NO. 19-_____

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 Writ of Certiorari to the Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

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

OCTOBER 31, 2019

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

QUESTION PRESENTED

In the process of writing a book about sexual assault on a college campus, *Missoula: Rape and the Justice System in a College Town*, Petitioner and Author Jon Krakauer sought records regarding the expulsion of the University of Montana's starting football quarterback and his subsequent reinstatement by the Montana Commissioner of Higher Education without a written decision. Krakauer sought to learn the process and rationale for the reversal of the star player's expulsion. Citing the public interest in the case and Montana's explicit constitutional right-to-know provision, the Montana District Court granted access to these records. The Montana Supreme Court overruled, citing the student's competing and heightened right to privacy conferred, in part, by 20 U.S.C. § 1232g (FERPA). The Montana Supreme Court made no mention of this Court's decision in *Gonzaga v. Doe*, 536 U.S. 273, 278-89 (2002), despite being briefed by the Petitioner. *Gonzaga* held that FERPA is a spending bill that confers no individual private rights.

THE QUESTION PRESENTED IS

Does FERPA confer an individual right to privacy sufficient to block a court from ordering the release of personally identifiable information about a high profile university athlete on an issue of compelling public interest?

LIST OF PROCEEDINGS

CIVIL PROCEEDINGS IN KRAKAUER V. MONTANA ET AL.

Montana Supreme Court

No. DA 18-00374

Jon Krakauer, Petitioner-Appellee-Cross-Appellant, v. *State of Montana, by and through its Commissioner of Higher Education, Clayton Christian*, Respondent-Appellant, v. *John Doe*, Intervenor and Appellant. (*Krakauer II*)

Decision Date: July 3, 2019

Montana First Judicial District Court,
Lewis and Clark County

Cause No. ADV 14-117

Jon Krakauer, Petitioner, v. *State of Montana, by and through its Commissioner of Higher Education, Clayton Christian*, Respondent.

Decision Date: October 19, 2017

Montana Supreme Court

No. DA 15-0502

Jon Krakauer, Petitioner-Appellee, v. *State of Montana, by and through its Commissioner of Higher Education, Clayton T. Christian*, Respondent-Appellant. (*Krakauer I*)

Decision Date: September 19, 2016

Montana First Judicial District Court,
Lewis and Clark County

Cause No. CDV-2014-117

Jon Krakauer, Petitioner, v. *State of Montana, by and through its Commissioner of Higher Education, Clayton Christian*, Respondent.

Decision Date: September 12, 2014

RELATED PROCEEDINGS

United States District Court for the
District of Montana, Missoula Division

No. CV 12-77-M-DLC

John Doe, Plaintiff, v.
The University of Montana, Defendant.

Decision Date: June 26, 2012

Montana Fourth Judicial District Court,
Missoula County

Cause No. DC-12-352

State of Montana, Plaintiff, v.
Jordan Todd Johnson, Defendant.

Decision Date: March 1, 2013

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jon Krakauer respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The Montana Supreme Court decision for which Krakauer seeks issuance of the writ appears at *Krakauer v. State*, 396 Mont. 247, 445 P.3d 201 (2019) (*Krakauer II*) (App.1a), which reviewed and reversed the Montana First Judicial District Court's October 19, 2017, decision (App.33a) and May 15, 2018, final judgment, both of which are unreported. The district court's ruling was issued after previous remand from the Montana Supreme Court in *Krakauer v. State*, 384 Mont. 527, 381 P.3d 524 (2016) (*Krakauer I*) (App.44a). The original trial court ruling was issued September 12, 2014, *Krakauer v. State*, 2014 Mont. Dist. LEXIS 33 (App.81a), and final judgment July 6, 2015, *Krakauer v. State*, which is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed

by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question." The validity of FERPA is at issue in this action. Specifically, the federal question sought to be reviewed—whether FERPA blocks a court from ordering the release of personally identifying information about a high profile individual on an issue with a compelling public interest—has been raised since the lawsuit's inception.

