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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner filed a lawsuit under 42 U.S.C. § 1983 for violation of her right to privacy when a public official intentionally published her personal information, including her Social Security number and signature, on a publicly accessible government website. The publication of this personal information enabled thieves to steal Petitioner's identity, causing her economic harm and damaging her credit. The question is whether the Court of Appeals erred in concluding that Petitioner failed to state a claim for violation of her constitutional right to privacy merely because the economic harm resulting from the theft of her identity did not implicate a fundamental liberty interest?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Constitution, Statutes, And Legislative History

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated February 25, 2008, is reported at 517 F.3d 433, and is reproduced in the Appendix to this Petition (App.) at App. 1. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc is reproduced at App. 41. The unreported opinion of the U.S. District Court for the Southern District of Ohio, dated December 29, 2006, is reproduced at App. 27.

STATEMENT OF JURISDICTION

The Court of Appeals entered an opinion on February 25, 2008, upholding the District Court's dismissal of Petitioners' complaint. A timely petition for rehearing en banc was denied on July 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides in relevant part:

> 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.

INTRODUCTION

Every year, millions of Americans fall victim to identity theft. Identity thieves steal billions in goods and services by gaining access to victims' personal information, particularly their Social Security numbers. After sapping their victims, sometimes for all they are worth, the thieves leave them to waste countless hours fighting bureaucracies to clean up the financial mess they find themselves in. This case is about whether a victim of identity theft has any remedy against a government official who feeds identity thieves a smorgasbord of personal information by intentionally posting it on the internet, fully aware of the devastating financial harm he could be causing.

Nearly 30 years ago, this Court recognized that the "interest in avoiding disclosure of personal matters" is inherent in an individual's right to privacy under substantive due process protections of the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977). Virtually every circuit to consider the question has applied this right to protect disclosure of such private information as medical records and financial information. In those circuits, a victim of identity theft would have a remedy against a governmental official who knowingly releases private financial information for public consumption.

The Sixth Circuit is the outlier. It refuses to protect an individual's privacy interest without a threshold showing that the violation implicates a fundamental liberty interest. In the Sixth Circuit, that threshold showing has been satisfied in only two instances: (1) where disclosure of personal information created a potential threat of bodily harm; and (2) where the information disclosed was of a sexual and humiliating nature. In this one circuit, government-facilitated financial ruin does not count as constitutionally relevant harm.

The Sixth Circuit's rule is inconsistent with this Court's approach of balancing the informational privacy interest at stake with the state's need for disclosure of the private information. *See Whalen*, 429 U.S. at 603–04; *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977). The result is stark: Victims of government-facilitated identity theft in the Sixth Circuit lack a remedy for gross abuses and devastating harm, whereas their counterparts in other circuits have a remedy. The confusion and disuniformity will persist unless this Court intervenes to declare a uniform approach to informational privacy claims.

STATEMENT

A Government Official Intentionally Disseminates Thousands of Social Security Numbers

Respondent Greg Hartmann, the Clerk of Courts for Hamilton County, Ohio, put hundreds of thousands of citizens at grave risk of identity

theft. At public expense, he maintained a website on which he published traffic citations. App. 28. His website permitted unfettered and anonymous public access to the name, address, date of birth, Social Security number, driver's license number, physical description, and signature of every driver who received a citation. App. 4. The information posted on each individual was more than enough to secure a drivers license, open a credit card account, and even apply for a loan. It was a veritable treasure trove for identity thieves, who could either use the information themselves or compile it and sell it on the black market.

According to the website itself, Mr. Hartmann's office processed about 50,000 traffic citations a year. CA App. 113.[1] When this lawsuit was filed, the website laid bare the personal information of individuals gathered from over 300,000 traffic citations. CA App. 76.

Mr. Hartmann was fully aware of the dangers of posting such vital personal data on the web. As early as July 2002, an identity thief pled guilty to running up $11,000 in charges in other people's names by tapping into information obtained from Mr. Hartmann's website. CA App. 131. That same year, a *New York Times* article reported about an individual whose identity had been stolen using a traffic citation obtained on

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[1] References to CA App. refer to the Appendix filed in the Court of Appeals for the Sixth Circuit.

Mr. Hartmann's website. CA App. 128. Mr. Hartmann also received several warnings in 2003 that the website was placing thousands of drivers at risk of identity theft. CA App. 287–90. Despite the warnings, Mr. Hartmann continued to post the sensitive personal financial information.

