No. 20-_____

In the Supreme Court of the United States

KEVIN M. GUSKIEWICZ,
in his official capacity as Chancellor of The University of North Carolina at Chapel Hill, et al.,
Petitioners,

v.

DTH MEDIA CORPORATION, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, conditions federal funding on educational institutions' compliance with certain policies and procedures to ensure the privacy of students' educational records.

But FERPA and its accompanying regulations carve out a few distinct categories of education records from the statute's general prohibition on disclosure. As relevant here, educational institutions "may," but are "not require[d]" to, disclose "the final results of any disciplinary proceeding . . . against a student who is an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense, if the institution determines . . . that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g; 34 C.F.R. § 99.31(a)(14), (d).

The question presented is:

Does the Supremacy Clause permit a state public-records law to override the discretion that FERPA grants universities over the disclosure of sexual assault disciplinary records and instead mandate that those records be publicly disclosed?

PARTIES TO THE PROCEEDING

Petitioners are Kevin M. Guskiewicz, in his official capacity as Chancellor of The University of North Carolina at Chapel Hill; and Gavin Young, in his official capacity as Senior Director of Public Records for The University of North Carolina at Chapel Hill. By rule, Chancellor Guskiewicz has been automatically substituted for former Chancellor Carol L. Folt, an appellant below and a defendant in the trial court. *See* S. Ct. R. 35.3.

Respondents are DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; and The Durham Herald Company.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

DTH Media Corp. v. Folt, No. 16 CVS 14300, Superior Court of Wake County, North Carolina. Order and final judgment entered May 9, 2017.

DTH Media Corp. v. Folt, No. COA17-871, North Carolina Court of Appeals. Judgment entered April 17, 2018.

DTH Media Corp. v. Folt, No. 142PA18, Supreme Court of North Carolina. Judgment entered May 1, 2020.

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INTRODUCTION

In this case, a closely divided North Carolina Supreme Court announced that a federal law cannot "subjugat[e] the authority of [a] state law's express mandates." App. 22a. That conclusion is incompatible with this Court's precedents.

The federal law at issue here is the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. To protect students' informational privacy rights, FERPA broadly prohibits educational institutions from disclosing students' education records. 20 U.S.C. § 1232g(a)(4)(A), (b)(1).

But FERPA and its implementing regulations also carve out an exception to this general nondisclosure rule: a school may choose, in its discretion, to release "the final results" of disciplinary proceedings involving allegations of sexual assault. *Id.* § 1232g(b)(6)(B); 34 C.F.R. § 99.31(a)(14), (d).

The North Carolina Supreme Court overrode this federal rule. It concluded that a state public-records law can mandate the disclosure of sexual assault disciplinary records, even where FERPA makes disclosure optional. Having so held, the court required the University to release highly sensitive education records. App. 22a.

That decision is inconsistent with this Court's precedents, which teach that a federal-law grant of discretion does not yield to a state law that purports to constrain that discretion. And it exacerbates the uncertainty that universities across the country already face about the scope of their often-competing

disclosure obligations under FERPA and state public-records laws. Finally, the decision below is likely to have negative consequences for all of the stakeholders involved in the Title IX process—victims of sexual assault, witnesses who are asked to share information, and responding parties who are accused of violations.

This Court's review is warranted to resolve the important federal question that this petition raises, to ensure compliance with this Court's precedents, and to protect the privacy interests of students at universities across the country.

OPINIONS BELOW

The North Carolina Supreme Court's decision is reported at 841 S.E.2d 251. App. 1a. The decision of the North Carolina Court of Appeals is reported at 816 S.E.2d 518. App. 44a.

JURISDICTION

Under 28 U.S.C. § 1257(a), the University respectfully seeks a writ of certiorari to review a judgment of the North Carolina Supreme Court. The court issued its opinion on May 1, 2020.

On March 19, 2020, this Court extended the time to file any petition for a writ of certiorari due on or after that day to 150 days from the date of the lower court judgment. Order, 589 U.S. ___ (Mar. 19, 2020).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant provisions of Article VI of the United States Constitution; the Family Educational Rights

and Privacy Act, 20 U.S.C. § 1232g; the North Carolina Public Records Act, N.C. Gen. Stat. § 132-1 to -11; and Title 34, Part 99 of the Code of Federal Regulations are reproduced at App. 83a-89a.

