IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 14-0657

JON KRAKAUER,

Petitioner/Appellee,

v.

STATE OF MONTANA, by and through its COMMISSIONER OF HIGHER EDUCATION, Clayton Christian,

Respondent/Appellant.

From the Montana First Judicial District Court
Cause No. CDV 2014-117
Honorable Kathy Seeley, Presiding

BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER, MONTANA NEWSPAPER ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER/APPELLEE KRAKAUER

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INTEREST OF AMICUS CURIAE

Amici incorporate by reference the Interests of Amici set forth in their Motion for Leave to File. In summary, the Student Press Law Center ("SPLC") is an IRS 501(c)(3) non-profit, non-partisan organization that helps journalists get access to records about schools and colleges, and advocates for the transparency of educational institutions.

The Montana Newspaper Association is an association of professional news media organizations founded in 1885 representing the interests of 87 newspapers published in the state of Montana.

The Reporters Committee for Freedom of the Press ("RCFP") is a voluntary unincorporated association of reporters and editors nationwide that works to defend the First Amendment rights and freedom-of-information interests of the news media.

The Society of Professional Journalists ("SPJ") is a nonprofit membership organization dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization.

SUMMARY OF ARGUMENT

This case involves the public's right to know about matters of paramount public concern – whether colleges take seriously their duty to protect student safety, and whether high-ranking government officials are providing honest

service. Against those overriding public interests, the State marshals an illogically broad interpretation of a federal privacy statute, the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, that neither comports with the statute's function and purpose nor is constitutionally sustainable – especially in light of the Supreme Court's dictate in *NFIB v. Sebelius*, 132 S.Ct. 2566, 2605 (2012), that Congress may not engage in "economic dragooning" by threatening states with financial ruin to coerce compliance with federal policy. This Court soundly harmonized FERPA with Montana's strong tradition of public access in *Board of Trustees v. Cut Bank Pioneer Press*, 337 Mont. 229 (Mont. 2007), by requiring that public records be produced with minimal redaction of students' identifying information, and should decline the invitation to overturn that sensible precedent.

The "privacy" interests in this case could scarcely be more minimal. Krakauer's request involves records (redacted to protect victim privacy) kept by Montana Higher Education Commissioner Clayton Christian, reflecting how he decided to overturn disciplinary sanctions against the most prominent athlete at the University of Montana, Jordan Johnson, whose nationally publicized case has already been the subject of a public criminal trial, through which substantial portions of his campus disciplinary files were publicly disseminated. This is, in short, exactly the type of situation in which a state agency would determine that

no compelling personal privacy interest overrides the public's right to know. The State would have the Court read FERPA in a nonsensical way, foreclosing the individualized privacy balancing test that Montana law requires. FERPA cannot be read to "dragoon" a state into decisions undermining entrenched state priorities.

ARGUMENT

I. Access to public records from colleges and schools is essential for honest, accountable government

A. Journalists rely on public records to hold colleges and schools accountable.

Public records are the backbone of investigative journalism. Access to records makes a decisive difference in whether the public learns of the shortcomings of government officials and programs in time to take action. Public records enabled the *Chicago Tribune* to expose an off-the-books "clout admissions" system run by University of Illinois lobbyists, through which relatives of politicians received preferential treatment ahead of better-credentialed applicants – a scandal that ousted UI's president and a majority of its trustees.[1] At Sonoma State University, the *Santa Rosa Press-Democrat* used public records to unravel rampant misuse of donations to the university

[1] Jodi S. Cohen, Stacy St. Clair & Tara Malone, "Clout goes to college," *Chicago Tribune*, May 29, 2009, at A1; Jodi S. Cohen, Stacy St. Clair and Todd Lighty, "Lobbyists, campaign donors got lawmakers' help to enter U. of I.," *Chicago Tribune*, Feb. 25, 2012.

foundation.[2] *The Atlanta Constitution* used public records to document widespread cheating throughout the Atlanta Public Schools to inflate standardized test scores, resulting in the indictment of 35 accused conspirators including the district's former superintendent.[3] These stories – and the reforms that they produced – were possible only because schools and colleges were required to adhere faithfully to state laws that empower the public to inspect government documents.

