In the
Supreme Court of Ohio

ERIN G. GABBARD, et al.,	:	Case No. 2020-0612
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Butler County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
MADISON LOCAL SCHOOL DISTRICT	:	
BOARD OF EDUCATION, et al.,	:	Court of Appeals
	:	Case No. CA2019-03-0051
Defendant-Appellant.	:	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.

Rachel Bloomekatz (0091376)
37 W. Dominion Boulevard
Columbus, OH 43201
614-259-7611
rachel@bloomekatzlaw.com

Counsel for Appellees
Erin Gabbard, et al.

Thomas B. Allen (003956)
W. Joseph Scholler (0072764)
Alexander L. Ewing (0083934)
Brodi Conover (0092082)
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069
513-870-8213
aewing@fbtlaw.com
bconover@fbtlaw.com

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
SHAMS H. HIRJI (0099227)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

Matthew C. Blickensderfer (0073019)
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
513-651-6800
mblickensderfer@fbtlaw.com

Counsel for Appellants
Madison Local School District
Board of Education, et al.

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INTRODUCTION

In 2016, a junior-high student in Madison, Ohio opened fire in his school's cafeteria. He injured four students. Miraculously, he killed none. But he could have. So the Madison Local School District Board of Education took proactive measures to deter such shootings and to ensure a quick response should a shooting ever happen again. Many of the new measures were uncontroversial. For example, the Board improved its communication system, installed new security-camera systems, hired a second school resource officer, and increased the security of doors and windows in its buildings. But the Board took one other step, the legality of which is at issue here: it adopted a policy allowing school employees voluntarily to carry concealed firearms, as long as they first received active-shooter training, earned a handgun-qualification certificate, passed mental-health exams, drug-screening exams, and a background check, and obtained permission.

This case presents the question whether school districts may allow non-security employees to carry firearms on school grounds. The answer is yes: R.C. 2923.122(D)(1)(a), which this brief calls the "Authorizing Statute," allows local school districts to authorize "any … person" to possess a firearm in a school safety zone. Thus, the Board's plan complied with the law.

But the Twelfth District held otherwise. More precisely, it held that the power conferred by the Authorizing Statute is cabined by another provision, R.C. 109.78(D),

which this brief calls the "Qualifications Provision." The Qualifications Provision says that no school "shall employ a person as a special police officer, security guard, or other position in which such person goes armed while on duty," unless that person has either completed peace-officer training or served for twenty years as an active-duty peace officer. According to the Twelfth District, any school employee allowed to voluntarily carry a firearm is "employ[ed] … as a special police officer, security guard, or other position in which such person goes armed while on duty." R.C. 109.78(D). Thus, the Twelfth District held, schools may exercise their authority under the Authorizing Statute with respect to school employees *only if* those employees either complete peace-officer training or serve for twenty years as an active-duty peace officer.

The Twelfth District erred. The Qualifications Provision does not apply to school employees hired to work as teachers or in some other non-security position. This follows from the statutory text. Everyone agrees that armed teachers (or janitors or coaches or other non-security staff members) are not "special police officer[s]" or "security guard[s]." Thus, they are subject to the Qualifications Provision only if they hold an "other position in which such person goes armed while on duty." They do not hold such a position. Statutory text must be read in context; courts "cannot pick out one sentence [of a statute] and disassociate it from the context." *Elec. Classroom of Tomorrow v. Ohio Dep't of Educ.*, 154 Ohio St.3d 584, 2018-Ohio-3126 ¶11 (2018) (quotation and citation omitted). And the context here shows that the language at issue—"employed" in

an "other position in which such person goes armed while on duty"—is a catch-all that concludes a list of covered positions. "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, §32, at 199 (2012); *accord, e.g.*, *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872 ¶29; *State v. Aspell*, 10 Ohio St. 2d 1, syl. 2 (1967). Here, that means the "other position[s]" to which the Qualifications Provision refers are those positions similar to that of a "special police officer" or "security guard." In other words, the language at issue picks out only those employees whose principal duties include keeping the peace and maintaining security on school grounds and who carry a weapon in that role. In contrast, the Qualifications Provision does not apply to employees in non-security positions—like teachers, principals, or other non-security personnel—whose duties are primarily educational or administrative and who do not carry a weapon in their role.

That interpretation is bolstered by the fact that the Qualifications Provision applies only to people whom school districts "*employ* as a special police officer, security guard, or other position in which such person goes armed while on duty." R.C. 109.78(D) (emphasis added). Anyone paid to be a teacher (or a principal, or a janitor, or something else unrelated to security) is *not* "employ[ed]" in a "position in which such person goes armed while on duty," even if their school district permits them to carry a

concealed firearm. To the contrary, they are employed in a position for which being armed is irrelevant; they just voluntarily *choose* to carry a weapon. No one would describe a salesman or a valet who carries a concealed weapon as being "employed in a position in which such person goes armed while on duty." And so it makes little sense to describe a teacher or other non-security school employee who carries a concealed weapon as being "employed" in such a position. For the armed teacher, just like the armed valet, the weapon carrying is not part of the position the person is employed to perform.

