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.,

Petitioners,

v.

CHARLES A. SUMMERS,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Ohio

BRIEF IN OPPOSITION

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May 3, 2021

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QUESTION PRESENTED

Whether the substantive due process right to privacy under the Fourteenth Amendment enables a state's adult trial witness to block the release of public records related to state criminal investigations and trials?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS AND ADMINISTRATIVE AGENCIES

- *State ex rel. Summers v. Fox, Pros. Atty.*, et al., 2020 WL 7250544, 2020-Ohio-5585, (Ohio 2020).
- *State ex rel. Summers v. Fox,* 159 N.E.3d 1181 (Ohio 2020).
- *State ex rel. Summers v. Fox*, 142 N.E.3d 684 (Ohio 2020).

STATEMENT AGAINST JURISDICTION

This Court lacks Article III jurisdiction as Petitioners lack standing to raise their claims. *See infra*, Argument, sec. II(C).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

1. Fourteenth Amendment of the United States Constitution:

- *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

2. Ohio Revised Code § 149.43 (effective October 17, 2019 to March 23, 2021):

- *See Respondent's Appendix I.*

STATEMENT OF THE CASE

This is a state *mandamus* action initiated by Respondent Charles Summers ("Mr. Summers") in which the Supreme Court of Ohio ordered state officials to produce public records related to the trial of Mr. Summers' son, Christopher Summers, pursuant to Ohio's Public Records Act. *See generally State ex rel. Summers v. Fox, Pros. Atty.*, et al., 2020 WL 7250544, 2020-Ohio-5585 (Ohio 2020), Petitioner J.K.'s App. 1; Ohio Revised Code § 149.43 (effective October 17, 2019 to March 23, 2021), Respondent's App. 1.[1] Petitioner J.K. ("J.K."), the State's witness in Christopher Summers' trial, intervened during the state proceedings, asserting her right to privacy should block the release of the public records. The Supreme Court of Ohio unanimously rejected her argument. Now, lacking Article III standing, Petitioners ask the Supreme Court to reverse decades of Fourteenth Amendment jurisprudence.

While J.K. exhaustively compares herself to child witnesses, Christopher Summers' convictions for sexual battery were based on a twenty-eight-month teacher-student relationship that started when J.K. was a junior in high school. J.K. was not a child at the time she spoke to police and prosecutors, then publicly testified at Christopher Summers' criminal trial. Nor did any court order the disclosure of video,

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[1] Respondent's Appendix 1 contains the version of O.R.C. § 149.43 in effect at the time of the Supreme Court of Ohio's decision in this case.

photographic, or audio recordings of J.K.'s sexual conduct.

Neither this Court, nor *any* federal court of appeals, has held that a person's "right to informational privacy" should block the release of public records when doing so has a penological purpose, like the release of public investigation and trial records released here. Assuming *arguendo* that a state's witness does have some substantive due process right, Ohio's Public Records Act is narrowly tailored to a compelling government interest (*i.e.*, the public's oversight of the state's investigative, prosecutorial, and judicial functions). The Petitioners also lack Article III standing as J.K. has suffered no constitutional injury in this case; Mr. Summers has not caused her injury; and the case is moot, as Ohio government officials have claimed Mr. Summers has received all the public records J.K. seeks to prevent from being disclosed.

Lastly, even if the Court finds merit in the Petitioners' argument, this case is an inappropriate vehicle to manufacture a broad right to informational privacy. Just last session the Court denied a similar petition for a writ of certiorari seeking to expand the right to privacy under the Fourteenth Amendment. The Court should likewise deny this Petition for Certiorari.

SUMMMARY OF THE ARGUMENT

J.K. has no privacy right that was affected by the Ohio Supreme Court decision. Even if she did, Ohio's Public Records Act is narrowly tailored to a compelling government interest. Moreover, Petitioners lack Article III standing in this case. Should the Court find merit in Petitioners' argument, this case is not the vehicle to recognize the vast right to informational privacy that they request, and there is no urgency to manufacture this alleged constitutional right at this time.

