IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

City of Columbus *et al.*,	:	
	:	
Plaintiff-Relators,	:	
	:	**Case No. 20CV007256**
v.	:	
	:	**Judge Holbrook**
Bureau of Criminal	:	
Identification & Investigation *et al.*,	:	
	:	
Defendant-Respondents.	:	

OPPOSITION TO DEFENDANT-RESPONDENTS'
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

For years, Defendant-Respondents Bureau of Criminal Identification and Investigation and Superintendent Joseph Morbitzer (together, "BCI&I") have publicly proclaimed that the extensively documented and alarmingly dangerous gaps in Ohio's background check system – a system BCI&I is indisputably tasked by statute with creating and maintaining – are the fault of other agencies. In its Motion to Dismiss (the "Motion" or "MTD"), BCI&I continues to pass the buck and ignore its obligations. This action is brought because the gaps in the background check system actually stem, in significant part, from BCI&I's clear misreading and misapplication of R.C. 109.57. BCI&I's failures to recognize and discharge its own clear statutory obligations require correction by the Court in order to redress ongoing and future injuries suffered by Plaintiff-Relators ("Plaintiffs"), and to ensure the safety of all Ohioans.

This case presents two central questions – one legal, one factual, and neither "political." First, as a matter of law, does BCI&I have an *affirmative obligation*, as clearly set forth by the Ohio General Assembly in subsection (A)(1) of R.C. 109.57, that it "shall procure from wherever procurable" information regarding persons convicted of felonies and other serious crimes in the State of Ohio; or, as BCI&I contends, is its obligation to ensure that available criminal disposition information gets into Ohio's background check system limited to the separate mandate in subsection (B) of R.C. 109.57 that BCI&I "furnish forms" to various state agencies to submit that information? And second, as a question of fact, whatever its duties, is BCI&I discharging them?

For all its bluster, BCI&I's Motion to Dismiss boils down to its fallacious contention that the ministerial duties described in subsection (B) of R.C. 109.57 to furnish forms constitute the entirety of its obligations set forth in subsection (A)(1). This is wrong as a matter of basic statutory construction, not to mention logic and common sense, and is contrary to the clear intent of the

General Assembly. As for the factual question, BCI&I's attempts to deflect blame onto other agencies or assert that it has made "significant strides" in improving the system are unpersuasive in the face of well-pleaded allegations in the First Amended Complaint ("FAC") pointing to specific and unremedied derelictions of clear legal duties by BCI&I itself.

This case does not seek relief for the failures of other agencies to submit other categories of information into the Computerized Criminal History ("CCH") database – such as warrants, mental health adjudications, civil protection orders, and other non-criminal information. *See, e.g.*, MTD at 5-7, 17-19. This case seeks relief for the failures of BCI&I to procure information related to persons with *criminal dispositions*. Once BCI&I's attempts at deflection are put to the side, its standing arguments collapse. The failure to procure criminal dispositions – and information related to persons convicted of crimes – is directly traceable to BCI&I, injurious to Plaintiffs, and redressable by this Court. As explained herein, Plaintiffs Columbus and Dayton ("Plaintiff Cities") have two independent bases for standing: (1) injuries they suffer currently related to their governmental responsibilities and roles as employers of persons in sensitive positions, and (2) injuries related to the significant risk of future gun violence. For her part, Plaintiff Meghan Volk, a mother of two children in public school, has standing based on the fear and distress she suffers by sending her children into classrooms that are potentially less safe because of BCI&I's failures.

BCI&I's arguments that Plaintiffs have failed to state a claim for declaratory relief or mandamus are no more persuasive. There is a real and urgent controversy between the parties as to the nature of BC&I's obligations and whether it is discharging those obligations. Plaintiffs are directly, vitally, and legally interested in and impacted by BCI&I's failures. The relief Plaintiffs seek would go a long way to redressing Plaintiffs' injuries. And these interests and injuries are not abstract or speculative; instead, they relate directly to the Cities' obligations not to hire into

sensitive positions individuals with dangerous criminal histories, and to keep their officers and residents safe and avoid the fiscal harms that flow from guns ending up in the hands of individuals with dangerous histories. Plaintiffs do not ask this Court to order BCI&I to do the impossible, but seek only and exactly what the General Assembly required when it enacted R.C. 109.57.

In the end, if adopted, BCI&I's arguments would mean that it can simply ignore its statutory obligations altogether, it can make no effort to procure available criminal disposition information, and no person or entity would be able to come to court and challenge that misfeasance. The absurdity of the argument speaks for itself. The Motion to Dismiss should be denied.

II. BACKGROUND

A. BCI&I's Role in Criminal Background Checks

This case concerns BCI&I's maintenance of the CCH, Ohio's centralized criminal history repository. FAC ¶¶ 67-68. As alleged in the FAC, the CCH is designed to hold criminal history records, including fingerprints and criminal disposition information. FAC ¶¶ 67. Although other Ohio state agencies maintain databases that may house pieces of an individual's criminal record,[1] the CCH is the centralized repository where the disparate pieces – including, critically, disposition information – are pulled together into a complete file. *See* FAC ¶¶ 67, 89; *see also* MTD Ex. B (the "2018 Report") at 6, 14-15. Additionally, pursuant to both Ohio law and the National Crime Prevention and Privacy Compact, the BCI&I superintendent (the "Superintendent") is responsible for sharing Ohio criminal history information with the FBI's background check system. FAC ¶¶ 49, 69, 72-77. Thus, BCI&I's CCH is critical to both state and federal background checks that look for disqualifying criminal convictions.

[1] For example, the Law Enforcement Automated Data System ("LEADS") database contains warrant and protection order information. And the Supreme Court of Ohio's Ohio Court Network ("OCN") contains court-related data. Much of the OCN data is ultimately fed into the CCH. *See* MTD Ex. B at 6-7. These databases are not at issue.

1. Pre-Employment Criminal Background Checks

As alleged in the FAC, Ohio law requires that many prospective employees and volunteers who work in sensitive positions undergo background checks to ensure that they do not have dangerous or disqualifying histories. FAC ¶ 64. For instance, Ohio law requires that police officers undergo criminal background checks for certain disqualifying felonies, against both the BCI&I and FBI background check systems. FAC ¶ 64; R.C. 109.77(E)(2). Teachers, preschool employees, and foster care providers are also subject to criminal background checks. FAC ¶ 64.

Plaintiff Cities Columbus and Dayton, in their capacity as employers, regularly request background checks against BCI&I's CCH repository as required by state and/or local law. For example, Columbus and Dayton request state-mandated criminal history background checks in the course of hiring police officers. FAC ¶ 64. Dayton requests background checks for all positions pursuant to Dayton Code § 39.02, including all police department employees, all fire department employees, and all employees and volunteers who work in proximity to children, along with transmitting background check requests to BCI&I on behalf of other employers. FAC ¶ 64. Columbus, for its part, requests BCI&I background checks prior to hiring almost all of its employees. *Id.* The Cities pay a $22 fee to BCI&I for each background check they request. FAC ¶ 104. Both Cities also rely on BCI&I background checks to keep police officers safe during street encounters by providing officers with individuals' criminal history information. FAC ¶¶ 65-66.

