No. 11-2066

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff/Appellee,

v.

UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES,

Defendant/Appellant.

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

REPLY BRIEF OF APPELLANT THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

The Tribune and its *amici* attribute all manner of ill motives to the University, reproaching it for allegedly using FERPA as a "secrecy statute" to "hide" public records that it finds embarrassing. They liken the University to "the boy who cried 'wolf'," asserting that the University is attempting to "obstruct school accountability." Simple, unavoidable facts refute these harsh words.

Far from asserting "absolute" FERPA protection or "unfettered discretion" to withhold documents, the University has already produced more than 5,200 pages of FERPA-compliant Category I records in response to more than a dozen prior FOIA requests, including the names of many elected or appointed "Sponsors" and university officials involved in Category I admissions. (A.61-62, ¶¶ 9-13; A.96, ¶¶ 9-13; A.225, ¶¶ 29-31; A.263, ¶¶ 14-16). The *Chicago Tribune* used these documents to write the "Clout Goes to College" series, ultimately leading to the resignation of the University's President, Chancellor, and six Trustees. (A.368). As the excerpts from the Commission Report cited in the Tribune's brief show, many of the "Sponsors" and officials have already been exposed by name, with detailed descriptions of their roles. (*See* A.158-59; A.168-95). If anything, then, this case shows the right approach to the FOIA/FERPA balance. The University complied with its duties under FOIA, disclosing even "embarrassing" records, but still safeguarded the privacy of its students under FERPA.

What the Tribune seeks today are education records containing personally identifiable information, like parents' names and addresses, that would lead to the identification and exposure of the Category I students themselves. These students are entitled to have their identities remain private under FERPA, so that they are not subjected to public ridicule for being admitted under a process they did not commence and many

likely did not even know existed. The students' FERPA-protected records meet FOIA's exemption for records specifically prohibited from disclosure by federal law. The Tribune's arguments to the contrary are wrong.

<u>First</u>, the records sought by the Tribune's Request are "education records," because they satisfy the express statutory definition of that term: They contain information directly related to students, and are maintained by the University. The Tribune's efforts to add new terms to the statute are contrary to settled principles of statutory construction and FERPA's legislative history.

<u>Second</u>, FERPA does "specifically prohibit" the disclosure of education records and personally identifiable information. When the University accepted federal funds subject to FERPA, it undertook FERPA's conditions as affirmative obligations. These obligations are compulsory and enforceable by the DOE through a variety of statutory mechanisms, including revocation of funding.

Third, the potential consequences of the district court's ruling are not cries of "wolf"; they are tangible and serious. By placing FERPA outside the scope of FOIA's exemption for federal statutory prohibitions on disclosure, the district court has forced the University into a position where it is subject to a statutory duty under FOIA requiring disclosure upon request of any FERPA-protected records, unless those records fall within one of FOIA's other, narrower exemptions. Compliance with FOIA is a "policy or practice," not an isolated instance of disclosure. The University would thus be forced to disclose not just the "discrete" records sought in this case, but many other FERPA-protected records in the future, substantially intruding upon student privacy. Moreover, because the DOE cannot secure voluntary compliance with FERPA under these circumstances, it could be forced to revoke the University's federal funding.

ARGUMENT

- I. The Records Sought by the Tribune Are "Education Records"
 - A. The Tribune Seeks Records That It Earlier Conceded, and the Record on Appeal Confirms, Are "Maintained" by the University.

The Tribune opens its argument with a contention it never raised below--that the documents sought by the Request are not "maintained" by the University, because the "Sponsor documents" sought by the Tribune are "rogue files" kept by the Chancellor's Office, Government Relations Office, or the Trustees, rather than within the University's "permanent institutional records." (Tribune Br., p. 14-19). That assertion is new on appeal. (See A.36-90; A.145-216). Before the district court, the University observed that it was "not in dispute" that the requested records were "maintained" by the University, and the Tribune did not contest the point. (A.118; A.200-216). Accordingly, the issue is waived on appeal. See MMG Financial Corp. v. Midwest Amusements Park, LLC, 630 F.3d 651, 659 (7th Cir. 2011) (citation omitted).

The record also lacks any evidence to substantiate the Tribune's new position. The Tribune's characterization of the documents as "rogue files" is nothing more than a naked assertion, unsupported by the parties' Rule 56.1 statements. (A.60-90; A.94-109; A.145-99). See N.D. Ill. L.R. 56.1; Bilal v. Rotec Industries, Inc., 326 Fed. Appx. 949, 956 (7th Cir. 2009) (courts "are not obliged to go beyond parties' Rule 56.1 statements by conducting their own investigation of the record"). The Tribune seeks to overcome this deficiency by quoting excerpts from the Commission Report¹ and the Freshman Application Procedures on the University's website. (See Tribune Br., pp. 15-19). The Commission Report, however,

¹ The Commission Report commands a prominent position in the Tribune's appellate brief. (*See* Tribune Br., pp. 2-7, 11, 15-17, 20, 24-26, 37). Below, by contrast, the Tribune introduced the Commission Report for the first time on reply, and used it solely to quote its finding that "Category I" was a "shadow process." (*See* A.202).

only discusses who participated in Category I and criticizes the fact that the Government Relations office was "given access to the admissions database"; it does not suggest that Category I records were kept in "rogue files" or some other database. (*See* A.168-69, A.175).

