

**IN THE TWELFTH DISTRICT COURT OF APPEALS  
BUTLER COUNTY, OHIO**

**ERIN GABBARD, ET AL.,**

Appellants,

V.

**MADISON LOCAL SCHOOL  
DISTRICT BOARD OF EDUCATION, ET  
AL.,**

Appellees.

) **CASE NO: CA 2019-03-0051**  
) **(REGULAR CALENDAR)**  
)

) **APPEAL FROM DECISION OF BUTLER**  
) **COUNTY COMMON PLEAS, CASE NO.**  
) **CV 2018-09-2028**  
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**BRIEF OF BUCKEYE FIREARMS FOUNDATION, INC., AS *AMICUS CURIAE* IN  
SUPPORT OF APPELLEES, MADISON LOCAL SCHOOL DISTRICT BOARD OF  
EDUCATION, ET AL.**

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## **INTRODUCTION AND STATEMENT OF AMICUS INTEREST**

Buckeye Firearms Foundation, Inc. (hereinafter “BFF”), is a not-for-profit 501(C)(3) public charity corporation, organized under the laws of Ohio. BFF is a grassroots organization with a mission to defend and advance the rights of more than 4 million Ohio citizens to own and use firearms for all legal activities, including self-defense, hunting, competition, and recreation. BFF engages in various activities throughout the United States including education, youth programs, school security programs, and a variety of other activities. After the tragic school shooting in Sandy Hook, Connecticut, BFF developed a crisis management program, FASTER Saves Lives (Faculty/Administrator Safety Training and Emergency Response “FASTER”) to meet the growing needs of educators and local communities concerned about emergency response protocols.

Despite the passage of laws creating “gun-free zones,” the rate of people killed in school zones has steadily increased. In fact, the rate of people killed by firearms on school premises has actually doubled in the years between 2009 through 2018, as compared to 2001 through 2008. John R. Lott, *Schools that Allow Teachers to Carry Guns are Extremely Safe: Data on the Rate of Shootings and Accidents in Schools that allow Teachers to Carry*, (April 25, 2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3377801](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377801) (accessed May 21, 2019) 4. This is in contrast to schools where educators are permitted to carry firearms, as there have been no mass shootings at these schools to date. *Id.* at 6. Studies have revealed that on average it takes law enforcement five to seven minutes to respond to an active killer event once it starts, even while the average length of mass killing events is six minutes. Nate McVicker, *An Interview with Ron Borsch, Retired Police Officer of 47 Years*, (May 21, 2019). <http://www.hero911.org/an->

interview-with-ron-borsch-retired-police-officer-of-47-years/ (accessed July 9, 2019). The simple reality is that when seconds count, police are just minutes away.

If you look at concealed carry as a whole, the risk to students from concealed carry in schools is no different than the risk students face in public settings. Outside of New York and California, approximately 8.63% of the adult population carries concealed firearms. Lott, *supra* at 9. In schools that permit educators to carry firearms, there has been only one accidental discharge reported with only slight injuries to the teacher. *Id.* at 9. Furthermore, as an additional metric of risk, insurance rates for schools that permit educators to carry firearms have not risen. *Id.* at 3. Considering the potential loss of life from an unopposed active killer, the relative risk of harm to students from educators carrying concealed firearms in schools is extremely low.

BFF is committed to saving lives by implementing its world class crisis management program, FASTER. BFF has raised and invested over one million dollars in its FASTER program to help train educators in emergency response and preparedness. Bryant Somerville, *Ohio Organizations Weigh In On Possible Solutions for School Shootings*, (May 18, 2018) <https://www.10tv.com/article/ohio-organizations-weigh-possible-solutions-school-shootings> (accessed July 9, 2019). The FASTER program has trained over 2,600 educators from over 260 school districts in 18 states, including 79 of Ohio's 88 counties. Joe Eaton, *On Anniversary of Columbine, FASTER Saves Lives Reaches Critical Milestone*, (April 19, 2019) <https://www.buckeyefirearms.org/anniversary-columbine-faster-saves-lives-reaches-critical-milestone> (accessed July 9, 2019). The purpose of FASTER is not to replace school security but rather to provide additional layers of emergency planning and risk management. *See* FASTER

Saves Lives, *Be Prepared for the Next School Shooting*, [https://fastersaveslives.org/wp-content/uploads/2016/09/FASTER-White-Paper\\_REV032816.pdf](https://fastersaveslives.org/wp-content/uploads/2016/09/FASTER-White-Paper_REV032816.pdf) (accessed May 21, 2019).

