

**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

REPLY BRIEF OF RELATOR

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I. INTRODUCTION

Respondent City of Columbus ("Respondent") claims that "Ohio 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 the identities of the officers involved in the I-70 Incident, which led to the death of Abdisamad Ismail. (Resp.'s Merit Br., p. 2; emphasis in original.) But this is not true. Respondent—like any other government employer—may condition employment as a police officer upon waiver of any confidentiality rights under R.C. 2930.07. *See State ex rel. Bd. of Cty. Comm'rs v. Bd. of Dirs. of the Gallia*, 75 Ohio St.3d 611, 616, 665 N.E.2d 202 (1996) ("As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy.") (internal quotation marks and citation omitted). Respondent has consciously elected not to require a waiver from its officers of any rights R.C. 2930.07 might confer, choosing secrecy over transparency. It should be clear that no law requires Respondent to deprive the public of this information in the future.

In making this argument, Respondent highlights another glaring error in its framing of the issue in this case. Article 10a of the Ohio Constitution, or "Marsy's Law," says nothing about the public's rights under Ohio's Public Records Act, R.C. 149.43 (the "Act"). Marsy's Law neither compelled the General Assembly to enact R.C. 2930.07, nor is there any language in Marsy's Law that can fairly be construed to create an exemption under the Act. *See State ex rel. Summers v. Fox*, 163 Ohio St.3d 217, 2020-Ohio-5585, 169 N.E.3d 625, ¶ 42 (holding that Marsy's Law could not be invoked to deny a request for public records relating to a criminal matter that had been concluded). Although R.C. 2930.07 utilizes the definition of "victim" provided in Marsy's Law, R.C. 2930.07 creates no constitutional right of privacy for

crime victims. And as Marsy's Law does not refer to the public's rights under the Act, no Ohio voter would have understood that they were affording government officials rights those officials could invoke against them.

It thus follows that—contrary to Respondent's argument—to the extent the Court recognizes a protectable right of Ohio citizens to obtain government records under the Ohio Constitution, the Court need not harmonize such a right with Marsy's Law. It need only conclude that R.C. 2930.07, as applied to the identities of police officers involved in a use of force incident while in the line of duty, violates that right.

Relator Gatehouse Media Ohio Holdings II, Inc. d/b/a The Columbus Dispatch ("Relator" or "The Dispatch") therefore respectfully requests that the Court grant its request for a writ of mandamus.

II. ARGUMENT

A. The Fireman's Rule Does Not Support Respondent's Contention That Ohio Voters Would Not Have Given Any Thought to Affording Government Agents Rights Against Them When Approving Marsy's Law

No assertion in Respondent's Merit Brief highlights more starkly the gravity of the position Respondent has taken in this case than its assertion that "there is nothing unique about public servants having rights against members of the public . . ." (Resp.'s Merit Br., p. 11). In support of this assertion, Respondent cites the "Fireman's Rule," suggesting that this rule supports the proposition that Ohio voters approving Marsy's Law would not have balked at the idea that they were affording government actors rights that could be exercised against them. But this argument fundamentally misunderstands the Fireman's Rule, and further highlights why the Court should extend the reasoning of *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167 to the facts presented here.

To start, in *City of Centerville*, the Court explained the unique characteristics of a municipal corporation as compared against a private corporation, which (critically) the Court held could constitute a "person" within the meaning of Marsy's Law. *City of Centerville* at ¶ 25.

The Court wrote that a municipal corporation

. . . is a dual-bodied corporation. On one hand, it is a corporate body, capable of performing the same proprietary functions as any private corporation. *Owen v. Independence*, 445 U.S. 622, 645-646, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). On the other hand, it is "an arm of the State" because it acts in a governmental or public capacity. *Id.* For example, a municipal corporation acts in a governmental capacity in the establishment and maintenance of a police department. *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922), syllabus. As such, a municipal corporation acts in its governmental capacity when, like here, its public-safety agencies respond to a reported crime.

Id. A human being employed by the state, and vested with governmental powers, must be viewed similarly. On the one hand, they can and do engage in the same activities as any other private citizen. But on the other, they act as government agents when they perform their public duties and exercise governmental authority. When a police officer responds to a reported crime, or attempts to apprehend a crime suspect, they act in their governmental capacity. And when a police officer shoots and kills a crime suspect in the course of responding to a call, they likewise act as government agents.

