

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CITY OF COLUMBUS,
ZACH KLEIN, in his official capacity,
STATE *ex rel.* CITY OF COLUMBUS,
STATE *ex rel.* ZACH KLEIN,
77 North Front Street, 4th Floor
Columbus, Ohio 43215,
CITY OF DAYTON,
STATE *ex rel.* CITY OF DAYTON,
101 W. 3rd Street,
Dayton, Ohio 45402, and
MEGHAN VOLK,

Plaintiff-Relators,

vs.

BUREAU OF CRIMINAL
IDENTIFICATION AND INVESTIGATION,
a division of the ATTORNEY GENERAL'S
OFFICE, and
JOSEPH MORBITZER, SUPERINTENDENT,
BUREAU OF CRIMINAL IDENTIFICATION
AND INVESTIGATION, in his official capacity,

Defendant-Respondents.

Case No.

Judge

SERVE ALSO:

Attorney General Dave Yost
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

COMPLAINT FOR DECLARATORY JUDGMENT
OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

1. This case is about the continuing and dangerous failure of the Ohio Attorney General's Office ("OAG"), through its Bureau of Criminal Identification and Investigation

(“BCI”), to fulfill its mandatory obligation to collect and report disqualifying criminal conviction information into the state and federal background check system databases.

2. The completeness and accuracy of these databases is critical to public safety.

3. By conducting a background check, gun shops know not to sell firearms to prohibited persons, sheriffs know to deny concealed carry permits to applicants with felony records, and schools and cities know not to hire as teachers and police officers people with dangerous histories.

4. But background checks only work if the State collects and maintains information about Ohioans’ criminal history, as it is required to do by law.

5. Disturbingly, BCI is failing to do exactly that, risking deadly consequences.

6. As former Governor Kasich observed in 2018, “the failure of even *one* public office, public official, or public employee to properly and timely upload the data required by the . . . databases can lead to a prohibited individual acquiring a firearm with tragic results” – including the mass shootings at Virginia Tech and in Sutherland Springs, Texas.

7. Despite repeated promises to fix known deficiencies in the background check system, the OAG/BCI have persistently and systematically failed to fulfill their mandatory obligations.

8. These deficiencies have been publicly reported time and again over the course of the past several years, but the system has not been fixed.

- a. Late last year, in October 2019, the Ohio Auditor sent an urgent letter to the Governor, Supreme Court of Ohio, and State General Assembly after a yearlong review, informing them of his conclusions about Ohio’s background check system. The Auditor found that “Ohio’s current system for inputting

information into the National Instant Criminal Background Check System (NICS) is broken and needs immediate attention.” He found that over half of Ohio’s 88 counties had “at least one court or law enforcement department that didn’t report records on time or in a few cases, at all.” The state’s background check system, he stated, “is a systemic failure. It isn’t a local, isolated failure.”

- b. The Auditor’s report echoes the findings of a 2018 report ordered by former Governor Kasich (the “2018 Report”). That report found that BCI was receiving and obtaining complete criminal conviction information from only 60% of elected Clerks of Court surveyed around the state. The remaining elected Clerks surveyed responded that they were sharing with BCI only “a majority” of qualifying convictions; “some” qualifying convictions, or, for a few, none at all. As Governor DeWine recently conceded, Ohio’s background check system is “dangerously deficient.”

9. Now more than ever, a complete and accurate background check system is necessary for the safety of all Ohioans. Since the COVID-19 crisis began in late February, gun sales have skyrocketed to unprecedented levels.

10. Between March and September of 2020, over 590,000 background checks were conducted of potential purchasers of firearms in Ohio, a 70% increase from the same period in 2019.

11. Yet because of the failures of BCI, each of those background checks was incomplete, potentially missing information that the potential purchaser was prohibited by law from possessing a firearm.

12. By this lawsuit the Cities of Columbus and Dayton, and Meghan Volk, a resident of Ohio with two children in Ohio's public schools, seek declaratory and injunctive relief – or, in the alternative, a writ of mandamus – finding BCI in default of its obligations and directing BCI and its Superintendent to promptly fulfill their mandatory, nondiscretionary legal obligations to procure disqualifying criminal history and other relevant information pertaining to *all* persons convicted of relevant crimes.

13. Ohio law assigns to BCI and its Superintendent the primary and mandatory obligation to “procure” specified information concerning all persons convicted of felonies and other crimes “from wherever procurable.” *See* R.C. 109.57(A)(1).

14. Yet, as described herein, BCI fails to collect this readily available information from all over the State.

15. While Clerks of Court also have an obligation to report criminal disposition information to BCI, many complain that BCI rejects that information on technical grounds; and, for the Clerks that simply do not report or fail to do so in a timely manner, they do so with apparent impunity from BCI, which fails to procure this “procurable” information.

16. Absent judicial intervention, there is no reason to believe BCI's years-long dangerous dereliction of its duty will be remedied any time soon, if ever.

17. And until these widespread and continuing failures are addressed, they will continue to jeopardize the safety of residents of Columbus, Dayton, the State of Ohio, and the entire nation.

