

No. 20-1381

In The
Supreme Court of the United States

—————◆—————
MATTHEW FOX, ET AL.,

Petitioners,

v.

CHARLES A. SUMMERS,

Respondent.

—————◆—————

**On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio**

—————◆—————

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF OF *AMICUS CURIAE*
BUCKEYE STATE SHERIFFS' ASSOCIATION
IN SUPPORT OF PETITIONERS**

—————◆—————

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MOTION FOR LEAVE TO FILE

Pursuant to Rule 37.3(b) of the Rules of this Court, the instant *amicus curiae*, Buckeye State Sheriffs' Association (the "BSSA") moves for leave to file the attached *Amicus Curiae* brief in support of Petitioners Matthew Fox, Prosecuting Attorney, Mercer County, Ohio, Jeff Grey, Sheriff, Mercer County, Ohio, and J.K., the Crime Victim. Petitioners provided the BSSA written consent to file an *amicus curiae* brief.

The BSSA sent a letter to Respondent's counsel of record via certified mail and electronic mail on April 16, 2021 requesting written consent to the filing of *amicus curiae* briefs. Respondent refused consent to the BSSA's filing of the attached *Amicus Curiae* brief on April 16, 2021.

The BSSA is a nonpartisan, not-for-profit corporation made up of the 88 sheriffs of Ohio, approximately 2,500 sheriffs' office employees, and approximately 18,000 private citizens. The protection of a victim's fundamental right of privacy is of vital importance to the BSSA.

The instant appeal seeks to protect from public disclosure documents that contain the graphic, personal details of a minor victim's sexual assault. While the public has an interest in transparency in government, the public's right to access public records is by no means absolute and certainly does not trump a crime victim's constitutional right to procedural privacy. The public also has an interest in enabling law enforcement officials to effectively investigate and

prosecute criminal misconduct. Victims will not be willing to come forward and report unlawful conduct if it is unclear whether their right to privacy will be protected by government officials or the judicial system.

Obtaining clear judicial guidance on the scope of a criminal victim's fundamental right to privacy is critically important to providing assurance to victims in the context of criminal investigations conducted by law enforcement. The Supreme Court of Ohio's recent decision conflicts with existing Sixth Circuit precedent, places a victim's right to privacy in jeopardy, stands to frustrate law enforcement efforts to investigate and stop criminal conduct across the United States, and will have a chilling effect on crime victims coming forward.

Accordingly, the BSSA respectfully requests that this Court grant its motion for leave to file.

Respectfully submitted,

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May 3rd, 2021

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INTERESTS OF *AMICUS CURIAE*¹

The Buckeye State Sheriffs' Association (the "BSSA") is a nonpartisan, not-for-profit corporation made up of the 88 county sheriffs of the state of Ohio, approximately 2,500 sheriffs' office employees, and approximately 18,000 private citizens. Ohio sheriffs serve as the *de facto* state police of unincorporated communities across the state. Founded in 1931, the BSSA exists to advocate for the interests of law enforcement agencies across the state, as well as for the interests of the administration of justice and fairness for all Americans.

Law enforcement is responsible for enforcing laws and maintaining public order and safety and includes the prevention, detection, and investigation of crime, and apprehension and detention of individuals suspected of criminal conduct. The trust and cooperation of victims is essential to effective police investigation and prosecution of criminal activity, especially in the context of sexual crimes and domestic violence. If victims stop reporting crimes to law enforcement out of

¹ Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. Petitioners granted written consent for *Amicus* to its filing of this brief. Respondents have not provided written consent for *Amicus* to its filing of this brief. Accordingly, *Amicus* also submits, as one document with this brief, *see* Sup. Ct. R. 37.3(b), an accompanying motion for leave necessary to file this brief. All parties have been timely notified of the submission of this brief.

fear their confidential interview tapes and conversations with law enforcement will be plastered across the Internet and subject to public ridicule, the ability of law enforcement to stop criminals and bring them to justice will be greatly impaired. The victim's right to privacy, and the societal interest of maintaining public safety and encouraging the reporting of criminal activity, far outweighs the government's interest in disseminating investigatory records.

