No. 08-500

IN THE

United States Supreme Court

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, Clerk of Courts for Hamilton County, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

There is a curious tension between the cover of Respondents' brief and its body. They call it a "Brief in Opposition," but they do not actually "oppose" any argument in the Petition. They concede the circuit split. They tacitly admit the importance of the conflict. And they offer no defense against the argument that the Sixth Circuit's rule flouts this Court's precedents.

Instead of opposing the Petition's arguments, Respondents offer a litany of dodges. First, they insist that the issue that has split the circuits is not presented here. But the Sixth Circuit acknowledged the split and disposed of the case on the basis of that issue alone. They also offer alternative grounds for affirmance—grounds that the courts below did not reach, and that are meritless. Finally, they argue that Ms. Lambert lacks standing. But they base the argument on a misunderstanding of the claim and the law.

A more apt label is: "Brief in Obfuscation."

I. RESPONDENTS DO NOT DISPUTE A SINGLE POINT IN THE PETITION.

The Petition made three arguments in support of certiorari. Respondents do not dispute any of them.

Point I is that the Sixth Circuit has adopted a rule on the scope of the right of informational privacy that conflicts with the rule adopted by eight other circuits. Eight circuits recognize that a plaintiff can claim a constitutional right of

privacy in private information without showing that a fundamental liberty interest is at stake. The Sixth Circuit stands alone in imposing this threshold requirement. *See* Pet. 9–17.

Respondents concede the circuits apply "distinct approaches." Opp. 6. Further, Respondents concede that "[t]he Sixth Circuit acknowledged in its opinion that other circuit courts of appeal have used" a different balancing "approach." *Id.* And they do not deny that the Sixth Circuit's position is by now entrenched, and the conflict is intractable.

Point II is that the circuit split is an issue of national importance, particularly in light of the national scourge of identity theft. Petitioners do not dispute the pervasiveness of the problem (8.3 million victims per year) or its immense cost ($15.6 billion per year). *See* Pet. 17. They do not dispute that consumers are especially vulnerable to releases of information by governments, because governments, by force of law, keep treasure troves of private identity information. Nor do they dispute that without a constitutional right of action, consumers are powerless to hold government officials accountable for purposely releasing information, knowing that they are exposing citizens to potential financial ruin.

Point III is that the Sixth Circuit's position on the issue of informational privacy conflicts with this Court's prior rulings in *Whalen* and *Nixon*. *See* Pet. 20–24. Respondents make no effort to reconcile the Sixth Circuit's rule with these decisions.

In short, Respondents either explicitly concede or completely ignore virtually every word of the Petition.

II. RESPONDENTS' EFFORTS TO NARROW THE QUESTION PRESENTED ARE UNAVAILING.

Since Respondents cannot refute the cert-worthiness of the question presented, they devote most of their energy to changing the subject in two ways: (A) by narrowing the complaint to challenge only a specific mode of dissemination; and (B) by insisting the claim presented would fail even under the majority rule. Both efforts are unavailing.

A. The Complaint Challenges the Disclosure of Private Information, Not Just the Mode of Disclosure.

Respondents mischaracterize the complaint when they assert: "It is not specifically identifying the criminal defendant in the public record that is the alleged wrong. Instead, it is the publication of that information on the county's website that is the alleged wrong in this case." Opp. 12.

This argument conflates Ms. Lambert's factual assertion as to what *caused* her injury in this case with her *constitutional theory* as to why that injury is actionable. The constitutional claim is premised on the view that *any* publication of private information is impermissible. Ms. Lambert complained that "hundreds of thousands [of] persons . . . have had their social secu-

rity numbers published by the Clerk of courts." CA App. 17. And her Prayer for Relief seeks to enjoin Respondents "from further indiscriminately publishing personally identifiable information and social security numbers of citizens by means of its official website . . . *or by any other means*." CA App. 21 (emphasis added).

It so happens that Ms. Lambert was injured by an especially egregious, dangerous, and pervasive instance of publication—Mr. Hartmann's "policy and practice of systematically publishing personal and private information on [the] website, which offers unrestricted access to said information." CA App. 12. But just because the complaint explains how Mr. Hartmann caused Ms. Lambert's injury does not mean that she was trying to narrow her constitutional claim to depend on some "distinction between records made public in paper form and records made public in electronic form." Opp. 14.

Certainly, neither the Court of Appeals nor the District Court read the complaint in such a crimped and unnatural manner. The Court of Appeals believed that "[Ms.] Lambert's claim implicates the . . . 'individual's right to control the nature and extent of information released about the individual,' [which] 'has been coined an informational right to privacy.'" App. 13–14 (citation omitted); *see also* App. 31 (similar formulation in District Court). Neither so much as hinted that it was addressing the narrower question whether there is a constitutional right to preclude the government from taking informa-

tion that is otherwise public and posting it on a website.

