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.	:	

MOTION TO DISMISS THE FIRST AMENDED COMPLAINT BY DEFENDANTS-RESPONDENTS

Pursuant to Ohio Civil Rule 12(B)(1) and (6), Defendants-Respondents Bureau of Criminal Identification and Investigation and Joseph Morbitzer, Superintendent of the Bureau of Criminal Identification and Investigation ("BCI&I"), respectfully move to dismiss Plaintiffs-Relators' First Amended Complaint in its entirety. This Court lacks jurisdiction over Plaintiffs-Relators' claims and they have failed to state a claim for which relief can be granted. A memorandum of law in support of this Motion is attached.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

Plaintiffs-Relators' second bite at the apple in this case is no better than their first. They first filed their Complaint on November 9 2020. Defendants-Respondents Joe Morbitzer and the Ohio Bureau of Criminal Identification and Investigation (collectively "BCI&I") moved to dismiss the Complaint, citing its many legal flaws. Rather than defend their Complaint and respond to the Motion to Dismiss, Plaintiffs-Relators amended it. But, their First Amended Complaint changed nothing. It does not include any additional parties or claims. Instead, it is virtually identical to the original Complaint, save a few more allegations of speculative harm, unidentified technological issues with Ohio's background check system, and additional requests for relief. Plaintiff-Relators again fail to state a legally cognizable claim against BCI&I and the First Amended Complaint should be dismissed.

So, this case remains just a political maneuver looking for a legal claim. Plaintiffs-Relators, two Ohio cities and an individual, bring this declaratory judgment and mandamus action accusing the Bureau of Criminal Identification and Investigation (BCI&I) of causing gaps in Ohio's background check system. Their Amended Complaint is based on a groundless legal theory that BCI&I, as the statutory administrator over Ohio's Computerized Criminal History (CCH) database, is somehow strictly responsible for "procuring" all criminal history information from any and all governmental agencies that may actually possess criminal history information, ostensibly by any means necessary. *See* R.C. 109.57(A)(1). Plaintiffs-Relators recklessly ignore the fact that Ohio law gives no governmental agency such sweeping power and authority. Without alleging one instance where BCI&I has actually failed to perform its duties, Plaintiffs-Relators demand this Court order BCI&I to follow the law and to "take such steps as are necessary to fulfill [its] obligations" under the law. First Am. Compl., Prayer for Relief, ¶ C.

The First Amended Complaint is both factually and legally defective for several reasons. First, Plaintiffs-Relators allege no legal injury whatsoever. That is, although they allege harm to the general public, Plaintiffs-Relators do not allege any direct and concrete injury to themselves. Instead, they allege harm amounting only to an undefined, speculative fear of future harm. Plaintiffs-Relators even fail to allege a significant possibility of harm. They try to hide their lack of legal standing by describing in great detail the toll that gun violence takes on communities. They set forth their fears that someday a bad actor may unlawfully obtain a firearm because of gaps in Ohio's background check system. Plaintiffs-Relators also fear that gaps in the system will allow an unqualified individual to obtain a sensitive position or a professional license and will do harm to the most vulnerable members of our communities. To be sure, every Ohio citizen, including the Ohio Attorney General and BCI&I, understands the importance of an accurate and comprehensive background check system in preventing such terrible tragedies from ever happening. On that point, the parties whole-heartedly agree. But this is a legal action and Plaintiffs-Relators cannot stand on their speculative, generalized fears of future harm alone.

Next, even if Plaintiffs-Relators state a legal harm (they do not), they have failed to allege that a declaration or a writ of mandamus ordering BCI&I to follow the law will redress that harm. They gloss over the fundamental fact that BCI&I is just one stakeholder among hundreds of agencies that possess information that must be reported into the CCH repository. Numerous clerks of courts, police chiefs, county sheriffs, and others have statutory obligations to report criminal information to BCI&I. Ordering BCI&I to follow the law does nothing to redress other entities' failure to do so.

Finally, Plaintiffs-Relators also fail to allege that any harm alleged (however speculative) is fairly traceable to BCI&I. Again, Plaintiffs-Relators fail to allege even one instance where BCI&I

failed to follow the law and caused a gap in Ohio's background check system, much less one that caused the "harms" that they fear. The truth is that Ohio's criminal background check system is dependent on multiple state and local agencies all discharging their duties under the law. Plaintiffs-Relators have utterly failed to trace any alleged harm to BCI&I as opposed to other governmental agencies who have not reported criminal history information as required by law.

Truly, Plaintiffs-Relators come to this Court completely empty-handed. Not only do they lack standing, but their declaratory judgment claim lacks a justiciable controversy between the parties, and they have no legal interest in their mandamus action. Additionally, Plaintiffs-Relators don't seek to compel BCI&I to perform any specific act. They simply seek general compliance with Ohio's laws, which is inappropriate as a matter of law. *See State ex rel. Stanley v. Cook,* 146 Ohio St. 348, 375-75, 66 N.E.2d 207 (1946). Finally, Plaintiffs-Relators' last-ditch attempt to save their mandamus claim by alleging that BCI&I abused its discretion as the statutory administrator for the CCH database repository falls just as flat. Like every other claim that they lodge against BCI&I, Plaintiffs-Relators fail to make any factual allegations that would establish that BCI&I abused its discretion.

Plaintiffs-Realtors' First Amended Complaint *is* a political maneuver in every sense of the term. It is completely devoid of any facts alleging that BCI&I failed in its duties to maintain the CCH database repository and its legal claims are simply baseless as a matter of law. Because Plaintiffs-Realtors have failed to establish jurisdiction or state a claim under Civ. R. 12(B)(1) and (6), their First Amended Complaint should be dismissed.

II. BACKGROUND

A. The Statutory Scheme for Ohio's Background Check System.

Ohio is a member of the National Crime Prevention and Privacy Compact (NCPPC), which is the agreement between the FBI and participating states to maintain the databases that

are used in the National Instant Criminal Background Check System (NICS) to determine whether a person is disqualified from possessing a firearm. Federal and state law prohibit the possession and/or transfer of a firearm or explosives if an individual falls within one or more "disqualifying events." First Am. Compl. ¶¶ 49, 59. *See also* 18 U.S.C. 922(g); R.C. 311.41 and 2923.125(C). But, the term "disqualifying events" is not limited just to criminal history information maintained by BCI&I. An individual is disqualified from possessing a firearm for reasons other than a criminal conviction. For example, a person is disqualified if he or she: (1) is a fugitive from justice; (2) has been adjudicated as a mental defective or has been committed to a mental institution; and (3) is subject to a criminal or civil protection order involving violence or threatening behavior towards an intimate partner or the intimate partner's child. 18 U.S.C. § 900(g)(2), (4), (8).