If this Court were to accept the Twelfth District's logic, it would strip school districts of the freedom to decide for themselves whether arming school employees is an effective means to deter and mitigate mass shootings. Because the General Assembly gave school districts that freedom under the Authorizing Statute, this Court may not take it away. The Twelfth District erred in taking this freedom from school districts. This Court should reverse.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General has an interest in ensuring that, so long as they comply with Ohio law, Ohio's local school dis-

tricts may make decisions about how best to protect Ohio's school children. Additionally, the Attorney General has a heightened interest in this case for at least three reasons.

First, the Attorney General oversees the Ohio Peace Officer Training Academy. The Academy, in turn, "oversees training requirements and curriculum for peace officers" and other security personnel. *See generally* Ohio Peace Officer Training Academy, OHIOATTORNEYGENERAL.COM, https://bit.ly/2xQdOrO (last visited Sept. 9, 2020). Insofar as the Twelfth District's decision requires school employees to undergo basic peace officer training before they can carry a firearm, its decision directly affects the Academy's operations.

Second, both the current and the former Attorney General have already opined on the legal issue at the heart of this case. Both concluded that Ohio law does not require Ohio teachers to become police officers or complete basic peace-officer training before they may carry a weapon in the event of a school shooting. 2019 Op. Att'y Gen. No. 2019-023, *available at* https://tinyurl.com/y5g6jgb7; Letter from the Attorney General and Executive Director of the Ohio Peace Officer Training Commission to Chairman of the Buckeye Firearms Association (Jan. 29, 2013), *available at* https://bit.ly/2XINY44.

Third, the current Attorney General took the rare step of submitting an *amicus* brief and presenting oral argument in the court of appeals in this case. Given the issue's importance and the history of the Attorney General's involvement with it, the Attorney General has an acute interest in ensuring that this Court corrects the lower court's error.

STATEMENT OF THE CASE AND FACTS

1. In 2012, a man walked into Sandy Hook Elementary School and opened fire, killing dozens of young children. These horrifying events in Connecticut shocked the Nation. And in Ohio, citizens began debating what they might do to prevent such events from happening in their neighborhoods. Some suggested allowing school employees to carry concealed firearms. Perhaps, the thinking went, the prospect of facing return fire would deter shooters from entering schools in the first place. It would at least give teachers and other employees the means to fight back. *See generally* Catherine Candisky, *Armed staffer may be option for schools, DeWine says*, Akron Beacon Journal (Dec. 20, 2012), *available at* https://bit.ly/30e69fp.

The legality of this solution turned on the interaction between two statutes. First, the Authorizing Statute, which says that school districts may authorize "any … person" to possess a firearm in a school safety zone, and does not specify any particular training requirement for those persons. R.C. 2923.122(D)(1)(a). Second, the Qualifications Provision, which says that no school "shall employ a person as a special police officer, security guard, or other position in which such person goes armed while on duty," unless that person either completed peace-officer training or previously served for twenty years as an active-duty peace officer. R.C. 109.78(D). Some argued that this second statute might apply to *all* armed school employees. In other words, some argued that teachers allowed to carry a gun at school would be employed as "special police of-

ficer[s], security guard[s], or other position[s] … in which [they] go armed while on duty," and therefore have to comply with the Qualifications Provision's training requirements. Under that reading, the *only* employees a school could permit to carry weapons under the Authorizing Statute would be those employees who either completed peace-officer training—a process that includes *hundreds of hours* of training, most of which pertain to policing skills unrelated to the use of firearms—or who served for twenty years as a peace officer.

The former Attorney General wrote a letter addressing the issue. *See* Letter from Ohio Attorney General and Executive Director of the Ohio Peace Officer Training Commission, to Chairman of the Buckeye Firearms Association (Jan. 29, 2013), *available at* https://bit.ly/2XINY44 ("2013 Attorney General Letter"). In this letter, the Attorney General concluded that "Ohio law does not prevent a local school board from arming an employee, unless that employee's duties rise to the level that he/she would be considered 'security personnel.'" *Id.* at 1. While the Qualifications Provision requires school-security personnel to "either have a basic peace officer certification from the Ohio Peace Officer Training Academy" or "20 years of experience as a law enforcement officer," it does not require the same for non-security personnel, even if the school authorizes them to carry a weapon. *Id*. In other words, the Authorizing Statute empowers schools to allow teachers and other non-security personnel to carry guns without re-

quiring them to undergo the training requirements imposed by the Qualifications Provision.