ARGUMENT

I. Statement of Facts and Procedural Posture

On February 1, 2017 Respondent, Charles Summers, submitted a public records request to Mercer County, Ohio Prosecutor Matthew Fox ("Fox"), pursuant to Ohio Revised Code ("O.R.C.") § 149.43 requesting documents and recordings related to Mercer County's investigation and prosecution of Mr. Summers' son, Christopher Summers. *State ex rel. Summers v. Fox, Pros. Atty.*, et al., 2020 WL 7250544, *2, 2020-Ohio-5585, ¶ 14 (Ohio 2020). Christopher Summers was convicted of sexual battery in 2013 after pleading guilty to actions occurring during a twenty-eight-month relationship that started when J.K. was a junior in the high school where he taught. *Id.*, 2020 WL 7250544 at *1, 2020-Ohio-5585 at ¶¶ 1-3; *State v. Summers*, 21 N.E.3d 632, 633-34 (Ohio Ct. App 2014). Christopher Summers pled guilty following J.K.'s public testimony at his criminal trial. *State v. Summers*, 21 N.E.3d at 637.

J.K. was not a minor when she spoke to law enforcement officers investigating Christopher Summers' case. *Id.*, 21 N.E.3d at 637. Nor was she a minor when J.K. publicly testified at trial accusing Christopher Summers of violating state law. *Id.*, 21 N.E.3d at 637. Mr. Summers viewed the twenty-one-year prison sentence as draconian,[2] and sought public

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[2] *See generally State v. Summers*, 21 N.E.3d 632 (Ohio Ct. App. 2014); *State v. Summers*, 2014 WL 2567924, 2014-Ohio-2441 (Ohio Ct. App. 2014) (addressing Christopher Summers' appeal challenging his sentences). Following J.K.'s trial testimony and

records related to how the state conducted its investigation and prosecution of his son. *See State ex rel. Summers,* 2020 WL 7250544 at **2-3, 2020-Ohio-5585 at ¶¶ 14-15. By the time Mr. Summers submitted his first public records request, Christopher Summers' appellate remedies had been exhausted. *Id.,* 2020 WL 7250544 at **1, 2, 2020-Ohio-5585 at ¶¶ 5-6, 14.

Fox sent Mr. Summers a response with a blanket refusal to produce any documents. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 16. Mr. Summers submitted another public records request to Mercer County Sheriff Jeff Grey ("Grey"), on March 6, 2017. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 15. This public records request also requested documents and recordings related to Mercer County's investigation and prosecution of Christopher Summers. *Id.* The Mercer County Prosecuting Attorney's Office sent a response to Mr. Summers on Grey's behalf again refusing to produce a single document. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 16.

On May 4, 2017 Mr. Summers sent a third letter to the Mercer County Prosecutor's Office responding to its letters. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 16. On May 31, 2017, the Mercer County Prosecutor's

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Christopher Summers' guilty pleas to eight counts of sexual battery in Mercer County and one count of sexual battery in Darke County, Christopher Summers was sentenced to thirty months on each of the eight counts in Mercer County, along with an additional year for the sexual battery plea in Darke County, resulting in an aggregate prison term of twenty-one years to be served consecutively for the alleged sexual battery of J.K. *Summers, supra*, 2014 WL 2567924 at *1, 2014-Ohio-2441, at ¶ 3.

Office replied, again refusing to produce any documents. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 17. In their responsive letters, Mercer County did not raise J.K.'s alleged right to privacy as a reason for blocking the release of the public records.

Mr. Summers filed a mandamus action against Fox and Grey in the Supreme Court of Ohio on July 12, 2018. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 18. J.K., Petitioner here and the State's witness in Christopher Summers' criminal case, filed a motion to intervene, which was granted by the Supreme Court of Ohio. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 19. Additionally, The National Crime Victim Law Institute, The Ohio Domestic Violence Network, The Ohio Alliance to End Sexual Violence, the Buckeye State Sheriffs' Association, and the Ohio Prosecuting Attorneys Association submitted amici briefs in support of J.K., Fox, and Grey. *Id.*, 2020 WL 7250544 at *3, 2020-Ohio-5585 at ¶ 20.