Under Ohio law, BCI&I is the centralized record keeper for criminal history records that are housed in the Computerized Criminal History (CCH) database repository. R.C. 109.57(A)(5). BCI&I is responsible for establishing "a complete system of criminal identification and in obtaining fingerprints and other means of identification of all persons arrested on" various charges and to file fingerprint records for persons confined to various institutions. R.C. 109.57(A)(3). BCI&I is also responsible for "procur[ing] from wherever procurable and fil[ing] 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" and certain misdemeanors. R.C. 109.57(A)(1).

Statutory law provides the mechanism for BCI&I to procure this information - by preparing and furnishing to various entities, including jails, correctional facilities, and every

clerk of court in the state, "standard forms for reporting the information required." R.C. 109.57(B). Under Ohio law, the holders of mandated criminal history information must report that information to BCI&I on required forms. *Id.* Ohio law does not give BCI&I the authority to enforce third party reporting obligations. *See generally* R.C. 109.57.

B. Third Party Reporting Requirements.

Even though BCI&I administers the CCH database repository, Ohio law specifically requires that the public entities who generate the criminal history information must also report the information to the CCH database repository. Said differently, the information that BCI&I maintains in the CCH database comes from other agencies pursuant to their own statutory obligations to report it to BCI&I.

Arrest information. Ohio law requires police chiefs and county sheriffs to report to BCI&I certain arrest information. Specifically, under R.C. 109.60(A)(1), "[t]he sheriffs of the several counties and the chiefs of police of cities" are mandated to "immediately upon the arrest of any person" for a crime that falls under the mandatory reporting laws to "take the person's or child's fingerprints, or cause the same to be taken, according to the fingerprint system of identification on the forms furnished by the superintendent of the bureau of criminal identification and investigation, and immediately shall forward copies of the completed forms, any other description that may be required, and the history of the offense committed to the bureau to be classified and filed and to the clerk of the court having jurisdiction over the prosecution of the offense or over the adjudication relative to the act."

Criminal case dispositions. Ohio law also imposes requirements on clerk of courts to report information essential to the criminal background check system. Specifically, Ohio law requires:

> "Every clerk of a court of record in this state, other than the supreme court or a court of appeals" to "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 108.572 of the Revised Code, or involving an adjudication in a case in which a child under eighteen years of age was alleged to be a delinquent child for committing an act that would be a felony or an offense of violence if committed by an adult."

R.C. 109.57(A)(2). Every clerk of a court of record also must submit specific information regarding criminal dispositions including: (1) the incident tracking number ("ITN"), which is generated when an individual is fingerprinted; (2) the case number; (3) the dates of arrest, offense, summons or arraignment; (4) the dates of the final disposition including convictions, dismissals or delinquency adjudications; (5) a statement of the original charge and criminal statute violated; and (6) the sentence imposed or any other disposition. R.C. 109.57(A)(2)(a)–(f) (hereinafter "mandated information"). Finally, R.C. 109.60(A)(3) requires courts at sentencing to order an individual to be fingerprinted if he or she hasn't already been fingerprinted so that the disposition may be properly reported to BCI&I.

Warrants and Criminal/Civil Protection Orders. In Ohio, the reporting of warrants and criminal/civil protection orders ("CPOs") is not administered by BCI&I. Instead, warrants and CPOs must be entered into the Law Enforcement Automated Data System (LEADS), a computerized system administered by the Ohio Highway Patrol. OAC 4501:2-10-03(C)(11). *See also* R.C. 5503.10. Ohio law does not require law enforcement agencies to enter warrants and CPOs into LEADS.

Mental health adjudications. Mental health facilities and/or probate judges, like courts, are required by statute to report mental health adjudications that disqualify a person from possessing a firearm. R.C. 5122.311(A); 18 U.S.C. § 900(g)(4). However, R.C. 5122.311 does not clearly define whether it's the probate court who made the adjudication or the chief clinical

officer of the mental health facility that is responsible for making the required report. Additionally, R.C. 5122.311 does not capture all mental health adjudications. For example, individuals who have been adjudicated Not Guilty by Reason of Insanity (R.C. 2945.40) or Incompetent to Stand Trial (R.C. 2945.39) by a criminal court are "mentally defective" as described in 18 U.S.C. § 900(G)(4). 27 C.F.R. § 478.11(a) and (b). But, if there is not a corresponding commitment to a mental health facility in that situation, there would be neither a probate judge nor a chief clinical officer to make the report as required by R.C. 5122.311. While forensic monitors and other mental health professionals might be involved in those cases and may conscientiously ensure reporting, there is no law mandating it.

C. Plaintiffs' Claims and Requested Relief.

Plaintiffs' broadly claim that BCI&I has failed to "fulfill its mandatory obligation to collect and report disqualifying criminal conviction information into the state and federal background check system databases." First Am. Compl. ¶ 1. They also complain that the system is missing "readily available information from all over the State." *Id.* at ¶ 8. Plaintiffs claim that a years-old investigation by the Columbus Dispatch found that BCI&I's computer system was "twitchy" and that, "upon information and belief" the system has not been upgraded. *Id.* at ¶¶ 83(d), 87. However, Plaintiffs conveniently fail to allege any *specific* instances where BCI&I has violated the law. Indeed, they do not claim that BCI&I is not fulfilling its statutory obligation to prepare and provide the reporting forms other entities must complete and return. *Id.* at ¶81. *See generally* R.C. 109.57. Plaintiffs also fail to allege that BCI&I even has the legal authority to compel the reporting of information that they claim is missing.

While Plaintiffs make much of the undisputable fact that gun violence is a vexing societal problem, they wholly fail to allege how *they* have been injured by BCI&I's alleged failures. They do not allege that BCI&I has maintained Ohio's CCH system in a manner that has actually

caused them harm, much less a significant possibility of future harm. They complain that BCI&I's alleged – but unidentified - failures "risk[] deadly consequences" and that even one failure to report certain information "can lead to a prohibited individual acquiring a firearm with tragic results." *Id.* at ¶¶ 5, 6 (quotation omitted). They claim that past unidentified background checks were "incomplete, potentially missing information that the potential purchaser was prohibited by law from possessing a firearm" and that, until "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." *Id.* at ¶ 11, 17.

