

In the
Supreme Court of Ohio

Erin G. Gabbard, et al.,
Appellees,
v.
Madison Local School District
Board of Education, et al.,
Appellants.

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: Case No. 2020-0612
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: On Appeal from the Butler County Court
: of Appeals, Twelfth Appellate District
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: Court of Appeals Case No.
: CA 2019-03-0051
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**Brief of Amicus Curiae Fraternal Order of Police of Ohio, Inc.
in support of Appellees urging affirmance**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Fraternal Order of Police of Ohio, Inc. is an organization consisting of more than 23,000 law enforcement officers, including school resource officers, in the State of Ohio. The FOP of Ohio is dedicated to representing its membership for a multitude of purposes.

Nothing is more important to the FOP of Ohio than the safety of its members, and the public they protect and serve. Amicus Curiae's interest in this case is ensuring that those who would brandish firearms during an active-shooter incident in a school have adequate training to handle such an unexpected crisis. Otherwise, these individuals serve only to make an already dangerous situation even more dangerous for law enforcement, for school staff, and for the students themselves.

INTRODUCTION

To carry a firearm is an "awesome responsibility." To use it appropriately in a life-or-death situation demands more than a weekend's worth of practice shooting at "paper targets." Our then-Attorney General and current Governor put it this way: "It's not just about can I shoot a gun. . . ." Rather, the question is whether someone has enough training so that they "don't end up shooting someone who's innocent." Ohio police officers train extensively for exactly that reason. To say the legislature intended to send teachers into the fray with one weekend of training—or none at all—is absurd.

The plain language of RC 109.78(D) answers the question here. A teacher who carries a weapon into a classroom while teaching is, quite literally, both “armed” and “on duty.” There is no reason to depart from this plain language because it yields a “just and reasonable” result, as the Revised Code demands. Indeed, it is the only just and reasonable result. The School Board’s contrary view would create dangers that are too obvious, dire, and virtually certain for the legislature to have ignored. To put it bluntly, the Board’s interpretation would get people killed.

First, accuracy drops in a gunfight, even for law enforcement. Without extensive training that is frequently repeated, teachers facing an active-shooter situation will be unable to suppress the inevitable adrenaline-fueled stress that impairs fine motor skills and peripheral vision. The result will be errant bullets flying down chaotic hallways full of running children. Those bullets must go somewhere.

Second, without adequate training on situational awareness and tactics, untrained teachers merely add to the chaos and the danger. Arriving officers will not know “who’s the good guy, who’s the bad guy.” Frightened teachers may be mistaken for the assailant. Or they may mistake an officer for the assailant. Either only makes a bad situation worse.

Third, inadequately trained teachers will lack essential gun-retention skills. By accident or by force, students will end up with the guns in their hands. It has already happened time and again all over the country, and right here in Ohio. Then “it’s only a

matter of time” before a child shoots himself or another student accidentally or intentionally.

Finally, responding appropriately to an active shooter calls on “every aspect” of an officer’s training. That’s why law enforcement trains on more than just the mechanics of firing a gun. This broad approach to training reduces the likelihood of an accident or improper use of deadly force, and is “clearly relevant” to a teacher who would carry a loaded weapon into a classroom. If nothing else, police officers train on the “mental preparedness” necessary to take a life. But in the context of a school setting, undertrained teachers will be mentally unprepared to kill one of their own students.

This case is not about whether schools may arm teachers. It is about whether those teachers must have sufficient training to do so safely, or whether—as the Board would have it—none. An interpretation holding that a school resource officer or security guard needs extensive training to carry a gun in school, but the art teacher does not, is neither just nor reasonable. The legislature could not have ignored, and intended, the obvious risks of that. The Court should affirm.

STATEMENT OF FACTS

The FOP of Ohio adopts the statement of facts in the merit brief of the Appellee parents.

LAW AND ANALYSIS

Amicus Curiae's Proposition of Law: The plain language of R.C. 109.78(D) is unambiguous; applying it to armed teachers is the only common-sense interpretation.

It hardly needs to be said that when interpreting a statute, a court “must first look to the plain language of the statute itself to determine legislative intent.” *State v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997). When a statute is unambiguous, it is a “primary rule of statutory construction” that a court must apply the statute “as it is written.” *Portage Cty. Bd. of Comm'rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996).