The Supreme Court of Ohio granted Mr. Summers a Writ of Mandamus on December 10, 2020, except for two prosecutorial trial preparation interviews. *Id.*, 2020 WL 7250544 at *14, 2020-Ohio-5585 at ¶ 89. The public records ordered to be disclosed did not contain any explicit videos, photos, or audio recordings of sexual conduct. Not a single justice held that a victim's "right to privacy" under the Fourteenth Amendment of the U.S. Constitution should block the release of the public records. *See id.*, 2020 WL 7250544 at **15-17, 2020-Ohio-5585 at at ¶¶ 90-107 (French, J., concurring in part and dissenting in part). Respondents' Joint Motion for Reconsideration was denied on December

30, 2020. *State ex rel. Summers v. Fox,* 159 N.E.3d 1181 (Ohio 2020). Respondents filed a Motion for Stay on January 12, 2021, which has not been ruled on at the time of the filing of this response. *See* Motion for Stay, *State ex rel. Summers v. Fox,* Sup. Ct. Ohio Case No. 2018-0959 (filed Jan. 12, 2021).[3]

In the meantime, Fox has claimed that Mr. Summers has received all the public records he originally requested from Mercer County, either through Mercer County's surrender of materials in this case or through other Public Records Act responses provided by the Darke County Prosecutor. Mr. Summers has not sought a review of the Ohio Supreme Court's refusal to order Grey and Fox to produce the trial preparation interviews.

II. Caselaw and Analysis

A. There is no privacy right allowing a state's witness to block the release of public records related to a public trial

J.K. misinterprets federal caselaw and requests the Court to reverse decades of Fourteenth Amendment jurisprudence with an unprecedented interference in states' rights to determine the public's access to state public records. J.K.'s false equivalencies comparing herself to child witnesses and victims who have not publicly testified in criminal cases result in incorrect

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[3] The Supreme Court of Ohio's docket for *State ex rel. Summers v. Fox*, et al., Case No. 2018-0959 (filed July 12, 2018) can be accessed at https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2018/0959.

foundational premises that undermine her argument. No federal court has ever held that a state's witness who publicly testifies in a criminal trial can block the release of public records related to the trial that the public is entitled to under state law. While J.K.'s summary of caselaw points to a possible circuit split as to whether crime victims have a right to block public officials from gratuitously releasing explicit sexual information unrelated to a public prosecution, the issues raised by J.K. do not fall within the spectrum of this possible circuit split. Even the Sixth Circuit (whose view is most favorable to her position) has not held a person's right to informational privacy can block the release of public records when the release of the documents serves a penological purpose, as it does here. In effect, J.K. requests this Court ignore Mr. Summers and other citizens' rights to receive public records under state law in favor of an invented right she has manufactured.

1. J.K.'s position conflicts with this Court's precedent

J.K. asks the Court to overrule each of its four cases she cites as support for her position. In *Paul v. Davis*, a 42 U.S.C. § 1983 case, the plaintiff asserted his right to privacy was violated when the defendant police chiefs defamed him by disseminating flyers to local businessmen that publicized criminal shoplifting charges that had not resulted in a criminal conviction. 424 U.S. 693, 694-95 (1976). While acknowledging that "the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby *impose limits upon government power*," it also

recognized that the plaintiffs claim was not based "upon any challenge to the State's ability to *restrict his freedom of action* in a sphere contended to be 'private,' but instead on a claim that the State may not *publicize* a record of an official act such as an arrest." *Id.* at 712-713 (emphasis added). The Court refused to recognize this alleged right. *Id.* at 713.

In *Whalen v. Roe*, the Court unanimously rejected claims by patients and doctors who challenged the constitutionality of a New York statute that required prescriptions for certain controlled substances to contain a form reporting some of the patient's private information to state officials. 429 U.S. 589, 589-590, 598-604 (1977). The statute at issue prohibited the public disclosure of the identity of the patients. *Id.* at 594. The Court refused to "decide any question which might be presented by the *unwarranted* disclosure of accumulated *private* data whether intentional or unintentional or by a system that did not contain comparable security provisions," finding that the record did not present this issue. *Id.* at 605-06 (emphasis added). The Court's admirable concern was about New York's unprecedented collection of the private information of medical patients (that may have resulted in unintentional, unauthorized leaks of those patient's medical information), which presenting novel issues related to government data collection on citizens. *See id.* at 605. This is a far cry from a witness trying to block the release of state records related to a public criminal trial.