Columbus and Dayton complain that the alleged "deficient" background checks cause them both financial injuries and "informational injuries" because they pay significant fees for the background check and they do not get the "benefit of their bargain between them and BCI." *Id.* at ¶¶104-106. Apparently, the alleged "informational injuries" also "indirectly deprive Volk of information" that is necessary to keep dangerous individuals from working in her children's schools. *Id.* at 108. Volk also claims injury in the form of "fear, emotional distress, and frustration" because she worries that employees at her children's school may have criminal convictions. *Id.* Notably, they do not premise these fears on actual *examples* of deficiencies which caused—or even risked—the injuries they claim. In short, Plaintiffs' First Amended Complaint did not fix any of their original problems. Like the original Complaint, it too is based on insufficient, generalized fear that *someday* a bad actor *may* unlawfully obtain a firearm or license, or may obtain a sensitive job, and *may* cause harm.

Plaintiffs' demand for relief is equally vague and undefined. They ask for a declaration that BCI&I has not satisfied its obligations to procure information as required by R.C. 109.57(A)(1), that BCI&I must follow the law, and that it has, and is continuing, to obstruct

clerks' ability to report required information. *Id.* at ¶¶ 113(1)-(5). They also seek a writ of mandamus compelling BCI&I to fulfill its duties set forth in R.C. 109.57(A)(1). *Id* at ¶¶ 115, 117. They do not identify what exactly BCI&I has omitted, or what it could or should be doing. Nor do they explain how the requested relief will actually fix the alleged harm. Statutory law plainly contemplates that many entities have legal duties to ensure that the system is complete and accurate. Merely ordering BCI&I to generically follow the law fixes nothing.

III. LEGAL ANALYSIS

A. Legal Standard

A motion to dismiss for failure to state a claim upon which a court may grant relief challenges the sufficiency of the complaint itself. *Volbers-Klarich v. Middletown Mgt. Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶¶ 11-12. A court should consider and accept all factual allegations of the complaint as true and afford all reasonable inferences in the non-moving party's favor. *Id.* This does not allow, however, unsupported conclusions to be admitted or to be deemed sufficient. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Dismissal under Civ. R. 12(B)(6) is warranted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. of Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975) (citation omitted).

Additionally, Civ. R. 12(B)(1) provides for dismissal of an action for lack of subject matter jurisdiction. A civil complaint must establish that the claims set forth are within the subject matter jurisdiction of the court. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989); Civ.R. 12(B)(1). Courts ask "whether any cause of action cognizable by the forum has been raised in the complaint." *Id.* at 80, citing *Avco Financial Services Loan, Inc. v. Hale*, 36 Ohio App.3d 65, 67 (10th Dist. 1987).

B. Plaintiffs-Relators lack standing.

This Court must dismiss Plaintiffs-Relators' First Amended Complaint because they lack standing. "A preliminary inquiry in all legal claims is the issue of standing." *Cuyahoga Cnty. Bd. of Comm'rs,* 112 Ohio St. 3d 59, 858 N.E.2d 330, 2006-Ohio-6499, at ¶ 22. Standing is a constitutionally imposed jurisdictional requirement. *ProgressOhio.org, Inc. v. Jobs,Ohio,* 139 Ohio St.3d 520, 13 N.E.3d 1101, 2014-Ohio-2382, ¶ 11. This is because Article IV, Section 4(B) of the Ohio Constitution provides that common pleas courts "shall have such original jurisdiction over all *justiciable matters.*" (emphasis added). "A matter is justiciable only if the complaining party has standing to sue." *ProgressOhio.org,* at ¶ 11, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 ("It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy."). "Standing does not depend on the merits of the plaintiff's claim," instead it "depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case." *ProgressOhio.org,* at ¶7. To establish standing, Plaintiffs-Relators must show "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.'" *ProgressOhio.org,* at ¶ 7, quoting *Moore v. Middletown,* 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Plaintiffs-Relators cannot meet their burden on all three elements.

1. Plaintiffs-Relators fail to establish any direct and concrete injury.

Here, Plaintiffs-Relators must show that they have suffered an "invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, not hypothetical or conjectural." *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, 840 N.E.2d 1101, ¶ 10 (10th Dist.), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Their particularized injury must be "different in character from that sustained by the public generally." *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 19 (quotation omitted). An imminent injury must be "certainly impending." *Clapper v. Amnesty Internatl. USA*, 568 U.S. 398, 409 (2013) (quotation and emphasis omitted). Plaintiffs-Relators fail to allege a direct and concrete injury for many reasons. First, they allege harm that is suffered by the public in general. Second, the alleged harm is speculative and hypothetical. Finally, they fail to establish any significant possibility of future harm.

Public harm. Plaintiffs-Relators allege harm to the public at large and not any direct and concrete injury to themselves. A plaintiff who alleges harm to the general public alone lacks standing to sue. Rather, a plaintiff must have "suffered or [be] threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general." *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22, quoting *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward,* 86 Ohio St. 3d 451, 469-470, 715 N.E.2d 1062 (1999). *See also State ex rel. Lynch v. Rhodes,* 176 Ohio St. 251, 254, 199 N.E.2d 393 (1964) ("'It is not enough that the party assailing the act suffers in some indefinite way in common with people generally'" and there is no standing when "Relator's only interest, as his petition shows, is that of any resident and taxpayer.") (citation omitted)).

Plaintiffs-Relators broadly allege various failures in administering the criminal background check databases that are "critical to public safety" and that "risk[] deadly consequences." First Am. Compl. at ¶¶ 1-2, 5. They insist that "a complete and accurate background check system is necessary for the safety of all Ohioans." *Id.* at ¶ 12. The Cities of Columbus and Dayton allege that they, as do many other employers, use the background check system to ensure those "who work with sensitive populations . . . do not have dangerous criminal

histories" and to ensure that "their police officers have access to timely and accurate information about individuals they may encounter." *Id.* at ¶¶ 64, 22. These rather obvious statements are not harms which confer standing. To the contrary, they are facts that the Plaintiffs-Relators utterly fail to connect to any injury to *them* that is attributable to BCI&I.

