

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2018-1209**

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**REBECCA BUDDENBERG**  
**Respondent.**

**-vs-**

**ROBERT K. WEISDACK; JAMES BUDZIK; TIMOTHY GOERGEN; DAVID GRAGG; CATHERINE WHITRIGHT; CHRISTINA LIVERS; ALTA WENDELL; GEAUGA COUNTY HEALTH DISTRICT**  
**Petitioners,**

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**Certified Question of State Law**

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**MERIT BRIEF OF *AMICI CURIAE***  
**OHIO CRIME VICTIM JUSTICE CENTER,**  
**OHIO ALLIANCE TO END SEXUAL VIOLENCE,**  
**CLEVELAND RAPE CRISIS CENTER,**  
**AND OHIO NOW EDUCATION AND LEGAL FUND**  
**IN SUPPORT OF RESPONDENT**

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## AMICI CURIAE'S STATEMENT OF INTEREST

The Ohio Crime Victim Justice Center (“OCVJC”) is a statewide nonprofit organization with offices in Powell, Cincinnati, and Cleveland, Ohio. OCVJC was founded in 2000 to provide crime victims a place to report victims’ rights violations and to furnish free legal representation to preserve and enforce their rights. The mission of OCVJC is to ensure that the constitutional, statutory, and inherent rights of Ohio’s state and federal crime victims are upheld throughout the criminal justice process in Ohio’s 88 counties. OCVJC accomplishes this mission by providing free direct legal representation of Ohio crime victims in state and federal courts to preserve and enforce victims’ rights during criminal proceedings. OCVJC also assists victims in accompanying protection order proceedings, Title IX proceedings, military proceedings, and immigration proceedings. In addition to providing direct legal assistance, OCVJC provides free victims’ rights education and training to hospital personnel, social workers, counselors, court appointed special advocates, guardians *ad litem*, law enforcement, prosecutors, courts, and the community, and briefs courts as *amicus curiae* on issues of importance regarding the rights of Ohio crime victims in state and federal courts.

The Ohio Alliance to End Sexual Violence (“OAESV”) advocates for a coordinated comprehensive community response to sexual violence and for rape crisis services for sex crime victims while regularly taking on an assistance role to help thousands of crime victims navigate the criminal justice system each year. OAESV provides training and technical assistance for Ohio’s 31 existing rape crisis centers, which serve victims in 77 counties. In addition, OAESV coordinates responses and provides direct advocacy for victims in the 11 counties without local services. OAESV works systematically with universities, hospitals, rape crisis centers, and other stakeholders to improve the response to survivors and proposes policy initiatives to state and federal lawmakers. OAESV works

tirelessly to help victims attain the tools necessary for physical, emotional, and financial recovery. Examples of this work include providing access to attorneys in emergency cases resulting from victimization, offering assistance to terminate a lease after being raped by a neighbor, obtaining a custody modification when one parent sexually abuses children, filing for civil protection orders, objecting to perpetrator motions to expunge records, and providing assistance in other legal matters related to sexual violence. OAESV bases its recommendations on crime victim feedback and direct advocacy work.

Since 2016, OAESV has provided legal assistance to survivors in civil systems<sup>1</sup> and Title IX proceedings. In OAESV's experience processing requests for legal representation in civil litigation, Ohio sexual violence survivors who seek civil remedies most often are not engaged in the criminal justice process. Some fear reporting a crime, some plan to report an incident later, and still others have reported sexual violence only to be told there is not enough evidence to proceed with criminal prosecution. OAESV's experience is supported by national data indicating that more than two-thirds of rapes go unreported.<sup>2</sup> Rape, Abuse & Incest National Network, *The Criminal Justice System: Statistics* (accessed Jan. 22, 2018) (relying on crime statistics reported by the United States Department of Justice).<sup>3</sup> Of the rapes that are reported, approximately one percent are referred for prosecution, and 0.7 percent result in a conviction. *Id.* OAESV sees this trend

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<sup>1</sup> Due to grant funding regulations, OAESV is permitted to represent survivors in numerous civil systems, including domestic relations matters, landlord/tenant disputes, and protection order hearings, among others. However, these grant regulations simultaneously prohibit OAESV from representing survivors in civil lawsuits for damages. Despite this prohibition, OAESV is frequently contacted by survivors who are either seeking to file a lawsuit against their alleged perpetrator or are being sued for defamation by their alleged perpetrator after the survivor reports the rape to police or Title IX personnel. Although OAESV cannot provide representation in these matters, the organization keeps data on the frequency of calls and assists survivors in securing pro bono representation.

