A majority of the population lives in the region's two metropolitan areas, Akron-Canton and Youngstown-Warren, and numerous smaller urban areas, including Mansfield, Wooster, Massillon and East Liverpool.

The region encompasses over 100 public school districts, as well as seven colleges or universities. NOLS is the primary source of representation in this region for low-income residents experiencing school problems including issues related to school records. Privacy and access to records under FERPA are issues highly relevant to NOLS' daily practice of law.

Through their joint appearance as amici curiae, LRS, OSBA, CLAS, and NOLS seek to direct this Court's attention to issues concerning the interpretation of Ohio's Public Records Act and the federal Family Education Rights and Privacy Act ("FERPA") and the release of education records to the public. The issues in this case are about more than an entertainment company seeking records from a university about a high-profile investigation of an athletic program. Rather, they affect all Ohio children attending public elementary, secondary, and postsecondary schools, and how school records containing students' personally identifiable information, the content and location of which encompass far more than grade cards in a modern educational environment, could be affected in terms of maintenance and public access. A holding by this Court that "education records" covered by FERPA are subject to disclosure under Ohio's Public Records Act may jeopardize continuing federal funding to Ohio schools and have a broader impact on other federally funded programs with similar disclosure prohibitions.

### **STATEMENT OF FACTS**

Relator ESPN filed this original mandamus action to compel Respondent The Ohio State University ("OSU") to produce certain records ESPN requested about alleged violations committed by OSU's football program and some of its starting players. In the course of its investigation, ESPN requested the following records from OSU:

1. All emails, letters and memos to and from Jim Tressel, Gordon Gee, Doug Archie, and/or Gene Smith with key word "Sarniak" since March 15, 2007.

2. All documents and emails, letters and memos related to NCAA investigations prepared for and/or forwarded to the NCAA since January 1, 2010 related to an investigation of Jim Tressel.
3. Any report, email or other correspondence between the NCAA and Doug Archie or any other Ohio State athletic department official related to any violation (including secondary violation) of NCAA rules involving the football program, since January 1, 2010.

("Requested Records").

OSU provided some of the Requested Records to ESPN with students' personal information redacted, and it withheld other records citing the confidentiality provisions under the Family Education Rights and Privacy Act of 1974 ("FERPA" or the "Act"), among other reasons. OSU filed portions of the Requested Records under seal with the Court; therefore, Amici do not know the content of the records.

Amici are focused primarily on the Court's interpretation of the Ohio Public Records Act in light of FERPA, and, to the extent any Requested Records meet FERPA's definition of "education records," Amici encourage the Court to withhold their disclosure.

## **BACKGROUND**

### **I. FERPA'S PURPOSE IS TO PROVIDE PARENTS AND STUDENTS ACCESS TO EDUCATIONAL RECORDS AND PROTECT THOSE RECORDS FROM UNAUTHORIZED DISCLOSURE**

FERPA was passed in response to growing concern over parents' and students' rights to access education records and students' privacy rights from unauthorized disclosure. FERPA was also part of a much broader movement in the United States to expand and protect individual privacy rights in different contexts. Below is an overview of FERPA's purpose, the historical

framework in which FERPA was enacted, parents' and students' rights to access education records, and educational institutions' obligations to protect students' information.

**A. FERPA Was Enacted to Address Increasing Violations of Student Privacy Rights**

FERPA, Pub.L No. 93-380 § 513 codified at Section 1232g, Title 20, U.S.Code (2011), was enacted by Congress pursuant to its authority under the Spending Clause in Section 8, Article I, United States Constitution. U.S. Department of Education, *Legislative History of Major FERPA Provisions* at 1 (June 2002)<sup>1</sup>. The Act was intended to remedy "the growing evidence of the abuse of student records across the nation." 121 Congressional Record 13,990 (May 13, 1975)(statement of Senator Buckley).

**1. FERPA Was Passed as Part of a Larger Movement to Protect Individual Privacy**

In the years surrounding FERPA's enactment, each branch of the United States government was particularly focused on protecting individuals' right to privacy across various settings. Congress enacted The Fair Credit Reporting Act of 1970, Section 1681 et seq., Title 15, U.S.Code, to prevent consumer credit reporting agencies from disclosing misleading, inaccurate, or arbitrary personal information regarding consumers' credit histories and status. The Privacy Act of 1974, Section 552a, Title 5, U.S.Code, was created to alleviate concerns caused by the increasing use of computerized databases that stored personal data. The Right to Financial Privacy Act of 1978, Section 3401, Title 12, U.S.Code, created a statutory Fourth Amendment protection for consumers to prevent banks from arbitrarily releasing their customers' personal banking records. Similarly, the United States Supreme Court was engulfed in several privacy lawsuits, including, *Griswold v. Connecticut* (1965), 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.

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<sup>1</sup> Available at: [www.2.ed.gov/policy/gen/guid/fpco/ferpa/leg-hisotry.html](http://www.2.ed.gov/policy/gen/guid/fpco/ferpa/leg-hisotry.html) (accessed November 29, 2011).

510 (holding that “specific guarantees in the Bill of Rights \* \* \* create zones of privacy”), *Terry v. Ohio* (1968), 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (reiterating the Fourth Amendment’s protection against unreasonable searches and seizures upon persons “wherever an individual may harbor a ‘reasonable expectation of privacy,’” quoting *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576), and *Roe v. Wade* (1973), 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (acknowledging the Court’s long recognition of a “right of personal privacy, or a guarantee of certain areas or zones of privacy” under the Constitution).

