No. 19-600

IN THE
Supreme Court of the United States

JON KRAKAUER,

Petitioner,

v.

STATE OF MONTANA, BY AND THROUGH ITS COMMISSIONER OF HIGHER EDUCATION CLAYTON T. CHRISTIAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a decision of the Montana Supreme Court construing two provisions of the Montana Constitution presents a federal question.

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INTRODUCTION

Petitioner's long-running quest to obtain information regarding a single University of Montana student presented the Montana Supreme Court with several possible roads to resolution. Because the Commissioner of Higher Education argued that both state and federal law independently preclude him from releasing any responsive records, the court might have resolved the case on either ground. Indeed, in its first opinion in this case, the Montana Supreme Court acknowledged the possibility that either federal or state law might decide this case against Petitioner, and remanded for the trial court to consider both. After remand, however, the Montana Supreme Court found it necessary to take only

one road: It determined that the student's right to privacy under the Montana Constitution outweighed Petitioner's right to examine the documents, which likewise springs from the Montana Constitution. That state-law determination required dismissal of Petitioner's case.

Petitioner now asks this Court to proceed down the road not taken below. Mischaracterizing the basis for the Montana Supreme Court's decision, he suggests that the court *actually* relied on federal law to dismiss his suit, and that it decided the federal question in a way that conflicts with the precedent of both this Court and that of other States.

Every step of Petitioner's argument is wrong. The Montana Supreme Court's ultimate basis for resolving this case did not turn on federal law. Although the decision under review mentioned a federal statute a handful of times, those mentions were exclusively in service of factual questions that did not depend on any contested interpretation of the law. This Court therefore lacks jurisdiction to hear this case. Even if those passing references to federal law could somehow confer jurisdiction on this Court, the Montana Supreme Court's discussion of federal law is correct and accords fully with the precedent of this Court and other States. And, on top of everything else, the ultimate outcome of the case depended on a highly unique set of facts unlikely to recur.

The Petition should be denied.

STATEMENT

1. As a large, public school, the University of Montana is a repository for many records regarding its students, faculty, and staff. Multiple state laws govern how the University safeguards such records.

Most relevant to this case, the University must not violate the Montana Constitution's provision that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. Several state statutes reinforce and supplement the University's privacy obligations regarding student records. *See, e.g.*, Mont. Code Ann. § 20-25-515 (barring "[r]elease of student records" unless the school has obtained "[a] student's written permission" or received "a subpoena issued by a court or tribunal of competent jurisdiction"); *id.* § 20-25-512 (universities "may not require a student to sign any contract that would waive the student's right to privacy").

The University, together with other schools in the state system, also receives millions of dollars in federal funding each year. As a recipient of such funds, it must comply with the provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA") and its implementing regulations. Pet. App. 54a; *see also* 20 U.S.C. § 1232g(a), (b). Those provisions place additional restrictions on whether and how federally-funded institutions may release student records. *See* 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31.

2. Petitioner is an author who has written a book about the University of Montana's handling of sexual assault cases. As part of his investigation, Petitioner requested certain disciplinary records the University may hold regarding a particular student's alleged assault of another student. Pet. App. 19a. Petitioner's request included the student's "legal name," rather than "an anonymous pseudonym." *Id.* at 19a n.6. The Commissioner of Higher Education, who is

the head of the Montana University System, denied the request, citing prohibitions on the release of records in both "state and federal law." *Id.* at 3a.

Unsatisfied, Petitioner filed suit against the Commissioner in the First Judicial District Court of Montana asserting that he was entitled to the records under the "right-to-know" provision of the Montana Constitution, which confers a "right to examine documents * * * of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II, § 9.

The district court agreed with Petitioner. The court began by finding that neither FERPA nor Montana's statutory provisions governing student records posed an obstacle to release. Pet. App. 88a-90a. Then, balancing the Montana Constitution's right-to-know provision against its right to individual privacy, the court determined "that the merits of public disclosure outweigh the individual privacy rights of the student in this case." *Id.* at 93a.

3. The Commissioner appealed, and, in its first of two opinions in this case (*Krakauer I*), the Supreme Court of Montana reversed. After determining that Petitioner, as an out-of-state resident, had standing to pursue a claim under the Montana Constitution's right-to-know provision, *id.* at 52a, the court turned to whether either federal or state law nevertheless precluded release of the records in question.