PARTIES

18. Plaintiff-Relator City of Columbus is an Ohio municipality organized under the laws of Ohio with a population of nearly one million people.

19. Plaintiff-Relator City of Dayton is an Ohio municipality organized under the laws of Ohio with a population of nearly 150,000 people.

20. The Cities of Columbus and Dayton (the “Cities”) are required by statute to conduct background checks prior to hiring employees in certain sensitive positions; in Columbus, this includes teachers and pre-school workers, and in both Cities it includes police officers and others described herein. The Cities rely on BCI’s criminal history repository for such checks.

21. The City of Columbus also performs background checks on applicants who hold licenses inside the cities, including individuals who engage in the short term rental of residential property.

22. Further, Columbus and Dayton rely on the criminal history repository to ensure that their police officers have access to timely and accurate information about individuals they may encounter in the course of discharging their duties.

23. Columbus and Dayton also have a strong and compelling interest in protecting their respective populations from gun violence caused by prohibited persons purchasing or possessing firearms due to gaps in the background check system.

24. Plaintiff-Relator Zach Klein is the City Attorney of Columbus, Ohio.

25. Plaintiff-Relator Meghan Volk is a resident and taxpayer of Ohio.

26. Volk is also the parent of one eight-year old child and one five-year old child who attend an Ohio public elementary school.

27. Nothing is more important to Volk than the safety of her children, and as such she has a personal, direct, and compelling interest in making sure that teachers and other employees

at her children's school have properly passed background checks based on complete criminal history information, particularly with respect to felony and other serious criminal convictions.

28. Volk's family owns a firearm, and she is an active volunteer with Moms Demand Action for Gun Sense in America.

29. Volk has a deep personal commitment to doing everything she can to prevent gun violence in her community and beyond – including ensuring that persons with dangerous histories such as felony or domestic violence convictions cannot pass background checks and unlawfully obtain firearms or improperly obtain a CCW permit or employment in a sensitive position, including in her local public schools.

30. Defendant-Respondent Bureau of Criminal Identification and Investigation is a division of the Ohio Attorney General's Office.

31. Defendant-Respondent Joseph Morbitzer is the Superintendent of BCI. He is sued in his official capacity.

JURISDICTION AND VENUE

32. The Court has jurisdiction over the complaint for declaratory judgment pursuant to Ohio Revised Code ("R.C.") 2721.02.

33. The Court has jurisdiction over this petition in mandamus pursuant to R.C. 2731.02.

34. Pursuant to Civ. R. 3(C), venue is in this Court because Franklin County is the county in which Respondents conducted activity that gives rise to the claim for relief (Civ. R. 3(C)(3)), it is the county in which Respondents maintain their principal office (Civ. R. 3(C)(4)), it is the county in which all or part of the claim for relief arose (Civ. R. 3(C)(6)), and it is the county in which Plaintiff-Relators Columbus and Volk are situated (Civ. R. 3(C)(12)).

BACKGROUND

A. Gun Violence is a Public Health Crisis

35. Gun violence is a public health crisis across the United States, and Ohio is no exception.

36. According a recent report on gun violence issued by the Ohio Office of Criminal Justice Services (“OCJS”), there were a staggering 14,452 victims of firearm-related crime in Ohio in 2016 alone.

37. The Center of Disease Control reports that gun deaths have increased 54% in Ohio from 2009 to 2018, compared to an 18% increase nationwide.

38. Last year, on August 4, 2019, a lone gunman in Dayton, armed with an AR-15 style pistol with a 100-round drum magazine, murdered 9 people and shot 17 others.

39. Firearms are the leading cause of homicide in Franklin County, accounting for 41% of homicides and 50% of suicides from 2015-2017.

40. Firearm-related assaults were the second leading cause of injury hospitalizations from 2013 to 2015 in Franklin County.

41. From 2016-2017, there were 2,753 firearm-related incidents reported to Columbus Police, with 3,950 related victims.

42. From 2014 through 2018, Columbus had a total of 520 homicides; 405 of them involved a firearm.

43. From January through October 16, 2020, there have been 127 homicides in Columbus; 111 of them were caused by firearm.

44. Dayton has also seen an increase in gun violence, even excepting the mass shooting. There were 511 violent gun crimes in Dayton during 2019, up from 448 in 2018. And

the first six months of 2020 have seen an increase in gun violence incidents over 2019. From January to July of 2020, there were 283 violent crimes committed with guns reported to the Dayton Police department, an increase from 239 during the same period the prior year.

45. From 2014 through 2018, Dayton had a total of 157 homicides, 129 of which involved a firearm.

B. Federal Background Checks for Firearms Transfers

46. The Brady Act is one of the foundational federal gun violence prevention laws.

47. The Brady Act requires that federally licensed firearms dealers (“FFLs”) contact the National Instant Criminal Background Check System (“NICS”) prior to transferring a firearm to an unlicensed individual.

48. A background check can then be performed to determine whether the purchaser is prohibited by federal or state law from possessing a firearm.