BFF is uniquely positioned to submit this brief because of its national expertise in firearms and school emergency management programs. In 2013, BFF sought out the legal opinion of Governor Mike DeWine, who was then the Ohio Attorney General, on the precise issue in this case, i.e. the legal interpretation of R.C. 109.78 in conjunction with R.C. 2923.122. *See Id.* BFF has an interest in the outcome of this litigation and an ongoing interest and recognized dedication in public safety. In short, BFF's position is unique and relevant to this matter, and hereby submits that it is best positioned to offer an amicus curiae brief in the case.

### **STATEMENT OF CASE AND FACTS**

Amicus adopts the Statement of Case and Facts as set forth in Appellee's merit brief.

### **LAW AND ARGUMENT**

This Court should affirm the decision below. The trial court was correct in holding that “the two statutes do not contradict each other and any apparent conflict is reconcilable” and that “school employees authorized by the Board to carry firearms on school premises are not under the training requirements as set forth in R.C. §109.18(D) [sic].” (Order Granting Defs' MSJ and Denying Pls' MSJ, T.d. 90, pp. 4-5).

As a matter of statutory interpretation, R.C. 109.78(D) should be given a plain and simple reading while considering the context in which it is situated as well as the general context of R.C. Chapter 2923: “To discern legislative intent, we first consider the statutory language, reading all words and phrases in context and in accordance with rules of grammar and common



usage.” *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 22. “We read and understand statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions.” *Id.* When considering the logical import and meaning of these statutes in context, it is clear the General Assembly intended to treat the training requirements of individuals authorized under R.C. 2923.122(D)(1)(a) differently than peace officers and school resource officers (hereinafter “SROs”).

The holding in this case is further supported by the Ohio General Assembly’s recognition of a limited right to keep and bear arms in school safety zones, granting said right to “any other person who has written authorization from the board of education” (hereinafter “Authorized Individuals”). *See* R.C. 2923.122(D)(1)(a). While this codified right is exclusively exercised by Authorized Individuals, it is a right nonetheless, rooted in the Second Amendment of the United States Constitution and Article I, Section 4 of the Ohio Constitution. The “any other person[s]” referenced in R.C. 2923.122(D)(1)(a) are ostensibly not peace officers, SROs, or any type of law enforcement, as the preceding clauses references and distinguish those individuals. *See* R.C. 2923.122(D)(1)(a). When considering the general context of the R.C. 2923.122, we see that Authorized Individuals are governed under laws solely relating to concealed carry and self-defense, not laws governing peace officers.

**THE OHIO LEGISLATURE RECOGNIZED A LIMITED RIGHT TO KEEP AND BEAR ARMS IN SCHOOL ZONES WHEN IT ENACTED R.C. 2923.122 AND AUTHORIZED INDIVIDUALS ARE NOT SUBJECT TO R.C. 109.78.**

The Ohio Constitution states: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” Ohio Constitution, Article

I, Section 4. A few years ago, this Court has affirmed that “[t]he right to keep and bear arms is a fundamental right enshrined in federal and state constitutional law.” *State v. Robinson*, 12th Dist. No. CA2014-12-256, 2015-Ohio-4649, ¶ 11. In *Ohio’s Concealed Carry Laws and License Application*, Attorney General Dave Yost greets fellow Ohioans and states: “As affirmed by the U.S. Constitution and the Ohio Constitution, the right to keep and bear arms is a fundamental element of individual liberty. Licenses to carry concealed handguns are an important part of the responsible exercise of that right.” Dave Yost, Ohio Attorney General, *Ohio’s Concealed Carry Laws and License Application*, (April 12, 2019) [https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Concealed-Carry-Publications/Concealed-Carry-Laws-Manual-\(PDF\).aspx](https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Concealed-Carry-Publications/Concealed-Carry-Laws-Manual-(PDF).aspx) (accessed May 21, 2019), at Inner Cover Page. Concerning a concealed handgun license (“CHL”), Ohio is a “shall issue” state which means that the sheriff is required to issue a CHL to persons who meet the stated criteria as defined in R.C. 2923.125. *See* R.C. 2923.125.

When determining the scope and meaning of R.C. 109.78 as it pertains to Authorized Individuals under R.C. 2923.122, a reviewing court must consider each statute in context and alongside each other. In short, the context of R.C. Chapter 2923 as a whole relates to weapons control and is the statutory mechanism within which Ohioans exercise their right to keep and bear arms. Unlike Authorized Individuals, it is anticipated and even expected that peace officers, which include school resource officers (“SROs”), will use force during the course of their duties. Clearly, the Ohio Legislature understood this distinction between peace officers and Authorized Individuals and drafted the training requirements found in R.C. Chapter 109 accordingly.

