In the Supreme Court of Ohio

STATE OF OHIO, ex rel.	:	Case No. 2019-1433
CABLE NEWS NETWORK, INC., *et al.*,	:	
	:	On Appeal from the
Relators/Appellants,	:	Ohio Court of Appeals,
v.	:	Second Appellate District,
	:	Greene County
BELLBROOK-SUGARCREEK LOCAL SCHOOLS, *et al.*,	:	
	:	Court of Appeals
	:	Case No. 2019CA0047
Respondents/Appellees.		

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL DAVE YOST IN SUPPORT OF THE RELATORS/APPELLANTS

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INTRODUCTION

In August 2019, twenty-four-year-old Connor Betts fired dozens of shots into a seemingly random crowd of people in Dayton, Ohio, killing eight. The police heroically intervened, killing Betts before he could injure anyone else.

In the aftermath of Betts's crime, members of the public understandably wondered whether any signs of Betts's future violence had gone unheeded. In particular, did the Bellbrook-Sugarcreek Local School District, which Betts attended as a child, know anything about Betts's violent propensities? If so, what did the District do about it? In hopes of answering these important questions, several news media outlets—the appellants here, who this brief will call "the Media"—made a public-records request seeking Betts's school records. The District denied the request, citing the Federal Family Education Right to Privacy Act ("FERPA"), 20 U.S.C. §1232g, and its Ohio equivalent, the Ohio Student Privacy Act, R.C. 3319.321. The Media responded by seeking, in the Second District Court of Appeals, a writ of mandamus compelling disclosure. When that court denied the writ, the Media appealed to this Court.

The Court should hold that the Second District erred in denying the writ of mandamus for the reasons outlined in the Media's brief. The Attorney General is filing this *amicus* brief to highlight two specific legal issues that ought to inform the Court's analysis. *First*, the District cannot rely on FERPA to justify its withholding Betts's records, because FERPA protections expire upon the death during adulthood of a former stu-

dent like Betts. *Second*, Ohio's Student Privacy Act, just like FERPA, does not protect the records of former students who die as adults

STATEMENT OF AMICUS INTEREST

Ohio law tasks the Attorney General with helping to ensure transparency in all levels of government. This includes, but is not limited to, the obligation to provide training and guidance to public officials in order to ensure that all are aware of their duties under the Public Records Act. R.C. 109.43. This obligation is directly implicated here, where a public office is violating the Public Records Act in contravention of all training and guidance provided by the Attorney General. This *amicus curiae* brief is offered in accordance with the Attorney General's duties under Ohio law.

STATEMENT OF FACTS

The facts in this case are largely undisputed. The Media asked the District to provide them with the student records of Connor Betts—a now-deceased former student. Complaint ¶¶20–23; Answer ¶10. On August 5, 2019, the District's superintendent denied the request, asserting that the records are protected by FERPA and Ohio's Student Privacy Act. The District further justified its refusal to provide the records by arguing that, although FERPA protections expire upon a student's death, the District had not received documentation of Connor Betts's death. Moreover, the District maintained that protections afforded to student records under Ohio's Student Privacy Act *do not* expire upon death. Complaint ¶24; Answer ¶11.

The Media responded by seeking a writ of mandamus in the Second District Court of Appeals. That court denied the writ; it concluded that the Ohio Student Privacy Act protected Betts's school records, and that those protections did not expire with Betts. *See State ex rel. CNN, Inc. v. Bellbrook-Sugarcreek Local Sch.*, 2019-Ohio-4187, ¶¶16–29 (2d Dist.) ("App.Op."). The Media timely appealed the Second District's decision to this Court.

ARGUMENT

Neither FERPA nor the Ohio Student Privacy Act protects the records of former students who die in adulthood. The Second District erred in holding otherwise.

***Amicus* Attorney General's Proposition of Law 1:**

FERPA does not protect the records of former students who die in adulthood.

FERPA prohibits the "federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002). In the Act's own words:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein …) of students without the written consent of their parents to any individual, agency, or organization, [except as otherwise authorized by statute].

20 U.S.C. §1232g(b)(1). As the text makes clear, the parents of a dependent student may consent to the release of his records. When the student reaches the age of eighteen or

enrolls in a post-secondary school, he alone may give or withhold consent. 20 U.S.C. §1232g(d).

This case presents the question whether FERPA continues to forbid disclosure of a former student's school records after he dies during adulthood. The statute nowhere addresses this matter expressly. Still, FERPA is best understood *not* to limit disclosure of the records of deceased former students.

The "meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *accord State v. Braden*, __ Ohio St.3d __, 2019-Ohio-4204, ¶17; R.C. 1.42. The context here militates against a finding that FERPA protects the school records of former students who die as adults. The most important pieces of context here are the common-law principles governing the time at which privacy interests lapse. "Congress legislates against the background of general common-law principles." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017). And at common law, "[e]xcept for the appropriation of one's name and likeness, an action for invasion of privacy [could] be maintained only by a living individual whose privacy is invaded." Restatement (Second) of Torts, §652I. In other words, the "right of privacy, which protects the right to an individual's self-esteem and dignity, typically ends at death." *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 325 (6th Cir. 2001). It follows that the dead have no privacy interests. No doubt, Congress could have included a clause in FERPA creating a perpetual interest.

But it did not do so. The law can therefore fairly be presumed to incorporate the background principle that the privacy interests die with their holder. Applying that principle here, Connor Betts's privacy interests died with him.