2. Years later, in February 2016, a student at Madison Junior-Senior High School opened fire in the school cafeteria. He killed no one. But he did injure four of his classmates, and he could have injured or killed many more. In response, the Madison Local School District Board of Education increased security throughout the School District. Relevant here, the Board decided to allow non-security personnel, including teachers, to voluntarily carry a concealed weapon while at work. To obtain permission to carry a weapon in school, these employees had to complete active-shooter training, earn a handgun-qualification certificate, pass mental-health and drug-screening exams, and pass a criminal background check.

3. This policy spurred the plaintiffs, parents of children in the Madison Local School District, to file this lawsuit. For ease of reference, this brief will refer to the plaintiffs collectively as "Gabbard." Gabbard argued that the Board's decision to authorize certain school employees to voluntarily carry concealed firearms in school safety zones violated the Qualifications Provision. The trial court granted summary judgment to the School District.

The Twelfth District reversed. In a divided opinion, it held that the Qualifications Provision's catchall phrase—"other position in which such person goes armed while on duty"—unambiguously applied to the teachers and other non-security per-

sonnel authorized to carry weapons. *Gabbard v. Madison Local Sch. Dist. Bd. of Edn.*, 2020-Ohio-1180 ¶17 (12th Dist.) ("App.Op."). The Twelfth District majority interpreted this catchall phrase—call it the "Residual Clause"—to prohibit school employees from carrying a firearm in a school safety zone unless they completed basic peace officer training or had already completed twenty years of active duty as a peace officer. App.Op. ¶¶18, 21. Judge Hendrickson concurred to explain that even if the Residual Clause were ambiguous, he would still find that it applied to the employees. App.Op. ¶33.

Judge Stephen W. Powell dissented. He explained that the Residual Clause did not unambiguously apply to the employees. App.Op. ¶¶43, 44. Rather, it presented "a classic example of when the rule of ejusdem generis applies." App.Op. ¶48 (citing *Moulton Gas Serv. v. Zaino*, 97 Ohio St.3d 48, 2002-Ohio-5309, ¶14). Judge Powell would have applied that "well established" canon of construction to ascertain the meaning of the phrase from its statutory context. App.Op. ¶46. Applying the canon, Judge Powell would have held that the Qualifications Provisions applies only to "'special police officers,' 'security guards,' and 'other positions' of the same, nature, kind, or class." App.Op. ¶46.

The School District appealed to this Court, which accepted jurisdiction, stayed the judgment below, and ordered expedited briefing.

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *R.C. 109.78(D)'s training requirements apply only to school employees hired to serve in a role comparable to that of a security guard or police officer—the statute does not apply to other employees authorized to carry a gun under R.C. 2923.122.*

The Authorizing Statute gives local school districts significant flexibility to decide both who may carry concealed firearms in school safety zones and what training they must undergo before doing so. R.C. 2923.122. The Qualifications Provision, by contrast, sets minimum training requirements only for employees that schools hire to serve as police officers, security guards, or in other positions that fill comparable roles. R.C. 109.78(D). Employees hired in these security roles must first undergo peace-officer training or serve as peace officers for twenty years before carrying firearms in school safety zones. But the Qualifications Provision does not apply to other employees who are hired in non-security roles and who voluntarily choose to carry a gun with the school's permission. Thus, the School District's policy at issue here, which allows approved non-security personnel to voluntarily carry weapons on school grounds without regard to whether they have completed the training required by the Qualifications Provision, is lawful.

A. The Authorizing Statute gives local school districts discretion authorize persons to carry concealed firearms in school safety zones without heightened training requirements.

1. Ohio law generally bans carrying a firearm into, or possessing a firearm within, a "school safety zone." School safety zones comprise schools, school buildings,

school premises, and school buses. R.C. 2923.122, 2901.01(C). With limited exceptions not relevant here, *see* R.C. 2923.122(D)(4), this prohibition extends even to those licensed to carry a concealed firearm. R.C. 2923.126(B)(2). This prohibition comes with a caveat, however. Under the Authorizing Statute, the general prohibition against carrying firearms in school zones does not apply to "any other person who has written authorization from the board of education or governing body of a school" to possess a firearm in a school safety zone, and who does so "in accordance with that authorization." 2923.122(D)(1)(a).

The Authorizing Statute gives local school boards great latitude to decide whom to authorize and how much training to require as a condition of authorization. *Accord* 2013 Attorney General Letter, at 1–2, *available at* https://bit.ly/2XINY44. Local school districts may, if they wish, require authorized persons to first undergo peace-officer training, or to undergo some other level of training above and beyond what is required for concealed-carry-license holders in general. (Madison Local School District availed itself of that option, imposing a number of training requirements and other qualifications on school employees who wanted to carry a concealed firearm at school. See App. Op. ¶3.) But the Authorizing Statute leaves those decisions to each school district.

2. Everyone agrees that if the Authorizing Statute were the only statute relevant to this case, the challenged policy would be permissible and the challenge here would

fail. This case presents the question whether a separate statute—the Qualifications Provision, R.C. 109.78(D)—changes the analysis.

