

IN THE SUPREME COURT OF FLORIDA

CITY OF TALLAHASSEE, FLORIDA,
et al.,

Petitioners,

Case No. SC21-651

v.

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

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

Respondents.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT IN REPLY

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

The officers and their union characterize the City's position as an effort to "re-open the Constitutional revision process" (AB-19), but that is not a fair characterization of the argument we made in the initial brief. The City is not asking this Court to re-open the process or to delve into policy considerations. Nor is that necessary. All the Court needs to do is construe Marsy's Law "reasonably, to contain all that it fairly means." Antonin Scalia, *A Matter of Interpretation* 22-23 (1997).

Textualism is not literalism.

The union's principal argument is that police officers on active duty are "persons" and thus they can be victims under the plain language of Marsy's Law. (AB-19,20). The fallacy in this argument is that it relies on one definition of the term *person* to the exclusion of another definition that is more accurate, given the text, structure, and purpose of Marsy's Law.

Depending on the context in which it is used, the term *person* can refer broadly to a human being, or it can refer more narrowly to

an individual. (IB-19, 20). Both definitions are common in the English Language¹ and in the Law² and so the answer to the question now before the Court depends on how the term was used in Marsy's Law.

If the voters meant to use the term *person* to refer in the most literal sense to a human being, the officers and their union are right. Police officers are human beings. But if the term *person* was used to refer to an individual—an equally acceptable dictionary definition—then the union is wrong. A police officer who responds to a threat of harm while on duty does not act as an individual, but rather as an arm of the government. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that a police officer who is acting in an official capacity is not a person under 42 U.S.C. § 1983).

When this Court approved Marsy's Law for placement on the ballot, it noted that the term *person* might be ambiguous. *See Sec'y of State v. Hollander*, 256 So. 3d 1300, 1311 (Fla. 2018). The Court's

¹ The definition in Merriam-Webster's Collegiate Dictionary is: "HUMAN, INDIVIDUAL – sometimes used in combination," Merriam-Webster's Collegiate Dictionary (11th ed. 2020), <https://www.merriam-webster.com/dictionary/person>.

² The first definition given in the Florida Statutes is "individual." *See* § 1.01(3), Fla. Stat.

comment pertained to whether a corporation could be a person within the meaning of Marsy's Law. This is a different point, as the officers and their union point out (AB-25,26), but it is instructive all the same.

A corporation is obviously not a human being and, therefore, not a person in a literal sense. But we know that in some situations the term *person* can be construed to include a corporation. See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 273-76 (2012). It should come as no surprise then that there are also some situations (this one is a good example) in which a human being performing a government function cannot be considered a *person* under a particular law. See *Will*, 491 U.S. at 71. The status of being human is not always controlling one way or the other. As Scalia and Garner said on this very subject, "much depends on context." *Reading Law, supra* at 273.

The Court concluded in *Hollander* that the potential ambiguity in Marsy's Law was not a ground to strike the amendment from the ballot and ultimately left for another day the question whether the Law applies to corporations. See *Hollander*, 256 So. 3d at 1311. But the fact that we are even discussing corporations as people shows

the problem with using the “human being” definition in this context. If the definition of a person in Marsy’s Law so clearly referred to a human being, as the union insists, the question whether a corporation can be a person under the Law wouldn’t even arise.

To accept the argument made by the union, the Court would have to construe the term *person* in isolation as if it were unrelated to the text of Marsy’s Law as a whole. The Court would have to find that this term has no bearing on the role of the alleged victim or the relationship between the alleged victim and other actors in the criminal justice system. Rather, the Court would have to believe that the term was used simply to refer to the immutable fact that the alleged victim is human.

This is a simplistic argument that ignores the context in which the term is used. It is an argument that might appeal to judges who adhere to literalism or strict constructionism, but these theories of interpretation gave way years ago to textualism.³ One of the

³ Justice Oliver Wendell Holmes was the first known textualist, although he did not label himself as such. Justice Scalia made textualism popular in America so much that it is now the dominant theory of statutory and constitutional interpretation. As Justice Elena Kagan famously said in a speech at Harvard, “We are all textualists now.” See Laura Temme, *The Letter of the Law:*

distinguishing features of textualism is that the reader considers the meaning of the words and phrases in the context in which they are used.⁴ As Justice Scalia famously said, “a text should not be construed strictly and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” *A Matter of Interpretation, supra* at 22-23. He then emphasized that “a good textualist is not a literalist.” *Id.* at 23.