The court began with FERPA. Initially, it considered whether the kinds of disciplinary records sought by Petitioner fall within the statute's definition of protected "education records." *Id.* at 53a-54a. To

answer that question, it looked first to the statutory text, which includes any "records" or "files" that "(i) contain information *directly related to a student*; and (ii) are maintained by an educational agency or institution." *Id.* at 54a (quoting 20 U.S.C. § 1232g(a)(4)(A)). Although the court had once "noted that several jurisdictions" formerly "interpreted the term 'education records' to exclude disciplinary records," it explained that the U.S. Department of Education has subsequently issued regulations "confirm[ing] that disciplinary records fall within the purview of the Act." *Id.* at 54a-55a (citing 34 C.F.R. § 99.31(a)(13), (14)). In light of that definition, the court held that the category of "records" sought by Petitioner "fall[s] within the restrictions of FERPA." *Id.* at 57a.

The court then rejected Petitioner's argument that FERPA imposed no obligations whatsoever on a federally-funded institution. *Id.* at 53a (citing Petitioner's claim that "FERPA 'simply does not prohibit anything'"). That position, the court explained, was "delusive." *Id.* at 55a. As the court put it, "FERPA is more than mere words in the wind": "By signing the Program Participation Agreement [to receive federal funding], the University acknowledged the potential consequence of loss of federal funding in the event that it violated FERPA." *Id.* at 55a-56a. Thus, even though FERPA may not give any particular student a right to enforce its provisions, "the financial risk it imposes upon [the Montana University System] for violation of the statute is a real one." *Id.* at 56a.

But the court also recognized that FERPA is not an absolute prohibition on releasing records. The Act "contains several * * * exceptions that permit an institution to release educational records" without a

student's consent. *Id.* at 57a. The court identified two exceptions in particular that might apply to the records requested by Petitioner: an exception for when "the institution determines as a result of [a] disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to [a] crime or offense," *id.* at 58a (quoting 20 U.S.C. § 1232g(b)(6)(B)), and an exception for when "'such information is furnished in compliance with judicial order,'" so long as the court is "acting properly within [its] jurisdiction," *id.* at 59a (quoting 20 U.S.C. § 1232g(b)(2)(B)). Surveying the record before it, the court declined to resolve whether these exceptions applied to Petitioner's request. Instead, the court "remand[ed]" for the district court to "conduct[] an *in camera* review of the records" and consider whether any FERPA exceptions applied. *Id.* at 58a-59a.

Turning to state law, the court examined the "constitutional balancing process" required by the Montana Constitution's right-to-know and individual privacy provisions. *Id.* at 63a. The court noted that both "the national and state legislatures have taken the affirmative action of enacting legislation establishing the privacy interests of students in their records." *Id.* at 64a. The court held that, given these "unique privacy protection[s]," a court balancing a student's privacy interest against the right to know must factor an "enhanced privacy interest into the balancing test." *Id.* Finding that the district court had not done so, the Montana Supreme Court also

instructed the trial court to redo the state-law constitutional balancing test on remand. *Id.* at 69a.[1]

4. On remand, the district court performed an "*in camera* analysis of the documents at issue" and revisited the legal issues in light of the Montana Supreme Court's ruling. *Id.* at 38a. But even considering the "enhanced expectation of privacy" afforded the student under Montana law, the court still "conclude[d]," based on the publicity surrounding the case, that the student had no state-law "expectation of privacy in the records at issue here." *Id.* Because the court thought the student had no privacy interest at all, the court declined to consider whether any privacy interest could be adequately protected by redacting the records in question, yet nevertheless ordered all identifying information redacted. *Id.* at 39a-40a. The court also thought there was no need to balance the student's privacy interest against the right to know. *Id.* at 40a. "Nonetheless, the [c]ourt" proceeded to "apply the constitutional analysis weighing the public's right to know and [the student's] expectation of privacy," *id.*, and concluded that the scales tipped in Petitioner's favor. *Id.* at 42a. And, reading the Montana Supreme Court's opinion in *Krakauer I* to authorize relying on FERPA's judicial-order exception, the district court ordered the Commissioner to turn over the redacted records. *Id.* at 36a, 43a.

