SUPREME COURT OF THE UNITED STATES

No. 01–679

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE, PETITIONERS *v.* JOHN DOE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[June 20, 2002]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The Court's *ratio decidendi* in this case has a "now you see it, now you don't" character. At times, the Court seems to hold that the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 20 U. S. C. §1232g, simply does not create any federal rights, thereby disposing of the case with a negative answer to the question "whether Congress *intended to create a federal right*," *ante*, at 9. This interpretation would explain the Court's studious avoidance of the rights-creating language in the title and the text of the Act. Alternatively, its opinion may be read as accepting the proposition that FERPA does indeed create both parental rights of access to student records and student rights of privacy in such records, but that those federal rights are of a lesser value because Congress did not intend them to be enforceable by their owners. See, *e.g.*, *ante*, at 16 (requiring of respondent "no less and no more" than what is required of plaintiffs attempting to prove that a statute creates an implied right of action). I shall first explain why the statute does, indeed, create federal rights, and then explain why the Court's novel attempt to craft a new category of second-class statutory rights is misguided.

I

Title 20 U. S. C. §1232g, which embodies FERPA in its entirety, includes 10 subsections, which create rights for both students and their parents, and describe the procedures for enforcing and protecting those rights. Subsection (a)(1)(A) accords parents "the right to inspect and review the education records of their children."[1] Subsection (a)(1)(D) provides that a "student or a person applying for admission" may waive "his right of access" to certain confidential statements. Two separate provisions protect students' privacy rights: subsection (a)(2) refers to "the privacy rights of students," and subsection (c) protects "the rights of privacy of students and their families." And subsection (d) provides that after a student has attained the age of 18, "the rights accorded to the parents of the student" shall thereafter be extended to the student. Given such explicit rights-creating language, the title of the statute, which describes "family educational rights," is appropriate: The entire statutory scheme was designed to protect such rights.

Of course, as we have stated previously, a "blanket approach" to determining whether a statute creates rights enforceable under 42 U. S. C. §1983 (1994 ed., Supp. V) is inappropriate. *Blessing* v. *Freestone*, 520 U. S. 329, 344

---

[1] The following portions of 20 U. S. C. §§1232g(a)(1)(A) and (B) identify the parents' right. After stating that no funds shall be made available to an institution that has a policy of denying parents "the right to inspect and review the education records of their children," subsection (a)(1)(A) clarifies that if an education record pertains to more than one student, "the parents of one of such students shall have the right to inspect and review only" the parts pertaining to that student. That subsection then provides that the educational institution "shall establish appropriate procedures" for the granting of parental requests for access within 45 days. *Ibid.* Subsection (a)(1)(B) also refers to the parents' "right to inspect and review the education records" of their children.

(1997). The precise statutory provision at issue in this case is §1232g(b).[2] Although the rights-creating language in this subsection is not as explicit as it is in other parts of the statute, it is clear that, in substance, §1232g(b) formulates an individual right: in respondent's words, the "right of parents to withhold consent and prevent the unauthorized release of education record information by an educational institution . . . that has a policy or practice of releasing such information." Brief for Respondent 11. This provision plainly meets the standards we articulated in *Blessing* for establishing a federal right: It is directed to the benefit of individual students and parents; the provision is binding on States, as it is "couched in mandatory, rather than precatory, terms"; and the right is far from "'vague and amorphous,'" 520 U. S., at 340–341. Indeed, the right at issue is more specific and clear than rights previously found enforceable under §1983 in *Wright* v. *Roanoke Redevelopment and Housing Authority,* 479 U. S. 418 (1987), and *Wilder* v. *Virginia Hospital Assn.,* 496 U. S. 498 (1990), both of which involved plaintiffs' entitlement to "reasonable" amounts of money.[3] As such, the federal right created by §1232g(b) is "presumptively enforceable by

---

[2] In relevant part, §1232g(b)(2) states that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information . . . unless" either "there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents," or a court order dictating release of information.

[3] In *Wright*, the right claimed was "that a 'reasonable' amount for utilities be included in rent that a [public housing authority] was allowed to charge." 479 U. S., at 430. In *Wilder*, health care providers asserted the right to "reasonable and adequate rates" from "States participating in the Medicaid program." 496 U. S., at 512.

§1983," *ante*, at 10.

