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

REPLY BRIEF FOR THE PETITIONERS

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In their brief in opposition, Respondents conspicuously do not attempt to defend the decision below on the merits. Instead, they argue that this case does not present a federal question. That argument is plainly incorrect: This case involves a dispute over the scope of a federal statute. Respondents then argue that ruling in the University's favor would undermine state sovereignty. But the University simply asks the Court to affirm the basic principle that federal law prevails over state law. Respondents finally argue that this Court's intervention is unnecessary. Again, they are incorrect. A grant of certiorari is needed to correct the erroneous decision below and to provide clarity on an important issue of federal law.

I. This Case Presents A Federal Question Over Which This Court Has Jurisdiction.

Respondents claim that this case "does not, and could not, present any basis for review by this Court," because, they say, "[t]he North Carolina Supreme Court did not decide *any* issue of federal law." Opp. 2, 4. This argument is clearly wrong.

Since this lawsuit's inception, the University has maintained that FERPA—a *federal law*, 20 U.S.C. § 1232g—authorizes educational institutions to decline to disclose certain educational records. Hence, this case asks this Court, like the state courts before it, to evaluate whether the University's interpretation of federal law is correct: Does FERPA grant universities discretion over the disclosure of education

records on sexual assault disciplinary proceedings, as the University has argued?

The answer to that question of federal law decides this case. If FERPA indeed grants educational institutions discretion over disclosure, then any state law that mandates automatic disclosure must give way, and the University's decision to withhold the requested records must be deemed lawful.

Though FERPA, a federal statute, is at the heart of this case, Respondents nevertheless suggest that the case does not present a federal question, because FERPA can purportedly be harmonized with the North Carolina Public Records Act. Opp. 4. This position makes little sense. A court cannot decide how a federal and a state statute interact without first determining the scope of each statute. Indeed, the very first line of the opinion below makes precisely that point: "This matter presents questions which require this Court to interpret the federal [FERPA] and the North Carolina Public Records Act . . . to determine whether officials of [the University] are required to release, as public records, disciplinary records of its students who have been found to have violated [the University's] sexual assault policy." App. 2a.

By "interpret[ing] the federal [FERPA]," App. 2a, the North Carolina Supreme Court decided a quintessential question of federal law. This case thus falls squarely within this Court's jurisdiction. *See, e.g.*, *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1195-96 (2017) (federal question where state high court interpreted federal statute to

decide how it interacted with state law); *Hillman v. Maretta*, 569 U.S. 483, 489-90 (2013) (same); *see also United States v. Donovan*, 429 U.S. 413, 422 (1977) (Supreme Court has jurisdiction over questions related to "the construction of a major federal statute").

II. Granting Certiorari In This Case Would Pose No Threat to State Sovereignty.

Respondents next urge the Court to deny certiorari out of respect for state sovereignty. But this argument for denying certiorari is also unpersuasive.

Respondents' sovereignty-based argument is inconsistent with the Supremacy Clause. That constitutional provision makes the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, any rule established by FERPA (a federal statute) necessarily supersedes any conflicting rule imposed by the North Carolina Public Records Act (a state statute).

Respondents cannot dispute the Supremacy Clause. Instead, they ignore that constitutional provision entirely and generally urge the Court not to "curtail the North Carolina General Assembly's sovereign authority to prescribe" public policy. Opp. 6.

This concern is overstated. In *every case* involving a conflict between federal and state law, a holding that state law has been preempted imposes some limit on state sovereignty. Nevertheless, the subordination

of state law to conflicting federal law is what the plain text of the Supremacy Clause requires. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (The Supremacy Clause "creates a rule of decision: Courts . . . must not give effect to state laws that conflict with federal laws."). Respondents' quarrel, therefore, is with the Supremacy Clause itself.