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[1] The court also held that the Montana state statute governing student records had a judicial-record exception, but that the district court could not rely on it without properly balancing "a student's right to privacy in his or her records * * * against the public's right to know." Pet. App. 61a.

5. The Commissioner again appealed, and the Montana Supreme Court again reversed (*Krakauer II*). This time, however, the court did not consider whether FERPA or state statutory law barred release of the records in question. Instead, its analysis began and ended with the dueling right-to-know and individual-privacy provisions of the Montana Constitution.

The court framed the issues for decision by restating the two relevant state constitutional provisions and observing that those "rights exist in tension," requiring the court to "balance the competing constitutional rights when they conflict." *Id.* at 5a-6a. The first step in that balancing test required asking "whether an individual privacy interest exists" under Article II, Section 10 of the Montana Constitution by examining "(1) whether the person involved has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable." *Id.* at 6a-7a (internal quotation marks omitted).

As to the subjective or actual expectation of privacy, the court stated that, under Montana law, that this is "a question of fact informed by notice." *Id.* at 9a. "If the person had notice his records were subject to public disclosure or the public entity already made them publicly available," the court explained, "then he cannot have an actual or subjective expectation of privacy." *Id.* But notice of a "potential" disclosure would not defeat a privacy interest; that occurs "only when [the person] knows the public entity holding [the] records may freely disclose them to the public." *Id.* at 11a n.3.

The court then looked to a series of legal provisions addressing the general subject of educational records. It explained that those statutes gave "notice" of only "very limited circumstances upon which a university may disclose their educational records to third parties, including the public at-large." *Id.* at 9a. It explained that both the Montana Code and FERPA "limit[] the non-consensual public release of educational records to a few exceptions." *Id.* at 9a-10a. With respect to FERPA specifically, it identified the same two exceptions it had mentioned in its first decision—for students found in a school disciplinary proceeding to have committed certain criminal offenses and for release pursuant to a court order. *Id.* In a footnote, the court "noted the possibility that" the disciplinary-violation exception "applied" to this case, but since the district court had "not consider[ed] it on remand," the Montana Supreme Court did "not address it on appeal." *Id.* at 10a n.1. The court also looked to the "University of Montana Student Conduct Code," which "guarantees all students a right to confidentiality with respect to disciplinary proceedings." *Id.* at 10a.

"Taken together," the court found, the existence of "these statutes and policies indicate[d]" the student "did not have notice his educational records would be subject to public disclosure"—meaning, again, they did not establish that the school could "freely disclose them to the public." *Id.* at 10a-11a & n.3. "Quite the opposite, the statutes and policies provide students like Doe with steadfast assurances that the university system will affirmatively protect their records from disclosure," except under very limited circumstances. *Id.* at 10a-11a. The court also rejected the notion that the publicity surrounding the case "in

any way diminish[ed] * * * a student's actual or subjective expectation of privacy in his records." *Id.* at 13a. Thus, considering "FERPA, [the Montana Code], the University's Student Conduct Code, and the facts of this case," the court held that under the state's Constitution the student "demonstrated he had an actual expectation of privacy in his educational records, and he did not have notice of possible public disclosure of those records." *Id.* at 15a. All the same considerations led to the conclusion that "society is willing to recognize [the student's] privacy expectation [a]s reasonable." *Id.* at 17a. Thus, the court concluded, the district court had erred by finding that the student lacked "a privacy interest in his educational records" under Montana law. *Id.* at 18a.

