No. 20-527

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

BRIEF OF VICTIM ADVOCACY GROUPS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Regulation:

Rule:

Other:

STATEMENT OF INTEREST

Amici curiae are two organizations that advocate for the rights of victims of sexual violence.[1]

The Victim Rights Law Center (VRLC) is a national organization founded in 2003 as the first nonprofit law center in the country solely focused on the legal needs of rape and sexual assault survivors. The VRLC provides free legal counsel to help over one thousand sexual assault survivors per year in Massachusetts and Oregon to help stabilize and rebuild their lives. The VRLC directly represents survivors in a broad array of proceedings that reflect the deep and reverberating impact of a sexual assault on all aspects of a survivor's life (including proceedings relating to education, privacy, physical safety, employment, housing, immigration, financial stability and other civil and administrative matters). The VRLC also trains tens of thousands of professionals annually through its national training programs to improve the response to sexual violence, including as a training and technical assistance provider for the Office on Violence's Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program. The VRLC understands the vital importance of privacy and safety to sexual assault survivors and believes the consequences of the decision below will

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[1] Under Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice of amici curiae's intent to file this brief at least ten days before its due date. Petitioners have consented to the filing of this brief; Respondents have not.

harm victims, leading to increased victim-shaming, suppressed reporting, and more dangerous campuses for all students.

The North Carolina Coalition Against Domestic Violence (NCCADV) leads the state's movement to end domestic violence. Working through a diverse network of partnerships and collaborations, the Coalition provides technical assistance, innovative trainings, groundbreaking prevention work, and legislative and policy support for members and the public. NCCADV works to empower all survivors of domestic violence and the agencies and networks that support them to create safe and healthy lives for themselves and their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by the petition before the Court is whether a federal law gives universities the discretion to withhold student disciplinary records related to sexual violence, and, if so, whether state law can eliminate that discretion. Missing from this case, however, are the innocent persons who are most likely to be harmed by the release of this information: the actual victims of sexual violence.

Amici curiae are nonprofit organizations that represent and advocate for such victims. Amici support the Petitioners because private things should be kept private.

The North Carolina Supreme Court, in a 4-3 decision, ordered the release of student disciplinary records held by the University of North Carolina at Chapel Hill. The majority subordinated the will of Congress espoused in the Family Educational Rights

and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, to the state's public records act. That decision should be reviewed for three reasons.

First, the question presented is one of great national significance. Sexual violence is more prevalent on college campuses than nearly anywhere else. If the decision below stands, or is adopted by other courts, it threatens to exacerbate the problems of sexual assault that plague campuses across the country.

Second, the decision below conflicts with the decisions from other courts. The majority below bypassed concerns that the identity of the victims of sexual violence could reasonably be determined by disclosure of the names of disciplined students. FERPA, however, *prohibits* disclosure of any information from which a victim's identity can be reasonably determined.

Finally, the North Carolina Supreme Court erred by re-delegating the discretion granted by FERPA. FERPA grants discretion to colleges and universities to decide whether to release student disciplinary records at all. The court below erred by letting the state legislature override that discretion through a law that *mandates* disclosure.

ARGUMENT

I. The Question Presented Is of Great National Importance.

The decision below exacerbates the prevalence of sexual violence on college campuses.

1. In recent years, published studies have shown the pervasiveness of sexual violence on campus.

During college, one in five women are sexually assaulted. *Statistics About Sexual Violence*, Nat. Sexual Violence Res. Ctr. (2015), https://rb.gy/t6xgye. According to the Department of Justice, that statistic puts female college students at a disproportionately high risk for sexual violence compared to women in the general population. Sofi Sinozich & Lynn Langton, U.S. Dep't of Justice, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, at 1 (Dec. 2014), *available at* https://rb.gy/ujpisr.

Despite its prevalence, sexual violence on campus is disproportionately *less* likely to be reported than other types of sexual violence. *See* Bonnie S. Fisher et al., U.S. Dep't of Justice, *The Sexual Victimization of College Women* 23–26 (2000), *available at* https://rb.gy/kby8w9. The victims have explained why: 45% of women who were raped but did not report it explained that they did not report because they did not want their families or other people to know. *Id.*

2. Title IX ensures that people are not denied the ability to participate in any federally-funded educational opportunities based on their sex, including opportunities at institutions of higher education. To implement Title IX, colleges and universities like the University of North Carolina have created a confidential process for reporting and resolving allegations of

sexual violence on campus. The University can encourage all students—reporting students, responding students, and witness students—to participate in the process because the University promises to keep the process confidential. Pets.' App. 108a–114a. Without the promise of confidentiality, victims of sexual violence would be even less likely to report, and underreporting increases the odds of another student getting hurt. Pets.' App. 95a. Confidentiality also increases the odds that responding students will participate in the process and even admit responsibility for their conduct. Pets.' App. 111a–1112a. Witnesses, too, fear retaliation if they speak up. Pets.' App. 113a–114a.

