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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO REPEAL RULE 25(g), ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	Supreme Court No. R-16-_____ **Petition to Repeal Rule 25(g), Arizona Rules of Protective Order Procedure** **(Emergency Action Requested)**

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer petitions this Court to repeal Rule 25(g) of the Rules of Protective Order Procedure. This Rule, which was created years ago ex nihilo by the CIDVC (Committee on the Impact of Domestic Violence in the Courts), tells judges that they can violate a citizen's Second Amendment right (and their Arizona Article 2, Section 26 Constitutional right) to bear arms by prohibiting a defendant in a **civil** action from "possessing, purchasing, or receiving firearms." As such, Rule 25(g) reduces hapless defendants to **criminals** (prohibited possessors) by way of a **civil** procedure. (And a very one-sided civil procedure at that, usually ex parte, without many of the usual R.Civ.P. safeguards in place.)

Similarly, this Rule tells judges that they can violate a defendant's Fourth Amendment right in a **civil** action by seizing a citizen's property (firearms) absent

any suspicion that a **crime** has been committed. As such, I seek to repeal this Rule.

Considering the irreparable harm that can come to defendants as long as this Rule exists, I request (and hereby file for) Emergency Action on this petition. In addition to the blatant constitutional violations, which, on their face, require immediate repeal of this onerous Rule, there can be bona fide, real life irreparable harm caused by not immediately repealing this Rule. Someone could die.

Consider: The stated purpose in the Arizona Constitution for "the right of the individual citizen to bear arms" is "in defense of himself."

Clearly, when a citizen has been deprived of their right to bear arms, they can no longer defend themselves with firearms. That is an increasingly dangerous position to be in our increasingly lawless society. And it's not just defendant who can be harmed here but also his family. (E.g., home invasions in the middle of the night.) This deprivation can last a year.

Worse, the defendant in a civil Injunction against Harassment has now been made a sitting duck by his adversary by way of an ex parte court Order. Now the adversary knows that their target has been disarmed and cannot shoot back. Considering that the plaintiff already sees the defendant as a threat (valid or not), this puts the defendant's life at a greater risk from the plaintiff than it was pre–injunction. (Who knows — perhaps the plaintiff hears voices?)

Therefore, so that the Court doesn't have innocent blood on its hands, I request that the Court repeal Rule 25(g) immediately, convening a special meeting if need be.

I. Background (and history) of Rule 25(g)

No doubt the usual proponents of this Rule (the CIDVC and the governors of the State Bar) will note that this is the fourth challenge to this Rule, the last being in 2015.[1] What's changed since then?

At least three things:

1) Justice Clarence Thomas (of the SCOTUS) made history last year when he asked his first question ever in oral arguments. He basically made my case.

In the matter of *Voisine v. U.S.*, Justice Thomas asked the U.S. Attorney "This is a misdemeanor violation. It suspends a constitutional right. Can you give me another area where a misdemeanor violation suspends a constitutional right?"

Of course, he already knew the answer to his question. There weren't any. Nor should there be. (And, he quipped that bearing arms "at least as of now, is still a constitutional right.")

Now, even though the SCOTUS eventually ruled 6-2 in *Voisine* that a State could suspend our Second Amendment rights in a **criminal** matter, it is still the case that a State cannot suspend our Second Amendment rights in a civil matter. And even if it could, *Voisine* requires that such a suspension would have to involve Domestic Violence. But a civil Injunction against Harassment is not, by

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[1] See Mrs./Miss Victoria Timm's petition R-15-0016 to repeal Rule 6(E)(4)(e)(2), this Rule's previous number, citing Fourth Amendment grounds. Also see her reply to Comments in Opposition. And her Comment in Opposition to R-10-0010, which focused on Second Amendment issues. The best arguments I've seen so far and I borrowed here from her work.

definition, Domestic Violence. (Doesn't meet the "intimate partner" requirement for DV.) So Rule 25(g) unlawfully suspends a constitutional right.

