IN THE SUPREME COURT OF THE UNITED STATES

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GONZAGA UNIVERSITY AND :

ROBERTA S. LEAGUE, :

Petitioners :

v. : No. 01-679

JOHN DOE :

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Washington, D.C.

Wednesday, April 24, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of the Petitioners.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

BETH S. BRINKMANN, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 01-679, Gonzaga University and Roberta S. League v. John Doe.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONERS

MR. ROBERTS: Thank you, Mr. Chief Justice, and may it please the Court:

In 1974, when it enacted the Family Educational Rights and Privacy Act, Congress conditioned Federal funding for educational institutions on the institution not having a policy or practice of releàsing student records without consent. Congress did not phrase this condition in terms of individual rights. It did not, for example, follow the model of title IX, enacted 2 years earlier and also dealing with educational institutions, and say something like, no student at a school receiving Federal funds shall have his records released without his consent. Instead, Congress proceeded more indirectly. It said that no funds shall be made available to any institution having a policy or practice of releasing student records without consent.

The statute is directed to the Secretary of

Education. He's the one who makes Federal funds available, not to the institution receiving the funds, and certainly not to the individual student. This Court's cases establish that that is a distinction that makes a difference. In Cannon, for example, the Court said there would be far less reason --

QUESTION: Mr. Roberts, isn't it primarily a distinction that makes a difference in connection with whether there's an implied cause of action, rather than whether 1983 authorized a cause of action?

MR. ROBERTS: In the implied right of action question there are two questions, did Congress intend to create a right, and did Congress intend to provide a judicial remedy? In the 1983 context, there are two questions, did Congress intend to create a right, and did Congress intend to preclude resort to the 1983 remedy, so that first question I think is the same under both categories of cases, and as the Court said in Cannon, if Congress phrases the statute as -- quote, as a prohibition on the disbursement of public funds, there's far less reason to think that they intended a private remedy.

In addition, purpose speaks in terms of an institutional policy or practice, not individual instances of disclosures. Again, the contrast with a rights-creating provision like title IX is stark. Title IX says,

no student shall be subject to discrimination, but FERPA doesn't look at what happens to individual students. It looks at institutional behavior, institutional policy or practice.

QUESTION: The statute does talk about rights of students and rights of parents. It's, of course, as you say, preceded by the mandate that there shall be no policy, but in this regard it seems to me to be at least more specific than -- with references to rights than some of the other funding statutes we've looked at.

MR. ROBERTS: Well, of course, the word rights does not appear in the disclosure provision, subsection (b), and in Pennhurst, where the Court was dealing with developmentally disabled bill of rights, the Court explained that just because the statute uses the word rights doesn't mean that it creates a 1983 right.

QUESTION: Yes, I recognize in the one section that we're talking about here you have a stronger argument than the other, but if we assume for the moment would have a 1983 cause of action under the whole act without going down provision by provision, then I do think you have to recognize that the act does talk about rights of students, rights of parents to look at files, et cetera.

MR. ROBERTS: Well, first of all, the Court in Blessing said that you don't look at the whole act. You

have to look at the particular provision that is relied upon to create the 1983 right.

Second of all, we're 6 years before Maine v. Thiboutot when Congress passed this, so it's not as if they're using rights as some term of art under the established jurisprudence, and finally, I think Congress can use the term to refer to the opportunity of parents and students to participate in the administrative remedy, to the criteria that the Secretary of Education is to use in deciding whether to terminate funds, without thereby necessarily triggering coverage under section 1982.

QUESTION: Well, I think it's that latter rationale that might be stronger for your case. I'll be somewhat reluctant to parse through this statute and say there's no right under (b), there is a right under (e), et cetera.

MR. ROBERTS: Well, whatever rights, whether you're talking -- putting aside the question whether it's a 1983 right or a right to participate in the process that's established under the statute, it is part of the policy or practice that the Secretary of Education is to look to in deciding whether to disburse funds. The obligation is to the Secretary, not to the institution, and that is made clear when you look at what Congress said about enforcement.

The Congress said, the Secretary shall enforce FERPA, and the Secretary shall deal with violations. Now, that deal-with-violations language should strike the Court as unusual and, in fact, nowhere else in the United States Code does Congress tell an agency to deal with violations. It has almost a colloquial tone to it. Mr. Secretary, FERPA is your problem, you deal with the violations. There's no suggestion that they would be dealt with by private actions brought in court and, in fact, that conclusion is reinforced when you look at subsection (g), which tells the Secretary, you set up an office to deal --

QUESTION: Whereabouts is this, Mr. Roberts?

MR. ROBERTS: 12a of our statutory appendix, Your Honor.

QUESTION: Thank you.

MR. ROBERTS: It says to the Secretary, you set up an office to investigate, process, review, and adjudicate complaints about violations under FERPA. I think this is something --

QUESTION: You say violations of this section. You tell us that there's no violation of this section unless there's a policy, right?

MR. ROBERTS: There's no violation unless there's a policy.

QUESTION: So he doesn't have to investigate any

individual complaint, unless the person comes in and says, not only do they do it to me, but this is their policy, right?

MR. ROBERTS: It's evidence that there might be a problem with the school's policy, and this is what makes it different, for example, from the Wright case. In Wright, the Court said, look, all you can do is terminate funding. There's no process to bring complaints to the attention of the Secretary. That's not enough.

Here, Congress said to the Secretary, you set up a complaint procedure, and if someone's got a problem with the release of their records you investigate it, you process the complaint, you review it, and you adjudicate it, and what has happened is that complàints have come in, and the Family Policy Compliance Office have gotten responses from the university, and voluntary compliance has ensured that the policy and practice of the institution complies with the Secretary's view.

QUESTION: I guess that that's all that the plaintiff could accomplish in court anyway. The plaintiffs here don't contend that they would be entitled to recovery if there is no policy or practice.

MR. ROBERTS: That's correct. That's correct.

QUESTION: So the Secretary's enforcement authority is coextensive with what the court did.

MR. ROBERTS: In terms of the scope of liability --

QUESTION: You'd need an allegation of a policy or practice.

