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 Ohio Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF LEGAL MOMENTUM, THE NATIONAL CRIME VICTIM LAW INSTITUTE, AND EIGHTEEN OTHER WOMEN'S AND CRIME VICTIM'S ORGANIZATIONS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Legal Momentum and the National Crime Victim Law Institute (NCVLI) received consent to file this brief on behalf of themselves and other *amici* organizations[1] from Petitioners Matthew Fox, Jeff Grey, and J.K.. However, Respondent Charles A. Summers did not consent to the filing of this brief. Accordingly, Legal Momentum, NCVLI, and their companion *amici* submit this motion for leave to file an *amici curiae* brief pursuant to Rule 37.2(b).

Legal Momentum, NCVLI, and companion *amici* are advocacy groups dedicated to, among other things, the rights of women, crime victims, and survivors of gender-based violence. As associations that represent women, victims, and survivors across the country, *amici* have a substantial interest in ensuring that a federal constitutional right to informational privacy is preserved and its scope clarified, particularly in the context of public records act requests in response to

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[1] Advocating Opportunity; Arizona Voice for Crime Victims, Inc.; Asian Pacific Institute on Gender-Based Violence; Chicago Alliance Against Sexual Exploitation; Crime Victim Services; Futures Without Violence; National Alliance to End Sexual Violence; National Association of Women Lawyers; National Center for Victims of Crime; National Coalition Against Domestic Violence; National Network to End Domestic Violence; National Organization for Victim Assistance (NOVA); Network for Victim Recovery of DC; Ohio Alliance to End Sexual Violence; Ohio Domestic Violence Network; Ohio Victim Witness Association; Rocky Mountain Victim Law Center; and Women Lawyers on Guard, Inc.

which the government may disclose the details of sexual assaults of minors.

Amici seek leave to file a brief in this case because the pending petition raises significant and timely issues – particularly in the Internet age – about the Fourteenth Amendment Due Process right to informational privacy and the protection that it provides against government disclosure of information concerning the details of a minor's sexual assault.

The brief supplements, rather than repeats, the arguments in the Petition. It further details the unexpected divergence of the Ohio Supreme Court's approach in this case, in which the state court ignored J.K.'s constitutional privacy rights in analyzing the propriety of a public records act disclosure, from that of the same court and the Sixth Circuit in other cases concerning privacy and the release of other public records. It also explains the carefully calibrated legislative and judicial efforts to protect and anonymize sexual assault victims and encourage them to come forward, and how governmental disclosure through public records act request responses would undermine these efforts and discourage reporting of such crimes, particularly where further disclosure of these records can be made on the Internet, which can allow for much more retaliation against sexual assault survivors.

Accordingly, *amici* seek leave to file the accompanying *amici curiae* brief.

Dated: May 3, 2021

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Under rule 29.6 of the Rules of this court, *amici curiae* state the following:

Legal Momentum is a not-for-profit corporation incorporated under the laws of the District of Columbia. It has no shareholders, parents, subsidiaries, or affiliates.

NCVLI is a not-for-profit organization incorporated under the laws of the state of Oregon. It has no shareholders, parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICI CURIAE*[1]

Legal Momentum, the National Crime Victim Law Institute (NCVLI), and companion *amici*[2] are advocacy groups dedicated to, among other things, the rights of women, crime victims, and survivors of gender-based violence. Legal Momentum is the nation's longest serving civil rights organization dedicated to advancing the rights of women and girls. For over 50 years, Legal Momentum has worked to achieve gender equality through impact litigation, policy advocacy, and education. NCVLI is a legal education and advocacy organization focused on promoting balance and fairness in the justice system through legal advocacy, education, and resource sharing. NCVLI is dedicated to ensuring

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioners have consented to the filing of this brief; Respondent has not. A motion for leave to file this brief is being concurrently submitted with this brief.