The court then considered whether the student's state-constitutional privacy interest would be adequately served by simply redacting the records. *Id.* "Based on" the nature of the student's "educational records and the District Court record," the court found that redaction could not serve that interest in this case because Petitioner's request had publicly singled out and named the particular student in question. *Id.* at 19a. Petitioner had done so even though he "could have requested information" in a more "general[]" fashion that would, "under the appropriate circumstances," have enabled the Commissioner to "respond[] by supplying the appropriate records" in redacted form. *Id.* at 19a-20a. Instead, because Petitioner had "requested information pertaining to one specific student," if he received redacted records "there would be no doubt to whom the records pertained." *Id*. at 20a. Therefore, redac-

tion would be futile in protecting the student's privacy interest under the Montana Constitution. *Id.*[2]

Finally, the court examined whether the student's "Article II, Section 10, right of privacy in his records" outweighed "[t]he public's Article II, Section 9, right to know the information contained in [the student's] records." *Id.* at 22a. Finding both interests "weighty," *id.*—and emphasizing that "whether disclosure is warranted will depend on the facts of each case," *id.* at 24a—the court held that the student's "enhance[d] * * * privacy interest in his educational records" won out, *id.* at 22a. Although the court recognized the enhanced publicity surrounding the case, the court determined that "under the law," the student was "entitled to be treated the same as any other student," and his privacy rights could not be "subject to the whim and caprice of public sentiment." *Id.* at 26a. The court therefore ordered that Petitioner's suit be "dismiss[ed] * * * with prejudice." *Id.* at 27a.[3]

Petitioner sought rehearing, which the Montana Supreme Court denied. *Id.* at 107a-109a. This petition followed.

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[2] In a footnote, the court observed that FERPA worked in much the same way—federal regulations would "prohibit universities from releasing a student's information, even redacted, when a requestor specifically asks for a student's information by name." Pet. App. 20a n.7 (citing 34 C.F.R. § 99.3).

[3] Justice Rice dissented on the redaction issue. Pet. App. 30a-31a. He thought it was "error" for the court to "reach[] an all-or-nothing result" based on "the wording of Krakauer's request for the records." *Id.*

REASONS FOR DENYING THE PETITION

Shorn of all the relabeling, this case, as decided by the Montana Supreme Court, involves exclusively a question of state law: whether Petitioner's state constitutional right to examine public records overcomes a student's state constitutional right to privacy. The Montana Supreme Court answered that question in the negative, and that court has the final word on that state-law issue. Although the court took note of certain FERPA provisions when examining factual issues relevant to this state-law question, it did not purport to interpret the statute and expressly disclaimed any decision about whether FERPA applied to the particular records in this case. There is therefore nothing for this Court to review, and this Court lacks jurisdiction over the case.

Even if the Montana Supreme Court's passing references to FERPA conferred jurisdiction on this Court, there would be no reason to exercise that jurisdiction through certiorari review. The decision below fully accords with this Court's limited exposition of FERPA, and does not conflict with any decision from another State. Finally, the decision below is correct and, as the Montana Supreme Court emphasized, rests on "the particular facts of this case." Pet. App. 24a. The Petition should be denied.

I. THE DECISION BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Petitioner asks this Court to decide whether "FERPA confer[s] an individual right to privacy sufficient to block a court from ordering the release of personally identifiable information." Pet. i. But that question would make no difference to the out-

come of this case: The Montana Supreme Court's sole basis for dismissing Petitioner's suit was its conclusion that the student's right to privacy under the Montana Constitution was not outweighed by Petitioner's right, also conferred by the Montana Constitution, to examine public records. No disputed interpretation of federal law played any role in that decision. Accordingly, this case is an inappropriate vehicle to review the question presented.

1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Pet. 1. That statute, however, limits review of state-court judgments to those involving a federal question. Under the statute, where "a state court judgment * * * rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision," "[t]his Court lacks jurisdiction." *Foster* v. *Chatman*, 136 S. Ct. 1737, 1745 (2016) (internal quotation marks omitted).

This rule also rests on constitutional principles. It flows in part from the prohibition on rendering "an advisory opinion," since "if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than an" impermissible "advisory opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1041-42 (1983) (internal quotation marks omitted). The rule is also grounded in federalism. "It is fundamental that state courts be left free and unfettered * * * in interpreting their state constitutions." *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). To be sure, where the state-law issue is "interwoven with the federal law," this Court retains jurisdiction. *Michigan*, 463 U.S. at 1040-41. But where "it is * * * clear from the opinion itself that the

state court relied upon an adequate and independent state ground," there is simply nothing for this Court to review. *Id.* at 1042.

