

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 14-0657

JON KRAKAUER,

Petitioner and Appellee,

v.

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

Respondent and Appellant.

**UNITED STATES' MOTION FOR LEAVE
TO FILE *AMICUS CURIAE* BRIEF**

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 12(7) of the Montana Rules of Appellate Procedure, the United States respectfully moves this Court for leave to file an *amicus curiae* brief in support of neither party for the limited purpose of addressing the substantive provisions of FERPA and its relationship with state law. The United States is prepared to file an *amicus* brief no later than the date on which appellant's opening brief is due.

INTEREST OF THE UNITED STATES

This case concerns the scope of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and its relationship with Montana open records laws. FERPA protects the privacy of student education records by imposing conditions on educational institutions and agencies that accept federal funds under a program administered by the Department of Education. The United States has a strong interest in ensuring that educational institutions and agencies abide by these conditions. Indeed, if a university believes that it cannot comply with FERPA due to a potential conflict with state law, it must notify the Department of Education. 34 C.F.R. § 99.61. The United States has participated as *amicus* in other cases raising similar issues, including *State ex rel. ESPN, Inc. v. Ohio State University*, 132 Ohio St. 3d 212, 970 N.E.2d 939 (2012), and *Chicago Tribune Co. v. Board of Trustees of the University of Illinois*, 680 F.3d 1001 (7th

Cir. 2012). Therefore, the United States has a substantial interest in the Court's resolution of this case.

REASONS WHY AN *AMICUS* BRIEF IS DESIRABLE

An *amicus* brief of the United States will serve the limited purpose of addressing the FERPA issues in this case. An *amicus* brief is desirable because the United States is uniquely positioned to explain the funding conditions imposed by FERPA, as well as the relationship between FERPA and state law.

In this case, appellee Jon Krakauer sought an order requiring the Montana Commissioner of Higher Education (the "Commissioner") to disclose records of disciplinary proceedings against Jordan Johnson, a student at the University of Montana. In response, the Commissioner argued, *inter alia*, that FERPA prohibits the Commissioner's office from disclosing any such records, even if they are redacted. The district court held that FERPA does not protect the records, and it ordered them disclosed in redacted form.

As *amicus curiae*, the United States wishes to clarify that disciplinary records constitute protected "education records" under FERPA. In addition, the United States will emphasize that the Department of Education amended its regulations in 2008 to clarify that FERPA protects "[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

(see “personally identifiable information” at (g)). Where, as here, the requestor asks for the records of a particular student by name, the university has a “reasonabl[e] belie[f]” that the requestor “knows the identity of the student to whom the education record relates.” *Id.*

Finally, the United States will argue that Montana open records laws may and should be construed consistently with FERPA. *Cf. ESPN*, 970 N.E.2d at 945-48 (interpreting Ohio’s open records law to be consistent with FERPA). Assuming, however, that this Court finds a conflict between FERPA and Montana open records laws, FERPA controls in this case because the Montana University System has received federal funds. *See id.* at 945 (“Under FERPA, schools and educational agencies receiving federal financial assistance must comply with [FERPA’s] conditions.”). Because the Montana University System agreed to accept FERPA’s conditions when it accepted federal funds, it is bound by those conditions. *See id.* (“Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent.”) (quoting *United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002)). To the extent that state law “command[s] the disclosure of particular information” protected by FERPA, “the Supremacy Clause means that federal law prevails.” *Chicago Tribune*, 680 F.3d at 1005.

PARTY WHOSE POSITION *AMICUS* SUPPORTS

An *amicus* brief of the United States would be filed in support of neither party. The United States seeks to present an *amicus* brief solely to guide the Court's analysis of the FERPA issues in this case.

DATE UPON WHICH AN *AMICUS* BRIEF CAN BE FILED

The United States will file its *amicus* brief no later than the date on which the appellant's opening brief is due.

CONSENT OF THE PARTIES

Counsel for the United States contacted the parties on December 4, 2014, regarding its interest in participating as *amicus*. The appellant consents to *amicus* participation. The appellee has not yet indicated whether he consents.

CONCLUSION

WHEREFORE, for the foregoing reasons, the United States asks this Court to grant leave to file an *amicus curiae* brief no later than the date on which appellant's opening brief is due. Pursuant to Rule 16(1) of the Montana Rules of Appellate Procedure, a proposed order is attached for the convenience of the Court.

Respectfully Submitted,

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DECEMBER 2014

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2014, I mailed a true and correct copy of the foregoing motion by sending a copy of the motion by First Class mail, postage prepaid, to counsel listed below.

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