IN THE SUPREME COURT OF OHIO

STATE ex rel. GATEHOUSE MEDIA OHIO HOLDINGS II, INC. D/B/A THE COLUMBUS DISPATCH,	:	Case No. 2023- 1327
	:	
	:	Original Action in Mandamus
Relator,	:	
	:	
v.	:	
	:	
THE CITY OF COLUMBUS POLICE DEPARTMENT	:	
	:	
Respondent.	:	

MERIT BRIEF OF RESPONDENT COLUMBUS DIVISION OF POLICE

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MEMORANDUM IN SUPPORT

I. Introduction

On July 6, 2023, two Columbus Division of Police ("CDP") officers were ambushed by a gunman who grievously injured one of them. Relator, Gatehouse Media Ohio Holdings II Inc. d/b/a The Columbus Dispatch (hereafter "the Dispatch"), sent a public-records request to CDP for all cruiser and body camera footage of the incident. CDP timely turned over the footage, as required by the Ohio Public Records Act, R.C. 149.43 *et seq*. Body Camera and Cruiser video, while generally subject to public release, may be withheld in certain circumstances. In this case, the law explicitly allows: 1) public agencies to restrict portions of the videos that include acts of severe violence, and grievous bodily harm to a peace officer, *see* R.C. 149.43(A)(1)(jj) and 2) R.C. 2930.07(C) requires a public office to redact the name or other identifying information of a crime victim from any public-records disclosure. Pursuant to that statutory mandate, respondent, the City of Columbus Police Department (hereafter "the City" or "CDP"), redacted the videos to conceal the identities of the two officers who were the victims of the shooter, and to remove footage that shows severe violence and grievous bodily harm.

The Dispatch has now filed an original action for a writ of mandamus to compel the City to disclose the crime victims' identities.[1] The Dispatch's complaint also sought to compel the production of a Use of Force Report pertaining to the incident, but, as discussed below, the Dispatch has now abandoned that claim. Mandamus should not issue because the City complied

[1] The Dispatch did not discuss statutory damages, court costs, or attorney fees in its merit brief, and therefore cannot recover these amounts even if it prevails. *State ex rel. Stuart v. Greene*, 161 Ohio St.3d 11, 2020-Ohio-3685, 160 N.E.3d 709, ¶ 10 (relator waived issue of court costs by failing to address it in merit brief); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174, ¶ 83 (holding that relators waived attorney-fees claim by failing to include "any argument in support of this relief in their merit brief").

with its statutory obligations. Ohio's Marsy's Law, as codified in Article I, Section 10a of the Ohio Constitution and implemented in R.C. 2930.07, *required* the City to withhold this information. The City takes no position on the wisdom of the policy underlying Marsy's Law as applied to these circumstances, but contends that the plain language of the law gave the City no choice but to withhold the information.

Because mandamus will not issue to compel a public office to perform an unlawful act, the Dispatch presents an alternative theory: namely, that R.C. 2930.07 is unconstitutional because it limits the public's right to view public records. The Dispatch asks this Court to hold that the public's right to review public records arises not by statute, but is a constitutional property right, and therefore *any* exception to disclosure is presumptively unconstitutional. The Dispatch's unprecedented legal theory, if adopted by the Court, would upend decades of public-records jurisprudence and potentially eliminate whole categories of statutory exemptions in R.C. 149.43 that, until today, were uncontroversial.

Under the facts of this case, the City of Columbus complied with its statutory obligations by simply following the plain language of the law in question. The Court should deny the writ of mandamus.

II. The facts in the record

A. *The assault on two Columbus Police Officers*

On the afternoon of July 6, 2023, Columbus Police Officer John Doe 1 was assigned to Patrol Zone 3, on the west side of Columbus. [Respondents' Exhibit B, Affidavit of John Doe 1, ¶ 3-4] At proximately 4:00 p.m., Doe 1 and his partner, Officer John Doe 2, were on patrol in a marked CDP cruiser when they heard over their cruiser radio that a bank robbery on the city's west side had become a police pursuit. [Exhibit B, ¶ 5-6]