That is precisely the situation the Court confronts here. The Montana Supreme Court's decision was entirely about resolving the "tension" between two different provisions of the State's Constitution: the right to privacy and the right to know. Pet. App. 6a. There is no question that the court's resolution of that issue was "adequate" to resolve the case: Because state law barred the Commissioner from releasing the records, there was no need for the court to decide whether federal law created a separate and independent barrier as well. *See id.* at 10a n.1, 26a-27a.

The Montana Supreme Court's analysis of the state Constitution was also independent of federal law. Neither of the Montana constitutional provisions at issue draws on federal law or precedent for guidance. *Cf. Maryland* v. *Garrison*, 480 U.S. 79, 83-84 (1987) (taking jurisdiction where a state constitutional provision was "construed *in pari materia* with the [federal] Fourth Amendment"). Indeed, the Montana Supreme Court has long held "that the Montana Constitution provides *more* privacy protection than the Federal Constitution." *Missoulian* v. *Bd. of Regents of Higher Ed.*, 675 P.2d 962, 967 (Mont. 1984) (emphasis added). And the right-to-know provision has no analogue in the federal Constitution. *See Associated Press* v. *Bd. of Public Ed.*, 804 P.2d 376, 379 (Mont. 1991) (observing "that this provision is unique").

Embedded within these questions of state law were a series of factual questions: whether the student

"had a subjective or actual expectation of privacy" based on "notice" that the school might "freely disclose" his records; "whether society is willing to recognize that expectation as reasonable"; and whether that privacy interest outweighed Petitioner's right to the view the requested records. Pet. App. 7a, 9a, 11a n.3, 20a (internal quotation marks omitted); *see also Raap* v. *Bd. of Trs., Wolf Point Sch. Dist.*, 414 P.3d 788, 793 (Mont. 2018) (explaining that "the questions of whether an individual has a subjective expectation in non-disclosure * * * and whether that expectation is objectively reasonable in society are mixed questions of fact and law under the totality of the circumstances of each case"); Pet. App. 24a (noting that whether a student's privacy interest has been overcome "depend[s] on the facts of each case").

In assessing those *factual* questions, the court mentioned FERPA, along with multiple other provisions of state law and university policy. But, critically, the court never purported to decide whether FERPA was "sufficient to block a court from ordering the release of" the requested records, as Petitioner asserts. Pet. i. All that mattered to the court's decision was that FERPA exists and is generally concerned with educational records. Pet. App. 9a-11a, 17a, 22a.[4] This special legislative solicitude for the general subject matter of educational records was one factor in the court's holding that Petitioner had

[4] To the extent the decision rested on the Montana Supreme Court's earlier holding that, as a general matter, disciplinary records can qualify as covered "education records," Pet. App. 55a, Petitioner has not challenged that determination.

an enhanced privacy interest in this case. *See id.* at 8a (noting a "legislatively-cloaked, enhanced privacy protection" based on "federal and state statutes" that "affirmatively establish heightened privacy interests for students in * * * educational records" generally).

Thus, contrary to Petitioner's strenuous claims, the court never resolved whether FERPA would actually block release of these particular records: That question remained open after the Montana Supreme Court's first decision, *id.* at 58a-59a, and the court had no need to take it up in its second decision in light of its conclusion that Montana law alone blocked release, *id.* at 10a n.1.[5] The Petition admits as much when it concedes that the court below "did not apply [or] analyze [FERPA's exceptions], or discuss why they did not apply to the information and records sought by" Petitioner. Pet. 17. The reason for that omission is plain: FERPA's applicability to these particular records simply did not matter to the outcome of this case. Whether or not federal law permits disclosure, the Montana Supreme Court concluded that Montana law forbids it.

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[5] Petitioner highlights (at 2) the Montana Supreme Court's statement in its first opinion that "had the Commissioner released the documents * * * using the specific student's name, he would have violated the statute." Pet. App. 57a. In context, it is clear that this language refers only to whether the records in question are generally the type covered by FERPA—a proposition, again, that Petitioner never contests—*not* whether the Act ultimately barred release. Indeed, the court had yet to even survey the possible exceptions, *see id.* at 57a-59a, and it later remanded the case to determine whether those exceptions applied, *id.* at 69a.