MR. ROBERTS: Exactly, but it is the fact that Congress focused on the policy or practice that helps establish that they were not concerned with individual instances of disclosure. It is odd to speak of a distinctly individual right being protected when whether it's protected or not depends on whether the school does the same thing to others. That looks more like a systemic concern, not an individual concern, and it's the --

QUESTION: Well, Mr. Roberts, why are they mutually exclusive? The Secretary has this authority, and I think your argument would be more impressive if this were a large operation. On the one hand you say, the courts, that the institutions will be harassed by all these lawsuits across the country, and yet this one agency that you are saying will take care of it, this centralized administration, we're told that as of 2000 it had all of seven staff members in that entire office, hardly a number that is likely to be able to handle a lot of complaints.

MR. ROBERTS: It's very important to keep in mind the distinction between how matters are handled before the Family Policy Compliance Office and in court.

FERPA places a premium on voluntary compliance, on informal and inexpensive adjudication. A 1983 damages action in Federal court doesn't. The statute says the Secretary shall deal with violations, not the court. The Secretary says -- and the statute goes on to say, we're going to tell you how to deal with individual complainants. They don't go to court, either. They go to the office that's set up by the Secretary, and there they will find an informal, inexpensive procedure in which people can quickly find out what the school's answer is and, in a case in which it suggests that there's a policy or practice problem, secure voluntary problem.

QUESTION: Do we know from the -- maybe the Solicitor General can tell us -- if the seven people are overworked?

MR. ROBERTS: In fact, in practice most of what they do is field questions from the school, how do we handle this situation, what do we do about this?

QUESTION: But how do you get a stop order? One of the points that were made is that if records are about to be divulged to, say, a newspaper, and the student or the parent wants an immediate stop order, you can go into court and get a TRO. There's nothing comparable in the Secretary's arsenal that has that kind of muscle behind it, is there?

MR. ROBERTS: There certainly is. The first thing, if you're a student subjected to that, what you would do is call the Family Policy Compliance Office and the Secretary, keep in mind, has the cudgel of terminating funding behind the most informal telephone call or correspondence. Schools respond to what the Secretary of Education tells them to do with respect to FERPA, because they appreciate the sanctions that can be brought. That's the way the system has worked effectively since FERPA was enacted.

QUESTION: This office can't really give relief to any individual, however, right, except to tell the school not to release, wrongfully release records in the future, right?

MR. ROBERTS: The focus of the office is in vindicating what the statute provides. The statute is directed to institutional behavior. The office reviews complaints in order to secure compliance with the proper policy or practice.

QUESTION: So all --

MR. ROBERTS: It is -- it is --

QUESTION: All you have to do is eliminate the policy, and everything that's happened in the past is water over the dam --

MR. ROBERTS: Because --

QUESTION: -- and go and sin no more is what the Secretary says, right?

MR. ROBERTS: Because the statute is directed to prospective compliance, not retrospective compensation for injuries. That is a different focus than section 1983. The 1983 --

QUESTION: What do you do about the language where it says, no funds shall be made available to a school that effectively prevent, et cetera, the student -- it says, of the right to inspect. It says of the right to inspect right in the first sentence, and then later on it says in (b) no -- or later on it says that you have to tell the parent in (e) of the rights accorded them by this. I mean, that's the same question, but I want to get -- that others have asked, but I want to have very clear in my mind the specific answer. It says, we won't give you any money if you interfere with the right.

Now, that sounds as if there's a right, and then they underline it by saying, and you have to tell them about the right, and what's -- your direct response to that is what?

MR. ROBERTS: The direct response is that -- you left out words in the quote, which is that no funds shall be made available to an institution that has a policy or practice, and the question is, is Congress focusing on

protecting individual rights in, as the Court said in Blessing, an individual way, or are they addressing a systemic concern. The policy, or the focus on the Secretary -- this statute is directed to the Secretary. Don't make funds available, and it says, look at the policy or practice. It's not written the way title IX is, which would suggest the conferring of an individual right.

Secondly, you're quoting from subsection (a). Subsection (b) does not talk about rights.

And finally, the answer --

QUESTION: Well, but Mr. Roberts, let me just be sure I understand your answer. I have the same problem Justice Breyer does, because in 1232g(1)(B) on page 2a, no funds and so forth shall be made available if the agency has a policy of denying or effectively prevents the parents of students the right to inspect. Now, is the right to inspect a Federal right?

MR. ROBERTS: I think not, because --

QUESTION: What is its source?

MR. ROBERTS: The right to inspect is not an independent and freestanding right. It is a description of the sort of policy or practice that should prompt the Secretary of Education to withhold funds. In addition, this is not the provision that's at issue in this case. Subsection (b) --

QUESTION: Well, I understand, but your initial submission is that this is not a rights-creating statute, it just -- but I don't know where the right comes from that they refer to in that section and also in -- on 12a informing parents and students of rights under this section.

MR. ROBERTS: Under this section. I think Congress can use the term, rights, to refer to the opportunities that are provided to the parents and students and to the criteria that the Secretary of Education will look to in deciding funding, without thereby triggering coverage under section 1983.

Just like in Pennhurst, Congress used the word rights repeatedly in --

QUESTION: But do you think that they would have had the rights described herein even if this statute had not been passed?

MR. ROBERTS: No. There would not have been -- no rights are conferred under this statute. What is conferred is discretion on the Secretary of Education to withhold funds depending upon a policy or practice. In describing the policy or practice that should trigger action by the Secretary of Education, the statute refers to opportunities that must be provided to parents and students by that institution, but in doing so I don't

think Congress is necessarily triggering the right to a damages action.

QUESTION: You use the word opportunity in the statute wherever the statute used the word rights.

MR. ROBERTS: Well, the statute doesn't use the words right under subsection (b). The statute in Pennhurst was called the Bill of Rights, and this Court concluded that that did not confer rights. The question is whether Congress acted in a way that indicated an intent to confer an individually enforceable right.

QUESTION: Mr. Roberts, you said that 1232g(b) is not the section at issue here.

MR. ROBERTS: No --

QUESTION: What section is the one at issue?