But, even if these undisputed facts are construed as "harms," and they should not be, none of these alleged harms are unique in any way to the interests of the public in general. In *Walgate,* the Supreme Court found that plaintiffs who challenged various gambling laws based on the alleged negative effects of gambling on them and their communities lacked standing to sue because they failed to allege any direct, concrete injuries outside those affecting the general public. 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶¶ 20, 22. The Court found that the negative effects of gambling, "do not constitute concrete injuries to appellants that are different in manner or degree from those caused to the general public, were not caused by the state's conduct, and cannot be redressed by the requested relief." *Id.* at ¶ 22. The same conclusion applies here. Plaintiffs-Relators' interests in public safety and in a robust, effective background check process to prevent future bad actors from causing societal harm is the same interest shared by the public in general and by BCI&I. They are insufficient interests upon which to stake their claims.

Plaintiff Volk fares no better. She attempts to gain standing by asserting a generalized "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" and her "commitment to doing everything she can to prevent gun violence in her community and beyond." First Am. Compl. at ¶¶ 27, 29. Volk also claims that she suffered "injury and harm in the form of fear, emotional distress, and frustration that employees at her children's school *may*

have criminal convictions that were missed during background checks." *Id.* at 108 (emphasis added). Finally, Volk claims she is "indirectly deprived" of the background check information. *Id.* Undoubtedly, millions of people are interested in—and rely on—the accuracy of Ohio's background check system and are committed to preventing gun violence. And, millions of parents undoubtedly experience emotional distress over the fear that school employees *may* have criminal convictions and *may* do harm to their children. But, absent any allegation that BCI&I has actually caused her a direct and concrete injury, her generalized interest in preserving the public from future harm where there is no significant possibility of that harm is wholly insufficient to confer standing.

Speculative injury. Plaintiffs-Relators' Complaint is based entirely on their hypothetical, speculative fears that there could be "potentially missing information" about a "potential purchaser" who will then unlawfully obtain a firearm. First Am. Compl. at ¶ 14. *See also* First Am. Compl. at ¶¶ 4-5, 23 (Columbus and Dayton 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."). They also speculate that someone will be able to unlawfully obtain a "sensitive position[]" or license for which they are disqualified from holding because of an unreported criminal record. *Id.* at ¶¶ 20, 21.

Said differently, the Plaintiffs-Relators speculate that there *might* be someone who buys a firearm, who *might* be disqualified but is not caught because BCI&I *might* have failed to do something that Plaintiffs do not identify. The Plaintiffs-Relators similarly—and vaguely—assert that they use and rely on background checks prior to hiring individuals for "sensitive positions." *Id.* at ¶¶ 20, 21. For the first time in their First Amended Complaint, Plaintiffs-Relators claim that the alleged failure to "procure" criminal information and/or to upgrade CCH database

technology has caused them informational and financial injuries because they are not getting what they paid for with the WebCheck fees. *Id.* at 104-107. To be clear, neither alleges that they have ever used the system and qualified an otherwise unqualified person for a "sensitive position" due to a failure by BCI&I. Nor do they allege one specific instance where they actually received a deficient background check at all, let alone one that actually led to any "harm" whatsoever. They instead seem to insinuate—and speculate—that it *might* happen. At bottom, the Plaintiffs-Relators' speculative fears do not confer standing and this Court lacks jurisdiction over the Complaint.

No significant possibility of future harm. Plaintiffs-Relators also fail to sufficiently allege the significant possibility of future harm. "Although a declaratory-judgment action generally contemplates that the action is brought before an injury-in-fact has occurred, a plaintiff must nonetheless demonstrate 'actual present harm or a significant possibility of future harm to justify pre-enforcement relief.'" *Ohioans for Concealed Carry, Inc. v. City of Columbus,* Slip Op. No. 2020-6724, 2020 Ohio LEXIS 2809, ¶32 quoting *Peoples Rights Org., Inc. v. Columbus,* 152 F.3d 522, 527 (6th Cir. 1998).

Plaintiffs-Relators allege that in 2010, and again between 2011 and 2016, two individuals unlawfully obtained firearms despite having disqualifying events. First Am. Compl. at ¶¶ 85. Plaintiffs-Relators do not claim that those tragedies caused them harm and they do not establish a significant possibility that similar incidents will cause future harm. First, Plaintiffs-Relators do not allege in those prior instances that the gap in criminal history information was the result of misconduct by BCI&I. Indeed, not all mandated information is reported through the CCH database. *See supra* at 3-4, 6. Plaintiffs-Relators don't indicate where the alleged gaps occurred in those incidents or which agency allegedly caused the gaps. Moreover, Plaintiffs-Relators

offer no assertions that the alleged technical issues with the CCH database have caused any actual harm at all, let alone how the alleged failures cause a significant possibility of future harm. Without making those critical connections, Plaintiffs-Relators cannot show a significant possibility of future harm which will be caused by BCI&I.

Further, Plaintiffs-Relators ignore the fact that significant strides have been made in Ohio's background check system in recent years. The NICS Working Group which includes BCI&I, the Ohio Supreme Court and other state and local agencies have made tremendous strides in developing and implementing statewide systems for reporting criminal history information as provided for by law. *See* First Am. Compl. ¶84, "IMPROVING THE COMPLETENESS OF FIREARM BACKGROUND CHECKS THROUGH ENHANCED STATE DATA SHARING: A FINAL REPORT," by the Ohio Office of Criminal Justice Services, the Supreme Court of Ohio, and the Bureau of Criminal Investigation, November 2015 ("2015 Report") at 4, attached here to as Exhibit A.[1] Thereafter, in its 2018 report, the NICS Working Group found that significant progress in reporting capabilities had been made and it offered several recommendations for continued improvement such as eliminating any need for paper submissions and "creating efficiencies and eliminating redundancies" for reporting agencies. *See* First Am. Compl. ¶ 11(b), Ohio Office of Criminal Justice Services, "2018 Report, The State of NICS in Ohio" at 35, attached hereto as Exhibit B. Presently, the Governor's Warrant Task Force is working towards improving processes that will enhance the reporting of warrants and civil and criminal protection orders. *See* First Am. Compl. ¶ 91. *See also* Governor

[1] Plaintiffs-Relators incorporate the NICS Working Group's 2015 Report and other documents in their Complaint. Documents referred to in pleadings may be attached and relied upon in a motion to dismiss under Civ. R. 12(B). *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, fn. 1, 1997-Ohio-274, 673 N.E.2d 1281 (1997) (various articles and public health studies attached to the complaint were considered in Rule 12 motion).