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SUMMARY OF ARGUMENT

Respondent seeks to utilize Ohio public records statutes to seek records held by Petitioners Matthew Fox, Prosecuting Attorney of Mercer County, Ohio and Jeff Grey, elected Sheriff of Mercer County, Ohio. The records at issue contain graphic details of sex crimes committed against a minor, Petitioner J.K., by her teacher and coach, Christopher Summers, who was convicted and imprisoned as a result.

Following Christopher Summers' conviction and unsuccessful appeals, Respondent (Christopher Summers' father) made a public records request to Mercer County Prosecutor's Office to obtain various records, including video and audio recording of interviews with J.K. that contain graphic, sexual details of J.K.'s life. Respondent has made clear his intent to use the graphic content of the records to continue to harass and embarrass Petitioner J.K. by posting the sensitive content on the Internet.

Victims of sexual and domestic assault are generally hesitant to report crimes to law enforcement because they are worried about public disclosure of the incident's personal, sensitive, and sexual details. Sexual and domestic assault cases are unique in that they carry, unfairly, a social stigma for the victims. If the public is afforded the right to access the victim's interview videos and tapes and post them to Facebook and/or other social media and news sites for the purpose of harassing and embarrassing sexual assault victims, victims will stop coming forward to report crimes and will refuse to cooperate with investigators and prosecutors to prosecute crimes.

We live in a unique time, where a member of the public has the power to disseminate information to millions across the nation with just a click of a button. As occurred here, police interviews of minor sexual assault victims can be shared on Facebook for millions to view and for the sole purpose of shaming victims. Forcing the prosecutor's office to turn over the confidential, sensitive information Respondent seeks, without any restraint on how such information can be used, will have a reverberating and chilling effect across the nation's law enforcement agencies' ability to effectively investigate and prevent crime. When crime victims, especially victims of rape, sexual assault, and domestic violence, are allowed to be publicly shamed and humiliated for the purposes of "government transparency," the foundation of trust and confidentiality is obliterated. The erosion of a victim's privacy equates to the erosion of cooperation with law enforcement. Without

this cooperation, law enforcement cannot hope to pursue offenders and seek out justice on behalf of victims.

This Court's decision will have a direct impact on the level of trust and confidence victims will be willing to place in their conversations and cooperation with law enforcement. Law enforcement has spent time and money to create, train, and educate a special unit of detectives to work in this unique area of victims. Both law enforcement and victims need a clear understanding of how the law balances the victim's fundamental right to informational privacy under the Fourteenth Amendment against the public's right to access investigatory records. The Supreme Court of Ohio's decision below highlights a clear conflict among federal circuit courts regarding a victim's right to informational privacy that must be resolved to provide a clear boundary between the interests of government transparency and the fundamental right to informational privacy under the Fourteenth Amendment.

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ARGUMENT

I. The Status of the Fundamental Right to Informational Privacy Under the Fourteenth Amendment Bears a Direct Relationship to Law Enforcement's Ability to Investigate and Deter Crime.

One of the fundamental pillars of our criminal justice system is the basic social contract between the public and the State, which allows and encourages

innocent witnesses and crime victims to cooperate with law enforcement freely and fully. The heart of this contract is the implied duty of trust witnesses and victims place in law enforcement officials.

In reality, acquiring and maintaining the trust and confidence from its citizens is a constant challenge for U.S. law enforcement. Law enforcement is one of the most heavily scrutinized arms of the State, with its failures being highly sensationalized and its successes celebrated by a quiet few. In instances of victim-focused crimes, such as sexual crimes and domestic violence, law enforcement's ability to successfully prosecute the offender entirely hinges on the victim's willingness to testify and cooperate with the investigation. These crimes involve highly sensitive and emotionally charged information, therefore, cooperation with law enforcement is dependent upon the victim's or witness's sense of comfort and protection in the presence of sheriffs, police officers, and detectives.

U.S. law enforcement is acutely aware of this challenge and, in response, makes diligent efforts to uphold its duties in the social contract, carefully developing science-based means of investigatory techniques that are thoughtful and intentional in their approach to obtaining essential information whilst protecting the safety and dignity of the victims of sexual assault and domestic abuse.