MR. ROBERTS: 1232g(b) is the section at issue. Justice Stevens and Justice Breyer were quoting from 1232g(a). (a) refers to rights, (b) does not.

QUESTION: Well, but (b) does say, the parents of students the right to inspect and review.

MR. ROBERTS: That's (a), Your Honor. That's 1232g(a)(1)(A).

QUESTION: (b) is on 6a, I gather is what you're --

QUESTION: Oh, (b) is on --

MR. ROBERTS: (b) is on 6a, and it does not

refer to rights.

QUESTION: Okay. Thank you.

MR. ROBERTS: Thank you, Your Honor.

QUESTION: Ms. Millett, we'll hear from you.

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

If I could begin by responding to Justice Kennedy's question about whether the Family Policy Compliance Office is overworked, I will tell you that they do work very hard, but they handle -- for a small staff, they handle an amazing amount of work, and have been doing so for 28 years under this statute. They handle over 900 pieces of correspondence a year, up to -- close to 100 of things that are formally categorized as complaints as they go through the investigation stages.

QUESTION: Three letters a day, I guess.

MS. MILLETT: Hmm?

QUESTION: That's three letters a day.

MS. MILLETT: Yes, but they also -- I'm not done with my -- forgive me.

(Laughter.)

MS. MILLETT: They have about 300 phone calls a

month, and well over 1,000 e-mails a year to --

QUESTION: That's 10 phone calls a day.

(Laughter.)

MS. MILLETT: That's right, and well over 1,000 e-mails, and I think one of the reasons that there isn't -- I mean, if you look at the legal landscape out there, too, there hasn't been an enormous volume of 1983 actions, and that is because the Secretary has been very successful, I think, in communicating and enforcing this in an informal manner with the universities. The universities wish to comply with this, and a lot of it is -- we've had 28 years now to explicate what this statute means and to clarify what it means.

Now, I fear that may change if this Court were to recognize a 1983 action --

QUESTION: What is your opinion about the idea that this could be bifurcated, that it orders a right to inspect, that isn't going to be too tough, you let the person look at the record, but there's a policy of disclosure. Does that make sense in terms of the statute to say there's a private right under (a) but not under (b)? What's your opinion of that?

MS. MILLETT: Okay, I'll answer that in two stages. It makes sense to bifurcate analysis as a matter of this Court's 1983 precedents, and specifically that's

exactly what the Court did in the Blessing case, which is your most recent case up here.

As a whole, we don't think it actually makes sense to do so under this statute. The Court may not decide that today because the only provision at issue is subsection (b), which does not refer to rights and focuses on policies or practices, but our position is that there are three mutually reinforcing features here, both in (a) and (b), that show there is not a right under 1983, and that is -- even under (a), the very beginning of the sentence, and the operative command is that no funds shall be distributed, or shall be distributed by the Secretary of Education, and that is distinctive, unique language that this Court recognized, suggested in Cannon, and held just last term in Sandoval. It's not the type of language Congress would use to create individual rights and in particular, in 1974, 2 years after title IX was enacted, Congress chose different, distinctly different language that is very uncommon in the U.S. Code.

QUESTION: If you go through the first three factors listed in Blessing, Congress intended to benefit the plaintiff, and it not be beyond judicial competence --

MS. MILLETT: Not not be --

QUESTION: -- and there must be an unambiguously binding obligation on the State, it would seem to me that

those are met here, and that you then have to go to the next part of the test which is -- that creates a presumption that there is a right.

MS. MILLETT: Well, as we said in our brief, we think that the problem here is not that it's vague or amorphous, and it's not that there's not binding obligations, which is the second two prongs of the Blessing test, but the first prong of the Blessing test, while phrased in terms of benefiting individuals, the Court made clear in Blessing it's not just a general inquiry if it's of some good to people, because all legislation is of some good to somebody. It is whether it creates individual entitlements, and that's where we think this statute fails, a statute that --

QUESTION: Well, with reference to the other parts, the non-(b) parts of the statute, it does seem to me that it talks about the student and the parent in very specific terms, and it uses the term, rights.

MS. MILLETT: Well, again, this Court made clear in Pennhurst that you can't just look at the word right in isolation. You have to put it in context, and there are some important contexts I would like to stress, again even up through subsection (a). The right begins with -- it begins with the no-funds command. The focus is on a policy, system-wide basis, and even when it talks about

rights, it's not an individual right, it is the -- the education records of the children -- I'm sorry, I'm reading from -- this is my appendix. I hate to confuse the Court, to my brief, at 1a, where subsection (a) is, and there has to be a policy of denying or effectively preventing the parents of students, plural, access to these records, so we think that makes clear that you have the same programmatic, system-wide rule here, and in fact the Secretary's position is that if you had one instance of a failure to allow someone access to records during nonpolicy or nonprogram-wide failure to allow access to records, that would not violate FERPA. The command is still -- it's written differently. I mean, the statute was put on, was enacted on the floor of Congress. It didn't have long hearings where people sort of labored and struggled over precise language, but it contains --

QUESTION: May I ask you -- it's really the same question I asked Mr. Roberts, I suppose, but the first sentence of 1232g(a)(1)(A) refers to a policy of denying access, denying the right to inspect and review education records. In your view, is that right a federally created right, or is that a right created by some other source and, if so, what is the source of the right?

MS. MILLETT: I'm sorry, I'm having -- there were too many numbers in that. g(1) --

QUESTION: it's the first sentence of 1232g on page 2a of the blue brief, and the first, very first sentence in the statute ends by saying the right to inspect and review the education records of their children, and my question is whether you think that is a federally created right and, if not, what is the source of that right?

MS. MILLETT: I think it's not -- I have two answers. First of all, whatever it is, it's a collective, program-wide, aggregated right, because it speaks in the plural, but secondly it;'s not -- I think it is used as Mr. Roberts said here in a shorthand way, and the legislative history says that one of the things they were trying to enforce here is what Congress considered to be pre-existing moral or legal --

QUESTION: Let me be sure you have my question in mind. Do you think the right to which the statute refers is a federally created right, or right with a different source?