[2] Advocating Opportunity; Arizona Voice for Crime Victims, Inc.; Asian Pacific Institute on Gender-Based Violence; Chicago Alliance Against Sexual Exploitation; Crime Victim Services; Futures Without Violence; National Alliance to End Sexual Violence; National Association of Women Lawyers; National Center for Victims of Crime; National Coalition Against Domestic Violence; National Network to End Domestic Violence; National Organization for Victim Assistance (NOVA); Network for Victim Recovery of DC; Ohio Alliance to End Sexual Violence; Ohio Domestic Violence Network; Ohio Victim Witness Association; Rocky Mountain Victim Law Center; and Women Lawyers on Guard, Inc.

that everyone in the justice system respects and enforces the legal rights of crime victims.

Legal Momentum, NCVLI, and the companion *amici* have an interest in ensuring that a federal constitutional right to informational privacy is preserved and its scope clarified, particularly in the context of public records act requests in response to which the government may disclose the details of sexual assaults of minors.

SUMMARY OF ARGUMENT

Christopher Summers, Petitioner J.K.'s high school teacher and athletic coach, pled guilty to eight counts of sexual battery against her, and was sentenced to twenty years in prison. Summers' post-conviction legal challenges did not succeed.

Summers' parents set up a Facebook page, "Justice for Chris," on which they posted J.K.'s photograph, called J.K. a liar, and posted graphic details of the sexual assaults, including videos of witness interviews provided for their son's criminal defense and text messages between their son and J.K. at the time of the crimes. Summers' parents were charged with criminal offenses for this conduct. Pet. at 3.

Summers' father made a public records act request to the Mercer County Prosecutor's Office and Sheriff for documents and witness interview videos, including videotaped interviews of J.K. by the police

early in the criminal investigation, in which she detailed the assaults.

The Ohio Supreme Court held that disclosure of this graphic material was required, over J.K. and the government's privacy objections, because there was no "categorical exception to disclosure under federal law," and disclosure therefore was not prohibited by the Ohio Public Records Act. *State ex rel. Summers v. Fox*, Slip Opinion No. 2020-Ohio-5585, ¶ 41 (2020).

The Ohio Supreme Court's conclusion defies its own precedent, under which it has weighed core privacy rights and interests under the public records act, and Sixth Circuit caselaw, which continues to recognize a federal constitutional right to privacy about sexual matters following this Court's decision in *NASA v. Nelson*, 562 U.S. 134 (2011). Indeed, a "public record" under the Ohio Public Records Act does not include "[r]ecords the release of which is prohibited by state or federal law." Ohio Rev. Code Ann. § 149.43(A)(1)(v) (LexisNexis 2021). "Constitutional privacy rights are 'state or federal law' for purposes of the Public Records Act." *State ex rel. Cincinnati Enquirer v. City of Cincinnati*, 157 Ohio St. 3d 290, 292, 2019-Ohio-3876, 135 N.E.3d 772 (Ohio 2019); *see also State ex rel. Keller v. Cox*, 707 N.E.2d 931, 934 (Ohio 1999) (personal information in police officers' personnel files is exempt from disclosure).

Moreover, as we explain, release of such information will undermine judicial and legislative efforts to protect the privacy of sexual assault victims and

encourage reporting and prosecution of such crimes. The judicial system's efforts to anonymize victims (through pseudonyms and elimination of identifying information in judicial opinions, for example) will be nullified if victims can be easily "outed" on social media using documents disclosed by other branches of government through public records act inquiries. And the purpose of public records act statutes (which exist at the federal level and in all 50 states) – to lend transparency to government agency action – would not be served by disclosure of information that would only invade the privacy of individuals rather than illuminate government decision making.[3]

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[3] *See United States Dep't of State v. Ray*, 502 U.S. 164, 177-79 (1991); *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (FOIA "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." (citation omitted)); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (FOIA was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny[.]" (internal quotations and citations omitted)); *see generally* Claudia Polsky, *Open Records Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. Rev. 208, 220 (2019) ("Federal and state PRLs in the United States, like the European Enlightenment open records laws from which they descend, are premised on the need for a democratic government to be transparent and accountable to its citizen-subjects. The federal FOIA, enacted in 1966 and significantly strengthened in 1974, reflects the suspicion of U.S. government secrecy born of the Cold War and Vietnam era, and magnified by the Watergate scandal.").

ARGUMENT

I. In assessing whether graphic material detailing a minor's sexual assault should be disclosed as part of a public records act request, the Ohio Supreme Court refused to balance a constitutional right to informational privacy recognized by both the Sixth Circuit and its own precedent. This alone warrants review, even if there were no circuit split about the scope and existence of a federal constitutional right to informational privacy.

