In the
Supreme Court of Ohio

CHARLES A. SUMMERS,	:	Case No. 18-0959
Relator,	:	
	:	Original Action in Mandamus
v.	:	
MATTHEW FOX, PROSECUTING ATTORNEY, MERCER COUNTY, OHIO, *et al.*,	:	
Respondents.	:	

RESPONDENTS' AND INTERVENING RESPONDENT'S JOINT MOTION FOR RECONSIDERATION

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Respondents, Mercer County Prosecutor Matthew Fox and Mercer County Sheriff Jeff Grey, and Intervening Respondent, J.K., by and through respective counsel, respectfully move this Honorable Court, pursuant to Supreme Court Practice Rule 18.02, for reconsideration of the opinion dated December 10, 2020 that granted Relator's writ of mandamus in part.

Respondents request this Court reconsider its opinion and adopt the dissenting opinion finding Relator Charles A. Summers is the designee of inmate Christopher Summers. First, a public agency, in responding to a public records request, has no ability to question the identity of the requester, except when the relationship between Relator and inmate is clear. The designee standard is a low bar, as this Court implicitly recognized in its previous holding in *Barb* II. A simple statement by the requester in that case that he sought to demonstrate that his incarcerated brother did not receive a fair trial was sufficient, in and of itself, to form the designee relationship. The majority's decision in this case turns the designee analysis on its head. As recognized by the dissent, Respondents presented overwhelming evidence, in addition to the familial relationship of Relator and inmate, to demonstrate actual agency and designee status. The express, direct authority standard announced by the majority effectively eliminates designee status under R.C. § 149.43(B)(8).

Second, the majority accepts as true the averments of Relator's affidavit flatly claiming he is not his son's designee without assessing the credibility of the Relator's self-serving claims and with no recognition that Respondents had no ability to test the claim through cross examination or other methods. Third, the majority opinion conflates exemption and other procedural requirements regarding public record compliance found in R.C. § 149.43(B)(8) with the defined exceptions to categories of public records found in R.C. § 149.43(A). In so doing, the majority finds the Respondents have not established Relator is the designee of the inmate by clear and convincing

evidence, a burden of proof never previously pronounced. This conflation and newly articulated standard will force public agencies to choose between violating the civil rights of victims of crime and violating the public records law.

Intervening Respondent, J.K., also requests this Court reconsider its opinion. First, the majority erred when it refused to apply J.K.'s constitutional privacy rights simply because this is a public records matter. Second, the court erred when it ignored J.K.'s state and federal constitutional privacy rights that exist in addition to Marsy's Law. Third, the court erred when it failed to apply a balancing test to weigh J.K.'s fundamental right to privacy with the State's interest in complying with public records requests. As written, the opinion would not only harm J.K. and all other Ohio victims by failing to balance their state and federal constitutional privacy rights against the interest in release of records, but it would also subject Ohio public officials and public offices to civil liability.

The reasons for this Joint Motion are more fully set forth in the Memorandum in Support attached hereto and incorporated herein by reference.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

On December 10, 2020, this Court granted in part and denied in part the Complaint in Mandamus of Relator Charles A. Summers and issued a Writ of Mandamus ordering the Respondents to provide to Relator certain records maintained in Respondents' files.

For the reasons set forth herein, Respondents and Intervening Respondent submit that granting the Writ of Mandamus was error. The granting of this Writ creates a litany of constitutional and other legal issues and will force public agencies to choose between protecting a victim's rights and complying with this newly articulated law; it will also have a chilling effect on victims' willingness to testify against their perpetrators, turning the public records law into a potentially life-long sword to be used against them.

Reconsideration before this Court is appropriate if it is confined to the grounds urged for reconsideration, is not a re-argument of the case, and is filed with respect to one of the criteria listed in Supreme Court Practice Rule 18.02(B), including, as in this case, a decision on the merits.