<sup>2</sup> Specifically, as many as 690 out of every 1,000 rapes, go unreported.

<sup>3</sup> Available at: <https://www.rainn.org/statistics/criminal-justice-system>



across several facets of the organization's work, including its role on the Ohio Attorney General's Rape Kit Tracking Task Force. In that capacity, OAESV has observed the long list of rape reports that were never investigated due to lack of officer awareness of the neurobiology of trauma and other dynamics of sexual violence. Ultimately, OAESV's position as a statewide resource for victims and an advocacy agent against sex crimes comes with invaluable insight into the stark reality that most survivors of sexual violence will not receive their day in criminal court. The survivors who end up seeking justice almost universally have to rely on civil remedies, as the criminal system so often does not provide any avenue for relief at all.

Cleveland Rape Crisis Center ("The Center") was founded in 1974 and is dedicated to supporting survivors of rape and sexual abuse, promoting healing and prevention, educating and training, and advocating for social change. The Center is nationally recognized, the largest independent rape crisis center in the nation, and the only one to earn an accreditation from the Commission on the Accreditation of Rehabilitation Facilities. The Center reaches more than 40,000 people each year through its counseling, advocacy, prevention, and training services at dozens of locations, including The Center's various offices, grade schools, college campuses, community centers, and many other locations in Northeast Ohio. The Center also provides critical counseling and other support services for survivors engaged in the criminal justice system, pursuing civil remedies, or who are otherwise seeking to have their legal and civil rights enforced. The issues to be decided in this matter could adversely impact the thousands of survivors cared for by the Center each year, and thus the Center's interest in this case is paramount.

The Ohio NOW Education and Legal Fund ("OHIO NOW ELF") is a non-profit corporation originally founded by the trustees of the Ohio Chapter of the National Organization for Women ("Ohio NOW"). Ohio NOW ELF strives to eliminate gender

discrimination and violence against women through research, education, legal support, referrals to other service providers, and public policy advocacy. To that end Ohio NOW ELF also participates—and has frequently participated in the past—as an *amicus curiae* in important legal cases and appeals whose outcomes will affect the members of Ohio NOW and the legal status of women in Ohio. Its priorities include, but are not limited to, issues of domestic violence, sexual violence, education, employment and other gender discrimination, and fair divorce, child custody, child support, and spousal support laws. Providing full and adequate legal remedies for victims of domestic violence and sexual crimes is an especially important priority for Ohio NOW ELF and the members of its sister organization, Ohio NOW. Where possible, battered women and sexual assault victims should be able to hold their perpetrators fully accountable for their criminal acts and liable for all appropriate damages, including punitive or exemplary damages and attorney's fees.

*Amici Curiae* OCVJC, OAESV, The Center, and OHIO NOW ELF (collectively, “*Amici*”) can provide perspective regarding the importance of victims’ rights, modes of vindicating those rights, and legal arguments that will assist this Court with a ruling. *Amici* are uniquely positioned to illuminate the important issues surrounding the rights of crime victims and to highlight for this Court the public policy reasons for enforcing and upholding those rights.

### **STATEMENT OF THE FACTS**

*Amici* adopt and incorporate the statement of facts that Plaintiff-Respondent, Rebecca Buddenberg (“Plaintiff Buddenberg”), has offered to this Court. *Merit Brief of Plaintiff-Respondent filed Jan. 22, 2019 (“Plaintiff’s Brief”)*. In addition, *Amici* offer the following background information.