STATEMENT OF THE CASE

A. Under FERPA, educational institutions "may" disclose certain education records, but are not required to do so.

"Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002). One such condition is that "education records" generally may not be released without the written consent of the relevant student or the student's parents. *Id.* FERPA defines "education records" broadly to include any records "maintained by an educational agency or institution" that are "directly related to a student." *Id.* at 429 (quoting 20 U.S.C. § 1232g(a)(4)(A)). If a school has a "policy or practice of permitting the release" of these kinds of records without the requisite approvals, federal funds can be withheld. 20 U.S.C. § 1232g(b)(1).

There are a few limited categories of "education records" that FERPA carves out from the statute's disclosure bar. Among these categories are the "final results of a[ ] disciplinary proceeding conducted by [an educational] institution against a student who is an alleged perpetrator" of sexual assault. *Id.* § 1232g(b)(6)(A)-(B). When records of this type satisfy three requirements, an educational institution "may disclose" them, but is "not require[d]" to do so:

- First, the assault alleged must be either a "crime of violence," as that term is defined under federal law, "or a nonforcible sex offense";[1]
- Second, the institution must have determined that the alleged perpetrator "committed a violation of [its] rules or policies with respect" to the alleged assault; and
- Third, the records "shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student."

Id. § 1232g(b)(6)(B)-(C); 34 C.F.R. § 99.31(a)(14), (d).

B. The University has historically chosen not to disclose these records.

The University's longstanding historical practice has been not to disclose the final results of its disciplinary proceedings involving allegations of sexual assault. This practice is grounded in the University's determination that disclosure is not in the best interest of its students and would undermine the University's ability to comply with its obligations under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

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[1] The offenses that qualify as "crime[s] of violence" or "nonforcible sex offense[s]" are listed at 34 C.F.R. App. A to Part 99. Due to the scope of respondents' record requests, the only section 1232g(b)(6)(B) records implicated in this case are those arising out of disciplinary proceedings involving the types of sexual assault listed in Appendix A.

Broadly speaking, Title IX forbids educational institutions that receive federal funding from discriminating on the basis of sex. *Id.* § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). One way that Title IX enforces this general anti-discrimination mandate is to require educational institutions to establish policies to prevent sexual misconduct, as well as procedures to investigate and respond to violations of those policies. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (explaining that sexual harassment is "[w]ithout question" discrimination on the basis of sex); 34 C.F.R. § 106.3(c) (requiring preemptive evaluation and modification of any policies or procedures that may lead to violations); *id.* § 106.9(a)(1) (requiring dissemination of an anti-discrimination policy to all employees, students, and applicants); *id.* § 106.44(a) (requiring institutions to "respond promptly" and make "supportive measures" available to complainants); *id.* § 106.45(b)(5) (listing requirements for grievance investigation policies).

The University takes seriously its responsibilities under Title IX. In 2014, following more than a year of deliberations by a group composed of over twenty faculty, staff, and community members, the University strengthened its prior Title IX policies by developing a detailed protocol for the investigation and adjudication of reported sexual violence and harassment. One cornerstone of this protocol is the

University's commitment that "every effort will be made to respect and safeguard the privacy interests of all individuals involved." Equal Opportunity and Compliance Office at The University of North Carolina at Chapel Hill, *Policy on Prohibited Discrimination, Harassment and Related Misconduct* 14 (Aug. 28, 2014), https://unc.live/32beiDX. Consistent with this protocol, the University has exercised its discretion under FERPA not to make public any disciplinary records, including those involving allegations of sexual assault.

In the University's experience, preserving anonymity is critical to securing the trust of all the stakeholders involved in the Title IX process. *See* App. 92a-93a (Affidavit of Christiane Hurt, Assistant Vice Chancellor for Student Affairs (Hurt Affidavit)) (expressing a "strong[ ] belie[f]," based on the affiant's "professional experience," "that the release of either Title IX files or the identities of individuals who have been found responsible . . . through the University's Title IX process would irrevocably harm both the students who report alleged assaults . . . and [responsible students]").[2] If victims have reason to fear that their identities may be exposed, the University anticipates "a very significant chilling effect upon reporting and seeking help." App. 95a

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[2] In the trial court, the University submitted this affidavit, along with three others, as exhibits in support of the University's brief in opposition to respondents' records request. Each of the affiants is a University official familiar with the school's Title IX policies. The affidavits—which were part of the supplemental appellate record below—are reproduced at App. 90a-141a.

