

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Gatehouse Media
Ohio Holdings II, Inc.
d/b/a/ The Columbus Dispatch

Relator,

-vs-

The City of Columbus
Police Department

Respondent.

Case No. 2023-1327

Original Action in Mandamus

**Brief of Amici Curiae
Fraternal Order of Police, Capital City Lodge #9
-and-
Fraternal Order of Police of Ohio, Inc.
In Support of Respondent Columbus Division of Police**

John C. Greiner (0005551)
*Counsel of Record
Darren W. Ford (0096449)
FARUKI PLL
201 East Fifth Street, Suite 1420
Cincinnati, OH 45202
Telephone: (513) 632-0315
Fax: (513) 632-0319
Email: jgreiner@ficlaw.com
dford@ficlaw.com

Counsel for Relator, The Columbus Dispatch

Lathan J. Lipperman (0095523)
Harshman, Wannemacher, Tipton & Lipperman
4683 Winterset Drive
Columbus, Ohio 43220
Telephone: 614.573.6944
Fax: 614.573.6948
Email: llipperman@hcands.com

*Counsel for Amicus Curiae,
Fraternal Order of Police, Capital City Lodge #9*

Zachary M. Klein (0078222)
Columbus City Attorney

Aaron D. Epstein* (0063286)
*Counsel of Record
Joshua P. Monroe (0095538)
Assistant City Attorneys
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
Telephone: (614) 645-0480
Fax: (614) 645-6949
Email: adeptstein@columbus.gov
jmonroe@columbus.gov

*Counsel for Respondent,
City of Columbus,
Division of Police*

Gwen Callender (0055237)
Fraternal Order of Police
of Ohio, Inc.
222 East Town Street
Columbus, Ohio 43215
Telephone: 614.224.5700
Fax: 614.224.5775
Email: gcallender@fopohio.org
*Counsel for Amicus Curiae,
Fraternal Order of Police of Ohio*

Table of Contents

Table of Contents	ii
Table of Authorities	iii
I. Statement of Interest of Amici Curiae	1
II. Summary of Argument	2
III. Statement of the Case and Facts	4
IV. Argument	4
<u>Proposition of Law #1</u>	
A police officer that is shot or shot at by a suspect is a “victim” of a “criminal offense” and therefore entitled to the protections afforded in Article I, § 10a of the Ohio Constitution and R.C. 2930.07.	4
A. The text of Article I, § 10a of the Ohio Constitution and R.C. 2930.07 leave no room for interpretation and must be applied as written.	5
B. Even if the text in Article I, § 10a of the Ohio Constitution and R.C. 2930.07 was ambiguous, designating the officers here as “victims” furthers the purpose behind Marsy’s Law.....	6
C. Relator’s arguments fail to show that victim-officers are not entitled to protection under Marsy’s Law.....	9
<u>Proposition of Law #2</u>	
Protecting a victim-officer’s identity under Marsy’s Law easily passes muster under the rational-basis test and is therefore constitutional.	15
V. Conclusion	20

Table of Authorities

Cases

<i>Bernardini v. Board of Education</i> , 58 Ohio St. 2d 1 (1979)	4
<i>City of Centerville v. Knab</i> , 166 N.E.3d 1167 (2022)	<i>passim</i>
<i>Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.</i> , 122 Ohio St. 3d 56 (2009)	16
<i>Feliciano v. Cleveland</i> , 661 F. Supp. 578 (N.D. Ohio 1987).....	12
<i>Gardner v. Broderick</i> , 392 U.S. 273 (1968).....	12
<i>Garrity v. N.J.</i> , 385 U.S. 493 (1967)	12, 17
<i>Kish v. City of Akron</i> , 109 Ohio St. 3d 162 (2006)	15, 16
<i>Lyons v. Limbach</i> , 40 Ohio St. 3d 92 (1988)	16
<i>McCrone v. Bank One Corp.</i> , 107 Ohio St. 3d 272 (2005).....	16
<i>Provident Bank v. Wood</i> , 36 Ohio St. 2d 101 (1973).....	4
<i>State ex rel. Christian v. Barry</i> , 123 Ohio St. 458 (1931)	12
<i>State ex rel. Cincinnati Enquirer v. Dupuis</i> , 98 Ohio St. 3d 126 (2002)	15
<i>State ex rel. Cincinnati Enquirer v. Jones-Kelley</i> , 118 Ohio St. 3d 81 (2008).....	6
<i>State ex rel. Miami Student v. Miami Univ.</i> , 79 Ohio St. 3d 168 (1997)	15
<i>State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ.</i> , 74 Ohio St. 3d 543 (1996)	4, 6
<i>State ex rel. Sylvania Home Tel. Co. v. Richards</i> , 94 Ohio St. 287 (1916).....	4
<i>State v. Jordan</i> , 89 Ohio St. 3d 488 (2000)	4
<i>State v. Mole</i> , 149 Ohio St. 3d 215 (2016)	16
<i>State v. Weber</i> , 163 Ohio St. 3d 125 (2020).....	17
<i>State v. Yerkey</i> , 171 Ohio St. 3d 367 (2022).....	14
<i>United States v. Allstate Ins. Co.</i> , 620 F. Supp. 3d 674 (E.D. Mich. 2022).....	7
<i>Wells v. Lewis</i> , 12 Ohio Dec. 170 (1901).....	16