Using the Website, a Thief Steals Ms. Lambert's Identity and Hundreds of Others

Predictably, there were more casualties of Mr. Hartmann's recalcitrance. Petitioner Cynthia Lambert was one of them. In September 2004, Ms. Lambert was notified of suspicious activity on her Sam's Club and Home Depot credit accounts. App. 28. A thief made over $20,000 in unauthorized purchases using Ms. Lambert's identity. *Id.* The theft dealt a significant blow to Ms. Lambert's sterling credit. App. 29. Ms. Lambert had to invest substantial amounts of time, money, and energy to restoring her credit and safeguarding her identity from future theft. CA App. 115.

Ms. Lambert alerted Mr. Hartmann's office that her identity had been stolen using personal information obtained from his website. App. 4. The source of information was obvious from the start, because Mr. Hartmann's website incorrectly reported Ms. Lambert's driver's license number, and the thief used that same incorrect number in the scam. *Id.* Mr. Hartmann's office dismissed the concerns, insisting that it would be too time consuming and expensive to remove the citations from the website. *Id.*

The police eventually caught the culprit, an identity thief named Traci Southerland. App. 4–5. In pleading guilty, she confirmed that she ran a ring of identity thieves who mined Mr. Hartmann's website for information that would allow them to pose as others. *Id.* They stole the identities of hundreds of individuals and accrued unauthorized charges totaling over $450,000. CA App. 521. The ringleader was sentenced to 139 months. App. 5.

The District Court Dismisses Ms. Lambert's Privacy Claim

Ms. Lambert filed a complaint under 42 U.S.C. § 1983 asserting that Mr. Hartmann violated her right to privacy when he published her Social Security number and other personal information on his website. App. 31. The District Court dismissed Ms. Lambert's complaint for failure to state a claim. App. 38–39.

In doing so, the District Court acknowledged this Court's opinions in *Whalen* and *Nixon*, setting forth a balancing test to determine whether an individual's right to privacy had been violated. App. 33–34. These precedents would have required that the District Court (1) consider whether Ms. Lambert's expectation of privacy was reasonable and then (2) balance her right to informational privacy against the governmental interest in disclosing the personal information at issue. *Id.*

But the District Court felt constrained by Sixth Circuit precedent narrowly construing this

Court's precedent. App. 34–35. The District Court followed the Sixth Circuit's rule that that an individual's "right to privacy is triggered only when the interest at stake concerns 'those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.'" *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Specifically, the District Court outlined the Sixth Circuit's test for analyzing informational privacy claims as follows: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." App. 36 (citing *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998)).

The District Court concluded that, under Sixth Circuit precedent, the only information that would satisfy the first prong of the two-step analysis was information that could create a threat of bodily integrity (e.g., disclosure of the addresses, phone numbers, driver's license and family information of undercover police officers to defendants) and the public disclosure of the details of a rape. App. 36–38 (discussing *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)). Against this backdrop, the District Court found that Ms. Lambert had not met the burden of pleading a violation of a right to informational privacy on the basis of allegations that she had suffered damage to her credit and

financial harm. App. 38–39.

The Court of Appeals Affirms

The Court of Appeals affirmed the dismissal of Ms. Lambert's complaint. Echoing the District Court, the Sixth Circuit acknowledged that, "in contrast to some of [its] sister circuits, [it] '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.'" App. 14 (quoting *Bloch*, 156 F.3d at 684). The Court of Appeals further acknowledged that it had found a fundamental liberty interest to apply only in the same two narrow contexts that the District Court outlined—(1) where the information released could lead to bodily harm; and (2) where the disclosed information was of a sexual and humiliating nature. *Id.*

While the Court of Appeals acknowledged that Congress and nearly every other circuit court has recognized a privacy interest in one's Social Security number, App. 19 (citing the Privacy Act of 1974, 5 U.S.C. § 552a), it was not persuaded that Mr. Hartmann's intentional disclosure of this information rose to the level of implicating a fundamental liberty interest. First, the Court of Appeals found that disclosure of Ms. Lambert's Social Security number and other personal information did not threaten her personal security because its disclosure did not create a serious threat of bodily harm. App. 21 (citing *Kallstrom*, 136 F.3d at 1064). It also rejected the argument that the disclosure led to

reputational injury, a fundamental liberty interest, despite the damage to Ms. Lambert's creditworthiness. App. 22. The Court of Appeals then concluded that "protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are 'implicit in the concept of ordered liberty.'" App. 23 (quoting *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002)).