The plain language of RC 109.78(D) is clear. It says that a school may not “employ a person as a special police officer, security guard, or other position in which such person goes armed while on duty,” unless that employee has “basic peace officer training” or has “completed twenty years of active duty as a peace officer.” RC 109.78(D). Except for being “armed while on duty,” the General Assembly chose no qualifying or limiting language to accompany the phrase “or other position.” A teacher who carries a firearm into the classroom while teaching is—literally—both “armed” and “on duty.” This plain language speaks for itself; the inquiry should stop right here.

Further inquiry yields the same result though. The Revised Code instructs that courts interpreting a statute must presume the General Assembly intended a “just and reasonable result.” RC 1.47(C). This Court’s precedent requires the same. *E.g., State ex rel. Clay v. Cuyahoga Cty. Med. Exam’rs Office*, 152 Ohio St. 3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶ 23, citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208, 339 N.E.2d 820 (1975), Syll. ¶ 2. In this case, an interpretation applying RC 109.78(D) to teachers is a just and reasonable result. More than that, it is the *only* just and reasonable result.

A contrary interpretation would get people killed. It would bless teachers strolling through the classrooms, corridors, and cafeterias of Ohio schools with loaded guns they are inadequately trained to use safely in this specialized setting. For that matter, it would endorse armed teachers with no training whatsoever. As the Board points out, the criminal statute’s exception authorizing school boards to permit staff to carry weapons “does not prescribe . . . the qualifications or training an authorized individual must have.” Applt. Br. at 1, citing RC 2923.122(D)(1)(a). It necessarily follows that while a school resource officer or security guard must have either basic training or 20 years on the job before openly bringing a gun into school, the art teacher would need neither. Though Madison’s School Board decided on a weekend-long training, others could require none at all. In either case, the amount of training would be recklessly insufficient. It would introduce risks too obvious, too dire, and too certain to ignore. It

would be unreasonable to assume the General Assembly not only ignored them, but intended to foist them upon Ohio's law enforcement, teachers, and children.

A. Impaired by the physiological stress of an active-shooter emergency, insufficiently trained teachers will shoot innocent students, staff, or law enforcement.

A paper target is not an armed gunman. It's one thing to practice firearm accuracy on a two-dimensional piece of paper in the controlled environment of a firing range. "It's a different situation when someone is firing back at you." Pinkerton, *Teachers as first line of defense? Many in law enforcement see it as a dangerous idea*, Houston Chronicle (Jan. 21, 2013) A1, quoting Houston Chief of Police Charles McClelland. The body floods with adrenaline during a gunfight, tensing muscles and causing tunnel vision. See Affidavit of Capt. Howard Rahtz in Support of Motion for Preliminary Injunction at ¶ 46 (Oct. 31, 2018) ("Rahtz Aff."). This physiological response impairs the ability to accurately fire a gun. "One of the first casualties of this stress is fine motor skills, precisely those skills needed for accurate shooting." *Id.* Not even the highly skilled and trained members of law enforcement are entirely immune from this physiological inevitability.

Multiple studies prove that a police officer's accuracy materially (and understandably) decreases when a suspect returns fire. See, e.g., Rostker, et al., *Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process*, Rand Center on Quality Policing (2008) 14, available at

<https://www.rand.org/pubs/monographs/MG717.html> (accessed Sept. 18, 2020); DeMitchell, et al., *Armed And Dangerous - Teachers? A Policy Response To Security In Our Public Schools*, 2019 B.Y.U. Educ. & L.J. 63, 88 (2020), citing Force Science Institute, *New study on shooting accuracy: How does your agency stack up?*, POLICEONE.COM, <https://www.policeone.com/police-training/articles/482251006-New-study-on-shooting-accuracyHow-does-your-agency-stack-up/>; White, *Hitting the Target (or not): Comparing Characteristics of Fatal, Injurious, and Noninjurious Police Shootings*, 9 *Police Quarterly*, Vol. 3, 303, 307 (2006). This is no indictment of the skill or training of law enforcement. Rather, it reflects the immutable forces of human nature.

Only extensive training can mitigate these counterproductive forces. That's why Ohio's police officers do it; the stakes are too high not to. Basic officer training includes 60 hours of firearms-related training, 46 of which "must be spent at the range." Rahtz Aff. at ¶ 13. But it is more than just target practice. Basic officer training also includes Critical Incident Stress Awareness, which "specifically addresses the physical and emotional changes afflicting human beings in a high stress critical incident." *Id.* at ¶ 22.2.

