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 CHRISTIAN,

*Respondent.*

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

## BRIEF *AMICUS CURIAE* OF THE STUDENT PRESS LAW CENTER, NATIONAL FREEDOM OF INFORMATION COALITION, NEWS LEADERS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, GANNETT CO., INC., THE E.W. SCRIPPS COMPANY, AND BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF PETITIONER JON KRAKAUER

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## QUESTION PRESENTED

Does the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, preempt state statutory and constitutional law in a field traditionally committed to the states, rendering it an unconstitutional Spending Clause condition under *NFIB v. Sebelius*, 567 U.S. 519 (2012), or can the statute be interpreted as a constitutionally permissible prohibition on the "policy or practice" of disclosing confidential education records, consistent with *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) and with state law?

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## BRIEF OF *AMICI CURIAE* AND INTEREST OF *AMICI CURIAE*[1]

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 National Freedom of Information Coalition ("NFOIC") is a nonprofit organization that works to raise public awareness about the importance of transparency and to protect the public's right to open government. The NFOIC awards grants to its affiliated state- and region-based freedom of information organizations for their work in fostering, educating, and advocating for open, transparent government.

The News Leaders Association (formerly the American Society of News Editors and AP Managing Editors) is a nationwide membership organization of newsroom managers that aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

The Society of Professional Journalists is The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

Gannett Co., Inc., is the largest local newspaper company in the United States. Gannett's 260 local daily brands in 46 states and Guam – together with the iconic USA TODAY – reach an estimated digital audience of 140 million each month.

The E.W. Scripps Company is the nation's fourth-largest independent TV station owner, operating 60 television stations in 42 markets. Scripps' commitment to journalism also includes an award-winning investigative reporting newsroom in Washington, D.C., multiplatform news network "Newsy" and broadcast networks including Bounce and Court TV. Scripps also owns podcast company, Stitcher; technology and measurement service Triton; and is the longtime steward of the Scripps National Spelling Bee.

The Brechner Center for Freedom of Information is located at the University of Florida College of Journalism and Communications, where for 42 years the Center's legal staff has served as a source of research and expertise about the law of access to information. The Brechner Center regularly publishes scholarly research about the public's rights under open-government laws, responds to media inquiries about the workings of public-records statutes, and conducts educational programming to inform citizens about their access rights.

## 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 making decisions honestly and without favoritism. The court below erroneously found that a federal privacy statute, the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, preempts not just state statutory law but state *constitutional* law on the subject of access to public records from state universities – a matter of unique state jurisdiction and expertise. This is not a permissible application of a federal Spending Clause condition in light of the Court's interpretation in *NFIB v. Sebelius*, 567 U.S. 519 (2012), 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. This Court's FERPA jurisprudence, and decades' worth of U.S. Department of Education guidance, have consistently interpreted FERPA in a sensibly narrow way: To penalize only a systemic refusal to enforce protocols against the indiscriminate release of confidential, centrally maintained student records. But that is not the way FERPA is being applied in practice. In practice, FERPA is being interpreted – as it was in this case – to penalize the disclosure of *non*-confidential and *non*-centrally maintained records that would, indisputably, be accessible to the public if not for the perceived preemptive force of FERPA.

By interpreting FERPA in a way that contradicts this Court's precedent in *Owasso Independent School District v. Falvo*, 534 U.S. 426 (2002), and *Gonzaga*

*University v. Doe*, 536 U.S. 273 (2002), the court below has created a constitutional issue where none need exist. In construing FERPA to confer an individual right of privacy that penalizes a one-time release of documents, in derogation of state law that entitles the public to disclosure, the Montana Supreme Court has interpreted the statute as an unconstitutional Spending Clause condition, invalid under the *Sebelius* doctrine. It is incumbent on this Court to restore FERPA to its intended boundaries so that it can be harmonized with state law without creating a needless constitutional infirmity.

## ARGUMENT

### I. FERPA is pervasively misinterpreted and misapplied, denying the public access to critical information

While the Petitioner's case involves the right of access to records from a public educational agency in Montana, the misapplication of federal privacy law is in no way limited to one agency or one state. Wrongly insisting that FERPA forbids disclosure, schools and colleges routinely withhold access to records that the public needs to evaluate the safety and effectiveness of educational institutions. The specific issue in this case – whether Krakauer is entitled to inspect the records reflecting how and why a high-ranking state official, Commissioner Christian, used his authority to overturn the determination of a campus disciplinary board in a high-profile case involving allegations of violent criminal wrongdoing – shows just how far FERPA has been distorted beyond its authors' intent as a narrow statute entitling parents to see their children's academic and disciplinary records to correct any inaccuracies or omissions. *See* Thomas R. Baker, *Inaccurate and Misleading: Student Hearing Rights*

*Under FERPA*, 114 Ed. Law Rep. 721, 725 (Feb. 1997) (explaining that FERPA's chief author, Sen. James Buckley, was primarily concerned that "erroneous and harmful material can creep into the records" if parents are not allowed to review and correct them).