MS. MILLETT: I think what the statute is creating there is a Federal overlay to protect pre -- as was said in the legislative history on page 17 of our brief, preexisting legal or moral right.

QUESTION: So that if a school came back and said, in our State there's no such right, then the statute

would not apply?

MS. MILLETT: Congress felt that when it said preexisting moral or legal rights, there was a sense of Congress that this is a type of, not in a bright sense that we use for purposes of 1983 actions, but the legislative history was that Congress had a sense here that this was something all individuals should have. But this --

QUESTION: It is something they should have by reason of this statute, and therefore it's created, or by some preexisting rule of law in some -- at some other source?

MS. MILLETT: Well, Congress' language was preexisting moral or legal rights, and so I'm not sure what one considers --

QUESTION: If it's another source, it seems to me that the State or the institution could say, in this locality there is no such right, and that would make the statute totally inapplicable.

MS. MILLETT: No, it wouldn't, because what you still have is, once you take these funds you have a Federal overlay. Once you decide to take these funds your prior law doesn't matter, which you have --

QUESTION: It's a Federal overlay on a nonexistent right, if I understand you correctly.

MS. MILLETT: Well, there's a -- there is -- there's no doubt that there's a Federal level of protection here for privacy, and it's at an aggregated, collective system-wide level. It's not at the individual level of --

QUESTION: But you use the word overlay, Mr. Roberts used the word obligation, you stay away from the term, right, in the statute. If we followed Justice Stevens' line of questions and concluded that there is a Federal right, would you necessarily -- would your position -- would that be fatal to your position, or would you say it's a right that can be enforced through a comprehensive administrative scheme?

MS. MILLETT: In two ways it wouldn't. It's not at issue in this case, and the second argument is that the nature of the -- whatever the nature of the right is that's created here, Congress has created the very type of scheme that it thinks is appropriate to enforce these collective, aggregated, system-wide rights that it created here, that in fact --

QUESTION: Well, are you in effect saying, as Mr. Roberts did, I think when he used the word, opportunity, that this is kind of, that the scheme of this section is sort of an if-then sort of scheme. If you deny them the opportunity then -- and you do so on a systemic

basis, then the Secretary will take, or should take certain action. Is that -- you are saying essentially the same thing that he did.

MS. MILLETT: Yes.

QUESTION: So when you say there's a Federal right, you really mean there's an opportunity. If the opportunity is denied, then certain administrative action can be taken.

MS. MILLETT: That's right. There's a Federal obligation -- to use Mr. Roberts' words, a Federal obligation, once you take these funds, to not have system-wide practices or policies that either deny access or, in this case, disclose without consent, or an authorized basis for disclosure, and I think it's very -- again, very unique language. You have -- you didn't have to look at the two separately, but when you combined the no-funds language and the focus on system-wide policies and practices, that this Court made clear in Blessing that type of aggregate language doesn't create individual lights -- rights, excuse me, and then you marry to that the fact that Congress has enacted an administrative scheme that is directly responsive to that type of system-wide overlay, there should not --

QUESTION: Thank you, Ms. Millett.

MS. MILLETT: thank you.

QUESTION: Ms. Brinkmann, we'll hear from you.

ORAL ARGUMENT OF BETH S. BRINKMANN

ON BEHALF OF THE RESPONDENT

MS. BRINKMANN: Mr. Chief Justice, and may it please the Court:

In FERPA, Congress gave parents the right to prevent the release of certain educational records. That's evident from Congress' choice of words and the structure and history of the statute. There are at least five indications of that intent, including references to rights under that provision, which I'll get to in a moment. It involves reading two sections together.

First, in section -- this is on page 9a of the red brief, at the very top. In 1232g(b)(2)(A), at the top of page 9a, Congress prohibited a recipient from having a policy of releasing education records, quote, unless there is written consent from the students' parents. Congress did not say, unless there is a policy of obtaining written consent. Congress thereby --

QUESTION: Now, you're reading from 9a, Ms. Brinkmann? Whereabouts on page 9a?

MS. BRINKMANN: At the very top, Your Honor, paragraph 2 begins that no fund shall be given to an agency, and explains that has a policy or --

QUESTION: -- see it either. I'm looking at

page --

QUESTION: I think she said red brief.

QUESTION: 9a of the red brief.

MS. BRINKMANN: It's on page 8a of the --

QUESTION: You're switching briefs on us.

MS. BRINKMANN: I'm sorry.

(Laughter.)

MS. BRINKMANN: It's on page 8a of the blue brief, if you prefer that. The problem is, there are other provisions in here I need to refer to. At the very top of the page, it explains that no funds shall go to a school that has a policy of releasing information, and at the end of that first paragraph, quote, unless, and then we go to subparagraph (A), there is written consent from the students' parents.

Congress did not say, unless the school has a policy of obtaining consent.

QUESTION: Yes, it does. It says no money will go to an educational agency or institution which has a policy or practice.

MS. BRINKMANN: Unless.

QUESTION: Unless.

MS. BRINKMANN: Yes.

QUESTION: Now, if you don't have a policy or practice, the whole provision doesn't apply.

MS. BRINKMANN: If you don't have a policy or practice of releasing information other than under the preceding (b)(1), you're correct, Your Honor.

QUESTION: The whole thing wouldn't apply, so I don't --

MS. BRINKMANN: And (b)(2)(A) is -- (b)(1) says you can't -- a school can't have a policy of releasing without consent, other than to certain categories.

QUESTION: It's a question of whether you read the word policy, what policy? I think Justice Scalia is reading it as, what policy?

MS. BRINKMANN: It's a policy --

QUESTION: A policy of releasing records without written consent.

MS. BRINKMANN: That's not what not -- that's not what (b)(2)(A) says. That language is not -- that is, the without consent is in (b)(1). It's not in (b)(2). It says, has a policy or practice of releasing or providing access to any personally identifiable information, other than direct information, or is permitted under paragraph (1). That's what paragraph (1) does. It permits a laundry list of releases where Congress said, we're not going to require parental consent.

School educators need this information. (b)(1), no problem, you get all of this information without

parental consent. Other than in those situations, if you have policy or practice, then the school decides --

QUESTION: I'm really not following you. What do you think the unless goes to? I take it that the unless goes to, no funds shall be made available.

