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

REPLY BRIEF OF PETITIONER

PETER MICHAEL MELOY
COUNSEL OF RECORD
MELOY LAW FIRM
P.O. BOX 1241
HELENA, MT 59624
(406) 442-8670
MIKE@MELOYLAWFIRM.COM

JANUARY 17, 2020

COUNSEL FOR PETITIONER

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The entirety of the Brief in Opposition relies on a bluff—that the "sole basis" for the Montana Supreme Court's decision was state law. (BIO.13) That the Respondent's assert the decision is "entirely" (BIO.14) based on state law rings untrue, for as the Montana Supreme Court stated

> Our decision is rooted in federal and state laws, the University's policies safeguarding students' privacy rights, and our conclusion that Doe neither holds a position of public trust nor performs public duties. (App.18a).

Since the inception of the parties' dispute, the Respondent Commissioner has relied on FERPA to justify its denial of Krakauer's request for public documents, made pursuant to the "right to know" under Article II, § 9, Mont. Const. Indeed, the Commissioner denied Krakauer's initial request on the basis he was "prohibited" by FERPA from admitting the records' existence, let alone disclosing them, forcing Krakauer to file the instant action. At every step of this litigation, the Commissioner has cited FERPA as a basis for denying the records at issue and ultimately obtained a favorable ruling from the Montana Supreme Court. Now, as it serves his purpose to disavow application of the federal law, the Commissioner maintains that "[n]o disputed interpretation of federal law played any role" in the Montana's Supreme Court's decision. (Commissioner's Response Brief at pgs. 2, 14). Such a statement is a blatant misrepresentation of the court's rationale and ruling. FERPA has always fostered this controversy. It is disingenuous, if not hypocritical, for the

Commissioner to now disclaim it, when it has been his federal weapon of choice for the past six years.

The Montana Supreme Court's application of an "enhanced right of privacy" was ultimately rooted in the Commissioner's "futility of redaction" FERPA argument. *Krakauer II*, ¶ 35. (App.20a). ("Doe's privacy interest in his educational records, which is enhanced, reasonable, and weighs heavily in favor of nondisclosure to begin with, receives no protection at all in the constitutional inquiry and balancing because redaction is futile). The "enhanced" right of privacy the court factored into its balancing equation not only eradicated the presumption of openness explicated in Art. II, § 9, Mont. Const., but its reliance on FERPA to supply such "enhanced" privacy rights is in direct derogation of *Gonzaga University v. Doe*. The Montana Supreme Court's balancing analysis, in the absence of FERPA, would have tipped the scales in favor of Krakauer's right to know.

The Commissioner's jurisdictional argument must also be labeled for what it is—a red herring distraction from the substantive legal issue presented. Perhaps most telling in this regard is the Commissioner's decision to devote the bulk of its response brief to making an "adequate and independent state grounds" argument, but merely two pages to addressing the actual controversy of whether the Montana Supreme Court's decision conflicts with *Gonzaga*. The Commissioner also gives short shrift to the two decisions from Maryland and North Carolina noted by Krakauer in his Petition.

Conspicuously absent all together from the Commissioner's response is any rebuke or rebuttal of Krakauer's position that this case presents an issue of undeniable national interest and importance. Such an

omission echoes the collective response of colleges and universities to downplay the severity, and even denies the existence of, campus sexual assaults committed by student athletes—notably, the precise societal impetus for Krakauer's investigative journalism and associated public records request. *See generally*, *Are Student-Athletes Alleged of Sex-Crimes Granted Educational Privacy Protections? FERPA's Misinterpretation by Academic Institutions*, 14 Ohio St. J. Crim. L. 809, 829 (Spring 2017) (noting the "hardened tradition by many academic institutions to put financial and reputational goals ahead of First Amendment rights").

As argued below, this case supplies not only the necessary jurisdictional prerequisites for certiorari, but also presents compelling reasons for the Court to exercise its discretionary review to reverse the Montana Supreme Court's decision upholding the Commissioner's denial of Krakauer's request for disciplinary documents related to a star quarterback's reinstatement.

ARGUMENT

I. RESPONDENT'S RELIANCE ON *FOSTER V. CHATMAN* IS MISPLACED, AS THE MONTANA SUPREME COURT OPINION DECLARES THAT IT IS BASED IN PART ON FEDERAL LAW.