Petitioners raise three independent grounds for granting certiorari: (1) a circuit split about the existence and scope of a federal constitutional right to informational privacy; (2) an important issue of federal constitutional law; and (3) a conflict between a state supreme court and a federal circuit court of appeals on an issue of federal constitutional law. We elaborate on the latter conflict and explain why it compels review.

A "state court of last resort [] decid[ing] an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals" is a well-established ground for review by this Court. U.S. Supreme Court Rule 10; S. Shapiro et al., *Supreme Court Practice* § 4.9, p.14 (11th ed. 2019) ("Another established reason for the grant of certiorari is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state where that conflict

concerns a federal question.")[4] Here, the Ohio Supreme Court ignored J.K.'s assertion of her privacy rights in information about her sexual assault as a minor, despite the Sixth Circuit's prevailing law on federal constitutional protection of informational privacy.

Ohio's Public Records Act, unlike many public records acts,[5] has no express statutory privacy exemption.

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[4] This Court has granted certiorari in many cases in which, as here, state supreme courts have diverged from federal courts of appeals about important issues of federal law. *See*, *e.g.*, *Turner v. Rogers*, 564 U.S. 431, 438 (2011) ("In light of differences among state courts (and some federal courts) on the applicability of a 'right to counsel' in civil contempt proceedings enforcing child support orders, we granted the writ."); *Johnson v. California*, 545 U.S. 162, 164 (2005) (granting certiorari when the Supreme Court of California and Ninth Circuit "provided conflicting answers" to a question); *Florida v. White*, 526 U.S. 559, 562-63 (1999) (granting certiorari to address the Florida Supreme Court's express rejection of an Eleventh Circuit holding); *United States v. Estate of Romani*, 523 U.S. 517, 521-22 (1998) (granting certiorari "to resolve the conflict" between the Pennsylvania Supreme Court and two federal courts of appeals decisions, and to decide whether U.S. Supreme Court precedent required a different result); *Hagen v. Utah*, 510 U.S. 399, 409 (1994) ("We granted certiorari to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." (citation omitted)); *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985) (granting review "to resolve [a] significant conflict" between the Eleventh Circuit and the Supreme Court of Alabama).

[5] Alaska, Arkansas, California, Colorado, D.C., Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island, Utah, Vermont, Washington, and Wyoming statutorily consider personal privacy before disclosing records. *See* OLR Staff, Other States' FOI Exemptions Protecting Personal Privacy, OLR Research Report (Oct. 1, 2013), https://www.cga.ct.gov/2013/rpt/

See Ohio Rev. Code Ann. § 149.43(A)(1) (listing exceptions to disclosure); *see also State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 129 (Ohio 1994) ("FOIA does not apply here, and R.C. 149.43 contains no similar personal-privacy exception."). Yet the Ohio Public Records Act exempts "[r]ecords the release of which is prohibited by state or *federal law*." Ohio Rev. Code Ann. § 149.43(A)(1)(v) (emphasis added).

The Ohio Supreme Court has recognized that constitutional privacy rights are "state or federal law" for purposes of the Public Records Act. *See State ex rel. Keller*, 707 N.E.2d at 934 (personal information in police officers' personnel files is exempt from disclosure: "Police officers' files that contain the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like should not be available to a defendant who might use the information to achieve nefarious ends. This information should be protected . . . by the constitutional right of privacy. . . ."); *State ex rel. Cincinnati*

2013-R-0384.htm; Discussion of each exemption, Reporter's Committee, https://www.rcfp.org/open-government-sections/2-discussion-of-each-exemption/ (last accessed Apr. 13, 2021); *see also*, *Ray*, 502 U.S. at 175 (the text of the FOIA privacy "exemption requires the Court to balance 'the individual's right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny' " (citation omitted)); Cal. Gov't Code § 6250 (Deering 2021) (California's Public Records Act: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.").