Finally, the executive branch was attending to growing privacy rights and concerns in America. In a radio address to the public on February 23, 1974, President Nixon stated:

To use James Madison's terms, in pursuing the overall public good, we must make sure that we also protect the individual's private rights. There is ample evidence that at the present time this is not being adequately done. In too many cases, unrestricted or improper use of personal information is being made. \* \* \* Whether such information is provided and used by the government or the private sector, the injury to the individual is the same. His right to privacy has been seriously damaged. So we find that this happens sometimes beyond the point of repair.

President Richard Nixon, *Radio Address About the American Right of Privacy* (1974).<sup>2</sup>

To address these concerns, President Nixon established the Domestic Council Committee on the Right of Privacy, chaired by then Vice President Gerald Ford. The Committee’s purpose was to examine (1) “[h]ow the Federal Government collects information on people and how that information is protected;” (2) “[p]rocedures which would permit citizens to inspect and correct information held by public or private organizations;” (3) “[r]egulations of the use and dissemination of mailing lists;” and (4) “most importantly, ways that we can safeguard personal information against improper alteration or disclosure.” *Id.* Several months later, President

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<sup>2</sup>Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=4364#axzz1dnCNtghW> (accessed November 29, 2011).

Gerald Ford reiterated that “[t]here will be hot pursuit of tough laws to prevent illegal invasion of privacy in both government and private activities.” President Gerald Ford, *Address to a Joint Session of the Congress* (1974).<sup>3</sup>

## **2. The Russell Sage Report Demonstrated Growing Abuse of Student Records and Led to FERPA’s Passage**

In 1969, the Russell Sage Foundation convened a conference on the legal and ethical aspects of school record keeping. The conference found that (1) parents and students had little knowledge of the contents of student records, how they were used, or to whom they were dispersed; (2) parents had difficulty accessing the records to determine if the information contained was appropriate or accurate, and no procedure existed to challenge any inaccurate information in a student’s record; and (3) records were released to non-school individuals without a parent’s or student’s consent because little regulation was in place to protect students’ records from unauthorized access. Jacob, Decker, and Harshorne, *Ethics and Law for School Psychologists* (6 Ed.2011 Wiley & Sons) 62. The results of the conference played a large role in FERPA’s subsequent enactment. Senator Buckley, FERPA’s primary sponsor, stated, “the recommendations of the Conference in large part formed the basis of my amendment.” 121 Congressional Record 13,990 (May 13, 1975)(statement of Senator Buckley).

FERPA’s initial enactment was unusual because it was offered as an amendment on the Senate floor and passed without Committee consideration. 120 Congressional Record 39862 (1974). Thus, no legislative history existed until Senators Buckley and Pell introduced, on December 13, 1974, the “Joint Statement in Explanation of the Buckley/Pell Amendment” (“Joint Statement”) to explain their intent in passing the Act. 120 Congressional Record 39862-39866 (1974). The Joint Statement remains a significant part of FERPA’s legislative history,

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<sup>3</sup>Available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=4694#axzzlSenKzoWT> (accessed November 29, 2011).

and explains FERPA's purpose as two-fold: to give parents and students access to the students' educational records and to protect individual privacy. Congressional Record at 39862. Senators Buckley and Pell anticipated that with adoption of the Act "parents and students may properly begin to exercise their rights under the law, and the protection of their privacy may be assured." Id. at 39863. Senators Buckley and Pell's remarks further emphasize the particular importance placed on individual privacy through FERPA. "An individual should be able to know, review, and challenge all information – with certain limited exceptions – that an institution keeps on him, particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution." Id. at 39862. Enforcement rights rest with the Secretary of the U.S. Department of Education. Id.

**B. FERPA is Both an Access and Privacy Statute Designed to Ensure Parents and Students' Rights to Inspect and Contest Education Records and Maintain Students' Privacy**

FERPA has been amended nine times since its enactment thirty-seven years ago. The first amendments were introduced through the Joint Statement - less than one month after FERPA's enactment - with retroactive application to FERPA's November 19, 1974 effective date. These amendments were intended to clarify concerns that members of the educational community identified, including: the institutions and agencies to which the Act applies, parents' right to challenge inaccurate or misleading information in education records, and when certain information may be disclosed without parental or eligible student consent. Congressional Record at 39862. The 1974 Amendments created FERPA's existing structure, and subsequent amendments further modify the Act to meet its intended purpose.

**1. Covered Institutions**

FERPA applies to any "educational agency or institution" defined as "any public or private agency or institution which is the recipient of funds under any applicable program."

Section 1232g(a)(1)(D)(3), Title 20, U.S.Code. The 1994 Amendments to the Improving America's Schools Act expanded this definition to include State educational agencies whose records are not otherwise covered by FERPA. Section 1232g(a)(1)(B), Title 20, U.S.Code, U.S. Department of Education, *Legislative History of Major FERPA Provisions* at 1 (June 2002).