49. The NICS system contains disqualifying information provided by local, state, federal and tribal agencies – including, for Ohio, disqualifying information provided and made accessible by BCI.

50. Federal law provides several categories of disqualifying events that would prohibit an individual from purchasing or receiving a firearm.

- a. One such “federal prohibitor” is a prohibition on the sale of a firearm to any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1) (the “Felony Prohibitor”).

- b. Another prohibitor prevents sales to those who have been convicted “in any court of a misdemeanor crime of domestic violence” (the “Domestic Violence Prohibitor”). § 922(g)(9).
- c. The federal statute also contains prohibitors for those committed to a mental health institution (the “Mental Health Prohibitor”) (§ 922(g)(4)) or subject to a domestic violence protective order (the “DV Protective Order Prohibitor”) (§ 922(g)(8)).¹

51. Since the NICS program began in 1998, more than 330 million firearm background checks have been initiated.

52. In Ohio, the number of background checks initiated through NICS increased 200% from 1999 to 2014, with 596,389 in 2014 alone.

53. By 2017, Ohio ranked 9th in total number of background checks initiated through NICS, with 753,072 checks.

54. Between November 1998 and December 2018, the NICS background check system blocked over 3.5 million attempted firearms purchasers based on disqualifying information.

55. Of these NICS denials, felony convictions are by far the most frequent reason, accounting for over 53% of all denials.

56. In Ohio, in 2018 alone, the background check system resulted in 4,126 persons being blocked from purchasing firearms because information in the NICS databases indicated

¹ Additionally, under Ohio law, it is forbidden to knowingly “acquire, have, carry, or use any firearm” if a person has been convicted of a felony offense of violence or been committed to a mental institution. *See* R.C. 2923.13(A)(2), R.C. 2923.13(A)(5).

they were prohibited from owning or possessing a gun. The Felony Prohibitor was the most common reason for the denial, with 1,517 denials, or 37% of the total.

57. As noted above, since the beginning of the COVID-19 crisis, sales of firearms have exploded, including in Ohio, where the FBI reports that more than 590,000 background checks were conducted between March and September 2020, far more than during that same period in any other year since the NICS system was instituted, and constituting an over 70% increase from the same period in 2019.

58. This is particularly concerning because, at the same time, the Columbus police department has seen a 20% increase in domestic violence calls in March, and the Ohio Domestic Violence Network's domestic violence fatality data shows that Ohio has seen a 35% increase in domestic violence fatalities between January and July of this year, compared with the same period last year. In June, the number of domestic violence cases filed in Franklin County Municipal Court was up 31% compared to the same month in 2019.

B. Ohio Background Checks for Concealed Carry Permits

59. A criminal history records check is also required by Ohio law before the state will issue a concealed handgun carry permit ("CCW" or "Concealed Carry Permit"). *See* R.C. 311.41(A)(1) and 2923.125(C) (the "Concealed Carry Statutes").

60. The Concealed Carry Statutes prohibit persons from receiving a Concealed Carry Permit if they have been convicted of a felony or certain other crimes, including misdemeanor crimes of violence within the prior three (3) years. *See* R.C. 2923.125(D)(1)(d) and (e).

61. With a Concealed Carry Permit, Ohioans may carry a concealed firearm nearly anywhere, subject to certain limited exceptions, and may purchase a firearm without an

additional background check. *See* R.C. 2923.126(B) and ATF Open Letter to All Ohio Federal Firearms Licensees.

62. Additionally, certain Ohio school districts have authorized the carrying of concealed firearms by public school personnel, including teachers, and rely on the requirement that the carrier has qualified for a Concealed Carry Permit, which requires a background check and certain firearms education/training.²

63. Background checks for Concealed Carry Permit applications rely upon information in the BCI databases (a “BCI Background Check”) as well as the FBI’s NICS system. *See* R.C. 311.41(A)(1).

- a. In other words, there are two criminal history repositories that are checked: Ohio’s database (operated by BCI) and the FBI’s NICS database (which also checks Ohio’s database).
- b. Unlike firearms transfers – which involve Ohio’s gun dealers directly contacting the FBI for only a NICS check – applicants for Concealed Carry Permits contact their local sheriff, who conducts a criminal records check using Ohio’s databases. *See* R.C. 311.41(A)(1).
- c. As part of such checks, the sheriff also must contact NICS. *Id.*

C. Ohio Pre-Employment and Pre-License Background Checks

64. Certain employers and agencies – including Plaintiff-Relators Columbus and Dayton – also utilize BCI’s criminal history repository to ensure that prospective employees or

² An Ohio appeals court recently ruled that Ohio law prohibits a school board from employing personnel who go armed while on duty unless they have successfully completed an approved basic peace officer training course or have 20 years of experience as a peace officer. *See Gabbard v. Madison Local Sch. Dist. Bd. of Educ.*, No CA2019-03-051, 2020-Ohio-1180 (12th Dist. Ct. of Appl. Mar. 30, 2020), *appeal accepted*, No. 2020-0612, 2020-Ohio-3882.

volunteers who work with sensitive populations, like children, do not have dangerous criminal histories.

