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 SUMMERS,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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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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- *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 plaintiff's 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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APPENDIX

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APPENDIX A

R.C. § 149.43

149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

Effective: October 17, 2019 to March 23, 2021

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings, to proceedings related to the imposition of community control sanctions and post-release control sanctions, or to proceedings related to determinations under section 2967.271 of the Revised Code regarding the release or maintained incarceration of an offender to whom that section applies;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the

Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under sections 3705.12 to 3705.124 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Designated public service worker residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) In the case of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code or a review conducted pursuant to guidelines established by the director of health under section 3701.70 of the Revised Code, records provided to the board or director, statements made by board members during meetings of the board or by persons participating in the director's review, and all work products of the board or director, and in the case of a

child fatality review board, child fatality review data submitted by the board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.15 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division;

(cc) Information and records that are made confidential, privileged, and not subject to disclosure under divisions (B) and (C) of section 2949.221 of the Revised Code;

(dd) Personal information, as defined in section 149.45 of the Revised Code;

(ee) The confidential name, address, and other personally identifiable information of a program participant in the address confidentiality program established under sections 111.41 to 111.47 of the Revised Code, including the contents of any application for absent voter's ballots, absent voter's ballot identification envelope statement of voter, or provisional ballot affirmation completed by a program participant who has a confidential voter registration record, and records or portions of records pertaining to that program that identify the number of program

participants that reside within a precinct, ward, township, municipal corporation, county, or any other geographic area smaller than the state. As used in this division, "confidential address" and "program participant" have the meaning defined in section 111.41 of the Revised Code.

(ff) Orders for active military service of an individual serving or with previous service in the armed forces of the United States, including a reserve component, or the Ohio organized militia, except that, such order becomes a public record on the day that is fifteen years after the published date or effective date of the call to order;

(gg) The name, address, contact information, or other personal information of an individual who is less than eighteen years of age that is included in any record related to a traffic accident involving a school vehicle in which the individual was an occupant at the time of the accident;

(hh) Protected health information, as defined in 45 C.F.R. 160.103, that is in a claim for payment for a health care product, service, or procedure, as well as any other health claims data in another document that reveals the identity of an individual who is the subject of the data or could be used to reveal that individual's identity;

(ii) Any depiction by photograph, film, videotape, or printed or digital image under either of the following circumstances:

(i) The depiction is that 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.

(ii) The depiction captures or depicts the victim of a sexually oriented offense, as defined in section 2950.01 of the Revised Code, at the actual occurrence of that offense.

(jj) Restricted portions of a body-worn camera or dashboard camera recording;

(kk) In the case of a fetal-infant mortality review board acting under sections 3707.70 to 3707.77 of the Revised Code, records, documents, reports, or other information presented to the board or a person abstracting such materials on the board's behalf, statements made by review board members during board meetings, all work products of the board, and data submitted by the board to the department of health or a national infant death review database, other than the report prepared pursuant to section 3707.77 of the Revised Code.

(ll) Records, documents, reports, or other information presented to the pregnancy-associated mortality review board established under section 3738.01 of the Revised Code, statements made by board members during board meetings, all work products of the board, and data submitted by the board to the department of health, other than the biennial reports prepared under section 3738.08 of the Revised Code;

(mm) Telephone numbers for a victim, as defined in section 2930.01 of the Revised Code, a witness to a crime, or a party to a motor vehicle accident subject to

the requirements of section 5502.11 of the Revised Codethat are listed on any law enforcement record or report.

A record that is not a public record under division (A)(1) of this section and that, under law, is permanently retained becomes a public record on the day that is seventy-five years after the day on which the record was created, except for any record protected by the attorney-client privilege, a trial preparation record as defined in this section, a statement prohibiting the release of identifying information signed under section 3107.083 of the Revised Code, a denial of release form filed pursuant to section 3107.46 of the Revised Code, or any record that is exempt from release or disclosure under section 149.433 of the Revised Code. If the record is a birth certificate and a biological parent's name redaction request form has been accepted under section 3107.391 of the Revised Code, the name of that parent shall be redacted from the birth certificate before it is released under this paragraph. If any other section of the Revised Code establishes a time period for disclosure of a record that conflicts with the time period specified in this section, the time period in the other section prevails.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains,

or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly

issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Designated public service worker" means a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, county or multicounty corrections officer, community-based correctional facility employee, youth services employee, firefighter, EMT, medical director or member of a cooperating physician advisory board of an emergency medical service organization, state board of pharmacy employee, investigator of the bureau of criminal identification and investigation, judge, magistrate, or federal law enforcement officer.

(8) "Designated public service worker residential and familial information" means any information that discloses any of the following about a designated public service worker:

(a) The address of the actual personal residence of a designated public service worker, except for the following information:

(i) The address of the actual personal residence of a prosecuting attorney or judge; and

(ii) The state or political subdivision in which a designated public service worker resides.

