No. 11-2066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff/Appellee,

v.

UNIVERSITY OF ILLINOIS
BOARD OF TRUSTEES,

Defendant/Appellant.

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

BRIEF OF AMICI SUPPORTING THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS AND REVERSAL OF THE DISTRICT COURT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici the American Council on Education, the American Association of State Colleges and Universities, the Association of American Universities, the American Association of University Professors, the Association of Public and Land-Grant Universities, the American Association of Community Colleges, the American Association of Collegiate Registrars and Admissions Officers, the American College Personnel Association, NASPA – Student Affairs Administrators in Higher Education, and the National Association for College Admission Counseling are nonprofit associations that have no parent corporations, and no publicly held corporation owns 10% or more of their stock. The name of the law firm whose partners or associates have appeared for the amici in the case or are expected to appear in this court is Drinker Biddle & Reath LLP. The American Council on Education, by its General Counsel Ada Meloy, has also appeared for the amici in the case or is expected to appear in this court.

Date: July 20, 2011

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Counseling are nonprofit associations that have no parent corporations, and no publicly held corporation owns 10% or more of their stock. The name of the law firm whose partners or associates have appeared for the amici in the case or are expected to appear in this court is Drinker Biddle & Reath LLP. The American Council on Education, by its General Counsel Ada Meloy, has also appeared for the amici in the case or is expected to appear in this court.

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I. STATEMENT OF THE IDENTITY AND INTEREST OF AMICI

Amici are national organizations dedicated to the interests of improving higher education and recognize that widespread access to a postsecondary education is a cornerstone of a democratic society. Founded in 1918, the American Council on Education ("ACE") is a nonprofit organization that represents more than 1800 presidents and chancellors of American accredited, degree-granting institutions. As the major coordinating body for the nation's higher education institutions, ACE seeks to provide leadership and a unifying voice on key higher education issues. Accordingly, ACE supports and defends its member institutions in their efforts to meet the nation's goal of expanding access to higher education and increasing educational attainment.

The American Association of State Colleges and Universities ("AASCU") is a nonprofit association that represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU's members share a learning and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their region's economic progress and cultural development. AASCU schools enroll more than three million students, or more than half the enrollment of all public four-year institutions in the nation.

The Association of American Universities ("AAU"), is a nonprofit association of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 59 U.S. universities and two Canadian universities, divided almost evenly between public and private. Founded in 1900, AAU focuses on national and institutional issues that are important to research-intensive universities, including funding for research, research and education policy, and graduate and undergraduate education.

The American Association of University Professors ("AAUP") is a national, nonprofit membership organization comprised of faculty, librarians, graduate students, and academic professionals who serve at institutions of higher education across the country. Founded in 1915, the AAUP is committed to the defense of academic freedom, supporting the free exchange of ideas and advocating for the importance of higher education to society. The AAUP's policies are widely respected and followed in American colleges and universities and have been cited by the Supreme Court of the United States. *See, e.g., Board of Regents v. Roth,* 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). The AAUP frequently submits amicus briefs in cases that implicate AAUP policies or otherwise raise legal issues important to higher education.

The Association of Public and Land-Grant Universities ("APLU"), founded in 1887, is a nonprofit association of public research universities, land-grant institutions, and state public university systems. APLU member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faulty members, and conduct nearly two-thirds of all federally-funded academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, APLU is dedicated to advancing learning, discovery and engagement. The association provides a forum for the discussion and development of policies and programs affecting higher education and the public interest.

The American Association of Community Colleges ("AACC"), a nonprofit association, is the primary national voice and advocacy organization for the nation's community colleges, representing nearly 1,200 two-year, associate degree-granting institutions and more than 12 million students – almost half of all U.S. undergraduates.