The Court of Appeals declined to rehear this case en banc. App. 41.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons. First, the Sixth Circuit deepened an existing split among the circuits over whether a plaintiff must meet a threshold showing that a fundamental liberty interest underlies her claim before proceeding to the balancing test set forth by this Court in *Whalen* and *Nixon*. Second, this case presents an issue of profound national importance. Third, the Sixth Circuit's approach is at odds with this Court's precedent.

I. THE CIRCUITS ARE SPLIT OVER THE ELEMENTS OF AN INFORMATIONAL PRIVACY CLAIM.

In keeping with this Court's precedents, all courts of appeals agree that Fourteenth Amendment substantive due process protection extends to two types of privacy interests. The first is "independence in making certain kinds of impor-

tant decisions"; the second is the informational privacy interest at issue in this case, the "interest in avoiding disclosure of personal matters." *E.g.*, App. 13 (citing *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977)); *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Alexander v. Peffer*, 993 F.3d 1348 (8th Cir. 2002); *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000); *Sheets v. Salt Lake City*, 45 F.3d 1383 (10th Cir. 1995); *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994); *James v. City of Douglas*, 941 F.3d 1539 (11th Cir. 1991); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); *Fraternal Order of Police v. City of Philadelphia*, 821 F.2d 105 (3d Cir. 1987).

The circuits are hopelessly split, however, on the scope of the latter category, the informational privacy interest. Eight circuits recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See infra* Point I.A. The Sixth Circuit defies the weight of authority by engrafting such a threshold requirement. *See infra* Point I.B. The split is acknowledged, entrenched, and intractable. Only this Court can resolve the split.

A. Eight Circuits Recognize a Right to Privacy with Regard to Personal Information Without a Threshold Showing of an Underlying Fundamental Liberty Interest.

Eight circuits—the Second, Third, Fourth,

Seventh, Eighth, Ninth, Tenth, and Eleventh—recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Alexander*, 993 F.3d at 1350; *Denius*, 209 F.3d at 957; *Sheets*, 45 F.3d at 1388; *Doe*, 15 F.3d at 267; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 109.

When an individual claims that a governmental entity has violated her right to privacy by disclosing personal matters, these circuits apply the balancing test this Court set forth in *Whalen* and *Nixon*. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956; *Sheets*, 45 F.3d at 1388–89; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983). As a first step in evaluating whether a claimant has a right to privacy over the confidential information at issue, the circuits examine whether the claimant had a reasonable expectation of privacy in that information. "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Walls*, 895 F.2d at 192 (citing *Fraternal Order of Police*, 812 F.2d at 112–13).

Many cases in this context concern an individual's right to privacy in his or her medical records. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956–57; *Fraternal*

Order of Police, 821 F.2d at 112–15; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). It is widely accepted among the eight circuits recognizing a right to privacy in personal information that an individual has a reasonable expectation of privacy in such medical information. Indeed, even this Court has recognized as much. *Whalen*, 429 U.S. at 599–600. All eight circuits have further recognized that parties have a reasonable expectation of privacy in, and thus a constitutionally protected privacy interest with respect to, personal financial information. *See, e.g.*, *Sheets*, 45 F.3d at 1388 (finding a protected privacy interest in matters concerning "marriage, finances and business"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (noting the Second Circuit's recognition of the right to confidentiality in "the context of financial disclosure"); *Alexander*, 993 F.2d at 1348 (acknowledging a privacy interest in "highly personal . . . financial information"); *Walls*, 895 F.2d at 194 (same); *Fraternal Order of Police*, 812 F.2d at 115 (same); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (recognizing a "substantial" privacy interest in personal financial information); *James*, 941 F.2d at 1543 n.7 (noting Fifth Circuit precedent finding a right to privacy in confidential financial information as binding). As the Seventh Circuit has noted, "[b]ecause confidential financial information may implicate substantial privacy concerns and impact other fundamental rights, we agree with the overwhelming majority of our sister circuits that some types of financial infor-

mation involve the degree and kind of confidentiality that is entitled to a measure of protection under the federal constitutional right of privacy." *Denius*, 209 F.3d at 958.