As for the Freshman Application Procedures, the link supplied by the Tribune (http://admissions.illinois.edu/apply/tips-freshman.html) generated an error each time counsel for the University attempted to access it. (*See* Tribune Br., p. 18). Even taking the quoted excerpt at face value, the procedures simply direct current undergraduate applicants not to submit letters of recommendation. (*See id.*). It does not address how solicited letters of recommendation (such as for graduate students) are maintained, nor how such documents were maintained at the time of the Category I process, nor how any prior Category I records are maintained. This Court is the wrong forum to introduce new fact questions of this type.

Regardless, the only record evidence addressing where the documents responsive to the Request are "maintained" is the Affidavit of Carol Malmgren, the Registrar at Urbana-Champaign. (A.267). Her list of the education records that the University "collects and maintains" encompasses records sought by the Request, including "student and parent names [and] addresses," "application and admission materials," and "letters of recommendation[.]" (A.267 ¶ 6; *compare with* A.17; A.61 ¶ 8; A.95-96 ¶ 8).

Lastly, *Oswasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002), does not hold that the records "maintained" by a school exclude those held in the files of officials like the University Chancellor, Government Relations Office, or Trustees. *Falvo* held that peergraded assignments do not qualify as "education records," because peer graders "only handle assignments for a few moments as the teacher calls out the answers" and are not agents "acting for" the school. 534 U.S. at 433-34. Yet *Falvo* stated that records "kept in a

filing cabinet in a records room at the school or on a permanent secure database," by "agents of the school, such as teachers, administrators, and other school employees," are "maintained" by the school. *Id.* The Chancellor, Government Relations Office, and Trustees are undoubtedly agents of the University, and their files and databases are therefore "maintained" by the University.

B. The Request Seeks "Education Records" Under FERPA.

The Tribune next argues that this Court should limit the meaning of "education records" to specific academic records. (Tribune Br., pp. 19-20). That contradicts FERPA's broader express 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[.]" 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The Tribune's brief initially acknowledges this definition, but later rewrites it to read, "records, files or documents *reflective of an applicant's educational performance, skills or traits*." (Tribune Br, pp. 9, 20 (emphasis added)). Those limiting terms are not contained anywhere in FERPA or its regulations; they are the Tribune's words.

Courts cannot redraft a statutory definition simply because a litigant disagrees with it. "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). The Tribune may be unhappy with Congress' definition of "education records," but that does not warrant rewriting the statute by judicial fiat. "Even if there were some justification for concern," which there is not, "courts cannot rewrite statutes." *In re Matter of Witkowski*, 16 F.3d 739, 745 (7th Cir. 1994).

To support its contra-textual reading, the Tribune relies on an erroneous

construction of *Disability Rights Wisconsin, Inc. v. State of Wisconsin Dept. of Public Instruction*, 463 F.3d 719 (7th Cir. 2006). (Tribune Br., p. 21). The Tribune argues that *Disability Rights Wisconsin* rejects defining "education records" to mean "all records that could identify a student[.]" (Tribune Br., p. 21). That is a straw man; the University has never asserted such a definition. Information that could identify a student is "personally identifiable information"; it can be contained in "education records," but is not part of the definition. *See* 34 C.F.R. § 99.3. Moreover, *Disability Rights Wisconsin* only interprets "personally identifiable information," and does not discuss or define "education records" at all. *See* 463 F.3d at 730. The Tribune has never denied that it seeks "personally identifiable information," nor could it, since the definition of that phrase specifically includes parents' names and addresses. *See* 34 C.F.R. § 99.3.

The Tribune's reliance on various flawed state court rulings to support its definition of "education records" is similarly misplaced. (Tribune Br., pp. 19-23). It is "beyond cavil" that this Court is "not bound by a state court's interpretation of federal law[.]" *RAR*, *Inc. v. Turner Diesel*, *Ltd.*, 107 F.3d 1272, 1276 n. 1 (7th Cir. 1997) (quoting Grantham v. Avondale Indus., *Inc.*, 964 F.2d 471, 473 (5th Cir. 1992)). Most of the cases cited by the Tribune erroneously add new terms that were never part of FERPA's definition of "education records." *See*, *e.g.*, *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (adding "individual student academic performance, financial aid or scholastic probation"); *State ex rel. The Miami Student v. Miami University*, 680 N.E.2d 956, 959 (Ohio 1997) (same); *Bd. of Educ. of Colonial School Dist. v. Colonial Educ. Ass'n*, Civil A. No. 14383, 1996 WL 104231, *5 (Del. Ch. Feb. 28, 1996) (same); *Red & Black Publishing Co.*, *Inc. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (same); *BRV*, *Inc. v. Superior Court*, 143 Cal.App.4th 742, 754, 49 Cal.Rptr.3d 519, 526 (Cal. App. 2006) (adding "directly related to