Therefore, Rule 25(g) is unconstitutional on its face and must be repealed.

2) Two years ago, the Arizona Supreme Court let stand an Arizona Court of Appeals ruling in *American Helicopters, LLC v. Arizona Department of Revenue*. That case was cited in a previous petition to repeal this Rule filed by a previous petitioner. Among other things, that case stood for the proposition that "What the Legislature means, it will say."

Specifically, as Justice Bolick might say after looking at the plain language in the only statute governing civil injunctions, there is nothing about firearms (or their prohibition or the process for seizing them) in the law. So, as a first matter, because the Legislature never said anything about firearms in civil injunction law, it never meant for the courts to seize or prohibit firearms in civil injunctions.

In contrast, there are such provisions in criminal Domestic Violence law. This invokes the ruling in *American Helicopters* which I will expand on that later. Suffice it to say for now that because the Legislature mention firearms in criminal Domestic Violence law, but not in injunction law, this is further proof that it was never the Legislature's intent for the courts to prohibit firearms in civil Injunctions against Harassment. (Presumably the Legislature, like Justice Thomas, knew that such a suspension of a constitutional right is - uhhh - unconstitutional.)

The CIDVC is "legislating from the bench." Therefore, because Rule 25(g) promulgates a procedure that the Legislature never intended, it must be repealed

immediately as unlawful. (Also see A.R.S. 12-109, that "The rules [of procedure] shall not abridge, enlarge or modify substantive rights of a litigant.")

3) Speaking of Justice Bolick, another thing that's changed since the last petition challenging this Rule is that there are now three Conservative Justices on the bench. Make no mistake about it. This made-up Rule suspending the Second Amendment has always been a political battle between the Liberals in the court and Conservatives outside. (Even though judges are supposed to be apolitical.) My hope is that there is now a majority of Justices who will support the Constitutions of the United States and of the State of Arizona and repeal this Rule.

II. Discussion

Broadly speaking, the whole of Rule 25 purports to establish rules of procedure that follow the only statute governing civil injunctions against harassment, namely A.R.S. § 12-1809. (Although there is a sister law, A.R.S. § 12-1810 governing civil injunctions against workplace harassment that sheds light on -1809, per *LaFaro* (below).)

Narrowing down, Rule 25(g), titled *Firearms*, says "The judicial officer must ask the plaintiff about the defendant's use of or access to firearms. If necessary to protect the plaintiff or any other specifically designated person, the judicial officer may prohibit the defendant from possessing, purchasing, or receiving firearms for the duration of the order."

But there is nothing in A.R.S. § 12-1809 to support this Rule. In fact, the word "firearms" isn't even in the statute!

Consistent with this, there is nothing in the statute about prohibiting defendants from possessing, purchasing or receiving firearms. Nor is there any provision for seizing firearms. Or for giving a defendant a receipt for their seized firearm. Whereas in A.R.S. § 13-3601, the statute governing criminal Domestic Violence, there is.

Not even the CIDVC cites any authority to justify Rule 25(g). That's because there is none. Again, the CIDVC made up this Rule out of nothing.[2]

Furthermore, because the Legislature mentioned firearms (and the seizure thereof) in criminal Domestic Violence law, but not in civil injunction law, this makes it even clearer that it was never the Legislature's intent to prohibit firearms in civil injunctions. Which brings us to this Court's affirmation of *American Helicopter,* above.

Borrowing from the Arizona Court of Appeals in *American Helicopter*, "[t]hat is not to say that the same reasoning that prompted the Legislature to carve

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[2] So how did we get here? I've been able to trace this "rule" back to 2004, when someone in the DV Benchbook Workgroup sneaked this language into then what was called the DV Benchbook. (This was before the United States Supreme Court affirmed what we all knew, that the Second Amendment was an individual right.) As wrong as the "rule" was back then, the Benchbook was only advisory in nature, and judges were advised to go by the law not by the Benchbook. (And so the Benchbook could have advised judges to execute all defendants in Orders of Protection. But it wouldn't have mattered, since the Benchbook was only advisory.) Over the course of time, the advisory Benchbook became the more authoritative ARPOP, and this Rule was grand fathered in. Despite numerous challenges since then, the previous Justices have steadfastly refused to repeal this unconstitutional Rule.

out a [firearm prohibition] under [criminal domestic violence law] would not also justify a [prohibition] under [civil injunction law]. ... Nevertheless, it is for the Legislature, **not this court**, to extend the scope of this [prohibition]."