Whether colleges respond effectively to complaints of sexual assault is one of the highest-profile issues of public concern facing America today. *See* Aamer Madhani & Rachel Axon, "Biden: Colleges must step up to prevent sexual assault," *USA Today*, April 29, 2014. Amicus SPLC worked during 2014 with the *Columbus Dispatch* on a series of stories, "Campus Insecurity," that revealed the depth of colleges' deceit in minimizing the severity of violent

[2] Nathan Halverson, "Attorney General auditing SSU loans to Carinalli," *The Press Democrat*, July 29, 2009 at A1.
[3] Joy Resmovits, "Atlanta Cheating Scandal Unveiled by Reporters," *The Huffington Post*, July 6, 2011, *available at* http://www.huffingtonpost.com/2011/07/06/atlanta-public-schools-cheating_n_891737.html.

crime; an analysis of 12 years' worth of records from 1,800 colleges found that one in five institutions claimed never to have heard of even one sexual assault.[4]

Access to public records about the handling of sexual assault cases was indispensable to the *Dispatch* investigation as well as to comparable recent investigations of campus sexual assault by other media outlets, both scholastic and professional.[5] Such investigations will become impossible if the University of Montana's interpretation of FERPA prevails in this case. Many agencies insist that FERPA requires denial of even a request for *redacted* records if the records pertain to a small pool of individuals, to preclude anyone from mentally matching a redacted record to a known person – a position that, as discussed *infra*, is rooted in an irrational interpretation by the U.S. Department of Education ("DOE"). If redacted records of sexual-assault appeals are categorized as confidential, meaningful public oversight of colleges' handling of rape cases will come to an end.

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[4] *See* Collin Binkley *et al.*, "Reports on college crime are deceptively inaccurate," *The Columbus Dispatch*, Sept. 30, 2014 at A1 (summarizing analysis of 12 years of federal data collected from colleges under the Clery Act crime disclosure statute).

[5] *See, e.g.*, Patricia Boh *et al.*, "Sweeping rape under the rug," *The Daily Campus*, May 1, 2012 at 1 (student reporters used public records to examine 100 documented cases of sexual assault reported to SMU and discovered that only one resulted in anyone being successfully prosecuted).

When a sexual assault is handled through normal criminal-justice channels, public documents – jail logs, police reports, court dockets – enable the public to track the effectiveness of the justice system and to become informed about potential hazards. (*See* § 44-5-103(13), MCA) When colleges funnel these cases into secretive campus disciplinary systems, none of these things happens. Disciplinary secrecy has effectively enabled colleges to afford preferential treatment to campus VIPs. Because of legitimate questions about the integrity of campus disciplinary systems – questions resonating in the halls of Congress and the White House – it is especially essential that colleges be required to produce records enabling the public to oversee how campus justice is dispensed.

B. Colleges and schools habitually misuse FERPA to conceal records even where no legitimate student privacy interest exists.

Justified or not, FERPA has become the knee-jerk response whenever a school or college is confronted with a demand for public records that might reflect unfavorably on the institution's reputation. When the *Baltimore Sun* began investigating the scope of hazing at fraternities across Maryland, colleges reflexively invoked FERPA to withhold responsive documents shedding light

on how often, and why, fraternities were disciplined for abusing pledges.[6] The journalists eventually convinced the universities otherwise, resulting in a database of hundreds of pages of records documenting forced binge drinking, sleep deprivation and other hazardous induction rituals.[7]

College journalists at the University of Wisconsin-Milwaukee were forced to take their college to court to obtain access to recordings of university committee meetings – meetings that were open for public attendance – because of their university's insistence that, once a public meeting is recorded, it becomes a confidential FERPA record, requiring the redaction of students' voices.[8] A student watchdog seeking public records from the University of Florida was forced to file suit after the university insisted that recordings of Student Senate meetings – meetings open for public attendance – were confidential FERPA records.[9] Perhaps the most tragic misuses of FERPA

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[6] Caitlin Johnson, "How to investigate a university (the right way)," *The Poynter Institute*, Dec. 9, 2014, *available at* http://www.poynter.org/news/mediawire/306863/how-to-investigate-a-university-the-right-way/ (last viewed Feb. 14, 2015).
[7] Carrie Wells, "Hazing at Md. colleges includes humiliation, coercion, hospital trips," *The Baltimore Sun*, Nov. 22, 2014.
[8] Bruce Vielmetti, "UWM student paper wins public records lawsuit," *Milwaukee Journal-Sentinel*, Feb. 15, 2010.
[9] *Bracco v. Machen*, No. 1-2009-CA-4444 (Fla. Cir. Ct., Jan. 10, 2011).

involve requests made by grieving parents, who have been compelled to sue to obtain videotapes of their children's last moments.[10]

II. The State's interpretation of FERPA is not legally permissible

A. FERPA was never intended to, and cannot be understood to, override deep-rooted state public-access regimes.

Montana has an especially strong tradition of respect for the public's right to know, having enshrined that right in the Constitution (Art. II, § 9), an enactment that predates the 1974 passage of FERPA and of which Congress must necessarily have been aware.