MS. BRINKMANN: Yes.

QUESTION: Unless.

MS. BRINKMANN: Yes.

QUESTION: Okay.

MS. BRINKMANN: So --

QUESTION: But that whole provision, no funds shall be made available, only applies to an educational agency or institution which has a policy or practice of releasing.

MS. BRINKMANN: Absolutely.

QUESTION: If it doesn't have a policy or practice of releasing, it's entirely exempt from that provision.

MS. BRINKMANN: That's correct, Your Honor, because they did not -- Congress did not intend to go after inadvertent releases.

For example, the school makes a decision if they are going to have a policy of releasing information to a scholarship program, or to the press, and if they have a policy release, they have to abide by this very specific

requirement in (b)(2)(A).

QUESTION: Well --

MS. BRINKMANN: They may choose not to. It's parallel to the directory information provision in the statute.

Congress also said, you, school, can make a choice. If you want to release things like names, classes, awards receipts under the directory information provision, you can make that decision. You have to give notice at the beginning of the year, and you have to give parents enough time to respond whether or not they want to opt out of that.

Same thing under (b)(2)(A). If you as a university decide that you want to have a policy or practice of releasing things beyond what is already authorized under (b)(1), which includes other teachers, emergency situations, Federal officials, all kinds of situations, then you have to abide by (b)(2)(A), and you cannot have that policy or practice unless there is written consent from the students' parents.

QUESTION: But it appears to be a scheme, at least as I read it, just directed at when Federal funds are going to be given to a school, and you determine that by whether the school has a particular policy or practice, and the remedy is withholding funds. I don't see how you

extrapolate from this statute the intent to create a private cause of action for damages.

MS. BRINKMANN: Your Honor, in addition to the language, unless there is, our position is, because there is that requirement, unless there is written consent from the parent, Congress intended to directly benefit the parents and to say to the parents in a particular situation, you can say no, I don't want this information released. Parents may have different decisions based on whether or not they think it will benefit the child.

QUESTION: But they can't do that, because I mean, if the information is released and the parent says, I object, the institution can say, oh, I'm sorry, that was just a mistake. We don't have that policy. You know, we released it. Too bad. We don't have the policy. So there is no absolute right on the part of the parent to prevent it.

MS. BRINKMANN: There is, Your Honor, because the -- if they do have a policy and practice, it's akin to the standard that the Court adopted in Gebser, and here Congress did that. They said, we are not going to charge every institution with inadvertent release, but to the extent, as under Monell, if there is requisite knowledge by the school that they have a policy or practice, they're intending to be releasing information, they are charged

with getting the consent from the parents, and again I have to --

QUESTION: The consequence, if they don't get consent from the parents, the express consequence is no funds shall be made available.

MS. BRINKMANN: Which is the commonality in all of the Spending Clause cases that have come before the Court, Your Honor.

QUESTION: Ms. Brinkmann, but not the emphasis, as was pointed out by Mr. Roberts. Title IX, title VI say, no person shall be, and this starts out with no funds. Do you have any statutes, any spending statutes that uses the no funds shall, instead of no person shall be denied, where this Court has either implied a private right of action, or has found a right which 1983 can then be used to enforce?

MS. BRINKMANN: Well, Your Honor, there's never been a formula. None of the statutes where the Court has found a right has included that language, Wright, Wilde, or Blessing, none of them have the language the petitioner and the Solicitor General now urges.

In fact, in footnote 12 of the Suter opinion the Court contrasted the language where they were not finding a right to a statute that, quote, said, no Federal payment may be made under this part, and they said, now, there's a

specific requirement, so there's no formula. None of the courts have had this language that they're now urging. The Suter opinion refers to this type of language as being more specific, and it doesn't as a practical matter make any difference what these Spending Clause statutes do say. If you receive Federal funds, you have to abide by these conditions.

QUESTION: I'm not sure that I gave you my question precisely. There are title VI, title IX, statutes that use the formula, no person shall, and under those statutes a right of action has been implied, and what I'm asking is, is there any statute with the language, no funds shall, where a right of action has been implied?

MS. BRINKMANN: No statute of that language has ever come before the Court, Your Honor, and all I'm saying is, there are many other cases in which statutes have been found to accord rights under section 1983 that don't have that no-student-shall language.

QUESTION: What about -- you say, you agree there is no example of a case we've decided where the term is no funds shall?

MS. BRINKMANN: That statute has not come before the Court. I have to say in the title IX and title VI context, it was a broader inquiry of whether or not there

was implied cause of action, but in Your Honor's opinion, in Suter, in footnote 12, it does refer to this type of statute and suggests that that is a direct requirement.

QUESTION: If I may --

QUESTION: Well, where is the statute -- the footnote you're quoting speaks in terms of, or addresses the no funds shall?

MS. BRINKMANN: The precise language in that statute which is quoted in that footnote says that no Federal funds payments shall be made, Your Honor. It's on page 361 of the opinion, and it's citing 42 U.S.C. 672(e) that says, quote, for example, no Federal payment may be made under this part, and then it goes on and it says that that is an example of more precise requirements as contrasted to the statute in Suter.

If I may, there are four other provisions I'd like to speak to in addition to the language, unless there is. In addition, again on page 9a under (b)(2)(A), it's not just unless there is written consent. That consent has to have included a provision of a copy of what is intended to be released by the school to the parents. The parents have to be told why the information is being released, and the parents have to know to whom it is being released. That is exactly what the Court referenced in Blessing about Congress addressing the particular need of

the individuals who they're according the rights to.

They knew that parents were going to be able to need to know why the information was provided, exactly what it is, and to whom. Parents may think it's fine to release financial information, personal information about their household for a scholarship or an honorary award purpose, but not, for example, to a newspaper story about low income families in the school district.

Third, the history of the -- before I go to the history, actually, I want to explain another provision of the statute which I think --

QUESTION: Two more. You have two more coming. You said you had four.