Statutes

R.C. 149.43.....*passim*
R.C. 2921.0410
R.C. 2930.01(H)..... 5
R.C. 2930.07*passim*
R.C. Chapter 2921.....10
R.C. Chapter 4117.....13

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)7
Columbus Division of Police, *2022 Use of Force Analysis Year End Review (2023)*.....10
Dr. Lawrence Miller, *Officer-Involved Shooting: Reaction Patterns, Response Protocols, and Psychological Intervention Strategies*, INTERNATIONAL JOURNAL OF EMERGENCY MENTAL HEALTH, Vol. 8, No. 4 (2006)..... 1
Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. Ann. Surv. Am. Law 247 (2003)..... 15
Naomi Zakimi, Alissa Greer, Amanda Butler, *Too Many Hats? The Role of Police Officers in Drug Enforcement and the Community*, POLICING: A JOURNAL OF POLICY AND PRACTICE, Volume 16, Issue 4 (December 2022)..... 1
Ohio Legislative Service Commission, *Final Analysis of H.B. No. 343 (Apr. 6, 2023)* 6
Ohio Legislative Service Commission, *Final Analysis of S.B. No. 16 (July 7, 2023)* 6
OSHA, *Workplace Violence Fact Sheet (2002)* 11
Violanti, J.M. and Steege, A., *Law enforcement worker suicide: an updated national assessment*, POLICING: AN INTERNATIONAL JOURNAL, Vol. 44 No. 1 (2021)..... 1

Constitutional Provisions

Ohio Const. Art. 1 § 10a(A)*passim*

I. Statement of Interest of Amici Curiae

Amici curiae Fraternal Order of Police, Capital City Lodge #9 and Fraternal Order of Police of Ohio, Inc. (collectively “FOP”) are labor unions that represent many thousands of law enforcement officers throughout Ohio. The FOP is dedicated to ensuring fair and safe working conditions for its members.

Policing is a challenging, dangerous and stressful profession. Officers are quite frequently called upon to perform several jobs at once: the crime fighter, the helper, the health responder, and the administrator.¹ These roles and job requirements unfortunately mean officers are sometimes the victims of crime. And though officers are trained and equipped to enforce the law, they suffer the same physical, emotional and psychological damage and challenges as those in any other profession when they are, for example, assaulted, stabbed or shot. The daily stressors of the job, both big and small, negatively impact mental health. For example, police officers are 54% more likely to die of suicide than those in other professions.²

And perhaps there is no more stressful a situation than an officer-involved shooting. As one clinical and forensic psychologist put it,

The sources of stress attached to an officer-involved shooting (OIS) are multiple, and include the officer’s own psychological reaction to taking a life, the responses of law enforcement peers and the officer’s family, rigorous examination by departmental investigators and administrators, possible disciplinary action or change of assignment, possible criminal and civil court action, and unwanted attention - sometimes outright harassment - by the media.³

¹ Naomi Zakimi, Alissa Greer, Amanda Butler, *Too Many Hats? The Role of Police Officers in Drug Enforcement and the Community*, POLICING: A JOURNAL OF POLICY AND PRACTICE, Volume 16, Issue 4, pp. 615–629 (December 2022), available at <https://doi.org/10.1093/police/paabo82>.

² Violanti, J.M. and Steege, A., *Law enforcement worker suicide: an updated national assessment*, POLICING: AN INTERNATIONAL JOURNAL, Vol. 44 No. 1 (2021), pp. 18-31, available at <https://doi.org/10.1108/PIJPSM-09-2019-0157>.

³ Dr. Lawrence Miller, *Officer-Involved Shooting: Reaction Patterns, Response Protocols*,

This case presents the question of whether police officers that are repeatedly shot at—and even struck and grievously injured—by a violent suspect qualify as “victims” under Marsy’s Law. The FOP urges this Court to find that they do. That conclusion is compelled by the plain text of the statute; is consistent with the purpose behind the law; passes muster under the Ohio Constitution; and ensures that police officers enjoy the same statutory and constitutional protections as the citizens they are sworn to protect.

II. Summary of Argument

Statutory interpretation has one goal: ascertaining the legislature’s intent. And the cornerstone of intent is the text itself. If the meaning of the text is plain and unambiguous, then the analysis ends, and that clear meaning must be enforced. Here, the text of Marsy’s Law could not be clearer. If a person has a criminal offense committed against him or her, then that person is a “victim under Marsy’s Law. And that is exactly what happened here: police officers had a criminal offense committed against them, making them each “victims.”

Though the text is unambiguous, the law’s legislative history also supports this conclusion. Nowhere within the legislative analysis are law enforcement officers excluded from protection. And in fact, leaders of the Columbus Division of Police met with the law’s sponsor, Representative Andrea White, and advised her that under the plain text police officers could be considered “victims” and entitled to protection. Nonetheless, the General Assembly chose not to amend the language to exclude law enforcement. Therefore, officers cannot be excluded from the protections in that law.