The two officers knew from the radio information that the suspect vehicle was a black Porsche SUV. [Exhibit B, ¶ 8] However, the two officers had no description of or information about the suspects, including whether or not they were armed. [Exhibit B, ¶ 9] The two officers stationed their vehicle on the side of the eastbound entrance ramp from West Broad Street on to I-70, to watch for the suspect vehicle. [Exhibit B, ¶ 10]

They soon saw a black Porsche SUV traveling eastbound on I-70 at well over the legal speed limit, and weaving in and out of traffic. [John Doe 1 Aff., ¶ 11] Doe 2, who was driving, activated the cruiser's lights and sirens and pursued the suspect vehicle. [Exhibit B, ¶ 7, 12]

Moments later, the two officers caught up to the SUV, which had stopped in the middle of the interstate. [Exhibit B, ¶ 13] As their cruiser approached, Doe 1 saw two individuals flee the stopped vehicle, heading toward the south (that is, towards his right) to jump over the highway berm wall. [Exhibit B, ¶ 14] Doe 1 exited the passenger side of the cruiser and began running towards the south wall to apprehend the two suspects, while drawing his service weapon and yelling to the two suspects to stop. [Exhibit B, ¶ 16-17]

As this was occurring, a third suspect emerged from the passenger side of the SUV and shot Doe 1 multiple times. [Exhibit B, ¶ 18; Respondents' Exhibit C, Affidavit of John Doe 2, ¶ 20] The shooting happened within seconds of Doe 1 leaving his cruiser, and Doe 1 never saw the man who shot him before he was hit. [Exhibit B, ¶ 18] The third suspect continue to fire at Doe 1 even after the officer had fallen to the pavement. [Exhibit B, ¶ 19]

Meanwhile, Doe 2 exited the driver's side of the vehicle and circled around the rear of the cruiser. [Exhibit C, ¶ 18] He heard gunshots and his partner yell, "I'm down. I'm hit." [Exhibit C, ¶ 19] Doe 2 took cover behind a stopped civilian vehicle, from which vantage point he saw the third suspect (whom he too had not previously seen) firing at his partner. [Exhibit C, ¶ 20]

The third suspect was later identified as Abdisamad Ismail. [Agreed Statement of Facts, ¶ 7]

Doe 2 unholstered his service weapon and engaged Ismail from behind the cover of the civilian vehicle. [Exhibit C, ¶ 21] Ismail then turned toward Doe 2 and leveled his gun at him, causing Doe 2 to fear for his life. [Exhibit C, ¶ 22] Doe 2 and other officers engaged with Ismail, who was killed. [Exhibit C, ¶ 23-25; Agreed Statement of Facts, ¶ 7]

Doe 1 received five gunshot wounds: two in the back and one each in the right thigh, buttocks, and left hand. [Exhibit B, ¶ 22] Bleeding heavily, he received emergency assistance at the scene from Doe 2 and other responding officers, who transported him to Grant Hospital. [Exhibit B, ¶ 22-24] Doe 1 was hospitalized for three weeks, after which he was transferred to a long-term rehabilitation center for another three weeks. [Exhibit B, ¶ 25-27] In all, he underwent seven surgeries due to the gunshot injuries he received, with an eighth surgery scheduled for the future. [John Doe 1 Aff., ¶ 28]

B. *The Dispatch's Public Records Request*

On the day of the shooting, the Dispatch sent an email request for body-cam and dash-cam footage of the shooting. [Agreed Statement of Facts, ¶ 8; Joint Exhibit D] The next day, July 7, the Dispatch requested all Use of Force Reports relating to the incident. [Agreed Statement of Facts, ¶ 9; Joint Exhibit E]

CDP initially declined to release the videos in question, citing, among other reasons, the exception in R.C. 149.43(A)(17)(f) for body-worn and dashcam footage that shows "grievous bodily harm" to a peace officer occurring in the performance of official duties. [Joint Exhibit G] However, after further consideration, CPD released redacted versions of the videos on September 12. [Resp. Ex. A, Affidavit of Kathryn Hartshorne, ¶ 9] The redacted versions of the videos

complied with Marsy's Law, that is, they redacted the identifying information for Officers John Doe 1 and 2. [*Id*.]

