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 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court should decline to review this case because:

- The North Carolina Supreme Court did not decide *any* issue of federal law, much less an "important" one;
- The result urged by the Petitioners would constitute a serious and unwarranted intrusion on state sovereignty;
- The North Carolina court's opinion does not conflict with this Court's precedents;
- The state court's opinion does not create legal "confusion" or "uncertainty;" and,
- The Petitioners' assertion that the state court's ruling is injurious to the victims of campus sexual assaults is not supported by any competent evidence and was not deemed worthy of consideration by the North Carolina trial or appellate courts.

ARGUMENT

I. BECAUSE THE NORTH CAROLINA SUPREME COURT DID NOT DECIDE ANY ISSUE OF FEDERAL LAW, THE PETITION PRESENTS NO BASIS FOR REVIEW BY THE COURT.

The Petitioners assert that this Court's review of this case is warranted because, they say, it raises an "important federal question" — i.e., whether a provision of the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g(b)(6)(B), preempts the North Carolina Public Records Act. But the Supreme Court of North Carolina did not decide the case on that ground. Indeed, the

four justices who voted in the majority ruled that there was no need even to reach the preemption issue and addressed it only because the three dissenting members did. Rather, the majority agreed with the North Carolina Court of Appeals that the trial court had unnecessarily invoked and improperly applied the preemption issue because the state and federal statutes at issue, when read *in pari materia,* simply are not in conflict. *DTH Media Corp. v. Folt*, 374 N.C. 292, 293-310, 841 S.E.2d 251, 253-263 (2020). Citing the North Carolina Court of Appeals' unanimous opinion, Justice Morgan wrote, " '[d]efendants would not violate § 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act.' *DTH v. Folt*, 259 N.C. App. at 74, 816 S.E.2d at 527." 374 N.C. at 307, 841 S.E.2d at 261-262.

The majority's determination that there was no conflict between FERPA and the Public Records Act rendered the preemption issue irrelevant, immaterial and unnecessary. In his opinion for the majority, Justice Michael Morgan wrote:

> Although defendants argue that "FERPA and the Public Records Act conflict because the University cannot both exercise discretion about releasing information and be forced to release records containing that information," we have heretofore established in this case that the two Acts do not conflict under these circumstances as well as held in this case that UNC-CH does not have the discretion regarding the release of the information at issue. Nonetheless, since our learned colleagues who are in the dissent have addressed their view of the role of the doctrine of federal preemption in this case and since the lower appellate court addressed the subject of the applicability of the federal preemption doctrine in notable detail in its opinion, we elect to examine the principle to a warranted degree.

374 N.C. at 305-306, 841 S.E.2d at 261.

Throughout the long history of this case the Respondents have conceded that, *nothing else appearing,* FERPA would confer the University with discretion to

withhold the records at issue. By enacting the Public Records Act, however, the North Carolina General Assembly directed the state's public, taxpayer-funded universities to *exercise* that discretion in favor of the public's right to know. Seven of the 10 state appellate judges who considered this case not only accepted the Respondents' argument but also concurred that the preemption issue is not invoked when federal and state statutes are not in conflict.

In concluding that the preemption issue is not invoked because FERPA and the Public Records Act are not in conflict and can and should be read *in pari materia,* North Carolina's appellate courts followed an analytical path illuminated by decisions from other states. *See*, *e.g.*, *U.S. v. Miami University,* 294 F.3d 797, 811 (6th Cir. 2002) (Because Ohio Public Records Act does not conflict with FERPA, federal preemption is "not implicated."); *State ex rel. McQueen v. Metro. Nashville Bd. of Pub. Educ.,* 587 S.W.3d 397, 401-404 (Tenn. Ct. App. 2019), *appeal denied,* No. M2018-00506-SC-R11-CV, 2019 Tenn. LEXIS 270 (June 20, 2019) (School board must disclose student "directory information" because FERPA does not conflict with state public records law and thus does not preempt it).

Because the North Carolina Supreme Court did not decide any question of federal law, the Petition does not, and could not, present any basis for review by this Court.