The Court claims that §1232g(b), because it references a "policy or practice," has an aggregate focus and thus cannot qualify as an individual right. See *ante*, at 12. But §1232g(b) does not simply ban an institution from having a policy or practice—which would be a more systemic requirement. Rather, it permits a policy or practice of releasing information, *so long as* "there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents." 20 U. S. C. §1232g(b)(2)(A). The provision speaks of the individual "student," not students generally. In light of FERPA's stated purpose to "protect such individuals' rights to privacy by limiting the transferability of their records without their consent," 120 Cong. Rec. 39862 (1974) (statement of Sen. Buckley), the individual focus of §1232g(b) is manifest. Moreover, simply because a "pattern or practice" is a precondition to individual relief does not mean that the right asserted is not an individually enforceable right. Cf. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690–695 (1978) (authorizing municipal liability under §1983 when a municipality's "policy or custom" has caused the violation of an individual's federal rights).

Although §1232g(b) alone provides strong evidence that an individual federal right has been created, this conclusion is bolstered by viewing the provision in the overall context of FERPA. Not once in its opinion does the Court acknowledge the substantial number of references to "rights" in the FERPA provisions surrounding §1232g(b), even though our past §1983 cases have made clear that a given statutory provision's meaning is to be discerned "in

light of the entire legislative enactment," *Suter* v. *Artist M.,* 503 U. S. 347, 357 (1992).[4] Rather, ignoring these provisions, the Court asserts that FERPA—not just §1232g(b)—"entirely lack[s]" rights-creating language, *ante*, at 11. The Court also claims that "we have never before held . . . that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." *Ante*, at 4. In making this claim, the Court contrasts FERPA's "[n]o funds shall be made available" language with "individually focused terminology" characteristic of federal antidiscrimination statutes, such as "no person shall be subjected to discrimination," *ante*, at 11. But the sort of rights-creating language idealized by the Court has *never* been present in our §1983 cases; rather, such language ordinarily gives rise to an implied cause of action. See *Cannon* v. *University of Chicago,* 441 U. S. 677, 690, n. 13. (1979). None of our four most recent cases involving whether a Spending Clause statute created rights enforceable under §1983—*Wright*, *Wilder*, *Suter*, and *Blessing*—involved the sort of "no person shall" rights-creating language envisioned by the Court. And in two of those cases—*Wright* and *Wilder*—we concluded that individual rights enforceable under §1983 existed. See n. 3, *supra*.

Although a "presumptively enforceable" right, *ante*, at 10, has been created by §1232g(b), one final question

---

[4]The Court correctly states that "rights" language alone does not necessarily create rights enforceable under §1983, *ante*, at 14, n. 7 (quoting *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981)), but such language is certainly relevant to whether a statute creates rights, see *ante*, at 12 (describing "'rights-creating' language" as "critical to showing the requisite congressional intent to create new rights"). Moreover, in *Pennhurst*, the Court treated the "rights" language as the only arguable evidence that the statute created rights; here, the "'overall' or 'specific' purposes of the Act," 451 U. S., at 18, also show an intent to create individual rights. See *supra*, at 4 (discussing FERPA's "stated purpose").

remains. As our cases recognize, Congress can rebut the presumption of enforcement under §1983 either "expressly, by forbidding recourse to §1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement [actions]." *Blessing*, 520 U. S., at 341. FERPA has not explicitly foreclosed enforcement under §1983. The only question, then, is whether the administrative enforcement mechanisms provided by the statute are "comprehensive" and "incompatible" with §1983 actions. As the Court explains, *ante*, at 14–15, FERPA authorizes the establishment of an administrative enforcement framework, and the Secretary of Education has created the Family Policy Compliance Office (FPCO) to "deal with violations" of the Act, 20 U. S. C. §1232g(f). FPCO accepts complaints from the public concerning alleged FERPA violations and, if it so chooses, may follow up on such a complaint by informing institutions of the steps they must take to comply with FERPA, see 34 CFR §§99.63–99.67 (2001), and, in exceptional cases, by administrative adjudication against noncomplying institutions, see 20 U. S. C. §1234. These administrative avenues fall far short of what is necessary to overcome the presumption of enforceability. We have only found a comprehensive administrative scheme precluding enforceability under §1983 in two of our past cases—*Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.,* 453 U. S. 1 (1981), and *Smith* v. *Robinson,* 468 U. S. 992 (1984). In *Sea Clammers*, the relevant statute not only had "unusually elaborate enforcement procedures," but it also permitted private citizens to bring enforcement actions in court. 453 U. S., at 13–14. In *Smith*, the statute at issue provided for "carefully tailored" administrative proceedings followed by federal judicial review. 468 U. S., at 1009. In contrast, FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it

leaves to administrative discretion the decision whether to follow up on individual complaints. As we said in *Blessing*, 520 U. S., at 348, the enforcement scheme here is "far more limited than those in *Sea Clammers* and *Smith*," and thus does not preclude enforcement under §1983.[5]

