No. 20-1381

In the Supreme Court of the United States

MATTHEW FOX, PROSECUTING ATTORNEY, MERCER COUNTY, OHIO, JEFF GREY, SHERIFF, MERCER COUNTY, OHIO, AND J.K., THE CRIME VICTIM

Petitioners,

v.

CHARLES A. SUMMERS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF OHIO PROSECUTING ATTORNEYS ASSOCIATION TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONERS

The Ohio Prosecuting Attorneys Association ("OPAA") respectfully moves for leave of court to file the accompanying amicus brief under Supreme Court Rule 37.3(b). The OPAA timely sent letters indicating its intent to file an amicus brief to all counsel of record pursuant to Rule 37.2(a). Petitioners granted consent, but the OPAA has been unable to obtain consent from Respondent, Charles A. Summers.

The OPAA is a private non-profit membership organization organized in 1937 for the benefit of Ohio's 88 elected county prosecutors. The association's mission is to increase the efficiency of the prosecutors in pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of a prosecuting attorney; and to aid the furtherance of justice.

It is a matter of great concern to all prosecutors nationwide, regardless of whether they are public officials or trial attorneys, that this Court accept the Petitioners' request to resolve the Circuit split in this case.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES—Continued

Constitutional Provisions

Rules

Other Authorities

TABLE OF AUTHORITIES—Continued

Internet

TABLE OF AUTHORITIES—Continued

STATEMENT OF AMICUS INTEREST[1]

The Ohio Prosecuting Attorneys Association offers this amicus brief in support of the Petition for a Writ of Certiorari filed by the Petitioners. The Ohio Prosecuting Attorneys Association is a private non-profit membership organization organized in 1937 for the benefit of Ohio's 88 elected county prosecutors. The association's mission is to increase the efficiency of the prosecutors in pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of a prosecuting attorney; and to aid the furtherance of justice.

It is a matter of great concern to all prosecutors nationwide, regardless of whether they are public officials or trial attorneys, that this Court accept the Petitioners' request to resolve the Circuit split in this case, and to recognize an informational privacy right for crime victims.

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[1]No counsel for any party authored any part of this brief, and no monetary contributions were made to fund the preparation or submission of this brief. See Rule 37.6. The OPAA notified all parties, through the parties' attorneys, of its intent to file the amicus brief more than ten days before its May 3, 2020 due date. See Rule 37.2(a). The OPAA is filing this brief pursuant to Rule 37.2 (b).

SUMMARY OF THE ARGUMENT

Nationwide, 1,206,836 murders, nonnegligent manslaughters, rapes, robberies, and aggravated assaults — crimes that had victims — took place in 2018, the last year of data available from the FBI's Uniform Crime Reports. Source: FBI Uniform Crime Reports, 2018, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/violent-crime, accessed March 2, 2021.

That year, close to one out of every 250 people was a victim of a violent crime nationwide; in Ohio alone, nearly one out of every 333 people was a victim of a violent crime. See id.; see also Table 4, FBI Uniform Crime Reports, 2018, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-4, accessed March 2, 2012.

Nationwide, more than 139,000 of those victims was the victim of a rape, a crime that the Sixth Circuit acknowledged as being particularly painful and that exposes victims to "victim blaming," criticism, and humiliating scrutiny, all of which can and often does continue long after the criminal case ends. See Table 1, FBI Uniform Crime Reports, 2018, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1, accessed April 23, 2021; *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir.1998).

Victims of any crime — and particularly victims of sexual assaults — are vulnerable to retaliation that includes online harassment, and some courts have recognized that the humiliation victims can suffer from public dissemination of their

private information after a case concludes can have a chilling effect on other victims that may prevent them from coming forward to law enforcement.

The Federal government and most states and U.S. territories have thus sought to shield crime victims from unwarranted intrusions into their privacy by enacting variants of "Marsy's Law" or a Victims' Bill of Rights in their statutes or state constitutions, in addition to rape shield laws and evidence rules. Generally, Marsy's Laws and Victims' Bills of Rights give all crime victims, not just rape victims, rights to receive notice of important developments in the offender's case; the right to be heard concerning the offender's bond, sentencing, and release; and often the right to refuse abusive discovery requests from the defense. Rape shield laws and evidence rules such as Fed.R.Evid. 412 frequently prohibit using evidence of a crime victim's sexual history to discredit him or her.

