In the
Supreme Court of Ohio

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

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MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF RESONDENT CITY OF COLUMBUS POLICE DEPARTMENT

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INTRODUCTION

This case hinges on the meaning of the word "victim" in the Marsy's Law provisions of the Ohio Constitution. The common-sense and plain constitutional definition provides the answer: a "victim" is a "person" who is "harmed" by a crime. Ohio Const. art. I, §10a(D). The Constitution does not permit any exceptions. From there, the law is easy to apply, no matter who the harmed "person" is. Thus, a police officer who is harmed by a crime is a victim.

Gatehouse Media's contrary position relies on gymnastics over jurisprudence. To prove that a police officer can be a "person" who is "harmed" but still not be a "victim," Gatehouse Media grasps at reasons to prioritize almost anything instead of the plain meaning of the text—primarily policy preferences and the imputed secret intent of voters. But just as this Court does not create policy exceptions *against* disclosure of public records, it should not create policy overrides that favor unauthorized disclosure above specifically enumerated victims' rights. As the upshot of Gatehouse Media's arguments make obvious, that would be just the beginning of stripping the Marsy's Law constitutional protections away from countless state employees and their families.

Gatehouse Media's backup argument relies on a concocted constitutional conflict. But established canons of construction explain why there is no conflict—and if there were, why Marsy's Law would easily prevail.

STATEMENT OF *AMICUS* INTEREST

The Ohio Attorney General is the "chief law officer for the state" and "shall appear for the state in … causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in the correct interpretation of the Ohio Constitution and its legal protections for victims.

STATEMENT OF THE CASE AND FACTS

This case is about whether Marsy's Law protects victimized police officers from disclosures under the Open Records Act. Because this case implicates several important laws, this brief begins with an overview of the relevant laws in addition to the facts of this case.

The Open Records Law. Before 1963, Ohio had no law broadly conferring public-record status on all government-held documents. Instead, statutes identified discrete records that the public could view, such as "all documents in [the] possession" of the "Motor Vehicle Registrar of Ohio," GC 6296-31; 116 Ohio Laws, Part 2, 33, §31 (1935), or the "complete and full record" of "all [the] proceedings … and the result" of each local election regarding whether a town should buy stock in railroads, 48 Ohio Laws 273, §3 (1850). Ohio passed dozens of laws specifying which records were public records. *See, e.g.*, H.B. No. 539, 95 Ohio Laws 757, §3 (1902) (school board proceedings); H.B. No. 113, 111 Ohio Laws 24, §1240 (1925) (actions taken by the Director of Health); H.B. No. 105, 111 Ohio Laws 14, §3270-1 (1925) (township asset inventories); Am. S.B. No. 122, 119 Ohio

Laws 543, §486-19 (1941) (municipal corporation's annual report). When the Ohio Supreme Court referred to "public records" in this timeframe, it was referring to these kinds of documents—those which the General Assembly had made into public records. *See, e.g.*, *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 369 syl.1 (1960). This Court also recognized some common-law rights to public records, though it noted that the contours of the common-law right were not clear, and they were subject to alteration by statute. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 198 (1900). So in public-records disputes covered by statute, the primary reason to provide relief was that a specific statute required it. *See, e.g.*, *State ex rel. Withworth Bros. Co. v. Dittey*, 23 Ohio Dec. 31, 32 (Ohio Com. Pl. 1911).

Ohio passed its first comprehensive Open Records Act in 1963. R.C. 149.43 (1963); Am.Sub.H.B. No. 187, 130 Ohio Laws 155 (1963). For the first time, the General Assembly defined "public record" to mean "any record required to be kept by any governmental unit." *Id.* Its companion section imposed a fine for failing to comply with the public records law. R.C. 149.99; Am.Sub.H.B. No. 187, 130 Ohio Laws 155 (1963).

From the beginning, the Open Records Act recognized exceptions. Among the first were "records pertaining to physical or psychiatric examinations, [or] adoption, probation, and parole proceedings." R.C. 149.43 (1963); Am.Sub.H.B. No. 187, 130 Ohio Laws 155 (1963). The law also deferred to any conflicting "state or federal law." *Id.*

Such a broad law was not to remain simple for long. In 1980, the General Assembly amended the Open Records Act to exempt other sensitive information: "trial preparation records, confidential law enforcement investigatory records," and "medical records." Am.Sub.S.B. No. 62, 138 Ohio Laws, Part 1, 245 (1980). It also promoted smoother access to open records by instructing government units to "maintain public records in such a manner that they can be made available for inspection" and by requiring disclosure "promptly" upon request. *Id.*

The General Assembly has continued to refine the Open Records Act in the decades since, and the law has matured from ninety words to almost nine thousand. The General Assembly has now excluded from the universe of public records things like "trade secret[s]," personal information about children, and social security numbers. R.C. 149.43(A)(1)(q), (r), (dd). It also more fully describes the processes that government units should follow to facilitate access. R.C. 149.43(B). Today, the term "public record" includes "records kept by any public office," except those excluded in that statute or those protected by any "state or federal law." R.C. 149.43(A)(1).

Marsy's Law. Long before our modern Marsy's Law, Ohio started adopting laws to protect victims' rights. *See, e.g.*, Am.Sub.H.B. No. 28, 130 Ohio Laws 371 (1964); Am.Sub.H.B. No. 185, 135 Ohio Laws 555 (1974); 1984 Sub.S.B. No. 76, 140 Ohio Laws, Part 1, 127. And Ohio was not alone—around the same time, many state and federal initiatives created new protections for victims. *See* Michael E. Solimine & Kathryn Elvey,

Federalism, Federal Courts, and Victims' Rights, 64 Cath. U. L. Rev. 909, 911–12 (2015). In 1986, the General Assembly instructed the Attorney General to compile existing victims' rights into a pamphlet called a "victim's bill of rights." Sub.H.B. No. 657, 141 Ohio Laws, Part 3, 5466 (1986).

Ohio added its first victim-protection amendment to its Constitution in 1994. Without much elaboration, it guaranteed victims "fairness, dignity, and respect" as well as "notice, information, access, and protection" and a "meaningful role in the criminal justice process" as the General Assembly "shall define and provide by law." Ohio Const. art. I, §10a (1994). The General Assembly also passed the Victims' Rights Act, which significantly expanded victims' statutory rights. Am.Sub.S.B. No. 186, 145 Ohio Laws, Part 2, 2085 (1994). It contained a qualified protection of victims' privacy, but only if the prosecutor thought the victim had "reasonable grounds" to be "apprehensive" and if the court agreed; and even then it only prevented compelled testimony about the victim's place of abode or work. *Id.* at 2096. It also defined "victim" for the first time: "a person who is identified as the victim of a crime in a police report or in a complaint, indictment, or information charging the commission of a crime." *Id.* at 2092.