In 2016 alone, hundreds of thousands of Ohio citizens were victimized by crime.

Federal Bureau of Investigation, *Crime in the United States* (accessed Jan. 18, 2019).<sup>4</sup> Of those, 34,877 were victims of violent felony crimes. *Id.* These numbers only represent reported crimes. *Id.* Countless victims will never disclose their victimization. Crime impacts everyone; it knows no boundaries, crossing all racial, ethnic, gender, and socioeconomic lines. Crime impacts every Ohio citizen.

Public interest regarding victim treatment spans several decades. Its national significance led President Ronald Reagan to convene a task force on the treatment of crime victims during the criminal justice process, which found:

[T]he treatment of crime victims in America was a national disgrace. Ignored, mistreated, or blamed, the innocent victims had been handled like photographs or fingerprints—mere evidence to be manipulated at the criminal justice system's convenience. By the end of the ordeal, many victims vowed that they would never again become embroiled in the system, and that they would tell their friends and loved ones to stay away from the courts. Just as a pebble dropped in a pool causes rippling all across the water, the mistreatment of victims spread resentment and distrust of the justice system throughout entire communities. We saw that this insensitivity toward victims was not only unjust, it was unwise. The criminal justice system is absolutely dependent upon the cooperation of crime victims to report and testify. Without their help, the system cannot hold criminals accountable and stem the tide of future crime.

Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 Wayne L.Rev. 29, 30 (1987). Despite the passage of three decades, very little has changed. Crime victims' rights are often ignored or violated, which exacerbates their injuries and alienates them from the criminal justice system. To address these abuses, every state has enacted crime victims' rights

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<sup>4</sup> Available at <https://perma.cc/4E6M-GNJ2> as a permanent archive of a report maintained by the United States Department of Justice. This Court is entitled to take judicial notice of public records that are available through reliable governmental websites. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8; *Caghan v. Caghan*, 5th Dist. Stark No. 2014 CA 00094, 2015-Ohio-1787, ¶ 60-62; *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir.2003); *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, 630 F.Supp.2d 842, 849 (S.D. Ohio 2007).

legislation, and most have adopted constitutional amendments protecting victims' rights. Ohio is no exception. The right to a civil remedy created by R.C. 2307.60 was passed during the years 1983 to 1985, in the heyday of the crime victims' rights movement. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 33-35 (Kennedy, J., concurring in judgment only).

This Court's decision on the merits should be made with careful consideration of the foregoing circumstances, which show the importance of the cause of action in R.C. 2307.60 as a supplement to the civil justice system—not an afterthought within the criminal justice system.

### **ARGUMENT**

The United States District Court for the Northern District of Ohio has certified two questions of law to this Court:

1. Does O.R.C. § 2307.60's creation of a civil cause of action for injuries based on a "criminal act" require an underlying criminal conviction?
2. Is a criminal conviction a condition precedent to a civil claim pursuant to O.R.C. § 2921.03?

*Certification Order, filed Aug. 27, 2018.* Defendant-Petitioners, Robert K. Weisdack, James Budzik, Timothy Goergen, David Gragg, Catherine Whitright, Christina Livers, Alta Wendell, and Geauga County Health District (collectively "Defendants"), have offered an array of arguments supporting the position that each of these certified questions should be answered in the affirmative. *Merit Brief of Defendant-Petitioners filed Dec. 3, 2018 ("Defendants' Brief")*. Plaintiff Buddenberg has provided a comprehensive analysis of the meaning of the language adopted by the General Assembly in R.C. 2307.60, which *Amici* fully support. *Plaintiff's Brief, pp. 6-23*. But it cannot be overstated that the Defendants have admitted that R.C. 2307.60 "does not explicitly state whether a conviction is needed" before a such a claim may be maintained. *Defendants'*

*Brief*, p. 4. Defendants have also admitted that there is no language in R.C. 2921.03 that would “require the presence of an underlying criminal conviction” in order to avoid a dismissal. *Defendants’ Brief*, p. 19. It should be apparent in light of these statements that the Defendants have actually asked this Court to “ignore the unambiguous language of a statute” by going beyond what the words of R.C. 2307.60 and 2921.03 actually say. *Jacobson*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, at ¶ 8. The Court should reject the Defendants’ illogical entreaties and should adopt the statutory construction provided by Plaintiff Buddenberg.