The American Association of Collegiate Registrars and Admissions Officers

("AACRAO"), founded in 1910, is a nonprofit association of more than 2,600 institutions of higher education and more than 10,000 enrollment officials. AACRAO represents campus professionals in admissions, enrollment management, academic records, and registration. Because they work with sensitive information contained in educational records, members of the AACRAO are directly responsible for protection of privacy of applicants, students, and former students.

The American College Personnel Association ("ACPA"), founded in 1924, is the leading comprehensive student affairs association, with nearly 8,500 members representing 1,500 private and public institutions from across the U.S. and around the world. Members include organizations and companies that are engaged in the campus marketplace. Members also include graduate and undergraduate students enrolled in student affairs/higher education administration programs, faculty, and student affairs professionals, from entry level to senior student affairs officers. ACPA leads the student affairs profession and the higher education community in providing outreach, advocacy, research, and professional development to foster college student learning.

NASPA-Student Affairs Administrators in Higher Education ("NASPA") is the leading voice for student affairs administration, policy, and practice, and affirms the commitment of the student affairs profession to educating the whole student and integrating student life and learning. With more than 12,000 members at 1,400 campuses, and representing 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship, and the spirit of inquiry.

The National Association for College Admission Counseling ("NACAC") is an Arlington, Virginia based education association of more than 11,000 secondary school counselors, independent counselors, college admission and financial aid officers, enrollment managers, and organizations that work with students as they make the transition from high school to postsecondary education. The association, founded in 1937, is committed to maintaining high standards that foster ethical and social responsibility among those involved in the transition process, as outlined in the NACAC Statement of Principles of Good Practice.

Amici seek to be heard in this appeal because the District Court's decision, if upheld, will remove established privacy rights in education records and have a profound, adverse impact on the nation's public educational institutions, thereby undermining their educational missions. Accordingly, Amici submit this brief in support of Defendant Board of Trustees of the University of Illinois (the "University") and for reversal of the District Court. Amici's authority to file this brief is based upon the consent of all parties to the filing of this brief.

II. STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel has authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than amici, contributed money that was intended to fund preparing or submitting this brief.

III. ARGUMENT

In the case *sub judice*, Plaintiff Chicago Tribune Company (the "Tribune") submitted a request (the "Request") to the University under the Illinois Freedom of Information Act (the "Illinois FOIA"), 5 Ill. Comp. Stat. 140/1 *et seq*., seeking the release of education records and personally identifiable information contained therein as part of the Tribune's investigation into

whether certain students received preferential treatment when they were admitted to the University. However, the Illinois FOIA provides an exemption from its disclosure requirements for "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law." 5 Ill. Comp. Stat. 140/7(1)(a). In light of that express exemption, the University denied the Tribune's Request because the Family Education Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(b)(1) specifically prohibits educational institutions that receive federal funds under programs administered by the U.S. Department of Education ("ED") from releasing education records or any personally identifiable information contained therein.

In this declaratory judgment action, the District Court ruled that the University must disclose the education records requested by the Tribune because they did not fall within the Illinois FOIA exemption for information specifically prohibited from disclosure by federal law. In reaching its decision, the District Court erroneously concluded that FERPA does not "specifically prohibit [the University] from doing anything," because the University could have chosen to reject federal education money "and the conditions of FERPA along with it[.]" (Dkt. No. 31, pp. 5-6.) The District Court's decision that the University is not bound by FERPA because it has a "choice" regarding receipt of federal education funds disregards the undisputed record evidence in this case, misapplies the law, contravenes Congressional policy embodied in FERPA's privacy requirements, and ignores the reality of the nation's diverse higher education landscape.

FERPA has been universally recognized and accepted as the nationwide standard for the privacy protection of elementary, secondary, and postsecondary students' education records for nearly 40 years. In fact, Congress enacted FERPA "to protect [parents' and students'] rights to

privacy by limiting the transferability of their records without their consent." (Joint Statement, 120 Cong. Rec. 39858, 39862 (1974).) Virtually all of Amici's members receive substantial federal education funds in the form of student loans and other student financial assistance, which serve to expand access to education and increase the quantity and enhance the quality of educational offerings. Because they accept federal education funds, Amici's members and member institutions are obligated to comply with FERPA's privacy requirements prohibiting the release of education records.