Undaunted, the Liberals in the court are (liberally) interpreting a phrase "grant relief necessary" from § 12-1809(F)(3) to justify their unconstitutional deprivation of our constitutional rights, despite the fact that there is nothing about firearms in the statute.

But even if the Legislature really had meant to put a firearm prohibition in civil injunction law, it is for the Legislature to correct its oversight. Not this Court.

To make the point even clearer, let's assume, for the sake of argument, that their reasoning is valid — that A.R.S. § 12-1809(F)(3) could justify a constitutional deprivation — and see where that takes us.

If it were true that -1809(F)(3) justifies a constitutional deprivation, then a judge could seize a defendant in a civil injunction and throw him in jail. (Obviously implicates the Fourth Amendment.) I mean, what better way to protect an alleged victim than to lock up their adversary? And if you can seize a person's firearm, then why not the whole person? But not even the CIDVC goes that far with respect to a Fourth Amendment seizure.

Similarly, a judge could order a defendant to stop posting negative ("annoying") comments about a plaintiff on Facebook or Twitter. (Implicates the First Amendment.) Those cases make national news when judges go too far, and judges quickly reverse themselves because everyone knows that that is an obvious

violation of our First Amendment right.

But when it comes to our Second Amendment right, the CIDVC and the governors of the Bar treat the Second Amendment as a second-class right.

Fortunately, the Arizona Court of Appeals has already ruled that "A higher standard of review applies when a court's order implicates a defendant's right to possess firearms under the Second Amendment to the United States Constitution or under Article 2, Section 26, of the Arizona Constitution. ... A firearm restriction under **the federal Gun Control Act** is triggered by an order of protection 'only if the order `includes a finding that [the] person represents a credible threat to the physical safety of [the] intimate partner or child.'" *(Savord v. Morton*, 330 P.3d 1013, 1017 (2014).)

Note that *Savord* specifically says that a firearm restriction is only justified under 1) the federal Gun Control Act, triggered by 2) a criminal DV OOP. But the Act, and criminal DV OOP's, only apply to criminal Domestic Violence situations. Consistent with this, *Savord* cites the need for 3) an "intimate partner" in order to suspend a defendant's Second Amendment right.

But a court order arising out of a civil Injunction against Harassment can never meet the "higher standard" required by *Savord* to restrict a defendant's Second Amendment right. That's because a civil IAH does not involve intimate partners. Without intimate partners there cannot be a criminal DV Order of Protection. Without a Title 13 (Criminal) OOP, there is nothing in a civil IAH to trigger the federal Gun Control Act. Therefore, there is nothing to justify a

restriction of Second Amendment rights in a civil IAH. Rule 25(g) doesn't even meet this Court's own standard

III. Conclusion

The Legislature, through its laws, does not allow the suspension of any constitutional right in a civil Injunction against Harassment. Already this Court's own Court of Appeals has acknowledged that "we do not attribute to the legislature any intention to authorize unconstitutional injunctions." *LaFaro v. Cahill* , 203 Ariz. 482, 56 P. 3d 56 (App. 2002) at FN 7. As Justice Thomas observed, the Second Amendment "is still a constitutional right."

In this petition, I am simply asking the Justices to agree with Justice Thomas, the Legislature, and with their own Court of Appeals to repeal Rule 25(g). Today. Before a defendant loses his family because he wasn't able to use firearms to defend them from some random violent encounter.

SUBMITTED this 10th day of January 2017.

By /s/Mike Palmer