Importantly, Defendants have not argued that R.C. 2307.60 and 2921.03 are ambiguous, but have instead argued in favor of a “plain reading” of the provisions. *Petitioners’ Brief*, pp. 4, 19. They have gone far afield of the boundaries of this Court’s rules of statutory construction, however, by providing public policy arguments in favor of their preferred view of the requirements of R.C. 2307.60. *Compare Petitioners’ Brief*, pp. 17-19 with *Jacobson* at ¶ 8, quoting *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16 (“Without ‘an initial finding’ of ambiguity, ‘inquiry into \* \* \* public policy \* \* \* is inappropriate.’”).

In response to these policy arguments, *Amici* argue that there is no extra-statutory public policy necessitating a criminal conviction as an element or a condition precedent to a claim under either R.C. 2307.60 or 2921.03. In addition, close similarities between the language in R.C. 2307.60 and 2921.03 and in the recently-enacted Marsy’s Law counsel in favor of rejecting the arguments offered by the Defendants. Without some overriding reason for requiring a criminal conviction as a prerequisite to a R.C. 2307.60 or 2921.03 claim, and in light of the potential impact that this litigation could have outside of the scope of civil claims under that statute, this Court should answer the certified questions in the negative.

**I. DETERMINING THE BREADTH OF A STATUTE THAT CREATES A CIVIL CLAIM IS THE PREROGATIVE OF THE GENERAL ASSEMBLY**

The Defendants have argued that “Ohio’s blanket civil liability statute is unique” in that it is “considerably broader than those permitted in other states.” *Petitioners’ Brief*, pp. 17-18. They remark that R.C. 2307.60 “allows a civil cause of action for any crime, presumably including jaywalking or other minor misdemeanors, while other states limit civil liability to specifically enumerated crimes, if at all.” *Id.*, p. 18. And because “Ohio courts generally favor consistency among laws of different states,” the Defendants ask this Court to impose a subtextual conviction requirement upon the claim created by R.C. 2307.60 to avoid increased “inconsistency in Ohio’s judicial system.” *Id.*, pp. 17-18. This Court should reject this illogical policy argument.

That the statutes are broader in Ohio than anywhere else in our nation must mean that *the law* is broader in Ohio than in other states. The state of Ohio is one among dozens of independent sovereigns, and the General Assembly is fully empowered to make decisions that differ from those made by the law-making authorities in the other states. Ohio does not have an “implicit general civil cause of action for any crime” of the sort that the Defendants claim other states have rejected. *Petitioners’ Brief*, pp. 17-18. R.C. 2307.60 *explicitly* creates a cause of action with language that is “crystal clear.” *Jacobson*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, at ¶ 10. Moreover, this Court has already rejected this sort of consequence-oriented decision making when determining the meaning of R.C. 2307.60. *See Id.* at ¶ 12. If the plain text of R.C. 2307.60 has threatened consistency between the laws of the various united states, then it was the General Assembly’s prerogative to do so. *Id.* The Defendants’ concerns should be addressed to the statehouse rather than the courthouse.

## II. THE EXISTING COMMON LAW TORTS DO NOT PERMIT RECOVERY FOR EVERY INJURY CAUSED BY A CRIME

The Defendants make the mistaken claim that the “remedies provided in R.C. 2307.60 are the same as those available under tort law” and that these common law remedies “would provide relief to a civil plaintiff without the need to further expand R.C. 2307.60 to include situations where there is no underlying conviction.” *Petitioners’ Brief*, p. 18. They could not be more wrong.