Finding that a police officer can be a “victim” also furthers the purpose of Marsy’s Law—to provide justice and due process to victims of criminal acts. Unfortunately, police

and Psychological Intervention Strategies, INTERNATIONAL JOURNAL OF EMERGENCY MENTAL HEALTH, Vol. 8, No. 4, pp. 239-254 (2006), available at https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/imp_officer_involved_shooting-508.pdf.

officers, like anyone, can be the victims of violent crime. As the facts underlying this mandamus action illustrate, sadly officers can be brutally victimized and grievously injured or killed. Providing those officers and their families due process and justice—for example, treating them with fairness and respect and notifying them of any proceeding involving the criminal defendant—further the purpose of Marsy’s Law.

Finally, Marsy’s Law easily passes muster under Ohio’s Constitution. First, while the public’s right to inspect public records is indeed an important part of our democracy, Ohio law has long restricted a wide swath of public records from disclosure. Relator argues that withholding the names of victim-officers unconstitutionally impinges on the public’s right to information under Ohio’s public records laws; but Relator fails to distinguish how such information is any different from other categories of records already prohibited from disclosure under Ohio law. Nor has Relator argued how restricting a victim-officer’s identity prohibits the public from becoming informed about a particular incident. For example, portions of body worn camera and cruiser footage of the incident have been released by the City, as was a press release outlining the basic facts. Relator is also free to request copies of the victim-officers’ prior trainings, discipline, and uses of force—any identifying information must simply be redacted prior to release.

Likewise, the facts of that incident were investigated by the Ohio Bureau of Criminal Investigation, an independent state law enforcement agency. Prosecutors will present that investigation to a grand jury to determine whether the officers’ actions were consistent with the law. If the grand jury determines that charges are warranted against any officer, then under Marsy’s Law that officer is no longer a “victim,” and his or her name and identifying information may be released. If no charges are brought, then BCI’s entire investigation will be publicly posted online, freely available for Relator to access.

III. Statement of the Case and Facts

The FOP defers to and incorporates the Agreed Statement of Facts submitted by the Parties.

IV. Argument

Proposition of Law No. 1

A police officer that is shot or shot at by a suspect is a “victim” of a “criminal offense” and therefore entitled to the protections afforded in Article I, § 10a of the Ohio Constitution and R.C. 2930.07.

“It is well accepted that the cornerstone of statutory construction and interpretation is legislative intention.” *State v. Jordan*, 89 Ohio St. 3d 488, 491 (2000) (citation omitted). To determine legislative intent, courts first look to the text of the statute. *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105 (1973) (citation omitted). If the meaning of the text is plain and unambiguous, then no interpretation is necessary and “it must be applied as written.” *State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ.*, 74 Ohio St. 3d 543, 545 (1996) (citation omitted). Finally, this Court has noted that, “In ascertaining the legislative intent of a statute, ‘It is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.’” *Bernardini v. Board of Education*, 58 Ohio St. 2d 1, 4 (1979) (citation omitted). If, however, a statute is ambiguous, then, to determine the legislature’s intent, a court “may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects.” *Jordan*, 89 Ohio St. 3d at 492.

Likewise, in interpreting a constitutional provision adopted by direct vote, courts “consider how the language would have been understood by the voters who adopted the amendment.” *City of Centerville v. Knab*, 166 N.E.3d 1167, 1173 (2022) (citation omitted). The goal, much like with statutory construction, is “to ascertain and give effect to the intent of the people.” *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294 (1916).

And mirroring the statutory construction process, the starting point is the plain language of the text as well as “how the words and phrases would be understood by the voters in their normal and ordinary usage.” *Knab*, 166 N.E.3d at 1173. Finally, when the language is unclear or of doubtful meaning, “the court may review the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis.” *Id.* (citations omitted).

A. The text of Article I, § 10a of the Ohio Constitution and R.C. 2930.07 leave no room for interpretation and must be applied as written.

Article 1, § 10a(D) of the Ohio Constitution defines a victim as “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.” Any such victim is entitled to the ten enumerated rights in Article 1, § 10a of the Constitution.

Next, the term “victim” as used in R.C. 2930.07 is defined identically to that in the Constitution. R.C. 2930.01(H). Moreover, R.C. 2930.07 gives a “victim” certain rights based upon the constitutional protections afforded in Article 1, § 10a. Included is the requirement that, when requested by a victim, a public office “take measures to prevent the public disclosure of the name, address, or other identifying information of the victim or victim’s representative through the use of redaction.” R.C. 2930.07(C). The statute also provides that “all case documents related to the cases or matters specified by the victim maintained by the entity to whom the victim or victim’s representative submitted the request shall be redacted prior to public release pursuant to section 149.43 of the Revised Code to remove the name, address, or other identifying information of the victim.” R.C. 2930.07(D)(1)(a)(i).

In this context, there are arguably three elements required for “victim” status: 1) a person 2) against whom 3) the criminal offense or delinquent act is committed. The text

outlining those elements is plain and unambiguous, therefore leaving no room for interpretation, only application. *State ex rel. Savarese*, 74 Ohio St. 3d at 545.