So when a crime is committed against police officers while they are exercising their governmental powers, that crime is committed against the State as well. Respondent contends that the deceased suspect Ismail "assaulted a human being who happen[ed] to be a public employee" and that he did not threaten to "fire five shots into '*the City of Columbus*.'" (Resp.'s Merit Br., p. 10; emphasis in original.) But this argument is disingenuous and misses the point.

Ismail could not have fired shots at "the City of Columbus" as the City of Columbus has no corporeal form. Had Ismail survived, the State of Ohio would have almost certainly charged him with attempted aggravated murder because he knowingly shot at and nearly killed a police officer, not merely because he shot a human being. Under Ohio law, the murder of a law enforcement officer, who the offender "knows or has reasonable cause to know is a law enforcement officer," and the officer is "engaged in the victim's duties," constitutes aggravated murder. R.C. 2903.01(E). Thus, Ismail would have faced much greater penalties because the officer he nearly killed was not merely a "human being who happen[ed] to be a public employee[.]" but a human being acting as an agent of the City of Columbus.

With respect to the Fireman's Rule, its justification stems from a public policy preference to limit private citizens' liability to government agents when they enter private land, not expand it. This Court explained that it has

. . . offered several policy considerations that justify limiting a landowner's duty to firefighters and police officers: (1) "fire fighters and police officers can enter the premises of a private property owner or occupant under authority of law"; (2) landowners or occupiers cannot anticipate the presence of safety officers on the premises and would be too burdened if they owed them a duty of reasonable care; (3) all citizens share the benefits provided by firefighters and police officers and, therefore, should share in the cost of workers' compensation provided to police officers and firefighters injured on the job; and (4) firefighters and police officers assume the risk of injury by the very nature of their chosen profession and are trained to expect the unexpected.

Torchik v. Boyce, 121 Ohio St.3d 440, 2009-Ohio-1248, 905 N.E.2d 179, ¶ 10 (citation omitted).

Thus, the Fireman's Rule confers no rights, but rather limits the ability of police officers and firefighters to recover against private citizens for injuries sustained on private property—injuries for which other private citizens might recover. The policy justifications for the Fireman's Rule only reinforce the conclusion that an Ohio voter would have understood that Ohio law, based on

public policy, treats police officers differently when they suffer an injury during the course of performing their official duties, and that they do not stand on the same footing as private citizens.

B. Respondent's Contention that Application of *City of Centerville* to This Case Would Strip Every Public Employee of Rights Under Marsy's Law Is Groundless

Respondent suggests that the result for which The Dispatch advocates here would mean that "[n]o public official could ever be a 'crime victim' if the crime occurred while she was performing her official duties . . ." (Resp.'s Merit Br., p. 11.) This purported concern rings particularly hollow in light of Respondent's citation of the Fireman's Rule, which does not of course apply to every public employee since "cashiers" or "child welfare investigators" do not exercise the State's power to forcibly enter private property. And even if the term "victim" did not apply to public employees who become victims of crime while performing their official duties, Respondent offers no reason why such a result would conflict with the objectives underlying Marsy's Law. Public employees injured on the job would have the ability to recover worker's compensation benefits, and have access to government power that private citizens do not have.

But the application of *City of Centerville* to this case does not result in the expansive rule Respondent contends would result. Law enforcement officers enjoy State power not enjoyed by other public employees, namely, the power to use force, including deadly force, against Ohio citizens in the performance of their public duties. The exercise of this power carries with it a much higher likelihood that law enforcement officers will have a crime committed against them. Consequently, the law treats crimes committed against the State's law enforcement officers when they are performing their official duties more harshly. Moreover, there are crimes

that a person can only commit against a law enforcement officer while the officer is performing their official duties, such as resisting arrest.

Application of *City of Centerville* to the facts of this case would only result in the term "victim" not applying to public employees when the crime committed against them can be charged as a crime against the State, carrying greater penalties as a consequence. Respondent asserts that the officers involved in this case were victims of three crimes: felonious assault under R.C. 2903.11; attempted murder (had Ismail survived); and aggravated menacing under R.C. 2903.21.

Respondent—conveniently—omits the fact that each of these crimes carries with it harsher punishment if committed against a law enforcement officer. Felonious assault under R.C. 2903.11 is a first-degree felony if the victim is a "peace officer." R.C. 2903.11(D)(1)(a). Attempted murder becomes attempted aggravated murder under R.C. 2903.01 when the victim is a law enforcement officer performing their duties, and the offender knows or has reasonable cause to know they are a law enforcement officer. R.C. 2903.01(E). Aggravated menacing, normally a first-degree misdemeanor, becomes a fifth-degree felony when committed against "an officer" and the offense "relates to the officer's . . . performance or anticipated performance of official responsibilities or duties . . ." R.C. 2903.21(B).