The causes of action in R.C. 2307.60 and 2921.03 serve as an important gap-filler, allowing a crime victim to recover in a way that is not permitted under the common law torts. In this modern era, there is an appreciation that not all injuries from crime are physical. Damages for emotional distress cannot be recovered in an action for intentional infliction of emotional distress without proof of “extreme and outrageous conduct.” *E.g.*, *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, 915 N.E.2d 696, ¶ 45-48. Yet the Ohio Supreme Court has explained that not all criminal conduct is extreme and outrageous. *Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen, & Helpers of Am.*, 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666 (1983), quoting Restatement of the Law 2d, Torts, Section 46, Comment d (1965). It is also not certain that a plaintiff will meet the “publicity” or “highly offensive” elements of a false-light tort claim merely by establishing that a false writing was used in a manner that would violate R.C. 2921.03. *See Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, ¶ 53-55. Criminal conduct is often injurious in the absence of a physical injury, whether or not it is extreme, outrageous, or highly offensive, and even if it is not widely publicized. Because tort claims have often-rigid elements that do not track society’s sensibilities as closely as the criminal law, R.C. 2307.60 closes a regrettable legal void between injury and relief.

The General Assembly is *not* limited by the same caution against societal interference

that a court must exercise when expanding upon the common law. *See Yeager*, 6 Ohio St.3d at 374, 453 N.E.2d 666, quoting Prosser, *Law of Torts*, 51, Section 12 (4<sup>th</sup> Ed.1971) (“As Dean Prosser reasoned in his learned treatise, ‘[i]t would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control.’). The legislature has thus provided that where an individual has caused injury by criminal conduct, R.C. 2307.60 and 2921.03 provide avenues for the victim to recover, whether or not the common law has seen fit to do so.

Moreover, the cause of action serves important private interests that cannot be vindicated within the criminal justice system. Restitution as a part of a criminal sentence is limited to “an amount based on the victim's economic loss.” R.C. 2929.18(A)(1) and 2929.28(A)(1). The damages recoverable under R.C. 2307.60 are much broader: “[a]nyone injured in person or property by a criminal act has, and may recover *full damages*,” including “the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state” and “punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.” (Emphasis added.)

### **III. A CRIMINAL CONVICTION IS A CONDITION PRECEDENT TO A LOSS OF LIBERTY, NOT TO A DETERMINATION OF CIVIL LIABILITY**

The Defendants express the unfounded concern that permitting a claim under R.C. 2307.60 “would also lead to confusion over the standard of proof to be applied, and application of various defenses.” *Petitioners’ Brief*, p. 18. Again, the Defendants’ concern does not justify a judicially-created conviction requirement.

#### **A. The More Stringent Demands of a Criminal Trial are Appropriate Only Because the State, Unlike a Civil Plaintiff, is Empowered to Imprison Individuals Convicted of a Crime**

The Ohio and United States Constitutions each place significant barriers in the path to a criminal conviction solely because the liberty rights of the accused are at stake.



This Court has recognized as a “basic principle of law that the prosecution has the burden of proving a defendant's guilt” by “ ‘proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’ ” *State v. Jenks*, 61 Ohio St.3d 259, 263, 574 N.E.2d 492 (1991), quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This high burden of proof is a foundational safeguard of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.*; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The United States Supreme Court originally decided to impose the highest possible evidentiary burden upon criminal prosecutors because “[the] accused during a criminal prosecution has at stake interest of immense importance, both because of the *possibility that he may lose his liberty upon conviction* and because of the certainty that he would be stigmatized by the conviction.” (Emphasis added.) *Winship*, 397 U.S. at 363, 90 S.Ct. 1068, 25 L.Ed.2d 368.

Similarly, the risk of the loss of liberty in criminal cases triggers other procedural protections found in the Bill of Rights, which require the state to invest heavily toward the end of making criminal trials fair. *Mathews v. Eldridge*, 424 U.S. 319, 332-333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”); *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment”); *Gideon v. Wainwright*, 372 U.S. 335, 340-341, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (The right to counsel and the other “guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”); *see*

also *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (The right to a speedy trial is a fundamental due process right); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (“In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.”); *Pointer v. Texas*, 380 U.S. 400, 404-405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (confrontation is one of the fundamental guarantees of life and liberty).

