THE OHIO COURT OF APPEALS
TWELFTH APPELLATE DISTRICT

ERIN GABBARD, et al.,	:	
	:	CA 2019 03 0051
Appellants,	:	
	:	On Appeal from the Butler County
v.	:	Court of Common Pleas, Civil Division.
	:	
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	:	Trial Case No. CV-2018-09-2028
	:	
Appellees.	:	

BRIEF FOR PROFESSOR PETER M. SHANE AS *AMICUS CURIAE* [1] IN SUPPORT OF APPELLANTS ERIN GABBARD, *et al.*

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[1] The parties' written consent to the filing of this brief is attached hereto.

TABLE OF CONTENTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF INTEREST

Amicus, Professor Peter M. Shane, is the Jacob E. Davis and Jacob E. Davis II Chair in Law at The Ohio State University Moritz College of Law, where he teaches and writes on statutory interpretation and the separation of powers. While Professor Shane has no personal interest in the outcome of this case, he has an academic and pedagogical interest in seeing Ohio statutes interpreted in a sound manner that follows and respects basic separation of powers principles. On this basis, he submits this brief in support of Appellants to aid the Court's consideration of these issues.

This brief highlights several fatal flaws committed by the trial court in its analysis of the relevant statute here, R.C. 109.78(D). This brief also addresses the very real harms that occur to our system of government when a court unjustifiably deviates from the plain language of a statute. This Court should reverse the lower court's decision to ensure that courts properly effectuate the intent of the legislature, rather than creating policy of their own, and to buttress the separation of powers principles that are fundamental to our democracy.

II. STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statements of the Case and Facts articulated in Appellant's brief.

III. ARGUMENT

***Assignment of Error*: The Court of Common Pleas improperly set aside the statutory text of R.C. 109.78(D), in contravention of foundational separation of powers principles and of Ohio law.**

The statute at the center of this case provides:

> No public or private educational institution, or superintendent of the state highway patrol shall employ a person as a special police officer, security guard, **or other position in which such person goes armed while on duty**, who has not received a certificate of having satisfactorily completed an approved basic peace officer training program, unless the person has completed twenty years of active duty as a peace officer.

R.C. 109.78(D) (emphasis added). The text is clear and unambiguous: "other position in which such person goes armed while on duty" is not limited in any way, and therefore includes teachers and all other employees who go "armed while on duty." Thus, teachers and other employers who go armed while on duty must complete "an approved basic peace officer training program."

Despite this manifest statutory command, the trial court held that R.C. 109.78(D) is limited by the descriptive heading for the code section. Then, in dicta, the trial court offered an alternative holding: if the statute were not limited by the heading, it would be in irreconcilable conflict with another statute that excepts from a broad prohibition on carrying deadly weapons in a school safety zone those who have "written authorization from the board of education or governing body of a school to convey deadly weapons." R.C. 2923.122(D)(1)(a). After conjuring this purported "irreconcilable conflict," the court further reasoned that R.C. 2923.122(D)(1)(a) is a special provision and prevails over R.C. 109.78(D)'s general rule that any armed employee of an Ohio public or private educational institution must undergo peace officer training. The trial court's alternative holding, too, is incorrect.

Questions of statutory interpretation directly impact separation of powers principles. When the judicial branch deviates from seeking legislative intent in interpreting a statute, it leaves its realm of constitutional authority and infringes upon the authority of the legislature. Here, both holdings by the trial court subvert fundamental separation of powers principles, whether by discounting the legislature's plain text in favor of a private-company-crafted heading, reading two statutes in conflict when they can be read in harmony, or rendering legislative provisions inoperative. This Court should correct those errors and hew to the prudent course of judicial restraint by applying the unambiguous terms of R.C. 109.78(D). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l*

Bank v. Germain, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

A. When courts incorrectly approach questions of statutory interpretation, they violate separation of powers principles and intrude on powers reserved to the legislature.