- a. For example, Ohio law requires that a criminal history check be run on prospective and licensed teachers (R.C. 3319.39 and 3319.291), employees who work with preschool children (R.C. 3301.541), foster parents (O.A.C. 5101:2-5-09.1), licensees of child day-care centers (R.C. 5104.013), employees of nursing homes (R.C. 3712.09), police officers (R.C. 109.77(E)(2)) and firefighters (R.C. 737.081).
- b. As with Concealed Carry Permit applicants, these background checks involve both a BCI Background Check and a NICS background check. *See, e.g.*, R.C. 109.572(B)(1) and (2) and 109.77(E)(2).
- c. It is of critical importance that applicants for all of these positions – particularly police officers and teachers with access to young children – be evaluated with complete information regarding their criminal history backgrounds.

65. Furthermore, with respect to police officers, as noted in one investigation into the flaws in BCI’s criminal history repository, “officers make life and death decisions based on the criminal background check information that originates from this system.”

66. In street encounters, police officers need to know quickly whether a person presents a danger to themselves or others based on their criminal history.

**BCI’S CENTRAL ROLE IN COLLECTING RECORDS FOR FEDERAL-
AND STATE-MANDATED BACKGROUND CHECKS**

67. In Ohio, the Identification Division of BCI “serves as the central repository for all criminal records for the state of Ohio and maintains fingerprints, palm prints, photographs, and

other information related to arrests and dispositions within the Computerized Criminal History [Database] (CCH) and reports this information to” the FBI’s NICS system.

A. The Statutory Duties of BCI and its Superintendent

68. BCI is a division of the Ohio Attorney General’s office. The Superintendent of BCI, who is appointed by the Attorney General, is tasked by statute with the primary role in the creation and maintenance of Ohio’s central repository of criminal history records.

69. Those duties, set forth in R.C. 109.57, include the following:

- (A)(1) The superintendent of the bureau of criminal identification and investigation **shall procure from wherever procurable** and file for record photographs, pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of **all persons who have been convicted of committing within this state a felony**, any crime constituting a misdemeanor on the first offense and a felony on subsequent offenses, or any misdemeanor described in division (A)(1)(a), (A)(5)(a), or (A)(7)(a) of section 109.572 of the Revised Code . . .
- (A)(3) The superintendent **shall cooperate with and assist sheriffs, chiefs of police, and other law enforcement officers in the establishment of a complete system of criminal identification** and in obtaining fingerprints and other means of identification of all people arrested on a charge of a felony The **superintendent also shall file for record the fingerprint impressions of all persons confined** in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse community-based correctional facility, halfway house, alternative residential facility, or state correctional institution for the violation of state . . . and any other information that the superintendent may receive from law enforcement officials of the state and its political subdivisions.
- (A)(5) The bureau **shall perform centralized recordkeeping functions for criminal history records and services in this state** for purposes of the national crime prevention and privacy compact set forth in section 109.571 of the Revised Code and is the criminal history record repository as defined in that section for purposes of that compact. The superintendent or the superintendent’s designee is the compact officer for purposes of that compact and **shall carry out the responsibilities of the compact officer** specified in that compact.

(Emphasis added).

70. By this statute, under Subsection (A)(1), the General Assembly has assigned the Superintendent with the primary, active, nondiscretionary role in obtaining – i.e., “procur[ing] from wherever procurable” – information related to *all persons* within the state who have been convicted of a felony or certain enumerated misdemeanors (the “Qualifying Crimes” or “Qualifying Convictions”).

71. Subsection (A)(3) further mandates that the Superintendent cooperate with law enforcement to establish a “complete system” of criminal identification and that he file for record all fingerprints of persons confined in the state.

72. Subsection (A)(5) additionally mandates that the Superintendent perform “centralized recordkeeping functions” for the purposes of the National Crime Prevention and Privacy Compact (the “Compact”), the agreement between the FBI and the various states (including Ohio) designed to facilitate the exchange of criminal history data among states.

73. The Compact, which has 34 member states, was ratified by Ohio in 2003, and is set forth in R.C. 109.571.

74. Under the Compact, “the FBI and the party states agree to maintain detailed databases of their respective criminal history records, including arrests and dispositions, and to make them available to the federal government and to party states for authorized purposes.” R.C. 109.571.

75. The Compact imposes certain additional obligations on the state and the Compact Officer, here, the Superintendent:

Each party state shall do all of the following:

- (1) Appoint a compact officer who **shall do all of the following:**
 - (A) **Administer this compact** within that state;

- (B) **Ensure that the compact** provisions and rules procedures, and standards established by the council under Article VI are complied with in the state;
- (C) **Regulate the in-state use of records** received by means of the III system from the FBI or from other party states;
- (2) Establish and maintain a criminal history repository, which shall provide both of the following:
 - (A) Information and records for the national identification index and the national fingerprint file;
 - (B) The state's III system-indexed criminal history records for noncriminal justice purposes described in Article IV;
- (3) Participate in the national fingerprint file

R.C. 109.571, Art. III(4)(b) (emphasis added).