(Hurt Affidavit). Witnesses may also be less likely to cooperate, hindering the University's ability to conduct thorough investigations and reach fair and informed results. App. 126a (Affidavit of Ew Quimbaya-Winship, Student Complaint/Deputy Title IX Coordinator); App. 113a-114a (Affidavit of Katherine B. Nolan, Interim Title IX Compliance Coordinator (Nolan Affidavit)). And individuals who have in fact engaged in sexual misconduct may be less likely to accept responsibility voluntarily. App. 112a (Nolan Affidavit). They could also "become victims of harassment" or campus "pariahs," even after "legitimately serv[ing] their sanction[s]." App. 96a (Hurt Affidavit). Each of these outcomes could "irrevocably damage the efficacy of the University's Title IX process." App. 93a (Hurt Affidavit). For all these reasons, the University has determined that disclosing the results of sexual assault disciplinary proceedings would undermine its Title IX process.

C. Respondents sue the University to compel disclosure.

Respondents are a group of North Carolina-based media organizations. For nearly four years, respondents have sought to compel the disclosure of certain education records related to sexual assault disciplinary proceedings.

Respondents' efforts began with a September 2016 letter. That letter invoked the North Carolina Public Records Act, N.C. Gen. Stat. §§ 132-1 to -11, and contended that the Act entitled respondents to "copies of all public records made or received by [the University] in connection with a person having been

found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [the University's] Honor Court, the Committee on Sexual Conduct, or the Equal Opportunity and Compliance Office." App. 3a-4a.

The University denied respondents' request. It explained that the requested records were "educational records" "protected from disclosure by FERPA." App. 4a.

After further communications between the parties, including mediation, respondents narrowed their request to three items: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [the University] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanction[ ] imposed on each such person for each such violation." App. 4a. In response to this revised request, the University reiterated its position that the records that respondents sought were protected from disclosure by FERPA. App. 4a. On that basis, the University again declined to produce any materials. App. 4a.

Respondents sued. They alleged that the requested records were "public records" under the state Public Records Act, N.C. Gen. Stat. § 132-1. App. 5a. Respondents sought an order requiring the University to provide them with copies of the records. App. 5a.

In its answer, the University maintained that FERPA preempts the Public Records Act, and thus that it was not obligated to disclose the requested records. App. 5a. More specifically, the University asserted that it had "reasonably exercised its discretion" under FERPA "not to release [the requested] information, because doing so would breach the confidentiality of the University's Title IX process and would interfere with and undermine that process." App. 5a.

The trial court agreed with the University. App. 73a-82a. The court noted that the state Public Records Act carves out an exception to its general access rule where "otherwise specifically provided by law." App. 76a (quoting N.C. Gen. Stat. § 132-1(b)). And, the court held, FERPA is such a law: it preempts state public records laws that mandate disclosure by granting educational institutions discretion over the disclosure of records related to sexual assault. App. 76a-80a.

The state court of appeals reversed. App. 44a-72a. That court resisted the idea that FERPA "expressly or impliedly grant[s] educational institutions the absolute discretion to decide whether to release exempt educational records." App. 65a. Instead, the court of appeals said, FERPA simply "allows [the University] to disclose the records at issue without federal sanction." App. 65a. If FERPA is read that way, the court explained, "it is possible for [the University] to comply with both [FERPA] and the Public Records Act," and, thus, no preemption issue arises. App. 65a.

The North Carolina Supreme Court affirmed in a 4-3 opinion. App. 1a-43a. The majority emphasized the need to read federal and state statutes "*in pari materia*" and harmonize them wherever possible. App. 13a. For that reason, although the majority acknowledged that section 1232g(b)(6)(B), "standing alone," granted schools discretion, App. 20a, it held that the University's discretion was cabined by the State's Public Records Act. On that basis, the majority ordered the University to produce the requested records.