In recent years, this Court has stressed the importance of considering the context in which a word or phrase is used. For example, the Court has said that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Advisory Opinion to the Governor Re: Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting *Reading Law, supra* at 56) (emphasis added). The Court went on to say in in the same opinion that “every word employed in

Unpacking the History of Textualism, <https://www.findlaw.com/legalblogs/supreme-court/the-letter-of-the-law-unpacking-the-history-of-textualism/History-1930-Kagan>.

⁴ Textualism is defined and compared to strict constructionism in Christopher Cooke, *Don't Hear What I'm Not Saying: Defining Strict Constructionism to Distinguish It*, Federalist Society 2019, <https://fedsoc.org/commentary/fedsoc-blog/don-t-hear-what-i-m-not-saying-defining-strict-constructionism-to-distinguish-it>.

the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.” *Id.* at 1078 (quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833)) (emphasis added).

Likewise, the United States Supreme Court has emphasized the role of context in construing a text. As the Supreme Court explained, “[I]t is a ‘fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.’” *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto, Aerospace, Agric. Implement Workers of AM., Int’l Union*, 523 U.S. 653, 657 (1998) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)).

The term “person” must be understood in context.

The City’s argument is that the word *person* does not include an active duty police officer, in the context in which it was used in Marsy’s Law. (IB-17-28). The Answer Brief does not address this argument, much less refute it. Instead, the officers and their union have attempted to characterize the City’s argument as though it were a plea for the use of extraneous sources outside the text of the

document. (AB 29). That is not the argument. We are not asking the Court to ascertain the intent of the voters from historical documents or contemporaneous statements about Marsy's Law. To the contrary, the argument we are making here is one that can be determined from the text of the Law and nothing more.

The officers and their union contend that the term *person* in Marsy's Law can be construed broadly enough to include a police officer who is threatened with harm in the course of duty. (AB-20). That interpretation would twist the Law beyond its text and the obvious intent of the voters. The Law was adopted by the people to enhance the protections that are afforded to crime victims. It was not designed to create a secret police force or to give police officers unneeded access to the criminal justice system. As Sheriff Chitwood put it, "[a] law enforcement officer who uses deadly force while performing official duties was never contemplated and should never be considered a 'victim' under Marsy's Law." (Amicus Brief of Sheriff Michael J. Chitwood, Sheriff of Volusia County at p.3).

Sheriff Chitwood's point is borne out by the text. Nearly all of the provisions of Marsy's Law are either facially inapplicable to police officers or simply not needed by police officers. For example, the

stated purpose of Marsy's Law is to "ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims." Art. I. § 16(b), Fla. Const. Voters could not have been thinking of police officers when they adopted this language, as police officers already have a meaningful role in the system. In fact, they are indispensable to the system.

Marsy's Law then adds that a victim has the "right to be reasonably protected from the accused." Art. I § 16(b)(3). Any thought that the voters intended to include police officers in this section is quickly removed by the next sentence, which states, "nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office." Here, the voters are affirmatively distinguishing victims from police officers. It is impossible to read this sentence to mean that an officer can be a victim.

Following the list of victims' rights that apply automatically under Marsy's Law there is a list of rights that can be exercised "upon request" of the victim. Art. I, § 16(b)(6), Fla. Const. This part of Marsy's Law outlines the rights victims have to participate in the criminal justice system. In summary, these sections grant victims a

right to participate in some way at every stage of a criminal proceeding from the time that bail is set to the time of sentencing.

Could it be that the voters were trying to make sure that police officers can participate in the criminal justice system? That is a question that answers itself. It is an absurd notion. Police officers play an integral role in the criminal justice system as it is. There would be no need to make sure they can speak with a prosecutor or that they can make a comment in a presentence report. They have been doing that as a part of their job for many years.

Peraza is distinguishable.