the private educational interests of the student" to the definition of "pupil records" under California's counterpart to FERPA); *Kirwan v. The Diamondback*, 771 A.2d 196, 204 (Md. 1998) (adding "relate to academic matters or status as a student"). These judicial amendments all depart from the plain language of FERPA. Thus, in *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit rightly declined to follow them or any similar "content-based judgments" that stray from FERPA's text. *See id.* at 811-12.

In any event, the Request still seeks "education records" even under the Tribune's erroneous definition. The Tribune's brief focuses on "Sponsor documents" (*see* Tribune Br., pp. 19-20), but the Request sweeps more broadly. It seeks all "public records with regard to each applicant in Category I" who was admitted and attended the University, containing "the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in the such [sic] applicants' applications[.]" (A.17; A.61 ¶ 8; A.95-96 ¶ 8). Parents' names and addresses are "personally identifiable information," and all but directly identify the Category I students. *See* 34 C.F.R. § 99.3. Many records regularly collected and maintained by the University contain parents' names and addresses, and further qualify as involving "academic matters or status as a student." *See Kirwan*, 771 A.2d at 204. Such records include application and admission materials, parent financial information, applications for financial aid, scholarships, or other financial assistance, and payment records and histories. (A. 267 ¶ 6). The district court foresaw this danger when it stayed its judgment, finding that these students would suffer "overwhelming," "catastrophic," and "irreparabl[e]" injury. (A.373-77).

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² The Tribune's remaining case kept the statutory definition, but found it inapplicable where the records at issue no longer contained "information relating directly to a student" because all such information had been redacted. *See Cut Bank Public Schools v. Cut Bank Pioneer Press*, 160 P.3d 482, 487 (Mont. 2007).

In addition to parental information, the Request seeks records for all "individuals who made a request or otherwise became involved" in applications. That encompasses not just "Sponsor requests," but letters of recommendation and comments from high school administrators or counselors--again, records that the University collects and maintains, and which involve academic matters or status as a student. (A. $267 \, \P \, 6$).

C. "Private Facts" Are Not Part of FERPA's Definition of "Education Records."

The Tribune's next argument is another that it never raised below--that the definition of "education records" is limited to "private facts" or "private data." (Tribune Br., p. 23-26). That argument, too, is waived. *See MMG Financial*, 630 F.3d at 659.

Regardless, this belated attempt to add a "private facts" element to "education records" again merely grafts non-existent language to FERPA's statutory definition, which contains no reference to "private facts" or "private data." See 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The Tribune follows a winding road to get to its construction. It notes that the definition is contained in the section of FERPA dealing with parental access to education records. See 20 U.S.C. § 1232g(a). A different subsection therein requires that parents be provided an opportunity "to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students[.]" 20 U.S.C. § 1232g(a)(2). The Tribune contends that this bespeaks an implicit "private facts" element within the definition of "education records."

The separate reference to "privacy rights" in section 1232g(a)(2) of FERPA cannot be read to modify the definition of "education records" in section 1232g(a)(4). Section 1232g(a)(2) recognizes that "education records" can contain information that is "inaccurate, misleading, or otherwise in violation of the privacy rights of students," but does not identify any of these traits as part of what defines an "education record." 20 U.S.C. § 1232g(a)(2).

Nor does the definition of "education records" itself. 20 U.S.C. § 1232g(a)(4)(A). The Tribune's effort to lift "privacy rights of students" from Section 1232g(a)(2), change it to "private facts," and plant it in Section 1232g(a)(4) is contrary to settled principles of statutory construction. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 130 S. Ct. 827, 837 (2010) (*quoting Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009)). Here, Congress intentionally chose to include "privacy rights of students" on the list of grounds that parents may raise to challenge the contents of "education records," but not to include a "private facts" element in the definition itself. "It is axiomatic that the statutory definition of a term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484 (1987).

The Tribune also errs in discussing only the privacy interests of sponsors and parents, but not the students themselves. (Tribune Br., pp. 24-26). These students are not public officials claiming privacy in information "concerning discharge of public duties." *Cassidy v. American Broadcasting Co.*, 60 Ill.App.3d 831, 838 (1st Dist. 1978). Nor is there any indication that they chose "a way of life or course of conduct calculated to thrust them" into the limelight. Restatement (Second) of Torts § 652D, cmt. f. *See also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993). For students who did not choose the Category I process, but would face the glare of the public spotlight if their admissions under that process were revealed, it is difficult to imagine any fact in their education records that could be more private or embarrassing than their unknowing participation in Category I admissions. Even under the Tribune's erroneous interpretation, that is a "private fact" meriting protection.