The Court may invoke its reconsideration procedures in order to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Found v. Cuyahoga Falls*, 82 Ohio St3d 539, 541 (1998) quoting *State ex rel. Huebner v. Jefferson Village Council*, 75 Ohio St.3d 381, 383 (1995). *See also, State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597 (1993) (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration); *State ex rel. Eaton Corp. v. Lancaster*, 44 Ohio St.3d 106 (1989) (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for "rehearing").

Reconsideration is particularly appropriate where an issue was not fully considered or when this Court fails to cite authority for abandoning prior precedent. *Oberline Manor, Ltd. v. Lorain Cty. Board of Revisions*, 69 Ohio St. 3d 1, 203 (1994), citing *Matthews v. Matthews*, 5 Ohio App. 3d 140 (1981). Reconsideration is proper in this case.

I. Relator is the Designee of his Inmate Son.

A. The Majority Effectively Eliminates Designee Status Under O.R.C. §149.43(B)(8) by Effectively Overruling *Barb* II.

The public records act clearly states that a public office is not required to permit an incarcerated person to inspect or even obtain a copy of the public records involved in his or her case. R.C. § 149.43(B)(8). While the statute is silent on how to prevent an inmate from obtaining a public record related to his conviction, prior to the majority's decision, courts have held that inmates cannot use an intermediary to obtain the records. Or, as this Court put it, "[the designee] may not do indirectly what [the inmate] is prohibited from doing directly." *State ex rel. Barb v. Cuyahoga County Jury Comm'r*, 2010-Ohio-6190, ¶6, 2010 Ohio App. LEXIS 5172 (8th Dist.), *aff'd by* 128 Ohio St.3d 528, 2011-Ohio-1914, 947 N.E.2d 670, 671 (*Barb* II). There is no question

that Christopher, Relator's incarcerated son, was not entitled to the records requested in this case. (¶96).

Prior to the present case, the threshold for designee status was low, as evidenced by the following decisions, both from this Court and others:

- *Barb* II, this Court, with minimal analysis, affirmed the Eighth District Court of Appeals and held that the brother of an inmate who requested verdict forms and lists of prospective jurors in criminal cases involving his brother served as his designee "based solely on [the brother's] statement that his intent was to demonstrate that his [incarcerated brother] did not receive a fair trial." (¶101). There was no express delegation. (¶102). As recognized by the dissent (¶97), this Court offered nothing more than a "single-paragraph opinion in *Barb* II," and it "affords no indication of the contours of that court-created rule. Nor has this court subsequently provided any additional insight."

- *State ex rel. Hopgood v. Cuyahoga Cty. Prosecutor's Office*, 2018-Ohio-4121, ¶6-7, 2018 Ohio App. LEXIS 4426 (8th Dist.), the Court explicitly held that being a relative of the incarcerated person that is the subject of the public records request, **in and of itself**, is sufficient to establish that the relative is the designee of the inmate. The *Hopgood* decision, which was issued less than one year ago, holds: "**[A] relative** or any party in privity with the incarcerated person that is the subject of the records request, may not bypass the requirement of R.C. 149.43(B)(8) by seeking a records request on their own behalf."

- *Ellis v. Cuyahoga Cty. Prosecutor's Office*, 2018-Ohio-3479, ¶13 (Court of Claims) ("Ellis's designees, who made request for the records to which Ellis himself is not entitled, are not entitled to the records.")

In contrast to this Court's minimalist approach in *Barb* II, the majority undertook an extensive analysis in reaching its designee determination in this case and fashioned a new rule. As noted by the dissent (Opinion at ¶101), the court now requires proof of "express, direct delegation of authority" "in order to require a noninmate to comply with R.C. 149.43(B)(8)." Here, the dissent easily concluded that "[t]he evidence that Charles is acting on Christopher's behalf here is every bit as strong, if not stronger than, the evidence of agency in *Barb* II." (¶102). Relator's Facebook page, which he uses to "critique what [he sees] as unfairness in Christopher's

prosecution," coupled with "the evidence submitted by respondents that Christopher has himself been intimately involved in the efforts to obtain and post information about his criminal case, lead to the conclusion that Charles is acting as Christopher's designee and attempting to accomplish indirectly what Christopher cannot accomplish directly." (¶102-03). Christopher memorialized in writing that the records/videos related to his criminal case were his property, and he "directed the use of the documents relating to his criminal case, including the posting of those documents on the Facebook page." (¶104-06).