In these circuits, once a court determines that the claimant has a reasonable expectation of privacy in the personal information she seeks to protect, it balances that interest against whether the state has a compelling state interest in making or requesting the disclosure of that information. *See, e.g.*, *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry*, 712 F.2d at 1559. Most circuits take the extra step of examining whether the state has taken adequate measures to protect the claimant's private information and to ensure that it is not disseminated for any other unrelated purposes. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Walls*, 895 F.2d at 194; *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Westinghouse*, 638 F.2d at 579–80 (3d Cir. 1980). Many circuits have adopted a more particularized balancing test that takes into account several factors in determining whether an individual's right to privacy has been violated. Some circuits have broken down the factors as follows:

> 1) the type of record requested; 2) the information it does or might contain; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the

> adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; 7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Denius, 209 F.3d at 956 n.7 (citing *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999)) (internal quotations omitted).

None of these circuits require a party to demonstrate that the claimed right to privacy implicates a fundamental liberty interest. In fact, some of them have explicitly considered, and rejected, such a requirement. *See, e.g.*, *Denius*, 209 F.3d at 957 (expressly rejecting the Sixth Circuit's approach and noting that the majority of circuits agree that *Whalen* and *Nixon* established a federal right of informational privacy); *Barry*, 712 F.2d at 1559 (identifying the Sixth Circuit as one of the only circuits that do not recognize a general right to nondisclosure of personal information against which infringing government actions are balanced).

B. The Sixth Circuit's Opinion Deepens an Existing Split.

The Sixth Circuit's rule stands in stark conflict to this overwhelming authority. In the Sixth Circuit, unlike in these eight circuits, it is not enough for a plaintiff to demonstrate that she had a reasonable expectation of privacy in the information she seeks to protect. The plaintiff must also show that her claimed privacy in-

terest implicates "a right that is either 'fundamental' or 'implicit in the concept of ordered liberty.'" App. 19 (quoting *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1988). Consequently, the Sixth Circuit has found that a right to privacy extends only to two narrow classes of personal information: (1) information that, if disclosed, could create a threat to bodily integrity, and (2) information of a sexual and humiliating nature. *See Bloch v. Ribar*, 156 F.3d 673, 673 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1055 (6th Cir. 1998).

This focus on the result of disclosure, rather than the private nature of the personal information at stake, means that the Sixth Circuit, unlike its sister circuits, will simply not recognize a right to privacy in any financial information. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2000) (declining to find a policy mandating the disclosure of real estate holdings to violate the right to privacy because "[t]he privacy interest one may have in one's personal finances . . . is far afield from [the] intimate concerns" recognized as fundamental privacy interests). Thus, in this case, because Ms. Lambert could not demonstrate that the disclosure of her Social Security number and other personal information implicated a fundamental liberty interest, the court refused to balance the interest in protecting that information against the Clerk of Court's interest in disclosing it in perhaps the most public of forums—the internet.

While no other circuit requires such an onerous showing before proceeding to the balancing test, at least one other circuit seems poised to follow the Sixth Circuit's lead. The First Circuit has analyzed this circuit split in the context of determining whether a governmental official violated "well established" constitutional rights when disclosing certain psychiatric records. *See Borucki v. Ryan*, 827 F.2d 836, 841–42 (1st Cir. 1987). Because of the posture of the case, the First Circuit did not have to resolve definitively whether the right to informational privacy required a showing that a fundamental liberty interest was at stake. But in ruling that there was no "well established" right to privacy in that context, the court drew heavily from the Sixth Circuit's approach to informational privacy cases—suggesting that if given the opportunity, the First Circuit might well follow the Sixth.[2]

* * *

This circuit conflict is entrenched and intractable. As noted above, some circuits that espouse the majority position have considered and rejected the Sixth Circuit's approach. *See supra* at 14. Conversely, since 1981, the Sixth Circuit has acknowledged this Court's balancing test and the majority rule, but declined to follow ei-

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[2] The D.C. Circuit has also noted the conflict but has declined to take a position. *See, e.g., Am. Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791–92 (D.C. Cir. 1997).

ther. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088–89 (6th Cir. 1981). The Sixth Circuit has hardened its position in a series of opinions—almost all unanimous. *See Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007); *Overstreet*, 305 F.3d at 575; *Bloch*, 156 F.3d at 684; *Kallstrom*, 136 F.3d at 1064. And in denying rehearing en banc, the Sixth Circuit has confirmed that it has no interest in reconsidering its longstanding position. Only this Court's intervention will resolve the conflict.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE IN LIGHT OF THE NATIONAL SCOURGE OF IDENTITY THEFT.