**B. The Risk of Civil Liability Does Not Justify a Criminal Conviction Requirement**

A civil judgment will not, in this free nation, result in imprisonment. And the insult and stigma of civil liability has never been significant enough to necessitate more than the lowest default standard of proof in civil cases—a mere preponderance of the evidence. *See, e.g., Walden v. State*, 47 Ohio St.3d 47, 53, 547 N.E.2d 962 (1989) (rejecting the clear and convincing evidence standard of proof for wrongful imprisonment claims in favor of the default preponderance of the evidence standard of proof for civil claims because the statute creating the claim could have, but did not, specify a standard of proof). The grave liberty interests at stake in a criminal case, identified in *Winship*, 397 U.S. at 363, 90 S.Ct. 1068, 25 L.Ed.2d 368, are not implicated in a civil lawsuit. As a result, a civil defendant has no “private interest” sufficient to provide immunity from a lawsuit brought under R.C. 2307.60 or 2921.03 before there has been a criminal conviction. *Mathews*, 424 U.S. at 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18. Likewise, a requirement of proof beyond a reasonable doubt would be entirely disproportionate to the private interests at stake. *Id.*

Concurrently, all of the constitutional constraints upon criminal process represent significant “fiscal and administrative burdens” upon prosecution and conviction. *Id.*

These procedures are absurd overkill when placed in the path of a civil litigant, particularly because criminal prosecutions are entirely in the hands of the state and subject to priorities quite distinct from those of private parties. It has been commonly held that these procedural impediments should not apply in other civil lawsuits. *E.g.*, *Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 26-33 (applying *Mathews* to determine that there was no right to appointed counsel at a civil contempt hearing). The constitutional criminal procedures are likewise inapt in lawsuits brought under R.C. 2307.60 or 2921.03, and requiring compliance with these standards would be senseless.

Moreover, if there is a general due process requirement that a plaintiff proceeding under R.C. 2307.60 or 2921.03 must wait for a criminal conviction prior to suit, it is not clear why that same requirement would not apply to all other civil suits, including common law torts, alleging *any conduct* that would constitute a criminal act. Civil litigation necessarily requires declaring another to be a wrongdoer, and sometimes a lawsuit implies criminality as in the case of torts like assault, battery, or conversion. Yet the law in Ohio has been that civil litigation may proceed prior to related criminal litigation for more than a century. *Merit Brief Of Amicus Curiae The State Of Ohio filed Jan. 11, 2019, pp. 6-9*. Because there are such stark differences between the interests at stake in civil and criminal litigation, the procedural lines between these areas of the law will not easily blur.

#### **IV. THE IMPACT UPON MARSY'S LAW**

##### **A. Article I, Section 10a(D) of the Ohio Constitution Recognizes Rights that are Triggered Upon Commission of a "Criminal Offense or Delinquent Act"**

On November 7, 2017, an overwhelming 83% of Ohio voters passed Marsy's Law, formally titled Issue 1, Rights for Crime Victims ("Marsy's Law"), a constitutional

amendment enacting constitutional rights for crime victims. Marsy's Law provides Ohio's victims with concrete, enforceable rights during the criminal justice process. In order to exercise these rights, a person must meet the constitutional definition of "victim." The term victim refers to "a person against whom the *criminal offense or delinquent act* is committed or who is directly and proximately harmed by the commission of the offense or act." (Emphasis added.) Ohio Constitution, Article I, Section 10a(D). The vast majority of the rights recognized by Marsy's Law accrue to victims during the investigation and prosecution of the criminal offense or delinquent act. *See* Ohio Constitution, Article I, Section 10a(A)(2)-(6), (8), (9), and (10). Few rights accrue only after a criminal conviction. *Id.*

Ohio courts have recognized that a "criminal act" is a component of a "criminal offense." *See State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 72. At least one Ohio court has held that, in the criminal context, reading the requirement of a conviction into the term "offense" is not warranted:

The word "offense" is not separately defined in the 1974 Criminal Code (except in R.C. 2935.01(D) where that definition appears to be limited to R.C. Chapter 2935). However, "offense" must be construed, under R.C. 1.42, according to common usage: it means conduct violating a criminal statute, and no more. *See* R.C. 2901.03(B), and Webster's Third New International Dictionary (1971). This meaning is apparent from the way in which the word is used in Ohio criminal law. The prime example is its use in Section 10, Article I, of the Ohio Constitution: "No person shall be twice put in jeopardy for the same offense." The word means the conduct constituting a violation of law, and not a conviction of that violation.