Public colleges and universities, including the University of Illinois, fulfill a vital role in the nation's higher education system and constitute an important part of Amici's membership. The District Court's suggestion that public educational institutions subject to state open records laws should simply choose not to accept federal education funds and thereby free themselves from FERPA's privacy requirements is not only unrealistic, but also, harmful to Amici's member institutions and our nation's outstanding system of public universities. Left undisturbed, the District Court's decision would invade important established privacy rights and expectations to education records. The District Court's decision also would deprive Amici's members of the funding that opens their doors to students who otherwise do not have the means to attend one of the nation's colleges or universities.

A. FERPA Prohibits Disclosure of the Education Records Requested by the Tribune

The District Court's ruling that FERPA does not specifically prohibit the University from disclosing education records because the University may theoretically choose to reject federal education funding ignores the record and misapplies the law. The record evidence demonstrates that the University in fact accepted federal funds that are subject to FERPA's funding conditions. Indeed, well over half of all funds used to pay student tuition and fees at the University came

from federal student loan and other applicable student financial assistance programs administered by the ED and covered by FERPA, constituting a significant portion of the University's annual operating revenues. (Defendants' Motion to Stay Judgment Pending Appeal, ¶ 23.) In Fiscal Year 2010, the year of the Tribune's Request, the combined student loans and other student financial assistance received by the University from or through the ED totaled $520,512,566, comprising approximately 63.2% of the University's total operating revenues from student tuition and fees. (*Id*., ¶¶ 7, 26.) Accordingly, there is no dispute in the record that the University accepted significant federal funds from ED programs covered by FERPA *prior* to the Tribune's Request. By accepting those funds, the University was bound by FERPA's mandatory prohibition against release of education records.

Rather than construe FERPA and the Illinois FOIA in the context of the record before her, the District Court chose to analyze both statutes in a vacuum, concluding that FERPA does not prohibit the University "from doing anything," because the University does not have to accept federal education funds "and the conditions of FERPA along with it[.]" (Dkt. No. 31, pp. 5-6.) That ruling is fundamentally flawed because it is premised upon a hypothetical, prospective analysis of what the University *could choose to do in the future*, but does not reflect what the University actually did in this case – accept federal education funds and the affirmative obligations imposed by FERPA prohibiting disclosure of education records. Whether the University could indeed choose to reject federal education funds at some future time as the District Court hypothesizes was not part of the record, and therefore, should not have served as the basis for summary judgment in favor of the Tribune.

Further, the District Court's decision is directly contrary to *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the leading federal authority that interpreted FERPA in

the context of a newspaper's request for education records from a public university pursuant to a state FOIA. In *Miami University*, the Ohio FOIA that was at issue contained an exemption, similar to the Illinois FOIA, for information "the release of which is prohibited by state or federal law." *Miami University*, 294 F.3d at 803. In analyzing the interplay between FERPA and the Ohio FOIA exemption, the Sixth Circuit noted that spending clause legislation, like FERPA, "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 808 *quoting Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Thus, once a university has "knowingly accepted" federal funds subject to statutory conditions, the statute "imposes enforceable, affirmative obligations" on the university. *Id.* at 808. Accordingly, the Sixth Circuit concluded that "FERPA unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents." Id. at 809 *citing* 20 U.S.C. § 1232g(b)(2). Once the conditions and the funds are accepted, the school is prohibited from releasing education records without consent. *Id.* at 809.