Enquirer v. Craig, 132 Ohio St. 3d 68, 71, 2012-Ohio-1999, 969 N.E.2d 243 (Ohio 2012) (Police officers "have a fundamental constitutional interest in preventing the release of private information when disclosure would create a substantial risk of serious bodily harm, and possibly even death, 'from a perceived likely threat[.]'" (quoting *Kallstrom v. Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998)); *State ex rel. McCleary v. Roberts*, 725 N.E.2d 1144, 1150 (Ohio 2000) (disclosure of photo-identification-program database would create general risk of harm to children who use municipal recreation facilities); *see also United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002) ("Ohio Public Records Act does not require disclosure of records the release of which is prohibited by federal law." (citing Ohio Rev. Code Ann. § 149.43(A)(1)(v))).

"[W]hether the release of a particular record is prohibited by federal law necessarily implicates the interpretation of that federal law." *Miami Univ.*, 294 F.3d at 810. Here, that federal law is the U.S. Constitution and the substantive due process right to informational privacy. Both before and after this Court's decision in *Nelson*, the Sixth Circuit "has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm; and (2) where the information released was of a sexual, personal, and humiliating nature." *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008) (citations omitted); *see also Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) ("[A] rape victim has a fundamental right of privacy in

preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served."); *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 586 (6th Cir. 2012) ("In contrast to our sister circuits, we have limited the right of informational privacy 'only to interests that implicate a fundamental liberty interest.' Accordingly, a plaintiff alleging the violation of his informational privacy rights must demonstrate that 'the interest at stake relates to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.' " (cleaned up)); *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 260 n.8 (6th Cir. 2011) (acknowledging that *Nelson* stated that "[w]hether a broader right to nondisclosure of private information even exists remains an open question," but concluding that "the [Supreme] Court has not provided us with any reason to take the opportunity to revisit our past precedents on this matter" because the Court had also acknowledged the various approaches taken by Circuit courts).

Evaluating a right to informational privacy claim in the Sixth Circuit involves a two-step analysis, which includes a balancing test: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." *Bloch*, 156 F.3d at 684.

Here, the Ohio Supreme Court not only failed to recognize J.K.'s informational privacy right, as both it and the Sixth Circuit previously had done in other cases; it refused to consider that right in connection with a challenge to a public records act request because to do so would require application of a constitutional balancing test rather than a categorical prohibition on disclosure. *See State ex rel. Summers*, Slip Opinion No. 2020-Ohio-5585 at ¶ 41.

The Ohio Supreme Court's divergence from the Sixth Circuit on the U.S. Constitution alone merits review.

This case is also a good vehicle for defining the scope and application of a federal constitutional right to informational privacy. First, because the Ohio Public Records Act has no stand-alone statutory protection for privacy, the federal constitutional right to privacy is pivotal to the outcome here. Second, the personal sexual information at issue lies at the core of informational privacy,[6] which makes this case a good vehicle for this Court to address central privacy protections.

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[6] *See*, *e.g.*, *Bloch*, 156 F.3d at 686; *Sealed Plaintiff #1 v. Farber*, 212 Fed. Appx. 42, 43 (2d Cir. 2007) ("[A] person's status as a juvenile sex abuse victim is clearly the type of 'highly personal' information that we have long recognized as protected by the Constitution from governmental dissemination absent a substantial government interest in disclosure." (citation omitted)); *Malleus v. George*, 641 F.3d 560, 564-65 (3d Cir. 2011) ("[T]he right not to have intimate facts concerning one's life disclosed without one's consent is a venerable [right] whose constitutional significance we have recognized in the past"; recognizing three categories of information as being protected – "sexual information, medical

II. Review is necessary because informational privacy carries heightened importance in the Internet age. Moreover, web publication of government records detailing a minor's sexual assault would undermine longstanding judicial and legislative efforts to both encourage reporting of such crimes and maintain the anonymity of sexual assault survivors.