As Ohio courts have long recognized, separation of powers principles are crucial to preserving individual liberty. "The distribution of the powers of government, legislative, executive and judicial, among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our system of constitutional government. In the preservation of these distinctions is seen, by many able jurists, the preservation of all the rights, civil and political, of the individual, secured by our free form of government; and it is held that any encroachment by one upon the other is a step in the direction of arbitrary power." *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 135, 2000-Ohio-116, -117, and -119 (quoting *Zanesville v. Zanesville Tel. & Tel. Co.*, 63 Ohio St. 442, 451 (Ohio 1900), *rev'd on other grounds*, 64 Ohio St. 67 (Ohio 1901). The tripartite scheme of checks and balances is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *City of S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 159 (Ohio 1986).

- **The Ohio Constitution gives the legislature, as the "the ultimate arbiter of public policy," the exclusive power to create and amend statutes.**

Part and parcel of this system of checks and balances is the constitutional requirement that the judiciary faithfully interpret statutory text. The power to create and amend statutes belongs exclusively to the General Assembly, and courts are charged with giving effect to the General Assembly's intent. OHIO CONST. art. II, § 01; *see also State ex rel. Harris v. Rubino*, 2018-Ohio-5109, at ¶ 21 (citing *Griffith v. Aultman Hosp.*, 146 Ohio St. 3d 196, 2016-Ohio-1138, at ¶ 18; *Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589, at ¶ 20). Courts are not permitted to

"establish legislative policies or to second-guess the General Assembly's policy choices." *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029, at ¶ 35 (quoting *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, at ¶ 212. These duties and prohibitions reflect the "fundamental principle of the constitutional separation of powers . . . that the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, at ¶ 21 (quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network v. Dupuis*, 98 Ohio St. 3d 126, 2002-Ohio-7041, at ¶ 21). To deviate from this distribution of power threatens the entire tripartite order. *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches.").

- **A court discharges its duty to give effect to the legislature's intent by following, not evading, the plain language of a statute.**

Proper fulfillment of the judicial function demands that all statutory interpretation begins at the same place: the text of the statute. It is the "duty" of Ohio courts "in construing a statute . . . to give effect to the intent of the General Assembly." *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, at ¶ 21 (citing *Griffith v. Aultman Hosp.*, 146 Ohio St. 3d 196, 2016-Ohio-1138, at ¶ 18; *Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589, at ¶ 20). And where, as here, the text is clear, there is only one way to serve that duty: effectuation of the statutory text. "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for [a] court to apply the rules of statutory interpretation." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 2000-Ohio-470. Rather, "[a]n unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (Ohio 1944), paragraph five of the syllabus; *see also, e.g.*, *United States v. Locke*, 471 U.S. 84, 95 (1985) ("Deference to the

supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

- **If and when a statute requires construction, a court must correctly apply the canons of statutory construction to give effect to the intent of the legislature and follow separation of powers principles.**

As set forth above, the use of canons of statutory interpretation is unnecessary and inappropriate when the text of the statute is plain and unambiguous. In those instances where the plain text of a statute might be deemed ambiguous, a gross misapplication of the canons can be equally dangerous to separation of powers principles. The canons are "a cornerstone judicial interpretive tool created and followed to honor the principle of separation of power and balance the respective constitutionally defined roles of the legislative and judicial branches." *Farnsworth v. Burkhart*, 2014-Ohio-4184, at ¶ 96 (Ohio Ct. App. 7th Dist.) (DeGenaro, J., concurring). Courts must be vigilant that they are applying interpretive canons correctly and only when necessary. The goal must remain to give effect to, not evade the legislature's intent. When canons are misapplied to provide cover for judicial policymaking, a court leaves its realm of constitutionally-assigned authority and intrudes upon the legislature's authority instead.

- **A court engaged in statutory interpretation exceeds its authority, and intrudes on the legislature's authority, by substituting its policy preferences for those of the legislature.**

The demand that the judiciary either apply the plain text—or, if the text is not plain, apply canons with the goal of effectuating the intent of the legislature—may, at times, require judges to reach results contrary to their personal policy preferences. But faithful interpretation of the text—*especially* in those scenarios—is the sole safeguard against judicial excesses in the realm of statutory interpretation. Antonin Scalia and Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, xxviii-xxix (Thomson/West 2012) (noting that reliance on the

text "will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences" and "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law"). As then-Judge Neil Gorsuch wrote, the role of the judiciary is to "apply, not rewrite, the law enacted by the people's representatives. Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting); *see also Dennis v. United States*, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring) ("[D]irect policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."); Antonin Scalia, *Essay: The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("[W]hen one does not have a solid textual anchor . . . from which to derive [a] general rule, its pronouncement appears uncomfortably like legislation.").

