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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 :
- - - - -X

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.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

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

6 Mr. Roberts.

7 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

8 ON BEHALF OF THE PETITIONERS

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

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

25 The statute is directed to the Secretary of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 QUESTION: Whereabouts is this, Mr. Roberts?

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

15 QUESTION: Thank you.

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

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

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

25 QUESTION: So he doesn't have to investigate any

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 QUESTION: So all --

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

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

25 MR. ROBERTS: Because --

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

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

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

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

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

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

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

10 And finally, the answer --

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

18 MR. ROBERTS: I think not, because --

19 QUESTION: What is its source?

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

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

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

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

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

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

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

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

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

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

13 MR. ROBERTS: No --

14 QUESTION: What section is the one at issue?

15 MR. ROBERTS: 1232g(b) is the section at issue.
16 Justice Stevens and Justice Breyer were quoting from
17 1232g(a). (a) refers to rights, (b) does not.

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

20 MR. ROBERTS: That's (a), Your Honor. That's
21 1232g(a)(1)(A).

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

24 QUESTION: Oh, (b) is on --

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

1 refer to rights.

2 QUESTION: Okay. Thank you.

3 MR. ROBERTS: Thank you, Your Honor.

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

5 ORAL ARGUMENT OF PATRICIA A. MILLETT

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONERS

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

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

19 QUESTION: Three letters a day, I guess.

20 MS. MILLETT: Hmm?

21 QUESTION: That's three letters a day.

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

24 (Laughter.)

25 MS. MILLETT: They have about 300 phone calls a

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

2 QUESTION: That's 10 phone calls a day.

3 (Laughter.)

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

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

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

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

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

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

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

23 MS. MILLETT: Not not be --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 would not apply?

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

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

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

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

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

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

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

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

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

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

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

4 MS. MILLETT: Yes.

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

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

24 QUESTION: Thank you, Ms. Millett.

25 MS. MILLETT: thank you.

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

2 ORAL ARGUMENT OF BETH S. BRINKMANN

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

1 page --

2 QUESTION: I think she said red brief.

3 QUESTION: 9a of the red brief.

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

5 QUESTION: You're switching briefs on us.

6 MS. BRINKMANN: I'm sorry.

7 (Laughter.)

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

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

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

21 MS. BRINKMANN: Unless.

22 QUESTION: Unless.

23 MS. BRINKMANN: Yes.

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

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

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

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

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

12 MS. BRINKMANN: It's a policy --

13 QUESTION: A policy of releasing records without
14 written consent.

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

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

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

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

6 MS. BRINKMANN: Yes.

7 QUESTION: Unless.

8 MS. BRINKMANN: Yes.

9 QUESTION: Okay.

10 MS. BRINKMANN: So --

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

15 MS. BRINKMANN: Absolutely.

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

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

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

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

2 QUESTION: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: If I may --

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

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

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

1 the individuals who they're according the rights to.

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

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

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

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

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

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

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

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

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

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

19 MS. BRINKMANN: Yes.

20 QUESTION: So --

21 MS. BRINKMANN: Yes, but --

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

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

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

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

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

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

15 QUESTION: Ms. Brinkmann --

16 MS. BRINKMANN: -- required there.

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

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

21 QUESTION: In the regulations, okay, fine.

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

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

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

12 Under petitioner's interpretation --

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

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

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

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

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

6 QUESTION: It may not be the ideal remedy. It
7 may not be the best remedy, and one of the anomalies here
8 that wouldn't be present in title IX is working through
9 1983, where you must have a State action pegged. Now,
10 here, it happened that there was a connection with a
11 State, with a State officer. The conversation was between
12 private institutions and State officer, but suppose we
13 have two schools, and one is about to give a record to a
14 newspaper, and the other is about to do the same thing,
15 and one is the State university, and one is the private
16 university.

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

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

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

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

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

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

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

24 QUESTION: Which an overwhelming number of
25 schools do.

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

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

23 MS. BRINKMANN: Absolutely, Your Honor.

24 QUESTION: Isn't that right?

25 MS. BRINKMANN: Absolutely, and --

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

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

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

9 MS. BRINKMANN: With all due respect --

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

13 MS. BRINKMANN: I respectfully disagree.

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

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

18 QUESTION: How so?

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

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

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

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

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

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

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

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

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

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

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

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

20 MS. BRINKMANN: I think --

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

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

1 numbers of phone calls and inquiries about this, but its
2 own interpretation of its role I think is really
3 illustrated by footnote 6 in our brief, which is on page
4 35.

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

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

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

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

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

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

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

11 MS. BRINKMANN: It's -- yes.

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

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

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

25 MS. BRINKMANN: Because the presumption has to

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

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

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

10 QUESTION: Ms. Brink --

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

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

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

1 person allegedly violating the right has done it before?

2 MS. BRINKMANN: Yes, Your Honor.

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

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

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

10 QUESTION: No, no, no.

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

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

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

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

1 I don't know of any --

2 MS. BRINKMANN: This is the fact --

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

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

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

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

21 MS. BRINKMANN: Well, I have to emphasize, our
22 statutory argument about rights is not based solely on the
23 1232g(d) referenced rights. It's based on the, unless
24 there is consent from the parents, and on this
25 particularized consent required, giving parents a copy,

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

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

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

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

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

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

16 QUESTION: Thank you, Ms. Brinkmann.

17 Mr. Roberts, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

19 ON BEHALF OF THE PETITIONERS

20 MR. ROBERTS: Thank you, Your Honor.

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

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

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

13 It would have been a radical notion, even in
14 1974, for Congress to confer individual rights on every
15 student from kindergarten to graduate school in a way that
16 would directly implicate the day-to-day running of schools
17 across the country, and there's no evidence to suggest
18 that that's what Congress had in mind.

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

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

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

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

16 (Laughter.)

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

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Roberts.

25 MR. ROBERTS: Thank you, Your Honor.

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

A		
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