Three Justices (Justice Davis, joined by Justices Ervin and Earls) disagreed. As they saw it, the majority had "fundamentally misappl[ied] the federal preemption doctrine." App. 32a. "[T]he dispositive issue," the dissenters explained, was "whether FERPA confers discretion upon universities regarding whether to release the category of records at issue." App. 32a. "If FERPA does so, then the doctrine of preemption precludes states from mandating that universities exercise that discretion in a certain way." App. 32a.

The dissent proceeded to evaluate "the pertinent language" from FERPA itself, "in conjunction with the language of the accompanying federal regulations." App. 35a. In the dissent's view, these laws authorize universities to "exercise their own independent judgment over whether to produce" the "category of documents . . . governed by" section 1232g(b)(6)(B). App. 36a-37a. And, under basic preemption principles, "[a] university must be allowed to exercise its federally mandated discretion unimpeded by a

state law that seeks to eliminate that discretion." App. 37a-38a. In short, "a federal law's 'may' cannot be constrained by a state law's 'must.'" App. 42a.

REASONS FOR GRANTING THE PETITION

I. The North Carolina Supreme Court's Decision Was Incorrect And Conflicts With This Court's Decisions.

Federal law establishes a clear rule regarding the obligation of educational institutions to disclose disciplinary records related to sexual assault: institutions are neither prohibited from turning over such records, nor required to do so. 20 U.S.C. § 1232g(b)(6)(B); 34 C.F.R. § 99.31(a), (d). Disclosure, in other words, is discretionary. Despite this federal rule, the North Carolina Supreme Court ordered the University to produce these records, after concluding that production was required under state law.[3] That decision was incorrect.

Like all States, North Carolina has a public-records law that seeks to ensure that government affairs are conducted in a transparent and accountable manner. That law declares that "it is the

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[3] The University has complied with the North Carolina Supreme Court's disclosure order and produced the relevant records. Nevertheless, this case continues to present a live case or controversy for purposes of Article III. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12-13 (1992) (holding that the production of tapes to the IRS, in compliance with a court order, did not render the case moot, because the Court still had the "power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession").

policy of th[e] State that the people may obtain copies of their public records and public information free or at minimal cost." N.C. Gen. Stat. § 132-1(b); *see also id.* (noting that this disclosure obligation does not apply when another law "otherwise specifically provide[s]").

However, if a specific federal law protects a certain kind of public record from automatic disclosure, a state law mandating disclosure must give way under the Supremacy Clause. U.S. Const. art. VI, cl. 2. That is the case here. FERPA and its accompanying regulations together empower educational institutions to exercise their own independent judgment regarding the disclosure of education records related to sexual assault. Under this Court's precedents, state law cannot override or constrain that federal grant of discretion. The North Carolina Supreme Court's decision to the contrary warrants this Court's review. *See* S. Ct. R. 10(c).

A. FERPA grants educational institutions discretion over the disclosure of sexual assault disciplinary records.

Though FERPA generally bars educational institutions from releasing education records without written consent, it treats certain records differently. If, following a disciplinary proceeding, a university determines that "an alleged perpetrator of any crime of violence . . . or a nonforcible sex offense" has violated the school's "rules or policies," then FERPA does not "prohibit" the school "from disclosing the final results" of the proceeding. 20 U.S.C. § 1232g(b)(6)(B). In that scenario, the university is

permitted—but not required—to disclose "the name of the student, the violation committed, and any sanction imposed by the institution on that student" without sacrificing its federal funding. *Id.* § 1232g(b)(6)(C).

FERPA's implementing regulations supplement the discretion that these statutory provisions vest in educational institutions. To begin, the regulations make clear that a university "*may* disclose personally identifiable information from an education record" if (1) "[t]he disclosure . . . is in connection with a disciplinary proceeding"; (2) "[t]he student is an alleged perpetrator of a crime of violence or non-forcible sex offense"; and (3) "the student has committed a violation of the institution's rules or policies." 34 C.F.R. § 99.31(a)(14)(i) (emphasis added). But, the regulations clarify, an educational institution is "not *require[d]* . . . to disclose" these records.[4] *Id.* § 99.31(d) (emphasis added).