## 2. Covered Records

When FERPA was first enacted, it included a non-exclusive list of records that were subject to the Act's protection. 120 Congressional Record 39,864 (1974). Through the 1974 Amendments, Congress removed the list of content-specific records for the current, broader definition of education records: "records, files, documents, and other materials which (i) contains 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". 120 Congressional Record 39,864-5 (1974). Four categories of records are excluded from the 1974 Amendments' definition:

(1) records in the sole possession of instructional, supervisory, and administrative personnel; (2) records of a law enforcement unit which are kept apart from "education records", are maintained solely for law enforcement purposes, and are not made available to persons other than law enforcement officials of the same jurisdiction, provided that personnel of a law enforcement unit do not have access to "education record"; (3) records of employees who are not also in attendance; and (4) physician, psychiatrist, or psychologist treatment records for eligible students.

U.S. Department of Education, *Legislative History of Major FERPA Provisions* at 2 (June 2002).

The current definition has been the subject of much litigation to determine whether specific records are "education records." For example, the U.S. District Court for the District of New Hampshire in *Belanger v. Nashua School Dist.* (D.NH.1994), 856 F.Supp. 40, held that records relating directly to the student and maintained by the school district's attorney, as the

district's agent, were "education records" regardless of the source of the record. In *Owasso Indep. School Dist. No. I-011 v. Falvo* (2002), 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.Ed.2d 896, the court held that grades on peer-graded papers were not "education records" until the teacher recorded them in his/her grade book when they could be considered "maintained" for purposes of FERPA. Finally, the Sixth Circuit Court of Appeals concluded that a university's student disciplinary records – including non-academic content - were "education records" as defined in FERPA. *United States of America v. Miami University* (C.A.6 2002), 294 F.3d 797. In all cases, the courts recognized Congress' intent to define "education records" broadly and the court's role to interpret the definition accordingly.

### **3. Rights of Parents and Eligible Students**

Under FERPA, parents and eligible students - students who have reached the age of eighteen or who are attending postsecondary education institutions - have the right to access and inspect the student's education records, challenge the content of the education records, and consent to the disclosure of the education records. Sections 99.3, 10, 20, and 30, Title 34, C.F.R. The Code of Federal Regulations clarifies an educational agency or institution's obligations to parents and eligible students. First, educational agencies or institutions must give parents and eligible students the opportunity to inspect the student's educational records upon request and for any reason. Sections 99.10, Title 34, C.F.R. This right to inspect is limited in two ways to further protect privacy rights of others. To the extent that the student's records contain information about more than one student, the parent or student may view only the information specific to that student. Section 99.12(a), Title 34, C.F.R. In the case of postsecondary students, the postsecondary institution may not permit an eligible student to view the financial records of his parents or, in some instances, confidential letters or statements of recommendation. Section 99.12(b), Title 34, C.F.R.

Second, parents and eligible students have the right to contest information in a student's education records that may be inaccurate or misleading by requesting that the educational agency amend the record to reflect accurate information. Section 99.20(a), Title 34, C.F.R. Parents and eligible students are entitled to a hearing if the educational agency determines it will not amend the student's record after receipt of the request. Section 99.20(c), Title 34, C.F.R.

#### **4. Disclosure Requirements**

An educational agency or institution is prohibited from implementing a policy or practice of releasing education records, including personally identifiable information, without a parent or eligible student's consent, except as permitted by the Act. Section 1232g(b)(1), Title 20, U.S.Code. There are several exceptions that identify when consent is not required prior to disclosure (e.g. consent is not required to release education records to other school officials or to parents of a dependent student, among others); however, as consent is not at issue in this case, these exceptions will not be discussed here. Sections 1232g(b)(1)(A) and (H), Title 20, U.S.Code.

Further, even if an educational agency or institution releases education records with or without consent, it must ensure the records' continuing confidentiality. Each educational agency or institution must keep a record indicating all third parties who have requested or received access to a student's education records. Section 1232g(b)(4)(A), Title 20, U.S.Code. Pursuant to 1994 Amendments, a third party may only receive information from a student's education record on the condition that it will not permit another party to have access to the information without the parent or eligible student's written consent. If a third party fails to adhere to this condition, then the educational agency or institution may not allow that third party access to information from education records for at least five years. Section 1232g(b)(4)(B), Title 20, U.S.Code.

## ARGUMENT

### **PROPOSITION OF LAW: OHIO'S PUBLIC RECORDS ACT PROHIBITS DISCLOSURE OF EDUCATION RECORDS AS DEFINED UNDER FERPA**

#### **I. OSU IS PROHIBITED FROM DISCLOSING EDUCATION RECORDS PURSUANT TO OHIO'S PUBLIC RECORDS ACT AND FERPA**

ESPN asserts that OSU must release the Requested Records because they are public records as defined by the Ohio Public Records Act. ESPN also argues that the Requested Records are not "education records" under FERPA and relies on this Court's previous holding in *State ex rel. The Miami Student v. Miami University* (1997), 79 Ohio St.3d 168, 680 N.E.2d 956, to support its argument. It is important to note that Amici do not have access to the Requested Records filed under seal with the Court and cannot make a definitive argument as to whether any of them are "education records". If the Court finds that none of the Requested Records meet FERPA's definition of "education records" then it need not reach the larger issue of whether the Ohio Public Records Act and FERPA prohibit the Requested Records' disclosure.

If the Court finds that any of the Requested Records are "education records" then Amici assert that the Ohio Public Records Act precludes OSU from releasing education records because FERPA prohibits their disclosure. This contention is based on the plain language of the statutes, federal interpretation of FERPA, and Spending Clause legislation jurisprudence. Amici also demonstrate why the Court's holding in *State ex rel. Miami Student v. Miami Univ.* should not be followed here, and provides guidance to the Court for determining whether the Requested Records are "education records" under FERPA.