Because firearms skills degrade quickly, it is not enough to train only once. See National Association of School Resources Officers, *NASRO opposes arming teachers*, (Feb. 22, 2018), available at <https://www.nasro.org/news/2018/02/22/news-releases/nasro-opposes-arming-teachers/> (accessed Sept. 18, 2020). For good reason, Ohio law requires

officers to requalify on their firearms at least once a year. Ohio Admin. Code 109:2-13-02(D). This annual re-qualification is not idle target practice. It occurs under realistic conditions, intended to place the officer “as close as possible to the conditions” the officer would face “in an encounter in which the use of a firearm would be justified.” *Id.* at 109:2-13-05(A). Through repeated training, police officers learn to tamp down the natural biological impediments that an active-shooter situation imposes.

By contrast, neither the quality nor quantity of training the Board suggests is sufficient. Aside from significantly fewer hours of firearms training, the FASTER program “*misses the connection between performance and the stress inoculation and mental preparedness incorporated in more comprehensive and long term training.*” Rahtz Aff. at ¶¶ 34–35 (emphasis added). One weekend of training will in no way prepare teachers to suppress the physiological impacts of a gunfight. To say that police need comprehensive training before we trust them to use deadly force, but teachers do not, belies not only biology, but basic common sense.

Well-intentioned though it may be, the Board’s interpretation fails to appreciate what actually happens during a gunfight. As a result, it overlooks the consequences of its position: people will needlessly die. An eight-year study sponsored by the New York City Police Department found that officers in a gunfight fired an average of 7.6 bullets. Rostker, at 14. Assume an undertrained teacher will do the same, and will be as accurate as an experienced police officer—a generous assumption. Several bullets will

miss the target. Now consider those errant bullets flying down a hallway full of screaming children. Arms are flailing; kids are bumping into each other, running in every direction—most likely including directly at the teacher. Add in the stress-induced impairment of fine motor skills and accompanying tunnel vision afflicting the terrified teacher. *See Rahtz Aff.* at ¶ 46. The wayward bullets must go somewhere. It would take a near-miracle for none of them to hit a fleeing child.

B. Without adequate tactical training, armed teachers will make it harder for law enforcement to stop an active shooter, and may get themselves shot in the process.

Inadequately trained teachers with guns will make it both harder and more dangerous for police responding to an active-shooter incident. Officers must make “decisions in split seconds” whenever they see a weapon, let alone in a situation “as a volatile as a mass shooting at a school.” Patterson, *America’s Police Chiefs Call BS on Arming Teachers*, Mother Jones (March 8, 2018), quoting former New Orleans Chief of Police Ronal Serpas, available at <https://www.motherjones.com/politics/2018/03/police-chiefs-call-bullshit-on-arming-teachers-sandy-hook-parkland-columbine/> (accessed Sept. 18, 2020). When police rush to a scene and see a plainclothes person with a gun in their hand, they “don’t know who’s the good guy, who’s the bad guy.” *Id.*, quoting Montgomery County, Md. Chief of Police J. Thomas Manger. They must consider that person as a potential threat. With just split seconds to react, “[t]hat’s very dangerous for the police. And it’s dangerous for the community.” *Id.*

Situational awareness and tactical decisionmaking under pressure are critical during an active-shooting incident. A step in the wrong direction; the careless turn of a corner; the sudden twitch of an arm—any of these tactical mistakes could get an officer shot by an assailant, or by friendly fire. Ohio’s law enforcement train on situational awareness and tactical maneuvers so they will avoid these needless, and potentially fatal, mistakes. Beyond just the mechanics of firing a gun, basic officer training includes review of “common tactical mistakes that increase risk to officers.” Rahtz Aff ¶ 16. Such training is “clearly relevant to armed school staff.” *Id.*

But Appellants would have schools thrust teachers into the fray with none of this training, or at most a cursory gloss on it. That makes no sense. A teacher without significant training on situational awareness and gunfight tactics will invariably distract arriving law enforcement, if only because the officers must stop to assess the additional potential threat. Worse yet, an armed teacher whose movements are uncontrolled, or who is actively firing, may well be seen by arriving officers as the actual assailant. More likely still, an untrained teacher glimpsing an arriving officer from the side or back—dressed in dark clothes and aiming a gun—may mistake the officer for the shooter. Either way, the consequences that follow are obvious.