The majority does not (and cannot) reconcile its non-designee determination in this case despite the vast evidence demonstrating the control exerted by Christopher over the public records as well as his father's Facebook page, with its designee determination in *Barb* II due to a single statement of a family member that he wanted to show that his incarcerated brother did not receive a fair trial. To the contrary, it goes so far as to claim that the proof that the dissent found compelling, in actuality, "has little probative value for proving that Charles was acting as Christopher's designee when he requested public records (because the emails were sent over year after the public records requests were made and Christopher's email does not mention the request)." (¶33). Respondents struggle to think of a scenario in which this type of contemporaneous agency formation will be available to a public body that receives a request from the "designee" of an inmate. Here, Respondents presumed Christopher was controlling the records and Facebook page, and were able to confirm this fact only through Court-ordered discovery. But most public records requests do not reach the point of being reviewed by this Court. The majority opinion disregards the incontrovertible evidence of Christopher's control of the records based on the mere passage of time, but there is not a scintilla of record evidence that Christopher relinquished that control any time in the subsequent year --the majority opinion has presumed a

change in agency based on an absence of evidence. It is more than safe to say that the purpose and control of the Facebook page never changed and the "proof' located by Respondents was more than sufficient than the standard articulated in *Barb* II. The two opinions cannot be squared.

And from a more practical perspective, a public agency in this state (which, of course, is not permitted to inquire about the identity of a requester, let alone conduct discovery regarding the nature and origin of such a request) will presumably never be presented with any form of "express, direct delegation of authority" when a public records requester submits their request. Further, the majority's decision allows an inmate to obtain records and avoid compliance with (B)(8) with the use of a few magic words by his designee: submit an affidavit that states "I am not the designee of the incarcerated person these records relate to." That is sufficient under the newly-enunciated standard.

B. Relator's Self-Serving Affidavit does not Demonstrate Non-Designee Status in Light of the Evidence Uncovered.

The majority places great reliance on Relator's affidavit flatly denying any designee status. This denial, analyzed under the lens of the newly-enunciated "intentional agency" standard, was singularly sufficient to defeat designee status. (¶31). Not surprisingly, Relator's affidavit, which was filed before his son's inmate communications were uncovered, did not contain any mention of the "ownership" of the public records in question or control of the Facebook page. Nor did Relator attempt to even address his son's incriminating communications after they came to light.

In both civil and criminal contexts, Ohio courts typically examine a self-serving affidavit with skepticism. For instance, in the post-conviction relief stage of the criminal process, the Third District Court of Appeals noted that a record reflecting compliance with Crim.R. 11 has greater probative value than a petitioner's self-serving affidavit. *State v. Lewis*, 3d Dist. Logan No. 8-19-08, 2019-Ohio-3031, ¶17 (quoting *State v. Kapper*, 5 Ohio St.3d 36, 38 (1983)) which stated that

self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that the plea was voluntary). Also in the post-conviction relief context, this Court held in *State v. Gondor*, 112 Ohio St. 3d 377 (2006) (citing *State v. Calhoun* 86 Ohio St.3d 279 (1999)), that a trial court has a gatekeeping role as to whether a defendant should be granted a hearing on his motion. Yet, in the context of Relator's petition, this court accepts his averments as true.[1]

Similarly, in the civil realm, Courts find that a self-serving affidavit contradicting evidence offered by opposing parties is not sufficient to avoid summary judgment. *Merino v. Levine Oil*

[1] In *Calhoun*, at 286, this Court held that a trial court could dismiss a petition for postconviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief," and that "the trial court did not abuse its discretion in dismissing the credibility of [the] affidavits," which served as the basis for his petition. This Court stated that:

> In determining the credibility of supporting affidavits in postconviction relief proceedings, we adopt the reasoning of the First Appellate District in *State v. Moore* (1994), 99 Ohio App. 3d 748, 651 N.E.2d 1319. The court, in *Moore*, cited *Sumner*, and suggested that a trial court, in assessing the credibility of affidavit testimony in so-called paper hearings, should consider all relevant factors. *Id.* at 754, 651 N.E.2d at 1323. Among those factors are (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony. *Id.* at 754-756, 651 N.E.2d at 1323-1324.

Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Such a decision should be within the discretion of the trial court. A trial court that discounts the credibility of sworn affidavits should include an explanation of its basis for doing so in its findings of fact and conclusions of law, in order that meaningful appellate review may occur.

Ents., LLC, 2019-Ohio-205, 131 N.E.3d 368, 377 (7th Dist.). "A self-serving affidavit **that is not corroborated by any evidence** is insufficient to establish the existence of an issue of material fact." *Id.* (internal citations omitted; emphasis added). When applying these principles to the inmate by-pass process contained in R.C. § 149.43(B)(8), the majority should have examined Relator's affidavit with similar skepticism. Taking the Relator's simple assurance without more, especially when analyzed under the lens of the post-affidavit evidence presented by Respondents, will effectively nullify the statutory by-pass process.

C. The Majority Conflates the R.C. § 149.43(B)(8) Exemption with R.C. § 149.43(A) Exceptions.

For the first time, this court pronounced a standard to be used in determining how agencies must determine whether a request falls within this category. The court's decision to treat R.C. § 149.43(B)(8) as an exception to the public records act, despite it not falling within the public records exception list set forth in 149.43(A), and then applying the newly pronounced "clear and convincing" standard for those exceptions places an impossible burden on the public office and will effectively eliminate the statutory by-pass process.

The majority confuses the R.C. § 149.43(B)(8) **exemption** by-pass process which permits public record holders to reject an inmate's attempt to or obtain records using the public records act (and by extension, the inmate's designee), with **exceptions** to public records requests contained in R.C. § 149.43(A). This section defines categories of records that are not public records while the R.C. § 149.43(B)(8) exemption permits a public record holder to compel an inmate, and by extension the inmate's designee, to seek a court order before being permitted to obtain records. While recognizing the inmate process, the majority imposes a burden upon the public agency that it must possess "clear and convincing proof" that the Relator is a designee of the inmate. (¶33). No such standard had previously been applied by this Court to establish the R.C. § 149.43(B)(8)

exemption. Rather, this court has previously indicated that **the Relator** must demonstrate a right to the writ by clear and convincing evidence. *State ex rel. Pietrangelo v. City of Avon Lake*, 149 Ohio St.3d 273, 2016-Ohio-5725, 74 N.E.3d 419, ¶ 14.

Further, if the majority was opining that the exemption is a de facto R.C. § 149.43(A) exception, the application of the clear and convincing proof standard is erroneous. There are hundreds of court decisions that state that the public record holder must evaluate a request to determine whether the request falls squarely within the identified exception(s). Determining if a record falls squarely within an exception to a public record is, by definition, an evaluation of the record itself, while the clear and convincing proof standard is an evaluation of the quantum of evidence a Relator must meet to establish his initial burden when seeking a writ. Both the newly established clear and convincing standard for public record exceptions, and the analysis of the inmate exemptions as an exception, should be reconsidered.

II. J.K.'s Privacy Rights Under Both Marsy's Law and the Federal and State Constitutions Prevent Release of Records Including J.K.'s Name and Other Identifying Information, as well as Records of the Intimate Details of the Sex Crimes Committed against her.

A. Marsy's Law Applies to this Matter because it Involves the Criminal Offenses Committed against J.K. and Implicates her Rights, and Should Not be Overlooked by this Court.

Marsy's Law directs that victims' rights apply "in ***any proceeding*** involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated * * *" and the victim "may assert the rights enumerated in this section and any other right afforded to the victim by law." Ohio Constitution, Article I, Section 10a(B) (emphasis added). All aforementioned provisions of Marsy's Law are self-executing and supersede any conflicting state law. Ohio Constitution, Article I, Section 10a(E).