Next, each element is easily met. First, Relator does not dispute that each victim-officer here is a “person” as used in Article I, § 10a of the Ohio Constitution. Relator’s Merit Brief at 10. Neither can it be disputed that the suspect that fired his weapon at the officers on Interstate 70 committed a “criminal offense or delinquent act” as doing so constitutes several serious felony criminal offenses. Finally, it is indisputable that such criminal acts were committed “against” the victim-officers: The suspect fired directly and proximately at those officers and in fact struck and grievously injured and nearly killed one of them. As all three “victim” elements are met, each involved officer is a “victim” entitled to the protections outlined in Article I, § 10a of the Ohio Constitution and R.C. 2930.07. Stated differently, withholding those officers’ identifying information “falls squarely” within an exception to the Public Records Act—specifically disclosure that is “prohibited by state or federal law.” R.C. 149.43(A)(1)(v); *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St. 3d 81, 84 (2008).

B. Even if the text in Article I, § 10a of the Ohio Constitution and R.C. 2930.07 was ambiguous, designating the officers here as “victims” furthers the purpose behind Marsy’s Law.

Even assuming arguendo that there is any uncertainty as to the meaning of the text in Article I, § 10a of the Ohio Constitution and R.C. 2930.07, there is no indication within the legislative history that the General Assembly intended to exclude police officers from protection. Specifically, none of the final analysis for H.B. 343 or S.B. 16 indicates that law enforcement would not be entitled to protection under the law. *See generally* Ohio Legislative Service Commission, Final Analysis of H.B. No. 343 (Apr. 6, 2023); Ohio Legislative Service Commission, Final Analysis of S.B. No. 16 (July 7, 2023). Under the omitted-case canon of construction, “[n]othing is to be added to what the text states or reasonably implies....” *United*

States v. Allstate Ins. Co., 620 F. Supp. 3d 674, 682 (E.D. Mich. 2022) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012)).

Indeed, in May of 2023, when the General Assembly was in the midst of amending Marsy’s Law, Columbus Assistant City Attorney/Police Legal Advisor Jeff Furbee, and CPD Assistant Chief of Police Gregory Bodker met with the primary sponsor to the amendment, Ohio State Representative Andrea White (R-Kettering), as well as her staff and various advocates, to express concerns about the impact Marsy’s law would have on law enforcement. Columbus Division of Police, Press Release – Marsy’s Law (July 13, 2023), *available at* <https://www.columbus.gov/WorkArea/DownloadAsset.aspx?id=2147530863>. Mr. Furbee and Chief Bodker explained to Rep. White that under the amended law police officers that had a crime committed against them would qualify as “victims.” *Id.* Those individuals also warned Rep. White that withholding victim-officers’ names involved in critical incidents (like a shooting, for example), would “likely cause concern for the community and the media.” *Id.* Despite receiving this feedback, the General Assembly failed to take steps to amend the language to exclude coverage for law enforcement, providing further evidence of the intent to cover police officers under such circumstances.

Beyond the legislative history, the purpose of Marsy’s Law—both the constitutional amendment and the statute—supports treating the officers here as “victims.” The express purpose of the 2017 constitutional amendment was to “secure for victims justice and due process throughout the criminal and juvenile justice systems.” Ohio Const. Art. 1 § 10a(A); *see also Knab*, 166 N.E.3d at 1170 (noting same). The catalyst for Marsy’s Law was the killing of a woman named Marsy by her ex-boyfriend. The deceased’s mother later encountered the killer on her way home from Marsy’s funeral after the killer had been released on bail, a fact not communicated to Marsy’s family. *Id.* Marsy’s family did not want other victims or their families to go without the constitutional protections afforded by Marsy’s Law. *Id.*

Specifically, the 2017 constitutional amendment provided the following rights:

- (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
- (2) 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;
- (3) 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;
- (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (5) upon request, to reasonable notice of any release or escape of the accused;
- (6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;
- (7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;
- (8) to proceedings free from unreasonable delay and a prompt conclusion of the case;
- (9) upon request, to confer with the attorney for the government; and
- (10) to be informed, in writing, of all rights enumerated in this section.

Ohio Const. Art. 1 § 10a(A).

The above rights, as well as the overarching purpose of Marsy's Law, apply with equal weight to the police officers here. First, and perhaps most obviously, a police officer shot or shot at by a violent suspect suffers the same physical, psychological, and emotional pain as a civilian. The same goes for that officer's family. In other words, a person's profession has no bearing on whether he or she suffers any less or more than another person. Accordingly, officers and their families are entitled to the same "justice and due process throughout the criminal...justice systems" as civilians. Ohio Const. Art. 1 § 10a(A).

To argue that the enumerated protections outlined above do not apply to police officers would be to argue that law enforcement that are shot or shot at are not entitled to, for example, "be treated with fairness and respect for" their "safety, dignity and privacy." Neither would a police officer that is shot and grievously injured be entitled to "reasonable protection from the accused or any person acting on behalf of the accused." Nor would that officer's

spouse, children, or parents—just like Marsy’s mother—be entitled to receive “reasonable notice of any release or escape of the accused.” It is highly doubtful a voter would have believed law enforcement would be carved out from such protections or that the mother of an officer killed in the line of duty would not be entitled to receive notice of the release of her child’s killer merely because of her son or daughter’s profession.⁴

C. Relator’s arguments fail to show that victim-officers are not entitled to protection under Marsy’s Law.

While it is true that officers already had some statutory protections related to the release of certain information under public records law prior to the 2017 amendment, those safeguards do not offer the same protections afforded by Marsy’s Law. For example, prior to Marsy’s law, an officer could shield his or her home address from disclosure under some circumstances—though not the officer’s identity. Restricting access to a victim-officer’s name and identifying information sidesteps (or drastically reduces) the possibility a home address is found. With the ubiquity of information on the internet, even if a government agency shields a home address, if someone has the officer’s name and identity, the address can more easily be found, making the victim-officer and his or her family a target for harassment or worse.