Making information public in a court filing is one thing; sharing government agency documents through a public records act request that, as in this case, will in turn be published on the Internet, is another. "We live in a time that has commonly been referred to as The Information Age. Technological advances have made . . . it possible to generate and collect vast amounts of personal, identifying information. . . . The advent of the Internet and its proliferation of users has dramatically increased, almost beyond comprehension, our ability to collect, analyze, exchange, and transmit data,

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information, and some financial information" (internal quotations and citations omitted, alterations in *Malleus*)); *Dillard v. O'Kelley*, 961 F.3d 1048, 1059 (8th Cir. 2020) (en banc) (Kelly, J., dissenting) ("The particular facts alleged here are not near the periphery of the right to privacy but at its center. Certainly, allegations of incestuous sexual abuse implicate 'the most intimate aspects of human affairs' and are 'inherently private.' " (cleaned up)); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) ("Ms. Anderson possesses a constitutionally protected privacy interest in the video because it depicts the most private of matters: namely her body being forcibly violated."); *Thorne v. El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) ("The interests Thorne raises in the privacy of her sexual activities are within the zone protected by the constitution.").

including personal information." *State ex rel. McCleary*, 725 N.E.2d at 1149.[7] "Posting on the Internet is kind of like a bell you can't unring." Jess Bidgood, *After Arrests, Quandary for Police on Posting Booking Photos*, N.Y. Times (June 26, 2015), https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html (quoting a police chief about posting mug shots on Facebook).[8]

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[7] *See also id.* (citation omitted) ("[I]t is not beyond the realm of possibility that the information at issue herein might be posted on the Internet and transmitted to millions of people. Access to the Internet presents no difficulty. Anyone with a personal computer can transmit and receive information on line via the Internet. This court has long recognized that children possess certain fundamental rights, among which are the right 'to be free from physical, sexual and other abuses.' Because, unfortunately, we live in a society where children all too often fall victim to abuse, it is necessary to take precautions to prevent, or at least limit, any opportunities for victimization."); *id*. ("[A]ny perceived threat that would likely follow the release of such information, no matter how attenuated, cannot be discounted.")

[8] *Cf. People v. Bryant*, 94 P.3d 624, 642 (Colo. 2004) (Bender, J., dissenting) ("The majority, through its sanction of the order not to publish, seeks to protect the alleged victim from embarrassing revelations about her private sexual conduct, but 'that cat is out of the bag.' Through court filings and interviews with the alleged victim's associates, the media have reported on topics related to the evidence considered at the rape shield hearing and the purposes for which the defense seeks to admit that evidence." (citation omitted)); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) (discussing, in the context of unsealing a transcript where a confidential settlement agreement was discussed: "We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again. The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back." (citation omitted)).

Allowing the disclosure of records that detail the sexual assault of the minor victim here, *e.g.*, videotaped police interviews where the victim recounts the sexual assault perpetrated by her teacher and coach, would serve no governmental interest; it also would undermine all of the concerted judicial and legislative efforts over the past several decades to protect the privacy of sexual assault victims and encourage them to come forward. In other words, what the courts and legislatures have given to sexual assault victims on the one hand would be taken away by public records acts and the Internet on the other.

"Sexual assault is one of the most traumatic types of criminal victimization. Whereas most crime victims find it difficult to discuss their victimization, sexual assault victims find it especially painful. One obvious reason for this is the difficulty that many people have in talking about sex. A more important reason, however, is that many victims of sexual assault are intensely traumatized not only by the humiliation of their physical violation but by the fear of being severely injured or killed." Office for Victims of Crime, *OVC Archive: Victims of Sexual Assault*, https://www.ncjrs.gov/ovc_archives/reports/firstrep/vicsexaslt.html (last accessed Apr. 16, 2021). "The prevalence of Posttraumatic Stress Disorder (PTSD) in assault survivors is drastically higher than the national prevalence of the disorder, which is a strong indication that the current therapies for sexual-assault-related PTSD are in need of improvement. Increasing knowledge and understanding of the

pathologies associated with rape trauma in biological, psychological and sociological domains will help to develop more effective treatments for survivors." Kaitlin A. Chivers-Wilson, *Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments*, 9 McGill J. Med. 111 (2006).

"Victim reactions to sexual assaults are still not well understood in society and 'rape myths' are still common. These misunderstandings, unfortunately, continue to persist in the justice system. In fact, they contribute to ongoing deficiencies in criminal justice system processing of sexual assault cases, leading to imperfect justice for victims and survivors. This has been described as the 'justice gap' for sexual assault cases." Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (2019), https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf; *see also* Jennifer J. Freyd, *When sexual assault victims speak out, their institutions often betray them*, The Conversation (Jan. 11, 2018, 6:41 AM), https://theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050 ("[I]nstitutional betrayal exacerbates symptoms associated with sexual trauma, such as anxiety, dissociation and sexual problems.").

