Supreme Court of Ohio Clerk of Court - Filed October 05, 2020 - Case No. 2020-0612

IN THE SUPREME COURT OF OHIO

ERIN GABBARD, et al.,	:	
	:	Case No. 2020-0612
Plaintiffs-Appellees,	:	
	:	Appeal from the Butler County Court of Appeals, Twelfth Appellate District
v.	:	
	:	
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	:	Court of Appeals Case No. CA2019-03-0051
	:	
Defendants-Appellants.	:	

BRIEF FOR PROFESSOR PETER M. SHANE
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES ERIN GABBARD, *et al.*

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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 Appellees to aid the Court's consideration.

The arguments made by Appellants and their amici in this matter are flawed and violate separation of powers principles. These flaws include advocating for courts to "interpret" statutes that are plain and unambiguous to reach a desired result, which would be a direct judicial infringement on the province of the legislature. This brief also addresses the very real harms that would occur to our system of government if this Court were to adopt Appellants' arguments and unjustifiably deviate from the plain language of the statute. This Court should affirm the Twelfth District Court of Appeals' decision and reaffirm that courts must properly effectuate the intent of the legislature, rather than create policy of their own, and thus 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 Appellees' brief.

III. ARGUMENT

Proposition of Law: Foundational separation of powers principles require courts to apply the plain and unambiguous meaning of R.C. 109.78(D) and prohibit courts from engaging in further acts of "interpreting" the statute to arrive at a different result.

The relevant statute in 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). As the Twelfth District found below, the text of this statute is clear and unambiguous. (*Gabbard v. Madison Local School Dist. Bd. of Edn.*, 12th Dist. Butler No. CA2019-03-051, 2020-Ohio-1180, ¶ 17 ("Op."), ¶¶ 17, 33.) The statute's provision regarding "other position in which such person goes armed while on duty" is not limited in any way, and therefore includes all school employees who go "armed while on duty." Thus, teachers and other employees who go armed while on duty must complete "an approved basic peace officer training program" before doing so.

In the face of this unambiguous language, Appellants and their amici ask this Court to engage in further interpretative exercises to reach a different result. Appellants also argue that an unrelated criminal statute—R.C. 2923.122(D)(1)(a)—somehow trumps or nullifies the manifest statutory command to schools in R.C. 109.78(D). But R.C. 2923.122(D)(1)(a), which protects individuals from criminal prosecution if they carry a gun on school grounds with written authorization from the board of education, has no such effect. Appellants' labeling of R.C. 2923.122(D)(1)(a) as an "Authorizing Statute" is misleading and does not alter this result.

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

Before understanding why Appellants' arguments violate key separation of powers principles, a brief discussion of those key principles is necessary.

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) (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." *Rubino*, 2018-Ohio-5109, at ¶ 21 (citing *Griffith*, 2016-Ohio-1138, at ¶ 18; *Fisher*, 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. 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, Appellants ask this Court to act beyond the bounds of its role by neglecting the text of the statute and reaching a policy-driven result contrary to the text. In circumstances like this one, where the text is clear, there is no room for the type of creative interpretation that Appellants wish this Court to perform. The Ohio Constitution and basic separation of powers principles both should compel this Court to apply the statute as it is written.

B. The plain and unambiguous language of R.C. 109.78 prohibits schools from having employees go armed while on duty unless they complete peace officer training.

Applying this constitutional framework, the Twelfth District's decision must be upheld. The Twelfth District properly found that the language in R.C. 109.78 is "plain and unambiguous" and prohibits a school district from employing a teacher who "goes armed while on duty" unless that teacher completes basic peace officer training or has 20 years of active duty as a peace officer. (Op. ¶¶ 17, 18; *id.* at ¶ 33 ("R.C. 109.78 is unambiguous and must be applied as written.") (Hendrickson, concurring)). And, finding the language plain and unambiguous, the Twelfth District properly stopped its analysis there. So too should this Court.

Appellants' attempts to muddy the water on this clear statutory command are not persuasive and require adding language to the statute. Appellants argue that the statute applies only to positions that necessarily require the person to be armed while on duty and/or to those who have principal duties of providing security.[1] But none of this language is found in R.C. 107.98(D),

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[1] It is unclear that a focus on whether or not the employee provides security at the school is helpful to Appellants' argument, as Appellants' resolution makes clear that it is arming their employees while on duty "to be prepared and equipped to defend and to protect our students." (Resolution, Mot. Summ. J., Ex. B; *see also* Appellants' Br., at 1 (recognizing that Madison Board found "that

and this Court may not usurp the role of the legislature by adding it. *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, 907 N.E.2d 706, ¶ 29 ("[i]t is our duty to apply the statute as the General Assembly has drafted it; it is not our duty to rewrite it"); *State ex rel. Columbia Res., Ltd. v. Lorain Cty. Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 32 (declining to "add a requirement that does not exist in the statute").