Thus, Respondents' efforts to defeat this narrowed theory are wasted. In any event, the two cases Respondents invoke are inapposite. This case has nothing to do with the principles at issue in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which revolved around the public's right to attend trial proceedings. Nothing in *Richmond Newspapers* suggests that a court is constitutionally obliged to publicize litigants' Social Security numbers. Similarly, *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), merely stands for the proposition that a privately owned *newspaper* cannot be held liable for reprinting information that the government has already put in the public domain. It does not stand for the proposition that a governmental entity can avoid liability for an egregious violation of privacy by pointing out that the government itself also committed a more limited violation.

B. Resolving the Threshold Question in Ms. Lambert's Favor Will Lead to a Different Outcome.

Respondents next insist that "[w]hether the Sixth Circuit or other Circuit Courts of Appeal properly interpret" *Whalen* and *Nixon* "makes no real difference to the resolution of this case." Opp. 19. As they see it, even under the majority rule, "[Ms.] Lambert could not show a reasonable objective expectation of privacy that would justify keeping her personal identifiers from the

public record." Opp. 15. In other words, they claim they have an alternative ground for dismissal, even if Ms. Lambert prevails on the question presented.

It is not clear whether Respondents are speculating about what might happen at future stages of the litigation or suggesting that they will offer this Court an alternative ground for affirmance, even though neither of the courts below addressed the fact-intensive alternative ground. Neither version of the argument is a basis for denying certiorari on the threshold question that has split the lower courts and that transcends this case and transcends even the context of personal identifiers.

More importantly, whether they raise the issue in this Court or on remand, Respondents are plainly wrong in contending that Ms. Lambert had no expectation of privacy in her Social Security number. Both federal law and Ohio law give rise to an expectation of privacy. The federal government takes great pains to keep that information private. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (providing restrictions on the disclosure of Social Security numbers by agencies of the federal government); Intelligence Reform and Terrorism Prevention Act of 2004, 42 U.S.C. § 405(c)(2)(C)(vi)(II) (prohibiting states from listing citizens' Social Security numbers on drivers' licenses and state-issued identification cards). Based upon these federal protections, courts have found that individuals have a reasonable expectation of privacy in their Social Se-

curity number to the extent it is collected and maintained by a government entity. *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) ("[A]n individual's informational privacy interest in his or her SSN is substantial."); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999); *State ex rel. Beacon Journal Pub'g Co. v. Akron,* 640 N.E.2d 164, 169 (Ohio 1994). We have not found, and Respondents have not cited, any on-point authority taking the contrary position.

III. MS. LAMBERT HAS STANDING BECAUSE SHE SUFFERED AN INJURY AND HAS NOT BEEN MADE WHOLE.

Respondents' jurisdictional objections are hard to fathom. At points, they argue that Ms. Lambert lacks standing, which "must exist when the Complaint is filed." Opp. 7. At other points, their objection sounds more in mootness—that "there is *no longer* a case and controversy between Petitioner Lambert and the Respondents," based largely on events that are not in the record at this point. Opp. 11 (emphasis added). As the Court of Appeals held, both versions of the objection are meritless.

To establish standing sufficient to survive a motion to dismiss, Ms. Lambert need only have alleged: (1) that she suffered an injury in fact as a result of Mr. Hartmann's conduct; (2) that her injury is fairly traceable to the challenged action; and (3) it is likely that her injury will be redressed by the relief she requests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61

(1997). The complaint plainly establishes each of these elements.

The operative complaint alleges that Ms. Lambert was injured in multiple ways: (1) "nearly $20,000 worth of unauthorized charges appeared on various accounts in [her] name"; (2) "[a]s a result, Ms. Lambert's credit rating has fallen"; (3) "[s]he has invested substantial amounts of time and energy to ensure that she will not be held personally liable for any unauthorized charges"; (4) "Ms. Lambert has invested a great deal of time and has suffered emotional distress and anxiety arising from her attempts to clear her name and her credit rating"; (5) "Ms. Lambert has suffered . . . damage to her reputation"; and (6) because "she has no way of knowing who else might have access to her personal and private information that was posted on the Court's website[,] . . . Ms. Lambert could face another round of fraudulent activity and unauthorized charges." CA App. 17.

Respondents do not argue that this litany of harm is not injury-in-fact. Instead, they assert that a "subsequent proposed amended Complaint makes clear that Sam's Club and the Home Depot made Petitioner Lambert whole financially." Opp. 8. As an initial matter, that proposed complaint is not the operative complaint, which is all that is relevant in a standing controversy. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). But in any event, the proposed complaint says no such thing. *See* CA App. 111–22. The most that can be gleaned from the new com-

plaint is that Ms. Lambert is prepared to abandon the operative complaint's demand for "an award of compensatory damages" for all these harms, CA App. 21, and instead demands only prospective relief: (1) an order enjoining Respondents from releasing private information publicly; and (2) "an award of uniform, class-wide relief in the form of a credit monitoring fund or other prophylactic measure to detect or prevent potential identity theft . . . to which Plaintiff and putative class members have been unjustifiably and unreasonably exposed." CA App. 120.