III. This Court's Review Is Warranted.

A. The North Carolina Supreme Court's decision was incorrect.

For reasons the University has already explained, the decision below was wrong. *See* Pet. 11-18; *see also* Brief of Victim Advocacy Groups as Amici Curiae in Support of Petitioners 9-11. Indeed, Respondents themselves concede that FERPA confers upon educational institutions "discretion to withhold the records at issue." Opp. 3-4 ("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."). That concession should be the end of this case.

Where federal law grants an entity discretion, that entity "must be allowed to exercise its federally mandated discretion unimpeded by a state law that seeks to eliminate that discretion." App. 37a-38a (Davis, J., dissenting); *see also, e.g.*, *Armstrong*, 575 U.S. at 324 (courts "must not give effect to state laws that conflict with federal laws"); *Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 257-59 (1985) (explaining that if Congress has

granted entities "more discretion . . . than the State would allow them," the relevant "state statute is invalid under the Supremacy Clause"); *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."). Here, because the North Carolina Public Records Act would constrain the discretion that educational institutions like the University are afforded under FERPA, the state statute's default rule mandating disclosure must give way. *See* Pet. 11-14; *see also* App. 42a (Davis, J., dissenting) ("[A] federal law's 'may' cannot be constrained by a state law's 'must.'").

B. The decision below conflicts with this Court's decisions.

This Court's intervention is needed to correct the state supreme court's errors and bring this case in line "with relevant decisions of this Court." S. Ct. R. 10(c). Respondents insist that "[t]he state court's opinion does not conflict with this Court's precedents," Opp. 7, but the scattershot reasons that Respondents offer to distinguish those precedents are unpersuasive.

Respondents first focus on the fact that several of the conflicting precedents that the University identified in its petition are about banks. Opp. 8-12. Respondents acknowledge that "cases involving banking law potentially have relevance," but claim that "that relevance is limited owing to the particular nature of banks, whose business is heavily regulated." Opp. 8. This distinction is tenuous at best. If the

banking cases on which the University relied were *field-preemption* cases, then the fact that banking is a heavily regulated industry might be relevant. After all, in field-preemption cases, a court concludes that a state law is preempted because the "scheme of federal regulation [is] 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But none of the cases that the University cited in its petition—*Barnett Bank* or any other—based its holding on field preemption or relied in any way on the heavily regulated nature of the banking industry. Respondents, accordingly, can offer no coherent reason why this Court should limit the preemption principles set forth in *Barnett Bank* and the other banking cases to that particular industry.

Respondents next propose casting aside the conflicting precedents identified in the University's petition because most of them do not involve "federal regulation of a *state* entity." Opp. 12 (emphasis added); *see also* Opp. 7-8, 13-14. This distinction also falls apart under closer inspection. None of the decisions that the parties have discussed indicates that the state or federal character of the entity being regulated affected the court's preemption analysis. This Court, moreover, has repeatedly invalidated state statutes that regulate state entities, when those statutes conflict with federal law. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 468 (2012) (state statute enforced by state's chief legal officer preempted by

federal law); *Haywood v. Drown*, 556 U.S. 729, 736-37 (2009) (state statute stripping state courts of jurisdiction to hear federal cause of action invalid under the Supremacy Clause); *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 277-80 (2006) (state statute authorizing state agency to assert lien over certain proceeds preempted by federal law). Thus, Respondents' observation that the cited cases do not involve state entities raises a distinction without a difference.

The same is true of Respondents' point that the University, "as a state entity, will be 'subject to local restriction.'" Opp. 10 (quoting *Barnett Bank*, 517 U.S. at 34). Public universities, to be sure, can be subject to state and local regulation. But the same is true of countless other entities, including national banks—a fact that this Court confirmed in *Barnett Bank* and that Respondents themselves reiterate in their opposition brief. *See* 517 U.S. at 33 (emphasizing that States retain "the power to regulate national banks," so long as "doing so does not prevent or significantly interfere with the national bank's exercise of its powers"); Opp. 10 ("[S]tate 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."). In fact, it is difficult to imagine how any preemption case could involve an entity that is *not* the subject of both federal and state regulation. After all, such dual regulation is a necessary predicate for the

alleged conflict of laws at the heart of any preemption case.[1]

* * *

In the end, each of Respondents' arguments for disregarding this Court's prior opinions cannot withstand even minimal scrutiny. No matter the specific facts, the holdings of these precedents are clear: Any state law that seeks to narrow a federal statute's wide-ranging grant of discretion cannot stand. Because the decision below contravenes this principle and the precedents that affirm it, this Court's review is necessary.