In short, a court's role is a limited one, and it is constrained by the text of the statute. As set forth below, the trial court acted beyond the bounds of its role by neglecting the text of the statute. In circumstances like this one, where the text is clear, there is no room for the type of creative interpretation that the trial court performed. Instead, the Ohio Constitution and basic separation of powers principles both should have compelled it to apply the statute as it is written.

B. The trial court's holding that R.C. 109.78(D) is limited by the statutory heading ignores the legislature's policy decisions as expressed in the plain language of the statute.

Here, the plain text of R.C. 109.78(D) is clear, so the trial court erred by engaging in statutory interpretation at all. Its justification for going beyond the statutory text—reliance on the descriptive heading for the statutory code—is prohibited by statute and separation of powers principles.

1. Ohio law prohibits using a heading to contradict the plain language of a statute.

Ohio law is clear: "Title, Chapter, and section headings and marginal General Code section numbers *do not constitute any part of the law* as contained in the 'Revised Code.'" R.C. 1.01 (emphasis added). And courts, correctly, consistently eschew reliance on section headings. *State v. Blankenship*, 2011-Ohio-1601, 192 Ohio App. 3d 639, at ¶ 20 (Ohio Ct. App. 10th Dist.) ("[I]t is well-established that title, chapter, and section headings do not constitute part of the law."); *see also State v. Beener*, 54 Ohio App. 2d 14, 16 (Ohio Ct. App. 2d Dist. 1977) (holding that interpreting the title of the statute was "unnecessary and improper"); *Warner v. Zent*, 997 F.2d 116, 133 (6th Cir. 1993) ("[H]eadings, however, do not constitute any part of Ohio law. Resort to a title in construing a statute is unnecessary and improper.").

2. The rule prohibiting the use of a heading to contradict the plain language of a statute is based in separation of powers principles.

The rule that courts do not rely on section headings to interpret an otherwise-plain text has its foundation in and is bolstered by separation of powers principles. Because "headings and titles are not meant to take the place of the detailed provisions of the text," courts have developed "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) (citing *United States v. Fisher*, 2 Cranch 358, 386 (1805); *Cornell v. Coyne*, 192 U.S. 418, 430 (1904); *Strathearn S. S. Co. v. Dillon*, 252 U.S. 348, 354 (1919)). As Justice Kagan wrote, "[t]he reason for that 'wise rule' is easy to see: A title is, almost necessarily, an abridgment. Attempting to mention every term in a statute 'would often be ungainly as well as useless'; accordingly, 'matters in the text . . . are frequently unreflected in the headings.'" *Yates v. United States*, 135 S.Ct. 1074, 1094 (2015) (Kagan, J., dissenting) (quoting *Ohio R.R.*, 331 U.S. at 528). To read the headings in a manner that limits the plain text therefore improperly aggrandizes the judicial role

at the expense of the legislature: the Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 249.

3. The heading relied upon by the trial court was developed by a private publishing company and not the legislature.

This rule—wise in the federal context—is even wiser in Ohio. This is so because, "[i]n Ohio, the General Assembly does not assign official Revised Code headings, or taglines; they are written by the Publisher's editorial staff." *Cosgrove v. Williamsburg of Cincinnati Mgmt. Co.*, 70 Ohio St. 3d 281, 286 n.1 (Ohio 1993) (Resnick, J., concurring) (quoting Baldwin's Ohio Legislative Service (1994), User's Guide, 4). Thus, while in the federal context it is at least *conceivable* that a United States Congresswoman may have seen a statutory heading before she cast her vote on any given bill, it is *impossible* in Ohio, where the headings are created by a nongovernmental third party after the fact. The headings are neither "part of the code" nor are they "official"—they are simply "publisher's aids to the user of the code." *Id.*