The federal question was first raised by the Respondent Commissioner as a defense to Petitioner's initial complaint seeking public documents. The First Judicial District Court for the State of Montana, Lewis and Clark County, determined in its September 12, 2014, decision on page 7 that "[t]he plain meaning of the language used in FERPA makes it clear that the purpose of the act is to discourage a system or practice allowing disclosure of personal student information. The Court concludes that FERPA does not preclude release of the records in the circumstances presented in this case." (App.89a).

On appeal, the Montana Supreme Court reversed and determined that the University's release of a specific student's records to Krakauer would violate FERPA § 1232g. Specifically, the Montana Supreme Court held that "had the Commissioner released the documents that Krakauer originally requested, using the specific student's name, he would have violated the statute. FERPA and its accompanying regulatory scheme, including its expanded definition of "Personally Identifiable Information," (App.57a, 71a) prohibited the unilateral release of the requested documents by the Commissioner, as Krakauer clearly knew the

identity of the student that he named specifically in his request." *Krakauer I*, ¶ 24. (App.57a).

The Montana Supreme Court noted several FERPA exceptions, but determined that the record was insufficient to determine their applicability and therefore remanded the action back to the district court to conduct an *in camera* review. *Krakauer I*, ¶¶ 26-30. The Montana Supreme Court determined that FERPA's strong public policy of protecting the privacy of student records created an "enhanced privacy interest" which "must be considered and factored into the constitutional balancing test on remand." *Krakauer I*, ¶ 37. (App.66a).

On remand, the First Judicial District Court for the State of Montana conducted the ordered *in camera* review on August 3, 2017, and issued its decision October 19, 2017, holding that the student had no reasonable or protectable privacy interests and ordered release of the documents pursuant to FERPA's court order exception in § 1232g(b)(2)(B). The Montana Supreme Court again reversed the district court, determining that "the District Court erred when it held Doe did not have a privacy interest in his educational records," an interest which it determined was "rooted in" part "on FERPA." *Krakauer II*, ¶¶ 28, 31. (App.18a). The judgment of the Montana Supreme Court in *Krakauer II* was entered July 3, 2019.

Krakauer timely filed a Petition for Rehearing, in which he questioned the Montana Supreme Court's failure to decide several issues he raised regarding the applicability of FERPA and several of its exceptions. (App.170a). The Montana Supreme Court denied summarily the Petition on August 6, 2019. (App.107a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant federal statutory provisions at issue of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, Parts A and D, are lengthy, and their pertinent text is reproduced in the Appendix. (App.110a, 129a). The following provision of the Montana Constitution is implicated:

> RIGHT TO KNOW. No person shall be deprived of the right to examine documents or to observe the deliberations 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.

Article II, Section 9, Mont. Const.

The right of individual privacy asserted by Intervenor John Doe is found in Article II, Section 10, Mont. Const., which provides 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."

STATEMENT OF THE CASE

This case involves the rising societal and cultural concerns of sexual assaults and rapes on university campuses, especially those committed by star athletes,

many of which have garnered national media attention. This dispute involves one of those instances at the University of Montana ("University") in Missoula, Montana. Petitioner Jon Krakauer, a well-known journalist, investigated and published a book chronicling instances of alleged sexual misconduct on or near the University campus. In connection with his book, Krakauer sought records from the Montana Commissioner of Higher Education related to allegations of a sexual assault committed by the University's starting football quarterback and resulting discipline by the University.

Specifically, Krakauer filed a request with the Commissioner's office on January 17, 2014, naming the student athlete and asking for "the opportunity to inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher Education in July and August 2012 regarding the ruling by the University Court of the University of Montana in which student . . . was found guilty of rape and was ordered expelled from the University." Krakauer named the high-profile student athlete because his identity was known as a result of a very publicized criminal trial. Krakauer reasonably deduced, from his knowledge of the case, *Doe v. Univ. of Mont.*, No. CV 12-77-M-DLC, 2012 U.S. Dist. LEXIS 88519 (D. Mont. June 26, 2012) (App.96a), that the Commissioner must have overturned the University Court's and President Engstrom's decision and sanction of expulsion, noting that the student "remained in school and continued to participate as the Grizzly quarterback."

