IN THE SUPREME COURT OF FLORIDA

CITY OF TALLAHASSEE, FLORIDA, *et al.*,

Petitioners,

v.

FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., *et al.*,

Respondents.

Case No. SC21-651

L.T. Case Nos. 1D20-2193
2020-CA-1011

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

CASSANDRA K. JACKSON
Florida Bar No. 650757
CITY ATTORNEY'S OFFICE
300 S. Adams Street, Box A-5
Tallahassee, FL 32301
Tel: (850) 891-8554
cassandra.jackson@talgov.com

PHILIP J. PADOVANO
Florida Bar No. 157473
JOSEPH T. EAGLETON
Florida Bar No. 98492
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass St., Ste. 200
Tampa, FL 33606
Tel: (813) 223-4300
ppadovano@bhappeals.com
jeagleton@bhappeals.com
Secondary:
eservice@bhappeals.com

Counsel for Petitioner, the City of Tallahassee, Florida

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

STATEMENT OF THE CASE AND FACTS

Overview

In two separate incidents, police officers employed by the City of Tallahassee used deadly force in response to threats they encountered in the line of duty. (R. 83-89). When tragic incidents like this occur, the City, as the custodian of municipal police records in Tallahassee, routinely receives requests under Florida's broad public records law for information about the incidents. The City received several such records requests here. (R. 59-60, 190, 331-36).

Through public-policy balancing undertaken by the Florida Legislature, Florida's public records law exempts from disclosure some details in police records, such as information that is part of an active criminal investigation. *See* § 119.071, Fla. Stat. (2021). But the public records law does not exempt the names of the police officers involved in the incidents. *See* §§ 119.071, 119.105, Fla. Stat. (2021). Historically, then, it has been established practice that the City has a legal duty to disclose the officers' names. (R. 192). Established, that is, until this case.

Following the deadly shootings, the officers and their union, Respondent Florida Police Benevolent Association, objected to the

City's intention to release public records that included the officers' names. (R. 13, 89-92). The basis for their objection? A 2018 state constitutional amendment known as Marsy's Law, which granted certain rights to "crime victims." (R. 10, 77-78, 92-93).

The officers were not "victims" in a traditional sense—they deployed force against suspects in an official law enforcement capacity. (R. 84-89). Even still, they said they were victims of the suspects' threats. (R. 73, 85, 88). They then used their self-declared victim status to assert a "right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim," Art. I, § 16(b)(5), Fla. Const.—a right, the officers said, that included the right to keep their identities secret. (R. 92-93). These officers' invocation of Marsy's Law is representative of how other police officers and state agencies have since sought anonymity under Marsy's Law for government actions. *See, e.g.*, Juris. Br. of News Media Coalition at pp. 8-10 & nn.4-6, *City of Tallahassee, Fla. v. Fla. Police Benevolent Ass'n*, No. SC21-651 (Fla. June 14, 2021) (collecting examples).

No criminal prosecution was ever launched for the officers to invoke Marsy's Law; the suspects were killed in the police encounters. (R. 85, 88, 406). Without an active judicial proceeding within which to seek redress, the officers and their union filed a declaratory judgment lawsuit to prevent the City from publicly disclosing the officers' names. (R. 72). Considering the issue of first impression—an issue that has divided law enforcement agencies and municipalities across the state—the trial court decided that the Tallahassee police officers were not victims, were not protected by Marsy's Law, could not invoke Marsy's Law outside a criminal proceeding, and had no right to remain anonymous. (R. 351-55).

The First District Court of Appeal reversed. *Fla. Police Benevolent Ass'n v. City of Tallahassee*, 314 So. 3d 796 (Fla. 1st DCA 2021). Purporting to rely on the plain text of the Florida Constitution, but in fact deviating far from it, the First District held that publicly employed police officers involved in on-duty shootings have a constitutional right to remain anonymous. *Id.* at 802-03. For the reasons that follow, the City respectfully disagrees with the First District's analysis and asks this Court to quash the First District's decision. *See infra* at pp. 17-41.

The Legal Framework

In 2018, Florida voters approved a state constitutional amendment granting a list of rights to "crime victims." (R. 75). The amendment was modeled on similar proposals in other states—it is the brainchild of a California billionaire—and is known as Marsy's Law, after a woman who was murdered by her ex-boyfriend. *See* Beth Schwartzapfel, *The Billionaire's Crusade*, The Marshall Project, https://www.themarshallproject.org/2018/05/22/nicholas-law (May 22, 2018). When this Court approved Marsy's Law for placement on the ballot, it commented that the text, and specifically the definition of "victim," might have "ambiguous legal effect." *Dep't of State v. Hollander*, 256 So. 3d 1300, 1311 (Fla. 2018). But that did not stop voters from adopting it.

Marsy's Law was codified in article I, section 16, of the Florida Constitution. (R. 75); *see Fla. Police Benevolent Ass'n*, 314 So. 3d at 797 n.1. Giving "more specificity" to the victims' rights that were previously added to the constitution in 1988, *Hollander*, 256 So. 3d at 1309, Marsy's Law is formally entitled "Rights of accused and of victims." Art. I, § 16, Fla. Const. It has the express textual intent to:

> [P]reserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents.

Id. § 16(b).

Marsy's Law defines a "victim" as:

> [A] person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed.

Id. § 16(e). "The term 'victim' does not include the accused." *Id.* Temporally, the rights provided by Marsy's Law begin at the time of victimization. *Id.* § 16(b).