#### **A. Ohio's Public Records Act Precludes the Release of Records Where Federal Law Prohibits Disclosure**

If any of the Requested Records are deemed "education records," then those records are not subject to release under the Ohio Public Records Act because FERPA prohibits their

disclosure. R.C. 149.43(a)(1)(v), in its pertinent part, states “[p]ublic record’ does not mean \* \* \* [r]ecords the release of which is prohibited by state or federal law.” FERPA is a federal law that “prohibits” disclosure of education records within the meaning of R.C. 149.43(a)(1)(v). There is no dispute that OSU has accepted federal education funds, and thus is bound by FERPA’s conditions. Therefore, by the plain language of R.C. 149.43(a)(1)(v), such education records are not public records subject to disclosure by OSU.

**B. The Court Should Construe FERPA as a Prohibition on the Release of Education Records**

The plain language of FERPA, the United States Supreme Court’s jurisprudence on Spending Clause legislation, and the U.S. Department of Education’s interpretation of FERPA establish that FERPA actually prohibits the release of education records. Consequently, if this Court finds that the Requested Records are “education records,” then it should also find that FERPA prohibits their release.

FERPA states: “No funds shall be made available \* \* \* to any educational agency \* \* \* which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein \* \* \*) of students without the written consent of their parents \* \* \*” Section 1232g(b), Title 20, U.S.Code. ESPN attempts to muddle this language by arguing that FERPA does not “prohibit” the release of records, but merely sets conditions for the receipt of federal funds. This is a distinction without a difference.

Pursuant to the Spending Clause of the Constitution, Congress may condition the receipt of federal funds on compliance with certain directions. See *South Dakota v. Dole* (1987), 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171. “Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the

recipient with federal statutory and administrative directives.” *South Dakota v. Dole* at 206 (internal quotations omitted). The United States Supreme Court has likened Spending Clause legislation to the terms of a contract, in that the entity receiving federal funds agrees to abide by the conditions imposed in the applicable federal law. See, e.g., *Pennhurst State School & Hosp. v. Halderman* (1981), 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. Thus, an educational agency or institution becomes bound by FERPA’s terms upon acceptance of federal funds, and is prohibited from releasing education records.

Further, ESPN’s assertion that FERPA is not a prohibition because OSU “could choose to reject federal education money, and the conditions of FERPA along with it,” is inaccurate. OSU has already accepted the federal funding, so it is currently bound by FERPA’s prohibition on the release of education records. Regardless of whether OSU could have rejected federal education funds in the past,<sup>4</sup> it did not do so, and thus is prohibited by FERPA from releasing education records. The Sixth Circuit Court of Appeals adopted this reasoning in *United States v. Miami University* (C.A.6, 2002), 294 F.3d 797, 809. In that case, OSU and Miami University were sued by the DOE to prevent the release of education records in violation of FERPA pursuant to a public records request. The court stated that “once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent.” *Id.* This Court has long recognized the rule that a state court should defer to a federal court’s interpretation of a federal statute. *State ex rel. Marcolin v. Smith* (1922), 105 Ohio St. 570, 616-617, 138 N.E. 881 (“In construing and applying federal laws and the federal constitution, every state should follow that construction and application which has been made by the federal

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<sup>4</sup>See the discussion below addressing the feasibility of rejecting federal funds.

courts.”) Because the Sixth Circuit is a federal court interpreting a federal statute, this Court should defer to the Sixth Circuit’s analysis of FERPA.

ESPN acknowledges the holding in *United States v. Miami University*, but attempts to distinguish it based on the court’s footnote that recognized the United States Supreme Court’s then-recent holding in *Gonzaga University v. Doe* (2002), 536 U.S. 273, 122 S.Ct. 2268; 153 L.Ed.2d 309, that FERPA does not contain a private right of action under Section 1983, Title 42, U.S.Code. In that footnote, the court was merely noting the procedural posture of the case before it, which was not an attempt by a student or parent to enforce FERPA’s non-disclosure provisions. This case similarly does not involve an attempt to enforce FERPA through a private right of action. Thus, the Sixth Circuit’s reasoning that FERPA prohibits the release of education records pursuant to a public records request is equally applicable to this case.

Finally, the U.S. Department of Education’s interpretation of FERPA as a prohibition is also entitled to substantial deference here. Under *Chevron, U.S.A., Inc. v. NRDC, Inc.* (1984), 467 U.S. 837, 104 S.Ct. 2778; 81 L.Ed.2d 694, an agency’s interpretation of the statute it is charged with administering is entitled to substantial deference. The U.S. Department of Education views FERPA’s disclosure provisions as a prohibition, rather than a mere penalty, and enforces it accordingly. See, U.S. Department of Education, *FERPA General Guidance for Parents* (“schools are generally prohibited from disclosing personally identifiable information derived from education records.”);<sup>5</sup> U.S. Department of Education, *Letter to Tazewell County (VA) School Board re: Unauthorized Access to Education Record Systems* (October 7, 2005) (“\* \* the prohibition in FERPA against disclosing or permitting access to education records without consent clearly does not allow an educational agency or institution to leave education

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<sup>5</sup> Available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html> (last modified February 28, 2011).

records unprotected or subject to access by unauthorized individuals \* \* \*)<sup>6</sup>; *United States v. Miami University* (C.A.6, 2002), 294 F.3d 797, 815 (The U.S. Department of Education filed a complaint for injunction in federal court under its enforcement authority to prevent Miami University and OSU from disclosing education records). Because the U.S. Department of Education has unambiguously interpreted FERPA as prohibiting the disclosure of education records, the Court should give substantial deference to the agency.