In 2017, Ohio voters, by a wide margin, amended the Ohio Constitution to expand victims' rights. *2017 Official Elections Results*, Ohio Secretary of State, https://www.ohiosos.gov/elections/election-results-and-data/2017results/. The amendment was called "Marsy's Law" after a murder victim whose family suffered an

unexpected emotional confrontation by their daughter's killer in a grocery store. Ohio Const. art. I, §10a; *Marsy's Story*, Marsy's Law for All, https://perma.cc/JVQ5-RRKB. The new provision broadly defined "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." Ohio Const. art. I, §10a(D). And it recognized a new fundamental right for victims: "privacy." §10a(A)(1).

Marsy's expansion of victims' rights required changes in statutes and rules to comply with the Constitution. For example, this Court amended Evidence Rule 615 to recognize a victim's right to be present during proceedings. *See* Evid. R. 615(B)(4), Staff Notes (2019). Among other statutory revisions to align with the amendment, the General Assembly created a mechanism for vindicating victims' constitutional guarantee of privacy. First, it enacted a provision that prohibits "the public disclosure of the name, address, or other identifying information of the victim" and requires redaction as necessary to protect that information. R.C. 2930.07(C), 2022 Sub. H.B. No. 343. Second, it amended the Open Records Act to explicitly exempt any information protected under that new provision. R.C. 149.43(A)(1)(pp), 2022 Sub.H.B. No. 343.

The Records Request. This case is rooted in a 2023 incident in which an officer was shot while confronting a suspect. While patrolling in their car, two officers were called to help stop suspects who were fleeing from a robbery. Resp. Ev., Ex. B, at 7. When they responded, they found the fugitive car stopped in the road and the suspects fleeing on

foot. John Doe #1 jumped out of his car and started chasing two of the suspects. *Id.* at 8. But he did not see the third. *Id.* The third suspect shot Doe, dropping him to the pavement. *Id.* As Doe cried out for help, the suspect continued firing and hitting Doe. *Id.* He only stopped when John Doe #2 fired on him. Resp. Ev., Ex. C, at 11. As his last act, the suspect turned and aimed at Doe #2 before succumbing to the incoming officer fire. *Id.*

Incredibly, Doe survived the five gunshot wounds. *Id.* He spent weeks in the hospital and in rehabilitation. *Id.* And he has undergone at least eight surgeries to repair the grievous damage to his body. *Id.*

In the wake of the shooting, the Columbus Dispatch requested body camera and dash camera footage as well as 9-1-1 calls related to the incident. *Id.*, Ex. E, at 16. They later asked for any use-of-force reports about the shooting, *id.*, Ex. K, at 27, but they do not press that issue here. Gatehouse Br.7 n.1. The Columbus Police Department released redacted videos of the incident that did not reveal the identity of John Does #1 and #2 and stopped just before the shooting occurred. *Id.*, Ex. G, at 20. The Department explained that Marsy's Law protects the identity of victimized officers. Resp. Ev., Ex. H, at 23; Relator's Ev., Ex. F, at 33. It also noted that including the footage of the shooting itself would violate the public records law because it depicts "[g]rievous bodily harm" and "[a]n act of severe violence against a person." Resp. Ev., Ex. H, at 22; *see* R.C. 149.43(a)(17)(d), (f), (e), (g).

ARGUMENT

Attorney General's First Proposition of Law:

A police officer who is harmed by a crime is a "victim" under the Ohio Constitution, Article I, Section 10a.

Straightforward principles of textual interpretation show that a police officer harmed by a crime is a "victim" under Marsy's Law. Marsy's Law defines "victim" in a way that plainly includes officers, and it gives no indication that officers should be excluded. That answers the question. But even if this Court looked to outside evidence of the Ohio voters' understanding when they passed Marsy's Law, it would come to the same conclusion.

I. The Ohio Constitution defines "victim" for purposes of Marsy's Law.

Applying the law always starts with the text. *State v. Faggs*, 159 Ohio St. 3d 420, 2020-Ohio-523 ¶15. If the statute or constitutional provision defines a term, that definition "controls." *Id.* (quoting *Terteling Bros., Inc. v. Glander*, 151 Ohio St. 236, 241 (1949)). If it does not, this Court applies the ordinary meaning as clarified in dictionaries and case law. *State v. Bertram*, 173 Ohio St. 3d 186, 2023-Ohio-1456 ¶13. If after that, the text is still "unclear or of doubtful meaning, the court may review the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis." *City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219 ¶22. The ultimate goal—similar to statutory interpretation—is to

determine "how the words and phrases would be understood by the voters in their normal and ordinary usage." *Id*.

The Ohio Constitution defines the term "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." Ohio Const. art. I, §10a(D).

The Constitution does not further define the terms in that definition, but both dictionaries and case law do. A "person" is primarily a "human being," although it can also include an "entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." *Black's Law Dictionary* (11th ed. 2019); *see also City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219 ¶24. The phrase "against whom the criminal offense or delinquent act is committed" includes at least "crimes against persons," which is "[a] category of criminal offenses in which the perpetrator uses or threatens to use force." Black's Law Dictionary (11th ed. 2019). And "harm" is "[i]njury, loss, damage; material or tangible detriment," *Black's Law Dictionary* (11th ed. 2019), which ordinarily "includes both physical and psychological harm," *State v. Mohamed*, 151 Ohio St. 3d 320, 2017-Ohio-7468 ¶14; *see also Muldrow v. City of St. Louis*, 601 U.S. ___, 2024 WL 1642826, at *8 (2024) (Alito, J., concurring in judgment) ("The primary definition of 'harm' is 'physical or mental damage,' and an 'injury' is defined as 'an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm.'"). The concepts of harm and injury also "incorporate at least some degree of significance or

substantiality," such that petty slights or minor inconveniences do not fit the natural use of those words. *Id.*

Putting this all together, the provision regarding victims applies to any human beings—and potentially other entities—that suffer any direct injury or loss because of a crime, whether physical or psychological.

II. Police officers who are harmed by criminal offenses are victims.

A police officer can be a "victim" under Marsy's Law. To start, a police officer is a human being. *See State v. White*, 142 Ohio St. 3d 277, 2015-Ohio-492 ¶98 (Lanzinger, J., dissenting) ("Police officers are human.") Officers can have crimes committed "against" them, and a police officer can be "directly and proximately harmed by the commission of" a crime. *See, e.g.*, Bethany Bruner, *Columbus police officer injured in July 6 shootout on I-70 released from hospital*, Columbus Dispatch (July 26, 2023), https://perma.cc/Q35J-8UGB. Nothing in Marsy's Law excludes police officers, and officers are included in the unambiguous statutory terms. That should end the inquiry. *State v. Jordan*, 89 Ohio St. 3d 488, 492 (2000). "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *Id.*

If there were any doubt that the text unambiguously includes police officers, the legal context of the day confirms that Ohio voters would have understood the term in that same ordinary sense.

