IN THE
SUPREME COURT OF OHIO

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

RELATOR CHARLES A. SUMMERS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' AND INTERVENING RESPONDENT'S JOINT MOTION FOR RECONSIDERATION

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Relator Charles Summers ("Mr. Summers") respectfully submits this Memorandum in Opposition to Respondents' and Intervening Respondent's Joint Motion for Reconsideration. This Court granted Mr. Summers a Writ of Mandamus on December 10, 2020 with regard to Mr. Summers' first, second, sixth, eighth, and ninth requests to Fox (except for two interviews), as well as Mr. Summers' first, second, third, seventh, and eighth requests to Grey (except for the same two interviews). *State ex rel. Summers v. Fox, Pros. Atty.,* et al., Slip Opinion No. 2020-Ohio-5585, ¶ 89. Respondents and J.K. filed a Joint Motion for Reconsideration on December 21, raising no new issues or facts not already raised in over one hundred pages of briefings by Respondents, J.K., and the several amici (including an association ostensibly benefiting every elected prosecutor in the state of Ohio), despite S. Ct. R. Practice 18.02(B)'s mandate that "A motion for reconsideration shall not constitute a reargument of the case…."

Remarkably, Respondents and J.K. now claim this case has not been fully considered, despite having the opportunity to file a Motion for Judgment on the Pleadings, two Merit Response Briefs, three amici briefs, and a Privilege Log; along with submitting six volumes of evidence under seal and also making their argument orally before this Court. Moreover, *Respondents* now request that this Court abandon decades of legal precedent, including its recent holding in *State ex rel. Caster v. City of Columbus*, which emphasized the broad purview of the Public Records Act and the interests of justice inherent in requests related to oversight of the criminal justice system. 151 Ohio St. 3d 425, 2016-Ohio-8394, 89 N.E.3d 598. Respondents' and J.K.'s Joint Motion for Reconsideration should be denied.

I. Applicable law

This Court has set a high standard for adjudicating Motions for Reconsideration: "We have invoked the reconsideration procedures set forth in S. Ct.Prac.R. XI to correct decisions which,

upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council,* 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). "We will not, however, grant reconsideration when a movant seek merely to reargue the case at hand." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9. Additionally, issues raised in a motion for reconsideration that were not raised in merit briefs are "deemed to be abandoned." *City of E. Liverpool v. Columbiana Cty. Budget Comm*., 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3. Reconsideration is disfavored because final decisions of the court are intended to "put [disputes] to rest." *Toledo Edison Co. v. City of Bryan*, 91 Ohio St.3d 1233, 1234, 2001-Ohio-272, 742 N.E.2d 655 (Pfeiffer, J., concurring).

II. Mr. Summers is not a designee, and this Court should not reverse its bright-line rule that a public official must prove by clear and convincing evidence that a public records requestor is a designee

In its opinion, this Court clarified confusing court of appeals caselaw on "designees" under the Public Records Act, making a clear rule that a public official must prove that an inmate appointed a designee by clear and convincing evidence. *State ex rel. Summers* at ¶ 33. Respondents now request the Court abandon this clear rule for an overbroad rule that all relatives of inmates are designees under the Public Records Act, despite *nothing* in the Public Records Act suggesting this, and this argument being rejected by *the entire Court*. *See* Motion for Reconsideration, pp. 6-10; *c.f. State ex rel. Summers* at ¶¶ 34-35; 100 (French, J., concurring in part and dissenting in part) ("Neither the statutory language in R.C. 149.43(B)(8) nor this court's adoption of a designee rule in *Barb II* supports the broad presumption that respondents propose."). As they have been unable to meet their burden that Christopher Summers designated Mr. Summers to request the public records, Respondents seize this moment to re-litigate their case and argue with the Court over its decision.

Respondents argue with the Court's analysis of the evidence. Motion for Reconsideration, pp. 7-9. Surely this Court is aware that affidavits *can* be self-serving (but also truthful), and the hornbook law that a Court does not *have* to accept self-serving affidavits. But Respondents already made this argument, Mr. Summers has made his counter-points, and this Court has assessed Mr. Summers' sworn affidavit as well as Respondents' six volumes of evidence, finding the Respondents *still* failed to prove by clear and convincing evidence Mr. Summers was Christopher's designee. *See* Respondents' Motion for Judgment on the Pleadings (filed January 18, 2019), pp. 11-13; *see also* Brief of Respondents (filed August 21, 2019), pp. 29-34; Respondents' Privilege Assertion in Response to Documents Requested by Relator Lg (filed May 28, 2020), p. 2; *c.f.* Brief of Relator (filed August 1, 2019), pp. 12-16; Reply Brief of Relator (filed Sept. 4, 2019), pp. 12-14; *State ex rel Summers*, ¶¶ 33-36. As the Court noted, expressing opinions about a Facebook page is not the same as designating an individual to make a public records request. *State ex rel Summers*, ¶¶ 33. And Mr. Summers has already explained the dangers of relying on Respondents' unreliable evidence in public records cases. *See* Reply Brief of Relator at pp. 11-12.