With respect to the Dispatch's request for Use of Force Reports, CPD informed the Dispatch on August 4 that, "Use of Force reports are administrative and are not completed until the criminal investigation is concluded." [*Id*., ¶ 19; Resp. Ex. L] As of the date of the Dispatch's request, the Use of Force Report it was seeking had not yet been created. [Respondent's Exhibit D, Affidavit of Terry McConnell, ¶ 13] Indeed, as of February 2024, the investigation was not complete and hence CDP still did not have a Use of Force on this incident. [*Id*., ¶ 13-14]

C. *Procedural history*

The Dispatch filed this original mandamus action on October 19, 2023. The complaint sought writs of mandamus to compel production of the two officers' names, as well as the non-existent Use of Force report. In addition, the complaint sought statutory damages for CDP's alleged failure to respond in any fashion to the request for the Use of Force report. CDP filed an answer, and has filed both the redacted and unredacted videos with the Court, the latter under seal. On January 24, 2024, the Court granted an alternative writ of mandamus and ordered the parties to file briefs on the merits. 172 Ohio St.3d 1473, 2024-Ohio-202, 225 N.E.3d 1051.

III. Law and argument

A. Standard of review

"Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act." *State ex rel. Physicians Comm. For Responsible Medicine v. Bd. of Trustees of Ohio State Univ.*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6. A relator seeking a writ of mandamus must prove entitlement to the writ by clear and convincing evidence. *State ex rel. Cleveland Right to Life v. State Controlling Bd.*, 138 Ohio St.3d 57, 2013-Ohio-5632, 3 N.E.3d

185, ¶ 2. Unlike other mandamus cases, the relator in a public-records case is not required to prove the absence of an adequate remedy in the ordinary course of law. *State ex rel. ACLU of Ohio v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24. "R.C. 149.43 is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

Exceptions to disclosure under the Public Records Act are strictly construed against the records custodian. *State ex rel. Miller v. Ohio State Highway Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23. The records custodian has the burden to establish the applicability of a claimed exception. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus. The custodian must show that the requested records "fall squarely within the exception." *Id*., *see also Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 27.

B. The Court should deny relief as to Counts I and III of the Complaint

The Dispatch is "no longer pursu[ing] Count I and Count III of its Complaint [Relator's Merit Brief, p. 6], which relate to the Use of Force report. However, they remain part of the complaint and the Court will have to resolve them. The undisputed evidence shows that the Use of Force report did not exist as of the date the Dispatch requested it. Mandamus will not lie to compel a public office to convey a record that does not exist. *State ex rel. Walborn v. Erie Cty. Care Facility*, 6th Dist. Erie No. E-94-19, 1994 Ohio App. LEXIS 4883, *4. And the Dispatch is not entitled to statutory damages for CPD's alleged failure to acknowledge the Use of Force report request because, as even the Dispatch has now admitted, CPD *did* timely respond to the request.

[*See* Relator's Exhibit 1, Supplemental Affidavit of Bethany Bruner, ¶ 3-4 (verifying receipt of the email).] For these reasons, the Court should deny the relief sought in Counts I and III.

C. The Dispatch is not entitled under Count II to a writ of mandamus compelling the release of the John Doe officers' real names

In its merit brief, the Dispatch presents three propositions of law for this Court's consideration. The first proposition of law has two components. It contends that mandamus is the proper vehicle for enforcing obligations under the Public Records Act. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 16. And it asserts that a relator may challenge the constitutionality of a statute in the context of a mandamus action. *See State ex rel. Ethics First-You Decide PAC v. DeWine*, 147 Ohio St.3d 373, 2016-Ohio-3144, 66 N.E.3d 689, ¶ 11 ("When confronted with complaints that challenge the constitutionality of a statute, we have consistently construed them as seeking a mandatory injunction to compel the respondent public official to abide by the provisions of preexisting law and therefore squarely within our original mandamus jurisdiction"). Both of these propositions of law are undisputed.

The Dispatch's second proposition of law reaches the heart of this case: whether R.C. 2930.07 exempts the names of these officers from the scope of the Public Records Act. For the reasons discussed below, the Court should hold, on the facts of this case, that the officers meet the definition of "victims" in Ohio Const. Art. I, Sec. 10a.