The Court also rejected claims by President Nixon that his right to privacy superseded the Presidential

Recordings and Materials Preservation Act. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 455-465 (1977). The Court held the President "cannot assert any privacy claim as to the documents and tape recordings *that he has already disclosed to the public.*" *Id.* at 459 (emphasis added). The Court noted that the screening of private documents by public officials did not violate alleged privacy rights, and instead implied that screening could be used as evidence that alleged privacy rights were sufficiently protected. *See id.* at 463-65.

Most recently, the Court once again refused to acknowledge a privacy right to prevent the collection of private information in *NASA v. Nelson*. 562 U.S. 134 (2011). There, NASA contract employees challenged whether NASA could require the employees to complete security background questionnaires requesting personal information about the employees' school, employment, drug treatment, and housing history. *Id.* at 138, 141-42. The Court noted that while it had previously "referred broadly to a constitutional privacy 'interest in avoiding disclosure of personal matters,' [... s]ince *Nixon*, the Court has said little else on the subject of a constitutional right to informational privacy." *Id.*, at syllabus, ¶ 1; *id.*, 562 U.S. at 144-46. While refusing to acknowledge such an alleged right, the Court rejected the employees' claims under a rational basis standard. *Id.*, at syllabus, ¶ 2; *id.*, 562 U.S. at 138, 151-52.

J.K. requests the Court adopt a right to privacy that it explicitly refused to acknowledge only ten years ago. *See Nelson*, *supra*, at syllabus, ¶ 2; *id.*, 562 U.S. at 138,

151-52. Moreover, without proffering any conceptualization of this right, she claims it should allow her to block the release of public records, not simply to limit the intrusion of the government on her personal life. The Court specifically rejected this proposal in *Paul v. Davis*. *See* 424 U.S. at 712-713. J.K. must acknowledge that by publicly testifying against Christopher Summers, she has sacrificed some of her privacy like President Nixon, and therefore she "cannot assert any privacy claim as to the documents and tape recordings that [s]he has already disclosed to the public." *Nixon*, 433 U.S. 425 at 459. Like the Presidential Recordings and Materials Preservation Act, Ohio's Public Records Act provides for exceptions to protect J.K.'s privacy, and state officials and courts can conduct non-public screenings of the requested records. *See* O.R.C. § 149.43(B)(1) (permitting state officials to redact or not produce documents subject to the Public Records Act's numerated exceptions); *State ex rel. Summers v. Fox*, 142 N.E.3d, 684-85 (Ohio 2020) (permitting in-camera inspection by the Court of documents withheld by Fox and Grey in this case). J.K.'s arguments cannot survive in the face of the overwhelming Supreme Court precedent condemning her position.

2. J.K.'s position conflicts with every circuit court's jurisprudence

J.K. acknowledges that the recent trend among federal circuit courts is to not recognize *any* constitutional right to informational privacy following this Court's decision in *Nelson*. *See* J.K.'s Petition for Writ of Certiorari, pp. 11-13. Instead, she once again

heavily relies on the Sixth Circuit's pre-*Nelson* case *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998). But J.K.'s interpretation of outdated Sixth Circuit precedent is incorrect, and still does not support her claim that a state's witness has a privacy right to block the release of records related to public investigations and trials.

Bloch involved a 42 U.S.C. § 1983 retaliation claim where a sheriff released intimate and undisclosed details of an unprosecuted rape in retaliation for the complainant speaking with media about the failure to prosecute, and there "was no nexus between the details of the rape released by [the sheriff] and the Blochs' criticism of the investigation." *Id.* at 673. The Sixth Circuit noted that "the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private" and that "the details of the rape primarily implicate a private interest *until such time as the public interest in prosecution predominates.*" *Id.* at 684, 686 (emphasis added). As J.K. admits, the only privacy right endorsed by the *Bloch* court is a right to prevent "government officials from gratuitously and unnecessarily releasing the intimate details of the rape *where no penalogical [sic] purpose is being served.*" *Id.* at 686 (emphasis added).