Consistent with its stated purpose, Marsy's Law provides victims a panoply of legal protections, from the right to be treated with fairness and respect, to the right to be reasonably protected from the accused, to the right to notice and an opportunity to participate in the judicial process. *See id.* §§ 16(b)(1)-(10). The ability to participate and to be kept informed of ongoing proceedings—the textual intent—was also the impetus for Marsy's Law. *See What is Marsy's Law?*, Marsy's Law for All,

https://www.marsyslaw.us/what_is_marsys_law (last visited Mar. 8, 2022).

With few exceptions, the rights set forth in Marsy's Law can be exercised and protected only during a criminal proceeding. If a victim's rights are not honored, Marsy's Law provides that the method of enforcement is to seek relief in the criminal case against the accused. Art. I, § 16(c), Fla. Const. Court rules that have implemented Marsy's Law provide a similar mechanism. *See*, *e.g.*, Fla. R. App. P. 9.143 ("A victim seeking to invoke a right under article I, section 16, of the Florida Constitution may file a motion in the court in which the matter is pending.").

As part of Marsy's Law, victims are afforded the constitutional right "to prevent disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim." Art. I, § 16(b)(5), Fla. Const. Marsy's Law does not say that a victim's "name" or "identity" is confidential, nor does it say that victims have a right to remain anonymous. This contrasts with other areas of Florida law that explicitly shield the identity of individuals, including crime victims, when that is the intent. *See*, *e.g.*, § 119.071(2)(f), Fla.

Stat. (2021) ("Any information revealing the identity of a confidential informant or a confidential source is exempt [from public records disclosure]."); § 119.071(2)(h), Fla. Stat. (2021) (providing for confidential treatment of "[a]ny information that reveals the identity of the victim of the crime of child abuse" or that "reveals the identity of a person under the age of 18 who is the victim of the crime of human trafficking" or that "may reveal the identity of a person who is a victim of any sexual offense"); § 119.071(2)(j), Fla. Stat. (2021) (exempting some agencies from disclosing some records that "reveal[] the identity . . . of the victim of a crime and identif[y] that person as the victim of a crime").

Marsy's Law was adopted against the backdrop of Florida's longstanding, constitutionally enshrined right of access to public records. In that vein, the Florida Constitution provides:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

Art. I, § 24(a), Fla. Const.

The Legislature has implemented article I, section 24(a), through the public records law, ch. 119, Fla. Stat., which provides that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person." § 119.01, Fla. Stat. (2021). The public records law promotes the public policies of transparency and accountability in government. *See Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 124 (Fla. 2016) (explaining that the right of access to public records is "a cornerstone of our political culture," with the purpose of "allow[ing] Florida's citizens to discover the actions of their government" (internal quotations omitted)); *Forsberg v. Housing Auth. of City of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) (Overton, J., specially concurring in result) ("The purpose of the Public Records Act is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.").

Under the public records law, "[p]olice reports are public records except as otherwise made exempt or confidential." § 119.105, Fla. Stat. Exemptions are governed by section 119.071, Florida Statutes. That law exempts from disclosure the home

addresses, telephone numbers, social security numbers, dates of birth, and photographs of active and former police officers and other law enforcement personnel. § 119.071(4)(d), Fla. Stat.; *see also* § 914.15, Fla. Stat. (2021) (offering additional protection for personal information of law enforcement officers and their families involved in criminal proceedings). The public records law does not exempt an officer's name or identity from disclosure.

The Factual Backdrop

This case tests the legal principles recited above. The relevant facts are straightforward and mostly undisputed. (R. 183-87, 352, 387, 390, 403-04). Two City of Tallahassee police officers were involved in separate deadly shootings. (R. 72-73, 351). The shootings took place while the officers were actively on duty, responding to calls for service, and their firearms were used in the course and scope of their roles as police officers employed by the City. (R. 84-89, 387).

In both instances, the officers said that the civilian victim of the shooting was the aggressor. (R. 84-89, 352). The first officer was responding to a report of an aggravated battery when he fatally shot a person brandishing a knife at him in a threatening manner. (R. 84-

85, 352). The second officer was responding to a report of a stabbing when he fatally shot a person pointing a gun at him. (R. 88-89, 352).

Following the shootings, the City received several requests from the public, including the news media, for records related to the incidents. (R. 59, 190, 331). The two officers, led by their union, protested the City's stated intention to comply with the public records law and to release records that included their names. (R. 72, 96). In the union's view, the two officers were victims of aggravated assaults with a deadly weapon. (R. 85, 88, 352). Thus, according to the union, the officers were protected by Marsy's Law. (R. 92-93).

All along, the City has accepted that the officers were reasonably in fear for their safety and acted accordingly. (R. 183-87, 403-04). But the City did not agree that this made the officers victims under Marsy's Law, or that Marsy's Law required the City to withhold the officers' names. (R. 194-96, 351-52, 406-13). Indeed, that the officers acted appropriately is all the more reason the City has a vested interest in being transparent about the incidents. The City also has a legal duty, as a records custodian, to strictly adhere to the public records law and to redact only information that is specifically

exempt from disclosure. *See* §§ 119.01(1), 119.07(1)(d), Fla. Stat.; *Lee*, 189 So. 3d at 126-27.

The Litigation

To prevent the City from releasing the records, the officers and their union petitioned the circuit court for declaratory judgment, mandamus, and injunctive relief. (R. 72). Their petition sought a declaration that the officers have a "constitutional right of confidentiality" and asked the trial court to enter an order enjoining the City from releasing "any personal information that could be used to identify or locate" the officers. (R. 92-93).