This Court erred when it refused to apply victims' constitutional privacy rights to this matter simply because this is a public records matter. Marsy's Law explicitly states that all of its guarantees apply to any matter "involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated[.]" Ohio Constitution, Article I, Section 10a(B). This case unquestionably involves the criminal offenses committed against J.K. "Involved" means "having a part in something : included in something." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/involved (accessed Dec. 16, 2020). The meaning of the term "involved" is clear on its face.

When a constitutional provision is clear and unambiguous, the plain meaning controls. *See Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (explaining that "in construing the Constitution, we apply the same rules of construction that we apply in construing statutes;" "[w]ords used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning;" and "'[w]here the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean' "), *reconsideration denied*, 146 Ohio St.3d 1473, 2016-Ohio-5108, 54 N.E.3d 1271. "Courts must give effect to the words * * * and may not modify an unambiguous [provision] by deleting words used or inserting words not used." *State v. Waddell*, 71 Ohio St.3d 630, 631, 646 N.E.2d 821 (1995).

This matter involves the criminal offenses committed against J.K. because, but for the criminal offenses, this matter would not exist and the content of the records sought in this case is wholly comprised of information concerning the criminal offenses committed against J.K. Applying the common definition of "involved," the criminal offense absolutely "has a part in this matter" and is "included in" this matter.

Therefore, the rights contained in Marsy's Law, as well as J.K.'s other constitutional privacy rights, apply in this matter and should be applied by this Court.

Marsy's Law provides victims with two constitutional privacy rights; one is general while the other is specific to the right to refuse defense initiated interview, discovery, and deposition requests. Ohio Constitution, Article I, Section 10a(A)(1), (6). The latter is inapplicable in this matter, but it is relevant insofar as these provisions must be read *in pari materia* to determine the meaning of the former. The question becomes, in which contexts are victim privacy invaded in cases involving criminal offenses. Marsy's Law directly addresses one such scenario—when defendants seek to interview, depose, or make discovery requests of victims. Ohio Constitution, Article I, Section 10a(A)(6). However, in passing Marsy's Law, Ohio citizens also embraced another more broad constitutional privacy right for victims in Ohio Constitution, Article I, Section 10a(A)(1).

In light of the fact that interview, deposition, and discovery requests are covered in Ohio Constitution, Article I, Section 10a(A)(6), the privacy right in Ohio Constitution, Article I, Section 10a(A)(1) must be interpreted to provide victims with additional privacy rights not specifically stated in Ohio Constitution, Article I, Section 10a(A)(6). This existence of this additional privacy protection makes clear that Ohio's voters determined that victims' privacy should be protected with vigor wherever possible in any proceedings involving the criminal offense or implicating victims' rights. This Court should thus interpret Article I, Section 10a(A)(1) as a catch-all provision in the Ohio Constitution that protects victims' privacy rights implicated outside the context of defense interview, discovery, or deposition requests.

Aside from defense interview, deposition, or discovery requests, victim privacy is most commonly implicated when victim names and identifying information appear in the law

enforcement, prosecution, and court records created as a result of the criminal offense committed against a victim. Therefore, Ohio Constitution, Article I, Seciton 10a(A)(1) must be interpreted to provide victims the privacy right to redaction of their names and other personally identifiable information from public record. Such redactions are consistent with the basic tenants of modern privacy law, which generally seeks to protect personally identifiable information from public disclosure due to various privacy concerns both personal, such as a fear or humiliation, and practical, such as the concern for identity theft.

Affording victims the right to such redactions in response to public records requests is consistent with protections this Court has provided to some victims, as well as other persons involved in judicial proceedings, even before the passage of Marsy's Law. For example, this Court's Rules of Superintendence permit parties to omit personally identifying information in filings and allow for persons involved in court proceedings to request that the court restrict public access to certain filings for "higher interest[s]" such as "individual privacy rights," among others. *See* Sup.R.45(D), (E). In addition, this Court's Writing Manual requires that juveniles, including minor victims of child abuse or sexual offenses, must be referred to in filings by initials only to protect the minors' identities. *See* Supreme Court of Ohio Writing Manual Rule 14.4(E). The aforementioned rules clearly indicate that this Court recognizes the need to protect the privacy of individual persons, especially vulernable persons, such as children, involved in the justice system. It is difficult to imagine any other victim privacy concern that would more strongly implicate the privacy protection that the Ohio Constitution guarantees victims than this ability to request such redactions.