Many of the Marsy's Law or Victims' Bill of Rights provisions make prosecutors responsible for protecting crime victims' rights to dignity and privacy. Some states' public records or "freedom of information" acts also shield law enforcement investigatory materials and prosecutors' trial preparation materials while a criminal case is active — but only while the case is pending. Some, however, bar disclosure of government documents that contain information of a private nature, or that are barred from disclosure under other state or Federal laws.

Without a definitive recognition of a crime victim's right to informational privacy, these

provisions often do not give prosecutors a consistent basis upon which they can fulfill their continuing responsibilities to crime victims after the offenders' cases conclude. Without a nationally recognized right to informational privacy, there is also no guarantee that existing laws will operate as intended by state legislators, or, as in Ohio's case, by the voters who enacted them through ballot initiatives.

Recognizing a victim's informational privacy right, however, would give prosecutors and law enforcement consistent guidance on how to treat victims' information, in promoting justice and protecting the public, and would give victims additional, consistent tools for their self-protection.

The Petitioners' case presents this Court with the ideal opportunity to establish this right for crime victims.

WHY THE PETITION SHOULD BE GRANTED

I. The Need for Consistency

As the Petitioners ably summarize, this Court has assumed that a right to informational privacy exists, without declaring it so, and that the Circuits vary in their resulting opinions on the subject.

Privacy is something everyone connected to the criminal justice system understands. It is the cornerstone of this Court's Fourth Amendment jurisprudence. See, e.g., *Carpenter v. United States*, 138 S.Ct. 2206 (2018). It is the cornerstone of political and associational rights. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 65-67 (1976). It is a vital component of the accused's right to counsel. See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 563 (1977), Marshall, J., dissenting.

It is important to prosecutors for crime victims to also have a right to informational privacy that is recognized, rather than merely assumed, by this Court. The Petitioners already raise concerns for the ability of minor victims of sex offenses to find healing, and for public officials who are in the intolerable situation of being simultaneously subject to civil suits for releasing records and to civil suits for refusing to release those same records.

In addition to those concerns, however, many state statutory and constitutional provisions, including in Ohio, and the Federal Crime Victims' Rights Act, 18 U.S.C. §3771(a)(8), make prosecutors responsible for protecting all crime victims' rights to dignity and privacy with the same vigor that they must protect the rights of the accused. See Paul G.

Cassell, Margaret Garvin, "Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida," 110 J. Crim. L. & Criminology 99, 127–29 (2020); see also Article I, Section 10a, Ohio Constitution (Ohio's version of "Marsy's Law"); Article I, Section 28, California Constitution; Article I, Section 35, Washington Constitution; *Koenig v. Thurston Cty*., 287 P.3d 523, 536 (Wash.2012).

Indeed, all of the nation's ten most populous states have enacted some victim protection provision, either through statutes, constitutional provisions, or rules of court. See Article I, Section 10a, Ohio Constitution; Article I, Section 28, California Constitution; Article I, Section 8.1, Illinois Constitution; Ga. Code Ann. 17-17-01 *et seq*.; Article I, Section 16, Florida Constitution; Article I, Section 37, North Carolina Constitution; Article I, Section 30, Texas Constitution; Pa. Stat. Ann. §11.201 *et seq*.; N.Y. Ct. Rules Part 129. Texas, Illinois, and Ohio, for example, specifically give crime victims constitutional rights to dignity and privacy, in addition to a right to receive notice of important proceedings in the offender's case.

However, these provisions generally do not define either dignity or privacy, and some do not guarantee privacy at all — thus, they provide a patchwork of varying protections nationwide. See, e.g., Article II, Section 2.1, Arizona Constitution (guaranteeing victims' dignity but not privacy); Article I, Section 13, Indiana Constitution (same); Article I, Section 16, Florida Constitution (same).

Even within a state, a lack of national

recognition of a crime victim's right to informational privacy can lead to inconsistent protections. Ohio, the nation's seventh most populous state, is an example, where the rules of court do not consistently address crime victims' privacy concerns. The Rules of Practice before the Ohio Supreme Court mention neither victims nor minors, and neither do Ohio's Rules of Criminal Procedure nor its Rules of Appellate Procedure. Of Ohio's 12 intermediate District Courts of Appeal, only those seated in Marietta, Toledo, and Cleveland have local rules that prohibit naming juveniles or victims of sex offenses in unsealed documents. At the time of this writing, the Ninth District, seated in Akron, has proposed local rules that would prohibit naming juveniles and all crime victims in many documents.

