IN THE COURT OF APPEALS OF THE XX DISTRICT

STATE OF OHIO, *ex rel.*,	**:**	
XX,	**:**	**CASE NO. XX**
Relator,	**:**	
v.	**:**	
JUDGE XX,	**:**	
Respondent.	**:**	

BRIEF OF RELATOR XX
ORAL ARGUMENT REQUESTED

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ISSUE PRESENTED FOR REVIEW

Following Intervenor XX's ("Intervenor") conviction for domestic violence and application for relief from disability, Respondent Judge XX XX, a state common pleas court judge, purportedly relieved Intervenor of a federal firearms disability. Does a state court judge act outside the scope of his judicial power when he purports to relieve a domestic violence offender of a federal firearms disability?

STATEMENT OF THE CASE

On or about January 15, 2017, Intervenor XX ("Intervenor") was charged with a violation of Revised Code Section 2919.25(A), domestic violence, a misdemeanor of the first degree, as a result of crimes committed against Relator. (Stipulated Statement of Facts, ¶ 1.) On or about January 18, 2017, Intervenor was charged with a violation of Revised Code Section 2919.27, violation of a protection order, a misdemeanor of the first degree, as a result of crimes committed against Relator. (*Id.* at ¶ 2.)

On or about April 7, 2017, Intervenor was convicted of domestic violence and a violation of a protection order by a jury in case numbers xx and xx in the xx County Court. (*Id.* at ¶ 3.) As a result of his convictions, Intervenor was sentenced to twenty days in jail, with ten suspended, one year of non-reporting probation, and a fine. (*Id.* at ¶ 4.)

On or about February 5, 2019, Intervenor filed Applicant's Request for Relief from Firearms Disability. (*Id.* at ¶ 9.) At the hearing on Intervenor's Request for Relief from Firearms Disability, counsel for Intervenor and counsel for the State of Ohio stipulated as to the applicability of Revised Code Section 2923.14 to Intervenor. (*Id.* at ¶ 10.) Relator did not stipulate as to the applicability of Revised Code Section 2923.14 to Intervenor. (*Id.* at ¶ 11.) On or about April 29, 2019, Respondent granted Intervenor's motion in a written decision. (*Id.* at ¶ 13.)

As this decision is beyond the scope of Respondent's judicial power and violates Relator's rights, Relator sought review of the decision from this Court.

STATEMENT OF THE FACTS

On or about January 2017, Intervenor caused significant physical harm to Relator XX XX, Intervenor's wife at the time, when he grabbed her by the throat and pulled out chunks of her hair. Subsequently, Intervenor was charged with a violation of Revised Code Section 2919.25(A), domestic violence, a misdemeanor of the first degree, as a result of his crimes against Relator. Undeterred by the pending domestic violence charges, Intervenor ignored a protection order, and, as a result, was charged with a violation of Revised Code Section 2919.27, violation of a protection order, a misdemeanor of the first degree. Intervenor was ultimately convicted of both domestic violence against Relator and violation of a protection order where Relator was the protected person.

ARGUMENT

I. Standard of Review

> The conditions which warrant the granting of a writ of prohibition are: (1) the court or officer against whom it is sought must be about to exercise judicial or quasi-judicial power; (2) it must appear that the refusal of the writ would result in injury for which there is no adequate remedy; (3) the exercise of such power must amount to an unauthorized usurpation of judicial power.

State ex rel. N. Ohio Tel. Co. v. Winter, 23 Ohio St.2d 6, 8 (1970).

On March 21, 2019, in the matter of *State v. Hughes*, the Eighth District held that, while victims cannot appeal violations of Marsy's Law, "[a] victim may 'petition' the appropriate appellate court for relief. Appellate courts have original jurisdiction to hear actions in quo warranto, mandamus, habeas corpus, prohibition, procedendo, or '[i]n any cause on review as may be necessary to its complete determination.' " *State v. Hughes*, 8th Dist. Cuyahoga No. 107697, 2019-Ohio-1000, ¶ 28. More recently, the Eighth District reaffirmed its position that petitions for extraordinary writs are the appropriate procedural vehicle for review of victims'

rights violation under Ohio Constitution, Article I, Section 10a. *See State ex rel. Seawright v. Russo*, 8th Dist. Cuyahoga No. CA 19 108484, 2019-Ohio-4983, ¶ 13; *see also State ex rel. Thomas v. McGinty*, 8th Dist. Cuyahoga No. CA 19 108633, 2019-Ohio-5129, ¶ 30. This is the only case law on point in the state, and the legislature has not yet spoken to this issue. Thus, Relator has no other adequate remedy in the ordinary course of law.