Likewise, the home addresses of a large class of professions are deemed not public records by the Public Records Act. R.C. 149.43(A)(1)(p). For example, the home addresses of an assistant prosecuting attorney, youth services employee, firefighter, EMT, state board of pharmacy employee, emergency service telecommunicator, forensic mental health provider, mental health evaluation provider, and regional psychiatric hospital employee, to name some, are all protected from disclosure. Yet it is highly doubtful voters believed that any of these

⁴ Indeed, while Relator has argued that the purpose behind Marsy’s Law does not apply to police, it has not even attempted to argue how or why its protections would not apply to the family of an officer killed in the line of duty.

classes of professions would be denied “victim” status by virtue of the home address disclosure restriction already in place.

Relator argues that because there are certain offenses pertaining directly to police—for example, resisting arrest or false allegation of peace officer misconduct—voters would not have understood such acts to constitute a “criminal offense” as used in Marsy’s Law. Yet there are also many such crimes pertaining directly to other professions. For instance, it is a felony offense to threaten an attorney because that attorney is involved in a criminal case. R.C. 2921.04. In fact, the Revised Code classifies that crime as an “Offense Against Justice and Public Administration.” R.C. Chapter 2921. But there are no indications voters intended to withhold “victim” status from attorneys that were assaulted or threatened merely because of their profession—even if Ohio law classifies that crime as a having been committed against “justice” and “public administration.” *Id.*

Relatedly, simply because a suspect has violated a criminal statute does not, on its own, make an arresting or witnessing officer a “victim” under Marsy’s Law. The crime or delinquent act must be committed “against” the officer. For instance, a suspect lying on his or her stomach with their arms locked under their body passively resisting by refusing to get handcuffed is quite likely not committing the act of resisting arrest “against” the arresting officer. If instead that same suspect is striking, kicking, shoving or otherwise assaulting the arresting officer to resist arrest then such offense meets the “against whom” element.

And in fact, in nearly every officer-citizen interaction, the officer will end the encounter without having become a “victim,” even in cases when an arrest is made, or force is used. For example, in 2022, Columbus police officers encountered 433,150 total incidents and calls for service.⁵ Arrests were made in only 3.19% of those cases and a tracked use of

⁵ Columbus Division of Police, *2022 Use of Force Analysis Year End Review (2023)*, p. 9, available at <https://www.columbus.gov/WorkArea/DownloadAsset.aspx?id=2147531791>.

force⁶ happened in only .06%.⁷ Of arrests, a tracked use of force occurred in only 3.2% of cases.⁸ Further, a use of force, on its own, does not mean the arresting officer is a “victim.” For instance, if an officer discharges pepper spray at group of individuals fighting one another, that officer would not be a “victim.” Neither would an officer that discharges a taser or K9 to stop a fleeing suspect. It is only in the exceedingly small number of cases in which a suspect commits a crime or delinquent act “against” the officer by, for example, using force against the officer, that the officer becomes a “victim.”

Relator argues that a police officer injured by a suspect’s criminal act would receive workers’ compensation. Generally, this is true. It is also generally and equally true that a bank teller pistol whipped during a robbery would receive workers’ compensation. So too would a construction worker deliberately struck by a road-raging motorist. Or a paramedic attacked and injured by a psychotic patient. Indeed, according to the Occupational Safety and Health Administration (OSHA), “Some 2 million American workers are victims of workplace violence each year. Workplace violence can strike anywhere, and no one is immune.” OSHA, *Workplace Violence Fact Sheet* (2002), available at <https://www.osha.gov/sites/default/files/publications/factsheet-workplace-violence.pdf>. Yet it is exceedingly doubtful the voters that approved the 2017 amendment believed or intended to exclude any “victim” that happened to be injured and victimized while on the job. There is no support for that position in the text of the Constitution or R.C. 2930.07 or in the express purpose underlying Marsy’s Law.

Relator argues that police officers agree to accept restrictions on their constitutional rights by virtue of their profession. The Supreme Court, however, has expressly held that

⁶ A “tracked” use of force constitutes a Level 2 use of force or higher. *Id.* at vi.

⁷ *Id.* at 9, 12.

⁸ *Id.* at 11.

“policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.” *Garrity v. N.J.*, 385 U.S. 493, 500 (1967). Indeed, police officers, like all public employees, are afforded rights guaranteed by the Ohio and U.S. Constitutions. *See, e.g., Gardner v. Broderick*, 392 U.S. 273, 277 (1968) (reiterating that police officers enjoy protection under the Fifth and Fourteenth Amendments); *State ex rel. Christian v. Barry*, 123 Ohio St. 458 (1931) (finding police officers enjoy the right under Ohio Const. Art. I, § 16 to access the courts); *Feliciano v. Cleveland*, 661 F. Supp. 578 (N.D. Ohio 1987) (holding that police officers enjoy protection under the Fourth Amendment and Section 14, Article 1 of the Ohio Constitution).