Finally, assuming the Court agrees that Marsy's Law shields the names of these officers from disclosure, the third Proposition of Law asks the Court to hold that the statute exempting crime victims' identifying information from disclosure under the Public Records Act is unconstitutional. To the contrary, however, it is the province of the General Assembly to weigh

the public's right to information against other considerations, and it is not the role of this Court to second-guess those assessments.

1. Marsy's Law and the Public Records Act

In 2017, the voters of Ohio overwhelmingly approved an amendment to Ohio's Bill of Rights, Article 1, Section 10a of the Ohio Constitution, with 82.59 percent of the vote in favor. The initiative, known as Marsy's Law, "sought to give crime victims and their families meaningful and enforceable rights." *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 13.

The new constitutional provision defined 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." Oh Const. Art. I, Section 10a(D). The definition included some exclusions: the term "victim" "does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incompetent victim." *Id*. The Marsy's Law amendment left it to the General Assembly to further define and provide for those crime-victim rights. *Centerville* at ¶ 14.

To that end, the General Assembly adopted HB 343 to implement Marsy's Law in 2023. The statutory Marsy's Law provided that the word "victim "has the same meaning as in Section 10a of Article I of the Ohio Constitution." R.C. 2930.01(H).[2] Among the statutory rights accorded to crime victims was the following: upon written request from a victim, all "case documents * * * shall be redacted prior to public release pursuant to section 149.43 of the Revised Code to remove

[2] Prior to the enactment of HB 343, the definition of "victim" in R.C. 2930.01(H) was arguably broader than the constitutional definition. *See City of Cleveland v. Alrefaei*, 8th Dist. Cuyahoga No. 107985, 2020-Ohio-5009, 161 N.E.3d 53, ¶ 78 (S. Gallagher, J., concurring in judgment only). However, because the HB 343 version took effect on April 6, 2023, before Ismail opened fire on Columbus Police, the constitutional definition applies.

the name, address, or other identifying information of the victim." R.C. 2930.07(D)(1)(a)(i). The statute defines a "case document" as "a document or information in a document, or audio or video recording of a victim of * * * an offense of violence * * * regarding a case that is submitted to a court, a law enforcement agency or officer, or a prosecutor, or filed with a clerk of court * * *." R.C. 2930.07(A)(1)(a). A separate section of the Revised Code creates a temporary automatic opt-in with respect to redaction of identifying information. *See* R.C. 2930.04(E)(2) ("The victim's failure to complete the form or to request the victim's applicable rights under this division shall be considered an assertion of the victim's rights, including redaction, until the prosecutor contacts the victim pursuant to section 2930.06 of the Revised Code to provide another opportunity to request any right that is not automatically conferred under the Ohio Constitution").

2. The Doe Officers are "Victims" within the meaning of Marsy's Law

As noted above, Marsy's Law 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." (Emphasis added.) Oh Const. Art. I, Section 10a(D). Officers John Doe 1 and John Doe 2 meet the elements of this definition.

First, they are "persons." This Court has noted, in the context of Marsy's Law, that the definition of "person" includes " 'a human being.' " *Centerville* at ¶ 24, quoting Black's Law Dictionary 1378 (11th Ed.2019) and Webster's Third International Dictionary 1686 (2002). The John Doe Officers qualify as "human beings."

Second, the officers were crime victims. When Ismail ambushed Officer Doe 1 and shot him five times, he violated (among other statutes) R.C. 2903.11(A)(2), the felonious assault statute, which makes it a crime to "cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordinance." Indeed, had Ismail survived, he could have been

charged with attempted murder. Likewise, he could have been prosecuted for aggravated menacing toward Officer Doe 2 under R.C. 2903.21(A), which makes it a crime to "knowingly cause another to believe that the offender will cause serious physical harm to the person * * *." *See State v. Wilk*, 9th Dist. Medina No. 22CA0008-M, 2023-Ohio-112, ¶ 14 (defendant committed aggravated menacing when he pointed a BB gun at another person during an argument, the BB gun was indistinguishable from an actual firearm, and the victim believed the firearm was real).