D. The Records Sought by the Request Are "Directly Related to a Student."

The Tribune asserts that the records it seeks are not "directly related to a student," because the Request merely seeks "the identities of clouted Sponsors who sought special treatment, and the University administrators who granted it[.]" (Tribune Br., p. 27). Yet the Tribune has already received more than 5,200 pages of documents containing this kind of information, leading to the public exposure of numerous "clouted Sponsors" and "University administrators" involved in Category I. (A.61-62, ¶¶ 9-13; A.96, ¶¶ 9-13; A.158-59; A.168-95; A.225, ¶¶ 29-31; A.263, ¶¶ 14-16). There can be no credible suggestion that the University is seeking to conceal a "shadow process" or secrete documents relating to "unofficial deal making," the details of which have already been fully revealed and recounted in *Chicago Tribune* articles and the Commission Report. What the Request now seeks is information that would lead to the direct identification of the students associated with Category I, through the disclosure of the names and addresses of the parents of those students. (A.17; A.61 ¶ 8; A.95-96 ¶ 8). The suggestion that such details are not "directly related to a student" is implausible.

The Tribune relies upon *National Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1211 (Fla. App. 2009), and *Kirwan*, 721 A.2d 196, to support its position. (Tribune Br., pp. 27-29). The University addressed both cases in its opening brief. (*See* University Br., pp. 41-43). In *NCAA*, the records at issue were redacted to remove all personally identifiable information, whereas the Tribune's Request expressly demands parents' names and addresses. 18 So.3d at 1211. In *Kirwan*, the court adopted an erroneous, content-based definition of "education records," requiring that they "relate to academic matters or status as a student." 721 A.2d at 204. That definition conflicts with the statute. *See* Section I.B, *supra*. In any event, there is an obvious difference between disclosing

parking tickets versus revealing the details of how students came to be admitted to the University, which goes to the heart of their "status as students."

E. FERPA's Legislative History Supports the University's Interpretation.

The Tribune next argues that the University's interpretation "flouts" the intent of FERPA. (Tribune Br., pp. 29-33). What is most striking about the Tribune's discussion of FERPA's legislative history is how much it relies on second-hand accounts from *Kirwan* and a law review article, Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75 (2011), rather than addressing the history itself. Although the University already discussed FERPA's legislative history in its opening brief (*see* University Br., pp. 44-48), a few additional points warrant mention.

The Tribune cites *Kirwan* to argue that FERPA's legislative history "reveals" an intent "to prevent educational institutions from operating in secrecy" and to "take the lid off secrecy in our schools." (Tribune Br., p. 29, *quoting Kirwan*, 721 A.2d at 204). In context, however, the legislative history cited in *Kirwan* shows that Congress intended to prevent schools from keeping education records secret from *students and parents*, not journalists. *See* 120 Cong. Rec. 13951-52 (1974). In fact, the other stated purpose of FERPA was to *prevent* disclosures of these records to others, affirming "the privacy and rights of children and their parents" against "all invasions of privacy." *Id.* As *Kirwan* recognized, "[t]he sponsor's explanation of the provision discloses an intent to ensure that students and their parents had access to education records, as well as an intent *to stop the widespread dissemination of education records to others*." 721 A.2d at 204 (*citing* 120 Cong. Rec. 39862 (1974)) (emphasis added).

The Tribune cites Penrose's article to argue that FERPA's aim "was to protect academic and academically-related records" rather than "tangential records," and that

"refusing to disclose non-academic information" was not what FERPA intended. (Tribune Br., pp. 29-32, quoting Penrose, 14 N.Y.U. J. Legis. & Pub. Pol'y at 77, 82, 86-87, 96, 105). What Penrose criticizes, however, is the **statutory definition** of "education records," which she urges *Congress* to "revisit." 14 N.Y.U. J. Legis. & Pub. Pol'y at 86-87, 92-13. Penrose faults the definition for causing schools to withhold all records that the school "maintains" on behalf of students. Id. at 88, 94-98. She notes that "[t]he earliest version of FERPA protected only those records that were truly academic in nature." Id. at 105. After the December 1974 amendments, "the definition was expanded greatly to cover any document that identifies an individual student and is 'maintained' by the institution." Id. at 105. The December 1974 legislative history confirms this, stating that the new definition of "education records" was intended to capture "**everything** in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student," and "all information—with certain limited exceptions—that an institution keeps on [a student], particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution." 120 Cong. Rec. at 39858-59, 39862 (1974) (emphasis added).