*Clinton v. Leis*, 56 Ohio App.2d 30, 31-32, 381 N.E.2d 344 (1st Dist.1977). By analogy, the phrase "criminal act" must refer to the criminal conduct of an individual, not the conduct of police and prosecutors who have sought and acquired a criminal conviction. In the criminal law, and as used in Marsy's Law, the words "act" and "offense" are analogous if not entirely interchangeable.

## **B. The Broad Potential Impact of This Court's Ruling**

If this Court accepts an interpretation of “criminal act” or “offense” that would require a criminal conviction, it would eliminate the rights recognized by Marsy’s Law for victims to have notification of proceedings, to be present at proceedings, to be heard at proceedings, to refuse interview, deposition, and discovery requests, and to proceedings free from unreasonable delay. Ohio Constitution, Article I, Section 10a(A)(2)-(3), (6), (8).

Marsy’s Law provides victims the right “upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings.” Ohio Constitution, Article I, Section 10a(A)(2). If a criminal conviction is required before this right is implemented, victims would only be notified of public proceedings after a conviction and would lose the right to be present at pre-trial hearings or the trial. This would be a significant change for victims’ rights in Ohio, even as they existed prior to the enactment of Marsy’s Law. Since the 1990s, R.C. 2930.09 has provided victims the right to be present at most proceedings conducted on the record, but with the specific limitation that a court was empowered to exclude the victim in certain circumstances. Any interpretation of “criminal act” or “offense” that requires a criminal conviction would eliminate the overriding *constitutional* right to be present and the right to notification in Marsy’s Law.

Marsy’s Law provides victims the right “to be heard in any public proceeding involving release, *plea*, sentencing, *disposition*, or parole, or in *any public proceeding in which a right of the victim is implicated*.” (Emphasis added.) Ohio Constitution, Article I, Section 10a(A)(3). This provision explicitly contemplates a pre-conviction right. Change of plea hearings and dispositional hearings can occur prior to a conviction in a case, and victims’ rights may be implicated in many hearings prior to conviction, i.e. a bond determination during arraignment. Any interpretation of “criminal act” or “offense” that

requires a criminal conviction would contradict the plain language of Marsy's Law that explicitly applies the right to be heard to proceedings prior to conviction.

Marsy's Law provides victims the right "to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused." Ohio Constitution, Article I, Section 10a(A)(6). If a criminal conviction were required to trigger this right, it would render the text nonsensical because discovery, by its very nature, occurs prior to conviction. There would be no need for a victim to refuse interview requests or deposition requests after conviction. Therefore, any interpretation of "criminal act" or "offense" that requires a conviction would thwart the intentions of Ohio voters.

Marsy's Law provides victims the right "to proceedings free from unreasonable delay and a prompt conclusion of the case." Ohio Constitution, Article I, Section 10a(A)(8). An interpretation of "criminal act" or "offense" that requires a conviction would render this section meaningless because the most commonly delayed proceeding is the trial.

The question of whether the phrase "criminal act" or the term "offense" includes an implicit requirement of a criminal conviction is important to Ohio's crime victims. Any interpretation of Ohio law in which those terms require a criminal conviction would undermine the will of Ohio voters who enshrined numerous pre-conviction rights for crime victims into Ohio's Constitution.

**CONCLUSION**

For the foregoing reasons, this Court should apply Ohio's longstanding rules of statutory construction, adopt the plain language of R.C. 2307.60 and 2921.03, and answer the questions certified by the District Court in the negative.

Respectfully submitted,

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