In fact, there are multiple private publishers of the unofficial Ohio Revised Code: Baldwin's, Page's and Lawriter. They often contain different headings for the same statute; indeed, they list substantially different headings for *this* statute. *Compare* Baldwin's Ohio Rev. Code Ann. §109.78 (2014) ("Certification as special police officer or security guard; payment of cost; firearms training; peace officer private security fund") *with* Page's Ohio Rev. Code §109.78 ("Certification of special police, security guards, private police; firearms training; private security fund.") *with* Lawriter Ohio Rev. Code §109.78 ("Certification of special police, security guards, or persons otherwise privately employed in a police capacity.").

The trial court appears to have relied on the Lawriter version of the heading: it is the only one that contains the language "persons otherwise employed in a police capacity." (Trial Court

Op. at 5). But to rely on *any* version would have been in error because to do so unlawfully circumvents the plain text based on an unofficial summary of an extrinsic private publisher. As then-Judge Kavanaugh wrote with regard to federal Congressional committee reports: "It is hard to consider something 'authoritative' if it was not voted on and may actually have been voted *down* if it had been voted on." Brett Kavanaugh, *Book Review: Fixing Statutory Interpretation, Judging Statutes*, 129 HARV. L. REV. 2118, 2124 (2016). True enough, and truer still where—as here—the source upon which a court purports to rely is no indicator at all, not even an unreliable one, of legislative intent.

4. The trial court's reliance on a heading ignored the intent of the legislature.

The trial court thwarted the intent of the legislature by narrowing the plain language of the statute by reference to a private publisher's heading. It reasoned that because "the descriptive heading for this code section is 'Certification of special police, security guards, or ***other persons otherwise privately employed in a police capacity***" then "the phrase at issue . . . must refer to persons otherwise privately employed in a police capacity." (Trial Court Op. at 5 (emphasis in original)). The trial court's reliance on the limiting phrase "in a police capacity" improperly elevates an unofficial heading (created by a private publisher) above the plain text of the statute (created by the legislature): a result precluded by the Ohio Constitution, Ohio statute, and basic interpretive principles.

C. This Court should reject the trial court's dicta that R.C. 109.78(D) and R.C. 2923.122(A) are irreconcilable.

Finally, the trial court improperly opined that if R.C. 109.78(D) *did* apply to teachers and other staff that went armed while on duty, there would be an irreconcilable conflict with R.C. 2923.122(A). Once again, the trial court's holding fails to afford the proper degree of deference to the statutory text. Ohio law is explicit that when the General Assembly it passes a law, it intends

"[t]he entire statute . . . to be effective." R.C. 1.47(B). Indeed, a basic rule of statutory interpretation provides that "[a]ll provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously unless they are irreconcilable." *Blair v. Bd. of Trs. of Sugarcreek Twp.*, 2012-Ohio-2165, 132 Ohio St. 3d 151, 157, at ¶ 18; *see also Johnson's Mkts., Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 35 (Ohio 1991) ("The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously."). Rather than reading the two statutes in harmony, the court made a series of interpretive errors that subvert the legislature's intent as expressed in the language of the statute.

1. R.C. 109.78(D) and R.C. 2923.122 operate in entirely different ways. There is no irreconcilable conflict between these two statutes, and neither is more or less general or specific than the other.

A court need not resort to creative interpretation to construe R.C. 109.78(D) and R.C. 2923.122 harmoniously—there is simply no conflict between the statutes at all. As set forth above, R.C. 109.78(D) provides that a school may employ a person in a position where they go armed while on duty only after that person has completed basic peace officer training. It is a requirement placed on schools and a limit on the discretion of school authorities. On the other hand, R.C. 2923.122 is a criminal statute: it criminalizes the conveyance or attempted conveyance of a deadly weapon into a school safety zone, with certain limited exceptions. Those exceptions include, for example, law enforcement officers who are authorized to carry deadly weapons and are acting in the scope of their duties, school security officers, and "any other person who has written authorization from the board of education or governing body of a school to convey deadly weapons or dangerous ordnance into a school safety zone or to possess a deadly weapon or dangerous ordnance in a school safety zone and who conveys or possesses the deadly weapon or dangerous ordnance in accordance with that authorization." R.C. 2923.122(A) & (D)(1)(a).