76. Additionally, federal regulations governing the national records databases provide that “[i]t shall be the responsibility of each criminal justice agency contributing data to the [Interstate Identification Index] System³ and the [Fingerprint Identification Records System] to assure that information on individuals is kept complete, accurate, and current so that all such records shall contain to the maximum extent feasible dispositions for all arrest data included therein. Dispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred.” 28 C.F.R. § 20.37.

77. Revised Code 109.57(C)(3) further confirms that BCI is authorized to share the information it collects with the FBI for incorporation into the NICS system. *Id.* (“In addition to any other authorized use of information, data, and statistics of the nature described in division

³ The Interstate Identification Index (or “III”) is one database within NICS. It is a “fingerprint-supported ‘index-pointer system’ for the interstate exchange of criminal history records”; in short, it is the national system used to search fingerprint matches for felony and reportable misdemeanor offenses. *See* Becki Goggins and Dennis DeBacco, “Survey of State Criminal History Information Systems, 2016: A Criminal Justice information Policy Report,” National Consortium for Justice Information and Statistics, Bureau of Justice Statistics, *available at* <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

[109.57](C)(1) of this section, the superintendent or the superintendent’s designee may provide and exchange the information, data, and statistics pursuant to the national crime prevention and privacy compact as described in division (A)(5) of this section.”).

B. The Statutory Duties of the Clerks of Court

78. The clerks of court also have statutory duties with respect to criminal history reporting, which are described – after the Superintendent’s primary duties are described – in the second sub-section of R.C. 109.57:

(A)(2) Every clerk of a court of record in this state, other than the supreme court or a court of appeals, shall send to the superintendent of the bureau a weekly report containing a summary of each case involving a felony, involving any crime constituting a misdemeanor on the first offense and a felony on subsequent offenses, involving a misdemeanor described in division (A)(1)(a), (A)(5)(a), or (A)(7)(a) of section 109.572 of the Revised Code

R.C. 109.57(A)(2) (emphasis added).

79. While sub-section (A)(2) thus requires that clerks of court send weekly summaries regarding cases involving Qualifying Crimes, Section 109.57 does not permit the Superintendent to passively receive only that which the clerks provide; instead, the statute mandates that at least with respect to all persons *convicted* of Qualifying Crimes, the Superintendent and BCI “shall” procure fingerprints and other identification and pertinent information from “wherever procurable.” R.C. 109.57(A)(1).

80. The Superintendent and BCI cannot fulfill their statutory obligation – and ensure that they have procured all such information – without first procuring all disposition information.

- a. That information exists; it is procurable; but, as set forth herein, Respondents have failed to procure it for all relevant convicted persons.

- b. Despite the statutory mandate, the Superintendent fails to “procure from wherever procurable and file for record photographs, pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of **all persons who have been convicted of committing**” a Qualified Crime. R.C. 109.57(A)(1) (emphasis added).

OHIO’S WIDESPREAD, YEARS-LONG AND CONTINUING FAILURES TO COLLECT AND REPORT DISQUALIFYING INFORMATION

81. Large, dangerous gaps have existed in Ohio’s background check repository for years. Despite the fact that BCI has had knowledge of such gaps, and repeatedly promised to fix them, it has continuously failed to do so.

82. In April 2015, investigations from WBNS Channel 10 and the Columbus Dispatch into Ohio’s background check system “reveal[ed] that the system keeping track of these criminals repeatedly breaks down, causing fingerprints to slip through the cracks for months and hundreds of criminals to be misidentified.” The investigation further found that “[b]y spring of 2013 . . . the system that holds fingerprints overflowed - blocking thousands of criminal records from getting into the state’s database.”

- a. The WBNS investigation showed that BCI was aware of these problems as early as 2012, including emails sent and received between BCI employees and supervisors describing the flaws as a “widespread issue,” “getting ugly, “ and “THIS IS STILL HAPPENING.”
- b. The Columbus Dispatch investigation found that “[t]he computerized background-check system operated by the Bureau of Criminal Investigation . . . has been troubled for years, sometimes indicating that thousands of criminals have clean records.”

- c. BCI initiated a project that would fix a part of the problem, but that project was cancelled in 2014.

83. Following these reports, the “Ohio NICS Working Group” (the “NICS Working Group”) – previously established in 2013, and made up of representatives from the Supreme Court of Ohio, BCI, the OAG, OCJS, and the Ohio Department of Mental Health and Addiction Services – analyzed the status of NICS reporting in Ohio. This resulted in the publication of a report in November 2015 entitled “IMPROVING THE COMPLETENESS OF FIREARM BACKGROUND CHECKS THROUGH ENHANCED STATE DATA SHARING: A FINAL REPORT” (the “2015 Report”).