Similarly, *Anderson v. Blake* was also a pre-*Nelson* 42 U.S.C. § 1983 case dealing with a victim who had not testified in public hearings and who claimed "that there was no law enforcement purpose in defendant's release of [a] video" that contained graphic imagery of her rape to a news reporter who aired the rape video. *Anderson v. Blake,* 469 F.3d 910, 912-13 (10th Cir.

2006). In *Lambert v. Hartman*, yet another pre-*Nelson* case, the Sixth Circuit rejected the plaintiff's claim that the publication of a traffic citation with her unredacted social security number had violated her right to privacy, as "her alleged privacy interest was not of a constitutional dimension." 517 F.3d 433, 435 (6th Cir. 2008).

Contrary to her assertion, the Ohio Supreme Court properly analyzed and rejected her arguments that *Bloch* is a public records case and that there is a substantive due process right under the United States Constitution for a state's witness to block the release of public records. *See State ex rel. Summers*, 2020 WL 7250544 at *7, 2020-Ohio-5585 at ¶ 41 ("*Bloch* is not a public-records case and it did not create the categorical exception to disclosure under federal law required by R.C. § 149.43(A)(1)(v)."). J.K. provides no evidence supporting her claim that a trial witness' alleged right to block public records about a public trial are "fundamental" or "implicit in the concept of ordered liberty." *See J.P. v. Desanti*, 653 F.2d 1080, 1088 (6th Cir. 1981) (citing *Paul*, 424 U.S. at 713); *see also Lambert, supra*, 517 F.3d at 440 ("This court, in contrast to some of our sister circuits, has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest.") (internal quotations omitted). J.K. publicly testified in the prosecution against Christopher Summers, waiving any alleged privacy right she claims under *Bloch*. The Ohio Supreme Court has espoused the penological purposes of public records requests in allowing public oversight over criminal prosecutions, including exonerating

wrongfully convicted prisoners. *See State ex rel. Caster v. City of Columbus*, 89 N.E.3d 598, 601, 608-9 (Ohio 2016) (detailing exonerations resulting from public records requests and emphasizing that one of the main concerns when addressing Public Records Act requests is "the interests of justice."). *Bloch* does not create any privacy right that would bar disclosure of public records that would not otherwise be prohibited from disclosure under Ohio's Public Records Act.

Despite scores of pages of pleadings in state court, J.K., Fox, and Grey have failed to point to *any* federal court case that blocked the release of public records under state law based on a state's witness' alleged right to privacy under the Fourteenth Amendment of the United States Constitution. The cases cited by Respondents hold that a government official cannot gratuitously release records about details of a victims' sexuality if no related crime has been charged and the victim has not testified in public court. On the other hand, there *is* a penological purpose to releasing the records when a state's witness has testified in public court, in addition to the fundamental public interest in government transparency. *See State ex rel. Caster, supra*, 89 N.E.3d at 601, 608-9.

Thus, J.K.'s position does not even lay within the spectrum of her claimed circuit split. Instead, she is requesting a radical reinterpretation of the "right to privacy." Adopting her interpretation of this right would overrule each of this Court's opinions (including its 2011 opinion in *NASA v. Nelson*) along with every circuit's caselaw on the issue.

3. J.K.'s proposed right to privacy is unsuitable for the American justice system and unduly interferes with other citizens' rights

J.K.'s central fallacy lies in her misguided belief that after making public accusations against Christopher Summers at a public criminal trial, she is not a semi-public figure. To the contrary, she has placed herself at the center of the most public of government forums, and now has elevated the case to a nationwide stage. Her public actions as an adult have contributed to a man's loss of liberty. Thus, for the purposes of Ohio's sunshine law, records related to her public accusations are public records, with the exception of documents specifically identified by the Ohio legislature to protect J.K.'s privacy.