But first, we must establish what question is *not* important. This Court is not attempting to "reconstruct what the [voters] would have done" if they had been presented with this exact case. Antonin Scalia & Bryan A. Garner, *Reading Law* 349 (2012). That kind of inquiry is a relic of "a time in which statutes were relatively scarce" and "the monarch was the de jure and de facto head of state." *Id.* That kind of question is now "meaningless" and "violat[es] the separation of powers" when applied to our constitutional republic, where hundreds of legislators (or hundreds of thousands of voters) voted on a single enactment. *Id.* at 349–50; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

If there were any doubt left in the 2017 Ohioan's mind as to how courts would implement the term "person," and thus "victim," well-established legal context settled the score. This Court "presume[s] that the voters were aware of the laws in existence at the time they voted to adopt the constitutional amendment," *State v. Yerkey*, 171 Ohio St. 3d 367, 2022-Ohio-4298 ¶9. Several Ohio statutes refer to on-duty officers as "persons" either directly or indirectly. Some refer to officers and "*other* persons," which implies that officers are themselves persons. R.C. 2935.031; *see also* R.C. 2945.51; R.C. 2963.08; R.C. 2963.10; R.C. 2927.27(A). Others describe a "person" doing something that can only be done in an official capacity. *See* R.C. 2921.37 (running a detention facility); *cf.* R.C. 2963.01 (acting as Governor). Another statute applies to any "person, whether or not acting under color of law," which implies that a "person" can be someone who is acting on

behalf of the State and by its authority. R.C. 2927.03(A). Indeed, federal law speaks similarly of a "person" who is acting "under color of [state law]." 42 U.S.C. §1983. When the General Assembly wants to refer to only people who are *not* acting in an official capacity, they have used the term "private person." *See* R.C. 2963.12.

In sum, the term "victim" unambiguously includes any "person" who suffers the requisite harm, and the term "person" unambiguously includes on-duty police officers. That is true as a matter of pure textual interpretation, and nothing in 2017 parlance should shake confidence in those terms' meaning.

III. Gatehouse Media's contrary arguments fail.

Gatehouse Media does not argue that officers are not "persons." *See* Gatehouse Br.14. ("[T]here is no question that a police officer is a 'person'…"). Instead, it argues that some "persons" can be excluded from the category of "victims" notwithstanding the text.

For that reason, Gatehouse Media pivots from the law's unambiguous terms and seeks to undermine the text by instead answering a counterfactual: What would Ohio voters in 2017 have wanted if they had faced this exact question? Gatehouse Media answers for them: They would not want on-duty officers to receive equal rights as other victims. That answer is doubtful, given the Amendment's support surviving widows like Cheryl Cole-Candelaresi. *See* Matt Clarke, *California Billionaire Pushes States to Adopt "Marsy's Law," Prison Legal News* (Jan. 31, 2008), https://perma.cc/HZ55-NPAB. But more importantly, the question is misguided. The voters voted on the text, not on their

collective secret wishes. Thus, what matters is the text, not what one might discover as "a telepathic time-traveler and collaborative lawmaker." Scalia & Garner, *supra at* 350.

At any rate, Gatehouse Media offers six specific arguments for adopting its interpretation despite the Constitution's text. None are persuasive.

First, Gatehouse Media argues that this Court excluded officers from the definition of "victim" when it held that municipal corporations cannot receive restitution under Marsy's Law. *Knab*, 162 Ohio St. 3d 623. That does not follow. This Court held in *Knab* that—even taking the broadest definition of "person" and including corporations—municipal corporations did not fit the bill because they do not have "most of the rights and duties of a human being." *Id.* at ¶26. In support of that textual reading, this Court also noted that municipal corporations could not logically invoke (or need) the fundamental rights that Marsy's Law emphasized: "safety, dignity and privacy… [and] reasonable protection from the accused." *Id.* at ¶27. After all, municipal corporations do not have physical bodies or human emotions that could need protection. (Justice Kennedy would have narrowed *Knab*'s holding even further by recognizing that municipalities sometimes act as private corporations—called their "proprietary functions"—during which they might qualify as "victims" just as much as any wholly private corporations. *Id.* at ¶¶33–52 (Kennedy, J., concurring in judgment.))

The *Knab* case is irrelevant here because officers *do* fall inside the definition of "person," even in its narrowest sense. *See* Gatehouse Br.14. Because there is no mismatch

between the officer and the definition, there is no ambiguity. Thus, this Court needs no recourse to the voters' understanding. But if this Court looked into the law's purpose the same way *Knab* did, it would find that officers *do* have need of "safety, dignity and privacy… [and] reasonable protection from the accused." *Knab*, 162 Ohio St. 3d 623 at ¶27. After all, they have bodies capable of harm and personal dignitary interests at risk. So applying *Knab* faithfully would mean coming to the opposite ultimate outcome because of the differences between municipal corporations and individual officers.

It does not make any difference that officers are exercising government authority when they complete their duties. *Contra* Gatehouse Br.14–15. Of course, on-duty police officers are the government's agents. But no doctrine strips them of their personhood during that time. And beyond noting that agency relationship, Gatehouse offers no reason to create that startling doctrine now. Gatehouse instead tries to confuse the matter by saying that withholding officers' names is the same as giving the *government* a privacy right. Gatehouse Br.21. That is a false equivalence. When private citizens invoke their Marsy's rights, the government redacts their personal information from its documents. When officers invoke their Marsy's rights, the government redacts their personal information from its documents. Either way, the right belongs to the individual, not the government.

Second, Gatehouse Media argues that voters could not have thought that officers could be "victims" because that would make Section 10a include "victims" of crimes like

resisting arrest, even when such crimes do not cause "physical or economic harm." Gatehouse Br.16. But Gatehouse itself suggests the most natural answer to this quandary: "these kinds of offenses are really 'against' the state," not the officer. *Id.* So if the crime is not committed "against" the officer and he is not "harmed," then he is not a victim under the definition in Marsy's Law. Ohio Const. art I, §10a(D). In any "no-harm" case like Gatehouse Media is suggesting, the courts would still just follow the text to its obvious conclusion. And at any rate, this argument goes not to the interpretation of the text, but to the divination of the voters' likely preferences if they had faced this exact case at the time they voted for the amendment. Those assumed policy preferences are not the guiding star for interpreting the law; the plain meaning of the text is.