Law enforcement already faces an uphill battle in obtaining victim cooperation and the Supreme Court of Ohio's decision stands to further erode law

enforcement's ability to secure the trust, confidence and cooperation of victims in the reporting of crimes and in criminal investigations. Respondent seeks to utilize Ohio public records statutes to obtain and publish recordings of a confidential interview between law enforcement and a minor victim of sexual crimes. Allowing such records to be handed over to the public under the veil of "government transparency" is a direct assault on the minor victims' dignity, safety, and constitutional rights. Permitting an Ohio citizen to post victim interview videos and records to social media and other Internet sites, for the obvious purpose of harassment and embarrassment of the victim, will be viewed by sexual assault victims across the Country. As a result, crime victims everywhere will receive a clear message that if they come forward and speak with law enforcement, their interview tapes, detailing horrific and personal sexual details, may be disseminated across the Internet, and viewed and commented upon by all members of the public. Permitting public dissemination of such sensitive victim information inflicts upon victims a cruel punishment for coming forward and will thus have a chilling effect on law enforcements' ability to investigate and prosecute. For the sake of not only law enforcement, but for women, children, and all victims of the most heinous crimes, the U.S. Supreme Court must provide clarity to this issue.

A. Law Enforcement Already Faces a Challenge of Sex-Crime Victims Underreporting Their Victimizations.

Crime victims experience a traumatic incident that shatters their perception of personal safety, challenges their positive views of society, elicits feelings of mistrust and fear, and causes them to question many previously held beliefs. Law enforcement interactions with crime victims seek to serve as a stabilizing influence in the victims' lives and provide victims with the ability to begin reestablishing a sense of safety and trust. If the officers and the institution that they represent are untrustworthy, the stabilizing effects of this interaction are eliminated, and the ability of victims to begin the healing process is impeded. This, in turn, causes the victim to further resist cooperating with the investigation, inhibiting law enforcement's ability to prosecute the offender.

The Bureau of Justice Statistics (BJS) reports that the majority of rapes and sexual assaults perpetrated against women and girls in the United States in 2019 were not reported to law enforcement, with only 33.9 percent of rapes and sexual assaults being reported.² This figure trends with past data, showing that between 1992 and 2000 where only 36 percent of rapes, 34 percent of attempted rapes, and 26 percent of sexual

² U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, NCJ 255113 (2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=7046>.

assaults were reported.³ Reasons for not reporting sexual crimes vary among individuals, but one study identified the following as common:

- Self-blame or guilt.
- Shame, embarrassment, or desire to keep the assault a private matter.
- Humiliation or fear of the perpetrator or other individual's perceptions.
- Fear of not being believed or of being accused of playing a role in the crime.
- Lack of trust in the criminal justice system.⁴

While research on this issue speaks for itself, sheriffs, police officers, detectives, and prosecutors across the nation can share their personal experiences and observations of crime victims' uneasiness and lack of trust in law enforcement institutions. Knowing that a victim's testimony is a near essential component of a successful prosecution of the offender, and thus, preventing future crimes, law enforcement has met the challenge head on, making bold changes to its practices based on scientific and victim-centered approaches.

³ U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RENNISON, C.M., RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, NCJ 194530 (2002), <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>

⁴ Janice Du Mont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 4, 446-486 (2003).

B. Crime Victims' Willingness to Cooperate with Law Enforcement is Correlated with the Victims' Experiences With Law Enforcement.

The public's perception of procedural justice and law enforcement's legitimacy directly influences crime victims' decisions on whether or not to report their victimization to law enforcement and subsequently cooperate the investigation.⁵

When crime victims decide to report their victimization to law enforcement, the interaction between the crime victims and law enforcement is significant for both parties. The exchange is important for the investigation because crime victims often share relevant, very personal information about the circumstances of the crime and the offender.⁶ This kind of information

⁵ See Nathalie-Sharon N. Koster et al., *Crime Victims' Evaluations of Procedural Justice and Police Performance in Relation to Cooperation: A Qualitative Study in the Netherlands*, 30 POLICING AND SOCIETY 3, 225-240 (2020); see also Nathalie-Sharon N. Koster, *Victims' Perceptions of the Police Response as a Predictor of Victim Cooperation in the Netherlands: A Prospective Analysis*, 23 PSYCHOLOGY, CRIME & LAW 3, 201-220 (2017).

