

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO,</b>	<b>:</b>	<b>CASE NO. 2021-1047</b>
<b>PLAINTIFF-APPELLANT,</b>	<b>:</b>	<b>ON APPEAL FROM THE MONTGOMERY</b>
<b>v.</b>	<b>:</b>	<b>COUNTY COURT OF APPEALS,</b>
		<b>SECOND APPELLATE DISTRICT</b>
<b>ZACARY L. FISK,</b>	<b>:</b>	
<b>DEFENDANT-APPELLEE.</b>	<b>:</b>	<b>COURT OF APPEALS</b>
		<b>CASE NO. 28798</b>

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**BRIEF OF AMICI CURIAE NATIONAL CRIME VICTIM LAW INSTITUTE AND OHIO CRIME  
VICTIM JUSTICE CENTER IN SUPPORT OF APPELLANT, STATE OF OHIO**

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## STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote comprehensive and enforceable legal rights for crime victims, and access to knowledgeable attorneys to help protect those rights in every case, through victim centered legal advocacy, education, and resources. NCVLI accomplishes its mission through training and education; providing legal technical assistance on cases nationwide; researching and analyzing developments in crime victim law; promoting the National Alliance of Victims' Rights Attorneys & Advocates; and participating as amicus curiae in select state, federal, and military cases that present victims' rights issues of broad importance.

Ohio Crime Victim Justice Center (OCVJC) is a statewide nonprofit organization with offices in Columbus, Cincinnati, and Cleveland. OCVJC was founded in 2000 to provide crime victims a place to report victims' rights violations and to provide free legal representation to preserve and enforce their rights. OCVJC's mission is to ensure that the constitutional, statutory, and inherent rights of Ohio's state and federal crime victims are upheld throughout the criminal justice process in Ohio's 88 counties. OCVJC accomplishes this mission by providing free direct legal representation to Ohio crime victims in state and federal courts to preserve and enforce victims' rights during criminal proceedings. OCVJC also assists victims in accompanying protection order proceedings, Title IX proceedings, military proceedings, and immigration proceedings. In addition to providing direct legal assistance, OCVJC provides free victims' rights education and training to hospital personnel, social workers, counselors, court appointed special advocates, guardians ad litem, law enforcement, prosecutors, courts, and the community,

and briefs courts as amicus curiae on issues of importance regarding the rights of Ohio crime victims in state and federal courts.

This case presents an issue of fundamental importance to all crime victims in Ohio – whether a trial court’s unlawful failure to order restitution is redressable by the State.

### **STATEMENT OF THE CASE AND FACTS**

Amici adopt the statement of the case and facts presented by the State in its Memorandum in Support of Jurisdiction.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law: Ohio Constitution, Article I, Section 10a did not revoke prosecutors’ standing to appeal a trial court’s imposition of an unlawful sentence.**

Marsy’s Law was passed as part of a national effort<sup>1</sup> to secure “justice and due process” for crime victims throughout the criminal justice system. Ohio Constitution, Article I, Section 10a(A) (granting rights to “secure for victims justice and due process throughout the criminal and juvenile justice systems”). The plain language of the amendment expanded victims’ rights in Ohio, explained who can assert the rights in trial courts, and clarified the process for victims’ and their representatives to challenge a rights’ violation in the appellate courts. Ohio Constitution, Article I, Section 10a(A).

The lower court’s decision propels some victims into a frustrating and painful reality where constitutional rights are illusory—merely rights on paper. Touting the promise of rights without providing access to the tools to ensure that promise is fulfilled will lead to victims

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<sup>1</sup> Marsy’s Law for All is an organization working for crime victims’ rights across the United States. Since Marsy’s Law passed in California in 2008, similar provisions have been overwhelmingly approved by voters in Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin.  
[https://www.marsyslaw.us/about\\_marsys\\_law](https://www.marsyslaw.us/about_marsys_law).

suffering secondary victimizations. *See* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 *Social Justice Research* 313, 315-316, 321-322 (2002) (finding that victims' perception of procedural justice is a "powerful predictor[] of secondary victimization"). Such system-based revictimization compounds the initial trauma and pain that victims suffer in the aftermath of crime. *See* National Crime Victim Law Institute, *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate "Secondary Victimization" in the Criminal Justice System*, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), March, 2013, at 2 (internal footnotes omitted) ("[V]ictims who \* \* \* [are] denied the opportunity to exercise their rights—report experiencing more trauma symptoms [than those who feel that they have been treated fairly and afforded their rights]. These victims are more likely to feel that they have been harmed by the legal system.").