In its decision below, the Second District discounted the relevance of these principles. This "matter," it reasoned, "is not a common law tort action seeking relief on behalf of a deceased person whose privacy has been invaded; it is a request for an extraordinary writ to overcome a deceased person's *statutory* right to consent before his/her educational records are released." App.Op. ¶20. The Second District's reasoning is circular, in that it assumes the answer to the very question the case presents: whether statutory law requires a school to protect the records of a former student who died in adulthood. What the common law has to say about privacy interests can inform the answer to that question. After all, if no one at common law could sue for the violation of a dead person's right to privacy, then it follows that dead people had no privacy interests at common law—at least, they had no privacy interests that the law cared to protect. Congress legislated against that backdrop of that common-law principle, and its failure to alter the principle by expressly giving the dead a privacy right confirms that it left the background rule in place.

Another key piece of statutory context is the statute's manifest purpose. FERPA is designed to "protect the privacy interests of students and their parents." *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002). Once the student turns eighteen or at-

tends a post-secondary institution, FERPA protects the privacy interests of the student alone—the parents lose any right to grant or withhold consent. *See* 20 U.S.C. §1232g(d). If the former student's records are released *after* his death, however, his privacy interests cannot be affected, because he has none. Thus, nothing about FERPA's context suggests that the Act imposes on educational institutions an eternal obligation to protect the records of deceased students.

No doubt, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). But the text of FERPA is silent on when the obligation to protect the privacy of student records lapses. Given that silence, it makes sense to consult the statute's objective purpose (as distinct from the subjective purposes of the legislators who voted for it). *See, e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989). Here, because dead people have no ongoing, legally cognizable privacy interests, the objective purpose of protecting student privacy suggests that FERPA's obligations lapse with the adult death of a former student.

In light of all this, it is perhaps not surprising that the federal agency charged with administering FERPA—the United States Department of Education—has advised that FERPA does not protect the educational records of a deceased student. This conclusion, the Department explained, follows from "FERPA and common law principles."

Department of Education, *Does FERPA protect the education records of students that are deceased*, online at https://tinyurl.com/FERPAanalysis (last visited Dec. 4, 2019). This Court has generally deferred to "an agency's interpretation of a statute which it has a duty to enforce." *State ex rel. Clark v. Great Lakes Construction Company*, 99 Ohio St. 3d 320, 2003-Ohio-3802, ¶10 (2003). And as the foregoing shows, the agency's interpretation is certainly reasonable. But regardless of whether the Department of Education is entitled to "deference," its interpretation at least deserves respectful consideration, given its expertise in administering FERPA. In particular, the Department's analysis confirms that giving FERPA its best reading will not undermine the statutory purpose or otherwise interfere with FERPA's operation.

***Amicus* Attorney General's Proposition of Law 2:**

> *Ohio's Student Privacy Act, R.C. 3319.321, does not provide more protection than FERPA and a deceased student's records are public records subject to disclosure under Ohio's Public Records Act.*

The District's attempt to shield the requested records pursuant to the Ohio Student Privacy Act, R.C. 3319.321, is similarly unavailing. Ohio's Student Privacy Act provides:

> No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school, for purposes other than those outlined in division (C), (E). (G), or (H) of this section, without the written consent of the parent, guardian, or custodian of each such student who is less than eighteen years of age, or without the consent of each such student who is eighteen years of age or older.

R.C. 3319.321(B).

This statute, for the same reasons as FERPA, is inapplicable to the records of former students who die as adults. *First*, the language largely mirrors the language in FERPA: it bars the release of most student records absent consent from the student himself or, if the student is a minor, the student's parents. *Second*, the General Assembly passed R.C. 3319.321 against the backdrop of the same common-law principles that Congress legislated against when it passed FERPA. *See, e.g.*, *Kutnick v. Fischer*, 2004-Ohio-5378, ¶28 (8th Dist. 2004); *Estate of Leach v. Shapiro*, 13 Ohio App. 3d 393, 398 (9th Dist. 1984); *Young v. That Was The Week That Was*, 423 F.2d 265, 265–66 (6th Cir. 1970) (applying Ohio law). *Third*, the law serves the very same purpose as FERPA: it restricts "the release of information about public school pupils." 1987 Ohio Atty. Gen. Ops. No. 1987-37, at 2-255 (citing Am. S.B. No. 367, eff. August 24, 1976). As noted above, that purpose does not justify protecting the school records of former students who die as adults. In sum, if FERPA does not protect the records of former students who die as adults, neither does the Student Privacy Act.

That is especially true given that the General Assembly passed the Student Privacy Act against the backdrop of FERPA itself. The legislature enacted R.C. 3319.321 "to bring the state's public schools into compliance with the Family Educational Right to Privacy Act (FERPA)." *State ex rel. School Choice Ohio v. Cincinnati Public School District*, 147 Ohio St. 3d 256, 2016-Ohio-5026, ¶31 (2016); *see also Summary of 1976 Enact-*

ments, January-July, Ohio Legislative Service Commission, August, 1976, Pg. 87. It thus makes sense to look to FERPA when interpreting the Student Privacy Act. See *Patton v. Solon City Sch. Dist.*, Ct. of Cl. No. 2017-00570-PQ, 2017-Ohio-9415, ¶13 (stating that in the absence of a definition of "personally identifiable information" in R.C. 3319.321 "the court must refer to the related FERPA definition."). Thus, the fact that FERPA permits releasing the records of former students who die in adulthood suggests, by itself, that the Student Privacy Act does the same.

CONCLUSION

The Court should reverse the judgment of the Second District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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