Determining whether a public employee against whom a crime is committed is a "victim" within the meaning of Marsy's Law based on whether the state may punish the crime based on the victim's public employee status is a limiting principle, and one that is consistent with the Court's decision in *City of Centerville*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167. A public employee who is the victim of a crime that is punished more harshly because of their status as a public employee does not stand on the same footing as a private

citizen against whom a similar crime is committed. As the Court must presume that Ohio voters were aware of existing Ohio law, it must presume that Ohio voters understood that the criminal law often does not treat public employees and private citizens the same. *Id.* at ¶ 28.

Eliding the distinction the law draws between crimes committed against private citizens and crimes committed against the State's agents—particularly police officers—Respondent's argument boils down to "person" means "human being" and public employees are human beings. But this Court also wrote in *City of Centerville* that "person" may include "a partnership or corporate entity." *City of Centerville*, at ¶ 24. A municipal corporation is a "corporate entity," which is why this Court relied on a municipality's "authority to 'exercise all powers of local self-government and to adopt and enforce within [its] limits such local police, sanitary and other similar regulations, as are not in conflict general laws" to distinguish it from a private corporation. *Id.* at ¶ 25. According to the Court, a private corporation could be a "person" where it has "most of the rights and duties of a human being." *Id.* at ¶ 26. A municipal corporation did not qualify because although it had "some rights and duties that are similar to individuals and private corporations, it is often treated differently than such persons." *Id.*

Such is the case here. Public employees have rights and duties similar to private individuals and private corporations, but the law often treats them differently than such persons when they are exercising the power of the State. The differential treatment of public corporations and private corporations under Ohio law was sufficient, in the Court's view, to take public corporations out of the definition of "person" in the eyes of Ohio voters, even though private corporations might qualify. *Id.* at ¶ 39 (Kennedy, J., concurring in the judgment only).

As now-Chief Justice Kennedy observed in her separate opinion in *City of Centerville*, "the purpose of a bill of rights is 'to protect people from the state.'" and Marsy's Law

is contained in Ohio's Bill of Rights. *Id.* at ¶ 47 (Kennedy, J., concurring in the judgment).

Respondent offers no reason why an Ohio voter would have believed that public employees needed protection from the State when they act in their governmental capacity.

The fact pattern presented here falls squarely within the reasoning of both the majority in *City of Centerville*, and Chief Justice Kennedy's concurring opinion. The police officers whose identities Respondent withheld had responded to a reported crime, which ultimately led to the shooting death of one of the crime suspects. One of the officers was injured during the encounter, and had the suspect Ismail survived, he almost certainly would have been charged with crimes that carried harsher penalties because those crimes were committed against police officers. The officers thus became victims of crimes in their governmental capacities, a status which carries with it rights that private citizens would not typically have, such as the right to recover worker's compensation benefits.

The central question in this case is what Ohio voters would have understood the term "victim" meant when they voted for Marsy's Law. The mere fact that police officers are "human beings" no more resolves the issue than the fact that the City of Centerville in *City of Centerville* was a corporation, which are often deemed "persons" under Ohio law. The "plain language" is not sufficient. And when Marsy's Law is considered as a whole, the same reasoning that compelled the Court in *City of Centerville* to conclude that a public corporation acting in a governmental capacity is not a "victim" within the meaning of Marsy's Law should compel the same result here with respect to public employees.

C. As Marsy's Law Does Not Create an Exemption to the Public's Right of Access to Public Records, this Court Need Not Harmonize a Constitutional Right of Access to Government Records With That Law

Marsy's Law itself, as distinguished from R.C. 2930.07, does not create a constitutional right of privacy for crime victims against the public's rights to access public records under the Act. *See State ex rel. Summers v. Fox*, 2020-Ohio-5585 at ¶ 42. Indeed, had it done so, there is little reason to think the General Assembly would have seen a need to create such rights through legislation, as it has done. Thus, Respondent's contention that "voters of Ohio approved the Marsy's Law amendment knowing and intending that it would modify existing rules governing the dissemination of public records" (Resp.'s Merit Br., p. 15) does not accord with how this Court has previously interpreted that amendment, or the General Assembly's actions in passing legislation creating the exemption Respondent now invokes. Consequently, if this Court recognizes a constitutionally imposed limit to the General Assembly's power to deprive the public of access to their government's records, it need not harmonize such a rule with Marsy's Law.