The legal underpinning for Respondent's argument against certiorari is this Court's guidance in *Foster v. Chatman*, 136 S.Ct. 1737 (2016). This is an odd choice for authority, as it was a case upon which this Court conferred subject matter jurisdiction. *Foster* cites to *Harris v. Reed*, 489 U.S. 255 (1989), which

holds that his Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." *Harris* at 264. There is no statement in the Montana opinions that state law could serve as an "independent" and "adequate" basis for the decision. *Foster* at 1745, referring to the standard set forth in *Michigan v. Long*, 463 U.S. 1032, 1035 (1983).

To the contrary, the Montana Supreme Court contains several plain statements that it does rest on federal law, stating that the decision is "Based on FERPA, § 20-25-515, MCA, the University's Student Conduct Code, and the facts of this case…" (App.15a); that "federal and state statutes" provide enhanced privacy (App.17a); and that the decision is "rooted in federal and state laws." (App.18a).

II. THE MONTANA SUPREME COURT'S DECISION IS ROOTED IN MISAPPLICATIONS AND MISINTERPRETATIONS OF FERPA.

The Commissioner devotes the entirety of his argument to the premise that since the Montana Supreme Court ultimately employed a constitutional balancing test to deny Krakauer's access to the records, its holding was not based on federal law. It argues that since the Montana Supreme Court did not determine that FERPA alone justified the Commissioner's non-disclosure, there can be no federal question presented sufficient to confer this Court's jurisdiction. Such a simplistic argument misrepresents the record and misapprehends the core premise underlying the Montana Supreme Court's decision. The application of FERPA

has been the core dispute between the parties at every step of this litigation.

In *Krakauer I*, the first issue asserted by the Commissioner for review by the Montana Supreme Court was whether FERPA "prevent[ed] the release of any record that may be responsive to the public record request of [Krakauer]." (DA 15–0502 Commissioner's Opening Brief 10/26/15). The Montana Supreme Court remanded for balancing under a newly recognized "enhanced" privacy interest founded on FERPA's non-disclosure provisions, which it noted "sets this case apart from others involving general privacy interests, and courts must honor the unique privacy protection legislatively cloaked around the subject records by factoring that enhanced privacy interest into the balancing test." *Krakauer I*, ¶ 37. (App.64a). In support of its "enhanced privacy" determination, the Montana Supreme Court cited its only other decision to address FERPA and student disciplinary records, *Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, 337 Mont. 229, 160 P.3d 482, and noted that since it decided the case, "stricter FERPA regulations have been adopted." *Krakauer I*, ¶ 37. (App.65a, citing *Pioneer Press*, ¶ 36). This "enhanced" right based on FERPA resulted in the imposition of an "increased burden" to Krakauer on remand. *Krakauer I*, ¶ 37. (App.65a) ("[t]his enhanced privacy interest must be considered and factored into the constitutional balancing test on remand").

Then, in *Krakauer II*, the Commissioner criticized the district court for failing to analyze whether the "futility of redactions affect(ed)s the privacy analysis." The Montana Supreme Court seized on this contention ultimately ruling that where redaction cannot protect individual privacy interests, such "futility cannot weigh

in favor of releasing the private records." *Krakauer II*, ¶ 34. (App.19a). In support of its conclusion that "Doe demonstrated he had an actual expectation of privacy in his educational records" and "did not have notice of possible public disclosure of those records," the court cited FERPA and its regulations, including 34 C.F.R. § 99.3(g), which prohibits the disclosure of "personally identifiable information" contained in student records. *Krakauer II*, ¶¶ 28-35. (App.15a-19a).

While it is an accurate statement by the Commissioner that the Montana Supreme Court's ultimate ruling in *Krakauer II* is based on an analysis of its right-to-know/privacy constitutional balancing test under state law—"whether the demands of individual privacy clearly exceed the merits of public disclosure" —the nature of the privacy interest balanced against Krakauer's right-to-know was given more weight based on the court's erroneous interpretation of FERPA in *Krakauer I.* Notably, the jurisdiction of this Court is informed by all prior "substantial federal questions determined in the earlier stages of the [state] litigation" and the "right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *Hathorn v. Lovorn*, 457 U.S. 255, 261-62, 102 S.Ct. 2421, 2426 (1982) (citing *Reece v. Georgia*, 350 U.S. 85, 87, 76 S.Ct. 167, 169 (1955)).

