

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. 10-3921

DOE,
Plaintiff-Appellant,
v.

LUZERNE COUNTY, et al.
Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION
CENTER (EPIC) IN SUPPORT OF APPELLANT AND URGING REVERSAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA AT CIVIL ACTION NO.: 08-1155
THE HONORABLE A. RICHARD CAPUTO ORDER/JUDGMENT DATED
AUGUST 31, 2010

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)
for Case No. 10-3921

Amicus Curiae, Electronic Privacy Information Center (“EPIC”), is a District of Columbia corporation with no parent corporation. No publicly held company owns 10% or more of the stock of EPIC.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF AMICUS1

ARGUMENT.....4

 I. The Search Implicates the Constitutional Right to Informational Privacy4

 II. Digital Images of Unique Physical Features Constitute Personally Identifiable Information, Giving Rise to Constitutional Privacy Interests..... 13

 A. Federal Privacy Statutes Recognize the Importance of Personally Identifiable Information..... 13

 B. There are Harms Resulting from the Disclosure of Personally Identifiable Information..... 15

CONCLUSION17

CERTIFICATE OF COMPLIANCE18

ANTI-VIRUS CERTIFICATION19

CERTIFICATE OF BAR MEMBERSHIP20

CERTIFICATE OF SERVICE21

TABLE OF AUTHORITIES

Cases

<i>Berger v. New York</i> , 388 U.S. 41 (1967)	16
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	11
<i>Krebs v. Rutgers</i> , 797 F. Supp. 1246 (D. N.J. 1992)	15
<i>NASA v. Nelson</i> , 131 S. Ct. 746 (2011)	5, 11
<i>Nixon v. Adm'r of Gen. Services</i> , 433 U.S. 425 (1977)	5
<i>Northwestern Memorial Hospital v. Ashcroft</i> , 362 F.3d 923 (7th Cir. 2004).....	15
<i>Olmstead v. U.S.</i> , 277 U.S. 438 (1928).....	4
<i>US v. Miami University</i> , 294 F. 3d 797 (6th Cir. 2002)	15
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977)	4, 5

Statutes

20 U.S.C § 1232g.....	20
20 U.S.C. § 1232g(a)(4)(A).....	18
43 Pa. Stat. Ann. §1.4	19
5 U.S.C. § 552a.....	18, 20
65 Pa. Stat. Ann. § 67.302	17
65 Pa. Stat. Ann. § 67.305	17

Other Authorities

Anita L. Allen, <i>Coercing Privacy</i> , 40 WM. & MARY L. REV. 723 (1999)	12
--	----

Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving? A Connecticut’s Court’s Ruling Highlights an Important Question*, Findlaw News, Aug. 23, 2005 11

Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance*, 1 INTERNATIONAL JOURNAL OF INTERNET TECHNOLOGY AND SECURED TRANSACTIONS 2 (2007)..... 14

Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT’L L.J. 211 (2008) 13

Gary T. Marx, Commentary, *At-Home Spying: Privacy Wanes as Technology Gains; Surveillance may be legal, but is that the only standard?*, Los Angeles Times, May 28, 2002 13

Gary T. Marx, *Murky Conceptual Waters: the Public and the Private* (2001) 14

HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010) 13, 17

Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117 (2001) . 13

Jeffrey Rosen, *Why Privacy Matters*, WILSON Q., Autumn 2000 12

Jerry Kang, *Info. Privacy in Cyberspace Transactions*, 50 STAN.L.REV. 1193 (1998)..... 14

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000)..... 11

Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, May 22, 2007 19

Pamela Samuelson, *Privacy As Intellectual Property*, 52 STAN. L. REV. 1125 (2000)..... 11

ROBERT ELLIS SMITH, *OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS* (1993) 16

Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193
(1890)..... 10

WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF
WIRETAPPING AND ENCRYPTION (1998)..... 15

Rules

Fed. R. App. P. 29..... 8

Regulations

34 CFR Part 99 20

45 C.F.R. 164.501 19

STATEMENT OF AMICUS

The Electronic Privacy Information Center (“EPIC”)¹ is a public interest research center in Washington, D.C.² EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values. EPIC routinely participates as *amicus curiae* in cases before the United States Supreme Court, federal circuit courts, and state appellate courts in cases concerning privacy issues, new technologies, and Constitutional interests, including: *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011); *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Quon v. City of Ontario*, 130 S. Ct. 2619 (2010); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Crawford v. Marion County Election Board*, 553 U.S. Ct. 181 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *S.E.C. v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010); *IMS Health v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) *cert. denied*, 129 S. Ct. 2864

¹ No party’s counsel authored EPIC’s brief in whole or in part, nor did a party or other person contribute money intended to fund preparing or submitting the brief.