DeWine, Executive Order 2019-10D, attached hereto as Exhibit C. These significant improvements in processes cut directly against any inference that there is a significant possibility that whatever issues that allegedly existed then still exist now.

2. Plaintiffs-Relators' alleged harm is not redressable by the requested remedy.

Plaintiffs-Relators fail to show that the alleged harm is likely to be redressed by the requested relief. Their entire theory of liability rests on a baseless 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 types of crimes. *See* R.C. 109.57(A)(1) (emphasis added). According to the Plaintiffs-Relators, if information exists then apparently it is *ipso facto* "procurable" by BCI&I. *See* First Am. Compl. ¶¶ 78-80. Plaintiffs-Relators are simply wrong as a matter of law, and more importantly, their First Amended Complaint fails to state a legal claim for relief that will redress the alleged harm.

Essentially, Plaintiffs-Relators demand an injunction and writ of mandamus directing BCI&I to follow their interpretation of the law. They demand that this Court direct BCI&I to: (1) "procure wherever procurable" criminal disposition and other information; (2) "take such steps as are necessary to accept disposition records from courts regardless of whether an arrest record or ITN number already exists;" (3) "take such steps as are necessary to eliminate technological barriers;" (4) "take such steps as are necessary to procure all criminal disposition information"; and (5) "take such steps as are necessary to carry out the responsibilities of the Compact Officer of the National Crime Prevention and Privacy Compact." First Am. Compl., Prayer for Relief, ¶C. Again, the alleged harm in this case is a moving target. Plaintiffs-Relators fail to identify any *specific* information that BCI&I has either unlawfully rejected or

failed to report in the CCH database. As to the alleged technical issues, Plaintiffs-Relators believe that BCI&I has not "upgraded" the CCH database system. They offer absolutely no allegations that any needed upgrades have led to specific failures that could even been remedied by an "upgrade." *Id.* at ¶ 87. Indeed, the NICS Working Group and the Ohio Auditor never identified lack of technology upgrades to be a contributing factor to any deficiencies in Ohio's background check system. *See* Exhs. A,B and D. Without even one specific allegation of present wrongful conduct by BCI&I, any declaration by this Court would be utterly meaningless. And Plaintiffs-Relators fail to show how such a declaration would redress the alleged harm here.

At its core, the inability of BCI&I to redress Plaintiff-Relators' alleged harm through their requested relief stems from their oversimplification and inaccurate description of Ohio's statutory framework for reporting and maintaining criminal history and other critical information for use in mandatory state and federal background checks. They gloss over the fundamental fact that, while BCI&I is the statutory administrator over Ohio's CCH database repository, it is just one stakeholder among hundreds of agencies that possess information that must be reported into the CCH repository. As noted above, numerous clerks of courts, police chiefs, county sheriffs, and others have statutory obligations to report to BCI&I. *See supra* at 3-6. Ordering BCI&I to follow the law does nothing to redress other entities' failure to do so.

In addition, as Plaintiffs themselves acknowledge, over the years, a wide range of state and local stakeholders – the Governor's Office, the Ohio Supreme Court, the Ohio Attorney General's Office, and many local law enforcement agencies and clerks of courts - have worked cooperatively, spending countless hours and resources on developing, improving and refining Ohio's system for capturing and reporting criminal and other required information. First Am.

Compl. at ¶¶ 84, 88. Those efforts have identified systemic issues that cannot be cured by the relief Plaintiffs-Relators seek.

For example, the Supreme Court of Ohio, BCI&I, the Attorney General, the Ohio Office of Criminal Justice Services, and the Ohio Department of Mental Health and Addiction services formed the "Ohio NICS Working Group" to study and improve the system. *See Id.* ¶84, Ex. A. In its 2015 Report, the NICS Working Group identified systemic barriers to reporting criminal and other information such as Ohio's decentralized court system and inconsistent or inadequate resources for state hospitals and other mental health facilities to report mental health adjudications. Ex. A at 5-6.

Bifurcated responsibilities for reporting and housing warrants and civil/criminal protection orders was another systemic issue that the NICS Working Group identified in its 2018 Report. Ex. B at 9. In Ohio, the reporting of warrants and CPOs is not administered by BCI&I through the CCH database. Instead, warrants and CPOs must be entered into the Law Enforcement Automated Data System (LEADS), which is exclusively administered by the Ohio Highway Patrol. *Id. See also* OAC 4501:2-10-03(C)(11); R.C. 5503.10. Moreover, Ohio law does not require law enforcement agencies to enter warrants and CPOs into LEADS. *Id.* Even if BCI&I had some enforcement authority over LEADS, which it does not, it still could not remedy any failure by law enforcement officials to submit warrants and CPOs into LEADS because those submissions are voluntary as well.

Finally, in 2019, the Ohio Auditor, using his exclusive authority under R.C. Chapter 117 to "examine a public office's compliance with laws applicable to the public office," conducted an audit to "test whether public offices [were] in compliance with statutory requirements to share NICS information or data with BCI&I." *See* First Am. Compl. at ¶11(a), Audit Letter of Ohio

Auditor of State, October 9, 2019 attached hereto as Exhibit D. The Auditor found noncompliance by various clerks of courts in reporting criminal dispositions and by various law enforcement agencies in providing fingerprints as required by law and "strongly recommend[ed] that the Governor's Office or the Ohio General Assembly convene a task force to study and recommend statutory changes that are better designed to meet this important public policy objective." Ex. D at 2-3.

Even after years of research and study, neither the NICS Working Group nor the Ohio Auditor identified any alleged failures by BCI&I in "procuring" criminal disposition information from mandated reporting agencies or technological failure as reasons for any deficiencies in Ohio's background check system. *See* Exs. A, B, and D. The truth is that Ohio's criminal background check system is dependent on multiple state and local agencies all discharging their duties under the law. Issuing a declaration to BCI&I alone to "follow the law" will do nothing to redress any alleged gaps in the system.