Journalists keeping watch over the integrity and safety of schools and colleges regularly are forced to go to court, because hidebound institutions take advantage of the muddle of contradictory judicial interpretations of FERPA to opportunistically conceal unflattering records. Just recently, a Georgia newspaper was forced to sue to obtain a hallway surveillance video showing a school official grievously injuring a 13-year-old student, whose leg was amputated, because the school claimed that FERPA requires withholding access to footage in school security cameras. *See* Mark Rice, *Video shows physical confrontation between 13-year-old MCSD student who lost leg, school contractor*, Columbus Ledger-Enquirer, Aug. 9, 2019. Absurdly, journalists have been told that FERPA forbids them from knowing how many times guns were brought into Ohio schools[2], or how many times college football players in Tennessee experienced head injuries.[3] Contrary to this Court's settled precedent, FERPA is widely misperceived as requiring educational institutions to conceal records critical to public welfare and safety, including:

In Arkansas, where the family of a critically injured seven-year-old boy was denied access to school

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[2] Bill Bush, *Privacy law shields school-district tallies of gun incidents*, Columbus Dispatch, Dec. 10, 2013.

[3] Tony Casey, *ETSU won't share football concussion numbers as NCAA faces class action lawsuit*, Johnson City Press, Feb. 5, 2017.

security-camera footage showing how the injury occurred, which doctors needed to administer lifesaving treatment, because the school regarded the video as a FERPA-protected record;[4]

In Oklahoma, where a known serial sex offender was allowed to remain at large on the campus and in the community, because his university interpreted FERPA as forbidding disclosure of his offenses even to the campus police department;[5]

In Georgia, where the family of a teenager inexplicably found dead in a rolled-up mat in his high-school gym was forced to sue for access to the surveillance video needed to determine whether his death was a homicide and whether his killers might still be at large.[6]

Common to each of these tragic cases, and many hundreds like them, is the pervasive misperception that FERPA carries catastrophic financial penalties for a one-time disclosure of public records – even when necessary for public safety, even under a court order, and even when there is no legitimate expectation of privacy in the contents of the records. This perception is irreconcilable with this Court's two commonsense interpretations of FERPA in *Owasso* and *Gonzaga University*, *supra,* each of which correctly interpreted FERPA as a narrow statute applying only to a

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[4] Kitty L. Cone & Richard J. Peltz-Steele, *FERPA Close-Up: When Video Captures Violence and Injury*, 70 Okla. L. Rev. 839, 841 (2018).

[5] Silas Allen, *Report: Oklahoma State University's response to sexual assault reports was 'misguided,'* The Oklahoman, Feb. 25, 2013.

[6] Michelle E. Shaw, *Parents of dead Valdosta teen seek release of video*, Atlanta Journal-Constitution, Oct. 24, 2013.

wholesale institution-wide failure to protect the privacy of records kept in students' confidential, centrally maintained files. This is the only way that FERPA can be harmonized with state public-records laws without contravening fundamental principles of federalism and making FERPA unconstitutional.

## II. The interpretation of FERPA adopted by the Montana Supreme Court is not legally permissible

### A. FERPA was never intended to, and cannot be understood to, preempt state-guaranteed rights to public access

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), as well as in the Montana Public Records Act, § 2-6-102(3), MCA. To interpret a federal statute as displacing the public's state-guaranteed right of access requires proof either that Congress has occupied the entire field ("field preemption") or that it is impossible to comply with the conflicting obligations imposed by federal and state law ("conflict preemption"). Neither can apply to FERPA and state freedom-of-information laws.

The areas in which courts have found federal field preemption to exist are areas of traditional federal expertise and responsibility. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012) (immigration); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (patent law). Education and the maintenance of state records are, conversely, two areas of law over which states have primary expertise and responsibility, subjects historically committed to the discretion of state and local government. To find that Congress has preempted state authority in these

areas of unique state expertise and discretion would represent a drastic recalibration of federalism.

A conflict preemption argument fares no better. As with field preemption, the ultimate question in conflict preemption comes down to federal intent. Preemption analysis must always begin "with the presumption that Congress does not intend to supplant state law and that the historic police powers of the states are not superseded by the federal act unless preemption was the clear and manifest purpose of Congress." *Morgan Keegan & Co., Inc. v. Smythe*, 401 S.W.3d 595, 605 (Tenn. 2013). Nothing in the FERPA statute even *acknowledges the existence* of state open-records statutes, much less indicates an intent to displace or override them. To the contrary, the one-and-only reference to state law in either the federal FERPA statute or the Department of Education's implementing regulations is a "savings clause" that enables recipients of federal education funding to avoid FERPA penalties by the simple act of *filing a notice* with the Department stating that they believe themselves to be compelled by state law to make a release of education records. *See* 34 C.F.R. § 99.61 ("If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it must notify the Office within 45 days, giving the text and citation of the conflicting law."). Because federal regulations fully account for a situation in which state law requires disclosure of student records, the court below erred in finding that FERPA requires the Commissioner to withhold the requested records. Plainly, FERPA does no such thing.