By its plain language, FERPA declares an educational institution ineligible for all federal education funding if it maintains a "policy and practice" of disclosing students' confidential education records. 20 U.S.C. § 1232g(b)(1). Most courts asked the question have decided, as the trial court below did, that FERPA must mean what it says: it penalizes only an institutional breakdown in recordkeeping, not a one-time decision to honor a records request in compliance with state law. Indeed, the DOE itself took the position, when sued over its now-discredited interpretation that police crime reports were "education records," that FERPA does not override or excuse compliance with state freedom-of-information laws, but merely "makes

[10] Matthew Spina, "Parents of high school football player who died file claim," *The Buffalo News*, Jan. 28, 2014; Michelle E. Shaw, "Parents of dead Valdosta teen seek release of video," *Atlanta Journal-Constitution*, Oct. 24, 2013.

disclosure financially unattractive(.)" *Student Press Law Ctr. v. Alexander*, 778 F.Supp. 1227, 1232 n.13 (D.D.C. 1991).

The "policy" of obeying public records acts cannot be the "policy" that FERPA forbids. It would raise insurmountable federalism issues to interpret FERPA as preempting state open-records law when neither the statute nor the DOE's implementing regulations even mention the existence of state FOI laws. More to the point, no educational institution could be proven to have a "policy" of disclosing confidential records; at most, the "policy" would be to make an individualized privacy determination on each request. For example, if a stranger showed up at a school and demanded to see every student's report card, the school would properly deny the request based on the privacy balancing test in § 2-6-102(3), MCA. Thus, at most, the DOE would be able to demonstrate that an agency had a "policy" of releasing records when served with a lawful request for public records where no overriding privacy interest exists.

Krakauer's interest here is not in how Johnson behaved – his behavior is well-documented in public records – but in how Commissioner Christian behaved. Because FERPA applies only to records "directly" relating to a student of the type that would be kept on file corresponding to that student's name, courts have had little difficulty recognizing that records primarily concerning the behavior of a government official are not the "education

records" to which FERPA was directed. See, e.g., *Ellis v. Cleveland Municipal Sch. Dist.*, 309 F. Supp. 2d 1019, 1022-23 (N.D. Ohio 2004); *Wallace v. Cranbrook Educ. Community*, No. 05-73446, 2006 WL 2796135 at *3-*4 (E.D. Mich., Sept. 27, 2006); *Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*, 1996 WL 104231, at *6 (Del. Ch. 1996).

B. DOE rules and interpretations do not categorically override the public's right to know.

1. Courts have repeatedly rejected the Department of Education's extreme applications of FERPA.

Courts regularly have been required to rein in the DOE's attempts to unreasonably expand the universe of FERPA-protected records. In a pair of 1991 rulings, two federal courts rejected as unreasonable the DOE's position that FERPA overrides the public's right of access to "incident reports" describing the crimes to which campus police respond. *Bauer v. Kincaid*, 759 F.Supp. 575 (W.D. Mo. 1991); *Alexander*, 778 F.Supp. at 1227. As the court stated in *Alexander*, "There is no legitimate privacy interest in arrest records, and therefore the potential harm to third-parties is not legally cognizable." *Id.* at 1234. Again in 1998, the DOE tried to broaden the range of FERPA records – this time, to include parking tickets issued to student-athletes – and again a court rejected the Department's interpretation as an unreasonable expansion of what Congress meant by "education records." *Kirwan v. The Diamondback*, 721

A.2d 196 (Md. 1998). In each instance, the courts found a significant public interest in disclosure and minimal individual privacy interest – applying the common-sense balancing test codified in Montana law and in this Court's *Cut Bank Pioneer Press* ruling.

2. DOE's "Targeted Request Rule" would be irrational and unconstitutional if applied to deny access to non-confidential records involving campus safety.

Against this history of failed expansion attempts, the Department tried again with a 2008 rulemaking – known as the "Targeted Request Rule" – on which the State relied in denying Krakauer's FOIA request and which is the basis of its appeal here. Promulgated in March 2008 and enacted in December 2008, the rule broadens what qualifies as "personally identifiable information" from education records that is to be kept confidential, adding:

> (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
> (g) Information 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. Part 99.3.