3. Plaintiffs-Relators alleged harms are not traceable to BCI&I.

For all of the same reasons that the requested relief will not redress Plaintiffs-Relators' alleged harms, those harms are also not fairly traceable to BCI&I. For example, they allege that an otherwise disqualified individual *would be able* to obtain firearms because many agencies that possess criminal information do not consistently report qualifying information. First Am. Compl., ¶ 88. They further claim that "felony dispositions did not get transmitted to the [CCH]" by the entities responsible for doing so—courts—thus it was urged that *courts* be provided with a mechanism for doing so. *Id.* at ¶ 85. And, Plaintiffs-Relators point to the development of a "completed criminal history information" as a process that "does not always work smoothly." *Id.* at ¶ 89. Finally, they allege, without any supporting facts, that BCI&I needs to upgrade its technology and is solely responsible for any and all failures in the criminal history reporting

system. *See Id.* at ¶¶ 83, 86, 87. Plaintiffs-Relators' allegations regarding technology upgrades come from old news articles that pre-date the NICS Working Group's advancements to Ohio's background check system as detailed in its 2015 and 2018 reports. *See* Exhs. A-B. *See also* First Am. Compl. ¶¶ 83, 86, 87 (identifying news articles on Ohio's background check system from 2012-2014). In any event, the incidents of apparent gaps in the system that Plaintiffs-Relators point to in the First Amended Complaint were not traced to BCI&I. *Id.*, ¶ 85. Presumably, if those incidents were attributable to a failure on the part of BCI&I, the Plaintiffs-Relators would have alleged as much. Tellingly, they do not. Indeed, Plaintiffs-Relators have failed to allege even one scenario where any alleged harm would be fairly traceable to BCI&I.

Plaintiffs' own allegations only underscore the fact that their speculative fear of harm is not traceable to BCI&I. In an apparent attempt to paint BCI&I as the culprit for any alleged "problems" with Ohio's background check system, Plaintiffs dedicate numerous pages in their First Amended Complaint paraphrasing reports by the NICS Working Group and the Ohio Auditor. *See* First Am. Compl. ¶¶ 8, 84, 88-91. But, as stated above, Plaintiffs-Relators ignore the fact that neither the NICS Working Group nor the Ohio Auditor identified any alleged failures by BCI&I in "procuring" criminal disposition information from mandated reporting agencies as a reason for any deficiencies in Ohio's background check system. *See* Exs. A, B, and D. Nor did these groups find that BCI&I failed to perform technological upgrades to the CCH database repository. *Id.* The simple reason is that Ohio's background check system is reliant upon multiple agencies to report information and that systemic characteristics such as: (1) Ohio's decentralized court system (Ex. A at 5, 16-18); (2) inconsistent resources and laws to report mental health adjudications (Ex. B at 34); (3) bifurcated responsibilities for housing warrants and CPOs (Ex. B at 9-10); and (4) lack of enforcement authority over reporting

agencies (Ex. D at 3) all show that any alleged harm is not fairly traceable to BCI&I. Therefore, as a matter of law, Plaintiffs-Relators lack standing and their Complaint should be dismissed.

C. Plaintiffs-Relators Fail to State a Claim for Declaratory Relief.

Plaintiffs-Relators lack standing under the Ohio's Declaratory Judgment Act and they have also failed to state a claim for which relief can be granted. Ohio's Declaratory Judgment Act "is remedial in nature; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and it is to be liberally construed and administered." *Ohio Ass'n of Pub. Sch. Emples. (OAPSE) v. Sch. Emples. Ret. Sys.,* 10th Dist. Franklin App. No. 19AP-288, 2020-Ohio-3005, ¶ 24, citing *Swander Ditch Landowners' Assn. v. Joint Bd. of Huron and Seneca Cty. Commrs.,* 51 Ohio St.3d 131, 134, 554 N.E.2d 1324 (1990), citing *Radaszewski v. Keating*, 141 Ohio St. 489, 496, 49 N.E.2d 167 (1943). "The essential elements for declaratory relief are: (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Id.* at ¶ 25, citing *Aust v. Ohio St. Dental Bd.,* 136 Ohio App.3d 677, 681, N.E.2d 605 (10th Dist. 2000). *See also Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 49 ("Courts have the duty to ensure that plaintiffs plead these elements for purposes of declaratory-judgment actions and that the complaint sufficiently avers injury, causation, and redressability. Thus, our generosity is tempered by an insistence on sufficiency in the pleadings. If a party fails to establish any of the necessary showings to bring the claims, the judge must dismiss the cause."). "A controversy is justiciable when it presents 'issues that are ripe for judicial resolution and which will have a direct and immediate impact on the parties.'" *OAPSE,* at ¶ 25, quoting *Cristino v. Ohio Bur. of Workers' Comp.,* 10th Dist. Franklin App. No. 13AP-772, 2014-Ohio-1383, ¶ 22 (additional citation omitted).

There are two reasons for dismissing a declaratory judgment action 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." *McConnell v. Hunt Sports Enters.,* 132 Ohio App.3d 657, 681, 725 N.E.2d 1193 (10th Dist. 1999), citing *AEI Group Inc. v. Ohio Dept. of Commerce,* 67 Ohio App.3d 546, 550, 587 N.E.2d 889 (10th Dist. 1990). *See also OAPSE,* at ¶ 26 ("[I]n the absence of an actual controversy, a trial court may not render a declaratory judgment."), citing *Mid-Am Fire & Cas. Co. v. Heasley,* 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. Plaintiffs-Relators' declaratory judgment claim fails on both fronts.

1. There is no controversy between Plaintiffs-Relators and BCI&I.

Plaintiffs-Relators' interest in a judicial declaration that BCI&I is not sufficiently "procuring" criminal records is not a real controversy for purpose of the Declaratory Judgment Act. "For a real controversy to exist 'there must be a 'genuine dispute between the parties having adverse *legal* interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *OAPSE,* at ¶ 25 (emphasis added), quoting *Town Ctrs. Ltd. Pshp. v. Ohio State AG,* 10th Dist. Franklin App. No. 99AP-689, 2000 Ohio App. LEXIS 1457, * 12, quoting *Wagner v. Cleveland,* 62 Ohio App.3d 8, 13, 574 N.E.2d 533 (8th Dist. 1988). Plaintiffs-Relators have no *legal* interest in whether BCI&I is doing what the law requires.