Plaintiff Meghan Volk, an Ohio resident with two children in public schools, relies on the BCI&I background check system to protect her children's safety by providing a critical check on whether school employees have disqualifying or dangerous criminal histories. FAC ¶¶ 27-29.

2. Firearm Transfer Criminal Background Checks

As the FAC explains, federal law requires that, prior to selling or otherwise transferring a

firearm to an individual, a federally licensed firearms dealer ("FFL") contact the National Instant Criminal Background Check System ("NICS System") to request a background check. FAC ¶¶ 46-48. The NICS System is a collection of databases administered by the FBI. FAC ¶¶ 76-77; 2018 Report at 4. The FBI depends on state entities to incorporate state criminal history information into the NICS system. FAC ¶¶ 49, 72-77. As alleged in the FAC, the Superintendent is responsible for Ohio's contribution to the FBI's NICS system, and BCI&I's CCH repository is a critical conduit for reporting criminal history information, including convictions, to NICS. FAC ¶¶ 72-77, 89. Put another way, an individual's Ohio state law criminal conviction is not searchable via the FBI's NICS system unless it is first entered into Ohio's CCH database.

The availability of conviction information via the NICS system is paramount because federal law prohibits the transfer of firearms to individuals with convictions for felonies or certain misdemeanors, such as domestic violence misdemeanors. FAC ¶ 50.[2] NICS system gaps, including those attributable to gaps in the underlying state criminal history repositories, can result in prohibited purchasers obtaining firearms. Indeed, data show that individuals with disqualifying convictions regularly attempt to purchase firearms. FAC ¶¶ 54-55. In Ohio, just in 2018, 4,126 people failed NICS background checks, with the most common reason being disqualifying criminal convictions. FAC ¶ 56. Additionally, Ohio law requires applicants for concealed handgun permits to undergo a background check; obtaining such a permit allows residents to purchase firearms without any further background checks. FAC ¶¶ 59-63.

[2] Federal law also identifies other categories of prohibited persons that are not at issue here, including persons who have been committed to mental health institutions. FAC ¶ 50.

B. BCI&I's Statutory Duties

As described above, background checks for disqualifying Ohio criminal convictions rely on BCI&I's CCH repository. But the CCH repository is only as complete and accurate as the records that are deposited into it. As such, the Superintendent is charged by state statute with a slate of duties concerning the collection and filing of criminal history information in the CCH.

Most critically, the very first subsection – subsection (A)(1) – of R.C. 109.57 charges the Superintendent with the primary duty to "procure from wherever procurable" information regarding "all persons" who have been convicted within Ohio of committing felonies or certain misdemeanors (collectively, "Qualifying Crimes"):

> 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. . . .

(emphasis added). That duty includes procurement of obtainable conviction and other criminal disposition information. FAC ¶ 80.[3] The Superintendent is also responsible for cooperating with law enforcement to establish a "complete system of criminal identification" and to file for record the fingerprints of persons confined to correctional facilities. R.C. 109.57(A)(3).

Additionally, R.C. 109.57(A)(5) designates the Superintendent as the responsible Ohio officer for purposes of the National Crime Prevention and Privacy Compact, which in turn governs the incorporation of state criminal history records into the FBI's NICS system. FAC ¶¶ 49, 69, 72-77. Federal regulation provides that contributing state criminal justice agencies, such as

[3] To "procure" something is to "obtain" it "by particular care and effort." *Procure*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/procure. "Procurable" information is thus that which is obtainable.

BCI&I, shall "'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.'" FAC ¶ 76, quoting 28 C.F.R. § 20.37. In this way, the Superintendent's compact officer obligations reinforce BCI&I's obligation to procure criminal history information.

As the FAC also alleges, along with BCI&I, Ohio state law also imposes obligations on local Clerks of Court concerning the reporting of criminal history records. Specifically, pursuant to subsection (A)(2) of R.C. 109.57, Clerks must "'send to the superintendent of the bureau a weekly report containing a summary of each case involving [a Qualifying Crime],'" including disposition information. FAC ¶ 78, quoting R.C. 109.57(A)(2). State law directs the Clerks to report this information to BCI&I on standard forms that BCI&I is required to provide. FAC ¶ 81; R.C. 109.57(A)(2); R.C. 109.57(B). But, neither the Clerks' reporting obligations nor BCI&I's obligation to provide reporting forms limits or displaces BCI&I's primary duty – set forth in subsection (A)(1) of R.C. 109.57 – to "procure from wherever procurable" the criminal history records of "all persons" convicted of Qualifying Crimes. FAC ¶¶ 79, 81.

C. BCI&I's Failures to Procure Available Criminal History Information

Despite its clear statutory obligations, the FAC alleges that BCI&I has for years both been aware of and failed to address substantial and dangerous gaps in the CCH. BCI&I refuses to recognize – much less discharge – its affirmative duty to "procure" available information pertinent to Qualifying Crimes. FAC ¶¶ 82-94. As recently as October 2019, Ohio's Auditor sent a letter to the Governor, Ohio Supreme Court, and the Ohio Legislature declaring that Ohio's background check system is "broken and needs immediate attention." FAC ¶ 92. The Auditor found that the background check system "is a systemic failure. It isn't a local, isolated failure." FAC ¶ 11.

The FAC contains ten pages of allegations as to deficiencies and gaps evidencing BCI&I's

years-long failures to "procure" all "procurable" or obtainable criminal history information. FAC ¶¶ 82-98. For example, the FAC alleges that the design of the CCH frustrates the ability of Clerks of Court to successfully report certain categories of criminal conviction information. Specifically, the FAC alleges that Incident Tracking Numbers ("ITNs"), which are generated when an arrested person is fingerprinted, enable the CCH to match up the different pieces of a criminal record. FAC ¶ 89. If no ITN is assigned at the outset of a prosecution, such as in cases where the defendant appears in response to a summons, then the CCH system will not accept later conviction information. FAC ¶ 89. In other words, in such circumstances there is available and procurable disposition information that BCI&I unnecessarily rejects due to the lack of an ITN. The FAC further alleges the problem could be solved if BCI&I "'use[d] multiple identifiers instead of just ITN,'" such as name, date of birth, or Social Security number. FAC ¶ 89.