Thus, contrary to the Commissioner's argument that the "sole basis" upon which the Montana Supreme Court's decision rests is "adequate and independent state grounds" and that the Montana Supreme Court did not consider and "did not purport to interpret" whether FERPA barred release of the records in question (BIO.12-13) it is clearly apparent that the decision,

informed by its prior pronouncement in *Krakauer I*, is based on an individual right of privacy derived from and bolstered by FERPA. Indeed, the Commissioner concedes that such a federal issue existed in *Krakauer I* and that FERPA was at least "one factor in the court's holding that Petitioner has an enhanced privacy interest in this case." (BIO.16, 18). It is also clear that in *Krakauer II*, the court relied on FERPA's prohibition of the release of "personally identifiable information" to conclude that any futility of redaction weighed in favor on non-disclosure. *Krakauer*, ¶¶ 28-35. (App.15a-19a). This proposition, now etched in Montana jurisprudence, operates to preclude disclosure of student records when the requestor specifically names the student.

The state law relied upon by the Montana Supreme Court is collateral to the inescapable conclusion that, regardless of the state's constitution, FERPA is the source of the secrecy afforded by the court to the student disciplinary records sought by Krakauer. This Court has jurisdiction. The case was not decided on independent state grounds. Contrary to the Commissioner's claim, this is not a case where the federal issue did not survive remand. In fact, the federal issue was the focus of the remand in *Krakauer I*. The "enhanced" nature of the individual privacy right reviewed and balanced by the Montana Supreme Court in *Krakauer II*, was based on the erroneous interpretation of FERPA in *Krakauer I*.

As argued below, such a blatant misinterpretation of the privacy protections afforded by the federal law by the Montana Supreme Court is in direct conflict with this Court's decision in *Gonzaga v. Doe*.

III. THE MONTANA SUPREME COURT'S INTERPRETATION OF FERPA TO CONFER AN "ENHANCED PRIVACY INTEREST" CONFLICTS WITH *GONZAGA UNIV. V. DOE*, 536 U.S. 273 (2002).

The Commissioner offers a minimal response to the substantive question presented for review, arguing that this Court's holding in *Gonzaga* cannot be extrapolated to the present case, without effectively explaining why. Respondent claims that while "FERPA does not render universities amenable to suit under Section 1983, [*Gonzaga*] says nothing about whether the law's obligations are mandatory or might be enforced through other means." (Respondent's Brief at 19). The Commissioner misses the thrust of Krakauer's position. As established in the previous section, the critical error committed by the Montana Supreme Court is its determination that FERPA's confidentiality provisions created a student's "enhanced" right of privacy in their educational records.

Such an enforceable privacy right was rejected by this Court in *Gonzaga* even if the vehicle for the assertion of the right was a student's § 1983 claim seeking to enforce the right versus an investigative journalist's request for public records regarding the discipline of a university student. The underlying rationale for the ruling is the same in both instances. FERPA and its regulations do not create a substantive right of privacy in student records. Yet the Montana Supreme Court determined otherwise, holding that FERPA and its non-disclosure provisions confer a substantive right of enhanced privacy to a student sufficient to prevent public disclosure. Indeed, because Krakauer identified the student in his initial request, based on the fact his identity could be deduced from

the public record, the Montana Supreme Court deferred to FERPA's non-disclosure regulations which prohibit disclosure, even if redacted, to justify its decision. *Krakauer II*, ¶ 35, n. 7 (citing 34 C.F.R. § 99.3(g) and *Krakauer I*, ¶ 24). (App.20a).

The Montana Supreme Court's decision clearly conflicts with *Gonzaga*, where this Court determined that FERPA is merely spending legislation which does not confer any enforceable right of privacy. *Gonzaga Univ.*, 536 U.S. at 279, 122 S.Ct. at 2273 ("we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights"). FERPA cannot be cited by a student, or by a University, to create or enforce a substantive right of privacy in student educational records. This is not to say that a student does not have a cognizable right of privacy in their records, but FERPA plays no role in their origin, enhancement, or individual enforcement. Rather, the only effect of non-compliance by a University with a policy or practice of the same is a loss of funding.