It is helpful to start with some stage setting. In a section of the Ohio Revised Code dealing with the Attorney General's powers, the General Assembly required the Ohio Peace Officer Training Commission to certify graduates of "training programs designed to qualify persons for positions as special police, security guards, or persons otherwise privately employed in a police capacity." R.C. 109.78(A). This section goes on to, among other things, detail these certificates and training programs and to specify certification fees. Tucked at the end of this thousand-word statute is the Qualifications Provision:

> (D) 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.

This provision, the Qualifications Provision, sets forth minimum training requirements for people "employ[ed]" by public or private schools "as a special police officer, security guard, or other position in which such person goes armed while on duty." It requires all such employees to have either: (1) "received a certificate of having satisfactorily completed an approved basic peace officer training program"; or (2) served at least twenty years as an active duty peace officer. All that is clear enough. But which employees are "employed" in an "other position in which such person goes

armed while on duty"? More precisely, does this "Residual Clause" ("other position in which such person goes armed while on duty") apply even to non-security personnel, such as teachers, authorized to carry weapons on school grounds under the Authorizing Statute? If the answer is yes, then any school employee allowed to carry a weapon under the Authorizing Statute must *also* undergo the training required by the Qualifications Provision before doing so.

The answer is "no." The Residual Clause applies only to employees whose principal duties include keeping the peace and maintaining security and who carry a gun while on duty. Thus, school employees employed in a non-security role are not subject to the Qualifications Provision, and they do not have to comply with the Provision's training requirements, simply because they are permitted to carry a weapon at work under the Authorizing Statute.

The Residual Clause's limited scope follows for four reasons.

First, the *ejusdem generis* canon requires this reading. "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, §32, p. 199 (2012); *accord, e.g.*, *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872 ¶29; *State v. Aspell*, 10 Ohio St. 2d 1, syl. 2 (1967). The Residual Clause is a general, catch-all provision that follows an enumeration of two things. The specifically enumerated things are law-enforcement and

security-related jobs: "special police officer" and "security guard." Thus, under the *ejusdem generis* principle, the Residual Clause captures only those "other position[s]" that are "of the same nature, kind, or class" as special police officers and security guards. App.Op. ¶46 (Powell, J., concurring in part and dissenting in part); *accord* 2013 Attorney General Letter at 1, available at https://bit.ly/2XINY44; *see also Aspell*, 10 Ohio St. 2d at 4. More concretely, the "other position[s]" to which the catch-all provision applies are those in which the person's duties consist primarily of keeping the peace and maintaining security.

Second, the Residual Clause cannot apply to those who voluntarily *choose* to carry a weapon (even with their employer's permission), because its application is triggered by *employment* in a security-related job. Again, the Qualifications Provision applies only to people whom schools "*employ* … as a special police officer, security guard, or other position in which such person goes armed while on duty." R.C. 109.78(D) (emphasis added). And with respect to the Residual Clause, the defining characteristic of covered "position[s]" is going "armed while on duty." If a teacher is *permitted* to carry a weapon under the Authorizing Statute, she is not thereby *employed in* a position in which she goes armed while on duty. Rather, she is employed in—paid to perform—a position the duties of which are unrelated to carrying a weapon (teaching). That she voluntarily chooses to carry a weapon does not mean she is "employ[ed]" in a position in which she goes armed while on duty. A teacher who *chooses* to carry a weapon at work no more

works in an "position" in which she "goes armed while on duty" than does a landscaper, chef, or lawyer who, with his employer's permission, carries a firearm while at work. In each example, weapon-toting has nothing to do with the "position" for which the person is "employed."

Third, the statutory context makes the Residual Clause inapplicable to teachers and other non-security employees permitted to carry weapons at work. Courts "cannot pick out one sentence and disassociate it from the context," but must instead "consider the statutory language in context." *Elec. Classroom of Tomorrow v. Ohio Dep't of Educ.*, 154 Ohio St. 3d 584, 2018-Ohio-3126 ¶11 (internal quotation marks and citations omitted); *accord Great Lakes Bar Control, Inv. v. Testa*, 156 Ohio St. 3d. 199, 2018-Ohio-5207 ¶8–10. The context in which the Residual Clause appears supports the School District's (and the Attorney General's) interpretation. Much of the statute in which the Qualifications Provision is contained is targeted towards training special police officers to be employed by either the state highway patrol or political subdivisions. See R.C. 109.78(D) ("No … 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 ….") (emphasis added); R.C. 109.78(A) ("Such certificate or the completion of twenty years of active duty as a peace officer shall satisfy the educational requirements for appointment or commission as a *special police officer* or *special deputy* of a political subdivision of this state.") (emphasis added); R.C. 109.78(C) (addressing those holding

"positions as special police, security guards, and other private employment in a police capacity.")