II

Since FERPA was enacted in 1974, all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under §1983.[6] Nearly all other federal and state courts reaching the issue agree with these Circuits.[7] Congress

---

[5] The Court does not test FERPA's administrative scheme against the "comprehensive enforcement scheme," *Blessing*, 520 U. S., at 341, standard for rebutting the presumptive enforceability of a federal right, *ante*, at 15, n. 8, because it concludes that there is no federal right to trigger this additional analysis. Yet, at the same time, the Court imports "enforcement scheme" considerations into the initial question whether the statute creates a presumptively enforceable right. See *ante*, at 14 ("Our conclusion that FERPA's nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing FERPA violations"). Folding such considerations into the rights question renders the rebuttal inquiry superfluous. Moreover, the Court's approach is inconsistent with our past cases, which have kept separate the inquiries of whether there is a right and whether an enforcement scheme rebuts presumptive enforceability. Thus, the Court's discussion of the schemes in *Wright* v. *Roanoke Redevelopment and Housing Authority,* 479 U. S. 418 (1987), and *Wilder* v. *Virginia Hospital Assn.,* 496 U. S. 498 (1990), is inapposite, see *ante*, at 14, because neither of those cases considered the existence of an enforcement scheme relevant to whether a federal right had been created in the first instance.

[6] See *Falvo* v. *Owasso Independent School Dist. No. I–011*, 233 F. 3d 1203, 1210 (CA10 2000), rev'd on other grounds, 534 U. S. 426 (2002); *Tarka* v. *Cunningham*, 917 F. 2d 890, 891 (CA5 1990); *Brown* v. *Oneonta*, 106 F. 3d 1124, 1131 (CA2 1997) (citing *Fay* v. *South Colonie Central School Dist.*, 802 F. 2d 21, 33 (CA2 1986)). The Court does not cite—nor can it—a circuit or state high court opinion to the contrary. See *ante*, at 3, n. 2.

[7] To justify its statement that courts are "divided," *ante*, at 3, con-

has not overruled these decisions by amending FERPA to expressly preclude recourse to §1983. And yet, the Court departs from over a quarter century of settled law in concluding that FERPA creates no enforceable rights. Perhaps more pernicious than its disturbing of the settled status of FERPA rights, though, is the Court's novel use of our implied right of action cases in determining whether a federal right exists for §1983 purposes.

In my analysis of whether §1232g(b) creates a right for §1983 purposes, I have assumed the Court's forthrightness in stating that the question presented is "whether Congress *intended to create a federal right*," *ante*, at 9, and that "[p]laintiffs suing under §1983 do not have the burden of showing an intent to create a private remedy," *ibid.* Rather than proceeding with a straightforward analysis under these principles, however, the Court has undermined both of these assertions by needlessly borrowing from cases involving implied rights of action—cases which place a more exacting standard on plaintiffs. See *ante*, at 8–11. By using these cases, the Court now appears to require a heightened showing from §1983 plaintiffs: "[I]f Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Ante*, at 16.

---

cerning FERPA's enforceability under §1983, the Court cites only *two* cases disagreeing with the overwhelming majority position of courts reaching the issue. See *ante*, at 3, n. 2 (citing *Gundlach* v. *Reinstein*, 924 F. Supp. 684 (ED Pa. 1996), aff'd, 114 F. 3d 1172 (CA3 1997), and *Meury* v. *Eagle-Union Community School Corp.*, 714 N. E. 2d 233, 239 (Ind. Ct. App. 1999)). And *Gundlach* did not even squarely hold that FERPA rights are unenforceable; rather, the court merely rejected a claim under §1232 in which the plaintiff "failed to allege that Defendants released the alleged educational records pursuant to university policy," 924 F. Supp., at 692.