Meanwhile, other state laws — such as rules of criminal procedure — may only shield crime victims' private information while the offender's case is pending, so once the case ends, a victim's shield vanishes. That is the case in Ohio, where the Ohio Public Records Act allows police and prosecutors to withhold the kinds of records the Respondent requested only until the case concluded — first, as police investigatory materials, then, as trial preparation materials and the prosecuting attorneys' work product. See Ohio Rev. Code 149.43. Georgia's public records statute, Ga. Code Ann. §50-18-72, is similar.

Some states, such as Florida, Kentucky, and Illinois, explicitly bar disclosure of public records that contain private information without a court order (see Fla. Stat. Ann. Chap. 119; Kentucky

Statutes 61.878(1)(a); Ill. Comp. Stat. Ann. 140/7. Connecticut bars disclosure only of law enforcement records that would identify victims of sexual assault, and photos of homicide victims. See Conn. Gen. Stat. Ann. §1-210.

Thus, protections contained in state statutes and procedural rules are inconsistent nationwide, and can come to an abrupt end once the case concludes.

The Petitioners' case illustrates the problem. While a criminal case is pending in Ohio, the state's Rules of Criminal procedure regulate discovery to protect victims and witnesses from abuse, for instance by allowing prosecutors to restrict access to certain discovery materials to only the accused's counsel. See Ohio R.Crim.P. 16.[2] During that time, the Ohio Public Records Act does not require prosecutors and law enforcement to produce investigatory materials, trial preparation materials, or the prosecutors' work product. See Ohio Rev. Code 149.43.

The Act also has a "catchall" provision that protects materials that some other state or Federal law would prohibit from disclosure, and Ohio has previously held that constitutional privacy rights were included in the Federal laws that trigger the catchall provision. See Ohio Rev. Code 149.43; *Ohio ex rel. WBNS-TV, Inc. v. Dues*, 805 N.E.2d 1116,

[2] The rule permits defense counsel to orally communicate the contents of material marked "counsel only" to the client. See Ohio R.Crim.P. 16(C).

1125 (Ohio 2004) ("Constitutional privacy rights are 'state or federal law' that prohibit the disclosure of certain records.").

In this case, however, the Ohio Supreme Court decided that the state constitutional privacy rights in Marsy's Law did not trigger the Act's catchall provision. See *Ohio ex rel. Summers v. Fox*, — N.E.3d —, 2020-Ohio-5585, ¶41. So, without a nationally-recognized right to informational privacy to prohibit the materials' disclosure under the catchall exception, law enforcement agencies and prosecutors are required to turn over humiliating details about what happened to a crime victim once the offender's case ends. See id.

This leaves prosecutors with an impossible choice: to continue to fulfill their responsibilities to vindicate victims' rights to privacy under Marsy's Law, or violate victim's rights to privacy by producing public records as they are required to do under their jurisdiction's public records or "sunshine" act. There is no Solomonic solution for the prosecutor struggling to fulfill these competing obligations.

A nationally-recognized right to informational privacy for crime victims would solve that problem, by allowing prosecutors and other law enforcement personnel to protect victims after the offender's case has concluded with the same vigor that state laws and procedural rules do while the case is pending, and on a consistent footing. This is what state and federal victim protection provisions intend.

The Petitioners' case is again an example.

Ohio voters approved a ballot initiative in 2017 to amend Ohio's Constitution to protect the

rights of all crime victims to dignity and privacy "in a manner no less vigorous than the rights afforded to the accused." Article I, Section 10a of the Ohio Constitution, also known as Marsy's Law. That provision makes prosecutors including Petitioner Fox responsible for protecting the rights of the minor rape victim in this case to dignity and privacy, and that responsibility does not end.

Yet, once the trial and all of the appeals ended in the offender's case, the investigatory records and trial preparation materials that contained lurid details of the crime perpetrated against the victim lost their protected status under Ohio's Public Records Act.