Relators could have submitted other evidence (e.g., transcript from depositions or other hearings),[1] but did not do so. Respondents have presented *no* new evidence to contest the Court's determination that Mr. Summers was not acting as Christopher's designee. Nor do they propose what evidence Mr. Summers would need to submit to prove that he is *not* a designee. The

[1] During the course of this litigation, Respondent Fox filed criminal charges against Mr. Summers, necessitating that he invoke the Fifth Amendment right against self-incrimination when Respondents proposed to depose him. Looking aside from the suspicious timing of these criminal charges, Relators' case strategy precluded them from deposing Mr. Summers. In other cases, public officials will likely be given the opportunity to depose records requestors they suspect are designees, providing them the opportunity to gather evidence on whether an inmate requested the public records request.

Respondents are simply unhappy with the Court's analysis of the vast amounts of evidence they have submitted and disappointed with their failure to meet their burden of proof.

Once more Respondents raise *Barb II* (along with a court of claims and court of appeals decision they have already raised) and despite acknowledging its "minimal analysis," request this Court re-muddy the waters by adopting "a low bar" threshold to determine a designee, that it argues this Court has "implicitly" adopted in the past. *See* Motion for Reconsideration, pp. 1, 5- 7; *see also* Respondents' Motion for Judgment on the Pleadings, p. 12 (raising *Barb I*); Respondents' Merit Brief, pp. 27, 31 (raising *Barb I* and *II*); *id.* pp. 2, 29 (raising *Hopgood*); *id.* at p. 29 (raising *Ellis*); *c.f.* Brief of Relator, pp.14-16 (addressing *Barb I* and *II*); pp. 12-16; Reply Brief of Relator, p. 13 (addressing *Hopgood*, *Ellis*, and *Barb II*). By addressing *Barb I* and *II* in its opinion, this Court has clarified what the Public Records Act requires: that a public official prove by clear and convincing evidence that an exception exists to permit rejection of a request. *State ex rel. Summers* at ¶¶ 30, 34. The Court has appropriately utilized its authority to clarify confusing caselaw as well as the requirements of the Public Records Act by creating a clear rule: a public official must prove a requestor is a designee by clear and convincing evidence. This rule is easy to apply and will benefit public officials, records requestors, and lower courts. It should reject Respondents' renewed proposition to adopt a vague "low" threshold, which would invite abuses by public officials and unnecessary litigation in the lower courts.

In a futile attempt, Respondents argue with the Public Records Act itself as well as decades of jurisprudence, claiming that a public records *requestor* has a burden to disprove a public official's reason for claiming public records are exempt from disclosure. Motion for Reconsideration, pp. 9-10 ("this court has previously indicated that the Relator must demonstrate a right to the writ by clear and convincing evidence"). Its strained interpretation to distinguish

"exemptions" and "exceptions" does not make sense and is not founded in any caselaw, especially in the context of the Public Records Act's "fundamental policy of promoting open government, not restricting it," as well as decades of jurisprudence holding that a public official refusing to release records "has the burden of proving that the records are excepted from disclosure by R.C. 149.43" and "A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception." *Gilbert v. Summit Cty*., 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564,¶¶ 6, 7; *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

This Court recently rejected an argument remarkably similar to Respondents' position. *See Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 2020-Ohio-5371, ¶¶ 24-31. While a "requester's basic burden of production is to plead and prove facts showing that he or she requested a public record pursuant to R.C. 149.43(B)(1) and that the public office or records custodian did not make the record available […] If a public office or person responsible for public records withholds a record on the basis of a statutory exception, the "burden of production" is on the public office or records custodian to plead and prove facts clearly establishing the applicability of the exemption." *Id*. at ¶¶ 26-27. This Court also noted public officials' burden to prove *exemptions* to public record requests: "R.C. 149.43 imposes on public offices and records custodians a corresponding clear legal duty to make a requested public record available for inspection or copying unless it falls squarely within a specific statutory *exemption*." *Id.* at ¶ 25 (emphasis added). A clear-and-convincing standard is the appropriate standard to adjudicate a burden that must "fall squarely" in an enumerated statutory exception or exemption. Respondents' illogical, irrational, and unfounded view that a citizen requesting public records bears a burden to prove the

public officer's claims of exemption are incorrect once again demonstrates that they are not acting as "well-informed public officials" and to promote the policies behind the Public Records Act.