As the dissent below recognized, "there are only three possible" ways to interpret this statutory and regulatory scheme: FERPA and its accompanying regulations "either (1) *prohibit[ ]* universities from producing the records at issue; (2) *require[ ]* that they produce the records; or (3) allow[ ] universities to exercise their own independent judgment over

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[4] With one exception: the regulations do require educational institutions to disclose these records to the student whose personally identifiable information is contained in the record (or if that student is younger than 18, the student's parent). *See* 34 C.F.R. § 99.31(a)(12), (d); *id.* § 99.3. This exception is not at issue in this case.

whether to produce them." App. 36a-37a (Davis, J., dissenting). And, because the plain text of the laws clearly forecloses the first two options, "the only remaining option is the third one—that is, the conclusion that FERPA confers discretion on universities as to whether such records should be produced to a third party in a particular case." App. 37a (Davis, J., dissenting).

The dissent's reading of FERPA is consistent with this Court's prior opinions. The Court has repeatedly explained that when federal law "says an actor 'may' take certain action," but is not required to do so, "such language constitutes a grant of discretion to that actor." App. 35a-36a (Davis, J., dissenting) (citing *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016); *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 346 (2005); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994); *United States v. Rodgers*, 461 U.S. 677, 706 (1983)).

That is precisely what federal law says here: FERPA and its accompanying regulations provide that educational institutions "may" release certain information from disciplinary records related to sexual assault, but are not required to do so. 34 C.F.R. § 99.31(a)(14)(i); *id.* § 99.31(d). These federal laws therefore leave the disclosure of such records to an educational institution's discretion.

B. The North Carolina Supreme Court misapplied this Court's prior opinions in overriding this federal grant of discretion.

The North Carolina Supreme Court declined to apply FERPA and its accompanying regulations.

Instead, the court overrode the University's discretion under FERPA and ordered the school to produce the protected records. That erroneous decision is inconsistent with this Court's precedents and therefore warrants review. S. Ct. R. 10(c).

As the dissent below recognized, the majority incorrectly interpreted FERPA and its accompanying regulations by "looking to *state* law." App. 32a (Davis, J., dissenting). The majority conceded that, "standing alone," federal law grants "a postsecondary educational institution . . . discretion" over education records related to sexual assault. App. 20a. But, the majority said, it could not look at federal law "in a vacuum." App. 20a. Instead, it sought to "harmonize" federal and state law by considering "federal law's permissive" approach to the relevant education records alongside "the state law's mandatory Public Records Act provision." App. 20a. And, the majority held, because state law requires state agencies, including universities within the state system, to produce public records, federal law should not be read to grant "*public* postsecondary educational institution[s]" discretion. App. 20a.

This methodological approach was incorrect as a matter of federal constitutional law. The Supremacy Clause provides that "the Laws of the United States" are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under that Clause, a state public records law cannot alter the meaning of FERPA and its accompanying regulations. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (stating that courts' decisions "must not give

effect to state laws that conflict with federal statutes"); *Chicago Tribune v. Bd. of Trs. of the Univ. of Illinois*, 680 F.3d 1001, 1005 (7th Cir. 2012) ("Even if [state] law purports to command the disclosure of particular information, the Supremacy Clause means that federal law prevails."). Federal law either confers discretion on universities, or it does not. And, if it does, state law cannot attempt to cabin that discretion without running afoul of the Supremacy Clause. *Armstrong*, 575 U.S. at 326; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "Discretion," after all, connotes "the power of free decision-making." App. 40a (Davis, J., dissenting) (quoting Black's Law Dictionary (11th ed. 2019)) (emphasis omitted). A state law that restricts the "options available" to a particular entity is, therefore, "antithetical to the very concept of discretion." App. 40a.