II. Respondent is about to exercise or has exercised judicial authority in such a manner as to amount to an unauthorized usurpation of judicial power because Intervenor has no right to the requested relief under state law. Thus, the issuance of a peremptory writ of prohibition is appropriate.

At the heart of this case is the distinction between a firearms disability created and governed by state law and a firearms disability created and governed by federal law. Revised Code Section 2923.13 prohibits several groups of individuals from acquiring, having, carrying, or using firearms. These groups include fugitives, those charged with or convicted of felony offenses of violence or certain drug crimes, those who are drug or alcohol dependent, and those who suffer from some form of mental incompetence or illness subject to court adjudications or control. *Id.* None of these provisions apply to Intervenor as to his conviction for misdemeanor domestic violence, and, therefore, Intervenor's firearms disability is not a result of state law. Thus, Ohio's relief from disability statute (R.C. 2923.14) is inapplicable to Intervenor.

Instead, Intervenor is federally firearms disqualified, pursuant to 18 U.S.C. 922(g)(9), as he was convicted of a misdemeanor crime of domestic violence. (Stipulated Statement of Facts, ¶ 3.) Pursuant to 18 U.S.C. 921(a)(33)(A), Intervenor's conviction meets the federal definition of "misdemeanor crime of domestic violence" because it is a misdemeanor under state law, has, as an element, the use of force, and was committed against Intervenor's then-current, now-former, spouse. *See generally United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405 (2014); *see also Eibler v. Dep't of Treasury*, 311 F. Supp.2d 618 (N.D. Ohio 2004). Therefore, under 18 U.S.C.

922(g)(9), Intervenor is federally disqualified from possessing firearms. Because Intervenor's firearms disqualification emanates from federal law, and not state law, Intervenor must seek relief from his firearms disability pursuant to federal law.

There are two distinct federal avenues available to seek restoration from federal firearms disabilities. These avenues are set forth in 18 U.S.C. 921(a)(33)(B)(ii) and 18 U.S.C. 925(c). Respondent acted outside his judicial authority when he attempted to restore Intervenor's ability to own, use, and possess firearms, because Intervenor failed to exhaust his remedies for restoration under federal law.

a. Intervenor has not exhausted his remedies under 18 U.S.C. 921(a)(33)(B)(ii).

18 U.S.C. 921(a)(33)(B)(ii) states that "[a] person shall not be considered to have been convicted of such an offense for the purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored * * *." For the purposes of the aforementioned section, "such an offense" includes a misdemeanor crime of domestic violence. 18 U.S.C. 921(a)(33)(A). Intervenor was convicted of a misdemeanor crime of domestic violence that meets the definition in this section.

As such, Intervenor has three paths to relief from his disability under this statute. First, Intervenor would be relieved of his disability if he had his conviction expunged or set aside. In Ohio, expungement is not an option for Intervenor, due to the nature of his convictions. Revised Code Section 2953.36(A)(3) makes offenses of violence that are misdemeanors of the first degree and higher not expungable. Revised Code Section 2901.01(A)(9)(a) defines "offense of violence" and explicitly includes a conviction for domestic violence in violation of Revised Code Section 2919.25—a crime for which Intervenor was convicted.