The officers and their union rely heavily on this Court's decision in *State v. Peraza*, 259 So. 3d 728 (Fla. 2018) (AB-17, 19, 22-25, 27, 28), and they criticize the City for failing to mention the decision in its brief. (AB-22). Although the union now makes much of *Peraza*, a decision of this Court in a completely different context, the union barely mentioned that case during the litigation below. It is little surprise, then, that *Peraza*—the case the union now hangs its hat on—was not once mentioned in the First District decision the union is defending in this Court.

The reason the *Peraza* case was not featured in the arguments below or even mentioned in the district court opinion is that it construes the term *person* in an entirely different context. The police officer in *Peraza* was a criminal defendant facing a charge of manslaughter. At issue in the case was the officer's ability to assert stand-your-ground immunity, as all other criminal defendants have a right to do. This Court concluded that the officer was a person under the stand-your-ground statute and that he was, therefore, entitled to claim immunity. This makes perfect sense. The officer was acting on his own behalf in an individual capacity, by defending himself in a criminal case brought by the state. In that situation, it was reasonable to conclude that the officer was a person within the meaning of the statute, entitled to all the same protections as all other similarly situated criminal defendants.

By contrast, the City's argument here is that an on-duty police officer who uses force against a suspect is acting on behalf of the government and not as a person within the meaning of Marsy's Law. The officers here were acting in an official capacity by the authority vested in them by the City of Tallahassee. At no time were they acting on their own behalf as individual citizens.

It is one thing to act on behalf of the government, as in this case, and quite another to act as an individual in defense of an action taken by the government, as in *Peraza*. If anything, the contrast between *Peraza* and this case shows how important it is to consider words and phrases in the context in which they are used.

The statutory definition favors the City.

The officers and their union also rely on the statutory definition of the term *person* in section 1.01(3), Florida Statutes. (AB-25). But that definition actually proves our point. Section 1.01(3) states that “[t]he word “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.” The fact that the statute includes associations, trusts, syndicates, and other nonhuman entities shows that the Legislature does not equate the term *person* with the term *human being*, as the union urges the Court to do here.

Another aspect of the statutory definition that supports our position is that none of the terms used in the statute could be used to describe a government entity or a government agent. It is true that there is a catch-all phrase at the end—“and all other groups or

combinations”—but under the principle of *eiusdem generis*, that phrase must be interpreted to include only items like those on the list. *See State v. Weeks*, 202 So. 3d 1, 8 (Fla. 2016).

Police officers are not “victims.”

The Answer Brief states that it “would surely shake the earth beneath Florida’s jails and prisons” if the Court were to deliver “[n]ews that on-duty police officers cannot be crime victims.” (AB-28). These general observations about crime and punishment are really just a deflection from the more specific issue before the Court. It is certainly true that a police officer might be harmed in the course of his or her duty. But that has little to do with the proper interpretation of the constitutional provision here.

As we pointed out in the Initial Brief, there are other laws that protect police officers who are injured in the line of duty. (IB-24). For example, a police officer who is injured on the job can obtain a special award under the Worker’s Compensation Law. In fact, officers who are injured in the line of duty have special rights that are not afforded to other injured workers. *See* § 440.091, Fla. Stat. Similarly, a law enforcement officer who is killed in the line of duty is

entitled to special death benefits that are unavailable to ordinary citizens. *See* § 112.19, Fla. Stat.

These statutes would continue to protect law enforcement officers in the same way if the Court were to accept the City's argument that Marsy's Law was not designed to create a new right for police officers who are threatened or harmed in the course of duty.

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

The officers and their union argue that there is no need for a triggering event that would define one person as an offender and the other a victim, because it is clear from the City's stipulations and the grand jury presentments that the officers were, in fact, victimized. (AB-32-34). This argument is of no help to the union because the grand jury presentments are not in the record. Those proceedings occurred well after the dispute here and, because they are not in the record, they were not part of the First District's analysis.

In addition, the union overstates the City's stipulations. The City agreed to the basic facts of the incidents and conceded that, if the officers qualified as victims protected by Marsy's Law, they had been subjected to aggravated assaults by the suspects. (R-403,404).