Plaintiffs-Relators do not claim to have any statutory or constitutional right over the criminal background check system. They simply ask this Court to order BCI&I to follow their interpretation of the law. But, "[f]or purposes of a declaratory judgment action, 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 (citation omitted). The

parties do not have adverse legal interests. At bottom, wanting to know if someone else is complying with the law, without having an actual legal stake in the answer, is not an actual legal controversy.

2. Plaintiffs-Relators' requested declaration will not terminate the controversy.

Plaintiffs-Relators fail to show that the requested declaration will cause BCI&I to "procure" more criminal history information or will be able to more ably process criminal history information. Said differently, the requested declaration will not terminate Plaintiffs-Relators' controversy over alleged gaps in the system. If such gaps exist (and Plaintiffs-Relators have failed to identify any), this Court does not have jurisdiction over the entities that possess the missing information to fill the gaps. The requested relief also does not resolve the systemic issues identified by the Ohio Auditor and the NICS Working Group. *See supra* at 15-18. In short, the requested declarations will not terminate the non-justiciable controversy that Plaintiffs-Relators raise. Accordingly, this court should refuse to consider their claims. *Molnar v. Ohio Liquor Control Com.*, 79 Ohio App.3d 318, 320, 607 N.E.2d 112 (10th Dist.1992) ("A court may refuse to enter a declaratory judgment when such judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.") (quotation, punctuation omitted).

D. Plaintiffs-Relators Fail to State a Mandamus Claim.

Even if Plaintiffs-Relators could overcome the critical threshold deficiencies in their First Amended Complaint, their request for mandamus relief still fails. To be entitled to a writ of mandamus, Plaintiffs-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. "The right to the relief sought by a relator in a mandamus action

must be clear, and the burden of establishing such a clear right is on the relator." *State ex rel. Welsh v. Ohio State Med. Bd.*, 176 Ohio St. 136, syllabus par. 1, 198 N.E.2d 74 (1964).

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

Plaintiffs-Relators fail to establish the first element of their mandamus claim - a clear legal right to the requested relief. "'If no legal right of a person can be affected by the failure of a public official to act in any given matter, such person does not have a beneficial interest such as will permit him to maintain an action in mandamus to require such official to so act.'" *State ex rel. Gen. Contrs. Assn. v. Wait,* 168 Ohio St. 5, 7-8, 150 N.E.2d 851 (1958), quoting *State, ex rel. Skilton,* v. *Miller, Judge*, 164 Ohio St. 163, 128 N. E. 2d 47 (1955). A writ of mandamus "may issue on the information of the party beneficially interested." R.C. 2731.02. "Hence, if the petition does not set forth specific facts showing the relator to be a 'party beneficially interested,' as required by R.C. 2731.02, relator has not stated a proper claim for relief in mandamus." *State ex rel. Snyder v. State Controlling Bd.*, 11 Ohio App.3d 270, 272, 464 N.E.2d 617 (10th Dist.1983). The Ohio Supreme Court has explained this requirement: "Where no legal right of a person can be affected by the failure of public officials to act in any given matter, he has no such beneficial interest as will permit him to maintain an action in mandamus against them to require official action in such matter." *State, ex rel. Brophy, v. Cleveland*, 141 Ohio St. 518, 49 N.E.2d 175, syllabus par. 1 (1943). Here, Plaintiffs-Relators offer no allegations establishing any legal interest that is affected by BCI&I's alleged failure to perform its statutory duties.

In *State ex rel. Skilton v. Miller,* the Ohio Supreme Court explained that "reason, logic and necessity for the orderly administration of justice" mandated the requirement that "in the absence of injury to the relator in a manner different from that as to the public in general," a relator cannot obtain a writ. 164 Ohio St. at 169. In *Skilton*, the relator sought a writ of

mandamus to compel a judge and clerk to issue a warrant or summons based on his complaint that a store had violated a statute requiring it to be closed on Sunday. Because the relator had no legal right that was affected, he could not bring his claim. The Court explained: "To hold otherwise would permit any crusading zealot to ride off, helter-skelter, throughout the state compelling police or municipal courts to arrest persons for alleged offenses in which the relator has no legitimate concern." *Id.,* It reasoned that "[l]aw enforcement may better be left to the public officials" and any "dereliction of duty. . . is always subject to review by their superiors and to correction by impeachment, removal or by a refusal to re-elect." *Id.* at 169-170.

Here, Plaintiffs-Relators have no *legal* right or interest in how BCI&I procures information for the criminal background check system. They allege they 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[,]" including "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." First Am. Compl. at ¶ 115, 117. This allegation fails to establish any legal right affected by how BCI&I procures information for Ohio's background check system. Rather, these interests are shared by the general public and are simply insufficient to state a claim for mandamus relief.

2. Plaintiffs-Relators do not seek to compel the performance of any specific act.

For over 120 years, the Ohio Supreme Court has recognized that mandamus will not issue to compel general compliance with the law, but only to compel a specific act. As far back as 1897, the Ohio Supreme Court recognized:

> The object of the writ is to compel an officer to do some specific thing enjoined on him by law, and not to compel him to enforce, the general mandates of the law. . . . To do so would simply duplicate the act of the legislature in making the law.

State ex rel. Keyser v. Comm'r of Wayne Cty., 57 Ohio St. 86, 91, 48 N.E. 136 (1897). The Supreme Court has reaffirmed this basic principle over and over again. *See Cullen v. State,* 105 Ohio St. 545, 138 N.E. 58 (1922); *State ex rel. Tillimon v. Weiher,* 65 Ohio St.3d 468, 470, 1992-Ohio-83, 605 N.E.2d 35, citing *State ex rel. Stanley v. Cook*, 146 Ohio St. 348, 66 N.E.2d 207, syllabus par. 7 (1946); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 589, 113 N.E.2d 14, 19 (1953) ("A writ of mandamus will not issue to compel the observance of laws generally[.]"). The Ohio Supreme Court has been clear that "[t]he extraordinary remedy of mandamus will be granted only upon a showing of a clearly defined legal duty and a plain dereliction of that duty." *State ex rel. Spellmire v. Kauer*, 173 Ohio St. 279, 280, 181 N.E.2d 695 (1962). Mandamus is "confined to commanding the performance of specific acts specially enjoined by law to be performed." *Stanley,* 146 Ohio St. at 375-76 (quotation omitted).