MS. BRINKMANN: Yes. Yes. Actually, I'm going to jump in, though, because this responds to questions of the Court about the use of the word, right. If you could turn to page 12a in the red brief, subsection (d), 1232g(d), is entitled, "Students Rather than Parents' Permission or Consent." That clearly references the permission or consent under (b)(2)(A). That is where this permission or consent is referenced in FERPA, and it explains there the purpose of it, to explain that when a student becomes 18, as the student here was, or attending a school of higher education, the permission or consent required, and the rights accorded to the parents of the

students, shall be required in accordance -- (b)(2)(A) gives the student, requires permission or consent, and then gives the right to deny permission or consent. That is a direct reference to the rights under (b)(2)(A). Moreover, as members of the --

QUESTION: So we have right, the word right used in (b) as well as in (a), or at least with reference to (b) as well as with reference to (a).

MS. BRINKMANN: Much more precisely, Your Honor, here, because they are specifically talking not just about (b) generically, but about permission or consent.

QUESTION: Why does right refer to (b)? I mean, rights could refer to (a).

MS. BRINKMANN: Because the whole provision of (d) refers to permission nor consent, Your Honor. There is no permission or --

QUESTION: No, it says permission or consent of and the rights.

MS. BRINKMANN: Yes.

QUESTION: So --

MS. BRINKMANN: Yes, but --

QUESTION: (b), the first is this, and the other is that.

MS. BRINKMANN: But if you look at the structure of the provision, they are referring to the actual

permission or consent, because that's when you would need to know, do I go to the -- when I -- for a college student, do I go to the --

QUESTION: The right to inspect after he's 18 is a right that goes to the student, not to the parent.

MS. BRINKMANN: But Your Honor, this is specifically addressing the permission or consent provision. You can tell by the heading of subsection (d).

Moreover, under (e), as Your Honor pointed out before, the school is obligated to inform parents or students of their rights under the regulations promulgated by the Secretary of Education. One of the rights they are required to inform parents and students about is the consent --

QUESTION: Ms. Brinkmann --

MS. BRINKMANN: -- required there.

QUESTION: Where does it say that? Where does it say that?

MS. BRINKMANN: It would be in the regulations, Your Honor.

QUESTION: In the regulations, okay, fine.

QUESTION: Even if we say that you met the three Blessing standards, Blessing still kind of said in that opinion, there's something more, and the more is what seems to be the strongest emphasis of the case that Mr.

Robert and Ms. Millett made, and that is that Congress created an enforcement scheme that they meant to be it, that would be incompatible with individual enforcement.

MS. BRINKMANN: Actually that, ironically, leads me to my third point, in fact. When you look at this history, Congress clearly was addressing the interest of parents in controlling dissemination of information about their children. This is a paradigm example of what they were worrying about, information that's gossip, unsubstantiated, never had a chance to respond to it, could have a devastating effect on a student's career.

Under petitioner's interpretation --

QUESTION: But the issue isn't whether they were worried about that. The issue is whether they wanted to eliminate that worry by having the Secretary police the thing, or by having lawsuits to vindicate private rights.

MS. BRINKMANN: Yes, Your Honor, and I think --

QUESTION: I don't see how you advance the ball at all by saying what they were worried about was precisely this thing. I mean, I think Mr. Roberts would stipulate that.

MS. BRINKMANN: Well, it was the point that Justice Ginsburg brought up before, which actually I think responds to your inquiry. Under petitioner's interpretation, if this student had found out that this

information was about to be released, information he could prove was false, he would have no avenue to prevent the release of that. There was no method at the Department of Education to provide any individual remedy, let alone our TRO, and I think that that's even magnified by --

QUESTION: It may not be the ideal remedy. It may not be the best remedy, and one of the anomalies here that wouldn't be present in title IX is working through 1983, where you must have a State action pegged. Now, here, it happened that there was a connection with a State, with a State officer. The conversation was between private institutions and State officer, but suppose we have two schools, and one is about to give a record to a newspaper, and the other is about to do the same thing, and one is the State university, and one is the private university.

Under your scheme, the private university would be home free, it wouldn't be subject to 1983 liability, but the public would, and I think that would be a strange scheme for Congress to enact.

MS. BRINKMANN: Your Honor, actually it's much more complicated than that. It's just not whether or not suits are available against public or private, because, of course, State universities are often deemed arms of the State, so they're not subject to suit at all. The only

action that can be brought against a State official is for injunctive relief. Moreover, most private elementary and secondary schools, as was pointed out in the amicus brief in support of respondent, don't receive Federal funding, so there are a lot of different ways in which there may be different actions, but that is because of 1983 Eleventh Amendment --

QUESTION: Well, maybe that shows that 1983 really doesn't fit this pattern, because why -- even, why should certain kinds of institutions be stopped, and others not, from doing the same thing?

MS. BRINKMANN: Because the relationship of students at the private school is different than a relationship with a public school. A rèlationship of a student at public school is defined by State law. It is -- and that's what an action under 1983 is, it's under color of State law.

QUESTION: But doesn't the student have the same, whether we're going to call it right or opportunity, in the private school with respect to records, like a private university?

MS. BRINKMANN: Only if the school receives Federal funds. Secondary and elementary --

QUESTION: Which an overwhelming number of schools do.

MS. BRINKMANN: Only universities, Your Honor. Actually, the amicus brief of the ACLU cites a letter from the Department of Education explaining that the vast majority of private schools, elementary and secondary, do not receive Federal funding, but if I may, I think that the important point here is, the relationship of a student with a private school is different. There is a contractual relationship there, and there may very well be other remedies against a private school arising out of -- for example, here in Exhibit 1 at the trial, the handbook, Gonzaga promised to abide by FERPA and said, we will not release information without your consent. There could be a contractual action there. You can't have those kinds of actions against a school, public school. That's why Congress created section 1983. There was --

QUESTION: Ms. Brinkmann, can I come back to your assertion that there is no right to an injunction, you can't get an injunction under this act, but you can't get an injunction, even if we accept your theory of the act. You cannot get an injunction unless you show not only that they're about to release this information, but also that this is their practice or policy.

MS. BRINKMANN: Absolutely, Your Honor.

QUESTION: Isn't that right?