(2009); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); *Commonwealth v. Connolly*, 913 N.E.2d 356 (Mass. 2009); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in individuals' right to informational privacy – the right to control the collection and disclosure of privacy facts. *See, e.g., NASA v. Nelson*, 131 S. Ct. 746 (2011) (Brief of *amicus curiae* Electronic Privacy Information Center); *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010), *cert. granted*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 857 (2011) (No. 10-779) (Brief of *amicus curiae* Electronic Privacy Information Center). EPIC also has a long-standing interest in protecting individuals from unreasonable technology-aided searches. *See, e.g. Tolentino v. New York*, 926 N.E.2d 1212 (N.Y. 2010), *cert. granted*, 131 S. Ct. 595, (2010) (No. 09-11556) and *cert. dismissed as improvidently granted*, 131 S. Ct. 1387 (U.S. 2011) (Brief of *amicus curiae* Electronic Privacy Information Center); *Herring v. United States*, 555 U.S. 135 (2009) (Brief of *amicus curiae* Electronic Privacy Information Center).

At issue in this case is the right of public employees to remain free from surreptitious video surveillance while undressed as they shower at their

² EPIC Fellows Conor Kennedy and Nichole Rustin-Paschal contributed to the preparation of this brief.

workplace. Further, the case implicates the individuals' interest in preventing the subsequent disclosure of images of their unclothed bodies on computer networks accessible to others. Such disclosures create particular privacy harms when the images reveal unique physical features, which constitute personally identifiable information.

EPIC urges reversal of the lower court's decision granting summary judgment in favor of Appellees. The digital video captured unique physical features that constitute personally identifiable information linked to Ms. Doe. Appellees' surreptitious search of Ms. Doe violates the constitutional right to informational privacy and should be impermissible.

Counsel for Appellees oppose the filing of this *amicus* brief. Therefore, EPIC contemporaneously files a motion for leave to file as *amicus* pursuant to Fed. R. App. P. 29.

ARGUMENT

I. The Search Implicates the Constitutional Right to Informational Privacy

Justice Brandies described the right of privacy as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In our modern age, the right of informational privacy seeks to protect this "most comprehensive of rights" from intrusion by means of new technology. The surreptitious recording of naked images of the human body by a state actor, coupled with the risk of widespread disclosure, implicates this privacy interest, rooted in the Constitution.

Courts have interpreted informational privacy rights as concerning both the collection and the disclosure of sensitive personal information. In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court considered "whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs . . ." 429 U.S. at 591. At issue in the case was the collection and risk of disclosure of sensitive medical information by the state that was potentially stigmatizing and could limit the ability of individuals to obtain employment, housing, education, and a wide range of opportunities.

The Court catalogued the tiers of robust legislative and physical data protections ensuring that individual technological failures would not result in the

exposure of personal information. The Court concluded that although the right to informational privacy was implicated, existing safeguards were adequate to protect the privacy interest. *Id.* Concurring, Justice Brennan further noted, "[t]he central storage and easy accessibility of computerized data vastly increases the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." *Id.* at 607 (Brennan, J., concurring).

The Supreme Court recently affirmed that *Whalen*, in addition to *Nixon v. Adm'r of Gen. Services*, 433 U.S. 425 (1977), established that informational privacy interests that are "root[ed] in the Constitution." *NASA v. Nelson*, 131 S. Ct. 746, 762 (2011).

Even before the *Whalen* and *Nixon* decision, Warren and Brandies described the foundation of privacy as "not rights arising from contract or from special trust, but are rights as against the world." Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890). Since the publication of *The Right to Privacy*, scholars and advocates have advanced a commonly accepted understanding of informational privacy. As Professor Julie E. Cohen has written:

Informational privacy is an essential building block for the kind of individuality, and the kind of society, that we say we value. Legislating for informational privacy, in turn, requires a different kind of attention to the categories that have dominated the discussion about data privacy protection. Effective data privacy protection must

delineate the appropriate boundary between ownership and speech, specify the parameters for effective consent, and impose meaningful procedural and substantive protections on information practices.