Next, Intervenor could seek relief of his federal disability if his civil rights were restored. This path is equally unavailing to Intervenor because the State of Ohio does not strip those convicted of domestic violence of their civil rights, such as the right to vote and hold elected office. The United States Supreme Court has held that, in the context of 18 U.S.C. 921(a)(33)(B)(ii), the words "civil rights restored" do not apply to an offender such as Intervenor who has lost no civil rights. *United States v. Bridges*, 696 F.3d 474, 475 (6th Cir.2012), citing *Logan v. U.S.*, 552 U.S. 23, 36-37, 128 S.Ct. 475 (2007). In *Bridges*, as here, one of the defendant's arguments for restoration of his rights was that "individuals in his position, who are not subjected to a loss of their civil rights as a result of their conviction, should be treated equivalently to individuals who lose their civil rights and subsequently have those rights restored." *Id.* However, the Sixth Circuit applied Supreme Court precedent in holding that "Bridges does not qualify for an exception to the firearm restriction in 922(g)(9) * * *." *Id.* Therefore, Intervenor also does not qualify for relief under this provision, as his civil rights were never taken away.

Finally, 18 U.S.C. 921(a)(33)(B)(ii) provides that Intervenor may seek relief from his federal disability through a pardon for his conviction. Intervenor has not sought a pardon in this matter. (Stipulated Statement of Facts, ¶ 15.) As such, Intervenor has failed to exhaust his federally approved remedies under 18 U.S.C. 921(a)(33)(B)(ii).

Therefore, Respondent acted outside his judicial authority in granting Intervenor relief. This Court could very well end the inquiry here.

b. Even if Intervenor had exhausted his remedies under applicable federal law, state courts lack judicial authority to relieve federal firearms disabilities.

18 U.S.C. 925(c) also provides an ostensible avenue for relief for Intervenor. That section provides that

> [a] person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial.

Subsequent to the passage of 18 U.S.C. 925(c), the United States Congress defunded the provision and instructed the Bureau of Alcohol, Tobacco, and Firearms to cease its investigations under the provision. In 2000, the Sixth Circuit explained Congress' intent in defunding this provision:

> [I]n a report to the Senate, the Appropriations Committee explained why it first withheld funds in the 1993 Appropriations Act for ATF action on applications for § 925(c) relief: 'After ATF agents spend many hours investigating a particular applicant[,] they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications from relief from federal firearms disabilities.

Mullis v. United States, 230 F.3d 215, 220 (6th Cir.2000), quoting S. Rep. No. 353, 102nd Cong., 2d Sess. 77 (1992). The Sixth Circuit found that "[e]ven if there were any doubt concerning Congress' intent, the practicalities of conducting the requisite investigation only serve to reinforce the conclusion that Congress intended to suspend § 925(c)'s operation." *Id.* at 219.

> Unlike the ATF, the court cannot canvas the circle of neighbors and acquaintances who may have negative information concerning such things as the applicant's tendency toward violence or use of drugs and alcohol. These institutional disadvantages make it highly unlikely that Congress intended district court [sic] to review an applicant's dangerousness to society in the first instance.

Id. at 220. Therefore, the defunding "rendered federal courts without subject matter jurisdiction to consider petitions for the restoration of firearms" under 18 U.S.C. 925(c). *Id*. at 218.

Two years later, the United States Supreme Court took up the question of whether federal district courts could grant relief from disability pursuant to 18 U.S.C. 925(c) without an ATF investigation. *See United States et al. v. Bean*, 537 U.S. 71, 123 S.Ct. 584 (2002). The Court accepted review after the Fifth Circuit held that it had jurisdiction to review a petition for relief under 925(c) following ATF inaction. *Id.* at 73. The Supreme Court was clear that "an actual adverse action on the application by ATF is a prerequisite for judicial review." *Id.* at 76. "Whether an applicant is 'likely to act in a manner dangerous to public safety' presupposes an inquiry into that applicant's background—a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation." *Id*. at 77. "Accordingly, we hold that the absence of an actual denial of respondent's petition by ATF precludes judicial review under 925(c), and therefore reverse the judgment of the Court of Appeals." *Id*. at 78.

Respondent acknowledges this provision provides a remedy for Intervenor, but argues that the defunding of this initiative by the United States Congress provides an opportunity for state courts to step in to "take an active role in directly restoring the Second Amendment rights to persons who are subject to federal firearms disabilities." However, Respondent's conclusion does not logically follow. If the Sixth Circuit and the United States Supreme Court held that Congress did not intend the federal district courts—courts which are expressly mentioned in the statute—to "take up the mantle" of reviewing and resolving 925(c) applications, Congress could not have intended state courts to do so.