The Residual Clause appears in the midst of all this. Indeed, it appears in a subsection—the Qualifications Provision—that expressly applies to "special police officer[s]" and "security guard[s]" employed by schools. R.C. 109.78(D). Given that context, the citizen reviewing the Revised Code would naturally conclude that the Residual Clause, like its surroundings, pertains to those who serve law-enforcement and security roles. It would not likely occur to the average citizen that the Residual Clause might also refer to people in jobs *unrelated to* law enforcement or security who just so happen to carry a gun at work.

Finally, the practicalities support the Attorney General's interpretation. The Revised Code expressly permits this Court to consider "[t]he consequences of a particular construction." R.C. 1.49(E). And this Court construes statutes to avoid "unreasonable … consequences." *See State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 384 (1985). The Attorney General's reading keeps the Court from reading the Qualifications Provision to have positively "unreasonable" consequences. The reason is this: if the Residual Clause applied to *all* school employees authorized to carry a gun at work, then the Authorizing Statute would give school districts total discretion to allow *non*-employees to carry weapons on school grounds, since non-employees are not "employed" by the district, and thus not subject to the Residual Clause. At the same time, it

would make it practically impossible for school districts allow *their own employees*, over whom school districts have significantly more oversight than non-employees, to carry weapons. The practical impossibility arises from the fact that anyone subject to the Residual Clause can carry a gun on school grounds *only* by either serving as a peace officer for twenty years or else taking a basic peace officer training course. Very few school employees will have previously served for twenty years as a peace officer. And perhaps even fewer have the time to complete a basic peace-officer training course. That course consists of a minimum of *728 hours* of training. Prelim. Inj. Mot., Ex. A T.d. 22. Consider, for example, the Butler Tech Peace Officer Training Academy (a nearby location where Madison's staff could enroll). Butler Tech's program is a full-time program that consists of 770 hours of training and costs $7,265. *See* Basic Police Academy, BUTLERTECH.ORG, https://www.butlertech.org/public-safety/basic-police-academy/ (last visited Sept. 9, 2020). Even if a school could afford to pay that tuition for each participating staff member, what teacher or school administrator has time to complete a program like that in addition to his or her day job? If the staff member were to enroll in the program for eight hours a day, five days a week, it would still take her a little over eighteen weeks to complete. The reality is that few if any teachers or school administrators can train to become police officers while maintaining their day jobs. Thus, as a practical matter, Gabbard's interpretation would neuter the Authorizing Statute in its application

to the one group of potential firearm carriers over whom the school has the most oversight: its own employees.

Even for the very few school employees who could possibly enroll in and complete a basic peace officer training program, much of the program would be a waste of time. Basic peace officer training involves a lot more than just preparing a person to deal with an active shooter. These courses provide the initial training that an Ohio police cadet receives before he or she enters the ranks of Ohio law enforcement. As such, enrollees receive hundreds of hours of training in skills that are unrelated to the safe use and carrying of a weapon. For example, enrollees receive a minimum of: 125 hours of traffic training, including 40 hours on field-sobriety testing and 32 hours on traffic crashes; 24 hours of training on driving a patrol car; and 77 hours of training on human relations, including 12 hours on domestic violence, 3 hours on interacting with the media, and 12 hours on human trafficking. Prelim. Inj. Mot., Ex. A, T.d. 22 (emphasis added). All of this training is valuable for Ohio police officers, who regularly rely on it in carrying out their various law-enforcement duties. But it is quite irrelevant to school teachers and administrators who wish only to carry a firearm so they are prepared to deal with an active shooter. It would be odd indeed if the General Assembly permitted school districts to authorize concealed carry by their employees only to limit the ability to carry a weapon to those employees who complete hundreds of hours of irrelevant and expensive training.

* * *

The Qualifications Provision's language and context point toward one conclusion: its Residual Clause applies *only* to school employees in positions comparable to that of a peace officer or security guard. Employees serving in other roles are not subject to the Qualifications Provision's requirements, and may carry a weapon if the school permits them to do so, as long as they do not violate some other law in the process. Thus, the School District may, under the Authorizing Statute, permit teachers and non-security staff to carry concealed firearms without regard to the Qualifications Provision. The Twelfth District erred in holding otherwise.

B. Neither Gabbard's arguments below nor the Twelfth District's analysis are persuasive.

1. Below, Gabbard argued (and a majority of the Twelfth District agreed) that the "plain text" of the Qualifications Provision "unambiguously covers teachers, administrators," and similar "school employees." App.Opening.Brief at 7; *see also* App.Op. ¶18. The Twelfth District's majority opinion contained almost no textual analysis, however. It simply italicized the relevant language in the statute and held that it clearly and unambiguously applied to Ohio's teachers and administrators. *See* App.Op. ¶17. Such *ipse dixit* provides no basis for affirmance.