In circulating the rule for comment in March 2008,[11] the DOE did not mention state open-records laws at all, indicating either that the Department did not intend to override state law or that the Department was unaware of the impact of its actions on state-secured rights.

When promulgating the final rule, the DOE acknowledged having received comments about the risk of depriving citizens of access to public records. *See* "Family Educational Rights and Privacy; Final Rule," 73 Fed. Reg. 74805, 74830 (Dec. 9, 2008) (codified at 34 C.F.R. Part 99). Nevertheless, the DOE shrugged off those concerns, waving them off with one phrase: "FERPA is not an open records statute or part of an open records system." *Id.* at 74831. This can be read to mean: (1) that the Department did not believe its regulations affected the public's rights under state law, or (2) that the Department was unaware of and unconcerned with the public's rights under state law. In neither case can an intent to displace state law be inferred.

Before the Targeted Request Rule, it was clearly understood – including by this Court – that an educational institution's duty to safeguard the confidentiality of education records extended only to an examination of the records themselves. If the records could be purged of individual student identifiers, then it was the agency's responsibility to do so and to produce the

[11] 73 Fed. Reg. 15574 (March 24, 2008).

balance of the records with only minimal redactions. *See Cut Bank Pioneer Press*, ¶¶ 27-28 (collecting cases and finding that FERPA did not prohibit release of disciplinary records with student names redacted, regardless of requester's personal knowledge). This is consistent with general principles of state open-government law everywhere. *In no other instance are agencies empowered to withhold information based on how they believe a requester might combine the records with his preexisting knowledge.*

It is extraordinarily dangerous to put government agencies in the position of deciding which requesters "know too much" to be entitled to obtain public records. This issue was explored at length in *Predisik v. Spokane Sch. Dist.*, 319 P.3d 801 (Wash. App. 2014), involving two teachers' attempt to enjoin the disclosure of public records containing misconduct complaints against them. The teachers insisted that the records could not be disclosed even in redacted form, because the requester could use personal knowledge to match the redacted records to the accused teachers. The Court of Appeals ruled:

> Production of a redacted record is permitted even though redaction is insufficient to protect the person's identity. .... Nonexempt information in a record must be produced, even if disclosure of this information would result in the court's inability to protect the identity of an individual.

Id. at 804 (internal citation omitted).

Where a federal agency has employed a congressional grant of authority to speak with the force of law, a resulting rule does not control if – as here – the result is contrary to Congress' explicit intent or would produce results manifestly contrary to the purposes of the authorizing statute. *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Deference to the *federal* government is at its nadir in this case, because FERPA purports to govern the conduct of state agencies in two areas of traditional, if not exclusive, *state* expertise: Education, and access to state records. Courts should hesitate to infer an intent to override state policy – *especially* in Montana, where the right of access to government records is constitutionally enshrined – when a more sensibly limited interpretation exists.

The Department's attempt to expand FERPA by regulation impermissibly exceeded the authority granted by Congress. Congress empowered the Department to penalize educational institutions that fail to maintain and enforce a policy protecting the confidentiality of individually identifiable education records. The Department is now claiming to have authority to penalize colleges even if *no* policy or practice or disclosure exists, even if the records disclosed contain *nothing* confidential or individually identifying – based not on the content of the records but on the independent knowledge of the person making the request. This arrogation of authority expands FERPA far beyond what

Congress intended. Nothing in the FERPA statute empowers the Department to make differentiations on the "education record" status of documents based on who asks to see it.

The absurdity of the 2008 rule has been judicially recognized already. In *Heller v. Safford Unified School District*, No. CV2011-00165 (Ariz. Super. Ct., Aug. 22, 2011), a journalist made what the Department would categorize as a "targeted request" for a settlement agreement in a Fourth Amendment lawsuit between a school district and the family of an Arizona teenager who was strip-searched unlawfully, as determined in a nationally publicized Supreme Court ruling. *Safford Unif. Sch. Dist. v. Redding*, 129 S.Ct. 2633 (2009). The school district cited a passage in the 2008 DOE rulemaking in which the Department asserted that "settlement agreements" are confidential education records, but the Court afforded no deference to that interpretation of FERPA and ordered the settlement released, despite the fact that the requester (and the public) knew the student to whom the records referred. The court reached its conclusion by balancing the "minimal" privacy interests of the now-famous student "weighed against the greater public interest for transparency in the expenditure of public funds by the district." *See Heller* at *2.