- a. The 2015 Report shockingly found that in a single year, while there were 45,733 cases resulting in felony convictions in Ohio, BCI reported to the FBI NICS database only 33,486 of those felony convictions; “[t]his indicates at a minimum that roughly 27 percent of felony dispositions did not get transmitted to the [Computerized Criminal History] repository.”
- b. The Report contained next steps and urged courts be provided with “a mechanism for submitting disposition data in a timely, efficient, and accurate manner.”

84. In 2016, a report by News 5 Cleveland, “Broken background checks: How Ohio fails to protect the public,” found that failures in the background check system led to tragic consequences.

- a. In 2010, a man with a prior violent felony conviction that did not turn up in a background check was hired at Ohio State University. When he learned he was to be fired, he shot and killed a colleague.

- b. Another man who should never have been hired as a home health care worker due to a prior felony assault raped the teenage sister of a developmentally disabled boy under his care.
- c. The then-supervisor of BCI promised the system would be upgraded “within the next couple of years.”

85. However, two years later, the Cincinnati Enquirer conducted another investigation, and in 2018 reported that, “[i]n Ohio, a convicted felon barred from owning a gun could still purchase one after passing a background check – all because dozens of courts have failed to upload some paperwork.” Having reviewed records from the Ohio Attorney General’s Office, the investigation further found that, “[i]n the past three years, at least 90 Ohio courts have gone months without reporting people who are prohibited from owning a gun.”

86. Following this report and a series of high profile mass shootings, including in Parkland, Florida, former Governor Kasich issued Executive Order 2018-03K in April 2018, which ordered the survey of all reporting agencies and again called on the NICS Working Group to report “on the current status in Ohio of the reporting and uploading all relevant information required by NICS into CCH and/or LEADS and then into NICS.”

- a. The 2018 Report was issued following the survey and released in August 2018.
- b. The most dramatic and dangerous deficiency the survey revealed was the continuing failure to collect and report information relating to criminal dispositions. As noted above, despite the statutorily-mandated duty imposed on BCI and its Superintendent to procure identification and other pertinent information regarding *all persons* convicted of Qualifying Crimes pursuant to

R.C. 109.57(A)(1), in 2018 only 60% of elected clerks responded that they reported “all” Qualifying Conviction disposition data.

- c. The remaining clerks admitted to providing much less: 35% of clerks admitted that they reported only “a majority” (defined as greater than 50%) of Qualifying Conviction disposition information; 4% admitted that they reported only “some” (approximately 25-50%) of the Qualifying Conviction disposition data; less than 1% admitted reporting only “a few” (less than 25%) records of disposition; and one clerk admitted to sending *no records* at all.

87. Further, the 2018 Report identified an additional and related failure and gap in the criminal history reporting system caused by Respondents:

In Ohio, NICS is dependent upon a completed criminal history information [*sic*]. A completed criminal history consist[s] of an arrest, which must include a fingerprint, and a disposition. Once a fingerprint is taken as the result of an arrest, an incident tracking number (ITN) is generated. The arrest information is then sent to BCI. That same ITN becomes part of the case and follows it through the court process. Once the case is finished, the disposition information with the ITN is sent to BCI. The disposition information is then matched by the ITN with the original arrest record and after a few more steps will be searchable through NICS.

However, this process does not always work smoothly. If the Respondent is brought to court by summons then no arrest information is sent to BCI, despite the requirement in ORC 109.60(A)(2).⁴ As a result, once the Respondent’s case is complete and the disposition is sent to BCI, there is no corresponding arrest record and ITN. Consequently, the information will not be searchable by NICS and a person, who should be prohibited from buying a weapon, **would be able to walk into an FFL and purchase a weapon they are legally prohibited from buying.**

(emphasis added).

⁴ R.C. 109.60(A)(2) provides that if a person is summonsed rather than arrested, “the court shall order the person or child to appear before the sheriff or chief of police within twenty-four hours to have the person’s or child’s fingerprints taken,” and copies must then be forwarded to BCI and the local clerk of court.

- a. In other words, BCI, which is tasked with creating and maintaining the central repository for criminal history records, only “accepts” criminal disposition information if an ITN and arrest record already exists in the system.
- b. This unnecessary requirement results in a number of disposition records being rejected by BCI, because, for a variety of reasons, some people charged with crimes are never fingerprinted, and with no fingerprint records there is no ITN. This includes people who are summonsed, rather than arrested, as well as people charged with crimes that are later “escalated” to felonies.
- c. Moreover, this “pre-existing ITN requirement” frustrates the ability of clerks of court to perform *their* statutorily-mandated duty of submitting all Qualifying Conviction disposition information. As one clerk noted in response to the 2018 Survey, “BCI rejects all dispositions without finger prints. The BCI should use multiple identifiers instead of just the ITN # = finger prints, (e.g., Name, DOB & SSN, [REDACTED]) without finger prints causes the criminal record to be incomplete.”
- d. The 2018 Report also revealed that with respect to reporting court findings of mental illness or commitments to mental health facilities – both required to be reported by statute⁵ – only 21% of mental health facilities reported “all” required information in 2018; a full 67% reported none at all.