In support of his petition, Krakauer submitted documents that the United States District Court for

the District of Montana had previously unsealed and released in *Doe*, where the unnamed student initiated the action under seal, seeking a preliminary injunction halting the University's disciplinary proceedings against him. The documents, made a part of this record, indicate that after a female student alleged that Doe had raped her in an off-campus apartment, the University initiated an investigation into a possible violation of the Student Conduct Code. Dean of Students Charles Couture determined that Doe committed sexual intercourse without consent, and as sanctions, recommended Doe's immediate expulsion from the University and restriction from all University property and University-sponsored events. Doe appealed to the University Court, a body made up of faculty, staff, and students appointed to hear disciplinary matters.

The University Court conducted a hearing and concluded by a 5-2 vote that Doe committed sexual intercourse without consent, and further concluded by a unanimous vote of 7-0 that he should be sanctioned by expulsion from the University. Pursuant to the Student Conduct Code, Doe requested that the University Court's determination be reviewed by President Engstrom. President Engstrom upheld the University Court's findings and proposed sanction and determined that Doe was not denied a fair hearing. Doe then appealed President Engstrom's decision to the Commissioner, whose office acknowledged receipt of the appeal, but never issued a public decision. This decision, and related documents, form the basis for this action.

In response to Krakauer's request, the Commissioner refused to acknowledge that such records existed, and further refused to permit inspection or release of

any such documents, asserting that both FERPA and state law prevented him from doing so. When Krakauer's request was denied by the Commissioner, Krakauer initiated this action by filing a petition in the First Judicial District Court, on February 12, 2014, citing the explicit right-to-know under the Montana Constitution, which provides that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations 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." Art. II, § 9, Mont. Const. The parties filed cross-motions for summary judgment, and after a hearing, the Montana district court granted summary judgment to Krakauer, and ordered the Commissioner to "make available for inspection and/or copying within 21 days" the requested records, with students' names, birthdates, social security numbers, and other identifying information redacted.

The Commissioner appealed to the Montana Supreme Court, which initially dismissed the case without prejudice, as the lower court had not yet addressed the issue of attorney fees. The court awarded fees to Krakauer on June 19, 2015, and the Commissioner again appealed. On appeal, the Montana Supreme Court reversed and remanded the district court's decision:

> Having concluded that the records in question in this case appear to fall under the "Personally Identifiable Information" protection granted by FERPA, and also having concluded that FERPA and state statute

> provide an exception for release of information pursuant to a lawfully issued court order, we remand this case to the District Court for an in camera review of the documents in question. After giving due consideration to the unique interests at issue in this case, as discussed herein, the District Court will re-conduct the constitutional balancing test and determine what, if any, documents may be released and what redactions may be appropriate. As noted above, the exception to FERPA that allows for release of documents pursuant to a court order requires advance notice to the affected student or parents, and a district court must comply with this directive before releasing protected information. *See* Opinion, ¶ 27 n. 6. Because we remand this case for further proceedings, the award of attorney fees is vacated.

Krakauer I, ¶ 42. (App.45a).

In *Krakauer II*, the Montana Supreme Court characterized its remand instructions in *Krakauer I* as a directive "to conduct an in-camera review of Doe's records with the following instructions":

> 1) determine whether there was an adverse final ruling against Doe during his student disciplinary proceedings, which would have allowed for the release of certain, limited information as an exception to the general prohibition against the release of educational records under the Family Educational Rights

and Privacy Act of 1974, as amended, 20 U.S.C. § 1232g (FERPA);

2) factor the enhanced privacy interests of students into the analysis of whether the Montana Constitution permits disclosing Doe's educational records; and

3) determine whether the potential for redacting Doe's personally identifying information affects the privacy analysis and the ultimate determination about what records, if any, can be released.

Krakauer II, ¶ 5. (App.3a-4a).