Numerous opinions from this Court confirm the point. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), for example, this Court weighed how to interpret two statutes—one federal, one state—that both addressed national banks' ability to sell insurance in small towns. The federal statute provided that a "national banking association[ ] . . . doing business" in a town of fewer than 5,000 inhabitants "*may* . . . act as the agent for any fire, life, or other insurance company authorized by . . . the State in which said bank is located." 12 U.S.C. § 92 (emphasis added). In other words, the federal statute granted the banks discretion to sell insurance; they *could* act as insurance agents, but were not required to do so. The state statute at issue, by contrast,

prohibited most banks from selling insurance in Florida—in other words, it constrained the banks' discretion. *Barnett Bank*, 517 U.S. at 29.

This Court held unanimously that Florida lacked the authority to restrict federally granted discretion. Explaining that state law cannot forbid activity that federal law authorizes, the Court concluded that the banks had a federal right to sell insurance. *Id.* at 37.

The reasoning in *Barnett Bank* applies equally in this case. Here, federal law grants educational institutions discretion over the disclosure of education records related to sexual assault—universities are permitted to withhold such records, but are not required to do so. *See* 20 U.S.C. § 1232g(b)(6)(B); 34 C.F.R. § 99.31(a)(14), (d). Given this federal authorization, just as the Florida state law could not rescind the banks' discretion to sell insurance, North Carolina state law cannot rescind the University's discretion to withhold the records.

Barnett Bank, moreover, is only one of many cases in which this Court has rejected the proposition that state law can constrain the discretion that an entity enjoys under federal law. As another example, in *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, this Court considered whether a South Dakota statute could impose restrictions on local government spending, notwithstanding a federal statute that granted local governments broad discretion to spend certain federal funds "for any governmental purpose." 469 U.S. 256, 257-59 (1985) (quoting 31 U.S.C. § 6902(a)). This Court held that the state statute could do no such thing. *Id.* at 258. Because Congress

granted the local governments "more discretion in spending federal aid than the State would allow them," the Court held that "the state statute is invalid under the Supremacy Clause." *Id.*; *see also, e.g.*, *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (holding that California law could not limit the use of due-on-sale clauses in savings-and-loan contracts when federal law granted savings-and-loan associations the discretion to include them); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375-79 (1954) (holding that a state law could not prohibit banks from using the word "savings" in their advertisements when federal law permitted them to do so).

The opinion below is inconsistent with this precedent as well. FERPA and its accompanying regulations grant educational institutions "more discretion" in terms of disclosure "than the State would allow them" under the mandatory-access rule set forth in the Public Records Act. *See Lawrence County*, 469 U.S. at 258. Under *Lawrence County*, the state law must give way in this situation.

In short, because federal law establishes a discretionary (*i.e.*, non-mandatory) approach to the disclosure of education records related to sexual assault, state law cannot require mandatory disclosure. The contrary holding below conflicts with this Court's prior opinions and therefore warrants this Court's review.

II. The Question Presented Is Important And Likely To Recur.

This Court's review is also warranted because the question presented is important and is likely to generate disparate rules for thousands of colleges and universities across the country. *See* S. Ct. R. 10(c).

A. The question presented is important.

To begin, the question presented involves "the construction of a major federal statute." *See United States v. Donovan*, 429 U.S. 413, 422 (1977). FERPA governs the privacy of education records at almost every college and university. *Gonzaga v. Doe*, 536 U.S. 273, 278 (2002); *see also* U.S. Dep't of Educ., *FERPA General Guidance for Students*, https://bit.ly/2XODkr6. In 2018 alone, roughly 20 million students attended the more than 4,000 degree-granting postsecondary institutions that accept federal funds and must therefore follow FERPA's requirements. Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics*, Tbl. 317.40, https://bit.ly/2PLTMUR.

The question presented also implicates important questions about how to address the serious problem of sexual assault on college campuses nationwide. According to a 2019 Association of American Universities report, 26 percent of women, 7 percent of men, and 23 percent of transgender people experience sexual assault during their college careers. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, Tbls. 5, 7, 9 (Jan. 17, 2020), https://bit.ly/3gTPW89.

In designing their responses to this serious problem, many institutions, including the University, have concluded that protecting the identities of all individuals involved in a disciplinary proceeding is the most effective way to respond to incidents of sexual violence, protect and support victims, respect the rights of all stakeholders, and promote safety on campus.