Third, Gatehouse Media charges Marsy's Law with absurdity if interpreted according to its plain meaning. It says that Marsy's Law protections for victims "require state actors" to carry them out, and that it also "assume[s] [victims'] lack of access to state information and resources." Gatehouse Br.17–19. According to Gatehouse, affording victimized officers physical protection means charging each officer with protecting himself, which is absurd. Indeed, it would be. So any reasonable person would read the right to protection to afford all victims—including (likely injured) officers—protection as appropriate by on-duty, non-injured officers. Such a reading is far more reasonable than concluding that Ohio voters secretly wanted *only* injured officers to have no right to

protection and thought that the Marsy's Law definition of "victim" accomplished that feat.

Gatehouse Media's view of officers' inside knowledge about offenders is also peculiar. It says that officers "have ready access to … information" about an offender's release or escape "by virtue of their employment." Gatehouse Br.18. For one, police officers do not have special access to information for their personal safety through their work. Accessing police information databases for "personal use for any reason" is illegal, so using their power as police officers to obtain otherwise unavailable personal information about their assailants would subject them to criminal penalties. *State v. Garn*, 2017-Ohio-2969 ¶20 (5th Dist. Ct. App.). Further, any person can search for offender information on the Ohio Department of Rehabilitation and Correction's website, so access to information cannot justify reconstruing the statute. https://appgateway.drc.ohio.gov/OffenderSearch. And since 1994, victims have been able to sign up for notifications through the Victim Information and Notification Everyday (VINE) program. https://vinelink.vineapps.com/state/OH/ENGLISH. But most importantly, this argument cannot come close to accomplishing what it purports to do: prove that Ohio voters understood the term "victim" to exclude victims who have some level of knowledge or access that might reduce the need for one of the Marsy's Law protections. Indeed, this argument is just a thinly veiled policy argument.

Fourth, Gatehouse Media says that Ohio voters would not have thought that Marsy's Law applied to officers because they can recover workers' compensation for any injuries sustained on the job. Gatehouse Br.18–19. Again, this argument abandons any appearance of clarifying the text. This argument seeks only to answer what intent might have been in the secret thoughts of voters, or worse, what policies would justify removing officers from Marsy's protections now.

Regardless, this argument fails on its own terms. Ohioans have long been able to claim workers' compensation for work-related violence. *See Indus. Comm'n of Ohio v. Pora*, 100 Ohio St. 218 (1919); *Shamberger v. NHV Physicians Pro. Corp.*, 2003-Ohio-4390 ¶13 (9th Dist. Ct. App.). So under Gatehouse Media's rationale, those victims were not in the mind of the 2017 Ohio voters who ratified Marsy's Law—rendering them ineligible for both restitution and the other rights for victims. Even for an ambiguous law, that would be a bizarre conclusion. But all the more because it is supposed to prove that the voters harbored a cramped understanding of the words "victim" or "person."

Fifth, Gatehouse Media argues that Ohio voters would have thought officers already had enough protections granted by other statutes, so they would not have thought that Marsy's Law would apply to them. Gatehouse Br.19. Besides this argument's focus on the past voters' assumed policy preferences rather than the text, this argument fails. To begin, the statutes Gatehouse Media cites are not just about police officers. They cover "any peace officer, parole officer, prosecuting attorney, assistant

prosecuting attorney, correctional employee, or youth services employee." R.C. 2921.24(A). So instead of targeting police officers for exposure as intended, this argument would strip Marsy's Law protections from all kinds of state employees. But more than that, Marsy's Law is not just about protecting home addresses; it protects "privacy," §10a(A)(1), which includes the victim's "name" and "other identifying information" as well, R.C. 2930.07(C). And, Marsy's Law establishes other rights for victims unrelated to redaction—such as the right "to be heard" in "any public proceeding in which a right of the victim is implicated." §10a(A)(3); *see also* R.C. 2930.14. The minor overlap between existing protections for officers' home addresses and the comprehensive protections under Marsy's Law does not prove that officers were meant to be left out.

Marsy's Law also affords rights to a victim's family members, who share in the trauma of the crime and yet would be excluded if the officer did not qualify as a victim. §10a(B); R.C. 2930.02(A). Indeed, under Gatehouse Media's interpretation of Marsy's law, if Marsy had been an on-duty officer, Marsy's parents would have had no right to notification about the criminal proceedings or right to be heard in the criminal process. They would be back in the same grocery store with the same ambush by Marsy's murderer. That is a strange divination of the 2017 voters' intentions.

Sixth, Gatehouse Media says that protecting officers' personal information conflicts with the Columbus Police Division's Directive instructing personnel to identify themselves upon request. To the extent the Ohio Constitution or a statute conflicted with

a department policy, the Constitution or statute would always control—even if the directive did not defer to the law, as it does. *Rules of Conduct*, Columbus Police Division Directive, Nos. 1.01, 1.02, 1.06(B) (Sep. 30, 2023), https://perma.cc/W84B-6PXQ. "The Constitution is the superior law and the ultimate criterion. The court's sole duty is to enforce it." *State ex rel. Campbell v. Cincinnati St. Ry. Co.*, 97 Ohio St. 283, 309 (1918).

The rest of Gatehouse Media's arguments say explicitly what their others imply: its claim rests on the premise that government employees cannot enjoy equal rights as other individuals because they sometimes take up official capacities as well. Pulling from case law about employee speech, Gatehouse Media says that the privacy rights of victimized officers and other victimized citizens simply "are not equivalent as a matter of practice and policy." Gatehouse Br.21. These policy arguments cannot carry Gatehouse Media's desired changes to the law. The "practice and policy" of Ohio law is what the voters and legislators have expressed in the Constitution and statutes, even if Gatehouse Media disagrees with the outcome.

Even if policy arguments could win the day, these arguments would strip Marsy's Law protections from more than just police officers. Many government employees—from prosecutors, parole officers, elected officials, judges, state lawyers, and investigators, to executive staff, paralegals, auditors, board members, and inspectors—have special authority, access to information, and sometimes statutory protections by virtue of their public employment. If Gatehouse Media is right, each government job will

need to be reevaluated for likely revocation of Marsy's Law protections—at least for crimes committed during the workday (or worknight, as the case may be). As far as policy arguments go, destabilizing victims' rights for all government employees has little to recommend it.

As a final note, Gatehouse Media mentions that "[e]xceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish … that the requested records fall squarely within the exception." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St. 3d 81, 2008-Ohio-1770 syl.2. Whatever merit that standard has in statutory public-records cases, it makes less sense in a case with a competing constitutional right of privacy. That is, the *statutory* default of openness cannot limit the *constitutional* demarcation of privacy. "The Constitution is the superior law and the ultimate criterion." *Campbell*, 97 Ohio St. at 309. That shifts the focus to the correct interpretation of the constitutional text, which this Court should apply without deferring to any statutory presumption. But at any rate, even if the strict construction and burden applied here, there is no dispute that if the term "victim" includes officers, then they "fall squarely" within the exception. So the focus of the analysis would still be the plain meaning of the text.