⁵ See R.C. 5122.311(A). Under federal law, another “prohibitor” from possessing a firearm are those persons previously committed to a mental health institution. See 18 U.S.C. § 922(g)(4).

- e. And with respect to criminal protection orders, law enforcement agencies admitted that only 37% report “all” requisite information; a full 57% report none at all.
- f. The 2018 Report again contained a series of recommendations to fix the serious flaws in the criminal history repository, including “[e]stablish[ing] a process for the submission of felony indictments” and expanding training and education.

88. Following the 2018 Report, former Governor Kasich issued Executive Order 2018-10K, making permanent the NICS Working Group, and requiring that the group “meet no less than quarterly to discuss the three categories of recommendations contained in the 2018 Report . . . and assess the current state of NICS compliance in the state of Ohio,” as well as produce an annual report on the status of NICS compliance.

89. In 2019, Governor DeWine redirected the focus of the NICS Working Group by issuing Executive Order 2019-10D, converting it into the “Governor’s Warrant Task Force.”

- a. While Executive Order 2019-10D purports to merely expand the focus of the Group by maintaining the requirements of the earlier Executive Order, the Warrant Task Force instead appears to have shifted its focus to Ohio’s system of issuing and serving arrest warrants.⁶
- b. Despite this, the 2019 report issued by the Warrant Task Force alarmingly found that of 217,052 Ohio warrants, only 18,117 (or about 8%) were entered into the federal background check system; and among the 17,552 outstanding

⁶ See May 2019 Report of Ohio Governor’s Warrant Task Force. Indeed, after completing its yearlong review of Ohio’s background check system, in October 2019 the Ohio Auditor urged the Governor to convene yet another “task force to study and recommend statutory changes that are better designed to meet this important public policy objective” of compliance with NICS reporting requirements.

warrants for the most serious crimes – including homicide, sex crimes, and aggravated assault – a stunning 58% (or 10,098) were not entered into the federal National Crime Information Center (“NCIC”) system.

- c. As a result of these deeply troubling findings of the Warrant Task Force report, Governor DeWine has proposed certain legislative changes for protection orders and arrest warrants, and the Lieutenant Governor has promulgated an RFP for a new state-wide electronic system for uploading such orders and warrants. But no formal or specific recommendations or steps have been publicly announced to address the background check system failures with respect to procuring information concerning all Qualifying Convictions.

90. The deficiencies continue. As noted above, in October 2019, the Ohio Auditor sent a letter to the Governor, Supreme Court of Ohio, and Ohio Legislature declaring that Ohio’s background check reporting is “broken and needs immediate attention.” And on December 16, 2019, the Cincinnati Enquirer published an article entitled, “One key way that Ohio keeps felons from purchasing guns is broken. No one is fixing it.”

- a. The article reports that “[a] new review from Ohio Auditor Keith Faber found 48 of Ohio’s 88 counties had at least one court or law enforcement that didn’t report records on time or in a few cases, at all.”
- b. In another case, “court officials uploaded records to the Ohio Supreme Court’s system, which didn’t transfer that information to the state or federal background check system. That scenario led to two years of missing records” from one court.

- c. The Ohio Auditor found that despite the statutory requirement that clerks of court report felony dispositions on a weekly basis, “[i]n many instances where a clerk of court sent reports on a monthly basis, the clerks of court reported to us that they had received advice from BCI that reports could be sent on a monthly basis.”

BCI IGNORES ITS STATUTORY OBLIGATIONS

91. In official public facing documents, often issued by or in conjunction with BCI or the OAG, the statutory obligation on BCI to “procure from wherever procurable” information related to all persons convicted of Qualifying Crimes is ignored.

92. Instead, the official focus has been solely on the obligation of the clerks of court to provide weekly reports to BCI, pursuant R.C. 109.57(A)(2).

- a. For example, in the August 2018 NICS Data Reporting Manual for Ohio, issued in partnership with BCI, every reporting obligation for agencies in Ohio is listed except for BCI’s obligation pursuant to R.C. 109.57(A)(1).⁷
- b. Similarly, the 2018 Report issued by the NICS Working Group (which includes BCI) states that, “Ohio law provides that clerks of some courts have certain obligations to report information which pertains to the various firearm purchase disqualifications specified in the United States Code”; no mention is made of BCI’s statutory obligation.

93. In effect, and by their conduct, Ohio state officials have read out of the statute the primary statutory obligation placed on BCI in Subsection (A)(1) of the statute.

⁷ See *id.* A reference is made to BCI’s more general obligation to perform central recordkeeping functions pursuant to R.C. 109.57(A)(5).

94. By this action, Relators seek an order from this Court directing Respondents to fulfill that obligation.

FIRST CAUSE OF ACTION – DECLARATORY JUDGMENT
(DECLARATION OF DUTIES UNDER R.C. 109.57)

95. Plaintiffs re-allege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-94 above.

96. A real controversy exists between the parties, the controversy is justiciable, and speedy relief is necessary to preserve the rights of the parties. Plaintiffs are affected by defendants' failure to fulfill their duties as set forth herein.