Appellants do not like this result. They ask this Court to go beyond the plain language and engage in additional interpretation to reach a different one. The Court must decline to do so.

1. The arguments of Appellants and their amici are flawed and infringe upon legislative powers.

a. The Attorney General asks this Court to reject one of its bedrock rules and turn statutory interpretation on its head.

Perhaps the most blatant intrusion on separation of powers is found in the amicus brief of the Ohio Attorney General. The Ohio Attorney General's brief recognizes the long-held requirement that courts must follow unambiguous statutory language without further application of canons of interpretation, but then argues that this means that courts must first apply canons of interpretation to decide if a statute is ambiguous. (Attorney General Br., at 21.) This doublespeak is dangerous, backwards, and contrary to precedent. **A court must first find ambiguity to apply a canon of statutory interpretation; a Court must not apply a canon of statutory interpretation to create an ambiguity.** *See supra*, at 4–5; *Symmes Twp. Bd. of Trustees*, 87 Ohio St. 3d at 553; *Weimer*, 143 Ohio St. 312, paragraph five of the syllabus. In other words, where the language is plain and unambiguous, the court may not resort to other canons of interpretation "such as the doctrine of ejusdem generis * * * that are used when a provision's meaning is unclear." *See*

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the best way to provide for the safety of their students and staff is to arm certain administrators, teachers, and support staff."); Attorney General Br., at 27 (recognizing that these authorizations were made to "let those closest to school children arm themselves for the children's protection").)

City of Cleveland v. State, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 23; *see State v. Warner*, 55 Ohio St.3d 31, 62, 564 N.E.2d 18 (1990) ("ejusdem generis should not be invoked to defeat the obvious purpose of a legislative enactment"); *Harrison v. State*, 112 Ohio St. 429, 442, 147 N.E. 650 (1925) (rejecting application of ejusdem generis, because that doctrine should not "be used to destroy the plain and well-known meaning of words").

The novel argument found in the Attorney General's brief not only stands in stark contrast to this Court's precedents, but also deviates from previous submissions to this Court from that office. For example:

- May 25, 2017 Memorandum in Opposition to Jurisdiction written by the Ohio Attorney General's Office in *Madison St. Fishery v. Zehringer*, Case No. 2017-0574:

> The Fisheries appear to allege that the statute should be interpreted to mean the Council must essentially renew the quota system rule every year. However, "[c]ourts may not construe words that need no construction or interpret language that needs no interpretation. Under Ohio law, when a statute is unambiguous, a court must only read and follow it."

- May 14, 2015 Memorandum in Support of Jurisdiction written by the Ohio Attorney General's Office in *Pryor v. Director*, Case No. 2015-0770:

> Start with the plain language. *See In re M.W.*, 133 Ohio St. 3d 309, 2012-Ohio-4538 ¶ 17 ("When analyzing a statute, [this Court] first examine[s] its plain language and appl[ies] the statute as written when the meaning is clear and unambiguous."); *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553 (2000) ("When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation").

- February 17, 2009 Brief written by the Ohio Attorney General's Office in *Cincinnati City Sch. Dist. Bd. Of Educ. v. State Bd. of Educ. Of Ohio*, Case No. 2008-1480:

> The appeals court mistakenly looked past the provision's plain meaning and invoked the canon of ejusdem generis * * * because the plain meaning of the term "organization" includes governmental and non-profit organizations, the Court need not resort to ejusdem generis or other principle used only to resolve ambiguities.

This is not a case where the canon of ejusdem generis is particularly applicable. This Court has explained that "ejusdem generis is particularly applicable to criminal statutes which must be strictly construed." *State v. Hooper*, 57 Ohio St.2d 87, 89, 386 N.E.2d 1348 (1979); *see also Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 151, 2000-Ohio-493, 735 N.E.2d 433 (citing *Hooper* to emphasize that "the canon of ejusdem generis is particularly applicable to statutory language that must be strictly construed."); *State v. Wood*, 137 Ohio App.3d 623, 626, 739 N.E.2d 410 (2d Dist. 2000) ("One such canon, ejusdem generis, is used when a **criminal** statute contains specific enumerations followed by more general terms." (emphasis added)). Not surprisingly, the primary cases relied upon by Appellants and their amici are criminal or other cases requiring strict construction of applicable provisions. (*See* Appellants' Br., at 12 (citing *State v. Aspell*, 10 Ohio St.2d 1, 4, 225 N.E.2d 226 (1967)); Attorney General Br., at 13 (citing *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872[2] and *Aspell*).)