Another court implicitly rejected the Department's construction of FERPA in *Phoenix Newspapers Inc. v. Pima Community College*, No.

C20111954 (Ariz. Super. Ct., May 17, 2011). There, a news organization made what the Department would categorize as a "targeted request" for emails retained by a college concerning former student Jared Loughner, incarcerated in the January 2011 Tucson shooting that killed six people. The court overrode the college's FERPA-based objection and ordered disclosure of the emails, notwithstanding the fact that the requester not only knew the student's identity but received them in un-redacted form. Consequently, there is precedent for rejecting the Department's 2008 reinterpretation of FERPA when the Department's position contravenes important state public-policy imperatives and serves no logical purpose.

3. FERPA's penalty structure renders the State's understanding of the statute implausible.

As the District Court correctly observed, FERPA is about the duty to enforce a *pattern and practice* of confidentiality – that is, a duty not to make a habit of disclosing students' education records. This is much different from the Department's current notion of FERPA as a one-strike-and-you're-out regime in which a single fulfilled public-records request – *even with* reasonable redactions made to protect confidentiality – can be fatal to the institution's existence.

Congress equipped the Department with only one remedy for a FERPA violation: Complete disqualification from federal education funding. 20 U.S.C.

§ 1232g(b)(1). Revoking the University of Montana's eligibility for federal funding would literally put the University out of business, since it receives tens of millions of dollars in federal funding annually, including life-sustaining Pell Grants.[12] To insist that Congress could have intended to shutter an educational institution because of a single good-faith grant of a request for public records is absurd.

Realistically, Congress clearly intended FERPA to penalize only the rare outlier institution that wantonly makes a *practice* of handling student records carelessly. Otherwise, Congress would have provided (and the Department would have implemented by rulemaking) milder intermediate penalties, as Congress has proven amply capable of doing with comparable education-funding statutes. *See* Department of Education, *Adjustment of Civil Monetary Penalties for Inflation*, 77 Fed. Reg. 60047, 60049 (Oct. 2, 2012) (amending 34 CFR Part 36) (specifying range of civil penalties for violating statutes administered by the Department of Education, all but one of which is capped at $35,000 per violation and none of which provides for complete revocation of federal funding).

[12] During the 2012-13 academic term, the University of Montana received $20,983,719 through the Pell Grant student aid program alone. *See* U.S. Department of Education, Distribution of Federal Pell Grant Program Funds by Institution, Award Year 2012-13 (*available at* http://www2.ed.gov/finaid/prof/resources/data/pell-institution.html)

It is nonsensical for the Department to take the position that the penalty for falsifying a crime report to mislead the public is an offense carrying a penalty of no more than $35,000, while the penalty for granting a request for public records is in excess of $20 million. For the penalty structure to make any sense, a FERPA violation must necessarily be of the magnitude of a total institutional breakdown in security, not a one-time decision made in good-faith reliance on controlling state disclosure laws.

Based on its 40 years of practice, the Department plainly does not operate under the understanding of FERPA that it asks this Court to accept. Indeed, in the 40-year history of the FERPA statute, *not one educational institution has been penalized*,[13] even though many have released public records comparable to those being debated in this case. As the Department itself does not treat the lawful grant of a request for public records as a punishable violation of FERPA, this Court should not allow itself to be "*dragooned*" into doing so.

The Court must be especially wary of affording deference in this situation, because the interests of the regulator (the DOE) and the regulated (the State) align against the interests of the public. In a typical agency rulemaking, the regulated industry is a check on overreaching by a regulator bent on

[13] Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 498 (January 2013).

expanding its authority. Here, the incentives are misaligned – the more unreasonably the DOE interprets FERPA, the better the regulated agencies like it, because it furthers their interest in secrecy, while they operate secure in the knowledge that none will ever be sanctioned. Because the "industry" has no incentive to seek a sensibly narrow construction of the statute, courts must provide that check.

4. The State's interpretation is irreconcilable with FERPA's role as a disclosure statute giving students and parents the right to correct "education records."

Categorizing documents as "FERPA education records" carries the obligation to afford the family substantive rights of access and review. *See* 34 C.F.R. Parts 99.10 - 99.22. These rights are logically irreconcilable with the State's concept that the Commissioner's correspondence can be "education records." In the Supreme Court case of *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002), the DOE filed a brief laying out a narrow view, consistent with congressional intent, of what qualifies as a FERPA record:

> The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert into such records a written explanation by the parents regarding the content of the records.