J.K. relishes in her imagined privacy right while ignoring Mr. Summers' and other citizens' concrete constitutional rights. Mr. Summers, like other citizens, has a right to request public records under Ohio law. Procedural due process prevents states from arbitrarily refusing to provide public records without proper notice. *See Willner v. Comm. on Character & Fitness,* 373 U.S. 96, 105 (1963) (holding that a state bar was required to provide notice and hearing on grounds for rejection of bar application). In this case, no notice was provided to Mr. Summers that his Public Records Act request was being rejected due to J.K.'s "right to privacy" before his mandamus action was filed. Failure to provide such notice is a procedural due process violation that cannot be sanctioned.

To be clear, Mr. Summers is not seeking information about J.K.'s private sexual conduct unrelated to Christopher Summers' trial – he only seeks information about the State's investigation of his son that resulted in his public trial and conviction. While reporters and innocence projects often seek public records to uncover injustices,[4] so too do the family members of convicted inmates. Family members are often the last members of society willing to believe an inmate's claim to innocence. The public, including Mr. Summers, has a right under Ohio's Public Records Act to access public documents related to J.K.'s public accusations, and so state documents related to the investigation of her public accusations about Christopher Summers are public records.

Petitioners propose a Kafkaesque legal system whereby secret investigations take place outside of the public view, only to be placed on a choreographed stage at trial. Under their view, the public would have no right to review investigative records related to sexual crime investigations, they would be stuck with what information the government presents at a public trial. Such a proposal is grotesquely inapposite to the American justice system.

The Court should not forget that public records have been used many times by the public to critique and vindicate public officials on every level and branch of government. While alleged victims have a right to make public claims about sexual misconduct, so too does the accused have a right to access public records

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[4] *See State ex rel. Caster*, *supra*, 89 N.E.3d at 601, 608-9.

that could prove their innocence. In this day and age, allowing people to publicly claim sexual misconduct while hamstringing the accused's ability to gather and present exonerating public records would result not only in unfair trials, but also unfair elections and unfair proceedings related to government appointments.

Moreover, artificially creating a federal "right to privacy" to interfere with state sunshine laws would provide blanket fodder for law enforcement and prosecutors who wish to cover up potential wrongdoing, such as racially motivated policing and wrongful convictions. Undoubtedly, this new ammunition will be used to prevent the public from reviewing and criticizing law enforcement actions. As mentioned above, it would likely prevent those publicly accused of sexual misconduct (usually men) from obtaining exonerating evidence. The further strain this will place on citizens' right to equal protection under the law is the opposite thing this divided country needs during these unprecedented times when racially motivated policing and unfair public sexual harassment claims are becoming issues of increasing public concern.

B. Ohio's Public Records Act is narrowly tailored to a compelling government interest

As this Court has never recognized a "privacy right" that blocks the release of public records, it is unclear what standard of review is appropriate. In *NASA v. Nelson*, the Court analyzed the government employee's alleged privacy right under a rational basis standard (without deciding that such a privacy right to prevent

disclosure of information actually exists). *See* 562 U.S. at 138, 151-52.

Assuming, *arguendo*, that a right to privacy does exist that would allow a citizen to block the release of public records, J.K.'s arguments fail even under strict scrutiny. As J.K. notes, the Sixth Circuit has recognized that details released in trial or released as necessary to apprehend a suspect may constitute a compelling interest. J.K.'s Petition for Certiorari, pp. 8-9, citing *Bloch*, 156 F.3d at 686. Similarly, the public's oversight of the state's investigatory, prosecutorial,[5] and judicial systems is a compelling government interest as well *See State ex rel. Caster, supra*, 89 N.E.3d at 601, 608-9; *c.f. Press-Enter. Co. v. Superior Ct. of California, Riverside Cty.*, 464 U.S. 501, 510 (1984) ("Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982)).[6]

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[5] By disclosing public records related to law enforcement investigations and public trials, the public can assess aspects of the state's prosecutorial system (e.g., whether the defendant was appropriately charged). Ohio's Public Records Act and the Ohio Supreme Court's decision in this case still protect the state's prosecutor's trial preparation materials from public disclosure. *See* O.R.C. § 149.43(A)(1)(g); *State ex rel. Summers,* 2020 WL 7250544 at **8-9, 2020-Ohio-5585 at ¶¶ 46-52.