The FAC further alleges that BCI&I has failed to act to "procure" available criminal history information from Clerks who possess such information but are not reporting it as required by law, and has even affirmatively sanctioned deficient reporting practices. More specifically, the FAC alleges that a 2018 survey of Clerks of Court revealed that only 60 percent of Clerks were reporting to BCI&I disposition information for all Qualifying Crimes, and the remaining 40 percent report only some or, in a few instances, no disposition information. FAC ¶ 88. The FAC further alleges that a 2019 audit by the Ohio Auditor found that many Clerks of Court sent felony disposition information to BCI&I on a monthly basis, rather than the statutorily mandated weekly basis, based on incorrect advice by BCI&I that monthly reports sufficed. FAC ¶ 92. And the FAC alleges that the Clerks of Court that regularly fail to send timely criminal history reports to BCI&I do so with apparent impunity, often due to misinformation provided by BCI&I itself. FAC ¶¶ 9, 93.

More broadly, the FAC alleges a years'-long constellation of technical problems and

procedural failures resulting in BCI&I's failure to (a) complete background checks for concealed carry permit applications, (b) promptly notify public employers, including schools, of recent employee convictions, and (c) promptly provide fingerprint and conviction information to the FBI for its databases, which includes the NICS databases. FAC ¶ 83. For example, over the course of just one year (2011), the FAC alleges that over 12,000 felony convictions did not get transmitted into the CCH database (and therefore were not reported into the FBI NICS system), out of a total 45,733 felony convictions in Ohio. In other words, 27 percent of disqualifying felony convictions never made their way into the CCH or NICS databases in a single year. FAC ¶ 84. The FAC further alleges that BCI&I has failed to take steps to fix the full range of technological and other issues obstructing the collection of disposition information, or to identify and fill in the records missing from the CCH, even though they are available and "procurable." FAC ¶ 94.[4]

III. LEGAL STANDARD

A motion to dismiss filed pursuant to Civ. R. 12(B)(6), including a motion to dismiss for lack of standing, "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey County Bd. of Comm'rs*, 65 Ohio St.3d 545, 548 (1992); *LULAC v. Kasich*, 2012-Ohio-947, ¶ 22 (10th Dist.). The court takes the material allegations of the complaint as true and draws all reasonable inferences in the nonmovant's favor. *Id*; *see also Moore v. City of Middleton*, 133 Ohio St.3d 55, 56 (2012). The court may consider "[d]ocuments attached or incorporated into the complaint," but "'may not consider or rely on evidence outside the complaint.'" *Manifold &*

[4] Additionally, the FAC alleges repeated breakdowns within BCI&I's computerized system, resulting in fingerprints slipping through the cracks and thousands of criminals being incorrectly identified by BCI&I as having clean records. FAC ¶¶ 83, 86. BCI&I was aware of its technical issues as early as 2012, and internal BCI&I emails have described the issues as "ugly" and "widespread." FAC ¶¶ 83, 86. Knowledge of BCI&I's chronic technical struggles has reached as high as then-Attorney General Mike DeWine, who told the Columbus Dispatch in 2015: "'Going back years and years, nothing had been done, really, to bring [BCI&I's background check system technology] up to date.'" FAC ¶ 83. In 2014, BCI&I initiated and then cancelled a project to address some of the technical issues. FAC ¶ 83. In 2016, BCI&I's then-Superintendent publicly promised to upgrade BCI&I's system, but the FAC alleges that the upgrade has not occurred. FAC ¶ 87.

Phalor, Inc. v. Konecranes, Inc., 2020-Ohio-7009, ¶ 10 (10th Dist.) (citations omitted). Consistent with Ohio's liberal pleading standard, "a pleader is ordinarily not required to allege in the complaint every fact he or she intends to prove; such facts may not be available until after discovery." *Hanson*, 65 Ohio St.3d at 549. Dismissal is appropriate only where it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* at 548 (internal quotation marks and citation omitted).

IV. LEGAL ARGUMENT

BCI&I argues that Plaintiffs (a) do not have standing to bring their claims, and (b) have not stated a claim for either declaratory judgment or mandamus. Because both arguments are largely informed by BCI&I's misinterpretation of the governing statute, R.C. 109.57(A), we address that issue first, before explaining the flaws in BCI&I's standing and merits arguments.

A. BCI&I Misinterprets R.C. 109.57

In construing a statute, a court's "'paramount concern is the legislative intent in enacting the statute.'" *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 119, 122 (2009) (citation omitted). "'To discern this intent, we first consider the statutory language, reading words and phrases in context and construing them in accordance with rules of grammar and common usage.'" *Id.* (citation omitted). "In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines v. Public Utils. Comm'n*, 20 Ohio St.2d 125, 127 (1969). "Statutory language 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.'" *D.A.B.E., Inc. v. Toledo-Lucas Bd. of Health*, 96 Ohio St.3d 250, 256 (2002) (citation omitted).

Here, Plaintiffs allege that BCI&I has read out of the statute its obligations under subsection (A)(1). The first and primary directive set forth in R.C. 109.57(A)(1) is that BCI&I "shall procure from wherever procurable" certain criminal history information for "all persons" convicted of a Qualifying Crime. BCI&I cannot dispute that the statute imposes this obligation, or that "procure" means "obtain" (*see supra* note 3) and expressly imposes an obligation on BCI&I to take affirmative steps to obtain (and not obstruct others in submitting) available and obtainable disposition-related information. Instead, BCI&I contends that the exclusive "mechanism for BCI&I to procure this information [is] 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)." MTD at 4-5. In other words, BCI&I reads its obligation to furnish forms in subsection (B) as constituting the whole of its obligations under subsection (A)(1).

BCI's self-serving and buck-passing interpretation is plainly wrong. To interpret BCI&I's clear and express duty set out in subsection (A)(1) as nothing more than a duty to promulgate forms pursuant to subsection (B) violates the basic canons of statutory construction set out above: it ignores and erases the unambiguous command of subsection (A)(1), fails to give meaning to the mandate to "procure from wherever procurable," and renders subsection (A)(1) superfluous and meaningless. BCI&I's interpretation must be rejected.

B. <u>Plaintiffs Have Standing to Bring Their Claims</u>

We turn now to BCI& I's argument that Plaintiffs have failed to adequately allege standing, which requires "(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." *Moore*, 133 Ohio St.3d at 60. Plaintiffs may show "'actual present harm'" or, because "a declaratory-judgment action generally

contemplates that the action is brought before an injury-in-fact has occurred," "'a significant possibility of future harm [justifies] pre-enforcement relief.'" *Ohioans for Concealed Carry, Inc. v. City of Columbus ("OFCC")*, 2020-Ohio-6724, ¶ 32 (citation omitted). The Ohio Supreme Court has "ma[d]e clear that we are generous in considering whether a party has standing." *Moore*, 133 Ohio St.3d at 68.