FERPA's language and federal guidance on its interpretation and enforcement prove that FERPA prohibits the disclosure of education records, and the Court should hold as much here.

**C. ESPN Cannot Rely on *State ex rel. Miami Student* to Compel Production of Education Records as Non-academic Records and Information that Directly Relate to the Student are Covered by FERPA**

ESPN asserts that the Requested Records are not covered under FERPA because they are non-academic in nature. Its argument hinges on this Court's decision in *State ex rel. The Miami Student v. Miami University* (1997), 79 Ohio St.3d 168, 680 N.E.2d 956, and the Court's rationale in that case that proceedings and records that do not contain educationally related information, such as grades or other academic data, are not covered by FERPA. Id. at 171-2. However, ESPN is wrong to rely on the Court's holding in *State ex rel. The Miami Student* because it depended on distinguishable law and ignored the U.S. Department of Education's definitive guidance, and federal courts' subsequent interpretation of FERPA directly contradicts this Court's ruling.

In *State ex rel. The Miami Student vs. Miami Univ.*, the editor in chief of Miami University's student newspaper requested records of student disciplinary proceedings held before the University Disciplinary Board to track student crime trends on campus. The university

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<sup>6</sup>Available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/tazewellva-mcgraw.html> (accessed November 29, 2011).

withheld the requested information citing the confidentiality provisions under FERPA. The editor filed an original mandamus action in this Court to compel production of the records. Id. at 168-9. In reaching its decision, the Court followed the holding of the Georgia Supreme Court in *Red & Black Publishing Co. v. Bd. of Regents of Univ. System of Georgia* (1993), 262 Ga. 848, 427 S.E.2d 257, and held that the records from a student organization court that disciplined student organizations were not covered under FERPA as they were not education records since they did not relate to “student academic performance, financial aid, or scholastic probation.” *State ex rel. The Miami Student v. Miami University* (1997), 79 Ohio St.3d 168, 171-2, 680 N.E.2d 956.

The Court’s reliance on the Georgia Supreme Court’s decision was misplaced. In fact, the U.S. Department of Education – the agency charged with enforcing FERPA – spoke directly to the issue raised in *Red & Black Publishing Co.* while promulgating regulations implementing FERPA. In explaining FERPA’s 1995 Amendments, the U.S. Department of Education concluded “all disciplinary records, including those related to non-academic or criminal misconduct by students, are ‘education records’ subject to FERPA.” 60 F.R. 3464, 3465. The U.S. Department of Education distinguished the holding in *Red & Black Publishing Co.* stating that it “concerned records of a student ‘organization court,’ which disciplined a student *organization* (fraternity) for a rules violation, and did not concern disciplinary action against an individual student.” Id. at 3465. Justice Lundberg Stratton, in her dissenting opinion in *State ex rel. Miami Student v. Miami Univ.*, correctly recognized that *Red & Black Publishing Co.* was decided prior to the 1995 Amendments and that this Court’s reliance on it ignored the U.S. Department of Education’s “[definitive interpretation of] the issue of whether disciplinary records are education records.” *State ex rel. Miami Student v. Miami Univ.*, 79 Ohio St.3d 168 at

176. Finally, in *United States v. Miami University* (C.A.6, 2002), 294 F.3d 797, 815, the Sixth Circuit followed the U.S. Department of Education's lead and held that student disciplinary records are education records under FERPA regardless of their non-academic content. The Sixth Circuit also noted that this Court's decision in *State ex. rel. Miami Student* was reached in error. *Id.* at 810. In response to the Sixth Circuit's holding, the U.S. Department of Education stated, "[w]e have believed all along that disciplinary records are protected by FERPA." U.S. Department of Education, *Statement of LeRoy Rooker Regarding Miami Decision*.<sup>7</sup>

Federal law and guidance plainly state that information, not directly related to *academics* but directly related to the *student*, is information protected by FERPA. Heeding this Court's rule to follow federal courts' construction and application of federal law, the Court should tailor its opinion to accurately reflect the Sixth Circuit's holding and the U.S. Department of Education's interpretation of FERPA. Accordingly, if the Court finds that any or all of the Requested Records relate directly to the student and are maintained by OSU, then it should also find that they are "education records" covered by FERPA regardless of their non-academic content.

**D. The Court Should not End Its Analysis if It Finds the Requested Records Only Tangentially Relate to Students because Copies of Records Used in Student Disciplinary Proceedings are Education Records**

Copies of records used in student disciplinary proceedings are "education records." ESPN argues that the Requested Records are not covered by FERPA because they relate only tangentially to the student; therefore, they should be released to ESPN without redactions. For

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<sup>7</sup>Available at: <http://www2.ed.gov/policy/gen/guid/fpco/courtcases/miami.html> (last modified September 15, 2004).