Despite this well-established law, Plaintiffs-Relators do not seek to compel BCI&I to perform any specific act. Instead, they generally seek to compel BCI&I to comply with its "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." First Am. Compl., ¶¶ 115, 117. They also seek to compel BCI&I to "otherwise…fulfill their statutory obligations pursuant to R.C. 109.57." *Id.* In other words, Plaintiffs-Relators seek a court order instructing BCI&I to follow the law. They do not seek to compel BCI&I to perform any specific act they contend is necessary to comply with the law. Tellingly, they seek an order requiring BCI&I "to take such steps as are necessary" to do certain things. First Am. Compl., Prayer for Relief, ¶ C (ii-v). Plaintiffs-Relators never explain what those necessary steps are or how there is a clear legal duty to perform them. Thus, their mandamus claim fails.

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

Plaintiffs-Relators also improperly seek to use their mandamus claims to force BCI&I to carry out its discretionary duties in some unspecified, improved manner. "Absent an abuse of discretion, mandamus cannot compel a public official to act in a certain way on a discretionary matter." *State ex rel. Husted v. Brunner,* 123 Ohio St.3d 119, 2009-Ohio-4805, 914 N.E.2d 397, ¶ 20, quoting *State ex rel. Lee v. Montgomery*, 88 Ohio St.3d 233, 235, 724 N.E.2d 1148 (2000); *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997). "In other words, while the extraordinary remedy of mandamus may be available to compel a public entity to perform a duty specifically enjoined by law. . . , it does not permit the courts to control that public entity's discretion." *State ex rel. Carlson v. State Bd. of Pharm.,* Mahoning App. 7th Dist. No. 18 MA 006, 2018-Ohio-3102, ¶ 13 (emphasis omitted), citing *City of Cleveland ex rel. Neelon v. Locher,* 25 Ohio St.2d 49, 51, 266 N.E.2d 831 (1971). Because no statute prescribes exactly how BCI&I is to go about procuring information for its criminal background check system, it has the discretion to carry out its duty "in a reasonable manner not in conflict with any law of the state." *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960) (emphasis omitted). Plaintiffs-Relators cannot use this mandamus case to control BCI&I's discretion in performing its statutory duties. *See, e,g., Carlson,* at ¶¶ 12, 13, 15 (relator's petition seeking a writ of mandamus compelling the Board of Pharmacy to investigate and enforce its rules was dismissed because, *inter alia,* mandamus could not be used to control the board's discretion in carrying out its discretionary duties).

Apparently recognizing this flaw in their claims, Plaintiffs-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. Plaintiffs-Relators assert that BCI&I's "failure to fulfill their clear legal duty. . . is [] an abuse of discretion and is unreasonable, arbitrary, and

unconscionable." First Am. Compl. at ¶ 117. "An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude." *State ex rel. Lee v. Montgomery*, 88 Ohio St.3d 233, 235, 724 N.E.2d 1148 (2000). Plaintiffs-Relators' allegation merely restates the legal standard as to what an abuse of discretion is and is nothing more than a legal conclusion not entitled to a presumption of truth. But, they fail to follow up this recitation of the law with factual allegations to support the alleged abuse. That is, Plaintiffs-Relators fail to allege how BCI&I has acted in an unreasonable, arbitrary, or unconscionable manner. And, as explained above, based on the very sources upon which Plaintiffs-Relators rely, BCI&I (and many others) have been diligently working to address the issues that have arisen in the very complex criminal background check system. *See* Exhs. A-D. Plaintiffs-Relators have not, and cannot, allege how BCI&I has acted in an unreasonable, arbitrary, or unconscionable manner.

4. Mandamus cannot compel the vain and impossible acts Plaintiffs-Relators seek.

Plaintiffs-Relators' mandamus claim fails for the additional reason that it seeks to compel BCI&I to perform a legally unauthorized, impossible act. 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. First Am. Compl. at ¶¶ 115, 117. But, the order would compel BCI&I to commit a vain act because BCI&I has no legal authority or enforcement mechanism to force these other entities to report the mandated information. Ordering BCI&I to simply "eliminate technological barriers" would be an equally vain act because Plaintiffs-Relators have failed to even identify one barrier that caused the alleged injuries. Id. at Prayer for Relief ¶ C (iii). It is well established that "[m]andamus will not issue to compel a vain act." *State ex rel. Keith v. Gaul,* 147 Ohio St.3d 270, 2016-Ohio-5566, 63 N.E.3d 1197, ¶ 16, citing *State ex rel. Bona v. Orange*, 85 Ohio St.3d 18, 22, 1999-Ohio-431, 706 N.E.2d 771(1999), *State ex rel. Thomas v.*

Ghee, 81 Ohio St.3d 191, 192, 1998-Ohio-461, 690 N.E.2d 6, (1998). *See also State ex rel. Weaver v. Bauer,* 2d Dist. Clark C.A. CASE No. 96-CA-0110, 1997 Ohio App. LEXIS 3568, at *7 (June 27, 1997), citing *State ex rel. Ingerson v. Berry*, 14 Ohio St. 315 (1863); *State v. Staley*, 38 Ohio St. 259 (1882) ("Mandamus will not issue to command the performance of an act which is either impossible or useless. . ."). "Furthermore, mandamus will not be allowed unless the act performance of which is sought is legally possible at the time." *Id.*, citing *State ex rel. Rhinehart v. Celebrezze*, 147 Ohio St. 24, 67 N.E.2d 776 (1946). Because Plaintiffs-Relators' mandamus action is premised on ordering BCI&I to perform impossible and vain acts, their mandamus claim must be denied.

IV. CONCLUSION

For the foregoing reasons, this Court does not have jurisdiction over Plaintiffs-Relators First Amended Complaint and it fails to state a claim. This Court should therefore dismiss the First Amended Complaint pursuant to Civ. R. 12(B)(1) and (6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 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:

SEAN ALTO for Meghan Volk

CHARLES COOPER for Meghan Volk

RICHARD N COGLIANESE for Meghan Volk, State Ex Rel City Of Dayton, City Of Dayton, State Ex Rel Columbus City Attorney, State Ex Rel City Of Columbus, City Of Columbus

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

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