A. **Authorized Individuals who carry firearms pursuant to R.C. 2923.122 do so under the laws governing concealed carry.**

In enacting the exception located in 2923.122(D)(1)(a), the Legislature set apart Authorized Individuals from law enforcement and SROs therein by recognizing a limited right of those persons to bear arms in school safety zones. Educators who are Authorized Individuals carry in schools on a strict volunteer basis and are not hired with the intent or purpose of carrying weapons. As a practical matter, educators who are authorized to carry firearms under R.C. 2923.122 do so according to each school district's emergency management plan or policy. If Authorized Individuals carry firearms concealed, they are additionally subject to Ohio's concealed carry requirements as found in R.C. 2923.125, et seq. The open carry of firearms is a legal activity in Ohio and is not specifically regulated. Yost, *supra*, at 16.

Upon examining Ohio law, we find that Authorized Individuals with valid CHLs are set apart from peace officers and SROs throughout the Ohio Revised Code. For example, R.C. 2923.125(C)(1) is a distinct section that provides concealed carry exceptions for peace officers and specifically references R.C. 109.801. *See* R.C. 2923.125(C)(1)(b). Concealed carry exceptions for ordinary CHL licensees, however, are found in a completely different subsection, i.e. subsection (C)(2). *See* R.C. 2923.125(C)(2). Thus, we have another instance in Ohio law, and specifically in R.C. Chapter 2923, where peace officers, explicitly subject to R.C. Chapter 109 therein, are set apart from CHL licensees who are not subject to those provisions.

On a larger scale, we discover that Chapter 2923 is the primary statutory mechanism by which Ohioans are granted the ability to exercise their fundamental rights of self-defense. While, certain sections of Chapter 2923 do apply exclusively to law enforcement, e.g. R.C. 2923.1214,

the Legislature has clearly distinguished the rights of law enforcement versus the rights and manner which civilians possess and carry firearms. R.C. 2923.122 is no different, and the Legislature enumerated an exception to the general prohibition of possession of firearms in school zones. This exception specifically applies to individuals who are *not* law enforcement or security, and the phrase “any other person who has written authorization” is distinctly and grammatically set apart from a “law enforcement officer” or “security officer” referenced in the proceeding clauses of R.C. 2923.122(D)(1)(a).

In enacting R.C. 2923.122, the Legislature also provided a means for ordinary CHL holders of the general public to possess and carry firearms in school safety zones. Pursuant to 2923.122(D)(3)-(4), an individual may possess firearms in a school safety zones so long as they have a valid CHL and the firearm is secured in the individual’s vehicle. Again, the context of R.C. 2923.122 is critical—it is a statute that recognizes a limited right for certain individuals to keep and bear arms in school zones.

**B. An Authorized Individual’s potential use of force is a last-resort measure and governed under the laws of self-defense.**

Authorized Individuals have a constitutional right to bear arms for purposes of self-defense. The U.S. Supreme Court, in *District of Columbia v. Heller*, held that “the Second Amendment conferred an individual right to keep and bear arms.” *D.C. v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The Court went on to discuss the preeminence of the individual right to self-defense, explaining that self-defense “was the *central component* of the [Second Amendment] right itself.” *Id.*, 554 U.S. at 599 (emphasis in original). In *McDonald v. City of Chicago*, the U.S. Supreme Court held that the Fourteenth Amendment Due Process

clause incorporates the Second Amendment and is mandated upon the states. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 744 130 S.Ct. 3020, 3023 (2010). *McDonald* further noted that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present.” *Id.* Upon recognizing these fundamental rights, the state of Ohio is clearly within its power, sovereignty, and prerogative to extend this exception to bear arms in school zones, especially where the need for self-defense is patently obvious.

In enacting R.C. 2923.122, the General Assembly enabled local education boards to make key decisions on who would have the ability to keep and bear firearms on school premises. In doing so, the Ohio Legislature recognized the core individual rights of Authorized Individuals to keep and bear arms in school safety zones, for the purpose of self-defense and the defense of others, such as children. The Legislature narrowly limited the scope and exercise of those rights by enacting R.C. 2923.122. Authorized Individuals are not permitted to exercise powers vested in peace officers. Importantly, if an Authorized Individual uses deadly force, she does so under the laws generally governing self-defense in Ohio.

In Ohio, self-defense requires “(1) the defendant was not at fault in creating the situation giving rise to the affray, (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, and (3) the defendant did not violate any duty to retreat or avoid danger.” *State v. Montgomery*, 12th Dist. No. CA2015-03-028, 2015-Ohio-4652, ¶ 15 (citing *State v. Barnes*, 94 Ohio St.3d 21, 24 (2002)). Those who act in defense of another, such as a child, “stand in the shoes of the person whom he is aiding.” *State v. Wenger*, 58 Ohio St.2d 336, 339–40 (1979).

Any Authorized Individual who uses deadly force would be subject to potential criminal liability absent a legal justification of self-defense.