The City agreed to litigate the case with the officers' identities redacted, to accept the relevant facts as pleaded in the petition, and to present the legal issue on the applicability of Marsy's Law to the trial court for resolution. (R. 179, 183-87, 403-04). As the City noted, it would benefit from the judiciary's guidance on this recurring issue of public concern. (R. 60, 412). The City argued that Marsy's Law does not apply to police officers acting in the course and scope of their duties and that the officers' names must be disclosed under the public records law. (R. 179, 190-91, 404-13). A coalition of

media organizations intervened and presented their own arguments in support of disclosure. (R. 67, 177, 198, 413-25).

The trial court held a non-evidentiary hearing (the union did not ask to offer any evidence) and then issued an order denying the petition. (R. 351, 384). The trial court agreed with the City, finding that Marsy's Law does not apply to police officers acting in their official capacities. (R. 353). The court noted that the "would-be accuseds" here—the victims of the police shootings—are dead, and that the officers were not seeking protection from those persons but from "possible retribution for their on-duty actions." (R. 353). According to the trial court, "[t]his type of protection is outside the scope of Marsy's Law and is inconsistent with the express purpose and language of the amendment." (R. 353-54).

Stating that the union's interpretation of Marsy's Law would shield police action from public scrutiny, the trial court decided that disclosure of an officer's name is essential to the public's constitutional right of access to public records, which includes the right to meaningful review of police conduct. (R. 354-55). The trial court further held that victims' names are not specifically protected or even mentioned in Marsy's Law, and that the Legislature, through

the public records law, has already made the public-policy determinations about what information must be protected for officer safety and what information is important to disclose for accountability and transparency in government. (R. 355).

The officers and their union appealed. (R. 356). In reversing the trial court's order, the First District stated that "[n]othing in article I, section 16 excludes law enforcement officers . . . from the protections granted crime victims," and "no language in either article I, section 16 or article I, section 24(a) suggests that public records related to government employees ordinarily subject to disclosure are not entitled to confidential treatment under article I, section 16 when a government employee becomes a crime victim." *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801-02. The First District also rejected the City's argument, embraced by the trial court, that Marsy's Law requires a trigger, holding that "a criminal prosecution need not begin before a victim may assert his rights" under Marsy's Law. *Id.* at 803-04; *see* (DCA R. 357-62).

Finally, citing statutes that specifically exempt "identities" from disclosure, the First District decided that Marsy's Law—which includes no such language—protects "records that could reveal the

victim's identity" because, in the First District's view, "a crime victim's name is the key that opens the door to locating the victim." *Fla. Police Benevolent Ass'n*, 314 So. 3d at 804. Although the City pointed it out, the First District sidestepped the union's failure to present any evidence that disclosure of these officers' names would lead to harm. *See id.* at 799 (merely noting that the City "did not object to [the union's] assertion that the officers had a well-founded fear that violence against their persons was imminent"); (DCA R. 363-65).

This Court accepted jurisdiction to address whether Marsy's Law provides a constitutional right of anonymity to police officers for on-duty actions. *City of Tallahassee v. Fla. Police Benevolent Ass'n*, No. SC21-651, 2021 WL 6014966 (Fla. Sup. Ct. order filed Dec. 21, 2021).

SUMMARY OF THE ARGUMENT

When Florida voters decided to strengthen the rights of crime victims to participate in the criminal justice system, they never could have imagined this case. Marsy's Law was intended to put victims on equal footing with defendants—to ensure that their voices were heard, and their interests considered, at important inflection points in criminal proceedings. This was a laudable goal, and one Marsy's Law now furthers as part of the Florida Constitution.

Marsy's Law was not designed to create a secret state police force. Yet that is where the First District's decision leaves us. Police officers are dedicated public servants and honorable representatives of the government. Led by their union, though, a few officers are invoking Marsy's Law to prevent the public from learning about their on-duty actions. As now authorized by the First District, they are transforming Marsy's Law into a cloak of anonymity for police conduct to the detriment of the public these officers serve.

The First District's decision finds no support in the language, structure, context, or stated purpose of Marsy's Law. No reasonable voter when Marsy's Law was adopted would have understood it to apply to police officers who are threatened while on duty. Nor would

they have understood it to apply, as the First District applied it here, without some formal criminal process. Perhaps most of all, they would not have understood it to grant police officers anonymity, given that anonymity is mentioned nowhere in it. This Court should quash the First District's decision.

ARGUMENT

Standard of Review

The central issue in this case is whether a police officer who is threatened with harm while on duty is a "crime victim" under the Florida Constitution. That is a legal question this Court reviews de novo. *See Israel v. DeSantis*, 269 So. 3d 491, 494 (Fla. 2019).

The First District's decision presents two additional interpretive issues, as well: (1) whether there must be a triggering event—the commencement of a criminal proceeding—for Marsy's Law to apply; and (2) whether Marsy's Law grants victims a right to remain anonymous. These issues are similarly subject to de novo review. *See Graham v. Haridopolos*, 108 So. 3d 597, 603 (Fla. 2013).

We address each issue in turn.

I. The First District erred in holding that on-duty police officers threatened with harm in the course and scope of duty are entitled to victim status under Marsy's Law.

Constitutional interpretation focuses mainly on text: "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Advisory Op. to Gov. re Implementation of Amd. 4*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). "The goal of constitutional interpretation is to arrive at the fair meaning of the constitutional text." *Thompson v. DeSantis*, 301 So. 3d 180, 187 (Fla. 2020). This is an objective analysis that asks "how a reasonable member of the public would have understood the text at the time of its enactment." *Id.*; *see also* Neil Gorsuch, *A Republic, If You Can Keep It* 131 (2019) (noting that a proper textual analysis "tasks judges with discerning (only) what an ordinary English speaker familiar with the law's usages would have understood the [] text to mean at the time of its enactment").