The Sixth Circuit's holding, that FERPA imposes a binding obligation on schools that accept federal education funds prohibiting disclosure of education records in response to a state FOIA request, is directly on point. Rather than follow the Sixth Circuit's decision however, the District Court distinguished *Miami University* on the basis that it involved "federal government action to enforce FERPA." The fact that the ED was seeking to *enforce* FERPA's requirements in *Miami University* while the Tribune seeks to *disregard* FERPA's requirements in this case does not diminish the compulsory nature of FERPA's privacy requirements. In both cases, the universities "accept federal funds," and thus, are subject to FERPA's "enforceable, affirmative obligations" and "to federal government action to enforce FERPA."

Indeed, the ED has already weighed in on this case and, consistent with its position in *Miami University*, issued an opinion letter to the University that FERPA prohibits disclosure of "all information provided in connection with the admissions process" once an applicant becomes a student. (Dkt. No. 20: University's Statement of Additional Undisputed Facts, ¶¶ 3, 4; Exh. 2.) That the ED has not commenced an action to enjoin the release of the FERPA protected records in this case does not make it any less on all fours with *Miami University*. The distinction relied upon by the District Court to disregard the Sixth Circuit's reasoning and ruling in *Miami University* is irrelevant.

Because the District Court's holding lacks both factual and legal support, its judgment in favor of the Tribune should be reversed.

B. The District Court's Decision Invades Established Privacy Rights to Education Records

The District Court's decision adversely impacts the privacy rights of students and parents that FERPA was specifically designed to protect. As discussed *supra*, for nearly 40 years FERPA has been the uniform standard protecting the privacy of education records across the nation. In enacting FERPA, Congress explained that its purpose "is two-fold – to assure parents of students, and students themselves if they are over the age of 18 … access to their education records and to *protect such individuals' rights to privacy* by limiting the transferability of their records without consent." (Joint Statement, 120 Cong. Rec. 39858, 39862 (1974) (emphasis added).) Congress further explained that under the statute, "parents and students may properly begin to exercise their right under the law, and *the protection of their privacy may be assured*." (Id. at 39863) (emphasis added).

Congress was surely mindful of important countervailing policy justifications favoring disclosure of records when it enacted FERPA. Nevertheless, FERPA embodies Congress' policy

determination to protect the privacy of education records against public disclosure without written consent of the student's parents (or the student herself if she is 18 or attending a postsecondary educational institution). Congress did not delegate this policy determination to the ED or to the courts or to the states or to anyone else. Congress made this policy determination itself in FERPA. Indeed, Congress places such importance upon the privacy of education records that "educational institutions may withhold from *the federal government* certain personal data on students and families." *Miami University,* 294 F.3d at 806-807 *citing* 20 U.S.C. § 1232i (emphasis in original).

Congress' intent to prevent the release of education records is revealed through the language and structure of FERPA. "Statutory construction must begin with the language employed by Congress[.]" *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,* 469 U.S. 189, 194 (1985). "Education records" is defined broadly in the statute as records which: "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232(g)(a)(4)(A). Four categories of records are expressly excluded from this statutory definition. 20 U.S.C. §1232(g)(a)(4)(B). This broad definition of education records encompasses many records whose contents are clearly private such as test scores, transcripts, course schedules, class rosters, academic counseling materials, disciplinary records, candid faculty notes and comments, evaluations, and letters of recommendation.[1] In connection with applications for financial aid, parents and students must file a Free Application for Federal Student Aid ("FAFSA") with very detailed financial information including, at times, copies of their tax returns. *See* FAFSA,

[1] Students may, however, waive their right to access letters of recommendation to ensure the letters are as candid as possible. 20 U.S.C. §1232(g)(a)(1)(C). Under the District Court's ruling, the public will have access to these letters of recommendation, rendering meaningless the student's waiver and this provision of FERPA.

www.fafsa.ed.gov.[2]