2. The mere fact that the Montana Supreme Court referenced the existence of FERPA in its decision does not suffice to trigger this Court's jurisdiction. To lose its "independent" status, the state-law ground for decision must depend on "the merits of the federal claim." *Foster*, 136 S. Ct. at 1745 (internal quotation marks omitted). Here, it obviously did not, since the Court did not even *decide* the merits of the federal claim. There is likewise no indication that the court below felt "compelled" to reach its decision by federal law. *Kentucky* v. *Stincer*, 482 U.S. 730, 735 n.7 (1987). It never suggested, for example, that there was a particularly thorny federal question to avoid, or that FERPA commanded its interpretation of the State's Constitution.

Petitioner seizes on footnote 7 of the court's opinion below to claim that the court "interpreted FERPA" in some meaningful way. Pet. 16. The fact that the reference is wholly contained in a footnote is the first indication Petitioner is wrong: Courts rarely bury dispositive holdings of federal law in footnotes. And checking the cited quotation confirms that Petitioner is referring to pure dictum: The footnote is just an aside where the court notes that FERPA's treatment of requests involving a named student parallels its own rule grounded in the Montana Constitution. *See* Pet. App. 20a n.7. That observation did no work in the decision; the result would have been the same without the footnote. In short, the footnote played no analytical role in the Court's reasoning and offers Petitioner no jurisdictional hook.

Nor does it make any difference that *Krakauer I* interpreted FERPA by concluding that requested records qualify as "education records" covered by the Act. On remand, that federal issue dropped out of

the case. This Court has recognized that when a federal issue does "not survive the remand" because the case is ultimately resolved on non-federal grounds, that "foreclos[es] the federal issue" and deprives this Court of jurisdiction. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482 (1975). This is just such a case. The Petition should be denied because there is no federal question left to review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH *GONZAGA UNIVERSITY* V. *DOE*.

Assuming that the Montana Supreme Court's minimal references to FERPA could support this Court's jurisdiction, Petitioner still falls woefully short of making out a case for certiorari. His lead claim is that is that the decision below conflicts with *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). Even a cursory look at that decision shows that argument is wrong.

Gonzaga was a suit purportedly brought under 42 U.S.C. § 1983 by a former student of Gonzaga University who sought damages because one of the school's employees had allegedly disclosed adverse information about him to potential employers in violation of FERPA. 536 U.S. at 277. The question the Court confronted in that case was "whether a student may sue a private university for damages" under Section 1983 "to enforce provisions of" FERPA. *Id.* at 276. The answer, this Court held, was no: Because FERPA was "spending legislation" that was not "phrased in terms of the persons benefitted," the Court held that there was "no indication that Congress intend[ed] to create new individual rights" and therefore the plaintiff could not bring a suit under

Section 1983. *Id.* at 279, 284, 286 (internal quotation marks omitted).

Petitioner extrapolates from that conclusion a very different one indeed: that "FERPA does not prohibit anything" at all. Pet. 17. He relies on the Court's characterization of FERPA as "spending legislation" to support that reading of *Gonzaga*. *Id.* at 15. The logical leap Petitioner asks this Court to make is untenable. That FERPA does not render universities amenable to suit under Section 1983 says nothing about whether the law's obligations are mandatory or might be enforced through other means.

On the contrary, as this Court's only other decision interpreting FERPA makes plain, "[u]nder FERPA, schools and educational agencies receiving federal financial assistance *must* comply with certain conditions." *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 428 (2002) (emphasis added). That is, in part, because the federal government has the power to enforce FERPA—indeed, the part of the Code of Federal Regulations dedicated to FERPA contains an entire subpart dedicated to the question "What Are the Enforcement Procedures?" *See* 34 C.F.R. pt. 99, subpt. E. The answer to that question includes a possible loss of federal funding. *See id.* § 99.67(a) (listing penalties including "[w]ithhold[ing] further payments" and "[t]erminat[ing] eligibility to receive funding").[6]

[6] It makes no difference that penalties might not be levied unless the University has a "policy or practice" of violations. Pet. 15 (quoting *Gonzaga*, 536 U.S. at 276). That does not authorize—much less require—the University to engage in one-off violations at its discretion.

More to the point, even if FERPA is a "spending provision" that "prohibits nothing," that is decidedly not what this Court held in *Gonzaga*. That case accordingly presents no conflict worthy of this Court's attention.