Respondent nevertheless argues that the continued existence of 18 U.S.C. 925(c) means "it is Congress's intent for the states to take an active role in directly restoring the Second Amendment rights to persons who are subject to federal firearms disabilities pursuant to the standards found in 18 USCA § 925(c)." (Respondent Answer, ¶ 43.) To support this proposition, Respondent cites a 2013 case from the Illinois Supreme Court. *Id.*, citing *Coram v. State*, 2013 IL 113867, 996 N.E.2d 1057 (Ill.Sup.Ct.). Importantly, in *Coram*, the court was analyzing a provision of Illinois statutory law that has since been amended. *See* 430 ILCS 65/10(c) (2010). Prior to its amendment, this provision, unlike Ohio's relief from weapons disability statute, Revised Code Section 2923.14, did not provide an exclusion from such relief for offenders who were federally firearms disqualified. *See id.*

Notably, in the immediate aftermath of the *Coram* decision, the Illinois legislature amended 430 ILCS 65/10 to provide that Illinois state courts cannot relieve offenders from federal firearms disabilities. 430 ILCS 65/10(b) (2013) ("However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law."). *Accord* R.C. 2923.14(D)(3) ("(D) Upon hearing, the court may grant the applicant relief pursuant to this section, if all of the following apply: * * * (3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms."). Since its amendment, Illinois courts have interpreted 430 ILCS 65/10 to provide that state courts cannot relieve offenders from federal disabilities. *See generally Walton v. Ill. State Police*, 2015 IL App. (4th) 141055, 39 N.E.3d 1095, ¶ 25 ("Since we have found petitioner is prohibited from possessing a firearm under section 922(g)(9) of the Gun Control Act of 1968, the circuit court could not enter an order allowing petitioner to obtain a FOID card."); *People v. Heitman*, 2017 IL App. (3d) 160527, 88 N.E.3d 129, ¶ ¶ 16, 40 (holding that "[i]n order to remove the federal

firearms disability, one of the federal avenues of relief would have to actually apply in Illinois, which as we set out below, they do not" and finding that the failure to apply for a pardon to seek relief from weapons disability foreclosed petitioner from a constitutional challenge to 430 ILCS 65/10).

Therefore, *Coram* is inapposite. The revised Illinois statute is substantially similar to Revised Code Section 2923.14, whereas the version of the Illinois statute analyzed in *Coram* lacked the provision shared by its amended version and Revised Code Section 2923.14. Interestingly, though not dispositive for the reasons set forth above, the *Coram* court noted that, in relieving Coram's disability, it drew on seventeen years of law-abiding history on Coram's part. *Coram* at ¶ 84. Here, Respondent drew on less than two years of history, during most of which time, Intervenor was subject to court control through probation.

III. Relator has standing in this matter because Relator's constitutional rights as a crime victim do not terminate merely because Intervenor was convicted. Thus, the issuance of a peremptory writ of prohibition is appropriate.

Respondent has argued that Relator does not have standing to petition this Court pursuant to Ohio Constitution, Article I, Section 10a(B) because relief from federal firearms disability proceedings are civil in nature. However, Revised Code Section 2923.14—the provision under which Respondent purportedly relieved Intervenor of his federal firearms disability—is in the criminal title of the Revised Code. Relief under that section presupposes a criminal conviction. *Id.* In fact, the county prosecutor is notified of any application for relief and must investigate that application. *Id.* The county prosecutor may object to relief under this section. *Id.* Respondent's own entry purporting to grant Intervenor relief from Intervenor's federal disability repeatedly references the State as the party opposing restoration in the hearing on the matter. (Decision and Entry Granting Applicant's Request for Relief from Firearms Disability.) Further, if Intervenor

had sought relief from his federal disability in the proper manner, by seeking a pardon, Relator would have unequivocal rights to notice and a voice in that process. R.C. 2967.12.