"Every application of a text to particular circumstances entails interpretation." Scalia & Garner, *Reading Law* §1, at 53. The reason is simple: meaning depends on context. Because a word or phrase's meaning "may vary according to context, custom, and

usage, statutory language cannot be declared clear or ambiguous until the context in which it appears or the connotations which it may carry are taken into consideration." *State v. Hooper*, 57 Ohio St. 2d 87, 88 (1979). To see this principle in action, consider Ohio's law forbidding healthcare practitioners from directly soliciting accident and crime victims, except by U.S. mail, in the thirty days following a car accident:

> No health care practitioner, with the intent to obtain professional employment for the health care practitioner, shall directly contact in person, by telephone, or by electronic means any party to a motor vehicle accident, any victim of a crime, or any witness to a motor vehicle accident or crime until thirty days after the date of the motor vehicle accident or crime. Any communication to obtain professional employment shall be sent via the United States postal service.

R.C. 1349.05(B). The final sentence of this provision states: "Any communication to obtain professional employment shall be sent via the United States Postal service." Stripped of its context, this would unambiguously forbid *anyone* in *any* sector (healthcare or otherwise), from making *any* communications (direct or indirect), at *any* time (not just in the thirty days after an accident), except by mail. But no English speaker would understand the final sentence to mean that, because every English speaker would read the sentence in context. And when it is read in context, as the Sixth Circuit recently held, the final sentence applies unambiguously *only* to healthcare practitioners (as opposed to other professionals), *only* to direct solicitations (as opposed to indirect solicitations like television and radio advertisements), and *only* in the thirty

days following an accident. *First Choice Chiropractic, LLC v. DeWine*, ___ F.3d ___, 2020 U.S. App. LEXIS 25740, *4–8 (6th Cir. Aug. 13, 2020).

As this example shows, it does not make sense to declare a statute "unambiguous" before interpreting it; one must interpret it to know whether it is unambiguous, and that requires looking to context. Part of looking to context includes looking to semantic canons of construction. Those canons are simply tools for deriving meaning from context. *Ejusdem genris*, for example, is really just a pedantic way of expressing the principle, known to every English speaker, that catch-all phrases at the ends of lists are generally best read to capture only things similar to specifically enumerated items that precede them. A high-school athlete, for example, would understand a coach's instruction to "bring your jersey, cleats, and other stuff to the game," as instructing her to bring the sort of "stuff" (like her jersey and cleats) that she plans to use in competition—not as a command to bring everything she owns.

True, some of this Court's cases say that when "the language of a statute is plain and unambiguous … there is no occasion for resorting to rules of statutory interpretation," and that an "unambiguous statute is applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, syl. 5 (1944). But one cannot know whether "the language of a statute is plain and unambiguous" before determining what it means, and one cannot know what it means without interpreting it. *Hooper*, 57 Ohio St. 2d at 88. All these cases really mean is that courts must not resort to *atextual* clues or other interpretive "rules" to

change the meaning of text that is unambiguous when read in context using ordinary rules of grammar. And indeed, this principle has comfortably existed for years alongside cases recognizing that a statute can be deemed unambiguous only once it is interpreted and that invoke canons like *ejusdem generis* to interpret the statutes before them. *Id.* at 87–90.

Gabbard's arguments for deeming the statute unambiguous in her favor all fail. In the Twelfth District, Gabbard argued that the Qualifications Provision *unambiguously* applied to teachers permitted to carry weapons in school. Recall the statute's text:

> 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). Gabbard argued that "position" means "job," "armed" means "equipped with or carrying a firearm," and "on duty" means "engaged in one's regular work." App.Opening.Br.7 (quotations omitted). Thus, Gabbard argued, the statute covers teachers, coaches, and other non-security personnel, because: (1) they are hired into various "position[s]" or "job[s]"; and (2) under Madison's policy, they may go "equipped with … a firearm" while "engaged in [their] regular work." App.Opening.Br.7. Under Gabbard's reading, the Residual Clause applies to anyone that the school hires into a "job" and who happens to carry a weapon while performing that "job."

That argument fails for at least three reasons. *First*, it examines the Residual Clause in a vacuum—it fails to consider the way in which the words relate to one another, and thus fails to ascertain the meaning of the statute as a whole. And as explained above, the way in which the words work together does a great deal of work. The text that precedes the Residual Clause—in particular, the enumeration of "special police officer" and "security guard"—provides context from which the generic phrasing of the Residual Clause gains meaning. More concretely, the enumeration of "police officer" and "security guard" makes clear that the Residual Clause's vague phrasing captures only similar positions. Courts "cannot pick out one sentence [of a statute] and disassociate it from the context." *Elec. Classroom of Tomorrow*, 154 Ohio St.3d 584, ¶11. But Gabbard's argument requires the Court to do just that.