[6] While this mandamus action was pending, Fox filed a sixty-two count indictment against Mr. Summers. *State of Ohio v. Summers*,

The Public Records Act is narrowly tailored by its numerous defined exemptions to protect victims' privacy. The Ohio legislature has designated thirty-nine exceptions to the Public Records Act, many of which are designed to protect the privacy of crime victims. *See* O.R.C. § 149.43(A). The exceptions to public records include:

- Images or videos depicting the victim during the sexually oriented criminal offense or that depict the victim in a manner that is "offensive and [an] objectionable intrusion into the victim's expectation of bodily privacy," O.R.C. § 149.43(A)(1)(ii);
- Confidential law enforcement investigatory records, O.R.C. § 149.43(A)(1)(h);
- Information that would disclose a confidential informant's identity, O.R.C. § 149.43(A)(2)(b); and

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Mercer C.P. No. 19-CRM-107; *see also State ex rel. Summers,* 2020 WL 7250544 at *2, 2020-Ohio-5585 at ¶ 13. Fox then attempted to use Mr. Summer's assertion of his Fifth Amendment right to discredit him. Respondents' Merit Brief, *State ex rel. Summers,* Sup. Ct. Ohio Case no. 2018-0959 (filed Aug. 21, 2019), p. 3, fn. 1. Fox also pressed criminal charges against the alleged host of a website after he submitted a Public Records Act request to Fox. *See State of Ohio v. Rasawehr*, Celina M.C. No. 16CRB00943. Without accusing Fox of misconduct, the suspicious timing of his criminal prosecutions against citizens requesting public records about investigations he coordinated, and attempting to use those prosecutions to discredit those requesting public records, highlights why the public has a right to access public records to verify that his actions are in the pursuit of justice, rather than to simply shield himself from scrutiny.

- "Information that would endanger the life or physical safety of [...] a crime victim," O.R.C. § 149.43(A)(2)(d).

In its twenty-eight-page Opinion, the Ohio Supreme Court exhaustively reviewed the issues and statutory exceptions raised by J.K., Fox, and Grey. Not a single justice in the majority or dissent held that J.K.'s federal right to privacy should block the release of public records. *See* 2020 WL 7250544 at **15-17, 2020-Ohio-5585 at at ¶¶ 90-107 (French, J., concurring in part and dissenting in part). With the exception of two prosecutorial trial preparation interviews, the Court ordered Fox and Grey to turn over all the public records requested, unredacted. *Id.* at 2020 WL 7250544 at *14, 2020-Ohio-5585 at ¶ 89.

Mr. Summers has not sought any pictures or videos that would depict J.K. during a sexual offense. Nor has he sought any pictures or videos that would contain a depiction of J.K. that was offensive and an objective intrusion into J.K.'s expectation of bodily privacy. Mr. Summers simply requested videos depicting interviews that law enforcement conducted with J.K., which J.K. later publicly testified about.

J.K. is not a confidential informant, as J.K. publicly testified about her accusations during Christopher Summers' trial. J.K. has never claimed the State promised her that her interviews with law enforcement would be confidential. Similarly, none of the information requested would endanger J.K.'s physical safety. J.K. has already publicly testified against Christopher Summers and revealed her identity.

The Ohio legislature and Ohio Supreme Court have considered J.K.'s privacy rights and balanced them against the public interest in access to government documents, especially documents related to criminal proceedings. The thirty-nine exceptions demonstrate that Ohio's Public Records Act is narrowly tailored to the State's compelling government interests in making criminal investigations public; providing open, public trials; and correcting wrongful convictions to apprehend actual perpetrators.

C. Petitioners lack Article III standing

Fox, Grey, and J.K. lack standing to appeal the writ of mandamus, which was issued against Respondent Fox. The Supreme Court has recognized three components of standing under Article III: (1) injury-in-fact, (2) causation, and (3) redressability. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014) ("The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision."). Fox and Grey do not have standing to raise J.K.'s privacy right, even if one existed. *See Heald v. District of Columbia*, 259 U.S. 114, 123 (1922).