There are 8.3 million Cynthia Lamberts every year. Federal Trade Commission, *2006 Identity Theft Survey Report* 4 (2007), *available at* http://www.ftc.gove/os/2007/11/SynovateFinal ReportIDTheft2006.pdf. Identity thieves inflict about $15.6 billion in financial damage per year, not just on consumers, but on creditors and retail establishments. *Id.* at 9. That does not account for the immense time and effort the victims expend in fending off angry creditors, responding to investigations, and cleaning up besmirched credit ratings. *Id.* at 39–42. Identity theft is one of the fastest growing crimes in the United States. Social Security Administration, *Identity Theft and Your Social Security Number* 2 (2007), *available at* http://www.ssa.gov/pubs/10064.pdf. That stands to reason, for the marks are so easy, the potential payload is so high, the

crime is so risk-free, and the chances of getting caught are so slim. *See* Chris Jay Hoofnagle, *Identity Theft: Making the Known Unknowns Known*, 21 Harv. J.L. & Tech. 97, 107–08 (2007) (estimating that identity thieves have only a one in 700 chance of getting caught).

Because the stakes are so high, and the potential harm so ruinous, consumer organizations, banks, and state and federal governments have made it a priority to alert consumers to the need to safeguard their private financial information. *See e.g.*, Federal Trade Commission, *Deter Detect Defend, Avoid ID Theft* (2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt01.pdf. A whole new industry has emerged in recent years to protect consumers from identity theft. Federal Trade Commission, *To Buy or Not to Buy: Identity Theft Spawns New Products and Services to Help Minimize Risk* (2007), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt05.pdf. These authorities all underscore just how critical it is for consumers to maintain the confidentiality of their Social Security numbers. For an identity thief, a Social Security number represents the keys to the kingdom. Armed with that one piece of information, an identity thief can locate everything he needs to obtain a state ID card or drivers license, open credit card accounts, apply for loans, set up telephone service, and obtain medical and auto insurance. *Preserving the Integrity of Social Security Numbers and Preventing their Misuse by Terrorists and Identity Thieves: Hearing Before the Subcomm. on Social Security of*

the H. Ways and Means Comm., 107th Cong. (2002) (testimony of Grant D. Ashley), *available at* http://www.fbi.gov/congress/congress02/ashley091902.htm. In short, a Social Security number is all a thief needs to completely swipe an identity. *Id.*

All the warnings, all the precautions, and all the sophisticated security systems are for naught, if government officials feel free to post the secret information publicly for all to see. Governmental units have more secret financial information on more citizens than anyone else. A single inept government official has the power to wreak havoc with the finances and security of thousands of consumers.

That is why this case presents an issue of national importance. The premise of liability under § 1983 is that governmental officials like Mr. Hartmann respond to tort incentives. *See Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (stating that the specter of § 1983 liability for injurious conduct "should create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights"). They are more likely to respect constitutional rights—and less likely to conclude, as Mr. Hartmann did, that it is not worth the expense or the bother—if they face the prospect of being held accountable.

But, of course, the § 1983 incentives will serve this intended function only to the extent that the courts treat the privacy right at issue as a right of constitutional dimension. The answer to the question presented will affect whether

government officials safeguard the secret information they are entrusted with or, like Mr. Hartmann, expose hundreds of thousands of citizens to the real possibility of financial ruin.

III. THE SIXTH CIRCUIT'S HOLDING IS WRONG.

This Court should also grant certiorari because the rule followed by the Sixth Circuit is wrong.

First, the Sixth Circuit's rule is inconsistent with this Court's jurisprudence. Justice Brandeis described the right to protect one's thoughts, beliefs, and emotions from governmental intrusion as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In *Whalen v. Roe*, this Court looked to Justice Brandeis' opinion in finding a constitutionally protected "zone of privacy" with respect to the "individual interest in avoiding disclosure of personal matters." 429 U.S. at 598–99 & n.25. Four months later, this Court reaffirmed the right to protect private information in *Nixon v. Administrator of General Services*. 433 U.S. at 457–58. In requiring a threshold showing of an underlying fundamental liberty interest as a prerequisite to pleading a violation of informational privacy, the Sixth Circuit has put itself at odds with this Court's 30-year-old precedent.