Absent any ambiguous language, the Court should not resort to canons of interpretation like ejusdem generis to alter the meaning of the language selected by the General Assembly.[3] This is especially true in cases like this one, which do not involve provisions that must be strictly limited and construed. The Court should affirm the Twelfth District's decision and hold that the legislature used plain and unambiguous language to identify the prohibitions applicable to school district hiring and not engage in further acts of interpretation.

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[2] The Court noted that the relevant provisions to be applied in *Levin* were "tax exemptions and therefore must be strictly construed." *Levin*, 2009-Ohio-4872, ¶ 11.

[3] As the concurrence below noted, even if the Court were inclined to apply the doctrine of ejusdem generis, the final result would be the same. (*See* Op., at ¶¶ 33–36.) Indeed, application of the doctrine begs the question: what is the general kind or class specifically mentioned in the statute? Here, the legislature provides that answer: those employees that "go[] armed while on duty." And, this would include the school employees at issue in this case that were authorized to go armed while on duty.

2. Appellants' policy arguments may represent fair questions for public debate, but they should have no impact on this Court's interpretation of the statute as written.

Appellants and their amici rely heavily on policy arguments to attack the language of R.C. 109.78(D). They argue that the plain language meaning of the statute would make it too hard or expensive for teachers to carry guns around children in school. They argue that not all peace officer training is directly relevant to carrying a gun around children in schools. And they argue that the plain language could result in schools trying to authorize unemployed volunteers to carry guns around students in schools instead of employees.

Even accepting all of these policy arguments as sound, it means only that there is room to debate this issue in public forums and in the legislature. Should it be difficult to be given the significant responsibility to carry deadly weapons around children in schools? Opinions will certainly differ. The amount and content of that training can also be debated. And if a school indicates that it plans to allow non-employee volunteers—over whom it would not have oversight authority or even perhaps insurance coverage—to carry guns around its students, there can be a debate as to whether that is actually permitted by statute or whether the legislature should create additional regulations. None of these policy questions, however, changes the statute that the General Assembly chose to enact. And none of these policy questions empower this Court to overrule the legislature with its own policy preferences. *See supra*, 5–6.

C. R.C. 2923.122(A) is irrelevant to the analysis in this case and referring to it as an "Authorizing Statute" is misleading and unsupported by the text.

It is telling that both the Appellants' and the Attorney General's argument sections start first with an analysis of R.C. 2923.122 instead of the relevant statute, R.C. 109.78. That discussion is a red herring. As the Twelfth District properly found, R.C. 2923.122(A) is irrelevant to the prohibitions found in R.C. 109.78(D) and does not win the day for Appellants. (*See* Op. at ¶ 16

("we find that R.C. 2923.122 does not provide Madison Local with authority to enact a resolution above the clear and unambiguous dictates of R.C. 109.78(D)").) Appellants' and the Attorney General's repeated reference to R.C. 2923.122(A) as an "Authorizing Statute" is misleading and unsupported.

1. R.C. 2923.122(A), a criminal statute applicable to persons, does not inform the interpretation of R.C. 109.78(D), which contains employment prohibitions applicable to schools.

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).

Neither of these unrelated statutes depends on the other for its meaning and the plain meaning of each is compatible with the other. One statute regulates schools; the other, individuals. One regulates employment; the other defines a crime and its exceptions. 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 even though she is excepted from criminal liability, she must still 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*.

Thus, the existence of R.C. 2923.122(D)(1)(a) is irrelevant to the meaning of R.C. 109.78(D). It is crucial that this Court safeguard principles of judicial restraint by not expanding one statute to impermissibly alter a different and unrelated statute not in conflict.

Indeed, Appellants' argument that the written authorization in R.C. 2923.122(D)(1)(a) somehow overrides the prohibitions in R.C. 109.78(D) would render 109.78(D) inoperative. 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 guard. Carrying forward the Appellants' arguments, there is room for school boards to engage in gamesmanship in order to avoid the requirements of R.C. 109.78. For example, a school could employ an individual to defend the school and its students and make carrying a gun an optional job requirement, but this individual could then "volunteer" to carry a gun and do so 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 school board. Like in this case, this hypothetical results in a school employee carrying a dangerous weapon in schools to protect students without completing the peace officer training. 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.