The difference in proposed relief—even if it could be considered on a motion to dismiss a different operative complaint—is obviously not a concession that the mere reversal of charges "made Petitioner Lambert financially whole." Opp. 8. Reversing the charges does not, for example, address Ms. Lambert's credit-rating or reputational harm. And it certainly does not take care of the money she has had to expend to ensure that the "ring of identity thieves" that already has her private information will not strike again. The change in focus in the proposed complaint simply reflects a strategic decision to focus on obtaining prospective relief that will shield Ms. Lambert—and the class as a whole—from future abuses and future repercussions of Respondents' past wrongdoing.

Which brings us to the third prong of the standing inquiry—that the injury asserted must be redressable by the relief requested. Here, Re-

spondents' argument seems to be that the prospect that Ms. Lambert will suffer future instances of identity theft is "purely conjectural." Opp. 10. But Respondents can make that argument only by distorting the risk identified in the complaint. The point in the complaint is not, as Respondents suggest, that "maybe someone else in the future might steal Lambert's personal identifiers from the Respondent Hartmann's website" and "[m]aybe that thief would use the information to again induce Home Depot and Sam's Club to extend credit." Opp. 9.

The risk is as follows: Because of Mr. Hartmann's improper conduct, Ms. Lambert's personal identifying information has already been released. It has already been plundered by "a ring of identity thieves." CA App. 16. Only one member of that crime syndicate has been apprehended. It is almost inevitable that some of the victims of that massive publication of information are still in the sites of those thieves or others who might already have preserved the information or who could access it through website archives. The possibility is concrete enough that a lucrative security industry has emerged to guard against it. Ms. Lambert has expended resources hiring such a firm to protect against the risk. *Id.* She is simply requesting relief that would require the defendants to assume the responsibility for continued monitoring to shield against the risk they created, rather than forcing each of the affected individuals, on peril of future identity thefts, to absorb the expense and energy of making individual monitoring ar-

rangements. *See Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2005) (holding that medical testing and monitoring was a proper prospective remedy for the increased risk of future harm caused by a heart-valve implant).

For similar reasons, various changes in the law and in county practices do not moot the relief Ms. Lambert has requested. It is nice to know Hamilton County has learned its lesson and now has a rule that "addresse[s] remote public access to sensitive information, including SSN's on the website." Opp. 9. But this rule does not address the continuing risk from Mr. Hartmann's past malfeasance.

IV. RESPONDENTS' DEFENSE OF ELEVENTH AMENDMENT IMMUNITY IS NOT A BASIS FOR DENYING THE PETITION.

Respondents' final argument is yet another alternative ground for affirmance: They argue that they are entitled to Eleventh Amendment immunity. Respondents do not suggest that their immunity defense presents a novel issue of law or is otherwise independently cert-worthy. Besides, both the District Court and the Court of Appeals saw "no need to address the Defendants' immunity argument," App. 10, and Respondents offer no argument for why this Court should depart from its usual practice of declining to address issues not ruled on below.

In any event, the immunity defense is frivolous. First, the Eleventh Amendment does not

apply to Ms. Lambert's claim for injunctive relief—including her demand for prospective monitoring. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984); *Ex parte Young*, 209 U.S. 123, 166–67 (1908).

Second, Respondent Hamilton County is obviously not a state and not part of state government. *See* Ohio Rev. Code Ann. § 2744.01(F). And Mr. Hartmann is not a state employee. Although a local official may be covered by Eleventh Amendment immunity if he is "sued simply for complying with state mandates that afford no discretion," *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999), there was no Ohio law that required Mr. Hartmann to post Social Security numbers on a website—or to otherwise make them public. To the contrary, the Ohio Supreme Court has repeatedly held that a government official *must redact* Social Security numbers from records where an individual's right to privacy outweighs the government's interest in disclosure. *See Beacon Journal,* 640 N.E.2d at 169; *also State ex rel. WLWT-TV5 v. Leis,* 673 N.E.2d 1365, 1369 (Ohio 1997) (Social Security numbers "are exempt under R.C. 149.43(A)(1)"); *State ex rel. Wadd v. Cleveland,* 689 N.E.2d 25, 28 (Ohio 1998) (accident report may be disclosed only "following prompt redaction of exempt information such as Social Security numbers"); *State ex rel. Highlander v. Rudduck* 816 N.E.2d 213, 217 (Ohio 2004) (directing judge to "promptly make any appropriate redactions, e.g., Social Security numbers, before releasing the [divorce] records"); *State ex rel. Montgomery County Pub. Defender*

v. Siroki, 842 N.E.2d 508, 512 (Ohio 2006) (clerk of courts properly redacted Social Security from criminal records because "[r]evealing individuals' Social Security numbers that are contained in criminal records does not shed light on any governmental activity"). As is evident from this long list of cases, this principle is not, as Respondents suggest, a new wrinkle in Ohio law. *See* Opp. 3 & n.1. Simply put, had Mr. Hartmann been following Ohio law, he would have never publicized Ms. Lambert's Social Security number in the first place.

No doubt, that is why Respondents' immunity arguments have gotten no traction to date, in either the Court of Appeals or the District Court. The possibility that Respondents will nevertheless renew these arguments on remand—and that some court might be willing to consider them—is no basis for denying certiorari on the central and important issue that the courts below *did* decide.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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