Taking issue with this "expanded" definition, Penrose urges *Congress* to "sculpt a new definition that provides protection only to academic materials and records." *Id.* at 106. She proposes adding the phrase, "directly related to a student's academic potential, academic progress, or academic performance[.]" *Id.* Thus, Penrose actually acknowledges that the current definition of "education records" is *not* limited to "academic and academically-related records," but she thinks it should be amended by Congress to impose such restrictions. That is, of course, Congress' prerogative if it agrees with her criticisms.

This Court, however, is concerned with FERPA as it exists today, and may not substitute its own text for that chosen by Congress. *See Stenberg*, 530 U.S. at 942. In a contest between the text and the legislative history (or, for that matter, a newspaper interview with FERPA's sponsor fifteen years later), "the text must prevail." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 1465 n. 6 (2009).

F. The DOE's August 6, 2009 Opinion Letter Supports the University's Interpretation.

The Tribune asserts that the DOE's August 6, 2009 opinion letter lacks persuasive value, because it was addressed to a broader request by the Commission. (Tribune Br., p. 33). The Tribune states that it is not seeking "sensitive education information" like GPAs, test scores, and the like. (*Id.*, p. 33). That is not altogether true, as the Tribune is simultaneously pursuing a state court action on another FOIA request seeking students' GPAs and ACT scores. *See Chicago Tribune Company v. University of Illinois Board of Trustees*, No. 09-MR-431 (7th Jud. Cir. Sangamon Cty.), First Amended Complaint (seeking "ACT scores and high school grade point averages" of students, and asserting that production of this information would not constitute "a clearly unwarranted invasion of personal privacy"). In all events, the opinion letter pertains to "all information provided in connection with the admissions process," not just GPAs and test scores. (A.97 ¶ 4; A.108).

The Tribune also suggests that the DOE's interpretation "makes no sense," because it only applies to admissions records once the applicant "becomes a student in attendance[.]" (Tribune Br., p. 34). That comports with the text of FERPA, which defines "education records" as those containing "information directly related to a student," and prohibits the release of education records and personally identifiable information "of students." 20 U.S.C. § 1232g(a)(4)(A)(i), 1232g(b)(1)-(2). By contrast, the Tribune's suggestion that it is "far more reasonable" to interpret application materials "as being beyond FERPA's scope"

(Tribune Br., pp. 34-35), contradicts the text of FERPA. Categorical exclusion of all admissions records from "education records" would nullify multiple provisions of FERPA treating "confidential letters," "statements of recommendation," and "confidential recommendations ... respecting admission" as part of the student's education records. *See* 20 U.S.C. §§ 1232g(a)(1)(C)(ii), 1232g(a)(1)(C)(iii)(I). This Court avoids interpretations of statutes "that render words, or other sections, superfluous." *Gillespie v. Trans Union Corp.*, 482 F.3d 907, 909 (7th Cir. 2007) (citations omitted).

G. Preserving FERPA's Definition of "Education Records" Does Not Violate the First Amendment.

The Tribune further asserts that "concealing Sponsor records" violates the First Amendment. (Tribune Br., pp. 35-37). It argues that this Court should employ a balancing test to determine "what is and is not treated as an education record under FERPA," balancing privacy interests against the public's "right to know what its elected officials and the University's employees did[.]" (*Id.*, p. 35). Both the balancing test and the asserted interests the Tribune seeks to weigh against FERPA are erroneous.

The two cases cited by the Tribune to support its balancing test, Falvo and Disability Rights Wisconsin, are not First Amendment cases and do not espouse any such balancing test to define "education records." Falvo did not employ a balancing test; it applied the explicit textual definition of "education records" and found that peer-graded assignments are not "maintained" by an educational institution. 534 U.S. at 433-35. Disability Rights Wisconsin did not involve any issue of "education records" at all; it found that disabled students' names are not "personally identifiable information" because they are directory information and their disclosure to a state agency that protects students from abuse and neglect harms "neither students with disabilities nor their parents[.]" 463 F.3d at 730. The Court's comment in dicta that privacy interests are "frequently outweighed" by the agency's

"broad mandate to investigate and remedy suspected abuse or neglect" does not imply judicial modification of FERPA's express terms to balance every other "interest" that a party might conceive.

The competing interests asserted by the Tribune under its erroneous balancing test are also defective. The Tribune argues that the State Records Act, 5 ILCS 160/1.5, "has codified the First Amendment interest." (Tribune Br., pp. 35-36). That is yet another new argument on appeal, and is waived. *See MMG Financial*, 630 F.3d at 659. Regardless, the right to inspect and copy records under the State Records Act does not purport to "codify" a First Amendment interest, and only applies to records prepared or received by the State prior to July 1, 1984. *See* 5 ILCS 160/26; *Bowie v. Evanston Community Consol. School Dist.* 65, 168 Ill.App.3d 101, 107 (1st Dist. 1998). That statute has no relevance here.