⁶ U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, P. CIREL ET AL., AN EXEMPLARY PROJECT: COMMUNITY CRIME PREVENTION PROGRAM, SEATTLE, WASHINGTON, NCJ 42383 (1977); R.J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 5328, 918-924 (1997).

helps law enforcement solve the crime and, more generally, preserve law and order.⁷

Research suggests that perceived negative experiences with the law enforcement may be harmful for victims' willingness to share information with the law enforcement.⁸ Particularly, repeat victims are less likely to cooperate with law enforcement when their past interactions were perceived negatively by the victim.⁹

Whether a contact with law enforcement is perceived as positive or negative depends in large part on how law enforcement officers interact with victims during interpersonal encounters.¹⁰ Respectful treatment of crime victims by law enforcement increases the public's perception of "procedural justice," as this communicates that one is a respected member of

⁷ W.G. Skogan et al., *Information, Apprehension, and Deterrence: Exploring the Limits of Police Productivity*, 7 JOURNAL OF CRIMINAL JUSTICE 3, 217–241 (1979).

⁸ E.A. Ziegenhagen, *The Recidivist Victim of Violent Crime*, 1 VICTIMOLOGY INTERNATIONAL JOURNAL 4, 538–550 (1976); J. SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM (1985).

⁹ J.J.M. Van Dijk, *Attitudes of Victims and Repeat Victims Toward the Police: Results of the International Crime Victims Survey*, 12 CRIME PREVENTION STUDIES, 27–52 (2001); R. Tarling et al., *Reporting Crime to the Police*, 50 BRITISH JOURNAL OF CRIMINOLOGY 3, 474–490 (2001); Ipsos MORI, *Experiences of the Criminal Justice System—Victims and Witnesses of Crime* (2003).

¹⁰ M. Symonds, *Victims of Violence: Psychological Effects and Aftereffects*, 35 THE AMERICAN JOURNAL OF PSYCHOANALYSIS 1, 19–26 (1975).

society who is worth fighting for.¹¹ It has been found that negative experiences with law enforcement can result in less positive opinions of law enforcement legitimacy and, subsequently, less willingness to cooperate with officials in the future.¹² By contrast, positive experiences with sheriffs and police may lead to more favorable views of law enforcement legitimacy and subsequently more willingness to cooperate with officials in the future.¹³

The public's willingness to cooperate with law enforcement directly impacts law enforcement's ability to prevent crime. A deterioration this cooperation threatens law enforcement's legitimacy in the eyes of the public. Unsolved cases of highly impactful crimes, for example, may result in disappointed victims and a disappointed public, who may, as a result, question the

¹¹ J.M. WEMMERS, *VICTIMS IN THE CRIMINAL JUSTICE SYSTEM* (1996).

¹² Nathalie-Sharon N. Koster, *Victims' Perceptions of the Police Response as a Predictor of Victim Cooperation in the Netherlands: A Prospective Analysis*, 23 *PSYCHOLOGY, CRIME & LAW* 3, 201-220 (2017).

¹³ E. Lind et al., *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); J. Sunshine et al., *The Role of Procedural Justice and Legitimacy In Shaping Public Support for Policing*, 37 *LAW & SOCIETY REVIEW* 3, 513-548 (2003); T.R. Tyler, *Why People Obey the Law*, YALE UNIVERSITY PRESS (1990); T.R. Tyler et al., *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 *OHIO STATE JOURNAL OF CRIMINAL LAW* 1, 231-275 (2008); T.R. Tyler et al., *Trust in the Law: Encouraging Public Cooperation with Police and Courts*, RUSSELL SAGE FOUNDATION (2002); T.R. Tyler et al., *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*, 115-191 (1992).

importance of further cooperation with law enforcement, especially in cases of subsequent victimizations.¹⁴

Research has distinguished four elements that characterize “procedural justice” in the eyes of a crime victim: (1) voice, (2) neutrality, (3) respect, and (4) trustworthiness.¹⁵ Voice relates to the opportunity to express ones views to a genuinely interested law enforcement, neutrality refers to law enforcement being unbiased, respect relates to being treated with dignity, and trustworthiness refers to law enforcement showing sensitivity and concern for people’s needs and concerns indicating that they are motivated to achieve the best possible solution for all parties involved.¹⁶ These elements have been recognized in further research of crime victims and their willingness to cooperate with law enforcement.¹⁷ According to these studies, victims

¹⁴ U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, P. CIREL ET AL., AN EXEMPLARY PROJECT: COMMUNITY CRIME PREVENTION PROGRAM, SEATTLE, WASHINGTON, NCJ 42383 (1977); R.J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 5328, 918–924 (1997); W.G. Skogan, *Asymmetry in the Impact of Encounters with Police*, 16 POLICING AND SOCIETY: AN INTERNATIONAL JOURNAL OF RESEARCH AND POLICY 2, 99-126 (2006).