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1435 (2000). Professor Pamela Samuelson explains,

In addition, it may be important to realize that our concept of information privacy, and in particular, our understanding of what is appropriate and inappropriate to do with personal information, is evolving over time.

Pamela Samuelson, *Privacy As Intellectual Property*, 52 STAN. L. REV. 1125, 1170-72 (2000). Professor Anita Ramastry stresses privacy's role in freedom: "As our society becomes less private, even with our consent at each step, the sum of all those steps may mean is also becomes less free." Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving? A Connecticut's Court's Ruling Highlights an Important Question*, Findlaw News, Aug. 23, 2005.

Privacy contributes to personal and social development, as many scholars have described. Professor Jeffrey Rosen states:

There is also an important case for privacy that has to do with the development of human individuality We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship, even love.

Jeffrey Rosen, *Why Privacy Matters*, WILSON Q., Autumn 2000, at 38.

Privacy also bolsters personal development. Professor Anita Allen-Castellitto suggest that limiting the disclosure of embarrassing personal information strengthens the individual's capacity to experiment and comply with cross-cutting social roles, both in public and behind closed doors:

Privacy has value as the context in which individuals work to make themselves better equipped for their familial, professional, and political roles. With privacy, I can try to become competent to perform and achieve up to my capacities, as well as to try out new ideas and practice developing skills.

Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 739-40 (1999).

Professor Allen has written:

There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being. It is not simply that people need opportunities for privacy; the point is that their well-being, and the well-being of the liberal way of life, requires that they in fact experience privacy.

Id., at 756. Professor Gary T. Marx notes: "We assume, or at least morally expect, that under ordinary circumstances behavior behind closed doors, in darkness and at a distance will be protected from the eavesdropping of third parties." Gary T. Marx, Commentary, *At-Home Spying: Privacy Wanes as Technology Gains*;

Surveillance May be Legal, But is that the Only Standard?, L.A. Times, May 28, 2002, at 11.

Privacy is also foundational to human dignity, respect, and autonomy. Professor Francesca Bignami urges that “[e]ven in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected.” Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT’L L.J. 211, 223 (2008). Professor Rosen explains how the term applies to privacy law: “autonomy concerns the individuals’ ability to maintain a sphere of immunity from social norms and regulations.” Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2121 (2001). Professor Helen Nissenbaum has written:

[E]ven when we are uncertain whether or not we are being watched, we must act as if we are. When this happens, when we have internalized the gaze of the watchers and see ourselves through their eyes, we are acting according to their principles and not ones that are truly our own.

HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 82 (2010). Professor Marx states:

When the self can be technologically invaded without permission and even often without the knowledge of the person, dignity and liberty are diminished. Respect for the individual involves not causing harm, treating persons fairly through the use of universally applied valid

measures, offering meaningful choices and avoiding manipulation and coercion. These in turn depend on being adequately informed.

Gary T. Marx, *Murky Conceptual Waters: the Public and the Private* (2001), <http://web.mit.edu/gtmarx/www/murkypublicandprivate.html>. Former OECD

Official and Director of the Harvard Information Infrastructure Project Deborah

Hurley adds that:

Protection of privacy and personal data are important because they go profoundly to our sense of self, individual integrity, and autonomy and to our ability to express ourselves, to communicate with others, and to participate in the collective, all deep human needs.

Deborah Hurley, *A Whole World in One Glance: Privacy as a Key Enabler of Individual Participation in Democratic Governance*, 1 INTERNATIONAL JOURNAL OF INTERNET TECHNOLOGY AND SECURED TRANSACTIONS 2 (2007).

