IN THE SUPREME COURT OF OHIO

CITY OF CENTERVILLE, Plaintiff-Appellant, vs. MICHAEL KNAB, Defendant-Appellee,	)	Case No. 2019-0873 On Appeal from the Montgomery Court of Appeals, Second Appellate District Case No. 28081

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION IN SUPPORT OF APPELLEE MICHAEL KNAB

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INTRODUCTION

Ohioans enacted Marsy's Law because they wanted to help people directly harmed by criminal violence to receive some measure of justice.[1] For the first time since its passage, this law comes before the Court for interpretation. Appellee Michael Knab asks the Court to limit Marsy's Law, specifically its restitution provision, to its stated purpose: to provide recompense to the victim directly and proximately harmed by a criminal offense. Appellant, the City of Centerville, asks Court to expand the law—far beyond Ohio voters' intent—to encompass the City that deployed the police, as if the City itself were a "victim" to Mr. Knab's offense. Expanding the law in this way would allow the City to recover from Mr. Knab the value of police time spent on his case, even when that police time came at no added cost beyond the City's ordinary operating expenses.

Amicus Curiae the American Civil Liberties Union of Ohio Foundation (the "ACLU of Ohio") submits that the City's interpretation of Marsy's Law is a gross misinterpretation of the law's intent and language that would produce an array of perverse incentives and unintended consequences. *First*, applying Marsy's Law in cases like Mr. Knab's would create powerful disincentives for people to call 911, contrary to both the public interest and the people's right to

[1] Ohioans voted on ballot language "for the purpose of securing for victims justice" where "victim" meant a "person…who is directly and proximately harmed by [a criminal] offense." Marsy's Law for Ohio, *Summary Petition for Ohio Crime Victims Bill of Rights*, (Jan. 24, 2017) http://www.ohiojudges.org/Document.ashx?DocGuid=3fa21d55-2299-4c72-8420-3e007ebfde41 (accessed Dec. 17, 2019). The elections ads Ohioans saw described recovery after the murder and assault of family members. *E.g.,* Associated Press, *Actor Kelsey Grammar featured in TV as backing Ohio's 'Marsy's Law,'* (Nov. 1, 2017) https://www.wkyc.com/article/news/local/ohio/actor-kelsey-grammer-featured-in-tv-ad-backing-ohios-marsys-law/488012025 (accessed Dec. 17, 2019). The electorate passed the ballot issue by over 83%. Jo Ingles, *Marsy's Law Overwhelmingly Passes, Making Ohio Sixth State to Adopt the Measure*, (Nov. 8, 2017) https://radio.wosu.org/post/marsys-law-overwhelmingly-passes-making-ohio-sixth-state-adopt-measure#stream/0 (accessed Dec. 17, 2019).

petition their government. *Second*, the City's interpretation could easily extend well beyond cases like Mr. Knab's, to the point where practically *any* offense would trigger a municipal restitution claim. *Third*, by claiming restitution even in the absence of any actual cost—by "double-dipping" to recover the cost of services that are already paid for—the City is asking this Court to ratify use of the criminal justice system to levy taxes.

None of these consequences flow from the letter or intent of Marsy's Law. But they will arise if the City is allowed to transform the restitution provision into Centerville's law. Marsy's Law is supposed to provide restitution for actual crime victims. The ACLU of Ohio urges this Court not to mutate it into a means for municipalities to use the criminal law to levy taxes, and to disincentivize legitimate uses of 911.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae the American Civil Liberties Union of Ohio Foundation (the "ACLU of Ohio") is a nonprofit, nonpartisan membership organization devoted to protecting the basic civil rights and liberties of all Americans. For nearly a century, the ACLU of Ohio and its national affiliate organization, the American Civil Liberties Union, have litigated questions involving civil liberties in the state and federal courts, helping to establish literally dozens of precedents that today form part of the basic framework of our constitutional jurisprudence. Among the liberty interests crucial to the ACLU of Ohio and its membership are the fundamental rights of personal autonomy and the right to petition one's government—including for emergency and non-emergency municipal services—that are protected by the United States Constitution. The arguments advanced by the City in this matter threaten those liberties.

STATEMENT OF THE CASE AND THE FACTS

The ACLU of Ohio adopts and incorporates the Statement of Facts submitted in the forthcoming brief on the merits by Appellee Michael Knab.