¹⁵ T.R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 SWISS JOURNAL OF ECONOMICS AND STATISTICS 2, 219–240 (1997).

¹⁶ *Id.*

¹⁷ V. DE MESMAECKER, PERCEPTIONS OF CRIMINAL JUSTICE (2014); I. Elliott et al., *Procedural Justice In Contacts With The Police: Testing A Relational Model Of Authority In A Mixed Methods Study*, 17 PSYCHOLOGY, PUBLIC POLICY, AND LAW 4, 592–610 (2011); I. Elliott et al., *Procedural Justice In Contacts With The*

valued these aspects in their interaction with law enforcement, because it made them feel believed and taken seriously by authorities.¹⁸ Furthermore, this research concluded that fair treatment by the law enforcement encouraged victims to cooperate with the law enforcement in the future.¹⁹

In order to create this “procedural justice” for crime victims, law enforcement agencies around the county, at every level of government, have devoted a great deal of time, resources, and effort in studying and developing specific interview tactics for crime victims that are different from methods used to interview suspects. The U.S. Office of Justice Programs, a federal agency of the U.S. Department of Justice, has created a standalone Office for Victims of Crime (“OVC”). The OVC funds and develops education and training programs for state and local law enforcement agencies, with the mission of equipping officials with the

Police: The Perspective Of Victims Of Crime, 13 POLICE PRACTICE AND RESEARCH 5, 437–449 (2012).

¹⁸ V. DE MESMAECKER, PERCEPTIONS OF CRIMINAL JUSTICE (2014); I. Elliott et al., *Procedural Justice In Contacts With The Police: Testing A Relational Model Of Authority In A Mixed Methods Study*, 17 PSYCHOLOGY, PUBLIC POLICY, AND LAW 4, 592–610 (2011); I. Elliott et al., *Procedural Justice In Contacts With The Police: The Perspective Of Victims Of Crime*, 13 POLICE PRACTICE AND RESEARCH 5, 437–449 (2012).

¹⁹ I. Elliott et al., *Procedural Justice In Contacts With The Police: Testing A Relational Model Of Authority In A Mixed Methods Study*, 17 PSYCHOLOGY, PUBLIC POLICY, AND LAW 4, 592–610 (2011).

requisite knowledge and understanding to adopt a victim centered approach to investigations.²⁰

Another example of law enforcement's genuine effort to bridge the communication gap with crime victims is an increasing amount of law enforcement officials becoming certified in Forensic Experiential Trauma Interview ("FETI"), a science-based methodology for conducting effective victim interviews that focuses on enhancing the quality and quantity of information obtained from victims who have undergone highly stressful or traumatic experiences.²¹

The purpose of adopting these carefully designed interview tactics is to improve and humanize the way the public, specifically victims of sexual crimes and traumatic events, interacts with law enforcement. Victims must trust that the behavior of the officer and organization are beyond reproach. Honesty and confidentiality are critical traits that crime victims seek in law enforcement officers. Crime victims fear that their personal reputations and professional relationships can be damaged if their victim status becomes public knowledge. Therefore, officers take great strides to protect the privacy of the victim when possible and always provide clear expectations to the victim as to the agency's ability to control information.

²⁰ Office for Victims of Crime, <https://ovc.ojp.gov/program/law-enforcement/ovc-law-enforcement-initiatives> (last visited May 3, 2021).

²¹ Certified FETI, <https://www.certifiedfeti.com/about/> (last visited May 3, 2021).

Despite these efforts, sheriffs, police officers, detectives, and prosecutors still face the uphill battle of convincing victims that it is safe for them to cooperate with the investigation and that some of the information they share will remain confidential.

C. The Infringement of Petitioner’s Right to Informational Privacy Threatens to Undermine Law Enforcement’s Efforts to Build Trust with Crime Victims.