The decision below threatens to undermine these important objectives. Perhaps most significantly, confidentiality is critical to encouraging victims of sexual violence to report incidents and to participate in the University's Title IX process. App. 94a (Hurt Affidavit); App. 109a (Nolan Affidavit). If victims cannot trust that their identities will remain confidential, they may hesitate to come forward. Moreover, because a victim often has a prior connection to a responsible party, disclosure of a responsible student's identity may expose the victim's identity too, particularly given the ready availability of personal information online and the ubiquity of social media. App. 95a (Hurt Affidavit); App. 110a (Nolan Affidavit); *see also, e.g.*, Emma Woollacott, *Google Under Fire for Revealing Rape Victims' Names*, Forbes (May 22, 2018), https://bit.ly/3kWpEED. Alternatively, responsible students whose identities will be revealed may feel compelled to defend themselves publicly, even if doing so will also reveal their victim's identity. App. 110a (Nolan Affidavit).

Confidentiality is also imperative for student witnesses who participate in the Title IX process. Witnesses are asked to share sensitive information

with investigators. If these individuals cannot expect anonymity, they are far less likely to be forthcoming or, in some cases, to participate in the Title IX process at all. App. 113a-114a (Nolan Affidavit). Though respondents have not asked the University to reveal the names of witnesses, witness exposure may nevertheless be a byproduct of their records request. Like victims, witnesses often have prior connections to a responsible party, and so the public release of a responsible party's identity may necessarily mean that witness identities are revealed as well. App. 113a-114a (Nolan Affidavit).

Finally, confidentiality is important to students who are accused of sexual misconduct. Responsible students who are named publicly may be subject to severe harassment and retribution, in addition to whatever punishment the University decides is appropriate. Some of these students may face threats to their immediate physical safety. App. 111a (Nolan Affidavit). Others may suffer lifelong stigma despite never having been found guilty in a formal court proceeding.[5] These outcomes "hinder[ ] the University's ability to educate and rehabilitate students through the Title IX process." App. 136a

[5] The University's Title IX process does not seek to determine whether a crime has occurred, but rather whether an accused party has violated a University policy. The standard the University applies during Title IX proceedings is the "preponderance of the evidence" standard, not the "beyond a reasonable doubt" standard that applies in criminal proceedings. This standard simply requires the University panel overseeing the proceeding to find that it is more likely than not that the accused party violated a University policy.

(Affidavit of Felicia Washington, Vice Chancellor for Workforce Strategy, Equity and Engagement).

In addition, students who are accused of sexual misconduct can resolve allegations voluntarily, avoiding the need for a contested hearing. Students who know that their names will be publicly released may be less willing to take this step. App. 112a (Nolan Affidavit).

In sum, by depriving universities of their discretion over whether to release education records on sexual assault disciplinary proceedings, the decision below harms both victims and responsible students, while impeding the efforts of universities to address an issue of national concern. This petition therefore raises an important question of federal law that merits this Court's review.

B. The question presented has already generated confusion among courts and is likely to recur.

This petition also warrants review because it involves a recurring issue of federal law that is generating confusion among courts and will continue to do so absent this Court's intervention.

Although the decision below is binding only in North Carolina, every State has some type of public-records law mandating the disclosure of certain information. Nat'l Freedom of Information Coalition, *State Freedom of Information Laws,* https://bit.ly/3iZmi1U. Not surprisingly, then, this case is hardly the first that has required a court to confront the difficult task of deciding "where

disclosure ends and where confidentiality begins" under potentially conflicting state and federal statutory schemes. *See Press Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 482 (Iowa 2012); *see also, e.g.*, *Kendrick v. Advertiser Co.*, 213 So. 3d 573, 578 (Ala. 2016); *Caledonian-Record Publ'g Co., Inc. v. Vermont State Colleges*, 833 A.2d 1273, 1274 (Vt. 2003); *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997). This push-and-pull between specific FERPA provisions and state public-records laws has "sharply divided" courts, and will likely continue to do so until this Court steps in. *See Caledonian-Record*, 833 A.2d at 1275. This Court's review is therefore needed to ensure that colleges and universities face uniform federal-law disclosure obligations.