Attorney General's Second Proposition of Law:

The Marsy's Law protections for victims do not violate other constitutional provisions.

The next question Gatehouse Media poses is whether Marsy's Law or the statutory privacy protections implementing it violate other constitutional provisions by including officers in the definition of "victim." As presented, this case implicates five constitutional provisions and two sets of statutes. Marsy's Law protects victims' "privacy." §10a(A)(1). The Ohio Constitution also protects "inalienable rights," including life, liberty, property, happiness, and safety, Ohio Const. art. I, §1, the right to assembly and petition, §3, the freedom of speech, §11, and due process, §16. (For the ease of the reader, call these four sections the "other constitutional provisions.") The Open Records Act provides access to many government-held documents. R.C. 149.43. And Chapter 2930 of the Ohio Revised Code implements victims' rights.

The question, then, is how these provisions interact—and if they conflict, which provisions take precedence. To navigate this question, the Court should apply the established canons of interpretation. Doing so will show that there is no barrier to effecting the full Marsy's Law protections in this case.

I. Established canons guide constitutional interpretation.

Several canons of interpretation could apply here, described briefly below. Start with the harmonious-reading canon. *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372 (1994); Scalia & Garner, *supra at* 180–82. This canon advises that, if two provisions of

equal authority could conflict, courts should try to read them in a way that they do not conflict. For example, suppose one statute defines taxable property as only property used in business, and another statute tells the tax commissioner to assess the value of all property. *Limbach*, 71 Ohio St. 3d at 372. A court might read the second law as referring to only all of the taxable property mentioned in the first law, not literally *all* property, which would create two conflicting tax schemes. *Id.*

Next is the general/specific canon. *State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808 ¶13; Scalia & Garner, *supra at* 183–88. When applying this canon, courts treat the more specific of two equal provisions as an exception or correction to the general rule. *Id.*; *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550 (1974). The theory is that the lawmaker speaks to the more specific situation when it expressly addresses it, and it does not seek to wipe away its more targeted directive when it speaks elsewhere to the general category.

Lastly is the subordinating/superordinating canon. Scalia & Garner, *supra at* 126–28. That canon acknowledges that a lawmaker can specify what priority a particular law should receive. For example, a law that uses the phrase "except as otherwise provided by law" will not be read to override other conflicting laws; by its own terms, that law is subordinate. *Limbach*, 71 Ohio St. 3d at 373. On the other hand, the legislature may supersede other conflicting laws by expressing that the law controls "notwithstanding" other laws, or words to that effect. Scalia & Garner, *supra at* 126–28.

II. Constitutional interpretation leads to giving effect to Marsy's Law.

With those three canons in mind, the next step is determining whether the provisions conflict and how to handle any conflict that arises. But first, two provisions are easy to dispense with at the outset.

First, Article I, Section 1 cannot be the basis for an independent claim, so there is no use including it in the analysis. That section says, "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Ohio Const. art. 1, §1. This Court has already explained that this section does not "provide for adequate and meaningful enforcement of its terms without other legislative enactment," so it is not "self-executing." *State v. Williams*, 88 Ohio St. 3d 513, 521, 523 (2000). "Rather, it is a statement of fundamental ideals upon which a limited government is created." *Id.* at 523. For enforceable protections of the rights this section mentions, Ohioans turn to more specific guarantees. *See, e.g.*, Ohio Const. art. I, §§3–16 (life and liberty), §19 (property), §4 (safety), *cf. State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶3. In this case, Gatehouse Media is interested in a right to information, so any analysis of its claimed right must take place under specific provisions that speak to that right.

Second, the Open Records Act does not purport to contradict any part of Marsy's Law or the statutory privacy protections; it specifically notes the statutory privacy

protections as an exception. R.C. 149.43(A)(1)(pp). That means that victims' identities and personal information—by statute—are not "public records," just as "trade secret[s]," personal information about children, and social security numbers are not "public records." R.C. 149.43(A)(1)(q), (r), (dd). So the Public Records Act cannot be any basis for Gatehouse Media's claims either.

Three canons explain why A) there is no overlap between the other constitutional provisions and Marsy's Law, B) finding overlap would not create conflict, and C) any conflict would resolve in favor of Marsy's Law. When the dust clears, it becomes apparent that Gatehouse Media's bottom line has no anchor in the Ohio Constitution. Properly characterized, it wants to invoke a public-records right that the General Assembly has already denied. And that it cannot do.

A. The other constitutional provisions do not overlap with Marsy's Law because they do not create broad rights to information.

This Court need not read the constitutional provisions here as generating any tension at all. Interpreted reasonably, there is no overlap between Marsy's Law and the other constitutional provisions.

Article I, Section 3. First is the provision protecting the rights of assembly and petition. "The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their Representatives; and to petition the general assembly for the redress of grievances." Ohio Const. art. I, §3. This Court has

never held that this provision includes a right to demand disclosure of government-held information, nor should it.

The right to petition has ancient origins. The earliest known petition in Anglo-American history was in 1013, and the Magna Carta of 1215 expressly recognized the right to petition. Norman B. Smith, *"Shall Make No Law Abridging...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1154 (1986). Petitions during this era took different forms, from petitions by small groups for resolving disputes, to requests for broad privileges that looked much like the legislation of today, to petitions from parliament to the king to make their proposals into laws. *Id.* at 1155–56. The right to petition gained popularity in the mid-sixteen-hundreds, and the English Bill of Rights of 1689 recognized "the right of the subjects to petition the king" and outlawed "all commitments and prosecutions for such petitioning." *Id.* at 1157–62; *see An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, The Avalon Project, Yale Law School, https://perma.cc/2N4N-AM47.

As the term "petition" suggests, the right to petition means permitting citizens to pass information to the government, not to get information from the government. "Preparing a written communication and sending it to the government are the essentials of petitioning." Smith, *supra at* 1189. This may also include activities like meetings for creating and presenting the petitions and publicizing the content through the press, but

those activities are encompassed by other rights. *Id.* at 1189–91; *see* Ohio Const. art. I, §3 (assembly), §11 (press).