In some communities, a negative view is taken toward those who cooperate with law enforcement. Witnesses are often intimidated, and victims may face retaliation for reporting the crime. Law enforcement has adopted new procedures and policies with these risks in mind and take every precaution to maintain confidentiality and protect the victim.

Giving the general public the right to access videos and details of victim conversations with law enforcement will have both practical and psychological implications. A victim may feel violated by the disclosure of information, even if it was obtained from a legal, non-confidential source, and the victim may decline to participate in the prosecution and remain concerned about their safety. The disclosure of such sensitive, personal information can affect the immediate safety of the victim as well as the confidential trust that was built between the victim and those confidantes who were helping the victim remain safe. Furthermore, as research suggests, a violation of this confidentiality

makes it less likely the victim will cooperate with law enforcement in the future.

The breach of confidence between law enforcement and victims also risks a cascading effect on future victims of crime. The reality of our modern age demonstrates there is no shortage of bad actors willing to expose and publish, to the broader public, personal and intimate information of innocent people. With online social media being the dominant medium for this viral spread of information, one's privacy is violated in a continuing and permanent manner. Once that information has been handed over to the online mob, the proverbial bell cannot be unrung.

Members of the public, and potential future crime victims will witness and observe the public humiliation and shaming propounded upon an innocent victim, watching as the victim is robbed of their procedural justice. Entire communities will witness it. Women will witness it. Children will witness it. They will all remember how it happened and why. As the research indicates, the erosion of trust in law enforcement will be exacerbated. Law enforcement will see years of diligent and thoughtful efforts to build the four elements of procedural justice, voice, neutrality, respect, and trustworthiness, all obliterated with the click of button.

While the instant case stems from Mercer County, Ohio, this Court's decision in this case will have a chilling effect on victims and law enforcement in every county in the United States. The effects of this case

stand to permeate through all classes of crime victims and witnesses, not just those related to sexual crimes. What willingness will victims and witnesses of gang activity and other organized crime have to cooperate with law enforcement if the suspect or his accomplices can merely file a public records request to find their identity? That is why the BSSA, on behalf of America's law enforcement, respectfully asks the Court to rule on this matter.

II. The Court's Review is Necessary to Provide Balance Between the Interests of Individual Privacy and Government Transparency.

The nature of this case presents the Court with the opportunity to identify the proper balance between a victims' right of privacy and government transparency. While a criminal defendant has the right to access victim interview tapes and other information necessary to evaluate the victim's claims and establish a defense, the general public does not and should not have an unfettered right to such sensitive information. There is little to no legitimate public right to obtain the graphic details of a sexual assault against a minor victim, and certainly not a compelling interest sufficient to overcome the victim's fundamental right to informational privacy under the Fourteenth Amendment. The BSSA urges this Court to establish the boundaries between these interests, weighing in favor of protecting a criminal victim's right to informational privacy.

A. Law Enforcement Must Be Able to Clearly Identify Which Information is Accessible to Public Records Laws and Which is Protected by A Victim's Fundamental Right to Procedural Privacy.

Transparency and accountability in the activities of government authorities are core values of our republic. In principle, citizens should have access to information in the hands of government authorities so as to be able to hold them properly to account. Access to information in the hands of government can permit independent analysis that may reveal mismanagement or systemic problems in governmental operations. However, the public's right to access governmental information is by no means absolute, and must be balanced against other competing interests and values. Chief among these are the interests of security and the right to privacy. In some cases, government records may contain highly sensitive personal information, the public release of which might cause harm to individuals, that is not outweighed by transparency and accountability considerations. This is often already the case for certain propriety information of businesses that contract with government entities. If the law protects these business interests, why not victims' privacy interests?

It is crucial that law enforcement, being one of the most scrutinized branches of the State, lead by example in transparency of government. Law enforcement agencies will readily admit there is a public interest in having access to certain public records. At the same

time, law enforcement must respect and uphold victims' right to privacy and desire to keep confidential graphic and personal sexual details of their lives and crimes. Victims who seek help from law enforcement deserve to know whether their videotaped conversations with law enforcement will be made available to the public and the Internet for dissemination. If their privacy is breached or invaded, victims' statements and lives will be unjustly exploited. Particularly, in sexual assault and domestic violence cases, maintaining the confidentiality of victim interviews not only encourages the reporting of crimes, but also prevents revictimization by prohibiting unwanted publicity. This is particularly important in cases involving intimate partner violence, where a victim's safety may be compromised to an even greater extent once the victim has left the batterer.