As the Louisiana Court of Appeals found in a case, like this one, involving access to redacted student

records, there is no conflict between FERPA and state public-records law once student identifiers are removed. *Ferguson v. Louisiana Dept. of Education*, No. 2014-0032, 2014 WL 4667545 (La. App. Sept. 19, 2014). "According to FERPA, an educational agency can release a student's record if the agency removes personally identifiable information and replaces it with a code. . . . Once the document is legally created, the document becomes a public record under the Louisiana Public Records Law." *Id.* at *5. This interpretation of FERPA avoids creating a conflict between state and federal law, and where multiple reasonable interpretations are possible, fundamental principles of federalism required the court below to choose the reading that avoids nullifying the state law.

More broadly, it is eminently possible to harmonize FERPA with state open-records law by holding that an agency, such as the Montana Office of Commissioner of Higher Education, can comply with FERPA by maintaining a *policy and practice* of securing students' education records, while also honoring lawful requests for public records when state law compels disclosure. The Montana Supreme Court did not take this commonsense option and instead created a conflict between federal and state law by holding that FERPA overrides the right of access that Krakauer would otherwise have been guaranteed under Montana law.

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). Many courts have, correctly, interpreted FERPA to mean exactly what it says: That educational institutions cannot make a *practice* of releasing student records, not that a single release, in

compliance with state law, will make the institution forfeit millions of dollars in life-sustaining federal subsidies. *See, e.g., Red & Black Pub. Co., Inc. v. Board of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) ("the Buckley Amendment does not prohibit disclosure of records. Rather . . . the Buckley Amendment provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records."); *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138 (2d Cir. 2002) (school's alleged conduct of contacting a student's doctors, a potential home instructor, and a lawyer to provide defamatory and inaccurate information about student who was allegedly unable to attend classes for an extended period of time due to chronic fatigue syndrome and fibromyalgia did not constitute a "policy or practice" under FERPA); *Daniel S. v. Bd. of Educ. of York Cmty. High Sch.*, 152 F.Supp.2d 949 (N.D. Ill. 2001) (teacher's disclosure to his cross-country team that he had kicked two students out of his gym class did not involve "policy or practice" that violated provisions of FERPA); *Jensen v. Reeves*, 45 F.Supp.2d 1265, 1276 (D.Utah 1999) (principal's disclosure of information to parents complaining of sexual harassment about how student offender was disciplined did not violate FERPA, because a one-time release did not represent a policy or practice of disclosure: "FERPA was adopted to address systematic, not individual, violations of students' privacy by unauthorized releases of sensitive information in their educational records."); *Gundlach v. Reinstein*, 924 F.Supp. 684, 692 (E.D. Pa. 1996) ("the requirement placed on the participating institution is not that it must prevent the unauthorized release of education records . . . but that it cannot improperly release such records as a matter of policy or practice.").

This is the *only* way that FERPA can reasonably be understood to operate, consistent with this Court's interpretation that the statute confers no individual right of action because it imposes obligations only in the aggregate. *See Gonzaga, supra,* at 288 (stating that "FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure" and further noting that the statute requires only "substantial" compliance to avoid financial penalties); *see also id.* at 290 (stating that FERPA's strictures "have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions.").

Conversely, other courts have ruled that FERPA sanctions are triggered even by a single disclosure of records, regardless of whether the records contain anything that is either educational or private. *See State ex rel. ESPN v. Ohio State Univ.,* 132 Ohio St. 3d 212, 217 (Ohio 2012) (rejecting requester's contention that *Gonzaga* and *Owasso* limit FERPA to a spending condition violated only by a widespread policy and practice of disclosure, and holding that FERPA "does constitute a prohibition on the release of records" even in a single instance).

Similarly, the highest state courts are in irreconcilable conflict over whether redacting identifying information from student records – as Krakauer agreed to accept here – removes them from the purview of FERPA. Some rulings align with the Montana Supreme Court's view that releasing even wholly redacted documents can constitute a FERPA violation. *See Sherry v. Radnor Township School District*, 20 A.3d 515, 525 (Pa. Commonw. 2011) (concluding that FERPA precluded disclosure of

records pertaining to students even with all identifying information redacted). But others, in a more faithful reading of the FERPA statute and the intent behind it, conclude that records cease to qualify as federally protected "education records" once student identifiers are removed. *See Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 647 N.W.2d 158, 168 n. 11 (Wis. 2002) ("once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student."); *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir. 2002) ("Nothing in . . . FERPA would prevent [educational institutions] from releasing properly redacted records.").