Exacerbating all of this is the Internet – which can broadcast both the original crime and government records about the abuse. "Many victims know that the images of their sexual abuse as children are being consumed by numerous, and often unknown, perpetrators

and that this revictimization may continue for the rest of their lives due to the nature of the Internet. Amy Unknown, the child portrayed in the 'Misty series,' one of the most widely-distributed and collected sets of child sexual abuse images, wrote about this problem in her victim impact statement. She wrote:

> '**Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again**. . . . **[T]he crime has never really stopped and will never really stop**. It is hard to describe what it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused by my uncle and is getting some kind of sick enjoyment from it. It's like I am being abused over and over and over again.' "[9]

Courts and legislatures have adopted a panoply of approaches to protect sexual assault victims and allow them to come forward in a way that reduces renewed trauma and embarrassment. "State legislators have pursued a number of strategies to protect crime victims from the potential stigma of publicity, including prohibiting the publication of victim identity, requiring the redaction [of] names or use of pseudonyms in police reports and court filings, allowing victims to

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[9] Warren Binford et al., *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, 35 Children's Legal Rights J. 117, 121 (2015) (emphasis added).

request redaction or the use of pseudonyms in official documents, protecting victims from the normal requirement that witnesses identify themselves on the public record at trial, exempting police reports and court filings relating to certain crimes from public records requirements, and allowing trials to be closed to the public in some circumstances." Charles Putnam and David Finkelhor, "Mitigating the Impact of Publicity on Child Crime Victims and Witnesses," *Handbook on Children, Culture, and Violence*, 113, 119 (2006). Both the legislature and the courts protect victim privacy by carefully balancing the privacy right and interest with the rights of the accused and respect for open courts.

For example, South Carolina "criminalizes publication of a rape victim's name. The statute makes it a misdemeanor to publish the name (but not the image or other identifying information) of victims of criminal sexual conduct." *Id.* at 120 (citing S.C. Code Ann. §§ 16-3-652-656 (2002); Ga. Code Ann. § 16-6-23 (2004)). "Texas gives victims of sexual crimes the right to be referred to by pseudonym in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. Victims who elect to use this procedure complete a 'pseudonym form' developed and distributed by the Sexual Assault Prevention and Crisis Services Program of the Texas Department of Health, which records their name, address, telephone number, and pseudonym." *Id.* at 121 (citing Tex. Code Crim. Proc. Ann. art. 57.02 (West 2002)).

Rape shield laws prevent publication of victims' names, as well as limit inquiries into a victim's past sexual history. *See Michigan v. Lucas*, 500 U.S. 145, 149-50 (1991) (recognizing that Michigan's rape-shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy"). In discussing a Florida law punishing publication of rape victim names, this Court recognized that Florida's law pursued three "highly significant interests": "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure."[10] *Florida Star v. B.J.F.*, 491 U.S. 524,

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[10] This Court recognized the danger of retaliation over thirty years ago, before the age of the Internet. As this case illustrates, through the actions the parents have already taken which led to a criminal complaint against them, the Internet amplifies this danger.

Sexual assault victims whose names become known are often the target of harassment – including death threats – as well as efforts to make good on them; the Internet (particularly where the alleged perpetrator is well-known) may exacerbate this by widening the group of potential harassers. *See*, *e.g.*, *Man charged with soliciting murder of Kobe Bryant's accuser*, ESPN News Wire, http://www.espn.com/espn/wire/_/id/1621370 (last visited Apr. 21, 2021) (man offered to kill Kobe Bryant rape accuser); *Iowa man sentenced to prison for threatening Bryant accuser*, Waterloo-Cedar Falls Courier, https://wcfcourier.com/news/breaking_news/iowa-man-sentenced-to-prison-for-threatening-bryant-accuser/article_be7994cf-2222-5f5a-b2f5-698ba79d4a89.html (last visited Apr. 21, 2021); *What happened in the rape claim case against NBA star Kobe Bryant that was dropped in 2004?*,