As this instant case demonstrates, law enforcement often bears the brunt of responsibility of managing the competing interests of government transparency and victims' privacy rights. Law enforcement should be able to clearly and confidently explain to victims what, if any, privacy protections are afforded to victims in order to minimize victims' personal fears for their own safety, as well as the safety of their family members. Instead, as in the instant case, well-intentioned public records laws directly conflict with law enforcement's interest in protecting the privacy of a crime victim, putting law enforcement in the difficult position of trying to determine the increasingly smudged boundary between these interests. Law enforcement and crime

victims need and deserve to have a clearer sense of this boundary in order to avoid providing a false sense of confidentiality to the victims and witness. The BSSA believes this Court must define this boundary.

B. Public Records Laws Do Not Reflect Modern Technological Realities as They Relate to Current Privacy Rights Precedent.

The “right of privacy” is “[t]he right of a person . . . to be free from unwarranted public scrutiny or exposure.”²² The Sixth Circuit held in 1998 that “a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate detail of a rape where no penological [sic] purpose is being served. *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998). The Sixth Circuit further articulated the balance between a victim’s privacy and government transparency, holding that absent a compelling government interest in the release of the information, the victim’s privacy interest must prevail. *Id.*

Although the right to public records may be established by statute, there is no constitutional right to public records. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978). When Ohio’s original Public Records Act became effective in 1963,²³ access to public records and the spread of information was highly limited by

²² *Right of Privacy*, Black’s Law Dictionary (10th ed. 2009).

²³ H.B. 155, 105th Gen. Assemb., Reg. Sess. (Ohio 1963).

geographic and technological constraints. “Access” to public records meant physical paper records were made available to members of the public and press for onsite review and inspection. Mass duplication of these records was expensive and thus, rare. A robust local press that existed at that time, with its own safeguards imposed by journalistic ethics, acted as *de facto* gatekeeper in controlling what information was spread amongst the local masses and for how long it remained in the news cycle. Unless it entailed a matter of great national interest, “the story” rarely spread far beyond geographic region.

Today, technology has essentially eliminated the gatekeeping role of the press and the geographic limits regarding the spread of information. Anyone with minimal technological know-how is now able to duplicate and spread any information across the country and the world. The very nature of the Internet age allows for the instantaneous spread of information to the masses with virtually no limits on how far the information will spread and for how long it will remain accessible. And while the Ohio Public Records Act has and continues to be amended to reflect today’s technological realities, members of our nations legislatures or judiciaries will readily admit that the law moves incredibly slow in relation to the technological innovations.

In the case of Petitioner J.K., the Ohio General Assembly was two years too late in excluding these types of highly sensitive records from the Ohio Public

Records Act.²⁴ The legislature's actions, however, give insight into its current intent as to the scope of the Ohio Public Records Act. Petitioner J.K. and future crime victims, however, should not have to rely on public records statutes and the whims of state lawmakers to protect their fundamental right to informational privacy. Other states may not be as responsive to the concerns of crime victims and the use of public records laws for victim shaming can and will continue through other means and in other jurisdictions. Acknowledging this reality forces a difficult confrontation with the privacy rights of victims. Only this Court is able to reconcile this confrontation.

This Court must decide how two important interests, victims' privacy rights and government transparency, are to be weighed and balanced when those interests directly conflict, as in this instant case. The BSSA urges this Court to recognize that modern technological capabilities extend far beyond the intent of public records' laws and that, for the sake of victims and law enforcement, a clear articulation of victims' rights by this Court is necessary for the protection of

²⁴ After the initial public records requests were made in this instant case in 2017, the Ohio General Assembly has since amended The Ohio Public Records Act to exclude from the definition of a public record any depiction of a victim of an offense the release of which would be, to a reasonable person of ordinary sensibilities, an offensive and objectionable intrusion into the victim's expectation of bodily privacy and integrity. Ohio Rev. Code § 149.43(A)(ii) (2021); *see also* S.B. 214, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018).

victims and the preservation of law enforcement's ability to investigate and prosecute.



CONCLUSION

For the foregoing reasons, the Buckeye State Sheriffs Association respectfully requests that the Court grant certiorari.

Respectfully submitted,

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