III. THERE IS NO RELEVANT DIVISION OF AUTHORITY AMONG THE STATES.

The Petition likewise fails to identify any split of authority among state courts that could warrant this Court's review.

1. In *Kirwan* v. *Diamondback*, 721 A.2d 196 (Md. 1998), the Maryland Court of Appeals ruled in favor of a newspaper that sought disclosure of certain documents from the University of Maryland (specifically, records of parking tickets and correspondence with the NCAA about a student athlete) under the Maryland Public Information Act. *Id.* at 198. That court's ruling in favor of disclosure was due to the idiosyncrasies of state law, rather than a differing interpretation of FERPA. The *Kirwan* court held that the Maryland Public Information Act required disclosure of the records at issue as there was no countervailing privacy interest under Maryland law. *See id.* at 203. Here, in contrast, the court below held that Doe's privacy interest "clearly exceed[ed] the merits of public disclosure" under the Montana Constitution. Pet. App. 27a.

The *Kirwan* court also held that FERPA did not prevent disclosure of the records at issue. *See* 721 A.2d at 204-206. But that is also not in conflict with the decision below, since the Montana Supreme Court never decided whether FERPA precluded disclosure of the student's records in this case. *See supra* p. 16.

Petitioner suggests (at 20) that the Maryland Supreme Court would have held that FERPA was inapplicable to this case because it would have defined "educational records" to exclude disciplinary records. As a preliminary matter, Petitioner has not challenged in his Petition the Montana Supreme Court's determination that the student's records fall within the statutory definition of "education records," making this argument beside the point. But, in any event, as the Montana Supreme Court explained, *Kirwan* dates from a time when the regulations did not clearly define "education records." *See* Pet. App. 54a-55a. This Court does not have the benefit of the Maryland Court of Appeals' view of those new regulations. Moreover, it is not even clear that under the *Kirwan* standard, the Maryland court would reach a different result: There is a significant difference between "parking tickets," 721 A.2d at 206, and the kinds of disciplinary proceedings alleged to be at issue here.[7]

The Petition's only remaining point about *Kirwan* is likewise unavailing. The Petition notes that *Kirwan* "declined to decide" a pair of issues: (1) whether FERPA's exception for "law enforcement records" applied in that case, and (2) whether there

[7] Similarly, despite the Petition's repeated emphasis (at 20, 22) on footnote 7 of the opinion below, which discussed in dictum the definition of "personally identifiable information" in FERPA's implementing regulations, there is no reason to believe the Maryland Court of Appeals would have a different view of those regulations, as they did not exist when *Kirwan* was decided in 1998—they were adopted a decade later. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,852 (Dec. 9, 2008).

is a difference between "directly prohibit[ing]" the release of records and merely "having 'a policy or practice of permitting the release of'" those records. Pet. 22 (quoting *Kirwan*, 721 A.2d at 206). Obviously, if the *Kirwan* court did not decide these issues, there is no conflict with the decision below. In any event, Petitioner did not raise the "law enforcement records" exception in the Montana Supreme Court at all, and the decision below *also* did not address how FERPA might eventually be enforced against the University.

2. The Petition (at 22) also points to a pending North Carolina Supreme Court case: *DTH Media Corp.* v. *Folt*, No. 142PA18 (N.C.). Of course, a pending case does not a split make—this Court does not sit to ward off *potential* conflicts among the States. *Cf. Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.").

In any event, regardless how the North Carolina Supreme Court decides that case, it could not warrant granting review here.

In *DTH Media Corp.*, the North Carolina Court of Appeals ruled that a news organization could obtain certain information regarding student misconduct records under North Carolina's Public Records Act. 816 S.E.2d 518, 522 (N.C. Ct. App. 2018). The parties and the court *agreed* that "student disciplinary records" are "educational records" for purposes of FERPA, but the court determined a FERPA exception applied: the exception for "the final results of

any disciplinary proceeding * * * if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." *Id.* at 522-524 (quoting 20 U.S.C. § 1232g(b)(6)(B)).