The Ohio Constitution and Revised Code provide crime victims with rights, the exercise of which is appropriate throughout the criminal justice system and beyond. Victims' constitutional rights to safety and protection necessarily extend far beyond an offender's conviction. Ohio Constitution, Article I, Section 10a(A)(1), (4). In order to "secure for victims due process throughout the criminal and juvenile justice systems * * *," the constitutional rights to be treated with fairness and respect for the victim's safety, dignity, and privacy, to reasonable protection from the accused, and to be heard in public proceedings when the victim's rights are implicated must extend into the post-conviction phase of the criminal justice process. Ohio Constitution, Article I, Section 10a(A). Indeed, many rights contained in Ohio Constitution, Article I, Section 10a only apply post-conviction, such as the right of the victim to be notified of, present during, and heard during parole proceedings. Ohio Constitution, Article I, Section 10a(A)(3). The notion that the enforceability of victims' rights ends with the prosecution flies in the face of the plain language of the Ohio Constitution.

Further, post-conviction actions can often blur lines between criminal and civil actions. *See Harris v. Nelson*, 394 U.S. 286, 293-294, 89 S.Ct. 1082 (1969) (calling the civil label for habeas corpus proceedings "gross and inexact"); *O'Brien v. Moore*, 395 F.3d 499, 505 (4th Cir.2005) (noting that habeas proceedings are a unique hybrid between criminal and civil proceedings, making strict application of the civil rules inappropriate). In other states with constitutional protections for crime victims that are substantially similar to Ohio's, victims' constitutional protections extend into civil matters. For instance, in *State v. Lee*, an Arizona

appellate court held that crime victims may refuse deposition and discovery requests in the civil context (in that case, a civil forfeiture proceeding). *See State v. Lee*, 226 Ariz. 234, 238 (2011).

Importantly, the Revised Code provides victims the rights to be notified and heard in proceedings substantially similar to disability relief proceedings—specifically, pardon proceedings. R.C. 2967.12. Intervenor cannot refuse to avail himself of the federally prescribed avenue for relief via pardon as set forth in 18 U.S.C. 921(a)(33)(B)(ii), then select another inapplicable avenue for relief and argue that Relator should be denied rights she would inarguably have if Intervenor had proceeded according to law. This produces an absurd result.

In addition, Relator has standing pursuant to the United States Supreme Court's standing test. The United States Supreme Court adopted a three-prong test for establishing this personal stake standing: "1) The litigant must have suffered an 'injury in fact'; 2) there must be a nexus between the injury and the conduct complained of; and 3) the injury must be redressable by a favorable decision." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992). Ohio adopted the *Lujan* three prong test for standing. *See Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App.3d 261, 268-269 (4th Dist.1999); *see also Middletown v. Ferguson*, 25 Ohio St.3d 71, 75 (1986) (noting Ohio's standing inquiry asks whether an individual seeking "to obtain judicial resolution of [a] controversy" has a "personal stake in the outcome of the controversy.").

An "injury in fact" or "legally cognizable injury" is an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* at 560 (internal quotations omitted). At a minimum, however, an injury in fact occurs when a litigant is denied legal rights created by constitution or statute. *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197 (1975); *see also Assn. of Data Processing Serv. Orgs.,*

Inc. v. Camp, 397 U.S. 150, 154, 90 S.Ct. 827 (1970) (explaining a person may have a spiritual stake in First Amendment values sufficient to support standing).

As a victim of domestic violence, and the person, arguably, most at risk if Intervenor is allowed to obtain and use firearms, Relator has a personal stake in whether laws put in place for her protection and the protection of other domestic violence victims, such as 18 U.S.C. 922(g)(9), are followed. Relator will certainly suffer an injury in fact, as set forth in *Lujan*, if Respondent is allowed to deny her rights under the myriad federal and state laws designed to protect her.

While Respondent and Intervenor may argue that it is problematic for Ohio's legislature to have created a mechanism for restoration of firearms rights for felons but not for those convicted of misdemeanor domestic violence, this argument ignores the significant danger—for both victims and law enforcement officers—created when domestic violence and firearms mix.

> Recognizing that 'existing felon in possession laws * * * were not keeping firearms out of the hands of domestic abusers, because many people who engage in serious spousal or child abuse are ultimately not charged with or convicted of felonies,' Congress extended 'the federal firearm prohibition to persons convicted of misdemeanor crimes of domestic violence' to 'close this dangerous loophole.'