Professor Jerry Kang has described several purposes served by informational privacy. Jerry Kang, *Info. Privacy in Cyberspace Transactions*, 50 STAN.L.REV. 1193, 1212–16, 1260 (1998). First, informational privacy helps individuals avoid the embarrassment that accompanies the disclosure of certain personal details. *Id.* Second, informational privacy helps individuals construct intimacy with others by preserving a body of personal information that can be selectively shared to communicate trust. *Id.* Third, informational privacy helps individuals avoid damaging misuse of information that may unnecessarily expose them to prejudice. *Id.* Finally, informational privacy helps to preserve human dignity. *Id.*

Given the specific threats posed to privacy by the emergence of modern information systems, it is also not surprising that experts in computer security have also contributed to the formulation of the modern privacy right:

Privacy is at the very soul of being human Privacy is the right to autonomy and it includes the right to be let alone. Privacy encompasses the right to control information about ourselves, including the right to limit access to that information. The right to privacy embraces the right to keep confidence confidential and to share them in private conversation. Most important, the right to privacy means the right to enjoy solitude, intimacy, and anonymity.

WHITFIELD DIFFIE & SUSAN LANDAU, *PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION* 126 (1998). The protection of informational privacy remains central to the American experience. U.S. privacy commentator Robert Ellis Smith has said:

Privacy is vital to our national life. Otherwise our culture is debased, belittled, and perverted.

It is equally crucial to the lives of each one of us. Without privacy there is no safe haven to know oneself. There is no space for experimentation, risk-taking, and making mistakes. There is no room for growth. Without privacy there is no introspection; there is only group activity. Without privacy, everyone resembles everyone else. A number will do, everyone resembles everyone else. Without privacy, individuality perishes. Without individuality, there can be no group culture, or at least no group culture with any merit.

ROBERT ELLIS SMITH, *OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS* 4 (1993), *citing Doe v. Bolton*, 410 U.S. 179 (1973).

In this case, Appellees surreptitiously collected digital video and images of Ms. Doe while she showered. *Doe v. Luzerne*, No. 08-1155, slip op. at 5, 7 (M.D. Pa. Aug. 31, 2010) appeal docketed, No. 10-3921 (3d. Cir. 2010). Appellees then distributed the sensitive, personal video and images through the workplace computer network, which later resulted in disclosure of the data to other employees. *Id.* at 7-8. Beyond the known collection and disclosures in this case, Appellees also exposed Ms. Doe to great risk that her personal information would be further disclosed through the computer network – a network accessible to numerous employees.

The risk of improper disclosure of the naked images of an employee placed on a computer network goes far beyond what the Supreme Court called a “mere possibility that security measure will fail” in *Nelson. Nelson*, 131 S.Ct. at 763. Images of an employee, standing naked in a shower, were surreptitiously gathered, improperly retained, and purposefully disclosed. The case before this Court implicates numerous interests, including freedom, intimacy, autonomy, and human dignity. The right of informational privacy protects individuals from such unreasonable intrusions into their private lives.

Furthermore, Appellees placed Ms. Doe’s personal information at risk of disclosure to the public. The Pennsylvania Open Records Law imposes a presumption in favor of public disclosure for all state and municipal agency

records, including computer records. 65 Pa. Stat. Ann. § 67.302; § 67.305. No statutory exemption would, on its face, preclude disclosure to the public, in response to an Open Records Law request, of the video and screen shots depicting Ms. Doe's naked body. 65 Pa. Stat. Ann. § 67.302 *et seq.* The Act includes exemptions protecting records containing Personally Identifiable Information (PII) from disclosure, but fails to include semi-nude images within the list of protected data. 65 Pa. Stat. Ann. § 67.708(b)(6)(i)(A)-(C). As Professor Nissenbaum has explained, open government laws with insufficient privacy safeguards expose government employees to substantial risks.

As more and more public agencies place records online . . . seekers are able to retrieve information from myriad locales without leaving their desks. As a consequence, interested parties, from journalists and information brokers to identity thieves and stalkers, are availing themselves of these services.

HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE*, 56 (Stanford University Press, 2010).

II. Digital Images of Unique Physical Features Constitute Personally Identifiable Information, Giving Rise to Constitutional Privacy Interests

A. Federal Privacy Statutes Recognize the Importance of Personally Identifiable Information.

Federal statutes typically define “personal information” or “personally identifiable information” (“PII”) as any information that is linked or can be linked to a known individual. The type of information covered by these definitions often includes Social Security numbers, biometric data, date and place of birth, mother’s maiden name, and an individual’s name. A uniquely identifying personal characteristic or feature, such as distinguishing body marking, constitutes personally identifiable information.