Gabbard argued in the Twelfth District that the *ejusdem generis* principle is not even applicable here. Her argument went like this: the Residual Clause is not actually a catch-all, because it "does not generally say it applies to a person serving in an 'other position'—it specifies that it applies to 'other position[s] *in which such person goes armed while on duty*.'" App.ReplyBr.5 (emphasis in original) (quoting R.C. 109.78(D)). According to Gabbard, this qualifying language means "the scope of 'other position' is already limited by the statute," and "it would be improper for the Court to limit it further." App.Reply.5–6. This argument fails. A qualified catch-all is a catch-all nonetheless. Consider this Court's decision in *Aspell*. The statute in that case prohibited anyone from

forcing their way into a "safe, vault, or depository box *wherein is contained any money or thing of value*." *Aspell*, 10 Ohio St. 2d at 2 (emphasis added). The case presented the question whether the term "depository box" included "a cigarette vending machine." *Id.* at syl. 3. The Court applied *ejusdem generis* and held cigarette vending machines are not "depository boxes"—the catch-all nature of the depository-box language captured only those depository boxes "of a similar character" to safes and vaults. *Id.* at syl. ¶¶2–3. But as the italicized language shows, the clause to which *Aspell* applied the *ejusdem generis* canon was qualified by other language. That did not make the canon's application any less appropriate.

Second, Gabbard's argument fails because it ignores the significance of the word "employ." Again, the Residual Clause says that no school "shall *employ* a person" in an "other position in which such person goes armed while on duty." R.C. 109.78(D) (emphasis added). As noted above, to "employ" means to hire someone to complete a task, and a teacher who *chooses* voluntarily to carry a gun is not *employed* in a position in which she goes armed while on duty. *See above* 14–15. Rather, she is employed in a job having nothing to do with going armed, and simply chooses to go armed while performing it. Again, the landscaper or chef or lawyer who carries a gun at work with his employer's permission is not employed in a position in which he goes armed while on duty. Neither is the teacher who carries a gun at work. Thus, even if one ignores the

context surrounding the Residual Clause and examines it in a vacuum, Gabbard's argument still fails.

Finally, Gabbard's argument disregards the overall context of the statute in which the Qualifications Provision and the Residual Clause appear. As explained above, context shows that the Qualifications Provision and its Residual Clause are directed at people hired to work as police officers or in security, not at citizens in non-security roles who voluntarily choose to carry a firearm. *See above* 15–16. Gabbard disputed this point in the Twelfth District. She said that various references to special police, security guards, private police, and the state highway patrol in R.C. 109.78 were added *after* the original enactment of the Qualifications Provision. App.Reply.6–7 n.2. That makes no difference, however. R.C. 109.78 *now* contains this language, the current version applies here, and the relevant question is what the *current* version means. The context of R.C. 109.78 in its now-applicable form confirms the State's reading.

2. Below, Gabbard supplemented her arguments with references to legislative purpose and legislative history. Neither is even relevant here. Because the Authorizing Statute and the Qualifications Provision unambiguously support the Attorney General when read in context, it would be improper to resort to legislative history or abstract purpose. R.C. 1.49. And even where resort to atextual clues is allowed, it must be used with caution. "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations," they "would

risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). In Ohio, the courts' role is "is to apply the statute as it is written—even if [the courts] think some other approach might accord with good policy.'" *Johnson v. Montgomery*, 151 Ohio St. 3d 75, 2017-Ohio-7445 ¶15 (quoting *Burrage v. United States*, 571 U.S. 204, 218 (2014) (alterations omitted)).

Regardless, neither statutory purpose nor legislative history gets Gabbard anywhere. Start with the purpose. According to Gabbard, the Attorney General's interpretation would "upset Ohio's statutory scheme" in allowing "teachers and staff—those closest to school children—to carry concealed firearms in school" with fewer hours of training than special police officers and security guards. App.Reply.7. That argument fails for a few reasons. First, to the extent consequences matter here, the truly bizarre consequences flow from Gabbard's reading, which would give school districts the freedom to allow *non*-employees to carry guns on school grounds while greatly restricting their freedom to extend the same privilege to employees, over whom they necessarily have more control. And Gabbard's reading is also quite odd because it entails requiring teachers and school staff, before qualifying to carry a gun on school grounds, to take hundreds of hours of training on policing skills unrelated to firearms. Second, this purposive argument misunderstands the nature of the Authorizing Statute. The statute does not itself allow teachers and staff to carry guns. Instead, it delegates that very-important decision to school boards, who are better positioned to assess the costs and

benefits based on local circumstances than are officials in Columbus. There is every reason to believe that delegation was intentional, and that there is nothing strange about letting a school district decide for itself whether to let "those closest to school children" arm themselves for the children's protection.

Gabbard's reliance on legislative history fares no better. Even for anyone willing to resort to legislative history, the legislative history here does not help Gabbard. In her briefing below, Gabbard relied on prior *drafts* of the Qualifications Provision and proposed amendments to that provision. Neither form of evidence contains anything useful for this Court's purposes.