FERPA's purposes, this proposition of law is true generally.<sup>8</sup> See, *Wallace v. Cranbrook Edn. Community, Michigan AFSCME Council 25* (Sept. 27, 2006), E.D. Michigan, Southern Division No. 05-73446, unreported (attached) (holding that records used in disciplinary proceedings against an employee that contained names and addresses of students were not "education records" under FERPA as the records only tangentially related to the students.); *Ellis v. Cleveland Mun. School Dist.* (N.D. Ohio 2004), 309 F.Supp.2d 1019 (holding that FERPA does not prevent the disclosure of information contained in teacher disciplinary records, including the names of students as alleged victims or witnesses, as those records relate directly to the teacher not the students). However, to end the analysis there is premature as it does not consider whether any of the Requested Records are maintained by OSU and were used in student disciplinary proceedings, which may entitle them to FERPA protection.

In the analogous context of records created by a law enforcement unit for law enforcement purposes, which are exempt from FERPA, the U.S. Department of Education noted:

If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a dean, principal, or other school official for use in a disciplinary proceeding, that copy is an 'education record' subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an 'education record' and does not become an 'education record' merely because it was shared with another component of the institution.

60 F.R. 3464, 3465.

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<sup>8</sup> Other laws relating to public records may protect students' information and require redaction. *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117 (citing *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 2000-Ohio-345 personal information about private citizens [jurors] is not 'public record' because it does nothing to shed light on the operations of the court ). See also, *State ex rel. Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662 (social security numbers in court records do not "shed light on any government activity"); *Ohio Sunshine Laws: An Open Government Resource Manual* (Ohio Attorney General, 2009) at 73.

It is uncertain if any students at issue here were subject to student disciplinary proceedings at OSU. Nevertheless, if any of the Requested Records were copied and used in student disciplinary proceedings, and the records were maintained by OSU as part of the student's disciplinary proceeding, then, following the U.S. Department of Education's reasoning, those records are "education records" under FERPA.

**E. The Release of Education Records Pursuant to This Court's Order Creates a Policy and Practice that Violates FERPA**

A single order by this Court requiring OSU to release education records will inevitably become a policy and practice of releasing education records in violation of FERPA. ESPN argues that a "discreet request for records pursuant to R.C. 149.43 would not constitute a 'policy or practice of permitting the release of education records.'"<sup>9</sup> This is incorrect. As the court recognized in *United States of America v. Miami University* (C.A.6 2002), 294 F.3d 797, a decision by this Court to order OSU to release education records under R.C. 149.43 will "serve as precedent to compel" OSU to release education records when requested from other sources. OSU would feel "constrained to follow the Ohio Supreme Court's interpretation of [FERPA]." *United States of America* at 819-20. Since FERPA applies to all Ohio public schools and its state educational agency, it necessarily follows that those entities may also feel constrained to follow this Court's interpretation of FERPA and release otherwise protected information. Accordingly, ESPN's request may be more than "discreet," rather, if granted, it may be the creator of a forced policy and practice to release protected information in violation of FERPA.

For these reasons, the Court should find that the Ohio Public Records Act prohibits OSU's disclosure of education records.

**II. EVEN IF THE OHIO PUBLIC RECORDS ACT DOES NOT PROHIBIT THE RELEASE OF EDUCATION RECORDS UNDER FERPA, THEN THE OHIO**

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<sup>9</sup> Merit Brief of ESPN, Inc. at 14.

**PUBLIC RECORDS ACT IS PREEMPTED BY FERPA UNDER THE SUPREMACY CLAUSE.**

If this Court finds that the Ohio Public Records Act does not prohibit the release of education records as required by FERPA, then FERPA preempts the Ohio Public Records Act under the Supremacy Clause of the Constitution. Under the principle of conflict preemption, state law is preempted by federal law if it is “impossible for a private party to comply with both state and federal law.” *Crosby v. Natl. Foreign Trade Council* (2000), 530 U.S. 363, 372-73, 120S.Ct. 2288, 147 L.Ed.2d 352 (citing *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248). State law is also preempted by federal law where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Natl. Foreign Trade Council* at 373 (citing *Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581).

The United States Supreme Court has consistently invalidated state laws that conflict with federal Spending Clause legislation. See, e.g., *Dalton v. Little Rock Family Planning Services* (1996), 516 U.S. 474, 116 S.Ct. 1063, 134 L.Ed.2d 115 (conflict between state constitution and federal Hyde Amendment); *Bennett v. Arkansas* (1988), 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (conflict between state attachment statute and federal restriction on attachment of Social Security benefits); *Blum v. Bacon* (1982), 457 U.S. 132 (conflict between state and federal welfare program requirements); *Carleson v. Remillard* (1972) 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (same); *Townsend v. Swank* (1971), 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (same). Thus, FERPA similarly preempts state laws that conflict with its mandates.

Few courts have reached this question, but two state courts have held that FERPA preempts state public records laws. See, *Rim of the World Unified School Dist. v. Superior Court* (Cal 2002), 104 Cal.App.4th 1393, 1399; *Board of Trustees, Cut Bank Public Schools v. Pioneer*

*Press* (Mont.App. 2005), Cause No. DV-05-081 at 8-9 (attached), reversed on other grounds, *Board of Trs. v. Cut Bank Pioneer Press* (Mont.Sup.Ct. 2007), 337 Mont. 229, 160 P.3d 482, 2007 MT 115. The state courts in both of these cases held that FERPA preempts state public records laws because of the inherent conflict between the state law's disclosure requirements and FERPA's prohibition on disclosure.