The Tribune asserts that there is also a right of public access under the "federal common law" or the First Amendment. (Tribune Br., pp. 36-37). The Tribune did not assert a common law right of access below, but in any event, any common law right of access "can be supplanted by legislation." *United States v. Blagojevich*, 614 F.3d 287, 296-97 (7th Cir. 2010). FERPA has supplanted any common law right of access to the records it protects. *See* 20 U.S.C. § 1232g(b)(1)-(2). The Tribune's cases are inapposite, as they did not involve records protected by FERPA or any other statute. *See Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 905 (D.C. Cir. 1996); *People ex rel. Gibson v. Peller*, 34 Ill.App.2d 372, 374 (1st Dist. 1962).

As for the First Amendment, this Court has already rejected as "without merit" a similar First Amendment challenge involving the denial of access under FOIA to information that Congress used its spending power to protect against disclosure. *City of Chicago v. U.S. Dept. of Treasury*, 423 F.3d 777, 784 (7th Cir. 2005) (denying access to

information regarding sale and tracing of firearms, because Congress passed appropriations legislation prohibiting the use of federal funds to process such a FOIA request). The Court held that the First Amendment "does not mandate ... a right of access to government information or sources of information within the government's control." *Id.* (*quoting Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)). In light of this principle, as well as the absence of any authority "for the proposition that a Congressional ban on the release of certain governmental records violates the First Amendment," the Court rejected the First Amendment argument. *Id.*

The authorities cited by the Tribune do not alter this outcome; they involve the right of access to judicial proceedings and the right to publicize official misconduct, not a right of access to statutorily protected documents. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (recognizing right of access to criminal trials); *In re Application of CBS, Inc.*, 540 F. Supp. 769, 771 (N.D. Ill. 1982) (discussing right of public access to judicial records); *Stilp v. Contino*, 629 F. Supp.2d 449, 464 (M.D. Pa. 2009) (addressing right to publicize the filing of a complaint charging unethical behavior by a public official). Even the Tribune's FERPA-specific authority, though erroneously decided, limits its holding to a right of access to "the names of students involved in criminal activity," while recognizing that the First Amendment does not impose "an affirmative obligation to increase the scope of information available to the public." *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1233-34 (D.D.C. 1991). *See also Bauer*, 759 F. Supp. at 593-94.

Whatever interest the public may have in the disclosure of misconduct by elected officials or University employees has been vindicated by the more than 5,200 pages of documents the University has already disclosed. (A.61-62, ¶¶ 9-13; A.96, ¶¶ 9-13; A.158-59; A.168-95; A.225, ¶¶ 29-31; A.263, ¶¶ 14-16). There is no First Amendment right to access the

remaining, FERPA-protected education records that the Tribune seeks to use to identify individual Category I students.

II. The District Court Erred in Holding That FERPA <u>Does Not "Prohibit" Disclosure of Education Records</u>

A. A "Funding Statute" Can, and FERPA Does, "Prohibit" Disclosure of Education Records.

The Tribune does not reach the merits of the district court's actual ruling until page 38 of its 56-page brief. There, the Tribune asserts that a "funding statute" like FERPA does not "prohibit" an action unless it contains individually enforceable rights that would actually be enforced against the recipient in the event of a violation. Accordingly, the Tribune argues that FERPA does not "prohibit" the disclosure of education records, because it does not contain an individual right of action and would not be enforced against the disclosure of "particular information," so long as the University continues to "comply substantially" with the statute. (Tribune Br., pp. 38-44). That reasoning is flawed.

The Tribune argues that FERPA is directed to "a policy or practice" of disclosure, not "particular information," and hence the University could continue to receive federal funding so long as it "compl[ies] substantially" with FERPA, notwithstanding a particular disclosure. (Tribune Br., pp. 38-39). As a public body subject to FOIA, however, the University is required to disclose *all* non-exempt records upon request. *See* 5 ILCS 140/1.2, 3. Therefore, if FERPA-protected records are non-exempt, as the district court held, the University would be subject to a mandatory "policy or practice" under FOIA of disclosing on request *all* FERPA-protected records that do not fall within one of FOIA's other, more limited exemptions. *See id.* The University cannot "comply substantially" with FERPA if it is subject to a mandatory duty to disclose FERPA-protected records. Once FERPA is written out as an exemption to FOIA, "public disclosure of such materials could soon become a commonplace

occurrence." Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana University, 787 N.E.2d 893, 904 (Ind. App. 2003).

