IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

CITY OF COLUMBUS, et al.,	:	
	:	
Plaintiff-Relators,	:	**Case No. 20-CV-007256**
	:	
v.	:	**J. Holbrook**
	:	
BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION, et al.,	:	
	:	
Defendant-Respondents.	:	

DEFENDANT-RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Respectfully submitted,

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INTRODUCTION

Plaintiff-Realtors have failed to establish jurisdiction or state a claim under Civ. R. 12(B)(1) and (6), and the arguments raised in their Memorandum in Opposition do nothing to cure the deficiencies raised in BCI&I's Motion to Dismiss their First Amended Complaint. Plaintiff-Relators' entire theory of this action rests on an unfounded extrapolation of R.C. 109.57(A)(1) which requires the Superintendent of BCI&I to "procure from wherever procurable" criminal disposition histories of individuals who have been convicted of certain crimes. According to the Plaintiff-Relators, if information exists then it is *ipso facto* procurable by BCI&I and any rebuttal is simply an attempt to shift the blame to ignore a statutory obligation. Plaintiff-Relators are wrong as a matter of law. They not only lack standing to make such an argument, but fail to allege a justiciable controversy for declaratory judgment, and they have no legal interest in a mandamus action.

ARGUMENT

I. Plaintiff-Relators Lack Standing.

Plaintiff-Relators have failed to meet their burden to establish standing. That is, they have not shown "that they have suffered '(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.'" (Internal quotation omitted.) *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 13 N.E.3d 1101, 2014-Ohio-2382, ¶ 7.

A. Plaintiff-Relators fail to establish any concrete injury.

Plaintiff Cities' desperate search for a particularized injury to establish standing still yields nothing. They now stress that, as government employers, they suffer an "informational injury" or possible economic injury associated with potential gun violence, which is comparable to the "informational injury" found in *FEC v. Akins*, 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d

10 (1998). *See* Response at 13. But the Plaintiff Cities have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, Plaintiff Cities' claimed injury is that they suffer as government employers because information not being obtained by BCI&I *might* exist on an employee they *might* hire who then *might* "injure another or otherwise violate the law" such that the employee *might* expose the Cities to liability. Such an alleged informational injury comes nowhere near satisfying the concrete injury-in-fact requirement for standing. Indeed, notwithstanding the speculative nature of the alleged injury, numerous steps between the conduct of the defendant and the harms suffered by the plaintiffs "is strongly suggestive of remoteness." *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 355, 780 A.2d 98 (2001).

The same is true of Plaintiff-Relators' gun-violence argument. Plaintiff Cities contend that as governmental entities, they have a special interest in preventing future gun violence and possible associated economic impacts from gun violence. *See* Response at 16-18. But, again, such an alleged harm is far too tenuous and remote. Curiously, numerous lawsuits have been brought around the country by municipalities (primarily against gun manufacturers) alleging the same economic-impact injury from gun violence. Yet Plaintiff-Relators fail to cite to even one of them. Perhaps it is because in not one of these cases has a court allowed such an action to proceed where, as here, the alleged harm was so remote. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.,* 213 Ill. 2d 351, 821 N.E.2d 1099 [redacted]04); *City of Cincinnati v. Beretta U.S.A. Corp.,* 95 Ohio St. 3d 416, 2002-Ohio-2480, 76 [redacted]2d 1136; *Ganim v. Smith & Wesson,* 258 Conn. 313, 780 A.2d 98 (Conn.2001); *City of Boston v. Smith & Wesson,* 12 Mass. 225 (Mass.

Super. Ct. July 13, 2000). Ultimately, despite their efforts to distinguish their interests, Plaintiff-Relators' interests in public safety and in a thorough background check process is the same interest shared by the public in general and by BCI&I. These interests are not enough to establish standing and Plaintiff-Relators' claims must be dismissed.