J.K. cannot claim she has been injured when she has no right to informational privacy. She cannot show causation because she merely seeks to block Mr. Summers from requesting public records, a request which does not impair her alleged rights. Lastly, she cannot show redressability, as Fox claims Mr.

Summers has received all of the public records he requested, so the issues are moot.

J.K. cannot show injury. "In order to satisfy Art. III, the plaintiff must show that [s]he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979). "The plaintiff must show that [s]he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

J.K. has no injury, because she has no privacy right at issue. *See supra,* section III(A). Even if she has a privacy right, Ohio's Public Records Act does not offend her substantive due process rights. *See supra*, section III(B). Moreover, it is unclear how Mr. Summers' receipt of voluntary interviews she gave to law enforcement officers and discussed at a public trial injure her.

Mr. Summers' mandamus action did not cause her alleged injury. Mr. Summers simply asked the Ohio Supreme Court to order public officials to disclose public records he is entitled to seek under Ohio law. Thus, even if J.K. is injured, Mr. Summers is not causing her injury in this case, as he is simply a citizen

requesting information, he is not the government official *disclosing* the personal information she seeks to protect.

Lastly, this case is moot, as J.K. cannot show redressability as Fox has claimed Mr. Summers has received all of the public records in dispute. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). "The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests. An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64–65 (1997) (internal citations and quotations omitted). Mercer County has stated that Mr. Summers has already received the public records he requested from Fox and Grey, so J.K.'s request for certiorari is moot, and the Court will not be able to provide her any redress. The Petitioners lack standing, and so the Court lacks Article III jurisdiction.

III. This case is a poor vehicle for resolving this issue

This odd procedural posture of the case should preclude the Court from accepting it for review. The ramifications of a federal court sanctioning a third party's intervention in a state *mandamus* lawsuit between a citizen and public official to block the release of public records under state law are unimaginable. J.K.'s resort to a slippery slope argument is unavailing,

as this Court's caselaw on the right to privacy has not created a backlog of litigation. Instead, permitting her intervention would result in a virtual freeze in the administration of the various state and federal sunshine laws while government officials and courts struggled to interpret when, how, and to what extent witnesses could intervene in administrative and judicial proceedings to block the release of public records.

Recognizing such a vast right to privacy in this context would raise innumerable issues about how that right interacts with other constitutional rights. For example, does *Brady v. Maryland* need to be revisited to clarify whether a criminal defendant has the right to exculpatory evidence when the evidence infringes on the victim's so-called right to privacy? *See generally* 373 U.S. 83 (1963). Moreover, the ability of criminal defendants and the public to discover *Brady* violations or other prosecutorial misconduct would be crippled by government officials blocking sunshine laws because of the victim's alleged right to privacy.

As mentioned *supra*, Petitioners' position is not even within the realm of the federal circuit split regarding whether a right to informational privacy even *exists*. The side most favorable to Petitioners still rejects their position, as not a single circuit court has held that an individual can block public records when the release of the public records has a penological purpose. The Court should address the issue of whether individuals have a right to block the gratuitous release of sexual information when doing so does not serve a penological purpose before expanding that right to

allow a trial witness to block the release of public records related to her public testimony at a criminal trial.

IV. There is no compelling reason to review this issue now

Less than six months ago, the Court rejected a similar petition for certiorari inviting it to vastly expand the right to privacy under the Fourteenth Amendment. *See Parents for Priv. v. Barr*, 949 F.3d 1210, 1221-26 (9th Cir. 2020) (affirming the district court's dismissal of the plaintiffs' claim for violation of privacy rights under the Fourteenth Amendment's Due Process Clause), *cert. denied sub nom. Parents for Priv. v. Barr*, 141 S. Ct. 894 (Dec. 7, 2020). There is no reason the Court should overrule its Fourteenth Amendment precedent now.

V. Conclusion

Mr. Summers respectfully requests the Court deny J.K.'s Petition for a Writ of Certiorari.

Respectfully submitted,

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