Stimmel v. Sessions, 879 F.3d 198, 202 (6th Cir.2018), quoting *United States v. Hayes*, 555 U.S. 415, 426, 129 S.Ct. 1079 (2009) (internal quotation marks, citation, and bracket omitted). The Sixth Circuit has found: "Domestic violence remains a serious, pervasive problem; the Supreme Court observed in 2014 that the United States 'witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year.' " *Id.* at 208, citing *United States v. Castleman*, 572 U.S. at 159.

In discussing the domestic violence recidivism rate estimated to be between 40-80%, the Sixth Circuit stated: " 'No matter how you slice these numbers, people convicted of domestic

violence remain dangerous to their spouses and partners.' " *Id*. at 209, quoting *United States v. Skoien*, 614 F.3d 638, 644 (7th Cir.2010). "Essential here is that the victim is more likely to be killed when a gun is present." *Id.* "Moreover, 'nearly 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the perpetrator used a firearm in roughly 65% of the murders.' " *Id.*, quoting *United States v. Booker*, 644 F.3d 12, 25-26 (1st Cir.2011).

Domestic violence is not only dangerous for victims. The Sixth Circuit acknowledged that "responding to family violence calls is among a police officer's most risky duties." *Id.* at 210, citing Nick Breul & Mike Keith, *Deadly Calls and Fatal Encounters: Analysis of U.S. Law Enforcement Line of Duty Deaths When Officers Responded to Dispatched Calls for Service and Conducted Enforcement, 2010-2014*, 15 (2016). The FBI reported that, in 2016, "approximately 10% of non-accidental law enforcement officer fatalities in the line of duty that year occurred while officers were responding to domestic disturbance calls." *Id.*

In the reporting period 2017-2018, 100% of homicide/suicide intimate partner violence cases in Ohio involved a firearm; 71% of fatal intimate partner incidents involved firearms. Ohio Domestic Violence Network, *Ohio Domestic Violence Fatalities*, http://www.odvn.org/ Resource%20Center/2017-2018_ODVN_FatalityReport.pdf (accessed Dec. 6, 2019). In the reporting period 2016-2017, 86% of fatal intimate partner violence incidents involved firearms and 100% of homicide/suicide cases involved firearms. Ohio Domestic Violence Network, *Ohio Domestic Violence Fatalities*, http://www.odvn.org/Resource%20Center/2016-2017_ODVN_ FatalityReport.pdf (accessed Dec. 6, 2019). From 2015-2016, 74% of domestic violence fatal incidents involved firearms. Ohio Domestic Violence Network, *Ohio Domestic Violence Fatalities*, http://www.odvn.org/Resource%20Center/2015-2016_ODVN_ FatalityReport.pdf (accessed Dec. 6, 2019). In three of four of those reporting periods, law enforcement officers

were killed with firearms at the scene of domestic violence fatalities. *See id.* Children were victims of these fatal incidents and were present at the scene of a fatal incident about 25% of the time. *See id.*

As the victim of domestic violence and a protection order violation at the hands of Intervenor, Relator is uniquely positioned to suffer a concrete, particularized injury if Intervenor's firearms rights are restored without judicial authority. The restoration of the Intervenor's rights is the clearly traceable cause of the injury, and this Court can redress the injury by preventing Respondent from acting outside his judicial authority in an attempt to relieve Intervenor's federal firearms disability.

IV. Application of 18 U.S.C. 922(g)(9) to Intervenor does not violate Intervenor's constitutional rights. Thus, the issuance of a peremptory writ of prohibition is appropriate.

Importantly, this Court is not tasked with determining whether 18 U.S.C. 922(g)(9) is facially unconstitutional or unconstitutional as applied to Intervenor. Rather, this Court is only tasked with determining whether, in attempting to relieve Intervenor of his federal firearms disability, Respondent acted outside his judicial authority. It is axiomatic that a court should not reach constitutional issues unless absolutely necessary. *State v. Chasteen*, 21 Ohio App.3d 87, 88 (12th Dist.1984), citing *Bd. of Edn. v. Brunswick Edn. Assoc.*, 61 Ohio St.2d 290, 297 (1980).

a. Respondent does not have standing to assert Intervenor's constitutional rights.