A key component of Marsy's Law is the explicit recognition of standing to seek enforcement of the rights afforded. The amendment provides:

The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

Ohio Constitution, Article I, Section 10a(B). This explicit provision of standing is intended to avoid the dysfunction caused in the criminal justice system when courts mistakenly find there is a lack of standing to enforce the rights. *Cf.* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U.L.Rev. 255, 331 (2005) (detailing significant problems that stem from victims' rights without standing; "Without victim standing to enforce victims' rights, judicial hierarchy is turned upside down because the trial courts are

allowed to usurp appellate courts' traditional authority, hierarchy of laws is upset, adversity is corrupted, rights enforcement is crippled, victim advocacy in favor of defendants is constrained, and constitutional rights are degraded.”).

In this case, the court of appeals construed the above two sentences in Marsy's Law as removing prosecutors' pre-existing standing to defend restitution orders, and found that the State did not have standing to appeal the court's restitution order. The court of appeals' interpretation of Marsy's Law cannot stand for at least two reasons: (1) it is contrary to the plain language and impliedly repeals Revised Code Section 2953.08 (B)(2); and (2) it results in a legal landscape where constitutional rights may be violated without remedy in cases where victims lack their own counsel. For these reasons, this Court should reverse the court of appeals' decision, find that the trial court erred as a matter of law by not ordering restitution, and remand to the trial court for proceedings consistent with its decision.

**I. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' DECISION BECAUSE ITS CONSTRUCTION OF MARSY'S LAW IS UNSUPPORTED BY THE PLAIN LANGUAGE AND IMPERMISSIBLY REPEALS R.C. 2953.08(B)(2) BY IMPLICATION.**

**A. MARSY'S LAW, WHICH EXPANDS VICTIMS' RIGHTS AND CLARIFIES THE PROCEDURE FOR VICTIMS TO PERSONALLY ASSERT AND SEEK ENFORCEMENT OF THEIR RIGHTS, DID NOT MODIFY PROSECUTOR STANDING TO APPEAL AN ERRONEOUS SENTENCE.**

Among the rights that Marsy's Law guarantees, and that victims may now personally assert, is the right “to full and timely restitution.” Ohio Constitution, Article I, Section 10a(A)(7). Prior to, and unmodified by Marsy's Law, was prosecutors' standing to appeal restitution orders that are contrary to law. *See, e.g.*, R.C. 2953.08 (B)(2) (“[Attorney for the government] may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony \* \* \* on \* \* \* the following ground [that] [t]he sentence is contrary to law.”);

*see also* R.C. 2929.18(A)(1) (including restitution as part of a defendant's sentence by authorizing courts to sentence a felony offender to pay restitution as a financial sanction). Marsy's Law did not alter this authority to challenge an unlawful sentence; rather, it made explicit that those who could challenge a restitution order included victims and their representatives. To construe the amendment to remove prosecutor standing thwarts the prosecutor's role in seeking justice and in ensuring victims' rights are afforded. *C.f.* R.C. 2930.19(A) ("In a manner consistent with the duty of a prosecutor to represent the interests of the public as a whole, a prosecutor shall seek compliance with [Rights of Victims of Crime] chapter on behalf of a victim\* \* \*").