C. Without extensive training on gun retention, students will get a teacher’s gun, either by accident or by force.

Gun retention is a critical aspect of firearm safety, and one that demands extensive training. Ohio’s basic officer training teaches law enforcement how to keep

someone else from getting their gun, either accidentally or otherwise. It includes “a lot of emphasis” and practice on “gun retention skills when the attempt to grab the gun comes from the front, rear or side.” Rahtz Aff. at ¶ 19.1. Permitting Ohio’s teachers to carry guns in the classroom without adequate gun-retention training guarantees that students will end up holding those guns, one way or another.

Gun retention (or rather the lack thereof) has already proven to be a problem for schools across the country. The news is rife with stories of teachers leaving their weapons in places like bathrooms, locker rooms, school buses, and elsewhere throughout school grounds, only to be found later in the hands of students. *See* Giffords Law Center, *Every Incident of Mishandled Guns in Schools* (March 2, 2020), <https://giffords.org/lawcenter/report/every-incident-of-mishandled-guns-in-schools/> (accessed Sept. 19, 2020) (cataloging reports). In one widely reported case, a teacher showing eight-year-olds how to do a backflip had his loaded 9 mm handgun fall out of his waistband. *Loaded Gun Fell out of Substitute Teacher’s Waistband on Pinellas County Playground*, WFLA News Channel 8 (Oct. 24, 2018), <https://www.wfla.com/news/pinellas-county/report-loaded-gun-fell-out-of-substitute-teachers-waistband-on-pinellas-county-playground/1546792808/> (accessed September 18, 2020). Ohio has not been immune. Just last year, a Morrow County school employee left her office to go to the restroom and returned to find two first-graders had taken her gun out of its case. Narciso, *First-graders got access to authorized gun*, Columbus Dispatch (Aug. 16, 2019) 1A.

Losing one's gun is not the only mishap to worry about. Numerous reports detail teachers accidentally firing their guns in schools, and hurting students in the process. In 2018, a teacher injured three students when he accidentally fired his weapon (ironically enough) during a class on gun safety. Larson, *Seaside High teacher accidentally fires gun in class, students injured*, KSBW (March. 14, 2018), <https://www.ksbw.com/article/seaside-high-teacher-accidentally-fires-gun-in-class/19426017> (accessed Sept. 18, 2020). That teacher hit one student with bullet fragments in the neck. *Id.* In another incident last year, a teacher's gun accidentally went off in class, hitting a first-grader with a bullet fragment. Seale, *Substitute Teacher's Gun Discharges In 1st Grade Classroom*, Birmingham, AL. Patch (March 25, 2019), <https://patch.com/alabama/birmingham-al/substitute-teachers-gun-discharges-1st-grade-classroom> (accessed Sept. 18, 2020).

These were all accidents. There are also multiple reports of students stealing teachers' guns. For example, a high-school student in Jacksonville stole the gun out of his teacher's purse during the school day. Harten, *Police: Jacksonville High student steals gun from teacher*, Arkansas Democrat Gazette (Jan. 17, 2012), available at <https://www.arkansasonline.com/news/2012/jan/17/jacksonville-high-student-steals-gun-teacher/#:~:text=According%20to%20a%20release%20sent,while%20school%20was%20in%20session> (accessed Sept. 18, 2020). And in 2018, two Missouri middle schoolers—ages 13 and 14—also stole their teacher's gun. Danielson, *Central Middle Teacher Brought Gun To Class, Students Stole It*, St. Louis Patch (Oct. 26, 2018), <https://patch.com/>

missouri/stlouis/central-middle-teacher-brought-gun-class-students-stole-it (accessed Sept. 18, 2020). That teacher did not notice it was gone until the after the school day ended. *Id.*

But what about a disturbed teen with a plan? He is younger than his teacher. Stronger. Faster. An insufficiently trained teacher creates an opportunity. No longer does the student need to find a gun elsewhere: there's already one in his classroom. And if the teacher carrying it is inadequately trained, he is going to get his hands on it.

James Johnson, the Baltimore County Chief of Police, summed it up when testifying before the United States Senate: "How are you going to safeguard that weapon from a classroom full of 16-year old boys that want to touch it?" *What Should America Do About Gun Violence?, Hearing before the S. Comm. on the Judiciary, 113th Cong. 825, at 39 (2013) (testimony of Baltimore County Chief of Police James Johnson) ("Johnson Testimony")*. The answer is you can't. Permitting armed teachers without adequate—or as the Board proposes, any—training on gun retention starts a countdown to the inevitable. If the Court holds that is what the General Assembly actually intended, then "it's only a matter of time that some 6-year-old kindergartner injures or kills one of his, or her, fellow students." Pinkerton, quoting University of Houston Professor Larry Karson.