IV. THE MONTANA SUPREME COURT'S DECISION CONFLICTS WITH OTHER STATE HIGH COURTS.

The Commissioner attempts to distinguish the case of *Kirwan v. Diamondback*, 352 Md. 74, 721 A.2d 196 (Md. 1998) as not presenting a conflict by reiterating its position that the Montana Supreme Court's decision was not based on FERPA but rather "idiosyncrasies in state law." (Respondent's Brief at 20). As already established, however, the Montana Supreme Court's decision was rooted in its misinterpretation of FERPA. Additionally, Maryland's Public Information Act is very similar to Montana's right-to-know laws,

both containing a general presumption in favor of disclosure of government or public documents. *Kirwan*, 721 A.2d at 199.

Yet contrary to the Montana Supreme Court, the Maryland Appellate Court determined that FERPA did not offer any privacy protections for the student records requested by journalists. *Kirwan*, 721 A.2d at 204-206. This interpretation of FERPA is in conflict with the Montana Supreme Court's determination that FERPA confers an enforceable, enhanced right of privacy to a student accused of a sexual assault of another student. While the Commissioner claims that "parking tickets" cannot be compared to the disciplinary records sought by Krakauer, it is clear the Maryland Appellate Court's rationale was not limited to the case before it and extended to "information about criminal activity on campus" and "universities . . . refus[al] to release information" regarding the same. *Kirwan*, 721 A.2d at 204 (1998).

The Commissioner accurately points out that the pending North Carolina Supreme Court case, *DTH Media Corporation, et al. v. Folt, et al.*, does not present an actual conflict with *Krakauer II*—yet. Obviously, this observation is true, but Krakauer would be remiss if he did not point out the potential conflict to this Court. It is likely the North Carolina Supreme Court will issue its decision any day, likely before any opinion is issued in this case. Even the existence of a potential conflict from another high court, however, highlights the discrepancy in lower court decisions, and strengthens the need for additional guidance on FERPA from this Court.

V. SEXUAL ASSAULTS ON UNIVERSITY CAMPUSES ARE NOT ISOLATED, NOR UNIQUE, AND PRESENT A PUBLIC ISSUE OF NATIONAL IMPORTANCE.

The Commissioner tries to downplay this case as "fact-bound," implicitly discounting any trend by Universities, especially those with lucrative sports programs, to hide behind FERPA when their star athletes are accused of sexual assaults on campus. While the Montana Supreme Court employed a necessarily fact-driven balancing test in determining that the student's privacy interests outweighed the public's right to know under Art. II, § 9, Mont. Const., the test itself was informed by an erroneous legal interpretation of FERPA—one which government-funded Universities in other states are seizing upon to deprive the public from the right to know how they are disciplining athletes accused of sexual assault and rape on campus.

FERPA is being abused by universities, with the aid of courts, to shield disciplinary records from public purview in derogation of its purpose and its limits as declared by this Court as merely "spending legislation." Tellingly, the Commissioner's brief replicates the error often made by lower courts that FERPA constitutes an absolute federal prohibition on the disclosure of records that states have no choice but to obey. As pointed out by Amicus, this erroneous position is no longer tenable after *Natl. Fedn. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 523, 132 S.Ct. 2566, 2574 (2012), where this Court held that Congress may not engage in "economic dragooning" by threatening states with financial ruin to coerce compliance with federal policy.

FERPA is widely misunderstood and misapplied in ways that put public safety at risk. The original intention of the federal act was to protect and serve

students, but that intention is not served when misappropriated by educational institutions in a manner which makes campuses less safe. FERPA should be enforced in a sensibly narrow way: to penalize only a systemic refusal to enforce protocols against the indiscriminate release of confidential, centrally maintained student records. This case presents a timely opportunity for clarification of FERPA's purview and, more importantly, prevent its abuse in order to promote campus safety and transparency.

CONCLUSION

For the foregoing reasons, and those stated in the petition, Krakauer's petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER MICHAEL MELOY
COUNSEL OF RECORD
MELOY LAW FIRM
P.O. BOX 1241
HELENA, MT 59624
(406) 442-8670
MIKE@MELOYLAWFIRM.COM

COUNSEL FOR PETITIONER

JANUARY 17, 2020