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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

PETITION TO ABROGATE RULE
25(g) OF THE ARIZONA RULES OF
PROTECTIVE ORDER PROCEDURE

Supreme Court No. R-24-0037

**Petitioner's Reply to the
CIDVC's & APAAC's Comments
in Opposition, citing new case
law from the 9th Circuit**

I first reply to the Comment made by the CIDVC, then I cite new case law from the 9th Circuit, and last, reply to the APAAC. If TL;DR, jump to Section II about the new 9th Circuit ruling, since it's dispositive.

I. REPLY TO THE CIDVC

The CIDVC quotes A.R.S. § 12-1809(F)(3) as authority for Rule 25(g).

But you don't have to read the statute to know that this claim can't be true. Just read Rule 25(g). For not even Rule 25(g) itself cites this statute – nor any statute – for authority!

Moreover, 12-1809(F)(3) is already used as authority for the Rule beforehand, 25(f), titled, "Relief." Citing the same statute a second time in the Rules of Procedure is glaringly redundant. It's like "Double secret probation."

Now Rule 25(g) says “the judicial officer may prohibit the defendant from

possessing, purchasing, or receiving firearms for the duration of the order."

But because, as above, not even the ARPOP cites any statutory authority for this, this Rule is, by definition, just dicta. (It had been tacked on, in margin note fashion, to the "Relief" section of the old, advisory, DV Benchbook. There it speculated that "In an IAH, the JO **may** have discretion to prohibit firearms." Unfortunately that note morphed past speculation, and was later grandfathered into the Arizona Rules of Protective Procedure as what we have now.)

It's also obvious that Rule 25(g) is dicta because not even the statute that the CIDVC cites for authority (§ 12-1809(F)(3)) mentions "firearms." Or "prohibiting" the "possession" thereof.

What 1809(F)(3) says is "If the court issues an injunction, the court may do any of the following: ... Grant relief necessary for the protection of the alleged victim ..."

Citing this, the CIDVC says "the Legislature did not limit the type of relief a judicial officer can grant to protect the plaintiff..." and concludes that this includes prohibiting defendants from possessing firearms.

This is making an argument from silence. And I'll deal with that in a bit.

For now, since, in a different comment to a different Petition of mine, the CIVDC says that criminal DV OOP's and civil IAH are essentially the same, let's compare and contrast their statutes to see if we can learn anything about "grant relief necessary." We begin by contrasting the two.

As you can see in the graphic on the next page, the statutes are not exactly the same. The important contrast is that while the criminal DV OOP statute (on the left) has a subsection that specifically mentions firearms and how to seize them, the statute for civil IAH (on the right) does not.

Now note that, in comparison, both statutes have a subsection "grant relief necessary."

If "grant relief necessary" were sufficient authority for judicial officers to prohibit possession of firearms, as the CIDVC claims, then why did the Legislature spend so much ink specifically codifying a subsection about prohibiting and seizing firearms?

And if "grant relief necessary" were sufficient to prohibit possession of firearms, why does it come **after** the subsection about seizing firearms in the criminal DV OOP statute?

The answer is that "grant relief necessary" is a catchall to allow judicial officers the ability to grant ancillary constitutional relief which might be needed in unique situations. "The defendant is prohibited from flying drones over the plaintiff's house," as one example.

Okay, now to making arguments from silence.

The CIDVC says that "Under this salutatory authority {of 'grant relief necessary'}, a judicial officer has the discretion to prohibit a defendant from possessing firearms ..." This despite the fact that 12-1809(F)(3) is silent about