Education records also include personal essays students submit with their applications. *See* The Common Application, www.commonapp.org/CommonApp/DownloadForms.aspx (last visited July 19, 2011). Many universities invite students to supplement The Common Application with additional, personal information such as a description of a disability and its impact on the student's life, or other intimate details such as descriptions of physical, psychological, or emotional abuse. *See* University of Oregon Application, http://admissions.uoregon.edu/freshmen ("[d]etails of any serious illness, diagnosed disability, personal difficulties, or family circumstances that have affected your education are encouraged") (last visited July 20, 2011); University of Washington Application, http://admit/washington.edu/Apply/Transfer/Documents/Statement (under Educational Challenges/Personal Hardships "[d]escribe any personal or imposed challenges or hardships you have overcome in pursuing your education" including serious illness, a disability, first generation in your family to attend college, significant financial hardship, or responsibilities associated with balancing work, family and school) (last visited July 20, 2011); University of Akron Law School Application, http://www.uakron.edu/law/admissions/applying/newstudents/require.dot (describe in your personal statement "economic hardship, educational deprivation, physical disability, discrimination, assimilation to a different culture/society, or any other disadvantage") (last visited July 20, 2011).

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[2] The 7th Circuit may take judicial notice of public records and may do so "at any time, including on appeal." *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (finding district court abused discretion in withdrawing judicial notice of information from the website of the National Personal Records Center, and taking judicial notice of same information pursuant to Fed.R.Civ.P. 201). *See also Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of fact that bank was branch office of another bank and citing commercial bank website and FDIC website). Government websites are considered sources of public records. *Id*.

However legitimate the interest of the Tribune may be to the education records it seeks, the District Court's decision would render *all education records* regarding *all students* of public colleges and universities fair game for records requests under state law not only for the news media, but also, for anyone seeking to acquire intimate, confidential information on students or their families. The implications of such an "open records" policy on the safety, security, and well-being of students and their families is readily apparent.

Section (b) of FERPA imposes a "consent *requirement*" for release of a student's education records which must be in the form of "written consent[.]" 20 U.S.C. §1232(g)(b) and (b)(1) (emphasis supplied). Congress left no room for doubt about this consent requirement. Lest anyone think this privacy right attaches only to the education records themselves as opposed to the personally identifiable information they contain, Congress also separately prohibited the release of personally identifiable information contained in education records. 20 U.S.C. §1232(g)(b)(2) and (2)(A). The only exceptions to FERPA's restriction against disclosure of education records without consent are expressly set forth in the statute itself.

As a further privacy protection measure, Congress requires that each educational institution "shall" maintain a record, kept with the education records of each student, identifying each person who has obtained access to a student's education records and the legitimate interest each such person had for accessing those records. 20 U.S.C. §1232(g)(b)(4)(A). Nor may educational institutions merely look the other way when a third party with access to education records improperly releases the personally identifiable information they contain. The educational institution "shall be prohibited" from permitting access to information from educational records for five years to any third party that releases personally identifiable information in education records in violation of paragraph (2)(A). 20 U.S.C. §1232(g)(b)(4)(A).

Further, the educational institutions must inform parents of students or students "of the rights accorded them by [FERPA.]" 20 U.S.C. §1232(g)(e). Because they are informed of their rights, students and their parents have an expectation of privacy when they disclose personal and private information to schools. Indeed, the schools are given this private information to assist them to make better decisions evaluating candidates for admission only because they promise that the information will be treated confidentially and protected from disclosure to third parties, as Congress intended. Students and their parents rely upon this promise that their personal information disclosed to the schools in order to aid the decision-making process will not be released.

Congress' intent to protect the privacy of these broadly defined education records, notwithstanding countervailing policy reasons favoring disclosure, is clearly revealed by FERPA's language and structure. The District Court's ruling undermines this important, nationwide federal policy that has been settled for nearly 40 years through FERPA. If the ruling of the District Court is not reversed, education records directly related to students maintained by public colleges and universities will lose the broad privacy protections intended by Congress.