II. THE RESULT URGED BY THE PETITIONERS WOULD CONSTITUTE A SERIOUS AND UNWARRANTED INTRUSION ON STATE SOVEREIGNTY.

As the North Carolina Supreme Court noted in its opinion, "A reviewing court confronting [the preemption] question begins its analysis with a presumption against federal preemption." *State ex rel Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005); *see also Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)." ***DTH Media Corp. v. Folt***, 374 N.C. 292, 300-01, 841 S.E.2d 251, 257-58 (2020). The presumption, the court said,

> is grounded in the fact that a finding of federal preemption intrudes upon and diminishes the sovereignty accorded to states under our federal system. Indeed, in *Wyeth v. Levine*, the United States Supreme Court explained that "[i]n all [preemption] cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (alterations in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)

Id., at 306, 841 S.E. 2d at 261.

The presumption against preemption prescribed by this court in *Wyeth* is particularly important in this case because North Carolina's legislature and courts have collaboratively made open government a lynchpin of our state's public policy, the former by enacting the Public Records Act and the latter by construing and applying the Act broadly. The state court's majority described this collaboration thusly:

> In the present case, the state's legislative body—the North Carolina General Assembly—has clearly expressed its intent through the Public Records Act to make public records readily accessible as "the property of the people," as described in N.C.G.S. § 132-1(b). . . .The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996) *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997). The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. The Public Records Act thus allows access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis added). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. at 624, 633 S.E.2d at 684.

Id. at 300-01, 841 S.E.2d 251, 257-58 (2020)

A ruling that FERPA preempts the Public Records Act, as the Petitioners advocate, would severely curtail the North Carolina General Assembly's sovereign authority to prescribe, and the state courts' ability to enforce, the state's long-established policy requiring openness and accountability on the part of state and local public institutions, including the University of North Carolina at Chapel Hill and the other constituents of the UNC system.[1] As pointed out in Section IV, *infra,* other state legislatures have made different choices, as is their sovereign duty and right under our federal system.

[1] This Court may judiciously notice that several, but not all, of North Carolina's public universities have honored the policy prescribed by the General Assembly in response to the North Carolina court's ruling. *See* Cullen Browder, *Records show scores of students found responsible for sex offenses at UNC schools*, WRAL.COM, https://www.wral.com/records-show-scores-of-students-found-responsible-for-sex-offenses-at-unc-schools/19377924/ (last visited November 18, 2020).

Throughout the long history of this case the Petitioners, who are entrusted with the care and administration of North Carolina's most important public institution, have argued that the discretion accorded them by FERPA should override the policy prescribed by the legislature. By its ruling in this case, the North Carolina Supreme Court protected the General Assembly's authority to exercise *its* discretion to make state law and set state policy.

III. THE STATE COURT'S OPINION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

The state court's opinion does not conflict with this Court's precedents, because the precedents that Petitioners cite relate to federally-granted discretion afforded to federal or federally-regulated entities rather than state entities, including federally-regulated banks, which are subject to particularly complex and nuanced regulations. Moreover, even in those cases where a federal statute controls over state law or federal court precedent, the holdings emphasize that federally granted discretion cannot exist in a vacuum. Not only is the entity at issue here a state entity, but the principal purpose of FERPA, the federal law at issue, is to protect the privacy interests and rights of students and parents rather than to grant powers to universities.

Importantly, not one case cited in §I of the Petition deals with the actions and regulation of a state entity. With a lone exception, the actors are all federal courts, federal agencies, or federally-chartered and regulated financial institutions. In the one case in which the actor is not a federal entity or federally-chartered institution, the actor was a local municipality and the federal statute was specifically and

explicitly designed to circumvent state interference. The chart below shows the relevant cases and the actor at issue in each case:

Case	Actor
Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996)	Federally-regulated national bank
Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954)	Federally-regulated national bank
Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)	Federally-regulated savings and loan
Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985)	Municipal governments
United States v. Rodgers, 461 U.S. 677, 706 (1983)	IRS
***Halo Elecs., Inc. v. Pulse Elecs., Inc.*,** 136 S. Ct. 1923 (2016)	Federal court
***Jama v. Immigration & Customs Enf't*,** 543 U.S. 335 (2005)	Federal court
***Fogerty v. Fantasy, Inc.*,** 510 U.S. 517 (1994)	Federal court
Chi. Tribune Co. v. Bd. of Trs. of the Univ. of Ill., 680 F.3d 1001 (7th Cir. 2012)	State university, but federal case dismissed owing to lack of subject matter jurisdiction
Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)	Federal court
Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015)	Federal court

A. Precedents involving banking law are not persuasive in this case.

Although cases involving banking law potentially have relevance in the present matter, that relevance is limited owing to the particular nature of banks, whose business is heavily regulated. Petitioners particularly rely on *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996), but this reliance is misplaced because 1) the petitioner was a federally-regulated national bank rather than a state entity; 2) due

to its heavy regulation, banking law cannot easily translate to non-banking cases; and 3) the Court did not consider the federal statute in a vacuum, but by examining the background and intent of the federal statute in question.