After remand, the district court granted Doe a motion to intervene in the case, and then conducted the *in camera* review of his records. The district court determined that Doe did not have a subjective or actual expectation of privacy in the records at issue, which rendered the issue of redaction moot, because his personal information was already available to the public through unsealed court records and significant media coverage of the public criminal trial. The district court also concluded that even assuming Doe did have a privacy interest in his records, his privacy interest did not clearly exceed the merits of public disclosure due to his status as a high-profile student-athlete at the time of the disciplinary proceedings, the scholarships he received from the University, the attendant publicity of the alleged sexual assault, and the public's compelling interest in understanding the disciplinary procedures employed by a state university. Specifically, the First Judicial Court of the State of Montana, reasoned:

> Here, weighing favorably in Doe's right to privacy is his enhanced privacy interest in his student records. On the other hand, a variety of factors weigh against Doe's right to privacy and in favor of the public's right to know. First, Doe's status as a high-profile student athlete weighs against his right to privacy. Prior to the commencement of disciplinary proceedings and criminal litigation against him, Doe was a well-known individual in Montana and enjoyed a position of prominence and popularity by virtue of his athletic position. Second, the University of Montana is a public institution, and Doe, while not a paid athlete, receives valuable consideration for his skills in the form of an athletic scholarship. Although he is not a public official or university employee, Doe is a public representative of the University of Montana. Third, the details of Doe's alleged bad acts have been publicly aired through national and local media coverage, a publicly held criminal trial, and a nationally bestselling book. Fourth, the public has a compelling interest in understanding the disciplinary procedures employed by a state university, especially where the student in question is a prominent and popular campus figure whose education is paid for in part by public funds.

(District Court's October 19, 2017, Order on Motion for Release of Records, pgs. 8-9). (App.16a-17a).

The district court denied Krakauer an award of attorney fees. Both the Commissioner and Doe appealed

the district court's decision and Krakauer cross-appealed the order denying him attorney fees. The Montana Supreme Court again reversed, determining that FERPA and state statutory protections "provid[ed] students like Doe with steadfast assurances that the university system will affirmatively protect their records from disclosure, just as the University and the Commissioner have done here." *Krakauer II*, ¶ 21. (App.10a-11a). *Citing* 20 U.S.C. § 1232g(b)(2)(B) of FERPA, the Montana Supreme Court reasoned that "Doe had notice the University could only disclose the results of his disciplinary proceedings to an alleged victim, essential University personnel, or other necessary individuals in compliance with federal or state law, which would include compliance with a judicial order or subpoena."

The Montana Supreme Court reasoned further that "[t]he University did not have a policy of disclosing educational records" and "absent Doe's consent or a judicial subpoena, the University could only disclose specific information from Doe's records in limited circumstances." *Krakauer II*, ¶ 21. (App.11a). The Montana Supreme Court also rejected the district court's rationale that the University's Student-Athlete Conduct Code and "the public's independent knowledge of certain information contained in a student's private educational records" diminished the student's actual or subjective expectation of privacy in his records. *Krakauer II*, ¶¶ 21-25. (App.13a).

The Montana Supreme Court ultimately "con-clude[d] Doe had an actual or subjective expectation of privacy in his educational records" and "did not have notice of possible public disclosure of those records

. . . based on FERPA, § 20-25-515, MCA, the University's Student Conduct Code, and the facts of this case." *Krakauer II*, ¶ 28. (App.15a). The Court went on to hold that FERPA and "state statutes providing enhanced privacy protections support the idea that society is willing to recognize Doe's privacy expectation is reasonable." *Krakauer II*, ¶ 30. (App.17a) Accordingly, the Montana Supreme Court declared that Doe did "have a privacy interest in his education records" which, under the facts of the case, "clearly exceed[ed] the merits of public disclosure." *Krakauer II*, ¶¶ 31, 43. (App.21a).