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a designated public service worker;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a designated public service worker by the designated public service worker's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the designated public service worker's employer from the designated public service worker's compensation, unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a designated public service worker;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

(9) As used in divisions (A)(7) and (15) to (17) of this section:

"Peace officer" has the meaning defined in section 109.71 of the Revised Codeand also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

"Correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

"County or multicounty corrections officer" means any corrections officer employed by any county or multicounty correctional facility.

"Youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

"Firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

"EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I,"

and "paramedic" have the meanings defined in section 4765.01 of the Revised Code.

"Investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

"Federal law enforcement officer" has the meaning defined in section 9.88 of the Revised Code.

(10) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(11) "Community control sanction" has the meaning defined in section 2929.01 of the Revised Code. "Post-release control sanction" has the meaning defined in section 2967.01 of the Revised Code.

(13) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(14) "Designee," "elected official," and "future official" have the meanings defined in section 109.43 of the Revised Code.

(15) "Body-worn camera" means a visual and audio recording device worn on the person of a peace officer while the peace officer is engaged in the performance of the peace officer's duties.

(16) "Dashboard camera" means a visual and audio recording device mounted on a peace officer's vehicle or vessel that is used while the peace officer is engaged in the performance of the peace officer's duties.

(17) "Restricted portions of a body-worn camera or dashboard camera recording" means any visual or audio portion of a bodyworn camera or dashboard camera recording that shows, communicates, or discloses any of the following:

(a) The image or identity of a child or information that could lead to the identification of a child who is a primary subject of the recording when the law enforcement agency knows or has reason to know the

person is a child based on the law enforcement agency's records or the content of the recording;

(b) The death of a person or a deceased person's body, unless the death was caused by a peace officer or, subject to division (H) (1) of this section, the consent of the decedent's executor or administrator has been obtained;

(c) The death of a peace officer, firefighter, paramedic, or other first responder, occurring while the decedent was engaged in the performance of official duties, unless, subject to division (H)(1) of this section, the consent of the decedent's executor or administrator has been obtained;

(d) Grievous bodily harm, unless the injury was effected by a peace officer or, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(e) An act of severe violence against a person that results in serious physical harm to the person, unless the act and injury was effected by a peace officer or, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(f) Grievous bodily harm to a peace officer, firefighter, paramedic, or other first responder, occurring while the injured person was engaged in the performance of official duties, unless, subject to division (H)(1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(g) An act of severe violence resulting in serious physical harm against a peace officer, firefighter, paramedic, or other first responder, occurring while the injured person was engaged in the performance of official duties, unless, subject to division (H) (1) of this section, the consent of the injured person or the injured person's guardian has been obtained;

(h) A person's nude body, unless, subject to division (H)(1) of this section, the person's consent has been obtained;

(i) Protected health information, the identity of a person in a health care facility who is not the subject of a law enforcement encounter, or any other information in a health care facility that could identify a person who is not the subject of a law enforcement encounter;

(j) Information that could identify the alleged victim of a sex offense, menacing by stalking, or domestic violence;

(k) Information, that does not constitute a confidential law enforcement investigatory record, that could identify a person who provides sensitive or confidential information to a law enforcement agency when the disclosure of the person's identity or the information provided could reasonably be expected to threaten or endanger the safety or property of the person or another person;

(l) Personal information of a person who is not arrested, cited, charged, or issued a written warning by a peace officer;

(m) Proprietary police contingency plans or tactics that are intended to prevent crime and maintain public order and safety;

(n) A personal conversation unrelated to work between peace officers or between a peace officer and an employee of a law enforcement agency;

(o) A conversation between a peace officer and a member of the public that does not concern law enforcement activities;

(p) The interior of a residence, unless the interior of a residence is the location of an adversarial encounter with, or a use of force by, a peace officer;

(q) Any portion of the interior of a private business that is not open to the public, unless an adversarial encounter with, or a use of force by, a peace officer occurs in that location.

As used in division (A)(17) of this section:

"Grievous bodily harm" has the same meaning as in section 5924.120 of the Revised Code.

"Health care facility" has the same meaning as in section 1337.11 of the Revised Code.

"Protected health information" has the same meaning as in 45 C.F.R. 160.103.

"Law enforcement agency" has the same meaning as in section 2925.61 of the Revised Code.

"Personal information" means any government-issued identification number, date of birth, address, financial information, or criminal justice information from the

law enforcement automated data system or similar databases.

"Sex offense" has the same meaning as in section 2907.10 of the Revised Code.

"Firefighter," "paramedic," and "first responder" have the same meanings as in section 4765.01 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request by any person, a public office or person responsible for public records shall make copies of the requested public record available to the requester at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requester's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory, that the requester may decline to reveal the requester's identity or the intended use, and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person requests a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person requesting the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public

record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person requesting the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by that person. Nothing in this section requires a public office or person responsible for the public record to allow the person requesting a copy of the public record to make the copies of the public record.

(7)(a) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

(b) Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request,

copies of public records by United States mail or by any other means of delivery or transmission pursuant to division (B)(7) of this section. A public office that adopts a policy and procedures under division (B)(7) of this section shall comply with them in performing its duties under that division.