MS. BRINKMANN: Absolutely, and --

QUESTION: So what good does that do you? You have to go in --

MS. BRINKMANN: Because in this case you needed the testimony of one witness --

QUESTION: Which suggests that you're not vindicating a private right of yours, that somehow what Congress is concerned with is the existence of a policy or practice that it doesn't like, even though --

MS. BRINKMANN: With all due respect --

QUESTION: Even though you're being harmed by this release, under your theory you can't get an injunction against it.

MS. BRINKMANN: I respectfully disagree.

QUESTION: Unless you show that there's a policy or practice.

MS. BRINKMANN: You absolutely could get an injunction, Your Honor.

QUESTION: How so?

MS. BRINKMANN: Because you needed the testimony of one witness in this case who said, we do this all of the time. We disclose information to the State agency before --

QUESTION: You need that witness, and if you don't have such a witness, you cannot get an injunction, isn't that right?

MS. BRINKMANN: That's right. That's a matter of proof, and Your Honor, what -- I just have to emphasize that what the provision here goes to with the policy and practice in (b)(2)(A) is Monell, Gebser, it is Congress saying, we're not going to charge every university with this requirement. If they have a policy or practice, if this decision is made at a high enough level that they would have requisite knowledge, that's the only place in which this section 1983 liability would be triggered.

QUESTION: Is there -- can I ask you one question on the practicality? Assuming all the language is ambiguous, et cetera, and I would like you to remove this image from my mind, the image that I have in my mind was an earlier case argued here in this Court, and as a result of the lawyer's argument in that case I focused on the language, educational record, and I realized it's a close question, perhaps, as to whether those words do include things like a gold star the third grade teacher might give out in class, or the statement, you're going to get a bad mark on your report card.

I suddenly realized it's highly ambiguous, and the lawyer said that he had been cross-examining the school officials on this and related questions in the courtroom for several hours, I thought. I mean, at least for a time, and suddenly it occurred to me, how are they

teaching or running the school district, and the image that came up in my courtroom was of private actions all over the place trying to bring into court school officials to interpret language which really doesn't explain itself.

Therefore, a need for centralized administration, which of course would be harmful to some parents, but counterbalanced by the need for effective school administration, and those were the things in my mind, and that's the image it called up, and I want you to reply to that, because I think that's at the heart of this, at least the practical part.

QUESTION: I think I have at least five answers. I haven't counted them off. First of all, I think it's important to realize that that's one of the reasons you have the particularized examination in Blessing. We are not saying there's a right under every one of these provisions, but if you look at (b)(2)(A), unless there is the specific requirement, the history of it, and also if you compare it to the other release provisions that do not have this kind of right, they say you have to notify the parent, or you have to make the person who's getting it promise to destroy it when they're done with it. They don't have this right.

So if you look at this particular right, then you step back and you realize what the Department of

Education has been saying. Schools comply with this statute. It is clear and simple. You give them a copy, you ask the parents -- tell the parents why and to whom it is going.

In the 28 years since this statute has been enacted, there has been no flood of litigation, despite the fact that the Second Circuit, I think 15 years ago, held that there was a section 1983 cause of action, the Fifth Circuit more than 10 years ago. There is no Federal court of appeals that has taken petitioner's position. I think in the past 5 or 6 years there have been at least two more circuits. People comply.

QUESTION: But Ms. Brinkmann, if your -- if the force -- if we accept the force of your argument, then I think we'd have to say, well, Congress really didn't need to bother with the centralized administration provision, and yet Congress did put it in, and it seems to me the most likely reason that it put it in is the reason that Justice Breyer just gave.

MS. BRINKMANN: I think --

QUESTION: So you may have made a good argument for getting rid of it, but as long as it's there, it seems to have the same lesson that his question suggests.

MS. BRINKMANN: I think that the FPCO office serves a admirably meritorious role. It answers countless

numbers of phone calls and inquiries about this, but its own interpretation of its role I think is really illustrated by footnote 6 in our brief, which is on page 35.

In 1987, when FPCO changed regulations, it explained that it wasn't going to require schools even to afford them access to education records information because they don't go out and investigate.

What more accurately reflects their investigation is allowing schools to submit reports -- and this is quotes -- since its inception, FPCO has not conducted any on-site visits to resolve complaints. Rather, it has resolved complaints through correspondence and telephone calls with the affected parties, and that works in the vast majority of cases.

In the limited number of cases that are brought under FERPA in the Federal courts, Federal and State courts since its enactment, this is the only reported case that anyone has located for punitive damages, and the only other case that had any damages was $1 of nominal damages that we've been able to --

QUESTION: But that may be a very good argument for saying that what Congress had in mind, in effect, in confining the enforcement the way it seems to have done by this exclusive authority provision works in the general

run of cases, and therefore there is not a good reason to say that Congress probably would have wanted this private right of action with the punitive damages.

MS. BRINKMANN: I think it works generally, and then you look at the Blessing inquiry to see if Congress intended to create a right, they intended to create a right from all of those reasons I said. Once you get there, it's clear, it's mandatory --

QUESTION: But we're at the -- we're beyond stage 1, 2, 3 --

MS. BRINKMANN: It's -- yes.

QUESTION: -- and we're saying, okay, are there particular reasons to think that they did not.

MS. BRINKMANN: Then it's presumptively available, a section 1983 action. It's not an implied cause of action. Congress created 1983 and said, if you have a Federal right, you can enforce it in court. It is against that presumption the petitioner has to carry the heavy burden that this Court has found met only twice, in the Sea Clammers case and Smith v. Robinson.

QUESTION: Why isn't the theory of centralized administration, spelled out in the statute, with the Secretary's office doing this thing, why doesn't that overcome the presumption?

MS. BRINKMANN: Because the presumption has to

be overcome by an enforcement scheme, an administrative scheme that supplants the section 1983 that has some address for a private remedy.

QUESTION: Well, certainly it doesn't have to be a duplicate of section 1983, or there would be no point in saying it supplants it.