In addition, Congress intended that FERPA be enforced and applied uniformly across the nation. Pursuant to FERPA, the Secretary of Education established an office and review board within the Department of Education for "investigating, processing, reviewing, and adjudicating violations of [the Act]. *Gonzaga University v. Doe*, 536 U.S. 273, 279 (2002) *quoting* 20 U.S.C. § 1232g(g). Congress further provided that "[e]xcept for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices" of the Department of Education. *Id.* at 290 *citing* 20 U.S.C. § 1232g(g). "This centralized review provision was added just four months after FERPA's enactment due to 'concern that

regionalizing the enforcement of [FERPA] may lead to multiple interpretations of it, and possibly work a hardship on parents, students, and institutions.'" *Id.* at 290 *quoting* Joint Statement, 120 Cong. Rec. 39863 (1974).

Therefore, Congress' purpose in enacting FERPA was to ensure that a single, uniform, nationwide standard protected the privacy of education records. The District Court's ruling, contrary to Congress' intent, would result in different standards being applied to public versus private educational institutions for the release of education records. Students at public universities will not have privacy rights in their education records whereas students at private universities will continue to enjoy the privacy protections afforded by FERPA. Public universities will be damaged by this discriminatory treatment as they will no longer be able to promise their students privacy protections in education records. Students who attend public universities likewise will be damaged by this discriminatory treatment as they will be compelled to waive the privacy of their education records in order to pursue their higher education goals. Rather than a consistent, uniform standard protecting the privacy rights of students across the nation as intended by Congress, the District Court's decision will result in inconsistent privacy rights regarding education records.

C. The District Court's Decision Undermines Vital Educational Interests

The District Court's conclusion that the University has a "choice" to reject federal education funding misunderstands the realities of higher education. As a practical matter, Amici's member institutions have no real "choice" in the matter as the federal government is the single largest provider of student loans and other student financial assistance for higher education, which funding serves as a central component in each institution's budget as demonstrated by the record in this case. This is especially true for our nation's public colleges

and universities, like the University of Illinois.

In Fiscal Year 2010, the University received $448,883,775 in federal student loans and other student financial assistance disbursed from or through the ED. (Defendant's Motion to Stay Judgment Pending Appeal, ¶ 24.) That same year, the University received $145,552,087 in student financial assistance and other federal funding from the ED. (*Id*. at ¶ 25.) The combined federal student loans and student financial assistance received by the University from or through the ED in Fiscal Year 2010 totaled $520,512,566, comprising approximately 63.2% of the University's total operating revenues from student tuition and fees. (*Id.* at ¶ 26.) The total of all federal funding received by the University from or through the ED in Fiscal Year 2010 totaled $594,435,862, comprising approximately 19.1% of the University's total operating revenues from all sources. (*Id.* at ¶ 28.)

The University is but one example of the extent that federal education funding supports Amici members including especially the public colleges and universities. Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* established several types of student aid programs administered by ED, each with the aim of fostering access to higher education. *See Career College Association v. Arne Duncan,* Case 1:11-cv-0138-RMC, Docket No. 28 at *2 (D.D.C. July 12, 2011). Every year Title IV programs provide more than $150 billion in new federal aid to approximately fourteen million post-secondary students and their families. *Id.* In 2007 and 2008, 56.6% of full-time students at public institutions received federal aid. *Id.* The ED's total funding for all elementary and secondary schools in 2010 was $46,246,133,000, while its total funding for all postsecondary educational institutions in 2010 totaled $193,079,453,348. *See* "Funds for State Formula-Allocated and Selected Student Aid Programs," U.S. DEPT. OF EDUC. FUNDING, http://www2.ed.gov/about/overview/budget/statetables/12stbystate.pdf (follow

the "Grand Total" hyperlink) (last visited July 14, 2011).