The Dispatch asks this Court to disregard the plain language of the statute and conclude that the two officers do not constitute "victims," despite being natural persons upon whom a crime was committed. The Dispatch's argument rests entirely upon a misreading of this Court's opinion in *Centerville*.

The underlining crime in *Centerville* was filing a false report to law enforcement, in violation of R.C. 2917.32(A)(3). 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, at ¶ 7. Upon conviction, the City of Centerville sought restitution for the costs it incurred responding to Knab's 911 call. *Id*. The specific question the Court considered was whether the municipality qualified as a "victim" under the restitution statute, R.C. 2929.28(A)(1). The majority answered in the negative for multiple reasons. First, and most significant, a municipal corporation does not constitute a "person" under any dictionary definition. *Id*. at ¶ 26. Second, the text of Marsy's Law focused on private rights that would concern an individual, not a governmental entity, such as the right " 'to be treated with fairness and respect for the victim's safety, dignity, and privacy.' " *Id*. at ¶ 27. Based on these and similar considerations, the Court "determine[d], based on both the text and context, that the voters who approved the constitutional amendment did not intend that a municipal corporation—a governmental entity—would qualify as a victim under the amendment." *Id*. at ¶ 31.

Citing *Centerville*, the Dispatch argues that these police officers are also not "victims." Essentially, the Dispatch asserts that the voters who approved Marsy's Law would have understood that police officers acting in their official capacity are merely agents of the municipality, and as we know from *Centerville*, the municipality cannot be a crime victim. [Merit Brief, p. 14] This argument disregards the distinction between the officer acting in an official capacity, which is a legal fiction, and the human being wearing the badge and gun. Abdisamad Ismail did not fire five shots into "*the City of Columbus*." Ismail did not level his gun at, and threaten to kill, a "*political subdivision as the term is defined in R.C. 2744.01(F)*." Ismail assaulted a human being who happens to be a public employee, and threatened grave physical harm to a second human being who also happens to be a public employee.

The Dispatch's argument, if adopted, has no logical stopping point. If a police officer cannot be a victim because he is acting in his official capacity, then the same would be true for *every* public employee. No public official could ever be a "crime victim" if the crime occurred while she was performing her official duties, not the cashier who suffers an armed robbery, the child-welfare investigator assaulted during a home visit, or the court bailiff receiving a death threat.

Building off its conflation of the City and its police officers, the Dispatch contends that Marsy's Law cannot apply to police officers because doing so "would provide state actors with rights enforceable against Ohio citizens." [Merit Brief, p. 21] But there is nothing unique about public servants having rights against members of the public, even when those rights arise specifically by virtue of their employment. Perhaps the best example is the "Fireman's Rule," pursuant to which an owner or occupier of real property can be liable to a police officer or firefighter who enters the premises and is injured in the performance of his official duties. *Smyczek v. Hovan*, 8th Dist. Cuyahoga No. 80180, 2022-Ohio-2261, ¶ 12-13, citing *Scheurer Trustees of*

Open Bible Church, 1963, 175 Ohio St.3d 163, 192 N.E.2d 38, paragraph two of the syllabus, and *Hack v. Gillespie*, 74 Ohio St.3d 362, 658 N.E.2d 1046 (1996), syllabus.

Alternatively, the Dispatch asserts that the right of restitution created by Marsy's Law precludes police officers from its scope because an Ohio voter would have understood that such officers are entitled to receive workers' compensation benefits. [*Id*.] Again, this argument proves too much. Under this theory, no employee covered by workers compensation could be a "victim" within the meaning of Marsy's Law, if the criminal conduct occurs when the person is at work.