The Tribune cites Gonzaga University v. Doe, 536 U.S. 273 (2002), to argue that FERPA does not "prohibit" anything because, if that were its intent, Congress would have created a private right of action. (Tribune Br., pp. 39-44). Neither Gonzaga nor any other case holds that the creation of a private action is the only tool available to Congress under its spending authority to forbid or prevent proscribed actions by a funding recipient. To the contrary, Gonzaga specifically recognized that an "institutional policy and practice" of violating FERPA--here, a policy of disclosing FERPA-protected records under FOIA--can "trigger[] a funding **prohibition**." 536 U.S. at 288-89 (emphasis added). No private cause of action could communicate Congress' prohibitions under FERPA more effectively than the threat of cutting off hundreds of millions of dollars in federal funds, including student loans and financial assistance. "[T]he intent of Congress to withhold millions of federal dollars from universities that violate [FERPA] is ample prohibition, regardless of how the word 'prohibit' is construed[.]" WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 8.7.2, p. 509 (2007) (quoting Shreveport Professional Chapter of Society of Professional Journalists v. Louisiana State University, Shreveport, No. 393, 332 (1st Jud. Dist. Ct., Caddo Parish, La., Mar. 4, 1994)).

The Tribune cites a string of state authorities in an effort to offset the Sixth Circuit's well-reasoned opinion in *Miami University* that, once a funding recipient accepts FERPA's funding conditions, the statute "imposes enforceable, affirmative obligations[.]" 294 F.3d at 808-09. (Tribune Br., pp. 40-44). The Tribune's authorities make the same mistake as the district court; they look at FERPA's conditions from the standpoint of the choice a school has *before* it accepts federal funds, without addressing the affirmative obligations that

come into play *after* the school has accepted such funds. *See, e.g., NCAA*, 18 So.3d at 1210; *Troutt Bros., Inc. v. Emison*, 841 S.W.2d 604, 607 (Ark. 1992).

In *Falvo*, by contrast, the Supreme Court recognized the mandatory nature of FERPA's obligations once funds are received: "Under FERPA, schools and educational agencies receiving federal financial assistance *must* comply with certain conditions. One condition specified in the Act is that sensitive information about students *may not be released* without [the student's] consent." 534 U.S. at 428 (emphasis added). Thus, "[o]nce the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent." *Miami University*, 294 F.3d at 809. Or, as the Tribune's own authority expressed it, FERPA "does impose a binding obligation on the government unit that accepts designated federal funds." *Board of Education of Colonial School Dist. v. Colonial Educ. Ass'n*, No. 14383, 1996 WL 104231, *5 (Del. Ch. Feb. 28, 1996).

B. The Contract Analogy Is Valid to Demonstrate FERPA's Prohibition on Disclosure of Education Records.

The Tribune confuses the Supreme Court's statement that Spending Clause legislation is "much in the nature of a *contract*," *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (emphasis in original) (citation omitted), with a literal contract, and takes an unproductive detour into the question of what contract remedies are available to the DOE to enforce FERPA. (Tribune Br., pp. 45-47). The Tribune appears to be arguing that a Spending Clause statute does not "prohibit" conduct unless it is specifically enforceable. (*See id.*). That conclusion does not follow the law.

The Supreme Court has cautioned against taking too literally the analogy of Spending Clause legislation to contracts: "We have acknowledged the contract-law analogy, but we have been clear 'not [to] imply ... that suits under Spending Clause legislation are

suits in contract, or that contract-law principles apply to all issues that they raise." *Sossamon v. Texas*, 131 S.Ct. 1651, 1661 (2011) (*quoting Barnes*, 536 U.S. at 189 n. 2). Applying "ordinary contract principles" to a Spending Clause statute, as the Tribune attempts, "would make little sense because contracts with a sovereign are unique," and "do not traditionally confer a right of action for damages to enforce compliance[.]" *Id*.

The use of contract law as an analogy remains helpful, however, as it clarifies that acceptance of federal funding also constitutes acceptance of affirmative statutory obligations. *See Miami University*, 294 F.3d at 808. Whether FERPA's obligations are enforceable at equity, as *Miami University* held, or only by revocation of funding, as the Tribune argues, is of no moment. In either event, the mandatory nature of the obligation following acceptance of FERPA-conditioned funds constitutes a "prohibition." *See Black's Law Dictionary* (9th ed. 2009) ("prohibit" means "[t]o forbid by law" or "[t]o prevent or hinder"). A condition is a condition, regardless of whether its violation yields an injunction or monetary damages.

At any rate, the Tribune is simply wrong when it asserts that the only DOE "action" that is "authorized by law" in FERPA is "to withhold the recipient's funds," rendering the statute somehow non-compulsory. (Tribune Br., p. 46). FERPA provides many other remedies, including authorizing the DOE to "**compel compliance** through a cease and desist order," to "enter into a compliance agreement," and to take "any other action authorized by law[.]" 20 U.S.C. § 1234c(a) (emphasis added). Given these myriad remedies, the Sixth Circuit correctly held that equity may enforce FERPA's terms. *See Miami University*, 294 F.3d at 809.