Under the circumstances of this case, if this Court holds that the Ohio Public Records Act does not exempt "education records" from the definition of public records, then it will be impossible for OSU to comply with both the Ohio Public Records Act's requirements of disclosure and FERPA's requirement of non-disclosure. In addition, disclosure of education records by OSU would impede the "accomplishment and the execution of the full purposes and objectives of Congress" - students' right to privacy - as dictated by FERPA. Therefore, FERPA preempts the Ohio Public Records Act due to the inherent conflict.

For these reasons, if this Court holds that the Ohio Public Records Act requires the disclosure of education records, then the Ohio Public Records Act is preempted by FERPA under the Supremacy Clause.

### **III. PUBLIC POLICY SUPPORTS A HOLDING THAT THE OHIO PUBLIC RECORDS ACT'S REFERENCE TO FEDERAL LAW INCLUDES SPENDING CLAUSE LEGISLATION**

In this case, this Court must strike a balance between three competing policy interests: individuals' interest in maintaining the privacy of personally identifiable information in records that are held by public offices, the public's interest in public offices continuing to receive federal funds, and the public's interest in open government. The balance between these interests will be best met by this Court holding that OSU must not disclose education records.

At the outset, it is important to note the principle difference between the records requested in this case and those in *State ex rel. The Miami Student v. Miami University* (1997),

79 Ohio St.3d 168, 680 N.E.2d 956. In *State ex rel. Miami Student v. Miami Univ.*, a student newspaper requested student disciplinary records for the purpose of tracking crimes and other misconduct on campus. The newspaper specifically requested that identifying information, including names and identification numbers, be redacted from the records prior to disclosure. By contrast, ESPN is contesting the redaction of student names from records that have been disclosed and the refusal to disclose other records that would be easily traceable to particular students. Thus, individual privacy rights are directly at stake in this case, unlike in *State ex rel. Miami Student v. Miami Univ.*, and this Court should carefully consider an individual's privacy interests.

This Court has long recognized that the role of the Ohio Public Records Act in serving the public's interest in open government is not unlimited. In *State ex rel. Dawson v. Bloom-Carroll Local School District* (2011), Slip Op. No. 2011-Ohio-6009, the Court upheld a school district's decision to withhold requested records that were covered by the attorney-client privilege, stating that "[w]hile the Public Records Act serves a laudable purpose by ensuring that governmental functions are not conducted behind a shroud of secrecy, even in a society where an open government is considered essential to maintaining a properly functioning democracy, not every iota of information is subject to public scrutiny and certain safeguards are necessary." *Id.* at ¶ 35 (internal quotations omitted), citing *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 438, 732 N.E.2d 960 (affirming decision to withhold Medical Board records to protect confidentiality of patients, witnesses, and physicians under investigation).

The public has an even greater interest in the state's public offices continuing to receive federal funding. There is no dispute that public universities depend on federal funds, and they cannot operate without federal financial support. In a report from the Association of Public &

Land-Grant Universities (“APLU”) - a non-profit association of public research universities, land-grant institutions, and state university systems - to its members, the APLU noted the consensus among its members that “federal funding is needed to help maintain critical research university capacity and that [they] must pursue this additional federal support.” McPherson, Gobstein, and Schulenburger, Ph.D., *Ensuring Public Research Universities Remain Vital: A Report to the Membership on the Research University Regional Deliberations* at 18 (November 2010).<sup>10</sup> The report also called for the “renewal of the federal-university partnership, critical to future U.S. economic and technological competitiveness.” *Id.* at 22. The courts have also acknowledged public universities’ need for federal money and the impact the withdrawal of federal funding would have on a university’s operations. “[C]utting off federal funding under 20 U.S.C. § 1234c(a)(1) would be detrimental to the Universities’ educational purpose and would injure more students than it would protect.” *United States of America v. Miami University*, (C.A.6, 2002), 294 F.3d 797, 819.

Public universities’ dependence on federal funds is further demonstrated by the amount of financial aid the U.S. Department of Education provides to students to attend college each year. In fiscal year 2010, the U.S. Department of Education, Federal Student Aid issued \$134 billion through Title IV Programs through 6,200 schools to students seeking postsecondary education. U.S. Department of Education, Federal Student Aid, *Annual Report 2010* at 1.<sup>11</sup> The U.S. Department of Education estimated that its grant, loan, and work-study programs assist more than 15 million postsecondary students. U.S. Department of Education, *The Federal Role*

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<sup>10</sup> Available at: <http://www.aplu.org/document.doc?id=2856> (accessed November 29, 2011).

<sup>11</sup> Available at: <http://www2.ed.gov/about/reports/annual/2010report/fsa-report.pdf> (accessed November 29, 2011).

in Education.<sup>12</sup> In 2010, Ohio received from the U.S. Department of Education approximately \$1.4 billion in federal funding through postsecondary student aid programs, and similar amounts are allocated to Ohio for the next two years. U.S. Department of Education, *Funds for State Formula – Allocated and Selected Student Aid Programs* (July 11, 2011).<sup>13</sup> These amounts reflect only funds provided to individual students and do not reflect the amounts received through research grants or federal funds given to states and reallocated to universities.