1. Plaintiff Cities Suffer Cognizable Injuries Due to BCI&I's Failures to Fulfill its Statutory Obligations

In the FAC, Plaintiff Cities establish two sets of injuries sufficient to confer standing: (a) injuries related to their governmental responsibilities, including as employers of persons in sensitive positions, and (b) injuries related to the significant risk of future gun violence. We address each in turn, and then address BCI&I's meritless arguments to the contrary.

a. Plaintiff Cities Are Injured By BCI&I in Their Governmental and Employer Capacities

As described above, the FAC alleges that Plaintiff Cities are responsible for hiring employees in a number of sensitive positions that – by law – require criminal background checks. Dayton runs background checks on all employees, pursuant to Dayton Code § 39.02, including police officers, firefighters, and city employees who work with children. FAC ¶¶ 20, 64. Columbus screens nearly all employees through a pre-employment background check. FAC ¶¶ 20, 64. Columbus and Dayton also pay significant fees to BCI&I for background checks. FAC ¶ 104, citing Ohio Adm. Code 109:5-1-01(4). Upon request, BCI&I is statutorily mandated to provide background check information regarding individuals – including criminal history information. *See, e.g.,* R.C. 109.57(F)(2)(a). The FAC further alleges that the Cities rely on the accuracy and comprehensiveness of BCI&I's criminal history repository for such checks – and on BCI&I to discharge its obligations under R.C. 109.57(A). FAC ¶¶ 20, 64, 106-07. But due to gaps

in the system caused in significant part by BCI&I, the FAC alleges that the Cities are deprived of available information necessary to make those sensitive employment decisions. FAC ¶ 106.

Because the FAC clearly alleges that those systemic gaps directly interfere with the Cities' governmental responsibilities – including the responsibility to run background checks to avoid hiring disqualified employees with dangerous criminal histories, and the responsibility to keep its communities safe – Plaintiffs Cities are presently injured by the gaps in the background check system. *See United States v. Fed. Mar. Comm'n*, 694 F.2d 793, 801 (D.C. Cir. 1982) ("The purpose of the injury in fact requirement is achieved when agency action interferes directly and specifically with the governmental responsibilities of the public agency.")[5]

Stated differently, Plaintiff Cities allege a cognizable informational injury: BCI&I is depriving Columbus and Dayton of criminal history information that is obtainable, that BCI&I is statutorily required to obtain and provide, and that would otherwise be used in the decision-making process of the Cities. The United States Supreme Court has recognized such informational injury as sufficient to establish standing. *See FEC v. Akins,* 524 U.S. 11, 21 (1998) (holding that the "inability to obtain information. . . that, on [plaintiffs'] view of the law, the statute requires," and that "would help them [] to evaluate candidates for public office," satisfies the injury in fact requirement); *see also Robertson v. Allied Sols.*, 902 F.3d 690, 697 (7th Cir. 2018) (applying *Akins*: "An informational injury can be concrete when the plaintiff is entitled to receive and review substantive information."). Plaintiff Cities are therefore presently injured by being forced to hire potentially unqualified and dangerous employees (and by its police officers making split-second decisions) without information that by statute should be made available to them, a concrete and

[5] While Ohio courts are not bound by federal standing doctrine, "in deciding issues of standing in the courts of Ohio, the Ohio Supreme Court relies on federal court decisions." *Cincinnati City Sch. Dist. v. State Bd. of Educ.*, 113 Ohio App.3d 305, 313 (10th Dist. 1996).

direct injury-in-fact.

BCI&I argues that some further injury is necessary for standing, such as a specific disqualified employee wrongly hired because of a gap in the background check system. MTD at 13-14. But Ohio courts have recognized that failures to follow statutory mandates can cause presently existing harms, even without the "ultimate harm" of injury coming to pass. For example, in *OAPSE/AFSCME Local 4 v. Berdine,* 174 Ohio App.3d 46 (8th Dist. 2007), a union sought a writ of mandamus against a school district that employed the same person as both treasurer and "business manager," even though the governing statute provided that the treasurer may not be "otherwise regularly employed by the board." *Id.* at 48. There was no allegation that this person had actually made any decisions injurious to the unions; nonetheless, the Court found that the union had standing because "its members are suffering an immediate injury in that the same individual who is responsible for the care and custody of the. . . moneys is also serving in the position of business manager [] in direct contravention of statutorily mandated provisions." *Id.* at 53. Here, the Cities are hiring employees (and its police officers are making investigative decisions) without as complete information about criminal histories as they should have, a concrete injury regardless of whether a separate act of harm follows.

Because BCI&I is presently interfering with Plaintiff Cities' ability to fulfill their governmental responsibilities and depriving them of obtainable and necessary information central to its hiring and law enforcement responsibilities, the Court need not even consider BCI&I's arguments related to "speculative injury" and "risks of future harm." *See* MTD at 13-16. However, to the extent the Court requires it, Plaintiff Cities easily meet those thresholds as well. As described in the FAC, harm flowing from the hiring of unqualified employees with dangerous criminal histories is not speculative; it has already occurred. *See* FAC ¶ 85. In one instance, as

the FAC alleges, an Ohio State University employee with a prior felony conviction that did not turn up in a background check shot and killed his colleague. FAC ¶ 85. In another, a home health care worker with an unknown prior felony raped the teenage sister of a disabled boy under his care. FAC ¶ 85. These are the types of injuries that have resulted and will result from the hiring of unqualified employees with dangerous criminal histories, and that present a significant risk of future harm. While BCI&I argues that Plaintiffs present no proof that the missing criminal history information in those particular cases was caused by BCI&I, *see* MTD at 14-15, that is a traceability argument, not an injury argument. What matters is that these are the types of non-speculative harms and injuries that have occurred and can be expected to occur again and therefore are sufficient to confer standing. Indeed, background checks are utilized in nearly every employment context in the United States to prevent dangerous and unqualified individuals from causing harm once hired; it requires burying one's head in the sand to call such harms merely speculative.

BCI&I also misses the mark in arguing that these injuries are not cognizable because they are "public harms" that allegedly are not "unique in any way [from] the interests of the public in general." MTD at 11-12. The "general public" does not hire employees, let alone police officers or firefighters. *See* FAC ¶ 64. Unlike the Cities, the general public is not exposed to liability for the actions of employees who injure another or otherwise violate the law. *See* FAC ¶ 103. Nor does the general public employ police officers who face increased danger because they are operating on less than full criminal history information when facing life or death decisions during their criminal investigative work. FAC ¶ 103. BCI&I's citation to *State ex rel. Walgate v. Kasich,* 147 Ohio St.3d 1 (2016), does not help its argument. There, a variety of private plaintiffs and an organization complained that new gambling laws allowing for increased gambling would adversely affect them due to the gambling addictions suffered by themselves or their relatives, and

due to their desire to avoid a diversion of funds from schools. *Id.* at 8-14. While the *Walgate* court held that those harms "do not constitute concrete injuries to appellants that are different in manner or degree from those caused to the general public," *id.*, here, in stark contrast and as just described, the Cities' harms are distinct from those of the public in general.

b. Plaintiff Cities Face the Significant Possibility of Future Injury Due to Gun Violence Caused By BCI&I's Lapses

The FAC also alleges a second, independently sufficient injury-in-fact: the missing information in the CCH "substantially and significantly increase[s] the likelihood that. . . prohibited purchasers are able to pass background checks and obtain firearms, putting Plaintiff Cities at heightened risk of gun crime and the costs associated therewith (including investigative and prosecution costs and other economic impacts from gun violence)." FAC at ¶ 103.