2. Calling R.C. 2923.122(D)(1)(a) an "Authorizing Statute" is misleading and unsupported by text.

Both the Appellants and the Attorney General label R.C. 2923.122 as an "Authorizing Statute," claiming it gives school boards "great latitude to decide whom to authorize and how much training to require as a condition of authorization." (Attorney General Br., at 11.) This label mischaracterizes the statute, and nothing in the language of that statute, or the act of which it was a part, supports treating it as a broad grant of power that would override other statutory provisions like R.C. 109.78(D).

R.C. 2923.122 is first and foremost a statute of prohibition: it criminalizes the conveyance or possession of deadly weapons or dangerous ordinances in a school safety zone. The provision relied upon by Appellants is an exception to the criminalization of certain activity. Any "authority" given to the school board in this provision is done passively. Indeed, the criminal exception **focuses on the person possessing written authorization** from the board of education or relevant governing body; **it is not an active grant of power to the board of education or school board.** *See* R.C. 2923.122(D)(1)(a) ("any other person who has written authorization from…"). Thus, at most, the statute impliedly gives a school board the ability to provide some sort of written authorization in order to de-criminalize certain actions. It would be contrary to law to read this limited and implied grant as a far-reaching grant of power beyond this narrow context. *See Hall v. Lakeview Local School Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992) ("Boards of education, as creatures of statute, have no more authority than that conferred upon them by statute, or what is clearly implied therefrom." (citing *Wolf v. Cuyahoga Falls City School Dist. Bd. of Edn.*, 52 Ohio St.3d 222, 223, 556 N.E.2d 511, 513 (1990)); *Hamilton Local Bd. of*

Edn. v. Arthur, 10th Dist. Franklin No. 73AP-179, 1973 Ohio App. LEXIS 1777, at *20 (July 24, 1973) (Boards of Education are creatures of statute and "have special powers which are to be strictly construed, and which they cannot exceed." (quoting 48 Ohio Jurisprudence 2d, at Section 80, page 778)). R.C. 2923.122 certainly should not be read to abrogate the requirements of other unrelated statutes like R.C. 109.78(D).[4]

Although it is unnecessary to go this far, there is also nothing in H.B. 154, through which R.C. 2923.122 was enacted in 1992, that indicates the General Assembly intended this passive criminal exception to permit School Boards to arm teachers in order to protect students, let alone to do so without following other statutory requirements such as those found in R.C. 109.78(D).[5] Instead, H.B. 154 was primarily focused on how a school board would be notified if a student committed an act that would be a crime if committed by an adult, and then giving schools the ability to permanently expel such students. *See* Am. Sub. H.B. No, 154, 144 Ohio Laws, Part II, 3198, 3200, 3245. There did not exist an adult crime associated with bringing a gun into school, so H.B. 154 created one in order that a school could permanently expel a student for bringing a gun to school. *See id.* at 3220.

[4] Finally, Appellants' arguments are also internally inconsistent. While they argue that R.C. 2923.122(D)(1)(a) somehow overrides the requirements of R.C. 109.78(D), they admit that this allegedly broad grant of power does not disturb the requirement of a concealed handgun license. (Appellants' Br. at 3 ("Because Ohio law requires it, the first requirement of course, is that an authorized staff member must have a valid concealed handgun license.")) Applying this same logic "[b]ecause Ohio law requires it," the next requirement should be that an authorized staff member must have completed peace officer training.

[5] Nor should it be surprising that this was not in the minds of the legislature, as the law was passed seven years before the tragic Columbine shooting in 1999, which brought to the forefront discussions regarding school shootings.

There is nothing in the text of the statute or in the related overarching act to justify reading the criminal exception found in 2923.122(D)(1)(a) as a broad grant of power or to justify referring to the provision as an "Authorizing Statute."

IV. 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. Appellants ask this Court to encroach on the role of the legislature by ignoring the plain text of the statute, applying canons of interpretation where none are necessary, and substituting the policy choices of the legislature with the policy choices of the Court. This Court should reject these arguments and affirm the Twelfth District's decision.

Respectfully submitted,

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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 Appellees Erin Gabbard, et al*, was served upon counsel as follows by email on October 5, 2020:

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