In this case, Defendant-Appellee was found guilty of two counts of assault, and, at sentencing, the victim presented the court with a restitution request of \$177,179.58 for medical bills. The fact that the victim suffered economic loss as a result of the crime was not disputed in the trial court. Over the state's objection, however, the trial court refused to order restitution on the basis that the victim did not show proof that the Veterans Administration would not pay for that loss. *State v. Fisk*, 2nd Dist. Montgomery No. 28798, 2021-Ohio-1973, ¶¶ 18-21. The state challenged the order on cross-appeal, but the court of appeals never reached the issue on the merits; instead the court dismissed the state's case after construing Marsy's Law to limit the authority to challenge the order to the victim or his representative. *Id.* at ¶ 46. This holding ignores the explicit prosecutor standing found in Revised Code Section 2953.08 (B)(2), and, contrary to Marsy's Law, leaves the victim worse off than he would have been prior to the amendment's passage.

**B. THE COURT OF APPEALS' DECISION IMPLIEDLY REPEALS REVISED CODE SECTION 2953.08 (B)(2).**

As stated above, Marsy's Law did not repeal the Revised Code Section 2953.08 (B)(2) grant of prosecutor standing to appeal sentences that are contrary to law, yet the court of appeals' holding reaches that result. The court, employing the "negative implication" canon of statutory construction to the constitutional amendment, repealed by implication longstanding prosecutorial authority. The court reasoned that because the phrasing "attorney for the government" was explicitly stated in the first sentence relating to assertion of victims' rights in the trial court, but absent from the second sentence describing how a victim may personally petition the court for relief if a right were violated, the drafters did not intend for the State to advocate for victims' rights on appeal and that the State is "without standing to appeal this particular issue." *Fisk* at ¶ 44.

The court of appeals' analysis ignores pre-existing Ohio law that grants prosecutors standing to appeal unlawful sentences as a matter of right. R.C. 2953.08 (B)(2). Given this statutory grant of authority, and the fact that prosecutors routinely appeal defendants' sentences, it was unnecessary for the drafters to include government attorneys in the appellate standing provision.

The court of appeals also attempted to support its holding by finding that the state is not injured by an unlawful restitution order. Given the explicit statutory standing, this analysis is superfluous. Assuming *arguendo*, that it is relevant, it is also inaccurate. While the court's finding that the state did not suffer a financial injury in this case may be true, the court failed to recognize that the state does suffer an injury when an unconstitutional sentence is imposed. Specifically, the state's interests in seeing offenders held accountable and rehabilitated and

seeing Ohio laws followed are impaired. *See State v. Aguirre*, 144 Ohio St.3d 179, 2014-Ohio-4603, 41 N.E.3d 1178 (finding restitution serves a remedial and punitive purpose); *State v. Pettis*, 133 Ohio App.3d 618, 621, 729 N.E.2d 449 (8th Dist.1999) (finding “[r]estitution can be an integral part of an offender’s sentence, not only as punishment, but for rehabilitation as well”). It is these interests that provide the state’s ability to appeal restitution orders. *See, e.g., Pettis* at 621 **Error! Bookmark not defined.** (finding “payment of court-ordered restitution is an obligation ‘rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose’ ”) (internal citations omitted).

Significantly, where constitutional amendments do not expressly repeal a pre-existing statute, the statute is only repealed by implication if it is sufficiently inconsistent with the amendment such that it could not have been passed after the new amendment took effect. *State ex rel. Price v. Huwe*, 105 Ohio St. 304, 306, 137 N.E. 167 (1922) (“It is elementary that a statute must be sustained and enforced unless it is in clear and irreconcilable conflict with some express provision of the Constitution[.]”); *State ex rel. Stokes v. Prob. Ct. of Cuyahoga Cty.*, 17 Ohio App.2d 247, 250-251, 246 N.E.2d 607 (8th Dist.1969) (“[W]hether a new Constitution containing no express repeal of earlier legislation repeals by implication a pre-existing statute[] depends upon one rather simple question: Is the statute one which is sufficiently consistent with the new Constitution to have been capable of passage after the new Constitution took effect? If the answer is in the affirmative, the statute cannot be said to have been repealed by implication; if in the negative, such repeal is implicit in the adoption of the new Constitution.”).