BCI&I argues that gun violence from a prohibited person is a "speculative injury" and that there is "[n]o significant possibility of future harm" of such violence. MTD at 13-16. This assertion ignores the reality of the world we live in. As former Governor Kasich stated in his executive order re-establishing the task force to review the enormous gaps in Ohio's background check system, failures of public officials "to properly and timely upload data required by" the background check databases "can lead to a prohibited individual acquiring a firearm with tragic results," as occurred with the mass shootings at Virginia Tech on April 16, 2007 and in Sutherland Springs, Texas on November 5, 2017. FAC ¶ 6. More broadly, as noted above, the FAC alleges that in Ohio, in 2018 alone, the background check system blocked 4,126 persons from purchasing firearms because they were prohibited by law from possessing a gun, with criminal convictions being the number one reason for the denials. FAC ¶ 56. In other words, each year, thousands of persons with dangerous criminal histories attempt to purchase guns in Ohio, and the background check system stops them. Undoubtedly, due to gaps in the system caused by BCI&I's failures,

some such persons are successful. That presents a clear and significant risk of future harm.

BCI&I essentially asks the Court to wait until the unthinkable happens. But as BCI&I concedes, the Ohio Supreme Court recently confirmed that a "significant possibility of future harm" is a sufficient basis for a declaratory judgment action. MTD at 14, citing *OFCC*, 2020-Ohio-6724, ¶ 32. Here, the sheer number of prohibited purchasers attempting to buy guns in Ohio, along with the high levels of firearm violence in this state, makes the risks more than sufficient to satisfy the injury requirement for standing. FAC ¶¶ 36, 56. This is especially so where, as here, the threatened future harm from gun violence is so severe. *See, e.g., Brooklyn Ctr. of Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 415 (S.D.N.Y. 2012) ("[W]here the threatened injury is particularly severe, courts are more likely to find standing"); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) ("[T]he more drastic the injury. . . the lesser the increment in probability necessary to establish standing. . . . [T]he potential destruction of fire is so severe that relatively modest increments in risk should qualify for standing."). *See generally Ohio Democratic Party v. LaRose*, Franklin C.P. No. 20CV-5634, 2020 Ohio Misc. LEXIS 131, at *35 (Sep. 15, 2020) ("legal standing is not defeated merely because the potential for future harm cannot be shown with precision. . . . Courts 'have excused definitive proof where the injury was impossible to prove with absolute certainty or where the injury could not be "specifically identified in advance"'") (citations omitted), *aff'd in part and rev'd in part on other grounds*, 2020-Ohio-4778 (10th Dist.).

Finally, BCI&I makes its "public harm" argument with respect to firearm violence as well. However, Plaintiff Cities have alleged a special interest above and beyond that of the general public in preventing gun violence. Unlike the general public, such violence "put[s] Plaintiff Cities at a heightened risk of gun crime and the costs associated therewith (including investigative and

prosecution costs and other economic impacts from gun violence)." FAC ¶ 103. Moreover, courts have recognized that governmental entities have a special interest in keeping their residents safe. *See Stark-Tuscarawas-Wayne Joint Solid Waste Mgmt. Dist. v. Republic Waste Servs. of Ohio II, LLC,* 2009-Ohio-2143, ¶ 51 (10th Dist.) (waste management district's "interest is distinguishable from that of an ordinary citizen with a general interest in a safe environment because it is statutorily charged with ensuring the safety of the residents and environment within the District").

In sum, Plaintiff Cities have alleged a second, independently sufficient injury of significantly increased risk of gun violence and unique injuries flowing to the Cities therefrom.

2. The Plaintiff Cities' Injuries Are Traceable to BCI&I and Redressable By This Court

"Plaintiffs suing public officials can satisfy the causation and redressability requirements of standing by demonstrating 'a meaningful nexus' between the defendant and the asserted injury." *Durham v. Martin*, 905 F.3d 432, 434 (6th Cir. 2018). Because BCI&I makes traceability arguments in its "redressability" section, and vice versa, we will address them together. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) ("Causation and redressability typically 'overlap as two sides of a causation coin.' After all, if a government action causes an injury, enjoining the action usually will redress that injury") (citation omitted).

As alleged in the FAC and set forth above, the gaps and deficiencies in Ohio's background check system are traceable in significant part to BCI&I's failures. *See* FAC ¶¶ 100-103. In short, BCI&I is statutorily mandated to "procure from wherever procurable" Qualifying Crime information for "all persons" convicted of such crimes. FAC ¶ 69, citing R.C. 109.57. The FAC alleges that BCI&I is failing to do exactly that – including by failing to even acknowledge the affirmative obligation 109.57(A)(1) imposes on it (which obligation is reinforced by 109.57(A)(5)), and by maintaining a system and approach that directly results in available and

obtainable criminal conviction disposition information not ending up in the CCH database. FAC ¶¶ 82-99. That is sufficient to withstand a motion to dismiss.

But the FAC goes much further, as explained above, detailing how BCI&I: (1) *rejects* submitted disposition information where there is no corresponding arrest record and ITN (FAC ¶ 89); (2) *ignores* statutory timetables, provides misinformation to Clerks allowing for delayed reporting, and fails to follow up with Clerks on reporting deficiencies (FAC ¶ 92); and (3) has not taken reasonable steps to fix long-standing technological issues interfering with the submission of records or to identify and procure currently missing criminal history information (FAC ¶ 94). The FAC further alleges that BCI&I has the power to fix these problems and that doing so would remedy a significant part of the deficiencies and omissions alleged:

> Had BCI&I taken, or were BCI&I to take, reasonable steps to "procure" such information – including but not limited to taking steps to encourage, facilitate, and ensure complete and timely submission by Clerks of Court, taking steps to upgrade its database technology to alleviate the technical failures that have plagued its system since at least 2012, and/or taking steps to allow acceptance of criminal history information even in the absence of an ITN – then a significant number of missing convictions would have been and would be incorporated into the BCI&I database.

FAC ¶ 102. In short, the FAC makes plain that the Cities' injuries resulting from gaps in the background check system are directly traceable to BCI&I and redressable by the relief requested.