For example, the Privacy Act of 1974, 5 U.S.C. § 552a defines a record as:

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(a)(4)(A), defines “education records” as

those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

The Health Insurance Portability and Accountability Act (“HIPPA”) defines Protected Health Information (“PHI”) as health status, provision of health care, or payment for health care that can be linked to an individual (including any part of an individual’s medical record or payment history). 45 C.F.R. § 164.501. PHI includes individually identifiable health information related to the past, present or future physical or mental health or condition, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual. 45 C.F.R. § 160.103 Even the fact that an individual received medical care is protected information under the regulation. *Id.*

The Office of Management and Budget (“OMB”), defines PII as information which can be used to distinguish or trace an individual’s identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother’s maiden name, etc.

Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, May 22, 2007 at fn. 1.

The Pennsylvania Code recognizes, in relation to military and personnel records (43 Pa. Stat. Ann. §1.4), consumer privacy, and student educational records (§ 4226.5 and § 16.65), the privacy protections granted by federal statute in section 13(a) of the Family Educational Rights and Privacy Act of 1974 (20 U.S.C

§ 1232g), 34 CFR Part 99 (relating to family educational rights and privacy), Chapter 12 (relating to students) and other applicable laws, and the maintenance of system of records under 5 U.S.C. § 552a (relating to records maintained on individuals).

B. There are Harms Resulting from the Disclosure of Personally Identifiable Information

Circuit courts have also identified the harm that results when personally identifiable information is disclosed without an individual's consent. In *US v. Miami University*, 294 F. 3d 797, 818 (6th Cir. 2002), the court found that "once personally identifiable information has been made public, the harm cannot be undone." In *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), Judge Posner explained that the harm presented by disclosure pertains even to redacted medical records:

Even if there were no possibility that a patient's identity might be learned from a redacted medical record, there would be an invasion of privacy. Imagine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.

In *Krebs v. Rutgers*, 797 F. Supp. 1246, 1260 (D. N.J. 1992), the court held that "Privacy Act case law and legislative history support" the assertion that "any violations of those protected rights [in the Privacy Act and FERPA] presents

serious, ‘irreparable’ injury.” In fact, the Privacy Act provides that an individual harmed by an agency’s intentional or willful disclosure in violation of the Privacy Action is entitled to recover statutory damages, attorney’s fees, and costs. 5 U.S.C. § 552a(g)(4)(A), § 552a(g)(1)(C)-(D); *see also Doe v. Chao*, 540 U.S. 614 (2004).

The Supreme Court has recognized that American privacy law is built on a long legal tradition that recognizes the harm associated with disclosure of personal information. In *Berger v. New York*, 388 U.S. 41, 49 (1967) the Court stated, “[I]t has been held since Lord Camden’s day that intrusions into [individuals’ privacy] are ‘subversive of all the comforts of society.’” (citing *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765)).

Appellant Doe has a Constitutional privacy interest in protecting her nude image, improperly obtained by a state actor, from public disclosure.

CONCLUSION

Amicus Curiae respectfully requests this Court to grant Appellant's motion to reverse the decision of the lower court.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7,000 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i). This brief contains 3,376 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman style.

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ANTI-VIRUS CERTIFICATION

In the matter of *Doe v. Luzerne*, Docket No. 10-3921, I, Marc Rotenberg, certify that I used AVG Anti-Virus Free 9.0.894, LinkScanner Version 562; Virus Definitions Version 271.1.1/3573 to scan for viruses the PDF version of the Brief of Amicus Curiae that was submitted in this case via ECF and that no viruses were detected.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that on this 14th day of April, 2011, that Counsel of Record for *Amicus Curiae* Electronic Privacy Information Center, Marc Rotenberg, is a member in good standing of the Bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2011, the foregoing Brief of *Amicus Curiae* Electronic Privacy Information Center was filed and served on the below parties *via* ECF. Also, on April 14, 2011, ten identical, paper copies of the foregoing Brief of *Amicus Curiae* Electronic Privacy Information Center were filed with the Clerk of the Court by overnight delivery service, and two identical, paper copies were shipped by commercial carrier for next-delivery upon the following:

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