With regard to redaction, the Montana Supreme Court rejected the district court's rationale that there is no practical difference between releasing redacted and unredacted documents when the identity of the student is known, disagreeing with the "resulting implication that the futility of redaction weighs in favor of releasing private records. Where redaction is futile—*i.e.*, where redaction cannot protect individual privacy interests—that futility cannot weigh in favor of releasing the private records." In so holding, the Montana Supreme Court reasoned:

> Krakauer could have requested information about the process by which the University or the Montana University System generally handle sexual assault or how the Commissioner reviews appeals of student disciplinary proceedings. He could have requested general information about all sexual assault complaints over an appropriate, specified period of time, and he could have requested information about the appeals the Com-

> missioner reviewed over that time. Had Krakauer done so, the Commissioner, under the appropriate circumstances, could have responded by supplying the appropriate records with each student's personally identifying information redacted to protect his or her privacy interests. But Krakauer requested information pertaining to one specific student, and now, no amount of redaction can protect that student's privacy interests. Were Krakauer to receive Doe's records, there would be no doubt to whom the records pertained. Therefore, 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.

Krakauer II, ¶ 35. (App.19a-20a).

The Montana Supreme Court therefore reversed the Montana district court's decision ordering the Commissioner of Higher Education to release Doe's student disciplinary records, affirmed the denial of attorney fees, and dismissed Krakauer's petition with prejudice. *Krakauer II*, ¶ 48. (App.27a). The Montana Supreme Court assumed the applicability of FERPA and did not rule upon several issues raised by Krakauer, including whether any of the exceptions in § 1232(g) applied.

In Justice Jim Rice's concurring and dissenting Opinion, joined by Chief Justice Mike McGrath and Justice Beth Baker, he would have ordered "a

more limited release of information setting forth the Commissioner's decision and the grounds on which he made it" opining that "a limited release of information is required to satisfy the constitutional right to know, and is authorized under FERPA as necessary in response to a court order." *Krakauer II*, ¶ 58. (App.32a).

Krakauer now petitions this Court to review the Montana Supreme Court's majority decision and issue a writ of certiorari.

REASONS FOR GRANTING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." Sup. Ct. Rule 10. Under Sup. Ct. Rule 10(c), the United States Supreme Court will be inclined to exercise its discretionary review of a state's highest court if "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Under Sup. Ct. Rule 10(b), this Court will be inclined to exercise its discretionary review if "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

As argued below, the Montana Supreme Court has decided an important federal question regarding FERPA which conflicts with both a relevant decision of this Court in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), and a decision of the Maryland Court of Appeals, the State's highest court.

I. THE MONTANA SUPREME COURT'S DECISION CONFLICTS WITH *GONZAGA UNIV. V. DOE*, 536 U.S. 273 (2002).

In *Gonzaga Univ. v. Doe*, 536 U.S. at 278-89, a Gonzaga University undergraduate sued the school and teacher under 42 U.S.C. § 1983, alleging a violation of FERPA. The student was planning to become an elementary teacher, and under Washington State Law, all new teachers required an affidavit of good moral character from their graduating college. The teacher in charge of certifying such affidavits, overheard a student conversation discussing sexual misconduct by the undergraduate student, and after an investigation, refused to certify the affidavit. The student sued, claiming a violation of his confidentiality rights.

This Court ruled that FERPA, which prohibits the federal government from funding educational institutions that release education records to unauthorized persons, does not create a right which is enforceable under 42 U.S.C. § 1983. In so ruling, the Court declared that FERPA is merely spending legislation which prohibits "the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." *Gonzaga*, 536 U.S. at 276. In other words, this Court held that the statute addresses only federal funding and does not confer any enforceable right of privacy which could serve as a basis for withholding student records.

Despite this ruling, in *Krakauer II*, the Montana Supreme Court applied FERPA's non-disclosure provisions in violation of Krakauer's explicit right to know under the Montana Constitution, despite acknowledging that "[t]he University did not have a policy

of disclosing educational records." *Krakauer II*, ¶ 21. (App.11a). Indeed, nowhere in either *Krakauer I* or *Krakauer II* does the Montana Supreme Court even cite to *Gonzaga*, yet it applied FERPA and its non-disclosure provisions to confer a substantive right of enhanced privacy to a student and to reason that if a public records requester reasonably knows the student's identify, the information cannot be disclosed or redacted.