A requirement that Congress intend a "right to support a cause of action," *ante*, at 8, as opposed to simply the creation of an individual federal right, makes sense in the implied right of action context. As we have explained, our implied right of action cases "reflec[t] a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder,* 496 U. S., at 509, n. 9. However, imposing the implied right of action framework upon the §1983 inquiry, see *ante*, at 8–11, is not necessary: The separation-of-powers concerns present in the implied right of action context "are not present in a §1983 case," because Congress expressly authorized private suits in §1983 itself. *Wilder*, 496 U. S., at 509, n. 9. Nor is it consistent with our precedent, which has always treated the implied right of action and §1983 inquiries as separate. See, *e.g.*, *ibid.*[8]

It has been long recognized that the pertinent question in determining whether a statute provides a basis for a §1983 suit is whether Congress intended to create individual rights binding on States—as opposed to mere "precatory terms" that do not "unambiguously" create state obligations, *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 17, 18 (1981), or "generalized," "*systemwide*" duties on States, *Blessing*, 520 U. S., at 343; *Suter*, 503 U. S., at 363. What has never before been required is congressional intent specifically to make the right *enforceable under §1983.* Yet that is exactly what the Court, at points, appears to require by relying on implied right of action cases: the Court now asks whether "Congress none-

---

[8] Indeed, endorsing such a framework *sub silentio* overrules cases such as *Wright* and *Wilder.* In those cases we concluded that the statutes at issue created rights enforceable under §1983, but the statutes did not "clear[ly] and unambiguous[ly]," *ante*, at 14, intend *enforceability under §1983.*

theless intended private suits to be brought before thousands of federal- and state-court judges," *ante*, at 16.

If it were true, as the Court claims, that the implied right of action and §1983 inquiries neatly "overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*," *ante*, at 8–9, then I would have less trouble referencing implied right of action precedent to determine whether a federal right exists. Contrary to the Court's suggestion, however, our implied right of action cases do not necessarily cleanly separate out the "right" question from the "cause of action" question. For example, in the discussion of rights-creating language in *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979), which the Court characterizes as pertaining only to whether there is a right, *ante*, at 11–12, *Cannon*'s reasoning is explicitly based on whether there is "reason to infer a private remedy," 441 U. S., at 691, and the "propriety of implication of a cause of action," *id.*, at 690, n. 13. Because *Cannon* and other implied right of action cases do not clearly distinguish the questions of "right" and "cause of action," it is inappropriate to use these cases to determine whether a statute creates rights enforceable under §1983.

The Court, however, asserts that it has not imported the entire implied right of action inquiry into the §1983 context, explaining that while §1983 plaintiffs share with implied right of action plaintiffs the burden of establishing a federal right, §1983 plaintiffs "do not have the burden of showing an intent to create a private remedy because §1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Ante*, at 9. If the Court has not adopted such a requirement in the §1983 context—which it purports not to have done—then there should be no difference between the Court's "new" approach to discerning a federal right in the §1983 context and the test we have "traditionally" used, as articulated in *Blessing:* whether

Congress intended to benefit individual plaintiffs, whether the right asserted is not "vague and amorphous," and whether Congress has placed a binding obligation on the State with respect to the right asserted. 520 U. S., at 340–341. Indeed, the Court's analysis, in part, closely tracks *Blessing*'s factors, as it examines the statute's language, and the asserted right's individual versus systematic thrust. See *ante*, at 11–12.

The Court's opinion in other places, however, appears to require more of plaintiffs. By defining the §1983 plaintiff's burden concerning "whether a statute confers any right at all," *ante*, at 10, as whether "Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges," *ante*, at 16, the Court has collapsed the ostensible two parts of the implied right of action test ("is there a right" and "is it enforceable") into one. As a result, and despite its statement to the contrary, *ante*, at 9, the Court seems to place the unwarranted "burden of showing an intent to create a private remedy," *ibid.*, on §1983 plaintiffs. Moreover, by circularly defining a right actionable under §1983 as, in essence, "a right which Congress intended to make enforceable," the Court has eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under §1983. Under this reading of the Court's opinion, a right under *Blessing* is second class compared to a right whose enforcement Congress has clearly intended. Creating such a hierarchy of rights is not only novel, but it blurs the long-recognized distinction between rights and remedies. And it does nothing to clarify our §1983 jurisprudence.

Accordingly, I respectfully dissent.