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[1] Finally, Respondents urge this Court to disregard "the non-banking cases cited by" the University because, they say, those precedents "rely on clear legislative intent not present in this case." Opp. 12. But the one case that Respondents cite, Opp. 13, to support this argument—*Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256 (1985)—does not suggest that legislative history is necessary to decide the question presented here. Instead, consistent with well-settled principles of statutory interpretation, *Lawrence County* acknowledges that legislative history should play a role in a preemption analysis only when the statutory text at issue is ambiguous. *See* 469 U.S. at 261 (explaining that the Court will "[r]esort to other indicia of the meaning of the statutory language," including the statute's legislative history, only because the statute's language "does not of its own force dispose of the . . . case"). In cases like this one, where every single judge and justice to consider the relevant language has agreed that the statutory text is clear, there is no reason to delve into legislative history. *See, e.g.*, *Chamber of Commerce v. Whiting*, 563 U.S. 582, 599 (2011) (rejecting reliance on legislative history when preemption issue could be decided based on analysis of federal law's "plain text").

C. Granting certiorari would provide clarity on an important question of federal law.

Finally, granting certiorari would "decide[ ] an important question of federal law that has not been, but should be, settled." S. Ct. R. 10(c).

Respondents first attempt to argue that the question presented by this case is not important. Respondents are wrong. However one evaluates the merits of this case, the implications of the question that it presents are sweeping. Every State in the country has some type of public-records statute mandating the disclosure of certain information. Nat'l Freedom of Information Coalition, *State Freedom of Information Laws*, https://bit.ly/3iZmi1U. And FERPA is a federal statute that affects tens of millions of students and more than 4,000 postsecondary institutions across the country. Nat'l Ctr. for Educ. Statistics, *Digest of Education Statistics*, Tbl. 317.40, https://bit.ly/2PLTMUR. Review by this Court would clarify the privacy rights of all of these students, as well as the authority of all of these educational institutions to exercise their discretion over public-records requests for sexual assault disciplinary records. *See also* Br. of Victim Advocacy Groups 4-6 (explaining the "great national importance" of the question presented).

Respondents next suggest that review by this Court would not be productive, because even if the question presented is recurring, the fifty States' public-records laws differ from one another. Opp. 18-20; *see also* Opp. 20 (conceding that "from time to time state courts will be called upon to construe and

analyze the relationship between FERPA and state public records laws"). Indeed, because of these state-by-state variations, Respondents dispute that a "uniform understanding" of "the interplay between FERPA" and state public-records laws is even possible. Opp. 18, 20 ("[I]n this area of the law, a 'uniform understanding' is neither achievable nor necessary.").

Again, these arguments are incorrect. If this Court were to confirm, first, that FERPA grants educational institutions the discretion to decide whether to disclose sexual assault disciplinary records and, second, that state public-records laws may not attempt to override that discretion, the Court's holding would result in a uniform standard for all educational institutions across the country. Any State with a mandatory-disclosure policy for sexual assault disciplinary records would learn that its policy is invalid. And every FERPA-regulated educational institution—public or private—would understand that it had discretion to make its own considered decision about whether disclosure is in its students' best interest. Certiorari is needed to provide clarity for all of these schools in States across the country.

CONCLUSION

For the foregoing reasons, as well as those stated in the University's petition, this Court should grant certiorari and reverse the decision of the North Carolina Supreme Court.

Respectfully submitted,

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