Given the fact that federal education funding comprises such a significant percentage of a school's total operating revenue, the District Court's conclusion that schools can simply discontinue receipt of those funds is not grounded in reality. Just as the University is not in the financial position to say "no" to over half a billion dollars comprising 19.1% of its total operating revenues, neither are the Amici member institutions in a position to choose not to accept these hundreds of billions of dollars in ED funds. Such a "choice" would have a profound, negative impact on the Amici member institutions' operations by restricting access to the schools and leading to significant cuts in the quantity and quality of their educational offerings. The District Court's conclusion regarding "choice" may, at first blush, appear theoretically possible, but it certainly fails to translate to the realities of American higher education.

The District Court's ruling also undermines important national educational policy goals, particularly that of greater access to higher education. In his first joint address to Congress on February 24, 2009, President Obama set a goal that the nation should once again have the highest proportion of college graduates in the world by the year 2020. *See Meeting the Nation's 2020 Goal: State Targets for Increasing the Number and Percentage of College Graduates with Degrees,* U.S. DEPT. OF EDUC., www2.ed.gov/policy/highered/guid/secletter/110323insert.pdf (last visited July 19, 2011). To reach this goal, the ED projects that the proportion of college graduates in the country will need to increase by 50% nationwide by the end of the decade. *Id*. In terms of specific numbers, 8 million more young adults will need to earn associate's or bachelor's degrees by 2020 in order to meet the nation's goal. *Id*.

Those goals cannot be met under the District Court's decision in this case. That decision,

if upheld, would require those Amici members subject to state open records laws to disclose FERPA protected education records and cease accepting federal education funds in order to be free from FERPA's conditions. The loss of that funding, in turn, would choke off their ability to enroll students receiving federal student loans and other forms of federal financial aid. The ultimate consequence is clear: access to these institutions of higher education would be restricted to only those students who could pay their own way, thereby thwarting the nation's and Amici's goal of significantly increasing the percentage of college graduates by 2020.

Not only is the District Court's ruling an impediment to this important national goal, but it actually will seriously damage the nation's public universities and educational institutions by depriving them of a critical and substantial source of revenue for their operations. The District Court's decision, if permitted to stand, will create a two-tiered system of higher educational institutions in this country. The first tier would be comprised of private schools that are not subject to state open records laws, and thus, could comply with FERPA's obligations and continue to accept federal educational funding. The second tier would be comprised of public institutions subject to state open records laws who could not accept federal funds because they could not comply with FERPA. Without federal education funding, the second tier would not have the means to attract a diverse student body or top-notch educators, nor would they have the means to offer their students more course selections in diverse fields of study. In essence, the second tier schools would become second class citizens, undermining their educational missions.

IV. CONCLUSION

For the reasons set forth herein, the American Council on Education, the American Association of State Colleges and Universities, the Association of American Universities, the American Association of University Professors, the Association of Public and Land-Grant

Universities, the American Association of Community Colleges, the American Association of Collegiate Registrars and Admissions Officers, the American College Personnel Association, NASPA–Student Affairs Administrators in Higher Education, and the National Association for College Admission Counseling respectfully request that this Court reverse the judgment of the District Court, enter judgment in favor of the University on the Tribune's declaratory judgment claim, declare that the education records sought by the Tribune are exempt from disclosure under section 7(1)(a) of FOIA, 5 ILCS 140/7(1)(a) because FERPA specifically prohibits their disclosure, and grant such other and further relief as the Court deems just and necessary.

Dated: July 20, 2011

Respectfully submitted,

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

The undersigned counsel certifies that the foregoing Brief of Amici Supporting the Board of Trustees of the University of Illinois and Reversal of the District Court complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word count function of Microsoft Word 2000, the word-processing system used to prepare this brief, there are 6,342 words, including footnotes, in this brief.

s/John A. Simon
John A. Simon

CERTIFICATE OF SERVICE

I, John A. Simon, an attorney, hereby certify that I caused a copy of the foregoing **BRIEF OF AMICI SUPPORTING THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS AND REVERSAL OF THE DISTRICT COURT** to be served upon the parties listed below through the CMS/ECF system and by messenger on July 20, 2011:

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