Peace officers, who include law enforcement and school resource officers, are subject to a completely different set of legal standards in the course of their duty. For example, “[a]t common law, a law enforcement officer had a privilege to use force in the discharge of his official duties.” *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 14. In carrying out their duty, peace officers making arrests for felonies and misdemeanors “could use whatever force was reasonably necessary—including deadly force—if the suspect offered resistance; and in the case of a fleeing felon, deadly force could be used even if the offender presented no imminent threat of harm.” *Id.* at ¶ 15. Not only is the use of force a privilege granted to peace officers when necessary to carry out their duties, but use of force is anticipated and expected. “School resource officers” are considered peace officers under Ohio law and typically enter into an agreement with a municipality’s school district and police department. See R.C. 3313.951(A)(2).

Peace officers are further distinguished from Authorized Individuals under the law by the manner in which officers are permitted to use force. For example, where a peace officer “has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” *Tennessee v. Garner*, 471 U.S. 1, 11–12, 105 S.Ct. 1694 (1985). In this way, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning

has been given.” *Id.* The appropriate use of force investigation and analysis necessary for peace officers, as shown above, would not apply to Authorized Individuals who are simply subject to the laws of self-defense.

C. **Authorized Individuals do not have police powers pursuant to R.C. 2923.122 and are not governed under or subject to R.C. 109.78.**

Appellants propose that Authorized Individuals are subject to the peace officer 728-hour training requirement found in R.C. 109.78(D) and ask this Court to strip away the intent and purpose of R.C. 2923.122, making the rights recognized therein effectually impossible to exercise. If this Court interpreted R.C. 109.78 to apply to Authorized Individuals, an absurd training requirement would result, wholly disproportionate to their responsibility as concealed carry licensees. Comparatively speaking, peace officers and SROs must carry out a wide range of duties that would never apply to Authorized Individuals. Vehicle chases, traffic, patrol, arrests, searches and seizures, investigation, report taking, and *many* other such duties applicable to peace officers and SROs would never apply to Authorized Individuals—this is the common sense context of “duty” as contemplated in R.C. 109.78.

The primary duties of peace officers and SROs are to preserve the peace. Peace officers are treated differently under the law and are subject to legal standards Authorized Individuals are not. In *State v. White*, the Ohio Supreme Court framed this issue precisely: “An officer, in the performance of his *duty* as such, stands on an entirely different footing from an individual. He is a minister of justice, and entitled to the peculiar protection of the law.” *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 14 (emphasis added). The court in *White* further instructs us that

“[w]ithout submission to his authority there is no security, and anarchy reigns supreme. He must, of necessity, be the aggressor, and the law affords him special protection.” *Id.*

Peace officers are subject to more stringent training requirements because they have a set of responsibilities uniquely distinct from Authorized Individuals and the public-at-large. For example, an important distinction between Authorized Individuals and peace officers is that the latter is required to use force in the course of his duties:

R.C. 2935.03(A)(1) mandates that peace officers ‘shall arrest and detain, until a warrant can be obtained, a person found violating, within the limits of the political subdivision \* \* \* a law of this state’ or a municipal ordinance. Further, R.C. 2921.44(A)(2) makes it a second-degree misdemeanor for a law enforcement officer to negligently fail to prevent or stop the commission of an offense or to negligently fail to apprehend an offender. The mandatory *duty* to enforce criminal laws and apprehend violators necessarily places police officers in dangerous situations where the use of force is expected and often required \* \* \* .

*Id.* at ¶ 32 (emphasis added).

As shown above, law enforcement and SROs are treated differently than Authorized Individuals under Ohio law. In enacting the training requirements of R.C. 109.78(D), the General Assembly clearly understood the obvious differences between peace officers and SROs who exercise general police powers, and Authorized Individuals who do not, as well as the relative training requirements to be mandated between the two.

### **CONCLUSION**

This Court should uphold the trial court’s judgment. This court need only look to the natural and most obvious meaning of the statutes in context. The context of the word “duty” as provided for in R.C. 109.78 relates only to peace officers. Authorized Individuals are governed



under laws solely relating to concealed carry and self-defense and are in no way subject to R.C. 109.78 or any other laws governing peace officers.

Respectfully submitted,

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**WRITTEN CONSENT OF THE PARTIES TO THE FILING OF AN AMICUS BRIEF BY  
BUCKEYE FIREARMS FOUNDATION, INC., IN SUPPORT OF APPELLEES,  
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.**

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Now come the parties, pursuant to Rule 17 of the Ohio Rules of Appellate Procedure and hereby consent to the filing of an Amicus Brief by Buckeye Firearms Foundation, Inc., in support of Madison Local School District Board of Education, et al.

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