MS. BRINKMANN: Absolutely, Your Honor, but here there is absolutely no availability for any remedy for an individual injury, and Sea Clammers --

QUESTION: Ms. Brink --

QUESTION: Well now, wait a minute. As I understand it, people who are aggrieved by some practice in the schools can get a hold of the Secretary's office and -- by a phone call and perhaps by the Secretary's action in saying, either you fly right or we'll cut off funds, they do have a remedy.

MS. BRINKMANN: Not under (b)(2)(A), if they have released records. There's no provision for any kind of damages compensation for an individual, and the Court has looked at that role of the administrative scheme in its line of cases, deciding whether or not it was sufficient to supplant this congressionally created right under section 1983. In the two cases --

QUESTION: Ms. Brinkmann, can you give us one other example of a right that depends upon whether the

person allegedly violating the right has done it before?

MS. BRINKMANN: Yes, Your Honor.

QUESTION: Or has a policy or practice of doing it? For example, you know, your right to be free from unreasonable searches and seizures.

QUESTION: I suppose you're going to tell us about the Monell case.

MS. BRINKMANN: I was going to cite the Monell case. I think that's --

QUESTION: No, no, no.

MS. BRINKMANN: -- exactly what the Monell case is about.

QUESTION: That depends on whom you can sue. That depends upon whom you can assert the right against, but against the individual you can assert that right, whether there's a policy or practice or not. That's simply the question of whether you can reach the municipality, but I cannot think of a single other right in the world which only exists as a right when somebody is a two-time loser, or has a policy, or practice.

MS. BRINKMANN: Your Honor, a policy or practice may not have injured anyone in the past. They may have a written policy in saying, we're going to release these things to --

QUESTION: Maybe, but it's a very strange right.

I don't know of any --

MS. BRINKMANN: This is the fact --

QUESTION: I mean, I have another rights question, too, but I -- you're relying on the use of the right, of the term, right, in the statute. What do you do -- what do you conceive to be the -- it's on the -- it's on page 4a of the blue brief.

It refers to the privacy rights of students. It says that no funds shall be available, blah, blah, blah, unless in accordance with regulations of the Secretary, the student or parents has a right to challenge the content of each student's education record in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students. Is that also the creation of a Federal privacy right?

MS. BRINKMANN: I don't believe so, Your Honor. I have to --

QUESTION: Does it refer to existing State privacy rights, or just sort of a moral notion of what things should be kept private?

MS. BRINKMANN: Well, I have to emphasize, our statutory argument about rights is not based solely on the 1232g(d) referenced rights. It's based on the, unless there is consent from the parents, and on this particularized consent required, giving parents a copy,

telling them to whom am I -- that is what demonstrates under the Blessing standard it was intended to benefit parents and to address their specific needs to protect their children from information they have never been informed about, as in this case, that destroyed this person's career.

That's exactly what Congress was aiming at, and without -- in petitioner's position there was absolutely nothing that anyone can do to protect that right. The Department of Education cannot give individual relief, and this -- anybody will be barred from going into court. Fortunately, this doesn't happen. It's simple. Schools comply with it. This is an exceptionally unusual and egregious case.

QUESTION: Well, Ms. Brinkmann, there haven't been other cases where substantial monetary damages and punitive damages have been available, and maybe that's the concern. I mean, it's -- this is a person who did have a right. There was a contract right, and there was the deformation, but by bringing 1983 into the picture, the damages are increased for the same conduct, and you can pick up 1988 counsel fees.

MS. BRINKMANN: It's not the same conduct, Your Honor, if I may. First of all, deformation would not necessarily cover cases that involved truthful

information, but in this particular case, if I could just make clear, what I think -- first of all, this involved compensatory damages, just not punitive, but of course this Court's ruling will affect injunctive actions also, but in this case, because this information was released at the very outset of this investigation, it affected the school's decision about whether or not to issue an affidavit to my client.

There was disagreement -- even as it stood, without any information from my client to say this was false, there was disagreement amongst the school officials about whether or not to issue this, and plaintiff's exhibit 28 has a chronology. The people at the school who were in favor of releasing, of not giving the affidavit got State officials to contact the dean and --

QUESTION: Thank you, Ms. Brinkmann.

Mr. Roberts, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONERS

MR. ROBERTS: Thank you, Your Honor.

Two statutes enacted within 2 years of each other: title IX, no person shall be subject to discrimination; FERPA, no funds shall be made available to an institution that has a policy or practice described in the statute, and the Secretary shall deal with violations,

and the Secretary shall do that at one place, because we're worried about multiple interpretations causing confusion.

Now, that is two -- those are two very different ways of approaching a problem. Under this Court's precedents the former, the title IX model confers privately enforceable rights. The latter does not. Why would Congress proceed differently in dealing with educational institutions in those two different contexts? Because of the appreciation that the regulation of student records from kindergarten through graduate school directly implicated pedagogical concerns.

It would have been a radical notion, even in 1974, for Congress to confer individual rights on every student from kindergarten to graduate school in a way that would directly implicate the day-to-day running of schools across the country, and there's no evidence to suggest that that's what Congress had in mind.

The evidence is the opposite. It proceeded gingerly. It said, this is directed to the Secretary. It's directed to policies and practice. Who's going to deal with violations? Mr. Secretary, deal with violations, and do it in one place. Four months after FERPA was enacted, in response to what was called by the sponsors the perplexity and frustration it had caused --

four months -- they added the second sentence to subsection (g) on page 12a of the blue brief, and that said, don't do any of this, Mr. Secretary, in any of the regional offices. The reason? We're afraid of multiple interpretation.

Well, multiple interpretations caused by regional offices, there's a slight problem there, are, after all, answerable to the Secretary. Individual private plaintiffs suing in State and Federal court around the country, any one of these 62 million students covered by the Federal funds requirement, that would give rise to multiple interpretations, and it is implausible to suppose --

QUESTION: They're answerable to us, presumably. We could take care of all of that, right?

(Laughter.)

MR. ROBERTS: Well, it is implausible to suppose that the same Congress that was so worried about multiple interpretations of the law from the regional offices of one Department would have been perfectly content and, in fact, intended to confer the right for every one of 62 million students to go into court in a 1983 action.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roberts.

MR. ROBERTS: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)