OSU, in particular, received \$473,301,218 in federal Title IV student aid in the 2010-2011 academic year, which accounted for 12% of the university's total operating revenues.<sup>14</sup> The Director of Student Financial Aid anticipated that the university will receive at least the same amount for the 2011-2012 academic year.<sup>15</sup> OSU also received \$446,594,000 in federal research dollars for the 2010-2011 academic year, which accounted for 11% of the university's total operating revenue.<sup>16</sup> The Associate Controller in the Office of Business and Finance at OSU anticipated that the university will receive at least the same amount in research dollars for the 2011-2012 academic year.<sup>17</sup>

The U.S. Department of Education has clearly warned that recipients that do not abide by FERPA's requirements will lose their federal funding. "If a school wishes to continue to receive Federal funds, the recipient must comply with FERPA's provisions on the disclosure of education records. \* \* \* Compliance with portions of a State law that conflict with FERPA may jeopardize continued eligibility to receive Federal education funds. If educators believe that a

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<sup>12</sup>Available at: <http://www2.ed.gov/about/overview/fed/role.html> (last modified March 30, 2011).

<sup>13</sup>Available at: <http://www2.ed.gov/about/overview/budget/statetables/12stbystate.pdf> (accessed November 29, 2011).

<sup>14</sup>Affidavit of Diane L. Stemper at ¶¶ 6-8.

<sup>15</sup>Id.

<sup>16</sup>Affidavit of Thomas F. Ewing at ¶¶ 4-6.

<sup>17</sup>Id.

State law conflicts with FERPA, they should bring this to the attention of appropriate State officials.” U.S. Department of Education, Family Policy Compliance Office, *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs* at 13 (June 1997). FERPA’s disclosure prohibition applies to the entire institution even if only one department of the university receives funding from the U.S. Department of Education. Section 99.1(d), Title 34, C.F.R. Just the same, if only one department disclosed education records, the entire university would be at risk of losing its federal funding. Therefore, if OSU disclosed education records in violation of FERPA but pursuant to an order by this Court, it would do so at the expense of almost one quarter of its total operating revenues, and at the incalculable expense of thousands of students.

Moreover, the potential impact of this case is not limited to receipt of federal education funds by public universities. The state’s elementary and secondary schools receive billions of dollars in federal education funds, which would be lost if schools were required to disclose education records under the Public Records Act. In fiscal year 2010, the Ohio Department of Education received approximately \$2,528,567,000 in federal funds, or just under one quarter of the department’s total revenue.<sup>18</sup> Public elementary and secondary schools could not operate without these funds.

A holding by this Court that Spending Clause legislation does not “prohibit” the release of records risks the loss of billions of funds to the State of Ohio from the federal government. Such a holding will require myriad public offices to release records that FERPA and other federal laws require the offices to keep confidential. A small sample of other federal laws that prohibit the disclosure of confidential information by funding recipients include Medicaid

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<sup>18</sup>Timothy S. Keen, State of Ohio, *The Executive Budget Fiscal Years 2012 and 2013, The Jobs Budget, Transforming Ohio for Growth, Book One: The Budget Book* (March 15, 2011) D-188.

(Section 1396a(a)(7)(A), Title 42, U.S.Code), Temporary Assistance to Needy Families (Section 654(26), Title 42, U.S.Code), the Individuals with Disabilities Education Act (Section 1417(c), Title 20, U.S.Code)(special education for school-age children with disabilities) and (Section 1439(a)(2), Title 20, U.S.Code)(early intervention services for infants and toddlers with disabilities)), the National School Lunch Act (Section 1758(b)(6), Title 42, U.S.Code), and the Violence Against Women Act<sup>19</sup> (Section 13925(b)(2), Title 42, U.S.Code). The State of Ohio and public offices within the state will no longer be able to make required assurances about the non-disclosure of confidential information if this Court holds that these laws enacted under the Spending Clause do not exempt records from disclosure. The result will be the loss of federal funding under these programs, which will cause the end of critical social programs that assist individuals and families across the state.

Thus, this Court's holding will directly impact the privacy rights of individuals and the continued ability of public offices to continue receiving essential federal funding, balanced against the goal of maintaining an open government. The balance of these interests weigh heavily in favor of this Court holding that Spending Clause legislation, such as FERPA, is included within R.C. 149.43(a)(1)(v)'s exemption for records that may not be released under federal law.

## CONCLUSION

For the reasons above, Amici respectfully request that the Court find that the Ohio Public Records Act and FERPA prohibit the release of education records, regardless of their non-academic content. Further, if the Court finds that the Ohio Public Records Act does not prohibit

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<sup>19</sup>This Court recently received a \$30,000 subgrant under the Violence Against Women Act from the Office of Criminal Justice Services at the Ohio Department of Public Safety. See "Supreme Court Awarded \$30,000 Grant to "STOP" Domestic Violence," available at [http://www.sconet.state.oh.us/PIO/news/2011/DVGrant\\_111711.asp](http://www.sconet.state.oh.us/PIO/news/2011/DVGrant_111711.asp)

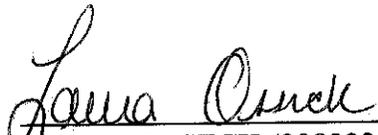
the release of education records, then Amici request a holding that FERPA preempts the Ohio Public Records Act to prohibit the release of education records. Finally, Amici request that the Court prohibit the disclosure of any Requested Records that meet the definition of "education records" under FERPA.

Respectfully Submitted,

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A copy of the foregoing Brief Amici Curiae was served upon the following by ordinary

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