Protecting the right to petition has historically meant preventing punishment for presenting petitions. For example, in the early Eighteenth Century, the House of Commons imprisoned five petitioners whose request it found offensive. Smith, *supra at* 1162–64. In response, a tract purporting to represent two hundred thousand people "condemned the House as dishonorable, oppressive, neglectful of its duty, and 'scandalously vicious,'" and the five men were soon released. *Id.* at 1164. Because of protections for petitioners in England, Blackstone explained that the right to petition in England outperformed the equivalent right in Russia at the time, which required petitioners to first approach two different ministers and then later petition to the prince, "but upon pain of death, if found to be in the wrong." 1 William Blackstone, *Commentaries on the Laws of England*, 143 (4th ed. 1770). That system meant that "grievances seldom [fell] under the notice of the sovereign," so "he had little opportunity to redress them." *Id.* In America, the right to petition found a place in the Declaration of Rights and Grievances by the Stamp Act Congress of 1765, the 1774 Declaration and Resolves by the First Continental Congress, and the declarations of rights by several States—including Pennsylvania, from whom Ohio would later borrow closely similar phrasing. Smith, *supra at* 1173–74; Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 125–26 (2d ed. 2022).

The right to assemble emerged after the right to petition, and "petitioning likely was the activity that brought about the practice of publicly assembling." Smith, *supra at* 1168–69. In an age without electronic communication, preparing a petition "often required public meetings," so the increasing frequency of petitions and public meetings coincided. *Id.* at 1169. Nevertheless, these rights "are distinct," and Ohioans may "assemble or congregate for any lawful purpose." Steinglass, *supra at* 126.

The right to assemble also does not carry any information-entitlement component. To assemble has long meant "to bring, call or meet together, to collect," and an assembly has long been "a company assembled or met, a ball, a legislature or a branch of it." Noah Webster, *Compendious Dictionary of the English Language* (1806); *see also* Nicholas S. Brod, *Rethinking A Reinvigorated Right to Assemble*, 63 Duke L.J. 155, 163 (2013) (listing definitions). These commonsense definitions, combined with other uses of the word "assemble" or "assembly" during that timeframe to refer to gatherings, make the right to assemble most naturally understood as a protection for "physical, in-person gatherings." Brod, *supra at* 164–65.

In sum, the rights to assemble and petition have a rich history, but they have no historical connection to receiving information from the government.

Article I, Section 11. Freedom of speech comes next: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of

the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted." Ohio Const. art. I, §11. This provision, enacted in 1851 and not amended since, was derived from the original free-speech provision in Ohio's 1803 Constitution and updated to shift its focus away from the use of "the printing presses" and to change the approach to libel. Ohio Const. of 1803 art. VIII, §6; Steinglass, *supra at* 162.

Around the time the speech provisions were adopted, free speech meant communicating one's thoughts without prior restraint and (in many cases) without punishment afterward. *See, e.g.*, 1 David Hume, *Essays Moral, Political and Literary, Part I.II: Of the Liberty of the Press* 14–16 (1742), available at https://perma.cc/65PD-L3MF; Leonard W. Levy, *Emergence of a Free Press* (1985). State constitution writers drafted free speech guarantees in response to a particular threat to public criticism of government—seditious libel prosecutions. Seditious libel criminalized any negative statement about government or an official, even if true. *See Crown v. John Peter Zenger*, 1735, Historical Society of the New York Courts, https://perma.cc/UB7Q-Z3QG. Further, the jury in a seditious libel prosecution commonly received instructions to decide only whether the accused had published the libelous statements. *Id.* Such a factual finding would guarantee that the judge found legal guilt. *See id.* State and federal constitution drafters created free speech guarantees to counter this specific threat by making truth a defense

to subsequent criminal prosecution for a public statement and by ensuring that the jury, not the judge, would determine guilt. *See* Levy, *supra at* xi.

These concerns became central even before independence, thanks to the famous 1735 trial of New York newspaper printer John Peter Zenger. Zenger faced seditious libel charges for publishing criticism of Royal Governor William Cosby. See *Crown v. John Peter Zenger*, 1735, Historical Society of the New York Courts, https://perma.cc/UB7Q-Z3QG. The jury in Zenger's case ignored its narrow instructions to decide only the facts and declared Zenger "not guilty" after short deliberation. *Id*. Zenger published a popular account of his trial that heavily influenced the Founding generation. *The Tryal of John Peter Zenger* (1738), https://perma.cc/SE3L-R5AV; *Argument in the Zenger Trial* (1735), National Constitution Center, https://perma.cc/TWP4-4YZ9.

That influence reached the Ohio framers of 1803, who drafted the State's first constitutional free-speech guarantee to ensure both that "truth … may always be given in evidence" in seditious libel prosecutions and that "the jury shall have the right to determine the law and the facts." Ohio Const. of 1803 art. VIII, §6 (emphasis added). The 1851 Framers completed the dialogue with seditious libel concerns when they revised the state constitution's speech protection to specify that truth is a sufficient defense to criminal libel if the statement was also "published with good motives, and for justifiable ends." Ohio Const. art. I, §11.

That background demonstrates that Ohio's constitutional free speech protection is wholly unrelated to public access to information in the state's possession. It simply provides no right of public access to government documents. This conclusion finds support from the U.S. Supreme Court's rejection of the idea that federal free speech rights somehow included a right of access to government documents. In *Houchins v. KQED, Inc.*, a majority of the justices agreed that "[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government." 438 U.S. 1, 16 (1978) (Stewart, J., concurring). Free speech protections, the plurality said, are "neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14 (plurality op.). As it tracks the First Amendment, *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 222 (1994), Ohio's speech clause creates no constitutional right to obtain information made available by open-records laws, much less a right to information that no statute grants public access to, *see McBurney v. Young*, 569 U.S. 221, 232 (2013).

Still, free-speech protections offer safe harbor for lawful information-collection activities—a type of non-interference principle. For example, the State cannot prevent private parties from communicating with each other, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011), or with the public at large, *Mills v. Alabama*, 384 U.S. 214, 219 (1966). That principle also protects private citizens lawfully collecting openly available information in public, such as "videotap[ing] police carrying out their duties in public." *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011). This Court has also noted that public-records laws help to

support the exchange of information "where it is not prohibited by law." *Kish v. Akron*, 109 Ohio St. 3d 162, 2006-Ohio-1244 ¶16. In other words, disclosing records that the General Assembly has designated as public helps to "encourage the free flow of information." *Id.*

Article I, Section 16. Finally, Section 16 provides, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." Ohio Const. art. I, §16.

As originally understood, this provision provided that injured parties had a right to seek redress; it did not create any substantive rights. *See State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, ¶¶40, 45–48 (DeWine, J., concurring). Nevertheless, this Court has found a right to substantive due process under this provision, one that tracks with the federal substantive-due-process doctrine. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶48; *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110 (1957). Even under that much broader conception of due process, this provision protects a select group of substantive rights. "Government actions that infringe upon a fundamental right are subject to strict scrutiny, while those that do not need only be rationally related to a legitimate government interest." *Stolz v. J & B Steel Erectors*, 155 Ohio St.3d 567, 2018-Ohio-5088 ¶14. And "fundamental rights" include only those rights that are "objectively,

deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Aalim*, 150 Ohio St.3d 489 ¶16 (quotation omitted).