LAW AND ARGUMENT

I. Adopting the City's Proposition of Law Would Discourage 911 Calls and Harm Police-Community Relations

The City's misappropriation of Marsy's Law to attempt to recoup the cost of the regular use of municipal resources will have severe consequences. To force Mr. Knab to cover the bill for the law enforcement response to his 911 call would operate as a deeply inequitable penalty—one that would disincentivize the use of emergency services. Even beyond cases like Mr. Knab's, numerous categories of people in need would be forced to think twice, or three times, before calling 911 with the possibility of suffering harm as a result.

Ohio's criminal statutes (not to mention its county and municipal codes) contain dozens of offenses that could be, and are, used to penalize people for relying on police and emergency services. Some, like the ones Mr. Knab was convicted under, straightforwardly criminalize certain uses of the 911 system. *E.g.,* R.C. 2917.32 (Making False Alarms), 128.32(E) (Abusing 911). Cities have used other statutes to criminalize calling 911 or otherwise interacting with police. Consider, for example R.C. 2917.31 (Inducing Panic). A number of Ohio cities have used this law to penalize people for calling for emergency medical services after the caller or a loved one experiences an opioid overdose. *See, e.g.*, Anstaett, *Ohio: Misusing the Inducing Panic Law One Overdose at a Time* (Oct. 13, 2017), https://www.acluohio.org/archives/blog-posts/ohio-misusing-the-inducing-panic-law-one-overdose-at-a-time (accessed Dec. 18, 2019). Or consider R.C. 2917.13 (Misconduct at Emergency). Ohio cities have charged people under this law when they tried to speak to police or EMS services in person, and are deemed to be causing a disturbance. *E.g.* CBS News, *Cops Cite Man for Sign Warning Drivers About DUI Checkpoint* (Jun. 19, 2014), https://www.cbsnews.com/news/cops-cite-man-with-sign-warning-drivers-about-dui-checkpoint/ (accessed Dec. 18, 2019) (Parma police cited man after he interacted with

police during traffic stop); Reighard, *Columbus Police Respond to Viral Video Showing Officers, Man Struggle During SWAT Situation* (Sept. 17, 2019) https://www.10tv.com/article/columbus-police-respond-viral-video-showing-officers-man-struggle-during-swat-situation-2019 (accessed Dec. 18, 2019) (Columbus police cited man after he spoke to them during SWAT raid). In addition to being used to penalize people for calling for emergency services, statutes of this nature introduce a substantial risk in any interaction with emergency or other municipal services. *E.g.,* R.C. 2909.04 (Disrupting Public Services); R.C. 2917.11 (Disorderly Conduct).

In addition to these state laws, cities regularly use their municipal codes to criminalize calling 911 too frequently. *See, e.g.* Joseph Mead, et al., *Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio* (Nov. 11, 2017) *available at* https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2513&context=urban_facpub (identifying over 40 Ohio cities that criminalize calling 911 more than twice per year for various reasons). In these cities, police have charged women for calling to report attacks by domestic abusers, *id.* at 11 (discussing Fairlawn, Ohio); people with mental health disabilities calling to report attempted suicides, *id.* at 14 (Bedford); and family members calling to report overdose deaths, *id.* at 16 (Lakewood).

Distressingly, as cities and towns penalize people for calling or otherwise speaking to police, the state also creates criminal liability for *failing* to call the police in certain circumstances. R.C. 2921.22 (Failure to report a crime or knowledge of a death or burn injury) and 2921.23 (Failure to aid a law enforcement officer).

Ohio's legal scheme thus already imposes a delicate balancing act on persons who experience an emergency. Should they be too quick to call 911—or make any perceived misstep once they do so—they risk criminal penalties, either from the call itself or from the interactions

with police and EMS that will follow. Against that, they must weigh the need for those services, and the personal or legal consequences for *not* calling. The state and the public may have an interest in dissuading frivolous emergency calls, but they also have an obvious interest in encouraging people to summon police and emergency services, including to report crimes and to ask for help.[2] "Public policy favors the exposure of crime… [and] encourages all citizens to report crime and to come forward to aid law-enforcement officers during the investigation of those crimes." *Foley v. Univ. of Dayton*, 150 Ohio St. 3d 252, 2016-Ohio-7591, 81 N.E.3d 398, ¶ 13. Moreover, discouraging 911 calls corrodes police-community relations, and disproportionately harms crime victims including domestic violence survivors, people with disabilities, and Black and Brown communities in general. *See* Mead et al. at 8-9, 12-13 (collecting cases and sources in the context of use of nuisance ordinances to discourage 911 calls); *see also, e.g.*, Theresa Langley, *Living Without Protection: Nuisance Property Laws Unduly Burden Innocent Tenants and Entrench Divisions between Impoverished Communities and Law Enforcement*, 52 Houston L. Rev. 1255, 1286 (2015).