The City did not agree that this made the officers victims or that Marsy's Law applied, let alone that the officers acquired victim rights immediately upon the incidents having occurred.

Most importantly, the City's interest all along has transcended these individual incidents. The City does not question these officers. The City seeks to faithfully and accurately apply Marsy's Law, which is impossible to do unless there is some neutral determination of victimhood.

If this Court were to accept the First District's view that the officers in this case had a right to declare themselves to be victims, the Court would have to think about how the precedent would play out in other situations with different facts. For example, what about the case of a street fight in which both people claim to be the victim? Will they both get to immediately claim the protections afforded by Marsy's Law? The Court would also have to think about how its precedent would play out in a case where it is not yet known whether the putative defendant had the criminal intent needed to make the act in question a crime. Will the putative victim have a right to claim the protections of Marsy's Law based on the criminal act alone? A

fair reading of Marsy's Law for all that it contains and all that it does not contain will avoid these unintended outcomes.

The Answer Brief posits that if a criminal proceeding is needed to distinguish the victim from the defendant "victims of crimes committed by living defendants would receive the law's protections while victims under other circumstances would not." (AB-31). The officers and their union go on to point out that some offenders "commit suicide or are killed during apprehension." (AB-31). This argument has little force as a practical matter.

If the putative defendant is dead, the putative victim will not have much need for the rights granted by Marsy's Law. There would be no need to attend a bail hearing, to speak with the prosecutor, to be informed about a plea deal, or to attend a sentencing hearing. In fact, the death of the defendant would eliminate the stated need for Marsy's Law altogether.

The need for a criminal proceeding is best illustrated by the text of Article I, section 16(b). This section not only outlines the goals of Marsy's Law, it also categorically states that all of the "following rights" listed in the Law are afforded to victims for the purpose of

achieving those goals. The full text of Article I, section 16(b) is as follows:

To preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents, every victim is entitled to the following rights, beginning at the time of his or her victimization”

None of these objectives could be achieved before a criminal proceeding is initiated. Obviously, a victim could not be given a “meaningful role” throughout the criminal justice system before a case comes into the system. Nor could a victim be “protected by law in a manner no less vigorous than the protections afforded to criminal defendants” absent any proceeding against a criminal defendant.

Article I, section 16(b) does conclude with the statement that the victim's rights begin at the time of victimization. But, in the context of the sentence, that could only refer to a retroactive application, for example to calculate the amount of restitution that would be due. Otherwise, the main point of the Law, to give victims

constitutional rights that are equal to those afforded to criminal defendants, makes no sense.

III. The First District erred in holding that Marsy's Law grants victims a right of anonymity.

The officers and their union concede that Marsy's Law does not expressly protect the identity of the victim. (AB-36). At the same time, they argue that Marsy's Law should be interpreted to establish a right of anonymity because disclosure of the victim's name would be "the first and most necessary step" in locating and harassing the victim. (AB-36,37). This is a policy argument that is simply not supported by the text of the Law.

The framers of Marsy's Law included a list of 10 specific rights that are automatically afforded to all crime victims and 8 other specific rights that must be honored at the request of the victim. If the framers wanted to grant a crime victim the right to remain anonymous they could easily have done that.

The officers argue that we live in the information age and that it would be a simple matter now to locate a victim with nothing more than a name. (AB-35). That may or may not be true, but it is beside the point. The fact that a name might be used to locate a victim who

would then be harassed is an argument for the inclusion of a right that is simply not there. Nothing in Marsy's Law grants the victim a right of anonymity and the courts are not at liberty to add such a right. See *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 633 (Fla. 2012).

Finally, it is clear that the Court could not accept the union's strict constructionist argument that an on-duty officer is a person under Marsy's Law, and at the same time agree with the union that anonymity can be added to the language that was actually used. These arguments are inconsistent.

CONCLUSION

The officers and their union have failed to refute the City's arguments. This Court should hold: (1) that police officers acting in an official capacity are not "victims" under Marsy's Law; (2) that Marsy's Law requires the commencement of a criminal proceeding; and (3) that Marsy's Law contains no right for victims to remain anonymous.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). This brief contains 3797 words.

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