BCI&I's counterarguments with respect to traceability and redressability are all legally erroneous and/or red herrings. To begin, BCI&I misconstrues the FAC by attempting to pass the buck to other agencies that have independent reporting obligations. *See* MTD at 17 (arguing that BCI&I "is just one stakeholder among hundreds of agencies that possess information that must be reported into the CCH repository"). Putting aside the fact that BCI&I actually maintains the entire CCH database, this case is not about *all* information in the CCH repository or about every agency

that has reporting obligations. Rather, this case is about *the failure of BCI&I* to discharge *its express obligation* to procure a specific category of available information related to persons *convicted of crimes*. While the FAC alleges by way of background that there are *also* substantial and dangerous reporting deficiencies with "warrants and civil/criminal protection orders" (MTD at 18[6]) and with "state hospitals and other mental health facilities [failing] to report mental health adjudications" (*id.*), those additional deficiencies do not undermine Plaintiffs' requested relief or the specific injuries complained of here: the criminal history repository gaps relating specifically to available and obtainable criminal conviction information that is traceable to BCI&I's failures to discharge its obligations.

Nor does the fact that Clerks of Court and other agencies *also* have obligations to report convictions to BCI&I – and may *also* be falling short vis-à-vis reporting convictions – mean that Plaintiffs have not adequately alleged (or cannot prove) injuries traceable to and redressable by rectifying *BCI&I's failures* in those regards. *See Parsons v. United States*, 801 F.3d 701, 714 (6th Cir. 2015) ("the fact that a defendant was one of multiple contributors to a plaintiff's injuries does not defeat causation" for standing purposes). And the fact that BCI&I may not have express enforcement authority over Clerks of Court does not mean it cannot be held responsible for its own failures to discharge its own express obligations to procure available and obtainable information.[7]

BCI&I's additional argument that Plaintiffs do not identify "one scenario where any alleged harm would be fairly traceable to BCI&I" (MTD at 20) ignores the FAC's specific

[6] Notably, as BCI&I acknowledges, this information isn't even entered into the CCH; this information goes into an entirely separate database, LEADS, not at issue here. *Id.*

[7] As noted above, the Ohio General Assembly assigned to BCI&I the primary and central role in maintaining the CCH database and procuring critical information relating to criminal dispositions, which is why Plaintiffs properly sued BCI&I in the first instance. Plaintiffs of course reserve the right to sue other officials and agencies for failing to discharge their obligations to provide information to BCI&I. BCI&I too could sue other agencies that are failing to carry out their reporting responsibilities; indeed, much of the information regarding which Clerks in Ohio's 88 counties are failing to fulfill their obligations is within BCI&I's control.

allegations described above that do tie the CCH gaps in conviction information to specific actions, systems, and failures of and by BCI&I. *See supra* at 8-9. To the extent BCI&I is arguing that, for purposes of surviving a motion to dismiss, Plaintiff Cities must point to a specific missing conviction in BCI&I's database or a particular instance of an unqualified employee being hired due to BCI&I's failures, it misses the mark. That is information would be in BCI&I's exclusive possession; and even BCI&I may *not have* that information precisely because they are failing to procure it. Either way, that is the purpose of discovery. It would turn the litigation process on its head if BCI&I could have this case dismissed because Plaintiff Cities cannot know in advance specific names and other identifying information relating to convictions that BCI&I has failed to procure. Plaintiffs have alleged *systemic* failures of BCI&I resulting in large numbers of missing convictions; that is more than sufficient to survive a motion to dismiss.

BCI&I also misses the mark in arguing that none of the reports cited in the FAC expressly identify failures by BCI&I as the "reasons for any deficiencies in Ohio's background check system." MTD at 19-20. As the FAC alleges, these reports do in fact contain information showing, for example, that BCI&I obstructs the ability of Clerks to submit conviction information where there is no ITN or fingerprints/arrest record, and that BCI&I has provided inaccurate information about and sat idly by with respect to Clerks' deficient reporting. FAC ¶¶ 89, 92, citing 2018 Report at 14-15 and MTD Ex. D ("2019 Ohio Auditor's Letter") at 2. BCI&I's proclamations of innocence – or claims that it has made progress in addressing other deficiencies in the background check system (MTD at 15-16) – are irrelevant in the face of well-pleaded allegations of failures to discharge its statutory obligations with respect to convictions, and in any event raise factual issues not resolvable on this motion to dismiss.

Finally, the FAC more than adequately alleges that the requested relief would redress Plaintiffs' injuries. As described above, the basic flaw in BCI&I's treatment of its obligations is that it interprets its statutory duty under 109.57(A)(1) to procure information as wholly fulfilled by its separate duty under 109.57(B) to furnish forms to various agencies. Redress will flow from correcting that misinterpretation: procuring available/obtainable information – as BCI&I is mandated to do by law – will reduce or eliminate the gaps in the CCH causing Plaintiffs' injuries. The FAC alleges exactly this in paragraph 102, as quoted above. Plaintiffs also request specific declarations from the Court, FAC ¶ 113(1)-(5), and have both general and specific prayers for relief. FAC at 33-34. These include, for example, requests that the Court order BCI&I to take such steps as are necessary to accept disposition records from courts regardless of whether an arrest record or ITN number already exists. *Id.* Discovery will likely reveal more specific steps BCI&I can take to cure its deficiencies.

In the end, BCI&I's arguments that none of this requested relief will alleviate the large numbers of conviction records missing from the CCH database at best raise factual issues that must be resolved after discovery, especially since the requested relief need not resolve *all* of the gaps in the background check system. *See Parsons*, 801 F.3d at 717 ("An injury is redressable if a court order can provide substantial and meaningful relief. . . . [I]t need not be likely that the harm will be entirely redressed, as partial redress can also satisfy the standing requirement").[8]

[8] BCI&I also ignores the fact that Ohio courts have "broad authority" to fashion a remedy to ensure enforcement of a declaratory judgment, *see Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St. 3d 157, 160 (1995), citing R.C. 2721.09, even where the feasibility of discharging a clear legal obligation is disputed and requires judicial fact-finding, *see Capital City Cmty. Urban Redevelopment Corp. v. City of Columbus*, 2016-Ohio-8266, ¶ 9 (issuing a declaratory judgment to enforce restrictive covenant requiring a theater to show children's movies "as long as was feasible," and holding fact-finding hearing before deciding it was no longer "feasible"). Here, the well-pleaded allegations and requests for relief are more than sufficient at this pre-discovery stage.

3. Plaintiff Meghan Volk Has Standing

Plaintiff Meghan Volk has also alleged an adequate basis for standing.[9] She is a resident and taxpayer of Ohio, and the mother of two young children who attend an Ohio public elementary school. FAC ¶ 26. The FAC alleges that BCI&I's failures have caused and will continue to cause her 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. . . and that accordingly her children are at heightened risk of harm." FAC ¶ 108. This is sufficient injury. *See Throndson v. Huntington Nat'l Bank*, S.D. Ohio No. 2:19-cv-1789, 2020 U.S. Dist. LEXIS 111060, at *19-20 (Jun. 24, 2020) (plaintiff's "severe annoyance" at robocalls sufficient injury for standing purposes); *Ben-Davies v. Bilbaum & Assocs., P.A.*, 695 F. App'x 674, 676 (4th Cir. 2017) (standing established because plaintiff suffered "emotional distress, anger, and frustration"). Plaintiff Volk's injuries are distinct from those of the general public because not every Ohioan sends their children on a daily basis to school and into the care and custody of others in an environment that is less safe because of incomplete pre-employment background checks. *See Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 2020-Ohio-4664, ¶ 23, citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). And for the reasons previously explained, these injuries are traceable to BCI&I's failures, and would be redressable were BCI&I ordered to fulfill its obligations.