This Court's recent cases teach that the constitution must be interpreted "reasonabl[y]," in a manner that "honors the whole text" and "furthers rather than obstructs the document's purpose."

Thompson, 301 So. 3d at 187 (quoting Scalia & Garner, *Reading Law* at 63). "Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Advisory Op. re Amd. 4*, 288 So. 3d at 1078 (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833)).

The relevant constitutional text here reads:

> As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term "victim" includes the victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term "victim" does not include the accused.

Art. I, § 16(e), Fla. Const. Thus, the issue for this Court to decide is whether a police officer who is threatened in the scope of performing an official police action is "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." *Id.*

The First District skirted this issue entirely. Its opinion did not even cite the constitutional text. Instead, the First District simply assumed that police officers could be victims because "[n]othing in article I, section 16 excludes" them. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801. The First District approached the analysis in a backwards manner.

We begin, as the First District should have, with the text. Marsy's Law applies to "persons." That may, to a strict constructionist, sound simple. A police officer is, literally, a person. But Florida does not follow strict constructionism: "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation: Federal Courts & the Law* 23 (1997).

And as it turns out, the word "person" is not always defined in every circumstance to include every human being and to exclude every other being. Sometimes, "person" means "individual"; other times, it means "a living human." *Person*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020); *Person*, American Heritage Dictionary of the English Language, https://www.ahdictionary.com

/word/search.html?q=person. It can even include non-humans, such as an organization or entity "deemed or construed to be governed by a particular law" or "recognized by law as the subject of rights and duties." *Person*, American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=person; *Person*, Merriam-Webster, https://www.merriam-webster.com/dictionary/person.

In other words, context matters. *See* Scalia & Garner, *Reading Law* at 56 (explaining that "words are given meaning by their context" and that "[c]ontext is a primary determinant of meaning"); *see also FCC v. AT&T, Inc.*, 562 U.S. 397, 404 (2011) (examining how the definition of the word 'personal' "turns on context"). For example, since Blackstone, corporations have famously been treated as "persons" in some contexts. *See*, *e.g.*, *Monell v. Dep't of Social Serv. of City of N.Y.*, 436 U.S. 658, 687 (1978); Carson Holloway, *Are Corporations People?*, Nat'l Affairs (Fall 2015). By contrast, in other contexts, the government has *not* been treated as a "person." As Justice Scalia once explained, there is a "longstanding interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens* 529 U.S. 765, 780

(2000); *see South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (holding that the word "person" in the Fifth Amendment does not encompass the states).

This presumption applies to police officers. When a police officer engages with the public in the line of duty, the officer is a representative of the government. That's why police officers have powers and constraints ordinary citizens do not. *See*, *e.g.*, § 943.10, Fla. Stat. (2021) (making clear that police officers have the responsibility to prevent and detect crime and to enforce state law, and, to carry out this responsibility, are "vested with authority to bear arms and make arrests"). With reasonable suspicion, police officers can stop someone and ask for identification. *See Brown v. Texas*, 443 U.S. 47, 53 (1979); § 901.151, Fla. Stat. (2021). With probable cause, they can detain someone and place them under arrest. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964). With justification, they can use force. *See* §§ 776.05-07, Fla. Stat. (2021). But police officers must also be aware of *Miranda* rights, and Fourth Amendment rights, and other limits our constitution places on the authority of the state. *See, e.g.*, Amends. IV & V, U.S. Const.; Art. I, § 12, Fla. Const.

Being a police officer is a dangerous and noble job. Officers are exposed to difficult situations daily as part of their responsibility to protect public safety. But as Volusia County Sheriff Michael Chitwood has said, police officers "are fully aware before and after they become deputies that, although relatively rare, they may face circumstances that dictate that they use deadly force." Volusia Sheriff's Mot. for Leave to File Amicus Curiae Br. at 3, *City of Tallahassee, Fla. v. Fla. Police Benevolent Ass'n*, No. SC21-651 (Fla. Feb. 14, 2022).

And with great power comes great responsibility. *See* Quote/Counterquote, *The Evolution of the Pithy Proverb*, http://www.quotecounterquote.com/2012/07/with-great-power-comes-great.html (July 5, 2012). In the words of Pinellas County Sheriff Bob Gualtieri, police officers undertake "public duties" and are therefore "accountable to the public they serve." Mot. for Leave to File Amicus Curiae Br. at 1, 3, *City of Tallahassee, Fla. v. Fla. Police Benevolent Ass'n*, No. SC21-651 (Fla. Feb. 8, 2022); *see also* Volusia Sheriff's Mot. for Leave to File Amicus Curiae Br. at 4 *City of Tallahassee, Fla. v. Fla. Police Benevolent Ass'n*, No. SC21-651 (Fla. Feb. 14, 2022) ("[T]ransparency and accountability are imperative in

rebuilding public trust in law enforcement . . . ."). To put it in definitional terms, police officers are not "individuals" when out on the job; they are "the sovereign."

The law understands the unique role police officers play in our society. Decades ago, the United States Supreme Court ruled that police officers are not "persons" when sued in their official capacity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983."); *see also* Op. Att'y Gen. Fla. 89-62 (1989) (concluding that police officers are not "persons" protected by the Good Samaritan Law). This ruling follows the well-accepted principle that government employees acting in an official capacity assume the identity of the government that employs them. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991); *see also Chamberlain v. Lishansky*, 899 F. Supp. 108, 110 (N.D.N.Y. 1995) (immunizing from suit two members of state police as "arms of the State"). Justice Scalia and Bryan Garner explicitly recognize this canon in their governing treatise. *See Reading Law* at 273-77.