In footnote 7 of *Krakauer II*, the Montana Supreme Court interpreted FERPA in a way which conflicts with *Gonzaga*:

> FERPA prohibits institutions from releasing educational records or personally identifiable information contained therein without written consent. 20 U.S.C. § 1232g(b)(1). In the definition of Personally Identifiable Information, the regulations include "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3 (Personally Identifiable Information at (g)). Where the public requests a student's records by name, FERPA's regulations assume the information sought would allow the public to personally identify the student. Therefore, the regulations prohibit universities from releasing a student's information, even redacted, when a requestor specifically asks for a student's information by name. *See* 34 C.F.R. § 99.3(g); *see also Krakauer I*, ¶ 24. (App.20a).

FERPA does not prohibit anything and certainly does not yield to a state's constitutional right to know provision, yet the Montana Supreme Court held otherwise in violation of this Court's ruling in *Gonzaga*. The Montana Supreme Court erred in determining that FERPA creates an "enhanced" and "robust" privacy right protection which preempts a state right-to-know constitutional provision. *Krakauer II*, ¶ 17. (App.8a). In short, the Montana Supreme Court, in direct conflict with *Gonzaga*, declared that FERPA's non-disclosure provisions conferred a substantive right of privacy to a Montana student athlete, trumping Petitioner's (and the public's) constitutional right-to-know.

While the Court cites to FERPA's exceptions—such as the "court order or subpoena" exception under 20 U.S.C. § 1232g(b)(2)(B) or the exception in 20 U.S.C. § 1232g(b)(6)(B), permitting disclosure of the final results of a disciplinary proceeding against a student who is an alleged perpetrator of a crime of violence or a nonforcible sex offense, "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"—it did not apply, analyze them, or discuss why they did not apply to the information and records sought by Krakauer.

II. THE MONTANA SUPREME COURT'S DECISION CONFLICTS WITH THE MARYLAND COURT OF APPEALS, THE STATE'S HIGHEST COURT.

In *Kirwan v. Diamondback*, 352 Md. 74, 721 A.2d 196 (Md. 1998), a case decided prior to *Gonzaga*, Maryland's highest appellate court addressed the similar issue of whether the Maryland Public Information

Act ("MPIA"), or FERPA, authorized the university's non-disclosure of information related to a specific student athlete. In February of 1996, the University of Maryland, College Park campus, notified the National Collegiate Athletic Association (NCAA) that a student-athlete accepted money from a former coach to pay the student-athlete's parking tickets. The student-athlete was suspended for three games as a result. *Kirwan*, 721 A.2d at 198. The student newspaper, *The Diamondback*, began investigating this incident and other alleged incidents involving the men's basketball team, including whether the University sanctioned team members' illegal parking on campus. *Kirwan*, 721 A.2d at 198.

In connection with its investigation, *The Diamondback*, requested from the University the following documents:

> (1) copies of all correspondence between the University and the NCAA involving the student-athlete who was suspended and any other related correspondence during February 1996; (2) records relating to campus parking violations committed by other members of the men's basketball team; and (3) records relating to parking violations committed by Gary Williams, who is the head coach of the men's basketball team.

Kirwan, 721 A.2d at 198.

The University relied on the MPIA to deny the requests. The University claimed that any parking tickets received by the coach were personnel and financial records exempt from disclosure under MPIA. The University also asserted that the documents

relating to the student-athletes were educational records prohibited from disclosure by FERPA, 20 U.S.C. § 1232(g). *The Diamondback* initiated suit to compel the University to disclose the requested documents. The lower court granted summary judgment in favor of *The Diamondback* and the University appealed. *Kirwan*, 721 A.2d at 199. Before the Court of Special Appeals decided the case, the Maryland Court of Appeals issued a writ of certiorari. *Kirwan v. Diamondback*, 346 Md. 372, 697 A.2d 112 (1997).