This patchwork of state legal interpretations has produced the result that federal privacy law means different things in neighboring states – *exactly* the undesirable outcome that this Court warned of in *Gonzaga* if state courts are put into the business of deciding what qualifies as a FERPA record every time a request for access is filed. *See Gonzaga*, 536 U.S. at 290 (noting that Congress created a centralized hearing system within the Department of Education to guard against regional fragmentation in the interpretation of FERPA, and observing "[i]t is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid.").

Significantly, the Department of Education – which has exclusive authority to enforce FERPA – has itself taken the position that FERPA is a funding condition and not an affirmative prohibition on the release of records in compliance with state freedom-of-information

laws. In a case involving a journalist's request for access to incident reports from a campus police department, the Department argued that FERPA does not override or excuse compliance with state freedom-of-information laws, but merely "makes disclosure financially unattractive(.)" *Student Press Law Ctr. v. Alexander*, 778 F.Supp. 1227, 1232 n.13 (D.D.C. 1991). This directly contradicts the position urged by the State of Montana and adopted by the Montana Supreme Court, enabling the State to defy an otherwise-lawful request for public records on the basis of *anticipated* federal sanctions. This persistent and irreconcilable confusion is exactly the situation that calls for authoritative clarification from this Court.

### B. FERPA's penalty structure renders the Montana Supreme Court's understanding of the statute untenable

By its terms, FERPA is about the duty to enforce a *policy and practice* of confidentiality – that is, a duty not to make a habit of disclosing students' education records. This is much different from the Montana Supreme Court's 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 Montana University System's eligibility for federal funding would essentially put the system out of business, since by its own account the system receives more than $263 million in "critical" federal funding annually. To insist that Congress could have intended to shutter an entire state's higher education

system 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. 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.

The Court must be especially wary of affording deference in this situation, because the interests of the regulator (the Department of Education) 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 expanding its authority. Here, the incentives are misaligned: The more unreasonably the Department and the courts interpret FERPA, the better the regulated agencies like it, because it enables them to withhold more records from the public. Because the "industry" has no incentive to seek a sensibly narrow construction of the statute, courts must provide that check.

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

When this Court heard the *Owasso* case, the U.S. Department of Education 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.

*Owasso Indep. School District v. 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 view comports 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. *See* Stephanie Humphries, *Institutes of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law*, 35 J.C. & U.L. 145, 152 (2008) (explaining that Congress' "most fundamental reason" for enacting FERPA was to involve parents in their children's education by giving them access to all of the information

used by schools in making decisions). A graduate school or employer doing a background check might be given access to a student's academic and disciplinary file in the University of Montana registrar's office, but would certainly not be given access to the Montana Commissioner of Higher Education's notes and correspondence. Nor would the Commissioner make his notes and correspondence available to a student who asked for an opportunity to insert corrective material to make them complete and non-misleading, as would be required for *actual* FERPA records.

In the *Owasso* case, this Court arrived at its limited notion of what qualifies as a FERPA record in part by looking at the disclosure consequences that would attach if each-and-every document referencing a student fell within the statute's strictures. As the Court observed, FERPA confers duties and rights that necessarily can apply only to a small subset of records; for instance, once a record qualifies as a FERPA "education record," the school must maintain with the record a log of everyone who has requested access to it, and the student (or the student's family) must be granted an opportunity to submit corrective information, and must be afforded a hearing if the corrective information is refused. *Owasso*, 534 U.S. at 434-35. Plainly, as the Court held in *Owasso*, Congress cannot have intended for such burdensome obligations to attach to anything but a centrally maintained file of the type kept in a registrar's office or principal's office.

## 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 *NFIB v. Sebelius,* 567 U.S. 519 (2012), 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.

This 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.*, 570 U.S. 205 (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 "death penalty" of disqualification from federal 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.

If FERPA does operate as the Montana Supreme Court has construed it, the statute is unconstitutional under the *Sebelius* doctrine, because it compels states to abandon their constitutional and statutory commitment to public disclosure of government records under threat of financial ruin. Declaring legislative enactments unconstitutional is a disfavored "nuclear option," and courts properly avoid doing so when a statute can be given a limiting construction salvaging it as constitutional. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). As this 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)).

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. The Montana Supreme Court disregarded settled law, including the precedents of this Court, in interpreting FERPA as an unconstitutionally coercive spending condition.

## CONCLUSION

For all of the aforesaid reasons, the petition for certiorari should be granted and the decision of the Montana Supreme Court vacated.

Respectfully submitted,

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