D. Shooting at “paper targets” does not mentally prepare a teacher to take the life of one of their students.

Deciding when and whether to shoot another human being is no trivial matter under any circumstance. Police officers train on the “mental preparedness” required to fire a weapon at someone. *See* Rahtz at ¶ 35. But a teacher’s “training and expertise has nothing to do with police tactics—shoot-don’t-shoot decision making, the psychological trauma that accompanies violence.” *Police experts urge intensive training if teachers are armed*, PBS Newshour (Feb. 23, 2018), quoting Major Cities Chiefs Association Executive Director Rick Myers, available at <https://www.pbs.org/newshour/politics/police-experts-urge-intensive-training-if-teachers-are-armed> (accessed Sept. 18, 2020). In a school setting, an armed teacher responding to gunfire is likely to be confronted with the prospect of shooting one of her own students—a child she knows. Teachers lacking extensive training “will likely be mentally unprepared to take a life, especially the life of a student assailant.” *NASRO opposes arming teachers*, National Association of School Resources Officers; *see* DeMitchell, 2019 B.Y.U. Educ. & L.J. at 84 (“Visualizing students as potential targets is fundamentally different than seeing students as the focus of instruction.”). Yet the Board would have teachers make those split-second decisions with no more than a weekend’s worth of training (assuming a school requires even that much). No rational legislature could have thought that was a “just and reasonable” idea.

* * *

To carry a firearm is an “awesome responsibility” requiring a particular kind of “inner fiber.” Johnson Testimony at 39. Meeting the challenge of an active-shooter incident takes more than accuracy in the low-stakes environment of a firing range. It “calls on every aspect of [an officer’s] overall training and policing.” *Police experts urge intensive training if teachers are armed*, PBS Newshour, quoting Rick Myers. Ohio’s then-Attorney General Mike DeWine explained it this way:

It’s not just about can I shoot a gun. That’s just a small part of it. It’s: Do I have enough training to be able to react so that my training goes into effect and I don’t end up shooting someone who’s innocent.

Buggs, *Gun Bill Weighs in on Liability*, Dayton Daily News (Jan. 28, 2014) A1. The Governor is right about that.

It is no accident that police officers undergo “weeks and weeks of training on how to use [their] weapon, and tactically how to deal with it, how to care for it, and how to safeguard that weapon.” See Johnson Testimony at 39. So they will be prepared for active-shooter incidents, Ohio police officers train on more than just shooting. They train on a host of skills, like “defensive tactics, crisis intervention training, [and] de-escalation...” Rahtz Aff. at ¶ 44. They also train on dealing with “mental illness and emotionally distraught individuals.” *Id.* Training in these varied areas reduces “the likelihood of error in judgment or tactics,” and has “clear relevance for armed staff in a school,” *Id.* at ¶¶ 35, 44. Compared to the more cursory FASTER program, such training

would “significantly” lessen “the risk of an accident, misstep, [or] improper or unjustified use of force.” *Id.* at ¶ 44.

The Board gripes that RC 109.78(D) calls for too much training. That ignores the reality of what it is like to be in a gunfight. There is a world of difference between “shooting at paper targets on a known-distance range” and a “shooting confrontation on the streets. . .” or here, in a school hallway. Rostker at xviii; Pinkerton, quoting McClelland (explaining the difference between confronting an armed gunman and practicing on “a paper target”). With the stakes what they are, anything less than extensive, and repeated, training is indefensible. But of course the Board’s position isn’t just that basic officer training is too much. It is that schools need not require any training *at all*. Suggesting that anyone can just pick up a gun and be ready to do what police officers do sells law enforcement short. It is also reckless: “The idea that anybody can go to Joe Smith’s School of Shooting for a day or a week and become proficient at shooting a handgun in a life-and-death situation is a little bit absurd.” Pinkerton, quoting Washington State Criminal Justice Training Commission Firearms Program Manager Doug Tangen. That is the Board’s read of RC 109.78(D) though. This Court should not accept it.

CONCLUSION

The plain language of RC 109.78(D) applies to armed teachers. That is the only “just and reasonable” interpretation of the statute, and the only one that does not

gratuitously endanger the lives of Ohio's law enforcement, its teachers, and most of all, its children. The Court should affirm.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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