The state high court affirmed, determining that the requested records did not qualify as either "personnel" or "financial" records under the MPIA, noting the "general presumption in favor of disclosure of government or public documents." *Kirwan*, 721 A.2d at 199. Montana's statutory open records laws do not exempt categories of documents, but Montana shares an openness presumption, which emanates from the explicit right-to-know provision in Art. II, Sect. 9, of the Montana Constitution. While the Montana Supreme Court acknowledged this constitutional presumption in its Opinion, it clarified that "[t]he right to know is not, however, absolute—it may be overcome when the demands of individual privacy clearly exceed the merits of public disclosure." *Krakauer II*, ¶ 9 (App.5a) (citing *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876 and Art. II, § 9, Mont. Const.).

The Maryland Appellate Court in *Kirwan* also rejected the University's additional argument that student privacy concerns justified nondisclosure under the state Act, noting the "[w]hen an adult commits or is formally charged with committing a criminal offense,

even a petty one, it is doubtful that any 'invasion of privacy' occasioned by an accurate newspaper report of the matter is 'unwarranted.'" *Kirwan*, 721 A.2d at 203. The Montana Supreme Court in this case concluded otherwise, reasoning:

> [I]nformation contained in a student's educational records is broader than that offered during a public criminal trial, which is governed by rules of evidence, burdens of proof, and constitutional protections not applicable to educational records. The District Court fundamentally erred by holding the public's knowledge of the personal information in Doe's records negated his expectation of privacy in them.

Krakauer II, ¶ 28. (App.15a).

While the Montana Supreme Court relied on a regulation which the Department of Education adopted in 2002, after the *Kirwan* decision, the Maryland Appellate Court's decision that FERPA was inapplicable was based on the definition of "education records," and not any definition of "personally identifiable information" contained in those records. *Compare Krakauer II*, ¶ 35, n. 7 (App.20a) (citing 34 C.F.R. § 99.3(g) to conclude that FERPA's "regulations prohibit universities from releasing a student's information, even redacted, when a requestor specifically asks for a student's information by name" with *Kirwan*, 721 A.2d at 204 ("[s]everal courts have taken the position that records similar to those involved in the present case are not education records within the meaning of [FERPA]").

The Maryland Appellate Court in *Kirwan* rejected the University's position that FERPA protected the

documents requested by the newspaper, noting that "in addition to protecting the privacy of students, Congress intended to prevent educational institutions from operating in secrecy" and that "[p]rohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind [FERPA]." *Kirwan*, 721 A.2d at 204. The Court distinguished academic records from those implicating criminal activity on campus. *Kirwan*, 721 A.2d at 205. "Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, thus keeping very important information from other students, their parents, public officials, and the public." *Kirwan*, 721 A.2d at 204. By its decision in this case, the Montana Supreme Court condoned this very practice.

Finally, and directly to the point of this Court's evaluation of the petition under Supt. Ct. R. 10(b), the Maryland Appellate Court held that "[t]he legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because it contained the name of the student." *Kirwan*, 721 A.2d at 204. The Maryland Appellate Court specifically held "[p]rohibiting disclosure of any document containing a student's name would allow universities to operate in secret, which would be contrary to one of the policies behind the Family Educational Rights and Privacy Act. Universities could refuse to release information about criminal activity on campus if students were involved, claiming that this information constituted education records, this keeping very

important information from other students, parents, public officials and the public. *Id.*

This holding is in direct conflict with the Montana Supreme Court's Opinion in *Krakauer II* that FERPA, privacy concerns, and state open-records laws, precluded disclosure of student records implicating potentially criminal activity, if the requestor identified the student. Indeed, the interpretation of FERPA by the Montana Supreme Court accomplishes exactly what the Maryland high court warned could happen: Universities could refuse to release information about criminal activity on campus if named students were involved.

The *Kirwan* Court declined to decide the newspapers' alternative argument regarding the applicability of an exception for "law enforcement records" under 20 U.S.C. § 1232g(a)(4)(B)(ii). *Kirwan*, 721 A.2d at 206. The Court also declined to address the newspaper's argument that FERPA "does not directly prohibit the disclosure of protected education records, that the only enforcement mechanism under the Act is the withholding of funds from institutions having 'a policy or practice of permitting the release of education records,' 20 U.S.C. § 1232g(b)(1)." *Kirwan*, 721 A.2d at 206. Krakauer also raised this issue, with no mention, let alone resolution, from the Montana Supreme Court.