Importantly, Marsy's Law requires that the privacy rights contained therein be protected "in a manner no less vigorous than the rights afforded to the accused[.]" Ohio Constitution, Article

I, Section 10a. Those accused of crimes, but never charged, are afforded the privacy right to redaction of their names and identifying information from public record. R.C. 149.43(A)(2)(a). While the uncharged suspect exception to public records law is specifically enumerated in Revised Code Section 149.43, there is no question that this exception has its genesis as a privacy right. *See State ex rel. Moreland v. City of Dayton*, 67 Ohio St.3d 129, 130, 616 N.E.2d 234 (1993) ("Releasing such data could compromise the successful reopening of unsolved criminal cases, as well as the privacy rights of uncharged suspects.").

Given Marsy's Law's guarantee that the rights of victims be protected in a manner no less vigorous than the rights of the accused, it is critical that victims' privacy rights be protected in public records matters. Victims like J.K. are dragged into the criminal justice process through no fault of their own. These innocent third parties, to whom the Ohio Constitution guarantees privacy rights, must be afforded—at least—the same privacy rights as uncharged suspects.

Furthermore, Marsy's Law guarantees victims the right to assert all of their rights provided by law, and not simply those rights contained in Marsy's Law itself. Ohio Constitution, Article I, Section 10a(B). J.K. asserted her constitutional privacy rights under Marsy's Law, but also asserted her constitutional privacy rights applicable to all citizens under the federal and state constitutions. In issuing its ruling, this Court did not address J.K.'s privacy rights applicable to all citizens under the federal and state constitutions.

B. This Court must Analyze J.K.'s State and Federal Constitutional Privacy Rights that Exist Outside Marsy's Law.

The Sixth Circuit Court of Appeals ("Sixth Circuit") and several other federal appellate courts have held that the United States Constitution's informational privacy rights are implicated in the release of public records which contain the intimate details of sex crimes. *See 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 [sic] purpose is being served."). For years, Ohio courts have embraced this holding and applied it to public records matters like the case at bar.

In *Bloch*, the Sixth Circuit determined that release of the intimate details of a sexual assault implicates the victim's fundamental, constitutional informational right to privacy. *See id.* at 683. The court reasoned that

> a historic social stigma has attached to victims of sexual violence. In particular, a tradition of "blaming the victim" of sexual violence sets these victims apart from those of other violent crimes. Releasing the intimate details of rape will therefore not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning her sexuality and personal choices regarding sex. This interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws and to advocate against the publication of rape victims' names.

Id. at 685. Therefore, "the right to prevent the dissemination of confidential and intimate details of a rape implicates a fundamental right * * *." *Id*. at 686. The Sixth Circuit concluded by ensuring that "public officials in this circuit will now be on notice that such a right to privacy exists." *Id.* at 687.

This Court's characterization of *Bloch* as "not a public records case" overturns a litany of case law, ignores the factual and procedural history of *Bloch*, and conflicts with the Sixth Circuit characterization of *Bloch*. Further, this characterization is to the detriment of victims, and leaves public agencies to navigate the conflict between this Court's opinion in this case and the Sixth Circuit's decision in *Bloch*. The public agency must make the untenable decision of whether to release records and face legal action from victims pursuant to *Bloch*, or whether to withhold records and face legal action from those seeking the records.

Bloch began with a public records request from the victim to Sheriff Ribar. *Id.* at 676. The Sixth Circuit explained this posture in the procedural history, stating:

> Prior to bringing this action, the Blochs attempted to obtain a copy of Ms. Bloch's statement to the sheriff discussing the details of the rape. Relying on the advice of the local prosecutor, the sheriff refused to give them a copy of the statement, claiming that the statement contained non-public information which was exempt from Ohio's Public Records Law.