Indeed, in this very case, the officers benefited from a provision in the Florida appellate rules that offers a special stay pending appeal

to state entities. *See* Fla. R. App. P. 9.310; (R. 378). In so doing, they relied on Florida case law that does not differentiate between the government entity itself and the officers acting in an official capacity. (R. 371-72 (citing *City of Delray Beach v. White*, 616 So. 2d 602, 602 (Fla. 4th DCA 1993))). Their status as state actors performing official state actions is the very reason police officers are shielded from liability for conduct that would be criminalized or civilly punished if committed by a regular "person." *See*, *e.g.*, *Esposito v. Williamson*, 854 So. 2d 694, 695 (Fla. 2d DCA 2003); *Montague v. Cooley*, 735 So. 2d 511, 512 (Fla. 2d DCA 1999).

For many years, the Florida Legislature has similarly recognized that police officers are different, singling them out for special benefits that do not apply to ordinary people. *See*, *e.g.*, §§ 112.19, 440.091, Fla. Stat. (2021). A good analogue concerns restitution benefits provided under Florida's crimes compensation law. There, police officers are listed as a separate category of actors, distinguished from "persons," in a definition of "victim" that otherwise mirrors the definition in Marsy's Law—suggesting that they are not included in the more general definition. *See* §§ 960.03(14), 960.194, Fla. Stat. (2021). This interpretation has been embraced by at least one out-

of-state case. *See Auber v. Com., Crime Victim's Comp. Bd.*, 582 A.2d 76, 78 (Pa. Commw. Ct. 1990) (recognizing that, as "a body of personnel which is officially charged with the duties of securing the public against crime, the investigation of crime, and the apprehension of criminals," police officers are not included in general definitions of victims).

In view of these authorities, it was error for the First District to simply assume that because Marsy's Law extends protections to a "person," it necessarily covers an on-duty police officer. More analysis is required—analysis that focuses on "the entire text," heeding "its structure" and "the physical and logical relation of its many parts." Scalia & Garner, *Reading Law* at 167; *see also Dep't of Envt'l Protection v. Millender*, 666 So. 2d 882, 886 (Fla. 1996) (explaining that constitutional text should be "construed as a whole in order to ascertain the general purpose and meaning of each part," reading each term "in light of the others to form a congruous whole"). Given the presumption that a police officer acting in an official capacity has historically *not* been treated as either a "person" or a "victim," there must be some affirmative indication, in the text or the context of Marsy's Law, to demonstrate an intent to include police

officers. *See Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862-63 (2019). Yet there is none.

In fact, all evidence is to the contrary. Marsy's Law's stated purpose is to "ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims." Art. I, § 16(b), Fla. Const. Marsy's Law furthers its expressed purpose by affording rights that crime victims otherwise would not possess, such as the right to due process and to participate in the criminal justice system. *Id.* As one court has put it, Marsy's Law "address[es] a concern that the criminal justice system is overtly defendant-focused and that victims and their families are being alienated." *L.T. v. State*, 296 So. 3d 490, 495 (Fla. 1st DCA 2020).

Police officers do not need these protections. Police officers are integral to the criminal justice system already: they investigate crimes, make arrests, and suggest charges to the prosecution team. They are in regular contact with the state attorney and work towards a common goal: obtaining convictions for the crimes they investigate. Thus, police officers already have a "meaningful role" in the process, and their concerns are routinely considered in the criminal justice

system. Marsy's Law does not anywhere say that it was intended to offer police officers additional protections.

The substantive protections provided by Marsy's Law also have little application to police officers. For instance, one of the rights conferred by Marsy's Law is the right "to be reasonably protected from the accused." Art. I, § 16(b)(3), Fla. Const. But who does this protecting? The police! The same provision then says that "nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency." *Id.* But of course, police officers already have a special relationship with their employers. Simply put, a reasonable voter would not have understood any of the rights set forth in Marsy's Law to apply to a police officer, whose job is to protect victims and prevent crimes. *See Thompson*, 301 So. 3d at 187.

This conclusion tracks how other jurisdictions have interpreted Marsy's Law. Presented with a similar argument, an appeals court in Ohio, a state that has also adopted Marsy's Law, held that a police department was not entitled to restitution for the filing of a false police report because the department did not qualify as a victim. *City of Centerville v. Knab*, 136 N.E. 3d 808, 815-16 (Ohio Ct. App. 2019).

The Ohio court acknowledged that, while Marsy's Law contains an expansive definition of "victim," it does not expressly categorize law enforcement agencies carrying out their official duties as victims. *Id.*

This makes sense. Police officers face a "threat of harm," to use the language of Marsy's Law, nearly every time they answer a 911 call or confront a violent or mentally unstable person. Strictly speaking, they are the "victim" of resisting arrest every time a suspect flees or refuses to cooperate. To hold that the inherent dangers of their job transform police officers from state actors into crime victims would stray from the context of Marsy's Law and its stated textual purpose. *See* Scalia & Garner, *Reading Law* at 167 (explaining that the "entirety" of a law "provides the context for each of its parts").

This Court should decline to sanction such an absurd interpretation. The only reasonable interpretation of Marsy's Law—the only reading consistent with text, context, and purpose, that "honors the whole text" and "furthers rather than obstructs the document's purpose"—is that a police officer who is threatened with harm while performing an official duty is not a "victim." *Thompson*, 301 So. 3d at 187. Because the First District held otherwise, this Court should quash the underlying decision.

II. The First District erred in holding that victim status under Marsy's Law can be self-declared and enforced absent any criminal proceeding.

Apart from holding that police officers can be victims under Marsy's Law, the First District also held that the officers here were entitled to the benefit of Marsy's Law even though no crime was ever charged and no criminal prosecution ever launched. *See Fla. Police Benevolent Ass'n*, 314 So. 3d at 803. This too was error.