[9] Assuming the Court determines that Plaintiff Cities have standing, that is sufficient to allow the case to go forward, and the Court need not determine if Ms. Volk also has standing. *See State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 391(2007); *see also Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 569 (2012) ("It is sufficient for purposes of jurisdiction that at least one plaintiff has standing for the claims of the remaining plaintiffs to be heard and the court to proceed to decide the case on the merits.").

C. Plaintiffs Have Stated a Claim For Declaratory Judgment

BCI&I separately argues that Plaintiffs have failed to state a claim for either declaratory relief or mandamus. These arguments are largely a re-hash of BCI&I's meritless arguments with respect to standing. Nevertheless, we address each in turn, beginning with declaratory judgment.

1. There is a Real Controversy Between Plaintiffs and BCI&I

BCI&I argues first that "[Plaintiffs] have no *legal* interest in whether BCI&I is doing what the law requires" and that "wanting to know if someone else is complying with the law. . . is not an actual legal controversy." MTD at 22-23. But Plaintiffs do have a legal interest in whether or not Ohio's background check system reflects all conviction information "procurable" by BCI&I, and there certainly is a real controversy here about whether BCI&I is faithfully discharging its express and affirmative statutory obligations under 109.57(A).

Plaintiff Cities are not mere bystanders idly musing about the state of the background check system in Ohio, and BCI&I's suggestion to that effect is nothing short of outrageous. The Cities rely on the integrity of the system to discharge their governmental duties and protect public safety in a number of ways, including guarding against the hiring of dangerously disqualified individuals with criminal convictions, *see* FAC ¶¶ 20-22, and, for police officers, "know[ing] quickly whether a person presents a danger to themselves or others based on their criminal history." FAC ¶ 66.[10] Indeed, the Cities' legal interests as employers are expressly enumerated by statute. The Cities employ police officers, who are required by state law to get pre-employment background checks. *See* FAC ¶ 64, citing R.C. 109.77(E)(2). The Cities are also required by state law to run background checks on certain other employees. *See, e.g.,* R.C. 718.131 (cities acting as "tax

[10] Columbus also relies on the background check system to issue licenses for rentals of residential properties, *see* FAC ¶ 21; and Dayton relies on the system to "assist the Montgomery County Sheriff" in conducting background checks for the purposes of Concealed Carry Permits, *see* FAC ¶¶ 59-63.

administrators" must request background checks of municipal employees with access to certain tax information). Plaintiff Volk similarly has a direct and concrete interest in the integrity of the background check system to ensure that employees in her children's school do not have dangerous criminal records. All of this establishes a more than sufficient "legal interest."

Nor can there be any serious question that there is an "actual legal controversy" between Plaintiffs and BCI&I. BCI&I contends it has no legal obligation under Ohio law to take affirmative steps to "procure" conviction information for disqualifying crimes, as set forth in R.C. 109.57(A)(1) (apart from promulgating forms, as set forth in R.C. 109.57(B)), and that it has not failed to discharge its obligation under 109.57(A)(1). Plaintiffs contend it does have such an affirmative legal obligation, and allege that BCI&I refuses to recognize and has failed to discharge that obligation. If that is not a "genuine dispute" properly addressed through a declaratory judgment action, then it is difficult to imagine what is.

2. The Requested Declaration Need Not Completely Resolve BCI&I's Failures

BCI&I further argues that the claim for a declaratory judgment should be dismissed because it will not "terminate the controversy." *See* MTD at 23. This is largely a repeat of its traceability/redressability arguments – namely, that because *other* entities may possess some missing information, or because there are other "systemic" issues, nothing this Court can do will resolve the problems. This argument fails in the face of Plaintiffs' well-pleaded allegations that their injuries are caused by *BCI&I's failures* to discharge *its express statutory obligation* to "procure" disposition information that is available and obtainable (and by BCI&I's refusal to even acknowledge that it has such obligation), as well as their further allegations that there are specific things *that BCI&I can do* that would close those gaps if this Court grants the requested relief by issuing a declaration confirming BCI&I's affirmative obligation under R.C. 109.57(A)(1) and its

continuing failure to carry out that obligation. *See* FAC ¶¶ 101-105. This is sufficient.

Even if the requested declaratory judgment would not remedy every problem and every gap in the background check system (or could not compel non-defendants to act differently), that is not a barrier to this Court granting relief – especially where Plaintiffs have alleged (*see, e.g.,* FAC ¶ 113(3)) that BCI&I has "obstructed the ability of" other actors to fulfill their reporting obligations. *See, e.g., State ex rel. Thernes v. United Local Sch. Bd. Dist. Of Educ.*, 2008-Ohio-6922, ¶ 24 (7th Dist.), citing R.C. 2721.02(A) (a "declaratory judgment . . . need not be a final and complete remedy to a controversy: a court may issue declaratory relief 'whether or not further relief is or could be claimed'").[11]

D. Plaintiffs Have Stated a Claim for Mandamus

To be entitled to relief in mandamus, relators must "establish a clear legal right to the requested relief, a clear legal duty on the part of the [respondent] to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 480 (2016). "[M]andamus is the appropriate remedy to compel a governmental entity to comply with statutory edict." *Berdine*, 174 Ohio App.3d at 52. "[I]f [a] public entity has misinterpreted a statute, a writ of mandamus may be an available remedy," *State ex rel. GMC v. Indus. Comm'n*, 117 Ohio St.3d 480, 482 (2008), particularly where the "statutes are designed to protect the public safety." *State ex rel. Dollison v. Reddy*, 55 Ohio St.2d 59, 61 (1978).

1. Plaintiffs Have a Cognizable Legal Interest

BCI&I argues first that Plaintiffs have no "legal right or interest that is affected by BCI&I's alleged failure to perform its statutory duties," and that they are therefore not "beneficially

[11] BCI&I's citation to *Molnar v. Ohio Liquor Control Com.*, 79 Ohio App.3d 318, 320 (10th Dist. 1992), is not to the contrary. *Molnar* simply recites the text of the declaratory judgment statute, which gives the court *discretion* to refuse to enter a declaratory judgment if it "would not terminate the uncertainty or controversy." R.C. 2721.07.

interested" under RC 2731.02. MTD at 24-25. That is wrong both factually and legally.