Respondent lacks standing to raise as defenses, or generally, violations of Intervenor's constitutional rights. In allowing Intervenor to intervene in this case, this Court found that neither party would adequately represent Intervenor's stated constitutional interests. Respondent did not respond to Intervenor's Motion to Intervene, presumably in acquiescence to this finding.

Respondent cannot meet the standing test set forth above as it relates to Intervenor's constitutional rights. *See Lujan* at 560-561 ("1) The litigant must have suffered an 'injury in fact'; 2) there must be a nexus between the injury and the conduct complained of; and 3) the injury must be redressable by a favorable decision."). In this matter, assuming, without conceding, that application of 18 U.S.C. 922(g)(9) to Intervenor would burden any of Intervenor's constitutional rights, the party suffering an injury would be Intervenor, not Respondent. In fact, in this case, application of 18 U.S.C. 922(g)(9) to Intervenor would not even conjecturally or hypothetically injure Respondent. Respondent is not being denied any legal rights created by constitution or statute. It is Intervenor, and not Respondent, who has standing to assert Intervenor's constitutional rights.

If Respondent can adequately represent the constitutional interests of Intervenor, there is no reason that Intervenor should be permitted to intervene in the first place. *See* Civ.R.24(A).

b. It is procedurally inappropriate to argue that portions of Intervenor's criminal sentence violate Intervenor's constitutional rights in this matter. Instead, Intervenor should have raised these arguments in his underlying criminal cases.

Procedurally, this case provides the incorrect vehicle to adjudicate the question of whether application of 18 U.S.C. 922(g)(9) to Intervenor violates his constitutional rights. Intervenor should have raised these arguments as assignments of error in an appeal of his criminal convictions. In fact, Intervenor did appeal his convictions, but he did not raise an assignment of error concerning his firearms disability. (Stipulated Statement of Facts, ¶ 6.) Intervenor's sole assignment of error was that the trial court erred "in denying Appellant's 'Motion to Permit Inquiry on Cross-Examination re: Safecracking.' " *Id.* This Court has held that, procedurally, "[i]ssues such as the constitutionality of a statute that are not raised in the trial court cannot be raised for the first time on appeal." *State v. Elifritz*, 12th Dist. Preble No.

CA2016-02-002, 2016-Ohio-7193, ¶ 10. While this matter is not a direct appeal of Intervenor's conviction, the same reasoning applies here.

c. Application of 18 U.S.C. 922(g)(9) to Intervenor does not violate Intervenor's constitutional rights.

Application of 18 U.S.C 922(g)(9) to Intervenor does not violate Intervenor's Second Amendment right to bear arms, because the statute, in preventing gun possession by those convicted of misdemeanor domestic violence, "is substantially related to the government's compelling interest of preventing gun violence." *Stimmel v. Sessions*, 879 F.3d 198, 201 (6th Cir.2018). Since the government can carry out this interest by prohibiting firearm possession by those convicted of misdemeanor domestic violence, a conviction which statistically increases the chance of future violence significantly, this statute is not an unconstitutional limitation upon the Second Amendment. *Id.* at 208-211.

In determining that 18 U.S.C. 922(g)(9) does not violate the constitutional right to bear arms, the Sixth Circuit reasoned that the intermediate scrutiny standard was satisfied because the government produced evidence sufficient to show a reasonable fit between the restriction of firearms for those convicted of misdemeanor domestic violence and the justification for the restriction (the interest in decreasing gun violence). *Stimmel* at 207-212. Because the government provided evidence showing significant recidivism rates for domestic violence offenders, including evidence showing death of victims is more likely when guns are present, the court determined that the prevention of gun possession by those convicted of misdemeanor domestic violence reasonably fits into the government's interest in decreasing gun violence. *Id.* at 208-212. "The Second Amendment's core right allows 'law-abiding, responsible citizens to use arms in defense of hearth and home.' " *Dist. of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783 (2008). Since the defendant in *Stimmel* broke the law by committing domestic violence, he was

properly disqualified from Second Amendment protections, as he is not a protected class under *Heller*. *Stimmel* at 203.