There is no chance the North Carolina Supreme Court's ruling will conflict with the decision below. The reason why is simple: The Montana Supreme Court *expressly* declined to decide whether that exception applies to this case. Pet. App. 9a-10a & n.1. In any event, Petitioner requested significantly more information than would be available under that exception, *see* Pet. 5, which permits disclosure of only the name of the disciplined student, the determined violation, and the imposed sanction, *see* 20 U.S.C. § 1232g(b)(6)(B). And, like *Kirwan*, *DTH Media* does not involve an interpretation of the privacy and right-to-know provisions of the Montana Constitution that formed the basis of the Montana Supreme Court's ruling.

In short, Petitioner's purported splits in authority are entirely illusory.

IV. THE DECISION BELOW IS FACT-BOUND AND CORRECT.

Review is inappropriate for yet another reason: The decision below is a product of the unique circumstances of this case. As the Montana Supreme Court explained, "whether a person has an actual or subjective expectation of privacy in certain records is a question of fact informed by notice." Pet. App. 9a (citing *Raap*, 411 P.3d 788). Further, because "[a] student's privacy rights are not absolute," "whether disclosure is warranted will depend on the facts of

each case." *Id.* at 24a. As such, the Montana Supreme Court scrutinized numerous documents, including the University of Montana's Student Conduct Code and Student-Athlete Conduct Code; the student's status as a student-athlete; the student's receipt of an athletic scholarship; the degree to which information in the student's records had already been publicly released; the nature of the student disciplinary proceedings at the University of Montana; the motivation for Petitioner's request; and the *in camera* review of the student's records, in addition to the pertinent provisions of Montana statutes and FERPA, in reaching its conclusion that Montana law protected Doe's records from disclosure. Indeed, as Justice Rice's separate opinion showed, a different result might well have obtained had Petitioner simply phrased his initial request with greater care. *Id.* at 30a-31a. Such a *sui generis* case at the very least presents a poor vehicle for this Court's consideration of any issue, if any indeed falls within its jurisdiction.

Finally, the Petition fails to identify any error in the Montana Supreme Court's extremely curtailed discussion of FERPA. For the most part, the decision under review simply identifies or quotes the relevant text, without interpreting it at all. To the extent the decision below can be read as a holding that FERPA prohibits the disclosure of *some* educational records, that decision is consistent with this Court's instruction that "[u]nder FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions," *Owasso Indep. Sch. Dist.*, 534 U.S. at 428, as well as decisions of other courts to consider the issue. *See, e.g.*, *United States* v. *Miami Univ.*, 294 F.3d 797, 802-803, 806-807 (6th

Cir. 2002); *Kernel Press, Inc.* v. *Univ. of Kentucky*, No. 2017-CA-000394-MR, 2019 WL 2236421, at *7 (Ky. Ct. App. May 17, 2019); *Bryner* v. *Canyons Sch. Dist.*, 351 P.3d 852, 856-857 (Utah Ct. App. 2015); *Sherry* v. *Radnor Twp. Sch. Dist.*, 20 A.3d 515, 524 (Pa. Commw. Ct. 2011). Likewise, even had the decision below held that student disciplinary records are among the "education records" covered by FERPA absent an applicable exception, such a decision would plainly comport with the definition of "education records" as records which "contain information directly related to a student" and "are maintained by an educational agency or institution," 20 U.S.C. § 1232g(a)(4)(A), as well as the statutory context, *see Miami Univ.*, 294 F.3d at 812-815 (explaining that FERPA exceptions for releases of disciplinary records "would be superfluous" if such records are not "education records"), and FERPA's implementing regulations, *see* 34 C.F.R. § 99.31(a)(13), (14); *accord Knight News, Inc.* v. *Univ. of Cent. Florida*, 200 So. 3d 125, 127 (Fla. Dist. Ct. App. 2016); *State ex rel. ESPN, Inc.* v. *Ohio State Univ.*, 970 N.E.2d 939, 946-947 (Ohio 2012) (per curiam). Indeed, the Petition does not argue otherwise. And, finally, even if the decision could be read to conclude that FERPA shields records from disclosure where a student's information is requested by name, that observation would be consistent with FERPA's implementing regulations and precedent. *See* 34 C.F.R. § 99.3; *Press-Citizen Co.* v. *Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012) ("educational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with redactions").

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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