There is no fundamental right to non-public government documents that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." For most of our State's existence, Ohioans had the right to access only select types of documents that the General Assembly designated as "public records." *See* above at 2–4. And yet ordered liberty existed. Now, the default is that all government records are public, but the General Assembly still defines the exceptions to that rule. Those exceptions do not threaten the concept of ordered liberty, and instead have long been recognized as a legitimate use of the General Assembly's power to balance the costs and benefits of disclosure. As this Court has said, "the General Assembly and not this court is the ultimate arbiter of policy considerations relevant to public-records laws." *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St. 3d 372, 2008-Ohio-6253 ¶51 (quotation and brackets omitted).

As such, this Court has never recognized a fundamental due-process right to information not designated as a public record, nor should it. Creating that right would continue to expand substantive-due-process doctrine, creating deeper conflict with the original meaning of the provision. As then-Judge Kavanaugh put it, courts should "resolve questions about the scope of … precedents in light of and in the direction of the

constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Here, that means declining to create a substantive-due-process right to non-public records.

As for rational basis review, Marsy's Law and its accompanying redaction instructions would clearly pass muster if such review applied. *But see* below at 36–37. Under rational basis review, "[t]he state does not bear the burden of proving that some rational basis justifies the challenged legislation; rather, the challenger must negative every conceivable basis" for the law. *State v. Williams*, 88 Ohio St. 3d 513, 531 (2000). Gatehouse Media cannot do so because it is clearly rational to balance openness and privacy by protecting victims' personal information from disclosure. Indeed, it is the exact kind of judgment call that this Court has repeatedly approved. *See State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497 ¶36 (collecting cases).

In sum, Section 16 does not overlap with Marsy's Law because it does not support a right to obtain information from the government. Marsy's Law and Section 16 simply do not cover any of the same ground.

Harmonious Reading. Because the most natural reading of each constitutional provision does not imply any special right to disclosure, there is no reason to find Marsy's Law in conflict with those provisions. Thus, the harmonious-reading canon would advise reading these provisions as providing non-overlapping instructions in different areas of law. Scalia & Garner, *supra at* 180–82; *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369,

372 (1994). To do otherwise would introduce unnecessary overlap into the Ohio Constitution, which this Court normally presumes speaks with one consistent voice.

For the same reason, the natural reading of the other constitutional provisions also creates no overlap with the statutes that carry out Marsy's privacy protections by requiring redacting. In fact, even if Marsy's Law did not exist, the statute exempting victims' personal information from disclosure would still have no constitutional issue. Because the constitutional provisions have no information-entitlement aspect, they do not affect in any way the statutes that restrict access to victims' personal information.

B. If the other constitutional provisions created broad rights, they would still not conflict with Marsy's Law protections.

If we assume that the other constitutional provisions *do* overlap with Marsy's Law by creating an implied right of access, the laws would still not conflict. Marsy's Law speaks specifically to victims' personal information, and the other constitutional provisions—assuming they say anything about information access at all—speak generally to the public right to information.

In this situation, the specific-general canon would treat Marsy's Law as an intentional exception to the more general constitutional provisions. *State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808 ¶13; Scalia & Garner, *supra at* 183–88. "[I]t is a general rule of constitutional interpretation that when a specific constitutional provision applies, it controls over more general notions of substantive due process." *State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶26 (plurality op.). For example, a double-jeopardy

challenge falls under double-jeopardy analysis, not the more general due-process analysis. *Id.* Otherwise, many rights would be analyzed under "the open-ended rubric" of due process, which would create "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.* at ¶24 (quotation and emphasis omitted).

Interpreting the constitutional provisions this way makes far more sense than assuming that the voters added Marsy's Law so that it could be overshadowed by a preexisting general implied right to information. This Court "presume[s] that the voters were aware of the laws in existence at the time they voted to adopt the constitutional amendment," *State v. Yerkey*, 171 Ohio St. 3d 367, 2022-Ohio-4298 ¶9, and it would be strange to conclude that they 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 conclusion also clarifies how to analyze the statutes implementing Marsy's Law. If Marsy's Law and the other constitutional provisions overlap, then Marsy's Law creates an exception to the other constitutional provisions, and the statutory implementation for the right to privacy falls directly inside the exception. Shielding personal information is the essence of privacy. Indeed, what else could the voters have meant when they added victims' right to "privacy" to the Constitution? By enacting a

law directly within the scope of Marsy's protections for "privacy," the General Assembly acted within that amendment's explicit scope.

C. If the other constitutional provisions did conflict with Marsy's Law, then Marsy's Law would control.

Finally, if this Court concluded that the other constitutional provisions create a right to information that intractably conflicts with Marsy's Law, then Marsy's Law would prevail. Marsy's Law, which was passed more recently than any of the other cited provisions, expressly states that it "shall supersede all conflicting state laws." Ohio Const. art. I, §10a(E). This is the kind of language that lawmakers use to superordinate one law over others. *See* Scalia & Garner, *supra at* 126–28; *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 373 (1994). It would be a mistake to read Marsy's Law as if it said the opposite—that conflicting implied rights to information in separate laws can overcome the express right to privacy in Marsy's Law. That is, if Marsy's Law conflicts with another constitutional provision, it effectively amends that provision to include "except when it would diminish these protected victims' rights."

This Court has already recognized that an implied right to privacy can overcome a request for personal information. *State ex rel. Keller v. Cox*, 85 Ohio St. 3d 279, 282 (1999). And that privacy interest withstood claims sounding in both the freedom of association and the desire to monitor police misconduct. *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 372 (2000) (Pfieffer, J., concurring). All the more, an explicit right to privacy should shield the information it exists to protect. Ohio Const. art I, §10a. That means that

Marsy's Law cannot logically be subject to a rational-basis, heightened-scrutiny, or free-speech test for constitutionality. By definition, Marsy's Law is constitutional—it is part of the Ohio Constitution.

If it is true that Marsy's Law supersedes and thus redefines the scope of the other constitutional provisions, then the statutes implementing Marsy's Law fall inside the area that Marsy's Law redefined. That is, the statutes that enact Marsy's protections would fall directly inside the field of protection that Marsy's Law creates by superseding and effectively amending the other constitutional provisions.