C. The Consequences of Granting the Tribune's Requested Declaratory Relief Are Substantial.

The Tribune dismisses the University's discussion regarding the potential

consequences of the district court's ruling as "frenzied" "near hysteria" that is "unfounded" and "overwrought." (Tribune Br., pp. 13, 47-50). It argues that the DOE only revokes funding as a "last resort" and that FOIA contains other privacy exemptions. (*Id.*).

Notwithstanding the Tribune's unconcerned tone, it is telling that eight other Illinois public universities, ten nationwide associations of universities and educators, a leading public interest research center on privacy, and the U.S. Department of Justice have all filed *amicus* briefs expressing similar concerns regarding the implications of the district court's decision for funding and student privacy. The consequences are real, and the University's concerns are legitimate.

Although revocation of funding is the DOE's tool of "last resort," it has no discretion once voluntary compliance ceases to be an option. FERPA directs the DOE to "take appropriate actions to enforce this section," which includes "action to terminate assistance" when the Secretary "finds that there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means." 20 U.S.C. § 1232g(g). The district court's ruling excises FERPA from FOIA's federal statutory exemption, placing the University's disclosure obligations under FOIA directly in conflict with its non-disclosure obligations under FERPA. This is not an "isolated instance" of disclosure. By declaring that FERPA does not afford an exemption under FOIA, the ruling below requires that the University disclose FERPA-protected documents on request, unless another FOIA exemption is found to apply. Given the hundreds of FOIA requests the University receives every year, many of which seek FERPA-protected information that is not subject to any other exemption (see A.221-22, ¶¶ 14, 16, A.262-263, ¶¶ 6-8, 10, 12), the response to the Request would just be the first of what could soon become a "commonplace occurrence." Indiana Newspapers, 787 N.E.2d at 904. And, because the disclosures are

mandatory under FOIA, in the absence of a FERPA exemption, "voluntary compliance" is not an option. The DOE could find itself statutorily obligated to terminate assistance. 20 U.S.C. § 1232g(g).

With respect to student privacy, the University has never argued that the ruling below "spells the end of privacy protections for student records[.]" (Tribune Br., p. 48). It does, however, unquestionably diminish student privacy protections substantially below the level of FERPA, which protects all "education records" or "personally identifiable information" contained therein. 20 U.S.C. § 1232g(b)(1)-(2). FOIA only protects personal information contained in records where its disclosure "would constitute a clearly unwarranted invasion of personal privacy," which requires that the disclosure be "highly personal or objectionable to a reasonable person" **and** that "the subject's right to privacy outweighs any legitimate public interest in obtaining information." 5 ILCS 140/7(1)(c). These are high hurdles to protect under FOIA what FERPA protects automatically. Moreover, the office of the Public Access Counselor, which is responsible for reviewing the denial of a FOIA request, see 5 ILCS 140/9.5, has held that the FOIA exemptions "are to be narrowly construed," and has done so. See Public Access Opinion No. 11-001, at 2 (2/18/11) (available online at http://foia.ilattorneygeneral.net/2011binding.aspx). Thus, whereas Congress singled out education records for enhanced privacy protections under FERPA, the district court's ruling subjects them to significantly diminished protections.

If Congress had felt that FERPA suffered from "egregious defects" that have been "manipulate[d]" by universities, it could have amended FERPA at any time in the eight years since the authors the Tribune cites made that allegation. (*See* Tribune Br., pp. 49-50 (citing Matthew R. Salzwedel & Jon Ericson, Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics,

2003 Wis. L. Rev. 1053, 1097 (2003)). The fact that it has not reflects that Congress continues to feel now, as it did in 1974, that student education records and personally identifiable information merit a heightened level of protection.

III. The Tribune's "Narrower Basis for Sustaining the Judgment" Is Erroneous

Finally, the Tribune argues that this Court can sustain the district court's judgment on a "narrower basis," because compliance with the Request would involve only "discrete Category I documents," not a "policy or practice" of violating FERPA. This merely repeats the Tribune's earlier "policy or practice" argument, which ignores the reality that eliminating FERPA as an exemption to FOIA subjects the University to a mandatory, systematic, statutory "policy or practice" of producing FERPA-protected documents in response to FOIA requests. *See* Section II.A, *supra*.

CONCLUSION

For the reasons stated herein, the University respectfully requests that this Court reverse the order of the district court and enter judgment in favor of the University on the Tribune's declaratory judgment claim.

Dated: August 26, 2011 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P RULE 32(A)(7)

The undersigned counsel for Appellant The Board of Trustees of the University of Illinois certifies that the foregoing Brief of Appellant The Board of Trustees of the University of Illinois complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word count function of Microsoft Word 2000, the word-processing system used to prepare this brief, there are 6,998 words, including footnotes, from pages 1-25 in this brief.

S	/Gregory	E. Ostfeld

CERTIFICATE OF SERVICE

I, Gregory E. Ostfeld, an attorney, hereby certify that I caused a copy of the foregoing

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