Prior drafts of R.C. 109.78. Gabbard puts great stock in the fact that the General Assembly rejected a previous draft of the bill that enacted the Qualifications Provision. The draft in question used the phrase "in any similar position" rather than "other position in which such person goes armed while on duty." App.Opening.Br.8–9. From this, Gabbard infers that the latter phrase—the one the General Assembly actually passed into law—must refer to a broader class of people than those in a "similar position" to that of a police officer or security guard. *Id.*

Gabbard's conclusion does not follow from her premises. She seems to think that the difference in language suggests that the General Assembly rejected the "in any similar position" language as unduly narrow, and so passed a broader Residual Clause to encompass employees who do not serve in a role comparable to that of a security guard

or police officer. But it is just as likely that the General Assembly thought the two phrases—one of which the House included in its version of the bill, and the other of which the Senate introduced in its version—meant the same thing in context, and chose the final version rather than the first for some reason having nothing to do with their meaning. What is more, even if *this* piece of legislative history supported Gabbard, other legislative history supports the Attorney General's conclusion. In particular, the House's journal says the chamber's intent in enacting the Qualifications Provision was "to prohibit circumvention of the requirements for appointment *as a peace officer*." *See* Am. Sub. H.B. No. 575, 108 House Journal 1347, Ex. L, T.d. 49 (emphasis added). So, to the extent legislative history tells us anything, it indicates that the General Assembly was targeting only peace-officer-related positions, not all positions in which someone may carry a gun while at work. Arguments that rely on legislative history have "the tendency to become … an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation omitted). That is why legislative history is of limited value. The value is especially limited in cases, like this one, where both sides can find friends in the crowd.

Proposed amendments to R.C. 109.78. Gabbard has also argued that the General Assembly has "consistently rejected attempts to exempt teachers, staff, and other persons authorized by a local school board to carry a firearm at school from the peace officer training requirement in R.C. 109.78(D)." App.Opening.Br.9–10 (emphasis omit-

ted). Specifically, she points to a number of failed attempts at amending the Qualifications Provision to include this exemption. From this, she infers that the General Assembly must understand the Qualifications Provision in general, and the Residual Clause in particular, as applying even to those who work in positions dissimilar from that of a security guard or police officer—otherwise, no one would have bothered to propose an amendment.

That hardly follows. Perhaps legislators have proposed these amendments simply to leave no doubt that the Residual Clause means what it says—that it does not apply to teachers and staff in non-security positions. Perhaps the bills failed because too many members of the General Assembly thought the Clause was clear enough already, and that any amendment would be unnecessary. Perhaps some wanted to see what the courts would say about the current statutes before spending time on a vote. Perhaps some legislators agreed that the clarification accurately stated current law, but oppose the law, and wanted to leave it be in hopes that other court rule as the Twelfth District did. There is no way to know.

As the speculative nature of all this suggests, failed statutory amendments—sometimes called "subsequent" or "post-enactment" "legislative history"—are "a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 U.S. 274, 287 (2002). "A bill may fail for numerous unexpressed reasons that are unrelated to the merit or content of any one proposed provision." *Rice v.*

CertainTeed Corp., 84 Ohio St. 3d 417, 421 (1999). As a result, the "'act of refusing to enact a law … has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.'" *Id.* (quoting *United States v. Estate of Romani*, 523 U.S. 517, 535 (1998) (Scalia, J., concurring in part and concurring in the judgment)).

On top of that, to the extent legislative purpose matters, what matters is the purpose of the General Assembly *that enacted the law*. And "'the views of a subsequent [General Assembly] form a hazardous basis for inferring the intent of an earlier one.'" *Jefferson Cty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). This "post-enactment legislative history by definition 'could have had no effect on the [earlier General Assembly's] vote,'" and thus "is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (citation omitted). So even if it is true that more-recent General Assemblies were uninterested in explicitly exempting non-security personnel from the Qualifications Provision's scope, this does not tell us what the General Assembly that enacted the provision in its current form intended.

True enough, this Court has at least once discussed a proposed-but-rejected statutory amendment that "support[ed]" the conclusion that the Court had already reached as a matter of statutory text. *See Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 2013-Ohio-1933 ¶¶21–25. But it has never, to the knowledge of the Attorney General's Office, allowed rejected amendments to alter its interpretation of the statutory

text. Indeed, *Rice* seems to foreclose that approach to statutory interpretation in its critique of post-enactment legislative history. 84 Ohio St. 3d at 421.

CONCLUSION

This Court should reverse the judgment of the Twelfth District.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT (0081842)
Chief Deputy Solicitor General
SHAMS H. HIRJI (0099227)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant was served this 9th day of September, 2020, by e-mail on the following:

Thomas B. Allen
W. Joseph Scholler
Alexander L. Ewing
Brodi Conover
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069
aewing@fbtlaw.com
bconover@fbtlaw.com

Matthew C. Blickensderfer
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
mblickensderfer@fbtlaw.com

Rachel Bloomekatz
37 W. Dominion Boulevard
Columbus, OH 43201
rachel@bloomekatzlaw.com

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General