97. Pursuant to R.C. 2721.01, *et seq.*, Plaintiffs request that the Court find and issue a declaration that:

1. Pursuant to R.C. 109.57(A)(1), Defendants must procure from wherever procurable and file for record photographs, pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of all persons who have been convicted of committing Qualifying Crimes in Ohio.
2. Defendants have failed and continue to fail to carry out their legal obligations described in par. [](1).
3. Defendants have obstructed and continue to obstruct the ability of clerks of Court to fulfill the clerks' statutory duties of providing criminal disposition data to BCI, by, among other things, rejecting such data in the absence of fingerprints and/or an Incident Tracking Number, in violation of R.C. 109.57.
4. Pursuant to R.C. 109.57(A)(5), R.C. 109.571, and 28 C.F.R. § 20.37, Defendants must carry out the responsibilities of the Compact Officer of the National Crime Prevention and Privacy Compact (the "Compact"), and ensure that information on individuals is kept complete and accurate so that all such records contain to the maximum extent feasible dispositions for all arrest data.
5. Defendants have failed and continue to fail to carry out the legal obligations described in par. [](4).

SECOND CAUSE OF ACTION - WRIT OF MANDAMUS
(COMPEL PERFORMANCE OF R.C. 109.57(A))

98. Relators re-allege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-97 above. Relators bring this claim in the alternative, to compel performance of statutory duties pursuant to R.C. 2731.01 and 2731.02.

99. Respondents have failed to fulfill their clear legal duty to “procure from wherever procurable and file for record photographs pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of all persons who have been convicted of committing within this state” a Qualifying Crime. R.C. 109.57(A)(1) (emphasis added). Relators have a clear legal right to mandamus because R.C. 109.57 is directed at the safety and security of taxpayers, citizens, parents of schoolchildren, and municipalities of Ohio. This includes protection from the harms of allowing persons with dangerous histories to purchase firearms or receive Concealed Carry Permits and from the harms of such persons being hired into sensitive positions. Finally, in the absence of relief under the First Cause of Action herein, there is no adequate remedy at law. Relators are therefore entitled to a writ of mandamus ordering Respondents to fulfill their statutory obligation to procure, from wherever procurable, and file for record photographs, pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of all persons who have been convicted of committing a Qualifying Crime within Ohio.

THIRD CAUSE OF ACTION – WRIT OF MANDAMUS
(ABUSE OF DISCRETION RELATED TO R.C. 109.57(A))

100. Relators re-allege and incorporate by reference, as if fully set forth herein, the allegations in paragraphs 1-99 above. Relators bring this claim in the alternative, to compel performance of statutory duties pursuant to R.C. 2731.01 and 2731.02.

101. Respondents' failure to fulfill their clear legal duty to "procure from wherever procurable and file for record photographs pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of all persons who have been convicted of committing within this state" a Qualifying Crime, R.C. 109.57(A)(1), and otherwise fail to fulfill their statutory obligations pursuant to R.C. 109.57, is alternatively an abuse of discretion and is unreasonable, arbitrary and unconscionable. Relators have a clear legal right to mandamus because R.C. 109.57 is directed at the safety and security of citizens, parents of schoolchildren, and municipalities of Ohio. This includes protections from the harms of allowing persons with dangerous histories to purchase firearms or receive Concealed Carry Permits and from the harms of such persons being hired into sensitive positions. Finally, in the absence of relief under the First Cause of Action herein, there is no adequate remedy at law. Relators are therefore entitled to a writ of mandamus ordering Respondents to fulfill their statutory obligation to procure, from wherever procurable, and file for record photographs, pictures, descriptions, fingerprints, measurements, and other information that may be pertinent of all persons who have been convicted of committing a Qualifying Crime within Ohio.

PRAYER FOR RELIEF

Relator requests that the Court:

- A. Issue a declaratory judgment providing that which is set forth in Paragraph 97.
- B. Alternatively, issue a writ of mandamus as set forth in Paragraphs 99 and/or 101.
- C. To effectuate the above-described relief, and pursuant to, among other authority, R.C. 2721.09 and 2727.03, issue an order and injunction directing that within a prompt and reasonable period of time Defendant-Respondents Morbitzer and BCI:
 - i. procure from wherever procurable and file for record photographs, pictures, descriptions, fingerprints, measurements,

- and other information that may be pertinent of all persons who have been convicted of committing Qualifying Crimes in Ohio, and take such steps as are necessary to fulfill these obligations;
- ii. take such steps as are necessary to accept disposition records from courts regardless of whether an arrest record or ITN number already exists;
 - iii. take such steps as are necessary to procure all criminal disposition information necessary to fulfill the above responsibilities; and
 - iv. take such steps as are necessary to carry out the responsibilities of the Compact Officer of the National Crime Prevention and Privacy Compact, and ensure that information on individuals is kept complete and accurate so that all such records contain to the maximum extent feasible dispositions for all arrest data.
- D. Grant an award of fees and costs.
- E. Grant any and all such other relief that the Court may deem appropriate.

Respectfully submitted

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