Marsy's Law requires the "commission or attempted commission of a crime," Art. I, § 16(e), Fla. Const.; that is, "an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to punishment by that law." *Crime*, Merriam-Webster's Collegiate Dictionary (11th ed. 2020). Often, it will be obvious that there is a crime—the police will make an arrest, the state attorney will file charges, and the wheels of the criminal justice system will be set in motion. But the existence of a crime is not always so clear cut.

Take, for example, a routine transaction between a homeowner and a contractor to install siding on a house. The contractor promises to do the job if the homeowner pays a $3,000 deposit. The homeowner pays the money. The contractor fails to perform. The

siding never gets installed. Ordinarily, we would not consider the homeowner to be the victim of a crime. But what if, upon investigation, it turns out that this was all just a scam to get the homeowner to pay the $3,000? What if the contractor had never intended to install the siding? In that circumstance, the contractor's intent to defraud *would* amount to criminal conduct, and the homeowner *would* be the victim of a crime. The specific criminal intent makes all the difference.

But how do we know the contractor's intent? Surely the homeowner cannot simply declare himself the victim of a scam and gain the protections of Marsy's Law the minute the contractor fails to show up at the scheduled time. Odds are, the failure to perform was a simple misunderstanding—perhaps the contractor got sick, or went out of business, or just changed his mind. In that case, the failure to perform would not be a criminal violation but a civil one, suited for a breach of contract lawsuit with a plaintiff and a defendant, not a victim and an accused.

Put differently, the only proof point that someone has committed or attempted to commit a crime is a finding by a law enforcement officer—an arrest—or an allegation by a state attorney—

an information or indictment—that a crime has been committed. This is important in the application of Marsy's Law. Marsy's Law requires there to be a crime.

Marsy's Law also distinguishes between a "victim" and an "accused." Art. I, § 16(e), Fla. Const. But consider now a bar fight in which both parties claim that the other was the aggressor. Under the First District's approach, which allows someone to self-invoke Marsy's Law outside any criminal proceeding, each party would simultaneously be both victim and accused. This renders Marsy's Law meaningless and impossible to apply. *See* Scalia & Garner, *Reading Law* at 174 (explaining that courts should not embrace a textual interpretation that ignores competing provisions or causes them to have no consequence).

But Marsy's Law is not meaningless, nor is it difficult to apply; it simply recognizes the need for a trigger: the commencement of a criminal proceeding. It is this trigger that sorts out whether a crime was committed, who the victim of the crime is, who the accused is, and when, where, and how the rights of both victim and accused—the title of the constitutional provision itself—are to be enforced. *See* Art. I, § 16 ("Rights of accused and of victims.").

The need for a criminal proceeding is evident in the constitutional text. For starters, the stated purpose of Marsy's Law is to "ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims" and to "ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants." *Id.* § 16(b). These are goals that cannot be achieved in the abstract, only as part of a criminal proceeding. Marsy's Law makes that fact explicit: "The provisions of this section apply throughout the criminal and juvenile justice processes." *Id.* § 16(d). What's more, Marsy's Law provides that the mechanism for enforcing a victim's rights is in whatever court has "jurisdiction over the case," *id.* § 16(c), reaffirming the need for a criminal proceeding. *See also* Fla. R. App. P. 9.143(c).

A review of the specific rights themselves offers additional proof. Although Marsy's Law contains some freewheeling rights—the right to be treated with fairness and respect, for instance, and the right to be free from harassment and abuse—the rights by and large pertain to things that are part of a criminal proceeding and must be understood to apply only in that context. *See In re Advisory Op. to Atty' Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d

786, 801 (Fla. 2014) (explaining that general terms in a list should be construed as applying to the same kind or class as the more specific items); Scalia & Garner, *Reading Law* at 199, 201.

Victims are afforded the right to due process, Art. I, § 16(b)(1), Fla. Const.; the right to have their safety and welfare considered when setting bail and other conditions of pretrial release, *id.* § 16(b)(4); the right to notice of all proceedings involving the criminal conduct and notice of any release or escape of the defendant, *id.* § 16(b)(6)a.; the right to be heard in proceedings involving pretrial release, *id.* § 16(b)(6)b.; the right to confer with the prosecuting attorney about plea agreements and other case dispositions, *id.* § 16(b)(6)c.; the right to offer victim impact statements during sentencing, *id.* § 16(b)(6)d.; the right to receive a copy of presentence reports, *id.* § 16(b)(6)e.; the right to be informed of the conviction, sentence, adjudication, place and time of incarceration, and any scheduled release date of the offender, *id.* § 16(b)(6)f.; the right to be informed of and participate in postconviction and clemency procedures, *id.* §§ 16(b)(6)g., (b)(6)h.; the right to the return of property when no longer needed as evidence in the case, *id.* § 16(b)(8); the right to full and timely restitution from each convicted offender,

id. § 16(b)(9); and the right to proceedings free from unreasonable delay, *id.* § 16(b)(10). These are rights that can *only* be exercised and protected within a criminal proceeding.

The need for a criminal proceeding has been recognized by other jurisdictions. California, for example, has held that its version of Marsy's Law does not apply to executive clemency, reasoning that Marsy's Law is directed towards the "criminal justice system" and that clemency is a discretionary decision of the executive rather than an ordinary part of the criminal process. *See Santos v. Brown*, 238 Cal. App. 4th 398, 420-21 (Ct. App. 3d Dist. 2015). Although Florida's version of Marsy's Law includes clemency—likely because of this California precedent—*Santos* remains persuasive for showing that the rights provided by Marsy's Law must be tethered to a specific proceeding and cannot be enforced in the abstract. The Ohio Supreme Court has reached the same conclusion. *See State ex rel. Summers v. Fox*, 169 N.E.3d 625, 638 (Ohio 2020) ("Marsy's Law does not provide an exception to the Public Records Act here. This case is a civil dispute over the release of public records relating to a criminal matter that is no longer ongoing.").