The decision below ignored the reliance interests of the very students whose privacy FERPA protects. The students whose records are involved here all believed that they were participating in a confidential proceeding because the University itself had been encouraged by the federal government to keep the proceedings private. Russlynn Ali, "Dear Colleague" Letter, U.S. Dep't of Educ., at 5 (Apr. 4, 2011), https://rb.gy/32qfam. When victims reported their injuries to the University, they could not have anticipated making front-page news. Pets.' App. 110a.

3. When names leak out, students get hurt. In cases where the names of responding students have been publicized, those students have feared for their safety because of threats and harassment. Pets.' App. 110a–111a. One student became "terrified to go to class." Pets.' App. 124a.

Likewise, if universities cannot ensure confidentiality, students may stop reporting sexual violence. If victimized students stop reporting violence, dangerous students may keep perpetrating violence in the

educational community. Pets.' App. 95a. And if reporting is chilled, victims may never learn about the school's counseling and health services that could alleviate some of their trauma. Pets.' App. 123a. Without these services, students have let sexually transmitted diseases go undiagnosed and untreated, developed harmful addictions, and dropped out of school altogether. Pets.' App. 123a–124a.

These harms, which occur because of the victims' sex, are all ones that Congress sought to eradicate with Title IX. Yet these harms will follow if the decision below is allowed to stand.

II. The Decision Below Conflicts with Decisions from Other Courts.

The court below also erred because it failed to determine whether disclosure of the requested records would disclose victims' identities. That error runs contrary to the holding of other courts.

Under FERPA, a college or university *may* release "the final results of any disciplinary proceeding." 20 U.S.C. § 1232g(b)(6)(B). Any such disclosure, however, must be limited to the name of the disciplined student, the violation committed, and any sanction imposed. *Id.* § 1232g(b)(6)(B)–(C). In addition, FERPA *prohibits* the release of the names of victims and witnesses unless those persons have given written consent.[2] *Id.* § 1232g(b)(6)(C)(ii).

Even then, a college may not release disciplinary results if doing so will likely result in the identification of a victim's identity. FERPA also prohibits the

[2] This case does not involve any student who gave written consent.

disclosure of "personally identifiable information," *id.* § 1232g(b)(1), which means "information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," 34 C.F.R. § 99.3. The phrase also includes information that would allow the requester to identify the student to whom the record relates. *Id.*

This limiting definition is critical to protecting students who are victims of violence. Although § 1232g(b)(6)(C) only requires the redaction of a victim's name from disciplinary records, the regulations make clear that this redaction is not always enough. As the Department of Education has explained, "[e]xperience has shown [that] . . . personal characteristics are often sufficiently unique in a school community that a reasonable person can identify the student from this kind of information even without access to any personal knowledge . . . ." Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74831 (Dec. 9, 2008).

The court below failed to acknowledge that disclosure of the names of disciplined students could lead to the public identification of victims. By contrast, courts in other states have recognized that the release of records like those involved here necessitates a case-by-case determination of whether a victim will be identified.

In an analogous case involving a conflict between FERPA and a state public records act, the Iowa Supreme Court held that the state act conflicted with FERPA and that FERPA prevailed. *Press-Citizen Co.*

v. Univ. of Iowa, 817 N.W.2d 480, 488 (Iowa 2012). The court then held that disciplinary records could be withheld when, even with name redactions, the other information constituted personally identifiable information that could lead to the identification of a student. *Id.* at 492.