Id.

After the victim criticized Sheriff Ribar in the press, Sheriff Ribar responded by publicly releasing the intimate details of the sexual assault during a press conference. *Id.* While Bloch is certainly a 42 U.S.C. § 1983 case, the genesis of the case was in a denied records request and a retaliatory response to that request. Although the manner in which the records were released was unique, ultimately, it was a release of the Sheriff's records regarding a sexual assault case, containing the intimate details of a sexual assault. Therefore, the factual and procedural history of *Bloch* do not conform to this Court's characterization of the case as "not a public records case."

The Court of Claims has consistently interpreted *Bloch* as a public records case and has applied it in the same manner that J.K. argued here. In *Ohio Crime Victim Justice Ctr. v. City of Cleveland Police Div.*, the Court of Claims analyzed the application of *Bloch* in a public records case. *Ohio Crime Victim Justice Ctr. v. City of Cleveland Police Div.*, Ct. of Cl. No. 2016-00872-PQ, 2017-Ohio-8950. The court found that there was a fundamental right to privacy in the intimate details of a sexual assault, citing to *Bloch*, and applied a balancing test to determine what portions of the record in question to exclude from the request. *Id.* at ¶ 17.

"In balancing these rights and interests, the test is whether the public office has fulfilled the compelling state interest in providing access to its public records, while narrowly drawing the boundaries of that interest to protect the victim's fundamental constitutional right to privacy." *Id.*

at ¶ 18. The court went on to exclude large portions of the records to protect the victim's privacy. *Id.* at ¶ 19. The Court of Claims has applied the 14th Amendment fundamental rights explained in *Bloch* to several other cases. *See Narciso v. Powell Police Dep't*, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590, ¶¶ 43-45 (invoking the informational privacy right established in *Bloch* to deny a public records request for information of a "sexual, personal, and humiliating nature."); *see also Shaffer v. Budish*, Ct. of Cl. No. 2017-00690-PQ, 2018-Ohio-1539, ¶¶ 44-46 (relying on *Bloch* to redact a portion of the public records request that featured inmate in a state of undress).

Additionally, the Sixth Circuit and other Federal Circuits view *Bloch* as a public records case. In *Lambert v. Hartman*, the Sixth Circuit analyzed the release of a person's social security number on a Clerk's public website under the informational right to privacy framework proscribed in *Bloch*. *See Lambert v. Hartman*, 517 F.3d 433, 443 (6th Cir.2008) (refusing to apply the balancing test because there is no fundamental right to privacy in a social security number). "The clear principle emerging from *Bloch* is that the sheriff's publication of the details of Bloch's rape implicated her right to be free from governmental intrusion into matters touching on sexuality and family life, and that to permit such an intrusion would be to strip away the very essence of her personhood." *Id.* at 441. This principle applies to public records requests just as it does any other public release of information by the government.

In *Anderson v. Blake*, the Tenth Circuit held that there was a constitutionally protected privacy interest in the videotape of a rape that was provided by law enforcement to the news media. *Anderson v. Blake*, 469 F.3d 910, 917 (10th Cir.2006). In *Anderson*, the victim provided a videotape of her rape to law enforcement for the purposes of conducting an investigation, but law enforcement instead gave the video to a reporter who broadcast it on the local news. *Id.* at 912. The *Anderson* Court relied on the holding of *Bloch* and applied it to the release of a record by law

enforcement. *Id.* at 916 ("Just because disclosing private information at a possible criminal trial is justified by the evidentiary nature of that information, it does not follow that disclosing the same information on a television news broadcast is similarly justified.").

Bloch is, at its core, a public records case, as are the cases cited above interpreting it. However, even if this Court maintains that *Bloch* is "not a public records case," this does not change the fact that the release of records in this case implicates J.K.'s Fourteenth Amendment informational right to privacy set forth in *Bloch*, as well as the constitutional privacy rights guaranteed to Ohio citizens. *See State v. Williams*, 88 Ohio St.3d 513, 525, 728 N.E.2d 342 ("We have stated that the right to privacy under Section 1, Article I runs parallel to those rights of privacy guaranteed by the Fourteenth Amendment to the United States Constitution. Further, when evaluating rights under Section 1, Article I, we find useful federal court interpretations of the Fourteenth Amendment.").