Factually, as described above, Plaintiff Cities are directly impacted by the gaps in the background check system, which they rely on to carry out their governmental functions, screen employees, and otherwise protect public safety. *See supra* at 12-15. Legally, as the principal case BCI&I cites makes clear, whether Plaintiffs have a sufficient "beneficial interest" to compel the issuance of a writ of mandamus turns on whether they are injured "in a manner different from that as to the public in general." *State ex rel. Skilton v. Miller*, 164 Ohio St. 163, 169 (1955). Here, again as explained above (*see supra* at 15-16), Plaintiff Cities clearly are injured in a very specific and direct way different from the general public: unlike the general public, Plaintiff Cities are required to both conduct and rely on background checks to discharge their governmental duties and to keep their residents and employees safe. And unlike the relator in *Miller*, who the Ohio Supreme Court described as having "no legitimate concern" about an ice cream store violating a Sunday closing law, *see* 164 Ohio St. at 169, Plaintiffs here are legitimately concerned about current gaps in a background check system on which they regularly rely to discharge their governmental functions and keep their residents and employees safe.

The same is true of Ms. Volk, who, unlike many other members of the general public, sends her kids to schools where they are under the supervision of employees whose background checks may not have screened out individuals with dangerous criminal histories because of BCI&I's dereliction of its clear, express duty under R.C. 109.57(A)(1).

2. Plaintiffs Seek to Compel a Specific Act

BCI&I's second argument against mandamus is that Plaintiffs "do not seek to compel the performance of any specific act" and request only an order "instructing BCI&I to follow the law." MTD at 25-26. That misdescribes what Plaintiffs seek – which is a writ "commanding the

performance of specific acts specially enjoined by law to be performed," *State ex rel. Stanley v. Cook*, 146 Ohio St. 348, 375-76 (1946), *i.e.*, a writ directing BCI&I to remedy its current default under a specific mandate in a particular sub-section of the Ohio Revised Code: "to procure from wherever procurable" the specified criminal history information set forth in R.C. 109.57(A)(1). Every mandamus action seeks a directive that the government discharge some specific legal obligation, and that of course is no basis for dismissing it. Where, as here, a government actor has simply read out of the statute its clear obligation, mandamus is a proper remedy. *See generally State ex rel. GMC*, 117 Ohio St.3d at 482 (mandamus may be an appropriate remedy "if the public entity has misinterpreted a statute").

3. BCI&I's Obligations are Non-Discretionary Or, Alternatively, BCI&I Has Abused its Discretion

BCI&I argues next that mandamus is inappropriate because, "[a]bsent an abuse of discretion, mandamus cannot compel a public official to act in a certain way on a discretionary matter." MTD at 27 (citation omitted). According to BCI&I, "[b]ecause no statute prescribes exactly how BCI&I is to go about procuring information for its criminal background system, it has the discretion to carry out its duty in a reasonable manner." MTD at 27 (citation omitted).

This argument fails, first, because Plaintiffs have alleged, in their Second Cause of Action, that the obligation under R.C. 109.57(A)(1) that BCI&I "shall procure from wherever procurable" criminal history information is *not* a discretionary duty. *See* FAC ¶¶ 114-15; *Dorrian v. Sciotao Conservancy*, 27 Ohio St.2d 102, 108 (1971) ("Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion."). To the extent the mandatory requirement to "procure from wherever procurable" has built in some discretion as to *how* to do that, the existence of the latter is no barrier to issuance of a writ of mandamus as to the former.

In any event, to the extent the Court determines that BCI&I has discretion in how it goes

about procuring the criminal history information it is required to obtain under 109.57(A)(1), BCI&I has abused that discretion. *See* FAC ¶¶ 116-17 (Third Cause of Action). "Abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude." *State ex rel. Hamilton Cty Bd. of Comm'rs*, 90 Ohio St.3d 55, 61 (2000) (citation omitted). Here, it is unreasonable – even unconscionable – for BCI&I to simply read out of the statute its obligation to "procure from wherever procurable" criminal history information, and to instead misinterpret that obligation as one to merely furnish forms, a separate statutory obligation altogether. *See* Section IV(A). Refusing to even recognize an express and affirmative statutory obligation is by definition an abuse of discretion. Moreover, it is unreasonable for BCI&I to have affirmatively rejected disposition information submitted by Clerks of Court. *See* FAC ¶ 89. It is unreasonable for BCI&I to have failed to take any steps to identify and procure missing information that has accrued over the years of its ongoing failures. *See* FAC ¶ 94. Finally, it is unreasonable for BCI&I to have failed to take affirmative steps to procure from Clerks disposition information when said Clerks do not report or fail to do so in a timely manner. *See* FAC ¶ 15. These alleged unreasonable and arbitrary acts and failures to act are more than sufficient at the pleading stage to state a claim for abuse of discretion.

4. Plaintiffs Do Not Seek an Order Mandating "Impossible Acts"

Finally, BCI&I argues that Plaintiffs are seeking "vain" or "legally impossible" acts, because, BCI&I argues, Plaintiffs "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." *See* MTD at 28-29. Not so. Plaintiffs do not ask the Court to order that BCI&I procure "all" information in the hands of third parties. Rather, Plaintiffs seek an order requiring BCI&I to, as the statute requires, procure all "procurable" – *i.e.,* obtainable (*see supra* note 3) – information relating specifically to criminal convictions. *See* FAC ¶¶ 115, 117. This cannot be "vain" or

"impossible" because it is *precisely what the General Assembly requires* of BCI&I in R.C. 109.57. (To the extent BCI&I cannot figure out how to discharge its mandatory statutory obligation, Plaintiffs have even laid out several discrete steps BCI&I can take – such as accepting criminal disposition information in the absence of an ITN.) Moreover, as noted above, Plaintiffs have explicitly alleged that if BCI&I were to recognize its obligations and take reasonable, affirmative steps to "procure" the missing criminal disposition information, "then a significant number of missing convictions would have been and would be incorporated into the BCI&I database." FAC ¶ 102. In other words, Plaintiffs have alleged that – if directed to carry out its affirmative obligation under R.C. 109.57(A) – BCI&I can take steps that would remedy the current deficiencies giving rise to the controversy. To the extent BCI&I disputes that contention, it raises an issue of fact not properly decided on a pre-discovery motion to dismiss. Finally, the fact that it may not be simple or easy for BCI&I to carry out its clear obligation provides no basis for dismissal. *See State ex rel. Park Inv. Co. v. Board of Tax Appeals ("Park II")*, 26 Ohio St.2d 161, 167 (1971) ("The fact that the taxing of lands and improvements thereon *uniformly* according to value is a difficult task does not excuse the board from performing its statutory and constitutional duty.").

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendant-Respondents' Motion to Dismiss.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Opposition to Defendant-Respondents' Motion to Dismiss the First Amended Complaint has been served by operation of this Court's electronic filing system on this 23rd day of March 2021.

/s/ Richard N. Coglianese
Richard N. Coglianese