In *Barnett Bank*, the petitioner, a national bank regulated by the federal Office of the Comptroller of the Currency, sought to sell insurance in Florida. A federal statute permitted such sales, but a Florida statute prohibited them. The Court, holding that the federal law preempted the state law, wrote:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.

Id. at 31.

The Court noted that the federal statute in question "explicitly grants a national bank an authorization, permission, or power. And… it contains no 'indication' that Congress intended to subject that power to local restriction. Thus . . . a broad interpretation of the word 'may' that does not condition federal permission upon that of the State." *Id*. at 34-35.

Unlike the federal statute at issue in *Barnett Bank*, the purpose of FERPA is not to grant powers to institutions; rather, it is "to assure parents of students, and students themselves if they are over the age of 18 or attending an institution or post-secondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability [and disclosure] of their records without their consent." *See, e.g.*, *Rios v. Read*, 73 F.R.D. 589, 597 (citing 120 Cong.

Rec. S21487 (daily ed. Dec. 13, 1974) (joint remarks of Sen. Buckley and Sen. Pell)). By its very nature, a public university, as a state entity, will be "subject to local restriction." *Barnett Bank* at 34.

Moreover, state and nationally-chartered banks exist within a heavily-regulated industry and are subject to a complex of interrelated state and federal laws and the oversight of multiple regulators. The National Bank Act and case law bestow broad discretion on nationally-chartered banks like Barnett, but even here, state laws are not uniformly preempted. *See*, *e.g.*, *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712, 726 (9th Cir. 2012) ("As a non-discriminating state law of general applicability that does not 'conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties,' the Unfair Competition Law's prohibition on misleading statements under the fraudulent prong of the statute is not preempted by the National Bank Act.")

Petitioners also cite *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954), which addressed "the narrow question whether federal statutes which authorize national banks to receive savings deposits conflict with New York legislation which prohibits them from using the word "saving" or "savings" in their advertising or business. *Id.* at 374. The Court held that the state statute was "invalid, because it conflicts with federal laws expressly authorizing national banks to receive savings deposits and to exercise incidental powers." *Id.* The term "incidental powers"[2] is a

[2] "Judicial and administrative rulings have identified 80 specific activities that are considered to be within the parameters of the 'banking business' or incidental powers." *See* Christian A. Johnson, *Wild Card Statutes, Parity, and National*

term that has specific meaning within the banking law context. Section 24 of "[t]he National Bank Act authorizes national banks to receive deposits without qualification or limitation, and it provides that they shall possess 'all such *incidental powers* as shall be necessary to carry on the business of banking. . ." *Id.* at 376 (emphasis supplied). As with *Barnett*, the ruling in *Franklin Nat'l Bank* case is highly specific to banking law and not readily applicable to the present matter.

Along the same lines, Petitioners cite *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in which the Court considered a federal regulation providing that a federal savings and loan association could utilize a "due-on-sale" clause (a provision that permits the savings and loan to declare the balance of the loan immediately due and payable if/when the property is transferred), even though California state court precedent "limited a lender's right to exercise such a clause to cases where the lender can demonstrate that the transfer of the property has impaired its security." *Id.* at 144. The Court emphasized that the "state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Id.* at 153 (internal citations omitted).

Putting aside the fact that, in the present case, Petitioners' compliance with FERPA and the open records law is *not* "a physical impossibility," the Court in *Fid.*

Banks—The Renascence of State Banking Powers, 26 LOY. U. CHI. L.J. 351, 356 n.28 (1995).

Fed. Sav. & Loan Ass'n again returned to statutory intent and history in coming to its conclusion. *Id.*

> Any ambiguity in § 545.8-3(f)'s language is dispelled by the preamble accompanying and explaining the regulation. The preamble unequivocally expresses the Board's determination to displace state law: 'Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by [§ 545.8-3] and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in [§ 545.8-3(g)] on the ground that such . . . avoidance of limitations is permissible under State law.'"