(c) In any policy and procedures adopted under division (B)(7) of this section:

(i) A public office may limit the number of records requested by a person that the office will physically deliver by United States mail or by another delivery service to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes;

(ii) A public office that chooses to provide some or all of its public records on a web site that is fully accessible to and searchable by members of the public at all times, other than during acts of God outside the public office's control or maintenance, and that charges no fee to search, access, download, or otherwise receive records provided on the web site, may limit to ten per month the number of records requested by a person that the office will deliver in a digital format, unless the requested records are not provided on the web site and unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes.

(iii) For purposes of division (B)(7) of this section, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)(a) Upon written request made and signed by a journalist, a public office, or person responsible for public records, having custody of the records of the agency employing a specified designated public service worker shall disclose to the journalist the address of the actual personal residence of the designated public service worker and, if the designated public service worker's spouse, former spouse, or child is employed by a public office, the name and address of the employer of

the designated public service worker's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for:

(i) Customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information;

(ii) Information about minors involved in a school vehicle accident as provided in division (A)(1)(gg) of this section, other than personal information as defined in section 149.45 of the Revised Code.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(10) Upon a request made by a victim, victim's attorney, or victim's representative, as that term is used in section 2930.02 of the Revised Code, a public office or person responsible for public records shall transmit a copy of a depiction of the victim as described

in division (A)(1)(gg) of this section to the victim, victim's attorney, or victim's representative.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may do only one of the following, and not both:

(a) File a complaint with the clerk of the court of claims or the clerk of the court of common pleas under section 2743.75 of the Revised Code;

(b) Commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(2) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

(2) If a requester transmits a written request by hand delivery, electronic submission, or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or

person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(3) In a mandamus action filed under division (C)(1) of this section, the following apply:

(a)(i) If the court orders the public office or the person responsible for the public record to comply with division (B) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(ii) If the court makes a determination described in division (C)(3)(b)(iii) of this section, the court shall determine and award to the relator all court costs, which shall be construed as remedial and not punitive.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section or if

the court determines any of the following, the court may award reasonable attorney's fees to the relator, subject to division (C)(4) of this section:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(iii) The public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with division (B) of this section. No discovery may be conducted on the issue of the alleged bad faith of the public office or person responsible for the public records. This division shall not be construed as creating a presumption that the public office or the person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order described in this division.

(c) The court shall not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(4) All of the following apply to any award of reasonable attorney's fees awarded under division (C)(3)(b) of this section:

(a) The fees shall be construed as remedial and not punitive.

(b) The fees awarded shall not exceed the total of the reasonable attorney's fees incurred before the public record was made available to the relator and the fees described in division (C)(4)(c) of this section.

(c) Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the

reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.

(d) The court may reduce the amount of fees awarded if the court determines that, given the factual circumstances involved with the specific public records request, an alternative means should have been pursued to more effectively and efficiently resolve the dispute that was subject to the mandamus action filed under division (C)(1) of this section.

(5) If the court does not issue a writ of mandamus under division (C) of this section and the court determines at that time that the bringing of the mandamus action was frivolous conduct as defined in division (A) of section 2323.51 of the Revised Code, the court may award to the public office all court costs, expenses, and reasonable attorney's fees, as determined by the court.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. A future official may satisfy the requirements of this division by attending the training before taking office, provided that the future official may not send a designee in the future official's place.

(2) All public offices shall adopt a public records policy in compliance with this section for responding to

public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

The public office shall distribute the public records policy adopted by the public office under this division to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(G) A request by a defendant, counsel of a defendant, or any agent of a defendant in a criminal action that public records related to that action be made available under this section shall be considered a demand for discovery pursuant to the Criminal Rules, except to the extent that the Criminal Rules plainly indicate a contrary intent. The defendant, counsel of the defendant, or agent of the defendant making a request under this division shall serve a copy of the request on the prosecuting attorney, director of law, or other chief legal officer responsible for prosecuting the action.

(H)(1) Any portion of a body-worn camera or dashboard camera recording described in divisions (A)(17)(b) to (h) of this section may be released by consent of the subject

of the recording or a representative of that person, as specified in those divisions, only if either of the following applies:

(a) The recording will not be used in connection with any probable or pending criminal proceedings;

(b) The recording has been used in connection with a criminal proceeding that was dismissed or for which a judgment has been entered pursuant to Rule 32 of the Rules of Criminal Procedure, and will not be used again in connection with any probable or pending criminal proceedings.

(2) If a public office denies a request to release a restricted portion of a body-worn camera or dashboard camera recording, as defined in division (A)(17) of this section, any person may file a mandamus action pursuant to this section or a complaint with the clerk of the court of claims pursuant to section 2743.75 of the Revised Code, requesting the court to order the release of all or portions of the recording. If the court considering the request determines that the filing articulates by clear and convincing evidence that the public interest in the recording substantially outweighs privacy interests and other interests asserted to deny release, the court shall order the public office to release the recording.