Much of the Dispatch's analysis involves unsubstantiated or irrelevant assertions. For example, the Dispatch argues that the Marsy's Law amendment is ambiguous because the text "provides no textual limitations on what types of criminal offenses or delinquent acts against a 'person' would satisfy the definition." [Merit Brief, p. 16] But an law is not *ambiguous* merely because its scope is potentially broader than the Dispatch thinks it should be. Rather, a statute is ambiguous " 'if a reasonable person can find different meanings in the [statute] and if good arguments can be made for either of two *contrary* positions.' " (Emphasis sic.) *Turner v. Hooks*, 152 Ohio St.3d 559, 2018-Ohio-556, 99 N.E.3d 354, ¶ 12, quoting *4522 Kenny Rd. v. Columbus, Bd. of Zoning Adjustment*, 152 Ohio App.3d 526, 2003-Ohio-1891,789 N.E.2d 246, ¶ 13 (10th Dist.). Along the same lines, the Dispatch posits that Ohio voters would not have assumed that offenses such as making a false statement or failing to comply with an officer's signal constitute "criminal offenses within the meaning of Section 10a(D) "as these kinds of offenses are really 'against' the state." [Merit Brief, p. 16] The Dispatch's argument answers itself. A reasonable voter would have understood the difference between telling a lie to a police officer (in which case, the officer is not the victim of the offense and Marsy's Law does not apply) and punching that

officer in the face or shooting him from ambush (in which case the amendment plainly *does* apply).[3]

In its effort to prove what the hypothetical Ohio voter "would have known," the Dispatch makes a number of factual assumptions that have no evidentiary support. For example, the Dispatch assumes that Marsy's Law could not have possibly been intended to apply to police officers because the law requires that victims receive "reasonable notice of any release or escape of the accused," Ohio Const. Art. I, Sec. 10a(A)(5), and "[a]n Ohio voter would have likely believed that law enforcement officers would already have ready access to such information by virtue of their employment." [Merit Brief, p. 18] The Dispatch is not asserting that police officers *actually* have greater access to this information than the general public—because there is no reason to believe this is true and no such evidence in the record—but only that a hypothetical Ohio voter "would have likely believed" this to be the case. Of course, this is nothing more than speculation.

The Merit Brief also speculates that the voters would not have approved Marsy's Law if they had realized that the General Assembly would use it to shield information in public records. But Section 10a(E) of the amendment plainly states that its provisions "shall supersede *all* conflicting state laws," which necessarily includes the public records laws. Given the evident public concern with victim's rights, it is more plausible to conclude that the public intended this result.

The first place to look for legislative intent is the plain language of the statute. *State ex rel. Gold v. Wash. Cty. Bd. of Elections*, 172 Ohio St.3d 288, 2023-Ohio-1051, 223 N.E.3d 431, ¶ 17.

[3] The Dispatch also raises the specter of a resisting-arrest charge, which might present a more complicated factual scenario as far as who the victim of the crime is. The simplest response is that *this* case does not involve resisting arrest or any factual uncertainty as to whether crimes were committed against flesh-and-blood victims.

The plain language of Marsy's Law defines a victim as any and all persons. The Dispatch wants this Court to create an exception excluding *certain* persons. In that sense, this case is the inverse of *Centerville*. In the latter case, the definition of "person" did not include a municipality, but the city (unsuccessfully) tried to prove that it should be included in the definition anyway. Here the officers, as "persons" *do* fall within the statute, and the Dispatch wants to exclude them anyway. The Dispatch cannot credibly dispute that these police officers are "victims," within the meaning of Marsy's Law. So instead, the Dispatch asks the Court to disregard the plain language of the statute and Constitution, and substitute its own policy judgment, under the guise of what a hypothetical "average Ohio voter" might have been thinking.

The Court should deny the writ of mandamus because Officers Doe 1 and 2 are crime victims, and the Revised Code *requires* redaction of their identifying information from public records.

D. The constitutional challenge to R.C. 2930.07 must fail

Assuming the Court finds that the officers *do* qualify as victims under R.C. 2930.07, the Dispatch has a fallback position: the statute itself is unconstitutional. (Proposition of Law III). The Dispatch cites a number of court decisions that predate the enactment of Ohio's Public Records Law as suggesting that the public's right to review government documents is a constitutionally-protected property right. [Merit Brief, p. 25] Thus, the Dispatch asserts, any infringement on the public's right of access must survive strict scrutiny. [*Id*., p. 27] And not surprisingly, the Dispatch concludes that the victim's-rights limitation on public-records access is unconstitutional. [*Id*., p. 29] Alternatively, the Dispatch suggests that the exemption cannot even overcome the most deferential "rational-basis review." [*Id*.]