The Vermont Supreme Court was one of the first courts to address the interaction between FERPA and a state public-records law. In *Caledonian-Record*, the court allowed state law to eliminate a university's discretion under section 1232g(b)(6)(B) and affirmed a trial-court order requiring two universities to disclose the same kind of records at issue here. *Id.* at 1278. The court read section 1232g(b)(6)(B) as an exception to FERPA's general bar on the disclosure of education records, and thus held that the provision merely cleared the way for a state law requiring disclosure. The court therefore concluded that the trial court had "properly ordered" the release of the education records under state law. *Id.*

By contrast, the Sixth Circuit has described section 1232g(b)(6)(B) as an affirmative grant of

discretion. According to that court, section 1232g(b)(6)(B) is one of two "particular situations in which otherwise protected student disciplinary records *may* be released." *United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) (emphasis added). The court explained that, in section 1232g(b)(6)(B), "Congress acknowledged that student disciplinary records are protected from disclosure but, based on competing public interests, carefully *permitted* schools to release bits of that information while retaining a protected status for the remainder." *Id.* at 813 (emphasis added).

The Montana Supreme Court has also considered the meaning of section 1232g(b)(6)(B). *Krakauer v. Montana*, 381 P.3d 524 (Mont. 2016). The court remanded a dispute over the release of disciplinary records involving sexual assault after a journalist argued that release was required under state law, notwithstanding the university's discretion under FERPA. The state supreme court instructed the trial court to consider the application of section 1232g(b)(6)(B) on remand. *Id.* at 536-37, 543-44.[6]

Other courts, too, have been called on to consider an educational institution's discretion under section 1232g(b)(6)(B). *See, e.g.*, *Keerikkattil v. Hrabowski*, No. WMN-13-2016, 2014 WL 12737622, at *2 (D. Md. June 30, 2014); *R.M. v. Boyle Cty. Sch.*, No. 5:06-152-

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[6] The trial court, however, never reached the issue, leaving the application of section 1232g(b)(6)(B) uncertain. *Krakauer v. Montana*, 445 P.3d 201, 207 & n.1 (Mont. 2019), *cert. denied*, 140 S. Ct. 1107 (2020).

JMH, 2006 WL 2844146, at *1 (E.D. Ky. Oct. 2, 2006); *Rim of the World Unified Sch. Dist. v. Superior Court*, 104 Cal. App. 4th 1393, 1398-99 (2002); *B.W.B. v. Eanes Indep. Sch. Dist.*, No. 03-16-00710-CV, 2018 WL 454783, at *8 (Tex. Ct. App. Jan. 10, 2018).

These courts have yet to coalesce around a uniform understanding of how section 1232g(b)(6)(B) interacts with a state public-records law. Yet as this Court has explained, FERPA "explicitly sought to avoid" these kinds of "multiple interpretations." *Gonzaga*, 536 U.S. at 290. Without this Court's intervention, such disparities will likely only get worse. Lawsuits seeking disclosure of education records almost always arise under a state public-records law in the first instance. And a university's assertion of FERPA as a federal defense typically will not confer federal jurisdiction. *See Chicago Tribune*, 680 F.3d at 1003-05; *accord Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction" under 28 U.S.C. § 1331). As a result, the federal courts of appeals cannot be counted on to play their ordinary role of ensuring the uniform application of federal law. Universities' disclosure obligations will therefore vary, depending on how each of the 50 different state court systems interpret FERPA and its accompanying regulations.

Consider also that decisions like the one below will subject different universities *in the same State* to different obligations under FERPA. State public-records laws do not apply to private universities. So, while a private university will retain discretion over

whether to disclose education records related to sexual assault, a public university down the road will not. App. 37a n.1 (Davis, J., dissenting). The result is different privacy protections for students at public and private institutions—yet another example of the "multiple interpretations" Congress "explicitly sought to avoid" when it enacted FERPA. *Gonzaga*, 536 U.S. at 290.

Under the current legal landscape, universities face uncertain and conflicting rules about the extent of their discretion to disclose education records related to sexual assault disciplinary proceedings. This Court alone can provide the clarity necessary to resolve that confusion and ensure that universities across the United States know exactly what their obligations are moving forward.

CONCLUSION

This Court should grant certiorari and reverse the decision of the North Carolina Supreme Court.

Respectfully submitted,

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