Revised Code Section 2953.08 (B)(2) could be passed following the passage of Marsy’s Law as it does not conflict with the amendment’s language or purpose. As explained above,

Marsy’s Law made explicit that victims have standing, which is easily construed to align with prosecutors’ statutory standing to appeal unlawful sentences. This straightforward reading of the provision fulfills Marsy’s Law’s purpose— to expand victim participation and to ensure victims’ rights are afforded— and in no way conflicts with Revised Code Section 2953.08 (B)(2). In contrast, the court of appeals’ reading undermines the purpose of the law through use of a disfavored doctrine. *See State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 44, quoting *Lucas Cty. Bd. of Commrs. v. Toledo*, 28 Ohio St.2d 214, 217, 277 N.E.2d 193 (1971) (finding that this Court “ ‘ha[s] said many times [that] repeals by implication are not favored’ ”).

**II. THIS COURT SHOULD REVERSE THE COURT OF APPEALS’ DECISION BECAUSE ITS CONSTRUCTION OF MARSY’S LAW LEADS TO UNREASONABLE AND ABSURD RESULTS BY PROHIBITING THE STATE FROM APPEALING UNCONSTITUTIONAL SENTENCES.**

Courts have a duty to construe constitutional provisions to avoid unreasonable or absurd results. *State v. Hughes*, 2019-Ohio-1000, 134 N.E.3d 710, ¶ 17 (8th Dist.). Here, the lower court’s interpretation that Marsy’s Law strips prosecutors of their standing to appeal an unlawful restitution order is absurd and unreasonable because it allows unconstitutional sentences to remain unchallenged and victims to remain uncompensated for their losses.

A prosecutor’s job is to seek justice, yet the court’s decision prevents them from challenging unconstitutional sentences to the detriment of victims and society. *See State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984) (“The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice shall be done.”); S.Ct.Prac.R. 3.8, comment 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). It is unreasonable to conclude that the drafters’ goal

that victims' rights are to be protected as vigorously as defendants' rights would be accomplished by binding the hands of prosecutors in the face of unconstitutional sentences.

In addition, the court of appeals' analysis is also at odds with the rehabilitative function of restitution. As stated above, restitution has rehabilitative elements to the extent that it compels defendants to recognize the real harms that their actions cause victims. *See, e.g., Pettis*, 133 Ohio App.3d at 621 **Error! Bookmark not defined.** Allowing sentences with insufficient or no restitution ordered to go unchallenged by the state leaves defendants with the mistaken impression that they bear no responsibility for the financial harm victims suffer.

The court of appeals' construction of Marsy's Law creates the unreasonable result of stripping prosecutors of the ability to challenge sentences that contain unlawful restitution orders. This result is antithetical to the purpose of Marsy's Law. As such, this Court must reverse the court of appeals' decision, find that the trial court erred as a matter of law by not ordering restitution, and remand to the trial court for proceedings consistent with its decision.

## CONCLUSION

Marsy's Law intended to expand all Ohio victims' constitutional rights, and to detail a means for victims to personally assert and seek enforcement of those rights. The court of appeals' decision thwarts this purpose by effectively repealing by implication prosecutors' statutory standing to appeal a sentence that includes an unlawful restitution order. This outcome is unsupported by the plain language and purpose of Marsy's Law and overturns long-standing criminal practice without justification. The decision will allow unconstitutional restitution orders to stand in cases where victims are unable to challenge the orders themselves. This Court must overrule the court of appeals' finding that prosecutors lack standing to appeal a restitution order,

find that the trial court erred as a matter of law by not ordering restitution for an undisputed economic loss, and remand to the trial court for proceedings consistent with its decision.

Respectfully submitted,

/s Elizabeth A. Well

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I hereby certify that on March 17, 2022, a copy of the foregoing Brief of Amici Curiae was sent by email and/or first class mail, postage pre-paid, to:

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