Relator further argues that according “victim” status to an officer “would provide state actors with rights enforceable against Ohio citizens.” Relator’s Merit Brief at 21. These arguments are misplaced for several reasons. First, a police officer that is the victim of a crime is no more a “state actor with rights enforceable against Ohio citizens” than is an Ohio Department of Transportation employee struck by a road-raging motorist, or a Columbus firefighter assaulted by a suspect, or a New Albany EMT shot by a suspect. All are “state actors” as defined by Relator; yet there are no signs voters believed they would be excluded from Marsy’s Law protection.

Next, a police officer, firefighter, ODOT employee, or EMT is not actually a “state actor” for purposes of Marsy’s Law—these are “persons” with rights protected by law. As discussed earlier, the home addresses of police officers, firefighters and EMTs are protected from disclosure under the Public Records Act. Relator argues that, “It is one thing to provide private citizens a right to prevent disclosure of information in public records as against other private citizens, but another entirely to provide state actors with that same right.” Yet those professions are all “state actors” as used by Relator, state actors that Relator would ostensibly extend “victim” protections under Marsy’s Law.

Beyond protecting the home addresses of numerous specific professions, the Public Records Act carves out “Restricted portions of a body-worn camera or dashboard camera recording” from the definition of a “public record.” R.C. 149.43(A)(1)(jj). That carve-out restricts a citizen’s right to request and review a large swath of recordings made by a police officer that would otherwise be released as a public record. R.C. 149.43(A)(17). So too are “confidential law enforcement investigatory records” excluded from the definition of a “public record.” R.C. 149.43(A)(1)(h). This also restricts the public’s right to access a large category of documents that would otherwise be available under the Public Records Act. R.C. 149.43(A)(2). But Relator does not attack these provisions as state actors wielding a right against an Ohio citizen.

For decades, police officers, much like firefighters and other public employees in Ohio, have enjoyed collective bargaining rights under Ohio law. *See generally* R.C. Chapter 4117. Collective bargaining allows public employees to gain rights, benefits, and privileges that far exceed what is provided by statute in the absence of a collective bargaining agreement. For example, under the collective bargaining agreement between the City of Cleveland and the Cleveland Police Patrolmen’s Association, if a citizen files a complaint more than six months after the incident giving rise to the complaint, then the focus officer cannot be subject to discipline.⁹ Neither are these protections attacked as state actors using a right against a private citizen.

Likewise, as this Court must “presume that the voters were aware of the laws in existence at the time they voted to adopt the constitutional amendment,” then the Marsy’s Law voters would have understood that public employment does not deprive a person of

⁹ Collective Bargaining Agreement Between the City of Cleveland and the Cleveland Police Patrolmen’s Association, § 11(m) (April 1, 2022 – March 31, 2025), *available at* <https://dam.assets.ohio.gov/image/upload/serb.ohio.gov/PDF/Contracts/2021/21-MED-12-1588.pdf>.

statutory and constitutional protections and, if anything, several statutes provide certain public employees additional protections like those cited above. *State v. Yerkey*, 171 Ohio St. 3d 367, 370 (2022) (citations omitted).

In this sense, the rights being afforded to persons working as public employees contrast sharply with the facts of *City of Centerville*, relied on by Relator to argue against extending police officers protection under Marsy's Law. In that case, this Court ruled that a municipal corporation cannot be deemed a "victim" for purposes of restitution under Marsy's Law. *City of Centerville*, 162 Ohio St. 3d at 632. Accordingly, the City of Centerville could not seek restitution from a defendant that had been charged after making a false complaint that required a police response. *Id.* at 624.

But the facts in *City of Centerville* are different from those here in at least three appreciable ways. First and most obviously, as Relator has conceded, the victims here are persons, not municipal corporations. That the victims here work in public service does not change that fact. Next, in that case there was a factual dispute whether the City of Centerville had even suffered a loss for which restitution could issue since the officers that responded were already on duty and being paid their wages. Here, in contrast, there is no question that a criminal offense was committed and was done so "against" the victim-officers. And finally, the victims here are not seeking restitution; they merely want to enjoy the same privacy and due process rights afforded to any other victim.

For all these reasons, a finding that police officers shot and shot at by a suspect are entitled to protections under Marsy's Law furthers the intent behind the law. Likewise, voters would have understood that a police officer shot or shot at by a suspect would enjoy such protections.

Proposition of Law No. 2
Protecting a victim-officer’s identity under Marsy’s Law easily passes muster under the rational-basis test and is therefore constitutional.

The right to inspect and request copies of public records is doubtless an important right. Public records “foster openness and...encourage the free flow of information *where it is not prohibited by law.*” *State ex rel. Miami Student v. Miami Univ.*, 79 Ohio St. 3d 168, 172 (1997) (emphasis added). Public records are also “one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance.” *Kish v. City of Akron*, 109 Ohio St. 3d 162, 166 (2006) (citations omitted).