G. If a court issues an order of protection, the court may do any of the following:

1. Enjoin the defendant from committing a violation of one or more of the offenses included in domestic violence.
2. Grant one party the use and exclusive possession of the parties' residence on a showing that there is reasonable cause to believe that physical harm may otherwise result. If the other party is accompanied by a law enforcement officer, the other party may return to the residence on one occasion to retrieve belongings. A law enforcement officer is not liable for any act or omission in the good faith exercise of the officer's duties under this paragraph. While the order of protection is in effect, if a party was granted the use and exclusive possession of the parties' residence and subsequently moves out of the house, the party must file a notice in writing with the court within five days after moving out of the residence. After receiving the notification from the plaintiff, the court shall provide notice to the defendant that the plaintiff has moved out of the residence and of the defendant's right to request a hearing pursuant to subsection I of this section.
3. Restrain the defendant from contacting the plaintiff or other specifically designated persons and from coming near the residence, place of employment or school of the plaintiff or other specifically designated locations or persons on a showing that there is reasonable cause to believe that physical harm may otherwise result.
4. If the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons, prohibit the defendant from possessing or purchasing a firearm for the duration of the order. If the court prohibits the defendant from possessing a firearm, the court shall also order the defendant to transfer any firearm owned or possessed by the defendant immediately after service of the order to the appropriate law enforcement agency for the duration of the order. If the defendant does not immediately transfer the firearm, the defendant shall transfer the firearm within twenty-four hours after service of the order.
5. If the order was issued after notice and a hearing at which the defendant had an opportunity to participate, require the defendant to complete a domestic violence offender treatment program that is provided by a facility approved by the department of health services or a probation department or any other program deemed appropriate by the court.
6. Grant relief that is necessary for the protection of the alleged victim and other specifically designated persons and that is proper under the circumstances.

against harassment that is issued by a municipal court may be served by the police agency for that city if the defendant can be served within the city. If the defendant cannot be served within the city, the police agency in the city in which the defendant can be served may serve the injunction. On request of the plaintiff, each injunction against harassment that is issued by a justice of the peace shall be served by the constable for that jurisdiction if the defendant can be served within the jurisdiction. If the defendant cannot be served within that jurisdiction, the constable in the jurisdiction in which the defendant can be served shall serve the injunction. On request of the plaintiff, an injunction against harassment that is issued by a superior court judge or commissioner may be served by the sheriff of the county. If the defendant cannot be served within that jurisdiction, the sheriff in the jurisdiction in which the defendant can be served may serve the order. The court shall provide, without charge, forms for purposes of this section for assisting parties without counsel.

E. The court shall review the petition, any other pleadings on file and any evidence offered by the plaintiff, including any evidence of harassment by electronic contact or communication, to determine whether the injunction requested should issue without a further hearing. Rules 65(a)(1) and 65(e) of the Arizona rules of civil procedure do not apply to injunctions that are requested pursuant to this section. If the court finds reasonable evidence of harassment of the plaintiff by the defendant during the year preceding the filing of the petition or that good cause exists to believe that great or irreparable harm would result to the plaintiff if the injunction is not granted before the defendant or the defendant's attorney can be heard in opposition and the court finds specific facts attesting to the plaintiff's efforts to give notice to the defendant or reasons supporting the plaintiff's claim that notice should not be given, the court shall issue an injunction as provided in subsection F of this section. If the court denies the requested relief, it may schedule a further hearing within ten days with reasonable notice to the defendant. For the purposes of determining the one-year period, any time that the defendant has been incarcerated or out of this state shall not be counted.

F. If the court issues an injunction, the court may do any of the following:

1. Enjoin the defendant from committing a violation of one or more acts of harassment.
2. Restrain the defendant from contacting the plaintiff or other specifically designated persons and from coming near the residence, place of employment or school of the plaintiff or other specifically designated locations or persons.
3. Grant relief necessary for the protection of the alleged victim and other specifically designated persons proper under the circumstances.

firearms. As such, the CIDVC “divines” this intent from silence.

As for making an argument from silence, quoting this Court from *Planned Parenthood v. Mayes*, "We typically do not infer legislative intent from silence."

Rather, "We interpret statutes in view of the entire text... Clear and unequivocal language determines a statute’s meaning, reading each word, phrase, clause, and sentence in such a way to ensure no part of the statute is void or trivial. Under this plain meaning analysis, we look first to the language of the provision, for if the language is clear, judicial construction {e.g., adding additions to the law} is neither required nor proper. This analytical approach is premised on foundational trust in legislative competency, and this Court presumes that the legislature knows the existing laws {e.g., the 2nd Amendment to the US constitution, as well as Article 2, Section 26 of the Arizona constitutional} when it enacts or modifies a statute." (Internal quotes, citations, etc. omitted. My clarifications in brackets.)