III. Gatehouse Media's contrary arguments fail.

Gatehouse Media argues that the General Assembly can only go so far in limiting access to records, and that protecting victims' personal information violates "protections for property and free speech rights enumerated in the Ohio Constitution." Gatehouse Br.24. Both of these arguments share one fundamental flaw, and they each also have their individual roadblocks.

First, the shared fundamental flaw: all of Gatehouse Media's arguments are about judging the constitutionality of a *statute*, and they ignore the constitutional privacy protection for victims. Ohio Const. art.I, §10a. Even Gatehouse realizes that its arguments apply only to statutes. *See* Gatehouse Br.25, 28, 29 (discussing "[l]egislation," "statute[s]," and "legislative history") (quotation omitted). So it asks this Court to judge the related statutes—which provide the mechanism for protecting the right to privacy—

by only the property and speech protections in the Ohio Constitution, not by the affirmative privacy grant in Marsy's Law. This tactic skirts the heart of the issue. The Ohio Constitution gives victims a right to privacy over and above any right that Gatehouse Media has to probe for information. If there is any further analysis to be done, it is in the formidable shadow of Marsy's Law.

Property-based Argument. Gatehouse Media's property-rights argument fails. The bottom line of this argument appears to go like this: access to public records is a property right, and government interference with property rights must not be arbitrary and unreasonable, so a statute that limits access to public records must not be arbitrary or unreasonable. Gatehouse Br.25–26. Under rational-basis review, Gatehouse Media concludes that the statute based on the privacy protections fails that test because "[n]othing in the extensive legislative history… suggests that any consideration was given to the effect the legislation would have on the public's right to obtain information about state actors." Gatehouse Br.29–30.

To begin, Gatehouse Media's lone citation to a superior-court case does not support its conclusion. The *Wells* court held that inspecting public records was a "property" right for the limited purpose of issuing an injunction rather than a mandamus writ. *Wells v. Lewis*, 12 Ohio Dec. 170, 180 (Super. 1901). It did not otherwise apply property-law principles to restrictions on viewing government records. Quite the opposite—it recognized that the General Assembly could, "by a constitution or statute,"

limit access to government documents. *Id.* at 176. It also specifically noted the statutes that designated the requested documents as public records. *Id.* at 174; *see* 1 *Revised Statutes of the State of Ohio including All Laws of a General Nature in Force January 1, 1890 with Numerous Notes and References and Marginal Notes Showing All Changes to January 1, 1896* 221, 235, 237, 655, 658, 665 (7th ed., Florien Giauque, ed.). And that makes sense because the term "public record" has always referred to records that the General Assembly declared to be public. *See above* at 2–4.

Moreover, even if public records are "property" in some sense, they are not Gatehouse Media's personal property in any sense. They are, at most, publicly shared property that the government manages on behalf of the people. "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *City of Athens v. Bromall*, 20 Ohio App. 2d 140, 146, (4th Dist. Ct. App. 1969) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)). And the law here is clear—disclosing victims' personal information is not a lawful use.

If Gatehouse Media's claim to property rights in non-public records could prevail, there would be no point in having an Open Records Act. After all, accepting this argument would mean that any citizen could claim a right to see any information held by the government. And while Gatehouse Media surely thinks its demands are reasonable and noble, every other citizen will think the same—from the Boy Scout recruiter seeking the detailed personal files of children, *State ex rel. McCleary v. Roberts*, 88

Ohio St. 3d 365, 372 (2000) (Pfieffer, J., concurring), to the newspaper demanding the identities of undercover officers whose cover would be irreparably blown, *State ex rel. Cincinnati Enquirer v. City of Cincinnati*, 157 Ohio St. 3d 290, 2019-Ohio-3876 ¶5. If eleven million of Ohio citizens "had the same right as [Gatehouse Media] claims for [itself]," then "[n]othing but chaos and the break down of law and order could result." *Bromall*, 20 Ohio App. 2d at 146.

Lastly on the issue of property, even if Marsy's Law was subject to an "arbitrary or unreasonable" test as a limit on a property right, Gatehouse Media offers no cognizable reasons to find it arbitrary or unreasonable. Under rational basis review, "[t]he state does not bear the burden of proving that some rational basis justifies the challenged legislation; rather, the challenger must negative every conceivable basis" for the law. *State v. Williams*, 88 Ohio St. 3d 513, 531 (2000). Gatehouse does not attempt to do so; it merely points out that the General Assembly did not spell out in the legislative history how they anticipated the law would apply to officers. Gatehouse Br.29–30.

Speech-based Argument. Finally, Gatehouse Media's speech-based argument fails. Gatehouse Media notes that access to more information means that it will be able to use that information to speak and hold the government accountable. Gatehouse Br.26–27. Courts have already rejected the idea that speech rights give citizens a right to force the government to disclose information. *See Houchins*, 438 U.S. at 16; *Eastwood Mall*, 68 Ohio St. 3d at 222; *cf. State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St. 3d 392, 2015-Ohio-974

¶22. And the best free-speech cases that Gatehouse Media can muster are about the government *silencing* private individuals' speech, not declining to disclose private information. *See* Gatehouse Br.26–27 (citing *Sorrell*, 564 U.S. at 570; *Glik*, 655 F.3d at 82; *Mills*, 384 U.S. at 218).

At any rate, Gatehouse Media tries to use the speech rationale to justify applying a "heightened level of scrutiny." Gatehouse Br.27. It argues that, if it could obtain the protected information, it could use it to engage in speech about Columbus policing, and speech about Columbus policing is exceptionally important, so the protection for victims' information must meet heightened scrutiny or else be found "unconstitutional." *Id.* at 27–28 (quotation omitted).

By now, the grounds for rejecting this reasoning are piling up. It makes no sense to analyze Marsy's Law for unconstitutionality; it expressly supersedes anything that conflicts with it, including the free-speech clause in the Ohio Constitution. It also makes no sense to peel away the implementing statutes from Marsy's Law to analyze their constitutionality separately; they fall directly under the Constitution's protections for privacy. And beyond that, it makes no sense to analyze either Marsy's Law or the implementing statutes for violations of the freedom of speech because free speech does not mean free access to government information. The topic of the desired speech—police behavior or otherwise—does not change that fact.

* * *

Victims are chosen by the perpetrator—often at random—to suffer gross violations of their bodies, their property, and their dignity. Afterward, they may choose not to be thrust into the public eye or suffer further violation as fodder for gawking media consumption. Put simply, they might want to be left alone. The Ohio Constitution gives them the right to make that choice. Gatehouse Media cannot change the law by protesting that they think it is more important to "investigate" and "inform[] the public debate." Gatehouse Br.27. Balancing those interests is a job for the people of Ohio and the General Assembly. They have already spoken.

CONCLUSION

For the above reasons, the Court should deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost was served this 23rd day of April, 2024, by e-mail on the following:

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