The right to inspect public records is also longstanding and predates R.C. 149.43. As stated by former Chief Justice Moyer,

The common-law right to inspect government documents has been recognized in Ohio since the earliest reported court decisions. As there was no statutory provision to the contrary (and no constitutional mandate), the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or unreasonably interfere with the duties of the public official having custody of the record. These early Ohio cases, like those of other jurisdictions, recognized that public records were available for inspection regardless of whether an individual had a private interest in the record.

Moyer, *Interpreting Ohio’s Sunshine Laws: A Judicial Perspective*, 59 N.Y.U. Ann. Surv. Am. Law 247, 248 (2003).

But as alluded to by former Chief Justice Moyer, the General Assembly is empowered to curtail the right to inspect public records. Indeed, this Court has repeatedly noted that the General Assembly is “the ultimate arbiter of policy considerations relevant to public-records laws....” *Kish*, 109 Ohio St. 3d at 173 (citing *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126, 130 (2002)). It “is for the legislature to weigh and balance the competing public policy considerations between the public’s right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by

disclosure.” *Kish* at 173 (citation and internal quotation marks omitted). One of the earliest Ohio courts to recognize the common law right to inspect public records also expressly noted that the right could be “forbidden by a constitution or statute.” *Wells v. Lewis*, 12 Ohio Dec. 170, 176 (1901).¹⁰ Finally, as noted by Relator, this Court has never found that Ohio’s Constitution limits the General Assembly’s right to restrict the release of public records.

In reviewing the constitutionality of Marsy’s Law, the relevant standard of review is rational basis. That standard is used in the absence of a fundamental right or suspect classification. *State v. Mole*, 149 Ohio St. 3d 215, 222 (2016). Under the rational basis test, a statute will be upheld “if it is rationally related to a legitimate governmental purpose.” *Id.* (citations omitted). More specifically, the rational basis test entails a two-step analysis: A court “must first identify a valid state interest. Second, [the court] must determine whether the method or means by which the state has chosen to advance that interest is rational.” *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 274 (2005) (citation omitted). “[S]tatutes are presumed to be constitutional and...courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.” *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 59 (2009) (citation omitted). Finally, “the challenger to the validity of the statute must negate every conceivable basis which might support it.” *Lyons v. Limbach*, 40 Ohio St. 3d 92, 94 (1988) (citation omitted).

Here, Marsy’s Law unquestionably has a valid state interest—namely, “secur[ing] for victims justice and due process throughout the criminal and juvenile justice systems.” Ohio Const. Art. 1 § 10a(A). Protecting victims and enshrining their right to be treated fairly is not only valid but substantial and perhaps even compelling. Likewise, the means chosen by

¹⁰ This important caveat makes Relator’s reliance on *Wells* misplaced.

the General Assembly are rational and substantially related to achieving that interest.¹¹ Specifically, the enumerated rights given to victims of crime are all directly related to the stated goal of ensuring victims receive justice and due process.

The statutory right for a victim to request redaction of his or her name, home address, or identifying information—the right at issue here—is also wholly tied to the interest of protecting victims. Specifically, among other things, that protection helps ensure that a victim can be free from harassment from any third party merely because they were the victim of a crime or delinquent act. Of course, Marsy’s Law does not compel a victim to request redaction of his or her home address, name or identifying information; the law merely provides the option to do so. R.C. 2930.07(D)(1)(a)(i).

As applied here, the right for a victim-officer to request redaction also easily survives rational basis. First, a police officer is just as entitled to justice and due process as is a victim in any other public or private profession. *See, e.g., Garrity*, 385 U.S. at 500. In other words, the state interest remains valid as applied to police officers. So too are the means of achieving that interest rational.

Relator argues that, “Knowing the identities of police officers involved in a use of force incident allows a newspaper, like Relator, to investigate an officer’s trainings, prior use of force incidents, disciplinary history, public statements, and other information that informs the public debate about issues such as crime prevention, police reform, and civil rights.” Relator’s Merit Brief at 27. This argument fails for several reasons. First and most obviously, Relator’s framing of this issue turns it on its head: The victims’ rights created by Marsy’s Law

¹¹ The facts presented do not warrant a review under intermediate scrutiny. That level of review is typically limited to Equal Protection challenges and particular First and Second Amendment issues. But even under that standard Marsy’s Law still passes muster. Under intermediate scrutiny, “a statute is constitutional so long as it furthers an important governmental interest and does so by means that are substantially related to that interest.” *State v. Weber*, 163 Ohio St. 3d 125, 133 (2020) (citation omitted).

are expressly enshrined in Ohio's Constitution; whereas the right to inspect public records is a statutory right, one that can be curtailed by the General Assembly. There is no support to find that a constitutional right must give way to a statutory right.

Next, Relator's argument fails because the General Assembly chose means that are rationally and substantially related to achieving due process and justice for a victim-officer. The redaction provision affects only an officer's identity and home address. In other words, every other fact about the officer and the officer's use of force not otherwise restricted by law is fair game for release, dissection, and debate. Specifically, Marsy's Law does not restrict the release of the victim-officers' prior trainings, uses of force, and discipline—that information must simply be released with the victim-officers' identifying information redacted. Puzzlingly, while Relator argues that it wants access to that information, it did not request such records here. *See* Joint Exhibits D, E to Agreed Statement of Facts (outlining that Relator requested only footage, 911 audio, and use of force reports from the incident).