There is no conflict whatsoever between those provisions. One statute regulates schools; the other, individuals. One regulates employment; the other defines a crime and its exceptions. It is impossible to describe one as more "general" and one as more "specific"—they operate in completely different ways. To understand how these statutes are plainly compatible, take the example of a police officer whose sergeant asks her to visit an elementary school to teach D.A.R.E. classes: Under R.C. 2923.122(D)(1)(a), she can rest assured that she is not committing a crime by bringing her duty weapon into a school safety zone. But just because she is excepted from criminal liability does not mean she does not also have to meet certain requirements before *the school* may hire her in an ongoing capacity: she still has to undergo peace officer training to be eligible to carry her gun in a school *as an employee of the school.* Just as a court cannot creatively "interpret" an unambiguous statute, it cannot "reconcile" a statutory conflict where none exists. *See State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St. 3d 255, 2012-Ohio-753, at ¶ 48 ("Only where the conflict is deemed *irreconcilable* does R.C. 1.51 mandate that one provision shall prevail over the other." (quoting *Gahanna-Jefferson Local School Dist. Bd. of Educ. v. Zaino*, 93 Ohio St. 3d 231, 234, 2001-Ohio-1335 (emphasis in original)). It is therefore once again crucial that this Court safeguard principles of judicial restraint by correcting the trial court's dicta.

Conversely, the trial court's interpretation leads to an unforced error: that of rendering statutory provisions inoperative. Again, the role of the judiciary in statutory interpretation "is to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 2010-Ohio-2550, at ¶ 21 (alteration in

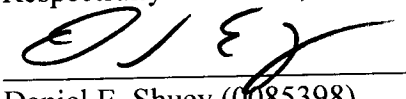
original) (quoting *State ex rel. Myers v. Bd. of Educ. of Rural School Dist. of Spencer Twp., Lucas Cty.*, 95 Ohio St. 367, 373 (Ohio 1917)). Consider the example of a school security officer. Carrying forward the alleged irreconcilable conflict created by the trial court, a school security officer could also be employed by the school and carry a gun on school grounds *without peace officer training* as R.C. 109.78(D) requires—as long as he gets written authorization to do so from the board of education. Whatever one might think of the wisdom of such a policy, it is inarguably true that it is not enshrined in the legislative text. By using the criminal statute to ignore the terms of the employment statute, the trial court improperly evaded the will of the legislature in violation of the separation of powers.

CONCLUSION

There can and will surely be debate as to the amount of training a teacher or other school employee should receive before carrying a gun in school while on duty. That debate should occur in the legislature and be effectuated through properly enacted legislation. Whatever policy the legislature selects should not be ignored or altered by the judiciary.

Separation of powers is a liberty-preserving principle that the judiciary must zealously guard. It is therefore crucial that, when the legislature speaks clearly, the judiciary listens. The trial court deviated from that basic principle twice: first when it limited the plain text of R.C. 109.78(D) based on the statutory heading, and again when it unnecessarily construed R.C. 109.78(D) as in conflict with R.C. 2923.122(D)(1)(a). This Court should correct those errors.

Respectfully submitted,



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WRITTEN CONSENT OF THE PARTIES TO THE FILING OF AN AMICUS BRIEF BY PROFESSOR PETER SHANE IN SUPPORT OF APPELLANTS ERIN GABBARD, *et al.*

Pursuant to Rule 17 of the Ohio Rules of Appellate Procedure, the parties hereby consent to the filing of an amicus brief by Professor Peter Shane in Support of Appellants Erin Gabbard, *et al.*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the *Brief for Professor Peter Shane as Amicus Curiae in Support of Appellants Erin Gabbard, et al*, was served upon counsel as follows by U.S. mail on June 13, 2019:

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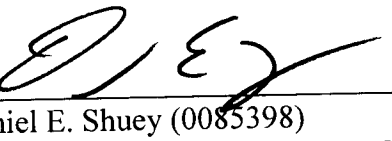
/s/ 

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