B. Plaintiff-Relators fail to trace their alleged injuries to BCI&I's allegedly unlawful conduct.

In their Response, Plaintiff-Relators suggest they can sidestep traceability at the pleading stage and save specifics for discovery. *See* Response at 21 ("that is the purpose of discovery"). To the contrary, traceability is one of the three factors that constitute "the irreducible constitutional minimum of standing." *Moore v. City of Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Plaintiffs-Relators' failure to plead sufficient facts in their First Amended Complaint to establish traceability is fatal to their case.

Plaintiff-Relators do not allege that they have ever hired an unqualified person for a "sensitive position" due to a failure by BCI&I to report criminal information. So, in their Response Plaintiff-Relators pivot, contending that they do not have to allege specifics yet as their alleged harm is based on a BCI&I technical requirement to include an incident tracking number ("ITN") to accept criminal disposition information into the CCH database. See Response at 19. As alleged by Plaintiff-Relators, sometimes this ITN-requirement results in rejected dispositions where there is no ITN, frustrating the ability of clerks of court to submit disposition information. See FAC at ¶ 89, 92. However, the presence of governmental policy cannot establish standing. See, e.g., Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376 (1st Cir. 1992) (holding that it was not pertinent whether the challenged practice was a "routine, daily procedure implemented as a matter of policy by the defendants," but whether a "sufficient likelihood" of future injury exists because of the policy). Plaintiff-Relators had to at least allege facts supporting the

allegation that BCI&I's technical policy of sometimes rejecting disposition information from clerks of court actually caused injury, or creates a substantial likelihood of future injury, to Plaintiff-Relators. They did not, and therefore, Plaintiff-Relators fail to trace any alleged harm to BCI&I.

C. Plaintiff-Relators' alleged harm is not redressable by the requested remedy.

Instead of showing how the alleged harm is likely to be redressed by the requested relief, Plaintiff-Relators' Response repeats the same line that BCI&I is "passing the buck" to various agencies with independent reporting obligations to BCI&I. Plaintiff-Relators demand an injunction and writ of mandamus directing BCI&I to follow *their* interpretation of the law, but still fail to identify any *specific* information that BCI&I has either unlawfully rejected or failed to report in the CCH database. Plaintiff-Relators' repeated allegation that BCI&I should have upgraded its database technology does not equate to an allegation that needed upgrades have led to specific failures that could have been remedied by an "upgrade." Without a specific allegation of present wrongful conduct by BCI&I, any declaration by this Court would be meaningless. And Plaintiff-Relators fail to show how such a declaration would redress the alleged harm here.

II. Plaintiff-Relators Fail to State a Claim for Declaratory Relief.

Plaintiff-Relators lack standing and have failed to state a claim for which relief can be granted under Ohio's Declaratory Judgment Act. A declaratory judgment action should be dismissed under Civ. R. 12(b)(6) "(1) where there is no real controversy or justiciable issue between the parties, or (2) when the declaratory judgment will not terminate the uncertainty or controversy." (Citations omitted.) *McConnell v. Hunt Sports Enters.*, 132 Ohio App.3d 657, 681, 725 N.E.2d 1193 (10th Dist. 1999). Plaintiff-Relators' declaratory judgment claim fails in both respects.

Plaintiff Cities' position that they have special legal interests because of their own statutory obligations still does not make a claim for any statutory or constitutional right over Ohio's criminal background check system. For purposes of declaratory judgment, "a 'justiciable issue' requires the existence of a legal interest or a right, and a 'controversy' exists where there is a genuine dispute between parties who have adverse legal interests." *Woodson v. Ohio Adult Parole Auth.*, 10th Dist. Franklin No. 02AP-393, 2002-Ohio-6630, ¶ 7.

In Plaintiff-Relators' Response, they insist that as government employers of employees who are required to have background checks they have a legal interest in whether BCI&I is procuring all procurable conviction information. *See* Response at 24-25. However, a legal obligation to vet an employee does not give rise to a legitimate claim of ensuring that the vetting system is adequately run. Furthermore, Plaintiff Cities' position does not establish a controversy between parties with *adverse* legal interests. If anything, Plaintiff Cities and BCI&I have corresponding interests in a thorough background check system and ensuring the public safety. Without actual or potentially opposing interests, there is no controversy for this Court to resolve.