Likewise, the City of Columbus released four redacted versions of body worn camera and cruiser footage to Relator regarding the I-70 shooting.¹² Relator has also published reporting on the suspects' numerous criminal actions and the victim-officers' uses of force from the incident.¹³ Relator was given access to information and footage to inform its readers and the public writ large. In turn, the public is free to learn about the incident, to comment about the matter, and make known their concerns, if any, to politicians and Columbus leaders.

¹² Mark Ferencik, THE COLUMBUS DISPATCH, *Columbus police release redacted videos of July I-70 pursuit, which stop short of shootout* (last updated September 13, 2023), available at <https://www.dispatch.com/story/news/local/2023/09/12/columbus-police-release-videos-of-interstate-70-pursuit-that-are-redacted-and-dont-show-shootout/70836310007/>.

¹³ Bethany Bruner, THE COLUMBUS DISPATCH, *Columbus police officer shot after robberies, shootout near I-70: Here's what we know* (last updated July 10, 2023), available at <https://www.dispatch.com/story/news/local/2023/07/07/columbus-police-officer-what-we-know-now-ohio-bank-robbery-shootout-porsche-whitehall/70390027007/>.

Even if Relator had requested records about the victim-officers' information, it has not shown how knowing the victim-officers' identities would inform it or the public whether the officers' actions here were consistent with law and policy. When a suspect points his weapon at officers and fires, those officers—no matter their names or histories—have a right to fire back and defend their lives. And that is exactly what happened here.

Relator's concern regarding its ability to investigate officers' uses of force is misplaced for another reason: An independent state law enforcement agency, the Ohio Bureau of Criminal Investigation (BCI), investigates all CPD officer-involved shootings. The same is true of most large law enforcement agencies in Ohio. The officer-involved shooting underlying this action was no exception.

After BCI conducts its investigation, its findings are turned over to the county prosecutor. In Franklin County, for example, every death of a suspect by an officer is automatically then presented to a grand jury to determine, based on BCI's independent investigation, whether charges are warranted. The officers' actions here will therefore not only be independently investigated, but also reviewed by the prosecutor's office and presented to a grand jury of citizens. If the grand jury clears the officers of all wrongdoing, BCI publishes its complete investigation online, where it is available to the public.¹⁴ If charges are brought, then the investigation will not be released to the public until the criminal matter against the officer is resolved. In either scenario, however, the investigation will ultimately be available to the public, allowing newsgathering agencies such as Relator to expand on any previous reporting on the incident.

¹⁴ See generally Ohio Bureau of Criminal Investigation, *Investigative documents related to fatal officer-involved shooting cases*, available at <https://www.ohioattorneygeneral.gov/SpecialPages/Investigative-Documents>.

While officers act consistent with policy and law in nearly every officer-involved shooting, in the exceedingly rare case when an officer does not, Marsy's Law addresses that issue. Specifically, if a prosecutor or grand jury determines that charges are warranted, then under Marsy's Law an officer goes from "victim" to "accused" and loses all protection. Ohio Const. Art. 1 § 10a(A). In such a case, Relator would have access to the officer's identity and unredacted records once charges are brought.

For all these reasons, Marsy's Law easily passes muster under the rational basis test and is therefore constitutional.

V. Conclusion

For all the reasons set forth above, amicus curiae FOP respectfully urges this Court to deny Relator's application for a Writ of Mandamus.

Respectfully submitted,

s/ Lathan J. Lipperman

Lathan J. Lipperman (0095523)
Harshman, Wannemacher, Tipton & Lipperman
4683 Winterset Drive
Columbus, Ohio 43220
Telephone: 614.573.6944
Fax: 614.573.6948
Email: lipperman@hcands.com

*Counsel for Amicus Curiae,
Fraternal Order of Police, Capital City Lodge #9*

s/ Gwen Callender

Gwen Callender (0055237)
Fraternal Order of Police of Ohio, Inc.
222 East Town Street
Columbus, Ohio 43215
Telephone: 614.224.5700
Fax: 614.224.5775
Email: gcallender@fopohio.org

*Counsel for Amicus Curiae,
Fraternal Order of Police of Ohio Inc.*

Certificate of Service

I hereby certify that this Brief of Amici Curiae Fraternal Order of Police, Capital City Lodge #9 and Fraternal Order of Police of Ohio Inc. In Support of Respondent Columbus Division of Police was filed with the Court and sent by electronical mail to the following this 22rd day of April, 2024:

John C. Greiner (0005551)
*Counsel of Record
Darren W. Ford (0096449)
Email: jgreiner@ficlaw.com
dford@ficlaw.com

Counsel for Relator, The Columbus Dispatch

Zachary M. Klein (0078222)
Columbus City Attorney

Aaron D. Epstein* (0063286)
*Counsel of Record
Joshua P. Monroe (0095538)
Email: adeptstein@columbus.gov
jpmunroe@columbus.gov

*Counsel for Respondent,
The City of Columbus,
Division of Police*

By: /s/ Lathan Lipperman
Lathan Lipperman (0095523)