A right to informational privacy recognized by this Court would permit Fox to continue to honor his responsibility to vindicate the victim Petitioner's dignity and privacy, by protecting these records under state or Federal law. It would do the same for thousands of other prosecutors nationwide, under their states' and territories' laws, for the benefit of the more than 1 million people who become victims of crime every year, and their families.

II. Public Policy Supports the Right

There are other clear public policy reasons for establishing the informational privacy right for those million or more victims, in addition to establishing nationwide consistency and relieving prosecutors from an untenable Catch-22 situation.

Victims often compare public exposure to a second victimization. Crime victims are increasingly vulnerable to retaliation in the internet era, particularly through doxing, a slang term that

Merriam-Webster defines as a verb meaning "to publicly identify or publish private information about (someone) especially as a form of punishment or revenge." https://www.merriam-webster.com/dictionary/dox, accessed April 26, 2021; see also *Vangheluwe v. Got News*, *LLC*, 365 F. Supp. 3d 850, 858–59 (E.D. Mich. 2019); Blackburn, Kimberly Kelley, "Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort," 55 S.C.L. Rev. 619, 621 (Spring 2004).

In addition, courts have already acknowledged that when crime victims are humiliated through the public disclosure of the details of their victimization, it can have a chilling effect on other victims, who will become more reluctant to report crimes than otherwise. See, e.g., *Exoneration Initiative v. New York City Police Dep't*, 980 N.Y.S.2d 73, 76-77 (N.Y. App. Div. 2014); *Koenig v. Thurston Cty.,* 287 P.3d 523, 534 (Wash.2012), as amended (Dec. 18, 2012) (Regarding chilling effect, "Effective law enforcement is thwarted without victim cooperation.").

Sex offenses in particular have long been chronically underreported; a 2000 U.S. Justice Department study of college women found that one in 36 had been a victim of rape or attempted rape during the previous academic year, but that fewer than five percent of those women had reported these crimes to authorities. See Bonnie S. Fisher, Francis T. Cullen, Michael G. Turner, "The Sexual Victimization of College Women," National Institute of Justice, Bureau of Justice Statistics (December 2000), at 23. Among the reasons these women did not

report these offenses included fears of reprisals from the offender and the offender's family, and a desire that other people not gain knowledge of the offense. See id., 23.

III. Privacy Must Still Yield to Compelling State Interests

It is not necessary to declare that a victim's informational privacy right is absolute and unlimited, however. Instead, it would be appropriate for this Court to use this case to establish that crime victims have a 14th Amendment right to informational privacy, but to also hold that a victim's right to privacy can, and in some instances must, give way when a request for the victim's private information serves a compelling state interest and the request is the least intrusive means of serving that compelling state interest.

The Sixth Circuit in *Bloch*, for instance, found that a state's compelling interest in prosecuting the offender accused of the crime will almost certainly outweigh the crime victim's right to privacy. See *Bloch*, 156 F.3d at 686. Therefore, a victim's right to privacy could not be used to subvert and obstruct an offender's prosecution by, for instance, barring prosecutors and law enforcement from obtaining a victim's relevant hospital records and using those records as evidence against the offender.

Once the state's compelling interest in prosecuting the offender abates, however, the victim's privacy interests can acquire greater, overriding weight.

In the case at bar, however, no such compelling interest existed to outweigh the victim's

privacy interests. Fulfillment of a public records request is not a compelling state interest, as there is no constitutional right to obtain government documents, and neither the First nor the Fourteenth Amendments "mandates a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); see also *McBurney v. Young*, 569 U.S. 221, 232 (2013).

Ultimately, crime victims are unlike individuals who voluntarily disclose their private information to private parties, such as banks or social media outlets. They do not seek to become victims. They disclose their private information to government agents because of society's requirement that they report the offense and because of the government's need to prosecute the offense — in other words, they are expected to temporarily forfeit their privacy and to allow the government to intrude deeply into the particulars of their trauma, in the interests of justice.

Granting them a right to informational privacy would allow the government to protect them from unreasonable intrusion by others who are not acting in the interests of justice.

CONCLUSION

For the above-stated reasons, the Ohio Prosecuting Attorneys Association respectfully requests that this Court grant the Petition for a Writ of Certiorari and reverse.

Respectfully submitted,

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