The First District avoided this outcome solely by focusing on language in Marsy's Law stating that a victim's rights "begin[] at the time of his or her victimization." *Fla. Police Benevolent Ass'n*, 314 So. 3d at 803. But the *timing* of when the rights apply is different from whether the rights apply in the first place. There still must be a neutral determination that the "person" asserting the rights is entitled, as a "victim" of a "crime," to assert them.

Put another way, once the rights attach (trigger), those rights apply from the moment of the crime (time). And the timing might well matter. The right to "full and timely restitution . . . from each convicted offender for all losses suffered," Art. I, § 16(b)(9), Fla. Const., for instance, would be retroactive to the time the crime was committed, even if the arrest, prosecution, or conviction took years. The temporal language in Marsy's Law thus aligns with the requirement that there be a criminal proceeding.

The lack of a trigger is particularly problematic in this case. Two police officers, without a mechanism for independent verification, declared themselves to be victims. They then sought, in a standalone civil action divorced from the criminal justice system, based on no evidence other than their own assertions, to enforce provisions

enforceable only in a criminal case against an accused. That is not how Marsy's Law is supposed to work, nor how it was intended.

To be clear, the City does not dispute these officers' accounts or question their motives. But that may not always be true. As is unfortunately the case, sometimes an officer acts inappropriately or uses force when a suspect presented no real threat. And under the First District's decision, such an officer would be entitled to the protections of Marsy's Law just by claiming, with no criminal proceeding ever existing, that the officer was the subject of threatening conduct by a suspect. That is, in fact, how some government agencies are now implementing Marsy's Law, withholding public records as a result. *See* Kenny Jacoby & Ryan Gabrielson, *Marsy's Law was meant to protect crime victims. It now hides the identities of cops who use force.*, USA Today & ProPublica, https://www.usatoday.com/indepth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/ (Oct. 29, 2020).

The First District's decision also opens a Pandora's Box to all kinds of self-declarations of victimhood. Now, anyone who claims to be the victim of a crime can invoke Marsy's Law, outside the criminal

justice system, even if there has never been an arrest, prosecution, or neutral finding that a crime occurred.

This Court should shut that Box. The text, structure, and context of Marsy's Law all reveal that it requires the commencement of a criminal proceeding to confirm that a crime has been committed and to orient the victim and the accused. Because the First District mistakenly held otherwise, this Court should quash the underlying decision.

III. The First District erred in holding that Marsy's Law grants victims a right to remain anonymous.

The First District's final error strayed farthest from the constitutional text. While paying lip service to the principle that "it is not the province of the judiciary to read into the language of the constitutional text anything not included," the First District found in Marsy's Law an unstated right for victims to shield their identities. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802, 804. No such right exists.

Marsy's Law lays out numerous rights in painstaking detail. Nowhere among them is there a right to prevent disclosure of a victim's name or identity. And courts are not free to add language to

the constitution that is not there. *See In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 633 (Fla. 2012) ("In construing the words used in the constitution, the Court is not at liberty to add words and terms that are not included in the text of the constitution.").

The First District reasoned that a victim's general right to prevent the disclosure of "information . . . that could be used to locate or harass the victim or the victim's family" includes the right to prevent disclosure of records that could reveal the victim's name or identity. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 804. But the authorities the First District cited in support—an amalgamation of statutes that shield certain victim information in certain circumstances—explicitly exempt records that could "reveal the identity of the victim" from disclosure. *See supra* at pp. 6-7. Marsy's Law says nothing of the sort.

This is important. When Marsy's Law was adopted, these other statutes were already on the books. So if the drafters of Marsy's Law wanted to expand the category of victims whose identities were protected, they needed to say so. *See Williams v. Smith*, 360 So. 2d 417, 420 (Fla. 1978) ("Had the framers intended that conviction of a

felony involving a breach of public trust would work an automatic forfeiture of retirement and pension benefits, it would not have been difficult for them to express that intent."); *Amos v. Mathews*, 126 So. 308, 339 (Fla. 1930) ("If the makers of the Constitution had desired to do so, it would have been an easy matter to have extended the terms of the Constitution to cover situations like that under review."); *see also Apportionment*, 83 So. 3d at 696 (Canady, J., dissenting) (noting, where the text of a constitutional amendment was silent on an issue, that the amendment could not have implicitly altered existing Florida law). They did not.

The First District's atextual decision to engraft a right of anonymity onto Marsy's Law conflicts with the public's right of access to public records (and, possibly, to open court proceedings) and raises separation of powers concerns. The Florida Legislature, through the public records law and its statutory exemptions, is empowered to make the public-policy determinations about what information is important to disclose to the public and what information must be protected. That decision is not left up to the courts. As for police records, the Legislature has decided to exempt

addresses, phone numbers, birthdates, and photographs—but not names—from public disclosure. *See* § 119.071(4)(d), Fla. Stat.

The separation of powers problem is even more acute in this case. The union never presented evidence that disclosure of the officers' names would cause them to be located or harassed—no affidavits, no testimony, no factual showing of any kind. Thus, the First District's decision was based on nothing but judicial speculation about what information might "open[] the door to locating the victim." *Fla. Police Benevolent Ass'n*, 314 So. 3d at 804. This kind of speculative reasoning runs headlong into the Legislature's policymaking function.