The Dispatch places too much emphasis on the language describing public-record access as a "property right." The exact quote is, "The right to inspect public records is a property not political right, and will be enforced by courts of equity in a case calling for the exercise of the powers of such courts." *Wells v. Lewis*, 12 Ohio Dec. 170, 181 (Sup. Ct. 1901). The Court was deciding whether a public-records case arose in law or equity, back at a time when that was still a meaningful distinction. Similarly, in *In re Grear*, 9 Ohio Dec. 299 (1899), the superior court judge held that "[t]he right of one seeking to be elected to office, and the right incident thereto to have none but legal votes counted, is a purely political right, distinct from a civil or property right," and therefore a court of equity had no jurisdiction to hear such a case. These references to a "property right" were not declaring some superior ownership interest in public records belonging to the citizenry that the legislature may never limit.

Moreover, even if there were a constitutional property right at issue, that right would have to be harmonized with Marsy's Law, which is also a constitutional provision. Section 10a(E) expressly states that the provisions of this section "shall supersede all conflicting state laws." And Section 10a(A)(1) specifically ensures the right of crime victims "to be treated with fairness and respect for [their] * * * privacy." Clearly, the voters of Ohio approved the Marsy's Law amendment knowing and intending that it would modify existing rules governing the dissemination of public records.

The Dispatch is seeking something unprecedented. This Court does not independently weigh whether an exception to the Public Records Act should be enforced.

> 'It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.'

State ex rel. Thomas v. Ohio State Univ., 71 Ohio St.3d 245, 248, 643 N.E.2d 126 (1994), quoting *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992).

This Court routinely considers whether otherwise-public-records should be shielded from disclosure based on a statutory exemption. In *every* case, the question before the Court is whether the record fits squarely within the scope of the exception. *See, e.g., Ludlow v. Ohio Dept. of Health*, Slip Op. No. 2022-1391, 2024-Ohio-1399 (April 17, 2024), ¶ 24 (protected health information); *State ex rel. Myers v. Myers*, 169 Ohio St.3d 536, 2022-Ohio-1915, 207 N.E.3d 579, ¶ 30 (confidential law-enforcement investigatory record ("CLEIR") exception). The Court *never* undertakes an analysis of whether the exception is *constitutional*, based on weighing the public's right to know against the interest in maintaining confidentiality. The Dispatch has not identified a single instance after the passage of the Public Records Act in which a court has undertaken such an analysis. Indeed, if the Court were to adopt the Dispatch's reasoning and hold that the public has a constitutional property interest in public records, it would be required to undertake such a balancing of interests in *every* public records case, to determine whether the exception can survive given the specific facts and interests in that case.

At first glance, one might assume that an exception such as R.C. 149.43(A)(1)(h), which shields confidential law enforcement investigatory records from disclosure, would easily pass constitutional muster in all cases. But on further consideration, one can envision a scenario in which a high-profile public official or candidate is charged with crimes of moral turpitude, and law enforcement refuses to disclose records to protect the integrity of the investigation. But the offenses may be relatively minor misdemeanors, possibly even victimless, whereas the public's right to the information before casting a ballot is substantial. The point is not whether that public

interest would or would not outweigh law enforcement's need to complete its investigation of a minor offense; the point is that the courts will be required to balance those competing interests in every case. The courts could no longer rely on the fact that the General Assembly has already weighed the competing interests.

Moreover, the Dispatch's new constitutional test would create confusion and increase litigation. Record custodians would no longer have bright line rules to guide their public-records decision-making. Instead, the applicability of a given exception would vary on a case-by-case basis, and the custodians would have to guess how a reviewing court might balance the interests, given the facts presented in each request. There is no reason to invite such uncertainty.

The Court should decline the request to declare R.C. 2930.07, and by extension, all public-records exemptions, presumptively unconstitutional.

IV. Conclusion

For the foregoing reasons, this Court should deny the petition for the writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Merit Brief of Respondent was* filed with the Ohio Supreme Court via their online e-filing system and has been sent on this 22nd day of April, 2024, via electronic mail to the following:

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