The City's proposition of law would upset this balance, tilting it sharply in the wrong direction. In practice, the risk of a monetary penalty would be one more impediment in every Ohioan's mind when they experience an emergency and consider calling 911. The most vulnerable people—those who already fear for their safety when they come into contact with police, or cannot afford to pay for a 911 call that might be found unnecessary—would face an

[2] This entitlement is not merely theoretical; courts have held that discouraging the use of 911 violates the First Amendment right to petition the government. *E.g., Meyer v. Bd. of Cty. Comm'rs of Harper Cty, Okla.*, 482 F.3d 1232, 1243 (10th Cir. 2007); *Bd. Of Trustees of Vill. of Groton v. Pirro,* 58 N.Y.S.3d 614, 620-21 (N.Y. App. Div. 2017); *Montagno v. City of Burlington*, No. 2:16-cv-232, 2017 WL 2399456, at *10-11 (D. Vt. June 1, 2017).

additional, often prohibitive financial penalty on top of the already-considerable disincentives in Ohio law. The result would be less access to emergency services for those who need them.

II. The City's Reasoning Could Expand Marsy's Law to Any Offense

Mr. Knab's case involves offenses against the public peace, with an impact on the general public rather than on any identifiable victim. *See generally* R.C. 2917.32(A)(3). But the City's proposed interpretation of Marsy's Law—a breathtaking expansion of what a "victim" is—is not limited to that category of offense. On the contrary, in the City's view, it should be entitled to assume the posture of the "victim" in the case of *any* crime, in order to recoup its operating costs. That was never the intent of Marsy's Law, nor does it follow from a plain reading of its language.

In the City's view, a municipality is a "victim" under Marsy's Law whenever it is "required to divert resources to respond to [a] crime that were normally devoted to other activities." *See* Appellant's Brief at 11. It is critical to note just how wildly overbroad that proposed definition is. By its own characterization, the City would be a "victim" in *literally any circumstance* where its municipal resources were diverted as a proximate result of *any* offense. *See id.* The resulting slippery slope carries on for a considerable distance. In what would appear to be a new innovation in how any state applies restitution law, *see infra* Section III, the City would not have to experience harm directly, as by being the target of embezzlement, or even indirectly, as with offenses against the peace. On the contrary, the City's proposal would entitle it to claim restitution from a criminal defendant for the cost of *any* "exercise of a governmental function, such as police services[.]" Appellant's Brief at 12.

If "harm" is stretched to include a city's mere diversion of resources, nearly any offense would qualify that city as a "victim," even if the government is not actually harmed. Imagine, for

instance, that a patron in a bar punches another and the bartender calls the city police. Not only could the actual victim—the person who was assaulted—claim restitution for medical bills or other harm, but the municipality could charge the offender an allocated share of police salaries and operating costs. If a municipal fire department responds to reported arson of a private building, the property owner would not be the only "victim." The city could cast itself as one, entitled to levy an extra tax on the offender for responders' time.

Even further, the City's position would expand the scope of its "victimhood" well beyond police or emergency response services, to *any* municipal services, again even if those services did not incur actual costs. *See* Appellant's Brief at 12 (arguing that the City would be a victim "[r]egardless of the nature of the services it was providing"). If the victim of an assault uses municipal health services, for example, then not only would that victim have a right to restitution, but the City could attempt to levy a fine for its medical staff's salaries. If an offender smashes the front window and display cases of a jewelry store, and the victim store owner discards the broken glass to be retrieved by municipal sanitation services, even those regular services could be billed to the offender. In each case, the offender would be liable three times over: once for criminal penalties under criminal law, once to the victim for restitution under Marsy's Law, and once *again* to the city government if any municipal resources became involved.

That would be an absurdity, and a far-reaching one. Nearly any conceivable offense, including those committed against purely private victims, will trigger use of *some* municipal service. The City's distorted reading of Marsy's Law would allow it to recover not only law enforcement expenditures, but general operating costs—and in so doing, effectively layer a new criminal penalty onto nearly *every single offense*.

III. The City's Interpretation of Marsy's Law Would Amount to a Tax, Incentivizing Criminal Charges

When police respond to a 911 call, as in Mr. Knab's case, they are expending resources their municipality has already paid for through residential taxes, and has already allocated towards emergency response and related services. So when it responds to a call for help, the City does not experience any loss, pecuniary or otherwise, as a crime victim does. Under its proposed reading of Marsy's Law, the City would nevertheless be allowed to bill criminal defendants for these services—effectively double-dipping, with the net effect of enriching the City government. Put another way, Marsy's Law would become a mechanism for municipalities to impose a tax through the criminal justice system.