The Court should be aware that there is a pending North Carolina Supreme Court case on similar issues. *DTH Media Corporation, et al. v. Folt, et al.* In this case, news media organizations made a public records request under the North Carolina Public Records Act to the University of North Carolina at Chapel Hill ("UNCCH"), the names of students found responsible

for rape, sexual assault, or sexual assault, and the sanction imposed. Specifically, the news media organizations requested "copies of all public records made or received by [UNCCH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office." UNC-CH denied the request on the basis the requested records were "educational records" under FERPA and were "protected from disclosure by FERPA." *DTH Media Corp. v. Folt*, 816 S.E.2d 518, 520-21 (N.C. Ct. App. 2018). The trial judge ruled in UNC-CH's favor, citing FERPA. The Court of Appeals reversed, determining that FERPA did not preempt or conflict with the state's Public Records Act:

> [W]e hold Defendants, as administrators of a public agency, are required to comply with Plaintiffs' request to release the public records at issue under the Public Records Act. FERPA's § 1232g(b)(6)(B) does not prohibit Defendants' compliance, to the extent Plaintiffs' request the names of the offenders, the nature of each violation, and the sanctions imposed. Defendants' arguments are overruled.

DTH Media Corp. v. Folt, 816 S.E.2d at 525-26.

The case is now fully briefed and pending before the North Carolina Supreme Court. Oral argument was held August 27, 2019.

III. THE QUESTION PRESENTED RAISES A PUBLIC ISSUE OF NATIONAL IMPORTANCE REGARDING UNIVERSITIES' PROTECTION OF HIGH PROFILE STUDENT ATHLETES FROM ALLEGATIONS OF SEXUAL ASSAULT.

This case implicates not only the public's right to know how colleges and universities are dealing with star athletes accused of sexual assault and rape on campus, but also the more disturbing trend that educational institutions are hiding behind FERPA to protect such programs' revenue potential at the expense of student welfare and safety. FERPA, designed to protect students' interests, is now being abused by universities to accomplish the opposite. Colleges and universities with lucrative sports' programs are increasingly relying on FERPA to claim confidentiality in high profile student athletes' disciplinary records in order to avoid disclosure of damaging information which may affect their profits. Allegations are not investigated, and criminal acts, not prosecuted.

FERPA has become a convenient shield for image-conscious higher educational institutions and does not serve the purpose for which it was enacted. Indeed, universities have been criticized for using FERPA's non-disclosure provisions for illicit concealment purposes:

> Universities, often to protect their own image and to stave the free flow of information, regularly invoke FERPA in response to open-record requests or press inquiries where the information sought places the institution in a negative light. The goal is non-disclosure. The chorus is student privacy. The tool: the FERPA defense.

Mary Margaret Penrose, *Tickets, Tattoos and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 Cardozo L. Rev. 1555 (April 2012).

The emerging chorus of "student privacy concerns" has become a catch-all excuse for educational institutions that do not want to disclose records containing damaging information. Such a practice expands FERPA beyond its intended and lawful scope. Just as the Montana Commissioner of Higher Education did in this case, university officials employ inflated "student privacy" rhetoric to claim the university's funding is in danger when the reality is that FERPA's constraints are narrow and the reality of funding penalties associated with disclosure, non-existent. It is worth noting that no educational institution has ever been penalized since the enactment of FERPA forty-five years ago. Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 Geo. L.J. 493, 498 (2013).

The likelihood that the federal government would penalize a university for complying with state open-records laws in an area of unique public concern is extremely doubtful. Congress intended only that FERPA be utilized to penalize the rare educational institution that carelessly distributes student records. This case presents the Court with the opportunity to clarify the confines of FERPA and prevent its abuse by universities attempting to downplay the severity of sexual assault on campus, an issue of undeniable national interest and importance.

CONCLUSION

For all of these reasons, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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

OCTOBER 31, 2019