Id. at 158 (citing 41 Fed. Reg. 18286, 18287 (1976)).

The North Carolina Court of Appeals concluded in this case that *Fid. Fed. Sav. & Loan Ass'n* was "patently distinguishable from the case at hand, because neither § 1232g(b)(6)(B), any other provision of FERPA, nor any relevant federal regulations expressly or impliedly preempt state law to grant educational institutions discretion over disclosure of exempt student disciplinary records." *DTH Media Corp. v. Folt*, 816 S.E.2d 518, 528 (N.C. App. 2018).

B. **None of the non-banking cases cited by the Petitioners involves a state actor, and the outcomes in several rely on clear legislative intent not present in this case**.

Petitioners do not restrict their reliance to banking law cases, but the non-banking law cases cited are equally unhelpful because none deals with federal regulation of a state entity.

For example, in *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 264-265 (1985), the Court invalidated a South Dakota statute that required local governments to spend federal funds for specific purposes. That case is distinguishable because 1) the state law intended to restrict local government entities rather than state agencies and 2) the opinion relied heavily on legislative history to reach this conclusion. At issue was the Payment in Lieu of Taxes Act, which requires the federal government to make annual payments to local governments to compensate them for lost revenue attributable to tax-exempt federal "entitlement lands" such as wilderness areas and national parks. State law directed a certain percentage to be paid to school districts. The Court noted that "[a]t the very least, [the federal statute] is ambiguous with respect to the degree of discretion it confers on local governments" and that "[r]esort to other indicia of the meaning of the statutory language is therefore appropriate." *Id.* at 261.

Accordingly, the Court looked extensively at the legislative scheme and history.

> That Congress made a knowing choice to vest discretion in local governments over the expenditure of in-lieu moneys is apparent from the issues posed in the congressional hearings. The question of who should actually receive the payments under the Act was the subject of extensive discussion before the House Committee, and several alternatives were considered. Although a number of witnesses advocated payments directly to the State, others argued that the counties were the appropriate recipients because, among other considerations, the counties were in the best position to determine what local functions were most in need of additional funds.

Id. at 264-265.

In the present case, the state statute in question regulates a state entity rather than a federal or local one, and Petitioners give no persuasive account of any legislative history of FERPA that would indicate intent to circumvent a state statute.

In addition to the above cases, Petitioners also cite several of this Court's decisions in support of their argument that a federal "may" connotes unlimited and unchecked discretion. They argue that FERPA must "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 whether to produce them." Petition at 14, citing App. 36a-37a (Davis, J., dissenting). Once again, option three cannot exist in a vacuum. The cases that Petitioners cite to support this either/or proposition reinforce the principle that federally-granted discretion is not absolute, and that relevant concerns and laws must be considered in assessing its proper limits.

In *United States v. Rodgers*, 461 U.S. 677 (1983), the Court construed § 7403 of the Internal Revenue Code of 1954, which provides that a federal district court, upon application of the government and the establishment of a valid lien, "may" decree the sale of a delinquent taxpayer's property. The specific question presented was whether the statute authorized a court to order such a sale, even though the third-party surviving spouse had a state-granted homestead interest in the property. The Court held that the federal law did empower the court to order the sale, but that its exercise was limited by "equitable discretion" and that "if the home *is* sold, the nondelinquent spouse is entitled, as part of the distribution of proceeds required

under [the law], to so much of the proceeds as represents complete compensation for the loss of such spouse's separate homestead interest." *Id.* at 680. (Emphasis in original.) The Court also held that in exercising its "equitable discretion," a court should consider factors such as prejudice to the government's interest, reasonable expectations of the third party, prejudice to the third party, and the character and value of the interests in the property. *Id.* at 710-711. Justice Brennan's opinion for the Court noted that "may," when used in a statute, usually implies "*some degree of discretion,"* the extent of which will vary in light of legislative intent, the "structure and purpose of the statute," and other factors. *Id.* at 706.