Instead, the Court would need to assess whether—in passing R.C. 2930.07—the General Assembly has gone too far in depriving the public of access to their records. Respondent is correct that this Court has never recognized a floor to how far the General Assembly may go in shielding information from the public. But it has nevertheless suggested such a limit may exist. *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 372, 171 N.E.2d 508 (1960) ("How far the General Assembly might go in limiting access to and inspection of public records is not now before us."). Here, The Dispatch asks the Court to recognize a limit on the specific facts before the Court, that is, whether the General Assembly may pass a law that

permits a police department to withhold the identities of police officers who, while exercising the powers of the State, shot and killed a crime suspect.

D. The Potential for Confusion or Increased Litigation Does Not Provide Grounds for Not Recognizing a Constitutional Limitation on the General Assembly's Ability to Curtail the Public's Access to Government Records

Respondent makes no effort to defend R.C. 2930.07 as "not unreasonable or arbitrary," or suggest that Respondent has a compelling interest in shielding this information from the public. Instead, Respondent argues that subjecting the General Assembly's exceptions to the Act to judicial scrutiny would "create confusion and increase litigation," and that "[r]ecord custodians would no longer have bright line rules to guide their public-records decision-making." (Resp.'s Merit Br., p. 17.)

These are not legitimate reasons for the Court to conclude that Ohio citizens have no protectable interest in accessing their government's records. Many constitutional rights "create confusion and increase litigation." One need only sit through a law school criminal procedure class to understand this. But weighed against the important role public access to government information plays in fostering public debate, exposing corruption, and preserving the integrity of democratic processes, additional confusion and litigation seem like a very small price to pay in exchange for preserving government transparency.

Moreover, the existence of constitutional limits on the General Assembly's ability to deprive the public of access to government records would not eliminate "bright line rules" for public offices (such as they exist now). Statutes passed by the General Assembly are entitled to a "strong presumption of constitutionality" until declared otherwise. *City of Reading v. PUC*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 25. There would be no cause (or incentive) for public officials to question the constitutionality of statutory exceptions created by the Act

when responding to public records requests. And to the extent a public office did conclude that an exception that gave it discretion to withhold public records was unconstitutional, and decided not to invoke it, what harm would result?

If the Court recognizes a limit on the General Assembly's ability to curtail the public's access to government records, the Court need not consider whether other exceptions to the Act would pass muster, merely whether R.C. 2930.07, as applied to the specific records at issue, does. *Cf. Port Washington Teachers Assn. v. Bd. of Edn.*, 361 F.Supp.2d 69, 76 (E.D.N.Y.2005) ("judicial decision-making is best conducted in the context of an actual controversy rather than in a hypothetical exercise of a parade of horrors"). And if the outcome is that the General Assembly becomes more circumspect in creating exceptions to the Act, it is difficult to see why such circumspection would be unwelcome as a matter of public policy.

E. The Arguments of *Amici Curiae* Misconstrue Marsy's Law and The Dispatch's Arguments in this Case

Both the Ohio Attorney General ("OAG") and the Fraternal Order of Police ("FOP") submitted amicus briefs in support of Respondent's position, together totaling over 60 pages.

Amici Curiae—like Respondent—make the mistake of reading into Marsy's Law a constitutional right to privacy that may be invoked against other citizens when they request government records. (OAG Br. of *Amicus Curiae*, at 35 ("it would be strange to conclude that [Ohio voters] passed a law specifically enshrining victims' right to 'privacy' but expected it to be washed over by a general and implied right to information"). This Court has already held that the constitutional amendment does not create such a right. If it had, then R.C. 2930.07 would be superfluous, and Respondent would have started invoking that right to withhold information,

such as that involved here, in 2017, after the amendment's passage. Indeed, the FOP details inadmissible evidence of conversations it allegedly had with lawmakers about the creation of these new privacy rights, reinforcing the fact that no one (and especially Ohio voters) understood that Article I, § 10a of the Ohio Constitution already stripped the Ohio public of its rights to public records. (FOP Br. of *Amicus Curiae*, p. 7.)¹

Amici Curiae also mischaracterize The Dispatch's reliance on the rights afforded under Marsy's Law to show why Ohio voters would not have understood "victim" to include public employees against whom crimes are committed while performing their public duties. The Ohio Attorney General observes, for example, that "Ohioans have long been able to claim workers' compensation for work-related violence" and that under The Dispatch's "rationale," private citizens who might be able to recover worker's compensation benefits would be "ineligible for both restitution and the other rights for victims." (OAG Br. of *Amicus Curiae*, p. 17.)