Nor will the requested declaration terminate Plaintiff-Relators' non-justiciable controversy over alleged gaps in the system. If such gaps exist, this Court, like BCI&I, does not have jurisdiction over the entities that possess the missing information to fill the gaps. Accordingly, this Court should refuse to consider their claims.

III. Plaintiff-Relators Fails to State a Mandamus Claim.

Even if Plaintiff-Relators could overcome the deficiencies in their First Amended Complaint, their request for mandamus relief still fails. To be entitled to a writ of mandamus, Plaintiff-Relators must establish: (1) a clear legal right to the requested action; (2) a clear legal duty on the part of Respondents to undertake it; and (3) the lack of an adequate remedy at law.

State ex rel. Van Gundy v. Indus. Comm'n., 111 Ohio St. 3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13.

A. Plaintiff-Relators have no legal interest in or right to the official action they seek to compel.

Even as government entities, with the duty to conduct and rely on background checks, Plaintiff-Relators have no legal right or interest in how BCI&I procures information for the criminal background check system. Rather, Plaintiff Cities' governmental interests in public safety, like Plaintiff Volk's, are the same interests shared by the general public, and are simply insufficient to state a claim for mandamus relief.

B. Plaintiff-Relators do not seek to compel the performance of any specific act.

Plaintiff-Relators do not seek to compel BCI&I to perform any specific act. Instead, they seek to compel BCI&I to "otherwise…fulfill their statutory obligations pursuant to R.C. 109.57." FAC ¶ 115, 117. In other words, Plaintiff-Relators seek a court order instructing BCI&I to follow the law. Even in their Response, Plaintiff-Relators never explain what specific acts they seek to compel or how there is a clear legal duty to perform them. Thus, their mandamus claim fails.

C. Mandamus may not be used to control a public official's discretion.

Despite Plaintiff-Relators' assertion to the contrary, they nevertheless improperly seek to use their mandamus claims to force BCI&I to carry out its discretionary duties in some unspecified, improved manner. No statute prescribes exactly how BCI&I is to go about procuring information for its criminal background check system, thus it has the discretion to carry out its duty "in a reasonable manner not in conflict with any law of the state." (Emphasis omitted.) *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960).

Plaintiff-Relators unsuccessfully attempt to invoke an exception to this rule that applies when a public entity abuses its discretion. *See State ex rel. Husted v. Brunner,* at ¶ 20. But Plaintiff-Relators' allegation, again, primarily relies on their unsupported legal conclusion that BCI&I read out of the statute "procure from wherever procurable." *See* Response at 29. Plaintiff-Relators also allege circumstances that result from Ohio's statutory framework for reporting and maintaining criminal history for use in background checks—which, as Plaintiff-Relators allege, involves numerous clerks of court, police chiefs, county sheriffs meeting their statutory obligations to report to BCI&I. In the context of Plaintiff-Relators' First Amended Complaint, which describes a highly decentralized reporting system, their allegations do not establish that BCI&I abused its discretion.

D. Mandamus cannot compel the vain and impossible acts Plaintiff-Relators seek.

Plaintiff-Relators' mandamus claim fails for the additional reason that they essentially seek an order that BCI&I must "procure" all information mandated to be reported even if the information is in the hands of third parties. FAC at ¶ 115, 117. Such an order would compel BCI&I to commit a vain act because BCI&I does not have legal authority or an enforcement mechanism to force these other entities to report the mandated information. Accordingly, Plaintiff-Relators' mandamus claim must be denied.

CONCLUSION

For these reasons, the First Amended Complaint should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2021, I electronically filed the foregoing with the Clerk of the Court by using the e-Filing system which will send a notice of electronic filing to the following:

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I further certify that a copy was served by electronic mail to the following:

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