III. This Court has appropriately held that there is no basis for J.K.'s purported right to privacy to block citizens' access to public records.

Yet again, J.K. claims a vague, overly broad, and unfounded "right to privacy" should block Mr. Summers and other citizens' access to public records. She re-argues that Marsy's Law should somehow be interpreted to block access to public records. *See* Motion for Reconsideration, pp.10-13; *see also* Brief of Real Party in Interest, J.K. (filed August 20, 2019), pp. 6-8 (raising Marsy's Law); *c.f.* Brief of Relator, pp. 20-23 (addressing Marsy's Law and crime victims' right to privacy); Reply Brief of Relator, pp. 4-11 (addressing the same). She also re-raises her argument that federal civil rights cases should somehow be interpreted to block public records from being released to citizens. *See* Motion for Reconsideration, pp. 14-19; *see also* Brief of Real Party in Interest, J.K., pp. 4-6 (raising *Bloch* and *Lambert*); Brief of Respondents, p. 40 (raising *Ohio Crime Victim Justice Center*); *c.f.* Brief of Relator, pp. 22 (addressing *Bloch*); Reply Brief of Relator, p. 10 (addressing the same).

But as this Court properly concluded, "*Bloch* is not a public-records case and it did not create the categorical exception to disclosure under federal law required by R.C. 249.43(A)(1)(v)." *State ex rel Summers* at ¶ 41. *Bloch*, as well as *Anderson v. Blake*, were civil rights cases dealing with victims who had not testified in public hearings and who claimed "that there was no law enforcement purpose in defendant's release of the video." *Anderson v. Blake,* 469 F.3d 910, 912-13 (10th Cir.2006); *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir.1998) ("a rape victim has a fundamental right of privacy in preventing government officials *from gratuitously and unnecessarily* releasing the intimate details of the rape *where no penalogical purpose is being served*.") (Emphasis added); *see also Lambert v. Hartman*, 517 F.3d 433, 435 (6th Cir.2008)

(affirming dismissal of § 1983 claim because "her alleged privacy interest was not of a constitutional dimension."). The public records at issue in this case were clearly related to law enforcement and penological purposes, and are not being "gratuitously and unnecessarily" released as these types of documents are fundamental for the public's oversight of the government. *Bloch* and *Anderson* are inapplicable, and they do not implicate the floodgates of civil rights litigation that J.K. conjectures about.

Nor does Marsy's Law affect this Court's analysis, especially as Respondents have already raised this argument to no avail. As this Court noted, Marsy's Law deals with criminal proceedings, while this is a civil proceeding. *State ex rel. Summers* at ¶ 42. Moreover, the Public Records Act *does* protect victims from disclosure of certain public records due to privacy concerns, and has been amended since Marsy's Law was passed. Judicially manufacturing a rule in spite of the legislature's intent is unnecessary. The public records that were ordered to be disclosed in this case simply do not fall in the legislative exceptions to disclosure.

There is no "fundamental right" of witnesses in criminal cases to block the release of public records when doing so is related to penological purposes, or when doing so is not gratuitous and unnecessary. *See Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008) ("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). Public access to public records is inherently necessary for proper government oversight by the citizenry.

J.K. does not speak for all victims, as justice for many victims would not have occurred *but for* public records requests for law enforcement files. *See Caster* at ¶ 13 (noting affidavit of investigator who testified "'that [a]t least five individuals [he has] assisted were exonerated, and

their convictions were reversed, as a direct result of [his] ability to obtain criminal case files held by law enforcement agencies and/or prosecutors through public records requests' under R.C. 149.43."). The purpose of Ohio Constitution Art. I, Sec. 10(a) is "To secure for victims justice and due process throughout the criminal and juvenile justice systems [….]" Public officials like Respondents who refuse to produce public records risk concealing evidence about government wrongdoing as well as the true perpetrators of crimes – the opposite of securing victims justice. Nor do Respondents meet any of the numerous statutory exceptions to disclosure that would block release of the records based on witnesses' privacy considerations.

As no fundamental rights are implicated, no balancing test is required, nor is this Court required to overturn decades of jurisprudence in face of the legislature's clear intent to provide access to public records, subject to specific legislative exceptions. *Even if* the Court finds there is a constitutional right to privacy related to the Public Records Act, there is a compelling government purpose to promote public access to public records, especially public records related to criminal cases, and the statute is narrowly tailored by R.C. 149.43's numerous defined exceptions and exemptions to protect victims' privacy.

IV. Conclusion

For the foregoing reasons, Mr. Summers respectfully requests the Court deny Respondents' and Intervenor's Joint Motion for Reconsideration.

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 29th day of December, 2020 upon the following:

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