537 (1989); *see also People v. Fontana*, 232 P.3d 1187, 1194 (2010) ("The Legislature's purpose in crafting these limitations is manifest and represents a valid determination that victims of sex-related offenses deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. By affording victims protection in most instances, these provisions also encourage victims of sex-related offenses to participate in legal proceedings against alleged offenders." (citations omitted)); *Bryant*, 94 P.3d at 636 (noting that publication of *in camera* transcripts of a victim's sexual conduct and its "graphic detail" would inflict "[t]he very damage that the rape shield statute is designed to prevent" and would also "demonstrate to other sexual assault victims that they cannot rely on the rape shield statute to prevent public airing of sexual conduct testimony the law deems inadmissible. This would directly undercut the reporting and prosecution of sexual assault cases, in contravention of the General Assembly's legislative purposes.").

Several states also provide heightened protections to minor victims of sex crimes. *See*, *e.g.*, *In re A Minor*, 595 N.E.2d 1052, 1056 (Ill. 1992) (upholding an Illinois state law preventing the press from disclosing the identities of minor victims of sex crimes, because: "Public identity could cause continuing emotional trauma to these unfortunate children and impede the lengthy

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Australian Broad. Corp., https://www.abc.net.au/news/2020-01-30/what-happened-in-the-kobe-bryant-nba-star-rape-claim-case/11912250 (last visited Apr. 21. 2021) (rape case dismissed because, after receiving death threats, victim declined to proceed).

and difficult healing process which they must endure. We find that the danger of public disclosure and the probability of irreparable adverse effects which such disclosure would entail to be a compelling State interest at stake in this case."); *Allied Daily Newspapers v. Eikenberry*, 848 P.2d 1258, 1262 (Wash. 1993) ("recogniz[ing] that closure of judicial proceedings or court documents may, under some circumstances, be necessary in order to protect child victims of sexual assault from further trauma and harm and to protect their rights of privacy").

For example, child victims of sex crimes may be allowed to testify remotely by video. "Closed Circuit Television (CCTV) is a video system that securely transmits signals from a video camera to specified television monitors. In the context of child victim witnesses, it is used to limit the number of individuals in the room when the child is testifying, thereby creating a less intimidating environment. Victims of child abuse typically experience denial of the abuse, helplessness, a lack of self-worth, and an inability to trust adults. Subjecting children who have experienced a multitude of these emotions to 'adversarial testing' in open court in front of a room full of other adult authority figures, such as a defense attorney and a judge, can aggravate their mental and emotional distress. Existing research indicates that, for some children, testifying by CCTV can alleviate significant stressors and lower levels of anxiety pre-trial."[11] *Survivor Protection: Reducing the*

[11] Permitting testimony in this fashion requires a judicial determination that it is "necessary to further an important public

Risk of Trauma to Child Sex Trafficking Victims, Rights4Girls, at 17 (Jan. 2018) https://rights4girls.org/wp/wp-content/uploads/r4g/2018/01/Survivor-Protection.pdf.

Ohio law provides many of these same protections to sexual assault survivors and child sexual assault victims. Ohio's rape shield law bars questioning sexual abuse victims about their sexual history. Ohio Rev. Code Ann. §§ 2907.02(D), 2907.05(E) (LexisNexis 2021); *State v. Jeffries*, 160 Ohio St. 3d 300, 306, 2020-Ohio-1539, 156 N.E.3d 859 (Ohio 2020) (noting that the rape-shield "promotes several interests" including "preventing harassment of the victim with probing inquiries into private matters" and "encouraging victims to report sexual assaults without fear of being harassed and traumatized by the process"). Victims of certain sex crimes have the right to ask the judge to order that the information in the police report not be released. Ohio Rev. Code Ann. § 2907.11 (LexisNexis 2021). If the judge grants the request, all names and details will remain confidential until after a preliminary hearing or an arraignment or until the case is dismissed. *Id.* The prosecutor may file a motion requesting an order that the victim and other witnesses in the case not be compelled to give testimony that would disclose the victim's or victim's representative's address, place of employment, or similar identifying

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policy" so long as "the reliability of the testimony is otherwise assured" to ensure careful balance between victim protection and the accused's right to confrontation. *Maryland v. Craig*, 497 U.S. 836, 850-53 (1990).

facts without the victim's consent. Ohio Rev. Code Ann. § 2930.07(A) (LexisNexis 2021). If the court orders that the identifying information must remain confidential, the court files or documents must not contain that information unless it is used to identify the location of the crime. Ohio Rev. Code Ann. § 2930.07(B). The hearing will be recorded, and the court must order the transcript sealed. *Id*.