Two additional cases cited by the Petitioners involved federal court rulings that effectively modified federal statutes – a situation not analogous to the present case. In *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016), the Court looked at 35 U.S.C § 28, which states that that courts "may increase the damages up to three times the amount found or assessed" in patent infringement cases. *Id.* at 1928. A three-part evidentiary test judicially created by the U.S. Court of Appeals for the Federal Circuit effectively curtailed the discretion granted by the statute. In striking down the test, the Court said that the test "reflect[ed], in many respects, a sound recognition that enhanced damages are generally appropriate under §284 only in egregious cases" but was "'unduly rigid, and it impermissibly encumber[ed] the statutory grant of discretion to district courts.'" *Id.* at 1932. Because the three-part test was judicially created, the Court's ruling did not involve the interplay between federal and state law, and thus has no application here.

Similarly, in *Jama v. Immigration & Customs Enf't*, 543 U.S. 335 (2005), the question was whether the federal immigration statutes conferred discretion on the Attorney General to remove the plaintiff, a citizen of Somalia who was subject to removal from the United States, to his home country despite Somalia's failure to accept his return. Because this Court's ruling in favor of the government was predicated solely on its interpretation of federal immigration statutes, the case has no relevance to this one beyond the Court's uncontroversial *dicta* that "the word 'may' customarily connotes discretion."

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), is likewise inapposite. This Court's opinion merely confirmed that 17 U.S.C. § 505, which states in part that "the court may also award a reasonable attorney's fee to the prevailing party as part of the costs," was discretionary. *Id*. at 522. Unsurprisingly, this Court unanimously held that is was (and is).

Other cases cited by Petitioners appear to be cited only for their language rather than for their substance. Although not a Supreme Court case, Petitioners cite *Chi. Tribune Co. v. Bd. of Trs. of the Univ. of Ill.*, 680 F.3d 1001 (7th Cir. 2012). The case is superficially similar to this one, because the plaintiff newspaper was seeking records related to the University of Illinois' admission practices, but it is not instructive because the Seventh Circuit dismissed the case for lack of subject matter jurisdiction, saying that "[b]ecause the [petitioner newspaper's] claim to the information arises under Illinois law, the state court is the right forum to determine the validity of whatever defenses the University presents to the Tribune's request.

We do not express any opinion on whether the information the Tribune seeks relates to student records within the meaning of [FERPA] and the implementing regulations." *Id*. at 1006.

Similarly, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) is not instructive, because it involved a state law that directly conflicted with a federal law.

> In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . Congress has thus mandated the enforcement of arbitration agreements." The Court ruled that "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause."

Id. at 16.

Finally, Petitioners include *Armstrong v. Exceptional Child Ctr., Inc*., 575 U.S. 320, 324-325 (2015) in a string citation in support of the proposition that state court decisions "must not give effect to state laws that conflict with federal statutes," but *Armstrong* merely holds that the Supremacy Clause does not impliedly give Medicaid providers a private right of action against a state when Congress chose not to create enforceable rights under the Medicaid Act.

In sum, Petitioners do not cite one case involving a state court's ordering a public university or other state agency to comply with a state law when the actions required by the state law are not prohibited under federal law.

IV. THE STATE COURT'S OPINION DOES NOT CREATE CONFUSION OR UNCERTAINTY FOR STATE COURTS.

Petitioners assert that this case "involves a recurring issue of federal law" that is "generating confusion" among courts. Neither assertion is correct. First, as explained in Section I, *supra,* this case does not involve *any* issue of federal law; rather, it involves the interplay between FERPA and the North Carolina Public Records Act. Second, as Petitioners acknowledge, the decision for which they seek review affects only public universities in North Carolina. And finally, the very cases cited by the Petitioners on this point, and others, collectively belie any "confusion" on the part of courts confronted with the task of harmonizing FERPA and state public records laws. The fact that courts reach different results in similar cases from different states does not mean that they are "confused."

The cases cited by the Petitioners in which state courts analyzed the interplay between FERPA and state public records laws plainly demonstrate that state records laws are idiosyncratic and thus can produce varied outcomes even when they are properly construed *in para materia* with FERPA, as the North Carolina Supreme Court did in this case. *See*, *e.g.*, *Press-Citizen Co. v. Univ. of Iowa,* 817 N.W.2d 480 (Iowa 2012) where the state court's analysis of the interplay between FERPA and Iowa's Open Records Act concluded that a provision of the state statute prohibited release of the records at issue, so the court did not need to concern itself with issues of preemption or federal supremacy. The outcome in the *Iowa* case differs from the result in this case not because either court was "confused," but simply because the state laws themselves are different.