The Dispatch's argument leads to no such conclusion, however, as the exercise of governmental authority is a prerequisite to whether the Court would look at whether affording rights to those government agents would have been seen as necessary by an Ohio voter in 2017. The analytical framework stems from *City of Centerville*, which as previously discussed, distinguished a public from a private corporation based, in part, on the fact that public corporations function in a governmental capacity. But the majority's analysis did not stop there, and it also looked at the nature of the rights afforded under Marsy's Law in assessing whether an

¹ The weblink the FOP included on page 7 of its brief appears to be broken, and it is unclear what occurred during this discussion. Nevertheless, the issue in this case is whether the term "victim," as used in the constitutional amendment approved in 2017, includes police officers against whom crimes are committed in the line of duty, not what lawmakers may have intended when they incorporated the definition of victim into R.C. 2930.07.

Ohio voter would have understood "victim" to include a public corporation. *City of Centerville*, at ¶ 27.

As this Court observed in *City of Centerville*, when Ohio voters approved Marsy's Law, they only had the term "victim" on the ballot, and not a definition for that term. *Id.* at ¶ 15. (*See also* Relator's Merit Br., p. 12.) Although the Court did not ascribe significance to that fact in *City of Centerville*, its opinion did not turn solely on the meaning of "person," but on what an Ohio voter would have understood the term "victim" meant. *Id.* at ¶ 27 ("These enumerated rights are incongruent with an understanding of 'victim' that includes a public incorporation.") (emphasis added). As The *City of Centerville* court reasoned, and as The Dispatch has argued, a the understanding a hypothetical Ohio voter had of the term "victim" must be informed by the rights afforded under Marsy's Law when interpreting that term.

Both the OAG and FOB also suggest that under The Dispatch's reading of the term "victim," family members of police officers against whom crimes are committed in the line of duty would be stripped of their rights under Marsy's Law. (*See, e.g.*, OAG Br. of *Amicus Curiae*, p. 18.) But a family member would be a person "who is directly or proximately harmed by the commission of the offense or act," not the person "against whom the criminal offense or delinquent act is committed." Ohio Const., Art. I, § 10a(D). The Dispatch has never argued that a crime committed against a police officer is not a criminal "offense or act."

The Dispatch has instead argued that when crimes are committed against police officers while they are exercising their official duties, the criminal offense is committed against the State (even if it is also committed against the individual). The "against the State" fact takes the police officer, as the State's agent, outside the meaning of the term "victim." The Dispatch's argument does not logically extend to family members of police officers directly or proximately

harmful by the commission of that crime. Nor should it. Granting privacy or other rights to private citizens whose lives are affected by crime against a law enforcement officer does not afford the government rights against its citizens. But affording a police officer a right to restitution against private citizens for injuries sustained in the course of performing their duties does. Indeed, it is the policy against affording exactly this type of right to government agents that supports the limitation on tort liability reflected in the Fireman's Rule, and erroneously relied on by Respondent to support its position.

III. CONCLUSION

At stake in this case is the public's right to know the identities of law enforcement officers involved in a use of force incident that led to the death of a crime suspect. Respondent, as an arm of the State of Ohio, has invoked a statute that incorporates a definition of "victim" found in the Ohio Bill of Rights to deprive The Dispatch (and by extension the public) of its ability to obtain this information.

The Dispatch has proposed a reasonable construction of the term "victim" as used in Marsy's Law, consistent with the reasoning of this Court in its *City of Centerville* decision. The Dispatch's construction would neither deprive, wholesale, public employees of the rights afforded under Marsy's Law, nor deprive their family members of these rights under any circumstances.

Accordingly, The Dispatch respectfully requests that the Court GRANT the writ of mandamus sought by its Complaint and direct Respondent to provide all information in the I-70 Incident Footage withheld under R.C. 2930.07.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Relator has been served via electronic mail pursuant to Sup.Ct.Prac.R. 3.11(C) upon the following counsel of record this 29th day of April 2024:

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