Since the word "firearm" is not in the statute that the CIDVC cites for authority, your own rules of interpretation prove that it was never the legislator's intent to prohibit the possession of firearms in A.R.S. § 12-1809.

In fact, in *Planned Parenthood*, all of you acknowledged that "the legislature does not ordinarily 'hide elephants in mouseholes'..."

So if it really were the legislature's intent to deprive defendant's in civil IAH's of their (Arizona) constitutional "right of the individual citizen to bear arms

in defense of himself..." — a HUGE, politically suicidal deprivation in a gun friendly state like Arizona — the legislature would have said it.

Moreover, the fact that the legislature DID not hide an elephant in a mousehole in its statute governing criminal Domestic Orders of Protection proves that the Legislature was not hiding an elephant in its statute governing civil IAH's.

More fundamentally, the Legislature did not need to speak about what types of relief that a judicial officer can grant because judicial officers are —ostensibly— already limited by our Constitutions. Judges know that they are limited by the 1st Amendment and can't put a gag order on a defendant in a civil Injunction. And they know that they are limited by the 4th Amendment and can't jail a defendant in a civil Injunction. Both the US and the Arizona Constitution guarantee us the right to bear arms. (As made even more certain recently by the 9th Circuit, in the next Section.)

II. NEW CASE LAW FROM THE 9TH CIRCUIT

Before rebutting the APAAC in the next Section, it's better to read what the 9th Circuit just ruled about the 2nd Amendment and non-violent felons in this Section since it nullifies most of the APAAC's arguments.

Now, although we're still waiting on the U.S. Supreme Court's decisions in *U.S. v. Rahimi* ("Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the

Second Amendment on its face."), the die has already been cast by the 9th Circuit as it goes to defendants in civil Injunctions Against Harassment.

(If the SCOTUS upholds the 2nd Amendment in *Rahimi*, then it will be icing on this cake in this instant matter regarding civil IAH's.)

In *United States v. Duarte* (9th Circuit 2024), the Court of Appeals considered the question of "whether barring nonviolent felons {in society} from possessing firearms {via 18 U.S.C. § 922(g)(1)} violates the Second Amendment, because this Nation has no historical tradition of barring such nonviolent offenders from possessing firearms, and instead such regulations are relatively recent 20th century inventions."

The 9th Circuit agreed that it IS a violation of the 2nd Amendment. That it is the right of ALL Americans (except for violent felons) to carry a handgun for self-defense. ("The Second Amendment . . . presumptively guarantees {our} right to possess a firearm for self-defense...")

Now, since the 9th Circuit affirmed that all Americans (except violent felons) have the constitutional right to bear arms, then it automatically follows that defendants in civil Injunctions Against Harassment have the same right. At least three reasons:

First, defendants who have been found, by way of a **civil** Injunction Against Harassment to have "harassed" someone are non-violent "offenders" by definition. (If a defendant in a civil IAH had actually criminally harassed or stalked someone,

or physically assaulted someone, brandished a weapon, etc. then they would be in criminal court. In which case they would be prohibited from possessing firearms already via arrest, arraignment, incarceration, etc.)

So, per *Duarte*, you cannot deprive these defendants of their constitutional rights to possess firearms simply because they've been found civilly to have committed "harassment." ("Harassed" in quotes because we all saw the silly Injunction issued for state Senator Wendy Rogers against a Reporter who was simply angling to get a story about the senator.)

And if a defendant in a civil IAH were a violent felon returned to society, then they are already prohibited from possessing firearms.

And even if a defendant in a civil IAH really did harass someone in the strictest legal sense (but then why wouldn't it have been adjudicated in criminal court as criminal Harassment as provided under A.R.S. § 13-2921?), and so now is a "non-virtuous" citizen, that still is not grounds to deprive that defendant their right to bear arms in defense of oneself either. For as the 9th Circuit noted, "With respect to whom the right to keep and bear arms belongs, nothing in the Second Amendment's text draws a . . . distinction between those who are virtuous and those who are not." (*Duarte*, page 33.) Nor is there any distinction in Arizona's Section 2, Article 26 .