To like effect are *Kendrick v. Advertiser Co.,* 213 So.3d 573 (Ala. 2016) (records at issue were explicitly protected from disclosure by FERPA and were not, as in this case, subject to any exception authorizing their release); *Caledonian-Record Publ'g Co. v. Vermont State Colleges,* 833 A.2d 1273 (Vt. 2003) (FERPA and state public records law were not in conflict because the latter specifically prohibited the release of "student records" unless they were subject to disclosure under FERPA). Similarly, while the *Krakauer* cases cited by Petitioners followed a long and tortuous history, they ultimately came down to the Montana Supreme Court's ruling, which this Court declined to review, that the records sought by the plaintiff were barred from disclosure by Article II, § 9 of the state constitution, which provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Krakauer v. State, 445 P.3d 201 (Mont. 2019), *cert. denied,* 140 S. Ct. 1107 (2020).

The two Miami University cases cited by the Petitioners reached different outcomes not owing to any variation in the applicable state and federal statutes, but because the records at issue were different. In 1997, in an opinion that this Court declined to review, the Ohio Supreme Court ruled that student disciplinary records from which identifying information had been redacted were not "education records" as defined by FERPA and thus compelled their disclosure under the state's public records law. *State ex rel. The Miami Student v. Miami University,* 680 N.E.2d 956 (Ohio 1997), *cert. denied,* 522 U.S. 1022, 118 S. Ct. 616, 139 L.Ed.2d 502 (1997). Five years later, in *U.S. v. Miami University,* 294 F.3d 797 (6th Cir. 2002) the Sixth Circuit

determined that student disciplinary records from which identifying information was *not* redacted *were* "education records" and thus were barred from disclosure by FERPA and by the Ohio Public Records Act, which exempts records whose release is barred by federal law. Again, there is no indication that either court was "confused," even though the cases produced different outcomes. To the contrary, the federal court wrote that in light of the redactions imposed by the state court in the earlier case, "the mandamus appears to comport with the FERPA's requirements." *Id.* at 811.

These and the other cases cited by the Petitioners in support of their "confusion" argument merely demonstrate the unremarkable fact that from time to time state courts will be called upon to construe and analyze the relationship between FERPA and state public records laws. The Petitioners complain that state courts "have yet to coalesce around a uniform understanding of how section 1232g(b)(6)(B) interacts with a state public records law," but they do not contend that the outcome in any of the cited cases was incorrect. Moreover, in this area of the law, a "uniform understanding" is neither achievable nor necessary. Disparate outcomes from state to state do not reflect "confusion" on the part of state courts; they simply reflect the variations in the types of records at issue and in state statutes or constitutions governing access to public records. This Court's imposition of the "uniform understanding" preferred by the Petitioners would constitute both a misapplication of the preemption doctrine and an unwarranted encroachment on state sovereignty.

V. THE PETITIONERS' CONTENTION THAT THE STATE COURT'S OPINION IS INJURIOUS TO VICTIMS OF CAMPUS SEXUAL ASSAULT IS IRRELEVANT, IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE, AND WAS NOT CONSIDERED BY THE NORTH CAROLINA COURTS.

In Section B of their "Statement of the Case" (pp. 4-7) and Section II.A of their contentions as to why the Court should review this case (pp. 19-22), the Petitioners attempt to raise a non-germane policy argument about Title IX confidentiality that has nothing to do with the legal issues, is not supported by any competent evidence, and was not deemed worthy of consideration by any of the state courts that decided this case.

From the beginning, Respondents have argued that it does not matter *why* the defendant university administrators do not want to release the records at issue, the only pertinent issue is *whether* they are required to release them as a matter of law owing to the interplay between the Public Records Act and a single, discrete provision of FERPA. The North Carolina courts, regardless of how they ruled on the merits, all agreed. Nevertheless, Petitioners persist in pushing forward their distracting and irrelevant policy arguments.