It also goes against common sense. The victim's identity is almost always known to the accused. Knowing someone's name does not, standing alone, provide enough information to locate or harass them. That is especially true for police officers, whose personal information is already exempt from the public records law. Indeed, many police officers wear nametags while on duty and are required to show their badge if asked. They are, to bring the brief full circle, extensions of the state; they have no right to hide from the public. *See Ford v. City of Boynton Beach*, 323 So. 3d 215, 220 (Fla. 4th DCA

2021) (reaffirming that police officers have no expectation of privacy for on-duty actions); *Bacon v. McKeithen*, No. 5:14-cv-37-RS-CJK, 2014 WL 12479640, at *3 (N.D. Fla. Aug. 28, 2014) ("[T]here is little societal expectation of privacy for police officers acting in the line of duty in public places; an expectation of privacy in these circumstances would undercut societal expectations of police accountability.").

In sum, the First District's approach vastly expands the number of victims whose identities can remain secret. According to the First District, all victims now possess the right to remain anonymous, even though this right is never mentioned in the constitution. Because such a holding diverges from the constitutional text, the surrounding context, and the purpose of Marsy's Law, it should be reversed.

CONCLUSION

This Court should quash the First District's decision. It should hold: (1) that police officers acting in an official capacity are not "victims" under Marsy's Law; (2) that Marsy's Law requires the commencement of a criminal proceeding; and (3) that Marsy's Law contains no right for victims to remain anonymous.

CASSANDRA K. JACKSON
Florida Bar No. 650757
CITY ATTORNEY'S OFFICE
300 S. Adams Street, Box A-5
Tallahassee, FL 32301
Tel: (850) 891-8554
cassandra.jackson@talgov.com

/s/Joseph T. Eagleton
PHILIP J. PADOVANO
Florida Bar No. 157473
JOSEPH T. EAGLETON
Florida Bar No. 98492
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass St., Ste. 200
Tampa, FL 33606
Tel: (813) 223-4300
ppadovano@bhappeals.com
jeagleton@bhappeals.com
Secondary:
eservice@bhappeals.com

Counsel for Petitioner, the City of Tallahassee, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all counsel in the below service list on this 10th day of March 2022.

SERVICE LIST

Counsel for Intervenor, News Media:
Carol Jean LoCicero
Mark R. Caramanica
Thomas & LoCicero PL
601 S. Boulevard
Tampa, FL 33606
clocicero@tlolawfirm.com
Secondary:
tgilley@tlolawfirm.com
mcaramanica@tlolawfirm.com
Secondary:
dlake@tlolawfirm.com

Daniela B. Abratt
Thomas & LoCicero PL
915 Middle River Drive,
Suite 309
Fort Lauderdale, FL 33304
dabratt@tlolawfirm.com
Secondary:
bbrennan@tlolawfirm.com

Counsel for Respondents:
Luke Newman
Luke Newman, P.A.
908 Thomasville Road
Tallahassee, FL 32303
luke@lukenewmanlaw.com

Louis Jean Baptiste
The Law Offices of Stephen G. Webster LLC
1615 Village Square Blvd.,
Suite 5
Tallahassee, FL 32309
lb@swebsterlaw.net

Stephanie Dobson Webster
Florida Police Benevolent Association
300 E. Brevard Street
Tallahassee, FL 32301
stephanie@flpba.org

Continued on next page

Amicus counsel for City of Miami Investigative Panel:
Edward G. Guedes
John J. Quick
Weiss Serota Helfman Cole & Bierman, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, FL 33134
eguedes@wsh-law.com
Secondary:
szavala@wsh-law.com
jquick@wsh-law.com
Secondary:
lmartinez@wsh-law.com

Amicus counsel for the Brechner Center, the Reporters' Committee for Freedom of the Press, The Radio Television Digital News Assoc., They Poynter Institute, the Society of Professional Journalists Florda Pro Chapter, the Florida Center for Government Accountability, and the Asian Americans Journalists Assoc. Florida Chapter:
Edward L. Birk
Marks Gray, P.A.
1200 Riverplace Blvd., Suite 800
Jacksonville, FL 32207
ebirk@marksgray.com
Secondary:
sstrong@marksgray.com

Amicus counsel for Bob Gualtieri in his Official Capacity as Sheriff of Pinellas County, Florida:
Shannon K. Lockheart
Paul G. Rozelle
Pinellas County Sheriff General Counsel's Office
10750 Ulmerton Road
Largo, FL 33778
slockheart@pcsonet.com
prozelle@pcsonet.com
Secondary:
rreuss@pcsonet.com

Amicus counsel for Richard A. Harrison:
Richard A. Harrison
Richard A. Harrison, P.A.
400 N. Ashley Drive,
Suite 2600
Tampa, FL 33602
rah@harrisonpa.com
Secondary:
lisa@harrisonpa.com

Amicus counsel for Michael Chitwood, in his Official Capacity as Sheriff of Volusia County, Florida:
Peter A.D. McGlashan
123 W. Indiana Ave.
Deland, FL 32720
pmcglashan@vcso.us
Secondary: mcarlin@vcso.us

Continued on next page

Amicus counsel for Palm Beach County Sheriff's Office:
Carri S. Leininger
Jayme S. Sellards
Williams Leininger & Cosby.
11300 US Highway One,
Suite 300
North Palm Beach, FL 33408
cleininger@wlclaw.com
jsellards@wlclaw.com

/s/Joseph T. Eagleton
JOSEPH T. EAGLETON
Florida Bar No. 98492

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). This brief contains 8,296 words.

/s/Joseph T. Eagleton
JOSEPH T. EAGLETON
Florida Bar No. 98492