Falvo, Brief for the United States, No. 00-1073, 2001 U.S. S. Ct. Briefs LEXIS 964 at *24-25, (June 1, 2001).

The Department's pre-2008 view comported with FERPA's purpose and function. FERPA was intended to protect students against harm from the disclosure of confidential documents without providing an opportunity to correct errors or omissions. A graduate school or employer doing a background check on Johnson might be given access to his academic and disciplinary file in the University of Montana's central office, but would certainly not be given access to Christian's notes and correspondence. Nor would Christian make his notes and correspondence available to Johnson for inspection and correction.

Significantly, the legislative intent behind FERPA indicates that the statute is "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39862 (1974). But categorizing Christian's records of the Johnson appeal as FERPA records would produce exactly that result.

Montana Board of Regents Policy 203.5.2, Sec. II, sets the procedure for appealing the adverse decision of a university president to the Commissioner. It provides one opportunity for appeal to the Commissioner, and gives the Commissioner discretion to "limit the scope of review to procedural matters." If Christian's records of the disciplinary appeal are FERPA records as the State

urges, then Johnson and his student accuser ("Doe") must be afforded *additional* opportunities to challenge his conclusions, contrary to the clear intent of FERPA's authors. Both Johnson and Doe will have the right to challenge the completeness and veracity of Christian's records, to insert corrective material into Christian's records, and to demand a hearing if their corrections are refused. The potential for absurdity is obvious: Each party will have a federally protected right to additional rounds of "yes he did"/"no I didn't" hearings beyond those that Montana regulations afford – resulting in even *further* federal override of exclusive state jurisdiction, without the slightest indication that the DOE foresaw or intended such result.

III. FERPA cannot constitutionally be interpreted as a "gun to the head" overriding Montana's strong public policy favoring transparency

While Congress may condition the receipt of federal funds on accepting reasonable conditions under its Spending Clause authority, the financial penalty for noncompliance cannot be "so coercive as to pass the point at which pressure turns into compulsion." *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (internal quotes and citation omitted). In *Sebelius*, the Supreme Court determined that pressure had become compulsion where states were threatened with ineligibility for hundreds of millions of dollars in federal health funding if they rejected the Affordable Care Act's mandate to expand Medicaid eligibility.

Significantly, the Supreme Court views Spending Clause enactments with special skepticism where, as here, the condition purportedly being imposed – exempting anything meeting FERPA's description of an "education record" from disclosure, regardless of the privacy and disclosure interests at stake – does not relate to the actual grant program. *Id.* at 2604; *see also Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S.Ct. 2321 (2013) (striking down as an "unconstitutional condition" a federal policy conditioning receipt of federal AIDS-education grants on an agreement to adopt federal "party line" condemning prostitution, which the Court found unrelated to the purpose of the grant program).

While courts at times have misinterpreted FERPA as a federal prohibition against honoring individual requests for public records, that interpretation is no longer tenable after *Sebelius*. If honoring a request for public records will put a university in violation of FERPA, and the result of being found in violation of FERPA is the "institutional death penalty" of disqualification from federal education funding, then FERPA fails the compulsion standard of *Sebelius*. Indeed, educational institutions have themselves argued for decades that FERPA operates as *Sebelius*' proverbial "gun to the head," because refusing federal education funding would be such a ruinous choice as to be no choice at all.

Declaring legislative enactments unconstitutional is a disfavored "nuclear option," and courts properly avoid doing so when a statute can be giving a limiting construction salvaging it as constitutional. *See State v. Mathis*, 315 Mont. 378, 381 (Mont. 2003) ("It is the duty of courts, if possible, to construe statutes in a manner that avoids unconstitutional interpretation."). As the Supreme Court has repeatedly instructed, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. Calif.*, 155 U.S. 648, 657 (1895)).

As the trial court correctly recognized, FERPA is readily harmonized with state open-records laws by giving it the limited understanding that its drafters intended – as a prohibition on a policy or practice of failing to secure centrally maintained education records containing non-public information of the type that could be used detrimentally against a student if disclosed.

CONCLUSION

For all of the aforesaid reasons, the ruling of the trial court should be affirmed and the State ordered to produce the records to which Krakauer is entitled.

Dated this 18th day of February, 2015.

MORRISON, SHERWOOD, WILSON & DEOLA, PLLP

BY: _____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2008 for Mac is 4,965, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By _____

CERTIFICATE OF SERVICE

I certify that on February 18, 2015, a true and correct copy of the foregoing was served by U.S. mail, first class postage prepaid, to the following:

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