Even though the trial court ruled in favor of the Petitioners, the presiding judge agreed that their reasons for preferring to withhold the records at issue were irrelevant, saying:

> The reasons and justification for the University's exercise of discretion are not considered — and need not be considered — by the Court in its determination of the legal issues at hand. In making these findings of fact and conclusions of law and arriving at this decision and Order, therefore, the Court has not considered the policy reasons for UNC's exercise of discretion, UNC's desire to protect and nurture its students, or any other potentialities of disclosure.

Order and Final Judgment of the Superior Court of Wake County issued May 9, 2017, at ¶ 9. App. 73a-82a. The North Carolina Court of Appeals' panel, which unanimously reversed the trial court's decision, likewise declined to consider the university's policy arguments or evidence, saying that questions regarding public policy issues "are for legislative determination." *DTH Media Corp. v. Folt,* 259 N.C. App. 61, 76-77, 816 S.E.2d 518, 529 (2018) App. 44a-72a, at 69a-70a.

The North Carolina Supreme Court implicitly agreed, because neither the majority opinion nor the dissent bothered to mention them. *DTH Media Corp. v. Folt,* 374 N.C. 292, 841 S.E.2d 251 (2020). App. 1a-43a.

This case was tried on stipulated facts that were adopted by the trial court and by both North Carolina appellate courts. No discovery was necessary. No material facts were in dispute. Nevertheless, in an effort to buttress irrelevant, distracting and speculative policy arguments, the Petitioners repeatedly proffered four self-serving affidavits that the state courts unanimously declined to consider. Undaunted, the Petitioners once again have tendered this incompetent "evidence" by including the affidavits in their appendix at App 09a-128a. Like the state courts, this Court likewise should ignore them. All four were executed in March or April, 2017. They were irrelevant and incompetent then, and remain so, because they address issues that are neither in dispute nor at issue in this case, including the following:

- All four describe in minute detail the history and operation of the University's Title IX policies and procedures for investigating accusations of sexual misconduct, including sexual violence. None of these policies or

procedures is in dispute or has any relevance to the legal issues presented by this case.

- The affidavit of Katherine Nolan, a lawyer who was the University's Interim Title IX coordinator in 2017, includes a lengthy description of the University's "Title IX Investigation Files." Plaintiffs did not, and do not, seek access to these files.
- A significant portion of each of the affidavits is devoted to a discussion of the identities of "Reporting Parties." The plaintiffs did not, and do not, seek records containing any such information.
- Several paragraphs of Ms. Nolan's affidavit address the identities of non-party witnesses who participate in Title IX investigations. Again, the plaintiffs did not, and do not, seek the identities of any such persons.

Moreover, the affidavits are incompetent because each is replete with statements of the affiants' opinions about the putative dire consequences of the University's releasing the limited information sought by the plaintiffs. The affiants' opinions are couched in language such as "I believe . . ." or "I anticipate that . . ." or "I am concerned that . . ." or "I fear that . . ." or "I worry that . . ." etc. Not one of these opinions is buttressed by any competent evidence, such as a peer-reviewed, statistically reliable study or a specific, concrete example. To the contrary, they are grounded solely in unsubstantiated, undocumented speculation. At some points, the affidavits even venture into the realm of unsupported <u>factual</u> statements. For example, at paragraph 37 of her affidavit, Ms. Nolan said:

> In the few cases in which the identities of Responding Parties have become known publicly, we are aware that these Responding Parties have received threats of violence and have feared for their safety.

App 111a.

Despite the fact that this statement refers to Responding Parties *whose names are already publicly known*, Ms. Nolan offers no competent evidence of the threats or fears experienced by such persons.

At paragraph 9 of her affidavit, Ms. Ew Quimbaya-Winship, another Title IX administrator whose educational credentials are not stated but who appears to have no psychiatric training or credentials, goes even further, stating as a matter of fact that if the names of Responding Parties are released, "They will feel that their story is being hijacked by other people." App 120a. She does not say how she came by, or why she is competent to make, this remarkable psychological insight.

Finally on this point, in footnote 3 to their Petition (p. 11) the Petitioners acknowledge that they already have released the limited records at issue in compliance with the North Carolina Supreme Court's ruling. What they do not, and cannot, say is that release of the records has engendered any of the dire consequences forecast by the affiants.

For the reasons set out above, this Court should deny the Petition and thereby join the North Carolina courts in firmly rejecting both the Petitioners' policy arguments and the speculative, incompetent evidence proffered in support of them.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this the 18th day of November, 2020.

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