A prosecutor may admit videotaped preliminary hearing testimony of the child victim as evidence at the trial, instead of the victim testifying at the trial. Ohio Rev. Code Ann. § 2945.49 (LexisNexis 2021). A child victim's testimony at trial may be taken by deposition, videotaped, and then played for the jury. Ohio Rev. Code Ann. § 2152.81 (LexisNexis 2021). Appellate courts use pseudonyms in their opinions to protect minor victims. *State v. Boehme*, No. 27255, 2017 WL 4712432 at *1 n.1 (Ohio Ct. App. Oct. 20, 2017) ("We use this pseudonym for the victim to protect her identity"); *State v. Hall*, No. 25794, 2014 WL 2091895, at *1 n.1 (Ohio Ct. App. May 16, 2014) ("We use this pseudonym to protect the identity of the minor victim").

These interlocking efforts to protect and support sexual assault victims would all be compromised if this same information were disclosed through public records act requests and allowed to be published on the Internet.[12] It is often the judiciary who carefully

[12] Recent efforts at criminal justice reform, including expungement, would likewise be compromised by publication of arrest and other criminal records on the Internet. *E.B. v. Landry*, No. 19-862, 2020 WL 5775148, at *4 (M.D. La. Sept. 28, 2020)

(even if the defendants' records were expunged "future employers will nonetheless learn that they were the named Plaintiffs in a case involving the expungement of criminal records through a simple internet search"); *Lucky v. United States*, 15-MC-1979, 2016 WL 525474, at *3 (E.D.N.Y. Feb. 8, 2016) (noting that expungement would not "have any effect on the availability of newspaper or internet articles about [the petitioner's] case"); *In re Expungement of the Crim. Records of E.C.*, 184 A.3d 120, 122 n.2 (N.J. Super. Ct. App. Div. 2018) ("We use E.C.'s initials to protect her privacy, as this opinion discloses personal details from her application. Further, posting her name on the internet, as part of this opinion, would defeat the purpose of expungement, should that relief be granted remand."); *In re Expungement Petition of R.M.M.*, No. A-5413-13T3, 2015 WL 2259228, at *1 n.1 (N.J. Super. Ct. App. Div. May 15, 2015) (the court used the petitioner's initials because "it would do him little good to later obtain expungement, when this opinion revealing his identity would still be available on the internet").

In Michigan, for example, if an individual is arrested but the charges are dismissed before trial, the arrest record must be removed from the online criminal history database, and absent objection from court or prosecutor, the arrest record, all biometric data, fingerprints, and DNA samples or profile must be expunged, destroyed, or both. Mich. Comp. Laws Serv. §§ 764.26a(1), 28.243(8) (LexisNexis 2021); *see also* Pennsylvania's Clean Slate Law, 2018 Pa. Laws 56, codified at 18 Pa. Cons. Stat. §§ 9121-9125 (2021) (establishing limited access to expunged records); Fiscal Impact Statement for Proposed Legislation: Senate Bill No. 1339, 2020 Legis. Bill Hist. Va. S.B. 1339 (Va. Feb. 5, 2021) ("Summary of Proposed Legislation") ("The bill creates a process for the sealing of criminal records for certain charges, convictions, deferred dispositions, acquittals, and for offenses that have been nolle prossed or otherwise dismissed. The bill also expands the eligibility of criminal records for expungement, expedites the expungement process for dismissed district court charges, introduces new criminal penalties regarding illegal disclosure and requiring disclosure of sealed and expunged records, and establishes civil penalties for business screening services that publish unauthorized police and criminal records.").

balances the interests of the victim, the accused, and the presumption that our courts should be open in determining whether records of sexual assault victims should remain private; allowing release of this information through public records act requests would defy the judiciary's efforts.

CONCLUSION

For these reasons, and for the reasons stated in the petition, this Court should grant review.

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