The second reason that defendants in civil IAH's have a 2nd Amendment right is, even if the silence in A.R.S. 12-1809(F)(3) allowed prohibiting the possession of firearms, that statute would now be unconstitutional because it is

inconsistent with this Nation's historical tradition of firearm regulation.

The 9th Circuit said it was now necessary, in light of *Bruen*, to prove that such a prohibition "is consistent with this Nation's historical tradition of firearm regulation." (*Duarte*, page 34.) So now some history.

The 2nd Amendment was ratified in 1791.

A.R.S. §12-1809 became law in 1984. That's 193 years since the 2nd Amendment. And 72 years after Article II, § 26.

And although *Duarte* is a federal case, and so it focused on our federal constitutional right, a right is a right, and I submit that our Arizona constitutional "right of the individual citizen to bear arms in defense of himself or the State shall not be impaired," which is broader and stronger than the federal right, is also relevant history. So then, Article II, § 26 of the Arizona constitution became effective circa 1912.

Given this history, neither the 2nd Amendment nor Article II, § 26 carve out exceptions in the right to bear arms as it goes to defendants who have been found civilly to have harassed someone, because Injunction Against Harassment law was not a thing when the Constitutions became effective.

But human nature being what it is, the constitutions could have restricted the right to bear arms. That is, acts of harassment (as opposed to laws against it) have been with us ever since Cain murdered his brother Abel. So our federal or state Founders could have put prohibited "harassers" from possessing firearms.

But they didn't. And so neither can you.

So even if the Legislator really intended for an open ended reading of §12-1809(F)(3) to allow judicial officers to prohibit the possession of firearms in civil IAH's, the statute is now unconstitutional in light of the Historical test.

Similarly, Rule 25(g) is unconstitutional for the same historical reason. For Rule 25(g) became effected (as then Rule 6) in 2008. 217 years after the 2nd Amendment.

Third, even if the Legislature intended for A.R.S. §12-1809(F)(3) to prohibit the possession of firearms in civil IAH's, and even if it could survive the Historical test, Rule 25(g) is still unconstitutional because it's overly broad. This in light of the Arizona Constitution which says the "right of the individual citizen to bear arms **in defense of himself** or the State shall not be impaired."

The 9th Circuit observed the right of ALL Americans to carry a handgun **for self-defense**. ("The Second Amendment . . . presumptively guarantees [our] right to possess a firearm for self-defense..." And "We concluded in *Heller* that citizens must be permitted to use handguns for the core lawful purpose of self-defense.")

As such, anything that "impairs" Americans in Arizona from defending themselves with firearms is unconstitutional by definition.

And even if this weren't the case, prohibiting defendants in civil IAH's from possessing firearms is still overly broad because it prevents them from defending

their home.

The 9th quoting *District of Columbia v. Heller*, 554 (2008), "[the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms **in defense of hearth and home.**"

A blanket prohibition against possessing firearms deprives a defendant of this constitutional right to protect his/her home.

(Don't worry. It's not likely the plaintiff in a civil IAH will go to the defendant's home. But if you're worried, a judicial officer could issue an Injunction stating "The defendant is prohibited from killing the plaintiff with a firearm, from assaulting the plaintiff with a firearm, or from displaying a firearm in the presence of the plaintiff."

Oh, wait. We already have a law against murder, against aggravated assault, against brandishing weapons.

III. REPLY TO THE APAAC

The APAAC has a unique take. It cites ARPOP Rule 23(i) as justification for Rule 25(g). That because Rule of Procedure 25(i) faithfully restates the statutory prohibition against the possession of firearms in criminal DV OOP's, and since Rule 25(g) is kinda like Rule 23(i) (if you squint hard enough), then 25(g)'s statute must also allow prohibition against firearms.

But this is reasoning from the lesser to the greater. (Instead of from the greater to the lesser.) So it's wrong. A.R.S. §12-1809(F)(3) does not say the same

thing as §13-3602(G). The latter clearly states that the court may “prohibit the defendant from possessing or purchasing a firearm.” The former has none of those words.