Courts in other states have reached the same conclusion. *See, e.g.*, *Kendrick v. Advertiser Co.*, 213 So. 3d 573, 578 (Ala. 2016); *Champa v. Weston Pub. Sch.*, 39 N.E.3d 435, 442 (Mass. 2015) (explaining that whether even redacted records can be released calls for a "case-by-case determination"); *L.R. v. Camden City Pub. Sch. Dist.*, 171 A.3d 227, 247 (N.J. App. Div. 2017). So, too, has the Department of Education. *See* Family Policy Compliance Office, Letter to School District re: Disclosure of Educ. Records to Tex. Office of Attorney Gen. (Jan. 19, 2007), *available at* https://rb.gy/1lhdjr (determining that, if "the redaction of names . . . is not sufficient to prevent the identification of a student involved in a disciplinary proceeding, including student victims and student witnesses, then FERPA prohibits [the college from] releasing the information").

Here, the University at first withheld the requested records because it determined that the release of the names of disciplined students would likely lead to the public identification of the student victims. Pets.' App. 134a–135a. After the North Carolina Supreme Court ordered production of the requested documents, the Respondents rushed to publish the names of disciplined students. *See, e.g.*, Maddie Ellis, *University releases 15 sexual assault records following four-year lawsuit*, Daily Tarheel (Aug. 6, 2020), https://rb.gy/unxrnk; Tyler Dukes & Randall Kerr,

UNC-Chapel Hill releases names of students found responsible for sexual misconduct, WRAL.com (Aug. 6, 2020), https://rb.gy/78y8ga. Although the media companies have not yet publicized the names of any victims, University students already worry that victims' identities will be made public. Anna Neil, *The release of sexual assault records leaves activists asking what comes next*, Daily Tarheel (Aug. 30, 2020), https://rb.gy/4igwz7 ("That could inadvertently lead to the names and the identities of the victims being discovered, and that is in direct conflict with what victims are told going into the Title IX process . . . ."). This was a predictable result, but one which the court below disregarded.

Amici request that this Court grant certiorari to correct the error below and bring it into agreement with the decisions of other states.

III. The North Carolina Supreme Court Erroneously Addressed a Major Question Under FERPA That This Court Should Settle.

Within FERPA, Congress created a zone of discretion for student disciplinary records. Congress intended that discretion to be exercised by the educational institutions that are directly regulated by FERPA. The court below erred by letting a state legislature override Congress's grant of discretion to educational institutions.

FERPA regulates educational institutions, not states. In particular, FERPA's regulation of disciplinary records allows "an institution of postsecondary education" to decide whether to release information related to student disciplinary records. 20 U.S.C. § 1232g(b)(6)(B). The school is allowed to decide whether to release the records because it is the school

that holds the record, determined that the student committed a sex offense, and disciplined its own student. *See id.* In short, the school has all the knowledge to decide whether to produce or withhold its own disciplinary records.

And it is the school that is subject to FERPA because the school is the entity that has accepted federal funding. *See id.* § 1232g(b)(1). Congress enacted FERPA under its spending-clause powers. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). Thus, when a university accepts federal funding, payment becomes conditioned on the school's compliance with FERPA, just like a contract.[3] *Jackson v. Birmingham Bd.*, 544 U.S. 167, 182 (2005).

The majority below, however, held that the state legislature, through the public records act, could override the discretion that Congress had intentionally delegated to the University. Pets.' App. 17a–18a. The dissent correctly recognized that the two laws are irreconcilable because "FERPA gives [Petitioners] a choice, while the Public Records Act gives them a command." Pets.' App. 39a. As this Court has already held, a federal statute that grants a decision-maker "discretion" cannot live in harmony with a rule under which the outcome is "automatic." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

This decision below, of course, creates a disparity in how public and private universities will be treated. Public universities, which are subject to the public

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[3] And, to be sure, the University of North Carolina is a legal entity distinct from the State of North Carolina. N.C. Gen. Stat. § 116-3. The University has the right to contract and receive funding in its own name. *Id.*

records act, will be denied discretion to withhold disciplinary records, while private universities can continue to exercise the discretion that Congress gave them.

More pernicious, however, is the broader implication of the decision below. The majority determined that, despite FERPA's grant of discretion, a state legislature can adopt a rule of automatic production of university disciplinary records. That rule means that the state legislature could enact a new law directing *private universities* how they, too, will exercise their FERPA discretion.

That is the necessary implication of the decision below, but that is not what Congress envisioned. Congress intended that colleges and universities accepting federal funds, whether public or private, would weigh the stakes and make a decision whether to publicize student disciplinary records. This Court should grant review of the decision below and restore that discretion.

CONCLUSION

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

Respectfully submitted,

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November 18, 2020