Ohio voters passed Marsy's law to make crime victims whole, not to fill the coffers of municipal governments. Indeed, Ohio law consistently holds that criminal defendants are *not* liable for law enforcement costs as a form of restitution. *E.g., State v. Pietrangelo*, 11th Dist. Lake No. 2003–L–125, 2005-Ohio-1686, ¶ 12-17; ("absent an express statement from the legislature authorizing trial courts to sentence criminal defendants to pay restitution to law enforcement agencies for [the costs of police investigation], we should not, as an appellate court, take it upon ourselves to judicially rewrite the statute."). Even where governments arguably spend unallocated money, as with making a drug buy or launching a new investigation, they are not entitled to restitution for regular law enforcement. *E.g.*, *State v. Samuels*, 4th Dist. Washington No. 03CA8, 2003–Ohio–6106, ¶ 4 (state not entitled to restitution for money spent to make a drug buy); *State v. Williams*, 6th Dist. Sandusky No. S–13–007, 2013–Ohio–4838, ¶ 9 (similar); *State v. Ferguson*, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153, ¶ 29 (similar). Ohio courts have repeatedly declined to create restitution allowance for government agencies when they simply function in their official capacity. *E.g., State v. Wolf*, 176 Ohio App.3d 165,

2008–Ohio–1483, 891 N.E.2d 358 at ¶¶ 38-41. Other states that have enacted victim's rights laws similar or identical to Marsy's Law have not found cause to deviate from this sensible rule. *E.g. People v. Torres,* 59 Cal.App.4th 1, 4-5, 68 Cal.Rptr.2d 644, 646 (1997) ("the Legislature did not intend to include as a 'direct victim of a crime' a law enforcement agency that in the course of investigating criminal activity purchases illegal drugs"); *People v. Danenberger,* 364 Ill.App.3d 936, 945, 848 N.E.2d 637, 645 (2006) ("we cannot say that requiring defendant to pay financial compensation to an agency that has suffered no financial loss is reasonably related to the nature of the offense"); *Taylor v. State*, 672 So.2d 605, 606 (Fla. Dist. Ct. App. 1996) ("for purposes of restitution, a police agency does not meet the definition of 'victim'").

To deviate from this longstanding principle, and to rewrite a statute in order to charge criminal defendants for regular police costs, would be both contrary to law and bad policy. It would be perverse to create a scheme where municipalities benefit financially from bringing criminal charges. Certainly, cities like Centerville have a keen interest in ensuring their police and municipal services are funded. It is also true that many of Ohio's cities and towns struggle financially, particularly in light of reduced state support—a state of affairs that would incentivize them to use a Marsy's Law "tax" to its fullest extent.[3] But hijacking the court system in this manner, usurping a law intended by Ohio voters to provide victim restitution, is neither a just nor a lawful way to achieve that end. As courts and researchers have found repeatedly, municipal use of criminal fines and fees to supplement revenue or fund general operating costs is destructive,

[3] Ohio's 2012-13 budget "cut the local government fund in half," and beginning in "2017, counties, municipalities and townships [were] working with $1.176 billion less than in 2010" annually. W. Patton, Policy Matters Ohio, *State Cuts Sting Ohio Localities* (Dec. 2016) *available at* https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/state-cuts-sting-ohio-localities. Montgomery County, where much of Centerville sits, lost 39.3% of its budget between 2010 and 2017 as a result of state cuts. *Id.*

and can be unlawful. *E.g.,* S.D. Thakkilapati, ACLU of Ohio, *Off the Record: Profiteering and Misconduct in Ohio's Mayor's Courts* (April 2019), *available at* https://www.acluohio.org/wp-content/uploads/2019/05/Report_OffTheRecordProfiteeringAndMisconductInOhiosMayorsCourts_FINAL_2019-0520.pdf; J. Rosnick, et al., ACLU of Ohio, *The Outskirts of Hope: How Ohio's Debtors' Prisons are Ruining Lives and Costing Communities* (April 2013), *available at* https://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf. Indeed, as discussed above, allowing Centerville to use Marsy's Law to fund municipal services would paradoxically *degrade* many residents' ability to use those very services, and would do so more intensely for working class and Black residents.

CONCLUSION

For the foregoing reasons, Amicus Curiae the ACLU of Ohio urges this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 20, 2019, I filed the foregoing via the Court's electronic filing system, and served a copy of this brief by e-mail to Scott A. Liberman, Counsel of Record for Appellant, at liberman@altickcorwin.com, and Patrick T. Clark, Counsel of Record for Appellee at Patrick.clark@opd.ohio.gov.

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