And so, "Yes," if I wasn't clear in my Petition, the Arizona Supreme Court has exceeded its authority by making up a Rule of Procedure that has no basis in law. (Gasp!)

(I would like to think that everyone here knows that the statutes supercede Rules of Procedure. Even the Preface to the old DV Benchbook advised “At the time of publication, this benchbook reflects accurate and up-to-date information and forms. However, readers should make themselves aware of any subsequent changes in **the law** ...” But apparently not everyone knows this.)

Next, the APAAC cites *State v. McCarney* to say “in the event of an irreconcilable conflict between a procedure statute and a rule, the rule prevails.”

But that case was specifically about “statutory procedural enactments” by the Legislature which might infringe on the Court’s constitutional rule making authority as it goes to its own housekeeping. (E.g., "the Legislature cannot enact an analytical framework contrary to the Rules of Evidence.") It did not say that Rules of Procedure always trump statutes.

Is the APAAC saying that the Court can make up a Rule of Procedure that prohibits defendants from possessing firearms despite lack of statutory authority for the prohibition? If yes, then this is abridging a substantive right of litigants, a

violation of A.R.S. §12-109(B)(1), as even clearer now after the 9th Circuit's ruling above.

To further buttress its claim that judges can infringe on constitutional rights in civil IAH's, the APAAC claims, as fact, that the AZ COA ruled against the 1st Amendment in *LaFaro v. Cahill*.

Wut? The COA vacated the Injunction against Mr. Cahill, upholding his 1st Amendment right to Free Speech.

What the COA actually said was that not all speech is protected, because not all speech is "Free Speech." For example, "fighting words," which are often a prelude to an assault, are not protected speech. (In fact, causing fear, can be considered criminal.)

Moreover, the COA said " we also presume that the Legislature would not intentionally enact an unconstitutional statute." (At § 22.)

I also presume that the Legislature did not intent to enact an unconstitutional statute in § 12-1809(F) by prohibiting the possession of firearms. It is this Court who enacted this prohibition via Rule 25(g).

As to the APAAC's argument that "the right to possess firearms is not absolute": In the particular instance of civil Injunctions Against Harassment, this argument has been nullified the by 9th Circuit, above.

And last, the APAAC says, in essence, that this Court's public Rules Forum is not the place to petition to abrogate Rule 25(g). It claims that a defendant can

challenge the constitutionality of the Rule to the Arizona Court of Appeals.
(Implied.)

Well, first, the COA is generally not available to appeal criminal DV OOP's or civil IAH's. First, by law, defendants are allowed only one appeal. (Yet another violation of Due Process.) Appeals from the Justice Courts go to the Superior Court. Only petitions originating in Superior Court can go to the Court of Appeals. And those are very rare, since most petitions are heard in the Justice Courts. (And even then, I know of one petition heard by a Superior Court judge who captioned it "In the Justice Court.")

But even if one could appeal to the COA, it is not true that one can challenge a Rule of Procedure there. Here's the money quote from the COA itself. "Appellant then is asking this Court, an intermediate appellate court, to declare unconstitutional a rule of procedure adopted by our highest court. It is true that we frequently construe the effect of the rules of criminal or civil procedure, but this is quite different from asking this Court to rule upon the constitutionality of a rule of criminal or civil procedure which has been promulgated by the Supreme Court of Arizona. If we did so, we would in effect be passing judgment upon the same court that passes judgment upon our actions. We have been recently reminded in regard to prior decisions of our Supreme Court that this is not our obligation." State v. Meek, 445 P. 2d 463 - Ariz: Court of Appeals 1968

Aside from a challenge in federal court, this forum is the proper venue.

As even this Court observed this year, citing our Arizona Constitution, "A

frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government,”. *Beck v. Neville*, Ariz: Supreme Court 2024.

Also, see *Amos 5:15*, “Hate evil, love good. Maintain justice in the courts.”

SUBMITTED this 3rd day of June 2024.

By /s/ Mike Palmer