Here, Intervenor was convicted of the exact same crime as the defendant in *Stimmel*—misdemeanor domestic violence. As such, Intervenor's Second Amendment right to bear arms is not violated by the imposition of a federal disability pursuant to 18 U.S.C 922(g)(9) because, as in *Stimmel*, Intervenor is not the "law-abiding, responsible citizen" the Second Amendment is designed to protect.

Application of 18 U.S.C. 922(g)(9) to Intervenor does not violate Intervenor's Fourteenth Amendment right to Equal Protection because Intervenor was not treated disparately as compared to individuals similarly situated. The Sixth Circuit requires that the person challenging the constitutionality of a law must "adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Stimmel* at 212, quoting *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir.2011).

Other courts have expressly addressed the issue raised by Intervenor—that his right to equal protection is violated by 18 U.S.C. 922(g)(9) because felons can be relieved of federal disability, but domestic violence misdemeanants cannot. *See United States v. Smith*, 171 F.3d 617, 626 (8th Cir.1999); *see also United States v. Chovan*, 735 F.3d 1127, 1132-1134 (9th Cir.2013). Applying rational basis review, the Eighth Circuit held that application of 18 U.S.C. 922(g)(9) to a domestic violence misdemeanant from Iowa—a state having a weapons under disability law substantially similar to Ohio's—did not violate the misdemeanant's right to equal protection of the law "because Smith can receive a pardon from the governor of Iowa, similar to a felon who can receive restoration of his civil rights * * *." *Smith* at 626. Similarly, the Ninth

Circuit applied rational basis review and found that Congress " 'was aware of the discrepancies in state procedures for revoking and restoring civil rights * * *' " but provided several mechanisms, such as a pardon, for relief from disability for domestic violence misdemeanants. *Chovan* at 1133-1134, quoting *Smith* at 625. Therefore, the Ninth Circuit held that 18 U.S.C. 922(g)(9) did not violate the misdemeanant's right to equal protection.

Intervenor argues the statute is unconstitutional because he is being disparately treated compared to those convicted of felony crimes. However, courts have widely accepted evidence supporting the conclusion that individuals with a domestic violence record are significantly more likely to pose future danger to the public, including the increased likelihood of violent use of deadly weapons. *Stimmel* at 208-210. Since Intervenor cannot show disparate treatment from a similarly situated class, he cannot prevail on an equal protection claim.

Application of 18 U.S.C. 922(g)(9) does not violate Intervenor's right to due process under the Fourteenth Amendment because the illegal act of domestic violence itself is sufficient to put Intervenor on notice that he may be subject to regulation of firearms due to the violent nature of his crime. *United States v. Beavers*, 206 F.3d 706, 710 (6th Cir.2000); *see also United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir.2000). Courts have agreed that a "conviction on a domestic violence offense sufficiently placed [the defendant] on notice that the government might regulate his ability to own or possess a firearm." *Beavers* at 710. Therefore, Intervenor's conviction alone was sufficient to put him on notice of the restrictions on his ability to own, use, or possess a firearm.

Application of 18 U.S.C 922(g)(9) to Intervenor does not violate the Commerce Clause. " '[A] firearm that has been transported *at any time* in interstate commerce has a sufficient effect on commerce to allow congress to regulate the possession of that firearm pursuant to its

Commerce Clause powers.' " *United States v. Napier*, 233 F.3d 394, 400 (6th Cir.2000), quoting *United States v. Chesney*, 86 F.3d 564, 570-571 (6th Cir.1996). Additionally, 18 U.S.C. 922(g)(9) contains a sufficient jurisdictional element to survive a challenge under the Commerce Clause. *See id.* at 401-402.

For the aforementioned reasons, application of 18 U.S.C 922(g)(9) to Intervenor does not violate Intervenor's constitutional rights.

CONCLUSION

Therefore, Relator respectfully requests that this Court issue a Peremptory Writ of Prohibition to prohibit Respondent from relieving Intervenor of his federal firearms disability, and thereby exceeding Respondent's judicial power.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via ordinary US mail and electronic mail, this 13th day of December, 2019:

_____

Elizabeth Well (0087750)