"The right to privacy has been described as 'the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of the community living under a government of law.' " *Id.*, quoting *Time, Inc. v. Hill*, 385 U.S. 374, 413, 87 S.Ct. 534, 555, 17 L.Ed.2d 456, 481 (1967) (Fortas, J., dissenting); *see, also*, *Housh v. Peth*, 165 Ohio St. 35, 39, 59 Ohio Op. 60, 62, 133 N.E.2d 340 (1956). " '[T]he right to privacy is the most comprehensive of rights and the right most valued by civilized men.' " *Id.*, quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956 (1928) (Brandeis, J., dissenting). As discussed more fully above, one aspect of the constitutional right to privacy is the informational right to privacy applicable to the case at bar.

Just as this Court acknowleged in *Williams*, the right to privacy is, arguably, the most valued right in this state and nation. This is especially true for victims of crime.[2] This Court erred when it failed to consider and analyze J.K.'s state and federal constitutional privacy rights that exist separate and apart from the privacy guarantees of Marsy's Law.

C. If this Court finds that Marsy's Law does not Prevent Release of J.K.'s Name and Identifying Information, as well as the Intimate Details of the Sex Crimes Committed against Her, this Court Must Apply the Balancing Test Required by the Fourteenth Amendment and the Ohio Constitution.

Since this case implicates a fundamental right to privacy, this Court should apply the balancing test to determine if the information should be released. When state action infringes on a fundamental right, the action can only be permitted under the substantive due process component of the Fourteenth Amendment if the action furthers a compelling state interest and the action is narrowly drawn to further that state interest. *Kallstrom v. Columbus*, 136 F.3d 1055, 1064 (6th Cir.1998); *State ex rel. Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶ 14. The release of public records is undoubtedly an important state interest. *Kallstrom* at 1065; *State ex rel. Cincinnati Enquirer v. Streicher*, 1st Dist. Hamilton No. C-100820, 2011-Ohio-4498, ¶ 31.

"In balancing these rights and interests, the test is whether the public office has fulfilled the compelling state interest in providing access to its public records, while narrowly drawing the boundaries of that interest to protect the victim's fundamental constitutional right to privacy." *Ohio*

[2] Suzanne M. Leone, Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment, 27 New Eng. L. Rev. 883, 909-10 (1993) (A victim's right to control information about him or herself "constitutes a central part of the right to shape the 'self' that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will * * * in defiance of one's most conscientious efforts to share those facts only with close relatives or friends"), quoting Laurence H. Tribe, American Constitutional Law § 12-14, at 650 (1st Ed.1978).

Crime Victim Justice Ctr. v. City of Cleveland Police Div., Ct. of Cl. No. 2016-00872-PQ, 2017-Ohio-8950, ¶ 18. When applying the balancing test, this Court should not allow the release of information where the victim's right to privacy in the intimate details of the sexual assault overbalances the state's interest in releasing information in a public records request. *Id.* at ¶ 19.

When applying the test to the case at hand, this Court should redact the portions of the records that include the name and any identifying information of J.K., as well as the portions that contain the intimate details of the sex crimes committed against J.K.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court vacate the Opinion and adopt the position of the dissenting opinion; or, in the alternative, Intervening Respondent requests this Court protect her privacy rights by applying Marsy's Law, as well as J.K.'s other state and federal constitutional privacy rights, to prevent release of any records containing J.K.'s name and identifying information, as well as any records containing the intimate details of the sex crimes committed against J.K. In doing so, this Court will prevent harm to both J.K. and all Ohio public officials, such as Respondents, who have been placed by this opinion in the unenviable position of being subject to public records actions such as this when seeking to protect victims of crime or being subject to federal suit as set forth in *Bloch v. Ribar* when seeking to comply with this decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by regular U.S. mail and electronic mail this 21st day of December, 2020 upon the following:

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