In *Whalen*, this Court identified the individ-

ual interest in avoiding disclosure of personal matters. 429 U.S. at 599. In that case, physicians and patients had brought an action challenging the constitutionality of a New York statute requiring disclosure of every prescription of a certain class of drugs. The patients argued that the statute violated their privacy interest in avoiding disclosure of personal matters because, if information regarding their prescriptions became publicly known, it could adversely impact their reputations, and thus make them reluctant to use the drugs. *See id.* at 600. Without any threshold consideration of whether a fundamental liberty interest was implicated, this Court weighed the totality of the circumstances—i.e., the patient's expectation of privacy in the prescription information; the number and nature of the individuals who would have access to the information; the extent to which the information would be protected; and the state's need for disclosure. *See id.* at 600–03. This Court ultimately held that the disclosure was limited to individuals who would typically have access to prescription information, and that adequate safeguards existed to protect the information. *Id.* at 601–02. As a result, it found that the statute did not violate the patients' right to privacy. *Id.* at 603–04.

In *Nixon*, this Court gave form to *Whalen*'s principles, by balancing competing interests to determine the constitutionality of legislation requiring President Nixon to disclose his presidential records to the Administrator of General Services for safekeeping. Once again, this Court

recognized the right to privacy in "avoiding disclosure of personal matters." 433 U.S. at 457 (quoting *Whalen*, 429 U.S. at 599). Its analysis did not require a threshold consideration of whether a fundamental liberty interest was implicated. *Id.* Instead, this Court's balancing test examined: (1) whether the "pattern of de facto Presidential control and congressional acquiescence gave rise to [President Nixon's] legitimate expectation of privacy in" his presidential records; (2) the nature and quantity of the personal, private information present in the files; (3) the important public interest in preserving access to his Presidential files; and (4) the limited number of individuals who would have access to the files. *Id.* at 457–65. This Court ultimately upheld the law. *Id.* at 465.

The Sixth Circuit was simply wrong when it opined that "*Whalen* and *Nixon* . . . extend the right to informational privacy only to interests that implicate a fundamental liberty interest." App. 14 (internal quotations omitted); *see DeSanti*, 653 F.2d at 1090 (articulating same point). The Sixth Circuit derived the notion from dicta from an opinion decided a year before *Whalen* and *Nixon*—*Paul v. Davis*, 424 U.S. 693 (1977)—in which this Court considered whether individuals had a constitutionally protected right that would prevent a state from "publiciz[ing] the record of an official act such as an arrest." *Id.* at 713. This Court, in dicta, stated that the right to "personal privacy must be limited to those [rights] which are 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.*

However, when confronted with the same issues a year later in *Whalen* and *Nixon*, this Court made no mention of any threshold requirement of showing an underlying "fundamental liberty interest." Indeed, this standard has never appeared anywhere else in this Court's jurisprudence.

Second, the Sixth Circuit's rule incorrectly focuses on the *effect* of the disclosure rather than on the private nature of the information being disclosed. In keeping with Supreme Court precedent, the majority approach focuses on the information itself, and asks whether a reasonable person would expect the information to be kept private. The answer to that question should depend, as it does in most circuits, upon the nature of the information disclosed. It should not depend, as it does in the Sixth Circuit, upon the nature of the harm inflicted. If information is private, it should be kept private, and the right to keep it private should not depend upon whether the harm from its dissemination is classified as reputational or bodily harm, on the one hand, or, financial harm, on the other hand.

Third, the Sixth Circuit's misplaced focus on the nature of the harm is confusing and unworkable. There is no better illustration of the confusion than the unpredictable and inconsistent rulings that have come out of the Sixth Circuit, even in the narrow circumstances where it recognizes a right to informational privacy. For example, the Sixth Circuit has reached

irreconcilable conclusions over when release of the same information could lead to bodily harm. In the Sixth Circuit, the disclosure of police officers' addresses and family information to defense attorneys of gang members "encroached upon [the officers'] fundamental rights to privacy," *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998), but the disclosure of corrections officers' social security numbers and dates of birth (which prisoners' used to locate the corrections officers home addresses and family information), did not implicate a fundamental right to privacy *Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007)).

The Sixth Circuit's rule has led to a similar conflict over when the information of a sexual and humiliating nature is actionable. On the one hand, the release by a county sheriff of a rape victim's identity, and the embarrassing details of her rape, implicates the fundamental right to privacy. *Bloch v. Ribar*, 156 F.3d 673, 685–86 (6th Cir. 1998)). On the other hand, the release of juveniles' social histories, including the details of their sexual and physical abuse, does not. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981). These inconsistencies are not attributable to a nuanced parsing of facts. They are the product of the fundamental incoherence of the Sixth Circuit's legal standard.

This Court should intervene to announce a coherent rule that is more consistent with its prior precedents.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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